AN ANALYSIS OF THE COMPLEMENTARITY OF AFRICAN STATES AND THE ICC

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DECLARATION

I, **Kijala Mwachoni**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as a University Supervisor.

Signed by the Supervisor: .....

Date: .....

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I would like to that the ALMIGHTY Father for granting me the grace and the strength through this entire writing process. Without Him I would have not made it this far. I would also like to thank my parents for believing in me, for their encouragement and support. I am eternally grateful. Thirdly, I would like to thank my supervisors, first Dr. Francis Khayundi who helped me with the initial stages of this dissertation, who believed that I was capable of writing this paper. Second Mr. Augustus Mbila for his patience and genuine commitment; for his guidance and support through the process. Forth, I would like to thank my study group for their amazing support and encouragement. God bless you all abundantly. Last but not least, I would like to applaud myself for not giving up, for putting in the hard work required to complete this research paper.

DEDICATION

I dedicate this paper to God for without Him I would not have made this far.

To my parents for their encouragement, their moral support, their love and kind words.

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ABSTRACT

States are encouraged to prosecute the four core crimes provided by the Rome Statute i.e. crimes against humanity, war crimes, genocide and crimes of aggression [1]committed in their jurisdiction as having primary responsibility. For a state to be termed as 'able to prosecute crimes' without the interference of the International Criminal Court (ICC) it must show steps that it is applying to gain that capacity e.g. incorporating the Rome Statute into its legislation, giving domestic court judicial powers to prosecute these cases etc. However, most African states are being termed as unwilling and unable to investigate and prosecute these crimes causing scrutiny by the ICC. This has caused tension between the ICC and the African states to a point of threatening to withdraw from the ICC.

After the 2007 post- election violence Kenya attempted to make steps to investigate the atrocities caused and other crimes in the future e.g. by creating hybrid courts.[2] Some researchers argue that they did so to avoid interference by the ICC rather than genuinely being willing to make positive steps. Seeking to identify the challenges causing the tension between African states especially Kenya and the ICC that is weakening the principle of complementarity is important if the ICC is going to be benefit to Kenya and Africa as a whole rather than a 'watch dog'.

This study analyses the principle of complementarity in the Rome Statute[3] and how the ICC interprets it from its actions. It also analyses the steps Africa has taken to improve the complementarity principle and the co-operation with the ICC or lack thereof. The study will utilize case studies used to identify this issue in Kenya and African and the issue of interpreting complementarity in the Rome statute. Finally, it shall draw recommendations to improve the relationship between Africa and the ICC.

[1] Rome Statute 1998.
[2] Chandra Lekha Sriram and Stephen Brown 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact' (2012) 12(2) International Criminal Law Review, pp. 219-44. < https://www.academia.edu/3056850/Kenya_in_the_Shadow_of_the_ICC_Complementarity_Gravity_and_Impact >.
[3] See above.

ABBREVIATIONS

ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights
ASPA	American Service-men's Protection Act
ASR	International Wrongful Rights
AU Commission	African Commission on Human and People's Rights
AU	African Union
AUDP	African Union High-Level Panel on Dafur
Banjul Charter	African Charter on Human and People's Rights
CAR	Central Africa Republic
CCAIL	Code of Crimes against International Law
CIA	Central Agency Unit
DRC	Democratic Republic of Congo
EU	European Union
ICA	International Crimes Act
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunals for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	The International Military Tribunals
Malabo Protocol	Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights

MP	Member of Parliament
OAU	Organisation of the African Unity
PSC	Peace and Security Council of the African Union
Rome Statute	Rome Statute of the International Criminal Court
UN Charter	Charter of the United Nations
UN	United Nations
UNSC	United Nations Security Council
UNWCC	United Nations War Crimes Commission
USA Constitution	United States of America: Constitution
USA	United States of America
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties

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CHAPTER ONE: RESEARCH PROPOSAL

1.1 Background

Article 5 of the Rome Statute states that,

> The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.[4]

This constitutes the purpose of the International Criminal Court (ICC); 'to investigate and prosecute the most grievous crimes of International concern.' The ICC only has jurisdiction on the states party to the treaty and states that have agreed to the jurisdiction of the court or if one or more such crimes is referred to the Security Council of the United Nations (UN) or if the prosecutor investigates the crime himself.[5]

The preamble of the Rome Statute emphasises 'that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdiction.' This establishes the principle of complementarity.[6] It limits the court's functions in that, states are expected and required to investigate and prosecute crimes of international concern before the ICC gets involved. The ICC can only get involved in instances provided for in Article 17 of the Rome Statute i.e. where the state is unwilling or genuinely unable to prosecute the crime of international concern.[7]

According to Lijun Yung,

> the idea for the principle of complementarity is to maintain State sovereignty, under which it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, to enhance the national jurisdiction over the core crimes prohibited in the Statute, and to perfect a national legal system so as to meet the needs of investigating and prosecuting persons who committed the international crimes listed in the Statute.[8]

In the spirit of this principle, the Rome Statute provides when the court can investigate a case. Article 17 states that,

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[4] The Rome Statute of the International Criminal Court 1998 Article 5.
[5] The Rome Statute of the International Criminal Court 1998 Article 13,14.
[6] The Rome Statute of the International Criminal Court 1998 Preamble Paragraph 10.
[7] The Rome Statute of the International Criminal Court 1998 Article 17.
[8] Lijun Young, 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court' (2005) Vol. 4, No. 1 Chinese Journal of International Law, 121–132
< https://academic.oup.com/chinesejil/article-abstract/4/1/121/2365933> accessed 7th August 2019.

> 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.[9]

The ICC is not meant to take the place of the national jurisdiction but to complement it. The purpose of this principle as discussed earlier is to ensure that the sovereignty of states is not limited ideally leading to the conclusion that the ICC encourages domestic jurisdiction on international crimes. However, some African states were recently threatening to leave the ICC due to the supposed scrutiny on African states. The question is whether the ICC is justified to keep African states on its toes and whether the scrutiny is causing a positive or negative impact on African states. Does it encourage them to improve their domestic criminal jurisdiction on international crimes?

African states have attempted to create courts that will deal with African atrocities i.e. the African Court on Human and People's Rights (ACHPR). In 2010, a protocol was added expanding the jurisdiction of the court to hear the four core international crimes provided in the Rome statute among others. However, the court has failed in many ways to investigate and prosecute the crimes caused in African countries. This is mostly due to the lack of capacity of the court not forgetting that Africa is still a developing country; the financial capacity, the workforce and the political turmoil affecting the relationship between the African leaders and the African court just to mention a few.[10] Considering the lack of effectiveness of the African court, there is a need for the ICC to help curb international crimes in Africa. We shall look at a few case studies to contextualize the problem arising from the relationship between the ICC and African states.

Fratricidal violence followed the 2007 Kenyan presidential elections that shocked the world. Supporters of the two major political parties clashed with each other, dividing the country through

[9] The Rome Statute of the International Criminal Court 1998 Article 17.
[10] Max Du Plesis, 'Implications of the AU decision to give the African Court jurisdiction over international crimes' (2012) No 235 Institute for Security Studies <https://www.ingentaconnect.com/content/sabinet/ispaper/2012/00002012/00000235/art00001> accessed 25th February 2020.

ethnic groups. More than 1300 people were reported dead and hundreds of thousands displaced.[11] The violence stirred anger of historical injustice, corruption, inequalities, high unemployment, and monopolization of political power in small ethnic groups etc. The country failed to hold the proprietors accountable causing the ICC to be particularly interested. Uhuru Kenyatta and William Ruto were indicted for allegedly causing the clash between different ethnic groups erupting to a hideous violence. It brought controversies and debates up to date concerning the ICC and drastically changed Kenya's political sphere.[12]

Another important scenario is of the arrest warrant by the ICC to the then president of Sudan, Omar Al Bashir.[13] The ICC placed an arrest warrant for Omar Ahmed Hassan Al Bashir in 2009.[14] He attended a conference in Chad in 2010 and was there for 3 days. International organizations including the European Union and the Human Rights Watch urged Chad to arrest him. According to the Rome Statute Article 87, every member state is required to comply with any arrest warrants given by the ICC. However, there are no repercussions to the refusal to comply. Besides Chad other African states members to the United Nations (UN) and the ICC have not cooperated with the ICC arrest warrant.[15]

In 2010, Omar Al Bashir visited Kenya to join in the celebrations of ushering in the new constitution. Kenya was criticized for failing to arrest him by various International Organizations. Amnesty International said that Kenya regrettably followed the example of Chad by refusing to cooperate with its International obligations by providing a safe place for Al Bashir.[16] In 2015, Omar Al Bashir attended the African Union summit held in South Africa by Robert Mugabe, the

[11] Stephen Brown with Chandra Lekha Sriram, 'The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence In Kenya' (2012) 111/443 African Affairs <https://watermark.silverchair.com/ads018.pdf?> accessed 21st August 2019.

[12] Gabrielle Lynch and Miša Zgonec-Rožej, 'The ICC Intervention in Kenya' (2013) 01 AFP/ILP Chatham House < https://www.chathamhouse.org/sites/default/files/public/Research/Africa/0213pp_icc_kenya.pdf> accessed 21st August 2019.

[13] Gwen P. Barns, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34/6 Fordham International Law Journal < https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2313&context=ilj> accessed 14th July 2019.

[14] See above.

[15] Gwen P. Barns, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34/6 Fordham International Law Journal < https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2313&context=ilj> accessed 14th July 2019.

[16] Amnesty International, 'Kenya Refuses to Arrest President Omar Al Bashir' (2010) https://www.amnesty.org/en/latest/news/2010/08/kenia-se-niega-detener-presidente-sudanes/> accessed 21st August 2019.

president of Zimbabwe and was allowed to fly back to Sudan. Again, South Africa was criticized for not practicing its country's policies and values of protecting International Human Rights.[17]

The Rome Statute establishing the ICC entering into force on 1st July 2002. Some countries established temporary tribunals in place for the investigations of the crimes that took place in those countries i.e. the International Criminal Tribunals for Rwanda ("ICTR") and the International Criminal Tribunal for the former Yugoslavia ("ICTY"). These tribunals inspired the idea of creating a permanent international court.[18] Currently, there are 122 countries that are State Parties to the Rome Statute of the International Criminal Court. Out of them 33 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States, Africa having the largest state parties.'[19]

1.2 Literature Review

Lijun Yung focuses on the Rome Statute, its establishment of the ICC and the basis of the principle of complementarity. He explains the purpose of the ICC and its jurisdiction. It has jurisdiction over the core crimes of international concern.[20] Its purpose is to end impunity thus contributing to the prevention of such crimes. He addresses the principle of complementarity by establishing its purpose and what it means; that complementarity limits the jurisdiction of the ICC. The basic purpose, he argues, is to maintain the sovereignty of states. It is upon all states to prosecute offenders of major violations of international concern.

He analyses the Rome Statute Article 17 which is important for our study. This article provides for the four core scenarios in which the ICC cannot admit the case. It seeks to create a balance between the purpose of the ICC and the national legislation of countries. He critically analyses what it means for a state to be unwilling and unable to investigate and prosecute a case. He explains the importance of adopting the Rome Statute into the national legislation. He argues that this will

[17] The Guardian, 'South Africa's failure to arrest Omar al-Bashir 'is betrayal of Mandela's ideals'' (2015) < https://www.theguardian.com/global-development-professionals-network/2015/jun/24/south-africas-failure-arrest-al-bashir-not-in-keeping-mandelas-ideals> accessed 21st August 2019.

[18] Gwen P. Barns, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34/6 Fordham International Law Journal < https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2313&context=ilj> accessed 14th July 2019.

[19] International Criminal Court, 'State Parties to the Rome Statute' < https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 21st August 2019.

[20] Rome Statute 1998.

require amendment of the national legislation to qualify to be willing and able to investigate and prosecute a case.[21] This study was important to give a basis of the meaning of the principle of complementarity and the content thereof. However, the writer quickly concludes that the reason for the failure of co-operation of the ICC and the African states is the national legislation of the states not reflecting the ICC statute. He fails to recognise the complexity of amending every national legislation. This study sought to determine the other reasons for the failure of complementarity and other ways to make it effective.

Meisenburg narrows his study on the state of Cambodia and the challenges of the incorporation of the ICC statute in its Criminal Code. He describes how each of the four core crimes is incorporated in the national legislative. In his analysis he demonstrates the importance of ensuring that the ICC statute is incorporated into the national legislation and should comply with international law and complementarity. How the national legislation is structured will influence the ICC in its decision as to whether the state is unable and or unwilling to investigate and prosecute crimes. He emphasises the importance of the language in the national legislation complementing the ICC statute.

He looks at the defences provided in the Criminal Code of Cambodia while comparing with those provided in the ICC statute. Cambodia being a monarchy he analyses the contradictions between the ICC and the states' criminal code.[22] the fact that he bases his study on an African state will benefit this study by bringing the issue into context. It will help to understand the African's view and perspective. the writer, despite this, fails to look at how the ICC has failed in ensuring that the principle of complementarity from which the court is based on is failing. This study sought to look at the problems on both sides of the spectrum.

Imoedemhe emphasises that the most important way of achieving complementarity is by implementing the ICC statute in national legislation. He introduces the same-person test. The state must ensure that its domestic investigation encompasses both the same person and substantially the same conduct for which the suspect is standing in trial at the ICC. He explains that co-operation legislation as a means to achieve complementarity with the ICC. As much as the ICC does not

[21] See above.
[22] Simon Meisenberg, 'Complying with Complementarity? The Cambodian Implementation of the Rome Statute of the International Criminal Court' (2015) 5 Asian Journal of International Law pp. 123–142 < https://www.cambridge.org/core> accessed 7thAugust 2019.

expressly give states the provision to do so, the author argues that it is important. States should ensure that pre-existing mechanisms enhance co-operation with the ICC. He finally analyses the complementarity legislation and the different ways states have used to incorporate the ICC statute into their national legislation.

He does a study on how South Africa has implemented its legislation and the procedures it took. He goes on to briefly compare South Africa and a few African states i.e. Kenya and Uganda. He touches on the history of the implementation of the ICC into the national legislation and the process since then.[23] The writer does a case study of different African countries briefly summarizing their history which will be important for this study especially when relating the issue at hand to different African countries and the comparative study in Chapter Three. He, however, fails to look at the weaknesses of his tests as well as the complexity of amending all national legislations which this paper shall tackle.

Merget takes a different approach and focuses on the process the ICC uses to identify whether the state is unwilling and unable to investigate and prosecute the case.[24] He argues that the principle of complementarity is not what it was meant to be. The ICC has given it a different approach envisaging the principle as rules that the member states must follow to reach a certain bar. He explains that the ICC is acting like a 'human rights court' rather than a court of last resort for core international crimes. He also identifies the fact that the ICC tends to focus on the states that are unwilling and unable to investigate and prosecute crimes [25] putting them under high scrutiny.

He critically analyses the state of unwillingness and inability and how the standards set by the ICC directly affects the member states hence robbing them of an opportunity to try their own crimes.[26] The fact that the writer analyses the method of determining how states are unable and unwilling to investigate and prosecute the crimes will be of benefit to this study. the writer however, fails to explain that the African court is failing to investigate these crimes forcing the ICC to do the same.

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[23] Imoedemhe, 'National Implementation of the Rome Statute of the International Criminal Court: Obligations and Challenges for States Parties' (2017) Springer International Publishing pp55-87 < https://link.springer.com/chapter/10.1007/978-3-319-46780-1_3 > accessed 7th August 2019.
[24] Rome Statute 1998.
[25] See above.
[26] Frederic Me¤gret and Marika Giles Samson, 'Holding the Line on Complementarity in Libya' (2013) 11 Journal of International Criminal Justice, 571-589 < https://academic.oup.com/jicj/article-abstract/11/3/571/814564 > accessed 7th August 2019.

This paper determined how the African courts can improve on their newly acquired and expanded jurisdiction of investigating and prosecuting these crimes.

Merget in another article looks at the development of the complementarity with the ICC, what it was and what it is now and tries to find the cause of the friction affecting complementarity in the present. He introduces the idea of having different criminal tribunals handling core international crimes. He discusses the case of Rwanda and the effectiveness of these tribunals. He emphasises that they will be more sensitive to individual cases than the ICC. He argues that in doing so, the purpose of complementarity will be effective; to ensure that the central courts that deal with such cases are the domestic tribunals.

He analyses Article 17 of the Rome Statute[27] and offers how it might be amended. The ICC should have been given more powers i.e. to handle cases of international concerns despite there being domestic courts. This would avoid controversies of the functionality of domestic courts and would instead focus on the ability to maximize international criminal strategies.[28]

The writer thoroughly analyses the cause of friction between African states and the ICC which is beneficial to this study. He fails to recognise the importance of the sovereignty of the state which is the core of the limitation of the jurisdiction of the ICC. This paper sought to factor in the fact that the sovereignty of African states should be respected when finding solutions for the problem at hand.

Laplante argues that the contentious debates relating to the meaning of complementarity is as a result of Article 17 of the Rome Statute. In doing so it creates an unrealistic expectation by the ICC. It also makes a presumption that the ICC is required to intervene due to the incompetent legislative and judiciary of member states. He explains that the term complementarity no longer means that a sovereign state has the discretion to prosecute rather that the state cannot stay inactive in the case of a crime of international concern. The author proposes that the ICC be given a more expansive role to ensure a consistent uniform development of the criminal jurisdiction.[29]

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[27] Rome Statute 1998.

[28] Frederic Me¤gret, 'A Case Against Complementariy' (2017) (<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3100308 >accessed 7th August 2019.

[29] Lisa Laplenta, 'The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence' (2010) 43 J. Marshall L. Rev. 635

He states an important fact of the judiciary of the African court lacking capacity which shall help to set the basis of our discussion concerning the same. This writer also fails to recognise the principle of sovereignty of the African states which is key when determining the extent to which the ICC can get involved in a state's affairs. It fails to see the ICC as a court of last resort. This paper considered this fact. Furthermore, it looked for solutions to help African states to help themselves and not rely on the ICC to do so.

Max du Plessis's article does an analysis on the complementarity of African courts and the ICC. He gives examples of affected African cases such as; the arrest warrant issued for the then DRC's Minister of Foreign Affairs, Yerodia, the arrest of chief of protocol to President Paul Kagame of Rwanda, Rose Kabuye, the arrest warrant issued for the then president of Sudan, Omar Al Bashir and the ICC trial of President Uhuru Kenyatta and Vice President Ruto.[30]

He poses the question of the sensitivity to this case affecting the relationship between the African Union (AU) and the ICC.[31] Despite the fact that the African countries rallied against the ICC the author argues that the ICC was in the scope of its duty. 'The ICC is required to prosecute cases where the state is unable and unwilling to genuinely investigate and prosecute'.[32] Most African states are unwilling to do so therefore the responsibility of the ICC to come in.[33] The writer does an in depth case study on Kenya and the cases brought before the ICC which creates the backbone of this study. He fails to explain immunity enjoyed by these leaders as the reason for the lack of co-operation of the African states which this study shall incorporate.

Research has been done concerning the complementarity of the ICC and African states but very limited focus is on Kenya. This study focused on these gaps related to the challenges of complementarity in Kenya.

<https://scholarship.law.marquette.edu/facpub/?utm_source=scholarship.law.marquette.edu%2Ffacpub%2F146&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 7th August 2019.

[30] Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, 'Africa and the International criminal Court'(2013) 01 Chatham House < http://www.dphu.org/uploads/attachements/books/books_3820_0.pdf> accessed 13th July 2018.

[31] See above.

[32] Rome Statute 1998.

[33] Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, 'Africa and the International criminal Court'(2013) 01 Chatham House < http://www.dphu.org/uploads/attachements/books/books_3820_0.pdf> accessed 13th July 2018.

1.3 Problem statement

The Rome Statute establishes the ICC on the principle of complementarity. The states have primary responsibility to investigate and prosecute crimes in their jurisdiction. The ICC is only allowed to intervene when the state is unwilling and unable to prosecute and investigate the crimes. The rationale is to encourage states to investigate and prosecute cases in their jurisdiction that are against international law, especially the four core crimes.[34] After the 2007 elections, Kenya was investigated by the ICC with respect to crimes done during the post-election violence. Some researchers argue that the ICC has lost its scope of complementarity, and that scrutinising Kenya is unfair and does not fulfil the ICC's main objectives. Other researchers argue that Kenya was indeed unwilling and unable to investigate and prosecute the crimes. This gave us an opportunity to look into the progress of the principle of complementarity and the challenges affecting this principle between Kenya and the ICC. The question was whether the current state of complementarity encourages Kenya and other African states to increase their ability to investigate and prosecute the four core crimes.[35]

Another rationale for the principle of complementarity is to protect and respect the sovereignty of states. AU has been claiming that the ICC is scrutinising African states more than other countries who have similar or worse atrocities taking place in their countries. This has caused tremendous friction between the AU and the ICC.[36] However, the African court does not have the capacity to or rather, is failing to investigate these atrocities. Is the ICC helping the situation by trying to play super hero rather than helping the African court to strengthen its judicial capabilities and developing it towards independence? This study sought to look for solutions on how the ICC can respect the sovereignty of the African states without jeopardising its mandate. We also tackled the problem of why the African court is not able to investigate international crimes and how it can get there.

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[34] Juianita Goebertus, 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya' (2011) 14(1) Yale Human Rights and Development Journal < https://pdfs.semanticscholar.org/0406/0c386358d60a3cb8155841aa6da78e04dc50.pdf> accessed 14th July 2018.

[35] Rome Statute 1998

[36] Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, 'Africa and the International criminal Court'(2013) 01 Chatham House < http://www.dphu.org/uploads/attachements/books/books_3820_0.pdf> accessed 13th July 2018.

1.4 Theoretical Framework

1.4.1 The theory of liberal Internationalism

Liberalism is a western political philosophy. It suggests that states can peacefully coexist and that not all states are at war with each other all the time. It gives an optimistic view of the relationship between international bodies and sovereign states. Interacting with them like they are on the verge of war or like there is always a threat of war is an unrealistic way. It should not always be a zero-sum-game.[37] There are different types of this theory. This research is interested in the liberal internationalism. Hedley Bulls puts it this way, "a group of states with common interests and common values decide to bind themselves on a set of rules and governance of another international party." The theory argues that co-operation by states to form an integrated international community is paramount to increase economic and social growth and to effectively respond to international security concerns. It also suggests that other international parties should be invested in world politics directly placing an emphasis on the role that international organizations play.[38]

This theory explains the reason behind the formation of the then League of Nations and the now UN. Some argue that it is a way of Western countries trying to project their ideologies in the international system. It is seen as an international program of peace and security where the international governing bodies seek to replace the sovereign state system with a world government. The purpose of internationalism is not to do away with national independence but to weaken the states by immersing them in rules.[39]

The Rome Statute entered into force on the 1 of July 2002. It was the first ever permanent international court in the world which was given a mandate to investigate and prosecute the four core crimes i.e. 'genocide, crimes against humanity, crimes of aggression and war crimes'.[40] States

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[37] Libre Text, 'Theories of International Relations' (2019) Social Sciences <https://socialsci.libretexts.org/Bookshelves/Political_Science/Map%3A_A_Primer_on_Politics_(Sell)/9%3A_International_Relations/9.2%3A_Theories_of_International_Relations> accessed 20th August 2019.

[38] Rebecca Devitt, 'Liberal Institutionalism: An Alternative IR Theory or just Maintaining the Status Quo' E-International IR Students (2011) <https://www.e-ir.info/2011/09/01/liberal-institutionalism-an-alternative-ir-theory-or-just-maintaining-the-status-quo/> accessed 20th August 2019.

[39] Cecelya Lynch, 'The Promise and Problems of Internationalism' (1999) 5(1) Global Governance, Brill Pg 83-101 <https://www.jstor.org/stable/pdf/27800221.pdf?refreqid=excelsior%3A66784552d420b79c7ce6c10c1b1d3d7d> accessed 20th August 2019.

[40] ABA-ICC Project, 'Evolution of the International Criminal Court'<https://www.aba-icc.org/about-the-icc/evolution-of-international-criminal-justice/> accessed 20th August 2019.

ratified the Rome Statute therefore being bound by the treaty. This explains the theory in that states with common interest to preserve international security came together to form the ICC. There have been critics concerning the court. Some argue that it is the Western way of imposing their rules and sanctions on weaker state parties. This can be seen in the scrutiny of African countries by the ICC. Others have argued that the ICC tries to implement what should be and does not accept what is causing unrealistic expectations.

1.4.2 Theory of Neo- Marxism

Marxism saw the world in the view of production modes; such that these modes of production govern the social and political relations. Marx, Engels and Lenin expounds the relationship between states in different approaches. First, the relationship between states is dependent on the dominant mode of production and the extent to which it has developed its modes of production. Secondly, the foreign policy of a state is directly linked to its domestic policy which eventually affects international relations. The different national policies come together to form new unique combinations. Third, it argues that states do not seek to realise their national interest but seek to realise the interests of a particular group of people. Lastly, it views the international system as a distinct identity created by the supernatural state leading in capitalism. It influences the international division of labour and eventually creates the world economy.[41]

This can possibly explain the reason behind the tension between African states and the ICC[42] and the feeling of being dominated by certain rules and obligations that emerges from a western culture. The ICC being the stronger international subject imposes particular rules on African states that might be unrealistic or that might not resonate with their culture. On the other hand, it could explain the reason why states ratified Rome Statute and do not withdraw their membership despite the many critics; the need for a state to depend on another state for particular resources as well as the feeling of being identified in a group of people.

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[41]B. S. Chimni ' Marxism and International Law: A Contemporary Analysis' (1999) 34(6) Economic and Political Weekly pg 337, 338 <https://www.jstor.org/stable/pdf/4407628.pdf?refreqid=excelsior%3A401f14244d85fd1e874290b9351b6727> accessed 20th August 2019.

[42] Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, 'Africa and the International criminal Court'(2013) 01 Chatham House < http://www.dphu.org/uploads/attachements/books/books_3820_0.pdf> accessed 13th July 2018.

1.4.3 Theory of Realism

Theory of realism argues that states seek self-preservation. All nations are working to increase their power and those that manage to hoard the most power will eventually thrive. The dominant party is the nation and therefore the decisions made in an international sector is to benefit the nation before any other party. Theorists put it this way, 'our selfishness, our appetite for power and our inability to trust others leads to predictable outcomes' and that no one can help a nation like the nation itself. Waltz looked at this theory based on the reasoning that the decisions that nations come up with are not based on just the human character but also a formula. In the international sector, it is dependent on the state with the most powers when measured against other states.[43]

Similar to other theories discussed above, this theory possibly explains the reason behind the 'rebellion' by African states against the ICC and the strict rules imposed on them. Most African leaders believe that no state can help another state except the state itself. In addition, the ICC focuses on African states more than other states in the world based on the benefits that the dominant-powers get from them; that people are still selfish and as a result seek their own need before others.

1.5 Research questions

1. Why are African states reluctant to cooperate with the ICC concerning the prosecution of African leaders?
2. Why is complementarity failing between Africa and the ICC?
3. Why are African states' justice mechanisms not enough to complement the ICC?
4. What can the ICC do to assist African states to improve their justice system?
5. How can other relevant organizations contribute to improve the relationship between African states and the ICC?

[43] Sandrina Antunes, 'Introducing Realism in International Relations Theory'(2018) E-International Relations Student' <https://www.e-ir.info/2018/02/27/introducing-realism-in-international-relations-theory/> accessed 20th August 2019.

1.6 Research Objectives

1. To explain the problems causing the principle of complementarity between African states and the ICC to fail.
2. To analyse the incorporation of the elements and the principles of the Rome Statute fully in African states' legislation especially Kenya's to enhance complementarity.
3. To determine ways to improve the justice mechanisms in African states so as to strengthen the principle of complementarity.
4. To give recommendations to improve the relationship between the ICC and African states.
5. To find ways that relevant organizations can contribute to improving the relationship between African states and the ICC.

1.7 Justification of the study

The purpose of this study was to investigate the challenges facing the principle of complementarity between the ICC and the African states. It sought to analyse the reason behind the scrutiny of the ICC on African states and the importance of complementarity. It is important that besides the ICC investigating and prosecuting the cases in African states, that their actions pose a positive impact and cause an urge for African states to develop their judicial system in order to investigate crimes within their own jurisdiction. This however is not the case; this paper sought to investigate the reason why this principle seems to be failing in reality. Finally, this paper will provide possible solutions for the failing relationship of the ICC and African states.

It provided well needed information to International Organizations and judiciary bodies in Africa on strategies and methods of improving the complementarity of African states and the ICC. In the future, this could ensure that the states are more willing to develop their judicial bodies to investigate and prosecute cases in their own jurisdiction avoiding scrutiny by the ICC. It could also prevent more states from threatening to withdraw from the ICC.

1.8 Hypotheses

1. The Rome Statute which governs the functions of the ICC is sufficient to end impunity.
2. The ICC is genuinely focusing on African states due to the grievous crimes in the area.

3. The ICC is fulfilling its objective by encouraging African states to investigate and prosecute crimes[44] in their domestic jurisdiction.

1.9 Methodology

The main method used in this study was desktop research. It involves library sources, online journal articles, information from credible academic websites and books. These sources came in handy in understanding the relevant principles of international law and determining how the International Criminal Court functions. The internet was useful tool in analysing what has been written about this topic in the past in order to determine what gap this study aims to fill.

Secondly, doctrinal research which involves an analysis of statutes, international conventions, case- laws as well as various constitutions. Doctrinal research was useful in proving or disproving the first hypothesis as highlighted above. Lastly, the historical research involved a study on the historical events in Kenya post the 2010 elections i.e. the case against Uhuru Kenyatta and William Ruto at The Hague. This method of research was useful so as to understand the context of the problem in question.

Thirdly, this study used a comparative research which involved a comparison of a factual background and legislative framework of three states with a view to finding the similarities and differences. It was necessary so as to pick why some laws and application of the laws worked for other states and did not work for others. It also emphasised on the fact that development of some states played a role on the co-operation or non-co-operation with the ICC.

Lastly, non-doctrinal research is a research which involves collecting data through interviewing experts in the field of study. This type of research was useful to collect information from learned lawyers, advocates, professors, people who are conversant with international law and experts in the field. It will be of great benefit to this study as it will help to collect more accurate information and a more practical view of the study.

[44] Rome Statute 1998

1.10 Chapter breakdown

Chapter One: Research Proposal

This was a research proposal that gave a background of the study and analysed other literature done by other scholars finding the gap that was the reason for this study. It identified the problem in question as well as the research questions and objectives for this study. The chapter went further to analyse the theoretical framework, the hypotheses, methodology and justification of the study.

Chapter Two: The Historical Background and Conceptual Framework of the Complementarity Model

This gave a history of the principle of complementarity for the purpose of placing the study in context. It further explained the principle of complementarity from the relevant international legal instruments and sought to further interpret the principle in context. It also analysed other international law principles that were important to the study. It finally looked at the interpretation of the principle in various African states views.

Chapter Three: A Comparative Study of Kenya, The United States and Germany

Chapter Three gave a comparative study of Kenya, Germany and the United States carefully identifying the similarities and differences among the three countries thereby drawing lessons and drawbacks that Kenya (representing Africa) can learn from.

Chapter Four: Africa's Response to The ICC and the Establishment of the Malabo Protocol

Chapter Four analysed the problem statement of the study by identifying and doing an in depth study on the issues and challenges affecting the principle of complementarity in Kenya. It focuses on case studies and legal opinions by experts in the field. It set out measures put in place by the AU with the intention to curbing these challenges facing the principle of complementarity.

Chapter Five: Summary of findings, Conclusions and Recommendations

Chapter Five gave a summary of the findings of the research study, conclusions and recommendations.

CHAPTER TWO

THE HISTORICAL BACKGROUND AND CONCEPTUAL FRAMEWORK OF THE COMPLEMENTARITY MODEL

1.1 Introduction

This chapter will discuss the historical development of the complementarity model. It will also explore the various principles and theories of International Law and tie them to the Rome Statute so as to bring a better understanding of the statute and the principle of complementarity. The principles that will be discussed will show a basis on which the Rome Statute and the principle of complementarity were built upon.

Part two of this chapter shall discuss the jurisdiction of the court in trying the cases brought before it and its admissibility. The chapter will also give an insight into the functions of the ICC and the United Nations Security Council (UNSC) in prosecuting the perpetrators of international crimes. The chapter will finally look into the responsibility of good faith that is placed upon all member especially African states to comply with the treaty.

2.1 The Historical Development of the Principle of Complementarity

2.1.1 Post World War I

The end of World War I led to an idea of creating an international tribunal that would have the jurisdiction to prosecute perpetrators responsible for war crimes in that period. As a result, the Versailles Treaty was established.[45] However, countries like Germany would later oppose the idea arguing that it would infringe on their right to state sovereignty. Despite their unstable government as a result of the war, they insisted on trying the criminals under their national jurisdiction.[46] Even so, according to Article 228 of the Versailles Treaty, the German government was required to give up any suspects accused of committing war crimes during the World War I. They were to be tried

[45] Mohamed M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) Vol 23(4) Michigan Journal of International Law 869 < https://repository.law.umich.edu/mjil/vol23/iss4/3?utm_source=repository.law.umich.edu%2Fmjil%2Fvol23%2Fiss4%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages > accessed March 13th 2020.

[46] Michael Both, 'Complementarity: Ensuring compliance with international law though criminal prosecutions — whose responsibility?' (2008) Vol. 83, No. 4, 10 Jahre Rom-Statute, pp. 59-72 < https://www.jstor.org/stable/23774716 > accessed March 13th 2020.

in the international tribunal.[47] The Allied agreed to waive their right to prosecute the suspects of the war crimes to the German government despite the government's capacity to do the same.[48]

As early as then, though not as solid the principle of complementarity was set in the wording of the Versailles Treaty. Article 228 of the Versailles Treaty provides that,

> The German Government recognises the right of the Allied and Associated Powers to bring before military Tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishment laid down by law. This provision will apply not withstanding any proceedings or prosecution before a Tribunal in Germany or in the territories of one of her allies…[49]

Germany incorporated this section into their national laws.[50]

The Treaty recognised Germany's co-operation to punish the persons accused of having committed the war crimes giving precedence to national jurisdiction. The Allied Tribunal were to take over the proceedings if Germany failed to prosecute the accused persons. Despite the provisions of this treaty, the Tribunal failed to bring the perpetrators to justice. This is mainly because Germany passed a new legislation replacing the former one giving it national jurisdiction to try the crimes under the Leipzig Trials.[51] The efforts of the Allied Tribunal to prosecute the suspects as well as Germany incorporating the treaty into their national brings out the principle of complementarity.

2.1.2 Post-World War II

To try and curb the problem of dealing with the war crimes committed in the Second World War, the League of Nations in 1941 established the London International Assembly.[52] Previously, the major atrocities committed in the world war went undealt with. The Assembly's mandate was to

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[47] M. Bassiouni, DePaul University, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court.' (1997) 10 Harvard Human Rights Journal. < https://works.bepress.com/m-bassiouni/34/ > accessed 14th March 2020.
[48] See above.
[49] Versailles, Treaty 1919.
[50] M. Bassiouni, DePaul University, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court.' (1997) 10 Harvard Human Rights Journal. < https://works.bepress.com/m-bassiouni/34/ > accessed 14th March 2020.
[51] M. Bassiouni, DePaul University, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court.' (1997) 10 Harvard Human Rights Journal. < https://works.bepress.com/m-bassiouni/34/ > accessed 14th March 2020.
[52] Mohamed M. El Zeidy, *The Principle of Complementarity: Origin, Development and Practice* (2008) 59.

study the prosecution of war crimes.[53] It was discovered that national courts were not capable of trying all war crimes for various reasons e.g. lack of jurisdiction, lack of resources or the after-war effect. A good example of the latter was Germany which was tremendously affected after the world war.[54]

The commission's idea of an international criminal court was for it to try all war crimes committed that were beyond the national court's ability. Its basis was the principle of complementarity whereby, all national courts were expected to take responsibility for any war crimes committed under their jurisdiction.[55] The court could intervene when the state found it impossible or inconvenient to try the case. This could only be determined through an admissibility test.[56]

In 1942, the United Nations War Crimes Commission (UNWCC) was created. This commission recognised the importance of national courts trying their own cases without the interference of the international court. The basis for their argument was that the Anglo- American legal systems were different from the continental legal systems. This meant that some crimes will have less harsh punishments degrading the notion of justice in those states. The focus on establishing the UN War Crimes court became irresolute leading to the idea of coming up with mixed international tribunals.

2.1.2.1 Nuremburg International Military Tribunal

The International Military Tribunals (IMT) were established to focus on the most serious international crimes while the rest of the cases which formed a large percentage were to be tried by national jurisdictions.[57] This reflected a form of complementarity as it emphasised on the corporation between the IMT and the national jurisdiction.[58] The Nuremburg Tribunal was specifically formed to try the major crimes whose offences had no particular geographical localization while the national criminal courts were responsible for dealing with the German war crimes that were committed in that particular country where the court resides.[59] As a result, of the

[53] William Schabas OC MRIA, 'The United Nations War Crimes Commission's Proposal for an International Criminal Court' < https://core.ac.uk/download/pdf/43504795.pdf > accessed 16th March 2020.
[54] Mohamed M. El Zeidy, *The Principle of Complementarity: Origin, Development and Practice* (2008) 59.
[55] See above.
[56] See above.
[57] Mohamed M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) Vol 23(4) Michigan Journal of International Law 869 < https://repository.law.umich.edu/mjil/vol23/iss4/3?utm_source=repository.law.umich.edu%2Fmjil%2Fvol23%2Fiss4%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages > accessed March 13th 2020.
[58] See above.
[59] Mohamed M. El Zeidy, *The Principle of Complementarity: Origin, Development and Practice* (2008) 59.

twenty two accused criminals that were tried, nineteen were declared guilty and three were acquitted.[60]

The IMT had a notion of primacy of international law. This is reflected on the fact that it only tried major international crimes leaving the minor ones under the responsibility of national courts. However, the IMT had no direct relationship with the national court. Therefore, the idea was to divide the tasks such that the Nuremberg tribunal had jurisdiction where the national courts did not and vice versa giving it a complementarity aspect.

2.1.2.2 The Ad-hoc tribunals

The first ad-hoc tribunal was created in 1993 known as The International Criminal Tribunal for the Former Yugoslavia (ICTY) for the sole purpose of prosecuting the persons responsible for the serious crimes against international humanitarian law in the former Yugoslavia since 1991. In 1994, the Security Council formed another ad-hoc tribunal following the grievous acts committed in Rwanda known as the International Criminal Tribunal for Rwanda (ICTR).[61] The two tribunals are similar in nature i.e. the statutes and institutions are similar. The tribunals also share a prosecutor and an Appeals Chamber. Both tribunals had primacy over national courts. This was due to the appalling situation in both countries. The Security Council saw the situation as a threat to international peace and security.[62]

The statutes of both tribunals outline the scope of their jurisdictions in relation to national courts. Article 9 of the ICTY statute states that;

> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
>
> 2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunals.[63]

[60] See above.
[61] Mohamed M. El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 Bis of the Ad Hoc Tribunals' (2008) Vol 57 No. 2 The International and Comparative Law Quarterly 403-415 < https://www.jstor.org/stable/20488212> accessed March 13th 2020.
[62] See above.
[63] ICTY Statute, Art. 9(2).

The above section was later repeated in article 8 of the ICTR statute with respect to the International Tribunal for Rwanda.[64] This provision bases the tribunals on primacy and concurrent jurisdiction. In other words, the tribunal was supreme to the national courts.[65] The prosecutor could at any stage of the proceedings take up the case.[66] Ideally, some argue that the purpose of primacy was due to the fact that national courts lacked the ability to carry out fair trials.[67] However, in practice, the tribunals have worked on the basis of division of powers whereby tasks are divided between the international tribunals and the national court.[68] Tasks like investigation and prosecution were tackled by the national courts while the rest were handled by the international tribunal. [69]

Although this kind of model still gives some sort of primacy to international criminal courts it creates a kind of relationship between the two courts which is closer to the idea of complementarity.[70] In the principle of complementarity, the international court only comes in when the national court is unable or unwilling to investigate or prosecute a case. Ideally, the national courts and the ICC are meant to work together with the main agenda of dealing with serious international crimes.

In 2004, the rule 11 was amended changing the primacy rule to a model more similar to complementarity.[71] The prosecutor only deals with serious international crimes leaving the more minor ones to national courts.[72] The idea as stated above is to distribute functions between the

[64] ICTR Statute, Art. 8(2).
[65] Mohamed M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) Vol 23(4) Michigan Journal of International Law 869 <https://repository.law.umich.edu/mjil/vol23/iss4/3?utm_source=repository.law.umich.edu%2Fmjil%2Fvol23%2Fiss4%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages > accessed March 13th 2020.
[66] See above.
[67] Mohamed M. El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 Bis of the Ad Hoc Tribunals' (2008) Vol 57 No. 2 The International and Comparative Law Quarterly 403-415 < https://www.jstor.org/stable/20488212> accessed March 13th 2020.
[68] Mohamed M. El Zeidy, *The Principle of Complementarity: Origin, Development and Practice* (2008) 59.
[69] See above.
[70] Mohamed M. El Zeidy, *The Principle of Complementarity: Origin, Development and Practice* (2008) 59.
[71] Mohamed M. El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 Bis of the Ad Hoc Tribunals' (2008) Vol 57 No. 2 The International and Comparative Law Quarterly 403-415 < https://www.jstor.org/stable/20488212> accessed March 13th 2020.
[72] See above.

national courts and the international tribunals.[73] This model is also similar to the one in the International Military Tribunal in Nuremburg.[74]

The notion of complementarity has developed over the years and has been embodied in the Rome Statute of the ICC. The idea is to balance the sovereignty powers of states and international peace and security. The following topics will look into the depth of the complementarity model discussing the international principles and concepts that it entails.

2.2 The principle of Complementarity

The principle of complementarity is established in the jurisdiction and the admissibility of the ICC.

2.2.1 Jurisdiction of the ICC

Article 1 of the Rome Statute establishes the jurisdiction of the court by stating that,

> An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.[75]

'Serious crimes of international concern' which the court is limited to includes: The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression. This specific jurisdiction given to the court is as a result of the World War II atrocities. The objective of limiting the court to the most serious crimes is due to the fact that it is unrealistic to expect the court to rule all crimes against international law principles. It is only reasonable to deal with the crimes with the largest international criminal responsibility.[76]

The jurisdiction of the court is limited by the principle of complementarity; as emphasised in the preamble of the Rome Statute, "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."[77] The national jurisdiction comes before the criminal jurisdiction of the ICC. This is to encourage the states to place a system in

[73] Mohamed M. El Zeidy, *The Principle of Complementarity: Origin, Development and Practice* (2008) 59.
[74] See above.
[75] Rome Statute of the International Criminal Court 1998, Article 1.
[76] Imoedemhe, 'National Implementation of the Rome Statute of the International Criminal Court: Obligations and Challenges for States Parties' (2017) Springer International Publishing pp55-87 < https://link.springer.com/chapter/10.1007/978-3-319-46780-1_3 > accessed 7th August 2019.
[77] Rome Statute of the International Criminal Court 1998

place effective enough to curb crimes of international concern in their respective states.[78] The principle also respects and protects the sovereignty of the states. However, the idea of the sovereignty of states as will be discussed later in the study has been challenged due to the fact that a state can no longer hide under that veil as a defence of not allowing the ICC to interfere with the situation.

2.2.2 Admissibility threshold of the ICC

The admissibility of the court is set out in Article 17(a, b, c) of the ICC statute for the relevance of this study.

> The court can only determine that a case is inadmissible if: (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.[79]

Unlike other international courts the ICC has placed its threshold to determine the inadmissibility of the case rather than the admissibility thereof. This means that it is the responsibility of the person arguing that the case is inadmissible to prove the admissibility thereof.[80] The power of the court to declare a case admissible relies on the state's effort to curb the international crime. It becomes its responsibility to interfere if the state in question is "unable or unwilling to investigate and prosecute the international crime."[81] The criterion for finding admissibility is not as simple as it looks on paper. The drafters attempted to make it easier by defining what 'unwillingness and inability' entails in Article 17(2).[82]

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[78] Lijun Young, 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court' (2005) Vol. 4, No. 1 Chinese Journal of International Law, 121–122 < https://academic.oup.com/chinesejil/article-abstract/4/1/121/2365933> accessed 7th August 2019.

[79] Rome Statute of the International Criminal Court 1998, Article 17.

[80] Julio Baccio, 'National Implementation of ICC Crimes Impact on National Jurisdictions and the ICC' (2007) Vol. 5 Journal of International Criminal Justice 421-440 <https://academic.oup.com/jicj/article-abstract/5/2/421/869743> accessed 2nd March 2020.

[81] Rome Statute of the International Criminal Court 1998.

[82] Mohammed Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) Vol. 23, Issue 4 Michigan Journal of International Law, 898 <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1351&context=mjil> accessed 29th February 2020.

2.2.2.1. Unwillingness

In order to determine unwillingness, the court must find evidence that "the proceedings that were or are being undertaken or the national decision" concerning the case are shielding the person from taking criminal responsibility.[83] The important thing to note is that the court cannot declare that the state is unwilling to investigate and prosecute the case without evidence of the same. This is difficult since the court will have to look into the political system beyond the case itself. This will definitely, in most circumstances be opposed by the state.[84]

All states take pride in their position as sovereign states so much that they would not so easily allow the UN to scrutinise their system. In the Kenyan context, intervention of the ICC led to political tension among different parties. It resulted in threats to ICC witnesses, the communities that were affected by the 2007 post-election violence and civil societies that were involved with the purpose of getting justice. Furthermore, the state requested for a deferral under Article 16 of the Rome Statute.[85] To find the unwillingness, the court will be required to justify that the intent of the state was to shield the suspect. This can be seen by how the investigations were or are being undertaken. It could be evident that the state is doing shoddy investigations so that the person is not found to have any responsibility.[86]

The Rome Statute provides that the court will determine the unwillingness and inability of a state to prosecute or investigate a case with regard to due process. Introducing the term 'due process'; shows that there is a process that is seen as appropriate. Therefore, if a state decides to or does not follow the necessary process, it could be seen as unwilling to genuinely prosecute or investigate the case. This is especially if the intention of not following the said process was as a result of bad faith.[87]

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[83] Rome Statute of the International Criminal Court 1998, Article 17(2) (a).
[84]Julio Baccio, 'National Implementation of ICC Crimes Impact on National Jurisdictions and the ICC' (2007) Vol. 5 Journal of International Criminal Justice 421-440 <https://academic.oup.com/jicj/article-abstract/5/2/421/869743> accessed 2nd March 2020.
[85] Kent Law School, ''UhuRuto' and Other Leviathans: The International Criminal Court and the Kenyan Political Order.' (2014) Vol. 7, African Journal of Legal Studies 399-427 <https://brill.com/view/journals/ajls/7/3/article-p399_6.xml?language=en > 14th August 2019.
[86]See above.
[87] Anna Bishop, 'Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge' (2013) Minnesota Journal of International Law 325
< https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mjgt22&section=14> accessed 2nd March 2020.

2.2.2.2 Inability

Pursuant to Article 17(3) of the Rome Statute, "the state of a country being unable to investigate and prosecute a crime is determined in two ways; whether due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[88]

The judicial system may collapse due to civil wars or a civil war in the state, natural disaster etc. The Statute goes on to identify two forms of collapse i.e. total collapse of the judicial system and substantial total collapse meaning that the judicial system is not functioning completely. Substantial collapse is not necessarily cast on stone.[89] The court however, must show evidence that the part of the judicial system that is negatively affected has caused a big impact on the investigation and prosecution of the case. For example, the judicial system may lack judges, investigators or prosecutors to work on the case.[90]

In 2002, after the ICC went into force, Uganda referred a case to the ICC involving the Lord Resistance Army.[91] This was a terror group that caused so much havoc in Uganda by ruthlessly killing masses of people and taking glory in their massacres, abducting children, causing war etc. the government attempted to use military action to stop the group which failed terribly. They tried to negotiate with the group which also bore no fruits. By the time the government opted to refer the case to the ICC, the situation in Northern Uganda had become defenceless. Both the military and judicial system had collapsed.[92]

In the case of *The Prosecutor v. Saif Al-Islam Gaddafi*;[93] the Pre- Trial Chamber found the judicial system in Libya genuinely unable to handle the case of Gaddafi. it failed to secure a transfer of the suspect into safe custody, to get adequate witnesses for the case and to also get a legal

[88] Rome Statute of the International Criminal Court 1998, Article 17(3).
[89] Julio Baccio, 'National Implementation of ICC Crimes Impact on National Jurisdictions and the ICC' (2007) Vol. 5 Journal of International Criminal Justice 421-440 <https://academic.oup.com/jicj/article-abstract/5/2/421/869743> accessed 2nd March 2020.
[90] See above.
[91] Situation in Uganda The Prosecutor v. Joseph Kony and Vincent Otti ICC-02/04-01/05 <https://www.icc-cpi.int/CaseInformationSheets/KonyEtAlEng.pdf> accessed 9th April 2020.
[92] Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) Vol. 9 No. 2 The American Journal of International Law 403-421 <https://www.jstor.org/stable/1562505 > accessed 7th April 2020.
[93] The Prosecutor v. Saif Al-Islam Gaddafi ICC-01/11-01/11 <https://www.icc-cpi.int/libya/gaddafi> accessed 9th April 2020.

representative for the suspect. Due to the struggles of peace that Libya was facing at the time, the judicial system was collapsing.[94]

This criterion is debatable especially when considering the development of states. African states have a higher chance of falling short to the required competency level of a judiciary system while developed countries may get away with it due to their advanced judicial systems. If the court was to determine the inability of a developing state to investigate and prosecute by evaluating its judicial system, it may be said to be a violation of the state's sovereignty.[95]

2.3 *Jus cogens* and Obligations *Erga Omnes*

2.3.1 *Jus cogens*

Jus cogens has been defined in the Vienna Convention on the Law of Treaties (VCLT) as a treaty that conflicts with the peremptory norm of general international law.[96] A peremptory norm being a norm that is accepted by the international community as a whole and in which no derogation can be allowed nor can it be modified except by a subsequent norm of a similar character.[97] The literal translation of the term *jus cogens* is compelling law which means as discussed in the VCLT as a law that cannot be derogated.[98]

One of the main reasons for the establishment of this principle is to ensure public order and policy within domestic legal orders. Article 53 brings about two approaches to *jus cogens.* The principle is proposed as a rule of general international law; it is accepted as a peremptory norm in its wholeness by the international community. International treaties and opinions resulting from international cases as well as commissions have emphasised on the superiority of the hierarchy

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[94]Thomas Hamilton, 'Case Admissibility at the International Criminal Court' (2015) Vol. 14, The Law and Practice of International Courts and Tribunals 305-317 <https://www.google.com/url?q=https://www.researchgate.net/publication/281575960_Case_Admissibility_at_the_International_Criminal_Court&sa=D&ust=1586429980171000&usg=AFQjCNGtuyDV5znjtVGELQGZX2v77IH9dg> accessed 9th April 2020.

[95]Anna Bishop, 'Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge' (2013) Minnesota Journal of International Law 325 < https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mjgt22&section=14> accessed 2nd March 2020.

[96] Vienna Convention on the Law of Treaties (1969) Article 53

[97] Vienna Convention on the Law of Treaties (1969) Article 53 'Treaties conflicting with a peremptory norm of general international law ("jus cogens")' <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. >accessed 7th March 2020.

[98] Oxford Bibliographies <https://www.oxfordbibliographies.com/ > accessed 7th March 2020.

that *jus cogens* norms lay. "Article 41(2) International Law Commission (ILC)'s Articles on State Responsibility, 2001 provides that no state shall recognise as lawful a breach of a peremptory norm." In the North Sea Continental Shelf Case[99], the judge stated that any reservation that is made by a state that is a breach of a peremptory norm is unlawful therefore void.[100]

A legal basis exists to determine which crimes are *jus cogens*. From that legal criterion, war crimes, crimes against humanity, genocide, piracy, slavery and aggression are said to be *jus cogens.* The criteria includes determining: *opinio juris* in Customary International Law which is the state practice, international treaties that hold these crimes as grievous atrocities which cannot go unpunished, ratification of those treaties by a significant number of states as well as prosecutions and decisions by the ad hoc tribunal.[101]

2.3.2 Obligations *Erga Omnes*

The literal meaning of *Obligations Erga Omnes* is 'towards all'[102]. This means that it is the duty of all states to promote and protect any international rules that are obligations *erga omnes*. In the *Barcelona Traction case*,[103] The International Court of Justice explained this principle as namely 'obligations owed by states to the international community as a whole, intended to protect and promote the basic values and common interests of all.'[104] An *erga omnes* arises when a norm that is *jus cogens* is universally accepted by states through their practice i.e. *opinio juris.*[105]

The International Law Commission adopted the Articles on Responsibility of States for Internationally Wrongful Acts (ASR) in 2001 explaining *erga omnes* as important obligations of international concern that protect the international community as a whole. It has a collective nature to it therefore placing a responsibility on all members of the international community to protect

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[99] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Netherlands)* , I.C.J. Reports 1969, p.3, International Court of Justice (ICJ), 20 February 1969, <https://www.refworld.org/cases,ICJ,50645e9d2.html> accessed 2nd April 2020

[100]Malcom. N. Shaw, *International Law* (6th Edition, Cambridge University Press 2008).

[101] M. Cherif Bassiou, 'International Crimes: Jus Cogens and Obligations Erga Omnes' (1996) Vol. 59, No. 4 Law and Contemporary Problems, pg. 63-74 < https://www.jstor.org/stable/1192190 > accessed 7th March 2020.

[102] Oxford Reference <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095756413>

[103] Barcelona Traction, Light and Power Company Ltd [1970] ICJ Rep 32.7 <https://www.icj-cij.org/files/case-related/50/050-19640724-JUD-01-00-EN.pdf> accessed 9th April 2020.

[104] Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford Scholarship Online 2000) <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198298700.001.0001/acprof-9780198298700> accessed 7th March 2020.

[105] M. Cherif Bassiou, 'International Crimes: Jus Cogens and Obligations Erga Omnes' (1996) Vol. 59, No. 4 Law and Contemporary Problems, pg. 63-74 < https://www.jstor.org/stable/1192190 > accessed 7th March 2020.

the obligations. Good examples are international treaties concerning human rights. Some of the obligations and principles that are contained in those treaties are practiced in all states forming Customary International Law.[106] The ICC was established for the sole purpose of investigating and prosecuting crimes of the highest international concern.[107] These obligations were and have been recognised by all state parties.

The preamble of the ICC implicitly affirms obligation *erga omnes* as an important principle in international law. Where it states that, 'Affirming that the most serious crimes of concern to the international community as a whole...'[108] That statement refers to the obligations binding all subjects of international law whether or not they are party to the Rome Statute of the ICC. It emphasises on the principle of universality. Whether or not states leave the ICC or are party to it, it does not change the responsibility on all states to investigate and prosecute the crimes. This brings us to the second principle of solidarity which is recognised in the preamble[109], 'Recognizing that such grave crimes threaten the peace, security and well-being of the world....' All states, party to the statute or not have a legal responsibility to protect the values that govern the international community, one of them being preserving peace and promoting human rights.

Jus cogen brings into acceptance that there are certain international crimes that cannot go unpunished. It is through this principle, that states have recognised this fact through customary international law. It was therefore not a new concept when the ICC decided to base its jurisdiction on the four core crimes that are of serious international concern.[110] *Erga Omnes* now places an obligation on all states to comply with the Rome Statute by making an effort to investigate and prosecute those crimes.[111]

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[106] Erika D. Wet, 'Invoking obligations erga omnes in the twenty-first century: Progressive developments since Barcelona Traction' (2013) Vol.38 SAYIL.
[107] Rome Statute of the International Criminal Court 1998, Article
[108] Rome Statute of the International Criminal Court 1998, Preamble Para 4.
[109] Federica Gioia, 'State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court' (2006) Vol.19 Leiden Journal of International Law, pp. 1095–1123 <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/state-sovereignty-jurisdiction-and-modern-international-law-the-principle-of-complementarity-in-the-international-criminal-court/21B40D4BFDB94AF14B92BD72D027E843 > accessed 12th March 2020.
[110] Marc Weller, 'Undoing the global constitution: UN Security Council action on the International Criminal Court' (2002) 78 International Affairs 603-712 <https://onlinelibrary.wiley.com/doi/abs/10.1111/1468-2346.00275> accessed 9th April 2020.
[111] See above.

Article 49 and 50 of the Geneva Convention strengthens the above doctrines by providing that states have an obligation to search for the persons who have committed or have ordered to be committed such acts that are grievous. Parties are to make any relevant legislative measures that will provide for penal sanctions against such persons.[112] Furthermore, the concepts support the universal jurisdiction that the ICC has. The court can intervene when it is evident that a state is going against or is not able to fulfil its duty to investigate these cases.[113]

2.4 Sovereign Immunity

Sovereign Immunity is a concept in international law that allows sovereigns in states not to be subject to judicial processes. The rationale was held in Holland v. Lampen-Wolfe[114] where Lord Millett stated that, "State immunity is a creature of customary international law and derives from the equality of sovereign states."[115] It originated from English Common Law where the crown could not be sued under any circumstances unless by consent. It was derived from the saying that goes 'The King can do no wrong.'[116] The concept was that the acts done by the sovereigns themselves were done on behalf of the state and not for personal gains. Therefore, it would not be just to subject the sovereign to judicial processes as he represents the state itself. There was a thin line between the state and the head of state.[117]

With time however, the doctrine of sovereign immunity began to raise questions. Heads of States could get away with atrocious acts by hiding under the veil of Sovereign Immunity or State Sovereignty.[118] This led the international community to come up with the doctrine of restrictive immunity. This doctrine distinguished between public and private acts. Public acts were acts done

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[112] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, <https://www.refworld.org/docid/3ae6b36d2.html > accessed 9 April 2020.

[113] Jan Wauters, 'The Obligation to Prosecute International Law Crimes' (2005) < https://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf> accessed 9th April 2020.

[114] Holland v Lampen- Wolfe [2000] UKHL 40 <https://opil.ouplaw.com/view/10.1093/law:ildc/223uk00.case.1/law-ildc-223uk00> accessed 9th April 2020.

[115] Malcom. N. Shaw, *International Law* (6th Edition, Cambridge University Press 2008).

[116] Erwin Chemerinsky, 'Against Sovereignty' (2001) Vol.53 Stanford Law Review, pp. 1201-1224 < https://www.jstor.org/stable/> accessed 16th March 2020.

[117] Heidi M. Spalholz, 'Saddam Hussein and the IST on Trial: The Case for the ICC'(2007) Vol. 13, Art 10 Buffalo Human Rights Law Review < https://digitalcommons.law.buffalo.edu/bhrlr/vol13/iss1/10?utm_source=digitalcommons.law.buffalo.edu%2Fbhrlr%2Fvol13%2Fiss1%2F10&utm_medium=PDF&utm_campaign=PDFCoverPages > accessed 26th March 2020.

[118] See above.

on behalf of the government or acts done *jure imperii* while private acts were acts done for personal gain, commercial or economic acts; or acts done *jure gestionis*.[119]

The Pinochet Trial in the United Kingdom in 1998 is an important landmark case in the development of the doctrine of restrictive immunity.[120] General Pinochet led a coup against the then Spanish president which resulted in serious human violations. He was arrested and tried in the United Kingdom where he claimed that he had immunity being a former head of state. The court held that international human violations cannot be protected under the veil of sovereign immunity. The acts done could not be classified as official acts.[121] The court also acted upon the doctrine of universal jurisdiction which provides that a state can exercise its jurisdiction on a perpetrator wanted for international human violations.[122]

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the UNSC for the sole purpose of investigating the crimes against humanity that resulted from the war that occurred from1991 to 1999.[123] The former president of Yugoslavia, Milosevic was arrested and charged with war crimes and crimes against humanity.[124] It is said that the reason as to why the former president did not bother to plead sovereign immunity was because it was a concept that was ending.[125]

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[119] Adam Isaac Hasson, 'Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic – Trends in Political Accountability and Transnational Criminal Law'(2002) Vol. 25(1) Boston College International and Comparative Law Review < http://lawdigitalcommons.bc.edu/iclr?utm_source=lawdigitalcommons.bc.edu%2Ficlr%2Fvol25%2Fiss1%2F6&utm_medium=PDF&utm_campaign=PDFCoverPages > accessed 26th March 2020.

[120] Christa-Gaye Kerr, 'Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined (2020) Vol. 41(1) Michigan Journal of International Law pg. 195-224 < https://repository.law.umich.edu/mjil?utm_source=repository.law.umich.edu%2Fmjil%2Fvol41%2Fiss1%2F5&utm_medium=PDF&utm_campaign=PDFCoverPages > accessed 26th March 2020.

[121] See above.

[122] See above.

[123] Adam Isaac Hasson, 'Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic – Trends in Political Accountability and Transnational Criminal Law'(2002) Vol. 25(1) Boston College International and Comparative Law Review < http://lawdigitalcommons.bc.edu/iclr?utm_source=lawdigitalcommons.bc.edu%2Ficlr%2Fvol25%2Fiss1%2F6&utm_medium=PDF&utm_campaign=PDFCoverPages > accessed 26th March 2020.

[124] See above.

[125] Christa-Gaye Kerr, 'Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined (2020) Vol. 41(1) Michigan Journal of International Law pg. 195-224 < https://repository.law.umich.edu/mjil?utm_source=repository.law.umich.edu%2Fmjil%2Fvol41%2Fiss1%2F5&utm_medium=PDF&utm_campaign=PDFCoverPages > accessed 26th March 2020.

2.4.1 Sovereign Immunity and the principle of complementarity

The Rome Statute expressly discards the notion of sovereign immunity as a defence. Article 27 of the Rome Statute states that, "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence."[126] The rationale is that the heads of state have a responsibility over their country and that responsibility is not to kill people or cause wars.[127] Section 27 has a principle of equality attached to it whereby no matter the person, whether a head of state or not, justice must prevail.[128]

During the sought-for arrest of Al Bashir, the former president of Sudan; the African Union (AU) argued that Sudan was not a party to the ICC and was therefore not obligated to surrender. Contrary to this argument, the Rome Statute Article 13(b) states that, "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations (UN Charter)."[129] Any state that is party to the UN Charter is automatically party to the UNSC by virtue of the fact that the UNSC is a branch of the UN.[130] This means that if a case is referred to the ICC by the UNSC, a state cannot claim that they are not under the jurisdiction of the court. By ratifying the UN Charter, they waive that right.[131]

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[126] Rome Statute of the International Criminal Court 1998, Article 27(1).
[127] Heidi M. Spalholz, 'Saddam Hussein and the IST on Trial: The Case for the ICC'(2007) Vol. 13, Art 10 Buffalo Human Rights Law Review < https://digitalcommons.law.buffalo.edu/bhrlr/vol13/iss1/10?utm_source=digitalcommons.law.buffalo.edu%2Fbhrlr%2Fvol13%2Fiss1%2F10&utm_medium=PDF&utm_campaign=PDFCoverPages > accessed 26th March 2020.
[128] Christa-Gaye Kerr, 'Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined (2020) Vol. 41(1) Michigan Journal of International Law pg. 195-224 < https://repository.law.umich.edu/mjil?utm_source=repository.law.umich.edu%2Fmjil%2Fvol41%2Fiss1%2F5&utm_medium=PDF&utm_campaign=PDFCoverPages > accessed 26th March 2020.
[129] Rome Statute of the International Criminal Court 1998, Article 13(b)
[130] United Nations Website < https://www.un.org/en/sections/member-states/about-un-membership/index.html> accessed 26th March 2020.
[131] Christa-Gaye Kerr, 'Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined (2020) Vol. 41(1) Michigan Journal of International Law pg. 195-224 < https://repository.law.umich.edu/mjil?utm_source=repository.law.umich.edu%2Fmjil%2Fvol41%2Fiss1%2F5&utm_medium=PDF&utm_campaign=PDFCoverPages > accessed 26th March 2020.

The days where state sovereignty or sovereign immunity was used as a defence is long gone. From the Pinochet trial to the ICTY investigations, the International community has made tremendous progress to ensure justice across all spheres and levels of power; be it a commoner or a head of state.

2.5 *Pacta Sunt Servanda*

Article 26 of the Statute of the VCLT states that, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[132] *Pacta Sunt Servanda* is a Latin phrase which means 'treaties shall be complied with.' It is the basis of every legal contract and agreement. The binding of a legal agreement places an obligation on the parties to comply.[133]

Anzilotti in his text book of International Law explains the rules of international law as rules that have emerged from customary international law. He goes on to expound the meaning of a 'legal order as a collection of complex norms whose obligatory character comes from a fundamental norm.'[134] He demystifies *pacta sunt servanda* as the fundamental norm itself and not an obligation that depends on another norm. In other words, the doctrine id the basis of every legal agreement.[135]

For a state to be able to ratify a treaty it must show its willingness to be bound by the obligations of that treaty. A state does so by expressly consenting to the treaty either through signing, ratification, acceptance or accession. A state does so voluntarily.[136] The principle comes in; if a state has ratified a treaty voluntarily then they must comply with the contents of the treaty in good faith. 'Good faith' means that states must take reasonable measures to comply with the treaty either through domestic legislation or any other relevant ways. States cannot therefore use a defence that their domestic legislation goes against the treaty. [137]

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[132] Vienna Convention on the Law of Treaties (1969) Article 26.
[133] International Judicial Monitor, 'General Principles of International Law' (2008) American Society of International Law <http://www.judicialmonitor.org/archive_0908/generalprinciples.html> accessed 26th March 2020.
[134] Jianming Shen, 'The Basis of International Law: Why Nations Observe' (1999) Vol 7, No. 2 Penn State International Law Review < http://elibrary.law.psu.edu/psilr?utm_source=elibrary.law.psu.edu%2Fpsilr%2Fvol17%2Fiss2%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 26th March 2020.
[135] See above.
[136] The UN Office of Legal Affairs, 'Treaty Handbook'<https://www.cbd.int/abs/doc/treatyhandbook_en.pdf> accessed 26th March 2020.
[137] International Judicial Monitor, 'General Principles of International Law' (2008) American Society of International Law <http://www.judicialmonitor.org/archive_0908/generalprinciples.html> accessed 26th March 2020.

African states voluntarily ratified to the Rome Statute. It is unsound for the states not to comply with the contents of the treaty. This extends to compliance through assisting the ICC in investigating and prosecuting perpetrators of serious international crimes.

2.6 Conclusion

This chapter discussed the historical background and development of the principle of complementarity from World War I to the ad-hoc tribunals. It also gave the complementarity from the principles and theories of international law. It expounded on the court's jurisdiction identifying the crimes that the court can try and the rationale behind limiting the court to those crimes. The court is the last resort giving an opportunity for states to try the cases under their national jurisdiction. This analysis gave an in depth study on the admissibility of the court explaining the unwillingness and inability of states to investigate and prosecute crimes.

The analysis on *jus cogen* and obligation *erga omnes* showed the importance of states cooperating with the ICC. These obligations arise from Customary International Law and have become binding to all parties whether or not they are party to the statute. The chapter also expounded on the reason behind the failure of sovereign immunity being used as a defence. Finally, this chapter emphasised on the obligation on all member states to comply with the content of the treaty in good faith.

CHAPTER THREE

A COMPARATIVE STUDY OF KENYA, THE UNITED STATES AND GERMANY

3.1 Introduction

This chapter shall compare Kenya, the United States and Germany. Kenya is the best state in Africa for this comparative study considering the fact that it was the first time where a case was entered in a *proprio motu* case. Furthermore, the situation led it to opt for a withdrawal from the ICC as well as pushing the African Union (AU) agenda of establishing its own African court. The state has evidently displayed an issue in the co-operation with the ICC which is a problem in most African countries.

The United States of America (USA) being anti- ICC is a good comparison to Kenya as it gives an ideal situation of fighting impunity without the assistance of the ICC. If Kenya were to withdraw from the ICC, would it be capable of fighting impunity on its own like the USA? Through its legislation and co-operation, we shall be able to compare it to Kenya and find out if Kenya is self-sufficient. Comparing Kenya to Germany is beneficial as it is one of the strongest supporters of the ICC. Kenya could borrow from the co-operation that Germany has with the ICC and its method of implementing the Rome Statute into domestic legislation.

The chapter shall compare the three countries based on the legislation framework and the co-operation with the ICC. The laws of the state determine the intention of co-operation. The idea is to ensure that the Rome Statute is incorporated into domestic law to ensure that the state is capable of investigating and prosecuting the crimes accordingly. Comparing the legislative framework of the three countries will give a clearer perspective of Kenya's challenges with the ICC.

Co-operation with the ICC demonstrates how the state's law is implemented in practice. It brings out the capability of a state to fight impunity with or without the help of the ICC. Germany and the USA situation will help to evaluate whether Kenya needs the help of the ICC. It is also able to borrow ideas from both countries.

3.2 Background

3.2.1 Kenya

The issue of Kenya not cooperating with the ICC came into light after the 2007-2008 post-election violence. The then president Mwai Kibaki won the elections which angered the Orange Democratic Movement (ODM) supporters who were certain that their leader, Raila Odinga won the elections. They believed that Kibaki rigged the elections. This caused havoc and violence broke out against Mwai Kibaki supporters who supported Mwai Kibaki and ODM supporters. As a result, many lost their lives and millions were displaced.

In March 2010, ICC's Pre Trial Chamber entered an investigation against six individuals for charges of crimes against humanity as a result of the post-election violence.[138] It was the first time that the ICC was entering a case in *proprio motu* I.e. charging the perpetrators in his own violation.[139] There were two cases. The first case was against Ruto, Kosgey and Sang. They allegedly used violence to drive out the *kikuyus* in the Rift Valley region as a result of the former president Kibaki, a kikuyu winning the elections. The second case was against Kenyatta, Muthaura and Ali. They allegedly used a Kikuyu gang by the name *Mungiki* to cause harm to the ODM supporters in the Rift Valley region.[140]

We see three instances where it was abundantly clear that Kenya was not going to cooperate with the ICC. The first was when Uhuru Kenyatta and Ruto did everything they could to delay the case so that it begins after the 2013 elections. They did so, so that they can use their powers as the heads of state to avoid prosecution.[141] The second instance was when the witnesses began to disappear or to withdraw from testifying. Some said that they received death threats and that it was not worth

[138] Yvonne M. Dutton, 'EnForcing The Rome Statute: Evidence Of (Non) Compliance From Kenya' (2016) 26 Ind. Int'l & Comp. L. Rev. 7 < https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/iicl26&section=6 > accessed 4th July 2020.
[139] See above.
[140] Susanne D. Mueller, 'Kenya And The International Criminal Court (ICC): Politics, The Election And The Law' (2014) Vol. 8 N.o 1 Journal of Eastern African Studies 25-42 < http://dx.doi.org/10.1080/17531055.2013.874142 > accessed 4th July 2020.
[141] See above.

testifying, others actually suddenly died.[142] Lastly, they tried to use legal challenges to dismiss the case as they lobbied for voters against the ICC.[143]

3.2.2. United States of America (USA)

The US was at the forefront of the development of the ICC. They contributed greatly to the establishment of the ICTY and ICTR.[144] Furthermore, President Clinton's administration was one of the first to suggest the development of a permanent International Criminal Court. they participated in the negotiations of the draft statute after it was presented in the General Assembly. On December 31st 2000, they decided that they would sign the treaty.[145] However, the then incoming Bush administration opted to do away with the treaty. They argued that the statute has very many flaws and if accepted would have been detrimental to the United States policies and constitutional principles.[146] Since the US decided to vote against the statute, they have been very vocal about their position in the matter by enacting the American Service members Protection Act and drafting bilateral agreements that ensure the immunity of American military personnel in other states.[147]

The US confidently declared their position against the ICC despite the fact that most of its allies were parties to the statute. Unlike Kenya, its position was not provoked by a case against them rather by the constitutional principles that they stand for. The fact that Kenya's sudden anti-ICC flaunts came after a case was brought against the leaders raises suspicion. it would have been

[142] JonathanW. Rowsen, 'Reporters, Witnesses Silenced 'One By One' With ICC Link Deadly In Kenya' *Aljezeera America* (24th August 2015)
< http://america.aljazeera.com/articles/2015/8/24/kenyas-dark-path-to-justice.html> accessed 4th July 2020.
[143] Susanne D. Mueller, 'Kenya and the International Criminal Court (ICC): Politics, The Election And The Law' (2014) Vol. 8 N.o 1 Journal of Eastern African Studies 25-42 < http://dx.doi.org/10.1080/17531055.2013.874142 > accessed 4th July 2020.
[144] Bartram Brown, "U.S. Objections to the Statute of the International Criminal Court: A Brief Response" (1999) 31 N.Y.U. J. Int'l L. & Pol. 855 <http://scholarship.kentlaw.iit.edu/fac_schol/146?utm_source=scholarship.kentlaw.iit.edu%2Ffac_schol%2F146&utm_medium=PDF&utm_campaign=PDFCoverPages > accessed 20th July 2020.
[145] David Scheffer, 'The Constitutionality of the Rome Statute of the International Criminal Court' (2008) Vol 98(3) Journal of Criminal Law and Criminology < https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jclc98&section=30 > accessed 7th July 2020.
[146] See above.
[147] Gerhard Hafner, "An Attempt to Explain the Position of the USA towards the ICC" (2005) Journal of International Criminal Justice 3, 323-332 <https://academic.oup.com/jicj/article-abstract/3/2/323/854255 > accessed 20th July 2020.

preferable a stand was taken from the very beginning that Kenya does not agree with the terms of the statute.

3.2.3. Germany

Like most countries that make up the European Union, Germany is a strong supporter of the ICC. In 2018, Germany passed a resolution whose argument was that the government should continue supporting the ICC by encouraging other states to do the same and by giving sufficient financial support to the court. Since the negotiations of the draft of the statute it has been supportive of the ICC and its mandate so much that after ratification of the statute plans were underway to ensure that it is incorporated into the German criminal law.

The state declared its commitment to the mandate of the court as well as the implementation of the Rome Statute into its domestic law. Considering the fact that many laws had to be changed to ensure the same, it was no small commitment. However, as will be discussed in its legislative framework, Germany successfully managed to implement the statute accordingly. This has enhanced the co-operation with the ICC.

Being one of the strongest supporters of the ICC, Kenya could pick a few things from Germany including the incorporation of the Rome Statute into domestic law beyond Article 2(5).

3.3 Legislative Framework

3.3.1 Kenya

The Constitution of Kenya 2010 under Article 2(5) states that; "The general rules of international law shall form part of the law of Kenya." Article 2(6) states that, "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[148] According to this particular provision of the constitution, Kenya is displayed as a monist country. Consequently, any treaty that Kenya ratifies automatically becomes part of the law of Kenya. Monists states are of the opinion that international and domestic laws are not diverse systems of laws and that they should correspond with each other.[149] It is important for countries that fall under this school of

[148] The 2010 Constitution of Kenya.
[149] Tumaini Regina Wafula, Implementation Of The Rome Statute In Kenya: Legal And Institutional Challenges In Relation To The Change From Dualism To Monism (LLM, University of the Western Cape, 2015) < http://etd.uwc.ac.za/handle/11394/4632 > accessed 4th July 2020.

thought that both systems of law are treated as one law encompassing all domestic and international law instruments.[150]

Kenya signed the Rome Statute in 1999 and ratified it in 2005 mostly due to pressures by human rights organizations.[151] Thereafter, the Rome Statute was domesticated through the enactment of the International Crimes Act 2008 (ICA). The preamble states that, "an act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to cooperate with the International Criminal Court established by the Rome Statute in the performance of its functions." [152]

Article 9 of The Rome Statute requires that the elements of crimes of the Statute be adopted by a two thirds majority of the members of the parliament of the State Parties.[153] To comply with the requests made in Article 9, the Part III of the ICA provides for general guidelines and procedures.[154] Section 27 of the ICA states that,

> (1) The existence of any immunity or special procedural rule attaching to the official capacity of any person shall not constitute a ground for— (a) refusing or postponing the execution of a request for surrender or other assistance by the ICC; (b) holding that a person is ineligible for surrender, transfer, or removal to the ICC or another State under this Act; or (c) holding that a person is not obliged to provide the assistance sought in a request by the ICC. [155]

This correlates with Article 27 of the Rome Statute that states that immunities are irrelevant in prosecution at the ICC. [156]

3.3.2. United States of America

Unlike Germany whose position as we will see later is in favor of the ICC the USA has been reluctant to ratify the Rome Statute since its establishment due to the clash between the Statute and its constitutionality.[157] Those that support the establishment of the ICC argue that it would not

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[150] See above.
[151] Susanne D. Mueller, 'Kenya And The International Criminal Court (ICC): Politics, The Election And The Law' (2014) Vol. 8 No. 1 Journal of Eastern African Studies 25-42 < http://dx.doi.org/10.1080/17531055.2013.874142 > accessed 4th July 2020.
[152] International Crimes Act 2008, Preamble.
[153] Rome Statute of the International Criminal Court Article 9, U.N. Doc. A/CONF.183/9.
[154] International Crimes Act 2008.
[155] International Crimes Act 2008, Section 27.
[156] Rome Statute of the International Criminal Court Article 27, U.N. Doc. A/CONF.183/9.
[157] David Scheffer, 'The Constitutionality of the Rome Statute of the International Criminal Court' (2008) Vol 98(3) Journal of Criminal Law and Criminology < https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jclc98&section=30 > accessed 7th July 2020.

be of any harm if the US ratified the Rome Statute by virtue of the fact that the court is of last resort.[158] The USA on the other hand argues that it's judicial system provides the best accountability in the world and there is therefore no need for an external accountability body.[159] Contrary to the US' opinion, Germany has a very stable and strong accountability system but has still ratified the Rome Statute. It has used its stable judiciary to help the ICC to investigate cases in Rwanda[160] and Libya.[161]

The US Constitution Article III Section 1 states that, "The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[162] Any offense committed in the USA can only be tried by the federal institutions in the USA. This provision prohibits any foreign courts from trying any crimes in the USA. Ratifying the Rome Statute gives the ICC jurisdiction over serious crimes in the US.[163] Article 120 of the Rome Statute provides that, "No reservations may be made to the Rome Statute". If a state is to ratify the treaty it accepts it as a whole. Therefore, it does not give a state an opportunity to raise constitutional issues.[164]

Kenya and Germany have amended their constitutions to allow the ICC to try domestic cases. The US on the other hand have adamantly refused to amend their constitution to agree with the Statute. Kenya did so by enacting the International Crimes Act 2008 (ICA) which allows the ICC to investigate and prosecute international crimes where the national courts fail to do so.[165]

Article III, section 2 states that, "The trial for all crimes shall be by jury and such trial shall be held in the state where the said crimes have been committed."[166] The Sixth Amendment states that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an

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[158] John R. Bolton, "American Justice and the International Criminal Court" (2003) < https://2001-2009.state.gov/t/us/rm/25818.htm > accessed 7th July 2020.
[159] See quote by Secretary Powell: "We have the highest standards of accountability of any nation on the face of the earth."
[160] Higher Regional Court of Frankfurt Case No. 5-3 StE 4/10-4-3/10 <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=C1AB11CE599ECDB0C1257E93006022F2&action=openDocument&xp_countrySelected=DE&xp_topicSelected=GVAL-992BU6&from=state> accessed 22nd July 2020.
[161] International Criminal Court, Situation in Libya, ICC-01/11.
[162] United States of America: Constitution [United States of America], 17 September 1787 < https://www.refworld.org/docid/3ae6b54d1c.html > accessed 7th July 2020.
[163] Rome Statute of the International Criminal Court Article 13(b), U.N. Doc. A/CONF.183/9.
[164] Rome Statute of the International Criminal Court Article 120, U.N. Doc. A/CONF.183/9.
[165] International Crimes Act 2008, Preamble.
[166] United States of America: Constitution [United States of America], 17th September 1787 < https://www.refworld.org/docid/3ae6b54d1c.html > accessed 7th July 2020.

impartial jury of the state and district wherein the crime shall have been committed."[167] Article 67 of the Rome Statute provides for the rights of the accused but the right to trial by a jury is not included in the section. [168]

The US constitution demonstrates the competence of the justice system to the extent where crimes done that are in violation of international law can be tried in the federal courts justly and fairly. The constitution also provides for a different kind of trial as compared to what is provided by the ICC i.e. trial by a jury. Kenya's constitution on the other hand Article 162 provides for a system of courts where cases are tried by a judge or a magistrate. Unlike the US situation where the legislation evidently shows that the ICC and the federal courts are not alike and cannot cooperate, Kenya's legislation does not demonstrate such differences.

3.3.3. Germany

In 2000, Germany enacted the Ratification Act which made it possible to ratify the statute. Furthermore, a constitutional amendment was necessary to implement it.[169] In 1999, the German Federal Ministry of Justice established a group of experts that were responsible for the implementation.[170] In 2001, they came up with a 'Working Draft of Law for the Introduction of the Code of Crimes against International Law'. This led to the enactment of the Code of Crimes Against International Law (CCAIL) in 2002.[171] Germany's process of ratifying the statute shows its intention to cooperate with the ICC. This is contrary to Kenya's enactment process which was done hurriedly with the aim of coming out of the Court's scrutiny. Unlike Germany whose process took 3 years, Kenya's took less than one year.[172]

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[167] United States of America: Constitution [United States of America], Sixth Amendment Right 17 September 1787 < https://www.refworld.org/docid/3ae6b54d1c.html > accessed 7th July 2020.
[168] Rome Statute of the International Criminal Court Article 67, U.N. Doc. A/CONF.183/9.
[169] German Delegation to the ICC-PrepCom, "International Criminal Law in Germany– The Drafts of the International Crimes Code and the Rome Statute Implementation Act –" <http://www.iccnow.org/documents/Comments%20on%20ICCode%20and%20E41.pdf> accessed 20th July 2020.
[170] Fatuma Mninde Silungwe, 'A Comparative Study On The Implementation Of The Rome Statute By South Africa And Germany: A Case Of Fragmentation Of International Criminal Law' (LLM, University Of Western Cape (2013) <https://www.researchgate.net/publication/276206641_A_Comparative_Study_on_the_Implementation_of_the_Rome_Statute_by_South_Africa_and_Germany_A_Case_of_Fragmentation_of_International_Criminal_Law > accessed 20th July 2020.
[171] See above.
[172] Thomas Hansen, 'Complementarity in Kenya? An analysis of the Domestic Framework for International Crimes Prosecution (2015) Ulster University - Transitional Justice Institute < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2696089>

Article 1 of the CCAIL provides for universal jurisdiction. it states that, "This Act shall apply to all criminal offenses against international law designated under this Act, to serious criminal offenses designated therein even when the offence was committed abroad and bears no relation to Germany."[173]

The reason behind this section is that if states are to cooperate with the ICC to fight impunity it is important to grant states universal jurisdiction. The crimes go against the international community as a whole therefore placing a responsibility on all states.[174]

Similarly, the ICA 2008 does touch on the principle in Article 6(1) which states that; (1) A person who, in Kenya or elsewhere, commits: (a) genocide; (b) a crime against humanity; or (c) a war crime, is guilty of an offence. The term 'elsewhere' refers to universal jurisdiction.

Article 1 is complemented by Section 152(2) of the German Code of Criminal Procedure which provides for mandatory prosecution.[175] Prosecutors are expected to prosecute a person who has committed a crime that violates international principles no matter where the crime has been committed and by whom.[176] However, due to the respect of other states' sovereignty, a person will not be prosecuted if the foreign country can be seen to take responsibility.

Germany has implemented all the four core crimes in the CCAIL. Chapter 1 of Part 2 provides for genocide and crimes against humanity. Section 6 provides for crimes of genocide while section 7 provides for crimes against humanity. The sections give in detail the elements of the crimes avoiding any ambiguity as well as the sentences.[177] Chapter 2 of Part 2 provides for War crimes divided into different categories.

Section 8 provides for war crimes against persons. Section 9 provides for war crimes against property and other rights. This includes extensively destroying, appropriating or seizing property of the adverse party contrary to international law.[178] Section 10 provides for War crimes against

[173] Act to Introduce the Code of Crimes against International Law of 26 June 2002 <https://ihl-databases.icrc.org/ihl-nat/0/09889d9f415e031341256c770033e2d9/$FILE/Act%20to%20Introduce%20the%20Code%20of%20Crimes%20against%20International%20Law%20of%2026%20June%202002%20%5B1%5D.pdf> accessed 20th July 2020.
[174] German Delegation to the ICC-PrepCom, "International Criminal Law in Germany– The Drafts of the International Crimes Code and the Rome Statute Implementation Act –" <http://www.iccnow.org/documents/Comments%20on%20ICCode%20and%20E41.pdf> accessed 20th July 2020.
[175] German Code of Criminal Procedure Act 1987.
[176] German Code of Criminal Procedure Act 1987, Section 152(2).
[177] Act to Introduce the Code of Crimes against International Law of 26 June 2002.
[178] See above.

humanitarian operations and emblems. May include personnel, installations, material, units or vehicles involved in humanitarian assistance.[179] Section 11 provides for War crimes consisting in the use of prohibited methods of warfare and finally section 12 provides for War crimes consisting in employment of prohibited means of warfare.[180] In addition to the core crimes provided in the statute, the CCAIL provides for other crimes that are in violation of international principles.[181]

Through its legislation, Germany is a key model to states that are party to the ICC including Kenya. The International Crimes Act 2008 (ICA) lists the international crimes and offences. Section 6 states that, "The section lists the offenses briefly without giving in details the elements of the crimes. Germany on the other hand has dedicated six sections to explain the offences in detail."[182]

The ICA provides for the procedure of the arrest and surrender of persons to the ICC which includes the eligibility of surrender, request for arrest, issuing of arrest warrants etc.[183] The CCAIL does not provide for such procedures but rather relies on the criminal code. Despite the depth in which the ICA has gone into concerning such procedures, it is not sufficient to facilitate its co-operation with the ICC. It would be beneficial to include the elements of the crimes and details thereof.

3.4 Co-operation with the ICC

3.4.1 Kenya

At the time of ratification, the members of parliament had perceived that the Rome Statute was not as relevant. The ICC had only targeted non-state actors.[184] Furthermore, the state was protected by dualist nature which implied that the ICC will only be a court of last resort when a state is unable and unwilling to prosecute the crimes themselves.[185] The members of parliament (MPs) had not

[179] See above.
[180] See above.
[181] See above.
[182] Act to Introduce the Code of Crimes against International Law of 26 June 2002.
[183] International Crimes Act 2008, Part IV.
[184] See above.
[185] Tumaini Regina Wafula, Implementation of the Rome Statute in Kenya: Legal and Institutional Challenges In Relation To the Change from Dualism to Monism (LLM, University of the Western Cape, 2015) < http://etd.uwc.ac.za/handle/11394/4632 > accessed 4th July 2020.

foreseen a situation where a *proprio motu* case could be entered against the state.[186] Hence, the reason why Kenya was suddenly uncooperative with the ICC after the post-election violence.

A Commission of Inquiry into the Post-Election Violence known as the *Waki Commission* was appointed as an initial response to the Post-Election Violence. The inquiry was to investigate the perpetrators responsible for the violence.[187] The Commission found that those responsible were politicians and businessmen. In addition to that, the perpetrators were state security agencies.[188]

The Waki Commission also recommended the establishment of a Special Tribunal consisting of domestic and international judges to try the perpetrators that were of high profiles.[189] However, this did not sit well with most MPs. They had very many delaying tactics to ensure that the tribunal was never formed as a result, reducing the number of high-profile perpetrators that would be held accountable.[190]

Due to the delayed tactics, the then ICC chief prosecutor, Moreno Ocampo entered the case against the six individuals.[191] Immediately after, Kenya began mobilizing other African countries including the AU to support them in their efforts to deter the ICC case against Kenya. If that was not enough, the MPs passed a motion to withdraw from the ICC.[192]

Kenya's legislative framework seems to be complementing the ICC however, the actions depicted otherwise. The leaders' decisions were mostly influenced by politics rather than the law itself therefore making the ICC look like a political institution. Kenya ought to make a clear boundary

[186] Susanne D. Mueller, 'Kenya and the International Criminal Court (ICC): Politics, The Election and the Law' (2014) Vol. 8 N.o 1 Journal of Eastern African Studies 25-42 < http://dx.doi.org/10.1080/17531055.2013.874142 > accessed 4th July 2020.
[187] KNHR,' Waki Commission Report' (KNHR) < http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf > accessed 4th July 2020.
[188] Susanne D. Mueller, 'Kenya and the International Criminal Court (ICC): Politics, The Election and the Law' (2014) Vol. 8 N.o 1 Journal of Eastern African Studies 25-42 < http://dx.doi.org/10.1080/17531055.2013.874142 > accessed 4th July 2020.
[189] KNHR,' Waki Commission Report' (KNHR) < http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf > accessed 4th July 2020.
[190] Susanne D. Mueller, 'Kenya and the International Criminal Court (ICC): Politics, The Election and the Law' (2014) Vol. 8 N.o 1 Journal of Eastern African Studies 25-42 < http://dx.doi.org/10.1080/17531055.2013.874142 > accessed 4th July 2020.
[191] See above.
[192] Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, 'Africa and the International Criminal Court'(2013) Criminal Justice < https://www.dphu.org/uploads/attachements/books/books_3820_0.pdf > accessed 7th July 2020.

between the politics and the law if the ICC is meant to be effective in its obligation. We shall compare Kenya's developments to the USA and Germany.

Immunity for heads of states has also been a contentious issue that has deterred Kenya's co-operation. In August 2010, Al Bashir visited Kenya for the signing of the New Constitution.[193] The ICC had issued an arrest warrant however he was not arrested. Kenya and the AU argue that he has immunity and that it should be respected by the ICC.[194] The same argument was used during the trial of Uhuru Kenyatta and William Ruto.[195]

3.4.2 United States of America

The ICC is based on complementarity, meaning that it can only intervene when the state in question is unwilling or unable to prosecute the crimes committed.[196] The Rome Statute provides that the court can intervene even when the country is not a party to the Rome Statute.[197] The rationale is to ensure the protection of international law standards.

However, this poses a threat to the USA's citizens constitutional rights. If for example, American soldiers commit crimes prohibited under the Rome Statute outside American soil, they can be prosecuted by the ICC.[198] In 2017, the chief prosecutor of the ICC, Fatou Bensouda announced that they will be opening an investigation into alleged crimes committed in Afghanistan by US military forces and the Central Intelligence Agency (CIA) despite the fact that the USA is not a party to the statute.[199] America argued that it infringes in their constitutional rights, state sovereignty and democracy.[200]

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[193] 'President Al Bashir's visit to Kenya' Coalition for the International Criminal Court (17th September 2010) <http://archive.iccnow.org/?mod=newsdetail&news=4043> accessed 22dn July 2020.
[194] Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, "Africa and the International Criminal Court" (2013) Chatham House <https://www.chathamhouse.org/publications/papers/view/193415 > accessed 22nd July 2020.
[195] See above.
[196] Rome Statute of the International Criminal Court Preamble, U.N. Doc. A/CONF.183/9.
[197] Rome Statute of the International Criminal Court Article 13(b), U.N. Doc. A/CONF.183/9.
[198] Cara Levy Rodriguez, "Slaying the Monster: Why the United States Should Not Support the Rome Treaty" (1999) Vol 14(3) American University International Law Review 805-844 < https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/amuilr14&section=42 > accessed 7th July 2020.
[199] Mar A. Thiessen, "Trump is Protecting our Country from a Sham of an International Court" *The Washington Post* (14th September 2018) < https://www.washingtonpost.com/opinions/trump-is-protecting-our-country-from-a-sham-of-an-international-court/2018/09/13/8ad60f1e-b784-11e8-a7b5-adaaa5b2a57f_story.html > accessed 7th July 2020.
[200] See above.

Contrary to a widely known opinion that the ICC only prosecutes cases from African countries, we see their efforts to bring justice in the USA. Kenya has been basing their lack of co-operation on that opinion which in fact does not hold water. The reason as to why the USA were able to stop the investigations is not because they were not an African country but because they have a strong judicial system that can investigate the issue without the ICC's intervention. The point of concern for Kenya should be to meliorate the judicial system conditions.

The state has strong opinions against the ICC. According to them, the ICC cannot be a fair and impartial court without checks and balances.[201] Having a court with that much power without a body that it is accountable to goes against democracy, transparency and impartiality[202]. The USA has gone beyond not ratifying the statute to enacting an 'American Service members' Protections Act' (ASPA).[203] The Act not only expressly states that the USA shall not cooperate with the ICC but also puts measures in place to punish the court if it tries to prosecute the American citizens. [204]

Unlike Kenya, the US has ensured that the courts are capable of handling the cases to a point where if the ICC tries to intervene it will be an obvious violation of the ICC was established for I.e. investigating where the state has failed to do so. Kenya on the other hand has focused on avoiding the ICC's prosecution through delayed tactics and lack of witness protection. As a result, it is evident that without the ICC Kenya lacks accountability.

Many reforms ought to be done to the judicial system in order to avoid such interference by the ICC. Some reforms may include increasing budgetary allocation to the judiciary and placing accountability measures to improve impartiality and integrity among judges and lawyers. The establishment of an African court could also be necessary to increase the possibility of African states being able to investigate and prosecute heads of states. The US is a powerful state with the resources to independently fight impunity. An African court could increase the chances of doing the same.

[201] See above.
[202] See above.
[203] The American Service-Members' Protection Act (ASPA, Title 2 of Pub.L. 107–206, H.R. 4775, 116 Stat. 820, enacted August 2, 2002).
[204] See above.

3.4.3 Germany

Since the enactment of the CCAIL, Germany has made many developments to ensure that it is cooperating with the ICC.[205] Kenya began making developments when the ICC opened investigations after the post-election violence. Germany is therefore a great example for Kenya to follow. It is not clear whether Germany is a monist or a dualist state. It has a constitutional jurisdiction. [206]

However, it is evident that the state is very amicable towards international laws.[207] Consequently, they put more effort to ensure that there are laws in place that support international laws that are important to the country.[208] One of Kenya's greatest achievements was the enactment of the 2010 constitution which made it a monist state as discussed earlier. However, the progress that the state is making to ensure that international laws are protected is slow.

In 2009, the Federal Public Prosecutor's office established a new department for the sole purpose of investigating international crimes.[209] A Central Unit for the Fight Against War Crimes and other Offences pursuant to the CCAIL was established in the Federal Criminal Police Unit. From 2009 to 2012, twenty nine investigations were open against fifty six suspects.[210] The Prosecutor's Office carried out an investigation in the Rwandan genocide and war crimes in the Democratic republic of Congo (DRC) in 2010.[211] Germany has also played a role in assisting the ICC to investigate the situation in Libya.[212]

The establishment of the Waki Commission to investigate the perpetration was a good development but not a long term progression.[213] Germany on the other hand made significant

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[205] Andreas Schuller, "The Role of National Investigations in the System of International Criminal Justice – Developments in Germany" (2013) Vol 31 N.o 4 Ten Years of International Criminal Court Impact and Effect 226-231 <http://www.jstor.com/stable/24233777 > accessed 21st July 2020.
[206] Michael Eichberger, 'Monist or Dualist? (2000) 53e Année, No. 2 La Revenue Administratif 10-18 < <http://www.jstor.com/stable/40773339 > accessed 20th August 2020.
[207] See above.
[208] See above.
[209] See above.
[210] See above.
[211] Higher Regional Court of Frankfurt Case No. 5-3 StE 4/10-4-3/10 <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=C1AB11CE599ECDB0C1257E93006022F2&action=openDocument&xp_countrySelected=DE&xp_topicSelected=GVAL-992BU6&from=state> accessed 22nd July 2020.
[212] International Criminal Court, Situation in Libya, ICC-01/11.
[213] KNHR,' Waki Commission Report' (KNHR) < http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf > accessed 4th July 2020.

changes to their Police Unit to ensure that international crimes are investigated in the long run. Kenya would have made greater strides by passing the suggestion of establishing a Special Tribunal that consists of judges solely for international crimes.[214]

Despite the successes that the state has had they have also faced some challenges.[215] Article 20 of the Court's Constitution provides for immunity for when state actors come to Germany on official visits.[216] In 2008, the head of Uzbek's secret service, Rustam Inoyatov visited Germany and was not arrested due to immunity. He was allegedly responsible for torture in Uzbek's prisons and killings of many protestors.[217] The presence of the courts constitution and other laws such as Article 31 of the Vienna Convention on Diplomatic Relations (VCDR) makes it difficult to prosecute or investigate powerful actors who enjoy such immunity.[218]

This situation of immunity is similar to the Al Bashir Situation in Kenya and other countries. Despite the fact that the Rome Statute provides that immunity is not a defence, most states including Germany and Kenya are of another opinion. Respect for immunity means respect for a state's sovereignty. Due to the constant practice, immunity is an international customary law. This will continue to be a challenge that will affect the co-operation of the ICC and its parties.

Unlike Kenya, Germany has made efforts to assist the ICC in investigating crimes even beyond the state. Kenya on the other hand used delaying tactics to try and stop the ICC from investigating the atrocities that occurred in the Post- Election Violence. It would be beneficial if changes and reforms were made in the Police Units such as establishing a unit that is responsible solely for investigating and prosecuting the crimes listed in the Rome Statute.

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[214] Susanne D. Mueller, 'Kenya And The International Criminal Court (ICC): Politics, The Election And The Law' (2014) Vol. 8 N.o 1 Journal of Eastern African Studies 25-42 < http://dx.doi.org/10.1080/17531055.2013.874142 > accessed 4th July 2020.

[215] Andreas Schuller, "The Role of National Investigations in the System of International Criminal Justice – Developments in Germany" (2013) Vol 31 N.o 4 Ten Years of International Criminal Court Impact and Effect 226-231 <http://www.jstor.com/stable/24233777 > accessed 21st July 2020.

[216] Courts Constitution Act in the version published on 9 May 1975 (Federal Law Gazette I p. 1077

[217] Andreas Schuller, "The Role of National Investigations in the System of International Criminal Justice – Developments in Germany" (2013) Vol 31 N.o 4 Ten Years of International Criminal Court Impact and Effect 226-231 <http://www.jstor.com/stable/24233777 > accessed 21st July 2020.

[218] Vienna Convention on Diplomatic Relations 18th April 1961.

3.5. Conclusion

This chapter has looked at the co-operation or lack thereof that the USA and Germany has with the ICC compared to Kenya. The USA being anti- ICC while Germany being for the ICC. It has given a good basis to determine the future of Kenya and other African states in the event that they decide to withdraw from the ICC. It has also brought out the benefits that cooperating with the ICC has from the relationship that Germany has with the ICC.

CHAPTER FOUR

AFRICA'S RESPONSE TO THE ICC AND THE ESTABLISHMENT OF THE MALABO PROTOCOL.

4.1 Introduction

The relationship between the AU and the ICC has been deteriorating over the past few years thus negatively affecting the common goal which is to fight impunity. The previous chapter identified and discussed the differences and similarities that Kenya (representing Africa) has with other Europe and the USA in the context of cooperating with the ICC. This chapter shall examine and analyze the issues that have been causing the tension.

Part one of this chapter shall give a factual background for the sake of understanding when and why the tensions between the AU and ICC arose. It shall do so by explaining the case of Al Bashir and the involvement of the AU and the ICC. Part two shall analyse how African states responded to the request for the arrest warrant that led to increase in the tension. It shall also explain the Kenyan situation that resulted to some African countries threatening to withdraw their membership from the Rome Statute.

Part three shall identify some of the issues that may have caused the tensions which includes universal jurisdiction, the principle of immunity, ICC's concentration on Africa, justice over peace and the complementarity principle. Finally, part four discusses the proposed African Criminal Chamber through the formation of the Malabo Protocol. It also discusses the overlaps that exist between the protocol and the Rome Statute that do not improve the relationship between the ICC and the AU.

4.2 Background

In 2005, pursuant to Article 13(b) of the Rome Statute, the UNSC referred the issue of the atrocities happening in the Dafur region to the ICC.[219] The referral was based on the fact that Omar Al Bashir

[219] Dire Tladi, 'The African Union and the International Criminal Court: The battle for the soul of international law' (2009) 34 SAYIL < https://cpb-us-e2.wpmucdn.com/sites.uci.edu/dist/9/798/files/2012/11/Tladi-AU-and-ICC.pdf> accessed 18th December 2020.

together with some of the military leaders in the Government of Sudan planned attacks on the armed groups involved in the conflict. As a result, thousands of civilians died.[220]

On 14th July 2008, the prosecutor, Luis Moreno Ocampo issued an arrest warrant against the former president Omar Al Bashir for crimes against humanity, war crimes and genocide.[221] In 2009, pursuant to Article 89(1) of the Rome Statute, the prosecutor requested that Sudan arrests Al Bashir as well as the other member states if an opportunity arises.[222]

In response to the arrest warrant the Peace and Security Council of the African Union (PSC) issued a communique requesting for a deferral of the warrant.[223] They stated that the prosecution at the time would not be in the interest of peace in the country. They condemned the abhorrent atrocities and emphasised on the importance of ensuring accountability so as to bring justice to the victims. However, they insisted that the arrest warrant would interfere with the efforts underway to bring peace to Sudan.[224]

The African Commission on Human and People's Rights (AU Commission) went further to call a meeting of African state leaders where it was agreed that the states would not cooperate with the ICC to arrest Al Bashir.[225] According to Article 9 of the AU Constitutive Act, they have the power to determine the Union's policies. However the conflict arises when African states that are party to both the AU and the ICC have to decide whether to arrest Al Bashir as soon as an opportunity arises or not to.[226]

4.3 African states' responses

Pursuant to Article 23 of the AU Constitutive Act which provides that "…any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other

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[220] The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 < https://www.icc-cpi.int/CaseInformationSheets/albashirEng.pdf > accessed 12th December 2020.
[221] See above.
[222] See above.
[223] Gwen P Barns, The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34(6) Fordham International Law Journal <http://ir.lawnet.fordham.edu/ilj>
[224] Dire Tladi, 'The African Union and the International Criminal Court: The battle for the soul of international law' (2009) 34 SAYIL < https://cpb-us-e2.wpmucdn.com/sites.uci.edu/dist/9/798/files/2012/11/Tladi-AU-and-ICC.pdf> accessed 18th December 2020.
[225] See above.
[226] Organisation of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000, < https://www.refworld.org/docid/4937e0142.html> accessed 18th December 2020.

measures of a political and economic nature to be determined by the Assembly."[227] Members of the AU are thereby obligated to comply with the decision that was given by the AU Commission.

However, the UNSC resolution 1593 was adopted with reference to the situation in Southern Sudan Darfur that urged all member states to arrest Al Bashir when the opportunity arose. The resolution is binding on all members party to the UN.[228] As a result, the dilemma caused some African states to choose to cooperate while other states chose not to. The latter states are relevant to this study due to the fact that their decision escalated the tensions between the ICC and Africa.

In 2010, Chad hosted a meeting for the leaders of the community of Sahel- Saharan and invited Al Bashir.[229] On arrival, Chad refused to arrest him stating that he was a state leader and therefore enjoys immunity.[230] They also argued that arresting him would lead to conflict with Southern Sudan their neighbouring country after so much effort of trying to maintain the peace. Furthermore, they argued that they were obligated to follow the decisions made by the AU not to arrest Al Bashir.[231]

Article 222 of Chad's constitution states that, "The President of the Republic negotiates and ratifies the treaties. He is informed of any negotiation regarding the finalization of an international agreement not submitted to ratification." Article 223 states that, "...these treaties and agreements only take effect after having been approved and ratified.[232]" The fact that an international law instrument requires only ratification and approval and not necessarily an enactment of another legislation before becoming part of the national law proves that Chad is a monist state. A monist state is a state that recognises international law as superior to municipal law therefore forming part of the national laws when ratified. Legislative acts are not required to make the international law applicable in the state.[233]

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[227] Organization of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000, < https://www.refworld.org/docid/4937e0142.html> accessed 18th December 2020.
[228] See Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting on 31 March 2005 S/RES/1593 (2005)
[229] Xan Rice, 'Chad refuses to arrest Omar al-Bashir on genocide charges' *The Guardian* (Nairobi, 22nd July 2010) < https://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir> accessed 12th December 2020.
[230] See above.
[231] See above.
[232] Chad's Constitution of 2018.
[233] Alina Kaczorowoska, Public International Law (4th edn, Routledge 2010).

Chad ratified the Rome Statute on 1st January 2006 and it came into force on 1st January 2007.[234] The national constitution still supports the immunity of a president except in the event that the president commits treason.[235] Despite this fact, by ratifying the statute, Chad bound itself to the responsibilities set out in the Rome statute including that immunity is irrelevant when the arrest of international crimes is concerned.[236]

In 2010, Kenya invited Al Bashir for the signing of the New Constitution. They argued that it was important to maintain the peace between the two countries since Kenya would be directly affected if conflict arose due to his arrest.[237] In addition to that, they expressed their conflict towards adhering to the AU's decision or the court thus choosing to focus on the aspect of peace.[238]

The constitution of Kenya states Article 2(6) states that, "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." This particular section makes Kenya a monist state similar to Chad. Therefore, due to the ratification of the Rome Statute, Kenya is bound to its duties including the irrelevance of head of state immunity provided in the Rome Statute.

Another incident that increased the tension was that of the post-election violence in Kenya. After the tragic post-election violence, in 2010 Uhuru Kenyatta and William Ruto were named as suspects involved in organizing the violence that resulted to grievous international crimes.[239] In 2011, Kenya requested the UNSC to defer the case under Article 16 of the Rome statute so as to give the country an opportunity to investigate the case with the help of a reformed judiciary.[240]

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[234]Ratification and Implementation Status <https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/chad.aspx > accessed 1st March 2021.
[235] Chad's Constituion 2018 Article 83.
[236] Rome Statute of the International Criminal Court 1998, Article 27(1).
[237] Associated Press, 'Kenya defends failure to arrest Sudan's president Omar al-Bashir in Nairobi' *The Guardian* (Nairobi, 29th August 2010) < https://www.theguardian.com/world/2010/aug/29/kenya-omar-al-bashir-arrest-failure > accessed 12th December 2020.
[238] Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, 'Africa and the International Criminal Court' (2013) International Law 01 <http://www.chathamhouse.org/> accessed 12th December 2020.
[239] Scott Baldauf, 'International Criminal Court prosecutor Ocampo names six top Kenyans for post-election violence trial' *The Christian Science Monitor* (15th December 2012). <https://www.csmonitor.com/World/Africa/2010/1215/International-Criminal-Court-prosecutor-Ocampo-names-six-top-Kenyans-for-post-election-violence-trial> accessed 1st February 2021.
[240] UNSC S 2011/201 (23rd March 2011) <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_624.pdf> accessed 1st February 2021.

Despite the request, Uhuru Kenyatta and William Ruto were summoned to appear before the Pre-Trial ICC Chamber.[241] In the 2013 election they were declared president and vice president respectively complicating the matter even more.[242]

The country requested for a deferral in 2013 stating in the letter that it was important to avoid aggravating the situation in the horn of Africa i.e. the terrorist threat.[243] The AU forwarded the same.[244] The ICC however rejected this request in the view that seeking justice for the victims is more important than the political interests of the leaders.[245]

The tensions between the ICC and the African states led to some countries expressing their intention to withdraw from the ICC.[246] In 2016, South Africa, Burundi and Gambia sent their letters of withdrawal to the Secretary General of the United Nations. South Africa and Gambia eventually revoked their withdrawal.[247] However, this caused a strain in the relationship between Africa and the ICC which eventually affects the end goal i.e. to end impunity.[248]

4.4 Issues that caused the tensions

4.4.1 Universal jurisdiction

One of the main disputes was the alleged abuse of the doctrine of universal jurisdiction.[249] The area of contention is the fact that African states were concerned that the western states were taking

[241] The Prosecutor v. Uhuru Muigai Kenyatta ICC-01/09-02/11 <https://www.icc-cpi.int/kenya/kenyatta> accessed 15th February 2021.
[242] Jason Patinkin, 'Uhuru Kenyatta wins Kenyan election by a narrow margin' *The Guardian* (Nairobi, 9th March 2013) <https://www.theguardian.com/world/2013/mar/09/kenyatta-declared-victor-in-kenyan-elections> accessed 15th February 2021.
[243] UNSC S 2013/624 (22nd October 2013) <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_624.pdf> accessed 1st February 2021.
[244] UNSC S 2013/639 (1st November 2013) <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_624.pdf> accessed 1st February 2021.
[245] UNSC S 2013/660 (15th November 2013) <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_624.pdf> accessed 1st February 2021.
[246] ECDPM, 'Why some African countries turned their back on the International Criminal Court' <https://ecdpm.org > accessed 12th January 2021.
[247] Franck Kuwonu, 'ICC: Beyond the Threats of Withdrawal' *Africa Renewal'* (May-July 2017) <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal> accessed 12th January 2021.
[248] See above.
[249] Harmen van derWil, 'Universal Jurisdiction under Attack An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States' Journal of International Criminal Justice 9 (2011), 1043^1066 <https://academic.oup.com/jicj/article/9/5/1043/2188935> accessed 15th February 2021.

the universal jurisdiction too far to the extent of abusing it.[250] The AU has argued that it is a way pushing a neo-colonial agenda towards African states.[251] In addition, it has resulted to a question of whether justice surpasses peace.[252]

The argument is that the ICC and the western countries do not consider the threat of peace that their implications may cause. Both in the Al Bashir situation and the case of Uhuru Kenyatta and William Ruto the AU requested for a deferral because of a threat to peace that the indictments may cause.[253] The ICC however argue that it is a form of a political strategy to avoid taking responsibility of their actions.[254]

As much as the Rome Statute does not expressly state the acceptance of universal jurisdiction, Article 13(b) states that; "A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the UNSC acting under Chapter VII of the UN Charter…"[255] This section gives the UNSC a right to disregard the national and territorial jurisdiction provided by the statute for the interest of peace and justice.[256]

The AU Commission noted the potential for abuse arising from universal jurisdiction, including the proliferation of litigation and the disregard for the principle of sovereign equality of states. In the report the AU observed that, to avoid the abuse of jurisdiction, summonses issued to heads of state to appear before the courts of another country must be with the consent of the head of state and respect for diplomatic confidentiality.[257]

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[250] Patricia Hobbs, 'The Catalysing Effect Of The Rome Statute In Africa: Positive Complementarity And Self referrals' (2020) Criminal Law Forum < https://doi.org/10.1007/s10609-020-09398-7> accessed 16th November 2020.
[251] See above.
[252] JeAn-Baptiste Jeangène Vilmer, 'The African Union and the International Criminal Court: counteracting the crisis' (2016) International Affairs 92: 6, 1319–1342 <https://academic.oup.com/ia/article/92/6/1319/2688348> accessed 15th February 2021.
[253] UNSC S 2013/639 (1st November 2013) <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_624.pdf> accessed 1st February 2021.
[254] UNSC S 2013/660 (15th November 2013) <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_624.pdf> accessed 1st February 2021.
[255] Rome Statute 1998
[256] Jenifer Tarahan, 'The Relationship Between The International Criminal Court And The U.N. Security Council: Parameters And Best Practices' (2013) Criminal Law Forum 24:417–473 < https://link.springer.com/content/pdf/10.1007/s10609-013-9213-9.pdf > accessed 24th February 2021.
[257] African Union, 'The Executive Council Thirteenth Ordinary Session, Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General,'2008. Addis Ababa <https://archives.au.int/handle/123456789/3264> accessed 8th February 2021.

4.4.2 Principle of Immunity

Heads of state immunity means that the head of state is immune from prosecution in the court of a foreign state. It usually applies to heads of state for acts done while in office.[258] The immunity is meant to ensure foreign leaders are treated with respect and they continue to perform their diplomatic duties and is partially derived from the principles of state's sovereignty. The law relating to heads of state immunity has been developed through international custom.[259]

In practice, courts have held the principle of head of state immunity in its decision. The most recent being the decision by the Cour de Cassation, the highest court in France that Muammar el-Qaddafi was entitled to immunity concerning a suit alleging that he was responsible for French DC-10 aircraft attack in 2001.[260]

However, the statute of the ICTY[261] and ICTR[262] and the ICC[263] do not provide for immunity of the heads of state before these tribunals. These has led to discontent from African Countries, especially due to the stance adopted by the ICC in interpretation of international law in determining that it could issue an arrest warrant of a sitting head of state such as in the case of the former president of Sudan, Omar Hassan Ahmad al-Bashir.

4.4.3 ICC's Concentration on Africa

Most African countries view the ICC prosecutions as a tool for selective justice meant to punish African defendants[264] and shield powerful states from accountability[265]. Some of the prominent

[258] Sari A, 'The Immunities of States and Their Officials in International Criminal Law and International Human Rights Law. By Rosanne Van Alebeek, Oxford, Oxford University Press, 2008. (2009) 79(1) British Yearbook of International Law 388 <https://academic.oup.com/bybil/article/79/1/388/499037> accessed 8th February 2021.
[259] Malanczuk P, Akehurst's Modern Introduction to International Law (Seventh Edition, Taylor & Francis Group 2002) <https://law.famu.edu/wp-content/uploads/2015/05/1.-Modern-Introduction-to-International-Law.pdf> accessed 8th February 2021.
[260] 'Gaddafi Case, General Prosecutor at the Court of Appeal of Paris, Appeal Judgment, Appeal No 00-87215, Decision No 64, (2001) 125 ILR 490, (2001) RGDIP 474, ILDC 774 (FR 2001), 13th March 2001, France; Court of Cassation [Cass]; Criminal Division' (Oxford Public International Law) <https://opil.ouplaw.com/view/10.1093/law:ildc/774fr01.case.1/law-ildc-774fr01> accessed 9th February 2021.
[261] Article 7(2) ICTY Stattute, 1993.
[262] Article 6(2) ICTR Statute, 1994.
[263] Article 27(1) Rome Statute, 1998.
[264] Ssekandi F and Tesfay N, 'Engendered Discontent: The International Criminal Court in Africa' (2017) 18 Georgetown Journal of International Affairs 77 <http://www.jurisafrica.org/docs/articles/2017-03-29-Engendered-Discont-Article-Authors-edits-2.pdf> accessed 9th February 2021.
[265] Sirleaf MVS, 'Regionalism, Regime Complexes, and the Crisis in International Criminal Justice' Columbia Journal of Transnational Law 80 <http://d-scholarship.pitt.edu/27814/4/Sirleaf_CJTL__Article_Final.pdf> accessed 9th February 2021.

remarks were from former chairman of the African Union, Jean Ping once said, “that "there are two systems of measurement...the ICC seems to exist solely for judging Africans”[266] and chairman of the AU Executive Council and Ethiopian foreign affairs minister Tedros Adhanom Ghebreyesus who said that, “Far from promoting justice and reconciliation and contributing to the advancement of peace and stability on our continent, the court has transformed itself into a political instrument targeting Africa and Africans”[267].

This view has mostly developed because rather than applying itself equally to punishing atrocities and war crimes committed in the various armed conflicts around the world, the ICC is concentrating on Democratic Republic of the Congo (DRC), Central African Republic (CAR), Sudan (Darfur), Uganda (Northern), Libya, Côte d’Ivoire, Sudan and Kenya[268]. On the other hand, countries like the United States have shielded themselves from the ICC by entering bilateral agreements to prevent arrest or extradition of US citizens and even enacting statutes such as American Service-men's Protection Act (ASPA).

This has been attributed mainly to political interference by the main financial supporters of the ICC who are stronger financially, economically and diplomatically. This view has been further backed by the refusal by the UNSC to defer some of the cases before it at the request of individual countries and the AU in order to pursue more peaceful and reconciliation means to resolve conflict.

Case examples are the situation that occurred when the ICC issued arrest warrants against Sudan’s the president Al Bashir,[269] later, the AU Peace and Security Council requested the UNSC to exercise its powers under Article 16 of the Rome statute to defer the indictment and arrest in order for the AU to keep trying to find a lasting peaceful solution to the Darfur crisis[270] but, the UNSC

[266] Magnoux C, ‘Patrick S. Wegner, The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace–Justice Divide’ (2016) 14 Journal of International Criminal Justice 1034 <https://search.proquest.com/openview/47dbeb295fd8019a94d8246f6ca9174a/1?pq-origsite=gscholar&cbl=2032113> accessed 9th February 2021.

[267] Cannon BJ, Pkalya DR and Maragia B, ‘The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative’ (2016) 2 African Journal of International Criminal Justice <https://www.researchgate.net/profile/Brendon_Cannon/publication/320407768_The_International_Criminal_Court_and_Africa_Contextualizing_the_Anti-ICC_> accessed 9th February 2021.

[268] Murithi T, ‘The African Union and the International Criminal Court: An Embattled Relationship?’ 12 <https://www.africaportal.org/documents/9525/IJR_Policy_Brief_No_8_Tim_Miruthi.pdf> accessed 9th February 2021.

[269] Liu Z, ‘The Prosecutor v. Omar Hassan Ahmad Al Bashir’ [2016] SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830778> accessed 9th February 2021.

[270] Communiqué, PSC/PR/Comm.(CLXXV), Peace and Security Council 175th Meeting 5 March 2009 Addis Ababa, Ethiopia < https://www.peaceau.org/uploads/iccarrestwarranteng.pdf > accessed 9th February 2021.

declined. Similarly the situation in Kenya where UNSC declined to defer cases against the President of Kenya, Uhuru Kenyatta and the Deputy President William Ruto[271].

4.4.4 Justice over Peace

South Africa believes that peace and justice are complementary, a view that can be seen to be contrary to the decisions of UNSC and ICC that seem to almost entirely rely on prosecution to render justice to victims of serious crimes[272]. In South Africa's view, "its obligation with respect to the peaceful resolution of conflicts at times were incompatible with the interpretation given by the International Criminal Court of obligations contained in the Rome Statute."[273] The UNSC declining to defer the case against Al-Bashir being one of the best case scenario for the claims by South Africa. Rather than allow peace talks and allow African Union High-Level Panel on Darfur AUDP to find effective and comprehensive means to address issues of accountability and combat impunity on the one hand, and promote reconciliation and healing, on the other continue in Darfur, they would rather the Court arrest and prosecute Al-Bashir.

South Africa submitted its notification to withdraw from the ICC partly due to the difference in the interpretation of Articles of the Rome Statute. Article 98 of the Rome Statute provides that, "the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the co-operation of that third State for the waiver of the immunity or pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the co-operation of the sending State for the giving of consent for the surrender." In its view, South Africa argued that arresting Al-Bashir when he went to South Africa would in fact be in conflict with its obligations under international law unless Sudan waived his immunity.

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[271] 'Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining | Meetings Coverage and Press Releases'
< https://www.un.org/press/en/2013/sc11176.doc.htm > accessed 9th February 2021.

[272] Ssekandi F and Tesfay N, 'Engendered Discontent: The International Criminal Court in Africa' (2017) 18 Georgetown Journal of International Affairs 77 <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/geojaf18&section=29 > accessed 9th February 2021.

[273] Omorogbe EY, 'The Crisis of International Criminal Law in Africa: A Regional Regime in Response?' (2019) 66 Netherlands International Law Review 287 < https://link.springer.com/article/10.1007/s40802-019-00143-5 > accessed 10th February 2021.

4.4.5 Complementarity Principle

"The principle of complementarity governs the exercise of the Court's jurisdiction. This distinguishes the Court in several significant ways from other known institutions, including the ICTY and the ICTR. The Statute recognises that States have the first responsibility and right to prosecute international crimes. The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings. The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings. Moreover, there are limits on the number of prosecutions the ICC, a single institution, can feasibly conduct."[274]

The African countries are of the opinion that the ICC does not respect the Complementarity Principle. The AUPD came up with recommendations concerning the Darfur conflict that did not involve the ICC such as: the creation of a hybrid court consisting of Sudanese and non-Sudanese judges that shall handle the most serious crimes; the introduction of legislation to remove all immunities of state actors who were suspected to have committed crimes; and the establishment of a truth, justice, and reconciliation commission.

However, in the handling of the situation, the ICC disregarded these recommendations and went ahead with the case against Al-Bashir. Similarly, in the Kenyan case, individuals were prosecuted at the ICC before giving the local courts a chance to try the suspected persons involved in the atrocities that occurred in 2007. Complementarity ensures that state sovereignty is respected and as such ICC should only complement the national courts.

In response, African leaders in the 2009 meeting on the role of ICC in Africa[275] came up with two recommendations to ensure better co-operation between Africa and ICC and especially ICC to come in as a complimentary court in resolution of disputes only in instances where the national

[274] Agirre X and others, 'Informal Expert Paper: The Principle of Complementarity in Practice.' [2003] ICC OTP 37 <https://www.narcis.nl/publication/RecordID/oai:dare.uva.nl:publications%2F4c50f20f-12a8-4b38-aec0-6040e099b632> accessed 10th February 2021.
[275] 2009 meeting on the role of the ICC in Africa <https://reliefweb.int/report/sudan/decision-meeting-african-states-parties-rome-statute-international-criminal-court-icc> accessed 10th February 2021.

courts are unable or unwilling to prosecute persons suspected of atrocities under international law.[276]

The recommendations were: Concurrence with the AU Assembly that the AU Commission "examine the implications of the African Court on Human and Peoples' Rights, being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes"; and the initiation of "programmes of co-operation and capacity building to enhance the capacity of legal personnel in their respective countries regarding the drafting and security of model legislation dealing with serious crimes of international concern, training of members of the police and the judiciary, and the strengthening of co-operation amongst judicial and investigative agencies.[277]

4.5. Establishment of the African court v the Rome Statute

4.5.1. Formation of the Malabo Protocol

In 1981, the African Charter on Human and People's Rights (Banjul Charter) was adopted[278] which later became the African Union in 1999 and was launched in 2002.[279] The aim of the Banjul Charter is to promote and protect human and people's rights by opening up Africa to supra-national accountability.[280] It establishes the AU Commission whose mandate is to promote human and peoples' rights and ensure their protection in Africa.[281]

The Commission saw a need to further adopt the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights in 1998 so as to complement the protective 'mandate of the commission'.[282] In 2003 before the protocol

[276] Cannon BJ, Pkalya DR and Maragia B, 'The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative' (2016) 2 African Journal of International Criminal Justice < http://www.elevenjournals.com/doi/10.5553/AJ/2352068X2016002001001> accessed 10th February 2021.
[277] See above.
[278] About the African Union < https://au.int/en/overview> accessed 18th February 2021.
[279] See above.
[280] African Charter on Human and People's Rights < https://www.achpr.org/legalinstruments/detail?id=49> accessed 18th February 2021.
[281] African (Banjul) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) Article 30.
[282] African Court on Human and People's Rights < https://www.achpr.org/afchpr/ > accessed 18th February 2021.

came into force, it established the Africa Court of Justice (ACJ).[283] These two courts were merged in 2004 to form the African Court of Justice and Human Rights (ACJHR).[284]

In 2014, a protocol was added to enhance the ACJHR known as the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).[285] This came about due to the concentration of the ICC on African states including the Al Bashir case, the Kenya situation, the ICC investigations conducted in Sudan in 2005 and Libya in 2011.[286] The Malabo Protocol gives jurisdiction to the court to try international crimes.[287] It specifically extends jurisdiction to try serious international crimes.[288] Article 28A gives power to the court to try 14 crimes including genocide, crimes against humanity and war crimes.[289]

Article 16 of the Malabo Protocol states that the court shall be divided into three sections; "The General Affairs Section; a Human and People's Rights Section and an International Criminal Law Section. It gives competence to the latter section to hear all cases related to the crimes specified in this section."[290]

The major concern that the Malabo Protocol raises is that it gives jurisdiction to the African court to try the same cases as the Rome Statute which may result to a clash of authority. Some countries may opt for a regional approach abandoning their commitment to the Rome Statute. Another concern is that the Malabo Protocol' provisions clash with the Rome Statute resulting to confusion as to which laws to follow. Some of the principles in question include; immunity, universal jurisdiction and complementarity.

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[283] The Protocol of the Court of Justice of the African Union Article 2.
[284] Protocol on the Statute of the African Court of Justice and Human Rights < https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights > accessed 18th February 2021.
[285] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights > accessed 18th February 2021.
[286] Pauline Martini, 'The International Criminal Court versus the African Criminal Court' (2021) Journal of International Criminal Justice, 1–21 < https://watermark.silverchair.com/mqaa061.pdf? > accessed 18th February 2021.
[287]Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights <https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e-compressed.pdf > accessed 18th February 2021.
[288] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Article 3
[289] See above Article 28A
[290] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights

4.5.2 Head of State Immunity

Article 46A of the Malabo Protocol states that, "No charges shall be commenced or continued before the Court against any serving AU head of state or government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."[291] This section has raised a lot of criticism especially because it clashes with the Rome Statute Article 27 which states that,

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[292]

Initially the AU was in favor of discarding immunity for state officials. The previous draft protocol stated that, "Without prejudice to the immunities provided for under international law, the official position of any accused person, whether as Head of State or Government, Minister or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[293] However, due to the prosecution of sitting heads of states like Al Bashir, President Kenyatta Uhuru and William Ruto the AU became aggrieved with the situation and opted for[294] African solutions to African problems.[295] This provision raises the question of supremacy of international law and whether the law is a form of neo-colonialism towards African states.

To further give clarification to the matter; the AU, at the 30th Ordinary Summit in Addis Ababa, Ethiopia requested for an advisory opinion from the International Criminal Justice (ICJ).[296] The AU's intention was to ensure that as a result of the advisory opinion states can fulfil their obligations without undermining their role to end impunity or their respect to the already existing

[291] See above.
[292] Rome Statute
[293] Article 4 (o) and (h) of the Constitutive Statute of the African Union.
[294] Emmanuel Okurut1 and Hope Among, 'The contentious relationship between Africa and the International Criminal Court (ICC)' (2018) Journal of Law and Conflict Resolutions 10(3) <http://www.academicjournals.org/JLCR > accessed 21st February 2021.
[295] Institute for Security Studies, 'African Solutions to African problems' (18th September 2018) *ISS Today* <https://issafrica.org/iss-today/african-solutions-to-african-problems> accessed 21st February 2021.
[296] Assembly of the African Union ("AU Assembly"), 30th Ordinary Session, Decision on the International Criminal Court, AU Assembly Doc. Dec.672 (XXX), 5(i) (Jan. 28–29, 2018) <https://au.int/sites/default/files/decisions/33908-assembly_decisions_665_-_689_e.pdf>

and thriving international rules and obligations set in place.[297] This advisory opinion would also give the ICJ an opportunity to give the international community a proper and clear interpretation of the international laws and norms concerning immunity being that the ambiguity around the subject is evident.[298] Finally, it would be of benefit to the international community and the African states not to rely on their own interpretation which would compromise the international legal jurisdiction that governs the community.[299]

4.5.3. Universal Jurisdiction

In 2008, Rose Kabuye the then Rwandan Chief of Protocol and former major of the Rwandan Patriotic Front was arrested in Germany by the German authorities as a result of an arrest warrant issued by a French judge. She was allegedly involved in the plane crash in 1994 that was said to have caused the assassination of the former president of Rwanda, Habyarimana which triggered the Rwandan genocide.[300] The charges were dropped in 2009 however, this arrest triggered the tensions between France and Rwanda. President Paul Kagame stated that the exercise of universal jurisdiction by European countries against African states was to bring shame to African political leaders.[301]

This among other cases led to continuous discussion concerning the abuse of universal jurisdiction by European countries in almost every AU summit.[302] The road to finding a lasting solution began in the summit of 2008 where the EU acknowledged the declining relationship between the AU and the EU as a result of the issue of universal jurisdiction.[303]

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[297] Sascha-Dominick D. Bachmann & Naa A. Sowatey-Adjei, The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice? (2020) 29 Wash. L. Rev. 247. <https://digitalcommons.law.uw.edu/wilj/vol29/iss2/3> accessed 21st February 2020.
[298] See above.
[299] See above.
[300] Florian Jeßberger 'On Behalf of Africa': Towards the Regionalization of Universal Jurisdiction?' (2014) G. Werle et al. (eds.), Africa and the International Criminal Court, International Criminal Justice Series 1(10) <http://www.springer.com/series/13470> accessed 23th February 2021.
[301] Sascha-Dominick D. Bachmann & Naa A. Sowatey-Adjei, The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice? (2020) 29 Wash. L. Rev. 247. <https://digitalcommons.law.uw.edu/wilj/vol29/iss2/3> accessed 21st February 2020.
[302] Florian Jeßberger 'On Behalf of Africa': Towards the Regionalization of Universal Jurisdiction?' (2014) G. Werle et al. (eds.), Africa and the International Criminal Court, International Criminal Justice Series 1(10) <http://www.springer.com/series/13470> accessed 23th February 2021.
[303] Decision on Africa's Relationship with the International Criminal Court (ICC), AU Extraordinary Session, 2009 Addis Ababa, Ext/Assembly/AU/Dec. 1 (15th April 2009). <https://reliefweb.int/report/sudan/au-eu-technical-ad-hoc-expert-group-principle-universal-jurisdiction-report>

In 2013, during the AU encouraged the AU Commission to ensure that the jurisdiction of the African Criminal Chamber to include international crimes stated in the Rome Statute so as to strengthen the national jurisdiction and to avoid arrests of their political leaders in other foreign states.[304]

The Malabo Protocol Article 3 states that, "The Court is vested with an original and appellate jurisdiction including international criminal jurisdiction, which it shall exercise in accordance with the provisions of the Statute annexed hereto" Article 28A goes on to define the international criminal jurisdiction and provides an extensive list of international crimes.[305]

The provision of such an expanded jurisdiction to the African Court is progress that may lead Africa taking control of its international criminal sector as opposed to allowing the EU countries to execute the arrest of its leaders. They concern may be that the African Court may choose to be lenient with its political leaders in the event that they commit grievous international crimes due to political affiliations.

4.5.4. Complementarity Principle

Article 46H of the Malabo Protocol states that,

> (1) The jurisdiction of the Court shall be complementary to that of National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.[306] (2) The Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless that State is unwilling or unable to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to prosecute.[307]

This section does not state that it is complementary to international jurisdiction which has raised a lot of criticism to the ingenuity of the AU's effort to improve their relationship with the ICC.[308] It

[304] Decision on Africa's Relationship with the International Criminal Court (ICC), AU Extraordinary Session, 2013 Addis Ababa, Ext/Assembly/AU/Dec. 1 (Oct. 2013), para 3.
[305] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.
[306] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.
[307] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Subsection 2.
[308] Sarah Nimigan, 'The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity' (2019) Journal of International Criminal Justice 17, 1005^1029 <https://academic.oup.com/jicj/article-abstract/17/5/1005/5613008 > accessed 23rd February 2021.

however introduces the concept of regional complementarity which might be a solution to making the complementarity principle more effective.

"Regional complementarity entails that "a genuine prosecution by a lawfully constituted regional tribunal should be seen as prosecution by a state such that the case is inadmissible before the ICC" in connection with Art. 17 (1) (a) of the Rome Statute."[309] National states give power to a regional tribunal to investigate and prosecute a matter on their behalf.[310] This concept is seen to be a promising step to improving the co-operation between the ICC and the AU.[311]

In 2015, Kenya proposed an amendment to the preamble of the Rome Statute[312] which currently states 'Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.'[313] The proposed amendment would change it to read 'Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions'[314] Kenya was of the opinion that it would allow prosecutions to be done closer to the involved state thereby allowing the ICC to be the last resort as it should be.[315]

4.6. Conclusion

It is quite evident that the Al Bashir and the Kenya situation among others caused a lot of tension between the ICC and the AU which seem irreparable. However, the Malabo Protocol has some potential to create a relationship probably not in the traditional way that the ICC may have been looking to. We have discussed regional complementarity which in my opinion gives light at the end of the tunnel. It will allow the ICC to give an opportunity to the AU to strengthen their judicial system to be able to account for crimes committed in Africa. The ICC should encourage other

[309] Jos van Doorne, 'The Rome Statute and Malabo Protocol: Complementarity's Creation of a Fragmented World' (LLM, August 2019) < http://arno.uvt.nl/show.cgi?fid=148714 > accessed 23rd February 2021.
[310] See above.
[311] See above.
[312] Sarah Nimigan, 'The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity' (2019) Journal of International Criminal Justice 17, 1005^1029 <https://academic.oup.com/jicj/article-abstract/17/5/1005/5613008 > accessed 23rd February 2021.
[313] Rome Statute 1998.
[314] Sarah Nimigan, 'The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity' (2019) Journal of International Criminal Justice 17, 1005^1029 <https://academic.oup.com/jicj/article-abstract/17/5/1005/5613008 > accessed 23rd February 2021.
[315] See above.

countries including Europe to give the AU a hand of support to see through the the idea of an African Criminal Chamber.

Nevertheless, the AU ought to clearly separate justice from politics so as to ensure that criminal offenders are not protected in the veil of 'head of state immunity'. It would be a step towards the right direction if both the AU and the ICC amend their statutes to ensure harmony and lack of ambiguity.

CHAPTER FIVE

SUMMARY OF MAJOR FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction

This research paper's main focus was the principle of complementarity as the key to the co-operation of Africa and the ICC. Ideally the ICC was formed to be a court of last resort for the prosecution of serious international crimes namely; genocide, war crimes, aggression and crime against humanity. From the development of complementarity as seen in the history; it seems to be a well thought of and structured concept to adequately facilitate the relationship and co-operation of the ICC and African states. Having analysed the concept in practice, the correlation between the two parties has been deteriorating at a very fast rate contrary to international community's exception.

This chapter shall give a summary of the findings and arguments, conclusions of the four chapters and recommendations which if put in practice may assist in the improvement of the very much desired co-operation and in the end a common goal to fight impunity.

5.2. Summary of major findings

5.2.1. State Sovereignty

From the history of complementarity discussed in chapter two, it is evident that the primary concern of states was the protection of their state sovereignty. They had a problem with an international court whose power surpassed the national courts thus the principle of complementarity carefully evolved over the years for the main purpose of protecting the sovereignty of the nations. Article 17 clearly provides that states have a primary responsibility to prosecute international crimes introducing the principle of complementarity.

However, as seen in chapter four, the theory is yet to become a practical experience for African states and the AU. Some states still argue that Western countries use the concepts of jurisdiction and the ICC to 'colonize' Africa. Despite the fact that African states lack strong judicial bodies and political stability to fight major international crimes, the principle of complementarity should

still be viable to protect the sovereignty of the states. Sovereignty here includes the primary responsibility that all African states have to fight international crimes.

5.2.2 Ramifications of the African Criminal Chamber

Chapter Four of this paper discussed the establishment of the African Criminal Court in light of the tension between the ICC and the AU. From the ICC refusing to accept the deferral requested by Kenya and the AU to Kenya threatening to withdraw from the Rome Statute. The issue of President Al Bashir's warrant of arrest that led to countries like Chad, Kenya and South Africa choosing to side with the AU's legislation that provides for immunity abandoning their responsibility as a party to the Rome Statute to arrest him.

The African Court may be undermined due to the incongruous nature of the two legislations. The ICC does not provide for immunity of heads of state while the AU does. The AU seems to prioritize peace more than the ICC whose methods are more inclined to seeking justice. The issue of jurisdiction will cause more conflict as the Malabo Protocol does specify which court shall have primacy to fight international crimes affecting the complementarity principle that the Rome Statute so prides itself in.

5.2.3 Incorporation of the Rome Statute in African countries' legislation

Chapter three compared the legislation of Kenya, Germany and the United States and the practicality of the laws on the road to complementing the Rome Statute. We found that since Germany is pro-ICC its legislation has enacted the elements of the Rome Statute and made it part of the laws. Despite the fact that Kenya is a monist state it has not made enough changes to cooperate with the ICC. The enactment process was done hurriedly to avoid scrutiny by the ICC including enacting the ICA 2008. It does not include the elements of the international crimes provided in the Rome Statute and the ingredients of the said elements therefore causing ambiguity and lacking sufficiency.

Chapter Four found that most African countries are like Kenya, in that they have not put in enough effort to ensure that the legislation complements that of the Rome Statute e.g. Chad. For efficient co-operation with the ICC so as not to be termed as 'unwilling or unable to investigate and

prosecute a crime' being a monist state is not enough; the state ought to enact subsidiary laws that facilitate adequate support to the ICC.

5.3. Conclusion

Chapter One began by giving a background of the research explaining the principle of complementarity and the law that provides for the same as well as the importance of the ICC being a court of last resort. It well further to give a factual background by briefly explaining the situation in Kenya and Africa that led to this study. The Chapter also reviews literature provided by other authors with the intention of finding the gaps that this research sought to address therefore coming up with a problem statement that guided the research.

It gave a theoretical framework that explained the reason behind the tension between the AU and the ICC. This research began on the assumption that the Rome Statute sufficient to end impunity; The ICC is genuinely focusing on African states due to the grievous crimes in the area and The ICC is fulfilling its objective by encouraging African states to investigate and prosecute crimes in their domestic jurisdiction.

Chapter Two discussed the historical background of the principle of complementarity which was essential to appreciate the development into what it is today and to give hope that such progression shall some day in the future be the reason an impeccable relation between Africa and the ICC. The Chapter analysed the elements of the principle of complementarity which included jurisdiction, the admissibility threshold, jus cogens and obligation erga omnes, sovereign immunity and *pacta sunt servanda.*

It expounded on the court's jurisdiction identifying the crimes that the court can try and the rationale behind limiting the court to those crimes. The court is the last resort giving an opportunity for states to try the cases under their national jurisdiction. This analysis gave an in depth study on the admissibility of the court explaining the unwillingness and inability of states to investigate and prosecute crimes. The analysis on *jus cogen* and obligation *erga omnes* showed the importance of states cooperating with the ICC. These obligations arise from Customary International Law and have become binding to all parties whether or not they are party to the statute. The chapter also expounded on the reason behind the failure of sovereign immunity being used as a defence. Finally,

this chapter emphasised on the obligation on all member states to comply with the content of the treaty in good faith.

Chapter Three was a comparative study of Kenya, the United States and Germany giving a background of the countries and comparing them based on the legislation framework and the co-operation with the ICC. The background in Kenya was the devastating 2007-2008 post-election violence which led to prosecution by the ICC and the enactment of a legislation that attempted to incorporate the Rome Statute. The USA, despite being a great supporter of an international criminal court decided to establish their legislation to prosecute their own crimes and to prevent the ICC from doing so. Germany has been and continues to be a supporter of the ICC evident in their legislation including the enactment of the CCAIL. The Chapter gave a good basis to determine the future of Kenya and other African states in the event that they decide to withdraw from the ICC. It also brought out the benefits that cooperating with the ICC has from the relationship that Germany has with the ICC.

Chapter Four was an in-depth study of the Al Bashir situation in Africa that was the main cause of the accelerated tension between the AU and the ICC thereby drawing out the issues that caused the tension such us universal jurisdiction, immunity, the scrutiny of the ICC on Africa, whether justice surpasses peace and the complementarity principle. It finally focused on the establishment of the Malabo Protocol which formed the African Criminal Chamber.

5.4 Recommendations

5.4.1 Regional Complementarity

Chapter Four explained the issue of the complementarity as a cause of the tension. Both the Malabo Protocol and the Rome Statute are silent on the kind of relationship that each should have and the primacy of either court when dealing with serious international crimes in Africa. It is likely that without the amendment of both statutes a legal fragmentation shall be caused leading to a further division between both institutions.[316]

[316] Jos van Doorne, 'The Rome Statute and Malabo Protocol: Complementarity's Creation of a Fragmented World' (LLM, August 2019) < http://arno.uvt.nl/show.cgi?fid=148714 > accessed 23rd February 2021.

This research paper suggests that both statutes ought to be amended to recognise the power of each institution to prosecute and investigate international crimes in the region.[317] The idea is that the African Court would act as a supranational body with adjoining powers from African states to try international crimes.[318] The ICC on the other hand would allow and recognise that power and withhold from trying crimes already tried or in the process of doing so by the AU. It would therefore come in only when the African court has failed to do so. Despite both courts acting as supranational powers, the presence of clear provisions defining the relationship will ensure that both courts complement each other efficiently.

5.4.2. Strengthening the capacity of the African Criminal Chamber to fight international crimes.

A practical concern is the funding required for the criminal chamber to function. In 2011 a budget of $9million was allocated. If compared to the ICC whose budget at the time was $134 million just to fight the main core international crimes, the concern is justifiable.[319] Resources will be required to have stuff such as prosecutors, judges, investigators etc. Nevertheless, it is not an impossible task if backed up by the joint effort of member states investing their finances to ensure that first the legislation is implemented in the individual states and second that some of their finances go towards the support of the Criminal Chamber.[320] The Court will also require the support of other stakeholders and regional communities like the EU.

The Protocol will cause an overlap of jurisdictions which might hinder support from especially EU and the ICC.[321] One way to avoid this lack of support would be to amend the immunity clause and

[317] Sarah Nimigan, 'The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity' (2019) Journal of International Criminal Justice 17, 1005^1029 <https://academic.oup.com/jicj/article-abstract/17/5/1005/5613008 > accessed 23rd February 2021.
[318] Kamari M. Clarke, Abel S. Knottnerus, Eefje de Volder, *Africa and the ICC* (4th edn Cambrdge University Press 2016).
[319] Garth Abraham, 'Africa's Evolving Continental Court Structures: At the Crossroads?' (2015) South African Institute of International Affairs <https://www.africaportal.org/documents/12585/saia_sop_209__abraham_20150202.pdf > accessed 22nd March 2021.
[320] Sarah Nimigan, 'The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity' (2019) Journal of International Criminal Justice 17, 1005^1029 <https://academic.oup.com/jicj/article-abstract/17/5/1005/5613008 > accessed 23rd
23rd February 2021.
[321] See above.

not recognizing immunity for current or former head of states.[322] Another way would be to allow the ICC to try the heads of states that the African Criminal Chamber cannot due to the immunity clause. That will increase the chances of the ICC supporting the AU therefore increasing the ability of the chamber to become a success.

5.4.3 A Different Approach: The ICC Actively Encouraging Domestic Prosecution

Luis Moreno Ocampo once emphasised that, "the success of the ICC will be judged not by its number of prosecutions, but by the number of international prosecutions avoided because of the increased functioning of domestic legal systems."[323] He stated that the ICC has an objective of encouraging national states to strengthen their judicial systems to investigate and prosecute international crimes.[324] The ICC can be more involved by establishing positive complementary system that involves the division of labor between the court and the national state's judicial systems. [325]

One example is the Former Yugoslavia whose criminal tribunal had a transition team that shared information about with the national states and went further to refer the cases back to them.[326] This however requires national states to be willing and show their willingness to be supported by putting in the effort to work with the ICC.

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[323]Luis Moreno-Ocampo, Chief Prosecutor, ICC, Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court 2 (June 16, 2003) [hereinafter Prosecutor's Initial Statement], <http://www.icccpi.int/NR/rdordyres/ > accessed 14th July 2018.

[324] Juianita Goebertus, 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya' (2011) 14(1) Yale Human Rights and Development Journal <https://pdfs.semanticscholar.org/0406/0c386358d60a3cb8155841aa6da78e04dc50.pdf> accessed 14th July 2018.

[325] Patricia Hobbs, 'The Catalysing Effect of the Rome Statute in Africa: Positive Complementarity and Self referrals' (2020) Criminal Law Forum < https://doi.org/10.1007/s10609-020-09398-7> accessed 16th November 2020.

[326] Juianita Goebertus, 'Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya' (2011) 14(1) Yale Human Rights and Development Journal <https://pdfs.semanticscholar.org/0406/0c386358d60a3cb8155841aa6da78e04dc50.pdf> accessed 14th July 2018.

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