The African Approach to the Principle of Complementarity of the International Criminal Court: A Potential Gem or Germ?

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Abstract

This article provides an analysis of existing and emerging African views that reflect and/or seek to develop the principle of complementarity of the International Criminal Court. The broad consensus on the African continent is that the principle of complementarity must be applied timeously within context and subjected to state discretion. It is argued that, despite the continent's obvious shortcomings in confronting impunity, its proposed strategic pillars for complementarity require attention. These came at an opportune time, as there is controversy about the interpretation of the proper application of the principle of complementarity. The International Criminal Court is being accused of unwarranted intervention in national affairs. The rapport between the International Criminal Court and certain African states has deteriorated over the last decade, raising fears that an unacceptable interregnum in the prosecution of international crimes may occur. In this regard, the article discusses African efforts that may assist the International Criminal Court from further losing credibility and visibility in Africa. The article further asserts that international criminal justice in Africa is a regional, rather than a national issue, although regional positions will further the implementation at national level. Therefore, African states are exploring regional perspectives to safeguard ownership and incorporate regional involvement in international criminal justice.

Keywords: Complementarity; International Criminal Court; African states; State discretion; international crimes; Rome Statute of the International Criminal Court

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Introduction

The tension that exists between the International Criminal Court (ICC or Court) and the African continent is well documented.[1] Complementarity, a principle that prefers prosecution by national jurisdictions and that anchors the ICC in its pursuit of perpetrators of genocide, crimes against humanity, war crimes and aggression,[2] is at the heart of the controversy. This has resulted in threats and actual withdrawals by African states from the 1998 Rome Statute of the International Criminal Court (Rome Statute).[3] Consequently, the narrative now is that African states have backtracked on their support of the ICC and international criminal justice.[4] In contrast, this article advances an argument that African states are entreating the ICC to broaden the scope of complementarity. It will be demonstrated further that African initiatives and perspectives offer potentially strong pillars for complementarity, the enhancement of state ownership of international crimes, and seek to mend gaps in the ICC's jurisprudence on the subject.

As the debate continues, Africa's contribution to the existing fora for prosecuting international crimes, has gathered momentum. Most of the African perspectives are yet to be fully tested and utilised by the Court but the time is ripe for the Court to explore these perspectives and the continent's commitment to invoke both the letter and spirit of the Rome Statute. African states, often using the African Union (AU) and its Regional Economic Communities (RECs),[5] continue to borrow and refine approaches drawn from

1 See for example Firew Kebede Tiba, 'Regional International Criminal Courts: An Idea whose Time has Come?' (2016) Cardozo Journal of Conflict Resolution 539–540; Eki Yemisi Omorogbe, 'The African Union and the International Criminal Court: What to do with Non-Party Heads of State' (2014) 17–19 University of Leicester School of Law Research Paper 42; Fainos Mangena, 'Restorative Justice's Deep Roots in Africa' (2015) 34 South African J of Philosophy 1–12; Bartram Stewart Brown, 'The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit' (2017) 31 Temple Intl and Comp LJ 168; Benson Chinedu Ologbou, 'The African Union, the United Nations Security Council and the Politicisation of International Justice in Africa' (2014) 7 African J of Legal Studies 359–360, discussing Africa's views on the bias, impartiality, imperialistic, insensitiveness, and political nature of the ICC.

2 Rome Statute of the International Criminal Court (2187 UNTS 90 1998) Preamble para 10, arts 1 and 17.

3 See Duncan Miriri and Andrew Roche, 'Uganda's Museveni Calls on African Nations to Quit the ICC' (*Reuters*, 12 December 2014) <http://www.reuters.com/article/us-africa-icc-idUSKBN0JQ1DO20141212> accessed 8 May 2020.

4 'Africa and the International Criminal Court: Mending Fencing' (2012) Avocats Sans Frontières Paper 5–12.

5 Africa has eight RECS, namely, The Arab Maghreb Union, The Economic Community of West African States, The East African Community, The Intergovernmental Authority on Development, The Southern African Development Community, The Common Market for Eastern and Southern Africa, The Economic Community of Central African States, and the Community of Sahel-Saharan States.

elsewhere to clarify the understanding of complementarity.[6] Ultimately, the AU anticipates the strengthening of its regional institutions and legislation for the enforcement of international criminal law.[7] Likewise, African states envisage assistance at the regional level in the prevention and prosecution of international crimes.[8] Embryonic ideas, such as the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) and an African Court of Justice and Human Rights (African Court or ACJHR) with jurisdiction over international crimes,[9] have the potential to change the face of international criminal justice in Africa. As to whether and when the Malabo Protocol will secure enough ratifications is beyond the scope and subject of this article. Further, although the idea of an ACJHR with jurisdiction over international crimes seems far-fetched at this stage, the author contends that it is worth exploring the options available for international criminal justice now and in the future.

Africa seeks to advance a context-based, time-sensitive and state-sensitive approach to the principle of complementarity. This augurs well for the historical development of the principle of complementarity, which demonstrates that it is not static.[10] In the current application of the principle by the ICC, the prosecution of the ˊmost responsibleˋ is emphasised.[11] The principle can be developed further to include the ˊmost convenientˋ, namely the justice and peace dynamics in a given context. Thus, the prerogative of States to act first, based on the uniqueness or complexity of their situation[12] and their position as the main players in international criminal justice will be preserved.[13] The argument espoused in this article is to use the ICC when it is most beneficial and when the intervention of the Court results in the closing of a jurisdictional lacuna at national or regional level.

This article consists of six sections: An introduction; complementarity as a state-centric concept; the rationale for using regional mechanisms in the application of

6 For example, the East African Community aired its views on the application of complementarity and presented itself as a forum with jurisdiction over ICC crimes during Kenya's opposition to the ICC's intervention in the country's post-election violence.

7 Cayley Clifford, 'Justice Beyond the International Criminal Court: Towards a Regional Framework in Africa' (2019) 293 South African Institute of International Affairs Paper 21.

8 Kenneth Rodman, 'Justice as a Dialogue between Law and Politics: Embedding the ICC Within Conflict Management and Peacebuilding' (2014) 12 J of Intl Crim Justice 437–469.

9 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014). To date, only 15 of the 55 AU members states had signed the Protocol.

10 Mohamed El Zeidy, ˊFrom Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11*bis* of the Ad Hoc Tribunalsˋ (2008) 57 The Intl and Comp LQ 415.

11 <http://www.icc-cpi.int/about> accessed 8 May 2020.

12 Kai Ambos, ˊThe Role of the Prosecutor of an International Criminal Courtˋ (1997) 45 The Review of International Commission of Jurists 53.

13 Hans Morgenthau, *Politics Among Nations: The Struggle for Peace and Power* (1st edn, Alfred A. Knopf 1948) 489.

complementarity; Africa's multi-layered approach to international criminal justice; the continent's initiatives and strategies for an effective and sustainable co-operation with the ICC; and finally, a conclusion.

State-centrism in Complementarity

The Concept of State-centrism

The Collins English Dictionary defines centrism as 'the state or condition of having a specified thing as the centre of attention or focus.'[14] It follows that state-centrism in international criminal law is premised on the assumption that entities other than States, only intervene in State affairs with due regard to a State's own efforts and options. The general opinion in Africa is that African solutions should be found for African problems, with States at the centre of initiating solutions in their respective territories.[15] In essence, these solutions encompass both judicial and non-judicial mechanisms, and leave room for intervention by States from regional and international institutions.[16] It is in this vein that the ICC should embrace a more decentralised approach in the enforcement of international criminal justice by encouraging States' flexibility in the use of different forms of justice and mechanisms.[17] On the other hand, while the ICC has settled the question of prosecuting international crimes as national crimes at the domestic level,[18] this article reveals the difficulty States have to prove that national and international cases are similar .

The ICC has also missed important complementarity components by paying little attention to the political perspectives of States.[19] This is despite the Rome Statute acknowledging politics and an international criminal court that operates under the UN system.[20] The resolutions of the United Nations Security Council (UNSC) and the AU reveal that complementarity is not only a matter for the ICC and States, but should also incorporate regional actors to combat impunity. A case in point is the situation in Darfur where the UNSC invited the Court and the AU ˙to discuss practical arrangements for facilitating the work of the Prosecutor and the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the

14 <http://www.collinsdictionary.com/dictionary/english/centrism> accessed 18 April 2020.

15 The Constitutive Act of the African Union (2158 UNTS 3 2001) arts 3–4 and Preamble para 10.

16 *Report of the AU Panel of the Wise on Peace, justice and reconciliation in Africa, opportunities and challenges in the fight against impunity* (February 2013) The African Union Series.

17 Kenneth Abbott, 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' (1999) 93 American J of Intl L 374.

18 *Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 13 May 2013 entitled Decision on the admissibility of the case against Saif Al-Islam Gaddafi, Prosecutor v Gaddafi & Al-Senussi* ICC/01/11-01/11 OA 4 (21 May 2014) paras 63–78.

19 See for example Editorial Staff, ˙African Union Backs Mass Withdrawal from the ICC' (*BBC News*, 1 February 2017) <http://www.bbc.com/news/world-africa-38826073> accessed 2 March 2021.

20 (n 2) Preamble para 9.

fight against impunity.'[21] It can be deduced from the pronouncement that the UNSC defined the relationship between the ICC and AU as one of consultation, cooperation, complementarity and participation of the AU in the fight against impunity. The UNSC approach emphasised that States should be encouraged to explore solutions through consultation, mediation, judicial settlement, use of regional agencies and other means available to States.[22] In practice, the ICC has intervened in complex situations in which the Court was required to explore both national and regional solutions prior to intervention. For example, the Prosecutor accepted that the Central African Republic was unable to undertake proceedings due to the complexity of the situation.[23] In the case of Libya, the Court stated that transitional societies require 'exceptional circumstances',[24] but did not state that 'exceptional responses', including regional assistance, are required in such societies.

State-centrism in international law is grounded in the assumption that States dispose of advanced jurisdictions.[25] The non-interference doctrine is meant to preserve State sovereignty and political stability.[26] However, as members of the international community, States cede certain rights for the global good and the protection of human rights.[27] In the African context, States are surrounded by a wall of common positions, the foundation of which are State interests. Notable common positions include shielding sitting heads of State or high-ranking political officials from prosecution,[28] promotion of Pan Africanism and African Renaissance,[29] and the adoption of a common defence policy.[30] These examples indicate that pertinent issues in Africa such as the administration of international criminal justice constitute a regional rather than a national issue. Unlike the Prosecutor of the ICC (Prosecutor) who separates law from

21 Resolution of the 5158th meeting of the United Nations Security Council on Darfur 1593 (2005) para 3.

22 Charter of the United Nations (1 UNTS XVI 1945) chapters VI and VIII.

23 *Prosecutor's report on the status of the preliminary examination, Situation in the Central African Republic* ICC/01/05 (15 December 2006) paras 12–20.

24 *Decision on the Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge, Prosecutor v Saif Al-Islam Gaddafi & Al-Senussi* ICC/01/11-01/11 para 18.

25 Gene Lyons and Michael Mastanduno, *Beyond Westphalia?: National Sovereignty and International Intervention* (Johns Hopkins University Press) 250–251.

26 ibid.

27 Antonio Cassese, 'The International Criminal Court Five Years on: Adante or Moderato? in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 22–25.

28 Max Du Plessis, 'The International Criminal Court and its Work in Africa: Confronting the Myths' (2008) 173 Institute for Security Studies Paper 2.

29 <http://www.au.int/en/agenda2063/overview> accessed 5 May 2020.

30 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2003) art 3(e).

politics, the African approach strikes a balance between the two concepts, and the approach encourages States to seek assistance from regional and sub-regional bodies.[31]

International Criminal Court and State-centrism

The pre-Rome Conference on the establishment of the ICC adopted strict admissibility tests to counter unwarranted ICC intrusion into national justice systems.[32] Cases were deemed inadmissible before the Court if a State with jurisdiction demonstrated that it had investigated a case and had valid reasons not to proceed (a position retained in the Rome Statute).[33] The ICC would also reject cases where a State was in the process of investigation.[34] The latter was a strong state-centric approach and during its ICC era, Kenya urged the Court to qualify preparatory steps as part of the investigative process.[35] The Court rejected such a broad interpretation of an investigation and restricted the scope to actual and concrete investigations.[36] The Court further emphasised in the *Simone Gbagbo* case that ˙the presumption in favour of domestic jurisdictions only applies where it has been shown that there are (or have been) investigations and/or prosecutions at the national level.'[37] In the Court's view, investigations should not be ˙sparse and disparate,'[38] should be ˙specific and clear,'[39] and should be ˙tangible, concrete and progressive'.[40] These standards were maintained in the *Saif Al-Islam Gaddafi* case (*Gaddafi* case).[41]

The Court has ˙observer status˙ and watches, with subdued interest, the extent to which a State would exercise discretion over crimes. States are the main drivers of dispute settlement in their jurisdictions, with the ICC and other external actors having a supporting role. Notwithstanding that the Office of the Prosecutor (OTP) has made some

31 Allan Shine, 'AU moves to Take Over Hague Cases' 9 May 2012 <http://www.nation.co.ke/News/politics/AU-moves-to-take-over-Hague-cases-/-/-1064/1402884-/xqolwr-/index.hmtl> accessed 8 May 2020.

32 William Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2011) 192.

33 ibid.

34 Schabas (n 32).

35 *Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011, Prosecutor v Muthaura et al* ICC/01/09-02/11 OA (30 August 2011).

36 ibid para 49, where the Court stated that an investigation must be accompanied by detailed information on the concrete and ongoing steps taken by a state.

37 *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', Prosecutor v Simone Gbagbo* ICC/02/11-01/12 OA (27 May 2015) para 59.

38 ibid para 82.

39 ibid para 89.

40 ibid para 82.

41 Gaddafi (n 18) para 95.

progress to preserve the supremacy of States,[42] the last decade has raised questions as to whether the OTP policies are adequate for States to exercise their discretions as envisaged in the Rome Statute. Regardless of whether the intervention in State affairs is made by a regional or international forum, the intervention must strive to keep friction between a State and the intervening forum at minimal level. Where a thin line exists between the admissibility and inadmissibility of a case, a presumption should be made in favour of a domestic jurisdiction. The use of any external mechanism—whether ICC or AU, should be of benefit at the domestic level. For Viljoen:

> A regional human rights system should not be made into a fetish; and its accomplishments should not be viewed in isolation from the domestic level where its actual impact is sought. It is at the domestic level that the interpretation and implementation of the Charter and other human rights instruments have to be felt and resonate.[43]

Following its inception, the Court had opportunities to entrench a strong state-centric practice. Prior to the referral by the Democratic Republic of Congo (DRC),[44] it had sought a local solution. In December 2002, the Inter-Congolese Dialogue (consisting of representatives from the government, civil society and opposition parties, among others) recommended the creation of an ad hoc tribunal by the UNSC to address human rights violations that occurred after independence.[45] The domestic initiative projected the coverage of a larger scope of crimes than the ICC (from 30 June 1960 as opposed to 1 July 2002). Realistically, the DRC was not expected to address every single case over such a broad time frame. Kenya also projected a broader coverage of violations from its independence in 1963 as opposed to the ICC scope that covered events of the post-election violence of 2007 to 2008.[46] The DRC and Kenyan scenarios demonstrate that the resolution of violations in most African states appreciates the historical context and use of different forms of justice to prevent the recurrence of violations in future and to ensure a harmonious society.

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42 See for example The Office of the Prosecutor, ʻPolicy Paper on the Interests of Justiceʼ (2007) <http://www.icc-cpi.int/otp/otp_docs.html> accessed 2 March 2021; The Office of the Prosecutor ʻStrategic Plan 2019-2021ʼ <http://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf> accessed 2 March 2021.

43 Frans Viljoen, ‘From a Cat into a Lion? An Overview of the Progress and Challenges of the African Human Rights System at the African Commission’s 25 Year Mark’ (2013) 17 LDD 314.

44 Democratic Republic of Congo, ‘Letter of Referral from President Joseph Kabila to Prosecutor of the ICC’ (3 March 2004) <http://www.issafrica.org/uploads/M164APPEND1.PDF> accessed 4 May 2020.

45 The establishment of an International Criminal Court of the Global and Inclusive Agreement on Transition in the DRC (Res ICD/CPR/05 2002).

46 Odande Basil, ʻWhen Survivors Heal, they Heal the Nation: How Kenya’s Truth Commission is Mending the Country’s Woundsʼ (2020) <http://www.usfca.edu/journal/globus/winter-2020-5> accessed 2 March 2021.

In the case of the DRC, African states appointed a facilitator to oversee the negotiations,[47] making Africa a contributor to the DRC peace negotiations. Refusal by the United Nations General Assembly (UNGA) to endorse the recommendation for an ad hoc tribunal because of the cost, ˊforcedˋ the DRC to opt for the ICC.[48] While the move by the UNGA was understandable, it deprived the DRC of a locally-situated tribunal, which could combine domestic law, domestic forms of justice, regional perspectives and international law. Unfortunately, the DRC and AU could not proceed without external assistance. Funding for peace, security and justice initiatives from within Africa remains limited at this stage.[49] It is hoped that innovations such as the AU Peace Fund will one day mitigate this shortcoming.[50] After the referral, the DRC maintained the position of balancing justice and peace, hence its initial reluctance to arrest and surrender Bosco Ntaganda to the ICC.[51] An intervention by the ICC often goes along with different charges being identified by the Court as opposed to a State.[52] The practice of the ICC remains embedded in the identification of specific persons and to a large extent specific crimes.[53] The ICC uses the *same person and same conduct* test.[54] The test requires a State to investigate and prosecute the person identified by the ICC and for the same conduct for it to retain jurisdiction. The test pays little attention that the charges by a State may be more serious and likely to attract a harsher sentence. The Court charged Lubanga with the enlistment, conscription and use of child soldiers,[55] while the DRC charged him with crimes against humanity, genocide, murder, illegal

47 See Inter-Congolese Dialogue, ˊPolitical Negotiations on the Peace Processes and on Transition in the DRC: Global and Inclusive Agreement on Transition in the Democratic Republic of Congoˋ <http://www.ucdpged.uu.se/peaceagreements/fulltext/DRC%2020021216.pdf> accessed 6 May 2020.

48 Shirambere Philippe Tunamsifu, ˊTransitional Justice and Peacebuilding in the Democratic Republic of Congoˋ (2015) 65 African J on Conflict Resolution 15.

49 See Giulia Paravicini, ˊAfrican Union Delays Plan to Start Using Fund for Security Operationsˋ (11 February 2020) <http://www.reuters.com/article/us-africanunion-summit-idUSKBN2050D9> accessed 2 March 2021; see also Report of the International Crisis Group, ˊThe Price of Peace: Securing UN Financing for AU Peace Operationsˋ (31 January 2020) <http://www.crisisgroup.org/africa/286-price-peace-securing-un-financing-au-peace-operations> accessed 2 March 2021.

50 <http://www.au.int/en/peace-fund> accessed on 2 March 2021.

51 Shirambere Philippe Tunamsifu, ˊThe Challenges of the Obligation to Co-operate between the ICC and the DR Congo: The Case of the Fourth Arrest Warrant Against General Bosco Ntagandaˋ (2012) 1 The A38 JIL 105–125.

52 Michael Newton, 'The Complementarity Conundrum: Are We Watching Evolution or Evisceration' (2010) 8 Santa Clara JIL 154.

53 *Application for leave to appeal, Prosecutor v Gadaffi & Al-Senussi* ICC/01/11-01/11 (12 February 2013) para 26, mentioning the requirement for a ˊsubstantiallyˋ the same conduct.

54 See for example *Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute Prosecutor v Muthaura et al* ICC/01/09-02/11 (30 May 2011) para 51.

55 *Decision on the issuance of warrant of arrest, Prosecutor v Lubanga* ICC/01/04-01/06-8 (10 February 2006).

detention and torture.[56] The DRC can be said to have charged him with more serious offences when it arrested him in March 2005. The Court missed an opportunity not only to encourage national proceedings, but also to interpret the *same person* and *same conduct* test more broadly. The likelihood that an accused person will get a more severe penalty for the offences identified by a national jurisdiction should satisfy the requirements of international law.[57] When the Court settles for less serious offences, its conduct is tantamount to shielding an accused from ˊsomeˋ responsibility.

In the *Bemba et al* case, the Appeals Chamber of the ICC viewed the sentences imposed on the accused to be ˊmanifestly inadequate and disproportionateˋ,[58] and ordered the Trial Chamber to review and impose new sentences.[59] In the *Aleksovski* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that the Trial Chamber ˊgave insufficient weight to the conduct of the accused and failed to treat his position as commander as an aggravating feature.ˋ[60] There are good examples of national and regional jurisdictions imposing severe penalties for international crimes. The DRC sentenced Ntabo Ntaberi Sheka to life imprisonment for crimes against humanity.[61] Habré was found guilty of same and was also sentenced to life imprisonment by the Extraordinary African Chambers (established by the AU and Senegal).[62] The *Habré* case indicates that complementarity will come under scrutiny again, once the African Court starts prosecuting international crimes. Cases and sentences before the ICC and African Court will continue to be debated because of grey areas regarding the tests used by the ICC to determine admissibility.

The *Gaddafi* case partly settled the issue of national crimes being prosecuted as international crimes.[63] In *casu*, Libya stated that its investigation was ˊmuch broader than the ICCˋs investigationˋ.[64] The Appeals Chamber of the ICC maintained the phrase

56 ˊDemocratic Republic of Congo and the International Criminal Court Hearing to Confirm the Charges Against Thomas Lubanga Dyiloˋ <http://www.hrw.org/legacy/backgrounder/ij/lubangaqna1106/> accessed 25 February 2021.

57 ibid.

58 *Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Decision on Sentence pursuant to Article 76 of the Statute' Prosecutor v Bemba et al* ICC/01/05-01/13 A6 A7 A8 A9 (8 March 2018) para 89.

59 ibid paras 361–362.

60 *Prosecutor v Aleksovski IT-9514/1-A* (24 March 2000) para 187.

61 Editorial Staff, ˊNtabo Ntaberi: DR Congo Militia Jailed for Crimes Against Humanityˋ (*BBC News*, 23 November 2020) <http://www.bbc.com/news/world-africa-55052520> accessed 19 February 2021.

62 Ved Nanda, ˊSenegalˋs Habré Sentence Sends a Strong Messageˋ (12 June 2016) <http://www.djilp.org/senegals-habre-sentence-sends-a-strong-message/> accessed 24 February 2021.

63 Gaddafi (n 18) para 63.

64 *Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, Prosecutor v Al-Islam Gaddafi & Al-Senussi* ICC/01/11-01/11-258-Red2 (13 January 2013) para 63.

ʻsubstantially the same conductʼ[65] that was used in the *Ruto* Admissibility Judgment.[66] It proceeded to define the phrase to encompass the extent to which there must be an ʻoverlap, or sameness, in the investigation of the conduct described in the incidents under investigation which is imputed to the suspectʼ, and that such determination ʻwill depend upon the facts of a specific caseʼ.[67] The Appeals Chamber stated that ʻdiscrete aspectsʼ of the State case are insufficient to demonstrate that the State is investigating the same case as that before the Court.[68] It further rejected the intention of Libya to carry out a full investigation at a later stage.[69] It held that ʻin assessing admissibility, what is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating.ʼ[70] Therefore, the *Gaddafi* case shows that as much as the ICC acknowledges the investigation or prosecution of national crimes by a State, the restrictive definition of a ʻsame caseʼ by the ICC makes it difficult for a State to prove a jurisdictional conflict between the Court and a State. The strict standard required for the Court to accept a national crime *in lieu* of an international one, somehow renders the determination by the Court in the *Gaddafi* case nugatory. In most cases States may struggle to convince the Court of the existence of the same case and same conduct.

In future, the same-case-and-same-conduct debate may be threefold, involving the ICC, the African Court and a State. Which forum should be deemed appropriate to adjudicate over the case? It is the author's view that what works better for the affected State should prevail. A case in point would be the crime of aggression, that is of concern for both the ICC and Africa. In certain circumstances, the crime may not be a case before the ICC but will be one before the African Court. The Rome Statute definition of aggression does not qualify material support to a warring party as an act of aggression,[71] while the Malabo Protocol does.[72] Thus, the Malabo Protocol provides a stronger prevention system than the Rome Statute and provides for possible extraterritorial jurisdiction over the crime. In addition, the Malabo Protocol defines the crime of aggression to include non-state actors.[73] In a scenario where the African Court has jurisdiction over the crime of aggression, Africa, being a continent with armed conflicts, in which non-state actors

65 Gaddafi (n 18) paras 60–63.

66 *Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Prosecutor v Ruto et al* ICC/01/09-01/11 OA (20 September 2011) para 40.

67 ibid para 71.

68 Gaddafi (n 18) paras 75–76.

69 Gaddafi (n 18) para 77.

70 Gaddafi (n 18) para 85.

71 (n 2) art 8*bis*.

72 (n 9) art 28M.

73 (n 9) 28M(B).

are heavily involved either as fighters or sponsors to those actors, would see its member states relying on the African Court to prosecute the crime.

Africa and State-centrism

Africa has played a significant role in the development of human rights-oriented legislation at regional and international levels. The continent's contribution often manifested itself at crucial intervals before and after the establishment of the ICC. The continent has, among other initiatives, adopted the 2000 Constitutive Act of the African Union (Constitutive Act),[74] actively participated in the discussions leading to the establishment of the ICC,[75] and adopted the 1998 Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights (Protocol to the African Charter). These African instruments and interventions have been consistent in the balancing of justice and peace.[76] They also reinforce the 1981 African Charter on Human and Peoples' Rights (African Charter)—the main instrument on human rights on the continent—that explicitly requires a conceptualisation of human rights that constitute a broad manifestation of African values.[77] The ICC should consider this position when incorporating the emerging African view in its operations. The Prosecutor hinted in 2016 that the ICC as a court of last resort is not necessarily opposed to proposals for an African Court.[78] The ICC has also considered the realities of transitional societies. In the *Gaddafi* case, the Court acknowledged that such societies pose impediments to State investigations.[79] Nevertheless, the Court concentrated on the time required by transitional societies to prove the inadmissibility of a case rather than deliberating on whether such societies should be allowed to explore judicial, non-judicial and regional solutions to internal problems.[80] In the African context, issues of transitional justice are likely to arise frequently in the ICC-states-AU complementarity model.

In creating a complementarity approach, Africa can draw inspiration from the relative success of hybrid instruments such as the Special Court for Sierra Leone (SCSL) and the Extraordinary African Chambers, to augment Africa's readiness to deliver international criminal justice.[81] Although the continental contribution to these mechanisms is debatable, if not insignificant, the fact that they were established in

74 The Constitutive Act entered into force on 26 May 2001 while the Rome Statute entered into force on 1 July 2002.

75 Du Plessis (n 28) 1.

76 (n 4).

77 African Charter on Human and Peoples' Rights (CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 1986) Preamble.

78 Carl Schmitt, '13 Years, 1 Billion Dollars, 2 Convictions: Is the International Criminal Court Worth it?' (27 January 2016) <http://www.dw.com/en/13-years-1 -billion-dollars-2-convictions-is-the-international-criminal-court-worth-it/a-19006069> accessed 19 April 2020.

79 Gaddafi (n 18) para 165.

80 Gaddafi (n 18) paras 173–174.

81 Clifford (n 7) 19–20.

Africa with input from African states serves as inspiration that Africa has an important role to play in the development of international criminal law. The continent can use these examples to argue that it has made some progress to ˊAfricaniseˋ international law, in which an inter-state judiciary system is possible.[82] Riding on these, Africa can explore and pursue solutions available on the continent and work towards increasing the ratification status of African instruments on international criminal law. The current low ratification status of the Malabo Protocol must not be perceived as Africa's unpreparedness. Rather, it must be understood within the context of the slow progress in the operationalisation of other equally important initiatives in Africa such as the deployment of the African Standby Force.[83] Africa understands the law of the 'big picture' that demands a clear understanding of the past and the investigation of the abuses according to the context in which they were committed. The African perspective is to consider these factors as a guidance on the appropriate approach to international criminal justice.[84] Bearing in mind that initiatives such as the SCSL had shortcomings, Africa should draw lessons from them and strengthen its future approach in using state-centric and complementarity concepts.

Africa and the United Nations System Espoused in the Rome Statute

Interpretative Value of the Preamble

The Preamble of the Rome Statute is one of the interpretative tools used by the Court to dissect the provisions of the Statute itself.[85] The main object and purpose of the Rome Statute is to end impunity by using domestic courts as preferred mechanisms.[86] The Preamble provides four essential features that anchor the complementary system of the ICC: state-centric prosecutions; enhanced scope for national prosecutions; subordination of international criminal jurisdiction to national criminal jurisdictions; and the pledge by States to undertake prosecutions.[87] States enjoy a broad discretion for national prosecutions under the Rome Statute.[88] Delegates at the Rome Conference preferred the term ˊinternational crimesˋ over ˊmost serious or grave crimesˋ in the explanation of the duty of States to prosecute perpetrators.[89] The terminology permits

82 ibid.

83 The African Standby Force was established in 2003 to intervene in crises on the continent. The Force is yet to be deployed.

84 For a discussion on how such an approach has worked in other contexts, see for example Naomi Roht-Arriaza, 'The Need for Moral Reconstruction in the Wake of Past Human Rights Violations: An Interview with Josè Valaquett' in Carla Hesse and Robert Post (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia* (Iowa Research Online 1999) 200.

85 Vienna Convention on the Law of Treaties (1155 1980) art 31.

86 (n 2) Preamble paras 5 and 6.

87 (n 2) Preamble paras 4, 6, 10 and 11.

88 Otto Triffterer, 'Preliminary Remarks: The Permanent International Criminal Court-Ideal and Reality' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden 1999) 11.

89 ibid.

flexibility to prosecute international crimes beyond the ones which were eventually placed under the Court.[90] Arguably, the drafters of the Rome Statute envisaged the prosecution of these additional crimes through mechanisms other than the ICC. The drafters of the Malabo Protocol included crimes within and beyond the scope of the ICC,[91] making Africa a potential important player in the complementarity project of the ICC.

Regionalism in the United Nations System

The Rome Statute defines two prominent institutions with primacy, namely, States (in prosecuting international crimes)[92] and the UNSC (in determining situations which threaten international peace and security).[93] The international community acknowledge that States require assistance from regional organisations and that regional actors can assist States to fulfill their obligations under international law. The ICC is a three-fold organisation in so far as it is an independent institution, complements national jurisdictions and operates within the UN system.[94] In akin to the UN system, the Rome Statute strives to prevent serious crimes, as these result in global instability and insecurity.[95] The Court allows the UNSC to determine interventions premised on the maintenance of international peace and security.[96] In terms of the UN Charter, the UN works with States and regional institutions for purposes of international peace and security.[97] The UN Charter encourages States to employ existing regional institutions before they refer disputes to the UNSC,[98] the reasoning being that regional institutions better understand the context and culture of their member states.[99]

In an age of armed conflict and instability, regional organisations are increasingly contributing to international peace, security and order.[100] The African system allows participatory processes that involve States in decision-making.[101] Africa's call for the

90 ibid.
91 (n 9) art 28A.
92 (n 2) arts 10 and 17.
93 (n 2) art 16.
94 (n 2) Preamble paras 7–10.
95 (n 2) Preamble paras 3 and 5.
96 (n 2) art 15*bis* (6) and Preamble paras 7–9.
97 (n 2) art 1.
98 (n 22 above) art 52(2).
99 George William Mugwanya, 'Realizing Universal Human Rights Norms Through Regional Human Rights Mechanisms: Reinvigorating the African system' (1999) 10 Indiana Intl and Comp LR 42.
100 Fred Morrison, 'The Role of Regional Organizations in the Enforcement of International Law' in Jost Delbrück (ed), *Allocation of Law Enforcement Authority in the International System* (Martinus Nijhoff 1995) 43.
100 Bernard Ntahiraja, 'The Present and Future of Universal Jurisdiction in Africa: Lessons from the His sène Habré Case' in Hermanus van der Merwe and Gerhard Kemp (eds), *International Criminal Justice in Africa: Issues, Challenges and Prospects* (Konrad Adenauer Stiftung 2015) 14–16.
101 (n 15) art 3.

UNGA to decide on deferrals alongside the UNSC is a clear indication that it does not regard the UNSC as having a monopoly on issues of international peace and security.[102] At any given time more than one forum may be considering similar international law issues. While the invocation of UNSC powers does not stop the Prosecutor from exercising discretion, the UNSC intervention can control the timing and sustainability of prosecutorial activities.[103] The intervention implies an acceptance of the Rome Statute that a State or group of States may define political priorities of States at a given time, analyse the interface between justice and peace, and define the extent and circumstances in which the Court is requested to intervene.[104] The connection between justice, peace and democracy are widely discussed by scholars and the UN,[105] rendering justice and politics mutually reinforcing.[106]

Reinvigorating a Multilayered Approach

Complementarity within African Institutions

The multi-faceted nature of African institutions positions them to deal with impunity while promoting peace and harmony in Africa.[107] These institutions give States primacy with secondary forums only intervening after the States have exhausted their options.[108] The African Charter ensures that States' discretion is respected, by preferring amicable settlement of disputes between States before resorting to other options.[109] A cautious and patient dialogue with States is the norm in the African institutions.[110] There is also cooperation between different institutions. For example, the African Commission may send cases to the African Court for determination.[111] While these institutions have

102 Dapo Akande, ˊAddressing the African Union's Proposal to Allow the United Nations General Assembly to Defer ICC Prosecutions' (30 October 2010) <http://www.ejiltalk.org/addressing-the-african-unions-proposal-to-allow-the-un-general-assembly-to-defer-icc-prosecutions/> accessed 16 April 2020.

103 Morten Bergsmo and Jelena Pejic, ˊArticle 15: Prosecutor' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden 2008) 363.

104 ibid 398.

105 See for example Ottilia Maunganidze, ˊInternational Criminal Justice as Integral to Peacebuilding in Africa: Beyond the "Peace v Justice" Conundrum' in Hermanus van der Merwe and Gerhard Kemp, *International Criminal Justice in Africa* (Konrad Adenauer Stiftung 2016) 52.

106 Rodman (n 8).

107 Cecile Aptel and Wambui Mwangi, 'Developments in International Criminal Justice in Africa during 2009' (2010) 10 AHRLJ 291–292.

108 See for example, Grand Bay (Mauritius) Declaration and Plan of Action para 15 (adopted at The First OAU Ministerial Conference on Human Rights on 16 April 1999); and Kigali Declaration para 27 (adopted at the 1st AU Ministerial Conference on Human Rights in Africa meeting on 8 May 2003).

109 Chairman Okoloise, 'Circumventing Obstacles to the Implementation of Recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 AHRLJ 33.

110 ibid.

111 (n 77) arts 2 and 8.

shortcomings and are sometimes criticised for failing to enforce decisions,[112] they have contributed immensely to the promotion and protection of human and peoples' rights on the continent. Like the ICC, the African institutions treasure the capacity of States to carry out their primary obligations in the prosecution of crimes.

Efforts to develop domestic systems are on the increase in Africa in the form of guidance to States, resolutions and legislation development. The case of *Abubakari v United Republic of Tanzania* (*Abubakari* case)[113] is illustrative in this regard where the applicant alleged a violation of his right to a fair trial by a domestic court on a charge of armed robbery. On appeal, the African Court not only ruled that a violation occurred but also asserted its power to evaluate procedures and decisions of national courts to ensure consistency with international standards and the African Charter.[114] States are expected to align domestic laws with treaty obligations,[115] and the African Court can issue directives in this regard.

Rationale for a Broad Approach

The Preamble of the Rome Statute states that the ICC intends to contribute to the prevention of international crimes.[116] The use of the word 'contribute' denotes that the ICC does not act in isolation in addressing international crimes. The word also indicates that the Court should welcome any mechanism that leads to the prevention of international crimes. Beyond the frontline objectives of ending impunity and advocacy for international criminal justice, the Rome Statute is mindful of the need to preserve cohesion among States.[117] Thus, the Court is designed to operate in an international relations arena. This arena explores judicial and non-judicial means to address international crimes and the ICC's support may include political and diplomatic backing to national authorities.[118] The Court was created out of a political compromise and it would be naïve for it to divorce itself from political considerations.[119]

112 Okoloise (n 109) 42–46.

113 *Mohamed Abubakari v United Republic of Tanzania,* Application 007/2013 (3 June 2016).

114 *Mohamed Abubakari v United Republic of Tanzania,* Application 002/2017 (28 September 2017) para 35.

115 Nyameko Barney Pityana, 'Reflections on the African Court on Human and Peoples' Rights' (2004) 4 AHRLJ 126.

116 (n 2) Preamble para 5.

117 (n 2) Preamble paras 1 and 7.

118 Luis Moreno-Ocampo, 'Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, Pursuant to UNSCR 1593' (2005) 5 June 2008 <http://www.icc-cpi.int/NR/rdonlyres/71FC0D56-11FC-41B9-BF39-33FC54F2C2A1/223633/ICCOTPST20080605ENG6.pdf> accessed 15 May 2020.

119 Mohamed El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 Michigan JIL 906.

The Court has been described as a multifaceted body which targets individuals, leaves room for restorative justice, is mindful of the justice aspirations of the public, a contributor to stability and a protector of human dignity.[120] The African agenda advocates for the law to be understood, criticised and developed in a societal context.[121] Thus, a normative framework for a justice- and peace-based approach to complementarity already exists. The Court cannot afford to be rigid if it wishes to be understood better. Law is no longer an autonomous discipline presenting itself as an end but a socially engaged and controlled discipline.[122]

The African system consists of clustered mechanisms that continue to develop despite the establishment of the ICC.[123] It is a system that the ICC has under-utilised and one that the Court needs to unlock for the attainment of peace, stability and justice. The system is built on historical influences, present realities, cultural norms and the search for solutions.[124] Africa supported the creation of the ICC partly because of atrocities and impunity on the continent.[125] The present environment of conflict in Africa requires stabilisation, conflict resolution and reconciliation among ethnic and religious groups.[126] Where Africa failed to get the expected international support in the prosecution of international crimes, such as in the case of the crime of apartheid, the continent has relied on national legislation and the universal jurisdiction of States.[127] For this reason, Africa may be of the view that it cannot rely solely on the ICC to provide a satisfactory application of complementarity.

Tackling the ˈNon-negotiablesˈ in International Criminal Court–African Union Relationship

This section uses the tension between the ICC and the AU on the immunity of heads of State and government to demonstrate that a middle-of-the road path could be found on matters where agreement might appear unimaginable. The ICC and the AU agree that impunity is prohibited and that immunity at some stage is immaterial. What remains is a consensus that some form of ˈderogationˈ may be allowed for a limited time, in the

120 Aptel and Mwangi (n 107).
121 ibid.
122 Richard Posner, 'The Decline of Law as an Autonomous Discipline' (1987) Harvard LR 762–763.
123 Tiba (n 1) 537–539.
124 Cornelius Murphy, 'Some Reflections upon Theories of International Law' (1970) 3 Columbia LR 447.
125 See Tiyanjana Maluwa, 'OAU Secretariat Statement at the 6th Plenary' Official records of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of the International Criminal Court (17 June 1998) UN doc. A/CONF 183.13 (Vol II) para 116.
126 Steve Odero, 'Politics of International Criminal Justice: the ICC's arrest warrant for Al Bashir and the African Union's Neo-Colonial Conspirator Thesis' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (PULP 2011) 153.
127 John Dugard, 'International Convention on the Suppression and Punishment of the Crime of Apartheid' (2008) <http://www.legal.un.org/avl/pdf/ha/cspsa/cspca_e.pdf> accessed 9 April 2020.

interests of peace and uninterrupted functioning of the government. Since this compromise may encourage leaders not to relinquish power, the AU must expeditiously enact and/or enforce legislation on unconstitutional changes of government[128] and deal decisively with unwarranted extensions of presidential terms. On the other hand, States such as Eswatini and Morocco have heads of States who can constitutionally occupy office until death and as such can realistically not be brought before any court.

The author is of the view that the above complexities may be resolved by reading the issue of immunities through the lens of the concept of 'peoples' enshrined in the African legal system. In terms of the Constitutive Act, peoples have an enhanced participation in affairs which affect them, and the AU is mandated to pursue a collective action to protect their rights and advance democratic principles.[129] Since time immemorial, the governance systems of some African tribes reflect elements of human rights and democracy built on bestowing power to the people. For example, there is a Ndebele proverb that says *inkosi yinkosi ngabantu* (a king is a king because of the people). By revisiting and applying such profound concepts that identify people as the source of power and as 'principals' in governance systems, the scope of accountability is enlarged to counter absolute immunity for those in power. If the peoples of Africa are given more space in international criminal justice, they may have a say on the fate of their king or leader in cases of human rights violations.

A Desired Co-operative Model

Co-operation Between the International Criminal Court and States

The outcome of the principle of complementarity is co-operation. The enforcement of international criminal law largely depends on co-operation between the Court and States. An international law system like the ICC is prone to challenges of enforcement, co-operation and implementation.[130] Schabas views the complementarity regime in the ICC system as expressed in theory but not carried out in practice.[131] While it is desirable for the Court and States to reinforce co-operative synergies, there is a spirit of competition between the two.[132] This friction threatens the relevance of complementarity and in the absence of clarity the concept may be degraded in the future to nothing more than a misnomer or utopia.

128 (n 9) art 28 E; See also (n 15) art 4(p).
129 (n 15) arts 4(c); 4(m); 3(g) and Preamble para 4.
130 Dieter Fleck, 'Enforcement of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (OUP 2008) 675.
131 Schabas (n 32) 190–191.
132 ibid.

When a State is unwilling to prosecute, it is likely to be unwilling to co-operate with the ICC.[133] A strong framework of co-operation that is mutually beneficial is therefore necessary. Such a framework cannot be developed without a compromise of balancing States' obligations to a regional organisation and the ICC. The indictment of Al Bashir by the ICC and the controversy after his arrest is illustrative that African states welcome AU leadership on international and continental affairs. Although the controversy started before the AU got involved, it is noteworthy that once the AU intervened, obligations to the AU became the mainstay for refusal by African states to comply with requests for his arrest.[134] South Africa even contemplated withdrawal from the Rome Statute in line with the AU's resolution that the arrest warrant threatened peace, security and stability in Sudan.[135] Therefore, a healthy and well-defined co-operative model between the ICC and AU will enhance co-operation by African states under regional and sub-regional blocs.

International Criminal Court and Regional Organisations

Since 2009, African states have examined the implications of the African Court with powers to prosecute international crimes[136] and the possibility of regional influence in the processes of the ICC.[137] However, at least at this stage, the ICC appears unprepared to endorse the view that other actors can complement States in the prosecution of international crimes. Gallant believes that regional courts can fill the gaps created by the restrictive operation of the ICC.[138] Other scholars oppose regional mechanisms because the African Court has, since its establishment, failed to execute its mandate in other areas of jurisdiction.[139] Opponents of regional mechanisms further argue that the best option for Africa at the moment is to encourage States to co-operate with the ICC.[140] As persuasive as the opposition is, it can be argued that in a developing system such as the African Court, it would be fair to avoid conclusive judgments before the system

133 Kristina Miskowiak, *The International Criminal Court: Consent, Complementarity and Cooperation* (Djóf Publishing 2000) 51.

134 See AU, 'Decision on the progress report of the Commission on the implementation of the Assembly decisions on the International Criminal Court' Assembly/AU/Dec.397(XVIII) para 8; See also O Imoedemhe, 'Unpacking the Tension Between the African Union and the International Criminal Court: The Way Forward' (2015) 74 African J of Intl and Comp L 78–79.

135 'South Africa's Withdrawal from the Rome Statute of the International Criminal Court' <http://www.dirco.gov.za/milan_italy/newsandevents/rome_statute> accessed 17 April 2020.

136 *Decision of the African Union on the implementation of the Assembly decision on the abuse of the principle of universal jurisdiction* (4 February 2009) para 9.

137 *Decision of the African Union on the meeting of African states parties to the Rome Statute of the International Criminal Court* (12 July 2009) para 8.

138 Kenneth Gallant, 'Africa and Beyond: Should the International Criminal Court be the Sole International Organ of Criminal Justice? (2012) *Bowen School of Law Working Paper* <http://www.ssrn.com/abstract=2044876> accessed 6 April 2020.

139 (n 4) 13.

140 Vincent Orlu Nmehielle, 'Saddling the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient' (2014) 7 African J of Legal Studies 37–41.

fully matures and to consider that the ICC itself is confronting African accusations. Some of these are aimed at encouraging the Court to reform rather than destroy it.

African states anticipate co-operation between the ICC and African mechanisms in future. Statements by the AU point to the anticipated co-operation,[141] another sign that Africa is anticipating a relationship rather than a confrontation with the ICC. The ICC should modify its co-operative model in view of the imminent entrance of the African Court and other non-judicial African mechanisms into the complementarity arena. However, a jurisdictional conflict is unavoidable with the cross-cutting mandates of these mechanisms. The case of Muammar Gaddafi demonstrated that the AU Assembly, although ʻdeeply concernedʼ with the situation in Libya imposed a limit on the cooperation requested by the ICC.[142] The AU member states refused to cooperate in an arrest that was an affront to immunity of a head of State, peace and reconciliation in Libya.[143] While it will be a mammoth task in the foreseeable future to reconcile legal and political considerations in the ICC system, the reconciliation process must start now and the experience of the AU in this regard should not be underestimated. As the former judge of ICTY and ICTR, Mandiaye Niang concedes, the friction in the justice-politics interface should be resolved:

> The African Union, despite its current limitations, is effectively involved in ending violence and building peace in every African hotspot. The African Regional entities like the Economic Community of West African States, the Southern African Development Community and the like are doing pretty much the same. There should be a way to make these institutions play a role in linking the political and judicial agenda in Africa or at least in avoiding a major clash between the two. Some may be reluctant to accept this. It is not clear to the Author how this could be done, and the Author confesses that he is not even sure that it would work, but do we have a choice not to try? Failing to try, or having not tried enough, may have fuelled part of the current resentment. This, in turn has led to singlehanded initiatives that aim at reversing part of the progress made in building or reinforcing international criminal law.[144]

Niangʼs sentiments reveal that Africa has mechanisms at the regional and sub-regional levels for use by States for justice and peace initiatives in their territories. These mechanisms should be strengthened and have a potential to bridge the divide between justice and peace. The solution to dilemmas surrounding international criminal law

141 See for example ʻAssembly of the Union Thirty Second Ordinary Session, Addis Ababa, Ethiopiaʼ (10–11 February 2019) para 2 <http://www.au.int/sites/default/files/decisions/36461-assembly_au_dec_713_-_748_xxxii_e.pdf> accessed 21 April 2020.

142 African Union Press Release, ʻThe African Union Deeply Concerned About the Situation in Libyaʼ (23 February 2011) <http://www.au.int/sites/default/files/pressreleases/24189-pr-au_deeply_concerned_about_the_situation_in_libya.pdf> accessed 3 March 2021.

143 See for example Assembly/AU/Dec.419 (xix) para 4, highlighting the same approach taken by the AU Assembly in the case of Kenya.

144 Mandiaye Niang, ʻAfrica and the Legitimacy of the ICC in Questionʼ (2017) 17 Intl Crim LR 621.

cannot be left to the ICC alone. Concerted efforts should be made to reinforce the relationship of this body of law with the AU and African states assuming leadership in advancing an African contribution.

Encouragement from Best Practices

The initial policy of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) was based on the position of the person, serious violations, policy and practical considerations.[145] The ICTY and ICTR considered the importance of inter-ethnic reconciliation and regional equity in the case selection process by not jeopardising them.[146] The strategy of the ICTY and ICTR was later revised to implement the completion strategy that required more deferrals to States under rule 11*bis*.[147] With the change of strategy, the ICTR co-operated with Rwanda and the African Commission in the finalisation of its cases. In the opinion of the ICTR, the African Commission possessed requisite competence to monitor trials prosecuted by Rwanda.[148] In this regard, the ICTR assisted the African Commission in monitoring guidelines as demonstrated in the *Prosecutor v Uwinkindi* (*Uwinkindi* referral).[149] It is submitted that the ICTR created a co-operative model where a State, international criminal tribunal and African regional mechanism have an interest in a case.

The lack of clarity on the hierarchical order between the Court and regional mechanisms could be among the stumbling blocks in the ICC's recognition of these mechanisms as complementarity partners. The Malabo Protocol states that the African Court shall be complementary to the national courts and to the courts of RECs.[150] The Protocol does not expressly provide for complementarity with international courts such as the ICC, although it permits the African Court to seek the co-operation or assistance of regional or international courts, non-state parties or co-operating partners.[151] The hierarchy is in descending order as follows: national courts, RECs, African Court and other forums such as regional or international courts from outside the continent. This shows that African states prefer a more participatory and African-driven approach in the decision-making process before considering the ICC. A forum with better protections and a likelihood to assist domestic initiatives under any circumstance should be preferred.

145 Claudia Angermaier, 'Case Selection and Prioritization Criteria in the Work of the Tribunal of the Former Yugoslavia' in Morten Bergsmo (ed), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Forum for International Criminal and Humanitarian Law 2010) 27–28.

146 Alex Obote-Odora, 'Case Selection and Prioritization Criteria at the International Criminal Tribunal for Rwanda' in Bergsmo (n 145) 56.

147 Kevin Jon Heller, 'Completion Strategies' (2009) <http://www.ipp.ghum.kuleuven.be/publications/heller.pdf> accessed 21 April 2020.

148 See for example *Prosecutor v Yusuf Munyakazi*, Case No ICTR-97-36-R11 *bis* para 30.

149 *Prosecutor v Jean Bosco Uwinkindi*, Case No ICTR-2001-75-R11*bis* paras 209 and 212–213.

150 (n 9) art 46 (H).

151 (n 9) art 46 (L)(3).

The ability of the African Court to interpret the African Charter, the Protocol to the African Charter and other international human rights instruments applicable to AU member states, is a unique feature.[152] This contributes to the progressive development of international criminal law and enables Africa to borrow and refine approaches from elsewhere in developing its international criminal law jurisprudence. Africa also holds the view that justice may be sacrificed or diversified to attain peace.[153] Africa believes that it is faced with particular crimes[154] and that the continent embraces 'Africanisation' in the protection of human and peoples' rights.[155] Consequently, the continent aspires to align its approach to human rights and justice concepts with African values, concerns, traditions, conditions and aspirations.[156] It follows that the prevailing circumstances in Africa have led the continent to invent new ideas relevant to the continent. Other regions have also been influenced by their own circumstances to adopt certain approaches to human rights.[157] The *Kadi v European Court of Justice* case provides good guidance on the resolution of a potential conflict between the norms of regional and international bodies. The case highlights the importance of considering and respecting the laid-down norms of a regional body.[158]

Conclusion

This article shows that the ICC can no longer exist as the sole alternative to national jurisdictions. African states are challenging the dominance of the Court and are advocating for the recognition of regional mechanisms in the sphere of international criminal justice. Where regional mechanisms assist in the endeavour to end impunity for atrocities, the ICC should allow them to complement States. The evolution of legislation in Africa raises hopes for the continent's increased role in the prosecution of international crimes. On the other hand, the legislation must be put into practice to realise the goal of prosecutions at the regional level. The ICC should keep up with legislative and prosecuting forum developments in Africa to avoid an outdated approach

152 See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (2004) art 3.

153 Patrick Wegner, 'The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace-Justice Divide' (CUP 2015) 41.

154 Ademola Abass, ˈHistorical and Political Background to the Malabo Protocolˈ in Gerhard Werle and Moritz Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (T.M.C Asser Press 2017) 18.

155 Wilfred Lajul, ˈJustice and Post-LRA War in Northern Uganda: ICC Versus Acholi Traditional Justice Systemˈ Paper delivered at the European Conference on Ethics, Religion and Philosophy (2016) 3; Theo van Boven, 'The Relationship Between Peoples' Rights and Human Rights in the African Charter' (1986) 7 Human Rights LJ 183.

156 (n 111 above) Preamble.

157 Tatiana Sainati, 'Divided We Fall: How the International Criminal Court Can Promote Compliance with International Law by Working with Regional Courts' (2016) 49 Vanderbilt J of Transnational L 222.

158 *Kadi and Al Barakaat International Foundation v Council and Commission ECHR*, C-404/05 P & C-415/05 P, Judgment of the Grand Chamber (3 September 2008).

to complementarity. Regional mechanisms invigorate the exercise and are guarantors of State discretion. The mechanisms share many commonalities with States in their grouping, thereby narrowing areas of contestation in different and complementary operations. The ICC could enter into a Memorandum of Understanding with Africa to demarcate the boundaries of complementarity in view of a state-centric approach, which encompasses African values and approaches to international criminal justice. Furthermore, the ICC should deal with African states in a regional context, rather than as individual States.

The emergence of African regional mechanisms presents both challenges and opportunities for the ICC, but the promising contribution of African regional mechanisms has failed to sway the ICC to fully embrace them. However, the stage is set for the ICC to consider maintaining relations with African states at a regional level and to develop a policy that incorporates regional mechanisms in the application of complementarity. The predominant view is that State discretion remains the main element in any system that depends on complementarity. This article therefore concludes with the premise that the emerging African approach to the principle of complementarity of the ICC contains germs (figuratively speaking) that should be exterminated but it has the potential to be the gem that international criminal justice needs. Complementarity on the continent will be enhanced when African institutions influence and assist States to craft strategies to resolve internal problems. The operations of the Court would also not be adversely affected if regional mechanisms play the role that the Court would ordinarily play. In the spirit of complementarity, the focus should now be on whether adequate action is taken to address international crimes, rather than on the forum that delivers the required action.

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