

B

Institutional and Procedural Issues

Complementarity at the African Court

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INTRODUCTION

This chapter explores the likely relationships among the African Court (AC), the International Criminal Court (ICC), possible sub-regional courts, and national courts. It begins with an analysis of the complementarity provision of the AC Statute, which largely replicates that of the ICC. Based on this analysis, as well as the ICC's early complementarity jurisprudence, the chapter seeks to explicate the legal relationships among the various institutions. The chapter then turns to the normative question of how the proposed regional court should interact with national courts, the ICC, and other supra-national criminal courts such as the Extraordinary African Chambers in Senegal. While a great deal of theoretical work remains to be done in this area, the chapter suggests that as regional and sub-regional criminal courts such as the AC emerge, they should not be viewed as forming a jurisdictional hierarchy, with national courts at the top and the ICC at the bottom, but rather as providing a menu of adjudicative options. Adjudicative priority should be decided by balancing a range of factors from practical considerations, such as ease of obtaining evidence and custody, to defendants' rights. Particular attention should be paid to the interests of each institution's constitutive community in adjudicating a particular case. In this way, national, regional, and international criminal courts can truly complement each other.

1. LEGAL ANALYSIS OF THE PROTOCOL'S COMPLEMENTARITY PROVISIONS

This section of the chapter analyzes the Malabo Protocol's provisions on complementarity as well as the ICC jurisprudence concerning the virtually identical provisions in the Rome Statute. It then explains the likely contours of

complementarity at the AC and sets forth the biggest open questions concerning application of the principle.

A. *Complementarity in the Protocol*

The concept of complementarity is broadly conceived in the Protocol as encompassing a cooperative relationship with any institution concerned with human rights promotion and protection on the continent. The Protocol first mentions complementarity in the Preamble, which takes note of ‘the complementary relationship between the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights, as well as its successor, the African Court of Justice and Human and Peoples’ Rights.’¹ The Protocol further asserts that African Union (AU) member states are ‘[c]onvinced that the present Protocol will complement national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples’ rights . . . and ensuring accountability for them wherever they occur.’² Article 4 of the Protocol on the ‘Relationship between the Court and the African Commission on Human and Peoples’ Rights’ notes that: ‘The Court shall, in accordance with the Charter and this Protocol, complement the protective mandate of the African Commission on Human and Peoples’ Rights.’³ This protective mandate is set forth in Article 45 of the African Charter on Human and Peoples’ Rights, which provides that the Commission will promote human and peoples’ rights inter alia by ‘cooperat[ing] with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.’⁴ The Protocol’s drafters thus envisioned a system in which various institutions would work together to further human rights on the continent.

The details concerning the functioning of complementarity at the AC are set forth in Article 46(H) of the Protocol entitled ‘Complementary Jurisdiction’, which states:

1. The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.

¹ Preamble *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, EX.CL/846(XXV), 27 June 2014.

² *Ibid.*

³ *Ibid.* at art. 4.

⁴ Art. 45 *African Charter on Human and Peoples’ Rights* (‘Banjul Charter’), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981.

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 the State is unwilling or unable 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 to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint; (d) The case is not of sufficient gravity to justify further action by the Court.
3. In order to determine that a State is unwilling to investigate or prosecute in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
 - (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
 - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
4. In order to determine that a State is unable to investigate or prosecute in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.⁵

Most of this provision is identical to Article 17 of the Rome Statute of the ICC.⁶ However, there are some notable differences. First, the AC is to be complementary not only to national courts, but also to the courts of regional economic communities (RECs).⁷ Currently, no regional community court has jurisdiction over international crimes; but some state leaders have

⁵ Art. 46(H) Draft Protocol ACtJHR.

⁶ Art. 17 ICCSt.

⁷ Art. 46(H) Draft Protocol ACtJHR.

indicated an interest in extending the jurisdictions of these institutions.⁸ Should this occur, another layer of complexity will be added to the complementarity analysis, particularly in cases where states, RECs, and the AC have overlapping jurisdiction.

A drafting peculiarity is worth noting in regards to complementarity with the RECs. While paragraph 1 of Article 46(H) asserts that the AC ‘shall be complementary’ to both national courts and courts of the RECs, the remainder of the article mentions only the possibility of deferring to ‘State’ investigations and prosecutions.⁹ For instance, the Court is instructed to ‘determine that a case is inadmissible’ when ‘[t]he case is being investigated or prosecuted by a State which has jurisdiction over it’.¹⁰ Technically, therefore the AC judges could interpret paragraphs 2 and 3 of Article 46(H) to apply only to situations where States are investigating or prosecuting a case before the Court.¹¹ In that case, they would have to identify other rules applicable to complementarity with RECs should those institutions be granted jurisdiction over international crimes. More likely, however, the judges will read references to the RECs into paragraphs 2 and 3, which is probably what the drafters intended. The omission of the RECs from these paragraphs appears to be a casualty of the decision largely to copy this provision from the Rome Statute.

A potentially more important drafting difference between the two statutes is the omission of the word ‘genuinely’ from paragraphs 2 (a) and (b) of the Protocol. The Rome Statute provides that a case is inadmissible when it is being investigated or prosecuted by a state with jurisdiction ‘unless the State is unwilling or unable *genuinely* to carry out the investigation or prosecution’.¹² Likewise, a case is inadmissible when a state has investigated and decided not to prosecute ‘unless the decision resulted from the unwillingness or inability of the State *genuinely* to prosecute’.¹³ The AC Statute uses identical language in these paragraphs except that it omits the word ‘genuinely’. The most likely explanation for this omission is that state leaders were reluctant to grant

⁸ See e.g., ‘East African Court to Hear Crimes Against Humanity’, Chimp Reports, 29 April 2013, available at www.chimpreports.com/9681-east-african-court-to-hear-crimes-against-humanity/ (reporting that the East African Community is considering adding criminal jurisdiction, including over crimes against humanity, to the East African Court of Justice); see also Don Deya, ‘Is the African Court Worth the Wait: Pushing for the African Court to exercise jurisdiction for international crime’, Open Society Initiative for Southern Africa, 6 March 2012, available at www.osisa.org/opensource/regional/african-court-worth-wait.

⁹ Art. 46(H) Draft Protocol ACtJHR.

¹⁰ *Ibid.* at art. 46(H)(2) and (3).

¹¹ *Ibid.*

¹² Art. 17(1)(a) ICCSt (emphasis added).

¹³ *Ibid.* art. 17(1)(b) (emphasis added).

the AC the power to evaluate the genuineness of their state's criminal proceedings. The consequence, however, is that the provisions are rendered nonsensical.¹⁴ As drafted, paragraph 2(a) asserts that a case is inadmissible when a state is investigating or prosecuting unless it is not investigating or prosecuting (due to unwillingness or inability).¹⁵ Similarly, paragraph 2(b) states in part that a case is inadmissible when a state has investigated and decided not to prosecute unless the state is unwilling to prosecute – which is clearly the case since the state has decided not to do so.¹⁶

For the judges of the AC to conduct a complementarity analysis, they will have to find some basis on which to evaluate the adequacy of national, and perhaps regional, proceedings. They might do this by reading the word 'genuinely' back into the provision or by finding another principle on which to rest their decisions. For purposes of the remainder of this chapter, I will assume that something akin to genuineness will be required.

Another difference between the AC's complementarity provision and that in the Rome Statute is that the latter contains two additional articles entitled 'Preliminary Rulings Regarding Admissibility' (Article 18) and 'Challenges to the Jurisdiction of the Court or the Admissibility of a Case' (Article 19).¹⁷ Article 18 requires the ICC prosecutor to notify relevant states before opening an investigation except in situations referred by the Security Council and to defer to the state's investigation unless the Pre-Trial Chamber authorizes an investigation.¹⁸ The article provides for appeal of the Pre-Trial Chamber's decisions and requires states to inform the prosecutor of the progress of investigations when the prosecutor has deferred to them.¹⁹ Article 19 sets forth procedures regarding challenges to the ICC's jurisdiction or the admissibility of a case including who may assert such challenges, the timing of the challenges, and which chamber will hear them.²⁰ It is unclear why these (or similar) provisions were omitted from the AC Statute. Part of the explanation may be that the Protocol generally does not include the same level of procedural detail as the Rome Statute. With regard to appeals, for instance, Article 18 of the Protocol simply states that '[a]n appeal may be made against a decision on jurisdiction or admissibility of a case, an acquittal or a conviction'.²¹ In contrast, the Rome

¹⁴ I am grateful to my research assistant, Kelsey Lee, for this observation.

¹⁵ Art. 46(H)(2) Draft Protocol ACtJHR.

¹⁶ *Ibid.*

¹⁷ Arts 18 and 19 ICCSt.

¹⁸ *Ibid.* at art. 18(1) and (2).

¹⁹ *Ibid.* at art. 18(4) and (5).

²⁰ *Ibid.* at art. 19.

²¹ Art. 18(3) Draft Protocol ACtJHR.

Statute contains detailed provisions regarding the grounds and procedures for appeal.²² The absence of detailed procedures from the Protocol will likely mean the judges will be tasked with elaborating the AC's procedures.

A final difference between the two statutes is that Article 17 of the Rome Statute is labelled 'Admissibility', while Article 46(H) of the Protocol is labelled 'Complementary Jurisdiction'.²³ The term 'complementarity' in the context of the Rome Statute is usually interpreted to refer only to the question of whether a case is admissible due to a state's failure adequately to investigate or prosecute. Considerations of *ne bis in idem* and gravity, also covered in Article 17, are separate aspects of admissibility. It is unclear why the Protocol's drafters deviated from the Rome Statute model in this regard and the difference may have little practical effect.²⁴ Nonetheless, since the judges of the AC will conduct the analyses concerning gravity and *non bis in idem* alongside that of whether another jurisdiction is adequately investigating and prosecuting, it is conceivable that those analyses will be linked to a greater degree than they are in the ICC's jurisprudence. In light of the inclusion of *non bis in idem* and gravity as part of complementarity in the Protocol, those provisions are analyzed below.

In both the Rome Statute and the Protocol, *non bis in idem*²⁵ is referenced twice: first in the provisions concerning complementarity (Protocol)²⁶ and admissibility (Rome Statute),²⁷ and then in a separate article that elaborates the *non bis in idem* principle.²⁸ Article 46(I) of the Protocol, which largely mirrors Article 20 of the Rome Statute, states:

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

²² Arts 81–3 ICCSt.

²³ Art. 17 ICCSt; Art. 46(H) Draft Protocol ACtJHR.

²⁴ In the *Al-Senussi* case, the court referred to *ne bis in idem* as a 'corollary' to the principle of complementarity. Prosecution's Response to 'Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute', *Saif Al Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11–01/11–321-Red), Pre-Trial Chamber I, 2 May 2013, § 38; see also O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (München: CH Beck, 2008), at 7 (stating that Article 20(3) both helps to safeguard defendants' rights and to limit the ICC's reach by 'distributing and balancing the competences of the ICC and those of national courts according to the principle of complementarity').

²⁵ The Rome Statute uses the term '*ne bis in idem*'.

²⁶ Art. 46(H) Draft Protocol ACtJHR.

²⁷ Art. 17 ICCSt.

²⁸ Art. 46(I) Draft Protocol ACtJHR; Art. 20 ICCSt.

2. Except in exceptional circumstances, no person who has been tried by another court for conduct proscribed under Article 28A of this Statute shall be tried by the Court with respect to the same conduct unless the proceedings in the other Court:
 - (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
 - (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Court shall take into account the extent to which any penalty imposed by another Court on the same person for the same act has already been served.²⁹

There are several important differences between this provision and Article 20 of the Rome Statute. First, the Rome Statute contains an additional paragraph asserting: ‘No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court’.³⁰ This seems to have been omitted from the Protocol to allow states flexibility in deciding whether to adhere to the principle of *non bis in idem* in regards to judgments of the AC. Second, unlike the Rome Statute, the Protocol qualifies the prohibition on retrial at the AC of a person who has been tried by another court with respect to the same conduct with the phrase ‘except in exceptional circumstances’.³¹ Again, the intent seems to be to afford the AC flexibility in respecting the principle of *non bis in idem*, although no guidance is given regarding what might constitute ‘exceptional circumstances’ beyond those already taken into account in paragraphs 2 (a) and (b).³²

Finally, there is no equivalent in the Rome Statute of Article 46(I) of the Protocol, which instructs the Court in determining an appropriate penalty to take account of any time served by virtue of another conviction for the same act.³³ Article 78(2) of the Rome Statute concerning determination of sentence states that ‘[t]he Court may deduct any time otherwise spent in

²⁹ Art. 46(I) Draft Protocol ACtJHR.

³⁰ Art. 20(2) ICCSt.

³¹ Art. 46(I)(2) Draft Protocol ACtJHR; Art. 20 ICCSt.

³² Art. 46(I) Draft Protocol ACtJHR.

³³ *Ibid.* at art. 46(I)(3).

detention in connection with conduct underlying the crime'.³⁴ This statement is discretionary, however, whereas the AC is required to take time served into account.

Apart from the differences highlighted above, the complementarity provision of the AC Statute largely mirrors that of the Rome Statute. The next sections will explain how the ICC's judges and prosecutors have interpreted and applied complementarity, *ne bis in idem*, and gravity to set the stage for the final Part's discussion of how the AC ought to interpret the Protocol's similar provisions.

B. Complementarity at the ICC

At the ICC, complementarity has been treated as a 'principle' requiring the Court to complement the efforts of national courts. This principle has been implemented both by the Court's prosecutors, who have adopted a policy of 'positive complementarity',³⁵ and by the judges who have ruled on complementarity-based challenges to the admissibility of particular situations and cases. The Prosecutor's positive complementarity policy entails providing assistance to national systems in an effort to encourage and support them in conducting prosecutions of crimes within the ICC's jurisdiction.³⁶ Such assistance takes the form of trainings, evidence-sharing, and technical guidance, among other things.³⁷ In a recently issued draft policy paper, the Prosecutor states that if a state with jurisdiction is investigating or prosecuting a case, her office 'may consult with the authorities in question to share the information or evidence it has collected, pursuant to Article 93(10) of the Statute, or it may focus on other perpetrators that form part of the same or a different case theory, in line with a burden-sharing approach'.³⁸

The ICC judges have ruled on complementarity-based challenges to admissibility on several occasions, thereby developing jurisprudence around the concept. The issue of complementarity sometimes arises at the investigation

³⁴ Art. 78(2) ICCSt.

³⁵ The Office of the Prosecutor, *Prosecutorial Strategy*, International Criminal Court, 1 February 2010, available at www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf.

³⁶ *Ibid.* at § 5.

³⁷ *Ibid.* at § 17.

³⁸ The Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, International Criminal Court, 15 September 2016, available online at www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf, at 31.

stage, in which case the question is whether the overall situation is admissible.³⁹ To determine the admissibility of a situation, the Court examines whether the cases most likely to come before the Court would be admissible.⁴⁰ Determining admissibility at the case stage is more straightforward because the identities of the defendants and the nature of the charges are already known.

To determine whether the requirements of complementarity are met, the Court first looks to whether a state with jurisdiction is actively investigating or prosecuting a relevant case.⁴¹ The determination is made as of the time of the admissibility decision and is subject to revision if circumstances change.⁴² The Court will not consider the willingness or ability of a state to investigate unless there is some relevant state-level activity.⁴³ The ICC Appeals Chamber has stated:

in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.⁴⁴

³⁹ Art. 53(1)(b) ICCSt.

⁴⁰ Ibid.

⁴¹ Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Thomas Lubanga Dyilo* (ICC-01/04-01/06-8-US-Corr 09-03-2006 20/65 SL), Pre-Trial Chamber I, 24 February 2006, § 29.

⁴² Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11-96 30-05-2011 1/27 RH PT), Pre-Trial Chamber II, 30 May 2011, §§ 56–66; The Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07-1497 25-09-2009 1/44 IO T OAS), Appeals Chamber, 25 September 2009, § 56.

⁴³ Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Katanga and Chui* (ICC-01/04-01/07-1497 25-09-2009 1/44 IO T OAS), Appeals Chamber, 25 September 2009, § 78.

⁴⁴ Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-547-Red 21-05-2014 1/96 NM PT OA4), Appeals Chamber, 21 May 2014, § 213 (referring to Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Katanga and Chui*, (ICC-01/04-01/07-1497 25-09-2009 1/44 IO T OAS), Appeals Chamber, 25 September 2009, § 78).

Thus, when all states with jurisdiction are inactive, a case is admissible.⁴⁵ This situation may arise when a state with territorial or nationality jurisdiction over a case requests the ICC's involvement. In the *Katanga* case, the Appeals Chamber rejected the argument that a state's decision to relinquish jurisdiction, despite its own ability to prosecute, renders the case inadmissible.⁴⁶ The Chamber found that such a decision complies with the state's obligation to exercise jurisdiction over international crimes, and that admitting such 'self-referred' cases promotes the ICC's goal of ending impunity for international crimes.⁴⁷

When a state with jurisdiction is investigating or prosecuting, the question becomes whether the state activity pertains to the same 'case' that is before the ICC. The Court has interpreted this to mean that the state activity must concern the 'same individual and substantially the same conduct'.⁴⁸ Thus, in the *Lubanga* case, which involved charges of conscripting, enlisting, and using child soldiers, the Pre-trial Chamber determined the case to be admissible because the Democratic Republic of Congo (DRC) – the state where the crimes were committed – had charged Lubanga with different conduct.⁴⁹ The DRC was thus deemed 'inactive' for purposes of the complementarity analysis.⁵⁰ This was true even though some of the crimes charged in the national proceedings were arguably more serious: genocide and crimes against

⁴⁵ Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Lubanga* (ICC-01/04-01/06-8-US-Corr 09-03-2006 1/65 SL), Pre-Trial Chamber I, 24 February 2006, § 29.

⁴⁶ Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *Germain Katanga and Mathieu Ngudjolo Chui*, (ICC-01/04-01/07-1213-t-ENG 15-07-2009 1/38 IO T), Trial Chamber II, 16 June 2009, § 79.

⁴⁷ *Ibid.*

⁴⁸ Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', *William Samoei Ruto et al* (ICC-01/09-01/11-307 30-08-2011 1/44 NM PT OA), Appeals Chamber, 30 August 2011, § 1 (hereinafter Ruto Admissibility Judgment); Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11-274 30-08-2011 1/43 NM PT OA), Appeals Chamber, 30 August 2011, § 1.

⁴⁹ Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Lubanga* (ICC-01/04-01/06-8-US-Corr 09-03-2006 1/65 SL), Pre-Trial Chamber I, 24 February 2006, §§ 36-40.

⁵⁰ *Ibid.* at § 39.

humanity.⁵¹ What mattered was that Lubanga was not charged with crimes related to child soldiers, as he was before the ICC. The Court has rejected the argument that it suffices for a state to investigate persons at the same level in the hierarchy of an organization implicated in international crimes as those the ICC is pursuing.⁵²

To determine whether state activity concerns ‘substantially the same conduct’, the Court compares the incidents the state is investigating with those that are the subject of the ICC proceedings to ascertain the degree of overlap.⁵³ To the extent the incidents differ, the Court considers the state’s explanation for why it is not investigating the incidents the ICC is investigating.⁵⁴ The requirement that the conduct be ‘substantially the same’ does not mean that the state proceeding must concern identical charges, or even international crimes.⁵⁵

A state challenging admissibility bears the burden of demonstrating that it is investigating or prosecuting the same person and substantially the same conduct that are the subject of ICC proceedings.⁵⁶ To show it is ‘investigating’, a state must provide evidence that it is taking ‘concrete and progressive investigative steps’ to determine the responsibility of a suspect under ICC investigation.⁵⁷ It is insufficient for the state to provide evidence of future intent to investigate; the investigation must be ongoing at the time of the admissibility

⁵¹ *Ibid.* at § 33; *International Center for Transitional Justice, Situation Brief: The Trial of Thomas Lubanga*, International Center for Transitional Justice, January 2009, available at www.ictj.org/sites/default/files/ICTJ-DRC-Lubanga-Trial-2009-English.pdf (stating that the DRC arrested and charged Lubanga with genocide and crimes against humanity under DRC’s military criminal code).

⁵² Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11-96 30-05-2011 1/27 RH PT), Pre-Trial Chamber II, 30 May 2011, §§ 56–66.

⁵³ Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-547-Red 21-05-2014 34/96 NM PT OA4) Appeals Chamber, 21 May 2014, § 72.

⁵⁴ *Ibid.* at § 74.

⁵⁵ Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2003 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-565 24-07-2014 1/117 NM PT OA6), Appeals Chamber, 24 July 2014, § 119.

⁵⁶ Decision on the admissibility of the case against Saif Al-Islam Gaddafi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-344-Red 31-05-2013 26/91 FB PT), Pre-Trial Chamber I, 31 May 2013, §§ 61, 135 (defining ‘case’ as same person same conduct and stating that evidence does not allow the Chamber to discern the contours of the national case).

⁵⁷ OTP says in Côte d’Ivoire statement that this standard is from *Gaddafi*; Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May

challenge.⁵⁸ The evidence must be ‘of a sufficient degree of specificity and probative value’ to establish the existence of an ongoing investigation.⁵⁹ Merely opening a file on a suspect has been deemed insufficient to constitute an ongoing investigation.⁶⁰ Examples of the kinds of evidence required include ‘directions, orders and decisions issued by authorities in charge of the investigation as well as internal reports, updates, notifications or submissions contained in the file arising from the domestic investigation of the case’.⁶¹

The evidence submitted must enable the ICC judges to discern the contours of the state investigation and to determine that they cover substantially the same conduct as the ICC investigation.⁶² In the *Gaddafi* case, the Pre-Trial Chamber found that the evidence Libya presented was insufficient to demonstrate that Libya was investigating substantially the same conduct as the ICC.⁶³ The ICC case alleged that Gaddafi used his leadership position within

2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11-274 30-08-2011 1/43 NM PT OA), Appeals Chamber, 30 August 2011, §§ 1, 40, 80, 81 (stating that examples of investigative steps may include interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analysis); Decision on the admissibility of the case against Saif Al-Islam Gaddafi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-344-Red 31-05-2013 2/91 FB PT), Pre-Trial Chamber I, 31 May 2013, § 73.

⁵⁸ Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11-96 30-05-2011 1/27 RH PT), Pre-Trial Chamber II, 30 May 2011, §§ 59–66.

⁵⁹ Decision on the admissibility of the case against Abdullah Al-Senussi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-466-Red 11-10-2013 1/152 NM PT), Pre-Trial Chamber I, 11 October 2013, § 66(vi); Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11-274 30-08-2011 1/43 NM PT OA), Appeals Chamber, 30 August 2011, § 61.

⁶⁰ Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11-274 30-08-2011 1/43 NM PT OA), Appeals Chamber, 30 August 2011, § 61 (holding that the submissions of Kenya regarding investigation of all allegations into the six suspects and consideration of all evidence that emerged was insufficient and the Chamber considers that there remains a situation of inactivity).

⁶¹ Decision on the Admissibility of Case against Saif Al-Islam Gaddafi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-344-Red 31-05-2013 84/91 FB PT), Pre-Trial Chamber I, 31 May 2013, § 55.

⁶² *Ibid.* at § 135.

⁶³ *Ibid.* at § 134.

the government to suppress civilian demonstrations, including through lethal force.⁶⁴ Although Libya's submissions in support of its admissibility challenge demonstrated that its investigations related to aspects of the ICC charges, they were deemed insufficient to cover substantially the same conduct.⁶⁵

In sum, for the ICC to find a case inadmissible based on ongoing national proceedings, the party challenging admissibility must submit a significant amount of evidence demonstrating that the state is investigating or prosecuting a substantially similar set of incidents involving the same defendants as the ICC case.

When a state with jurisdiction is investigating or prosecuting the same person for substantially the same conduct, the case may nonetheless be admissible before the ICC if the state is found to be unwilling or unable *genuinely* to investigate or prosecute the case.⁶⁶ Here again, the party challenging admissibility bears the burden of demonstrating the conditions that render a case inadmissible;⁶⁷ that is, that the proceedings were not undertaken to shield the accused, there was no unjustified delay, and the proceedings were conducted independently, impartially, and consistently with the intent to bring the person concerned to justice.⁶⁸

The Court has held that an evaluation of a state's willingness and ability genuinely to investigate or prosecute is only necessary when some doubt exists as to the genuineness of state proceedings.⁶⁹ When such an evaluation is necessary, it must be conducted in light of the applicable national laws and procedures.⁷⁰ The evidence submitted to demonstrate relevant state activity may also be used to determine the genuineness of that activity.⁷¹

The Court considered the questions of unwillingness and inability in the *Gaddafi* and *Al-Senussi* cases in the Libya situation. In *Gaddafi*, the Pre-Trial Chamber held that the national judicial system was unable genuinely to prosecute largely because the central government did not adequately control

⁶⁴ Ibid. at § 133.

⁶⁵ Ibid. at § 134.

⁶⁶ Art. 17(1)(a) ICCSt.

⁶⁷ Decision on the Admissibility of the case against Abdullah Al-Senussi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-466-Red 11-10-2013 1/152 NM PT), Pre-Trial Chamber I, 11 October 2013, § 208.

⁶⁸ Art. 17(2) ICCSt.

⁶⁹ Decision on the Admissibility of the case against Abdullah Al-Senussi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-466-Red 11-10-2013 1/152 NM PT), Pre-Trial Chamber I, 11 October 2013, § 208.

⁷⁰ Ibid. at § 203.

⁷¹ Ibid. at § 210.

relevant areas of the country.⁷² The Chamber noted that the government did not have custody of the accused and was unable to obtain necessary testimony, to ensure witness protection, or to control adequately detention centres.⁷³ Additionally, the government had not secured independent legal representation for Gaddafi.⁷⁴ The Appeals Chamber upheld the decision, although it did not reach the questions of unwillingness or inability.⁷⁵

In contrast, in the *Al-Senussi* case, the Pre-Chamber declined to find Libya unable genuinely to proceed, noting that Libya had collected significant evidence against Al-Senussi – more than it had against Gaddafi – and that the security situation had not undermined the investigation.⁷⁶ Moreover, unlike Gaddafi, Al-Senussi was in the custody of the central government and efforts were being made to secure him representation.⁷⁷ The Appeals Chamber confirmed these rulings as well.⁷⁸

In the *Al-Senussi* case, the Appeals Chamber further held that unwillingness is not demonstrated simply by failure to adhere to international fair trial standards.⁷⁹ Although the Chamber conceded that it might be possible to read the Rome Statute as implying such a requirement, it found this interpretation to be contrary to the purpose of the complementarity principle, which is to promote the exercise of national jurisdiction.⁸⁰ However, the Appeals Chamber noted that: ‘instances may arise when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice.

⁷² Decision on the Admissibility of Case against Saif Al-Islam Gaddafi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-344-Red 31-05-2013 84/01 FB PT), Pre-Trial Chamber I, 31 May 2013, § 205.

⁷³ *Ibid.* at §§ 206–11.

⁷⁴ *Ibid.* at §§ 212–14.

⁷⁵ Judgment on the Appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-547-Red 21-05-2014 1/06 NM PT OA4), Appeals Chamber, 21 May 2014, §§ 213–14. The appeals Chamber found that Libya had not satisfied the Pre-Trial Chamber that it was investigating the same case and therefore did not address the question of unwillingness and inability. *Ibid.*

⁷⁶ Decision on the admissibility of the case against Abdullah Al-Senussi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-466-Red 11-10-2013 1/152 NM PT), Pre-Trial Chamber I, 11 October 2013, §§ 297–9.

⁷⁷ *Ibid.* at § 308.

⁷⁸ Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-565 24-07-2014 1/117 NM PT OA6), Appeals Chamber, 24 July 2014, § 295.

⁷⁹ *Ibid.* at §§ 213–14.

⁸⁰ *Ibid.* at § 217.

In such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all.⁸¹ It therefore remains to be seen where the ICC will draw the line between violations of defendants' rights that render a state unwilling genuinely to prosecute and those that do not meet the threshold.

The Pre-Trial Chamber also considered unwillingness in the *Al-Senussi* case. The Chamber rejected the argument that Libya is unwilling to conduct genuine proceedings, finding that there was no evidence of intent to shield the accused, unjustified delay, or a lack of intent to bring the accused to justice.⁸² The evidence the Pre-Trial Chamber evaluated in reaching this conclusion included the quantity and quality of the evidence Libya collected as part of its investigation of Mr. Senussi, the scope of the investigation and resources employed, the transfer of the case to the Accusation Chamber, the conduct of proceedings against other Gaddafi-era officials, and the efforts to resolve issues in the national judicial system using international assistance.⁸³

In sum, the jurisprudence to date on unwillingness and inability suggests that the ICC is reluctant to find states unwilling to investigate or prosecute and will give significant latitude to state procedures in determining inability.

C. *Ne Bis In Idem and Gravity at the ICC*

The ICC has yet to interpret either Article 17(1)(c) or Article 20(3), which contain several unresolved ambiguities regarding the application of *ne bis in idem*. Moreover, although the statutes of the *ad hoc* international criminal tribunals contain similar provisions, those also have not been the subjects of significant jurisprudence. Although the principle of *ne bis in idem* – that a court cannot try someone for a crime that has already been the object of criminal proceedings against them⁸⁴ – is present in many of the world's legal systems, significant differences exist in its application.⁸⁵ In particular, divergence exists as to whether the principle bars further prosecutions on the

⁸¹ *Ibid.* at § 230.

⁸² Decision on the admissibility of the case against Abdullah Al-Senussi, *Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11-466-Red 11-10-2013 143/152 NM PT), Pre-Trial Chamber I, 11 October 2013, §§ 290–2.

⁸³ *Ibid.* at § 289.

⁸⁴ A. Cassese, *Cassese's International Criminal Law*, (3rd edn., Oxford: Oxford University Press, 2013), at 314.

⁸⁵ G. Conway, 'Ne Bis in Idem in International Law', 3 *International Criminal Law Review* (2003) 351–83, at 355.

same facts – the ‘in concreto’ application of the principle – or only for the same offence – the ‘in abstracto’ version.⁸⁶ Civil law systems tend to adopt the former approach, while common law systems follow the latter.⁸⁷

Both the Protocol and the Rome Statute contain the broader ‘in concreto’ version of the principle with regard to previous national trials. That is, apart from limited exceptions,⁸⁸ an individual convicted by a national court cannot be tried at either institution for the same conduct even if the offence of conviction was not the offence with which the supranational court would have charged the individual. This broad prohibition on retrial was controversial among the drafters of the Rome Statute, with some preferring to permit an ICC trial when the national court had charged only ‘ordinary’ crimes.⁸⁹ This restriction was rejected, however, with the majority finding it sufficient that a perpetrator was tried, convicted, and punished, even if the conduct was not categorized as an international crime.⁹⁰

The gravity threshold in Article 17(d) of the Rome Statute has received more attention in the jurisprudence and scholarship. Like the equivalent language in the Protocol, Article 17(d) prohibits the ICC from admitting a case that ‘is not of sufficient gravity to justify further action by the Court’. Unlike the Protocol, however, the Rome Statute clearly limits the ICC’s jurisdiction to ‘the most serious crimes of concern to the international community’.⁹¹ Because the Rome Statute lists war crimes, crimes against humanity, genocide, and aggression as fulfilling this criterion, the ICC’s judges have struggled to explain which such crimes fall below the gravity threshold.

The gravity determination must be made first in deciding whether it is appropriate to open an investigation, and second, to ascertain the admissibility of particular cases within a situation.⁹² The ICC Prosecutor’s policy is to consider the following four factors in determining whether a case or a

⁸⁶ Ibid. at 356–7.

⁸⁷ Ibid. at 357.

⁸⁸ As noted above, in addition to the exceptions detailed in the Rome Statute, the Protocol permits the AC judges to disregard this prohibition in unspecified ‘exceptional circumstances’.

⁸⁹ J. T. Holmes, ‘Principle of Complementarity’, in R. S. Lee (ed.), *ICC: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999), at 57–8. The Rome Statute and Protocol differ in this regard from the *ad hoc* international criminal tribunals for Former Yugoslavia and Rwanda where retrial is permitted when the national convictions were for ‘ordinary crimes’. Art. 10(2)(b) ICTYST; Art. 9(2)(b) ICTRST.

⁹⁰ Holmes, *supra* note 89 at 58.

⁹¹ Art. 5 ICCSt; see also Preamble ICCSt.

⁹² Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, 24 February 2006, § 44.

situation meets the gravity threshold: (1) the scale of the crimes, (2) the nature of the crimes, (3) the impact of the crimes, and (4) the manner of commission of the crimes.⁹³

The ICC's judges have adopted a similar approach, generally applying the same four factors to determine the admissibility of cases. In the *Abu Garda* case, the Pre-Trial Chamber asserted that gravity must be determined according to both quantitative and qualitative factors.⁹⁴ The quantitative aspect concerns the number of victims while the qualitative inquiry looks to the 'nature, manner and impact' of the crimes.⁹⁵ This requires the Court to consider 'the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime'.⁹⁶

The judges have taken a flexible approach to the gravity evaluation, emphasizing different factors in different cases. In many cases they emphasize the quantitative aspect, noting the high numbers of people killed, raped, and subjected to other serious harms to find a case sufficiently grave. However, in cases involving fewer victims, the Court emphasizes other gravity factors. For instance, the *Abu Garda* case concerned an attack that killed only twelve people, and was thus low in terms of quantitative gravity. The Court nonetheless found the case admissible on the grounds that since those attacked were peacekeepers, the impact of the crimes included a reduction in peacekeeping forces that harmed the broader community.⁹⁷ The Court has also held that crimes involving omission and crimes committed through indirect means can be sufficiently grave to meet the threshold.⁹⁸

⁹³ The Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, International Criminal Court, November 2013, available at www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf, at 15 (discussing ICC Prosecutor's policy for assessing gravity as a Principle).

⁹⁴ Decision on the Confirmation of Charges, *Bahar Idriss Abu Garda* (ICC-02/05-02/09), Pre-Trial Chamber I, 8 February 2010, § 31.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* at § 32.

⁹⁷ *Ibid.* at §§ 33–4. The Pre-Trial Chamber ultimately declined to confirm the charges against Abu Garda on grounds of insufficient evidence. *Ibid.* §§ 215–16. In another case, the Pre-Trial Chamber adopted and applied the gravity threshold analysis in Abu Garda without further analysis or elaboration. Corrigendum of the 'Decision on the Confirmation of Charges', *Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (ICC-02/05-03/09), Pre-Trial I Chamber, 7 March 2011, §§ 27–8.

⁹⁸ Confidential Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC01/09-02/11-382), Pre-Trial II Chamber, 23 January 2012, §§ 46–7.

A Pre-Trial Chamber attempted to give additional content to the gravity threshold in the *Lubanga* and *Ntaganda* cases, although the effort was rejected on Appeal. The Pre-Trial Chamber had interpreted the gravity threshold to include three requirements: (1) that the conduct at issue was large-scale or systematic, with due consideration given to the ‘social alarm’ the conduct causes; (2) that the accused was among the most senior leaders of the situation; and (3) that the accused was among those most responsible for the crimes.⁹⁹ The Appeals Chamber rejected each of these requirements. It held that to require large-scale or systematic conduct would conflate war crimes and crimes against humanity, only the latter of which has such a requirement.¹⁰⁰ The Chamber found the concept of ‘social alarm’ too subjective to be used in the admissibility determination, and it concluded that limiting admissibility to the most responsible senior leaders would undermine the ICC’s deterrence objective.¹⁰¹ The Appeals Chamber did not provide an alternate framework for evaluating gravity although one judge writing separately opined that the threshold should be read narrowly to exclude only the most insignificant war crimes.¹⁰²

To evaluate the gravity of a *situation*, the Court considers the gravity of the cases likely to arise in that situation.¹⁰³ In deciding to authorize the investigation in the Kenya situation, the Pre-Trial Chamber not only employed the quantitative and qualitative factors elaborated above in determining whether the crimes were sufficiently grave, but also inquired into whether the potential defendants were likely to include those who bear the greatest responsibility for the crimes.¹⁰⁴ The Pre-Trial Chamber thus seemed to revive one of the elements the Appeals Chamber rejected in the *Lubanga* and *Ntaganda* case, but this time in the context of evaluating the gravity of a situation rather than a case.

In sum, a body of jurisprudence concerning the nature of the gravity threshold is beginning to emerge that leaves the judges a high degree of flexibility in making gravity determinations.

⁹⁹ Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, *Lubanga Dyilo* (ICC-01/04-01/06), Pre-Trial I Chamber, 2 February 2006, §§ 46–50.

¹⁰⁰ *Ibid.* at §§ 70–1.

¹⁰¹ *Ibid.* at §§ 72–79.

¹⁰² *Ibid.* §§ 40–1 (Judge Pikiš, Separate and Partly Dissenting Opinion).

¹⁰³ Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the situation in the Republic of Kenya, *Situation in the Republic of Kenya* (ICC-01/09), Pre-Trial II Chamber, 31 March 2010, § 58.

¹⁰⁴ *Ibid.* at § 62.

D. *Relevance of ICC Jurisprudence to AC*

The ICC's jurisprudence on complementarity, *ne bis in idem*, and gravity is likely to be an important source of insights for the judges of the AC given that the applicable provisions of the Protocol are taken largely verbatim from the Rome Statute. Nonetheless, there are important differences between the institutions that limit the relevance of ICC jurisprudence for the AC. First, when the ICC's complementarity provisions were drafted, the only alternative adjudicative fora were national courts. In contrast, although the Protocol nowhere mentions the ICC, the Protocol's drafters undoubtedly understood that the relationship between the AC and the ICC would be an important issue for the AC to resolve. Moreover, as noted above, if any of the RECs obtain jurisdiction over the crimes in the Protocol, an additional layer of complexity will be added to the complementarity analysis for the AC. As such, complementarity for the AC will have a significantly broader scope than it has thus far at the ICC.

That said, once the AC becomes operational, the ICC will likely have to address the appropriate relationship between the two institutions as well. Ideally, the prosecutors of each institution will exercise their discretion in ways that avoid unnecessary conflicts over priority in the exercise of jurisdiction. Nonetheless, it is likely that at some point each institution will seek to exercise jurisdiction over the same case and priorities will have to be determined. An important question that will arise in this regard is whether the Rome Statute permits the ICC to defer to a regional court given that its complementarity provision refers only to state courts. The ICC judges could conceivably interpret the words 'investigate or prosecuted by a State' to include situations in which a state has delegated its investigative or prosecutorial prerogatives to a regional body such as the AC. Such an interpretation would enable the ICC to defer to an AC investigation. However, it would also require the ICC to evaluate whether the AC is 'genuinely' investigating and prosecuting, which would certainly be a sensitive inquiry. Moreover, when the UN Security Council refers a situation to the ICC as a measure in furtherance of global peace and security, it is unclear whether the ICC could defer the matter to a regional court. The ICC's jurisprudence on these issues and the AC's reactions will be important determinants of the level of harmony between the institutions.

Another important difference between the institutions is that the Protocol, unlike the Rome Statute, does not limit the jurisdiction of the AC to the most serious crimes of concern to the world, or even to the most serious crimes of concern to the African continent. Indeed, the Protocol does not claim that the crimes listed are especially grave compared to national

crimes.¹⁰⁵ This difference is particularly relevant to the gravity analysis. Whereas the ICC's gravity threshold is understood to provide additional assurance, beyond the definitions of crimes, that the ICC will limit its reach to exceptionally serious crimes, it is less clear what role the gravity threshold in the AC Statute serves. For that reason, the ICC's gravity jurisprudence may be of limited relevance to the AC.

2. HOW SHOULD THE AC STRUCTURE ITS COMPLEMENTARITY ANALYSIS?

This section seeks to provide insight into how the AC ought to approach the complementarity analysis. It draws on theories of complementarity and gravity developed in the ICC context to argue that the AC should adopt a burden sharing rather than a hierarchical approach to complementarity and that it should interpret the gravity threshold as a minimal bar to the exercise of jurisdiction.

A. *Burden Sharing, Not Hierarchy*

The dominant narrative concerning complementarity at the ICC is that the ICC is a 'court of last resort'.¹⁰⁶ Indeed, when the ICC was established, many of the drafters used this or similar language in describing the intended role of the Court in the global legal order.¹⁰⁷ The chairman of the committee that drafted the complementarity provision of the Rome Statute, Canadian diplomat John Holmes, describes the complementarity system as creating a mechanism 'to fill the gap where States could not or failed to comply with' their obligations to prosecute crimes against humanity, genocide, and war crimes.¹⁰⁸ The standard view therefore considers national courts with jurisdiction, usually based on territoriality or nationality, to be superior fora for adjudicating international crimes compared to the ICC. National courts have greater capacity and are closer to the evidence, the victims, and the most

¹⁰⁵ Draft Protocol ACtJHR.

¹⁰⁶ See e.g. E. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Cheltenham: Edward Elgar Publishing 2010).

¹⁰⁷ P. Kirsch, 'The Role of the International Criminal Court in Enforcing International Criminal Law', 22 *American University International Law Review* (2007) 539–47, at 543 ('The ICC is a court of last resort'); 'International Criminal Court Receives Mixed Performance Review, as General Assembly Concludes Discussion of Body's Annual Report', Meetings Coverage and Press Releases: United Nations, 31 October 2014, available online at www.un.org/press/en/2014/ga11577.doc.htm (last visited 21 January 2018).

¹⁰⁸ Holmes, *supra* note 89, at 74.

affected communities.¹⁰⁹ Moreover, under the Rome Statute,¹¹⁰ the Responsibility to Protect Doctrine (R2P),¹¹¹ and perhaps customary international law,¹¹² states have a responsibility to prosecute international crimes committed on their territories.

The 'last resort' approach to complementarity is often presented in contradistinction to the 'primacy' enjoyed by the *ad hoc* international criminal tribunals for Former Yugoslavia and Rwanda. Those tribunals were created on the opposite premise; that is, that they would provide superior fora for adjudicating international crimes compared to the relevant national courts.¹¹³ As such, the statutes of those tribunals provide that they have priority in adjudicating cases within their jurisdictions.¹¹⁴ When the ICC, a permanent institution, was created, states were unsurprisingly reluctant to cede their sovereignty to a permanent international institution to such an extent. The idea of complementarity arose to reassure states that the ICC would only exercise its jurisdiction when states were unwilling or unable to do so. In a sense then, the 'court of last resort' approach to complementarity places the ICC in a hierarchical relationship below national courts, whereas primacy put the *ad hoc* tribunals above national courts.

An alternative way to conceptualize complementarity is as a 'burden-sharing' system.¹¹⁵ This approach considers the ICC to be no less appropriate

¹⁰⁹ Office of the Prosecutor, *Paper on Some Policy Issues before the Office of the Prosecutor*, International Criminal Court, September 2003, available at www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf, at 2.

¹¹⁰ Preamble ICCSt.

¹¹¹ GA Report of the Secretary-General, *Implementing the Responsibility to Protect*, UN Doc. A/63/677, 12 January 2009, §§ 17–19, at 11–12 (discussing the duty under the first pillar of R2P to prosecute international crimes).

¹¹² See generally *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31 (listing obligations of High contracting Parties regarding creation of penal statutes and the duty to search for and bring such persons before the court); Jan Wouters, 'The obligation to Prosecute International Law Crimes', in *The Need for Justice and Requirements for Peace and Security: Proceedings of the Bruges Colloquium, 9th–10th September 2004* (32nd edn. Bruges: College of Europe, 2005), at 17–32 (discussing whether an obligation to Prosecute international law crimes exists in customary international law).

¹¹³ See M. M. El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-Visting Rule 11 BIS of the Ad Hoc Tribunals', *International and Comparative Law Quarterly*, 57 (April 2008) 403–15, 403–4. (discussing primacy in the *ad hoc* tribunals.)

¹¹⁴ Art. 9(2) ICTYSt.; Art. 8(2) ICTRSt.

¹¹⁵ R. Rastan, 'Complementarity: Contest or Collaboration?', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 83–132, at 83.

a forum than national courts for adjudicating international crimes and perhaps even a superior one in some circumstances, such as when national courts might be viewed as less fair or impartial.¹¹⁶ The burden-sharing approach to complementarity thus places the ICC in a horizontal relationship with national courts.¹¹⁷ Where the hierarchical approach implies a presumption in favour of national court adjudication, the burden-sharing approach suggests a more nuanced inquiry into the appropriateness of each forum in a given situation.

While the rhetoric surrounding complementarity often invokes the hierarchical ‘last resort’ trope, the ICC’s jurisprudence and prosecutorial policies tend to reflect the burden-sharing approach. For instance, the ICC’s decision to find situations and cases to be admissible when national courts are inactive without inquiring into inability or unwillingness suggests a burden-sharing understanding of complementarity. As William Schabas has pointed out, there is no reason the ICC cannot adjudicate willingness and ability even in the absence of state action.¹¹⁸ Indeed, at least some of the drafters of the Rome Statute envisioned that the Court would do just that.¹¹⁹ If the judges truly considered the ICC to be a court of last resort, it would make sense for them to inquire into the likelihood of a state exercising its jurisdiction within a reasonable timeframe rather than proceeding whenever relevant states are inactive. In the Kenya situation, the government of Kenya asserted that it intended to investigate persons at a similar level in the organizational hierarchy as the ICC accused.¹²⁰ The government provided evidence that it had made efforts toward that end, including amending and adopting relevant national laws.¹²¹ The ICC nonetheless proceeded with its cases on the grounds that Kenya was not currently investigating the same persons for the same conduct as the ICC.¹²²

¹¹⁶ See *ibid.* 84–90 (discussing the role of the complementarity analysis in deciding the appropriateness of investigation and prosecution).

¹¹⁷ *Ibid.* at 84.

¹¹⁸ W. Schabas, *An Introduction to the International Criminal Court* (3rd edn., Cambridge: Cambridge University Press, 2007), at 181 ([I]t remains legitimate to consider whether the State is itself willing and able to prosecute’).

¹¹⁹ *Ibid.* at 16 (‘The International Law Commission draft envisaged a court with “primacy” much like the ad hoc tribunals for the former Yugoslavia and Rwanda’).

¹²⁰ Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11-96 30-05-2011 1/27 RH PT), Pre-Trial Chamber II, 30 May 2011, §§ 14–15.

¹²¹ *Ibid.* at § 12.

¹²² *Ibid.* at § 66.

Another example of burden sharing is the willingness of the Court to accept referrals from states parties regarding crimes committed on their own territories.¹²³ The ICC's judges have found this to be a legitimate way for states to fulfil their obligations under the Rome Statute to investigate and prosecute international crimes committed on their territories.¹²⁴ Again, if the judges considered the ICC a court of last resort, it would presumably do more to encourage states to adjudicate international crimes committed on their territories rather than so readily accepting these 'self-referrals'.

Some of the ICC Prosecutor's policies also adopt a burden-sharing approach to complementarity. In a Draft Policy Paper on Case Selection and Prioritization issued in March 2016, the ICC Office of the Prosecutor asserts that if relevant national authorities are investigating the same person for substantially the same conduct, the ICC Prosecutor may turn her attention to 'other perpetrators that form part of the same or a different case theory, in line with a burden-sharing approach'.¹²⁵ A hierarchical approach to complementarity would instead suggest that the prosecutor should desist from investigating any perpetrators in a situation that states are actively and genuinely addressing.

Despite the 'last resort' rhetoric that dominates discussions of complementarity, it is not surprising that the ICC's judges and prosecutors have leaned toward a burden-sharing approach to operationalizing the concept of complementarity. First, institutional incentives favour an approach that treats the ICC as at least co-equal with national courts. Particularly in the early days of the Court's existence, it had incentives to assert its jurisdiction in order to demonstrate its value to the international community, in particular to states parties and states considering joining the regime. Second, as a practical matter, deciding complementarity based on evidence of current investigations of the

¹²³ P. McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism', 13 *Chinese Journal of International Law* (2014) 259–96, at 262 <http://chinesejil.oxfordjournals.org/content/early/2014/05/22/chinesejil.jmu007.full.pdf+html>.

¹²⁴ Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, Lubanga (ICC-01/04-01/06-8-US-Corr 09-03-2006 1/65 SL), Pre-Trial Chamber I, 24 February 2006, § 35; Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), *Katanga and Chui* (ICC-01/04-01/07-1213-tENG 15-07-2009 32/38 IO T), Trial Chamber II, 16 June 2009, §§ 79–80; Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *Katanga and Chui* (ICC-01/04-01/07-1497 25-09-2009 1/44 IO T OAS), The Appeals Chamber, 25 September 2009, § 85.

¹²⁵ The Office of the Prosecutor, *Draft Policy Paper on Case Selection and Prioritisation*, International Criminal Court, 29 February 2016, 11, available at www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf.

same people and conduct is much easier than requiring the judges to speculate about potential future state action.

A burden-sharing approach at the ICC also makes sense in terms of the institution's objectives. As the preamble to the Rome Statute asserts, the Court's overall objective is to 'put an end to impunity for the perpetrators of [serious international crimes]'.¹²⁶ This broad objective can be understood in retributive terms as an effort to inflict deserved punishment, or as a utilitarian mandate to prevent international crimes, or both. Regardless of the underlying justification, burden sharing is likely to be more productive in accomplishing the goal of ending impunity for several reasons. First, the availability of multiple adjudicative fora tends to increase the chances of punishment and thus prevention. While ICC involvement could theoretically decrease the likelihood of national prosecutions, there is little evidence to suggest this effect. Moreover, the ICC can mitigate any possible disincentive to national prosecutions by clearly expressing its intention to share the burden of prosecutions with national courts and by assisting national courts through positive complementarity.

Second, a burden-sharing approach to complementarity increases the likelihood that both global community and national community interests will be addressed. Sometimes such interests are aligned, but not always. For instance, the global community has an interest in promoting norms that are not yet well established around the world; but this interest may not fully align with national interests in prosecuting the most serious crimes committed in a given situation. For example, in the DRC situation, the ICC has focused in part on prosecuting the recruitment and use of child soldiers in order to express global reprobation of such crimes, while national courts enforce the arguably more serious, but also more established, prohibitions against large-scale murder, rape and so forth.

Finally, for some crimes, ICC adjudication is more likely to be viewed as impartial and therefore more legitimate than national prosecution. The crime of aggression, for instance, involves the leaders of a state acting against the sovereignty of another state. The political nature of the crime increases the likelihood that prosecution in a national court will be conducted in a partial manner and raises concerns about illegitimacy, or at least the perception of illegitimacy. Indeed, one scholar has argued that aggression should not be subject to the usual complementarity analysis, but rather the ICC should have *de facto* primacy in situations involving aggression.¹²⁷

¹²⁶ Preamble ICCSt.

¹²⁷ See B. Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression', 10 *Journal International Criminal Justice* (2012) 133–64, at 163.

Similar practical and goal-based considerations also support a burden-sharing approach to complementarity between the AC on the one hand, and national courts, the RECs, and the ICC on the other.

1. Burden Sharing Between the AC and National Courts

First, like for the ICC, any hierarchical relationship would place the AC below national courts in priority rather than above. This is clear from the drafting history of the Protocol – there was no intention to create a supreme court for the African continent. Rather, the idea was to close whatever impunity gaps exist by virtue of the inability or unwillingness of national courts to act.¹²⁸ But the AC's judges and prosecutors are unlikely to view the AC as an inferior forum for adjudication compared to national courts; and, particularly early in the AC's existence, they will have incentives to exercise their jurisdiction over whatever cases are available. Moreover, the AC's judges, like those of the ICC, will likely resist developing an approach to complementarity that requires them to speculate about future state actions.

There are also goal-based justifications for a burden-sharing approach to complementarity between the AC and national courts. The purpose of the AC is similar to that of the ICC. The Protocol's preamble asserts that the institution will contribute to 'preventing serious and massive violations of human and peoples' rights . . . and ensuring accountability for them wherever they occur'. As such, the arguments made above in favour of burden sharing also apply to the AC. Moreover, the AC's expanded jurisdiction compared to the ICC makes burden sharing even more important. The AC has jurisdiction not only over the so-called 'core crimes' in the Rome Statute – war crimes, crimes against humanity, genocide, and aggression – but also over a long list of what are often called 'transnational crimes'.¹²⁹ For transnational crimes, supranational jurisdiction may be particularly important in some circumstances. Transnational crimes often, although not always, cross physical borders in that some of their elements take place in one state and other elements or effects take place in another.¹³⁰ The transnational crimes in the Protocol include

¹²⁸ *African efforts to close the impunity gap: Lessons for complementarity from national and regional actions*, Institute for Security Studies, November 2012, available at www.issafrica.org/uploads/Paper241.pdf.

¹²⁹ Art. 28A Draft Protocol ACTJHR.

¹³⁰ G. O.W. Mueller, 'Transnational Crime: Definitions and Concepts', in Dimitry Vlassis and Phil Williams (eds), *Combating Transnational Crime* (New York: Frank Cass Publishers, 2001) 13–21, at 13. ('The then United Nations (UN) Crime Prevention and Criminal Justice Branch

trafficking in drugs, persons, and hazardous waste; money laundering; and illicit exploitation of natural resources, among others.¹³¹ Moreover, Article 28 (A) of the Protocol states that '[t]he Assembly may extend upon the consensus of States Parties the jurisdiction of the Court to incorporate additional crimes to reflect developments in international law'.¹³² As such, additional transnational crimes may be added in the future.

When criminal activity crosses borders, adjudication by an institution outside of either state can be useful. This is particularly true when the states involved take different positions regarding the criminality of the acts or government actors are implicated in the crimes. Under such circumstances, a supranational court is likely to be more impartial, or at least to be viewed as such. Supranational adjudication may therefore decrease the likelihood of inter-state tension and increase the chance that outcomes will be perceived as legitimate.

The AC will also have jurisdiction over the crimes of 'unconstitutional change of government' and corruption.¹³³ For these crimes, the case for supranational adjudication is even stronger since the governments involved in these crimes are highly unlikely to investigate and prosecute them, at least in a manner that is perceived as legitimate. Moreover, even assuming the national courts of other states have jurisdiction over these crimes, their political nature will likely make the exercise of such jurisdiction undesirable in many cases. For these reasons, the AC may sometimes be a superior forum compared to national courts. Even when this is not the case, assuming the AC garners substantial legitimacy through its procedures and outcomes, it should at least not be considered an inferior forum to national courts.

Another argument against a hierarchical approach to complementarity with national courts at the AC is that the AC will inhabit a world of overlapping jurisdictions that is likely to continue to grow in complexity. The AC will have to navigate relationships not only with national courts, the ICC, and possibly REC courts, but also with other courts that will likely be added to the mix. The Extraordinary African Chambers within the Senegalese court system, created to try former Chadian dictator Hissène Habré, is the most recent example of a special court created to adjudicate international crimes on the African continent. Many other such courts have been created or proposed

coined the term [transnational] in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country'.)

¹³¹ Art. 28A Draft Protocol ACtJHR.

¹³² *Ibid.* at art. 28A(2).

¹³³ *Ibid.* at art. 28(A)(1).

around the world, indicating that the trend is likely to continue.¹³⁴ Determining a hierarchy of appropriate exercise of jurisdiction among this growing network of courts will present many challenges. This is particularly true since each institution will likely have incentives to promote its own jurisdiction.

A burden-sharing approach to complementarity at the AC is therefore preferable for both practical and principled reasons. Rather than any institution being considered superior as a general matter, the courts should develop balancing tests to determine the most appropriate forum for adjudication of particular cases, somewhat like *forum non conveniens* doctrines in some national courts.¹³⁵ The final section of this Chapter will provide some thoughts regarding the contours of the suggested balancing tests.

2. Burden Sharing Between the AC and RECs

The question of whether there should be a hierarchical or horizontal relationship between the AC and any REC courts that may be given criminal jurisdiction is somewhat more complicated. On the one hand, the RECs are closer geographically and culturally to the communities they serve than is the more geographically diverse AC. An argument could therefore be made that the REC courts should have priority over the AC in exercising any overlapping jurisdiction between them.¹³⁶ On the other hand, the institutional incentives discussed above may also make it difficult for the AC to defer to the REC courts. Moreover, it is unclear whether the REC courts or the AC will develop greater institutional legitimacy through the nature and quality of their work.¹³⁷ In the event the AC is widely seen as more legitimate or effective, requiring it to defer to the RECs when they have jurisdiction might be viewed as inappropriate. On balance, the complexity of the developing networks of jurisdiction

¹³⁴ B. Van Schaack, 'Building Blocks of Hybrid Justice', 44 *Denver Journal of International Law and Policy* (2016) 169–280, at 170.

¹³⁵ See generally P.K. Bookman, 'Litigation Isolationism', 67 *Stanford Law Review* (2015) 1081–144 (discussing the US strategy of avoiding transnational litigation through the doctrine of *forum non conveniens*).

¹³⁶ Interestingly, the creation of REC courts will also raise the question of how questions of overlapping jurisdiction among those courts should be decided.

¹³⁷ For discussions of institutional legitimacy from a sociological perspective see A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions', 20 *Ethics and International Affairs* (2006) 405–37, at 405 ('An institution is legitimate in the sociological sense when it is widely *believed* to have the right to rule'); R. H. Fallon Jr., 'Legitimacy and the Constitution', 118 *Harvard Law Review* (2005) 1787–853, at 1795 (addressing legitimacy as a sociological concept).

discussed above mitigates in favour of a horizontal approach to complementarity between the AC and the RECs.

3. Burden Sharing Between the AC and the ICC

The question of what relationship the AC should have with the ICC is perhaps the most complex of the complementarity issues. First, there is no provision in the statute of either court that addresses this question. When the ICC was created the drafters did not anticipate the possibility of other supranational courts with jurisdiction over international crimes. The omission of any mention of the ICC in the Protocol is glaring, however, particularly since substantial portions of the Protocol are copied from the Rome Statute. Yet the jurisdiction of the AC will almost certainly overlap with that of the ICC. Even if all African states withdraw from the ICC – a possibility that remains remote – the Security Council could still refer situations in Africa to the ICC. It is therefore crucial for these courts to develop some kind of *modus vivendi*.

As explained above, the ICC's complementarity provision requires it to defer to 'a State which has jurisdiction' under appropriate circumstances.¹³⁸ It is not clear that this provision permits the ICC to defer to another supranational institution such as the AC. However, the ICC's judges could interpret the Rome Statute to render cases inadmissible when a supranational court, to which a state has granted jurisdiction, is investigating or prosecuting in good faith. One difficulty with such an interpretation is that, just as the ICC can exercise jurisdiction over non-party states when the Security Council refers the situation, the AC can exercise jurisdiction over non-party states when a situation is referred to it by the Assembly of Heads of State and Government or the Peace and Security Council of the African Union.¹³⁹ In such situations, it is more difficult to argue that the 'state' is investigating or prosecuting through its delegation of jurisdiction to the AC. It may therefore be preferable to amend the Rome Statute to expand the complementarity provision to allow deferral to the AC, and possibly other supranational courts with jurisdiction.

Nonetheless, assuming the AC develops a significant degree of legitimacy by, for instance, operating independently and respecting the human rights of defendants, the ICC should defer to the AC in appropriate circumstances. As a regional body, the AC will be closer to the crimes and to the legal and cultural norms in the affected societies. The mantra 'African solutions to

¹³⁸ Art. 17 ICCSt.

¹³⁹ Art. 46F Draft Protocol ACtJHR.

African problems' that helped motivate the creation of the AC will likely also generate support for the AC being given priority some of the time.

However, the AC should also be willing to defer to the ICC in some cases. Like the ICC's complementarity provision, the Protocol could be interpreted to allow the AC to defer to a supranational court or the Protocol could be amended to explicitly allow such deferral. In some situations, the ICC may be a superior forum for adjudication of international crimes. The ICC's global reach and stature enables it to express global norms to a global audience.¹⁴⁰ For some crimes this may be particularly important. For instance, for relatively recently criminalized international crimes, such as the recruitment and use of child soldiers, there is value in having the norm recognized at the international level. In other cases, the AC and the ICC may be equally appropriate forums of adjudication. A burden-sharing approach to the exercise of jurisdiction would enable courts to make particularized determinations of appropriateness according to the facts and circumstances of each situation.

The following section discusses how a burden-sharing approach to complementarity could be implemented in the jurisprudence of the courts.

B. *Developing a Complementarity Test for the AC*

To implement a burden-sharing approach at the AC, complementarity should be conceived narrowly to render inadmissible only cases where another court is already active or has rendered a verdict. The gravity threshold should likewise be a minimal bar to admissibility. The real work of ensuring that the various courts share the burden of ending impunity for serious crimes should be done at the level of prosecutorial discretion and judicial oversight of that discretion.

1. Relevant Activity as a Threshold Inquiry

A burden-sharing approach to complementarity supports the approach the ICC has taken thus far of treating relevant activity as a threshold requirement for any inquiry into complementarity. When no other institution with jurisdiction is actively investigating or prosecuting in a given situation, the AC need not conduct a further complementarity analysis. Moreover, the ICC's test of relevant activity – 'the same person and same conduct' test – also makes

¹⁴⁰ For a discussion of this point see M. M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', 33 *Michigan Journal of International Law* (2012) 265–320.

sense for the AC. The test has been criticized on the grounds that it is not sufficiently deferential to state investigative procedures.¹⁴¹ According to critics, the ICC should allow states more leeway in terms of the targets of their investigation, the nature of the charges, and the timing of bringing investigations.¹⁴² Such critiques largely reflect a hierarchical 'last resort' view of the ICC's appropriate exercise of jurisdiction. If states are the more appropriate forum of adjudication, it stands to reason that the ICC, and likewise the AC, should show significant deference to them.

As explained above, however, practical and principled reasons counsel against this approach. It is impracticable for courts to base admissibility decisions, like decisions about jurisdiction which must be routed in clear and consistent criteria, on speculation about what other courts may do in the future. In addition, simultaneous investigations may best accomplish the goal of ending impunity for international crimes. The danger of duplicative efforts can be avoided if the prosecutors of the institutions work together as recommended below. In sum, the AC should adopt a narrow view of relevant activity similar to the one the ICC has taken. It should consider admissible any case where the same person is not being investigated or prosecuted for the same conduct, or at least similar conduct, that is at issue before the AC.

2. Unwillingness and Inability

Decisions about the unwillingness and inability of other courts to act in a situation before the AC will likely be among the most difficult and controversial decisions the Court makes. Here again, the approach of the ICC provides useful guidance. First, the AC must adopt some standard akin to the 'genuineness' standard in the Rome Statute. The difficulty of course is that the AC's drafters seem to have explicitly rejected inclusion of the word 'genuinely' given that they copied most of the complementarity provision from the Rome Statute and yet left out that word. But, as already noted, without some qualifying adjective, the complementarity provision simply

¹⁴¹ See, e.g., K. Heller, 'Radical Complementarity', 14 *Journal International Criminal Justice* (2016) 1–38, at 3, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714503 (arguing 'that as long as a state is making a genuine effort to bring a suspect to justice, the ICC should find his or her case inadmissible regardless of the prosecutorial strategy the state pursues, regardless of the conduct the state investigates, and regardless of the crimes the state charges').

¹⁴² For an example of the former, see the argument the government of Kenya made in contesting the admissibility of the Kenya situation. Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11-96 30-05-2011 1/27 RH PT), Pre-Trial Chamber II, 30 May 2011, §§ 4–7.

makes no sense – a state cannot be both investigating or prosecuting and not investigating or prosecuting at the same time.

Confusion can be avoided by reference to paragraph (3) of Article 46(H), which explains the circumstances in which a state should be considered unwilling to investigate or prosecute. These include when the proceedings are being undertaken to shield a person, when there is unjustified delay that is inconsistent with an intent to bring the person to justice, and when the proceedings are not conducted independently or impartially or are otherwise being conducted in a way that is inconsistent with an intent to bring the person to justice.¹⁴³ Each of these is an example of a situation where the investigation or prosecution is not ‘genuine’ – or is in some sense a sham. As such, despite the absence of the word ‘genuinely’ from Article 46(H), the AC should apply a similar requirement to determine unwillingness.

With regard to the first two types of unwillingness – the intent to shield and unjustified delay – there is as yet no ICC case enunciating a standard. In determining the existence of such circumstances, both the ICC and the AC should be quite deferential to the other courts with jurisdiction over the same crimes. They should bear in mind the reputational damage that can be inflicted by accusations of intentional injustice and only levy such charges when they are clearly warranted.

The question of independence and impartiality has arisen at the ICC in the cases in the Libya situation discussed above. Like the ICC in those cases, the AC should take a fairly broad view of what it means for a court to be independent and impartial. The AC should not seek to serve as an arbiter of strict compliance with human rights standards under the guise of admissibility determinations. Instead, the AC should address such concerns when properly raised under the human rights jurisdiction of the Court. Such restraint in adjudicating the legitimacy of proceedings in another forum is compatible with the burden-sharing approach to complementarity discussed above.

3. The Gravity Threshold

The AC should also follow the lead of the ICC judges in interpreting the gravity threshold as a minimal bar to admissibility. As the ICC Appeals Chamber explained in the *Lubanga* and *Ntaganda* decision discussed above, giving significant content to the requirement of gravity is tantamount to

¹⁴³ Art. 46(H)A-C Draft Protocol ACTJHR.

revising the subject matter or personal jurisdiction of the Court.¹⁴⁴ If the AC judges decided that the gravity threshold requires widespread harm, they would essentially be adding an element to war crimes as well as to most of the transnational crimes, which have no such requirement in their definitions. If the judges determined that the gravity threshold requires that prosecutions be limited to senior leaders or to those most responsible for criminal activity, they would be narrowing the personal jurisdiction of the Court. The inclusion of a broad range of crimes in the AC Statute is ample evidence that the drafters intended no such gravity-based limitations. As such, the gravity threshold should be treated as a low bar that excludes only the most insignificant cases from the AC's purview.

4. Prosecutorial Discretion and Positive Complementarity as Primary Vehicles for Burden Sharing

In light of the limited ability of the formal requirements of complementarity in the AC Statute, to ensure appropriate burden sharing among courts, the task of implementing the burden-sharing approach will fall largely to the prosecutor. The Protocol is not entirely clear about the degree of discretion the prosecutor will have to determine which cases reach the court. On the one hand, unlike the Rome Statute, which contains significant limits on the ICC Prosecutor's ability to initiate investigations,¹⁴⁵ the AC Statute simply states that: 'cases brought before the International Criminal Law Section shall be brought by or in the name of the Prosecutor'.¹⁴⁶ At the same time, however, the AC Statute provides that cases can be submitted to the Court by state parties, the AU Assembly, and the Peace and Security Council, as well as by the prosecutor acting *proprio motu*.¹⁴⁷ It is thus unclear how much discretion the prosecutor will have to decide not to investigate or prosecute cases submitted by other bodies.

The ICC Statute requires the Prosecutor to initiate investigations, or seek to do so in the case of *proprio motu* referrals, when: (1) there is a reasonable basis to believe crimes within the Court's jurisdiction have been committed, (2) the case is admissible, and (3) taking account of the gravity of the alleged crimes and interests of victims, the investigation is not contrary to the interests of

¹⁴⁴ For a more extensive discussion on this point see M. M. deGuzman, 'The International Criminal Court's Gravity Jurisprudence at Ten', 12 *Washington University Global Studies Law Review* (2013) 475–86.

¹⁴⁵ Art. 53 ICCSt.

¹⁴⁶ Art. 34A Draft Protocol ACtJHR.

¹⁴⁷ *Ibid.* at art. 46F.

justice.¹⁴⁸ While the ICC Prosecutor has yet to invoke the interests of justice, that provision at least arguably provides the ICC Prosecutor leeway in determining whether the ICC is an appropriate forum of adjudication compared to other available fora. When the ICC Prosecutor declines to investigate a situation based on the interests of justice, that determination is subject to review by the Pre-Trial Chamber.¹⁴⁹ As such, both the Prosecutor and the Pre-Trial Chamber are given important roles in determining the interests of justice.

To implement a burden-sharing approach, the AC's Prosecutor should also have discretion to determine whether adjudication at the AC best advances the interests of justice, or another forum would be more appropriate. Providing a role for the AC judges in reviewing such decisions would likely help to ensure the decisions are perceived as legitimate. In making decisions about the appropriateness of AC adjudication, the prosecutor and judges should balance the interests of the AU community in prosecuting particular cases with those of the national communities most directly impacted by the crimes. While space constraints preclude a detailed elaboration of the many factors that could be relevant to this balancing, they include, for instance, the extent to which the crimes have affected the entire AU community, whether the AU community norms implicated require regional reinforcement, whether the national communities most affected support AC adjudication, and whether AC adjudication is likely to promote or undermine other important goals such as peace and security in the relevant states.

In addition to balancing the interests of each of the relevant communities, the test to determine the most appropriate forum should take into consideration questions such as which forum has greatest access to relevant evidence, can devote appropriate resources to the case, and is best able to respect victims' and defendants' rights. Of course, such a balancing test raises many complex questions given the diversity of values around the world. In addressing these questions over time, international and regional courts can contribute to the development of a normative framework for determining the most appropriate forum for adjudicating international crimes.

Another important way for the AC to pursue burden sharing is for the AC Prosecutor to adopt a policy of 'positive complementarity' similar to that in place at the ICC.¹⁵⁰ According to the ICC's Office of the Prosecutor, the

¹⁴⁸ Art. 53(1) ICCSt.

¹⁴⁹ Ibid.

¹⁵⁰ See S. T. Ebobrah, 'Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations', 22 *European Journal of International Law* (2011) 663–88.

positive approach to complementarity means that the Office ‘encourages national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation’.¹⁵¹ This has taken different forms in different situations, demonstrating the Office’s flexible approach.¹⁵²

Positive complementarity has been controversial, with some critics asserting that the Court’s founders did not intend for the Court to use its resources to encourage national prosecutions proactively.¹⁵³ Others, however, see positive complementarity as an important vehicle for the ICC to pursue the goal of ending impunity for serious international crimes.¹⁵⁴ There is evidence that the ICC’s positive complementarity policy has contributed to accountability in some situations.¹⁵⁵

Positive complementarity would support burden sharing at the AC by putting the AC in close communication with national and REC systems interested in investigating and prosecuting similar crimes. The Court could encourage those systems to proceed in situations where it deems national or REC prosecutions would be beneficial and to desist in others. This kind of interaction among the various systems should promote the overall goal of ending impunity for serious crimes. Indeed, positive complementarity might

¹⁵¹ Office of the Prosecutor, *Report on Prosecutorial Strategy*, International Criminal Court, 14 September 2006, available online at www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf, at 5; International Criminal Court: Office of the Prosecutor, *Prosecutorial Strategy*, International Criminal Court, 1 February 2010, available online at www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf, at 5.

¹⁵² See S. Krug (ed.), ‘Testing the ICC: The Politics of Complementarity’, *Jurist*, 1 June 2012 (discussing the principle of positive complementarity and its application in the situation in Libya), available at www.jurist.org/hotline/2012/06/eric-leonard-libya-ICC.php; see also H. Takemura, ‘A Critical Analysis of Positive Complementarity’, in S. Manacorda and A. Nieto, *Criminal Law between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions* (Cuenca: Ed. De la Universidad de Castilla-LaMancha, 2009) 601–21.

¹⁵³ See, e.g., D. Jacobs, ‘The ICC and Complementarity: A Tale of False Promises and Mixed up Chameleons’, *Post-Conflict Justice*, 11 December 2014, available at <http://postconflictjustice.com/the-icc-and-complementarity-a-tale-of-false-promises-and-mixed-up-chameleons/>; L. Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Switzerland: Springer, 2015), at 32. (‘The idea of actively encouraging domestic prosecutions was novel and not one which was contemplated as the ICC was being established’.)

¹⁵⁴ Nichols, *supra* note 153, at 31–2.

¹⁵⁵ G. Dancy and F. Montal, ‘Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions’, (2015) 1–58, available at <http://tulane.edu/liberal-arts/political-science/upload/Dancy-Montal-IO-2014.pdf>.

even be implemented between the AC and ICC so that over time a mutually beneficial *modus vivendi* could develop between the institutions.

3. CONCLUSION

When the AC comes into existence, the prosecutor and judges will face the important challenge of determining the most appropriate relationships between the AC on the one hand and national courts, sub-regional courts, and the ICC on the other. While the Protocol clearly provides for complementarity – at least with national and sub-regional courts – it leaves important questions about the nature of complementarity unanswered. This Chapter has sought to provide some insight into how the prosecutor and judges of the AC ought to interpret and implement the Protocol in this regard. In particular, it has argued that they should adopt a burden sharing rather than a hierarchical understanding of complementarity.

Burden sharing suggests that the AC should take a fairly narrow view of when cases are inadmissible either based on relevant activity in another jurisdiction or on gravity. Rather than finding entire categories of cases to be outside the AC's purview, the prosecutor and judges should engage in a more particularized inquiry to determine which forum is most appropriate for a given case. That inquiry should involve balancing a host of factors relevant to the respective interests of the communities each institution represents in adjudicating the case, as well as their practical ability to investigate and prosecute the case effectively.

Finding the right balance will not be easy, and the very idea of burden sharing will be resisted by those who view supra-national adjudication, particularly at the ICC, as a last resort. But as the number of supra-national courts increases, and the subject matter they address expands, a hierarchical approach to admissibility will become increasingly impracticable and unattractive. Supra-national courts are created because supra-national communities have interests, and those interests are not always compatible with the interests of national communities. The task of determining which community's interest should prevail when conflicts arise is one of the most pressing challenges facing international criminal law.