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

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# **CHAPTER 1. HISTORICAL PERSPECTIVES ON THE NEGLECT OF REGIONAL COMPLEMENTARITY**

## **Introduction**

In this chapter, I focus on history to answer the question: why was regionalism neglected in the history and development of ICL and complementarity? I seek to establish that complementarity continuously reshaped itself and evolved in different models throughout its developmental stages, even though the central tenets remained the same. I also establish that in spite of the continuous reshaping, complementarity did not take into account the possible interaction between international and regional bodies, in the realm of international criminal justice. I suggest three factors that may be responsible for ICL's neglect of regionalism and the ideas that underpin regional complementarity. I also show why regionalism in ICL matters. I criticize the failure of ICL to embrace regionalism earlier in its development. I conclude by arguing that given the absence of any substantive discussion on regional complementarity, recent theory and practice, including certain development in ICL, have necessitated a theory on regional complementarity. Structurally, I begin the chapter with a discussion on certain significant attempts at complementarity after the two World Wars. These attempts did not however take regional prosecution of crimes into consideration. I also discuss the adoption of the Rome Statute in 1998. Thereafter, I provide a narrative on why the drafters of the Rome Statute ignored regionalism during the negotiations and discussions at the Rome Conference. I examine why regionalism (or regional efforts to prosecute international crimes) came so late in the history of international criminal justice. I note that international law has witnessed the advent of many regional human rights institutions in the 1950s. It is therefore important to establish why there has been regionalism in the context of human rights and not in the context of international criminal justice, until the early 2000s, after the establishment of the ICC. I explain that ICL's obsession with universality and cosmopolitanism; the liberal foundation of ICL; the understanding that ICL is an enemy of sovereignty and the fact that ICL had developed more slowly and less dynamically are some of the factors responsible for the neglect of regionalism and regional complementarity in the history of ICL. I conclude with a discussion on why there is a need for a theory on regional complementarity.

## 1. Origin of complementarity

In international criminal law, the principle of complementarity is defined in the context of the relationship between two or more institutions who perform similar or overlapping roles.<sup>1</sup> However, the historical origin of the principle is closely tied to the historical origin of ICL itself. The Treaty of Sèvres (1920) contained provisions that mandated the Turkish government to hand over suspected war criminals of WWI to the Allied Powers.<sup>2</sup> This suggests that from an early period in the history of ICL, concerns had arisen about cooperation between national and international institutions to avoid a clash of jurisdiction. In the Nuremberg, Tokyo and the *ad hoc* tribunals, there were also provisions that mandated states to surrender accused persons to these international tribunals.<sup>3</sup> The codification in the Rome Statute 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 measures at the *national* level and by enhancing *international* cooperation’ firmly suggests the need to promote cooperation and avoid conflicts between national and international institutions. This provision of the Rome Statute also forms the core strand of the basic tenets of complementarity.<sup>4</sup>

However, in legal scholarship, El Zeidy is one of the first authors to argue that the origin of complementarity long predates the 1994 International Law Commission (ILC) Draft Statutes and the negotiations that took place before and during the Rome Conference of 1998.<sup>5</sup> He acknowledged a few authors who took the debate as far back as 1991, but not further.<sup>6</sup> Ellis argues that the United Nations War Crimes Commission (UNWCC) was the body that laid the grounds

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<sup>1</sup> See footnote 67 in the Introduction.

<sup>2</sup> See for example Article 230 of the Treaty of Sèvres.

<sup>3</sup> M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers 2008).

<sup>4</sup> See M. Bergsmo, C. W. Ling and Y. Ping (eds) *Historical Origins of International Criminal Law: Volume 1* (Torkel Opsahl Academic EPublisher 2014) 398.

<sup>5</sup> See generally M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers 2008).

<sup>6</sup> In this regard, El Zeidy acknowledged the works of I. Tallgren, ‘Completing the “International Criminal Order”’: The Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court’ (1998) 67 *Nordic Journal of International Law* 107, 120 and O. Solera, ‘Complementary Jurisdiction and International Criminal Justice’ (2002) 84 *International Review of the Red Cross* 145, 151.

for the current design and interpretation of the principle of complementarity.<sup>7</sup> Kleffner noted that attempts to establish international judicial bodies for the enforcement of international criminal law could be traced back to the aftermath of WWI,<sup>8</sup> El Zeidy's main thesis was that 'the notion of complementarity is manifestly not the product of the 1994 International Law Commission's work. Nor is it the sole outcome of any recent work on the subject during the 21<sup>st</sup> century. It is an idea that developed over a long period of time until it was inserted into the 1998 Rome Statute.'<sup>9</sup> This work builds on El Zeidy's position as I argue that as long as there have been attempts at punishing individual violators who commit crimes at the supranational level, there have equally been the discussions on how these prosecutions would fit in with existing national mechanisms and the notion of state sovereignty. Further, I establish that certain factors which are tied to the history of the development of ICL were responsible for the late engagement by ICL with regionalism.

### **1.1. Earliest attempts at enforcing 'international criminal law'**

Long before the two world wars, there have been attempts at enforcing 'international criminal law', although these were actually attempts to prosecute certain wrongful acts from which present-day international crimes may have taken some roots.<sup>10</sup> These roots of contemporary international law/crimes were laws of war, which only attracted state responsibility, as opposed to individual penalties.<sup>11</sup> Prohibitions against piracy, slavery and slave trade in the 19<sup>th</sup> century are other examples of strands of international law history upon which 'the norms, rules, instruments, and institutions that now make up the modern ICL machinery' are built.<sup>12</sup> This was at a time when

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<sup>7</sup> M.S. Ellis, *Sovereignty and Justice: Balancing the Principle of Complementarity between International and Domestic War Crimes Tribunals* (Cambridge Scholars Publishing 2014) 13.

<sup>8</sup> Jann K. Kleffner, *Complementarity in the Rome Statute and National Jurisdictions* (Oxford University Press 2008) 60, note 17. Here, he referenced the work of T.L.H. McCormack 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in T.L.H. McCormack and G.J. Simpson (eds) *The Law of War crimes: National and international approaches* (Kluwer Law International 1997) 31-63 at 37 where it was argued that the early beginnings of an attempt at establishing international criminal body for the prosecution of international crimes dates back to the trial of Peter von Hagenbach in 1474 AD.

<sup>9</sup> M. M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff 2008) at 6.

<sup>10</sup> On this, see B.V. Schaack & R. Slye 'A Concise History of International Criminal Law' (2007) *Santa Clara Law Digital Commons* 7.

<sup>11</sup> On the law of war and state responsibility, where the author argued that 'punishment -at least in modern criminal law- constitutes individual responsibility, whereas the specific sanctions of international law constitute collective responsibility', see H. Kelsen 'Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals' (1943) 31 *California Law Review* 5 at 533.

<sup>12</sup> B.V. Schaack & R. Slye 'A Concise History of International Criminal Law' (2007) *Santa Clara Law Digital Commons* 7.

slavery and colonialism were rife, and the independence and sovereignty of states were contested. This point is important, as I would later show that the fight against colonialism was a driving factor for some of the earlier regional and sub-regional arrangements in Africa and the Caribbean.<sup>13</sup>

Given this background, some of the earliest attempts at prosecuting individuals for violations of the laws of war were found in the trials of Conrandin, King of Jerusalem in 1268,<sup>14</sup> Sir William Wallace in 1305,<sup>15</sup> Peter Von Hagenbach in 1474<sup>16</sup> and Henry Wirz in 1865.<sup>17</sup> These trials were conducted in respect of wrongful acts committed within the context of wars. They were similar to much of the acts that are now known as international crimes punishable by ICL. The trials also suggest that there have at least been attempts to punish acts that shock the conscience of humanity, especially when committed in the context of armed conflicts, through the use of special tribunals set up for those purposes: Conrandin was convicted by a panel of Knights;<sup>18</sup> Wallace by a military tribunal;<sup>19</sup> Von Hagenbach ‘by a tribunal comprised of judges from several principedoms’<sup>20</sup> or, as stated by Gordon, ‘ad hoc tribunal of twenty-eight judges from various regional city-states’,<sup>21</sup> and Henry Wirz by a military commission.<sup>22</sup> This then lends credence to the assertion that ICL’s true history indeed spans across centuries and did not begin in or after Nuremberg.<sup>23</sup>

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<sup>13</sup> See R. Dadhich ‘Understanding SAARC: Regional Cooperation in neo-colonial context’ (2005) 18 *Indian Journal of Asian Affairs* 1, 49-64.

<sup>14</sup> Conrandin was tried for crimes against peace *to wit* instigating an unjust war (due to papal opposition) to become the King of Sicily. See M. Cherif Bassiouni, *Introduction to International Criminal Law* (Martinus Nijhoff 2013), 1047.

<sup>15</sup> Wallace was tried for “sparing neither age nor sex, monk nor nun” in a brutal Scottish campaign against England. See Z. Bohrer ‘International Criminal Law’s Millennium of Forgotten History’ (2016) 34 *Law and History Review* 2, 393-485.

<sup>16</sup> On this trial, see G.S Gordon ‘The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law in K. Heller & G. Simpson *The Hidden Histories of War Crimes Trials* (Oxford Scholarship Online 2013)

<sup>17</sup> On the trial of Henry Wirz, see Darrett B. Rutman ‘The War Crimes and Trial of Henry Wirz’ (1960) 6 *Civil War History* 2, 117-133.

<sup>18</sup> See Archibald Bower, *The History of the Popes: From the Foundation of the See of Rome, To the Present Time*, Vol VI (Kessinger Publishing 2005) 14.

<sup>19</sup> M. Keen, “Treason Trials under the Law of Arms,” (1962) 12 *Transactions of the Royal Historical Society* 85-103 at 98.

<sup>20</sup> Z. Bohrer ‘International Criminal Law’s Millennium of Forgotten History’ (2016) 34 *Law & History Review* 1.

<sup>21</sup> G.S. Gordon ‘The Trial of Peter Von Hagenbach: Reconciling History, Historiography, and International Criminal Law in K. Heller & G. Simpson ‘The Hidden Histories of War Crimes Trials’ (Oxford Scholarship Online 2013) 1.

<sup>22</sup> Darrett B. Rutman ‘The War Crimes and Trial of Henry Wirz’ (1960) 6 *Civil War History* 2, 117-133.

<sup>23</sup> Z. Bohrer ‘International Criminal Law’s Millennium of Forgotten History’ (2016) 34 *Law & History Review* 1.

Additionally, the idea of ‘regional city-states’ participating in a joint effort at prosecuting crimes was seen in the case of Von Hagenbach, which has been described by some authors as ‘the first international war crimes trial in history.’<sup>24</sup> The Von Hagenbach trial mirrors modern-day attempts at atrocity crimes prosecution by regional mechanisms. The idea that the trial was a regional arrangement was not without its contestations. Some argue that since the judges ‘were all subject of the Holy Roman Empire’, the trial could not be said to have been of an international (or regional) nature.<sup>25</sup>

There are those who argue that modern international justice owes its earliest roots to the prosecution of pirates and the prohibition against piracy as pirates were generally known as the universal enemies to whom universal jurisdiction first applied.<sup>26</sup> Piracy has even been described by others as the ‘oldest international crime.’<sup>27</sup> In the trial of Henry Avery, one of Britain’s most renowned pirates in the 17<sup>th</sup> century, an English central criminal court (the Old Bailey) had in 1696 declared that ‘the King of England hath not only an empire and sovereignty over the British seas, but also an undoubted jurisdiction and power, in concurrency with other princes and states, for the punishment of all piracies and robberies at sea, in the most remote parts of the world...’<sup>28</sup> Thus, some of the reasonings that underpinned the present day international criminal law were also present since the 17<sup>th</sup> century, when some of the first trials for piracy were instituted. The idea of universal jurisdiction, as demonstrated in the old English central criminal court was one. The idea, as expressed in the court’s reasoning above, contemplates the concurrency of other princes and states ‘jurisdiction’, in the punishment of piracy. This is in tandem with universal jurisdiction on one hand, but also a reflection of the idea that states acting together in a regional arrangement, can enforce ICL.

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<sup>24</sup> G.S Gordon, (n. 21) 1.

<sup>25</sup> *Ibid.*

<sup>26</sup> On this, see M. Chadwick ‘Piracy and the Origins of Universal Jurisdiction: On Stranger Tides?’ (2018) 34 *Queen Mary Studies in International Law* 1.

<sup>27</sup> M. Scharf & M. Taylor ‘A Contemporary Approach to the Oldest International Crime’ (2017) 33 *Utrecht Journal of International and European Law* 84, 77-89.

<sup>28</sup> Howell T.B and Howell T.J, *Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanor from the Earliest Period to the Present Time* (R Bagshaw 1809) Vol 13, 455

Lastly, the prohibition against slavery through the British Slave Trade Act of 1807,<sup>29</sup> the Slave Trade Felony Act of 1811,<sup>30</sup> and the Slavery Abolition Act of 1833<sup>31</sup> as well as the ‘exploits’<sup>32</sup> of transatlantic admiralty courts<sup>33</sup> that tried crew members of captured slave ships across different jurisdictions, also lend credence to the argument that attempts to punish what were termed as ‘crimes against humanity’ pre-dated the two world wars.<sup>34</sup> Prohibition against slavery and slave trade has attained the status of *jus cogens* – for which no derogation is allowed under any guise or circumstance.<sup>35</sup> The history of their prosecutions offers interesting insights into how some modern crimes that are now often described as crimes against humanity took their name originally from the prohibition of slavery and slave trade, while offering striking similarities to present day prosecutions of international crimes.<sup>36</sup>

More importantly, there appeared to have been some regional<sup>37</sup> and international initiatives at abolishing slavery and slave trade.<sup>38</sup> Added to this were the ideas of regional and international judicial arrangements which entertained prosecutions of slave owners and slave traders. Starting

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<sup>29</sup> The Slave Trade Act, which is better known by its longer title of ‘An Act for the Abolition of the Slave Trade’ was enacted on 25 March 1807 and it imposed fines which were not enough to deter entrepreneurs from engaging in such lucrative commercial activities of slave trade. See the text of the Act at <http://www.esp.org/foundations/freedom/holdings/slave-trade-act-1807.pdf>.

<sup>30</sup> The 1811 Act made slave trading a felony/crime and imposed stiffer punishment as against the earlier 1807 Act which only imposed fines. It was however the Slavery Abolition Act of 1833 that significantly expanded the jurisdiction of the slave trade acts of 1807 and 1811.

<sup>31</sup> Its longer title was ‘An Act for the Abolition of Slavery throughout the British Colonies; for promoting the industry of the manumitted Slaves; and for compensating the Persons hitherto entitled to the Services of such Slaves.’ It received royal assent on 28 August 1833 and entered into force throughout most of the British Empire on 1 August 1834. It was repealed in 1998.

<sup>32</sup> For an interesting account of proceedings before one of such courts, see Haslam E, *Redemption, Colonialism and International Criminal Law: The Nineteenth Century Slave Trading Trials of Samo and Peters* in Kirkby D, (ed) *Past Law Present Histories* (ANU press 2012). See also Haslam E, *The Slave Trade, Abolition and the Long History of International Criminal Law: The Recaptive and the Victim* (Routledge 2020).

<sup>33</sup> These were often called the Courts of Mixed Commission for the Abolition of Slave Trade and some have argued that they were the first international human rights court. See J. Martinez ‘Antislavery Courts and the Dawn of International Human Rights Law’ (2008) 117 *Yale Law Journal* 4.

<sup>34</sup> See generally J. Martinez *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press 2011).

<sup>35</sup> On *jus cogens*, see T. Kleinlein ‘Jus Cogens Re-examined: Value Formalism in International Law’ (2017) 28 *The European Journal of International Law* 1.

<sup>36</sup> A. Gross ‘Introduction: “A Crime Against Humanity”: Slavery and The Boundaries of Legality, Past and Present’ (2017) 35 *Law and History Review* 1 1-8.

<sup>37</sup> ‘Regional’ in this context is used to distinguish slave trade within the Americas, as against the ‘Trans-Atlantic’ slave trade. See S. Westbury ‘Analysing a regional slave trade: The West Indies and Virginia, 1698-1775’ (1986) 7 *Slavery and Abolition* 3, 241-256.

<sup>38</sup> H. Suzuki *The Suppression of the Transoceanic Slave Trade* (Oxford University Press 2022).

in 1817, Britain, for example, started to conclude treaties with different countries in order to establish international courts for the suppression of slave trades.<sup>39</sup> However, until recently, these initiatives have not inspired concrete efforts at international crimes prosecution by regional organisations.

## 1.2. Post WWI complementarity attempts

When WWI ended, there were calls for the prosecution of those responsible for war crimes.<sup>40</sup> One of such persons was Kaiser Wilhelm II of Germany.<sup>41</sup> In answering these calls, the Allies, at the Paris Preliminary Peace Conference in 1919,<sup>42</sup> decided to establish a ‘Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties’.<sup>43</sup> The Commission had a mandate to investigate and report on the facts and evidence necessary to determine who was responsible for the World War.<sup>44</sup> In executing its mandate, the Commission had to determine, among other things, the guilt of individuals and whether they could be tried as well as what would amount to a suitable forum for prosecution. There were proposals for bringing accused persons of the Enemy States before a ‘High Tribunal’ composed of 22 judges from different countries. Given the novelty and the unprecedented nature of the idea of a criminal tribunal with an international composition, the United States and Japan objected, arguing that it was better to find recourse in an existing system. Despite the objections, the Allied National Military Tribunals were established under the Treaty of Versailles, with jurisdiction over perpetrators of crimes during the World War,

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<sup>39</sup> See E. Kontorovich ‘The Constitutionality of International Courts: The Forgotten Precedent of Slave Trade Tribunals’ (2009) 158 *University of Pennsylvania Law Review* 1, 58-59. See also Jenny S. Martinez ‘Anti-slavery Courts and the Dawn of International Human Rights Law’ (2008) 117 *Yale Law Journal* 550.

<sup>40</sup> G. Hankel *The Leipzig trials. German war crimes and their legal consequences after World War I* (Republic of Letters Publishing 2014); C Mullins ‘The Leipzig trials. An account of the war criminals’ trials and a study of German mentality’ (1921) *H.F. & G. Witherb*; P. Betts ‘Germany, International Justice and the Twentieth Century’ (2005) 17 *History & Memory* 1/2 45-86.

<sup>41</sup> For a full account of the events surrounding the never-to-be-held trial of the Kaiser, see W.A. Schabas *The Trial of the Kaiser* (Oxford University Press 2018). See also J.B Scott ‘The Trial of the Kaiser’ in House and Seymour *What Really Happened at Paris*, 231-258 and B. Kampmark ‘Sacred Sovereigns and Punishable War Crimes: The Ambivalence of the Wilson Administration towards a Trial of Kaiser Wilhelm II’ (2007) 53 *Australian Journal of Politics and History* 4, 519-537.

<sup>42</sup> For a general understanding of the Peace Conference and its achievements, see G. A. Finch ‘The Peace Conference of Paris, 1919’ (1919) 13 *The American Journal of International Law* 2, 159-186.

<sup>43</sup> For a general understanding of the Commission’s work, see ‘Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report presented to the Preliminary Peace Conference’ (1920) 14 *The American Journal of International Law*, No. 1/2, 95-154.

<sup>44</sup> M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers 2008) 11.

including heads of states.<sup>45</sup> The objection by Japan and the USA is symptomatic of the present-day debate on whether the future of prosecutions of international crimes is domestic or remains international.<sup>46</sup>

Germany, as the ‘vanquished’ State, objected to certain provisions, particularly articles 228-230 of the treaty relating to turning over suspected war criminals to the Allies for trials and also those provisions relating to penalties for the convicted. The Allies however insisted, resulting in an unconditional acceptance of the provisions by the German National Assembly.<sup>47</sup> By this acceptance, Germany agreed to turn over suspected war criminals to the Allies for trial. Where violations affected the nationals of more than one power, Germany agreed to turn suspects over to a Mixed (Inter-Allied) Military Tribunal composed of judges from the affected powers.<sup>48</sup>

Germany however failed to comply with the treaty, arguing that it was unacceptable for the German government to surrender its citizens to be tried by foreign powers. The debate that followed led to a compromise between the Allies and Germany. The Allies accepted a German offer to prosecute some of the offenders before its Reichsgericht (Supreme Court), sitting at Leipzig, but with a proviso that the Allies retained the rights under article 228 of the Versailles Treaty to set aside any German verdict in case of unsatisfactory results.<sup>49</sup> Allies conceded some grounds to Germany through allowing prosecution of certain crimes before German domestic courts, while the Military Tribunals handled the other cases. This division of labour approach is consistent with the idea that this work promotes. Utilizing regional courts for international crimes prosecution could help maximize the advantages of domestic system while minimizing the disadvantages of a purely international system.

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<sup>45</sup> *Ibid.*

<sup>46</sup> On this debate, see M. du Plessis ‘The Future of International Criminal Justice is Domestic’ [available at <http://ilawyerblog.com/future-international-criminal-justice-domestic/> - accessed 23 January 2023]. See also A.M. Slaughter ‘The Future of International Law is Domestic’ (2006) 47 *Harvard International Law Journal* 2.

<sup>47</sup> On the unconditional acceptance of the Treaty of Versailles by the German Government, see A. Luckau ‘Unconditional Acceptance of the Treaty of Versailles by the German Government, June 22-28, 1919’ (1945) 17 *Journal of Modern History* 3, 215-220.

<sup>48</sup> M. M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers 2008) 14.

<sup>49</sup> On Germany’s protest and what has been called ‘constant revisionism of the treaty’, see S. Marks ‘Mistakes and Myths: The Allies, Germany, and the Versailles Treaty, 1918–1921’ (2013) 85 *The Journal of Modern History* 3, 632-659.

Earlier attempts at complementarity can be gleaned from the Allies' commitment to step in, if Germany failed to prosecute the offenders under its national laws. It is also an attempt to bridge the gap between domestic and international efforts at prosecuting crimes. Germany's efforts at protecting its sovereignty reminds one of states' attitudes towards complementarity and sovereignty at every stage of the development of ICL. States had always preferred that their prerogative to prosecute is given primacy over any international arrangement and it is the failure or absence of national efforts that ought to trigger international efforts. This is what El Zeidy refers to as the 'shift from the notion of primacy to the more restrained notion of complementarity.'<sup>50</sup> It is in this regard that 'article 228 of the Versailles Treaty could be regarded as the [first] precedent for the application of the principle of complementarity,' irrespective of its limited scope in comparison to the current expanded notion of the concept.<sup>51</sup>

The Allies also concluded similar peace treaties with other 'enemy' governments, particularly, Austria,<sup>52</sup> Bulgaria,<sup>53</sup> Hungary<sup>54</sup> and Turkey.<sup>55</sup> These treaties all had penalty provisions similar to that of the Treaty of Versailles.<sup>56</sup> The application of these penalty clauses in each of these cases followed the German experience that had been discussed earlier. In each of these cases, the national courts of these countries could prosecute a select number of perpetrators before their national courts. These experiences provided historical evidence that international crimes prosecution may have benefited from burden-sharing between national mechanisms and supranational tribunals such as the ones established under these peace treaties. These ideas of division of labour and burden-sharing, also underpin the notion of regional complementarity that I propose in this research.

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<sup>50</sup> M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers 2008) 15.

<sup>51</sup> *Ibid.*

<sup>52</sup> The Treaty of St. Germain was signed on 10 September 1919 between Austria and the Allies and took effect on 16 July 1920. The treaty dissolved the Austro-Hungarian monarchy.

<sup>53</sup> The Treaty of Neuilly was the Allies' Peace Treaty with Bulgaria and was signed on 5 November 1919.

<sup>54</sup> The Treaty of Trianon was the treaty between the Allies and Hungary. It was signed on 4 June 1920.

<sup>55</sup> The Treaty of Sevres, the peace treaty with Turkey was concluded on 10 August 1920.

<sup>56</sup> Articles 173, 157, 118 and 226 of the Treaties of St. Germain, Trianon, Neuilly and Sevres respectively.

One significant discussion at the 1919 preliminary Peace Conference, leading to the conclusion of the treaty of Versailles was the trial of the Kaiser. The Allies were clear about their intention to bring the Kaiser to trial. This was reflected in article 227 of the Treaty of Versailles.<sup>57</sup>

In hindsight, the attempt at prosecuting the Kaiser brought to the fore some of the issues that are still as relevant today, as they were over 100 years ago: complementarity and the interaction between international and domestic mechanisms for crimes prosecution, extradition, command responsibility, prosecution of heads of state for international crimes and the push back against it, discussion on a proper forum to mete out international justice, among many others. Complementarity and the interaction between international and domestic mechanisms became obvious in the contestation by Germany that its nationals were going to be tried before its courts and not before any international criminal tribunal. As will be seen in the next sections of this chapter, during the negotiations that led to the adoption of the Rome Statute, including the negotiations at the Rome conference itself, many states rallied against relinquishing their prosecutorial powers to an international criminal tribunal. In the end, a compromise was reached, in a similar fashion to the compromise between the Allies and Germany. It reflects the central theme of complementarity, which is the working together of international and domestic criminal jurisdictions to achieve the aim of international crimes prosecution. At this point in history though, thoughts about the regional arrangement and how it fits into international crimes prosecution had not emerged significantly. Complementarity and the interaction between international and domestic mechanisms became obvious in the contestation by Germany that its nationals were going to be tried before its courts and not before any international criminal tribunal.

### **1.3.Prosecution of international crimes after WWII**

The end of WWII again signaled not only the call for prosecutions of war criminals, but also the question of the appropriate forum for prosecution. This was because of the concerns about sovereignty and the roles of national courts in the prosecution of international crimes, which had overshadowed such discussions in the past. After the war, certain developments further increased

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<sup>57</sup> It provides that ‘The Allied and Associated Powers [will] publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties... The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.’

the attention on creating an international criminal court. Such developments included the events at the 1941 London International Assembly (LIA), the activities of the 1943 UN War Crimes Commission (UNWCC) and the Nuremberg International Military Tribunal (NIMT), the adoption of the 1948 Genocide Convention as well as the activities of the 1951-1953 Committees on International Criminal Jurisdiction.

The London International Assembly (LIA) studied the question of war crimes and concluded that jurisdiction over such crimes should be vested in national courts while certain categories of war crimes should be prosecuted by an international criminal court.<sup>58</sup> The LIA favored jurisdictional division of labour between international and national mechanisms. The body also adopted a 62-article convention for an international criminal court.<sup>59</sup>

The 1943 UN War Crimes Commission (UNWCC) was established to investigate crimes committed during WWII. It became immediately concerned with establishing a war crimes court. It worked in committees and Committee II on enforcement used the draft convention by the LIA as a basis for its discussions.<sup>60</sup> A draft prepared by the US for the Committee's consideration, first took the LIA's convention into account and then proposed that the court would exercise jurisdiction only where national courts lacked or preferred not to exercise jurisdiction.<sup>61</sup> After several amendments, the jurisdictional provisions of the UNWCC's draft conferred primary jurisdiction on national courts while States had the liberty to either deal with a case or refer it to the proposed court.<sup>62</sup> Stahn argued that the UNWCC's focus on facts, evidence and interaction with domestic authorities represents both the past and the future of international crimes prosecution.<sup>63</sup> Attention however shifted away from the UNWCC and its efforts were frustrated

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<sup>58</sup> See UN, *Historical Survey of the Question of International Criminal Jurisdiction*, UN Doc., A/CN.4/7/Rev.1, 18, (1949).

<sup>59</sup> W. Schabas 'The United Nations War Crimes Commission Proposal for an International Criminal Court' (2014) 25 *Criminal Law Forum* 171-189.

<sup>60</sup> *Ibid.*

<sup>61</sup> M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers 2008) at 71.

<sup>62</sup> *Ibid.*

<sup>63</sup> C. Stahn 'Complementarity and cooperative justice ahead of their time? The United Nations War Crimes Commission, fact-finding and evidence' (2014) 25 *Criminal Law Forum* 1, 223-260 at 223.

when it was opposed on several grounds by the UK government, while the allied powers decided to adopt the charter establishing the International Military Tribunal.

The Nuremberg International Military Tribunal (NIMT) reflected the guiding principle of the Moscow Declaration wherein the Allies declared that German war criminals would be prosecuted in line with territorial jurisdiction, while ‘major criminals whose offences have no particular geographical location will be punished by a joint decision of the Governments of the Allies.’<sup>64</sup> The NIMT only concentrated on major criminals while national mechanisms dealt with the bulk of cases. When contrasted with the position under the Treaty of Versailles and other peace treaties of post-WWI era, this subsidiary approach reveals a different model of complementarity. Under the peace treaties, the Inter-Allied court would intervene where the German national courts failed in their duty to prosecute satisfactorily. Thus, the Inter-Allied court deferred jurisdiction to the German national courts, and this was generally seen as a victory for state sovereignty. On the contrary, however, under the NIMT, the complementarity model ‘reflected the principle of primacy of international law over national law, regarding trying major war criminals for core crimes.’<sup>65</sup>

Article VI of the 1948 Genocide Convention<sup>66</sup> clarified the anticipated relationship between national mechanisms and an international penal tribunal with jurisdiction, in the following words: ‘[P]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.’

The 1951-1953 Committees on International Criminal Jurisdiction drafted clauses that created complementarity model like the one proposed by the LIA.<sup>67</sup> The International Law Commission

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<sup>64</sup>M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers 2008) at 74.

<sup>65</sup> *Ibid.*

<sup>66</sup> The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly of The United Nations on 9 December 1948.

<sup>67</sup> Established in 1950 by the General Assembly of the UN, the body was set up to prepare a concrete proposal for establishing an international judicial organ for the trial of persons charged with genocide or other crimes. See S.A. Williams ‘The Rome Statute on the International Criminal Court: From 1947-2000 and beyond’ (2000) 38 *Osgoode Hall Law Journal* 2 at 302.

(ILC) on the other hand adopted the 1951 and 1954 Draft Codes of Offences against the Peace and Security of Mankind.<sup>68</sup> At the time, the ILC favored the establishment of an international criminal court with exclusive competence over the crimes defined in the codes and this idea of exclusivity of jurisdiction inspired the work of the ILC until as recent as the early 1980s.<sup>69</sup> It was only in the early 1990s that the ILC realized that the idea of exclusive jurisdiction was not viable; hence, the current approach of reconciling both international and national criminal jurisdictions.<sup>70</sup> From the day of its inception in 1946, the ILC continued to be the principal player on the project of creating a permanent international criminal court.<sup>71</sup>

#### **1.4.Complementarity in the Draft Statutes and the two Committees**

The long history of the codification of complementarity began to yield results with its inclusion in the 1993 and 1994 ILC Draft Statutes and the discussions that took place at the Ad Hoc (AHCom) and Preparatory Committees (PrepCom).

The 1993 Draft Statute touched on the question of complementarity in two provisions.<sup>72</sup> One was in relation to the commentary on article 1, where the purpose for the establishment of the Court was explained. The article explains that the Statute was meant to ‘provide a venue for the fair trial of persons accused of crimes of an international character, in circumstances where other trial procedures may not be available or may be otherwise less preferable.’<sup>73</sup> The second was in respect of article 45 on *ne bis in idem*,<sup>74</sup> which provides as follows, ‘a person who has been tried by another court for acts constituting crimes referred to in articles 22 or 26, may be subsequently tried under this Statute only if: (a) the act in question was characterized as an ordinary crime; or (b) the

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<sup>68</sup> See D.H.N. Johnson ‘The Draft Code of Offences against the Peace and Security of Mankind’ (1945) 4 *International and Comparative Law Quarterly* 445.

<sup>69</sup> *Ibid.*

<sup>70</sup> See UN Doc. A/CN.4/SER.A/1985/Add.1 (Part 2) (1985) *Yearbook of the International Law Commission*.

<sup>71</sup> B.E. Berg ‘The 1994 I.L.C. Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure’ (1996) 28 *Case Western Reserve Journal of International Law* 2, 223.

<sup>72</sup> J. K. Kleffner, *Complementarity in the Rome Statute and National Jurisdictions* (Oxford University Press 2008) at 72.

<sup>73</sup> *Ibid.*

<sup>74</sup> On the principle, see G. Conway ‘Ne Bis in Idem in International Law’ (2003) 3 *International Criminal Law Review* 217–244.

proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.’<sup>75</sup>

The 1994 Draft Statute contains the first express reference to the concept of complementarity. Its preamble stated that ‘the Court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.’<sup>76</sup> The ILC views the Court as one that should operate where there is no prospect that accused persons would be duly tried in national courts. It stressed that the Court is a body ‘which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts, or to affect the right of States to seek extradition and other forms of international judicial assistance.’<sup>77</sup> Sub-paragraph 3 of the commentary to the preamble states that ‘[T]he purposes set out in the preamble are intended to assist in the interpretation and application of the Statute, and in particular in the exercise of the power conferred by article 35.’<sup>78</sup> The ILC explained that article 35 allows the Court to decide which case is admissible. The article relates to the *exercise*, as opposed to the *existence* of jurisdiction.<sup>79</sup> The provision is a response to suggestions from some States that the Court should only deal with cases in circumstances ‘where it is really desirable to do so.’<sup>80</sup> This is not only a way of ensuring that the Court limited its focus to the most serious crimes, but also, an important method by which the Court could manage its caseload according to available resources.<sup>81</sup> This implies that the original idea of the drafters of what would later become the Rome Statute was that the Court could not realistically take on every single case, even if it has jurisdiction to do so. In this regard, complementarity does not mean that the Court would be able to exercise jurisdiction in all circumstances where it can, but only in situations where it should, according to the presence of other enabling factors. To achieve this, the ILC streamlined the exercise of jurisdiction by summing up the grounds of inadmissibility as being ‘[t]hat the crime in

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<sup>75</sup> J. K. Kleffner, *Complementarity in the Rome Statute and National Jurisdictions* (Oxford University Press 2008) at 72.

<sup>76</sup> UN, Draft Statute for an International Criminal Court with commentaries 1994 at 27.

<sup>77</sup> UN Doc A/CN.4/SER.A/1994/Add.1 (Part 2) 27 *Yearbook of the International Law Commission* (1994).

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> S. SáCouto & K. Cleary ‘The Gravity Threshold of the International Criminal Court’ (2008) 23 *American Journal of International Law* 5, 807-854 at 820.

question has been or is being duly investigated by any appropriate national authorities or is not of sufficient gravity to justify further action by the Court.<sup>82</sup>

AHCom held two sessions.<sup>83</sup> The second session focused on complementarity, among other issues.<sup>84</sup> The AHCom detailed its discussions and understanding of the principle of complementarity under three headings, namely: a) the significance of the principle of complementarity; b) the implications of the principle of complementarity as regards the list of crimes which would fall under the jurisdiction of an international criminal court; and c) the role of national jurisdiction.<sup>85</sup> It remains surprising that in the discussions around the role of national jurisdictions, there was no consideration of the role that national jurisdictions, acting under the auspices of a regional arrangement, could play.

On the implications of complementarity for crimes under the jurisdiction of an international criminal court, there is a link between the scope of the proposed court's jurisdiction and complementarity.<sup>86</sup> While some delegations argued that the Draft Statute should provide for a single legal system for all crimes within the jurisdiction of the court, with a limited number of 'hard-core crimes', others felt that a multiplicity of jurisdictional mechanisms was preferable.<sup>87</sup> On the role of national jurisdictions, the AHCom first noted the need to clarify the term 'national jurisdiction' in the context of complementarity. Some delegations observed that the term "was not limited to territorial jurisdiction but also included States' competence to exercise jurisdiction in accordance with established principles and arrangements."<sup>88</sup> The question was which State should be considered relevant in making the assessment on whether trial procedures were available and effective and which State(s) may be considered as an 'interested party', in an application for a decision of inadmissibility, within the ambit of article 35 of the Draft Statute.<sup>89</sup>

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<sup>82</sup> UN Doc A/CN.4/SER.A/1994/Add.1 (Part 2) (note 77) 52.

<sup>83</sup> UN Doc A/50/22 *General Assembly Official Records, Fiftieth Session Supplement No. 22*, para. 1.

<sup>84</sup> Kleffner (n. 75) 76.

<sup>85</sup> *Ibid* at 76; See also UN Doc., A/50/22 (n. 83) 6-10.

<sup>86</sup> Kleffner (n. 75) 76.

<sup>87</sup> Kleffner (n. 75) at 76-77. See also UN Doc., A/50/22, (n. 83) para 38.

<sup>88</sup> UN Doc., A/50/22. (n 83) para 39.

<sup>89</sup> Kleffner (n. 75) 77.

Cassese noted that the success of AHCom was that it helped to ensure that ‘the primacy of national jurisdiction was to be respected, [and] the Court’s prospective encroachment on national sovereignty was seen as less threatening.’<sup>90</sup>

While the AHCom had already emphasized the importance of complementarity, discussions at the Preparatory Committee (PrepCom) focused on the questions of what is to be understood by the principle, how the principle should be reflected in the Statute, and which articles of the Statute were of relevance in implementing the principle.<sup>91</sup> It was clear that a proper balance between the proposed court and national jurisdictions was crucial in order to make the Draft Statute acceptable to a large number of States.<sup>92</sup> While many states agreed on the desirability of the principle, the questions as to how, where, to what extent and with what emphasis complementarity should be reflected in the Statute required further deliberations.<sup>93</sup>

The PrepCom began its work in 1996 and completed its Draft Statute in April 1998. Discussions were held in different sessions<sup>94</sup> and at the working group on complementarity and trigger mechanisms.<sup>95</sup> At the first session, various interpretations of the concept of complementarity were discussed, but two views were prominent. The first view underscored the primary rights of States to prosecute crimes within their territories, the need to incorporate complementarity in all aspects of State cooperation with the Court as well as a more restrictive and limited role for the new Court.<sup>96</sup> The second view was that the preamble of the Draft Statute had to be amended so that the

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<sup>90</sup> A. Cassese, Gaeta & Jones, *The Path to Rome and Beyond, Drafting History and Further Developments in Cassese, Gaeta & Jones (eds) The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 15.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> C.K. Hall ‘The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court’ in “Current Developments” (1997) 91 *American Journal of International Law* 177-181; C.K. Hall ‘The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court’ in “Current Developments” (1998) 92 *American Journal of International Law* 124; C.K. Hall ‘The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court’ in “Current Developments” (1998) 92 *American Journal of International Law* 331 and C.K. Hall ‘The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court’ in “Current Developments” (1998) 92 *American Journal of International Law* 548.

<sup>95</sup> UN Doc A/AC.249/1997/L.8/Rev.1 (14 August 1997) *Decisions Taken by the Preparatory Committee at its Session held from 4 to 15 August 1997*, para. 1.

<sup>96</sup> Cassese & ors (n. 90) 15.

Court should act when States failed to carry out their duty to bring suspects to justice.<sup>97</sup> There was a third, but not so prominent view that a very restrictive approach to complementarity may undermine the Court's authority and effectiveness. Proponents of this view suggest that the Statute should expressly provide exceptions to complementarity and that the Prosecutor should not be required to prove, in every case, that the Court's intervention is required.<sup>98</sup>

The PrepCom only returned to the discussion on complementarity at its fourth session in August 1997. Prior to this, different delegations had submitted proposals and position papers, as fallout of the discussions on complementarity at the first session. Discussions resumed largely at informal debating and drafting in closed working groups.<sup>99</sup> The atmosphere was such that there seemed to be an understanding that the issues of complementarity and trigger mechanisms were so contentious that they may not be resolved until the diplomatic conference, considering their political nature.<sup>100</sup> Progress was however made in drafting consolidated texts, particularly, in relation to the grounds for determining whether a case is admissible and the roles of the Security Council, States and the Prosecutor in initiating cases and prosecutions.<sup>101</sup> The drafting group, coordinated by the head of the Canadian delegation, Mr. John T. Holmes, mainly focused on Draft Article 35 and did not address other procedural aspects.<sup>102</sup> After a week of intense negotiations, the Committee approved a new consolidated draft that was produced by Mr. Holmes.<sup>103</sup>

It was only at its last session in March 1998 that the PrepCom completed its work of preparing a consolidated text of a statute for a permanent international criminal court.<sup>104</sup> The text that was forwarded to the Rome Conference by the PrepCom greatly expanded the grounds on which the ICC can assume jurisdiction. It also helped to have a more focused debate on preconditions and trigger mechanisms by setting a better template for discussions and agreements at the Rome Conference.<sup>105</sup> With the Committee's work done, a consolidated Draft Statute was adopted.

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<sup>97</sup> *Ibid.*

<sup>98</sup> Kleffner (n. 75) 80.

<sup>99</sup> Hall, 'The Third and Fourth Sessions...', (n. 94) 130.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> Kleffner (n. 75) 84.

<sup>103</sup> *Ibid.*

<sup>104</sup> Hall, 'The Sixth Session...', (n. 94) 548.

<sup>105</sup> O. Triffterer & K. Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (CH. Beck, Hart & Nomos 2015) at 791.

Further debates and final discussions about admissibility and complementarity then shifted to Rome.

### 1.5. Complementarity at the Rome Conference

Throughout the drafting process of the ICC Statute, the relationship between the proposed Court and national jurisdictions was a recurring theme.<sup>106</sup> The question of complementarity dominated the discussions.<sup>107</sup> It was clear that States did not want a replacement for national jurisdictions, but a Court that can work alongside existing national mechanisms.<sup>108</sup> The principal considerations at the time were the need to accommodate states' concerns about sovereignty, and the necessity to ensure that the Court was strong enough to bring perpetrators of international crimes to justice. There was no doubt that any agreement on the Statute must strike a balance between these two considerations.<sup>109</sup>

The Conference's Committee of the Whole (CW) took up the discussions on complementarity during the second week of the Conference.<sup>110</sup> The substantive discussions centered around Draft Articles 15 to 19 on the criteria for admissibility and procedure of complementarity.<sup>111</sup> Mr. Holmes who had earlier coordinated the discussions at the PrepCom introduced the subject. He explained the origin and substance of the provisions on admissibility and *ne bis in idem*. He went further to explain the long and difficult route to the compromises that produced these provisions and therefore urged the delegations not to reopen the discussions on these provisions.

This notwithstanding, certain states like China, Egypt, Mexico, Indonesia, India and Uruguay were not totally satisfied with the formulation of complementarity in Draft Article 15.<sup>112</sup> They called for the reopening of discussions on the issue, as the article did not fully meet their expectations.

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<sup>106</sup> Kleffner (n. 75) 72.

<sup>107</sup> UN Doc A/CONF. 183. C. 1/SR. 11 'Summary Records of the 1998 Diplomatic Conference' (22 June 1998), para. 19, 213 in *The UN United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' Rome, 15 June - 17 July 1998 Official Records Volume II.*

<sup>108</sup> *Ibid.*

<sup>109</sup> Kleffner(n. 75) 3.

<sup>110</sup> J. T. Holmes 'The Principle of Complementarity' in R. S. Lee (ed.), *The International Criminal Court, the Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International 1999) 52.

<sup>111</sup> Kleffner (n. 75) 90.

<sup>112</sup> P. T. T. Huong, 'A Changing Notion of Complementarity under the Rome Statute of the International Criminal Court' (2002) [available at <http://ir.nul.nagoya-u.ac.jp/jspui/bitstream/2237/16936/1/18-Pham%20Thi%20Thu%20Huong%E6%A7%98.pdf> – accessed 12 May 2023] 616.

They argued that the article gave the Court too broad a discretion in determining ‘unwillingness’ as there are no objective criteria to guide the Court and that the phrase ‘undue delay’ was a very low threshold for unwillingness. They equally submitted that the criterion ‘partial collapse’ of national judicial system for the Court to determine inability was insufficient.<sup>113</sup> In an attempt to resolve these concerns, the phrase ‘having regard to the principle of due process recognized by international law’ was added to the yardstick for determining ‘unwillingness’ in paragraph 2.<sup>114</sup> Additionally, the term ‘undue delay’ was replaced with the term ‘unjustified delay’ as ‘unjustified’ was understood to establish a higher threshold than ‘undue’<sup>115</sup> while the term ‘substantial collapse’ was used in the place of ‘partial collapse’ so as to narrow down the requirement.<sup>116</sup> Given the elaborative efforts on complementarity as contained in Draft Article 15 which became article 17 in the final text, States agreed not to include further elaboration on the subject in the Preamble, but to make a reference to it in article 1, considering its importance and for the purposes of clarity.<sup>117</sup>

On the relationship between complementarity and the principle of *ne bis in idem*, no significant discussion took place at the Conference.<sup>118</sup> But on *ne bis in idem* itself, some significant discussions took place. Accordingly, two amendments were proposed to the final text. One relates to the addition of the phrase ‘with respect to the same conduct’, which was included in the *chapeau* of paragraph 3. This was to underscore that the Court could still try a person even if the person had been tried at the domestic level, provided that different conduct was the subject of the new prosecution.<sup>119</sup> The second change related to the addition of the phrase ‘in accordance with the norms of due process recognised by international law’ to paragraph 3(b) of the *ne bis in idem* provision. This phrase was already included in the admissibility provision in Draft Article 15(2).<sup>120</sup>

The consolidated Draft Statute as forwarded by PrepCom remained largely unchanged at the Rome Conference except for three modifications, two of which had been discussed in the preceding

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<sup>113</sup> *Ibid*; see also Holmes at 52.

<sup>114</sup> Holmes at 54.

<sup>115</sup> Kleffner (n. 75) 90; see also Holmes (n. 110) 55.

<sup>116</sup> Holmes (n. 110) 54-55.

<sup>117</sup> *Ibid* 56.

<sup>118</sup> Kleffner (n. 75) 90.

<sup>119</sup> Holmes at 59.

<sup>120</sup> Holmes at 59; Kleffner at 91.

paragraph. The third relates to the inclusion of articles 6 to 8, which set down the crimes within the jurisdiction of the Court.<sup>121</sup>

In terms of procedure, there was a debate on whether it was only State Parties to the Statute that could validly challenge the Court's jurisdiction, as there were States who argued that complementarity should apply irrespective of the fact that the State where national proceedings were taking place is a non-party to the Statute. In order to resolve this, it was agreed that any State, including non-State Parties, could make a challenge provided that it had jurisdiction over a case and was investigating or prosecuting or had done so already. This was to 'forestall situations where a State could challenge (and delay) the Court from proceedings with a case on the ground that it was investigating when in fact the investigation or prosecution was sure to fail because the State lacked jurisdiction.'<sup>122</sup> It was however further agreed that the Prosecutor may continue investigation pending the decisions on admissibility to avoid delays and loss of valuable evidence caused by the challenge of admissibility.<sup>123</sup>

The United States made certain proposals on 'preliminary rulings regarding admissibility' in respect of draft article 16.<sup>124</sup> While some States supported the proposal because they saw it as a necessary safeguard for sovereignty, others viewed it as unnecessarily setting up an obstacle to the Court's operation.<sup>125</sup> The US viewed the proposal as necessary to provide for procedure that would allow a State to investigate and prosecute the crimes concerned, even at the outset of or during a referral.<sup>126</sup> To resolve this and to modify the proposal, parties were mindful of the need to strike a balance between the need for the ICC to defer to genuine national efforts on one hand, and the danger of allowing provisions that can be used to frustrate investigations by the Prosecutor, thus undermining the essence of the Court.<sup>127</sup> In the end though, compromises were reached and draft

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<sup>121</sup> Kleffner at 91.

<sup>122</sup> Holmes at 66; Huong at 615.

<sup>123</sup> Huong at 615; Holmes at 66.

<sup>124</sup> See Holmes 69-70; see also UN Doc A/CONF.183/C.1/L.25 (29 June 1998), in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court (Rome 15 June-17 July 1998) UN General Assembly Official Records Volume III, Reports and other documents (2002) UN Doc A/CONF. 183/13 (Vol. III)* at 241-242.

<sup>125</sup> UN Doc A/CONF. 183. C. 1/SR. *Summary Records of the 1998 Diplomatic Conference* at 11, 12, 29, 30, 31, 33.

<sup>126</sup> Kleffner at 93.

<sup>127</sup> Holmes at 70; Huong at 614.

article 16 became article 18 in the final text.<sup>128</sup> In the end, the Statute was made to contain ‘a delicately balanced provision’ that spells out rigorous criteria for the Court to assume jurisdiction. This is the present provision of article 17 of the Rome Statute.<sup>129</sup> Articles 18 and 19 of the Statute also spelt out rigorous procedures to ensure that the Court accords all due deference to the proceedings before national jurisdictions.<sup>130</sup>

The agreements reached at the Rome Conference arose out of the need for compromise from States who had divergent views of the purposes they want the Court to serve as well as its *modus operandi*. In this regard, it is observed ‘the general idea of complementarity was agreed early in the negotiating process, it was the details of that principle in dealing with the appropriate relation between national courts and the ICC that proved controversial.’<sup>131</sup> This was also partly because the drafters had intended to develop a comprehensive complementarity regime.<sup>132</sup> This they seemed to have achieved, although other aspects of operationalizing the new Court had to be worked out. Hence, the Preparatory Commission<sup>133</sup> was established to elaborate a set of subsidiary instruments, including Rules of Evidence and the Elements of Crimes for the new Court.<sup>134</sup>

One surprising outcome of the discussions at Rome, was the complete silence on the subject of regional organisations’ participation in international crimes prosecution. This is also as there were a number of regional organizations with delegates at the conference. Examples include the Organisation of African Unity (OAU), Organisation of American States, Council of Europe, among others.<sup>135</sup>

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<sup>128</sup> See Holmes at 71-73; Kleffner at 93.

<sup>129</sup> A. Cassese and ors, *The Path to Rome and Beyond, Drafting History and Further Developments* (Oxford University Press 2002) 37.

<sup>130</sup> *Ibid.*

<sup>131</sup> Huong at 613.

<sup>132</sup> Holmes at 75.

<sup>133</sup> For a general understanding of its work and achievements, see P. Kirsch & V. Oosterveld ‘The Preparatory Commission for the International Criminal Court’ (2001) 25 *Fordham International Law Journal* 3, 563-588.

<sup>134</sup> Kleffner at 85.

<sup>135</sup> UN Doc: A/CONR183/13(Vol.II), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Vol II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 40-42.

## 2. Contextualising the neglect of regionalism in ICL history

From the historical analysis in the previous section of this chapter, it has emerged that in the development of ICL, and the discussions that attended the establishment of a permanent international criminal court, there has been little or no reference to the role those regional organisations can play in the enforcement of international criminal justice. Discussions at the Rome Conference revolved largely around creating a permanent court with jurisdiction over core crimes, without unnecessarily expanding it in a manner that overburdens the limited finance and personnel of the court.<sup>136</sup> Also, at the time, there appeared to be a general understanding that the Security Council may still be able to create tribunals that would address specific atrocity situations, like the ICTY and the ICTR; hence, there was no need for other mechanisms, including a regional criminal tribunal.

This is of interest because prior to and at the Rome Conference, there were discussions that reflected specific concerns of practitioners and delegates in relation to crimes of specific regional concern. Some countries had identified regional challenges and sought to expand the remit of the proposed court to address some of those regional crimes. For instance, prior to the Rome Conference, Trinidad and Tobago had long sought the creation of an international criminal tribunal to deal with the crime of drug trafficking, which had become endemic in the Caribbean region. In fact, the renewed interest in the project of an international criminal court was traceable to the Trinidad and Tobago proposal.<sup>137</sup> Also, throughout the discussions at the PrepCom, there were delegates who supported the inclusion of drug trafficking as one of the crimes that the proposed court would have jurisdiction over. A 1997 Working Group of the PrepCom also ‘discussed crimes involving illicit traffic in narcotic drugs and psychotropic substances without prejudice to a final decision on their inclusion in the Statute.’<sup>138</sup> At the start of the Rome Conference, drug trafficking was still included as one of the crimes to be prosecuted in the new court, but supporters of its inclusion could not garner sufficient support, leading to the expulsion of the crime from the final

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<sup>136</sup> M. McConville ‘A global war on drugs: Why the United States should support the prosecution of drug traffickers in the International Criminal Court’ (2000) 37 *American Criminal Law Review* 75, 92-93.

<sup>137</sup> Philippe Kirsch & Valerie Oosterveld ‘Negotiating an Institution for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court (2001) 46 *McGill Law Journal* 1141-1160.

<sup>138</sup> M. McConville ‘A global war on drugs: Why the United States should support the prosecution of drug traffickers in the International Criminal Court’ (2000) 37 *American Criminal Law Review* 75, 92-93.

statute.<sup>139</sup> This suggests that prior to, and at the negotiations in Rome, there were voices that reflected regional concerns and that attempted to shift attention to crimes that were of particular concerns to certain regions. It is therefore surprising that there was no other discussion at the Rome Conference on how regional criminal mechanisms could address these crimes that were of particular concerns to specific regions, seeing that the proposed universal mechanism could not accommodate their prosecution.

In the light of this, there are at least three factors that may have accounted for the neglect of regionalism in ICL's development. This is in sharp contrast to development in the field of human rights, where regionalism has long been observed. Since at least the cold war era, regional institutions have played some human rights protection roles in three regions – Europe, America and Africa.<sup>140</sup> What could be responsible therefore, for the late interaction of ICL with regionalism?

### **2.1. ICL's slow pace of development and liberal foundations**

In comparison to human rights law and its institutions, international criminal law has developed more slowly and less dynamically.<sup>141</sup> As a product of the twentieth century, it remains a body of law in the making.<sup>142</sup> It has not been stagnant, although its growth has been relatively slow. While many modern-day ICL norms developed well ahead of institutions that were subsequently created to enforce them, ICL had what has been termed 'conduct rules' and no corresponding 'enforcement rules'.<sup>143</sup> Other aspects and strands of public international law had developed and taken their place in legal science before WWII. The Tokyo and Nuremberg trials were the first actual international attempts at enforcing international criminal law. Since then, international criminal justice has continued to assert itself and acquire its identity. Some argue that it is neither completely

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<sup>139</sup> *Ibid*, 93.

<sup>140</sup> On human rights protection roles played by regional institutions, see generally A. Huneus & M. R. Madsen 'Between universalism and regional law and politics: A comparative history of the American, European, and African human rights systems' (2018) 16 *International Journal of Constitutional Law* 1, 136-160.

<sup>141</sup> See P. De Hert & ors (eds) 'Convergences and Divergences Between International Human Rights, International Humanitarian and International Criminal Law' (Intersentia 2018).

<sup>142</sup> C. Stahn 'A critical Introduction to International Criminal Law' (Cambridge University Press 2019) 9.

<sup>143</sup> B.V. Schaack & R. Slye 'A Concise History of International Criminal Law' (2007) *Santa Clara Law Digital Commons*, 3.

international nor fully criminal.<sup>144</sup> It strives to exist as an independent body of criminal law rules, but ‘its norms and its practitioners draw a deep intellectual inheritance from human rights and humanitarian law.’<sup>145</sup>

Not only was international criminal law slow in its development, but it could also be slow in dispensing justice.<sup>146</sup> The slow pace of development and justice dispensation has been attributed to the overall aims of international criminal justice, which are ‘bringing perpetrators to justice and providing retribution for victims-or domestic-criminal-law-styled aims; creating a historical record of mass atrocities, and lastly, helping transitioning societies to achieve peace and reconciliation.’<sup>147</sup> These aims require different timelines for their achievement. The slow pace of ICL’s development and current practice may therefore explain why it has taken it a long time to embrace regionalism. It strives to construct a global order, with less attention on regional systems. Even when the Rome Statute was being negotiated and drafted, there was no experience of the *ad hoc* tribunals that the drafters could benefit from.

Additionally, ICL is based on a number of liberal premises. Stahn identified ‘juridification’, ‘criminalization’ and ‘individualization’ as some of those premises that have been questioned.<sup>148</sup> ICL places the human person at its core and asserts that irrespective of their criminal conducts, they possess basic procedural rights. It contends that international criminal justice ought to emphasize the fairness of the proceedings in any trial. ICL stresses rights to which a defendant is entitled. Article 67 of the Rome Statute consists of elaborate provisions concerning the rights of the accused. This is to prevent a harm of wrongly punishing an innocent person for a crime committed by another. It holds its origin to the Blackstone formulation that ‘it is better that ten guilty persons escape, than that the innocent suffers.’<sup>149</sup> While the purpose of international criminal

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<sup>144</sup> C. Stephen ‘International Criminal Law: Wielding the Sword of International Criminal Justice’ (2012) 61 *ICLQ* 55.

<sup>145</sup> D. Robinson ‘Identity Crisis of International Criminal Law’ (2008) *Leiden Journal of International Law* 21, 925–963 at 928.

<sup>146</sup> J. Galbraith & ors ‘The Pace of International Criminal Justice’ (2009) 31 *Michigan Journal of International Law* 1, 80.

<sup>147</sup> *Ibid.*

<sup>148</sup> C Stahn ‘A Critical Introduction to International Criminal Law’ (Cambridge University Press 2019) 9.

<sup>149</sup> William Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765) 358. See also J. Keijser & ors ‘Wrongful convictions and the Blackstone ratio: An empirical analysis of public attitudes’ (2014) 16 *Punishment and Society* 1, 32–49.

law is to protect the society, it places restraints upon itself to achieve a just application of its rules to individuals.<sup>150</sup> The normative framework that underpins ICL is such that all its laudable objectives are ‘constrained by basic procedural norms as well as consideration for the civil/human rights of the accused.’<sup>151</sup> This is distinguishable from a system which deals with individuals in any manner, so long as it achieves its aims.<sup>152</sup> An example of this in human rights law is situations where international human rights law is suspended for the greater good. International human rights treaties contain claw back clauses that allow suspension of its provisions under certain conditions that are provided by the same treaties. For example, in the African Charter on Human and Peoples’ Rights, claw back clauses are built as restrictions to ‘qualify rights and permit a state to restrict those rights to the maximum extent permitted by domestic law.’<sup>153</sup>

Given these differences in ICL and international human rights law, it is not surprising that ICL developed much more slowly, and less dynamically than international human rights law. The late development also explains why international criminal justice embraced regionalism later than human rights law. The argument here does not detract from the counter-view that some international criminal law systems like the Nuremberg International Military Tribunal preceded the advent of modern human rights law. It would appear therefore, that ICL and IHRL developed according to their own distinct logic, given the rather different objectives and regulatory methods, particularly as they concern the challenges to state sovereignty.

## **2.2. Universality and cosmopolitanism of international criminal law**

International criminal law has long enjoyed a proclaimed universality. In this regard, it has tended to strive for universal systems, values, and institutions. Its obsession with universality can be seen from certain past events that are connected to its origin and continuous development. The Nuremberg and Tokyo Tribunals exemplified international justice’s obsession with universality. The charges, proceedings and the enabling laws of these tribunals all espoused universality. The conception of ‘crime against humanity’, for example, reveals the tribunals’ readiness to punish

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<sup>150</sup> D. Robinson ‘Identity Crisis of International Criminal Law’ *Leiden Journal of International Law*, 21 (2008) 928.

<sup>151</sup> A Fichtelberg ‘Liberal Values in International Criminal Law: A Critique of Erdemović’ (2008) 6 *Journal of International Criminal Justice* 1, pg. 12.

<sup>152</sup> D. Robinson ‘Identity Crisis of International Criminal Law’ *Leiden Journal of International Law*, 21 (2008) 928.

<sup>153</sup> S. Singh ‘The impact of claw back clauses on human and peoples’ rights in Africa’ (2009) 18 *African Security Studies* 4, 100.

offences beyond territorial boundaries. Article 6(c) of the Nuremberg Charter defines "crimes against humanity" as '...any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.' That supranational posture has continued to underpin the values and direction of international law in general, and ICL in particular. This is reflective of Immanuel Kant's theory about universal law in the famous words 'Act only according to that maxim by which you can at the same time will that it should become a universal law.'<sup>154</sup> For centuries, international law has been ambitiously concerned with universalism,<sup>155</sup> although, critical approach to international law has attempted to refute that pretension.<sup>156</sup> There was a general sense that it was preferable to aim for universal institutions, in order to avoid the fragmentation of international law.

In addition, cosmopolitanism has been one of the driving forces of international criminal justice.<sup>157</sup> It is the value that motivated rendering the crimes that the ICC would deal with as those 'that affect the international community as a whole' and 'are a threat to peace, to security and to the well-being of Humanity.' One piece of evidence of ICL's cosmopolitanism is its desire to apply 'universal principles of criminal law' and its pursuit of universal values.<sup>158</sup> According to McAuliffe, 'as an ideology, cosmopolitanism holds that all humans belong in the same, single, universal community on the basis of a shared morality. The tenets of cosmopolitanism are individuality, universality, and generality. Individualism recognizes each human as an indispensable unit of concern. Universality holds that all humans have equal moral standing while generality presupposes that the fate of one individual should be a subject of concern for all.'<sup>159</sup>

McAuliffe states that there are two types of cosmopolitanism: moral and legal. Moral cosmopolitanism exemplifies the idea behind universality – the thinking that all humans operate

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<sup>154</sup> C.M Korsgaard 'Kant's formula of universal law' (1985) 66 *Pacific Philosophical Quarterly* 1-2 at pg. 1.

<sup>155</sup> See generally J. Klabbbers 'On Epistemic Universalism and the melancholy of International Law' (2019) 29 *European Journal of International Law* 4, 1057-1069.

<sup>156</sup> *Ibid.*

<sup>157</sup> On this, see generally F. Mégret 'What Sort of Global Justice is International Criminal Justice' (2015) 13 *JICJ* 77-96.

<sup>158</sup> *Ibid.*, 81.

<sup>159</sup> P. McAuliffe 'From Watchdog to Workhorse: Explaining the Emergence of the ICC' s Burden-sharing Policy as an Example of Creeping Cosmopolitanism' (2014) 13 *Chinese Journal of International Law* 266-267. See also P. Hayden 'Cosmopolitanism and the Need for Transnational Criminal Justice: The Case of the International Criminal Court' (2004) 104 *Theoria* 69-70.

under equal moral standards, irrespective of the national or ethnic divides. Legal cosmopolitanism on the other hand seeks ‘to construct a global political order incorporating institutional schemes that will preserve and protect the rights of all human beings everywhere in the world.’<sup>160</sup>

Given ICL’s obsession with universalism and cosmopolitanism, it is clear why the system continues to strive for institutions that advance universal ideals, without any thoughts towards regionalism. ICL’s cosmopolitan posture may therefore have contributed to the delay in embracing regionalism. Regional systems are thought to further fragment the idea of a monolithic global structure that cosmopolitanism espouses.

Moreover, the Third World Approach to International Law (TWAIL) analytical method fundamentally opposes certain important questions of international law. By its tenets, TWAIL is ‘anti-universalism’, ‘anti-hierarchical’, ‘counter-hegemonic’ and ‘suspicious of universal truths’.<sup>161</sup> For instance, TWAIL challenges the formal equality that embodies international law through its assumption that all states are equal before the law.<sup>162</sup> It counters the ‘one size fits all’ idea behind the enforcement of international law, contending that mainstream international law fails to take into cognizance the peculiarities of the history of colonialism and slavery, in its attempt to couch acceptable international law doctrines and standards that serve the purposes of all its adherents.<sup>163</sup>

Similar arguments can be made about the tension between regionalism and universalism. For one, concentrating all powers and options of pursuing international criminal justice in a universal entity like the ICC drives the narrative that such universal entities exist partly for the reason of subordinating weaker states and eroding such states’ legitimacy.<sup>164</sup> As has been stressed, ‘colonial practice pervades every aspect of the discipline of international law’<sup>165</sup>, and the concentration of

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<sup>160</sup> *Ibid.*

<sup>161</sup> M. Mutua ‘What is TWAIL’ (2000) 94 *Am Soc’y Int’l L Proc* 31.

<sup>162</sup> J. D. Haskell ‘TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law’ (2014) 27 *Canadian Journal of Law & Jurisprudence* 2, 389.

<sup>163</sup> *Ibid.*

<sup>164</sup> O. Okafor ‘Is There a Legitimacy Deficit in International Legal Scholarship and Practice? (1997) *International Insights* 13, 91–120; M. Mutua, ‘What Is TWAIL?’ (2004) *American Society of International Law Proceedings* 94, 31–40.

<sup>165</sup> A. Anghie ‘The evolution of international law: colonial and postcolonial realities’ (2006) 27 *Third World Quarterly* 5, 751.

powers in a universal body undoubtedly perpetuates the narrative of western powers dispensing justice to previously colonised territories.<sup>166</sup> These arguments are not without merits. The structural inequalities embedded in most weak as well as third-world states are often responsible for the conflicts that give rise to international crimes. International law and its universalism often prescribe uniform global standards that do not take into account national or regional peculiarities – such peculiarities that could make a regional body more fitting for responding to atrocity crimes within the region.<sup>167</sup> This is complicated by the understanding that the ‘universal’ doctrines of international law are not as universal and are clearly products of western imperialism.<sup>168</sup> This is why Makau Mutua posited that international law ‘is a predatory system that legitimises, reproduces, and sustains the plunder and subordination of the Third World by the West.’<sup>169</sup> As ICL therefore comes of age, it must wean itself off its universalist posture. More domestic and regional systems continue to engage with international law’s structures, norms and institutions, and they deserve to be accommodated.

### **2.3.Perception of ICL as an enemy of sovereignty**

International criminal justice has been viewed as an enemy of sovereignty.<sup>170</sup> This derives from the Westphalia model of international relations to the effect that ‘sovereign states acknowledge no equal at home, and no superior abroad.’<sup>171</sup> Sovereign states therefore expected to act within their spaces, without interference from another sovereign – whether states or an external tribunal.<sup>172</sup> The delay in the emergence of a single court is partly attributable to distrust from states who viewed a single international criminal court as one that undermines state sovereignty—the essence of disciplining and punishing power of state—and states were reluctant to give up this sovereignty.

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<sup>166</sup> J. D. Haskell ‘TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law’ (2014) 27 *Canadian Journal of Law & Jurisprudence* 2, 389.

<sup>167</sup> B. Chimni ‘Third World Approaches to International Law: A Manifesto’ (2006) 8 *International Community Law Review* 3, 11.

<sup>168</sup> Haskell (n. 166) 391.

<sup>169</sup> M. Mutua ‘What is TWAIL’ (2000) 94 *Am Soc’y Int’l L Proc.* 31.

<sup>170</sup> On this, see R. Cryer ‘International Criminal Law vs State Sovereignty: Another Round?’ (2006) 16 *The European Journal of International Law* 5.

<sup>171</sup> C. Brown ‘Sovereignty, Rights and Justice’ (2002) *Polity Press*, 33.

<sup>172</sup> D. Partan & P. Rogic, ‘Sovereignty and International Criminal Justice’ (2003) *International Law: Revista Colombiana de Derecho Internacional* 1, 53-82

The idea of an international criminal court challenges states' monopoly to punish crimes committed within their territories.

Curiously, states did not view general regional court or regional human rights court with such scepticism. Studies have shown that states generally are more open to joining regional human rights institution, for different reasons.<sup>173</sup> This may explain why we have long had regional courts that dealt with human rights and economic subject-matters, and not international criminal law. For example, in the EU and the Americas, there were general regional courts, including one human rights court, but no regional criminal court.

The understanding that ICL is an enemy of sovereignty has however been challenged by other authors.<sup>174</sup> At the time that states were pushing hard against ICL as a system that undermines sovereignty, dominant narratives on sovereignty 'became less absolutist and more human rights-friendly.'<sup>175</sup> This suggests that while ICL continued to be perceived as an enemy of sovereignty, the latter became less antagonistic to human rights. The result was that states concluded arrangements to establish regional human rights courts, while there was no agreement on regional criminal courts.

#### **2.4. Regional jus cogens**

Recent debates at the ILC signal some openness to the idea of regionalism in wider public international law – and the same reasoning may be applied to the concept in ICL. For example, the idea of regional peremptory norms of international law (regional *jus cogens*) has started gaining

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<sup>173</sup> For an example of such studies, see D. Hill 'Why Governments Cede Sovereignty: Evidence from Regional Human Rights Courts' (2016) 14 *Foreign Policy Analysis* 3, 299–325.

<sup>174</sup> See B. Broomhall *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press 2003).

<sup>175</sup> J. Donnelly 'State Sovereignty and International Human Rights' (2014) 28 *Ethics & International Affairs* 2, 225.

momentum.<sup>176</sup> While it has been met with expected scepticism, it has not been totally discarded. It was recently amplified by the reports of the ILC Special rapporteur on *jus cogens*.<sup>177</sup>

On the face of it, an interaction between *jus cogens* and regionalism appears incompatible, as the basic definition of *jus cogens* is a norm that is ‘widely accepted and recognised by the international community of States as a whole... from which no derogation is permitted.’<sup>178</sup> Given this definition that advances the universality of international law, it will appear that such peremptory norms do not accommodate regional perspectives. However, some scholars and delegates at the ILC hold a different view.

Professor Kolb argues that an agreement between two or more states that a rule is non-derogatory would qualify as peremptory norms between them.<sup>179</sup> One obvious implication of this is that the peremptory nature of *jus cogens* does not derive from the number of parties undertaking the agreement, but the non-derogatory nature of the agreement between them. While this interpretation appears inconsistent with the definition in article 53 of the VCLT, it suggests that a different approach could be adopted to interpret the concept of *jus cogens* as a whole. For example, many norms that are widely accepted by the generality of states do not necessarily constitute *jus cogens*, as an important part of the balance is the idea of non-derogation. As such, even if states generally accept a rule, without the other leg of non-derogation, it would still be acceptable to them -but will not be accepted as *jus cogens*. For instance, the diplomatic rule that allows states to establish embassies and consular representatives in other states is widely recognised and accepted, yet, it is not considered non-derogatory as states’ ability to establish diplomatic premises in other states are hampered by several other factors, including economic and financial capacity. If, however, the states in a region, or indeed two or more states elect to have an agreement on a norm that is

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<sup>176</sup> See generally R. Kolb, *Peremptory International Law (Jus Cogens): A General Inventory* (Oxford, Hart, 2015); see also L. Carlos Lima & L. Marotti ‘An unlikely duo? Regionalism and jus cogens in international law’ (2022) 12 *Goettingen Journal of International Law* 1, 219-239. A. Pellet, ‘Comments in Response to Christine Chinkin and in Defense of Jus Cogens as the Best Bastion Against the Excesses of Fragmentation’ in (2006) (XVII) *Finnish Yearbook of International Law* 89. See also M. Abdollahi and K. Behzadi ‘Regional Jus Cogens: Conceptual Difficulties and Practical Challenges’ (2020) 3 *The Iranian Review for UN Studies (IRUNS)*, 33-74.

<sup>177</sup> UN Doc: A/CN. 4/727 Fourth report on peremptory norms of general international law (*jus cogens*) by D. Tladi, Special Rapporteur and previous reports.

<sup>178</sup> Article 53 of the VCLT.

<sup>179</sup> R. Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (Oxford Hart, 2015), 97.

acceptable to them, and also non-derogatory by them, this would possess all the qualities of *jus cogens*, albeit, at a regional or bilateral level.

Professor Kolb's position had been earlier theorized by G. Gaja when he criticized the perceived restrictive provisions of the VCLT on peremptory norms. Accordingly, he submitted that 'no convincing reason has ever been given for ruling out the possibility of the existence of non-universal, or 'regional' peremptory norms [particularly if those] values prevailing in regional groups do not necessarily conflict with values operating in a larger framework.'<sup>180</sup> An additional point is that regional necessities may have required the norms to attain a peremptory character in those specific regions.<sup>181</sup>

In the Inter-American system, the idea of a regional *jus cogens* has been met with a mixed and inconsistent reaction. As far back as 1987, the Inter-American Commission of Human Rights had held that 'in the member States (within the region), there is recognized a norm of *jus cogens* which prohibits the State execution of children.'<sup>182</sup> In a later case, the Commission submitted that this prohibition is a peremptory norm of general international law.<sup>183</sup> However, the ILC report, by the special rapporteur concluded that 'the inter-American human rights system does not provide support for the notion of regional *jus cogens*.'<sup>184</sup> In the European regional system, authors like Prof. Erika De Wet have argued that obligations in the European Convention on Human Rights have arguably attained the status of regional *jus cogens*.<sup>185</sup>

The prohibition of genocide, crimes against humanity and war crimes, in addition to other elements and constituents of these crimes are possible criminal norms to be covered under regional *jus cogens*. These norms are not only widely accepted, but are also enshrined in regional treaties and declarations. For example, regional treaties from Africa and the Latin America, explicitly prohibit both genocide and crimes against humanity.

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<sup>180</sup> G. Gaja, 'Jus Cogens Beyond the Vienna Convention', 172 *Collected Courses of the Hague Academy of International Law* (1981), 284.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Roach and Pinkerton v. United States*, IACHR Petition 12-439, No. 3/87.

<sup>183</sup> *Michael Domingues v. United States*, Case No. 12.285.

<sup>184</sup> ILC Fourth Report above, para. 40.

<sup>185</sup> ILC Fourth Report above, para. 24.

Whatever the merits or weaknesses of the debates on regional *jus cogens*, what is clear is that while majority of states seemed to have closed themselves to the idea, there is a growing number of scholars and practitioners who have started to tinker with the idea of regional *jus cogens*. While the analysis above suggests that there is a slow movement towards embracing the concept of regional *jus cogens*, there is a movement all the same, and it deserves some attention. It underscores the skepticism and limited openness to the idea of regionalism in public international law. The implication of this to the idea of regionalism in international criminal law is that while there has been limited interaction of regionalism in the realm of international criminal law, there appears to be some progress towards that trend.

## **Conclusion**

In this historical account, I have explored the changing nature of states' approach to complementarity and have established that the concept of regional complementarity came late in the development of ICL. While complementarity continuously reshaped itself and evolved in different models, it has not interacted with regionalism until very recently. The first model, referred to as 'optional complementarity model', was based on states' agreement to voluntarily relinquish jurisdiction. The second model was the outcome of the Nuremberg Military Tribunal experience, which prioritizes division of labour between the national and international jurisdictions. The outcome of the last two models is the traditional idea of complementarity as seen in the Rome Statute. No significant discussions have been taken place or attempts have been made to include regional institutions in the enforcement of international criminal law. This, in spite of the fact that since the 1950s, regional institutions have been playing critical roles in the field of human rights. I explored the difference between human rights and ICL in order to explain ICL's late interaction with regionalism. I suggested three factors responsible for the neglect of regional complementarity in the history of ICL. I argue that international law's absolutist view of sovereignty, ICL's liberal foundation and slow development, as well as its obsession with universality and cosmopolitanism are possible factors for ICL's late interaction with regionalism. My discussion on the concept of regional *jus cogens* also provided some context on international law's openness to the idea of regionalism in ICL. All these was to answer the question: why was regionalism neglected in the history and development of ICL and complementarity?