Complementary Jurisdiction (Article 46H)

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Chapter 11
Complementary Jurisdiction (Article 46H)

Harmen van der Wilt

Abstract The jurisdictional relationship between African states and the African Court of Justice and Human and Peoples' Rights and between the latter Court and the International Criminal Court is not entirely clear. While the Malabo Protocol (Annex) has borrowed the complementarity principle from the Rome Statute, the Protocol does not indicate that states' investigations or prosecutions should be *genuine*, in order to render a case inadmissible. Moreover, the Malabo Protocol (Annex) is completely silent on the African Court's relationship to the International Criminal Court. This chapter first discusses whether the leaving out of the term "genuinely" bears any consequences on the assessment of the quality of the performance of states in respect of investigation and prosecution of international crimes. Next, it considers two alternative scenario's—one in which the International Criminal Court is hierarchically superior to the African Court of Justice and Human and Peoples' Rights and one in which both courts cooperate as equal partners. The author concludes that the latter model would be feasible if the International Criminal Court and the African Court of Justice and Human and Peoples' Rights move towards a "division of labor".

Keywords Africa · African Union · African Court of Justice and Human and Peoples' Rights · International Criminal Court · complementarity · "genuinely" · cooperation

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The author is obliged to his Master-student, Mr. Timothy Kanyogonya, who wrote an interesting thesis on the proposed Criminal Chamber of the African Court, with an emphasis on complementarity issues.

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11.1 Extracts from the Malabo Protocol (Annex)

Article 46H Complementary Jurisdiction

1. The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.
2. The Court shall determine that a case is inadmissible where:
   (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution;
   (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to prosecute;
   (c) The person concerned has already been tried for conduct which is the subject of the complaint;
   (d) The case is not of sufficient gravity to justify further action by the Court.
3. In order to determine that a State is unwilling to investigate or prosecute in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
   (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
   (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
   (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
4. In order to determine that a State is unable to investigate or prosecute in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

11.2 Introduction

It is generally acknowledged that the efforts of the African Union to add an International Criminal Law Section to the African Court of Justice and Human and Peoples' Rights very much stem from feelings of discontent at the exercise of universal jurisdiction over African people by—mainly—Western states and the selective policy of the International Criminal Court, which is often perceived to be exclusively interested in targeting African countries.

The concrete event that prompted mounting tensions between the African Union and the International Criminal Court was the latter's decision to issue an arrest warrant for Sudan's incumbent president Al Bashir.[1] The general feeling was that the initiative was ill-timed and thwarted attempts to achieve peace by political means, thereby revealing callous disregard for African solutions.[2] In a Resolution issued in July 2009 the African Union referred to the "unfortunate consequences that the indictment has had on the delicate peace processes underway in the Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur." The Resolution enjoined African Union Member States not to cooperate with the Court when asked to surrender Al Bashir and requested the Security Council to defer the situation in Darfur in conformity with Article of the 16 ICC Statute, a request that was largely ignored.[3] In connection with the excessive exercise of universal jurisdiction against African high officials by European courts, the African Union acknowledged that "universal jurisdiction is a principle of international law whose purpose is to ensure that individuals who commit grave offences such as war crimes and crimes against humanity do not do so with impunity and are brought to justice", but it pointed to an "abuse of the principle of universal jurisdiction by judges from some non-African

[1] International Criminal Court, Situation in Darfur, Sudan, 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-02/05-01/09-3, 4 March 2009.

[2] See, amongst others, Murungu 2011; Obel Hansen 2012; Ssenyonyo 2013.

[3] Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII), 3 July 2009.

States against African leaders."[4] More specific allegations were uttered against European states, revealing old grievances:

> Indictments issued by European states against officials of African states have the effect of subjecting the latter to the jurisdiction of European states, contrary to the sovereign equality and independence of states. For African states, this evokes memories of colonialism.[5]

The African Union's decision to vest the African Court of Justice and Human and Peoples' Rights with criminal jurisdiction cannot be viewed in isolation from such deep-rooted misgivings.[6] It is plainly an attempt to preempt both the (universal) jurisdiction of European states and of the International Criminal Court. It is telling in this regard that the Preamble of the Malabo Protocol explicitly refers to the African Union Assembly's Decision on the Abuse of the Principle of Universal Jurisdiction.[7]

While the Annex to the Malabo Protocol endorses the ideal that Africans are only to be exposed to African justice and that the African Court of Justice and Human and Peoples' Rights is expected—at least to a large extent—to substitute the International Criminal Court, it hardly seems realistic to expect the International Criminal Court to quit the African scene entirely. After all, 34 African countries have ratified the ICC Statute and if they have no intention whatsoever of enabling the International Criminal Court to exercise its jurisdiction, they should withdraw from the Court.[8] Of course, such a withdrawal would probably toll the death knell for the International Criminal Court. It is therefore fair to assume that the African Court of Justice and Human and Peoples' Rights and the International Criminal Court will coexist.

This raises a number of interesting questions concerning the three-way relationship between African states, the African Court of Justice and Human and Peoples' Rights and the International Criminal Court, and it is the objective of this chapter to examine these relations more closely. It is worth pointing out from the outset that the jurisdictional relationships between African states on the one hand, and the International Criminal Court and the African Court of Justice and Human and Peoples' Rights on the other, are both mined by the complementarity principle.[9] This principle implies that both regional and international criminal courts are only allowed to intervene whenever a state is either unable or unwilling to carry out investigations or prosecutions. The first question that will be addressed in Sect. 11.3 is whether the African Court of Justice and Human and Peoples' Rights has to observe the same threshold of (in)admissibility in relation to African states as the International Criminal Court.

While the Annex to the Malabo Protocol regulates the division of labor between states and the African Court of Justice and Human and Peoples' Rights, the latter's relationship with the International Criminal Court is not dealt with explicitly at all. By the same token, the ICC Statute makes no mention of "regional criminal courts", an omission, which need not, however, surprise us, because such courts did not exist when the Statute came into being. It is odd, though, as has also been observed before by Du Plessis, that the Annex to the Malabo Protocol is entirely silent on the International Criminal Court.[10] Against the backdrop of this apparent *lacuna* in the ICC Statute and the Annex to the Malabo Protocol, Sect. 11.4 discusses a hierarchical model in which the International Criminal Court would remain at the apex of international criminal law enforcement. In other words, it envisages a situation in which a judgment by the African Court of Justice and Human and Peoples' Rights might be superseded by one of the International Criminal Court if the former's judgment be found not to measure up to the standards of the ICC Statute and therefore to exemplify the inability (or unwillingness) of the African Court of Justice and Human and Peoples' Rights to exercise effective jurisdiction in a particular case.

Such a hierarchical scenario would no doubt perpetuate the discontent of African states and is therefore neither desirable, nor likely to emerge. Precisely because the relationship between the African Court of Justice and Human and Peoples' Rights and the International Criminal Court is not carved in stone, it rather seems desirable to devise a "flatter", more horizontal model of mutual cooperation between the African Court of Justice and Human and Peoples' Rights and the International Criminal Court. Such a model ought to be based on the rule that states have primary jurisdiction and that the African Court of Justice and Human and Peoples' Rights and International Criminal Court must confer as to who should intervene whenever a particular state should show itself incapable of taking on a case. The delineation of jurisdiction between the African Court of Justice and Human and Peoples' Rights and the International Criminal Court should be made dependent on the nature of the crimes and their geographical scope. Section 11.5 will assess the viability of such a collaborative model. Section 11.6 offers some concluding reflections on the subject.

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[4] Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/14 (XI), Assembly/AU/Dec. 199 (XI), Eleventh Ordinary Session 30 June–1 July 2008, Sharm El-Sheikh, Egypt, §§ 3–5.

[5] Assembly/AU/Dec. 199(XI), no. 5, § 5(iv).

[6] In a similar vein, Ssenyonyo 2013, pp. 415–416, who identifies the objections against universal jurisdiction and the displeasure with the International Criminal Court's prosecutorial strategy as two of the four factors giving impetus to the African Union's decision. See also Du Plessis 2012, p. 1, observing that "the process [of amending the Statute of the African Court] occurs against the backdrop of the AU's open hostility to the ICC."

[7] African Union, First Meeting of the Specialized Technical Committee on Justice and Legal Affairs, Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereafter: Malabo Protocol), STC/Legal/Min/7(I) Rev. 1, Addis Ababa, Ethiopia, 15–16 May 2014, § 13.

[8] Kenya's threat to withdraw from the International Criminal Court on 5 September 2013 has—at least temporarily—been averted by the dropping of criminal proceedings against Kenya's incumbent President, Kenyatta.

[9] Paragraph 15 of the Preamble of the Malabo Protocol: "Convinced that the present Protocol will *complement* national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples' rights in keeping with Article 58 of the Charter and ensuring accountability for them whenever they occur [emphasis added]." Complementarity is corroborated in Article 46H of the Malabo Protocol (Annex).

[10] Du Plessis 2012, p. 12.

11.3 Complementarity and the African Court of Justice and Human and Peoples' Rights: The Relevance of the Adverb "Genuinely"

As indicated in the introduction, the jurisdictional relations between African states and the African Court of Justice and Human and Peoples' Rights, viz. between African states and the International Criminal Court are both governed by the principle of complementarity. Article 46H(1) of the Malabo Protocol (Annex) stipulates that the jurisdiction of the African Court of Justice and Human and Peoples' Rights be complementary to that of the national courts and the courts of the regional economic communities where specifically provided for by the communities. The provision goes on to echo Article 17 of the ICC Statute *almost* verbatim, referring to the successive stages of the criminal proceedings and elucidating the concepts of "unwillingness" and "inability".[11] Of special interest is the second paragraph of Article 46H that indeed reads nearly—but not entirely!—the same as Article 17(1) of the ICC Statute. When one compares both provisions, it is immediately obvious that the qualification "genuinely"—in relation to the carrying out of investigations or prosecution—is lacking in Article 46H. Is this a grave omission? Maybe. In my opinion, we need to distinguish between "genuine" activities or efforts on the part of an unwilling and of an unable state.

For a better understanding of the difference between these two cases, it seems useful to consider the dynamics of the interaction between states, the International Criminal Court and the African Court of Justice and Human and Peoples' Rights, in the light of the objectives of international criminal justice. In case of "unwillingness", the purpose of the state is to perpetuate "impunity" and prevent the African Court of Justice and Human and Peoples' Rights or International Criminal Court from intervening. After all, if the state wishes the regional or international court to "take over", it can simply sit still and do nothing. Both in Katanga and in Al Senussi, the (Pre-)Trial Chamber held that the issue of admissibility only arises, if a state deploys *action of some sort*.[12] There is no reason why the African Court of Justice and Human and Peoples' Rights should take another position in this respect. A state intending to outsmart the African Court of Justice and Human and Peoples' Rights or the International Criminal Court could thus start a token or fraudulent investigation, claiming that it is willing and able to prosecute the accused. In case of "inability", however, the stakes are rather different. The question is not whether impunity will prevail, but rather which entity, namely the state, the regional court or the International Criminal Court, will carry out investigations and prosecute the accused.

The qualifying adverb "genuinely" may have different connotations when applied by the International Criminal Court to assess the "willingness" or "ability" of a state. Several scholars have observed that the exact meaning of "genuinely" is both elusive and controversial. Kleffner questions "whether the term 'genuinely' modifies the verb 'to carry out' or the words 'is willing or unable'."[13] In a slightly different vein, Sadat and Carden inquire whether "[…] 'genuinely' refers to situations where the State's *motives* are not 'genuine' (id est are duplicitous or disingenuous) or situations where the State is 'really' unable or unwilling to prosecute."[14] One is inclined to associate motives primarily with an "unwilling" state. And because motives and intentions are difficult to gauge, it may not be easy for the International Criminal Court to assess their sincerity. These problems of interpretation are reflected in the *indiciae* for "unwillingness" (Article 17(2) of the ICC Statute and Article 46H of the Malabo Protocol (Annex)). After all, it may be hard to determine whether criminal proceedings are undertaken for the purpose of shielding a person from criminal responsibility or have not been conducted independently or impartially. And while a delay in the proceedings can be more easily established, the International Criminal Court would have difficulty in finding out whether such tardiness is "inconsistent with an *intent* to bring the person concerned to justice [emphasis added]."[15] For in the context of admissibility proceedings under the ICC Statute, it is not sufficient to render proof that the state is "unwilling". Rather, proof is necessary to the effect that the state in question is "genuinely" unwilling. Thus, the onus of proof on the Prosecutor is aggravated by the insertion of the qualifier "genuinely". This situation is compounded by the fact that (insincere) motives are hard to detect. In other words, the addition of the word "genuinely" increases the threshold of admissibility.[16] Leaving out the term "genuinely" would, therefore, ease the admissibility of a case.

In case of "inability", the emphasis of the term "genuine" shifts the focus from the motives to the actual performance of the state—does the state really lack the resources to conduct criminal investigations or is it simply convenient for the state to outsource a difficult job? "Genuinely" suggests the introduction of an objective

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[11] For the text of Article 46H see above.

[12] Situation in the Democratic Republic of the Congo, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui; Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of trial Chamber II of 12 June 2009 on the Admissibility of the Case, No. ICC-01/04-01/07 OA8, 25 September 2009, § 78: "It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of the State having jurisdiction […] renders a case admissible before the Court, subject to Article 17(1)(d) of the Statute." The Pre-Trial Chamber in the case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Abdullah Al-Senussi, No.: ICC-01/11-01/11, 11 October 2013, § 26) confirmed the finding of the Appeals Chamber, adding that Article 17(1)(a) of the Statute involved a two-step test "according to which the Chamber, in considering whether a case is admissible before the Court, shall address in turn two questions: (i) whether, at the time of the proceedings in respect of the admissibility of a case, there is an ongoing investigation or prosecution of the case at the national level (first limb); and, in case the answer to the first question is in the affirmative, (ii) whether the State is unwilling or unable genuinely to carry out such investigation or prosecution (second limb)."

[13] Kleffner 2008, p. 114.

[14] Sadat and Carden 2000, pp. 381, 418.

[15] Article 17(2)(b) of the ICC Statute and Article 46H(3)(b) of the Malabo Protocol (Annex).

[16] Kleffner 2008, p. 114.

standard against which the performance of the state can be assessed.[17] El Zeidy argues convincingly that "the inclusion of the term 'genuinely' clearly raises the threshold of *objective* scrutiny in testing the quality of states' national proceedings."[18] Obviously, the introduction of such a standard only makes sense if a situation lends itself to objective verification. The criteria for "(in)ability"—whether the state is (un)able to capture the accused or to obtain the necessary evidence and testimony [Article 17(3) of the ICC Statute/Article 46H(4) of the Malabo Protocol (Annex)]—can indeed be more easily verified objectively. Holmes correctly observes that "the inability of the state to effect an investigation or prosecution is not due to lack of good faith but rather to other, more *objective*, factors [emphasis added]."[19] Moreover, in the context of the assessment of the state's ability, "genuine" implies that the state must make a real effort to bring a criminal case to completion. In the case of *Paniagua Morales* et al. the Inter-American Court of Human Rights clarified and specified the meaning of "genuine and effective investigations", requiring the state to use "all the legal means at its disposal in the conduct of a serious criminal process that identifies the suspects involved and leads to actual trial and appropriate punishment if necessary."[20]

The effects of the application of the "genuinely" standard in the context of "inability" are difficult to predict. The introduction of an objective check gravitates towards a mean. On the one hand, it may prevent a rash presumption of "ability" by a state, by pointing out its poor performance.[21] In such situations, the insertion of "genuinely", when connected to the actual performance of states in the realm of criminal investigations and prosecution, introduces a quality check that indeed increases the threshold of *in*admissibility.[22] On the other hand, it may enable the Court to counter unnecessary self-referrals, in that the Court, in line with the *Paniagua* judgment, could urge the state concerned fully to employ its resources and make a real effort. In view of the current situation in Africa, where states have predominantly claimed "inability" and have subsequently referred situations to the International Criminal Court (*vide* Uganda, Democratic Republic of Congo, Central African Republic, Mali), the omission of the term "genuinely" in the Malabo Protocol (Annex) may indeed be a cause for some concern. Leaving out the word "genuinely" may allow African states to "throw the garbage over the fence" and saddle the African Court of Justice and Human and Peoples' Rights with a considerable caseload.[23]

11.4 A Hierarchical Relationship Between the International Criminal Court and the African Court of Justice and Human and Peoples' Rights?

In the previous section, we addressed the potential complementary relationship between the African Court of Justice and Human and Peoples' Rights and states, leaving the International Criminal Court out of the equation entirely. Such an approach is, however, of course not realistic because the International Criminal Court is here to stay. What form might, then, the three-way relationship between

[17] Compare Holmes 2002, pp. 673–674: "[...] the delegations [to the Rome Conference] were mindful that the ICC was not envisaged as an appellate body to review decisions of domestic courts. To avoid this result, it was said that the criteria permitting ICC intervention should be as *objective* as possible. [...] The negotiations finally settled on the term 'genuinely', even though there was no precedent quoted for the utilization of this word. The term captured the concerns of some delegations by being the *least subjective* concept considered [emphasis added]."

[18] El Zeidy 2008, p. 165.

[19] Holmes 2002, p. 674.

[20] *Paniagua Morales* et al. ("Panel Blanca", Judgment of 8 March 1998, Inter-American Court of Human Rights (series C) No. 37 (1998), para 94.

[21] A fairly good example of the standards that the International Criminal Court is applying is the Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo (Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v. Simone Gbagbo), Case No.: ICC-02/11-01/12, 11 December 2014. The Pre-Trial Chamber explained that "for the Admissibility Challenge to succeed, it must be established that tangible and progressive investigative steps are being undertaken in order to ascertain whether Simone Gbagbo is criminally responsible for the conduct alleged in the proceedings before the Court", adding that "from the documentation provided by Côte d'Ivoire, it appears that the investigative activities undertaken by the domestic authorities are not tangible, concrete and progressive, but, on the contrary, sparse and disparate."(§ 65). Later on, the Pre-Trial Chamber specified that "The investigative steps into Simone Gbagbo's criminal responsibility are not only scarce in quantity and lacking in progression. They also appear disparate in nature and purpose to the extent that the overall factual contours of the alleged domestic investigations (as part of which these individual investigative steps were undertaken) remain indiscernible. In this sense, the Chamber is unable to establish whether these limited steps undertaken at the national level are together directed at ascertaining Simone Gbagbo's criminal responsibility for the same conduct as that alleged in the proceedings before the Court."(§ 70). Although the Pre-Trial Chamber concluded that the national proceedings did not even reveal sufficient "action" to ascertain whether Ivory Coast was "willing and able", it gives a pretty good impression of the quality that the Court requires. The Pre-Trial Chamber's findings were confirmed by the Appeals Chamber in its judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on "Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo" No. ICC-02/11-01/12 OA, 27 May 2015.

[22] Kleffner 2008, p. 114.

[23] For similar apprehensions, see Abass 2013, pp. 27, 44: "The omission of the word 'genuinely' in the Draft Protocol's version has the disastrous implication of lowering the evidential standard of 'inability to prosecute' required before African states can refer a case to the Court. African states could easily exploit this lacuna to turn the Court into a clearinghouse for crimes otherwise prosecutable by their courts. Insofar as only evidence of an 'inability to prosecute' and not evidence of an 'inability to *genuinely* prosecute' is required under Article 46(2)(b), the Court should expect the floodgates to be opened by opportunistic states which will effectively turn the Court into a court of 'first recourse', not of 'last resort.'" [emphasis original].

states, International Criminal Court and African Court of Justice and Human and Peoples' Rights take? Is it, for instance, conceivable that states may be able to choose freely to refer a situation to either the African Court of Justice and Human and Peoples' Rights or the International Criminal Court if they consider themselves unable to exercise jurisdiction in a given case? As the Annex to the Malabo Protocol is silent on the International Criminal Court, it is difficult—if not impossible—to say. For its part, the ICC Statute does not envisage any criminal law enforcement by a regional court.

The most pressing question is, however, what, if any, hierarchy would govern the relationship between the two courts if they were to find themselves at odds on a certain legal issue. Would the International Criminal Court be authorized to scrutinize and assess the performance of the African Court of Justice and Human and Peoples' Rights if, in the former's opinion, the regional court did not come up with the right solution? At first glance, it may be quite difficult to conceive of any situation in which the African Court of Justice and Human and Peoples' Rights would turn out to be "unwilling" or "unable" to carry out investigations or prosecution. However, there is one conspicuous aspect in which the ICC Statute and the Annex to the Malabo Protocol differ, resulting in a limitation of the jurisdiction of the African Court of Justice and Human and Peoples' Rights. The Annex to the Malabo Protocol explicitly introduces the—severely criticized—personal immunity of any serving head of state or government of the African Union. Article 46A*bis* stipulates that "No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."[24] This is clearly at variance with the corresponding provision in the ICC Statute (Article 27) that does not allow any exclusion of criminal responsibility on the basis of official capacity, as the Al Bashir case made abundantly clear.[25]

Now one may imagine a situation in which a state, in order to deliberately bypass the International Criminal Court, refers a situation of gross and flagrant human rights violations in which the incumbent president of that state is involved as well, to the African Court of Justice and Human and Peoples' Rights. If the African Court of Justice and Human and Peoples' Rights were to decline to exercise jurisdiction over the President, invoking Article 46A*bis*, the International Criminal Court would arguably be allowed to intervene and consider the case admissible, in view of the "inability" of the African Court to carry out investigations. However, such hierarchical supremacy of the International Criminal Court over the regional court cannot easily be construed by legal arguments, precisely because the ICC Statute and the African Court of Justice and Human and Peoples' Rights make no mention of the other institution.[26] In respect of the specific topic of (personal) immunities, the supremacy of the International Criminal Court can be defended by resorting to the assumption that the abolition of immunities before international criminal courts has solidified into a rule of customary international law.[27] However, that does not entail a general authority of the International Criminal Court to intervene whenever the African Court is "unable" or "unwilling" to carry out investigations or prosecutions.

To be sure, it is not very likely that the situation described above will emerge. As is well known, the situations in Sudan/Darfur and Libya, in which the prosecution of a sitting head of state was at stake, were referred to the International Criminal Court by a Resolution of the Security Council.[28] Article 15 of the Malabo Protocol (Annex) authorizes the African Union Peace and Security Council to submit cases to the African Court of Justice and Human and Peoples' Rights, but the Protocol does not envisage a role for the UN Security Council. The UN Security Council is therefore likely to bypass the African Court and call upon the International Criminal Court directly, whenever it decides that widespread and systematic violence, including the involvement of heads of states, constitutes a threat or breach of the peace and requires action by the Court. Self-referrals, on the other hand, have usually emanated from situations in which the authorities were unable to cope with rebel forces.

Nonetheless, it cannot be ruled out that the African Court of Justice and Human and Peoples' Rights will be unable to prosecute perpetrators of core crimes, simply because it lacks the proper legal tools and concepts to accomplish this. In this context, one might observe that the modes of responsibility, as enunciated in Article 28N of the Malabo Protocol (Annex), are different from and less sophisticated than the concepts of criminal responsibility, detailed in the Rome Statute.[29] In these situations, the International Criminal Court must be available as a default option. And because there is no proper legal arrangement for such—admittedly

[24] On this contested provision, see the chapter by Tladi in this book.

[25] Situation in Darfur, Sudan, Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Case No. ICC-902/05-01/09-3, 4 March 2009.

[26] The Vienna Convention on the Law of Treaties (Vienna 23 May 1969, UN Treaties Series 1980, No. 18231) offers no solution. Article 30 suggests that the younger treaty (Annex to the Malabo Protocol) should prevail, but only in the relations between states that are party to both treaties. Moreover, Article 27 of the ICC Statute and Article 46A*bis* of the Malabo Protocol (Annex) only regulate the scope of the jurisdiction of both courts. They do not urge States Parties to comply with conflicting obligations.

[27] Compare for this approach, ICC, Situation in Darfur, Sudan, Prosecutor v. Omar Ahmad Al Bashir, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bahir, No.: ICC-02/05—011/09, 12 December 2011.

[28] See, respectively, Resolution 1593 (2005); Adopted by the Security Council at its 5158th meeting, on 31 March 2005, S/RES/1593 (2005) (Darfur) and Resolution 1970 (2011); Adopted by the Security Council at its 6401st meeting, on 26 February 2011, S/RES/ 1970 (2011).

[29] See the chapter by Meloni in this book.

rare—situations, the hierarchical relationship between the International Criminal Court and the African Court of Justice and Human and Peoples' Rights urgently requires attention.

11.5 Towards a Cooperative Model

The scenario that has been described in the previous section is predicated on a hierarchical relationship between the International Criminal Court and the African Court of Justice and Human and Peoples' Rights and contains the seeds of antagonism and conflict. However, the African states and the International Criminal Court need not necessarily remain embarked on a collision course. There is plenty of potential for fruitful and enduring cooperation in the future. The concept of "positive complementarity" may serve as a useful model. In its "Prosecutorial Strategy", the ICC Office of the Prosecutor has repeatedly emphasized the relevance of a positive approach to complementarity, meaning that "the Office will encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance."[30] Analogously, the International Criminal Court and the African Court of Justice and Human and Peoples' Rights might agree to enter into a working relationship, dividing the investigation and prosecution of international (and transnational) crimes between them and rendering mutual assistance by exchanging information and evidence. The prime incentive to establish such a relationship is to improve the effectiveness of international criminal law enforcement by broadening the opportunities for prosecution.[31] Obviously, this aspiration stems from the limited resources of the International Criminal Court that compel the Prosecutor to make difficult choices in selecting appropriate situations and cases. Selectivity is probably one of the greatest challenges for international criminal justice and the topic exceeds the limits of this modest contribution.[32] However, we cannot entirely ignore the issue either because any constructive cooperation between the International Criminal Court and the African Court of Justice and Human and Peoples' Rights requires a reflection on the proper division of labor between the Courts and, therefore, a decision on which cases, crimes and situations to select and which ones to leave to the other Court. Some brief observations will suffice for the moment.

First of all, one could envisage a selection and division of cases on the basis of gravity. Article 17(1)(d) of the ICC Statute stipulates that a case is inadmissible if it is not of sufficient gravity. Parallel to the division of labor between the Court and domestic jurisdictions, the International Criminal Court could opt for prosecution of the gravest crimes, while leaving others to the African Court of Justice and Human and Peoples' Rights.[33] The distribution of cases requires careful consultation and orchestration. In the case against Saif Al-Islam Gaddafi, the Appeals Chamber explained that such a distribution could even involve distinctions at the level of specific incidents:

> "[t]he 'conduct' that defines the 'case' is both that of the suspect, Mr Gaddafi, and that described in the incidents under investigation which is imputed to the suspect. 'Incident' is understood as referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators."[34]

However, the gravity criterion is not very precise and is, therefore, difficult to apply, especially since the Appeals Chamber in the case against Ntaganda has rejected the parameters that the Pre-Trial Chamber had advanced to accentuate the standard.[35]

A stronger case can arguably be advanced for selection on the basis of the nature of the crime. In this volume, Fernandez, Heger, Jeßberger, Kemp, Kinyunyu, and Mninde-Silungwe have analyzed the transnational crimes that belong to the subject matter jurisdiction of the African Court of Justice and Human and Peoples' Rights. Such crimes, for example trafficking in human beings or exploitation of natural resources, are beyond the jurisdictional grasp of the International Criminal Court and may particularly qualify for prosecution by the African Court of Justice and Human and Peoples' Rights. The regional court would, therefore, be well-advised to focus on transnational crimes, while leaving

[30] International Criminal Court, Office of the Prosecutor, Prosecutorial Strategy 2009–2012, The Hague, 1 February 2010, § 17, available at: http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf.

[31] On positive complementarity cf. Burke-White 2008, p. 73: "The most immediate implication of a policy of proactive complementarity is to increase the number of available judicial fora through which to prosecute international crimes."

[32] See for interesting discussions on the issue: Cryer 2005; Damaška 2008, pp. 329, 360–363; de Guzman 2012, p. 265; Schabas 2010, p. 535.

[33] Burke-White ibid., no. 32, p. 101: "[...] a division of labor may also arise where the OTP seeks to prosecute those crimes meeting the gravity threshold articulated in Article 17 and a state seeks accountability (whether criminal or non-criminal) for lower level offenders who are not likely to be the subjects of an ICC investigation."

[34] ICC, Situation in Libya, Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddaffi, Case No. ICC-01/11-01/11 OA 4, 21 May 2014, § 62.

[35] ICC, Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled: Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", Case No. ICC-01/04, 13 July 2006, §§ 68–82. The three-pronged test of the Pre-Trial Chamber included the social alarm caused to the community, the fact that the suspect was one of the most senior leaders in the situation under investigation and the role played by the state in the overall commission of crimes.

the prosecution of the perpetrators of core crimes to the International Criminal Court. Such a division of labor finds surprisingly broad support from African scholars on the African Court of Justice and Human and Peoples' Rights.[36] There are several arguments in favor of this mode of distribution. Obviously, it goes a long way to preventing conflict between the International Criminal Court, and reduces the risk of *bis in idem* and double jeopardy. More importantly, it enables the African Court of Justice and Human and Peoples' Rights to take charge of huge problems that cannot be adequately addressed by the International Criminal Court. The African continent is plagued by several man-made disasters. Rampant corruption paralyzes the public sector. Poachers exploit and destroy with dazzling speed the last remnants of African wildlife. By prosecuting the perpetrators of such transnational crimes, the African Court of Justice and Human and Peoples' Rights could demonstrate the special value of regional criminal courts. Indeed, there is one field in particular in which the African Court of Justice and Human and Peoples' Rights can make an interesting contribution. The Court's jurisdiction covers corruption and money laundering.[37] It is well-known that large corporations from Western countries are often involved in these white-collar crimes. Multi-national corporations succeed in evading taxes in developing states and rob countries like Malawi on a yearly basis of tens of millions of dollars, money that should go into the development of the public sector. Unlike the ICC Statute, which limits the jurisdiction of the International Criminal Court to natural persons, the African Court of Justice and Human and Peoples' Rights provides for corporate criminal liability.[38] The African Court of Justice and Human and Peoples' Rights could, therefore, decide to open investigations against corporations, including Western entities, whenever they can be located on the territory of an African State Party to the Malabo Protocol.

As indicated above, the African Court of Justice and Human and Peoples' Rights and the International Criminal Court could bolster each other's effectiveness by working closely together, for instance, by engaging in mutual exchange of evidence. The Annex to the Malabo Protocol and the ICC Statute would require but small amendments in order to enable such forms of assistance.[39] Such cooperation is not necessarily dependent on the assisting court having jurisdiction over the crime or perpetrator. The International Criminal Court could, for instance, assist the African Court of Justice and Human and Peoples' Rights by sharing information obtained in the context of the investigations of war crimes, if that information were to reveal possible complicity of *legal entities* in these war crimes or other offences. These are the kinds of concerted action and cooperation that would surely prove conducive to effective criminal law enforcement.

11.6 Some Final Reflections

Relations between the African states and the International Criminal Court have been strained. The efforts to establish criminal chambers in the African Court of Justice and Human and Peoples' Rights have—at least partially—been fueled by spite and resentment. In the first part of the present contribution I focused on the problematic aspects of the three-way relationship between African states, the African Court of Justice and Human and Peoples' Rights and the International Criminal Court. I tried to demonstrate that the current phrasing of the complementarity principle in the Malabo Protocol (Annex) invites states to outsource the prosecution of crimes to the regional court. Moreover, the assumption of a hierarchical relationship between the International Criminal Court and the African Court of Justice and Human and Peoples' Rights would be likely to perpetuate the mutual tensions.

The second part of this chapter strikes a more positive note. In it, I explored the possibilities for a constructive relationship between the International Criminal Court and the African Court of Justice and Human and Peoples' Rights, predicated on a division of labor based on the nature of the crime and mutual assistance. One should be cautious not to burden the courts with exaggerated expectations. Even the international and regional court working in tandem can obviously not solve all societal problems. Criminal courts cannot alleviate the suffering of all victims and I am personally not convinced of the deterrent effect of international criminal justice. However, criminal trials issue powerful normative messages that vastly exceed their capacity for concrete problem-solving. This norm-expressive function of international criminal justice is best served by a modest but determined

[36] Cf. Abass 2013, pp. 27, 49: "the fact that the Rome Statute does not cover such crimes as corruption, unconstitutional changes of governments, mercenarism and so on, which affect the majority of African states, is perhaps the strongest case in favour of the prosecution of international crimes by the African Court."; Murungu 2011, p. 1085: "[…] perhaps it would be good for the Criminal Chamber to show its distinctive features by dealing with the crime of aggression and certain common crimes in Africa (that do not all amount to international crimes) such as election-rigging, unconstitutional change of governments, human trafficking, acts of terrorism, piracy, drug trafficking, slave practices and slavery."

[37] Cf. Fernandez's chapter in this book.

[38] Article 46C(1) of the Malabo Protocol (Annex): "For the purpose of this Statute, the Court shall have jurisdiction over legal corporations, with the exception of States." See also Meloni's chapter in this book.

[39] Article 46L of the Malabo Protocol (Annex) provides that "The Court shall be entitled to seek the cooperation or assistance of regional or international courts, non-State Parties or cooperating partners of the African Union and may conclude Agreements for that purpose." In other words, it envisages the reception but not the rendering of assistance. Article 93(10) ICC Statute allows the Court to co-operate with and provide assistance to a State Party, but does not contemplate the cooperation with regional courts or institutions.

selection of strong and symbolic cases. The International Criminal Court's attention is legally restricted to the core crimes, while the African Court of Justice and Human and Peoples' Rights ought, in my view, to focus on transnational crimes such as illicit exploitation of natural resources, corruption, trafficking in human beings etc. This seems particularly desirable in such cases where the crimes affect multiple jurisdictions and are, therefore, difficult for individual states to counter on their own. The distribution of jurisdiction on the basis of the nature of the crime reflects the notion that some crimes are of concern to the entire international community, while others have but a regional import. Be that as it may, the urge for greater synergy and collaboration between the Courts symbolizes the increasing fusion of core and transnational crimes. Their cooperation may contribute to a better understanding of this relationship, a subject which has hitherto not received sufficient scholarly attention.

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