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

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CHAPTER 7. REGIONAL COMPLEMENTARITY AND THE RULES OF INTERPRETATION

Introduction

In this chapter, I ask the question: how do the rules of interpretation support the theory of regional complementarity? Put differently, I aim to argue that the ICC could develop a different complementarity reading that agrees with the Vienna Convention. To do this, I explored a number of sub-questions: whether article 17 of the Rome Statute could be interpreted to support the view that the ICC should consider a genuine action before a regional tribunal as sufficient to preclude the admissibility of a case before the ICC? How can the applicability of the VCLT to the Rome Statute provide some support for the theory of regional complementarity? Lastly, what relationship dimensions are anticipated in the application of regional complementarity and what interpretations would apply to resolve conflicts in these relationship dimensions? I present the theory of regional complementarity as the totality of efforts which enable regional expertise, institutions and policies to be deployed to prosecute international crimes and also encourage a strengthening of regional capacity in that process. I examine the theory by analysing some interpretation rules under international law. I also examine the Vienna Convention on the Law of Treaties (VCLT). I analysed the provisions of article 17 of the Rome Statute to inquire if prosecution before regional mechanism will be compatible with the complementarity provision of the Statute. I discuss the principle of international delegation and concluded that section with a discussion on the overriding benefits of regional complementarity. After a discussion on theory, I answer the question: what relationship dimensions are anticipated in the practical application of the theory of regional complementarity? This is important because a theory of regional complementarity will require practical application. I therefore explore the relationship dimensions that regional complementarity entails. I discuss five layers of relationship - how regional courts will interact with domestic court, sub-regional courts, other regional courts, hybrid tribunals and lastly, the ICC. The hierarchical nature of the interaction between these multiple layers of courts is also explored. In an instance where all the levels of court have competent jurisdiction over the same situation, I show that the problem is complicated. For example, in the CAR where the ICC, the SCCAR (a hybrid court) and the domestic system all have competence over crimes committed in that territory, what approach can be employed to resolve such complexities? The chapter is divided into two sections. In the

first section. I discuss the tension between different schools of interpretation as well as the applicability of the VCLT to the Rome Statute. In the latter part of the section, I discuss different principles of interpretation in order to support the notion of regional complementarity. In the second part, I explore the relationship dimensions that are anticipated in the practical application of regional complementarity.

1. Regional complementarity: A description

While the term 'regional complementarity' is somewhat new to ICL,[1] many of the underlying strands of the notion are already quite familiar. The idea that the ICC is a court of last resort, which should have a limited role in international crimes prosecution, is one of such strands.[2] The understanding that states bear the primary duty to punish crimes and that this could be done through international cooperation, even at a regional level, is another.[3] Again, the view that regional efforts toward the maintenance of international peace and security is a welcome development,[4] is yet another strand. More specifically, the idea that regional courts could serve as intermediary between national and international courts has received some scholarly attention.[5] This attention is partly because there is a debate among scholars on different rules of interpretation that applies to the Rome Statute. In international law, there are two major schools of interpretation - the literal and

[1] Du Plessis was one of the first scholars to use the coinage. He had used the term in his 2012 blog post titled 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes' (2012) *EJILTalk* at https://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/. Miles Jackson also used the term in his article titled 'Regional Complementarity: The Rome Statute and Public International Law' (2016) 14 *Journal of International Criminal Justice* 1061-1072.

[2] ICC as a court of last resort, see M. C. Bassiouni 'The ICC – *Quo Vadis?* (2006) 4 *Journal of International Criminal Justice* 3, 421–427.

[3] Paragraph 6 of the preamble to the Rome Statute provides that '[R]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.' Paragraph 4 also requires that effective prosecution of 'the most serious crimes of concern to the international community' must be 'ensured by taking measures at the national level and by enhancing international cooperation.' The joint reading of the two paragraphs suggests then that the Rome Statute also envisages that states are expected to take joint action in order to punish international crimes.

[4] An example of this can be found in UN Doc: S/PRST/2016/8, 'Statement by the President of the Security Council' where the President of the UNSC states in paragraph 3 that '[T]he Security Council reiterates its primary responsibility under the Charter for the maintenance of international peace and security, and recalls that cooperation with regional and sub-regional organizations in matters relating to the maintenance of international peace and security and consistent with chapter VIII of the Charter of the United Nations can improve collective security.'

[5] Sarah P. Nimigan 'Exceptional or Exceptionalism? The Malabo Protocol and 'Regional Complementarity' (2019) 17 *Journal of International Criminal Justice* 5, 1005-1029.

pragmatist/purposive schools of interpretations.[6] This is in line with the Vienna Convention on the Law of Treaties (VCLT). However, opinions are divided on the applicability of the VCLT to the Rome Statute. Dov Jacobs argues that ICL's principle of legality makes it inappropriate to apply VCLT to the Rome Statute.[7] Akande proposes that the VCLT applies to the Rome Statute, but not in its entirety.[8] I hold the view, just as the ICC does, that the VCLT applies to the Rome Statute.[9] I aim to clarify the point that regional complementarity could be construed within the ambit of the relevant provisions of the ICC Statute. The role that interpretation plays and the extent to which conflict be resolved through interpretation of the existing statutes is my focus. In answering the question as to how the rules of interpretation support the theory of regional complementarity, I establish the claim that the VCLT also envisages an interpretation that favours regional complementarity.

2. Interpretation of statutes- the VCLT and the Rome Statute

Article 31 of the VCLT embodies the general approach to treaty interpretation.[10] It provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' This provision refers to three aspects of interpretation. They are literal, systematic or contextual and teleological interpretation that concentrates on the object and purpose of a treaty.[11] None of these approaches takes precedence over the others as they are meant to be used in a "single combined operation".[12] Thus, interpreting a treaty provision has to take into account these three steps enquiry in order to achieve the right interpretative outcome. However, the literal analysis or an identification of the ordinary or plain meaning of the text is often the point to begin.[13]

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[6] T. Lonnquist 'The Trend Towards Purposive Statutory Interpretation: Human Rights at Stake' (2003) *Revenue Law Journal* 19.
[7] D. Jacobs 'International Criminal Law' in Kammerhofer J and D'Aspremont J, *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014) 473.
[8] D. Akande 'Treaty Interpretation, the VCLT and the ICC Statute: A Response to Kevin Jon Heller & Dov Jacobs' *EJIL: Talk* 25 August 2013.
[9] ICC-01/04-01/07 OA 6 Situation in The Democratic Republic of The Congo The Prosecutor V. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the PreTrial Chamber, para. 5.
[10] P. Viebig, *Illicitly obtained evidence at the International Criminal Court* (TMC Asser 2006) 17.
[11] *Ibid.*
[12] *Ibid.*
[13] R. Gardiner, *Treaty Interpretation* (OUP 2017) 2.

In this regard, an analysis of Article 17(1) of the ICC statute to ascertain if the word 'states' as contained in the provision refers only to a state is necessary. There is no doubt as to the meaning of the term states in article 17. What is however a subject of debate is whether the literal interpretation also precludes an interpretation that favors collective actions of states under a regional arrangement. To answer this, let me begin by borrowing the words of Field J. in *Williams v Evans* (1876) 1 Ex D 277 at 284 offers some guidance:

> No doubt it is a maxim to be followed in the interpretation of statutes, that the ordinary grammatical construction is to be adopted; but when this leads to a manifest absurdity, a construction not strictly grammatical is allowed, if this will lead to a reasonable conclusion as to the intention of the legislature.[14]

An interpretation that precludes joint efforts by states, on an action for which they individually have a right to act upon may amount to manifest absurdity. However, in this case, a textual interpretation of the Rome Statute may be flawed, but does not necessarily lead to manifest absurdity. The use of expressions such as 'a State' and 'the State' in article 17(1)(a) suggests that the drafters intended for the provision to refer to a single state that has jurisdiction over the alleged crimes. My thesis is that it may well be that drafters simply did not envisage the possibility of regional courts being engaged for international crimes prosecution. That it was not envisaged at that time does not make its emergence illegal or inappropriate. The text reflects this idea, without necessarily showing manifest absurdity.

Moreover, the VCLT also proposes a teleological interpretation. This places equal importance on the object and purpose of the statute, as it does on the literal meaning. An application of teleological interpretation helps to arrive at a proper meaning of 'State' that agrees with the entirety of the Rome Statute. In that regard, an interpretation that favors an analysis of the object and purpose of the Rome Statute would not be out of place and will be firmly within the contemplation of the VCLT, and thus valid. A teleological approach to interpretation is not without its faults. One example in international criminal law is when it yields odd results as to make the outcome of the purposive interpretation erode the meanings to be derived from text and other purposes of the

[14] F.A.R. Bennion *Bennion on Statute Law* (Longman 1990) 168.

treaty.[15] The interpretation of 'State' to also mean 'a group of States', that I propose here does not yield an odd result that negates the text, context and purpose of the Rome Statute.

2.1. Literalists vs Pragmatists

Jackson explored how criminal prosecutions before regional (or sub-regional) tribunals would fit into the provisions of Article 17(1)(a) of the Rome Statute. He concluded that 'a genuine criminal prosecution by a lawfully constituted regional tribunal means that "the case is being… prosecuted by a State which has jurisdiction over it" for the purposes of Article 17(1)(a). He argued that regional complementarity agrees with a proper understanding of the nature of the relationship between states and regional tribunals; with the provisions of Article 31 of the VCLT; is consistent with the values underlying the principle of complementarity and makes sense as a matter of policy.[16] With this view, Jackson belongs in the pragmatist school of thought: those who favour a strategic and creative interpretation of the Rome Statute. In this school, scholars like Scharf hold that the Rome Statute was deliberately drafted to preserve what they termed a 'creative ambiguity'. This ambiguity leaves room for ICC Prosecutor and judges to improve on the Rome Statute by deferring to truth commissions or other restorative justice mechanisms.[17] Others argue that certain provisions in the Rome Statute can be creatively interpreted to allow the ICC defer to regional courts. According to one such author, 'if the ICC is to fulfill its promise, its role in ending impunity should not be limited solely to pursuing cases. Instead, the ICC should defer to regional courts…'[18] They argue that the Rome Statute, like the UN Charter,[19] is a 'living document that is capable of

[15] D. Robinson 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 935.
[16] M. Jackson 'Regional Complementarity: The Rome Statute and Public International Law' (2016) 14 *Journal of International Criminal Justice* 1, 1061-1072.
[17] See A. Seibert-Fohr 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' (2003) *Max Planck Yearbook of United Nations Law* 553-590. See also M. P. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', 32 *Cornell Int'l L.J.* 526– 27.
[18] T. E. Sainati 'Divided We Fall: How the International Criminal Court Can Promote Compliance with International Law by Working with Regional Courts' (2016) 49 *Vanderbilt Journal of Transnational Law* 191-243.
[19] D. Kastrup 'From Nuremberg to Rome and Beyond: The Fight Against Genocide, War Crimes, and Crimes Against Humanity' (1999) 23 *Fordham International Law Journal* 2, 414.

adapting to changing circumstances and needs.'[20] They also favour a 'purposive interpretation' of the complementarity provisions of the Rome Statute.[21]

However, scholars in the literalist school of thought hold otherwise. Vaid notes that '[B]ased on the *plain text* of the complementarity provisions of article 17, this action must begin with *a domestic investigation* before the state either prosecutes or decides not to prosecute a particular case.'[22] Du Plessis argued that '…the prosecution of a case by the African Court [cannot] bar the ICC from prosecuting the very same case under the principle of complementarity, as Article 17 of the Rome Statute refers to 'states' and not to other courts.'[23] This approach favours a strict textual interpretation of the ICC Statute,[24] and reflects the view that article 17(1) of the Rome Statute would need to be amended to reflect an action by a group of states acting under a regional arrangement, since it currently speaks of states and not 'group of states'. Some other scholars have also drawn from article 22(2) to argue that the Rome Statute itself, or at least its provisions on the definition of crimes, should be 'strictly construed and not be extended by analogy.'[25] They generally urge judges not to usurp the authority and role of the legislature or drafters of the law. Many reasons have been advanced for a preference for strict interpretation of statutes. They include the need to give notice on the consequences of criminal actions; upholding the principle of separation of power as well as limiting arbitrary enforcement of criminal law.[26] While these reasons are valid, they do not apply to the issue under discussion. My argument relates to an interpretation that expands forum of prosecution, and not about giving notice on consequences of criminal actions. My interpretation does not erode the principle of separation of power. And lastly,

[20] M. Crowley, *Chemical Control: Regulation of Incapacitating Chemical Agent Weapons, Riot Control Agents and their Means of Delivery* (Palgrave Macmillan 2016) 194.
[21] G. Werle, L. Fernandez and M. Vormbaum (eds.), *Africa and the International Criminal Court* (Asser Press 2014) 231.
[22] K. Vaid 'What Counts as "State Action" under Article 17 of the Rome Statute? Applying the ICC's Complementarity Test to Non-Criminal Investigations by the United States into War Crimes in Afghanistan' (2012) 44 *Journal of International Law and Politics* 573-628, at 535.
[23] M. Du Plessis 'Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes' (2012) 235 *Institute for Security Studies Paper* 11.
[24] For reflections on different approaches to interpreting the ICC statute, see L. Sadat & J. Jolly 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot' (2014) 27 *Leiden Journal of International Law* 3, 755-788.
[25] C. Davidson 'How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court' (2017) 91 *St. John's Law Review* 1, article 3 at 37.
[26] *Ibid,* 56-68

does not promote arbitrary enforcement of criminal law. If anything, a regional court is also expected to uphold these values.

With an understanding of the tension between these schools, this chapter makes a case for the pragmatist school of thought. It argues that to the extent that the drafters of the Rome Statute contemplated the possibility of other prosecution avenues and strategies beyond strict prosecutions before formal judicial mechanisms of a state, prosecution of crimes before regional entities is permissible, even if not expressly stated in the Rome Statute. Additionally, this view is reflected in the OTP's recent policy on complementarity and cooperation where it argued that '[A]lthough article 17 of the Statute directs its attention to whether a case is being investigating or prosecuted by a State, this does not limit the potential application and operability of the admissibility provisions to other criminal accountability mechanisms capable of satisfying the admissibility requirements set out in the Statute.'[27]

In the next sub-section, I will examine different principles under international law to argue that prosecution of international crimes in a regional court that is properly constituted, is not incompatible with the Rome Statute.

2.2. The functionalist or teleological interpretation of statutes

Regional complementarity agrees with the overarching function and purpose of the Rome Statute, which is 'to end impunity for mass atrocity crimes.'[28] This teleological approach to interpretation considers the overall function of the law to be interpreted. Assessing the procedural features of an institution cannot be done unless there is some understanding of its goals.[29] In essence, adopting an interpretation that accommodates international crimes prosecution before a regional court may help further the goals of the Rome Statute. After all, accountability for international crimes should not be a matter of exclusive concern to the ICC alone. As Nmehielle puts it, '[no] treaty has an

[27] ICC-OTP 'DRAFT Policy on Complementarity and Cooperation' September 2023, para. 80.
[28] Mr. James Stewart Deputy Prosecutor of the International Criminal Court "Transitional Justice in Colombia and the role of the International Criminal Court" 13 May 2015.
[29] P. Viebig *Illicitly obtained evidence at the International Criminal Court* (T.M.C Asser Press 2006) 17.

exclusionary character in terms of having totally occupied the field for purposes of treaty-making in an area of human endeavor or international regulation.'[30]

In practical terms, there are ample instances where the ICC may not even be the appropriate or choice forum for prosecuting crimes, especially since many key states are not members.[31] As an example, key members of the UNSC have refused to join the Court. A regional court might be able to fill the gap. A study which does not specifically center on a regional criminal court found that 'powerful states' are more eager to join regional organizations, than they would a universal one.[32] Another study found that joining judicial regional organizations can promote economic integration.[33] States are likely to be more willing to join a regional criminal court than a universal one. Reasons may include the ability to set the agenda and influence negotiations of such organizations.[34] Note however, that a state's refusal to join the ICC does not preclude the UNSC's power to make a referral as it did in the Darfur situation in 2005 and the Libya situation in 2011.[35] Although, UNSC members with veto powers may frustrate any attempt by the UNSC to refer a situation that may affect them or their allies to the ICC. In 2014 for example, Russia and China vetoed a UNSC resolution to refer Syria to the ICC.[36] Also, the ICC's jurisdiction is limited to the most serious crimes of genocide, war crimes, and crimes against humanity. While these are indeed serious crimes, they are not the only crimes of concern to the international community. Thus, the ICC may not be well-placed to prosecute such other crimes that are of particular concern to different regions of the globe.[37]

Turning to the preamble of the Statute, paragraph 4 provides that 'affirming 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

[30] V. O. Nmehielle ''Saddling' the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?' (2014) 7 *African Journal of Legal Studies* 7–42 at 24-35.
[31] F.K. Tiba 'Regional International Criminal Courts: An Idea Whose Time Has Come?' (2016) 17 *Cardozo Journal of Conflict Resolution* 52, 523.
[32] D. Panke & S. Stapel 'Architects of regional regime complexity: states and regional organizations' (2021) *Journal of Contemporary European Studies* 1-18.
[33] E. Voeten 'Regional Judicial Institutions and Economic Cooperation: Lessons for Asia?' (2010) *ADB Working Paper Series on Regional Economic Integration*, 2-4.
[34] Panke & Stapel, (n. 32) 8.
[35] Tiba (n. 30) 523.
[36] UN Press Release 'Russia, China block Security Council referral of Syria to International Criminal Court' 22 May 2014.
[37] Tiba (n. 31) 523.

international cooperation.' The involvement of regional bodies in crimes prosecution is an example of attempts at 'enhancing international cooperation'. To this end, where cooperative international efforts are geared towards effective prosecution of crimes, such activities not only promote international justice, but also further the goals of the Rome Statute. The sixth recital of the Preamble further provides 'that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'. If a state chooses to exercise such jurisdiction in a case, through 'internationalized trials' at the regional court, it would defeat the purposes of the Statute, as established in the preamble, to argue that such trials do not fit within Article 17 of the Rome Statute.

In a similar sense, if the crimes punishable by the ICC are indeed of concern to the international community as whole, the specific usage of the term 'international community' connotes the inclusion of 'regional communities' within the wider meaning of the term 'international community'. International community implies the aggregate sum of national entities. In the same way, regional communities can be subsumed under that larger term and thus owe a duty to punish international crimes and close the impunity gaps as national entities would, under the principle of complementarity. To the extent that such crimes are of concern to the international community (and by extension, regional communities), the duty to prosecute rests with regional communities with the same degree to which it rests with national entities.

Moreover, the purposive or contextual approach to interpretation of legal texts deals with the mischief that the law to be interpreted was meant to cure. If the same question is asked in the context of the Rome Statute, the answer will be found in the preamble, especially paragraph 4 and 6. Thus, if the goal of the Rome Statute is to end impunity by taking measures at the national level, which may involve or include the delegation of such duties by national actors to regional bodies, the purpose of the Statute would have been fulfilled and the world would be edging closer to ending impunity.

On the whole therefore, it is necessary to underscore complementarity's potential to create a broader culture of accountability and prevention of mass atrocity crimes.[38] In this regard, this work

[38] C. Stahn "Taking complementarity seriously: On the sense and sensibility of 'classical', 'positive' and 'negative' complementarity" in C. Stahn & M. El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011) 234.

promotes regional complementarity's broad capacity to hasten the realization of this goal by bringing justice to the victims of international crimes, thus closing the impunity gap.

2.3.The expanded interpretation of statute

In finding further support for regional complementarity, I attempt an expanded and comparative analysis of Articles 17(1)(a) & (c) and 20(3) of the Rome Statute. The analysis here is speculative. The ICC is yet to interpret certain unresolved ambiguities regarding the application of the principle of *ne bis in idem*.[39] The analysis relates to forum and timing of investigation and prosecution. It considers the difference in the formulation of Articles 17(1)(a) and (c) and 20(3).

First, Article 17(1)(a) partly reads that 'the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it…' Article 17(1)(c) however reads as follows: '[T]he person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3.' The first observation as to timing is that while sub (a) refers to a situation where a state is investigating or prosecuting, the operative word is 'being', a present continuous action. Sub (c) however refers to a situation where a person has already been tried. This implies that perhaps, in the minds of the drafters of the Rome Statute, if the other factors in Article 20 are met, the provisions herein could be interpreted to accommodate a likely situation where ICC jurisdiction may not be barred before a verdict is reached by a court, but may be barred after such court has concluded its proceedings and reached a verdict. This distinction between the investigation and prosecution stage as per sub (a) and the verdict or completion stage as per sub (c) presents possibility for prosecution before other entities outside of a domestic court (e.g. regional court). What is not in doubt however is that Article 17(1) distinguishes between sub (a) and sub (c) to the effect that an ICC jurisdiction can be activated when investigation and prosecution is ongoing as per sub (a) but may be impermissible after a verdict has been reached, as per sub (c). Taking this further, a thorough analysis of Article 17(1)(a) and (c) cannot be done without due reference to article 20(3) as has been mentioned in sub (c).

[39] For an analysis on the ambiguities around *ne bis in idem* and gravity at the ICC, see M. M deGuzman 'Complementarity at the Africa Court' in C. Jalloh and Ors. (eds) The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges (CUP 2019) 18-22.

Article 20(3) provides that '[N]o person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8bis shall be tried by the ICC with respect to the same conduct…' It should be noted here that the Rome Statute employs the use of the term 'another court', without necessarily using the specific term 'National or States', as it did in Article 17(1)(a). This blanket reference to 'another court' may have opened the possibility for wide and plausible creative interpretations that can accommodate the likelihood of a regional court that has been properly constituted.

As such, the Rome Statute itself envisages the likelihood of another court - possibly, a regional court - prosecuting international crimes, which will then render inadmissible the prosecution of the same conduct before the ICC. As per rules of interpretation, the express mention of one thing excludes the other (the principle of *expressio unius exclusio alterius*). The converse is also true. The non-express mention of one thing may not exclude another not expressly excluded. In this regard, a look at Article 20(3) of the Rome Statute reveals that the Statute here refers to 'another court', without necessarily limiting it to national courts, as found in 17(1)(a). Therefore, it can be argued that the drafters of the Rome Statute might have contemplated an interpretation of the complementarity provisions of the Statute that takes into consideration courts other than national courts, and in this case, a regional court. This creative interpretation notwithstanding, this research places much emphasis on seeing regional courts as projects emerging from the cooperation of states, rather than mechanisms that derive their legitimacy or justification from any expanded interpretation of the Rome Statute.

To conclude, the words of De Sloovere are apt, particularly in relation to interpreting Article 17 to accommodate collective efforts of states to jointly punish international crimes at a regional level. De Sloovere argued that:

> Truly, there may be an obvious meaning, and no other may be apparent even after a careful reading of the statute; but to stop there is only to solve the problem of interpretation by avoiding it... A statute, then, is not fully interpreted until it is shown that the meaning chosen accords with the subject-matter, the statutory purpose and the remaining portions of all statutory texts involved.[40]

[40] F. J. De Sloovere 'Contextual Interpretation of Statutes' (1936) 5 *Fordham Law Review* 2, 219.

A careful contextual interpretation of the word 'states' in Article 17 of the Rome Statute will also accommodate all efforts that are collectively undertaken by states at a regional level to punish international crimes, including through a regional tribunal.

2.4. The principle of international delegation

One of the consequences of the proliferation of international organizations is 'the shift in the locus of decision-making on a whole range of governance issues from national governments to international organizations.'[41] This is referred to as the principle of international delegation.[42] The principle is defined as a grant of authority by a state to an entity to make decisions or take actions that bind the state or commit its resources.[43] This grant of authority traditionally empowers the latter to act on behalf of the former; in this instance, the regional organization acting on behalf of the states in question. The principle is not a novelty in international relations,[44] and there is no question that states with primary jurisdiction can indeed delegate jurisdiction to an international organization. What has however been a question of debate is the legal effect and limits of such delegation. It is a trite principle which has become common state practice.[45] This delegation is often done through ratification of treaties, as every state possesses the capacity to conclude treaties.[46] The effect of treaty ratification, according to the VCLT, is that states, by virtue of the principle of *pacta sunt servanda*, are bound by their obligations under that treaty.[47]

What is the legal effect of a state's delegation of its criminal jurisdiction to an international tribunal? The legality of states delegating their criminal jurisdiction to one another has been fully

[41] D. Sarooshi 'Some Preliminary Remarks on the Conferral by States of Powers on International Organizations' (2003) *Jean Monnet Working Paper 4/03* at 3.
[42] For a general discussion on the principle, see the following: C. Bradley & G. Kelley 'The Concept of International Delegation' (2008) 71 *The law and Politics of International Delegation* 1, 1-36; O.A. Hathaway 'International Delegation and State Sovereignty' (2008) 71 *Law and Contemporary Problems* 115-149 and J. Erne 'Conferral of Powers by States as a Basis of Obligations of International Organizations' (2009) *Nordic Journal of International Law* 1
[43] Bradley & Kelley (n. 42).
[44] P. Jessup *A Modern Law of Nations* (Macmillan Publishers 1948*)*
[45] S. Wallerstein 'Delegation of Powers and Authority in International Criminal Law' (2015) 9 *Criminal Law and Philos*123–140.
[46] Art. 6 of the VCLT.
[47] Art. 26 of the VCLT.

established and is not in doubt.[48] Indeed, as stated by Akande, 'the fact that overwhelming majority of states have been prepared to delegate and to accept delegations of jurisdiction…is evidence that states generally take the view that such delegations of jurisdiction are lawful.'[49] In fact, there is almost no state that is not a party to at least one treaty that delegates criminal jurisdiction to another state.[50]

The pertinent question therefore is whether delegating such authority to a regional tribunal would amount to a nullity under international law. This is important because once the legal effect of such conferral of powers is shown, then the idea of regional complementarity makes sense as a legal theory. Akande answers this question in the affirmative. Although his focus was on the effect of such delegation of powers to the ICC, especially the jurisdiction over nationals of non-party states, his reasoning is equally applicable to regional tribunals. He noted Morris' divergent view. Morris had argued that 'there are very significant differences in the consequences and implications of ICC jurisdiction as distinct from state jurisdictions [and] that it cannot be said that the option of delegating state's jurisdiction to an international court is an already established feature of customary law of universal or territorial jurisdiction.'[51] Akande disagrees and states that there are reasons to suggest that delegation of national jurisdictions to the ICC is lawful. First, majority of the crimes in the ICC statute are offences over which states can exercise universal jurisdiction if the accused is present in their territory. Second, all states are permitted or required to exercise jurisdiction over certain crimes because 'those crimes are deemed to be prejudicial to the interest of the international community as a whole.'[52] Thus, when a state acts in this manner, such state is acting on behalf of the international community as a whole. Akande rightly concludes that it will be incoherent to argue that a rule that permits states to act individually will disqualify them from acting collectively in respect of the same crimes, in the absence of a specific rule that disqualifies collective action.[53]

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[48] D. Akande 'The Jurisdiction of International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *Journal of International Criminal Justice* 618-650 at 625-626.
[49] *Ibid* at 624.
[50] *Ibid.*
[51] M. Morris 'The Jurisdiction of the International Criminal Court over Nationals of Non-Party States: Conference Remarks' (2000) 6 *ILSA Journal of International and Comparative Law* 366.
[52] Akande (2003) 626.
[53] *Ibid.*

Wallerstein had maintained a position similar to Akande, when he submitted that 'in principle, delegation of power may ground the jurisdictional authority of any international criminal tribunal'.[54] The former was reacting to Luban's argument that the authority of international criminal courts cannot be based on delegated authority.[55] While admitting that it is not in all cases that the principle of delegated powers can be the basis for the jurisdiction of a criminal tribunal, he suggests that two questions must be asked in order to arrive at a proper answer: 'were powers, in fact, delegated to the tribunal? If so, were the delegating states right in delegating their power to punish in the specific case?'[56] He submitted that it is only when the two questions have been affirmatively answered, that we can safely base the jurisdiction of a tribunal on delegated powers.[57]

Flowing from this principle of international delegation as a result of treaty ratification, parties to a treaty establishing a regional mechanism could be said to have delegated their national criminal jurisdiction to such a regional mechanism.

There are however other alternative approaches to understanding the principle of international delegation, in relation to the jurisdiction of international criminal mechanisms. Some authors have expressed views that fundamentally challenge the idea that the jurisdiction of an international criminal mechanism flows from the principle of international delegation. One of such is the view as championed by Sadat that 'States "confer upon" or "accept" the jurisdiction of international courts and tribunals like the ICC not to transfer a subset of their own power to those entities, but because they often want and need those courts and tribunals to do things that they cannot do in their national systems.'[58] The other view, as championed by Frédéric Mégret is the understanding that the two broad views of the ICC as either a court of the world, or one for only the state parties, is insufficient in capturing the court's jurisdictional foundation.[59]

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[54] S. Wallerstein (n. 45) 124.
[55] See D. Luban Authority and responsibility in international criminal law' in J. Tasioulas & S. Besson (eds) *The Philosophy of International Law* (Oxford University Press 2009).
[56] Wallerstein (n.45) 139.
[57] *Ibid*.
[58] L. Sadat 'The Conferred Jurisdiction of the International Criminal Court' (2023) *Washington University in St. Louis Legal Studies Research* Paper No. 23-03-01, 1-63.
[59] See F. Mégret 'The International Criminal Court: Between International Ius puniendi and State Delegation' (2020) 23 *Max Planck Yearbook of United Nations Law*, 1-47.

2.5. The overriding benefits approach

There are many benefits of regional prosecution over an international or centralized prosecution. Placed side by side with prosecutions at the ICC, prosecution before a regional court has many advantages. These advantages make the theory and practice of regional complementarity a necessity. For one, the ICC's justice is symbolic and often far removed from the victims as it is ensconced in faraway city of the Hague in the Netherlands, while regional efforts figuratively bring justice home.[60] The idea of bringing justice home does not only imply proximity to the geographical location where the crimes occurred. For example, a regional tribunal based, say, in Addis Ababa may not necessarily 'bring justice home' in Lagos or in Bamako. Regional tribunals are not necessarily based in the country most affected. However, the fact that a regional court will most likely be officiated by people of the same region with the defendants and victims may improve the perception of credibility and legitimacy. Also, regional efforts may in themselves enhance positive perception of prosecution of international crimes. This is because justice is seen as being dispensed within the continent, by people of the continent, and may be deemed as a practical local solution to local problems. This echoes the idea behind the call for 'African solutions to African problems.'[61] Again, regional courts are sited in the same continent where the crimes occurred. They are therefore closer to the scenes and perpetrators of crimes and as such may be more suitable for evidence gathering, procuring witnesses, victims and indeed defendants. Lastly, there is less chaos and uncertainties around the applicable legal systems for crimes prosecution at the regional level thus enhancing the credibility perception of the entire process.

With these supports for the theory of regional complementarity, it is clear that disputes over the application of regional complementarity can be resolved through a contextual interpretation of the Rome Statute and other international law instruments. This, is a way to make the Rome Statute less strict and to accommodate the prosecution of international crimes in a properly constituted regional tribunal.

[60] O.A. Maunganidze & A. du Plessis 'The ICC and the AU' in C. Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford Univ. Press 2015) 82.
[61] N.C. Ani 'Three Schools of Thought on "African Solutions to African Problems' (2019) 50 *Journal of Black Studies* 2 135-155.

In the next section, I will explore five relationship dimensions that are anticipated in the operationalization of regional complementarity.

3. Relationship dimensions of regional complementarity

Complementarity is a tool for organizing the relationship between the ICC and national criminal mechanisms.[62] However, there are other variations in which the concept has been contextualized.[63] Accordingly, complementarity has been observed in the context of the relationship between the *ad hoc* tribunals and their national mechanisms; between hybrid courts and national courts; between regional and/or sub-regional courts and national courts, on one hand, and also between regional courts and global courts like the ICC, on the other hand; and lastly, complementarity variation in state to state cooperation.[64] My focus is on regional complementarity and the multi-layered dimensions of the relationships that a regional court could have with other courts. A regional court may interact with national mechanisms, sub-regional mechanisms, a hybrid court, other regional mechanisms and universal criminal jurisdiction like the ICC. These levels of interactions reveal either horizontal and vertical hierarchies. For instance, the relationship between a regional court and other regional courts are horizontal in nature. This is without any debate. Also, the relationship between national mechanisms and a regional court is vertical. But the hierarchical nature of the relationship between a regional court and the ICC, as well as a regional court and sub-regional courts in a region is open to debates. In the next sub-section, I will analyse each of this relationship to explore how jurisdictional clashes that arise from competing obligations could be resolved if they were to arise.

3.1.Regional court and national courts

The first dimension that regional complementarity entails is the relationship between a regional court and state criminal jurisdictions. This is similar to the relationship envisaged by the classical

[62] There are several academic works detailing this understanding. For example, see C. Stahn & M. El Zeidy (eds) *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011). See also J.K. Kleffner 'Complementarity in the Rome Statute and National Jurisdictions' (2008) *Oxford University Press;* ICJ Kenya 'International Criminal Justice: The ICC and Complementarity' (2014) ICJ Kenya ISBN No. 9966-958-70-3.
[63] C. Stahn *Fair and Effective Investigation and Prosecution of International Crimes, Inventory and State-of-the-Art: Context, Cluster 1 and Cluster 2* (International Nuremberg Principles Academy 2018).
[64] *Ibid.*

notion of complementarity in the Rome Statute. To that end, the ICC will only intervene when a state is either unable or unwilling to carry out investigation or prosecution. In the same manner, this dimension implies that the relationship between a regional court and its member states will be governed by complementarity. I am however only able to attempt a speculative analysis of this dimension. The reasons are obvious. There is only one region that has made a move towards full regionalism in ICL. Even at that, the regional court is not yet operational. Hence, all analysis relating to complementarity practice can only be futuristic. This is why the Malabo Protocol becomes my reference point in this section.

The actual provisions on complementarity in the protocol is contained in article 46H. It provides partly that '[T]he jurisdiction of the Court shall be complementary to that of the National Courts...' This hierarchical relationship is vertical in nature. It is similar to the vertical relationship between the ICC and national courts. The regional court is an 'international' entity in relation to national mechanisms. In this regard, the regional court enjoys 'superiority and a sense of authority' over national mechanisms.[65] This contrasts with the horizontality of the inter-state relationship dimension.[66] The provision of Article 46H of the Malabo Protocol largely replicates article 17 in the Rome Statute, with minor differences.

3.2.Regional court and a similar regional court

Assuming that another region decides to establish a regional criminal court as the African Union has attempted, what will be the nature of the relationship between these regional courts? Secondly, if these two courts have jurisdiction over a situation, which court will have primacy? The answer to the first question appears straight forward. The hierarchical relationship will be horizontal. It is similar to the relationship that exists between courts of coordinate jurisdictions within a state. Regional practices in the EU offer certain perspectives on which national court will have jurisdiction where more than one national mechanism has competence to prosecute a crime.

[65] F. Mégret 'In Search of the 'Vertical' An Exploration of What Makes International Criminal Tribunals Different (and why)' in Larissa van den Herik & Carsten Stahn (eds.), *Future Perspectives on International Criminal Justice*, (T.M.C. Asser 2010) 5.
[66] *Ibid.*

Certain factors must be assessed to determine which jurisdiction is better placed to prosecute. These factors include territoriality, location of suspects, interest of victims, among others.[67]

3.3. Regional court and the ICC

The third relationship dimension of regional complementarity is the idea of complementarity between global institutions like the ICC, on one hand, and regional criminal tribunals, on the other hand. The relationship between these levels of courts presents two possible scenarios. One is a vertical relationship where the ICC is hierarchically superior to the regional court. The second is a horizontal relationship where they relate as equals.[68] These two scenarios have different implications. In a horizontal dimension, it could be argued that the two courts are supranational entities, whose memberships consist of a conglomeration of states.[69] Since there is only one region that has made a move to full regionalism, the AU remains the example for reference. As identified by Du Plessis, one of the limitations inherent in Article 46H of the Malabo Protocol is its complete silence on any possible future relationship between the African Court and the ICC specifically. In his words, 'It is unfathomable that the draft protocol nowhere mentions the ICC.'[70] This lacuna shows that the jurisdictional relationship between the African Court and the ICC is not entirely clear.[71] Unless the Rome Statute or the treaty establishing a regional criminal tribunal specifically provides for a relationship between these two levels of courts, the debate about the nature of their relationship will continue. The underlying assumptions in their relationship should be that the regional tribunal and states are working for a common goal and as such, comparative advantage should be the basis for intervention by any of the mechanisms. Either party should also be willing and ready to offer help and assistance where it is needed.

One practical approach towards resolving a likely conflict in this regard, is a textual amendment to the Rome Statute or the instrument establishing the regional mechanism. At this point that the Malabo Protocol has not come into effect, it is not out of place to undertake a review that

[67] Eurojust 'Guidelines for Deciding 'Which Jurisdiction Should Prosecute?' (2016).
[68] M. du Plessis 'Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes' (2012) *Institute for Security Studies Paper* 235: 1-14.
[69] *Ibid.*
[70] *Ibid.*
[71] H.G. Van der Wilt 'Complementary Jurisdiction (Article 46H)' in G. Werle & M. Vormbaum (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (TMC Asser Press 2017).

specifically mentions the ICC and clarifies many aspects of the future possible relationship between the two courts. Additionally, while it is admittedly a herculean task, an amendment of the Rome Statute that adds the phrase 'groups of states acting under a regional arrangement', to the provisions of article 17 will readily address the challenges posed by a strict interpretation of the text. In that regard, if article 17(1)(a) is amended to read as follows: 'The case is being investigated or prosecuted by a State (or a group of states acting under a regional arrangement) which has jurisdiction over it…', this would address the challenge of jurisdictional conflict between the ICC and any regional tribunal with an ICL mandate. Also, as noted in chapter 6, the use of MOU on cooperation and to clarify roles between the ICC and states, have become a common practice. The use of such soft instruments between a regional mechanism and states, as well as between the ICC and a regional court, could be adopted for similar purposes.

3.4. Regional courts and sub-regional courts

The fourth relationship dimension that regional complementarity connotes is complementarity between a regional court and sub-regional courts within the same region. For the reasons stated earlier, the Malabo Protocol will be the basis for this analysis. The Protocol specifically provides for a relationship between a regional court and sub-regional courts. It says the court will be complementary to national courts and 'the courts of the Regional Economic Communities where specifically provided for by the Communities.' The AU, through the African Economic Community (AEC), officially recognizes eight Regional Economic Communities (RECs).[72] These regional groupings of African states were established 'as the basis for wider African integration, with a view to regional and eventual continental integration.'[73] Some of these RECs possess active judicial organs known as courts or tribunals. ECOWAS has a court while SADC has a tribunal. The challenge that these judicial organs of the RECs pose is that they not only interpret the African Charter, as the African court, they also 'constitute the overlapping regimes that contend and contest

[72] These are the Arab Maghreb Union (AMU); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States (CEN-SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD); and the Southern African Development Community (SADC). See African Union, 'Regional Economic Communities (RECs)' at https://au.int/en/organs/recs.
[73] S. Ebobrah 'Complementarity between the African Court and the judicial organs of Regional Economic Communities in Africa' in *PALU Guide to Complementarity within the African Human Rights System* (PALU 2014) 52.

with the African Court for authority in the field of human rights.'[74] This then explains why the Malabo Protocol specifically created a complementary relationship between them and the African court. In fact, as noted by Ebobrah, the RECs judicial organs 'represent some of the greatest danger to the unity and coherence of Africa's international human rights law.'[75] Importantly, they could serve as transitional justice mechanisms.[76] As of today, none of the judicial organs of the RECs has explicit provision on complementarity between them and the African court. More importantly, none has a criminal jurisdiction. But that may also happen, seeing that the African court, which hitherto had no such jurisdiction, now has same. If that were to happen, it will add to the existing confusion on what the relationship should look like. But then, the same arguments that have been advanced for operationalizing the relationship between the ICC and the African court may be applied in the case of the African court and RECs.

Article 46H of the Protocol strongly suggests that 'the African Court can accept a case, not only after the national court of an indicted person has proved 'unwilling' or 'unable' to prosecute, but also after a REC court that has jurisdiction has also failed to prosecute that person.'[77] This twin-layered complementarity provision is innovative but also presents multiple challenges. The complexities that are involved in an analysis on whether a state is unable and/or unwilling becomes double where the regional court must conduct the same analysis for a state as well as a sub-regional court. Also, as Kamari Clarke and others have noted,[78] many states in Africa belong to multiple RECs, so it implies that the 'unwilling' and 'unable' analysis would need to be done in respect of many RECs that a defendant's state belongs to. This, undoubtedly, is a herculean task and its operationalization remains in the realm of imagination.

As I have earlier argued while discussing the relationship between regional courts and the ICC, the relationship between a regional and sub-regional court also presents two possible scenarios. One is a vertical relationship where the regional court is hierarchically superior to the sub-regional court. The second is a horizontal relationship where they relate as equals. Again, the two scenarios

[74] *Ibid*.
[75] *Ibid*.
[76] A. Heinrich 'Sub-Regional Courts as Transitional Justice Mechanisms: The Case of the East African Court of Justice in Burundi' in J. T. Gathi (ed) *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change* (Oxford University Press 2021) 88-105.
[77] K. Clarke & ors 'Introduction' in C. Jalloh & ors 'The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges' (CUP 2019) 47.
[78] *Ibid.*

have different implications. In a horizontal dimension, it could be argued that the two courts are supranational entities, whose memberships consist of a conglomeration of states.

3.5. Regional courts and hybrid tribunals – the case of the SCCCAR

The fifth relationship dimension that regional complementarity connotes is complementarity between a regional court and a hybrid tribunal. Current practices suggest that despite the existence of the ICC, and the move towards regionalism in ICL, the establishment of hybrid tribunals to try atrocities associated with specific conflicts continues. In fact, regions that are moving towards full ICL regionalisation are also involved in the project of establishing hybrid tribunals to address specific contexts. It is therefore not impossible that a hybrid tribunal could exist alongside the national mechanism, in a country that is a state party to both the ICC and a regional criminal court. We could even add a state's membership of a sub-regional court to the mix. The relationship between such hybrid tribunal and the regional court will depend on a proper analysis of the enabling instrument of both courts. The current example of a situation like this is the hybrid court in the Central African Republic – The Special Criminal Court in the Central African Republic (SCCCAR).

The SCCCAR is the first hybrid tribunal to have been established in a country where the ICC is also investigating international crimes. The tribunal was established to try crimes that were committed in the context of the political violence that engulfed the CAR from 2011 to 2014. Like the ECCC that was earlier discussed, it was established by domestic legislation (organic law) and embedded into the domestic system of CAR. It applies national and international laws. It will prosecute national and international crimes. It has a mixture of local and international staff and judges. It held its inaugural session in 2018. Stahn submits that its establishment shows that an ICC involvement in a situation cannot sufficiently deal with accountability dilemmas.[79] Its establishment also grounds the argument that the ICC cannot sufficiently respond to all the justice needs arising in the world. Hence, the need for other accountability measures like regional criminal courts.

[79] C. Stahn *A Critical Introduction to International Criminal Law* (OUP 2019) 208.

In May 2014, the CAR government made a self-referral to the ICC. In September 2014, the OTP opened an investigation. The ICC has made three arrests since investigation was opened.[80] The organic law establishing the SCCCAR provides for a relationship between the ICC and the tribunal. While the SCCCAR enjoys primacy over national courts, the ICC enjoys primacy over the SCCCAR.[81] Authors like Labuda have criticised this provision as contradicting ICC's complementarity regime and incompatible with international law.[82] I agree with this submission. Article 41 of the SCCCAR's rules of procedure and evidence requires that the SCCCAR Prosecutor should, 'in the interests of efficiency and judicial economy, consult, as much as possible, [with] the Prosecutor of the ICC regarding the implementation of his investigation and prosecution strategy.'

The nature of the relationship between a hybrid tribunal and a regional court will depend largely on the hybrid or regional court's enabling laws. Where there is a specific provision in that regard, the law would be interpreted accordingly. Where the law is silent, a creative interpretation would be made. The picture is clearer for hybrids who form part of the domestic system. Their relationship to a regional court would be vertical, in the same manner that the domestic system interacts with the regional court. However, in the case of the SCCCAR, the relationship between the ICC and the tribunal is also vertical. Verticality should not always imply superiority. The superior may defer to the other party. For instance, the OTP had envisaged a future relationship with hybrids when it stated that it would defer to investigations and prosecutions if carried out genuinely by a hybrid tribunal, in the same manner in which it defers to states.[83] How this plays out in practice is a different matter altogether.

3.6. Concurrent jurisdictions

Assuming that three or more of the courts I have discussed have concurrent jurisdiction over a situation, how will such jurisdictional clash be resolved? One possible example is the SCCCAR.

[80] J. Elderfield 'The Rise and Rise of the Special Criminal Court (Part II)', *Opinio Juris*, 4 July 2021, [available at, https://opiniojuris.org/2021/04/07/the-rise-and-rise-of-the-special-criminal-court-part-ii/ - accessed 10 may 2023].
[81] Section 37 of the Organic Law.
[82] P. Labuda 'The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?' (2017) 15 *Journal of International Criminal Justice*,175-206, 192.
[83] ICC-OTP 'Informal expert paper: The principle of complementarity in practice' (2003) 5.

Imagine that the ICC, the national court, the SCCCAR and a regional court all have jurisdiction over a particular situation, the question as to who should prosecute does not lend itself to an easy answer. This analysis is futuristic, but it is nonetheless important as its likelihood cannot be overlooked. In the case of the ICC, the national court, and the hybrid, the analysis in the sub-section above suggests that the ICC will have primacy as a result of Section 37 of the Organic Law. Even though this position is flawed under international law, it remains the position of the law insofar as the relationship between the ICC, SSSCR and the national court in CAR is concerned. In a situation where a regional court is added to the mix, a creative interpretation suggests that the national court will still have primacy. This is because complementarity, properly interpreted, places an obligation on the international court—or a regional court—to defer to a national jurisdiction that is genuinely investigating or prosecuting. This however depends on the mechanism that is entertaining a challenge to jurisdiction. If the ICC is entertaining the case, it will be bound by the Rome Statute and not the laws establishing the regional court or the tribunal. The same is true for any of these courts. The submission here is therefore that a proper interpretation of the complementarity regime – as we have it both in the ICC statute and Malabo Protocol (our regional reference document) - invests in national mechanisms the primary duty to prosecute international crimes in their domain. Unless, of course, there is unwillingness or inability on the part of a national mechanism. A fuller discussion on resolving jurisdictional clashes has been made in Chapter 8 of this dissertation.

Conclusion

This chapter has argued that a more strategic interpretation of Article 17 of the Rome Statute will accommodate regional complementarity. This view contrasts with the position of scholars who argued that prosecution of a case before a regional court [the African Court] would not bar the ICC from prosecuting, simply because Article 17 specifically refers to 'states' *strictu sensu*. From an analysis of a few provisions in the Rome Statute as well as other international treaties like the VCLT, I propose and find support for the theory of regional complementarity. In explaining the need for theories, Wright notes that understanding a phenomenon requires the construction of a

theory.[84] She argues that theories are the basis for 'predicting, manipulating, controlling and counteracting the phenomenon', as well as 'relating the phenomenon to other phenomena.'[85] Theories are used to make sense of certain complexities in knowledge.[86] They also help scholars to climb the 'ladder of abstraction.'[87] In this chapter, I related the notion of regional complementarity with other existing notions of complementarity, in order to simplify the strands of that notion. I looked through existing theories on complementarity and I conclude that a golden thread runs through them. This golden thread is the idea that the intention of the drafters of the Rome Statute is for a limited role for the ICC in international crimes prosecution. This has been expressed as the ICC's place as a court of last resort. The notion of regional complementarity also lends credence to this golden thread. It promotes the idea that states have the primary duty to prosecute crimes, whether international or otherwise. It goes a step further to assert that if states choose to do this through international cooperation at a regional level, the ICC should consider a genuine action before such a regional tribunal sufficient to preclude admissibility of cases before the ICC. The argument is that this promotes the overall goals of the Statute. In this chapter, I assume that the regional tribunal in question is validly established and properly constituted. Also, that the crimes and conducts being investigated or prosecuted are those that are seen to be 'international crimes' in line with the statutes or the enabling acts of the tribunal and lastly, that a prima facie case has been established against the defendants such that the preliminary question of whether the accused persons ought to be tried or not does not arise. My notion of regional complementarity implies that if a regional judicial mechanism is prosecuting or investigating a particular crime within the jurisdiction of the ICC, the ICC ought to find the prosecution of the

[84] The term 'constructivism' was coined by Emeritus Professor Nicholas Greenwood Onuf in his 1989 book titled World of Our Making. Constructivism is a system of concepts and proposition and [it] makes it feasible to theorize about matters that seem to be unrelated…' See N.G. Onuf *Making Sense, Making Worlds: Constructivism in social theory and international relations* (Routledge 2013) 3.
[85] B.D. Wright 'Theory construction from empirical observations' (1994) 8 *Rasch Measurement Transactions* 2.
[86] J.N. Rosenau & M. Durfee *Thinking theory thoroughly: coherent approaches to an incoherent world* (Boulder, CO, Oxford: Westview 1995) 1-218.
[87] The Ladder of Abstraction is itself a theory that was created by S.I Hayakawa in his 1941 book titled 'Language in Action'. As explained by Paul Achar, '[A] ladder presents the perfect imagery for this concept. Like the ladder rests on solid ground, the bottom of the ladder of abstraction represents concrete things or ideas. The Middle of the ladder represents things or an idea that not entirely concrete, and yet not completely abstract, while the top of the ladder represents abstract ideas or concepts.' See P. Achar 'Understanding the Ladder of Abstraction and its Application in Communication' (15 June 2016) [available at https://paulachar.wordpress.com/2016/06/15/understanding-the-ladder-of-abstraction-and-its-application-in-communication/ - accessed 12 January 2023].

suspect's case inadmissible, *in so far* as the regional mechanism displays genuine will and ability to properly investigate and prosecute the same case.

In the second part of the chapter, I have analyzed five relationship dimensions that regional complementarity entails. I show that a future regional criminal mechanism will probably need to interact with domestic courts, sub-regional courts, other regional courts, hybrid tribunals and lastly, the ICC. The hierarchical nature of the interaction between these multiple layers of courts reveals both horizontal and vertical relationships. I show that in an instance where all the levels of court have competent jurisdiction over the same situation, an analysis of the enabling acts of the competing institutions will offer guidance. In the case of the SCCCAR, I establish that a proper interpretation of complementarity of both the ICC and the Malabo Protocol invests primary jurisdiction on the national mechanism.