Interstate Cooperation and Why a Horizontal Treaty Would Make a Difference for ICC Investigations*

*George William Mugwanya***

Abstract

The International Law Commission's Draft Articles on the Prevention and Punishment of Crimes Against Humanity contain an obligation to implement an interstate cooperation regime. This article argues that although this regime is 'horizontal', it also has the potential to enhance the efficacy of investigations by the International Criminal Court (ICC). It provides a brief overview of the regime as set out in the Draft Articles, and the ICC's cooperation regime, before exploring how the Draft Articles can fill some gaps in the ICC system. It also makes suggestions to improve the Draft Articles and strengthen the cooperation regime.

Keywords: cooperation framework, Draft Articles, international criminal law, International Criminal Court, interstate cooperation.

1 Introduction

This article assesses interstate cooperation under the Draft Articles on the Prevention and Punishment of Crimes Against Humanity[1] ("Draft Articles on Crimes Against Humanity") of the International Law Commission (ILC) and why this horizontal treaty may make a difference for International Criminal Court (ICC) investigations of crimes against humanity under the Rome Statute.

It argues that while the interstate cooperation regime proposed by the Draft Articles is 'horizontal' – in the sense that it creates relationships and obligations between (Member) States inter se, rather than between each State and the ICC – this regime may also enhance the efficacy of ICC investigations in a couple of interrelated aspects.

* The views expressed herein are those of the author and do not necessarily represent those of the ICC or its Office of the Prosecutor.

** Advocate, High Court of Uganda; Prosecution Appeals Counsel, International Criminal Court (ICC). Formerly Senior Appeals Counsel, UN International Criminal Tribunal for Rwanda, and Senior Lecturer, Makerere University Faculty of Law, he holds a JSD (*summa cum laude*), (Notre Dame Law School); LLM (Birmingham); LLM (*with distinction*) (Pretoria); LLB (*Hons*) (Makerere) and a Postgraduate Diploma in Legal Practice (Law Development Centre).

1 Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, *in* Int'l Law Comm'n, *Report of on the Work of Its Seventy-First Session*, UN Doc. A/74/10 (2019).

doi: 10.5553/AJ/2352068X2020006002013

First, by obligating and rallying States Parties to cooperate with and support *each other* in preventing, investigating and prosecuting crimes against humanity – an obligation that is not covered by the ICC's Rome Statute given its 'vertical' nature – the Draft Articles' network of interstate cooperation, when implemented in practice, holds the promise of strengthening States Parties' legal and institutional capacities and readiness to afford each other the cooperation necessary for achieving a common mission of fighting impunity for crimes against humanity within and across their jurisdictions. Consequently, if or even when the same States Parties are approached by the ICC, their enhanced domestic legal and institutional regimes and capacities will likely be better prepared, more responsive and hopefully more efficacious in extending to the ICC the ever-needed timely and robust support it requires to discharge its mandate under the Rome Statute.

Second, and related to the aforementioned, while 'vertical' and is meant to assure the ICC full State cooperation, the ICC's State cooperation regime in some respects does not entirely impose absolute obligations on States Parties. As such, the regime leaves room for States Parties to deny or postpone some cooperation requests based on State sovereign interests. The Draft Articles, when implemented domestically, may help fill this lacuna by strengthening domestic legal regimes and tailoring them more towards supporting accountability for crimes against humanity, and possibly ameliorating their emphases on State sovereignty interests. When approached by the ICC for support, such domestic systems are better attuned to respond effectively and in a timely manner.

Third, by explicitly obligating States Parties to domestically fight crimes against humanity – and to that end, to strengthen their capacities, including through interstate cooperation – the Draft Articles' interstate cooperation system holds the promise of invigorating the effectiveness of the ICC's *complementarity* regime and contributing to closing the impunity gap. Under the complementarity system, States bear the first responsibility to investigate and prosecute, and it is only when they fail to act or are unable or unwilling to do so, that the ICC's jurisdiction will be triggered. If States successfully deal with the vast majority of cases within their domestic systems, this limits the need for the ICC's intervention, or the extent of such engagement. In any event, it 'frees' the ICC's limited resources, enabling it to devote them on those fewer cases that such domestic systems may be unable to handle. In turn, the fewer the situations and cases that the ICC may be called upon to address at any given time, the more efficient the ICC should be in its investigation and prosecution of them.

It is noteworthy that since the Draft Articles' object is not to 'reform' the ICC as such, it cannot be a panacea to all the limitations in the ICC's interstate cooperation regime. Nor can it be a solution for all the ICC's State cooperation challenges, which are multifaceted in nature. Rather, this article submits more modestly that the Draft Articles hold promise for making *some* contribution that will be helpful in ameliorating what is acknowledged to be a much bigger challenge. And given the importance of State cooperation to the success of the ICC, any such contribution, however small, whether from the Draft Articles or similar efforts at different levels, be it regional or global, should be applauded. Nevertheless, to enhance their contribution to the efficacy of ICC investigations and prosecutions,

the Draft Articles on Crimes Against Humanity may still require some improvement. This may be done carefully, without undermining their horizontal interstate cooperation orientation.

Following this introduction, Sections 2 and 3 provide brief overviews of the 'horizontal' interstate and 'vertical' cooperation regimes of the Draft Articles and the ICC, respectively. An assessment of the ICC's vertical cooperation regime – including its scope and limitations, and how the Draft Articles on Crimes Against Humanity may help to invigorate the ICC's investigations – is then provided in Sections 4 and 5. At various stages, this article makes recommendations on how to further strengthen the Draft Articles' potential impact on the efficacy of the ICC, without necessarily undermining their horizontal interstate cooperation posture. In concluding, a few of the most important recommendations are briefly discussed in Section 6.

2 A Brief Overview of the Draft Articles' Interstate Cooperation Regime

The ILC Draft Articles on Crimes Against Humanity were born out of the recognition that, unlike the other core international crimes of genocide and war crimes, crimes against humanity were not covered by a special convention. Such conventions reflect the critical importance that the international community may attach to dealing with a certain crime, and such recognition is certainly overdue for crimes against humanity, which, like other atrocity crimes, have throughout history victimized millions of children, women and men, and deeply shocked the conscience of humanity.[2] Consistent with the vital work done in the Rome Statute granting the ICC jurisdiction over crimes against humanity, the Draft Articles were designed to complement, rather than contradict, the ICC's approach in defining crimes against humanity.[3]

One of the critical features of the Draft Articles is the creation of a network of interstate cooperation, obligating States Parties to cooperate with each other in the prevention of crimes against humanity, as well as in the investigation, apprehension, prosecution, and punishment in their domestic jurisdictions of perpetrators of crimes against humanity, through extradition, mutual legal assistance and other actions. The Rome Statute established the ICC to complement domestic jurisdictions in this common mission, but it did not go as far as explicitly obligating States Parties to cooperate with each other at the horizontal level. Rather, they are only obligated to cooperate with the ICC at the vertical level. Yet, as discussed later in this article, enhanced interstate cooperation in fighting crimes of concern to the international community, such as that espoused in the Draft Articles on Crimes Against Humanity, may benefit the ICC in executing its mandate more effectively. Similar regimes of cooperation are more common when it comes to so-called suppression conventions.

2 *Ibid.*, preambular Para. 1.
3 *See generally ibid.*, pp. 7-29.

doi: 10.5553/AJ/2352068X2020006002013

After recalling that the prohibition of crimes against humanity is a norm of *jus cogens*,[4] and identifying the proposed convention's two principal objects of prevention and accountability,[5] the Draft Articles' Preamble asserts that

> because crimes against humanity must not go unpunished, the effective prosecution of such crimes must be ensured by taking measures at the national level and by *enhancing international cooperation*, including with respect to *extradition* and *mutual legal assistance*.[6]

Concerning *extradition* – and in keeping with their horizontal interstate cooperation disposition – the Draft Articles on Crimes Against Humanity do not establish a State Party's stand-alone obligation to automatically extradite offenders to another State, or an international criminal court or tribunal. Rather, under Draft Article 10, whenever an alleged offender is present in a State, the State is under a legal duty to submit the matter to its "*competent authorities for the purpose of prosecution*", unless the person is extradited to another State, or a competent international criminal court or tribunal – a formula commonly known as "prosecute or extradite" (*aut dedere aut judicare*).[7] Overall, by obligating the State in which the alleged offender is present to submit the case to its "competent authorities for prosecution", the Draft Articles move in the right direction of stamping out amnesties or pardons for crimes against humanity.[8] Furthermore, requiring States to extradite or surrender persons – including to the competent international criminal court – if the State itself is unable to prosecute, is critical in further mobilizing States to cooperate with international courts, including the ICC, in the concerted effort against impunity. The last sentence of Article 10 – which

4 *Ibid.*, preambular Para. 4.

5 *Ibid.*, preambular Paras. 5 and 6. The objects are further identified and elucidated in Arts. 1, 3-10 of the Draft Articles.

6 *Ibid.*, preambular Para. 10 (Emphasis added).

7 *Ibid.*, Art. 10 (Emphasis added); commentaries, pp. 76-82; 97-110.

8 Concerning the compatibility of amnesties with international law, the Majority of the ICC Appeals Chamber have held that international law is still in the development stages. *Prosecutor v. Saif Al-Islam Gaddafi*, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to article 17(1)(c), 19, and 20(3) of the Rome Statute"' of 5 April 2019, ICC-01/11-01/11-695, 9 March 2020, Paras. 88 and 96. In her separate and concurring opinion in the same case, Judge Carranza found that "in the context of the Rome Statute, amnesties or similar measures that result in impunity for serious violations of human rights or grave breaches of international humanitarian law that constitute crimes under the jurisdiction of the Court appear to be contrary to the object and purpose of the Rome Statute. Nevertheless, each case must be assessed on a case-by-case basis". ICC-01/11-01/11-695-AnxI, 22 April 2020, Para. 3. More generally, at Para. 1, Judge Carranza was more emphatic on the incompatibility of amnesties with international law: "[a]mnesties or similar measures that prevent the investigation, prosecution, and eventual punishment of international core crimes that amount to grave human rights violations and grave breaches of international humanitarian law are incompatible with international law because they violate concrete treaty and *erga omnes* obligations of States and internationally recognised victims' rights." *See also* Pre-Trial Chamber I's decision in *Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Art. 17(1)(c), 19, and 20(3) of the Rome Statute,' 5 April 2019, Para. 77.

permits the authorities to "take their decision in the same manner as in the case of any other offence of a grave nature *under the law of the State*"[9] – may, however, open a gap for amnesties, especially in States that may permit them even for other grave crimes, and appears to undermine a universal approach towards stamping out amnesties across all States Parties. Removing it may avoid this risk. Article 10 could be further strengthened by requiring States to act promptly in taking accountability steps before their courts or extraditing the person. This may help avoid unreasonable delays by States, some of which may in the end be tantamount to 'shielding' alleged offenders from accountability.

As in other treaties, including the Genocide Convention,[10] under Draft Article 13(3), an offence shall not be considered a political offence or an offence connected with a political offence or an offence inspired by political motives. As a result, "a request for extradition based on such offence may not be refused on *these grounds alone*".[11] This "signals that there may be other grounds that the State may invoke to refuse extradition [...] provided such other grounds in fact exist".[12] For instance, under Draft Article 5, no State shall transfer, refouler, surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity. A State may also deny extradition if there are substantial grounds to believe that the request has been made for the purpose of prosecuting or punishing of a person on account of that person's gender, race, religion or other grounds universally recognized as impermissible under international law.[13] Nevertheless,

> whatever the reasons for refusing extradition [...], the requested State in which the offender is present remains obligated to submit the case to its competent authorities for the purpose of prosecution pursuant to Article 10.[14]

But probably most salient to this analysis is the Draft Articles' extensive *mutual legal assistance* regime. States may arrest, initiate prosecutions before their domestic courts or indeed choose to extradite offenders to other jurisdictions. All these actions are important steps, but, to bear fruit, especially when dealing with organized criminality, these steps may require additional forms of judicial or legal assistance from other jurisdictions. Indeed, mutual legal assistance in criminal matters, as one analyst has argued,

> [i]s not just one of the traditional forms of judicial cooperation in criminal matters. In daily practice, its importance for international criminal law enforcement, and in particular for combating international organized crime,

9 ILC's 2019 Draft Articles on Crimes Against Humanity, with commentaries, *supra* note 1, Art. 10 (Emphasis added).
10 *See generally ibid.,* p. 101.
11 *Ibid.*, Art. 13(3) (Emphasis added).
12 *Ibid.*, p. 102, Para. 12.
13 *Ibid.*, Art. 13(11).
14 *Ibid.*, p. 104, Para. 20.

doi: 10.5553/AJ/2352068X2020006002013

> is much more significant than any other form of judicial cooperation, be it extradition, transfer of proceedings, or transfer of the execution of sentences.[15]

Under Draft Article 14(1),

> States shall afford one another the *widest measure* of mutual assistance in the investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles in accordance with this draft article.[16]

Concerning legal persons, mutual legal assistance shall be afforded only to the *fullest extent* possible under Article 14(2). Criminalizing legal persons and obligating States to support each other in ensuring accountability are commendable measures for fighting impunity.[17] They could, however, be reinforced by removing an overly vague 'caveat' in Article 6(8), namely, "where appropriate", to which, among other factors, the criminalization of legal persons is subjected.

The Draft Articles identify an extensive and non-exhaustive catalogue of such mutual legal assistance States must extend to each other, to include the following:

- Identifying and locating alleged offenders and, as appropriate, victims, witnesses or others
- Taking evidence or statements from persons, including by video conference
- Effecting service of judicial documents
- Executing searches and seizures
- Examining objects and sites, including obtaining forensic evidence
- Providing information, evidentiary items and expert evaluations
- Providing original or certified copies of relevant documents and records
- Identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes
- Facilitating the voluntary appearance of persons in the requesting State

15 G. Vermeulen, 'EU Conventions that Enhance the Updating of Traditional Mechanisms for Judicial Cooperation in Criminal Matters', *Revenue Internationale de Droits Penal*, Vol. 77, No. 1, 2006, pp. 59-95, Para. 62. The Appeals Chamber of the U.N. *ad hoc* International Criminal Tribunal for Rwanda has recognized that the existence of Mutual Legal Assistance agreements between Rwanda and other States was a major legal tool to assure Rwandan courts could have access to witnesses and other evidence in foreign jurisdictions. The Chamber thus considered mutual legal assistance as an important tool in the effective investigation and prosecution of crimes. *See, e.g., Prosecutor v. Munyakazi,* Decision on the Prosecution's appeal against decision on referral under rule 11bis, ICTR-97-36-R11bis, 8 October 2008, Para. 41; *Prosecutor v. Kanyarukiga*, Decision on the Prosecution's appeal against decision on referral under rule 11bis, ICTR-2002-78-R11bis, 30 October 2008, Para. 32.

16 ILC's 2019 Draft Articles on Crimes Against Humanity, with commentaries, *supra* note 1, Art. 14(2) (Emphasis added).

17 Under Art. 25(1) of the ICC Statute, the Court's jurisdiction is limited to natural persons only.

– Any other type of assistance that is not contrary to the national law of the requested State.[18]

Under Draft Article 14(4), bank secrecy shall not be a bar for States to deny mutual legal assistance to each other.[19]

Pursuant to Draft Article 14(9),

> States shall consider, as appropriate, entering into agreements or arrangements that are established by the United Nations or by other international organizations and that have a mandate to collect evidence with respect to crimes against humanity.

A separate annex to the Draft Articles addresses a number of primarily procedural and other matters related to mutual legal assistance between States Parties.[20]

Finally, in keeping with the plain terms of the Preamble – which call for interstate cooperation in a non-exhaustive manner, not limited only to extradition and mutual legal assistance[21] – the Draft Articles also obligate States Parties to cooperate with each other in diverse other ways, right from preventing crimes against humanity to investigating those crimes and ensuring accountability for alleged perpetrators. Indeed, in respect of *prevention*, for instance, each State is to "cooperate with other States, relevant intergovernmental organizations, and as appropriate, other organizations".[22]

3 A Brief Overview of the ICC's Cooperation Framework

Overall, the ICC Statute establishes a detailed 'vertical' cooperation regime – pursuant to which States are under an obligation to support the arrest of ICC fugitives, and the investigation and prosecution of crimes of concern to the international community, including crimes against humanity. Several ICC State cooperation obligations, especially concerning the provision to the Court of legal assistance by ICC States Parties, are overall similar to those that accrue to States inter se under the Draft Articles on Crimes Against Humanity. But, as will be shown in this article, there are some gaps or limitations in the ICC cooperation regime. While horizontal in nature, the Draft Articles' interstate cooperation regime may help fill some of these lacunas or gaps.

Under Article 86, "States parties shall, in *accordance with the provisions of the Statute*, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court".[23] The highlighted language suggests

18 ILC's 2019 Draft Articles on Crimes Against Humanity, with commentaries, *supra* note 1, Art. 14(3).
19 *Ibid.*, Art. 14(4) ("States shall not decline to render mutual legal assistance […] on the ground of bank secrecy").
20 *Ibid.*, pp. 121-132.
21 *Ibid.*, preambular Para. 10.
22 *Ibid.*, Art. 4(b).
23 ICC Statute, Art. 86 (Emphasis added).

doi: 10.5553/AJ/2352068X2020006002013

that the States Parties' obligations on cooperation are specified elsewhere in the Statute, such as in Articles 89 and 93, and that Article 86 should be read in light of those provisions. Nevertheless, some case law at the ICC has underscored that the general obligation of States Parties, under Article 86, "to cooperate fully" means that States are under an obligation to afford cooperation requests not specifically mentioned in those other provisions, such as Article 93, as long as this does not conflict with their national laws.[24]

According to Article 89(1),

> [S]tates Parties shall, in accordance with the provisions of [Part 9 of the Statute] and *the procedure under their national law*, comply with [the ICC's] requests for arrest and surrender[25]

of persons wanted by the ICC. Indeed, "in urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the [ICC's] request for surrender and the documents supporting the request".[26]

Like the Draft Articles on Crimes Against Humanity, Article 93 identifies, in a non-exhaustive manner, the following modes of cooperation or forms of assistance that States are to extend to the ICC "in accordance with the provisions of [Part 9 of the ICC] Statute and *procedure under national law*"[27] in relation to investigations and prosecutions:

a The identification and whereabouts of persons and location of items
b The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court
c The questioning of any person being investigated or prosecuted
d The service of documents, including judicial documents
e Facilitating the voluntary appearance of persons as witnesses or experts before the Court
f The temporary transfer of persons in custody for purpose of identification or for obtaining testimony or other assistance
g The examination of places or sites, including exhumation and examination of grave sites

24 *See, e.g., Prosecutor v. Bemba et al*, Decision notifying the election of a Presiding Judge and Single Judge, ICC-01/05-01/13-1181-Corr, 25 August 2015, Paras. 18-19 ("Art. 63 of the Statute stipulates that the 'accused shall be present during trial'. Likewise, Art. 67(l)(d) of the Statute provides that the accused has the right 'to be present at trial'. The right to be present at trial implies that the accused, if not detained, must be free to travel from the State (on whose territory he or she is present) to the Court. This translates into an obligation on the part of States Parties to take all necessary steps to facilitate the appearance of the accused before the Court. In the view of the Chamber, and contrary to the submission of the Defence, such obligation to cooperate cannot be read into Art. 93(l)(e) of the Statute, as the accused is neither a witness nor an expert. Rather, the obligation to take all necessary steps to facilitate the appearance of the accused before the Court emanates from the general obligation of States Parties to 'cooperate fully' with the Court as enshrined in Art. 86 of the Statute").

25 ICC Statute, Art. 89 (Emphasis added).

26 ICC Statute, Art. 92(1) (Emphasis added).

27 ICC Statute, Art. 93(1) (Emphasis added).

h The execution of searches and seizures
i The provision of records and documents, including official records and documents
j The protection of victims and witnesses and the preservation of evidence
k The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crime for the purpose of eventual forfeiture without prejudice to the rights of bona fide third parties
l Any other type of assistance which is *not prohibited by the law of the requested State*, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.[28]

The assistance that States may provide to the ICC for the investigation and prosecution of crimes is thus extensive – indeed, according to the ICC Appeals Chamber, the Statute only establishes *minimum* obligations of cooperation, which States are free to exceed (so-called enhanced cooperation) subject to their domestic laws.[29]

In addition to delineating States' substantive cooperation obligations, the ICC Statute also identifies important procedures and requirements to guide not only States in carrying out their cooperation duties but also organs of the Court. These apply, for example, to the form or contents of cooperation requests, or how or where such requests may be transmitted.[30]

4 Limitations in the ICC's State Cooperation Regime and How the Draft Articles May Help Fill Some Gaps

4.1 Multilateral Interstate Cooperation – Building Domestic Capacities

The Rome Statute establishes the ICC to complement States Parties' domestic jurisdictions in the common mission of fighting impunity for crimes of concern to the international community, including crimes against humanity.[31] The Statute, however, does not explicitly obligate States Parties to cooperate with each other at the horizontal level. They are only obligated to cooperate with the Court at the vertical level under Part 9 of the Statute. For this reason, the provisions on interstate cooperation in the Draft Articles on Crimes Against Humanity fill a gap and may also benefit the effective execution of the ICC's mandate.

A key objective of the Draft Articles' interstate cooperation mission is obligating and mobilizing States Parties towards achieving a common goal of fighting

28 ICC Statute, Art. 93(1) (Emphasis added).
29 *Prosecutor v. Ruto & Sang*, Judgement on the appeals of Mr William Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation', ICC-01/09-01/11-1598 OA7 OA8, 9 October 2014, Para. 112.
30 ICC Statute, *e.g.*, Arts. 87 (general provisions, including on communication channels); 89 (surrender of persons, ICC documents accompanying requests), 90 (competing requests); 91 (contents of requests for arrest and surrender); 96 (contents of request for other forms of assistance under article 93); and 97 (consultations).
31 *See, e.g.*, ICC Statute, preambular Para. 10; and Art. 1.

doi: 10.5553/AJ/2352068X2020006002013

impunity for crimes against humanity – a goal also underpinning the ICC's Rome Statute. Success in the adoption of the Draft Articles will help States Parties to build and operationalize strong legal and institutional capacities at the domestic levels – particularly institutions that not only fully appreciate their obligations, but are also more efficient in responding to each other's requests for the legal and judicial assistance necessary when investigating and prosecuting crimes against humanity. The desired end result is a robust network of interstate cooperation united in a common goal that may have a broader impact.

It is therefore argued that, despite their horizontal interstate focus, by obligating and rallying States Parties to cooperate with and support each other in preventing, investigating and prosecuting crimes against humanity, the Draft Articles' network of interstate cooperation holds the promise of strengthening not only their States Parties' legal and institutional capacities and readiness to afford each other cooperation necessary for achieving a common mission of fighting impunity for crimes against humanity within and across their jurisdictions, but also their capacities to support the ICC. Indeed, when the same States Parties are approached by the ICC – a Court whose mandate also covers accountability for crimes of concern to the international community, including crimes against humanity as defined in the Draft Articles – their enhanced domestic legal and institutional regimes and capacities will likely be better prepared, more responsive and efficacious in extending support to the ICC to enable it to discharge its mandate under the Rome Statute. This potential exists, notwithstanding that the Draft Articles' provisions on extradition and mutual legal assistance are not entirely different from the parallel provisions of the ICC's cooperation regime in Part 9 of the Rome Statute.[32] But even the few 'additional' elements in the Draft Articles – which will be analyzed in this article – however 'modest' they are, can still have some positive impact if implemented by States Parties.

Moreover, the potential impact of the Draft Articles is not necessarily rendered redundant by the mere fact that, under the ICC Statute, States Parties are expected to ensure the availability of procedures under their national laws and to build capacities to meet their cooperation obligations to the ICC. Given their multilateral interstate cooperation character, the Draft Articles are likely to precipitate more intensive legislative and capacity-building activity at the domestic level than the ICC Statute– especially if each State Party to the Draft Articles aims to respond effectively to many requests for mutual legal assistance, potentially from multiple States Parties, at any given time.[33] And when domestic systems regularly afford mutual legal assistance to each other, including in matters of a technical nature, the skills they acquire in this process come in handy when they are

32 H. van der Wilt, 'Extradition and Mutual Legal Assistance in the Draft Convention on Crimes Against Humanity', *Journal of International Criminal Justice*, Vol. 16, 2018, pp. 795-812, at pp. 809-812.

33 It may be argued that since States Parties to the Draft Articles will have to respond to many cooperation requests from each other, this may hinder their responses to competing and similar requests from the ICC. But the intense capacity-building momentum precipitated by the Draft Articles' interstate cooperation regime, if fully implemented, should be able to address or ameliorate this.

approached by the ICC for similar support. Indeed, since its inception, about half of the States Parties to the Rome Statute have not yet adopted domestic legislation to implement the ICC Statute and establish systems to operationalize their cooperation obligations *vis-à-vis* the Court.[34] Arguably, the potential capacity-building 'momentum' from the Draft Articles may change this situation.

That the success of the ICC's vertical cooperation regime is critically dependent not only on mobilizing the "collective responsibility of States Parties"[35] but also on building States Parties' legal, institutional and other capacities – including through exchange of experience, and mutual assistance, between states and the Court – has been underlined by the ICC's Assembly of States Parties,[36] especially concerning the execution of large, technical or sensitive ICC requests for cooperation.[37]

Therefore, any efforts that build or strengthen States' capacities, even if taken outside the framework of the ICC Statute, should be applauded. The Draft Articles on Crimes Against Humanity may be credited for such effort. The fact that the strengthened domestic systems of the Articles' States Parties are likely to be more responsive to support the ICC is not entirely far-fetched. First, as noted earlier, the Articles' goal of fighting impunity for crimes against humanity is shared by the ICC. Second, notwithstanding their independent, interstate character, the Articles to some extent, albeit impliedly, recognize the complementary role of the ICC. Indeed, the Draft Articles recall that "[i]t is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity".[38] This suggests that States cannot just stand by and leave the matter to 'extraterritorial' institutions.

The Draft Articles could, however, have even stronger impact in supporting the ICC if they were further to be revised in some respects, and this could be done without necessarily undermining their horizontal interstate cooperation leaning. This includes expressly encouraging States Parties to share skills, experiences and to support each other in capacity building in the prevention, investigation and prosecution of crimes against humanity. They could also be revised to expressly recognize the complementary role of the ICC in the fight against impunity, and at a minimum, specifically *encourage* States Parties to the Draft Articles to render the necessary cooperation whenever approached by the ICC. The Articles' eighth

34 Assembly of States Parties, *Report of the Court on Cooperation*, ICC-ASP/18/16, 21 October 2019, Para. 14.

35 *See* Recommendations on States' Cooperation with the International Criminal Court (ICC): Experiences and Priorities, ASP/14/26/Rev.1, annex II, Para. 6(g)(i).

36 *Ibid.*, Para. 6(g)(i) ("While concrete cooperation requests are usually addressed by each State individually, helping the ICC to fulfil its mandate is the collective responsibility of the community of States Parties. Progress on the many concrete steps discussed […] will benefit from the further exchanges of experiences and mutual assistance where appropriate between States, the Court and other relevant partners, including civil society"); Assembly of States Parties, *Report of the Court on Cooperation*, ICC-ASP/18/16, 21 October 2019, Para. 79.

37 Assembly of States Parties, *Report of the Court on Cooperation*, ICC-ASP/18/16, 21 October 2019, Paras. 25, 36, and 51-54.

38 ILC's 2019 Draft Articles on Crimes Against Humanity, with commentaries, *supra* note 1, preambular Para. 8. *See also* Art. 10.

doi: 10.5553/AJ/2352068X2020006002013

preambular paragraph impliedly deals with this, but it could be more explicit, coupled with a similarly more explicit substantive provision in the Articles. Indeed, the same approach could be adopted to enhance Draft Article 14(9), by encouraging States to accord the ICC the widest support, in particular on matters (which will be discussed in this article) that are somehow omitted in the ICC Statute, but are included in the Draft Articles.

4.2 The ICC's Cooperation Obligations vis-à-vis Domestic Laws, Procedures and Other Interests

The domestic laws, procedures and practices of States Parties to the Rome Statute are indispensable for the success of the ICC, given that it has not been afforded its own police and other enforcement mechanisms to arrest suspects or to secure relevant evidence and material to support the trials. This is similar to the position of many ad hoc tribunals.

But given the elements of discretion or latitude left to domestic jurisdictions even in the ICC vertical cooperation regime, the importance of strengthening or attuning domestic laws and procedures towards supporting the Court cannot be overemphasized. And any such effort to streamline them to be more supportive of accountability, rather than the promotion of sovereign interests, must be commended. While horizontal in nature, the Draft Articles do this to an extent, in a manner that may in the end also enhance States laws and procedures to support the ICC.

While vertical and intended to assure the Court full State cooperation, the ICC's State cooperation regime in some respects also recognizes some state sovereignty needs – and in the end, does not impose absolute obligations on States Parties in some respects.[39] Indeed, even if the Appeals Chamber has construed the ICC's cooperation regime in Part 9 as establishing primarily *minimum* cooperation obligations, and the ICC's cooperation orders may extend beyond this minimum to cover *enhanced* State cooperation, States enjoy discretion in this territory, so to speak:

> [P]art 9 of the Statute generally and Article 93(1) of the Statute in particular, establish primarily *minimum* obligations of cooperation that States Parties have *vis-à-vis* the Court. However, *States Parties are at liberty to cooperate more extensively with the Court, if they so wish (so-called "enhanced cooperation")*. It follows that, even if States Parties were not obliged to provide cooperation in relation to orders compelling a witness to appear before the Court, this does

39 *See, e.g.*, Z. Durdevic, 'Legal and Political Limitations of the ICC Enforcement System: Blurring the Distinctive Features of the Criminal Court', *in* B. Ackerman, H. Sikirić & K Ambos (Eds.), *Visions of Justice,* Berlin, Duncker & Humbolt, 2016, p. 173 ("[T]he adopted ICC cooperation regime, compared to the cooperation regime of the ad hoc Tribunals, is described in the literature as not being strong enough and suffering from a considerable number of imperfections; less vertical or weak vertical cooperation; a middle ground between a vertical and horizontal model; or a regime closer to inter-State cooperation"). *See also* G.A. Knoops & R.R. Amsterdam, 'The Duality of State Cooperation Within International and National Criminal Cases', *Fordham International Law Journal*, Vol. 30, No. 2, 2006, pp. 260-295, at pp. 264, 275-277.

> not necessarily mean that the Court does not have the power to make such an order, *as some States may decide to cooperate with the Court*, even in the absence of an obligation to do so.[40]

As such, the ICC's State cooperation regime leaves some room for States Parties to decline or delay cooperation in some respects or situations, for instance, to secure their national security information, or if the type of assistance is prohibited by their domestic law.[41]

Often, such sovereign interests may collide with international criminal justice efforts. The fact that only about half of States Parties have adopted domestic legislation to implement the ICC Statute, and to regulate (among other matters) their cooperation with the ICC also means that the manner in which their ICC obligations will be implemented – and how effective this may be – remains unknown.

The Draft Articles, if implemented domestically, may help fill these gaps by strengthening their States Parties' legal regimes and capacities, and/or tailoring them more towards supporting accountability for crimes against humanity, and possibly ameliorating their emphases on diverse State sovereignty interests and related constraints. When approached by the ICC for support, such domestic systems are better attuned to respond effectively and in a timely manner.

The following aspects of the Draft Articles, in particular on mutual legal assistance, while not necessarily extensive – because the Articles' objective is to create horizontal interstate obligations, rather than being directly intended to reform the ICC's vertical State cooperation regime – are noteworthy:

First, the Draft Articles' obligation that States "identif[y] and locat[e] alleged offenders and, as appropriate, *victims*, witnesses or *others*"[42] is laudable. To the extent that it is non-exhaustive in delineating the 'persons' in question, the language of the obligation is similar to the parallel one in the ICC Statute – "identification of *persons* or [the location of items]".[43] But unlike the ICC Statute, the Draft Articles also combine 'inexhaustiveness' with providing particularities or specifications of categories 'persons' that are most pertinent to international criminal investigations and prosecutions. This clarification may help ameliorate any disputes as to the scope of the State's obligations, and any attendant delays.

There is overall no dispute that identifying and locating 'offenders' and 'witnesses' is a key form of assistance States Parties must provide to the ICC. But,

40 *Prosecutor v. Ruto & Sang*, Judgement on the appeals of Mr William Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation', ICC-01/09-01/11-1598 OA7 OA8, 9 October 2014, Para. 112 (Emphasis added).

41 *See, e.g.*, Arts. 72 and 93(4) (protection of national security information); Art. 93(1)(l) (assistance not prohibited by the law of the requested state); Art. 94 (postponement of execution of request in respect of ongoing investigation or prosecution); Art. 99 ("Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State, and unless prohibited by such law, in the manner specified in the request …").

42 ILC's 2019 Draft Articles on Crimes Against Humanity, with commentaries, *supra* note 1, Art. 14(3)(a) (Emphasis added).

43 ICC Statute, Art. 93(1)(a) (Emphasis added).

doi: 10.5553/AJ/2352068X2020006002013

arguably, there may be contestations in relation to 'victims', especially for States that make no provision for victim participation in their criminal proceedings or reparations, and that view victims only through the lens of 'witnesses'. In any event, specifically identifying 'victims', as done by the Draft Articles on Crimes Against Humanity, underlines the importance States may accord their tracing and identification in support of international investigations and prosecution, besides matters of victims' participation in proceedings and reparation.

Although the inclusion of victim-identification information within mutual legal assistance regimes is relatively recent, and has principally arisen in the context of international efforts to suppress trafficking in persons,[44] identifying victims may also help prove a number of specific crimes against humanity recognized in the ICC Statute, including deportation and displacement of population,[45] as well as the *chapeau elements,* namely that the crimes were committed as part of a *widespread* or *systematic* attack directed against a civilian population.

Second, the Draft Articles specifically oblige States Parties to provide mutual legal assistance through video conferencing for the purpose of obtaining testimony or other evidence.[46] The ICC Statute generally requires States Parties to assist the Court in "taking evidence" under procedures of national law, and does not specifically identify video conferencing. It may be covered under "any other type of assistance" not prohibited by the law of the State.[47] Nevertheless, specifically identifying video conferencing also ensures predictability of the States' obligations. But it also may help in rallying States to build their capacities – especially by putting in place structures and facilities that may also support ICC requests. In particular, video conferencing may minimize resources of having to transport some witnesses to the ICC. It also enables the ICC to efficiently respond to urgent matters, or exceptional situations that may make witnesses unable or unavailable to appear in person, including for health and other reasons.[48] In the end, video conferencing may avert the risk of losing crucial evidence, while also protecting the well-being and dignity of witnesses.

Third, by explicitly obligating States not to decline mutual legal assistance to each other on grounds of bank secrecy, the Draft Articles address an important constraint. It is missing in the ICC Statute, although it may be addressed under the States' obligation to "cooperate fully with the Court" and to provide "any

44 van der Wilt, *supra* note 32, p. 805.

45 ICC Statute, Art. 7(1)(d).

46 ILC's 2019 Draft Articles on Crimes Against Humanity, with commentaries, *supra* note 1, Art. 14(3)(b).

47 ICC Statute, Art. 93(1)(l).

48 *See, e.g., Prosecutor v. Lubanga*, Decision on defence request for a witness to give evidence via video link, ICC-01/04-01/06-2285-Red, 9 February 2010, Para. 15 ("[C]ontrary to the contention of the legal representatives, applications for evidence to be given via a video link are not restricted to the two suggested limited situations, namely when the witness has either refused to attend court or is unable to do so. Instead, the Chamber is generally enjoined to protect the psychological well-being and dignity of its witnesses, subject to the fundamental dictates of a fair trial, and this calls for a fact-specific Decision, in which a wide variety of different factors may be relevant. Rule 67 of the Rules is framed in a way that leaves the Chamber with a broad discretion, subject particularly to the provisions of Rule 67(3) of the Rules").

other type of assistance" not prohibited by the law of the State.[49] By addressing it specifically, the Draft Articles may enhance the viability of domestic systems to assist each other, but also the ICC when they are approached, by removing a critical roadblock. Many States may not be constrained in affording each other assistance concerning banking information with respect to certain crimes such as corruption or money laundering.[50]

But, on its face, removing bank secrecy appears of limited relevance to the investigation of crimes against humanity. Yet, it is also critically important first in the context of identifying resources for victim reparations for crimes against humanity and other international crimes. Second, it may be useful "for proving the crimes",[51] for instance, as a form of 'linkage' evidence to support individual criminal participation in the crimes – even if for corroborative purposes only.

As recently confirmed in the *Yekatom & Ngaissona Confirmation Decision*, financial information may show that a person financed the crimes, and thus, that the person may be held culpable according to one or more of the modes of participation under Articles 25 and 28 of the Statute.[52] Such financial information may be relayed by witnesses, but it may also be confirmed by a person's financial transactions hidden in banks and other financial institutions.[53] So, stamping out banking secrecy in domestic legal regimes of States Parties for purposes of investigation and prosecution of crimes against humanity is a welcome development.

Moreover, although discretionary, the Draft Articles may be applauded for encouraging States to transmit information to one another even in the absence of a formal request.[54] This "could assist [the requesting state] in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or might lead to a formal request by the [requesting] State".[55] Originating from the Schengen Agreement and Convention, among other instruments, this "spontaneous exchange of information"[56] is indeed

> a valuable addition in treaties on mutual legal assistance, as states may for instance be ignorant about the presence of a suspect of crimes against

49 ICC Statute, Arts. 86 and 93(1)(l).

50 *See* ILC's 2019 Draft Articles on Crimes Against Humanity, with commentaries, *supra* note 1, p. 116, Para. 15 (noting that the provision is inspired by the UN Articles against Corruption).

51 *Ibid.*, p. 116, Para. 15.

52 *Prosecutor v. Yekatom & Ngaissona*, Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaissona, ICC-01/14-01/18-403-Red-Corr, 14 May 2020, Paras. 175-176 (but the Pre-Trial Chamber declined to confirm the charges at the specific locations basing on adduced financial information, because, in its view "[t]he evidence presented by the Prosecution does not allow the Chamber to trace Ngaissona's financial contribution, or otherwise, to the Anti-Balaka groups operating in those locations").

53 *See* ILC's 2019 Draft Articles on Crimes Against Humanity, with commentaries, *supra* note 1, p. 116, Para. 15.

54 *Ibid.*, Art. 14(6).

55 *Ibid.*, p. 117, Para. 17.

56 van der Wilt, *supra* note 32, p. 807.

doi: 10.5553/AJ/2352068X2020006002013

humanity on their territory. Any information may trigger an investigation and/or subsequent request for further evidence.[57]

Furthermore, the Draft Articles also contain other forms of mutual legal assistance that reiterate parallel forms of assistance in the ICC Statute. On its face, the inclusion in the Draft Articles of these forms of assistance arguably may not necessarily enhance domestic legal systems of States Parties to the Rome Statute as such – such as by attuning such systems to support accountability. Nevertheless, given that assuring interstate cooperation calls for multifaceted actions, reiterating some forms of assistance already in the ICC Statute in the Articles may play a positive role, including a further 'mobilization' role, by reminding States Parties of the importance of parallel duties in the Statute.

For instance, the examination of objects and sites, including obtaining *forensic evidence,* under Draft Article 14(3)(e) – a parallel form of assistance found in Article 93(1)(g) of the Rome Statute – is critical in the investigation and prosecution of atrocity crimes, including crimes against humanity and genocide. The Draft Articles underline that the examination of sites – which may include exhumation – is for obtaining forensic evidence. The ICC may not by itself carry out such an exhumation on the territory of a State without authorization, so it relies on States.

Reminding States, as Article 13(3) of the Draft Articles does, that an offence covered by the Articles shall not be considered a political offence or an offence connected with a political offence or an offence inspired by political motives, is important. This is more so given that some States, even in recent past, have attempted to raise political offence claims to deny extradition, notwithstanding the seriousness of the alleged atrocities.[58]

5 Enhancing Complementarity

As noted earlier, a key objective of the Draft Articles' interstate cooperation regime is strengthening and building the capacities of domestic legal systems to stamp out impunity for crimes against humanity and contribute to the prevention of such crimes.[59] But what is also very critical is that the Draft Articles recognize the central role played by domestic systems in fighting impunity and therefore, albeit impliedly, the *complementarity* role of the Rome Statute. Indeed, the Draft Articles recall that "[i]t is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity".[60]

And the Articles' 'drafting history' to date, while expressly recognizing the complementarity role of the Rome Statute and the ICC in fighting impunity, also acknowledges that the

57 *Ibid.*

58 *See, e.g., ibid.,* pp. 799-801.

59 ILC's 2019 Draft Articles on Crimes Against Humanity, with commentaries, *supra* note 1, preambular Paras. 6 and 10.

60 *Ibid.*, preambular Para. 8. *See also* preambular Para. 10.

> ICC does not have the capacity to prosecute all persons who commit crimes against humanity [and therefore] effective prevention and prosecution of such crimes has to take place primarily in national jurisdictions.[61]

By contributing towards the construction of domestic legal regimes in responding to crimes against humanity at the domestic level, especially through the network of interstate cooperation to service those regimes, the Draft Articles hold the promise for 'freeing space' for the ICC to focus its limited resources on fewer (potential) cases right from the time it initiates investigations into a situation. By doing so, the effectiveness of the Court's investigations and prosecution will be enhanced, given the 'reduced' volumes or numbers of cases it will have to handle.

Although when the prosecution initiates investigations into a situation, the aim is not to prosecute every case – because "that would be both practically unfeasible and run counter to the notion of complementarity action at the international and national levels"[62] – the Office expends resources in trying to identify, select and prioritize which cases to prosecute at the Court. Indeed,

> as investigations within each situation proceed, and bearing in mind the Office's strategy to conduct in-depth and open-ended investigations, the Office will gradually develop one or more provisional case hypotheses.[63]

Moreover,

> case selection and prioritisation will require updating on the basis of the information and evidence obtained during the course of investigations, any ongoing criminality, as well as the evolution of operational conditions that could impact on the Office's ability to conduct successful investigations and prosecutions. As part of this process, not only could a selection or prioritisation decision need to be revisited over time, the case hypothesis itself may need to be adjusted to take account the evidence (*sic*) that has been collected.[64]

The more potential cases there are in a given situation – due in part to the absence of relevant action at the domestic level – the more expensive, complex and time consuming are the ICC's own investigative actions. The fewer cases there are – again due in part to action at the domestic level – the easier, faster and more effective will the ICC's actions likely be, right from its intervention in a situation.

61 Int'l Law Comm'n, *Report on the Work of Its Sixty-Fifth Session*, UN Doc. A/68/10 (2013), Annex B, Para. 11.
62 ICC Prosecution Policy paper on case selection and prioritisation, 15 September 2016, Para. 5.
63 *Ibid.*, Para. 10.
64 *Ibid.*, Para. 13.

doi: 10.5553/AJ/2352068X2020006002013

But it may be argued that the ICC Statute already 'obligates' national systems to take accountability actions domestically. So how do the Draft Articles meaningfully contribute?

As shown next, whether or not the ICC already 'obligates' domestic systems to exercise jurisdiction and ensure accountability for crimes against humanity before the ICC intervenes is somewhat contentious. It may strongly be argued that it does, but some questions still abound in this regard. This situation – of ambiguity or debate – is not the most ideal when it comes to mobilizing domestic systems to respond to crimes against humanity. Without States taking action as extensively as possible, due in part to any lingering doubt as to whether the Rome Statute creates such positive obligation for them, the struggle against impunity for these crimes is hampered because the ICC cannot do it alone. Moreover, overwhelming the ICC with looking into countless cases right from the time any given situation is referred to the Court, or right from the preliminary examination stage, through to the investigations and prosecution, is not ideal for effective ICC investigation into such a situation.

Ultimately, regardless of which view may be taken concerning whether the ICC Statute obligates States to take domestic action, the Draft Articles, for their part, expressly obligate States to act. And by also expressly requiring them to cooperate with each other to achieve accountability locally, the Articles fill any gap, whether merely perceived or otherwise, in the ICC legal regime and/or promote the *complementarity* role of the ICC.

Therefore, while the ICC's complementarity role, any limits in that system and the utility of the Articles in helping to fill those gaps could have been expressed more explicitly in the Articles, in the end it is indisputable that the Articles strengthen the ICC's complementarity idea.

5.1 Debates as to States' Obligation to Assume Jurisdiction

On the one hand, based on a plain reading of the Rome Statute, it may be strongly argued that the Statute obligates States to assume (primary) jurisdiction over crimes of concern to the international community, including crimes against humanity. To this extent, the Draft Articles on Crimes Against Humanity may be seen as merely reiterating an established position, and thus doing not so much, because there is no 'legal gap' in the ICC's legal regime.[65]

In its Preamble, the Rome Statute not only

> affirms that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measure at the national level and by enhancing international cooperation.[66]

65 In our view, even the mere reiteration of such a critical 'obligation' is also by itself important for playing a further 'mobilizing' role and reminding States to take accountability actions with all seriousness.

66 ICC Statute, preambular Para. 4.

The Rome Statute also recalls the primary "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[67] In Article 1, "the International Criminal Court [...] shall be complementary to national criminal jurisdictions".

That States are under a 'legal obligation' under the Rome Statute to exercise jurisdiction over international crimes has also been reiterated by some ICC case law. For instance, in *Ruto, Kosgey & Sang; Muthaura, Kenyatta & Ali* and *Gaddafi*, the Appeals Chamber has underscored that

> States have the *primary responsibility* to exercise criminal jurisdiction and the Court does not replace but complements them in that respect. Article 17(1)(a) to (c) sets out how to resolve a conflict of jurisdictions between the Court on the one hand and a national jurisdiction on the other.[68]

Pre-Trial Chamber II was even more emphatic in the *Muthaura et al* decision,[69] stressing not only the duty of the ICC – but also both a right and legal duty of States:

> [S]tates not only have the right to exercise their criminal jurisdiction over those allegedly responsible for the commission of crimes that fall within the jurisdiction of the Court, they are also under an existing duty to do so as explicitly stated in the Statute's preambular Paragraph 6.[70]

On the other hand, some ICC case law seems to construe States' domestic actions under complementarity generally or through the lenses of a "right" of states, or a "principle", a "goal" or at the extreme end as a [mere] 'barrier' to the Court's exercise of jurisdiction. For instance, in the *Gaddafi & Al-Senussi* Decision, the Appeals Chamber viewed Libya's *right* to prosecute Gaddafi as "merely restat[ing] the principle of complementarity contained in the Statute".[71] In *Ruto, Kosgey & Sang* and *Muthaura, Kenyatta & Ali*, Judge Ušacka, in her dissenting opinions, described

67 ICC Statute, preambular Para. 6.

68 *Prosecutor v. Ruto, Kosgey & Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to Art. 19(2)(b) of the Statute', ICC-01/09-01/11-307 OA, 30 August 2011, Para. 37; *Prosecutor v. Muthaura, Kenyatta & Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to Art. 19(2)(b) of the Statute', ICC-01/09-02/11-274 OA, 30 August 2011, Para. 36; *Prosecutor v. Saif Al-Islam Gaddafi*, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility challenge by Dr. Saif Al-Islam Gadafi pursuant to Art. 17(1)(c), 19 and 20(3) of the Rome Statute"', of 5 April 2019, ICC-01/11-01/11-695, 9 March 2020, Para. 58 (Emphasis added).

69 *Prosecutor v. Muthaura, Kenyatta & Ali*, Decision on the application of Kenya challenging the admissibility of the case pursuant to Art. 19(2)(b) of the Statute, ICC-01/09-02/11-96, 30 March 2011, Para. 40.

70 *Ibid*.

71 *Prosecutor v. Gaddafi & Al-Senussi*, Decision on the Request for Disqualification of the Prosecutor, ICC-01/11-01/11-175 OA3, 12 June 2012, Para. 38.

doi: 10.5553/AJ/2352068X2020006002013

complementarity as "[a] *core guiding principle for the relationship between States and the Court*".[72]

At the extreme, so to speak, other decisions view complementarity as a mere 'barrier' to the exercise of jurisdiction by the ICC, as elucidated in Article 17 of the Statute. And "the presence of anyone of the [...] impediments enumerated in Article 17 renders the case inadmissible and as such non-justiciable".[73]

Given these controversies, it may be argued that the Draft Articles fill a 'gap' in the Rome Statute by unambiguously underscoring States' legal obligation to pursue accountability for crimes against humanity domestically and rallying them to do so. If this obligation is fully implemented by the Articles' States Parties – especially those that are also Parties to the Rome Statute – it will reduce the number of situations and cases the ICC has to intervene in. This will thus enable the ICC to devote its limited resources to effectively investigating fewer cases.

6 Improving the Draft Articles and Conclusions

As noted earlier, since the Draft Articles were not designed as a tool for reforming the ICC's cooperation regime, they cannot be a panacea for all limitations or gaps in the ICC regime. The ILC Draft Articles also only addresses one of four of the crimes within the ICC's jurisdiction.[74] Nonetheless, by addressing crimes against humanity, its contribution, however modest, should be applauded. To be more effective, certain improvements could be made in the Draft Articles without undermining their horizontal cooperation orientation. This analysis has already suggested some reforms. Only a few are reiterated here.

72 *Prosecutor v. Ruto, Kosgey & Sang*, Dissenting Opinion of Judge Ušacka in the Judgment on the appeal of the Republic of Kenya against the decision Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute', ICC-01/09-01/11-336 OA, 20 September 2011, Para. 19. Diss. Op; *Prosecutor v. Muthaura, Kenyatta & Ali*, Dissenting Opinion of Judge Ušacka in the Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute', ICC-01/09-02/11-342 OA, 20 September 2011, Para. 19. Diss. Op. (Emphasis added).

73 *Prosecutor v. Lubanga,* Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the Decision on the defence challenge to the jurisdictional of the Court pursuant to Art. 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772 OA4, 14 December 2006, Para. 23. *See also Prosecutor v. Saif Al-Islam Gaddafi*, Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility challenge by Dr. Saif Al-Islam Gadafi pursuant to Art. 17(1)(c), 19 and 20(3) of the Rome Statute"', of 5 April 2019, ICC-01/11-01/11-695, 9 March 2020, Para. 58 ("[U]nder the complementarity principle, States have the primary responsibility to investigate and prosecute crimes falling within the jurisdiction of the Court, and *the Court may only exercise jurisdiction* where the relevant national jurisdiction is either not doing so or is unwilling or unable to do so genuinely") (Emphasis added).

74 There is another ongoing initiative, spearheaded by a few countries (Argentina, Belgium, Mongolia, the Netherlands, Senegal and Slovenia), for a multilateral treaty covering all the core international crimes. *See generally*: www.centruminternationaalrecht.nl/mla-initiative (last visited 16 August 2020).

First, there is need to limit the scope of "national security, *ordre public*, prejudice to sovereignty or other essential interests"[75] as grounds for States to decline cooperation requests. By allowing States Parties room to deny assistance to each other on these grounds, the Draft Articles are problematic. These concepts are overbroad. The Draft Articles should be revised to restrict the reach of these grounds. While parallel grounds exist in the ICC Statute, they are not as broad, and in any event, case law has endeavoured to construe them restrictively.

Under Article 72 of the ICC Statute, for instance, States Parties may raise objections against disclosure of material from their systems based on national security concerns.[76] This may have an impact on the efficacy of the ICC investigations. If the defence is entirely denied access, the prosecution may not rely on the material in securing a conviction. States have the prerogative to raise objections on the basis of Article 72 – and the ICC has to work within this constraint. Indeed, the prerogative to determine whether disclosure would prejudice national security lies with the intervening State – the Chamber's role is (only) to decide on the most appropriate way forward.[77]

To be clear, given the impact Article 72 may have, any restrictions on its reach are critical in enhancing the ICC's investigation and prosecution efforts. Arguably, the Draft Articles on Crimes Against Humanity/Annex should be reframed from simply reiterating that States may deny cooperation based on "national security, *ordre public*, prejudice to sovereignty or other essential interests" to encouraging States to limit the reach of such grounds as much as possible. If States are approached by the ICC for assistance, they are likely to be more amenable to also do so under their vertical obligations in the Rome Statute.

At the ICC, although the judges have limited room to restrict the reach of Article 72, they have tried to do so. For instance, if prior to the State's objection under Article 72, the evidence has already been disclosed between the parties, without the State raising any concerns, the objection will not be allowed.[78] States must thus raise any concerns in a timely manner. Moreover, objections referencing "state security" must be assessed in their proper context, and as was emphasized in the *Muthaura et al* case, a mere reference to a State entity, such as the "State House", may not automatically suffice to show the information or documents belong to the "State".[79] The judges have also somewhat strictly construed some other provisions granting latitude to States Parties to deny or postpone

75 ILC's 2019 Draft Articles on Crimes Against Humanity, with commentaries, *supra* note 1, Annex, Para. 8(b).

76 *See, e.g.*, *Prosecutor v. Muthaura, Kenyatta & Ali*, Decision on the 'Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings', ICC-01/09-02/11-340, 20 September 2011, Para. 11.

77 *Prosecutor v. Ongwen,* Decision in Response to an Art. 72(4) Intervention, ICC-02/04-01/15-1267, 1 June 2018, Para. 17. *See also ibid.,* Para. 19 ("When an Article 72 intervention arises, pursuant to Article 72(5) of the Statute, the Single Judge has to determine whether the matter can be resolved by cooperative means").

78 *See, e.g.*, *Prosecutor v. Muthaura, Kenyatta & Ali*, Decision on the 'Request by the Government of Kenya in respect of the Confirmation of Charges Proceedings', ICC-01/09-02/11-340, 20 September 2011, Para. 11.

79 *Ibid*.

doi: 10.5553/AJ/2352068X2020006002013

cooperation requests, and have rejected States Parties' attempts to liberally apply otherwise restrictive provisions. For instance, they have rejected States' request to postpone execution of cooperation requests merely because they intend to or are in the process of filing an admissibility challenge with the ICC. The judges have insisted that there must be a pending admissibility request under consideration by the ICC before a State can invoke Article 95. Moreover, the State may only temporarily suspend the execution of a request for cooperation until such time that a determination on admissibility is made by the ICC.[80]

Therefore, revising the ILC Draft Articles by encouraging States Parties to narrowly or restrictively rely on "national security, *ordre public*, prejudice to sovereignty or other essential interests", as well as other related provisions granting latitude to deny or postpone cooperation, would enhance the Articles' positive contribution.

Second, even if the Draft Articles' object is not to 'reform' the ICC as such, they can still be revised to establish some (more direct) 'link' to the Court without undermining their horizontal cooperation orientation, or discouraging States, especially those that are not Parties to the Rome Statute, from ratifying a future crimes against humanity convention. At a minimum, they should specifically *encourage* States Parties to a future convention to render the necessary cooperation whenever approached by the ICC. In particular, they should be *encouraged* to accord the ICC the widest support, especially on matters that are somehow omitted in the ICC Statute, but are included in the Articles, and ultimately, in a treaty on crimes against humanity negotiated by States. These changes may further enhance the impact of a new convention on crimes against humanity on the efficacy of the ICC.

80 *See, e.g., Prosecutor v. Gaddafi & Al-Senussi*, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-100, 4 April 2012, Paras. 5, 15, 18, and 19; *Prosecutor v. Gaddafi & Al-Senussi*, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to Art. 95 of the Rome Statute, ICC-01/11-01/11-163, 1 June 2012, Paras. 23, 37, and 40; *Prosecutor v. Gaddafi & Al-Senussi*, Decision on the "Urgent Application on behalf of Abdullah Al-Senussi for Pre-Trial Chamber to order the Libyan Authorities to comply with their obligations and the orders of the ICC", ICC-01/11-01/11-269, 6 February 2013, Paras. 29 and 30.