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The Rome Statute Complementarity Principle and the Creation of the African Court of Justice and Human and Peoples' Rights

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Abstract

The Rome Statute places the responsibility of prosecuting crimes recognized under the Statute on state parties and the International Criminal Court (ICC) and will only intervene when such states are unwilling or unable. This is called the principle of complementarity. Thus, African state parties to the Statute are expected to prosecute crimes recognized under the Statute. However, these African state parties and their counterparts who are not parties have decided to create the African Court of Justice and Human and Peoples' Rights, which, like the ICC, will prosecute the crimes recognized under the Rome Statute if they are unwilling and unable. This study therefore examines the question of whether the creation of the African Court of Justice and Human and Peoples' Rights is compatible with the obligation of the African state parties under the Rome Statute to prosecute. The study argues that the creation of the Court can be reconciled with the obligation to prosecute under the Rome Statute if the African Union, of which the Court is its judicial organ, is considered to be the agent of the African state parties, which invariably implies that the African state parties are the ones carrying out the prosecution as principals.

Keywords: Rome Statute, International Criminal Court, complementarity, African Court of Justice and Human and Peoples' Rights, unwillingness and inability.

1 Introduction

It has always been on the agenda of the human rights movements since 1948 that an International Criminal Court (ICC) should be established. The idea of establishing this Court, however, suffered a setback until it was rejuvenated after the end of the Cold War.[1] In 1992, the General Assembly instructed the International Law Commission to prepare a draft statute for a permanent criminal court. The efforts of the Commission culminated in a conference, held on 17 July 1998 in

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1 H.J. Steiner, P. Alston & R. Goodman, *International Human Rights in Context: Law, Politics, Morals*, 3rd ed., Oxford, Oxford University Press, 2007, p. 1291.

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Rome, where the Statute for the ICC was adopted.[2] On 1 July 2002, the Statute of the International Criminal Court (ICC), otherwise known as the Rome Statute, came into force. As of 18 December 2018, 123 states had ratified the Statute,[3] 33 of which are in Africa.[4] The number of African state parties to the Statute underscores the significant roles played by these states in the formation of the Statute. The Rome Statute recognizes genocide, crimes against humanity, war crimes and the crime of aggression,[5] all of which are considered to be the most serious crimes that are of concern to the international community.[6] The Rome Statute also creates the ICC and makes it a permanent institution.[7] The Rome Statute places the ICC at the heart of the international criminal justice system. This is because it is the only "independent permanent International Criminal Court in relationship with the United Nations system",[8] in contradistinction to the preceding *ad hoc* tribunals like the International Military Tribunal (IMT), International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

However, in spite of the position of the ICC, the Rome Statute recognizes the role of the domestic criminal justice system. In the Preamble to the Statute, state parties recall that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and that effective prosecution of these crimes "must be ensured by taking measures at the national level". Since measures are expected to be taken at the domestic level, the Rome Statute emphasizes "policy prescriptions in favour of national action"[9] by state parties. With emphasis on state action, the Rome Statute develops the principle of complementarity.[10] The principle of complementarity permits states that have juris-

2 The International Centre for Criminal Law Reform and Criminal Justice Policy, *International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute*, 3rd ed., Vancouver, British Columbia, Canada, The International Centre for Criminal Law Reform and Criminal Justice Policy, 2008, p. 1.

3 International Criminal Court, 'The State Parties to the Rome Statute', available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last accessed 18 December 2018).

4 *Ibid*. The distribution of the State Parties is as follows: African States: 33, Asia-Pacific States: 19, Eastern Europe: 18, Latin American and Caribbean States: 28, Western Europe and other States: 25.

5 *See* Art. 5 Rome Statute of the International Criminal Court (Rome Statute). It should be noted that the crime of aggression was not defined until 11 June 2010 in Kampala, Uganda, by the Review Conference of the Rome Statute, as mandated by Art. 123 (1) of the Rome Statute. The adoption of the said definition of the crime of aggression took effect in July 2018.

6 Art. 5 Rome Statute.

7 *See* the Preamble to the ICC Statute, where it is stated that state parties "determined…for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole."

8 Preamble Rome Statute.

9 D. Robinson, 'The Inaction Controversy: Neglected Words and New Opportunities' *in* C. Stahn & M. El Zeidy (Eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I, Cambridge, Cambridge University Press, 2011, pp. 496-498.

10 *See* Art. 17 Rome Statute.

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diction to prosecute the crimes recognized under the Statute, and the ICC will intervene only if the state concerned is unwilling or unable.[11]

In spite of the contributions of the African states in the creation of the ICC, however, African state parties have turned against the Court. The African state parties contend that the ICC is targeting Africans alone and that it has become a tool in the hand of Western powers. Meanwhile, the African state parties and their counterparts who are not parties to the Rome Statute have created for themselves the African Court of Justice and Human and Peoples' Rights, otherwise known as the African Criminal Court (ACC).[12] The African Court of Justice and Human and Peoples' Rights, like the ICC, also recognizes the crimes recognized under the Rome Statute[13] and the role of the domestic justice system of these African states in prosecuting them;[14] and like the ICC, it will only intervene if these African state parties are unwilling or unable.[15]

This study therefore examines the issue of whether the creation of the African Court of Justice and Human and Peoples' Rights is compatible with the obligations of African state parties under the Rome Statute. The study is divided into six parts. The first part introduces the study. The second part discusses the Rome Statute Complementarity Principle and what it essentially contemplates. This is the first factual background. The discussion on complementarity is required because without it there is no way the creation of the ACC can be reconciled with it. What is there to be reconciled with, if it is not discussed first? In discussing the principle of complementarity, this segment of the study relies substantially on legal documents. It is worth noting that the documents here are on complementarity principle as understood by the ICC itself. One of the ways to know what an organization stands for is to examine its objectives, which in this instance are what the Policy and Prosecutorial Strategies of the Office of the Prosecutor (OTP), among others, stand for. In addition, the legal documents are primary sources in this regard because they are made pursuant to the Rome Statute. At the domestic level, they will be regarded as subsidiary legislation, which to all intents and purposes are also primary sources. The third part examines the basis for the dissatisfaction of the African leaders with the ICC. This is the second factual background. The discussion of the dissatisfaction of African leaders is necessary because this is the major factor that triggered the creation of the ACC, even though there are other factors too that culminated in the creation of the Court. The fourth part examines the creation of the African Court of Justice and Human and Peoples' Rights. The fifth part seeks to reconcile the creation of the African Court of Justice and Human and Peoples' Rights with the Rome Statute Complementarity Principle. The thesis of the study comes in at this point, stating that Africa can do justice on its own terms by creating the ACC to assuage the dissatisfaction of African leaders and, at the same time, stay within the ambit of the

11 *Ibid.*
12 *See* Statute of the African Court of Justice and Human and Peoples' Rights.
13 *Ibid.*, Art. 14.
14 *Ibid.*, Art. 22; Art. 46H Statute of the African Court of Justice and Human Rights as amended.
15 *Ibid.*

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Rome Statute justice system in line with the complementarity principle. The sixth part concludes the study.

2 The Complementarity Principle of the Rome Statute of the International Criminal Court

The principle of complementarity under the Rome Statute is embodied in Articles 1 and 17 of the Statute. Article 1 of the Statute provides 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.

Article 17 of the Statute reinforces the provisions of Article 1 by providing that:

1 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.

2 In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following exist, as applicable:
   a The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
   b There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
   c The proceedings were not or are not being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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3 In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

If one considers the above provision, it can be seen that Article 17 does not expressly mention the word 'complementarity'. However, Article 1 uses the word 'complementary'. Paragraph 10 of the Preamble, referred to in Article 17, reinforces the principle of complementarity by emphasizing that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". Article 20 paragraph 3, which is referred to in Article 17, mentions the *ne bis in idem* principle. This principle means that a person shall not be tried for the same crime twice. Within the context of Articles 1 and 17 of the Rome Statute, it means that once a person has been genuinely tried by a domestic court, the ICC cannot try that same person for that same crime again.[16] As regards Article 5 of the Statute, which is also referred to, this article mentions only crimes to which the principle of *ne bis in idem* applies, which in this instance are genocide, crime against humanity, war crimes and aggression.[17]

The Rules of Procedure and Evidence (RPE),[18] which are aimed at giving effect to the various provisions of the ICC Statute, also make provision for the principle of complementarity. Rule 51 of the RPE provides that:

> In considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, *inter alia*, information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.

Article 42, paragraph 2 of the Rome Statute and Rule 9 of the RPE empower the Prosecutor to regulate his office. Pursuant to these provisions, the OTP issued its regulation known as the Regulation of the Office of the Prosecutor (ROTP).[19] Pursuant to Regulation 14 of the ROTP, the OTP issued its Prosecutorial Strategy.

16 M. Adigun, *The International Criminal Court and Nigeria: Implementing the Complementarity Principle of the Rome Statute*, Abingdon, UK, Routledge, 2018, p. 33.

17 *Ibid.*

18 *See* the Rules of Procedure and Evidence (RPE) adopted by the Assembly of States Parties First session 3-10 September 2002 Official Records ICC-ASP/1/3. *See also* Art. 51 Rome Statute, pursuant to which the RPE was made. Art. 51(4) provides that the RPE shall be consistent with the Rome Statute, while Art. 51(5) provides that any inconsistency between the Rome Statute and the RPE shall be resolved in favour of the Rome Statute. In addition, see explanatory note to the RPE.

19 Regulation of the Office of the Prosecutor (ROTP) ICC-BD/05-01-09, date of entry into force: 23 April 2009, Official Journal Publication, available at: www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf (last accessed 18 December 2018).

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However, before issuing its Prosecutorial Strategy, the OTP had, in 2003, first issued its policy paper where the principle of complementarity was considerably emphasized.[20] Similarly, in the report on its activities between June 2003 and June 2006, the OTP also placed emphasis on the principle of complementarity.[21] Considering the earlier reports to be sufficient foundation, the OTP in its first Report on Prosecutorial Strategy (RPS)[22] emphasized the principle of complementarity as follows:

> With regard to complementarity, the Office emphasizes that according to the Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories. In this design, intervention by the Office must be exceptional-it will only step in when states fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings.[23]

In furtherance of the principle of complementarity, the OTP in its 2009-2012 Report on Prosecutorial Strategy reinforces the principle of complementarity.[24] The OTP stated that the 2009-2012 Report is based on the previous 2006-2009 Report,[25] which indicates that the commitment to the principle of complementarity continues. Furthermore, the report states that the OTP will work with states to "promote national activities including adoption of implementing legislation and promotion of domestic proceedings".[26] In paragraphs 16 and 17 of the Prosecutorial Strategy, the OTP reiterates its previous commitment to complementarity and adds that the "principle of complementarity has two dimensions: (i) the admissibility test, i.e. how to assess the existence of national proceedings and their genuineness, which is a judicial issue; and (ii) the positive complementarity concept, i.e a proactive policy of cooperation aimed at promoting national proceedings".

The notion of admissibility referred to can best be understood in contradistinction to the concept of jurisdiction. Jurisdiction is the competence of a court

20 *See* Paper on Some Policy Issues before the Office of the Prosecutor September 2003, available online at: https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (last accessed 18 December 2018), para. 1.1.

21 Office of the Prosecutor Report on the activities performed during the first three years (June 2003-June 2006), available online at: www.iccnow.org/documents/3YearReport%20_06Sep14.pdf (last accessed 18 December 2018), para. 58.

22 Report on Prosecutorial Strategy (RPS) of 14 September 2006, available online at: www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf (last accessed 18 December 2018).

23 *Ibid.*, para. 2(a). *See also* paras. 2(b) and 15 of the RPS of 14 September 2006.

24 *See* paras. 2, 3, 7, 8(a) and (c), 9, 16, 17, 19, 28, 40, 59 and 79 Report on Prosecutorial Strategy (RPS) 2009-2012 of 1 February 2010, available online at: www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf (last accessed 18 December 2018).

25 *Ibid.*, para. 3.

26 *Ibid.*, para. 7. *See also* paras. 8(a) and 8(c), where the OTP seeks to achieve the same goal by working with NGOs and external experts, respectively.

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to adjudicate a matter. The ICC may assume jurisdiction based on the crime committed (*ratione materiae*); on the time the alleged crime was committed (*ratione temporis*); on the place where the alleged crimes were committed (*ratione loci*) and on the nationality of the people who were alleged to have committed the crimes (*ratione personae*).[27] On the other hand, admissibility refers to a situation where the ICC has jurisdiction as a result of the fulfilment of the aforementioned conditions but is, all the same, precluded from exercising its jurisdiction because the state, which has primacy, has exercised its own jurisdiction or for any other reasons stated in the Rome Statute.[28]

As regards "proactive policy of cooperation aimed at promoting national proceedings", which is also referred to, this is known as positive complementarity. With positive complementarity, the ICC is to "encourage genuine national proceedings where possible…relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance".[29] The implication is that domestic prosecution is essentially at the core of the principle of complementarity, with the ICC facilitating the achievement of this objective. But, in facilitating the achievement of this objective, the ICC cannot provide capacity building, financial or technical assistance to state parties in putting in place domestic measures for the fulfilment of their obligations under the ICC Statute. This is quite understandable since the ICC is limited in resources and confines their utilization to its direct operations.[30]

If one considers the provisions of the Rome Statute, the RPE, OTP's Policy Paper, the Regulation of the Office of the Prosecutor and the Reports on Prosecutorial Strategy, it can be seen that the principle of complementarity is central to the functioning of the ICC. It is therefore not surprising when *Federación Internacional de los Derechos Humanos* (FIDH) considers complementarity "not only a key element of the functioning of the Rome Statute system but…also the most essential aspect of the Court's legacy".[31] The principle of complementarity as embodied in the Rome Statute gives primacy to state parties in the prosecution of international crimes; thus, the ICC will exercise its jurisdiction only if a state party is 'unwilling' or 'unable' to prosecute. The Court is ordinarily expected to be a court of last resort with little or no case to handle. Anne-Marie Slaughter puts it eloquently as follows:

27 Due Process of Law Foundation, *Digest of Latin American Jurisprudence on International Crimes*, Washington DC, Due Process of Law Foundation, 2010, p. 236.

28 *Ibid.*

29 *See* para. 17 Report on Prosecutorial Strategy (RPS) 2009-2012 of 1 February 2010 *supra* note 24.

30 V.O. Nmehielle, 'Taking Credible Ownership of Justice for Atrocity Crimes in Africa: The African Union and the Complementarity Principle of the Rome Statute', *in* V.O. Nmehielle (Ed.), *Africa and the Future of International Criminal Justice*, The Hague, Eleven International Publishing, 2012, p. 233.

31 *Federación Internacional de los Derechos Humanos* (FIDH), Comments on the ICC's Prosecutorial Strategy 1 December 2009, available online at: www.fidh.org/IMG//pdf/FIDHCommentsProsecStrategy2009-12_FINAL_REV.pdf (last accessed 18 December 2018), para. 3.

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> One of the most powerful arguments for the International Criminal Court is not that it will be a global instrument of justice itself-arresting and trying tyrants and torturers world-wide – but that it will be a backstop and trigger for domestic forces for justice and democracy. By posing a choice – either a nation tries its own or they will be tried in The Hague – it strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle.[32]

Therefore, the assertion of the OTP that

> with the complementarity principle, much of the work done to achieve the goals of the Statute may take place in national judiciary around the world… [and that] the number of cases that reach the Court is not a positive measure of [its] effectiveness[33]

is an overt realization of the implication of the principle of complementarity. As a matter of fact, domestic legal systems are better placed to obtain evidence in prosecuting crimes within their respective jurisdictions than an international tribunal that is miles away from the scene of the crime. The challenges implicit in investigating and obtaining evidence in a foreign state by the ICC are overwhelming apart from the expensive nature of the enterprise.[34] Similarly, the Court may be enmeshed in a caseload of enormous proportions and be subdued, leading to the truncation of international criminal justice.[35] In a nutshell, what the principle of complementarity contemplates is for states to prosecute international crimes under the Rome Statute.[36]

3 The Dissatisfaction of the African Leaders with the International Criminal Court

A number of African leaders believe that the ICC is biased in the exercise of its prosecutorial discretion. At present there are 11 situations that are being investigated, namely Uganda, Democratic Republic of the Congo, Darfur (in Sudan), Kenya, Central African Republic, Central African Republic II, Libya, Cote d'Ivoire,

32 *See* Anne-Marie Slaughter, 'Not the Court of First Resort', *The Washington Post*, 21 December 2003, Sunday, p. B07, available online at: www.princeton.edu/~slaughtr/Commentary/WPCourtResortdoc.pdf (last accessed 18 December 2018).

33 *See* para. 79, Report on Prosecutorial Strategy (RPS) 2009-2012 of 1 February 2010, *supra* note 24. *See also* para. 15 Report on Prosecutorial Strategy (RPS) of 14 September 2006, *supra* note 22.

34 Nmehielle, 2012, p. 231.

35 *Ibid.*, 232.

36 P. Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, New York, International Center for Transitional Justice, 2016, pp. 28-69.

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Mali, Georgia and Burundi.[37] These situations have yielded 28 cases.[38] All of these situations except Georgia are in Africa and have led to the feeling of opprobrium and discontent on the part of African leaders. The question of why African leaders are the only ones being hauled before the ICC, since leaders in other parts of the world are also committing these crimes of grave concern to the international community, is necessarily confounding.

Jean Ping, former President of the African Union (AU) Commission, stated that "we are not against the ICC, but there are two systems of measurement…the ICC seems to exist solely for judging Africans".[39] Paul Kagame, Rwandan President, described ICC as imperial and contended that it only seeks to "undermine people from poor and African countries, and other powerless countries in terms of economic development and politics".[40] At a point when the Kenyan President and some others were standing trial before the Court, Kenya instigated the East African Legislative Assembly (EALA) to adopt a resolution at the 10th East African Summit of Heads of States, which was to be presented to the Council of Ministers, to have the four Kenyan suspects tried in Tanzania by the East African Court of Justice (EACJ). While the East African Community (EAC) Treaty does not confer jurisdiction on the EACJ, the resolution called for the amendment of its Article 27 to confer jurisdiction on the Court with retrospective effect.[41]

Of course, Kenya's effort turned out to be a moot exercise as the amendment could not be achieved. Nonetheless, this development shows the extent to which African states are ready to go to prevent their leaders from being tried by the ICC – a Court whose creation they overwhelmingly supported. It is therefore not surprising that South Africa sought to withdraw from the Rome Statute.[42] Similarly, the Gambia, under President Yaya Jammeh, also withdrew from the Rome Stat-

37 *See* ICC, 'Situations under Investigation', available online at: https://www.icc-cpi.int/pages/situations.aspx (last accessed 18 December 2018).

38 *See* ICC, 'Cases', available online at: https://www.icc-cpi.int/Pages/cases.aspx (last accessed 18 December 2018).

39 Congressional Research Service, International Criminal Court Cases in Africa: Status and Policy Issues Congressional Research Service 7-5700 RL 34665, 22 July 2011 available at: www.fas.org/sgp/crs/row/RL34665.pdf (last accessed 18 December 2018), p. 27.

40 *Ibid.*

41 A. Ndegwa, 'Kibaki Joins EAC Fray to Refer The Hague Cases to Arusha Court', *The Standard* (Kenya) 28 April 2012, available online at: https://www.standardmedia.co.ke/article/2000057236/kibaki-joins-eac-fray-to-refer-the-hague-cases-to-arusha-court (last accessed 18 December 2018). However, the Kenyan National Commission for Human Rights (KNCHR) has stated that Kenya's effort was geared primarily towards shielding the suspects. Speaking through its Commissioner, Lawrence Mute, the Commission said that Kenya had never given its support to the East African Court of Justice (EACJ) in trying human rights violation in the past but has now changed its position. *See* A. Jamah & J. Ogutu, 'Effort to Transfer ICC Cases to EAC Court Challenged', *The Standard* (Kenya) 1 May 2012, available at: https://www.standardmedia.co.ke/article/2000057377/effort-to-transfer-icc-cases-to-eac-court-challenged?searchtext=EAC&searchbutton=SEARCH (last accessed 18 December 2018).

42 The withdrawal has been declared unconstitutional by the *South African High Court in Democratic Alliance v. Minister of Internal Relations and Cooperation* and Others, Case No. 83145/2016.

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ute, describing the Court as "International Caucasian Court".[43] The tension between the ICC and African states, however, peaked when members of the AU passed a resolution calling for the mass withdrawal of all African state parties to the ICC Statute.[44]

The argument on bias goes further to state that the ICC has focused solely on Africa because it does not have sufficient clout to confront impunity elsewhere, particularly those committed by the Western powers and their satellite states. The development in respect of the declaration of the Palestinian authority conferring jurisdiction on the ICC over the situation in Palestine since 1 July 2002 appears to lend credence to this criticism. Following Operation Cast Lead, where a lot of lives and properties were destroyed by the Israeli Government, the United Nations set up a commission of inquiry in respect thereof, which later characterized the said destruction as war crimes and crimes against humanity.[45] The OTP, in declining jurisdiction that the Palestinian authority sought to confer on the ICC by way of declaration, however, stated that only states can, by way of declaration, confer jurisdiction on the Court and that the OTP is incompetent to deter-

43 President Adama Barrow has, however, nullified the withdrawal. *See* Pulse, 'Gambia to Remain in ICC, Notifies UN of Change', available online at: http://pulse.ng/world/adama-barrow-gambia-to-remain-in-icc-notifies-un-of-change-id6219675.html (last accessed 18 December 2018).

44 BBC, 1 February 2017, 'African Union Backs Mass Withdrawal from ICC', available online at: www.bbc.com/news/world-africa-38826073 (last accessed 18 December 2018). It should be noted that the resolution is non-binding and both Nigeria and Senegal opposed it. On the issues arising out of the withdrawal notifications by South Africa, Burundi and the Gambia, *see* M. Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court', *Criminal Law Forum*, Vol. 29, No. 1, 2018, pp. 63-119; M. Ssenyonjo, 'State Withdrawals from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia', *in* C. C. Jalloh & I. Bantekas (Eds.), *The International Criminal Court and Africa*, Oxford, Oxford University Press, 2017, Ch. 9; M. Ssenyonjo, 'African States Failed Withdrawal from the Rome Statute of the International Criminal Court: From Withdrawal Notifications to Constructive Engagement', *International Criminal Law Review*, Vol. 17, No. 5, 2017, pp. 749-802; M. Ssenyonjo, 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders', *International Criminal Law Review*, Vol. 13, No. 2, 2013, pp. 385-428. On the tenous relationship between the International Criminal Court and Africa, *see* C.C. Jalloh & I. Bantekas (Eds.), *The International Criminal Court and Africa*, Oxford, Oxford University Press, 2017; E.A. Ankumah, *The International Criminal Court and Africa: One Decade On*, Cambridge, Intersentia, 2016; K.M. Clarke, A.S. Knottnerus & E. de Volder (Eds.), *Africa and the ICC: Perceptions of Justice*, Cambridge, Cambridge University Press, 2016; B.J. Cannon, D.R. Pkalya & B. Maragia, 'The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative', *African Journal of International Criminal Justice*, Vol. 2, 2016, p. 6; L.A. Nkansah, 'The International Criminal Court in the Trenches of Africa', *African Journal of International Criminal Justice*, Vol. 1, 2014, p. 8; C.C. Jalloh, 'Africa and the International Criminal Court: Collision Course or Cooperation?' *North Carolina Central Law Review*, Vol. 34, 2012, p. 203; C.C. Jalloh, D. Akande & M. du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court', *African Journal of Legal Studies*, Vol. 4, 2011, p. 5; C.C. Jalloh, 'Regionalizing International Criminal Law' *International Criminal Law Review*, Vol. 9, 2009, p. 445.

45 Human Rights Council, 'Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict', A/HRC/12/48 15 September 2009, available online at: https://unispal.un.org/DPA/DPR/unispal.nsf/0/25184E52D3E5CDBA8525763200532E73 (last accessed 18 December 2014).

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mine whether Palestine is a state or not.[46] William Schabas, referring sarcastically to the length of time it took the ICC to decide on the two-page declaration of the Palestinian Authority as "longer than it took most lawyers to earn their law degrees",[47] wondered why it should have taken the OTP 3 years to hand down its decision on a one-page document after having led the parties and various stakeholders to make their submissions on the issue of whether Palestine is a state or not. After advancing his argument on why the decision of the OTP is wrong, he concluded that the ICC clearly "…has no taste for wading into a conflict that would anger the United States and some of its close allies".[48]

However, some have viewed the matter differently. Justice Sandile Ngcobo, of the Constitutional Court of South Africa, expressed his support for the Court, stating that "abuses committed in Sub-Saharan Africa have been most serious, and this is certainly a legitimate criterion for the selection of cases".[49] The former U.N. Secretary-General, Kofi Annan, also gave his support for the Court and argued that "in all of these cases, it is the culture of impunity, not African countries, which are the target".[50] It has also been contended that the judicial systems of most African countries are pathetically weak and cannot grapple with the complexity of prosecuting international crimes.[51]

The truth of the matter lies in between the extremes maintained by both the critics and the supporters of the ICC. It cannot be seriously contested that the impunity in Sub-Saharan Africa is of a higher magnitude that requires urgent attention. It can also not be denied that the situations in Uganda, Central African Republic, Cote d' Ivoire and Mali were referred to the Court by the states concerned. Similarly, the situations in Darfur and Libya were referred to the Court by the Security Council. In addition, Africans who are being prosecuted have committed crimes against Africans and not against citizens of any of the Western powers. Nor can it be denied that the victims of the crimes prosecuted by the ICC want justice done to them and do not see the ICC the way African leaders or elites perceive the Court. And the confession of the Central African Republic that it could not successfully try international crimes committed within its borders also appears to justify the conclusion that the ICC is not biased.

However, if one considers the way ICC took the Kenyan cases at the time, it appears that the ICC itself does not appreciate the principle of complementarity.

46 *See* Office of the Prosecutor, 'Situation in Palestine', available online at: www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf (last accessed 18 December 2018).

47 W. Schabas, 'The Prosecutor and Palestine: Deference to the Security Council', Sunday, 8 April 2012, available online at: http://humanrightsdoctorate.blogspot.com/2012/04/prosecutor-and-palestine-deference-to.html (last accessed 18 December 2018).

48 *Ibid.*

49 F. Rabkin, '"No Anti-African Bias" at International Criminal Court', *Business Day*, 19 July 2010, available at: http://allafrica.com/stories/201007200391.html (last accessed 18 December 2018).

50 K.A. Annan, 'Justice vs. Impunity', *International Herald Tribune*, 30 May 2010, available online at: http://theelders.org/article/justice-vs-impunity (last accessed 18 December 2018).

51 S. Hanson, 'Africa and the International Criminal Court', Council on Foreign Relations 24 July 2008, available online at: www.cfr.org/africa/africa-international-criminal-court/p12048 (last accessed 18 December 2018).

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The ICC should have allowed Kenya to try the suspects; after all, the Court could still try them again if the trial conducted by Kenya was calculated to shield them or if Kenya exhibited such gross incompetence that it could be said to be 'unwilling' or 'unable'. The objection of the OTP to Kenya's admissibility challenge considering its Reports on Prosecutorial Strategy is like blowing hot and cold at the same time. By no stretch of imagination can the OTP's avowed commitment to complementarity be reconciled with its objection to Kenya's admissibility challenge. The approbation and reprobation of the OTP and the failure of the ICC judicial organ to appreciate the principle of complementarity can be said to have put the Court in a controversial situation suggestive of bias. It appears that both the OTP and the judicial organ are fearful of a situation where the Court would become redundant. Thus, they seek to obtain business for the Court on the slightest triggering of its jurisdiction. The consequence of this attitude has been preempted by Judge Hans-Peter Kaul in his dissenting judgment in the *Situation in the Republic of Kenya* case,[52] where he held that such an attitude

> …would broaden the scope of possible ICC intervention almost indefinitely. This might turn the ICC, which is fully dependent on State cooperation, in a hopelessly overstretched, inefficient international court, with related risks for its standing and credibility. Taking into consideration the limited financial and material means of the institution, it might be unable to tackle all the situations which could fall under its jurisdiction with the consequence that the selection of the situations under actual investigation might be quite arbitrary to the dismay of the numerous victims in the situations disregarded by the Court who would be deprived of any access to justice without any convincing justification.[53]

Similarly, the overly dismissive attitude of the OTP when the AU was trying to persuade the Security Council to defer Sudan's referral for a year could hardly be justified, nor could the ominous silence of the OTP for 3 years on Palestinian declaration be construed differently other than bias considering the grave situation in the territory and the interest of the international community in the crisis. In addition, self-referral of the states does not necessarily follow that the Court must assume jurisdiction, considering the fact that the financial burden has automatically been shifted by the states concerned to the ICC together with the suspicion that the referrals were calculated to shield the ruling governments of these

52 Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the situation in the Republic of Kenya Pre-Trial Chamber II ICC-01/09-19, 31 March 2010, available online at: https://www.legal-tools.org/doc/338a6f/pdf/(last accessed 18 December 2018). On this decision, *see* C.C. Jalloh, 'International Decision: Situation in the Republic of Kenya No. ICC-01/09-19: Decision on the Authorization of an Investigation', *American Journal of International Law*, Vol. 105, No. 3, 2011, pp. 440-447. *See also*, C.C. Jalloh, 'Kenya vs. The ICC Prosecutor', *Harvard International Law Journal*, Vol. 53, 2012, p. 269.

53 Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the situation in the Republic of Kenya Pre-Trial Chamber II ICC-01/09-19, 31 March 2010, Para. 10.

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states from having their officials prosecuted for international crimes. There is nothing to preclude the ICC from ascertaining whether these self-referring states could actually prosecute international crimes.

Therefore, the scales of international justice are uneven in the hands of the ICC. There is no logical consistency in what informs the OTP to act as it does in any of the situations where its prosecutorial discretion has called for proper exercise. While the ICC may not be targeting African states deliberately, there is every reason to suggest that it is using them to test the waters. In other words, the ICC is using African states as guinea pigs to ascertain how theoretical propositions play out in actual life experience.

Instead of complaining about ICC being biased, what should have been the beginning of wisdom for African states is the implementation of the principle of complementarity. If African states had put their efforts in implementing complementarity, ICC would have no business subjecting African leaders and its citizens to its criminal justice process. Vincent Nmehielle sufficiently warned African states when he stated that "Africa must take credible ownership of the judicial process on the problems it faces";[54] however, it appears his admonition has not been given the attention it deserves. Since the principle of complementarity contemplates that states are to prosecute international crimes recognized under the Rome Statute, one would have ordinarily expected African leaders to strengthen their domestic criminal justice system. However, they chose to establish the African Court of Justice and Human and Peoples' Rights. It is worth noting that although the face-off between African states and the ICC is not the only reason for Africa's quest for international criminal jurisdiction, the fall-out did trigger it.[55]

4 The Creation of the African Court of Justice and Human and Peoples' Rights

The African Court of Justice and Human and Peoples' Rights is created from the African Court of Justice and Human Rights.[56] The Protocol that created the African Court of Justice and Human and Peoples' Rights amended the Protocol that created the African Court of Justice and Human Rights.[57] The African Court of

54 Africa Legal Aid, 'South/North Dialogue: The Al-Bashir Arrest Warrant-The World vs. Africa or the African Union vs. the People of Africa?' (Report) 26 April 2010, available online at: www.brandeis.edu/ethics/pdfs/internationaljustice/BashirReport.pdf (last accessed 18 December 2018), p. 14.

55 *See* A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', *The European Journal of International Law*, Vol. 24, No. 3, 2013, pp. 933-946 at p. 936. *See also* A. Abass, 'Historical and Political Background to the Malabo Protocol', *in* G. Werle & M. Vormbaum (Eds.), *The African Criminal Court: A Commentary on the Malabo Protocol*, Vol. 10, International Criminal Justice Series, The Hague, T.M.C. Asser Press/Berlin, Heidelberg, Springer-Verlag, 2017, pp. 11-28 at pp. 14-20.

56 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

57 *Ibid.*

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Justice and Human Rights was created from the African Court on Human and Peoples' Rights and the African Court of Justice[58] which is the judicial organ of the AU.[59] The Protocol that created the African Court on Human and Peoples' Rights[60] and the Protocol that created the African Court of Justice[61] were replaced by the Protocol that created the African Court of Justice and Human Rights.[62] The African Court of Justice and Human Rights was to merge the African Court on Human and Peoples' Rights and the African Court of Justice.[63] This Court was to act as the judicial organ of the AU and at the same time hear and determine petitions in respect of human rights abuses by African states, as was previously done by the African Court on Human and Peoples' Rights.[64] When African leaders were dissatisfied with the ICC, they then created the African Court of Justice and Human and Peoples' Rights (African Criminal Court). This Court is now to act as the judicial organ of the AU, hear and determine petitions in respect of human rights abuses by African states and prosecute international crimes committed in Africa.[65]

The African Court of Justice and Human and Peoples' Rights is made up of three sections, namely the General Affairs Section, the Human and Peoples' Rights Section and the International Criminal Law Section.[66] The General Affairs Section is competent to hear all cases relating to the AU,[67] the Human and Peoples' Rights Section is competent to hear all cases relating to human and peoples' rights,[68] while the International Criminal Law Section is competent to hear all cases "relating to the crimes specified in this Statute".[69] Each of these sections may comprise one or more chambers.[70] The International Criminal Law Section is made up of the Pre-Trial Chamber, the Trial Chamber and the Appeals Cham-

58 Protocol of the Court of Justice of the African Union adopted on 11 July 2003 in Maputo, Mozambique.

59 *See* Art.18 Constitutive Act of the African Union.

60 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the Assembly of Heads of States and Governments of the Organisation of African Unity on 10 June 1998 at Ouagadougou, Burkina Faso and which entered into force on 25 January 2004.

61 Protocol of the Court of Justice of the African Union adopted on 11 July 2003 in Maputo, Mozambique.

62 Protocol on the Statute of the African Court of Justice and Human Rights.

63 *Ibid*., Art. 2.

64 *See* Arts. 2, 16, 17, 28, 30, 33 and 34 Statute of the African Court of Justice and Human Rights annexed to the Protocol on the Statute of the African Court of Justice and Human Rights.

65 *See* Arts. 6, 7, 9, 9 Bis, 14 and 17 Statute of the African Court of Justice and Human and Peoples' Rights annexed to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, *African Journal of International Criminal Justice*, Vol. 1, No. 1, 2014, pp. 122-158.

66 *Ibid.,* Art. 6.

67 *Ibid.,* Art. 7; Art. 28 Statute of the African Court of Justice and Human Rights annexed to the Protocol on the Statute of the African Court of Justice and Human Rights.

68 Art. 6 Statute of the African Court of Justice and Human and Peoples' Rights annexed to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

69 *Ibid.*

70 *Ibid.,* Art. 9.

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ber.[71] The Court also has the OTP,[72] the Registry[73] and the Defence Office.[74] The Registry is responsible for the protection of witnesses and victims.[75] The Court has the jurisdiction to prosecute genocide,[76] crimes against humanity,[77] war crimes,[78] the crime of unconstitutional change of government,[79] piracy,[80] terrorism,[81] mercenarism,[82] corruption,[83] money laundering,[84] trafficking in persons,[85] trafficking in drugs,[86] trafficking in hazardous wastes,[87] illicit exploitation of natural resources[88] and the crime of aggression.[89] Those who are entitled to bring cases to the Court include state parties, Peace and Security Council of the AU, the OTP, African individuals or African non-governmental organizations with observer status with AU or any of its organs or institutions.[90] The Court is empowered to impose any sentence except death penalty.[91] After conviction, the Court may also order victims' restitution, compensation and rehabilitation.[92]

The Court is obliged to respect the human rights of the accused, such as the right to be presumed innocent until proven guilty.[93] The right to fair hearing is, however, subject to the order by the Court for the protection of victims and witnesses.[94] The Court recognizes individual criminal responsibility as the Protocol creating it states that official position shall not relieve anyone of his or her culpability.[95] Similarly, it recognizes criminal culpability of corporate entities or legal persons except states.[96] The Court may exercise jurisdiction on the basis of the principle of territoriality, active personality, passive personality and extraterritor-

71 *Ibid.*, Art. 9 Bis.
72 Art. 12 Statute of the African Court of Justice and Human and Peoples' Rights annexed to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights; Art. 22A Statute of the African Court of Justice and Human Rights as amended by the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.
73 *Ibid.*, Art. 12; *Ibid.*, Art. 22B.
74 *Ibid.*; *Ibid.*, Art. 22C.
75 *Ibid.*; *Ibid.*, Art. 22B(9)(a).
76 *Ibid.*, Art. 14; *Ibid.*, Arts. 28A(1) and 28B.
77 *Ibid.; Ibid.*, Arts 28A(1) and 28C.
78 *Ibid.; Ibid.*, Arts. 28A(1) and 28D.
79 *Ibid.; Ibid.*, Arts. 28A(1) and 28E.
80 *Ibid.; Ibid.*, Arts. 28A(1) and 28F.
81 *Ibid.*, Arts. 28A(1) and 28G.
82 *Ibid.*, Arts. 28A(1) and 28H.
83 *Ibid.*, Arts. 28A(1) and 28I.
84 *Ibid.*; *Ibid.*, Arts. 28A(1) and 28I Bis.
85 *Ibid.*; *Ibid.*, Arts. 28A(1) and 28J.
86 *Ibid.; Ibid.*, Arts. 28A(1) and 28K.
87 *Ibid.*; *Ibid.*, Arts. 28A(1) and 28L.
88 *Ibid.*; *Ibid.*, Arts. 28A(1) and 28L Bis.
89 *Ibid.*; *Ibid.*, Arts. 28A(1) and 28M.
90 *Ibid.*, Arts. 15 and 16; *Ibid.*, Arts. 29 and 30.
91 *Ibid.*, Art. 19; *Ibid.*, Art. 43A.
92 *Ibid.*, Art. 20; *Ibid.*, Art. 45(2).
93 *Ibid.*, Art. 22; *Ibid.*, Art. 46A.
94 *Ibid.*; *Ibid.*, Art.46A(2).
95 *Ibid.*; *Ibid.*, Art. 46B.
96 *Ibid.*; *Ibid.*, Art. 46C.

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iality where the vital interest of the state party concerned is affected.[97] The Court recognizes the principle of complementarity. It is stated in the Protocol creating it that

> the jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.[98]

The provision on complementarity is worded like that of the Rome Statute except that the word 'genuinely' is omitted.[99] The Court also recognizes the *non bis in idem* principle.[100] It is only the Court that can pardon or commute sentences.[101]

5 Reconciling the Rome Statute Complementarity Principle with the Creation of the African Court of Human Rights and Criminal Justice

As previously noted; the principle of complementarity under the Rome Statute places an obligation on the state parties to the Statute to prosecute the crimes recognized under the Statute. The ICC will intervene only if the state party concerned is unwilling or unable. It appears that by creating the African Court of Justice and Human and Peoples' Rights (African Criminal Court), the state parties to the Protocol creating this Court have acted in contravention of their obligation under the Rome Statute. Thus, once the African Court of Justice and Human and Peoples' Rights prosecutes crimes under the Rome Statute instead of the state parties to the Statute, the state parties concerned have acted in contravention of the legal obligations placed on them.

It has, however, been argued that the African Court of Justice and Human and Peoples' Rights, which is a creation of a multilateral treaty, does not require the approval of another multilateral treaty (in this instance the Rome Statute) creating a similar court (the ICC); that a state cannot enter into a treaty (in this instance the Rome Statute) to the exclusion of any other treaty (Protocol creating the African Court of Justice and Human and Peoples' Rights) on the same subject matter; and that the AU, which is not a party to the Rome Statute, cannot seek the legality of its own court under the Rome Statute.[102] While this argument is persuasive, what is overlooked is that it is only states that can enter admissibility challenge under the Rome Statute, and by necessary implication the ICC is not obliged to take cognizance of any prosecution done by the ACC and can make a finding of unwillingness or inability even when prosecution is being carried on by the ACC.

97 *Ibid.*; *Ibid.,* Art. 46E bis.
98 *Ibid.*; *Ibid.,* Art. 46H.
99 *See* Art. 17 Rome Statute.
100 Art. 22 Statute of the African Court of Justice and Human and Peoples' Rights; Art. 461 Statute of the African Court of Justice and Human Rights as amended.
101 *Ibid.*; *Ibid.,* Art. 46K.
102 Abass, 2013, pp. 941-943; Abass, 2017, pp. 20-23.

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There appears to be a way by which the creation of the ACC by state parties to the Rome Statute can be reconciled with their obligations under the Statute. With this, the extreme positions maintained by both the critics and the supporters of the ICC can be brought to a meeting point. This reconciliation can be achieved if one argues that there is an agency relationship between the AU (of which the African Court of Human and Peoples' Rights is an organ) and the African states who are parties to the Rome Statute. Thus, the AU is the agent of these state parties. Therefore, when an African state concerned is obliged to prosecute and it cannot, but the AU is prosecuting through the ACC, it can be argued that it is that state concerned which is prosecuting and that the AU is only acting as its agent. If ICC is about to intervene, it is the state concerned, and not AU, that will enter an admissibility challenge since the Rome Statute does not take cognizance of an international organization with respect to admissibility challenge. The state concerned will now give the necessary report in respect of the prosecuting activities of the AU (which is doing the prosecution through its judicial organ) and claim that the AU is its agent.

There is nothing implausible in this suggestion. The concept of agency in international law, in general,[103] and in relation to prosecution of crimes, specifically, is not a novel one. Agency has been defined as a relationship "in which one party (the agent) may act on behalf of another (the principal)" as a device to "enable [an entity] through the services of another, to broaden the scope of [its] activities".[104] As rightly suggested, "the duty to exercise criminal jurisdiction" within the context of complementarity should not be construed strictly; rather it should be considered an obligation

> to ensure that a genuine investigation be undertaken, be it by the State itself, be it by way of extradition to another State, or even by way of surrender to an international criminal jurisdiction.[105]

103 *See* A.P. Sereni, 'Agency in International Law', *The American Journal of International Law*, Vol. 34, No. 4, October 1940, pp. 638-660. On the adaptation of private law concepts to international law, *see* H. Lauterpacht, *Private Law Sources and Analogies of International Law*, London, Longmans, Green & Co. Ltd, 1927.

104 B.A. Garner, *et al.*, *Black's Law Dictionary*, 9th ed., St. Paul, MN, Thomson Reuters, 2009, p. 70.

105 C. Kress, '"Self-Referrals" and "Waivers of Complementarity": Some Considerations in Law and Policy', *Journal of International Criminal Justice*, Vol. 2, 2004, p. 944, at p. 946.

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The competence of a state to delegate its criminal jurisdiction is not without foundation[106] as a number of treaties can attest to it.[107] As a matter of fact, the European Union (EU) Council Framework Decision permits delegation of criminal jurisdiction by one state to another by stating that an EU member can exercise jurisdiction over acts of terrorism committed on the territory of another member.[108] Similarly, the European Convention on the Transfer of Proceedings in Criminal Matters 1972[109] allows a party to the treaty to transfer criminal proceedings commenced by that party to another party.[110] Article 6 of the Convention allows transfer even when the state party to which it is transferred would not have had jurisdiction. In the same vein, the Agreement between Member States of the European Communities on the Transfer of Proceedings in Criminal Matters 1990[111] permits transfer on similar terms. Its Article 4 similarly allows transfer even when the party to which it is transferred would not have had jurisdiction. In addition, Article 5(c) of the Southern African Development Community Extradition Protocol provides that a state party may refuse extradition if the state party that is requesting extradition would impose death penalty but that the state that refuses to extradite may carry out the trial if the state requesting extradition so requests. This clearly indicates that a state may delegate another to exercise on its

106 D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits, *Journal of International Criminal Justice*, Vol. 1, 2003, p. 618, at p. 622.

107 *See* The Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft (signed 14 December 1963, entered into force 4 December 1969) 704 UNTS 220; the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (signed 16 December 1970, entered into force 14 October 1971) 860 UNTS 105; Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (signed 23 September 1971, entered into force 26 January 1973) 974 UNTS 178; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167; the New York Convention against the taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205; Convention against Torture and other Cruel, Inhuman and Degrading Treatment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (signed 10 March 1988, entered into force 1 March 1992) 1678 UNTS 222; UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95; the Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363; the International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256; the International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197. For an analysis of these treaties within the paradigm of 'extradite or prosecute' *see* L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford, Oxford University Press, 2003, Ch. 3.

108 Art. 9(1) Council Framework Decision of 13 June 2002 on Combating Terrorism (2002/475/JHA), *Official Journal of the European Communities* I.164/3-7, 22.6.2002.

109 European Convention on the Transfer of Proceedings in Criminal Matters (signed 15 May 1972, entered into force 30 March 1978) ETS No. 73.

110 *Ibid*., Art. 3.

111 Agreement between Member States of the European Communities on the Transfer of Proceedings in Criminal Matters 1990 (2009/C 219/03), *Official Journal of the European Communities*, C219.7, 22 September 2009.

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behalf its criminal jurisdiction. The Treaty on Mutual Legal Assistance in Criminal Matters between the Government of the Federal Republic of Nigeria and the Government of the Republic of South Africa[112] arguably makes transfer of the kind done by the EU members possible. The treaty provides that the two states agree to assist each other "in connection with the investigation, prosecution and prevention of crimes and in proceedings related to criminal matters."[113] Assistance within the meaning of the treaty includes "taking the testimony or statements of persons";[114] "providing documents, records and articles of evidence";[115] "transferring persons in custody for testimony or other purposes";[116] and any "other form of assistance not prohibited by the laws of the Requested State".[117] The clause "other form of assistance not prohibited by the laws of the Requested State" may accommodate transfer similar to that of the European Conventions mentioned earlier or that of the SADC[118] Extradition Protocol. Of course, it can be argued that the examples given relate to delegation of criminal jurisdiction between a state and another and not between a state and an international organization. However, nothing should preclude a state from delegating its criminal jurisdiction to an international organization if it can delegate it to another state.[119]

Having argued thus, can the argument on delegation be sustained where, for example, the AU Peace and Security Council refers a situation involving victims that are nationals of a state party to the Rome Statute but where the crimes took place in a non-state party to the Rome Statute. Since the AU is the agent and the Peace and Security Council is part of the AU, the argument on delegation can be sustained. The process by way of AU Peace and Security referral through which the ACC, which is the organ of AU, assumes jurisdiction does not matter. It suffices that the AU is the agent. Also, the fact that the crimes occurred in a non-state

112 The Treaty on Mutual Legal Assistance in Criminal Matters between the Government of the Federal Republic of Nigeria and the Government of the Republic of South Africa (Ratification and Enforcement) Act Cap T24 Revised Laws of the Federation of Nigeria (LFN) 2004.

113 *Ibid.*, Art. 1(1).

114 *Ibid.*, Art. 1(2) (a).

115 *Ibid.*, Art. 1(2) (b).

116 *Ibid.*, Art. 1(2) (e).

117 *Ibid.*, Art. 1(2) (i).

118 SADC: Southern African Development Community.

119 *See* Vienna Convention on the Law of Treaties between States and International Organisations, or between International Organisations, 1989 (not yet in force); Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 332, Art. 3(c); Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Art. 24(1); Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter, Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151 at p. 163; Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion by the World Health Organization) Advisory Opinion of 8 July 1996, International Court of Justice, paras. 18-31; Case Concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) Judgment of 24 May 1980, I. C. J. Reports 1980, p. 3, para. 74; G. Gaja, 'A "New" Vienna Convention on Treaties between States and International Organizations or between International Organizations: A Commentary', British Yearbook of International Law, Vol. 58, No. 1, 1987, pp. 253-269; D. Sarooshi, International Organizations and their Exercise of Sovereign Powers, Oxford, New York, Oxford University Press, 2005.

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party does not matter once the victims are nationals of state parties since state parties can assume jurisdiction on the basis of the principle of passive personality that is applicable once the victims are their nationals.

From another perspective, it can be argued that the AU is not even the agent but other state parties to the Constitutive Act of the AU. In this wise, what it implies is that state parties to the Rome Statute enter into a treaty with other states and they jointly create an organization to prosecute for them. Thus, when a state party to the Rome Statute cannot prosecute, it is these other parties to the AU Constitutive Act that are acting for that state. This argument may appear persuasive if it is understood that a multilateral treaty is an agreement between each of the state parties to the agreement inter se. Articles 19, 20, 23, 30 (3) & (4), 40, 41, 58, 60 (2) (a) and (b), 69 (2) (a) and 70 (2) of the Vienna Convention on the Law of Treaties 1969 appear to lend credence to the argument that a multilateral treaty is considered an agreement between parties inter se.

Similarly, another way to understand the situation is to see the ACC as an extension of the criminal jurisdiction of any state party to the Protocol creating it.[120] Therefore, once the ICC is to intervene, the state party concerned can enter an admissibility challenge claiming that it is indeed fulfilling its obligation under the Rome Statute as the ACC is an extension of its criminal jurisdiction. With this understanding, any reservation that one may have in instances of AU Peace and Security Council referral can be said to have been adequately addressed. Therefore, African states can do justice on their own terms and at the same time stay within the criminal justice system of the Rome Statute.

6 Conclusion

The principle of complementarity under the Rome Statute contemplates the prosecution by the state party concerned of the crimes recognized under the Statute. Therefore, state parties are required to strengthen their criminal justice system to achieve this end. Where a state party is unwilling or unable, the ICC will intervene. The creation of the ACC by African state parties to the Rome Statute triggered by the dissatisfaction of African state parties with the ICC appears to negate the principle of complementarity. This is because the Court is empowered to prosecute the crimes recognized under the Rome Statute and to intervene if African state parties are unwilling or unable. It has, however, been suggested that the creation of the ACC should not be an impediment to the working of the Rome Statute Complementarity Principle. Whenever the ACC is prosecuting any of the crimes recognized under the Rome Statute, it can be taken that the AU, which is prosecuting through the Court, is acting as the agent of the African state concerned. If the conduct of the trial shows that the AU prosecuting through the ACC is unwilling or unable, such will be imputed to its principal, which is the African state party concerned. This way, the creation of the African Court of Justice and

120 *Attorney-General of Israel v Kamiar*, Supreme Court of Israel sitting as the Court of Criminal Appeal, 9 June 1968, 44 ILR p. 197 at p. 249.

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Human and Peoples' Rights can be reconciled with the Rome Statute Complementarity Principle.

Of course, the principle of complementarity has to be construed in a flexible manner to permit this suggestion, and the attitude of the ICC to have a case to prosecute, as demonstrated in the Kenyan admissibility challenge, may have to be jettisoned. In fact, the ICC can have an understanding with African state parties who have created the ACC to the effect that the AU (which is prosecuting through the ACC) is an agent of these states. Article 4 of the Rome Statute appears to make this feasible as it stipulates that

> The Court [that is ICC] shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.