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**PRIORITIZING JURISDICTION IN THE  
COMPETING REGIMES OF THE  
INTERNATIONAL CRIMINAL COURT AND THE  
AFRICAN COURT OF JUSTICE AND HUMAN  
RIGHTS: A WAY FORWARD**

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INTRODUCTION .....	286
BACKGROUND.....	289
FRAGMENTATION AND NORM CONFLICTS .....	292
a. The Issue of Complementarity.....	293
b. Principles of Treaty interpretation.....	295
THE APPLICABILITY OF THE ICC’S COMPLEMENTARITY REGIME TO THE AFCJHR—A REGIONAL COURT AS OPPOSED TO A NATIONAL COURT .....	297
LEADERSHIP IMMUNITY IN THE AFCJHR’S AND ROME STATUTE ARTICLE 17’S COMPLEMENTARITY REGIME .....	298
a. Immunities, its effect in foreign domestic jurisdictions and the removal of immunities under the Rome Statute .....	299
i Personal immunity and functional immunity .....	299
ii Immunity <i>ratione personae</i> in international criminal prosecutions in foreign domestic jurisdiction.....	302
iii The removal of Immunity <i>ratione personae</i> in the international criminal prosecutions in the ICC.....	304
b. The impact of Article 46A bis of the Amendments on the admissibility to the ICC.....	307

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286 *BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL* [Vol 35:285]

i Article 17(1)(a)&(b) of the Rome Statute .....	308
ii Article 17(1)(c) of the Rome Statute.....	310
RESOLVING ADMISSIBILITY ISSUES THROUGH THE PRISM OF VIENNA	
CONVENTION ARTICLE 41(1)(B)(II).....	313
a. Vienna Convention Article 41(1)(b)(ii) in the context of the	
Rome Statute .....	315
b. Incompatible with the object and purpose of the Rome Statute .	318
i. Delivering effective justice in eradicating impunity .....	319
ii. Encouraging domestic prosecutions against perpetrators ...	326
CONCLUSION: A WAY FORWARD.....	331

### INTRODUCTION

On June 15, 2015, an emergency order was issued by a South African Court to hold Sudanese President Omar al-Bashir in custody for possible transfer to The Hague for prosecution in the International Criminal Court (“ICC”).<sup>1</sup> Al-Bashir is wanted on charges of genocide and war crimes committed against the people of Darfur.<sup>2</sup> At the time, al-Bashir was in South Africa for an African Union (“AU”) summit of leaders, where he was allegedly guaranteed safety by the South African government.<sup>3</sup> Despite the court order, his aircraft was allowed to depart for Khartoum and he safely arrived home.<sup>4</sup> Some contend that this development proved the ICC is toothless, or that this demonstrated an inherent crack in the ICC structure and therefore a fissure in evolving international criminal justice.<sup>5</sup> Others are consoled by the palpable specter of leadership accountability as it continues to pressure recalcitrant leaders to the extent they must flee foreign states for personal safety, which also challenges their effectiveness to lead at home.<sup>6</sup>

<sup>1</sup> *South Africa Court bid to arrest Sudan’s Omar al-Bashir*, BBC NEWS (June 14, 2015), <http://www.bbc.com/news/world-africa-33125728>.

<sup>2</sup> *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09-242, Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, ¶ 2 (June 13, 2015), [https://www.icc-cpi.int/CourtRecords/CR2015\\_06500.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_06500.PDF).

<sup>3</sup> *Sudanese president Omar al-Bashir flies home South Africa despite ban, International Criminal Court arrest warrant*, ABC NEWS (June 15, 2015), <http://www.abc.net.au/news/2015-06-15/sudanese-president-defies-ban-leaves-south-africa/6548060>.

<sup>4</sup> *Wanted Sudan leader Bashir avoids South Africa arrest*, BBC NEWS (June 14, 2015), <http://www.bbc.com/news/world-africa-33135562>.

<sup>5</sup> See Editorial, *A flawed institution: The chances of Omar al-Bashir being tried at the ICC remain remote*, THE INDEPENDENT (June 14, 2015), <http://www.independent.co.uk/voices/editorials/a-flawed-institution-the-chances-of-omar-al-bashir-being-tried-at-the-icc-remain-remote-10319561.html>.

<sup>6</sup> See Mark Kersten, *Should South Africa have arrested Sudan’s president?*, THE WASH.

Certainly, this illuminates the flaws in South African democracy and separation of powers inasmuch as the executive leadership unilaterally and illegally chose to override a court order by a South African court of competent jurisdiction. In a broader context, this action crystallizes the ongoing disaffection of many African leaders with the ICC and its implications for international criminal justice.<sup>7</sup>

In failing to extradite al-Bashir, South Africa started a trend of non-compliance with obligations of the Rome Statute that has since been followed by several other countries in the AU, including Uganda and Djibouti.<sup>8</sup> This wave of pro-sovereignty movement culminated in the withdrawal of Burundi<sup>9</sup> and the intended withdrawal of Gambia<sup>10</sup> and South Africa from the ICC.<sup>11</sup> However, Adama Barrow, the democratically elected President of Gambia, reversed the former authoritarian leader Yahya Jammeh's decision to quit ICC.<sup>12</sup> Also, the Pretoria High Court in South Africa has recently blocked President Jacob Zuma's withdrawal attempt, holding such a move unconstitutional without prior parliamentary endorsement.<sup>13</sup> Soon afterwards, South Africa submitted a letter to the Secretary-General of the United Nations to formally revoke its withdrawal from the ICC.<sup>14</sup> Thus, the full repercussions of this anti-ICC political

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POST (June 15, 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/06/15/should-south-africa-have-arrested-sudans-president/>.

<sup>7</sup> *See id.*

<sup>8</sup> Press Release, ICC, Al Bashir case: ICC Pre-Trial Chamber II finds non-compliance of Uganda and Djibouti; refers matter to ASP and UN Security Council, ICC-CPI-20160712-PR1231 (July 12, 2016).

<sup>9</sup> Press Release, ICC, Statement of the President of the Assembly of States Parties on the process of withdrawal from the Rome Statute by Burundi, ICC-CPI-20161014-PR1244 (Oct. 18, 2016).

<sup>10</sup> *Gambia Is The Latest African Country Deciding to Pull Out Of International Criminal Court*, WASH. POST (October 26, 2016) [https://www.washingtonpost.com/world/gambia-latest-african-country-deciding-to-pull-out-of-international-criminal-court/2016/10/26/7f54d068-c4ca-440f-848f-e211ba29dc34\\_story.html?utm\\_term=.aacb170c647c](https://www.washingtonpost.com/world/gambia-latest-african-country-deciding-to-pull-out-of-international-criminal-court/2016/10/26/7f54d068-c4ca-440f-848f-e211ba29dc34_story.html?utm_term=.aacb170c647c).

<sup>11</sup> *South Africa Says It Will Quit The International Criminal Court*, WASH. POST (Oct. 21, 2016) [https://www.washingtonpost.com/world/africa/south-africa-says-it-will-quit-the-international-criminal-court/2016/10/21/0eb8aa66-978f-11e6-9cae-2a3574e296a6\\_story.html?tid=a\\_inl&utm\\_term=.b3c23eae49c4](https://www.washingtonpost.com/world/africa/south-africa-says-it-will-quit-the-international-criminal-court/2016/10/21/0eb8aa66-978f-11e6-9cae-2a3574e296a6_story.html?tid=a_inl&utm_term=.b3c23eae49c4).

<sup>12</sup> *UN: Gambia Formally Reverses Withdrawal From ICC*, N.Y. TIMES (Feb. 14, 2017) [https://www.nytimes.com/aponline/2017/02/14/world/africa/ap-af-gambia-international-criminal-court.html?\\_r=0](https://www.nytimes.com/aponline/2017/02/14/world/africa/ap-af-gambia-international-criminal-court.html?_r=0).

<sup>13</sup> *South African Judge Blocks Attempt To Withdraw From ICC*, THE GUARDIAN (Feb. 22, 2017) <https://www.theguardian.com/world/2017/feb/22/south-african-judge-blocks-attempt-to-withdraw-from-international-criminal-court>.

<sup>14</sup> Depository Notification C.N.121.2017.TREATIES-XVIII.10 of 7 March 2017 (Withdrawal of Notification of Withdrawal: South Africa),

momentum remain to be seen.

Africa has long been overcast by humanitarian crises.<sup>15</sup> The often-precarious political situations originated from ethnic, cultural, or religious conflicts, poverty, and the legacy of colonialism and *uti possidetis*,<sup>16</sup> which, in the present day, continues to bring many African countries to the brink of civil war.<sup>17</sup> Recently, the unpredictable nature of continental reactions to African humanitarian catastrophes has misdirected the trajectory on which the response of international criminal justice should be developing.<sup>18</sup> Although accountability seemed to triumph to a limited extent during the heyday of international prosecutions for humanitarian catastrophes through the efficacious prosecutions of those most responsible in the past two decades,<sup>19</sup> the prospect of continuing remedies has grown murky in the face of the shifting mentality of some African leaders. In particular, while a vibrant development process of international criminal justice has taken root in the emerging jurisprudence of the ICC, some powerful stakeholders within the AU have become increasingly skeptical of its work and measures have been launched which subject the ICC's efforts to a tortuous path.<sup>20</sup>

One such measure is the incorporation of the International Criminal Law section ("ICL section") in the not yet operational African Court of Justice and Human Rights ("AfCJHR"). As this latest movement has generated a string of commentators, scholarship abounds discussing various aspects of the substantive and procedural challenges to the prosecution of international crimes in Africa posed by the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ("the Amendments").<sup>21</sup> Issues include politicization and the legal basis and rationale leading to the Amendments, fragmentation and the potential for

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<https://treaties.un.org/doc/Publication/CN/2017/CN.121.2017-Eng.pdf>.

<sup>15</sup> See Kurt Mills, *'Bashir is Dividing Us': Africa and the International Criminal Court*, 34 HUM. RTS. Q. 404 (2012).

<sup>16</sup> See Timothy Besley & Marta Reynal-Querol, *The Legacy of Historical Conflict: Evidence from Africa*, 108 AM. POL. SCI. REV. 319 (2012) (discussing the history of conflict within Africa and resulting consequences).

<sup>17</sup> Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, 31 FORDHAM INT'L L.J. 343, 343-46, 351 (2008).

<sup>18</sup> *Id.* at 347, 349-52.

<sup>19</sup> MD. Mostafa Hosain, *Complementary Jurisdiction of the ICC: A Method to Ensure Effective Prosecution of Perpetrators of the Most Serious Crimes*, 11 ISIL Y.B. INT'L HUMAN. & REFUGEE L. 214, 235-37 (2011).

<sup>20</sup> Mills, *supra* note 15, at 404.

<sup>21</sup> See generally *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, FIRST MEETING OF THE SPECIALIZED TECHNICAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS, (May 15, 2014), [http://www.iccnw.org/documents/African\\_Court\\_Protocol\\_-\\_July\\_2014.pdf](http://www.iccnw.org/documents/African_Court_Protocol_-_July_2014.pdf) [hereinafter *The Amendments*].

forum shopping, leadership immunity, and other potential problems created by some of the ICC States Parties' adoption and ratification of the Amendments, which include benefits and drawbacks.<sup>22</sup>

This article argues that a logical reading of complementarity jurisdictional principles embedded in the ICC and the Amendments, firmly established rules of treaty interpretation, *inter se* agreements under public international law, and policy considerations prioritizes the jurisdiction of the ICC over the AfCJHR, or, at the very least, provides it with residual default jurisdiction.

#### BACKGROUND

Initially, the African Commission on Human and Peoples' Rights was the principal supervisory organ of the African Charter.<sup>23</sup> The African Court on Human and Peoples Rights ("AfCHPR") was established via the protocol of the Organization of African Unity ("OAU") in June 1998, which entered into force on January 25, 2004, later complemented its function.<sup>24</sup> The OAU vested the AfCHPR with jurisdiction over "all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by

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<sup>22</sup> P. Manirakiza, *The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa*, in AFRICA AND THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 375 (V. O. Nmehielle ed., 2012); Vincent O. Nmehielle, 'Saddling' the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?, 7 AFR. J. LEGAL STUD. 7, 32 (2014); see Kristen Rau, *Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights*, 97 MINN. L. REV. 669 (2012); see Ademola Abass, *The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects*, 60 NETH. INT'L L. REV. 27 (2013); see Ademola Abass, *Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges*, 24 EUR. J. INT'L L. 933 (2013); see Max du Plessis, *Shambolic, Shameful and Symbolic—Implications of the African Union's Immunity for African leaders*, 278 INST. SEC. STUD. 1 (2014); see also *Joint Letter Regarding Proposed Expansion of Jurisdiction of African Court of Justice and Human Rights*, HUM. RTS. WATCH (May 3, 2012), <https://www.hrw.org/news/2012/05/03/joint-letter-justice-ministers-and-attorneys-general-african-states-parties>; see generally Chacha Bhoke Murungu, *Towards a Criminal Chamber in the African Court of Justice and Human Rights*, 9 J. INT'L CRIM. JUST. 1067 (2011).

<sup>23</sup> Christof Heyns, *The African Regional Human Rights System: The African Charter*, 108 PENN ST. L. REV. 679, 682 (2004); see also African Charter on Human and Peoples' Rights, June 27, 1981, 21 ILM 58 (1982), art. 30 (providing that [a]n African Commission on Human and Peoples' Rights shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa).

<sup>24</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 2, June 10, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

the States concerned.”<sup>25</sup> In 2003, the AU adopted a protocol establishing the African Court of Justice (“ACJ”), which became the AU’s principal judicial organ, and was later conferred with jurisdiction over all disputes concerning treaty interpretation and international law.<sup>26</sup>

In 2008, the AU Assembly adopted the Draft Protocol on the Statute of the African Court of Justice and Human Rights, with a view to merging the AfCHPR with the ACJ.<sup>27</sup> The AfCJHR is expected to be the main judicial organ of the AU<sup>28</sup> and shall have jurisdiction over all cases and legal disputes which relate to “the interpretation and application of the Constitutive Act[,] . . . Union Treaties and all subsidiary legal instruments[,] . . . the African Charter[,] and] . . . any question of international law.”<sup>29</sup> The protocol will “enter into force . . . [thirty] days after the deposit of the instruments of ratification by . . . [fifteen] Member States” of the AU.<sup>30</sup> However, only five instruments of ratification have been lodged so far (Libya, Mali, Burkina Faso, Benin, and Congo).<sup>31</sup> As such, the merged African Court has not yet come into being.

In February 2009, the AU Assembly issued a decision requesting that the AU Commission and the African Commission on Human and Peoples’ Rights “examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity, and war crimes.”<sup>32</sup> One year later, the AU Commission engaged “consultants to work on drafting an amended protocol on the Statute of the African Court of Justice and Human Rights.”<sup>33</sup> In May 2012, the AU Ministers of Justice and Attorneys General “approved the draft protocol as amended and recommended it to the AU Assembly for adoption.”<sup>34</sup> African heads of state

<sup>25</sup> *Id.* at art. 3.

<sup>26</sup> Protocol of the Court of Justice of the African Union, art. 2, ¶ 2, art. 19, ¶ 1, July 11, 2003, A.U. Doc. Assembly/AU/Dec.25 (II).

<sup>27</sup> Assembly of the African Union A.U. Doc. Assembly/AU/Dec. 193-207 (XI), at 196 (June 30-July 1, 2008).

<sup>28</sup> Protocol on the Statute of the African Court of Justice and Human Rights, art. 2, ¶ 1, July 1, 2008.

<sup>29</sup> *Id.* at art. 28.

<sup>30</sup> *Id.* at art. 9.

<sup>31</sup> Ratification Status: Protocol on the Statute of the African Court of Justice and Human Rights, AFRICAN COURT COALITION (July 12, 2014), [http://www.africancourtcoalition.org/index.php?option=com\\_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12](http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12).

<sup>32</sup> Assembly of the African Union Dec. 208-242 (XII), 213, ¶ 9 (Feb. 1-3, 2009); *The Amendments*, *supra* note 21, at 15 (listing crimes that fall under the jurisdiction of the ICC).

<sup>33</sup> Max du Plessis, *Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes*, 235 INST. SECURITY STUD. 1, 1 (2012).

<sup>34</sup> *Id.*

adopted the Amendments during a meeting in Malabo, Equatorial Guinea on June 27, 2014.<sup>35</sup>

In January 2017, the AU Assembly adopted a decision<sup>36</sup> with the ICC Withdrawal Strategy (“the Strategy”)<sup>37</sup> and welcomed the sovereign decisions taken by Burundi, South Africa and the Gambia regarding their notification of withdrawal from the ICC.<sup>38</sup> It also noted with concern that more than two years after the adoption of the Amendments, only nine Member State<sup>39</sup> had signed and none had ratified it.<sup>40</sup> The Strategy proposed by the Open ended Ministerial Committee comprises two broad approaches: (i) Legal and Institutional Strategies; and (ii) Political Strategies/Engagements.<sup>41</sup> In particular, it is stated that:

member states should endeavor to ratify and domesticate the Protocol on the Amendments on the Statute of the African Court of Justice and Human Rights in order to enhance the principle of complementarity in order to reduce the deference to the ICC, which furthers the mantra of African solution to African problems.<sup>42</sup>

Through these developments, the AU intended to add competence to the jurisdictional scope of the anticipated merged court in order to deal with individual criminal responsibility by incorporating an ICL section into its structure.<sup>43</sup> The new African regional arrangement would create a parallel legal structure of individual criminal responsibility and arguably lead to the fragmentation of international criminal justice. The greatest concern of the international community is the overlapping jurisdiction with the ICC, which may provide opportunities for forum shopping in the prosecution of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>44</sup> Furthermore, differing treatment of the issue of head of state

<sup>35</sup> Assembly of the African Union, Dec. 517-545 (XXIII), at 529, ¶ 2(e) (June 26-27, 2014).

<sup>36</sup> Assembly of the African Union, Draft 1, Dec. 1 (XXVIII) Rev. 2 (Jan. 30-31, 2017).

<sup>37</sup> African Union, Withdrawal Strategy Document, Draft 2 (Jan. 12, 2017).

<sup>38</sup> Assembly of the African Union, Draft, Dec. 1 (XXVIII) Rev. 2 (Jan. 30-31, 2017), ¶ 6.

<sup>39</sup> As of January 2017, the Amendments had been signed by nine member states, namely: Kenya, Benin, Chad, Congo, Ghana, Guinea-Bissau, Guinea, Sierra Leone, Sao Tome and Principe.

<sup>40</sup> African Union, Withdrawal Strategy Document, Draft 2, version 12 Jan. 2017, 12, ¶ 36.

<sup>41</sup> *Id.* at 8, ¶ 28.

<sup>42</sup> *Id.* at 12, ¶ 35.

<sup>43</sup> See *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, A.U. Doc. Exp/Min/IV/Rev.7 (2012).

<sup>44</sup> Rome Statute of the International Criminal Court art. 27, July 17, 1998, 2187 U.N.T.S. 90/37 [hereinafter Rome Statute], art. 5 (providing that the jurisdiction of the ICC

immunity in the ICC and AfCJHR may provide an avenue for escape for perpetrators. While incumbent heads of state and government officials are expressly denied immunity protections in ICC proceedings,<sup>45</sup> immunity from prosecution is extended in the proceedings of AfCJHR.<sup>46</sup> Given that international crimes are, by definition, crimes perpetrated by leaders, this distinction is highly significant.<sup>47</sup> The issue of whether the ICC or AfCJHR should be given jurisdictional priority in conducting international criminal prosecution is therefore central to the functioning of international criminal law in Africa.

#### FRAGMENTATION AND NORM CONFLICTS

Presently, genocide, crimes against humanity, and war crimes are triable in both the ICC and the AfCJHR. One issue that arises from the lack of coordination between the two courts is whether the ICC could exercise its jurisdiction *ratione materiae* effectively in Africa subsequent to the coming into force of the Amendments. Jurisdiction vested originally in the ICC may be affected by the new contour laid down by the Amendments.

Three potential scenarios are worthy of discussion. First, if the AfCJHR had already issued an arrest warrant for a target, whether the ICC prosecutor would be authorized to apply to the Pre-Trial Chamber (“PTC”) for a warrant or a summons to appear for the same target. Second, there may be implications on ICC jurisdiction for a state that waives its obligation to try an accused domestically and defers to the jurisdiction of the AfCJHR. Third, a state may have conflicting obligations owed to the ICC and AfCJHR, resulting in contested choice of jurisdiction and ambiguity on the position of head of state immunity. These norm conflicts emerging from fragmentation require a resolution, accomplished by determining the priority between the two norm sets.

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shall be limited to the most serious crimes of concern to the international community as a whole, namely, the crime of genocide, war crimes, crimes against humanity, and the crime of aggression), art. 15*bis* and 15*ter* (providing that the ICC may exercise jurisdiction over the crime of aggression, subject to a decision to be taken after January 1, 2017 by a two-thirds majority of States Parties and subject to the ratification of the amendment concerning this crime by at least thirty States Party).

<sup>45</sup> *Id.* at art. 27.

<sup>46</sup> Beth Van Schaack, *Immunity Before the African Court of Justice & Human Peoples Rights—The Potential Outlier*, JUST SECURITY (July 10, 2014), <https://www.justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/>.

<sup>47</sup> Claus Krieb, *The Crime of Genocide under International Law*, 6 INT’L CRIM. L. REV. 461, 501-02 (2006).



*a. The Issue of Complementarity*

One approach to resolve the issue of competing courts is to resort to complementarity provided in Article 17 of the Rome Statute.<sup>48</sup> Article 17 provides that a case is inadmissible if it is or has been “investigated or prosecuted by a State which has jurisdiction over it, unless the state” that has original jurisdiction (a) “is unwilling or unable genuinely to carry out the investigation or prosecution,” or (b) “has decided not to prosecute the person[s] concerned,” as a result of the unwillingness or inability of the State to prosecute.<sup>49</sup>

However, the ICC complementarity concept applies only if the contestant is a nation state.<sup>50</sup> There is no practice or authority for the application of Article 17 to be extended to a regional criminal court like that of the AfCJHR.<sup>51</sup> Equally, the Amendments contain no express insight into the relationship between the AfCJHR and ICC. Pursuant to Article 46H of the Amendments,<sup>52</sup> the jurisdiction of the AfCJHR “shall be complementary to

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<sup>48</sup> Rome Statute, *supra* note 44, at art. 17, which states that:

(1) . . . [T]he Court shall determine a case is inadmissible where:

The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; . . .

(2) In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; . . .

The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. . . .

<sup>49</sup> *Id.*

<sup>50</sup> Chacha Bhoke Murungu, *Towards a Criminal Chamber in the African Court of Justice and Human Rights*, 9 J. INT’L CRIM. JUST. 1067, 1075 (2011).

<sup>51</sup> *Id.* at 1081.

<sup>52</sup> Revisions up to May 15, 2014. *The Amendments, supra* note 21, at art. 46H, which provides that:

The 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 Court shall determine that a case is inadmissible where:

The case is being investigated or prosecuted by a State which has jurisdiction over it,

that of National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.”<sup>53</sup> However, the Article does not touch upon the complementarity relationship with the jurisdiction of international tribunals.

The ICC has recognized the jurisdictional priority of other international tribunals in the case of the ad hoc tribunals of the International Criminal Tribunal of the former Yugoslavia (“ICTY”) and the International Criminal Tribunal of Rwanda (“ICTR”) as subsidiary organs of the U.N.<sup>54</sup> The ICC has also recognized the jurisdictional priority of so-called hybrid tribunals, such as the Special Tribunals for Lebanon, Sierra Leone, and Cambodia.<sup>55</sup> Many of these were pre-existing tribunals and their cases would have been inadmissible if there had been national prosecutions, as no competent claim could have been made that the courts would have been unwilling or unable to prosecute, and they would not have been underwritten with head of state immunity.<sup>56</sup> More importantly, in terms of norm prioritization, these were international tribunals, rather than regional courts, and were thus established by the U.N. Security Council.<sup>57</sup> Article 103 of the Charter of the United Nations (“U.N. Charter”) obliges conformity to U.N. Charter obligations over international agreements.<sup>58</sup> In the case of international tribunals established by the U.N. Security Council, failure to comply would

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unless the State is unwilling or unable to carry out the investigation or prosecution;

The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to prosecute; . . .

In order to determine that a State is unwilling to investigate or prosecute in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal liability for crimes within the jurisdiction of the Court.

<sup>53</sup> *Id.*

<sup>54</sup> Melissa K. Marler, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49 *DUKE L.J.* 825, 829 (1999).

<sup>55</sup> *International and Hybrid Criminal Courts and Tribunals*, U.N. AND THE RULE OF L., <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/> (last visited Oct. 30, 2016).

<sup>56</sup> Rome Statute, *supra* note 44, at art. 17.

<sup>57</sup> Marler, *supra* note 54, at 829.

<sup>58</sup> U.N. Charter, at art. 103 (noting that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”).

violate U.N. Charter Article 41 and Chapter 7 generally.<sup>59</sup> However, there is no such legal priority for regional courts. The AfCJHR would also be obliged to observe the priority of U.N.-mandated international tribunals under U.N. Charter Article 103, such as the *ad hoc* tribunals.<sup>60</sup> But this is not necessarily the case with the ICC, which is an independent treaty-based court that only acts in cooperation with the U.N.<sup>61</sup>

In the absence of an independent umpire to decide on the prioritization of regimes, the ICC and AfCJHR will inevitably be entrusted with the task of determining how they relate to each other. The ICC PTC may ultimately undertake jurisdictional supremacy under its own jurisprudence as it assumes the power to determine questions of jurisdiction and admissibility on the basis of express challenges or *proprio motu* pursuant to Article 19(1).<sup>62</sup> Article 18 also mandates that the ICC engage in “preliminary rulings regarding admissibility.”<sup>63</sup> In *Prosecutor v. Kony*, the PTC stressed that it holds the ultimate authority “to interpret and apply the provisions governing the complementary regime” once its jurisdiction has been triggered.<sup>64</sup> However, this decision was made in a vacuum before the rise of other complementarity regimes or competing regional courts such as the AfCJHR. The decision was also contemplated in the context of a jurisdictional contest with a state party.<sup>65</sup> *Prosecutor v. Kony* established that the ICC decides issues of complementarity between the ICC and state parties, through the case did not involve issues incumbent to any potential contest between the ICC and a regional court.<sup>66</sup>

#### *b. Principles of Treaty interpretation*

As the Rome Statute and the Amendments have competing jurisdictional

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<sup>59</sup> *Id.* at art. 41, ch. 7 (noting that “[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”). Chapter VII of the U.N. Charter concerns action with respect to threats to the peace, breaches of the peace, and acts of aggression. *Id.*

<sup>60</sup> *Id.* at art. 103.

<sup>61</sup> *UN Documentation: International Law*, U.N., <http://research.un.org/en/docs/law/courts> (last updated Oct. 28, 2016).

<sup>62</sup> Rome Statute, *supra* note 44, at art. 19, ¶ 1.

<sup>63</sup> *Id.* at art. 18.

<sup>64</sup> *Prosecutor v. Kony*, Case No. ICC-02/04-01/05-377, Decision on the Admissibility of the Case under Art. 19(1) of the Statute, ¶ 45 (Mar. 10, 2009), [https://www.icc-cpi.int/CourtRecords/CR2009\\_01678.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_01678.PDF).

<sup>65</sup> *Id.* at ¶¶ 34-35.

<sup>66</sup> Rome Statute, *supra* note 44, at art. 98.

paradigms and they are treaty bodies, recourse to the well-established principles of treaty interpretation can provide insight.

Looking at both Article 31(3)(c) of the Vienna Convention of the Law of Treaties (“Vienna Convention”)<sup>67</sup> and Articles 17 and 18 of the Rome Statute can bridge the gap between the two courts.<sup>68</sup> Specifically, equipped with the principle of “systemic integration” embedded in Article 31(3)(c) of the Vienna Convention,<sup>69</sup> the ICC can legitimately take into account Article 17 of the Rome Statute in resolving the norm conflict arising from a competing jurisdiction. The significance of Article 31(3)(c) in operation had been described as “a ‘master key’ to the house of international law.”<sup>70</sup>

Establishing the complementarity regime under Article 17 of the Rome Statute also necessarily touches upon other statutory criteria of the principle of complementarity, including unwillingness, inability, and the principle of double criminality (*ne bis in idem*).<sup>71</sup> These criteria would be engaged to the largest extent in a situation where a state that is party to both the Rome Statute and the Amendments decided not to prosecute or investigate an accused due to the immunity-granting provision (i.e. the head of state immunity) in the Amendments. Thus, in the following part of this discourse, an analysis of the question of how the ICC PTCs should rule on the admissibility of such cases will be undertaken. This is followed by an examination of the relevant duties of state parties to both the Rome Statute and the Amendments, particularly with regard to the rules set out in the Vienna Convention’s Article 41(1)(b)(ii) to analyze whether the prerequisite has been met by the limited number of parties wishing to regulate their relations by *inter se* rules (i.e. the Amendments). If the *inter se* agreement is incompatible with the effective execution of the object and purpose of the original treaty as a whole (i.e. the Rome Statute), then the relevant portions of the Amendments would not thereby be invalidated.<sup>72</sup> Rather, the consequence is to be ascertained from the interpretation of the original treaty.<sup>73</sup> In the present case, the consequence would be that the ICC would assume jurisdiction in relation to that case to preserve its

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<sup>67</sup> Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>68</sup> Rome Statute, *supra* note 44, at art. 17-18.

<sup>69</sup> Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT’L & COMP. L. Q. 279 (2005).

<sup>70</sup> Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.682, at 211 (Apr. 13, 2006) [hereinafter Fragmentation of International Law].

<sup>71</sup> Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT’L L.J. 85, 92 (2012).

<sup>72</sup> Fragmentation of International Law, *supra* note 70, at 164, ¶ 319.

<sup>73</sup> *Id.*

fundamental aim of ending to impunity.

THE APPLICABILITY OF THE ICC'S COMPLEMENTARITY REGIME TO THE  
AFCJHR—A REGIONAL COURT AS OPPOSED TO A NATIONAL COURT

Among the most authoritative works in the area of fragmentation of international law is the Report of the Study Group of the International Law Commission, titled "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" and published in 2006.<sup>74</sup> In the work, various methods of resolving norm conflicts are proposed, including the maxim *lex specialis derogate lege generali*, Vienna Convention's Article 31(3)(c), *inter se* agreements (i.e. the case of agreements to modify multilateral treaties by only a certain number of the parties), and hierarchy in international law: *jus cogens*, *erga omnes* obligations, Article 103 of the U.N. Charter, as conflict rules.<sup>75</sup>

Some essential parameters on contemporary approaches of norm conflict resolution are as follows. First, with the exception of *jus cogens*, a norm is seldom regarded as void or invalidated against a conflicting norm.<sup>76</sup> It is advisable to regard the priority of one norm as higher than another.<sup>77</sup> Secondly, it is also not appropriate to treat a whole set of norms in one regime as invariably displacing another set of norms under an alternative regime.<sup>78</sup> The preferable approach is to focus only on the specific conflicting norms from the two regimes and decide which particular norm gains priority over another, as the former is more coherent with the object and effect of the factual matrix underpinning the norm conflict.<sup>79</sup>

In the present case, Article 31(3)(c) of the Vienna Convention could be used by the PTC to bridge the gap between the ICC complementarity regime under Rome Statute's Article 17 and the question of admissibility upon the contested jurisdiction of the AfCJHR. In the context of treaty interpretation, Article 31(3)(c) of the Vienna Convention provides "[t]here shall be taken into account, together with the context: . . . (c) any relevant rules of international law applicable in the relations between the parties."<sup>80</sup> The idea underlying Article 31(3)(c) is that the normative environment must be taken account of in the interpretation of the treaty.<sup>81</sup> On the one hand, there is no specific applicable norm governing the relationship of the

<sup>74</sup> *See id.*

<sup>75</sup> *See generally id.*

<sup>76</sup> *Id.* at 25-26, 33.

<sup>77</sup> *Id.* at 170, ¶ 333.

<sup>78</sup> *Id.* at 208, ¶ 414.

<sup>79</sup> *Id.* at 208, ¶ 414.

<sup>80</sup> Vienna Convention, *supra* note 67, at art. 31(3)(c).

<sup>81</sup> *Id.*

ICC and AfCJHR regimes. On the other hand, it is predictable that in many circumstances where there is contested jurisdiction, the national state concerned would be a party to both instruments (i.e. the Rome Statute and the Amendments). Further, whenever situations of a contested jurisdiction arise, any question pertaining to the ruling of admissibility to the ICC should boil down to two sets of relationships: (i) that between the ICC and the AfCJHR and (ii) that between the ICC and the national state.<sup>82</sup> Viewed in this light, the standards derived from the ICC complementarity must be a “relevant [rule] of international law applicable in the relations between the parties.”<sup>83</sup>

LEADERSHIP IMMUNITY IN THE AFCJHR’S AND ROME STATUTE ARTICLE  
17’S COMPLEMENTARITY REGIME

The object and purpose of the Rome Statute is to end the impunity gap.<sup>84</sup> This is incompatible with the AfCJHR’s adherence to immunity for heads of state. African leaders at the 23rd Ordinary Session of the Summit of the African Union from June 26-27, 2014 in Malabo, Equatorial Guinea<sup>85</sup> “approved the proposal to grant immunity to sitting heads of State and senior government officials” accused of committing relevant crimes in the Draft Protocol on Amendments to the Statute of the AfCJHR.<sup>86</sup> Article 46A bis of the Amendments provides that “[n]o charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.”<sup>87</sup> The motivations for including this immunity provision can arguably be traced to the skeptics of some AU Member States toward the ICC’s indictment against two sitting heads of state, Uhuru Kenyatta of Kenya and Omar al-Bashir of Sudan<sup>88</sup> (although the case against Kenyatta

<sup>82</sup> See generally Fragmentation of International Law, *supra* note 70.

<sup>83</sup> Vienna Convention, *supra* note 67, at art. 31(3)(c).

<sup>84</sup> Rome Statute, *supra* note 44, at ¶ 5.

<sup>85</sup> See generally Assembly of the African Union, *supra* note 35.

<sup>86</sup> *Id.* at 529, ¶ 2(e); *AU approves immunity for African Leaders in the African Court of Justice and Human Rights*, AFRICA LEGAL AID (July 9, 2014), <http://www.africalegalaid.com/news/au-approves-immunity-for-african-leaders-in-the-african-court>.

<sup>87</sup> *AU Summit: Government leaders must not grant themselves immunity for genocide, war crimes and crimes against humanity*, AMNESTY INTERNATIONAL (June 18, 2014), <http://www.amnestyusa.org/news/news-item/au-summit-government-leaders-must-not-grant-themselves-immunity-for-genocide-war-crimes-and-crimes-a>.

<sup>88</sup> Beth Van Schaack, *Immunity Before the African Court of Justice & Human & Peoples Rights—The Potential Outlier*, JUST SECURITY (July 10, 2014), <http://justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the->

was subsequently dropped).<sup>89</sup> This could lead to forum shopping whereby leaders would opt for the African court instead of the ICC to avoid liability, a concern echoed by a coalition of civil society organizations:

In the absence of such a norm of compliance and co-operation, the existence of a regional human rights court with criminal jurisdiction would likely result in forum shopping by regional states accused of gross and massive violations of human rights. It would also lead to regional exceptionalism from international justice and create an impunity gap, precluding effective international action and excusing any regional inaction on individual accountability for international crimes. Effectively, it would be contrary to the obligation of AU Member States in both the Constitutive Act and the UN Charter to eliminate impunity.<sup>90</sup>

*a. Immunities, its effect in foreign domestic jurisdictions and the removal of immunities under the Rome Statute*

Before the effect of Article 46A bis of the Amendments on the admissibility of case to the ICC is discussed, it is useful to outline the removal of immunities under the Rome Statute as a background framework. Prior to any exercise of jurisdiction by international criminal tribunals of a state official, the question of immunity will inevitably arise. The ICC is no exception because Article 98(1) of the Rome Statute stipulates that:

[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.<sup>91</sup>

Thus, the ICC cannot exercise jurisdiction in the absence of consent of a third state if diplomatic immunity is available for the officials of that third state, presuming such immunity is obligatory under international law.<sup>92</sup>

*i Personal immunity and functional immunity*

There are two types of immunity for state officials: functional immunity (*immunity ratione materiae*) and personal immunity (*immunity ratione personae*).<sup>93</sup> Functional immunity provides that an individual may in

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potential-outlier/.

<sup>89</sup> ICC, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta* (Dec. 5, 2014).

<sup>90</sup> du Plessis, *supra* note 33.

<sup>91</sup> Rome Statute, *supra* note 44, at art. 98, ¶ 1.

<sup>92</sup> *Id.*

<sup>93</sup> See generally Brian Man-Ho Chok, *Let the Responsible be Responsible: Judicial*

certain situations be exempted from criminal liability if he has acted on behalf of the state and such official acts could be attributed to the state.<sup>94</sup> In this way, “[s]tate officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act.”<sup>95</sup> Both incumbent and former Heads of State can rely on functional immunity with respect to official acts performed while in office.<sup>96</sup> In the context of international crimes, functional immunity may not provide the perpetrator with a shield because such crimes could not fairly be regarded as sovereign acts.<sup>97</sup> The question of the attribution of *ultra vires* conduct is irrelevant<sup>98</sup> because it is not open for a state to perform acts that violate *jus cogens* norms.<sup>99</sup> Nevertheless, the law is not settled with regard to whether functional immunity could afford protection

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*Oversight and Over-Optimism in the Arrest Warrant Case and the Fall of the Head of State Immunity Doctrine in International And Domestic Courts*, 30 AM. U. INT’L L. REV. 489 (2015) (providing a general overview of immunity).

<sup>94</sup> See Attorney General of Israel v. Adolf Eichmann, 36 I.L.R. 277, 308–309 (1962) (Isr.) [hereinafter Eichmann II]. The Israeli Supreme Court stated that

[t]he theory of ‘Act of State’ means that the act performed by a person as an organ of the State—whether he was the head of the State or a responsible official acting on the government’s orders—must be seen as an act of the State only. It follows that the state alone bears responsibility therefor, and it also follows that another state has no right to punish the person who committed the act, save with the consent of the state whose mission he carried out. Were it not so, the first state would be interfering in the internal affairs of the second, which is contrary to the conception of the equality of states based on their sovereignty. *Id.*

<sup>95</sup> Prosecutor v. Blaškić, Case No. IT-95-14-AR, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 38 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997).

<sup>96</sup> Chanaka Wickremasinghe, *Immunities Enjoyed by Officials of States and International Organizations*, in INTERNATIONAL LAW 380, 383 (Malcolm D. Evans, ed., 3d ed., 2010).

<sup>97</sup> Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 EUR. J. INT’L L. 237, 265 (1999); Adam C. Belsky et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 394 (1989).

<sup>98</sup> See HA 7 juli 2000, R 97/163.12 m.nt. L.J.N. (Bouterse) (Neth.) (stressing “the commission of very grave punishable offences . . . cannot be regarded as the official duties of a Head of State”).

<sup>99</sup> Eichmann II, *supra* note 94, at 310. The Court here states that crimes against humanity:

are completely outside the ‘sovereign’ jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot seek shelter behind the official character of their task or mission, or behind the ‘Laws’ of the State by virtue of which they purported to act.



for officials who had committed international crimes.<sup>100</sup>

Personal immunity attaches to the office or status of the official.<sup>101</sup> It covers all of his acts, both in public and in private<sup>102</sup> and is conferred as long as the official remains in office.<sup>103</sup> Usually this type of immunity is only available to serving heads of state,<sup>104</sup> heads of government,<sup>105</sup> diplomats,<sup>106</sup> and a very limited number of top government officials charged with the conduct of international relations and who are frequently required to travel internationally.<sup>107</sup> A head of state enjoys absolute immunity from foreign criminal jurisdiction.<sup>108</sup> The rationale is to recognize that heads of state are the “symbolic embodiment of sovereignty,”<sup>109</sup> and diplomats and foreign ministers are part and parcel to international relations and international cooperation between states.<sup>110</sup> The purpose of observing the immunity rule is to prevent a state from interfering with the effective process of communication between states.<sup>111</sup> Thus, the

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<sup>100</sup> Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT’L L. 815, 838 (2010) (opining that

[i]n the Arrest Warrant case, the ICJ appeared to suggest that immunity *ratione materiae* would bar the prosecution of officials or former officials for international crimes committed whilst in office. This suggestion is implicit in a paragraph of the Court’s judgment in which the Court listed the circumstances in which the immunities of an incumbent or former Foreign Minister would not act as a bar to criminal prosecution . . .”).

<sup>101</sup> *Id.* at 817.

<sup>102</sup> Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 121, 23 ¶ 55 (Feb. 14); Hazel Fox & Philippa Webb, *THE LAW OF ST. IMMUNITY* 538, (3d ed., 2013).

<sup>103</sup> *Id.* at 23, ¶ 55.

<sup>104</sup> See *Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.)*, Judgment, 2008 I.C.J. 177, ¶ 170 (June 4, 2008).

<sup>105</sup> See *Dem. Rep. Congo v. Belg.*, *supra* note 102 at 21, ¶ 51; Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, in 247 COLLECTED COURSES OF THE HAGUE ACADEMY OF INT’L L. 9 (1994); Institut de Droit International, *Les immunités de juridiction et d’exécution du chef d’Etat et gouvernement en droit international [Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law]*, arts. 1, 2, and 15 (Aug. 26, 2001).

<sup>106</sup> Vienna Convention on Diplomatic Relations art. 29, 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

<sup>107</sup> *Id.* art. 40.

<sup>108</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 14, 1984, 80 I.L.R. 365, 1989 (Ger.).

<sup>109</sup> Tribunal fédérale [TF] [Federal Tribunal] Nov. 2, 1989, ARRÊTS DU TRIBUNA FEDERAL SUISSE (RECUEIL OFFICIEL) [ATF] 115 Ib 496, (Switz.).

<sup>110</sup> See Wickremasinghe, *supra* note 96, at 406.

<sup>111</sup> *Id.* at 380.

doctrine finds its root in preserving the symbolic sovereignty<sup>112</sup> and the principle of ‘non-intervention’ of the political independence of another state.<sup>113</sup>

ii Immunity *ratione personae* in international criminal prosecutions in foreign domestic jurisdiction

The fact that the crimes committed by a serving head of state or foreign minister are heinous international crimes would not necessarily lift immunity *ratione personae*. The International Court of Justice (“ICJ”) regarded this as a rule in customary international law.<sup>114</sup> In the *Arrest Warrant* case, the ICJ held that “[i]t has been unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.”<sup>115</sup> In England, immunity *ratione personae* has been granted to the serving President of Zimbabwe,<sup>116</sup> Defense Minister of Israel,<sup>117</sup> and Minister of Commerce of China<sup>118</sup> on indictments for torture and other grave breaches of the Geneva Conventions.<sup>119</sup>

Two points have to be clarified. First, the prohibition of international crimes is of a *jus cogens* character.<sup>120</sup> As a peremptory norm, its non-derogatory nature prevails over the international law rule prescribing immunity.<sup>121</sup> However, any *jus cogens* norm in question only forbids the

<sup>112</sup> Tribunal fédérale [TF] [Federal Tribunal] Nov. 2, 1989, ARRÊTS DU TRIBUNA FEDERAL SUISSE [ATF] 115 Ib 496, 102, (Switz.).

<sup>113</sup> Akande & Shah, *supra* note 100, at 824.

<sup>114</sup> *Dem. Rep. Congo v. Belg.*, *supra* note 102, at 8.

<sup>115</sup> *Id.* at 25, ¶ 58.

<sup>116</sup> *Tatchell v. Mugabe* (2004) 136 I.L.R. 572 (Eng.).

<sup>117</sup> *Re Mofaz*, (2004) 128 I.L.R. 709 (Eng.).

<sup>118</sup> *Re Bo Xilai* (2005) 128 I.L.R. 713 (Eng.).

<sup>119</sup> *Id.* at 713; *Re Mofaz*, *supra* note 117, at 709 (Eng.); *Tatchell v. Mugabe*, *supra* note 116, at 572.

<sup>120</sup> Vienna Convention, *supra* note 67, at art. 53 (defining peremptory norm of international law or *jus cogens* as “a norm accepted and recognized by the international community as a whole as a norm from which no derogation is permitted . . .”).

<sup>121</sup> Bianchi, *supra* note 97, at 265; Michael Byers, *Decisions of British Courts During 1996 Involving Questions of Public or Private International Law*, BRITISH 67 Y.B. INT’L L. 537, 539-40 (1996); Magdalini Karagiannakis, *State Immunity and Fundamental Human Rights*, 11 LEIDEN J. INT’L L. 9, 15-16 (1998); Alexander Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong*, 18 EUR. J. INT’L L. 955, 964 (2007) [hereinafter Orakhelashvili, *Why the House of Lords Got it Wrong*]; Alexander Orakhelashvili, *International Decisions: Arrest Warrant Case*, 96 AM. J. INT’L L. 677, 680 (2002); Alexander Orakhelashvili, *State Immunity and International Public Order*, 45

commission of international crimes and does not relate to the prosecution of such crimes.<sup>122</sup> Thus, the duty to prosecute the international crimes committed by a head of state is not of a *jus cogens* character.<sup>123</sup> The *jus cogens* norm, which prohibits the commission of international crimes, is a substantive rule and does not trump the procedural rule that grants immunity to heads of state.<sup>124</sup>

Second, Article 41(2) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that “[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.”<sup>125</sup> In this regard, Article 40(1) stipulates that “[t]his chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.”<sup>126</sup> Seemingly, any recognition of immunity in the face of *jus cogens* violations would render the host state an “accomplice

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GERMAN Y.B. INT’L L. 227, 255 (2002); Alexander Orakhelashvili, *State Immunity in National and International Law: Three Recent Cases Before the European Court of Human Rights*, 15 LEIDEN J. INT’L L. 703, 712-13 (2002); Mathias Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Prinz v. Federal Republic of Germany*, 16 MICH. J. INT’L L. 403, 421-23 (1995).

<sup>122</sup> For example, both the prohibition of aggression and the right of self-determination have a *jus cogens* character, but there is no universal jurisdiction for prosecuting the violators of these obligations. Orakhelashvili, *Why the House of Lords Got it Wrong*, *supra* 121, at 963-64.

<sup>123</sup> Akande and Shah opine that “[e]ven if the right to universal jurisdiction were to flow directly from the peremptory nature of a prohibition, it does not follow that the right is itself of *jus cogens* character. Secondary norms which emerge as a consequence of violations of norms of *jus cogens* are not themselves necessarily of overriding effect.” Akande & Shah, *supra* note 100, at 837.

<sup>124</sup> This observation is echoed in a recent ICJ decision, in which the Court has clarified that,

[t]his argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists . . . . The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Case No. ICC 2012/2, Judgment, ¶ 93 (Feb. 3, 2012).

<sup>125</sup> Int’l L. Comm., Rep. on its 53rd Session, U.N. Doc. A/56/10, 53 (2001) [hereinafter ILC Draft Articles].

<sup>126</sup> *Id.*

to the act”<sup>127</sup> and tantamount to permitting its own nationals to escape justice.<sup>128</sup> However, the head of state immunity is not equivalent to “a situation created by a serious breach.”<sup>129</sup> Head of state immunity does not emanate from the commission of international crimes.<sup>130</sup> Head of state immunity is a legal claim as opposed to a factual situation like statehood or territorial sovereignty, which were contemplated in the ILC Commentary.<sup>131</sup>

iii The removal of Immunity *ratione personae* in the international criminal prosecutions in the ICC

The ICC is tasked with investigating *jus cogens* international crimes committed by former and serving heads of state, *inter alia*, and it is not constrained by the limitation imposed on a foreign domestic court by virtue of Article 27(1) of the Rome Statute, which provides that:

[t]his Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.<sup>132</sup>

Pursuant to Article 27 of the Rome Statute, the official capacity of any state official will not absolve individual criminal liability.<sup>133</sup> Hence, immunity *ratione personae* is lifted before proceedings of the ICC.<sup>134</sup> Since parties to the Rome Statute have conferred extra-territorial jurisdiction over international crimes and “the jurisdictional rule contemplated (or was even restricted to) prosecution of those acting on behalf of states . . . immunity *ratione materiae* possessed by those persons would have necessarily been displaced.”<sup>135</sup> The exemption of international criminal tribunals to the

<sup>127</sup> Adam C. Belsky, Mark Merva & Naomi Roht-Arriaza, *Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 401 (1989).

<sup>128</sup> Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 226-27 (1982-3).

<sup>129</sup> ILC Draft Articles, *supra* note 125, at art. 41(2).

<sup>130</sup> Rather, being attached to and embodied in the official status of the perpetrator, it exists long before it is capable of being relied on in barring prosecution.

<sup>131</sup> International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, reprinted in THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 61, 74-76 (James Crawford ed., 2002).

<sup>132</sup> Rome Statute, *supra* note 44, at art. 27(1).

<sup>133</sup> *Id.* at art. 27(2).

<sup>134</sup> *Id.* at art. 25(1)-(2).

<sup>135</sup> Akande & Shah, *supra* note 100, at 845.

constraints of head of state immunity was referenced in the ICJ *Arrest Warrants* case.<sup>136</sup> There is also a long-standing practice of customary international law that perpetrators could not rely on their official position as a defense before international criminal tribunals.<sup>137</sup>

As a practical matter, since the ICC does not have an enforcement mechanism, the arrest and detention of the accused perpetrators, as well as the investigation of the crimes fall heavily on the shoulders of state parties to the Rome Statute.<sup>138</sup> Thus, Article 27 must be construed beyond the removal of immunity before the Court but also at the domestic level for purposes of surrender to The Hague.<sup>139</sup> In this way, the investigation and arrest functions in support of the ICC exercised by the national authority of the parties to the Rome Statute would not be impeded in the face of immunity *ratione personae* and immunity *ratione materiae*.<sup>140</sup>

<sup>136</sup> *Dem. Rep. Congo v. Belg.*, *supra* note 102, at ¶ 61.

<sup>137</sup> Prosecutor v. Milošević, Case No. IT-02-52-T, Decision on Preliminary Motions, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia, Nov. 8, 2001); Prosecutor v. Karadžić, Case No. IT-95-5-D, Trial Chamber Decision on the Bosnian Serb Leadership Deferral Proposal, ¶ 24 (Int'l Crim. Trib. for the Former Yugoslavia, May 16, 1995); Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgment, ¶ 35 (Sept. 4, 1998); Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 44 (Special Ct. for Sierra Leone May 31, 2004); R. v. Bow Street Stipendiary Magistrate and others, Ex parte Pinochet (No.3) [1999] 2 All ER 97 at 98 (Eng.); Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶¶ 41-43 (Mar. 4, 2009); see Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences, *reprinted in* 41 AM. J. INT'L L. 172, 221 (1947) (finding representatives of state are not protected when acts are "condemned as criminal by international law."); see also S.C. Res. 827, art. 2, U.N. Doc. S/RES/827 (May 25, 1993) (establishing international criminal tribunal to investigate situation in Yugoslavia); S.C. Res. 955, art. 1 U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing international criminal tribunal to investigate situation in Rwanda); S.C. Res. 1315, art. 1, U.N. Doc S/RES/1315 (Aug. 14, 2000) (requesting Secretary-General to work with government of Sierra Leone to create special court).

<sup>138</sup> Akande & Shah, *supra* note 100, at 815.

<sup>139</sup> See, e.g., Crimes Against Humanity and War Crimes Act, S.C. 2000, c 24 § 48 (Can.) (incorporating amendment to Extradition Act, S.C. 1999, c 18 § 6.1 (Can.)) (stating that state or diplomatic immunity is not bar to ICC proceedings against person); International Criminal Court Act 2006 (Act No. 30 / 2006) § 61 (Ir.); International Criminal Court Act (Act No. 24 / 2002) c. 453. Art. 26S (Malta) (amending Extradition Act (Act No. 18 / 1978) (Malta)); International Crimes and International Criminal Court Act 2000, s 31(1) (N.Z.); International Criminal Court Act (Act No. 26 / 2007) § 32 (Samoa); Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 §10(9) (S. Afr.); AMTLICHE SAMMLUNG DES BUNDESRECHTS [AS] OFFICIAL COLLECTION OF FEDERAL LAW, June 22, 2001, AS 1493, art. 6 (Switz.); International Criminal Court Act (Act No. 4 / 2006) (Trin. & Tobago); International Criminal Court Act 2001, c. 17, § 23 (U.K.).

<sup>140</sup> Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 J. INT'L CRIM. L. 333, 338 (2009).

As mentioned above, complications arise under Article 98(1) of the Rome Statute, which stipulates that the ICC should not exercise jurisdiction in the absence of consent of a third state if diplomatic immunity is available for the officials of that third state.<sup>141</sup> This would not be problematic in situations where the arresting state and the third-party state (i.e. the state from which the targeted official originated) are both parties to the ICC.<sup>142</sup> This is because “[a]s between parties to the Rome Statute, immunities of officials of parties are removed by Article 27 when such persons are wanted by the ICC,”<sup>143</sup> whereas if the third state concerned is not a state party to the ICC, then Article 27 would not remove the diplomatic immunity of its officials. The corollary is that Article 98(1) would allow the host state to give effect to the immunity obligations they owe to non-parties to the Rome Statute.

However, in the case of al-Bashir, South Africa was a party to the Rome Statute at the time, while Sudan was not.<sup>144</sup> In that case, the question turns on the issue of whether a State Party, having waived relevant immunity protections for its own nationals under Article 27 of the Rome Statute, is obliged to refuse the same protection to visiting officials from countries which are not States Parties. The starting point is the PTC’s decision to issue the arrest warrant where the PTC stated that “the current position of Omar Al Bashir as Head of a state which is not a party to the Statute has no effect on the Court’s jurisdiction over the present case.”<sup>145</sup> The competence of the PTC was premised on the view that:

by referring the Darfur situation to the Court, pursuant to Article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the situation, as well as any prosecution arising

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<sup>141</sup> Rome Statute, *supra* note 44, at art. 98(1) (providing that

[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity).

<sup>142</sup> The states would not be acting inconsistently with their obligations under international law as, manifested in the rationale echoed in the *Lotus Case* that

[t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. The Case of the S.S. “*Lotus*” (Fr. V. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7, 1927).

<sup>143</sup> Akande, *supra* note 140, at 339.

<sup>144</sup> Prosecutor v. Al-Bashir, *supra* note 137, at ¶ 249.

<sup>145</sup> *Id.* at ¶ 41.

therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.<sup>146</sup>

By virtue of Security Council Resolution 1593, the U.N. Security Council referred the situation in Darfur to the ICC.<sup>147</sup> The decision was made pursuant to Chapter VII of the U.N. Charter.<sup>148</sup> It is noted that Article 25 of the U.N. Charter provides that “[m]embers of the United Nations agree to accept and carry out the decisions of the Security Council.”<sup>149</sup> Hence, it is submitted that South Africa’s national authority should have arrested al-Bashir because the removal of the immunity by Article 27 of the Rome Statute operates “not as a treaty but by virtue of being a Security Council resolution”<sup>150</sup> in such exceptional circumstances. This lack of immunity then means that under Article 98, a state party to the Statute would *not* be “act[ing] inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person . . . of a third state”<sup>151</sup> by proceeding with a request for arrest and surrendering al Bashir to the ICC.<sup>152</sup>

*b. The impact of Article 46A bis of the Amendments on the admissibility to the ICC*

If Article 46A *bis* of the Amendments is capable of leading to a ruling by the PTC that a case concerning an incumbent head of state is inadmissible to the ICC, its impact would not only extend to the creation of an impunity gap, but also a common practice of forum shopping.<sup>153</sup> The incidence on the ruling of admissibility hinges on the “same person, same conduct” rule<sup>154</sup> and the ICC complementarity regime under Article 17 of the Rome Statute.

The “same person, same conduct” rule is discussed in the *Lubanga* Arrest Warrant Decision, where the PTC concluded that for a case to be inadmissible “it is a *conditio sine qua non* . . . that national proceedings

<sup>146</sup> *Id.* at ¶ 45.

<sup>147</sup> S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

<sup>148</sup> *Id.*

<sup>149</sup> U.N. Charter, at art. 25.

<sup>150</sup> Akande, *supra* note 140, at 333.

<sup>151</sup> Rome Statute, *supra* note 44, at art. 98(1).

<sup>152</sup> Akande, *supra* note 140, at 339.

<sup>153</sup> *See id.* at 336 (noting that PTC stated that one of the goals of Rome Statute was to end impunity).

<sup>154</sup> Rome Statute, *supra* note 44, at art. 17(1)(c) (providing that the ICC will determine a case is inadmissible when “[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 . . .”).

encompass both the person and the conduct which is the subject of the case before the Court.”<sup>155</sup> A synopsis of this section implies that the ICC would not prosecute international crimes where there is domestic willingness and ability to initiate proceedings for the head of state.<sup>156</sup> Arguably, Article 46A *bis* thus tilts the forum allocation in favor of the ICC by stating unequivocally that the proposed regional arena of justice in Africa is not available for the prosecution of an incumbent head of state who allegedly committed widespread and systematic human rights violations.<sup>157</sup>

i Article 17(1)(a)&(b) of the Rome Statute

Article 17(1)(a) is not engaged simply because there is no ongoing national investigation or prosecution currently in progress by the state.<sup>158</sup> However, in the *Katanga* Admissibility Decision, the Appeals Chamber stated that:

in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to Article 17 (1)(d) of the Statute.<sup>159</sup>

The PTCs must balance whether state inaction is temporary or sustained. If temporary, then an unwillingness or inability analysis may be conducted; if sustained, then these factors do not apply.<sup>160</sup> However, when a state recognizes the immunity enjoyed by an accused under Article 46A *bis* of the Amendments, it signals intentional sustained inaction and admissibility

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<sup>155</sup> Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-8-Corr, 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, ¶ 31 (Feb. 24, 2006), [https://www.icc-cpi.int/CourtRecords/CR2007\\_00196.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_00196.PDF).

<sup>156</sup> *Id.* at ¶ 29.

<sup>157</sup> See du Plessis, *supra* note 22, at 13 (noting that efforts of some African states to bring African Court into discussion are impeding ICC proceedings).

<sup>158</sup> Prosecutor v. Katanga and Chui, Case No. ICC-01/04-01/07, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 78 (Sept. 25, 2009) [https://www.icc-cpi.int/CourtRecords/CR2009\\_06998.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_06998.PDF) (holding “in considering whether a case is inadmissible under Article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability”).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*



vests.

Article 17(1)(b) of the Rome Statute provides that a case is inadmissible where “[t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute,” such as to shield the accused from prosecution.<sup>161</sup> As will be explained below, Article 17(1)(b) protects a genuine state decision not to prosecute based on substantive or evidential grounds but not on grounds of immunity. In the *Katanga* Admissibility Appeal Judgment, the Court held that despite the goal of the Rome Statute to respect state sovereignty, “Article 17(1)(b) of the Statute . . . must also be applied and interpreted in light of the Statute’s overall purpose as reflected in the fifth paragraph of the Preamble, namely ‘to put an end to impunity.’”<sup>162</sup>

The Court further provided that:

The Appeals Chamber acknowledges that States have a duty to exercise their criminal jurisdiction over international crimes. The Chamber must nevertheless stress that the complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to ‘put an end to impunity’ on the other hand. If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in.<sup>163</sup>

Reading Article 17 together with the object and purpose of the Rome Statute (and Article 27 of same) invalidates observance of head of state immunity as otherwise provided under Article 46A *bis* of the Amendments and claim that such observance could be treated as a bona fide “decision not to prosecute.”<sup>164</sup> To read otherwise would render the Rome Statute’s admissibility provision *subject to* Article 46A *bis* of the Amendments, a subsequent and unrelated treaty.<sup>165</sup> Furthermore, interpretation of Article 17 of the Rome Statute should be made in light of the object and purpose of the treaty under Vienna Convention’s Article 31(1) and would therefore result in a finding of admissibility of cases involving heads of state immunized

<sup>161</sup> Rome Statute, *supra* note 44, at art. 17(1)(b).

<sup>162</sup> *Katanga and Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 83 (Oct. 1, 2008) [https://www.icc-cpi.int/CourtRecords/CR2008\\_05172.PDF](https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF).

<sup>163</sup> *Id.* at ¶ 85.

<sup>164</sup> *Id.* at ¶ 83.

<sup>165</sup> Prosecutor v. Katanga and Chui, Case No. ICC-01/04-01/07, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 83 (Sept. 25, 2009) [https://www.icc-cpi.int/CourtRecords/CR2009\\_06998.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_06998.PDF).

under national laws or Article 46A *bis*, except as mentioned above.<sup>166</sup>

If the arresting state decides to adjourn the proceeding until the accused relinquishes his position as the head of state under Article 46A *bis* (instead of doing nothing) then likely the delayed prosecution may fall under the “unwillingness” limb pursuant to Article 17(2)(b) of the Rome Statute.<sup>167</sup> The underlying theme of “unjustified delay” under that limb should be viewed alongside principles of due process recognized by international law. Accordingly, the incumbent head of state concerned is not legitimately entitled to immunity while in office upon a proper construction of the Rome Statute and the general principles of law recognized by civilized nations (as illustrated above).<sup>168</sup>

Moreover, from a policy perspective, the incumbent head of state would possess a strong incentive to refuse to step down in order to be shielded from criminal liability indefinitely or make plans to abscond to a non-Rome Statute State Party to avoid extradition, thereby thwarting the purpose of the Rome Statute. If successful, the possibility of a fair trial and justice would be aborted because of problems such as the quality of evidence (eye witness testimony in particular) and the aging and passing away of the witnesses and the accused. Such foreseeable consequences are not only detrimental to accountability and transitional justice concerns such as reparations to victims; they would also provide a continued avenue for transgressions, reinforcing corrupt practices, and encouraging dictatorial rule. All of these results are counterproductive to the deterrence goals of the ICC.<sup>169</sup> Moreover, if temporal state public security exigencies exist that would be best served by the head of state remaining briefly in office, then this could be taken up by the U.N. Security Council through its authority under Article 16 of the Rome Statute as lobbied by the AU.

#### ii Article 17(1)(c) of the Rome Statute

The prohibition of double jeopardy or *ne bis in idem* pursuant to Article 17(1)(c) provides that a case is inadmissible to the ICC where “[t]he person concerned has already been tried for conduct which is the subject of the

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<sup>166</sup> *Id.* at ¶ 79 (explaining correct interpretation of Rome Statute is to favor admissibility in ICC and decrease immunity).

<sup>167</sup> Rome Statute, *supra* note 44, at art. 17(2)(b).

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether . . . There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice.

*Id.*

<sup>168</sup> *Id.* at art. 27(1).

<sup>169</sup> *See id.* (describing which persons are not exempt from criminal responsibility due to their official positions).

complaint, and a trial by the Court is not permitted under Article 20, paragraph 3.”<sup>170</sup> Article 20(3) lays down two criteria where the ICC could assume jurisdiction over a person who has been tried by another court with respect to the same conduct.<sup>171</sup> Such jurisdiction could be assumed where the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility of crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.<sup>172</sup>

It should be noted that “[t]he main criterion to be assessed by the Court is whether the respective ordinary crime prosecution covers ‘conduct *also* proscribed under Article 6, 7 or 8’, i.e. conduct proscribed by the ICC core crimes.”<sup>173</sup>

The question of whether a head of state who capitalizes on the Amendments’ Article 46A *bis* immunity could be regarded as being tried pursuant to Rome Statute Article 20(3) turns on at what point in the proceedings jeopardy attaches.<sup>174</sup> In many, if not most jurisdictions, a *ne bis*

<sup>170</sup> Rome Statute, *supra* note 44, at art. 17(1)(c).

<sup>171</sup> *Id.* at art. 20.

(1) Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

(2) No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court.

(3) No person who has been tried by another court for conduct also proscribed under Article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.” *Id.*

<sup>172</sup> *Id.* at art. 20(3)(a)-(b).

<sup>173</sup> Carsten Stahn, *Taking Complementarity Seriously: On the Sense and Sensibility of ‘Classical’, ‘Positive’ and ‘Negative’ Complementarity*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY 233, 242 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011); see MOHAMED M. EL ZEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INT’L CRIM. L. 288-293 (2008).

<sup>174</sup> ANTONIO CASSESE, ET AL., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOLUME 1 710, 726 (1st ed. 2002) [hereinafter CASSESE ET AL.].

*in idem* effect is only given to judgments on the merits of the case (i.e. acquittals or convictions),<sup>175</sup> or when the trial begins. The granting of immunity to an accused person is tantamount to giving him refuge from being arrested, detained, investigated, and prosecuted. In *Prosecutor v. Bemba*, the Trial Chamber held that:

the accused has not already been tried for the conduct which is the subject of the present complaints (see Article 20(3)). The decision at first instance in the CAR was not in any sense a decision on the merits of the case—instead it involved, *inter alia*, a consideration of the sufficiency of the evidence before the investigating judge who was not empowered to try the case—and it did not result in a final decision or acquittal of the accused, given the successful appellate proceedings.<sup>176</sup>

Also, in *Prosecutor v. Tadić*, the ICTY Trial Chamber opined in the context of the Draft Statute of the ICC that:

[t]his review of the authorities leads to the unmistakable conclusion that there can be no violation of *non-bis-in-idem*, under any known formulation of that principle, unless the accused has already been tried. Since the accused has not yet been the subject of a judgment on the merits on any of the charges for which he has been indicted, he has not yet been tried for those charges. As a result, the principle of *non-bis-in-idem* does not bar his trial before this Tribunal.<sup>177</sup>

Thus, immunity is typically granted prior to the attachment of jeopardy unless the grant comes after trial. In the latter case this raises the specter of a sham trial, which also defaults to ICC jurisdiction under Article 17(1)(b).<sup>178</sup> Accordingly, an incumbent head of state who was granted

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<sup>175</sup> Such a view is expressed in CASSESE ET AL., at 710, where it is commented that “[c]ivil laws tend to look at multiple prosecutions from the perspective of the ‘right to prosecute’ that ‘belongs’ to the public prosecutor and that ‘elapses’ when the prosecutor has obtained a final decision on its case. The *autrefois acquit/autrefois convict* rule in common law jurisdictions is approached from a somewhat different perspective: rather than a formal rule excluding a second prosecution as in civil law countries, common law countries apply the *abuse of process* doctrine: bringing multiple prosecutions against the same person for the same conduct would be an abuse of process.” See also Rome Statute, *supra* note 44, at art. 20(2) (stating “[n]o person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the [ICC].”).

<sup>176</sup> Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision on the Admissibility and Abuse of Process Challenges, ¶ 248 (June 24, 2010), [https://www.icc-cpi.int/CourtRecords/CR2010\\_04399.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_04399.PDF).

<sup>177</sup> Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-in-Idem*, ¶ 24 (Int’l Crim. Trib. For the Former Yugoslavia, Nov. 14, 1995), <http://www.icty.org/x/cases/tadic/tdec/en/951114.pdf>.

<sup>178</sup> The recognition of Head of State Immunity in the judgment of the domestic court and the subsequent acquittal are inconsistent with the state’s obligation under the ICC

immunity by national authority pursuant to Article 46A *bis* of the Amendments could hardly be regarded as “hav[ing] already been tried for conduct which is the subject of the complaint” under Article 17(1)(c).<sup>179</sup>

RESOLVING ADMISSIBILITY ISSUES THROUGH THE PRISM OF VIENNA  
CONVENTION ARTICLE 41(1)(B)(II)

There are two significant scenarios that relate to norm conflict between the Courts. First, the question arises of whether the PTC is authorized to issue a warrant of arrest or an appearance summons if the AfCJHR previously issued a warrant. Second, it is unclear whether the jurisdiction of the ICC is viable in cases where a state had waived its rights domestically and deferred jurisdiction to the AfCJHR. Guidance on these issues can be found in Vienna Convention’s Article 41(1)(b)(ii), which addresses a situation where a limited number of parties (thirty-four out of the continent’s fifty-four countries are state parties to the Rome Statute<sup>180</sup>) wishing to regulate their relations by *inter se* rules (i.e. the Amendments).<sup>181</sup> The key question is whether the Amendments are compatible with the effective execution of the object and purpose of the Rome Statute as a whole. If incompatibility is shown, the ICC could assume jurisdiction in the situations above to preserve its fundamental aim of eradicating impunity.

Article 41(1)(b)(ii) of the Vienna Convention provides that States Party can modify treaties between themselves if the treaty allows it and the modification “[d]oes not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.”<sup>182</sup>

An initial consideration is whether Article 41(1)(b) is operative in prohibiting the modification of state responsibility under the Rome Statute by *inter se* agreements between parties. The Rome Statute does not

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Statute and the general principles of law recognized by civilized nations. As such, such judgment is no bar to prosecution by the ICC as the domestic trial could be regarded as a sham proceeding, i.e. a trial held to shield an offender from criminal responsibility and in a manner which “in the circumstances, was inconsistent with an intent to bring the person concerned to justice.” Rome Statute, *supra* note 44, at art. 20(3); *see also* CASSESE ET AL., *supra* note 175, at 726-27 (arguing when “amnesties occur before or in the course of pending criminal proceedings, nothing would preclude the ICC from adjudicating the case on the basis of Article 17(1) or (2).”).

<sup>179</sup> Rome Statute, *supra* note 44, at art. 17(c).

<sup>180</sup> African States Parties to the Rome Statute, ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE, [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx) (last visited Aug. 5, 2016).

<sup>181</sup> Vienna Convention, *supra* note 67, at art. 41(1)(b)(ii).

<sup>182</sup> *Id.*

expressly prohibit modifying *inter se* agreements, but its character as a treaty that does not provide for reservations<sup>183</sup> implies a prohibition. Certainly it implies a prohibition of *inter se* agreements that would act as a reservation to substantive provisions and obligations of state parties. An *inter se* agreement that would serve the same effect as a reservation to Article 27 (head of state immunity) or a party's duty to surrender targets on the territory of their state to the ICC would impliedly be void given the character of the Rome Statute, though this specific issue has not yet been addressed in judicial judgment.<sup>184</sup>

Whenever an *inter se* agreement under Article 41(1) is engaged, there will be two types of relations: 'general' relations applicable to all parties to the original treaty and 'special' relations applicable to the states parties to the *inter se* agreement.<sup>185</sup> It differs from treaty amendment in the sense that *inter se* agreement merely "modifies its application in relations between the certain parties."<sup>186</sup>

There are two requirements for entering into *inter se* agreement, namely (i) preservation of the rights and interests of the parties to the original treaty,<sup>187</sup> and (ii) preservation of the object and purpose of the multilateral treaty. Rights and interests of other parties are not at stake because the Rome Statute's obligation "could not be broken down into bilateral relationships"<sup>188</sup> since it is a type of non-reciprocal treaty which is characterized in terms of the "absolute," "integral," or "interdependent" nature of their obligations.<sup>189</sup> Modifying this type of non-reciprocal treaty is likely to affect the object and purpose of the original treaty.

The rationale for the requirement of preserving the object and purpose of the multilateral treaty is that modification which would constitute derogation incompatible with the effective execution as a whole is impliedly prohibited.<sup>190</sup> The mischief of this requirement is to deal with agreements that run counter to the aims, intentions, and ends of the original

<sup>183</sup> Rome Statute, *supra* note 44, at art. 120.

<sup>184</sup> *See generally Id.* at art. 27 (explaining immunity due to official governmental position is not bar to prosecution under Rome Statute).

<sup>185</sup> Fragmentation of International Law, *supra* note 70, at ¶ 301.

<sup>186</sup> *Id.* at ¶ 302.

<sup>187</sup> Vienna Convention, *supra* note 67, at art. 41(1)(b)(i) (stating *inter se* agreement is permissible when it "[d]oes not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations . . .").

<sup>188</sup> Fragmentation of International Law, *supra* note 70, at ¶ 311.

<sup>189</sup> *See generally* G. G. Fitzmaurice, *Third Report on the Law of Treaties*, [1958] 2 Y. B. Int'l L. Comm'n 20, 41-45, U.N. Doc. A/CN.4/115 (describing language and structure of treaties like Rome Statute create single regime that parties cannot contract out of); Sir Humphrey Waldock, *Third Report on the Law of Treaties*, U.N. Doc. A/CN.4/167. (1964).

<sup>190</sup> MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 535 (2009).

treaty and has the result of rendering them meaningless and impossible to be implemented in practice.<sup>191</sup>

*a. Vienna Convention Article 41(1)(b)(ii) in the context of the Rome Statute*

A preliminary question is what role and under what circumstances does Article 41(1)(b)(ii) of the Vienna Convention apply? The Rome Statute is a multilateral treaty whose character allows for no reservations at ratification or accession.<sup>192</sup> Moreover, it has been illustrated earlier that the ICC complementarity regime under Article 17(1)(a) and (b) can give resort to resolving questions of competing jurisdiction by virtue of Article 31(3)(c) of the Vienna Convention.<sup>193</sup> Yet, admittedly, the ICC complementarity regime provides no express antidote for every situation.

In fact, Article 17(1)(a) and (b) governs only two situations, namely, where domestic investigation or proceedings are ongoing, and where the domestic proceedings has been concluded.<sup>194</sup> Potentially these two situations may not be met, for example, where a state waives its jurisdiction to try an accused domestically and defers the exercise of jurisdiction to an international Court under the auspices of the U.N. or, foreseeably, by an operational AfCJHR. On other occasions situations could arguably be covered by the ICC complementarity regime using the expansive interpretation approach under Article 31(3)(c) of the Vienna Convention, such as where the AfCJHR had already issued an arrest warrant, but the ICC is reluctant to relinquish jurisdiction.

With no relevant bar under complementarity, the ICC could develop policies and principles according to the following analysis on Vienna Convention Article 41(1)(b)(ii) in the above situations as there is no clear-cut allocation of primacy to domestic or regional (under the expansive interpretation) jurisdiction under the ICC complementarity regime. Article 41(1)(b)(ii) provides rudimentary principles of admissibility such as unwillingness, inability, *ne bis in idem*, and gravity. Thus, there is space for the allocation of admissibility on the basis of comparative advantage.<sup>195</sup>

To trigger Article 41(1)(b)(ii), the original treaty (the Rome Statute, in this case) has to be modified by the *inter se* agreement (the Amendments).<sup>196</sup> In what way, if any, do the Amendments modify the Rome Statute? The competing jurisdictions now ensure an impact on obligations of states parties under the ICC complementarity regime. In

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<sup>191</sup> *See id.*

<sup>192</sup> Rome Statute, *supra* note 44, at art. 120.

<sup>193</sup> *Id.* at art. 17(1)(a)-(b); Vienna Convention, *supra* note 67, at art. 31(3)(c).

<sup>194</sup> Rome Statute, *supra* note 44, at art. 17(1)(a)-(b).

<sup>195</sup> Stahn, *supra* note 173, at 241.

<sup>196</sup> *See* Vienna Convention, *supra* note 67, at art. 41(1)(b)(ii).

particular, the equilibrium of the normative exercise of forum allocation between the ICC and a national state is upset and in effect ‘derogated.’

The practical utility is such as to facilitate the ICC to develop policies on the basis of comparative advantages when confronting situations of competing jurisdiction, including (i) where the AfCJHR had already issued a warrant to arrest an accused, or (ii) where a state which waives its jurisdiction to try an accused domestically defers to the exercise of jurisdiction by AfCJHR. This forum selection should be identified according to the best comparative advantage in light of the original treaty as adapted from Article 41(1)(b)(ii), which provides a legitimate and authoritative avenue to resolution.<sup>197</sup> Significantly, the ICC retains authority to interpret and apply the provisions governing the complementarity regime once its jurisdiction has been triggered.<sup>198</sup>

In engaging Article 41(1)(b)(ii), the guiding light is the object and purpose of the Rome Statute as a whole. Then a particularized evaluation of whether the Amendments in application are compatible with its effective execution would be undertaken. If the ICC finds that deferring jurisdiction to the AfCJHR in a relevant case would prevent effective execution of such object and purpose, the ICC could refuse to concede jurisdiction or give effect to the Amendments pursuant to Vienna Convention’s Article 41(1)(b)(ii) and seize jurisdiction on the matter.<sup>199</sup> This course of action gives effect to the principle of effectiveness, enshrined in the maxim *magis valeat quam pereat*.<sup>200</sup> By virtue of this principle, the Court “will seek to determine what are the purposes and objectives of the organization and will give to the words in question an interpretation which will be most conducive to the achievement of those ends.”<sup>201</sup> This principle observes that “the instrument as a whole and each of its provisions must be taken to have been intended to achieve some end, and that an interpretation that would make the text ineffective to achieve that object is also incorrect.”<sup>202</sup> Thirlway opines that this approach is similar to the ‘object and purpose’ criterion, and “has therefore, like this criterion, to be employed with

<sup>197</sup> *Id.*

<sup>198</sup> Stahn, *supra* note 173, at 240; *see* Prosecutor v. Kony et al., Case No. ICC-02/04-01/05-377, Decision on the Admissibility of the Case under Article 19(1) of the Statute, ¶ 45 (Mar. 10, 2009), [http://www.worldcourts.com/icc/eng/decisions/2009.03.10\\_Prosecutor\\_v\\_Kony2.pdf](http://www.worldcourts.com/icc/eng/decisions/2009.03.10_Prosecutor_v_Kony2.pdf).

<sup>199</sup> Vienna Convention, *supra* note 67, at art. 41(1)(b)(i).

<sup>200</sup> Meaning ‘That the thing may rather have effect than be destroyed.’

<sup>201</sup> E. Lauterpacht, Q.C., *The Development of the Law of International Organizations by the Decisions of International Tribunals*, 152 RECUEIL DES COURS 377, 420 (1976).

<sup>202</sup> Malgosia Fitzmaurice, *The Practical Working of the Law of Treaties*, in INT’L L. 166, 182 (Malcolm Evans ed., 4th ed. 2014).



discretion.”<sup>203</sup>

For the purposes of Article 41(1)(b)(ii), it is not necessary to pinpoint a particular provision to prove derogation would cause the prescribed effect. Subparagraph 1(b)(ii) enables a distinction between the various provisions, although in the same sentence it specifically refers to the treaty’s object and purpose as a whole.<sup>204</sup> One example given in the 1966 ILC Report in relation to this provision is that an *inter se* agreement modifying substantive provisions of a disarmament or neutralization treaty would be incompatible with its object and purpose and not permissible under the present Article.<sup>205</sup>

In this case, the Amendments clearly relate to many substantive provisions in the Rome Statute, derogations from which are incompatible with the effective execution of its object and purpose as a whole.<sup>206</sup> The Amendments intend to subject the prosecution of international crimes, previously under the purview of the national state or by default the ICC, to an entirely new regime of the ICL Section, now orchestrated by the Assembly of Heads of State and Government of the African Union and the AU Peace and Security Council.<sup>207</sup>

By way of example, Article 46F(2) of the Amendments first stipulates that the ICL Section may exercise its jurisdiction if a situation is referred by the Assembly of Heads of State and Government of the African Union and the Peace and Security Council of the African Union, replacing the ‘triggering’ mechanism (the Rome Statute’s Article 16) with a referral by the U.N. Security Council acting under Chapter VII of the U.N. Charter.<sup>208</sup> Second, Article 46A *bis* of the Amendments, which recognizes immunities, derogates from the Rome Statute’s Article 27 that provides head of state liability.<sup>209</sup> Third, Article 46H of the Amendments provides that the jurisdiction of the ICL Section is complementary to that of the National Courts, and to the Courts of the Regional Economic Communities, displacing by implication the role of ICC and the ICC complementarity regime under the Rome Statute’s Article 17.<sup>210</sup> Indeed, the character of the Amendments is embedded with wide-ranging legal implications that

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<sup>203</sup> *Id.* (citing Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989: Part Three*, 62 BRIT. Y.B. INT’L L. 1, 44 (1992)).

<sup>204</sup> VILLIGER, *supra* note 190, at 535.

<sup>205</sup> Int’l L. Comm., *Report on its 18th Session*, U.N. Doc. A/6309/Rev.1 (May 4-July 19, 1966).

<sup>206</sup> *See generally* Vienna Convention, *supra* note 67, at art. 31 (describing general rules of interpretation for the treaty and supplementary texts).

<sup>207</sup> *See generally id.* (describing general rules of interpretation for treaty and supplementary texts).

<sup>208</sup> Rome Statute, *supra* note 44, at art. 13(b).

<sup>209</sup> *Id.* at art. 27(1)-(2).

<sup>210</sup> *The Amendments*, *supra* note 21, at art. 46H.

arguably negate Rome Statute Articles 11 through 19, all dealing with the exercise of ICC jurisdiction and challenges by state parties.<sup>211</sup>

*b. Incompatible with the object and purpose of the Rome Statute*

Thus, the issue can be reduced to whether the Amendments are incompatible with the effective execution of the object and purpose of the Rome Statute, and can be seen as an *inter se* agreement that cripples or even negates, in whole or part, the practical functionality of the ICC in the African continent. For the purposes of analyzing this question, resort can be made to certain special characteristics of constituent instruments highlighted by the ICJ:

the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.<sup>212</sup>

The object and purpose of the Rome Statute as a whole includes delivering effective justice in eradicating impunity,<sup>213</sup> thereby promoting international peace and security, and encouraging domestic prosecutions against perpetrators.<sup>214</sup> In relation to this, the ICC complementarity regime mandates the consideration of the principles of effective justice in determining admissibility.<sup>215</sup> The principle of effective justice is a precondition for the achievement of the aim of the Rome Statute, namely, “to put an end to impunity”<sup>216</sup> and to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished.”<sup>217</sup> It is worthwhile to reiterate the message of the Appeals Chamber in *Katanga*, which stated that, in the absence of effective justice,

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<sup>211</sup> See generally *The Amendments*, *supra* note 21.

<sup>212</sup> Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 74-75, ¶ 19 (July 8), <http://www.icj-cij.org/docket/files/93/7407.pdf>.

<sup>213</sup> Rome Statute, *supra* note 44, at pmb. ¶ 5.

<sup>214</sup> *Id.* at pmb. ¶¶ 4, 6 10.

<sup>215</sup> Stahn, *supra* note 173, at 245.

<sup>216</sup> Rome Statute, *supra* note 44, at pmb. ¶ 5.

<sup>217</sup> *Id.* at pmb. ¶ 4.

“[i]mpunity would persist unchecked and thousands of victims would be denied justice.”<sup>218</sup>

i. Delivering effective justice in eradicating impunity

While the ICC serves as an apolitical international body, the factors relevant to the assessment of the effectiveness of the ICL Section in delivering justice to eradicate impunity include the political agenda of the AU and its constituencies and their financial capability in operating the ICL Section.<sup>219</sup> In respect to the former, it is clear that the AU and its Member States’ political priorities are at variance with the ICC. The highest governing body of the union is the Assembly of Heads of State and Government of the Union, which is bestowed with most of the powers in the Constitutive Act.<sup>220</sup> As a matter of fact, “many of the current leaders of African states have risen to power through undemocratic means and have been flagrant human rights violators. As of 2008, only eighteen African countries regularly elected their governments in free and open elections.”<sup>221</sup> Furthermore, even though Article 6, section 4 of the Constitutive Act provides that “[t]he Office of the [Chairperson] of the Assembly shall be held for a period of one year . . . after consultations among Member States,” the Constitutive Act does not contain any stipulations in relation to the yardstick under which the chairperson of the Assembly should be elected.<sup>222</sup> President Mbasogo and Colonel Qadhafi, the long-serving dictators of Equatorial Guinea and Libya, respectively, once served as chairpersons of the Assembly.<sup>223</sup> Their notoriously poor record in respecting human rights and promoting democracy casts doubt on the determination of the AU in putting an end to impunity for serious crimes such as crimes against humanity and unconstitutional changes of government.

Additionally, as the following events illustrate, the determination of the ICC in combating impunity and in bringing perpetrators to justice at any

<sup>218</sup> Prosecutor v. Katanga, *supra* note 165, ¶ 79.

<sup>219</sup> YUVAL SHANY, *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* 117, 126, 130 (2014).

<sup>220</sup> Corinne A.A. Packer & Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AM. J. INT’L L. 365, 375 (2002).

<sup>221</sup> Stacy-Ann Elvy, *Theories of State Compliance with International Law: Assessing the African Union’s Ability to Ensure State Compliance with the African Charter and Constitutive Act*, 41 GA. J. INT’L & COMP. L. 75, 135 (2012).

<sup>222</sup> *Id.* at 90; Org. of African Unity [OAU], *The Constitutive Act of the African Union*, art. 6, ¶4 (8), OAU Doc. CAB/LEG/23.15, (July 11, 2000), [http://www.au.int/en/sites/default/files/ConstitutiveAct\\_EN.pdf](http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf).

<sup>223</sup> See CHRISTOPHER M. BLANCHARD & JIM ZANOTTI, *LIBYA: BACKGROUND AND U.S. RELATIONS* 7 (2011), <http://fpc.state.gov/documents/organization/158525.pdf> (last visited Aug. 5, 2016).

cost is in sharp contrast with the reconciliatory approach adopted by the AU, where a paramount objective is the maintenance of stability in the region, even at the expense of justice.<sup>224</sup> Indeed, the AU's political agenda favoring reconciliatory effort and undermining justice and accountability has been manifested in the saga of the souring relationship between the African States and the ICC, which has eventually lead to the introduction of the ICL Section.

Among the more prominent incidents of the clashes between the ICC and AU is the referral of the Darfur situation, the developments in Kenya, and the situation in Libya. Conflicts arose when the former prosecutor of the ICC, Luis Moreno-Ocampo, sought an arrest warrant for President Omar Hassan Ahmad al-Bashir of Sudan in relation to the conflict between the Southern and Northern Sudan and the crimes committed in Darfur.<sup>225</sup> The tense atmosphere may be attributable to the unprecedented nature of the arrest warrant naming a sitting head of state of a non-State Party of the Rome Statute, notwithstanding precedents in other international tribunals where heads of state, such as Slobodan Milosevic of Yugoslavia and Charles Taylor of Liberia, were prosecuted.<sup>226</sup>

Fearing that the arrest of al-Bashir would disturb peace in the region, many African countries petitioned to the U.N. Security Council requesting the latter to defer the Darfur investigation.<sup>227</sup> The U.N. Security Council declined to defer the investigation for one year pursuant to the Rome Statute's Article 16.<sup>228</sup> There were international concerns, notably from the

<sup>224</sup> *The Constitutive Act of the African Union*, *supra* note 222, at art. 3.

<sup>225</sup> On July 14, 2008, the OTP applied for an arrest warrant against President Omar Hassan al-Bashir for ten charges of genocide, crimes against humanity and war crimes. *See* Prosecutor v. Al Bashir, ICC-02/05-193, Public notice of the Decision on the Prosecution's Application under article 58 of the Statute (Feb. 23, 2009), [https://www.icc-cpi.int/CourtRecords/CR2009\\_01313.pdf](https://www.icc-cpi.int/CourtRecords/CR2009_01313.pdf).

<sup>226</sup> Ana Gómez Rojo, *ICC Arrest Warrant for Omar Al Bashir On Charges Against Humanity and War Crimes*, in THE AM. NON-GOVERNMENTAL ORG. COAL. FOR THE ICC (Mar. 4, 2009), [http://www.iccnw.org/documents/AMICC\\_Bashir\\_Warrant.pdf](http://www.iccnw.org/documents/AMICC_Bashir_Warrant.pdf).

<sup>227</sup> *Communiqué of the 175th meeting of the Peace and Security Council of the African Union*, Peace and Sec. Council, PSC/PR/Comm(CLXXV), ¶¶ 2, 6 (Mar. 5, 2009).

<sup>228</sup> The AU in a resolution voiced its disappointment that the U.N. Security Council had not acted upon its request to defer the proceedings initiated against Omar Al Bashir pursuant to Article 16 of the Rome Statute, which allows the U.N. Security Council to defer cases for one year during the Fifth Ordinary Session of the Assembly of Heads of State and Governments of the AU held from July 25-27, 2010 in Kampala. *See Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)*, Assembly of the African Union, Fifteenth Ordinary Session, Assembly/AU/Dec.296(XV), ¶ 4 (July 27, 2010) [hereinafter *Decision on the Progress Report*], [http://www.au.int/en/sites/default/files/decisions/9630-assembly\\_en\\_25\\_27\\_july\\_2010\\_bcp\\_assembly\\_of\\_the\\_african\\_union\\_fifteenth\\_ordinary\\_se](http://www.au.int/en/sites/default/files/decisions/9630-assembly_en_25_27_july_2010_bcp_assembly_of_the_african_union_fifteenth_ordinary_se)

AU and the U.S., that the decision to prosecute would seriously destabilize the Sudan situation and sabotage the peace agreement effort,<sup>229</sup> although it is noteworthy that the U.S. chose to abstain rather than veto the original U.N. referral of the situation in Sudan initially<sup>230</sup> (perhaps as it had already publically declared the situation as a genocide).<sup>231</sup> Also, the AU maintains that as a head of state, al-Bashir enjoyed immunity from prosecution under Article 98 of the Rome Statute.<sup>232</sup> In addition, President al-Bashir, representing the Northern government, was seen as a key person to the success of the North-South Accord and the recently promulgated North-Darfur Accord, whose failure could signal a potential relapse into violent conflict.<sup>233</sup> That in turn led to the passage of a resolution in the AU meeting in Kampala, Uganda in July 2010, which called for its Member States to balance their obligations to the AU with their obligations to the ICC, especially with respect to the pending arrest warrant for President al-Bashir.<sup>234</sup> In addition to South Africa, as of July 2016, seven other African state-parties to the Rome Statute had entertained al-Bashir in their respective countries without extraditing him to The Hague and had been found non-compliant with their treaty obligations.<sup>235</sup>

In a similar vein, the AU expressed concern for the indictments of President H.E. Uhuru Muigai Kenyatta and Deputy President William

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<sup>229</sup> See Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34 *FORDHAM INT'L L. J.* 1585, 1587 (2011).

<sup>230</sup> Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005), <http://www.un.org/press/en/2005/sc8351.doc.htm>.

<sup>231</sup> Scott Straus, *Darfur and the Genocide Debate*, 84 *FOREIGN AFF.* 123, 123 (2005); Int'l Com'n for Inquiry on Darfur, *Report of the International Commission for Inquiry on Darfur to the United Nations Secretary-General*, ¶ 50, U.N. Doc. S/2005/60 (Jan. 25, 2005) (in July 2004, U.S. Congress had already passed resolution that crimes in Darfur qualify as genocide).

<sup>232</sup> *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly of the African Union, Thirteenth Ordinary Session, ¶ 10, Assembly/AU/13(XIII) (July 3, 2009), [http://www.au.int/en/sites/default/files/decisions/9560-assembly\\_en\\_1\\_3\\_july\\_2009\\_auc\\_thirteenth\\_ordinary\\_session\\_decisions\\_declarations\\_message\\_congratulations\\_motion\\_0.pdf](http://www.au.int/en/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf).

<sup>233</sup> Steve Odero, *Politics of international criminal justice, the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis*, PROSECUTING INT'L CRIMES IN AFRICA 151-153 (Chacha Murungu & Japhet Biegon eds., 2011).

<sup>234</sup> *Decision on the Progress Report*, *supra* note 228, at ¶ 6.

<sup>235</sup> Those countries are Chad, Kenya, Djibouti, Malawi, Democratic Republic of Congo, Uganda, and Nigeria. ICC-CPI, *Assembly of State Parties: Non-cooperation* (July 15, 2016), [https://asp.icc-cpi.int/en\\_menus/asp/non-cooperation/Pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/non-cooperation/Pages/default.aspx).

Samoei Ruto of the Republic of Kenya, which was seen as undermining the on-going efforts in promoting peace, national reconciliation, rule of law, and stability in the region.<sup>236</sup> The AU was aggrieved by the fact that the ICC assumed primary jurisdiction to prosecute perpetrators of crimes committed in the 2007 post-election violence<sup>237</sup> pursuant to an Article 17 analysis. The AU supported Kenya's request for a referral of the ICC prosecutions to its national legal mechanism, but this request did not find support from the President or the Prosecutor of the ICC.<sup>238</sup> On December 5, 2014, the prosecutor of the ICC withdrew charges of crimes against humanity against Kenya's President Uhuru Kenyatta.<sup>239</sup> The ICC later dismissed the case against William Ruto in April 2016.<sup>240</sup>

Similar concerns were echoed in the situation in Libya, which was also referred by the U.N. Security Council to the ICC under U.N. Security Council Resolution 1970.<sup>241</sup> The principle target was the late Colonel Muammar Qadhafi and his family members, who were accused of sending troops targeting civilian population in Tripoli, Benghazi, and Misrata in the spring of 2011.<sup>242</sup> The ICC subsequently issued arrest warrants for Qadhafi, his son, Saif al-Islam Qadhafi, and his brother-in-law, Abdullah al-Sanussi, for crimes against humanity.<sup>243</sup> Similar to previous occasions, the AU Assembly at its July 2011 Summit criticized "the warrant of arrest issued by the Pre-Trial Chamber concerning Colonel Qadhafi, [as it] seriously complicates the efforts aimed at finding a negotiated political solution to the crisis in Libya, which will also address, in a mutually-reinforcing way, issues relating to impunity and reconciliation."<sup>244</sup> As a result, the Assembly

<sup>236</sup> *Progress Report of the Commission on the Implementation of the Decision Assembly/AU/Dec.482 (XXI) on International Jurisdiction, Justice and the International Criminal Court (ICC)*, Executive Council of the African Union, Fifteenth Extraordinary Session, ¶ 2, Ext/EX.CL/2(XV) (Oct. 11, 2013), <https://www.scribd.com/document/175522897/Progress-Report-of-the-Executive-Commission-on-the-Implementation-of-the-Au-Decision-on-International-Jurisdiction>.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at ¶¶ 17, 19, 22.

<sup>239</sup> *ICC drops Uhuru Kenyatta charges for Kenya ethnic violence*, BBC NEWS (Dec. 5, 2014), <http://www.bbc.com/news/world-africa-30347019>.

<sup>240</sup> *Kenya's William Ruto's case dismissed by ICC*, BBC NEWS (Apr. 5, 2016), <http://www.bbc.com/news/world-africa-35965760>.

<sup>241</sup> S.C. Res. 1970, ¶ 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

<sup>242</sup> Garth Abraham, *Africa's Evolving Continental Court Structures: At the Crossroads?* 10 S. AFRI. INST. OF INTERN'L AFFAIRS GOVERNANCE AND APRM PROGRAMME, OCCASIONAL PAPER No. 209, (2015).

<sup>243</sup> *Id.*

<sup>244</sup> *Decision on the Implementation of the Assembly Decisions on the International Criminal Court*, Assembly of African Union, Seventeenth Ordinary Session, ¶ 6, Assembly/AU/Dec.366(XVII) (July 1, 2011),

decided that “Member States shall not cooperate in the execution of the arrest warrant.”<sup>245</sup>

These examples illustrate a lack of political will in eradicating impunity on the part of some African leaders and an evolving political agenda against the ICC. The premier issue in their agenda has been the maintenance of stability in the region.<sup>246</sup> However, the three examples cited, which the AU exhausted so much political capital upon, contradict this assertion. In Libya, the actions toppling the regime were quite distinct from the meager and focused powers of the ICC and though there are grave concerns over the succeeding regime,<sup>247</sup> this political concern is quite distinct from the crimes of Colonel Qadhafi, who was summarily executed by troops in the field.<sup>248</sup> The indispensable necessity of al-Bashir to the North-South peace accords is questionable and the crimes continue in Sudan, especially, *inter alia*, in the Nuba Mountains.<sup>249</sup> Similarly in Kenya, the prosecutions of targets were dismissed.<sup>250</sup> Reconciliatory means, as opposed to prosecution, are often sought by the AU to achieve political ends, which casts doubts on the legitimacy of the AU’s commitment to bringing perpetrators to justice. The aforesaid stance may also be driven by reality and practical concerns. To bring perpetrators to justice means the AU-mandated troops have to intervene in circumstances where genocide, crimes against humanity, and war crimes occur. Although the right of intervention is bestowed on the AU pursuant to Article 4(h) of the Constitutive Act,<sup>251</sup> the AU would rightly exercise this alternative sparingly, as their troops may well be inferior to those of the conflict state where the perpetrators are seeking refuge,<sup>252</sup> and because of perceived political fallout. This factor, coupled with the

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[http://www.au.int/en/sites/default/files/decisions/9647-assembly\\_au\\_dec\\_363-390\\_xvii\\_e.pdf](http://www.au.int/en/sites/default/files/decisions/9647-assembly_au_dec_363-390_xvii_e.pdf) (last visited Aug. 5, 2016).

<sup>245</sup> *Id.*

<sup>246</sup> *Constitutive Act of the African Union*, *supra* note 222, at art. 3.

<sup>247</sup> See Int’l Crisis Group, *Popular Protest in North Africa and the Middle East (V): Making Sense of Libya*, MIDDLE EAST/NORTH AFRICA REPORT No. 107 (Jun. 6, 2011).

<sup>248</sup> *Muammar Gaddafi: How he died*, BBC NEWS (Oct. 31, 2011), <http://www.bbc.com/news/world-africa-15390980>.

<sup>249</sup> *Sudan Profile—Timeline*, BBC NEWS (June 18, 2015), <http://www.bbc.com/news/world-africa-14095300>.

<sup>250</sup> *Dismissal of case against Kenya’s Ruto huge blow to ICC*, BBC NEWS (Apr. 5, 2016), <http://www.bbc.com/news/world-africa-35974172>.

<sup>251</sup> *The Constitutive Act of the African Union*, *supra* note 222, at art. 4(h).

<sup>252</sup> See John Mukum Mbaku, *International Justice: the International Criminal Court and Africa*, THE BROOKINGS INST. AFR. GROWTH INITIATIVE 9, <https://www.brookings.edu/wp-content/uploads/2016/07/03-foresight-international-criminal-court-africa-mbaku-1.pdf> (stating “[t]here was urgent need in Africa to squarely confront impunity and the mass violation of human rights, as well as prevent militarily, politically and economically stronger countries from invading weaker ones”).

qualified belief of sovereignty and that of non-intervention with internal affairs of member states,<sup>253</sup> results in the prevailing practice to attain political settlement and engage in covert negotiations involving power-sharing arrangements and amnesty proposals even if the AU decides to intervene.<sup>254</sup> Thus, the judicial body of the African Court would act subject to the political auspices of the AU.

The ICC, being an independent judicial body, exercises significantly greater political autonomy, though it, too, is subject to some political pressures as with any court. Indeed, though the Rome Statute provides for temporary deferrals by the Security Council, the ICC was initially fashioned and operates as an independent treaty body to de-politicize its character and function.<sup>255</sup> The AfCJHR subverts this aspiration by re-infusing overly intrusive politics into the judicial arena.<sup>256</sup> Much of the popularity surrounding the ICC at its inception among states in the African continent may have been due to perceptions that it was an independent treaty body not subject to political and economic prerogatives of Western or elite states, especially those occupying permanent membership on the U.N. Security Council.<sup>257</sup>

Another hindrance preventing the AfCJHR from delivering effective justice is its precarious financial capability, which is wholly inadequate when compared with that of the ICC.<sup>258</sup> Although Article 14, Section 1(b) of the Constitutive Act establishes a committee on monetary and financial affairs,<sup>259</sup> nowhere can a provision directly addressing the budget and

<sup>253</sup> See *Constitutive Act of the African Union*, *supra* note 222, at art. 4(h) (representing paradigmatic shift from OAU's exclusive focus on principles of State sovereignty and non-interference); see S.A. Dersso, *The Quest for Pax Africana: The Case of the African Union's Peace and Security Regime*, 12 AFR. J. CONFLICT RES. 11, 29 (2012).

<sup>254</sup> George Kegoro, *On the Brink: Kenya and the International Criminal Court*, in A FRACTIOUS RELATIONSHIP: AFRICA AND THE INTERNATIONAL CRIMINAL COURT 21 (Heinrich Böll Stiftung ed., 2012), [https://za.boell.org/sites/default/files/perspectives\\_1.12\\_web-1.pdf](https://za.boell.org/sites/default/files/perspectives_1.12_web-1.pdf).

<sup>255</sup> Rome Statute, *supra* note 44, at art. 16.

<sup>256</sup> *Constitutive Act of the African Union*, *supra* note 222, at art. 4(h).

<sup>257</sup> Mbaku, *supra* note 252, at 9.

<sup>258</sup> The ICC has to be responsible for its own funding as it is not a United Nations body. See William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 370 (3<sup>rd</sup> ed., 2007); see also Rome Statute, *supra* note 44, at art. 117 (providing "the contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget."). As of July 2016, 124 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them, thirty-four are African States, nineteen are Asia-Pacific States, eighteen are from Eastern Europe, twenty-eight are from Latin American and Caribbean States, and twenty-five are from Western European and other States. On the other hand, there are fifty-four Member States from the African Union.

<sup>259</sup> *Constitutive Act of the African Union*, *supra* note 222, at art. 14(1)(b). Moreover, art. 19 establishes certain financial institutions. See *Constitutive Act of the African Union*,



financing for the organs of the AU be found.<sup>260</sup> The AU has long faced budgeting and financial difficulties because of its Member States' failure to pay their contributions.<sup>261</sup> The scale of payment is based on the Member States' capacity to pay.<sup>262</sup> It is noteworthy that Algeria, Egypt, Libya, Nigeria, and South Africa each pay a rate up to 15% of the annual AU budget, with the remaining 25% to be shared among the other forty-eight Member States.<sup>263</sup> As of January 2009, only twenty-three of the fifty-three States, which include four of the five main contributing States, fulfilled their payment obligations.<sup>264</sup> The total contribution in arrears by Member States amounted to \$127 million at that time.<sup>265</sup> In contrast, in 2011, "the ICC budget—currently for investigating just three crimes, and not the raft of offences the African Court is expected to tackle—[wa]s more than fourteen times that of the African Court without a criminal component; and [wa]s just about double the entire budget of the AU."<sup>266</sup>

Given the limited budget, however exhaustive and ambitious the list of crimes the ICL Section is mandated to prosecute, its potential in delivering justice would be severely constrained. In particular, huge financial costs are to be incurred in paying for qualified judges, prosecutors, investigators, facilities for holding detainees, witness protection, victim liaison work, and the costly, complicated, and protracted trials of an international character.<sup>267</sup> As such, the ICL Section, if properly run, would be much more expensive to maintain and to support in its daily operations than the

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*supra* note 222, at art. 9.

<sup>260</sup> Corinne A.A. Packer & Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AM. J. INT'L L. 365, 377 (2002).

<sup>261</sup> *Decision Alternative Sources of Financing the African Union*, Assembly of the African Union, Seventeenth Ordinary Session, ¶ 3, Assembly/AU/Dec.364(XVII) (July 1, 2011), [http://www.au.int/en/sites/default/files/decisions/9647-assembly\\_au\\_dec\\_363-390\\_xvii\\_e.pdf](http://www.au.int/en/sites/default/files/decisions/9647-assembly_au_dec_363-390_xvii_e.pdf).

<sup>262</sup> *Decision on the scale of assessment*, AU Council, Seventh Ordinary Session, ¶ 2, EX.CL/Dec.223(VII) (July 2, 2005), [http://www.au.int/en/sites/default/files/decisions/9629-council\\_en\\_28\\_june\\_2\\_july\\_2005\\_council\\_executive\\_council\\_seventh\\_ordinary\\_session.pdf](http://www.au.int/en/sites/default/files/decisions/9629-council_en_28_june_2_july_2005_council_executive_council_seventh_ordinary_session.pdf); *Decision on the Scale of Assessment*, Assembly of the African Union, Fifth Ordinary Session, ¶ 2, Assembly/AU/Dec.88(V) (July 5, 2005).

<sup>263</sup> *Id.* at ¶ 3.

<sup>264</sup> *Decision on the Contributions of Member States*, Executive Council of the African Union, Fourteenth Ordinary Session, ¶ 2, EX.CL/ Dec.457(XIV) (Jan. 30, 2009), [http://www.au.int/en/sites/default/files/decisions/9628-council\\_en\\_26\\_30\\_january\\_2009\\_executive\\_council\\_fourteenth\\_ordinary\\_session.pdf](http://www.au.int/en/sites/default/files/decisions/9628-council_en_26_30_january_2009_executive_council_fourteenth_ordinary_session.pdf).

<sup>265</sup> *AU States Contributions in Arrears Estimated At U.S. \$127 Million*, ALL AFR. (June 29, 2009), <http://allafrica.com/stories/200906291577.html>.

<sup>266</sup> In 2011, the AfCHPR had a budget of \$9 million, while the ICC has an annual budget of \$134 million. See Abraham, *supra* note 242, at 11; du Plessis, *supra* note 33.

<sup>267</sup> Du Plessis, *supra* note 33, at 6.

other two branches of the merged court.<sup>268</sup> Also, it is questionable whether the ratifying states would fulfill their future financial obligation. With respect to the nine states that have signed the Amendment (Kenya, Benin, Chad, Congo, Ghana, Guinea-Bissau, Guinea, Sierra Leone, Sao Tome and Principe), some possible motives for ratification include being investigated by the ICC; non-state Rome Statute party, leaders, or governmental figures being future targets; and obtaining status as low paying country (or a country that is in arrears), which suggests they do not plan to pay or enjoy very low payment burdens anyway.<sup>269</sup>

ii. Encouraging domestic prosecutions against perpetrators

Only those high-ranking officers who bear the greatest responsibility for crimes of international concern are tried in the ICC.<sup>270</sup> The importance of the object of encouraging domestic prosecutions against lower-level perpetrators is embodied in the complementarity principle.<sup>271</sup> Ineffective national judicial cooperation would lead to a chasm of impunity, which would undermine the ICC's primary goal to end impunity.<sup>272</sup> The mechanism through which the ICC could foster compliance with the ICL norms<sup>273</sup> and prosecution in domestic level is the referral of a 'situation,' which would lead to the relevant actors within the ambit of the referral to appreciate that prosecution is a real possibility. The relevant state, at the same time, would be motivated to strengthen prosecution of international crimes domestically due to the reputational costs at stake.

In the past, and until recently, most of the African countries took a very

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<sup>268</sup> For an analogy, reference could be made to a comparison of the proposed budget of the ICC and ICJ. The ICC proposed budget for 2016 is approximately \$162.5 million whereas the ICJ proposed budget for the same year is approximately \$52.5 million. Thus, the operation of the ICC costs more than three times of that of the ICJ. See *Proposed Programme Budget for 2016 of the International Criminal Court*, ICC Assembly of States Parties, Fourteenth Session, art. A(2)(e), ICC-ASP/14/10/Add.1 (Nov. 26, 2015).

<sup>269</sup> *Member States of the AU*, AFR. UNION, [http://www.au.int/en/AU\\_Member\\_States](http://www.au.int/en/AU_Member_States) (last visited Oct. 10, 2016).

<sup>270</sup> Rome Statute, *supra* note 44, at art. 25.

<sup>271</sup> Benson Olugbo, *Positive Complementarity and the Fight Against Impunity in Africa*, PROSECUTING INT'L CRIMES IN AFRICA 44, 256 (Chacha Murungu & Japhet Biegon eds., 2011).

<sup>272</sup> *Id.* at 257.

<sup>273</sup> See SHANY, *supra* note 219, at 123-24. Shany notes that

[f]or example, the indictment of a serving head of state by the ICC and the issuance of a warrant for his or her arrest may not result in decision- compliance (as the case of Omar Al-Bashir illustrates). Still, the Court's indictment of heads of states may influence the future conduct of other heads of state and help in preventing them from committing or tolerating future crimes. *Id.*

positive stance with respect to the work of the ICC.<sup>274</sup> Tremendous effort was displayed by some African non-governmental organizations (“NGOs”) and civil societies in rallying support for the ICC.<sup>275</sup> The effort of the AU<sup>276</sup> and individual African states<sup>277</sup> in paving the way for the ICC to fight impunity has been vital.

Nevertheless, the coming into force of the ICL Section would render the AU and African States less willing to cooperate with the ICC and would ultimately undermine the importance and efficacy of the ICC work in Africa. In regard to the costs to the sovereign in ratifying the ICL Section and the Rome Statute, the former expressly immunizes heads of state whereas the latter delivers judgments that are perceived to adversely affect important state interests in a significant manner, such as an arrest warrant

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<sup>274</sup> Senegal, an African country, was the first in the world to ratify the Rome Statute on February 2, 1999. According to the then representative from the OAU,

Africa had a particular interest in the establishment of the Court, since its peoples had been the victims of large-scale violations of human rights over the centuries: slavery, wars of colonial conquest and continued acts of war and violence, even in the post-colonial era. T Maluwa, *Legal Adviser OAU Secretariat Statement at the 6<sup>th</sup> Plenary*, Official records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Vol. II), U.N. Doc. A/CONF.183/2/Add.1, 104, ¶ 116 (June 17, 1998), [http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v2\\_e.pdf](http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf).

<sup>275</sup> They founded the NGO Coalition for the Establishment of an International Criminal Court (the Coalition), which, subsequent to the adoption of the Rome Statute, transformed into an effective international campaign for prompt attainment of the sixty ratifications required. See William R. Pace & Mark Thieroff, *Participation of Non-Governmental Organizations*, in *THE INTERNATIONAL CRIMINAL COURT: THE MARKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS* 395 (Roy S. Lee ed., 1999).

<sup>276</sup> See Letter to Foreign Ministers on the 19<sup>th</sup> African Union Summit from African Civil Society and International Organizations on the Relationship between the ICC and the AU, HUM. RTS. WATCH (July 5, 2012), <https://www.hrw.org/news/2012/07/05/letter-foreign-ministers-19th-african-union-summit> (last visited Aug. 5, 2016).

In 2006 and 2007, at an AU meeting of heads of state in Addis Ababa, Sudanese President Omar al-Bashir’s bid to become the AU chairperson was rejected due to the atrocities that were occurring in Darfur, Sudan. More recently, the AU deployed 5,000 troops to pursue Joseph Kony of the Lord’s Resistance Army, who is wanted by the ICC for crimes committed in northern Uganda. The AU has also played a key role in pressing Senegal to investigate and prosecute Hissène Habré, the former president of Chad, for serious crimes. *Id.*

<sup>277</sup> *Id.*

Individual African states have independently reaffirmed their commitments to ending impunity, this includes the requests by the governments of Uganda, the Democratic Republic of Congo, the Central African Republic, and Côte d’Ivoire to the International Criminal Court to investigate crimes committed in their countries. *Id.*

against a head of state.<sup>278</sup> The political capital of the former's arrangement is vastly superior from a state sovereignty perspective than the ICC. African governments arguably would be relatively reluctant to ratify the latter.

From the foregoing, some possibilities may ensue. First, Member States may halt the process of ratifying the Rome Statute and press for those dualist countries which had already ratified it to stop domestication of the Rome Statute or withdraw from the treaty,<sup>279</sup> as South Africa attempted.<sup>280</sup> This would pose some challenges to the ICC because, at present, only a small number of African states have incorporated the terms of the Rome Statute into their domestic law<sup>281</sup> and, as noted, ineffective domestication is problematic in those dualist states whose international treaty obligations could not be directly applicable without such process.<sup>282</sup> As a result of ineffective domestication, inconsistencies may arise in the areas of head of state immunity,<sup>283</sup> extradition and rendition,<sup>284</sup> mutual judicial assistance

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<sup>278</sup> See, e.g., Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American American Courts for Human Rights*, 6 J. INT'L & INT'L REL. 35, 59 (2010) (stating "[o]verall, these figures provide some evidence that states comply when the costs are relatively low.").

<sup>279</sup> It should be noted that "the traditional distinction between monist and dualist countries is not so useful in the ICC context [because] . . . there are many exceptions and variations that exist in systems that are 'notionally monist' or 'notionally dualist.'" Also, "[t]hose States Parties that have seriously examined the question of implementation have come to the unanimous conclusion that, regardless of their legal tradition or normal practice, the [Rome] Statute requires some form of domestic implementing legislation." BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 4 (2003).

<sup>280</sup> Milton Nkosi, *What South Africa Leaving the International Criminal Court would mean*, BBC NEWS (Oct. 14, 2015), <http://www.bbc.com/news/world-africa-34509342>.

<sup>281</sup> See HUM. RTS. WATCH, *supra* note 276 (stating "Mauritius adopted such legislation in 2012, and other countries—including Burkina Faso, the Central African Republic, Kenya, Senegal, and South Africa—previously enacted such laws.").

<sup>282</sup> The domestic jurisdiction could not deal with cases concerning international crimes unless its legal system either has already contained definitions about the crimes in Article 5 of the Rome Statute, or where it has incorporated these offences into its domestic legislations. See Rome Statute, *supra* note 44, at art. 1, 5(2).

<sup>283</sup> For example, the Malawian Constitution seemingly provides blanket immunities to the President; The Zambian National Assembly can waive the immunity that normally attaches to the office of the President. See Mwiza Nkhata, *Implementation of the Rome Statute in Malawi and Zambia: Progress, Challenges and Prospects*, PROSECUTING INT'L CRIMES IN AFRICA 291, 299 (Chacha Murungu & Japhet Biegon eds., 2011).

<sup>284</sup> For example, the Extradition Act (Ch. 8:03 of the Laws of Malawi) proceeds on the presumption that a request for the surrender must have been made by a government. Likewise, under the Extradition Act (Ch. 94 of the Laws of Zambia), no provision is made for the processing of extradition requests from an international organization. See *id.* at 292, 300.

and cooperation,<sup>285</sup> definitions and elements of crimes, as well as jurisdiction between the domestic legislation regional obligations and the Rome Statute.<sup>286</sup> Chaos may ensue in the application of international criminal law by the domestic judiciary and a regional court.

Second, the ICL Section may serve to sabotage the mutual judicial assistance and cooperation with the ICC due to the conflicting obligations that some African States face.<sup>287</sup> Since the ICC does not have its own police force, detention centers and prison facilities, it effectively depends on state parties in relation to the arrest of the defendants, their subsequent detention and surrender, and venue where the convicted persons could serve their sentences,<sup>288</sup> without which the ICC would virtually become a tiger without teeth. Moreover, consent of a third state may be required for the transfer of a national of that state (not being a Member State) who is caught on the territory of a Member State pursuant to the Rome Statute's Article 98.<sup>289</sup>

On the other hand, the ICL Section is not a desirable substitute in terms of encouraging domestic prosecutions against perpetrators. It is unlikely to yield much respect to victims and would tend to perpetuate the circle of potential leadership perpetration of heinous crimes through lack of deterrence. The conclusion is that an ICL Section would divert African states' cooperative efforts with the ICC and would hinder the latter's influence in fostering domestic prosecution. As observed by a realist

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<sup>285</sup> Int'l Ctr. for Crim. L. Reform and Crim. Just. Policy, *International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute*, at 8 (3 ed. 2008), [http://www.iccnw.org/documents/ICC\\_Manual\\_-\\_March\\_2008\\_-\\_ICLR.pdf](http://www.iccnw.org/documents/ICC_Manual_-_March_2008_-_ICLR.pdf). "[T]he Court does not possess an international police force of its own and relies on States to perform all cooperation tasks." *Id.*

<sup>286</sup> Anna Triponel & Stephen Pearson, *African States and the International Criminal Court: A Silent Revolution in International Criminal Law*, 12 J. L. & SOC. CHALLENGES 65, 78 (2010).

<sup>287</sup> See Rome Statute, *supra* note 44, at part 9; see also *Id.* at art. 86 (providing "[s]tates Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."). A recent challenge for the ICC is the AU Assembly's refusal on the request from the ICC to open a liaison office in Addis Ababa, Ethiopia. *Decision on the Progress Report of the Commission on the Implementation of Decision Assembly AU/Dec. 270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)*, Assembly of the African Union, Fifteenth Ordinary Session, ¶ 8, Assembly/AU/Dec.296XV (July 27, 2010), [http://www.au.int/en/sites/default/files/decisions/9630-assembly\\_en\\_25\\_27\\_july\\_2010\\_bcp\\_assembly\\_of\\_the\\_african\\_union\\_fifteenth\\_ordinary\\_session.pdf](http://www.au.int/en/sites/default/files/decisions/9630-assembly_en_25_27_july_2010_bcp_assembly_of_the_african_union_fifteenth_ordinary_session.pdf).

<sup>288</sup> Charles Chernor Jalloh, *Regionalizing International Criminal Law?*, 9 INT'L CRIM. L. REV. 445, 457 (2009); Int'l Ctr. for Crim. L. Reform and Crim. Just. Policy, *supra* note 285, at 8 (noting "the Court does not possess an international police force of its own and relies on States to perform all cooperation tasks.").

<sup>289</sup> Rome Statute, *supra* note 44, at art. 98.

commentator, “the extent to which a state’s behavior conforms to international law mainly depends on a state’s political, economic, and military power in comparison to its neighboring states or the human rights regime, not on the norms and rules established by the governing human rights regime.”<sup>290</sup> Thus, if the perpetrator is a strong regional actor or has significant regional trade ties, prosecution would be less probable in domestic courts if the ICL Section, rather than the ICC, issued the arrest warrant.

Nonetheless, despite the perceived state sovereignty cost of the ICC, it is a remarkable fact that the vast majority of African states has refused to go down this path and rejected exaggerated notions of state sovereignty in exchange for eradicating impunity. This is an encouraging sign of political motivation to deliver effective justice, although the future trend is difficult to project.<sup>291</sup>

The foregoing analysis proffers on an array of features of the proposed ICL Section in order to predict whether it would be compatible with the object and purpose of the Rome Statute upon its operation. As the ICL Section has yet to come into force, predictions of effective execution are based on the various institutional characteristics of the AfCJHR and the track record of the relevant stakeholders in combating international crimes. An important question arises as to the permissibility of the ICC to take into account the matters of the past and even prior to the existence of the ICL Section in determining the criteria pursuant to Article 41(1)(b)(ii) of the Vienna Convention.

Although this question admits no direct answer, Rule 51 of the ICC Rules of Procedure and Evidence (“RPE”) stipulates that the fact that a state’s courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct can be considered in determining whether the state is “unwilling” under Article 17(2).<sup>292</sup> It is

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<sup>290</sup> Stacy-Ann Elvy, *supra* note 221, at 81; MARKUS BURGSTALLER, *THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW* 96 (2005).

<sup>291</sup> Some recent incidents include that the Assembly of the African Union decided (Decision 586 XXV) to set up an Ministerial Committee of Ministers of Foreign Affairs on the ICC to ensure that the decisions of the Assembly on ICC are implemented in June 2015 and the AU summit voted in favor of a proposal for withdrawal from the ICC in January 2016. *See African Union members back Kenyan plan to leave ICC*, THE GUARDIAN (Feb. 1, 2016), <http://www.theguardian.com/world/2016/feb/01/african-union-kenyan-plan-leave-international-criminal-court> (last visited Aug. 5, 2016).

<sup>292</sup> Rule 51 (Information provided under Article 17) states that:

[i]n considering the matters referred to in Article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, *inter alia*, information that the State referred to in Article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has

noteworthy that this gateway is open for the PTC to take into account a state's track record of investigating and prosecuting similar crimes in the determination of the admissibility under the ICC complementarity regime.<sup>293</sup> The reference to a state's track record can be expanded to that of the relevant pan-African organizations by virtue of Article 31(3)(c) of the Vienna Convention, as discussed earlier. However, in considering the track record, credence must be given to the concrete facts of the case actually under determination, since it is provided in Rule 51 of the RPE that the record may only be considered "in the context of the circumstances of the case" before the Court.<sup>294</sup>

#### CONCLUSION: A WAY FORWARD

The inauguration of the ICL Section in its current form would complicate the legal issues involved in the balancing of states' legal obligations, in particular those that concern arrest, surrender, jurisdiction and admissibility. Both the ICC and AfCJHR regulate the special regime of international criminal law. It is important to note that in resolving the norm conflicts engendered by the AfCJHR, the legal orders it created could not be regarded as an autonomous legal system.

The European Court of Justice ("ECJ") in *Kadi*<sup>295</sup> reviewed this issue when confronted with a clash between legal norms of a regional body, namely the fundamental rights guaranteed in the European Community Treaty, and those of general international law, namely Articles 25 and 103 of the U.N. Charter. The ECJ held that "the Community judicial organs must ensure the full review of the lawfulness of all Community acts, including those giving effect to Security Council resolutions under Chapter VII."<sup>296</sup> The ECJ further stated that:

the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an

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confirmed in writing to the Prosecutor that the case is being investigated or prosecuted. *See* ICC R. EVID. & CIV. P. 51.

<sup>293</sup> Vienna Convention, *supra* note 67, at art. 31(3)(c).

<sup>294</sup> Ben Batros, *The evolution of the ICC jurisprudence on admissibility*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY – FROM THEORY TO PRACTICE 580 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

<sup>295</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat Int'l Found. v. Council of the European Union and Comm'n of the European Communities*, 2008 E.C.R. I-06351, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0402>.

<sup>296</sup> Dinah Shelton, *International Law and 'Relative Normativity'*, INTERNATIONAL LAW 157 (Malcolm D. Evans ed., 4th ed. 2014).

international agreement.<sup>297</sup>

Additionally, the ECJ held that

an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by . . . Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community.<sup>298</sup>

If the AfCJHR regime is to be regarded as an autonomous legal system that possesses a superior character to, and is not to be prejudiced by, an international agreement such as the Rome Statute, it would render the Rome Statute's complementarity regime nugatory and lead to "regional exceptionalism from international justice and create an impunity gap, precluding effective international action and excusing regional inaction on individual accountability for international crimes."<sup>299</sup> Moreover, such interpretation would result in an inappropriate assertion of primacy that tends to arrogate to the Amendments' Member States' power beyond the parties to the Rome Statute or make assertion *erga omnes* even if it is arrangement *inter partes*.<sup>300</sup>

More importantly, as a matter of principle, the legal order created by the AfCJHR could hardly be regarded as an autonomous legal system. Both the ICC and the AfCJHR operate in the sensitive area of the maintenance of international peace and security. In this area, the framework of the U.N. Charter conceived one set of highly centric rules for the world, consolidated in its own hand.<sup>301</sup> According to Article 24(1) of the U.N. Charter, primary responsibility for taking prompt and effective action for the maintenance of international peace and security was conferred on the Security Council, which was authorized to act on behalf of Member States.<sup>302</sup> This is

<sup>297</sup> Kadi, Joined Cases C-402/05 P and C-415/05 P, *supra* note 295, at ¶ 316.

<sup>298</sup> *Id.* at ¶ 282.

<sup>299</sup> du Plessis, *supra* note 33, at 19.

<sup>300</sup> James Crawford & Penelope Nevill, *Relations between International Courts and Tribunals: The 'Regime Problem'*, in REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 257 (Magaret A. Young ed., 2012).

<sup>301</sup> In its resolution of January 29, 2004, the European Parliament "confirm[ed] that the U.N. Charter constitutes the key political and legal basis for developing international relations and ensuring peace and international security." Resolution on the Relations Between the European Union and the United Nations, EUR. PARL. DOC., at ¶ 15, PV. 341.150 (2003), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P5-TA-2004-0037&language=SL> (last visited Aug. 5, 2016).

<sup>302</sup> U.N. Charter, at art. 24(1) (providing "[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.").



illustrated in the U.N. Security Council-oriented responses under Chapter VII of the U.N. Charter concerning threats to and breaches of the peace.<sup>303</sup> Article 39 of the U.N. Charter stipulates that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”<sup>304</sup> Of relevance is Article 41, which is directed at measures decided on by the Security Council that do not involve the use of armed force.<sup>305</sup> The establishment of International Tribunals falls squarely within the powers of the U.N. Security Council under Article 41.<sup>306</sup>

Indeed, all contemporary international criminal tribunals embedded themselves in the U.N. system, and their functions are inextricably linked with the U.N.<sup>307</sup> There is no precedent for a regional criminal court, unrelated to the U.N. system, which creates a legal order that constitutes a supreme autonomous legal system incompatible to any hierarchy of international norms. Indeed, the Nuremberg and Tokyo trials were the product of the Draft Convention for the Establishment of a United Nations War Crimes Court<sup>308</sup> prepared by the United Nations Commission for the Investigation of War Crimes. The establishment of the *ad hoc* tribunals in Yugoslavia and Rwanda was premised upon the decisions of the U.N. Security Council.<sup>309</sup> Likewise, the U.N. is signatory to the “hybrid”

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<sup>303</sup> The title of U.N. Charter Chapter VII reads: “Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” See U.N. Charter, at ch. VII.

<sup>304</sup> U.N. Charter, at art. 39 (providing “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

<sup>305</sup> U. N. Charter, at art. 41. This article stipulates:

[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

*Id.*

<sup>306</sup> Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 36 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>307</sup> See, e.g., RODNEY DIXON & KARIM A.A. KHAN, ARCHBOLD: INTERNATIONAL CRIMINAL COURTS PRACTICE, PROCEDURE AND EVIDENCE §§ 2.1-2.4 (4<sup>th</sup> ed. 2013) (setting historical background of establishment of international criminal courts).

<sup>308</sup> U.N. War Crimes Comm’n, Draft Convention for the Establishment of a United Nations War Crimes Court art. 12, Sep. 30, 1944, Doc. C.50(1).

<sup>309</sup> See S.C. Res. 827, *supra* note 137, at ¶ 1 (establishing tribunal charged with

tribunals set up in Sierra Leone,<sup>310</sup> Lebanon,<sup>311</sup> and the court in Cambodia.<sup>312</sup> Lastly, the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, convened on June 15, 1998 in Rome, was premised upon General Assembly resolutions adopted in 1996 and 1997.<sup>313</sup> Also, special powers are provided to the Security Council for referral of cases pursuant to Article 13(b) of the Rome Statute<sup>314</sup> and deferral of investigation or prosecution for a period of twelve months pursuant to Article 16 of the Rome Statute<sup>315</sup> acting in unison with Chapter VII of the U.N. Charter. Thus, in a very pragmatic way, the ICC is part of the U.N. system.

The Rome Statute, in particular the complementarity jurisdictional principles embedded in it, has a pivotal role in the process of balancing competing obligations owed by a state when leaders are involved in gross violation of human rights. The Rome Statute was established by the U.N. system and is bestowed with jurisdiction over “the most serious crimes of concern to the international community as a whole.”<sup>316</sup> In the third paragraph of the preamble of the Rome Statute, States Party recognized “that such grave crimes threaten the peace, security and well-being of the world.”<sup>317</sup> Likewise in the seventh paragraph of the preamble it is

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prosecution of “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”); S.C. Res. 955, *supra* note 137, at ¶ 1 (mandating tribunal to prosecute genocide and serious violations of international humanitarian law committed in Rwanda and neighboring countries during 1994).

<sup>310</sup> Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 UNTS 138.

<sup>311</sup> Pursuant to S.C. Res. 1757, ¶ 4 (May 30, 2007).

<sup>312</sup> Pursuant to the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003, 2329 UNTS 117.

<sup>313</sup> G.A. Res. 51/207, ¶ 2 (Dec. 17, 1996); G.A. Res. 52/160, ¶ 8 (Dec. 15, 1997).

<sup>314</sup> U.N. Charter Ch. VII; Rome Statute, *supra* note 44, at art. 13(b). The Rome Statute noted:

The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: . . .

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. *Id.*

<sup>315</sup> *Id.* at art. 16. This article provides that:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

<sup>316</sup> *Id.* at pmb. ¶¶ 4, 9.

<sup>317</sup> *Id.* at pmb. ¶ 3.

reaffirmed that “the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>318</sup>

Thus, in determining priority of jurisdiction between the ICC and the AfCJHR, the complementarity jurisdictional principles embedded in the ICC must be engaged and the rules of engagement submitted to those firmly established under the international law of treaty interpretation and the auspices of the U.N. system. This consists of principle-based legal techniques, which are useful for states, the ICC, and the AfCJHR to engage the major issues under the existing legal framework. In light of these principles, the grant of head of state immunity by the Amendments would not undermine the ICC’s capacity in prosecuting widespread and systematic human rights violations in Africa through the prism of an assessment on the Amendments resultant domestic willingness and ability to punish perpetrators who are otherwise immunized. Furthermore, after evaluating the object and purpose of the Rome Statute applicable in the case of *inter se* agreements, and analyzing policy considerations, the AU should prioritize the jurisdiction of the ICC over that of the AfCJHR and/or at least tip the balance in favor of ICC jurisdiction.

The new age of accountability, existing since the formation of the first ad hoc tribunal, has shifted with the reluctance of the U.N. to establish new international tribunals. The ICL has begun a process of exploring the feasibility of regional courts to fill this gap. If properly orchestrated and conducted in concert with the U.N., the ICC, and established principles of international law, regional courts have the potential of further eradicating impunity and deterring leaders and others who would violate the most serious crimes of concern to the international community. Regional criminal courts could be of immeasurable worth to this enterprise, as the ICC alone, even working with national jurisdictions, is incapable of bringing all offenders to justice. Such courts would make the deterrence value incumbent to the enterprise; however, a proper hierarchy, or concurrent jurisdictional powers within the instruments themselves, must be established or forum shopping and other counterproductive measures will ensue, thereby increasing impunity.

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<sup>318</sup> *Id.* at pmb1. ¶ 7.