
Thesis submitted for the degree of Doctor of Philosophy at the University of Leicester

By

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Abstract

The thesis is an analysis of how the complementarity regime of the Rome Statute of the International Criminal Court (ICC) can be implemented in member states, specifically focusing on African states and Nigeria. Complementarity is the principle which outlines the primacy of national courts to prosecute a defendant unless a state is ‘unwilling’, ‘genuinely unable to act’, assuming the crime is of a ‘sufficient gravity’ for the ICC. This thesis argues that a mutually inclusive interpretation and application of complementarity should be followed because it will increase domestic prosecutions and reduce self-referrals to the ICC.

African states need to have appropriate legal framework in place; implementing legislation and institutional capacity as well as credible judiciaries to investigate and prosecute international crimes. The mutually inclusive interpretation of the principle of complementarity entails that the ICC should provide assistance to states in instituting this framework while being available to fill the gaps until such time as these states meet a defined threshold of institutional preparedness sufficient to acquire domestic prosecution. The minimum complementarity threshold includes proscribing the Rome Statute crimes in domestic criminal law and ensuring the institutional preparedness to conduct complementarity-based prosecution of international crimes. Furthermore, it assists the ICC in ensuring consistency in its interpretation of complementarity.

The thesis uses the policy-oriented approach, to define the relationship between the ICC and states as one of interdependence and to demonstrate that decision makers at the domestic level need to join the international community to implement complementarity. Complementarity has been stipulated in the Rome Statute without a clear and comprehensive framework of how states may implement it. The thesis proposes a framework that will hopefully help member states to overcome this problem.
Dedication

This Thesis is dedicated to the memory of my father, David Obowhodo Ojarikre
Acknowledgements

I appreciate the help and divine guidance of my in-dwelling partner; the Holy Spirit. I am thankful to the Lord God Almighty and my Saviour Jesus Christ who preserved and sustained me, and provided the resources that were necessary to complete this study.

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The completion of this thesis would not have been possible without the support of my father-in-the-Lord Rev Dr Efe Obuke and his family. Thank you for your immense support in every way. Special thanks also to the ‘Amazing Grace’ family. Indeed your prayers, care and assistance were truly amazing. Thank you all. I am also grateful for the encouragements from the ‘GPC’ and the ‘RLC’ families both in Port-Harcourt, Benin City and Lagos, Nigeria.

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Declaration

Chapter Four ‘Unpacking the Tension between the African Union (AU) and the International Criminal Court (ICC): The Way Forward’ has been accepted for publication in the *African Journal of International and Comparative Law* forthcoming edition.
# Table of Contents

Abstract....................................................................................................................................................... ii  
Dedication...................................................................................................................................................... iii  
Acknowledgements......................................................................................................................................... iv  
Declaration....................................................................................................................................................... v  
Table of Contents.......................................................................................................................................... vi  
Table of Abbreviations................................................................................................................................. x  

**Introduction: National Implementation of the Complementarity Regime of the Rome Statute: Obligations and Challenges for Domestic Legislation with Nigeria as a Case Study.**

0.1 Contextual Background .......................................................................................................................... 1  
0.2 Justification of the Study on Nigeria...................................................................................................... 6  
0.3 Research Hypothesis/Questions: ........................................................................................................... 9  
0.4 Methodology: Application of the New Haven School ......................................................................... 10  
0.5 Structure of the Thesis .......................................................................................................................... 12

**Chapter One: The Complementarity Regime of the Rome Statute: An Analysis of its Components.**

Chapter Two: National Implementation of the Rome Statute of the International Criminal Court:
Obligations and Challenges for States Parties. ............................................................................................ 13  
Chapter Three: Domestic Prosecutions in Africa under the Complementarity Regime of the Rome Statute: A Practical Approach. .......................................................................................... 14  
Chapter Four: Unpacking the Tension between the African Union and the ICC: The Way Forward ...................................................................................................................................................... 14  
Chapter Five: Institutional Preparedness for the Complementarity Regime: Nigeria as a Case Study ...................................................................................................................................................... 15  

**Chapter One**  
1.1: The Principle of Complementarity ....................................................................................................... 17  
1.1.1:  
1.1.2: ...................................................................................................................................................... 19  
1.2 Evaluating the Twin Concepts of Jurisdiction and Admissibility......................................................... 23  
1.2.1 Admissibility and Trigger Mechanisms for ICC Investigation ....................................................... 29  
1.2.2 Clarifying the Elements of Complementarity ................................................................................... 31  
1.2.3 Evaluating Complementarity Under Articles 18, 19 and 20......................................................... 32  
1.3 Emerging Models of Complementarity .................................................................................................. 33  
1.3.1 Passive Complementarity ................................................................................................................ 33  
1.3.2 Positive Complementarity .............................................................................................................. 34  
1.3.3 Proactive Complementarity ............................................................................................................ 35  
1.3.4 Proactive Complementarity, the African Union and Nigeria .......................................................... 37  
1.4 Conclusion ........................................................................................................................................... 40  
2.1.2:......................................................................................................................................................... 42  
2.2.2:......................................................................................................................................................... 43  
3.1.1:......................................................................................................................................................... 48  
3.1.2:......................................................................................................................................................... 49  
4.1.1:......................................................................................................................................................... 51  
4.1.2:......................................................................................................................................................... 52  
4.1.3:......................................................................................................................................................... 53  
4.1.4:......................................................................................................................................................... 54  
4.1.5:......................................................................................................................................................... 55
Conclusion ................................................................................................................................. 60


2.1 The Rationale for Implementing Legislation ........................................................................... 67
2.2 Cooperation Legislation ........................................................................................................ 77
2.3 Complementarity Legislation ................................................................................................ 84
   2.3.1 The Minimalist Approach .............................................................................................. 87
   2.3.2 The Express Criminalisation Approach ......................................................................... 88
2.4 States’ Implementing Legislation ........................................................................................... 92
   2.4.1 Procedures for South Africa’s Implementing Legislation .................................................. 93
   2.4.2 South Africa’s Complementarity Legislation ................................................................ 95
   2.4.3 South Africa’s Cooperation Legislation ......................................................................... 99

Conclusion ................................................................................................................................ 102

Chapter Three Domestic Prosecutions in Africa under the Complementarity Regime of the Rome Statute: A Practical Approach ........................................................................... 105

   3.1.1 Domestic Prosecution in the Democratic Republic of Congo (DRC) .............................. 114
   3.1.2 Domestic Prosecution in Kenya .................................................................................... 120
   3.1.3 Domestic Prosecution in Sudan .................................................................................... 124
   3.1.4 Domestic Prosecution in the Democratic Republic of Congo (DRC) .............................. 126

3.2 Part II: Complementarity-Based Prosecution in the United Kingdom ................................. 130

3.3 Part III: The differences between Domestic Prosecution and Complementarity-Based Prosecution ......................................................................................................................... 134
   3.3.1 The Differences between International and Domestic Crimes ....................................... 134
   3.3.2 The Transfer of Cases from the ICTR to Rwandan National Courts ............................. 138

Conclusion ................................................................................................................................ 142

Chapter Four Unpacking the Tension between the African Union and the ICC: The Way Forward ................................................................................................................................. 145

4:1 The Politics Behind International Criminal Law ................................................................. 148
   4:1:1 Selectivity ..................................................................................................................... 151
   4:1:2 Is Africa merely a Laboratory or a Scapegoat? .............................................................. 156

4.2 Africa and the ICC ............................................................................................................... 157
   4.2.1 Africa’s Modern Perspective on Peace and Stability ....................................................... 159
   4.2.2 The Case against President Omar Hassan Ahmad Al-Bashir of Sudan ....................... 163

4.3 Unpacking the Tension between the ICC and the AU ......................................................... 166
   4.3.1 Legal Challenges ........................................................................................................ 167
   4.3.2 Political Challenges .................................................................................................... 177
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1</td>
<td>The Nigerian Criminal Justice System</td>
<td>191</td>
</tr>
<tr>
<td>5.1.1</td>
<td>The Criminal Code, the Police and Criminal Investigation in Nigeria</td>
<td>192</td>
</tr>
<tr>
<td>5.1.2</td>
<td>The Role of the Nigerian Prison Service in the Criminal Justice System</td>
<td>197</td>
</tr>
<tr>
<td>5.2</td>
<td>The Nigerian Judiciary and Complementarity</td>
<td>200</td>
</tr>
<tr>
<td>5.2.1</td>
<td>Appointment of Judges in the Nigerian Judiciary: The Need for focused Expertise in the field of International Criminal Law</td>
<td>202</td>
</tr>
<tr>
<td>5.2.2</td>
<td>Professional legal skills and Personal Qualities required in judicial function</td>
<td>204</td>
</tr>
<tr>
<td>5.2.3</td>
<td>Appointments of Judges in Nigeria: Towards a More Representative Judiciary?</td>
<td>206</td>
</tr>
<tr>
<td>5.3</td>
<td>Tackling Corruption: A Strategy for implementing complementarity in Nigeria</td>
<td>211</td>
</tr>
<tr>
<td>5.3.1</td>
<td>Corruption in Nigeria</td>
<td>213</td>
</tr>
<tr>
<td>5.3.2</td>
<td>Corruption in the Nigerian Judiciary</td>
<td>216</td>
</tr>
<tr>
<td>5.3.3</td>
<td>Intimidation and Manipulation of Judges</td>
<td>218</td>
</tr>
</tbody>
</table>

Conclusion

Conclusions and Recommendations: Mutual Inclusivity as a *Sine qua non* to National Implementation of Complementarity and the Future of the International Criminal Court (ICC) | 232 |

6.1 Conclusions | 234 |

6.1.1 The Relevance of a Mutually Inclusive Interpretation and Application of Complementarity | 234 |

6.1.2 Complementarity-based Prosecution at the Domestic level: The New Frontline of International Criminal Justice | 238 |

6.1.3 Institutional Preparedness of States to Prosecute International Crimes | 244 |

6.1.4 Corruption, Unemployment, Poverty and Bad Leadership | 247 |

6.2 Recommendations | 249 |

6.2.1 The Policy-Oriented Perspective and Complementarity | 249 |

6.2.2 Minimum Complementarity Threshold: National Implementation Strategies | 251 |

Bibliography | 259 |

1. Primary Sources | 259 |

(A) International Instruments and Commentaries | 259 |

(B) States’ Laws | 261 |

(c) Cases | 264 |

(D) AU/UN Documents | 269 |

2. Secondary Sources | 270 |

(A) Books | 270
(B)  Chapters in Books ........................................................................................................... 274
(C)  Journal Articles ........................................................................................................... 279
(D)  Online Articles ........................................................................................................... 287
(E)  Conference Papers/Research Papers/Reports ............................................................ 291
(F)  Blogs/Newspapers/Websites ....................................................................................... 298
# Table of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACHPR</td>
<td>African Charter on Human and Peoples’ Rights</td>
</tr>
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<td>AMF/CFT</td>
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<td>Additional Protocol II</td>
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<tr>
<td>App</td>
<td>Appendix</td>
</tr>
<tr>
<td>APRM</td>
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<td>ASF</td>
<td>African Standby Force</td>
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<td>Avocats sans Frontières (Lawyers beyond Borders)</td>
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<td>Assembly of States Party</td>
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<td>CAR</td>
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</tr>
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<td>DRC</td>
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<td>DRT</td>
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<td>ECOWAS</td>
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<td>Other Situation of Violence</td>
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<td>PCIJ</td>
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<td>PRIO</td>
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<td>PSC</td>
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0.1 Contextual Background

International criminal law encompasses the law proscribing international crimes, which includes genocide, war crimes, crimes against humanity and potentially, aggression,¹ and the principles and procedures governing the investigation and prosecution of these crimes.² In an attempt to ensure accountability for such serious crimes, the international community established the International Criminal Court (the ICC or the Court).³ The Rome Statute of the International Criminal Court (the ‘Rome Statute’) adopted at the diplomatic conference in Rome, Italy in 1998,⁴ created the ICC in accordance with the proposition, arguably, that international prosecution is most appropriate for international crimes.⁵

Nevertheless, while the international criminal justice system established under the Rome Statute set up a permanent international institution - the ICC- it also puts the primary responsibility of prosecuting international crimes on states.⁶ This is exemplified by

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¹ Though included in the Rome Statute in article 5(1)(d), the crime of Aggression has only been defined at the first Review Conference of the Rome Statute held in Kampala Uganda May-June 2010. The jurisdiction of the ICC over the crime would be activated in January 2017.
the complementarity regime of the Rome Statute, whereby the ICC assumes jurisdiction to investigate and prosecute only where states are unwilling or genuinely unable to act or where a situation is of exceptional gravity.\(^7\)

The first president of the International Criminal Tribunal for the former Yugoslavia (ICTY), Antonio Cassese, once noted that the ‘the tribunal can be likened to a giant without arms and legs yet it needs artificial limbs to walk and work and these artificial limbs are state authorities’.\(^8\) As it were, the *ad hoc* tribunals had concurrent jurisdictions with domestic courts but had primacy over them.\(^9\) Under the Rome Statute, however, the reverse is the case, as states have primacy of jurisdiction while the ICC is complementary to national jurisdictions.

Thus, the complementarity regime presents several challenges. First, inactivity in conducting genuine domestic prosecutions is diverse and may be linked to inability. There are capacity issues in connection with an absent or ineffective legislative framework for implementation, limited expertise on the part of investigators, prosecutors and judges, and the national judicial system’s lack of resources. Therefore, states may have the will and intent to investigate and prosecute perpetrators of international crimes but may lack the resources, expertise and capacity as well as functioning independent judiciaries. Second, there may be unwillingness on the part of states to conduct genuine domestic prosecutions where there is governmental complicity in the commission of the crimes. This will result in political interference in the judicial system and unwillingness to secure the arrest and surrender of the suspects.

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\(^7\) Rome Statute, Article 17.


In order to overcome some of the practical challenges, it is argued in this thesis that complementarity should be interpreted and applied as a mutually inclusive concept in which both the ICC and states share the responsibility of investigating and prosecuting international crimes. Mutual inclusivity of complementarity further implies that there must be an appropriate legal framework and the institutional capacity to investigate and prosecute international crimes domestically.

This is critical to the emerging international criminal justice system because, by their nature, international crimes often require the direct or indirect participation of a number of individuals in positions of governmental authority. For example, the definition of torture in the Convention Against Torture requires the involvement of a public (government) official as perpetrator or co-perpetrator. In the Rome Statute, torture comes under crimes against humanity and together with other acts that constitute that crime, there is a further requirement that such acts should have been committed ‘in furtherance of a state or organisational policy’. The question then is whether a state or government which is an alleged perpetrator or co-perpetrator can actually prosecute itself. Examples of this scenario are the cases of Sudan and Kenya, which will be examined in this thesis.

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11 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 10 December 1984, Art 1.
12 See Rome Statute, Art 7(1)(f).
13 See Rome Statute, Art 7(2)(a).
15 See The Prosecutor v. Uhuru Muigai Kenyatta ICC-01/09-02/11 and The Prosecutor v. William Samoei Ruto and Joshua Arap Sang ICC-01/09-01/11 President Uhuru Muigai Kenyatta and Vice President William Ruto of the Republic of Kenya are currently standing trial before the ICC for their alleged role in the 2007 post-election violence that resulted in the death of over 1,000 people in Kenya.
In addition to unwillingness by national authorities where they are implicated as suspects, national institutions are often unable to act in times of conflict. Inability may be attributed to either a lack of political will on the part of a government to prosecute its own citizens or to the inadequacy of institutions.  

Therefore, complementarity is the linchpin for assessing whether the last major international institution established in the 20th century will become a functioning reality or an international absurdity. The exact scope of complementarity can only be established through its interpretation by the ICC and application at national levels. The parameters for the implementation of complementarity measures are likely to differ significantly from state to state to suit constitutional conditions. These differing implementation methods at domestic levels will further reflect the jurisdictional imbalance of the ICC regime itself, weighted as it is towards states.  

Nevertheless, the sustainability of the ICC rests greatly on the success of the complementarity regime; states parties, having been saddled with the primary responsibility of investigating and prosecuting international crimes, must therefore be well-equipped to do so. Otherwise, the effectiveness of the ICC will be undermined and the credibility of the international criminal justice system as a whole will be called into question.  

In addition to the obligation to investigate and prosecute international crimes, states are further required to cooperate fully with the ICC. However, the lack of domestic implementing legislation consistent with the Rome Statute as well as the fact of non-party

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16 See Kleffner, (n 10).
19 Ibid
20 See part 9 of the Rome Statute on International Cooperation and Judicial Assistance particularly Arts 86-89 on General Obligation to Cooperate.
states can undermine cooperation and render arresting and prosecuting suspects problematic.\textsuperscript{21} Changeable obligations for states parties and non-party states may hinder cooperation by some states. For example, the United Nations Security Council Resolution 1593 of 31 March 2005\textsuperscript{22} by which the Security Council referred the situation in Darfur Sudan to the ICC specifically urged the government of Sudan to cooperate fully with the Court.\textsuperscript{23} Also, Security Council Resolution 1970 of 26 February 2011 by which Libya was referred to the ICC put the same obligation to cooperate on Libya.\textsuperscript{24} However, other non-party states are not put under similar obligation.\textsuperscript{25}

Presently, there are eight situations resulting in twenty-one cases before the ICC,\textsuperscript{26} all from the African continent. Of the eight situations, four are self-referrals: situations in Uganda,\textsuperscript{27} Central African Republic (CAR),\textsuperscript{28} the Democratic Republic of the Congo (DRC)\textsuperscript{29} and Mali\textsuperscript{30} have been referred to the ICC by their respective governments. Two


\textsuperscript{23}Ibid, para 2.


\textsuperscript{25}Ibid, para 5.

\textsuperscript{26}See situation and cases before the ICC available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx \textsuperscript{> (Accessed 5 June 2013).


countries, Sudan and Libya, were referred by the Security Council, and one is the Chief Prosecutor’s *proprio motu* action in Kenya. Although not a party at the time, Cote d’Ivoire made a declaration pursuant to Article 12(3) of the Rome Statute accepting the jurisdiction of the ICC in October 2003. This was confirmed in May 2011. Technically, such declarations constitute self-referral.

Taking into consideration the limited mandate of the ICC, which is only to prosecute the worst offenders, and the complementarity regime, collaboration with national jurisdictions is imperative for its effective functioning. According to William Schabas, ‘there seems to be a paradox: the ICC is independent and interdependent at the same time. It cannot act alone. It will achieve efficiency only if it works closely with other members of the international community.’ Therefore the central theme of this thesis is that states need implementing legislation in conformity with the Rome Statute and institutional capacity to carry out their primary responsibility of investigating and prosecuting international crimes.

### 0.2 Justification of the Study on Nigeria

Nigeria is a federation comprising 36 states and a Federal Capital Territory (FCT), Abuja. Since gaining independence in 1960, Nigeria has had 12 presidents or heads of government, eight of whom presided over a total of 29 years of military rule. During this

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33 Cote d’Ivoire is the 34th African State party to the Rome Statute, having deposited its instrument of ratification on 15 February 2013.
period, Nigeria had six constitutions (including one that never entered into force),\textsuperscript{37} four constitution drafting processes and four programs of transition from military to civilian rule.\textsuperscript{38} In addition, Nigeria has had three civilian regimes, two constituent assemblies and one civil war.\textsuperscript{39} With a population estimated at 168 million, Nigeria is Africa’s most populous nation.\textsuperscript{40} Nigeria is not currently a situation country before the ICC, although it is under preliminary examination.\textsuperscript{41} However, regardless of whether indictments result from these inquiries or not, complementarity puts the primary responsibility to investigate and prosecute international crimes on states. A corollary of this duty is for individual states to undertake a study of how they may review their laws to incorporate the crimes in the Rome Statute. Thus, ratification of the Rome Statute alone is not sufficient; thereafter, states need to take further steps to enact implementing legislation in conformity with the Rome Statute and ensure they have credible institutions to investigate and prosecute international crimes, should the need arise.

From this standpoint, virtually any state party to the Statute could be selected as a case study to illustrate the capacity to investigate and prosecute international crimes domestically. However, since all situations currently before the ICC are from Africa and because there seems to be a lack of understanding on the part of a number of African states as to what their obligations are under the complementarity regime, it is logical to investigate how African states can take proactive steps to ensure the institutional capacity and a legal

\textsuperscript{37} The 1989 Constitution drafted under the Ibrahim Babangida regime was abrogated following the annulment of the Presidential elections of June 1993. See \textit{Attorney General of Anambra State & Others v Attorney General of the Federation} [1993] NWLR (Pt 302) 692.

\textsuperscript{38} With the exception of the regime of Mohammadu Buhari (December 1983-August 1985), every military regime in Nigeria showed an intention to design and implement a transition to a civilian government. See Awa Kalu, ‘the Democratisation of Nigeria: More Bullets or Ballot?’ in \textit{Lawyers Biannual} (1994) 40.

\textsuperscript{39} The Nigerian Civil war began in 1967 and formally ended on 15 January 1970.

\textsuperscript{40} In October 2006, a national population census put Nigeria’s population at 140,003,542. With an annual growth rate of 3.2 per cent since 1991, Nigeria’s population is estimated at 168 million belonging to about 250 ethnic groups. See Legal Notice on the Publication of the 2006 Census Vol 94(4) Federal Republic of Nigeria Official Gazette 19 January 2007 B50. Available at \url{www.population.gov.ng/pop_figure.pdf}.

\textsuperscript{41} Nigeria is presently under preliminary examination by the office of the Prosecutor and may potentially come before the ICC before the end of this research. (See infra notes 43-50).
framework in line with the Rome Statute. Moreover, failure to do this will not only invoke the complementary jurisdiction or interference of the ICC, which can result in tension and antagonism, it will also lead to case overload for the ICC.

Nigeria ratified the Rome Statute in 2001, which means that by implication, the ICC has jurisdiction over Rome Statute crimes committed in the territory of Nigeria or by its nationals, from 1 July 2002, the date of coming into force of the ICC. From November 2005 to September 2012, the ICC has received 59 communications in relation to the situation in Nigeria inviting the OTP to activate its Article 15 *proprio-motu* powers to investigate atrocities being committed in Nigeria. Of these, 26 were outside the jurisdiction of the ICC, five were found to warrant further analysis and 28 communications were made part of a preliminary examination, which was made public in 2010. The alleged crimes which the OTP is currently analysing include killings, rape and sexual violence, abductions and torture, all attributed to members of the Boko Haram sect.

‘Boko Haram’, which means ‘western education is sinful’, is a Salafi-jihadi Muslim group that operates mainly in North-Eastern Nigeria but has launched attacks in other parts of the country including Abuja, Kaduna and Plateau States. To date, no arrest warrant has been issued for any of the crimes. However, the OTP has determined that there is a reasonable basis to believe that crimes against humanity, namely, acts of murder and

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44 Ibid, para 75.
45 Ibid.
46 Ibid, paras 81, 84, 85 & 86.
persecution, have been committed by members of Boko Haram in Nigeria.\textsuperscript{48} Since July 2009, members of Boko Haram have launched widespread and systematic attacks that have resulted in the killing of over 1,200 civilians in different parts of Nigeria, with the scale and intensity of the attacks increasing over time.\textsuperscript{49} Consequently, the Prosecutor decided that the preliminary examination in Nigeria should progress to phase 3 (admissibility),\textsuperscript{50} with a view to assessing the gravity of the crimes and whether Nigeria is conducting genuine proceedings in relation to those who bear the greatest responsibility.\textsuperscript{51}

Crucially, being a party to the Rome Statute, Nigeria is meant to take the vanguard role in investigating and prosecuting crimes against humanity, as the ICC will only intervene if Nigeria is shown to be unwilling or genuinely unable to act. However, it would appear that, like other African states, Nigeria has merely ratified the Rome Statute without due consideration of how it could carry out this primary role. This leads to the research hypothesis and questions outlined below, which the thesis endeavours to answer.

\textbf{0.3 Research Hypothesis/Questions:}

In recognition of the dynamic nature of complementarity, a working hypothesis is therefore adopted in this thesis as follows: \textbf{Can the complementarity regime of the Rome Statute accord with the current legal contexts or criminal justice systems in African states?} Derived from the hypothesis are the research questions below:

1. Do African states parties to the Rome Statute have the legal framework and institutional capacity to investigate and prosecute crimes under the Statute?

\textsuperscript{48} OTP Article 5 Report on Nigeria 2013, para 128.
\textsuperscript{49} Ibid, para 15.
\textsuperscript{50} Ibid, paras 2 & 17; OTP Report November 2012, para 96 (The OTP retains four main phases in its preliminary examination process. Phase 1 includes an initial assessment of all information on alleged crimes; Phase 2 involves a determination whether the preconditions to the exercise of jurisdiction under Article 12 of the Rome Statute are satisfied and whether the alleged crimes fall under the subject matter jurisdiction of the ICC. Phase 3 involves analysis of admissibility in terms of complementarity and gravity. Having concluded its preliminary examination, the office takes into account the gravity of the crimes, the interests of victims and examines whether there is a reasonable basis to proceed in phase 4).
\textsuperscript{51} Ibid, para 131.
2. What legislation and institutional expansion are necessary and can be made available for African states, and Nigeria in particular, to carry out the investigation and prosecution of international crimes?

3. How does the relationship between the ICC and the African Union affect the implementation of the complementarity regime?

4. What are the challenges that states parties face in implementing the Rome Statute?

0.4 Methodology: Application of the New Haven School

The importance of analysing the methods of international law relates to their application to practical problems; thus, the method most appropriate for this research is the New Haven School, also known as the policy-oriented jurisprudence. The policy-oriented approach has been chosen because the implementation of international law norms (complementarity) at the domestic level forms the core of this research.

Established by Harold Lasswell and Myres McDougal of Yale Law School in the mid-1940s, the policy-oriented approach views international law as a process of decision making which involves various actors in the international community. Thus, international law serves not only as a limit on effective power, but also as a creative tool for promoting both order and other values.

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54 Lung-chu Chen, ‘Perspectives from the New Haven School’ Proceedings of the Annual Meeting - Challenges to International Governance (1993) 87 ASIL 407-411. (Other proponents of this approach are Siegfried Weissner and Andrew Willard).
55 Ibid.
Proponents of the policy-oriented jurisprudence identify with international legal instruments. These include the Charter of the United Nations, the Charters of the Nuremberg and Tokyo Tribunals, the Genocide Convention, the Geneva Conventions, the Statutes of the tribunals for the former Yugoslavia and Rwanda and the Rome Statute of the International Criminal Court, which the Positivists also refer to. However, beyond this point, there is a divergence of opinion, as the policy-oriented approach disputes positivism’s method of searching for rules as well as the concept of law based on rules alone. The New Haven approach sees these instruments as tools only for policy makers to use in the service of minimum public order. Accordingly, the instruments have no significance in and of themselves; they are simply the carapace that the international community constructs in trying to address a problem.

Thus, the policy-oriented approach does not see international law norms, procedures and institutions as immutable and autonomous, capable of self-application. Rather, it recognises that norms and institutions are the outcome of a continuous process of authoritative decision making, as actors in the international community attempt to achieve public-order goals. The method highlights the complex, interdependent and decentralized system of international decision making. A derivation of this is that international law is necessarily dualistic in nature, since it will usually take authoritative decision making at the domestic level to implement its norms.

In addition, international law lacks a legislature or an institutionalised law-giver of a general competence whose legal prescriptions are binding. In a sense, legislation

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57 Ratner & Slaughter, ‘Appraising the Methods’ (n 52).
59 Chen (n 54) 409.
does exist with international organisations like the United Nations.\(^{60}\) However, the dominant consent principle gives states the option to apply or not to apply rules of international law. Rules of international law are either conventional or customary. Conventional international law is the law created or consolidated in an international treaty. It is written law and derives its binding force from the basic principle of *pacta sunt servanda*.\(^{61}\) Customary international law is all of international law that does not rest on a treaty basis.\(^{62}\)

The policy-oriented approach recognises that, although there are a variety of actors in the international community, the international legal system depends primarily on states and state institutions. Therefore, the ability of states to implement international law norms at the domestic level is critical to the enforcement of international law. Beyond identifying the decision makers at the state level, which is the core of policy-oriented jurisprudence, this thesis comprises an investigation of what institutional and legal frameworks are available or can be made available to African countries in implementing the Rome Statute. The method selected for this purpose suggests that the relationship between international and domestic legal systems is one of interdependence.

### 0.5 Structure of the Thesis

In addition to the introduction and conclusion, the thesis is divided into five chapters as follows:

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This chapter comprises a critical analysis of the complementarity regime of the Rome Statute. In view of the practical difficulties in interpreting and applying complementarity, a mutually inclusive application of the principle is proposed in which both the ICC and national systems share the burden of investigating and prosecuting international crimes. Also, an analysis of the key elements of complementarity, which include ‘unwilling’, ‘unable’, ‘genuinely’ and ‘sufficient gravity’, together with the ICC decisions in the Kenya and Libya cases, reveals that the complementarity thresholds are imprecise but favour mutual inclusivity. Furthermore, emerging models of complementarity, namely, passive, positive and proactive are discussed and, the conclusion outlines how states can take advantage of the reverse cooperation provision in Article 93(10) of the Rome Statute to achieve proactive complementarity.


With the exception of issues relating to the administration of justice and cooperation, there is no provision in the Rome Statute expressly stipulating how states should implement complementarity through their legal systems. It is argued here that a mutually inclusive interpretation of complementarity implies that states should adopt implementing legislation as a first step towards ensuring their willingness and capability to investigate and prosecute international crimes. It is proposed in this chapter that for a state to pass the ‘same person, same conduct’ test, required for a successful admissibility challenge, it is necessary for it to have the Rome Statute crimes in its domestic criminal law. The chapter also discusses cooperation legislation. This is necessary because of the reverse cooperation regime introduced in Article 93(10), which makes the cooperation regime of the Rome Statute distinct. The chapter concludes with the example of how South Africa adopted its
implementing legislation, because it is the only African state which has adopted implementing legislation in advance.

**Chapter Three: Domestic Prosecutions in Africa under the Complementarity Regime of the Rome Statute: A Practical Approach.**

This chapter presents a critical analysis of ongoing domestic prosecutions in selected African states. A distinction is made between domestic prosecution based on ordinary domestic crimes and complementarity-based prosecution and it is observed that not all domestic prosecutions constitute prosecution based on the complementarity of the Rome Statute. This is because complementarity-based prosecution should be holistic in terms of the crimes, together with the process, thereby enabling states to prosecute international crimes as such and not as ordinary crimes. It is suggested that the adoption of implementing legislation in line with the Rome Statute should precede any complementarity-based prosecution.

**Chapter Four: Unpacking the Tension between the African Union and the ICC: The Way Forward**

This chapter explores the relationship between the African Union (AU) and the ICC, tracing the trajectory from cooperation to conflict, as well as the general politics of international criminal law under two subheadings: ‘selectivity’ and the ‘scapegoat’ thesis. It is admitted that the perception that Africa is targeted by the ICC seems well-founded, given the fact that all the trigger mechanisms have been utilised and yet only African cases are before the ICC. Nevertheless, situating the tension within the broader Africa/ICC relationship reveals that the ICC in fact enjoys its greatest support from the African continent, as measured by ratifications of the Rome Statute and self-referrals. Therefore, the view that the ICC is biased against African states is not supported by the facts. The chapter identifies the points of conflict in the AU/ICC rapport; in terms of both legal and political sources, and how they have strained the relationship. It is proposed that if there is sincerity on both sides, the
ICC’s investigations and prosecutions in Africa could lead to the mutual benefit of both institutions and to the implementation of complementarity in African states.

Chapter Five: Institutional Preparedness for the Complementarity Regime: Nigeria as a Case Study

This chapter provides an analysis of the Nigerian Criminal Justice System. Nigerian criminal laws, institutions such as the Nigerian Police Force (NPF) and the Nigerian Prison systems, as well as the preparedness of the Nigerian courts are discussed. The analysis reveals that these institutions in their present state are incapable of implementing the complementarity regime of the Rome Statute; therefore, reforms in these institutions and the laws are imperative. The courts must achieve a high degree of independence and impartiality. Furthermore, a discussion of corruption as a bane to the implementation of complementarity in Nigeria is made and it is proposed that tackling the problems of corruption and insecurity is one strategic means by which Nigeria can achieve institutional preparedness. Nigeria could then serve as an example to other African states facing similar challenges in implementing complementarity and fulfilling their obligations as parties to the Rome Statute.

The central theme of this is that national implementation of the complementarity of the Rome Statute in African states and specifically in Nigeria requires much more than mere ratification of the Statute. It is argued that for national legal systems to be able to carry out their primary role of investigating and prosecuting international crimes, the legal framework, which includes implementing legislation and institutional capacity of states, which include strong judiciaries, must be in place. The argument is premised on the proposal that complementarity should be construed and applied as a mutually inclusive principle requiring both national legal systems and the ICC to have the same legal basis to act. Using Nigeria as a case study, this thesis demonstrates that these requirements are either
lacking or grossly inadequate in most African states, placing the concept of complementarity and the functioning of the ICC in a precarious state.

The next chapter presents a critical analysis of the complementarity regime both in Article 17 and as envisioned in other provisions of the Rome Statute. For a synthesised discussion, the complementarity components of unwillingness, inability, genuinely and gravity are scrutinised. Subsequently, the decisions of the Pre-Trial Chambers of the ICC on admissibility challenges under Article 19, all of which favour mutual inclusivity, are also examined.
Chapter One


Complementarity forms the cornerstone of the Rome Statute of the International Criminal Court.¹ As a mechanism that puts the primary responsibility to investigate and prosecute international crimes on states, complementarity envisages clear interactions between domestic criminal justice systems and the ICC.² Nevertheless, while the literature is replete with scholarly debates on how collaboration between the two justice systems could be achieved,³ the practical applications pose a serious challenge to the functioning of the ICC.

In light of the practical difficulties associated with the implementation of the principle, this chapter includes a discussion of the component elements of complementarity and the proposal that complementarity should be perceived as a mutually inclusive concept. This means that both the ICC and national systems share the responsibility of ensuring that perpetrators of international crimes are prosecuted. The central argument of the thesis is that

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¹ See Pre-Trial Chamber II decision in Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen ICC-02/04-01/05-377 10 March 2009 para 34. (Decision on the Admissibility of the case under Article 19(1) of the Statute). See also Trial Chamber I, Prosecutor v Lubanga, Decision on the Practice of Witness Familiarisation and Witness Proofing icc-01/04-01/06 8 November 2006 para 34 & 38 (describing complementarity as ‘one of the cornerstones of the Rome Statute’).
certain legal frameworks and institutional capacities are necessary for states to implement the Rome Statute domestically. Therefore the analysis of the component elements of complementarity will help shape the understanding of both the ICC and states in its implementation.

This chapter is divided into three sections. The first section discusses complementarity as a principle under the Rome Statute. The twin concepts of ‘jurisdiction’ and ‘admissibility’ and their relationship with ‘complementarity’ are also examined in this section. This is important because although ‘complementarity’ is the basis of the compromise which created the ICC, the word does not appear anywhere in the Rome Statute. It is a derivative of the word ‘complementary’, which itself appears only twice in the Statute. Therefore it is important to note that complementarity is realised through admissibility provisions.

In the second section, the fundamental components of complementarity are evaluated. These elements, which are referred to in this thesis as ‘complementarity thresholds’ or simply as ‘elements’, include ‘unwilling’, ‘unable’, ‘genuinely’ and ‘gravity’. Clarifying these elements is important because they constitute the bedrock on which the principle of complementarity is founded. They determine which forum is best suited for the prosecution of a particular case: the ICC or a national court. Analysis within this section reveals some deficiencies in the definition of the elements, which necessitates clarification from the ICC.

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5 Rome Statute, para 10 of the Preamble & art 1.
The second section further incorporates an evaluation of other provisions of the Rome Statute in which complementarity has been envisioned. For instance, articles 18, 19 and 20, which regulate admissibility challenges, clearly articulate interactions between the ICC and states. This analysis strengthens a mutually inclusive interpretation of complementarity.

Section three examines emerging models of complementarity. These models include passive, positive and proactive complementarity.6 Passive complementarity was reflected in the initial application of the concept, whereby the ICC was perceived as a court of last resort.7 Subsequently however, positive complementarity, which promotes cooperation and interaction between the ICC and states, was considered as the appropriate characterisation of the relationship between states and the ICC. Finally, it is argued that Article 93(10) of the Rome Statute could be used to promote the proactive complementarity model which would ensure that the ICC and national jurisdictions work in collaboration rather than in either isolation or even in contention.

1.1: The Principle of Complementarity

1.1.1: What is Complementarity

‘Complementarity’ denotes a situation in which two or more different things improve or emphasize each other’s qualities or complete one another.8 While the term was first coined to describe a phenomenon in physics,9 it can generally apply to a situation in which the description of the whole of a system in one picture is impossible as there are

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7 Christopher Hall, ‘Positive Complementarity in Action’ in Stahn & ElZeidy Complementarity Theory to Practice (n 3)1017.
complementary images which do not apply simultaneously but nevertheless exhaust the whole only together.\textsuperscript{10} The American English Dictionary defines complementarity as ‘a principle of law which stipulates that jurisdictions will not overlap in legislation, administration, or prosecution of crime’.\textsuperscript{11} The latter definition accords with the meaning attributed by the state plenipotentiaries at the Rome Conference to the concept as used in the context of the relationship between the ICC and national jurisdictions.\textsuperscript{12} In effect, complementarity is meant to close gaps in the task of prosecuting perpetrators of international crimes.

However, more than just eliminating jurisdictional gaps, complementarity under the Rome Statute awards national courts with precedence to exercise jurisdiction over international crimes. The priority given to domestic authorities is driven by the fact that under contemporary international criminal law, states are obligated to investigate and prosecute international crimes.\textsuperscript{13} It is only when they fail to do so that the ICC steps in to remedy their deficiencies. Consequently, the central argument of this thesis is that to ensure an appropriate legal framework and institutional capacity domestically, national and international jurisdictions cannot be deemed mutually exclusive,\textsuperscript{14} but rather that the two systems exist simultaneously to complete the functions of each other.

\textsuperscript{11} Available at <http://oxforddictionaries.com/definition/american_english/complementarity> (Accessed 2 February 2013). In Physics, complementarity is defined as the concept that two contrasted theories, such as the wave and particle theories of light, may be able to explain a set of phenomena, although each separately only accounts for some aspects.
\textsuperscript{12} Rome Statute, Article 17.
\textsuperscript{13} Mohammed ElZeidy, ‘The Genesis of Complementarity’ in Stahn & ElZeidy Complementarity From Theory to Practice (n 3) 71-141 (ElZeidy, Genesis of complementarity). See also John Holmes, ‘The Principle of Complementarity’ in Roy S Lee (ed), The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations and Results (The Netherlands: Kluwer 1999) 41-78, 41-42 (noting that many states argued that they are under an obligation to prosecute international crimes and thus an international court cannot enjoy a primary role in this regard).
Contrary to the perception of mutual inclusivity, William Schabas describes the term ‘complementarity’ as a ‘misnomer’ because it establishes a relationship between international and national justice systems that is far from complementary. According to him, the two systems function in opposition and to some extent with hostility vis-a-vis each other. Therefore, despite being conceived as a jurisdictional mechanism for the allocation of cases to the most effective forum, complementarity is inherently antagonistic. Similarly, Robert Cryer noted that the understanding of complementarity at its inception was that the ICC was to exist in a slightly antagonistic relationship with domestic jurisdictions. Accordingly, the ICC is meant to prod states to prosecute and step in when they fail to do so.

In line with the antagonistic perspective, Immi Tallgren describes complementarity as ‘an open container of contradictory or at least inconsistent arguments’ which reflects the deeply rooted postures on international criminal law and international jurisdiction in criminal matters. He discussed complementarity not as a principle or a legal concept but as conceptualised in two trends of argument. First is the ‘Butler ICC interpretation’ (the Butler) which sees complementarity as a means of restricting the role of the ICC and its scope of jurisdiction. The Butler interpretation rests upon the unconditional presumption of national omnipotence in the field of international criminal law. Accordingly this trend of thought aims to reduce the jurisdiction of the ICC to be exceptional.

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15 William Schabas, *An Introduction to the International Criminal Court* (3rd edn, CUP 2007) 175. (Schabas *Intro to the ICC*).
16 ibid.
17 Schabas, ‘Complementarity Uncomplimentary Thoughts’ (n 3) 6
18 Robert Cryer, ‘Darfur: Complementarity as the Drafters Intended?’ in Stahn & ElZeidy *Complementarity From Theory to Practice* (n 3) 1097-1119.
20 Kazuo Ishiguro, *The Remains of the Day* (London: Faber and Faber 1990) Cited in Tallgren Ibid, 124. (The story of the Butler was made famous by Ishiguro in his book). Why ‘Butler’? A butler is supposed to stay in the background and coordinate a scene just by his mere existence, to enter when it is necessary, to be around but not use any visible gestures of power. Never is a butler supposed to be too loud or draw extraordinary attention to himself. The allegiance of a butler to his master is unquestionable.
21 ibid.
22 ibid.
The second explanation according to Tallgren, is the ‘Master ICC interpretation’\textsuperscript{23} (the Master) in which complementarity represents the process of unification of criminal law. Since the responsibility for punishing international crimes lies with the international community as a whole, the Master is concerned that giving states the primary responsibility to prosecute international crimes would undermine its power.\textsuperscript{24} Presumably, the Master wants to achieve status, independence and authority, and therefore seeks to ensure that complementarity is constructed in such a way as to make the application coherent. Accordingly, Tallgren notes that espousing to monistic attempts to refer to the international criminal law system as a single coherent framework of values makes complementarity a fallacy.\textsuperscript{25}

Similarly, Frédéric Mégret argues that there are differences in the exercise of criminal justice.\textsuperscript{26} First, a line of inefficiency appears in all ‘human and therefore fallible’ justice systems. Second, the amount of resources that states are able to invest in maintaining proper justice systems varies widely.\textsuperscript{27} Therefore, criminal proceedings are necessarily dependent on the means at the disposal of the state and on the degree of authority which it is able to exert.\textsuperscript{28} As a consequence, Mégret argues that it is not possible to demand a uniform application in all systems which satisfies the minimum legal standards of international law.\textsuperscript{29}

Notwithstanding the foregoing arguments, complementarity appears to be the best attempt by the international community to ensure accountability for international crimes.

\textsuperscript{23}Tallgren, ‘…And why “Master”? A master regards “others” as able servants and wishes to make them hardworking and loyal companions in achieving a greater goal. A master aims at sovereignty of decisions and control of the situation. A tolerant master may, however, let the little mice dance on the table in his absence, but only when it is he who chooses the music . . . ’ cited in Tallgren.
\textsuperscript{24}Ibid.
\textsuperscript{27}Ibid
\textsuperscript{28}Ibid.
\textsuperscript{29}Ibid.
Therefore this thesis posits that national and international jurisdictions should not be deemed to be mutually exclusive. Rather, the complementarity regime should be perceived as offering an opportunity to achieve an inclusive fight against impunity. Its implementation at the national level would culminate in the success and sustainability of the ICC. Without it, the ICC may soon become overburdened with referrals. The next section discusses the concept as stipulated in the Statute.

1.1.2 Complementarity in the Rome Statute

The word ‘complementarity’ does not appear anywhere in the Rome Statute, which consequently does not allow for a precise definition. However, Mohammed ElZeidy notes that as a legal concept it has existed since the Treaty of Versailles in 1919 in which the Allies authorised the Germans to try some of the war criminals themselves in Leipzig, Germany.\(^{30}\) In contemporary times, the term ‘complementary jurisdiction’ appeared in the 1994 ILC Draft Statute which proposed that the ICC be ‘complementary to national criminal justice systems…’\(^{31}\) Subsequently, the French word ‘complèmentarité’ which corresponds with ‘complementarity’ and is a derivative of ‘complementary’ entered into the parlance of the Rome Statute negotiations as it aptly captured the relationship between the ICC and national courts.\(^{32}\)

Yet, the term ‘complementary’ was used only twice in the Rome Statute. Paragraph 10 of the Preamble and Article 1 provide that the ‘Court shall be complementary to national criminal jurisdiction’\(^{33}\). Nonetheless, complementarity is implied in all articles, including the preamble, making it an overriding theme of the Statute. For example, the

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\(^{30}\) ElZeidy, ‘The Genesis of Complementarity’ (n 13) 71-78 (noting that complementarity is not a novel concept. Rather it dates back to the twentieth century, covering over a period of seventy-nine years and ending with the Rome Statute); Mortem Bergsma and Philippa Webb, ‘International Criminal Courts and Tribunals: Complementarity and Jurisdiction’ in Rüdiger Wolfrum (ed) The Max Planck Encyclopaedia of Public International Law Vol VIII (Max-Planck- Gesellschaft OUP 2012) 688, 691.


\(^{32}\) Doherty & McCormack, ‘Complementarity as a Catalyst’ (n 4).

\(^{33}\) Rome Statute, para 10 of the Preamble and Article 1 (emphasis added).
preamble declares that it is ‘the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes’,\textsuperscript{34} and further states that the prosecution of international crimes ‘…must be ensured by taking measures at the national level…’\textsuperscript{35} Thus the preamble affirms that the ICC does not have sole or even primary jurisdiction.

The choice of ‘complementarity’ as a means of jurisdicitional allocation was not however without obstacles. The concerns that states expressed during the negotiations that led to the adoption of the Rome Statute culminated in the preference for complementary jurisdiction.\textsuperscript{36} At the top on the list was the issue of state sovereignty, which remains the fulcrum of the law of nations.\textsuperscript{37} In fact, the establishment of the \textit{ad hoc} tribunals\textsuperscript{38} in the 1990s and later the ICC were seen as encroachments on sovereignty.\textsuperscript{39} Nevertheless state sovereignty remains strong as obligations of international law are in turn formed by the consent of sovereign states themselves.\textsuperscript{40}

Since the potential loss of sovereignty was a major concern for states, they were reluctant to create the ICC without ensuring that their interests would be preserved.\textsuperscript{41}

For example, following the final meeting of the Preparatory Committee in anticipation of the

\textsuperscript{34} Rome statute, para 6 of the Preamble.
\textsuperscript{35} Rome statute, para 4 of the Preamble.
\textsuperscript{36} Issues of concern include sovereignty, the scope of jurisdiction of the ICC and the \textit{pro proprio motu} powers of the Prosecutor. See Paola Gaeta, ‘Is the Practice of Self-Referrals a Sound Start for the ICC?’ (2004) 2 JICJ 949-952, 950. (Noting that ‘it is well known that the Court was begotten by many but born against the will of some powerful countries…’).
\textsuperscript{40} See Kriangsak Kittichaisaree, \textit{International Criminal Law} (OUP 2001) 247.
\textsuperscript{41} Olympia Bekou, ‘In the Hands of the State: Implementing Legislation and Complementarity’ in Stahn & ElZeidy \textit{Complementarity Theory to Practice} (n 3) 830-852, 836.
Rome Conference, the United States Senator Jesse Helms, Chairman of the Senate Committee on Foreign Relations, sent a letter to then Secretary of State Madeleine Albright objecting to the court. He stated that he was ‘unalterably opposed to the creation of the permanent UN criminal court because any permanent judiciary within the UN system would…grant the UN a principal trapping of sovereignty’. He added that a ‘treaty establishing such a court without the clear US veto will be dead on arrival at the Senate Foreign Relations Committee’.

States' concerns were allayed in part by restrictions on the points at which the ICC could assert its jurisdiction.

The drafters of the Rome statute having determined that as a matter of principles, national jurisdiction should have primacy were faced with the question of when the ICC could assume jurisdiction. The solutions developed were both complex and politically sensitive, reflecting the concerns of states over national sovereignty and the potentially intrusive powers of an international institution.

Consequently, as long as a state can effectively investigate and prosecute international crimes, the sovereignty of the state will remain unaffected and the state will be free from ICC intervention.

Sovereignty and other concerns necessitated the ultimate choice of ‘complementary jurisdiction’ for the ICC. Having come into force, however, the

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42 Upon the submission of the final Draft Statute for the ICC by the ILC to the United Nations General Assembly (UNGA) in 1994 and recommendations of the ad hoc Committee 1995, the UNGA created the Preparatory Committee (PrepCom) on the Establishment of the ICC. In its primary responsibility to prepare a consolidated draft text for the establishment of the ICC the PrepCom held six sessions between 1996-1998.
44 Ibid.
complementarity regime of the Rome Statute is phenomenal, as states are required to play a
vanguard role in ensuring international criminal justice within their domestic spheres. While
some have hailed it as the bedrock of the ICC,48 others have raised objections to it.49 Some
reasons for the objections are that states where international crimes have occurred and are
likely to occur, particularly in conflict and post conflict areas, lack the competence, ability
and political will to prosecute their nationals who may be responsible for such crimes.

As will be shown in subsequent chapters, national courts face some challenges
because legislation, institutional capacity and due process may be lacking and trials may be
fraught with irregularities and biases. For example, the Specialised Courts in which Sudan
pursuits to prosecute those responsible for the atrocities in Darfur,50 routinely sentenced
unrepresented suspects to death after secret trials involving confessions obtained through
torture.51 Complementarity is thus described as a ‘double-edged’ sword.52 On the one hand, it
may reflect the willingness of states to take the lead in bringing the perpetrators of
international crimes to justice. On the other hand, it may expose perpetrators to national
judicial systems that are far less likely than the ICC to provide them with due process,
increasing the probability of malicious prosecutions and wrongful convictions.53

48 See Bruce Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (Oxford/New York 2003) 84; Cedric Ryngaert, ‘Horizontal Complementarity’ in Stahn and Elzeidy (above n 3) 855-885. See also Pre-Trial Chamber II decision in Joseph Kony et al and Trial Chamber I decision in Lubanga (above n 1).
50 Although not a state party to the Rome Statute, the situation in Darfur Sudan was referred to the ICC by the United Nations Security Council Resolution 1593 of 31 March 2005. Subsequently, Sudan purports to be able and willing to investigate and prosecute the perpetrators domestically.
53 Ibid, 256. See also Williams & Schabas, (n 45) 628. (Noting that complementarity may require an assessment of the quality of justice from the stand point of procedural and substantive fairness).
Implementation of complementarity remains a challenge. The ICC has begun formal investigations and prosecutions in eight situations resulting in twenty-one cases. Of the eight situation countries before the ICC, four were self-referrals.\(^{54}\) Although not a party to the Rome Statute at the time, Côte d’Ivoire accepted the jurisdiction of the ICC in 2003 by Art 12(3) declaration.\(^{55}\) Arguably, this is tantamount to a self-referral, particularly with the confirmation of acceptance of jurisdiction by the president in December 2010 and May 2011. This underscores the importance of national implementation of complementarity.

Self-referral was not contemplated in the Rome Statute, as it was perceived that states would be concerned if they have to defer to the ICC in respect of their own nationals. A demonstration of this underlying concern is rooted in the American opposition to the Rome Statute and the ICC.\(^{56}\) This was reflected in the fear that accepting the Statute will eventually mean that the ICC would exercise jurisdiction over United States Servicemen, possibly at the malicious behest of one of United States many enemies in the community of nations,\(^{57}\) which made the United States to withdraw from the Rome Statute.\(^{58}\)

Louise Arbour former Chief Prosecutor of the ICTY also noted; ‘I can’t think of a single state that will voluntarily defer to the jurisdiction of the ICC if one of their


\(^{55}\) Côte d’Ivoire became a party to the Rome Statute on 15 February 2013.\(^{55}\)


\(^{58}\) The Rome Statute was signed by the US President Bill Clinton on 31 December 2000 with the proviso that it will not be transmitted to Congress for ratification; the administration of President George W Bush subsequently withdrew the US signature and indicated the US intention not to become a party to the Statute: US Department of State Press Statement, 6 May 2001. Available at <http://www.state.gov/r/arpa/prs/ps/2002/9968.htm>
nationals is implicated’. The debate had focused on how states could aggressively and fairly pursue domestic prosecution so as to prevent the ICC’s intervention. According to Antonio Cassese, self-referrals are an opportunity to use the ICC as some sort of ‘bad bank’, ‘as a means of exposing dangerous rebels internationally so as to dispose of them through the judicial process of the ICC’. Similarly, Florian Jessberger and Julia Geneuss noted that self-referring is a mechanism by which states outsource their obligation to investigate and prosecute international crimes, ‘hijack’ the court and tie up financial resources that could otherwise have been used for investigations proprio-motu. Certainly, the practice of self-referrals ultimately turns the very idea of complementarity inside out.

Critical to the success of the ICC is not how situations are referred to it by states which, according to complementarity, should be engaged in carrying out investigation and prosecution themselves. Rather it is how these states demonstrate the willingness and ability to prosecute international crimes domestically. This will be discussed in subsequent chapters, but first, it is necessary to outline the provisions in the Rome Statute on complementarity and how the ICC has assessed complementarity in the cases before it. As noted, the debate on the principle of complementarity revolves around ‘jurisdiction’ and ‘admissibility’ provisions. The next section analyses the relationship between these two concepts and how they are entwined with the principle of complementarity.

1.2 Evaluating the Twin Concepts of Jurisdiction and Admissibility.

The Rome Statute distinguishes between two related concepts; jurisdiction and admissibility. Jurisdiction refers to the legal parameters of the ICC’s operations in terms of subject matter (jurisdiction *ratione materiae*),\(^{63}\) time (*ratione temporis*),\(^{64}\) space (*ratione loci*) as well as individuals (*ratione personae*).\(^{65}\) The preconditions to the exercise of jurisdiction by the ICC are prescribed in Article 12. This article stipulates that the court may exercise jurisdiction over crimes committed on the territory of a state party or by nationals of states parties to the Rome Statute. The Court may also exercise jurisdiction over non-party states who have made an Article 12(3) declaration accepting the jurisdiction of the ICC over crimes committed in their territories.\(^{66}\) Situations in the territories of states non-party to the Rome Statute may also come under the jurisdiction of the ICC where such situations are referred to it by the United Nations Security Council acting under its Chapter VII powers of the United Nations Charter.\(^{67}\) Consequently, jurisdiction only identifies the scope of the Court’s legal authority over a situation.

Admissibility on the other hand relates to when the court can effectively try a matter over which it has jurisdiction. Considerations of admissibility arise after the ICC has upheld jurisdiction. For this reason, jurisdicational provisions (articles 5-16) logically precede those on admissibility (articles 17-19),\(^{68}\) since if the Court does not have jurisdiction over a situation, there is no need to conduct an admissibility analysis.\(^{69}\) On the other hand, the ICC

\(^{63}\) Rome Statute, Articles 5-8 stipulate the Crimes within the Jurisdiction of the Court.

\(^{64}\) Rome Statute, Article 11 refers to crimes committed after the entry into force of the Statute; which suggests that the Rome Statute cannot be applied retroactively.

\(^{65}\) Schabas, *An Intro to the ICC* (n 15) 172.

\(^{66}\) Cote d’Ivoire and the Palestinian National Authority made such declarations in 2003 and 2009 respectively.

\(^{67}\) See Rome Statute, Article 13(b). The referrals of the situations in Darfur Sudan and Libya to the ICC in 2005 and 2011 respectively are examples.

\(^{68}\) Ryngaert, ‘Horizontal Complementarity’ (n 48) 874.

\(^{69}\) ibid.
may have jurisdiction over a situation, yet the matter will be inadmissible if certain conditions are not met. The admissibility criteria are contained in Article 17, which states:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.

The foregoing reveals four conditions in which a case will be inadmissible and the ICC is expected to defer to a national proceeding. The conditions are: (a) a domestic investigation or prosecution is in progress; (b) a domestic investigation has been completed with a decision not to prosecute; (c) a trial has been completed or (d) the case is deemed not to be sufficiently serious. Admissibility criteria could thus be broadly categorised into two. First, the ICC must carry out an assessment of the national justice system to see whether a state could reasonably be expected to investigate or prosecute genuinely. Second, the ICC must determine that the matter indeed warrants its intervention. This implies that the ICC may decide not try a case which comes under its jurisdiction due to other considerations. Therefore there is a need to consider the trigger mechanisms for investigation by the ICC.

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70 Schabas, An Intro to the ICC, (n 15) 172.
71 Rome Statute Art 17 (1)
72 Robinson, Mysterious Complementarity (n 3).
73 Rome Statute, Article 17(1)(d).
74 The Prosecutor v Thomas Lubanga Dyilo, Decision on the Prosecutor’s Application for a Warrant of Arrest, ICC-01/04-01/06 10 February 2006, para 29.
75 Rome Statute, Article 17(1)(d).
1.2.1 Admissibility and Trigger Mechanisms for ICC Investigation

Under the Rome Statute, three trigger mechanisms based on which the ICC may commence investigation into a situation are identified. The prosecutor may act upon referrals by state parties\textsuperscript{76} or by the United Nations Security Council\textsuperscript{77} or on his own motion (\textit{proprio motu}) on the basis of information received from any reliable source.\textsuperscript{78} Pursuant to these trigger mechanisms, the governments of Uganda, the DRC, CAR, Mali and technically Cote d’Ivoire have referred situations in their states to the ICC.\textsuperscript{79} The cases on Darfur, Sudan and Libya were triggered by Security Council referrals,\textsuperscript{80} while Kenya was the Prosecutor’s \textit{proprio motu} action.\textsuperscript{81}

None of these mechanisms, however, automatically triggers investigation because the Prosecutor is further required to consider whether there is a ‘reasonable basis’ to proceed.\textsuperscript{82} The determination of a ‘reasonable basis’ to proceed relates to jurisdiction and admissibility, and also to prosecutorial discretion,\textsuperscript{83} which is a consideration of whether the ICC investigation would serve the interests of justice.\textsuperscript{84}

Furthermore, Rule 104(1) of the Rule of Procedure and Evidence enjoins that, for the purpose of determining whether there is a reasonable basis to proceed under Article 53(1), the Prosecutor is to analyse the seriousness of the case based on the information available to him.\textsuperscript{85} The Prosecutor may seek additional information from states, organs of the

\textsuperscript{76} Rome Statute, Articles 13(a) & 14. See Akhavan (n 54).
\textsuperscript{77} Article 13(b)
\textsuperscript{78} Articles 13(c) & 15
\textsuperscript{79} Text to notes 26, 27, 28, 29, 30 & 33 in Intro.
\textsuperscript{80} Text to n 31 in Intro.
\textsuperscript{81} Text to n 32 in Intro.
\textsuperscript{82} See Article 53(1) for state and Security Council referrals and Article 53(3) for \textit{Proprio motu} investigations.
\textsuperscript{83} Jo Stigen, ‘The Admissibility Procedures’ in Stahn \& ElZeidy \textit{Complementarity: From Theory to Practice} (n 3) 503, 504.
\textsuperscript{84} Rome Statute, Article 53(1)(c)
\textsuperscript{85} Rule 104(1) RPE
United Nations, intergovernmental and non-governmental organisations or other reliable sources as appropriate.\textsuperscript{86}

Through the admissibility provisions and the trigger mechanisms, the Rome Statute reinforces the well-established right of sovereign states to enforce international criminal law.\textsuperscript{87} In the \textit{Muthaura et al}\textsuperscript{88} case the Appeals Chamber noted that by stipulating the substantive conditions under which a case is inadmissible before the ICC, Article 17 sets out how to resolve a conflict of jurisdiction between the ICC and a national court.\textsuperscript{89} This implies that complementarity confers a right on states to investigate and prosecute international crimes which, unless waived or rescinded, a case is inadmissible before the ICC.

As regards waiver of this right, several questions arise as to how to establish ‘unwillingness’, ‘inability’, and ‘genuineness’ and what may constitute ‘sufficient gravity’. These elements represent complementarity thresholds, yet they are not clearly defined by the Rome Statute. Therefore, the next section analyses the thresholds within the context of the jurisprudence of the ICC.

\subsection*{1.2.2 Clarifying the Elements of Complementarity}

Presently, there are no parameters by which complementarity can be evaluated. This is because the jurisprudence of the ICC to date does not encompass an analysis or interpretation of all the components of complementarity. For example, in the

\begin{footnotes}
\item[86] Rule 104(2)
\item[87] Michael Newton, ‘Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court’ (2001) 20 \textit{MLR} 167. See also Robinson Mysterious Complementarity (n 3).
\item[89] Ibid, para 36.
\end{footnotes}
Lubanga\textsuperscript{90} case, the ICC interpreted the phrase ‘case is being investigated’ in Article 17(1)(a). Consequently, the Pre-Trial Chamber I (PTCI) formulated and applied the ‘same person same conduct’ test to decide that for a case to be inadmissible before the ICC, investigations at the national level must encompass the same person and the same conduct for which the suspect is being tried before the ICC.\textsuperscript{91}

The ‘same person same conduct’ test has been applied by the ICC in other cases\textsuperscript{92} to reject the admissibility challenge by states. In the Muthaura et al case, the Appeals Chamber noted that the ‘same person same conduct’ test does not compel a prosecution or conviction of a particular person by national authorities. Rather it compels only a genuine investigation or prosecution of that person.\textsuperscript{93} Thus under Article 17(1)(a), the first question is whether the same case is being investigated by both the ICC and a national jurisdiction.\textsuperscript{94} Consequently, Kenya’s argument that it was investigating suspects in the ‘same hierarchical

\textsuperscript{90} The Prosecutor v. Thomas Lubanga Dyilo, Decision concerning Pre-Trial Chamber I Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006, ICC-01/04-01/06-8-Corr.

\textsuperscript{91} ibid, para 31.


\textsuperscript{93} Muthaura et al case, para 31.

\textsuperscript{94} ibid, paras 36, 40 & 41.
level’ with those indicted by the ICC failed to establish that it was investigating the same suspects as the ICC.\textsuperscript{95}

In the decision of the PTCI of 31 May 2013 in the \textit{Saif Al-Islam Gaddafi}\textsuperscript{96} case, the phrase ‘case being investigated’ was again considered and the ‘same person, same conduct’ test was applied but adjusted to ‘substantially’ the same conduct.\textsuperscript{97} The PTCI did not consider the element of unwillingness. According to the Chamber, consideration of ‘unwillingness’ was not necessary at the admissibility challenge stage since the Chamber found that Libya was unable genuinely to investigate and prosecute the suspect not least because of its inability to apprehend him.\textsuperscript{98}

From the jurisprudence of the ICC it appears that the problem of overlap between national and international jurisdictions has been given an abstract solution through the complementarity regime without an interpretive guide.\textsuperscript{99} This is because as noted by the Appeals Chamber in the \textit{Katanga}\textsuperscript{100} case, in considering whether a case is inadmissible under Article 17(1)(a) and (b), two questions must be asked. The first is empirical; whether there are on-going investigations or prosecutions at the domestic level. The second is whether there have been investigations in the past and the state having jurisdiction has decided not to prosecute the person concerned.\textsuperscript{101} It is only when these questions are answered in the affirmative that an examination of unwillingness and inability becomes necessary.\textsuperscript{102} As both elements, along with genuineness and sufficient gravity, are separate from the consideration

\textsuperscript{95} Ibid, para 41.


\textsuperscript{97} Ibid, paras 73, 77.

\textsuperscript{98} Ibid paras 204, 205, 206, 215 & 216.

\textsuperscript{99} Easterday, (n 49).

\textsuperscript{100} The Prosecutor v. Germain Katanga, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007, ICC-01/04-01/07-4.

\textsuperscript{101} Katanga case, para 20.

\textsuperscript{102} Ibid, para 78.
of whether or not an investigation is being carried out, it is important to see how the ICC would evaluate these elements, in the event that an admissibility challenge is brought on the basis of one of them.

Three types of unwillingness are mentioned in Article 17(2). First, a state is deemed unwilling when the proceedings were or are being undertaken or the national decision was made for the purpose of ‘shielding’ the person concerned from criminal responsibility.\(^{103}\) Moreover, in the *Katanga*\(^{104}\) case, the Pre-Trial Chamber II (PTCII) held that a state that does not intend to shield a person but rather wants the person to be prosecuted by the ICC is not an unwilling state under the terms of Article 17.\(^{105}\) The rationale behind this decision is hardly comprehensible because it poses the question as to why a state would prefer to have its nationals prosecuted by the ICC when complementarity gives it the primary duty to prosecute. A better argument may be that self-referral constitutes a demonstration of a state’s willingness but also its inability to prosecute.\(^{106}\)

In line with the main argument of the thesis, unwillingness could stem from the lack of an appropriate legal framework, lack of institutional capacity or of political will, as demonstrated in the Kenya *Muthaura et al.* case. In this case, the Appeals Chamber observed that Kenya submitted 29 annexes in support of its admissibility challenge, yet none of the annexes related to the suspects before the ICC.\(^{107}\) The Appeals Chamber further noted that Kenya's claim that the Commissioner of Police had confirmed that the suspects were being exhaustively investigated by the CID/DPP team lacked specificity.\(^{108}\) Arguably, these could be interpreted as revealing a goal of shielding the suspects. The Appeals Chamber

\(^{103}\) See article 17(2)(a).

\(^{104}\) *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* Case No ICC-01/04-01/07-123tENG (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case under Art 19) 16 June 2009.

\(^{105}\) Mauro Politi, ‘Reflections on Complementarity at the Rome Conference and Beyond’ in Stahn and ElZeidy *Complementarity Theory to Practice* (n 3)142-149.

\(^{106}\) Ibid.

\(^{107}\) *Muthaura et al* case, para 67.

\(^{108}\) Ibid, para 68.
further noted dissonance not only between the suspects being investigated by the Kenyan authorities and by the ICC but also in the crimes for which the suspects were being investigated, as the crimes against humanity for which the suspects were brought before the ICC were not at that time known to Kenyan domestic law.

The second type of possible unwillingness is where there has been an ‘unjustified delay’ in the proceedings which is deemed inconsistent with an intent to bring the person concerned to justice. 109 However, the Statute does not give a definition of what could constitute an unjustified delay; rather, the decision is left to the ICC. In line with the central argument in this thesis, it is submitted that an unjustifiable delay may be occasioned by the lack of requisite implementing legislation and inadequate institutions to carry out proceedings. Again, in the Muthaura et al case, Kenya’s delay in taking investigative steps could arguably be linked to the lack of implementing legislation at the time.110

Unwillingness is further implied in situations where the proceedings were not or are not being conducted ‘independently or impartially’, 111 or in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 112 Unwillingness could further be determined with ‘regard to the principles of due process recognized by international law’. 113 These include the presumption of innocence, non-retroactivity of criminal law, the right to a public hearing, the right to obtain free legal

109 Article 17(2)(b).
110 Infra (Text to notes 84 to 97 in Ch 3).
111 Cherif M Bassiouni, Introduction to International Criminal Law (2003) 518; see also Ellis, (n 60) 236 (‘A case will fall under the jurisdiction of the ICC because of the unwillingness of a State to prosecute or investigate when it is found that... the proceedings are not independent and impartial.’); Oscar Solera, ‘Complementary Jurisdiction and International Criminal Justice’ (2002) 84 International Review of the Red Cross 145, 166 (noting ‘...a State is unwilling to prosecute when the competent domestic court is not independent or impartial’).
112 Article 17(2)(c).
113 See the Chapeau of Article 17(2). ‘In order to determine unwillingness...the court shall consider, having regard to the principle of due process recognised by international law...’
assistance, the right to be informed, the right to examine the witnesses and the right to remain silent.\textsuperscript{114}

In line with the due process requirement, Stahn argued that alternative justice mechanisms at the domestic level must meet basic fair trial standards.\textsuperscript{115} Again the implication of a mutually inclusive construction of complementarity is that states would reflect and uphold the general principles of criminal law and strive to maintain international standards as explicated in the Rome Statute.

Furthermore there is the possibility of varying degrees of willingness being exhibited by rival branches of a particular state’s authorities.\textsuperscript{116} This may arise due to internal differences within a state which are not envisaged in the Rome Statute. For example, the judiciary may be willing whereas the executive is not. Investigators may be willing but an unwilling military may frustrate and hinder investigative efforts.\textsuperscript{117} Therefore unwillingness in one branch of government may create inability in another branch which is sincerely attempting to investigate or prosecute. There is also a possibility of selective willingness where state authorities may be eager to investigate crimes by rebel groups but may be reticent with respect to the investigation of government forces.\textsuperscript{118}

Inability is the second element of complementarity identified under Article 17. In reaching the determination of inability, there are two cumulative sets of considerations.\textsuperscript{119}

\textsuperscript{114} See Part 3 on General Principles of Criminal Law and Art 55 Rome Statute.
\textsuperscript{115} Carsten Stahn, ‘Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court’ (2005) 3 JICJ 695, 713.
\textsuperscript{117} Ibid, para 45
\textsuperscript{118} Ibid. See also the self-referral by the Government of Uganda of the Lords Resistance Army (LRA) in Northern Uganda to the ICC. Available at <http://www.icc-cpi.int/en_menus/licc/situations/nothern%20uganda.aspx> (Assessed 26 February 2013).
\textsuperscript{119} Yang, (n 47).
The first is inability as a consequence of the ‘collapse’ or ‘unavailability’ of the national judicial system. The use of the terms ‘inability’, ‘collapse’ and ‘unavailability’ thus imply certain political circumstances that could render holding trials impossible. The words further suggest a lack of expertise in the field of international criminal law including judges, prosecutors, and other court personnel. Clearly, an analysis of a state’s judicial system and political climate is necessary in determining ability to prosecute.

In the admissibility challenge by Libya in the *Saif Al-Islam* case, the PTCI noted the efforts deployed by Libya under extremely difficult circumstances to improve security conditions, rebuild institutions and to restore the rule of law. In particular, the Chamber observed the specific measures taken by the Libyan government to enhance capacity. These were in relation to the proposed strategy to improve the effectiveness of accountability of the police service, the security of the courts and of participants in the proceedings. It also noted the proposed strategy to reform the detention centres and to bring practices of torture to an end. In spite of these measures, the Chamber found that Libya continues to face multiple challenges as it cannot exercise its judicial powers fully across the entire territory. Consequently, Libya’s national system was found unavailable according to the terms of Article 17(3) of the Statute.

The second aspect of the inability consideration is inability with respect to apprehending the accused, or obtaining evidence or testimony such that proceedings cannot be carried out. In the admissibility challenge by Libya, the PTCI observed that the Libyan Code of Criminal Procedure contained provisions that could sustain the prosecution of Saif

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120 Informal Expert Paper, (n 116) paras 49 & 50.
121 *Saif Al-Islam* case (n 96)
122 Ibid, para 200.
123 Ibid, para 204.
124 Ibid.
125 Ibid.
126 Ibid, para 205.
127 Rome Statute, Art 17 (3).
Al-Islam. These include Article 59 of the Libyan Code, which provides for confidentiality of investigations, and Article 106, which guarantees a defendant’s right to a lawyer during investigation. The PTCI observed that additional rights of accused persons are guaranteed under other provisions of the Libyan Code.

Nevertheless, the Chamber found that there had been no concrete progress towards transferring Saif Al-Islam from his detention centre in Zintan. The Chamber further expressed concerns over the issues raised by the United Nations Support Mission in Libya (UNSMIL) about instances of torture and death arising from torture in detention centres and concluded that Libya was not able to assume full control of the detention facilities. Also Libya’s capacity to obtain the necessary testimony was in doubt, as the Chamber observed ‘clear inability of judicial and governmental authorities to ascertain control and provide adequate protection for witnesses’.

Based on the decision of the PTCI in the Libya admissibility challenge in the *Saif Al-Islam* case, it can be deduced that ‘inability’ may not only refer to situations of armed conflict resulting in the total or substantial collapse of a national judicial system. Rather, inability may include the lack of institutions or lack of judges and prosecutors who are trained in international criminal law. This point is underscored by Libya’s submission that it was in the process of ‘approaching the Bar Associations of Tunisia and Egypt in order to obtain suitably qualified and experienced counsel…’ The PTCI rejected this point on the

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128 Ibid
129 For example, Art 435 of the Libyan Code safeguards the accused right to review evidence presented against him and forced confessions are inadmissible in criminal proceedings. Also, under Article 9 of the Code the accused has the right to be informed of his fights and duties and Article 4 of the Libyan Prisons Act requires the defendant to be held in prison prepared for that purpose.
130 *Saif Al-Islam* case paras 206, 207
131 Ibid, para 209.
132 Ibid, paras 209, 211.
133 Ibid, para 213.
grounds that Libya did not demonstrate that it was taking any concrete steps to overcome the deficiencies.\textsuperscript{134}

Closely linked to inability or unwillingness is ‘inactivity’\textsuperscript{135}. Inactivity was developed by the office of the Prosecutor based on the theory of ‘uncontested admissibility’.\textsuperscript{136} In the Katanga\textsuperscript{137} case, the PTCII held that inaction on the part of a state having jurisdiction renders a case admissible before the Court regardless of any question of unwillingness or inability.\textsuperscript{138} Thus, referral was deemed appropriate on account of inaction by the Ugandan government. The ICC and Uganda, which claimed to be incapacitated by its inability to apprehend members of the LRA agreed that a consensual division of labour is the most logical and effective approach.\textsuperscript{139}

In authorising the issuance of arrest warrants in the case, the PTCII invoked a letter of 28 May 2004 from the government of Uganda stating that it had been ‘unable to arrest…persons who may bear the greatest responsibility for the relevant crimes’ and that ‘the ICC is the most appropriate and effective forum for the investigation and prosecution…’\textsuperscript{140} The letter further noted that the Ugandan government ‘has not conducted and does not intend to conduct national proceedings in relation to the persons…’\textsuperscript{141}

The rationale is that armed groups divided by conflict may oppose prosecutions at each other’s hand and yet agree to a prosecution by the ICC for reasons of

\begin{footnotes}
\item[134] Ibid, para 214.
\item[135] Robinson, Mysterious Complementarity (above n 3) 76 (noting that the word ‘inactivity’ is not used in Article 17 but the Pre-Trial Chamber in the Lubanga case erroneously used it in interpreting when a case becomes admissible before the ICC. He agrees however, that a case is admissible where there is inaction on the part of a state in a particular case). See also El-zeidy The Genesis of Complementarity (above n 23) 137.
\item[136] Williams & Schabas, (n 45) 615-616.
\item[137] Prosecutor v. Germain Katanga et al (n 100).
\item[138] Ibid, para 37.
\item[139] Williams & Schabas Ibid.
\item[140] Ibid, 616. See also Schabas, Complementarity Uncomplimentary Thoughts (n 3) 6.
\end{footnotes}
neutrality and impartiality. The state, in such a case, waives its right of primacy of jurisdiction to trigger the jurisdiction of the ICC and the case is admissible before the ICC as long as the state with jurisdiction remains inactive.

As with complementarity thresholds of unwillingness and inability, there are no parameters in the Rome Statute for determining the third element of ‘genuinely’. In arriving at the term, other words like ‘ineffective’, ‘good faith’, ‘diligently’ and ‘sufficient grounds’ were considered and rejected for being too subjective. The term ‘genuinely’ that was finally adopted, bears close semblance to ‘good faith’; however, the later was deemed to be too constricted.

‘Genuinely’, open to interpretation by the court, is an adverb that explains what kind of investigation or prosecution a state must be willing and able to conduct in order to make a case inadmissible before the ICC – namely, a genuine one. It could further be argued that requiring states to conduct genuine investigations and prosecutions, as opposed to investigations and prosecutions of any kind indicates that the drafters intended to make due process a criterion of major importance.

The phrase ‘unless the state is unwilling or unable genuinely to carry out the investigation or prosecution’ presupposes something real and sincere, having the value claimed without a form of pretence. In the Muthaura et al case, the Appeals Chamber observed that the report on the investigations into the post-election violence did not include

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143 Holmes, The Principle of Complementarity (n 13) 49.

144 Ibid. See also Holmes Complementarity vs. National Courts (n 46) 266.

145 Jon Heller, The Shadow Side of Complementarity (n 52).

146 Jon Heller, Ibid.

147 Muthaura et al case (n 88).
any reference to the suspects. The report also did not reveal any investigative steps taken by the Kenyan investigation team. A genuine investigation would thus encompass detailed report of investigative steps taken in a particular case. Therefore in determining whether the actions of a state are genuine, the ICC looks beyond the domestic laws or implementing legislation and objectively examines whether the motives and broad context of the state’s actions are real and sincere.

Another complementarity element is ‘sufficient gravity’. Two prong components to the determination of admissibility are complementarity and gravity. Crimes falling within the jurisdiction of the ICC have been designated ‘serious crimes’, yet the Rome Statute provides for the additional admissibility consideration of ‘sufficient gravity’. Thus, even where subject-matter jurisdiction is satisfied, the ICC must determine whether the case is severe enough to justify further action. Factors relevant in assessing gravity include the scale, the nature, the manner of commission and the impact of the crimes. Therefore isolated instances of criminal activity do not meet the gravity threshold.

One way of assessing gravity for the purpose of determining prosecutorial priorities is to look at absolute numbers. This is exemplified in the actions taken by the Prosecutor with respect to situations in Uganda in one case and the United Kingdom in another. Upon receipt of information regarding the activities of British troops in Iraq, the Prosecutor noted that there were only four to twelve victims, which does not meet the

148 Ibid, para 53.
149 Ibid, para 68.
150 Schabas, An Intro to the ICC (n 15) 171-175; Williams & Schabas, (n 45) 613.
151 Rome Statute, para 4 of the Preamble.
152 Rome Statute, Articles 17 (1) (d), 53 (1) (b) and 53 (2) (b).
154 See Williams & Schabas (n 45) 621-622.
requirement of sufficient gravity.\textsuperscript{155} On the other hand, regarding the situation in Uganda, the Prosecutor noted:

…we examined information concerning all groups that had committed crimes in the region. We selected our first case based on gravity. Between July 2002 and June 2004, the [Lord’s Resistance Army] was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we start with the Lord’s Resistance Army.\textsuperscript{156}

The analysis of the complementarity thresholds reveals that so far, the case law of the ICC relates to waivers or inaction and the Court has not had the opportunity to interpret the other constituent elements of unwillingness and genuineness. Although some of these complementarity thresholds may be inferred in the cases as they do overlap, the decisions of the ICC have focused on the ‘same person same conduct’ test as a result of admissibility challenges by states which claimed to be carrying out investigations domestically. The Pre-Trial Chamber has further interpreted ‘inability’ in light of the deficiencies of Libya’s judicial system, including its inability to procure the suspect, witnesses and evidence.

It is submitted that the cumulative effect of Article 17 makes it imperative for states to start investigation and prosecution and it would be for the ICC, if it wishes, to assert and prove that the state is unwilling or unable genuinely to carry out the proceedings. Thus far, the reverse has been the case. This underlines the central argument in this thesis that for states to assume their primary role to investigate and prosecute international crimes, appropriate legal framework and institutional capacity in conformity with the Rome Statute is imperative.


\textsuperscript{156} See ‘Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties’ at The Hague 28 November to 3 December 2005. 2.
The complementarity thresholds analysed above are entwined in the admissibility provisions in Article 17. The Article is certainly the focus of complementarity and it is usually the central point of complementarity discussions. However, the broader interplay and division of labour between national jurisdictions and the ICC envisaged in the Rome Statute makes complementarity a dominant theme that is woven through many other Articles of the Rome Statute. The next section evaluates complementarity framework under articles 18-20 of the Rome Statute and the relevant Rules of Procedure and Evidence (RPE).

1.2.3 Evaluating Complementarity Under Articles 18, 19 and 20

The Rome Statute, supplemented by its Rules of Procedure and Evidence (RPE), establishes a comprehensive though complex procedure for complementarity. The procedure reinforces the approach of allowing national proceedings to take primacy of jurisdiction unless there are compelling reasons to intervene. The argument here is that, though not specifically stated, complementarity appears to be central to the procedures articulated in Articles 18, 19 and 20 and the relevant RPE. This section analyses these provisions to support the view of a mutually inclusive interpretation of complementarity. The underlying objective is to give states the first opportunity to prosecute.

Article 18 stipulates deferral procedures by which the OTP could suspend its action to allow for a state’s investigation. Article 19 specifies the determination of jurisdiction and admissibility by the ICC and the need to balance the interests of states and the requirements of effective investigation. Article 20 establishes the ne bis in idem rule.

157 Robinson, ‘Three Theories of Complementarity (n 3), 177-178.
158 Articles 1, 18, 19, 20, 89(4), 90, 93(10), 94.
160 Broomhall, (n 48) 88.
161 Rome Statute, Article 20(1) & (2).
which forbids trying a person before the ICC with respect to criminal conduct for which the person has been convicted or acquitted by another court.162

Where there is a state referral or the prosecutor initiates *proprio-motu* investigation and believes that there is a reasonable basis to proceed, Article 18 will apply.163 The Article requires the prosecutor to inform all states parties as well as other states which would normally exercise jurisdiction of his intention to conduct an investigation. Regardless of whether the Prosecutor conducts its preliminary examination upon the receipt of a referral by a state or upon the receipt of communication,164 there are procedural mechanisms by which admissibility is determined. First Article 53(1)(b) and Rule 48 of the RPE require an admissibility assessment to be conducted during the preliminary examination of a situation prior to the initiation of an investigation. Second within thirty days after the Prosecutor’s notification of the initiation of an investigation into a situation, Article 18 allows a state to allege the inadmissibility of the relevant situation and obtain a deferral as a result of its national proceedings.

Article 18 allows confidential and limited information with a view to protecting witnesses and evidence and prevents alleged perpetrators from absconding. However, Rule 52 RPE obliges the Prosecutor to provide ample information so that a state may determine if it is examining the same situation. If the information is insufficient then the state may request additional information under the Rule.

As illustrated in the *Muthaura et al* case, with respect to proceedings relating to preliminary admissibility challenges under Article 18, the likely cases are often imprecise

162 Ibid.
163 Ibid, article 18(1).
164 Pursuant to its literal wording, Art 18 does not appear to apply when the Prosecutor opens an investigation as a result of a referral by the Security Council.
because the investigations of the Prosecutor are in their initial stages.\textsuperscript{165} In the case, even though the Prosecutor had received information and a list of alleged perpetrators, his preliminary examination into the situation was necessary to confirm the suspects. Thus, no individual suspects had been identified by the Prosecutor at that stage, and there was no clear determination or legal classification of the exact conduct.\textsuperscript{166} The relative vagueness of the cases in Article 18 proceedings is further reflected in Rule 52(1) of the RPE which speaks of information about the acts that may constitute crimes referred to in Article 5, relevant to the purposes of Article 18(2).\textsuperscript{167}

Article 18(2) and Rule 53 provide that the information must be sufficiently detailed to demonstrate that the state is indeed conducting investigation or has investigated the criminal acts contained in the information provided by the Prosecutor in the original notification.\textsuperscript{168} Article 18(7) and Rule 55 authorise a state to challenge the ruling of the Pre-Trial Chamber. Therefore pursuant to Article 82(1)(a) the Pre-Trial Chamber and eventually the Appeals Chamber decides on the admissibility of the situation.\textsuperscript{169}

As it relates to the original notification, both the Statute and the Rules encourage a dialogue between the state and the Prosecutor to ensure that there is no overlap in their respective areas of interest. This implies that where the Prosecutor is uncertain about the nature of national proceedings, he should request additional information from the state.\textsuperscript{170} This is further reinforced by Article 18(5) which allows the Prosecutor to request periodic updates from the state on the progress of the investigations. Where the Prosecutor is not

\begin{footnotes}
\item[165] \textit{Muthaura et al} case, (n 88) para 38.
\item[166] Ibid
\item[167] Ibid.
\item[168] Rome Statute, Art 18 (2) & Rule 53 RPE. See also \textit{Muthaura et al} case para 41(Kenya failed to provide detailed information about the investigative steps it purported to have taken with respect to the suspects before the ICC).
\item[170] Ibid.
\end{footnotes}
convinced of the genuineness of national proceedings or the proceedings cover a different situation, he may seek authorisation for an investigation from the Pre-Trial Chamber.\footnote{See Lubanga case.} Admittedly, these provisions may slow down the process of initiating an investigation and make obtaining of evidence, accused persons and witnesses more difficult.\footnote{See generally Article 18 Rome Statute and Rules 53-57 RPE.} However, the underlying objective is to allow states to have primary jurisdiction.

Article 19 together with Rules 58-62 RPE relate to situations in which there are challenges to the exercise of jurisdiction by the ICC and the admissibility of cases before it. Under this Article, questions of jurisdiction and admissibility may be raised either by the ICC, the Prosecutor, the accused person, a state with jurisdiction or a state from which acceptance of jurisdiction is required under Article 12.\footnote{Rome Statute, article 19 (2) (a), (b) & (c).} These questions can be raised regardless of the triggering mechanism. However, in \textit{proprio-motu} investigations by the Prosecutor under Article 15, a determination by the Prosecutor of a reasonable basis to proceed and an authorisation from the Pre-Trial Chamber must be completed. This is followed by compliance with Article 18 (notification to states by the Prosecutor and authorisation by the Pre-Trial Chamber where a state request a deferral). Once these criteria are met and the Prosecutor decides to proceed, jurisdiction and admissibility issues become relevant.

Article 19 permits states or accused persons to make challenges only once and at the earliest possible time.\footnote{Rome Statute, article 19(5).} This is to ensure speed in the process. To facilitate the process, the Rules entrust the relevant Chamber with the authority to set its own procedures without an obligation for a hearing.\footnote{See Stigen (n 83).} Notwithstanding, possible delays exists, as states that
potentially have jurisdiction may bring challenges at different times. In addition, the Statute and the Rules allow victims to make representation.\textsuperscript{176}

The interactions envisaged between the ICC and national jurisdictions in these procedures are further depicted in Article 19(11). The provision anticipates that the Prosecutor must at all times be abreast with proceedings at the national level by requesting periodic update on the status of such proceedings. These interactions have the advantage of demonstrating to the state that though the Prosecutor may have deferred to its national investigation, he remains interested in the situation and may reactivate his investigation should doubts emerge as to the genuineness of the state’s actions.\textsuperscript{177} Nevertheless, the overall objective of these procedures is to allow states the first opportunity to prosecute.

Furthermore, embedded in the \textit{ne bis in idem} rule is the principle of complementarity. The rule forbids the ICC from reopening a case that has been prosecuted by a state with jurisdiction, whether resulting in either acquittal or conviction.\textsuperscript{178} In effect, the rule maintains jurisdictional interactions between the ICC and domestic courts as well as protects an accused person from being punished twice for the same crime.\textsuperscript{179}

However, the rule admits of exceptions expressed in Article 20(3) by which the ICC could reopen a case where proceedings in the domestic court were undertaken for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC. The Court is also permitted to reopen the case when the proceedings were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances,

\textsuperscript{176} Rule 59 limits the opportunity of making representation to those victims or their legal representatives who have previously communicated to the Court in relation to the case before it.
\textsuperscript{177} Holmes, National Courts versus the ICC (n 46) 275.
\textsuperscript{178} Rome Statute, Art 20(1) & (2).
\textsuperscript{179} Daine Bernard, ‘\textit{Ne Bis In Idem} - Protector of Defendants’ Rights or Jurisdictional Pointsman?’ (2011) 9 JICJ 863-880.
was inconsistent with an intent to bring the person concerned to justice.\textsuperscript{180} The question remains as to what may constitute a proceeding that shows a ‘purpose of shielding’. As the Kenya Appeals Decision reveals, Kenya’s failure to indicate that it was investigating the same suspects that were before the ICC showed a purpose of shielding.

Furthermore, while the Rome Statute encourages national authorities to comply with ‘principles’ or ‘norms’ of due process recognised by international law;\textsuperscript{181} the question of how this could be implemented is not addressed. A case simply becomes admissible before the ICC where particular national proceedings fall short of international standards and show a ‘purpose of shielding’ or an ‘inconsistency’ of intent.\textsuperscript{182} Thus, the Prosecutor must show additional bad faith on the part of the state or, in the case of inconsistency, a lack of good faith. The risk of improper standards and proceedings that do not meet the threshold of independence and impartiality would be particularly high where the police and security forces are subject to their own courts.

The complementarity procedures analysed in this section envision some interactions and interdependence between the ICC and national jurisdictions. Whilst the Rome Statute titled these provisions ‘admissibility challenges’ which attribute antagonism to the relationship, it is proposed that allowing such admissibility challenges actually reinforces the belief that domestic efforts are preferred. Furthermore, the monitoring of national prosecutions by the Prosecutor and the division of labour makes the relationship between the ICC and states a mutually inclusive rather than an exclusive one. The principle of complementarity was reaffirmed at the first review conference held in Kampala Uganda, during which different models of complementarity, particularly positive complementarity,

\begin{footnotesize}
\begin{enumerate}
\item [\textsuperscript{180}] Rome Statute, Article 20(3).
\item [\textsuperscript{181}] Rome Statute, Articles 17(2) and 20(3)
\item [\textsuperscript{182}] Broomhall (n 48) 89.
\end{enumerate}
\end{footnotesize}
were discussed. This indicates that complementarity is the future of the ICC. Therefore, the next section discusses emerging models of complementarity.

1.3 Emerging Models of Complementarity

Models of Complementarity have been analysed by ElZeidy.\textsuperscript{183} He conceptualized complementarity from the peace treaties of World War I according to which he argues that the concept of complementarity is not novel but that it has existed as early as 1919.\textsuperscript{184} Consequently, he noted that complementarity models include amicable, mandatory and optional complementarity.\textsuperscript{185} He posits that dating back to Nuremberg and Tokyo Tribunals, the nature of the crimes under consideration made amicable complementarity the best option since the crime of aggression, for example, could not be left to the jurisdiction of national courts. Accordingly the philosophy was that the tasks would be divided and performed in two jurisdictions in a friendly manner.\textsuperscript{186}

ElZeidy further maintains that mandatory complementarity model could be seen from the plain reading of the chapeau of Article 17.\textsuperscript{187} He postulates that the provision ‘The Court shall determine that a case is inadmissible…’ suggests a mandatory requirement on the part of states to investigate and prosecute cases arising within their jurisdictions.\textsuperscript{188} However, optional complementarity has emerged in the procedure of self-referral by which a state waives its right to prosecute, preferring rather to refer a situation within its jurisdiction to the ICC. This is the reverse scheme of the ‘mandatory model’ as it was not due to the

\textsuperscript{183} ElZeidy The Genesis of Complementarity (n 13) 77-78.
\textsuperscript{184} Ibid 80-83.(noting that under Articles 228-230 of the Treaty of Versailles 1919, Germany initially agreed to hand over suspected criminals to the Allies for trials, but subsequently asked permission to try alleged war criminals in its domestic court. The allies granted the request on condition of setting aside German courts’ judgement in case of unsatisfactory result).
\textsuperscript{185} ElZeidy, (n 13), 126.
\textsuperscript{186} Ibid, 126.
\textsuperscript{187} Ibid, 136
\textsuperscript{188} Ibid, 137
ICC’s determination, but rather it was because the state itself voluntarily decided to renounce the exercise of its jurisdiction.\textsuperscript{189}

The mutually inclusive interpretation of complementarity proposed in this thesis, was also articulated by ElZeidy, in which he noted that a mutually inclusive interpretation mirrors the amicable model of complementarity.\textsuperscript{190} This is exemplified in the jurisprudence of the ICC to prosecute only those who bear the greatest responsibility as it is impossible for the ICC to investigate and prosecute all perpetrators of international crimes.

The mutually inclusive interpretation of complementarity is adopted and expanded in this thesis to propose a model that envisages clear interactions and division of labour between the ICC and domestic jurisdictions. Therefore, a mutually inclusive interpretation will ensure that states incorporate Rome Statutes crimes into their domestic law and ensure institutional preparedness to prosecute those crimes. This is important because the optional model discussed by Elzeidy, which is reflected in states’ referral of situations to the ICC instead of taking action domestically will not occur. Consequently, this section analyses emerging models of complementarity – passive, positive and proactive - from the point of view of the Rome Statute and other scholarly debates since the inception of the ICC.

The thesis supports the proactive complementarity model because its importance to the overall thesis is in demonstrating that understanding complementarity from a mutually inclusive perspective would mean that both national jurisdictions and the ICC are proactive in implementing complementarity. This means that states and the ICC would not wait until there are situations before they act. Rather states would take advantage of Article 93(10) to request assistance from the ICC in ensuring legal framework and institutional capacity that are in conformity with the Rome Statute.

\textsuperscript{189} ElZeidy, \textit{Origin and Development of Complementarity} (n 14) 212-214, 229.
\textsuperscript{190} Ibid.
1.3.1 Passive Complementarity

One view of complementarity which was prevalent during the drafting of the Rome Statute was mainly passive, where the ICC would simply be a court of last resort.\textsuperscript{191} As succinctly argued by Ann-Marie Slaughter;

One of the most powerful argument for the International Criminal Court is not that it will be a global instrument of justice itself-arresting and trying tyrants and torturers worldwide-but that it will be a backstop and trigger for domestic forces for justice and democracy...\textsuperscript{192}

In other words, the ICC would make few or no contributions to international justice if states fulfilled their obligation to investigate and prosecute international crimes.\textsuperscript{193} This also conferred an obligation on states not only to ensure that international crimes were defined in their national criminal laws but that there were institutions and expertise to carry out justice.

Passive complementarity meant that the ICC would be dormant until its jurisdiction was triggered either by states parties or the Security Council referrals. Consequently, this model of complementarity undermined the \textit{proprio-motu} powers of the Prosecutor whereby the Prosecutor is empowered to initiate investigations and prosecutions on his own following information received from states.\textsuperscript{194} Arguably, it was thought that the Prosecutor would rarely use the \textit{proprio-motu} powers, as that would run counter to states’ sovereignty and the principle of non-intervention. While the ICC was passive or dormant waiting for states to take on their primary responsibility, states on the other hand, were passive because they perceived the ICC as an institution endowed with the expertise and resources to investigate and prosecute international crimes.

\textsuperscript{191} Hall, (n 7) 1017.
\textsuperscript{193} Hall, ibid.
\textsuperscript{194} Rome Statute, art 15.
As an initial model, passive complementarity could not last for a long time because the lack of understanding of complementarity on the part of states soon resulted in referrals of situations from some African states to the ICC. In addition, the Prosecutor has exercised its powers under Article 15 with respect to Kenya. As a result, passive complementarity gave way to positive complementarity.

1.3.2 Positive Complementarity

Articulating positive complementarity, the first Prosecutor of the ICC, Luis Moreno-Ocampo said that the ICC should be viewed as a success when it has no cases, due to the availability and ability of national courts to try persons responsible for the crimes described in the Rome Statute.

As a consequence of complementarity, the number of cases that reach the court should not be a measure of its efficiency. On the contrary, the absence of trials before the court, as a consequence of the regular functioning of national institutions would be a major success.

The strategic priority would be that, rather than compete with national jurisdictions, the OTP would ‘encourage national proceedings wherever possible’. In its 2006 Policy Paper, the OTP further expounded the model by introducing what has since become known as 'a positive approach to complementarity'.

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195 See Self-Referrals (n 54).
200 Burke-White, Positive Complementarity (n 6).
Nevertheless, there seems to have been a shift in the above connotation of positive complementarity because at the Review Conference held in Kampala Uganda, positive complementarity was defined as ‘all activities whereby national jurisdictions are strengthened … to conduct genuine national investigations and trials … without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis’. 

The three categories of support for national jurisdictions identified were legislative assistance, technical assistance and capacity building and physical infrastructure. Different scenarios in which assistance could be provided were discussed, including assistance before, during and after situations arise, and assistance in situations where the Court is investigating and prosecuting and where it is not. Most significantly, actors involved in positive complementarity were discussed, and the limited role that the ICC should play in positive complementarity was highlighted. As a result of its judicial mandate and limited budget, the ICC was not to be actively involved in capacity building but to focus its resources on investigating and prosecuting the crimes under its jurisdiction. Of crucial importance is the point that the ‘Court is not a development agency’.

The position taken at the Review Conference reveals that there has been a shift in the meaning of positive complementarity as formulated by the OTP. Whilst the OTP intended some collaboration between the ICC and states in its formulation of positive complementarity, the Review Conference defined it more narrowly, emphasizing the voluntary nature of assistance and the limited role of the ICC in capacity building. This shift reflects the evolving understanding of the Court’s role in the international criminal justice system.
complementarity, the Review Conference emphasised collaboration but only amongst states, civil society and non-governmental organisations.\(^{208}\) It is submitted that the interdependent relationship between the ICC and national jurisdictions with respect to complementarity needs further clarification. It is recognised that states need some assistance to be able to investigate and prosecute international crimes; the question of how and who to ensure these have been left unanswered.

Admittedly, for positive complementarity to work, it is not enough to rely on the OTP to inspire national jurisdictions to undertake investigations and prosecutions. Although such encouragement is significant, it runs the risk of becoming a paper exercise if there is no strong national framework in place enabling states to exercise criminal jurisdiction.\(^{209}\) Consequently, a more systematic approach towards empowering national legal orders is imperative. It is argued that proactive complementarity by which both the ICC and states are actively engaged in on-going processes at the domestic level is necessary for the implementation of complementarity.\(^{210}\)

1.3.3 Proactive Complementarity

Proactive complementarity involves requests for assistance from states to the ICC and pragmatic cooperation from the ICC to build national justice systems to enable them carry out the investigation and prosecution of international crimes domestically.\(^{211}\) This could be achieved by the consensual sharing of burden between the ICC and national jurisdictions,

\(^{208}\) Stocktaking on Complementarity, para 4.

\(^{209}\) Burke-White, Positive Complementarity (n 6) 71.

\(^{210}\) Burke-White Proactive Complementarity (n 2) 57.

a point on which scholars agree. However, the point is highlighted by the use of the word ‘catalyst’ stating that the ICC could act as a catalyst to national jurisdictions. The view point on the catalytic effect of the ICC often stems from the notice that the Prosecutor is required to give to states which usually have jurisdiction over a case that there are sufficient grounds for investigation. According to Kleffner, the notice is meant to catalyse states into prosecution and where that happens the states concerned can stop intervention by the ICC. On the other hand where the state in question fails to act, the Prosecutor finds the failure or inaction as a reasonable basis to commence an investigation.

However, this view of the ICC as having a catalytic role is coercive and has the effect of creating hostility between the ICC and states. It appears complex and may possibly be frustrated by lack of cooperation by states. Therefore the state concerned may ignore the Prosecutor’s notification and allow the one month time frame to elapse without carrying out any investigation. The consequence of this is that the case returns to the Prosecutor. Conversely, the state may react positively to the notification and commence an investigation, but could such action then be classified as genuine? These scenarios have been reflected to a small degree in the Kenya and Libya admissibility decisions. As analysed above, the admissibility challenges were rejected because the states failed to produce investigative steps and evidence of sufficient degree of specificity and probative value.

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212 See Broomhall (n 48) 84, 86 (noting that the ICC might act as ‘spur’ to national proceedings); Kleffner (n 2) 309; Perrin (n 4); Burke White, Proactive Complementarity (n 2).
213 Kleffner, 309 (noting that the catalytic effect of the ICC would yield good result in which the ICC motivates national justice systems through the threat of international intervention).
214 Rome Statute, Art 18(1).
215 Kleffner, 314-315.
216 Ibid. See also the Decision of the PTCII in the admissibility Challenge in Katanga et al, (n 100).
217 Perrin (n 4)
218 See Libya Saif Al-Islam case (n 96) para 54; Mathaura et al case (n 88) para 61.
The foregoing scenario is aptly captured by the term ‘complementarity paradox’ by Paolo Benvenuti, who stated that:

The ICC starts with a terrible disadvantage. It acquires complementary jurisdiction when states having primary jurisdictions are unwilling or unable genuinely to carry out investigation or prosecution. These states are usually those most connected with the crime... and consequently they are precisely those whose cooperation is essential [for effective ICC prosecution]. Why would those states genuinely unwilling to carry out investigation and prosecution be subsequently cooperative with the ICC?

In view of the foregoing, this thesis submits that the catalytic effect of the ICC should be conceptualised from the perspective of proactive complementarity. The argument is that both the ICC and states could rely on Article 93(10) to ensure a mutually inclusive and an interdependent relationship. Article 93(10) requires the ICC to ‘cooperate with and provide assistance to a state conducting an investigation into a trial...’ The assistance provided by the ICC to states, oriented as it is in the opposite direction vis-à-vis the perspective in which cooperation is usually addressed, namely, from states to the ICC has been referred to as ‘reverse cooperation’ by Federica Gioia. This thesis adopts Article 93(10) ‘reverse cooperation’ provision as a mechanism by which proactive complementarity could be achieved.

Complementarity and cooperation are two pillars on which the effective functioning of the ICC is founded. Cooperation would be discussed in detail in the subsequent chapter; it suffices to mention here that hitherto, references to cooperation almost invariably focuses on cooperation that states are statutorily obliged to provide to the ICC.

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220 Benvenuti, 50.

221 Federica Gioia, ‘Complementarity and Reverse Cooperation’ in Stahn and ElZeidy (eds) Complementarity Theory to Practice (n 3) 807-828.
However, the Rome Statute does address cooperation as a two-way process i.e. as occurring not only from states to the ICC but also from the ICC to states.\footnote{Gioia, 808.}

Under Article 93(10), the ICC is expected to cooperate with and provide assistance to a state upon a request from that state. The state’s request may cover areas of investigations into trials with respect to conduct which constitutes international crimes and may also include conduct which constitutes serious crimes under national law.\footnote{Rome Statute, Art 93(10)(a).} The assistance the ICC could provide may include transmission of documents, statements or other types of evidence obtained in the course of an investigation or a trial conducted by the Court.\footnote{Rome Statute, Art 93(10)(b); Rule 194 RPE.} It is submitted that, notwithstanding the restrictive or limited assistance that the ICC may provide, states could take advantage of the provision to request the ICC for assistance and cooperation in their genuine attempt at investigating and prosecuting international crimes domestically. When engaged in these collaborations, the ICC and states would function proactively and as mutually inclusive institutions to carry out the task of prosecuting international crimes.

In the Kenya Appeals Decision, Kenya noted that it had filed a Request for Assistance pursuant to Article 93(10) and Rule 194 before the PTCI but it was denied.\footnote{Muthaura et al case, para 114.} Kenya claimed that it was unfair to have been denied the opportunity of relying on the evidence and assistance in its national investigation.\footnote{Ibid, paras 115-116.} It is submitted that the use of Article 93(10) Request for Assistance in the Kenya admissibility challenge appeared late. It is proposed that states could use the Request for Assistance in advance, not waiting until cases are before the ICC and then using the Request for Assistance as a means for requesting an inadmissibility consideration.
It is important to note that under Article 93(10) cooperation and assistance from the ICC can only occur on ‘request’. This again is to safeguard the sovereignty of states, as the ICC may not want to intervene unless formally and expressly requested. It is therefore incumbent on states to take advantage of this option. This is even more imperative as the OTP has established a Jurisdiction, Complementarity and Cooperation Division (JCCD), which has the remit to assist national proceeding where possible and to verify that those proceedings are genuine.

The theoretical assumptions of complementarity both as initially conceived and as it has materialised since the beginning of the operational phase of the ICC require assessment against the background of a relationship between the ICC and states. Thus according to Gioia, a friendly vision of complementarity relies on the assumption that the ICC is not meant to act as a censor of national jurisdictions but rather to allow for the most efficient sharing of competences between the ICC and states. This thesis agrees with this proposition and notes that adopting proactive complementarity would facilitate constructive interplay between states and the ICC. It may further detract resources from the direct investigation and prosecutions that the ICC can undertake.

While proactive complementarity offers a potentially effective and efficient means of allowing the ICC to fulfil its mandate, its implementation could raise new challenges. These include the practical difficulty of coordinating with national governments and the legal risks that could compromise the subsequent admissibility of a case before the

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227 Gioia, Reverse Cooperation 815.
229 Gioia, 817.
230 Burke-White ‘Proactive Complementarity’, 83; Morten Bergsmo, Olympia Bekou, Annika Jones, ‘Complementarity and the Construction of National Ability’ in Stahn & ElZeidy Complementarity from Theory to Practice (n 3)1052-1070, 1063.
It is therefore suggested that a cautious strategy of proactive complementarity be adopted, with appropriate limits in order to achieve its full benefits and minimise its potential challenges.

**Conclusion**

Complementarity is the future of the ICC. However, the concept is yet to be fully interpreted and applied. Analysis of the components of complementarity revealed that they are still ill-defined. This is linked to the fact that most of the cases in which the ICC has had to give an interpretation have been cases in which states claimed to be carrying out investigations domestically. As in previous cases, in the admissibility challenges by the Kenyan and Libyan governments, the ICC only had the opportunity to determine whether the investigations encompassed the same person and substantially the same conduct. Although this is permissible under the Statute, it appears that complementarity is working in reverse.

This is because the clear wording of Article 17 means that it is for states to be actively engaged in investigation and prosecution and it would be for the ICC to allege and prove that the complementarity thresholds of ‘unwillingness’, ‘inability’, ‘genuinely’ or ‘sufficient gravity’ exist on the part of the state or situation for which reason it would assume jurisdiction over the case. In view of this dilemma, the ICC has constructed another threshold of ‘inactivity’. Arguably, this is the result of lack of understanding that states bear the primary responsibility to prosecute international crimes. It is maintained that a proper understanding would make states incorporate international crimes into their domestic criminal law.

Stigen (n 83) 507; Stahn ‘Complementarity: A Tale of Two Notions’ (2008) 19 CLF 87-113, 103.
The lack of understanding is exemplified in the fact that of the eight situations before the ICC, four were referred by the states themselves. This raises the fundamental question whether the complementarity regime was intended to encourage self-referrals. It is acknowledged that two of the three trigger mechanisms are by referrals; either by states or the Security Council, however it is submitted that self-referrals seem to undermine the very purpose of complementarity. Be that as it may, the first ten years of the functioning of the ICC has been described as the ‘teething’ period and therefore neither the ICC nor the states that referred situations in their territories are to blame.232

While it may be difficult to determine the precise application of complementarity even in the next decade, it is suggested that a mutually inclusive interpretation may be beneficial. This would make states to see the need to incorporate the crimes in the Rome Statute into their domestic criminal law, ensure institutional capacity and confidently investigate and prosecute the crimes domestically rather than refer to the ICC situations for which they are meant to be primarily responsible.

The emerging complementarity models point to the fact that proactive complementarity would be of value to states, the ICC and the international community as whole. The distinctive provision of Article 93(10) providing for a reverse cooperation from the ICC to states is the architecture of the model. An understanding of complementarity from this perspective would make both national jurisdictions and the ICC to collaborate for the purpose of closing impunity gaps as envisioned in the Rome Statute.

This implies that the duty of states under the complementarity regime goes beyond mere ratification of the Rome Statute. For effective burden-sharing between states and the ICC, there are certain requirements for the implementation of complementarity. The

next chapter would discuss these requirements with a view to ensuring that states do not stop at ratification but to take a further step to integrate the Rome Statute crimes into their domestic criminal law and ensure institutional capacity to act.
Chapter Two


With the exception of issues relating to the administration of justice and cooperation,¹ the Rome Statute does not expressly stipulate any requirement on how states should implement it. Therefore states are not specifically obliged to incorporate international crimes into their domestic criminal law. For this reason some scholars have argued that states do not have to integrate the Rome Statute crimes into their domestic criminal law.²

However, the central argument of this thesis is that the distinctive regime of the Rome Statute rests on two pillars, namely; cooperation and complementarity. Consequently it could be inferred that cooperation and complementarity legislation (implementing legislation) are necessary for states to implement the Rome Statute regime. Following the explication in the previous chapter, that complementarity should be perceived and applied as a mutually inclusive concept, in this chapter it is argued that implementing legislation is required for states to realise complementarity. The premise of this argument is that states’ ratification of the Rome Statute constitutes consent to complementarity as a concept designed by states, to be operated by states and for the benefit of states,³ and that it is for individual states to devise its implementation mechanism.

The importance of this argument to the thesis as a whole is that in order to realise the benefit of complementarity, states would need to engage actively in the investigation and prosecution of international crimes domestically. To demonstrate their

¹See Articles 70(4)(a) and 86-92 relating to the adoption of legislation penalizing offences against the administration of justice and the obligation to cooperate fully with the ICC respectively.
²See Infra Sarah Nouwen and Frédéric Mégret (notes 45 & 48 respectively).
³Olympia Bekou, ‘In the Hands of the State’ (Text to n 41 in Ch 1) 830-852. 851-852.
willingness and genuine ability to carry out this duty, it is argued that it is expedient for states
to incorporate the crimes in the Rome Statute into their domestic criminal law. This is
because international crimes and ordinary domestic crimes are not the same. This point is
further strengthened by the jurisprudence of the Pre-Trial and Appeals Chambers of the ICC
in which they have repeatedly rejected admissibility challenges brought by states with
jurisdiction to try the same cases. The basis for rejection has been that the states’ assertions
that they were investigating the suspects for the crimes they allegedly committed did not
establish that the states’ investigations actually covered the same persons and substantially
the same conduct for which they were on trial before the ICC.

How a treaty is implemented (that is, how it is given force under domestic law,
or what legal changes are made to allow the state to act in accordance with its international
obligations) often varies from state to state, legal system to legal system and from treaty to
treaty. In the case of the Rome Statute, issues of domestic implementation arise for both
complementarity and cooperation. The former relates to the integration of Rome Statute
crimes into domestic criminal law to enable domestic prosecution of the crimes. The latter is
necessary to support and facilitate the ICC and national jurisdictions in the investigation and
prosecution of alleged perpetrators.

This chapter is divided into four sections. The first section discusses the
rationale for implementing legislation. This is significant because the thesis acknowledges
that the Rome Statute does not expressly oblige states to enact implementing legislation.

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4 See Pre-Trial Chamber I in the Saif Al-Islam case (Text to n 96 in Ch 1); Pre-Trial Chamber II in the Joseph
Kony et al case, Trial Chamber II in the Germain Katanga case (Text to n 100 in Ch 1) and the Appeals
Chamber in the Muthaura et al (Kenya Appeals Decision) case (Text to n 88 in Ch 1).
5 See the ‘same person same conduct’ test formulated in the Lubanga case and applied in the cases analysed in
Chapter One (Text to notes 90 & 92 Ch 1).
6 International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR); Rights and Democracy,
Accessed 10 July 2012
7 Ibid.
However, since states determine how to observe their obligations under international law and particularly in view of the distinctive complementarity regime, it is necessary for states to reflect on how to ensure its domestic implementation.

Besides, for a state to successfully challenge the admissibility of a case before the ICC, the state has to prove that its domestic investigation encompasses both the same person and substantially the same conduct for which the suspect is standing trial before the ICC. It is argued that to pass the ‘same person same conduct’ test, states would need to have incorporated Rome Statute crimes into their domestic criminal law.

The second section discusses cooperation legislation. Although the Rome Statute expressly requests states to cooperate fully with the ICC, there is no precise provision requiring them to adopt cooperation legislation. This means that states may use pre-existing cooperation mechanisms. In this section, it is argued that existing cooperation mechanisms like extradition rules cannot be relied on by states because the cooperation regime under the Rome Statute is different from extradition procedures that exist between states. Therefore cooperation legislation is important, not least for the sole purpose of cooperating fully with the ICC, but also for states to benefit from the ‘reverse’ cooperation regime introduced in Article 93(10).

The third section examines complementarity legislation. The different methods by which states have integrated international crimes into their domestic criminal law are analysed and two main approaches are identified, namely; the minimalist and express criminalisation methods. Although the minimalist approach seems to be the easiest, the use of the express criminalisation method, by which the exact wordings of the definitions of crimes in the Rome Statute are adopted by states in their implementing legislations, is nonetheless advocated.

8 Saif Al-Islam case (Text to n 96 in Ch 1) para 74.
An analysis of how South Africa adopted its implementing legislation forms the basis of the discussion in the fourth section. Here, it is admitted that several countries both from the common law and civil law traditions have enacted implementing legislation; however, the section’s focus on South Africa is due to two reasons. First, as all cases currently before the ICC are from the African continent, it is thus more relevant to examine an African state which has implementing legislation, with a view to other states in the region following the example. Second, South Africa offers a ready case study because it is the only African state with implementing legislation in conformity with the Rome Statute in advance.9

Three other African states that have passed implementing legislations are Kenya, Senegal and Uganda, but their legislations were adopted late. Kenya’s implementing legislation, for example, was passed two years after its 2007/2008 post-election violence.10 Kenya’s inability to prosecute those involved in the post-election violence, is arguably linked to the lack of implementing legislation at the time. Similarly, Senegal was found guilty of delaying the adoption of local legislation in the judgement of the International Court of Justice (ICJ) in the case between Belgium v Senegal.11 Arguably, Uganda hastily passed its implementing legislation in March 2010 in order to secure its hosting of the first Review Conference held in May and June 2010.

This chapter proposes that to ensure proactive complementarity, ratification of the Rome Statute by states is only a starting point. Thereafter, it is imperative for states to adopt both cooperation and complementarity legislation to ensure domestic implementation of the Rome Statute. However, since this is not strictly required under the Statute, and the

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argument over whether implementing legislation is necessary for states is on-going, the basis for implementing legislation is discussed in the following section.

2.1 The Rationale for Implementing Legislation.

It might seem out of place to consider the implementation of the Rome Statute in the national legal systems of states. This is because the Statute places no specific obligation upon states to implement the Statute’s provisions per se. While it does contain various requirements for states’ cooperation with the ICC, these relate exclusively to matters of investigatory, executory and trial procedures. Consequently, these have been the subject of little or no controversy, although the practical application of cooperation between the ICC and states remains a challenge.

With respect to complementarity legislation, it may further be argued that some of the crimes defined by the Rome Statute, as well as the general principles and the jurisdictional regimes applicable to them, had been recognised by international law prior to the adoption of the Statute. According to some, the obligation on states to adopt the crimes into their domestic laws is derived from treaties. Thus, a strong point may be made that since the crimes have been recognised by international law, it is superfluous to require states to incorporate them into their domestic criminal law. However, in this thesis, it is maintained that for the distinctive regime of the Rome Statute, complementarity legislation is necessary for states.

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13 See Part 9 of the Rome Statute which imposes a general obligation on states parties to cooperate with the ICC in investigating and prosecuting the crimes within the Court’s jurisdiction.
14 See the Forms of Cooperation (infra n 66).
15 Turns, 338.
16 The Convention for the Prevention and Punishment of Genocide (1948) proscribed the crime of genocide, the Four Geneva Conventions of (1949) and the Additional Protocols I and II of 1977 (AP I & II) proscribed war crimes and crimes against humanity.
17 See for example Article V of the Genocide Convention, Articles 49, 50, 129 and 146 of the First, Second, Third and Fourth Geneva Conventions respectively; Articles 85-87 AP I; Article 6 of the Torture Convention (1984) where states undertook to enact necessary legislation to give effect to the provisions of the Conventions.
Admittedly, Article 1 of the Rome Statute does not require national implementation in express terms.\textsuperscript{18} However, its formulation of complementarity, reiterates that primary jurisdiction over the crimes delineated in the Rome Statute is given to individual states. Implicitly, this implies a need for implementation. States must ensure that they are able to prosecute the crimes enumerated in Articles 6-8 of the Statute, not only theoretically, for example, by having the legal capability to assert jurisdiction to prosecute, but also in reality, by having the crimes listed in the Statute in their national criminal law.\textsuperscript{19}

Logically, implementing legislation safeguards states’ primary right to investigate and prosecute crimes which could potentially come under the jurisdiction of the ICC and more specifically to avoid being declared ‘unable’.\textsuperscript{20} This is because inability does not only apply to situations of failed states in which armed conflict has resulted in the substantial or total collapse of the national judicial system, but it equally applies to states’ inability to carry out proceedings due to the substantial or total unavailability of its judicial system.\textsuperscript{21} This form of inability may result from the absence or inadequacy of substantive legislation at the domestic level.\textsuperscript{22} Thus, defects in domestic law, which might render the national judicial system substantially or totally unavailable, can make a case admissible before the ICC.\textsuperscript{23}

Contrary to the assertion that implementing legislation is necessary for national implementation of the Rome Statute, the Statute does not expressly say that it is. In

\textsuperscript{18} Article 1 of the Rome Statute provides that the ICC shall be complementary to national criminal jurisdictions; other formulations of complementarity are to be found in paras 6 & 10 of the Preamble to the Statute.

\textsuperscript{19} Turns (above n 12) 338.


\textsuperscript{21} Ibid.

\textsuperscript{22} Doherty & McCormack, ‘Complementarity as a Catalyst’ (Text to n 4 in Ch 1) 152; Lattanzi, ‘The International Criminal Court and National Jurisdictions’ (Text to n 48 in Ch 1) 181; Paola Gaeta, ‘Official Capacity and Immunities’ in Antonio Cassese, Paola Gaete and John Jones (eds) The Rome Statute of the International Criminal Court (OUP 2002) 975-1002, 998 (Cassese et al); Yang, ‘On the Principle of Complementarity’ (Text to n 47 in Ch 1) 124.

\textsuperscript{23} Kleffner, (n 20).
fact, the Statute’s silence on the point has been read to mean that states may depend on ordinary domestic criminal law to prosecute international crimes. Surprisingly, this position was upheld by the Pre-Trial Chamber I (PTCI) in its decision of 31 May 2013 regarding the admissibility challenge by Libya in the *Saif Al-Islam Gaddafi*\(^\text{24}\) case. The PTCI noted that ‘a domestic investigation or prosecution for ‘ordinary crimes’ *to the extent that the case covers the same conduct* shall be considered sufficient’.\(^\text{25}\) It is the Chamber’s view that Libya’s current lack of legislation criminalising crimes against humanity does not *per se* render the case admissible before the Court.\(^\text{26}\)

Nevertheless, the Chamber assessed Libya’s ability in relation to the Libyan Code of Criminal Procedure, amongst others, and found that Libya was unable to investigate Mr Gaddafi. The PTCI decision was founded on Libya’s failure to provide the Chamber with ‘enough evidence with a sufficient degree of specificity and probative value to demonstrate that Libya’s investigations *covered the same conduct* as those with the ICC’.\(^\text{27}\)

In rejecting the admissibility challenge, the PTCI made reference to the Appeals Chamber’s previous decisions in the two Kenyan cases,\(^\text{28}\) in which the Chamber upheld the validity of the ‘same person same conduct’ test thus:

> The defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under Article 17(1)(a) of the Statute, the national

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\(^{24}\) *Saif Al-Islam* case (Text to n 96 in Ch 1).

\(^{25}\) Ibid, paras 88, 108, 133, 200, 201 (emphasis added)

\(^{26}\) Ibid, para 88

\(^{27}\) Ibid, paras 134, 135, 219 (emphasis added).

investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.\textsuperscript{29}

The ‘case’ as referred to in Article 17 of the Statute is characterised by two components: the person and the conduct. The PTCI further observed that while it is uncontested that national investigations must cover the ‘same person’,\textsuperscript{30} the ‘conduct’ part of the test raises issues of interpretation and needs further clarification.\textsuperscript{31}

Admittedly, the determination of what constitutes ‘substantially the same conduct’ as alleged in the proceedings before the Court will vary according to the concrete facts and circumstances of the case and therefore requires a case-by-case analysis.\textsuperscript{32} However, it is argued that ‘substantially the same conduct’ cannot be interpreted in a manner that would allow variation in the underlying facts and incidents, as such a flexible interpretation would undermine the very purpose of complementarity.\textsuperscript{33}

The ordinary crimes for which Saif Al-Islam Gaddafi was being investigated were intentional murder, torture, incitement to civil war, indiscriminate killings, misuse of authority against individuals, arresting people without just cause and unjustified deprivation of personal liberty pursuant to articles 368, 435, 293, 296, 431, 433 and 434 of the Libyan Criminal Code.\textsuperscript{34} On the other hand, the ICC arrest warrant for Saif Al-Islam was for the commission of murder and persecution as crimes against humanity under Article 7(1)(a) and (h) of the Statute.

It is maintained that the ordinary crimes for which Libya proposed to prosecute Saif Al-Islam are not the same as the crimes against humanity of murder and persecution, for which he is indicted before the ICC. Although not expressly stated by the

\textsuperscript{29} Muthaura \textit{et al} case paras 39, 40, 41, 42 & 61.
\textsuperscript{30} Ibid, paras 1, 40-43.
\textsuperscript{31} \textit{Saif Al-Islam} case, para 61
\textsuperscript{32} Ibid, para 77.
\textsuperscript{33} Ibid, para 68.
\textsuperscript{34} \textit{Saif Al-Islam} case paras 28 & 112.
PTCI, it is submitted that it is for this reason that the PTCI found Libya unable to investigate and prosecute and rejected the admissibility challenge. This argument finds support in the PTCI assertion that ‘a domestic investigation or prosecution for ordinary crimes is sufficient provided that it covers the same conduct’.\(^{35}\) In other words, to pass the ‘same conduct’ limb of the test, the domestic investigation of an ordinary crime must cover the same acts as stipulated in the Rome Statute and the ICC arrest warrant. It is argued that this is possible only when the domestic law incorporates the Rome Statute crimes because international crimes are not usually known to domestic criminal law.

In addition, the PTCI raised specific concerns regarding the ordinary crimes for which Saif Al-Islam was being investigated.\(^{36}\) Two concerns noted by the Chamber were; first, that the crimes potentially applicable to Saif Al-Islam apply only to ‘public officers’ under Libyan legislation, which could raise problems, as Saif Al-Islam did not occupy a formal official position in Libya.\(^{37}\) Second, since the crime of persecution was not known in Libyan law, the Chamber was not satisfied with Libya’s claim that though discriminatory intent was absent, it was an aggravating factor which would be taken into account in sentencing under Articles 27 and 28 of the Libyan Criminal Code.\(^{38}\)

Furthermore, the PTCI determined that the crimes which Libya proposed charging Saif Al-Islam with under Libyan legislation do not cover all aspects of the offences under the Rome Statute.\(^{39}\) Consequently, the Chamber established that Libya failed to ‘provide evidence with a sufficient degree of specificity and probative value to demonstrate that Libya’s investigations covered the same conduct as those with the ICC’.\(^{40}\)

\(^{35}\) Ibid, paras 85, 86, 108, 133, 200, 201 (emphasis mine).
\(^{37}\) Ibid, para 109.
\(^{38}\) Ibid, para 111.
\(^{39}\) Ibid, para 113.
\(^{40}\) Ibid, paras 134, 135.
The PTCI argument inevitably leads to the inference that if Libya had adopted implementing legislation and begun its investigation based on the same conduct as contained in the Rome Statute and the ICC arrest warrant, Libya would have been able to show the ‘sufficient degree of specificity and probative value’ required by the PTCI. Ultimately a state that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible.\(^{41}\) The central argument in this thesis as reflected in the PTCI decision in the \emph{Saif Al-Islam} case, is that the lack of substantive and procedural penal legislation in conformity with the Rome Statute rendered Libya’s judicial system unavailable.

It is submitted that the PTCI’s assertion that states do not have to integrate the Rome Statute crimes into their domestic criminal law is supported by the Statute only to the extent that the Rome Statute is silent on it. In the \emph{Lotus}\(^{42}\) case, the Permanent Court of International Justice (PCIJ) noted that as long as international law does not expressly prohibit something, it may be applied.\(^{43}\) It is argued further that although not explicitly stated, such an obligation is implied and could be read into the Rome Statute, as it is not possible to ‘put something on nothing and expect it to [stand], it will collapse’.\(^{44}\) Complementarity can only stand on the effective criminal justice systems of states and the starting point for that effectiveness is criminalising the Rome Statute crimes domestically.

Nevertheless, the argument that states can prosecute the crimes in the Rome Statute on the basis of ordinary domestic crimes has been advanced by some scholars. Sarah Nouwen, for example, maintains that the Statute’s only provision referring to a duty to prosecute is the sixth preambular paragraph, which states that it is the duty of every state to

\(^{41}\) \textit{Saif Al-Islam} case, para 52; \textit{Muthaura et al} case, para 62; Pre-Trial Chamber I Decision in \textit{Saif Al-Islam} case 7 December 2012 para 9; Pre-Trial Chamber I, Transcript of Hearing, 10 October 2012 ICC-01/11-01/11-T-3-Red-ENG, 64-65.

\(^{42}\) \textit{SS Lotus,} PCIJ Series A No 10 (1927) (\textit{Lotus} case).

\(^{43}\) ibid, 19.

\(^{44}\) \textit{Per Lord Denning in Macfoy v UAC Ltd} (1961) 3 WLR (PC) 1405, 1409.
exercise criminal jurisdiction over those responsible for international crimes.\textsuperscript{45} Accordingly, she argues that there is no obligation on states to proscribe the Rome Statute crimes in their domestic criminal law.\textsuperscript{46} Moreover, the Statute does not oblige states to make use of their primary right to investigate and prosecute war crimes, crimes against humanity or genocide.\textsuperscript{47} Similarly, Frédéric Mégret argues that rigorous legal reform in national criminal law is not strictly required under the Rome Statute.\textsuperscript{48}

Notwithstanding the lack of an explicit obligation on states to enact implementing legislation, the main argument of this thesis is that adopting such legislation is nonetheless necessary for the application of complementarity. In addition to the inferences derived from the PTCI’s decision in the \textit{Saif Al-Islam} case described above, such a position finds support in a number of arguments. First, paragraph six of the preamble recalls states’ duty to ‘exercise [their] criminal jurisdiction...’\textsuperscript{49} such a duty presupposes an obligation to ensure that the crimes in the Rome Statute are incorporated into national criminal law.

Second, the Statute affirms that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’ and expresses the view that ‘their effective prosecution must be ensured by taking measures at the national level...’\textsuperscript{50} This underpins the realistic assertion that not all international crimes committed in a particular situation can be prosecuted before the ICC.\textsuperscript{51} In line with this position, it has been noted that

\begin{footnotesize}
\begin{enumerate}
\item Sarah Nouwen, ‘Complementarity in Uganda: Domestic Diversity or International Imposition?’ in Stahn and ElZeidy (eds) \textit{Complementarity from Theory to Practice} Vol II (Text to n 3 in Ch 1) 1127.
\item Ibid.
\item Ibid.
\item Frédéric Mégret, ‘Too Much of a Good thing? Implementation and the Uses of Complementarity’ in Stahn and (eds) \textit{The International Criminal Court and Complementarity: From Theory to Practice} Vol I (CUP 2011) 361-390, 367-374 (noting that requiring states to adopt comprehensive implementing legislations goes beyond what is required under the Rome Statute).
\item Rome Statute, para 6 of the Preamble.
\item Rome Statute, para 4 of the Preamble.
\item Otto Triffterer, ‘Preamble’ in Otto Triffterer (ed) \textit{Commentary on the Rome Statute} (Text to n 45 in Ch 1) 1-16, 11-12.
\end{enumerate}
\end{footnotesize}
the ICC only prosecutes those who bear the greatest responsibility for the gravest crimes.\textsuperscript{52}

By implication, an appropriate starting point for effective prosecution by states would be to either adjust domestic laws or make new laws to incorporate the crimes. Without the crimes being reflected in national criminal laws, implementation of complementarity as envisaged in the Rome Statute lacks its principal pillar, namely, ‘measures at the national level’.\textsuperscript{53}

Third, effective prosecution at the national level is to fulfil the goal; of putting ‘an end to impunity for the perpetrators…and thus contributing to the prevention of such crimes’.\textsuperscript{54} This implies that the complementary jurisdiction of the ICC denotes a system of international law enforcement that allocates primary responsibility to national criminal jurisdictions.\textsuperscript{55} In such a system, the object of prosecuting with the effect of deterrence for the ultimate purpose of putting an end to impunity is undermined by states not having implementing legislation.

In agreement with this argument, the Informal Expert Group noted with regard to the principle of complementarity that, consistent with its mandate to help ensure that serious international crimes do not go unpunished, it should be a high priority for the Office of the Prosecutor to actively remind states of their responsibility to adopt and implement effective legislation.\textsuperscript{56} This implies that proof of a state’s ability or willingness to investigate

\begin{itemize}
\item \textsuperscript{52} See the PTCI decision of 10 February 2006 in the \textit{Lubanga} and \textit{Ntaganda} cases ICC-01/04-01/07; The ICC, ‘Understanding the International Criminal Court’ Available at \url{http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf}> paras 37 & 38; Xabier Aranburu, ‘Prosecuting the Most Responsible for the International crimes: Dilemmas of Definition and Prosecutorial Discretion’. Available at <\url{http://s3.amazonaws.com/academia.edu/documents/30582797/100106_Xabier_AGIRRE_ARANBURU_Prosecuting_Most_Responsible.pdf?AWSAccessKeyId=AKIAJ56TQJRTWSMTNPEA&Expires=1389181216&Signature=7CteHoAGmmm9861NTg07kQeo4ps%3D&response-content-disposition=inline}>.
\item \textsuperscript{53} Kleffner, (n 20) 93.
\item \textsuperscript{54} Rome Statute, para 5 of the Preamble.
\item \textsuperscript{55} Kleffner.
and prosecute international crimes and to cooperate with the ICC could be ascertained by its implementing legislation.\textsuperscript{57}

According to the former Registrar of the ICC, implementing legislation underpins the Rome Statute structure, such that the whole system becomes ineffective without it.\textsuperscript{58} She affirms that effective cooperation with the ICC is dependent upon the existence of implementing legislation at national levels.\textsuperscript{59} Accordingly, to guarantee cooperation, legislative and sometimes constitutional amendments are needed, although their exact scope and legal form may vary from one state to another.

\ldots as an international institution without direct enforcement mechanisms, the Court heavily relies on cooperation from states… the Rome Statute is a two pillar system: a judicial pillar represented by the Court, and an enforcement pillar represented by the states, which undertook a legal obligation to cooperate with the Court through the Rome Statute. Cooperation is the inter-play between these two pillars, shown clearly by the fact that the Court requires the states to play their part in order for the system created by the Statute to work.\textsuperscript{60}

The foregoing argument reveals that the ICC can only be an effective complement if states adopt the Statute’s substantive law for the purpose of domestic prosecution. Where states fail to enact implementing legislation, gaps are left that would ultimately prevent perpetrators from being brought to justice at the domestic level. It may also culminate in a large number of cases being admissible before the ICC. Thus, in order for

\begin{itemize}
  \item Speech by Ms Silvana Arbia at the conference ‘Justice for all? The International Criminal Court - 10 Year Review of the ICC’ at the University of New South Wales (UNSW) Sydney Australia 14 February 2012. Available at <http://www.icc-cpi.int/NR/rdonlyres/8C6B4B5B-D854-4F18-BA76-E0F687F2D60C/284274/Speech_10anniversary_Australia.pdf> (Accessed 2 March 2013).
  \item Arbia, ‘Justice for all’.
\end{itemize}
the ICC to effectively perform its complementary function, comprehensive implementing legislation is indispensable.\(^{61}\)

The view expressed by the German government in the course of implementing the Rome Statute by adopting the Code of Crimes against International Law (CCAIL) in 2002 further exemplifies this understanding.\(^{62}\) The government of Germany noted that adoption of the law was necessary in order to ensure, in light of the complementary prosecutorial competence of the ICC, that Germany is always able to prosecute crimes within the jurisdiction of the ICC.\(^{63}\) Furthermore, the Dutch Minister for Foreign Affairs J.D. de Hoop Scheffer in his statement to the First Assembly of States Parties, explained that complementarity requires states ‘to ensure ratification is followed by swift action to bring national legislation into line, because the Rome Statute will be incomplete without implementation and enforcement…’\(^{64}\) As noted by Garapon:

Complementarity is not just a mechanism for the ICC Prosecutor to bypass cases: it carries with it the hope for a more harmonious world in which we are all engaged, starting with the Third states. If this institution is not supported by respected states prepared to lend their weight in the service of justice in a coordinated development policy, complementarity will become purely cosmetic.\(^{65}\)

The debate in this section has thus far focused on justification for the adoption of implementing legislation by states. It is believed that it is first and foremost to the benefit of states to take on the investigation and prosecution of crimes in the Rome statute and second for the sustainability of the ICC. Once domestic criminal laws reflect the international

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\(^{62}\) Turns, (n 12), 379. (The final version of the Code of Crimes against International Law (CCAIL) entered into force on 30 June 2002: Bundesgesetzblatt (BGBI) 2002, 1, 2254).

\(^{63}\) Ibid.


crimes that come under the jurisdiction of the ICC, then it would be easy for them to investigate and prosecute with the international legal characterisation of the crimes. It is argued that it is only on this basis that primary jurisdiction has been given to states, as it is only then that states would be able to pass the ‘same conduct’ limb of the ‘same person same conduct’ test. Issues of implementing legislation relate principally to complementarity and cooperation. The next section discusses cooperation legislation.

2.2 Cooperation Legislation

There appears to be no debate on the need for cooperation legislation, as it is expressly declared in the Rome Statute that states are expected to cooperate fully with the ICC. However, it may be argued that states’ duty to cooperate with the ICC does not necessarily demand an extensive cooperation regime as individual states may rely on pre-existing cooperation mechanisms available to them. The purpose of the analysis in this section is to argue that under the complementarity regime, distinct cooperation legislation is required for a number of reasons.

First, the general cooperation that the ICC may request from states parties are set out in Parts 9 and 10 of the Rome Statute. As described there, the cooperation envisaged could be broadly categorised into three areas: (1) the arrest and surrender of persons at the request of the Court; (2) other practical assistance with the Court’s investigations and prosecutions and (3) general enforcement.66 Of these, the arrest and surrender of persons at

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66 See Parts 9 & 10 (Arts 86-111) of the Rome Statute. The forms of cooperation include general compliance with the ICC requests for cooperation (Art 87); Surrender of persons to the Court (Art 89); Provisional arrests pursuant to ICC requests (Art 92); identification or location of persons or items, taking and production of evidence, service of documents, facilitating witnesses’ and experts’ attendance before the ICC, temporary transfer of persons, examination of sites (e.g. mass graves), execution of search and seizure Orders, protection of witnesses, freezing of sequestration of property and assets (Art 93); and enforcement of sentences (Arts 103-107), fines and forfeiture orders (Art 109). See also Rod Rastan, ‘Testing Co-operation: The International Criminal Court and National Authorities’ (2008) 21(2) LJIL 431-456
the request of the Court is arguably the most important because under the Rome Statute, trials in absentia are not permitted.⁶⁷ Thus, the effective functioning of the ICC is wholly dependent upon national procedures which can comply with a request for arrest, and facilitate the surrender of suspects in order to ensure the appearance in court of accused persons.⁶⁸

Article 89(1) of the Rome Statute imposes a general duty on states to comply with a request for the arrest and surrender of an individual to the ICC.⁶⁹ However, the manner in which the arrest is to be executed and that of the surrender of the suspect to the ICC is left entirely to states to determine. This is understandably so since it would have been impossible for the drafters of the Rome Statute to provide a generic approach which could be followed by all states parties.⁷⁰ It would also have amounted to infringing too much on the sovereignty of states, as the intrusiveness of the ICC was already a major concern.

In order to secure the presence of accused persons at proceedings before the ICC, the question of whether the cooperation regime under the Rome Statute could depend on existing extradition laws between states needs to be answered. Extradition is the traditional method of securing the presence of alleged perpetrators of crimes to stand trial or serve a sentence, and it is usually a consequence of a bilateral agreement between states.⁷¹ The national legislation of some states contains provisions on extradition but the content varies from one state to another.⁷²

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⁶⁷ See Rome Statute, art 63.
⁶⁹ Rome Statute, Article 89(1).
⁷⁰ Bekou and Shah, (n 68) 525.
⁷¹ Katz, (n 68) 28.
A cornerstone of extradition law is the requirement of double criminality.\textsuperscript{73} The rule of double criminality requires that the conduct with regard to which extradition is requested constitutes a crime according to the law of both the requesting and the requested state at the time of its commission.\textsuperscript{74} This requirement is a means of ensuring reciprocity as well as protecting the individual requested against punishment for conduct that has not been criminalised by the requested state.\textsuperscript{75} Another requirement is the principle of speciality whereby the requesting state can only prosecute the surrendered person for the crime for which extradition was granted.\textsuperscript{76} Other procedural impediments to extradition include statutes of limitation and immunities.\textsuperscript{77} These considerations are irrelevant under the Rome Statute because the Statute uses the word ‘surrender’ and not extradition and inhibitions such as immunities and statutes of limitations have been conspicuously removed.\textsuperscript{78}

Article 59 of the Rome Statute provides for arrest and surrender proceedings in the custodial state.\textsuperscript{79} During the negotiations in Rome, three different terms were considered to achieve the handing over of an alleged perpetrator to the ICC; these were extradition, transfer or surrender. However, ‘extradition’ was rejected by some states during the Rome Conference because of constitutional restrictions on the extradition of nationals.\textsuperscript{80} Similarly, the concept of ‘transfer’,\textsuperscript{81} where a person sought is merely arrested and sent to the

\textsuperscript{73} Bert Swart, ‘Arrest and Surrender’ in Cassese et al (n 22) 1639, 1652-1654.
\textsuperscript{74} Ibid, 1653.
\textsuperscript{75} Ibid.
\textsuperscript{76} Bassiouni Intro to ICL Ibid, 501.
\textsuperscript{77} Swart, 1653.
\textsuperscript{78} Rome Statute, Articles 27 & 29. See also Swart 1657.
\textsuperscript{79} See Rome Statute, art 59 (2). Other relevant provisions on surrender include articles 58, 86, 101, 102.
\textsuperscript{80} States with civil law tradition (such as Germany, France, Spain and Italy) as opposed to a common law tradition do not as a rule extradite their own citizens.
\textsuperscript{81} ‘Transfer’ was the expression used by the ILC in its 1994 Draft Statute. In Part 10 of the Rome Statute, the term ‘transfer’ is now used in relation to persons serving a sentence of imprisonment imposed by the Court.
ICC, was rejected because the usual safeguards contained in the extradition process concerning the curtailment of liberty were absent.\(^8^2\)

As a compromise, the term ‘surrender’ was adopted.\(^8^3\) For the purposes of the Statute, Article 102 defines surrender as the delivering up of a person by a state to the Court pursuant to the Statute.\(^8^4\) Extradition means the handing over of a person by one state to another as provided by treaty, convention or national legislation.\(^8^5\) Thus, the surrender of a person to the ICC is fundamentally different from the handing over of a person within the framework of extradition between states,\(^8^6\) because it does not rest on reciprocity. Although this may not be fundamentally different in practice, it is recommended that for the full cooperation required, states should not rely on their extradition laws for the purposes of arrest and surrender of alleged perpetrators to the ICC.

Second, similar to the ad hoc tribunals, the ICC cannot enforce its own decisions; it cannot execute arrest warrants in the territory of states and does not have its own police force.\(^8^7\) As noted by the Appeals Chamber of the ICTY in the Blaskic\(^8^8\) case, ‘enforcement powers must be expressly provided and cannot be regarded as inherent in an international tribunal’.\(^8^9\) From this perspective, there is no direct enforcement of international

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\(^8^2\) Robinson, (n 61) 1852.
\(^8^3\) Cassese et al, ‘Surrender and Transfer under the Statutes of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda’ in Cassese et al (n 22)1664, 1676-1684.
\(^8^4\) See Rome Statute, art 102 (a).
\(^8^5\) See Rome Statute, art 102 (b).
\(^8^6\) Cassese et al, 1678.
\(^8^7\) Cryer et al, An Intro to ICL (Text to n 2 in Intro) 509; Kai Ambos, ‘Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik’(2008) 19 CLF 181-198 (noting that as a rule international tribunals depend on the cooperation with national jurisdictions not only for the arrest, investigation and prosecution of core international crimes but also for the execution of sentences).
\(^8^8\) Prosecutor v Tihomir Blaskic ICTY Case No. IT-95-14-AR108bis Appeals Chamber decision of 29 October 1997 (Blaskic case).
\(^8^9\) Ibid para. 25.
criminal law because the organs in charge of implementation depend on indirect enforcement in order to function properly.\textsuperscript{90}

The cooperation regime of the \textit{ad hoc} tribunals and states could be described as vertical, which is distinct from horizontal cooperation between states.\textsuperscript{91} With the latter, there is no legal obligation to cooperate. Rather such cooperation depends on the sovereign decision of the state concerned.\textsuperscript{92} The only precondition which may act as an impediment is the requirement of the principle of reciprocity.\textsuperscript{93} On the other hand, vertical cooperation is not inhibited by such an obstacle because the state’s cooperation is not theoretically dependent on the sovereign decision of the state, but rather on a general obligation to cooperate.\textsuperscript{94}

Consequently, the cooperation regime set out in the ICTY and ICTR Statutes is binding on all member states of the United Nations by virtue of Chapter VII of the United Nations Charter and it contains no qualifications and no exceptions.\textsuperscript{95} This is what makes it truly vertical, as the cooperation regimes were construed in a one-sided fashion; namely, entailing assistance and support from states to the tribunals.\textsuperscript{96} National rules and other international obligations which are opposed to obligations towards the tribunals cannot, in principle, be raised as grounds for refusal to cooperate. Therefore, noncompliance with the duty to cooperate could be met with Security Council sanctions on the violating state.


\textsuperscript{91} Blaskic case, paras 47 & 54.

\textsuperscript{92} Bassiouni, \textit{Intro to ICL} (n 72) 24.


\textsuperscript{94} Cryer et al, \textit{An Intro to ICL}.

\textsuperscript{95} See Articles 28 and 29 ICTY and ICTR Statutes respectively, which derive their authority from Security Council Resolutions 927 (1993) and 955 (1994). According to the provisions, the tribunals may issue an ‘order’ or ‘request’ both being equally binding on states. See Sluiter (n 93) 147-150.

Conversely, the Rome Statute favours a cooperation regime based on the traditional horizontal law of mutual assistance. At the same time, the ‘like-minded’ states proposed a new form of cooperation which takes into account the *sui generis* nature of the ICC. As a result, the Rome Statute contains a mixed regime of cooperation that is, on the one hand, less vertical than the one of the *ad hoc* Tribunals but on the other hand, goes beyond merely horizontal cooperation. This is because the ICC cooperation regime is treaty-based, and must therefore reconcile conflicting interests. In principle, the duty to cooperate presupposes the full cooperation of state parties upon ratification of the Statute, and at least a conclusion of an *ad hoc* agreement with non-state parties in accordance with Article 87(5). Therefore, there is a distinction between the general duty of states parties and the limited one of non-party states to cooperate.

Third, in addition to the mixed cooperation regime of the ICC, the Rome Statute’s formulation of cooperation foresees the option of ‘reverse’ cooperation. This means that the ICC is expected to provide assistance and support to domestic jurisdictions for the purposes of investigating and carrying out prosecutions under Article 93(10). The proactive complementarity model proposed in the preceding chapter implies that where cooperation legislation is in place, states would be able to request assistance from the ICC in their domestic efforts. This distinctive provision in the Rome Statute is not only an advantage

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99 Ambos, (n 87).
100 *Rome Statute*, Art 86.
101 Art. 87(5) allows the ICC to request non-party state to the Statute to provide assistance on the basis of an *ad hoc* arrangement, an agreement with such state or any other appropriate basis. See Rastan, (n 66) 441.
102 Federica Gioia, ‘Complementarity and Reverse Cooperation’ (Text to n 221 in Ch 1) 807-828.
103 *Ibid*. 

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to states and the ICC, it is also a basis for a mutually inclusive interpretation and application of complementarity.

Moving from the theoretical framework to the practical questions involved, the first imperative is for the Prosecutor to know with whom to cooperate. This question should, among others, be dealt with in national cooperation laws of states parties. The importance of determining who to cooperate with in national legislation is underscored by the withdrawal of the charges against Mr Muthaura in the Muthaura et al case. The Prosecutor noted that a major challenge in the case and one of the reasons for the withdrawal was ‘the disappointing fact that the Government of Kenya failed to provide my Office with important evidence and failed to facilitate our access to critical witnesses…’ This is irrespective of the decision on the confirmation of charges on the basis of a ‘thorough review’ by the Pre-Trial Chamber in January 2012.

Cooperation legislation therefore, could have the effect of eliminating confusion and streamlining the state’s action by indicating which authority is empowered to provide the cooperation required by the ICC. In practical terms, cooperation legislation has been enacted by a few states and, only by states where, frankly, the commission of

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104 Bekou and Shah, (n 68).
108 See Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali Case No: ICC-01/09-02/11 <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf> (Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute). The Prosecutor charged Muthaura and others with crimes against humanity of murder, deportation or forcible transfer, rape and other forms of sexual violence, other inhumane acts and persecution. Muthaura and Kenyatta were charged as indirect co-perpetrators pursuant to Article 25(3)(a) of the Rome Statute while Ali was charged as having contributed to the alleged crimes.
109 Bekou and Shah (n 68)
international crimes is very unlikely. This accounts for the inability of the Prosecutor in the cases currently before the ICC to obtain suspects, necessary witnesses and evidence, particularly concerning the indictments of alleged perpetrators in Sudan and Uganda.

The reasons advanced above in favour of states adopting cooperation legislation are by no means exhaustive. However, they demonstrate the distinctive cooperation regime under the Rome Statute. Without cooperation legislation at the domestic level, the ICC will not be effective. As noted, the Rome Statute is explicit on the need for states to cooperate fully with the ICC. However, the mechanisms of ensuring full cooperation are left entirely in the hands of individual states. Therefore it is imperative for states not to rely on existing cooperation or extradition rules, but to adopt cooperation legislation in line with the Rome Statute. There is yet further debate, particularly regarding complementarity legislation, because the Rome Statute does not specifically mandate the adoption of such legislation. Consequently, the next section discusses what complementarity legislation is and how states may incorporate the Rome Statute crimes into their domestic criminal law.

2.3 Complementarity Legislation

Complementarity legislation is the legislation required at the domestic level which should incorporate the Rome Statute’s substantive crimes, their definitions, elements and the penalties attached thereto. It is anticipated that this would provide a legal basis for states to prosecute international crimes as such. This is important because intentions to prosecute international crimes on the basis of ordinary crimes such as murder, rape and theft

without the international classification, could imply that the state is not equipped to prosecute international crimes. In order to ensure that states are willing and genuinely able to prosecute international crimes as such, it is argued in this section that complementarity legislation is imperative. The section further contains an examination of the different methods by which the Rome Statute crimes may be reflected in domestic criminal law.

The justification for complementarity legislation has been discussed in the first part of this chapter. In addition, it is submitted that the argument is founded on the principle that criminal law must be written prospectively, as clarity and non-retroactivity are key components of the principle of legality, *nullum crimen sine lege* (no crime without law). The principle of legality promotes a legal system’s legitimacy by limiting the interventions of its criminal process to those clearly prescribed in advance by law. Therefore, complementarity legislation gives states the opportunity to proscribe in advance the crimes in the Rome Statute within their domestic criminal laws. This would avoid a potential challenge to the exercise of jurisdiction on the grounds that the crimes were not known to domestic law. The Rome Statute does not allow retroactivity of criminal law, and it is argued that states should conform to the same standard in view of the nature and gravity of the crimes concerned.

Furthermore, the crimes listed in the Rome Statute have been recognised as having attained the status of *jus cogens*. The *jus cogens* nature of the crimes imposes a duty on all states, irrespective of their ratification, to ensure that they are proscribed under

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111 See arguments on the Saif Al-Islam case (notes 24–40), Turns (n 12); Kleffner (n 20).
113 Ibid.
114 See Rome Statute; art 11 on the temporal jurisdiction of the ICC (Stating that the ICC has jurisdiction only with respect to crimes committed after the coming into force of the Rome Statute).
115 *Jus cogens* is the body of ‘peremptory norm of general international law… from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’ (See art 53 Vienna Convention on the Law of Treaties 23 May 1969 1155 UNTS 331).
Thus, the principle aut dedere aut judicare (duty to extradite or prosecute), considered not just as a rule of customary international law, but also of jus cogens means that states are obliged to either extradite or prosecute perpetrators of international crimes. The focus of complementarity is, however, on the latter.

The duty to prosecute international crimes under the Rome Statute entails a two-fold requirement of national preparedness. First, states are expected to develop the legislative competence to prosecute core international crimes in their courts. This includes ensuring that there are provisions in the national criminal law explicitly criminalising genocide, crimes against humanity and war crimes. Without such crimes in national criminal law, it may not be possible to bring cases with the proper international legal classification. This may force prosecutors and judges to fall back on ordinary crimes which may not be adequate for the severity of international crimes. Second, states should have the institutional capacity to investigate and prosecute international crimes domestically. Thus, states are expected to ensure that some members of the criminal justice system develop expertise in this area through suitable capacity building measures, including training and access to specialised electronic resources.

Complementarity legislation is achieved through the process of incorporating core international crimes into national criminal law, thereby ensuring that crimes of such magnitude are proscribed by domestic law. To this end, there are different methods a state could use.

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116 Bassiouni, Intro to ICL (n 72) 137-140; Broomhall, (n 112) 41-42. See also the Trial Chamber of the ICTY in Prosecutor v. Anto Furundzija Case No: IT-95-17/1-T Judgment of 10 December 1998 paras 153-157 (Noting for example that torture is derived from the force of jus cogens).
118 Broomhall, 41; ICJ’s decision of 20 July 2012 (n 11) paras 71-75 & 99.
120 See submission in the Saif Al-Islam case (section on ‘Rationale for Implementing Legislation’).
121 Ibid.
122 Bergsmo et al (n 119).
can adopt. They include; the minimalist approach, the express criminalisation approach and the hybrid method. The next section discusses these methods in detail because it is in states’ interest to integrate the Rome Statute crimes into their domestic criminal law.

2.3.1 The Minimalist Approach

The minimalist approach is a method by which states apply military or ordinary civilian criminal law, already in force and relying on domestic crimes, such as murder, theft and rape, which are closely related to the conduct in question.\(^{123}\) In this approach, the domestic criminal law does not integrate international crimes but merely applies its categorisations to the conduct. Libya relied on this approach in its admissibility challenge, as analysed in the first section, and the result was a decision by the PTCI that Libya was not able to investigate and prosecute Saif Al-Islam Gaddafi.

Similarly, in April 2009, the Peruvian Supreme Court sentenced former President Alberto Fujimori for murder, serious bodily harm and kidnapping. The court recognised that the acts he was accused of committing could have fallen under the international definition of crimes against humanity but it could only sentence him for the ordinary crime of murder, as crimes against humanity was not known in Peruvian domestic criminal law.\(^{124}\)

This method is advocated by the so-called dualist states, i.e. those whose constitutions or domestic laws do not allow direct implementation of international law. Denmark, for example, applies a combination of regular criminal law provisions for substantive crimes, such as murder or torture, and a harsher sentencing regime to take into


account the international character of the crimes.\footnote{See Bergsmo \textit{et al} (above n 119).} However, a harsher sentencing regime may only reflect the seriousness of the crime under consideration; it does not reflect the scale, manner and pattern of the atrocity committed. Moreover, the stigma attached to a longer sentence for murder is not the same as a similar or even shorter sentence for an international crime.\footnote{Joseph Rikhof, ‘Fewer Places to Hide? The Impact of Domestic War crimes Prosecutions on International Impunity’ (2009) 20 CLF 1-51.} Therefore a major criticism of this approach is that the crimes and their requirements together with the penalty conform only minimally to international standards. Thus, it is argued that the minimalist approach may not serve the best interests of states as it does not provide the opportunity to import international crimes into their domestic criminal law.

\subsection*{2.3.2 The Express Criminalisation Approach}

A second method is that international crimes may be the subject of express criminalisation in domestic law, which involves specific incorporation through a general and open-ended reference to the Rome Statute. Two types of express criminalisation are considered here; the static or literal transcription approach and the dynamic criminalisation approach.

The static approach involves a transcription of the international crimes into domestic law in such a way that it repeats the definitions of genocide, crimes against humanity and war crimes as set out in Articles 6, 7 and 8 of the Rome Statute.\footnote{Bekou and Shah, (n 68) 508.} The legislation uses identical wordings to those of the Rome Statute and sets out the penalties.
applicable to the crimes in question. The United Kingdom, Malta, Jordan, and South Africa amongst others have adopted this method in enacting complementarity legislation.

The static transcription approach accords with the principle of legality because it sets out clearly and predictably which conduct is considered an international crime and what punishment is envisaged therefor. It also facilitates the task of those responsible for applying the law. By using the exact words of the Statute in domestic legislation, guidance with respect to the essential elements of international crimes as contained in the Rome Statute is provided. The disadvantage, however, is that it may not take into account new developments in international criminal law. Therefore amendments would have to be made to reflect new developments.

A variation on the static transcription method is where states do not reproduce the text of the three articles of the Rome Statute but only make reference to them. This can be found in the legislation of New Zealand, Uganda and Kenya. Another variant on the approach can be found in Australia, where in importing core international crimes, it is not only the text of the three articles of the Rome Statute that is reproduced but also the full

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128 Bergsmo et al, (n 119).
132 Sluiter, Appearances of Witnesses (n 123).
133 Sluiter, Appearances of Witnesses (n123) 476.
134 New Zealand, the International Crimes and International Criminal Court (Amendment) Act 2002. Articles 9, 10 and 11 define international crimes by reference to the Rome Statute.
details set out in the ICC Elements of Crime document.\textsuperscript{136}

The dynamic criminalisation approach, on the other hand, is one in which the conduct criminalised in the Rome Statute is reformulated, rephrased and redrafted either to provide a better connection to existing criminal provisions in the domestic legislation or to clarify some of the Rome Statute concepts.\textsuperscript{137} Such clarifications are especially used in instances where the definition of crimes under the Statute appears imprecise as a result of the incorporation of existing notions of customary international law. While the dynamic criminalisation approach may enable the legislator to complement the definitions of the Rome Statute in consideration of the lists and wordings of crimes in related international instruments,\textsuperscript{138} it may also prove a major task for legislators and entail an extensive review of domestic criminal law.

Another approach categorised as an express criminalisation method could be termed a hybrid of static and dynamic criminalisation. The hybrid approach combines both methods in order to facilitate the transcription of certain international crimes, with a generic or residual clause covering other grave violations of international humanitarian law or treaties to which the state is party.\textsuperscript{139} Reforms in Finish criminal law may be considered a mixed or hybrid approach, as it is one in which some international crimes are expressly defined,\textsuperscript{140} whereas others are incorporated through an open-ended reference to Finland's international

\textsuperscript{137} Sluiter, 476.
\textsuperscript{139} See Bergsno \textit{et al} (n 119).
obligations. This takes the form of an express prohibition of any acts which ‘otherwise violate the provisions of an international agreement on warfare binding upon Finland or the generally acknowledged and established rules and customs of war under public international law.’

From the above analysis of the different methods, it appears that the most straightforward approach compatible with the Rome Statute is the express (static) criminalisation method. This is because it repeats the Rome Statute crimes both in their definitions and penalties. However, whatever method is adopted, it is imperative that states are rightly positioned to benefit from the complementarity regime and to enable their domestic courts to assert jurisdiction accordingly.

This section has analysed the different approaches that states have taken or may take to incorporate international crimes into their domestic criminal codes. Having discussed the importance of implementing legislation, it is imperative to now examine how African states have incorporated international crimes into their national criminal law. The significance of this lies in the fact that, as noted earlier, all situations and cases before the ICC to date have come from the African region, and most of them were referred by the respective states. It may be logical to conclude that the reason for this is both a lack of understanding of the implications of complementarity on the part of the states, and the lack of will and ability.

In addition, the key argument of this thesis is that the starting point for establishing willingness and ability is enacting implementing legislation. Therefore, for African states to demonstrate the willingness and the ability to investigate and prosecute international crimes domestically, it is proposed that the adoption of implementing legislation

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141 The Finish Criminal Code, (n140).
is important. The next section examines how South Africa enacted its implementing legislation.

2.4 States’ Implementing Legislation

With a special focus on the implementation of the Rome Statute in national jurisdictions, some scholars have done detailed research on the need for implementing legislation and on how states have imported the core crimes in the Rome Statute into their domestic criminal law. As a consequence, states from both the common law and civil law traditions have enacted implementing legislation using different approaches.

According to Amnesty International, a total of thirty-three states have adopted implementing legislation. For the purposes of analysis in this thesis, the procedure adopted by the United Kingdom appears to be the most appropriate approach and is in line with complementarity because the United Kingdom adopted its implementing legislation before it submitted its instrument of ratification. While this approach is not strictly required under the Rome Statute, it is submitted that complementarity imposes an implied duty on states to look into their laws, revise them accordingly and enact implementing legislation to define how it would implement the Rome Statute before the coming into force of the Statute.


143 See Implementation Report Card and the National Implementing Legislation Data Base (n 110).


145 The UK International Criminal Court Act 2001, 2001 Ch 17 was passed on 24 September 2001. UK’s instrument of ratification was deposited on 4 October 2001 after the implementing legislation had been passed. The UK ICC Act entered into force on 17 December 2001.
However, since the focus of this thesis is on Nigeria, this section will examine how South Africa enacted its implementing legislation because South Africa is the only African state that adopted implementing legislation well in advance.\footnote{Bekou and Shah, (n 68) 501. (Lamenting the slow pace at which African states have adopted implementing legislations, Bekou and Shah noted that despite the many ratifications, only South Africa has enacted specific legislation regarding the ICC. See also Du Plessis and Ford, \textit{Unable or Unwilling?} (n 142) 3-4.} It is important to note however, that subsequently, other African states, namely; Kenya,\footnote{See Kenya International Crimes Act 2008 (n 10).} Senegal and Uganda,\footnote{The International Criminal Court Act 2010 Act 11 (Act Supplement No 6 Act to the Uganda Gazette No 39 Vol CIII) 25 June 2010. Available at \texttt{<http://www.issafrica.org/anicj/uploads/Uganda_ICC_Act_2010.pdf>} (Accessed 30 June 2013).} enacted implementing legislation. Consequently, references will also be made to the implementing legislation of Kenya and Uganda.

\subsection*{2.4.1 Procedures for South Africa’s Implementing Legislation}


In contrast, Kenya’s International Crimes Act was passed in 2008 even though it had ratified the Rome Statute in 2005.\footnote{Kenya signed and ratified the Rome Statute on 11 August 1999 and 15 March 2005 respectively. See CICC at \texttt{<http://www.iccnow.org/?mod=country&iduct=89>} (Accessed 30 June 2013).} Kenya’s ICC Act entered into force on 1 January 2009, approximately two years after the Chief Prosecutor’s investigations into its 2007 post-election violence had resulted in six of its nationals standing trial before the ICC. Similarly, Uganda’s ICC Act came into force in June 2010,\footnote{See the Ugandan ICC Act 2010 (n 148).} over five years after Uganda referred situations in its territory to the ICC and irrespective of the fact that Uganda had signed and
ratified the Rome Statute in 1999 and 2002, respectively. Arguably, adopting implementing legislation eight years after its ratification was only in a bid to secure the hosting of the First Review Conference of the Rome Statute, which was held in Kampala, Uganda in May and June of the same year.\textsuperscript{152} It is for these reasons that the implementing legislation adopted by both Kenya and Uganda is regarded as late; i.e. coming only after cases involving their nationals were already before the ICC.

Chapter 1 of the South African ICC Act states that the general objectives are to create a framework to ensure that the Statute is effectively implemented in South Africa, to ensure that the Act conforms with the obligations of South Africa under the Statute, to proscribe the crimes in the Rome Statute in South Africa and to enable South African courts to assume jurisdiction to investigate and prosecute the crimes.\textsuperscript{153} Other aims include ensuring that South Africa cooperates with the ICC. The passing of the South African ICC Act has been described as momentous as it was the first implementing legislation by an African state.\textsuperscript{154}

Prior to the adoption of the South African ICC Act, South Africa had no legislation on war crimes or crimes against humanity. Therefore no domestic prosecution of international crimes was contemplated in South Africa. Although customary international law forms part of South African law,\textsuperscript{155} South African courts could not prosecute international

\textsuperscript{152} The First Review Conference of the Rome Statute of the International Criminal Court was held in Kampala Uganda 31 May to 11 June 2010. (Arguably, it was important that the host country for such a review should not only have been the first state to activate the jurisdiction of the ICC but must demonstrate its willingness and ability to investigate and prosecute international crimes and cooperate with the ICC by adopting its implementing legislation).

\textsuperscript{153} South African ICC Act, Chapter 1 sections 1-3.


crimes because of the principle of *nullum crimen sine lege* (no law no crime). Similarly, South Africa had not incorporated the Geneva Conventions of 1949 into its domestic criminal law and so it could not prosecute or punish grave breaches.

The gap in South African law also exists in most states in Africa, as international crimes are not generally known to domestic legal codes. Clearly, it is important to examine how South Africa adopted its implementing legislation and to recommend that all African states, particularly Nigeria, should follow the example. This is because the proactive complementarity model proposed in the previous chapter obliges states to engage in national construction and capacity building in preparation to assume primary jurisdiction if and when the need arises.

### 2.4.2 South Africa’s Complementarity Legislation

South Africa has employed the static criminalisation method, meaning that the Rome Statute crimes have been expressly adopted into its law. Recognising its complementarity obligations, the South African ICC Act provides a framework to ensure the effective implementation of the Rome Statute in South Africa and to ensure that South African courts are able to prosecute persons accused of having committed those crimes.

The South African ICC Act incorporates the Rome Statute definitions of the crimes of genocide, war crimes and crimes against humanity directly into South African law according to a schedule appended to the Act. In this regard, Part 1 of Schedule 1 took the exact wording of Article 6 of the Rome Statute in relation to genocide, Part 2 of the Schedule

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157 Ibid.
158 South African ICC Act, para 1 of the preamble.
mirrors Article 7 of the Statute with respect to crimes against humanity and Part 3 does the same for war crimes, as set out in Article 8 of the Rome Statute.\(^{160}\)

Clearly the objective of criminalising the Rome Statute crimes domestically was met by the South African ICC Act, particularly as Section 4(1) of the Act provides that, notwithstanding anything to the contrary in any other law in South Africa, any person who allegedly commits these crimes shall be prosecuted.\(^{161}\) Conversely, the Kenyan and Ugandan ICC Acts merely made references to the Statute’s definitions of the crimes in their implementing legislation, without expressly using the exact wording of the Statute.\(^{162}\)

The South African ICC Act not only imported the exact wording of the Rome Statute in the definition of crimes, it also made some amendments to its existing laws to bring them into conformity with other provisions of the Statute.\(^{163}\) In this regard, section 18 of the Criminal Procedure Act of 1977 was amended by adding a paragraph (g) to include international crimes as defined in the Act.\(^{164}\) Similarly, section 3 of the Military Disciplinary Supplementary Measures Act of 1999 was amended by adding a subsection (3) to expand the scope of jurisdiction to include military officials who may be perpetrators of international crimes.\(^{165}\)

By expressly criminalising the Rome Statute crimes domestically and amending existing laws, South Africa is not likely to fall into the dilemma of being found unable or unwilling to carry out domestic prosecution of such crimes should the situation arise. Arguably, the likelihood of being denied an admissibility challenge before the ICC as

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\(^{160}\) Du Plessis, ‘SA: An African Example’ (n 131) 463.
\(^{161}\) South African ICC Act, section 4(1).
\(^{162}\) See section 6 of the Kenya International Crimes Act and sections 7, 8 and 9 of the Ugandan ICC Act which made references to genocide, crimes against humanity and war crimes as defined in the Rome Statute.
\(^{163}\) South African ICC Act, Schedule 2 relating to South African Laws Amended as a consequence of the Act.
\(^{164}\) See Criminal Procedure Act of the Republic of South Africa, Act 51 of 1977, section 18(g) as amended.
\(^{165}\) See Military Discipline Supplementary Measures Act of the Republic of South Africa, Act 16 of 1999, section 3(3) as amended.
Libya was, as analysed above, would be almost none. The reason is not far-fetched. The international categorisation of the crimes would allow South Africa to pass the ‘same person same conduct’ test, as its investigation would further meet the ‘specificity and probative value’ requirement of the PTCI in the *Saif Al-Islam* case.

In addition, the South African ICC Act expressly provides procedures for the institution of domestic prosecutions in South African courts.  
166 First, the Act requires that the consent of the National Director of Public Prosecution (NDPP) be obtained before any prosecution may be initiated against any person accused of the crimes.  
167 In reaching a decision whether to authorise a prosecution or not, the NDPP is guided by South Africa’s primary obligation under complementarity to institute prosecution domestically.  
168 South Africa’s responsibility to prosecute is further emphasised by the fact that the NDPP is allowed to decline to authorise a prosecution only if the crimes were committed before the ICC Act entered into force.  
169 The South African implementing legislation also provides for the designation of ‘an appropriate High Court in which to conduct prosecution’ of alleged perpetrators.

Theoretically, the obligation and power to prosecute given under the South African ICC Act is not hindered by any considerations of immunity. In this regard, section 4(2)(a) of the South African ICC Act provides that, notwithstanding any other law to the contrary, including customary and conventional international law, the fact that a person is or was a head of state or government, a member of a government or parliament, an elected

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166 South African ICC Act, section 5.  
167 Ibid, section 5(1)  
168 Ibid, section 5(3).  
169 Ibid, section 5(2).  
170 Ibid, sections 5(4) and 5(5)
representative or a government official is neither (i) a defence for a crime, nor (ii) a ground for any possible sentence reduction once the person has been convicted of a crime.\textsuperscript{171}

Consequently, Du Plessis asserts that in terms of the Act, South African courts acting under complementarity are thus accorded the same power to ‘trump’ the immunity afforded to government officials in the same way as the ICC is by virtue of Article 27 of the Rome Statute.\textsuperscript{172} In agreement, Dugard and Abraham noted that ‘section 4(2)(a) of the South African ICC Act represents a wise choice by the South African legislature...’\textsuperscript{173}

Similarly, section 27 of Kenya’s Act appears to have removed immunity but made the provisions subject to sections 62 and 115.\textsuperscript{174} Sections 62 and 115 of the Kenyan Act relate to Article 98 of the Rome Statute, which provides for respect for bilateral immunity agreements between states. Consequently, the exact extent of the removal of immunity stipulated in section 27 in the Kenya International Crimes Act is not clear. However, Article 143(4) of Kenya’s Constitution removes immunity for the President regarding international crimes.\textsuperscript{175} By virtue of section 2(4), the Constitution is the supreme law of the land and it prevails over any other law that is inconsistent with its provisions.\textsuperscript{176} Therefore like South Africa, immunity is not a hindrance to Kenya’s implementing legislation.

\textsuperscript{171} Ibid Section 4(2)(a)(i)&(ii).
\textsuperscript{172} Du Plessis SA: African Example (n 131) 474.
\textsuperscript{174} See section 27(1) & (2) Kenya International Crimes Act. See also Jolyon Ford, ‘Country Study III: Kenya’ in Max Du Plessis and Jolyon (eds) Unable or Unwilling? (n 142) 70-71 (Noting that there is a strong reluctance among the MPs in Kenya to implement a law removing immunities from state officials).
\textsuperscript{175} See section 143(4) Constitution of the Federal Republic of Kenya 2010 Available at \texttt{<http://kenyahighcommission.ca/wp-content/uploads/2013/04/constitution-of-kenya-2010.pdf>} (the subsection provides that the immunity of the President shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity).
\textsuperscript{176} Constitution of Kenya 2010, section 2(4).
Unlike the legislation of Kenya and South Africa, which explicitly remove immunity in line with the Rome Statute, the Uganda ICC Act seems to retain immunity.\textsuperscript{177} Although section 25 of the Uganda ICC Act provides that the existence of any immunity is not a bar,\textsuperscript{178} Article 98(4) of the Constitution provides for immunity for the President.\textsuperscript{179} This position remains unchanged even though the Ugandan Constitution has undergone several amendments.\textsuperscript{180} By virtue of the supremacy of the Ugandan Constitution over any other law,\textsuperscript{181} the purported removal of immunity in its implementing legislation appears cosmetic.

\textbf{2.4.3 South Africa’s Cooperation Legislation}

As noted, the ICC lacks mechanisms to gain custody of suspects and ensure their attendance at proceedings taking place in The Hague. Since this is crucial, as the ICC cannot prosecute in \textit{absentia}, the South African implementing legislation includes a broad cooperation regime by which certain governmental officials are empowered to facilitate cooperation between South Africa and the ICC.\textsuperscript{182} The Act stipulates how the South African government is to execute arrest warrants issued by the ICC under existing South African law.\textsuperscript{183} However, the South African ICC Act does not rely on its existing law alone to ensure the execution of arrest warrants and surrender but further details a procedure which specifies the particular office and department which carry the responsibility of ensuring cooperation with the ICC.

\textsuperscript{177} See section 19 Ugandan ICC Act which provides for the general principles of criminal law but omits provisions relating to immunity).
\textsuperscript{178} See section 25 Ugandan ICC Act 2010.
\textsuperscript{181} See Constitution of Ugandan 1995, Article 2(2).
\textsuperscript{182} South Africa ICC Act, section 8
\textsuperscript{183} South African ICC Act, section 9(3)
Consequently, the office of the Director-General of Justice and Constitutional Development is tasked with dealing with such issues as regards the arrest and surrender of suspects to the ICC.\textsuperscript{184} The Director General is responsible for forwarding the warrant to a magistrate who must endorse the ICC’s arrest warrant for execution in any part of the Republic.\textsuperscript{185} When an arrest has been executed pursuant to an ICC arrest warrant, the suspect is taken to the magistrate in whose jurisdiction the suspect has been arrested or detained.\textsuperscript{186}

In line with due process guarantees and safeguards of the rights of the suspect, the South African Act provides that such a suspect must be brought before the magistrate within 48 hours of their arrest.\textsuperscript{187} Further safeguards of the rights of the suspect are provided for in section 10 of the ICC Act. This section mandates that the presiding magistrate ensures that the warrant relates to the suspect,\textsuperscript{188} that the suspect has been arrested in accordance with the procedures outlined in the ICC Act\textsuperscript{189} and that the rights of the suspect have been respected.\textsuperscript{190} It is argued that with these procedures properly outlined in the South African ICC Act, cooperation between South Africa and the ICC will be enhanced.

In addition, when the South African authorities have taken a suspect into custody, the country is then in a position to surrender the suspect to the ICC. The procedure for the surrender of a suspect, which includes a committal order, is outlined in the ICC Act.\textsuperscript{191} The magistrate is mandated to ensure that the suspect is the same as named in the warrant and that the process is carried out in accordance with the provisions in the Act.

\textsuperscript{184} South African ICC Act, section 8(1).
\textsuperscript{185} Ibid, section 8(2).
\textsuperscript{186} Ibid, section 10.
\textsuperscript{187} Ibid, section 10(1).
\textsuperscript{188} Ibid, section 10(1)(a).
\textsuperscript{189} Ibid, section 10(1)(b).
\textsuperscript{190} Ibid, section 10(1)(c).
\textsuperscript{191} Ibid, sections 10-13.
The procedure makes clear that surrender to the ICC is different from extradition proceedings. First, there is no condition of double criminality and second, there is no requirement that a *prima facie* case be made against the suspect. The Act further provides that the magistrate must be satisfied that the three requirements in section 10(1)(a), (b) and (c) are met before the issuance of an order committing the suspect to prison pending their surrender to the ICC.

It is important to note however, that the South African ICC Act is not a perfect example of implementing legislation because it does not contain provisions relating to Article 9 of the Rome Statute on the Elements of Crimes. In this regard, however, Du Plessis argues that there is nothing which prevents a South African court from referring to the Elements of Crimes when involved in a domestic prosecution. This argument appears valid because ratification of the Statute by a state constitutes acceptance of the Rules of Procedure and Evidence (RPE) together with the Elements of Crimes.

The South African Act does not also reflect Part 3 (Articles 22-33) of the Rome Statute which specifies the general principles of criminal law. Du Plessis further maintains that the general principles of criminal law will find application in any domestic trial under the ICC Act. While this may be true, it is submitted that the absence of these provisions may be prejudicial to South Africa’s domestic prosecution based on complementarity, as due process considerations are necessary for determining the admissibility of cases before the ICC under Article 17 of the Rome Statute.

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192 Du Plessis (n 131) 468.
193 South Africa ICC Act, section 10(5)
194 Elements of Crimes, adopted by the Assembly of States Parties in New York, on 9 September 2002 and entered into force on the same date (ICC-ASP/1/3) (the Elements of Crimes were adopted in order to assist the Court in interpreting and applying Articles 6, 7 and 8 of the Rome Statute; Available at [http://www.icc-cpi.int/NR/donlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf](http://www.icc-cpi.int/NR/donlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf).
195 Du Plessis (n 131) 464.
196 Rome Statute, Article 51.
197 Du Plessis, Ibid.
Notwithstanding this apparent omission, the South African ICC Act remains an example for African States. Not only did the Act incorporate the Rome Statute crimes expressly, it also grants jurisdiction to South African courts on the basis of the crimes. It also contains an elaborate cooperation regime which would ensure the effective functioning of the ICC. Arguably, with its implementing legislation adopted in advance, South Africa’s willingness and genuine ability to exercise jurisdiction is not in doubt. This contrasts sharply with the implementing legislation of Kenya and Uganda, which were adopted only after cases involving their nationals were brought before the ICC.

**Conclusion**

This chapter focused primarily on the legislative implications for states parties to the Rome Statute. Although not expressly required by the Statute, several arguments have been advanced in favour of the need for states to adopt implementing legislation. First, embedded in complementarity is the notion that measures must be taken by individual states to prosecute international crimes domestically on behalf of the international community. Second, there must be mechanisms in place at the national level to arrest and surrender to the ICC suspects that it seeks to prosecute and who happen to be in a particular state’s jurisdiction. These procedures are critical to the effective functioning of the ICC and to the implementation of complementarity.

In addition, the critical analysis of the PTCI decision of 31 May 2013 regarding the Libyan admissibility challenge in the *Saif Al-Islam Gaddafi* case reveals that implementing legislation is imperative for states to assert their criminal jurisdiction. Although the PTCI admitted that Libya could investigate and prosecute *Saif Al-Islam* based on its domestic criminal law, the conclusion reached by the Chamber was different. Thus, implicit
in the Chamber’s reasoning was the underlying inability based on the failure of Libya to pass the ‘same conduct’ limb of the ‘same person same conduct’ test, which Libya could have passed had it applied the international categorisation of the crimes. However, Libya, not being a party to the Rome Statute, did not have any implementing legislation and the crimes against humanity of murder and persecution were not known to its domestic Law.

Based on the premise that complementarity commits states to investigate and prosecute international crimes domestically, it was further argued that although not expressly stated in the Statute, it could be implied that adopting implementing legislation is a necessary step for states to fulfil their obligations. The combined effect of the dominant themes, complementarity and cooperation, which run through the Statute, means that states parties are meant to do much more than mere ratification.

Certainly, ratification of the Rome Statute clearly demonstrates a state’s abhorrence of the crimes contained therein and its commitment to joining the international community’s efforts to combat impunity.198 African states’ efforts in this regard are indisputable. This is reflected in the number of ratifications and self-referrals to the ICC. It is submitted however, that mere ratification cannot drive the complementarity regime of the Rome Statute. Nor is it the objective of the Statute that all cases and situations be referred to the ICC. In fact, it is submitted that self-referrals, if continued, could arguably defeat the object and purpose of the Statute, which focuses on state authorities as the primary mechanism to ensure accountability. The purpose of the ICC is only to fill in the gaps where and when necessary.

Consequently, in order for the ICC to truly function as a ‘complement’, it is submitted that African states should adopt the two prong components of the complementarity

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regime, namely; cooperation and complementarity legislation. As observed, African states’ rapid ratification of the Rome Statute has not been matched with corresponding legislative action. Whilst the absence of complementarity and cooperation legislation may not be the only reasons for the inability of African states to investigate and prosecute international crimes domestically, adopting the legislation is an appropriate starting point which would demonstrate both willingness and the ability to act. As a mechanism designed by states and to be operated by states, complementarity can benefit African states when states of the continent integrate the Rome Statute crimes into their domestic criminal law.

Admittedly, there are significant challenges faced by African states in adopting complementarity and cooperation legislation. These include; the time involved in the process of integrating the crimes, the difficulty in accessing experts in the field, not taking the issue as a priority and the lack of political will. Other challenges are corruption and the desire to preserve perpetuity in power by some African leaders. In view of these challenges, the express criminalisation approach has been advocated.

It is important to note that a few African states are involved in domestic prosecution of conduct that would qualify as crimes against humanity, whether as ordinary domestic crimes or international crimes. This raises the question of whether national prosecution of ordinary domestic crimes instead of their international classification accords with the complementarity regime of the Rome Statute. In other words, could on-going prosecutions in some African states be categorised as realising the complementarity regime? The next chapter examines this question in light of the domestic prosecutions in Kenya, the DRC, Uganda and Sudan.

199 Bekou and Shah (n 68).
Chapter Three

Domestic Prosecutions in Africa under the Complementarity Regime of the Rome Statute: A Practical Approach.

The ultimate aim of complementarity is for states to undertake the investigation and prosecution of international crimes domestically. This has begun in a few African states, namely: the Democratic Republic of the Congo (DRC), Uganda, Kenya and Sudan. The question of whether these prosecutions meet the requirements of complementarity under the Rome Statute is the focus of this chapter. The importance of this analysis to the thesis is to argue that not all domestic prosecutions can be classified as realising the complementarity regime of the Rome Statute. This is because the argument in this thesis is that interpreting and applying complementarity as a mutually inclusive concept implies that adopting implementing legislation should precede any domestic prosecution based on complementarity.

Although not expressly mandated by the Rome Statute, cooperation and complementarity legislation are nevertheless necessary for states to implement the Rome Statute domestically. The purpose of such legislation is to ensure that domestic prosecutions are carried out in line with the provisions of the Rome Statute. Consequently, two types of domestic prosecutions and the difference between them are discussed in this chapter. The first type is domestic prosecutions ostensibly of international crimes but based on the ordinary domestic crimes of murder, theft and rape. The second is complementarity-based prosecution which is domestic prosecution carried out on the basis of international crimes categorised and defined as such.

Complementarity-based prosecution is preferable, as it arguably accords with the complementarity regime. This is due to the fact that international crimes are different
from domestic crimes because they are more serious. Thus, it is argued that to treat international crimes as ordinary domestic crimes is to be unresponsive to the experience of mass criminality.\(^1\) It also undermines the gravity and impact of international crimes and the entire complementarity regime of the Rome Statute.

This chapter is divided into three parts. The first part discusses domestic prosecutions in selected African states, namely: the DRC, Kenya, Sudan and Uganda. Domestic prosecutions in these states are discussed because they represent African states whose situations have been referred to the ICC either by self-referrals (DRC and Uganda),\(^2\) Security Council referral (Sudan)\(^3\) or the chief Prosecutor’s \textit{proprio motu} action (Kenya).\(^4\) Consequently, they constitute four of the African states which are currently subject to ICC investigations and prosecutions. While some of these states have accepted the jurisdiction of the ICC, others have challenged it. The Sudanese government, for example, argued that it could not be deemed to be unwilling or unable to carry out domestic prosecutions since it had established a Special Criminal Court for the Event in Darfur (SCCED). Therefore, in line with the complementarity principle the ICC could not assert jurisdiction.\(^5\)

Using the domestic prosecution in the United Kingdom as a model, the second part of this chapter discusses complementarity-based prosecution. The United Kingdom is used as a model for complementarity-based prosecution because though not mandated by the Rome Statute, the UK passed implementing legislation before its ratification of the Rome Statute in 2001. This is imperative because without implementing legislation in conformity

\(^2\) The Situations in the DRC and Uganda were referred by the respective governments on 19 April 2004 and 29 January 2004 respectively. Available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/>
\(^3\) By Security Council Resolution 1593 the situation in Darfur Sudan was referred to the ICC on 31 March 2005.
\(^4\) The Chief Prosecutor’s \textit{proprio motu} action in the situation in Kenya was authorised by the Pre-Trial Chamber on 31 March 2010.
with the Rome Statute domestic prosecution will inevitably be carried out based on ordinary crimes. The domestic prosecution that was carried out by the UK was thus based on the international categorisation of the crimes as recognised in the UK implementing laws, which flowed from the Rome Statute.

In the third part, the differences between the two types of prosecutions; domestic prosecution based on ordinary crimes and complementarity prosecution based on international crimes, are delineated. The crimes of genocide and crimes against humanity are analysed and it is observed that they cannot be prosecuted as ordinary domestic crimes because they are different in terms of their definition, elements, scale and overall impact. Although not a party to the Rome Statute, Rwanda is given as an example. The jurisdictional interaction between the International Criminal Tribunal for Rwanda (ICTR) and Rwandan national courts is cited because the transfer of cases from the former to the latter was only possible when the ICTR was convinced that Rwanda had passed legislation incorporating the crimes in the ICTR Statute into its domestic criminal law. It is argued that the transfer of cases is instructive to both the ICC and states in ensuring that domestic prosecution is in line with the complementarity regime.

The analysis in the chapter exposes the divergences of opinion amongst scholars on domestic prosecutions of international crimes and whether such prosecutions by states meet the standards of complementarity. It is argued that though attempts to prosecute domestically are being made by some African states, these prosecutions cannot be classified as complementarity-based prosecutions. The on-going debate regarding the domestic prosecution of international crimes is outlined first, in order to situate the argument within the context of the complementarity regime of the Rome Statute.
3.1 Part I: Domestic Prosecutions of International Crimes in Selected African States

The debate on the domestic prosecution of international crimes is on-going. Whilst some argue in its favour, others think that international prosecution is better for the reason that domestic courts cannot be trusted with the effective prosecution of international crimes. This is because the direct or indirect involvement of state authorities in the commission of these crimes sometimes results in the collapse or malfunctioning of the judicial system.

As a consequence, international crimes raise intrinsic questions that go far beyond the usual tasks of judges and prosecutors in a domestic setting. Moreover, since the crimes are designated as ‘international’, it follows that their prosecutions should be by an international institution established by the international community. Nevertheless, the obstacles to international prosecution include limited resources and absolute dependence on the cooperation of states. These difficulties ultimately strengthen the argument for domestic prosecution.

The domestic prosecutions of international crimes in certain African states are discussed in this section. Prior to an analysis of the domestic prosecutions, it is important to note that there are two approaches to prosecuting international crimes domestically. The first approach allows states to carry out such prosecutions using domestic criminal law provisions

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6 Jose Elvarez, ‘Crimes of States/Crimes of Hate: Lessons from Rwanda’ (1999) 24 Yale J.Int’l.L 365; Broomhall, (Text to n 112 in Ch 2) 23-24; Schabas, An Intro to the ICC (Text to n 15 in Ch 1) 60, 175; Kleffner, Complementarity of the Rome Statute (Text to n 2 in Ch 1) 2. See also Nidal Nabil Jurdi, The International Criminal Court and National Courts: A Contentious Relationship (Ashgate 2011) 34.


8 Kleffner Ibid.


10 Jessberger Ibid.
for ordinary crimes. This approach suggests that states should be permitted to prosecute the crimes of genocide, crimes against humanity and war crimes as the ordinary crimes of murder, theft and rape. Adapting Fédéric Mégrét’s propositions, Kevin Jon Heller stated that allowing states to prosecute international crimes as ordinary crimes could be termed the ‘soft mirror theses’. The soft mirror thesis maintains that as long as the offenders are tried for correspondingly grave domestic crimes, it does not matter whether the trial was based on the international categorisation.

The rationale behind this approach is that states are more familiar with domestic crimes and will not require additional expertise to handle their investigation and prosecution. In addition, it has been argued that requesting states to prosecute international crimes categorised as such may significantly increase the likelihood that domestic prosecutions will be unsuccessful. This is because international crimes are far more difficult to investigate and prove than ordinary crimes, because their investigation and prosecution require better-trained personnel and significantly more financial resources.

The foregoing argument for the soft mirror theses, that states may prosecute international crimes as ordinary crimes, implies that states do not have to ratify the Rome Statute. States may also not be required to enact domestic legislation incorporating the Rome Statute crimes into their domestic criminal law. Ultimately, the justification for the soft mirror theses could mean that the Rome Statute has little relevance.

However, Jann Kleffner proposes that states should incorporate the substantive provisions of the Rome Statute, because to meet the complementarity criteria, it is better for

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11 Sarah Nouwen, ‘Complementarity in Uganda’ (Text to n 45 in Ch 2) 1127; Frederic Megret, ‘Too Much of a Good Thing? (Text to n 48 in Ch 2) 363, 372.
12 Megret, 372.
14 Ibid.
16 Ibid.
states to prosecute international crimes as such rather than as ordinary crimes.\textsuperscript{17} Significantly, international crimes are different from ordinary crimes; the context in which they are committed, the nature, scale, gravity and the overall impact are usually greater than for ordinary crimes. Crimes against humanity, for example, must be committed within the context of an attack that is characterised as ‘widespread or systematic’, directed against a civilian population, and the accused must have had knowledge of the attack.\textsuperscript{18} Therefore, murder as crime against humanity, for example, cannot be the same as the ordinary crime of murder under domestic criminal law.\textsuperscript{19}

In line with this argument, the second approach proposes that domestic prosecution must be based on international crimes, categorised and defined as such, rather than on ordinary crimes.\textsuperscript{20} Proponents of this approach argue that it is only by such prosecution that states can avoid the possibility of being considered ‘unwilling’ or ‘unable’, which facilitates intervention by the ICC.\textsuperscript{21} Jon Heller classifies this approach as the ‘hard mirror theses’.\textsuperscript{22}

Prosecuting international crimes as ordinary domestic crimes undermines the fundamental concept on which the international criminal justice system is founded. This is

\textsuperscript{17} Kleffner, ‘The Impact of Complementarity on National Implementation’ (Text to n 20 in Ch 2) 98. See also Dawn Seman, ‘Should The Prosecution of Ordinary Crimes in Domestic Jurisdictions Satisfy the Complementarity Principle?’ in Carsten Stahn and Larissa van den Herik (eds) Future Perspectives on International Criminal Justice (2010) 259, 266.

\textsuperscript{18} Rome Statute, art 7.

\textsuperscript{19} Edoardo Greppi, ‘Inability to Investigate and Prosecute under Article 17’ in Mauro Politi and Federica Gioia (eds.), The ICC and National Jurisdictions (2008).


\textsuperscript{21} See Ellis (Text to n 60 in Ch 1) 225; See also Kai Ambos and Ignaz Stegmiller, (Text to n 142 in Ch 2).

\textsuperscript{22} Jon Heller (n 13) 87-89. (Noting that complementarity does not require that domestic prosecutions must be carried out in precise accord with the legal regime of the Rome Statute).
because while prosecuting for ordinary crimes may fulfil the objective of closing impunity gaps, such prosecutions risk the danger of being perceived as ‘sham’ trials, which effectively shields perpetrators from criminal responsibility.  

Contrary to this argument, Mégrét asserts, that the intermediary position of ‘sham’ trials seems unlikely. He notes that if a state is unwilling, it will always be unwilling all the way as it can hardly be imagined that the Sudanese authorities would give Al-Bashir even a lenient trial. Accordingly, he argues that it is unlikely that the ICC would undertake sophisticated qualitative analysis of domestic trials to see if they constitute ‘genuine’ proceedings or not.

Nevertheless, it is precisely the reason put forward by Mégrét that accounts for why the trials being conducted by the SCCED could be regarded as ‘sham’ trials. As Sudan is not a party to the Rome Statute, its criminal laws do not reflect the Rome Statute crimes. This means that domestic trials in Sudan could only be based on ordinary crimes. Furthermore, the President himself is one of the indictees and therefore domestic prosecution in Sudan does not accord with complementarity.

There is yet a third approach; ‘a sentence-based theory of complementarity’, suggested by Jon Heller. Discounting the earlier approaches, Jon Heller advanced a critique of both domestic prosecution based on ordinary crimes (soft mirror theses) and domestic prosecutions based on international crimes (hard mirror theses). He proposed replacing both

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23 See Zahar & Sluiter, (n 20) 489 (arguing that, ‘the crimes set out in the Statute… must be implemented in domestic law as international crimes because prosecuting such crimes as ordinary crimes ‘will in all likelihood result in an inability determination’); Halling, 839(Noting that complementarity requires that states prosecute crimes as they are spelled out in the Rome Statute; the prosecutions have to be for ‘crimes against humanity,’ not the murders, rapes, and so on that underlie the charge of crimes against humanity’).
24 Megret ‘Too Much of a Good Thing?’ (Text to n 48 in Ch 2) 376.
26 Ibid. See also Nouwen, (Text to note 45 in Ch 2) 1129.
27 Jon Heller (n 13).
approaches with one focused exclusively on the sentence.\textsuperscript{29} Rather than engage in the argument of the categorisation of the crimes concerned whether ‘ordinary’ or ‘international’, the outcome, which is the sentence, should be the focus. According to him, when a domestic prosecution ends with a sentence that is the same or higher than what is prescribed by the Rome Statute or what the ICC would have given in the same case, then domestic prosecution can be accepted regardless of the categorisation of the crime.\textsuperscript{30}

It is submitted that proposing a sentence-based approach to complementarity that focuses exclusively on the severity of the sentence is not only contrary to the provisions of the Rome Statute,\textsuperscript{31} but it may also present certain difficulties. The first is that a sentence-based approach does not reflect the differences in the crimes. Prosecuting international crimes as the ordinary crimes of murder or rape, rather than as their international counterparts, is not desirable, since ordinary crimes do not capture the scope, scale and gravity of the conduct.\textsuperscript{32}

Moreover, the sentence-based approach does not take into consideration that a domestic prosecution could end up in acquittal.\textsuperscript{33} Acquittal may well be the appropriate outcome of a domestic prosecution and yet, where an accused is acquitted, there is of course no sentence, and it is therefore impossible to compare with the Rome Statute. The sentence-based approach also implies that one must wait until the end of the prosecution to determine the acceptability of the prosecution, in which case the ICC would be barred by the \textit{ne bis in

\textsuperscript{29} Ibid, 107-130.
\textsuperscript{30} Ibid.
\textsuperscript{31} Implicitly, the sentence-based theory allows the death sentence which some states apply as the maximum sentence in consideration of the gravity of particular crimes. On the contrary, the maximum penalty under the Statute is life imprisonment, although it could be argued that article 80 which appears as a compromise allows states to apply the death penalty. See William Schabas, ‘Penalties’, in Antonio Cassese \textit{et al} (eds) \textit{The Rome Statute of the International Criminal Court} (OUP, 2002) vol. II 1505.
idem rule.\textsuperscript{34} Other questions that the sentence-based approach fails to address are;- does the approach include traditional justice mechanisms? To what extent could high sentences achieved by alternative means in a domestic setting accord with the complementarity regime?

Thus, the complementarity-based prosecution which is proposed in this thesis is a holistic and proactive approach which requires that states incorporate international crimes that conform to Rome Statute definitions into their domestic criminal law. It is also a practical way of avoiding a scenario in which a crime occurs that is not covered under domestic law. A typical example is the rejection of the Pre-Trial Chamber I of the admissibility challenge by Libya in the \textit{Saif Al-Islam Gaddafi}\textsuperscript{35} case. As observed, the crime against humanity of persecution was absent in the Libyan Criminal Code and a proposed higher sentence by Libya was rejected by the ICC.\textsuperscript{36}

In response to Jon Heller’s sentence-based theory, Darryl Robinson proposes a ‘process-based’ approach; stating that the genuineness of the process rather than its outcome should be the focus.\textsuperscript{37} For Robinson, once it is shown that a state is carrying out or has carried out prosecutions in relation to a case,\textsuperscript{38} the question should be whether the state is carrying out those prosecutions ‘genuinely’.\textsuperscript{39} Thus, in the context of Articles 17(2) and (3), ‘genuinely’ could be interpreted in two ways; in terms of the sincerity of the process, and in terms of exhibiting a rudimentary level of capacity.\textsuperscript{40} Robinson proposes that ‘process’ is the master theory and that charges and sentences could be looked into insofar as they reveal

\textsuperscript{34} See Rome Statute, articles 17(1)(c) & 20 (the rule against double jeopardy which states that no person shall be tried twice for the same conduct.
\textsuperscript{35} Saif Al-Islam Case (Text to n 96 in Ch 1).
\textsuperscript{36} Ibid, paras 111, 112 & 113.
\textsuperscript{37} Robinson, (n 33).
\textsuperscript{38} See Rome Statute, art 17(1)(a)-(c).
\textsuperscript{39} Rome Statute, arts 17(1) (a) & (b) 20.
something about the genuineness of the process. 41 Again, the process-based theory does not take into account the nature of the crimes.

The foregoing discussion is necessary to understand why a particular domestic prosecution may not meet the complementarity threshold. The next section will discuss domestic prosecutions in the DRC, Kenya, Sudan and Uganda which were or are being conducted on the basis of ordinary crimes. Although the military tribunals in the DRC made references to the Rome Statute, the prosecutions could not be considered as complementarity-based because of the lack of implementing legislation and the use of mobile courts. The opinion that for domestic prosecution to be considered complementarity-based, the Rome Statute crimes must have been incorporated into the domestic criminal law and must form the basis of prosecution is supported in this thesis.

3.1.1 Domestic Prosecution in the Democratic Republic of Congo (DRC)

The DRC is a monist state, 42 meaning that international treaties carry the same weight as constitutional law and can be applied directly. 43 The DRC ratified the Rome Statute in March 2002, 44 and thus, in principle, the Statute should be applicable domestically. 45

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41 Robinson.

42 Conversely in a dualist state, domestic and international law are two distinct legal systems and transposition of the contents of the treaty by a law is necessary for its incorporation into the domestic legal system. See Antonio Cassese, International Law (2nd edn. 2005) 213-217.


Constitutions adopted successively since 1994 in the DRC provide that treaties and international agreements have higher authority than national laws upon publication. Article 215 of the 2006 Constitution adopts the same monist view giving treaties primacy over local laws.

In 2002 the DRC adopted a new Military Penal Code. Title V of the Congolese Code specifically proscribes genocide, war crimes and crimes against humanity. Although the Military Penal Code recognises and criminalises international crimes, there are gaps and inadequacies such that they do not conform to the definitions of crimes in the Rome Statute. For example, the Code provides for the death penalty, making it incongruous with the Rome Statute. In addition, gaps exist in the definitions of the crimes of ‘rape’ or ‘sexual violence’ concerning the prevention and punishment of the crime, protection of vulnerable groups, compensation of victims and the treatment of evidence. The Songo Mboyo, the Kibibi and the Bongi cases discussed below illustrate these gaps.

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47 The DRC Constitution of 2006, Article 215 provides that ‘duly concluded treaties and international agreements have, upon publication, a higher authority than laws subject, for each treaty or agreement, by its application by the other party’.


49 Ibid.


55 TMG de l’Ituri, Affaire Bongi, 24 March 2006, RP 018/06.
In the Congolese civil court system, *Tribunal de Grande Instance* (General Tribunal) is the competent court with jurisdiction over international crimes. However, under the 2002 Penal Code, the *Tribunal Militaire de Garrison* TMG (Military Tribunals) have exclusive jurisdiction over these crimes. In fact, most of the domestic prosecutions in the DRC have been carried out by the TMG, thereby depriving civil courts from exercising jurisdiction even though the civil court system is responsible for guaranteeing the rights and liberties of Congolese citizens.

In the *Songo Mboyo* case, a Captain in the Congolese army stole the salaries of the soldiers under his command in December 2003 and this led to mutiny in Songo Mboyo in the northwest province of Equateur. A reprisal by soldiers who were former rebels awaiting formal reintegration into the army in accordance with a ‘global agreement’, led to the looting of property and the rape of 30 women, including a man. The violence led to the death of one of the women. Thirteen of the rape survivors instituted proceedings at the TMG of Mbandaka. The Military Prosecutor, on behalf of the victims, charged the soldiers with the crime against humanity of rape. The Penal Code of 2002 does not define rape; rather, it merely states that the crime against humanity of rape comprises any form of sexual violence of comparable gravity knowingly committed in peacetime or wartime in the context of a

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56 ICTJ, ibid.
57 See art 161 Military Penal Code 2002 (n 48); Mansfield, ibid; Where the perpetrators were civilians, the General Tribunal applied the July 2006 amendments to the Penal Code which the Swahili called *vitiendo vya haya*, ‘the law of shameful acts’.
58 ICTJ, ibid.
59 Zongwe, (n 52).
60 The war in the DRC has been described as ‘Africa’s World War’, presumably because about eight countries (Angola, Burundi, Chad, Libya, Namibia, Rwanda, Uganda and Zimbabwe) were allegedly involved in it at different times. The conflict is divided into three eras. The first was 1996-1997 inter-tribal, the second 1998-2003 national and the third 2003 to date regional. In December 2002, former Congolese President Joseph Kabila signed a peace agreement with other belligerents, the *Accord Global Inclusif* (the Inclusive Global Agreement), which officially brought the war to an end. See Zongwe. See also Gaëlle Breton-Le Goff, ‘Ending Sexual Violence in the Democratic Republic of the Congo’ (2010) 34(1) *The Fletcher Forum of World Affairs* Available at [http://ui04e.moit.tufts.edu/forum/archives/pdfs/34-1pdfs/34-1_Breton-LeGoff.pdf] (Assessed 2 November 2012).
systematic and widespread attack against a civilian population. Notwithstanding the deficiency in the definition of rape in the penal code, the Military Tribunal relied on the Rome Statute definition of the crime against humanity of rape and found the soldiers guilty of the crime.

The broad definition found in Congolese laws stipulates that rape meant the act by which a man engages in sexual intercourse with a woman without her permission, either because she did not give her consent, because of physical or psychological violence or because of the element of surprise or other coercive means. The defence relied on this definition in the *Songo Mboyo* case and noted that the crime of rape could not be committed against a man.

However, the MTG circumvented the defects in the Congolese law on rape by applying the Rome Statute definition, according to which both men and women can be victims of rape. Consequently, the Elements of Crimes together with Article 7 of the Rome Statute were used to fill gaps within the DRC military penal code by the MTG of Mbandaka in the *Songo Mboyo* case.

In the *Kibibi* case, a group from the Armed Forces of the Democratic Republic of the Congo (FARDC) carried out a reprisal attack on the town of Fizi south of Kivu, following the killing of a soldier. The attack in January 2011 resulted in the pillaging of property, inhumane and degrading treatment of a large number of the population, displacement and mass rape. The attack was allegedly instigated by *Colonel Kibibi Mutware* who was eventually arrested along with eleven others. His trial commenced on 11 February 2011 in the town of Baraka near Fizi and on 21 February 2011, he and three others were

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62 Ibid, article 170.
63 TMG Mbandaka, Affaire *Songo Mboyo*, (n 53) 28.
64 *Military Prosecutor v Lieutenant Colonel Kibibi Mutware et al* (n 54).
sentenced to 20 years’ imprisonment for crimes against humanity. Arguably, the summary judgement meant that due process and the accused persons’ rights may not have been safeguarded during the trial.

Furthermore, the military penal code was found to be lacking with respect to the crime of pillaging, as the constitutive element of pillaging in the Military Code includes the requirement that the conduct must have taken place in the context of an international armed conflict. However, the crime in question occurred during an internal conflict between two armed groups; the FADRC and the Front for the Patriotic Resistance in Ituri (FRPI) thus lacking in international character. Therefore, in the Bongi case, the military court in Bunia Ituri applied the provisions of the Rome Statute on the war crime of pillaging, including sentencing provisions, which the military code also lacked, with the result that Blaise Bongi Massaba was sentenced to life imprisonment. The tribunal thus applied provisions of the Rome Statute to meet the objectives of the ratification of the Treaty by the DRC.

Whilst such a move may appear proactive, the tribunal is still susceptible to challenges due to the use of mobile-military courts. The DRC’s military justice reform was not accompanied by a similar reform of the civilian justice system. Consequently, criminal justice was militarised to the extent that the most serious crimes committed during the armed

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67 Military Penal Code (n 48) Arts 161-175 provide for genocide, war crimes and crimes against humanity. See ICRC Customary IHL, Democratic Republic of Congo Practice Relating to Rule 52.


69 Articles 8 & 77 of the Rome Statute on war crimes and penalties respectively were specifically applied.

70 Article 153 of the Congolese Constitution of 2006 states that civil and military courts can implement duly ratified international treaties.
conflicts were and are being prosecuted exclusively by mobile courts.\textsuperscript{71} Granted that the prosecution of members of the armed forces in the DRC appears to be in line with domestic accountability efforts, the question as to how civilian perpetrators are to be held accountable is left unanswered. The DRC’s Constitution of 2006 rightly limits the jurisdiction of the military courts to members of the armed forces.\textsuperscript{72} As a result, it appears that selectivity will continue to pose a challenge to the emerging criminal justice system both at the domestic and international level.\textsuperscript{73}

Moreover, the military reform of 2002 seems inadequate as it lacked provisions ensuring fair trial guarantees recognised by the Constitution of 2006 and other regional instruments.\textsuperscript{74} In the Kibibi\textsuperscript{75} trial, for example, the proceedings lasted only 10 days. Arguably, fair trial guarantees were compromised by such a short process.

It is argued that the use of a military penal code and mobile courts in the domestic prosecutions in the DRC makes the prosecutions fall short of complementarity-based prosecution. This is because the prosecutions do not capture the conduct criminalised in the Rome Statute nor do they follow due process as recognised by international law. For instance, the use of mobile courts was not contemplated under the Rome Statute. Therefore, the domestic prosecutions in the DRC demonstrate the need for implementing legislation in order to be effective or genuine. Only by applying the Rome Statute definitions of crimes such as rape and pillaging was the military tribunal able to overcome the deficiencies in the Military Penal Code.

\textsuperscript{71} Domestic prosecutions have been conducted before the following courts: military garrison tribunals (MTG) of Bunia, Songo Mboyo, Mbandaka, Gbadolite, Beni, and Katanga.
\textsuperscript{72} DRC Constitution (n 43) (Article 156 limits the jurisdiction of military courts to members of the armed forces and the police).
\textsuperscript{74} The right to a fair trial are stated in Articles 19 to 21 of the 2006 Constitution and in Article 7 of the African Charter on Human and Peoples’ Rights.
\textsuperscript{75} Trials started on 11 February and Kibibi was sentenced on 21 February 2011.
In other African states where domestic prosecution on the basis of complementarity has been proposed, it has come shortly after a referral of a situation concerning that state. At other times, an attempt at domestic prosecution has come after the announcement of a preliminary investigation by the Chief Prosecutor of the ICC in relation to a situation in the state concerned.

3.1.2 Domestic Prosecution in Kenya

In Kenya, the announcement of the results of the December 2007 Presidential election led to inter-ethnic violence that culminated in the loss of 1,133 lives, accompanied by the displacement of people and the destruction of property. As the violence escalated, a mediation process was initiated by the former Secretary-General of the United Nations, Kofi Annan. A National Accord and Reconciliation Committee was constituted and charged with the task of finding a solution. The outcome of the Committee’s deliberations was the formation of a grand coalition government led by President Mwai Kibaki with opposition leader Raila Odinga appointed as the Prime Minister. Amongst other things, the Committee set up a Commission of Inquiry into the post-election violence that was mandated to investigate the circumstances surrounding the violence and to make recommendations.

On 15 October 2008, the Commission of Inquiry, chaired by a judge of the Court of Appeals, Justice Philip Waki, issued its report (the ‘Waki Report’). The Waki Report determined that crimes against humanity had been committed during the post-election

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78 Mwai Kibaki was the third President of the Republic of Kenya. He was first sworn in on 30 December 2002, when he took over from Daniel Arap Moi. He served a second term in office from December 2007 to April 2013.
80 An Independent Review Committee (the IREC) was also set up and mandated to investigate all aspects of the 2007 Presidential Election and make findings and recommendations to improve the electoral process.
violence and recommended the creation of a Special Tribunal for Kenya with the mandate to prosecute those bearing the greatest responsibility for these crimes.\textsuperscript{81}

The Commission further noted that if the recommended Special Tribunal was not established or if it was established but failed to carry out its mission, a list containing the names of those suspected of bearing the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal should be forwarded to the Prosecutor of the ICC. This was to be accompanied by a request for the Prosecutor to proceed with an investigation and prosecution of those suspected persons. The Commission handed over the list of names in a sealed envelope to Kofi Annan.\textsuperscript{82}

Kenya was thus faced with the dilemma of either prosecuting those responsible or having the situation referred to the ICC. This development brought attention to Kenya’s national legislation as well as its capacity to handle the investigation and prosecution of international crimes. Apparently, Kenya lacked capacity to handle domestic prosecution effectively because its implementing legislation for the Rome Statute had not yet passed into law. The Kenyan Penal Code, which lays down Kenya’s criminal law, did not contain provisions for international crimes.\textsuperscript{83} Similarly, the Armed Forces Act,\textsuperscript{84} which provides for the establishment, regulation and discipline of the Kenyan armed forces, did not contain provisions concerning international crimes.

\textsuperscript{81}Okuta, (n 77)1071.
\textsuperscript{82} The list contained the names and information on those who were suspected to bear the greatest responsibility in the post-election violence. Kofi Annan handed the sealed envelope to the Chief Prosecutor of the ICC when the government of Kenya failed to set up the Special Tribunal.
The only exception was the Geneva Conventions Act,\textsuperscript{85} which criminalises grave breaches, including wilful killing, and prescribes penalties of life imprisonment and in some cases fourteen years imprisonment for violators.\textsuperscript{86} Thus, in the \textit{Muthaura et al.}\textsuperscript{87} case, the Pre-Trial Chamber II dismissed the admissibility challenge by Kenya on the grounds that Kenya’s investigation failed the ‘same person same conduct’ test.\textsuperscript{88}

The Geneva Conventions Act could not be used in the context of the post-election violence of 2007 because the crimes were not committed in the context of an international armed conflict. Granted that Common Article 3 of the Geneva Conventions and Additional Protocol II relate to non-international armed conflicts, still the post-election violence in Kenya did not meet the threshold. The conflict could only be classified as OSV (other situations of violence), to which the Geneva Conventions and their Additional Protocols do not apply. Arguably, the violence amounts to crimes against humanity on account of its widespread or systematic character.\textsuperscript{89} However, the dissenting judgement of Hans-Peter Kaul appears to show a lack of organisational policy by the government,\textsuperscript{90} which is an important element in the definition of crimes against humanity, and therefore this point is contested.

\textsuperscript{86} Geneva Conventions Act 1968 Ibid; section 3(1).
\textsuperscript{88} Ibid, paras 49-53 (emphasis added).
\textsuperscript{89} See ICTY, \textit{Prosecutor v Tadic}, Appeals Chamber, 2 October 1995, para 141.
The domestic prosecution of the 2007 post-election violence was thus fraught with obstacles due to the lack of domestic implementing legislation at the time. Consequently, upon authorisation by the Pre-Trial Chamber II in 2010, six Kenyan citizens voluntarily appeared before the ICC. The ‘Ocampo Six’, as they were frequently called, were charged with crimes against humanity. Had the crimes been known to the domestic criminal law of Kenya, or had the Kenya implementing legislation been passed before the violence, Kenya might have been rightly positioned to assert jurisdiction to prosecute the alleged perpetrators domestically.

However, Kenya’s implementing legislation - The International Crimes Act of 2008 - entered into force in January 2009, after the Waki Report was released. While it represents a significant milestone towards Kenya’s preparedness to ensure domestic accountability, the act could not be used to prosecute perpetrators of the 2007 post-election violence because it was passed two years after the crimes were committed. It may yet be a vital tool for Kenya in dealing with international crimes in the future. This point underscores the importance of this research; states parties to the Rome Statute should not stop at ratifying the Rome Statute, they must go a step further by ensuring enactment of implementing legislation to enable them handle domestic prosecutions should the need arise.

92 On 31 March 2010, Pre-Trial Chamber II granted the Prosecutor’s Request to open an investigation proprio motu in the situation in Kenya. This culminated in the two Kenyan cases before the PTCII: The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang Case No : ICC-01/09-01/11 and The Prosecutor v. Francis Kirimi Muthaura and Uhuru Kenyatta and Mohammed Hussein Ali Case No: ICC-01/09-02/11.
93 The six suspects have further been reduced to three as the charges against Ali and Kosgey were not confirmed and those against Muthaura were withdrawn by the Chief Prosecutor for lack of cooperation from the Kenya authorities.
95 Okuta (n 77); See also Christine Alai and Njonjo Mue, ‘Complementarity and the Impact of the Rome Statute and the International Criminal Court in Kenya’ in Stahn and ElZeidy (eds) The International Criminal Court and Complementarity: From Theory to Practice (CUP 2011) 1222, 1231.
96 Brown and Sriram, (n 91).
3.1.3 Domestic Prosecution in Sudan

Since February 2003 the people of Darfur in Western Sudan have been victims of a systematic extermination campaign. The violence has claimed over 400,000 lives, mostly civilians, and has left over three million displaced within Sudan and to neighbouring Chad. In response to protests by the Sudanese People’s Liberation Movement (SPLM) and the Justice and Equality Movement (JEM), which demanded proportional political representation and equitable access to the country’s economic resources, the Government of Sudan launched a violent campaign against the people of Darfur. The governing party of Khartoum, known as the National Islamic Front (NIF), along with a government-sponsored Arab militia called the ‘Janjaweed’ (militiamen on horseback), has allegedly been linked to the rapes, killings and other human rights abuses in Darfur. Amnesty International accused the Sudanese military of the ‘use of rape as a tool for humiliation and intimidation.’

The report of the subsequent International Commission of Inquiry revealed that both ‘the Government of Sudan and the Janjaweed were responsible for serious violations of international human rights and humanitarian law amounting to crimes under

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98 Ibid.
international law.' This resulted in the referral of the situation in Darfur to the ICC by the Security Council under Article 13(b) of the Rome Statute.

Having satisfied the requirement of the Rome Statute of a ‘reasonable basis’ to proceed, the Prosecutor announced his intention of opening an investigation into the situation in Darfur on 6 June 2005, and the next day, the government of Sudan promulgated a decree establishing the Special Criminal Court on the Events in Darfur (SCCED). The SCCED was given jurisdiction over Darfur in relation to crimes under Sudanese Law. The government of Sudan noted that at least 160 cases would be brought before the court. However, only 13 cases had been brought by June 2006 and to date, the SCCED has not charged any Khartoum government official involved in the Darfur crisis. Furthermore, the SCCED charged two intelligence officers suspected of involvement in a mass killing with looting instead of murder.

As the ICC was established to step in and ensure accountability where there is an apparent failure on the part of a state to do so, it is argued that the ICC is the best forum to prosecute in the Darfur, Sudan cases. This is because those indicted in Sudan are top government officials, including the president, Omar Al-Bashir. As Sudan is not a party to the Rome Statute, and international crimes are not known to its criminal laws, its domestic prosecution does not meet the complementarity threshold.

103 UNSC Resolution 1593 UN DOC S/RES/1593 (2005); although eleven members of the Security Council voted in favour of the resolution and none voted against it, Algeria, Brazil, China, and the United States abstained.
104 Article 53 Rome Statute stipulates the general procedure for the initiation of investigation.
106 Ibid.
3.1.4 Domestic Prosecution in Uganda

The government of Uganda triggered the jurisdiction of the ICC for the first time by referring the situation concerning the Lord’s Resistance Army (LRA) to the ICC in December 2003. This was a surprise because few people anticipated that a state would refer a situation on its own territory and concerning its own nationals to the Court. It had been assumed that states would consider such intervention as costly to their sovereignty and reputation. However, President Museveni’s government may have perceived the referral as a strategy to defeat the LRA.

Whatever the merits of self-referral, the Chief Prosecutor of the ICC commenced an investigation into crimes committed by the LRA in northern Uganda. The same government which referred the situation and further, in February 2008, established a War Crimes Division, also called International Crimes Division (ICD), nevertheless appeared to go to great lengths to defeat the purpose of the ICD and obstruct the functioning of the ICC particularly through the use of amnesty. The Ugandan Amnesty Act allows

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111 Nouwen & Werner, 948-949.
anyone who renounces violence, regardless of rank, to return to his community without fear of prosecution.\textsuperscript{113}

According to this Act, amnesty means pardon, forgiveness, exemption or discharge from criminal prosecution or other forms of punishment by the state.\textsuperscript{114} Its significance is that it confers on the beneficiaries an irrevocable legal immunity from prosecution or punishment and covers all insurgency-related offences ranging from combat to collaboration and aiding rebellion. Over 4,000 persons have applied for amnesty under the Amnesty Act.\textsuperscript{115}

An illustrative case is that of Thomas Kwoyelo,\textsuperscript{116} a member of the LRA, who was arrested in the DRC in 2009 and charged with 53 counts of murder, wilful killing, kidnapping, aggravated robbery and destruction of property during the conflict that began in 1986.\textsuperscript{117} It is submitted that the conducts for which Kwoyelo was charged constitute crimes against humanity. However, since there was no implementing legislation at the time, which recognised and defined crimes against humanity in Uganda, Kwoyelo was initially charged with war crimes under Uganda’s Geneva Conventions Act of 1964,\textsuperscript{118} even though that Act does not apply to non-international armed conflicts.\textsuperscript{119} The prosecution was the first

concluded by the ICD and it culminated in the acquittal of Kwoyelo, on the basis of his application for amnesty.\footnote{120}{The Statutory basis for the International Crimes Division (ICD) was the legal notice issued by the Uganda’s Chief Justice, ‘ICD Practice Directions’ Legal Notice No 10 of 2011. Legal Notice Supplement, Uganda Gazette No 38 vol CIV 31 May 2011.} Although the five-judge panel ultimately ruled that Thomas Kwoyelo was entitled to amnesty for all crimes committed by him during the conflict and was therefore acquitted, they initially refused to grant amnesty, leading Kwoyelo’s lawyers to appeal. The ICD then referred the case to the Constitutional Court which found that the only way by which an alleged criminal could be excluded from amnesty was by a statement issued by the Minister of Internal Affairs.\footnote{121}{By virtue of an amendment to the Amnesty Act in 2006, the Minister of Internal Affairs with approval by the Ugandan Parliament could exclude certain individuals from receiving amnesty.} Consequently, the Constitutional Court granted amnesty on the grounds that such a statement had not been issued by the minister and considering that Kwoyelo had not been granted amnesty prior to the case.\footnote{122}{Patrick Wegner, ‘Squashing the Amnesty Law in Uganda? Possible Implications of the Kwoyelo Trial’ 12 September 2011. Available at http://justiceinconflict.org/2011/09/12/squashing-the-amnesty-law-in-uganda-possible-implications-of-the-kwoyelo-trial/ (Accessed 24 March 2012).}

The Court thereafter ordered the ICD to terminate the case against Kwoyelo.\footnote{123}{Mark Kersten, ‘Kwoyelo Granted Amnesty and Set Free but Questions Remain’ 22 September 2011. Available at http://justiceinconflict.org/2011/09/22/kwoyelo-granted-amnesty-and-set-free-but-questions-remain/ (Assessed 2 November 2012).} Indeed, such prosecution could be categorised as proceedings undertaken for the purpose of ‘shielding the person concerned from criminal responsibility’.\footnote{124}{See article 17(2)(a) Rome Statute.} While the Amnesty Act enjoins the Amnesty Commission\footnote{125}{An Amnesty Commission and Demobilisation and Resettlement Team (DRT) were established by the Act to oversee amnesty processes. Their functions include promoting dialogue, sensitisation, drawing up programmes for decommissioning of weapons and resettlement of returnees.} to promote appropriate mechanisms for reconciliation,\footnote{126}{See section 9C Amnesty Act} it is argued that it actually undermines efforts towards accountability and leads to impunity.
The involvement of the ICC has been criticised as tantamount to a breach of the Amnesty Act and an impediment to Uganda’s peace process.\textsuperscript{127} However, it is argued that the grant of amnesty to individuals allegedly accused of international crimes and who are subject to the jurisdiction of the ICC compromises the complementarity regime.\textsuperscript{128} The international community recognises that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict. However, the United Nations notes that amnesty cannot be granted with respect to international crimes.\textsuperscript{129}

Besides the Amnesty Act, the lack of implementing legislation led to the application of alternative justice mechanisms in Uganda. These include the mediation of traditional chiefs (\textit{rwodi}) through which many offences are traditionally resolved by reconciliation. Whenever a crime occurs, for example, homicide, the \textit{rwodi} intervenes to offer mediation and a reconciliation process known as \textit{mato oput}.\textsuperscript{130} The \textit{mato oput} is a ceremony of clan and family-centred reconciliation which incorporates the acknowledgment of wrongdoing or confession, the offering of compensation by the offender and the sharing of a symbolic drink.\textsuperscript{131} It is believed to bring true healing in a way that the formal justice system does not. Other traditional justice mechanisms include individual cleansing rituals, which routinely take place whenever former LRA members return to the community.

The analysis in this part has indicated that although there seem to be domestic prosecutions taking place in the DRC, Kenya, Sudan and Uganda, such prosecutions do not


\textsuperscript{130} Afako (n 115).

\textsuperscript{131} Ibid
meet the requirements of complementarity for various reasons. Kenya’s International Crimes Act was passed two years after the violence and therefore could not be applied retroactively. Sudan is not a party to the Rome Statute, and the legal basis for its SCCED and domestic trials is therefore doubtful. This point is underscored by the fact that alleged perpetrators can only be charged with crimes which are known to Sudanese law, which does not incorporate international crimes.

Domestic prosecution is vital to the success of the ICC and therefore domestic implementing legislation and institutional preparedness are necessary to catalyse the process. The unsuccessful attempts by the selected African states to carry out complementarity-based prosecution were partly due to the lack of implementing legislation. The next part discusses complementarity-based prosecution using the United Kingdom as a model.

3.2 Part II: Complementarity-Based Prosecution in the United Kingdom

Complementarity-based prosecutions are prosecutions of international crimes conducted by states domestically, with the provisions of the Rome Statute underpinning the process. Such domestic prosecution aims at ensuring conformity with the Rome Statute both in the legal framework and in the institutional preparedness of states to prosecute international crimes domestically. The United Kingdom is used here as a model of complementarity-based prosecution because it carried out a domestic prosecution on the basis of its implementing legislation with the proper classification of international crimes as defined in the Rome Statute.

The legal system in the United Kingdom is dualistic in relation to treaties. Consequently, parliament passed the International Criminal Court Act in 2001 (the ICC Act),

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which entered into force on 1 September 2001. This was necessary to incorporate international crimes into the British legal system. Referring to a similar Act passed in Scotland, Baroness Scotland declared that these Acts sought to ‘provide a robust regime which will prevent the United Kingdom [from] being, or being seen as, a safe haven for war criminals’. Prior to the ICC Act, legislative provisions incorporating international crimes into the British criminal justice system consisted of three acts: the Geneva Conventions Act of 1957, the Genocide Act of 1969 and the War Crimes Act of 1991. The first two Acts remained largely unused, whilst the War Crimes Act resulted in one conviction.

In conformity with the Rome Statute, Part 5 of the ICC Act relates to international crimes. Specifically, Section 51(1) of the ICC Act provides that ‘it is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime’. Pursuant to section 51(2), the ICC Act grants jurisdiction to courts in England and Wales over these crimes where they are committed in England and Wales and under Section 51(2)(b) when they are committed ‘outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to United Kingdom service jurisdiction.’

134 Scotland being governed by its system of criminal law, the Scottish Parliament brought in similar legislation at approximately the same time. This Act was passed on 24 September 2001, and entered into force on 17 December 2001. International Criminal Court (Scotland) Act 2001, 2001 ASP 13 House of Lords Hansard, Vol. 623, cols 418-419.
138 Cryer & Bekou, ‘ICC Cooperation in England and Wales’ (Text to n 129 in Ch 2).
139 The conviction concerned the matter of Andrei Sawoniuk. R. v. Sawoniuk [2000] 2 Criminal Appeal Reports 220. A second prosecution, concerning the matter of Simon Serafinowicz, was abandoned owing to the accused’s ailment.
The ICC Act has already been used to sustain domestic prosecutions in the United Kingdom. For example, Donald Payne, a member of the British Armed Forces, became, in 2007, the first citizen to be convicted of war crimes in relation to atrocities committed by members of the British Armed Forces in Iraq in 2003. British forces in Basra, Iraq, arrested Baha Mousa along with nine other Iraqis in 2003. Mousa and the nine others were assaulted by British soldiers while in British custody. As a consequence, Mousa was reported to have died from the cumulative effects of 93 different injuries. Then British Defence Secretary Liam Fox noted that Mousa’s death and the abuse of other detainees in British custody was deplorable, shocking and shameful.

Consequently, Donald Payne was charged with manslaughter, inhumane treatment of persons and perverting the course of justice. He pleaded guilty for the crime of inhumane treatment and was convicted on that basis and sentenced to one year imprisonment. Others charged with him were acquitted, although of lesser crimes. While the prosecution may be hailed as constituting domestic prosecution under the complementarity principle, the conviction for the lesser crime of inhumane treatment and the penalty of one year imprisonment is questionable. Even more questionable is the acquittal of the others who were charged with Donald Payne. Colonel Jorge Mendonca, for example, who was

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143 Members of the British Armed Forces had employed the use of controversial interrogation techniques which had been banned over 30 years ago.
144 Baha Mousa was a 26-year-old father of two and a hotel receptionist. He was one of the men rounded up after wrongly being identified as insurgents in 2003. He was detained in British custody and later died of 93 injuries from inhumane treatment. BBC News 19 September 2006 <http://news.bbc.co.uk/1/hi/5360432.stm> See also Raymond Whitaker, ‘93 Injuries, One Killing, No Justice’ The Independence 18 March 2007, 19 London.
145 Fox stressed that Baha Mousa’s death occurred as a detainee in British custody, it was avoidable and preventable and there can be no excuses. Mail Online 8 September 2011. <http://www.dailymail.co.uk/news/article-2035029/Baha-Mousa-inquiry-Army-condemned-gratuitous-violence.html#ixzz1jpZSdvLd>
146 Wayne Crowcroft (inhumane treatment of persons), Darren Fallon (inhumane treatment of persons) Kelvin Stacey (actual bodily harm, alternatively assault), Mark Davies (negligently performing a duty) Michael Peebles (negligently performing a duty) Jorge Mendonca (negligently performing a duty) <http://www.upi.com/Top_News/Special/2011/09/08/No-excuse-for-Iraqi-detainee-death/UPI-66021315494062/#ixzz1jpPr9v6k>
commander of the 1st Battalion Queen’s Lancashire Regiment (1QLR) in which Payne served, was acquitted. Arguably, a charge and conviction as a co-perpetrator or an indirect perpetrator could have been sustained against Mendonca as the commander bearing responsibility.

Nevertheless, the case represents a ready example of complementarity-based prosecution because the crimes for which Donald Payne and others were prosecuted had already been proscribed and their penalties explicitly provided for before the crimes were committed. It was therefore easy to carry out domestic prosecution based on the international categorisation of the crimes. Other prosecutions including those analysed above fall short of the requirement of complementarity because of the deficiencies described previously, such as being based on ordinary crimes.

Until implementing legislation which conforms to the Rome Statute is enacted domestically and in force, domestic prosecution could be challenged on the basis of the non-retroactivity of criminal law. Or such domestic prosecutions may be perceived as sham trials with the purpose of shielding perpetrators from criminal responsibility and may be susceptible to being used as a tool of revenge. In order to illustrate the difference between the two types of domestic prosecution discussed, the key features of the crime of genocide and crimes against humanity are analysed, in the next part, to explain why they cannot be prosecuted as ordinary domestic crime. The part further includes a discussion of the transfer of cases from the ICTR to Rwandan national courts as an example that may be instructive for states in the performance of their duties under the Rome Statute.

147Jack Doyle, ‘The Men Who Disgraced the Army’ Mail Online 8 September 2011
<http://www.dailymail.co.uk/news/article-2035029/Baha-Mousa-inquiry-Army-condemned-gratuitous-violence.html> Although, the inquiry found he had no knowledge of the abuse, the report said that as commanding officer he bears a 'heavy responsibility' for the tragedy.
3.3 Part III: The differences between Domestic Prosecution and Complementarity-Based Prosecution.

3.3.1 The Differences between International and Domestic Crimes

Both the high threshold set for the act and the mental element required for proof of international crimes such as genocide and crimes against humanity remove them from the realm of ordinary crimes.\textsuperscript{148} This section comprises an analysis of the crimes of genocide and crimes against humanity in order to demonstrate that prosecuting them as the ordinary domestic crimes of murder, rape and theft does not meet the objectives of the Rome Statute.

The definition of the crime of genocide in the Rome Statute is comparable to the definition given in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.\textsuperscript{149} According to William Schabas, replicating the definition of Genocide in the Rome Statute represents a codification of customary international law.\textsuperscript{150} The Statute defines the crime of genocide as any of the following acts committed with an intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such: (a) killing members of the group (b) causing serious bodily or mental harm to members of the group, (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (d) imposing measures intended to prevent births within the group and (e) forcibly transferring children of the group to another group.\textsuperscript{151}

Two components of the crime of genocide are readily apparent. The first is the specific intent (the \textit{mens rea} or mental element) to destroy in whole or in part a national, ethnical, racial or


\textsuperscript{149} The Convention on the Prevention and Punishment of the Crime of Genocide 9 December 1948 78 UNTS 277 28 ILM 763 art II.

\textsuperscript{150} William Schabas, \textit{An Introduction to the International Criminal Court} (4th edn CUP 2011) 93-94. See also Roy Lee, \textit{The Making of the Rome Statute} (Text to n 13 in Ch 1) 122-126 (demonstrating that the crime of genocide is identical to the definition laid out in the Genocide Convention of 1948 whereas the definition of crimes against humanity and war crimes codify existing developments in international criminal law); Claus Kress, ‘The International Criminal Court as a Turning Point in the History of International Criminal Justice’ in Antonio Cassese (ed) \textit{The Oxford Companion to International Criminal Justice} (2009) 143, 148.

\textsuperscript{151} Rome Statute, art 6.
religious group. There must be a psychological nexus between the physical result and the mental state of the perpetrator. The mental element of the crime is important in determining whether or not an act constitutes genocide. The Trial Chamber in the Akayesu case held that genocide is distinct from other crimes in as much as it embodies a special intent or dolus specialis. Special intent of a crime is the specific intention required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus the special intent in the crime of genocide lies in the intent to destroy in whole or in part a national, ethnical, racial or religious group.

Consequently, genocide is described as the crime of crimes. This is because where there is an absence of direct evidence relating to mens rea, the ICTR held in the Nshamihigo case that ‘...the overall context in which the crime occurred, the systematic targeting of the victims on account of their membership in a protected group, the scale and scope of the atrocities and the frequency of the destructive and discriminatory act...’ indicate the specific intent.

Therefore, although in the Jelisic case, the ICTY held that the specific intent to destroy in whole or in part must be found in order to justify a conviction for the crime of genocide, the genocidal intent may be shown in two forms. The first is the desire to exterminate a large number of a protected group and the second is the desire to destroy a

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154 Prosecutor v Jean-Paul Akayesu (Case ICTR-96-4-T) ICTR Trial Chamber 1, 2 September 1998.

155 Ibid para 498-520.


157 Prosecutor v Simeon Nshamihigo (Case ICTR-01-63-T).

158 Ibid, para 331. See also Prosecutor v Micah Muhimana (Case ICTR-95-1B-T) para 496 (noting that the perpetrator’s specific genocidal intent may be inferred from the general context of the perpetration, in consideration of the factors such as the systematic manner of killing).

159 Prosecutor v Goran Jelisic Case No IT-95-10 Trial Chamber 1 of the ICTY, Oral Judgement of 19 October 1999. (Jelisic case)
more limited number of members of such a group who are selected because of the potential impact of their destruction on the survival of the group.\textsuperscript{160}

Similarly, the second constituent element of the crime of genocide is the \textit{actus reus}, which is the commission of one or more of the five enumerated acts,\textsuperscript{161} and which takes it far from the realm of ordinary crime. Furthermore, as decided in the \textit{Kambanda}\textsuperscript{162} case, the failure to act to stop genocide may itself constitute genocide. In this case, the ICTR found Jean Kambanda guilty of genocide on account of his failure as Prime Minister of Rwanda at the time to take action to stop the on-going exterminations, which he was aware of, and for his failure to protect the entire population from being destroyed.\textsuperscript{163}

Furthermore, culpability stems from the fact that the perpetrator knew or should have known that the act committed would destroy a group in whole or in part.\textsuperscript{164} In the \textit{Al-Bashir}\textsuperscript{165} case, the PTCI said that pursuant to the case law of the \textit{ad hoc} tribunals ‘the crime of genocide is completed by \textit{inter alia}, killing or causing serious bodily harm to a single individual with the intent to destroy in whole or in part the group to which such individual belongs.’\textsuperscript{166} The crime of genocide may thus be committed during armed conflict or peacetime and therefore is punishable regardless of the context.\textsuperscript{167}

Similarly, crimes against humanity require the intent to commit the crime together with the knowledge that the crime is being committed within the context of a

\textsuperscript{160} \textit{Jelisie}, para 81-81, \textit{Akayesu} para 520. See also Kittichaisaree (above n 152) 512-513.
\textsuperscript{161} Rome Statute, Article 6; See also \textit{Akayesu}, (n 154).
\textsuperscript{162} \textit{The Prosecutor v. Jean Kambanda} (ICTR Case no 97-23-S) Para 40(1)-(4). Jean Kambanda was the first Prime Minister to be convicted of the crime of genocide. He was PM of the interim government of Rwanda established 8 April 1994 during the Rwandan genocide. He was arrested in Nairobi Kenya and transferred to the ICTR Detention Camp in Arusha. Kambanda was subsequently tried and convicted for genocide, conspiracy to commit genocide and complicity in genocide in 1998.
\textsuperscript{163} ibid.
\textsuperscript{164} Ibid.
\textsuperscript{165} \textit{The Prosecutor v. Al-Bashir} Case No ICC-02/05-01/09. Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Al-Bashir 4 March 2009. (\textit{Al-Bashir} case)
\textsuperscript{166} \textit{Al-Bashir} case, para 119.
\textsuperscript{167} Triponel & Pearson, ‘African States and the ICC: A Silent Revolution (Text to n 57 in Ch 2) 79.
widespread or systematic attack. Not only is the definition of crimes against humanity in the Rome Statute more detailed than previous definitions, the requirement of a nexus to armed conflict or proof of a discriminatory motive is absent. This means that crimes against humanity can occur, not only in the course of armed conflict or civil strife but also during times of peace. This is one of the reasons the 2007 post-election violence in Kenya qualified for investigation and prosecution by the ICC. Also, a discriminatory motive is not required for crimes against humanity except for the specific crime of persecution, as discrimination is the essence of the crime.

For an act to constitute a crime against humanity, the specific element requiring that such acts be committed in the context of a widespread or systematic attack must be present. In analysing the underlying acts constituting murder as a crime against humanity, the OTP observed that the actus reus requires that the perpetrator killed one or more persons and that the conduct was committed as part of a widespread or systematic attack directed against a civilian population.

The condition of a ‘widespread or systematic attack’ distinguishes crimes against humanity from ordinary crime. The threshold of ‘widespread’ was defined by the ICTR as denoting a substantial number of victims, with massive, frequent and large-scale

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168 See Rome Statute, art 7.
169 The ICTY and ICTR Statutes (arts 5 & 3 respectively) listed 9 crimes constituting crimes against humanity whereas the Rome Statute (art 7) has 11 crimes listed under crimes against humanity.
170 Schabas, Unimaginable Atrocities (n 156) 110-111.
172 Discriminatory motive was a requirement in the ICTR Statute and although the ICTY Statute contains no such requirement, it was applied by the ICTY in the Tadic case. See Prosecutor v. Tadic Opinion and Judgement No IT-94-1-T para 652 (7 May 1997).
action carried out collectively against a multiplicity of victims.\textsuperscript{174} Also, ‘systematic’ comprises a thoroughly organised and following a regular pattern on the basis of a common policy involving considerable public or private resources.\textsuperscript{175} Thus, prosecuting crimes against humanity as ordinary crimes makes light of the gamut of international crimes.

Furthermore, the contextual elements of crimes against humanity include; first that the attack must be targeted against a civilian population;\textsuperscript{176} second the attack must involve a state or organisational policy;\textsuperscript{177} third, it must be of a widespread or systematic nature;\textsuperscript{178} and fourth, there must be an established nexus between the individual act and the attack and the accused must have knowledge of the attack.\textsuperscript{179} Thus an accused must know that the attack is directed against a civilian population and that his criminal act comprises part of that attack or at least risks being part of that attack.\textsuperscript{180}

3.3.2 The Transfer of Cases from the ICTR to Rwandan National Courts

Rwanda is not a party to the Rome Statute. However, points of interaction between the ICTR and Rwandan national courts in the transfer of cases from the former to the latter make an analysis relevant to the complementarity regime of the Rome statute. The purpose of the analysis is not necessarily to anticipate the transfer of cases from the ICC to states, although that is permissible and envisaged under the Rome Statute. Rather, it is to derive lessons from the example, to the effect that the legal framework of states and their

\textsuperscript{174} \textit{Prosecutor v. Akayesu Judgment} No ICTR-96-4-T 2 September 1998. Available at \url{http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf} paras 579-581.
\textsuperscript{175} There must be an element or evidence of organisational policy; see Hans-Peter Kaul dissenting opinion in the \textit{Muthaura et al} case (n 90).
\textsuperscript{176} Ibid; Article 5 Report of 5 August 2013 on Nigeria (n 173) para 79.
\textsuperscript{177} Ibid, paras 82-89.
\textsuperscript{178} Ibid, paras 80 & 81.
\textsuperscript{179} Ibid, para 35. See also Situation in the Republic of Cote D’Ivoire, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire’ 3 October 2011 (notified on 15 November 2011), ICC-02/11-14-Corr, para 29.
institutional preparedness in conformity with the Rome Statute is critical to their exercise of jurisdictional primacy to investigate and prosecute international crimes.

In pursuit of justice and reconciliation in post-genocide Rwanda, three transitional justice processes were instituted. The first was the International Criminal Tribunal for Rwanda (ICTR), the second was the National Genocide Trials and the third was the gacaca proceedings. While the three institutions each aimed at ensuring accountability for those responsible for the genocide, there were significant differences in the methods they employed. However, it is not within the scope of this thesis to analyse prosecutions by these institutions but only to highlight the points of interaction between the ICTR and Rwandan national courts.

Rule 11bis of the Rules of Procedure and Evidence (RPE) of the ICTR and the completion strategy formed the basis for the transfer of cases from the ICTR to Rwandan courts. Through the completion strategy, the ICTR was mandated by the Security Council to transfer intermediate and lower-level accused persons to national courts. This was to ensure that the Tribunal focused on those who bore the greatest responsibility for the crimes in order to finish its work within the time designated by the Security Council.

Rule 11bis allows a trial chamber to refer a case to a state in whose territory the crime has been committed and in which the accused is arrested provided that the state is willing and adequately prepared to accept the case. In assessing whether a state is competent according to Rule 11bis to accept a case from the tribunal, the designated trial chamber must

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consider whether the state has a legal framework that criminalises the alleged conduct of the accused and provides an adequate penalty structure.\textsuperscript{184}

However, the Rwandan government was not able to secure the transfer of any cases until June 2011. Prior to transfer, the Rwandan authorities had to ensure that the parliament enacted a Transfer Law (Organic Law No. 11/2007) to comply with the legislative requirements of Rule 11\textit{bis}.\textsuperscript{185} Even after the enactment of the Organic Law, Rwanda lacked facilities and had to embark on the building of prisons\textsuperscript{186} and the training of lawyers before it was found ready to handle the cases.\textsuperscript{187} Consequently, the Rwandan national courts began to receive cases from the ICTR only several years after the enactment of the law.

Thus, the \textit{Bosco Uwinkindi}\textsuperscript{188} case was the first time the Appeals Chamber of the ICTR judged in favour of transferring a case to Rwandan courts for prosecution. Hitherto, in the \textit{Kanyarukiga},\textsuperscript{189} the \textit{Hategikimana}\textsuperscript{190} and the \textit{Munyakazi}\textsuperscript{191} cases the Appeals Chamber decided against the transfer to Rwandan national courts because Rwandan laws and fair trial

\begin{itemize}
  \item \textsuperscript{184} Rule 11\textit{bis}\textsuperscript{(A)}.
  \item \textsuperscript{185} Organic Law No 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda (ICTR) and from Other States. Available at \url{http://www.refworld.org/docid/476644652.html} (accessed 26 August 2013).
  \item \textsuperscript{186} ‘Mpanga, A Stronghold for the UN in Rwanda’ \textit{International Justice Tribune} 5 May 2008. Available at \url{http://www.rnw.nl/international-justice/article/mpanga-stronghold-un-rwanda} (The Rwandan government built the Mpanga Prison near Nyanza in South-Western Rwanda and with financial support from The Netherlands embarked on its reconstruction in February 2008. It contained a ‘UN block’ designated to meet standards equivalent to the UN Detention Facility in Arusha).
  \item \textsuperscript{188} \textit{The Prosecutor v Jean-Bosco Uwinkindi} ICTR-2001-75-R11\textit{bis} T Ch (Decision on the Prosecutor’s Request for Referral to the Republic of Rwanda) 28 June 2011\url{http://www.unhcr.org/refworld/pdfid/4e5602ca2.pdf} Accessed 28 June 2012.
  \item \textsuperscript{189} \textit{The Prosecutor v. Gasper Kanyarukiga} Case No. ICTR-2002-78-R11\textit{bis} (Decision on the Prosecutor’s Appeal Against Decision on Referral Under Rule 11\textit{bis}) 30 October 2008.
  \item \textsuperscript{190} \textit{The Prosecutor v. Ildephonse Hategikimana} ICTR-00-55-R11\textit{bis} AC (Decision on the Prosecutor’s Appeal against the Decision on the Transfer under Rule 11\textit{bis}) 4 December 2008.
\end{itemize}
guarantees failed to meet the requirements of Rule 11bis. In these cases, the trial chambers looked beyond the relevant legislation to the practices of Rwandan courts, thereby coming to perceive the legislation as cosmetic. Another problem, the legal ambiguity between the law and the imposition of the death penalty, was addressed through an amendment establishing life imprisonment as the maximum sentence for transferred cases.

The lack of an appropriate legal framework in Rwanda effectively militated against the transfer of cases to Rwandan national courts. This is instructive for the complementarity regime because domestic prosecution could only be considered complementarity-based when the state carrying out such prosecution has laws criminalising genocide, crimes against humanity and war crimes as defined in the Rome Statute. It may be argued that the complementarity regime accepts domestic prosecutorial efforts that are far from comprehensive as against the primacy of the ad hoc tribunals. Nevertheless, it is submitted that if the ICC and states parties are to draw on the jurisprudence of the ad hoc tribunals, then it is necessary to avoid their pitfalls and establish a pragmatic approach to the domestic prosecution of international crimes.

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192 Other cases include The Prosecutor v Yusuf Munyakazi ICTR-97-36-R11bisAC (Decision on the Prosecutor’s Appeal against Decision on Transfer under Rule 11bis) 8 October 2008; The Prosecutor v Jean-Baptiste Gatete ICTR-2000-61-1 TCI (Decision on the Prosecutor’s Request for transfer to the Republic of Rwanda 17 November 2008. (The transfer of Jean-Baptiste Gatete was also refused but was not appealed).
196 Sarah Nouwen (Text to n 45 in Ch 2) 1146.
197 Alexander Betts, ‘Should Approaches to Post-conflict Justice and Reconciliation be Determined Globally, Nationally or Locally?’ (2005) 17(4) European Journal of Development Research 735-752, 741. (Noting that ‘the ICTR has formed a substantial body of case law and… a solid foundation for the work of the ICC’).
Conclusion

The Rome Statute outlines a set of obligations for individuals who fall within the jurisdiction of the ICC. To the extent that this branch of international law focuses on individuals, it represents a departure from classical international law, which focused on states. However, in constructing the regime of the ICC, it has not proved possible to discount the role of the state completely. Thus, the Rome Statute hinges international criminal justice on the ability and willingness of states to investigate and prosecute international crimes domestically.

Domestic prosecutions represent the new frontline of criminal justice for international crimes, and complementarity as intended in the Rome Statute is meant to activate the jurisdictions of domestic courts rather than that of the ICC. African states represent the largest regional support for the ICC in terms of number of ratifications of the Rome Statute. Paradoxically, they appear to be the least prepared to prosecute international crimes domestically, resulting in self-referrals and ultimately in the complex application of the complementarity regime in practical terms.

The domestic prosecutions in the African states discussed above were based on ordinary crimes as defined by their own domestic statutes, which makes them fall short of the requirements of complementarity. In addition, the states’ domestic prosecutions were a reaction to situations in their territories, after they had been referred to the ICC. Admittedly, there is nothing wrong with such prosecution, taking into consideration that the ICC prosecutes only those who bear the greatest responsibility while states must be involved in bringing the intermediate and low-level perpetrators to justice. However, prosecutions in the

198 Rome Statute, arts 1, 25, 27, 28 (essentially, the ICC has jurisdiction over individuals/persons and not states, but excludes persons under the age of 18 at the time of the alleged commission of a crime in article 26).
states have thus far relied on domestic crimes and they appear to conflict with rather than complement the efforts of the ICC, particularly in Uganda where amnesty and other alternative justice mechanisms are being used.

The underlying assumption of the complementarity regime is that states would ensure transcription of the Statute’s crimes into domestic criminal law to allow for domestic prosecutions of those crimes. This argument is premised on the fact that complementarity cannot be based on two distinct bodies of laws. If existing domestic criminal laws were sufficient to deal with international crimes then the Rome Statute would not have been necessary. Thus, a mutually inclusive interpretation of complementarity implies that both the ICC and states will have the same legal basis to act. It may be argued that prosecutions in the DRC constitute complementarity-based prosecutions but the use of military courts makes the argument significantly flawed.

The test of what might constitute appropriate criteria for domestic prosecution in line with complementarity is still ill-defined. This is because the complementarity regime of the Rome Statute is evolving. The ‘sentence-based’201 and ‘process-based’202 theories of complementarity advanced by Jon Heller and Robinson, respectively, are steps towards achieving a practical approach to domestic prosecutions.

This chapter proposes complementarity-based prosecution that looks not only at the charges, process and sentence, as propounded by scholars, but is also holistic in terms of the legal and institutional preparedness of states. Jon Heller acknowledged this point when he noted that the sentence-based theory is not intended to be a permanent solution to the problems facing national criminal justice systems, and that in an ideal world, states would

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201 Jon Heller (n 13).

202 Robinson (n 33).
always prosecute international crimes as international crimes, but that the problem is lack of capacity on the part of states. 203

The analysis of the crimes of genocide and crimes against humanity within the chapter highlights the fact that international crimes and ordinary domestic crimes are not the same and thus domestic prosecution based on ordinary crimes cannot meet the requirements of complementarity. The interaction between the ICTR and Rwanda national courts was further analysed to emphasise the point that a state’s legal framework must incorporate international crimes stipulated in the Rome Statute for its domestic prosecution to qualify as complementarity-based. On this point, the domestic prosecution in the United Kingdom was used as a model of complementarity-based prosecution.

The inability of African states to carry out complementarity-based prosecutions is largely due to the lack of implementing legislation in conformity with the Rome Statute. Beyond the legal perspective, however, is the capacity question. Should African states adopt implementing legislation, will they then have the institutional capacity to carry out complementarity-based prosecutions? The institutional preparedness of African states, particularly Nigeria, to carry out complementarity-based prosecution will be analysed subsequently, but first an analysis of the tension between the African Union and the ICC will be undertaken in the next chapter.

203 Jon Heller, 133.
Chapter Four

Unpacking the Tension between the African Union and the ICC: The Way Forward

It has been asserted that the international criminal justice regime anchored on the complementarity of the ICC could be undermined by distrust, much of which stems from Africa’s historical experience with the slave trade and colonialism. This contention seems well-founded, as the ICC is widely perceived as selective and biased against Africa. The perception appears to be justified by the fact that, although the ICC has the potential to cover all states, whether they are party to the Rome Statute or not, it has only African cases before it, even after utilising all the means by which it may be seized of jurisdiction. As a result, Africans are portrayed as being exclusively responsible for all of humanity’s inhumanity.

In previous chapters of this thesis, it has been proposed that a mutually inclusive interpretation and application of complementarity would be beneficial to both the ICC and states. Further, it has been argued that though not expressly stated in the Rome Statute, it is imperative for states to incorporate the crimes in the Statute into their domestic criminal law. Subsequently, domestic prosecutions in selected African states were analysed in the preceding chapter and it was proposed that for such prosecutions to meet the complementarity threshold, they should be based on international crimes and not on ordinary domestic crimes.

In this chapter, the relationship between the ICC and the African Union (AU) is analysed. The importance of this argument to the thesis is that since all cases before the ICC to date have come from the African continent, it is important that complementarity be

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2 Ibid.
4 Bikundo, 26-27.
fully interpreted and applied in the cases. The success of the ICC in the investigation and prosecution of these cases will depend on the sustained support and cooperation of African states. Also, the ICC is only able to prosecute a few cases, therefore to close the gaps, African states need credible institutions, in addition to implementing legislation, in order to prosecute lower-level and intermediate perpetrators.

Relations between the two institutions deteriorated from cooperation to conflict following the indictment of President Omar Hassan Ahmad Al-Bashir of Sudan for crimes against humanity and genocide. Therefore, the chapter examines how the trajectory of this relationship can be enhanced for the mutual benefit of both bodies with a view to achieving the goal of complementarity. It is argued that the basis for the tension was the involvement of the United Nations Security Council in the referral of the situation in Darfur, Sudan to the ICC and its subsequent refusal to defer the case as requested by the AU.

This chapter is divided into four sections. The first section discusses the politics behind international criminal law. It analyses the characteristics of selectivity and the ‘scapegoat’ thesis and argues that, although selectivity features in every criminal justice system, the assertion that the ICC targets African states may not be supported by the facts – particularly because four out of the eight situation countries currently before the ICC were referred by the respective African states’ governments themselves.

The relationship between the ICC and the AU is analysed in the second section. In order to capture the essence of this relationship, the section includes a discussion of Africa’s modern perspective on conflict and the desire among nations of the continent to achieve peace, security and stability. It is argued that relations between the ICC and the AU had hitherto been cordial and that the current conflict arose from the referral of the situation in Darfur. Therefore, although there might be good reasons why some African leaders
perceive the ICC as ‘neo-imperialism masquerading as international rule of law’,\(^5\) it is proposed that the conflict is not between the AU and the ICC *per se* but rather, it is between the AU and the United Nations Security Council. It is further suggested that if there is sincerity, both the ICC and the AU would benefit from the investigations and prosecutions being carried out by the ICC in Africa.\(^6\) It is therefore prudent for the two sides to collaborate.

Based on the assertion that the present tension between the AU and the ICC is misplaced, the third section discusses the need to illuminate the tension between the two institutions by characterising the relations between them more accurately. To that end, some points of misunderstanding between the AU and the ICC; conceptualised into legal and political perspectives are identified as further sources of tension.

The legal misconstructions stem from the inaccurate interpretation and application of complementarity and other concepts, including the ICC’s jurisdiction over nationals of non-party states and the irrelevance of immunities under the Rome Statute. The political perspective includes discussions on alternative justice mechanisms, discussed in the preceding chapter,\(^7\) and the uneven playing field and the United States’ exceptionality, both of which are examined in this chapter. Clarifying these points is necessary for the national implementation of the complementarity regime of the Rome Statute.

It is acknowledged that international criminal law is not always applied equally, but argued nevertheless, that the perception that the ICC has an inappropriate fixation on Africa, to the exclusion of crimes committed elsewhere, amounts to assuming bias where in fact more benign explanations are likely. In support of this, the incidences of self-

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\(^6\) Jalloh ‘Regionalising ICL’ (n 1) 451-452 (noting that both the ICC and the Africa continent needs each other and that if the relationship is properly harnessed, it could offer a ‘win-win’ prospect for both sides).

\(^7\) See Afako, ‘Reconciliation and Justice: Mato Opot and Amnesty’ (Text to notes 113, 115, 128-130 in Ch 3).
referrals, particularly of the most recent by another African state, Mali, in January 2012, together with other points, are considered in the fourth section.

The Office of the Prosecutor (OTP) has received information regarding alleged atrocities in various situations all over the world.\(^8\) Although the current crisis in Syria and other crimes committed by nationals of the United States in Iraq and Guantanamo Bay may have met the gravity threshold, the Prosecutor is unlikely to invoke his \textit{proprio-motu} powers to bring these states before the ICC, neither is it likely that the United Nations Security Council will ever refer these situations. This is because, although the Prosecutor has insisted that he is only guided by legal considerations,\(^9\) the question of whether or not to refer a situation and to indict suspects is not merely legal; it is largely political.\(^10\) Therefore an analysis of the politics of international criminal law and of the ICC is imperative.

\textbf{4:1 The Politics Behind International Criminal Law}

The first Chief Prosecutor of the ICC Luis Moreno-Ocampo once declared: ‘I apply the law without political considerations. But the other actors have to adjust to the law’.\(^11\) This statement implies that the ICC is an independent judicial institution, which must stay clear of politics. As a consequence, politics is portrayed as external to law, and as something that must be overcome by independent organs acting on the basis of rules.\(^12\)

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\(^8\) The OTP has received information on alleged atrocities in Iraq, Venezuela, Palestine, Colombia, Honduras and Afghanistan, but it has decided not to open investigations into those situations but instead kept them under preliminary examination. See ‘Africa Debate - Is the ICC Targeting Africa Inappropriately?’ Available at \texttt{http://iccforum.com/africa} (Accessed 3 August 2013).


\(^12\) Sarah Nouwen and Wouter Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’ (2010) 21(4) EJIL 941-965.
Paradoxically, the ICC’s fight against impunity is a fight against politics, with the aim of establishing individual criminal accountability before an independent court which is not compromised by political considerations.\(^\text{13}\)

Similarly, when asked whether he was ‘becoming a politician at the ICC’? Moreno-Ocampo answered, ‘on the contrary, I am putting a legal limit to the politicians. That is my job. I police the border-line and say, if you cross this you’re no longer on the political side, you are on the criminal side. I am the border control’.\(^\text{14}\) However, determining who is ‘on the political side’ or not is inherently political, especially when it involves the labelling of groups and individuals as international criminals.\(^\text{15}\)

Three features of the ICC make it particularly susceptible to political considerations. The first is that, in contrast to its predecessors, post-World War II tribunals and the ad hoc tribunals, the ICC, with jurisdiction over on-going armed conflicts, operates in the midst of conflict. Thus, while the Nuremberg, Tokyo, former Yugoslavia and Rwanda Tribunals dealt only with defeated antagonists in aftermath situations, the ICC can be used as an instrument for defeating enemies.\(^\text{16}\) Consequently, when the ICC gets involved in continuing strife, it can be expected to end up in political struggles.

The second is that one of the trigger mechanisms of the ICC’s jurisdiction is referral by the United Nations Security Council. The Security Council is a political body, and yet it is empowered to refer situations to a judicial institution. Such authority makes it difficult to separate the ICC from the politics of the Security Council, especially as the

\(^\text{13}\) Ibid.
\(^\text{15}\) Nouwen & Werner, 962.
Security Council is further empowered to defer situations it has already referred.\textsuperscript{17} Closely related to the power of the Security Council to refer situations to the ICC is the Prosecutor’s discretionary powers on whether or not to proceed and who to indict or not in a particular situation. The exercise of these powers, described in Article 53, particularly that of the prosecutor’s appraisal regarding whether the indictment of a certain person would serve the ‘interest of justice’,\textsuperscript{18} necessarily involves political considerations.

The third feature is the ICC’s absolute dependence on states’ cooperation. Therefore, its institutional interests may politicise its sentiments, for example, by necessitating the consideration of whether a case is against rebel groups or against state officials and determinations based on the need to attract more cooperation.\textsuperscript{19} The more the ICC’s suspects are generally recognised as enemies of the state or of mankind as a whole,\textsuperscript{20} the greater the likelihood that the state of which the suspects are nationals and other states will cooperate with the court by executing its arrest warrants.\textsuperscript{21}

In view of the above, the politics of international criminal law are evident in distinction between when the ICC’s jurisdiction is invoked to prosecute certain individuals and when it is not. The distinction does not necessarily imply that the ICC betrays justice or the rule of law. Nor does it mean that the ‘ICC is the only site of political contestation’.\textsuperscript{22} Rather, it requires the admission that the ICC is not a non-political oasis in a political world.\textsuperscript{23}

Inherent in the complementarit regime is the fact that the jurisdiction of the ICC can be invoked to prosecute certain individuals. This is because in practical terms, the

\textsuperscript{17} Rome Statute, Art 16.
\textsuperscript{18} Jo Stigen, ‘The Admissibility Procedures’ (Text to n 83 in Ch 1), 504.
\textsuperscript{19} Nouwen & Werner, (n 12) 963.
\textsuperscript{20} Simpson, (n 16) 75.
\textsuperscript{21} Nouwen & Werner, 963.
\textsuperscript{22} De Waal, ‘Who are the Darfurians? Arab and African Identities, Violence and External Engagement’ (SSRC, 10 December 2004. Available at \url{http://conconflicts.ssrc.org/hornofafrica/dewaal/} (noting how political opponents in Darfur have banked on international responses in taking their positions).
\textsuperscript{23} Kamari Clarke, \textit{Fictions of Justice: The ICC and the Challenge of Legal Pluralism in Sub-Saharan Africa} (CUP 2009) 237.
ICC can only prosecute a small number of perpetrators, namely, those who bear the greatest responsibility. However, prosecuting a select few is insufficient to serve the purpose of preventing criminality, and this has led to accusations of selectivity and the formulation of the scapegoat thesis.

4:1:1 Selectivity

Kenneth Davis describes selectivity as the situation in which an enforcement agency or officer chooses to use his discretionary power to do nothing about a case in which action would be clearly justified and expected. Such power involves the selection of parties against whom the law is enforced. According to Courtenay Griffiths, ‘there is an unspoken truth about international criminal law as currently practiced. It is that certain individuals, from certain countries of origin will never find themselves indicted before an international criminal tribunal.’ Selectivity in relation to which suspects the international community is prepared to prosecute collectively is known as selectivity ratione personae.

Analysis of selectivity ratione personae is found on the fact that political influences should not interfere with the equal application of the law. Admittedly, selective enforcement of law is not inherently wrong because prosecutorial discretion is allowed in almost all legal systems. This is because while equal application of the law is desirable, in practical terms, no criminal justice system has the capacity to prosecute all crimes no matter

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24 Immi Tallgren, ‘The Sensibility of ICL’ (Text to n 25 in Ch 1) 576.
26 Ibid.
27 Courtenay Griffiths QC, ‘The Politics of International Criminal Law’ News Africa 1 March 2012 <http://www.newafricanmagazine.com/special-reports/sector-reports/icc-vs-africa/the-politics-of-international-criminal-law> (Griffiths was Counsel to former President Charles Taylor of Liberia during his trial by the Special Court for Sierra Leone).
28 Timothy L.H. McCormack, ‘Selective Reaction to Atrocity’ (1996-1997) 60 Albany Law Review 681, 683. (McCormack also discusses selectivity ratione materiae i.e. selectivity in relation to the acts that the international community is prepared to characterise as ‘war crimes’).
30 Ibid.
their gravity.\textsuperscript{31} In this sense, all terrestrial justice is selective.\textsuperscript{32} The question is therefore, not whether selective prosecution should occur, as it is almost impossible that it does not, but when selective enforcement is unacceptable.\textsuperscript{33} Clearly, selective enforcement would be unacceptable when there is a duty to prosecute all crimes.\textsuperscript{34}

There are two aspects of selectivity \textit{ratione personae}. The first is legal-based and the second is legitimacy-based. The legal element of selectivity was explained by the Appeals Chamber of the ICTY in the Čelebići\textsuperscript{35} case. The Appeals Chamber noted that for a plea of selective enforcement to be accepted, there must be evidence establishing unlawful or improper motives and evidence that other similarly situated persons were not prosecuted.\textsuperscript{36} This is a high threshold, as proving a motive is very difficult, although improper or unlawful motives may be demonstrated by showing that the prosecutor has violated his duty of impartiality.\textsuperscript{37} Nevertheless, even where selectivity is established, the appropriate remedy does not include overturning a conviction.\textsuperscript{38}

A legitimacy-based perspective on selectivity comprises an evaluation of international criminal law based on equal application. The legitimacy of criminal law is undermined when the law is neither general nor applied equally.\textsuperscript{39} As argued by Robert Cryer, ‘when a law is general and yet in practice is applied only against a certain group or groups, the effect is the same as if it were explicitly targeted at those groups by its terms’.\textsuperscript{40} This is because it is insufficient to simply look at the law as it is written; ‘we must consider

\begin{footnotesize}
\textsuperscript{32} Mirjan Damaska, ‘What is the Point of International Criminal Justice?’ (2008) 83(1) \textit{Chicago-Kent Law Review} 347, 361. Also available at \texttt{http://digitalcommons.law.yale.edu/fss_papers/1573}.
\textsuperscript{33} Davis (n 25) 167-168.
\textsuperscript{34} Cryer, Ibid, 193.
\textsuperscript{35} \textit{Prosecutor v Delalić, Mucić, Delić and Landžo Judgement}, IT-96-21-A 20 February 2001 (Čelebići case).
\textsuperscript{36} Ibid, para 611.
\textsuperscript{37} Čelebići case (n 35) paras 602-603.
\textsuperscript{38} Ibid, para 618.
\textsuperscript{39} Cryer, (n 29) 195.
\textsuperscript{40} Ibid.
\end{footnotesize}
the interaction between the law itself and the discretion in the criminal process if we are to understand the social reality of the criminal law.  

Thomas Franck further explicates that legitimacy encompasses principles of coherence and consistency. According to him, a rule is coherent when, in its application, similar cases are treated similarly, and when the rule relates, in a principled fashion, to other rules of the same system. Consistency requires that a rule, whatever its content, be applied in similar or applicable instances.

Accusations of selective enforcement involve allegations that international crimes are ignored when it is considered politically expedient to do so; consequently, international criminal law has been criticised for being selective. During the Nuremberg and Tokyo trials, for example, the law was applied only to the defeated powers. In his opening speech, Justice Jackson admitted that it was not ideal that the victors tried the vanquished, but declared: ‘…let me make clear that while the law is first applied against the German aggressors, the law includes, and if it is to serve a useful purpose, it must condemn aggression by any other nations, including those who sit here now in judgement.’ However, this statement did not assuage the ‘victor’s justice’ cliché for which the trials were and are known to date.

43 Ibid 38.
44 Cryer, 194-198.
45 Justice Jackson in Trial 1, Trial of Major War Criminals Nuremberg 51. Available at <http://law2.umkc.edu/faculty/projects/trials/nuremberg/jackson.html>
46 Trial 1, 85.
Selectivity was further observed in the creation of the ad hoc tribunals, the ICTY and the ICTR, although in a different dimension. Richard Goldstone highlighted selectivity in the establishment of the tribunals thus:

The problem with the UNSC is that it says no in the case of Cambodia, Mozambique, Iraq and other places where terrible war crimes have been committed, but yes in the case of Yugoslavia and Rwanda. It is noteworthy that no ad hoc tribunals would ever be established to investigate war crimes committed by any of the five permanent members of the United Nations Security Council or those nations these powerful states might wish to protect.

Consequently, like incidents are not being treated alike and as noted by the defendant and amici curiae in the Milosevic case, ‘ad hoc reactions relating to one country corrupt justice and law’.

Similarly, the Security Council, albeit by agreement with Sierra Leone, established the Special Court for Sierra Leone (SCSL), but it has not responded to other conflicts in a similar way. In his submission, the defence counsel in the Charles Taylor case noted:

The Prosecution of Charles Taylor before the Special Court for Sierra Leone has been irregular, selective and vindictive from its inception. Examined from any vantage point imaginable, the case against Taylor has at its core political roots and motives and the inexorable determination of the United States and Great Britain to have Taylor removed and kept out of Liberia at any cost. Indeed this case directly raises the question of whether the judicial process can be fashioned into a political tool for use by powerful nations to remove democratically-elected leaders of other nations that refuse to serve as their handmaidens and footstools.

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49 Prosecutor v. Slobodan Milosevic IT-99-37, Decision on Preliminary Motions 8 November 2001, paras 8-10

50 Ibid para 11.

51 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone signed 16 January 2002 pursuant to Security Council resolution 1315 of 14 August 2000 wherein it expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone.


53 Prosecutor v. Charles Ghankay Taylor Case No SCSL-03-1-T (Judgment of 26 April 2012) (in a unanimous judgment, the Trial Chamber II of the SCSL found Charles Taylor guilty of aiding and abetting 11-count indictment for crimes against humanity of murder, rape, sexual slavery, enslavement and other inhumane acts.

54 Griffiths (n 27).
Further to the above selectivity discourse, Gerry Simpson notes that ‘each war crime trial is an exercise in partial justice to the extent that it reminds us that the majority of war crimes remain unpunished. If Yugoslavia why not Somalia, if Rwanda why not Guatemala?’ Also, Alfred Rubin postulates that ‘unless the law can be seen to apply to George H.W. Bush [who ordered the invasion of Panama]…it will seem hypocritical again.’ Similarly, Ian Brownlie notes that ‘political considerations, power and patronage will continue to determine who is tried for international crimes and who is not.’

It has been argued that selectivity is also demonstrated with respect to the ICC. This is because even though the ICC has the potential to prosecute cases from all over the world, it has only African situations and cases before it, even after utilising all the trigger mechanisms in the Rome Statute. Thus, it appears that it could be rightly asserted that the ICC has been selective in its prosecutions of African nationals on the basis that their states are weak or fail to enjoy the support of powerful countries. As argued by Damaska, when international prosecutors bring to justice only or mainly criminals from weak nations, the result is that they discriminate among human rights abusers on the basis of their citizenship.

Arguably, the formulation of a prosecutorial strategy which allows for some exercise of discretion, ultimately has led to the accusation that the ICC targets only Africa and Africans. However, there are facts to the contrary which will be examined subsequently, but first, an analysis of the second aspect of the politics of international criminal law, the scapegoat thesis, is in order.

58 Bikundo, (n 3) 23.
59 Ibid.
60 Damaska (n 32).
4:1:2 Is Africa merely a Laboratory or a Scapegoat?

Jean Ping, then Chairperson of the African Union Commission, once noted: ‘we are not against international justice, it seems that Africa has become a laboratory to test the new international law’. Referring to the ICC as a ‘fraudulent institution’, Paul Kagame, the President of Rwandan further observed; ‘Rwanda cannot be party to ICC for one simple reason…with ICC all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you. ICC is made for Africans and poor countries’.

In a similar vein, Bikundo asserts that the arbitrariness of the selection of only Africans for prosecution by the ICC is revealed by the fact that those Africans neither have the monopoly on international criminality nor can they be regarded as the worst offenders. Therefore, he proposes that ‘the ICC starts with Africans in order to cut its teeth before promising to sink its talons on bigger prey’. This buttresses the point that the ICC is yet to achieve legitimacy and respect and in seeking such credibility it has begun with the weakest and not necessarily the most criminal. This is the scapegoat thesis.

According to Jacques Derrida, a scapegoat is a being that simultaneously belongs and does not belong to a society. This ambiguous status between being an ‘insider’ and an ‘outsider’ makes scapegoats more amenable to sacrifice for communal atonement or expiation, they belong to the community enough to be associated with it but are just

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61 Jean Ping was former Foreign Minister of Gabon who headed the AU from 2008 – 2012. He was succeeded by South Africa’s Minister of Home Affairs Nkosazana Dlamini-Zuma who became the first female head of the AU in July 2012. <http://www.tesfanews.net/jean-ping-lost-au-chairmanship-to-dlamini-zuma/>


63 Paul Kagame is President of Rwanda since April 2000 to date.


65 Bikundo (n 3) 28.

66 Ibid.


68 Bikundo, 35
vulnerable enough within it to be picked as the victims of sacrifice.\textsuperscript{69} The scapegoat therefore exemplifies a channel through which a social body figuratively expels evil, harm or wrongdoing from itself as a purification process.\textsuperscript{70} Frazer and Fraser in their ethnographic study of the scapegoat, documented examples from all over the world, demonstrating the theory and practice of ritually transferring the guilt of a whole people onto an individual, animal or object.\textsuperscript{71}

Thus, it has been asserted that by targeting Africa, the continent is being used as a scapegoat; a sacrifice in order to mollify the international community through criminal justice.\textsuperscript{72} Admittedly, the scapegoat thesis and selectivity discourse lend credence to the assertion that Africa is inappropriately targeted by the ICC. However, there may be justifications for the fact that all of the situations and cases currently under investigation or prosecution happen to be in Africa.\textsuperscript{73}

\textbf{4.2 Africa and the ICC}

The relationship between the ICC and Africa suggests that the ICC enjoys its largest support from the continent. This support is evident in the number of ratifications of the Rome Statute by African states, thirty-four to date, thus constituting the largest regional bloc among states parties.\textsuperscript{74} Indeed the very first ratifications of the Rome Statute came from

\begin{itemize}
\item\textsuperscript{69} Bikundo, 35.
\item\textsuperscript{70} Ibid.
\item\textsuperscript{71} James Frazer and Robert Fraser, \textit{The Golden Bough: A Study in Magic and Religion} (Reissued edn, OUP 2009) 557
\item\textsuperscript{72} Bikundo, 29.
\item\textsuperscript{73} Kamari Clarke, ‘Is the ICC Targeting Africa Inappropriately or are there Sound Reasons and Justifications for Why all of the Situations Currently Under Investigation or Prosecution happen to be in Africa?’ in Africa Debate (n 8).
\item\textsuperscript{74} 122 countries are states parties to the Rome Statute. Out of them 34 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States and 25 are from Western European and other states. See Status of states parties to the Rome Statute at <http://www.icc-cpi.int/en_menus/asp/states\%20parties/african\%20states/Pages/african\%20states.aspx> (Assessed 12 March 2013).
\end{itemize}
Africa. In addition, active support for the ICC was reflected in African states’ participation in the Rome Diplomatic Conference that negotiated the Statute establishing the ICC. This suggests that African states contributed to the final wording of the document. Arguably, part of Africa’s support for the ICC was the hosting of the first Review Conference of the Rome Statute in Kampala, Uganda in May and June 2010. As a prelude to the Conference, at the July 2009 AU Summit held in Libya, the AU urged its member states to prepare for it fully.

Furthermore, states in the region have been described as the most ‘frequent users’ and ‘repeat customers’ of the ICC. It is postulated that this is due to the relatively high prevalence of conflicts, serious human rights violations and the general lack of a credible legal system to address them. The referrals of situations by some states’ governments in the continent might also constitute manifestations of the cordial relationship.

However, the good will diminished with the indictment of the president of Sudan, Omar Hassan Al-Bashir. Identifying the reasons requires a brief discussion of Africa’s more recent attempts towards realising peace and stability. It is argued that Africans cannot continue to blame their failings on their colonial past. Rather, Africa’s approach to peace and stability, the indictment of Al-Bashir by the ICC and the consequent reaction of African governments will be examined. The importance of this analysis is to demonstrate that the relationship between the ICC and African states could be enhanced for the purposes of

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75 Beth Simmons & Allison Danner, ‘Credible Commitments and the International Criminal Court’ (2010) 64 Int’l Org. 225. (Senegal was the first to ratify the Rome Statute on 2 February 1999). See also Kurt Mills, ‘Bashir is Dividing US: Africa and the International Criminal Court’ (2012) 34(2) HRQ 404-447, 409 (noting that of the 160 states in Rome only seven voted against the Statute including one African state; Libya).
78 Jalloh, (n 1) 447.
establishing the credibility of the ICC and for helping the AU realise its goal of stable peace on the continent.

4.2.1 Africa’s Modern Perspective on Peace and Stability

The 1950s and 1960s represent Africa’s first years of political independence from colonialism. The aspiration that independence would translate to greater stability, prosperity and development was not, however, realised in no small part because many African states began to exhibit traits of colonialism even among and within themselves, as a result of which several conflicts were recorded.

According to the United Nations’ report, well over 30 civil wars have been fought in Africa since 1970. Of these, the majority were internal i.e., civil wars, as opposed to inter-state or international conflicts. The continent was thus labelled the most conflict-ridden and conflict prone region in the world, as 10 out of the 24 most war-ridden countries recorded between 1980 and 1994, were in Africa. It is further alleged that over a decade later, as of 2007, the region retains the majority of the world’s conflicts.

However, Paul Zeleza regards the above assertion as a distortion of facts calculated by the West to portray African conflicts as peculiar and pathological without rational explanations. He argues that from a historical standpoint, Africa has been no more

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80 Beginning with Sudan which had its independence in 1956, other African states immediately followed in regaining independence in the 1960s and 1970s.
83 Ibid
84 Jalloh, (n 1) 475.
prone to violent conflicts than other regions. Indeed, Africa’s share of the more than 180 million people who died from conflicts and atrocities during the twentieth century is relatively modest. On the scale of sheer casualties, there is no equivalent in African history to Europe’s First and Second World Wars, or to the civil wars and atrocities in revolutionary Russia and China.

Zeleza’s argument appears valid because in 2012, 32 conflicts in 30 different states and locations were recorded. Although 13 of these occurred in Africa, others which occurred in America, Asia, Europe and the Middle East were of greater intensity and gravity than those in Africa. The conflicts in Syria and Afghanistan ranked highest in gravity, while Somalia, Pakistan, Yemen and Sudan followed in intensity and number of battle-related deaths in 2012. Also, the Middle East saw the highest number of battle-related deaths in 2012.

Be that as it may, the conflicts in Africa have led to the deaths of millions of Africans and to the displacement of thousands more. Different conflicts have been attended with extreme sexual violence and the deliberate targeting of not just civilians but women and

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88 Ibid.
89 Ibid.
91 These include Algeria, Central African Republic, Ethiopia, Ivory Coast, Libya, Mauritania, Nigeria, Rwanda, Senegal, Somalia, South Sudan, Sudan, Uganda. Out of these, the conflicts in Cote d’Ivoire, Libya, Mauritania and Uganda were no longer active in 2012.
92 Colombia and the United States of America.
93 Afghanistan, Cambodia, India, Myanmar, Pakistan, Philippines, Tajikistan and Thailand.
94 Russia.
95 Iran, Iraq, Israel, Syria, Turkey, Yemen. See generally UCDP at <http://www.pcr.uu.se/research/ucdp/faq/>
96 Battle-related deaths are all deaths-military as well as civilian- related to combat in a conflict involving the armed forces of the warring parties which includes traditional battlefield fighting, guerrilla activities and all kinds of bombardments of military units, cities and villages. See Themnér & Wallensteen (n 90) 520.
97 Themnér & Wallensteen, 510 (Noting that Syria had over 15,000 battle-related deaths in 2012 and that this is an exceptionally high figure).
98 In 2012, the number of battle-related deaths recorded in the Middle East was 34,754, Asia recorded 14,759 while Africa had 9,379. Europe was 750 and Americas 618. See Themnér & Wallensteen, 512.
99 Clarke, ‘Is ICC Targeting Africa Inappropriately?’ (n 73).
States including Angola, Burundi, Congo, Liberia, Mozambique, Rwanda, Sierra Leone, Somalia, Sudan and Uganda were involved in conflicts of varying degrees, with some spilling over to neighbouring states. In the quest for peace and stability in the continent, the Organisation of African Unity (OAU) was established with the expectation that it would help foster accord on the continent. However, the OAU’s extreme interpretation of sovereignty and the principle of non-intervention in the internal affairs of its member states militated against the achievement of its objective. It did, however, achieve some successes in its support for national liberation, especially the fight against apartheid.

As a rebranded version of the OAU, the African Union (AU) came into existence in 2002, about eight days after the coming into force of the ICC. It was an attempt by states in the continent to create a more unified front to address Africa’s problems. In this regard, the AU has pursued the ‘African Renaissance’, which entails a commitment to anti-colonialism, African solidarity, African responsibility for policies (commonly referred to as ‘African solutions for African problems’) and democracy.

In order to realise the objectives of the African Renaissance, the AU established the African Peer Review Mechanism (APRM) and the Principle of ‘non-indifference’. The APRM, headed by former South African President Thabo Mbeki, was

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101 Kambudzi, (n 81).


103 Mills, ‘Bashir is Dividing Us’ (n 75) 412.


intended to ensure that African states’ human rights records were reviewed by a panel under the APRM with a view to stemming violence in the continent. The legal adviser of the AU explained the term ‘non-indifference’ as a form of active solidarity that conforms to the maxim in most African cultures that ‘you do not fold your hands and just look on when your neighbour’s house is on fire’.  

The AU’s main objective is to promote peace, security and stability on the continent based on the understanding that Africa needs to protect the well-being of her peoples and their environment as well as create conditions conducive to sustainable economic growth and development. In furtherance of this objective, Article 4(h) empowers the AU to intervene in the internal affairs of member states where genocide, war crimes and crimes against humanity are being committed.

In addition, the AU adopted the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (the Protocol). The Protocol created the Peace and Security Council (PSC) as the permanent mechanism for conflict prevention, management and resolution in the continent. The AU’s further commitment to undertaking the tasks of post-conflict reconstruction, peace building and revitalisation of state institutions in its members states experiencing conflict were outlined in the Protocol.

Most significantly, Article 4(o) of the Constitutive Act provides for respect for the sanctity of human life, condemns impunity and political assassination, acts of terrorism

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108 Constitutive Act, Art 4(h) (stating the right to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances; namely genocide, war crimes and crimes against humanity).


110 Ibid, Art 2.

and subversive activities.\textsuperscript{112} The combined intention of the ‘sanctity of human life’ and ‘rejection of impunity’ is to protect the civilian population from atrocities. To this end, the AU has the right to unilaterally deploy the African Standby Force (ASF) in grave circumstances or, alternatively, to request an AU member state to restore stability in the territory of any other member state.\textsuperscript{113} This makes Africa the first region in the world to provide a specific legal basis for military intervention during conflict in order to protect the civilian population.\textsuperscript{114}

In order to realise its objectives, African leaders undertook, both in the Constitutive Act and in the Protocol, to engage other governments, civil societies, international organisations, for example, the United Nations, and other external entities.\textsuperscript{115} In relation to the ICC, these instruments represents an avenue for mutually beneficial AU-ICC cooperation on issues ranging from technical assistance, cooperation and concrete measures towards ensuring peace, security and stability in Africa. Indeed, until recently, there had been discussions of forming a Memorandum of Understanding between the two institutions.\textsuperscript{116} The indictment of Al-Bashir by the ICC halted these negotiations.

\textbf{4.2.2 The Case against President Omar Hassan Ahmad Al-Bashir of Sudan.\textsuperscript{117}}

With the adoption of the Rome Statute, it was hoped that the ICC would help ensure greater consistency in the application of international criminal justice by removing it from the vagaries of Security Council politics.\textsuperscript{118} Unfortunately, that did not happen as a role

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{112} See Constitutive Act, Art 4(o).
  \item \textsuperscript{113} See Constitutive Act, Art 4(h) & (j) & The Protocol, Art 13.
  \item \textsuperscript{114} Jalloh, (n 1) 458.
  \item \textsuperscript{115} See Constitutive Act, Art 13(C) & The Protocol, Arts 17-20.
  \item \textsuperscript{118} Jalloh (n 1) 561.
\end{itemize}
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was ultimately carved out in the Rome Statute for the body to refer and defer situations to the ICC.\textsuperscript{119} It appears that the involvement of a political body in a judicial process haunts the ICC, as the Sudanese controversy demonstrates.

Following the Prosecutor’s application for an arrest warrant for President Al-Bashir, the AU’s Peace and Security Council immediately called on the United Nations Security Council to invoke Article 16 of the Rome Statute to defer the process initiated by the ICC.\textsuperscript{120} The AU stated that, while it endorses criminal accountability for gross human rights violations, given the delicate nature of the processes in Sudan, the search for justice should be pursued in a way that complements rather than impedes efforts to secure lasting peace in the country.\textsuperscript{121}

Two arrest warrants were nevertheless issued against President Al-Bashir, first in 2009 for war crimes and crimes against humanity, and then in 2010 for genocide.\textsuperscript{122} On both occasions, the AU adopted resolutions, in its summits of 2009 and 2010.\textsuperscript{123} In the July 2010 Summit in Kampala, Uganda, the AU expressed its disappointment that the United Nations Security Council had not acted upon its request to defer the proceedings against President Al-Bashir in accordance with Article 16.\textsuperscript{124} Consequently, the AU called on its member states not to cooperate with the ICC in the arrest and surrender of Al-Bashir to The

\textsuperscript{119} Rome Statute, Articles 13(b) & 16.
\textsuperscript{121} Ibid, AU PSC Decision 21 July 2008.
\textsuperscript{124} Ibid, para 4.
The call not to cooperate was not new, as it only reiterated an earlier decision of the AU. However, it is contrary to African states’ obligations under the Rome Statute to cooperate fully with the ICC.

Thus, it appears that some African states are more committed to the AU’s call for non-cooperation than to observing their international obligations under the Rome Statute. As a result, Al-Bashir has freely visited several African states who are party to the Rome Statute without fear of being arrested and surrendered to the ICC. On 22 July 2010, President Al-Bashir travelled to Chad to attend a summit of the Community of Sahel-Saharan States and in August of the same year travelled to Kenya to attend the celebrations of a new constitution. More recently, President Al-Bashir travelled to Nigeria to attend the AU Special Summit on HIV/Aids, Tuberculosis and Malaria on 16 July 2013.

It may well be that the arrest warrant for Al-Bashir discomfited not just other African political leaders who dislike the precedent, but also those who fear the uncertainty of a new element in the already complex dynamics of international criminal justice. With other cases before the ICC implicating high government officials in Kenya, Libya and

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125 Ibid, para 5.
126 See AU Assembly, Decisions and Declarations of the 13th ordinary session (n 77) 7-8, paras 9 & 10.
Cote d’Ivoire,\textsuperscript{132} African leaders seem to be afraid of ‘whose turn would be next’ and have begun to threaten withdrawal from the ICC, which they once actively and fully supported.

On account of Africa’s conflicts and the desire to establish peace and stability in the continent, the cordial relationship between the ICC and the AU seemed entrenched. This is particularly demonstrated in the enabling instruments of both institutions which seek to ensure accountability for atrocious crimes in order to realise their respective goals. However, the amity gave way to conflict and this downturn originated with the referral of the situation in Sudan to the ICC by the United Nations Security Council.

\textbf{4.3 Unpacking the Tension between the ICC and the AU}

Understanding the underlying reasoning behind the AU’s call on its member states not to cooperate with the ICC would be valuable for achieving a more accurate portrayal of the relationship between the two institutions.\textsuperscript{133} First, unpacking the tension underscores that many of the AU’s expressed concerns \textit{vis-à-vis} the ICC relate to the Security Council’s actions or inactions and not to the ICC itself.\textsuperscript{134} It is submitted that the premise of the AU’s call for non-cooperation on the part of its member states with the ICC is the fact that the United Nations Security Council ignored its July 2008 request to defer the case against Al-Bashir.\textsuperscript{135} This is arguably so because even among strong supporters of the ICC in Africa, the posture of the Security Council in failing to respond, either positively or negatively, to the AU’s request was perceived as disrespectful.\textsuperscript{136}

\textsuperscript{132} Situation in Cote d'Ivoire No ICC-02/02/11, Decision on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire 3 October 20011 \url{http://www.icc-cpi.int/iccdocs/doc/doc1240553.pdf}


\textsuperscript{134} Ibid.

\textsuperscript{135} Specifically, the AU expressed deep regrets that its request to the UN Security Council to defer the proceedings initiated against President Bashir has neither been heard nor acted upon. (See notes 77 & 123).

\textsuperscript{136} Keppler, (n 133).
Second, the strain between the ICC and the AU may be attributed to the challenges that both institutions face in building a mutually beneficial relationship. These challenges could be broadly categorised as either legal or political, with some overlap.  

It must be noted, however, that these hindrances are not unique to the ICC and its relationship with states in the African continent. Rather they relate to the nature of international criminal law and the development of the ICC as a permanent institution.

### 4.3.1 Legal Challenges

Arguably, the current hostility between the ICC and the AU stems from new legal principles whose interpretation and implications remain unclear, though they are evolving. Fundamental to this ambiguity is the interpretation and implementation of complementarity, the application of which, as a mutually inclusive concept, would involve both national authorities and the ICC equally sharing the responsibility of prosecuting international crimes. However, certain legal issues arise from the complementarity regime; such as the ICC’s jurisdiction over nationals of non-party states and the irrelevance of immunity. Clarifying these uncertainties will reduce the points of contention between the ICC and the AU.

#### 4.3.1.1 The ICC’s Jurisdiction over nationals of states not party to the Rome Statute without the need for consent.

A primary rule of customary international and treaty law is that consent must precede a state’s assumption of international obligations under a treaty. It is quite significant that under the Rome Statute, this rule is not applicable because the Statute is held to bind nationals of all countries and indeed states themselves, whether they are party to it or not. This new legal position is founded upon the individualisation of criminal

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137 Jalloh (n 1).
responsibility; specifically in Article 25, which gives the ICC jurisdiction over individuals and not necessarily states, but requires enforcement and cooperation of states. The provision indicates that a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable to punishment. Since the Rome Statute addresses the individual, the place of the consent of the state of which such an individual is a national has become of negligible consequence.

Further support for the irrelevance of states’ consent is found in Article 12. As argued previously, the trigger mechanism of the ICC implies that the ICC’s jurisdiction can extend to nationals of a non-party state in three different circumstances. The first is that the ICC has jurisdiction where crimes proscribed by the Rome Statute are committed within the territory of a state party, by a national of a non-party state. The second is where a non-party state decides to lodge a declaration accepting the jurisdiction of the ICC, as happened with Cote d’Ivoire, and the third is where the Security Council, acting under Chapter VII of the UN Charter, refers a non-party state to the ICC, as was the case with Sudan and, later, Libya.

David Scheffer, who led the United States delegation to the Rome Conference, conceded that under the Statute, nationals of non-party states would be subjected to the jurisdiction of the ICC under Article 12, but contended that this should not be applied more generally. However, the overwhelming majority of nations could not agree to require the consent of the state of which a suspect is a citizen as a prerequisite for the Court’s jurisdiction.

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139 Clarke (n 73).
140 Rome Statute, Articles 25(2), 25(3)(a), (b) & (c).
141 See ‘Admissibility and Trigger Mechanism’ (text to notes 76-89 in Ch 1).
143 Rome Statute, Art 12(2)(a).
144 Rome Statute, Art 12(3).
145 Rome Statute, Art 13(b).
146 David Scheffer, ‘The United States and the International Criminal Court’ (1999) 93 AJIL 12, 18-20
Consequently, the ICC may exercise jurisdiction over anyone anywhere in the world if either the state in whose territory the crime was committed or the state of which the accused is a national consents and thus the treaty exposes nationals of non-parties.\footnote{Philippe Kirsch & John Holmes, ‘The Rome Conference on an International Criminal Court: The Negotiating Process (1999) 93 AJIL 2, 9-10; Cherif Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’ (1999) 32 Cor. Int’l LJ 443, 458; Mahnoush Arsanjani, ‘The Rome Statute of the International Criminal Court (1999) 93 AJIL 22, 26}

Article 12(1) provides no further guidance, except that it states merely that ‘if’ a state becomes a party, it ‘thereby accepts the jurisdiction of the court’. Thus, there is no requirement that a state be a party in order to accept the jurisdiction of the court and there is no requirement that the state of which the accused is a citizen be a party or accept the jurisdiction of the ICC.\footnote{Jordan Paust, ‘The Reach of ICC Jurisdiction Over Non-Signatory Nationals’ (2000) 33(1) Vanderbilt Journal of Transnational Law 1-16.} Article 12(3), which provides for the acceptance of jurisdiction signifies only that such acceptance may be the result of \textit{ad hoc} declaration as for example, Cote d’Ivoire.

The above position is novel and it will take some time for states to appreciate the dynamics of the international criminal justice system envisioned by the Rome Statute which they have created and embraced. It is therefore not surprising that after the referral of the situation in Darfur, Sudan to the ICC, some states, including Sudan argued that the ICC’s assertion of jurisdiction was a violation of Sudan’s sovereignty since it is not a party and had not consented to be bound by the Rome Statute. Arguably, however, Sudan and all United Nations member states agreed to implement the decisions of the Security Council in view of the binding effect of Chapter VII and specifically, Articles 25 and 103 of the UN Charter. As the Security Council’s referral was based on its Chapter VII authority, it is hardly comprehensible that the ICC should subsequently be criticised for this action.\footnote{Ibid.}
4.3.1.2 The ICC’s Jurisdiction over a Sitting Head of State and the Immunity Question

A second related legal question is whether the ICC is competent to issue an arrest warrant for a sitting president of a non-party like Sudan. The question of the consequences of the Security Council’s referral and its implication for the immunity that accrues to President Al-Bashir has been discussed by a number of scholars.\(^\text{150}\) Thus, it suffices to analyse the personal immunity of heads of state as recognised under international law as well as the Rome Statute’s position on the subject.

The doctrine of head of state immunity in international law proposes that serving heads of state enjoy immunity \textit{ratione personae} (personal immunity) for every act undertaken by them while in office, regardless of whether such acts are carried out in an official or private capacity.\(^\text{151}\) This personal immunity is not limited to heads of state, but also extends to all high-ranking state officials by virtue of the office they hold.\(^\text{152}\) Also, former heads of state enjoy a reduced form of immunity \textit{ratione materiae} (functional immunity), which offers immunity for acts carried out in pursuance of some official function, but not for those which are undertaken in a private capacity.\(^\text{153}\)

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\(^1\text{153}\) See Vienna Convention on Diplomatic Relations, done at Vienna 18 April 1961, 500 UNTS 95 entered into force 24 April 1964, Article 31(1).
In the Arrest Warrant\textsuperscript{154} case, the International Court of Justice (ICJ) found that the issuance of the arrest warrant by the Belgian judicial authorities against the incumbent Minister of Foreign Affairs of the DRC breached international norms on personal immunity.\textsuperscript{155} The ICJ held further that serving heads of state enjoy absolute immunity from prosecution in foreign courts,\textsuperscript{156} but that they may be prosecuted by certain international courts.\textsuperscript{157}

In contrast, the arrest warrant of Al-Bashir, did not emanate from a national court. Rather it is an international arrest warrant issued by the ICC.\textsuperscript{158} On the question of whether the customary rules of international law on the immunity of heads of state, which prevent a domestic judicial authority from issuing an arrest warrant against such an individual equally applies to the ICC, the ICJ made a clear exception for international tribunals and particularly, the ICC.\textsuperscript{159}

There are several justifications for this exception. First, since the personal immunity accorded to heads of state and state officials is informed by the principles of state equality and the desire to preserve the horizontal architecture of the international system, it may appear that such immunity should never be pleaded before truly international courts and tribunals.\textsuperscript{160} This is because the ICC derives its mandate from the international community as a whole and accordingly, cannot depend on a principle that operates between sovereign

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\item[155] Ibid, para 70.
\item[156] Ibid, para 58.
\item[157] Ibid, para 61.
\item[158] Gaeta, ‘Does Al Bashir Enjoy Immunity?’ (n 150) 318.
\item[159] Arrest Warrant case, para 61. The ICJ specifically referred to Article 27(2) of the Rome Statute which removes immunities that may attach to certain persons by reason of their official positions.
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Consequently, Gaeta argued that the functions of inter-state relations have little bearing on the ICC. She postulates:

The very *rationale* for the rules on personal immunities is lacking when criminal jurisdiction is instead exercised by an international criminal court. While at the ‘horizontal’ level, there is a need to protect foreign state officials from the exercise or even abuse of jurisdiction by the receiving state, things are clearly different at [the] purely ‘international’ level. International criminal courts are not organs of a particular state; they act on behalf of the international community as a whole to protect collective or universal values and thus to repress very serious international crimes.

Persuasive as the foregoing argument appears, it must be noted that the exercise of jurisdiction by the ICC can have serious consequences for the sovereign equality of states and the intercourse of international relations. This is particularly manifested in the complementary jurisdiction of the ICC, on account of which it depends absolutely on the cooperation of states to investigate and prosecute cases before it. Therefore, to disconnect the jurisdiction of the ICC from the operation of domestic courts and the sovereignty of states posits an inherently artificial understanding of the international criminal jurisdiction.

Article 27 of the Rome Statute stipulates that neither international nor domestic immunities nor special procedural rules will prevent the Court from exercising jurisdiction over any person. This implies that the ICC can exercise jurisdiction over persons who enjoy immunity under customary international law, regardless of whether the state of which the alleged perpetrator is a national is a party to the Rome Statute or not. This provision differs from its corresponding provisions in the Statutes of the ICTY, ICTR and the

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163 Gaeta, ibid, 320-321.
165 Wardle, (n 151) 186-187.
166 Rome Statute, Article 27.
SCSL in that it resolves to render both official capacity and immunities irrelevant before the ICC.

In contrast, the ICTY Statute stipulates that the official position of any accused person, whether head of state or government or a responsible government official, shall not relieve that person of criminal responsibility nor mitigate punishment. This provision is replicated in both the ICTR and SCSL Statutes, and it does not refer to immunity enjoyed by heads of state under customary international law presumably because the tribunals were created by the Security Council.

Consequently, the question of whether or not the tribunals violated the immunities of Slobodan Milosevic, Jean Kambada and Charles Taylor was not directly answered by reference to their enabling Statutes. However, Akande argues that immunity in those cases had been removed by the Security Council. Supporting this view, Gaeta noted that no one has ever claimed that the ICTY violated Milosevic’s immunity and that the absence of any challenge in that regard shows that an international tribunal and the ICC are not circumscribed by such immunities.

Be that as it may, it is important to note that neither the resolutions creating the tribunals nor their statutes contain provisions expressly removing personal immunity, let alone the immunities of serving heads of state. Accordingly, Gaeta argues that it is difficult to understand how the Security Council or the Statutes, could have derogated from the customary rules on personal immunity by simply remaining silent on the matter. Clearly, it would not be sufficient to counter that this derogation is implicit because the Security

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167 Rome Statute, Art 27(1).
168 Rome Statute, Art 27(2).
169 ICTY Statute, Art 7(2).
170 Article 6(2) of both Statutes of the ICTR & the SCSL
171 Akande, Legal Nature of Security Council Referral (n 150) 337.
173 Ibid.
Council has created an international tribunal vested with jurisdiction over persons responsible for international crimes. As the ICJ aptly noted in the *Arrest Warrant* case, the existence of jurisdiction does not imply the absence of immunity.174

As Sudan came under the jurisdiction of the ICC because of referral by the Security Council, the question was whether the referral, in effect, abrogates Bashir’s immunity. Neither the resolution nor the Rome Statute provides an answer to this question. The Pre-Trial Chamber which approved the arrest warrant in March 2009 asserted that Bashir’s current position as president or head of state does not constitute a bar to the Court’s exercise of jurisdiction over his case.175

Two justifications have been advanced for this position. The first is that by exercise of Chapter VII power, Al-Bashir’s immunity was lifted through the specific provision in the referral resolution that the government of Sudan ‘shall cooperate fully with the ICC’.176 The second is the assertion by Akande that the mere referral of Sudan by the Security Council automatically bound Sudan as if it were a party to the Rome Statute, including the provisions abrogating immunities.177 While the first condition is met by Article 27(2) which effectively removed the immunity accorded to state officials, the second might not because Sudan, to which the immunity is attached, insists on its immunity under customary international law.

Conversely, Jalloh argues that the assertion that the United Nations Security Council Resolutions which created the tribunals abrogated immunities by virtue of Chapter VII of the United Nations Charter cannot be relied upon.178 This is because the situations are slightly different in the Sudan scenario, particularly as Al-Bashir is still in power. Jalloh

174 *Arrest Warrant* case, para 59.
175 Decision on the Prosecution’s Application for Al Bashir’s Arrest Warrant 4 March 2009, paras 41-45.
176 See Resolution 1593 of 31 March 2005, para 2.
178 Jalloh (n 1) 484.
contends that this declaration could lead to some difficulties. The first is that a strong argument can be made that for the Security Council to revoke the immunity of a serving president, the referral resolution would have to explicitly nullify the immunity, since immunity accrues to the state (Sudan) as opposed to the person occupying the office (Al-Bashir). This problem could then be resolved easily by the adoption of a subsequent resolution expressly removing Al-Bashir’s immunity.

The second difficulty is that while the Security Council is competent to adopt measures aimed at restoring international peace and security, it does not possess the power to unilaterally impose treaty obligations upon a state. The United Nations Charter does not expressly give it such powers. Thus, it may be argued that the removal of Sudan’s immunity is an implied power necessary for the performance of its functions.

Furthermore, Gaeta argues that Article 27(2) merely restates the already existing principle of customary international law, that no official immunity may be enforced before an international criminal court. However, the provision of Article 98(1) of the Rome Statute renders this argument ineffective. Article 98(1) reads;

The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state.

179 Jalloh, 484.
180 Ibid.
181 Ibid.
182 Gaeta, ‘Does Al-Bashir Enjoy Immunity?’ (n 150) 322; ‘Official Capacity’ (n 160) 991.
183 Rome Statute, Art 98(1).
Clearly, there is a problem with the reconciliation of these two seemingly contradictory provisions, as Article 98 anticipates a situation of conflict between the provisions of the Rome Statute and existing international law norms. As argued by Wardle, if immunity is inapplicable before the Court, then why should such immunity be considered and respected in the course of requests for the surrender of persons indicted by the ICC? Indeed, if all states parties to whom requests for arrest and surrender are directed were permitted to avoid compliance with such requests because of the immunity accruing to the accused individual, then Al-Bashir, who enjoys such immunity, would never be brought before the ICC. The result is that Article 27(2) would be meaningless.

To resolve these contradictions, Akande argued that Article 27(2) serves to remove immunities and that Article 98(1) cannot be interpreted as to allowing parties to rely on those same immunities. The way forward, particularly to enhance the relationship between the AU and the ICC, and for the purpose of complementarity, may be to expunge Article 98 altogether from the Statute.

Ultimately, immunity is no longer relevant for international crimes. This is regardless of whether the alleged criminal is a past or incumbent head of state. Granted that immunity does not operate with respect to the crimes proscribed by the Rome Statute, the practicality of ensuring that states comply with this obligation is very unlikely, particularly taking into consideration that Article 98(1) seemingly contradicts Article 27 and can inhibit the functioning of the ICC.

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184 It has been argued that the ambiguity in these provisions is as a result of the drafting history of Article 98, which was proposed at the final stages of the Rome Conference by a completely different working group to that which proposed and negotiated Article 27. See Per Saland, ‘International Criminal Law Principles’ in Roy Lee (ed), The International Criminal Court: The Making of the Rome Statute (Kluwer Law International 1999) 202; Claus Kress and Kimberly Prost, ‘Article 98 Cooperation with Respect to Waiver of Immunity and Consent to Surrender’ in Otto Triffterer (ed) Commentary on the Rome Statute 1601-1619, 1607.

185 Wardle (n 151) 188.

186 Akande, ‘Legal Nature of Security Council Referral’ (n 150) 337.
4.3.2 Political Challenges

Sharp criticism is sometimes directed at the United States and others for participating in the referral of situations to the ICC while at the same time refusing to ratify the Rome Statute themselves. This constitutes one aspect of the critical political challenges to relations between the ICC and the AU; these include an uneven playing field, Western complicity in Africa’s conflicts and the exceptionality of the United States. Nevertheless, deriding the ICC as imperialistic only fuels the AU’s hostility towards the ICC and ultimately inures perpetrators while leaving millions of African victims’ claim to justice unaddressed.

4.3.2.1 An Uneven Playing Field, Western Complicity in Africa’s Conflicts and the United States Exceptionality

It is difficult to deny that the implementation of international criminal justice faces some obstacles which are founded on the legitimate concerns of some states, whether party to the Rome Statute or not.\(^{187}\) One of these impediments is the perception that citizens of some states are subject to such justice while those of others are not. As noted by a commentator with respect to the jurisdiction granted to the ICC in the Darfur referral, there is little chance that the ICC’s jurisdiction will one day be imposed on the United States, China, Israel or Russia.\(^{188}\) Similarly, Human Rights Watch once observed:

The reality that justice unfolds on an uneven international landscape has generated genuine frustration. This is a landscape that needs to change, so that the leaders of the world’s most powerful states as well as those from smaller, weaker states are subject to the reach of law for the worst crimes under international law.\(^{189}\)

Some African leaders have actively sought to exploit the disparities in the application of international justice to present the ICC as a new form of imperialism that

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\(^{188}\) Fabrice Weismann, ‘Secourir les victime ou Collaborer avec la CPI…’ (Rescue the Victims or Collaborate with the ICC) available at http://www.grotius.fr/rubrique/justice-internationale.\(^{189}\)

should be opposed.\textsuperscript{190} The insincere posture of some permanent members of the Security Council, who participate in referrals and yet are not parties to the Rome Statute themselves, seems to validate the disapproval.

In addition to the inequality of international criminal justice, it has been asserted that the flames of conflicts in Africa have been fanned to varying degrees by Western powers.\textsuperscript{191} In this regard, Ifeonu Eberechi contends that the on-going resistance to the prosecution of Al-Bashir by the ICC is in part borne out of a legitimate feeling among some African states that the ICC is an institution controlled by those who are partly responsible for the conflicts in the continent.\textsuperscript{192} Thus, from the AU point of view, an ‘international community’ which is complicit in the conflicts in Africa lacks the moral authority to enforce international criminal justice on the continent.\textsuperscript{193}

The United Nations Charter affirms the ‘equal rights of men and women and of nations large or small’ and the principle of sovereign equality of all states.\textsuperscript{194} The principle of equality, whether of individuals or of states, precludes arbitrary distinctions with respect to its application based on states’ or individuals’ social, wealth, moral or other status.

This principle is belied, however, by the exceptionality of the United States \textit{vis-à-vis} the ICC, thereby piquing Africa’s sense of justice.\textsuperscript{195} In the words of Ramtane Lamamre, ‘how could you refer the cases of others while you don’t feel compelled to abide


\textsuperscript{191} Anthony Anghie and B.S Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’ (2003) 2 \textit{Chinese Journal of International Law} 77, 90. See also Zeleza (n 87) 22.


\textsuperscript{193} Ibid, 56.

\textsuperscript{194} See the preamble and Article 2(1) of the UN Charter.

by the same rule?" Although, the fact that the United States, China and Russia, are not parties to the Rome Statute has led to charges of hypocrisy, this charge is weakened in this case by the abstention of the first two from the vote which resulted in the referral of Sudan to the ICC. However, it is nevertheless problematic that citizens of the United States are unlikely to ever face the Court themselves for war crimes that were committed in the context of hostilities in Afghanistan and Iraq in 2002 and 2003. This state of affairs bolsters the position of those who, rightly or wrongly, argue that international criminal law is being used to discipline only citizens of weak and poor states.

Moreover, the United States adopted a domestic legislation, The American Service-Members Protection Act (2002), precluding cooperation with the ICC. In addition, the Act prohibits American military assistance to states who are parties to the Rome Statute, and it provides a mechanism to penalise others, including through the use of military force, which would be so bold as to surrender a United States national to the ICC. Yet the Court has not publicly expressed a position regarding the posture of the United States While this is not to suggest that the ICC may not have its own misgivings about the posture of the United States, its silence on the issue has detrimental impact on the ICC, as it is being unfavourably interpreted by a number of African states.

197 See Press Release, ‘SC/8351 Security Council Refers Situation in Darfur, Sudan to the Prosecutor of the International Criminal Court Resolution 1593 (2005)’ (There were four abstentions namely; Algeria, Brazil, China and the United States).
198 Jalloh, 491.
199 Hoile, ‘ICC, A Tool to Recolonise Africa?’ (n 48).
202 Ibid.
203 Jalloh, 493.
Furthermore, during the George W. Bush administration, the United States coerced many developing countries to sign Article 98(2) Bilateral Immunity Agreements (BIA) wherein promises were made not to hand over American nationals to the ICC without first securing the consent of the United States. The countries were faced with the prospect of losing all financial, military and humanitarian aid if they failed to sign the BIA. Over 36 states in Africa signed those agreements; the exceptions were South Africa and a few other larger states that refused to succumb to the pressure. However, they lost the much-needed American assistance as a result of their refusal.

Notwithstanding these criticisms, it is suggested that Africa should enhance the support they once accorded and still accord the ICC. This is because the criticisms so far have been based on the involvement of the United Nations Security Council and the hypocritical stance of its permanent members and not on the ICC itself. In fact, it would appear that the accusation that the ICC is unfairly targeting Africans cannot be substantiated by the evidence.

4.4 The ICC: Unfairly Targeting Africa?

It is acknowledged that, to date, international justice has not been and may never be equally applied, for the reason that the ICC is less likely to prosecute leaders of powerful states and those that they protect. This is an important issue that should be addressed, but in a manner that extends, rather than curtails accountability, so that victims have recourse to justice no matter where the atrocities are committed. Despite the shortcomings in international criminal justice, dismissing the ICC as a new form of

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205 Olympia Bekou and Sangeeta Shah, ‘Realising the Potential of the ICC’ (Text to n 68 in Ch 2) 537.
206 Keppler, ‘Managing Setbacks’ (n 133).
207 Ibid.
imperialism targeting African states may not be accurate and is in any case counterproductive to the pursuit of justice. It is proposed that, rather than point to alleged perpetrators in other parts of the world that are not being prosecuted by the ICC, African states should focus on how the ICC’s present prosecutions and investigations on the continent could help ensure accountability and create peace and stability in African countries.

The first reason why it is argued that the aforementioned assertion does not bear scrutiny is that four African states have engaged in self-referrals to the ICC, namely: Uganda, the Central African Republic (CAR), the Democratic Republic of the Congo (DRC) and Mali. It has been argued that the first referrals by the governments of Uganda and the DRC occurred only under considerable pressure by the ICC prosecutor,\(^{208}\) as the Prosecutor had publicly called on states to refer those situations to the ICC.\(^{209}\) According to Akhavan, ‘the referral was an attempt to engage an otherwise aloof international community by transforming the prosecution of LRA leaders into a litmus test for the much celebrated promise of global justice.’\(^{210}\)

Nevertheless, it is submitted that self-referrals are a product of the lack of understanding of the obligations of both the ICC and states under complementarity because one of the reasons for the referral by the Ugandan government, for example, was its inability to arrest members of the LRA.\(^{211}\) Absurdly, eight years on, both the ICC and the Ugandan government have not been able to arrest any of the suspects. The question is: if the government of Uganda, on whose territory the crimes were committed and whose nationals

\(^{208}\) Hoile, (n 48).


\(^{211}\) See Pre-Trial Chamber II, Decision on the Admissibility of the Case Under 19(1) of the Statute ICC-02/04- 01/05-377, 10 March 2009, para 37. See also Rome Statute, art 17(3).
(members of the LRA) are the perpetrators, is not able to arrest the alleged criminals, how can the ICC, without a police force, manage to achieve that?

Irrespective of the above argument, the first ten years of the functioning of the ICC has been referred to as the ‘teething’ period and therefore neither the ICC nor the states that referred situations in their territories are to blame. Moreover, the self-referrals could be interpreted as a demonstration that the desire within the African region to promote international rule of law is not just a matter of principle, but of practice. As articulated by Bensouda, the Chief Prosecutor of the ICC, the states of the continent realise that acting alone cannot protect their citizens from perpetrators of international crimes; therefore, a realisation of the usefulness of collaboration may have prompted the self-referrals.

The recent self-referral by the government of Mali in 2012 concerning conflict in the Northern region, which made it the fourth African state to refer a situation in its territory, reveals the support and confidence that African states continue to have in the ICC. Consequently, it cannot be said that the ICC is Anti-Africa, any more than it can be said that these African states that have engaged in self-referrals are themselves anti-Africa.

In the cases of Sudan and Libya, the ICC’s investigation was triggered by a referral from the United Nations Security Council. Thus, the ICC has only utilised its *priori propria* powers in two situations, namely; Kenya and Cote d’Ivoire, but again, these were, in the case of Kenya, based upon information received by the Prosecutor, and, in the case of Cote d’Ivoire, upon invitation of the government.

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213 Mercy Eze, ‘Fatou Bensouda: We are not Against Africa But can she bring any real change to Africa-ICC relations?’ *New African Magazine* August/September 2012.
214 Ibid.
215 Black (n 187) 148.
The second and most persuasive reason why the ICC cannot be accused of being biased against Africa is one which emanates from the nature of the victims-Africans- of the alleged crimes and not necessarily the perpetrators of the crimes or the interests of the states that defend them. In this regard, to the extent that the ICC’s attention thus far has been focused on Africa, for the benefit of the victims, it should arguably be celebrated rather than criticised.216

As noted earlier, Africa has been the site of the commission of many, if not most, international crimes. Nevertheless, opposition to the ICC in Africa is led by the political interests of those who oppose the ICC’s mission, who possibly have never reconciled themselves to the idea of legal accountability for mass atrocities.217 Although the relevance of this point may be disputed, it does serve to highlight the fact that the controversy surrounding the ICC’s record and activities has ignored the interests of a substantial number of victims.218 What is certain, however, is that by working to render justice to African victims of mass crimes, one cannot simultaneously maintain that the ICC is biased against Africa.219 The argument is that where crimes are committed and perpetrators are made accountable and potential perpetrators are deterred from such conduct in the future, the victims (both actual and potential) are the beneficiaries. Denying justice to some victims because redress is not possible for all cultivates, rather than combats, the culture of impunity.220

A third reason which is closely linked with the benefit that accrues to victims of international crimes in Africa is the benefit of lasting peace and stability. The ultimate aim of ICC’s investigations and prosecutions is to foster peace and stability on the continent through justice. In this regard, both the AU and the ICC share common objectives, as both the

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216 Black (n 187) 154.
218 Black, ibid.
219 Ibid.
220 Gagnon, (n 189).
provisions of the Constitutive Act of the AU, the Peace and Security Protocol, and the Rome Statute demonstrate. For this reason, the AU should enhance its relationship with the ICC to ensure capacity building in its institutions in order to be able to prosecute and investigate international crimes domestically, thereby ensuring peace, security and stability.

Conclusion

Politics cannot be entirely divorced from law and this is particularly the case in international criminal law and the ICC, and the scapegoat thesis and selectivity appear at first to buttress the assertion that Africa is inappropriately targeted for prosecution. However, closer examination reveals that the United Nations Security Council, which is a political body, is actually the source of some points of contention and that other points are unsound. In the event, proof of selectivity does not negate the carriage of justice against the individual who was selected for prosecution.221

Admittedly, the ICC is less likely to prosecute leaders of powerful states and those they protect, but this issue must be addressed in and of itself and should not be used to curtail the accountability of others. The ICC cannot be said to be unfairly targeting Africa, as the ultimate aim of both the AU and the ICC is to ensure accountability for serious crimes and foster peace, security and stability. This is irrespective of the point that such actions are not being taken in other parts of the world where equally serious crimes are being committed. The cumulative gain to Africa, in addition to ensuring peace, is also the deliverance of justice to victims of atrocities.

Thus, the shared goals of justice and peace reveal that there is accord between the objectives of the AU. This is particularly demonstrated in the enabling instruments of

221 See Celebici case, (n 35) paras 611 & 618.
both institutions, such as the Constitutive Act and the Protocol, which seek to ensure accountability for atrocious crimes in order to realise lasting peace and stability. Both the Constitutive Act and the Protocol encourage relations and consultations with international institutions and organisations to ensure institutional capacity and peace building.\textsuperscript{222}

While it is conceded that the relationship between the ICC and the AU is strained, a more detailed analysis of the cause of the tension revealed, in fact, the strong support among African nations for the ICC. Therefore, unpacking the tension was necessary to situate an accurate portrayal of the AU/ICC relationship and to trace the cause of the conflict to the Security Council’s referral of the Darfur situation and the subsequent indictment of the Sudanese President by the ICC.

Certainly, other areas of misunderstandings do exist between the two institutions, which arise from both political and legal sources. These include the issue of the ICC’s jurisdiction over nationals of non-party states and immunities of heads of states, both of which were analysed as points of misconceptions that could exacerbate the tension between not only the AU and the ICC, but also between the ICC and other states parties and non-party states alike. It is suggested that Article 98 which is identified as a contradictory provision, should be removed from the Statute entirely. This will reduce confusion and points of conflicts in the functioning of the ICC.

With the institution of self-referrals, which African states alone have ‘\textit{pro proprio-motu}’ embarked upon, it is apparent that the AU cannot substantiate an argument that Africa is being unfairly targeted. Rather, it would be of immense benefit for the AU to find solutions to the tension. It would be for the mutual benefit of both the AU and the ICC to resume a cordial relationship, irrespective of the perceived selectivity and bias of the ICC with regards

\textsuperscript{222} See Arts 4, 13 & 17 of the Constitutive Act of the AU and Arts 14 & 17 of the Peace and Security Protocol
to Africa. The ultimate aim of such relationship will be to enhance African states’ criminal justice systems to enable them investigate and prosecute international crimes domestically. Using Nigeria as a case study, the next chapter examines institutional preparedness of African states to implement complementarity.
Chapter Five

Institutional Preparedness for the Complementarity Regime: Nigeria as a Case Study

Nigeria is one of the thirty-four African states that have ratified the Rome Statute, thereby becoming bound to implement complementarity. In addition, the preliminary examination of the situation in Nigeria by the office of the Prosecutor (OTP) determined that there is a reasonable basis to believe that crimes against humanity, namely, acts of murder and persecution have been committed by members of the Boko Haram sect in Nigeria.\(^1\) Consequently, the preliminary examination has progressed to phase 3 ‘admissibility’,\(^2\) and the OTP is currently assessing whether the Nigerian authorities are conducting genuine proceedings in relation to the situation in order to resolve jurisdictional and admissibility issues.

Under Article 17, the test of a state’s willingness and ability to investigate and prosecute international crimes is hinged upon the genuineness of the process, and which is further determined by the independence and impartiality of the domestic proceedings.\(^3\) Therefore, this chapter demonstrates, through a case study of Nigeria, that beyond ratifying the Rome Statute, and in addition to having implementing legislation in place, African countries need credible institutions to carry out genuine proceedings domestically. This is because having a functional criminal justice system, including the police, the prison system, and the judiciary, is fundamental to the fulfilment of the responsibility implied by the primacy of domestic jurisdiction over international crimes.

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\(^1\) See OTP Article 5 Report on Nigeria 5 August 2013 (Text to note 173 in Ch 3) para 17.
\(^2\) Text to n 50 in Intro.
\(^3\) Rome Statute, article 17(1)(a), (b) and 17(2)(c).
Carrying out genuine proceedings is premised upon the institutional preparedness of states to implement complementarity, and an integral part is the adoption of implementing legislation, as discussed in chapter two. However, even after the Rome Statute’s crimes have been incorporated into domestic law, adjudicating on the basis of it may still prove to be a challenge, depending on its status vis-à-vis other laws. Nigeria is a dualist state, as most other African states, therefore, international instruments or treaties do not have the force of law except after they have been given such force by the Nigerian legislature.

As a result, when the National Assembly simply adopts a treaty wholesale, as it did with the African Charter Act in 1983 and is preparing to do with the Rome Statute bill, without carrying out an extensive review of existing legislation to resolve any inconsistencies, it is left to the courts to determine where a treaty ranks in relation to conflicting domestic laws. For example, in the Abacha case, the inconsistency in the domestic Decrees and the provisions of the African Charter Act was resolved in favour of the Decrees by the trial court. It was only at the Court of Appeal and the Supreme Court that the supremacy of the African Charter Act over the Decrees was upheld. Nevertheless, the

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4 Kleffner, (Text to n 20 in Ch 2).
11 Abacha v. Gani Fawehinmi [2000] 4 FWLR 533 SC
supremacy of the Nigerian Constitution over any other law including international instruments is entrenched.¹²

Contrary to the Rome Statute, Nigerian laws allow the death penalty¹³ and immunity of the President and certain other persons in official government positions.¹⁴ Legal ambiguities such as this affect states’ institutional readiness to implement complementarity. When Nigeria adopts its implementing legislation, the question of whether it, and by analogy, other African nations, will then also have the institutions to prosecute international crimes is the focus of this chapter.

Institutional capacity to implement complementarity will vary from state to state depending on the local context and realities. Nevertheless, the similarities across the continent are sufficient to validate the approach of selecting one country for a case study and devising a minimum complementarity threshold that could then be applied elsewhere with slight adjustments to account for local peculiarities. Consequently, this chapter includes a discussion of whether the Nigerian police, prison system, and judiciary are equipped to carry out criminal proceedings based on complementarity.

This chapter is divided into three sections. The first section provides an overview of the current state of the Nigerian criminal justice system, in particular, the laws, the police and the prison system and identifies the reforms that would be necessary to prepare these institutions for the implementation of complementarity. It is found that international crimes have not yet been incorporated into Nigerian law. Also, it is shown that the police suffer from a lack of training and accountability, and that abuse and torture at their hands are endemic. Furthermore, the prisons are found to be insufficient and overcrowded, mainly due

¹² Ibid, Per Ogundare JSC 289; Mohammed JSC 301-302; Achike JSC 317-318 and Uwaifo JSC 343.
¹⁴ See 1999 Constitution, section 308.
to the large numbers of detainees awaiting trial. It is argued that since complementarity entails criminal proceedings at the national level, the police, the courts and the prisons are institutions that should be well equipped to ensure genuine domestic proceedings.

The second section includes a discussion of the procedure for appointing judges and the professional legal skills and qualities required of a judge. It is argued that in addition to the professional legal skills required of a judge, an ICC judge, and by extension, national judges who will adjudicate international crimes should possess additional essential quality of prior training and experience in international criminal law. This is important because when members of the Boko haram who are suspects in the on-going ICC investigation are eventually apprehended, Nigerian courts would need judges who are experts in international criminal law to carry out domestic trials. Thus, the unavailability of judges and prosecutors trained in the field of international criminal law may constitute a major drawback to the implementation of complementarity.

The third section discusses corruption as a bane to the implementation of complementarity in Nigeria. Corruption in the Nigerian judiciary is analysed and the prevalence of intimidation and manipulation of judges is demonstrated. This state of affairs, coupled with security concerns and the incidence of kidnapping of judges and their family members, militate against the independence and impartiality of the judiciary, which is necessary for the implementation of complementarity. It is therefore proposed that tackling the problems of corruption and insecurity is one strategic means by which Nigeria can achieve institutional preparedness. Doing so will also restore public confidence in the justice system, which is essential to its effective function. Therefore, public impressions concerning the workings of the courts in Nigeria and a minimum complementarity threshold are expounded at the end of the section.
5.1 The Nigerian Criminal Justice System

According to Joseph Daudu, criminal justice is the system of practices and institutions of governments directed at upholding social control, deterring crimes or sanctioning those who violate laws with criminal penalties and rehabilitation efforts. This definition identifies practices on the one hand and institutions of government on the other, as the fulcrum upon which the superstructure of crime control and justice delivery turns. Therefore, in addition to criminal legislation, of importance to a criminal justice system are the institutions, infrastructure, expertise and agencies involved in the process of implementation. Thus, a criminal justice system is the collective institutions through which an alleged criminal passes until the accusations against him have been disposed of or the assessed punishment concluded. Every stage of the process is dependent on a previous one; this interdependence exemplifies the nature of criminal justice as a system.

The institutions are linked through a process. Michael Moore, describing the inter-connectivity in a criminal justice system, postulates that it is not a ‘system’ in the sense that all its agencies are directed towards a particular objective with the help of a centralised authority. Rather, it is a limited system to the extent that the different agencies are linked through a process in which one agency’s outputs become the next agency’s inputs. Moore further espoused that the output of the police, for example, is the arrest of offenders, which in turn, and based on the outcome of an investigation, becomes the input into the courts. The cases, when developed as the output of the prosecution and defense,

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16 Ibid.
20 Ibid.
become the output of the courts after conviction and sentencing, which become input for the prisons, and so on.\textsuperscript{21} Through a criminal justice system, due process is achieved, with offenders processed from the time of arrest until they are finally acquitted or released from prison after serving a prescribed sentence.

Thus, the objective of a criminal justice system is to deliver justice to the victims, the accused, the immediate community affected by the crime committed and to the society as a whole. To achieve this objective, there must be sufficient and available resources, there must be some coordination and collaboration among the agencies, and most importantly, there must be an existing legal framework for the coordination and collaboration of available resources.\textsuperscript{22} A further objective of a criminal justice system is social equity, fairness and balance in the deterrence of crime. In this regard, certain institutions are indispensable to the criminal justice system; these include the police, the courts and the prisons.

5.1.1 The Criminal Code, the Police and Criminal Investigation in Nigeria

As discussed in chapter 3, a few African states, namely, the Democratic Republic of Congo, Kenya, Uganda and Sudan failed to meet the complementarity threshold in their domestic prosecution of international crimes in part because they attempted to prosecute these crimes as ordinary domestic crimes. Therefore, in this section, it is shown that Nigeria similarly will need to specifically proscribe international crimes, defined as such, in order to carry out genuine domestic prosecutions of international crimes. The reason for the analysis is to argue that no crime in Nigeria approximates the crimes against humanity of


\textsuperscript{22} Anthony Idigbe, ‘The Role of Legal Practitioners in an Efficient Criminal Justice System’ in Daudu & Adekunle (eds) \textit{Reforming Criminal Law in Nigeria} (n 15) 111, 115-116.
murder and persecution, which have been allegedly committed by members of Boko Haram, and also that existing legislation is insufficient.

The crime of murder is known to virtually all domestic criminal legislation and thus, in Nigeria, it is proscribed under section 316 of the Criminal Code. This section lists six intents, any one of which satisfies the means for murder. The section requires that the accused should have intended to kill the victim or another person. The question is, does the definition of murder in the Nigerian Criminal Code correspond to any of the crimes in the Rome Statute for which Nigeria as a state party may be able to assume jurisdiction to investigate and prosecute? It is important to note that criminal legislation in Nigeria does not include any of the international crimes categorised as such. The crime against humanity of murder is not the same as the ordinary domestic crime of murder under Nigerian criminal legislation, either in their definition or elements. Also, the crime of persecution is not recognised in Nigeria. Consequently, there are no such crimes as ‘crimes against humanity’ in Nigeria.

With respect to state or federal offenses, the Attorneys-General of the respective states and of the Federation have the responsibility to institute, take over and discontinue any criminal prosecution. The Constitution and the Police Act are the regulatory statutes for the Nigerian Police Force (NPF). Section 4 of the Police Act defines the functions of the NPF to include the prevention and detection of crime, apprehension of offenders and preservation of law and order. In addition, the NPF is vested with

24 See sections 174 (1) & 211 (1) of the 1999 Constitution.
constitutional powers to investigate crimes. Consequently, the NPF handles about 90 percent of criminal investigation while the remaining 10 percent is shared amongst other agencies like the Economic and Financial Crimes Commission (EFCC), the Independent Corrupt Practices and Other Related Offences (ICPC), Customs and Excise and Immigration Service.

The management structure of the NPF is centralised and monolithic, as local or state police forces are not permitted under the Constitution. Its organisation and administration are the responsibility of the Federal government. With estimated staff strength of 377,000 personnel, the NPF is the largest institution in Nigeria and also Nigeria’s largest employer. The structure is headed by an Inspector-General of Police (IGP). Each of Nigeria’s 36 states and the Federal Capital Territory (FCT) constitute a Police Command headed by a police commissioner.

Ultimately, the Nigerian government is responsible for criminal prosecution, since the NPF is a part of the executive arm and is accountable to the President of the Federal Republic of Nigeria. Since the duties of the NPF include the arrest of suspected criminals and investigation of crimes, their role is therefore very crucial in the criminal justice system, because for any prosecution to take place, an arrest must be made and the alleged criminal must be arraigned before a court.

The report of the Open Justice Society Initiative and the Network on Police Reforms in Nigeria documents patterns of abuse and torture committed by the NPF against

\[26\] See section 214(1) of the 1999 Constitution.

\[27\] Section 214(1) 1999 Constitution.


\[29\] ibid., 39.

\[30\] See sections 24-30 of the Police Act.
the civilian population. According to the report, atrocities reported are not the actions of a few rogue police officers but rather, they are examples of a culture of violence and lawlessness that pervades the police force. Thus, the NPF lacks the capacity to conduct proper criminal investigations because it relies on torture to elicit confessions, being known to use different forms of brutality, including sexual violence, against detainees and suspects. The failure of the Nigerian government to stop police abuse corrodes police-community relations, reinforces impunity and makes the NPF even more likely to prey on the people it is meant to protect. In fact, it is largely conventional that members of the NPF are more willing and likely to commit crimes than to prevent their commission.

The atrocities are widespread and are acknowledged by the political leadership of Nigeria. In its universal periodic review (UPR), submitted to the United Nations Human Rights Council in 2009, Nigeria acknowledged ‘allegations of extrajudicial killings’ but claimed that it ‘neither sanctions nor will it allow such atrocities to be carried out with impunity in Nigeria’. The inaction on the part of the government to stop these atrocities makes it complicit in the atrocities.

In June 2005, the Nigerian NGO Access to Justice issued a report in which it presented graphic accounts of how ‘the use of torture is extremely widespread within the Nigerian Police Force and is an institutionalised and routine practice’. Also, in its July 2005

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31 See OSJI & NOPRIN Report.
32 OSJI & NOPRIN Report, 23.
33 Ibid.
34 Ibid, 21.
report, Human Rights Watch similarly found ‘the use of torture and other cruel, inhuman and
degrading treatment by the Nigerian Police Force to be widespread and routine’.37

In November 2006, Amnesty International in its report on investigation of
sexual violence on the part of internal security agencies in Nigeria, stipulated that the ‘rape of
women and girls by the police and security forces… is acknowledged to be endemic in
Nigeria’.38 In the report, Amnesty International alleged that the NPF and security forces
commit rape at different times and that rape is used strategically to coerce and intimidate
entire communities.39

In April 2008, the report of the Second Presidential Committee on Police Reform admitted the existence of institutionalised police abuse.40 Public confidence is
essential to effective policing and when the police commit atrocities, they undermine the
public confidence which is central to guaranteeing public safety and security. The report of
the Committee determined that, arising from the pattern of violations associated with policing
in Nigeria, there was profound ‘loss of public confidence in the integrity of police personnel’.41 Consequently, the police have become generally regarded by the public as
corrupt, inept and inefficient’.42

It is also well-known that members of the NPF enjoy a high degree of
impunity. The Police Service Commission (PSC) has the oversight function for the NPF and
is responsible for preventing and investigating police abuses, but there seems to be an

d305bea2b2c7/afrr440202006en.pdf> (Accessed 20 December 2013).
39 Ibid, 5-11.
41 Ibid.
42 See OSJI & NOPRIN Report (n 28) 31.
unwillingness to challenge the status quo.\textsuperscript{43} Judicial oversight is also not effective because judges must rely on investigations conducted by the same NPF whose personnel are alleged perpetrators. With such weak oversight, few cases of police abuses are reported and fewer still are successfully prosecuted.

The foregoing reveals that the NPF cannot be relied on to investigate ordinary domestic crimes let alone international crimes. Part of the problem is undoubtedly a lack of training, deprived working conditions and inadequate remuneration, and the second is non-existent infrastructure for communication and investigation. Detailed analyses of these factors is beyond the scope of this thesis, but suffice it to mention that these problems have led to corruption, extortion, a tradition of police brutality and a high propensity for violence by members of the NPF.\textsuperscript{44}

5.1.2 The Role of the Nigerian Prison Service in the Criminal Justice System

Analysis of the Nigerian prison service is made in this section because complementarity and cooperation are two pillars upon which the Rome Statute is founded.\textsuperscript{45} Consequently, part of the institutional preparedness to implement complementarity, is the fact that the ICC depends on states, not only to arrest and surrender suspects that it seeks to prosecute, but also for states to take up convicted persons to serve prison sentences in their domestic prisons. This is important because there are no international prisons to which individuals convicted of international crimes by the ICC could be sent to serve their prison terms. Thus, Part 10 of the Rome Statute contains provisions on the responsibility of states in the enforcement of sentences of imprisonment by which states parties are required to ensure that their prison systems meet international standards.\textsuperscript{46}

\textsuperscript{43} ibid, 23.
\textsuperscript{44} Ibid, 37, 81-90.
\textsuperscript{45} See Silvana Arbia, ‘Justice for All?’ (Text to n 59 in Ch 2).
\textsuperscript{46} Rome Statute, Part 10 (articles 103-111).
The importance of the foregoing is underscored by the fact that under the regime of the ICTR, Rwanda only qualified to receive convicted persons to serve sentences after it had undertaken extensive reform of its prisons to bring it in conformity with international standards.47 The question is whether Nigerian prisons are adequate to receive convicted persons from the ICC to serve their term of imprisonment.

The objectives of the Nigerian Prisons Service (NPS) are tripartite. First, it is responsible for the legal custody of prisoners. Prisoners are deemed to be in the legal custody of the superintendent in charge of the prison and are subject to discipline and regulations.48 Second, the NPS is required to provide adequate, humane treatment for all categories of prisoners. The third objective is that the NPS is meant to rehabilitate and reform prisoners. Rehabilitation involves encouraging the prisoners to abstain from criminal behaviour by providing them with social, educational or vocational activities which they can integrate into their social lives upon completion of their sentences.49

Like the criminal justice system, all three objectives of the NPS are interwoven and not mutually exclusive. Thus, it is important to determine whether the NPS is able to achieve these objectives or not. It is worthy of note that the Nigerian prisons do not only suffer from poor infrastructure, they are also overcrowded. As a result, prison congestion and the need for their decongestion presents a major challenge in relation to proposals for prison reform in Nigeria.50 The choice to focus the discussion on decongestion does not make other problems of less importance. Rather, it is argued that the other issues of

48 See Prisons Act Cap 366 LFN 1990, section 3(1).
49 Ibid.
poor facilities, neglect and lack of effective rehabilitation and reintegration programmes are entwined in the problem of overcrowding.

According to the Former Controller-General of the Nigerian Prisons Service, Olusola Ogundipe, as of April 2011, the design capacity of the NPS was 46,698, while the total inmate population was 48,632. This means that the capacity was exceeded by 2000 inmates. However, out of the total number of 48,632 prisoners, 34,819, representing 72 percent, were awaiting trials. It was reported that in December 2007, out of a total of 42,030 inmates in custody, 28,500 were awaiting trial.

It is further reported that some of the ‘awaiting trial inmates’ have been waiting for up to sixteen years or more. In most cases, they have already spent well over the number of years in prison, if they were found guilty of the alleged crime. However, the situation becomes irreversible where such persons are ultimately not found guilty and are acquitted. This means that one way to guarantee decongestion in the Nigerian prisons is to ensure that those awaiting trials are brought to trial as quickly as possible.

Thus, decongestion of the prisons could only be effective and work towards a comprehensive justice reform if the police and the courts were effective in justice delivery. Ultimately, admission into the prison must be based on orders of conviction from a competent court, which means that until a prisoner is convicted, he cannot be subject to the process of rehabilitation, reform and reintegration into the society. Therefore the prison is not

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55 Ibid.
meant for suspects awaiting trials. The only way to ensure decongestion is to reduce the number of awaiting trial inmates and this can only be done when the investigation and prosecution of criminals are carried out promptly by the other agencies – the police and the courts.

5.2 The Nigerian Judiciary and Complementarity

Analysis of law enforcement and prisons in the previous section reveals that the key improvements required by Nigeria to realise its cooperation and complementarity obligations must occur in the police and the prisons. Since the inadequacies of the Nigerian police and the prison system have already been discussed, this section encompasses a discussion of the judiciary in Nigeria and whether they are able to carry out complementarity-based prosecution.

It is argued that presently, there are no courts to carry out both the investigation and prosecution of international crimes in Nigeria. This is not only because of the lack of a physical structure suitable for the purpose, but more importantly, it is due to the dearth of judges and prosecutors trained in the field of international criminal law. Thus, it is argued that Nigerian courts lack the capacity to investigate and prosecute members of the Boko Haram when or if they are ever apprehended.

The situation in Uganda shows that a consideration of institutional preparedness at the state level must go beyond mere physical infrastructure. Arrest warrants have been issued against members of the Lord’s Resistance Army (LRA) of Uganda since 2005, yet till date, the ICC has not been able to commence proceedings with respect to the suspects because they have not been arrested and surrendered to the ICC for that purpose. Clearly, the LRA leaders should be prosecuted but the question remains of ‘how’ or by

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‘whom’. It has been argued that Uganda has one of the most effective legal systems in Africa. Although this assertion needs substantiating, the fact that in the aftermath of the atrocities allegedly committed by members of the LRA, the Ugandan government established the Special War Crimes Division of the High Court may have given credence to the assertion. In addition, the Ugandan parliament has passed the ICC Bill, which empowers Ugandan courts to prosecute international crimes.

Regardless of these obvious preparedness, the Ugandan judiciary seems unable to handle the investigation and prosecution of international crimes, and particularly, of members of the LRA. According to Elizabeth Nahamya-Ibanda, ‘despite the War Crimes Division being a significant development, the country is in great need of support …especially with regard to the national lack of capacity to investigate and prosecute international crimes and lack of resources’.

Thus, institutional preparedness includes other factors, such as the availability of judges and prosecutors who are competent in international criminal law. This point was underscored in the Saif Al-Islam case when the Pre-Trial Chamber I (PTCI) observed the steps undertaken by the Libyan government which involved inviting judges and lawyers versed in international criminal law from other jurisdictions. In contrast, the Kenyan government merely relied on general submission in its efforts to reform its judicial system.

57 Patricia Soares, Positive Complementarity and the LEN (Text to n 52 in Ch 4) 325.
60 See, for example, the use of amnesty and mato oput in Uganda (Text to notes 111-129 in Ch 3).
62 See Admissibility decision of the PTCI in the Saif Al Islam Gaddafi case (Text to n 96 in Ch 1).
63 Ibid, para 213.
64 Ibid, para 85.
Also, ‘unwillingness’ under Article 17(2)(c) may be determined with respect to situations where the proceedings are not being conducted independently or impartially.\textsuperscript{65} Therefore, the complementarity thresholds of ‘unwillingness’ and ‘inability’, already discussed in chapter one,\textsuperscript{66} have direct links, not only to situation of non-existent laws criminalising international crimes, but also to the unavailability of national judicial systems,\textsuperscript{67} which includes lack of independence and impartiality of the courts at the domestic level to prosecute them. In this regard, the next sub-section examines the question of whether the Nigerian judiciary has the quality of independence and impartiality to prosecute international crimes.

5.2.1 Appointment of Judges in the Nigerian Judiciary: The Need for focused Expertise in the field of International Criminal Law

In this section, it is argued that the Nigerian judiciary lacks experts in the field of international criminal law and that part of Nigeria’s preparedness to implement complementarity, which means to prosecute international crimes, is having judges who are competent in the field. It is further argued that the criteria and method of appointing judges in Nigeria may account for the inadequacy. Although there appears to be no debate on the method of appointing judges, the discussion in this section includes an assessment of the extent to which the procedure can secure the requirements of independence and impartiality, essential to the judicial branch of government and specifically to the implementation of complementarity in Nigeria.

The Federal Judicial Service Commission (the FJSC) is responsible for advising the National Judicial Council (NJC) regarding the nomination of persons for appointment as judicial officers to the Supreme Court of Nigeria, the Court of Appeal, the

\textsuperscript{65} See Rome Statute, Article 17(2)(c).
\textsuperscript{66} (Text to notes 100-131 in Ch 1).
\textsuperscript{67} Rome Statute, Article 17(3).
Federal High Court and other courts in Nigeria. The FJSC equally recommends the removal from office of such officers, and dismisses and exercises disciplinary control over judges. The FJSC is one of the 14 Federal Executive Bodies created under section 153(1) of the 1999 Constitution. It is composed of the Chief Justice of Nigeria (CJN), the President of the Court of Appeal, the Attorney-General, the Chief Judge of the Federal High Court and four other persons, two of whom must be legal practitioners and must be recommended by the Nigerian Bar Association, while the other two are not legal practitioners but persons who, in the opinion of the President, are of unquestionable integrity.

According to the former CJN, Justice Dahiru Musdapher, a review of the procedure for appointment to the Bench is imperative to ensure that ‘knowledgeable persons of unquestionable integrity are appointed’. This statement reflects the provisions of the United Nations Basic Principles on the Independence of the Judiciary which declares that persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. In addition, the UN Basic Principles prohibits discrimination in the selection process and provides that any method of judicial selection shall safeguard against judicial appointments for improper motives.

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68 See section 13(a)-(c) of Part I to the Third Schedule of the 1999 Constitution. The equivalent of the FJSC in the 36 states is the State Judicial Service Commission (SJSC). See the 1999 Constitution, section 197(1)(c).
69 Ibid.
70 See the 1999 Constitution, section 153(1)(e).
71 See section 12(a)-(f) of Part I to the Third Schedule of the 1999 Constitution.
75 Ibid.
The above qualification for appointment implies that ‘many qualities are required of a judge… he or she must of course know the law, and know how to apply it’.\textsuperscript{76} It also connotes that any discussion of the appointment of judges must be based on an understanding of the nature of the judicial function and the conditions necessary for its effective performance.\textsuperscript{77} Accordingly, Anthony Mason postulates that ‘without a clear understanding of that function, it is futile to list all the desirable qualities that one might hope to find in a perfect human being and then assert that they are qualities that are expected of a judge’.\textsuperscript{78}

The judicial function requires professional legal skills of a high order and it takes a variety of forms, each of which may call for particular qualities.\textsuperscript{79} Common to all the forms of judicial function are the qualities of independence, impartial and neutral adjudication. Independent and impartial adjudication abnegates the notion that a judge will bring to bear a view which favours that of a particular section of the society, the president or the body that appointed him. Independence and impartiality are critical to the judicial function and these will be analysed subsequently, but first, an analysis of the professional legal skills and qualities required in the judicial function is in order.

\textbf{5.2.2 Professional legal skills and Personal Qualities required in judicial function}

Taiwo Osipitan once observed that ‘the quality of justice depends more on the quality of men who administer the law than on the content of the law they administer’.\textsuperscript{80}

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\textsuperscript{78} Ibid.

\textsuperscript{79} Ibid.

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Similarly, Marai Dakolias noted that ‘the quality and integrity of a judicial system can be measured by the quality and integrity of its judges’.\textsuperscript{81} These imply that though the place of the law is important, certain legal skills and personal qualities are necessary for the judge who interprets and implement the law.

According to Anthony Mason, the requisite professional legal skills include knowledge of evidence, procedure and practice, knowledge of the law, analytical ability, the capacity to dispose of a case smoothly and efficiently, and the capacity to give a well-reasoned judgement with reasonable promptness.\textsuperscript{82} Arguably, most of these skills will be more readily apparent in barristers than in other lawyers. Therefore, in the case of non-barristers, it may be a matter of identifying the possession of the capacity to develop these skills.\textsuperscript{83} That means identifying lawyers with a sound general knowledge of law or relevant specialist knowledge, as the case may be, and the intellectual capacity to acquire, in a relatively short time, the requisite professional legal skills appropriate to judicial work.\textsuperscript{84}

In addition, there are some essential personal qualities that are indispensable, namely, integrity, impartiality, industry, a strong sense of fairness and a willingness to listen to and understand the viewpoints of others.\textsuperscript{85} No doubt other qualities are desirable. Thus, according to Mason, the ability to communicate to the legal community and the public about the law and the workings of the court is also of high value, but not an essential quality.\textsuperscript{86}

The specific reference to ‘knowledgeable’ in the statement of the former CJN,\textsuperscript{87} suggests that some judges lack the requisite competence for the discharge of the

\textsuperscript{82} Mason (n 77).
\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid.
\textsuperscript{86} Ibid.
\textsuperscript{87} Nnochiri (n 73).
judicial function. This deficiency can be traced to a number of reasons, including the qualifications and procedures for appointing judges.

5.2.3 Appointments of Judges in Nigeria: Towards a More Representative Judiciary?

In order of hierarchy, the Chief Justice of Nigeria and other justices of the Supreme Court are appointed by the President on the recommendation of the National Judicial Council (NJC), subject to a confirmation by the Senate. The minimum qualification of a justice of the Supreme Court is fifteen years’ experience post call as a legal practitioner. The appointments of the President and other justices of the Court of Appeal follow the same pattern; the President’s decision is preceded by the advice and recommendation of the Federal Judicial Service Commission and the NJC, and subject to confirmation by the Senate. Furthermore, whereas the Chief Judge of the Federal High Court is appointed by the President subject to confirmation of the Senate, the appointments of the Chief Judge of States High Courts and other judges are carried out by the Governor of the state, subject to confirmation by the respective states’ Houses of Assembly.

The appointment procedure, especially the nomination of candidates by the FJSC or SJSC, as the case may be, and the subsequent screening by the NJC was designed to ensure the appointment of judges who possess the requisite competence and integrity. However, the appointing authorities seem to allow personal prejudice, ethnic and political considerations to preponderate over competence. Although the procedure and criteria for

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88 See Chapter VII of the Nigerian 1999 Constitution, sections 230-236 (section 230(2) provides that the number of Justices of the Supreme Court must not exceed 21); Section 231. See also ‘The Judiciary in Nigeria’ Available at <http://fhc-ng.com/judnig.htm> (Accessed 16 September 2013).
89 The 1999 Constitution, s. 231(3)
90 Ibid, see s 238.
91 Ibid, see ss 250(1) &r(2) for the Federal High Court’s Chief Judge and Judges’ appointments.
92 Ibid, see ss 271(1)(2) for the appointments of the Chief Judge and other Judges of a state.
the appointment of judges have been expressly stipulated in the Constitution, the FJSC, in its decision to nominate a particular person for appointment, considers other factors, such as the ethnic group the proposed nominee belongs and who recommended him or her. Consequently, intensive politicisation by those who aspire to become judges ultimately causes the appointment to be based not on merit but on the connections of the appointee. A judge whose appointment is the product of lobbying is unlikely to be independent and impartial, in cases involving his benefactors.

Appointments of judges are made subject to the principles of ‘federal character of Nigeria’ enshrined in section 14(3) and (4) of the Constitution that appointments should promote national unity, should not be dominated by few ethnic or sectional groups and shall reflect the diversity of the people of Nigeria. Making reference to a recent appointment of judges in Lagos State, which did not reflect any known criteria, Augustine Alegeh (SAN) said that the idea of appointing a person as a judge because his father was a judge, for example, should no longer be encouraged. Also, former President of the Nigerian Bar Association Joseph Daudu, noted that the process of appointing judges ‘is fraught with all manners of irregularities’, ‘siblings and favoured ones have been known to be appointed as judges when more qualified persons are available…’

According to Richard Akinjide, the process of appointing judges into the judiciary based on ethnicity is inappropriate: ‘why should you base appointment into the

95 Osipitan, (n 80).
97 Osipitan.
98 See the 1999 Constitution, s 14(3) & (4).
100 Joseph Bodurin Daudu was President of NBA from 2010 to 2012.
judiciary on the area where somebody comes from? Supposing that area does not have the right quality, you turn appointment into the judiciary as if it is political or board appointment? Indeed, considerations of ethnic origin, social background and connections as part of the criteria for appointing judges may have compromised competence and integrity and, ultimately, the independence and impartiality of the judiciary.

While these concerns seem well-founded, it is argued that this procedure is not peculiar to Nigeria, as countries in other jurisdictions are involved in the same politicised process of appointing judges. For example, Louise Arbour observed, with respect to the procedure in Canada, that ‘at the highest level…the appointment of judges at the Supreme Court level is essentially the decision of the Prime Minister, after a consultation process that is neither transparent nor extensive’.

Furthermore, it has been argued that the criterion for appointment of judges by reference to ethnic consideration is to allow for a more representative composition which is fairly balanced. Consequently, ‘an important duty lies upon the appointing authorities to ensure a balanced composition of the judiciary, ideologically, socially, culturally and the like…the judiciary is a branch of the government, not merely a dispute resolution institution. As such it cannot be composed in total disregard of the society’.

Nevertheless, it is argued that although the ideal of appointing a judiciary whose composition is reasonably balanced may be important, it is not practicable to appoint a

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103 Joseph Otteh, ‘Restoring the Nigerian Judiciary to its Pride of Place’ THISDAY Nigeria 13 April 2004 cited in Oko ‘Seeking Justice’ (n 94).
judiciary that approximates the composition of society as a whole for a number of reasons. The first is that the possession of professional legal skills, like the possession of professional medical skills, is not evenly distributed throughout the society.\textsuperscript{107} The second is that seeking a more representative appointment by reference to ethnic consideration ultimately leads to the appointment of persons who are less knowledgeable and who do not possess the requisite professional skills and qualities.

In the context of the ICC, as in the domestic, judicial independence has numerous dimensions.\textsuperscript{108} Some of these dimensions include the procedures for nomination, selection and re-election of the judges. For the purposes of judicial independence, the procedure for selection of ICC judges is subject to varying methods and to differing terms and conditions of service, for example, regarding tenure and the permissible scope of outside activities.\textsuperscript{109} Yet they share common characteristics with judges in the domestic setting insofar as they all play a central role in the interpretation and application of international law.

The Assembly of States Parties (ASP) consist of representatives of states parties to the Rome Statute and is responsible for the election of judges to the ICC.\textsuperscript{110} By implication, judges of the ICC are appointed by politicians and diplomats, which brings a political element into the appointment structure.\textsuperscript{111} For this reason, an independent appointments body, the Advisory Committee, has been established to review nominations and ensure a non-political component in the process.\textsuperscript{112} Selection is based on the competence of

\begin{itemize}
  \item \textsuperscript{107} Mason (n 77).
  \item \textsuperscript{109} The ICC has eighteen judges with nine serving as full-time and the other nine as ad-litem judges. See arts 35 & 36(1).
  \item \textsuperscript{110} Rome Statute, Article 36.
  \item \textsuperscript{111} Sylvia de Bertodano, ‘Judicial Independence in the International Criminal Court’ (2002) 15(2) LJIL 409–430, 421.
  \item \textsuperscript{112} Art 36(4)(c). The first meeting of the Advisory Committee on Nominations of judges was held on 19 April 2013. The report of the Committee is available at <http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-23-ENG.pdf> (Accessed 21 October 2013).
\end{itemize}
the nominee in international criminal law, experience and the essential qualities articulated earlier. Arguably, this mechanism for an independent review and assessment of nominations guarantees independence and impartiality.

The question of judicial independence is explicitly dealt with in Articles 40 and 41 of the Rome Statute, where it is stated that every judge shall be independent, and shall not participate in any case in which his impartiality might reasonably be doubted on any grounds. In practice, however, the nomination and election of judges to the ICC generally involve politicised processes with little transparency and which are subject to widely varying nomination mechanisms at the national level. This is because candidates for international judicial appointment are put forward by states, and therefore, a state might be suspected of only nominating an individual with the intention that he or she may be involved in deciding a contentious case that implicates its national interests. It would be unreasonable to expect that a nominating state would put forward a candidate who does not share its values and interests.

As a consequence, it has been argued that questions surround whether the ICC judges can be seen as independent and impartial dispensers of justice, handing down rule-based decisions; or whether they are merely another manifestation of state power and influence in international relations. Admittedly, the procedure for the nomination, selection and appointment of ICC judges lends itself to the same politics that accompany the procedure

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113 See notes 81-85.
115 Rome Statute, Articles 40 & 41 on independence of the judges and excusing and disqualification of judges respectively.
116 Rome Statute, art 40(1).
117 Rome Statute, art 41(2)(a).
118 Bertodano, (n 108) 420.
119 Ibid.
120 Mackenzie & Sands, (n 108) 278.
121 Ibid 275.
in any domestic sphere, as in Nigeria. This is arguably so notwithstanding the work of the advisory committee, like the FJSC/SJSC and the NJC of Nigeria, which review such nominations and make recommendations for appointment.

The foregoing discussion demonstrates that to concentrate on the goal of fair representation is detrimental to the fundamental goal of an independent and impartial judiciary and could compromise both the pursuit of efficiency and public confidence. Thus, the process of ensuring a more representative judiciary and appointing persons based on ethnic considerations rather than competence has only increased the problem of corruption in the Nigerian judiciary.

5.3 Tackling Corruption: A Strategy for implementing complementarity in Nigeria

Corruption is a complex phenomenon. It is an issue that has attracted no small amount of consternation both in Nigeria and internationally. The purpose of discussing corruption in this section is to argue that part of institutional preparedness to implement complementarity is confronting corruption with the aim of minimising or completely eradicating it from the judicial system. A judiciary that is found to be corrupt will ultimately lead to the conclusion that a state is unable to act and therefore the ICC will intervene.

Corruption has been defined and discussed extensively by various scholars. Therefore, this section does not examine the different definitions that have been proffered. Rather, it adopts that by the World Bank, which states that corruption is ‘the abuse of public

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office for private gain’. This is deemed to be the case when an official accepts, solicits or extorts a bribe, as well as when private agents proactively offer bribes to circumvent public policies and processes for competitive advantage and profit. Highlighting this definition, Patrick Igbinovia postulates that corruption encompasses all forms of bribery, abuse of office and nepotism, any favour done in expectation of material or non-material gain or even as a reward for an earlier deed.

According to Afe Babalola, corruption occurs at two levels. The first level is corruption associated with politics at the law-making level, and the second is that which is perpetrated at the law-implementation level. At the first level, people try to influence law-making and policy decisions while at the second, efforts are made to pervert the course of justice. This inevitably leads to the perception that corruption is linked to bad governance and leadership in Nigeria, as it is only those in government positions that get involved in the process of law-making and implementing.

The first level of corruption can be seen at both the National Assembly and the States Houses of Assembly, where certain Nigerian law-makers are motivated mostly by personal interests and selfish gains. For example, recently, the National Assembly proposed a

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125 Ibid.
127 Babalola, Ibid.
bill to legalise child marriage, because a few law-makers themselves have child brides.

Although a fruitful line of investigation, this level of corruption will not be explored here. Rather, the focus is on corruption at the level of law implementation, which invariably leads to the perversion of justice. The reason for this concentration is that the substratum for complementarity rests on the effectiveness of the judiciary. Thus, the National Assembly in Nigeria may adopt implementing legislation for the Rome Statute; thereafter, it becomes the duty of the courts to implement and to ensure that justice is delivered on the basis of the law.

5.3.1 Corruption in Nigeria

Although corruption is mainly attributed to those in official government positions, it is nonetheless commonplace in Nigeria, which Transparency International rated the 35th most corrupt country in the world. Corruption has permeated all aspects of Nigerian society; private businesses can hardly make any progress without engaging in corrupt practices to some degree. In the public sector, corruption permeates the judiciary, police, army, universities and other institutions. According to Chinua Achebe, ‘Corruption in Nigeria has passed the alarming and [has] entered the fatal stage and Nigeria will die if we keep pretending that she is only slightly indisposed’.

135 Achebe, 38 (emphasis in original).
According to Michael Maduagwu, the prevalence of corruption in Nigeria is attributable to the prevailing culture that condones and sometimes even encourages it.\(^{136}\)

Corruption thrives in Nigeria because the society sanctions it. No Nigerian official would be ashamed, let alone condemned by his people because he or she is accused of being corrupt… On the contrary, the official will be hailed as being smart. He would be adored as having ‘made it’; he is ‘a successful man’. Any government official or politician who is in a position to enrich himself [by stealing government funds] but failed to do so will in fact be ostracised by his people upon leaving the office. He would be regarded as a fool or selfish or both.\(^{137}\)

The culture of patronage that exist along lines of ethnicity, family, religion or local community, facilitates the public acceptance of corrupt practices.\(^{138}\) Consequently, corruption has been described as ‘the mother of all crimes’, ‘a hydra-headed monster’\(^{139}\) that appears to defy solution because of being firmly entrenched.

In 2010, a report\(^{140}\) by the Intergovernmental Action Group against Money Laundering in West Africa (GIABA),\(^{141}\) an agency of the Economic Community of West African States (ECOWAS), stated that Nigeria scored 87.3 per cent, the highest in Africa, on


\(^{137}\) Ibid, 18-19.

\(^{138}\) Aluko, (n 128) 398.


\(^{141}\) The GIABA is a specialised institution of the ECOWAS responsible for the implementation and coordination of anti-money laundering/counter financing of terrorism (AML/CFT) efforts in the West African region.
the scale of bribery to government officials.\textsuperscript{142} It also noted that 10 former Governors in Nigeria embezzled a total of $250 Billion over three years.\textsuperscript{143}

Furthermore, in a report by Transparency International,\textsuperscript{144} Nigeria scored 27 out of a maximum 100 marks, where a lower score indicates more corruption and higher mark corresponded to the least corrupt country, to take the 139\textsuperscript{th} position out of the 176 countries surveyed.\textsuperscript{145} Nigeria shares this ranking with Azerbaijan, Kenya, Nepal and Pakistan.\textsuperscript{146} Countries such as Togo, Mali, Niger and Benin to which Nigeria played and continues to play the role of a ‘big brother’,\textsuperscript{147} rated better.\textsuperscript{148}

Be that as it may, corruption is not exclusive to Nigeria, as every society is involved at various levels and to varying degrees in the fight against corruption. Thus, calling on all governments to prioritise the fight against corruption, Transparency International notes that corruption is a major threat facing humanity.\textsuperscript{149}

\begin{quote}
It destroys lives and communities and undermines countries and institutions. It generates popular anger that threatens to further destabilise societies and exacerbates violent conflicts. Corruption translates into human suffering, with poor families being extorted for bribes to see doctors or to get access to clean drinking water. It leads to failure in the delivery of basic services like
\end{quote}

\textsuperscript{142} This is followed by Ghana (56.7 per cent) Cote d’Ivoire (55 per cent), Liberia (44 per cent) and Benin Republic (40 per cent).
\textsuperscript{145} Comparatively, in 2011, Nigeria was placed 143\textsuperscript{rd} position and came 37\textsuperscript{th} most corrupt country. However, this does not mean there has been an improvement in the ranking because more countries (182) were ranked in 2011.\textsuperscript{146} See CPI 2012.
\textsuperscript{146} See CPI 2012.
\textsuperscript{148} Togo with 128 position scored 30, Niger 113\textsuperscript{th} position had 33, Mali at 105\textsuperscript{th} position scored 34 while Benin got 94\textsuperscript{th} position with 36 marks. See CPI 2012 Report.
\textsuperscript{149} See CPI 2012 Report. The CPI 2012 scored countries on a scale from 0 = Highly corrupt to 100 =very clean).
education or healthcare. It derails the building of essential infrastructure, as corrupt leaders skim funds.\textsuperscript{150} Admittedly, democracies all over the world face corruption.\textsuperscript{151} However, it has been asserted that corruption in the Nigerian judiciary has become a full-blown national plague,\textsuperscript{152} and it is a dominant, recurrent feature of the Nigerian judicial system.\textsuperscript{153}

5.3.2 Corruption in the Nigerian Judiciary

A United Nations study found that ‘corruption is an extremely serious problem for the country’s justice system, second only to the lack of sufficient funding’.\textsuperscript{154} Corruption in the judiciary includes any inappropriate financial or material and non-material gain aimed at influencing the impartiality of the judicial process by any actor within or outside the court system.\textsuperscript{155} It generally takes the form of a bribe, which might consist of cash, a gift or, less commonly, ‘status’ or ‘career capital’, and the outcome provided in return can range from dropping an investigation, ensuring a certain verdict in a trial, or forcing the prosecution and possibly the conviction of another person.\textsuperscript{156} Although independence and impartiality have been discussed, the analysis in this section focuses on incidents of intimidation and manipulation, which also negatively impact the independence and impartiality of the Nigerian judiciary.

The importance of this analysis is to argue that Nigeria will not be able to pass the threshold of ‘genuineness’ of its criminal proceedings in light of complementarity if these

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\textsuperscript{150} Huguette Labelle, CPI 2012 Report (n 144).
\textsuperscript{155} Issa Aremu, ‘Notes on Corruption and Judicial Administration in Nigeria’ paper presented at the Symposium organised by the Mustapha Akanbi Foundation (MAF).
\textsuperscript{156} Oko, Seeking Justice (n 94) 39.
inhibitions are not dealt with. Besides, there are further obstacles of the death penalty, 
amnesties and state pardon, the lack of effective mechanisms to protect witnesses while at the 
same time safeguarding the rights of the accused and the efficiency of the proceedings.\footnote{Soares, (Text to n 52 in Ch 4).}

Regrettably, corrupt practices are not restricted to politicians and the 
government but extend to the judiciary as well,\footnote{See Madaugwu (n 136) 18-19.} as a few Nigerian judges have not been 
able to rise above the corrupt environment in which they live and operate.\footnote{Ibid.} Aluko postulates 
that the sociological perspective does not regard a particular form of behaviour as the 
problem of the individual; rather, it regards the individual behaviour as emanating from the 
social order in which the person lives.\footnote{Aluko, (n 128) 398. See also Arthur Davies, ‘The Independence of the Judiciary in Nigeria: Problems and Prospects’ (1990) 10(3) African Study Monographs 125-136, 127 (Noting that the judiciary as an institution is a product of its environment).} Thus, some judges are trapped in a culture that 
values wealth over honour and integrity, it is therefore not surprising that a number of them 
seem unable to resist the urge to amass wealth even by engaging in corrupt and unethical 
practices.\footnote{Aluko, 398.}

It was reported recently that at least seven judges, namely, Abdul Kafarati, 
Gladys Olotu, Aliyu Liman, Ibironke Harrison, Rita Ofili-Ajumogobia, Chioma Nwosu-Iheme and Inumidun Akande are currently the target of corruption investigation by the 
EFCC.\footnote{See ‘Seven Nigerian Judges Targets of EFCC Corruption Probe’ Sahara Reporters 11 November 2013 
2014).}

Also, two Justices; Gladys Olotu and Ufot Inyang of the Federal High Court and 
High Court of Justice Abuja respectively, were recommended for compulsory retirement by
the Nigerian Judicial Council recently for charges of misconduct and corruption. According to Itse Sagay, the action ‘is a very healthy revival for the judiciary’. It was alleged that Justice Gladys Olotu owned several accounts in local banks and in the United Kingdom, as well as owned significant stock in various companies. She is reported to own several properties in Abuja, Lagos and Benin City.

A judge who has accepted a bribe is under undue influence and he is not likely to issue decisions grounded in law. The consequence of such rulings is that those with lawful rights and interests, rather than finding protection in the courts, see their rights being violated and their interests given to other people in an officially sanctioned proceeding. Far too often, the outcome of a case in Nigeria depends not on the merits and strength of the case but on extraneous factors, which can be partly attributed to the intimidation and manipulation of judges from within and outside the court system.

5.3.3 Intimidation and Manipulation of Judges

The complementarity threshold of unwillingness, set out in Article 17(2)(c), concerns the independence and impartiality of national proceedings. This article envisaged a situation in which a state is ostensibly endeavouring to prosecute an alleged perpetrator but the proceedings are being manipulated to ensure that the accused is not found guilty. This implies that even where a state is able and willing to prosecute and has actually commenced

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168 *Saif Al-Islam* case, para 108
trial, machinations in the process could lead to a finding of unwillingness for which the ICC will intervene.

Instances of manipulation in court proceedings compromise the independence and impartiality of the judiciary, which is theoretically guaranteed by provisions in the 1999 Constitution of Nigeria. The Nigerian constitution proclaims that the independence, impartiality and integrity of the courts of law in Nigeria, and easy accessibility thereto, shall be secured and maintained.\textsuperscript{169} In order to safeguard these attributes, the Nigerian constitution specifies that judges are to hold their office while they are of good behaviour until they attain the retirement age of sixty-five years and until they are relieved of office at the age of seventy years.\textsuperscript{170} The constitution also entitles them to generous pension and gratuity, depending on the number of years they have held judicial office and at what age they retire.\textsuperscript{171}

Furthermore, there are restrictions on the mode of removal of judges from office. Section 292, for example, declares that a judicial officer shall not be removed from his office or appointment before he reaches the age of retirement except in exceptional circumstances.\textsuperscript{172} Indeed, the tenure of office of judges in Nigeria is further guaranteed by the fact that they cannot be removed by any single person. The procedure for removal involves the legislative arm of government agreeing with the FJSC or the SJSC, as the case may be, which must have recommended the removal.\textsuperscript{173}

Other ways by which the independence of the judiciary is safeguarded in principle include charging the salaries and allowances of the judges to the Federation

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\begin{itemize}
\item[\textsuperscript{169}] 1999 Constitution, section 17(2)(e)
\item[\textsuperscript{170}] Sections 291(1) relates to justices of the Supreme Court and the Court of Appeal only. With respect to other justices or judicial officers, retirement age is sixty and the judge ceases to hold office when he attains the age of sixty-five years. See section 291(2).
\item[\textsuperscript{171}] See section 291(3)
\item[\textsuperscript{172}] The 1999 Constitution, section 292(1)(a)&(b).
\item[\textsuperscript{173}] Ibid.
\end{itemize}
\end{footnotesize}
Account,\textsuperscript{174} giving judges immunity in their role and separating them from politics. The first provision implies that the funds accruing to judges are paid directly to the NJC for disbursement to the heads of courts, thus shielding their emoluments from the ‘whims’ and ‘caprices’ of politicians.\textsuperscript{175} This also implies that their salaries cannot be reduced while they are in office. They are thus protected from financial embarrassment which may prevent them from discharging their duties without fear or favour.\textsuperscript{176}

Second, they enjoy absolute immunities from prosecution for anything done or said in the course of their judicial function. If anyone, a government official, for example, is dissatisfied with the ruling of a particular judge, such a person or official can only appeal to a higher court; he or she cannot commence civil or criminal proceedings against the judge for his decision.\textsuperscript{177} Third, they are insulated from politics. Judges can exercise their constitutional rights to vote in general elections, but they are exempted from contesting an elective office, or holding a political office.\textsuperscript{178}

However, these guarantees seem inadequate. As noted by Ikhariale,\textsuperscript{179} ‘with the constitutional guarantees given the judiciary, the political arm of the government still occasionally manages to exercise influence, and at times openly harass it, thereby making it doubtful if indeed Nigeria really possesses a constitutional system that ensures the insulation and independence of the judiciary from negative manipulations by politicians’.\textsuperscript{180} Similarly, Ben Nwabueze observed that ‘politicians are strongly inclined and prepared to use pressure

\textsuperscript{174} Ibid, section 162(9).
\textsuperscript{175} Arthur Davies, (n 160) 129.
\textsuperscript{176} Ibid.
\textsuperscript{177} Ibid.
\textsuperscript{178} Ibid.
\textsuperscript{180} Ikhariale, 147.
of various kinds to influence in their favour the judge’s decision - from lobbying to intimidation to outright bribery’. 181

Consequently, intimidation is depicted in several ways; for instance, trials may be delayed where powerful litigants aided by some unethical lawyers and a few faithless judges, manipulate the judicial process to achieve preordained outcomes.182 For example one of the allegations against Justice Gladys Olotu, one of the Judges recommended for compulsory retirement by the NJC recently, was that she delayed the delivery of judgement for eighteen months after the final address by all the counsel in the case contrary to laid down judicial procedures.183 Accordingly it was alleged that ‘it was clear that there was something under-hand going on...’184 Thus, the prevailing mind set is to bribe those who can be bribed and intimidate those who refused to be bribed.185

5.3.3.1 Kidnapping: A form of Intimidation of Judges

Nigerian Newspapers are replete with reports of harassment and intimidation of citizens including judicial officers.186 Occurrences of intimidation are exemplified by the frequent kidnapping of judges or their family members for ransom.187 This despicable act has undermined the performance of judges as they seem to now carry out their functions with fear. For example it was reported that a judge in the Delta state of Nigeria, Justice Flora Azinge, was unable to take the bench for two months because kidnappers had threatened to

183 Bartholomew Madukwe (n 164).
184 Itse Sagay in Madukwe.
185 Oko, Seeking Justice, 34. See also UNODC Report (n 154) 135: Alokou, 398 (Noting the Nigerian philosophy of ‘if you can’t beat them, then join them’).
186 Kidnapping occurs on a minute-by-minute basis in Nigeria even though only a few gets reported. Also abduction of judges and their family members has become prevalent in all 36 states of Nigeria.
abduct her unless she paid a ransom of N20 million. The kidnappers were reported to have told the judge that ‘many of her colleagues had paid similar monies and that if she failed to comply, her life would be in danger’. 

The Governor of Delta state was accused of being complicit in the kidnappings of judges in an attempt by the Governor to intimidate judges who were presiding over certain cases, which involved the state government’s interests. For example, On 7 August 2012, Justice Marcel Okoh of the high court of Delta state was abducted on his way to court to deliver a judgement. Similarly, Justice Marshal Mukoro was attacked by gunmen. Both judges were reportedly handling a case in which the Delta state government was said to have a stake. Consequently, the two judges dropped the case. Furthermore, on 27 September 2013, a high court judge in Edo state, Justice Daniel Okungbowa was kidnapped. This incident occurred less than three weeks after the release of human rights

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188 See ‘Kidnappers Prevent Judge from Sitting for Two Months, Demand N20m Ransom’; Ndubuisi Ugah, ‘Judges Kidnap: I’ve been Vindicated, says Ogbebor’ 4 December 2012 ThisDay Nigeria http://www.thisdaylive.com/articles/judges-kidnap-i-ve-been-vindicated-says-ogbebor/132457/
189 Ibid.
190 The first case involved the demand by the Okere people of the Itsekiri extraction that the court should stop the Delta State Government from using their land without following due process. The second was also instituted by the Itsekiri Host Communities and the Delta State Oil Producing Areas Development Commission (DESOPADEC), also seeking explanation from the State Government over an alleged diversion of N1 billion meant for the development of host communities.
191 See ‘Dust Over Delta Judge’s Kidnap’ 25 January 2013 ThisDay Nigeria http://www.thisdaylive.com/articles/dust-over-delta-judge-s-kidnap/137436/
activist and Senior Advocate of Nigeria (SAN) Mike Ozekhomhe, who was also abducted for several days before his release following the payment of a ransom.\textsuperscript{196}

Indeed, ‘abduction of judicial officers represents a real and mortal danger to the independence of judges and can constitute a major obstacle to the administration of justice anywhere’.\textsuperscript{197} Regrettably, Nigeria has acquired the dubious distinction of being the ‘global capital of kidnapping’,\textsuperscript{198} according to a 2011 report by the African Insurance Organisation.\textsuperscript{199} The report noted that ‘the number of kidnaps for ransom in Africa continued to increase. In the first half of 2011, Africa’s proportion of the global total increased from 23 per cent in 2010 to 34 per cent. Nigeria is now the ‘kidnap-for-ransom capital’ of the world accounting for a quarter of globally reported cases’.\textsuperscript{200}

Some years ago, the murder trial of those accused of killing late Attorney General, Bola Ige was delayed because three judges separately and consecutively refused to continue hearing the case due to pressure from unnamed, highly placed individuals.\textsuperscript{201} Justice Moshod Abaas recused himself citing instances of pressures from ‘unusual quarters’.\textsuperscript{202} Thus, judges are concerned for their lives and personal safety and they will inevitably ‘tamper justice with self-preservation’ as a result.\textsuperscript{203} Consequently, more needs to be done to shield

\begin{footnotes}
\footnote{196}{See Isi Esene ‘My Experience in the Kidnappers’ Den – Mike Ozekhomhe’ 13 September 2013 \url{http://www.ynaija.com/my-experience-in-the-kidnappers-den-mike-ozekhomhe/}}
\footnote{198}{See generally ‘Kidnapping of Judges’ 20 January 2013 \textit{Punch} Nigeria \url{http://www.punchng.com/editorial/kidnapping-of-judges/}}
\footnote{200}{Newsletter of the 18\textsuperscript{th} African Reinsurance Forum and 40\textsuperscript{th} Anniversary of the AIO 30 September – 3 October 2012 Balaclava, Mauritius.}
\footnote{202}{Ibid.}
\end{footnotes}
and protect judges and to ensure the safety of their family members if they are to dispense justice.

5.3.3.2 Insecurity in Nigeria

Implicit in the Pre-Trial Chamber I decision in the admissibility challenge in the case regarding Saif Al-Islam, is the consideration of security in Libya. Thus the PTCI determined, *inter alia*, Libya’s inability to assume full control of the detention facilities, and clear inability of judicial and governmental authorities to ascertain control, ensure security throughout the country and provide adequate protection for witnesses. Consequently, Libya was deemed ‘unavailable’ within the terms of Article 17(3) to prosecute Saif Al-Islam. Similarly, it is argued in this section that part of Nigeria’s preparedness to prosecute international crimes will be Nigeria’s ability to ensure security.

The Nigerian Constitution declares that the security and welfare of the people shall be the primary purpose of government, and that the sanctity of the human person shall be recognised and that human dignity shall be maintained and enhanced. Regrettably, these and other lofty provisions are contained in chapter II of the constitution, which relates to the Fundamental Objectives and Directive Principles of State Policy, and which the courts cannot enforce.

Thus, Okechukwu Oko observed that Nigeria is in ‘perpetual turmoil, incessantly roiled by violence, social disequilibrium, and conflicts’. This assertion appears

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204 Saif Al-Islam case, para 209.
205 Ibid, para 211.
206 Ibid, paras 204, 205
207 See the 1999 Constitution, section 14(2)(b)
208 Ibid, section 17(2)(b).
209 Includes, right to health, safety and welfare, right to medical and health facilities, right to free education, right to equal pay for equal work without discrimination.
210 The provisions of sections 13 – 24 of the 1999 constitution cannot be enforced.
211 Ibid, section (6)(6)(c)
valid given that the freedoms and liberties offered by democracy have produced new anxieties and tensions which have resulted in insecurity in Nigeria. Individuals and ethnic groups have exploited these liberties to pursue destructive and violent agendas against the government, which they disparage as unjust and unable to cater to their needs.\textsuperscript{213}

The preliminary investigation of the OTP in Nigeria reveals that members of Boko Haram are responsible for several deaths and this has resulted in a state of insecurity throughout the country, particularly the northern part.\textsuperscript{214} Insecurity in Nigeria stems from a regime of state repression and corporate violence, which has generated lawlessness, illegal appropriations and further insecurity.\textsuperscript{215}

Whatever the cause, security in Nigeria has collapsed under the weight of intense and implacable ethnic fervour that often erupts into violence.\textsuperscript{216} As a result of ineffective leadership which is unable to provide for the safety and security of citizens, restive and disaffected members of the society have resorted to violence to address their economic deprivations and grudges against the government.\textsuperscript{217}

Arguably, the failure of the Nigerian government to guarantee security opens the door to dysfunctional, extra-legal and criminal conduct that distorts the lives of citizens and undermines democratic consolidation.\textsuperscript{218} Discussing the impact of insecurity on democratic consolidation, Jeffrey Herbst stated that ‘African democracies are threatened by lawlessness, crime, the spill over of rebel activity from neighbouring countries and terrorist. It is imperative that the security services work better so that the security situation of

\textsuperscript{213} For example the Niger-Delta crisis was precipitated by the dissatisfaction by the people in the region who constantly accused the government of neglect.

\textsuperscript{214} OTP Report November 2012 (text to n 43 in Intro) paras 81, 84 & 85.


\textsuperscript{216} Oko, ‘Lawyers in Fragile Democracies’ (n 210) 1301.

\textsuperscript{217} Ibid.

\textsuperscript{218} Ibid.
individual countries can be improved’.  

Nigeria is susceptible to being a failed state due to the inability of the government to ensure security of persons and property. This security failure has led to a general distrust of the judiciary among citizens, as it is the third arm of an ineffective government.

5.3.3.3 The Attitude of the Public towards the Judiciary

The preservation of public confidence in the impartial and independent administration of justice is a vital element in the judicial function. This is because loss of confidence in the system, whether due to its inefficiency or, more particularly, due to perceptions of a want of independence or impartiality on the part of the judiciary is extremely damaging to the effective working of the justice system.

In Nigeria, there exists an appreciable popular distrust of the judiciary’s integrity and its ability to protect civil rights and constrain the excesses of elected officials. The late Alfred Rewane, citing the Chinese proverb, once noted, ‘it is safer to put your head in a lion’s mouth than it is to go to court’. He maintained that the hallmarks of the Nigerian legal system are corruption, injustice, general instability, unreliability, politicisation, unpredictability and mediocrity. According to Igbinovia, ‘this fairly accurately characterises the general mistrust among the Nigerian people towards the judiciary’.

In addition, former President Olusegun Obansanjo once observed with regard to the judiciary, ‘the persisting perception of the public is that it is still battling with the

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220 Mason, (n 77).
221 Oko, Seeking Justice (n 94) 18.
223 Ibid.
224 Ibid.
widespread corruption that made prosecution and the judicial process less than effective…225

For a number of Nigerians, the judicial process is nothing more than an auction in which justice goes to the ‘highest bidder’.226 Such perception fosters the belief that the judiciary is corrupt and that corruption is part of the pricing component of the justice system.

Convinced that judges issue verdicts on the basis of connections and recompense without regard to the merits of the case, many Nigerians seek to influence the outcome of cases by ‘settling the judge’ - [a local colloquialism for bribery]. In some parts of Nigeria, a majority of citizens lack faith in the justice system to the extent that they prefer not to resolve conflicts through the courts. Arguably, those who do go to court feel the need to engage in corrupt practices like bribery or intimidation to level the playing field.227

The consequence of the public distrust for the judiciary is that citizens view the role of the courts as objective dispensers of justice with some scepticism. Nigerians seem to have discarded the notion of the court as an impartial and independent institution, resigning themselves instead to the model of ‘cash and carry’ where they perceive some of the judges as disregarding precedents and the law to subvert justice.228 Motivations for deviating from judicial standards include prospect of quick though unmerited career advancement, political appointment of a judge’s nominee, immediate financial gains, or even membership in a secret society with one of the parties to the dispute.229

In fact, the extraneous activities of certain judges in such secret societies have not portrayed them to the people as fair and non-partisan custodians of justice. The secret society which a number of Nigerian judges are known to belong to are powerful and feared

228 Okongwu, ibid. (Describing justice in Nigeria as a ‘cash and carry’ affair).

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by their own members because they can intimidate and easily subdue people by imposing serious sanctions on them. Judges who belong to such secret societies are assumed to have double loyalty; loyalty to the state and its laws as well as the secret society to which they belong.

In light of the general distrust and lack of confidence in the Nigerian judiciary, former Supreme Court Justice Chukwudifu Oputa succinctly stated what the judiciary must do to regain public confidence:

To inspire public confidence in the judicial process, judges should not only be transparently impartial but also should be seen to be accentuated only by the principles of justice and fair play. The judge should therefore scrupulously eschew bias in any shape or form. It is not merely of some importance, but is of fundamental importance, that justice should not only be done but should manifestly and undoubtedly be seen to be done. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking – ‘the judge was biased’.

Confidence in the judiciary, as articulated by Justice Murray Gleeson of Australia, does not require a belief that all judicial decisions are wise, or that all judicial behaviour are impeccable, any more than confidence in representative democracy requires a belief that all politicians are enlightened and concern for the public welfare. What it requires, however, is a satisfaction that the justice system is based upon values of independence, impartiality, integrity and professionalism and that, within the limits of ordinary human frailty, the system pursues those values faithfully. The effectiveness of the

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230 Arthur Davies (n 160) 133.
231 Ibid.
234 Ibid.
judiciary, in turn, depends largely on the public’s confidence in the ability of judges to fairly and impartially administer justice.\textsuperscript{235}

\textit{5.3.3.4 Minimum Complementarity Threshold}

In light of the foregoing discourse, the Nigerian judiciary and by extension most African judiciaries seem unprepared to implement the complementarity regime at the domestic level. This is because the complementarity regime of the Rome Statute is over-inclusive. According to Marti Koskenniemi, a rule is over-inclusive when it assumes to do much more than it can in practical terms.\textsuperscript{236} One of the assumptions associated with complementarity is that there will be credible institutions at the domestic criminal justice systems to carry out genuine investigation and prosecution of international crimes. However, it has been shown in this chapter that the institutions that should partner with the ICC are either non-existent or grossly inadequate.

As a consequence, it is proposed that Nigeria could adopt a minimum complementarity threshold which could be adapted by other African states with slight variations to suit their peculiarities. The minimum threshold includes first, the transcription of the Rome Statute crimes into Nigerian criminal law. This is important because as established in the thesis, prosecuting international crimes as ordinary domestic crimes of murder is not desirable. Second, Nigeria would have to undertake extensive review of its laws including the constitution and provisions relating to immunity and the death penalty to bring them in line with the provisions of the Rome Statute. This is because conflicting domestic laws can potentially inhibit national implementation of the Rome Statute.


Third, the Nigerian Police Force, the Prison Service and the judiciary must be fundamentally reformed both to better protect citizens’ rights and to be well-equipped to carry out investigations and prosecutions of international crimes. In this regard, there should be the appointment of qualified persons into the judiciary, including investigators, prosecutors and judges. The continuous training of judges and court personnel in international criminal law will also be of benefit. In addition, the government must provide security for all, and most especially judges, to enable them discharge the responsibilities of their office.

**Conclusion**

Like every criminal justice system, the Nigerian criminal justice system is not a perfect one. Although it is evolving, there is urgent need for reforms in the criminal laws and the institutions which include the police, the prisons and the courts, to enable it carry out its complementarity role. The process of domesticating treaties, by wholesale adoption of the treaty, which the National Assembly has adopted again with regards to the Rome Statute, without first reviewing existing laws to bring them into conformity, leaves doubts as to what purpose such domestication serves.

Admittedly, the FJSC has its imperfections. Nevertheless, its advisory role in the process of appointing judges is comparable to what obtains in other jurisdictions, and even at the ICC. Also, its function in the process of removing judges is considered especially reassuring to the judiciary, as it is less biased than the legislative arm, where political considerations, rather than legal competence and uprightness of a judge may be given more weight.

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237 Examples are Canada and the United States. In the United States for example, judges at the state level contest election on party basis.

238 Davies, (n 160), 130.

239 Ibid, 131.
The examination of corruption, insecurity, bias and subordination on the part of the judiciary reveals that they constitute significant obstacles not only to the goal of ensuring the rule of law but also, specifically, to the implementation of complementarity. Thus, despite constitutional safeguards for an independent and impartial judiciary, Nigerian judges and their family members suffer constant intimidation. The instances of abductions and attempted assassinations of judges, along with other attendant security problems, make Nigeria prone to becoming a failed state. While Nigeria has been singled out as being especially encumbered by kidnappings, the problem of judges being bullied, coerced, bribed, and of justice being otherwise subverted, is widespread.

In light of the complementarity of the Rome Statute, the primacy of jurisdiction comes with responsibilities, which, though are not expressly stipulated in the Statute, are nevertheless imperative for states in order to fulfil their complementarity role. Consequently, the minimum complementarity threshold proposed in this chapter is that Nigeria, can improve its justice system both in the laws and institutions by embarking on reforms to increase its capacity to investigate and prosecute international crimes.

The challenges of corruption, insecurity and lack of independence of the judiciary analysed, which are entwined and endemic to many African nations, are exemplified by Nigeria. It is proposed that in addition to adopting implementing legislation and sourcing international criminal law experts into its judiciary, a critical implementation strategy includes tackling these problems. Therefore a holistic solution is imperative. Such solution would be relevant not only to Nigeria, but could be moulded to fit the particular needs of other African states facing similar challenges in meeting their obligations as states parties to the Rome Statute.

The centrality of the principle of complementarity to the regime of the ICC and the importance of states fulfilling their role under the Rome Statute by investigating and prosecuting international crimes domestically is the focus of this thesis. Although the components of complementarity are yet ill-defined in view of the fact that it is still evolving, the complementarity regime is vital in establishing and increasing the legitimacy of the ICC and the international criminal justice system. Thus, the future of international criminal justice is necessarily domestic.¹

However, many challenges to implementing complementarity remain. For instance, one of the assumptions associated with complementarity is that domestic criminal laws reflect international crimes. In practice, state authorities hardly ever consider international crimes in domestic legislation. The argument then is whether states should prosecute international crimes on the basis of ordinary domestic crimes? It is submitted that both crimes are not the same; both in their definitions, elements, nature, scale and gravity and it will be incongruous for states to fulfil their obligation under the Rome Statute without proscribing the Statute’s crimes in their domestic laws.

It is further argued that since international crimes are generally not known in national legal systems, where conduct constituting these crimes have occurred, a few African states have referred the situations to the ICC. Thus, complementarity is being applied to situations that were not specifically envisioned during the drafting of the Rome Statute.

For example, it was not anticipated that states will refer situations in their territories to the ICC.\textsuperscript{2} However, the ICC is currently faced with self-referrals, and has had to come up with another complementarity threshold of ‘inactivity’,\textsuperscript{3} to justify such referrals and its intervention.\textsuperscript{4}

Thus far, the application of complementarity is based on cases where the ICC had to determine admissibility as required by Article 19 of the Rome Statute and in cases in which states claimed to be carrying out investigations domestically.\textsuperscript{5} In the admissibility challenges by the Kenyan and Libyan governments, the ICC only had the opportunity to determine whether the investigations being carried out by both states encompassed the ‘same person and substantially the same conduct’.\textsuperscript{6} Although this is permissible under the Statute, it appears that complementarity is working in reverse. This is because the clear wording of Article 17 suggests that it is for states to be actively engaged in investigation and prosecution and it is for the ICC to allege and prove that the complementarity thresholds of ‘unwillingness’, ‘genuine inability’, or ‘sufficient gravity’ exist on the part of the state or the situation for which reason it would intervene. Thus, what we have seen so far is that the ICC is asserting jurisdiction, especially in the Kenyan and Libyan cases, and it is the states that then have to prove their willingness and ability in order to claim jurisdiction, as reflected in the admissibility challenges by both governments.

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\textsuperscript{2} Sarah Nouwen and Wouter Werner ‘Doing Justice to the Political’ (Text to n 12 in Ch 4) 948-949. See also Sharon Williams and William Schabas ‘Article 12 Preconditions’ and Payam Akhavan, ‘ICC in Context’ (Text to n 111 in Ch 3) 560 and 716 respectively.

\textsuperscript{3} ‘Inactivity’ was developed by the OTP based on the theory of ‘uncontested admissibility’ (Text to notes 135 to 139 in Ch 1).

\textsuperscript{4} Mauro Politi, ‘Reflection on Complementarity’ (text to n 105 in Ch 1) 142-149.

\textsuperscript{5} See Muthaura et al; Saif Al-Islam and the Germain Katanga cases (Text to notes 88, 96 & 100 respectively in Ch 1)

\textsuperscript{6} See Thomas Lubanga, Muthaura et al and Saif Al-Islam Gaddafi cases (Text to notes 86 to 94 in Ch 1).
Furthermore, of the eight situations currently before the ICC, five were referred by the respective states’ governments themselves. It is argued that these referrals were based on the absence of institutional and legal frameworks to carry out investigations and prosecutions domestically. This raises the fundamental question of whether the complementarity regime was intended to encourage self-referrals. Admittedly, two out of the three trigger mechanisms involve referrals, either by states or the United Nations Security Council; however, it is submitted that self-referrals reveal a lack of understanding of the complementarity regime, and can also undermine the object and purpose of the Rome Statute. For this reason, a mutually inclusive interpretation and application of complementarity is proposed.

6.1 Conclusions
6.1.1 The Relevance of a Mutually Inclusive Interpretation and Application of Complementarity

While it may be difficult to determine the precise interpretation and application of complementarity even in the next decade, it is suggested that a mutually inclusive interpretation may be beneficial. Mutual inclusivity implies that both the ICC and national systems share the responsibility of ensuring that perpetrators of international crimes are prosecuted. This implies that the duty of states under the complementarity regime goes beyond mere ratification of the Rome Statute. For effective burden-sharing, there are certain requirements, which both the ICC and states should be engaged in to ensure that states have the same legal framework and that they attain a certain level of institutional preparedness to investigate and prosecute international crimes.

8 (Text to notes 105 to 108 in Ch 1). Also (notes 24 to 41 in Ch 2 and notes 46 to 129 in Ch 3).
9 See ‘Admissibility and Trigger Mechanisms for ICC investigation’ (Text to notes 76 to 86 in Ch 1).
Certainly, ratification of the Rome Statute clearly demonstrates a state’s abhorrence of the crimes contained therein and its commitment to joining the international community’s efforts to combat them. African states’ efforts in this regard are indisputable. This is reflected by the continent’s number of ratifications and self-referrals to the ICC. It is submitted however, that mere ratification cannot drive the complementarity regime of the Rome Statute. Nor is it the objective of the Statute that all cases and situations be referred to the ICC. In fact, it is submitted that self-referrals, if not curtailed, could potentially lead to a case overload for the ICC and may also defeat the objective of the Statute, which focuses on state authorities as the primary mechanism to ensure accountability.

The ICC is only to fill in the gaps where and when necessary, such as where states fail and particularly where the alleged perpetrators are the state authorities themselves. In such cases, the ICC is certainly the most appropriate forum to ensure their accountability. In line with this argument, the cases of Kenya and Sudan are rightly before the ICC, since the Presidents, Vice President and other top government officials are those indicted. It is worth noting that the primacy of jurisdiction granted to states does not mean exclusivity. Consequently, in order for the ICC to truly function as a ‘complement’, it is submitted that African states should adopt the two prong components of the complementarity regime, namely; cooperation and complementarity legislation. Based on the premise that complementarity commits states to investigate and prosecute international crimes

12 See The Prosecutor v. Francis Kirimi Mathaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali ICC-01/09-02/11-274 30-08-2011 1/43 NM PT OA; The Prosecutor v. William Samoei Ruto, Henry Kiprono Koisegy and Joshua Arap Sang, (Text to notes 88 and 92 in Ch 1) (Uhuru Kenyatta and William Ruto are Kenya’s President and Vice President respectively since April 2013). See also The Prosecutor v. Omar Hassan Ahmad Al-Bashir (ICC-01/05-157) 4 March 2009 (Text to n 117 in Ch 4) (Omar Al-Bashir came to power by a military coup in Sudan in 1989 and despite the ICC’s arrest warrant, Al-Bashir was re-elected President in April 2010).
13 AI, ‘Rome Statute Implementation Report Card’ (Text to note 110 in Ch 2).
domestically, it is argued that, although not expressly stated in the Statute, adopting implementing legislation, incorporating the crimes in the Rome Statute into their domestic criminal law, is a necessary step for states to fulfil their obligations. This would further entail that states ensure institutional capacity and confidently investigate and prosecute the crimes rather than refer to the ICC situations for which they are meant to be primarily responsible.

Two arguments are advanced in favour of implementing legislation. The first is that, embedded in complementarity is the notion that measures must be taken by individual states to prosecute international crimes domestically. The second is that, since the Rome Statute requires states to cooperate fully with the ICC, it is argued that there must be mechanisms in place at the national level to arrest and surrender to the ICC suspects that it seeks to prosecute and who happen to be in a particular state’s jurisdiction.

A critical analysis of the Pre-Trial Chamber I decision of 31 May 2013 regarding the Libyan admissibility challenge in the Saif Al-Islam Gaddafi14 case reveals that implementing legislation is imperative for states to assert their criminal jurisdiction. Although the PTCI admitted that Libya could investigate and prosecute Saif Al-Islam based on its domestic criminal law,15 the conclusion reached by the Chamber was different.16 Thus, implicit in the Chamber’s decision was the underlying inability based on the failure of Libya to pass the ‘same conduct’ limb of the ‘same person same conduct’ test, which arguably, Libya could have passed had it applied the international categorisation of the crimes. However, Libya, not being party to the Rome Statute, did not have any implementing legislation and the crimes against humanity of murder and persecution were not known to its domestic criminal law.

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16 Ibid; paras 134, 135, 219.
Critically, African states’ rapid ratification of the Rome Statute has not been matched with corresponding legislative action.\(^{17}\) Whilst the absence of complementarity and cooperation laws may not be the only reasons for the inability of African states to investigate and prosecute international crimes, it is argued nevertheless that adopting the legislation is an appropriate starting point which would demonstrate both willingness and the ability to act. As a mechanism designed by states and to be operated by states, complementarity can benefit African states when they integrate the Rome Statute crimes into their domestic criminal law.

Admittedly, African states face significant challenges in adopting complementarity and cooperation legislation. These include; the time involved in the process of integrating the crimes, the difficulty in accessing experts in the field, not taking the issue as a priority and the lack of political will.\(^{18}\) Other challenges are corruption and the desire of a few African leaders to preserve perpetuity in power. In view of these challenges, the express criminalisation approach is advocated.

It is submitted that mutual inclusivity can further promote the proactive complementarity model, which requires assistance from the ICC to states upon request, can be of value to states, the ICC and the international community as a whole. The distinctive provision of Article 93(10) providing for a reverse assistance and cooperation from the ICC to states is the architecture of this model. An understanding of complementarity from this perspective would foster collaboration between national jurisdictions and the ICC for the purpose of closing impunity gaps, as envisioned in the Rome Statute.


\(^{18}\) Bekou and Shah (Text to n 68 in Ch 2).
6.1.2 Complementarity-based Prosecution at the Domestic level: The New Frontline of International Criminal Justice

The purpose of a mutually inclusive application of the complementarity regime is that states would ensure transcription of the Statute’s crimes into domestic criminal law to allow for domestic prosecutions of those crimes. This argument is premised on the fact that complementarity cannot be based on two distinct bodies of laws. If existing domestic criminal laws were sufficient to deal with international crimes then the Rome Statute would not have been necessary. Therefore, a complementarity-based prosecution at the domestic level necessitates implementing legislation.

Complementarity-based prosecution refers to prosecution of international crimes conducted by states domestically, with the provisions of the Rome Statute underpinning the process. Such domestic prosecution aims at ensuring conformity with the Rome Statute both in the legal framework and in the institutional preparedness of states to prosecute international crimes. The prosecution carried out by the United Kingdom was used to illustrate this model because it carried out a domestic prosecution on the basis of its implementing legislation with the proper classification of international crimes as defined in the Rome Statute.19

Analysis of the crimes of genocide and crimes against humanity within the thesis highlights the fact that international crimes and ordinary domestic crimes are not the same and thus domestic prosecution based on ordinary crimes cannot meet the requirements of complementarity. Significantly, international crimes are different from ordinary crimes because the context in which they are committed, the nature, scale, gravity and the overall

19 (Text to notes 134, 135, 143 in Ch 3).
impact are usually greater than for ordinary crimes. Crimes against humanity, for example, must be committed within the context of an attack that is characterised as ‘widespread or systematic’, directed against a civilian population, and the accused must have had knowledge of the attack.\(^{20}\) Therefore, murder as a crime against humanity, for example, cannot be the same as the ordinary crime of murder under domestic criminal law.\(^{21}\)

The domestic prosecutions in African states discussed in the thesis were based on ordinary crimes as defined by their own domestic statutes, which makes them fall short of the requirements of complementarity.\(^{22}\) In addition, the states’ domestic prosecutions were a reaction to being referred to the ICC.\(^{23}\) Admittedly, there is nothing wrong with such prosecution, taking into consideration that the ICC prosecutes only those who bear the greatest responsibility, while states must be involved in bringing the intermediate and low-level perpetrators to justice.

However, prosecutions in African states have thus far relied on domestic crimes.\(^{24}\) Also, they appear to conflict with rather than complement the efforts of the ICC, particularly in Uganda where amnesty and other alternative justice mechanisms are being used as demonstrated in the Thomas Kwoyelo\(^ {25}\) case. Arguably, proceedings in the DRC constitute complementarity-based prosecutions but the use of military courts is problematic.

\(^{20}\) Rome Statute, art 7.
\(^{22}\) (Text to notes 42 to 132 in Ch 3 regarding analysis of domestic prosecutions in the DRC, Kenya, Sudan and Uganda).
\(^{23}\) As for example the trials taking place in the SCCED in Sudan and in Kenya.
\(^{24}\) See, for example, the domestic prosecution in the DRC which uses military tribunal and relies on the Military Penal Code of 2002. Although the Code criminalises international crimes, yet there are gaps in the provisions which made the military court to apply the Rome Statute definitions in some cases. See the Songo Mboyo case (Text to notes 48 to 63 in Ch 3).
\(^{25}\) Text to notes 114 to 121 in Ch 3.
because mobile courts were not contemplated under the Rome Statute and military jurisdictions do not guarantee due process safeguards.26

As there is on-going debate on domestic prosecution, whether based on ordinary crimes or on their international classification, the proposal of a complementarity-based prosecution was not without a careful examination of the different theories of domestic prosecution. These included the ‘soft mirror thesis’,27 which maintains that as long as the offenders are tried for correspondingly grave domestic crimes, it does not matter whether the trial was based on the international categorisation.28 However, this theory implies that states do not have to ratify the Rome Statute. States may also not be required to enact legislation incorporating the Rome Statute crimes into their domestic criminal law. Ultimately, the justification for the soft mirror thesis implies that the Rome Statute has little relevance.

Nevertheless, it is proposed that states should incorporate the substantive provisions of the Rome Statute, because to satisfy the complementarity criteria, it is better for states to prosecute international crimes as such rather than as ordinary crimes.29 In line with this argument, the second approach, the ‘hard mirror thesis’,30 proposes that domestic prosecution must be based on international crimes, categorised and defined as such, rather than on ordinary crimes. This is because, by such prosecution, states can avoid the possibility of being considered ‘unwilling’ or ‘unable’, which precipitates intervention by the ICC.31

26 See, for example, Colonel Kibibi Mutware was sentenced to 20 years’ imprisonment for crimes against humanity by the DRC military tribunal in a trial that lasted for only 10 days (Text to n 65 in Ch 3).
28 Ibid.
30 Jon Heller, Ibid 87-89.
31 See Mark Ellis, ‘The ICC and Its Implication for Domestic Law (Text to note 60 in Ch 1); Kai Ambos and Ignaz Stegmiller, ‘German Research on International Criminal Law…’ (Text to 142 in Ch 2).
Discounting both of these theories, Jon Heller instead advanced ‘a sentence-based theory of complementarity’, in which he postulates that when a domestic prosecution ends with a sentence that is the same or higher than what is prescribed by the Rome Statute or what the ICC would have given in the same case, then domestic prosecution can be accepted regardless of the categorisation of the crime.32

It is submitted that proposing a sentence-based approach to complementarity that focuses exclusively on the severity of the sentence is not only contrary to the provisions of the Rome Statute,33 but it also presents certain difficulties. The first is that a sentence-based approach does not reflect the differences in the scope, scale and gravity of the crimes.34 Moreover, the sentence-based approach does not take into consideration that a domestic prosecution could end in acquittal.35 Acquittal may well be the appropriate outcome of a domestic prosecution and yet, where an accused is acquitted, there is of course no sentence, and it is therefore impossible to compare with the Rome Statute. The sentence-based approach also implies that one must wait until the end of the prosecution to determine the acceptability of the prosecution, in which case the ICC would be barred by the ne bis in idem rule.36

In response to Jon Heller’s sentence-based theory, Darryl Robinson proposed a ‘process-based’ approach, stating that the genuineness of the process rather than its outcome should be the focus.37 For Robinson, once it is shown that a state is carrying out or

32 Jon Heller (n 27) 87-89.
33 The sentence-based theory may allow the death sentence, which some states apply as the maximum sentence in consideration of the gravity of particular crimes. On the contrary, the maximum penalty under the Statute is life imprisonment. See William A Schabas, ‘Penalties’, in Antonio Cassese et al (eds) The Rome Statute of the International Criminal Court (vol. II OUP, 2002) 1505.
34 Morten Bergsno, Olympia Bekou & Annika Jones, ‘Complementarity After Kampala’ (Text to n 32 in Ch 3) 801.
35 Darryl Robinson, ‘Three Theories of Complementarity’ (text to n 33 in Ch 3).
36 See Rome Statute, articles 17(1)(c) & 20 (the rule against double jeopardy states that no person shall be tried twice for the same conduct.
37 Robinson.
has carried out prosecutions in relation to a case, the question should be whether the state is carrying out those prosecutions ‘genuinely’. Accordingly, he postulates that in the context of Article 17(2) and (3), ‘process’ is the master theory and that charges and sentences could be looked into insofar as they reveal something about the genuineness of the process.

Again, the process-based theory does not consider the difference between international crimes and ordinary domestic crimes. Consequently, the complementarity-based prosecution, which is proposed in this thesis, is a holistic and proactive approach which requires that states incorporate international crimes that conform to Rome Statute definitions into their domestic criminal law. It is also a practical way of avoiding a scenario in which a crime occurs that is not covered under domestic law. A typical example is the rejection of the Pre-Trial Chamber I (PTCI) of the admissibility challenge by Libya in the Saif Al-Islam Gaddafi case, because the crime against humanity of persecution was absent from the Libyan Criminal Code and a proposed higher sentence by Libya was not accepted by the PTCI.

Other difficulties relating to complementarity identified in the thesis include the tension between the African Union and the ICC arising from the fact that the ICC is being perceived as a form of neo-colonialism targeted against African states. Analysis in the thesis demonstrated that the conflict is not between the AU and the ICC per se but rather, it is between the AU and the United Nations Security Council.

Thus, a discussion of the politics of international criminal law in the thesis reveals that politics cannot be entirely divorced from law and particularly international

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38 Rome Statute, art 17(1)(a)-(c)
39 Rome Statute, arts 17(1) (a) & (b), 20
40 Robinson (n 35).
41 Saif Al-Islam case (n 14).
43 Elise Keppler, ‘Managing Setback for the ICC in Africa’ (Text to notes 133 & 134 in Ch 4).
criminal law and the ICC. This is more apparent with the involvement of the United Nations Security Council, which is a political body, and yet it is empowered under the Statute to refer and defer cases to the ICC. Therefore the tension is traced to the Security Council’s referral of the situation in Darfur, Sudan to the ICC and the fact that it ignored the AU’s ensuing request that the case be deferred.\textsuperscript{44} Furthermore, an examination of the scapegoat thesis and selectivity appeared at first to buttress the assertion that African states are inappropriately targeted by the ICC. However, proof of selectivity does not negate the carriage of justice against the individual who was selected for prosecution.\textsuperscript{45}

Undoubtedly, other areas of misunderstandings do exist between the AU and the ICC, which arise from both political and legal sources. These include the issue of the ICC’s jurisdiction over nationals of non-party states and immunities of heads of states,\textsuperscript{46} both of which were analysed as points of misconceptions that could exacerbate the tension between not just the AU and the ICC, but also between the ICC and other states parties and non-party states alike.\textsuperscript{47} It is suggested that Article 98 which is identified as a contradictory provision should be removed from the Statute entirely. This is because the effect of the Article does not only undermine the integrity of the ICC, but it also violates the principle of equality before the law and it contravenes the obligations undertaken by state parties to the Statute.\textsuperscript{48} Removal of the Article, however unlikely, will reduce confusion and points of conflicts in the functioning of the ICC.

The relevance of this argument in the thesis is the fact that all cases before the ICC to date have come from the African continent. This implies that for the ICC to

\textsuperscript{44} Text to notes 135 to 136 in Ch 4.
\textsuperscript{45} See Celebici case (Text to n 35 in Ch 4) paras 611 & 618.
\textsuperscript{46} Text to notes 138 -186 in Ch 4.
\textsuperscript{47} Some of the political challenges include the hypocritical stance of some of the permanent members of the United Nations Security Council and the United States exceptionality (text to notes 195-205 in Ch 4).
successfully prosecute the cases, it will need the sustained support and cooperation of African states. Also, the ICC is only able to prosecute a few cases, therefore, to close impunity gaps, African states need credible institutions, in addition to implementing legislation, in order to prosecute lower-level and intermediate perpetrators. Thus, the cumulative effect of enhancing the relationship between the ICC and the AU would be the overall improvement of the international criminal justice system.

6.1.3 Institutional Preparedness of States to Prosecute International Crimes

Another difficulty with complementarity is the complex tension between international standards and local specificities and the variations between national criminal justice systems. Again, the complementarity regime assumes that states’ judicial systems will necessarily be available and will be adequately prepared to handle the investigation and prosecution of international crimes as the ICC would.

Admittedly, there are significant dangers in the domestic prosecution of international crimes. First, domestic courts are potentially more likely to be biased or politically motivated than the ICC. The very proximity to the crime, the local press coverage, and interactions with victims and survivors may undermine the fairness of the procedure. Second, the quality of justice in local courts differs significantly. While some states have extremely well-developed legal systems, most African states lack even the most rudimentary legal tools. Third, in the prosecution of international crimes, there is often a need to convince both a local and an international polity of the fairness of the proceedings and the legitimacy of the justice rendered.

50 Seth Kaplan, ‘Strengthening the Rule of Law in Developing Countries’ Fragile States available at http://www.fragilestates.org/2012/06/17/rule-of-law-developing-countries/ (Accessed 10 March 2014)
While complementarity assumes homogeneity between national courts and the ICC, it is argued that at the domestic level, the institutions which should partner with the ICC in terms of complementarity simply do not exist. Seeing the disparity exemplified by physical structures, Antoine Garapon observes that the contrast between the luxurious glass construction of The Hague and the often precarious conditions of local courts puts complementarity in danger of becoming indefensible.

Certainly, the presence or absence of a credible judiciary to carry out domestic prosecutions in line with complementarity will determine the success or lack thereof of the emerging system of international criminal justice. Therefore, using Nigeria as a case study, it is argued that the institutional capacities of African States to investigate and prosecute international crimes are either non-existent or grossly inadequate.

The situation in Uganda also demonstrates that a consideration of institutional preparedness at the state level must go beyond mere physical infrastructure; Uganda has established a Special War Crimes Division of the High Court and has passed legislation empowering domestic courts to prosecute international crimes but still seems unable to handle the investigation of such crimes, particularly concerning members of the Lord’s Resistance Army (LRA). According to Elizabeth Nahamya-Ibanda, ‘despite the War Crimes Division being a significant development, the country is in great need of support …especially with regard to the national lack of capacity to investigate and prosecute international crimes and lack of resources’. 

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51 Antoine Garapon, ‘What does Complementarity commit us to?’ in Politorbis 20
52 Ibid.
53 Ibid.
54 See Justice Elizabeth Nahamya-Ibanda, ‘The Mandate and Activities of the Special War Crimes Division of the High Court Uganda’ (Text to n 61 in Ch 5).
55 Ibid.
Also, institutional preparedness includes the capacity of judges and prosecutors who are competent in international criminal law. This point was underscored in the *Saif Al-Islam* case when the Pre-Trial Chamber I (PTCI) observed the steps undertaken by the Libyan government which involved inviting judges and lawyers versed in international criminal law from other jurisdictions.\(^{56}\) In contrast, the Kenyan government merely relied on general submission in its efforts to reform its judicial system.\(^{57}\) This implies that general reform of a state’s judiciary is not sufficient; there should be focused appointments of experts in international criminal law.

It is further argued in the thesis that ‘unwillingness’ under Article 17(2)(c) may be determined with respect to situations where the proceedings are not being conducted independently or impartially.\(^ {58}\) Therefore, the complementarity thresholds of ‘unwillingness’ and ‘inability’, have direct links not only to the nonexistence of laws criminalising international crimes, but also to the unavailability of national judicial systems,\(^ {59}\) which encompasses a lack of independence and impartiality of the courts at the domestic level to prosecute them.

Thus, in light of the complementarity of the Rome Statute, the primacy of jurisdiction comes with responsibilities, which, though are not expressly stipulated in the Statute, are nevertheless imperative for states in order to fulfil their complementarity role. The finding in this thesis is that Nigeria, in its current condition, like other African states, lacks the institutional preparedness to prosecute international crimes. This is because the substratum for complementarity, which includes a strong judiciary, is lacking.

\(^{56}\) *Saif Al-Islam* case of 31 May 2013 (n 14) para 213.

\(^{57}\) Ibid, para 85.

\(^{58}\) See Rome Statute, Article 17(2)(c).

\(^{59}\) Rome Statute, Article 17(3).
The examination of corruption, insecurity, bias and subordination on the part of the judiciary reveals that they constitute significant obstacles not only to the goal of ensuring the rule of law but also, specifically, to the implementation of complementarity. For instance, despite constitutional safeguards for an independent and impartial judiciary, Nigerian judges and their family members suffer constant intimidation. While Nigeria has been singled out as being especially encumbered by kidnappings, the problem of judges being bullied, coerced, bribed, and of justice being otherwise subverted, is widespread.

The challenges of corruption, insecurity and lack of independence of the judiciary analysed in this thesis, which are entwined and endemic to many African nations, are exemplified by Nigeria. It is proposed that in addition to adopting implementing legislation and sourcing international criminal law experts into its judiciary, a critical implementation strategy includes tackling these problems. Therefore a holistic solution is imperative. Such solution would be relevant not only to Nigeria, but could be moulded to fit the particular needs of other African states facing similar challenges in meeting their obligations as states parties to the Rome Statute.

6.1.4 Corruption, Unemployment, Poverty and Bad Leadership

Aluko proposed that a major impetus for the growing corrupt practices in Nigeria is associated with poverty, unemployment and bad leadership. The people are ‘hurt, damaged and discounted by the very government that should protect them, their past is blighted, their present compromised and their future endangered, mortgaged and at risk’.

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60 See, for example, the analysis of Corruption in the Nigerian Judiciary (Text to notes 152 to 168 in Ch 5).
61 See the 1999 Constitution, s 17(2)(e).
62 Intimidation takes varying forms; from kidnappings, to threats to life, to assassinations (Text to notes 187-204 in Ch 5).
63 Aluko, (Text to n 128 in Ch 5) 398.
64 Ibid, 399.
Therefore corruption can only be minimised where the material foundations for it exist, the material foundation being bread - a fair standard of living.\textsuperscript{65}

The problem of lack of visionary leaders culminates in corrupt leadership. The struggle for political power is regarded as a chance to reap the fortunes of office by the ruling elite and an opportunity to partake of the ‘national cake’, which results in tension and corrupt practices.\textsuperscript{66} In addition, in Nigeria, the government is the primary source of private wealth accumulation and this makes the struggle for control of power even more intense.\textsuperscript{67} Added to this is the ‘winner takes all syndrome’\textsuperscript{68} which makes elections a contest to win at all cost.\textsuperscript{69} To this end, people explore every means, legal or illegal, including intimidation, kidnapping and even the murder of their opponents in order to hold on to power.\textsuperscript{70}

In view of the pervasive nature of corruption, several anti-corruption agendas have been endorsed by the Nigerian government at different times; these include initiatives to investigate financial crimes, corruption and fraud - the Economic and Financial Crime Commission (EFCC) and the Independent Corrupt Practices and Other Related Offences Commission (ICPC). While the setting up of these bodies may have been with laudable objectives, the focus on the fight

\textsuperscript{65} Ake, (1991) cited in Aluko.
\textsuperscript{66} Michael Burleigh, ‘A Country so Corrupt it would better to Burn our Aid Money’ 9 August 2013 Mail Online http://www.dailymail.co.uk/debate/article-2387359/Nigeria-country-corrupt-better-burn-aid-money.html\textsuperscript{>}
(Noting that ‘public office is so lucrative that people will kill to get it’)
\textsuperscript{67} A Nigerian Legislator earns a basic wage of approximately £122,000 which nearly doubles what the British MPs earn and more than what the President of America earns. Yet 70 per cent of Nigerians live below the poverty line of £1.29 a day. See Burleigh Ibid.
\textsuperscript{68} Aluko, 399.
\textsuperscript{69} Former President Olusegun Obasanjo during his campaign for the PDP Governorship election in Delta and Rivers States noted that the party must win at all cost. See also Segun Olatunji, ‘I’m Ready to Spend N1bn to win Ekiti Election-Kashamu’ 31 August 2013 Punch Nigeria http://www.punchng.com/politics/hotseat/im-ready-to-spend-n1bn-for-pdp-to-win-ekiti-election-kashamu/\textsuperscript{>}
\textsuperscript{70} See Burleigh citing an instance of a text message sent to Ayo Fayose former Governor of Ekiti State by the ‘Fayose M Squad’. ‘M’ stands for ‘murder’; the text message stated that they had stabbed and bludgeoned a third candidate to death on his own bed.
against corruption has itself breed more corruption in Nigeria.\textsuperscript{71} Therefore, a re-focusing is advocated, that of replacing the anti-corruption fight with a fight for development and a fight for values.

In fact, it is the absence of values and development strategies that have nurtured corruption, and corruption in turn has continued to perpetuate vicious circles of underdevelopment.\textsuperscript{72} Therefore, in terms of priority, what Nigeria and other African countries need is not anti-corruption mechanisms \textit{per se}. Rather what is necessary is development and a reordering of values. This is because if or when the fight against corruption is won, assuming that is possible, it may only lead to the beginning of the real war; that for development, reorientation and restructuring of values. Arguably, focusing on the fight against corruption has only exacerbated the already lost values like respect, hard work, honesty and integrity. In this regard, the policy-oriented perspective is recommended for Nigeria and other African states to identify with members of the international community in the pursuit of a common interest.

\textbf{6.2 Recommendations}

\textbf{6.2.1 The Policy-Oriented Perspective and Complementarity.}

The policy-oriented method has been selected in this thesis because the approach reflects the need to have a continuing process of authoritative decision-making at the different levels of the world community with the objective of identifying, clarifying and securing common interests. This implies that any study of the complementarity of the Rome Statute must necessarily be addressed to persons in official government positions who are responsible for decision making and implementation. It is proposed that authorities in Nigeria and other African states need to identify with the international community, in deed and not only in words, to secure the common interests.

\textsuperscript{71} Saxone Akhaine, ‘Aremu: We have Democracy, but Without Democrats’ \textit{The Guardian} 9 June 2013. Available at \url{http://www.ngguardiannews.com/policy-a-politics/124032-aremu-we-have-democracy-but-without-democrats} (Accessed 17 September 2013).

\textsuperscript{72} UNODC, ‘Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States’ (Text to n 152 in Ch 5).
These common interests consist of the maintenance of international peace and security and, ideally, the shaping and sharing of values such as respect, power, enlightenment, well-being, wealth, skill, affection and rectitude. The ultimate goal of securing the common interest is the establishment of a world community of human dignity. Towards this goal, education in the broadest sense is crucial. As argued by Chen, ‘we cannot be content with the status quo, we must think about new ways to build a better world’. Thus the policy-oriented perspective brings a distinct dimension to citizenship education as citizens of the world must be taught to think globally, to think contextually, and to think creatively for the common interest. This is because closing impunity gap requires inclusive orientation of values and education of citizens in the widest sense.

As an on-going process of authoritative decision-making, international law is dynamic. Even more dynamic is the complementarity regime of the Rome Statute, as it deepens the interdependence and interrelations amongst states and non-state participants, including international organisations, nongovernmental organisations and associations, individual and the world community as a whole. In this process, states continue to play a predominant role, with their control of unique territorial bases. However, as interdependencies deepen, what happens in one state increasingly affects others and communities must take one another into account and act with mutual respect when making choices and decisions. It is only when a basic order is achieved through the curtailment of

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73 See Article 55 of the UN Charter which emphasises universal respect for, and observance of, human rights and fundamental freedoms as indispensable to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among states. See also the UDHR 1948
75 Ibid.
76 Ibid.
unauthorised coercion and violence that the greatest production and widest sharing of all values can be seriously pursued and attained.\textsuperscript{77}

6.2.2 Minimum Complementarity Threshold: National Implementation Strategies

The benefit of national criminal jurisdiction has been highlighted. Like other international tribunals, the ICC is dependent on the cooperation of states to collect and transfer evidence as well as suspects and accused persons to the Court.\textsuperscript{78} Even where states are cooperative, the location of the Court away from the territories in which crimes were committed results in delays or obstacles to the pursuit of justice. Thus, it is better for states to engage their criminal justice systems in the prosecution of international crimes.

As demonstrated in the analysis of the case law of the ICC, not all the elements of complementarity have been interpreted and applied. In the \textit{Saif Al-Islam}\textsuperscript{79} admissibility decision, for example, the PTCI noted that consideration of ‘unwillingness’ was not necessary at the admissibility challenge stage since the Chamber found that Libya was genuinely unable to investigate and prosecute the suspect.\textsuperscript{80} Thus, as with previous admissibility challenges before the ICC, only the consideration of whether or not an investigation is being carried out at the domestic level to determine the ‘same person same conduct’ test was evaluated.

In considering whether a case is inadmissible under Article 17(1)(a) and (b), the Appeals Chamber of the ICC noted that there are two questions that must be asked.\textsuperscript{81} The first is whether there are on-going investigations or prosecutions at the domestic level. The second is whether there have been investigations in the past and the state having jurisdiction

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\textsuperscript{77} Ibid, 85.
\textsuperscript{78} See Part 9 Rome Statute relating to International Cooperation and Judicial Assistance, particularly Articles 86-89.
\textsuperscript{79} \textit{Saif Al-Islam} case.
\textsuperscript{80} Ibid paras 204, 205, 206, 215 & 216.
\textsuperscript{81} \textit{Germain Katanga}, case (Text to n 100 in Ch 1).
\end{flushleft}
has decided not to prosecute the person concerned. According to the Appeals Chamber, it is only when these questions are answered in the affirmative that an examination of unwillingness and inability becomes necessary. As both elements, along with genuineness and sufficient gravity, are separate from the consideration of whether or not an investigation is being carried out, it is apparent that the ICC is yet to evaluate all the components of complementarity.

In order to demonstrate willingness, a minimum complementarity threshold, which includes first, the transcription of the Rome Statute crimes into Nigerian criminal law, is proposed. Nigeria, and other African states, would have to undertake extensive review of its laws including the constitution and specific provisions relating to immunity and the death penalty to bring them in line with the Rome Statute. This is important because as discussed in the thesis, prosecuting international crimes as ordinary domestic crimes is not desirable and conflicting domestic laws can potentially inhibit national implementation of the Rome Statute.

Second, to ensure institutional preparedness, the Nigerian Police Force, the Prison Service and the judiciary must be fundamentally reformed both to better protect citizens’ rights and to be well-equipped to carry out investigations and prosecutions of international crimes. In this regard, there should be the appointment of international criminal law experts into the judiciary including judges. The continuous training of judges and other court personnel in international criminal law will also be of benefit. In addition, the government must provide security for all, and most especially judges, to enable them discharge the responsibilities of their office.

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82 Ibid, para 20.
83 Ibid, para 78.
The above minimum complementarity threshold is suggested so that African states can be ready, both in their laws and institutions, to implement complementarity. This is important because the problems faced by domestic institutions functioning in the context of a weak economy, lack of confidence in the judicial structure, lack of expertise in international criminal law and the questionable independence and impartiality of national judiciaries were highlighted in the thesis. Of critical importance is the fact that such operational capacity challenges are likely to be exacerbated particularly where there may be a large accumulation of cases, which usually happens in the aftermath of a mass atrocity.  

Since the first Review Conference of the Rome Statute held in Kampala Uganda in 2010, the role of the ICC has been streamlined to the construction of national capacity insofar as it does not interfere with the judicial function or divert funds from ongoing investigations and prosecutions by the ICC. Therefore, states, international organisations and civil society are to play a leading role in encouraging and assisting national jurisdictions to ensure their legal framework and institutional capacity to investigate and prosecute international crimes.

However, outlining that states, international organisation and civil society should construct national capacity building to implement complementarity only leaves the issue to the vagaries of international politics. For this reason, it is proposed in this thesis that Article 93(10) could be expounded and used by states to pursue proactive complementarity by which states could request legislative and technical assistance as well as capacity building from the ICC.

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84 Morten Bergsma, et al (n 34) 791-811.
85 Article 93(10)(a) says that the Court may, upon request, cooperate with and provide assistance to a state party conducting an investigation into a trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting state.
Against this background the thesis proffers some recommendations for African states and particularly Nigeria on how to ensure its legal framework and enhance institutional capacity to carry out complementarity-based prosecution. The recommendation is structured on the three prong requirement for complementarity articulated at the Review Conference, which include legislative assistance, technical assistance and capacity building and physical infrastructures.

6.2.2.1 Legislative Assistance

In constructing the possibility of developing capacity at the domestic level to ensure implementation of complementarity, the Review Conference noted that there is need for legislative assistance. This includes the drafting of the appropriate legislative framework and assistance in overcoming domestic hurdles for passing such legislation.\(^6\) This is apt for Nigeria and other African states to overcome obstacles to passing implementing legislation.

In this regard, African states could draw some lessons from other states implementing legislation, available through the ICC Legal Tools Project.\(^7\) Areas of concern include provisions regarding amnesties and immunities, the need for the definitions and penalty of international crimes to meet the threshold of the Rome Statute and the need to adopt procedural fair trial standards.

In principle, the ICC has provided, through its Legal Tools Project,\(^8\) ways by which states may construct functional capacity necessary for complementarity. This project was developed by the ICC and has been made available to governments, judges, prosecutors, defence counsel, NGOs and others around the world in the spirit of the complementarity of the Court. Initially developed as part of ICC’s Legal Tools Project of the office of the

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\(^6\) Review Conference Resolution para 17(1)(a)

\(^7\) The Project comprises of four main components which provide distinct services; Case Matrix, the Elements Digest, the Proceedings Digest and the Means of Proof Digest.

\(^8\) The ICC’s Legal Tools are available on <www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/> Accessed 10 May 2012.
Prosecutor, the realisation of their value as a means of increasing states’ capacity led to their availability and access to use by external actors.\textsuperscript{89} The Tools serve as an electronic library developed by lawyers with expertise in the field of international criminal law and justice.

Notably, the legal tools database contains a specific search engine, which allows users to search for specific aspects of national legislation implementing the Rome Statute. The text in these tools reflects the need to disseminate legal information relating to the functioning of the Court.\textsuperscript{90}

In addition, the National Implementing Legislation Database (NILD) forms part of the ICC’s Legal Tools.\textsuperscript{91} It is an online knowledge transfer platform developed by the OTP of the ICC to provide the general public with free access to the most comprehensive electronic library on international criminal law and justice.\textsuperscript{92} The NILD provides a comprehensive and up-to-date collection of national legislation that has been adopted by states in relation to the Rome Statute.\textsuperscript{93}

Thus, it is a tool for national legislators who have not yet adopted, but are considering or drafting implementing legislation, enhancing their capability to draft effective legislation by drawing upon the previous experience of other states parties. It is recommended that Nigeria and other African states could, in addition to the South African and Kenyan models of International Crimes Act,\textsuperscript{94} take advantage of the NILD to facilitate their implementing legislation. The importance of the NILD goes beyond implementing

\textsuperscript{89} Morten Bergsmo \textit{et al} (n 34).
\textsuperscript{90} Ibid
\textsuperscript{92} Ibid.
\textsuperscript{93} Ibid.
\textsuperscript{94} The South African and Kenya implementing legislation are the only African models that have adopted the Rome Statute crimes and also adjusted other local laws, including provisions on immunities, that conflict with the provisions of the Statute.
legislation; even where states have already adopted such legislation, they could monitor the impact of their legislation and undertake necessary amendments whenever the content of the Rome Statute changes.

Furthermore, the NILD is relevant to judges, police forces and prison authorities, who are expected to implement such legislation but may have limited access to information, with the result that the rights of individuals and the admissibility of a trial might be jeopardised. Both of these tools represent a practical and cost-effective transfer platform for states through which legal information pertaining to core international crimes is made available.

6.2.2.2 Technical Assistance and Capacity Building

Technical assistance includes, but is not limited to, the training of the police, investigators and prosecutors, capacity building with regard to the protection of witnesses and victims, forensic expertise, the training of judges and of defence counsel, security for officials and for their independence. Such assistance could take the form of supplying judges and prosecutors to assist national courts or other forms of support to special war crimes divisions of domestic institutions, as appropriate. Furthermore, assistance could be rendered for capacity building with regard to mutual legal assistance in criminal matters, to underpin cooperation in actual prosecutions.95

In addition, physical assistance includes support with construction of courthouses and prison facilities, and the sustainable operation of such institutions. Capacity building would, however, be needed to ensure that the functioning of such institutions

95 Review Conference Resolution para 17(1)(b).
comply with internationally accepted standards, and adding an element of training to the operation of the institutions may be beneficial.96

Admittedly, this will involve finances and other resources, which the ICC may not be able to handle. Currently, the ICC is funded by contributions made by states parties and the United Nations,97 and although the ICC may receive and utilise funds from voluntary contributions from governments, international organisations, individuals, corporations and other entities,98 there is a dearth of donors to the ICC. Consequently, it is suggested that each state desiring to benefit from the technical assistance and capacity building could contribute by funding the particular project.

In this regard, Article 93(10) of the Rome Statute could be employed by states to request assistance from the ICC to ensure capacity in all institutions in line with complementarity. Since the future of international criminal justice rests on credible institutions at the domestic level, it is hoped that states and the ICC will collaborate to ensure success and effectiveness.

Credible as these recommendations are, a major challenge in actualising them is the bane of corruption, which is endemic in Nigeria and in most African states. The substratum for the complementarity regime is functional systems at the domestic level, and, as has been noted in *Mcfoy v UAC*,99 ‘you cannot put something on nothing and expect it to stand’.100 Unless institutions at the domestic levels are functional and effective, the culture of self-referrals will continue and this will exacerbate the already almost overburdened ICC and ultimately undermine the complementarity regime.

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96 Ibid para 17(1)(c)
97 Rome Statute, Article 115.
98 Ibid, Article 116
100 Ibid, 1409.
The complementarity regime is hinged on efforts at national levels. As argued in the thesis, although African states’ support for the ICC is evident in both ratifications and referral of situations, for national implementation of the complementarity regime, African states need both appropriate legal frameworks and institutional capacity that meet a certain threshold. This is important not only for establishing the success and legitimacy of the ICC, but also for the future of international criminal justice as a whole.

The thesis argues that national implementation of complementarity, which means that there needs to be active investigation and prosecution of international crimes at the domestic level is necessary for the sustainability of the ICC and the international criminal justice system. Thus the minimum complementarity threshold, suggested in the thesis, which includes proscribing the Rome Statute crimes in domestic criminal law and ensuring institutional preparedness of states’ judiciaries, especially by appointing prosecutors and judges who are experts in international criminal law, is necessary. This will result in African states’ genuine ability and willingness to prosecute international crimes, rather than refer situations in their territories to the ICC. It will also ensure accountability for the most serious crimes of concern to the international community as a whole and it will lead to a reduction of impunity around the world.
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263


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Includes: (A) Books; (B) Chapters in books; (C ) Journal articles; (D) Online articles; (E) Conference papers/Research papers/Reports and (F) Blogs/Newspapers/Websites.

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