



Universiteit
Leiden
The Netherlands

Regional complementarity in international criminal law: making sense of the four-tiered justice paradigm

Bakare, S.S.

Citation

Bakare, S. S. (2024, November 6). *Regional complementarity in international criminal law: making sense of the four-tiered justice paradigm*. Retrieved from <https://hdl.handle.net/1887/4107988>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/4107988>

Note: To cite this publication please use the final published version (if applicable).

INTRODUCTION

1. Main themes of the study

In September 2023, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) published its latest policy on complementarity titled ‘Draft Policy on Complementarity and Cooperation’.¹ In the policy, the OTP not only acknowledges the role of regional organisations in international criminal justice, but also highlights ‘the strong and new forms of relationships recently developed’ between the ICC and regional organisations. There is a reason for this. The role that regional organisations play in international criminal justice has been hitherto understudied. Also, the regional dimensions of complementarity, which is the principle that governs the relationship between the ICC and other mechanisms in the field of international criminal justice, have equally received less attention. This study therefore seeks to make a novel contribution to scholarship by arguing in favor of a four-tiered approach to complementarity, that includes international crimes prosecution by regional and regionally-backed tribunals. This research sits in a line of studies on legal pluralism and hybridization of international criminal justice. It is situated at the intersection of international criminal law, (institutional) international law, international relations and politics (including the regional political context of the African Union and its members), and the theory of international law. The research examines the question of the extent to which regionalism poses not only a challenge to the coherence of international criminal law, but also an opportunity for the field. It therefore engages with complementarity in a broad sense, i.e. as an organizing principle of institutional relations (or a ‘big idea’ as Sarah Nouwen put it),² and not solely as an admissibility device. This structural question is important, because of certain developments relating to the resurgence of hybrid and regional/regionally-backed tribunals as forums for international crimes prosecution. A few examples of this resurgence from Africa will suffice.

¹ ICC-OTP ‘DRAFT Policy on Complementarity and Cooperation’ at ICC-OTP ‘Draft policy on Complementarity and Cooperation’ September 2023.

² S.M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013) 8-33.

In May 2014, the UN Mission in South Sudan published a report where it recommended that ‘a special or hybrid tribunal’ should be established for South Sudan, in order to prosecute perpetrators of international crimes.³ Secondly, in June 2014, the African Union adopted a protocol to establish a criminal chamber within its human rights court. This chamber will have the jurisdiction to prosecute the crimes provided in the protocol establishing the court.⁴ Thirdly, in August 2014, the UN and the government of the Central African Republic (CAR) entered into an agreement which required the latter to establish a Special Criminal Court.⁵ Fourthly, in the same year, in the DRC, a call had gone out for the establishment of a specialised mixed chambers, in order to bring an end to continuous human rights violations occasioned by armed conflicts.⁶ Lastly, there is the more recent and promising initiative to set up an Economic Community of West African States (ECOWAS) backed court in the Gambia, to try the Yahaya Jammeh regime crimes.⁷

The establishment of different criminal tribunals contributes to legal pluralism and the fragmentation of international law.⁸ On the other hand, the emergence of criminal tribunals could be seen as a result or function of the existing legal pluralism, rather than a catalysing factor. As such, institutional pluralism does not always lead to fragmentation, but where it does, it requires some attention. In this study, I refer to the fragmentation of international criminal law through the use of hybrid and regional tribunals, in its enforcement. This is one of the overarching themes of this study. The fragmentation of ICL is not specific to hybrid/regional tribunals. It can also occur through the establishment and operation of international courts. This has been witnessed with the

³ UNMISS ‘Conflict in South Sudan: A Human Rights Report’ 8 May 2014.

⁴ For the text of the protocol, see AU ‘Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

⁵ For preliminary thoughts on this court, see P. Labuda ‘The Special Criminal Court in the Central African Republic’ (2018) 22 *Insights on ASIL* 2.

⁶ H. Hobbs ‘Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy’ (2016) 16 *Chicago Journal of International Law* 2, 484.

⁷ O. Owiso & S. Nakandha ‘International Criminal Accountability for Yahya Jammeh’s Administration: The Gambia-ECOWAS Court’ *Just Security*, August 2023) [available at <https://www.justsecurity.org/87511/international-criminal-accountability-for-yahya-jammehs-administration-the-gambia-ecowas-court/> - accessed 11 January 2024].

⁸ C. Stahn & L. J. van Den Herik (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff Publishers 2012) 21-89. See also E. van Sliedregt & S. Vasiliev (eds) *Pluralism in International Criminal Law* (Oxford University Press 2014).

work of the ICTY, ICTR, MICT, and the ICC.⁹ The idea of legal pluralism pervades the entire discourse in this dissertation.

The second overarching theme of this study is the concept of regionalising international criminal justice, or more concretely, the notion of regional complementarity and its application in theory and practice. This idea of regional complementarity, in my view, can be understood both as an admissibility idea (i.e. need for deference), and as a broader institutional principle involving division of labour, cooperation and other principles, to make sense of the four-tiered justice paradigm that this study focuses on. The four-tiered justice paradigm highlights that there are now four types of mechanisms that enforce international criminal justice: domestic courts, hybrid tribunals, regional tribunals, and the ICC. The OTP admitted the place and importance of these mechanisms when it stated in its September 2023 policy on complementarity and cooperation that ‘there is no dichotomy in the character of the relevant accountability mechanisms in terms of whether it is purely national or regional, hybrid or internationalised.’¹⁰ In the following sections, I will introduce the fragmentation of international law and legal pluralism, as well the regionalization of international criminal justice, as the two over-arching themes of this study. I will also explore the problem statement, research questions and structure, as well as the research methodology and approach. Lastly, I will focus on the study’s contribution to knowledge.

2. Fragmentation of international law and legal pluralism

In many ways, international law is fragmented. It has no homogenous system – only different norms, elements, institutions, procedures, systems, and sub-systems.¹¹ Some authors have traced the increase of this fragmentation to the politics of the Cold War era.¹² In 2002, at its 54th Session, the International Law Commission (ILC) noted the risks associated with this fragmentation. It established a study group to examine the topic ‘Fragmentation of international law: difficulties

⁹ R. Geib & N. Bulinckx ‘International and internationalised criminal tribunals: a synopsis’ (2006) 88 *International Review of the Red Cross* 861, 49.

¹⁰ ICC-OTP Draft policy, (n. 1) para 80.

¹¹ On fragmentation in international law, see UN Doc: A/CN.4/L.702 (2006) ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ 1-25.

¹² J. Delbruck ‘A More Effective International Law or a New "World Law?" - Some Aspects of the Changing Development of International Law in a Changing International System’ (1993) 68 *Indiana Law Journal* 705; M. W. Reisman ‘International Law after the Cold War’ (1990) 84 *American Journal of International Law*. 859 at 864.

arising from the diversification and expansion of international law.¹³ The fragmentation of international law accounts for the division of public international law into different categories like international humanitarian law (IHL), international human rights law (IHRL), and the latecomer: international criminal law (ICL). The multiplication of international courts and tribunals as well as the multiplicity of treaties on various subjects of international criminal law are some of the causes of this fragmentation in the field of ICL. Stahn and van den Herik have identified three aspects of fragmentation that include institutional, substantive law, and procedural fragmentation.¹⁴ Institutional fragmentation relates to 'lack of interaction between international institutions' and roles that regional mechanisms may play in international law.¹⁵ This is part of the problem that this thesis seeks to address. Fragmentation presents challenges as well as opportunities for the development of international law, especially as it provides an opportunity for membership of different international organisations, which states seize.

Moreover, the future of international law and order depends on the activities of international organisations (IOs).¹⁶ States often scramble for membership of multiple international organisations,¹⁷ and this is a testimony to their growing significance.¹⁸ The result is that while states struggle to preserve their sovereignty,¹⁹ they become interdependent on one another. Interdependence is not only as a result of membership of different international organisations; it is rather the function of the interconnected world (trade, culture, food security, climate change, and global challenges). The emergence of multiple international organisations is a reflection of the need for more intensive state cooperation and regulation of various spheres of activity.

¹³ UN General Assembly, Report of the International Law Commission, 18 July 2006, A/CN.4/L.702.

¹⁴ C. Stahn & L. J. van Den Herik (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff Publishers 2012) 21-89.

¹⁵ *Ibid.*

¹⁶ H. Schermers & N. Blokker *International Institutional Law* (Brill Nijhoff 2011) Preface.

¹⁷ J. Pevehouse 'Democratisation, Credible Commitments, and Joining International Organizations' [available on <http://www.press.umich.edu/pdf/0472112899-ch1.pdf> - accessed 8 March 2023].

¹⁸ G. Sinclair 'State formation, liberal reform and the growth of international organizations' (2015) 26 *European Journal of International Law* 2 445-469; B.S. Chimni 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *European Journal of International Law* 1. See also M. Ruffert & C. Walter *Institutionalised International Law* (CH. Beck. Hart. Nomos 2014) 3; J. Klabbers *An Introduction to International Organizations Law* (Cambridge University Press 2022) 18.

¹⁹ The ability of States to participate in institutionalised international relations has also been described as an essential expression of their sovereignty (See Ruffert & Walter above, 55).

The states' interdependence and membership of different international organisations give rise to multiple obligations.²⁰ Multiple obligations often birth both normative and inter-institutional clashes.²¹ The possibility of these clashes raises the need to address inter-institutional relationships, in order to avoid anarchy or the 'general incoherence of the international legal system', which may be created by 'a surfeit of treaties that often overlap and, with increasing frequency, conflict with one another.'²² According to Ebobrah, '[I]n the anarchic environment in which international courts operate, jurisdictions overlap...competition among international courts becomes a danger to the unity and legitimacy of the international legal system.'²³ Professor Charney, in his 1998 study titled 'Is international law threatened by multiple international tribunals?'²⁴ had also argued that there is a risk of general incoherence. In a 2006 keynote address, Justice Higgins of the ICJ had spoken of the implications of multiplying judicial institutions and how that contributes to the fragmentation of international law.²⁵

Thus, when obligations owed to international institutions conflict,²⁶ as they often do,²⁷ states as well as treaty negotiators and drafters are left with a conundrum. In addressing this conundrum, different tools have been previously proposed. For example, the Vienna Convention on the Law of Treaties (VCLT) contains a set of (imperfect) rules for resolving treaty conflicts.²⁸ On their part, Du Plessis and Gevers argue that norm conflict 'can be resolved in one of two ways: with reference

²⁰ UN Doc A/CN.4/120 Fourth report on the Law of Treaties by Mr. G. G. Fitzmaurice, Special Rapporteur, extracted from the Yearbook of the International Law Commission (1959) Vol II, 42, art 4(1).

²¹ T. Broude & Y. Shani (eds) *Fragmentation(s) of International Law: On Normative Integration as Authority Allocation* (Hart Publishing 2008).

²² C.J. Borgen 'Resolving Treaty Conflicts' (2005) 37 *The Geo. Wash. Int'l L. Rev.* 574.

²³ S. Ebobrah 'Complementarity between the African Court and the judicial organs of Regional Economic Communities in Africa' in *PALU Guide to Complementarity within the African Human Rights System* (2014) 52.

²⁴ J. Charney 'Is international law threatened by multiple international tribunals' (1998) 271 *Collected Courses of the Hague Academy of International Law* 101.

²⁵ R. Higgins 'A Babel of Judicial Voices? Ruminations from the Bench' (2003) 55 *International and Comparative Law Quarterly* 4, 791-804.

²⁶ G. Binder 'The Dialectic of Duplicity: Treaty Conflict and Political Contradiction' (1985) 34 *Buffalo Law Review* 329-549; see also F. Londras, and S. Kingston, 'Rights, Security and Conflicting International Obligations: Exploring Inter-Jurisdictional Judicial Dialogues in Europe' (2010) *American Journal of Comparative Law* 1; N. Bhuta N, 'Conflicting International Obligations and the Risk of Torture and Unfair Trial: Critical Comments on *R (Al-Saadoon and Mufdhi) v Secretary of State for Defence; Al-Sadoon and Mufdhi v United Kingdom*' (2009) 5 *Journal of International Criminal Justice* 7, 1133.

²⁷ J. Klabbers *Treaty Conflict and the European Union* (2009) Book Review 20 *European Journal of International Law* (2009) 7-10.

²⁸ See C.J. Borgen 'Resolving Treaty Conflicts' (2005) 37 *The Geo. Wash. Int'l L. Rev.* 578.

to hierarchy (such as a *jus cogens* norm or per article 103 of the UN Charter) or through ‘techniques of interpretation’.²⁹

In the African human rights system, as well as in the International Criminal Court (ICC), the concept of complementarity³⁰ was introduced to address normative or institutional conflicts. In that regard, complementarity has been described as ‘usable in normative and descriptive dimensions’, thus suggesting that it is a mechanism for describing, prescribing as well as clarifying the relationship between institutions.³¹ In the EU human rights system, it is the principle of subsidiarity that was introduced for similar purpose.³²

Complementarity and similar concepts exist for different purposes in regional human rights systems, primarily as a result of normative and structural expansion in these systems.³³ In the African human rights system, complementarity was conceived to manage the relationship between different institutions within the same system.³⁴ This is an intra-system coordination. In the ICC, complementarity was conceived to serve broader purposes of arranging intra- and inter-system relationships. Article 1 of the Statute provides that the Court shall be complementary to national criminal jurisdictions, while article 17 establishes the substantive rules that constitute the principle of complementarity. The Statute defines the question of complementarity as pertaining to the

²⁹ See M. Duplessis and C. Gevers ‘Balancing competing obligations: The Rome Statute and AU decisions’ (2011) *ISS Paper* 225.

³⁰ C. Stahn ‘Complementarity: A Tale of Two Notions’ (2008) 19 *Criminal Law Forum* 87-113.

³¹ S. Eboobrah ‘Towards a positive application of complementarity in the African human rights system: issues of functions and relations’ (2011) 22 *European Journal of International Law* 3 663-688; see also A. Clapham, ‘On Complementarity: Human Rights in the European Legal Orders’ (2000) 21 *Human Rights Law Journal* 313.

³² On subsidiarity as a principle of the EU human rights system, see P. Carozza ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97 *American Journal of International Law* 1, 38-79.

³³ M. Mutua, ‘The African Human Rights System: A Critical Evaluation’ (2000) *UNDP Human Development Report* 1. See also B. Gawanas ‘The African Union: Concepts and implementation mechanisms relating to human rights’ [available on http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/6_Gawanas.pdf - accessed 11 February 2024]. Both authors discuss the normative and institutional expansions that have taken place in the African human rights system.

³⁴ Article 2 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights provides that ‘the Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples’ Rights.’ Article 8 of the same protocol requires the Court to bear in mind the principle of complementarity between the Commission and the Court when deciding cases brought before it. Additionally, rule 114 of the Rules of Procedure of the African Commission on Human and Peoples’ Rights reiterates the notion of complementarity between the Court and the Commission.

admissibility of a case rather than to the jurisdiction of the Court.³⁵ As such, the ICC cannot exercise the jurisdiction that it has if the case is inadmissible. The principle of complementarity does not affect the existence of jurisdiction of the Court; it regulates when the Court may exercise this jurisdiction.³⁶ Article 17 thus functions as a gatekeeper to the exercise of jurisdiction.³⁷ These provisions of the Rome Statute suggest that complementarity is one means through which domestic and international systems interact.

In the ICC's jurisprudence, a number of cases have brought increased attention to the principle of complementarity. Some of these cases involved sitting heads of states in Africa.³⁸ These cases also gave rise to the troubled relationship between the African Union (AU) and the ICC.³⁹ The strained relationship between the two entities have been extensively discussed in literature.⁴⁰ The reasons

³⁵ M. Benzing 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 *Max Planck UNYB* 591-632 at 594.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Examples of such cases include the ones that relate to Uhuru Kenyatta, President of the Republic of Kenya and his vice president, as well as the case against Omar Al-Bashir, the former President of Sudan.

³⁹ See generally M. DuPlessis 'The Obligation of African Union States to Implement ICC Arrest Warrants' (2011) *EJIL: Talk* [available on <http://www.ejiltalk.org/the-obligation-of-african-union-states-to-implement-icc-arrest-warrants/> - accessed 23 January 2023] and D. Akande 'The Genocide Convention and the Arrest Warrant Issued by the ICC' (2011) *EJIL: Talk* [available on <http://www.ejiltalk.org/the-genocide-convention-and-the-arrest-warrants-issued-by-the-icc/> - accessed on 7 March 2023]; S. Weldehaimanot 'Arresting Al-Bashir: the African Union's opposition and the legalities' (2011) 19 *African Journal of International and Comparative Law* 2, 208-235; O. Imoedemhe 'Unpacking the tension between the African Union and the International Criminal Court: the way forward' (2015) 23 *African Journal of International and Comparative Law* 1, 74-105; E. Keppler 'Managing setbacks for the International Criminal Court in Africa' (2012) 56 *Journal of African Law* 1, 1-14; A. Abass 'Prosecuting International Crimes in Africa: Rationales, Prospects and Challenges' (2013) 24 *European Journal of International Law* 933; and A. Mudukuti 'South Africa abandoning the International Criminal Court? The build-up and potential consequences' (2016) 1 *European Human Rights Law Review* 1-10. See also O. Ba, *States of Justice: The Politics of the International Criminal Court* (Cambridge University Press 2020). See also P. Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press 2018). Lastly, see K. Clarke 'Distant Justice Symposium: How colonial inscriptions continue to matter in ICC and Africa dynamics' (2019) [available at <https://opiniojuris.org/2019/10/01/distant-justice-symposium-how-colonial-inscriptions-continue-to-matter-in-icc-and-africa-dynamics/> - accessed 6 february 2024].

⁴⁰ M. Du Plessis & C Gevers 'Balancing competing obligations: The Rome Statute and AU decisions' (2011) 225 *ISS Paper* 2; M Kersten 'The Africa-ICC Relationship – More and Less than Meets the Eye (Part 1) [available on <http://justiceinconflict.org/2015/07/17/the-africa-icc-relationship-more-and-less-than-meets-the-eye-part-1/> - accessed 9 December 2023]; C. Kreß, 'The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber's Decision in the Al Bashir Case' (2009) 7 *Journal of International Criminal Justice* 297; A. Cayley 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide' (2008) 6 *JICJ* 829; R Pati 'The ICC and the Case of Sudan's Omar Al Bashir: Is Plea-Bargaining a Valid Option?' (2009) 15 *University of California at Davis Journal of International Law and Policy* 265; D Akande 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *JICJ* 333; P. Gaeta 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7 *JICJ* 312; T. Murithi 'The African

for this troubled relationship vary: allegations by the African Union that the ICC is a western tool designed to subjugate African leaders,⁴¹ that the ICC has unfairly focused on African states in the first ten years of its operations⁴² and that the court is a ‘neo-imperialistic tool that illegitimately targets Africa.’⁴³ The AU conceived of several retaliatory measures against the ICC, the most prominent ones being the AU’s decision not to cooperate with the ICC in the execution of the arrest warrants issued against Omar Al Bashir; the AU’s decision to confer international criminal jurisdiction on its African Court of Justice and Human Rights⁴⁴ and lastly the adoption of a ‘proposal by President Uhuru Kenyatta for the AU to develop a road map for the withdrawal of African nations from the Rome Statute.’⁴⁵ Out of the three-pronged retaliatory measures, the AU’s decision to confer its human rights court with an international criminal jurisdiction and the implication that similar attempts by any region may have on complementarity with the ICC and domestic courts, is the focus of this research.

3. The regionalization of international criminal justice

The second major area of study in this research relates to the regionalization of international criminal justice. The proposed establishment of regional criminal courts is due in part to

Union and the International Criminal Court: An embattled relationship’ (2013) 8 *The Institute for Justice and Reconciliation Policy Brief* 1-12.

⁴¹ Coalition for the International Criminal Court, ‘Africa and the ICC: Setting the facts straight’ [available at <https://coalitionfortheicc.org/explore-international-criminal-court-africa-icc> - accessed 5 February 2024]

⁴² N. Waddell & P. Clark ‘Courting conflict? Justice, Peace and the ICC in Africa’ (2008) *Royal African Society* 8.

⁴³ O. Maunganidze & A. Du Plessis ‘The ICC and the AU’ in C. Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford University Press 2014) 65.

⁴⁴ F. Viljoen ‘AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol’ (2012) *AfricLaw*; M. Du-Plessis ‘Implications of the AU decision to give the African Court jurisdiction over international crimes’ (2012) 235 *Institute for Security Studies Paper* 1; D. Deya ‘Worth the Wait: Pushing for the African Court to exercise jurisdiction for international crimes’ [available at http://www.osisa.org/sites/default/files/is_the_african_court_worth_the_wait_-_don_deya.pdf - accessed 15

December 2023]. See generally A. Abass ‘The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects’ (2013) *Netherlands International Law Review* 27-50.

⁴⁵ ‘AU adopts Uhuru’s proposal for withdrawal from the ICC’ [available in <https://citizentv.co.ke/news/au-adopts-uhurus-proposal-for-withdrawal-from-icc-113241/> - accessed 3 March 2023]. See also ‘ICC: What next for Africa and the tribunal in quest for justice?’ [available at <http://www.dw.com/en/icc-what-next-for-africa-and-the-tribunal-in-quest-for-justice/a-19020659> - accessed 4 March 2023]. See also Library of Congress ‘African Union: Resolution Urges States to Leave ICC’ [available at <https://www.loc.gov/item/global-legal-monitor/2017-02-10/african-union-resolution-urges-states-to-leave-icc/> - accessed 5 February 2024].

regionalism.⁴⁶ Regionalism has been variously defined.⁴⁷ In the context of this work, regionalism implies any arrangement that ‘enables states within the same geographical region to deal with common transnational issues... and to establish the international machinery necessary for carrying out tasks of mutual interest, thereby establishing distinct centers of action that further common goals and have shared benefits.’⁴⁸ In this study, I restrict the meaning of regionalism to the use of regional bodies as mechanisms for enforcing international criminal law.⁴⁹ While there are different views on the legality and appropriateness of the prosecution of international crimes by regional criminal mechanisms, Professor Van der Wilt drew “on Emile Durkheim’s concept of the social function of criminal law and Antony Duff’s idea of the requisite ‘political community’ on whose behalf a penal institution speaks to argue that a region can constitute a political community capable of being protected by criminal law and represented by a regional criminal court.”⁵⁰ In his theory on foundations in political philosophy, he concludes that it is appropriate for a region to establish regional criminal mechanisms to counter crimes that are of particular concern to that region.⁵¹

States have been the primary subjects of international law. During the industrial revolution of the 19th century, regional arrangements to ensure international peace and security became commonplace.⁵² The widening scope of regionalism has found its way into international criminal law, although it is not altogether new in international law at large. In other fields, particularly in

⁴⁶ M. Sirleaf ‘Regionalism, Regime Complexes, and the Crisis in International Criminal Justice’ (2016) 54 *Columbia Journal of Transnational Law* 699-778. See also K. J. Alter & L. Hooghe ‘Regional Dispute Settlement’ in T. Börzel and T. Risse (eds) *The Oxford Handbook of Comparative Regionalism* (Oxford University Press 2018) 1.

⁴⁷ On regionalism, see L. Fawcett ‘Exploring Regional Domains: A Comparative History of Regionalism’ (2004) 80 *Int’l Aff.* 429, 435; E. D. Mansfield and H. V. Milner ‘The New Wave of Regionalism’ (1999) 53 *International Organization* 3, 589-627.

⁴⁸ M. Swart ‘The Prospects for Regional and Sub Regional Complementarity in Africa’ in R. Slye (ed) *The Nuremberg Principles in Non-western Societies: A Reflection on their Universality, Legitimacy and Application* (International Nuremberg Principles Academy Press 2017) 217.

⁴⁹ C. Landauer ‘Regionalism, Geography, and the International Legal Imagination’ (2011) 11 *Chicago Journal of International Law* 2, 539.

⁵⁰ H. van der Wilt ‘On Regional Criminal Courts as Representatives of Political Communities: The Special Case of the African Criminal Court’ in K. J. Heller and others (eds) *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020) 194-212.

⁵¹ *Ibid.*

⁵² J. Klučka, & L. Elbert, *Regionalism and Its Contribution to General International Law* (Košice 2015) 13.

human rights,⁵³ investment law,⁵⁴ and trade law,⁵⁵ regional judicial implementation of international norms is relatively common.⁵⁶

Regionalism in international criminal law has been viewed as antagonistic to the universalism of international law, and has therefore been criticized. Some say that universalism is preferable since regionalism may bring about fragmentation, incoherence, divergent jurisprudence and inconsistency in standards.⁵⁷ Many felt that a universal system that guarantees individual rights was a preferable option. However, others argue that a regional arrangement is needed to supplement the universal system.⁵⁸ To address these concerns, some have proposed a peculiar model of regionalization through the exercise of quasi-criminal jurisdiction by regional human rights courts.⁵⁹ Others have argued that a model that allows the ICC itself to develop more awareness of regional particularities and methods to adjust to regional needs is a better approach.⁶⁰ In international human rights law, since the adoption of the UN Charter, this tension has also been observed and addressed.⁶¹ In the end, international human rights ‘capitulated to the compromise of coexistence between international and regional arrangements,’⁶² even though the UN Charter gives preference to universal mechanism in matters regarding maintenance of international peace and security.⁶³

⁵³ On regionalism in human rights law, see S. J. Powell & C. Pirez ‘Global Laws, Local Lives: Impact of the New Regionalism on Human Rights Compliance’ (2011) 17 *Buffalo Human Rights Law Review* 117-154.

⁵⁴ L. Trakman and N. Ranieri *Regionalism in International Investment Law* (Oxford Scholarship Online 2013).

⁵⁵ On regionalism in trade law, see A. Fabbriotti ‘Universalism and Regionalism in International Trade Law: Is the WTO a truly universal international organization?’ in *Scritti in memoria di Maria Rita Saulle* (Editoriale Scientifica 2014), 559-574.

⁵⁶ F.K. Tiba ‘Regional International Criminal Courts: An Idea Whose Time Has Come?’ (2016) 17 *Cardozo Journal of Conflict Resolution* 52, 523.

⁵⁷ R. Burchill ‘International Criminal Tribunals at the Regional Level: Lessons from International Human Rights Law’ (2007) 4 *New Zealand Yearbook of International Law* 25. See also R. Rauxloh ‘Regionalisation of the International Criminal Court’ (2007) 4 *New Zealand Yearbook of International Law* 67.

⁵⁸ C. Jalloh ‘The Place of the African Criminal Court in the Prosecution of Serious Crimes in Africa’ in C. Jalloh and Ors., (eds) *The African Court of Justice and Human and Peoples' Rights in Context: Developments and Challenges* (Cambridge University press 2019) 295.

⁵⁹ See A.V. Huneeus ‘International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts’ (2013) 107 *American Journal of International Law* 1.

⁶⁰ See R. Rauxloh (n. 57 above).

⁶¹ C. Jalloh ‘The Place of the African Criminal Court in the Prosecution of Serious Crimes in Africa’ in C. Jalloh and Ors., (eds) *The African Court of Justice and Human and Peoples' Rights in Context: Developments and Challenges* (Cambridge University Press 2019) 295. On this tension, see C. Schreuer ‘Regionalism v. Universalism’ 6 *EJIL* (1995) 477-499.

⁶² *Ibid.*

⁶³ Klučka (n. 52 above) 26.

4. Problem statement

International criminal law is fragmented. The universalism of international criminal justice is increasingly challenged by the involvement of regional mechanisms in its enforcement. For this reason, this study, while admitting that universalism might also benefit from regionalism, if regional entities apply or reinforce universal norms, seeks to understand to what extent regionalism is a challenge to the coherence of international criminal law, and how such concerns can be accommodated. Considering that four levels of courts that could enforce international criminal law have emerged, how do we arrange the relationship and interaction between them? Moreover, the involvement of regional mechanisms in international criminal justice appears not to have been envisaged, given that the drafters of the Rome Statute did not appear to have contemplated any relationship between the ICC and regional criminal mechanisms. Additionally, there are those who have argued that international criminal prosecution before a regional mechanism will not be sufficient to act as a bar for an ICC prosecution because article 17(1) of the Rome Statute only refers to states. This study will investigate this claim, in the light of the provisions of the VCLT in relation to the interpretation of statutes. Lastly, the problem of competing obligations owed by member states who belong to both the ICC and a regional criminal mechanism deserves attention, and will thus be addressed in this study. Ultimately, my argument points towards a need for greater polycentricity- the idea that many decision making centres can have limited and autonomous prerogatives, while operating under an overarching set of rules.⁶⁴ Some authors have previously presented 'legal polycentricity' as one of the consequences of pluralism in law.⁶⁵ I argue that while it is a consequence, it could also be a solution to friction between bodies dedicated to overlapping roles in ICL.

5. Research questions and structure

This study seeks to explore the macro-question: to what extent is regionalism a challenge to the universality or coherence of international criminal law and how such concerns can be accommodated? The following sub-questions will be answered in each chapter:

⁶⁴ P. D. Aligica & V. Tarko 'Polycentricity: From Polanyi to Ostrom, and Beyond' (2012) 25 *Governance* 167-361.

⁶⁵ P. Hanne & Z. Henrik *Legal Polycentricity: consequences of pluralism in law* (Aldershot; Brookfield; Dartmouth 1995).

- 1) Why was regionalism neglected in the history and development of ICL and complementarity?
- 2) What implication does the jurisprudence and practice at the ICC have for the notion of regional complementarity?
- 3) What are the typologies of hybrid and regional tribunals that have emerged in ICL?
- 4) What lessons can be learnt from the existing case studies of the EAC and KSCSPO as examples of tribunals backed by regional international organisations, in the assistance driven strand of hybridity?
- 5) What lessons can be learnt from the Malabo Protocol, as an example of a proposed fully independent strand of regionalism in ICL?
- 6) How does regional complementarity relate to other existing notions of complementarity?
- 7) How do the rules of interpretation support the theory of regional complementarity?
- 8) What are the normative and procedural challenges in the practical application of regional complementarity, and how does it fit within the broader structure of international criminal justice?

Structurally, the study is divided into three parts. The first part focuses on the historical exclusion and neglect of regional complementarity in international criminal justice. It also focuses on the neglect of regional complementarity in the jurisprudence and practice of the ICC. The second part examines the turn to regionalism in practice. Through an analysis of different case studies of hybrid and regionally backed tribunals, I establish the strands of hybridity and regionalism that have emerged in practice. In this part, I focus on the assistance-driven strand of regional-hybridity, using the Extraordinary African Chambers in the Courts of Senegal (EAC) and the Kosovo Specialist Chambers and Specialist Prosecutor's Office (KSCSPO) as case studies. These two tribunals are important as examples of hybrids that are established and supported by regional organisations, as against the others that were supported and established by the UN. I examine how effective these two tribunals have been in practice. In the last chapter of this part, I analyse the Malabo Protocol as an example of the emerging fully independent strand of regionalism in ICL. In the third part of the study, I map the theoretical concept of regional complementarity and attempt to find solutions to the problems created by the application of the concept. I aim to show how different dimensions of complementarity that we have seen in the ICC are also relevant to the idea of regional complementarity. Also, I focus on the VCLT, article 17 of the Rome Statute, and an analysis of

five relationship dimensions that the application of regional complementarity presents, to answer the question on interpretation. Lastly, I provide crosscutting analysis by synthesising normative insights from previous chapters, especially with the information on specific institutions. The focus on the ICC and the proposed international criminal chamber of the African court, aims to provide general recommendations that are applicable between the ICC and any regional tribunal with an ICL mandate. In the conclusion to the study, I provide recommendations for future research in this area.

6. Research methodology and approach

This study employs a doctrinal legal research methodology to examine the concept of regional complementarity in international criminal justice. This methodology focuses on the analysis and interpretation of legal texts, case law, and scholarly writings, in order to establish relevant claims on specific legal issues. A doctrinal legal research methodology is best suited for a study of this nature, considering ICL's complexities and breadth, as it encompasses a vast body of treaties, conventions, soft laws, statutes, jurisprudence, opinions of scholars, and other academic writings. The study also employs a historical approach to analyse the place and origin of regional complementarity in the development of ICL.

The study makes use of primary and secondary materials sourced from electronic and physical libraries. It relies on academic articles, books, treaties, resolutions from international organisations including the UN and the AU, judicial decisions, press statements, and a plethora of reports and findings of previous studies on some of the areas covered in the research. Some of the primary sources include the Rome Statute, the Vienna Convention on the Law of Treaties, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, otherwise known as the Malabo Protocol and other relevant conventions and customary law principles. Secondary sources including books and articles by leading scholars in the field of international law, will be consulted to provide further perspectives on the topics of the study.

The research process involves a scholarly review of primary and secondary sources in relation to the concept of complementarity in the practices and policy directions of relevant international, regional and national criminal mechanisms. A careful analysis of the *travaux préparatoires* of the Rome Statute and other treaties will also be done.

The study will conclude with specific recommendations on tackling legal and practical challenges associated with implementing regional complementarity, while providing suggestions for further research in this area of study.

7. Contribution to knowledge

There is no scarcity of writings on the fragmentation of international law and legal pluralism.⁶⁶ Also, several authors have written on complementarity and its many notions.⁶⁷ This work however

⁶⁶ For example, see footnote 7 above.

⁶⁷ C. Stahn & M. El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice*, Vols 1&2 (Cambridge University Press 2011); M. El Zeidy *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers 2008); D. Tladi 'Complementarity and cooperation in international criminal justice: Assessing initiatives to fill the impunity gap' (2014) *ISS Paper*; D. Kendal 'The ICC and the Principle of Complementarity: How Denmark can help strike a balance between international and domestic justice mechanisms' *Policy Research Paper* (Kendal Human Rights Consulting 2013); C. Sriram & S. Brown 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact' (2012) 12 *international Criminal Law Review* 2, 219-244; ICC-OTP 'Informal Expert Paper: The principle of complementarity in practice' (ICC-OTP 2003); AMICC 'The principle of complementarity' (2005); M. Du-Plessis 'Complementarity and Africa: The promises and problems of international criminal justice' (2008) 17 *African Security Review* 4; C. Stahn 'Complementarity: A Tale of Two Notions' (2008) 19 *Criminal Law Forum* 87-113, ICJ Kenya 'International Criminal Justice: The ICC and Complementarity' (ICJ 2014); JT Holmes 'Complementarity: National Courts versus the ICC', in *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, 667-685 A. Cassese et al. (eds) (Oxford University Press 2002); W. Burke-White 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo' (2005) 18 *Leiden J. Int'l L.* 557; M El Zeidy 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) *Mich. J. Int'l L.*, 869; K.J. Heller 'The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process' (2006) 17 *Crim. L. Forum* 255; J. Kleffner 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *JICJ*. 86; M. Benzing 'The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity' (2003) 7 *Max Planck Yearbook of United Nations Law* 591; J. Kleffner & G Kor (eds) *Complementary Views on Complementarity - Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court* (TMC Asser 2006); F. Gioia 'State Sovereignty, Jurisdiction and Modern International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 *Leiden J. Int'l L.* 1095; S.M.H. Nouwen *Complementarity in the Line of Fire: The Catalysing Effect of the International Court in Uganda and Sudan* (Cambridge University Press 2013); K.J. Heller 'A Sentenced-Based Theory of Complementarity' (2012) 53 *Harv. Int'l L.J.* 1; C. Stahn 'One Step Forward, Two Steps Back? Second Thoughts on a "Sentence-Based" Theory of Complementarity' (2012) *Harv. Int'l L. J.* 85; D. Robinson 'Three Theories of Complementarity: Charge, Sentence or Process?' (2012) 53 *Harvard International Law Journal Online*; B. Krings 'The Principles of "Complementarity" and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?' (2012) 4 *Goettingen Journal of International Law* 3 737-763; D. Robinson 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 1; W. Burke-White 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 *Cr. L. Frm.* 59-85; S.T. Eboerah 'Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations' (2011) 22 *European Journal of International Law* 3; W. Burke-White 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harv. Int'l L. J.* 1; X. Philippe 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (206) 88 *IRRC* 862; O. Solera 'Complementary jurisdiction and international criminal justice' (2002) 84 *IRRC* 845; C. Stahn & G. Sluiter 'The Emerging Practice of the International Criminal Court' (Brill 2009); M.S. Ellis *Sovereignty and Justice: Balancing the Principle of Complementarity between*

develops the emerging notion of regional complementarity. This is especially because the drafters of the Rome Statute did not appear to have contemplated a relationship between the ICC and regional criminal mechanisms. Again, some authors have written on the resurgence of interest in the prosecution of international crimes by hybrid and regional tribunals.⁶⁸ These regional and hybrid initiatives have both been hailed⁶⁹ and criticised.⁷⁰ This work's contribution is, however, in establishing that the involvement of regional bodies in international crimes prosecution is an offshoot of globalisation, regionalism, and an unavoidable milestone in the development of ICL. Several authors have written on the relationship between Africa and the ICC.⁷¹ With few exceptions,⁷² however, these writings concentrate on a general description of the rancorous nature of that relationship. Some of the available arguments are that: the establishment of the ICL section of the African court will violate the principle of *pacta sunt servanda* and represents an unnecessary duplication of the work of the ICC; the refusal to cooperate with the ICC on the arrest warrant

International and Domestic War Crimes Tribunals (Cambridge Scholars Publishing 2014); J. Stigen 'The Relationship between the International Court and National Jurisdictions: The Principle of Complementarity' (Martinus Nijhoff 2008); M. El Zeidy 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law' (2002) 23 *Michigan Journal of International Law*; L. Clarke 'Complementarity as Politics' (2016) 2 *Journal of International and Comparative Law* 2.

⁶⁸ For example, see P.K. Mendez 'The new wave of hybrid tribunals: A sophisticated approach to enforcing international humanitarian law or an idealistic solution with empty promises?' (2009) 20 *Criminal Law Forum* 53–95 at 95; see also C. Stahn 'Tribunals are Dead, Long Live Tribunals: MICT, the Kosovo Specialist Chambers and the Turn to New Hybridity' (23 September 2016) *EJIL: Talk Blog of the European Journal of International Law* [available at <https://www.ejiltalk.org/tribunals-are-dead-long-live-tribunals-mict-the-kosovo-specialist-chambers-and-the-turn-to-new-hybridity/> - accessed 15 January 2023]; S. William 'Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues' (HART Publishing 2012); E. M. Bruch 'Hybrid Courts: Examining hybridity through a post-colonial lens' (2010) 28 *Boston University International Law Journal* 1; S.M.H. Nouwen 'Hybrid Courts' The hybrid category of a new type of international crimes courts (2010) *Utrecht Law Review*.

⁶⁹ C. E. Carroll 'Hybrid Tribunals are the Most Effective Structure for Adjudicating International Crimes Occurring Within a Domestic State' (2013) *Seton Hall University Law School Student Scholarship*. Paper 90, 1.

⁷⁰ P. McAuliffe 'Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan' (2011) 7 *Journal of International Law and International Relations* 1 at 1.

⁷¹ See for example, D. Tladi 'The African Union and the International Criminal Court: The battle for the soul of international law' (2009) 34 *South African Yearbook of International Law*; M Du-Plessis (ed) *African Guide to International Criminal Justice* (Institute for Security Studies 2008); Human Rights Watch 'Briefing Paper on Recent Setbacks in Africa Regarding the International Criminal Court' (Human Rights Watch 2010); N. Waddell & P. Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (The Royal African Society 2008); Coalition for the International Criminal Court, 'Africa and the ICC: Setting the facts straight' [available at <https://coalitionfortheicc.org/explore-international-criminal-court-africa-icc> - accessed 5 February 2024]; M Du-Plessis 'The International Criminal Court that Africa wants' (2010) *Institute for Security Studies*; M Du-Plessis 'The International Criminal Court and its work in Africa; Confronting the myths' (2008) 173 *ISS Paper*; A. Abass 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) 24 *The European Journal of International Law* 3; M Du-Plessis & ors 'Africa and the International Criminal Court' (Chatham House 2013).

⁷² See for example Jalloh and others (eds) *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (Cambridge University Press 2019).

against Sudan's President amounts to a violation of obligations under customary international law, the Rome Statute and article 4 of the AU's Constitutive Act; and lastly, the establishment of the ICL section will defeat the object and purpose of the Rome Statute and thereby impede the work of the ICC to punish individuals who commit international crimes in Africa.⁷³ Others have also argued that the creation of the ICL section in the African Court has no legal basis;⁷⁴ there is no possibility to accommodate any prosecution by a regional tribunal under article 17 of the Rome Statute since the provision expressly mentions 'states';⁷⁵ the Malabo protocol—the AU instrument that creates and confers international criminal jurisdiction on one of the chambers of the African court—increases impunity especially with its provision on immunity,⁷⁶ etc.

The present study takes a different approach. While acknowledging counter-arguments,⁷⁷ it proposes that the current understanding of complementarity should be expanded to accommodate genuine prosecutions before a regional or sub-regional mechanism, thus making a case relating to the same conducts and persons inadmissible before the ICC. While most writings have discussed regional complementarity from the angle of the interpretative disputes between the ICC and proposed regional courts, my approach takes a holistic look at the four-tiered model and principles governing the relationship between ICC and regional courts, on the one hand, regional courts and domestic courts on the other hand. The relationship between the ICC and domestic courts has already been extensively discussed in literature. My dissertation therefore brings together the relationship between these four levels of courts. I go beyond the partial study of regional complementarity that only looks into the relationship between regional mechanisms and the ICC to provide a more comprehensive account of the idea of regional complementarity that transcends the classical complementarity criteria like inaction, unwillingness or inability test. I propose a more

⁷³ C.B. Murungu 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 5, 1.

⁷⁴ In this regard, Du Plessis argued that the AU's power to expand the jurisdiction of its single court to accommodate international criminal jurisdiction is in article 4(h) of the AU Constitutive Act and only limits it to the three core crimes. Hence, the inclusion of the other 11 transnational or novel crimes have no basis in law.' See M. Du Plessis 'Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes' (2012) 235 *Institute for Security Studies Paper* 1-14, 8.

⁷⁵ *Ibid.*

⁷⁶ Human Rights Watch, Coalition of African NGOs 'Joint Civil Society Letter on the Draft Protocol on Amendments to the Statute of the African Court of Justice and Human Rights' 12 May 2014.

⁷⁷ For instance, it could be argued that these relations should not be regulated through complementarity per se, but rather through mutual and transparent cooperation agreements. Complementarity is by no means the 'sole possible option' of contemplating relations. See M. Jackson 'Regional Complementarity: The Rome Statute and Public International Law' (2016) 14 *Journal of International Criminal Justice* 1070.

holistic framework in order to organize this relationship based on certain organizing principles. Conceptually, I argue in favour of regional complementarity. As will be shown, we need a broader theory than complementarity to organize relations between global international criminal mechanisms and regional counterparts. This is where I distinguish between complementarity in the technical/legal sense, and elements of the theory that I propose. My holistic approach involves deference (which is grounded in prosecutorial discretion), cooperation, and other criteria that go beyond complementarity, such as the *forum non conveniens* theory, nexus to locality, etc. I admit that not all of this may be captured by complementarity in the strict sense, and its traditional legal semantics, but will involve broader concepts, such as cooperation, new agreements etc. Such elements are partly reflected in the new OTP policy paper on complementarity where the OTP committed to ‘creating a community of practice and bringing justice closer to communities.’⁷⁸ This is in alignment with the broader goals of international criminal justice that include accountability for crimes, deterrence, justice for victims and building international norms.

⁷⁸ ICC-OTP ‘DRAFT Policy on Complementarity and Cooperation’ at ICC-OTP ‘Draft policy on Complementarity and Cooperation’ September 2023, 9-17.