The Rome Statute and Malabo Protocol: Complementarity's Creation of a Fragmented World

Jos van Doorne

1274385

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List of Abbreviations

ACC	African Criminal Court
ACHPR	African Commission of Human and Peoples' Rights
ACJ	African Court of Justice and Human and Peoples' Rights
Art.	Article
Arts.	Articles
AU	African Union
CIL	Customary International Law
E.g.	For example
Etc.	Et cetera
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
MP	Malabo Protocol
MS	Member State
OTP	Office of the Prosecutor of the International Criminal Court
Protocol	Malabo Protocol
PTCI	Pre-Trial Chamber I of the International Criminal Court
PTCII	Pre-Trial Chamber II of the International Criminal Court
REC	Regional Economic Community
RS	Rome Statute
SCSL	Special Courts for Sierra Leone
SSC	Substantially Same Conduct
UN	United Nations
UNSC	United Nations Security Council

1. Introduction

In recent times, the International Criminal Court (ICC) has come under scrutiny for its areas of investigation and active cases, predominantly finding place on the African continent.[1] Several states have even threatened to withdraw from the Rome Statute because of bias felt towards them, with several nations of the African Union (AU) feeling targeted by the 'western-influenced' Court.[2] Indeed, Burundi has already withdrawn from the Rome Statute,[3] doing so on 27 October 2017 and, whilst not located in Africa, the Philippines also exited the Rome State on 17 March 2019 after the mandatory one-year wait after filing its notification of withdrawal.[4]

Within the AU, however, several nations including South Africa, The Gambia, Rwanda, Uganda and Kenya have all expressed discontent with the way the ICC operates.[5] As a result, the African Union adopted the Malabo Protocol.[6] This instrument seeks to extend the jurisdiction of the African Court of Justice to cover crimes of international law, as the ICC currently does, and grant the AU the competence to try cases of their national jurisdictions, rather than have them subjected to the ICC.

This potential mass withdrawal of African nations from the Rome Statute, as well as their intent to set up a similar court to the ICC, has produced large uncertainty

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[1] International Criminal Court, *"Situations and Cases (Interactive Map)"* (International Criminal Court) Accessed 24 May 2019.

[2] Gerhard Werle et al., "Africa and the International Criminal Court" (Springer, 2014) 4.

[3] Office of the Prosecutor of the International Criminal Court, "Preliminary Examination of Burundi" (OTP, 2017) para 289.

[4] Press Release 03/2019 "President of the Assembly of State Parties regrets withdrawal from the Rome Statute by The Philippines" (18 March 2019).

[5] Franck Kuwonu, *"ICC: Beyond the threats of withdrawal"* (AfricaRenewal Online, May – July 2017) Accessed 24 May 2019.

[6] African Union, *Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.*

as to the future of international criminal law. Up until now, the ICC has been the most-recognised Court that prosecutes individuals for international crimes, with 122 countries State Party to its treaty.[7] As such, it is currently the only permanent international Court that adjudicates international criminal law cases. Other international criminal tribunals have been ad-hoc, such as the ICTY and ICTR. With the creation of the ACC, however, the first permanent regional court for hearing international criminal law cases would be established.

At the heart of the dispute between the ICC and African Union is the principle of complementarity, and how the ICC goes about applying this relationship in the context of its admissibility criteria.[8] As the AU has frequently challenged the admissibility of cases before the ICC, it is clear its members view the Court as overstepping its jurisdiction and not respecting the primacy that states have. This is further evidenced by these African states not complying with the ICC in cases where they have lost jurisdiction.[9]

As such, there is a link between the principle of complementarity (and the criticism it currently faces), and the decision of AU Member States to expand the ACJ's jurisdiction to including crimes under international law. It is this link that this thesis seeks to further explore in its identification of the following gap in the current body of knowledge: whilst many pieces look at the Malabo Protocol and principle of complementarity separately, few combine the two. It has thus rarely been explored in how far the principle of complementarity is responsible for the

[7] ICC Assembly of State Parties, *"The State Parties to the Rome Statute"* (Interactive Map, International Criminal Court) Accessed 9 June 2019.
[8] See for example *Al Bashir, Gaddafi, Simone Gbagbo.*
[9] See for example, Decisions on non-compliance of Malawi, Chad and Uganda in connection with *Al Bashir.*

potential fragmentation of international criminal law, as the Malabo Protocol stands of causing.

This thesis then contributes analysis of a relatively new body of literature to the debate surrounding the principle of complementarity. In doing so, this thesis will first address the principle of complementarity in a purely theoretical way, doing so by referring to the Rome Statute and the works of Jackson[10] and Heller[11] surrounding regional and radical complementarity respectively. Thereafter, the practice of complementarity by the ICC is analysed to discover whether the Court is consistent with the themes upon which the principle is based. ICC case law plays a large role here, as do OTP Papers and AU States' reactions to admissibility challenges.

After the principle of complementarity has been thoroughly analysed, attention will then turn to the Malabo Protocol. Here, Art. 46A*bis* will be particularly scrutinised and compared with the larger conversation within customary international law on how, if at all, immunities are recognised before international courts. Several pieces of literature will be consulted including those of Du Plessis[12] and a number of chapters in Werle's work.[13] This thesis will then relate its findings to the exploration of potential legal pluralism between the two courts. Here, van Sliedregt and Burke-White note its positive effects, such as the

[10] Miles Jackson, "Regional Complementarity: The Rome Statute and Public International Law" (Journal of International Criminal Justice, December 2016) Vol. 14(5), 1061-1072.
[11] Kevin J. Heller, "Radical Complementarity" (Journal of International Criminal Justice, July 2016) Vol. 14(3), 637-655.
[12] Max Du Plessis, "A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes" (EJIL:Talk! 27 August 2012).
[13] Gerhard Werle and Moritz Vormbaum, "The African Criminal Court: A Commentary on the Malabo Protocol" (Springer, 2016).

"commonness"[14] (rather than universality) it implies and the "hybridisation"[15] of law enforcement regimes. Hafner instead notes its complications, including the threat to international law's credibility.[16]

By its conclusion, this thesis aims to have thoroughly explored the situation surrounding the ICC and Malabo Protocol. In answering its main Research Question, several sub-questions will help guide the thought of this paper, including: 'How does the Rome Statute define complementarity and what are its effects in practice?'; 'How does the Malabo Protocol compare with the Rome Statute and with international law?'; 'What issues does Art. 46A*bis* raise in light of international law and complementarity?' and; 'Is legal pluralism in international criminal law an unwanted result, or would it have a positive effect?' Ultimately, answering these sub-questions will aid this thesis in providing a coherent and well-informed answer to its main Research Question: To what extent does the principle of complementarity threaten the fragmentation of international criminal law?[17]

[14] Elies van Sliedregt, "Pluralism in International Criminal Law" (Leiden Journal of International Law) Vol. 25 (4).
[15] William W. Burke-White, "International Legal Pluralism" (Michigan Journal of International Law) Vol. 25 (4) 963-980.
[16] Gerhard Hafner, "Pros and Cons ensuing from Fragmentation of International Law" (Michigan Journal of International Law) Vol. 25 (4) 849-844.
[17] In asking this question, 'threaten' is defined as 'causing something to be at risk; endanger'.

2. Methodology

It is the purpose of this section to convey not only how the referenced sources were deemed relevant to this thesis, but to also explain the scope of the research in connection with the topic of this thesis. Regarding the former, sources were analysed based on their relevancy, currency and reliability to best inform the author and ensure an end result of high quality. Several types of sources were consulted, including: books; book chapters; legal cases; journal articles; legislation; online news articles; online forums and other relevant websites. Online databases were a readily used tool in finding the majority of sources, with those of HeinOnline, Google Scholar and Oxford Bibliographies being the most popular. These provided easy access to various articles on a particular topic; as the search results can be refined based on the searched criteria, this was also an efficient way of researching information. The online databases of the ICC and AU were also used to find the relevant legal material for the same reasons.

Below, a more detailed explanation is provided of how regarding the sources this thesis included in its research. This is followed by an explanation of its scope to ensure the end quality is worthy of contribution to the respective field of academia.

2.1. Selecting Sources

A source's relevancy was a large factor in justifying the research invested into this thesis. For example, the chosen book chapters were selected for referencing independently from the whole book which they were part of due to these particular chapters being more relevant to the topic. This is not to say, however, that only one relevant source was chosen: a variety of sources were consulted

which detailed the same topic but in a different light. This enabled this thesis to explore various positions on the same matter, and accordingly provide an informed position and conclusion.

As well as a source's relevance, their reliability also constituted an important factor in considering reliance upon it for purposes of this thesis. For instance, a source compiled or written by a single, or variety of, academic Professors was viewed as more reliable and detailed than one written or compiled by a biased non-expert individual or a political website. This ensured that the information gathered remained independent and of high quality.

Also relevant was the currency of the information gathered. As this thesis concerned the particular case study of the Malabo Protocol of 2014 and the Rome Statute, information gathered or compiled before 2002 was not be considered (as this is the year in which the Rome Statute, and the principle of complementarity connected with it, came into effect). Additionally, as seventeen years' worth of material would be too much to analyse in this thesis, sources compiled between the years 2008 and 2019 were more heavily reviewed than those between 2002 and 2007, as these latter sources, though potentially relevant in their substance concerning the principle of complementarity, were more than ten years old and therefore susceptible to being out-dated.

2.2. Decisions Regarding Scope

Throughout the course of this thesis, the Rome Statute will be looked at, as well as multiple ICC cases. As of Chapter 5, the Malabo Protocol will be taken into

consideration. Furthermore, surrounding material from the African Union, Assembly of State Parties to the Rome Statute and numerous academic pieces commenting on their respective meetings and decisions will be referenced. However, in order to keep the chosen research appropriate to answering the Research Question, there needs to be a defined scope so as to narrow the abundance of information; there needs to be a cut-off between what is relevant and what is not. Therefore, whilst the Rome Statute will be analysed, it will not be done so in its entirety. As the principle of complementarity is first and foremost a principle, substantive law will not be taken into account, and only the provisions that are directly linked to this principle shall be analysed in detail (Paragraph 10 of the Preamble and Arts. 1 and 17 of the Rome Statute). Similarly, the Malabo Protocol shall be referred to in a manner that mirrors that of the Rome Statute, with the two instruments compared in Chapter 5. Their respective drafting histories will only be discussed in so far as it is necessary.

In connection with the Rome Statute and ICC, this thesis will not discuss all cases heard before the ICC, but will nonetheless reference a number of those decided by the Court. Particular attention will be paid to the Libyan cases of *Gaddafi*, *Al Bashir*, *Simone Gbagbo* and *Al-Senussi* due to their decisions in light of complementarity. These cases have contributed to the discussion either via precedent and decision-making, or through the commentaries made on those decisions by State Parties (of the Rome Statute or African Union). As these cases have been singled out, it is additionally important to mention that this thesis will mainly focus on the reactions around these decisions, rather than analyse how admissibility of a case can (successfully) be challenged. This is due to the focus

being on whether states are satisfied with how complementarity works in its current form, and not how states can challenge rulings if they are discontent with how the admissibility criteria are applied. Reactions to the principle of complementarity, and the admissibility criteria by extension, are then analysed to find out whether legal fragmentation of international criminal law is at play, later related to the creation of the Malabo Protocol.

In doing so, it is not the point of this thesis to discuss the likelihood of such fragmentation occurring, nor that of the Malabo Protocol acquiring the ratifications necessary for the ACC to acquire ICC-like jurisdiction and functions. Instead, it suffices for the purpose of this thesis to conclude whether fragmentation is evident, or whether a case of legal pluralism is instead at play. In the case of the latter, though its advantages and disadvantages will be discussed in connection with the particular case study of that surrounding the Malabo Protocol, it is likewise irrelevant to further analyse how likely it is that such a scenario will come to pass.

Finally, the subject of immunities will be touched upon in the later stages of this thesis. However, this is merely done to aid the highlighting of differences between the Rome Statute and Malabo Protocol. To analyse the effect immunity has on the international legal community at large is not the aim of this thesis, and the discussion surrounding Art. 46A*bis* shall be kept strictly relevant to the Research Question as such. In saying this, it is meant that immunity with regards to customary international law will be discussed in an introductory manner for context purposes. Greater detail shall instead be placed on whether the Malabo

Protocol's adoption of such a provision shows an interpretation of international criminal law that aligns with legal pluralism with respect to the Rome Statute, or whether that interpretation instead amounts to legal fragmentation of the law of the ICC. Previous analysis will then be used to discover the extent to which the principle of complementarity is the cause for such pluralism or fragmentation, with respect to both the provision on immunity, and the relationship the ICC and ACC would have with each other.

The above refinement of scope will allow this piece of academic work to critically discuss its raised issues, and provide a conclusion that aims to contribute to the evolving debate surrounding the principle of complementarity. By not venturing into areas deemed irrelevant, this thesis will stay focussed on the topic at hand and will result in a conclusion that convincingly answers the Research Question. Furthermore, the following work has as its goal to provide the reader with a logical path in reaching its conclusion, informed by the researched literature.

3. Theory of Complementarity

In discussing the principle of complementarity, it is first best to provide a definition as to how this characteristic of the ICC is intended to work, according to the Rome Statute. In order to do so, the drafting of the Rome Statute will be briefly explored so as to explain why complementary jurisdiction was chosen. Hereafter, relevant articles and literature will help frame the theory of complementarity, whilst Office of the Prosecutor (OTP) Papers and case law will be used in the next chapter to highlight how this theory works in practice, as well as which challenges the principle of complementarity faces with respect to its practical usage.

3.1. History of the Rome Statute: Preamble and Art. 1

In understanding why the ICC has complementary jurisdiction, it is of prime importance to realise that the Rome Statute, and the Court by extension, was created by a group of sovereign states. It was decided by these states that the Court have 'complementary' jurisdiction so that it did not infringe on their sovereignty; states wished to keep primary jurisdiction in the event of trying individuals of their nationality. As such, in order for the Statute to succeed as an instrument of international law and garner as many signatures and ratifications as possible, the primary jurisdiction of states would be respected and the ICC would only acquire jurisdiction in a certain number of ways, as outlined below. After acquiring sixty ratifications, the Rome Statute entered into force on 1 July 2002. At the time of writing, the Rome Statute currently has 122 State Parties.[18]

[18] ICC Assembly of State Parties, *"The State Parties to the Rome Statute"* (Interactive Map, International Criminal Court) Accessed 8 June 2019.

The basis of the Court's complementary jurisdiction is first laid down in paragraph 10 of the Preamble, which states very clearly that "the International Criminal Court established under this Statute shall be complementary to national jurisdictions." Though not explicitly defined by the Rome Statute, the principle of complementarity is seen as an essential aspect of the ICC's functioning.[19] In short, this principle recognises the States' primary jurisdiction in enforcing the respective law, with the ICC taking on a secondary role. The Court shall only step in where States are unable or unwilling genuinely to investigate or prosecute, per Article 17 of the Rome Statute. This provision will be explored in detail at a later stage, so it suffices for the moment to understand the difference between primary and complementary jurisdiction: a court with the former type has priority in trying a case at hand, whereas the ICC, having the latter type, only receives jurisdiction in a handful of ways. These ways include: through the Prosecutor's initiation of her own investigation (*propio motu*); through UNSC referral; or through referral by the State Party themselves.[20] Further to these, a non-State Party can file an Article 12(3) declaration with the registrar of the ICC, accepting the Court's jurisdiction.[21]

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[19] Otto Triffterer, *"Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article"* (2nd edn, C.H. Beck Publishing, 2008) 13, para 22.
Victor Tsilonis, *"The Awakening Hypothesis of the Complementarity principle"* in C.D. Spinellis et al. (eds.) *"Europe in Crisis: Crime, Criminal Justice, and the way forward: Essays in honour of Nestor Courakis"* (Ant. N. Sakkoulas Publishers, 2017) Vol. 2, 1258.
Jo Stigen, *"The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity"* (Martinus Nijhoff Publishers, 2008) 6-7.
[20] Art. 13 Rome Statute.
[21] Such as Ukraine did in 2015: Verkhovna Rada of Ukraine, Resolution No. 145-VIII *"On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of the terrorist organisations 'DNR' and 'LNR' which led to extremely grave consequences and mass murder of Ukranian nationals",* (4 February 2015).

The notion of complementary jurisdiction is again stated in Article 1 of the Statute: "[The Court] … shall be a permanent institution and shall … be complementary to national jurisdictions…" Herein is found another reason why the Court has complementary jurisdiction: it is a permanent institution. This is a notable difference when relating complementarity to other international courts and tribunals. For example, the International Criminal Tribunals of Rwanda (ICTR) and the Former Yugoslavia (ICTY) were granted primary jurisdiction on account of them being temporary institutions, later being dissolved.[22] Whilst the International Court of Justice (ICJ) is a permanent institution (being an organ of the UN),[23] parties recognised under its Statute only include states; it cannot be a location for bringing a case against individuals.[24] Therefore, in being a permanent institution that has jurisdiction over individuals, the ICC was given complementary jurisdiction vis-à-vis the States Parties to the Rome Statute.

3.2. Article 17 of the Rome Statute

Article 17 consists of three paragraphs; however, for the purposes of this thesis, only the first shall be analysed as Art. 17 (1) is critical to when the ICC deems a case admissible, and thereby acquires jurisdiction.[25] In doing so, the principle of complementarity comes into play in the ICC acquiring jurisdiction from the respective State. It is furthermore noted that several other pieces of literature analyse Article 17 in far greater depth, which this thesis is not able to do both

[22] UN Security Council Resolution 1534, S/RES/1534 (2004).
[23] Art. 1 ICJ Statute.
[24] Art. 34 (1) ICJ Statute.
[25] Kai Ambos, *"The legal framework of transitional justice. A systematic study with a special focus on the role of the ICC"* in Kai Ambos, Judith Large & Marieke Wierda (eds), "*Building a future on peace and justice: Studies on Transitional Justice, Conflict Resolution and Development"* (Springer, 2009) 71-2.
Hilmi Zawati, *"The International Criminal Court and Complementarity"* (Journal of International Law and International Relations, Spring 2016) 12:1, 208.

because of length and scope restrictions. Regarding the latter, it suffices for this thesis to say that Art. 17 (2) places limitations on admissibility with regards to unwillingness via an exhaustive list.[26] Paragraph 3 of Article 17, meanwhile, sets out how the ICC determines a state unable to prosecute a particular case.[27] Regarding Article 17 (1), sub-paragraphs (c) and (d) concern the *ne bis in idem* principle (no legal action can be instituted twice for the same cause of action) and sufficient gravity of the case respectively. Because of this, they will likewise not be considered in this thesis' explanation of the admissibility criteria.

The section of Article 17 (1) of the Rome Statute that will be analysed, then, reads as follows:

> ***Article 17 Issues of admissibility***
>
> *1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:*
>
> *(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*
>
> *(b) 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;*

This article's link with the Statute's principle of complementarity is evident in the first sentence where "paragraph 10 of the preamble and article 1" are recalled. This reiterates the Court's complementary jurisdiction, with the articles

[26] Otto Triffterer, *"Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article"* (2nd edn, C.H. Beck Publishing, 2008) 622, para 29.
[27] ibid at 623 para 33.

that follow indicative of when a case is deemed inadmissible before the ICC, leaving it at the discretion of national jurisdictions. The ICC's principle of complementarity can thus be clearly framed in this article, as it highlights the cooperation between the Court and the national jurisdictions. Specifically, Article 17 (1) (a) restricts the jurisdiction of the ICC to those cases where the national jurisdiction is "unwilling or unable genuinely to carry out the investigation or prosecution." Similarly, if a national jurisdiction has ruled that a case will not go ahead, the ICC will recognise this and will not pursue it further, "unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute" as stated in Article 17 (1) (b). This then seems to not only create a respect for national jurisdictions on the part of the ICC, but also suggests that a uniform body of international criminal law exists that the Court leaves the national jurisdictions to enforce.

Article 17 then enforces four instances where the ICC can claim jurisdiction over national courts in so far as the article has been looked at in this section: when that State is unwilling to prosecute or investigate and; when the State is "unable genuinely" to prosecute or investigate. Whilst the first two are relatively straight-forward,[28] the second begs to ask how the phrase "unable genuinely" is defined: how does the Court go about establishing when a State is not in a position to adequately preside over the case? Moreover, in determining when a State is not in such a position, is it viable that the ICC, a lone court, be tasked with overseeing all such cases? Whilst the former question will be looked at in more

[28] The ICC further lists criteria which are considered when "[determining] unwillingness in a particular case" under Art. 17 (2) Rome Statute, including: the undertaking of proceedings; an unjustified delay in proceedings and; the absence of independancy and/or impartiality in connection with the proceedings.

detail in the chapter hereafter, the latter can be addressed in this section using the literary works of Heller,[29] Jackson[30] and Stigen.[31] As such, the next section will seek to add to the discussion of complementarity by exploring its regional and radical forms as covered by the key literature.

3.3. Regional and Radical Complementarity

In analysing Article 17 (1) (a) and (b) above, it is realised that the ICC, being one Court, would be overwhelmed with cases on the grounds of simply applying its admissibility criteria. Therefore, the options of implementing the principle of complementarity through regional and radical methods could provide the Court with the means to successively and efficiently handle a multitude of cases, without the procedural 'shelving' of cases until resources become available.

Regional complementarity entails that "a genuine prosecution by a lawfully constituted regional tribunal should be seen as prosecution by a state such that the case is inadmissible before the ICC" in connection with Art. 17 (1) (a) of the Rome Statute.[32] This concept is relatively new, as Jackson notes,[33] given that there is currently no functioning regional tribunal with overlapping jurisdiction with the ICC.[34] Having said that, its implementation with respect to the better functioning of the ICC is viewed here to lead to positive effects; it is a desired result. In creating a regional tribunal, States Parties delegate their national

[29] Kevin J. Heller, "Radical Complementarity" (Journal of International Criminal Justice, July 2016) Vol. 14(3), 637-655.
[30] Miles Jackson, "Regional Complementarity: The Rome Statute and Public International Law" (Journal of International Criminal Justice, December 2016) Vol. 14(5), 1061-1072.
[31] Jo Stigen, *"The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity"* (Martinus Nijhoff Publishers, 2008).
[32] supra note 30 at 1061.
[33] ibid at 1063.
[34] ibid.

criminal jurisdiction to this tribunal, which has been seen to be widely permitted under international law.[35] Furthermore, as the ICC has been described as a court of 'last resort' (indeed, it has since its founding had the aim of being exactly that) the existence of regional tribunals would help underline this status, with the ICC only taking cases in the event that such a regional tribunal is either unwilling or genuinely unable to prosecute themselves according to Article 17 (1) as previously discussed.[36]

As Jackson points out most notably in discussing regional complementarity as a case of legal pluralism or legal fragmentation, the creation of such regional tribunals would prove that states recognise the limitations of the ICC, regarding both its design and operation.[37] As well as this, it would also speak to the difficulties associated with having one court prosecute crimes committed across the world.[38] In both situations, the respective States Parties, in setting up such regional tribunals, would not only be further enforcing the principle of complementarity (via enforcing the primacy of national jurisdiction in prosecuting a case), but would additionally then exhibit a closer working relationship with the ICC in delegating their national jurisdiction; crimes would

[35] ibid at 1066.
Dapo Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits" (Journal of International Criminal Justice, 2003) 625-634.
[36] ibid (Jackson) at 1068-1069.
Markus Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity" (Max Planck Yearbook of United Nations Law, 2003) Vol. 7, 599.
[37] ibid (Jackson) at 1069.
[38] C. de Vos, S. Kendall, and C. Stahn (eds), "Contested Justice: The Politics and Practice of International Criminal Court Interventions" (Cambridge University Press, 2015) in Miles Jackson, "Regional Complementarity: The Rome Statute and Public International Law" (Journal of International Criminal Justice, December 2016) Vol. 14(5) 1069.

be prosecuted closer to where they occur, rather than in The Hague.[39] As cases prosecuted by the ICC are of international criminal nature, an on-site relationship to the conflict is viewed here as only being positive to the field of international criminal law. Not only would it create a closer connection and increase familiarity with the on-going situations, but it would promote legal pluralism in doing so: the host state would feel they have an increased role in proceedings, and the tribunal itself would be working with and enforcing the law of the ICC.[40]

Up until now, regional complementarity has been viewed as a positive influence on the function of the ICC. However, this paper, whilst agreeing with Jackson up to this point, disagrees with the later stages of his article, where Heller's contribution on radical complementarity is considered. Both the regional and radical forms of complementarity concern the workings of regional tribunals, but radical complementarity goes a step further in specifically relating this to the admissibility criteria of Art. 17. Heller argues that "as long as a state is making a genuine effort to bring a suspect to justice, the ICC should find [its] case inadmissible..."[41] In this thesis, it is argued that there needs to be a critical examination of the word 'unable' in the context of Article 17, given that a state would be merely willing to prosecute the individual if it is making a genuine effort to do so.

[39] ibid (Jackson).
[40] ibid.
[41] ibid at 1070-1071.
Heller, supra note 28 at 640.

In *Lubanga*, Pre-Trial Chamber I alluded to the important weight the word 'genuinely' carries in the context of determining complementarity, with specific focus on the criteria used to establish whether a state was willing to prosecute an individual.[42] Whilst the term 'genuine' has more closely been associated with unwillingness,[43] it is equally important to nonetheless realise it also applies to a state's inability to prosecute as far as Art. 17 is concerned.[44] Whilst this criteria is 'black and white' (in that a state is deemed either able or unable to prosecute), the connection between radical complementarity, as Heller argues for it, and inability cannot be understated. A state may be making a genuine effort to bring a suspect to justice, but may simply lack the resources or judicial framework to prosecute the individual.[45] Any attempt to then prosecute the individual, however genuine, would be marred by evidence amounting to severe procedural inconsistencies – a biased trial being one example in the case of the State not having the adequate judicial system available, thereby infringing the rights of the accused. As a result, the ICC would still be left with prosecuting the individual, despite a genuine effort by the state party being made, on grounds of Art. 17 (3) of the Rome Statute.

This can be illustrated using the *Gbagbo* case, where the Ivory Coast "was fully aware it had not made substantial progress", saying this was caused by the fact that "the state had recently emerged from a serious conflict and thus lacked considerable material and human resources" to carry out the procedural

[42] *Prosecutor v Lubanga*, Decision on Prosecutor's Application for a Warrant of Arrest, 10 Feb 2006, para. 29.
[43] Otto Triffterer, *"Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article"* (2nd edn, C.H. Beck Publishing, 2008) 617, para 25.
[44] Art. 17 (3) Rome Statute.
[45] ibid.

requirements.[46] The 'genuinely willing' element of Art. 17 was argued by the Ivory Coast to be fulfilled, owing to the state's effort in investigating,[47] detaining,[48] and interrogating Simone Gbagbo.[49] Furthermore, the state had attempted to collect evidence relevant to her crimes.[50] Such effort would, it is here argued, fulfil the requirements of radical complementarity: the state of Ivory Coast showed genuine willingness to prosecute Simone Gbagbo. However, they were simply not in a procedurally sound environment to effectively do so, which the Pre-Trial Chamber concluded, although it did so on the basis of finding the Ivory Coast to be "inactive".[51]

As such, this thesis finds that regional tribunals are an effective means of ensuring legal pluralism between the ICC and its state parties to the extent of regional complementarity. The characteristic of radical complementarity to allow national proceedings based purely on that State being genuinely willing to prosecute is found to be insufficient to ensure an adequate level of prosecution will take place. Instead, such regional tribunals must also take genuine ability into account, as there is a high risk of the state not being sufficiently equipped to prosecute a case, leading to it nonetheless being tried before the ICC on grounds of Art. 17 (1) and (3) of the Rome Statute.

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[46] Heller, supra note 28 at 644-645.
Prosecutor v Gbagbo, Appeals Judgment, 27 May 2015, para 120.
[47] ibid at para 65.
[48] ibid.
[49] ibid at para 73.
[50] ibid at para 72.
[51] ibid at para 65.

3.4. Conclusions

This chapter has aimed to inform the reader of what the principle of complementarity entails in the context of the ICC by looking at the relevant articles of the Rome Statute: Paragraph 10 of the Preamble and Arts. 1 and 17. In doing so, the complementary relationship between the ICC and its state parties has been outlined: states have primary jurisdiction over cases, unless the criteria in Art. 17 (1) apply, in which case the ICC can step in.

In further explaining the principle of complementarity, the two forms of regional and radical have been explored, to which the argument is made that regional tribunals would indeed benefit the realm of international criminal law and the legal pluralism it would experience. On the other hand, radical complementarity, in its granting of cases to regional tribunals purely on the criteria of 'genuine willingness' and not 'genuine ability', goes too far as can be evidenced in the *Gbagbo* and *Lubanga* cases. For this reason, it is concluded that radical complementarity does not promote legal pluralism as the ICC would nonetheless acquire jurisdiction over the respective case due to that state's inability to 'genuinely' prosecute as is required by the Rome Statute.

4. Complementarity in Practice

Having laid out the necessary theoretical information relevant for understanding the relationship between the ICC and national jurisdictions with respect to the former's complementing of the latter in cases of international criminal law, attention is now turned to how this theory is used in practice by the ICC, and what decisions have been made regarding it. Before analysis can begin, it is of utmost importance to define the word 'case', as this section will refer to a variety of them. To this effect, this thesis will implement the definition as decided by the ICC: "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects."[52] [53]

4.1. OTP Policy Paper 2013

In light of this definition, it is best to first understand the ICC's policy towards implementing the principle of complementarity in practice, and then relate this to findings regarding how cases have been, or are currently being, handled. As such, the leading source of policy is that of the OTP Policy Paper on Preliminary Examinations.[54] Herein, the OTP makes clear that "admissibility requires an assessment of complementarity (Art 17 (1) RS)"[55] and that it requires the application of said assessment to be done on a "case-specific" basis.[56] By this, the Paper is referring to the Substantially Same Person/Conduct (SSC) test, which

[52] Situation in the Democratic Republic of the Congo, "Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" Case No. ICC-01/04-101 (17 January 2006) para 65.
[53] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for Warrant of Arrest, paras 21, 31, 38.
[54] Office of the Prosecutor of the International Criminal Court, "Policy Paper on Preliminary Examinations" (OTP, November 2013).
[55] ibid at 10, para 42.
[56] ibid at 11-12, para 46.

will not be covered in detail here; it suffices to know that this test essentially entails the principle that if a national jurisdiction is prosecuting, or has prosecuted, an individual according to crimes of international criminal law, the ICC is to find a personal case against that same individual inadmissible if it concerns substantially the same conduct.[57] Having said that, this thesis recognises the literature solely concerning the SSC-test and the depth to which this is being analysed to discover additional or incorrect meanings and definitions.[58]

As well as the requirement for the assessment to be handled on a case-to-case basis, the assessment "cannot be undertaken on the basis of hypothetical national proceedings …: it must be based on concrete facts as they exist at the time."[59] As an example of a state providing evidence of, as the Court found them to be, "hypothetical national proceedings", it is of worth to note here that the ICC found that evidence submitted by Libya when it challenged the Court's admissibility on the *Gaddafi* case was found to be insufficient and inconsistent, thereby allowing the case to be admissible before the ICC.[60]

The 2013 OTP Policy Paper, then, seems to clearly outline how it seeks to implement the complementarity principle when processing cases. Being mainly

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[57] See *Kenyatta* Appeals Judgment, 30 Aug. 2011, para 39.
Art. 20 (3) Rome Statute.
[58] See for example Rod Rasten, "What is 'Substantially Same Conduct'?: Unpacking the ICC's 'First Limb' Complementarity Jurisprudence", (Journal of International Criminal Justice, March 2017) Vol. 15:1, 1-29; Thomas O. Hansen, "A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity" (Melbourne Journal of International Law, June 2012) Vol. 13:1, 217-234.
[59] supra note 54 at 12, para 47.
Prosecutor v. Joseph Kony et al., 10 March 2009, paras. 49-52.
[60] *Prosecutor v Saif Al-Islam Gaddafi,* Case No. ICC-01/11-01/11, Fact Information Sheet.

applied through means of the SSC test, the ICC recognises further restrictions on itself with respect to the primary jurisdiction of national states. Having said that, it is ultimately the ICC that decides whether a case is substantially similar to one processed on the national level of states. It can be understood that this can cause friction between the ICC and its state parties, and even more so in cases where a non-state party is referred to the ICC via UNSC referral.[61] If states feel they are processing the same individual for the same conduct, this aligns with how the ICC defines a 'case', and one of substantially similar conduct by extension. Nevertheless, the ICC may still find the case admissible in applying the SSC test, to the detriment of the national jurisdiction.

Interestingly, the same OTP Paper can be interpreted to speak directly to such situations, as well as those generally considered with the admissibility criteria: "an admissibility determination is not a judgment or reflection on the national justice system as a whole."[62] This line appears to be directly addressed to those states whose cases have been found to be inadmissible in an effort to 'keep the peace'. Here, the Court essentially communicates that whilst the state has been deemed 'unwilling or unable genuinely' to prosecute in the present case, that is not to say that this should reflect badly on the national jurisdiction's ability to prosecute other cases. However, in several states' eyes, losing jurisdiction of a national case to the ICC can be interpreted as an infringement on that states' sovereignty.[63] The counterargument to this, of course, is that state parties

[61] Art. 13 (b) Rome Statute.
[62] supra note 53 at 11-12, para 46.
[63] It is here recognised that state parties agreed to potentially losing jurisdiction via signing and ratifying the Rome Statute. The case for losing sovereignty, then, is more applicable to those states who lose jurisdiction via UNSC referral, for example.

consented to the ICC's jurisdiction, and its admissibility criteria by extension, when ratifying the Rome Statute. Even in the cases of non-state parties, through being members of the UN, they understand the ICC's jurisdiction regarding UNSC referrals.

4.2. *Gaddafi* and *Al-Senussi*

Continuing with this point of how states may react to losing jurisdiction to the ICC, this thesis will now consider past and on-going ICC cases in order to: (i) provide a closer inspection of the ICC's implementation of the standards surrounding the principle of complementarity and; (ii) better understand why the collective of states mentioned at the start of this thesis are moving to withdraw from the Rome Statute and extend the African Court of Justice's jurisdiction to also include international criminal law. As this thesis directly links the dissatisfied body of African states to the ICC, the cases considered shall involve states placed on the African continent. In doing so, the aim is to draw a line of shared thought among these state parties, and find any potential pattern between the types of cases where the ICC exercises jurisdiction. Whilst a number of cases will be referred to, the prime focus lies with those concerning Saif Al-Islam *Gaddafi* and Abdullah *Al-Senussi*. It must be noted that up until the question of admissibility, these cases are subject to the same facts and will thus be discussed collectively until such a point in their analysis.

On 26 February 2011, the UN Security Council referred the situation in Libya to the ICC Prosecutor.[64] After conducting a preliminary examination, the Prosecutor decided to open an investigation into this situation, and warrants for arrest against Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi were issued on 27 June 2011.[65] Following his death, the warrant against Muammar Gaddafi was withdrawn on 22 November 2011. Libya filed challenges of admissibility against the cases involving both remaining individuals, on 1 May 2012 with respect to Gaddafi, and on 2 April 2013 with respect to Al-Senussi.[66]

In *Gaddafi*, Pre-Trial Chamber I (PTCI) recognised the same person/same conduct test, stating "while it is uncontested that national investigations must cover the same person, the conduct part of the test raises issues of interpretation." [67] In attempting to prove that Libya's and the ICC's trial concerned the same conduct such that the ICC should find its case inadmissible due to the SSC test, Libya provided "a number of documents … to substantiate its Admissibility Challenge." [68] However, the ICC ruled that these documents "contain no information of relevance to the determination as to whether the same conduct covered … is under investigation in Libya."[69] The Court here noted that, even if Libya had provided documentation worthy of substantiating same conduct between the cases, "the first limb of the admissibility test would not be determinative … because … serious concerns remain with respect to the second

[64] *Gaddafi*, para 1.
[65] ibid at para 2.
[66] ibid at para 3; *Al-Senussi*, para 3.
[67] *Gaddafi* at para 61.
[68] ibid at para 106.
[69] ibid.

limb… namely, Libya's ability genuinely to carry out the investigation or prosecution against Mr. Gaddafi."[70]

In analysing Libya's willingness and ability genuinely to prosecute, PTCI found Libya to be unable to prosecute the individual, referring to elements such as Libya's inability to obtain the accused,[71] inability to obtain testimony,[72] and inability to appoint defence counsel.[73] As a result, as Libya was found to be unable to prosecute, the Court made no effort to analyse the willingness of Libya.[74] Additionally, it was referred to during the case that Libya's recent civil war was evidence of its inability to prosecute.[75] Libya was unsuccessful in appealing the verdict, with the Appeals Chamber upholding the decision.[76]

Regarding *Al-Senussi*, PTCI found that, in this case, "evidence submitted by Libya is sufficient to conclude that concrete and progressive steps are being undertaken by the domestic authorities…"[77] Furthermore, the Chamber was "satisfied that … Libya … demonstrates taking identifiable, concrete and progressive steps" in prosecuting Al-Senussi.[78] Regarding the first limb of the admissibility test then, the Court found the case inadmissible based on Libya's on-going domestic trial.

Concerning the second limb – whether Libya is unwilling or unable genuinely to prosecute – the Court noted its' finding that "there is no indication that

[70] ibid para 137.
[71] ibid paras 206-208.
[72] ibid paras 209-211.
[73] ibid paras 212-214.
[74] ibid para 216.
[75] ibid para 143.
[76] *Gaddafi* (Appeal), 21 May 2014, para 215.
[77] *Al-Senussi* para 160.
[78] ibid paras 162 and 164.

proceedings [in Libya] are being undertaken for the purpose of shielding him from criminal responsibility ... such that it would warrant a finding of unwillingness."[79] In additionally finding that the national proceedings were not "tainted by an unjustified delay",[80] PTCI found Libya to be "not unwilling to carry out proceedings against Mr. Al-Senussi."[81] After having established this, and unlike *Gaddafi,* PTCI then moved on to the other requirement of inability, where it found Libya likewise "not unable genuinely to carry out proceedings…"[82] As such, the case against *Al-Senussi* before the ICC was deemed inadmissible on the grounds of the SSC test, with the Appeal Chamber confirming the PTC's decision on 24 July 2014, bringing the case before the ICC to an end.[83]

In comparing the two cases, certain distinguishable elements can be identified that show how the principle of complementarity is applied in practice. Firstly is the reliance of the ICC on the SSC test, being applied in both cases, as well as every other case when a state challenges admissibility on the grounds of national prosecution.[84] In substantiating whether a national jurisdiction, in the eyes of the ICC, is conducting a trial on the same person and conduct, the onus is placed on the state to prove so, via supplying documents speaking to a variety of facts, as *Al Senussi* shows. This seems contrary to the spirit of the principle of complementarity, in that it is the state that is recognised to have primary jurisdiction. There then seems to be an inconsistent interpretation associated with the principle of complementarity in that states have to defend their own

[79] ibid para 290.
[80] ibid para 291.
[81] ibid para 293.
[82] ibid para 309 and 310.
[83] *Al-Senussi* (Appeal) para 299.
[84] See for example *Simone Gbagbo* and *Kenyatta.*

national cases before the ICC in order to keep them; the ICC here seems to have the more important role rather than the state.

It could be argued here that the ICC does recognise state primacy, and only finds cases inadmissible based on its criteria set out in Art. 17 (1) RS. This argument can be extended to include the notion that the Court acts in the best interest of international law in finding a state unwilling or unable genuinely to hold their own trial: *Gaddafi* can here be used to illustrate concerns with human rights and domestic procedural violations.[85] Thus, the Court is complementary to the state by ways of ensuring the suspect experiences a fair trial; should they not, the state would be internationally criticised.

The second distinguishable element is the Court's emphasis on the terms 'unwilling and unable genuinely.' The previously mentioned OTP Paper of 2013 shows that the OTP assesses "unwillingness to investigate or prosecute genuinely" by considering: (i) whether the proceedings are/were undertaken for the purpose of 'shielding' the accused from ICC jurisdiction; (ii) unjustified delay in the proceedings and; (iii) whether the proceedings are/were not conducted independently or impartially.[86] This was carried out in both *Gaddafi* and *Al-Senussi*, even though the PTC ruled based more so on the test of genuine inability in the case of the former.

Regarding 'unable genuinely', the OTP Paper refers mainly to Art. 17 (3) RS.[87] It additionally specifically refers to both cases discussed in this thesis' section

[85] Human Rights Watch, "Libya: Gaddafi son, Ex-Officials, held without due process: Detainees describe solitary confinement, no access to lawyers" (Human Rights Watch, 13 February 2014) Accessed 10 June 2019.
[86] supra note 53 at para 50; each of these terms are then defined in later paras 51-55.
[87] ibid para 56.

when describing what the OTP can "consider" in conducting its evaluation.[88] Indeed, one main difference between the two cases was how Libya was able to prove, according to the ICC, that it was able genuinely to prosecute in the case of *Al-Senussi*, but not in the case of *Gaddafi*. This was mainly due to Al-Senussi being in Libyan custody at the time of challenging admissibility, and the longer time frame between Libya's civil war and challenge.[89]

Interesting here is to highlight the weight of the state's effort in proving they are 'genuinely' able and willing. Whilst states can show evidence of the descriptive elements (e.g. whether the accused is in custody or not), proving active desire to willingly and ably prosecute seems to be the defining characteristic of the term 'genuinely', and harder to prove considering the Court only takes these elements into account as they are at the time of trial.[90] Whilst this makes sense from a legal point of view, it is difficult for the national state to prove a genuine, on-going attempt.

4.3. Comparisons and State Reaction

Having analysed how the Court applies the principle of complementarity, and therein included its admissibility criteria, it is logical to take these states' reactions into account in connecting this part of the thesis with the chapters that follow. This is best done by noticing a pattern between ICC judgments and state actions. For example, it is worthy to note that Gaddafi, having lost both the original and appeal attempts in challenging admissibility, is not yet in the ICC's

[88] ibid para 57.
[89] *Al-Senussi* paras 189 and 294.
[90] supra note 58.

custody, despite his warrant of arrest being issued on 27 June 2011.[91] As a result, the ICC issued a finding of non-compliance with respect to Libya on 10 December 2014, deciding to refer the matter to the UNSC.[92] Up to the point of writing, Gaddafi remains at large.

This refusal to cooperate with the ICC goes against Art. 86 RS, whereby a duty to cooperate is conferred upon state parties. While Libya is not a state party to the Rome Statute, decisions of non-compliance have been issued against states that are party, with Malawi,[93] Chad,[94] the Democratic Republic of Congo (DRC),[95] Djibouti[96] and Uganda[97] all receiving such decisions in connection with *Al Bashir*. Likewise with *Gaddafi* and *Al-Senussi*, *Al Bashir* was referred to the ICC via the UNSC on 31 March 2005. Whilst Sudan is not itself a state party to the Rome Statute, it is striking to notice a host of state parties not complying with the ICC in connection with an on-going case. In particular, the DRC has previously complied with warrants of arrest issued by the ICC, doing so within one month in the *Lubanga* case.[98]

[91] *Gaddafi* para 2.
[92] *Gaddafi*, "Decision on the non-compliance by Libya with requests of cooperation by the Court and referring the matter to the United Nations Security Council" ICC-01/11-01/11-577 (10 December 2014).
[93] *Al Bashir*, "Decision on the failure by the Republic of Malawi to comply with the cooperation requests" ICC-02/05-01/09-139 (13 December 2011).
[94] *Al Bashir*, "Decision on the Non-compliance of the Republic of Chad with Cooperation Requests", ICC-02/05-01/09-151.
[95] *Al Bashir,* "Decision on the Cooperation of the Democratic Republic of Congo", ICC-02/05-01/09-195.
[96] *Al Bashir*, "Decision on the non-compliance by the Republic of Djibouti", ICC-02/05-01/09-266.
[97] *Al Bashir*, "Decision on the non-compliance by the Republic of Uganda", ICC-02/05-01/09-267.
[98] *Prosecutor v Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06, Fact Information Sheet (last updated December 2017).

The main difference here seems to be that *Lubanga* was referred to the ICC by the DRC; there was no UNSC referral, the state referred itself. This cannot be said for the previously discussed cases, with all three resulting from UNSC referrals. Indeed, there seems to be a pattern among ICC case law that states are more willing to comply in the cases of self-referrals and instances of accepting ICC jurisdiction (in cases where they are not state parties; e.g. *Gbagbo* before Ivory Coast ratified the Rome Statute), than they are when cases are started at the ICC via UNSC referral or *proprio motu* investigations.[99] There then seems to be a general discontent with the way the ICC applies the principle of complementarity via these latter ways of acquiring jurisdiction.

This thesis argues that the above difference amounts to fragmentation of international criminal law rather than to legal pluralism. It does so due to the creation of the Malabo Protocol by the African Union, three signatories of which are also state party to the Rome Staute.[100] Whilst this document will be explained in greater detail in the next chapter, these three states' signatures, coupled with their as yet unwillingness to comply with ICC requests, show their shared discontent with how the Court currently applies the principle of complementarity.

4.4. Conclusions

By looking at the 2013 OTP Paper and how both the OTP and the Court apply the principle of complementarity and admissibility criteria, this chapter has sought

[99] See for example *Katanga; Kenyatta* and *Simone Gbagbo.*
[100] Chad, Democratic Republic of Congo and Uganda, see African Union, "List of Countries that have signed, ratified/acceded to the [Malabo Protocol]", Accessed 10 June 2019.

to analyse ICC case law in order to find a pattern with respect to their judgments and state reactions. Whilst the Court uses the same criteria in judging challenges against admissibility, the way in which it applies them, with particular emphasis on the element of 'genuineness', is based heavily on that state's current conduct regarding the (attempt at) national prosecution. As the differences between *Gaddafi* and *Al-Senussi* show, elements such as whether the accused is in the state's custody carry significant weight in deciding which court may exercise jurisdiction.

The fact that the national state has to defend its primacy over a case currently in its jurisdiction, however, represents a complex notion with the principle of complementarity. The ICC's very nature is based on the idea of the Court being "complementary to national jurisdictions"[101], but in the cases regarding admissibility as have been explored, the states seem to be the complementing party – to the ICC. This relationship is proven to not work, as a number of accused are not yet in the Court's custody, with several states being issued with notices of non-compliance and such situations being referred to the UN. Thus, this speaks to the fragmentation of international criminal law in that states are growing increasingly discontent with how the ICC applies complementarity, more so in cases of UNSC referral and *proprio motu* investigations.

As a result, the Court can be said to be treading a thin line between enforcing complementarity and respecting state primacy. The fact that the onus is on states to prove they are willing and able genuinely to prosecute only fans the flames, as

[101] Art. 1 Rome Statute.

it places the ICC in the authoritative position. Such action undermines the nature of the spirit of complementarity. Relating this to some of those dissatisfied states, members of the African Union have, since 2014, been attempting to grant the African Court of Justice and Human Rights jurisdiction over the same area of international criminal law that the ICC practices. This is a substantial reaction to the ICC's jurisdiction, as the next chapter seeks to explore.

5. Malabo Protocol

Having highlighted the discontent of several states with the way the ICC currently practices the principle of complementarity above, attention is now drawn to how these states have responded and what actions they have taken. Whilst withdrawing, or showing intent to, from the Rome Statute is a clear indication of the divide currently being seen, so too is the African Union's adoption of the Malabo Protocol in 2014.[102] This amendment to the African Court of Justice's jurisdiction seeks to grant it authority over matters of international criminal law, with a close resemblance to how it is practiced by the ICC.[103] The question is whether this Protocol seeks to fragment international criminal law and exercise measures considerably different to those of the Rome Statute.[104] Alternatively, it can also be asked whether the Protocol is instead an example of complementarity, with the intention to enforce the same measures but perhaps confined to the continent of Africa with respect to jurisdiction. This chapter seeks to shed light on this by way of comparing the Malabo Protocol with the Rome Statute with respect to the articles and themes of the Rome Statute that this thesis has focussed on.

5.1. Comparison with Rome Statute

The Malabo Protocol, on the surface, is very similar to the Rome Statute. It is thus apparent that, from their discontent with the ICC's practice of international criminal law, the AU has taken inspiration from the Rome Statute in seeking to

[102] African Union, *Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.*
[103] ibid.
[104] Here, 'fragmentation' is defined as "a set of multiple legal systems with little or no harmonisation connecting them" in William W. Burke-White, "International Legal Pluralism" (Michigan Journal of International Law) Vol. 25 (4) 974.

draft legislation that they find will provide a better alternative.[105] This 'inspiration' amounts, in some places, to carbon copies of Rome Statute provisions.[106] In other areas, however, radical differences are shown from what is accepted as international criminal law under the Rome Statute.[107] As it has been established that the respective AU States are dissatisfied with how the ICC applies the principle of complementarity, the first area of comparison will concern the articles of the Protocol that deal with this principle.

The principle of complementarity is first evident in the Protocol's preamble, as is the case with the Rome Statute. Here, the necessary paragraph is the seventh: "Further Bearing In Mind the complementary relationship between the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights…" Herein lies the first difference between how the principle of complementarity is applied between the two courts: whilst the Rome Statute immediately emphasises the complementary relationship between the Court and national criminal jurisdictions, the Malabo Protocol instead highlights the relationship between the ACJ and the ACHPR.[108] Like the Rome Statute, however, there is little information given as to what is meant by 'complementarity' – understandable given this is part of the Preamble.

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[105] Gerhard Werle and Mortiz Vormbaum, *"Creating an African Criminal Court"* in Gerhard Werle et. al., *"The African Criminal Court: A Commentary on the Malabo Protocol"* (Asser Press, 2017) 3.
[106] See e.g. the criteria used to determine inability in Arts. 46H (4) MP and 17 (3) RS.
[107] See e.g. Art 46A*bis* Malabo Protocol.
[108] Here, it is important to note that the ACHPR is a quasi-judicial body tasked with promoting and protecting human rights and collective rights. It does not have any power or enforcement over laws, instead needing to draft proposals that will be acted upon by the Assembly of the AU. The difference here then, is that the ICC emphasises a direct relationship with national jurisdictions that each have legislative power, whereas the ACJ emphasises one with a collection of eleven State representatives, that has no legislative power.

This information is supplied in Art. 46H of the Protocol, which can be compared together with Arts. 1 and 17 of the Rome Statute:

> ***Article 46H – Complementary Jurisdiction***
>
> *(1) The jurisdiction of the Court shall be complementary to that of National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.*
>
> *(2) The Court shall determine that a case is inadmissible where:*
>
> > *(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless that State is unwilling or unable to carry out the investigation or prosecution;*
> >
> > *(b) The case has been investigated by a State which ahs 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.*
> >
> > *…*

Art. 46H (1) of the Protocol is best compared with Art. 1 of the Rome Statute. Here, it is realised that the ACJ's complementary relationship is extended to be between it and national courts, as well as those of 'Regional Economic Communities' (REC).[109] It is interesting, however, how this latter complementary relationship depends on those Communities "specifically provid[ing] for" such. The Court then, within this article, emphasises not only the national and REC courts' primacy, but adds the additional requirement that the latter courts must expressly show their consent before such a relationship applies.

[109] RECs are defined as groups of individual African countries to ensure better economic integration. In the context of complementarity, these RECs are tasked with developing capacities to maintain peace, security and stability as essential prerequisites for economic and social development.

Additionally, the Malabo Protocol does not limit its relationship between courts to those of a criminal nature, like the Rome Statute does.[110] In doing so, the Protocol implies a connection with the wider community of courts. Whilst this can be holistically interpreted in being part of the whole community of courts, it can also be viewed as a way of introducing to the realm of international criminal law courts that work in fields vastly different. In not defining its application of the principle of complementarity, this provision is read – in the case of the latter interpretation – with great uncertainty. To what extent is it relevant that the ACJ has such a relationship with courts of a non-international criminal law nature? Though this thesis will not attempt to answer the above question, it is nonetheless necessary to highlight the different interpretations of the Protocol's provisions.

Art. 46A (2) MP, meanwhile, provides the ACJ's interpretation of complementarity almost word-for-word as Art. 17 of the Rome Statute does. However, there is one clear absentee in the former's admissibility criteria: the word 'genuinely'. The previous chapter has shown which issues have arisen because of this word in the context of ICC case law, as well as the added dimension it seeks to bring to the provision. As Triffterer states on the drafting of the Rome Statute:

> "The sensitive issue was that the ICC would be passing judgment on the performance of national systems. Many delegations took the position that the subjective criteria should

[110] Rome Statute, para 10 Preamble and Art. 1: "…national criminal jurisdictions…".

> be deleted. However, as some subjectivity on the part of the Court was necessary, the term 'genuinely' was adopted as being the "least objectionable word"…"[111]

In the case of the Rome Statute, Art. 17's subjectivity complicates proceedings for both parties to the trial: to the prosecutor as she has to prove the State is 'genuinely' unwilling/unable; and to the State because it has to prove the opposite, that it *is* 'genuinely' willing/able. In the ACJ's case, the removal of the word 'genuine' removes the substantive test associated with it, easing the ways in which the criteria of admissibility are applied.[112] Including the term, then, increases the threshold by which the actions of the State are judged, which would not apply by way of the Malabo Protocol. A lower threshold results in a lower burden of proof during proceedings, which is likely to be taken advantage of.

As well as this substantive test, the removal of 'genuinely' leaves the possibility for States to overload the ACJ with cases.[113] By way of referral to the ACJ, national courts may choose to abuse the absence of the word 'genuinely' to willingly give up jurisdiction so that it is instead the ACJ's resources being used, not their own. Whilst the Protocol considers the same criteria as the Rome Statute in deciding on admissibility,[114] the absence of the substantive threshold creates here a one-way issue for the ACJ, as "States [in Africa] have predominantly claimed inability and have subsequently referred situations to

[111] supra note 20 at 617 para 25.
[112] Harmen van der Wilt in Werle et al., supra note 105 at 193.
[113] ibid at 195.
[114] Arts. 46A (3) and (4) MP; Arts. 17 (2) and (3) RS.

the ICC."[115] Therefore, it can be reasoned that similar action is easier against the ACJ when taking the removal of 'genuine' into account. The point above further highlights this, as offloaded cases would be found to be easily admissible to the ACJ without a substantive test to assess whether States have truly exhausted their own courts before submitting them to the ACJ.

As it has been shown, the Malabo Protocol takes a different approach to implementing the principle of complementarity, creating more relaxed admissibility criteria than the Rome Statute. This can be interpreted as a separation within international criminal law, although not necessarily one that can be seen as fragmentation. However, when it comes to Art. 46A*bis* of the Protocol (on immunities), this view stands to change as it is widely argued that the Protocol breaks with substantiated international criminal law.[116]

5.2. Immunity

Art. 46A*bis* MP states, in full:

> ***Article 46A*bis - *Immunities***
>
> *"No charges shall be commenced against or continued before the Court against any serving [African Union] Head of State of Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during tenure of office."*

At first glance, this article would widen the eyes of international lawyers owing to its granting of immunity to not only "Head[s] of State of Government", but to

[115] supra note 112.
[116] Dire Tladi in Werle et. al., supra note 105.

the ill-defined group of persons included by "anybody acting or entitled to act in such capacity." This provision can be interpreted in two ways: broadly, whereby immunity would apply to "potentially all minsters and even all members of parliament"; or narrowly in which Deputies of State are protected by the latter category.[117] As well as the group this provision applies to, the type(s) of immunity are likewise undefined; does it concern immunity *ratione personae* (immunity of person), *ratione materiae* (functional immunity), or both? In reading Art. 46A*bis*, it appears that both types apply to "Head[s] of State … or anybody acting … in such capacity", whilst the second type applies to "other senior state officials".[118] However, the case can equally be made that the only applicable type is that of *personae* that then applies to the whole group of persons the article concerns itself with. This would follow from the ICJ ruling in the *Arrest Warrant* case, whereby immunity *ratione personae* was extended to Ministers for Foreign Affairs.[119] The AU has, furthermore, not provided a distinction between Heads of State and other senior officials regarding immunity.[120]

Taking these points into account, especially the last regarding the AU Assembly, it seems that the interpretation likely associated with the intended type of immunity is that of *ratione personae*. This would then apply to the entire group of individuals as covered under Art. 46A*bis*, with the phrase "based on their

[117] ibid.
[118] Here, the phrase "based on their functions" is stipulated. The absence of such wording with respect to the former group suggests both types of immunity apply, given that no explicit distinction is made.
[119] *Arrest Warrant*, para 53.
[120] E.g. Decision on Africa's Relationship with the International Criminal Court (ICC), October 2013, para 9.

functions" forming a description of senior officials. As a result, this will be the interpretation this thesis hereon considers.

In relating the ACJ's immunity provision to international law, Murungu claims "immunity of state officials is no longer a valid defence for the commission of international crimes", a view also expressed by the ICC.[121] Murungu even goes as far as opining that the AU's actions are a result of wanting to "protect ... its leaders."[122] Indeed, the fact that Art. 46A*bis* restricts such immunity so that it only applies to "African Union [leaders and ministers]" gives the effect of exactly that.

The African Union, meanwhile, has defended its use of immunities. According to customary international law, they argue, "Heads of state and other senior state officials are granted immunity during their tenure of office."[123] Furthermore, the AU does not dispute the ICC's stance on immunities[124] but "approaches [it] as a treaty rule applicable only to State Parties, while for non-State Parties the rules of customary international law [apply]."[125] The AU can thus be said to approach the ICC's position as an exception to the customary international rule, a finding supported by the AU's press release in response to the decisions on the non-cooperation of Chad and Malawi.[126]

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[121] Chacha Murungu, "Towards a criminal chamber in the African Court of Justice and Human Rights" (Journal of International Criminal Justice, November 2011) Vol. 9:5, 1067.
supra notes 92 and 93, paras 18 and 36.
[122] ibid.
[123] supra note 112.
[124] Art. 27 Rome Statute.
[125] supra note 112 at 210.
[126] Press Release 02/2012, 9 January 2012.

This position is, however, flawed. Following the *Arrest Warrant* case, the ICJ stated that "…a state official may still be prosecuted before an international court…"[127] Furthermore, and more crucially, the immunity of State officials (*ratione personae* or *materiae*) under customary international law concerns immunity of those individuals from foreign *States*. This is based on the international law principle of States being sovereign; a State is immune from the jurisdiction of other States. However, international tribunals, such as the ICC and ACHPR in this case, are not themselves States, despite being created by States. As a result, the customary international law rule on immunity of States and their officials does not apply to them.[128]

The reason why this rule does not apply to international tribunals, as the ICJ noted, is because *immunity* does not mean *impunity*:

> *"Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility."* [129]

Thus, whilst international law upholds immunity before national courts concerning foreign ministers, it does not allow for immunity before *all* courts. From the ICJ's wording, this is to ensure that individuals still remain criminally liable for their actions, with immunity being a bar to jurisdiction rather than a

[127] *Arrest Warrant* para 61.
[128] supra note 112 at 212-213.
[129] supra note 127 at para 60.

measure to waive all responsibility. Additionally, the ICJ ruled that officials enjoying immunity might be prosecuted before international criminal courts where they have jurisdiction.[130] Whilst this does not speak to the status of immunity before international courts, it does show that "officials with immunity [may be prosecuted] if certain conditions are met."[131]

What constitutes an international tribunal's jurisdiction, however, including whether such jurisdictional obstacles (such as immunity) apply to them, depends on that tribunal's founding document.[132] It has been previously shown that the ICC, for example, flat out rejects immunity pursuant to Art. 27 of the Rome Statute. As a result, a minister that would otherwise be granted immunity under Art. 46A*bis* of the Rome Statute would not be able to plead such immunity before the ICC, as the Rome Statute does not recognise immunity as a jurisdictional bar to proceedings.

However, the AU's point on the Rome Statute being a treaty, and therefore only binding States Parties to its contents, stands. As a result, whilst the AU is incorrect in saying immunity of ministers applies in full and must be respected by international tribunals, [133] that all international tribunals refuse to acknowledge immunity is likewise incorrect; this is a matter to be decided upon drafting the respective constitutive act.

Regarding the Malabo's Protocol's provision on immunity then, this thesis finds that the AU is free to decide upon the provisions that form the Malabo Protocol,

[130] supra note 126.
[131] supra note 112 at 214.
[132] ibid.
[133] Following the *Arrest Warrant* case, supra note 130.

including that of Art. 46A*bis*. This follows from there not being an international legal custom of international tribunals recognising immunity of State leaders and ministers.[134] From this, it can be seen that the Malabo Protocol operates in a current grey area of international law between customary international law and established international criminal law concerning immunities.

5.3. Conclusions

The Malabo Protocol, as an instrument, is clearly based on the Rome Statute as far as the drafting of its provisions is concerned. Whilst it borrows the ICC's principle of complementarity, and enforces it through Art. 46H, the notable absence of the term 'genuinely' removes with it the substantive test that would have otherwise shielded the ACJ from the risk of case overload from national jurisdictions. This is mainly to the benefit of those national jurisdictions in that they do not necessarily need to prove they have exhausted their local resources before referring a case to the ACJ. This omission of one word may thus prove costly to the ACJ if its' treaty reaches the point of ratification.

On the subject of immunities, though it is understood why such a provision would attract the most attention from the international community, customary international law does allow for immunities, to which this Protocol can be said to adhere to. Having said that, its vague wording presents issues regarding not only which types of immunities are recognised, but also to whom they apply.

Furthermore, an important point to not forget is that Art. 46A*bis* only applies to the ACJ, not any other court. It thus has no implication on other international

[134] supra note 116 at 213.

tribunals' respective functions, nor does it affect their exercise of jurisdiction. They are still free to exercise jurisdiction over individuals that are otherwise immune under the Malabo Protocol.

Having said that, the differences in the wording of provisions between the Rome Statute and Malabo Protocol (particularly Art. 46H's removal of the genuineness test), are evidence of the AU attempting to enforce its understanding of how complementarity should operate. As a result, the introduction of a provision on immunities, coupled with another that omits the substantive test in relation to the admissibility criteria, is seen as a situation of legal fragmentation to the extent that it fragments practised international criminal law (by the ICC), but not what is accepted under customary international law.[135]

Where the Malabo Protocol does stand to fragment not only with international criminal law, but also with customary international law, is the definition of individuals who will be subject to immunity pursuant to Art. 46A*bis*. In being poorly defined, the provision stands to grant "other senior state officials based on their functions" immunity *ratione personae,* which is not currently granted to officials outside of those currently recognised under customary international law.[136]

[135] Following from what has been argued regarding the drafting process of international tribunals' constitutive documents.
[136] Heads of State, Heads of Government and Ministers of Foreign Affairs.

6. Legal Pluralism and Fragmentation

Up to this point, the Malabo Protocol has been analysed separately with respect to the Rome Statute and with customary international law. This chapter will expand on the discussion by further analysing the principle of complementarity in connection with the relationship that the ACJ will have with the ICC and States. In doing so, two different models will be examined: one where the ICC has hierarchical status over the ACJ, and one where the two courts form a cooperative model. In doing so, it must be stated that this thesis views the former to be a concept amounting to fragmentation of international criminal law, whereas the latter can be associated with legal pluralism.

Before arguing these respective points of view, it is important to first define what is meant by the relevant concepts. Legal pluralism is associated with "overlapping, not necessarily conflicting, legal regimes", [137] whilst legal fragmentation is defined as a set of multiple legal systems with little or no harmonisation connecting them. [138] Already noticeable is the negativity associated with the word 'fragmentation'; it gives the effect of the regime being broken in some way. With pluralism, however, there are simply multiple forms of the same regime, working together to create a working whole. Despite this starting point, both concepts will now be critically analysed in the context of the dispute between the ICC and AU, starting with that of legal fragmentation.

[137] Elies van Sliedregt, "Pluralism in International Criminal Law" (Leiden Journal of International Law) Vol. 25 (4) 847-855.
[138] William W. Burke-White, "International Legal Pluralism" (Michigan Journal of International Law) Vol. 25 (4) 974.

6.1. Hierarchical superiority of the ICC

Before any analysis can occur, it is paramount to analyse both the Malabo Protocol and Rome Statute to see how their respective institutions deal with others, and, more pressingly, which they explicitly mention as recognisable bodies in the context of international criminal law. For the ACJ's part, despite bearing a strikingly similar, if not almost identical, founding instrument to that of the Rome Statute, the Malabo Protocol itself does not mention the ICC by name anywhere. Likewise, the ICC is also silent on regional courts enforcing international criminal law, though this is understandable with it being the older Statute; it did not envisage such a situation as is currently being examined. As such, any relationship between these two institutions is currently a matter of discussion, but one that will certainly need clarifying, as this chapter aims to show.

Suppose the ACJ delivered its judgment on a case, being the Court it was tried in, but the ICC found that a different decision should have been reached. Would the ICC then be permitted to evaluate the performance of the ACJ based on a difference in opinion? As both instruments are silent, it is difficult to answer this question. However, the Malabo Protocol's insertion of Art. 46A*bis* constitutes a jurisdictional limitation of the ACJ here, whereby the ICC may be permitted to hear the same case and give its judgment.

As Art. 46A*bis* grants immunity, it is entirely possible that a State may choose to, for better use of the word, exploit this provision and bring its case before the ACJ where a Head of State stands accused of committing international crime(s). In such a case, the ACJ may very well find itself unable to prosecute due to its

immunity provision. Because of this, the ICC could find the same case to be admissible following the ACJ's inability.[139] This would, in turn, establish a hierarchical relationship between the two Courts with the ICC being superior in it nonetheless hearing cases that the ACJ has ruled upon. However, because the Courts' respective treaties are silent on a relationship with the other, it is difficult to establish this hierarchical placement.[140]

Such a hierarchical relationship would not sit well with the ACJ, it can be safely assumed, due to, among other reasons, the extension of its jurisdiction to cover international crimes widely seen in alignment with the discontent of the AU shown towards ICC.[141] However, the ACJ might see a number of cases tried before the ICC owing in part to its lack of tools and finance when compared with the ICC.[142] Because of this, the ICC must always be available in situations where the ACJ is unable to hear cases due to this inferior resource availability. This is, like with the previous situation regarding immunity, unlikely to be well-received by the ACJ, and provides another example of how a hierarchical relationship could be established as long as the respective treaties remain silent about the other institution.

A hierarchical relationship then, as explored above, amounts to fragmentation of international criminal law in that it fragments the relationship between the ACJ

[139] Art. 17 (1) (b) Rome Statute.
[140] Whilst Art. 30 of the Vienna Convention of the Law of Treaties (VCLT) provides for the younger treaty to prevail, this only applies to cases where States bringing actions before the ACJ and/or ICC are party to both treaties: Herman van der Wilt in Werle et. al. supra note 115 at 197.
[141] As has been covered earlier in this thesis: Franck Kuwonu, *"ICC: Beyond the threats of withdrawal"* (AfricaRenewal Online, May – July 2017) Accessed 24 May 2019.
[142] supra note 140 (van der Wilt).

and ICC. With the ACJ's potential exploitation regarding the removal of the 'genuineness' test,[143] the ACJ might very well have to unwillingly allow the ICC to prosecute cases, lest it wish to accumulate cases to the point where prosecution would stall in wait of sufficient resources. Such a heated relationship between these two Courts would not provide any benefit to the realm of international criminal law, and might even lead to the two consciously choosing to not cooperate with each other. This would in turn prove to be detrimental to the functioning of international criminal law as a whole, hurting the efficiency in which its actors operate.

6.2. Cooperation by pluralism

Of course, like there is the possibility of fragmentation in the relationship between the two Courts, so too is there a possibility of cooperation. The concept of legal pluralism seems, in this context, to be a harmonious one: States, the ICC, and the ACJ all working within the same legal framework, or similar resemblances of one, so as to operate in a method of cooperation.[144] This can be done at the horizontal level (between the various courts of a State so that the rule of law is enforced overall) the vertical level (between international and national courts, for example), or both.[145] Burke-White supports this line of thought by arguing that a coherent system of pluralistic international law is necessary in a globalising world: "… an enforceable system of international law offers an efficient and politically acceptable means of conflict resolution …"[146]

[143] Which could lead to African States offloading cases for the sake of sparing resources, as has been covered in Chapter 5 of this thesis.
[144] supra note 137.
[145] supra note 137 at 852.
[146] supra note 138 at 967.

This necessary relationship can be argued for in the case of the ICC, and how it should ideally function. Indeed, the principle of complementarity upon which its jurisdiction is based relies – to an extent – on national courts enforcing the law as written in the Rome Statute, lest the ICC be overloaded with cases from its 122 State Parties. Thus, the overlapping of international criminal law with national jurisdictions constitutes legal pluralism, and the effective handling of international criminal law in turn, makes the ICC – and the field of law by extension – function more efficiently. This is, in essence, the spirit of complementarity.

With respect to the relationship between the ICC and ACJ, following the model of positive complementarity might be useful.[147] In applying this model, the respective Courts would recognise the other as legitimately enforcing international criminal law, and allow them to conduct prosecutions without interfering. As well as this, instances may arise where the one Court refers a case to the other, in situations where they would be better situated or equipped to prosecute, for example. Having a relationship based on positive complementarity thus comes with the incentive of increasing the efficiency of international criminal law and its practise.

An example of the pluralistic model in effect would be the division of labour between the two Courts. As it has previously been stated that the Malabo Protocol provides a similar, if not identical, definition of the substantive laws on

[147] Positive Complementarity essentially entails that the international tribunal(s) will encourage national proceedings where possible and will not interfere in them.

international crimes,[148] the ACJ could allow the ICC to prosecute these crimes with its focus turning instead to those crimes not included in the Rome Statute, but solely in the Malabo Protocol.[149] This would strengthen the effect of international criminal law as a body of law in two Courts delegating which crimes they respectively have jurisdiction over, to the benefit of the international community. For example, the ACJ has the jurisdictional power to try those accused of money laundering.[150] As the ICC does not, this would put the ACJ on the front foot in tackling crimes inadequately covered by the ICC.[151]

Furthermore, leaving the ICC to try cases regarding the 'core crimes' that both treaties cover does not mean that the ACJ will be short of action. Rather, the opposite is true, as the ACJ will have exclusive jurisdiction over these other crimes that the ICC does not have jurisdiction over. The ACJ will thus be able to devote the resources it would have otherwise spent on such cases to enforcing its exclusive area of jurisdiction.

Added to the legal benefits a model of cooperation would bring, there would also be an additional benefit to the AU, considering their concerns with how the ICC functions currently in 'targeting' African nations: the ACJ's jurisdiction on money laundering, as covered above, would likely give rise to them having jurisdiction to prosecute Western corporations, as it is "well known" that such companies are involved in white-collar crimes.[152] Furthermore, the ACJ would have jurisdiction

[148] See Arts. 6-8 Rome Statute and Art. 28B-D Malabo Protocol.
[149] See Art. 5 Rome Statute and 28A Malabo Protocol.
[150] Art. 28I*bis* Malabo Protocol.
[151] supra note 140 (van der Wilt) at 200.
[152] ibid.

to try international corporations, whilst the ICC is limited to natural persons.[153] Having said that, the ACJ's exercise of such jurisdiction is based on the precondition that the accused corporation "can be located on the territory of an African State Party to the Malabo Protocol."[154]

Therefore, and contrary to what could be witnessed if the ACJ and ICC were not to form such a relationship, the cooperation of these two institutions has the potential to provide the field of international criminal law with pluralism currently unseen, as no regional criminal court has so far been witnessed. In doing so, the ACJ would not be short of cases, and would even be better positioned to tackle transnational crimes, such as money laundering, than the ICC.

6.3. Conclusion

After exploring both a hierarchical and cooperative relationship between the two Courts, legal pluralism by way of institutional cooperation shows a stronger and healthier enforcement of complementarity between jurisdictions on both the horizontal (vis-à-vis the ICC and ACJ) and vertical levels (vis-à-vis the Courts and States), and is argued to be the more ideal scenario out of the two, especially in a globalising world. The contradicting hierarchical model would instead worsen tensions between the two Courts, where fallout regarding the practise and efficiency of international criminal law would be realised.

[153] See Art. 25 Rome Statute and Art. 46C (1) Malabo Protocol.
[154] supra note 151.

It must be stated, however, that the above exploration of the two models is purely theoretical, as the fact remains that neither Court's treaty incorporates a relationship of any kind with the other; they remain silent. As such, though the cooperative model is to be desired, the hierarchical model stands the most chance of being realised unless this silence changes, owing to how the international community will likely view the ICC as the default institution regarding the enforcement of international criminal law. The result of this would be increasingly negative on the field of international criminal law, amounting to a fragmented relationship not only between the ACJ and ICC, but also between States' relationships with their institution's counterpart.[155]

[155] For example, African States will have an increasingly distrustful relationship with the ICC if it were to have a hierarchical relationship over the ACJ.

7. Implications of analysis on 'four corners'

In this thesis' introduction, reference was made to several key authors whose works constituted the 'four corners' between which this thesis' research was situated. It is now the job of this thesis to relate its analysis to these authors' works, thereby showing its contribution to the field of international criminal law, and commenting on the effect it has had on these works.

Regarding the works of Heller and Jackson on regional and radical complementarity, this thesis earlier took the position that regional tribunals would benefit the realm of international criminal law by means of legal pluralism. Analysis since making that point, however, has shown to not only support the view of Jackson, but enrich his argumentation as well when compared with the arguments for radical complementarity by Heller. Whilst the availability of a regional tribunal (the ACJ in this case) has been shown to be beneficial to the international criminal realm, the extent to which it is beneficial is emphasised by a pluralistic relationship between the ICC and ACJ. In this scenario, the ACJ as a regional institution could delegate jurisdiction with the ICC so as to clearly define which cases appear before which Court. As such, there would be no discrepancy regarding where a case is tried simply based on whether a Court is genuinely willing. Furthermore, a model of pluralism between the two institutions would ensure efficient allocation of resources pertaining to their jurisdictional agreement in removing any conflict between the Courts regarding jurisdiction.[156]

[156] In cases such as where the ACJ would be willing to try a case regarding a core crime, that it has agreed with the ICC that the latter Court shall enforce, per Heller's arguments.

On the works of Du Plessis and Werle concerning immunity before international tribunals, this thesis' analysis shows to be in line with both lines of argumentation in concluding that whilst the Malabo Protocol's recognition of immunity goes against the ICC's practise of international criminal law, it does not go against customary international law. However, the wording of Art. 46A*bis* is sufficiently vague to warrant further clarification as to which State individuals receive which type of immunity. Furthermore, the ACJ finding itself to be unable to rule on a case concerning a Head of State (who would then be immune to charges brought to him with respect to international criminal law) raises as yet unanswered questions regarding whether the ICC is then able to intervene and see the same case as admissible (this is also applicable to Jackson's definition of regional complementarity). Therefore, as both authors note and as this thesis also argues, the field of international criminal law needs to decide on what kind of relationship would be present between the ICC and ACJ.

In grouping the final two 'corners', this thesis largely agrees with Van Sliedregt and Burke-White in their stipulation of pluralism's positive effects. In specific relation to the ICC-ACJ relationship, however, whether legal pluralism will be realised hangs in the balance as neither treaty yet recognises nor mentions the other institution. As such, though the realisation of legal pluralism would provide numerous advantages to not only the two institutions, but also to their relationships with States and to the larger international community, it is paramount that such advancements be made with regards to the two Courts forming an alliance, if indeed the Malabo Protocol receives enough ratifications for the ACJ to exercise jurisdiction over crimes of international law.

This thesis does not, on the other hand, agree with Hafner's stipulation that legal pluralism constitutes a threat to international law's credibility as it has been shown that a harmonious relationship between the Courts can exist, whereby jurisdiction can be delegated to strengthen the overall impact the Courts will have on the field of international criminal law. This would, furthermore, only increase the efficiency of international criminal law, thereby increasing its credibility as a successful and enforceable area of international law.

8. Conclusion

This thesis has sought to answer the following Research Question: To what extent does the principle of complementarity threaten the fragmentation of international criminal law? In covering a vast array of literature and legal documents, it hereby informs the reader of its conclusion.

Though not explicitly defined in the Rome Statute, the International Criminal Court is founded on the principle of complementarity which, ideally, seeks a harmonious relationship between it and the States Parties to the Rome Statute. The theoretical elements within this treaty paint the principle of complementarity to recognise state primacy regarding cases concerning international crimes, with cases admissible before the ICC in accordance with Art. 17 (1) RS. In exploring the two types of regional and radical complementarity, it is concluded that regional complementarity would enhance the principle, as used by the ICC, in establishing a subjective relationship with states, particularly those experiencing conflict.

Whilst complementarity, in theory, recognises states' primary jurisdiction in cases, the ICC's practice of its admissibility criteria is inconsistent, as evident in cases such as *Gaddafi*, *Al-Senussi* and *Simone Gbagbo*. Here, the substantive test concerning the word 'genuinely' comes under scrutiny, with it being interpreted against African states on a number of occasions, based on their conduct at the time of the trial. The additional fact that in such challenges of admissibility the state has to defend its primacy complicates the principle of complementarity, to the point where several African State Parties to the Rome Statute are currently

not complying with the ICC. Furthermore, there is a noticeable trend in reactions towards cases started via UNSC referral, compared with those started via state referral or *proprio motu* acceptance of ICC jurisdiction. It has been discovered that cases started by the former methods tend to provoke harsher reactions towards the ICC, due to these States alleging an infringement on their primary jurisdictions in the context of the Rome Statute.

The mutual discontent between states of the African Union regarding how the ICC practices complementarity has led to the AU's adoption of the Malabo Protocol. This instrument shows clear signs of being based on the Rome Statute, although important differences with how it implements the principle of complementarity are evident, such as its removal of the substantive 'genuine' test and conditional jurisdictional requirement of recognition by Regional Economic Communities.

The largest discrepancy, though, is the Protocol's enforcement of immunity through Art. 46A*bis*. Having analysed this provision, this thesis has found that whilst the ACJ does not infringe upon international customary law in including such a provision, the vague wording of it warrants further clarification as it needs to be clear which immunities are to be conferred upon which parties.

Whilst Art. 46A*bis* does not, therefore, constitute fragmentation between the ICC and ACJ, it is possible for fragmentation to exist between the two Courts in the context of their working relationship. Likewise, however, there is the equal possibility of there to be a pluralistic relationship, which would benefit not only the field of international criminal law, but both respective Courts as well in their

allocation of resources following potential delegation of jurisdiction. However, as neither treaty mentions the other institution, nor what type of relationship would be had with them, the realistic option is that legal fragmentation would occur between the ACJ and ICC with respect to them failing to recognise the other as an institution capable of practising international criminal law, thereby creating a divide in its practise. This could potentially carry with it the spill over effect onto national jurisdictions' relations with the other tribunal, thereby fragmenting the field of international criminal law.

Therefore, it is found that the principle of complementarity threatens the fragmentation of international criminal law to the extent of the current silence in both the Rome Statute and Malabo Protocol. Absence of consideration regarding the tribunals' respective counterparts needs to change if a relationship of positive complementarity is to be realised between the two Courts. Whilst it has been argued that the highly controversial immunity provision of Art. 46A*bis* does not infringe on customary international law, there is a real danger of a hierarchical relationship between the ICC and ACJ being realised (where the ICC would most likely be granted superiority) if neither treaty is amended to include a relationship with the other institution by the time the Malabo Protocol comes into effect.

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