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

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CHAPTER 8. RESOLVING CHALLENGES TO THE APPLICATION OF REGIONAL COMPLEMENTARITY: THE ICC AND THE AFRICAN CRIMINAL CHAMBER

Introduction

This chapter provides cross-cutting analysis by synthesising normative insights from previous chapters, especially with the information on specific institutions. I analyse normative and procedural challenges in the practical application of regional complementarity. My goal is to meet specific objectives of each case study by discussing real or perceived legal challenges that have arisen or may arise in the attempt to operationalise regional complementarity. I examine the institutions discussed in chapters 4 and 5 to draw lessons that may be learnt from institutions that have completed their assignments, like the Habré court, and offer lessons to 'future' institutions like the Criminal Chamber of the African Court. While chapter 8 focuses exclusively on the ICC and the Criminal Chamber of the African court, the proposals for resolving conflicts are applicable between the ICC and any regional tribunal with an ICL mandate.

1. Jurisdictional overlap and competing obligations between the ICC and the ACC

Soon after the Malabo protocol was adopted, one of the issues that attracted wide criticism was the complete silence of the protocol on any possible relationship between the African Criminal Chamber that the Malabo Protocol seeks to establish, and the ICC, which had pre-existed the former. The silence was shocking, considering that the earlier draft of the protocol mentioned the ICC but was later deleted.[1] The following section creates hypothetical but possible challenges that may be encountered in the attempt to activate and operationalise regional complementarity.

In the introduction to this work, I had established that membership of multiple international organisations may birth a situation of conflicting obligations and jurisdictional overlap.[2] This has been seen in the context of the AU-ICC relationship when the AU instructed its members not to cooperate with the ICC in the execution of the arrest warrant against Omar Bashir, the former

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[1] See K. Clarke and ors., 'Introduction' in C. Jalloh & ors (eds) *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (OUP 2019) 46.
[2] *Ibid.*

President of Sudan. The AU decision was in clear violation of ICC member states obligation in article 87 of the Rome Statute. The PTC of the ICC emphasized this point when it ruled against South Africa for its failure to arrest Al-Bashir, in violation of its obligation under the Rome Statute. The court found 'that South Africa failed to comply with its obligations by not arresting and surrendering Omar Al-Bashir to the Court while he was on South African territory between 13 and 15 June 2015.'[3] This is irrespective of the fact that the AU decision was also binding on member states.[4]

Thus, one of the most contentious issues that may yet emerge from the mutual existence of both the ICC and the international criminal chamber of the ACJHPR is jurisdictional overlap and competing obligations. Jackson stated it more concisely when he opined that '[I]n the (probable) long-life of the ICC, the rise of overlapping regional tribunals should be expected.'[5] Philippa Webb also argued that the possibility of jurisdictional overlap between international courts is no longer hypothetical and deserves critical examination.[6] According to Huneeus:

> …from six international courts in 1985, today there are roughly two dozen international courts adjudicating disputes between states... As these courts proliferate and their memberships grow, their work increasingly overlaps with greater frequency they find themselves interacting with the same actors and institutions over the same policy areas.[7]

One of the major reasons for this is because international tribunals operate independently of themselves. As Webb puts it, 'there are no rules on what should happen when more than one court has jurisdiction over the same conflict…or how one court should treat the decisions of another court.'[8] In the case of the ACC and the ICC, the likelihood is real considering that many African

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[3] ICC 'Al-Bashir case: ICC Pre-Trial Chamber II decides not to refer South Africa's non-cooperation to the ASP or the UNSC', 6 July 2017.
[4] On the binding nature of the AU decision, see M. Du Plessis & C. Gevers 'Balancing Competing Obligations: The Rome Statute and AU Decisions' (2011) *ISS Paper* 225 where the authors argued that judging by article 23 of the AU Constitutive Act and the contextual reading of the entire act, in addition to the doctrine of implied powers, it is clear that the AU decision to its members not to cooperate with the ICC was a binding obligation.
[5] M. Jackson 'Regional Complementarity: The Rome Statute and Public International Law' (2016) 14 *Journal of International Criminal Justice* 1061-1072 at 1062.
[6] P. Webb 'Scenarios of jurisdictional overlap among international courts' (2006) 19 *Revue quebecoise de droit international* 2, 277.
[7] A. Huneeus 'Legitimacy and Jurisdictional Overlap: The ICC and the Inter-American Court in Colombia' in N. Grossman & Ors (eds) *Legitimacy and International Courts* (Cambridge University Press 2018) 114.
[8] Webb (n. 6) 278.

member states of the ICC are also potential parties to the Malabo protocol. The converse is also possible in theory. Some state parties to the ACC will also be state parties to the Rome Statute. There is therefore a higher likelihood that both the ICC and the ACC may deal with issues involving the same persons or conducts.

However, the likelihood of overlapping jurisdiction is reduced since the ICC and the ACC only have similar jurisdictions on the core crimes, while the latter has other crimes within the Malabo protocol over which the ICC does not have jurisdiction. Secondly, the possibility of jurisdictional overlap is reduced in relation to the category of perpetrators that both courts can try. From the Rome Statute, it is clear that the ICC is interested in perpetrators of the most serious crimes. An OTP policy paper[9] further clarified that 'the office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who *bear the greatest responsibility*, such as the leaders of the state or organization allegedly responsible for those crimes.'[10] Further, article 27 of the Rome Statute specifically provides that official capacity of a suspect or defendant shall not bar the court from exercising its jurisdiction. This is perhaps why the jurisprudence of the ICC has a shown a consistent pattern of focusing on the 'most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the court.'[11] Conversely, the Malabo protocol confers immunity on heads of states and governments in article 46Abis and withdraws immunity for all crimes in the protocol from defendants who are not heads of states or governments, as per article 46B (2). This is in addition to the fact that the ICC confers jurisdiction on the court to pursue only natural persons, while the Malabo protocol empowers the court to proceed against natural and legal persons, as per article 46C. Thus, it appears that the two instruments are focused on different classes of perpetrators thus further reducing the possibility of jurisdictional clash.[12] As I had noted earlier, the mode of responsibility in the Malabo protocol clearly catches in its net all sorts of low-level defendants who may have incited, instigated, organized, directed, facilitated, financed,

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[9] ICC OTP 'Paper on Some Policy Issues Before the Office of the Prosecutor' (2003).

[10] *Ibid.*

[11] Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo (24 February 2006), para. 50.

[12] See Z.B Abebe 'The African Court with a Criminal Jurisdiction and the ICC: A Case for Overlapping Jurisdiction?' (2017) 25 *African Journal of International and Comparative Law* 3, 418-429.

counselled or participated as a principal, co-principal, agent or accomplice…, [who] aid or abet the commission of any of the offences in the protocol.'[13]

Despite this, there remain several possible scenarios where jurisdictional clashes may occur. The first is if the Peace and Security Council (PSC) of the AU and the UNSC refer same issues to both the ACC and the ICC simultaneously. The second scenario is where the two courts indict the same person and perhaps, order his or her arrest and surrender. These possibilities are further enhanced given that the drafters of the Rome Statute did not mention or contemplate regional criminal courts in the statute's provisions. I have also earlier noted the silence of the Malabo protocol, in relation to the ICC.

In a general sense, jurisdictional overlap may give rise to different types of conflicts. One, where more than one court has jurisdiction over the same matter, a conflict that may lead to inaction from one or both courts may arise in the circumstance. An example was the theatrics that attended the attempt to prosecute Hissène Habré by both Senegal and Belgium. This led to more than a decade stalemate before his eventual prosecution in Senegal, through the AU established Extraordinary Chamber.[14] This is therefore a classic example of harms that international criminal justice may suffer if issues of jurisdictional overlap are not promptly attended to.

Another conflict that may engender jurisdictional overlap is what Higgins called 'competition of norms.'[15] This is when the body of substantive laws of two international courts differ in material terms. In this regard, the ICC and the ACC do not codify the same crimes; the ACC has an extensive catalogue of crimes, compared to the ICC. One common example of this competition of norms is instances where a country's criminal code may be different from the international criminal law that it is bound to enforce as a result of ratifying a treaty.

Where there is no competition of norms, a third kind of conflict could arise where international courts interpret same normative provisions differently. Higgins had pointed out the example of the ICJ and the ICTY where the former in the Nicaragua vs. USA case had adopted the 'effective

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[13] Article 28N of the Malabo Protocol.
[14] See 'Concurrent Jurisdiction' at https://www.brandeis.edu/ethics/pdfs/internationaljustice/biij/Con_Juris_2012.pdf.
[15] R. Higgins 'A Babel of Judicial Voices? Ruminations from the Bench' (2003) 55 *International and Comparative Law Quarterly* 4, 791-804.

control' test, as against the latter's adoption of the 'overall control' test in the Tadić case.[16] In analysing similar normative provisions, the two courts had different interpretations.[17]

1.1. Addressing jurisdictional overlap and competing obligations

Many suggestions have been made on how to reduce the likelihood of jurisdictional overlap between the ICC and the ACC. Some authors[18] have suggested that it is better for the ACC to focus on cases bordering on the novel crimes contained in its protocol while referring any cases concerning the core crimes to the ICC. This is however not as simple as it sounds. Many of the situations before international criminal tribunals will contain a basket-mix of subject matter jurisdictional issues. As such, a case of genocide may have the crimes of corruption and unconstitutional change of government as undergirding crimes, in a manner that becomes difficult to separate them as one crime leads to the commission of another. Where this happens and these crimes are committed as part of the same chain of events, how possible is it that some crimes be prosecuted at the ICC while the others be tried at the ACC, for example?

Thus, from the totality of previous submissions by scholars, a few approaches could be adopted to resolve or reduce the likelihood of jurisdictional clash or overlap between the ICC and the ACC.

For cases that border on the novel crimes contained in the Malabo protocol, I hold that it is indeed practicable to ensure that such cases are handled only by the ACC while the ICC focuses on the core crimes. This can be achieved through an agreement between the two courts that recognises the possibility of transfer of cases between them. Similar relationship already exists between the ICTY and ICTR, on the one hand, and national mechanisms, on the other hand. Except amendment is made to either the Malabo protocol or the Rome Statute, there is currently no legal basis for transfer of cases between the ICC and the ACC. This could however be achieved through other means – either by MOU or the conclusion of other procedural agreements.

[16] On the control tests, see A. Cassese 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 4, 649-668; see also S. Talmon 'The Various Control Tests in the Law of State Responsibility and the Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *International and Comparative Law Quarterly*.
[17] R. Higgins (n. 15).
[18] For example, see N. Boister 'Transnational Crimes Jurisdiction of the Criminal Chamber of the African Court of Justice and Human and Peoples' Rights' in C. Jalloh & ors (eds) *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (OUP 2019) 336-361.

On the practical side, the analysis on whether a case revolves around any of the novel crimes in the Malabo protocol is a determination that the pre-trial chamber of the ACC can make at the preliminary stages of any proceeding. This however implies that a regime of partnership must exist between these two courts in order to achieve positive cooperation that allows for case transfer and knowledge sharing. A regime of partnership and cooperation will not preclude any of the two courts from trying a case, where they both have jurisdictions, but one is more suitable than the other for the purposes of prosecution. Many factors could guide suitability: proximity to the location of crimes for the purpose of investigation and evidence-gathering; availability of resources; richness of the jurisprudence as well as legitimacy that the tribunal enjoys with victims, witnesses and indeed, the defendants. Both tribunals must understand that in most instances, they are working towards complementary ('improved human rights on the ground') and same ('fostering domestic investigation and punishment of atrocity crimes') goals and that oftentimes, they could work as one court – where the ACC's goals are enforced through ICC means and vice-versa.[19]

In other ways, Higgins had argued that 'creating an institutional hierarchy'; 'establishing a hierarchy of international norms'; and 'developing a respect for and use of other courts' judgments to promote consistency' are means through which international courts can avoid jurisdictional overlap.[20] How these measures will be operationalized in the context of the relationship between the ACC and the ICC is yet to be seen. But it is necessary to point out that the emerging relationship between the ICC and the ACC needs to be well thought out, to avoid this anticipated jurisdictional overlap. In previous chapters, I had argued for more subtle and pragmatic concepts that emphasizes cooperation, as against hierarchical competition.

The bulk of the duty lies with state parties to the Malabo protocol, especially those who are also parties to the Rome Statute. For them, avoiding conflict in substantive laws needs to happen on many levels. First, they must avoid conflict between their domestic criminal law, and both the ICC statute as well as the Malabo protocol. It then implies that meticulous comparison between their domestic laws and these international statutes, to avoid inconsistencies, is an exercise that needs to precede ratifying any international statute. The other approach is to amend local laws to come

[19] See A. Huneeus (n. 7).
[20] R. Higgins (n. 15).

in conformity with international standards. This is what Senegal did, when it was preparing to try Hissène Habré. A third approach, which has been seen across many nations, is making international treaty a part of the domestic laws, through for example, domestication acts by the law-making organ of each state. There is nothing novel about this, but it is also one approach through which many states have been able to reduce inconsistency that could birth jurisdictional overlap and competing obligations.

However, in a hypothetical situation in which the ACC has to take a decision on an issue that is 'settled law' as per previous ICC decision, what would be the proper approach? In other words, assuming that the ICC had previously rendered a decision on a similar issue that now confronts the ACC, how much of reliance can the ACC put on the previous ICC decision, or put more clearly, will the ACC be bound to follow a previous decision of the ICC, if the former finds itself in a similar situation. As simple as this seems, it is slightly more difficult because, the ICC, has in the past, maintained different positions on the same issue.[21]

In responding to a similar situation, Webb had developed a two-question test where she asked the following: 'has international criminal law evolved between the moment when the ICTY began to render decisions and the establishment of the ICC'; and secondly, 'should the ICC be given a priority position, considering the fact that it is the general jurisdictional body in international criminal law'.[22] While her analysis was focused on the ICTY and the ICC, mine will be focused on the ACC and the ICC. The proper starting point would be the applicable law of the ACC. Thus, article 31 of the Protocol on the Statute of the African Court of Justice and Human Rights, which is the substantive instrument that the Malabo Protocol purports to amend and complement, provides as follows:

> In carrying out its functions, the Court shall have regard to: a) The Constitutive Act; b) International treaties, whether general or particular, ratified by the contesting states; c) International custom, as evidence of a general practice accepted by law; d) The general principles of law recognised universally or by Africa States;

[21] See for example ICC's reference to the decision of ICTY and ICTR in many cases, while on at least one occasion, the PTC reprimanded the OTP for relying on case law of ICTR and ICTY in its submission on the Uganda redaction issue. See ICC Doc: ICC-02/04-01/05, Decision on the Prosecutor's Position on the Decision of Pretrial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, para. 19.

[22] P. Webb (n. 6) 282.

> e)…Judicial decisions; writings of publicists…; f) Any other law relevant to the determination of the case.

While this provision lists a few sources, it does not provide a hierarchy which the court must follow in their application. Unlike the Rome Statute, where a similar provision on 'applicable law' provides the order in which the court may consider the sources of law. For example, the Rome Statute says the ICC can apply, 'in the first place...' Also, this provision, unlike the Rome Statute, empowers the court to consider the decisions of other 'courts', albeit 'as subsidiary means for determining the rules of law.' This mirrors a similar provision in article 38(1)(d) of the Statute of the ICJ. This provision of the protocol therefore suggests that the ACC can adopt a previous decision by the ICC. For the ICC, seeing that the Rome Statute is silent on whether the court can consider the decision of other international courts, it is unlikely that the ICC will consider a decision by the ACC. Although, it must be noted that the ICC jurisprudence has shown reference to decisions of other international tribunals, while at other times, it refused to do so.[23]

In conclusion, it is fair to assume that once the ACC becomes functional, it will increasingly look to the jurisprudence of the ICC to draw inspiration, given the provisions relating to its applicable laws. Also, given ICC's place as 'the general jurisdictional body in international criminal law', it will not be out of place for the ACC to treat its jurisprudence with some measure of respect and I conclude that the ACC will be careful to depart from the well-argued[?] positions of law that had earlier been arrived at by the ICC. If a regime of partnership and cooperation that I had earlier advocated is adhered to, exchange of information and regular inter-court dialogue could also reduce the likelihood of departure from well laid down principles of law.

1.2. Complementarity: The ACC and the ICC

Similar to the Rome Statute, the protocol provides that the relationship between the African court and its member states will be governed by complementarity. But this section can only attempt a speculative analysis of the complementarity provisions in the protocol. The reasons are obvious: The African court is not yet operational. Hence, all analysis relating to complementarity practice can only be futuristic. Theoretically however, complementarity in the protocol is generally aimed

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[23] *Ibid.*

at strengthening cooperation between various organisations, for the purpose of furthering the goals of human rights promotion and protection on the African continent.[24] In this regard, the protocol mentions complementarity or related terms in a few provisions beginning with the preamble. It alludes to the complementary nature of the relationship between the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, which will, by virtue of this protocol, translate to the African Court of Justice, Human and Peoples' Rights. Also, the protocol reveals the intention of African countries to ensure a complementary regime between 'national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples' rights…' Further, the protocol provides in article 4 that the African court will complement the protective mandate of the African Commission. This mandate is as set out in article 45 of the African Charter on Human and Peoples' Rights.

The actual provisions on complementarity in the protocol are contained in article 46H. It provides partly that '[T]he jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.' The provision largely replicates article 17 in the Rome Statute. The similarities between the complementarity provisions in the two instruments, has necessitated a question on whether the African court will observe the same threshold of admissibility, in its relationship with state parties to the Malabo Protocol, as the ICC.[25] To answer that question, I wish to stress that there are a number of differences between the complementarity provisions in the two instruments. These differences therefore suggest that the admissibility threshold and probable interpretation of the complementarity provisions in the two instruments may not be the same.

1.2.1. Differences between the complementarity provisions of the Malabo Protocol and the Rome Statute

One major difference between the two instruments is that the African court as per 46H (1) is complementary to national courts as well as courts of the Regional Economic Communities (RECs) while the ICC is *only* complementary to national courts.[26] In practical terms however, it

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[24] M. deGuzman 'Complementarity at the African Court' in K. Clarke & C. Jalloh (eds) The African Court of Justice and Human and Peoples' Rights (CUP 2019).
[25] H.G. Van der Wilt 'Complementary Jurisdiction (Article 46H)' in G. Werle and M. Vormbaum (eds.) *The African Criminal Court: A Commentary on the Malabo Protocol* (TMC Asser 2017) at 191.
[26] *Ibid.*

does not appear that there is any significant disagreement between the Rome Statute and this protocol, on this issue. This is because, while article 46H (1) provides that the African Court shall be complementary to both national courts and the courts of the RECs, the rest of the article only provides that the African court will defer to investigations and prosecutions by 'a State which has jurisdiction over it', similar to the complementarity nature of the relationship between the ICC and national courts. There is no mention of investigation or prosecution by RECs. There could be many explanations for this omission.

The first is that the drafters probably envisaged that an investigation or prosecution by the REC is already an action of a state done through the REC, by virtue of the principle of delegated authority.[27] Secondly, it could be the result of a 'careless replication' of the Rome Statute that fails to tie all the loose ends. A third explanation is that paragraphs 2 and 3 may have intentionally excluded RECs and the provision may only apply to situations where states and states alone, are investigating or prosecuting a case that is before the African court. The import of this is that the judges of the African court will need identify and apply other rules of complementarity where a case before the court is being investigated or prosecuted by the RECs.[28]

Irrespective of what the explanation is, this complementarity provision in the protocol gives due recognition to the progressive roles that some of the courts of the RECs in Africa have played. For instance, the ECOWAS court has been hailed as the most progressive sub-regional human rights court in Africa.[29] It has recognised continuing violations and also held that no time limits can bar human rights complaints.[30] It has also done away with the requirement for exhausting local remedies before complaints of rights violations can be brought before the court.[31] These are in

[27] See Chapter 6 of this dissertation for a full discussion of the principle of delegated authority, as it relates to prosecution of international crimes by supranational bodies.
[28] M. deGuzman (n. 24).
[29] For a general understanding of its role as a human rights promoter in the sub-region, see S. H. Adjolohoun 'The ECOWAS Court as a Human Rights Promoter? Assessing Five Years Impact of the Koraou Slavery Judgment' (2013) 31 *Netherlands Quarterly of Human Rights* 3, 342-371.
[30] In *The Federation of African Journalists (FAJ) and others Vs. The Gambia*, Suit No: ECW/CCJ/AP/36/15, the Court maintained a most progressive position by holding that a claim for enforcement of human rights by nationals of Member States cannot be barred by the three-year limitation stated in the Court's Supplementary Protocol.
[31] The ECOWAS Court held in *Ocean King Nigeria Ltd v. Republic of Senegal*, Suit No: ECW/CCJ/AP/05/08 that 'the exhaustion of local remedies is not a condition precedent for the institution of an action for the relief of violation of human rights before [this Court].' In the case of *Hadijatou Mani Koraou v. Niger*, Suit No: ECW/CCJ/APP/08/08 the Court further confirmed that the existence of concurrent domestic proceedings was no bar to an otherwise admissible application to the Court.

sharp contrasts with the jurisprudence of the African Commission on Human and People's Rights, which has upheld that time limits can bar human rights complaints, and strictly requires the exhaustion of local remedies.[32]

Another notable difference between the complementarity provisions of the two instruments is that while the Rome Statute provides that the ICC would have no jurisdiction in a case that is being investigated or prosecuted by a state with jurisdiction, unless the state is unwilling or unable to 'genuinely' investigate or prosecute, the AU's protocol omits the word 'genuinely'. It has been suggested that the omission was because African leaders were 'reluctant to grant the African court the power to evaluate the genuineness of their states' criminal proceedings.'[33] The opposition of African leaders to the ICC on the issues of immunity of heads of states and the application of universal jurisdiction may have lent credence to this suggestion of reluctance.

Whatever the rationale, this omission renders it difficult if not impossible, for any proceeding to be taken over by the African court, irrespective of the genuineness or otherwise, of the proceeding at the state level. It leaves a lot of room for shielding suspects and defeating the ends of justice through shoddy and non-genuine investigation and prosecution at the national level. This was the mischief that the drafters of the Rome Statute had intended to cure by the inclusion of the requirement for genuine investigation or prosecution in the statute. Thus, to operationalize this provision, the judges of the African court will have to 'invent' innovative approaches towards analyzing the genuineness of a proceeding or an investigation before a national mechanism. It is easier to assume however, that the African court will necessarily read the word 'genuinely' back into that provision in order to assess whether such investigation or prosecution before a national court would satisfy the threshold of the admissibility provisions of the protocol.

A third difference between the complementarity provisions of the AU Protocol and the Rome Statute relates to the inclusion of Articles 18 and 19 of the Rome Statute which are titled 'Preliminary Rulings Regarding Admissibility' and 'Challenges to the Jurisdiction of the Court or the Admissibility of a Case' respectively. The Protocol does not contain similar provisions. While

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[32] For a general understanding of the exhaustion of local remedies rule in the jurisprudence of the African Commission, see N. J. Udombana 'So far, so fair: the local remedies rule in the jurisprudence of the African Commission on Human and Peoples' Rights (2003) 97 *American Journal of International Law* 1, 1-37.
[33] M. deGuzman (n. 24).

there is no explanation for these omissions too, it is important to note that the protocol does not contain as many procedural details as are included in the Rome Statute. This may suggest that the drafters of the protocol intend that the judges of the African court will have wide interpretative powers in their attempts at applying the provisions of the protocol. The Rome Statute also contains such constructive ambiguities.[34]

There is also a difference in titular nomenclature. While article 17 of the statute is titled 'Admissibility', article 46H of the Protocol is titled 'Complementary Jurisdiction'. There is no explanation for this difference either. But, article 46H only deals with issues of admissibility, which is one of the aspects of the principle of complementarity. *Ne bis in idem* is another aspect.[35] The OTP had earlier noted that *ne bis in idem* and the concepts of admissibility jointly serve to implement the principle of complementarity.[36] Thus, article 46H may have been wrongly titled, considering that it only covers one of the aspects of complementarity. But as noted by deGuzman, this difference in nomenclature is likely to 'have little practical effect.'[37]

It is article 46I of the protocol that deals with *ne bis in idem*. The corresponding provision is article 20 of the Rome Statute. Again, there are differences between these two provisions. Most of the differences relate to omissions and additions that operate to allow for more flexibilities on adhering to the decisions of the African courts by member states.[38]

Overall, what has emerged from the analysis on the differences between the provisions of these two instruments, in respect of admissibility and *ne bis in idem*, is that the protocol leaves room for more flexibilities, thus accommodating national or regional specificities. This may not be surprising, since the protocol was adopted many years after the Rome Statute and may have learnt from some of the inherent pitfalls of the statute.

These differences notwithstanding, the Rome Statute and the Malabo Protocol have both shown that the place of complementarity cannot be over-emphasised in international criminal justice.

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[34] On constructive ambiguity, see chapter 4 of this dissertation.
[35] On the principle of ne bis in idem, see chapter 2 of this work.
[36] OTP, ICC Doc: ICC-01/11-01/11 'Corrigendum to Prosecution Response to the "Document in Support of the Government of Libya's Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi"' dated 23 July 2013, 26 at para. 55.
[37] M. deGuzman (n. 24).
[38] *Ibid.*

How and with whom complementarity is exercised may differ, but the underlining principle remains the same: where another mechanism (whether national or (sub)regional) is already investigating or prosecuting a conduct, the ICC or the African Court, as the case may be, must find same inadmissible. This horizontal relationship that is being proposed between the ICC and the African court is more desirable in order to engender a regime of mutual cooperation and respect between the two courts.[39] It has been suggested that such a model be based on the understanding that states have primary duty to prosecute but where there is a failure, the two courts 'must confer as to who should intervene.'[40] Such delineation of jurisdiction may be based on certain factors like the nature of the crime and their geographical scope.[41] This model of division of labour holds promises of promoting mutual respect between the ICC and the African court. But outside of theory, what does the inter-relationship between the African court and the ICC mean in practical terms? What is to be expected in operationalizing this relationship? How will the complementarity provisions play out in a more practical scenario? These questions and the answers they generate will be the focus of the next section.

1.2.2. Complementarity in practice at the African court

This chapter assumes that at some point in the future, the African court will be operational, alongside the ICC, which is already functional. It also assumes that when this happens, there may arise a need to address the relationship between the latter and the former. These assumptions create a number of questions that must be addressed in order to ensure that probable frictions between these two courts are properly managed. Accordingly, likely questions relate to how the relationship between the two courts will be arranged, where both courts seek to exercise jurisdiction over the same conducts and same defendants. This is a real possibility, for obvious reasons: The two courts have similar or overlapping roles, and more importantly, there are member states who belong to the two organisations, with the resultant effect of a likely clash in obligations. The possibility of a clash is even more likely because the Malabo Protocol does not make any reference, either direct or veiled, to the ICC. In the same manner, the Rome Statute did not make a direct reference to

[39] On the horizontal and vertical relationships between judicial mechanisms, see W. Schabas & M. El Zeidy, 'Article 17: Issues of Admissibility' in K. Ambos and O. Triffterer (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2015) at 781.
[40] H.G. Van der Wilt 'Complementary Jurisdiction (Article 46H)' in G. Werle and M. Vormbaum (eds.) (2017), *The African Criminal Court: A Commentary on the Malabo Protocol* at 191.
[41] *Ibid.*

'regional courts', for the purposes of international crimes' prosecution. As such, the relationship between the two is not clear, thus adding to the likelihood of a clash in jurisdiction.

With this likelihood, the question that arises is which court will defer to the jurisdiction of the other, if there is a jurisdictional clash or in a situation of concurrent referrals that necessitate the exercise of concurrent jurisdictions by both the ICC and African chamber?

To begin, there are two situations in which there could be the concurrent jurisdiction between the two courts. The first is in the case of self-referral by the state; where a state refers a matter both to the ACC and the ICC. This is a highly unlikely but probable situation. Instances could be when a state refers a matter and feels obliged to refer to another entity, perhaps as a result of slow response from the earlier entity the matter had been referred to or as a result of any other supervening factor. The second is where the UNSC and the AUPSC or any other relevant organ of the AU took independent decisions to refer same matter to the ICC and the ACC, in accordance with their independent powers under articles 24(2), 25 and 103 of the UN Charter on one hand, and article 16 of the African Union Protocol Relating to the Establishment of the Peace and Security Council (AUPREPSC), in giving effect to Article 46(F) of the Malabo Protocol itself. Apart from self-referral as provided in Article 3 and 46(f)(1) of the Malabo protocol, Article 46(F)(2) lists the AUPSC and the Assembly of Heads of State and Government as the other two organs of the AU who may refer a matter to the Prosecutor of the Criminal Chambers. But in specific relation to the AUPSC, its powers under the Malabo Protocol and article 16 of the AUPREPSC are like the powers of the UNSC to maintain global peace and order, albeit, on a continental level.

In both scenarios painted above, the question as to what should happen remains valid. This question, though complex, has already received significant attention in the case of national courts and the ICC. For regional courts however, there has not been an operational regional court with overlapping jurisdictions with the ICC, hence, the absence of any jurisprudence in this regard. But if this situation occurs, what will be the proper approach?

The answer to this question is not straightforward. For one, judges of the ICC and the African court would have to ascertain whether there is any provision that permits deference of one court to another, thus triggering a complementarity analysis. The direction of such an analysis will take root from the relationship between national courts and the ICC. This is the most similar scenario

from which guidance can be sought. If that happens, a likely interpretation is as proposed in chapter 4 of this dissertation: the understanding that when a regional court acts, it is doing so in line with the delegated powers that states have given to it in that instant case.[42] The import of that interpretation is that the ICC, may for example, defer to the investigative or prosecutorial actions of the African court, on the understanding that it is doing so for a state, since the African court indeed derived its powers from the authority delegated to it by states. This analysis is not as simple as that, for it will also require that the ICC assesses, for example, the genuineness of the procedure before the African court. This will certainly amount to an unwanted assessment, capable of occasioning frictions between the two courts. Hence, there must be a way to avoid this possibility.

A number of authors have proposed that a more positive approach towards complementarity, especially between the ICC and regional bodies is the idea of 'burden sharing' or 'division of labour', as against, a hierarchical or vertical relationship that the ICC currently maintains with states.[43] According to professor H. van der Wilt, a number of considerations ought to guide the selection of cases and which forum will be best placed to investigate or prosecute a crime. He proposes that such considerations will include division of cases based on gravity. Drawing from the words of article 17(1)(d) of the Statute that provides that a case is inadmissible if it is not of sufficient gravity, he proposes that while the ICC concentrates on prosecuting the gravest crimes, the African court could be useful in prosecuting less serious crimes.[44] Additionally, he suggests that the nature of crimes could be a basis for delimiting jurisdiction. In this regard, while the Malabo Protocol criminalises many transnational crimes, which are outside the jurisdiction of the ICC, the African court could focus on these.[45]

However, I disagree with the position of professor van der Wilt, even though I fully understand that the purport of these suggestions is to chart out a way for managing the likely contentious relationship between the ICC and the African court. However, an approach that robs a court or tribunal of the powers to exercise its full mandate will be counterproductive. In this regard, any

[42] See arguments advanced on 'delegated authority' in chapter 7 of this work.
[43] Van der Wilt calls it 'a cooperative model'. See H.G. Van der Wilt 'Complementary Jurisdiction (Article 46H)' in G. Werle and M. Vormbaum (eds.) (2017) *The African Criminal Court: A Commentary on the Malabo Protocol* at 198. DeGuzman calls it the burden sharing approach. See M. deGuzman 'Complementarity at the African Court' in K. Clarke & C. Jalloh (eds) The African Court of Justice and Human and Peoples' Rights (CUP 2019).
[44] H.G. Van der Wilt 'Complementary Jurisdiction (Article 46H)' in G. Werle and M. Vormbaum (eds.) (2017) *The African Criminal Court: A Commentary on the Malabo Protocol* at 199.
[45] *Ibid.*

approach that encourages a tribunal to use less and less of its powers risks the tendency of reducing the overall effectiveness of a tribunal, thus defeating its purpose. In a situation where the African court is better placed to investigate and prosecute a crime, it will be ingenious and injurious to the ends of justice, to suggest that the African court should desist from exercising jurisdiction simply because the crime is of a grave nature.

Instead, I propose a more nuanced approach that considers the relevant overriding benefits or perceived advantages that prosecution before one court enjoys over the other. In common law, this approach I propose, is like the well-known doctrine of *forum non conveniens*[46] which was proposed and applied in civil actions. In the literal sense, the doctrine is translated to mean 'non convenient forum'. What it implies is that 'trial courts could refuse to hear cases when the ends of justice would best be served by trial in another (more convenient) forum.'[47] While the origin of the doctrine is not well known, some of its earliest practices dates back to decisions from Scottish courts.[48] The doctrine largely operates to allow 'courts that have jurisdiction over a case to stay or dismiss the case upon a determination that the case may be heard more appropriately in another court. The trial court is given substantial discretion in determining whether a more appropriate forum exists and if so, whether to stay or dismiss in favour of that other court.'[49] The criteria developed by US Supreme Court under this doctrine are first, a determination by a trial court that a more convenient forum that exists is an adequate forum, and secondly, a combination of other public and private interest factors.[50]

While not much of the doctrine has been seen in international criminal law, - although it is codified in some countries, including in the USA's Federal Rule of Criminal Procedure 21(b)[51]-, there have been debates about applying it in the context of international human rights.[52] I propose that international criminal law, especially as it relates to international tribunals, could benefit greatly

[46] See E. L. Barrett Jr. 'The Doctrine of Forum Non Conveniens' (1947) 35 *California Law Review* 3 380-422.
[47] *Ibid*, 387.
[48] For thoughts on this, see A. Arzandeh 'The origins of the Scottish forum non conveniens doctrine' (2017) 13 *Journal of Private International Law* 1, 130-151.
[49] R. A. Brand 'Forum non conveniens' *OUP Encyclopeadia entries* (2013).
[50] R.A Brand 'Challenges to Forum Non Conveniens' (2013) 45 *New York University Journal of International Law and Politics* 4, 1005-1006.
[51] See Stephen H. Weiner 'Forum Non Conveniens' (1995) 64 *Fordham Law Review* 3, 848.
[52] F.F. Martin 'The International Human Rights & Ethical Aspects of the Forum Non Conveniens Doctrine' (2003) 35 *The University of Miami Inter-American Law Review* 1,101-121.

from the application of this doctrine, to resolve jurisdictional clashes in the most pragmatic way, on a case by case basis.

This proposition does not assume that an analysis to determine a forum that is more convenient is an easy task. In fact, it has been admitted that '*forum non conveniens* is an imperfect doctrine… and subject to easy criticism.'[53] However, in order to put this doctrine to practice, the starting point is to admit that there are many factors that may enhance the effectiveness of investigating or prosecuting at the African court, in comparison to the ICC and vice-versa. Such factors may include proximity to the scenes of crimes, difficulty with procuring defendant and witnesses, expertise of relevant authorities within the court, etc. In so doing, there is an assumption that both courts understand that the relationship between them is that of partners in the goal of international criminal justice. Thus, as partners, there is a perception of equality, which does not relegate one of the partners to performing lesser functions than the other. This position supports the notion of burden sharing, as proposed by van der Wilt and deGuzman. However, it is a cooperative model that does not reduce a partner to lesser roles but allows for each partner to understand the limits of its abilities, within a healthy partnership. It allows for an assessment of strengths and weaknesses – as all tribunals possess these -, and then suggests arriving at a decision that is mutually beneficial.

How to operationalize this kind of relationship that is based on the perceived benefits that an institution has over the other, is yet to be seen in practice. This proposal however provides templates for a workable agreement between different levels of tribunals. A case in point is the Memorandum of Understanding that the ICC entered with the Inter-American Court. Accordingly, such agreements are capable of 'defining the terms of mutual cooperation…in affording each other assistance…subject to observance of their respective applicable legal regimes.'[54] The agreement also enjoins the parties to 'cooperate closely with each other and consult each other on matters of mutual interest'.'[55] Parties are expected to maintain contacts, hold meetings, exchange visits and establish appropriate liaison arrangements.[56] These arrangements afford both institutions opportunities to collaborate in different ways. Thus, a similar arrangement between the ICC and

[53] R.A Brand 'Challenges to Forum Non Conveniens' (2013) 45 *New York University Journal of International Law and Politics* 4, 1003.
[54] ICC-PRES/17-01-16. Memorandum of Understanding between The International Criminal Court and The Inter-American Court of Human Rights, 15 February 2016, article 1.
[55] *Ibid*, art. 3(a).
[56] *Ibid,* art 3(b).

the African court may provide a basis for cooperation that allows both courts to jointly assess, in each situation, the tribunal that is best placed to investigate or prosecute a particular conduct or defendant.

One of the factors that may determine the form and nature of complementarity between institution is the probable or anticipated challenges that complementarity was introduced to address. In the case of the African Court and the ICC, the likely challenges are numerous. The most probable of them are issues relating to who acts first in situations where the two courts are interested and have jurisdiction over a particular crime; probable fight for cases and competition for the same evidence; issues of *ne bis in idem*; possibilities of witnesses being interviewed multiple times; jurisdictional overlap; *res judicata* and judicial notice of adjudicated facts; and perhaps, decisions on who is best equipped to try specific crimes. My proposition in this regard is that if a horizontal relationship is cultivated, as against a vertical relationship between the two courts, many of these likely challenges would have been sufficiently navigated before they arise at all. For this reason, I submit that a more positive complementarity approach between these courts should be based on the principles of amity, partnership, 'sustainable and continuous dialogue', *res judicata* and referral, instead of review.

Authors like Carsten Stahn have promoted an understanding that suggests that what I am proposing mirrors a 'polycentric justice model'. In his view, this idea that prosecution of international crimes could have many centres that run independently within a larger whole, augurs well for the pluralist system that international criminal justice has become.[57] As such, while this may suggest that my argument points more to polycentricity, as against complementarity, I will hasten to add that polycentricity does not negate my idea of regional complementarity, rather it mirrors the strands of regional complementarity in so far as it prescribes that regional and international centres of justice relate as equals. This is similar to the counter-view that complementarity as a concept is too heavily shaped by ICC practice and semantics, and thus should not be the proper concept for arranging the relationship between the ICC and regional entities. In response, however, it must be stressed that the idea behind regional complementarity promotes different frames of interaction

[57] C. Stahn "Re-imagining the ICC in a Multipolar World" in C. Stahn (ed) *The International Criminal Court in its Third Decade: Reflecting on Law and Practices* (Brill Nijhoff 2024) 569.

that are based on cooperation and partnership among equals – a framing that the hierarchical nature of the ICC complementarity regime negates.

1.3. African Court: Promoting regional complementarity?

The previous section's analysis on the establishment, jurisdiction and crimes of the African Court helps to situate the discussion on the Court within the ambit of the wider discussion on complementarity, especially the notion of regional complementarity. As noted earlier, the creation of the ICL section generated both optimistic and pessimistic reactions. While some argued that it helps to advance international criminal justice at the regional level, others argue that it is an attempt to shield suspects of international crimes and thus defeat the goals of international criminal justice.[58] Whatever the view is, the establishment of the ICL section, in spite of all the shortcomings inherent in the Malabo Protocol, marks an important milestone in international criminal justice. This optimistic view is in tandem with the idea that all efforts at closing the impunity gap, at the national, regional and international levels must be encouraged. This chapter further aligns with the position that if properly operationalized, the African Court may yet justify and promote the ideas behind the notion of regional complementarity in several ways.

First, the idea that the African court purports to respond to specific African problems mirrors the 'overriding benefits approach' earlier discussed. It is the contention of scholars that regional-specific challenges require regional solutions.[59] Thus, in an effort to advance international criminal justice, especially at the regional level, employing the use of regional specific mechanisms, especially one that responds to the specific challenges at that regional level may be an acceptable best practice.

Secondly, the Malabo Protocol does not make any reference, either direct or veiled, to the ICC. This awkward silence has been referred to as a case of 'negative complementarity' which raises pertinent question as to the real motivation for establishing the ICL section of the African Court.[60]

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[58] Kenyans for Peace With Truth and Justice, 'Seeking Justice or Shielding Suspects: An Analysis of the Malabo Protocol', [available at http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf - accessed 12 February 2024].

[59] C. Jalloh 'Regionalizing International Criminal Law?' (2009) 9 *ICLR* 3 445-499.

[60] M. du Plessis 'A case of negative complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes' *EJIL: Talk!* available https://www.ejiltalk.org/a-case-of-negative-regional-

Irrespective of the motivation however, it is my contention that it does not detract from the advantages inherent in criminal justice at the regional level, especially if the court functions in strict adherence with its enabling acts and other rules as may be developed from time to time. The underlining principles behind regional prosecution still avails itself in the African court.

Lastly, justifying and advocating regional complementarity through the lens of the African court is not an attempt to downplay the inherent challenges that operationalizing the African Court may face. Additionally, this chapter notes the many challenges inherent in the Malabo protocol itself. Issues around *ne bis in idem* and what constitutes same crimes; who acts first between the two courts in a given situation; fight for evidence and cases, *etc.* are some of the practical issues that would need to be resolved at some point. But again, these likelihoods do not detract from the many advantages of prosecution at the regional level. Overall, the establishment and operationalization of the African court is in the wider interest of justice and may serve more to advance the wider goal of ICL, which is to bridge impunity gaps and punish perpetrators of international crimes.

Conclusion

The principle of complementarity continues to widen in scope and application. Its latest offspring is the notion of regional complementarity. The notion, as espoused in this and previous chapters 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 suspect's case inadmissible, *in so far* as the regional mechanism displays genuine will and ability to properly investigate and prosecute the same case.' But this depends on the relationship between such regional body and the ICC. For instance, if there is a relationship of equals between the ICC and such regional body, it would be possible to read the present idea of regional complementarity into their interaction. Now, considering that the Malabo Protocol is completely silent on any form of cooperation or relationship with the ICC, the question that arises is whether we can glean the possibility of such relationship between the two organizations. This is what this chapter has attempted to investigate.

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complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/ (accessed 21 May 2023).

One of my theses has been that though the jurisdictional relationship between the African court and the ICC is not entirely clear, a horizontal relationship of equals is preferable. This understanding is premised on the idea that both institutions are conglomerations of states with vertical relationships with their member states. As such, a horizontal relationship, between them, based on division of labour, will better serve the ends of international criminal justice. There is no doubt that the proposed establishment of the ICL section of the African court might signal an important development in ICL. Its proposed establishment will be a story of many firsts: it will be the first regional human rights mechanism to be invested with international criminal law jurisdiction as well as corporate criminal jurisdiction and it combines the already-known three core international crimes with nine new crimes that have hitherto been unknown to be part of any international criminal justice mechanism.[61] As stated by Chile Eboe-Osuji, former president of the ICC, '[T]here is immense value in conferring criminal jurisdiction to the AC – both as regards crimes within the Rome Statute and more so as regards crimes over which the ICC has no jurisdiction.'[62] Its operationalization however remains to be seen.

[61] 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).
[62] C. Eboe-Osuji 'Administering International Criminal Justice through the African Court: Opportunities and Challenges in International Law' in C. Jalloh & Ors (eds) The *African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (CUP 2019) 849.