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## Pull and Push'- Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges

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# PULL AND PUSH—IMPLEMENTING THE COMPLEMENTARITY PRINCIPLE OF THE ROME STATUTE OF THE ICC WITHIN THE AFRICAN UNION: OPPORTUNITIES AND CHALLENGES

*Sascha Dominik Dov Bachmann\* & Eda Luke Nwibo‡*

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## INTRODUCTION

The international community's resolve to bring to justice the perpetrators of serious international crimes, core crimes respectively, climaxed in the creation of the International Criminal Court (ICC)<sup>1</sup> in 2002. The ICC's establishment brought to conclusion a legal journey which had begun some eighty years prior.<sup>2</sup> It started with the failed attempt to try German war criminals before allied tribunals after World War I, which was replaced by a domestic judicial approach, whereas Germany was

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1. The ICC was established under the Rome Statute of the International Criminal Court ("ICC Statute"). Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

2. Sascha Bachmann, *Today's Quest for International Criminal Justice—A Short Overview of the Present State Of Criminal Prosecution of International Crimes*, in INTERNATIONAL LAW AND ARMED CONFLICT 289–90 (N. Quéniwet & S. Shah-Davis eds., 2010); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 317–30 (2008); Steven Ratner & Jason S. Abrams, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW-BEYOND THE NUREMBERG LEGACY 48–49 (2001). Further information is found in the German fifteenth century war trial, as described by Georg Schwarzenberger. See Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBS. 263 (1950).

responsible under the Treaty of Versailles<sup>3</sup> to try a number of its alleged war criminals before the German *Reichsgericht*, located in Leipzig.<sup>4</sup> This early attempt to establish criminal responsibility regained momentum when the allied victors established the two *ad hoc* Nuremberg<sup>5</sup> and Tokyo Tribunals<sup>6</sup> post World War II. In the early 1990s, more than fifty years after Nuremberg, the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>7</sup> and the International Criminal Tribunal for Rwanda (ICTR)<sup>8</sup> gave new impetus to the creation of an effective system of international criminal justice. This process was accompanied by the rather rapid development of international criminal law (ICL)<sup>9</sup> since 1993. The notion of international criminal responsibility had become a recognized international law concept, as evident in the works of five *ad hoc* international investigation commissions,<sup>10</sup> four *ad hoc* international criminal

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3. Treaty of Peace with Germany (Treaty of Versailles) arts. 228–30, June 28, 1919, 225 Consol. T.S. 188 [hereinafter Treaty of Versailles].

4. CLAUDE MULLINS, *THE LEIPZIG TRIALS* 6–7, 9 (1921).

5. See *Nuremberg Trials*, HISTORY, <http://www.history.com/topics/world-war-ii/nuremberg-trials> (last visited June 27, 2017); *The Nuremberg Trials*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007722> (last visited June 27, 2017); see also *Richard Overy, Nuremberg: Nazis On Trial*, World BBC, [www.bbc.co.uk/history/worldwars/wwtwo/nuremberg\\_article\\_01.shtml](http://www.bbc.co.uk/history/worldwars/wwtwo/nuremberg_article_01.shtml) (last visited June 27, 2017).

6. See International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1586.

7. The ICTY was formally established by the U.N. Security Council in 1993. See S.C. Res. 827 (May 25, 1993).

8. The ICTR was formally established by the U.N. Security Council in 1994. See S.C. Res. 955 (Nov. 8, 1994).

9. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide art. 6, 78 UNTS 277 [hereinafter Genocide Convention]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UN Torture Convention].

10. The five *ad hoc* international investigation commissions are: The 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties (1919 Commission); The 1943 United Nations War Crimes Commission (1943 UNWCC); The 1946 Far Eastern Commission (FEC); The 1992 Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate War Crimes and other Violations of International Humanitarian Law in the Former Yugoslavia (1992 Yugoslavia Commission of Experts); and the 1994 Independent Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) to Investigate Grave Violations of International Humanitarian Law in the Territory of Rwanda (1994

tribunals,<sup>11</sup> and three internationally mandated national prosecutions,<sup>12</sup> all arising out of the horrors of World War I and II respectively.<sup>13</sup>

It seemed as if the international community had come to recognize that such core crimes, which “deeply shock the conscience of humanity,”<sup>14</sup> “reveal the vanity of man and wickedness of the human heart,”<sup>15</sup> and “threaten the peace and security of the world,”<sup>16</sup> had to be prevented by means of criminal prosecution. And yet, such crimes continued to be committed with impunity, as aptly highlighted by Kofi Anan, then U.N. Secretary General, who summarized this failure of the international community to act when stating:

For nearly half a century—almost as long as the United Nations has been in existence—the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought, no doubt, that the horrors of the Second World War—the camps, the cruelty, the exterminations, the Holocaust—could never happen again. And yet they have—in Cambodia, in

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Rwanda Commission of Experts) and Commission on the Truth established under the peace agreements between the government of El Salvador and the *Frente Farabundo Martí para la Liberación Nacional* (FMLN). See generally M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).

11. The four-ad hoc international criminal tribunals are: The 1945 International Military Tribunal to Prosecute the Major War Criminals of the European Theater (IMT); the 1946 International Military Tribunal to Prosecute the Major War Criminals of the Far East (IMTFE); ICTY of 1993; and ICTR of 1994. Cf. Bassiouni, *supra* note 10.

12. The three internationally mandated national prosecutions are: 1921–1923 Prosecutions by the German Supreme Court Pursuant to Allied Requests Based on the Treaty of Versailles (Leipzig Trials); 1946–1955 Prosecutions by the Four Major Allies in the European Theater Pursuant to Control Council Law No. 10 (CCL 10); and 1946–1951 Military Prosecutions by Allied Powers in the Far East Pursuant to Directives of the FEC. Cf. Bassiouni, *supra* note 10.

13. See generally Bassiouni, *supra* note 10, at 11.

14. See TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: VOLUME II, INT’L MIL. TRIBUNAL 100 (1945) [www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-II.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-II.pdf) [hereinafter Jackson Opening Statement].

15. OSITA NNAMANI OGBU, HUMAN RIGHTS LAW AND PRACTICE IN NIGERIA: AN INTRODUCTION 35 (1999).

16. Rome Statute, *supra* note 1, pmb1.

Bosnia and Herzegovina, in Rwanda. Our time—this decade even—has shown us that man's capacity for evil knows no limits. Genocide—the destruction of an entire people on the basis of ethnic or national origins—is now a word of our time, too, a heinous reality that calls for a historic response.<sup>17</sup>

Thus, humanity's history and record of such atrocities highlights the need to establish a permanent international criminal court<sup>18</sup> for the prosecution of perpetrators of such core crimes as the crimes of the most serious concern.<sup>19</sup> In response, the ICC was established in 2002 under the Rome Statute, with jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>20</sup> These are all considered the so called core crimes.<sup>21</sup> They also constitute a violation of *jus cogens*<sup>22</sup> norms of international law, giving rise to so called *erga omnes* (State) responsibility to either prosecute or extradite.<sup>23</sup>

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17. Kofi Annan, Former Secretary General of the UN, Address to the International Bar Association in New York, Press Release SG/SM/625712 (June 1997), <https://www.un.org/press/en/1997/19970612.sgsm6257.html>.

18. Bassiouni, *supra* note 10.

19. See David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983 (2008).

20. See Rome Statute, *supra* note 1, art. 5(1)(a)–5(1)(d); see also Leena Grover, *LCIL Friday Lecture: Interpreting Crimes in the Rome Statute of the International Criminal Court*, LAUTERPACHT CENTRE INT'L LAW (May 8, 2015), <http://www.lcil.cam.ac.uk/events/lcil-friday-lecture-interpreting-crimes-rome-statute-international-criminal-court-dr-leena-gr> (lecture summary); LEENA GROVER, INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2014). Cf. Int'l Law Comm'n, Report on the Work of its Fifty-Third Session, Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 A/56/10, at 245 (2001).

21. John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 6, 9 (1999).

22. See, e.g., M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (1996); Murphy, *supra* note 21; MALCOLM N. SHAW, INTERNATIONAL LAW 611 (8th ed. 2017). For examples of individual crimes, see Int'l Law Comm'n, Draft Code of Crimes Against the Peace and Security of Mankind, UN Doc. A/CN.4/L.532, corr. 1, corr. 3 (1996); U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOLUME X: THE I.G. FARBEN AND KRUPP TRIALS 130–59 (1948); see also Regina v. Bow Street Metrop. Stipendiary Magistrate, ex parte Pinochet Ugart (No. 3) [1999] 2 ALL ER 97, 109 (defining the *jus cogens* nature of torture).

23. 'Aut dedere aut judicare,' establishing jurisdiction under the universal jurisdiction model; see, e.g., SHAW, *supra* note 22, at 612.

The new ICC is a court that “complements and supplements”<sup>24</sup> national jurisdictions when prosecuting international crimes.<sup>25</sup> This means that unlike the ICTY, the ICTR, and other mixed internationalized criminal Tribunals, the ICC wields no primary jurisdiction over national courts.<sup>26</sup> Instead, States are vested with the primary responsibility, or right, to prosecute such crimes. The ICC can only assume jurisdiction if national systems are “unwilling or genuinely unable to carry out the investigation or prosecution.”<sup>27</sup> Despite this, and against all initial expectations, the ICC’s complementarity jurisdiction has been faced

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24. S.E Mark, *LCIL Friday Lecture: Balancing the Principle of Complementarity between International and Domestic War Crimes Tribunal*, LAUTERPACHT CENTRE INT’L LAW (May 8, 2015), <http://www.lcil.cam.ac.uk/events/balancing-principle-complementarity-between-international-and-domestic-war-crimes-tribunals-d> (lecture summary).

25. Enrique C. Rojo, *The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From ‘No Peace without Justice’ to ‘No Peace with Victor’s Justice?’*, 18 LEIDEN J. INT’L L. 829, 832–33 (2005).

26. See Bachmann, *supra* note 2, at 306; Rome Statute, *supra* note 1, pmbl, art. 17; see also JUSTICE FOR CRIMES AGAINST HUMANITY 413 (Mark Lattimer & Philippe Sands eds., 2003).

27. Rome Statute, *supra* note 1, art. 17.



with numerous legal,<sup>28</sup> political,<sup>29</sup> and institutional<sup>30</sup> problems. In addition, and “despite the many encouraging developments, in terms of implementation of the institution-building process, the Court is facing many challenges to its jurisdiction linked to

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28. One example of the legal problems is the “same person same conduct” test, which has been applied in many cases by the ICC to reject State objections to admissibility of cases before the ICC. See Charles Chernor Jolloh, *Kenya v. The ICC Prosecutor*, 53 HARV. J. INT'L L. 272 (2012); Rod Rastan, *What is ‘Substantially the Same Conduct’?: Unpacking the ICC’s ‘First Limb’ Complementarity Jurisprudence*, 15 J. INT'L CRIM. JUST. 1, 1 (2017). See, e.g., *Prosecutor v. Katanga*, ICC-01/04-01/07-1497, Decision of the Trial Chamber II on the Admissibility of the Case, ¶¶ 81–82 (June 12, 2009); *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 24 (Apr. 27, 2007); *Prosecutor v. Mathieu Ngudjolo Chui*, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, ICC-01/04-01/07-262, ¶ 21 (July 6, 2007); *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-2-Conf, ¶ 50 (Mar. 4, 2009) (public redacted version in ICC-02/05-01/09-3); *Prosecutor v. Kony et al.*, ICC-02/04-01/05-377, Decision on the Admissibility of the Case under Article 19(1) of the Statute, ¶ 50 (Mar. 10, 2009); *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-101, ¶ 54 (May 30, 2011); *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-02/11-96, ¶ 48 (May 30, 2011); *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14, ¶ 16 (June 10, 2008).

29. A clear example of political challenges is the decision of the United States to pull out of the ICC, expressing its unwillingness to surrender its nationals to the ICC, as well as the blatant refusal of Russia, China, and India to join the ICC. See David Turns, *Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States*, cited in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 337–38 (Dominic McGoldrick et al. eds., 2004); David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999); Michael Newton, *Should the United States Join the International Criminal Court?*, 9 UC DAVIS JIL & POL'Y 35 (2002); Mark S. Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 224–25 (2003); Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 J. INT'L CRIM. JUST. 434, 436 (2006); Antonio Cassese, *The International Criminal Court Five Years On*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 21–30 (Carsten Stahn & Goran Sluiter eds., 2009).

the application of the principles of universality, complementarity, cooperation, as well as effectiveness and efficiency.”<sup>31</sup> Subsequent years of preliminary inquiries into the potential war crimes and crimes against humanity committed in Africa<sup>32</sup> seem to have led to stiff opposition from African political elites accusing the ICC of bias by selectively prosecuting Africans. Two ICC cases highlight this situation, namely Al-Bahir’s case in Sudan<sup>33</sup> and Kenyatta’s case in Kenya.<sup>34</sup> This opposition culminated in the African Union (AU) passing a resolution in 2017, calling on all African States to stop cooperating with the ICC and to even withdraw from it.<sup>35</sup> Opponents and critics fear that such steps

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30. For example, institutional capacity to implement complementarity varies from State to State, depending on local circumstances. The role of civil society and the ICC in overcoming these institutional challenges in the context of rule of law strengthening in Kenya has already been discussed extensively in an article by Christine Bjork and Juanita Goebertus. See Christine Bjork & Juanita Goebertus *Complementarity in Action: The Role of Civil Society and the ICC in the Rule of Law Strengthening in Kenya*, 14 YALE HUM. RTS. & DEV. L.J. 205 (2011).

31. Olympia Bekou, *LCIL Friday Lecture: The ICC at 15: Prospects and Challenges*, LAUTERPACHT CENTRE INT’L LAW (Feb. 10, 2017), <http://www.lcil.cam.ac.uk/events/lcil-friday-lecture-icc-15-prospects-and-challenges-professor-olympia-bekou> (lecture summary).

32. See ICC-OTP, Report on Preliminary Examination Activities 2015, ¶¶ 195–214. See also ICC-OTP Report on Preliminary Examination Activities 2016, Nov. 14, 2016; ICC-OTP, Situation in Nigeria, art. 5, ¶ 128 (Aug. 5, 2013).

33. See generally Prosecutor v. Omar Hassan Ahmad Al-Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest (July 14, 2008); see also UN: *Demand Al-Bashir’s Surrender to the International Criminal Court*, AMNESTY INT’L (Sept. 20, 2013), [www.amnesty.org/en/news/un-demand-al-bashir-s-surrender-international-criminal-court-2013-09-20](http://www.amnesty.org/en/news/un-demand-al-bashir-s-surrender-international-criminal-court-2013-09-20). The ICC had issued two arrest warrants against President Omar Al-Bashir of Sudan in 2009 and 2010, but the Al-Bashir Administration has rejected ICC jurisdiction over Darfur, calling it a violation of its sovereignty and an instrument of Western pressure for regime change. See Alexis Arieff et al., *International Criminal Court Cases in Africa: Status and Policy Issues*, 11 CONGRESSIONAL RES. SERV. (2010).

34. See Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Withdrawal of Charges (Mar. 13, 2015); Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case No. ICC-01/09-01/11, Termination of the Case (Apr. 5, 2016). President Uhuru Kenyatta and Vice President William Ruto, both of Kenya, are standing trial before the ICC for their alleged roles in the 2007 post-election violence in Kenya. The charges against Kenyatta, however, have since been dropped by the ICC, while those against Ruto have not. See *ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence*, BBC NEWS (Dec. 5, 2014), <http://www.bbc.co.uk/news/world-africa-30347019>.

35. On February 1, 2017, the AU issued a resolution, based on a decision made the day before, encouraging member nations to withdraw from the ICC.

will lead to more human rights violations and atrocities committed in African States. The AU is calling for the domestic prosecution of international crimes<sup>36</sup> without interference by the ICC, thus highlighting the often inadequate implementation of the complementarity regime, both in principle and in actual application.<sup>37</sup> The AU is currently taking steps to establish a regional criminal court,<sup>38</sup> which could altogether keep the ICC out of Africa.<sup>39</sup> Its opposition is as much a political problem as it is a legal

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*See African Union Backs Mass Withdrawal From ICC*, BBC NEWS (Feb. 1, 2017), <http://www.bbc.com/news/world-africa-38826073>; *see also* Gwenyth Gamble Jarvi, *African Union Leaders Back Leaving ICC*, JURIST (Feb. 1, 2017, 3:10 PM), <http://www.jurist.org/paperchase/2017/02/african-union-leaders-back-leaving-icc.php>. The AU Resolution is non-binding, and Nigeria and Senegal have stated that they oppose withdrawal from the ICC. *See* Constance Johnson *African Union: Resolution Urges States to Leave ICC*, LIBRARY OF CONGRESS (Feb. 10, 2017), <http://www.loc.gov/law/foreign-news/article/african-union-resolution-urges-states-to-leave-icc/>. African voices are, however, quite divided on whether or not African countries should keep fate with the ICC, despite the AU's Resolution urging mass withdrawal. For example, "Nigeria is not the only voice agitating against withdrawal; Senegal in fact is strongly speaking against it; Cape Verde, and other countries are also against it." Elise Keppler, *AU's 'ICC Withdrawal Strategy' Less than Meets the Eye*, HUM. RTS. WATCH (Feb. 1, 2017), <https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye>. Gambia and Burundi have already withdrawn from the ICC, but Gambia is now planning to rejoin. *See* Mark Kersten, *What the ICC Can Do to Improve Its Relationship with African States*, JUST. CONFLICT (Nov. 1, 2016), <https://justiceinconflict.org/2016/11/01/what-the-icc-can-do-to-improve-its-relationship-with-african-states/>; Kaddijatou Jawo, *'Gambia to Return to ICC, Commonwealth, Says Barrow*, POINT (Feb. 8, 2017), <http://thepoint.gm/africa/gambia/article/gambia-to-return-to-icc-commonwealth-says-barrow>. South Africa's recent attempt to withdraw from the ICC, without approval from its Parliament, was held "unconstitutional and invalid" by the country's High Court. *See* Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES (Mar. 8, 2017), at A9.

36. The AU reportedly supports a strategy of regionalization of international law, under which there would be a special African war crimes court. *See* Aaron Maasho, *African Leaders Cautiously Back Strategy to Quit Global Court*, REUTERS AFR. (Feb. 1, 2017, 6:55 AM), <https://af.reuters.com/article/topNews/idAFKBN15G49S>.

37. Rastan, *supra* note 28, at 1.

38. Firew Kebede Tiba, *Regional International Criminal Courts: An Idea Whose Time Has Come?*, 17 CARDOZO J. CONFLICT. RESOL. 521, 521–22 (2016).

39. Adam Branch, *LCIL Friday Lecture: After the ICC: The Politics and Possibilities of an African Criminal Court*, LAUTERPACHT CENTRE INT'L LAW (Nov. 4, 2016), <http://www.lcil.cam.ac.uk/events/lcil-friday-lecture-after-icc-politics-and-possibilities-african-criminal-court-dr-adam-branc> (lecture summary).

one.<sup>40</sup> These problems are the backdrop to this article, which aims to critically analyze the relationship between national and international systems of criminal justice, as well as how the Rome Statute's *complementarity principle* regulates the relationship between the ICC and national legal orders. Part I of this article will seek to explain the relationship between national and international criminal justice and how the Rome Statute's complementarity principle regulates the correlation between the ICC and national legal orders. Part II will reflect on the overall success of ICC justice being "accepted" and/or rejected in an AU context and will ascertain if mere compliance with international legal norms by African States can be validly rated as an indication of acceptance. Part III will highlight some of the obligations and challenges facing domestic implementation of the Rome Statute's complementarity regime within Africa's national legal orders. Finally, Part IV will provide concluding observations and recommendations.

#### I. THE ROME STATUTE'S COMPLEMENTARITY PRINCIPLE UNDER ARTICLE 17 AND THE RELATIONSHIP BETWEEN INTERNATIONAL CRIMINAL JUSTICE AND NATIONAL LEGAL ORDERS

Article 17 of the Rome Statute enunciates substantive rules that constitute the complementarity regime, which in turn defines the relationship between the ICC and national jurisdictions. In defining this relationship, the ICC honors the authority of States to conduct their own trials with respect to the prosecution of the Rome Statute's core crimes, with the international community expected to provide all the necessary financial, technical, and professional resources to support any States wanting resources in this regard. States must, on their own initiative, ensure that their judicial systems and trial procedures comply with the existing international standards of criminal procedure. This Part of the article will discuss the nature of the ICC's complementarity relationship with national jurisdictions from the perspective of international law. It will also discuss the rationale of the (primary) jurisdiction of the two international tribunals—the ICTY and the ICTR—in relation to the ICC's complementarity relationship, while considering emerging models of complementarity. In addition, it will reflect on the questions of jurisdiction and admissibility of cases before the ICC, as well as the

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40. *Id.*

methods of interpreting the elements or thresholds of complementarity as a trigger to admissibility. Finally, it will highlight some noticeable statutory and policy shortcomings of the principle.

*A. The Relationship Between International and National Systems of Criminal Justice and the ICC*

The interplay between international and national criminal justice in international law can offer opportunities for mutual improvement and legal reflection. The international law approach is explored to scrutinize the relationship between international and national criminal justice, originating from the wider general interface between national and international law.<sup>41</sup> Such “interfaces are the points where the actors, norms and procedures belonging to respective legal orders connect and interact with one another.”<sup>42</sup> International law prescribes standards that regulate different subject matters, such as human rights, health and environmental protection, financial markets, trade and investments, and the internet,<sup>43</sup> which are also regulated by domestic laws. In broad terms, the interfaces between the national and international legal rules can be appraised from *three* different perspectives. The first perspective requires understanding how rule of law at the *national* level recognizes, receives, and resists the international rule of law.<sup>44</sup> The second re-

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41. See Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARV. INT'L. J. 327 (2006).

42. Machiko Kanetake, *The Interfaces between the National and International Rule of Law*, 1–27 (Amsterdam Law School Research Paper No. 2014–27, 2014).

43. On international law regulation of human rights, health, and environmental protection, see, e.g., Dinah Shelton *Human Rights, Health & Environmental Protection: Linkages in Law & Practice* (Health and Human Rights Working Paper Series No. 1, 3, 2002). On regulation of the financial markets, see Christian Tietje & Matthias Lehmann *The Role and Prospects of International Law in Financial Regulation and Supervision*, 13 JIEL 663–82 (2010). On regulation of trade and investment, see Markus Wagner *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L. L. 4–87 (2014). On regulation of the internet, see Antonio Segura-Serrano *Internet Regulation and the Role of International Law*, MAX PLANCK UNYB 10 (2006); Molly Land, *Toward an International Law of the Internet*, 54 HARV. INT'L. L. J. 394–458 (2013).

44. Kanetake, *supra* note 42.

quires examining how rule of law at the *international* level recognizes, receives, and resists the national rule of law.<sup>45</sup> The third requires assessing how the correlation between them can be comprehended and assessed from *external* perspectives.<sup>46</sup> While legal scholarship has made giant strides in carrying out studies on the *domestic* reception of international law,<sup>47</sup> there are fewer studies on how the *international* rule of law recognizes, receives, or resists the domestic legal rules.<sup>48</sup> Among the few present studies are Yuval Shany's two books<sup>49</sup> on the jurisdictional relationship between domestic and international courts, which emphasize that both domestic and international courts circumvent or resolve conflicts arising from a jurisdiction by highlighting the dualism foundation between judicial decisions nationally and internationally. While the domestic and international legal systems are both crucial constituents of global governance, the overlap between them often gives rise to conflict in its relationship. This overlap generated a series of avoidances and conflicts in the interpretation of relevant domestic laws and the 1963 Vienna Convention on Consular Relations in *Breard v. Greene*,<sup>50</sup> where the U.S. Supreme Court held that the Vienna Convention did not clearly "provide a foreign nation with a private right of action in US courts."<sup>51</sup> This interpretation was scrutinized by the International Court of Justice (ICJ) in the cases of *LaGrand*<sup>52</sup> and *Avena*,<sup>53</sup> as well as by the Inter-American Court of Human

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45. *Id.*

46. *Id.*

47. See, e.g., David Sloss, *Treaty Enforcement in Domestic Courts: A Comparative Analysis*, in *THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 1* (David Sloss ed. 2009); see also David Sloss, *Domestic Application of Treaties*, in *THE OXFORD GUIDE TO TREATIES 367* (Duncan B. Hollis ed. 2012); *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION* (Dinah Shelton ed. 2011).

48. More research in this area is highly recommended.

49. See generally YUVAL SHANY, *REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS* (2007); YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003).

50. See *Breard v. Greene*, 523 U.S. 371 (1998).

51. *Id.*

52. See *LaGrand* (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466 (June 27).

53. See *Avena and Other Mexican Nationals* (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12 (Mar. 31).

Rights,<sup>54</sup> which created further domestic avoidance in *Medellín v. Texas*<sup>55</sup> and *Sanchez-Llamas v. Oregon*.<sup>56</sup>

Arguably, domestic courts' dynamic application of international law is a signal to "international courts that the national courts are no longer passive recipients of the decisions of the international courts but rather equal partners."<sup>57</sup> This is a direct response to the serious need for positioning the domestic legal orders, not only as the scene for implementation,<sup>58</sup> but as the "agent for the critical revision of the international rule of law"<sup>59</sup> and of the "universality of policies behind it."<sup>60</sup> This revision, however, has the capacity to create tension and conflict, especially in the context of the relationship between international criminal justice under the auspices of the ICC and national legal orders. This is the point where the Rome Statute's complementarity principle comes in to regulate the relationship. It does so with different approaches through defined rules of competence over specific cases.<sup>61</sup>

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54. See The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999).

55. See *Medellín v. Texas*, 552 U.S. 491 (2008); see also *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Request for Interpretation of the Judgment, 2009 I.C.J. Rep 3 (Mar. 31).

56. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).

57. Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59, 59–68 (2009).

58. See Report of the Secretary-General, *Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels*, UN Doc. A/66/749 (Mar. 16, 2012).

59. Benvenisti & Downs, *supra* note 57, at 68.

60. See Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT'L L. 19 (2003); Jean D'Aspremont, *The Systematic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order*, in THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW 141 (2012); Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7 (2012).

61. Olympia Bekou, *International Criminal Justice at the Interface: The Relationship Between International Criminal Courts and National Legal Orders* 1–6 (Oct. 2004) (unpublished Ph.D. thesis), <http://eprints.nottingham.ac.uk/13411/1/416308.pdf>.

First, it cross-fertilizes the norms of both systems of justice through the mutual exchange of ideas and working patterns, especially in the area of capacity building, which ensures that the ICC and the international community give struggling States technical and legislative support to meet their prosecutorial needs. Second, it endows the national systems with primacy over the ICC, in which control of criminal prosecutions is left with national jurisdiction,<sup>62</sup> which strikes a “delicate balance between the competing interests of State sovereignty and judicial independence.”<sup>63</sup> The rationale for this ‘compromise’ is to preserve States’ sovereignty and primary jurisdiction, while at the same time acknowledging the ICC’s complementarity jurisdiction as an exception. This ensures the transformation or adaptation of both systems, with a view towards creating flexible unity that is able to address common problems and find widely acceptable solutions.<sup>64</sup> Most importantly, the “UN General Assembly resolutions have given recognition to the rule of law at both the national and international levels,”<sup>65</sup> with literature being replete with scholarly debates<sup>66</sup> on how a mutual relationship between national and international criminal justice could be achieved.<sup>67</sup>

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62. JANN KLEFFNER, *COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS* 99–162, 309–10 (2009); see also William Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53 (2008).

63. See Morten Bergsmo et al., *Complementarity After Kampala: Capacity Building and the ICC’s Legal Tools*, 2 GOETTINGEN J. INT’L L. 794–95 (2010); see also M. Bachrach, *The Rome Statute Explained*, 12 INT’L L. PRACTICUM 1, 37, 40 (1999); Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 309–11 (1998).

64. Bekou, *supra* note 61, at 2–6.

65. See, e.g., G.A. Res. 60/1, ¶ 134, 2005 World Summit Outcome (Oct. 24, 2005). In 2006, the General Assembly adopted a resolution entitled ‘The Rule of Law at the National and International Levels.’ See U.N. Doc. A/RES/61/39 (Dec. 18, 2006).

66. See, e.g., Darryl Robinson, *Three Theories of Complementarity: Charge, Sentence or Process?*, 53 HARV. INT’L L.J. 165 (2012); Chandra Lekha Sriram & Stephen Brown, *Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact*, 12 INT’L CRIM. L. REV. 219 (2012); *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE, VOLUME 1* (Carsten Stahn & Mohamed M. El Ziedy eds., 2011).

67. Luis Moreno-Ocampo, *A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE VOLUME 1*, 21 (2011); Solomon



This article contends that the Rome Statute's principle of complementarity conceives this relationship as one of complementarity and interdependence, which presupposes that policy and/or decision makers, at the national level, need to fully cooperate with the ICC and the international community to end the egregious perpetration of core crimes.

### *B. The Rationale Behind Primacy and Complementarity Regimes*

The various international criminal courts and/or tribunals, most notably the ICC,<sup>68</sup> the ICTY,<sup>69</sup> and the ICTR,<sup>70</sup> as well as other internationalized national courts/hybrid tribunals,<sup>71</sup> such as the Special Court for Sierra Leone (SCSL),<sup>72</sup> the Extraordinary Chambers in the Courts of Cambodia (ECCC),<sup>73</sup> the Iraqi

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Ebobrah, *Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations*, 22 EUR. J. INT'L L. 663 (2011); Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 CRIM. L. REV. 67 (2010); William Schabas, *Complementarity in Practice: Some Uncomplementary Thoughts*, 19 CRIM. L. REV. 5 (2008).

68. See Rome Statute, *supra* note 1.

69. See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827 (May 25, 1993) [hereinafter ICTY Statute]; see also U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (May 3, 1993).

70. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955 (Nov. 8, 1994) [hereinafter ICTR Statute].

71. These national courts are described as "internationalized national courts" because even though their subject-matter jurisdictions remain national in character; their origins, outlooks, constitutions, and regulations wear international physiognomy and reference materials used during their proceedings, which reflects the highest international standards of criminal procedure. See, e.g., Report of the UN Secretary-General on the Establishment of the STL, U.N. Doc. S/2006/893, ¶ 7 (Nov. 15, 2006) (noting that the rules of procedure and evidence to be used in the STL (a good example of internationalized national tribunal) are to be inspired, in part, by reference materials reflecting the highest standards of international criminal procedure).

72. See Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 145.

73. The ECCC was established in 2003 through the Bilateral Agreement/Treaty between the General Assembly and Government of Cambodia and endorsed by Security Council Resolution 57/228 on December 18, 2002. See Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian law of Crimes Committed During the Period of Democratic Kampuchea (ECCC Agreement) (June 6, 2003), [https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement\\_between\\_UN\\_and\\_RGC.pdf](https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf). Commonly known as Cambodia Tribunal or

High Tribunal (IHT),<sup>74</sup> the War Crimes Chamber of the Courts of Bosnia and Herzegovina (WCC),<sup>75</sup> and the Special Tribunal for Lebanon (STL),<sup>76</sup> have essentially different approaches regarding their relationship with domestic legal orders. Different, but cogent and compelling reasons underscore each approach adopted by the respective courts, given the “different contexts in which the courts were created, the different methods by which they were created, and the different purposes they serve.”<sup>77</sup> From whichever angle the relationship is viewed, it can either be primary or complementary in character. The primacy regime essentially creates a hierarchy of jurisdiction, in which national

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Khmer Rouge Tribunal, the ECCC was established to try the most senior responsible members of the Khmer Rouge regime for alleged violations of Cambodian Penal Law, International Humanitarian Law and Customs arising from war crimes, crimes against humanity, and genocide perpetrated during the period of Democratic Kampuchea between April 17, 1975 and January 6, 1979, which led to the death of more than 1.7 million people in three years, eight months and twenty days. See Helen Jarvis, *Trials and Tribulations: The Long Quest for Justice for the Cambodian Genocide*, in *THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: ASSESSING THEIR CONTRIBUTION TO INTERNATIONAL CRIMINAL LAW* (INTERNATIONAL CRIMINAL JUSTICE SERIES) 6, 14 (Simon M. Meisenberg & Ignaz Stegmiller eds. 2016).

74. The IHT, more accurately called “Supreme Iraqi Criminal Tribunal,” was established by Supreme Iraqi Criminal Tribunal Law Number 10 of 2005, pursuant to Iraqi National Assembly approval, in accordance with Article 33(A) and (B), and Article 30 of the Law of Administration for the State of Iraq for the Transitional Period. It was established to prosecute Saddam Hussein and the leaders of his *Ba’athist* party regime for war crimes, crimes against humanity, genocide, and other crimes committed in the territory of Iraq between 1968 and 2003. See Michael P. Scharf & Ahran Kang, *Errors and Misteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT’L L.J. 911, 911–12 (2005).

75. The WCC of the Court of Bosnia-Herzegovina was established in 2005 to prosecute war crimes, crimes against humanity, and genocide perpetrated during the conflict in Bosnia-Herzegovina in the early 1990s. It was established in conjunction with the trials at the ICTY and in Bosnia’s lower entity-level courts. See *ENCYCLOPEDIA OF TRANSITIONAL JUSTICE*, VOLUME 3, 484–88 (Lavinia Stan & Nadya Nedelsky eds. 2012).

76. See Statute of the Special Tribunal for Lebanon, U.N. Doc. S/RES/1757 (May 30, 2007).

77. Jennifer Trahan, *Is Complementarity the Right Approach for the International Criminal Court’s Crime of Aggression: Considering the Problem of ‘Overzealous’ National Court Prosecutions*, 45 CORNELL INT’L L. J. 573 (2012).

jurisdictions retain the right to investigate and prosecute perpetrators of crimes,<sup>78</sup> but which nevertheless still preserves the intrinsic supremacy of the internationally constituted tribunals.<sup>79</sup> The rationale for according international courts primacy over national courts is to ensure that the different courts do not exercise concurrent jurisdiction over the same subject matter.<sup>80</sup> Primacy in this context may be viewed in three ways. First, it may be *doctrinal primacy*, whose theoretical underpinnings are founded on the demand for justice at the international level, and “constitute the first step towards implementation of international judicial competence.”<sup>81</sup> Second, it may be *operational primacy (deferral)*,<sup>82</sup> under which an international tribunal may, at any stage of national criminal proceedings, order national courts to defer to its competence and release a suspect to its custody for trial, a practice which builds on the ICL principle of *non bis in idem*.<sup>83</sup> Third, it may be *pragmatic primacy*, which, as an opposite of the operational primacy, requires a doctrinal shift from deferral to the international tribunals’ jurisdiction to *referral*<sup>84</sup>

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78. COMPLEMENTARITY OF THE INTERNATIONAL CRIMINAL COURT: FROM THEORY TO PRACTICE VOLUMES I & II 71–141 (Carsten Stahn & Mohammed El Zeidy eds., 2011).

79. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 16 MIL. L. REV. 20, 42 (2001); see also John Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS AND RESULTS 41, 41–42 (1999).

80. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE. J. INT'L L. 383, 387 (1998).

81. Prosecutor v. Tadić, Case No. IT-94-1-1, Separate Opinion of Judge Sidhwa on the Defense Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

82. Bekou, *supra* note 61, at 38; see also Int'l Tribunal for the Prosec. Of Persons Responsible for the Serious Violations of Int'l Humanitarian L. Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.50, r. 9(i), 9(ii), 9(iii), 10(a)–10(c) (July 8, 2015), [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev50\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf).

83. *Non bis in idem* derives from the Roman law maxim *nemo bis vexari pro una et eadem causa* (a man shall not be twice vexed or tried for the same cause). See Gerard Conway, *Ne Bis in Idem in International Law*, 3 INT'L CRIM. L. REV. 217, 217 (2003).

84. See Rome Statute, *supra* note 1, art. 13(b) (providing that where a State not party to the Rome Statute does not accept the ICC's jurisdiction, the United Nations Security Council may refer a situation to the ICC for investigation).

of cases to national courts. Likewise, the complementarity regime defines the relationship between the ICC and national courts,<sup>85</sup> while also determining the judicial forum that should have jurisdiction in any given case.

The overarching rationale of the complementarity principle is that it protects the sovereignty of State Parties *vis a vis*—both the ICC and third States alike.<sup>86</sup> Under general international law, States have territorial criminal jurisdiction over acts committed within their territory.<sup>87</sup> Such jurisdiction constitutes a central aspect of State sovereignty itself,<sup>88</sup> highlighting the important role of national criminal jurisdictions as resembling the “backbone for enforcement of international criminal law.”<sup>89</sup>

### 1. The Primacy Relationship of the ICTY and the ICTR

Unlike the ICC, the ICTY<sup>90</sup> and the ICTR<sup>91</sup> did not promote complementarity for a couple of reasons. Both tribunals were created by binding U.N. Security Council resolutions as a re-

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For example, the United Nations Security Council, for the first time, acted under *Chapter VII of the U.N. Charter* 1945 to refer the situation in Darfur, Sudan to the ICC. See S.C. Res. 1593 (2005). Again, in Resolution 1970 (2011), the United Nations Security Council referred the situation in Libya to the ICC for investigation of the crimes committed in the State. See generally Report of the International Commission of Inquiry on Darfur to the UN Secretary-General pursuant to Security Council *Resolution 1564* of 18 September 2004 (Jan. 25, 2005), ¶ 73.

85. See Linda E. Carter, *The Future of the International Criminal Court: Complementarity as Strength or a Weakness?*, 2 WASH. U. GLOBAL STUD. L. REV. 451, 451–52 (2013).

86. See Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK UNYB 595 (2003) (citing R.E Fife, *The International Criminal Court—Whence It Came, Where It Goes*, 69 NORD. J. INT'L L. 63, 72 (2000)).

87. See Article 3 of the Draft Convention on Jurisdiction with Respect to Crime (annexed to 29 AM. J. INT'L L. 439–42 Supplement: Research in International Law (1935)).

88. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 289, 303 (5th ed. 1998).

89. ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 88 (3d ed. 2014).

90. See ICTY Statute, *supra* note 69, art. 9 (giving the ICTY primacy over national courts).

91. See ICTR Statute, *supra* note 70, art. 8 (giving the ICTR primacy over national courts).

sponse to situations deemed a threat to peace and security, instead of by an international treaty requiring state accession. The U.N. Security Council, acting under Chapter VII of the U.N. Charter to maintain international peace and security,<sup>92</sup> established the ICTY, addressing the reality that the newly created States of the former Yugoslavia would not agree on the establishment of such a tribunal through multilateral treaty. There was also the concern that such a treaty would take too long to take effect, which was unacceptable given the extraordinary conflict prevalent in Yugoslavia at that time.<sup>93</sup> ICTY primacy also ensured that national courts would not be able to defer prosecutions at any stage of the proceedings.<sup>94</sup> Granting the ICTY primacy was by all indications very reasonable, given the context and situation under which the Tribunal was created. It occurred during "armed conflict in which different ethnic groups were pitted against each other including the Croats, Serbs, and Bosnian Muslims, with the Serb and Kosovar-Albanian conflict erupting in 1999."<sup>95</sup> Under these situations of ethnic hostilities, there were no guarantees that national courts would not, on the basis of ethnic bias,<sup>96</sup> conduct sham or façade prosecutions by shielding key perpetrators from justice.<sup>97</sup> Similar considerations can be applied for the creation of the ICTR as the judicial twin of the ICTY. The existing *distrust and disruption* in the Balkans and Rwanda created the same reality, where the judicial systems in both countries at that time were incapable of conducting any

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92. See U.N. Charter, ch. VII.

93. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 387 (1998).

94. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 42 (2001); see also U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704, 64–65 (May 3, 1993).

95. GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 206–75 (2002); see also DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* (2012) (chronicling the history of the creation of the ICTY and ICTR).

96. See Jennifer Trahan & Bogdan Ivanisevic, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, HUM. RTS. WATCH (2004), <http://www.hrw.org/reports/2004/10/13/justice-risk>.

97. Mohamed M. El Zeidy, *From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 Bis of the Ad Hoc Tribunals*, 57 INT'L & COMP. L.Q. 403, 403–406 (2008).

genuine prosecutions.<sup>98</sup> In Rwanda specifically, there were unresolved concerns that the country's decimated judiciary would be unable to prosecute the key perpetrators of the horrendous Rwandan genocide.<sup>99</sup> It seems as if primacy is unarguably a product of its time. It represents a conscious and deliberate choice by the U.N. Security Council to deal with a particular situation, such as in Yugoslavia and Rwanda. It was also thought to be the only way that international criminal justice could be met at the time,<sup>100</sup> prior to the existence of a permanent international criminal court.

## 2. The ICC's Complementarity Relationship

The Rome Statute, in contrast to the ICTY and ICTR Statutes, created a complementarity regime,<sup>101</sup> whereby national courts conduct, investigate, and prosecute crimes to the exclusion of the ICC's jurisdiction, except and in the event that, the national authorities are unwilling or genuinely unable to investigate or prosecute crimes.<sup>102</sup> Thus, instead of replacing the ICTY and the ICTR, the ICC complements and supplements national jurisdiction, only acting when national authorities fail to take necessary steps.<sup>103</sup> The rationale is that complementarity is designed to encourage national authorities to exercise jurisdiction to prosecute ICC crimes.<sup>104</sup> It is a way of restoring trust in national institutions.<sup>105</sup> Importantly, the proximity of national courts to the scene of the crimes, as well as the availability of witnesses to be called during trial, are also vital factors taken into consideration when granting national courts primary jurisdiction to prosecute

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98. Bekou, *supra* note 61, at 28–29.

99. For the meaning of 'unable,' see Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L.J. 202, 208–209 (2011).

100. Bekou, *supra* note 61, at 30.

101. Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK Y.B. U.N. L. 591–92 (2003).

102. See Rome Statute, *supra* note 1, art. 17(1) (making provisions on conditions of "admissibility" of cases before the ICC).

103. *Id.* at 592.

104. *Id.* at 596.

105. See Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, INT'L CENTER TRANS. JUST. 8 (2016), [https://www.ictj.org/sites/default/files/ICTJ\\_Handbook\\_ICC\\_Complementarity\\_2016.pdf](https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf).

international crimes. Ideally, the ICC cannot, in terms of capacity and practicalities, prosecute all of the gravest and most egregious crimes of genocide, war crimes, crimes against humanity, and the post Kampala crime of aggression<sup>106</sup> without assistance from national authorities. Again, complementarity serves to embolden the international community's efforts towards prosecution of international crimes to deter future perpetrations of atrocities.<sup>107</sup> Thus, by creating ICC complementarity jurisdiction, a delicate balance is struck between the demands of State sovereignty and the international community's obligation to effectively prevent grave international crimes and end impunity of the most serious nature.<sup>108</sup>

### C. Models of Complementarity

Historically, different models of complementarity, dating back to the Versailles peace treaty of World War I, the unconditional surrender of Nazi Germany in 1945, and the charters of the Nuremberg and Tokyo Tribunals, emerged with the passage of time. They have been adequately captured in literature. El Zeidy,<sup>109</sup> in his seminal work, notes that complementarity is not a novel idea, identifying four models of complementarity.<sup>110</sup> The first model, referred to as *optional complementarity*, developed from the enunciations of the League of Nations Convention 1937,<sup>111</sup> the London International Assembly 1941,<sup>112</sup> the U.N.

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106. Sascha-Dominik Bachmann & Gerhard Kemp, *Aggression as "Organized Hypocrisy?"—How the War on Terrorism and Hybrid Threats Challenge the Nuremberg Legacy*, 30 WINDSOR Y.B. ACCESS TO JUST. 246 (2012). The Kampala Review conference successfully introduced crime of aggression as one of the crimes under the ICC's jurisdiction and expanded the coverage for war crimes. See generally Claus Kre & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 9 JICJ 1179 (2010). See also Rev. Conference of the Rome Statute, Res. RC/Res.6 (June 11, 2010), <https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf>; Rev. Conference of the Rome Statute, Res. RC/Res.5 (June 11, 2010), <https://treaties.un.org/doc/source/docs/RC-Res.5-ENG.pdf>.

107. Benzing, *supra* note 101, at 597.

108. *Id.* at 600.

109. Mohamed M. El Zeidy, *The Genesis of Complementarity, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, VOLUME 1, 71 (Carsten Stahn & Mohamed M. El Ziedy eds., 2011).

110. *Id.* at 71.

111. *Id.* at 91.

112. *Id.* at 100.

War Crimes Commission 1943,<sup>113</sup> the Committees on International Criminal Jurisdiction 1951 and 1953,<sup>114</sup> and the 1990, 1992, and 1993 International Law Commission (ILC) Working Groups Reports.<sup>115</sup> It is based on States voluntarily consenting to surrender their jurisdiction. The second model, described as the *amicable model*, is derived from the Charters of the Nuremberg International Military Tribunal<sup>116</sup> and the Tokyo International Military Tribunal for the Far East.<sup>117</sup> It focuses on the allocation of responsibilities between international and national jurisdictions. The third model, designated as the *mandatory model*, is drawn from the ILC Working Group's Report<sup>118</sup> and the 1994 ILC Draft Statute of the International Criminal Court.<sup>119</sup> It represents a complementary blend of the first and second models. The fourth complementarity model, a *policy-based model*, is drawn from a combination of other emerging models negotiated under the Rome Statute.<sup>120</sup> Building from Mauro Politi's submissions,<sup>121</sup> the next subpart, from the Statute's perspective, discusses evolving models of complementarity, namely passive, positive, and proactive complementarity.

### 1. Passive Complementarity

The ICC's role in prosecuting international crimes is passive, whereby the ICC functions as a court of last resort.<sup>122</sup> As Ann-Marie Slaughter puts it:

One of the most powerful arguments for the International Criminal Court is not that it will be a global instrument of justice itself-arresting and trying tyrants and torturers world-wide-but that it will be a backstop and trigger for domestic

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113. *Id.* at 104.

114. *Id.* at 107.

115. *Id.* at 114.

116. *Id.* at 122.

117. *Id.* at 124.

118. *Id.* at 126.

119. *Id.* at 128.

120. *Id.* at 129.

121. Mauro Politi, *Reflections on Complementarity at the Rome Conference and Beyond*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE VOLUME 1*, 142 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

122. Christopher Hall, *Positive Complementarity in Action*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* 1017 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).



forces for justice and democracy. By posing a choice—either a nation tries its own or they will be tried in The Hague—it strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle. . .

<sup>123</sup>

The implication is that the ICC's jurisdiction remains dormant until triggered by Signatory States' unwillingness to act, or in cases of U.N. Security Council referrals. Consequently, the passive model undermined the ICC prosecutor's *proprio-motu* powers, whereby the prosecutor can initiate, investigate, and prosecute in the event that he receives information from States.<sup>124</sup> Being an initial model, and given that African States previously lacked understanding of complementarity, resulting in rampant State referrals to the ICC,<sup>125</sup> the passive model soon became unpopular. As a result, it gave way to a more meaningful positive complementarity.

## 2. Positive Complementarity

A conceptual understanding of positive complementarity is aptly captured in the statement of the first Prosecutor of the ICC, Luis Moreno-Ocampo, who posited that:

The Court is complementary to national systems. This means that whenever there is genuine State action, the court cannot and will not intervene. But States not only have the right, but also the primary responsibility to prevent, control and prosecute atrocities. Complementarity protects national sovereignty and at the same time promotes state action. The effectiveness of the International Criminal Court should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court, as a

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123. Ann-Marie Slaughter, *Not the Court of First Resort*, WASH. POST (Dec. 21, 2003), [https://www.washingtonpost.com/archive/opinions/2003/12/21/not-the-court-of-first-resort/8f2e6532-eb23-4311-b077-c6278115c542/?utm\\_term=.fe38a36854f6](https://www.washingtonpost.com/archive/opinions/2003/12/21/not-the-court-of-first-resort/8f2e6532-eb23-4311-b077-c6278115c542/?utm_term=.fe38a36854f6).

124. Rome Statute, *supra* note 1, art. 15.

125. Situations in Northern Uganda, Congo, and the Central African Republic were referred to the ICC through state referrals under Article 14 of the Rome Statute. See S.M.H. Nouwen & W.G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT'L L. 942–65 (2011).

consequence of the regular functioning of national institutions, would be a major success.<sup>126</sup>

Under the positive complementarity,<sup>127</sup> the utmost priority is that rather than contending with domestic systems, the ICC would embolden national proceedings by relying on domestic and transnational networks, while also partaking in the transnational cooperation system.<sup>128</sup> It is in fact a “problem solving strategy.”<sup>129</sup> The positive approach was further expounded in the Office of the Prosecutor’s (OTP) 2006 policy statement.<sup>130</sup> There has, however, been a gradual shift from the present understanding of positive complementarity following the Kampala Conference,<sup>131</sup> where three broad classes of assistance for national systems, namely technical and legislative assistance and building of national capacity, were articulated to broaden the concept, while emphasizing the ICC’s limited role in this regard.<sup>132</sup> Of particular reference is the fact that the “Court is not a Development Agency.”<sup>133</sup> If the argument that the ICC is not a development agency is to be taken as anything logical at all, it can only be more logical to argue that a more efficient approach that actively supports national legal orders is crucial. To this end, it is submitted that the proactive complementarity approach, by

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126. Luis Moreno-Ocampo, Prosecutor, International Criminal Court, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court, at 3 (June 16, 2003), [www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E32673648B4896/143585/030616\\_moreno\\_ocampo\\_english.pdf](http://www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E32673648B4896/143585/030616_moreno_ocampo_english.pdf).

127. Rome Statute, *supra* note 1, art. 93(10).

128. Luis Moreno-Ocampo, Prosecutor of the ICC, Statement of the Prosecutor to the Diplomatic Corps (Feb. 12, 2004), [www.icc-cpi.int/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM\\_20040212\\_En.pdf](http://www.icc-cpi.int/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM_20040212_En.pdf).

129. See Carsten Stahn, *The Future of International Criminal Justice*, HAGUE JUST. PORTAL, <http://www.haguejusticeportal.net/>; see also Carsten Stahn, *Complementarity: A Tale of Two Notions* 19 CRIM. L. REV. 87 (2008) [hereinafter Stahn, *Complementarity*].

130. ICC-OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY (2006), [www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC692D363E07274B/143708/ProsecutorialStrategy20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC692D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf).

131. See REPORT ON THE FIRST REVIEW CONFERENCE ON THE ROME STATUTE, COALITION FOR THE INT’L CRIM CT. (2010), [http://www.iccnw.org/documents/RC\\_Report\\_finalweb.pdf](http://www.iccnw.org/documents/RC_Report_finalweb.pdf).

132. See Bergsmo et al., *supra* note 63, at 3–22.

133. See Res. ICC-ASP/8/Res.9, at 16–22 (Mar. 25, 2010), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-8-Res.9-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.9-ENG.pdf).

which both the ICC and States are in active engagement at every stage of proceedings at the domestic level, ensures this efficiency.

### 3. Proactive Complementarity

Proactive complementarity entails a policy of formal requests by States for assistance from the ICC, and a corresponding agreement by the ICC to support national justice systems in terms of capacity building to help them investigate and prosecute international crimes domestically.<sup>134</sup> The areas in which States may request the ICC's assistance include, but are not limited to, investigations into conducts that States believe constitute international crimes or conducts that amount to serious crimes under national law. In practice, this assistance may take various forms, including the ICC transmitting documents relating to preliminary inquiries to national jurisdictions, analyzing forensic evidence, and evaluating witness statements. The idea is that the ICC will catalyze national prosecution by the sharing of burdens and responsibilities.<sup>135</sup> This notwithstanding, it is argued that the ICC's catalyst role in this regard, albeit commendable on its face, is coercive in application, potentially creating friction between States and the ICC. This is because it carries the misconceived belief that it yields good results, in the sense that it motivates national jurisdictions to investigate and prosecute crimes and that States would want to avoid threats of potential international intervention by the ICC in the event they fail to investigate or prosecute crimes. This can frustrate State cooperation. As long as ICC threats of potential intervention against States when they fail to prosecute crimes continue, States will contest an ICC prosecutorial system, as they will consider it to be very unfair. For example, in the *Kenyatta & Muthaura et al.* case, Kenya argued that it filed a request with the ICC Pre-Trial Chamber for assistance from the ICC on behalf of the government of the Republic of Kenya, pursuant to Article 93(10) of the Rome Statute.<sup>136</sup> Kenya's request relates *inter*

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134. Carsten Stahn, *Taking Complementarity Seriously: On the Sense and Sensibility of 'Classical,' 'Positive' and 'Negative' Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, VOLUME I 233–82 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

135. KLEFFNER, *supra* note 62, at 309.

136. *Prosecutor v. Uhuru Muigai Kenyatta*, *supra* note 34, ¶ 114.

*alia* to transmission of all statements, documents, and other types of evidence obtained by the ICC and the Prosecutor in the course of the ICC's investigation into the 2007 post-election violence in that country. The Pre-Trial Chamber refused Kenya's request for assistance. At the time Kenya filed the request for assistance, the case was already pending before the ICC, with Kenya simultaneously challenging the admissibility of the case by the Court (i.e., three weeks post admissibility challenge by Kenya).<sup>137</sup> Kenya had asked the Pre-Trial Chamber to determine the request for assistance issue first, before resolving the question of challenging admissibility. The Pre-Trial Chamber denied the request. Dissatisfied with the decision, Kenya appealed to the ICC's Appeals Chamber, contending, amongst other things, that receiving assistance from the Prosecutor was directly relevant and linked to the admissibility challenge. It also expressed the belief that it would be very unfair to deny Kenya the opportunity of relying on evidence obtained by the ICC during its prosecution of the case. The Appeals Chamber dismissed Kenya's appeal, finding the case admissible. It further stated that the Pre-Trial Chamber did not commit any procedural error when it refused to first determine the request for assistance before resolving the issue of admissibility. The decision of the Appeals Chamber appears to suggest that requests for assistance by States must be filed timely, not when the case is already before the ICC. In essence, what the ICC is understood to be saying is that if a State suddenly wakes up and decides to file a request for assistance, when the case is already pending before it, it will amount to nothing more than a postscript. While the ICC's decision that a request for assistance must be timely is highly commendable and appreciated, the ICC should be more cooperative with States who indeed are making genuine efforts to investigate and prosecute crimes, regardless of whether the case is already pending before it. This is so because, at the time Kenya requested assistance, the matter had not proceeded to trial, but was still at the stage of determining admissibility. The ICC could have comfortably provided Kenya with the requested assistance and deferred the case back to Kenya for trial. Otherwise, all efforts to implement proactive complementarity in this context would be frustrated by aggrieved States. This is more serious in the case of Africa, where the ICC is currently facing tough times. Recall

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137. *Id.* ¶ 118.

that the ICC was later forced to drop the crimes against humanity charges against Kenyatta after the Prosecutor's office told the ICC that Kenya had refused to hand over evidence vital to the case, and that available evidence at the ICC's disposal "had not improved to such an extent that Mr. Kenyatta's alleged criminal responsibility [could] be proven beyond reasonable doubt."<sup>138</sup> It is argued that had the ICC given the requested assistance to Kenya at the time the country asked for it, and the case deferred back to the Kenya national court for trial, Kenyatta would have been prosecuted successfully back home, regardless of whether or not he was convicted thereafter. It is therefore submitted that the ICC's catalyst role in this context must be reconceptualized to reflect the true purport of proactive complementarity, which is to ensure that national courts and the ICC are actively engaged with one another at every stage at the domestic level, instead of being engaged in power struggles that breed tension. This is possible if both the ICC and States proactively build on the Rome Statute's reverse cooperation mechanism<sup>139</sup> to establish a mutually reinforcing and synergetic relationship, whilst minimizing the chances of potential conflicts that may arise from the exercise of jurisdiction and admissibility of cases before the ICC.

*D. Complementarity, Jurisdiction, and Admissibility Issues Under Article 17 of the Statute: Analysis of its Elements and Components*

The provisions of Article 17 of the Rome Statute are deliberately worded to capture the merits of deferring cases to national courts for trial. It is considered a proactive way to implement the ICC's complementarity regime. It explicitly sets forth standards for admissibility of cases before the ICC if States are unwilling, or genuinely unable, to conduct any meaningful investigation or prosecution, or where the State's decision not to prosecute stems from unwillingness or inability to prosecute. Of particular importance is that the ICC has no power to order the admission of cases before it where a State with jurisdiction is already investigating or prosecuting the case,<sup>140</sup> or has investigated and

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138. *ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence*, *supra* note 34.

139. Rome Statute, *supra* note 1, art. 93(10).

140. *Id.* art. 17(1)(a).

reached a decision not to prosecute;<sup>141</sup> or has already tried the individual for the conduct, in the event of which a retrial would be barred under the statute;<sup>142</sup> or where the ICC reaches the conclusion that the case referred to it is not of sufficient gravity<sup>143</sup> to warrant prosecution. The effect of Article 17 of the Rome Statute is that it conceives complementarity as a question of admissibility of cases, rather than as a question of the ICC's jurisdiction. In other words, the question of admissibility and jurisdiction, in terms of exercising competences over specific cases, is distinguishable. What this distinction means, in practice, is that the complementarity principle does not *ipso facto* usurp the inherent jurisdiction of the ICC as such, but only defines special circumstances when its jurisdiction may be invoked. Thus, the ICC must, in all cases, first resolve the question of jurisdiction before dealing with matters of admissibility.<sup>144</sup> To this end, recent ICC decisions on jurisdiction and admissibility, particularly in *Katanga & Ngudjolo*,<sup>145</sup> *Kenyatta*,<sup>146</sup> *Saif Al-Islam Gaddafi & Al-Senussi*,<sup>147</sup> and the two Gbagbo cases—*Laurent Gbagbo*<sup>148</sup> and *Simone Gbagbo*<sup>149</sup>—have brought increased attention to the modes of interpreting the elements or thresholds for admissibility of cases before the ICC, namely the unwillingness test, the inability and unavailability test, and the sufficient gravity test.

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141. *Id.* art. 17(1)(b).

142. *Id.* art. 17(1)(c), art. 20.

143. *Id.* art. 17(1)(d).

144. Rules of Procedure and Evidence of the ICC, rule. 58(4)

145. *See Prosecutor v. Katanga*, *supra* note 28 (affirming the decision of the Trial Chamber against Katanga's admissibility challenge, having found a "clear and explicit expression of unwillingness of the DRC to prosecute th[e] case.").

146. *See Prosecutor v. Muthuara and Ors*, Case No. ICC-01/09-02/11, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (Aug. 30, 2011).

147. *See Prosecutor v. Saif Al-Islam Gaddafi & Al-Senussi*, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi (May 31, 2013); *Prosecutor v. Saif Al-Islam Gaddafi & Al-Senussi*, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Abdullah Al-Senussi (Oct. 11, 2013).

148. *See Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case No. ICC-02/11-01/15, Trial (Jan. 28, 2016).

149. *See Prosecutor v. Simone Gbagbo*, Case No. ICC-02/11-01/12, Admissibility Challenge (Oct. 1, 2013).

The following part analyzes these elements of complementarity as a trigger of admissibility of cases within the ICC's jurisprudence.

### 1. The Unwillingness Test

The unsettled parameters for measuring the admissibility of cases before the ICC, as expressed in Article 17 of the Statute, are embodied in a two-step process. First, any challenge by national authorities to admissibility must establish that there is an ongoing genuine national investigation or prosecution relating to the same person and same conduct as the ICC case.<sup>150</sup> A hypothetical or prospective investigation will fall short of this requirement, and any ongoing investigation must sufficiently touch and concern the same case as the ICC case. In other words, if a State challenges the admissibility of a case, it must provide the ICC with cogent, compelling, and unequivocal evidence that has a plausible level of specificity and probative value to clearly demonstrate that the State in question is indeed genuinely investigating the case, instead of merely asserting that investigations are ongoing. The point is that the investigation must not be conducted for the sole sake of conducting it but must instead be a genuine investigation. Second, if the first requirement is satisfied, it may still be decided that the case is admissible on grounds that the national judicial system is either unwilling or genuinely unable to investigate or prosecute crimes.<sup>151</sup> The parameters for measuring the meaning of the word unwilling may be understood as incorporating either or all of the following three criteria: (1) that national procedures are being used to shield a person from criminal responsibility; (2) that there has been an unreasonable delay in the investigation, showing a lack of intent to prosecute; and (3) that independence and impartiality of prosecuting institutions cannot be guaranteed. Similarly, the word "genuinely" presupposes States taking actions that are real, sincere, and devoid of any form of subterfuge. In the *Kenyatta & Muthaura et al.* case,<sup>152</sup> the Appeals Chamber held that the report of the investigations into the post-election violence in Kenya

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150. Payam Akhavan, *Complementarity Conundrums Debate, The ICC Clock in Transitional Times*, 14 J. INT'L CRIM. JUST. 1043 (2016).

151. See John T. Holmes, *Complementarity: National Courts Versus the ICC*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 667 (Antonio Cassese et al. eds., 2002).

152. *Prosecutor v. Muthuara and Ors*, *supra* note 146.

did not contain any reference to the suspects and did not reveal any investigative step taken by the Kenyan authorities. The investigation was therefore considered not genuine and calculated to shield the perpetrators from prosecution and justice. Arguably, what amounts to a genuine investigation in respect of national proceedings is a weighty matter. In the *Ahmad Harun and Ali Kushayb*<sup>153</sup> case, for example, the Pre-Trial Chamber made an initial finding of admissibility on the constricted ground that specific events in Darfur that were under investigation in Sudan did not comprise the same conduct as the ICC case.<sup>154</sup> In so holding, the Chamber technically circumvented the clearly meritorious question as to whether the Sudanese judicial authorities were unwilling to carry out a genuine investigation.<sup>155</sup>

## 2. The Inability and Unavailability Test

The case of inability and unavailability presents a more complex situation compared to the unwillingness question. For instance, a national jurisdiction may be fully willing, yet unable, to immediately investigate or prosecute crimes<sup>156</sup> in the immediate aftermath of mass atrocities, though it could potentially do so at a later point in time.<sup>157</sup> Even if inability to arrest the accused or to obtain evidence is not an obstacle, the ability to carry out timely investigations and fair trials remains a vital consideration.<sup>158</sup> Despite their best efforts, post-conflict national judicial systems lack investigative resources and the capacity for optimal compliance with due process standards.<sup>159</sup> The situation of inability manifested in Rwanda following the horrendous genocide that decimated the Rwandan judicial system, with few judicial officers surviving the massacre.<sup>160</sup> In such extreme circumstances, national courts will invariably fall short of ideal expectations of expeditious and fair trials. Justice therefore demands

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153. See *Prosecutor v. Ahmad Muhammad Harun* (“Ahmad Harun”); *Ali Muhammad Ali Abd-Al-Rahman* (“Ali Kushayb”), Case No ICC-02/05-01/07, *Participation of Victims* (Apr. 27, 2007).

154. *Id.* ¶¶ 19–25.

155. Akhavan, *supra* note 150.

156. See David Tolbert & Laura A. Smith, *Complementarity and the Investigation and Prosecution of Slavery Crimes*, 14 J. INT’L CRIM. JUST. 429 (2016).

157. Akhavan, *supra* note 150, at 1044.

158. *Id.*

159. *Id.* at 1047.

160. *Id.* at 1051.



that post-conflict societies be given more time and resources to satisfy these admissibility conditions in terms of institutional capacity building, as part of a wider post-conflict transformation process. Also, 'inability' encompasses complete or considerable breakdown or non-availability of a national system, which results in one of three following situations: (1) "the State is unable to obtain the accused,"<sup>161</sup> (2) it is unable to obtain "the necessary evidence and testimony,"<sup>162</sup> or (3) it is "otherwise unable to carry out its proceedings."<sup>163</sup> The use of the disjunctive word 'or' in Article 17 (1) of the Rome Statute indicates that these three situations need not coexist to sufficiently merit a finding of inability.<sup>164</sup> Thus, if a State cannot apprehend the accused or gather necessary evidence and testimony in good time, then the national proceeding is not genuine, regardless of whether the judicial system uses its best efforts.<sup>165</sup> In *Saif Al-Islam*,<sup>166</sup> a Libyan case which appears to be a partial victory for complementarity, the Pre-Trial Chamber initially acknowledged Libya's enormous efforts, under exceptionally tough circumstances, to boost security situations through reestablishing institutions, including restoring the rule of law. Despite that, the Pre-Trial Chamber still found that Libya continues to face manifold problems, including its inability to retrieve Saif Al-Islam from a detention facility in Zintan,<sup>167</sup> a situation showing that Libya is unable to exercise its full judicial powers across the country's entire territory.<sup>168</sup> On this ground alone, the ICC may have deemed Libya's national prosecution system unavailable in light of the Rome Statute's provisions.<sup>169</sup> Closely linked to the element of unavailability and

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161. *Id.* at 1043; see also Valerie Freeland, *Rebranding the State: Uganda's Strategic Use of the International Criminal Court*, 46 DEV. & CHANGE 293 (2015).

162. Akhavan, *supra* note 150, at 1043.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Saif Al-Islam Gaddafi & Al-Senussi*, *supra* note 147.

167. *Id.* ¶¶ 206–207.

168. *Id.* ¶¶ 209.

169. Rome Statute, *supra* note 1, art. 17(3).

inability is the OTP's invented element of "inactivity."<sup>170</sup> The situation of inactivity played out in *Katanga & Ngudjolo*,<sup>171</sup> where the Pre-Trial Chamber held that inaction on the part of the Ugandan government, which led to the self-referral of the case to the ICC, rendered the case admissible before the ICC.<sup>172</sup> From the facts and circumstances of the case, it appears that while State self-referrals may indicate their willingness to uphold justice on the one hand, it also amounts to inability on the other hand, which militates against the ends of justice.

### 3. The Sufficient Gravity Threshold Test

Another element of complementarity in the Rome Statute is one of sufficient gravity. Sufficient gravity and complementarity are the two-pronged elements for admissibility of cases before the ICC. Apart from classifying crimes falling within the subject matter jurisdiction of the ICC as the most serious,<sup>173</sup> the Rome Statute requires proof of the additional element of sufficient gravity for the case to be admissible.<sup>174</sup> Consequently, even where subject matter jurisdiction is established, the Court must still be satisfied that the case is serious enough before it takes further action. Relevant factors in evaluating the gravity threshold include qualitative and quantitative considerations, such as the scale, nature, manner of commission, and impact of the crimes.<sup>175</sup> It will not include isolated traces of criminal activity. In determining prosecutorial priorities based on gravity, the OTP relied on absolute numbers in at least one major case. The case relates to the situation in Uganda, where the OTP stated

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170. Ovo Catherine Imoedemhe, *National Implementation of the Complementarity Regime of the Rome Statute of the International Criminal Court: Obligations and Challenges for Domestic Legislation with Nigeria as a Case Study* (Mar. 2014) (thesis Submitted for the Degree of Doctor of Philosophy at the University of Leicester), <https://lra.le.ac.uk/bitstream/2381/36077/1/2014ImoedemheOCPhD.pdf>.

171. *Prosecutor v. Katanga*, *supra* note 28.

172. Rastan, *supra* note 28.

173. Bachmann & Kemp, *supra* note 106, at 246 (chronicling crimes of genocide, war crimes, crimes against humanity, and the post Kampala crime of aggression as the most serious crimes over which the ICC has jurisdiction).

174. See Rome Statute, *supra* note 1, art. 17(1)(d), 53(1)(b), 53(2)(b).

175. See *Draft Policy Paper on Case Selection and Prioritisation*, INT'L CRIM. CT. 12–13 (Feb. 29, 2016), [https://www.icc-epi.int/ic-docs/otp/29.02.16\\_Draft\\_Policy-Paper-on-Case-Selection-and-Prioritisation\\_ENG.pdf](https://www.icc-epi.int/ic-docs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf).

that, after considering information relating to activities of all groups in the region, the case of the Lord's Resistance Army (LRA) was prioritized as being the most serious, having resulted in at least 2,200 killings, 3,200 abductions, and over 850 attacks.<sup>176</sup> It is argued that in analyzing the complementarity thresholds for admissibility of cases before the ICC, a reexamination of the interpretation of the actual purpose of the complementarity regime, as well as what the principle is actually designed to achieve in practice, is necessary.

### *E. Interpretation of the Complementarity Principle*

There have been contrasting interpretations of the complementarity principle, from the national and international judicial *fora* and from highly qualified publicists in terms of the actual purpose that the principle is designed to achieve in practice. These contrasting interpretations contribute to the ICC's socio-political amalgamation and involvement in national jurisdictions, which in itself is a direct result of the failure to resolve the many challenges associated with the theory and practice of complementarity, both in national and in supranational terms. Christoph Burchard,<sup>177</sup> for example, argues that the principle ought to be interpreted and understood from the framework of global governance, since the ICC, unlike ordinary criminal courts, is not only an instrument to prosecute international crimes, but also generally part of a more wide-ranging, multi-leveled, polycentric, and actor-open implementation regime of international criminal law.<sup>178</sup> Carsten Stahn<sup>179</sup> argues that even though the complementarity regime is the cornerstone of the ICC, problem-solving based on the understanding of complementarity requires greater attention to the substantive objectives of the ICC, namely judicial independence,<sup>180</sup> effective justice,<sup>181</sup>

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176. See Luis Moreno Ocampo, Prosecutor, Int'l Crim. Ct., Statement at the Fourth Session of the Assembly of States Parties (Nov. 28, 2005), [https://www.icc-cpi.int/NR/rdonlyres/0CBFF4AC-1238-4DA1-9F4A-70D763F90F91/278514/LMO\\_20051128\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/0CBFF4AC-1238-4DA1-9F4A-70D763F90F91/278514/LMO_20051128_English.pdf).

177. Christoph Burchard, *Complementarity as Global Governance*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, VOLUME I, 167 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

178. *Id.* at 163.

179. Stahn, *supra* note 134, at 233.

180. *Id.* at 274.

181. *Id.* at 276.

fairness,<sup>182</sup> and sustainability.<sup>183</sup> In addition, when interpreting complementarity in the context of legality of self-referrals, Payam Akhavan<sup>184</sup> sees nothing wrong in the fragile State's practice of surrendering jurisdiction to the ICC, given the escalation and privatization of violence by non-state actors, as well as the inability of national and regional judicial bodies to bring to justice the perpetrators of crimes.<sup>185</sup> Given the somewhat divergent interpretation views of complementarity, the question then arises; how should the complementarity principle of the Rome Statute ideally be interpreted? Should interpretive outcomes be based on arguments about higher order organizational justice in a criminal law context since the ICC may be likened to an employer organization that utilizes higher organizational justice methods to seek to render justice to its employees or workers? Or, should judges give primacy to the ordinary elements of complementarity *simpliciter* without more? Alternatively, could they reject it and instead align their reasoning with other interpretive aids, such as custom or treaty law, or is it more desirable for ICC judges to develop a more object driven and purposive method of thinking through the interpretive glitches surrounding the complementarity principle in the Rome Statute? This article argues that a more tested and trusted purposive interpretation of the complementarity principle, predicated on mutual inclusivity, policy making, and higher order organizational justice should be the benchmark in trying to resolve the conflicts arising from the theory and practice of the principle. Mutual inclusivity in this context entails legal interpretation that is mutually reinforcing in the sense that the resulting interpretative outcomes leave room for mutual respect, clear communication, and for an effective relationship to exist between the ICC and States. It also promotes understandings that are explicit about real expectations and create critical self-assessments on the part of judges. Similarly, policy-making is meant to cause rational interpretative outcomes or decisions that result from the process

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182. *Id.* at 278.

183. *Id.* at 280.

184. See Payam Akhavan, *International Criminal Justice in the Era of Failed States: The ICC and the Self-Referral Debate*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, VOLUME I, 283 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

185. *Id.* at 284, 289.

of making, interpreting, and applying the Rome Statute's provisions by the ICC and how such decisions affect human beings. Those include people like the accused standing trial before the ICC, witnesses, victims of core crimes, their families, and other informed participants, such as ICC prosecutors, defendant lawyers, victims' representatives, NGO representatives, and the entire civil society observers. In the same vein, situating higher order organizational justice goals within the interstices of international criminal justice envisions the ICC as an organization or institution seeking to render justice to all classes of people looking up to it within the international community of States. Therefore, the ICC's interpretations of the Rome Statute's provisions must derive scores on the broader procedural, distributive, interpersonal, and informational justice goals. In procedural and distributive justice terms, the ICC should, for example, make its decisions fairer by strictly limiting its applicable interpretative rule to one of ethics, consistency, and predictability in the procedures. For interpersonal and/or interactional justice, the ICC should, for example, communicate its procedural details in an open and transparent manner, while justifying its interpretive decisions based on true, accurate, and complete information. It is argued that adjusting the text, context, and purpose of Article 17 of the Rome Statute to consider accused persons' basic trial rights and make it part of the wider due process procedures<sup>186</sup> required for effective administration of criminal justice at the international level is one good way to create room for ICC judges to test the efficacy of this purposive interpretative model in practice. Had this been the case from the time the Rome Statute was negotiated, it would have cushioned the effects of States' frequent objections to the ICC's complementarity jurisdiction. This is not presently the case in ICC jurisprudence,<sup>187</sup> contributing to the erroneous argument that the ICC is not a court of human rights. Carsten Stahn, in fact, argues quite rightly that "even alternative forms of justice must guarantee basic fair trial rights

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186. Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L. REV. 19 (2006) (explaining the due process thesis).

187. See, e.g., Kevin Jon Heller, *Why the Failure to Provide Saif with Due Process is Relevant to Libya's Admissibility Challenge*, OPINIO JURIS (Aug. 2, 2012), <http://opiniojuris.org/2012/08/02/why-the-failure-to-provide-saif-with-due-process-is-relevant-to-libyas-admissibility-challenge/>.

to the accused in the procedure.”<sup>188</sup> As demonstrated in the concluding part of this article, the purposive method of interpretation of the complementarity regime could empower both national and ICC judges to develop more policy oriented interpretative outcomes that allow judges to easily align their reasoning with other interpretive aids, such as custom or treaty law, while integrating the guidance enunciated under Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties into the statutory framework of the Rome Statute. It is believed that this method of interpretation would strengthen the hands of ICC judges to overcome, in practical terms, the statutory and policy shortcomings of the complementarity regime discussed below.

#### *F. Shortcomings of the Complementarity Regime*

There are two major concerns with the complementarity regime. One is in the “inherent structure of the ICC and the other is in the implementation of the statutory mandate.”<sup>189</sup> With respect to the inherent structure of the ICC, the problem lies in the fact that its jurisdiction is secondary to national jurisdictions, unlike the ICTY and the ICTR, which enjoy primacy jurisdiction over national courts.<sup>190</sup> Implicitly, the ICC is placed in a disadvantaged position in its complementarity relationship with national courts.<sup>191</sup> One major effect of this inherent weakness is that whenever the ICC’s Prosecutor wants to advance a case, he may encounter legal obstacles from national jurisdictions. This is already beginning to happen, following the admissibility challenges from Kenya<sup>192</sup> and the *Saif Al-Islam and Al-Senussi* cases in Libya.<sup>193</sup> In fact, in *Katanga and Ngudjolo’s* case, the accused himself challenged admissibility.<sup>194</sup> The Kenya and Libya cases clearly show that the complementarity regime is replete with

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188. Carsten Stahn, *Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 INT’L J. CRIM. JUST. 695, 713 (2005).

189. Carter, *supra* note 85, at 455–57.

190. Bachmann, *supra* note 2, at 306.

191. Paolo Benvenuti, *Complementarity of the International Criminal Court to National Criminal Jurisdictions*, in ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 21–22 (Flavia Lattanzi & William Schabas eds., 1999).

192. See *Muthuara and Ors*, *supra* note 146.

193. See *Gaddafi & Al-Senussi*, *supra* note 147.

194. See *Prosecutor v. Katanga*, *supra* note 28.

many statutory and policy shortages.<sup>195</sup> This is reflected in the inability of States to act in times of conflict, as was the case in Libya, whose state of affairs was not envisaged when the complementarity regime was negotiated. This is also linked to institutional “capacity issues in connection with an absent or ineffective legislative framework for implementation, limited expertise on the part of investigators, prosecutors and judges, and the national judicial system’s lack of resources.”<sup>196</sup> A more difficult implementation problem to address than the legal issue of admissibility is the political interference of States in national prosecution systems, which often erodes the independence of national judiciaries. This is more serious where senior State officials are believed to be liable for complicity in the perpetration of core crimes, coupled with situations where the State may be “too willing”<sup>197</sup> to prosecute the members of a former regime who they consider to be enemies of the State. This is further obfuscated by the inherent face-off between the ICC and national systems, arising from accusations that the ICC is concentrating on politically weak States, mostly African countries.<sup>198</sup> While discussing this problem in the context of globalization, Paul Kagame, President of the Republic of Rwanda, stated the following:

If the increased interdependence is to achieve consistency, it must be based on a level playing field, with some kind of standard applied to all, in light of the fact that the world is made up of the powerful and the less powerful. Take for example the 1994 genocide in Rwanda. The global interdependence then, was inadequate. It did not intervene to stop the genocide because powerful interests did not regard this important enough.

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195. Nidal Nabil Jurdi, *The Complementarity Regime of the International Criminal Court in Practice: Is It Truly Serving the Purpose? Some Lessons from Libya*, 30 LEIDEN J. INT'L L. 199 (2017).

196. OVO CATHERINE IMOEDMHE, *THE COMPLEMENTARITY REGIME OF THE INTERNATIONAL CRIMINAL COURT: NATIONAL IMPLEMENTATION IN AFRICA* 10–11 (2017).

197. Frédéric Mégret & Marika Giles Samson, *Holding the Line on Complementarity in Libya Debate: The Case for Tolerating Flawed Domestic Trials*, 11 J. INT'L CRIM. JUST. 571–73 (2013).

198. See generally Charles Chernor Jalloh, *Africa and the International Criminal Court: Collision Course or Cooperation?*, N.C. Cent. L.J. 203, 209–11 (2012); William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 53, 549 (2010); Jeremy Sarkin, *Enhancing the Legitimacy, Status, and Role of the International Criminal Court Globally by Using Transitional Justice and Restorative Justice Strategies*, 6 INTERDISC. J. HUM. RTS. L. 83–84 (2012).

In fact, some even abetted it. As if that is not bad enough, lately, some in the more powerful parts of the world have given themselves the right to extend their national jurisdiction to indict weaker nations. This is total disregard of international justice and order. Where does this right come from? Would the reverse apply—such that a judgment from less powerful nations indicts those from the more powerful? This is mere arrogance which simply has to be resisted. Most certainly this is not the tomorrow we should continue to see in our globe, our continent and my country. We envisage a world community in which sovereign nations govern themselves, and where the dignity of a nation's inhabitants is paramount whether a country is powerful or not. . . .<sup>199</sup>

Thus, these perceived statutory shortages of the complementarity regime continue to raise doubts as to how best national authorities, in conjunction with the ICC, may implement the principle within national legal orders, particularly those in Africa, where the ICC is currently witnessing stiff opposition from the AU. In many respects, the opposition of the AU to the ICC's jurisdiction in Africa presents many challenges for national implementation of the complementarity regime. But, there are also numerous political, institutional, and legal opportunities that can be explored to ensure timely and proper implementation of complementarity in the continent. These opportunities and challenges will be discussed below.

## II. NATIONAL IMPLEMENTATION OF THE COMPLEMENTARITY REGIME WITHIN THE AFRICAN NATIONAL LEGAL ORDERS: OPPORTUNITIES AND CHALLENGES

The ultimate goal of the ICC—prosecuting those responsible for committing horrendous crimes of genocide, war crimes, crimes against humanity, and crimes of aggression on African soil—appears to be elusive, more than a decade after the Rome Statute was successfully negotiated. The lack of political will on the part of African governments, as well as the contemporary politics of international criminal justice, influenced by geograph-

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199. Paul Kagame, Rwanda President, *Address at the 'Facing Tomorrow Conference', Presidents Discussing Tomorrow* (May 13, 2008), [http://presidency.gov.rw/index.php?id=23&tx\\_ttnews%5Btt\\_news%5D=10&cHash=950c52f08187b85fe4ab857981ca4b73](http://presidency.gov.rw/index.php?id=23&tx_ttnews%5Btt_news%5D=10&cHash=950c52f08187b85fe4ab857981ca4b73).



ical factors and distrustful international relations, has contributed significantly to the lethargy dampening the timely realization of the ICC's goal. Efforts to implement the complementarity regime in Africa continue to be scuttled, with a renewed call from different quarters within the continent for an independent Afro-framed prosecutorial approach, free of any interference by the ICC. This part will examine the opportunities and challenges arising from the efforts to implement the complementarity regime within African national legal orders. It will first examine States' obligations to implement the Rome Statute's complementarity principle. It will then reflect on the legislative steps that African States may take to implement the principle, namely the minimalist approach and the express and specific criminalization approach. Legal reflections on these legislative steps will occur by drawing key lessons from other advanced jurisdictions in the world, such as Germany, the United Kingdom, Canada, Finland, New Zealand, and France. In these jurisdictions, implementing legislation has either been successfully enacted or existing legislations have been adjusted to meet the Rome Statute's implementation demands. This Part will also examine implementation challenges facing African States in this regard. Finally, it will reflect on the overall success of ICC justice, and the extent to which it has been accepted and/or rejected in an AU context, while ascertaining whether mere compliance with international legal norms by African States can be validly rated as an indication of acceptance.

#### *A. Examining States' Obligations to Implement the Rome Statute*

The argument for domestic implementation of the Rome Statute's complementarity regime is founded on the understanding that the ICC does not exercise universal jurisdiction over crimes.<sup>200</sup> The ICC's jurisdiction is only activated when core crimes occur on the territory of a State Party that has accepted the ICC's jurisdiction (territorial jurisdiction), where the accused is a national of such a State (active nationality principle), or where the case is referred to the ICC by State Parties or by

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200. Max Du Plessis & Jolyon Ford, *Overview of the General Nature of Rome Statute Implementation Obligations*, in *UNABLE OR UNWILLING?: CASE STUDIES ON DOMESTIC IMPLEMENTATION OF THE ICC STATUTE IN SELECTED AFRICAN COUNTRIES 12* (Max Du Plessis & Jolyon Ford eds., 2008).

the U.N. Security Council, acting under Chapter VII of the U.N. Charter. The Rome Statute of the ICC requires States to cooperate with the ICC,<sup>201</sup> especially as relating exclusively to matters of investigation, execution, and trial procedures.<sup>202</sup> This is so, given the fact that the ICC does not have its own police force to enforce its judgment, and has no robust detention or prison facilities to hold suspects. The Statute, however, does not in strict terms impose any specific duty on States to implement the provisions of the Statute. The Statute's failure to specifically impose a duty on States to implement the Statute's provisions is most regrettable, to say the least. That notwithstanding, it is argued that the Rome Statute's prohibition of core crimes of genocide, war crimes, crimes against humanity, and crimes of aggression is quite consistent with the demands of *jus cogens* peremptory norms of international law. Therefore, *erga omnes* obligations upon States to implement, and not derogate from these norms, are intended. This argument is further reinforced by the fact that the implementation of international law principles at the domestic level is an age long practice of States arising from *opinio juris*, since the acts of implementation are taken by a significant number of States and not rejected by a significant number of States.<sup>203</sup> With regards to the complementarity principle, it is submitted that all of the Rome Statute's crimes, together with the applicable principles (whether general or jurisdictional) and duties on States thereon, had long been recognized under international law, even before the ICC Statute was adopted.<sup>204</sup>

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201. See Rome Statute, *supra* note 1, art. 86–102.

202. See *id.* art. 86–102, 103–11 (outlining the different forms of cooperation, including general compliance with the ICC requests for cooperation (Article 87); surrender of persons to the Court (Article 89); provisional arrests pursuant to ICC requests (Article 92); identification or location of persons or items, taking and production of evidence, service of documents, facilitating witnesses' and experts' attendance before the ICC, temporary transfer of persons, sites examination, execution of search and seizure orders, protection of witnesses, freezing and sequestration of property and assets (Article 93); enforcement of sentences (Article 103–107); and fines and forfeiture orders (Article 109)).

203. See Statute of the International Court of Justice, art. 38(1), June 26, 1945, TS 993.

204. For example, see provisions contained in the Four Geneva Conventions of 12 August 1949: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Art. 49; Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (Second Geneva Convention), Arti-

In many cases, the obligation incumbent on States to introduce international crimes into national laws derives from treaties<sup>205</sup> and/or customary international law. Consequently, as opposed to the *ad hoc* international criminal Tribunals for former Yugoslavia and Rwanda, which by their respective primacy jurisdiction and stronger constitutive basis do not necessarily require any further implementation domestically, the ICC regime, given its complementarity jurisdiction and weaker constitutive basis, requires incorporation into domestic law. In addition, and given the limited scope of the operational mandates of the ICTY and the ICTR Tribunals, focusing on particular cases and not having, like the ICC, universal implications, there was no immediate need to incorporate certain aspects of their Statutes, particularly crimes within the Tribunals' jurisdiction.<sup>206</sup> As the Tribunals were created by means of Security Council Resolutions,<sup>207</sup> the duty behooves on States, based on the U.N. Charter, the obligation to cooperate with the Tribunals.<sup>208</sup> In principle, as opposed to practical realities, such duty prevails, even if national provisions are contradictory.<sup>209</sup> Thus, comparing the implementation efforts undertaken with regard to the Tribunals with those of the ICC, it is crystal clear that their different constitutive basis has an impact on the stages of incorporation.<sup>210</sup> The ICC, being a creation of an international treaty, ascribes to

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cle 50; Convention Relative to the Treatment of Prisoners of War, (Third Geneva Convention), Article 129; Convention relative to the Protection of Civilian Persons in time of War, (Fourth Geneva Convention), Art. 146. *See also* Additional Protocol I to the Geneva Conventions, 8 June 1977, Article 85; Convention on the Repression and Punishment of the Crime of Genocide, 9 December 1948, Articles 4 and 6; and the Convention against Torture and other Inhumane or Degrading Treatment or Punishment, Article 7.

205. For example, see Article 6 of the Torture Convention (1984) (showing how States undertook to enact necessary legislation to give effect to the provisions of the Conventions).

206. Bekou, *supra* note 61, at 233.

207. The ICTY Tribunal and its Statute was established by Security Council Resolution 827. *See* S.C. Res. 827 (May 25, 1993); *see also* U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (May 3, 1993). Similarly, the ICTR Tribunal and its Statute was established by Security Council Resolution 955. *See* S.C. Res. 955 (Nov. 8, 1994).

208. Bekou, *supra* note 61, at 233.

209. *Id.*

210. *Id.*

States obligations that need to be balanced against other international State obligations, as well as requirements of domestic laws, especially national constitutions.<sup>211</sup> In many cases, it is national constitutions that determine the timing of implementation, before or after ratifying the Statute. Many States prefer to enact implementing legislation before ratification, as it gives the State concerned adequate time to review conflicting provisions in order to make necessary amendments.<sup>212</sup> This tendency may be explained by the fact that domestic implementation takes time, regardless of how expeditious and accelerated the State's efforts to quickly implement may be. It may also be that a State, desirous of giving immediate support from the domestic front to the ICC, wants to proceed with the ratification first, whereas implementation, being a rigorous domestic affair, follows subsequently thereafter. Implementation, as envisaged here, therefore requires States to review and adjust their domestic criminal laws to reflect, as closely as possible, the expressions of the Rome Statute, including the meaning and gravity of substantive crimes, penalties, and criminal defenses outlined under the Statute. Timely and proper implementation, however, depends on what legal tradition a State follows in domesticating international legislations or treaties. Starke maintains that "nothing is more essential to a proper grasp of the subject of international law than a clear understanding of its relation to State law."<sup>213</sup> The two most important theories that deal with the relationship between international and municipal law, in terms of transcription of international law into domestic law, are monism and dualism.<sup>214</sup> Whatever tradition a State follows, monism or dualism becomes very important at the implementation stage. The monist theorists hold that both State and international law constitute a single system of law,<sup>215</sup> and therefore the most important

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211. *Id.*

212. *Id.*

213. J.G. STARKE, *STARKE'S INTERNATIONAL LAW* 71 (1989).

214. *Id.*; P. Dupuy, *International Law and Domestic (Municipal) Law*, in *THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 2 (2011).

215. See STARKE, *supra* note 213; see also JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 49 (8<sup>th</sup> ed. 2012); Curtis A. Bradley, *Our Dualist Constitution, and the Internationalist Conception*, 51 *STAN. L. REV.* 529, 530–31 (1999); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 *AM. J. INT'L L.* 310, 314 (1992); S.I. Strong, *Beyond*

question relating to international law is whether it constitutes actual law.<sup>216</sup> Monist thinkers, however, are quite divided on which system of law, national or international, enjoys primacy. Kelson,<sup>217</sup> for example, focused on the analysis and determination of the hierarchy of international and municipal legal norms, on which laws and regulations are based, to reach the conclusion that domestic legal order enjoys supremacy. Kelson's analysis has been criticized by other thinkers<sup>218</sup> who argue that primacy of State law over international law cannot account for the sustained existence and stability of international law, contributing to numerous changes in national constitutions, revolutions, and similar developments. For Lauterpacht,<sup>219</sup> insofar as both State and international law are concerned with individuals, specifically human rights protection, the very existence of State or municipal law is dependent on international law. For that reason, international law is supreme. Whatever reasons underline division amongst the monist theorists, it does not militate against the objectives of this article, as no legal taxonomy among the divergent views is sought to be achieved. The fact remains that under a monist system; international law applies directly into domestic law, not requiring domestic implementation to take effect.<sup>220</sup>

In dualist systems, however, national and international law operate distinctly. Therefore, legal adaptation of the substances of treaties is needed for their transcription into the national legal system.<sup>221</sup> Most countries that follow the common law legal system practice the dualist approach. In the United Kingdom, for example, treaties to which the United Kingdom is a signatory do not automatically become part of U.K. law. They only become

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*the Self-Execution Analysis: Rationalizing Constitutional, Treaty, and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT'L L. 499, 510 (2013).

216. See REBECCA M.M. WALLACE, INTERNATIONAL LAW 35 (2002).

217. See HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 557–59 (1967); see also HANS KELSEN, GENERAL THEORY OF LAW AND STATE 363–80 (1945).

218. See STARKE, *supra* note 213, at 71.

219. HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 61 (1950).

220. See, e.g., Shaw, *supra* note 22, at 131–33; see also L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOLUME 1, 53 (2005); J.H. JACKSON, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992).

221. See ANTONIO CASSESE, INTERNATIONAL LAW 213–17 (2nd ed. 2005).

part of U.K. law, with binding effect on the courts, after the British Parliament passes and enacts them into law.<sup>222</sup> Nigeria is also a perfect example of a country that follows the dualist system of incorporating international norms into domestic law.<sup>223</sup> This was confirmed by the Nigerian Supreme Court in *Ibidapo v. Lufthansa Airlines*, where the Nigerian Supreme Court remarked that:

Nigeria like any other commonwealth country, inherited the English Common Law rules governing municipal application of international law. The practice of our courts on the subject matter is still in the process of being developed and the courts will continue to apply rules of international law provided they are found to be not overridden by clear rules of our domestic law. Nigeria, as part of the international community, for the sake of political and economic stability, cannot afford to live in isolation. It shall continue to adhere to respect and enforce both multilateral and bilateral agreements where their provisions are not in conflict with our fundamental law.<sup>224</sup>

This is reinforced by the Nigerian Constitution,<sup>225</sup> which provides that no treaty is enforceable in Nigeria unless the National Assembly enacts it into domestic law. The African Charter on Human and Peoples Rights (“Banjul Charter”),<sup>226</sup> is one international Charter that Nigeria has domesticated through implementing legislation,<sup>227</sup> pursuant to provisions of the 1999 Constitution.<sup>228</sup> With respect to customary international law, however, Nigeria follows a monist approach, as customary interna-

222. See Roger P. Alford, *The Future of Human Rights Litigation After KIOBEL*, 89 NOTRE DAME L. REV. 1765 (2014).

223. See Babafemi Akinrinade, *International Law and Domestic Legal Systems*, in INTRODUCTION TO INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS 448, 457–58 (Dinah Shelton ed. 2011).

224. See *Ibidapo v. Lufthansa Airlines*, [1997] 4 NWLR (Pt. 419) 124, 150 (Nigeria), [http://64.50.180.197/dbsight/search.do?indexName=lawpavilion\\_ipad&q=court%3A%22Supreme+Court%22&start=10300](http://64.50.180.197/dbsight/search.do?indexName=lawpavilion_ipad&q=court%3A%22Supreme+Court%22&start=10300).

225. See CONSTITUTION OF NIGERIA (1999), § 12.1.

226. See AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS, AFR. COMM’N HUM. & PEOPLES’ RTS. (June 27, 1981), <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>.

227. See African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Cap A9 LFN 2004, <http://www.nigeria-law.org/African%20Charter%20on%20Human%20and%20Peoples%27%20Rights.htm>.

228. See CONSTITUTION OF NIGERIA (1999), § 12(1).

tional law is automatically incorporated into domestic law, requiring no further legislation.<sup>229</sup> Regardless of any implementation tradition that States follow—monism or dualism—this article argues that in the context of the ICC's complementarity regime, it is national constitutions that determine whether the treaty establishing the ICC will be self-executing or require separate implementing legislation to be passed by domestic parliaments to take effect in the concerned State. The expediency of incorporation, therefore, dictates that, irrespective of whether a State is monist or dualist in principle, a close examination of the relevant State constitution is necessary to allow compliance with the Statute.<sup>230</sup> This is particularly important given the ICC Statute's very nature, which does not make it easily discernable as to how this treaty could be applied without specific legislative authority in the domestic sphere.<sup>231</sup>

*B. Legislative Steps Towards Implementation: The Need for African States to Implement the Rome Statute Through the Enactment of Complementarity Legislation*

Different approaches govern the ICC Statute's application within the domestic legal orders. Complementarity legislation is an instrument enacted by States designed to incorporate the Rome Statute's provisions into their domestic laws, especially the definition, elements, and penalties of substantive crimes.<sup>232</sup> The United Kingdom,<sup>233</sup> Kenya,<sup>234</sup> and Uganda,<sup>235</sup> are a few of the many States that have already adopted complementarity legislation to implement the Rome Statute. In Nigeria, a bill for a law to implement the ICC Statute's provisions is currently before the Nigeria National Assembly.<sup>236</sup> These States have in common their status as Commonwealth States, their common law system, and their dualist implementation approach.

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229. See Akinrinade, *supra* note 223, at 461, 467.

230. Bekou, *supra* note 61, at 244.

231. *Id.*

232. Imoedemhe, *supra* note 170, at 84.

233. International Criminal Court Act, 2001, c. 17 (U.K.).

234. See International Crimes Act, No. 16 (2008) (Kenya).

235. The International Criminal Court Act 2010, Act 11 (June 25, 2010).

236. See Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill (2012) (Nigeria), <http://www.pgaction.org/pdf/CRIMES-AGAINST-HUMANITY-WAR-CRIMES-GENOCIDE-AND-RELATED-OFFENCES-BILL-2012-Nigeria.pdf>.

According to S.J. Hankins,<sup>237</sup> the legislator needs to consider a wide range of issues in enacting implementing legislation designed to incorporate the Rome Statute's crimes into domestic laws. First, which definitions of the crimes should be adopted? Should it come from reference to the Rome Statute's definitions and categorizations or by drafting specific definitions? Or, should it come from restricting consideration to the stringent implementation of Rome Statute crimes, or by looking beyond that to the other State obligations derived from other germane international instruments or international customary law?<sup>238</sup> Second, how and where in domestic law should the crimes be stipulated? Should it be within a stand-alone legislation or through amendments to existing domestic penal codes?<sup>239</sup> Third, what penalties should be prescribed?<sup>240</sup> Fourth, on what basis should the State assert jurisdiction? Should it be based on territoriality and/or nationality, or universal jurisdiction; whether to require the presence of the alleged perpetrator on the national territory; and whether jurisdiction should be asserted retrospectively or only prospectively? Fifth, should the existing rules on criminal responsibility be amended considering the Rome Statute provisions?<sup>241</sup> Finally, how should the Elements of Crimes document be used?<sup>242</sup> To this end, States can adopt different approaches. Among the different approaches are the "minimalist approach," the "express and specific criminalization approach," and the "hybrid method." The other is "direct and/or dynamic reference to customary international law."<sup>243</sup> These broad approaches are discussed below in connection with discussing the ICC Statute's status within the national legal systems.

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237. S.J. HANKINS, OVERVIEW OF WAYS TO IMPORT CORE INTERNATIONAL CRIMES INTO NATIONAL CRIMINAL LAW, FICHL PUB. SERIES 6 (2010), <http://www.toaep.org/ps-pdf/1-bergsmo-hayashi-harlem-second>.

238. *Id.*

239. *Id.*

240. *Id.* at 4.

241. *Id.*

242. *Id.* at 5.

243. On dynamic reference to customary international law, see Helmut Kreicker, *National Prosecution of International Crimes from a Comparative Perspective: The Question of Genocide*, MAX PLANCK INST. FOREIGN & INT'L CRIM. L. 1, [https://www.mpicc.de/files/pdf1/natstraf\\_vortrag\\_nottingham.pdf](https://www.mpicc.de/files/pdf1/natstraf_vortrag_nottingham.pdf).



### 1. The Minimalist Approach

The traditional and/or minimalist approach is a method whereby States simply rely on existing ordinary criminal or military law, which is already in operation, and apply its provisions to the international behavior in question.<sup>244</sup> This approach does not permit the use of national criminal law to incorporate international crimes, but only applies its classifications to the conduct.<sup>245</sup> The main shortcoming of the minimalist approach is that the offences concerned correspond only minimally with international law requirements in defining offences.<sup>246</sup> This is in addition to the fact that the penalties provided in domestic criminal law may be incompatible with the gravity of international crimes. In some cases, as in States for example, Germany has adopted direct application of customary international law,<sup>247</sup> whereas Canada opted for dynamic reference to customary international law into their national criminal laws.<sup>248</sup> Also with respect to war crimes, States including Finland, Poland, Sweden, Russia, and the United States define the acts or conducts which constitute crimes under national law by dynamically referring to customary international law.<sup>249</sup> These divergent approaches by States raise a big question as to what should be the form and place of criminalization. Should the legislative authority enact distinct legislations dealing with substantive issues on the one hand and issues related to cooperation with the ICC on the other? Or should the legislator address these matters in a single legislation? Should the crimes be simply introduced into existing penal and/or criminal codes, or stipulated separately in a Statute of a special kind? According to Hankins,<sup>250</sup> enacting a special stand-alone legislation may significantly permit all domestic rules governing procedures for domestic implementation of international treaties dealing with international crimes to be

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244. See Goran Sluiter, *Appearance of Witnesses and Unavailability of Subpoena Powers for the Court*, in INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 459, 474 (Roberto Bellelli ed. 2010).

245. Imoedemhe, *supra* note 170, at 87–88.

246. *Id.*

247. See GRUNDGESETZ [GG] [BASIC LAW], art. 25, translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) (Ger.).

248. See Crimes Against Humanity and War Crimes Act, sec. 4(1) (2000), <http://laws-lois.justice.gc.ca/eng/acts/C-45.9/> (Can.).

249. Kreicker, *supra* note 243, at 33.

250. HANKINS, *supra* note 237, at 9.

contained in a single piece of legislation. This approach also affords an opportunity to bring together, under one act, both the definition of the crimes and the various general principles of criminal law applicable thereto. In contrast, incorporating international crimes into existing legislation obligates the law maker to determine the place (for example, in ordinary criminal codes, military criminal codes, or both) and the form (for example, as a special section or chapter) of their incorporation. Germany, the Netherlands, and Canada are among those States which have adopted the special stand-alone approach when implementing the Rome Statute crimes. Germany adopted a complete stand-alone international criminal code<sup>251</sup> dealing with the Rome Statute's substantive part. It also adopted a separate cooperation legislation to implement the cooperation regime. Under the UK ICC Act 2001, its first four parts documenting cooperation provisions precede the substantive part (part five) dealing with Rome Statute crimes, thereby integrating the implementation and cooperation regime into a single document. In the context of Africa, however, a separate cooperation legislation to implement the Rome Statute has been advocated by Imoedemhe<sup>252</sup> in her thesis. This approach definitely presents many advantages, as it is exhaustive in terms of traditions of codification and permits a thorough assessment of the potential issues that may arise when dealing with ICL provisions before national courts.<sup>253</sup> Some other States, like France, have opted for an amendment to only those provisions which are affected by the ICC Statute's provisions by incorporating cooperation provisions into the body of its criminal procedure code.<sup>254</sup> This approach has the separate advantage that applicable provisions can be found in a single piece of a document, allowing for easier access and a better appreciation of the procedures and their interface with the rest of criminal law codes. Civil law countries particularly prefer this approach, as codes are the foundation of their legal system.<sup>255</sup> It is

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251. See VÖLKERSTRAFGESETZBUCH [CODE OF CRIMES AGAINST INTERNATIONAL LAW (CCAIL)], translation at <http://www.iuscomp.org/wordpress/wp-content/uploads/2014/03/voestgb.pdf> (Ger.).

252. Imoedemhe, *supra* note 170, at 77–84.

253. Bekou, *supra* note 61, at 236.

254. See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 1 (Fr.).

255. Bekou, *supra* note 61, at 236–38.

submitted that enacting separate cooperation legislation, distinct from complementarity legislation, is still imperative in the African context, notwithstanding which legal system African countries follow—common law or civil law systems. The ICC's inability to arrest President Al-Bashir of Sudan demonstrates that a separate cooperation legislation enabling all States to specifically implement the cooperation regime beyond the Rome Statute is imperative. Otherwise, future State cooperation with the ICC, especially regarding the arrest and surrender of suspects,<sup>256</sup> will simply be an exercise in futility. This is because the ICC's actual life is preeminently dependent on domestic jurisdictions complying with requests for surrender and/or arrest of suspects, as it is the only way to guarantee their appearance in court.<sup>257</sup>

In addition to ensuring the appearance of defendants *in persona* before the ICC under Article 63 (1) of its Statute,<sup>258</sup> the issue as to whether the ICC Statute's requirements of cooperation depend on current international law of extradition needs some explication.<sup>259</sup> As extradition is the customary way of transferring crime perpetrators to attend trial and/or serve a sentence, its consequences stem from bilateral agreement between States.<sup>260</sup> Many States' domestic laws encompass requirements on extradition, but their nature, character, and content vary from State to State.<sup>261</sup> The bedrock of extradition law is the principle of double criminality.<sup>262</sup> The principle of double criminality

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256. See Rome Statute, *supra* note 1, art. 89(1).

257. See Olympia Bekou & Sangeeta Shah, *Realising the Potential of the International Criminal Court: The African Experience*, 6 HUM. RTS. L. REV. 499, 523 (2006).

258. There exists however the possibility that the defendant requests to be excused from the trial at the ICC while being represented by a legal counsel; see e.g., Rule 134 under its Rules of Procedure and Evidence, Resolution ICC-ASP/12/Res.7 (Nov. 27, 2013), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf).

259. Imoedemhe, *supra* note 170, at 78.

260. See Anton Katz, *An Act of Transformation: The Incorporation of the Rome Statute of the ICC into National Law in South Africa*, 12 AFR. SEC. REV. 25 (2003).

261. M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 500–502 (2d ed. 2013).

262. Bert Swart, *Arrest and Surrender*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1639, 1652–54 (Antonio Cassese et al. eds., 2002).

holds that the conduct, in respect of which extradition is requested, amounts to a crime in both the law of the requested and requesting State at the material time it was committed.<sup>263</sup> The rationale is to ensure reciprocity and protection of the requested individual against potential trial and punishment for conduct that does not constitute a crime within the law of the requested State.<sup>264</sup> Another aspect of extradition law is the principle of speciality, which requires that the State requesting extradition cannot prosecute the extradited person for other offence(s) other than that for which extradition was granted.<sup>265</sup> It is argued that these procedural requirements, in addition to strains of statute of limitations and immunities in national laws, constitute a limitation to the process of bringing accused persons before the ICC. These limitations in national procedures justify the argument for separate cooperation legislation beyond the Rome Statute's cooperation provisions.

## 2. The Express and Specific Criminalization Approach

As an alternative to the minimalist approach, States are increasingly adopting the express and specific incrimination approach into their domestic laws. Two methods of express and specific criminalization may be adopted by the legislator here. The first method is criminalization through a general and open-ended reference to international treaties like the Rome Statute and international law generally, or even to the customs and laws of war, while stipulating a range of punishments for the crimes in question.<sup>266</sup> The major problem with the general and open-ended reference method is that it does not conform adequately to the principle of legality. The principle of legality presupposes that no crime can be committed, nor punishment imposed, with-

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263. *Id.* at 1653.

264. *Id.*

265. BASSIOUNI, *supra* note 261, at 501.

266. See Advisory Service on International Humanitarian Law, *Methods of Incorporating Punishment into Criminal Law*, INT'L COMMITTEE RED CROSS 1–3 (Mar. 2014), [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjVod6ImJ\\_ZAhXKk1kKHe-KiDPEQFgg2MAA&url=https%3A%2F%2Fwww.icrc.org%2Fen%2Fdownload%2Ffile%2F1069%2Fmethods-of-incorporating-punishment-into-criminal-law-icr-eng.pdf&usg=AOvVaw25oecQxlF1mRb-rZ8E-4CW](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjVod6ImJ_ZAhXKk1kKHe-KiDPEQFgg2MAA&url=https%3A%2F%2Fwww.icrc.org%2Fen%2Fdownload%2Ffile%2F1069%2Fmethods-of-incorporating-punishment-into-criminal-law-icr-eng.pdf&usg=AOvVaw25oecQxlF1mRb-rZ8E-4CW).

out a pre-existing penal law. The second method is express criminalization of each and every crime outlined in relevant international treaties, such as the Rome Statute and/or crimes recognized under customary international law. Explicit criminalization may take either of three forms, namely static or literal transcription and dynamic transcription, or hybrid mixtures of both. Static or literal transcription involves a transcription of the offences into domestic law using an identical wording to that of the international treaty, while setting out the penalties applicable to the crimes in question. The main advantage of the static transcription is that it is consistent with the legality principle, insofar as it explicitly and predictably sets forth conduct that will be considered criminal, as well as the envisaged punishment.<sup>267</sup> The disadvantage, however, is that if the criminalization is too exhaustive and definite, it may impede the national courts' capacity to prosecute crimes in contemplation of new developments in international law. The static transcription method is mostly practiced in common law States, notably in England and Wales with the International Criminal Court Act, 2001;<sup>268</sup> Scotland with the Scottish International Criminal Court Act, 2001;<sup>269</sup> and New Zealand with the International Crimes and International Criminal Court Act, 2000.<sup>270</sup> There are two variants of static transcription. The first variant is where States do not necessarily reproduce the entire text of the applicable Statute, but only make references to it.<sup>271</sup> The second variant is where States not only adopt the entire text of the applicable Statute, but also details set out in the Statute's elements of

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267. See Sluiter, *supra* note 244, at 476.

268. See International Criminal Court Act, 2001, art. 51(1), <http://www.legislation.gov.uk/ukpga> (Eng.); see also Robert Cryer & Olympia Bekou, *International Crimes and ICC Cooperation in England and Wales*, 5 J. INT'L CRIM. JUST. 441–59 (2007).

269. Scottish International Criminal Court Act, 2001, <http://www.legislation.gov.uk/> (Scot.).

270. See International Crimes and International Criminal Court Act, 2000, <http://www.legislation.govt.nz/act/public/2000/0026/latest/DLM63091.html> (N.Z.).

271. Good examples of States that have adopted the first variant of the static transcription method into their Rome Statute implementing legislation are New Zealand, Uganda, and Kenya. See generally International Crimes and International Criminal Court (Amendment) Act 2002, arts. 9, 10, 11 (N.Z.) (defining international crimes with reference to the ICC Statute); International Criminal Court Bill 2005 (Uganda); International Crimes Act 2008 (Kenya) (making particular reference to the ICC Statute).

crimes document.<sup>272</sup> The dynamic transcription, on the other hand, is a method whereby the categories of conduct amounting to offences under the Rome Statute are redrafted, reformulated, and redefined in domestic law.<sup>273</sup> This approach presumes that the Rome Statute's definitions and categorizations are not entirely consistent with customary international law. Consequently, dynamic transcription affords the draftsman the opportunity to complement the Rome Statute's in such a way that it reflects the list and classification crimes in related international instruments. A final option of explicit criminalization is a hybrid mixture or combination of static and dynamic criminalization methods. A State utilizing the mixed approach may combine explicit and specific criminalization of certain transnational crimes with a generic and covering residual clause, for example, regarding crimes contained in other international treaties to which the State is a party. Finnish criminal law<sup>274</sup> is a typical example of a mixed approach, as it defines core international crimes expressly, while incorporating others through an open-ended reference to Finland's State obligations under international law. While this article does not express particular preference for any of the incorporation methods, it is, however, submitted that the duty behooves on States an obligation to examine the different approaches, with a view towards determining which of them best suits their own domestic circumstances, allowing them to maximize their benefit from the complementarity regime. Whichever approach a State chooses, it must be

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272. Good examples of States which adopted the second variant of the static transcription method in their Rome Statute implementing legislations are Australia, Argentina, the United Kingdom, Trinidad and Tobago, Samoa, and Burundi. *See generally* International Criminal Court Act (Consequential Amendment) 202, No. 42, sec. 268.4 (2002) (Aus.), [http://www.iccwomen.org/whatwedo/projects/docs/Overview\\_Implementing\\_Legislation.pdf](http://www.iccwomen.org/whatwedo/projects/docs/Overview_Implementing_Legislation.pdf); International Criminal Court Act 2007 (Samoa), <https://www.legal-tools.org/doc/306cc9/pdf/>; Burundi Law No. 1/004 (May 8, 2003); International Criminal Court Act 2001 (U.K.); International Criminal Court Act 2006 (Trinidad & Tobago), <http://www.ttparliament.org/legislations/a2006-04.pdf>; Law No. 26/200 on the Implementation of the ICC Statute (2007) (Argentina).

273. Sluiter, *supra* note 244, at 476.

274. *See* Finnish Criminal Code, ch. 13 (dealing with war crimes and crimes against humanity); *see also* Act on the Implementation of the Provisions of a Legislative Nature of the Rome Statute of the International Criminal Court and on the Application of the Statute, No. 1284/2000, Issued in Helsinki on 28 December 2000, ¶ 2, <http://www.finlex.fi/en/laki/kaanokset/2000/en20001284.pdf>.

geared towards finding if not a total solution, a solution that at least addresses inherent implementation challenges facing States, especially struggling African States.

*C. Challenges African States Face Implementing the Rome Statute's Complementarity Regime*

It has already been established that States are under an obligation to implement the Rome Statute. This finds solid anchorage in the fact that the Rome Statute governs core crimes that violate *jus cogens* norms of international law, and all States owe the international community *erga omnes* duties to put an end to impunity crimes. Core crimes are intrinsically contrary to international law. Thus, States are either, by customary international law or treaty law, obligated to try and punish guilty persons, regardless of the territories where the offences are committed and irrespective of the nationality of the accused.<sup>275</sup> If the essential values of a society demand the designation of certain conducts as amounting to serious crimes and/or an affront to justice and disruption of the rule of law, then criminal law and its implementation, both nationally and internationally, is the yardstick by which those values are measured.<sup>276</sup> As the ICC functions through a burden sharing arrangement,<sup>277</sup> in which States take on the major responsibility of enforcing the Rome Statute, the argument for domestic implementation is even more meritorious. Domestic implementation is the metric for measuring national capacity to investigate and prosecute core international crimes. Although the obligation to implement the Rome Statute may sometimes appear very burdensome on States because of conflicting demands of peculiar local circumstances, it is argued that the benefits of proper implementation, including, but not limited to, meeting the peace and justice needs of transitional societies, outweigh the burden to implement. These benefits notwithstanding, immense challenges from the political, judicial, and institutional angles continue to face implementation

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275. U.O UMOZURIKE, INTRODUCTION TO INTERNATIONAL LAW 86 (2007).

276. Luz E. Nagle, *Terrorism and Universal Jurisdiction: Opening a Pandora's Box*, 27 GA. ST. U. L. REV. 3 (2010).

277. Adam Bower, *Assessing the Diffusion of International Norms: Evidence from State Incorporation of the Rome Statute of the International Criminal Court* 12 (Max Weber Programme, European University Institute (EUI) Working Papers MWP 2013/15).

efforts in Africa. Politically, the major challenge has been constitutional immunity<sup>278</sup> of African Heads of State and Governments. For example, under the Nigerian Constitution,<sup>279</sup> like in many other national constitutions in Africa, the President and Vice President are immune from any arrest, criminal liability, or prosecution whatsoever, so long as they remain in office as executive heads. This is in direct conflict with the Rome Statute provisions, which remove immunity of Heads of State.<sup>280</sup> The direct result is that States like Nigeria cannot afford to cooperate with the ICC if the President or Vice President is indicted for any core crimes. The Nigerian Constitution forbids any such cooperation with the ICC. Such cooperation, if available at all, will ultimately be subject to Nigeria's political interest within the international community. In fact, the Rome Statute's implementation is not even currently prioritized by African States, contributing to the face-off between the AU and the ICC. This makes outsourcing the technical aspects that would have ensured implementation impossible. With respect to judicial challenges, the major setback has been that there are no true independent and credible judiciaries in Africa to prosecute core crimes. There is still massive political interference in the judicial affairs of African nations. This is especially the case given that the appointment of judges and prosecutors in many African countries are politically determined, which results in the appointment of judges and prosecutors with insufficient ICL expertise and experience. In addition, resources and expertise in the Chambers of the Attorneys General of most African countries are grossly insufficient. This is in addition to the fact that African States are also parties to other numerous international instruments and are facing enormous capacity challenges with respect to implementing them. This is particularly the challenge in "Ghana,

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278. For a full discussion on Concept of Immunities, see Dapo Akande, *International Law, Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407–33 (2004).

279. See e.g., CONSTITUTION OF NIGERIA (1999), § 308 (immunizing the President, Vice President, Governors, and Deputy Governors from prosecution while in office).

280. See Rome Statute, *supra* note 1, art. 27.



Kenya, Tanzania . . . Uganda,”<sup>281</sup> and Botswana.<sup>282</sup> Also noteworthy is the fact that corruption, including political and judicial corruption ravaging African Countries, is a major set-back to the Rome Statute’s implementation. This argument is founded on the premise that in a polity where judicial and political corruption is prevalent, States will be politically unwilling to implement any international criminal instrument that will indict and/or accuse State officials of committing core crimes. After all, States believe that core crimes of genocide, war crimes, and crimes against humanity are already being treated as either murder or torture in many national criminal laws. Therefore, there is no need to implement the Rome Statute domestically. This is a clear sign of “unresponsive[ness] to experience of mass criminality.”<sup>283</sup> This unresponsiveness is most evident in the delayed passage of implementing laws by national parliaments in Africa. For example, a 2001 Bill to implement the Rome Statute in Nigeria has not been signed into law for seventeen years now.<sup>284</sup> There is definitely something wrong with a legal system that takes such a long time to sign a legislative bill into law. Corruption, it is argued, is the problem. Generally, the negative effects of corruption on societal values has already been given

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281. See Max du Plessis & Jolyon Ford eds., *Unable or Unwilling?, Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries* (Institute for Security Studies, Monograph No. 141, Mar. 2008).

282. See Lee Stone, *Country Study 1: Botswana*, in *Unable or Unwilling?, Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries* (Institute for Security Studies, Monograph No. 141, Mar. 2008).

283. See Gerry Simpson, *The Death of Baha Mousa* 8 MELB. J. INT'L L. 340, 349 (2007).

284. The Nigerian Federal Ministry of Justice sent an executive bill, entitled “The Rome Statute of the International Criminal Court (Ratification and Jurisdiction) Bill 2001” to the Nigerian National Assembly for reading and adoption, pursuant to Section 12 of the Constitution of the Federal Republic of Nigeria 1999, as amended. On June 1, 2004, the lower House of the Nigerian Parliament (House of Representatives) passed its own version of the Bill. On May 19, 2005, the Upper House of Parliament (the Senate) passed a Legislative Bill to implement the Rome Statute. The Bill, however, was never signed into law by the then President Olusegun Obasanjo. Cf. Tonye Jaja, *Re-visiting the Status of Nigeria’s Membership of the International Criminal Court*, FED. BAR ASS’N (Winter 2017), <http://www.fedbar.org/Sections/International-Law-Section/Global-Perspectives/Winter-2017/Re-visiting-the-Status-of-Nigerias-Membership-of-the-International-Criminal-Court.aspx> (last visited Mar. 25, 2018).

adequate attention in literature.<sup>285</sup> Legislative measures have also been adopted nationally,<sup>286</sup> regionally,<sup>287</sup> and internationally<sup>288</sup> to tackle the scourge. In the ICC's eyes, the most culpable corrupt States in Africa cannot claim to be able or willing to investigate and prosecute international crimes. Given this prevalence of corruption, the question is then asked—to what extent, in terms of African States' political willingness, has international criminal justice, under the ICC's auspices, been accepted

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285. See, e.g., Nsongurua Udombana, *Fighting Corruption Seriously: Africa's Anti-Corruption Convention*, 7 SINGAPORE J. INT'L & COMP. L. 447 (2003); Klaus Abbink, *Staff Rotation as an Anticorruption Policy: An Experimental Study*, 20 EUR. J. POLITICAL ECON. 887 (2004); Kenneth W. Abbott & Duncan Snidal, *International Action on Bribery and Corruption: Why the Dog Didn't Bark in the WTO*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 177 (Daniel M. Kennedy & James D. Southwick eds. 2002).

286. Nigeria, for example, has enacted several legislations to check corruption. See Udombana, *supra* note 285. They include the following: The Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, Cap F2, Laws of Federation of Nigeria (2004), <http://ndic.gov.ng/files/failedbk1.pdf>; Money Laundering Act, Cap M18, Laws of Federation of Nigeria (2004), <http://www.lawyard.ng/wp-content/uploads/2015/11/MONEY-LAUNDARY-ACT-2004.pdf>; Advanced Fee Fraud and Other Related Offences Act, Cap. A6, Laws of Federation of Nigeria (2004), [http://resources.lawscopeonline.com/LFN/ADVANCE\\_FEE\\_FRAUD\\_AND\\_OTHER\\_FRAUD\\_RELATED\\_OFFENCES\\_DEGREE\\_NO.13\\_OF\\_1995\\_ACT\\_CAP.\\_A\\_6\\_L.F.N.\\_2004.htm](http://resources.lawscopeonline.com/LFN/ADVANCE_FEE_FRAUD_AND_OTHER_FRAUD_RELATED_OFFENCES_DEGREE_NO.13_OF_1995_ACT_CAP._A_6_L.F.N._2004.htm); Independent Corrupt Practices and Other Related Offences Act (2000), <http://www.nassnig.org/document/download/5792>; Economic and Financial Crimes Commission Act, Cap. E1, Laws of Federation of Nigeria (2004), <http://www.nassnig.org/document/download/5762>.

287. See, e.g., African Union Convention on Preventing and Combating Corruption (2003), [http://www.eods.eu/library/AU\\_Convention%20on%20Combating%20Corruption\\_2003\\_EN.pdf](http://www.eods.eu/library/AU_Convention%20on%20Combating%20Corruption_2003_EN.pdf); Inter-American Convention against Corruption (1996) (Venezuela), [http://www.oas.org/juridico/english/corr\\_bg.htm](http://www.oas.org/juridico/english/corr_bg.htm); Arabic Convention for Combating Corruption (2010), <http://www.almeezan.qa/AgreementsPage.aspx?id=1719&language=en>. At EU level, see EU Convention Against Corruption Involving Officials, Feb. 25, 2008, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:133027>. Within the Council of Europe, see Council of Europe Civil Law Convention on Corruption, 2003, Treaty No. 174, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174>; Council of Europe Criminal Law Convention on Corruption, 2002 Treaty No. 173., <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173>.

288. See G.A. Res. 58/4 (2005); see also OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1999), <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

and/or rejected in the continent? For instance, does mere compliance by African States with international legal norms signify enough indication of acceptance?

*D. The Pull and Push of Acceptance of International Criminal Justice in Africa: Is States' Mere Compliance with International Legal Norms Enough Indication of Acceptance?*

Acceptance can be viewed from different angles, depending on the parameters that one uses in analyzing the concept and the very context it is analyzed. In the context of this analysis, acceptance is being seen as a convergence of legal and political interests in the application of international criminal justice.<sup>289</sup> Thus, acceptance is deeply rooted not only in the decisions of African governments to do so, but also in the resulting implementing actions and inactions of State officials, such as judges, special prosecutors, lawyers, victims and/or survivors, and the entire civil society. It is argued that both the legal and political acceptance of international criminal justice, offered by the ICC within the context of Africa's national legal orders, is subject to political interests of regional powers in Africa, such as Nigeria and South Africa. As powerful players in Africa's affairs, Nigeria and South Africa must balance the competing, sometimes conflicting demands of their respective obligations to the international community and their respective leadership statuses on the continent. It is these pushes and pulls of continental leadership that result in the vacillating acceptance of international justice in Africa. Different events, including the Al-Bashir saga, have demonstrated this dilemma. When the Sudanese President, Al-Bashir, attended the 25th Summit of the AU Assembly of Heads of State and Government in South Africa in June 2015, South African authorities declined to arrest Al-Bashir, implicitly relying on the AU resolution not to cooperate with the ICC regarding the arrest warrant it issued for the apprehension of the Sudanese President.<sup>290</sup> Nigeria also deployed similar tactics to

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289. See, e.g., B.C. Olugbuo, *Acceptance of International Criminal Justice in Nigeria: Legal Compliance, Myth or Reality?*, in *AFTER NUREMBERG: EXPLORING MULTIPLE DIMENSIONS OF THE ACCEPTANCE OF INTERNATIONAL CRIMINAL JUSTICE*, INTERNATIONAL NUREMBERG PRINCIPLES ACADEMY 2 (Susanne Buckley et al. eds., 2016).

290. Amanda Khoza, *South Africa Failed in its Duty to Arrest Al-Bashir—ICC*, MAIL & GUARDIAN (July 6, 2017), <https://mg.co.za/article/2017-07-06-south-africa-failed-to-arrest-al-bashir-icc>.

protect Al-Bashir when he visited Nigeria as an attendee of the 2013 AU Special Summit on HIV/AIDS in Abuja. When the ICC prosecutor requested information on Al-Bashir's visit, the Nigerian government claimed that the event that brought the Sudanese President to Nigeria was organized by the AU, not Nigeria, and therefore the country was not responsible for the attendees. When pressed further by the ICC, the government claimed that when it noticed the mistake in inviting Al-Bashir, the country activated a legal process that remained inchoate until he left Nigeria.<sup>291</sup> Two years later, after the India-Africa Forum Summit in October 2015, the Nigerian President, Buhari, flew Al-Bashir out of India to Sudan with the Nigerian residential jet.<sup>292</sup> This appears to be a clear message to not only Africa, but the whole world in general, that solidarity among African leaders seems to include the granting of impunity for international crimes.<sup>293</sup> These examples of disregard show that African State's acceptance of the ICC's jurisdiction and the AU as a regional body is still lacking. The refusal of the AU to cooperate with the ICC regarding the arrest of Bashir for his complicity in the Darfur situation, even after the Darfur crisis was referred to the ICC by the U.N. Security Council,<sup>294</sup> underscores this lack of acceptance. Consequently, it is argued that mere compliance with international legal norms in form, as opposed to substance, falls short of the acceptance requirement. Regardless of the arguments supporting ICC jurisdiction in Africa,<sup>295</sup> mere ratification of the

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291. Nsongurua Udombana, *Can These Dry Bones Live? In Search of a Lasting Therapy for AU and ICC Toxic Relationship*, 1 AFR. J. INT'L CRIM. JUST. 57 (2014).

292. See *How Buhari Smuggled Fugitive Omar Al-Bashir Out of India to Sudan*, BREAKING TIMES (Nov. 2, 2015), <http://www.thebreakingtimes.com/breaking-news-how-buhari-smuggled-fugitive-omar-al-bashir-out-of-india-to-sudan/>.

293. See, e.g., Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV).

294. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005), <https://www.un.org/press/en/2005/sc8351.doc.htm>. For details of the Security Council Resolution 1593, adopted March 31, 2005, see S.C. Res. 1593 (Mar. 31, 2005).

295. See, e.g., KAMARI CLARKE, *FICCTIONS OF JUSTICE: THE ICC AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA* 237 (2009); Charles

Rome Statute by African States, without further commitments in terms of implementation to fully cooperate with the international community in meeting the ends of criminal justice, is a clear indication of rejection, rather than acceptance. The growing tension between the AU and the ICC, as well as its impact on the future of international criminal justice in Africa, will be discussed below to further underscore this point.

### III. THE AU VERSUS THE ICC: GROWING TENSION AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE IN AFRICA

The overall responsibility to implement legislation aimed at the prosecution of grave violations of international humanitarian law and international human rights law rests with the State. This is fully recognized under international law. This duty accounts for the principle of upholding States' sovereignty regarding the prosecution of certain individuals for international crimes. Hence, it is no surprise that attempts to prosecute State nationals at the supranational level have always been met with stiff political resistance from concerned States. The United States, for example, has always maintained that it would not surrender its nationals, especially members of its military, to the ICC for trial. Thus, the United States did not ratify the Statute, despite being one of its early supporters and signatories. An increasing number of African countries, and the AU as a regional body, are following the example of the United States and are backing out of the ICC. Opponents of the ICC, within the AU context, often cite the politics behind international criminal justice, which allow powerful (Western) nations to indict weaker (developing) ones as a reason. This Part will first examine the nature of these alleged politics and how this has impacted criminal justice goals in Africa, given the growing tensions between the AU and ICC. In assessing the pull factors fanning these political tensions and the prospects of resolving the impasse, Africa's contributions to the ICC will be considered. It will then explain how a planned establishment of an African regional criminal court with regional complementarity jurisdiction is a challenge to implementation of the ICC's complementarity regime in Africa. Against the background of the AU-ICC face-off, this Part will conclude by looking at what the future has in store

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Jalloh, *Regionalising International Criminal Law?*, 9 INT'L CRIM. L. REV. 445 (2009).

for the ICC and international criminal justice, especially in a continent where armed conflict, a polar opposite of justice and peace, has been emblematic.

*A. Addressing First Things First—The Politics of International Criminal Justice*

*“If I may say so, this is not a court set up to bring to book Prime Ministers of the United Kingdom or Presidents of the United States.”*<sup>296</sup>

In light of the reality of Robin Cook’s statement above, the following questions have been asked, and continue to be asked: Whose interest does international criminal justice serve, and who are the beneficiaries and/or heirs of its work?<sup>297</sup> Who are the ‘we’ in international criminal justice?<sup>298</sup> These questions go to the heart of more fundamental questions—whose imagery is projected as being the emblematic authority catalyzing the works of the ICC? Is the authority backing the ICC the same as its recipients, or are they in essence different? From whichever angle these questions are addressed, the answers, it is submitted, are inextricably interwoven with the politics of nations, given the continued debate about the effectiveness of international criminal justice in a world controlled by sovereign States. It is either that international criminal justice prevails with the backing of a world sovereign, or the logic behind the argument to tame State sovereignty in the interest of justice is allowed to prevail. If international criminal justice is allowed to prevail with the backing of a world sovereign, then the ICC may at least, in the abstract sense, perceive itself, or be perceived by observers, as working for justice and the interest of the whole international

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296. Former British Foreign Secretary, Robin Cook, was on BBC News Night to answer questions on whether the new ICC might one day indict Western leaders for their decisions to go to war in Iraq. See Courtenay Griffiths QC, *Racism and the Criminal Justice System*, Speech at Corruption, Spying, Racism and Accountability Conference at Conway Hall London (Feb. 7, 2015), <http://justyorkshire.org.uk/2015/02/18/racism-and-the-criminal-justice-system/>.

297. Frederic Megret, *In Whose Name? The ICC and the Search for Constituency*, in *CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS* 26 (Stahn Carsten et al. eds., 2015).

298. Immi Tallgren, *We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court*, 12 *LEIDEN J. INT’L L* 683, 683 (2004).

community. This is an equitable customary superiority, one that forefronts the significance of a justice idea as a precursor of the institutions seeking to inject life into it. The ICC and other international criminal tribunals are hypothesized as the repository of criminal justice ideas in the new world order. The political dimension of the ICC's work is often downplayed in the ICC's discourses and practices,<sup>299</sup> and many of its actions and policies can be diagnosed from the way and manner it allocates discrete forms of power. In certain circumstances, the ICC does exercise what may be described as mandatory power<sup>300</sup> over individuals, including the power to arrest persons and protect victims and witnesses. In these contentious areas, the ICC's mandatory power appears to be tantamount to usurpation of State power, and is most susceptible to criticisms that include, but are not limited to, a lack of democratic answerability. These criticisms appear to be justifiable in some ways. For example, application of ICL is politicized when the ICC's jurisdiction is triggered to prosecute certain individuals for certain crimes, and at the same time, it is not invoked to prosecute some other individuals that committed the same or similar crimes. Sometimes the justification for select prosecution of individuals relates to those that carry the highest liability for crimes. But certainly, prosecution of a select few cannot, in all sense of reasonableness and logicity, be seen as enough to serve the true purpose of eliminating core crimes in all their ramifications. Instead, selectivity constitutes a threat to the ICC's legitimacy,<sup>301</sup> insofar as it gives rise to scapegoat rhetoric, as evident during Thomas Lubanga's trial before the ICC. According to Kenneth Davis,<sup>302</sup> selectivity bespeaks of a situation where a law enforcement officer or agency exercises injudicious power of discretion to refuse to do anything about a case, even when taking action is obviously justified and expected. Such discretionary power plays out when certain parties against whom the law is enforced are selected,<sup>303</sup> regardless

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299. See Nouwen & Werner, *supra* note 125.

300. See CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS 5–6 (Stahn Carsten et al., eds., 2015).

301. See generally Margaret M. de Guzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 271 (2012).

302. KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 163 (1969).

303. *Id.*

of whether it is justifiable or not. *New Magazine Africa*, citing Griffiths, posits that there is an undeclared truth about the way and manner in which ICL is currently practiced.<sup>304</sup> It is that “certain individuals, from certain countries of origin will never find themselves indicted before an international criminal tribunal.”<sup>305</sup> To this end, Courtenay Griffiths QC, who himself acted as the lead counsel for Charles Taylor (Ex-President of Liberia) during his trial at the SCSL, stated that:

There is an unspoken truth about international criminal law as currently practiced. It is that certain individuals, from certain countries of origin will never find themselves indicted before an international criminal tribunal for: *right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.* This is the fundamental operating principle of international criminal law, rooted, not in their commitment to justice, but in their vastly superior economic, military and political power, and their control of the global opinion-forming agencies. The fact is that ruling elites can violate laws with impunity, while members of subject classes will be punished. Contrast the treatment of bankers and rioters in contemporary Britain and the US at a domestic level. Likewise contrast in the international arena the treatment of crimes committed by Britain, the US and Israel, and those committed in Liberia, Cote D’Ivoire or Libya. Acts are defined as criminal because it is in the interests, or at least not against the interests, of a ruling class to define them as such.<sup>306</sup>

Against the backdrop of Griffiths’ argument above, selectivity of prosecution may therefore be said to take either or all of the following forms; namely selectivity of denunciation, selectivity of investigation, selectivity of prosecution, and selectivity in terms of impunity.<sup>307</sup> Selectivity, as it relates to suspects that the international community is disposed to collectively prosecute, is referred to as selectivity *ratione personae*.<sup>308</sup> The doctrine of *ratione personae* presupposes that equal application of the law

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304. *The Politics of International Criminal Law*, NEW MAG. AFR. (Mar. 1, 2012), <http://newafricanmagazine.com/the-politics-of-international-criminal-law/>.

305. *Id.*

306. Griffiths QC, *supra* note 296 (emphasis added).

307. *Id.*

308. See Timothy L.H. McCormack, *Selective Reaction to Atrocity*, 60 ALB. L. REV. 681, 683 (1996–97).



should not be influenced by political considerations.<sup>309</sup> It is crucial to note, however, that while it is desirable to prosecute all crimes, in practice, no criminal justice system anywhere in the world has the capacity to prosecute all crimes, regardless of how serious they may be.<sup>310</sup> This justifies the argument that selective law enforcement is not in and of itself inherently wrong, as almost all legal systems permit it.<sup>311</sup> Thus, selectivity *ratione personae*, whether legally-based or legitimacy-based, bespeaks of the fact that all terrestrial justice is selective.<sup>312</sup> In the ICC context, selective prosecution of individuals appears inevitable, as the court is highly dependent on the cooperation of States and associated institutions to assist it in carrying out its statutory functions. To this end, it is believed that international courts, like the ICC, maintain their power through formalized responses, practices, and policies of interaction,<sup>313</sup> while decisions or claims to authority are then translated into technical legal documents to attract acceptance of the ICC's actions or to mitigate criticisms against it.<sup>314</sup> While it could be argued that every case before the ICC has its own political character and content, it is not plausible to conclude that justice is a political tool. A more logical argument may be that justice does not function in a vacuum. In other words, justice cannot, in practical terms, be completely isolated from the politics of those advancing its cause. Considerations of this kind are particularly relevant in international trials, where judgments against core crimes are technically designed to distinguish between enemies and friends, and between evil and good. By so doing, the ICC and other international courts fail to disentangle their work from the political realities of the cases they adjudicate upon and the sways and limits wielded by the international community. Two case studies, namely the Darfur and Northern Uganda crises, will better highlight this point. Regarding the Darfur region of

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309. ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 192 (2005).

310. See Kai Ambos, *Comparative Summary of the National Reports*, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT 495, 525 (Arbour et al. eds., 2000).

311. CRYER, *supra* note 309.

312. Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 347, 361 (2008).

313. See Jens Meierhenrich, *The Practice of International Law: A Theoretical Analysis*, 76 L. & CONTEMP. PROBS. 1 (2014).

314. Megret, *supra* note 297, at 26.

Sudan, the United Nations passed a series of Resolutions in response to the conflict, to no avail, after which the Security Council finally referred the case to the ICC. It was the first time that the Security Council would refer a case to the ICC and that the ICC would exercise jurisdiction over a non-state Party to the Rome Statute.<sup>315</sup> In many respects, this case demonstrates that the ICC is inevitably trapped in the political dilemma of the Darfur crisis by its mere decision to prosecute President Omar Al-Bashir and top Sudanese government officials. The effect of this is that it confers some degree of legitimacy on the Darfur rebel group. In fact, the group capitalized on it to project themselves as partners in progress with the ICC against the perpetrators of the atrocious crimes committed in Darfur.<sup>316</sup> The political involvement of the ICC is not that it is siding with one party *per se*, but rather, by labelling Al-Bashir and his officials as *hosti humani generis*—enemy of all mankind—it appears to be legitimizing the activities of the rebels.<sup>317</sup> In the case of Northern Uganda, the ICC played a similar, yet opposite, role in distinguishing enemies from friends. The LRA rebels were projected as enemies, whereas the government of President Yoweri Museveni was projected as an ally. This stems from the 2003 self-referral of the Ugandan situation to the ICC. It can logically be argued that the ICC, in stepping into the Ugandan dilemma upon request from the government, can only favor President Museveni.<sup>318</sup> The ICC's intervention, with active support from the Ugandan government, along with the blacklisting of the LRA rebels as enemies of not only the Ugandan government, but also the international community, will favor Museveni's bloc.<sup>319</sup> This is so because the LRA rebels had already been internationally

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315. See Thomas Thompson-Flores, *The International Criminal Court: Will it Succeed or Fail—Determinative Factors and Case Study on This Question*, 8 LOY. U. CHI. L.J. 57, 78 (2010).

316. Nouwen & Werner, *supra* note 125.

317. *Id.* at 957.

318. See COUNTRY SUMMARY REPORT: JANUARY 2005, HUM. RTS. WATCH, <http://pantheon.hrw.org/legacy/wr2k5/pdf/uganda.pdf>.

319. Nouwen & Werner, *supra* note 125, at 949.

ostracized<sup>320</sup> at the time, and were in fact on the list of U.S. terrorist groups.<sup>321</sup> It is argued that the ICC's legitimacy as an international court cannot be validly discredited solely on the grounds that at some point, in an attempt to render international justice, it got caught up in the politics of the moment. Perhaps, prior to the ICC's establishment, international tribunals were frequently criticized for being pure political manipulations, insofar as the judges at Nuremberg (being loyal to the victor's justice pursuits) were exercising jurisdiction in the absence of a precise body of law to refer to. The case of the ICC is, however, different. The Rome Statute grants the ICC legitimate jurisdiction, thereby escaping any political bias against it. The ICC regime solves two major problems that characterized the Nuremberg trials and subsequent *ad-hoc* tribunals. First, it resolves the issue of the *nullum crimen, nulla poena sine praevia lege poenali*<sup>322</sup> principle of international law concerning the absence of a written law, from which the Nuremberg Tribunal could have derived its jurisdiction, instead of relying on provisions of customary international law to assume jurisdiction. Second, the fears expressed during the Nuremberg Trials about how a lack of penal law to guide the Nuremberg Tribunal's proceedings may have shielded perpetrators of crimes amongst the allied powers

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320. SARAH M.H. NOUWEN, COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN 119 (2013).

321. See LRA, *ADF on American Terrorist List*, IRIN NEWS (Dec. 7, 2001), <http://www.irinnews.org/news/2001/12/07/lra-adf-american-terrorist-list>; *The Lord's Resistance Army*, OFF. SPOKESPERSON, U.S. DEP'T STATE (Mar. 23, 2012), <https://2009-2017.state.gov/r/pa/prs/ps/2012/03/186734.htm>. GULU-UGANDA has in fact appealed to President Trump to remove the LRA from the list of U.S. terrorist organizations on grounds that LRA's power is now diminished and is no longer a threat to Uganda's people. See John Muto-Ono, *Why Trump Should Remove the LRA From the List of Terrorist Organizations*, BLACK STAR NEWS (Feb. 15, 2017), <http://www.blackstarnews.com/global-politics/africa/why-trump-should-remove-the-lra-from-the-list-of-terrorist>. See generally U.S. DEP'T STATE, OFF. COUNTERTERRORISM, FOREIGN TERRORIST ORGANIZATIONS: FACT SHEET (Oct. 11, 2005), <https://2001-2009.state.gov/s/ct/rls/fs/37191.htm>; see also Kevin C. Dunn, *Uganda: The Lord's Resistance Army*, in AFRICAN GUERRILLAS: RAGING AGAINST THE MACHINE 131, 148 (2007).

322. "*Nullum crimen, nulla poena sine praevia lege poenali*" is a Latin phrase meaning "[n]o crime can be committed and no punishment can be imposed without a previous penal law." See James Popple, *The Right to Protection from Retroactive Criminal Law*, 13 CRIM. L.J. 251-62 (1989).

are allayed in the ICC regime. Thus, politics are inextricably interwoven with international criminal justice goals, especially in the ICC context, given that the ICC largely depends on State cooperation and contributions to discharge its statutory functions.

### *B. Africa's Contributions to the ICC*

To assert that Africa's contributions to the ICC's establishment is the cornerstone of its legitimacy today would simply be setting the record straight. In February 1998, representatives of twenty-five African States met in Dakar, Senegal and adopted a declaration (the "Dakar Declaration") calling for the establishment of an independent international criminal court<sup>323</sup> to prosecute perpetrators of grave crimes around the world, especially in Africa. Later, the Organization of Africa Unity (now the AU), during its 36th ordinary session of the Assembly of Heads of State and Government, held in Lome, Togo, condemned, in strong terms, the perpetration of war crimes, crimes against humanity, and genocide in the African continent,<sup>324</sup> pledging to fully cooperate with any institution established to prosecute perpetrators.<sup>325</sup> Earlier in September 1997, fourteen Member States of the Southern Africa Development Community met during its regional conference in Pretoria, South Africa, outlining a proposal of ten basic principles they suggested should be included in the proposed ICC Statute.<sup>326</sup> In fact, many African countries, notably Lesotho, Malawi, Senegal, South Africa, and Tanzania, all played significant roles in the process leading up to the Statute's actual drafting.<sup>327</sup> They all took part in a discussion leading up to the ICC's creation at a presentation of the Draft Statute of

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323. See Dakar Declaration for the Establishment of the International Criminal Court, Feb. 2, 1998, <http://www.iccnw.org/documents/DakarDeclaration-Feb98Eng.pdf>.

324. See Declaration and Decisions Adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government of the OAU held in Lome, Togo (2000), [https://au.int/sites/default/files/decisions/9545-2000\\_ahg\\_dec\\_143-159\\_xxxvi\\_e.pdf](https://au.int/sites/default/files/decisions/9545-2000_ahg_dec_143-159_xxxvi_e.pdf).

325. *Id.*

326. See J. Jele Khiphusizi, The Permanent Mission of South Africa to the United Nations, Speech at the Sixth Committee of the 52nd General Assembly, New York (Oct. 21, 1997), <http://www.iccnw.org/documents/SouthAfricaSADC6Comm21Oct97.pdf>.

327. See Rowland J. V. Cole, *Africa's Relationship with the International Criminal Court: More Political than Legal*, 14 MELB. J. INT'L L. 673-75 (2013).

the ICC to the U.N. General Assembly in 1993.<sup>328</sup> During the July 1998 Rome Conference on drafting the ICC Statute, forty-seven African countries were present, with a vast majority of them voting in favor of adopting the Statute at the Diplomatic Conference Plenipotentiaries on the establishment of the ICC.<sup>329</sup> After the adoption of the Rome Statute, many African countries, including South Africa, Kenya, Uganda, and Burkina Faso were among the earliest to enact implementing legislations to domesticate the Rome Statute.<sup>330</sup> Currently, of the 139 State Parties, thirty-four of them are African countries. In addition, civil society groups<sup>331</sup> and nongovernmental organizations<sup>332</sup> in Africa also played crucial roles in building support, which culminated in the ICC's establishment. They have continued to encourage African countries, in their large numbers, to implement the Rome Statute. Given the African bloc's enormous contributions to the ICC's success story, questions are now being asked as to why the relationship between the ICC and the African bloc, which once flourished, has so greatly deteriorated today. Further questions are raised as to why the ICC is now seen as anti-African by the AU and many other observers in the continent.

*C. Growing Tension between the AU and ICC: Analyzing the Pull Factors and Prospects of Resolving the Impasse*

To posit that the AU and the ICC have been in a face-off with each other for some years now is merely stating the obvious. The

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328. See Int'l Law Commission, *Report of the International Law Commission on the Work of Its 46th Session*, Draft Statute for an International Criminal Court, U.N. Doc. A/49/10 (1994), ch. II (B)(f).

329. *Id.*

330. See e.g., Rome Statute of the International Criminal Court Act (2002) (S. Afr.); International Crimes Act (2008) (Kenya); Rome Statute of the International Criminal Court, Decree No 2009-894/PRES, 3 December (2009) (Burkina Faso); International Criminal Court Act No. 18 of 2006 (Nov. 17, 2006).

331. See e.g., CENTRE FOR CITIZENS, PARTICIPATION IN THE AFRICAN UNION, 'COMMUNIQUÉ ON CSO CONSULTATION ON THE YEAR OF PEACE AND SECURITY IN AFRICA 5 (Communiqué, January 2010), [http://www.wanep.org/wanep/attachments/article/128/final\\_communique\\_yps\\_jan\\_2010.pdf](http://www.wanep.org/wanep/attachments/article/128/final_communique_yps_jan_2010.pdf)

332. See, e.g., William R. Pace & Mark Tieroff, *Participation of Non-Governmental Organizations*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE — ISSUES, NEGOTIATIONS, RESULTS 391, 392–98 (Roy S. Lee ed. 1999); see also Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L L.J. 243 (2006).

question remaining to ask, however, is why. What caused the rift and sudden strain on the relationship between the AU and the ICC, especially on the only continent where the ICC received its widest support prior to its establishment in 2002? The turning point in the eyes of many African politicians came in 2000, when Belgium issued a warrant of arrest for the then Minister of Foreign Affairs of the DRC, Abdoulaye Yerodia Ndombasi.<sup>333</sup> This sparked diplomatic protests across Africa, labelling this incident as an abuse of universal jurisdiction and a violation of sovereign immunity by European States. Then, in 2008, the Chief of Protocol to President Paul Kagame of Rwanda, Rose Kabuye, was arrested in Frankfurt, Germany, pursuant to a French arrest warrant in connection with the shooting down of the plane that killed the former Rwandan President, Juvenal Habyarimana, and his Burundian counterpart, Cyprien Ntaryamira. This incident triggered the horrendous Rwandan genocide<sup>334</sup> of 1994, which resulted in the death of over 800,000 people (mostly Tutsis). Among the early victims were the country's Prime Minister, Agathe Uwilingiyimana, and her husband, the Minister of Agriculture, the Minister of Labor, the President of the Supreme Court, Joseph Kavaruganda, and human rights activists, including Charles Shamukiga, Fidele Kanyabugoyi, Ignace Ruhatana, Patrick Gahizi, Father Chrysologue Mahame, S.J., and Abbé Augustin Ntagara, all of whom died in 100 days.<sup>335</sup> President Kagame personally raised the issue at the United Nations, calling it an abuse of universal jurisdiction by European States, as well as a conspiracy aimed at intimidating African leaders. These are but two instances in a series of cases in which European States

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333. The case was brought to the ICJ. See *Case Concerning the Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v Belgium* [2002], ICJ 3, at 1–5, Judgment, Feb. 14, 2002, <https://www.ilsa.org/jessup/jessup08/basic-mats/icjcongo.pdf>.

334. Mark Tran, *Rwandan President Kagame Threatens French Nationals with Arrest*, *GUARDIAN* (Nov. 12, 2008), <http://www.guardian.co.uk/world/2008/nov/12/rwanda-france>.

335. See Maria van Haperen, *The Rwandan Genocide, 1994*, in *THE HOLOCAUST AND OTHER GENOCIDES* 98, 113 (Maria van Haperen et al. eds., 2012); *HUM RTS. WATCH AFR.*, 6 *GENOCIDE IN RWANDA APRIL–MAY 1994* (May 1994), <https://www.hrw.org/sites/default/files/reports/RWANDA945.PDF>.

relied on universal jurisdiction to harass, in the eyes of some observers,<sup>336</sup> African leaders. The watershed moment for the AU's relationship with the ICC came in March 2009, following the issuance of the first arrest warrant for President Omar Al Bashir of Sudan.<sup>337</sup> The Al-Bashir arrest warrant further deteriorated the relationship between the AU and the ICC for three main reasons.

First, AU Member States treated the arrest warrant as an obstacle to their efforts to foster the peace and reconciliation processes in Darfur, thereby accusing the ICC of failure to appreciate the effect that its interference in Africa's internal affairs was having on the peace building efforts in Sudan,<sup>338</sup> as well as in Northern Uganda.<sup>339</sup> The AU insisted that the ICC was undermining the effectiveness of African solutions to African problems. Second, the ICC appears to be selectively prosecuting Africans. So far, almost all of the cases brought before the ICC are from Africa, thereby raising suspicion among some African observers that the ICC is using Africa as a testing ground<sup>340</sup> for its judicial power, with active support and encouragement of Western States. Third, diplomatic controversies following Al-Bashir's arrest warrant sparked a debate as to whether the Rome Statute can legally terminate sovereign immunity of a Head of State not privy to the Statute.<sup>341</sup> Generally, under customary international law, senior State officials, like President Al-Bashir and his Kenyan counterpart, Uhuru Kenyatta, have immunity, both

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336. For more information on "universal jurisdiction," see Charles Chernor Jalloh, *Universal Jurisdiction, Universal Prescription: A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction*, 21 CRIM. L. REV. 1, 2 (2010).

337. *Prosecutor v. Omar Hassan Ahmad Al Bashir*, *supra* note 28.

338. See Donna E. Arzt, *Views on the Ground: The Local Perception of International Tribunals in the Former Yugoslavia and Sierra Leone*, 603 THE ANNALS OF THE AMERICAN ACADEMY 223, 234 (2006).

339. See M. Cherif Bassiouni, *The ICC—Quo Vadis?*, 4 J. INT'L CRIM. JUST. 421, 424 (2006).

340. See TERENCE MCNAMEE, BRENTHURST FOUNDATION & AFRICAN CENTER FOR STRATEGIC STUDIES, *The ICC and Africa: Between Aspirations and Reality: Making International Justice Work Better for Africa, Reflections on a High-level Roundtable* 4–16 (Mar. 18–19, 2004) <http://africanlegalcentre.org/download/publications/International%20Criminal%20Justice/Brenthurst%20Foundation%20%27Between%20Aspiration%20and%20Reality%20-%20Making%20International%20Criminal%20Justice%20Work%20Better%20in%20Africa%27%20Discussion%20Paper%202-2014.pdf>.

341. See Rome Statute, *supra* note 1, art. 27(1), 27(2).

functional and personal, from criminal prosecution as Heads of State.<sup>342</sup> The question of immunities of African Heads of State is very crucial to the AU, consequently leading to open political opposition against the mandate of the ICC (as highlighted in the ongoing discussion of South Africa leaving the ICC). Article 27(1) of the Rome Statute abolishes official immunities as a bar to prosecution, among these most notably Head of State immunity, hence paving the way to prosecute Heads of State alongside other senior State officials under the ICC Statute. This overcomes any contradicting domestic and customary international law granting immunity, as stipulated in Article 27(2) of the Rome Statute. Exclusion of Head of State immunity in Article 27, however, seems to stand in direct conflict with Article 98 of the Statute, which stipulates that:

*The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.*<sup>343</sup>

Using Article 98 of the Statute as an argument to find a way of upholding Head of State immunity would ignore the actual rationale behind this rule. The legislative drafters of the ICC did craft Article 98 with a view “not to interfere with States qua States and with the efficient performance of the functions of diplomatic missions, while retaining the capacity to hold heads of State to account.”<sup>344</sup> Bearing this in mind, there is little room to use the Article 98 exception as an argument for upholding the Head of State immunity as a bar to ICC jurisdiction in exceptional circumstances. This is a lesson which the South African government of former President Zuma should have learned when the ICC accused Bashir was allowed to leave the Republic

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342. MAX DU PLESSIS ET AL., AFRICA AND THE INTERNATIONAL CRIMINAL COURT 5 (July 2013), [https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp\\_iccafrica.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf).

343. See Rome Statute, *supra* note 1, art. 98(1), 98(2) (emphasis added).

344. Jens Iverson *Head of State Immunity is not the same as State Immunity: A Response to the African Union's position on Article 98 of the ICC Statute*, EJIL: TALK! <https://www.ejiltalk.org/head-of-state-immunity-is-not-the-same-as-state-immunity-a-response-to-the-african-unions-position-on-article-98-of-the-icc-statute/>.



of South Africa in June 2015. Reflecting on the AU strained relationship with the ICC, on grounds of the absence of Head of State immunity, it may be argued that States Parties, by signing the Rome Statute, have, by necessary implication, agreed to waive the immunity of their own officials, given that the crimes outlined under the Statute are crimes that violate *jus cogens* norms of international law.

In light of the above discussion of the AU's difficulty to accept Head of State criminal responsibility without immunity, can it be validly argued that the relationship between the AU and the ICC has been damaged beyond repair? An answer to this question may be found in the simple phrase, "Well Almost!" The choice of this phrase stems from the fact that criticisms of the ICC's perceived focus on Africa are not to be taken as meaning a complete abandonment of the standards of international criminal justice in the continent. This is because recent developments in different parts of Africa indicate that support for efforts to ensure responsibility for international crimes is available. For example, in January 2015, Dominic Ongwen, a senior leader of the LRA, declared wanted since 2005 by the ICC, was surrendered to the ICC by joint efforts of the United States and the AU,<sup>345</sup> both of which are very critical of the ICC.<sup>346</sup> It is also widely believed that the ICC warrant of arrest against the main leader of the LRA, Joseph Kony, his deputy, Vincent Otti (now believed dead),<sup>347</sup> and other top commanders played a crucial role in bringing the rebels to the negotiation table during the failed Juba Peace Talks.<sup>348</sup> Similarly, in September 2015, Niger

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345. Adam Branch, *Dominic Ongwen on Trial: The ICC's African Dilemmas*, 11 INT'L J. TRANS. JUST. 30–49 (2017).

346. See H.J. van der Merwe, *Introduction*, in INTERNATIONAL CRIMINAL JUSTICE IN AFRICA ISSUES, CHALLENGES AND PROSPECTS 1–4 (H.J. van der Merwe & Gerhard Kemp eds., 2016).

347. *Otti 'Executed by Uganda Rebels'*, BBC NEWS (Dec. 21, 2007, 4:01 PM), <http://news.bbc.co.uk/2/hi/africa/7156284.stm> (reporting on Otti's execution); see also Noel Mwakugu, *Obituary: LRA Deputy Vincent Otti*, BBC NEWS (Jan. 23, 2008), <http://news.bbc.co.uk/2/hi/africa/7083311.stm>; Henry Mukasa, *How Vincent Otti was Killed*, DIOCESE N. UGANDA (Dec. 10, 2007), <http://dioceseofnorthernuganda.blogspot.co.uk/2007/12/how-vincent-otti-was-killed.html>.

348. See Philomena Apiko & Faten Aggad, *The International Criminal Court, Africa and the African Union: What Way Forward?* 3 (European Centre for Development Policy Management, Discussion Paper No. 201, Nov. 2016), <http://ecdpm.org/wp-content/uploads/DP201-ICC-Africa-AU-Apiko-Aggad-November-2016.pdf>. Cf. Patrick Wegner, *Ambiguous Impacts: The Effects of*

Ahmad Al Faqi Al Mahdi was surrendered by Niger to the ICC, becoming the first person charged for the war crime of directing attacks against buildings dedicated to religion and historical monuments (nine mausoleums and one mosque) in Timbuktu, Mali.<sup>349</sup> The Al Mahdi case was in fact a landmark for the ICC, being the first time that “intentionally directing attacks to historical, religious and cultural properties” was prosecuted as a war crime before an international court, and the first time a guilty plea was recorded for such a crime.<sup>350</sup> This is in addition to the commencement of the trial of Congolese commander, Bosco Ntaganda,<sup>351</sup> in September 2015 for war crimes and crimes against humanity committed in the Bogoro Village in the

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*the International Criminal Court Investigations in Northern Uganda* 2–22 (Refugee Law Project, Working Paper No. 22, Oct. 2016), [http://www.iccnw.org/documents/RLP\\_Working\\_Paper\\_22.pdf](http://www.iccnw.org/documents/RLP_Working_Paper_22.pdf) (suggesting that the Juba peace talks had long begun before the ICC intervened in Uganda and therefore ICC’s investigations in Northern Uganda made only little impact).

349. See Sebastián A. Green Martínez, *Destruction of Cultural Heritage in Northern Mali, Cases Before International Courts and Tribunals: A Crime against Humanity?*, 13 J. INT’L CRIM. JUST. 1073 (2015); Juan-Pablo Pérez-León-Acevedo, *International Criminal Justice Rendered Concerning the Attack Against Timbuktu Mausoleums and Mosque: Focus on Religion-Related Considerations*, 6 OXFORD J.L. & RELIGION 180–86 (2017); Federica Mucci, *Short and Quickly Delivered, Yet Quite Full of Meaning: the International Criminal Court Judgment about the Intentional Destruction of Cultural Heritage in Timbuktu*, 8 ITALIAN J. PUB. L. 415–23 (2016). For more information on destruction of cultural properties, see C. EHLERT, PROSECUTING THE DESTRUCTION OF CULTURAL PROPERTY IN INTERNATIONAL CRIMINAL LAW 158–59, 224 (2013); PAS DE DEUX, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 168–92 (Orna Ben Naftali ed. 2011); Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336 (2016); I.L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 ILSA J. INT’L & COMP. L. 12 (2005); Paige Casaly, *Cultural Property and World Heritage in International Criminal Law*, 14 J. INT’L CRIM. JUST. 1199 (2016). For cases where destruction of cultural properties was judicially discussed, see Prosecutor v. Prlić et al., Case No. IT-04-74-AR73.2, Judgment, ICTY Trial Chamber (May 29, 2013); Prosecutor v. Blaskić, Case No. IT-95-14-T, Judgment, ICTY Trial Chamber (Mar. 3, 2000); Prosecutor v. Kordić and Cerkez, Case No. IT-95-14/2-T, Judgment ICTY Trial Chamber (Feb. 26, 2001); Prosecutor v. Miodrag Jokic Case No. IT-01-42/1-S, Judgment, ICTY Trial Chamber I (Mar. 18, 2004).

350. Martínez, *supra* note 349.

351. See Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Decision: Charged Confirmed, Case Committed to Trial (June 9, 2014).

Ituri district of the Eastern DRC between 2002 and 2003.<sup>352</sup> These examples underline the ICC's important role with respect to international criminal justice in Africa, despite tensions between the AU and the ICC. The important role of the ICC, with respect to international criminal justice in Africa, is to pay more attention to the peculiar domestic contexts of its interventions, particularly its timing<sup>353</sup> and political expediency, in order to align its work with local circumstances,<sup>354</sup> thereby striking a balance between the competing interests of justice and peace. To this end, it is suggested that the ICC should continue combining instruments of policy considerations with humanistic values crucial for the realization of the ends of justice,<sup>355</sup> taking into account threats of the persistent clash between the Western notion of retributive justice and local traditional desire for restorative justice. In so doing, the ICC will ensure that international justice, under its auspices, contributes not only to retribution, but also to the broader objectives of incapacitating the perpetrators of grave crimes and the total removal of root causes of conflicts in Africa.

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352. Please note that Mathieu Ngudjolo Chui was discharged and acquitted by the ICC Trial Chamber II on December 18, 2012 for a lack of evidence. See *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-02/12, Verdict: Acquittal (Dec. 18, 2012). Germain Katanga was found guilty and sentenced to twelve years in prison as an accessory to one count of a crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property, and pillaging). See *Prosecutor v. Katanga*, *supra* note 28.

353. See, e.g., Lydia A. Nkansah, *The International Criminal Justice in Africa: Some Emerging Dynamics*, 4 J. POL'Y & L. 74 (2011); see also J. Geis & A. Mundt, *When to Indict? The Impact of Timing of International Criminal Indictment on Peace Processes and Humanitarian Action*, (Brookings Institution-University of Bern Project on Internal Displacement, Paper for the World Humanitarian Studies Conference, Groningen, The Netherlands, Feb. 2009); H. Cobban, *Think Again: International Courts*, FOREIGN POLICY 22–28 (2006).

354. See Lydia A. Nkansah, *International Criminal Court in the Trenches of Africa*, 1 AFR. J. INT'L CRIM. JUST. 8, 10–12 (2014).

355. Cherif Bassiouni suggests that the ICC is already combining instruments of policy considerations with humanistic values crucial for the realization of the end of justice. See M. Cherif Bassiouni, *The Universal Model: The International Criminal Court*, in POST-CONFLICT JUSTICE 819 (M. Cherif Bassiouni ed. 2002), cited in DAVID LANZ, THE ICC'S INTERVENTION IN NORTHERN UGANDA: BEYOND THE SIMPLICITY OF PEACE VS. JUSTICE, FLETCHER SCHOOL OF LAW AND DIPLOMACY 1 (May 2007), [http://reliefweb.int/sites/reliefweb.int/files/resources/EC66215A0071F156C12573910051D06D-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/EC66215A0071F156C12573910051D06D-Full_Report.pdf).

*D. African vs. International Criminal Justice: The Establishment of an African Regional Criminal Court with Regional Complementarity Jurisdiction as a Challenge to the ICC in Africa*

One of the challenges to the ICC's acceptance among African nations is directly linked to a growing consensus within the AU that Africa's problems warrant an African approach.<sup>356</sup> This is highlighted in the AU initiative to establish a regional criminal court, which could altogether keep the ICC out of the African continent.<sup>357</sup> An argument has been put forward that if an African Criminal Court becomes operational, it may represent a decolonized form of international criminal justice with a reformed jurisdiction for Africa, become an instrument in the hands of African leaders to ensconce impunity, or perhaps end up becoming a mere replication of the ICC's practice and procedures on a regional basis.<sup>358</sup> Without prejudice to any position that one takes, it is argued that the integrity of such efforts by African leaders cannot be vouched for. This argument is founded upon the fact that the main reason why the AU wants a regional criminal court is to drive the ICC out of Africa. This stems from the constant accusations from African leaders that the ICC is a selective justice institution only desirous of prosecuting African leaders, and that the ICC has turned from its original purpose to a neo-colonialist court.<sup>359</sup> As plausible as this allegation may seem, there is no empirical evidence to justify the argument that the ICC's focus on Africa is a conspiracy and/or a manifestation of a modern version of Western neo-colonialism<sup>360</sup> and/or imperialism, or perhaps in essence a further expansion of the already expanded expansionist policies of Western powers in the continent. It is argued instead that justice for the common good of

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356. Branch, *supra* note 39.

357. *Id.*

358. *Id.*

359. See, e.g., Manisuli Ssenyonjo, *The International Criminal Court and the Warrant of Arrest for Sudan's President Al-Bashir: A Crucial Step Towards Challenging Impunity or a Political Decision*, 78 *NORDIC J. INT'L L.* 397 (2009); see also K.G. Adar, *The International Criminal Court and the Indictment of President Omar al-Bashir: Implications for Sudan and Africa*, AISA Policy Brief, No. 10 (Feb. 2010) (dealing with the accusation that the ICC is a new form of neo-colonialism).

360. See Max Du Plessis, *The International Criminal Court and its Work in Africa: Confronting the Myths* 3 (Institute for Security Studies (ISS) Paper 173, Nov. 2008).

Africans does not form part of the purpose why African leaders want a regional criminal court. Instead, this is one singular fact that makes this purpose an ill-fated one. The most disturbing aspect of these accusations is that they find traction with dictators and their collaborators, who devise every tactic possible at their disposal to delay or ward off their accountability for international crimes. The accusations are unsubstantiated by any cogent, compelling, and unequivocally true and positive evidence. If any argument to the contrary is to be taken as anything near the truth, as opposed to fakery and a distortion of the true facts, it is that such accusations should at least, for the benefit of the doubt, not be taken for granted. In the strongest terms, this article disputes the integrity of African leaders in this regard. For example, President Yoweri Museveni of Uganda referred the case of Joseph Kony and the LRA to the ICC as a way for him and his *Uganda People's Defence Force*, formerly National Resistance Army, to score a political advantage. In turn, he condemned the ICC during Uhuru Kenyetta's inauguration, depicting it as a neocolonial court.<sup>361</sup> It is this political dishonesty on the part of African leaders that has put the ICC on the horns of dilemma in the continent. It is on record that President Yoweri Museveni and his Rwandan counterpart, President Paul Kagame, are both beneficiaries of nuanced selectivity justice within Africa, in that "both have much blood on their hands, but [are] immune from censure or prosecution because they are both highly valued clients of the west."<sup>362</sup> Although establishing a new regional criminal court with regional complementarity may succeed in keeping the ICC out of Africa, at least in the interim until tensions are calmed, such efforts, it is argued, are nothing but a foreshadowing of an impending trend of a reformed version of political chicanery and regional chauvinism designed by repressive African leaders to further fortify the kowtowing attitude and nigh deification of themselves as though they are conquerors of vassal lands poised to protect their suzerainty. By such needless theatricals, the continent's leaders are only designing a deliberate ploy to translate proceedings of the proposed regional criminal court into a mere judicial vaudeville, which is

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361. See Vision Reporter, *Museveni's Speech at Uhuru's Inauguration*, NEW VISION (Apr. 10, 2013), [http://www.newvision.co.ug/new\\_vision/news/1317104/musevenis-speech-uhurus-inauguration](http://www.newvision.co.ug/new_vision/news/1317104/musevenis-speech-uhurus-inauguration).

362. Griffiths QC, *supra* note 296.

definitely not in the best interest of criminal justice jurisprudence in Africa. There is no guarantee that the so-called regional criminal court will be free of political interference by African leaders, and that it will not end up being a mere replication of the ICC's practice and procedures at a regional level, under the thin guise of reformed criminal jurisdiction for Africa. This is nothing but a needless duplication of judicial institutions serving the same purpose. It is submitted that the only way to end impunity in Africa is for Africans to unite, with the rest of the international community, to implement the Rome Statute and strengthen the ICC's position in Africa.

*E. The Future of International Criminal Justice and the ICC in Africa*

This article has already highlighted the problems and criticisms which accompanied the ICC's involvement and acceptance of its Rome Statute in Africa since 2002. Given these criticisms, and the wide attention it has attracted over the last decade, what does the future hold in store for international criminal justice and the ICC in Africa? In answering this question, it is submitted that the ICC, notwithstanding the harshness of the time, remains an instrument for justice and a veritable tool of legal and social engineering in a continent where impunity, "the polar opposite of justice has been emblematic."<sup>363</sup> It is submitted that despite the popularly held public misgivings and doubts from the AU and other African observers about the integrity of the ICC's criminal justice role in the continent, future generations of Africans will increasingly throw their weight behind the ICC as a complementary global justice institution. According to Mehari Taddele Maru, "there is no legal solution to conflicts in Africa, but certainly there can be no solution without justice."<sup>364</sup> This justice is what the ICC stands for. Although fears that the face-off between the ICC and Africa may still tarry until such a time when systems of responsive governance emerges in the continent, the fact remains that the AU cannot validly keep the ICC out of Africa if African leaders do not on their own reject impunity totally. Strengthening the apparatus of the ICC in Africa is

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363. See Du Plessis, *supra* note 360, at 2.

364. MEHARI TADDELE MARU, THE INTERNATIONAL CRIMINAL COURT AND AFRICAN LEADERS: DETERRENCE AND GENERATIONAL SHIFT OF ATTITUDE, ISPI 8 (ISPS Analysis Paper No. 247, 2014).

the only way African leaders can honestly pay tribute to the judgment of reason over power. This submission finds solid anchorage on Justice Robert H. Jackson's opening address at the Nuremberg Trials. In his words:

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason. . . .<sup>365</sup>

If Justice Jackson's statement above is taken as very crucial to the attainment of the goals of international criminal justice in the twenty-first century, then the ICC is the most suitable justice institution to spearhead the judicial programs geared towards attainment of these broad international justice goals. It therefore follows that only proper and timely implementation of the complementarity principle within the African national legal orders can guarantee the future of the ICC in Africa—a continent where armed conflicts, engineered by repressive regimes and a culture of impunity,<sup>366</sup> have voided the prosperity of our common humanity.

#### IV. RECOMMENDATIONS

The challenges facing the domestic implementation of the complementarity regime in Africa today highlight the continuing challenges the ICC faces within the context of the African legal, institutional, and political landscape. The political atmosphere on the war-ravaged continent is harsh. Legal institutions are weak, and the tirades of hate rhetoric are embedded in phrases like "is Africa a testing ground for the ICC?" Such rhetoric is now

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365. See Justice Robert H. Jackson, Opening Statement Before the International Military Tribunal (Nov. 21, 1945), <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>.

366. P. Mochochoko, *Africa and the International Criminal Court*, in *AFRICAN PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE* 249 (Evelyn A. Ankumah & Edward K. Kwakwa eds., 2005).

implanted in the public consciousness of ICC critics. The complementarity principle, therefore, seems to have become a 'teeterboard' of international law. On the one hand, it seeks to find a realistic balance between somewhat contrasting notions in international law, namely respect for sovereignty of States. On the other hand, however, it seeks to account for the duty of the international community to end impunity for international crimes. Dithering like a pendulum is the fate of international criminal justice, which is on the brink of collapsing. If the United Nations and Member States signatory to the Rome Statute and the ICC are able to strike a realistic balance between these two competing demands, there will be, at least in the abstract sense, a level playing field. It is therefore evident that certain measures must be put in place to restore confidence in the ICC and meet the expectations of justice and peace, especially in Africa. It is suggested that the following measures can, to a reasonable extent, bring us closer to these expectations, if implemented.

#### *A. Policy-Oriented Approach to Implementation*

A policy-oriented approach to domestic implementation of complementarity presupposes that key decision-makers at the national level, including executive and judicial officials and national parliaments as a legislative body, need to fully cooperate with the rest of the international community to end impunity for grave crimes by taking legislative steps to implement the complementarity regime. This is the most potent way to ensure the success of the common interests of the international community regarding the maintenance of international peace and security, as well as the eradication of impunity. Quite instructively, an ICC implementing legislation of the United Kingdom<sup>367</sup> has already been relied upon to sustain a domestic complementarity-based prosecution and conviction. This happened in the case of *R v. Donald Payne*,<sup>368</sup> where Payne, a British soldier, became the first British citizen to be convicted for war crimes in connection with the presence of the British Armed Forces in Iraq post invasion 2003. It is therefore suggested that to show willingness and commitment to complementarity, African States should borrow

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367. See International Criminal Court Act 2001 (U.K.), <http://www.legislation.gov.uk/ukpga/Eliz2/3-4/18/contents>.

368. See Gerry Simpson, *The Death of Baha Mousa*, 8 MELB. J. INT'L L. 340 (2007).



from the highly effective criminal law practices and procedure systems offered by advanced countries, like the United Kingdom, and take adequate steps to meet the threshold of complementarity, at least at a minimum level, which includes initial transcription (dynamic or static) of core crimes of the Rome Statute into the *corpus juris* of their national criminal laws. Accordingly, African States should carry out a far-reaching revision of their criminal statutes, including where necessary, adjusting national constitutions to allow for a smooth and timely implementation. This is very crucial because as observed in this article, the very nature, character, content, definitions, scale, and gravity of international and domestic crimes are manifestly different. Therefore, non-proscription in specific terms of the Rome Statute's international crimes in domestic criminal laws will be incompatible with States' obligations to implement the provisions of the Statute. To this end, conflicting immunity provisions in national constitutions should be reconciled, streamlined, and harmonized with Article 27 of the Rome Statute, which extinguishes the immunity of Head of States and governments. In other words, immunity clauses in national constitutions of African States can be amended, for example, to create a chance for the impeachment of Heads of States in the event that they are indicted for any of the Rome Statute core crimes. Once impeached, the immunity of the executive head concerned stands extinguished, and criminal proceedings can then be commenced by the appropriate national prosecuting authorities or the ICC. In addition, to ensure the timely enforcement and execution of court sentences and judgments relating to the Rome Statute crimes, national implementing legislations in Africa should contain a provision establishing a special judicial enforcement institution. Its duty would be to enforce judgments of national courts regarding convictions and imprisonments secured under the Rome Statute. It could be called the judiciary police, or something to the effect. The recommended enforcement institution must be independent from undue influence by those who wield power, including both the executive and legislature. Its funding must be guaranteed from a separate consolidated revenue fund of the State concerned. It should also be fully equipped and tied to doing the will of the judiciary only. A step in this direction will complement the provisions of Part X<sup>369</sup> of the Rome Statute,

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369. See Rome Statute, *supra* note 1, arts. 103–11.

which deals with the enforcement of sentences and conditions of imprisonment. In addition, national decisions to prosecute international crimes that violate *jus cogens* norms enunciated in the Rome Statute should not be subject to any authority, no matter how highly placed. This is the main problem with the amended (2006 Nigeria ICC Bill) to implement the Rome Statute.<sup>370</sup> The Bill provides that the consent of the Attorney General of the Nigerian Federation is required for all prosecutions under the Bill, whether in Nigeria or elsewhere, and that the Attorney General will discharge Nigeria's obligations under the Rome Statute on behalf of the government.<sup>371</sup> This is a matter of serious concern because the Attorney General is a political appointee and may be influenced by the Executive in the discharge of his functions under the Rome Statute. Such consent, if at all necessary, should be obtained from a High Court Judge or the Director of Public Prosecutions. These are serious policy issues that States must address with every sense of responsibility if national authorities are actually serious about their commitment to implement the Rome Statute. As the future of international criminal justice depends largely on cooperation from national jurisdictions, it is also suggested that at the regional level, the AU should adopt a common policy document that clearly outlines regional strategies for implementation of the complementarity regime in Africa. This will ensure that noticeable impunity gaps in national jurisdictions and policies are bridged. In addition, African leaders have to reconsider their often-ambivalent stance towards impunity and political interference with the independence and integrity of the judiciary. To guarantee the total independence of the judiciary, the present system of appointing judges in many African States, notably Nigeria, with political and geographical spread serving as part of the criteria taken into consideration, should be scrapped. The overriding consideration in the appointment of judges and other quasi-judicial officers should be the intellectual attainment and personal integrity, suitability, competence, learning, and incorruptibility of the appointees or candidates concerned. The media too must be fully empowered to meaningfully contribute to the fight against the perpetrators of core crimes. This can be achieved if Africa's media focus turns

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370. International Criminal Court (Ratification and Implementation) Bill 2001 (Amended version in 2006) (Nigeria).

371. *See id.* § 16.

from propaganda to nation building, thus overcoming the present post-colonial liberation mantra evident in many AU Member States, such as Zimbabwe, South Africa, and Namibia. These are the hallmarks of a sound democratic society with robust criminal justice system, deemed necessary to guarantee implementation of the complementarity regime in Africa against otherwise uncertain and conflicting political interests.

*B. Purposive Judicial Method of Interpreting the Complementarity Regime*

To ensure proper and timely enforcement of the complementarity principle, the adoption of a more tested and trusted purposive method of interpretation of the complementarity principle is recommended. In such an interpretive method, the outcomes from relevant leading adjudication across AU States serve as a benchmark when resolving conflicts arising from theory and practice of the complementarity principle. One good way to test this purposive interpretative approach in practice is to adjust the text, context, and purpose of Article 17 of the ICC Statute to take into account accused persons' basic trial rights and make it part of the wider due process procedures required for effective administration of criminal justice at the international level. Had this been the case from the time the ICC Statute was negotiated, it would have cushioned the effects of frequent objections of States to the complementarity jurisdiction of the ICC. The ICC, on its own part, must look beyond the mere letters of Article 17, encapsulating the elements of complementarity and venture into the spirit of the overall requirement of justice in every case. This is possible if the ICC adopts judicial interpretation that is predicated on higher order organizational justice and on mutual inclusivity and policymaking, as opposed to mutual exclusivity and policy dysfunction. By so doing, both national and ICC judges would be able to align their reasoning with other interpretive aids, such as custom or treaty law that integrates the guidance enunciated under Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties<sup>372</sup> into the statutory framework of the Rome Statute. To assist the ICC in achieving these

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372. See Vienna Convention on the Law of Treaties art. 31–33, May 5, 1969, 1155 U.N.T.S. 331. Articles 31–33 of the Vienna Convention on the Law of Treaties 1969 deals with General Rules of Interpretation of Treaties. Article 31 (1) emphasizes that “a treaty shall be interpreted in good faith in accordance

purposive interpretative outcomes, it is proposed that Article 17 of the Rome Statute should be amended to give the ICC primacy jurisdiction in certain cases, such as when the commission of crimes of aggression is at issue, since States are almost always sponsors of crimes of aggression and will be reluctant to indict or prosecute themselves. This provision may be called the Primacy RULES Complementarity<sup>373</sup> provision and should be introduced into the first limb of Article 17 of the Statute. The reverse provision may be called the Complementarity RULES Primacy<sup>374</sup> provision. Although there are concerns that giving the ICC primacy in certain cases may violate State sovereignty, this article argues in favor of a doctrinal shift from the customary conception of State sovereignty as *absolute* to a *conditional sovereignty*,<sup>375</sup> in which sovereignty of States carry with it the responsibility to protect their own citizens from avoidable catastrophic crimes.

### *C. Domestic Capacity Building and Institutional Preparedness*

Building institutional preparedness and national capacity by States to prosecute the Rome Statute crimes domestically entails that human capacities, as well as the material and infrastructure necessary to carry out the relevant legal activities required for investigating and prosecuting crimes, be made available. To this end, it is recommended that States' judiciaries, the

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with the ordinary meaning to be given to the terms of the treaty in their context, and in the light of its object and purpose." *Id.* art. 31 (1). Article 32, on the other hand, stipulates "that recourse may be had to supplementary means of interpretation, including preparatory work of the treaty and circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31." *Id.* art. 32.

373. This is a phrase chosen and/or adopted in this article to highlight the proposals for amendment.

374. This is another phrase chosen and/or adopted in this article to highlight the proposals for amendment.

375. See THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, INT'L COMM'N INTERVENTION & ST. SOVEREIGNTY vii (Dec. 2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>; see also Sandra Fabijanić Gagro, *The Responsibility to Protect (R2P) Doctrine*, 3 INT'L J. SOC. SCI. 61 (2014); Astha Pandey, *The Responsibility to Protect ("R2P") in International Law: Protection of Human Rights or Destruction of State Sovereignty*, 2 NLUJ L. REV. 115, 115–16 (2013); Ramesh Thakur, *The Responsibility to Protect*, in THE UNITED NATIONS, PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT 246 (2006).

police, and prison services be reformed to ensure a better safeguard of citizens' rights by being fully empowered to execute investigative and prosecutorial functions. To this end, judges and special prosecutors with vast experience in ICL should be appointed to head national criminal courts. There should also be training and retraining of judges, the police, prison workers, and special prosecutors through the continuing legal education program of national jurisdictions. This will ensure that judges and prosecutors are well abreast of new developments regarding the ICL's technical rules and practices. Also, the government must, as a matter of necessity, provide adequate security for judges, especially judges serving in the criminal law division of national judiciaries, to enable them to effectively discharge the responsibilities of their office without any form of fear, favor, or intimidation from any quarter. Adequate resources and expertise should also be made available in the Chambers of the Attorneys General of all African countries to be able to prosecute international crimes. Also, victims' participation procedures, similar to that contained in the Statute establishing Special Tribunal for Lebanon,<sup>376</sup> should be built into national implementing legislations in order to restore the confidence of the victims, accused persons, and the society in the national judicial systems.

#### *D. Legislative and Technical Assistance*

As a corollary to national capacity building and institutional preparedness to prosecute international crimes, legislative and technical competence entails that the capacity of States to take proactive legislative steps to empower national authorities to prosecute international crimes is made available. Experience, however, shows that weaker nations do not always have the requisite legislative and technical proficiencies to meet this threshold. It is therefore very necessary, and highly recommended, for weaker States to ask for and get legislative and technical support from the ICC and other advanced national jurisdictions, like

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376. See S.C. Res. 1664, art. 17 (Mar. 29, 2006) (providing that "[w]here the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Pre-Trial Judge or the Chamber considers it appropriate.").

the United Kingdom, to enable them to put into place effective implementing legislations that ensure a complementarity-based approach to the prosecution of international crimes.

*E. Improving Relations Between the AU and the ICC*

To break the present deadlock at the AU level, it is suggested that both the ICC and the AU first shift grounds and pay more attention to each other's concerns about criminal justice delivery processes in the present complementarity regime. To this end, the AU and the ICC must both redirect and revitalize their justice programs from propagandas of the past to justice and peace-building in the present. Both institutions must join hands to implement the complementarity regime, and the AU should suspend plans to establish a regional criminal court to unseat the ICC in Africa, as such efforts will not advance the course of international criminal justice. To ensure that this is achieved, the ICC must pay more attention to the peculiar domestic contexts of its interventions, particularly its timing and political expediency, in order to harmonize its operations with local circumstances. This ensures that a mutually reinforcing balance is struck between the competing interests of justice and peace in the continent. The ICC should continue combining instruments of policy considerations and humanistic values as crucial elements for the realization of the ends of justice, considering threats of the persistent clash between the Western notion of retributive justice and local traditional desire for restorative justice. In so doing, the ICC will ensure that international justice contributes not only to retribution, but also to the broader objective of incapacitation of perpetrators of crimes and the total removal of root causes of conflict in Africa.

CONCLUSION

The principle of complementarity of the Rome Statute is the cornerstone and linchpin of the ICC's legitimacy today. The central focus of this article is the imperative role State Parties to the Rome Statute must play in fulfilling their obligation to implement the complementarity principle by investigating and prosecuting international crimes, while also enacting implementing legislations domestically. The central argument that permeates the entire strata of the article is that States play a crucially dominant role in the dialectic interaction between in-

ternational and national courts in the field of international criminal justice. As the future of international criminal justice is essentially domestic,<sup>377</sup> it follows that States must necessarily pay immense tribute to international criminal justice by allowing reason to prevail over politics and joining hands with the rest of the international community to implement the complementarity regime. It has been noted, however, that enormous challenges continue to face domestic implementation of the complementarity regime of the Rome Statute within the African national legal orders today. Many aspects of these challenges relate to the lack of institutional capacity and preparedness of States to implement the Statute's provisions. There is "absence of effective legislative framework for implementation; limited expertise on the part of investigators, prosecutors and judges, and the national judicial system's lack of resources."<sup>378</sup> Other challenges relate to corruption, lack of political will by States to implement, the ICC's sometimes illogical rejection of case admissibility challenge/objections by States, and, of course, the ICC's lack of purposive judicial interpretation of the complementarity principle, which currently appears to favor mutual exclusivity and policy dysfunction over mutual inclusivity and policymaking. Such policy and statutory shortages are linked to the inherent difficulties in judicially construing and understanding the breadth and depth of the unwillingness test, inability test, and the sufficient gravity test, which are conditions that must satisfactorily be established before the ICC's complementarity jurisdiction is triggered.<sup>379</sup> Other challenges include accusations by politically weak nations, mostly from Africa, contending that stronger nations, with the combined influence of the ICC and the U.N. Security Council, are abusing the principle of universal jurisdiction by extending their national jurisdiction to indict weaker nations. These allegations constitute a fundamental threat to the future relationship of the ICC with national legal orders. This article has therefore stressed the need to conceive the relationship between the ICC and States as one of complementarity and interdependence from the perspective of international law, as otherwise all international and domestic efforts to implement the Rome Statute will simply be an exercise in futility. This article

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377. See Stahn, *supra* note 129; Stahn, *Complementarity*, *supra* note 129. See also Slaughter & Burke-White, *supra* note 41, at 346–50.

378. IMOEDMHE, *supra* note 196.

379. Rastan, *supra* note 28.

has also stressed that States cannot validly prosecute international crimes merely as ordinary domestic crimes without a formal introduction and integration of international crimes into the *corpus juris* of domestic criminal laws.

It is expected that the lapses or loopholes inherent in the process of domestic implementation of the complementarity regime, as exposed in this article, be noted and justice done to them by all relevant national and international authorities, in line with the recommendations outlined herein. This article strongly asserts that proper and timely implementation of the ICC's complementarity regime within national jurisdictions will end impunity for crimes and bring our common humanity closer to a regime or scheme of things consistent with the much-cherished principles of democratic governance and the rule of law. Africa needs it now!