Reimagining Global Criminal Justice Accountability:

Is the Time Ripe for a Tripartite Complementarity of Courts?

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Abstract

This thesis examines whether there are compelling reasons for creating a regime of regional criminal courts (RCC) that can serve as complementary means of global criminal justice accountability alongside municipal criminal courts and global courts like the International Criminal Court (ICC). The research is an attempt to respond to growing controversies and frequent contentions regarding certain lapses and apparent frailties in the existing international criminal law (ICL) enforcement system. Much of the debate relates to perceived legitimacy and proximity deficits of several international criminal courts whose activities have sometimes been described as 'distanced justice' largely as a criticism of the fact that the courts seldom hold trials near the areas where they operate. But why is yet another study warranted in this area?

This PhD research is possibly the first elaborate normative investigation of the principal contentions regarding the use of RCCs as an ICL enforcement model. Above all, it is the first study that contemplates and expatiates the feasibility of a tripartite complementarity of national courts, RCCs, and the International Criminal Court. It considers not only an acceptable international policy for regionalising ICL, but also proposes and develops appropriate principles that could support efficient collaborative interactions within the envisioned three-tiered complementarity of courts. Through the rigorous examination of its objects, the thesis makes new contribution to the literature.

The study also contributes to knowledge by extending related research in the area. It draws from and expands Robert Woetzel's early outline of the indicia of an international criminal court. Previously, there had been scanty detailed analyses of the identity and characteristics of an international criminal tribunal. Exploring this subject enables the thesis to closely grapple with a number of the wrinkles and vexations surrounding the global justice system in addition to uncovering certain basic properties that confer legitimacy, credibility, and quiddity to international criminal courts.

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Author's Declaration

I declare that this thesis is a presentation of original work and I am the sole author. This work has not previously been presented for an award at this, or any other, University. All sources are acknowledged as References.

Chapter One

General Introduction

1.1 Introduction

The international society in the last few decades has witnessed an unprecedented upsurge in the number of international criminal courts and tribunals together with a corresponding extension of their jurisdictions.[1] These courts generally wield powers that have significant intrusive implications for the autonomy of states and individuals.[2] This has probably spurred the recent pushback in some quarters to the effect that international tribunals have increasingly become the subject of attacks and controversies.[3] Amid this development, can a compelling case still be made for the creation and operation of a new species of international courts, namely, regional criminal courts (RCCs)? This is the central issue for this thesis. A regional criminal court is understood in this thesis as an international judicial body that is created either by means of an international treaty or the decision of an international council of a regional entity and authorised to apply international criminal law (ICL) within the relevant international region.

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[1] See Cesare PR Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *NYU J INT'L L & POL* 709; Jenny S Martinez, 'Towards an International Judicial System' (2003) 56 *STAN L REV* 429; Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) *AJIL* 106(2): 225.

[2] See Christopher A Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) *OJLS* 34(4): 729, 729.

[3] See, for examples: John Bolton, 'Speech Transcripts: John Bolton on U.S. Policy Toward the International Criminal Court' (*The Epoch Times* 10 September 2018) <www.theepochtimes.com/speech-transcript-john-bolton-on-u-s-policy-toward-the-international-criminal-court_2656808.html> Accessed 10 November 2018 [announcing Trump administration's decision to sanction the ICC and its officials for attempting to open investigations into allegations of serious crimes committed by US personnel in Afghanistan since 2002.]; John Harold Jeffery, 'Opening statement by Mr. J.H. Jeffery, MP, Deputy Minister of Justice and Constitutional Development, Republic of South Africa, at the General Debate: Twelfth meeting of the Assembly of States Parties of the International Criminal Court, The Hague, 20-28 November 2013' <www.justice.gov.ca/m_speeches-2013/20131120-ICC.html> Accessed 23 January 2018 [defending South Africa's decision to withdraw from the ICC. That decision was later reversed.]

To begin, it is important to underline two key objectives of this thesis. The first is to assess whether there exists a coherent theoretical argument in favour of establishing RCCs. The second is to consider whether and how RCCs can collaborate with national courts and 'global' criminal courts like the International Criminal Court (ICC) in order to provide effective, legitimate, and complementary means of enforcing international criminal law.[4] The first half of the thesis will diagnose the current state of affairs in international criminal justice (ICrimJ) focusing mainly on the meaning and activities of international criminal tribunals as well as the jurisdictional pillars and obstacles to national prosecutions of international crimes. The second half will evaluate the normative case for regional application of ICL through regional mechanisms like RCCs. It will also set out a basic conceptual framework for a possible three-tier ICrimJ system.

1.2 Research Context

The study is set against the backdrop of current controversies regarding ICL application by national courts and international tribunals.[5] And the ICC has been at the epicentre of the criticisms in several quarters. The court has been accused of selective and uneven targeting of situations and suspects in economically weaker states particularly in Africa.[6] Critics allege that the ICC's prosecutorial strategy together with existing practices by like international tribunals appears to vindicate the ancient Greek philosopher Anacharsis's declaration that laws are like spiderwebs: strong enough to catch the weak, but too feeble to hold the strong.[7]

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[4] See William W Burke-White, 'A Community of Courts: Toward A System of International Criminal Law Enforcement' (2002) *MICH J INT'L L* 24(1): 1, 75.

[5] The terms 'international tribunal,' 'international criminal tribunal,' and 'international criminal court' will be used interchangeably in this thesis to represent international courts that deal, or have dealt, with criminal accountability for international crimes. Such terms will not cover the related courts otherwise called hybrid or internationalised tribunals. See Chapter 3 for more on this distinction.

[6] See Bartram S Brown, 'The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit' (2017) *TEMPLE INT'L &COMP LJ* 31(1): 145; Kamari Maxine Clark, 'Why Africa' in Richard H Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court* (Brill 2016) 326-32; Wolfgang Kaleck, *Double Standards: International Criminal Law and the West* (TOAEP 2015) 89-103; William A Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (OUP 2012); Edwin Bikundo, 'International Criminal Court and Africa: Exemplary Justice' (2012) *Law and Critique* 23(1): 21.

[7] Anacharsis cited in Christopher Hitchens, *The Trial of Henry Kissinger* (Verso 2001) xi.

Accordingly, as Christopher Hitchens explains, there is a perception 'that prosecutions for war crimes and crimes against humanity are reserved for losers, or for minor despots in relatively negligible countries. This in turn will lead to the paltry politicization of what could have been a noble process, and to the justifiable suspicion of double standards.'[8] Similar scepticism regarding current trends in the ICrimJ system has been articulated pungently not least by critics within the media and the political circles, but also by several academics, some of whom have endorsed a range of interesting models for regionalising ICL enforcement.[9]

Yet it is worth stating that, until fairly recently, the likelihood of criminal accountability of individuals (especially state officials) before an international tribunal for grave breaches of international law was remote.[10] That prospect increased considerably after WWII with the establishment of the provisional International Military Tribunal (IMT) at Nuremberg and its Tokyo counterpart. Both tribunals prosecuted and punished German and Japanese state officials respectively for major crimes committed during WWII. However, the ensuing Cold War era brinkmanship dashed further expectations of a consistent and permanent international regime of individual criminal accountability,

[8] Hitchens (n 7) xi. See also Wolfgang Kaleck, *Double Standards: International Criminal Law and the West* (TOAEP 2015) i-ii.

[9] See, for examples, Burke-White, 'Regionalisation of International Criminal Law: Preliminary Exploration' (2003) 38 *TEXAS INT'L LJ* 729; Richard Burchill, 'International Criminal Tribunals at the Regional Level: Lessons from International Human Rights Law' (2007) 4 *NZYIL* 25; Charles Jalloh, 'Regionalizing International Criminal Law?' (2009) 9 *INT'L CRIM L Rev* 445; Linda E Carter, Mark Ellis, and Charles Chernor Jalloh, *The International Criminal Court in an Effective Global Justice System* (Edward Elgar 2016); Matiangai Sirleaf, 'The African Justice Cascade and the Malabo Protocol' (2017) 11 *INT'L J TRANS J* 1.

[10] There exists a long history of trials in domestic courts of rogue combatants and captured enemy soldiers for war crimes. The first real experiment in ICrimJ was arguably the trial in 1474 of Peter von Hagenbach, the governor of Burgundy. He was tried by a tribunal composed of 28 judges drawn from Austria, Bohemia, Luxembourg, Milan, the Netherlands, and Switzerland for alleged crimes including murder, rape, and crimes against the 'laws of God and Man'. He was found guilty, convicted, and executed. See Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict*, Vol. II (Stevens & Sons Ltd 1968) 463; M Cherif Bassiouni, 'From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Court' (1997) 10 *HHRJ* 11; William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 1.

thereby worsening the grave breaches of international law and threatening the foundations of the international society.[11]

The Cold War era thankfully ended in the early 1990s and gave way to conditions that led to the birth of what can be called a new ICrimJ era. This was marked by the creation of the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY)[12] and for Rwanda (ICTR).[13] These tribunals, established in 1993 and 1994 respectively, were mandated by the United Nations Security Council (UNSC) to bring to justice the major perpetrators of the atrocities committed in the territories of the former Yugoslavia and Rwanda respectively.[14]

In addition to the ICTY and the ICTR, the post-Cold War period also has witnessed the formation of a number of hybrid tribunals, including the Special Court for Sierra Leone (SCSL),[15] the Extraordinary Chambers in the Courts of Cambodia (ECCC),[16] the Special Tribunal for Lebanon (STL),[17] and the Extraordinary African Chambers (EAC).[18] Unlike the ICTY and the ICTR, most of these hybrid courts were instituted by the UNSC by

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[11] See Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Praeger Press 1968) 104-105.
[12] See Statute of the ICTY, UN Doc S/RES/827 (25 May 1993).
[13] See Statute of the ICTR, UN Doc. S/RES/955 (8 November 1994).
[14] Both tribunals have concluded their mandates while a residual court currently manages certain outstanding commitments of the tribunals. See more on the ICTY and the ICTR in Chapter 3.
[15] For a critical assessment of the SCSL, see Charles C Jalloh, 'Special Court for Sierra Leone: Achieving Justice?' (2011) 32 *MICH J INT'L L* 395.
[16] The ECCC was authorised to prosecute the senior leaders of the Khmer Rouge for their roles in the mass atrocities committed in Cambodia between 17 April 1975 to 6 January 1979. For a critique of the ECCC, see Rebecca Gidley, *Illiberal Transitional Justice and the Extraordinary Chambers in the Courts of Cambodia* (Palgrave Macmillan 2019); Simon M Meisenberg and Ignaz Stegmiller (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law* (Asser Press 2016).
[17] The STL applies only Lebanese law and Lebanese criminal code. It was established in March 2009 by the UN in association with the Lebanese government to bring to justice those responsible for the 14 February 2005 terrorist attack, which killed former Lebanese premier Rafiq Hariri and other persons, and related attacks that occurred between 1 October 2004 and 12 December 2005. See UNSC S/RES/1757 (30 May 2007); STL Statute, arts. 1 and 2.
[18] The EAC was inaugurated on 8 February 2013 by the African Union following an agreement with the government of Senegal. The court, which was hosted by Senegal, was mandated to bring to justice individuals most responsible for the international crimes committed in Chad from 7th June 1982 up to 1 December 1990. The EAC only succeeded in prosecuting Hissène Habré, who had led Chad during the set period.

means of a treaty signed with the relevant states.[19] But reliance on this alternative post-conflict accountability mechanism seems to be waning especially in recent years. The reasons for this may relate not only to the launching of the ICC but also to what Padraig McAuliffe describes as 'dashed expectations'[20] including the many inconveniences regarding their establishment, limited geographical jurisdiction, and characteristically provisional mandates. 'How about the ICC then?' one might ask.

The inauguration of the permanent ICC in July 2002 – two years after the 60th ratification of the Rome Statute that was finalised in Rome on 17 July 1998 – was perhaps the clearest indication by the international society of a strong commitment to advancing ICL enforcement.[21] The new court inspired early optimism in what Antonio Cassese calls 'a realistic utopia,'[22] the feasibility of a radical innovation in international law that is geared at quelling impunity and achieving justice for victims of mass atrocities. The then UN Secretary-General Kofi Annan hailed the Rome Statute, as 'a gift of hope to future generations' and 'a giant step forward in the march towards universal human rights and the rule of law.'[23] For William Schabas, that treaty marked a key turning point in international relations and 'in the progressive development of international human rights'.[24]

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[19] Hybrid courts will be discussed further in Chapter 4.

[20] See Padraig McAuliffe, 'Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan' (2011) 7 *J INT'L L & INT'L REL* 1, 34. See also further discussion in Chapter 4.

[21] As of January 2020, 123 UN member states have ratified the Rome Statute: 33 in Africa; 28 in Latin America/the Caribbean group; 25 in Western Europe/Other group; 19 in Asia-Pacific group; and 18 in Eastern Europe. Of the remaining states, about 31 have signed but not ratified the Rome Statute while 41 have neither signed nor ratified it. The US, Israel, Sudan, and Russia all signed the Rome Statute but subsequently revoked their signatures. The UN 'regional groupings' is discussed below in section 1.3C.

[22] See Cassese, 'Introduction' in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (OUP 2012) xxi. [Cassese distinguishes his view of utopia from that popularised by Isaiah Berlin wherein utopia seems like 'a perfect society,' that is, 'some ideal state in which there [is] no misery and no greed, no danger and no poverty or fear or brutalising labour or insecurity'. See Isaiah Berlin, 'The Decline of Utopias in the West' in Isaiah Berlin and John Banville, *The Crooked Timber of Humanity: Chapters in the History of Ideas*, Henry Hardy (ed.) (Princeton University Press 2013) 21. For Cassese, utopia simply symbolises 'new avenues for improving the major deficiencies of the current society of states.' See Cassese (n 21) xxi]

[23] Kofi Annan, 'Preface' in Roy S Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999) ix.

[24] William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) ix.

Less than twenty years following its inauguration, the tide seems to be turning against the ICC with a steady stream of attacks regarding its focus,[25] operations, administration, and legitimacy.[26] A complex issue concerns the court's selection of situations and cases for investigation and prosecution, which has thus far concentrated mainly on African states and African defendants even though several preliminary examinations are ongoing elsewhere.[27] As a result, the ICC has been lampooned by some as a stratagem devised and deployed by its big Western backers to target and punish suspected bad boys in weaker states.[28] Besides, the glacial pace and the huge costs of the ICC's trials have been deplored as demonstrative of its administrative wastefulness. A case in point, as Schabas remarks, is the fact that the court's first trial began only in 2009 even though the defendant, Thomas Lubanga,[29] had been in custody for nearly three years.[30]

Notwithstanding these complaints and challenges, the ICC still fulfils a critical need – perhaps not yet so credibly – for a global court that can competently hold key authors of international crimes accountable, particularly in contexts where robust local responses are proven to be unlikely or inadequate.[31] As Bartram Brown suggests, a certain degree of disappointment with the ICC was inevitable given the enormous

[25] See William Schabas, 'The International Criminal Court: Struggling to Find its Way' in Cassese (n 21) 250ff.
[26] For challenges to the ICC's legitimacy arising from the court's strained relations with the African Union, see Charles C Jalloh, Dapo Akande, and Max du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *AJLS* 5.
[27] See C S Igwe, 'The ICC's favourite customer: Africa and international criminal law' (2008) 41 *Comparative and International Law Journal of Southern Africa* 294; Max du Plessis, 'A new regional International Criminal Court for Africa?: comments' (2012) *SAJCJ* 25(2): 286; Mia Swart and Karin Krisch, 'Irreconcilable Differences?: Analysis of the standoff between the African Union and the International Criminal Court' (2014) *AJICJ* 1(1): 38.
[28] See Max du Plessis, 'A new regional International Criminal Court for Africa?: comments' (2012) *SAJCJ* 25(2): 286; Bartram S Brown, 'The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit' (2017) *TEMPLE INT'L & COMP L J* 31(1): 145; Sara Kendall, 'Donors' Justice: Recasting International Criminal Accountability' (2011) *LJIL* 24(3): 585.
[29] *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06. [Lubanga was found guilty on 14 March 2012 for the war crime of enlisting and conscripting children below the age of 15 during the DRC's crises in the early 2000s. He was sentenced on 10 July 2012 to 14 years in jail.]
[30] See Schabas, 'The International Criminal Court' in Cassese (n 21) 252.
[31] See Rome Statute of the ICC, 2187 UNTS 90, (17 July 1998) arts. 1, 17, and 18.

degree of pressures it has withstood, right from its inception, to deliver justice.[32] Yet as a global entity, notes Madeline Morris, the ICC retains an immense potential to shape and to embed international criminal law to a degree far greater than any national or regional court.[33] This potential derives in part from the ICC's supranational capacity in relation to its 123 states parties and in part from its quasi-universal jurisdiction resulting from Article 13b of the Rome Statute (thanks to the UNSC's referral mechanism).[34]

At the same time, critics contend that the ICC, along with the entire ICrimJ machinery, requires a meaningful update to enhance its enforcement capabilities and to forestall recurrent controversies. In this connection, Brown has suggested a recalibration of the ICC's theory and practice of complementarity that is consistent with the original Rome Statute vision of the ICC as a court of last resort in relation to national courts.[35]

Another proposal, which more crucially underpins this study, is the development of competent and credible regional mechanisms for ICL enforcement. Advocates claim that such mechanisms would be more likely to enjoy robust support and legitimacy among states from the relevant regions.[36] Such regional mechanisms as RCCs also have been defended as likely to be administratively cheaper than distantly located international tribunals like the ICC. Besides, the relative geographic proximity of individual RCCs to the local crime scenes is considered a plus in terms of enabling victims' participation at the proceedings and better access to witnesses and evidence.

[32] Bartram S Brown, 'The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit' (2017) *TEMPLE INT'L & COMP LJ* 31(1): 145, 146-47.
[33] Madeline Morris, 'The Democratic Dilemma of the International Criminal Court' (2002) *BUFFALO CLR* 5(2): 591, 595.
[34] See Chapter 2.
[35] Brown (n 32) 177.
[36] ibid 176. See also Matiangai Sirleaf, 'The African Justice Cascade and the Malabo Protocol' (2017) 11 *INT'L J TRANS J* 1.

In contrast, there have been cautionary views regarding the prospect of regionalising ICL enforcement.[37] Opponents claim that institutionalising a system of RCCs would result in a pointless proliferation of international courts and that it would likely intensify the fragmentation of international law in general and ICL's jurisprudence in particular.[38] The underlying concern appears to be that having RCCs in particular would not only introduce disparate judicial standards but could also hamper the ICC's capacity to develop a coherent and uniform ICL jurisprudence.[39]

Critics also have argued that state officials would be unlikely to support regional criminal accountability mechanisms that have the capacity to put public officials on trial.[40] Others have noted that such mechanisms, if established, could be exploited by state officials to harass their political adversaries and to insulate state representatives from facing justice.[41] As such, proposals for regionalising ICL enforcement have been seen as diversionary tactics that could swell impunity gaps and undercut the relative advances made so far in ICrimJ.[42]

In light of the foregoing, this thesis will attempt to scrutinise these apparently divergent contentions at length in the bid to test the 'fitness' of RCCs to support ongoing ICrimJ efforts. To this end, the thesis will set out some preliminary considerations that motivate our principal research question. It will proceed to analyse both international and national responses to atrocity crimes while highlighting the

[37] See Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *JICJ* 1067; Max du Plessis, 'A (new) new regional International Criminal Court for Africa?: comments' (2014) *SAJCJ* 27(2): 199.
[38] See Richard Burchill, 'International Criminal Tribunals at the Regional Level: Lessons from International Human Rights Law' (2007) 4 *NZYIL* 25, sect. V.
[39] See generally Regina E Rauxloh, 'Regionalisation of the International Criminal Court' (2007) 4 *NZYIL* 67; Antonio Cassese, 'Reflections on International Criminal Justice' (1998) *MLR* 61(1): 1.
[40] See Murungu (n 37) 1067; Kirsten Rau, 'Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights' (2012) *MIN LR* 97(2): 669.
[41] Murungu (n 37) 1087.
[42] See Vincent O Nmehielle, '"Saddling" the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?' (2014) 7 *AJLS* 7, 32; Rau (n 40) 669.

flaws in both systems that may confront a future RCC regime. The thesis will further consider certain monumental arguments in favour and against forming an RCC regime.

Additionally, the RCC model will be assessed against other regional model like (i) regional exercise of universal jurisdiction, and (ii) regional hybrid tribunals.[43] The thesis will importantly also explore the structure and jurisprudence of the comparable regional human rights systems for salient lessons that could inform a more wholistic assessment of the possible merits and miseries of creating RCCs. There is scanty analysis in the literature on how national courts, international criminal courts, and future RCCs can forge an efficient judicial system of interaction. We will seek to close that lacuna through reimagination of the subsidiarity and complementarity doctrines.

1.3 Preliminary Considerations

The object of this section is to describe succinctly the methodological approach of the study and the fundamental precepts that drive the research. It also will foreground an apparent tension between regionalism and universalism that we will attempt to resolve in the later part of the study through the hypothetical technique of constructive complementarity of international criminal courts.

A. Doctrinal and Normative Orientations of the Study

The approach in this study will be both doctrinal and normative. The approach in the earlier part of this thesis (involving Chapters 2 and 3) will be profoundly doctrinal while that in the later part (embracing Chapters 4 and 5) will be mainly normative. As to the doctrinal approach, the thesis will be grappling with the existing law and practices of courts in the ICrimJ system in the attempt to identify pertinent issues in need of rectification. But the study will track a theoretical course in contrast to a sociolegal

[43] See Burke-White, 'Regionalisation of International Criminal Law: Preliminary Exploration' (2003) 38 *TEXAS INT'L LJ* 729, 748ff.

approach.[44] However, this should not imply the thesis will be wholly short on empirical evidence. On the contrary, legal doctrine is a source of legal evidence which can, as David Bederman aptly remarks, expose well dominant ideological trends or conceptual presuppositions that are too often embedded in treaties and legal instruments.[45]

In fact, as Nigel Simmons puts it, legal doctrine – the corpus of rules, laws and principles used as a basis for legal reasoning – represents 'the heart of a legal system'.[46] Small wonder the legal doctrinal approach is held to have furthered and unified legal scholarship over the past century or so.[47] It involves not only the analyses and syntheses of rules and interpretive guidelines but also can be utilised to explain, to make coherent, or to justify a segment of the law within a larger system of law.[48] This thesis will engage this approach by scouring a vast array of legal sources including national legislation, international conventions, treaties, caselaw and judicial opinions in the attempt to describe and diagnose correctly the status quo of ICL in theory and practice.

The Council of Australian Law Deans has compared the legal doctrinal technique to the methods of 'discovery' in the physical sciences.[49] In other words, the doctrinal methodology, 'at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of

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[44] Sociolegal studies refer to research that engages with qualitative and/or quantitative analysis to determine, for example, the impact that law makes on social life. See Robert Cryer, Tamara Hervey, Bal Sokhi-Bulley and Alexandra Bohm, *Research Methodologies in EU and International Law* (Hart 2011) 5.
[45] See David J Bederman, 'Appraising a Century of Scholarship in the American Journal of International law' (2006) *AJIL* 100(1): 20, 23; 49-51 [noting that for international legal norms and structures to be successful they must be allied with powerful ideologies and national interests.]. See also Alexander Somek, 'Kelsen Lives' (2007) *EJIL* 18(3): 409, 412 [arguing that conventions camouflage as much as they reveal the power structures that underpin the legal order.]
[46] Nigel Simmons, *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester University Press 1984) 1.
[47] See Susan Bartie, 'The Lingering Core of Legal Scholarship' (2010) *Legal Studies* 30(3): 345, 350.
[48] Trischa Mann (ed.), *Australian Law Dictionary* (OUP 2010) 197.
[49] Council of Australian Law Deans, 'CALD Statement on the Nature of Research' (May and October 2005) 3 <http://cald.anu.edu.au/docs/cald%20statement%20on%20the%20nature%20of%20legal%20research%20-%202005.pdf>. Accessed 20 January 2020.

extracting general principles from an inchoate mass of primary materials.'[50] It is usually a two-part process. In the first part, as Hutchinson and Duncan explain, the researcher seeks to establish an 'objective reality'.[51] And in the second part, the legal scholar attempts to make sense of the law, that is, to demystify the law,[52] or as Martha Minow puts it, to identify the difference between majority and 'preferred' or 'better' practice.[53]

The attempt to demystify the law, as Geoffrey Samuel puts it,[54] will be the central preoccupation in the second part of the thesis. Beginning from Chapter 4 through Chapter 5, the thesis will adopt a normative approach as it seeks to consider suitable remedies to the issues identified in the earlier part regarding how the law could or should be. The normative technique, as May and Fyfe write, encompasses 'a broad array of ways of discussing what institutions should be through the application of various norms'.[55] Hence, whereas the opening chapters, including Chapters 2 and 3, will take the form of a backward-glancing analysis of the *lex lata* (established law) of the ICL architecture, the other half of the thesis, will be largely a forward-looking elaboration of the *lex ferenda* of ICL (law as it should be).[56] Whereas the doctrinal part asks 'what is the law'; the normative part will ask 'what or how the law ought to be'? All in all, the thesis will engage with several key texts not simply for the authors' views as to what the law ought to be, but also 'for trustworthy evidence of what the law really is.'[57] Thus, both approaches will be complementary enabling the doctrinal part of the thesis to flow seamlessly into the normative part to provide a deeper assessment of our objects.

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[50] Ibid.
[51] Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: doctrinal legal research' (2012) *Deakin Law Review* 17(1): 83, 110. See also Terry Hutchinson, 'Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era' (2014) *LLJ* 106(4): 579, 584.
[52] See Geoffrey Samuel, 'Can Legal Reasoning Be Demystified?' (2009) *Legal Studies* 29(2): 181.
[53] Martha Minow, 'Archetypal Legal Scholarship – A Field Guide' in AALS Workshop for New Law Teachers (AALS 2006) 34-35 <www.aals.org/documents/2006nlt/nltworkbook06/pdf> Accessed 22 January 2020. See also Richard Posner, 'In Memoriam: Bernard D. Meltzer (1914-2007)' (2007) *University of Chicago Law Review* 74(2): 435, 437.
[54] Samuel (n 52) 181.
[55] Larry May and Shannon Fyfe, *International Criminal Courts: A Normative Defense* (CUP 2017) 2.
[56] See Covey T Oliver, 'On Saving International Law from Its Friends' (1958) 52 *AJIL* 498, 503.
[57] See *The Paquette Habana*, 175 US 677, 700 (1900).

B. Conceptualising Regionalisation of ICL within the Global Justice System

What the regionalisation of international criminal law could mean for the global criminal justice system remains subject to debate. There is at present no regional criminal justice enforcement model that could be relied upon in order to predict the relevant impact. As such, several recent discourses on this subject have tended to focus on the criminal jurisdiction of the proposed African Court of Justice and Human Rights (ACJHR).[58] The latter, not yet in force, is a merger between the existing African Court of Human and Peoples' Rights (ACtHPR) and the stillborn Court of Justice of African Union.[59] Without prejudice to the current attention on the ACJHR, a strong case for regionalising ICL must first establish the basis for such a project. Are courts like the ACtHPR and the European Court of Justice (ECJ) regional or international? For RP Anand, if such courts are created by treaty and their statutes ratified by states parties, they should rightfully be viewed as international and regional courts at the same time.[60] This then raises the question of how to separate the regional from the international.[61]

The task for this section therefore is to set out clear and consistent bases of regionality by which a possible regionalisation of ICL can be practiced. This will serve to foreground our later consideration of future RCCs as a potential ICL enforcement model. The discussion also will enable us to attempt to set boundaries between the regional domain and the global domain. The identity and attributes of courts in the latter domain will be elaborated in Chapter 3 while those in the former will be canvassed in Chapter 4. That said, the section will highlight geographic proximity and

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[58] See, for examples, Gerhard Werle and Moritz Vormbaum, *The African Criminal Court: A Commentary on the Malabo Protocol* (Asser Press 2016); Matiangai Sirleaf, 'The African Justice Cascade and the Malabo Protocol' (2016) *International Journal of Transitional Justice* 11(1); Sarah Nimigan, 'The Malabo Protocol, the ICC, and the idea of "Regional Complementarity"' (2019) *JICJ* 17(5): 1005.

[59] The merger protocol of ACJHR was adopted by the African Union in July 2008. As of October 2020, only seven states have ratified the protocol while just fifteen states have signed the amended 2014 protocol otherwise known as the Malabo Protocol of the African Court of Justice and Human Rights. For entry into force of the ACJHR, fifteen ratifications are needed. See Protocol on the Statute of the Proposed African Court of Justice and Human Rights, art. 2.

[60] See R P Anand, *International Courts and Contemporary Conflicts* (Asia Publishing House 1974).

[61] The terms 'international' and 'global' will be used interchangeably in this thesis, but not in all cases.

shared values as two credible conceptual bases for regionality. It will also suggest a reworking of the United Nations regional strategy as a possible policy basis for regionalising ICL.

I. Geographic Proximity and Shared Values

It is an inescapable reality that the international society is organised on the basis of the coexistence of states.[62] At least 193 of these states are counted as sovereign members of the United Nations. Central to the idea of sovereignty under international law is territorial integrity – the exclusive power and independence to exercise the functions of state within a defined geographic boundary without external interference.[63] Territoriality is also singled out alongside stable population, effective government and international relations' capacity among the Montevideo criteria for statehood.[64] As sovereign entities, states possess the power to engage (or not) with other states in a manner of their choosing and in accordance with international law. One of such relations of interest for our purposes is the formation of a regional organisation. The important question is the basis upon which an alliance of sovereign states can be seen as constituting a valid regional entity capable of enforcing international criminal law.

The dominant view in the literature is that the geographic closeness of the composing states' territories is decisive in constructing an international region.[65] Accordingly, Joseph Nye describes an international region as comprising a small number of states that are linked together by geography and a certain degree of mutual

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[62] See Philip C Jessup, *A Modern Law of Nations* (Macmillan 1948) 17.

[63] See *Island of Palmas Case* [1928], 2 RIAA 829 per Judge Huber; *Frontier Dispute Case (Burkina Faso v Mali)* [1986] ICJ Rep 554. See also Steven D Krasner, 'Comprising Westphalia' (1995) *International Security* 20(3): 115; Robert Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape' (1999) *Political Studies* 47(3): 413. Note, as Jessup points out, that exclusive or absolute 'sovereignty is no longer automatically accepted as the most prized possession or even as a desirable attribute of states.' Jessup (n 62) 1.

[64] Montevideo Convention on the Rights and Duties of States 1933 165 LNTS 19, Article 1.

[65] See Louise Fawcett, 'Exploring Regional Domains: A Comparative History of Regionalism' (2004) *International Affairs* 80(3): 429, 434; Björn Hettne, 'The New Regionalism: A Prologue' in Björn Hettne, András Inotai and Osvaldo Sunkel (eds.), *Globalism and the New Regionalism* vol. 1 (Palgrave Macmillan 1999) xv.

interdependence.[66] For Kathy Powers and Gary Goertz, underlying states' desire to establish or join a regional entity is a shared interest in tackling mutual socioeconomic, security and political problems.[67] One assumption for this conclusion is probably that the more geographically contiguous states are, the more vulnerable they will be to the named issues occurring in a nearby state. This is largely true although the ongoing Covid-19 pandemic, global refugee crises, and indiscriminate heinous terrorist attacks appear to demonstrate that certain ills cannot be easily localised within specific geographic areas and can pose serious threats having extensive global ramifications.

It is no surprise that scholars have begun to challenge the conceptualisation of international regions in purely geographic terms.[68] For Frederik Söderbaum, a region is not a fixed entity that is defined by nature or geography. It is rather a process that is capable of altering an inert terrestrial area into a dynamic entity worthy of sustaining transnational interests.[69] As Amin Maalouf puts it, a region 'is not given once for all;' it is constantly changing.[70] It comes alive, as Mansfield and Milner suggest, when a group of states sharing common cultures, history, or language compose an international region irrespective of their geographic distance or contiguity.[71] The key consideration, Katzenstein argues, is their common assent, political coalitions and shared identities.[72] Thus, Söderbaum states, all regions are socially constructed and politically contested.[73]

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[66] Joseph S Nye, *International Regionalism: Readings* (Little, Brown & Company 1968) vii.
[67] See Kathy Powers and Gary Goertz, 'The economic-institutional construction of regions: conceptualisation and operationalisation' (2011) *REV INT'L STUD* 37: 2387, 2388.
[68] Frederik Söderbaum, 'Rethinking Regions and Regionalism' (2013) *GEO JIA* 14(2): 9, 11, 17. For further discussion of non-geographic conception of regions, see Mario Telò, Louise Fawcett and Frederik Pojaert (eds.), *Interregionalism and the European Union* (Routledge 2015).
[69] Söderbaum (n 68) 12. See also Björn Hettne and Frederik Söderbaum, 'Theorising the Rise of Regionness' (2000) *NPE* 5(3): 457.
[70] Amin Maalouf, cited in Fawcett (n 65) 434.
[71] See Edward D Mansfield and Helen V Milner, 'The Political Economy of Regionalism: An Overview' in Edward D Mansfield and Helen V Milner (eds.), *The Political Economy of Regionalism* (Columbia University Press 1997) 3.
[72] See Peter J Katzenstein, *A World of Regions: Asia and Europe in the American Imperium* (Cornell University Pres 2005) 9.
[73] Söderbaum (n 68) 17.

A major difficulty with constructing regions on the basis of intangible non-geographic elements is the question of where to set the limits.[74] By contrast, as to geographic proximity, the external boundaries are more or less definite. Take the case of the European Union (EU). The relative geographic contiguity of its members states is generally uncontested. That such states as France, the Netherlands, Spain, Portugal, and Belgium have close territorial frontiers is a fact. Conversely, had the condition for EU membership been based simply on shared political interests, historical and cultural ties, socioeconomic relations and the existence of common language and legal tradition,[75] then the EU would have taken a much different trajectory and would in all likelihood not be bearing the same name. Of course, the conditions for EU membership,[76] restated in the 1993 Copenhagen criteria, include such intangible qualities as respect for democratic values and the rule of law. But, crucially, membership is open to 'European' states only. While questions remain as to where to set the external frontiers of Europe, it is fairly clear which states are geographically in Europe. Minus this basic geographic condition, states in far-flung places as Seychelles or Canada could well apply for EU membership by ticking all the Copenhagen boxes.[77]

The North Atlantic Treaty Organisation (NATO) presents a contrasting picture. Established in 1949, NATO is a transatlantic political and military alliance for collective defence,[78] as provided in Article 51 of the UN Charter. As its name suggests, geographic contiguity of member states is not a priority for membership. This was clear from its founding membership which included Canada and the United States in North America as well as Belgium, France, United Kingdom and seven other Western European states.[79] Whereas Article 10 of the Washington Treaty extends an open door invitation, with all

[74] See Fawcett (n 65) 433; William R Thompson, 'The Regional sub-system: A Conceptual Exposition and Propositional Inventory' (1973) *ISQ* 17(1): 89.
[75] See Bruce Russett, 'Delineating International Regions' in David J Singer (ed.), *Quantitative International Politics: Insights and Evidence* (Free Press 1968) 312.
[76] See Treaty on European Union, art. 49.
[77] Morocco's application in 1987 to join the European Community (the EU's precursor) was disqualified for failing the geographic criterion test. Morocco is officially classified as an African state.
[78] See The North Atlantic Treaty (Washington D.C. 4 April 1949), art. 5.
[79] The rest of the founding members include Iceland, Italy, Portugal, Denmark, the Netherlands, Norway and Luxembourg. As of October 2020, NATO has a total of 30 member states.

the parties' consensus, to any European state that is committed to furthering NATO's principles and purposes,[80] imposing a strict set of criteria for membership has not been a top priority issue in NATO's expansion.[81] It is feared that adopting a rigid approach could be damaging to the alliance's flexibility.[82] This suggests that potentially Russia and, perhaps, Mexico can become NATO parties if they satisfy the pertinent criteria.[83]

In sum, the brief spotlight on the EU and NATO illustrates how geography can interplay with shared values in the formation of regional entities and alliances. Both organisations emphasise continental Europe as their central geographical locus although NATO extends further across the Atlantic. Both also highlight, *inter alia*, democracy, rule of law, and human rights as shared values that members must uphold. Such intermingling of geography and shared (intangible) values can be a strong basis for regionalism for a number of reasons.[84] First, geographic proximity helps to delineate the zone of influence and interest of the parties. Second, geography contextualises the mutual vulnerability of the parties and thus can engender a unifying bond of good neighbourliness. A fire at a neighbour's home, an adage goes, is a warning to other homes in the neighbourhood.[85] Third, a commitment to shared values can help to weed out incompatible parties thereby lessening the chances of internal strains. And, lastly, likeminded parties upholding shared values may be more likely to get along and to

[80] NATO's purpose is to safeguard the freedom and security of all its members. Its basic principles include individual liberty, democracy, human rights, and the rule of law. See NATO, 'Active Engagement, Modern Defence: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organisation' (Adopted 19-20 November 2010) 6.
[81] See International Institute for Strategic Studies, 'NATO Expansion: The Criteria Conundrum' (4 May 1995) *IISS Strategic Comments* 1(4): 1.
[82] Ibid.
[83] See Coral Bell, 'Why an Expanded NATO must include Russia' (1994) *Journal of Strategic Studies* 17(4): 27.
[84] See Jean Grugel and Wil Hout, 'Regions, regionalism and the South' in Jean Grugel and Wil Hout (eds.), *Regionalism across the North/South Divide: State Strategies and Globalization* (Routledge 1998) 10; Fawcett (n 64) 429; Mansfield and Milner (n 70) 3; Edward D Mansfield and Etel Solingen, 'Regionalism' (2010) *ARPS* 13: 145, 147; Andrew Hurrell 'Regionalism in Theoretical Perspective' in Louise Fawcett and Andrew Hurrell (eds.), *Regionalism in World Politics* (OUP [1995] 2004) 39.
[85] This compares to Article 5 of the Washington Treaty, which holds that an attack against a NATO member is an attack against all NATO members.

hold each other accountable than parties yoked together merely on the basis of geography.

II. Spotlighting the United Nations' Regional Administrative Policy

The United Nations' system operates a regional format which has been adopted by certain international tribunals like the ICC.[86] This section will examine the extent to which the UN's policy complies with the criterion of geography and shared values outlined above. In terms of regional policy, the UN's system has been described as a laboratory of adaptation.[87] Whereas it has managed to preserve several of its core constitutional aspects including the primary organs[88] and the veto prerogative of the five permanent members (P-5) of the UNSC,[89] the UN has struggled to maintain a stable regional formula. This formula is used mainly to retain a stable geographical distribution of states in the UN's administrative functions such as in the election of the UNSC's non-permanent (N-P) members and the members of the Economic and Social Council, the appointment of the UNGA's President, and the hiring of the Secretariat personnel.[90]

Currently, the UN's 193-strong members states are allocated into five geopolitical regions based chiefly on geographic proximity but also, in some cases, on common

[86] The ICC adopted a similar policy for administrative purposes. See International Criminal Court, 'The States Parties to the Rome Statute' <www.asp.icc.cpi.int/en_menus/asp/assembly/Pages/assembly.aspx>. Accessed 12 October 2019.

[87] See Stephen Mathias, 'The United Nations: A Laboratory of Adaptation for Seventy Years' (2015) 109 *ASIL Proc*. 278.

[88] The six principal organs of the UN include the General Assembly, the Security Council, the Economic and Social Council (ECOSOC), the Trusteeship Council, the International Court of Justice (ICJ), and the UN Secretariat.

[89] See Brian Urquhart, 'The United Nations Discovered?' (2004) *WPJ* 21(2): 1, 2. As to the legal basis for the veto right, see UN Charter, art. 27; Bardo Fassbender, *UN Security Council Reform and Right of Veto: A Constitutional Perspective* (Kluwer 1998). [Note that the GA Res. 377(V) of 3 November 1950 titled 'Uniting for Peace' created an exception to the veto right of the P-5 members. In Paragraph 1A, it says that '…if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures'.]

[90] Birgit Reichenstein, 'Regionalization' in Helmut Volger (ed.), *A Concise Encyclopedia of the United Nations* (Martinus Nijhoff 2010) 598.

interests like historical affinity or political expediency. The five regions are namely: Africa (GAFS), Asia-Pacific, Eastern Europe (comprising mostly European states of the former Soviet bloc), Latin America and the Caribbean States (GRULAC), and Western Europe and Other (including West European states and other states like Australia, New Zealand, US, Canada, and Israel).[91]

The UN Charter tellingly provides neither a policy on international regions nor an inventory of 'recognised' regional groupings. What it does provide under Article 52 is that 'Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action'. But Article 52 does not confer exclusive jurisdiction to regional agencies over conflicts in the regions. Rather, the elbowroom in Article 52 is predicated upon the consistency with the UN Charter of the measures taken by regional entities.[92] Such measures also must be reported to the UNSC,[93] which in turn is obliged to aid and facilitate pacific resolutions of conflicts.[94]

Furthermore, the UN's regional policy has changed over the years with the current five-group formula having been redrawn with the initial amendment of the UN Charter in 1963.[95] In the early days, the UN upheld a five-group structure mainly for the purpose of allocating the then requisite six N-P seats in the UNSC. The seats were allotted as follows: British Commonwealth (1), Eastern Europe (1), Latin America (2), Middle East (1), and Western Europe (1).[96] There were neither seats nor regional groups for Africa,

[91] See Department for General Assembly and Conference Management, 'United Nations Regional Groups of Member States' (United Nations). <www.un.org/depts/DGACM/RegionalGroups.shtml>. Accessed 19 October 2019. See also generally Johann Aeschlimann and Mary Regan (eds.), *The GA Handbook: A practical guide to the United Nations General Assembly* (Permanent Mission of Switzerland 2017) 15.
[92] See Francis O Wilcox, 'Regionalism and the United Nations' (1965) *International Organization* 19(3): 789, 791.
[93] UN Charter, art. 54.
[94] Ibid, art. 52(2).
[95] Ingo Winkelmann, 'Regional Groups in the UN' in Helmut Volger (ed.), *A Concise Encyclopedia of the United Nations* (Martinus Nijhoff 2010) 592-93. See also M H Faridi, 'United Nations Reforms in International Perspectives' (2011) *IJPS* 72(2): 597, 603.
[96] Winkelmann (n 945 593.

Asia, and the Pacific states ostensibly because vast swathes of these continental areas were still under colonial rule at the time.

The later enlargement of the UN membership led by the massive decolonisation process of the early 1960s inspired a reform of the initial regional plan. It also led to the expansion of the UNSC's membership from 11 to 15 alongside a reordering of the Security Council's 10 N-P seats as well as an increase of the ECOSOC membership from 18 to 27 so as to reflect the new geopolitical reality.[97] On account of equitable geographical representation,[98] the UNSC's N-P seats are now allotted as follows: Africa (3), Asia-Pacific (2), Eastern Europe (1), Latin American (2), and Western Europe and Other (2). Under this new formula, Africa is classified as a discrete regional grouping while Asia, at first discrete, was recently reclassified to include the Pacific states and became the Asia-Pacific group. The former Middle East group has been redistributed within the Asia-Pacific and the Africa groups.

It is clear that geography informs much of the UN's regional policy. Most of its member states are allotted or reassigned on account of their continental locations. A few like the US, Israel, Canada, Australia, and New Zealand are allocated seemingly on account of historical and/or sociocultural kinships. This is at once both a pragmatic and a political policy.[99] Pragmatic because allotting states into large continental groupings saves the hassle of having to deal with several smaller groupings. Political because small and economically weaker states can exercise stronger bargaining powers in big continental groupings than in smaller or sub-regional organisations. It remains to consider whether ICL should be regionalised in accordance with existing UN's regional policy or whether that policy can be rethought to make it more appropriate. This thesis

[97] UNGA Res. UN Doc. A/RES/1991A (XVIII) of 17 December 1963; UN Charter, art. 23. See also M H Faridi, 'United Nations Reforms in International Perspectives' (2011) *IJPS* 72(2): 597, 603. [The UN Charter was amended again in 1973 to enlarge the ECOSOC membership from 27 to 54.]
[98] See UN Charter, art. 23; Sabine von Schorlemer, 'Blocs and Groups of States' in Rüdiger Wolfrum and Christiane Philipp (eds.), *United Nations: Law, Policies and Practice* vol. 1 (Martinus Nijhoff 1995) 75.
[99] Note that this is not an imposition as states are fairly able to choose which groupings to join. Israel, for instance, was formerly in the Asia group and later left to join the Western Europe and Other group.

will argue, in Chapter 4, that a rethinking of the policy will be imperative so as to incorporate the ICL enforcement mechanism within existing regional structures that could enhance the capacity and effectiveness of the relevant regional programmes.

C. Can Universal Ends Be Pursued or Reached by Multiple Means?

Whether or not universals exist is a perennial, and possibly an insuperable, question for philosophers.[100] The problem of universals, by contrast, is not as insuperable for international lawyers. Notwithstanding occasional rebellions by states, international law has a fairly established corpus of universal norms and precepts that permits no derogation insofar as one belongs to the international society. 'It is probably the case,' Louis Henkin memorably confirms, 'that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.'[101] And, as Phillip Jessup aptly observes, it is often the case that the disputes and doubts about the universal rules of the international society relate far more to the structure and activities of the necessary agencies and methods of enforcement than in the actual rules per se.[102]

Accordingly, an overarching issue for this thesis is whether certain universal ends of the international society can be pursued or reached through an amalgam of methods which include, albeit not limited to, global, regional, and national criminal courts. Global courts in this context refer to international courts that are directly and singly authorised by the UNSC pursuant to the terms of Chapter VII of the UN Charter as well as courts that are established by a global convention of states like the ICC. Regional courts represent those that come into being through a multilateral treaty covering only specific international regions. National courts describe the municipal courts of sovereign states.

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[100] See WVO Quine, 'On Universals' (1947) *The Journal of Symbolic Logic* 12(3): 74; David Pears, 'Universals' (1951) *The Philosophical Quarterly* 1(3): 218; William P Alston, 'Ontological Commitments' (1958) 9 Philosophical Studies 9(1): 8.

[101] See Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn, Columbia University Press 1979) 47.

[102] Philip C Jessup, *A Modern Law of Nations* (Macmillan 1948) 3.

Under current arrangements, global and national courts provide the typical means for reaching universal ends. Mixed tribunals also have been deployed at times as provisional responses to complex situations such as where the ICC is deemed to lack the relevant jurisdiction. In addition to the global and national mechanisms, the thesis seeks to explore the possibility of pursuing and propagating universal ends also through regional methods. Yet this endeavour may motivate questions regarding a possible tension between universalism and regionalism. In other words, a normative defence for the regionalisation of international criminal justice enforcement may provoke criticism relating to whether the aforesaid justice is meant to be universal or regional. This criticism is in order and may be particularly salient in contexts like the Extraordinary African Chambers (EAC) where certain regional efforts to combat impunity have been described as providing regional solutions to regional problems.[103]

Beneath the criticism however is perhaps an apparent category mistake. It appears to conflate means with ends. Means and ends though conceptually proximate belong to differing logical and temporal categories. The ends of ICrimJ, as was stated earlier, are arguably universal. But the means to these ends may be different and multiple. Recall Jessup's remark above that the subject of controversy in the international society is less about the universality of its norms or ends but more about the legitimacy and effectiveness of the existing methods or means of enforcement. Juan Antonio Carrillo Salcedo has similarly observed that the 'alleged imperfections so often complained of in international law are for the most part only structural problems inherent to the system'[104] rather than complaints as to the common interests of humanity. Hissène Habré was tried and punished by the EAC for torture and crimes against humanity

[103] See Sarah Williams, 'The Extraordinary African Chambers in Senegalese Courts: An African Solution to an African Problem' (2013) *JICJ* 11(5): 1139; VV Verga, 'Extraordinary African Chambers in the Senegalese Courts: A Regional Mechanism Enforcing International Criminal Justice' (2016) 61 *ATENEO LJ* 721; Mbaké Fall, 'The Extraordinary African Chambers: The Case of Hissène Habré' in Gerhard Werle, Lovell Fernandez & Moritz Vormbaum (eds.), *Africa and the International Criminal Court* (Asser Press 2014) 117-131.
[104] Juan Antonio Carrillo Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law' (1997) 8 *EJIL* 583.

allegedly committed during his reign as Chadian head of state from June 1982 to December 1990.[105] These crimes are not merely regional problems; they are prime universal evils. Thus, beyond the seeming rhetoric 'in the name of Africa' that was used by the AU Conference of Heads of State and Governments in its Decision 127(VII) of July 2006 to authorise Senegal's trial of Habré, the EAC can be rightfully said to have provided a regional means to a universal end.

Considering that the ICC lacked temporal jurisdiction to examine the Chadian situation, a regional solution was probably the least technically fraught means of reaching justice in that context.[106] But it was not the only admissible means. Under the territoriality and the personality doctrines, as will be seen in Chapter 3, the Chadian state had the strongest jurisdictional bases to bring Habré to justice although trying him in Chad could have posed grave security risks. As such, Habré could have been legitimately prosecuted by other willing states in Africa or elsewhere under the doctrine of universal jurisdiction. In fact, it was on account of the universality doctrine that Belgium attempted to prosecute Habré and it was also on the same basis that the International Court of Justice (ICJ) ordered Senegal to either prosecute him or extradite him to Belgium in view of his alleged violations of Article 7 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and customary international law.[107]

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[105] See further discussion of the EAC in Chapter 4.

[106] Note that at the initial stages of the Habré process, a Senegalese appeals court nullified the judgment of a trial chamber arguing that Senegal lacked the relevant jurisdiction to consider the matter as universal jurisdiction had not been provided for in Senegalese law. As a result, Senegal's Penal Code and Code of Criminal Procedure were later amended to provide for universal jurisdiction and an exception to the principle of non-retroactivity with respect to genocide, crimes against humanity and war crimes. A judgment of the ECOWAS Court of Justice in 2010 ruled that trying Habré on the basis of a domestic law passed after the commission of the relevant conduct was in breach of the rights guaranteed under the African Charter of Human and Peoples' Rights and other relevant instruments to which Senegal was party. To remedy this defect, he ECOWAS court proposed the creation of an ad hoc tribunal by the AU for the trial. See ECOWAS Court of Justice, *Hissein Habré v Republic of Senegal*, Judgment No ECW/CCJ/JUD/06/10 of 18 November 2010.

[107] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Rep 2012.

The ICJ's 2012 ruling may have been its first judgment regarding the obligation to prosecute or extradite in international law. At the same time, it served to reinforce the corpus of norms recognised as peremptory or jus cogens in international law. This body of norms are also sometimes called *erga omnes* in relation to their binding universal character. As Yuval Shany has argued, international courts like the ICJ and the ICC have enabled the recognition and growth of binding international legal norms and cooperative regimes governing such essential areas as human rights, economic relations, international criminal law, and armed conflict through their capacity to enforce international commitments, interpret international treaties, and settle international disputes.[108] In the European Union, for instance, Joseph Weiler contends that the European Court of Justice has played a substantial role in imposing a compliance regime not only with EU law but also with the basic universal norms.[109]

It is a fundamental precept accepted in this thesis thus that there exist or should exist certain universal values and common interests of the international society. As will be seen in Chapter 2, some of these values including the prohibition of genocide, torture, war crimes, crimes against humanity, and the crime of aggression constitute the material jurisdiction of international tribunals. The emerging concept of community interests or universal values of the international community was underlined by Judge Bruno Simma in his 1994 lecture at The Hague Academy as 'a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as of concern to all States.'[110] These collective interests and values of mankind, echoes Christian Tomuschat are 'embodied in the international community and its

[108] Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) *AJIL* 106(2): 225, 225.
[109] See Joseph HH Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (1994) *Comparative Political Studies* 26(4): 510.
[110] Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit Internationale* 217, 233.

constitution'.[111] In light of their status as establishing obligations arising from states without or even against their consent, Tomuschat maintains, it would be legitimate to have recourse to them when controversial legal issues have to be addressed.[112] And in our deeply divided global society, adds Nico Shrijver, the stated common interests and other shared values like peace, justice, humanity, freedom and sustainability constitute the common language of the international community.[113]

Following the conclusion of the Rome Statute, a poll of national opinions showed a striking absence of disagreement among states on the reality of international crimes although there were concerns regarding the definition of war crimes and the lack of a definition for aggression.[114] In other words, the emerging commonality of these norms are almost universally accepted by states in theory although in practice their adoption in domestic law is measured and their application frequently controversial. As Marcella David puts it, 'there is general consensus as to the broad parameters of these norms … A poll of the heads of national governments would elicit statements in agreement with these principles albeit subject to widely varying interpretations of their application.'[115] In a sense, as some have argued, it can probably be stated that certain universal values like the rules of jus cogens have introduced hierarchy into contemporary international law. They have considerably limited the relativism of classical international law by accentuating what brings together rather than what divides the international society.[116]

Another basic precept in this thesis is the idea that the pursuit, protection, propagation and realisation of these universal ends and common interests would require multiple strategies at the national, regional and global spheres especially by means of judicial

[111] Christian Tomuschat, 'Obligations Arising from States Without or Against their Consent' (1993) 241 *Recueil des Cours de l'Académie de Droit Internationale* 195, 236.
[112] Ibid.
[113] Nico Shrijver, 'Keynote Address by Nico Shrijver' in The United Nations (ed.), *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (Brill 2020) 429.
[114] See Roy S Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer 1999) 573-639.
[115] Marcella David, 'Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law' (1999) 20 *MICH JIL* 337.
[116] Salcedo (n 104) 595.

interventions. 'In the struggle against impunity,' notes Antonio Cassese, '. . . there is no single panacea available. One has to rely skillfully upon a host of possible options'.[117] It would ideally be most fitting for states to be at the frontlines in the pursuit of accountability for international crimes. Considering however that states tend to hesitate in carrying out this obligation, this thesis will contend that it is appropriate to entrust independent judicial institutions at the global and regional spheres with the authority to protect the common values of mankind alongside states and especially when states fail to turn up to their duties. Judge Simma shares a similar perspective: 'The realization of community interests depends not only on the creation of norms positing an "international community" but also on the existence of an institutional structure providing for the promotion as well as the protection of these interests.'[118]

The thesis will contend that whereas the quest to realise the common values would invariably result in greater institutionalisation of the international society, principled collaborative interactions between of the principal institutions through an enhanced technique described in this thesis as the 'constructive complementarity' of international criminal courts could help to minimise concomitant tensions within the system. For this system to work the role of the ICC would be reimagined as a central but parallel coordinating hub of the courts concerned with international criminal law enforcement. It is likely that this proposal would at first blush be met with resistance in certain quarters especially in light of existing suspicions regarding the independence of the ICC. Yet over time and with deeper understanding of how the system operates, it could become a more acceptable means of safeguarding and consolidating the common interests of the international society at national, regional and global levels.

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[117] Antonio Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality' in PRC Romano, A Nollkamper, and KJ Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004) 3.

[118] Simma (n 110) 285. See also Hans-Peter Kaul and Eleni Chautidou, 'Balancing Individual and Community Interests: Reflections on the International Criminal Court' in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Kahn, Andreas Paulus, Sabine von Shorlemer, and Christoph Vedder (eds.), *From Bilateralism to Community Interests: Essays in Honour of Judge Bruno Simma* (OUP 2011) 975.

The final precept in this thesis concerns the individual responsibility of perpetrators for breaching the common interests of humanity. It will be recognised that the international community is still work in progress. It is not yet a global village nor a global empire! As such, there is wide scope for plurality. The catalogue of common interests of the international society has not yet been concluded and canonised but rather continuously expanding. Thus, there may be room for other values deemed to be particularly crucial for the survival of those who live in those communities. Yet such values must be consistent with the already established values. It will be argued that individuals, not states, should be held criminally accountable for conduct that gravely violate the stated common interests. This is consistent with the established principles from the Nuremberg IMT's judgment which specify that 'crimes against international law are committed by men, not abstract entities, and only be punishing individuals who commit such crimes can the provisions of international law be enforced'.[119]

To this end, it will be argued that justice must not only be blind; it must also be seen to be blind both at the systemic level and at the level of individual cases.[120] In other words, as William Blackstone puts it, the law ought to have general application and should therefore be 'permanent, uniform and universal'.[121] It should not select particular individuals or groups for specific benefits or burdens based on external or extraneous characteristics.[122] Accordingly, the thesis will not endorse appeals to official capacity or superior orders as a defence against prosecution for individual conduct that gravely harms the collective interests of the international society. On this score, the thesis shares the view of the Nuremberg IMT that 'individuals have international duties which transcend national obligations of obedience imposed by the individual states.'[123]

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[119] 'Nuremberg Judgments, France & ors v Göring (Hermann) & ors, Judgments and Sentences' (1946) 41 *AJIL* 172, 221.
[120] See Larry May, *Global Justice and Due Process* (CUP 2011) 62
[121] William Blackstone, *Commentaries on the Laws of England* (Clarendon 1765) 44.
[122] See Martin Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Hart 2000) 79.
[123] Nuremberg Judgment (n 119) 221.

In sum, the thesis will contend that universal ends can and should be pursued and disseminated through multiple means. Municipal courts can provide one means. Global courts like the ICC or ICTY can provide another means. And future RCCs and hybrid courts can provide yet another means. Given the extreme harm inflicted on society and vulnerable peoples as a result of the perpetration of international crimes, the thesis argues in line with Justice Robert Jackson that international law cannot be 'so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that … war [will be made] impossible. It does expect that … juridical action will put the forces of international law, its precepts, its prohibitions and, most of all its sanctions, on the side of peace….'[124] It would be wrong to suppose that the tragedy imposed by international crimes is unrestrainable by law and justice just as it would be folly to imagine that the ICC alone can end this human tragedy in the long run.[125]

1.4 Thesis Structure

The thesis is organised as follows. Chapter 2 is a quest to establish a common identity of international criminal courts. At a time when the international sphere is crowded with an array of courts and the creation of regional criminal courts is being considered it is critical to ascertain the meaning of international tribunals. How does a court become an international criminal tribunal? Why have such courts been the subject of so much controversy? How do they gain or lose legitimacy? It will be argued that to be considered an international tribunal in a global sense of the term would require the satisfaction or possession of certain basic properties and that the attacks against international tribunals reveal the growing import of international criminal justice.

Chapter 3 investigates national prosecutions of international crimes from the angle of the legal foundations, the principal constraints, and the legislative obstructions

[124] Robert Jackson, *The Nuremberg Case* (Alfred Knopf 1971) 94.
[125] See Leila Sadat Wexler, 'The Proposed Permanent International Criminal Court: An Appraisal' (1996) *CORNELL INT'L LJ* 29(3) 665, 725.

involved in such trials. It will be argued that national courts command the most important and convenient jurisdiction for combatting international crimes and ending impunity. Nevertheless, given that national courts at times tend to be unable or unwilling to take decisive steps to ensure that justice achieved locally, it is sensible to have external international mechanisms capable of providing another path to justice when it is denied or defaced at home.

Chapter 4 examines the possibility of regional enforcement of ICL through regional criminal courts. Key evidence for and against admitting such a regime will be canvassed and closely analysed. Other potential means of bringing ICL closer to the regions will be assessed, including regional exercise of universal jurisdiction and the operation of ad hoc regional hybrid courts. Relevant events from the major regional human rights systems will be evaluated to highlight possibly comparable lights and shadows on the way towards regionalisation of ICrimJ.

Chapter 5 attempts to construct a hypothetical but systemic framework that could enhance the capacity and efficacy of the various ICrimJ strategies under review. By proposing a tripartite complementarity of national, regional and global criminal courts, it will be contended that conflicts of national interests and the likelihood of forum-shopping may pose certain challenges to the framework, yet a reimagination of the role and function of the ICC within a constructive complementarity model could ameliorate internal fragilities over the long term.

Chapter 6 wraps the thesis by reviewing its key findings, highlighting various forms of disconnect in the ideals and practice of ICL. It also underlines the central contributions of the study to the literature as well as the possible implications of applying its conclusions. Certain areas and questions for further investigation are pinpointed.

1.5 Conclusion

There are at least two apparent limitations of this thesis. The first pertains to the range of issues that it covers. By exploring the global criminal justice system, this study will be inevitably selective and thus will not engage all relevant cases with equal depth of analysis. It be might argue that this weakness could have been minimised by limiting our analysis to, perhaps, how the use of an RCC could impact ICL in a particular international region. This is a valid criticism, which has already been trialled by some in respect of the proposed African criminal court.[126] Nonetheless, the approach in this study is to evaluate the sensibleness and the challenges of creating RCCs in the first place as well as to establish, at least, on a normative basis how such a model, if adopted, can coordinated with other related courts in the ICrimJ arrangement.

Second, this thesis may be limited by what it excludes. Although certain aspects of hybrid criminal tribunals will be discussed in Chapters 2 and 4, the thesis will not engage extensively with this form of courts partly as that domain has already been well charted in the literature.[127] This is also because the RCC model being explored is not envisaged to be *ad hoc* or hybrid in nature but fully international. Moreover, while historical evidence will be used occasionally to explain or to contextualise relevant legal data and principles, there is no intent to assume a historical analysis of the objects under discuss. And, lastly, whereas the study will draw from a spectrum of cases, statutes, and scholarship from many linguistic areas and legal jurisdictions, unfortunately only texts written in English will be referenced throughout save where it is inevitable.

Overall, this thesis is optimistic about the future of ICL. In this sense, it does not share Jennings' startling cynicism that 'there is almost no machinery for the reform of public

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[126] *See*, for examples: Charles C Jalloh, Kamari M Clarke and Vincent O Nmehielle (eds.), *The African Court of Justice and Human and Peoples' Rights in Context* (CUP 2019); Gerhard Werle and Vormbaum Moritz (eds.), *African Criminal Court: A Commentary on the Malabo Protocol* (Asser Press 2017).

[127] For examples, see Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart 2012); Aaron Fichtelberg, *Hybrid Tribunals: A Comparative Examination* (Springer 2015).

international law; and there seems little prospect of such processes being achievable in the foreseeable future'.[128] While there may be small chance of the findings in this study ever being applied, the objective is to inspire debate and further research on ways to enhance ICL's purposes, including the prevention of international crimes and the ending of impunity for authors of such crimes. It is hoped that research of this sort may inform policy and ultimately contribute to shaping the course of international law.

Yet the thesis strives to strike the right balance, as Bederman puts it, 'between foolish utopianism and grim realism.'[129] It could amount to 'foolish utopianism' to imagine that installing regional ICrimJ systems would end impunity or cure all the ills plaguing ICrimJ.[130] But it is crucial to seek credible ways of confronting the grim realism of 'gaping holes and weaknesses'[131] in the status quo. A balanced approach is what this study is about. It is a rigorous search linked to the binding sources of law for a balance between idealism and realism, common values and ideological neutrality, apology and utopia.[132] As James Brierly warns: '[e]xtremes are always wrong: the truth lies in the golden middle way. The correct attitude must be equidistant from utopia, from superficial optimism and overestimation and from cynical minimizing; neither overestimation, nor underestimation: International law is "neither a panacea nor a myth".'[133]

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[128] Robert Y Jennings, 'International Law Reform and Progressive Development' in Gerhard Hafner (ed.), *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (Kluwer Law International 1998) 325.

[129] Bederman (n 45) 62. See also Payam Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism' (2009) *HRQ* 31(3): 624.

[130] Compare Michael W Reisman, 'International Law After the Cold War' (1990) 84 *AJIL* 859, 866 [criticising legal eschatologists who, at the turn of this millennium, had believed that all laws and legal problems would be ended with the arrival of the messiah.]

[131] See Bederman (n 45) 62.

[132] See Bruno Simma & A L Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *AJIL* 302, 302.

[133] James L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (4th edn, Clarendon Press 1949) v. See also Josef L Kunz, 'The Swing of the Pendulum: From Overestimation to Underestimation of International Law' (1950) 44 *AJIL* 135, 140.

Chapter Two

International Criminal Courts in the Pursuit of Justice, Identity and Compliance

2.1 Introduction

The question 'what is an international criminal court?' can be compared to the question 'what is man?'. The first is a jurisprudential enquiry while the second is a fundamental existential and anthropological query. It is a philosophical truism that we cannot cure the basic ills of man until we have grasped the basic meaning of man, the human nature. In like vein, to be able to diagnose, dissect, and resolve the central problems and infirmities in the global criminal justice system, it is imperative first to comprehend the essence or identity of the principal mechanism that propels the justice system in the international sphere, namely international criminal courts. Thus, we need to understand what makes a court an international criminal tribunal. Is there a difference in law and/or in practice between the Special Tribunal for Lebanon and the International Criminal Court or between the latter and the US Supreme Court? Does possessing an international character engender or enhance the legitimacy of a criminal court, its general pull towards compliance?[1] Is adjudicatory neutrality or judicial independence relevant to the credibility of international tribunals? Why are such tribunals authorised to apply only a limited set of laws in the pursuit of global justice?

These are fundamental jurisprudential questions that are frequently subject to fundamental divergences. At the heart of these questions one is wont to discover the essence and identity of an international criminal tribunal. It will be argued that international tribunals are a complex set of judicial institutions that are typically established by treaty and that do not form part of the judicial system of any single state. As Cesare Romano notes, they also have the capacity to issue binding judgments,

[1] See Thomas M Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 24.

are guided by procedural rules, and ordinarily have a permanent jurisdiction.[2] Yet, these properties are neither absolute nor wholly exclusive to international criminal courts. Despite its importance, for instance, permanence is not a crowning property of international courts and tribunals. As will be seen later, a court like the International Criminal Tribunal for the former Yugoslavia (ICTR) retained only a provisional jurisdiction whereas a rival court like the Permanent Court of International Justice (PCIJ) that once held a 'permanent' jurisdiction has since become defunct.[3]

Attempting to aptly characterise international criminal courts thus is a puzzling undertaking as there exists no simple or global definition. But the aim in this chapter is a modest one. It seeks to sketch a taxonomy of common properties that help to clarify the meaning and identity of international tribunals. 'A definition is useful,' Philip Jessup remarks, 'only to the extent to which it records an accurate observation, whether of natural phenomena, literary usage, or social conduct.'[4] To be able to record an accurate observation of the courts in view, this chapter will draw not just from the statutes and jurisprudence of relevant courts, but also from the existing scholarship as well as from views critical of international criminal law (ICL). A careful analysis of the major themes explored in this chapter will enable us to assess in the subsequent chapters whether there exists a genuine need for a reform or a reimagination of the global justice system.

2.2 What Is an International Criminal Court?

Put simply, an international criminal court is a principal court that is typically set up to bring major perpetrators of serious international crimes to justice either concurrently or in complementarity with states having the relevant jurisdiction. This simple definition needs unpacking. Composing a common profile of international tribunals would engage such issues as the legal basis upon which they are established; the type of law they

[2] Cesare PR Romano, 'The Proliferation of International Judicial Bodies: The Piece of the Puzzle' (1998) 31 *NYU JIL & POL* 709, 711-18.
[3] The PCIJ, the judicial arm of the League of Nations, was established in 1920 and dissolved in 1946. The League of Nations and the PCIJ were succeeded by the United Nations and the ICJ respectively.
[4] Philip C Jessup, *A Modern Law of Nations* (Macmillan 1948) 4.

enforce; and how their judges are selected. It should be noted that the terms 'international criminal courts and tribunals' as used in this chapter will not encompass the so-called internationalised or hybrid tribunals. The latter courts, widely studied in the literature,[5] will be lightly engaged here and succinctly revisited in Chapter 4. In contrast to the hybrid courts, as Kevin Jon Heller aptly notes, there have been limited scholarly elaboration of the identity of international tribunals.[6] This probably explains why such tribunals tend to be conflated with the internationalised variants[7] and why the right characterisation of the Tokyo IMT is still being contested.[8]

Robert Woetzel's 'Nuremberg Trials' is a groundbreaking attempt to sketch the identity and attributes of an international tribunal.[9] Sarah Williams has recently made similar distinctions in relation to the internationalised tribunals.[10] While Woetzel's early effort is commendable, certain parts of his analysis appear to be at odds with current developments in international law. Leveraging upon Woetzel's schema, this chapter will contend that the defining indicia of international tribunals include the following: (i) constitutional legality, (ii) supra-nationality, (iii) adjudicatory neutrality, (iv) international legitimacy, and (v) material jurisdiction. Whereas these attributes may be

[5] A few recent study of hybrid or internationalised criminal courts include: Sarah Nouwen, '"Hybrid Courts": The hybrid category of a new type of international crimes courts' (2006) *UTRECHT LR* 2(2): 190; Luigi Condorelli and Théo Boutruche, 'Internationalized Crimes Court: Are they necessary?' in Cesare P R Romano, André Nollkaemper and Jann K Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (OUP 2004) 428; Laura Dickinson, 'The Relationship between Hybrid Courts and International Courts: The Case of Kosovo' (2003) *NELR* 37(4): 1059.

[6] See Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP 2011) 110. More studies have been done on the attributes of successful international courts. For instance, Helfer and Slaughter argue that such courts are characterised by their independence; their judicial mix of senior, respected jurists holding substantial terms; their decisions are binding; they decide cases on the basis of principle rather than power; they have fact-finding capacity; and engage in high-level reasoning. See Laurence R Helfer & Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *YALE LJ* 273, 300-304.

[7] Schabas remarks that the distinction between the ICTY and the SCSL is sometimes blurred or simply reduced to mere nomenclature. See William A Schabas, 'The Special Tribunal for Lebanon: Is A "Tribunal of An International Character" Equivalent to an "International Criminal Court"?' (2008) 21 *LJIL* 513, 514.

[8] See Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (OUP 2008) 5-6 [arguing that the Tokyo IMT should be viewed as an internationalised instead of an international military tribunal.]

[9] Robert K Woetzel, *The Nuremberg Trials in International Law* (Stevens & Sons 1962).

[10] Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart 2012).

crucial as to the identity and operation of these tribunals, they are not exhaustive. In addition, as will be seen shortly, some of the stated properties are subject to controversy and ambiguity. We will now examine in turn how each of these factors contribute to the identity of international tribunals. Relevant sections of this discussion will be illustrated by events from a number of international and hybrid tribunals.

2.2.1 Constitutional Legality

The constitutional legality of an international criminal court simply refers to its legal basis. It indicates whether or not the court was validly established. In contrast to a municipal court, which is a creature of the relevant national system, an international court must have an international legal basis. On this account, international criminal tribunals can be validly created in two chief ways: (i) by an international treaty; (ii) via a decision of an international council.[11] In William Schabas's view, by inspecting how a given court was created it would be possible to ascertain whether it is a national, an international, or an internationalised court.[12] The first material test, he argues, 'should be whether the tribunal can be dissolved only by the law of a single country.'[13] A positive response indicates the court's national status. Conversely, a negative response indicates that they court may be either an international or an internationalised tribunal.

With respect to internationalised tribunals, according to Williams, scholars tend to refer to such courts without even defining them or by generalisations based on patterns of similarities noticed in related courts. But she counters this approach by outlining essential issues relevant to the identity of an internationalised tribunal. These include: 'whether the institution performs a criminal function; the duration of the tribunal; the participation of international personnel; the location of the tribunal; the involvement of the international community, in particular the United Nations; the funding mechanism

[11] See Woetzel (n 9) 41; William A Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 5.
[12] Alexander Zahar and Göran Sluiter make a similar point, but sadly chose to pin it under a footnote. See Zahar and Sluiter (n 8) 12 (footnote).
[13] William A Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (OUP 2012) 19.

of the tribunal; and the jurisdiction of the tribunal (temporal, territorial, personal and material).'[14] Whereas some of these features are also true of international tribunals, the crucial test is whether or not a tribunal was created by a valid international treaty.

As noted earlier, Woetzel enumerated a number of key features of an international criminal court. According to his study,[15] a tribunal is international if it: (i) 'applied international law and judged international crimes'; (ii) 'is based on powers of occupation under international law'; (iii) 'derived its authority from a treaty or decision of an international council'; (iv) conducts trials and hands down judgment led by 'representatives of several nations'; (v) has basis 'in principles of natural law';[16] and (vi) 'is one with powers to declare principles of international law,' that is, 'with the consent and approval of the international community'.[17] Some of these factors, like (ii), were ostensibly informed by the WWII context of his study, but might today seem outmoded and inconsistent with the UN Charter and so will not be treated in this thesis.[18]

The third property in Woetzel's outline underscores the two basic modes by which international tribunals can be validly established. The next section will explain how an international tribunal's legal basis flows from a treaty validly made. In like vein, the subsequent section will consider how an international tribunal can be validly created pursuant to a resolution of a legitimate international council such as the Security

[14] Williams (n 10) 201-2. See also Robert Cryer, Darryl Robinson, and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn, CUP 2019) 173.
[15] Woetzel (n 9) 41-49.
[16] Although Woetzel rejects this quality as 'extremely speculative and abstract,' it seems today to constitute part of the international legitimacy of international tribunals. See Woetzel (n 9) 46.
[17] This is perhaps Woetzel's most controversial distinction, with scholars like Bantekas and Nash in agreement with Woetzel while others like Astrid Kjelgaard-Pederson are in opposition. See Ilias Bantekas and Susan Nash, *International Criminal Law* (3rd edn, Routledge 2007) 505-506; Astrid Kjeldgaard-Pederson, 'What defines an international criminal court? A critical assessment of the "involvement of the international community" as a deciding factor' (2015) *LJIL* 28(1): 113.
[18] While international humanitarian law permits an occupying force to enact legislative measures to restore and ensure public order and safety, the fact that a court was established by an occupying force does not make that court an international tribunal *per se*. There is still no consensus as to the legal status of the Iraqi Special Tribunal that was created by the Coalition Provisional Authority in the wake of the US 'invasion' of Iraq in 2003. See Ilias Bantekas, 'The Iraqi Special Tribunal for Crimes Against Humanity' (2005) *ICLQ* 54(1): 237; Edmund H Schwenk, 'Legislative Power of the Military Occupant Under Article 43, Hague Regulations' (1945) 54 *YALE LJ* 393.

Council, the Council of Europe, or the African Union. These analyses will be important in relation to tackling questions regarding the legality validity of certain international tribunals. They will also help to foreground the later discussion in Chapter 4 concerning the legal basis sustaining the creation of future regional criminal courts.

2.2.1.1 Multilateral Treaty-Based Tribunals

The traditional and most authoritative way that international criminal courts are created and authorised is by means of a multilateral treaty.[19] The latter signifies an 'agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.[20] By means of a treaty the contracting states are able to specify and record their joint intent, which once ratified, binds the parties under international law. With treaties, explains Georg Schwarzenberger, states may elect to create 'new branches of international law with principles and standards of their own.'[21] What matters is that states have done what they intended to do via the treaty.[22]

For Woetzel, it is not enough that states agree by treaty to establish a tribunal. The latter 'would be indisputably international only in so far as the contracting members are affected by it, within their respective spheres of jurisdiction.'[23] Yet, questions may arise regarding the tribunal's legality if the contracting parties lacked the authority *ab initio* to enter into a valid treaty under international law.[24] One scenario in this respect

[19] See UNSC, Report of the Secretary General Pursuant to ¶ 2 of S. C Res 808 (S 25704, May 1993) ¶ 19; Christopher L Blakesley, 'Jurisdiction, Definition of Crimes and Triggering Mechanism' (1997) *Denver Journal of International Law & Policy 25*(2): 233, 236.
[20] Vienna Convention on the Law of Treaties (23 May 1969) art. 2(1)(a).
[21] Georg Schwarzenberger, 'The Problem of an International Criminal Law' (1950) *CLP* 263, 283.
[22] ibid.
[23] Woetzel (n 9) 43.
[24] Under the Vienna formula, an entity may be entitled to ratify treaties open to all states where that entity is a UN member state, a UN specialised agency, or a party to the ICJ Statute. However, there are instances where non-sovereign states or non-traditional subjects of international law had entered into valid international treaties. These include: New Zealand, India, Canada, Australia and South Africa, which though not sovereign at the time were signatories to the Treaty of Versailles and the Kellogg-Briand Pact. See Treaty Providing for the Renunciation of War as an Instrument of National Policy, 27 August

may be that the contracting parties are not recognised as sovereign states under international law. To illustrate, a tribunal jointly created by such entities as the Republic of Abkhazia, South Ossetia, Transnistria, and Somaliland that lack sovereign status at present would likely be devoid of international legitimacy.[25] Their lack of sovereign status means that a treaty may be unable to enable them to jointly exercise powers that they are unable to wield individually under international law.[26]

Note, however, that establishing tribunals by means of treaties is not an inter-state preserve under international law. An international council also may lawfully establish an international court provided it is properly mandated to do so. In the *Effect of Awards of Compensation* case,[27] a similar point was considered by the ICJ. The case concerned whether the General Assembly was authorised under the UN Charter to establish the United Nations Administrative Tribunal. The advisory opinion of the World Court is that this was the case thereby affirming the tribunal's legality and the binding nature of its judgments on the GA.[28] How about the tribunals established by international councils?

2.2.1.2 International Council Authorised Tribunals

Tribunals established pursuant to the decision of an international council of states or its organs may ordinarily possess constitutional legality provided their creation is authorised by a primary treaty or in a bilateral treaty with an international legal person. As to the United Nations, for instance, Christopher Blakesley has specified three ways in which a tribunal can be validly formed: (i) by the UNSC pursuant to its authority under Chapter VII of the UN Charter; (ii) by the UNGA pursuant to its authority alone under Article 22 of the UN Charter or together with that of the UNSC (per Chapter VII); and

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1928, 94 LNTS 57; UKTS (1929) 29, 206. See also Scott P Sheeran, 'International Law, Peace Agreement and Self-Determination: The Case of Sudan' (2011) *ICLQ* 60(2): 423, 431.

[25] On account of Palestine's unresolved status, the ICC felt unable to accept its declaration to join the court in 2009, but the ICC's stance has since softened after the non-binding UNGA resolution of 2012 to accord Palestine a UN non-member observer State status. See UNGA Res. 11317 (29 November 2012).

[26] The IMT judges used like reasoning to justify the Allied Powers' right to create the IMT. See *France et al v Goring et al* (1946) 22 IMT 203, 13 ILR 203. In 'Judgment' (Jan 1947) *AJIL* 41(1): 172, 216.

[27] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (1954) ICJ Rep 47

[28] Take note that the ICJ's ruling is not about whether the UNGA could validly establish a tribunal by means of a resolution but rather whether the terms of the UN Charter authorise the UNGA to do so.

(iii) through a UN Charter amendment that explicitly calls for a particular tribunal to be created.[29] Depending on the terms of their respective constitutional charters, parallel international councils like the Council of Europe,[30] the Organisation of American States,[31] and the African Union[32] also may lawfully create international tribunals.

A. Tribunals with Legal Bases on a Primary Multilateral Treaty

Not long ago, the ICTY and the ICTR were created following separate decisions taken by the UNSC as approved under Chapter VII.[33] Both tribunals are considered constitutionally valid and international in status because the UNSC resolutions that established them were adopted in accordance with the provisions contained in a primary international treaty, the UN Charter, even though the resolutions themselves constitute secondary international legislation.[34] Moreover, in the *Tadić* appeal case, the ICTY Appeals Chamber held that the UNSC resolutions establishing the ICTY and the ICTR along with their annexed Statutes could be likened to international treaties.[35] In *Milošević* also an ICTY Trial Chamber held that the tribunal's Statute may be 'interpreted as a treaty'.[36]

B. Tribunals with Legal Bases on Bilateral Treaties

Occasionally, individual states may contract with an international council to create a tribunal as evidenced in the UNSC's 14 August 2000 bilateral treaty with the Government of Sierra Leone, which gave birth to the Special Court for Sierra Leone

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[29] Christopher L Blakesley, 'Jurisdiction, Definition of Crimes and Triggering Mechanism' (1997) *Denver Journal of International Law & Policy 25*(2): 233, 236.
[30] Established the European Court of Human Rights.
[31] Established the Inter-American Court of Human Rights.
[32] Succeeded the Organisation of African Unity which had created the African Court of Human and Peoples' Rights.
[33] See William A Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 48.
[34] Antonio Cassese, *International Criminal Law* (OUP 2003) 26.
[35] *Prosecutor v Tadić* (Appeal) (Decision on the defence motion for Interlocutory Appeal on Jurisdiction) (case no. IT-94-1-AR72) §§71-93; and *Prosecutor v Tadić* (Appeal), ICTY Appeals Chamber, judgment of 15 July 1999, (case no. IT-94-1-A) §§ 282-6 and 287-305.
[36] *Prosecutor v Slobodan Milošević (Decision on Preliminary Motions)*, ICTY Trial Chamber III, Decision of 8 November 2001 (case no. IT-99-37-PT) § 47.

(SCSL).[37] Another model is the bilateral treaty between the African Union and the Government of Senegal that authorised the creation of the Extraordinary African Chambers in Senegal.[38] Tribunals established in this manner are more accurately designated as hybrid or internationalised tribunals owing to their generally mixed character including in terms of the applicable laws and the judicial personnel.[39] The great merit of this type of arrangement, as Frédérick Mégret writes, is that such mixed tribunals

> deal with the artificial distinction between the domestic and the international by simply collapsing it. … Hybrid tribunals can be seen as sophisticated attempts at striking the best possible balance between the competing pulls of sovereignty and universalism in a way that maximizes the "representational" function of international criminal justice.[40]

As noted previously, hybrid tribunals are often hard to characterize as each tends to adopt 'its own idiosyncratic amalgam' of domestic law, international law, criminal procedure, and personnel.[41] As products of political negotiations between a state and an international council, hybrid tribunals can be dismantled or disrupted by adverse local legislation.[42] This is a major distinction between internationalised tribunals and fully international tribunals as the latter cannot be dismantled by a unilateral action by any one of its contracting parties. Also, unlike international tribunals, hybrid tribunals are usually located on the territory of the requesting state and, as such, they tend to

[37] UNSC Res. 1315 (2000). See also UN Secretary General, 'Letter Dated 6 March 2002 from the Secretary-General Addressed to the President of the Security Council,' UN Doc. S/2002/246 (8 March 2002) (containing in App. II the January 2002 agreement between the United Nations and the Government of Sierra Leone).
[38] See Agreement on the Establishment of the Extraordinary African Chambers Within the Senegalese Judicial System Between the Government of the Republic of Senegal and the African Union, 22 August 2012, 52 *ILM* 1024 (2013). See also Reed Brody, 'Bringing a Dictator to Justice: The Case of Hissène Habré' (2015) *JICJ* 13(2): 209.
[39] Sarah Williams has noted that there is no global definition of hybrid tribunals: Williams (n 10) 252.
[40] Frédérick Mégret, 'In Defence of Hybridity: Towards a Representational Theory of International Criminal Justice' (2005) *CORNELL INT'L LJ* 38(3): 725, 747.
[41] See Richard Ashby Wilson, *Writing History in International Criminal Trials* (CUP 2011) 31.
[42] See further discussion on hybrid tribunals in Chapter 4.

lack another key property of international tribunals: supranational jurisdiction, to which we turn next.

2.2.3 Supranational Jurisdiction

Another defining character of international tribunals is their supranational jurisdiction. What does this mean? Supranational jurisdiction simply indicates that international tribunals are generally free-standing courts that are not part of a single legal system or subject to the jurisdiction or authority of any particular state.[43] This quality is crucial as it enables international criminal courts to maintain a certain degree of 'judicial' distance and independence from the contracting parties. As will be seen shortly, it also helps to minimise the chances of political interference in international judicial proceedings. This point was highlighted during negotiations in the UNSC regarding the structure and statute of the ICTR when a New Zealand delegate clearly stated that there could be no support for suggestions seeking to alter the tribunal's international character so as to subordinate it to the jurisdiction of the State of Rwanda.[44]

Supranational jurisdiction imbues an international tribunal with a *sui generis* character,[45] which sets it apart from the political authority, laws and judicial systems of its states parties and underlines its 'uniqueness and difference'.[46] This was confirmed by the appeals chamber of the Special Tribunal for Lebanon (STL) thus: an international tribunal 'constitutes a self-contained unit'[47] that is unattached to any existing domestic system although it may draw best practices and principles from differing legal and

[43] See Larry May and Shannon Fyfe, *International Criminal Tribunals: A Normative Defense* (CUP 2017) 9.
[44] See UNSC Verbatim Record (8 November 1994) UN Doc S/PV 3453 at 4-6. See also Patricia McNerney, 'The International Criminal Court: Issues for Consideration by the United States Senate' (2001) 64 *L&CP* 181.
[45] Henry Campbell Black, *Black's Law Dictionary* (6th edn, West Publishing Co, 1990) 1434.
[46] John Borrows and Leonard I Rotman, 'The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?' (1997) *ALBERTA LR* 36(1): 9, 10.
[47] *Decision on Appeal of pre-trial Judge's Order Regarding Jurisdiction and Standing*, STL Appeals Chamber, 10 November 2010, CH/AC/ 2010/02, para 41 [emphasis in the original].

judicial systems.[48] Likewise, in the *Blaškić* case, it was held that the ICTY is 'a *sui generis* institution with its own rules of procedure' not a mere transposition of legal systems.[49]

But note that supranational jurisdiction is not coterminous with universal jurisdiction. As will be argued in Chapter 3, universal jurisdiction refers to a court's authority to admit relevant situations or cases occurring anywhere in the world. No international tribunal currently enjoys universal jurisdiction. It also does not imply the superiority of an international tribunal over municipal courts. The pertinent question could be whether supra-nationality is compatible with primacy or concurrency of jurisdiction relative to national courts. A related issue is whether, or better still the extent to which, supranational jurisdiction entitles an international tribunal to consider situations occurring in the territory of third states. These questions highlight some of the enduring challenges to the credibility of international tribunals. The first question will be addressed by examining the supranational jurisdiction of the ICTY and the ICTR. To attempt the second question, the supranational character of the ICC will be evaluated.

2.2.3.1 Jurisdictional Priority Controversy: The ICTY and the ICTR in Focus

Does supranational jurisdiction imply an automatic primacy of jurisdiction of international tribunals over the relevant municipal courts? In other words, are national courts of the relevant states required to surrender jurisdiction over particular cases within the jurisdiction of an international tribunal if requested to do so by the tribunal? Similar questions were raised in the context of the ICTY and ICTR's at times tense interactions with national courts in the former Yugoslavia and Rwanda respectively. To some, jurisdictional primacy coupled with the practice of concurrent jurisdiction appeared to suggest a resigning of sovereignty to an external entity: a complex situation which ultimately helped to precipitate a preference for the complementarity

[48] Wilson (40) 24.

[49] ICTY press release, 'Blaškić Case: Defense Objection to the Admission of Hearsay Is Rejected' (The Hague, 23 January 1998), CC/PIO/286-E <www.icty.org/en/press/blaskic-case-defence-objection-admission-hearsay-rejected> Accessed 12 March 2019. See also: *Prosecutor v Blaškić*, IT-95-14.

principle during the Rome Conference negotiations for the ICC.[50] The experiences of the ICTY and ICTR will help us to evaluate the issues concerning jurisdictional primacy.

The modern incarnation of international criminal law arguably began around the mid-1940s with the creation of the post-WWII tribunals.[51] But the use of international tribunals as a system for tackling international crimes was intensified in the decade from 1990 to 2000. The early 1990s witnessed the collapse of communist regimes across Eastern Europe, the disintegration of the USSR, and the end of the Cold War. This new state of affairs boosted the level of international cooperation required for launching a new era of ICrimJ.[52] In response to the atrocities committed in the former Yugoslavia and in Rwanda during the early 1990s, the UNSC approved Res 827 in May 1993[53] and Res 955 in November 1994,[54] which created the ICTY and the ICTR respectively.[55]

Whereas the ICTY was based in The Hague, its ICTR counterpart had its seat in Arusha, Tanzania. Each tribunal had three trial chambers composed of a mix of permanent and *ad litem* judges.[56] However, both tribunals shared the same appeals chamber led by five permanent judges.[57] Both also had the same chief prosecutor until 2003 when the UNSC appointed a separate prosecutor for each tribunal.[58] Importantly, each tribunal had geographical jurisdiction that extended beyond the *locus delicti commissi* in the affected states. The ICTY's jurisdiction stretched across all the new states that

[50] See Hans-Peter Kaul and Eleni Chaitidou, 'Balancing Individual and Community Interests: Reflections on the International Criminal Court' in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine Von Schorlemer, and Christoph Vedder (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) 980.
[51] Jonathan Hafetz, *Punishing Through a Fair Trial: International Criminal Law from Nuremberg to the Age of Global Terrorism* (CUP 2018) 2.
[52] ibid 27.
[53] UNSC Res 827 (25 May 1993).
[54] UNSC Res 955 (8 November 1994). See also The Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, 33 ILM 1602.
[55] And to cap it all, the Rome Statute of the ICC was adopted on 17 July 1998. More on this later.
[56] ICTR Statute, art. 11(2); and ICTY Statute, art. 12(2). Each trial chamber was required to have, for each case, a maximum of three permanent judges and a maximum of six *ad litem* judges.
[57] ICTR Statute, art. 13(4); and ICTY, arts. 14(4) and 12(3).
[58] See UNSC Res. 1503, UN Doc. S/RES/1503 (28 August 2003).

composed the former Yugoslavia.[59] Likewise, under Articles 1 and 8 of the ICTR Statute, the ICTR had power to investigate alleged atrocities committed by Rwandan suspects in the states neighbouring Rwanda.[60]

Remarkably for our purposes both tribunals held the right to request the municipal courts to defer to their special jurisdiction over particular cases. On this note, Article 9(2) of the ICTY Statute specifies: 'The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute…'. A parallel provision is enshrined under Article 8(2) of the ICTR Statute. In addition, both tribunals possessed concurrent jurisdictions with the relevant national courts as regards their subject-matter jurisdiction.[61]

It is unsurprising therefore that the supra-nationality and the jurisdictional primacy of the ICTY and the ICTR have provoked intense debate over the lawfulness of such arrangements. For Richard Goldstone, the first chief prosecutor of both tribunals, the debate is essentially spurred by the novelty of this ICL enforcement model.[62] It highlights the fact that both tribunals were 'an experimental approach' at setting up international tribunals given that previously 'international lawyers and political leaders thought that only treaties could achieve international justice.'[63] Colin Warbrick adds that the debate reflects the fact that few had reckoned the UNSC would ever exercise its Chapter VII powers in such manner.[64]

[59] ICTY Statute, arts. 1 & 8.
[60] The ICTR's jurisdiction extended to atrocities committed in the DRC, Uganda, Burundi, and Tanzania.
[61] See ICTY Statute, art. 9(1); and ICTR Statute, art. 8(1).
[62] Richard J Goldstone, 'Obstacles in International Justice' (25 April 2009) *HIR* 1.
[63] Ibid.
[64] Colin Warbrick, 'International Criminal Law' (1995) *ICLQ* 44(2): 466, 472.

In *Tadić,* however, the defence argued that the UNSC lacks the powers to confer the ICTY with such supranational jurisdictional primacy.[65] The defence further rejected a suggestion that the 'measures not involving the use of armed force' as specified under Article 41 of the UN Charter served as a strong constitutional basis for the UNSC to install the ICTY. 'It is clear,' the defence maintained, 'that the establishment of a war crimes tribunal was never intended. The examples mentioned in this article [41] focus upon economic and political measures and do not in any way suggest judicial measures.'[66]

In response to these criticisms, the ICTY's Appeals Chamber (AC) separated the defence's challenge on the legality of the tribunal from that on the issue of tribunal's primacy over the domestic courts of the former Yugoslavia. With respect to the legality challenge, the AC held that it was futile to inquire whether the tribunal 'was pre-established or established for a specific purpose or situation'. The pertinent question rather should be whether it was 'set up by a competent organ in keeping with the relevant legal procedures … [and] observes the requirements of procedural fairness'.[67] Accordingly, the AC ruled that the ICTY was lawfully created in accordance with the powers of the UNSC under Charter VII of the UN Charter. It further held that the tribunal's creation conformed with international guarantees of fairness, justice, neutrality and human rights standards.[68] Besides, the measures outlined in Article 41 of

[65] See *Prosecutor v Duško Tadić*, Decision of 2 October 1995 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), ICTY Appeals Chamber, Case No. IT-94-1-ar72, 35 ILM 32 (1996) para 34.
[66] Ibid.
[67] ibid para 45. For a similar justification of the legality of the SCSL, see: *Prosecutor v Morris Kallon, Sam Hinga Norman, and Brima Bazzy Kamara*, SCSL AC (13 March 2004), Decision on Constitutionality and Lack of Jurisdiction, paras 47-58; *Prosecutor v Taylor*, SCSL, Decision on Immunity from Jurisdiction (31 May 2004) paras 37-42. [Note that under the emerging doctrine of *la compétence de la compétence*, international courts tend to assert the competence to determine their own jurisdiction over individual cases/situations. As to the ICC, for instance, Article 19(1) of the Rome Statute states: 'The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.' See also Malgosia Fitzmaurice and Elias Olufemi, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing 2005) 285.]
[68] *Tadić* (n 56) para. 45.

the UN Charter, the AC stated, are merely illustrative and should be read to imply that all specified measures exclude the use of force.[69]

Regarding the ICTY's supranational jurisdictional primacy, the AC argued that the seriousness of the crimes committed justifies such exceptional powers as the crimes 'do not affect the interests of one State alone but shock the conscience of mankind'.[70] Moreover, '[i]t would be a travesty of law and a betrayal of the universal need for justice,' the Appeals Chamber upheld, 'should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.'[71]

The Appeals Chamber's decision thus endorsed an earlier verdict of the Trial Chamber on the same subject. The latter chamber had adjudged that the ICTY's jurisdiction had been 'unconditionally accepted' by Bosnia and Herzegovina on whose territory the atrocities occurred as well as by the Federal Republic of Germany, where the accused had been residing at the time of his arrest. The Trial Chamber had also argued that it would be wrong to permit the accused to 'claim the rights that have been specifically waved by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to principles relating to coercive criminal jurisdiction.'[72]

In sum, this concise review has shown that supranational jurisdictional primacy is a contentious subject. It is not an automatic attribute of international tribunals. It has to be clearly stipulated by the founding treaty or international council. Not all international tribunals exercise jurisdictional primacy. In fact, such a power is rarely provided with the ICTY and ICTR being among the few exceptions. In light of

[69] Ibid, para 35.
[70] Ibid, para 57.
[71] Ibid, para 58.
[72] Ibid 50.

sovereignty concerns and the political calculations often apparent in UNSC's decisions, controversy will persist as to whether, and when, such UNSC-backed tribunals should be created. To an extent, as Payam Akhavan argues, both tribunals have provided 'a unique empirical basis for evaluating the impact of international criminal justice on post-conflict peace building.'[73] Yet the growing influence of the ICC today suggests that going forward the scale may tilt more towards multilateral treaty-based accountability models than those imposed by the fiat of international councils like the UNSC.[74]

2.2.3.2 Supranational Jurisdiction and Third States: The ICC's Dilemma

Another important question to consider is whether an international tribunal's supranational jurisdiction involves the right of judicial intervention in the territories of third states. This question is particularly imperative in light of debates trailing the ICC's operations in Africa[75] amid accusations that the ICC is a contraption used by powerful states to hound officials of weaker ones.[76] Jianping and Zhixiang have observed that similar concerns remain among the reasons certain major states like China and India have chosen to shun the ICC.[77] Nevertheless, it will be shown that the extent to which the ICC and related treaty-based international tribunals can 'intervene' in either the territories of its states parties or those of third states is often strictly limited by treaty.

Once described as 'the jewel in the crown' of international criminal justice[78] and lauded as 'a gift of hope to future generations,'[79] the permanent ICC became operative on 1

[73] Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) *AJIL* 95(1): 7.
[74] See Mia Swart and Karen Krisch, 'Irreconcilable Differences? An Analysis of the Standoff between the African Union and the International Criminal Court' (2014) *AJICJ* 1(1): 38, 39.
[75] For analysis of the key issues around the AU-ICC impasse, see Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds.)., *Africa and the International Criminal Court* Vol 1 (Asser Press 2014).
[76] These accusations dominate explanations of the strained relations between the ICC and the AU. See Ovo Imoedemhe, 'Unpacking the tension between the African Union and the International Criminal Court: the way forward' (2015) *AFR J INT'L & CRIM L* 23(1): 74; Lydia A Nkansah, 'International Criminal Court in the Trenches of Africa' (2014) *AJICJ* 1(1): 8.
[77] See Lu Jianping and Wang Zhixiang, 'China's Attitude Towards the ICC' (2005) *JICJ* 3(3): 608. See also Dan Zhu, 'China, Crimes Against Humanity and the International Criminal Court' (2018) *JICJ* 16(5): 1021.
[78] Christopher Stephen, 'International criminal law: wielding the sword of universal criminal justice?' (2012) *ICLQ* 61(1): 55, 73.

July 2002, the date of entry into force of the Rome Statute. It has four main organs: (i) the Presidency; (ii) the judicial chambers (including Appeals, Trial, and Pre-Trial Divisions); (iii) the Office of the Prosecutor; and (iv) the Registry.[80] The court's triple chambers are served by at least 18 full-time judges,[81] allocated as follows: at least six judges work in the Pre-Trial and the Trial Divisions respectively while four judges including the court President preside over the Appeals Division.[82]

Although the ICC enjoys a widespread geographical jurisdiction, it lacks a formal universal jurisdiction. As of January 2020, 139 states have signed the Rome Statute while a total of 123 states have formally ratified the treaty or acceded to the ICC out of a possible 193 member states of the United Nations. One outcome of the ICC's lack of universal jurisdiction is that the court may be unable, save under special conditions discussed shortly, to intervene in all situations where its subject-matter jurisdiction is engaged.[83] Hence, despite its broad global reach and judicial gravitas, the ICC is not a World Criminal Court. As will be seen presently, its jurisdiction is carefully curtailed.[84]

2.2.3.2.1 The ICC's Triggering Mechanisms

A robust basis for the ICC's supranational jurisdiction can be located in its triple triggering formula.[85] Unlike the ICTY and the ICTR, whose ad hoc jurisdictions were pre-

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[79] See Kofi Annan, 'Preface' in Roy S Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer 1999) ix; Press Release L/2890, 'Secretary-General Says Establishment of International Criminal Court Is Major Step in March Towards Universal Human Rights, Rule of Law', (*United Nations* 20 July 1998). <www.un.org/press/en/1998/19980720.12890.html> Accessed 6 March 2019.

[80] Rome Statute of the ICC, 2187 UNTS 90, (17 July 1998) art. 34.

[81] Ibid, art. 36(1).

[82] Ibid, art. 39(1). [Note that under Article 39(2) of the Rome Statute a select number of judges must be present to hear cases in the following courts: Pre-Trial Chamber – 1-3; Trial Chamber – 3; and Appeals Chamber – 5. Also, the number of Pre-Trial or Trial Chambers could be increased together with the number of judges whenever 'the efficient management of the Court's workload requires.']

[83] Over a third of UN member states are not ICC's states parties.

[84] Article 12(2) of the Rome Statute specifies two core preconditions to the exercise of jurisdiction: (a) 'The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;' (b) 'The State of which the person accused of the crime is a national'.

[85] See generally, Mahnoush H Arsanjani, 'Reflections on the Jurisdiction and Trigger-Mechanism of the International Criminal Court' in Herman A M von Hebel, Johan G Lammers and Jolien Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (Asser Press 1999) 65-66.

set and locked into their statutes and whose criminal jurisdictions were triggered by the UNSC resolutions that established them, the ICC's jurisdiction is broad and its objects are not pre-determined.[86] In contrast to its ad hoc counterparts, the ICC's jurisdiction can be triggered in three ways: (i) state-party referral,[87] (ii) UNSC referral,[88] and (iii) OTP's *proprio motu*.[89] Let us examine the function and the faults of each of these methods.

A. State-Party Referral System

How to activate the ICC's jurisdiction proved deeply contentious at the Rome Statute negotiations. In its draft proposal to the UNGA in 1994, the International Law Commission (ILC) recommended two ways of triggering the court's jurisdiction, namely: (i) a UNSC referral and/or (ii) a state party 'complaint'.[90] The latter was envisioned as a sort of an 'inter-State complaint mechanism' comparable to what obtains at international courts like the International Court of Justice and the European Court of Human Rights.[91] Under this vision, individual states parties could file reports to the ICC against other states where the relevant crimes are being, or have been, committed. But the consent of the complaining state and the referred state must be obtained prior to the ICC's intervention.[92]

Following numerous debates among the treaty delegates, the ILC's proposal was refined and expanded to form the triple system now specified under Article 13 of the Rome Statute. Curiously, however, several years after its inauguration, the ICC has only recently received a single interstate-party referral in stark contrast to the many self-

[86] William A Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 157.
[87] Rome Statute, art. 13(a).
[88] Ibid, art. 13(b).
[89] Ibid, art. 13(c).
[90] Report of the ILC on the Work of Its Forty-Sixth Session, 2 May – 22 July 1994, Chapter II, UN Doc. A/49/10, arts. 23(1) and (2).
[91] Schabas, *An Introduction* (n 86) 158.
[92] ibid.

referrals frequently received.[93] The court has been engaged in about ten situations.[94] Five of these situations had been self-referrals made by the states parties concerned and one was a self-referral by a former non-state party.[95] The State of Uganda led the way on 16 December 2003[96] and was followed by the Democratic Republic of Congo, Central African Republic (CAR I), CAR II, Ivory Coast, and Mali.

The frequency of self-referrals vis-à-vis interstate complaints has been an astonishing development. It is astonishing, as Schabas puts it, because experiences from the weakened provisions of international human rights treaties had shown states to be reluctant to complain against other states except where crucial national interests were at stake.[97] It was therefore believed that states desiring to lodge complaints against other states were more likely to petition the Office of the Prosecutor (OTP) of the ICC than to risk possible diplomatic tensions by making formal complaints themselves.[98]

Implicit in self-referrals is a political will by the referring state to address the situation as well as a genuine lack of capacity to do so.[99] This is consistent with the complementarity principle, which the ICC must take into account in evaluating the admissibility of referrals. Under the terms of Article 17 of the Rome Statute, a referral will be inadmissible if: the situation is already being investigated or prosecuted by the state(s) concerned; the matter had been considered and found not worthy of prosecution by the relevant state; the accused had already been prosecuted by the

[93] The first interstate party referral was received on 27 September 2018 when six states parties, including Canada, Argentina, Peru, Chile, Paraguay, and Colombia referred Venezuela to the ICC.
[94] Note that a situation refers to the entire atrocities committed in a particular state or territory, not just a single case. See David Scheffer, 'Restoring the U.S. Engagement with the international Criminal Court' (2003) 21 *WIS INT'L LJ* 599, 608.
[95] Ivory Coast was a non-state party when it accepted the ICC's jurisdiction on 18 April 2003 and later reconfirmed it on 14 December 2010 and 3 May 2011. It ratified the Rome Statute on 15 February 2013.
[96] See *Situation in Uganda* (ICC-02/04-01/05), Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, 2 December 2005, paras. 3-4. See also Mohammed El Zeidy, 'The Ugandan Government Triggers the First Test of Complementarity Principle: An Assessment of the First State's Party Referral to the ICC' (2005) 5 *ICLR* 83.
[97] See Schabas, *An Introduction* (n 86) 159.
[98] ibid.
[99] See Linda E. Carter, Mark S. Ellis and Charles Chernor Jalloh, *The International Criminal Court in an Effective Global Justice System* (Edward Elgar 2016) vii.

relevant state; or the case lacked the relevant threshold of gravity to justify further action by the ICC.[100] These conditions underline the considerable amount of leverage that states hold in enabling or impeding the ICC's intervention within their territories. This thus weakens the claim that joining the ICC involves a major loss of sovereignty.[101]

However, a notable flaw in the self-referral system is an apparent advantage it gives to incumbent state officials vis-à-vis their adversaries. As Antonio Cassese points out, a thread running through the first three self-referrals is the referring regimes' interest in inducing the ICC to 'investigate crimes allegedly committed by the rebels fighting against the central authorities.'[102] In contrast, non-state actors are constitutionally unable to refer state officials to the ICC. Such disparity tends to weaken 'the principle of complementarity within the context of an ongoing effort to halt hostilities.'[103] Thus, it may be fair to argue that only if all sides to a conflict can fairly access the ICC would the self-referral system be truly consistent with the Rome Statute objects.[104]

B. UNSC's Referral Mechanism

The ICC's association with the UNSC also furthers its supranational jurisdiction.[105] Article 13(b) of the Rome Statute authorises the UNSC to refer relevant situations in any state to the ICC. In a sense Article 13(b) can be said to vest the ICC with a quasi-universal jurisdiction as through such UNSC referrals, the court may be able to consider situations occurring not only in the territories of its states parties, but also in third states. UNSC referrals typically require 'all States and all concerned regional and other

[100] See further discussion of the complementarity principle in Chapter 6.
[101] See Salla Huikuri, *The Institutionalization of the International Criminal Court* (Palgrave Macmillan 2019) 32.
[102] Antonio Cassese, 'Is the ICC Still Having Teething Problems?' (2006) 4 *JICJ* 434, 436. See also Mohammed El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Brill 2008) 235.
[103] M Cherif Bassiouni, 'Where is the ICC Heading?: The ICC – Quo Vadis?' (2006) 4 *JICJ* 421, 424-425.
[104] Compare Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99 *AJIL* 403, 411.
[105] See generally, Franklin Berman, 'The Relationship between the International Criminal Court and the Security Council' in Herman A M von Hebel, Johan G Lammers, and Jolien Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (Asser Press 1999) 173-78.

international organizations to cooperate fully' with the ICC.[106] But issuing resolutions even under Article 41 of the UN Charter calling for states to cooperate with the ICC is one thing, getting states cooperate effectively with the resolution is another.[107]

Two conditions are essential to the validity of UNSC's referrals to the ICC. First, the referral must be made pursuant to the Security Council's Charter VII responsibility to preserve global peace and security.[108] Second, the referral must not be vetoed by a permanent member (P-5) of the UNSC. If a referral is contested by a P-5, then it cannot proceed to the ICC unless the contesting P-5 state chooses to abstain from voting to enable the referral to pass. Such was the case in the Darfur (Sudan) referral when the US abstained from voting[109] after having first preferred referring the matter to a putative African criminal tribunal.

I. The Darfur (Sudan) and Libya Backlash

The Darfur referral of 31 March 2005 marked the first UNSC's referral to the ICC. It concerned alleged international crimes committed in Sudan's western region of Darfur since 1 July 2002 by state officials, Janjaweed militia and rebel forces. Sudan is not an ICC state party; although it had signed the Rome Statue in 2000, it notified the court in August 2008 of the decision to rescind its signature. On one side, the Darfur referral was initially hailed as a major breakthrough for the ICC and a demonstration of the UNSC's support for the court. It was a breakthrough because it was the first ICC's indictment involving a sitting head of state, President Omar Al Bashir of Sudan. It was also a breakthrough for the fact that despite the Bush administration's open hostility towards the ICC, the United States allowed the referral to succeed.

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[106] See UNSC Res. 1593 (31 March 2005) para 2.

[107] See Corrina Heyder, 'The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of the U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status' (2006) *BERK J INT'L L* 24(2): 650, 655.

[108] Article 24(1) of the UN Charter tasks the UNSC with the primary responsibility of maintaining global peace and security. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Rep 16, para 113-116.

[109] See UNSC Res. 1593 (31 March 2005): The draft resolution was adopted after 11 members voted in favour while 4 members abstained, including Algeria, Brazil, China, and the US.

On the other side, the referral did not engender the hoped-for volte-face in the United States' antagonistic position towards the ICC given the numerous attempts by the Bush administration to weaken the court's authority and legitimacy.[110] Although the court has indicted about six suspects implicated in the Darfur referral, including President Al Bashir,[111] unfortunately none has yet to face trial. At present, the cases involving two suspects Jebor Jamus[112] and Abu Garda[113] have been closed for reason of death and for unconfirmed charges respectively, but the other suspects remain at large.

After Darfur, the only other referral by the UNSC concerns alleged war crimes and crimes against humanity committed in Libya since 15 February 2011.[114] Libya is one of several states (41) that have neither signed nor acceded to the Rome Statute. The ICC has indicted the former leader of Libya, Colonel Muammar Gaddafi, as well as four others, including Gaddafi's son, Saif Al-Islam.[115] But the case against Gaddafi was closed following his death in 2011 while that against Abdullah Al-Senussi was ruled inadmissible. The rest remain in the Pre-Trial state pending the arrest of the suspects.

Darfur and Libya thus have remained the only two occasions that the UNSC has referred matters to the ICC. The marginal number of such referrals vis-à-vis the self-referrals is striking. During the Rome negotiations, the UNSC referral procedure was widely viewed as the most potent way of triggering the ICC's jurisdiction.[116] Unlike states party referrals, the UNSC's referrals were seen as less likely to be stymied by diplomatic wrangling. However, the final draft of Article 13(b) differs significantly from the ILC's working draft. In its 1994 draft proposal, the ILC had envisaged the ICC as a permanent

[110] See Heyder (n 107) 650. See also Attila Bogdan, 'The United States and the International Criminal Court: Avoiding Jurisdiction Through Bilateral Agreements in Reliance on Article 98' (2008) *ICLR* 8(1): 1.
[111] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09.
[112] See *The Prosecutor v Abdallah Banda Bakaer Nourain and Saleh Mohammed Jebor Jamus*, ICC-02/05-03/09.
[113] See *The Prosecutor v Bahr Idriss Abu Garda*, ICC-02/05-02/09.
[114] UNSC Res. 1970 (26 February 2011).
[115] *The Prosecutor v Saif Al-Islam Gaddafi*, ICC-01/11-01/11.
[116] See William A Schabas, 'United States Hostility to the International Criminal Court: It's All About the Security Council' (2004) *EJIL* 15(4): 701, 702.

tribunal that would be wholly subordinate to the UNSC and interlocked with the UN Charter. While that proposal was backed notably by the US, the majority of delegates supported the current model in which the ICC is fairly independent of the UNSC.[117]

A compromise by way of Article 16 of the Rome Statute enables the UNSC to request the ICC to defer investigations or prosecutions for a renewable twelve-month period.[118] In Schabas's view, this compromise was likely intended to balance the tension between political concerns and judicial independence.[119] But Article 16 was not meant to confer a new power on the UNSC, according to Berman; it was meant to specify the effect on the ICC's powers should the UNSC make the relevant request.[120] To date, only once, thanks to UNSC Res 1422 of 12 July 2002,[121] has Article 16 been initiated. Res 1422, sponsored by the US in the wake of its wars in Afghanistan and Iraqi, was later renewed once in UNSC Res 1487 of 12 June 2003.[122] But both resolutions have been excoriated as political comprises made to allay the US's fear of the ICC's possible indictments of its personnel and to avert the US's threat of blocking future UN peacekeeping missions.[123]

Perhaps the most heated question around the UNSC's referral procedure concerns its scope in respect of third states or non-ICC states.[124] The jurisdictional regime specified under Article 12(3) of the Rome Statute permits non-ICC members to grant jurisdiction to the ICC on an *ad hoc* basis with respect to states party referrals or prosecutor-initiated situations, but Article 12(3) is irrelevant in situations referred by the UNSC. The US opposed this provision in Rome and later led efforts, in the post-Rome treaty

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[117] Ibid 720.
[118] See Lionel Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16' in Roy S Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer 1999) 149-151.
[119] Schabas, 'United States Hostility' (n 116) 716.
[120] Berman (n 105) 176.
[121] UNSC Res. 1422 (12 July 2002).
[122] According to David Scheffer, Res. 1422 permits the ICC to continue investigations and even to indict suspects but prohibits the surrendering of suspects: Scheffer, 'Restoring the U.S. Engagement' (n 94) 600.
[123] See Zsuzsanna Deen-Racsmány, 'The ICC, Peacekeepers and Resolution 1422: Will the Court Defer to the Council' (December 2002) *NILR* 49(3): 353; Carsten Stahn, 'The Ambiguities of Security Council Resolution 1422' (2003) *EJIL* 14(1): 85.
[124] See Frédérick Mégret, 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and The Looming Revolution of International Law' (2001) *EJIL* 12(2) 247.

preparatory commission, that narrowed its scope under Rule 44 of the ICC's Rules of Procedure and Evidence. The US argued that Article 12 exposed citizens of ICC's non states parties to political or unsolicited prosecutions. It was also concerned that Article 12(3) could constrain its involvement in humanitarian activities around the world.[125]

Thus, as evidenced in the Darfur and the Libya referrals, UNSC's referrals to the ICC appear to be at odds with the international law principle that a treaty only binds states that are party to it, provided no peremptory norms of international law are violated.[126] It should be noted that recently the ICJ held that even when peremptory norms are at issue in a dispute, the ICJ's jurisdiction still depends on the parties' consent.[127] This is not the case at the ICC. By considering situations in third states, Marc Grossman asserts, the ICC not only threatens the basis of the consent rule but also undermines states' ability 'to project power in defence of their moral and security interests.'[128]

Notwithstanding the US's strong opposition to any exercise of jurisdiction by the ICC over citizens of third states, the US still voted in favour of the Libya referral, a third state.[129] It is also curious why the Security Council chose in that Libya referral to bar the ICC's jurisdiction to consider, except with the relevant state's consent, alleged acts arising out of a UN-authorised mission carried out in Libya by nationals and personnel of third states.[130] It is perhaps even more ironic that thus far the UNSC has chosen not to contribute to funding or progressing the investigation and prosecution of the two

[125] See David J Scheffer, 'The United States and the International Criminal Court' (1999) *AJIL* 93(1): 12, 18-20; Michael P Scharf, 'The ICC's Jurisdiction Over Nationals of Non-Party States: A Critique of the US Position' (2001) *L&CP* 64(1): 67.
[126] See Vienna Convention on the Law of Treaties (adopted 23 May 1969; entered into force 27 January 1980) arts. 34-38.
[127] *Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v Rwanda)*, Judgment, 2007, ICJ Rep. 126.
[128] Marc Grossman, Under Secretary for Political Affairs, 'American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies' (Washington D.C., 6 May 2002) <https://2001-2009.state.gov/p/us/rm/9949.htm>. Accessed 20 April 2019.
[129] See UNSC Res. 1970 (26 February 2011) paras 4-8.
[130] ibid, para 6.

situations that it referred to the ICC. Perhaps Wolfgang Kaleck is right that these ironies reveal how incredibly lopsided ICrimJ is in favour of powerful states and their allies.[131]

In light of these highlighted contradictions and the lack of similar responses to the atrocities occurring in Syria and elsewhere, it is unsurprising, Charles Jalloh comments, that several states that initially backed the Darfur and Libya referrals now challenge those referrals.[132] The African Union and many African states have also consistently attacked the UNSC's referral system following the UNSC's refusal to request a deferral of the case involving President Al Bashir.[133] Moreover, recent developments including the now closed cases involving President Uhuru Kenyatta[134] and his deputy[135] have hardened relations between the AU and the ICC.[136] These issues seem to have inspired the AU's resolve to set up an independent RCC that would handle African situations.[137]

C. Prosecutor's *Proprio Motu*

Article 13(c) together with Article 15 of the Rome Statute authorise the OTP to launch investigations into situations where the relevant crimes had been, or are being, committed. An investigation must still be formally authorised by the Pre-Trial Chamber if the OTP adjudges there to be a reasonable basis for the ICC to intervene.[138] This procedure highlights yet another way of initiating the ICC's supranational jurisdiction.[139]

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[131] See Wolfgang Kaleck, *Double Standards: International Criminal Law and the West* (TOAEP 2018) 89-103.
[132] See Charles Chernor Jalloh, 'The African Union, the Security Council, and the International Criminal Court' in Charles Chernor Jalloh and Ilias Bantekas (eds.), *The International Criminal Court and Africa* (OUP 2017) 187-88.
[133] See Juliet Okoth, 'Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals' in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds.), *Africa and the International Criminal Court* Vol 1 (Asser Press 2014) 195-209.
[134] *The Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11.
[135] *The Prosecutor v William Samoei Ruto and Joseph Arap Sang*, ICC-01/09-01/11.
[136] For analysis of the conflict between the AU and the ICC, see Jean-Baptiste J Vilmer, 'The African Union and the International Criminal Court: counteracting the crisis' (2016) *International Affairs* 92(6): 1319; Sosteness Francis Materu, 'A Strained Relationship: Reflections on the African Union's Stand Towards the International Criminal Court from the Kenyan Experience' in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds.), *Africa and the International Criminal Court* Vol 1 (Asser Press 2014) 211-28.
[137] See more on regional criminal courts in Chapters 4.
[138] Rome Statute, art. 15(3).
[139] Jason Ralph, 'International Society, International Criminal Court and American Foreign Policy' (2005) *REV INT'L STUD* 31(1): 27, 29.

Unlike national prosecutors, Article 13(c) enables the ICC's OTP to open criminal investigation into relevant situations taking place in any of the court's 123 states parties. Given their commitments under Part IX of the Rome Statute, states parties are required to cooperate with the OTP. However, as we saw earlier, under Article 12 of the Rome Statute, the OTP may also commence action against nationals of third states as well as inquire into situations that occurred on the territory of a non-state party.[140] In the first case, sometimes termed the territorial liability of non-signatories,[141] the relevant crime must have transpired on the territory of a state party or a party that has acceded to the ICC.[142] In the second case, provided the suspect is a national of a state party, the ICC may claim jurisdiction regardless of where the conduct occurred.[143]

What distinguishes the *proprio motu* procedure is that it tends to allow the ICC to act without being stymied by the considerable level of political balancing acts involved in the two rival procedures. As such, the OTP may commence action based on evidence received not only from states parties or the UNSC, but also from other sources like human rights and non-governmental bodies.[144] At the Rome Statute negotiations, the delegates were convinced that the *proprio motu* procedure represented the best means by which victims of major atrocities could get justice if national courts fail to do so.[145]

Yet, the OTP-led procedure has encountered criticisms right from the Rome Conference. According to David Scheffer, who led the US negotiations, the inclusion of the procedure in the final draft of the Rome Statute irked the US as it differed considerably from what had been proposed by the ILC. The ILC's draft had suggested that 'the prosecutor should act only in cases referred by a state party to the treaty or by the

[140] See Schabas, 'United States Hostility' (n 116) 710.
[141] See Jack Goldsmith, 'The Self-Defeating International Criminal Court' (2003) *University of Chicago Law Review* 70(1): 89, 91.
[142] Rule 44 of the ICC's Rules of Procedure and Evidence requires the registrar to inform the state acceding to the court's jurisdiction of the consequences of such accession.
[143] Rome Statute, art. 12(2)(b).
[144] Ibid, art. 15(2).
[145] See Ralph (n 139) 36.

Council.'[146] Accepting the ILC's proposal would have left no other channel open for victims to access the ICC where both states parties and the UNSC failed to take action.

Critics further contend that the *proprio motu* system could be exploited by powerful leaders to harass their political opponents.[147] The worry, some have argued, seems to be that the provision of such a mechanism, free of the UNSC's control, amounted to an 'unprecedented attempt to check the power of the Security Council'[148] and 'a usurpation of the Security Council's established position in international law and in the architecture of the UN Charter.'[149] Beyond rhetoric, the OTP's *proprio motu* has statutory checks that amply address its critics' concerns: for instance, as noted earlier, the OTP cannot initiate a formal investigation without the approval of the Pre-Trial Chamber.

Additionally, the OTP must persuade the Pre-Trial judges against a high threshold set under Articles 17 and 18 of the Rome Statute. A major factor in attaining that threshold is the complementarity criterion. Prior to commencing an investigation, the prosecutor is required to notify the relevant territorial state. On the terms of complementarity, the state can suspend the ICC's jurisdiction by launching an independent investigation and, if merited, may proceed to implead the suspects. These statutory measures, David Scheffer observes, are meant to offer safeguards against politically motivated prosecutions.[150] And this brings us to another key character of international tribunals: adjudicatory neutrality.

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[146] David Scheffer, 'The United States and the International Criminal Court' (1999) *AJIL* 93(1): 12, 13 [emphasis added]. See also David Scheffer, 'Staying the Course with the International Criminal Court' (2001/2) *CORNELL INT'L LJ* 35(1): 47.

[147] See John Bolton, 'Speech Transcripts: John Bolton on U.S. Policy Toward the International Criminal Court' (*The Epoch Times* September 10, 2018) <www.theepochtimes.com/speech-transcript-john-bolton-on-u-s-policy-toward-the-international-criminal-court_2656808.html> Accessed 10 November 2018.

[148] See Goldsmith (n 141) 101.

[149] See Ruth Wedgwood, 'The Irresolution of Rome' (2001) *L&CP* 64(1): 193, 198-99.

[150] See Scheffer, 'Restoring the U.S. Engagement' (n 94) 602.

2.2.4 Adjudicatory Neutrality

Adjudicatory neutrality is a critical component of the rule of law and arguably a central character of international tribunals.[151] Unlike in several domestic justice systems, international criminal proceedings do not involve a jury trial system. As such, a defendant's fate is decided entirely by the bench of judges. Given the coercive and contentious nature of ICrimJ, the credibility and integrity of the process can hinge greatly on the fact, or appearance, of neutrality of the judicial branch.[152] Adjudicatory neutrality therefore, as Theodor Meron explains, simply means that judges 'will adjudicate the disputes brought to them with an eye to the guiding legal principles and without any undue influence by external sources.'[153] Put differently, it can be said to signify the capacity of international criminal courts' judges 'to resolve disputes fairly' relying 'on the existing laws and regulations' and applying 'that law to the facts at issue' without bias.[154]

On the international setting just as in national contexts, respect for the rule of law, which is the bedrock of a stable social order, 'presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges.'[155] The judges' capacity to maintain personal and professional freedom from pressure and undue influence in carrying out their judicial functions is recognised as a crucial device for safeguarding the sanctity of the primary values that sustain the justice system including procedural fairness, efficiency, and public confidence in judges.[156] Judicial independence also helps, Meron stresses, to 'solidify public respect

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[151] For a useful analysis of the constituent elements of the rule of law, see Tom Bingham, *The Rule of Law* (Penguin Books 2010).

[152] See John P Mackenzie, *The Appearance of Justice* (Scribner 1974); Shimon Shetreet, 'Fundamental Values of the Justice System' (2012) *European Business Law Review* 23(1): 61.

[153] See Theodor Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals' (2005) *AJIL* 99(2): 359, 359.

[154] Ibid.

[155] *New York State Board of Electors v Lopez Torres* (2008) 128 S. Ct. 791, 803 (Kennedy & Breyer, JJ, concurring).

[156] See Shimon Shetreet, 'The Challenge of Judicial Independence in the Twenty-First Century' (2000) *Asia Pacific Law Review* 8(2): 153, 153; Justice King, 'Minimum Standards of Judicial Independence' (1983) 8 *INT'L LEGAL PRAC* 65, 65.

for the courts and lead the people – and governments – to turn to the courts more often for the credible settlement of their disputes.'[157] The aim in this section is to portray the import of adjudicatory neutrality (as it relates to judicial credibility) through the prism of two historical international tribunals: Nuremberg and Tokyo IMTs.

2.2.4.1 Theoretical Aspects of Adjudicatory Neutrality

The theoretical foundation of adjudicatory neutrality is the doctrine of separation of powers, which is in most democratic states is a fundamental principle of the constitutional arrangements. In Baron Montesquieu's idea of that doctrine, the protection of the independence of the judiciary is essential for the preservation of individual liberty and basic freedoms. He theorised that the single way to forestall despotic and arbitrary rule is to divide the powers of state between three distinct entities charged with specific functions, namely the executive, legislature, and judiciary.[158] In its modern expression, as Shimon Shetreet clarifies, the division of powers' doctrine is not strictly a complete separation of the three arms of state. Instead, cooperation between the powers is essential for the efficiency of governance while accountability is achieved by way of mutual control, checks, and balances.[159]

Adjudicatory neutrality can be conceptualised at two levels, namely: (i) individual and (ii) collective. Taking the individual level first, according to the New Delhi Code, individual judges should enjoy both personal and substantive independence. Substantive independence requires that every judge be subject to nothing other than the law and their conscience in the discharge of their duties.[160] This means, Shetreet explains, that individual judges should be free from political pressures, interferences

[157] Meron (n 153) 359.
[158] See Baron de Montesquieu, *The Spirit of the Laws* (1st published 1748, CUP 1989) Book XI.
[159] Shetreet, 'Judicial Independence' (n 156) 155.
[160] The New Delhi Code of Minimum Standards of Judicial Independence (adopted by the IBA New Delhi Convention 1982) 1(c).

from state agents, as well as business or financial entanglements that may compromise their judicial duties.[161]

Personal independence requires that 'the terms and conditions of service' for judges are properly secured.[162] As a result, in certain jurisdictions, statutory rules and judicial conventions have been established to secure the substantive and personal independence of judges. An example is the US Constitution which states: 'the judges, both of the supreme and inferior courts, shall hold their office during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.'[163]

Judicial neutrality on the collective level signifies that judicial branch as an institution should enjoy relative autonomy and independence from the executive branch of state in the management of judicial affairs.[164] It also means that the judges as whole should be protected from forces and functions that could compromise their public credibility and the integrity of the courts. This is important as political interferences with judicial administration by way of budget control, court maintenance, judges' removal from office, and disciplinary proceedings can adversely affect individual judges' capacity for neutrality.[165]

Moreover, Joanna Shepherd alleges that in certain jurisdictions like the United States where a considerable percentage of the judges are usually elected by voters in one form or another such external factors as competitive judicial politics and campaign funds can profoundly influence judges' decisions so much so that the delicate balance

[161] Shetreet, 'Judicial Independence' (n 156) 155-56.
[162] See New Delhi Code (n 160) art. 1b.
[163] United States Constitution, Article III.
[164] See New Delhi Code (n 160) art. 2.
[165] Ibid arts. 3b & 4. [Under Article 3b of the New Delhi Code, whereas judicial appointments and promotions are not necessarily inconsistent with judicial independence, the involvement of the judicial branch, for example, a judicial commission in the process enhances adjudicatory neutrality.]

between judicial accountability and judicial independence is jeopardised.[166] What is more worrying, she maintains, is that electioneering and fiscal dependency can adversely influence or prejudice judicial outcomes. For instance, judges elected by Republican voters allegedly tend to decide cases in accord with the standard partisan policies while judges facing re-election in Democratic states tend to lean towards progressive ideals in their rulings.[167] In other words, judicial decisions change in tandem with changes in the voters' political preferences.[168] Under these conditions, Shepherd concludes, sticking to high moral convictions or uncompromising judicial integrity could be costly for individual judges as Justice Rose Bird found out in 1986 when she was voted out of California's supreme court for declining to authorise death sentences.[169]

At the same time no consensus exists as to the substantive elements of judicial independence. A study commissioned by the International Bar Association on international standards for judicial independence found that certain practices that were deemed in some jurisdictions as inconsistent with judicial independence were accepted in others as ordinary practices which do not impinge upon the principle. As a result, practices, 'which, considered logically and objectively, could only be regarded as destructive of judicial independence had to be accepted and accommodated into the

[166] Joanna M Shepherd, 'Politics, Money, and Impartial Justice' (2009) *DUKE LJ* 58(4): 623, 684.
[167] Voting according to political expediency is also alleged to have occurred in the US Supreme Court decision on *Bush v Gore* where a five-seat conservative majority justices voted to stop the recounting of votes in the State of Florida which ultimately led to Bush being declared the winner of the 2000 Presidential election. Conservative justices may also be likely to overturn laws passed by a Democratic Congress on issues such as gun control, healthcare, and carbon emissions. See Geoffrey Coll, 'What 2000 Bush v. Al Gore Decision Teaches Us' (*The Leaflet* 6 November 2020) www.theleaflet.in/what-2000-bush-v-gore-decision-teaches-us/> Accessed: 30 October 2020; Ido Vock, 'How Trump's Supreme Court pick could trigger a crisis of legitimacy for the judiciary' (*New Statesman* 21 September 2020) <www.newstatesman.com/election/2020/09/how-trump-s-supreme-court-pick-could-trigger-crisis-legitimacy-judiciary>. Accessed: 30 October 2020. See also *Bush v. Gore* 531 U.S 98 (2000).
[168] Shepherd (n 166) 623.
[169] Ibid 625. See also Joseph R Grodin, *In Pursuit of Justice: Reflections of a Supreme Court Justice* (University of California Press 1989) 167-79.

standards because they were found to have a long and venerable history in some systems and places without apparent harm to the independence of the judiciary.'[170]

On the international setting just as in domestic contexts, the powerful role of judges as guardians of the rule of law and stable social order raises the important question of how the judicial guardians can be guarded against abusing such enormous power.[171] In fact, as Shetreet and Turenne have contended judicial accountability is a fundamental aspect of adjudicatory neutrality.[172] Absolute judicial independence with no real system of judicial accountability in place can be dangerous as it risks substituting the tyranny of judges for that of despotic regimes untrammelled by the courts and the rule of law. In contrast to national contexts, however, international judges are not accountable to a single state legislature or executive. This arrangement may paint a winsome image of an international judiciary that is unconstrained by debilitating partisan allegiances and thereby able to adjudicate without fear or favour. But the reality is often more complex than imagined. An international criminal tribunal like the ICC, for instance, is accountable to its 123-member Assembly of States Parties (ASP), which meet periodically to review vital issues regarding the court's finances, personnel, and operational capacity. By its ability to approve or modify the court's budgets and to appoint its judicial personnel, the ASP exercises a supervisory control over the ICC.

In a related recent study, however, Eric Posner and John Yoo contend that independence may be an undesirable feature for international tribunals.[173] This is because the institutional context in which international tribunals operate fundamentally differs from that in which national courts work. Posner and Yoo define independent tribunals as those resembling municipal courts in which 'the judges are appointed in advance of any dispute and serve fixed terms' while dependent tribunals

[170] Justice King, 'Minimum Standards of Judicial Independence' (1983) 8 *INT'L LEGAL PRAC* 65, 65.
[171] This echoes the Latin maxim 'quis custodiet Ipsos custodes' (who watches the watchers?).
[172] See Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, CUP 2013).
[173] See Eric A Posner and John C Yoo, 'Judicial Independence in International Tribunals' (2005) *CAL L REV* 93(1): 1, 7.

are ad hoc courts in which the judges are assigned by states parties purposely to resolve a specific dispute.[174]

For Posner and Yoo, dependent tribunals function effectively because they are strictly monitored by states through the power of reappointment of judges and threats of reprisal: judges know they stand to lose if they fail to please the states parties.[175] Independent tribunals conversely are ineffective as they are likely 'neglect the interests of state parties and, instead, make decisions based on moral ideals, the interests of groups or individuals within a state, or the interests of states that are not parties to the dispute.'[176] As such, greater independence may be a burden which can threaten international cooperation instead of a boost to a tribunal's performance.[177] Neither is there any real value for tribunals to seek guidance from other tribunals set up for different purposes, Posner and Yoo maintain.[178]

A contrasting study by Laurence Helfer and Anne-Marie Slaughter, however, contends that facts contradict Posner and Yoo's contentions.[179] In what they describe as a 'constrained independence' theory, Helfer and Slaughter argue that evidence suggests that in setting up international tribunals states are usually confronted with the choose of vesting the tribunal with either complete independence or constrained independence but hardly a choice between either dependence and independence pace Posner and Yoo.[180] As they put, '[s]tates can establish a tribunal that is tightly tethered to their immediate interests. Or they can create a tribunal that is free to decide a case according to the rules agreed to in advance and thereby strengthen their commitment

[174] Ibid 1.
[175] Ibid 8, 27.
[176] Ibid 7.
[177] Ibid 7, 27.
[178] Ibid note 21 citing Jenny S Martinez, 'Towards an International Judicial System' (2003) 56 *STAN L REV* 429.
[179] Laurence R Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) *CAL L REV* 93(3): 899, 904.
[180] Ibid 905.

to the enforcement of those rules against all states.'[181] Thus, for Helfer and Slaughter, judicial independence is only one among several factors that can bring about international judicial effectiveness. Among these factors include tribunal's composition, caseload or functional capacity, independent fact-finding capability, formal authority, awareness of audience, incrementalism, quality of legal reasoning, extent of cross-fertilization, and the relative cultural and political homogeneity of members.[182]

Resolving the debate whether dependence or independence of international tribunals supports or undermines the tribunals' efficiency exceeds the remit of this thesis. Our more modest aim is to underscore adjudicatory neutrality as a critical attribute of international criminal courts. As Helfer and Slaughter have stated above the scope of independence of individual tribunals can vary considerably.[183] Given the multiple powerful interests and the gravity of the issues engaged in ICrimJ, the judicial neutrality questions becomes even more imperative because a widely perceived abuse of this crucial quality could encourage impunity or portray international justice as no more than 'fictions of justice'.[184] Let us now further inspect adjudicatory neutrality in practice within the context of the Nuremberg IMT and the Tokyo IMT in turn.

2.2.4.2 The Nuremberg IMT: A Selective Justice Experiment?

Few trials in history have been debated as much as the proceedings of the Nuremberg IMT and its Tokyo counterpart. As George Lorinczi puts it, much of this debate typically ranges from 'bitter, even vituperative criticism to equally impassionate apologetics of the legal and moral soundness of these proceedings.'[185] Both tribunals have been consistently pilloried as emblematic of prosecutorial bias and winners' justice in favour

[181] Ibid.
[182] Ibid 906, note 16. See also Laurence R Helfer & Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *YALE LJ* 273, 298-37.
[183] Ibid 905.
[184] On this line of argument, see Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (CUP 2009).
[185] See George G Lorinczi, 'Military Tribunals and International Crimes' (1955) *MARQUETTE LR* 38(3): 220, 221.

of their Allied initiators.[186] Prosecutorial bias as employed here is the idea 'that certain individuals, from certain countries of origin' escape indictment and prosecution by an international tribunal despite committing like offences for which others are tried and punished.[187]

Perhaps the most morally and politically deplored defect of the Nuremberg IMT is the fact that contrary to the principle of international justice its bench was composed entirely of Allied judges who prosecuted and punished only German nationals.[188] It is this singular fact that has cast arguably the most doubts over the adjudicatory neutrality of the IMT bench. The Allied judges, as Jonathan Hafetz argues, 'were not necessarily free from bias or immune to the overwhelming public demand that Nazi leaders be held accountable.'[189] To this end, a former US Supreme Court Justice, Harlan Stone, strongly dismissed the Nuremberg tribunal as a 'high-grade lynching party'.[190] Without prejudice to the professional competence and personal integrity of the individual judges, the lack of a fairly balanced bench staffed with officials drawn from Germany and/or 'neutral' states sullies the tribunal's claim to neutrality. Given the Allied States' policy and prevailing public opinion regarding Nazi Germany at the time, the judicial independence of the Nuremberg IMT could not have been more imperative.

Against this backdrop, Gary Bass claims that public opinion in the US towards the end of WWII had fancied Henry Morgenthau's plan of inflicting swift and certain revenge on

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[186] See Hafetz (n 51) 15; Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (2nd edn, Penguin Books 2002) 236; Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000) 204; Leo Gross, 'The Criminality of Aggressive War' (Apr., 1947) *APSR* 41(2): 205.

[187] Courtenay Griffiths, 'The Politics of International Criminal Law' (*New African* 1 March 2012) <www.newafricanmagazine.com/special-reports/sector-reports/icc-vs-africa/the-politics-of-international-criminal-law> Accessed 24 July 2017. See also Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005) 192-98.

[188] See Woetzel (n 9) 44.

[189] Hafetz (n 51) 14. See also Bradley F Smith, *Reaching Judgment at Nuremberg* (Basic Books 1977) 76.

[190] See Alpheus Thomas Mason, 'Extra-Judicial Work for Judges: The Views of Chief Justice Stone' (1953) *HLR* 67: 193, 212.

the Nazi leadership.[191] The Soviet and the British governments also held similar views at that time.[192] This was confirmed at the Yalta (also called Crimea) Conference in February 1945 where the Allies evaluated how to punish the Nazis.[193] Churchill proposed the summary arrest, identification and execution of the major Nazi leaders and the jailing without trial of the lesser culprits.[194] Stalin preferred public show trials of the Nazis prior to their pre-set executions.[195] In the end, what prevailed was the United States' backed proposal to formally prosecute and punish the Nazi leadership.[196]

Amidst this context, it would have been understandably testing for the Allied judges to stay above the political currents and public opinion. It was unsurprising therefore that some like Hans Kelsen criticised the Nuremberg IMT for what they perceived to be an unfair judicial arrangement that was skewed against German citizens for crimes for which several opposing Allied nationals were not entirely guiltless.[197] For Kelsen, the IMT was simply a *privilegium odiosum* (an odious privilege) imposed on vanquished Germany by the victorious Allies while the exclusion of German and neutral states'

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[191] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000) 147-166.

[192] A Communique issued by three of the Allied Powers (UK, US, and USSR) after the Crimea Conference of 4-11 February 1945 reads: 'It is our inflexible purpose to destroy German militarism and Nazism and to ensure that Germany will never again be able to disturb the peace of the world. We are determined to… bring all war criminals to justice and swift punishment and exact reparation in kind for the destruction wrought by Germans.' *See* Allied Control Authority Germany, *Enactments and Approved Papers of the Control Council and Coordinating Committee* Vol I (Legal Division US Office of Military Government for Germany 1945) no. 2 [hereinafter *Enactments and Approved Papers*]

[193] See Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (2nd edn, Penguin Books 2002) 227-29.

[194] Some in the British Cabinet wanted the Nazi leaders declared as 'world outlaws' that must be 'bumped off' within six hours of their arrest. See Richard J Overy, *Interrogations: The Nazi Elite in Allied Hands, 1945* (Allen Lane 2001) 6.

[195] This was a rigged system in which the defendants' guilt would be predetermined and each major defendant would be convicted following a rehearsed script and shot. Stalin had initially proposed at an earlier Tehran Conference in 1943 that between 50,000 to 100,000 Germans be summarily executed after the war. See Robertson (n 193) 229; Bass (n 191) 147.

[196] Franklin D Roosevelt (later succeeded by Harry Truman) insisted that the US public would frown at anything less than a fair trial of the Nazis. See Ann Tusa and John Tusa, *The Nuremberg Trial* (Macmillan 1983) 66.

[197] See Hans Kelsen 'Will the judgment in the Nuremberg Trial constitute a precedent in International Law?' (1947) *ICLQ* 1(2): 153, 167 & 170. See also Hans Ehard, 'The Nuremberg trial against the Major War Criminals and International Law' (1949) *AJIL* 43(2): 223, 359.

officials from its judicial process demonstrated utter hypocrisy and double standards not least for the fact the USSR had shared the initial spoils of WWII with the Nazis.[198]

In response to Kelsen's criticism regarding the lack of German judges at the IMT, Otto Kirchheimer points out that having German nationals on the IMT bench would have had no real benefit to the accused because the relevant judges would not have been selected from the ranks of the Nazi party or its sympathisers.[199] This is a valid point. Yet having local judges on that bench could probably have boosted the defendants' confidence in the process as well as the perceived credibility of the bench before external observers. Moreover, some have observed that the IMT's skewed judicial arrangement could account for the series of breaches of standard procedures by some of the tribunal's top officials during the proceedings. For instance, the US chief prosecutor Justice Jackson is alleged to have occasionally conferred in private with his compatriot on the bench, Justice Francis Biddle over crucial defence cases. The duo has also been criticised for frequently exchanging *ex parte* communication and other confidential data in breach of fair procedures and professional judicial standards.[200]

Furthermore, Robert Woetzel has contended that the case against the Nuremberg tribunal's judicial composition hardly undermines the merits of the trial and the verdict. Inferring from municipal settings, he claims that defendants are entitled to a fair trial but have no right to choose their own trial judges.[201] But Woetzel's analogy may be inapt in this context. It is moot what rules of fairness can be defended of a system wherein the accuser enacts the law, convokes the tribunal, appoints the personnel and

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[198] Kelsen alleges that the USSR had split with Germany 'the booty of the war waged against Poland'. *See* Hans Kelsen 'Will the judgment in the Nuremberg Trial constitute a precedent in International Law?' (1947) *ICLQ* 1(2): 153, 170.

[199] Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton University Press 1961) 335.

[200] See Hafetz (n 51) 14; Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Alfred A Knopf 1992) 134; Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History* (Palgrave Macmillan 2007) 75-78, 81-82.

[201] Woetzel (n 9) 45. See also John Alan Appleman, *Military Tribunals and International Crimes* (The Bobbs-Merrill Co., 1954) 12.

finances the process that tries and convicts the accused.[202] A basic condition for a fair judicial process is that the trial judges should have no mutual interest with either the accused or the accuser, which is what underpins the principle that 'justice must not be done but must be seen to be done'.

Even a mere chance of an interest that could compromise public confidence in the integrity of the process may require a recusal on the judge's part as the UK senior judge, Lord Hoffmann, found out during the 1998 extradition proceedings against Pinochet. In the first hearing of that appeal, the House of Lords ruled that the former Chilean leader did not enjoy immunity from prosecution and extradition regarding allegations of crimes against humanity committed whilst in office.[203] After that decision it was revealed that Lord Hoffmann, one of the five appellate judges, had failed to disclose that he was an unpaid director and chairman of Amnesty International Charity Limited, the fundraising arm of Amnesty International even though the latter had been allowed to intervene in the case.[204] On the basis of this revelation, Pinochet applied for the ruling to be quashed as the links between Lord Hoffmann and Amnesty were such as to give rise to the likelihood of bias.[205] In consequence, a new panel of five law lords later upheld the finding, disqualified Lord Hoffmann from the case and set aside the earlier decision. Reflecting on this matter, Lord Hope states: 'Judges are well aware they should not sit in a case where they have even the slightest personal interest in it, either as defendant or as prosecutor'.[206]

It is worth restating that the key contention regarding the Nuremberg IMT's process is not whether the Nazi leaders deserved to be tried and punished for their part in WWII.

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[202] See Bernard V A Röling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Polity Press 1993) 1.
[203] *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte* [1998] 3 WLR 1456, [1998] 12 CL 210.
[204] See Kate Malleson, 'Judicial Bias and Disqualification after Pinochet (No. 2)' (2000) *The Modern Law Review* 63(1): 119, 119.
[205] *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte* (No 2) [1999] All ER 577.
[206] Lord Hope qtd in Clare Dyer, 'Law lords condemn Hoffmann' (*The Guardian* 16 Jan 1999) <www.theguardian.com/uk/1999/jan/16/claredyer> Accessed: 12 January 2019.

The tribunal is rather pilloried for the lop-sidedness of its prosecutorial policy. Justice Robert Jackson acknowledged this criticism in his opening statement at the tribunal:

> There is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work, if we should falter, in even minor matters, in being fair and temperate. Unfortunately, the nature of these crimes is such that both prosecution and judgement must be by victor nations over vanquished foes. The worldwide scope of the aggression carried out by these men has left but few real neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves. After the First World War we learned the futility of the latter course.[207]

Justice Jackson's remark merits two quick comments. On the one hand, he was right to adjudge the prevailing context after WWII as not conducive for consigning the prosecution and punishment of the Nazi leaders to Germany. Doing so would have been too risky for the fragile state even with the support of the Allies. On the other hand, Jackson was incorrect to argue that only the Allies were best placed to do the job. The war scarcely engaged South American and Caribbean states. Thus, the inclusion on the tribunal's bench of judges from these states or the other 'neutral' states that later ratified the London Charter as well as judges from the territorial state could have greatly enhanced its claim to neutrality. As it happens, the Nuremberg IMT's adjudicatory failings subsequently resurfaced or, perhaps, worsened at the Tokyo IMT.

2.2.4.3 The Tokyo IMT: International Justice on Trial

Unlike the Nuremberg IMT, the Tokyo IMT has generally 'been wrapped in a shroud of indifference outside Japan.'[208] According to Bernard Röling and Antonio Cassese, the

[207] Justice Robert H Jackson, Chief of Counsel for the United States, 'Opening Address for the United States' before the International Military Tribunal at Nuremberg on 21 November 1945 in The Avalon Project*, Documents in Law, History and Diplomacy* Vol 1 (Yale Law School Library) Chapter V.
[208] Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) 5, 310. See also Solis Horwitz, 'The Tokyo Trial' (1950) *International Conciliation* 465: 473, 475.

apparent neglect of that tribunal is probably down to the international community's disillusionment with it: '…they didn't want the Tokyo Trial to become very well known'.[209] Perhaps eager to improve upon the Nuremberg IMT's flaws, Tokyo operated with a mixed bench of judges selected from Allied and friendly states. But the outcome, in terms of the legal standards or their absence was, in Georg Schwarzenberger's view, 'such as to make lawyers wish to forget all about it at the earliest possible time'.[210]

In brief, the Tokyo IMT began like this. On 26 July 1945 the UK, US, and China issued the Potsdam Declaration, which outlined the terms agreed earlier at the Potsdam Conference together with the USSR for total surrender by Imperial Japan. Subsequently, on 19 January 1946, nearly five months following Japan's surrender on 2 September 1945, General Douglas MacArthur, the Supreme Commander for the Allied Powers, issued a special proclamation establishing the Tokyo tribunal. Article 1 of the tribunal's Charter, affixed to MacArthur's proclamation, specifies its mandate as: 'the just and prompt trial of the major criminals in the Far East.[211]

In contrast to the Nuremberg IMT, there was no actual treaty authorising the Tokyo IMT's creation.[212] Although the Tokyo tribunal's Charter mirrored the Nuremberg Charter, the former was singlehandedly drawn up by a US attorney and personally approved by General MacArthur.[213] MacArthur also appointed the Tokyo tribunal's key personnel including its eleven judges and Chief of Counsel, a US national.[214] But the Chief Prosecutor Joseph Keenan was appointed directly by the US President Harry

[209] See Bernard V A Röling and Antonio Cassese, *The Tokyo Trial and Beyond* (Polity Press 1993) 81.
[210] Georg Schwarzenberger, 'The Problem of an International Criminal Law' (1950) 3 *CLP* 263, 291.
[211] See Tokyo IMT Charter, art. 1 in TIAS 1589, 'Special Proclamation by the Supreme Commander for the Allied Powers' (Tokyo January 19, 1946) [hereinafter 'Special Proclamation']. See also ibid, art. 2; Boister and Cryer (n 208) 25.
[212] See Robertson (n 193) 240.
[213] See 'Special Proclamation' (n 211) art. 2.
[214] See Robertson (n 193) 240. The eleven judges were appointed from a list of names submitted by the nine countries that co-signed the Instrument of Surrender: Australia, Canada, China, France, the Netherlands, New Zealand, the UK, the US, the USSR, British India, and the Philippines. These states also supplied prosecutors, referred to as Associate Counsels. The Defence Counsels were mainly US and Japanese nationals.

Truman. Under Article 17 of the Tokyo Charter, MacArthur had powers to approve, reduce or alter the penalties imposed by the judges. Given such considerable degree of US control over the Tokyo IMT, it has occasionally been viewed as an *ad hoc* US-led internationalised tribunal.[215]

Additionally, MacArthur's supremacy over the Tokyo court can be contrasted to the Allied Control Council's (ACC) collegiality at its Nuremberg counterpart. The ACC was a team composed of Allied representatives who operated jointly to enforce the provisions of the Nuremberg Charter and the London Treaty.[216] Unlike MacArthur, the ACC was not involved in the drafting of the Nuremberg Charter nor in the appointment of its officials. But like MacArthur, the ACC could alter but not increase the severity of sentences imposed by the Nuremberg tribunal. Following Article 5 of the Nuremberg Charter and the terms of the Moscow Declaration of 30 October 1943, the ACC jointly devised modalities within the four zones of occupation for concurrent trial and punishment of mid to low level German war criminals.[217]

To critics, MacArthur's role in relation to the Tokyo court epitomised the US control over the proceedings: a scenario that was resented by the USSR and several other countries.[218] In addition to its hefty US personnel, the tribunal was heavily funded by the US Government. The occupation forces in Japan at that time also consisted mostly of US military and civilian personnel. It is likely that the brewing distrust between the US and the USSR in the aftermath of Nazi Germany's defeat played a role in the lack of a joint treaty for the Tokyo IMT and in the eventual US dominance over the tribunal.[219]

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[215] See Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (OUP 2008) 5-6. [For an elaborate critique of the Tokyo IMT, see Richard H Minear, *Victors' Justice: Tokyo War Crimes Trial* (Princeton University Press 1971).]

[216] See Control Council's Directive No. 9, 'Developing Measures and Procedures Regarding Major War Criminals of European Axis' in *Enactments and Approved Papers* (n 192) no. 45.

[217] See Control Council's Law No. 10, 'Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity' in *Enactments and Approved Papers* (n 192) 306-11.

[218] See Eiji Takemae, *Inside GHQ: The Allied Occupation of Japan and Its Legacy* (Continuum Publishing Group 2002) 97.

[219] As Hasegawa reports, a Soviet-American rivalry existed at the time with both President Truman and Josef Stalin suspecting the other would take the first step to violate the Yalta Agreement that governed

2.2.4.4 Rethinking the Adjudicatory Neutrality of International Tribunals

It may seem academic to argue post facto that the deficiencies of the Nuremberg IMT and its Tokyo sibling could have been averted, or the outcomes significantly different, had the tribunals consisted of a blend of judges from the Allies, host states, and neutral states. Yet, such a composition could have bolstered the credibility and legacy of both tribunals by showing that adjudicatory neutrality is not about the uniformity of judicial personnel and opinions. That it is instead about the reality and semblance of fairness which can be evidenced through a principled acceptance and, balanced consideration, of opposing legal viewpoints and worldviews. Woetzel's contention that having local and neutral judges on those tribunals was akin to allowing defendants to choose their own magistrates has already been debunked as tired. Critics may insist that local judges could not be neutral in an international process against their compatriots,[220] but that claim would discredit having Allied judges on both tribunals too.[221] It also seems tenuous giving that in national settings, except in cases of mutual interest as was shown above, the ability of local judges to handle cases involving their compatriots is undisputed.

To enhance the adjudicatory neutrality of international tribunals therefore a case can be made for having *ad hoc* local judges work alongside international judges in relevant situations. It is true that modern international criminal courts typically use only international judges while hybrid tribunals like the SCSL tend to deploy a blend of local and international judges. The judicial structure envisioned here for the international

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Allied operations in the Far East. The Potsdam Conference that met from 17 July to 2 August 1945 eventually 'triggered a fierce race between the two leaders' as each jostled to gain advantage over the other in the post-WWII Far East. See Tsuyoshi Hasegawa, *Racing the Enemy: Stalin, Truman and the Surrender of Japan* (The Belknap Press of Harvard University Press 2005) 2-3.

[220] Yet the Rome Statute specifically encourages the domestic prosecution (of course by local judges) of suspects of international crimes: Rome Statute, preamble, paras 4 & 6.

[221] It is revealing that the Philippines judge at the Tokyo tribunal, Justice Delfín Jaranilla, had been among the war prisoners captured by the Japanese army during the Bataan Battle of January to April 1942 and who were later forced to undergo the Bataan Death March in which thousands of Filipino and US nationals died. Justice Jaranilla wanted the tribunal to impose heavier sentences and criticised the final punishments as too lenient and disproportionate to the atrocities committed by the Japanese.

tribunals differs slightly from both traditional systems. The new approach derives fairly from the ICJ's model which consists of fifteen permanent international judges as well as occasional *ad hoc* judges appointed by the parties in contentious cases before the court.[222] A central merit of integrating *ad hoc* local judges lies in their capacity to contribute pertinent contextual knowledge to the proceedings. Another is its likelihood to inspire the trust and confidence of states (and defendants) in the judicial process.[223]

Like at the ICJ, the *ad hoc* local judges will not be staff of the court and their terms will last in accordance with the duration of the particular situations or the terms of their appointment. Their presence, preferably at the trial stage, could reassure defendants that they are being tried by at least one of their peers (compatriots) – not just by total strangers – in keeping with an age-old principle of the Magna Carta. Besides, local judges could save the court much time and money otherwise spent in navigating the local context of the laws, politics, and culture of the accused. Above all, more states may be encouraged to ratify the Rome Statute or to refer situations to the ICC or like tribunals if states were certain to have a degree of representation at the tribunals.

To sum up, it should be noted that prosecutorial or adjudicatory bias in international criminal justice enforcement may not often appear in such overt binaries as victors versus vanquished. It may also feature in more subtle forms like in the ethnic or geopolitical makeup of the tribunal's personnel. In this respect, William Schabas comments that the top-heavy ratio of European judges on the ICC's bench, despite all defendants so far being of non-Western states, tends to reinforce allegations regarding the ICC's pro-Western bias.[224] Judges, as products of their legal training and

[222] While the ICJ's supporters praise its significant role in legitimising the international legal system through a principled resolution of inter-state disputes, critics have sometimes dismissed the court as being politically biased. See Davis R Robinson, 'The Role of Politics in the Election and the Work of Judges of the International Court of Justice' (2003) 97 *ASIL Proc* 277; Thomas Franck, *Fairness in International Law and Institutions* (OUP 1995) 346; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995).
[223] See Eric A Posner and Miguel F P de Figueiredo, 'Is the International Court of Justice Biased?' (June 2005) *JLS* 34(2) 599.
[224] William A Schabas, 'Regions, Regionalism and International Criminal Law' (2007) 3 *NZYIL* 12.

socialisation, inevitably bring this diverse background into their judicial practice. But familiarity with certain legal systems and cultural outlook does not amount to familiarity with all legal systems and cultural contexts. Having a good blend of independent, local and international judges could therefore considerably expand the perceived legitimacy of international tribunals, improve their adjudicatory neutrality and curtail lingering questions about racial and geopolitical bias at such courts.

2.2.5 International Legitimacy

We can also identify an international tribunal by evaluating its legitimacy credentials. Like comparative domestic arrangements, international criminal justice is a coercive system. Part of the mandate of international tribunals is to advance a set of rules and objectives.[225] Another is to exercise coercive authority by means of indictments, arrests, detentions, sanctions and penalties over persons accused and/or convicted of breaching the specified norms.[226] As such, coercive power can result to the deprivation of liberty and personal autonomy.[227] Besides, international tribunals in strict terms are limited within the framework of the powers that have been duly authorised (consented to) by states or an international council yet in substance these courts tend to take on a life of their own.[228] The question of the legitimacy of international tribunals therefore is the question of the justification of these tribunals' right to compel compliance.[229] On what legal, moral or social grounds are they entitled to 'rule'? Have the courts and the rules they impose come into existence in accordance with the generally accepted right process?[230] Have the addressees of the rules clearly consented to be thus compelled?

It can already be noticed that legitimacy is a deeply contested attribute of international tribunals. And the contentions are often logical and warranted. They also relate to such

[225] See Rome Statute, art. 5.
[226] Ibid art. 1.
[227] See Philip Pettit, 'Legitimacy and Justice in Republican Perspective' (2012) 65 *CLP* 59, 65.
[228] Christopher A Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) *OJLS* 34(4): 729, 730.
[229] See Thomas M Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 24.
[230] Ibid.

issues as posed by Jean Jacques Rousseau of how a person can be both free and forced to conform to wills that are not their own.[231] Put differently, legitimacy broadly speaking involves the question, as Frank Michelman avers, of how an individual can 'be self-governing through institutional enactment of a law to which he is opposed'.[232] These are profound questions that this thesis will not be able to resolve. What this section seeks to achieve is to examine the meaning and purpose of legitimacy as a cardinal component of international tribunals. In addition, the sources or forms of legitimacy will be scrutinised. It will be argued that beyond the contestations regarding the issue of legitimacy, the credibility and efficiency of international tribunals can hinge greatly on the extent to which they are perceived to be legitimate or otherwise.

2.2.5.1 The Meaning and Purpose of Legitimacy

Analysing legitimacy is akin to exploring a maze; the further one goes the more puzzling it gets. Whereas the term is widely used in varied contexts, clarity or consensus exists as to its provenance and significance. For scholars such as Morris Zelditch, legitimacy is a perennial political question and one of the oldest problems in the intellectual history of civilisation.[233] Yet others like Martti Koskenniemi contend that the concept itself is a 'recent innovation' that was of no import to classic thinkers like Hobbes, Locke, Rousseau and Marx.[234] For James Crawford, legitimacy is riddled with 'fuzziness and indeterminacy'.[235] In light of its semantic obscurity, Koskenniemi claims, legitimacy can only succeed as a rhetorical device by defying formal rules and moral principles.[236] In this regard, explains Christopher Thomas, legitimacy is asserted

[231] Jean Jacques Rousseau, *The Social Contract and Other Later Political Writings*, Victor Gourevitch (trans.) (CUP 1997) IV.2.7.
[232] Frank I Michelman, *Brennan on Democracy* (Princeton University Press 1999) 23.
[233] Morris Zelditch, Jr., 'Theories of Legitimacy' in John T Jost & Brenda Major (eds), *The Psychology of Legitimacy: Emerging Principles on Ideology, Justice, & Intergroup Relations* (CUP 2001) 33.
[234] See Martti Koskenniemi, 'Book Review: The Power of Legitimacy Among Nations. By Thomas M Franck' (1992) *AJIL* 86(1): 175. See also Thomas (n 228) 733.
[235] James Crawford, 'The Problems of Legitimacy-Speak' (2004) 98 *ASIL Proc.* 271, 271.
[236] Martti Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 *EJIR* 395, 409.

at times as a way to 'supplant legal discourse' or in order 'to provide a licence to privilege personal moral intuitions at the expense of the system as a whole.'[237]

The ambiguity regarding legitimacy in international law may point to its 'newness' in international legal scholarship. Whereas legitimacy has been a central theme in the rival field of social and political philosophy for several centuries,[238] until recently it had not been the subject of much systematic thought in international law. In fact, Thomas Franck's influential publication on legitimacy in 1990[239] is sometimes credited to have sparked interest in legitimacy research among international lawyers. The concept had previously been thought to exceed the proper remit of international lawyers as piquantly expressed by Crawford thus: 'Of legitimacy it is for others to judge.'[240]

However, the dominant valuation among international legal scholars views legitimacy (from the Latin *legitimus* – lawful) as connoting the idea of conformity to an accepted standard or a set of standards[241] considered as a necessary condition for justifiable exercise of coercive power.[242] Under this conception, contends Wilfried Hinsch, a rule or an institution laying claims to legitimacy must satisfy, or have satisfied, a definite set of criteria, which may be legal, moral, or empirical.[243] Expanding on this assessment, Larry May and Shannon Fyfe argue that whereas political legitimacy involves the right of a government to exercise coercive authority, the legitimacy of international tribunals is concerned with 'the right to issue binding "rulings".'[244] This underlines the crucial importance of legitimacy for international criminal courts given that a tribunal whose right to issue binding judgments is seriously disputed or widely discountenanced can

[237] Thomas (n 228) 732.
[238] See John T Jost & Brenda Major, 'Emerging Perspectives on the Psychology of Legitimacy' in John T Jost & Brenda Major (eds), *The Psychology of Legitimacy: Emerging Principles on Ideology, Justice, & Intergroup Relations* (CUP 2001) 6.
[239] See Franck, *Legitimacy Among Nations* (n 229).
[240] Crawford (n 235) 273.
[241] See *The Chambers Dictionary* (12th edn, Harrap Publishers 2011) 875.
[242] Wilfried Hinsch, 'Justice, legitimacy, and constitutional rights' in Matt Matravers and Lukas H Meyer (eds.), *Democracy, Equality, and Justice* (Routledge 2011) 40.
[243] ibid.
[244] Larry May & Shannon Fyfe, *International Criminal Courts: A Normative Defense* (CUP 2017) 12.

scarcely rule except by use of force which international tribunals of course cannot easily call upon or rely on.

May and Fyfe further maintain that the legitimacy of international criminal tribunals' decisions is often based not in the defendants' consent but rather in their acquiescence in or acceptance of the decisions. Upholding the legitimacy of such verdicts would therefore also involve consent or acquiescence on the part of the communities or groups to which the defendants or the addressees belong.[245] The ICC's enduring challenges with apprehending President Al Bashir of Sudan illustrates this contention.[246] In the first place, Al Bashir and Sudan have contested that the ICC possesses any form of legitimacy to issue indictments to Sudanese nationals given that Sudan is not party to the Rome Statute. Notwithstanding the fact that the Darfur situation was referred to the ICC by the UNSC, Sudan has refused to cooperate.[247]

Similarly, the African Union has questioned the legitimacy of criminal indictments issued against serving African state officials by the ICC and, as a result, has authorised its members to decline requests relating to the arrest and surrender of Al Bashir and other wanted African suspects to the ICC. In like vein, the United States also vehemently disputes the legitimacy of the ICC's decision to investigate alleged atrocities committed by US troops in Afghanistan.[248] The US claims that as non-ICC state party, the ICC has no jurisdiction over the US citizens and third states. It would seem therefore that progress on either front may require the consent or acquiescence of the State of Sudan (and the AU) in respect of Sudan and that of the United States in respect of the Afghan investigation. If these conditions are fulfilled, the consent of the specific suspects to the judicial process may not be crucial.

[245] Ibid.
[246] See *The Prosecutor v Omar Hassan Al Bashir*, ICC-02/05-10/09.
[247] Article 25 of the UN Charter requires UN member states to cooperate with UNSC's decisions.
[248] See *Situation in the Islamic Republic of Afghanistan*, ICC-02/17

Issues of legitimacy thus have far-reaching implications for international criminal courts. In domestic settings, where the notion of legitimacy is more established, states are able to coerce those within their territories to comply with national institutions, rules and conventions. As Christopher Wellman puts it, 'if you are in country X, X threatens to punish you if you disobey its legal commands. An account of political legitimacy explains why this coercion is permissible.'[249] In contrast, the international system does not boast of comparable political and enforcement structures as states which thereby leaves international institutions like international criminal courts without such coercive and legitimating facilities as a police force or a stable legislature, as May and Fyfe claim.[250] And this has considerable implications for international tribunals' capacity to command compliance. The next subsection will examine how international tribunals attain legitimacy through three key forms of legitimacy.

2.2.5.2 The Bases or Forms of Legitimacy for International Tribunals

Theorists have attempted to isolate a number of crucial ways the legitimacy of international tribunal are assessed or defended. Distinctions are usually made of the following classes of legitimacy: normative and sociological,[251] normative and empirical,[252] normative and descriptive,[253] and *de jure* and *de facto*.[254] Normative legitimacy is often used interchangeably with moral legitimacy. Similarly, *de jure* legitimacy and *de facto* legitimacy tend to be linked with legal legitimacy while sociological, empirical and descriptive legitimacy all relate to social legitimacy. To

[249] Christopher Wellman, 'Liberalism, Samaritanism, and Political Legitimacy' (1996) *Philosophy &Public Affairs* 25(3): 211, 211.
[250] May & Fyfe (n 244) 9-12.
[251] See Chris Thornhill & Samantha Ashenden (eds.), *Legality and Legitimacy: Normative and Sociological Approaches* (Nomos 2010); Allen Buchanan & Robert O Keohane, 'The Legitimacy of Global Governance Institutions' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008) 25.
[252] See Achim Hurrelman, Steffen Schneider and Jens Steffek (eds.), *Legitimacy in an Age of Global Politics* (Palgrave Macmillan 2007).
[253] See Lukas H Meyer and Pranay Sanklecha, 'Introduction' in Lukas H Meyer (ed.), *Legitimacy, Justice and Public International Law* (CUP 2009) 2; Arthur Isak Applbaum, 'Legitimacy in a Bastard Kingdom' (2004) Centre for Public Leadership Working Paper 04-05, 76 <http://dspace.mit.edu/handle/1721.1/55927> Accessed 20 January 2019.
[254] See Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) 5; Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (OUP 2007) 60.

enhance clarity, we will restrict our inspection to only three forms of legitimacy as follows: legal legitimacy, moral legitimacy, and social legitimacy. A comparable taxonomy of legitimacy was also adopted by Richard Fallon in his study of the US Constitution.[255] A scrutiny of these three bases of legitimacy is proper at this point.[256]

A. Social Legitimacy

Social legitimacy generally refers to the belief held by subjects about a rule or system, or an institution as deserving of obedience based on a social or empirical fact.[257] It concerns a belief in legitimacy[258]even if that belief may be false or unfounded.[259] Also sometimes called descriptive or empirical legitimacy, this approach to legitimacy is believed to have been first elaborated by Max Weber.[260] In his analysis, Weber focused essentially on explaining the legitimation of domination, that is, how people come to accept to be ruled or dominated by power especially through bureaucratic structures.[261] Previous social and political thought, as Richard Flatman notes, had either subordinated the legitimacy issue or treated its possibility and desirability as theoretically and politically unproblematic. It was widely assumed that the authority to rule others in organised societies was divinely, naturally and ontologically ordained.[262]

For Weber, however, the legitimacy of political authority relied 'on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands.'[263] It is this belief rather than coercion or self-interest that served as a

[255] Richard H Fallon Jr, 'Legitimacy and the Constitution' (2005) 118 *HLR* 1787, 1794-1801.
[256] For an overview of legitimacy in international law, see Rudiger Wolfrum and Volker Roeben (eds), *Legitimacy in International Law* (Springer 2008).
[257] Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press 2007) 7.
[258] David Beetham, *The Legitimation of Power* (Palgrave Macmillan 1991) 4-7.
[259] Thomas (n 228) 741.
[260] See Max Weber, *Economy and Society: An Outline of Interpretative Sociology*, 3 vols, (Guenther Roth and Claus Wittich (eds.), Bedminster Press 1968).
[261] Ibid 212-301.
[262] See Richard Flatman, 'Legitimacy' in Robert Goodin, Philip Pettit & Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy* (2nd edn, Blackwell 2007) 678; Reinhard Bendix, *Kings or People: Kings and the Mandate to Rule* (University of California Press 1978).
[263] Weber (n 260) 215.

social motivation for obedience and compliance to rules.[264] This suggests, David Dyzenhaus explains, that under Weber's approach the legitimation of legal authority 'would not arise out of any moral content inherent in legal order, but out of the particular kind of rationality inherent in legal order.'[265] With that said, the central contention of social legitimacy is 'that a norm or an institutional arrangement is legitimate if, *as a matter of fact*, it finds the approval of those who are supposed to live in this group.'[266] In other words, if political subjects freely accept a norm or an institution as lawful for the regulation of their conduct, it can be seen as legitimate.[267]

Social legitimacy thus can be seen as the widespread belief in the acceptability of an order, particularly that in which no norms may be assumed as superior to others.[268] It also signifies, as Seymour Lipset puts it, 'the capacity of the system to engender and maintain the belief that the existing [norms or] political institutions are the most appropriate ones for the society.'[269] This basic belief in the existence of a legitimate social and political order, Weber argues, then constitutes a necessary ground for social action and social stability.[270] To illustrate, in a study of public compliance with the law in England and Wales, Jackson *et al* found that in contrast to merely acting on a sense of duty to obey the law, people were willing to comply with the law and even to accept the police's right to dictate appropriate behaviour when they believe that the police and public institutions act in accordance with a shared moral purpose with citizens.[271]

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[264] See Thomas (n 228) 741.
[265] David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (OUP 1999) 237.
[266] See Hinsch (n 242) 40.
[267] ibid 41.
[268] Banshoff and Smith, 'Introduction: conceptualizing legitimacy in a contested policy' in Thomas Banshoff and Mitchell P Smith (eds.), *Legitimacy and European Union: the contested policy* (Routledge 2004) 5.
[269] Seymour Martin Lipset, *Political Man: The Social Bases of Politics* (Doubleday 1960) 77.
[270] Weber (n 260) 31.
[271] See Jonathan Jackson, Ben Bradford, Mike Hough, Andy Myhill, Paul Quinton and Tom R Tyler, 'Why do People Comply with the Law?: Legitimacy and the Influence of Legal Institutions' (2012) *BJC* 52(6): 1051

In addition, sociologists and political scientists have established that institutions and authorities are effective to the extent that they are widely seen to be legitimate and operating in accord with prevailing norms of right conduct. On the other hand, when institutions and authorities 'are perceived to be illegitimate,' as Jost and Major argue, 'their power begins to erode very quickly in the absence of physical force.'[272] International tribunals thus may be said to typify what Stanley Fish calls 'interpretive communities'[273] in that 'their ability to command authority demands that they comply with a certain vision of the system that they inhabit.'[274]

It should be underscored that a rule or certain institutions such as international criminal courts may be normatively legitimate but still be perceived descriptively or socially as illegitimate based on differing grounds of assessment.[275] Conversely, as Thomas points out, authorities and institutions may constantly violate the normative grounds for their legitimacy but still remain secure of their social legitimacy. This is often the outcome of a dichotomy between the perceiving subjects' internal beliefs regarding 'the moral operation of a system and the actual operation of that system.'[276]

B. Moral Legitimacy

The moral account of legitimacy accepts that legitimacy may be a social fact, but it insists that such a claim be normatively justifiable. Moral legitimacy thus is sometimes grouped together with legal legitimacy as two forms of normative legitimacy because they both assess given objects against specific normative criteria.[277] It basically argues that the legitimacy of a rule or an institution must be measured against its adherence with, or satisfaction of, certain 'objective' criteria or specified conditions, for example,

[272] Jost &Major, 'Emerging Perspectives' (n 238) 4.
[273] Stanley Fish, 'Interpreting the Variorum' in Stanley Fish, *Is There a Text in this Class? The Authority of Interpretive Communities* (Harvard University Press 1980) 147-172.
[274] Gleider I Henández, 'The Judicialization of International Law: Reflections on the Empirical Turn' (2014) *EJIL* 25(3): 919, 927.
[275] Thomas Franck, 'Legitimacy in the International System' (1988) *AJIL* 82(4) 706, 711.
[276] Thomas (n 228) 741.
[277] Ibid 735.

standards of basic justice, fairness, and rationality.[278] Moral legitimacy thus is closely linked with questions of who has the right to rule and how that right can be morally justified.[279]

Proponents maintain that the legitimacy of a rule or an institution requires a validation of the moral standing of the rule or institution rather than a mere acknowledgement of the fact of public belief in the rule or institution.[280] In contrast to the empirical tradition, moral theorists claim that a simple factual endorsement of social rules and institutions 'does not suffice to lend normative legitimacy to them'.[281] Owing to its stress on moral justifiability, moral legitimacy has been described as the account of legitimacy favoured by philosophers.[282]

The basis for moral legitimacy is often traced to natural law theory, which dates far back to Stoic philosophy as well as to the Judeo-Christian underpinnings of European culture.[283] This tradition postulates that certain fundamental rights (sometimes also called substantive rights) take moral and practical precedence over positive rights such that the legitimacy, say, of a civil government, may depend on the extent to which it safeguards these basic natural rights.[284] According to the classical natural law theorist Thomas Aquinas, 'if in any point [positive law] deflects from the law of nature, it is no longer law, but a perversion of law.'[285] As William Blackstone explains, positive law loses its validity once it is found to controvert natural law and, as such, it ceases to oblige compliance.[286]

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[278] Hinsch (n 242) 41.
[279] See Allen Buchanan, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 79. See also David A Strauss, 'Reply: Legitimacy and Obedience' (2004) 118 *HARV LR* 1854.
[280] Ibid 42.
[281] Ibid 41.
[282] Beetham (n 258) 4-7.
[283] See Leszek Kolakowski, *Modernity on Endless Trial* (The University of Chicago Press 1990) 214.
[284] Alan Ryan, *Property* (Open University Press 1987) 61.
[285] Thomas Aquinas, *The Summa Theologica of St Thomas Aquinas*, (BiblioLife 2009) I-II, Q-95, A-II.
[286] William Blackstone, *Commentaries on the Laws of England*, Vol I (J B Lippincott Co. 1893) bk 1, sect. II, 41.

Natural law theory further contends that an institution or a civil government loses its legitimacy to govern if it arbitrarily and gravely violates substantive natural rights.[287] Accordingly, as Jeffrey Jowell notes, while it is the role of courts within a municipal democratic system to delineate 'the boundaries of a rights-based democracy,'[288] it is natural rights that set limits on what governments may lawfully do.[289] In other words, argues John Finnis, the norms of natural law validate the obligatory force of positive law in society by requiring that authority be strictly exercised in accordance with the rule of law and 'due respect for the human rights which embody the requirements of justice'.[290]

The key question then concerns what constitutes natural rights. For the legal positivist Jeremy Bentham, unlike positive rights which derive from positive laws, natural rights together with natural law do not derive from objective and justiciable sources of law but rather from inscrutable sources that are no more than nonsense upon stilts.[291] And non-cognitivist theorists add that as natural rights norms are not deducible from facts, they are merely projections of subjective human desires rather than rational objects.[292]

In contrast, natural law theorists argue that natural rights are rights which precede civil society and compose inalienable entitlements discoverable by reason.[293] They are rights, states Alexander Hamilton, which individuals 'are entitled to by the eternal laws of right reason' and which constitute a valid test of the legitimacy of positive law.[294] for

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[287] John Locke, *Two Treatises of Government*, Peter Laslett (ed.), (Mentor 1963) II, 221-2.
[288] Jeffrey Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' (2003) *Public Law* 592, 597.
[289] Ryan (n 284) 62.
[290] John Finnis, *Natural Law and Natural Rights* (OUP 2011) 23-24. See also Germain Grisez, Joseph Boyle and John Finnis, 'Practical Principles, Moral Truth, and Ultimate Ends' (1987) 32 *AM J JUS* 99.
[291] See Jeremy Bentham, 'Anarchical Fallacies' in A I Melden (ed.), *Human Rights* (Wadsworth 1970).
[292] See Jeffery Goldsworthy, 'Fact and Value in the New Natural Law Theory' (1996) *AM J JUR* 41(1): 21.
[293] This is the general view of contractarian thinkers like John Locke, Jean-Jacques Rousseau, and Thomas Hobbes. See for e.g., John Locke, *Two Treatises of Government*, Peter Laslett (ed.), (Mentor 1963) Book V.
[294] See Alexander Hamilton, *The Farmer Refuted* (1775), quoted in Bernard Bailyn, *The Ideological Origins of the American Revolution* (Harvard University Press 1967) 188.

Robert George, natural rights are rational and universal moral norms 'whose directiveness and prescriptivity are independent of people's feelings or desires.'[295] In 1791 Thomas Paine proclaimed natural rights as the 'rights of man'[296] on the basis of which individuals and peoples could legitimately challenge despotic rules and absolute regimes.[297] Today, however, there is a growing convergence between natural law and positive law as certain rights previously only claimed as natural rights – such as the right to life and the right to freedom – are increasing recognised as positive rights. 'There is no substantial difference,' it would seem in Kolakoski's view, 'between proclaiming "the right to life" and stating that natural law forbids killing.'[298]

As regards the international system, the existing approach to universal human rights ostensibly tracks back to the natural law tradition. Theorists generally contend that the status and content of basic human rights spring fully formed from the inviolable and inherent dignity and worth of the human person.[299] This is being evidenced today in the fact that the substantive rights specified in certain key international instruments like the UDHR[300], the ICCPR[301] and the ICESCR[302] are held to be rights that individuals have by virtue of being human persons regardless of their 'social status, cultural accomplishments, moral merits, religious beliefs, class memberships, or cultural relationships'.[303] For example, the UDHR specifies these rights to include the right to freedom and equal dignity (Article 1), right to life and security of person (Article 3), right not to be held in slavery or servitude (Article 4), and right not to be subjected to

[295] Robert P George, *In Defence of Natural Law* (OUP 2001) 17.
[296] See Thomas Paine, *The Rights of Man* (Wordsworth Editions [1791] 1996).
[297] Notable among these declarations include: the English Bill of Rights of 1689; the Virginia Declaration of Rights of 12 June 1776; the American Declaration of Independence of 4 July 1776; and the French Declaration of the Rights of Man and of the Citizen of August 1789.
[298] Kolakoski (n 283) 214.
[299] See, for examples, Michael Ignatieff, *Human Rights as Politics and Idolatry*, Amy Gutmann (ed.), (Princeton University Press 2003); Michael Perry, *The Idea of Human Rights* (OUP 1998).
[300] Universal Declaration of Human Rights (adopted 10 December 1948).
[301] International Covenant on Civil and Political Rights (adopted 16 December 1966).
[302] International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966).
[303] John Langan, 'Defining Human Rights: A Revision of the Liberal Tradition,' in Alfred Hennelly and John Langan, *Human Rights in the Americas*: *The Struggle for Consensus* (Georgetown University Press 1982) 70.

torture or degrading treatment (Article 5). The moral and universal significance of these rights obliges single states and the global community to protect them from abuse.[304]

Above all, natural law theory, in its human rights tenor, may underpin the current approval of certain objects as peremptory norms or *jus cogens* from which derogation is impossible. The ECtHR alluded to this in *Chahal v UK* where it held that Article 3 of the ECHR prohibiting torture, inhuman and degrading treatment is an absolute right with no room for derogation.[305] The natural law tradition also may underlie the growing support for the new principle of Responsibility to Protect (R2P)[306] by which state officials can be held internationally accountable for breaching, or permitting the breach of, such peremptory norms as genocide and torture. R2P has been strongly affirmed in several international conventions,[307] UNGA,[308] and UNSC[309] resolutions.

The question of moral legitimacy is important for international tribunals as increasingly these courts are challenged to justify the moral basis of their actions and why they deserve compliance and universal support. These challenges tend to arise especially at times when international tribunals are perceived to be showing deference to power or to influential suspects while pursuing less powerful or minor perpetrators. As Michael Ignatieff remarks, central to the international protection of human rights is the belief that every member of the human species 'is entitled to equal moral consideration'.[310] Or, as Tawney puts it, '… every human being is of infinite importance, and therefore …

[304] Louis Henkin, *The Age of Rights* (Columbia University Press 1990) 3.
[305] See *Chahal v UK* [1996] EHRR 413.
[306] See Report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (December 2001); Jeremy Sarkin, 'The Role of United Nations, African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect' (2009) *Journal of African Law* 53(1) 1.
[307] See Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984).
[308] See UNGA, '2005 World Summit Outcome', UN Doc A/60/1 (24 October 2005).
[309] UNSC S/Res/1674 'On the Protection of Civilians in armed conflicts' (28 April 2006).
[310] Michael Ignatieff, *Human Rights as Politics and Idolatry*, Amy Gutmann (ed.), (Princeton University Press 2003) 4.

no consideration of expediency can justify the oppression of one by another.'[311] The moral legitimacy of international tribunals can be eroded when this basic belief about fairness and equal human dignity is widely seen to be abused or under serious threat by the tribunals.

At the same time, concern has been expressed regarding the potential dilution of the normative force of international law that could result from competing as opposed to complementary views of moral legitimacy.[312] International tribunals are usually set up to defend individual human agents against gross abuse, oppression, and cruelty.[313] But most of these abuses tend to be committed during moments of internal strife as in self-determination struggles and/or in wartimes by agents who claim competing moral legitimacy to defend their groups or the state against attack. In such situations determining who is morally justified to use force can be difficult but picking only one side or a few scapegoats for prosecution could dilute the deterrent impact of ICrimJ.

C. Legal Legitimacy

Legal legitimacy is the form of legitimacy that tends to preoccupy lawyers.[314] Legal legitimacy is acutely crucial for international tribunals because it offers an exclusionary reason for action and compliance even in the face of opposing moral convictions.[315] An exclusionary reason, in John Finnis's view is 'a reason for judging or acting in the absence of understood reasons, or for disregarding at least some reasons which are understood and relevant and would in the absence of the exclusionary reason have sufficed to justify proceeding in some other way.'[316] According to Franck, to claim that an institution or a rule is legally legitimate is to assert that it 'has come into being and operates in accordance with generally accepted principles of right process.'[317] The right

[311] Richard H Tawney, *Commonplace Book*, J M Winter (ed.) (CUP 1972) 67.
[312] Thomas (n 228) 740-41.
[313] See Amy Gutmann, 'Introduction' in Ignatieff (n 310) ix.
[314] See Beetham (n 258) 4-7.
[315] Thomas (n 228) 735.
[316] John Finnis, *Natural Law and Natural Rights* (OUP 1980) 233.
[317] Franck, *Legitimacy Among Nations* (n 229) 24.

process, Franck argues, includes conformity with the relevant pedigree of valid legal sources[318] and justifiable 'literary, socio-anthropological and philosophical insights.'[319]

Legal legitimacy has been powerfully defended today and best represented in the works of Hans Kelsen, HLA Hart, and Joseph Raz. According to this tradition, the legitimacy of an enactment is predicated upon its legal validity, that is, its adherence to the established due process or rule of law. Put differently, in Franck's view, to claim that a rule or its application is legitimate is to assert two things: first, that its provenance – how it came into being – is in accordance with the correct legal process;[320] second, that is deserving of validation, that is, it ought to stimulate voluntary compliance by the addressees.[321] Thus legal legitimacy puts a considerable emphasis on formalism and rules that are validly made, articulated, and promulgated by the recognised law-making authority.[322]

In contrast to moral legitimacy, legal legitimacy prioritises adherence to the formal status of law over external validating factors like morality, human dignity, practical utility or expediency.[323] Ronald Dworkin describes this formalistic approach to law as 'the rule book conception' in contrast to moral legitimacy, which he calls 'the right conception' of the rule of law.[324] But highlighting form over content, argues Dworkin, does not imply that legal legitimacy disregards the content of law. On the contrary, it claims that the content of law is an ideal of substantive justice, which is completely independent of the ideal of the rule of law. How then to separate form and content? For Michael Bayles, both categories are conceptually distinct. Whereas form or procedure relates to the steps or series of processes taken in arriving at a decision,

[318] Franck, 'Legitimacy in International System' (n 275) 705.
[319] Ibid 706.
[320] Ibid.
[321] Thomas M Franck, *Fairness in International Law and Institutions* (OUP 1995) 26.
[322] See Robert Cryer, Tamara Hervey, Bal Sokhi-Bulley and Alexandra Bohm, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 37.
[323] ibid.
[324] See Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 11-12.

substance concerns the actual content of the decision. As such, 'a substantive topic cannot imply a procedure, nor a given procedure imply a particular substantive topic.'[325]

Legal legitimacy further maintains that the substantive illegitimacy of a rule does not invalidate its procedural legitimacy. Procedural legitimacy only demands that no law or rule be held up as valid until it has passed a series of validity tests, such as: was it enacted in the right manner?; was it properly authorised?; is it sufficiently clear to guide conduct?; does it obey the doctrine of prospective application?; is it of general application and applied by an impartial judiciary?[326] Conversely, a rule that fails these basic tests may be deemed procedurally illegitimate even if its substantive content is morally sound.[327] By applying this formalistic logic in a judicial context, in Posner's words, one may be able 'to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect.'[328]

Kelsen also contends that the test for legal validity can be done recursively to identify a central non-legal norm, the *grundnorm*, upon which authority is presupposed in a legal system.[329] However, it is unclear what exactly founds Kelsen's *grundnorm* given its indirect, and perhaps unintended, validation of natural law theory's stress on 'extra-empirical' foundational norms. Unlike Kelsen, Hart reasons that the legal validity of a primary norm depends on its adherence with secondary 'rules of recognition,' which are a social fact not a *grundnorm*. [330] In Hart's view, new laws will be valid if and only if they conform to already established rules setting out the procedure for enacting new laws, but this proviso, Hart concedes, applies more aptly within domestic legal contexts.

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[325] Michael Bayles, *Procedural Justice* (Kluwer 1990) 3. See also Larry May, G*lobal Justice and Due Process* (CUP 2011) 47.
[326] See Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *LQR* 195.
[327] See Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467.
[328] Richard A Posner, 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution' (1986–1987) 37 *Case Western Reserve Law Review* 181.
[329] Hans Kelsen, *General Theory of Law and State*, Anders Wedberg (trans), (The Law book Exchange 2007) 110-22.
[330] HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 100-110.

In terms of the international arena, Hart prefers to speak of the reality of international law rather than of an international legal system. He compares the supposed international legal system to what obtains in an undeveloped or rudimentary society. He contends that, despite having copious substantive primary rules, the international system remains at the core a primitive system because it lacks 'a unifying rule of recognition specifying "sources" of law and providing general criteria for the identification of its rules.'[331] Yet Hart's criticism would seem less forceful today in light of enormous recent advances in international law that have been inspired by the active network of international courts and tribunals. Currently, Article 38(1) of the ICJ Statute may be viewed as detailing what Hart might call a 'rule of recognition' or what Kelsen could see as a *grundnorm* certifying the valid sources of law for the international system.[332]

As was earlier underscored, international criminal courts typically operate a blend of substantive law and procedural rules that have been generally agreed or ratified by the states parties or the relevant international council. The legitimacy of these substantive rules and procedures enhances the tribunals' capacity to pull toward compliance states and parties that could not otherwise be compelled to do so within the international system. And procedural fairness particularly provides the level of stability that is consistent with the rule of law.[333] At the same time, strict adherence to procedural correctness could occasionally result in gaps between law and morality. For instance, legal positivists may regard apartheid South Africa's racial laws like the Prohibition of Mixed Marriages Act 1949 or the Group Areas Act 1950 as morally distasteful but still

[331] Ibid 209.

[332] Thomas Franck observes that Hart's criticism was deeply influenced by Austinian positivism, which prevailed at the time of his writing and which led thinkers like Hart into making some rather incongruous even if innocuous comparisons between domestic and international systems: Franck, *Legitimacy Among Nations* (n 229) 185.

[333] See Franck, *Legitimacy Among Nations* (n 229) 24; Thomas Franck, *Fairness in International Law and Institutions* (OUP 1995) 22; Hans Kelsen, *Principles of International Law*, Robert W Tucker (ed.), (2nd edn, Holt, Rinehart & Winston, Inc. 1967) 4; Tom R. Tyler, 'Procedural Justice, Legitimacy and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283, 307.

uphold the validity of such laws. To them, whether those laws were valid is an empirical question which is separate from the moral question of whether they were good laws. As such, the Jim Crow laws, in the US during the early 20th century which authorised *de jure* segregation of public facilities in parts of the Confederate States, would be upheld as valid laws until their repeal through the right process.[334] In the same vein, the controversial Part 4 of Anti-terrorism, Crime and Security Act [ATCSA] 2001 by means of which the UK government could indefinitely detain suspected foreign terrorists had legal validity.[335]

Whereas the strict adherence to the letter-of-the-law independent of its moral status or substantive content can boost legal certainty and may prevent legal relativism, it raises serious moral questions about the rule of law and law-making. It also puts into perspective the ideological, amoral and other underlying cognitive assumptions of the framers of the law. For instance, in the *Belmarsh* case that came before the UK's apex court, Lord Nicholls described the notorious Part 4 of ATCSA 2001 as morally unconscionable. In his view, such a law should never have been enacted in the first place because it 'is anathema in any country which observes the rule of law. It deprives the detained person of a protection that the criminal trial is intended to afford.'[336]

For Raz nonetheless the rule of law is not synonymous with the rule of 'good law'. As one of the virtues of a legal system, the rule of law may occasionally be sacrificed for other desired ends. But care must be taken to not conflate the rule of law with notions of justice, equality, human rights, or democracy.[337] Raz adds that the role of the rule of law is to set out the law with the specific objective to guarantee legal certainty and

[334] The US Supreme Court in a landmark 1954 judgment in *Brown v Board of Education* overruled *Plessy v Ferguson* that had in 1896 authorised state-sponsored segregation of public schools and thus proceeded to declare segregation of public schools unconstitutional throughout the US: See *Brown v Board of Education of Topeka*, 347 US 483; *Plessy v Ferguson* 163 US 537. In like vein, the Civil Rights Act of 1964 and the Voting Rights Act of 1965 abolished all forms of segregation in the US.
[335] Note that Part 4 of ATCSA 2001 has now been replaced with Prevention of Terrorism Act 2005.
[336] *A & Others v Secretary of State for the Home Department* [2004] UKHL 56, at 74-75.
[337] Raz, 'The Rule of Law' (n 326) 196.

social stability rather than to promote morality or to gain moral approbation.[338] The difficulty for international tribunals, as May and Fyfe have highlighted, is that they lack a standing legislature equipped with the capacity to debate, enact, amend, repeal, or reform the law.[339] This lacuna leaves the courts sometimes scrambling for self-justification when challenged on the validity of the law or the legitimacy of their interpretation of the rules and procedures they enforce. Courts like the ICC do indeed have an Assembly of States Parties, but the latter meets occasionally and operates essentially administrative oversight functions rather than in a legislative capacity.

A persistent critique of ad hoc international tribunals like the Nuremberg IMT and its Tokyo counterpart is that they have at times tended to enforce or 'create' laws that seem to violate established rules of legality including *nullum crimen sine lege* (no crime without law) and prospective application.[340] As a permanent court that only accepts situations that occurred after its inauguration in 2002 the ICC has been fairly able to escape this particular criticism. In addition to that, Article 22 of the Rome Statute clearly specifies that crimes will be strictly construed and in favour of defendants in the event of any semantic ambiguities. Unlike the ICC, the post-World War II ad hoc tribunals have no comparable provisions regarding the principle of legality. In fact, a lingering challenge on the Nuremberg IMT's legitimacy is the allegation regarding its prosecution and conviction of defendants for crimes that were only post-facto prohibitions such as crimes against humanity and crimes against peace.[341]

The later ad hoc tribunals like the ICTY and ICTR were also created only after the relevant situations had occurred with the implication that the laws within their jurisdiction were meant to apply retrospectively rather than prospectively. It is true,

[338] ibid.
[339] See May & Fyfe (n 244) 9-12. See also Larry May, G*lobal Justice and Due Process* (CUP 2011) 6; HLA Hart, *The Concept of Law* (OUP 1984 [1960]) 214
[340] See Hans Kelsen, 'The Rule against Ex Post Facto Laws and the Prosecution of the Axis War Criminals' (1945) 2 *The Judge Advocate Journal* 8-12. See also Jerome Hall, 'Nulla Poena Sine Lege' (1937-38) *YALE LJ* 47(2): 165; Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2008).
[341] See Nuremberg IMT Charter, art. 6.

however, that the applicable laws pertain to grave breaches of currently established international humanitarian laws including the Geneva Conventions of 1949, the laws or customs of war, crimes against humanity, and genocide.[342] But the nature of these tribunals raises the question of whether the UNSC can be properly assumed to be the legislature for the tribunals.[343] In addition, the ICTY has been criticised for a tendency towards norm entrepreneurism apparent in its principle of 'joint criminal enterprise'.[344] This principle which was first mooted in *Tadić* is neither mentioned in its founding Statute nor already established in ICrimJ.[345] Although the principle may be driven by concerns for justice and fairness, yet it is important as Franck warns not to conflate ideas about justice or fairness with legitimacy given that a rule may be legitimate and yet be quite unjust while another may be 'very just and yet be distinctly illegitimate.'[346]

2.2.5.4 Matching Theory with Practice

To wrap up, it would seem that much of the controversy regarding the legitimacy of international tribunals boils down to differing perceptions of the scope of their jurisdictions. For instance, certain provisions of the Rome Statute have been criticised as illegitimate, particularly Article 27,[347] which disqualifies official capacity as a defence against the ICC's jurisdiction. Article 27 has been at the centre of the furore around the ICC's indictments of some African heads of states, including President Uhuru

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[342] See ICTY Statute, arts. 1-5; ICTR Statute, arts. 1-4.

[343] See May & Fyfe (n 244) 11.

[344] Van Sliedregt defines norm entrepreneurism as the practice of borrowing and transplanting legal concepts and norms from foreign domestic jurisdictions into international judicial processes. This practice, she believes, creates confusions and compounds the fragmentation of ICL: Elies Van Sliedregt, 'International Criminal Law: Over-studied and Underachieving?' (2016) *LJIL* 29(1): 1, 3.

[345] See *Prosecutor v Tadić*, Decision on Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case No. IT-94-1-AR72 (2 October 1995) para. 143.

[346] Franck, *Legitimacy Among Nations* (n 229) 209.

[347] Article 27 has also been criticised as indeterminate owing to an apparent clash in its construal with Article 98 of the Rome Statute. The latter bars the court from proceeding with a request for surrender of indictees, including public officials, that would require the requested state to breach its international law obligations with a third state (for example, the diplomatic immunity of the indictees). See: Carien du Plessis, 'ICC: At hearings, South Africa seeks clarity on Rome Statute' (*Daily Maverick* 11 April 2017) <www.dailymaverick.co.za/article/2017-04-11-icc-at-hearings-south-africa-seeks-clarity-on-rome-statute/#Z7oT3um5Bc> Accessed 20 July 2017. See also ICC Press Release, 'Al Bashir Case: ICC Pre-Trial Chamber II decides not to refer South Africa's non-cooperation to the ASP or the UNSC' (ICC 6 July 2017) <www.icc-cpi.int/Pages/item.aspx> Accessed 20 July 2017.

Kenyatta[348] and his deputy[349] as well as former President Al Bashir of Sudan.[350] It has been argued that strictly enforcing the Article 27 provision against indicted sitting state officials could gravely jeopardise diplomatic efforts to resolve conflict situations.[351] Conversely, others contend that failure to apply the law imperils the rule of law and could embed a culture of impunity.

It is doubtful that regionalising ICrimJ would resolve all the controversies and apparent conflicts between political interests and approaches to legal validity. A lesson from NATO's 1999 military expedition in Kosovo highlights an abiding tension between the form and the content of law. The memorable verdict of Justice Goldstone's inquiry into the legality of that intervention declared it to have been 'illegal but legitimate'.[352] The intervention was procedurally illegal because it violated the due process which requires prior UNSC authorisation before deploying a peacekeeping force.[353] On the other hand, the intervention was substantively legitimate because it was launched, after all diplomatic avenues had been exhausted, to end systematic cruelty against the Kosovar population,[354] albeit failing to prevent the ethnic cleansing of Kosovar Albanians.[355]

The Kosovar intervention raises at least two central problems relative to arbitrary deviations from procedural legitimacy, especially within the international system. The first is the risk of a multiplier effect in that other states or non-state actors may adopt the NATO 'exception' as a guide for future conduct. The Russian Federation highlighted

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[348] *Prosecutor v Uhuru Mungai Kenyatta*, ICC-01/09-02/11.
[349] *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11.
[350] *Prosecutor v Omar Hassan Al Bashir*, ICC-02/05-01/09.
[351] This was South Africa's contention in its now rescinded withdrawal plan from the ICC. See: Kaajal Ramjathan-Keogh, 'Op-Ed: South Africa puts up spirited defence at ICC hearing but adverse finding likely' (*Daily Maverick* 7 April 2017) <www.dailymaverick.co.za/article/2017-04-07-op-ed-south-africa-puts-up-spirited-defence-at-icc-hearing-but-adverse-finding-likely/#.WZ7igXum5Bc> Accessed 20 July 2017.
[352] The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000) 4 [hereinafter Kosovo Report].
[353] ibid.
[354] For the former UK prime minister, Tony Blair, the intervention was also justified by the need to protect human values and universal principles. See Tony Blair, 'The Blair Doctrine (*PBS News Hour* 22 April 1999) <www.pbs.org/newshour/bb/international-jan-jun99-blair_doctrine4-23> Accessed 30 July 2018.
[355] Kosovo Report (n 352) 5.

this point in its denunciation of NATO's activities in Kosovo.[356] The second difficulty with the intervention is the moral hypocrisy that arises when some states or regional entities pursue a particular course of conduct while blocking other states, by all manner of means, from doing the same.[357] On this account, the ICC is sometimes attacked for what some perceive as its subtle approval of this moral hypocrisy and double standards.[358]

Given the ICC's challenges with respect to enforcing Article 27 of the Rome Statute, as was noted earlier, it is doubtful that the proposed RCC system would fare any better. However, the option of having cases tried at a geographically and culturally closer RCC rather than at the more 'distant' ICC could offer an incentive to suspected officials and/or militia commanders to comply. But it is moot whether this was the reasoning behind the decision to try Hissène Habré at the Extraordinary African Chambers in Senegal[359] in contrast to Charles Taylor who was prosecuted in The Hague by the hybrid SCSL.[360]

With that said, the legitimacy of an international tribunal turns considerably on the degree to which its contracting parties are willing to support it and to submit themselves and their nationals to its jurisdiction.[361] Justice Jackson powerfully advanced a similar argument at Nuremberg: 'If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or Germany does them.'[362] By laying

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[356] See Russian Foreign Minister Sergei Lavrov, quoted in Paul Reynolds, 'Legal Furore over Kosovo Recognition' (*BBC News* 16 February 2008) <http://news.bbc.co.uk/1/hi/europe/7244538.stm> Accessed 15 July 2018.

[357] This claim is made by the Third World Approaches to International Law (TWAIL) in its criticism of what it considers the West's manipulation of international law. See D Fidler, 'Revolt Against or From Within the West? TWAIL, Developing World and the Future Direction of International Law' (2003) 1 *CJIL* 29.

[358] See Edwin Bikundo, 'The International Criminal Justice and Africa: Exemplary Justice' (2012) *Law and Critique* 23(1): 1; Charles Chernor Jalloh, 'Regionalizing International Criminal Law' (2009) 9 *ICLR* 445.

[359] See Celeste Hicks, 'The Habré trial: The future for African justice?' (*African Arguments* May 2, 2017) <www.africanarguments.org/2017/05/02/habre-trial-future-african-justice/> Accessed 19 July 2018.

[360] *The Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-A.

[361] See Woetzel (n 9) 46.

[362] Report of Robert H Jackson, United States Representative to the International Conference on Military Tribunals (1945) 330.

down rules of criminal conduct against others, adds Jackson, states must accept such rules when invoked against them and their nationals.[363] It is thus worth stressing that a clear rule with clearly unjust outcomes, just like a legitimate tribunal with illegitimate or unfair procedures, will be unlikely to induce the appropriate conforming behaviour.

2.2.6 Material Jurisdiction

Under current international law, certain offences have been established as the core international crimes the commission of which incurs international criminal liability. At present, national courts and international tribunals are authorised to prosecute individuals accused of perpetrating these core crimes.[364] If regional criminal courts are created, they will ordinarily be expected to prosecute similar crimes. The objective in this section is to elucidate the principal subject-matter specialisation of international tribunals. The investigation and prosecution of these crimes can be seen as the raison d'être of international tribunals. Given the wide acceptance of these crimes as the core crimes of concern to the international community, a criminal court with jurisdiction over crimes that involve none of these central crimes may lack international legitimacy.

While controversy remains as to the scope and definitions of the principal international crimes, four of these are now clearly enshrined in the Rome Statute.[365] Article 5 of the Rome Statute outlines the core international crimes as follows: the crime of genocide;[366] crimes against humanity;[367] war crimes;[368] and the crime of aggression.[369] By setting out and defining each of these principal crimes, the Rome Statute not only

[363] ibid.
[364] See the discussion in Chapter 3 for the various channels by which national courts deal with international crimes.
[365] The Rome Statute is increasingly viewed as a constitutional reference point in ICL because it 'crystallizes the whole body of law that has gradually emerged over the past' seventy-five years. See Antonio Cassese, 'From Nuremberg to Rome: From Ad Hoc International Criminal Tribunals to the International Criminal Court' in Antonio Cassese, Paola Gaeta, and John RWD Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 3.
[366] Rome Statute, art. 6.
[367] Ibid, art. 7.
[368] Ibid, art. 8.
[369] Ibid, art. 8*bis*.

codifies the proscribed unacceptable behaviours but also 'provides proceedings in response to the violation of the rules.'[370] Individuals have been prosecuted and punished not only by the ICC, but also by several international and hybrid tribunals for perpetrating a similar set of crimes.

Notice that although the Rome Statute specifies the core international crimes, the latter's pedigree predates the ICC. Crimes against peace (or the crime of aggression), war crimes, and crimes against humanity had been the central crimes for which defendants were punished at both Nuremberg and Tokyo. In his report to President Truman following the Nuremberg IMT's final verdict in October 1946, Justice Jackson affirmed: 'No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law and law with a sanction.'[371] Likewise, in his address to the maiden session of the UNGA on 23 October 1946, President Truman declared that the Nuremberg IMT Charter offers a path that could be explored to protect humanity from future wars.[372]

Accordingly, following a US-sponsored draft resolution, the UNGA on 11 December 1946 unanimously[373] endorsed the Nuremberg Charter and also set in motion a process for organising its principles into a binding international code.[374] Commentators believe the UNGA's approval of that Charter definitively stamped it 'with the expected imprimatur of customary international law.'[375] The Nuremberg Charter principles were

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[370] Huikuri (n 101) 32.
[371] See Letter from Robert Jackson to Harry Truman (October 7, 1946) <http://avalon.law.yale.edu/imt/jack63.asp> Accessed 7 December 2018.
[372] See *Journal of the United Nations*, No. 13: Supp. A-A/P. V/34, 8.
[373] Note however that the delegates of Cuba, Argentina, and Peru voted against the draft resolution in the Sixth Committee meeting. According to Cuba's delegates, the draft resolution 'affirmed principles of international law by a mere reference to them, without enumerating them explicitly.' See *Journal of the United Nations*, No.56, Supp. No. 6-A/C. 6/123, 127.
[374] See UNGA Res 95(1), UN Doc A/RES/1/95 'Affirmation of Principles of International Law recognised by the Charter of the Nürnberg (sic) Tribunal' (Dec 11, 1946). For an overview of the UNGA Res 95(1), see Viscount Maugham, *UNO and War Crimes* (John Murray 1951) 103-104.
[375] Donald M Ferencz, 'Continued Debate over the Crime of Aggression: A Supreme International Irony' (Spring 2017) 58 *HILJ Online* 24, 25. See also Ian Brownlie, *Principles of Public International Law* (5th edn, Clarendon Press 1998) 566.

likewise subsequently affirmed by the Attorney General of Israel in Eichmann's case as having formed an integral part of customary international law 'since time immemorial.'[376] The discussion that follows will discuss the meaning and importance of each of these core crimes. The section will close by exploring the possibility of expanding the inventory of justiciable crimes within the global criminal justice system.

A. The Crime of Genocide

A delicate term in legal and political discourses,[377] the crime of genocide has been described as the 'crime of crimes'[378] and was once styled as 'the crime without a name'.[379] The term 'genocide' is derived from a Greek noun '*geno*' (tribe or race) and a Latin verb '*caedere*' (to kill). It was first formulated in 1944 by Polish lawyer Raphael Lemkin to depict the Holocaust and the systematic attacks during WWII on the bases of Jewish societies across Eastern Europe, including 'political and social institutions, culture, language, national feelings, religion and economic existence.'[380] Since WWII, a series of international measures have been taken to prevent and punish genocide, including the Genocide Convention,[381] which seeks 'to safeguard the very existence of certain human groups' and 'to confirm and endorse the most elementary principles of morality'.[382]

Unlike other international crimes, genocide is perceived to be largely driven by ideology. As Stahn notes, during a genocidal regime, groups are persecuted and purged not for what they do (their acts), but for who they are (their being).[383] Norman Cohn similarly contends that 'however narrow, materialistic or downright criminal their

[376] *Attorney Gen of Gov't of Israel v Eichmann*, 36, ILR 277 (Sup. Ct. 1962).
[377] See Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (CUP 2012).
[378] See William A Schabas, Genocide in International Law: The Crime of Crimes (CUP 2009).
[379] This alludes to the statement: 'We are in the presence of the crime without a name' made by Winston Churchill in his radio broadcast about meeting with President Roosevelt on 24 August 1941.
[380] See Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2019) 33.
[381] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) [hereinafter Genocide Convention]
[382] *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15, 23.
[383] ibid.

motives may be,' it is near impossible to realise a genocidal project without an overarching ideology.[384] In contrast to crimes committed by a lone wolf, Eze explains, 'the organized, dedicated, and political nature of genocidal acts requires collective justification. Genocide thus necessitates that its perpetrators explain the reasoning behind their programmatic intent to destroy, completely or in part, a targeted population.'[385]

Genocide was not specifically mentioned in either the charter or the judgment of the Nuremberg and the Tokyo tribunals given its unidentified status at the time.[386] But genocide was later formally recognised as an international crime in UNGA Res 180(II) of 21 December 1947. Article I of the Genocide Convention similarly confirms genocide, whether committed in peace or war time, as a crime under international law. As a peremptory norm of international law, states and the international community are now also obliged to prevent and punish the commission of genocide.[387] However, since the end of WWII and notwithstanding the said international commitments, genocide has allegedly occurred in places like Cambodia, Bosnia, Rwanda, Darfur, and Myanmar.[388] This thereby calls into serious question the efficacy of the implementation of the Genocide Convention principles and the political will of states to prevent and punish a

[384] Norman Cohn, *Warrant for Genocide: The Myth of the Jewish World-Conspiracy and the Protocols of the Elders of Zion* (Harper and Row 1967) 263.
[385] Emmanuel Eze, 'Epistemic conditions for genocide' in John K Roth (ed.), *Genocide and Human Rights: A Philosophical Guide* (Palgrave Macmillan 2005) 115.
[386] Nonetheless, the wording of the relevant provisions, particularly Article 6(C) of the Nuremberg Charter and Article II(1)(C) of Allied Control Council Law No. 10, clearly envisaged genocide though not as a separate crime, but as a form of crimes against humanity.
[387] See *Case Concerning Barcelona Traction, Light and Power Co. (Belgium v Spain)* [1970] ICJ Rep. 3, 34.
[388] See Stahn, *A Critical Introduction* (n 380) 32. See also Ewelina U Ochab, 'Genocide Convention at 70 And Years of Failures to Prevent and Punish the Crime' (*Forbes* Dec 7, 2018) <www.forbes.com/site/ewelinaochab/2018/12/07/genocide-convention-at-70-and-years-of-failures-to-prevent-and-punish-the-crime/#1222428b4946> Accessed 20 April 2019.

crime whose monstrosity,[389] Arendt says, 'oversteps and shatters any and all legal systems'.[390]

As it is, genocide now constitutes a core crime within the subject-matter jurisdiction of international tribunals. Whereas the jurisprudence of these tribunals has shed light on the scope of the crime, its standard legal definition is authoritatively specified in the Genocide Convention as a range of 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[391] These acts include:

(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on members of the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[392]

It exceeds our scope here to analyse each of the constituent acts of genocide. Copious analyses of these acts can be found in the jurisprudence of the ICTR and the ICTY in such cases as *Akayesu*,[393] *Jelisić*,[394] and *Krstić*.[395] Under Article III of the Genocide Convention, liability for genocide extends to acts like conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide. Also, liability for genocide is not restricted to high-ranking

[389] As shown by President Clinton administration's reluctance to classify the Rwanda genocide as such in 1994, states tend to take slow and tactical steps in assessing the threshold for the crime of genocide within an ongoing mass atrocity as a way to deflect an obligation or pressure to respond.
[390] See 'Letter to Karl Jaspers', in Lotte Kohler and Hans Saner (eds.), *Hannah Arendt/Karl Jaspers correspondence, 1926-1969* (Harcourt Brace Jovanovich 1992) 51, 54.
[391] Genocide Convention (n 381) art. II.
[392] ibid art. II. See also ICTY Statute, art. 4(2); ICTR Statute, art. 2(2); Rome Statute (n 71) art. 6.
[393] *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998 [on how sexual violence can constitute serious bodily or mental harm in the context of genocide.]
[394] *Prosecutor v Jelisić*, IT-95-10-T, Judgment, 14 December 1999 [on the high threshold requirement for proof of specific intent to commit genocide.]
[395] *Prosecutor v Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004 [on geographically localised genocide.]

officials, but extends to private citizens[396] while the jurisdiction to prosecute and punish perpetrators of genocide can be exercised by both the territorial state and an international tribunal.[397]

B. Crimes against Humanity

The full range of what constitutes crimes against humanity remains disputed.[398] At present, four basic features of these crimes can be identified. First, they are extremely odious offences that degrade both the individual victims and humanity as a whole.[399] Second, they are seldom sporadic events, but form part of either state policy 'or of a widespread or systematic practice of atrocities tolerated, condoned, or acquiesced in by the government or a de facto authority.'[400] Third, no link to an armed conflict[401] is required and, as such, the crimes can be punished without regard to whether they were committed in peacetime or in wartime.[402] And fourth, the relevant victims can be civilians and/or non-combatants within the context of armed conflicts.[403]

Article 7 of the Rome Statute outlines the pertinent acts under crimes against humanity to include, among others: murder, torture, extermination, rape, deportation, apartheid, enforced disappearances, enslavement, persecution, and other inhumane acts. To be admissible, these acts must be 'committed as part of a widespread or systematic attack

[396] Genocide Convention (n 381) art. IV.
[397] ibid, art. VI.
[398] Christopher McLeod, 'Towards a Philosophical Account of Crimes Against Humanity' (2010) *EJIL* 21(2): 281, 282.
[399] See Cassese, *International Criminal Law* (n 34) 64.
[400] Ibid.
[401] In contrast, at Nuremberg and Tokyo, the link between crimes against humanity and an armed conflict was required. As to the Nuremberg IMT, Justice Jackson explained why such nexus was crucial: 'The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities.' See 'Minutes of Conference Session of July 23, 1945' in *Report of Robert H Jackson, United States Representative to the International Conference on Military Trials* (1949) 328, 331.
[402] This shows a shift in the law from the IMT and the IMTFE charters where it had been necessary to link the alleged offences to an armed conflict or other crimes within the relevant tribunal's jurisdiction.
[403] Cassese, *International Criminal Law* (n 34) 64. [Although not permissible under the statute of the ICTY, ICTR, and the ICC, enemy combatants may also qualify as victims under customary international law.]

directed against any civilian population, with knowledge of the attack'.[404] In the *Kunarac* Appeal Judgment, the ICTY held that there is no numerical threshold as to when hostile attacks constitute crimes against humanity. The court takes into account the 'consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes'.[405] Similarly, in the *Blaškić* case, it was clarified that an attack is widespread if it is directed against a large number of civilians and results in a large number of victims.[406]

Perhaps the most tricky aspect in deciding crimes against humanity is the wide range of offences and subtle contexts that are engaged.[407] Whereas, for instance, Article 7(1)(g) of the Rome Statute outlines a variety of sexual and gender-based offences constituting crimes against humanity, such offences are neither mentioned in the charters of the IMT and the IMTFE nor prosecuted by either tribunal.[408] Besides, the ICTY and the ICTR statutes contain only the gender-based crime of rape whereas the Rome Statute includes rape, enforced prostitution, sexual slavery, forced pregnancy, enforced sterilisation and other forms of sexual violence.[409] It is also unclear what is covered under the 'other inhumane acts' category.[410] In the *Dominic Ongwen* case, for example, the ICC Pre-Trial Chamber II ruled that 'forced marriage' is an 'inhumane act,' but not a form of sexual slavery.[411] While that ruling agrees with the SCSL

[404] Rome Statute, art. 7(1).
[405] *Prosecutor v Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković*, IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 95 [hereinafter *Kunarac* Appeal Judgment].
[406] *Prosecutor v Blaškić*, IT-95-14, Judgment, 3 March 2000, para. 206 (Hereafter Blaškić Trial Judgment).
[407] For example, the ICTY explained in the *Kunarac* Appeal Judgment (n 405) that an attack in the context of crimes against humanity is not limited to an armed conflict, but also includes any mistreatment of a civilian population (para. 86). Likewise, at paragraph 94, it clarified the phrase 'systematic' as linked to 'the organised nature of the act of violence and the improbability of their random occurrence.'
[408] This notorious omission has at times triggered criticisms of the IMTFE for the curious neglect of the sexual offences inflicted upon many Korean women by Japanese soldiers during WWII. See United Nations, Preliminary Report Submitted by the Special Rapporteur on Violence against Women, Its Causes and Consequences, UN Doc. E/CN.4/1995/42, 11 November 1994, para. 228.
[409] Rome Statute, art. 7(g).
[410] Ibid art. 7(k).
[411] *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, 23 March 2016, para. 87.

jurisprudence on a similar case,[412] it fails to settle misgivings as to whether 'other inhumane acts' is merely a blank set that is left to the tribunals' discretion to fill out.

That said, Cherif Bassiouni has correctly stressed that the objective of the prohibition of crimes against humanity 'is to protect against victimization irrespective of any legal characterisation or the context in which it occurs'.[413] In that sense, a discrete crime like torture can be punished as a crime against humanity regardless of whether it was done in peacetime or in wartime so long as it can be shown to be part of a widespread or systematic practice.[414] In Stahn's view, this reading shows a certain degree of modernisation by enabling international tribunals and municipal courts 'to engage with new forms of violence, transformations of conflict and peacetime violations.'[415] On the downside, however, the modernisation trend could provide a cover for states to frustrate legitimate rights activism by local political movements and/or to disproportionally target the violations by non-state actors vis-à-vis state violations.[416]

C. War Crimes

War crimes are among the oldest international crimes with origins that stretch to the *jus in bello* (justice in war) tradition as distinct from *jus ad bellum*. As the ICTY Appeals Chamber distinguished in *Šainović et al*: whereas the legitimacy under international law of 'the resort to the use of force' is a question of *jus ad bellum*, the legality of the manner in which force is used under humanitarian law is a question of *jus in bello*.[417] Thus, war crimes are grave breaches of international humanitarian law (IHL) of armed

[412] *Prosecutor v Brima, Kamara and Kanu*, SCSL-2004-16-A, Judgment, 22 February 2008, para. 194.
[413] M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn, Kluwer Law International 1999) 44.
[414] Cassese, *International Criminal Law* (n 34) 117. See also ILC's Draft Article 2, Provisionally Adopted by the Drafting Committee, 26 May 2017, UN Doc A/CN.4/L.829.
[415] Stahn, *Critical Introduction* (n 380) 73.
[416] See Frédéric Mégret, 'Is the ICC Focusing Too Much on Non-State Actors?' in Margaret M deGuzman and Diane Marie Amann (eds.), *Arcs of Global Justice: Essays in Honour of William A Schabas* (OUP 2018) 174ff; Andrew Clapham and Paola Gaeta, 'Torture by Private Actors and 'Gold-Plating' the Offence in National Law' in Margaret M deGuzman and Diane Marie Amann (eds.), *Arcs of Global Justice: Essays in Honour of William A Schabas* (OUP 2018) 292.
[417] *Prosecutor v Šainović, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić*, IT-05-87-A, Judgment, 23 January 2014, para. 1662.

conflict – a vast body of customary and treaty rules largely formed from the so-called 'law of The Hague'[418] and 'law of Geneva'.[419] The point of a robust international commitment to impose criminal responsibility for grave breaches of IHL is to protect 'the human dignity of every person'[420] and 'to prevent or mitigate suffering'.[421]

Unpacking the expression 'grave breaches' can be problematic nonetheless not least from a conceptual standpoint. It implies a curious balancing threshold, or a ranking, of breaches that qualify as war crimes given that not all breaches of IHL are treated in practice as war crimes. According to the ICTY Appeals Chamber, while it may contravene the basic principles of the Hague Convention, 'the fact of a combatant simply appropriating a loaf of bread in an occupied village' would not amount to a war crime.[422] Likewise, crimes committed by servicemembers against their own military do not amount to war crimes, notwithstanding that they may be punishable under the military laws of the respective parties.[423] Additionally, warring parties are permitted, within the bounds of lawful means, to attack each other's military objectives.

For a breach of IHL to constitute a war crime, therefore, at least four conditions must be satisfied.[424] First, the breach must involve the infringement of an IHL rule. Second, the infringed rule must belong to the corpus of either customary law or an applicable treaty. Third, the breach must be serious enough to be in violation of 'a rule protecting important values' and that 'must involve grave consequences for the victim'. Fourth, the

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[418] This refers to the provisions of the 1899 and 1907 Hague Conventions that regulate the means and methods of lawful warfare as well as the treatment of non-combatants, namely civilians and those *hors de combat*, including: the sick, wounded, shipwrecked, and war prisoners.

[419] This alludes to the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, which largely focus on the protection of persons who are not, or are no longer, involved in the armed conflict. See Cassese, *International Criminal Law* (n 34) 47.

[420] *Prosecutor v Furundžija*, IT-95-17/1-T, Judgment, 10 December 1998, para. 183.

[421] See Hirsch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 *BYIL* 363.

[422] *Prosecutor v Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal), IT-94-1, 2 October 1995. [hereafter *Tadić* (Interlocutory Appeal)]

[423] See *Motosuke*, Netherlands East Indies, Temporary Court Martial at Amboina, Decision of 28 January 1948, in *Annual Digest* 1948, 682-84; *Pilz*, Dutch Special Court of Cassation, Judgment of 5 July 1959, in *NEDERJ*, 1950, no. 681, 1209-11.

[424] These criteria were outlined by the ICTY Appeals Chamber in the *Tadić (Interlocutory Appeal)* case (n 422) para. 94.

breach must entail the individual criminal liability of the offender under either customary or conventional law. Importantly, under current international law, liability for breaching these conditions can be incurred by individual belligerents in either interstate or internal armed conflicts.[425] This shows a marked shift from traditional practice in which war crimes could only be committed during interstates' armed conflicts.[426]

International tribunals have contributed significantly to the development of the law on war crimes. In fact, jurisdiction over war crimes has been a constant in the charter of modern international tribunals. For example, Article 6(b) of the Nuremberg IMT charter includes the following, among other things, as war crimes: murder or ill-treatment of civilians, murder or ill-treatment of prisoners of war, killing of hostages, wanton destruction of towns and villages, plunder of public and private property, and devastation not warranted by military necessity. Similar items also feature under Article 3 of the ICTY statute plus the use of poisonous, or other, weapons that cause undue suffering. While the charters of the Nuremberg and Tokyo courts and the ICTY make no distinction between interstate and intrastate belligerence, Article 3 of the ICTR statute covers only intrastate armed conflict, specifically the violation of the Common Article 3 to the Geneva Conventions and Additional Protocol II. Conversely, the Rome Statute separates interstate from intrastate hostilities and also elaborates on the current list of war crimes.[427] Besides helping to shape the existing practice of IHL, international criminal jurisprudence has thus also moved in some ways towards embedding a global set of IHL rules.[428]

At the same time, international tribunals, especially the ICC, have drawn criticisms for seemingly lacking clear understanding of the humanitarian impact of their judgments

[425] Ibid, paras. 94-97.
[426] See Quincy Wright, 'When Does War Exist?' (1932) 26 *AJIL* 362.
[427] See Rome Statute art. 8.
[428] Stahn, *Critical Introduction* (n 380) 94.

and thereby risk instituting an awkward parallel legal universe.[429] In this regard, Cassese considers it rather retrograde that the Rome Statute should separate the law applicable to interstate armed conflicts from that applicable to internal armed conflicts.[430] Likewise, the Rome Statute contains a strange incongruity between the age of criminal responsibility and the age of military recruitment. Whereas the ICC lacks jurisdiction over suspects aged under 18 years at the commission of the relevant crime,[431] its statute permits the deployment of such persons (above age 15) in hostilities.[432]

In addition, the Rome Statute permits new states parties on acceding to the ICC to suspend the court's jurisdiction for a 7-year period over war crimes committed by their nationals or on their territory.[433] Such bizarre provisions, as Cassese aptly observes, can erode and/or sabotage the ICC's purposes.[434] While such provisions may have been compromises required to gain approval for the Rome Statute, they also expose and entrench damaging internal contradictions right at the centre of the ICC's system.

D. The Crime of Aggression

The crime of aggression, which is perhaps the most politically fraught of the core international crimes, was described by the IMT as 'the supreme international crime … in that it contains within itself the accumulated evil of the whole'.[435] It is small wonder that various states at the Rome Statute negotiations deplored aggression as the 'mother of all crimes' and they insisted on vesting the ICC with jurisdiction over the crime.[436] The recent criminalisation of aggression recognises its frequent priority in the series of acts that comprise breaches of *jus ad bellum* and/or *jus in bello* during armed

[429] Ibid.
[430] Cassese, *International Criminal Law* (n 34) 61. See also *Tadić (Interlocutory Appeal)* (n 422) para. 97.
[431] Rome Statute, art. 26.
[432] Ibid, arts. 8(2)(b)(xxvi) and 8(2)(e)(vii).
[433] Ibid, art. 124.
[434] Cassese, *International Criminal Law* (n 34) 62.
[435] See Nuremberg Judgment, *Trial of the Major War Criminals Before the International Military Tribunal,* Vol I (IMT Nuremberg 1947) 186.
[436] See Benjamin B Ferencz, 'The Illegal Use of Armed Force as A Crime Against Humanity' (2015) *JUFIL* 2(2): 187, 189.

conflicts. It is also a recognition of the trend towards *jus contra bellum* – the restriction of the recourse to war and the use of force in international relations.[437]

The crime of aggression inherently alludes to armed conflict and the use of force. Until fairly recently war-making and the use of force were considered a legitimate international relations policy.[438] In fact, as late as the 19th century, the military theorist Carl von Clausewitz described war as purely a continuation of politics by other means.[439] Two centuries before Clausewitz, Hugo Grotius had pressed for humane conduct in warfare 'lest by imitating wild beasts too much we forget to be human'.[440] And several centuries earlier, Thucydides had remarked that the struggle for power was the prevailing order of society: 'the strong do what they can, and the weak submit'.[441]

Notwithstanding the denunciations of war by the states parties to the 1928 Pact of Paris and the proscription of the threat or use of force under Article 2(4) of the UN Charter, war-making was only first specified as an international crime incurring individual criminal liability in the pre-IMT's London Agreement of 8 August 1945. Accordingly, many Nazi war leaders were tried and convicted by the IMT on account of committing the crime of aggression, which was seen as part of the 'crimes against peace'. Article 6(a) of the Nuremberg Charter defines the crimes against peace as: 'planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing'. This definition is restated under Article 5(a) of the Tokyo Charter.

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[437] See Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010).
[438] Article 12 of the League of Nations Covenant approved war-making insofar as the enemy was given a 3-month prior notice.
[439] Carl von Clausewitz, *On War*, Michael Howard and Peter Paret (eds.), (Princeton University Press [1832] 1984) 87.
[440] Hugo Grotius, *On the Law of War and Peace* [*De Juri Belli Ac Pacis Libri Tres*] A C Campbell (trans.), (Batoche [1625] 2001) bk 3, ch XXV, s II.
[441] Thucydides, *History of the Peloponnesian War*, Rex Warner (tran.), (Penguin Classics [431 BCE] 2000).

The ICTY and the ICTR statutes have no provision on aggression and neither tribunal considered the crime. In contrast, Article 5(d) of the Rome Statute initially gave the ICC a notional jurisdiction over aggression pending a later definition of the crime. Following the 2010 Kampala Review Conference, a definition of aggression was agreed by the ICC's states parties while the court's jurisdiction over the crime became effective on 17 July 2018 after a consensus resolution adopted by the ICC's Assembly of States Parties.[442] Yet, the irony has not gone unnoticed that the delay in granting the ICC jurisdiction, and the attempt to restrict the court's jurisdiction, over aggression was led by some of the key states that had been at the forefront in framing the Nuremberg's Charter with jurisdiction to prosecute and punish the Nazi leaders over crimes against peace.

Article 8 *bis* (1) of the Rome Statute defines the crime of aggression as 'the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression, which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.' Paragraph 2 of Article 8 *bis* explains 'act of aggression' as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.' This provision together with its seven specified contexts that constitute acts of aggression reproduce the definition and contexts of acts of aggression found in the UNGA Res. 3314 of 14 December 1974.

Meanwhile, the ICC's jurisdiction over the crime of aggression is fragmented and this could pose serious jurisdictional dilemmas with respect to effective prosecution of the crime. Different procedures are to be followed in contexts where the alleged acts of aggression were referred to the ICC by state parties or by the OTP's *proprio motu* in

[442] Resolution ICC-ASP/16/Res. 5, adopted at the 13th Plenary Meeting, 14 December 2017.

contrast to a UNSC referral.[443] In the first instance, for example, states parties are given an opt-out option[444] while the ICC is barred from considering acts of aggression involving nationals or territories of non-state parties.[445] Moreover, before commencing an investigation, the prosecutor is required to notify the UNSC regarding an alleged and evidenced crime of aggression and may only proceed to investigate if the UNSC concurs or makes no determination on the subject within 6 months.[446] These procedures will not apply if the original referral was submitted by the UNSC.[447]

The crime of aggression further divides opinions as regards humanitarian interventions. Delegates at both the ICC's inaugural Rome Conference of 1998 and the 2010 Kampala Review Conference chose to evade this debate despite numerous proposals tabled for its deliberation.[448] It is still unclear whether force applied in the context of humanitarian intervention could come under the acts of aggression specified in Article 8 *bis* (2) of the Rome Statute. Increasingly, states appeal to humanitarian intervention as validating the case to use force.[449] Yet, in complex contexts like the ECOMOG intervention in Liberia or the NATO activities in Kosovo, political calculations may cloud determinations of whether the use of force was legal or illegal and amounting to a crime of aggression. There is also dispute as to the scope of individual liability of states partaking in collective security enforcement.[450]

[443] For further discussion of the restrictions on the ICC's jurisdiction over aggression, see David Scheffer, 'The Complex Crime of Aggression under the Rome Statute' (2010) 23 *LJIL* 897, 904.
[444] Rome Statute, art. 15 *bis*; art. 121(5).
[445] Ibid, art. 15 *bis* (5).
[446] Ibid, art. 15 *bis* (6), (7), (8).
[447] Ibid, art. 15 *ter*.
[448] Leslie Esbrook, 'Exempting Humanitarian Intervention from the ICC's Definition of the Crime of Aggression: Ten Procedural Options for 2017' (2014) 55 *VA J INT'L L* 791, 802.
[449] See Antonio Cassese, '*Ex iniuria ius oritur*: Are We Moving Towards International Legitimation of Forcible Use of Humanitarian Countermeasures in the World Community?' (1999) 10 *EJIL* 23; Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) *EJIL* 16(3): 369.
[450] See Claus Kreß, 'The State Conduct Element' in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary,* Vol 1 & 2 (CUP 2017) 412, 423.

Above all, following the activation of the ICC's jurisdiction over aggression the claim by some that aggression could not be prosecuted because it had no legal definition is no longer sustainable.[451] But the question of how to assign criminal liability for aggression remains unresolved. Aggression or the use of force is usually authorised by heads of states or by congress or in some cases by the top leadership of rebel movements. In light of the prevalent doctrines of territorial sovereignty and state immunity, it is still unclear how international tribunals can effectively indict and prosecute sitting officials for committing aggression. Success would likely demand creative and consistent application of the relevant provisions and the international community's cooperation.

2.2.6.1 Is the Inventory of Grave International Crimes Complete?

It seems advisable at this juncture to consider whether there is a case to expand the limited scope of the material jurisdiction of international tribunals to incorporate grave transnational crimes or the so-called crimes of regional concern. International criminal law usually separates core international crimes from transnational treaty crimes.[452] The latter category is broad and includes economic crimes like serious drug trafficking, money laundering, and corruption. It also encompasses 'crimes against the environment' such as illegal release of toxic wastes, environmental degradation, illegal natural resource exploration, and the illegal trade in wildlife, fish stocks, and timber.[453] The crime of terrorism also falls within the category of transnational treaty crimes.

What specifically distinguishes these 'non-core' crimes at present is that they do not fall under the jurisdiction of any international criminal court.[454] Unlike the principal international crimes whose perpetration is regarded as an offence against the international community as a whole, transnational treaty crimes are deemed to breach 'the law of a particular state, or several jurisdictions, but the perpetrator is not treated

[451] As we have shown, many Nazi war leaders were tried and punished on the charge of aggression in 1945 while the crime was elaborately defined by the UNGA since 1974.
[452] Roger S Clark, 'Treaty Crimes' in William Schabas, *The Cambridge Companion to International Criminal Law* (CUP 2015) 214ff.
[453] Stahn, *Critical Introduction* (n 380) 107.
[454] Cassese, *International Criminal Law* (n 34) 101.

as an "international criminal".'[455] Thus, municipal courts rather than international tribunals are currently regarded as the best forum for dealing with such treaty crimes.

It is increasingly the case, however, that some transnational crimes are also being viewed as crimes of regional concern. During the Rome Statute negotiations, many Caribbean states contended for the inclusion of the transnational crime of drug trafficking in the Rome treaty. In their submission the Caribbean states argued that transnational and organised crimes particularly drug trafficking threatened the political, social, and economic order of states within their region.[456] That proposal was rejected, but with the concession to revisit the matter at a future review of the Rome treaty.[457]

That initial failure in Rome has not quelled further interests to confer international tribunals with material jurisdiction over transnational crimes. In the view of Stephanos Bibas and William Burke-White, '[p]erhaps international criminal law should naturally have fought supranational crimes that span jurisdictions, such as human trafficking, drug trafficking, intellectual and maritime piracy, and international terrorism.'[458] Both commentators further contend that had the transnational emphasis been upheld 'international tribunals and procedures would have spanned a very different set of substantive crimes …. What these crimes would all have shared is a need for states to cooperate in stamping them out.'[459]

Others have proposed the creation of treaty-based tribunals that will be tasked with jurisdiction over transnational and international crimes. A prominent example in this regard is the African Union, which has taken major steps towards establishing an African Criminal Court that would be considering both the core international crimes

[455] Stahn, *Critical Introduction* (n 380) 106.
[456] Patrick Robinson, 'The Missing Crimes,' in Antonio Cassese, Paola Gaeta, and John RWD Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* Vol. I (OUP 2002) 497, 504
[457] Stahn, *Critical Introduction* (n 380) 107.
[458] Stephanos Bibas and William W Burke-White, 'International Idealism Meets Domestic-Criminal-Procedure Realism' (2010) *DUKE LJ* 59(4): 637, 645.
[459] Ibid.

and certain crimes that are claimed to be concern to African states. In addition to the core international crimes, the African Criminal Court is set to be equipped with jurisdiction over a wide range of crimes including unconstitutional changes of government, human trafficking, drug trafficking, and corruption.[460] In like vein, some Latin American experts in December 2017 produced a 'Draft Statute of the Criminal Court for Latin America and the Caribbean against Transnational Organized Crime'.[461] The latter court is billed to handle such crimes as narcotics trafficking, human trafficking, money laundering, and the illicit trade in cultural artefacts.[462]

It is likely that the jurisdiction of the ICC and other international criminal courts will be expanded in the future to embrace certain transnational crimes. The matter came up at the 2010 Kampala Review Conference of the Rome Statute but was left unresolved. The Amendment provision under Article 121 of the Rome Statute permits states parties to propose additional crimes and revisions of definitions of existing crimes to the statute. But the ICL's wheels turn at a glacial pace. Persuading state delegates to internationalise or to canonise some crimes that others deem to be of marginal interest can prove a tough task at best. Yet, the recent definition of the crime of aggression and the subsequent empowerment of the ICC over that crime provide cause for optimism.

2.3 Conclusion

This chapter has identified and scrutinised certain common attributes that altogether contribute significantly to the identity and credibility of international tribunals. It has been shown that international criminal tribunals are typically characterised by such properties as constitutional legality, supranational jurisdiction, adjudicatory neutrality, international legitimacy, and material jurisdiction. Although not exhaustive the identified qualities indicate the basic essence of these courts. With these it will be

[460] More on the African Criminal Court further in Chapter 5.
[461] Robert J Currie and Jacob Leon, 'COPLA: A Transnational Criminal Court for Latin America & the Caribbean' (22 January 2018) *NJIL* (forthcoming) <https://ssrn.com/abstract=3106855> Accessed 12 May 2019.
[462] Stahn, *Critical Introduction* (n 380) 107.

possible to determine the legitimacy and/or legality of any institution that purports to be an international criminal court. Whereas the analysis has developed Woetzel's original effort,[463] it has also highlighted some of the critical controversies that have tested the credibility of ICrimJ practices, especially issues relating to adjudicatory neutrality, judicial interventions in third states, and prosecutorial selectivity.

The chapter also has sought to confront and/or contextualise the controversies by pointing out, in relevant contexts, certain underlying ideological assumptions. We also underlined a pattern of disconnect between the ideals and the praxes of international criminal justice. This was particularly apparent in the lack of equal prosecution of all sides in cases that came before the Nuremberg IMT and the Tokyo IMT. But even the ICTY, the ICTR and the ICC have not fared much better in this regard. The pertinent question today thus is not whether things could have been done differently, but how things can be done differently. As George Santayana memorably put it, not to learn from the past is to be condemned to repeat it. As was noted in Chapter 1, the rules of international law are rarely the problem; it is often the methods and manner of their application that tend to generate much discord. The discrepancies suggest the need for a structural reform, which, as Cassese proposes, can take the form of a sensible and careful blend of various models that may be applied 'not as alternatives but as a joint reaction to the intolerable suffering we are obliged to witness every day.'[464]

One approach that will engage us in chapter 4 is the possible establishment of RCCs that may be able to have jurisdiction over international and transnational crimes. This will be contrasted with other models such as the regionalisation of universal jurisdiction and the use of regional hybrid tribunals. A scrutiny of these models will us to ensure that we heed Georg Schwarzenberger's council not 'follow uncritically in the train of the enthusiastic protagonists' of new ideas 'but to pause and reflect on the

[463] See Woetzel (n 9).
[464] Cassese, *International Criminal Law* (n 34) 458.

meaning and value of it all.'[465] In the meantime, our next task is to examine the domestic context of prosecuting international and atrocity crimes. Our aim will be to highlight how domestic courts tend to be enabled to prosecute as well as hindered from considering relevant crimes by virtue of certain jurisdictional and legislative devices. A robust global justice system is a function of a robust domestic system.

[465] Georg Schwarzenberger, 'The Problem of an International Criminal Law' (1950) *CLP* 3(1): 263.

Chapter Three

National Prosecution of International Crimes: Selected Jurisdictional and Legislative Issues

3.1 Introduction

The last chapter has surveyed the international context of the global criminal justice system, focusing precisely on the activities, attributes and aspirations of international criminal courts. Yet, it should be emphasised that national courts provide the mainstay of international criminal law (ICL) enforcement. This is because the preponderance of international crimes occurs within national contexts and states have greater capacity than international tribunals to combat impunity. As Robert Cryer et al point out, whereas international criminal courts contribute enormously to the pool of global initiatives against impunity, they are incapable on their own of prosecuting even a minority of the serious cases and situations of concern to the international community.[1] Hence, effective national prosecutions of international crimes are crucial not just to complement other global efforts but also to embed a robust deterrence culture at the grassroots.

This chapter thus will examine how national courts combat international crimes. The focus will be limited to how states tend to justify their assertion of criminal jurisdiction over such crimes through what has become known in international law as the customary bases of criminal jurisdiction. In an era of the Rome Statute it may be validly expected that states should be able to prosecute locally all the proscribed crimes under Article 5 of the Rome Statute. However, as was highlighted in the last chapter, not all states are states parties to this treaty and a great number of its members have yet to integrate the applicable sections of the treaty into domestic law. As a result, beyond the Rome Statute and in contrast to international tribunals, national courts tend to rely on a

[1] Robert Cryer, Darryl Robinson, and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn, CUP 2019) 88.

broader menu of jurisdictional triggers in tackling atrocity crimes ranging from the more established territoriality norm to the emergent universality doctrine.

As may be expected, these jurisdictional groundworks are seldom triggered without controversy. The controversies usually mount when domestic criminal processes implicate citizens of foreign states typically by means of the application of the personality and/or universality jurisdictional mechanisms. As would be shown later, the political and diplomatic ramifications attending such exercise of jurisdiction could and do at times hinder the course of justice. In addition, effective domestic prosecution and punishment of perpetrators of atrocity crimes also frequently tend to be impeded by certain legal barriers, including statutory limitations, amnesty laws, double jeopardy rules, and official immunities.

The crucial question is clear: what option(s) then do victims of serious international crimes have when the course of justice is foreclosed domestically? In such grave situations, for the international society to do nothing would be tantamount to what the ICTY's Appeals Chamber calls 'a travesty of law and a betrayal of the human need for justice.'[2] It will be argued that the numerous challenges and obstacles to obtaining justice locally suggest, or perhaps vindicate, the need for more robust international mechanisms including possible regional criminal courts that could provide fresh rays or channels of justice when the prospect of justice at home is grossly impeded or jeopardised.

3.2 Preliminary Distinctions

3.2.1 Clarifying Jurisdiction

To be able to examine how jurisdictional issues engage with national prosecutions of international crimes it seems apt first to clarify the significance

[2] *Prosecutor v Tadić*, Decision on Defence Motion for Jurisdiction, Appeals Chamber, Case No. IT-94-I-A, 2 October 1995, para. 58.

of the term 'jurisdiction' in the context of criminal law. Etymologically derived from the Latin *iuris* (law) and *dicere* (to speak), jurisdiction literally means 'a saying or speaking of the law'.[3] The concept originally signified, according to Joseph Plescia, the authority granted to a magistrate 'to determine the law and, in accordance with it, to settle disputes concerning persons and property within his forum (sphere of authority)'.[4] Accordingly, for Markus Dubber, jurisdiction represents a precise activity performed by judges or magistrates to declare, state, interpret, or clarify legal norms.[5] Set within the context of criminal law, Albert Levitt defines jurisdiction as 'the power of a given court to inquire into and determine whether or not an alleged offense has been committed by a designated accused person, and to apply the penalty for the offense so determined.'[6] But this is only a basic view of jurisdiction, which must be complemented by the broader notion of jurisdiction in international law.

In contrast, jurisdiction in the international sphere indicates, as Roger O'Keefe puts it, a state's 'authority under international law to regulate and to give effect to the regulation of persons and property.'[7] As Bernard Oxman explains, a state's jurisdiction 'refers to its lawful power to act and hence its power to decide whether, and if so, how to act.'[8] The state's power 'to act' and 'to decide' is traditionally most critical in criminal matters, or its criminal jurisdiction. Hence, as Igor Lukashuk notes, the criminal jurisdiction of a state signifies 'the authority of the State to prescribe behaviour and to ensure that its prescriptions are

[3] See Kenneth S Carlston, 'The Grasp of Jurisdiction' (1959) 53 *ASIL Proc* 170, 170.
[4] Joseph Plescia, 'Conflict of Laws in the Roman Empire' (1992) 38 *Labeo* 30, 32.
[5] See Markus D Dubber, 'Criminal Jurisdiction and Conceptions of Penality in Comparative Perspective' (2013) *The University of Toronto Law Journal* 63(2): 247, 258.
[6] Albert Levitt, 'Jurisdiction Over Crimes' (1926) 16 *Journal of Criminal Law & Criminology* 316, 319 [emphasis in the original removed].
[7] Roger O'Keefe, *International Criminal Law* (OUP 2017) 3. See also Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *JICJ* 735, 736.
[8] Bernard H Oxman, 'Jurisdiction of States' in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law,* Vol. III (Elsevier Sciences Publishers 1997) 55.

carried out using all lawful means at its disposal.'[9] It is, argues Marshall CJ, 'a branch of that which is possessed by the nation as an independent power.'[10]

As such, criminal jurisdiction traditionally constitutes an essential demonstration of the sovereign powers of a state 'that it has no admitted superior, and that it gives the supreme law within its dominion on all subjects appertaining to its sovereignty.'[11] For Dubber, it represents 'the obvious manifestation of the state's penal power'.[12] Exclusive exercise of criminal jurisdiction has its merits. For one, it enables states to exercise clear authority over their territory and all that reside in it. For another, it ensures that states can be legitimately held accountable for what transpires within their territories, including the activities of their courts and state officials. Otherwise, it would be unreasonable to hold a state and its officials accountable for acts that are caused or influenced by external actors.

Conversely, absolute sovereignty and the attendant exclusive exercise of criminal jurisdiction may breed unaccountability or bolster impunity especially in the context of rogue regimes. In such contexts epitomised by the Idi Amin, Augusto Pinochet, and the Khmer Rouge regimes, without external interventions, fundamental rights tend to get crushed under foot and the human condition reduced to something worse than 'nasty, brutish, and short'.[13] As a result, developments in international law such as the prohibition of international terrorism, torture and the core international crimes have arguably modified the idea of criminal jurisdiction as the preserve of states. In certain contexts, international courts like the ICC now may have the jurisdiction to intervene in a state and may operate concurrent jurisdiction with the state's municipal courts.

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[9] Igor Lukashuk, *International Law* (3rd edn, Wolters Kluwer 2007) 330-31.
[10] *The Schooner Exchange v McFaddon* (1812), 7 Cranch 116, per Marshall CJ.
[11] See Joseph Story, *Commentaries on the Conflict of Laws* (Hilliard, Gray & Co., 1884) ch. 1, § 8. See also Constance Chevallier-Govers, 'The Europeanisation of French Criminal Law' (2017) *European Criminal Law Review* 7(1): 1, 67.
[12] Dubber (n 5) 263.
[13] See Thomas Hobbes, *Leviathan* (Penguin, 2017 [1651]) I, xiii, 9.

Let us at this point consider briefly three categories of national jurisdiction, which can enable states to exercise or project power over international crimes.

3.2.2 Categorising Domestic Jurisdiction

International law recognises three forms of national jurisdiction, including prescriptive, judicial, and enforcement jurisdiction. These classes of jurisdiction, O'Keefe asserts, represent a state's power 'to prescribe, to adjudicate on, and to enforce legal rules'[14] respectively. In a sense, they also mirror the customary separation of powers[15] in democratic settings although the idea of separation should not suggest that these classes of jurisdiction are entirely distinct or that they relate precisely to the corresponding powers of the legislature, the judiciary, and the executive respectively.[16] As Claus Kreß remarks, 'jurisdiction to prescribe and jurisdiction to adjudicate in criminal matters are generally congruent in scope'.[17] We will now describe these forms of jurisdiction in turn.

A. Prescriptive Jurisdiction

Sometimes also called legislative jurisdiction, prescriptive jurisdiction 'refers to the supremacy of the constitutionally recognised organs of the state to make binding laws within its territory.'[18] Prescriptive jurisdiction thus belongs to 'the sphere of authority of the sovereign as legislator'.[19] It is the state's capacity under international law to apply its own law within its own territory to given

[14] Roger O'Keefe, *International Criminal Law* (OUP 2017) 3.
[15] Separation of powers refers to a division of labour between the executive, legislative, and judicial branches of government. However, hardly any state practices pure separation of powers. There is usually a wide spectrum of interactions between the three arms of state power. Baron de Montesquieu, the acclaimed originator of this doctrine, wrote that 'All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or disputes of individuals.' See Baron de Montesquieu, *The Spirit of the Laws* (1st published 1748, CUP 1989) ch. 6, bk 11.
[16] See Malcolm N Shaw, *International Law* (7th edn, CUP 2014) 472.
[17] Claus Kreß, 'Universal Jurisdiction over International Crimes and the Institut de Droit International' (2006) 4 *JICJ* 561, 564. See also Michael Akehurst, 'Jurisdiction in International Law' (1972-1973) 46 *BYIL* 145, 179.
[18] Shaw (n 16) 472.
[19] Carlston (n 3) 170.

persons and property 'whether by means of primary or subordinate legislation, executive decree or judicial action.'[20]

Furthermore, as Robert Cryer *et al* observe, states have occasionally argued that prescriptive jurisdiction also entitles them to enact laws encompassing matters that extend beyond their borders.[21] In the English case of *Treacy v DPP*,[22] for instance, Lord Diplock contended that barring only the rules of international comity, which can restrict the extraterritorial effects of Acts of Parliament, there was no justified basis to assume any territorial limits to Acts passed by the UK Parliament.[23] In practice, however, extraterritorial prescriptive jurisdiction is little enforced as it tends to be highly contentious.[24]

B. Judicial Jurisdiction

Judicial (or adjudicative) jurisdiction describes the authority of a state's courts 'to entertain legal proceedings in respect of given persons or property, whether applying its own substantive law or, as is often the case in civil proceedings, the substantive law of another state.'[25] It is arguably the best-known and most debated form of jurisdiction. While criminal law and criminal questions are the clearest manifestations of adjudicative jurisdiction, the latter also engages civil concerns relating to private international law.[26]

Adjudicative jurisdiction in criminal matters tends to rely on the often-controversial grounds of territoriality, active nationality, passive nationality, protective principle, or universality. Conversely, the bases for exercising adjudicative jurisdiction in civil matters are less contentious and range from the

[20] O'Keefe (n 14) 4.
[21] Cryer *et al* (n 1) 49.
[22] *Treacy v DPP* [1971] 1 All ER 110 at para. 124.
[23] See Julian D M Lew, 'The Extra-territorial Criminal Jurisdiction of English Courts' (1978) *ICLQ* 27(1): 168, 175.
[24] See Cryer *et al* (n 1) 49.
[25] O'Keefe (n 14) 4.
[26] See Shaw (n 16) 473.

presence of the defendant within the interested state to domicile and nationality principles. In fact, given the rarity of diplomatic protests relative to the exercise of judicial jurisdiction in civil affairs, it has been argued that customary international law contains no standard prescriptions or regulations restricting states' jurisdiction in civil matters unlike in criminal matters.[27]

Importantly, adjudicative jurisdiction in international law should not be conflated with a domestic court's competence to act under municipal law in relation to: (i) *ratione personae* – personal jurisdiction; (ii) *ratione materiae* – subject-matter jurisdiction; and (iii) *ratione loci* – geographic jurisdiction.[28] In brief, personal jurisdiction signifies a court's authority to adjudicate on the rights and liabilities of the parties before it; subject-matter jurisdiction describes a court's power to decide upon a range of issues as defined in its statute; geographical jurisdiction refers to a court's authority to render judgment over conduct or events occurring within a defined geographical area. By contrast, as a matter of international law, adjudicative jurisdiction concerns whether states can lawfully assert judicial competence over acts or conduct occurring abroad.[29]

C. Enforcement Jurisdiction

Enforcement (or executive) jurisdiction refers to the capacity of one state to influence conduct or to execute acts within the territory of another state.[30] International law generally forbids states from exercising enforcement power in the territory of other states except with express consent.[31] Such prohibited functions include 'investigative, coercive or custodial powers in support of law … whether through police or other executive action or through its courts.'[32] For Akehurst, this prohibition is crucial because an unlawful act of one state in a

[27] ibid 474.
[28] See O'Keefe (n 14) 4.
[29] ibid.
[30] See Michael Akehurst, 'Jurisdiction in International Law' (1972-1973) 46 *BYIL* 145, 147.
[31] See *SS Lotus (France v Turkey)* 27 PCIJ Series A No. 10, 18.
[32] O'Keefe (n 14) 5.

foreign territory can usurp the latter state's sovereign powers by the nature of the act itself or by the purpose for which it was done.[33]

Enforcement jurisdiction therefore is a manifestation of a state's sovereignty and has the capacity to alter, create, and terminate legal relationships and obligations. By means of enforcement jurisdiction, O'Keefe explains, states have the 'legal authority to arrest and retain custody over persons and vessels, to have a court sit, to incarcerate persons and confiscate property, to undertake surveillance, to stop crime, to investigate and to collect evidence'.[34] Also, states have power to issue both court summons for witnesses to appear in court to testify orally[35] and subpoena for the production of evidence.[36]

A notorious case of illegal exercise of enforcement jurisdiction was the abduction of Albert Eichmann from Argentina by Israeli agents.[37] Nevertheless, an illegal use of enforcement jurisdiction may not always vitiate the legality of adjudicative jurisdiction.[38] In the instant case, Israel argued that it had a moral right to prosecute and punish Eichmann. The principled practice in some jurisdictions like England is that a rightful end does not cure a wrongful means to that end.[39] By contrast, in the *Dragan Nikolić* case, the ICTY held that in certain egregious circumstances a proportionate balance should be kept between the 'fundamental rights of the accused and the essential interest of the international community'[40] in holding the wrongfully arrested accused accountable.

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[33] Akehurst (n 30) 146.
[34] O'Keefe (n 14) 5.
[35] Also known as subpoenae ad testificandum.
[36] Referred to as subpoenae duces tecum.
[37] See *Attorney-General of Israel v Eichmann* (1968) 36 ILR 5, paras. 40-50 (District Court).
[38] Cryer *et al* (n 1) 50.
[39] See *A and Others v Secretary of State for the Home Department* (No 2) [2005] UKHL 71; *R v Horseferry Road Magistrates Court, ex parte Bennett* (No 1) [1993] 2 All ER 318.
[40] *Prosecutor v Dragan Nikolić*, IT-94-2, ICTY AC, 5 June 2003, para. 30.

3.3 Jurisdictional Pillars of National Prosecutions and their Constraints

Having considered certain preliminary issues regarding criminal jurisdiction, we are now able to analyse how the traditional jurisdictional pillars tend to facilitate as well as to preclude or constrain domestic prosecution of international crimes. As noted previously, domestic exercise of criminal jurisdiction over international crimes rests on five key legal bases ranging from territoriality and personality principles to universality.[41] These key principles are widely accepted by states. But their exercise is frequently problematic. Let us begin with arguably the most significant of them all: the territoriality principle.

3.3.1Territoriality Principle

The territorial principle is possibly the most invoked jurisdictional basis by states in criminal matters.[42] This is unsurprising because territoriality is also perhaps the least controversial of all the jurisdictional pillars. Unlike the other grounds, which typically involve crimes that transpired extraterritorially, the territorial principle is concerned mostly with crimes that occurred locally, that is, on a state's territory.[43] A basic presumption therefore is that jurisdiction under this principle is territorial[44] although its scope can be both territorial and extraterritorial.[45] The principle is basically linked, notes Schwarzenberger, to the idea that insofar as states are not limited by international law, they enjoy the freedom to define the territorial scope of their municipal criminal laws.[46]

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[41] See Draft Convention on Research in International Law of the Harvard Law School, 'Jurisdiction With Respect to Crime' (1935) 29 *AJIL* 435 (Supp.) [Hereinafter Harvard Research Draft]
[42] Akehurst (n 30) 152.
[43] See Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar 2012) 251.
[44] Ian Brownlie, *Principles of International Law* (6th edn, OUP 2003) 297.
[45] See Lukashuk (n 9) 331.
[46] Georg Schwarzenberger, 'The Problem of an International Criminal Law' (1950) *CLP* 263: 264-65.

Yet, as Joseph Story remarks, '[t]he laws of no nation can justly extend beyond its own territories, except as far as regards its own citizens.'[47] Put simply, the scope of the territorial principle is determined by the limits of prescriptive jurisdiction. Thus, if State A cannot make law for State B, it follows that State A cannot assert its criminal law in State B, and vice versa.[48] This was affirmed in the *Lotus* case to the effect that no state has competence to enforce a rule it has set unless it has the jurisdiction to prescribe the rule in the first place.[49] Story adds that however comprehensive the municipal laws may be, they only apply 'to places and persons, upon whom the legislatures have authority and jurisdiction.'[50]

Territoriality also derives from one of the core determinants of statehood – dominion over an identified territory.[51] The exercise of dominion or sovereignty over 'a portion of the surface of the globe' was established in the *Island of Palmas* case as the necessary condition for a lawful claim over that piece of territory by the relevant state.[52] This tenet of territorial sovereignty is formally consecrated in the UN Charter[53] and further reinforced by the principles of political independence and non-intervention.[54] Political independence signifies the exclusive right of a state to exercise its sovereign functions within its

[47] Joseph Story, 'The Appollon' (1824) 9 *Wheat* 364, referenced in Wendell Berge, 'Criminal Jurisdiction and the Territorial Principle' (1931) *MICH LR* 30(2): 238.
[48] Exceptions exist with respect to civil proceedings under private international law and in criminal conduct involving international crimes.
[49] See *Lotus* case (n 31).
[50] Story, 'The Appollon' (n 47) 238.
[51] Under customary international law, the four basic criteria for statehood comprise: (i) control of a defined territory; (ii) stable population; (iii) competent government; and (iv) independent capacity to engage in foreign relations. See Montevideo Convention on the Rights and Duties of States (26 December 1933) 165 UNTS 19, art. 1.
[52] *Island of Palmas case* (1928) RIAA 2, 829, 838.
[53] For instance, Article 2(4) of UN Charter states that 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.'
[54] See Neil Boister, *An Introduction to Transnational Criminal Law* (OUP 2018) 247.

territory[55] while non-intervention refers to the prohibition of external meddling in the internal affairs of states or, as the UNGA puts it, 'any attempt aimed at the partial or total disruption of the national unity or territorial integrity of a State or country or at its political independence'.[56]

Traditionally, the territorial principle enables states to enforce the rights that sovereignty entails.[57] Such a bundle of rights includes, as the *Schooner Exchange* upheld, the right of a state to exercise 'necessarily exclusive and absolute'[58] jurisdiction within its own territory, absent an implied or express waiver.[59] Territoriality therefore affords every state strong jurisdiction over crimes alleged to have taken place on its territory. This implies, Akehurst remarks, that once the prosecution admits that an alleged crime had not occurred on the state's territory, the municipal court must instantly resign jurisdiction over the crime under the territorial basis, and, unless a new pertinent ground can be found, the court must dismiss the case and free the suspect.[60]

Today, however, territorial sovereignty is no longer widely held to be inviolable and exclusive due largely to the growing accent given to such novel norms as the responsibility to protect (RTP),[61] the Nuremberg principles,[62] and some

[55] *Island of Palmas* case (n 52) 838.
[56] UNGA, Res 2625 (XXV) (adopted 24 October 1970). See also UNGA, Res 2131 (XX) (adopted 21 December 1965); UN Charter, art. 2(7) [barring the UN from meddling in the domestic affairs of states]. The *Corfu Channel Case* and the *Nicaragua Case* also both held that non-intervention has formed a part and parcel of international law. See *Corfu Channel Case (UK v Albania)*, 1949 ICJ Rep 4; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, 1986 ICJ Rep 14.
[57] For more on the exclusiveness of sovereignty and the territoriality of jurisdiction, see *R v West Yorkshire Coroner, ex parte Smith* [1983] QB 335, 358 per Donaldson LJ; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep 2004, 136.
[58] See *Schooner Exchange v McFaddon & Others,* 11 US 116 (7 Cranch) (1812) 136 per Marshall CJ.
[59] An implied or express waiver of criminal jurisdiction within a state's territory can apply, for instance, with respect to the visit of foreign public officials like heads of state and to foreign diplomats. See *Schooner Exchange* (n 58) 137.
[60] Akehurst (n 30) 152 (footnote commentary).
[61] See UNGA Res. A/60/1 '2005 World Summit Outcome' (24 October 2005), paras. 138 and 139; UNSC Res. 1674 (28 April 2006), para. 4; UNSC Res. 1894 (11 November 2009), preamble; International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect'

provisions of the Rome Statute. Take a specific example. Article 13(b) of the Rome Statute empowers the UNSC to refer states where serious international crimes have occurred to the ICC. As was evident in the recent situations in Libya[63] and in Sudan,[64] when activated such a mandate can impose enormous encumbrances on the sovereign rights of a state.[65]

Similarly, former UN Secretary-General Kofi Annan recently affirmed that states may – provided they respect the purposes and principles of the UN Charter – intervene in foreign territories during extreme situations of tyranny, catastrophes, and mass atrocities in order to end the mass suffering and/or to avert further perpetrations of atrocities.[66] In this connection, Article 4h of the African Union's Constitutive Act grants the Union the right 'to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances namely war crimes, genocide and crimes against humanity'.[67]

(December 2001), No. XI and para. 2.14 to 2.15 <http://www/icisss.ca/pdf/Commission-Report.pdf> Accessed 12 October 2018.

[62] The Nuremberg principles are a set of serious crimes codified in Article VI of the London Charter of the IMT and endorsed by the UN after WWII. These include crimes against peace (now known as aggression), war crimes, and crimes against humanity, which together with the crime of genocide are now regarded as the core international crimes for which perpetrators can be held individually responsible. See Chapter 4, sections 4.4 and 4.6 for further discussions of the Nuremberg trials and the core international crimes respectively. See also Frank Lawrence, 'The Nuremberg Principles: A Defense for Political Protestors' (1989) *Hastings Law Journal* 40(2): 397.

[63] *Situation in Libya*, ICC-01/11 [concerning alleged war crimes and crimes against humanity committed in Libya since 15 February 2011. Referred by the UNSC to the ICC on 26 February 2011, investigations began in March 2011.]

[64] *Situation in Darfur, Sudan*, ICC-02/05 [concerning alleged genocide, war crimes, and crimes against humanity committed in Darfur since 1 July 2002. Referred to the ICC by the UNSC in March 2005, investigations opened in June 2005.]

[65] See Chapter 4 for discussion of the UNSC's referral powers under Article 13(b) of the Rome Statute.

[66] Kofi Annan, 'Two Concepts of Sovereignty' (*The Economist* 16 September 1999) <www.economist.com/international/1999/09/16/two-concepts-of-sovereignty> Accessed 12 October 2018.

[67] See The Constitutive Act of the African Union (adopted 11 July 2000), art. 4(h). See also Ben Kioko, 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) *International Review of the Red Cross* 85(852): 807.

That said, the scope of the territorial principle extends to acts committed within a state's spatial boundaries and territorial waters, on ships sailing under its flags and aircrafts registered in its name.[68] It also extends to acts performed on territories occupied by a state after an armed conflict.[69] But territoriality does not, as a general rule, permit a state to assert jurisdiction over crimes committed on foreign territories except with the consent of the foreign state(s).[70] Neither does it permit a state to 'determine the lawfulness of occurrences in places outside of, or not assigned constructively to its control.'[71] Thus, notwithstanding its extensive breadth, territoriality cannot enable a state to exercise criminal jurisdiction 'outside its territory except by virtue of a permissive rule derived from international custom or from a convention.'[72]

The universality principle, to which we will return later, can be one example of such permissive rule from international custom alluded to in the *Lotus case* verdict. But Bruno Simma has disputed the court's conclusion. He contends that the absence of a prohibition does not necessarily equate to a permissive rule and that it is therefore wrong to conclude that something is permitted if it is not prohibited.[73] For him, the *Lotus case* failed to consider neither the fact that an act may be merely tolerated even if it is not illegal nor the possible degrees of non-prohibition from 'tolerated' to 'permissible' to 'desirable'.[74] In sum, states are generally viewed as competent to define, prosecute, and punish crimes within their own territories under the basis of the territorial principle.[75]

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[68] Schwarzenberger (n 46) 265.
[69] See Antonio Cassese, *International Criminal Law* (OUP 2003) 279.
[70] See *R v Cooke* [1998] 2 SCR 597; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ Rep. 2002, 3, 36 per Separate Opinion of Judge Guillaume; *Kaunda v President of South Africa* (CCT 23/04) [2004] ZACC 5 (4 August 2004).
[71] Charles Cheney Hyde, *International Law* (Little, Brown & Company 1922) 218.
[72] *The Lotus Case* (n 31) para. 45.
[73] See Judge Bruno Simma's Declaration appended to the Advisory Opinion of 22 July 2010, *Accordance with International Law of the Unilateral Declaration of Independence in Favour of Kosovo* (Advisory Opinion) ICJ Rep 2010, 403, 478ff.
[74] ibid.
[75] Edwin D Dickinson, 'International Law: An Inventory' (1945) *CAL LR* 33(4): 506, 521.

In *US v Burns*, which considered the extradition hearings of two Canadian nationals charged with homicide in the US, the Supreme Court of Canada underlined the import of territoriality. The court held that Canadians 'who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedures and punishments which the foreign state applies to its own residents'.[76] But the rule applies slightly differently to diplomats and consular staff charged with grave crimes within the territory of the receiving state.[77] Generally, the sending state must waive the diplomatic immunity of the alleged offenders before they can be prosecuted in the foreign state.[78] This brings us now to consider a core constraint of territoriality.

A. Major Constraint: Transnational Crimes and the Effects Doctrine

Asserting criminal jurisdiction on the basis of territoriality is not always straightforward, particularly where it involves crimes that are transnational in character with complex extraterritorial effects. We can notice this in contexts where a criminal activity may be planned in one state but carried out in another, or the crime may occur in one state but leave certain effects in another.[79] In such situations, on what principle can we decide which state should assume priority of jurisdiction over the relevant offenders?

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[76] *United States v Burns* [2001] 1 SCR 283, 2001 SCC 7, § 72.

[77] See Vienna Convention on Consular Relations and Optional Protocols, 500 UNTS 95, (adopted 24 April 1963), art. 41(a) [hereinafter VCCR]. Article 43 of the VCCR specifies that, save in respect of grave crimes and civil contracts conducted in their private capacities, consular and diplomatic personnel cannot be prosecuted by receiving states for acts done on their territories in the name of the sending state.

[78] See VCCR, art. 45. See also Articles 29, 31, and 32 of the Vienna Convention on Diplomatic Relations, (adopted 18 April 1961) [hereinafter VCDR]. Article 29 of VCDR states: 'The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.'

[79] See Cassese, *International Criminal Law* (n 69) 280.

As discussed earlier, international law recognises the competence of states to tackle criminal conduct occurring within their territories. In contexts where the criminal events are transnational in character, Warbrick and Sullivan observe that states are allowed to assert criminal jurisdiction on the bases of one of the events occurring within their own territories.[80] This suggests that two or more states can exercise concurrent jurisdiction over offenders in crimes that have extraterritorial effects.

In practice, Cassese explains, the tendency is to accord priority of jurisdiction to the state where the adverse effect of the crime occurred.[81] Such was the position of a US court in *Rivard v United States*: a case involving four Canadian defendants indicted for conspiracy to smuggle heroin from Mexico into the US. The US court ruled that: '[a]ll the nations of the world recognize the principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done'.[82]

To the extent that the criminal effect occurred in one state the principle from the *Rivard* case appears unambiguous. But what about where the effects occurred in two or more states? On what rule can a possible conflict of jurisdiction be resolved? To these questions, as Cassese observes, there appears to be no clear legal rules nor any uniform guidance from either municipal law or international law.[83] It is thus advisable to examine, if succinctly, how such questions are treated in a specific domestic setting like England, for instance.

In England, a common law approach to territoriality applies such that English courts will only exercise jurisdiction over crimes that occurred within English territory (which includes Wales but excludes Scotland, Ireland, the Isle of Man,

[80] Colin Warbrick and G R Sullivan, 'Criminal Jurisdiction' (1994) *ICLQ* 43(2): 460, 461.
[81] Cassese, *International Criminal Law* (n 69) 280.
[82] See *Rivard v United States,* US Court of Appeal judgment of 375 F 2d 882 (5th Cir. 1967) at 887.
[83] Cassese, *International Criminal Law* (n 69) 280.

and the Channel Islands) together 'with its ports and harbours, bays, gulfs and estuaries, and so much of the outer coast as extends to low water mark.'[84] Accordingly, jurisdiction extends to everyone, irrespective of their descent, who commits crimes on the territory of England. But jurisdiction will not extend to crimes that happened outside of the English frontiers, regardless of the offenders' nationality or the involvement of British citizens.[85]

The interesting question then is how English courts tackle situations involving transnational crimes? These are the sort of crimes whose elements traverse two or more jurisdictions. A common, though not exact, example is where a gun fired across the border from one state kills a person in the neighbouring state. Another example is where a mailbomb sent by a suspect in State A injures a person in State B.[86] In respect of ICrimJ we can also imagine a militia whose acts of crimes against humanity in one state result to a refugee situation that destabilises the neighbouring states. In such situations involving crimes of extraterritorial nature, the traditional approach in England was to regard as criminal under domestic law only those offences whose final elements transpired in England.[87]

Take the ordinary crime of theft for instance. Under English law, to obtain property by deception or false pretences can be an offence if the obtaining, the last part of the proscribed conduct, took place in England even if the deception occurred abroad.[88] But where the obtaining happened abroad even if the deception transpired in England, the crime was generally not justiciable in

[84] Lord Simonds (ed.), *Halsbury's Laws of England* Vol. 10, (3rd edn, Butterworth 1954) 318, 580.
[85] See *Director of Public Prosecutions v Stonehouse* [1978] AC 55, [1977] 3 WLR 143 at 59.
[86] ibid per Lord Keith.
[87] See Warbrick and Sullivan (n 80) 460. See also M Hirst, 'Jurisdiction over Cross-Frontier Offences' (1981) 97 *LQR* 80.
[88] See *R v Manning* [1999] QB 980.

England.[89] Hence, in *ex parte Khubchandani*, the court ruled that '[w]here a deception is made in this country, but the property is obtained outside the jurisdiction, there is no offence under the English law'.[90]

However, in the case of *DPP v Stonehouse*,[91] involving a failed attempt to obtain property by deception in England following a series of criminal events initiated in the US, Lord Diplock justified the justiciability of the case in England by distinguishing between the 'terminatory' and the 'initiatory' limbs of the effects doctrine of jurisdiction.[92] In terms of the initiatory limb, the crime occurs where the offender is when he does the relevant acts forming the material elements of the offence. As to the terminatory limb, the court looks at the effects of the acts of the accused, wherever they were done or planned.[93] While Stonehouse's offence was started abroad, its effect was felt in England thereby validating the intervention of the English courts.

In the final analysis, the reality of the complex internationality of certain crimes – as seen in *Stonehouse* – exposed loopholes in the traditional approach of the English courts to tackling transnational crimes on the basis of 'final elements of the crime' criterion. Lord Griffiths was notably forceful in stressing the need for a change of approach. In *Liangsiriprasert*, he asserted: 'nothing in precedent, comity or good sense ... should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England.'[94]

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[89] See Law Commission, *Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element* (No. 180, 1989) 4-5; Warbrick and Sullivan (n 80) 461.
[90] *Governor of Pentonville Prison, ex parte Khubchandani*, (1980) 71 Cr App R 241. See also R v Harden (1962) 46 Cr App R 90.
[91] [1978] AC 55, [1977] 3 WLR 143.
[92] ibid at 66 per Lord Diplock.
[93] This distinction was first made by Glanville Williams, 'Venue and the Ambit of Criminal Law' (1965) 81 *LQR* 518.
[94] *Somchai Liangsiriprasert v Government of the United States of America* [1990] 2 All ER 866 at 878 per Lord Griffiths.

Furthermore, in 1993, British Home Secretary Kenneth Clarke strongly criticised the traditional practice of the English courts with respect to transnational crimes and the effects doctrine. He lamented the fact that victims in England could be criminally induced to part with their property outside of England, yet they could not seek any redress in English courts as the final element of the crime had occurred elsewhere.[95] For him, like scenarios had exposed a void in the law, which required a legislative cure.

The Criminal Justice Act 1993 was consequently passed by UK's Parliament to tackle the alleged gap. Section 2 of that Act specifies that in determining jurisdiction for certain serious offences, like fraud listed as Group A offences, the question of where the final event occurred must be disregarded insofar as any of the relevant elements took place in England. Section 3 makes extraterritorial conspiracies and attempts to commit a Group A offence a criminal offence in England regardless of the nationality of the suspect and whether or not 'any act or omission or other event in relation to the conspiracy occurred in England and Wales.' And Section 5 makes it an offence, subject to certain conditions, to conspire in England to commit a Group A offence abroad.

To sum up, the move from a traditional common law approach to a more statute-based approach in England illustrates the evolving nature of this area of law.[96] Like in England, territoriality remains for most countries the touchstone for exercising extraterritorial criminal jurisdiction. For instance, Article 113-2 of the French Penal Code specifies that an offence is deemed to have taken place in France where one of its 'constituent elements' occurred within the French territory. Nevertheless, the extent to which the effects doctrine and the territorial principle can help to resolve jurisdictional claims in criminal cases involving complex foreign elements remains unclear.

[95] HC Hansard, vol. 222, col 861 (14 April 1993).
[96] Cassese, *International Criminal Law* (n 69) 280.

Meanwhile, the two main operative approaches to territoriality are the subjective and the objective. Under the former, jurisdiction extends over all persons living in a state, regardless of their nationalities, who perpetrate ordinary or international crimes within the state's territory. Under the objective approach, jurisdiction extends over all crimes that take effect within a state's territory irrespective of the physical location of the offender(s).[97]

3.3.2 Active Nationality Principle

Active nationality (or active personality) relates to the idea that a state's jurisdiction over its nationals remains effective beyond its territory. Accordingly, states may (subject to the consent of the territorial state) exercise jurisdiction over crimes committed by their nationals abroad regardless of the *locus criminis* – where the crime occurred.[98] Akehurst points out that in the context of a joint criminal enterprise, for example, whereas a state has total right to assert jurisdiction over an accused based on clear nationality links, that right does not extend to the suspect's alien accomplices. Rather, the nationality of each offender and the state with the relevant jurisdiction must be assessed separately.[99]

This raises an important question as to what is meant by nationality. In the *Nottebohm* case, the ICJ interpreted nationality as 'a legal bond' between states and their citizens 'having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.'[100] Malcolm Shaw highlights the criterion of 'genuine connection of existence' as specially crucial in terms of determining a

[97] See Wendell Berge, 'Criminal Jurisdiction and the Territorial Principle' (1931) *MICH LR* 30(2): 238.
[98] See Akehurst (n 30) 156. See also Dickinson (n 75) 521.
[99] Akehurst (n 30) 156.
[100] *Nottebohm* case, ICJ Rep. 1955, 4, 23.

state's responsibility to protect its nationals from injury.[101] But James Crawford rejects the same criterion as unfeasible and fraught with contentions particularly in respect of persons having dual or multiple nationalities.[102]

International law recognises a state's national as either 'a natural person upon whom that State has conferred its nationality, or a juristic person upon whom that State has conferred its national character, in conformity with international law.'[103] Both natural and juristic persons therefore owe allegiance to the state which they have adopted in line with the criteria set by that state.[104] The state practice has been to confer nationality upon persons: (i) born within the state's territory – *ius soli*; (ii) born to a national of the state – *ius sanguinis*; or (iii) naturalised by the state.[105] But each country also has its unique set of rules. Under the 1992 Constitution of Ghana, for example, Ghanaian citizenship can be obtained in multiple ways: birth,[106] descent,[107] adoption,[108] marriage,[109] and an act of parliament.[110] Dual nationality is also permitted.[111]

Particularly with respect to suspects holding multiple nationalities, determining with clarity their active nationality and the state(s) with the relevant jurisdiction to enforce criminal accountability can be daunting. Suppose D who is a national of States X, Y, and Z commits grave crimes in State A. By virtue of territoriality, State A may assert the priority of jurisdiction to prosecute D. But what if D has moved to State X where the State has no interest in prosecuting or extraditing

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[101] Shaw (n 16) 591-95.
[102] James Crawford, *State Responsibility: The General Part* (CUP 2013) 578.
[103] See Harvard Research (n 41) 473.
[104] Dickinson (n 75) 523-4.
[105] See Harvard Law School Research in International Law, 'The Law of Nationality' (1929) 23 *AJIL* 11: 21, 27-29 [hereinafter Law of Nationality]
[106] Ghana's Constitution of 1992 with Amendments through 1996, art. 6(3) [this obtains if the identity of the applicant's parents is unknown]
[107] Ibid art. 6(2).
[108] Ibid art. 6(4).
[109] Ibid art. 7.
[110] Ibid art. 9 [the applicant must be able to speak one of the local languages before registration]
[111] Ibid art. 8.

him? And what if States Y and Z have also both expressed separate interests in prosecuting D? Resolving such jurisdictional conflicts in practice remains an existing challenge for international law.

In claiming criminal jurisdiction under the active nationality principle, states generally tend to proceed in two ways. Some like Austria, India, Poland, and South Korea usually assert automatic jurisdiction over the offender, whether or not the alleged crime is also a crime in the *lex loci*, the law of the territorial state. In contrast, others like France, the UK,[112] and Turkey usually exercise conditional jurisdiction, whereby the alleged crime must be justiciable under both the *lex loci* and the home state law.[113] In exceptional circumstances,[114] states may even revoke citizenship from their own national for conduct deemed gravely prejudicial to national interests.[115] While such a move would contravene international law if it served to render the offender stateless,[116] its possibility and practice further complicates the scope of the nationality principle.

Several international treaties also specifically provide for the active nationality principle in respect of certain offences. For instance, Article 12(2) of the Rome Statute specifies that the ICC can claim jurisdiction where an accused person is a national of a state party. Mandate for the exercise of jurisdiction under the active nationality basis can also be found in the following instruments: the 1973 Convention,[117] the 1979 Convention,[118] the 1984 Convention,[119] the 1999

[112] In *R v Thompson* [1984] 71 Crim App R 191, the court held: 'It is of course a basic principle of our criminal law that no British subject can be tried under English law for an offence committed on land abroad, unless there is a statutory provision to the contrary.
[113] See Cassese, *International Criminal Law* (n 69) 281.
[114] Such as serious fraud; false identity; war crimes; terrorism; and material support for terrorist activities. See *United States v Maslenjak*, 821 F.3d 675 (6th Cir. 2016). See also N R Motaung, 'Revocation of citizenship in the face of terrorism' (2017) *CILJSA* 50(2): 214.
[115] See Ghana's Constitution of 1992 (n 106) art. 9(5)(a).
[116] See James Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) *ICLQ* 33(2): 348; Patrick Sykes, 'Denaturalisation and conceptions of citizenship in the "War on Terror"' (2016) *Citizenship Studies* 20(6-7): 749.
[117] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, (14 December 1973) art. 6(1)(b).

Convention,[120] and the 2000 Convention.[121] In the main, while the claim of active nationality can be contentious, the contention is less about its exercise and more about its abuse to shield nationals from facing criminal accountability, particularly where suspects enjoy official backing.

A. Key Complication: Conflicts of Interest

Unlike in criminal proceedings initiated by the territorial state against an alien, nationality ties between the alien and their home state represent a common interest, which can bias the proceedings where the home state elects to assert criminal jurisdiction.[122] But this is not to suggest that exercises of jurisdiction under the active nationality rule are always prejudiced in favour of the home state's nationals. Yet, such biases driven by a conflict of interest can be profound in contexts where an alleged offence abroad was done or aided by agents of the home state. Even with much external pressure, such suspects are rarely brought to justice by their own state.

As the curious case of the Skripals shows, states tend to be unwilling to prosecute their own nationals or agents for crimes they were alleged to have done abroad. In March 2018, the UK accused two Russian nationals of masterminding the attempted fatal poisoning in Britain of Sergei Skripal – a former Russian spy – and his daughter, Yulia. The suspects, who had visited England that March as tourists, were alleged to have used a military grade nerve

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[118] Convention against the taking of Hostages (17 December 1979) art. 5(1)(b).
[119] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) art 5(1)(b).
[120] Convention for the Suppression of the Financing of Terrorism (9 December 1999 10) art. 7(1)(c).
[121] Convention against Transnational Organised Crimes and the Protocols Thereto (12 December 2000) art 15(2(b).
[122] The counter argument can be that aliens may be vulnerable to politically motivated trials abroad or, if they carried out the alleged offence, they may not receive a fair trial in the courts of the territorial state. Also, what may be a crime in a foreign state may be lawful in the home state.

agent, novichok, for the attack.[123] They also were implicated in the death of a UK national and in the grievous bodily harm caused to the deceased's partner and to a police officer, each of whom had allegedly been exposed to the nerve agent. The UK and its allies later held the accused to be Russian agents; demanded that they be prosecuted; and also levied a series of sanctions and other measures against Russia.[124]

On its part, the Russian Federation dismissed the UK Government's allegations as speculative while also defending the innocence of the two suspected Russian nationals. Additionally, the Putin administration executed tit-for-tat measures (including the imposition of sanctions and the expulsion of diplomats) against the UK and its allies.[125] Nevertheless, despite the frenetic activities and the global notoriety of this case,[126] the suspects remain at large in Russia and it is highly unlikely that they will ever be prosecuted by the Russian Federation for the alleged offences.

Both the UK and the Russian Federation are states parties to the 1997 Chemical Weapons Convention (CWC).[127] Article 1(b) of the CWC forbids the use of chemical weapons while Article 1(d) bars states from assisting, encouraging or inducing anyone to use such weapons in any way. As a lethal nerve agent, the

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[123] For an account of the poisoning incident, see Francis Elliot and Fiona Hamilton, 'Salisbury poisoning: Russia hits out at West over novichok "lie"' (*The Times* 7 September 2018). <www.the.times.co.uk/edition/news/novichok-attack-reckless-russian-agents-could-have-killed-4-000-people-5tv83c9tx> Accessed 21 October 2018.

[124] BBC News, 'Russian spy poisoning: What we know so far' (8 October 2018) <www.bbc.co.uk/news/uk-43315636> Accessed 21 November 2018.

[125] See Elliot and Hamilton (n 123) ibid.

[126] The UK and several western states expelled scores of Russian diplomats and sanctioned many members of Putin's administration over the poisoning allegations while Russia also responded in kind. See Henry Mance, Michael Peel, and Guy Chazan, 'Key western allies back UK over novichok poisoning' (*Financial Times* September 6, 2018) <www.ft.com/content/d8e6df42-b1d2-11e8-99ca-68cf89602132> Accessed 10 November 2018.

[127] See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 13 January 1993).

production, stockpiling, and use of novichok are illegal.[128] According to the UK, a series of analyses led by chemical research scientists confirmed that the poison used in the Skripals' case was novichok. As it happens, Russia questioned the authenticity of the evidence, arguing that it had not received samples of the nerve agent and also alleged that the events may have been staged to damage Russia's image ahead of hosting the 2018 FIFA World Cup.[129]

The spat between Britain and Russia in this case demonstrates how tendentious the exercise of the active nationality principle can be. Between two friendly states, the progression from the implication to the prosecution of an alien suspect may be less fraught. Between hostile states, as the instant case shows, prosecuting an accused alien outside of the territorial state may be unrealistic.[130] One way out can be to try the alien in a neutral state or before an international tribunal. Yet, this will require the unlikely consent of the home state to arrest and extradite the suspect (if on home soil) to the neutral state. The accused can also be arrested and extradited to the neutral state or to the international tribunal by a willing state if found on a foreign territory.

Furthermore, Akehurst explains that states often claim jurisdiction over crimes committed on foreign territory by their servicemembers, crew members of their merchant vessels, and their civilian officials in the course of their official duties.[131] Whereas states sometimes commit to prosecuting such accused state servants, the judicial process and the punishment, if carried out, can be below the norm. This was evidently the case after WWI where proposals to try the

[128] See Alastair Hay, 'Novichok: the deadly story behind the nerve agent' (*The Conversation* 20 March 2018) <www.theconversation.com/novichok-the-deadly-story-behind-the-nerve-agent-93562> Accessed 21 October 2018.
[129] See Mance et al (n 126) ibid.
[130] Note that under the act of state doctrine an 'individual cannot be sued or prosecuted in one State for acts of war committed on behalf of another State' regardless of where the acts occurred. But this privilege does not extend to spies, saboteurs, or suspects accused of genocide, war crimes, crimes against humanity. See Akehurst (n 30) 240-41.
[131] Ibid 157.

defeated German forces by an Allied High Tribunal never materialised. Instead, Germany was required, following the terms of the 1919 Versailles Treaty, to try a curtailed 'test list' of 45 German suspects.

In the end, only 12 German defendants were prosecuted at the Leipzig Trials of 1921 in what has since been widely described as a sham.[132] This criticism is as result of the astonishing degree of leniency that was extended to the defendants, most of whom were either acquitted or sentenced to less than two years in prison. The lessons learnt from the Leipzig Trials likely played a big part in the Allies' decision after WWII not to hand the major Nazi suspects to Germany for trial but rather to have them tried by an international court, the IMT.[133]

Compare this with the My Lai massacre of 16 March 1968 in which several US forces systematically murdered over 500 Vietnamese civilians in two neighbouring villages. Of the 30 soldiers later implicated in the massacre, only 14 were charged with crimes by a US court martial.[134] Ultimately, all but Lieutenant William Calley either had their charges dismissed or were acquitted by the military court. Calley was found guilty in 1971 of premeditated murder of 22 Vietnamese civilians and was sentenced to life. But his sentence was subsequently reviewed and reduced to 10 years. And after serving only about three years of his term under house arrest, Calley was pardoned by President Nixon. The twin of active nationality is passive nationality, to which we turn.

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[132] Germany protested that it was unfair to punish German offenders while offenders from the Allied Powers were not even charged. See John Yarnall, *Barbed Wire Disease: British & German Prisoners of War, 1914-1919* (The History Press 2011) 183-96. See also Claude Mullins, *The Leipzig Trials: An Account of the War Criminals' Trials and Study of German Mentality* (Witherby 1921).

[133] More positively, the Leipzig Trials have at times been viewed to have laid an early foundation for ICL.

[134] See *US v Calley*, 48 CMR 19 (1973) (US Court of Military Appeals, 21 December 1973). For a detailed account of the massacre and the trial, see Michal R Belknap, *The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley* (University Press of Kansas 2002).

3.3.3 Passive Nationality Principle

Unlike active nationality which relates specifically to offenders, passive nationality (or personality) focuses largely on the victims of heinous crimes. The principle underlines a state's legal obligation to protect the safety and autonomy of all its nationals abroad, victims and offenders alike.[135] On the basis of passive personality, a state may assert jurisdiction to prosecute and punish offenders of whatever nationality for crimes committed abroad against the state's nationals. As Cassese elucidates, the principle is 'grounded both on: (i) the *need to protect nationals living or residing abroad* and (ii) a substantial *mistrust* in the exercise of jurisdiction by the foreign territorial State.'[136]

Like its allied principle, passive nationality is recognised in many international treaties and conventions as a valid ground for the exercise of extraterritorial criminal jurisdiction.[137] In recent times, states like the US[138] and France[139] have also adopted passive nationality in national legislation while some municipal courts have relied on it in cases relating to terrorism,[140] crimes against humanity,[141] and torture. Not long ago, it was invoked by Italian courts in the trial of Erich Priebke, a former Nazi commander. Before the trial, Priebke had been living in Argentina and had become an Argentine national. But following his indictment, he was expelled to Italy where he was tried and convicted in

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[135] See Dubber (n 5) 273.
[136] Cassese, *International Criminal Law* (n 69) 282 (emphasis in the original).
[137] See, for examples, the 1984 Torture Convention (n 113) art. 5(1)(c); the 2000 Transnational Crimes Convention (n 121) art. 15(2)(a).
[138] See the United States Federal Criminal Code, 18 USC §§ 1203, 2331 and 2332 (1988) [granting jurisdiction over certain crimes carried out abroad by aliens against US citizens]
[139] See the French Criminal Code, arts. 113-7.
[140] The US sought to rely on it to try the hijackers of the *MS Achille Lauro* Italian cruise ship for the murder of a US passenger on that ship. The hijackers (four members of the Palestinian Liberation Front) were later tried and sentenced by Italy on the basis of Italy's territorial claims over the ship. See Christopher L Blakesley, 'Jurisdictional Issues and Conflicts of Jurisdiction' in M Cherif Bassiouni (ed.), *Legal Responses to International Terrorism: US Procedural Aspects* (Martinus Nijhoff Publishers 1988) 131.
[141] Notable here is the case of General Carlos Mason, a former Argentine official who was tried *in absentia* in Italy and condemned to life for crimes against humanity (murder) committed against eight Argentines of Italian descent during the military dictatorship in Argentina from 1976 to 1983.

1997 for his role during WWII in the Fosse Ardeatine event of 24 March 1944 that killed 335 Italian civilians.[142]

However, it is common practice among states invoking passive personality that the rule of 'double incrimination' be respected if extradition of the alleged offender is required. Double incrimination is a procedural requirement that an alleged conduct be proscribed as criminal in both the territorial state and the victim's state. This is crucial not only in respect of extradition law, but also in respect of the principle of legality to ensure that the individual is not tried and punished for conduct that may be lawful in the state where it was done. Such was apparent in the case of *Cutting*,[143] a US national who was arrested in Mexico, tried and convicted by a Mexican court for a defamatory publication in Texas against a Mexican national. While Mexico considered Cutting's publication to be defamatory, the US did not view it as such. Hence, the US denounced Cutting's conviction, which helped to trigger the later rescission of the charges by the injured party.[144]

Whereas passive nationality practice is established in state practice and *opinio juris*, it remains one of the most controversial of the jurisdictional principles.[145] Judge Moore criticised the principle in a dissenting opinion in the *Lotus* case[146] against the backdrop of its provision in the Turkish criminal code.[147] In that case, France claimed that its sovereign rights had been breached by Turkey's trial of a French sailor for death caused to Turkish nationals during a maritime accident

[142] For analysis of this case, see Sergio Marchisio, 'The *Priebke* Case Before the Italian Tribunals: A Reaffirmation of the Principle of Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity' (1998) 1 *YBIHL* 344.
[143] See John Bassett Moore, *Digest of International Law*, vol. ii (Govt. Print. Off., 1906) 228.
[144] See Shaw (n 16) 483.
[145] ibid 484. See also *US v Yunis (No. 2)*, 681 F Supp. (1988) 896, 901.
[146] *The Lotus case* (n 31) para 92.
[147] The case was, however, decided on the basis of territorial jurisdiction rather than of passive personality jurisdiction.

outside Turkey's territory.[148] France would subsequently enact laws stipulating France's right to prosecute, in accordance with its law, aliens alleged to have committed crimes against French citizens abroad.[149]

Besides, unbridled assertion of passive nationality to prosecute serious crimes like torture and crimes against humanity may be incongruous with the overarching ideals of ICrimJ, in Cassese's view.[150] For him, ICrimJ strives to prosecute and punish offenders of international crimes because the harmful conduct injures 'our sense of humanity' and degrades 'respect for any human being', irrespective of the victims' nationality.[151] But this ideal may be jeopardised when states only sanction prosecutions in situations that harmed their own nationals, but ignore cases with no links to their nationals. The next subsection will develop this argument to show why the application of passive nationality still poses a source of friction among states and how it can occasionally support or obstruct the course of justice.

A. Resultant Constraint: Diplomatic Impediments

As earlier implied, asserting extraterritorial criminal jurisdiction on the back of passive personality can occasionally complicate international relations and may aid or prevent the prosecution of suspects of international crimes in two ways. First, it can engender or intensify diplomatic tension between states. As in the example of the Lockerbie bombing, this can transpire in contexts where a state like Libya refuses to hand over its nationals to another state for alleged crimes committed abroad against the requesting state's nationals. Related to this, diplomatic strains are also common in settings where more powerful states breach foreign territories so as to apprehend suspected 'terrorists' or offenders for prosecution for crimes supposedly committed abroad against their nationals.

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[148] *The Lotus case* (n 31) (Judgment No 9).
[149] See, for instance, the French Code of Criminal Procedure (adopted in 1975) art. 689(1).
[150] Cassese, *International Criminal Law* (n 69) 283.
[151] Ibid 283-84.

In the Sigonella crisis that followed the *MS Achille Lauro* hijacking event, Italian troops engaged US forces in a tense standoff to stop the US from seizing the hijackers from Italian territory without consent.[152] In the lead-up to the crisis, US fighters had diverted off course a commercial Egyptian airline carrying the hijackers and forced it to land at the Italian Sigonella airbase. Egyptian authorities denounced the US's action as an assault on Egypt's sovereignty. The fallout from the *Achille Lauro* and the Sigonella crises predictably soured relations between the US and several states, especially Italy.[153] At any rate, the suspects were ultimately tried and punished by the Italian courts on the basis of territoriality as the vessel had been of Italian origin and had docked in Italian waters.

A comparable breach of Uganda's territory by Israeli Defence Forces (ISF) in July 1976 on account of passive nationality resulted to many casualties and a divergence of views in the international community.[154] The ISF's 'Operation Thunderbolt' was staged to rescue scores of Israeli and Jewish hostages being held by Pro-Palestinian hijackers of a Paris-bound French airliner that was diverted and detained at Uganda's Entebbe airport.[155] Israel's action was criticised by UN Secretary-General Waldheim[156] and deplored by Uganda and the

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[152] The US claimed that it had rights to prosecute the hijackers because they had killed a US national aboard the *Achille Lauro* ship.

[153] For more background and analysis of the *MS Achille Lauro* and the Sigonella crises, see Michael Bohn, *The Achille Lauro Hijacking: Lessons in the Politics and Prejudice of Terrorism* (Potomac Books 2004); Malvina Halberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety' (1988) *AJIL* 82(2): 269.

[154] For a detailed account of the rescue operation, see William Stevenson, *90 Minutes at Entebbe* (Skyhorse [1976] 2015).

[155] See Alan Derschowitz, *Preemption: A Knife That Cuts Both Ways* (Norton 2007) 89-92.

[156] Kurt Waldheim called the rescue operation a 'serious violation of Uganda's sovereignty' while William Scantron, the US delegate to the UN described it as a 'combination of guts and brains that has seldom if ever been surpassed.' See Kathleen Teltsch, 'Rescue By Israel Acclaimed by U.S At Debate in UN' (*New York Times* 13 July 1976) <www.nytimes.com/1976/07/13/archives/rescue-by-israel-acclaimed-by-us-at-debate-in-un-a-combination-of.html> Accessed 12 March 2020.

Organisation of African Unity (OAU).[157] But the UNSC's reaction was fairly muted.[158] Unlike the *Achille Lauro* event where the hijackers were tried and punished, no trials followed the Entebbe crisis as all the hijackers were killed during the operation.[159]

The second difficulty with passive nationality relates to double standards. This is the practice whereby states tend to reject this ground of jurisdiction when their nationals are implicated as offenders but turn around and seek to enforce it when their own nationals are the victims. As noted above in the *Cutting* case, the US has historically resisted the arrest and/or trial of US citizens by foreign states on the basis of passive personality. But in the case of *US v Yunis*,[160] a US court held that passive nationality and universality principles justified the US's jurisdiction to try a Lebanese national in the US. The defendant and other accomplices had hijacked a Jordanian jetliner in Beirut. While the defendant argued that the US lacked jurisdiction,[161] the court insisted that the presence of US nationals on that flight afforded ample basis for the US jurisdiction.

At present, however, the exercise of passive nationality is less contentious particularly in cases involving terrorism and assassinations of state officials or diplomats.[162] In such contexts, as underscored by Judges Higgins, Kooijmans, and Buergenthal in the *Arrest Warrant* case, passive personality 'today meets with

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[157] The OAU (remodelled as the AU) passed a resolution calling on the UNSC to take a decisive action against Israel. See AHG/Res.83(XIII), 'Resolution of Israel Aggression against Uganda' (2-6 July 1976).

[158] The UK and the US sponsored a motion condemning international terrorism and calling for the respect of sovereign and territorial integrity. But the motion failed to garner the required nine votes to pass. See UNSC Official Records, 31st Year, 1939th Meeting, UN Doc S/PV 1939 (9 July 1976).

[159] While Operation Thunderbolt is mostly discussed under humanitarian interventions, it shows here the strong link between executive and judicial jurisdictions in the exercise of passive nationality.

[160] *US v Yunis (No. 2)* 681 F Supp 896 (1988).

[161] The defence argued that the US lacked jurisdiction because the defendant was not a US citizen, the airliner was not registered in the US, and the crime had not occurred within the US borders.

[162] Shaw (n 16) 484.

relatively little opposition'.[163] For cases involving torture, crimes against humanity and genocide, Cassese argues that the prosecution of the alleged offenders should not simply 'reflect a universal concern for their punishment' it should additionally be based 'on such legal grounds as territoriality, universality, or active nationality.'[164] In other words, the exercise of passive nationality may only come into play as a fall-back measure when the states with the relevant heads of jurisdiction show an inability or unwillingness to administer justice.[165]

3.3.4 Protective Personality Principle

Another jurisdictional ground available to states for national prosecution of international crimes is established under the protective personality principle. Although possibly the least employed of all five jurisdictional foundations, protective personality permits states to assert extraterritorial criminal jurisdiction on account of grave events conducted by aliens abroad which are deemed prejudicial to vital national interests.[166] A major definitional difficulty with this principle is that what constitutes 'essential national interests' differs from state to state and, as such, the scope of this doctrine is still unclear.[167] Nonetheless, alleged vital national interests usually embrace matters relating to treason and acts that threaten national security and political independence.[168] They may also include the forging of a state's currency;[169] spying; the selling and/or counterfeiting of a state's official seals, stamps, passports or credit instruments.[170]

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[163] See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ Rep 3 (14 February 2002), Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, paras. 63, 76-77 [hereinafter *Arrest Warrant case*]
[164] Cassese, *International Criminal Law* (n 69) 284.
[165] Ibid.
[166] Vaughan Lowe and Christopher Staker, 'Jurisdiction' in Malcolm Evans (ed.), *International Law* (3rd edn, OUP 2010), 325.
[167] Shaw (n 16) 484.
[168] *Lotus* case (n 31) para. 20; *Arrest Warrant* case (n 163) para. 4 (per Guillaume).
[169] *Eichmann* case (n 37) 5.
[170] See Cryer *et al* (n 1) 56.

According to O'Keefe, protective personality was previously considered less a general rule than the basis for allowing a restricted set of specific extraterritorial exercises of prescriptive criminal jurisdiction over foreign nationals.[171] The principle exists, Shaw argues, partly in response to the inadequate measures in most municipal laws that protect the essential interests, security, and integrity of foreign states.[172] But it could easily be overreached to subvert foreign states in the attempt to safeguard the vital interests of another state.

As it happens, protective personality is rarely invoked for the purposes of international criminal justice. According to Cryer et al, this is because practically all its conceivable usefulness relative to international criminal law merges with territorial, active nationality, and passive nationality grounds of jurisdiction.[173] It is thus usually considered ancillary to the other jurisdictional bases.[174] It is occasionally provided for in treaties that allow for multiple jurisdictional grounds.[175] In any case, protective personality will not detain us any further. We will proceed instead to explore succinctly the final but more dynamic and arguably the most contentious legal pillar of national criminal jurisdiction: the principle of universal jurisdiction.[176]

3.3.5 Universality Principle

There exists a profound uncertainty about the correct meaning, extent, and exercise of universal jurisdiction (also called universality principle). For O'Keefe, 'universal jurisdiction amounts to the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time

[171] O'Keefe (n 14) 12.
[172] Shaw (n 16) 484.
[173] Cryer *et al* (n 1) 56.
[174] See Akehurst (n 30) 158
[175] See for instance, the 1979 Hostages Convention (n 118).
[176] A more extended discussion of universal jurisdiction will be done in Chapter 4 in the context of models for regionalising ICL enforcement.

of the relevant conduct.'[177] This extraordinary use of jurisdiction is founded on the notion that certain crimes are so heinous and damaging to the global community 'that states are entitled – and even obliged – to bring proceedings against the perpetrator' for acts committed anywhere in the world.[178] As these crimes including genocide, torture and crimes against humanity are believed to unconscionably degrade humanity,[179] any given state may therefore assert jurisdiction to punish authors of the crimes regardless of any existing ties to where the acts were committed, by whom, or against whom.[180] In practice, states rarely consider these crimes under the ground of universality in the absence of a territorial or personal links or a clear treaty obligation to prosecute or extradite.

As a result, Alfred Rubin has wondered whether a universal jurisdiction really exists and whether states genuinely have a duty to exercise universality.[181] For Cryer *et al*, a duty exists in terms of piracy as it usually occurs on the *terra incognito* of the high seas.[182] Consistent with current practice, a duty also exists in reference to genocide, war crimes, crimes against humanity, and torture.[183] These crimes are proscribed and defined under customary international law.[184] Meanwhile, it is unclear whether a duty exists in relation to the crime of aggression despite its justiciability under the Rome Statute and its denunciation

[177] See Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *JICJ* 735, 745.
[178] Mary Robinson, 'Forward' in Stephen Macedo, *The Princeton Principles on Universal Jurisdiction*, (Princeton University Press 2001), 16. See also Cryer *et al* (n 1) 57; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 56-63.
[179] Rome Statute of the ICC, 2187 UNTS 90, (17 July 1998) preamble, paras. 2 & 6 [hereafter Rome Statute]
[180] Shaw (n 16) 485. See also Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2003) 5; Cedric Ryngaert, 'The International Criminal Court and Universal Jurisdiction: A Fraught Relationship?' (2009) *New Criminal Law Review: An International and Interdisciplinary Journal* 12(4): 498.
[181] Alfred Rubin, 'Actio Popularis, Jus Cogens and Offences Erga Omnes' (2001) 35 *NELR* 265.
[182] Cryer *et al* (n 1) 57.
[183] Ibid.
[184] Ibid. See also Anthony Colangelo, 'The Legal Limits of Universal Jurisdiction' (2006-7) 47 *VA J INT'L L* 149, 167-69.

by the IMT as the 'supreme international crime'.[185] In this regard, Claus Kreß has remarked that German prosecutors recently rejected pleas to open investigations into alleged acts of aggression prepared and performed against the Iraqi state.[186]

Barring treaty obligations, no real evidence exists requiring states to assert universal jurisdiction.[187] This prompts the question of how the principle came about in the first place? Briefly, universal jurisdiction was first proclaimed in the 17th century in customary international law with respect to piracy,[188] which was seen as the classic transnational crime.[189] Ever since, states have claimed universality over pirates,[190] who were regarded as '*hostis humani generis*' (enemies of humanity).[191] Pirates were deemed 'lordless' outlaws who were outside the protection and discipline of any particular sovereign.[192] To counter their pernicious and potentially universal threats, states were permitted to arrest and to bring pirates of any nationality to justice wherever they were found.[193]

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[185] Nuremberg Judgment, Trial of the Major War Criminals Before the International Military Tribunal, Vol I (IMT Nuremberg 1947) 186.
[186] See Claus Kreß, 'The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq' (2003) 2 *JICJ* 245.
[187] See Boister (n 54) 264.
[188] Cassese, *International Criminal Law* (n 69) 284. Article 101 of the 1982 Convention on the Law of the Sea defines piracy as consisting of any of the following: '(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or aircraft, and directed (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act or voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) and (b).'
[189] Stephano Bibas and William Burke-White, 'International Idealism Meets Domestic-Criminal-Procedure Realism' (2010) *DUKE LJ* 59(4) 637, 645.
[190] See *In re Piracy Iure Gentium* [1934] AC 586, 589; Section 290 of the US Criminal Code of 4 March 1909 (35 Stat 1088) states: 'Whoever, on the high seas, commits the crime of piracy as defined by the laws of nations and is afterwards brought into or found in the United States, shall be imprisoned for life.'; Article 20(5) of the 1890 Penal Code of Colombia: 'Nationals or foreigners who commit the act of piracy and are apprehended by Colombian authorities' 'shall be punished according to this Code'.
[191] See *US v Brig Malek Adhel*, 43 US 210 (1844) at 232 per Justice Story.
[192] See Dubber (n 5) 275.
[193] Ibid.

Eugene Kontorovich has challenged this neat depiction of piracy as the origin of contemporary practice of universal jurisdiction. His point is that the traditional jurisdiction over piracy was not based on the view that piracy was an atrocity analogous to the core international crimes in the Rome Statute.[194] Nevertheless, as Cassese explains, the traditional practice of universal jurisdiction over piracy sought to secure a joint interest while its current application with respect to such crimes as torture, war crimes,[195] and crime against humanity aims to protect universal values.[196] And Cherif Bassiouni concurs. For him, universal jurisdiction as currently practiced is 'in a manner equivalent to the Roman concept of *actio popularis,* which gave every member of the public the right to take legal action in defense of public interest, whether or not one was affected.'[197]

Today, accordingly, whenever and wherever the national courts fail to bring the suspects of atrocity crimes to justice, any state is presumed to have the competence under the universality principle to ensure that justice is done. The State of Israel was arguably the first in modern ICrimJ practice to assert this principle.[198] In its judgment in the *Eichmann* case,[199] the Supreme Court of Israel

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[194] See Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundations' (2004) 45 *HILJ* 183, 186.

[195] Note here a UN War Crimes Commission's Report that in general 'the only offences committed in internal armed conflict for which universal jurisdiction exists are "crimes against humanity" and genocide which apply irrespective of the conflict's classification.': Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1990) UN Doc. S/1994/674, annex, para. 42

[196] Cassese, *International Criminal Law* (n 69) 285.

[197] M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspective and Contemporary Practice' (2001) 42 *VA J INT'L L* 81, 88.

[198] Universality was mooted during WWII as a possible basis for prosecuting war crimes and some of the trials after that war could be explained on that basis. See Willard Cowles, 'Universality of Jurisdiction over War Crimes' (1945) 33 *CAL LR* 177.

[199] Although Israel relied on universality as a key jurisdictional ground, Eichmann was not tried under international law, but under a 1950 Israeli law that adopted some of the Nuremberg norms. He was charged for committing war crimes, crimes against humanity, and crimes against the Jewish people. Interestingly, Israel was not a state when the alleged atrocities occurred. Critics have decried many technical irregularities and breaches of due process in Eichmann's trial. For example, the defence was obstructed from calling witnesses and was unable to cross-examine some prosecution witnesses. See Richard Ashby Wilson, *Writing History in International Criminal Trials* (CUP 2011) 4; Hanna Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Classics [1964] 2006) 220-21.

justified its reliance on universal jurisdiction as resulting from Israel's position as 'a guardian of international law and an agent for its enforcement'.[200] Also, the court maintained that the 'harmful and murderous effects' of the appellant's crimes had an 'international character' which 'were so embracing and widespread as to shake the international community to its foundations.'[201]

Like Israel, a number of states have taken recourse recently to the universality doctrine to prosecute former or serving state officials for their alleged roles in grave atrocities. A prime case is the extradition trial of former Chilean strongman Augusto Pinochet[202] by the UK House of Lords in 1998 following an arrest warrant against him issued by a Spanish court.[203] But after nearly a decade of optimism about universal jurisdiction, especially in Europe, it seems as though 'the honeymoon is over'.[204] The economic costs and political effects of universal jurisdiction appear to have forced several enthusiasts to make a volte-face. States like Belgium and Spain have now modified their law and approach to universality and, as such, seem only to concern themselves with such crimes that have direct bearings on their territories or peoples.[205] This disillusionment was not helped by the ICJ's decision in the *Arrest Warrant* case that sitting heads of government enjoy official immunity from arrest while in office.[206] It is now appropriate to highlight the regnant approaches to universal jurisdiction.

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[200] *Attorney-General of the Government of Israel v Eichman*n (1962) 36 ILR at 304.
[201] Ibid.
[202] See *Ex parte Pinochet* (No. 1) (1998) 4 All ER 897.
[203] See Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (2nd ed., Penguin 2002), 395-400.
[204] See David Luban, 'After the honeymoon: reflections on the current state of international criminal justice' (2013) *Journal of International Criminal Justice* 11: 505
[205] See Florian JeBberger '"On Behalf of Africa': Towards the Regionalization of Universal Jurisdiction?"' in Gerhard Werle, Lovell Fernandez & Moritz Vormbaum, *Africa and the International Criminal Court* (Asser Press 2014) 167.
[206] See *Arrest Warrant* case (n 163).

3.3.5.1 Approaches to Universal Jurisdiction

The issues engaged under the universality principle are frequently sensitive and highly politicised.[207] However, two principal approaches to universality have emerged, arguably since the ICJ's decision in the *Arrest Warrant* case.[208] These are (i) conditional universal jurisdiction (or jurisdiction with presence) and (ii) absolute universal jurisdiction (or jurisdiction in *absentia*).[209] We will also highlight a budding midway method between the two main approaches.

A Conditional Universal Jurisdiction

Conditional universal jurisdiction premises the exercise of universality on the precedent condition of the suspect(s) being found within the territory of the asserting state at the moment of the initiation of the investigation/prosecution. Advocates maintain that only the *forum deprehensionis* – the state where the accused is present, apprehended or held in custody – may assert universal jurisdiction. In a word, but for the accused's presence in the territory of the custodial state the right of universal jurisdiction is not triggered.[210] This presence-based approach is consistent with the terms of many international treaties that specify the applicability of universal jurisdiction.[211]

B Absolute Universal Jurisdiction

Absolute universal jurisdiction contends that states have unimpeded competence to prosecute persons accused of atrocity crimes regardless of the accused not being present or in custody in the forum state or any links

[207] See Akehurst (n 30) 145; Cowles (n 198) 177.
[208] *Arrest Warrant* case (n 163).
[209] See Antonio Cassese, 'When may Senior State Officials be Tried for International Crimes?' (2002) *EJIL* 13(4): 853, 855-58; Cassese, *International Criminal Law* (n 69) 285.
[210] Cassese, *International Criminal Law* (n 69) 286. See also Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007) *ICLQ* 56(1): 49, 58.
[211] See, for examples, Convention for the suppression of unlawful acts against the safety of civil aviation (adopted 23 September 1971, effective 26 January 1973) art. 7; the 1979 Hostage Convention (n 118) art. 8(1); the 1984 Torture Convention (n 119) art. 7(1).

whatsoever to other grounds of jurisdiction.[212] Hence, this approach is sometimes referred to as universal jurisdiction *in absentia* or pure universal jurisdiction.[213] Under this approach, an interested state may commence investigations and the gathering of evidence while awaiting the arrest and extradition of the suspect.

In this connection, Belgium's Court of Cassation upheld in *HSA et al v SA et al*[214] – pursuant to Statute of 16 June 1993, as amended in February 1999, stipulating Belgium's broad jurisdiction in cases involving genocide, war crimes and crimes against humanity – that the accused's presence in Belgium was irrelevant. However, the 1993 Statute was further amended in April 2003 to limit Belgium's jurisdiction to cases committed against Belgian nationals or against legal residents who had lived in Belgium for no less than three years prior to the event at issue.

Furthermore, the April 2003 amendment specified that all proceedings relating to universal jurisdiction must be authorised by Belgium's Federal Prosecutor who may decide not to pursue a relevant situation in the interest of the proper administration of justice or in compliance with Belgium's international obligations, such as prioritising the jurisdiction of an international criminal court or the court of nationality of the offender.[215] An extra amendment on 5 August 2003 requires prospective foreign complainants to have been resident in Belgium for at least three years. With this series of reforms, some believe that

[212] Cassese, *International Criminal Law* (n 69) 286.
[213] See Cryer *et al* (n 1) 57.
[214] *HSA et al v SA et al (Decision Related to the indictment of defendant Ariel Sharon, Amos Yaron and others)*, Court of Cassation of Belgium, P.02. 1139. F (12 February 2003) [concerning the Lebanese refugee camp, Sabra and Shatila, massacre of 1982.]
[215] See Shaw (n 16) 488.

Belgium may have ceased to permit the applicability in domestic law of universal jurisdiction *in absentia*.[216]

C. 'Remedial' Universal Jurisdiction – A New Median Approach?

In addition to the two central approaches to universality, a novel approach can be gleaned from the literature and the practice in some states. We can describe it as 'remedial universal jurisdiction'. This is a midway approach that premises the exercise of universality by a foreign state with custody of the alleged offender on the failure of the territorial, national state(s), or international courts to bring the suspect to trial after due notification. Such a 'remedial' approach can be seen in the recent position adopted by the Institut de Droit International, which Cryer *et al* describe as treading 'a middle path'.[217] It states:

> Any state having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it wishes to prosecute that person, unless these States are manifestly unwilling or unable to do so. It shall also take into account the jurisdiction of international criminal courts. [218]

A similar stance was endorsed by Judges Higgins, Kooijmans, and Buergenthal in *Arrest Warrant*.[219] The judges enumerated a range of considerations under which universality may be exercised. First, the state intending to commence action must accord the national state of the accused the chance to act upon the charges concerned. Second, criminal jurisdiction may only be exercised over the

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[216] Ibid. See also Steven Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) *AJIL* 97(4): 888.
[217] See Cryer *et al* (n 1) 58.
[218] Institut de Droit International, Resolution on Universal Jurisdiction with regard to the Crime of Genocide, Crimes against Humanity and War Crimes (adopted 26 August 2005) para. 3(c). See also paras. 3(b) and 3(d).
[219] See *Arrest Warrant* case (n 163) paras. 59-60 and 79-85.

most heinous crimes. Third, the charges may only be laid by an independent prosecutor or an investigating judge. Fourth, the trial may be initiated only at the behest the persons concerned: the victims or their relatives. And fifth, jurisdiction may not be exercised if prospective suspects are serving state officials, but they may be exercised only over private acts of former foreign ministers.

The Spanish Supreme Court also appeared to favour this remedial approach in its judgment of 25 February 2003 in the *Guatemala Genocide* case.[220] It stated that with regards to alleged atrocities committed in Guatemala during the 1970s and 1980s, the Spanish jurisdiction was conditional upon Guatemala's failure to act. But the court was satisfied that Guatemala could competently investigate and prosecute the complaints. The court also noted that Spain would only claim universality over events in which Spanish nationals were victims. Nevertheless, this decision was reversed on 26 September 2005 by Spain's Constitutional Court.

In its reversal judgment, the Constitutional Court held that no nexus to Spain was needed to initiate a complaint; that Spanish jurisdiction extended beyond cases involving Spanish nationals and was independent of the territorial state's failure to act.[221] This decision briefly reinstated Spain as one of the world's most accessible forums for cases involving universal jurisdiction.[222] However, new legislation adopted in 2009 by the Spanish government now restricts Spanish court's reliance on universality to cases: involving Spanish victims; with clear links to Spanish interests; and where the suspects were present within Spanish territory.[223]

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[220] Judgment No. 327/2003.
[221] Judgment No. 237/2005.
[222] See Naomi Roht-Arriaza, 'Guatemala Genocide Case: Judgment No STC 237/2005' (2006) *AJIL* 100(1): 207.
[223] See Shaw (n 16) 489.

3.4 Further Barriers to National Prosecutions of International Crimes

In treating the customary grounds of national jurisdiction and their discontents, it was underscored how they can be exploited as bases to impede the ability of national courts to consider relevant cases or suspects in certain contexts. National prosecutions of international crimes also tend to be impaired occasionally as a result of laws adopted by states to eliminate, prevent, or suspend domestic criminal jurisdiction. In the rest of this chapter, three of these legal obstacles will be examined, including (i) statutory limitation, (ii) political amnesty, and (iii) double jeopardy. Another major impediment (official immunity) will be explored in Chapter 4 as one of the principal distresses regarding the idea of regional enforcement of ICL through a regional criminal courts' system.

3.4.1 Statutes of Limitation

Statutory limitation (or prescription in civil law jurisdictions) simply represents a legal timeframe after which it may be impossible to initiate prosecution in relation to certain offences.[224] It serves to block prosecutors from considering cases that have become time barred. And some states also provide for the inapplicability of a final sentence pronounced for a crime if it has not been served after a certain period.[225] Civil law jurisdictions usually provide for general application while some common law countries tend to exclude serious crimes like murder and rape from a statutory limitation.[226] For instance, the French Criminal Procedure Code specifies under Article 7 that the right to initiate a criminal proceeding is forfeited after 10 years of the commission of the crime

[224] See David Kohout, 'Statutory Limitation of Crimes Under International Law: Lessons Taken from the Prosecution of Nazi Criminals in Germany After 1945 and the New Demjanjuk Case Law' (2017) *International Comparative Jurisprudence* 3(1): 37, 39.
[225] See Cassese, *International Criminal Law* (n 69) 316.
[226] See Cryer *et al* (n 1) 82.

while under Article 132-2 a final penalty elapses if not served 20 years after it was issued.[227]

A Why Impose Statutory Limitations?

Why do states levy statutory limits for certain offences? At least three explanations can be identified. First, prescriptions serve to discourage undue delays between the criminal conduct and its prosecution and punishment.[228] This is critical not least because a wide gap between the perpetration and the prosecution of a crime could see a change in the law that: raises the past crime into a more severe category than when it was done; increases the penalty for the crime; or even legitimises the crime. In such scenarios, to prosecute or to free the suspect based on the new law may raise questions apropos the compatibility of the prescription with the non-retroactivity principle.[229]

In other words, prosecuting the suspect on the revised law or the extended penalty may breach the legality principle.[230] For example, the Model Criminal Code (MCC) stipulates that '[a] penalty that is heavier than the one that was applicable at the time a criminal offense was committed may not be imposed upon a person convicted of that offense.'[231] At the same time, the suspect may not escape liability as a result of the amended law for the fact that the past act was criminal when it was done.[232] However, '[i]f the law was amended on one or

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[227] Cassese, *International Criminal Law* (n 69) 316.
[228] See Cryer *et al* (n 1) 82.
[229] This arises when a prescription is extended or removed retroactively or when an extra-territorial jurisdiction is added retrospectively. See Cryer *et al* (n 1) 84.
[230] For commentary on the various aspects of this principle, see Aly Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects' (2005) *Statute Law Review* 26(1): 41; Antonio Cassese, 'Nullum Crimen Sine Lege' in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (OUP 2009) 438.
[231] See MCC, art. 3(6) in Vivienne O'Connor and Colette Rausch (eds.), *Model Codes for Post-conflict Criminal Justice* Vol 1 (USIP Press 2007) 38.
[232] For example, Article 15 of International Covenant for Civil and Political Rights states: 'Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.' See also Universal Declaration of

more occasions after a criminal offense was perpetrated, the law that most favors the accused must be applied.'[233]

Second, prescriptions may guarantee the clarity of the law so as to protect suspects against unsafe prosecution or the constant threat of prosecution. The point here is that after a long passage of time following the events, it may prove much more arduous to establish the authenticity of any physical evidence and of witness testimonies.[234] Besides, the key witnesses and victims may have died or vanished. And, as was apparent in the *Demjanjuk*[235] case, the principal witnesses may have forgotten critical aspects of the events or may even misidentify the culprits.[236] Under such conditions it may be impossible to prosecute the alleged crimes to the required standard of proof.

Third, after several years have gone by, the deterrent effect of prosecuting the suspect may have become negligible. The victims or their relatives may have moved on with life and may have little interest in revisiting a traumatic past.[237] Additionally, over the intervening years the suspect may have turned a corner, engaged in charitable causes, or become unfit to stand trial or serve a prison term.[238] To put them on trial at that point may provoke questions as to the ultimate goal of the trials and the justice system. Moreover, such trials may reopen unhealed wounds and can imperil post-conflict achievements.[239]

Human Rights (10 December 1948) art. 11(2); Protocol (II) Additional to the Geneva Conventions of 1949 (adopted 8 June 1977, enforced 7 December 1978) art. 6(2)(c).

[233] MCC art. 3(5) in O'Connor *et al* (n 231) 38.

[234] See Cryer *et al* (n 1) 87.

[235] *State of Israel v Ivan (John) Demjanjuk*, Case No. 347/88 (29 July 1993).

[236] Cryer *et al* (n 1) 87.

[237] Cassese, *International Criminal Law* (n 69) 316.

[238] See Susan Beck, 'Does Age Prevent Punishment? The Struggles of the German Judicial System with Alleged Nazi Criminals: Commentary on the Criminal Proceedings against John Demjanjuk and Heinrich Boere' (2010) 11 *GLJ* 347.

[239] See Erna Paris, *Unhealed Wounds: France and the Klaus Barbie Affair* (Grove Press 1985).

In contrast, there are two strong arguments why statutory limitations should not apply to the core international crimes. First, such crimes as genocide, war crimes, crimes against humanity, and torture are widely considered among the gravest crimes in international law. As such, their effective prosecution and punishment is viewed 'as an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security'.[240] Prescriptions thus tend to frustrate or impede the attainment of these objects.

Second, the core international crimes are believed to threaten the safety of the entire international community and to deeply shock the conscience of humanity.[241] As their effect often extends beyond the place of commission, Cassese contends that it would be incongruous to take into account the statutes of limitation of individual states in respect of such crimes.[242] In addition, as Fannie Lafontaine observes, the use of prescriptions for such crimes and the consequent failure to prosecute the crimes may be a tactic of some regimes to bar investigations into their role in the atrocities thereby providing a cover for impunity.[243]

B The Scope of Statutory Limitations

The Klaus Barbie case can shed light on some of the complex issues regarding prescriptions. In the 1970s, Bolivia's Supreme Court rejected France's request to extradite Barbie (a former Gestapo official) who had fled France after WWII and later became a Bolivian national. The Bolivian court argued that his prosecution

[240] UN Doc. A/RES/2391 (XXIII) 'Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity' (26 November 1968) preamble, para. 5 [hereafter RES/2391].
[241] Rome Statute (n 179) preamble, para. 2.
[242] Cassese, *International Criminal Law* (n 69) 318.
[243] See Fannie Lafontaine, 'No Amnesty or Statute of Limitation for Enforced Disappearances: The Sandoval Case before the Supreme Court of Chile' (2005) 3 *JICJ* 469, 470.

was time-barred under French law due to the lapse of time and that there existed no extradition treaty between both countries.[244] Notably, French courts had previously tried Barbie *in absentia* and sentenced him to death twice in 1952 and 1954 for torture and war crimes committed in France during WWII. By the 1980s, that unserved sentence had expired and also the death penalty had been abolished in France.

Under France's revised Penal Code of 1964, however, genocide and crimes against humanity were made imprescriptible – not subject to any limitations.[245] Barbie was finally expelled to France in 1983 by a new Bolivian government. He was later convicted of crimes against humanity for presiding over the deportation and murder of Jews and French Resistance members during WWII.[246] Sentenced to life imprisonment in 1987, Barbie died four years later aged 77. Had statutory limitations been upheld for crimes against humanity, he might have escaped justice. However, what that justice meant more than 40 years after the alleged crime was committed is moot. To Barbie's defence, his trial evoked grave questions about the morality and aims of the justice system given his age, the remoteness of the events, and the complicity of the French state in similar atrocities done in colonial Africa, the Middle East, and during WWII.[247]

At present, a minority of international treaties exclude statutory limitations. Notable is the UN's 1968 Convention on the non-applicability of statutory limitations.[248] Another is the 1974 European Convention on the same subject.[249]

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[244] See Peter McFarren and Fadrique Iglesias, *The Devil's Agent: Life, Times and Crimes of Nazi Klaus Barbie* (Xlibris 2013) 269-280.
[245] See French Penal Code, as amended by Law No. 64-1326 of Dec 26, 1964, arts. 211-1, 212-1 to 212-3 & 213-5. [The debarring of statutory limitations on crimes against humanity was restated in Article 213-5 of the French Criminal Code of 1994.]
[246] *Barbie*, Cass Crim 20 December 1985, Bull Crim No 407 at 1038. See also *Touvier*, Cass Crim 27 November 1992, Bull Crim No 394.
[247] For more on Barbie's defence, see Jacques Vergès, *Je Defends Barbie* (Jean Picollec, 1988).
[248] See RES/2391 (n 240).
[249] Council of Europe, ETS No. 082, 'European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes' (25 January 1974).

Both Conventions specifically proscribe prescriptions in respect of war crimes and crimes against humanity committed in contravention of the Genocide Convention of 1948 and the 1949 Geneva Conventions. The Rome Statute also specifies the inapplicability of statutory limitations for crimes within the ICC's jurisdiction, including war crimes and crimes against humanity as well as genocide and the crime of aggression.[250] This set of crimes are now widely regarded as not subject to statutory limitations under international law.[251]

While none of the identified treaties has universal application,[252] several states have taken domestic measures to remove or to revise prescriptions relating to international crimes.[253] A number of national and international courts have also rejected such statutory limitations. In *Sandoval*, for example, Chile's Supreme Court referenced the UN's 1968 Convention as one of the bases for its refusal of an appeal to a prescription relating to the crime of enforced disappearances.[254] Likewise, it was held in *Barbie* that crimes against humanity by their nature are not subject to statutory limitations.[255] In *Priebke*, an Italian court affirmed that the 'imprescriptibility of war crimes and crimes against humanity' enjoys the objective character of *jus cogens* in international law.[256] Also, in *Furundžija*, the ICTY noted *obiter* that as the ban on torture enjoys a peremptory status in international law, the crime of torture may not be subject to prescriptions.[257]

[250] Rome Statute (n 179) art. 29.
[251] Kohout (n 224) 37.
[252] None of the treaties has garnered a significant number of ratifications.
[253] For an overview, see Ruth Kok, *Statutory Limitations in International Criminal Law* (Asser Press 2007).
[254] *Sepúlveda (Sandoval* case*)*, Case No. 517/2004, Resolución 22267, (Chile Supreme Court, 17 November 2004) at § 43.
[255] *Barbie*, 78 ILR 125, 26 January 1984 (*Cour de Cassation*).
[256] *Priebke*, Military Court of Rome, Judgment of 22 July 1997, No 322, § 1.1.14(d).
[257] *Prosecutor v Furundžija*, IT-95-17/1, ICTY Trial Chamber, Judgment of 8 December 1998, §§ 155 & 157.

3.4.2 The Amnesty Question

Another major hurdle to effective domestic prosecution of international crimes concerns amnesty laws. In 1978 General Augusto Pinochet authorised legislation that guaranteed him and his top aides amnesty from prosecution in the courts of Chile.[258] After Nigeria's civil war in 1970, the Nigerian military regime decreed that the war had ended with neither victors nor vanquished.[259] Thus combatants on both opposing sides were cleansed of accountability for that war. Likewise, at the end of the French wars in Algeria and Indochina, the French parliament adopted laws on 18 June 1966 that pardoned all crimes committed in those wars.[260] Amnesty laws with differing scope have also been adopted elsewhere ranging from Argentina, Peru and Chile to South Africa, Rwanda and states of the former Yugoslavia.[261]

What then is amnesty?[262] Broadly speaking, amnesty (from the Greek *amnēstia*) is an official pardon extended by states to persons accused of criminal liability after a serious conflict.[263] Legally speaking, explains Louise Mallinder, amnesty signifies 'efforts by governments to eliminate any record of crimes occurring, by barring criminal prosecutions and/or civil suits'.[264] This official act of 'forgetting' the past wrongs presupposes a breach of law and serves to provide immunity from punishment. It is usually anchored in domestic legislation by means of which 'conduct that was previously criminal is no longer such, with the

[258] See *Decreto Ley* No. 2191 published in Diario Oficial No. 30. 042, 19 April 1978. See also Lafontaine (n 243) 470.
[259] For commentaries on certain historical aspects of the Nigerian civil war, see Dirk Moses and Lasse Heerten (eds.), *PostColonial Conflict and the Question of Genocide: The Nigeria-Biafra War, 1967-1970* (Routledge 2017).
[260] See Cassese, *International Criminal Law* (n 69) 312.
[261] Rwanda's amnesty law excludes amnesty for crimes within the ICTR's jurisdiction. See William Schabas, 'Genocide Trials and Gacaca Courts' (2005) 3 *JICJ* 879.
[262] Amnesty can be used in contexts ranging from illegal immigration to acts of treason and terrorism; our focus is on amnesty in post-armed-conflict contexts.
[263] See Bryan Garner (ed.), *Black's Law Dictionary* (9th edn, West Group 2009) 99. [Although 'amnesty' and 'pardon' are often used interchangeably, amnesty usually precedes a criminal prosecution while pardon is normally granted after a criminal conviction.]
[264] Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing 2008) 5.

consequence that: (i) prosecutors forfeit the right or power to initiate investigations or criminal proceedings; and (ii) any sentence passed for the crime is obliterated.'[265]

A On the Object of Amnesty

Amnesty can be absolute and unconditional whereby the qualified applicants receive pardon without any attendant conditions. Also, amnesty can be conditional upon the applicants' execution of some defined criteria such as the signing and swearing of loyalty oaths or the disclosure of truth. In addition, amnesty can be limited or blanket. Whereas the latter refers to amnesty of a sweeping scope extended to all applicants unconditionally, the former refers to amnesty that is restricted to a select group of persons, say, the low-level combatants, or to particular time period, or to certain crimes.[266] Bruce Broomhall shares the view that amnesty is usually 'endorsed during transition from one regime to another, or as part of a peace settlement'.[267] Crucially, states that favour the use of amnesty routinely consider it a vital strategy in the road to rebuilding their communities and establishing peace and security after a difficult and divided past.[268]

Amnesty laws also are sometimes adopted within the realism of the prohibitive cost of potential prosecutions and the impracticality of investigating and prosecuting all the relevant cases. As Justice Goldstone puts it: 'In an ideal society all criminals should be investigated, prosecuted, and if found guilty, punished. That's what most victims want, but sometimes the political situation

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[265] Cassese, *International Criminal Law* (n 69) 312.
[266] On amnesties generally, see G K Young, 'Amnesty and Accountability' (2002) 35 *UC DAVIS L REV* 427.
[267] Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP 2003) 93.
[268] See the 2000 Amnesty Act of Uganda, preamble, paras. 3 & 4.

or the practical, factual situation is such that you can't do that.'[269] In the context of post-genocide Rwanda, for instance, Goldstone observes that faced with the daunting task of prosecuting over 300,000 suspects some sort of compromise was inevitable. The same was true in post-apartheid South Africa during the 1990s. Goldstone recalls:

> In South Africa, in two-and-a-half years of the Truth and Reconciliation Commission, I heard evidence from well over 20,000 victims. Trials could never do that, so the compromise was amnesty only in return for publicly admitted full admission of the crime committed, and that is a form of justice for the victims because it's the way they get acknowledgement.[270]

Underlying the amnesty regime is the notion that it is the sovereign prerogative of individual states to decide who may or may not be exempted from criminal punishment.[271] For example, in 1977, Spain adopted *Ley de Amnistía* as the country transitioned to democratic rule after 36 years under General Franco's dictatorship. This amnesty law was seen as a way to appease those who posed the biggest threats to the new democracy.[272] Article 1 of the 1977 Act offers amnesty to all 'politically motivated acts … consisting of crimes committed before December 1976'.[273] Relatedly, thanks to Uganda's 2000 Amnesty Act well over 13,000 former rebels received amnesty.[274] Also, in 1996, Guatemala passed a national reconciliation law which enables amnesty for certain crimes but

[269] See International Bar Association, 'Interview with Richard Goldstone - Transcript' (28 June 2017) <www.ibanet.org/Article/NewDetail.aspx> Accessed 8 October 2018.
[270] ibid.
[271] See Cassese, *International Criminal Law* (n 69) 314.
[272] Peter Burbidge, 'Waking the Dead of the Spanish Civil War: Judge Balthasar Garzón and the Spanish Law of Historical Memory' (2011) 9 *JICJ* 753, 754. See also Giles Tremlett, *Ghosts of Spain: Travels through a Country's Hidden Past* (Faber & Faber 2006) xvii.
[273] See Burbidge (n 272) 770.
[274] See Paul Bradfield, 'Reshaping Amnesty in Uganda: The Case of Thomas Kwoyelo' (2017) *JICJ* 15(4): 827.

excludes amnesty for cases involving genocide, torture and forced disappearances.[275]

B Is Amnesty Permissible Under International Law?

The crucial question for our purposes is whether amnesty is permissible under international law. In contrast to state practice, it remains an unsettled question whether there exists a rule of international law that clearly prohibits or permits amnesty for international crimes.[276] On the one hand, scant evidence of the permissibility of amnesty for war crimes can be found in a few treaties. Notable is the Evian Accords signed by France and Algeria on 18 March 1962, which barred the prosecution and punishment of any criminal acts committed prior to the treaty.[277]

More important, however, is Article 6(5) of the 1977 Protocol II Additional to the Geneva Conventions of 1949. This provision states that 'the broadest possible amnesty' be extended after a conflict 'to persons who participated in the armed conflict'. There is much debate as to the true reading of this controversial provision. National courts have at times relied on it to argue that amnesty is consistent with international law.[278] A famous Red Cross letter of 1997 construes it as providing a form of 'combatant immunity' for combatants that participated in international armed conflicts insofar as they did not violate international humanitarian law.[279] For Cassese, Article 6(5) purposively exists to foster national reconciliation efforts following armed conflicts.[280]

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[275] See *Ley de Reconciliación Nacional*, Decree 145-96 (18 December 1996) (Guatemala).
[276] See Lafontaine (n 243) 480.
[277] See Cassese, *International Criminal Law* (n 69) 314.
[278] See, for example, *Azania Peoples Organisation (AZAPO) et al v South Africa* (CCT 17/96) [1996] ZACC 16 (25 July 1996).
[279] Letter from Dr Toni Pfanner, Head of Legal Division, ICRC to Douglas Cassel (15 April 1997) cited in Jessica Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (2002) *ICLQ* 51(1): 91, 102.
[280] Cassese, *International Criminal Law* (n 69) 314 (footnote commentary).

On the other hand, some treaties specify an obligation upon states parties to prosecute and punish grave breaches of international law without clearly excluding amnesties.[281] Such treaties include the Geneva Conventions, the Genocide Convention, and the Torture Convention.[282] Moreover, customary international law may impose a duty to prosecute in respect of offences involving norms of *jus cogens* character[283] in which case, as Justice Millet argues, there may even exist a universal jurisdiction to prosecute the offenders.[284] That such crimes can be cancelled by amnesty laws, argues Lafontaine, negates the idea that these offences constitute assaults on universal values.[285]

There is still debate whether a duty to prosecute international crimes exists beyond clear treaty obligations.[286] Some international courts have considered amnesty laws inconsistent with treaty provisions.[287] In the *Furundžija* case,[288] the ICTY's Trial Chamber held that amnesty does not apply to cases involving the core international crimes. A similar view was upheld by the SCSL Appeals

[281] The Rome Statute is curiously silent on amnesty. It has been noted that amnesty was discussed during the Rome Statute Preparatory Committee session in August 1997. But the topic was later discontinued after the US delegation introduced a 'non-paper' which suggested that in contexts where there was amnesty in place, the desirability of prosecuting perpetrators should be evaluated against the interests of national reconciliation and the facilitation of peaceful transitions to democratic rule. See John T Holmes, 'The Principle of Complementarity' in Roy S Lee (ed.) *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999) 60. See also Gavron (n 279) 108.

[282] See Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart 2012) 349.

[283] See M Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *L&CP* 63; Roman Boed, 'The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violation' (2000) 33 *CORNELL INT'L LJ* 297.

[284] See *Ex parte Pinochet* (No. 3) [2000] 1 AC 147 at 275 per Millett LJ.

[285] Lafontaine (n 243) 471.

[286] See Michael Scharf, 'Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?' (1996) 31 *TEXAS INT'L LJ* 1; Naomi Roht-Arriaza, 'The Developing Jurisprudence on Amnesty' (1998) 20 *HRQ* 953.

[287] Also, Argentina's Supreme Court in 2005 declared unconstitutional two federal amnesty laws adopted in 1986 and 1987. See *Simón, Julio Héctor y otros*, No. 17.768, S.1767.XXXVIII, 14 June 2005 (Corte Suprema)

[288] *Prosecutor v Furundžija*, Case No: IT-95-17/1-T (10 December 1998).

Chamber in the *Kallon* case[289] in light of Article 10 of the SCSL Statute which stipulates that amnesty shall not preclude prosecution against international crimes. Also, the Inter-American Court of Human Rights has found amnesty given in the context of alleged gross abuses of human rights to be incompatible with the provisions of international human rights instruments.[290]

In fine, the practice of amnesty still poses a major barrier to prosecuting international crimes in domestic courts. According to Michael Scharf, 'to the extent any state practice in this area is widespread, it is the practice of granting amnesties or de facto impunity to those who commit' international crimes.[291] Nevertheless, some commentators have suggested that limited and more focused amnesties comprising such complementary mechanisms as truth commissions, lustration, and reparations for victims or survivors may be more acceptable than blanket and self-excusing amnesties.[292]

3.4.3 The *Ne Bis In Idem* Doctrine

The final barrier to proceedings in domestic jurisdictions for our consideration is the *ne bis in idem* principle.[293] Also called the rule against double jeopardy or *autrefois acquit, autrefois convict* (previously acquitted or convicted), this principle prevents the retrial of a person for the same acts for which they had been previously convicted or acquitted.[294] Comparable definitions are stated in many

[289] See *Prosecutor v Morris Kallon and Brima Bazzy Kamara*, 'Decision on Challenge to Jurisdiction: Lomé Accord Amnesty', SCSL-2004-15-PT (13 March 2004).
[290] See *Barrios Altos* case *(Chumbipuma Aguirre and others v Peru*), Inter-Am-Ct HR, Judgment of 14 March 2001; 41 ILM 91 (2002).
[291] Michael Scharf, 'The Letter of the Law: The Scope of International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *L&CP* 41, 57.
[292] See Williams (n 282) 350; Cassese, *International Criminal Law* (n 69) 316.
[293] Literally translated '*ne bis in idem*', a scion of a Roman law axiom, means 'not twice about the same'.
[294] See Antonio Cassese, Guido Acquaviva, Mary Fan, & Alex Whiting, *International Criminal Law: Cases and Commentary* (OUP 2011) 100-101; MCC, art. 8 in O'Connor et al (n 231) 51.

human rights treaties.[295] Three reasons can explain why *ne bis in idem* appears in many domestic and international statutes.

First, the principle applies to final judgments and thus seeks to ensure legal certainty and respect of the *res judicata*, that is, the finality and binding effect of judicial decisions.[296] Second, it aims to protect defendants against arbitrary exercise of criminal jurisdiction by preventing the likelihood of a person being prosecuted repeatedly on the basis of the same offence or the 'same acts' (*idem*).[297] Third, it encourages prosecutorial diligence and promotes public confidence in the justice system.[298] In addition, some commentators observe that *ne bis in idem* can act as both a procedural and a substantive defence to a criminal charge; it is also upheld as a constitutional right and a human right in many domestic jurisdictions.[299] It will be advisable to explain succinctly the two forms of *ne bis in idem*: internal *ne bis in idem* and external *ne bis in idem*.

A Internal *Ne Bis in Idem*

Internal *ne bis in idem* applies to the proceedings that were concluded within an individual state. The rule is stated forcefully in Article 4(1) of Protocol No. 7 to the European Convention on Human Rights: 'No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.' However, Article 4(2) of the same provision permits the reopening of cases where there is

[295] See, for example, ICCPR, art. 14(7); Charter of Fundamental Rights of the EU (7 December 2000), art. 50; Convention on the Implementation of the Schengen Agreement (14 June 1985), art. 54; American Convention on Human Rights, art. 8(4).
[296] Cryer *et al* (n 1) 85.
[297] See *Prosecutor v Ieng Sary*, 002/19-09-2007-ECCC/OCIJ (PTC75) (Decision on Ieng Sary's Appeal Against the Closing Order) 11 April 2011, para. 142 [hereafter Sary's Appeal]; *Van Esbroeck*, Case 436/04, Judgment of 9 March 2006, paras. 19 & 43.
[298] Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2019) 247.
[299] See O'Connor *et al* (n 231) 51.

evidence of new facts or fundamental defects (such as outlined above) in the earlier proceedings that could result to a new outcome.

It is thus the finality of the proceedings that determines the applicability of internal *ne bis in idem*. This means that appeals against convictions or acquittals do not breach double jeopardy as appeals are seen as merely a continuation of the same case.[300] In the view of some commentators, internal *ne bis in idem* is widely accepted in domestic contexts and can be supposed to be prescribed by a customary rule of international law.[301] In contrast, controversies trail the exercise of external *ne bis in idem* and its legal status in international law remains unclear.[302] In this relation, the ICTY has stated that *ne bis in idem* generally bars only a double prosecution within the same state but is not broadly recognised 'as a mandatory norm of transnational application'.[303]

B External *Ne Bis in Idem*

External *ne bis in idem* concerns judgments handed down abroad by either the courts of another state or an international court. The question is whether such decisions should be upheld universally by other courts.[304] Evidently, this is still a contentious area of international law. For Cryer *et al*, it is lawful for a state to initiate proceedings against a person for an offence for which they had been previously tried and punished elsewhere.[305] This is because states evaluate the effects of decisions by foreign courts differently. It is also 'a matter of sovereign

[300] ibid 53.
[301] See Stahn (n 298) 247; Cassese, *International Criminal Law* (n 69) 319; Cassese *et al* (n 294) 100.
[302] See Gerald Conway, 'Ne Bis in Idem in International Law' (2003) 3 *ICLR* 217.
[303] *Prosecutor v Tadić*, IT-94-1-T, Decision on Defence Motion on the Principle of Non-Bis-In-Idem, 14 November 1995, para. 19.
[304] In *Zennaro*, for instance, Italy's Constitutional Court held that *ne bis in idem* is not yet a customary rule of international law. As such, states are not bound to respect judgments from foreign jurisdictions. See *Zennaro*, Judgment of 8 April 1976, No. 69 (1976) 77 ILR 581, para. 584-88.
[305] See Cryer *et al* (n 1) 85.

equality: one state's court cannot bind another,'[306] except where two states are bound by a treaty that explicitly prohibits double jeopardy.[307] However, where retrials are permitted, some national courts may take into account in sentencing the punishments imposed and/or served abroad.[308]

Furthermore, the statutes of many international criminal courts provide for the so-called upward effect versus downward effect of *ne bis in idem*. Upward effect refers to the impact of national judgments on international proceedings while downward effect is the reverse scenario.[309] The ICTY,[310] ICTR,[311] and SCSL[312] statutes bar double jeopardy before national courts as to the decisions reached at these ad hoc courts. By contrast, international courts may retry cases finalised before national courts for acts that gravely breach international law under two conditions: (i) the acts were mischaracterised as ordinary crimes; (ii) the trials were not impartial or independent due to an intent to shield the persons from justice or a lack of prosecutorial diligence.[313] In any case, account may be taken in sentencing the extent to which penalties imposed on the accused by a national court for the same act had been served.

The Rome Statute provides more leeway to national courts to conduct further trials. For instance, Article 20(2) protects defendants from domestic re-trial only in relation to crimes for which they have already been convicted or acquitted before the ICC.[314] It does not prevent them from facing further prosecution for other conduct not amounting to crimes within the ICC's jurisdiction.[315] Thus, the

[306] Ibid.
[307] See Cassese *et al* (n 294) 100.
[308] See Cryer *et al* (n 1) 85.
[309] See Stahn (n 298) 248.
[310] ICTY Statute, art. 10(1).
[311] ICTR, art. 9(1).
[312] SCSL Statute, art. 9(1) [referring to a national court of Sierra Leone.]
[313] ICTY Statute, art. 10(2); ICTR Statute, art. 9(2); SCSL Statute, art. 9(2).
[314] Stahn (n 298) 249.
[315] For a validation of this approach see *The Prosecutor v Katanga*, ICC-01/04-01/07-3679, Decision Pursuant to Article 108(1) of the Rome Statute, 7 April 2016, para. 25.

key test for the applicability of *ne bis in idem* before the ICC is whether the previous trial related to the 'same conduct'.[316] Moreover, Articles 20(3)(a) and 20(3)(b) allow the ICC to exercise jurisdiction if a previous proceeding at a national court was contrived to shield the person from criminal responsibility; was not guided in an independent and impartial manner; or was 'inconsistent with an intent to bring the person concerned to justice'.

Accordingly, certain cases finalised in national courts have at times been retried by external courts. In *Musema*,[317] for instance, the ICTR's Trial Chamber (TC) stated that *ne bis in idem* prevents the 'subsequent prosecution by the Tribunal of persons who have been tried by a national court of acts constituting serious violations of international law.'[318] However, the TC further argued that the Swiss courts had prosecuted Musema for serious breaches of international law not related to charges of genocide and crimes against humanity. Hence, his retrial before the ICTR for the latter charges was upheld as justified. Likewise, in the *Sary's Appeal* case, the ECCC relied on the *ne bis in idem* rule from the international jurisdiction to justify his retrial.[319] The court argued that Sary's previous conviction *in absentia* by the People's Revolutionary Court in 1979 did not bar his retrial at the ECCC because that trial had not been 'conducted by an impartial and independent tribunal with regard to due process requirements'.[320]

3.5 Conclusion

In a nutshell, this chapter has assessed the capacity and constraints of national courts to assert territorial and extraterritorial jurisdiction in matters relating to international crimes as well as in other crimes having transnational effects. It

[316] Rome Statute (n 179) art. 20(3). See also Stahn (n 298) 248.
[317] *Prosecutor v Musema*, ICTR-96-5-D, Trial Chamber I, 12 March 1996.
[318] ibid para. 12.
[319] *Ne bis in idem* is not provided in the ECCC statute. After the principle was raised by Sary's defence in an attempt to block his retrial, the Chamber appealed to international standards as set out in the statutes of the ad hoc tribunals, the Rome Statute, and Article 14 of the ICCPR.
[320] *Sary's Appeal* (n 297) para. 175.

was highlighted that domestic courts competence in such issues depend principally on five customary legal bases of jurisdiction including territoriality, active nationality, passive nationality, protective personality, and universal jurisdiction. Although in principle these legal bulwarks of jurisdiction should facilitate domestic vigilance against impunity and international crimes, in practice, the exercise of these competences tends to be controversial and conflictual. As a result, several of these powers are either rarely called in action or frustrated by political logjams to the detriment of justice.

What is more, justice in national courts also are frequently denied or delayed by apparent legislative and judicial measures consciously adopted by states. These measures increasingly extend beyond domestic settings into the international sphere and may scuttle the prospect of justice in certain international courts. We saw that statutory limitations, amnesty laws, and *ne bis in idem* can be invoked by both prosecutors and defendants alike to prevent attempts by external courts to consider cases relating to international crimes that occurred locally. But the good news is that principal international courts like the ICC and several domestic courts are starting to reject appeals to such prosecutorial barriers as statutory limitations, *ne bis in idem* and official immunity. The latter, which we shall consider extensively in the next chapter, is a persistent hurdle to prosecuting international crimes locally.

As was highlighted earlier, some of the barriers to national prosecutions do not entirely prevent international prosecutions. International criminal courts thus may be the only recourse for victims when jurisdictional and legislative measures are abused to deny them justice at home. But the course of international adjudication is not a smooth-sailing one. There are usually difficulties regarding funding, access to evidence, witnesses, and technical support including translators. In an ideal society, home is the best place to find justice. However, reality has shown that getting justice at home is seldom

guaranteed. Hence, the next chapter will explore how to strengthen the available channels for justice and deterrence outside the home front. It will be argued that RCCs alongside other regional mechanisms like regional exercise of universal jurisdiction and regional hybrid tribunals can contribute significantly to the pool of existing ICrimJ resources available to victims of atrocity crimes.

Chapter 4

Trialling Regional Criminal Courts: A Normative Exploration

4.1 Introduction

Having explored the international and the national spheres of the global justice system in the last two chapters, this chapter and the next will complement the foregoing analyses by examining what future regional criminal courts may contribute to the ICrimJ system and how they can be effectively incorporated into the global justice framework respectively. Unlike in the previous chapters our approach in the extant chapter and its sequel will be largely normative as we seek to launch compelling arguments in favour of establishing a network of RCCs.[1] As was previously highlighted, this thesis envisions regional criminal courts as complementary rather than as competing courts to other principal courts in the global criminal justice system. Complementarity in this non-technical sense signifies the closing up of a yawning gap, or the mending of a broken link, in the ICrimJ network. It does not imply frictionless relations. In contrast, as will be seen in the next chapter, a certain degree of friction will be anticipated and can be addressed through systemic channels within the envisioned new justice framework.

The chapter will commence by scrutinising the appropriate format for establishing RCCs based on the framework that was set out in Chapter 1. Next, it will closely inspect four central arguments in defence of RCCs, which attempt to demonstrate why RCCs can strengthen current ICrimJ arrangements. The chapter will also canvass three key arguments that highlight potential problems with installing a regional criminal court system. In addition, three alternative regional

[1] For useful scholarship on regional enforcement of ICL, see especially: William Burke-White, 'Regionalisation of International Criminal Law: Preliminary Exploration' (2003) *TEXAS INT'L LJ* 38: 729, 748; Charles Jalloh, 'Regionalizing International Criminal Law?' (2009) 9 *INT'L CRIM L REV* 445; Linda E Carter, Mark Ellis, and Charles Chernor Jalloh, *The International Criminal Court in an Effective Global Justice System* (Edward Elgar 2016).

models to RCCs will be briefly assessed. Above all, the chapter will consider what lessons a prospective regional enforcement of ICL can learn from the extant regional human rights court system. These lessons will help to reveal that although regionalisation may seem at first blush to foster tension between universalism and regionalism, it tends in practice to contribute to the integration and embedment of universal values at both national and regional domains.

4.2 Regional Modus Operandi: Adapting the United Nations Strategy

In Chapter 1, the question was raised whether the United Nations administrative regional policy can provide a sufficient blueprint for regionalising ICL. This thesis contends that that policy would require a slight remodelling to be able to bolster the regional enforcement model being canvassed.[2] It bears restating that blending geography with shared values would not simply amount to an international regional entity endowed with rights and obligations, including the duty to combat impunity. Constructing an efficient regional entity would involve committed political will and consent of states as well as the combined effort of non-state actors. As to what appropriate model a regime of regional criminal courts can be based on this thesis suggests adapting the United Nations regional convention after an appropriate finetuning that will be discussed shortly. But, first, let us consider why the existing policy might not be entirely fit for adoption.

To start with, the existing United Nations regional administrative strategy appears somewhat anachronistic in that certain aspects still reflect a short-lived

[2] Note that a number of UN member states, notably Australia and Canada, have also tendered proposals on how to reform the current regional policy so as to obtain a more equitable geographical representation of member states at the UN. In 1995, Australia proposed a 7-group formula comprising: Africa (43); America (35); East Asia and Oceania (25); Western Europe (24); Central and Eastern Europe (22); the Middle East and the Maghreb (19); and Central Asia and the Indian Ocean (17). On its part, Canada suggested a 9-group plan composed as follows: Asia/Pacific (25); North Africa (23); South Africa (23); Eurasia (21); the Mediterranean/Gulf (19); Northern Europe (20); Southern Europe (19); America (19); and the Caribbean (16). None of these proposals has received wide support. See Ingo Winkelmann, 'Regional Groups in the UN' in Helmut Volger (ed.), *A Concise Encyclopedia of the United Nations* (Martins Nijhoff 2010) 595-96.

reality that has long been transcended. Of prime concern is the partitioning of Europe into two regional blocs, namely Eastern and Western Europe, which is an enduring reminder of the ideological fault line of the defunct Cold War era.[3] The Eastern Europe group is composed of predominantly member states of the former communist Soviet Union that also belonged to the erstwhile Warsaw Pact.[4] In contrast, the anti-communist leaning states of the Western world including the rest of Europe, Australia, New Zealand, Israel, the United States,[5] and Canada, together form the Western Europe and Other (WEOG) regional grouping. Most WEOG states are also states parties to the NATO security alliance.

Europe is thus the sole continental region that is currently split up at the UN level into two international regional groupings and integrates states from far-flung continental areas outside of Europe, including in Asia, Oceania, and the Americas. In terms of equitable geographical balance within the UN organs or at the ICC, the cleavage gives Europe an unfair advantage over other regions. With the exception of Canada and the United States, the remaining 33 states in the Americas and the West Indies belong to the GRULAC group. Similarly, all 54 states on the African continent constitute the GAFS group. The Asia-Pacific regional group comprises all UN member states on the Asian continental zone

[3] Zbigniew Brzezinski argues that the unfortunate division of Europe into Western and Eastern blocs was the result of a naïve concession made by British and American leaders to Josef Stalin's proposal at the Tehran Conference in November 1943. The Western leaders' last-ditch effort at a later Yalta Conference to reverse the concession failed. See Zbigniew Brzezinski, 'The Future of Yalta' (1984) *Foreign Affairs* 63(2): 279.

[4] Following the demise of the Cold War, the Warsaw Pact was dissolved in March 1991 and today several former member states of the defunct Pact are members of the European Union and some have also joined the NATO military alliance. This thereby suggests that the division of Europe into two ideologically opposed regions may be outdated and irrelevant under current geopolitical understandings. See Tim Marshall, *Prisoners of Geography: Ten maps that tell you everything you need to know about global politics* (Elliott and Thompson Ltd 2016) 100-101.

[5] Although the United States is part of the WEOG for voting purposes, it prefers to be an observer member in the group.

(except Israel) along with the neighbouring Pacific Island states with the exception of Kiribati,[6] Australia, and New Zealand (53 states in total).[7]

If geographical proximity of a regional criminal court to the crime scene alongside the court's sociocultural embeddedness in the region's *Weltanschauung* is material to an effective regional enforcement of ICrimJ, as would be argued shortly, then a putative European Regional Criminal Court whose geographical jurisdiction cuts across North America, Asia, and the Oceania can hardly claim closer proximity to the regional territorial states than the ICC. At the same time, much of the difficulty with the UN regional formula seems to derive from the diverse range of membership of the WEOG and the 'ideologically-driven' division of the European bloc. And some have also queried the criterion upon which certain states like Russia can be classified in one European region rather than the other.[8] Another snag is the current merging of the already gigantic region of Asia with the Pacific Island states of the Oceania.

Such discrepancies ostensibly highlight how problematic it can be to determine with any realistic degree of precision the territorial confines of an international region and how hard it may seem to dogmatise any set of eligibility rules for membership of any international region.[9] As Francis Wilcox aptly remarks, 'even within a well-defined regional area, states sharing the same linguistic and cultural backgrounds may differ sharply with respect to ideology and political institutions.'[10] In other words, it is entirely possible for two countries to be

[6] Kiribati is at present the only UN member state that officially belongs to no regional grouping and until recently had no permanent representation at the United Nations.
[7] See Department for General Assembly and Conference Management, 'United Nations Regional Groups of Member States' <www.un.org/depts/DGACM/RegionalGroups.shtml> Accessed 19 October 2019.
[8] See Jacob Viner, *The Customs Union Issue* (Carnegie Endowment for International Peace 1950) 123. [Here Viner comments that economic theorists have struggled to device a workable formula to determine which economic regions certain states belong to.]
[9] See Francis O Wilcox, 'Regionalism and the United Nations' (1965) *International Organisation* 19(3): 789, 807.
[10] Ibid.

territorially contiguous but mutually opposite in terms of their political systems, economic and socio-cultural values. The contrasting political and economic systems in North and South Korea illustrate this point. It is open to question whether such radically opposed neighbours should, simply by dint of territorial proximity, be party to the same regional institutions or whether they should be free to link up with likeminded states in faraway regions?

These types of questions apparently venture beyond the reach of this thesis, but they are important to underscore the fact that differences in worldviews, value systems, and ideologies can have considerable impact on the structure, mode of operation, and efficiency of a regional organisation. Yet, discrepancies and conflicting ideologies are practically inevitable in every human establishment and therefore can only be anticipated and managed. The United Nations might not exist today if a uniformity of political ideologies and value systems had been the basic condition for its membership. At times, divergencies of worldviews can inspire creative approaches to issues whereas uniformity might conceal the reality of rut in the system or stymie ingenious solutions to existential problems.

Against this backdrop thus a principled solution to the issue of a right regional framework to guide a potential institution of RCCs may be to operate in accordance with existing intra-continental links. This implies that each of the five key continental blocs represented at the United Nations may be able to operate autonomous RCCs. These blocs include Africa, Asia, Americas, Europe, and Pacific-Oceania. As will be seen in a later section, this model has already been trialled in the area of regional human rights protection. In the Americas, for example, the Organisation of American States (OAS), as an umbrella entity open to all states within that continental area, runs the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission of Human Rights (IACHR). Also, in Africa, the African Union (AU) operates the African Court of Human and Peoples' Rights (ACtHPR) and the African Commission of Human and

Peoples Rights (African Commission) while in Europe, the European Court of Human Rights (ECtHR) serves all 47 member states of the European Council.
One of the benefits of the suggested model is that it may be able to leverage on the experience, operational structure and networks forged through the existing regional human rights systems. It will also have the capacity to support the efforts led by the human rights systems to safeguard fundamental rights and basic norms within the relevant regions. Thus, rather than attempting to assume a quasi-criminal jurisdiction, the IACtHR for example, may be able to motivate a putative Inter-American Criminal Court to pursue criminal investigations and prosecutions while the IACtHR concentrates on human rights processes. This would effectively provide a double-lock safeguarding measure for fundamental freedoms and a double whammy for impunity and atrocity protagonists. Caution should be exercised however to ensure that the two processes – human rights and criminal justice – are not merged together at this level given the separate emphasis and differing operational procedures of the two systems.

As to the Asian and the Pacific-Oceanian blocs where there are no existing all-embracing geopolitical institutions, the proposed regional model could spur the blocs to initiate and formalise a suitable structure that can support an RCC. At the same time, in light of the immense geographical size of Asia, it might be more expedient for the RCC project to be championed by strong sub-regional alliances like ASEAN. As will be argued in Chapter 5, mutual partnerships could also be reached between neighbouring regions or states for assistance in combating impunity, especially in the regions that lack RCCs. Another option in this instance may be to have such regions classified as 'special mandates' of the UN in respect of ICrimJ. This would imply that situations of international crimes occurring on the territories of non-ICC states in such regions would come directly under the UNSC, which would have the prerogative of deciding whether to refer such matters to the ICC, to another RCC, or to establish a hybrid tribunal.

4.3 Permanent Regional Criminal Courts: Critical Considerations

Having established a workable regional format for creating RCCs the task for this section is to examine the lights and shadows of a regional criminal court regime. In the first part, we will consider the ways in which RCCs may strengthen the ICrimJ system and how they may be able to confront several of the controversies that have long plagued the system. To this end, we will be grappling with issues involving the legality of the RCCs, geographic proximity, legitimacy, prosecutorial selectivity, and economic efficiency. In the second part, we will explore ways in which RCCs may complicate or replicate the defects in the status quo. Three major issues that will engage us include immunity of state officials, fragmentation of international law, and proliferation of international courts. Crucially, the case for RCCs in this thesis is based on the condition that they will be courts of permanent jurisdiction. This is perhaps the most central advantage such an arrangement would have over rival models. Without the stability and continuity associated with permanence of jurisdiction the RCC model would be unlikely to attain most of the objects elaborated in this thesis.

4.3.1 Matters of Monumental Importance

It was argued in Chapter 3 that domestic prosecution of international crimes can at times be constrained by several jurisdictional and legislative difficulties that could frustrate the attainment of justice for victims. And in Chapter 2 we saw that the more broadly international or global courts like the ICC lack universal jurisdiction, which again can stymie hopes for justice in certain situations. At the intersection between national courts and the ICC rate can be RCCs and the latter have been tapped as capable of bridging geographical and operational divide between national courts and the ICC or between domestic justice and distant justice.[11] With an existing regime of RCCs thus it would no longer be necessary

[11] See Phil Clark, Distant Justice: *The Impact of the International Criminal Court on African Politics* (CUP 2018); William Burke-White, 'Regionalisation of International Criminal Law: Preliminary Exploration' (2003) *TEXAS INT'L LJ* 38: 729, 748-54; Regina E Rauxloh, 'Regionalisation of International Criminal Court' (2007) 4 *NZYIL* 67-68; Carsten Stahn, *A Critical Introduction*

to rely entirely on the ICC's intervention in circumstances where local authorities prove unable or unwilling to bring perpetrators of mass atrocities to justice. As such, as William Burke-White puts it, a regime of RCCs may provide arguably the strongest form of regionalisation of global criminal justice.[12]

Like comparable international criminal courts, the RCCs would likely be created by treaty, but their jurisdiction would be limited to the particular regions that founded them. They could be designed as whole new entities or form part of pre-existing regional judicial mechanisms following relevant amendments to the statutes of the existing organs. With that said, recall that constitutional legality was identified in Chapter 2 as a crucial property of an international criminal court. It will be important thus to consider whether RCCs may pass the legality test. Again, in Chapter 2, legitimacy was elaborated as another essential property of an international tribunal. This section thus will also examine how controversial issues relating to perceived legitimacy and prosecutorial selectivity may be handled by RCCs. In addition, related matters like geographic proximity, diversification of ICrimJ measures and economic sustainability will be assessed. These five critical, albeit non-exhaustive criteria, would allow us to attempt a normative case for establishing a regime of permanent regional criminal courts.

A. Legal Basis

Reviewing constitutional legality in Chapter 2 it was emphasised that international tribunals may be directly created by international treaty ratified or acceded to by states or indirectly through the decision of an international council like the UNSC. The latter tends to create ad hoc tribunals in accordance with its Chapter VII powers which allows it to adopt provisional measures

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International Criminal Law (CUP 2019) 210; Firew Kebede Tiba, 'Regional International Criminal Courts: An Idea Whose Time Has Come' (2016) 17 *Cardozo Journal of Conflict Resolution* 521; Richard Burchill, 'International Criminal Tribunals at the Regional Level: Lessons from International Human Rights Law' (2007) 4 *NZYIL* 25.

[12] See William Burke-White, 'Regionalisation of International Criminal Law: Preliminary Exploration' (2003) *TEXAS INT'L LJ* 38: 729, 749.

excluding the use of force to tackle challenges to global peace and security.[13] With this in mind it is sensible thus to argue that the creation of RCCs would most likely be effected by means of separate treaties contracted by interested states parties from the specific international regions detailed earlier.

But the prospect of establishing regionally autonomous RCCs raises questions regarding whether such arrangement would be compatible with the Rome Statute of the ICC. The key contention is whether there are provisions in the Rome Statute that permit regions to create regional criminal courts that could be independent of the ICC.[14] Relatedly, it has been argued that rather than establishing wholly new and autonomous RCCs, it may be more expedient for the ICC to relocate its seat occasionally to provisional regional trial chambers (RTC) in certain situations.[15] This proposal, just like the preceding contention, provokes the issue of its consistency with the Rome Statute. To this end, we will first evaluate the latter suggestion before considering the earlier contention.

The case for creating RTCs of the ICC may turn on finding specific provisions for the legality of such in the Rome Statute. In a recent study, Stuart Ford argues that Articles 3, 4, and 62 of the Rome Statute lend tacit support to such an arrangement.[16] Let us examine the specific parts of these provisions that support Ford's claim. Article 3 states, *inter alia*, that the seat of the ICC shall be in The Hague and that the 'Court may sit elsewhere, whenever it considers it desirable'. Article 4(2) specifies: 'The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special

[13] See UN Charter, arts. 40 & 41.
[14] See Ademola Abass, 'Historical and Political Background to the Malabo Protocol' in Gerhard Werle and Moritz Vormbaum (eds.), *The African Criminal Court: A Commentary on the Malabo Protocol* (Asser Press 2017) 21-22. See also Linda E Carter, Mark Ellis, and Charles Chernor Jalloh, *The International Criminal Court in an Effective Global Justice System* (Edward Elgar 2016) 253.
[15] See Burke-White, 'Regionalisation' (n 12) 750-51.
[16] Stuart Ford, 'The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC's Trials to Take Place at Local or Regional Chambers?' (2010) 43 *The John Marshall Law Review* 715, 715-52.

agreement, on the territory of any other State.' And lastly, the concise provision in Article 62 reads: 'Unless otherwise decided, the place of the trial shall be the seat of the Court.'

In Ford's analysis, a good faith reading of each of the three provisions in light of the general rule of interpretation of treaties under Article 31(1) of the VCLT[17] indicates that Article 62 may provide the strongest basis for making a case for founding RTCs.[18] This is because Article 62 envisages the ICC's trials taking place at sundry locations besides The Hague.[19] Hence, Ford contends that whereas The Hague is the *de jure* seat of the ICC, the Rome Statute envisions that the court's *de facto* seat may be determined as the place where its actual trials occur. This reading of Article 62 agrees with Article 3, which authorises the ICC to sit away from The Hague whenever it is practicable to do so.

The problem with Article 62, or at least with Ford's reading of it, is its likelihood to lead to 'manifestly absurd and unreasonable' outcomes.[20] In theory, as a global court, the ICC may intervene in any given state at critical moments.[21] But this raises a number of questions vis-à-vis the meaning of Article 62. If the place of trial is simply assumed to be the *de facto* seat of the ICC, what happens in contexts where the court conducts local trials at several locations in different regions at the same time? Would the many local trial chambers all constitute separate *de facto* ICC seats at once? And more crucially, if all the trouble spots

[17] Article 31(1) of Vienna Convention on the Law of Treaties [VCLT] captioned 'General Rule of Interpretation' (of treaties) states: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.' See: UN Doc. A/Conf. 39/27, 'Vienna Convention on the Law of Treaties', 1155 UNTS 331, (adopted 23 May 1969).
[18] Ford, 'Proximity' (n 16) 725.
[19] Ibid 727.
[20] Article 32 of VCLT states that the negotiating history of a provision may only overwrite its ordinary meaning where the latter is ambiguous or would result to a 'manifestly absurd or unreasonable' conclusion.
[21] See Rome Statute, art. 13. [Although the ICC lacks universal jurisdiction, it may assert jurisdiction in any state referred to it by the UNSC.]

happen to fall within one geopolitical region why should the local trials be held separately if it could be more efficient to use a central place for all the trials?

Regrettably, Ford does not attend to these concerns. As it happens, he alleges that the drafting history of Article 62 supports having ICC trials away from The Hague.[22] The supposed drafting history is a provision in the ILC's Draft Statute for the ICC, which states: 'Unless otherwise decided by the Presidency, the place of the trial will be the seat of the Court.'[23] Contrary to a contention that moving the place of trial under Article 62 is permissible only as an exception,[24] Ford insists that '[n]othing in Article 62 prevents the court from moving all or most of its trials to a local or regional chamber if that is in the interest of justice.'[25] Burke-White similarly observes that based on the *traveaux preparatoire*, the crucial issues for the ICC regarding sitting elsewhere concern 'the practicality of such arrangements and whether it is in the interest of justice to do so.'[26]

The 'interest of justice' proviso deserves further comment. It stems from Rule 100 of the ICC's Rules of Procedure and Evidence. Setting out procedures for choosing the place of the proceedings, Rule 100(1) provides: 'In a particular case, where the Court considers that it would be in the interest of justice, it may decide to sit in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part.'[27] This decision, which the

[22] Ford, 'Proximity' (n 16) 727, 739.
[23] See UN Doc. A/49/10: Report of the Commission to the General Assembly on the work of its forty-sixth session, 'Draft Statute for an International Criminal Court' (2 May–22 July 1994) *Yearbook of the International Law Commission*, Vol II, Part 5, art. 32.
[24] See Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Hart Publishing 2008) 1190.
[25] Ford, 'Proximity' (n 16) 728.
[26] Burke-White, 'Regionalisation' (n 12) 750-51. See also Preparatory Commission for the International Criminal Court Working Group on the Basic Principle Governing a Headquarters Agreement to be Negotiated Between the Court and the Host Country, UN Doc. PCNICC/2001/WGHQA/L.1, princs. 16-23(2001).
[27] See Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 September 2002, 'The Rules of Procedure and Evidence,' (ICC-ASP/1/3 and Corr.1), part II.A, Rule 100(1).

ICC President must take in consultation with the Appeals Chamber, relies on the consent of the intended receiving State.[28] Where the latter declines to host the trial, the court cannot impose itself. To date, the ICC has yet to hold a trial elsewhere besides The Hague.

In sum, the Rome Statute and the ICC's Rules of Procedure and Evidence clearly permit having ICC trials away from The Hague. What is not so clear is whether these provisions could be read as a mandate to set up formal RTCs or, as will be discussed shortly, to create autonomous RCCs? To expand clarity on these issues may require the insertion of amending provisions into the Rome Statute, which will expressly authorise not just occasional 'extraterritorial' sittings of the ICC, but also the establishment of RTCs of the ICC and/or separate RCCs.[29]

Turning now to the matter of whether RCCs would be compatible with the Rome Statute, scholars like Ademola Abass have argued that there is no good reason to suspect a possible incompatibility of an RCC with the Rome treaty. He writes:

> No provision in the Statute forbids its States Parties from concluding treaties, even if those were to establish courts of a similar nature to the International Criminal Court. The Rome Statute is not a *primus inter pares* among treaties and cannot fetter the competence of its States Parties to deploy their consent in international law. It is but a manifestation of uncritical appraisal now to regard the Rome Statute as the *fons et origo* of all international crimes and their international prosecution.[30]

Abass further argues that as a court created by multilateral treaty, an RCC cannot, under international law, be subject to the dictates 'of another

[28] Ibid, Rule 100(3) and 100(2). See also Rome Statute, art. 38(3)(a)
[29] See Ford, 'Promixity' (n 16) 752.
[30] Abass (n 14) 21-22; Linda E Carter, Mark Ellis, and Charles Chernor Jalloh, *The International Criminal Court in an Effective Global Justice System* (Edward Elgar 2016) 253.

multilateral treaty creating a similar court'.[31] To illustrate, he contends that although Article 92 of the UN Charter designates the ICJ as the 'principal judicial organ' of the UN, yet neither that provision nor the ICJ's jurisprudence forbids the right of international and regional geopolitical entities to create parallel dispute resolution mechanisms. He maintains therefore that while the jurisdictions of regional courts like the European Court of Justice or the ECOWAS Court of Justice may at times coincide with that of the ICJ, it would be wrong to judge the legality of the former by their consistency with the ICJ's Statute. In like vein, the ICC's statute can have no bearing on the legality of RCCs, Abass insists.[32]

However, Abass's UN Charter analogy appears somewhat inapt. For instance, Chapter VIII of the UN Charter permits the use of regional dispute resolution mechanisms only insofar as these are consistent with the Charter's principles and purposes.[33] Moreover, Article 103 of the UN Charter states: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' This provision has implications on the legality of measures enacted by states or regional entities, for example, a measure or a treaty objective that breaches a peremptory norm of international law would contravene the UN Charter.[34]

According to Carter *et al*, whereas the Rome Statute does not prohibit regional entities from adopting measures to enforce ICrimJ, whatever measures taken

[31] Abass (n 14) 21.
[32] Ibid 22.
[33] See *UN Charter*, Chapter VIII [Regional Arrangements], arts. 52, 53, and 54.
[34] This also agrees with article 53 of the Vienna Convention on the Law of Treaties (VCLT), which states that a 'treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.' See UN Doc. A/Conf. 39/27, 'Vienna Convention on the Law of Treaties,' 1155 UNTS 331, (adopted 23 May 1969).

must be consistent with the Rome Statute.[35] Notably, in 2006, the compatibility issue was considered by a committee of jurists authorised by the AU to explore the best options for trying former Chadian leader, Hissène Habré. In its report, the committee stated that 'there is room in the Rome Statute for [an African criminal court] and that it would not be a duplication of the work of the International Criminal Court.'[36] Although the committee did not clarify the basis for its finding, the supposed room in the Rome Statute may allude to Articles 3, 4, and 62, considered above as to the legal basis of possible RTCs of the ICC.

But, as we saw earlier, Articles 3, 4, and 62 of the Rome Statute can be read rightly or wrongly as offering implicit endorsements for trials by RTCs not necessarily RCCs. That said, the preceding analysis suggests that creating RCCs would not violate international law and need not depend on the Rome Statute. Given that both RCCs and the ICC's RTCs would be likely to enjoy legal validity the follow-up question then is why not RTCs rather than RCCs? Or, put differently, why RCCs rather than RTCs?

The ideal situation would probably be to have both RCCs and RTCs operating at once. In other words, more criminal courts rather than less would arguably better protect and safeguard the basic objectives of the Rome Statute and the UN Charter principles. Domestically no state can hope to combat and prosecute domestic criminals by running just a single criminal court or a couple of courts. As will be argued subsequently, the international community also could benefit immensely by having more courts empowered to combat impunity. Moreover,

[35] Linda E Carter, Mark Ellis, and Charles Chernor Jalloh, *The International Criminal Court in an Effective Global Justice System* (Edward Elgar 2016) 253.
[36] See AU, 'Report of the Committee of Eminent African Jurists on the Case of Hissène Habré,' para. 35 <www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf> Accessed 12 February 2018. [words in bracket added]

having the RTCs operating in multiple international regions could help to alter current narratives regarding the ICC's selective targeting of the African region.[37]

In practice, however, there are still deep suspicions among states in matters of international justice. As we saw especially in Chapter 2, the political configuration of the international community with great amount of power concentrated in the hands of P-5 members of the UNSC is a major factor that makes the option of RTCs less favourable. As was shown in the case of the Darfur and the Libya referrals several states may resist RTCs as a long arm of the UNSC through the ICC. Additionally, as integral branches of the ICC the RTCs would be likely to be closely identified with the ICC in several quarters such that the sins and strains of the ICC would rebound upon the RTCs and vice versa. This could raise intense international cooperation implications for the ICC and ICrimJ. In contrast, running an independent RCC could engender regional solidarity to safeguard the region's security interests. In addition, the RCCs autonomy from the ICC could allay suspicions and even enable the two systems to cooperate as professional partners charged with a common mission and mutual objectives.

B. Extending the Reach of Global Justice

Another matter of monumental importance is the imperative to expand the reach of global criminal justice. The Rome Statute unequivocally affirms this imperative when it states that the most serious crimes of international concern must not go unpunished and that their effective prosecution must be ensured.[38] In order 'to guarantee lasting respect for and the enforcement of international

[37] See Lydia A Nkansah, 'International Criminal Court in the Trenches of Africa' (2014) *AJICJ* 1(1): 8; Steve Odero, 'Politics of international criminal justice, the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis' in Chacha Murungu and Japhet Biegon, *Prosecuting International Crimes in Africa* (Pretoria University Law Press 2011) 145-59; Patryk Labuda, 'The International Criminal Court and Perceptions of Sovereignty, Colonialism and Pan-African Solidarity' (2014) 20 *AFR YB INT'L L* 289; Res Schuerch, *The ICC at the Mercy of Powerful States: An Assessment of the Neo-colonial Claim Made by African Stakeholders* (Asser Press 2017); Max du Plessis, 'The International Criminal Court and its work in Africa: Confronting the Myths,' (November 2008) *ISS Paper* 173.

[38] Rome Statute, preamble, para. 4.

justice'[39] as well as to ensure justice for 'victims of unimaginable atrocities,'[40] it seems appropriate to consider institutionalising ICrimJ mechanisms at the regional rungs which thus far have remained virtually 'unexplored and underdeveloped'.[41] Accordingly, scholars like Angela del Vecchio have argued that establishing RCCs can provide a genuine intermediate option between the truly global level and the national level of the global justice enforcement.[42]

This proposal, first and foremost, offers the possibility of helping to extend the operational capacity of the ICC and related courts. As a single court of eighteen judges and one chief prosecutor serving practically 193 states of the international community, the ICC is acutely limited, manifestly over-ambitious, and unsurprisingly underachieving.[43] As Eric Posner and Alan Sykes put it, although most states have ratified the Rome Statute, 'the ICC has limited resources and cannot investigate all of the atrocities being committed around the world.'[44] Hence, as Carter *et al* contend, a system of RCCs could complement the ICC's operations as it was 'never intended nor realistically expected' that the ICC would be the sole global criminal accountability mechanism against international crimes.[45] And, as was noted earlier, incorporating RCCs may be able crucially to help narrow impunity gaps and to tighten up enforcement loopholes.

Secondly, given that the effects of international crimes frequently transcend national frontiers to embroil multiple neighbouring states and beyond, a wholistic approach to tackling such crimes would benefit from taking account of

[39] Ibid para. 11.
[40] Ibid para. 2.
[41] Burke-White, 'Regionalisation' (n 12) 730.
[42] Angela del Vecchio, *International Courts and Tribunals between globalization and localism* (Eleven International Publishing 2013) 57.
[43] See Elies Van Sliedregt, 'International Criminal Law: Over-studied and Underachieving?' (2016) *LJIL* 29(1): 1.
[44] Eric Posner and Alan Sykes, *Economic Foundations of International Law* (Harvard University Press 2013) 108.
[45] Carter *et al* (n 35) 212.

regional contexts and integrating regional efforts as '*supplementary* means'[46] of ICrimJ. In this respect, del Vecchio notes that regional courts and tribunals are generally 'better able to avoid being conditioned by specific domestic situations while at the same time remaining culturally and legally in tune with the special problems of the geographic area that they are operating in.'[47] In addition, as Carter *et al* argue, establishing RCCs would enable the respective regions 'to give their own unique stamp to the development of greater protections for individuals in light of the particular problems faced in their parts of the world.'[48]

Thirdly, apart from the core international crimes, several crimes of varying levels of gravity have often raised concerns among states within particular regions, as was raised in Chapter 2. Considering the ICC's limited subject-matter jurisdiction and the lack of consensus on expanding the court's jurisdiction, RCCs may be equipped with a broader jurisdiction to tackle such crimes of regional concern alongside the core material jurisdiction of international tribunals.[49] Recall that we noted in Chapter 2 that the State of Trinidad and Tobago has an abiding interest in having such a penal court to deal with the menace of drug trafficking in the Caribbean.[50] Michael Scharf has pointed out, however, that several Caribbean states may be unwilling at present to back a Caribbean penal court save on the condition that it could function without external interferences from the UNSC.[51] This is a genuine concern especially given the relatively weaker power ratio of most Caribbean states in relation to the power of the UNSC. But this power relational asymmetry would be most likely less palpable in a system founded and supported by the broader Organisation of American States (OAS).

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[46] See Carter *et al* (n 35) 222-23.
[47] del Vecchio (n 42) 57.
[48] Carter et al (n 35) 261.
[49] Ibid 261.
[50] Ibid 222.
[51] See Michael P Scharf, 'The Politics of Establishing an International Criminal Court' (1995) 6 *DUKE J COMP &INT'L L* 167, 172.

Similarly, the African Union recently amended the Malabo Protocol of the proposed African Court of Justice and Human Rights (ACJHR)[52] with a view to empowering the already existing African Human and Peoples' Rights Court with original and appellate international criminal jurisdiction.[53] The new court, to be officially called the African Court of Justice and Human and Peoples' Rights,[54] would therefore have both a human rights and a criminal justice jurisdiction. It would operate three principal divisions: General Affairs, Human Rights, and International Criminal Law.[55] The ICL division would have competence to hear cases relating not only to genocide, war crimes, crimes against humanity and aggression, but also an expanded schedule of crimes including piracy, terrorism, drug trafficking, corruption, unconstitutional changes of government, illicit exploitation of natural resources, and human trafficking.[56] This extended inventory of crimes is alleged to capture most of the serious transnational crimes of concern to African states.[57]

Whereas the African Union's vision as well as those of the Caribbean states are commendable the nagging concern is how to inspire and sustain robust political will and material support on the part of individual states towards the realisation of their grand ambitions. More than six years since the Malabo Protocol Amendments were agreed for the setting up of the proposed ACJHR it has garnered only eleven signatures but nil ratification. Fifteen ratifications are required for the treaty to enter into force. As will be discussed further in a later section, there are also concerns that states may seek to exploit RCCs to offer blanket official immunity to senior political leaders in the regions. This is a real

[52] See AU, 'Protocol on Amendments to the Protocol on the Statute of African Court of Justice and Human Rights' (Adopted 14 June 2014) <www.au.int/web/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> Accessed 12 June 2018. [hereafter Statute of the African Court of Justice]
[53] Ibid, art. 3.
[54] Ibid, art. 8.
[55] Ibid, art. 16.
[56] Ibid, arts. 17(3) & 28A (1).
[57] Carter *et al* (n 35) 221-24.

concern which could undermine the vision and purpose of ICrimJ, which rejects the doctrine of official immunity and prioritises individual criminal responsibility of perpetrators.

At the same time, as the experience of the ICC shows, establishing international judicial institutions requires not only state commitment but also the crucial effort of non-governmental organisations at least to keep states on their toes. The Coalition for the ICC played an important role in this respect towards the inauguration of the ICC and continues to act as an international lobby for the court. It would take like commitment on the part of NGOs and private bodies to inspire the execution of the envisioned goal of intensifying the reach of global justice.

C. Relative Geographical Proximity to the Crime Scenes

It was confirmed in *Eichmann* that the locus of the offence is the *forum conveniens* or the proper place of trial under customary international law.[58] Underlying this custom, as Genovese and van der Wilt put it, is the idea that trials held near to the people, localities, or regions that have been most affected by the crimes can be a more meaningful way of bringing justice closer to the victims as well as closure to the painful events.[59] In-country institutions such as the domestic courts or specialised hybrid courts like the SCSL are ordinarily better placed to actualise this ideal, which has been described as 'embedded justice'.[60] Next in line to in-country arrangements would arguably be potential RCCs in terms of relative geographical proximity to the *locus delicti commissi*.[61]

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[58] See *Attorney-General of the Government of Israel v Eichman*n (1962) 36 ILR at 302-3. [It is ironic however that despite this important declaration by the Israeli court, Eichmann's trial happened in Israel, several thousand miles away from the scene where his crimes occurred in Europe.]
[59] Cristina Genovese and H van der Wilt, 'Fighting Impunity of Forced Disappearances through a Regional Model' (2014) *AMST LF* 6(4): 14. See also Burke-White, 'Regionalisation' (n 12) 733.
[60] See Paul Gready, 'Analysis: Reconceptualising transitional justice: embedded and distanced justice' (2005) *Conflict, Security & Development* 5(1): 3.
[61] The place where the wrongs were committed.

In a succinct critique of a range of transitional justice measures applied in post-conflict societies like South Africa, Rwanda and Sierra Leone, Paul Gready makes a salient distinction between 'embedded justice' and 'distanced justice'. For him, embedded justice signifies locally generated justice, which 'at its best involves local participation, develops local legal systems and adjudicative mechanisms, achieves high local visibility, and, as a result, contributes to societal education, democratic development, and peace'.[62] Gready contends that the activities of the Special Court for Sierra Leone in Sierra Leone, the *gacaca* courts in Rwanda and several in-country accountability mechanisms demonstrate embedded justice.

Distanced justice, in contrast, describes the activities of international courts that are substantially far removed from the crime scenes of relevant jurisdiction. Such 'distant' courts, in Gready's view, fail consequently to promote sufficient local participation in the management and decision-making process. In addition,

> they impoverish and undermine local legal systems through skewed resource allocation, inadequate capacity building, and by marking them with the stigma of inadequacy; they are too invisible and alien to domestic legal communities and society more generally due, for example, to their geographic remoteness and inadequate outreach; and, as a result of all of the above, they make little contribution to democratic development and peace in the country concerned.[63]

In response to this unsavoury justice enforcement dichotomy, Gready advocates the need to maintain a 'correct balance' between 'embedded justice' and 'distanced justice'. The right balance can be achieved by harnessing the complementary capacities and legitimacies of both models of justice.[64] It will

[62] Gready (n 60) 9.
[63] Ibid 8-9.
[64] Ibid 3.

also demand an ability for the applicable judicial systems to resonate with local values and culture as well as the scaling of naïve faith in, and the necessary operational and structural reform of, both local and global justice instruments.[65]

In light of Gready's analysis, the proposed RCCs may be able to achieve a deeper degree of embedded justice within their respective regions than the ICC on account of their hypothetical location within the regions and thus would be potentially closer to victims and to the crime scenes.[66] One of the problems imposed by the ICC's remoteness from its crime situations is the sad fact that victims are often forced to traverse enormous distances and, as such, most victims fail to participate in the trials.[67] At the same time, it is unquestionable based on Article 68 of the Rome Statute that the ICC is open to victims' participation at all stages of the proceedings determined to be appropriate by the court. Victims' participation in proceedings and access to justice has also been strongly motivated by the United Nations in its 2005 Basic Principles and Guidelines.[68]

Whereas the problem of enhanced victims' participation may not be cured simply by creating RCCs, the costs and logistics of such intra-region trips could be considerably less. In Europe, for instance, several European states allow for free movement of persons which means that many European victims and defendants would be unlikely to require a visa to attend trials in Europe. The same could be said of potential African victims traveling to nearby courts in

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[65] Ibid 19.
[66] See Carter *et al* (n 35) 224.
[67] See Hans-Peter Kaul, 'International Criminal Court: Current Challenges and Perspectives' (Address delivered at Salzburg Law School, Austria, 8 August 2011) 8 <www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911salzburglawschool.pdf> Accessed 2 July 2019.
[68] See UNGA Res. 60/167, 'Basic Principles and Guidelines on the Right to a Remedy ad Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (Adopted 16 December 2005). See also: M Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) *Human Rights Law Review* 6(2): 203.

West Africa or East Africa due to the prevailing visa arrangements in those places.

As the ICC's experience reveals, another major challenge resulting from remote administration of justice relates to difficulties regarding cultural discrepancies, security of court personnel, the protection of witnesses and the collection of evidence through the period of investigating and prosecuting relevant cases.[69] In the Uhuru Kenyatta's case, for instance, Courtenay Griffiths observes that in order to evade numerous bottlenecks the OTP was forced to outsource the crucial responsibility of evidence-gathering to local intermediaries. The case ultimately collapsed as the OTP's evidence was adjudged insufficient and unreliable by the Trial Chamber.[70] It can only be hoped that the ICC's experience might inspire future RCCs to adopt strict measures to tackle similar challenges. A veritable tool to this end would the RCCs' capacity to leverage familiarity and sociocultural affinity with the prevailing conditions in the relevant regions.

Partly on account of the so-called 'proximity deficit', the ICC has often been criticised as exotic and isolated from its active constituencies.[71] As a result, the court's impact in these communities is said to be minimal at best.[72] But the latter criticism, in truth, is a concern shared by several international criminal tribunals.[73] In a new study of *ad hoc* international tribunals, Alexandra Huneeus

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[69] Kaul (n 67) 9. See also Hans-Peter Kaul, 'The International Criminal Court: Current Challenges and Perspectives' (2007) *WUGSLR* 6(3): 575.

[70] See Courtenay Griffiths, 'The International Criminal Court is hurting Africa' (*The Telegraph* 03 Jul 2012) <www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/9373188/The-International-Criminal-Court-is-hurting-Africa.html> Accessed 2 July 2019; *The Prosecutor v Uhuru Kenyatta*, ICC-01/09-02/11. See also Bartram S Brown, 'The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit' (2017) *TEMPLE INT'L &COMP LJ* 31(1): 145, 174.

[71] Carter *et al* (n 35) 212. See also Christopher Gosnell, 'The adoption of the essential features of the adversarial system' in Antonio Cassese and Paola Gaeta (eds.)., *International Criminal Law* (3rd edn, OUP 2008) 312.

[72] See, for example, Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007).

[73] This is no suggestion that the tribunals have zero impact in the areas where the crimes occurred. Another recent study suggests that the ICTY's impact continues to evolve and to be felt

has revealed that the impact of these tribunals tends to be less evident when the trials take place abroad. Several local participants in the study claimed to have known little about the tribunals and the trials; understood them less; and some even perceived the tribunals as external impositions on their states.[74]

A particularly striking example is the ICTR. The latter was located in Arusha, Tanzania – a country which borders Rwanda to the west. Notwithstanding the geographic proximity between both states, the ICTR still draws criticism for not being close enough to the affected communities. As Payam Akhavan puts it, '[t]he ICTR has often been faulted for its remoteness from the Rwandese people. Its geographical location … makes it visibly distant.'[75] Several witnesses and victims could not assess the court and it is debatable the extent to which the Arusha trials, unlike the local *gacaca* mechanism, had or have helped to instil any deterrence ethos among the Hutu and Tutsi peoples of Rwanda.[76] That said, part of the ICTR's alleged 'proximity deficit' may have been politically instigated considering that the local administration sometimes prevented victims and witnesses from leaving Rwanda to participate at the Arusha proceedings.[77] This demonstrates that proximity does not equate to easier access to victims and witnesses. Political interferences in this regard is a matter that all international tribunals, including RCCs, would have to confront in attaining their objectives.

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in some of the countries of the former Yugoslavia, including Serbia and Bosnia-Herzegovina. See Diane Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (OUP 2018).

[74] Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of Human Rights Courts' (2013) *AJIL* 107(1): 32. See also Elizabeth Neuffer, *The Key to My Neighbor's House: Seeking Justice in Bosnia and Rwanda* (Picador 2002) 371-88.

[75] See Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *AJIL* 7, 25.

[76] Neil Kritz has noted that whilst a small number of Rwandese felt any direct impact of the ICTR, as many as 90 percent of the nation took part in the Gacaca courts' process. See Neil J Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) *L&CP* 127, 131. See also William W Burke-White, 'A Community of Courts: Toward A System of International Criminal Law Enforcement' (2002) *MICH J INT'L L* 24(1): 1, 88.

[77] For a critique of the relations between the Rwandan state, judiciary and the ICTR, see José E Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda' (1999) 24 *YALE J INT'L L* 365.

On its part, the ICC has previously considered ways to tackle an apparent proximity problem. In the case of *Thomas Lubanga*,[78] whose later conviction was hailed as 'a milestone in the evolution of international criminal law,'[79] the ICC wanted to move part or all of its trial to the DRC. During the pre-trial proceedings, the Trial Chamber noted: 'We've reached the stage where we need the assistance of the parties and the participants as to whether or not there would be identifiable advantages and disadvantages to the proposal of sitting for all or part of the trial in Africa.'[80] That proposal was ultimately abandoned partly because the DRC declined to host the ICC on the argument that prosecuting Lubanga locally could aggravate the fragile security situation.

Nevertheless, Kathryn Sikkink has argued that the common prosecution of atrocity crimes influences behaviour and, as such, can have an international deterrent effect, especially in neighbouring states and regions, where potential perpetrators may be able to identify with the individuals facing trial.[81] If that is correct, then permanent regional criminal courts can be expected to embed criminal deterrence values over time among the local and regional population through their activities. As noted earlier, the RCCs also may be able to enrich peacebuilding efforts in post-conflict situations by giving voice to more victims and witnesses by assisting them to participate in the proceedings, facilitating truth discovery, and expediting the process of bringing perpetrators to justice.[82]

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[78] *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1311.
[79] See Benjamin B Ferencz, 'To the Editor Re: "Congolese Rebel Convicted of Using Child Soldiers"' (*The New York Times* 15 March 2012) <www.nytimes.com/2012/03/16/opinion/crimes-against-humanity.html> Accessed 20 April 2018.
[80] *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1311, Trial Chamber I, Transcript ICC-01-04-01-06-T-58-ENG (30 October 2007) at 78-79.
[81] See Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W W Norton 2011) 129ff. See Wolfgang Kaleck, *Double Standards: International Criminal Law and the West* (TOAEP 2015) 108.
[82] Cristina Genovese and H van der Wilt, 'Fighting Impunity of Forced Disappearances through a Regional Model' (2014) *AMST LF* 6(4): 15-16.

All said and done, it should be underscored that creating a regime of RCCs would not deal a death blow to the troubling issue of proximity deficits of international criminal tribunals. As was analyzed in Chapter 2, a distinctive property of international tribunals is their 'separation' from the domestic system of any single state. Retaining this supranational quality in practice together with the concomitant adjudicatory neutrality can generate the dilemma of distance. Yet, as Huneeus notes, 'the virtue of local prosecution and trial is a matter not only of geography … but also of using local legal institutions, local officials, and local laws.'[83] The notion of proximity also can be relative as even in domestic settings it is not always possible or necessary to try offenses near to the crime scenes. As was highlighted above in the *Lubanga* case,[84] certain sensitive cases may not be amenable to *in situ* trials as they could exacerbate tensions or prove testing for judges to remain impartial.[85] In such situations, moving the trials to more politically neutral loci away from the domestic arena may be imperative.[86]

D. Prosecutorial Selectivity and Perceived Legitimacy

Another sensitive matter of monumental importance is the idea that RCCs may be able to bolster the perceived legitimacy[87] of the global justice system, especially through attending to *ad nauseam* allegations of selective bias and double standards in the status quo.[88] According to Wolfgang Kaleck, the double standards are apparent in the pattern of irregular enforcements, which tend to

[83] Huneeus, 'Quasi-Criminal Jurisdiction' (n 74) 33.
[84] *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-1311.
[85] See Antonio Cassese, *International Criminal Law* (OUP 2003) 354.
[86] See Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (CUP 2018) 35.
[87] Perceived legitimacy tracks the discussion in Chapter 2 on social legitimacy.
[88] For critical views regarding selective bias at the ICC, see Kamari Maxine Clark, 'Why Africa' in Richard H Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court* (Brill 2016) 326-32; Ovo Imoedemhe, 'Unpacking the tension between the African Union and the International Criminal Court: The Way Forward' (2015) *AFR J INT'L & COMP L* 23(1): 74; Edwin Bikundo, 'International Criminal Court and Africa: Exemplary Justice' (2012) *Law and Critique* 23(1): 21; Aminta Ossom, 'An African Solution to an African Problem? How an African Prosecutor Could Strengthen the ICC' (2011) 52 *Virginia Journal of International Law Digest* 68.

undermine ICL's legitimacy and its claims to universality.[89] Some critics see the promise of ICL gradually receding for lack of consistent prosecutions of very serious violations of ICL by very senior ranking bad guys.[90] As a result, Richard Burchill has argued that states tend to view the judicial decisions of global justice tribunals like the ICC with suspicion as typical assessments by these courts concerning whether to investigate, which situations to select, and which perpetrators to prosecute always involve profound political considerations.[91]

Unlike global establishments, as Burchill notes, institutions created by regional bodies tend to possess sturdier legitimacy within the founding regions because the latter are able to claim 'ownership' while the institutions are held to share in the common sociocultural and other regional characteristics.[92] Thus, like in the allegory of the tragedy of the commons,[93] there is a sense that global institutions suffer legitimacy deficit because they are seen as belonging to everyone and to no one at once. In contrast, regional institutions tend to be viewed as descriptively close to the regions and local peoples and have better grasps of regional conditions, needs, and aspirations.[94] For this reason, it has been argued that states and local communities within the regions would be much better disposed to accept the decisions and directives from RCCs.[95] And Paul Williams adds that states generally find regional organisations more persuasive for their local knowledge and possession of other regional qualities.[96]

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[89] Wolfgang Kaleck, *Double Standards: International Criminal Law and the West* (TOAEP 2015) 7.
[90] See Eric Posner, 'Assad and the Death of the International Criminal Court' (*Slate*, 12 September 2013) <www.slate.com/news-and-politics/2013/09/failing-to-prosecute-assad-will-be-the-end-of-the-international-criminal-court.html>. Accessed: 20 October 2019.
[91] Richard Burchill 'International Criminal Tribunals at the Regional Level: Lessons from International Human Rights Law' (2007) 4 *NZYIL* 25, sect. IV.
[92] Ibid.
[93] See Garrett Hardin, 'The Tragedy of the Commons' (13 Dec 1968) 162 *Science* 1243.
[94] See James Rosenau, 'Governance in the Twenty-First Century' (1995) 1 *Global Governance* 16.
[95] Burchill (n 91) 25, sect. IV.
[96] Paul Williams, 'Regional and Global Legitimacy Dynamics: The United Nations and Regional Arrangements' in Dominik Zaum (ed.), *Legitimating International Organizations* (OUP 2013).

Armed with robust descriptive legitimacy therefore regional criminal courts' decisions with respect to the selection of situations and cases for prosecution may be more acceptable to its regional states parties. As Kenneth Davis explains, prosecutorial selectivity is simply a practice whereby enforcement officials use their discretionary powers to advance situations and cases for investigation and prosecution or, conversely, to ignore them even if prosecution would have been logically expected or legally justified.[97] There can be two forms of prosecutorial selectivity: horizontal selectivity and vertical selectivity.[98]

Kaleck describes horizontal selectivity as what happens when a limited number of situations are selected for prosecution – by the authorised officials – out of a larger number of comparable situations in which grave international crimes have been committed within a given historical period.[99] A classic example of horizontal selectivity took place after WWII when the two interim tribunals at Nuremberg and Tokyo were established in respect of the heinous crimes committed by Nazi Germany and Imperial Japan respectively while like atrocities perpetrated by the Allies and other states elsewhere were generally ignored.[100]

In contrast, vertical selectivity 'refers to the decision as to which of the individuals involved in a situation should be singled out for prosecution.'[101] For this reason, vertical selectivity is also sometimes described as selectivity *ratione personae*.[102] A case in point is the ICC's prosecution of Thomas Lubanga[103]

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[97] See Kenneth Kulp Davis, *Discretionary Justice: A Preliminary Enquiry* (Louisiana State University Press 1969) 163.
[98] Kaleck (n 89) 7.
[99] Ibid.
[100] More recent examples include the prosecution of the atrocities committed in the former Yugoslavia and in Rwanda during the mid to late 1990s even though similar, or perhaps worse, atrocities committed before and/or during that historical period in Vietnam, Biafra, Bangladesh, Angola, Mozambique, Zimbabwe, South Africa, Argentina, Haiti, Chile, Kuwait, and Palestine were overlooked. See Michael P Scharf, 'The Politics of Establishing an International Criminal Court' (1995) 6 *DUKE J COMP &INT'L L* 167, 169.
[101] Kaleck (n 89) 7-8.
[102] Ovo Imoedemhe, 'Unpacking the tension between the African Union and the International Criminal Court: The Way Forward' (2015) *AJICL* 23(1): 74, 78.

alongside three other DRC rebel leaders for crimes committed in the DRC situation while the court neither indicted nor prosecuted 'suspects from the Congolese army or the Congolese, Rwandan and Ugandan governments'.[104]

On balance, prosecutorial selectivity may not be inherently wrong because whereas equal application of the law is desirable, no criminal justice system has the capacity in practical terms to prosecute all possible suspects for all possible infractions of the law.[105] In light of this realism, the pertinent question is not whether selective prosecution should occur, but when is it (un)acceptable to be selective.[106] It would be unacceptable, according to Ovo Imoedemhe, in contexts where a duty exists to prosecute all relevant cases and suspects without bias.[107]

It was noted, in Chapter 2, how the strained relations between the ICC and the AU relate to an alleged selective targeting of African states and suspects by the ICC. As a result, some African statesmen have accused the ICC of 'race hunting' while others have ridiculed the court as a contraption of 'colonialism, slavery, and imperialism'.[108] Small wonder that Ramesh Thakur, a former Vice Rector of the United Nations University recently said of the ICC: 'A troubling issue is how an international criminal justice meant to protect vulnerable people from brutal national rulers has managed to be subverted into an instrument of power against vulnerable countries. A court meant to embody and pursue universal justice is in practice reduced to imposing selective justice of the West against the rest.'[109]

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[103] *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06.
[104] Kaleck (n 89) 92.
[105] Ibid. See also Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005) 192.
[106] Imoedemhe (n 102) 79; Mirjan Damaska, 'What Is the Point of International Criminal Justice?' (2008) *Chicago-Kent Law Review* 83(1): 347, 361.
[107] Imoedemhe (n 102) 79.
[108] Paul Kagame, quoted in New African, 'Is the ICC a tool to recolonise Africa?' (*New African* 31/03/17) <www.newafricanmagazine.com/icc-tool-recolonise-africa/> Accessed 4 July 2019.
[109] Ramesh Thakur, quoted in New African, 'Is the ICC a tool to recolonise Africa?' (*New African* 31/03/17) <www.newafricanmagazine.com/icc-tool-recolonise-africa/> Accessed 4 July 2019.

It seems thus reasonable to contend that creating RCCs could help allay fears around prosecutorial selectivity, shore up positive perceptions of the legitimacy of ICrimJ proceedings, and entrench ICL's principles at regional ranks. This argument, for Matiangai Sirleaf, seems cogent because '[w]here an international institution does not reflect shared beliefs in its practices and objectives due to normative changes, or because it imposes rules in contexts where supporting beliefs are lacking, it develops a legitimacy gap, which in the worst cases turns into an institutional crisis.'[110]

All things considered, issues of legitimacy deficits and selective bias may underlie but not entirely explain the recent decision by the African Union to back the collective withdrawal of African states from the Rome Statute.[111] This was followed by notices of withdrawal issued by three African states parties of the ICC including Burundi, South Africa, and the Gambia in 2016. The Russian Federation also revoked its signature from the Rome Statute in 2017 while the Philippines notified its intent to quit in 2018. At present, only Burundi and the Philippines have successfully left the ICC. Yet, these recent rebellions have shown that positive beliefs about legitimacy are crucial for international tribunals as they are not simply judicial entities but also, in many ways, political entities that rely heavily on national, regional, and international cooperation in order to function effectively.[112]

As Marko Milanović points out, the degree of perceived legitimacy of international tribunals among the local communities, and by extension among

[110] Matianga S Sirleaf, 'Regionalism, Regime Complexes and International Criminal Justice' (2016) 54 *COL JTL* 699, 707-708.
[111] See Patryk Labuda, 'The African Union's Collective Withdrawal from the ICC: Does Bad Law Make for Good Politics?' (*EJIL Talk* 15 February 2017) <www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/>. Accessed 20 June 2018.
[112] See Sirleaf (n 110) 707. See also Kamari M Clarke, Abel S Knottnerus and Eefje de Volder (eds.), *Africa and the ICC: Perceptions of Justice* (CUP 2016).

the regional states, may not hang strictly on the quality and fairness of their operations or the extent of their outreach efforts.[113] On the contrary, much of the assessment is usually influenced by the quality of cooperation of the dominant local elite with the tribunals. For Milanović, in situations where the leading political elite perceive their partisan interests and entrenched positions to be threatened by a tribunal's effort, they tend to react negatively and thereby prejudice local attitudes to the tribunal.[114] On their own, international tribunals may 'have little, if any, power to shape local opinion.' As such, their relative success or failure in gaining acceptance for their programmes or decisions among the target audiences may not truly express their success or failure.[115]

Reflecting on local beliefs regarding the ICTY's contribution towards the restoration of peace in the territories of the former Yugoslavia, David Tolbert claims that the ICTY had experienced a 'strategic failure' in not being able to markedly impact the development of courts and justice systems in the region.[116] In this connection, Janine Clark explains that 'attitudes and behaviours are shaped and affected less by the work of a distant and poorly-understood tribunal than by a variety of far more immediate factors, including the media, levels of inter-ethnic contact and whether a person has had positive experiences with members of other ethnic groups'.[117] And Martti Koskenniemi adds that legitimacy should not be seen as 'a standard external to power, against which

[113] Marko Milanović, 'Courting Failure: When Are International Criminal Courts Likely to be Believed by Local Audiences?' in Kevin Jon Heller, Jens Ohlin, Sarah Nouwen, Fred Mégret, and Darryl Robinson (eds.), *Oxford Handbook of International Criminal Law* (OUP 2018) 37.
[114] Ibid.
[115] Ibid.
[116] David Tolbert, 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings' (2002) *Fletcher Forum of World Affairs* 26(2): 7, 12.
[117] Janine Natalya Clark, 'The Impact Question: The ICTY and the Restoration and Maintenance of Peace' in Bert Swart, Alexander Zahar and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 55, 79. See also Carsten Stahn, 'Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?' (2012) 25 *LJIL* 251, 273.

power might be assessed, but a vocabulary produced and reproduced by power itself through its institutionalised mechanisms of self-validation.'[118]

Whereas perhaps a correlation exists between the ICC's alleged prosecutorial selectivity bias and the court's supposed legitimacy gap in some regions, it has not been established that RCCs can wholly overcome the question of prosecutorial selectivity. Addressing this problem would require international tribunals to take particular care in appointing their prosecutors[119] and in crafting their prosecutorial strategies. Given the prosecutor's crucial role in the ICrimJ system, the scope and remit of their powers must be unambiguously specified. In states like France[120] and England, for instance, the prosecutor exercises substantial discretion over charging decisions but does not generally oversee the investigations.[121] Yet elsewhere, as in the Netherlands, the prosecutor has broad discretion to direct investigations and to oversee charging decisions.[122]

Lastly, as noted in Chapter 2, the UNSC has been at the epicentre of controversies regarding alleged selectivity bias at the ICC.[123] Yet, while the idea of having an international tribunal that is independent of the UNSC may be

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[118] Martti Koskenniemi, 'Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism' (2003) 7 *Associations* 349, 373.

[119] The Committee of the Council of Europe has pointed out that 'it is public prosecutors, not judges, who are primarily responsible for the overall effectiveness of the criminal justice system.' See Council of Europe, 'The Role of Public Prosecution in the Criminal Justice System, Recommendation' (2000) 19, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and Explanatory Memorandum at 21 (2001).

[120] In France, judges direct investigations into serious crimes while the prosecutor directs investigations in less serious offences. However, even in serious criminal cases, the prosecutor sets the limit on what facts judges should consider. See Valérie Dervieux, 'The French System' in Mireille Delmas-Marty and J R Spencer (eds.)., *European Criminal Procedures* (CUP 2002) 218, 241.

[121] Andrew Ashworth, 'Developments in the Public Prosecutor's Office in England and Wales' (2000) 8 *EJC, CL&CJ* 257, 257.

[122] See Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *AJIL* 510, 512.

[123] Lack of clarity on the nature of the relationship between the ICC and the UNSC continues to raise concerns. A critic claims that insofar as its prosecutorial policy and convictions remain politically biased (read influenced by the UNSC), the ICC's expressed mission of ending impunity would remain a utopia: Celestine Nchekwube Ezennia, 'The Modus Operandi of the International Criminal Court System: An Impartial or a Selective Justice Regime?' (2016) *ICLR* 16(3): 448.

popular in some circles,[124] it might be unrealistic as things stand. Besides its role as the principal agency responsible for upholding global peace and security under the UN Charter, the UNSC is also closely allied to the ICC.[125] It would thus be crucial for future RCCs to clarify the UNSC's role in relation to their prosecutorial policies. It may be tempting to replace the UNSC's role as to the ICC with a regional council as to an RCC, but such a tactic would be unlikely to solve the vexing issues, especially compliance, legitimacy, and selectivity. These issues still demand principled attention. It matters little whether it is the ICC, the future RCCs, or municipal courts; when the laws or decisions of a judicial institution are routinely dismissed or defied by a large proportion of states or the population due to perceptions of unfairness, procedural or prosecutorial biases then the legitimacy of that system would be placed in grave jeopardy.[126]

E. Economic Efficiency

Regardless of the model in place, judicial enforcement of ICL involves tremendous expenditure. According to David Scheffer, the cost of global criminal justice appears to have slowed down an initial enthusiasm for international judicial interventions and triggered an ongoing search for new and less expensive enforcement models.[127] As a result, trials at regional criminal courts have been suggested as potentially more cost-effective than trials at the ICC or at the hybrid tribunals.[128] This claim appears to find corroboration in a recent

[124] Recall Scharf's observation about several Caribbean states' desire for an RCC that is independent of the UNSC: Michael P Scharf, 'The Politics of Establishing an International Criminal Court' (1995) 6 *DUKE J COMP & INT'L L* 167, 172.
[125] See International Criminal Court, *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, 22 July 2004, ICC-ASP/3/Res.1, arts. 3, 15, 17, & 18. See also UN Office of Legal Affairs, 'Best Practices Manual for United Nations – International Criminal Court Cooperation' (26 September 2016).
[126] See Larry May and Shannon Fyfe, *International Criminal Tribunals: A Normative Defense* (CUP 2017) 99.
[127] See David J Scheffer, 'International Judicial Intervention' (1996) 102 *Foreign Policy* 34, 45.
[128] Carter *et al* (n 35) 225.

study conducted by Alexandra Huneeus on the comparative costs of ICrimJ and the regional protection of international human rights law in the Americas.[129]

Appraising the total cost of running the ICTY, the SCSL, and the IACtHR respectively from their inaugural operation to the study date (2011) and dividing by the number of cases decided by each court, Huneeus discovered a staggering contrast. She writes: 'The cost per conviction for the ICTY is roughly $39 million; for the Special Court for Sierra Leone, $28 million; and for the Inter-American Court, $1million. The comparison is imperfect.'[130] The ICC's budget for the year under study (2011) was $130 million.[131] The significantly lower cost of the IACtHR clearly supports the view that the annual budget for each future RCC would likely pale in comparison to that of rival international criminal tribunals.

Note, however, that the institutional and procedural differences between criminal trials and human rights processes could have influenced the contrasting cost disparities. Whereas the ICTY, the SCSL, and the ICC hold criminal trials which emphasise individual liability, the IACtHR handles human rights processes with a stress on state liability. Investigating international crimes, producing credible evidentiary records, and prosecuting cases in conformity with the requisite higher standard of burden of proof would expectedly involve greater costs than investigating and adjudicating human rights infringements. Nevertheless, related studies have also shown that hybrid criminal tribunals' trials tend to cost considerably less than trials before international tribunals like ICTY and the ICC.[132]

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[129] Huneeus, 'Quasi-Criminal Jurisdiction' (n 74) 32.
[130] Ibid 35.
[131] The ICC's budget for 2017 was €150,230,000 ($177,306,403), but it ultimately received €144,587,300 ($170,646,702). See ICC Assembly of States Parties, 'Proposed Programme Budget for 2017 of the International Criminal Court,' ICC-ASP/15/10 (Fifteenth session, 16-24 November 2016) 7.
[132] See David Cohen, '"Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future' (2007) 43 *STAN J INT'L L* 1; David Wippman, 'The Costs of International Justice' (2006) *AJIL* 100(4): 861; Stuart Ford, 'The Promise of Local or Regional ICC

The vast amount of money spent by the international tribunals in order to secure a handful of convictions has also been sternly lambasted by critics.[133] Part of the criticisms weathered by the ICC in 2016 when three of its states parties threatened to withdraw from the court was that its expenses dwarfed its achievements.[134] The ICC's processes have also been faulted as overly long.[135] In fact, the Russian Federation claimed in 2016 that the ICC's high-cost budget and administrative inefficiency were key factors in its decision to un-sign the Rome Statute.[136] In sum, the ICC is accused of having spent well over US$1billion to date[137] but securing just four convictions of ex-rebel fighters.[138] This number of course excludes the four administrative convictions regarding agents who misled the court through interfering with key defence witnesses.[139] Also, thus far, four defendants have been acquitted[140] while a couple of cases are ongoing.[141]

Trial Chambers: Incorporating the Benefits of the "Hybrid" Tribunals into the ICC' (2010) 43 *The John Marshall Law Review* 715.

[133] See May and Fyfe (n 126) 116-17.

[134] ICC officials like Judge Morrison (UK) have sought to temper this criticism by noting that the court is constrained by its wide global reach, huge administrative size, but limited budget. As he puts it, merely sending out investigating teams to the situations of interest drains the court's annual budget which compares approximately to the cost of an F-35 jetfighter. See: Judge Howard Morrison, Keynote Address at the University of Leeds International Law Conference on 'New Approaches to Transnational and International Law and Justice', 1 December 2016 (speech recorded on file with this author).

[135] See Christopher Gosnell, 'The Adoption of the Essential Features of the Adversarial System' in Antonio Cassese and Paola Gaeta (eds.), *International Criminal Law* (3rd edn, OUP 2008) 312.

[136] See Russian Foreign Ministry, 'Statement by the Russian Foreign Ministry' 16:11:16 <www.mid.ru/ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566/> Accessed 12 June 2018.

[137] See Foreign Affairs, 'The International Criminal Court: A Conversation with Fatou Bensouda' (*Foreign Affairs* Interview January/February 2017 Issue) <www.foreignaffairs.com/interviews/2016-12-12/international-criminal-court-trial> Accessed 9 June 2018.

[138] These include: *The Prosecutor v Thomas Lubanga Dylio*, ICC-01/04-01/06; *The Prosecutor v Germain Katanga*, ICC-01/04-01/07; *The Prosecutor v Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15; *The Prosecutor v Bosco Ntaganda*, ICC-01/04-01/06.

[139] All four defendants were implicated in the CAR situation involving *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/13 and they include: *The Prosecutor v Babala Wandu Fidèle*, ICC-01/05-01/13; *The Prosecutor v Jean-Jacques Mangenda Kabongo*, ICC-01/05-01/13; *The Prosecutor v Aimé Kilolo Musamba*, ICC-01/05-01/13; *The Prosecutor v Narcisse Arido*, ICC-01/05-01/13.

[140] See *The Prosecutor v Mathieu Ngudjolo Chui*, ICC-01/04-02/12; *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08; *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15.

Additionally, it has pointed out that some donor groups exercise allegedly immense roles in decision-making on the tribunals particularly with respect to which situations or cases to pursue.[142] In fact, eleven of the ICC's major funders recently resolved to limit their financial contributions to the court – a situation which could have adverse impact on the court's capacity to achieve its objectives.[143] Perhaps this unusual step presses home the need to further explore less expensive and complementary models to the ICC. But the issue of donor influence on the tribunals is a matter that would in all likelihood also recur with future RCCs or any other tribunal as big donors may feel the need to justify their contributions by having some level of control on the courts. The aphorism that who pays the piper dictates the tune probably rings true here.

Some have argued that future RCCs can fulfil the crucial cost-saving need as they would likely cost a mere fraction of what the ICC would take to achieve comparable outcomes.[144] They 'may also allow a fairer allocation of the financial burdens' among their states parties,[145] thereby reducing the chances of control on the courts within a skewed donor system and contributing to a radical reduction in the overall costs of ICrimJ.[146] For instance, the regional courts could recruit judges and other personnel locally and their salaries could be set by

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[141] The major ongoing trial relates to the former Ugandan child soldier, Dominic Ongwen. See *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15.

[142] See Sara Kendall, 'Donors' Justice: Recasting International Criminal Accountability' (2011) *LJIL* 24(3): 585.

[143] This initiative was agreed by Canada, Colombia, Ecuador, France, Germany, Italy, Japan, Poland, Spain, UK, and Venezuela, citing inefficiencies in the ICC and the global financial meltdown as reasons for the restriction. See Elisabeth Evanson and Jonathan O'Donohue, 'States shouldn't use ICC budget to interfere with its work' (*Amnesty International* 23 November 2016) <www.amnesty.org/en/latest/news/2016/11/states-shouldnt-use-icc-budget-to-interfere-with-its-work/> Accessed: 12 June 2018. See also Peter Clusky, 'Funding cut may curb International Criminal Court' (*The Irish Times* 9 February 2017) <www.irishtimes.com/news/world/europe/funding-cut-may-curb-international-criminal-court-1.2968407> Accessed 12 June 2018.

[144] See Carter *et al* (n 35) 225.

[145] Ibid.

[146] Ibid 226.

regional standards. Their geographical nearness to the crime scenes could also make it cheaper to conduct investigations, to protect witnesses, and to enable victims' participation in the proceedings.

Above all, unlike international courts, a regional court would be likely to spend less on multilingual translations given the probability that the majority of its personnel, defendants, victims, and witnesses would come from that region and might be familiar with the prevailing lingua franca. For instance, an African regional court seated in Tanzania could use Swahili as its lingua franca[147] while its counterparts in Costa Rica and Lebanon might adopt Spanish and Arabic respectively as the main languages spoken in those domains.[148] It is useful to recall here that the proceedings of the Iraqi Special Tribunal (IST)[149] were conducted in Arabic just as English was the official language of the SCSL.[150]

In sum, these are only a sample of the central arguments and issues of monumental importance in defence of establishing a regime of RCCs. There are related arguments such as the promotion of regional solidarity and cooperation in criminal justice enforcement, some elements of which seem to dovetail with the discussion in the next chapter. It is advisable to note that as interesting as these contentions may seem, there are also differing views among scholars and strong arguments against creating RCCs. The next section will examine three among several issues of monumental concern regarding establishing new RCCs.

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[147] Note however that Article 10 of the Statute of the African Court recognises four languages for the court: Arabic, English, French Portuguese.

[148] The court proceedings may later be translated into English, French, or other international languages for the archives. The translation costs would be minimal as compared to the cost of live translations into multiple languages during the proceedings although live translations could occasionally be necessary where defendants or judges do not speak the regional lingua franca.

[149] The IST was established by the US-appointed Coalition Provisional Authority (later succeeded by the Iraqi Governing Council) on 10 December 2003 to try Saddam Hussein and others accused of responsibility for gross human rights violations committed between 1968 and 2003. While the IST is not classified as an internationalised tribunal as such, it is notable for trying suspects on crimes commonly classified as international crimes within the scope of Article 5 of the Rome Statute, which Iraq has yet to ratify.

[150] See SCSL Statute, art. 24.

4.3.2 Issues of Monumental Concern

As we saw in the foregoing section, a number of the matters of monumental importance for future RCCs could also pose critical challenges to the courts or ICrimJ in general. In this section the focus will be on three issues of great concern that could undermine RCCs or the ICrimJ system. The whole point of establishing a regime of RCCs, for this thesis, is to enhance and complement current global justice arrangements. But the downsides of introducing such a new system should and would be examined and perhaps justified where necessary. First, the official immunity question could be a major issue of concern for future RCCs. Second, creating RCCs would probably lead to a further fragmentation of international law in general and ICL's jurisprudence in particular. Third, as critics observe, RCCs would intensify the proliferation of international tribunals.[151] Each of these concerns will now be analysed in turn.

A. The Official Immunity Excuse

Perhaps the most complex issue of monumental concern for ICrimJ and a potential bottleneck for future RCCs is the question of how to hold sitting public officials accountable for allegations of heinous abuses of international law. Accountability for gross violation of international humanitarian law is at the centre of global criminal justice.[152] Yet with few exceptions, including Charles Taylor,[153] Lauren Gbagbo,[154] and Slobodan Milošević,[155] protagonists of atrocity crimes who occupy top ranks in government are rarely held accountable in the aftermath of conflicts.[156] As Kaleck observes, whereas the less powerful

[151] See Burke-White, 'Regionalisation' (n 12) 755.
[152] See Charles Jalloh, 'Regionalizing International Criminal Law?' (2009) 9 *INT'L CRIM L REV* 445, 465.
[153] See *The Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01-A.
[154] See *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15.
[155] See *The Prosecutor v Milošević*, Case No. IT-02-54.
[156] Note that all the cited cases involved deposed not incumbent public officials.

perpetrators are usually targeted for prosecution,[157] the suspects in public office and their proxies frequently escape prosecution by virtue of the customary rule of official immunity. And, as was noted in Chapter 3, official immunity often poses a major barrier to prosecuting grave violations of international law in national courts albeit its prohibition in the Rome Statute.[158] It is unlikely that RCCs would be able to overcome this problem and they may even exacerbate it.

The key test seems to turn on how to balance the tension between prosecuting public officials for alleged international criminal liability and respecting the contentious customary international law immunity of public officials. The immunity of public officials derives from the doctrine of state immunity, whose objective is to preserve respect for the sovereign equality of states. As Lord Millet clarifies in the UK's case of *Holland v Lampen-Wolfe*: 'State immunity … is a creature of customary international law and derives from the equality of sovereign states. It is not a self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom.'[159]

It will be useful to briefly examine the doctrine of official immunity in international law. International law traditionally differentiates between two forms of official immunity, namely: (i) functional or organic immunity (*ratione materiae*) and (ii) personal immunity (*ratione personae*). Functional immunity protects public officials from prosecution by foreign states for dealings done in their official capacity whereas personal immunity generally protects heads of

[157] Kaleck (n 89) 8.
[158] See Rome Statute, preamble, para. 5; and arts. 1, 25, 27, and 28.
[159] *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588, per Lord Millet. See also *Germany v Italy*, ICJ Rep, 2012, para. 99, 123.

states or government, cabinet ministers, and sometimes diplomatic agents[160] from prosecution for both private and public acts performed while in office.

Commenting on the *Arrest Warrant* case,[161] Antonio Cassese outlines the basic elements covered by both forms of official immunity.[162] For him, functional immunity: (i) is a substantive defence deriving from substantive law;[163] (ii) extends to all *de jure* and *de facto* acts of state agents; (iii) extends beyond the term of service of state agents; (iv) is *erga omnes*, that is, all other states may be required to comply.[164] In contrast, the scope of personal immunity is as follows: (i) it is a procedural defence arising from procedural law, which secures immunity from criminal and civil jurisdictions; (ii) it assures total inviolability;[165] (iii) it is intended to protect only a limited class of state officials, including heads of states or government, diplomats, and cabinet ministers; (iv) it ceases to operate once the state agent leaves office; and (v) it may not be *erga omnes*.[166]

[160] The immunity of diplomatic agents is, however, subject to certain exemptions relating to civil and administrative prosecutions as specified under Article 31 of the Vienna Convention on Diplomatic Relations (18 April 1961, entered into force 24 April 1964).

[161] This ICJ case considered the legality of an international arrest warrant issued by Belgium against a former foreign minister of the DRC for alleged 'grave violations of international humanitarian law' committed prior to his assumption of public office. In its concise judgment of 14 February 2002, the ICJ ruled that Belgium's act violated international law because a state official enjoys immunity and inviolability for all acts performed before or during his official service whether in official or private capacity. See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] *ILM* 41(3): 536. [hereafter *Arrest Warrant* case]

[162] See Antonio Cassese, 'When May Senior Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case' (2002) *EJIL* 13(4): 853. [hereafter 'Congo v Belgium']

[163] This requires state officials to comply with both international law and the substantive domestic law of other states, but any breaches of these laws by the said officials will be imputed to their states not to the person of the officials.

[164] Cassese, 'Congo v Belgium' (n 164) 862.

[165] It 'covers official or private acts carried out by the state agent while in office, as well as private or official acts performed prior to taking office'. See Cassese, 'Congo v Belgium' (n 164) 864.

[166] ibid.

A major flaw in the *Arrest Warrant* judgment,[167] as Cassese notes, is that it not only failed to separate the two types of official immunity[168] but also, and more importantly, it was ambiguous as to the customary international rule that imputes liability to both the state and the individual for certain grave crimes committed by the agent in an official capacity.[169] That said, the *Arrest Warrant* ruling did observe that the immunity of public officials being jurisdictional or procedural in nature, it cannot grant absolute exoneration from criminal responsibility, but 'may well bar prosecution for a certain period or for certain offences.'[170] To this end, state practice and established international rules have, at least since the end of WWII, placed limits on the scope of official immunity in relation to allegations of official acts of impunity.[171] From the Nuremberg Charter[172] to the Rome Statute,[173] ICL rejects reliance on official immunity as a defence against prosecution for grave crimes.

Additionally, as the notorious case of President Al Bashir shows,[174] there seems to be no easy way of bringing sitting public officials to justice for alleged grave breaches of international humanitarian law. Paola Gaeta has argued that consistent with customary international law President Al Bashir is entitled to

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[167] The judgment has also been criticised for failing to take a clear stand on the practice of universal jurisdiction. See Cassese, 'Congo v Belgium' (n 164) 855-62. See also David Turns, 'Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium): The International Court of Justice's Failure to Take a Stand on Universal Jurisdiction' (2002) 3 *MELB J INT'L L* 1.
[168] Cassese, 'Congo v Belgium' (n 164) 855.
[169] Ibid 864-65.
[170] See *Arrest Warrant* case (n 161) para. 60.
[171] Elsewhere Cassese has argued that the customary international rule on liability for international crimes has evolved in the international community. He states: 'The rule provides that, in case of perpetration by a State official of such international crimes as genocide, crimes against humanity, war crimes, torture, and serious crimes of international, State-sponsored terrorism, such acts, in addition to being imputed to the State of which the individual acts as an agent, also involve the criminal liability of the individual.' See Cassese, *International Criminal Law* (n 85) 273.
[172] Article 7 of the *Nuremberg Charter* states: 'The official position of defendants, whether as Head of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment'.
[173] See *Rome Statute*, art. 27.
[174] See *The Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09.

personal immunity from prosecution before national courts.[175] Yet this personal immunity claim is manifestly inconsistent with Article 27 of the Rome Statute and as such does not bar the ICC from issuing arrest warrants for Al Bashir. At the same time, under the curious terms of Article 98(1) of the Rome Statute, an ICC state party may be in contravention of its international obligations to Sudan if that state party were to arrest and surrender Al Bashir to the court.

In light of this background, the former ICTY Chief Prosecutor Carla Del Ponte's assertion in reference to Slobodan Milošević that 'no one is above the law or beyond the reach of international justice'[176] might mean little in terms of bringing sitting senior public officials to justice before international criminal tribunals, including the future RCCs. How the RCCs can navigate this major challenge is unclear. Arrest warrants issued by an RCC would arguably oblige only states parties and, perhaps also, member states within the relevant region. In contrast, with its broader geographical reach and boosted by statutory cooperation obligations under Part IX of the Rome Statute and through its links with the UNSC,[177] the ICC could issue international arrest warrants against suspected state officials and legitimately expect cooperation from all states in the world.

The litany of deliberate failures by states to apprehend President Al Bashir has shown however that notwithstanding its massive global influence even the ICC has enormous difficulty battling the cancer of official immunity. Despite two international warrants issued by the ICC for his arrest, Al Bashir has travelled to several countries especially in Africa including Chad, Kenya, Malawi, the

[175] Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) *JICJ* 7(2): 315. See also Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) *JICJ* 7(2): 333.
[176] ICTY Chief Prosecutor, Carla Del Ponte, in her opening remarks in the trial of Slobodan Milošević. See: United Nations, International Criminal Tribunal for the former Yugoslavia, 'Slobodan Milošević Trial – the Prosecution's case' <www.icty.org/en/content/slobodan-milošević-trial-prosecutions-case> Accessed 12 May 2018.
[177] See Rome Statute, arts. 13(b) & 16.

Democratic Republic of the Congo, Djibouti, and South Africa.[178] But it was South Africa's failure to arrest him following an AU summit in the country that has been the most controversial. During the visit, a local high court ordered South African authorities 'to take all reasonable steps to arrest President Al-Bashir' in compliance with the state's obligations under the Rome Statute.[179] However, the state government pledged loyalty to its obligations under an AU treaty[180] and assurances made to AU to accord immunity from personal arrest or detention to all representatives of AU member states and, as such, refused to arrest Al Bashir.[181] This refusal was confirmed in March 2016 by South Africa's Supreme Court of Appeal to be in breach of both domestic and international law.[182]

There are further concerns that enforcing ICL by means of RCCs might turn into a pretext for granting *de jure* immunity against prosecution to sitting state officials. Attention has been drawn to Article 46A *bis* of the Malabo Protocol of the proposed African Court of Justice.[183] Article 46A *bis* provides: 'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.'

If enforced, Article 46A *bis* would impede the African court's chances of prosecuting serving African officials. It could also embolden certain African state

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[178] See Dire Tladi, 'The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law' (2015) 13 *JICJ* 1027, 1028-29.
[179] *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015), High Court of South Africa, Gauteng Division, Pretoria, 24 June 2015, para. 2.
[180] General Convention on the Privileges and Immunities of the Organisation of African Unity (OAU, the AU's predecessor), CAB/LEG/24.2/13, sect. C, art. V(1).
[181] Tladi (n 178) 1031-32.
[182] *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016). [On account of this ruling the South African government unsuccessfully attempted to withdraw from the ICC.]
[183] For contrasting commentary on the challenges of establishing this court, see: Chacha B Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *JICJ* 1067; Ademola Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects' (2013) *NILR* LX: 27.

officials accused of criminal liability to seek ways to entrench themselves in office so as to evade international justice. The ICC's Prosecutor Bensouda recently underscored this concern in relation to the ICC's targets thus: 'Some leaders sought by the Court threatened to commit more crimes to retain power, blackmailing the international community with a false option: peace or justice.'[184]

Although it is unclear, and probably unlikely, that the proposed African Court of Justice's example of *de jure* immunity of serving officials would become the prevailing standard under the RCC model, there is scant evidence to suggest that serving state officials would be willing to support or to ratify measures that could ultimately target or incriminate them. Conversely, it seems more likely that where an RCC is not statutorily barred from trying state officials, the Rome Statute's Article 16[185] model might be adopted in the RCC's statute in order to provide an overseeing regional authority like the AU with the authority to request for a deferral of proceedings, particularly those involving states officials.

As to the ICC, the contentious Article 16, together with Article 13(b) of Rome Statute, is alleged to have achieved de facto immunity[186] for citizens and state officials of P-5 members of the UNSC and their allies.[187] De facto immunity conveys two senses in this context. First, it refers to the P-5 members capacity

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[184] See Coalition for the International Criminal Court, 'Interview with International Criminal Court Deputy Prosecutor and Prosecutor-Elect H.E. Ms Fatou Bensouda,' June 2012. <www.iccnow.org/documents/Fatou_Bensouda_Full_Interview_eng.pdf> 1. Accessed 24 January 2020.

[185] Article 16 of the Rome Statute states: 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.'

[186] Urged by the US, the UNSC exercised this right once in Resolution 1422 (with the latter renewed in Resolution 1487) to prevent the ICC from tackling cases involving personnel from non-ICC member states serving in UN approved peacekeeping operations. See: UNSC Resolution 1422, UN Doc. S/RES/1422(2002); UNSC Resolution 1487, UN Doc. S/RES/1487(2003).

[187] See Res Schuerch, *The International Criminal Court at the Mercy of Powerful States* (TMC Asser Press 2017) 219-63.

to influence the UNSC so as to activate Article 16 of the Rome Statute whenever their vital national interests are engaged. And, second, it signifies in reference to Article 13(b) of the Rome Statute the P-5 states' ability to exploit their negative vetoes in the UNSC to block potential referrals to the ICC of situations involving their nationals and/or allies. Similar political calculations over international criminal cases could become widespread and entrenched if the various regional authorities or regional hegemons are allowed to recreate corresponding arrangements as the UNSC vis-à-vis the ICC in their relations with the respective RCCs.

B. The Fragmentation Dilemma

Another issue of monumental concern is that a future regime of RCCs could fragment, that is, hinder or destroy the likelihood of a uniform development of the law, processes, and judicial standards for prosecuting international crimes.[188] Regionalising global justice enforcement, especially through the establishment of regional judicial organs, has thus been viewed as likely to aggravate and embed the fragmentation of international law.[189] Consequently, scholars like Regina Rauxloh have argued that rather than compounding the judicial disintegration of the global justice system via RCCs, the ICC should be made to show more sensitivity to 'regional particulars and methods' and try to adapt to the needs of the regions.[190] This is critical, she maintains, as each case decided by a future RCC is a missed 'opportunity for the ICC to develop case law.'[191]

In contrast to municipal courts, international criminal tribunals do not typically follow a system of precedence or a hierarchy of courts. As a result, judgments reached at one international tribunal like the ICTY may have scant bearing on

[188] See Burchill (n 91) sect. V. See also Antonio Cassese, 'Reflections on International Criminal Justice' (1998) *MLR* 61(1): 1, 18.
[189] Regina E Rauxloh, 'Regionalisation of International Criminal Court' (2007) 4 *NZYIL* 67.
[190] Ibid 68.
[191] Ibid 70.

how cases before another court, such as the ICC, are decided. In other words, a defendant before the ICTY might be treated to differing privileges and procedures and, if convicted, receive differing penalty than a defendant tried on similar charges before the ICC. In like vein, a hybrid court like the Extraordinary Chambers in the Courts of Cambodia might convict and punish a defendant for an alleged crime for which she could have been acquitted if the matter had come before the ICC or vice versa owing to differing judicial and/or prosecutorial standards, gravity thresholds, or admissibility criteria. These not-quite-hypothetical scenarios, critics argue, may be one of the upshots of a fragmented justice system which thereby justifies the case for having a central global court like the ICC with a common statute to provide uniformity and clear guidance on rules, processes, and sentencing strategy as supreme courts do in municipal systems. This is a valid contention, which we shall reprise, in the next chapter, as among the ICC's constructive complementarity responsibilities.

In the broader field of international law, the fragmentation question has been an enduring debate and, so, is not simply stimulated by the recent interest in the prospect of regionalising ICL. In fact, the International Law Commission (ILC) has described fragmentation in international law rather more technically as the emergence of specialised and fairly autonomous rules, or rule-complexes, legal institutions and spheres of legal practice.[192] On this score, Wilfred Jenks noted over sixty years ago that 'law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law.'[193] These often mutually opposing

[192] See Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from The Diversification and Expansion of International Law,' UN Doc. A/CN4/L682 (13 April 2006) para. 8 [Hereafter ILC Study Group]. See also Andreas Fisher-Lescano & Günther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) *MICH J INT'L L* 25: 999.
[193] C Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *BYIL* 401, 403.

instruments, Jenks averred, tend to result in 'conflict of law-making treaties.'[194] And this is thanks to the absence of a universal legislature in the global society notwithstanding the regular stream of new law by legislative action that characterises modern societies.[195]

At the same time, there is also another approach to fragmentation which views it as reflective not simply of the fluid and anarchic state of the global society,[196] but, more importantly, of the diversity of legal systems and multicultural contexts that compose and sustain the international system. As Alexander Somek puts it, this idea of diversity is so plain at the international plane that it is unhelpful and unfitting to see international law as a unified system. He writes:

> In both theory and practice, the impression of fragmentation and feebleness seems to be currently eclipsing the traditional faith in the unity and efficacy of cosmopolitan benevolence. Repeatedly, state interest has trumped the discipline of norms; international regimes do not form one coherent system, and behind their multiplicity seems to lurk disarray and new modes of hegemony.[197]

Somek adds that faced with the stark reality of pervasive fragmentation, many 'embracing the demise of a unified system of public international law … come to the subject matter with an unnecessary idealistic expectation of coherence.'[198] It is unsurprising therefore that the ILC's Study Group recently declared that international law would always be 'relatively' or 'naturally' fragmented.[199] At any rate, it would seem that this 'naturally' occurring fragmentation has already, or

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[194] Ibid.
[195] Ibid 401.
[196] Hedley Bull explains the anarchical state of the world as the fact that 'sovereign states unlike the individuals within them, are not subject to a common government'. See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (2nd edn, Macmillan Press 1995) 44.
[197] Alexander Somek, 'Kelsen Lives' (2007) *EJIL* 18(3) 409, 409.
[198] Ibid 451.
[199] See ILC Study Group (n 192) para 16.

better relatively, crept into the theory and practice of ICL as evidenced in the Rome Statute's sundry amalgam of Anglo-American common law and Continental European civil law as well as other applicable legal traditions.[200]

If fragmentation is inevitable in international law, as has been seen, it then raises the question of how to ensure that further fragmentation through the RCC systems can contribute positively to the development of international law. On the one hand, as Rauxloh contends, it is true that extreme regionalism can intensify fragmentation and hinder the attainment of global ideals.[201] Yet, on the other hand, as was argued previously, regionalism can also help to spread global goods and perpetuate global values down at national and regional spheres. The experience of regional application of IHRL in Europe, Africa and the Americas amply vindicate this point. In terms of the RCCs, it is safe to assume, as the proposed African Court of Justice statute shows, that they would be primarily established to enforce the core norms already extant in ICL. Although some may add other laws relevant to their regions, these ancillary laws would not form the raison d'être for the RCCs. Moreover, having the RCC regime retain a link with national courts and the ICC, as will be envisioned in Chapter 5, would at minimum help to preserve 'a widespread normative preference for coherence over fragmentation, order over disorder, system over plurality.'[202]

Furthermore, an increasing concern for consistency and uniformity of standards can already be noticed in the statutes and practices of certain recent ad hoc hybrid courts. The SCSL's appellate chamber was required to seek guidance from

[200] In terms of the ICC, the other legal traditions encompass applicable treaties and principles of international law as well as general principles of law derived from municipal jurisdiction, particularly those that would normally exercise jurisdiction over the alleged crime. See Rome Statute, art. 21.
[201] Rauxloh (n 189) 67.
[202] Ralf Michaels and Joost Paulwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law' (2012) 22 *DUKE J COMP & INT'L L* 349: 350.

the decisions of the ICTY and the ICTR appellate chambers.[203] The Bosnia War Crimes Chamber likewise adopted the 'Rules of the Road' procedure,[204] which obliged Bosnian state authorities to consult the ICTY's OTP before issuing arrest warrants relating to war crimes committed during the Bosnia conflict. The procedure's aim was to assess the credibility of implicating evidences against international standards. Thus, from 1996 to 2004, the ICTY reviewed 1,419 cases against 4,985 suspects and approved the arrest of 898 persons on charges of war crimes.[205] But from 1 October 2004 the review function was assigned to the War Crimes Department within the OTP of the state of Bosnia and Herzegovina.

Yet it is also true that the international society has been advanced by the experience of dynamism and diversity injected by the regional applications of several fields of international law, particularly in the area of human rights law, environmental law, maritime law, and trade law.[206] Regionalisation of ICL would be likely to introduce a certain degree of legal and political pluralism as well as cultural diversity. It is important that these human values be properly harnessed for the greater good of international law and the international society at large.[207] Legal plurality is also particularly striking in national settings, where no two states typically operate a like system of laws. In fact, several states like the UK, Nigeria, and India accommodate multiple legal traditions in domestic law.

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[203] See SCSL Statute, art. 20(3).

[204] The procedure was put in place following widespread fear of arbitrary arrests and detentions in the aftermath of the Bosnian crises. See *Book of Rules on the Review of War Crimes Cases*, RTZ-TA 47/04-1, 28 December 2004, art. 2. See also Mark S Ellis, 'Bringing Justice to an Embattled Region – Creating and Implementing the "Rules of the Road" for Bosnia-Herzegovina' (1999) 17 *BERK J INT'L L* 1; Human Rights Watch, 'Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina' (February 2006) *Human Rights Watch Report* 18(1D); Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (International Centre for Transitional Justice 2008).

[205] See Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart Publishing 2012) 104.

[206] See Richard Pomfret, 'Is Regionalism an Increasing Feature of the World Economy?' (2007) *The World Economy* 30(6): 923; Rick Fawn, '"Regions" and their study: wherefrom, what for and whereto' (2009) 35 *REV INT'L STUD* 6.

[207] See Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *LJIL* 553.

Hence, as Judge Simma aptly suggests, the odds for international law to sustain its growing universal appeal and vitality in today's very plural society could turn on 'its capacity to accommodate an ever-larger measure of heterogeneity.'[208]

The positive desire for harmony thus must not be confused with a desire to enforce a unipolar Western-centric approach to international law, which might not only be impossible but could be certain to elicit significant amount of resistance and rancour within the complex state of the global society. As noted earlier, despite the interest in harmony, international tribunals have continued to operate with different procedures and substantive law.[209] As such, regardless of how many courts and tribunals there are or there may be in the international sphere, at minimum, a uniform approach to common standards for the international judiciary may be an idea whose time has already come. In addition to that, through the gradual institution of relevant structures and procedures, the native longing for universalism and harmony in international law may be realised.[210] This is why in Chapter 6 we will imagine how RCCs might function within an enhanced framework in which the ICC serves as a quasi-coordinating centre to uphold consistency of practice and standards across the ICL system.[211]

C. Further Proliferation of International Courts

A parallel concern to the fragmentation conundrum is the contention that establishing regional criminal courts would overly populate the global society

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[208] Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2006) *EJIL* 20(2): 265, 266.

[209] See Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Law Regime* (CUP 2005) 167-84.

[210] Compare Burchill (n 91) sect. V.

[211] A recent example of what is envisioned here is illustrated by the ICJ's ruling in *Jurisdictional Immunities of the State (Germany v Italy)*, *Judgment* [2012] ICJ Rep. 99. Here the ICJ reviewed and dismissed a decision of the Italian Court of Cassation on the same subject matter by arguing that the Italian court had erred in its reading of international law and that Germany had incurred losses as a result of Italy's breach following that error of law. Likewise, the ICC can provide a similar oversight over regional and national courts vested with international criminal jurisdiction.

with international courts. Rephrasing William Ockham's famous critique of entities (otherwise known as Ockham's Razor), the nub of the contention seems to be that international courts should not be multiplied without necessity.[212] There is thus a genuine concern, as Gleider Henández notes, that international courts and tribunals today are 'taking on a dizzying array of different forms and exercising a vast range of competences'[213] so much so that the phenomenon of international judicialisation or otherwise termed the 'legalisation of world politics'[214] is being perpetuated and will be unlikely to fade away soon.[215] For Paul Mahoney, these diverse range of courts and tribunals have not only contributed to this lofty endeavour, 'many of them have come to make their effects felt in the everyday lives of ordinary people.'[216]

Adding to this already tightly judicialized landscape, it would appear, must thus be warranted and evidenced. In other words, to make international courts matter and their impacts substantial, there ought to be at least tentative demonstration that the international court(s) in prospect would be likely to meaningfully contribute to the advancement of international law.[217] It also involves considering whether in certain circumstances it may be more sensible to operate

[212] The statement often attributed to Ockham is 'Entia non sunt multiplicanda praeter necessitatem' (Entities should not be multiplied beyond necessity). Gernert Dieter has argued that the exact words are not found in any of Ockham's works and that the more correct expression is 'Pluralitas non est ponenda sine necessitate': Gernert Dieter, 'Ockham's Razor and Its Improper Use' (2007) *Journal of Scientific Exploration* 21(1): 135, 136. See also William M Thorburn, 'The Myth of Occam's Razor' (1918) *Mind* 27(107): 345.
[213] See Gleider I Henández, 'The Judicialization of International Law: Reflections on the Empirical Turn' (2014) *EJIL* 25(3): 919, 931.
[214] Daniel Terris, Cesare PR Romano & Leigh Swigart, *The International Judge* (Brandeis University Press 2007) 6.
[215] Gleider (n 213) 931. See also Cesare PR Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *NYU J INT'L L & POL* 709; Jenny S Martinez, 'Towards an International Judicial System' (2003) 56 *STAN L REV* 429.
[216] Paul Mahoney, 'The International Judiciary – Independence and Accountability' (2008) 7 *Law and Practice of International Courts and Tribunals* 313, 313.
[217] Gleider (n 213) 931.

alternative justice models that do not necessarily include creating new international courts.[218]

To highlight the remarkable extent of the judicialisation of modern society, Karen Alter's recent study has revealed that by the end of the Cold War in the early 1990s only six permanent international courts existed in the entire global community. That number has more than doubled today with modern international courts having collectively issued more than 37,000 binding legal decisions.[219] With this, critics contend that establishing RCCs would amount to a further, and perhaps unnecessary, judicialisation of international affairs which can 'have adverse consequences,' as Judge Buergenthal puts it.[220] In addition, as Mahoney argues, increasing the number of international tribunals not only complicates judicial independence issues in the international sphere, it also heightens the risk of divergent 'and perhaps even unsatisfactory approaches taking root.'[221]

In contrast, Kathryn Sikkink has recently advanced a thesis which contends that the spread of criminal accountability mechanisms for gross violations of human rights has contributed hugely to the transformation of the global political landscape.[222] She argues that the international order has witnessed a new justice cascade ushered in by the activities of courts like the ICTY that tried Slobodan Milošević, the SCSL that convicted Charles Taylor, the permanent ICC as well as by the engagement of municipal courts in the fight against impunity especially

[218] The alternative models may include restorative justice systems such as the Truth and Reconciliation Commission in South Africa or the Gacaca courts in Rwanda.
[219] See Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014).
[220] Thomas Buergenthal, 'Proliferation of International Courts and Tribunals: Is It Good or Bad?' (2001) *LJIL* 14(2): 267, 272.
[221] Mahoney (n 216) 346.
[222] See Kathryn Sikkink, *Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (WW Norton & Company 2011).

through the exercise of universal jurisdiction.[223] The cascading of justice cascade in contemporary global society, she claims, does not suggest that 'perfect justice has been done or will be done or that most perpetrators of human rights violations will be held criminally accountable.' It crucially 'means that there has been a shift in the *legitimacy of the norm* of individual criminal accountability for human rights violations and an increase in criminal prosecutions on behalf of that norm.'[224] In other words, Sikkink defends the idea that the use of international criminal accountability systems can have marked effect in preventing and/or curtailing human rights violations by powerful protagonists.[225]

There is yet an allied concern that operating several RCCs could ultimately nullify the cost-benefit case for having RCCs in the first place. As the experience of the ICTY and ICTR shows, the cost of running international courts tends to increase over time.[226] To keep several RCCs fully functional would over all require considerable amount of resources, including financial, judicial, administrative, and technical. The catch here is that whereas some regions may be able to shoulder these costs with relative ease, others might not, a possibility that could adversely affect the courts' standard of service and quality of justice.

A cursory inspection of funding contributions to the ICC buttresses the cost of justice concern. In recent years, the funding status of the ICC's Assembly of States Parties shows a number of African states parties to be in arrears of payment, with some of these states classified as ineligible to vote due to

[223] Ibid 4-5.
[224] Ibid 5 [emphasis in the original]
[225] Ibid Chapters 5 & 6.
[226] David Wippman observes that although the ICTY started in 1993 with a modest budget of $276,000, by 2007 the court had mushroomed into a mega-institution with 28 judges (16 permanent and 12 *ad litem*) and over 1100 staff that commanded a biennial budget of $276,474,100 for the 2006/7 period. The combined biennial budget for the same period for the ICTY and the ICTR exceeded $545 million. See David Wippman, 'The Costs of International Justice' (2006) *AJIL* 100(4): 861, 861.

longstanding debts.[227] It can be argued that such a pattern of arrears may be unlikely to improve in a new order where these indebted African states might be required to contribute to both the ICC and an African criminal court. However, it is also possible that the African states' contributions to the ICC dwindled in the wake of the strained relations between the ICC and the AU.[228] While African states are surely not the only ICC states parties lagging behind in contributions, the region boasts the highest number of members per region in arrears. Moreover, several African states have a record of poor contributions to African judicial institutions, including the African Court of Human and Peoples' Rights.[229]

By and large, given the huge cost of international justice and the growing sense of fatigue with the judicialisation of the international system, a return to Ockham's razor may be useful in assessing the ripeness or rightness of raising more international courts. Beings, Ockham cautions, should not be multiplied beyond necessity. In like fashion, it is right to argue that international courts should not be raised beyond and without necessity. Thus, as earlier highlighted, two crucial questions ought to be answered regarding any creation of future RCCs or indeed any international courts. The first is whether there is a genuinely justifiable need for the court and the other is whether that need cannot be truly met through other less expensive but effective means? A need that satisfies both criteria sets a strong case for a response through a judicial establishment.

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[227] See Rome Statute, art. 112(8). Part 12 of the Rome Statute details the key elements of the ICC's financial framework. Under Article 113, all financial matters related to the court are governed by the Rome Statute and the financial regulations and rules adopted by the ASP. Based on these and other relevant provisions, including Articles 115, 116, and 117 of the Rome Statute, the ICC's financing is based on assessed contributions made by the ASP, private donations, and the United Nations – the latter in relation to the cases it refers to the ICC.

[228] For a critical analysis of the roots of the tension between the AU and the ICC, *see* Charles Jalloh, 'Regionalizing International Criminal Law?' (2009) 9 *INT'L CRIM L REV* 445, 462-63.

[229] Carter *et al* have noted that the African Court of Human and Peoples' Rights receives an annual funding to an average tune of $10 million, some of which come from foreign donor assistance: Carter *et al* (n 35) 258, 256.

Yet it should be stated that actualising a justified need or interest within the international system requires committed political will and the international community's cooperation. The need to end impunity is established in the preamble to the Rome Statute as a justified need of monumental concern to the international community. But states and scholars have differed as to the best, less expensive, and effective ways to realise this justified need. In some ways, a more vigorous ICC that enjoys robust and wider support from states and the UN could weaken the case for seeking regional measures for ICL enforcement. But, as was argued previously, it is virtually impossible for a single international criminal court operating in an extremely complex and diverse international society to engender the desired justice cascade. Notwithstanding its candid efforts, a lone venture in this regard could amount instead to a justice trickle.

Whereas starting a regime of RCCs could complement the ICC's efforts, the merit of adopting this means of enforcement over possible alternatives should be established.[230] Importantly, a possible working liaison between the future RCCs and the ICC may be a legitimate consideration in setting up such a system as this could help to minimise the recurrence of the major vexations in the status quo.[231] In the next section we will briefly examine two other regional models that could be considered in place of, or in combination with, future RCCs. Afterwards, we will show how regional human rights courts have boosted the global protection of human rights and the advancement of the field international human rights law (IHRL).[232] Lessons from the regional systems could perhaps point the way to how ICrimJ could develop in a coordinated way within a tripartite model encompassing municipal, regional, and global courts.[233]

[230] See, generally, Jonathan I Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 *HAGUE ACAD INT'L L* 101, 133.
[231] Burchill (n 91) sect. V.
[232] Ibid.
[233] Ibid.

4.4 Two Alternative or Complementary Regional Models

In international criminal justice, as in life, there is no single measure that fits all possible cases and situations. In this section thus we will consider two models that could be used in certain contexts to achieve the aims of international justice. The first is regional exercise of universal jurisdiction while the second is the use of regional hybrid tribunals.[234] Both methods would involve criminal prosecutions but rather than establishing wholly new and permanent courts, they would rely mainly on the municipal courts of the relevant regional states parties. One major advantage of both models is that, at least in the short term, they would likely be less expensive than running permanent RCCs. In the long term, however, permanent institutions like the ICC or future RCCs have the advantage of curtailing the constant need to create such ad hoc arrangements including the many set-up and operational difficulties associated therewith.[235]

4.4.1 Regionalisation of Universal Jurisdiction[236]

A. Overview

The first alternative regional model that can be used in place of, or in combination with, RCCs involves the preferential exercise of universal jurisdiction by states within specific regions where international crimes have

[234] As was noted in the discussion on amnesty in Chapter 3, there are also transitional justice models that could be considered including truth commissions, lustrations, or the gacaca process (that was applied in Rwanda). But our interest is in criminal accountability through judicial prosecutions as the latter are, in this thesis's view, the best means of communicating deterrent sanctions to culprits and warnings to future perpetrators while effecting justice to victims. For various approaches to transitional justice, see: Pablo de Greiff, 'Theorising Transitional Justice' (2012) 51 *Nomos* 31; David C Gray, 'What's So Special About Transitional Justice? Prolegomenon for an Excuse-Centered Approach to Transitional Justice?' (2006) 100 *ASIL Proc* 147.

[235] See Suzannah Linton, 'Rising From the Ashes: The Creation of a Viable Criminal Justice System in East Timor' (2001) 25 *MELB ULR* 122; Sarah Williams, 'The Cambodian Extraordinary Chambers – a Dangerous Precedent for International Justice?' (2004) 53 *ICLQ* 227; Adam Day, 'No Exit Without Judiciary: Learning a Lesson From UNMIK'S Transitional Administration in Kosovo' (2005) 23 *WIS INT'L LJ* 183; J Peter Pham, 'A Viable Model for International Criminal Justice: the Special Court for Sierra Leone' (2006) 19 *NYILR* 37.

[236] This section develops the earlier discussion on universal jurisdiction in Chapter 3.

been committed.[237] We saw in Chapter 3 that universal jurisdiction enables states to try individuals for grave crimes committed in circumstances where none of the traditional jurisdictional links of territoriality, active nationality, passive nationality, or protective personality exists at the time of the alleged offences.[238] This model proposes that in lieu of foreign domestic courts elsewhere, only municipal courts within a specific region where serious international crimes have been committed may exercise the right of universal jurisdiction over the alleged perpetrators.[239] But the municipal courts in the region willing to assert jurisdiction would need to demonstrate legitimate interest to do so by issuing the relevant indictments and collecting evidence.

To be able to exercise universal jurisdiction, however, national courts must be lawfully authorised by their states with jurisdiction over the most serious international crimes.[240] As was noted in Chapter 3, although controversy exists as to the scope and practice of universal jurisdiction, the latter is established as a valid legal basis for claiming criminal jurisdiction in international law. A recent Amnesty International's indicates that about '147 (approximately 76.2%) out of 193 states have provided for universal jurisdiction' over torture, genocide, war crimes, or crimes against humanity while about 24 states have yet to proscribe the core international crimes in domestic law.[241]

Nevertheless, as Devika Hovell aptly observes, having the enabling legislation is no guarantee that the relevant state can apply universal jurisdiction. In her view,

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[237] See Burke-White (n 3) 752; Florian Jeßberger, '"On Behalf of Africa": Towards the Regionalization of Universal Jurisdiction' in Gerhard Werle, Lovell Fernandez, and Moritz Vormbaum (eds.), *Africa and the International Criminal Court* Vol 1 (Asser Press 2014) 155-175.
[238] See Council of the European Union, 8672/1/09 Rev 1, 'The AU-EU Expert Report on the Principle of Universal Jurisdiction' (Brussels, 16 April 2009) paras 8-9. See also Kenneth Randall, 'Universal Jurisdiction under International Law' (1988) 66 *TEXAS L REV* 820.
[239] Burke-White, 'Regionalisation' (n 12) 752.
[240] Ibid 752. See generally also Kenneth Randall, 'Universal Jurisdiction Under International Law' (1988) 66 *TEXAS L REV* 820.
[241] Amnesty International, *Universal Jurisdiction: A preliminary survey of legislation around the world – 2012 update* (Amnesty International Publications 2012) 2.

whereas the Amnesty International's statistics may suggest widespread approval of universal jurisdiction, they fail to highlight the limiting clauses that states often craft into national legislation which hinder the use, and consistency of the practice, of universality.[242] In like vein, Antonio Cassese comments that universal jurisdiction is rarely applied not simply because several states fail to grant their courts the express powers to do so, but also because even where the enabling legislation exists, many national courts seem reluctant to assert jurisdiction.[243]

William Burke-White has argued, however, that a great deal of the difficulties involved with the exercise of universal jurisdiction can be curtailed by favouring the model whereby only interested states within the respective regions have the authority to assert universal jurisdiction whenever the special need arises.[244] But this contention raises the question regarding how to determine which state(s) should claim priority in asserting universal jurisdiction. For him, this question can be resolved in accordance with the guidelines set out in the Princeton Principles on Universal Jurisdiction (PPUJ).[245] In accordance with Principle 8 of the PPUJ, for instance, in deciding whether to prosecute or extradite, the custodial state should consider an aggregate balance of the following:

> (a) multilateral or bilateral treaty obligations; (b) the place of commission of the crime; (c) the nationality connection of the alleged perpetrator to the requesting state; (d) the nationality connection of the victim to the requesting state; (e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim; (f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state; (g) the fairness and impartiality of the proceedings in the requesting state; (i) convenience to the

[242] Devika Hovell, 'The Authority of Universal Jurisdiction' (2015) *EJIL* 29(2): 427, 434.
[243] Cassese, *International Criminal Law* (n 85) 304-308. See also Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 *JICJ* 589.
[244] Burke-White, 'Regionalisation' (n 12) 753.
[245] Princeton Project On Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* (Program in Law and Public Affairs 2001) 32 [hereafter PPUJ].

parties and witnesses, as well as the availability of evidence in the requesting state; and (j) the interests of justice.[246]

The familiar case of Augusto Pinochet's extradition proceedings in England[247] may illustrate how the Principle 8 criteria could be applied to resolve conflicting claims by states in the same region to assert universality. The former Chilean strongman Pinochet was detained in England in October 1998 pursuant to a request for his arrest and extradition by a Spanish court.[248] He was accused *inter alia* of torturing and murdering Spanish nationals during his time in office from 1973 until 1990. While Spain's extradition request was being considered in England, Chile requested that Pinochet be returned home to face trial in Chile.[249]

Based on the principle of *aut dedere aut judicare* (either extradite or prosecute), the UK being in custody of Pinochet was required to prosecute him or to extradite him to either Spain or Chile. As it happens, the Lords of Appeal in the House of Lords voted 6 to 1 on 24 March 1999 to extradite him to Spain. But the British Home Office intervened and allowed Pinochet to return to Chile on compassionate grounds following an alleged brain damage caused by a stroke.[250] It is unclear whether the Lords' decision had taken into account the eighth Principle of PPUJ and the logic of the model under review considering that the jurisdictional clash existed between two states belonging to different international regions.

In light of the logic of this model and of the PPUJ's Principle 8 criteria, jurisdictional priority over Pinochet would devolve to Chile as the latter satisfies

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[246] ibid.
[247] See *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [1998] UKHL 41, [2000] 1 AC 61.
[248] See Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (2nd edn, Penguin Books 2002) 395-97.
[249] Ibid 398.
[250] Ibid.

most of the criteria, including: territoriality (b); active nationality (c); passive nationality (d); connection between the requesting state and the alleged perpetrator (e); convenience of parties and availability of evidence (i); and interest of justice (j). But assuming that Chile's claim was defeated by criteria (a), (f), and (g), another South American state that satisfied most of the set criteria would have been in pole position to assert jurisdiction. However, the PPUJ is vague as to whether a jurisdictional conflict resolution is reached by totalling the aggregate number of Principle 8 criteria satisfied. What is most apparent is that the state – usually the territorial state – with the best links to the accused, victims, witnesses, and evidence, holds the clearest claim to jurisdiction.

One remaining issue is why Spain can claim universal jurisdiction to bring to justice a third state's citizen for crimes committed abroad. Lord Browne-Wilkinson considered a related question at the final hearing on Pinochet's extradition. Underlining the internationality of torture, he argued: 'International law provides that offences *jus cogens* may be punished by any state because offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution."'[251] Torture is proscribed under international law by the Torture Convention of 1984[252] while Section 134 of the Criminal Justice Act 1988 enables the UK to exercise universal jurisdiction in respect of torture. For Bruce Broomhall, torture and such related serious crimes are deemed to affect the moral, peace, and security interests of the international community and, as such, deserve universal denunciation.[253] And, as Cherif

[251] *R v Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet*, 2 WLR 827, 38 ILM 581 (HL 1999) per Lord Browne-Wilkinson (hereafter *R v Bartle*). See also *Demjanjuk v Petrosky* (1985) 603 F Supp 1468. For a critical analysis of this case, see Jodi Horowitz, 'R v Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet: Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violation' (1999) *FILJ* 23(2): 489-527.

[252] See Convention Against Torture, and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984; entry into force 26 June 1987).

[253] Bruce Broomhall, 'Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law' (2001) 35 *NELR* 399, 402.

Bassiouni puts it, the exercise of universal jurisdiction over torture and the related international crimes is a form of 'indirect enforcement'[254] of ICL in contrast to 'direct enforcement'[255] by the territorial national courts.

To reiterate, the significance of this model is that instead of having to set up permanent regional courts, the domestic courts of member states of specific regions may assume the capacity to bring to justice those who grossly violate international law within the region. A crucial advantage of the model is that it would likely be cheaper to run in the short term than operating a fully-fledged RCC especially if the states asserting jurisdiction would be willing to bear the entire cost of the trials. On the other hand, it would also raise several challenges that will be highlighted shortly. An aspect of this model will be revisited in Chapter 5 under the subsidiarity principle where it will be argued that in certain contexts both the domestic courts of neighbouring states and RCCs as well as the ICC may be jointly involved in bringing perpetrators to justice.

At all events, considering the contentious nature of asserting universality,[256] there may be the need to balance foreign national interests to assert universal jurisdiction as against having trials by international tribunals, as Article VI of the 1948 Genocide Convention specifies. The next subsection will now critically assess the proposal to permit only member states of particular regional authorities the right to exercise universal jurisdiction within the specific regions.

[254] M Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Brill 2013) 25.
[255] Ibid.
[256] For instance, Steven Ratner claims that after running itself into a legal and political pickle, Belgium was forced to curtail its early enthusiasm for universal jurisdiction: Steven Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97 *AJIL* 888.

B. Critique

I. From *Erga Omnes* to *Inter Partes* Obligations

In theory, the proposal to restrict the use of universal jurisdiction to only states parties within regional zones appears plausible and even innovative. At present, universal jurisdiction though rarely exercised is not restricted within particular regions or to particular states. Countries ranging from Belgium to Spain, Germany, France and the UK have exercised this power at one time or the other over nationals of states outside of the European hemisphere. Exercising universal jurisdiction in this orthodox manner indicates the will of states to defend non-derogable international norms (or jus cogens) and their readiness to condemn wanton abuses of these norms irrespective of the identity, status, and nationality of the perpetrators and the place of commission of the crimes.

Under international law, an *erga omnes* obligation exists among states with respect to such norms as piracy, torture, genocide, and crimes against humanity.[257] In the *Barcelona Traction* case, the ICJ distinguished between the obligations that all states owed to the international community as a whole and those that they owed to one another individually, for example, by virtue of bilateral treaties. The former is called obligations *erga omnes*. 'Such obligations,' the ICJ explains, 'derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person including protection from slavery and racial discrimination.'[258] The exercise of universal jurisdiction is founded upon this principle. And it can be argued that the exercise of *erga omnes* obligations by states in respect of grave breaches of jus cogens has at minimum the merit of signalling to potential perpetrators that there can be no hiding place anywhere in the world whenever such norms are violated.

[257] See *Barcelona Traction Case (Belgium v Spain)* Second Phase, ICJ Rep. 1970, 3.
[258] Ibid para. 34.

By limiting the exercise of universal jurisdiction to member states of specific regions, the model under review appears to turn an *erga omnes* obligation of all states of the international community into an *inter partes* obligation of states parties of a regional grouping. At first blush, an *inter partes* obligation in this sense seems like a dilution of a supreme international imperative. Why should Brazil, for instance, whose nationals incurred no adverse losses under Pinochet claim a stronger right to prosecute him than Spain whose citizens were victims of his atrocities? Just because Brazil happens to belong to the American region while Spain is! What happens when no states in the relevant region is willing or able to prosecute high-ranking and notorious perpetrators? Why should courts elsewhere have to receive a greenlight from the region before they can proceed? These are complex questions that could make this model vulnerable to abuse.

Two arguments can be advanced in defence of a preferential exercise of universal jurisdiction on the basis of apparent *inter partes* obligations. The first is that *inter partes* obligations recognise the mutuality of the proximate effects of international crimes on neighbouring states within the regions. Thus, a political crisis in Chile with attendant atrocity crimes committed would be more likely to have more proximate deleterious consequences in Brazil than in Spain. In other words, as noted in Chapter 1, *inter partes* obligations would impose a critical duty upon states in the region to prevent and to tackle occasions of international crimes within their regions considering that whatever harms one state would be likely to affect all or several states in the region. They may also inspire states in the regions to become more proactive in preserving international justice as well as the peace and security of the region without having to sit back and wait on Big Brothers from outside the region to intervene to do for them what they could probably do better by and for themselves.

The second argument, which is consistent with the case for RCCs, is that *inter partes* obligations as theorised might strengthen rather than diminish *erga*

omnes obligations. A coherent and robust exercise of universal jurisdiction within the regions would invariably strengthen the measures against impunity and international crimes at the regional level which ultimately enhances the value of the norms and the rights that *erga omnes* obligations protect. This is also in line with the principle of regional enforcement of international human rights law as well as that of regional application of international humanitarian law through the establishment of regional security alliances like ECOMOG[259] and NATO.[260]

II. Political Ramifications

At the same time, the model seems to sidestep practical questions regarding diplomatic rifts and political tensions that universal jurisdiction tends to generate. In the Pinochet extradition saga, Chile insisted that trying him outside of Chile would offend Chile's political independence and sovereign dignity.[261] At times the lack of suitable solutions to these political issues have threatened to undermine the legitimacy of national exercise of universal jurisdiction. For instance, the Democratic Republic of the Congo (DRC) strongly criticised Belgium in the *Arrest Warrant* case for breaching her sovereign rights by issuing an international arrest warrant against a DRC's state official.[262] Similar protests based on the doctrines of territorial sovereignty and non-interference were also raised in the *Republic of the Congo v France* case.[263]

Predictably therefore there have recently been a number of calls for,[264] and debates on,[265] the restriction of the scope and use of universal jurisdiction. These

[259] Economic Community of West African States Monitoring Group.
[260] North Atlantic Treaty Organisation.
[261] Robertson (n 248) 398.
[262] *Arrest Warrant* case (n 161).
[263] *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France)*, ICJ Rep (9 December 2002).
[264] See AU, Decision Assembly/AU/Dec. 199(XI), 'Decision on the Abuse of the Principle of Universal Jurisdiction' (1 July 2008); AU, Decision Assembly/AU/Dec. 213(XII), Decision on the Abuse of the Principle of Universal Jurisdiction' (3 February 2009); and AU, 'Decision

debates highlight the lack of clarity on the range of crimes covered by universal jurisdiction. While certain states like Belgium, Spain, and Germany restrict their courts' application of universal jurisdiction to core international crimes like genocide, war crimes, torture and crimes against humanity, others like Senegal place a broader range of crimes within the scope of universal jurisdiction.[266]

The complex nature of universal jurisdiction was dramatically highlighted in the State of Israel's trial, conviction and execution of Adolph Eichmann for what Arendt has described as 'the banality of evil'.[267] On the one hand, the Eichmann's case[268] has sometimes been hailed as a major modern effort to enforce ICL in a domestic court.[269] It is also believed to have spurred interest in a 'global justice devoted to the development of an international jurisprudence dedicated to the punishment of severe and serious international offenses.'[270] In this regard, Hovell remarks that since Eichmann's trial in 1961, about 52 trials have been concluded under the basis of universal jurisdiction in 16 states worldwide, with 15 of these trials transpiring in Western Europe and Other regional grouping.[271]

Assembly/AU/Dec. 243(XIII) Rev 1, 'Decision on the Abuse of the Principle of Universal Jurisdiction' (3 July 2009).

[265] See UNGA, Sixth Committee, GA/L/3549, 'Tackling Scope and Application of Universal Jurisdiction, Sixth Committee Speakers Debate Best Venue for Further Discussions on Principle's Definition' (11 October 2017).

[266] In Senegal, acts of terrorism, forgery of State seals, and attacks on the security and territorial integrity of the State may give rise to the exercise of universal jurisdiction by Senegalese courts. See UNGA, Seventy-second session, A/72/112, 'The Scope and application of the principle of universal jurisdiction' (22 June 2017) paras. 12-14.

[267] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin [1964] 1994) 252. For a critical account of the crimes and trial of Adolf Eichmann, see Matthew Lippman, 'The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under International Law' (1984) *HOUSTON J INT'L L* 5(1): 1-32; Matthew Lippman, 'Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice' (2002) 8 *BUF HRLR* 45-121; David Cesarani, *Eichmann: His Life and Crimes* (Vintage 2005); Deborah E Lipstadt, *The Eichmann Trial* (Random House 2011).

[268] *Attorney-General of the Government of Israel v Eichmann* (Israel Sup. Ct. 1962) 36 ILR 1968.

[269] See Matthew Lippman, 'The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under International Law' (1984) *HOUSTON J INT'L L* 5(1): 1

[270] Matthew Lippman, 'Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice' (2002) 8 *BUF HRLR* 45, 121.

[271] Hovell (n 242) 434.

On the other hand, Eichmann's trial is believed to have instrumentalised ICL enforcement for political purposes. At the conclusion of Eichmann's case, Arendt lamented the proceedings as a form of theatre whose 'invisible stage manager' had been the Israeli Premier David Ben-Gurion.[272] And, for Henry Kissinger,[273] the Eichmann judgment by the Israeli court initiated a host of complex diplomatic and political issues into the practice of international law. Some of these include:

> State intervention in the affairs of other sovereign nations, the assertion of extra-territorial and universal jurisdiction by the judiciary of single States, the substitution of ethnic and racial identity for national citizenship, a disregard of international judicial institutions and a concern with substance at the expense of transnational legal procedures….[274]

In addition, following the Eichmann's ruling, many petitions have been filed in foreign courts against public officials regarding allegations of international crimes. For example, early this century several claims were brought to Belgian courts against such leaders as Yasser Arafat, Ariel Sharon, and General Tommy Franks. Belgian courts had been lawfully authorised to exercise universal jurisdiction, but after pressure from several states, Belgium has now softened its approach to universal jurisdiction.[275] The State of Israel is notably said to have viewed the petitions filed in foreign courts against its officials as an abuse of

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[272] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin [1964] 1994) 5.

[273] Referencing Kissinger in this text is no endorsement of his political views or denial of his possible liability for international crimes but is rather in the scholastic spirit of assembling a critical balance of views. For a treatise accusing Kissinger of war crimes deserving criminal prosecution, see Christopher Hitchens, *The Trial of Henry Kissinger* (Verso 2001).

[274] Henry A Kissinger, 'The Pitfalls of Universal Jurisdiction' (July/August 2001) *Foreign Affairs* 80(4): 86.

[275] See Law of 16 April 1998 Relating to the Repression of Grave Breaches of the Geneva Conventions, as Amended (1999) ILM 921, art. 7. See also Olympia Bekou and Robert Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007) 56 *ICLQ* 49, 56. [For reviews of Belgium's practice of universal jurisdiction, see Steven R Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97 *AJIL* 888; Damien Vandermeersch, 'Prosecuting International Crimes in Belgium' (2005) 3 *JICJ* 400.]

universal jurisdiction.[276] Besides Belgium, Haberman observes, other potential worry spots for the Israelis included Britain and Spain.[277] At any rate, the lingering Israeli-Palestinian conflict suggests that official worries about trials in foreign courts on universality grounds may not be sufficient to end impunity.

As a principle, most states endorse universal jurisdiction, but in practice it has proved difficult in most cases to enforce. It was hardly surprising therefore when Cassese recently declared that 'the principle of universal jurisdiction over international crimes is on its last legs, if not already in its death throes.'[278] After many protests against a series of indictments of African officials by some national courts in Europe, the AU lately drafted a guideline on universal jurisdiction, which restricts the right to exercise universal jurisdiction over African officials (but not over other African individuals) to African states.[279]

The AU guideline still does not tackle persistent questions regarding sovereign equality and non-interference in the exercise of universality. Moreover, the guideline may lead to a scenario whereby state officials exempt themselves, their agents, and their allies from prosecution within the specific region. And, unless a general and principled guideline which includes not only how and when universal jurisdiction should be asserted by states within the region but also how such vital obligation may be funded, the costs of trials, political backlashes, and foreseeable manipulations of evidence and witnesses could

[276] See Clyde Haberman, 'Israel Is Wary of Long Reach in Rights Cases' (*New York Times* 28 July 2001) <www.nytimes.com/2001/07/28/world/israel-is-wary-of-long-reach-in-rights-cases.html> Accessed 20 July 2017.
[277] Ibid. [Israel's concern was particularly fuelled by an attempt in Belgium to charge its former Premier Ariel Sharon with war crimes for the killing of hundreds of unarmed Palestinian refugees following Israel's invasion of Lebanon in 1982 to purge PLO rebels. Sharon was Israel's defence minister when the massacre occurred]. See also Wolfgang Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008' (2009) 30 *MICH J INT'L L* 927, 933.
[278] Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) *JICJ* 1(3): 589.
[279] AU, 'African Union (Draft) Model National Law on Universal Jurisdiction Over International Crimes' EXP/MIN/Legal/VI (Addis Ababa, Ethiopia 7 to 15 May 2012)

stymie the appeal of this model. In certain contexts, it may be more expedient for regional authorities to delegate one or certain key states with the special mandate to exercise universal jurisdiction for the region whenever necessary.[280]

As it happens, this thesis contends that universal jurisdiction, whether exercised *erga omnes* or *inter partes*, is usually complex and highly acrimonious. It should therefore be used as a fall-back measure when other measures, like the ICC, ad hoc tribunals, or a future RCC, have been well considered and ruled out as unrealistic excluding in contexts where states with the relevant territorial or national jurisdictions extend formal invitations or consent to other states to exercise universal jurisdiction. We will now examine the next alternative model.

4.4.2 Regional Hybrid Tribunals

A. Overview

Another interesting model that can be applied in place of, or together with, RCCs would involve the use of regional hybrid courts.[281] As was highlighted in Chapter 2, hybrid courts – sometimes called internationalised or mixed courts – have been applied in a number of states, including in Sierra Leone via the Specialised Court for Sierra Leone (SCSL) and in Cambodia through the Extraordinary Chambers in the Courts of Cambodia (ECCC). After the inauguration in 2000 of the East Timor Special Panels for Serious Crimes (ETSPSC) – the first-ever hybrid criminal tribunal – at least six other such tribunals have been created.[282] Although these tribunals tend to consider the core international crimes, they

[280] In this regard, countries with a track record of strong and credible judicial system could be so empowered. Caution and oversight should, however, be exercised by the delegating regional authority to curtail possible abuses of power and/or political witch-hunting. See Dustin N Sharp, 'Prosecutors, Development and Justice: The Trial of Hissein Habre' (2003) 16 *Harvard Human Rights Journal* 147, 153. See also Curtis A Bradley, 'The "Pinochet Method" & Political Accountability (1999) 3 *Green Bag* 2d 5.

[281] Compare Burke-White, 'Regionalisation' (n 12) 753-55.

[282] These include: the SCSL; the ECCC; the Special Tribunal for Lebanon (STL); the International Judges and Prosecutors Programme in Kosovo; the Iraqi Special Tribunal; and the War Crimes Chamber for Bosnia and Herzegovina. See Malcolm N Shaw, *International Law* (7th edn, CUP 2014) 300-309. See also Williams, *Hybrid and Internationalised Criminal Tribunals* (n 205) 90-98.

also usually target other crimes from the domestic systems.[283] Thus, a key feature of these courts is the general blend between international and national elements at the level of the applicable law and the institutional apparatus.[284]

Like the previous model, the focus of the current model is restricted to the regional sphere. In contrast to the previous model, it does not advocate for separate trials by individual states. Rather, it seeks to have common, mixed and ad hoc tribunals that engage resources and personnel from the relevant region. It may be useful to recall that unlike international tribunals, hybrid tribunals are typically embedded into the national legal order of the host or injured state. This arrangement, Padraig McAuliffe argues, bolsters the domestic justice system as a result of the close working relations between the courts' local and international personnel.[285]

According to Sarah Williams, hybrid tribunals were initially proposed as most likely to overcome the weaknesses of 'purely' international and national prosecutions.[286] Compared to international tribunals, hybrid tribunals have the advantage that their trials usually occur *in situ* (or near the crime scenes) and thus can have more profound impact on the affected communities than trials *ex situ*. In addition, the model has been viewed as having the capacity to promote local ownership of the proceedings through enabling more active involvement

[283] See section 3 of the UNTAET *Regulation 2000/15* for the ETSPSC mandating the Panels to apply the laws of East Timor and the relevant principles and norms of international law; Article 1 of the SCSL Statute restricts the court's jurisdiction to violations of IHL and the laws of Sierra Leone; Article 2 of the STL Statute specifies the applicable law as the domestic Criminal Code of Lebanon plus Articles 6 and 7 of the Lebanese law of 15 January 1985.
[284] See Laura A Dickinson, 'The Promise of Hybrid Courts' (2003) *AJIL* 97(2): 295.
[285] See Padraig McAuliffe, 'Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan' (2011) 7 *J INT'L L & INT'L REL* 1. See also Jann K Kleffner and André Nollkamper, 'The Relationship Between Internationalized Courts and National Courts' in Cesare P R Romano, André Nollkaemper, and Jann K Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004) 359.
[286] See Sarah Williams, The Extraordinary African Chambers in Senegalese Courts: An African Solution to an African Problem' (2013) *JICJ* 11(5): 1139, 1144.

of victims and affected populations.[287] For Laura Dickinson, the mixed tribunals also enjoy greater legitimacy due to the UN's participation in the process; they command a more enhanced independence and impartiality and are able to foster increased penetration of international norms into the domestic systems.[288]

Some have referenced the SCSL[289] as probably the finest exemplification of this model.[290] The SCSL, famous for trying and convicting the former Liberian President Charles Taylor, began operations in 2002 and completed its work in 2013. It has now been succeeded by the Residual Special Court for Sierra Leone.[291] In accordance with the agreement[292] reached between Sierra Leone's Government and the UN about using personnel drawn locally and from West African and Commonwealth states, the SCSL's judges were selected from Sierra Leone, Nigeria, Cameron, The Gambia, and the UK.[293] This is unlike the practice at comparable hybrid tribunals such as the East Timor Special War Crimes Panels[294] that have no specific guidelines stipulated as to the national or regional origin of the courts' judges or personnel.[295]

The model under discuss can still be distinguished what transpired at the SCSL. Whereas the latter captures several key aspects of a regional hybrid tribunal, it falls slightly short of perfectly representing this ideal for two key reasons. First, the SCSL was created by a treaty between the UN and Sierra Leone. As such, the key officials of the court were appointed were the UN Secretary General among

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[287] See Robert Cryer, Darryl Robinson, and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th edn, CUP 2019) 173.
[288] Dickinson (n 284) 295.
[289] UNSC, Resolution 1315 (2000) (14 August 2000).
[290] See Burke-White, 'Regionalisation' (n 12) 754.
[291] See more on this residual court in the next subsection.
[292] See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, UN SCOR, 57th Sess., UN Doc. S/2002/246, *appended to* Letter Dated 6 March 2002 from the Secretary General Addressed to the President of the Security Council, app. II (2002).
[293] See Burke-White, 'Regionalisation' (n 12) 754.
[294] The Panels' judges were mainly from East Timor, Portugal, Burundi, and Cape Verde.
[295] See Burke-White, 'Regionalisation' (n 12) 754.

a broad list of nominations from several UN member states while the deputies were appointed by Sierra Leone.[296] A true regional hybrid court, as contemplated, would be created by an agreement reached between a regional authority and the relevant state. The applicable appointments would thus be made by the regional authority or its representative from a pool of nominations submitted by the partner (territorial) state and other states parties within the specific region.

Second, as an UN-sponsored hybrid court, the SCSL was financed by the UN and donations from other interested parties around the world. As a result, the UN was involved in appointing the personnel, offering a measure of oversight, in setting the tribunal's completion strategy, and in helping to shore up international cooperation in the enforcement of the tribunal's decisions. In a regional hybrid tribunal, these multiple roles would be played by the relevant regional authority although it may be crucial for the latter also to consider ways to maintain effective cooperation with the UN and the international community.

Another hybrid tribunal, which approximates this model, is the Extraordinary African Chambers (EAC).[297] It was established on 22 August 2012 after an agreement reached between the African Union and the Senegalese Government.[298] The court was mandated to try persons most responsible for international crimes committed in the territory of Chad from 7 June 1982 to 1 December 1990. In the end, the EAC was able to prosecute only the former Chadian leader Hissène Habré who was however its principal target. Habré's trial began on 20 July 2015 and on 30 May 2016 he was found guilty of torture, war crimes, and crimes against humanity committed during his time in office which

[296] See SCSL Statute, arts. 12, 15 & 16.
[297] See Sarah Williams, 'The Extraordinary African Chambers in Senegalese Courts: An African Solution to an African Problem' (2013) *JICJ* 11(5): 1139; Venarisse V Verga, 'Extraordinary African Chambers in the Senegalese Courts: A Regional Mechanism Enforcing International Criminal Justice' (2016) 61 *ATENEO LJ* 721.
[298] For analysis of the processes that led to this tribunal, see Brody Reed, 'Bringing a Dictator to Justice: The Case of Hissène Habré' (2015) *JICJ* 13(2): 209.

corresponded with the tribunal's temporal jurisdiction. The trial was concluded on 27 April 2017 after the Appeals Chamber upheld the trial chamber's verdict.[299] The Habré's decision has since been hailed not least for representing the first time in ICL that the domestic courts of a third state have collaborated with a regional body to bring a former head of state to justice on the basis of universal jurisdiction.[300]

Although the SCSL and the EAC feature comparable characteristics, yet they differ in certain key aspects. Unlike the SCSL, the UN played a marginal role in the creation and operation of the EAC. The AU played an outsized role in the life of the EAC: from its establishment to its funding[301] and the appointment of its personnel.[302] Also, in contrast to the SCSL which was blended with Sierra Leone's legal system, the EAC was domiciled in the courts of a foreign state (Senegal) rather than in the territorial state (Chad). Whereas it would be ideal for regional hybrid tribunals to be stationed locally so as to bring justice home to the victims, in certain circumstances (as evidenced in SCSL's trial of Taylor in the Hague and the EAC's trial of Habré in Senegal) involving grave security challenges it may be sensible to host the tribunal in a third state.

Yet, the EAC's case is not a perfect model of a regional hybrid tribunal as it relied overly on Senegalese courts including judicial resources, especially at the prosecutorial, investigative, indicting, and trial cadres of the court. More balance should be aimed at between national and regional (international) elements in a truly regional hybrid tribunal. This would furnish the regional court with a

[299] For analyses of the tribunal and its work, see: Suhong Yang, 'Can Hybrid Courts Overcome Legitimacy Challenges?: Analysing the Extraordinary African Chambers in Senegal' (2020) 11 *GEO Mason J INT'L COM L* 45.
[300] See Sofie A E Høgestøl, 'The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity' (2016) *Nordic Journal of Human Rights* 34(3): 147. See also Williams, 'The Extraordinary African Chambers' (n 286) 1139.
[301] The EAC also received voluntary contributions from several European states as well as from the EU and the US.
[302] See Statute of the Extraordinary African Chambers, arts. 11, 12, & 13.

greater degree of legitimacy, as was pointed out by José Alvarez in his criticism of the ICTR's processes thus: 'If Rwandan society shares comparable notions of judicial legitimacy, it stands to reason that having judges who come from the local community may be determinative of the legitimacy of these processes.'

B. Critique

I. What Role for the United Nations?

Perhaps the most complex question about this model is whether regional hybrid courts should be set up only by regional authorities, as was done by the AU in the case of the EAC. In other words, should the United Nations also be involved in setting up regional hybrid tribunals? In response, it should be noted that ad hoc tribunals, including the international and the hybrid versions, have traditionally been established principally by the UNSC acting in consistence with its Chapter VII mandate under the UN Charter. It was in this light that tribunals like the ICTY, ICTR, SCSL, STL, and ECCC came into being. But these tribunals have been experimental in nature and their terms and jurisdictions were limited. Under Chapter VII, the UNSC does not have the power to establish permanent tribunals as a default mechanism for addressing global justice problems. That power is reserved to states dealing together by treaty and this was what transpired at the Rome Conference in 1998 that gave birth to the Rome Statute.

Under a mature and enhanced global justice system, as this thesis envisions, it is likely that the ICC and the future RCCs, will be the permanent and default mechanisms for bringing major protagonists of atrocity crimes to justice. Both mechanisms, of course, would have come into being through states parties' consent by treaty in the traditional manner. At the same time, certain situations or cases may be unsuitable for the ICC's or an RCC's intervention. This could be in complex situations where a state is not a party to the Rome Statute, an RCC

statute, or where the local administration has been critically destabilised by civil wars.[303] In such scenarios, a regional hybrid court may be a sensible solution.

The regional hybrid court can be properly constituted by the UN, a regional authority, or both working together insofar as the basic elements as preserved, including the selection of key personnel from the region and collaboration with the territorial court or a willing domestic court within the region. Insights from the UN Charter regarding regional enforcements of IHL may help to illumine the shape of possible interactions between the UN and regional agencies as regards establishing regional hybrid tribunals. Article 51 of the UN Charter allows for collective self-defence of UN member states in the face of an armed attack while Article 52 permits the adoption of appropriate regional measures to maintain international peace and security provided that such measures are in sync with the Charter's objectives. These provisions have enabled regional alliances like NATO and ECOMOG to launch humanitarian operations aimed at restoring peace in the Balkans and in West Africa respectively.

Under Article 53, the UNSC may contract or collaborate with regional agencies to achieve its objects. Articles 51, 53, and 54 of the UN Charter stipulate that any enforcement operations undertaken by regional agencies be authorised or promptly reported to the UN while the latter reserves the right to take other appropriate measures it deems necessary to maintain international peace and security. Drawing from these provisions, therefore, it can be argued that with respect to ICrimJ, regional agencies may separately and lawfully establish regional hybrid tribunals, as already trialled by the AU relative to the EAC. This does not prejudice however the right of the UN to form relevant ad hoc tribunals when it deems it necessary. In places equipped with functional regional

[303] An example here is the Special Tribunal for Lebanon (STL) that was set up by the UNSC in 2007 at the instance of the Lebanese Government. The STL sitting in The Hague focuses mainly on the trial of all those implicated in the terrorist bombing of 14 February 2005 in which former Premier Rafik Hariri and 22 others were killed. See UN Doc. S/RES 1757 (2007) (30 May 2007).

agencies, it would be probably ideal for the UNSC to request those agencies to institute ad hoc regional tribunals when the need arises. But where there are no existing regional bodies or where the latter are unwilling or unable to do so and neither the ICC nor an RCC holds the relevant jurisdiction, then the UNSC may be bound by its Chapter VII to take the appropriate steps to do the right thing.

Furthermore, Michael Scharf has elaborated three lessons from the UN's experience of setting up *ad hoc* tribunals that may be instructive in assessing the feasibility of operating *ad hoc* hybrid tribunals in the long term in ICrimJ. The first lesson concerns what is sometimes called a 'tribunal fatigue' which is said to be experienced by many UNSC members over the time-consuming process of reaching a consensus on each of the tribunals' statutes, electing the tribunals' judges, identifying suitable prosecutors and allotting funds for their operations.[304] Given that ad hoc hybrid courts generally require the UNSC's support, reaching consensus for every possible case will be unlikely. Similar problems will also likely surface should regional bodies embrace the model. On this score, Alain Pellet has noted that the provisional character of hybrid courts raises particular concerns quite unlike national courts or the permanent ICC.[305]

Second, Scharf observes that the fact only five UN member states (the so-called P-5 members) have permanent seats and veto powers in the UNSC is also a huge concern. This is because many member states consider the UNSC's practice of creating *ad hoc* tribunals to be inherently discriminatory. The vexing issue is that the P-5 members would never create such tribunals for, nor permit their jurisdiction over, atrocities that occurred in their own sovereign territories or in

[304] See Scharf, 'The Politics of Establishing an International Criminal Court' (n 124) 169.
[305] Alain Pellet, 'Internationalized Courts: Better Than Nothing…' in Cesare P R Romano, André Nollkaemper, and Jann K Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004) 438.

those of their allies.[306] Thus, it is conceivable that opposition against installing hybrid courts as a go-to method for ICL enforcement would regard such a system as seeking to cement double standards and exceptionalism in ICrimJ.[307]

The third lesson concerns financial resources. According to Scharf, 'the expense of establishing tribunals is simply seen as too much for an organization whose budget is already stretched too thin.'[308] Finding the money to make justice possible, as we saw earlier, is however a burden that confronts both hybrid and international criminal courts. In light of these concerns, Padraig McAuliffe has remarked that 'the popularity of hybrid criminal tribunals as an avenue for transitional criminal justice has declined dramatically.'[309] We will now highlight another key challenge regarding this model: the completion conundrum.

II. The Completion Conundrum

In contrast to the permanent ICC that can intervene even amidst ongoing hostilities, hybrid tribunals are usually installed in the aftermath of hostilities. To an extent, this may be a sensible strategy given the strains and political risks involved in setting up and administering contentious criminal trials. But one of its drawbacks is that waiting until the guns become silent could provide key suspects with ample leeway to plot and execute their escape strategies, including the destruction of tranches of incriminating evidence. A standing court, in contrast, could be gathering evidence in the middle of the hostilities.

Moreover, instead of reacting to disasters and their aftermaths, a permanent tribunal could be more proactive at anticipating the conflicts and issuing authoritative early warnings. By this means and by monitoring the pattern of

[306] Scharf observes that China had been unwilling to recognise the ICTY's establishment as setting a precedent for future ICL enforcement model: Scharf, 'The Politics of Establishing an International Criminal Court' (n 124) 169-170.
[307] See Pellet (n 305) 440-41.
[308] Scharf, 'The Politics of Establishing an International Criminal Court' (n 124) 170.
[309] McAuliffe (n 285) 1.

escalation of the crises, a permanent court could help to prevent further escalations. Such preventive measures could be by issuing cautionary notices to all the contending sides or, depending on the stage of the escalation, by issuing criminal indictments against the major protagonists. Thus, by threatening judicial intervention and criminal indictments if diplomatic efforts were allowed to collapse, a permanent court could propel local adversaries towards peace.

Because of the short lifespan of hybrid courts, residual mechanisms are often instituted near the end of their terms to settle the outstanding obligations of the courts.[310] Some of these functions include the: review of cases in light of new evidence; capacity to revoke cases transferred to national courts under certain conditions; future trials of indictees still at large; witness protection; and supervision of prison sentences, including early release of certified convicts.[311] Other related non-judicial matters like victims' reparations settlements and management of the mixed courts' archives add to the tasks of residual courts.[312]

In a sense, the provisional nature of hybrid tribunals may enable the tribunals to focus their resources towards achieving their mandate within the set timeframe. But it can also put these tribunals under enormously unhelpful pressures to complete their mandate. With a very limited budget and a strict deadline, the tribunals could be forced into setting pragmatic priorities that could result to or

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[310] See The Residual Special Court for Sierra Leone Agreement (Ratification) Act, 2012 (Supplement to the Sierra Leone Gazette Vol. CXLIII, No. 6, dated 9th February 2012) art. 1(1) [hereinafter RSCSL Act]; Statute of the International Residual Mechanism for Criminal Tribunals (IRMCT), UNSC Resolution, S/RES/1966 (22 December 2010) (which established the IRMCT to conclude the remaining tasks of ICTR and ICTY), arts. 1 and 2 [hereafter IRMCT Statute]. See also Fausto Pocar, 'Completion or Continuation Strategy?: Appraising Problems and Possible Developments in Building the Legacy of the ICTY' (2008) *JICJ* 6(4): 655; Giovanna M Frisso, 'The Winding Down of the ICTY: the Impact of the Completion Strategy and the Residual Mechanism on Victims' (2011) *GOET J INT'L L* 3(3): 1093.

[311] For example, in 2017, the Residual SCSL granted conditional early release to Allieu Kondewa, who had been serving a reduced 20-year jail term in Rwanda for war crimes and crimes against humanity. See Residual Special Court for Sierra Leone, Press Release 'CDF Convict Allieu Kondewa Granted Conditional Early Release, With Ten Months Delay' (30 May 2017) <www.rscl.org/Documents/Press/2017/pressrelease-053017.pdf> Accessed 20 April 2018.

[312] See RSCSL Act (n 310) art. 7.

encourage the lowering of the requisite strictness of standards so as to achieve the desired result. At the ETSPSC, for instance, David Cohen was concerned that the trials failed to meet international standards. As he puts it, notwithstanding the Panels' high conviction rate at 97.7%, many on the defence team had neither previous courtroom experience nor any training in ICL.[313] Moreover, some hostile events were inaptly labelled 'massacres' by the Panels in order to fit into a prosecution policy that was guided by political interests and thin resources.[314]

There is also the crucial question of what to do with the tribunals after their mandates have been completed. Typically, several issues remain outstanding even as the tribunals close. Both the ICTY and the ICTR were forced to revise their completion strategies several times in order to consider many outstanding issues. At present, residual mechanisms have been formed to tidy up after the tribunals. But how long would these mechanisms remain in place? As long as there remain indictees at large? What happens to the victims with unresolved suspicions or the convicts with fresh exculpatory evidence? Where and how would the tribunals' records, evidence, casefiles and equipment be protected whenever at last the residual mechanisms are wound up? How much interest is there in the UN or regional bodies to continue to support the residual outfits?

A fair consideration of these questions reveals why, even in domestic settings, courts of permanent jurisdictions tend to be preferred over provisional courts. A permanent court like the ICC undoubtedly addresses most of the issues raised above and thereby makes redundant, or hugely curtails, the requirement for *ad hoc* and residual courts. In a system which combines ad hoc regional hybrid tribunals with RCCs, the completion conundrum could be ameliorated by

[313] David Cohen, 'Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor' (2006) *East-West Center*, Special Report No. 9: 12, 16. See also Antonio Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality' in Cesare P R Romano, André Nollkaemper, and Jann K Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004) 6.
[314] Ibid 14.

transferring certain outstanding issues to the jurisdiction of the permanent RCC. The US proposal during the Darfur referral debate at the UN to create an ad hoc tribunal in place of the ICC to handle that situation failed to garner wide support among the UNSC's members.[315] That may be indicative of a wider preference for permanent tribunals over provisional mechanisms. Let us next consider what critical lessons can be learnt from the permanent regional human rights courts.

4.5 Critical Lessons from the Regional Applications of Human Rights

I. A Marriage of Necessity: The Overlapping Mandates of ICL and IHRL

The regional human rights systems have been acclaimed as one of the finest innovations in international law since the last century.[316] In light of the broad experience and the arguably growing popularity of the regional applications of international human rights law (IHRL) it seems apt to review briefly how these regional mechanisms are operationalised and what guidance they can offer to a possible regional enforcement of international criminal law. This is important considering that the general objectives of both systems intertwine although their means and procedures differ. At bottom, both IHRL and ICL seek to protect the fundamental human rights of individuals and to secure the foundational norms of the international community, including global peace and security.[317]

A critical modern starting point on the nexus between IHRL and ICL is arguably WWII, whose aftermath profoundly altered geopolitical alignments as well as the scope and landscape of international law.[318] In the heights of that war, as the British judge Lord Diplock once observed *obiter*, the fate of many nations and

[315] See International Bar Association, 'Interview with Richard Goldstone - Transcript' (28 June 2017) <www.ibanet.org/Article/NewDetail.aspx> Accessed 08 October 2018.
[316] See Alexandra Huneeus and Mikael Rask Madsen, 'Between Universalism and Regional Law and Politics: A Comparative History of the American, European and African Human Rights Systems' (2017) *SSRN Electronic Journal* 1, 3.
[317] See Kai Ambos, *Treatise on International Criminal Law, Vol 1: Foundations and General Part* (OUP 2013) 65-67.
[318] The end of WWII saw the rise of the Cold War, regional security alliances like NATO and the defunct Warsaw Pact, and decolonisation movements in Asia and Africa, which gave birth to many independent states.

the survival of countless peoples appeared to rest in a balance.[319] At the end of that war, the leading Nazi and Japanese actors were prosecuted and punished by the Nuremberg IMT and the Tokyo IMT respectively.[320]

However, both tribunals did not merely punish war criminals; they also helped to establish a set of core crimes whose commission entails 'the personal criminal liability of the individuals concerned'.[321] Justice Robert Jackson notably highlighted the Nuremberg IMT's trendsetting value thus: 'We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well…. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law.'[322]

The system that evolved after the tragedies of WWII and the adoption of the UN Charter saw the gradual 'canonisation' of certain universal norms from which no derogation is permissible. As such, through the aegis of the UN a basic set of rules and values 'considered important by the whole international community'[323] has been developed under international law, including the core international crimes, *jus cogens* norms, and universal human rights.[324] Some of these central values are now preserved at the global level in such principal international instruments as the UN Charter, the Universal Declaration of Human Rights (UDHR), and the two human rights covenants of 1966, namely the International

[319] See *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, para. 96 per Lord Diplock (dissenting).
[320] See Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Alfred A Knopf 1992); Richard H Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton Legacy Library 1971).
[321] Cassese, *International Criminal Law* (n 85) 23. See also Nuremberg Charter, art. 6; IMTFE Charter, art. 5.
[322] Robert Jackson, quoted in *The Trial of the Major War Criminals* (21 November 1945) vol. 2, 101, 154.
[323] Cassese, *International Criminal Law* (n 85) 23.
[324] Jonathan I Charney, 'Universal International Law' (1993) *AJIL* 87(4): 529, 543.

Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Disagreements remain nonetheless as to the justiciability of certain aspects of these global devices, particularly the human rights' instruments.[325] In light of the divergencies and the recognition that compliance mechanisms at the global level would be weak, several regional agencies mainly in Europe, the Americas, and Africa have since established regional human rights systems tasked with protecting and actualising these international human rights norms within the respective regions. Elaborate steps also have been taken by the Arab League and some sub-regional bodies in Africa and Asia to institute human rights protection mechanisms within the specified subregions.[326]

A brief word may apt at this juncture on the origin of each of the three main regional human rights systems. Arguably the most active of the three regional rights mechanisms is found in Europe. The Council of Europe, founded in 1949, established the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in Europe. The ECHR treaty was signed in November 1950 and entered into force on 3 September 1953. Currently, all 47 states of Europe, including Russia, have ratified the treaty and in 1959 the European Court of Human Rights (ECtHR) was set up under Article 19 of ECHR to 'ensure the observance of the engagements' laid out in the ECHR within the European region. From 1954 until 1998, the European Commission for Human Rights (European Commission) acted on behalf of individual applicants to the ECtHR as individual access to the court was barred. But the European Commission was abolished in 1998 following the entry into force of Protocol 11 of ECHR, which also served to authorise individual access to the ECtHR.

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[325] See Dinah L Shelton, 'An Introduction to the History of International Human Rights Law' *(2007) GW Law Faculty Publications and Other Works*, Paper 1052, 16.
[326] See Clare Ovey and Robin White, *Jacobs and White: The European Convention on Human Rights* (4th edn, OUP 2006) 1.

The oldest regional human rights system is found in the Americas. The Organisation of American States (OAS), which succeeded the Pan-American Union, was created in April 1948. On 2 May 1948, the OAS adopted the Inter-American Declaration on the Rights and Duties of Man, which predated the UDHR by about seven months. To enforce its human rights programme, the OAS operates a dual system, consisting of the Inter-American Commission of Human Rights (IACHR) established in 1959 (based in Washington D.C.) and the Inter-American Court of Human Rights (IACtHR) created in 1969 (seated in San José, Costa Rica). As will be seen shortly, the IACtHR and the IACHR have had significant influence in penetrating core human rights into the domestic systems in the Americas.

Africa is home to the youngest of the three regional human rights systems. The Organisation of African Unity (OAU, now succeeded by the African Union [AU] since July 2002) was formed in May 1963. In June 1981, the OAU adopted the African (Banjul) Charter on Human and Peoples' Rights. Like the OAS system, the Banjul Charter is being enforced in Africa by two principal organs, namely the African Commission on Human and Peoples' Rights (ACHPR) and the African Court on Human and Peoples' Rights (ACtHPR) which share complementary jurisdiction. The court, based in Tanzania was created in 1998, entered into force on 25 January 2004 but only began operations in 2006. The ACHPR was inaugurated on 2 November 1987 and is located in the Gambia. Whereas the ACtHPR allows direct access to states parties, the African Commission, and African intergovernmental organisations, individual direct access is restricted to two conditions. First, individual complaints can only be made against states that have ratified the protocol to the African Charter.[327] Second, the complaints must

[327] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entry into force 25 January 2004) art. 5(3) & 34(6).

be against states that have made optional declarations accepting the ACtHPR's competence to receive such applications.[328] Only eight states thus far have made these declarations.[329]

In contrast to the impetus that the activities of the regional human rights systems have introduced to the field of international human rights law since the late 1940s, no comparable advances were made in international criminal law until after the Cold War era in the early 1990s. Instructively, although Article VI of the 1948 Genocide Convention hinted at the possibility of prosecuting genocide suspects at an international criminal tribunal, no such tribunal could materialise until the creation of the ICTY and the ICTR in the mid 1990s. Following the demise of the Cold War, argues Arthur Watts, and despite disagreements as to what conduct should be universally criminalised, there has been keen interest among the international community in repressing conduct that gravely violates fundamental human rights and international humanitarian law; such breaches can now accordingly incur international criminal liability.[330]

There has also been a growing emphasis on the role of public international law not simply to protect the sovereign rights of states and the immunity of public officials but, also crucially, to defend international norms and basic human rights through such means as international criminal prosecutions. In Patricia Wald's view, this is an encouraging development as it shows that public international law has at last broken free from 'its sovereign boundaries to recognize the universality of repugnance for widespread crimes committed by

[328] See Manisuli Ssenyonjo, 'Direct Access to the African Court of Human and Peoples' Rights by Individuals and Non-Governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008 to 2012' (2013) *International Human Rights Law Review* 2(1): 17.
[329] These include Ghana, Mali, Tanzania, Malawi, Benin, Burkina Faso, Tunisia, and Cote d'Ivoire. However, Tanzania, Cote d'Ivoire and Benin have recently rescinded their declarations.
[330] See Sir Arthur Watts, *The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers* (Martinus Nijhoff 1994) 82. See also Rome Statute, art. 25(2).

governments against civilian populations.'[331] Moreover, notwithstanding recurrent contentions, much emphasis is now made about the responsibility of states to protect the basic civil and political rights of their citizens as well as the rights of peoples and aliens within their territories.[332] We will now examine in further detail how these basic rights and norms are being propagated and protected by the regional human rights systems.

II. Regional Protection and Promotion of Fundamental Human Rights

As was earlier highlighted, at least three continental regions, including Africa, the Americas, and Europe currently operate human rights courts and/or human rights commissions. In 1968, the League of Arab States likewise established a Permanent Arab Committee on Human Rights (known also as Arab Human Rights Commission [AHRC]) with a base in Beirut. Without a regional human rights charter, however, the AHRC has struggled to get going. The Arab Charter on Human Rights was eventually adopted on 22 May 2004[333] and it entered into force on 15 March 2008. But current plans for an Arab Human Rights Court has stalled because the required seven ratifications threshold for its inauguration has yet to be reached.[334]

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[331] Patricia M Wald, 'Why I Support the International Criminal Court' (2003) 21 *WIS INT'L LJ* 513.
[332] See ICCPR, art. 2(1). See also International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (December 2001) No. XI, paras. 2.14 to 2.15. <http://www/icisss.ca/pdf/Commission-Report.pdf> Accessed 12 December 2018; UNGA Res. A/60/1 '2005 World Summit Outcome' (24 October 2005) paras. 138 and 139; UNSC Res. 1674 (28 April 2006) para. 4.
[333] The original version created in September 1994 received no ratifications and was later abandoned. For explanation of key features of the Arab Charter, see Wael Allam, 'The Arab Charter on Human Rights: Main Features' (2014) *Arab Law Quarterly* 28(1): 40. *See* also Mervat Rishmawi, 'The Arab Charter on Human Rights and the League of Arab States: An Update' (2010) *HRLR* 10(1): 169.
[334] The Statute of the proposed Arab Court was adopted on 7 September 2014 by the Arab League. For commentary on the major flaws in the Statute, see Konstantinos Magliveras and Gino Naldi, 'The Arab Court of Human Rights: A Study in Impotence' (2016) *Revue québécoise de droit international* 29(2): 147. *See* also Rebecca Lowe, 'Bassiouni: New Arab Court for Human Rights is fake "Potemkin tribunal"' (*International Bar Association* 1 October 2014) <www.ibanet.org/Article/NewDetail.aspx> Accessed 12 October 2019.

The Arab League's drive to establish a human rights system with enforcement powers within its region is especially striking considering that the League of Arab States is not officially recognised as an international regional bloc within the UN. In terms of continental area, ten member states of the Arab League belong to the GAFS group and are states parties to the African Charter on Human and Peoples' Rights while the other twelve member states are usually classified under Asia and so form part of the Asia-Pacific group. The sense of sharing a common civilisation, identity, culture and socio-political struggle is stressed in Article 1 and the preamble to the Arab Charter on Human Rights as a strong factor underlying the region's human rights project. As we saw earlier, comparable elements seem to underpin the growing interest in ICL's regionalisation.

Whereas an arguably coherent collective sense of identity may have lent impetus to the regional human rights protection mechanisms particularly in Africa, the Americas, Europe and slowly even among Arab States, Asia has been described as 'a region whose collective identity is still being formed.'[335] As such, notwithstanding regular talks about 'Asian values' there is hardly any evidence of a pan-Asian identity or a pan-Asian regional human rights complaint mechanism. Recently, however, an Intergovernmental Commission on Human Rights was established in 2009 by the ASEAN (Association of South East Asian Nations) Council of Heads of States and Government. Although the Commission's draft ASEAN Human Rights Declaration was adopted on 18 November 2012, it has no authority to hear complaints but serves only as a consultative body.[336]

In general, international human rights law is 'protected' not only at the national level, but also at regional level. At the regional level, the human rights systems

[335] See Tae-Ung Baik, *Emerging Regional Human Rights Systems in Asia* (CUP 2012) 52.
[336] See Nicholas Doyle, 'The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard-Setting' (2014) *ICLQ* 63(1): 67.

are meant to provide individuals and peoples with an external entity that they could appeal to if they fail to obtain the requisite remedies against human rights' abuses within their own states. In contrast to the international criminal justice system that boasts of a global and permanent court, the ICC, there is no central international court that is tasked with protecting fundamental human rights globally. At the global level, the UN's Office of the High Commissioner for Human Rights (OHCHR) simply coordinates and monitors state parties' implementation of the basic international human rights instruments. It also monitors and supports regional human rights initiatives. But, unlike the ICC which can claim jurisdiction and request the transfer of key cases when specific states parties prove to be unable or unwilling to tackle the situations,[337] the OHCHR commands no comparative authority in respect of human rights' abuses.

Earlier we highlighted the monumental concern that regionalising ICL through RCCs could hinder the uniform development of ICL jurisprudence.[338] It may be interesting to consider how this concern is being approached in the field of IHRL. A peek into the vast and growing jurisprudence of the regional human rights mechanisms and the widening scope of interactions between them paints a rather positive picture. In the case of *Curtis Francis Doebbler v Sudan*,[339] for instance, the African Commission was able to rule on the matter only after noting at length how similar cases had been decided by the ECtHR.[340] Also, in the Ogiek Peoples of Kenya case,[341] the ACtHPR made references to several global human rights instruments like the ICCPR and ICESCR as well as to relevant jurisprudence from the IACtHR.[342]

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[337] See Rome Statute of the ICC, 2187 UNTS 90, (17 July 1998) art. 17(1).
[338] See Rauxloh (n 189) 67.
[339] Communication No. 236/2000 (2003), *Curtis Francis Doebbler v Sudan*.
[340] *Tyrer v UK*, 26 Eur Ct HR, Ser A, judgment of 25 April 1978 (1979-80) 2 EHRR 1, para 30; *Ireland v UK*, 26 Eur Ct HR (1979-80) 2 EHRR 25, para 162.
[341] See *The African Commission on Human and Peoples' Rights v Republic of Kenya*, Application No 006/2012, Judgment of 26 May 2017.
[342] Two examples of the referenced IACtHR cases include: Y*akye Axa Indigenous Community v Paraguay*, Judgment of 17 June 2005 (Merits, Reparations & Costs) Ser C No 125 para 161; *Case of*

Similarly, the IACtHR frequently refers to the ECHR[343] and the decisions of the ECtHR[344] as well as to the ICCPR, the ICESCR and related UN treaties.[345] As Ginah Shelton notes, the ECtHR also consistently cross-references other regional and global rights instruments in its decisions,[346] as manifest in many instances, including the *Soering* case,[347] the *Burghartz* case,[348] and the *Costello-Roberts* case.[349] These cross-pollination of caselaw and statutory instruments help to bring a certain degree of consistency in the jurisprudence of the regional human rights systems. For Shelton, these examples also confirm at minimum that the 'jurisprudence of regional human rights bodies has become a major source of human rights law.'[350]

In principle, human rights' regimes are not created to grapple with individual criminal accountability. Rather, they are set up to promote, protect and embed fundamental human and peoples' rights. At present, however, the regional human rights systems in the Americas and in Europe are starting to develop

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Sawhoyama Indigenous Community v Paraguay, Judgment of 29 March 2006 (Merits, Reparations & Costs), para. 73(3)-73(5).

[343] See for examples: Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, 5 Inter-Am-Ct HR (Ser. A) (1985) paras. 43-46; Enforceability of the Right to Reply or Correction, 7 Inter-Am-Ct HR (Ser. A) (1986) para 25.

[344] The Effect of Reservations on the Entry into Force of the American Convention, 2 Inter-Am-Ct HR (Ser. A) (1983) para. 29; The Word 'Laws' in Article 30 of the American Convention on Human Rights, 6 Inter-Am Ct HR (Ser. A) (1986) para. 20; Caballero Delgado and Santa Case (Preliminary Objections), 17 Inter-Am-Ct HR (Ser. C) (1994).

[345] Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, 4 Inter-Am Ct HR (Ser. A) (1984) paras 50-51.

[346] Shelton (n 325) 25.

[347] *Soering v UK*, 161 Eur Ct HR (Ser. A) (1989) para 88 [Here the court referred to the obligation under Article 3 of the UN Convention against Torture not to extradite an accused to a state where she may face torture, and so interpreted that obligation as implied under Article 3 of the ECHR.]

[348] *Burghartz v Switzerland*, 280B Eur Ct HR (Ser. A) (1994) para 24 [Here in considering the right to a name as provided under Article 8 of the ECHR the court referred to the CCPR and the American Convention on Human Rights.]

[349] *Costello-Roberts v UK*, 247C Eur Ct HR (Ser. A) (1993) para 27 [In considering the right to education, the court cross-referenced the UN Convention on the Rights of the Child.]

[350] Shelton (n 325) 24.

quasi-criminal jurisdictions[351] while plans are underway to create a separate criminal section in the African Court of Human and Peoples' Rights (ACtHPR).[352] This emerging form of judicial intervention by the regional human rights mechanisms may be explained as perhaps an outcome of the insufficient and weak extant channels of international criminal accountability for mass atrocities.[353]

Consider the Americas, for example. Whereas the IACtHR lacks a criminal jurisdiction, it 'has made national prosecution of gross human rights violations a centre piece of its regional agenda.'[354] Starting with the case of *El Amparo v Venezuela*[355] in 1996, the IACtHR has requested numerous states parties to prosecute serious abuses of human rights and to date at least 39 trials ordered by the court have led to convictions.[356] Two cases are noteworthy here. One is the case of *Myrna Mach Chang v Guatemala* wherein the court ordered the Guatemalan state to investigate, try, and punish all those involved in the 'extra-legal execution of Myrna Mach Chang' on 11 September 1990 in Guatemala City.[357]

The other case concerned the *19 Merchants v Colombia*.[358] In this highly contentious case, the IACtHR ordered Colombian authorities to investigate and punish all those involved in the detention, disappearance, and extrajudicial execution of 19 tradesmen on 7 October 1987. The execution was allegedly

[351] See Huneeus, 'Quasi-Criminal Jurisdiction' (n 74) 1.
[352] *See* African Union, Doc. No. STC/Legal/Min. 7(1) Rev. 1 'Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' (14 May 2014).
[353] See Huneeus, 'Quasi-Criminal Jurisdiction' (n 74) 43.
[354] Ibid 1.
[355] *See El Amparo v Venezuela*, Reparations & Costs, Inter-Am Ct HR (Ser. C) (14 Sept. 1996), No. 28, para. 64(4), (5).
[356] See Huneeus, 'Quasi-Criminal Jurisdiction' (n 74) 2.
[357] *Myrna Mach Chang v Guatemala*, Reparations & Costs, Inter-Am Ct HR (Ser. C) (25 Nov. 2003), No. 101, para. 273.
[358] *19 Merchants v Colombia*, Merits, Reparations & Costs, Inter-Am Ct HR (Ser. C) (5 July 2004) No. 109.

aided by Colombian Army officers and so the State of Colombia was also ordered to pay 'adequate and prompt reparation' to the families of the victims. Additionally, the court has occasionally struck down domestic legislation that it found to be incompatible with its core human rights instruments.[359] At times, as Ximena Soley and Silvia Steininger remark, it has also acted firmly to give direct effect to several of its decisions in the domestic systems of its states parties.[360]

Having said that, the regional human rights regimes have also weathered criticisms and even political and/or judicial pushbacks from national systems. With respect to the IACtHR, for instance, scholars have questioned whether the court has overreached its original mandate.[361] Argentina's Supreme Court of Justice recently ruled in the case of *Fontevecchia and D'Amico*[362] that the IACtHR had acted *ultra vires* when it ordered the reversal of the apex Argentine court's judgment.[363] Moreover, after a series of decisions by the IACtHR against Venezuela, the latter denounced the court in 2012 and withdrew from the American Convention in 2013. Likewise, in 2014, the Constitutional Court of the

[359] These include the American Declaration of the Rights of Man (adopted April 1948; in force since 2 May 1948) and the American Convention on Human Rights (adopted 22 November 1969; in force since 18 July 1978).
[360] Ximena Soley and Silvia Steininger, 'Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights' (2018) *International Journal of Law in Context* 14(2): 237.
[361] Huneeus, 'Quasi-Criminal Jurisdiction' (n 74) 4; Soley and Steininger (n 360) 237; Jorge Contesse, 'Judicial Backlash in Inter-American Rights Law?' (2 March 2017) *Int'l J Const L Blog* <www.iconnectblog.com/2017/03/judicial-backlash-interamerican/#_ftnref4> Accessed 18 October 2019.
[362] Corte Suprema de Justicia de la Nación (Argentina), Ministerio de la Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso 'Fontevecchia y D'Amico vs. Argentina' por la Corte Interamericana de Derechos Humanos (14 February 2017). See also Fontevecchio and D'Amico v Argentina, Merits, Reparations & Costs, Inter-Am Ct HR (Ser. C) No 238 (29 November 2011) [In brief, the case concerned a 2001 decision of Argentina's Supreme Court in which it confirmed a civil judgment against two publishers Fontevecchio and D'Amico for publishing stories about an 'illegitimate' child of the then-president Carlos Menem. The publishers took the case to the IACtHR and, in 2011, the court ruled against Argentina and ordered that the earlier verdict should be revoked in its entirety. But the Supreme Court uncharacteristically declined to reverse itself.]
[363] See Soley and Steininger (n 360) 237.

Dominican Republic nullified the state's acceptance of the compulsory jurisdiction of the IACtHR.

To a lesser degree, the ECtHR has also confronted political initiatives to curb its power among some of its member states like the United Kingdom.[364] After a series of judgments by the court against the UK, including allowing some prisoners to vote, bringing the age of consent for gays into line for that of heterosexuals, and making the government protect the anonymity of journalists' sources, the UK government under premier David Cameron threatened to replace the Human Rights Acts (HRA) 1998[365] with a British Bill of Rights,[366] paving the way thus for an eventual withdrawal of the UK from the ECHR. Whereas the HRA remains in place, lingering issues as to post-Brexit Britain's role in Europe have revived old fears as to whether the UK would remain in the ECtHR.[367]

In like vein, the ACtHPR has withstood attacks from its member states including a recent accusation by Côte d'Ivoire against the court for taking what it considers to be 'grave and intolerable actions' that violate its sovereignty.[368] This was in response to an order for interim measures issued against it by the

[364] See Nico Krisch, 'The Backlash against International Courts' (*Verfassungsblog* 16 Dec 2014) <www.verfassungsblog.de/backlash-international-courts-2/> Accessed 12 October 2019.
[365] The HRA 1998 is the enabling legislation that domesticates and secures the ECHR rights in Britain. Section 4 of the HRA permits UK courts to issue a declaration of incompatibility in circumstances where they determine that a local statute is in conflict with a Convention right. Following that declaration, it would be up to the UK government to decide whether and how to cure the infirmity in the law or to maintain it as enacted. That said, Section 3(1) of HRA stipulates: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.
[366] While the British Bill of Rights was included in the Conservative Party's 2015 election manifesto, it was abandoned after premier David Cameron resigned in 2016.
[367] See Martin Hannan, 'Will a post-Brexit UK remain in the European Court of Human Rights?' (*The National* 1 November 2018) <www.thenational.scot/news/17192518/will-post-brexit-uk-remain-european-court-human-rights/>. Accessed: 28 November 2019.
[368] See Tetevi Davi and Ezéchiel Amani, 'Another One Bites the Dust: Côte d'Ivoire to End Individual and NGO Access to the African Court' (*EJIL Talk* 19 May 2020) <www.ejiltalk.org/another-one-bites-the-dust-cote-divoire-to-end-individual-and-ngo-access-to-the-african-court/>. Accessed: 20 October 2020.

ACtHPR in the *Guillaume Soro* case.[369] Côte d'Ivoire consequently has notified the court on 29 April 2020 of its decision to revoke its declaration allowing individuals and NGOs to submit complaints against it directly to the court in accordance with Article 34(6) of the ACtHPR's Protocol. When this decision comes into effect next year, Côte d'Ivoire would join Tanzania and Benin among the three states parties of ACtHPR to have declared and later terminated the right of individuals and NGOs to submit applications directly to the court.

All in all, the activities of these regional human rights courts as well as the backlashes highlight the growing significance of the role of adjudication in resolving many forms of domestic and international disputes. Horrendous cases that previously would have been covered up or justified under the defence of sovereign immunity are increasingly being considered or, at least exposed, by the regional human rights mechanisms. But the mechanisms are still far from perfect. As Shelton points out, regional human rights initiatives have at times seemed incapable of 'addressing the massive violations that occur in weak or failed states where anarchy and civil conflicts prevail'.[370] This is a major and foreseeable weakness, which would require a combination of strategies embracing not only regional human rights mechanisms but also the expertise of international humanitarian law and international criminal law.[371] Yet, the growing degree of contacts and cross-referencing between the three principal regional human rights courts can be expected to deepen over time and this could considerably contribute to the curing of lingering infirmities in the system.

4.6 Conclusion

The object of this chapter has been to present a strong case for reinforcing the existing global criminal justice system by developing ICL enforcement potentials

[369] See *Guillaume Kigbafori Soro & Others v Republic of Côte d'Ivoire*, Application No 012/2020, Order for Provisional Measures, (22 April 2020).
[370] Shelton (n 325) 29.
[371] Ibid 29.

at the regional sphere. Consequently, it was important to identify and clarify a workable international regional policy that could support the envisioned enforcement programme. Regionalisation of ICL along broader continental lines was determined as arguably most capable of yielding optimal results. Not only would it be consistent with the principles of geographical proximity and shared identity set out in Chapter 1 as substantial in constructing the notion of international regions, it also would incorporate major aspects of existing operational structures and systems approved by the UN and applied by the ICC and several regional human rights mechanisms.

With the regional basis established, the bulk of the chapter was focused on assessing the merits and constraints of instituting a regime of permanent RCCs as a way to bolster the ICrimJ system at the regional realm. However, virtually every argument for or against RCCs raises new questions that may not always have convincing if any responses. Of the proposed arguments in favour of RCCs perhaps the most compelling is the capacity of future RCCs to help expand and perpetuate the reach of global criminal justice. In a world where opportunistic leaders can take advantage of the distant arc of international justice and/or the silence of the international community to commit heinous atrocities back in their countries, it is vital to bring the arc of justice closer to the frontiers by means of RCCs that are empowered to intervene within regional areas. Yet such ideal can only come into force by treaty ratified by states. But, from the case of the Rome Statute, powerful states tend to have the habit of watering down or refusing to ratify such treaties that may expose their agents to the tribunals' jurisdiction.

This ties up with one of the clearest arguments against creating RCCs; that they could be exploited by supervising regional authorities or influential states to secure official immunity against prosecution for serving state officials. We saw this with the proposed African Criminal Court which has not been vested

jurisdiction to indict or prosecute incumbent African leaders and their agents. No international criminal tribunal can be worthy of credibility if it is created solely to try opponents of ruling regimes or to prosecute one side in any potential conflict. This would not only contravene the rules of fairness and equality before the law, it can also embolden bad leaders to do terrible things with impunity. The ICTR has often been faulted for prosecuting only Hutu suspects while no Tutsis were ever arraigned before it. Yet, its establishing statute did not restrict the ICTR's personal jurisdiction to only Hutus. That it turned out that way was the result of domestic political interferences. While this does not excuse the tribunal's one-sidedness, it serves to underline this problem as a major potential challenge to achieving fair and credible justice via the means of future RCCs.

As there are usually several ways to skin a cat, the chapter also considered two other principal ways that regionalisation of ICL can be achieved, namely through regional exercise of universal jurisdiction and the use of regional hybrid tribunals. Both models were assessed as capable of being applied independently or in combination with RCCs. In principle, regional exercise of universal jurisdiction might receive wider approval within certain circles as it could quell contentious allegations regarding the witch-hunting of leaders in poorer countries for prosecutions by foreign domestic courts' in more advanced economies. But, in practice, it would hardly ever be exercised as individual states within the same regions would be unlikely to take up such controversial cases except with the consent of the relevant state or committed approval by the regional body. That is in addition to being able to surmount the technical difficulties around authorising the use of universal jurisdiction in municipal law.

Similarly, the model of ad hoc regional hybrid tribunals with regional personnel could command considerable attraction as a go-to mechanism for dealing with tough cases involving high security risks. The successful trial of Habré by the EAC is probably the premier demonstration of this ideal. The Habré's process

however looked more like a specialised domestic court than a true regional hybrid court as it relied mainly on Senegalese courts and personnel and had very little input in terms of personnel from the regional states. Going forward with this model, it would be important to resolve issues around the exit strategies for ad hoc regional tribunals. In regions where the latter operate alongside RCCs, it would probably be sensible to assign the ad hoc tribunals' outstanding duties to the permanent RCC in place of maintaining a new residual tribunal.[372]

Considering that the principles and objectives of international criminal law and international human rights law overlap in several ways, the last section of this chapter attempted to highlight how regionalisation events and strategies in the IHRL field could inform the burgeoning ICL discipline. It is remarkable that human rights courts have been fully operational in Europe, Africa, and the Americas for several decades. Steps are also being taken, albeit punctuated with difficulties, to establish similar systems in other places like among the League of Arab States. A notable lesson from the regional human rights' courts is a growing move towards securing a form of consistency of jurisprudence. This is apparent in the hefty referencing, in their separate caselaw, of the major global human rights' instruments as well as in the depth of cross-referencing of the jurisprudence of parallel regional rights' courts and their founding charters.

It is also remarkable that despite the seeming popularity of the major regional human rights' courts, they still individually encounter several resistances and attacks from states parties. But, interestingly, the pushbacks tend to follow decisions from the courts that are deemed unfavourable by the relevant states.

[372] Currently, interest in the use of ad hoc tribunals seems to be waning which should give cause to evaluate resort to this model for the long term. For instance, the UN inaugurated the East Timor Tribunal in 2000 but did not show keen support for the tribunal and even withdrew its mission from the area before the tribunal could get going. See Richard Burchill, 'From East Timor to Timor-Leste: A Demonstration of the Limits of International Law in the Pursuit of Justice' in Jose Doria, Hans-Peter Gasser, and M Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff 2008).

This is an all-too-familiar situation in the ICrimJ system, where the ICC especially is opposed frequently by states with pending situations before the court. Thus, whereas it is commendable that since the end of WWII and even more notably so since the end of the Cold War the international society has shown a marked level of interest in protecting the fundamental norms of international law and the basic rights of persons and peoples, yet grave national interests and lacklustre political will have at times hindered the greater realisation of these values. It is argued that securing ICrimJ application in the regions through RCCs could aid the further realisation of the core global ideals.

The next chapter will now attempt to pull together relevant central themes from the thesis to present a fuller response to our key research questions. It will supplement this chapter's analysis by examining a range of ways that RCCs can bridge the enforcement loopholes between the national and the global limbs of the international criminal justice system. In the main, we will be exploring how the three levels of courts could collaborate effectively using the framework of a modified conception of the traditional principles of subsidiarity and complementary.

Chapter Five

Towards an Enhanced System of Global Criminal Justice Enforcement

5.1 Introduction

In a sense the analyses in the previous chapters build up to this chapter. The latter is an attempt to reconceptualise the existing structure of the global criminal justice system for enhanced and optimal effectiveness. Having explored the international, national, and regional spheres of the global justice system in the previous chapters, we will now seek in this chapter to imagine how these three cadres of courts can cooperate within the framework of a tripartite complementarity of courts to set up an eternal vigilance of the international society against impunity and atrocity crimes.[1] These courts include municipal courts, regional criminal courts, and the ICC representing the domestic, regional, and global echelons of the ICrimJ system respectively. As such, the permanence and independence of the courts at all three levels will be supposed. That supposition then raises a set of critical questions. What principles or strategies might undergird future contacts between these tiers of courts? Would this involve a certain form of judicial hierarchy for the international criminal courts?

We will be unlikely to do justice to all the pertinent issues that this chapter will provoke, but we will attempt at minimum to sketch a sturdy roadmap by means of which our hypothesis can be navigated. To begin, the chapter will identify the traditional principles of subsidiarity and complementarity as two possible cooperation strategies for the courts in the suggested tripartite 'community of courts'.[2] It will then elaborate and reconceptualise each principle in turn. The chapter will leverage on the expanded notions of subsidiarity and

[1] See William Burke-White, 'A Community of Courts: Toward A System of International Criminal Law Enforcement' (2002) *MICH J INT'L L* 24(1): 1, 3.
[2] See Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *YALE LJ* 273, 372.

complementarity to construct an enhanced hypothetical global criminal justice framework that comprises a tri-tier system to wit: national, regional, and global. It will be argued that although the enhanced model would not cure every infirmity in the existing model, it promises at least to revive and reinforce ICrimJ by setting up a triple lock system of combating impunity and heinous crimes.

5.2 Judicial Contacts in an Enhanced Global Justice System: Rules of Engagement

A curious lack in the international criminal justice scholarship is elaborate analyses of possible systemic relations between municipal courts, future regional criminal courts, and the International Criminal Court. Some have attempted however to hypothesise on different aspects of relations between international courts or between international courts and national courts.[3] The purpose in this chapter thus is to theorise on the means and manner of possible interactions between international criminal courts, national criminal courts, and regional criminal courts. To this end, two principal doctrines would be crucial. The first is the subsidiarity principle, which we shall adapt from the existing EU law regime. And the second is the complementarity principle – a familiar keystone of the Rome Statute. Let us now begin by examining why and how the subsidiarity principle can help to enhance a putative three-tier ICrimJ system.

5.2.1 The Subsidiarity Principle

To appreciate how the doctrine of subsidiarity can provide a crucial strategy for aiding relations within the proposed three-tier system, it would be important first to examine the meaning of the concept. Viewed sometimes as a 'slippery,

[3] See for examples: Helfer and Slaughter (n 2) 273; Burke-White, 'A Community of Courts' (n 1) 1. See also Firew Kebede Tiba, 'Regional International Criminal Courts: An Idea Whose Time Has Come?' (2016) 17 *Cardozo Journal of Conflict Resolution* 521, 521; Charles C Jalloh, 'Regionalizing International Criminal Law?' (2009) 9 *INT'L CRIM L REV* 445; William Burke-White, 'Regionalisation of International Criminal Law: Preliminary Exploration' (2003) 38 *TEXAS INT'L LJ* 729; Max du Plessis, 'A new regional International Criminal Court for Africa?: Comments' (2012) *SAJCJ* 25(2): 286.

multifaceted, and polysemic concept,'[4] subsidiarity is perhaps best known today as one of the basic principles of EU law.[5] Is modern usage as a political principle can be traced to traditional Catholic social teaching,[6] particularly as expressed in the encyclicals of Popes Leo XIII[7] and Pius XI.[8] In its Catholic formulation, subsidiarity is a doctrine that specifies a division of labour or spheres of responsibility between higher bodies within state or church governance and their local units. Within national contexts, the subsidiarity doctrine suggests that certain decisions and duties should be better assumed at the basic local units rather than at the higher national realms, although the latter may be morally obliged to support or subsidise the former whenever the crucial need arises.[9]

According to George Bermann, the subsidiarity doctrine requires that specific functions be carried out at the appropriate levels of governance 'at which particular objectives can be adequately achieved.'[10] Put differently, subsidiarity seeks to manage relationships between two or more ranks of governance so as to safeguard the competences of each of the competing units and to enhance effective application of resources and influence to the grassroots. As Lady Justice Arden puts it, subsidiarity suggests 'that there can be a diversity of solutions to a particular problem.'[11] It also implies that 'a central authority

[4] See Pier Paolo Donati, 'What does "Subsidiarity" Mean? The Relational Perspective' (2009) 12 *Journal of Markets & Morality* 211, 211.
[5] Note that like the CJEU, the ECtHR also recognises the principle of subsidiarity. Whereas both courts hold cognate rationale for the principle, they approach the concept differently in their respective jurisprudence. See Lady Justice Arden, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe' (2010) *Yearbook of European Law* 29(1): 3, 16.
[6] See David Golemboski, 'Federalism and the Catholic Principle of Subsidiarity' (2015) 45 *Publius J Federalism* 526.
[7] See Leo XIII, *Rerum Novarum: On the Condition of Working Classes* (Catholic Truth Society [1891] 1983).
[8] See Pius XI, *Quadragesimo Anno: On Reconstructing the Social Order* (Catholic Truth Society [1931] 2007).
[9] See Markus Jachtenfuchs and Nico Krisch, 'Subsidiarity in Global Governance' (2016) *L&CP* 79(2): 1, 5.
[10] George A Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Union and the United States' (1994) 94 *COLUM L REV* 331, 338.
[11] Arden (n 5) 16.

should have subsidiary role by permitting its branches to take decisions on issues best dealt with at the local level.'[12]

Within the EU system, the subsidiarity doctrine is featured in a number of the Union's founding treaties,[13] but its formal articulation is set out in Article 5(3) TEU. The provision bars the EU from taking actions at the local level beyond what is needed to effectively achieve the Union's objectives.[14] Article 5(3) reads:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at the central level or at regional level and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[15]

Under Article 5(3) TEU therefore three preconditions are essential to justify the Union's intervention in issues within the member states' competence. First, 'the area concerned does not fall within the Union's competence (non-exclusive competence)'. Second, 'the objectives of the proposed action cannot be sufficiently achieved by the Member States (necessity)'. And, third, 'the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (i.e. added value).'[16] Together with Articles 5(2)[17] and

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[12] See *The Chambers Dictionary* (12th edn, Chambers Harrap Publishers 2011) 1552.
[13] See for examples: Treaty of Amsterdam, Protocol on the Application of the Principles of Subsidiarity and Proportionality, October 2, 1997 (C 340) 105; Treaty of Lisbon, Protocol on the Application of the Principles of Subsidiarity and Proportionality, December 13, 2007 (C 306) 1; TEU, art. 5(1).
[14] However, as Lady Justice Arden points out, it may be a difficult balancing act for the EU to determine on any given case whether measures taken at the local level would be sufficient to achieve the required objectives. See Arden (n 5) 18.
[15] See TEU, art. 5(3).
[16] See Rosa Raffaelli, 'The Principle of Subsidiarity' (Europa Parliament March 2017) <www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf/> Accessed 20 July 2018.
[17] On the conferral principle.

5(4)[18] of TEU, Article 5(3) TEU thus forms the legal basis governing the exercise of EU's competences.

The question may be asked as to why subsidiarity is given such prominence in the EU system? Subsidiarity is crucial 'to ensure that powers are exercised as close to the citizens as possible, in accordance with the proximity principle referred to in Article 10(3) of TEU.'[19] As Lady Justice Arden explains, subsidiarity seeks to guarantee as far as practicable that decisions are made by the appropriate authorities in the areas most likely to be affected by the decisions.[20] In that way, subsidiarity establishes the competence of member states and secures a level of independence for them vis-à-vis the central authority of the EU institutions.[21] Additionally, argues Andreas von Standen, subsidiarity sets clear benchmarks that 'if met, … justify the exercise of authority at the regional or global level of the organisation.'[22]

The EU system also preserves an intricate link between the subsidiarity principle and the conferral doctrine. The latter, as set out in Article 5(2) of TEU, permits the EU to act 'only within the limits of the competences conferred upon it by the Member States in the Treaties…. Competences not conferred upon the Union in the Treaties remain with the Member States.' The subsidiarity-conferral nexus is thus such that whereas the conferral rule asks whether the Union can 'take a proposed measure,' the subsidiarity principle examines whether the proposed measure should be deferred to the member states.[23] Put more simply, according to Gabriél Moens and John Trone, while conferral determines the 'existence' of

[18] On the principle of proportionality, which is defined as follows: 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'
[19] See Raffaelli (n 16).
[20] Arden (n 5) 16.
[21] See Case C-428/07 *Horvath v Secretary of State for the Environment, Food and Rural Affairs* [2009] ECR I-6355.
[22] Andreas von Standen, 'Subsidiarity in Regional Integration Regimes in Latin America and Africa' (2016) *L&CP* 79(2): 27, 29.
[23] Gabriél A Moens and John Trone, 'The Principle of Subsidiarity in EU Judicial and Legislative Practice Law: Panacea or Placebo?' (2015) *Journal of Legislation* 41(1): 65, 66-67.

competence, subsidiarity regulates the 'exercise' of concurrent competence.[24] Unlike the courts within the EU system, this thesis envisages a less formalised systemic relationship between the proposed three tiers of courts in the ICrimJ system. As such, the conferral and proportionality principles need not come into significant play and will not engage us any further.

Notwithstanding its prominence in the EU system, subsidiarity has given rise to frequent debate among EU scholars and within European political circles. Whereas some believe the principle has been a positive and central part of EU law right from the beginning, others have dismissed it as an anti-integrationist principle that has very limited legal relevance.[25] According to AG Toth, the inclusion of subsidiarity into EU law has been a 'retrograde step' which runs counter to the integrationist logic of the EU system. He writes: 'Without providing any cure for any of the Community's ills, it threatens to destroy hard-won achievements. It will weaken the Community and slow down the integration process. It will suit those who would like to see the Community move not towards but away from a truly federal structure.'[26] Given that the principle regulates the division of competences between the Union and its member states, it is possible to recognise the disappointment of those who hope for a more closer union of EU states and less emphases on state sovereignty.

On the other hand, it will be an exaggeration to argue that subsidiarity is detrimental to European integration or to the constitutionalism of the Union. Subsidiarity enables decisions to be made by those who would reap the greatest benefit or bear the greatest burden of those decisions. As the recent example of Brexit shows, where states and citizens strongly believe that their power to take such vital decisions and to exercise domestic competences is frustrated or at

[24] ibid 67.
[25] See Antonio Estella, *The EU Principle of Subsidiarity and Its Critique* (OUP 2002) 2.
[26] AG Toth, 'The Principle of Subsidiarity in the Maastricht Treaty' (1992) 29 *Common Market Law Review* 1079, 1105.

risk, integration may pay the price. Hence, some have acclaimed subsidiarity as providing 'a perfect equilibrium between, on one hand, [the Union's] desire that decisions should be taken as closely as possible to citizens [...] and, on the other, their desire that the integration process should continue its normal pace towards the establishment of an ever closer union among the peoples of Europe'.[27]

Relying therefore on the subsidiarity principle as explained, we can envision a division of competences or criminal jurisdictions within the proposed three-tiered ICrimJ model. Adopting this central EU principle does not suggest that there are no basic disparities between the EU system and our hypothetical ICrimJ system. The EU system is essentially an economic union based on a formally agreed two-tier structure between the member states and the Union whereas our model is a quasi-structured linkage between national, regional and 'global' courts concerned with prosecuting and punishing perpetrators of international crimes. Notwithstanding these basic discrepancies, adapting the subsidiarity doctrine to the ICrimJ system could markedly reinforce the global criminal justice architecture. And this could be done in the two following ways.

A. The Primacy of the Territorial State's Courts

Applying the subsidiarity doctrine within a reimagined ICrimJ system would presuppose the recognition of domestic priority in any meaningful response against international crimes. Atrocity crimes do not happen in a vacuum or in extra-terrestrial planes; they occur on states' territories and usually implicate or affect nationals of the territorial (or injured) states. It makes sense then that the territorial states should wield the requisite authority in deciding how to deal with the perpetrators of such crimes. And this may be particularly significant in

[27] Koen Lenaerts and P van Ypersele, 'Le principe de subsidiarité et son context: étude de l'article 3B du Traité CE' (1994) *Cahiers de droit européen* 30(1): 3, 83 [borrowed translation, word in bracket added].

the context of intrastate conflicts and/or in situations where the atrocities occurred within the borders of a single state. In such settings, the subsidiarity doctrine would vindicate the jurisdiction of the injured state's municipal courts as the principal *fora conveniens*[28] for prosecuting the authors of the atrocities.[29]

In addition to the subsidiarity principle, the preference of domestic courts as the appropriate fora in the given atrocity crimes context would be consistent with the major traditional principles of domestic criminal jurisdiction that we examined in Chapter 3. With respect to territoriality, the prohibited conduct would have taken place on the territory of the state. In terms of active nationality, the conduct would have likely implicated the state's nationals. As to the passive and protective nationalities, the consequences of the criminal conduct would have likely injured the state's nationals and her vital interests respectively. Each of these separate legal grounds once satisfied could individually entitle an injured state's courts to hold the suspected perpetrators accountable locally.[30]

Subsidiarity clearly does not suggest the exclusive competence of national courts over international crimes committed locally. Rather, it confirms the jurisdictional priority of the territorial state's municipal courts over international courts and/or the domestic courts of foreign states. It is also an acknowledgement of the territorial courts' geographic proximity to the *locus delicti* (the crime scene).[31] Moreover, subsidiarity affirms the territorial state's competence in terms of familiarity with the local context and as gatekeepers to

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[28] *Fora conveniens* (plural of *forum conveniens*) is a common law expression for courts suitable for an impending litigation.

[29] For analysis of what is implied by convenient and non-convenient forums for litigation, see Donald Earl Childress III, 'Forum Conveniens: The Search for a Convenient Forum in Transnational Cases' (2013) *VA J INT'L L* 53(1): 157.

[30] See Antonio Cassese, *International Criminal Law* (OUP 2003) 277-284.

[31] See Alvarez's comments, noted earlier, on the ICTR's processes and the judicial measures taken in post-genocide Rwanda: José E Alvarez, 'Crimes of State/Crimes of Hate: Lessons from Rwanda' (1999) 24 *YALE J INT'L L* 365, 416.

the victims, affected areas, witnesses, and evidence.[32] The Rome Statute also acknowledges this conception of subsidiarity, albeit without using the term, as it underscores in several places the prime position of states at the vanguard of ICrimJ.[33]

In addition, adapting this notion of subsidiarity to the ICrimJ system would be consistent with the principle of territorial sovereignty,[34] that is, the idea that a state occupies a specific portion of the earth within which it has the competence to exercise authority subject to the limitations of international law.[35] The territorial sovereignty doctrine, which is central to the notion of statehood,[36] has sometimes come under scrutiny as being threatened by the activities of global courts like ICC.[37] In this connection, as we saw in Chapter 2, the need to protect their national frontiers and interests from external interferences involving international courts like the ICC has been a recurring concern for states.[38]

The subsidiarity principle thus would affirm the municipal courts' right of first response in dealing with wholly local situations of atrocities. Allied to this right

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[32] See Neil J Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) *L&CP* 127, 133.
[33] Rome Statute, preamble, paras. 4, 6, 10; arts. 1 and 17.
[34] The sovereign rights of one state impose the duty to respect the rights of other states including the duty to protect alien nationals residing in the host state.
[35] See J L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (OUP 1949) 142; Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law* Vol 1 (9th edn, OUP 1992) 563.
[36] The right of states to non-interference in their territories is protected under Articles 2(4) and 2(7) of the UN Charter and in a number of international instruments including: UNGA Res. 2131 (XX) (Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty) (21 December 1965); UNGA Res. 3314 (XXIX) (Definition of Aggression) (14 December 1974). See also *Corfu Channel Case (UK v Albania)* 1949 ICJ Rep. 4; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* 1986 ICJ Rep 14, para 126.
[37] The US, particularly under George W Bush, has strongly protested what it considers as the ICC's threat to state sovereignty. See the discussion in Chapter 2.
[38] See, for example, John Bolton, 'Full text of John Bolton's speech to the Federalist Society' (10 Sept 2018). <www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html>. Accessed 23 September 2018 [criticising the ICC for seeking to open preliminary investigation into alleged torture and war crimes by US soldiers in Afghanistan]

would be the competence of municipal courts to reject external interference as well as to request external assistance if and when necessary. Such external support can be of a horizontal nature involving other national courts or of a vertical nature involving international criminal courts.[39] As to the vertical liaison, for instance, national courts may refer cases or submit questions of law for clarification, to the ICC.[40] We could liken this to the EU practice whereby member states' courts refer interpretative questions to the Court of Justice of the European Union (CJEU), whose rulings help to foster a fairly uniform reading of EU law among the member states.[41] This brings us to our second key proposal regarding subsidiarity.

B. External Courts as A Necessary Remedy[42]

As stated previously, municipal courts are ordinarily best suited to handle prosecutions involving international crimes committed locally. Yet in certain situations for reasons that will be assessed presently, national courts may be *fora non conveniens* or inconvenient loci to implead certain categories of suspects. The trouble may have nothing to do with the local courts' competence or lack of jurisdiction (*forum non competens*). Rather, the sensitive nature of the cases, the multinational character of the conflict or the suspects, and the ends of justice could motivate the choice of a more suitable forum elsewhere.[43] In such

[39] For an exploration of the horizontal and the vertical links between national and international courts, see Burke-White, 'A Community of Courts' (n 1) 86ff.
[40] ibid 94.
[41] ibid 95; Treaty of Amsterdam, art. 234.
[42] This remedy can be seen in light of a necessary evil with the latter being used here not in a moral or metaphysical sense. It is used rather to note that in certain contexts it may be inconvenient but expedient for states to work with external courts so as to bring some perpetrators to justice. A similar reading of necessary evil can be gleaned from a correspondence by Philip Mazzei with Thomas Jefferson. Mazzei writes: 'Necessary Evils are those which cannot be avoided without incurring greater; Among the necessary Evils are the Laws themselves; because they prohibit us to do certain things, or oblige us to do certain others; and consequently they deprive us of a Portion of Liberty, which is the greatest Good. But what would be the Consequence if we had no Laws?' See Margherita Marchione (ed.), *Philip Mazzei: Selected Writings and Correspondence* Vol I (Cassa di Risparmi 1983) 427.
[43] See *Société du Gaz de Paris v La Société Anonyme de Navigation* (*Les Armateurs Français*) 1926 SCR 13 [This case which confirmed the Scottish private-international law doctrine of *forum non*

scenarios, three types of courts could provide more apposite fora for trials as a necessary remedy, namely: (i) national courts of neighbouring states; (ii) regional criminal courts; and (iii) the ICC. We will consider each of these options in turn.

I. National Courts of Neighbouring States

Every sovereign state ideally should have the domestic capacity to deal with all grave breaches of international criminal law that occur within their borders. Such a plan will be in conformity with the subsidiarity regime and will also enable enforcement to occur, in Burke-White's view, 'as close to the affected populations as considerations of justice and fairness will allow.'[44] In reality, however, there may be circumstances where it might be prudent or perhaps necessary for a stricken state to reach out to the national courts of its neighbours for assistance.

One situation can be a formal request by the stricken state to willing neighbours to apprehend and prosecute or extradite fugitive suspects residing in the neighbours' territories. It is common for suspects implicated in atrocity crimes to flee to neighbouring states and, occasionally, suspected perpetrators may even regroup, plan and launch attacks on their home states from their hideouts in neighbouring states. It is likely that where good neighbourliness exists between an embattled state and its neighbours the latter would hardly allow serious international criminal suspects to hide in their states or to use their territories to cause havoc in the other state. Hostile neighbours in contrast might offer sanctuary to, or encourage, perpetrators to intensify hostilities in their home states. While this logic may be all sound, it is still true that few states have the capacity to effectively police their frontiers. And, as such, certain criminal

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conveniens concerned a vessel of French origin (*Les Armateurs Français*) that was impounded in Scottish territory by its French pursuers following a contractual breach. The Scottish Court of Session reasoned that the proper forum for litigating the case should be in France not Scotland. For Scottish precursors of the doctrine, see *Clemens v Macaulay* [1866] 4 M 583; *Sims v Robinow* [1892] 19 R 665]

[44] Burke-White, 'A Community of Courts' (n 1) 87.

elements may still slip through the cracks irrespective of good neighbourliness or the robustness of the existing immigration and border security arrangement.

Nevertheless, the request to prosecute or extradite is consistent with the international law principle of '*aut dedere aut judicare*' (extradite or prosecute), which requires a custodial state to either prosecute suspects or extradite them to a requesting state with the relevant jurisdiction.[45] As suggested, it differs to the situation from the ICJ's case between Senegal and Belgium concerning Hissène Habré.[46] In that case, Belgium requested Senegal to either prosecute Habré or extradite him to Belgium for trial involving charges of torture and crimes against humanity pursuant to Article 30(1) of the 1984 Torture Convention.[47] As it happens, the directly injured state in that case was Chad not Belgium given that the charges concerned Habré's responsibilities as Chad's leader during the 1980s. Belgium's only jurisdictional link to the case was based on universal jurisdiction. That Belgium lost the case is thus unsurprising. The outcome might have been different had Chad been the complainant against Senegal. A putative Chadian request to Senegal to either prosecute or extradite Habré to Chad would have been in accord with the model under review.

Relatedly, an embattled state might also formally request a willing and able neighbour to help with prosecuting particular cases that may be too contentious to deal with locally. The point here being that high-profile cases involving top political and/or military personnel tend to stir up divisive partisan interests among the local populace including the local judiciary to the effect that the

[45] The principle was originally suggested by Hugo Grotius as '*aut dedere aut punire*': 'When appealed to, 'a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal.' See Hugo Grotius, *De Jure Belli ac Paci*, Francis W Kelsey (trans), (Clarendon Press 1925) Bk II, Ch. XXI, sect. IV, 527.

[46] *Questions relating to the Obligation to Prosecute or Extradite (Senegal v Belgium)*, Judgments, 2012, ICJ Rep 422 [hereafter *Senegal v Belgium* case]

[47] The ICJ hinted that the 'prosecute or extradite' principle was drafted into the Torture Convention because the states parties had 'a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity'. See *Senegal v Belgium* case (n 46) 449, para. 68

local courts might prove inapt for such trials. Although this approach might seem novel in terms of ICrimJ, the right of states to request external help from other states is established in the field of international humanitarian law. For example, in a report on 'the Problem of Hungary',[48] the UNGA enjoins states to confirm the legality of an invitation before sending forces into a foreign state on request. And, in the *DRC v Uganda* case, the ICJ held that a state cannot commit an armed attack against another state that consents to the conduct in question.[49]

Alternatively, a regional authority like the Organisation of American States could instruct a state neighbouring the injured state, and with the latter's consent, to lend its courts for the relevant assistance to hold the suspects accountable.[50] Under this arrangement, certain indicted suspects, if apprehended on the home territory or elsewhere, would have to be transferred to the nominated state for trial. The injured state, the nominated state, and the regional body would be required to agree the status and judicial composition of the nominated tribunal. That is, whether it would be a specialised domestic court or a mixed regional court with select judges from other states within the region.[51] In regions that have no RCC or where the injured state is a non-ICC state party, such supplementary enforcement system might be acutely appealing. But where an RCC exists, the latter could provide another fitting locus for extra-territorial trials.

[48] UNGA, 'Report of the Special Committee on the Problem of Hungary' (1957) (Eleventh Session Supplement, No. 18 (A/3592) Ch VI, H5.
[49] *Armed Activities on the Territory of the Congo (DRC v Uganda)*, 2005, ICJ Rep 168, para. 149.
[50] The Hissène Habré's case noted earlier can be compared to this. The difference, however, is that the Senegalese court was dubbed an 'Extraordinary African Chamber' and was supervised not only by AU but also by the EU which provided most of the funding.
[51] There will also be practical issues to do with funding the delegated judicial arrangement. Unless the delegated state accepts to fund it, all the relevant players would need to agree on a workable model of financial contributions and judicial cooperation from the regional states.

II. Regional Criminal Courts

A regional criminal court, if extant, could serve as another suitable forum for dealing with certain atrocity crimes committed within national territories. With respect to priority of jurisdiction, an RCC would likely fall behind the national courts of the injured state and the requested and/or nominated courts of neighbouring states. But this is not to imply that all these possible players could not engage concurrently in the situation with each dealing with its specific concerns whilst sharing pertinent contact with the other partners.[52] In fact, within specific contexts the aid or intervention of an RCC may be inevitable.

First, where two or more states within the same region are engaged in interstate aggression, the judicial intervention of a credible and independent outsider, perhaps the applicable RCC or the ICC, may provide the only likelihood of genuinely instituting and achieving international criminal accountability. In such a context, the RCC could use its international status and credibility to urge the national courts to bring the perpetrators to justice and to moderate possible overlapping or conflicting jurisdictions of the national courts. The RCC could also champion the trial of senior officials whose local prosecution might portend security risks within the states or in the region.

Second, achieving peace in some conflicts occasionally requires the deployment of peacekeepers under the aegis of the United Nations, a regional authority, or a joint partnership between the UN and a regional body. Given that peacekeeping mandates usually originate from powers external to the host state, it would be reasonable that grave breaches of international law by service personnel in carrying out such missions should be dealt with by a lawful authority external to the host state, such as an RCC or the ICC. Such extraterritorial trials could

[52] The situation in the former Yugoslavia serves as an example of national courts of many states collaborating with an international court, the ICTY, concurrently to hold perpetrators accountable for mass atrocities.

guarantee equal treatment of indicted peacekeepers regardless of their nationalities and could thereby reduce the odds of accusations of unfairness or revenge by trials in the host state or of amnesty or inaction in the hands of the sending state. Recall here that many states decried the US-sponsored Res 1422 and 1487,[53] because of the 'deep injustice'[54] of discriminating between peacekeepers from sending states that are ICC states parties and those that are not.

Above all, preserving the integrity of ICrimJ and the credibility of the local enforcement processes might require that the relevant RCC occasionally review the admissibility of notorious cases being ignored by national courts and request that the cases be prosecuted or transferred to the RCC.[55] Also, as Michael Plachta argues in another context, the divergences posed by differing legal systems at the national level pose difficulties that could best be harmonised or rectified at the regional level.[56] An RCC could thus serve as a judicial conduit for interaction especially between national courts of hostile neighbours within the relevant region to expedite extradition procedures and/or inter-curial communications.

III. The International Criminal Court

A strict practice of the subsidiarity rule could broaden ICL enforcement at the national and regional tiers but might lessen such enforcement at the global tier that is symbolised by the ICC. The latter's limited involvement would likely be more profound in those regions of the world that operate autonomous RCCs and

[53] UNSC Res 1422, which was renewed a year later in Res 1487, marks the first and only time Article 16 of the Rome Statute has been activated. It was sponsored by the US and it required the ICC to defer tackling cases involving peacekeepers from non-ICC states parties for a period of one year unless otherwise instructed by the UNSC. See Carsten Stahn, 'The ambiguities of Security Council Resolution 1422' (2003) *EJIL* 14(1): 85; Charles Chernor Jalloh, Dapo Akande and Max du Plessis, 'Assessing the African Union Concerns About Article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *AJLS* 5, 17.
[54] UN SCOR, 58th Sess., 4772nd Meeting, UN Doc. S/PV.4772 11 (12 June 2003).
[55] We will return to this later in the section on complementarity.
[56] Michael Plachta, 'European Arrest Warrants: Revolution in Extradition?' (2003) *EJC, CL&CJ* 11(2): 178, 179.

that implement the range of alternatives to distant prosecutions earlier canvassed. But, as will be argued in section 5.2.3, reduction in the volume of cases that appear before the ICC could enable the court to harness its forces in championing fairness in ICrimJ enforcement globally. It would also most likely help to banish or at least weaken the recurrent portrayal of the ICC within certain circles as a judicial tool of globalist 'hegemony for powerful states.'[57]

At the same time, the ICC's status as a global court, in contrast to the autonomous RCCs, arguably imbues the ICC with a relative measure of neutrality in the context of atrocities committed during intra-regional or interstate crises that could test the neutrality and credibility of the appropriate RCC. For instance, the crisis in the Democratic Republic of the Congo (DRC) during the late 1990s to the early 2000s[58] involved at least nine African states including Rwanda, Uganda, Burundi, Angola, Namibia, Sudan, Ethiopia, Zambia, and Zimbabwe. About twenty different armed militias also were engaged in the hostilities while the UN had peacekeepers (MONUC)[59] on the ground.[60] Most of the contending states share land borders with the DRC while several of them are also neighbours within the East African community.

Within such a complex regional crisis, in contrast to the intervention of a putative African RCC operating from Arusha in Tanzania, the ICC could be in a stronger position of neutrality to investigate the criminal accountability of those most responsible for the atrocities in the respective states. This is because the feuding states might otherwise attempt to hinder the local RCC from asserting

[57] See Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 *AJIL* 7, 30.
[58] It was for his role in this crisis and its aftermath that the ICC's premier defendant, Thomas Lubanga, was convicted in 2013.
[59] MONUC stands for Mission de l'Organisation des Nations Unies en République Démocratique du Congo. It was succeeded in 2010 by MONUSCO – Mission de l'Organisation des Nations Unies pour la Stabilisation de République Démocratique du Congo.
[60] On the involvement of several states and the UN in the crisis, see generally Filip Reyntjens, *The Great African War: Congo and Regional Geopolitics, 1996-2006* (CUP 2009).

jurisdiction over the situation. And even if the RCC's jurisdiction were not upended, the judicial process could become frustrated by political interferences from the opposing states. Although the ICC's process would also not be invulnerable to political interference, in this instance, its relative remoteness from the crisis as well as its brittle link with the UNSC might offer it relative safety from regional political meddling.

In like vein, the ICC might also be well positioned to pursue the accountability of peacekeepers accused of grave wrongdoing. As earlier highlighted, international peacekeepers ordinarily may also be prosecuted by RCCs in light of the latter's supposed superior neutrality and credibility vis-à-vis municipal courts of embattled states. In addition to the RCCs, therefore, the ICC could be a fitting forum for resolving complex regional situations such as the DRC. The ICC may also occasionally invite or encourage an RCC with the relevant jurisdiction to transfer hard cases that pose grave security threats to the region.

Additionally, in the regions that we propose to classify under the United Nations' mandates for the purposes of ICL enforcement, that is, regions that do not operate autonomous RCCs, the ICC could serve as their court of last resort.[61] Of course, the proposals relating to the ICC would have to adhere to the rules around the triggering mechanisms specified under Article 13 of the Rome Statute as well as to the rules regarding admissibility. Further degrees of cooperation between national courts, the RCCs, and the ICC could be strengthened by the complementarity principle, to which we turn next.

5.2.2 The Complementarity Principle

Whereas the subsidiarity doctrine seeks to boost decision-making at the local or national level, the complementarity principle aims to support the efforts of

[61] See the discussion in Chapter 4.

national systems to plug impunity gaps in ICL enforcement.[62] Like the subsidiarity rule, complementarity prioritises domestic measures in the enforcement of ICL.[63] But, unlike the subsidiarity regime, national systems may attract sterner external scrutiny under a complementarity regime. The object of this section is to examine the ways in which the Rome Statute's doctrine of complementarity can be adapted to support our reimagination of the ICrimJ system. To begin, let us consider the meaning and import of complementarity.

5.2.2.1 Complementarity in the Rome Statute

Complementarity is a major theme in the Rome Statute where it underlines one of the quintessential interstices in ICL – the interface between national and international criminal jurisdictions. According to the ICC's founding treaty, the central objective of the court is to put an end to impunity by ensuring that 'the most serious crimes of concern to the international community as a whole' are investigated, prosecuted, and punished.[64] But attaining this objective, as the Rome treaty acknowledges, would involve complementary interactions between the ICC and national systems with the latter preferred to be at the vanguard of enforcement efforts whereas the ICC would step in when national systems are deemed unable or unwilling to fulfil the relevant ICL obligation.[65] This suggests, as Geoffrey Bindman notes, that neither system can work effectively in isolation.[66]

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[62] See ICC-OTP, 'Paper on some policy issues before the Office of the Prosecutor' (September 2003) 7 <www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa96-2ed8b6/143594/030905_policy_paper.pdf> Accessed 12 December 2019.

[63] Alexander KA Greenawalt, 'Justice Without Politics?: Prosecutorial Discretion and the International Criminal Court' (2007) 39 *NYU J INT'L L & POL* 583, 593. See also Burke-White, 'Community of Courts' (n 1) 86.

[64] Rome Statute preamble, paras. 4 and 5.

[65] ibid, para. 10; arts. 1 & 17.

[66] Sir Geoffrey Bindman, QC, quoted in J H Jeffery, 'Opening statement by Mr. J.H. Jeffery, MP, Deputy Minister of Justice and Constitutional Development, Republic of South Africa, at the General Debate: Twelfth meeting of the Assembly of States Parties of the International Criminal Court, The Hague, 20-28 November 2013' <www.justice.gov.ca/m_speeches-2013/20131120-ICC.html> Accessed 23 January 2018.

In other words, notwithstanding its grand place in the global criminal justice system, the ICC represents only the pinnacle of a pyramid of courts that share, or ought to share, mutual responsibility for combatting international crimes. As such, Bindman cautions:

> It would be absurd to imagine that a single court in The Hague could ever have the capacity to put on trial all those suspected of human rights abuses throughout the world. The ICC was never meant to displace the responsibility of every individual state to bring such criminals to justice within its own domestic courts.[67]

In basic terms, as the ICC's Pre-Trial Chamber puts it, '[c]omplementarity is the principle reconciling the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes'.[68] It is the outcome of the compromise reached in Rome to accommodate States' sovereignty concerns on the one side and the overarching ambition to stamp out impunity on the other. For Kaul and Chautidou, consensus on complementarity 'was the *conditio sine qua non* for convening the Rome Conference, the adoption of the Statute, and the subsequent establishment of the Court.'[69] Hence, the principle was favoured over that of concurrent jurisdiction, adopted for both the ICTY and the ICTR, which gave primacy to those ad hoc tribunals over national jurisdiction.[70]

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[67] Ibid.
[68] *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (Decision on the admissibility of the case under Article 19(1) of the Statute) ICC-02/04-01/05-377, Pre-Trial Chamber II (10 March 2009) para 34 [hereafter *Prosecutor v Kony*].
[69] Hans-Peter Kaul and Eleni Chautidou, 'Balancing Individual and Community Interests: Reflections on the International Criminal Court' in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Kahn, Andreas Paulus, Sabine von Shorlemer, and Christoph Vedder (eds.), *From Bilateralism to Community Interests: Essays in Honour of Judge Bruno Simma* (OUP 2011) 980.
[70] Ibid.

As Mark Ellis explains, the complementarity rule upholds the duty or prerogative of states to initiate criminal action against suspected perpetrators of atrocities.[71] But when the opportunity to take that initiative is deemed to have been squandered through lack of the political will to act, and/or the absence of the enabling capacity to adjudicate, the ICC may intervene.[72] Extensive details of this complementarity rule are set out under Article 17 of the Rome Statute. Darryl Robinson has argued however that many commentators misinterpret the 'unambiguous text' of Article 17 when they mysteriously question the ICC judges' reading of the text to justify the court's admission of cases in the absence of national proceedings.[73] The ICC's Appeals Chamber has clarified this 'mystery' in *Germain Katanga*: 'If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in.'[74]

Whether the court would admit a case or not would depend on the circumstances of each case. In fact, the ICC may even 'decide not to act upon a State's relinquishment of jurisdiction in favour of the Court.'[75] Certain admissibility criteria thus underpin the complementarity principle and enable the ICC to determine in respect of a given case, 'whether it is for the national jurisdiction or for the Court to proceed.'[76] By means of this apparent burden-sharing strategy, as noted earlier, the complementarity doctrine strives to maintain 'a balance between safeguarding the primacy of domestic proceedings' and realising the Rome Statute's goal of eradicating impunity.[77]

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[71] See Mark S Ellis, 'The International Criminal Court and Its Implication for Domestic Law and National Capacity Building' (2002) 15 *Florida Journal of International Law* 215, 221.
[72] Rome Statute, art. 17.
[73] Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *CRIM LF* 21(1): 67.
[74] *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (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) ICC-01/04-01/07-1497, Appeals Chamber (25 September 2009) para 85 [hereafter *Katanga* Admissibility].
[75] Ibid.
[76] *Prosecutor v Joseph Kony* (n 68) para 34.
[77] *Katanga* Admissibility (n 74) para. 85.

The prioritisation of national jurisdictions within the complementarity scheme can be said to resonate with the broader leitmotif of the subsidiarity doctrine. An early form of complementarity rule (albeit untitled as such) proposed in the context of the post-WWII Nuremberg IMT reads: 'As a rule, no case shall be brought before the Court when a domestic Court of any of the United Nations has jurisdiction to try the accused and it is in a position and willing to exercise such jurisdiction'.[78] The International Law Commission (ILC) would subsequently introduce the complementarity principle into its Draft Statute for the future ICC so as to enable the court to dismiss inadmissible cases.[79]

Where complementarity departs from subsidiarity is in the fact that complementarity involves regular assessments by an external body (the ICC) of the reality, lack, or genuineness of national processes against authors of atrocity crimes. States are typically required to provide concrete and pertinent evidence that proper investigations are ongoing[80] once the ICC has satisfied itself that crimes within its jurisdiction had occurred and that there exist reasonable bases to commence investigation.[81] Where the local processes are deemed unsatisfactory, the ICC may decide ways and means of engaging with the national authorities.[82] Even if a national system has been determined to be

[78] United Nations War Crimes Commission, Appendix II – Draft Convention for the Creation of an International Criminal Court, (Drafted by the Chairman, Marcel de Baer, and amended by Commission I of the LIA), SC II/2, 14 February 1944, art. 3(1) in Marcel de Baer (ed.), *Reports of Commission I – formerly Commission II on the Trial and Punishment of War Criminals* (London International Assembly 1944).
[79] See Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2019) 222.
[80] See *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senusi*, ICC-01/11-01/11-344-Red, FB-PT, 'Decision on the admissibility of the case against Saif Al-Islam Gadaffi', Pre-Trial Chamber I, 31 May 2013, para. 73. See also Rome Statute, art. 18(4) & (5).
[81] Rome Statute, arts. 15, 18, & 19; *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-33 (12 April 2019) paras. 25 & 72. [hereafter *Situation in Afghanistan*]
[82] Occasionally, the ICC may decide to close or suspend its investigation despite the admissibility of the situation due to substantial political pressures, serious technical difficulties like the paucity of evidence, the safety of witnesses and victims, and/or the interests of justice. Recently, for instance, the ICC referenced 'the interests of justice' as a major factor in its decision to

genuinely investigating, the OTP is required to continuously review and verify the progress of the investigations.[83] In contrast, the subsidiarity principle permits local authorities to decide independently how to deal with the atrocities occurring locally, which includes the freedom to invite or to reject external aid.

In the praxis of complementarity, what may be termed a subtle carrot-and-stick tactic is occasionally employed to ensure compliance. On the one hand, the OTP has formalised a policy of positive complementarity by which it extends relevant assistance to national courts in a bid to boost the latter's familiarity with the ICC's processes and to support their efforts against the crimes within the ICC's jurisdiction.[84] Such aids usually comprise technical guidance, evidence-sharing and capacity-building.[85] On the other, especially in UNSC-referred situations as in Sudan and Libya, the UNSC and the EU have at times applied a raft of sanctions on prominent local officials to enforce the regimes' compliance.[86] Given the lack of progress at the ICC in both situations, there is little evidence to suggest that the use of sanctions bolsters the practice of complementarity; they may in fact constitute a major obstacle to achieving positive complementary although certain sanctions sometimes tend also to target peace-enforcement.

According to Nidal Jurdi, the complementarity doctrine is much more than a mere jurisdictional filter or a mechanism for resolving disputes between national courts and the ICC.[87] In a sense, the praxis of complementarity appears

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dismiss the request to commence investigation in Afghanistan although this ruling was later reversed by the Appeals Chamber. See *Situation in Afghanistan* (n 81) paras. 87-96.

[83] *Situation in Afghanistan* (n 81) para. 73.

[84] See The Office of the Prosecutor, *Prosecutorial Strategy*, International Criminal Court (1 February 2010) <www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> § 5. Accessed 12 Dec 2019.

[85] ibid § 17.

[86] For the Sudan (Darfur) referral, see UNSC, UN Doc. S/RES/1593 (31 March 2005); for the Libya referral see: UNSC, UN Doc. S/RES/1970(2011) (26 February 2011).

[87] See Nidal N Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship* (Ashgate 2011) 164-65. See also Stahn (n 79) 223.

to blend with the so-called 'responsibility to prosecute'[88] which in turn is an offshoot of the emerging international humanitarian law norm of responsibility to protect (R2P).[89] The latter permits states to back humanitarian interventions in other states during internal strife in a bid to halt or avert humanitarian disasters and gross human rights abuses if the national authorities are unable or unwilling to do so.[90] The UNGA's 2005 'World Summit Outcome' declaration frames the R2P doctrine thus:

> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means…. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council … and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[91]

The R2P doctrine is still an unsettled doctrine and so comparing it to the complementarity doctrine may be moot. Whereas both norms may share certain basic operational premises, the fact the ICC does not command comparable enforcement systems as states, the UN, or regional organisations might be raised by critics to counter the said capacity of the ICC to project a palpable degree of

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[88] It is generally seen as a parallel obligation of the international community, alongside the R2P, to prosecute those responsible for committing grave international crimes.

[89] On the link between the responsibility to protect and responsibility to prosecute, see Kurt Mills, *International Responses to Atrocities in Africa: Responsibility to Protect, Prosecute and Palliate* (University of Pennsylvania Press 2015).

[90] For a cautionary commentary on this point, see Benjamin N Schiff, 'Can the International Criminal Court contribute to the Responsibility to Protect?' (2016) *International Relations* 30(3): 298.

[91] UNGA, RES 60/1, 'World Summit Outcome' (24 October 2005) paras. 138-39. See also UNGA, UN Doc. A/63/677, *Implementing the Responsibility to Protect*: Report of the Secretary-General (12 January 2009) § 19 [urging states to assist the ICC to apprehend suspects and to end impunity.]

soft and hard power in its relations with states. Yet, according to John Holmes, chair of the committee that drafted the Rome Statute's complementarity provision, the latter provision was deemed apposite 'to fill the gap where States could not or failed to comply' with their responsibility under international law.[92]

In addition, the ICC's dominance in the existing ICrimJ set-up sometimes entails that its negative assessment of a state's compliance with the Rome Statute might adversely impact the regime's international reputation or diplomatic relations. Such subtle but real power wielded by the court is not to be underestimated. It is small wonder, for Sarah Nouwen, that the ICC's complementarity practice, which arguably parallels the R2P doctrine, has at times proved problematic in several states where the court has intervened as it has appeared to undermine the primary responsibility of the states and the resilience of those it alleges to protect and sometimes to intensify conflicts.[93]

Another important aspect of complementarity relates to the growing construal of the ICC as a court of last resort.[94] As Margaret de Guzman puts it, the standard view construes national courts as holding superior fora for adjudicating international crimes given their greater proximity to the most affected population, the victims, and the evidence, as well as their greater capacity to handle more cases.[95] However, de Guzman further argues that complementarity was drafted into the Rome Statute as a form of backstop to reassure states that had concerns with ceding sovereignty to an international institution. As such, in

[92] John T Holmes, 'Principle of Complementarity' in Roy S Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer International 1999) 74.
[93] Sarah M H Nouwen, 'Complementarity in Practice: Critical Lessons from the ICC for R2P' (2010) 21 *Finnish Yearbook of International Law* 53. See also Frédéric Mégret, 'ICC, R2P, and the International Community's Evolving Interventionist Toolkit' (2010) 21 *Finnish Yearbook of International Law* 21.
[94] See Errol P Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (EE Publishing 2010).
[95] Margaret de Guzman, 'Complementarity at the African Court' in Charles C Jalloh, Kamari M Clarke and Vincent O Nmehiele (eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Developments and Challenges* (CUP 2019) 664.

her view, the 'court of last resort' approach to complementarity serves to subordinate the ICC to national courts in a hierarchical order of relationship.[96]

That said, de Guzman appears to misread the ICC's place vis-à-vis national courts as to hierarchical order. Several provisions in the Rome Statute requiring the ICC to assess the authenticity of national processes, and to assert its jurisdiction if those processes are found to be inactive or inadequate, suggest the superiority of the ICC over national courts.[97] It is the ICC which decides whether or not states are acting in good faith but the reverse is not the case. In like vein, Larry May and Shannon Fyfe have argued thus:

> The fact that the state has ratified the Rome Statute, with its complementarity principle, seems to mean that the state has agreed to let the ICC overrule it in certain matters. But the fact that it is the ICC that decides whether the principle of complementarity has been satisfied means that the ICC does indeed overrule the decisions of the states, seemingly placing itself procedurally above the state and apparently abridging the state's sovereignty.[98]

To a certain extent, national courts may be compared to courts of first instance in the domestic setting while the ICC arguably resembles courts of last instance such as Supreme Courts.[99] Additionally, the ICC can be visualised as a 'lender of last resort' like national central banks vis-à-vis commercial banks,[100] with the ICC able to lend its competence and assistance to national systems if the latter are

[96] ibid 665.
[97] See, for examples, Rome Statute, arts. 15, 17, 18 & 19.
[98] Larry May and Shannon Fyfe, *International Criminal Tribunals: A Normative Defense* (CUP 2017) 39.
[99] This is an imperfect analogy, but it shows that just as the Supreme Courts can call for cases to be retried and/or can dismiss appeals, the ICC can admit or reject cases from national systems. The latter do not enjoy equal or comparable supervisory powers vis-à-vis the ICC.
[100] Central banks often act as 'lenders of last resort' in situations where there is a general lack of liquidity among national banks by providing funds to make up for the temporary short fall. See Andrew B Abel and Ben S Bernanke (eds.), *Macroeconomics* (5th edn, Pearson 2005) 522-532.

genuinely unable to manage. In any case, the prime question to engage us in the next subsection is how the existing framework of complementarity relations between the ICC and national courts can be impacted if a system of RCCs is introduced.

5.2.2.2 Reconceptualising Complementarity in a New Global Justice Context

This section examines how the complementarity doctrine can be adapted to operate within an enhanced three-tier global justice system featuring national, regional, and global criminal courts. The analysis will be hypothetical nonetheless considering that any given RCC would likely have a unique set of rules and procedures on complementarity, which may or may not cover all the issues under review here. With that said, the proposed criminal section of the African Court of Justice and Human and Peoples' Right [ACJ] appears poised to become the first major RCC in history. Its amended Protocol has a set of provisions on complementarity, which will inevitably come under scrutiny in this treatise.

Thus far we have established that a regime of permanent RCCs will add a new layer to the range of available tools and fora for tackling international crimes. It remains to be considered whether or how the complementarity rule can support relations between future RCCs and other related courts. In light of current advances in international law and considering Geoffrey Bindman's earlier observation that modern courts tasked with enforcing ICrimJ can hope to succeed in mutual isolation,[101] it is hard to imagine an RCC or any international criminal court working without a complementary interaction with at least national systems. On the contrary, the creation of RCCs would likely initiate a triple structure of complementarity into ICL practice. The rest of this chapter will describe how such a tripartite complementarity framework can be designed.

[101] See Bindman (n 66).

A. First-tier Complementarity: Future RCCs and National Courts

The first tier of complementarity would conceivably exist between an RCC and the national courts of its states parties. There are at least two major objects that support this supposition. The first is the strong accent in ICL on the geographic proximity principle, that is, on having trials closer to the injured communities and the crime scenes.[102] To that effect, closer working contacts between national courts and the relevant RCC would likely strengthen the objectives of international criminal law. The second object is suggested by the subsidiarity principle under which it was argued that national courts followed by the RCCs can command priority of criminal jurisdiction in situations transpiring in the specific regional areas. What then would first-tier complementarity be likely to consist of?

To begin with, first-tier complementarity, as implied in the Rome Statute, would mean that national courts have the primary duty to prosecute and punish the relevant offenders.[103] However, in situations where states prove unable or unwilling to assume that responsibility,[104] the RCC in the region may assert its jurisdiction. In other words, based on the principles of proximity and subsidiarity, as earlier noted, the appropriate RCC would be best placed to respond ahead of the ICC and/or other related distant criminal courts whenever national courts within specific regions are deemed to be inactive in dealing with the pertinent atrocity situations. The recognition of this order of complementarity could help to avert possible conflicts of jurisdiction particularly between external courts like the RCC and the ICC that may be mutually interested in the same situation.

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[102] See Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (CUP 2011) 30; John Hopkins, 'What's Wrong with Regionalizing International Criminal Law?' (2007) 4 *NZYIL* 85, 95.
[103] See Rome Statute, preamble, paras. 4 & 6.
[104] ibid art. 17.

It is rather curious that the Malabo Protocol of the proposed ACJ appears not to anticipate such potential conflicts of jurisdiction between the ACJ and the ICC and thus specifies no solutions. Yet, as de Guzman aptly observes, it is likely that at some point both courts 'will seek to exercise jurisdiction over the same case and priorities will have to be determined.'[105] Also, perhaps more curiously, the entire Malabo Protocol contains not even a solitary mention of the ICC. Whereas the Protocol amply restates the text of the Rome Statute in several sections, the AU's often combative relationship with the ICC perhaps explains, although it does not justify, the Protocol's silence on both the Rome Statute and the ICC.[106]

Article 46H of the Malabo Protocol sketches the ACJ's complementarity regime and sets out the conditions for inadmissibility of cases. Paragraph 1 of Article 46H provides that the ACJ's jurisdiction 'shall be complementary to that of the National Courts' as well as 'to the Courts of the Regional Economic Communities where specifically provided for by the Communities.' The Protocol thus envisages a three-pronged complementarity between national courts, the ACJ and rival regional courts, but the ICC is out of the equation.[107] This further complicates the potential jurisdictional logjam as there is also no precision as to the priority of jurisdiction between the ACJ and its rival regional courts. Scenarios in which differing courts bicker over priority or legitimacy of jurisdiction over cases or situations could damage the credibility of the ICrimJ process and could thereby impair the chances of attaining the set ICL objectives.

Minus its opening paragraph, the rest of Article 46H of the Malabo Protocol simply reiterates Article 17 of the Rome Statute on admissibility issues. Such

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[105] de Guzman (n 95) 663.

[106] On the rift between the AU and the ICC, see for example, Patryk I Labuda, 'The International Criminal Court and Perceptions of Sovereignty, Colonialism and Pan-African Solidarity' (2014) 20 *AFR YB INT'L L* 289; Mahmood Mamdani, 'Darfur, ICC and the new humanitarian order: How the ICC's "responsibility to protect" is being turned into an assertion of neocolonial domination' (*Pambazuka News* 17 September 2008) <www.pambazuka.org/governance/darfur-icc-and-new-humanitarian-order>. Accessed 12 December 2019.

[107] See more discussion on constructive complementarity in subsection 5.2.2.2 C.

apparent concordance is positive as it could help to spawn consistency in the development of international criminal law. For example, paragraph 2 of Article 46H specifies the following conditions for inadmissibility of cases at the ACJ:

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.[108]

Like the Rome Statute, the Malabo Protocol further identifies that bogus proceedings aimed at shielding suspected persons from criminal responsibility would contravene international principles of due process.[109] In such circumstances, as well as in situations of unjustified delay to launch proceedings[110] and/or where the proceedings were or are being conducted unfairly,[111] the cases will be admissible at the ACJ. Consistent with the *ne bis in idem* doctrine, as reviewed in Chapter 3,[112] the ACJ Statute also provides that cases already prosecuted by other courts will be inadmissible before the ACJ except where those proceedings were conducted unfairly or for the purposes of

[108] Malabo Protocol, art. 46H, para. 2; compare Article 17 (1) of the Rome Statute (n 55).
[109] Malabo Protocol, art. 46H (3)(a). See also Rome Statute, art. 17(2)(a).
[110] Malabo Protocol, art 46H(3)(b).
[111] ibid art 46H(3)(c).
[112] This Latin maxim is a legal principle which prohibits double jeopardy. See Chapter 3.

shielding the relevant persons from justice for crimes within the ACJ's jurisdiction.[113]

It is worth noting however that future RCCs within the new ICrimJ system would be likely to be specialised criminal courts not omnibus courts. As such, they will be qualified to handle specific international crimes and perhaps certain core regional crimes. Their jurisdiction thus will be unlikely to cover ordinary crimes or purely human rights cases. Yet, Article 3 of the Malabo Protocol suggests otherwise. It states: 'The Court has jurisdiction to hear such other matters or appeals as may be referred to it in other agreements that the Member States or the Regional Economic Communities or other international organizations recognized by the African Union may conclude among themselves, or with the Union.'[114] The lack of precision on 'such other matters or appeals' hints that the ACJ could be shackled with a host of issues that would be likely to drain the court's resources or undermine its ability to sustain requisite international standards.[115]

Another important point is that future RCCs may be able to exercise jurisdiction only in those states that have expressly authorised them to do so through the process of ratification of, or accession to, the relevant court's treaty. By implication therefore the RCCs will have no universal jurisdiction to intervene in any state or region where crimes within their jurisdiction had transpired. For example, except under special arrangements,[116] the ACJ cannot entertain cases from victims of atrocities committed in Chile. As an African court, the ACJ's remit will be limited to Africa whereas cases in Chile may be admissible before either

[113] Malabo Protocol, art 46I.
[114] ibid art. 3(2).
[115] Margaret de Guzman also notes that the broad spectrum of the ACJ's subject-matter jurisdiction might affect the court's ability to develop a gravity jurisprudence based on sound criteria for gravity analysis. See de Guzman (n 95) 663.
[116] One example of this could be by the UNSC referring cases to the RCC, but it is unclear what form of link would exist between the UNSC and the RCCs. Another example, as we saw under the subsidiarity principle, could be by an express request for the ACJ's help by the State of Chile.

the ICC or an RCC for the Americas. The question can be raised regarding crimes committed in foreign regions that involve nationals of states parties to a foreign RCC either as victims or perpetrators. It might be best to try such cases locally before national courts that hold the relevant jurisdiction or to refer them to the ICC.

B. Mixed Complementarity: the ICC and National Courts

A mixed complementarity model in the new enhanced global justice system would probably define the new form of interaction between the ICC and national courts pursuant to Article 13 of the Rome Statute. Mixed complementarity suggests that the ICC would potentially exercise either first-tier or second-tier complementarity with national courts in given circumstances. In essence, first-tier complementarity would reflect the existing complementarity system between the ICC and national courts within the terms of the Rome Statute whereas second-tier complementarity would require a shift in jurisdictional exercise to adapt to the reality of the RCCs and to forestall jurisdictional conflicts with the RCCs. We will now attempt to address potential difficulties as to which states enjoy first-level or second-level complementarity with the ICC.

I. First-Tier Complementarity with the ICC

In terms of first-tier complementarity at the ICC, three scenarios are possible. First, it may prevail between the ICC and national courts of Rome Statute member states within specific regions that have no RCCs. The lack of an RCC in those areas would eliminate a mid-level jurisdictional buffer thereby affording the ICC a direct access to the national courts. Second, first-tier complementarity may also subsist in the contacts between the ICC and the national courts of the ICC's states-parties in certain regions operating RCCs where the relevant states

are not members of the pertinent RCC. The third scenario can occur between the ICC and national courts in any non-RCC states referred to the ICC by the UNSC.[117]

In each of the three scenarios above, pursuant to Article 19(1) of the Rome Statute, the ICC 'shall satisfy itself that it has jurisdiction in any case brought before it'. Having jurisdiction over a case is a preliminary procedure; it does not guarantee the case's admissibility at the ICC. Under Article 17, as we saw earlier, the ICC must concede priority of jurisdiction to national courts unless it is manifest that the state with the relevant jurisdiction is 'unwilling or unable genuinely to carry out the investigation or prosecution'.[118] First-tier complementarity thus serves, in Philippe Sands' view, to restrain the ICC from delving into situations within its statutory competence if they are being handled or have been concluded by a state with the relevant jurisdiction.[119] This provisional restraint will be abandoned nevertheless to pave way for the ICC's exercise of jurisdiction if the proceedings by the national systems are subsequently deemed to have been biased, a sham, or unjustifiably delayed.[120]

In addition, first-tier complementarity enables the ICC to share the burden of investigating and prosecuting relevant offenders with national courts in given situations. It does not imply the ICC can or will assume full responsibility for the entire criminal adjudicatory process. As Kai Ambos aptly observes, the reality is that the ICC cannot singly prosecute all suspected or potential perpetrators of international crimes.[121] At the moment, the ICC experiences massive capacity constraints arising largely from situation and case overloads, which appear to impel the court into delivering mere distributive rather than retributive justice.

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[117] See Rome Statute, art 13(b).
[118] ibid, art.17(1)(b).
[119] See Philippe Sands, 'After Pinochet: the role of national courts' in Philippe Sands (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice* (CUP 2003) 74.
[120] Rome Statute, art. 17(2).
[121] Kai Ambos, 'Introductory Note to Office of the Prosecutor: Policy Paper on Case Selection and Prioritisation (Intl Crim Ct)' (2018) *ILM* 57(6): 1131.

As a result, in Ambos' contention, for the ICC the most pressing challenge now 'is not so much the fair or just delivery of sanctions to individual defendants, but the *fair distribution of justice* to a selected number of suspects/perpetrators.'[122]

Right from the off, divvying up responsibilities with national courts has been integral to the Office of the Prosecutor's (OTP) prosecutorial strategy. For example, the OTP's 2003 policy paper stressed that the ICC intended to '*focus its investigative and prosecutorial efforts and resources on those suspects who bear the greatest responsibility, such as leaders of the State or organisation allegedly responsible for those crimes*.'[123] In contrast, national justice systems were tasked with the responsibility to handle cases mainly involving mid to low level perpetrators.[124] Such mutual division of labour was apparent in the proposal to the DRC Government by the former ICC Chief Prosecutor, Luis Moreno-Ocampo who stated thus:

> Since the international criminal court will not be in a position to try all the individuals who may have committed crimes under its jurisdiction in Ituri, a consensual division of labour could be an effective approach. We could prosecute some of those individuals who bear the greatest responsibility for the crimes committed, while national authorities, with the assistance of the international community, implement appropriate mechanisms to deal with others.[125]

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[122] ibid. [emphasis in the original]
[123] ICC-OTP, 'Paper on some policy issues before the Office of the Prosecutor' (September 2003) 7 [emphasis as in the original]. <www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa96-2ed8b6/143594/030905_policy_paper.pdf>. Accessed 12 December 2019.
[124] ibid.
[125] Excerpt of a letter by the ICC's Chief Prosecutor Louis Moreno-Ocampo to President Joseph Kabila of the Democratic Republic of the Congo (25 September 2003), cited in Angela del Vecchio, *International Courts and Tribunals Between Globalisation and Localism* (Eleventh International Publishing 2013) 34.

The OTP's prosecutorial strategy currently has two main limbs: (i) the test of admissibility, which assesses the existence and genuineness of national proceedings; (ii) positive complementarity, which facilitates national proceedings, where necessary, through strengthening or rebuilding national systems in ways not directly involving capacity building or financial assistance.[126] Under this policy, the ICC has been inclined to exercise concurrent rather than consecutive jurisdiction with the national systems. As noted already, this strategy was first enforced in the DRC's situation involving Thomas Lubanga and was seen as crucial to proactively complement ongoing domestic efforts.[127]

At the same time, the ICC's intervention in the DRC has sometimes drawn criticisms for failing to abide by the OTP's 2003 policy statement. For instance, according to Angela del Vecchio, the proposal made by Moreno-Ocampo to the DRC Government was not respected in reality as the suspects referred to the ICC by the DRC, including Lubanga, were not among the top personnel bearing the greatest responsibility for the grave crimes committed there.[128] In Lubanga's case, he was referred and tried simply for 'conscripting and enlisting children under the age of fifteen' and compelling them 'to participate actively' in the hostilities from September 2002 to August 2003. For such crimes of arguably lesser gravity, he was convicted by the Trial Chamber I on 14 March 2013.[129]

Carsten Stahn also has inveighed the ICC's proposals that seek 'to organize justice responses along a division of labour, based on categories of perpetrators, or by distinguishing between crime categories.'[130] For him, such a strategy is artificial because the ICC's jurisdiction 'is not exclusively focused on the "most

[126] See International Criminal Court, 'The Office of the Prosecutor's Prosecutorial Strategy 2009-2012' (The Hague 1 February 2010) Nos. 16-17; ICC-ASP, 'Report of the Bureau on Stocktaking: Complementarity,' UN Doc. ICC-ASP/8/51 (18 March 2010) para. 16.
[127] See *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06.
[128] Angela del Vecchio, *International Courts and Tribunals Between Globalisation and Localism* (Eleventh International Publishing 2013) 34.
[129] ibid 34.
[130] Stahn (n 79) 229.

responsible" perpetrators, nor should such perpetrators necessarily be tried exclusively through universal institutions'.[131] Del Vecchio also contends that adopting the OTP's proposal of concurrent prosecutions against different categories of perpetrators at multiple spheres 'would entail a need to coordinate the various trials, would lead to difficulties in contemporaneously gathering evidence and hearing testimony and could lead to divergent assessments of the facts underlying the crimes that the individual has been charged with.'[132]

Regardless of the merits or discontents of the OTP's prosecutorial policy, the pertinent point is that first-tier complementarity in the existing ICrimJ system as well as in the proposed enhanced system would involve direct engagement with national courts, which will entail some form of division of labour. Using wartime imagery, the ICC like aerial offensives will be unlikely to win the war against impunity without a substantial number of capable boots on the ground. The first boots on the ground are the national justice systems with whose collaboration there may be a greater chance of defeating impunity. In the new ICrimJ system, the boots on the ground would also involve RCCs with which the ICC can engage in a novel complementarity arrangement that will be argued in a later section.

II. Second-Tier Complementarity with the ICC

A widespread operation of RCCs across the globe could see second-tier complementarity become the default relationship between the ICC and national courts. As discussed earlier, geographic proximity of trial courts to the affected population is a big concern in ICrimJ discourse[133] and a major factor in the ranking order of the complementarity regime being advanced in this thesis. A related issue is the perception of distant international courts like the ICC as

[131] ibid.
[132] del Vecchio (n 128) 35.
[133] See, for example, Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (CUP 2018).

being part of a multi-level global governance agenda to control fringe states.[134] It is thus imaginable that in the regions that operate autonomous RCCs, and given the ICC's global credentials, the ICC would be likely to exercise second-tier complementarity with national courts of the states that are parties to the local RCC. What are the potential implications of second-tier complementarity?

Second-tier complementarity with respect to the ICC would likely come into play in two main scenarios. The first is in a situation where a state is a party to both the ICC and the RCC or has acceded to both courts. In such a situation, whereas the national courts would remain ideally the fitting fora for prosecuting international crimes, the trouble would surface when the national system is unable or unwilling to take the appropriate measures. The difficulty would be on how to decide which of the two external courts should have the priority of jurisdiction. On the basis of the proximity principle and the legitimacy issues highlighted above, the priority of jurisdiction would fall to the RCC. It is possible that in some situations the relevant RCC may decide to yield jurisdiction to the ICC, but such a concession should be clearly expressed and not assumed so as to forestall potential crisis of confidence between the ICC and the RCC.

What if a state party to both the ICC and the RCC chooses to self-refer to the ICC? To illustrate, let us suppose that Venezuela is a state party to the ICC and to a hypothetical American Regional Court of Justice (ARCJ). Venezuela has self-referred, or has been referred by another ICC state party, to the ICC. How could the ICC navigate this referral in relation to the ARCJ? In such a situation, as de Guzman argues, the prosecutors of each court will ideally be expected to 'exercise their discretion in ways that avoid unnecessary conflicts over priority in

[134] See Matthias Dembinski and Dirk Peters, 'The Power of Justice: How Procedural Justice Concerns Affect the Legitimacy of International Institutions' (2019) *Global Governance* 25(1): 149; William W Burke-White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo' (2005) *LJIL* 18(3): 557.

the exercise of jurisdiction.'[135] Perhaps a key question the ICC's Pre-Trial Chamber may be required to clarify in that scenario is whether the Rome Statute permits the ICC to defer jurisdiction to an RCC given that its existing complementarity provision refers only to national courts.[136]

For de Guzman, a possible resolution could be sought through a purposive interpretation of the Rome Statute.[137] In this way, the ICC could construe the text of Article 19(2)(b): 'A State which has jurisdiction over the case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted the case'[138] to encompass situations in which a given state like Venezuela has also delegated its investigative and prosecutorial prerogatives to an RCC such as the ARCJ. Such a reading, rewording de Guzman, could enable the ICC to defer the Venezuelan situation to the ARCJ.[139] It might nevertheless require the ICC to assess whether the ARCJ is 'genuinely' investigating and prosecuting the perpetrators in Venezuela.[140] Such inquiry, as will be seen in the next section, would likely be sensitive although it might also enable the ICC to establish or consolidate constructive complementarity with the relevant RCC.

The second setting in which the ICC would be likely to engage in second-tier complementarity with national courts can be triggered by the UNSC's referrals of situations transpiring in a relevant RCC member states that are not party to the Rome Statute. In light of the states' membership of the applicable RCC, it is probable that the RCC would already be investigating or at least monitoring the situations in those states prior to the UNSC's referrals. As such, unnegotiated interventions by the ICC following UNSC's referrals would be likely to complicate or politicise proceedings. Thus, it will be sensible that the ICC defer

[135] de Guzman (n 95) 663.
[136] Ibid.
[137] Ibid.
[138] Rome Statute, art. 19(2)(b).
[139] de Guzman (n 95) 663.
[140] Ibid.

jurisdiction to the appropriate RCC. The ICC can also constructively engage with the RCC by letting the latter conduct the proceedings while the ICC provides technical support.

One important benefit in having the ICC deferring to the individual RCC in the given context is that it would help to dispel the likely denunciations of the ICC as a tool of Western powers that is out to control or to punish weaker states. Conversely, by cooperating with the RCC, the ICC would be promoting critical curial collaboration in global justice. But where the RCC fails to act, the ICC would be within its rights to intervene although, as earlier noted, this could be complicated. However, effective and active prosecutions by the individual RCCs would potentially decrease the volume of situations and cases that are referred to the ICC. Paraphrasing Prosecutor Moreno-Ocampo, a decline in the number of trials taking place at the ICC as a result of prosecutions taking place at the national and regional levels would be strongly indicative of how successful the global justice system will have become at realising its cardinal objectives.[141]

That said, it is also totally conceivable that contacts between the ICC and future RCCs could become strained by political pressures and/or by differing constitutional or technical details. For example, in contrast to the ICC, the proposed ACJ has a broad subject-matter jurisdiction, ranging from the core international crimes[142] to crimes on a lesser threshold of gravity, including corruption,[143] money laundering,[144] unconstitutional change of government,[145] and illicit exploitation of natural resources.[146] Unlike the Rome Statute, the

[141] See Luis Moreno-Ocampo, 'Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC' (The Hague 16 June 2003) <www.iccnow.org/documents/MorenoOcampo16June02.pdf>. Accessed 14 December 2019.
[142] These include: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. See Malabo Protocol, art. 28A *bis*; Rome Statute, art. 5.
[143] Malabo Protocol, art. 28I.
[144] Ibid art 28I *bis*.
[145] Ibid art. 28E.
[146] Ibid art 28L *bis*.

Malabo Protocol also provides for corporate criminal liability.[147] Above all, it disallows the ACJ jurisdiction over 'any serving AU Head of State or Government' including 'senior state officials' during their term of office.[148] The latter provision conflicts with Article 27 of the Rome Statute on the irrelevance of official capacity. How these discrepancies can be resolved or at least managed will be explored in the next subsection.

C. The Constructive Complementarity of International Criminal Courts

The installation of RCCs could further engender a new system of interactions between the array of international criminal courts in what may be described as the constructive complementarity of international criminal courts. This description is salient because, in ICL, complementarity is a term not commonly applied in reference to the contacts between courts on a horizontal plane. As we saw earlier, complementarity tends typically to be associated with the pattern of relations between courts on a vertical axis, for example, national courts and the ICC or, in some ways, between individual states and international institutions.[149]

In this connection, Daniel Nsereko remarks that the Rome Statute drafters, while providing for complementarity, were particularly keen to guarantee respect for state sovereignty. Hence, they allocated priority of jurisdiction to national courts vis-à-vis the ICC.[150] The *Katanga* Admissibility Appeal also confirms this observation by affirming that 'protecting the State's sovereignty' underlies Article 17(1) (b) of the Rome Statute as it seeks to ensure that the ICC 'respects genuine decisions of a State not to prosecute a given case'.[151] The concern to curtail undue external interferences with, or oversight of, national systems by the ICC thus appears to undergird the Rome Statute's model of complementarity.

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[147] Ibid art 46C.
[148] Ibid art 46A *bis*.
[149] See Burke-White, 'Community of Courts' (n 1) 86.
[150] See Daniel Nsereko, 'The ICC and complementarity in principle' (2013) *LJIL* 26(2): 427, 429.
[151] *Katanga* Admissibility (n 74) para. 83.

In contrast, constructive complementarity is not about interactions between individual states or national courts and the ICC or other international courts as such. It concerns, rather, the possible modus operandi in the contacts between the community of international criminal courts operating under the proposed enhanced global justice system. Given that a regime of RCCs would invariably increase the number of permanent international criminal courts, the pertinent question to consider is how these various institutions could collaborate with minimal or manageable friction. Constructive complementarity thus would suggest a series of positive technical and creative ways by which these international judicial bodies could support one another to make the global justice project stronger and more effective. Our analysis will be restricted to the interactions between the ICC and future RCCs or sub-RCCs, where applicable.

1. The Interdependence of International Criminal Courts

In the new enhanced ICrimJ system, international criminal courts would likely be independent and mutually interdependent at once. As will be seen presently, this apparent paradox will be especially true for the ICC in light of its unique position in the scheme of global criminal justice. Constructive complementarity envisions the ICC as the linchpin that would informally coordinate contacts between the relevant international courts. Would this function imply the crafting of a formal hierarchy of courts between the ICC, the future RCCs and other attendant courts? Would it entail the judicial precedence of the ICC's decisions vis-à-vis the RCCs? These and related questions will be tackled in a moment.

2. The ICC as Coordinator in a Quasi-Hierarchical System

In response to the preceding questions, we may adumbrate that the ICC could become the coordinating core of international criminal courts, but it would be unlikely to do so from a superior court's position. Contrary to the sovereign powers of states which help to establish and enforce judicial hierarchy and

judicial precedence among national courts, no parallel sovereign powers exist as yet either in the regional or the global sphere. As a result, within the new enhanced ICrimJ system, the ICC would be unlikely to be treated as any more than a *primus inter pares*[152] by rival international criminal courts like the RCCs.

This supposition is supported by a recent decision of the Special Tribunal for Lebanon (STL) wherein the tribunal reasoned that international courts and tribunals are set up through agreements by states or organizations like the UN, but such courts 'do not constitute a closely intertwined set of judicial institutions.'[153] In the STL's view, each 'tribunal constitutes a self-contained unit' such that 'neither a *horizontal* link … nor, *a fortiori*, a *vertical* hierarchy' exists between them.[154] The *Dusko Tadić* appeal at the ICTY held similarly that the ICrimJ system 'lacks a centralized structure, [and as such] does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components as jurisdiction of power could be centralized or vested in one of them and not the others.'[155]

Contrary to formal hierarchy, constructive complementarity thus predicts a quasi-hierarchical relationship between the ICC and future RCCs by which the former employs its capacities to bolster the ends of ICrimJ through the RCCs. It is probably true, remarks Jenny Martinez, that an international judicial system cannot 'exist in the absence of a central scheme of hierarchical relationships.'[156] Considering still certain lingering misgivings about the ICC, an attempt to treat

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[152] First amongst equals.
[153] Special Tribunal for Lebanon, Decision on Appeal of pre-trial Judge's Order Regarding Jurisdiction and Standing, Appeals Chamber, 10 November 2010, CH/AC/ 2010/02, para 41 [hereafter *Jurisdiction and Standing Appeal*]. See also Inter-American Commission of Human Rights, 'The Right to Information on Consular Assistance: In the Framework of the Guarantees of the Due Process of Law,' Advisory Opinion OC-16/99 of 1 October 1999, Series A No 16, para 61.
[154] *Jurisdiction and Standing Appeal* (n 149) para 41 [emphasis in the original]
[155] *Prosecutor v Dusko Tadić*, IT-94-1 (Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) 2 October 1995, para 11. See also *Prosecutor v Zejnil Delalic, Zdravco Mucic, Hazim Delic, and Esad Landzo*, IT-96-21-A, (20 February 2001) para 24.
[156] Jenny S Martinez, 'Towards an International Judicial System' (2003) 56 *SLR* 429, 443.

the RCCs as external arms of the ICC would likely be rebuffed by states. But a quasi-hierarchical or less intrusive interaction between the ICC and the RCCs could be more successful. To this end, a number of opportunities will be open to the ICC. Of these, the most potent would probably involve the Rome Statute.

I. Advisory Readings of the Rome Statute

The central importance and the historical place of the Rome Statute in ICL is unquestionable. As an instance, we highlighted earlier how numerous provisions of the Malabo Protocol of the African Court of Justice appear to reaffirm sections of the ICC's founding treaty. Moreover, the ICC's states parties are required to incorporate key provisions of the Rome Statute into domestic law in order to enable their domestic courts to prosecute the crimes within the ICC's jurisdiction.[157] And, like the Malabo Protocol, it is likely that the statutes of future international criminal courts or RCCs would model the Rome Statute.

It is yet conceivable that the statutes of some RCCs would deviate from the Rome Statute in many and unpredictable ways. For example, as was noted earlier, the Malabo Protocol provides for immunity of sitting public officials, including heads of states and governments,[158] which runs counter to the Rome Statute.[159] Other crimes not found in the Rome Statute might also be provided for in the statutes of the future RCCs, as seen again in the Malabo Protocol.[160] Thus, these discrepancies suggest that the ICC might occasionally be called upon to provide consistent advisory readings of the Rome Statute to the RCCs. This might entail formal or informal referrals of interpretive questions from the RCCs to the ICC.

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[157] Part of these key provisions will likely include the sections on the core international crimes and those on complementarity. See Rome Statute, art. 5, 6, 7, 8, 8*bis*, 15, 17 & 19.
[158] See Malabo Protocol, art. 46A *bis*.
[159] See Rome Statute, art. 27.
[160] Compare Malabo Protocol, art. 28A and Rome Statute, art. 5.

II. Systemic Inter-Curial Cooperation

Through constructive complementarity the ICC might offer capacity training of the judges and prosecutors of the RCCs. Such sessions could throw light on the distinction between the purely regional crimes and the core international crimes as well as on how to maintain appropriate international standards of fairness and the integrity of the entire judicial process. Related trainings, workshops or conferences may also be organised by the ICC for the registry, defence counsels, and victim advocates of the RCCs. Additionally, the ICC could promote inter-curial exchanges of personnel whereby select judges from the RCCs would participate for a set period on the ICC's bench and vice versa. Such diverse level of interactions could help to forge a strong sense of collegiality between the international courts' officials, which could in turn bolster the interdependence of these courts as well as their judicial independence from the political universe.

III. Extraordinary Referrals of Complex Cases

In rare situations, the ICC could encourage a relevant RCC to refer cases to The Hague, which the RCC found extremely complex or politically sensitive. Such cases need not be referred merely because they concern notorious suspects or well-known public officials. Instead, they could be cases that contest key provisions of the Rome Statute and/or the existing practice and principles of ICL. The referrals from the RCCs in such cases need not be inspired by a duty to do so, but by an understanding between the courts concerned. Nonetheless, it is envisioned that such referrals would be occasional and a 'last resort' measure and must not prejudice the interests of justice, the defendants, or the victims.

3. Cross-Referencing International Criminal Justice Case law

As we saw in Chapter 4 on the section concerning regional human rights systems, human rights' courts have a practice of drawing from the caselaw of rival courts. Such mutual recognitions can promote not only the harmonious development of international law, but also an amenable setting for inter-curial

working relations. A like practice of cross-referencing the jurisprudence of international criminal courts could go a long way in consolidating the gains made thus far in the ICL field. As it turns out, '[i]nternational law is a single legal system,' Christopher Greenwood rightly remarks, 'and the judgments of other courts and tribunals on more general matters are sources from which the ICC [and ICL in general] can and should draw.'[161] Hence, through a consistent practice of referencing the decisions of other international courts, notes Anne-Marie Slaughter, international courts bolster their 'legitimacy by linking to a larger community of courts'.[162]

5.3 Conclusion

While it may be virtually impossible to accurately predict the shape of any future ICrimJ system, this chapter has proffered a workable model and clarified theories and principles that could underpin inter-curial contacts for three grades of courts likely to champion the prospective system. The institution of RCCs, in addition to the established criminal jurisdiction of national courts and the ICC, would doubtless intensify the available channels of judicial responses against impunity. But it would also demand, at the barest minimum, clarity as to a workable regional policy upon which the RCCs can be established and how the resulting three-tier courts' system may collaborate effectively where necessary.

A feasible regional policy was detailed in Chapter 4 while elaborating the collaborative strategies for the enhanced ICrimJ regime featuring the principles of subsidiarity and complementarity was the preoccupation in this chapter. Both principles would be probably central in ordering the relations between national courts, future RCCs, and the ICC in the remodelled ICrimJ system. The subsidiarity principle enables states to take domestic initiatives to tackle

[161] Christopher Greenwood, 'What the ICC Can Learn from the Jurisprudence of Other Tribunals' (2017) *HILJ* (online) 58: 71, 73.
[162] Anne-Marie Slaughter, 'A Real New World Order' (1997) 76 *Foreign Affairs* 183, 187.

international crimes that occur within their territory or that harm their national interests. A typical domestic initiative would engage the criminal jurisdiction of the national courts. Other initiatives may include formal requests to willing neighbouring states, the relevant RCC, or the ICC for prosecutorial and judicial assistance in dealing with diverse categories of perpetrators. While the subsidiarity principle may reinforce state sovereignty, its strict application might entrench a state of impunity whereby states exploit the courts to punish their local adversaries while taking no action over state officials and/or their agents implicated in serious atrocities.

Furthermore, complementarity was seen as a principle that could be significant not only to restrain the impunity of public officials, but also to improve the ICrimJ status quo whereby each international tribunal currently appears to operate as 'a kind of unicellular organism'.[163] Viewed as a derivative of the nascent norm of responsibility to protect, the complementarity principle is sometimes described as an international responsibility to prosecute major offenders of international criminal law if the states with the relevant jurisdiction fail to do so. Yet, as Sarah Nouwen has aptly argued based on studies in Uganda and Sudan, the complementarity rule may not necessarily increase domestic, or we may add regional, prosecutions.[164] Nevertheless, complementarity in the prospective ICrimJ system would likely be the glue holding together the entire judicial design of international criminal justice. Absent complementarity, there

[163] See Paola Gaeta, 'Inherent powers of International Courts and Tribunals' in Lal Chand Vohrah, Fausto Pocar, Yvonne Featherstone, Olivier Fourmy, Christine Graham, John Hocking and Nicholas Robson (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer 2003) 365.

[164] See Sarah M H Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (CUP 2013); Sarah M H Nouwen, '"As You Set out for Ithaca": Practical, Epistemological, Ethical and Existential Questions about Socio-Legal Empirical Research in Conflict' (2014) *LJIL* 27(1): 227.

would be potential conflict of jurisdiction between the three levels of courts and this could have consequences on the number of cases that reach the courts.[165]

To forestall this outcome, three distinct levels of complementarity were described. The first-tier complementarity would function mainly between national courts and the RCCs in the individual international regions as well as between the national courts and the ICC in regions without an RCC. The second tier of complementarity puts the ICC second in line of jurisdiction to the RCC within an RCC region although the RCC could choose to defer priority to the ICC in certain situations. Lastly, constructive consolidation defines the third level of complementarity, which could see the ICC lending judicial and technical support to other international tribunals within an interdependent judicial framework.

[165] See Stephanos Bibas and William W Burke-White, 'International Idealism Meets Domestic-Criminal-Procedure Realism' (2010) *DUKE LJ* 59(4): 637, 650.

Chapter Six

General Conclusion

6.1 Introduction

This thesis has examined whether and how the creation of a regime of regional criminal courts can help to further effective enforcement of ICL. It has exposed inherent tension between idealism and realpolitik in the global criminal justice system.[1] And it has contended that while much enforcement attention thus far has focused on international criminal courts and tribunals, the vision is gradually changing. Above all, it has argued that a more effective and credible accountability mechanism against impunity would require a multipronged approach, embracing at minimum national courts, future RCCs, and global courts like the ICC.[2] To conclude, this chapter will review the major findings or arguments of the research. Next, it will underscore the study's principal contributions. It will also highlight some potential implications of adopting the thesis's proposals and, lastly, it will signpost possible areas for further research.

6.2 Review of Key Arguments/Findings

The opening chapter of this thesis proposed three central issues that would shape the scope of the study. The first concerned whether establishing RCCs can bolster the existing ICrimJ system; the second was whether there are alternative models of regional enforcement of ICL; while the third sought to explore principles that could support a tripartite complementarity of national, regional and global courts concerned with ICL enforcement. To approach these tasks, first, the thesis adopted doctrinal legal and normative research methodologies. With these techniques we sought not only to clarify key concepts and scrutinise a vast body of legal evidence including treaties, statutes, caselaw, but also to propose ways in which certain identified infirmities in the system can be cured.

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[1] Compare Stephanos Bibas and William Burke-White, 'When Idealism Meets Domestic-Criminal-Procedure Realism' (2010) *DUKE LJ* 59(4): 637; Christian Tomuschat, *Human Rights: Between Idealism and Realism* (OUP 2014).

[2] See Carsten Stahn, *A Critical Introduction to International Criminal Law* (CUP 2019) 266.

Next, to isolate pertinent gaps in the law and in the literature, it was necessary to situate the study within the broader ICL context. Accordingly, Chapter 2 assessed the state of ICrimJ as enforced by typical international criminal courts. Particular attention was paid to analysing the common characteristics of these courts and the controversial aspects of their activities that tend to weaken the credibility and legitimacy of international criminal justice. Relatedly, in Chapter 3, we evaluated domestic prosecution of international crimes through the prism of the traditional bases of national criminal jurisdiction and the attendant legislative barriers to such prosecutions. Our analyses revealed, perhaps unsurprisingly, a certain degree of disconnect between the ambitions and the praxes of ICrimJ.

This thesis found that the disconnect results in part from the fact that the legitimacy and the efficacy of ICrimJ is still entwined with sovereign states. The laws are made and ratified by states; the relevant courts are set up and funded by states; the judges and the prosecutors are usually nominated and approved by states; and it is states that must enforce the decisions of these courts.[3] Thus, the disconnect between the aims and the praxes of ICrimJ exists partly because individual states and/or group of states sometimes disregard international criminal law and/or the decisions of the applicable international courts. We saw this, in Chapter 2, with the case of the US's hostility towards the ICC evidenced not only by its unsigning of the Rome Statute, but also by its active engagement in activities contrary to the purposes of the ICC, including the conclusion of bilateral immunity agreement (BIA) with several states, which seeks to shield US personnel from the ICC's jurisdiction.[4]

[3] See Juan Antonio Carrillo Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law' (1997) 8 *EJIL* 583.

[4] For analysis of the BIA, see Markus Benzing, 'U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties' (2004) 8 *MAX PLANCK YUNL* 181. See also Robert Cryer and Nigel White, 'The Security Council

Another reason for the disconnect may relate to an apparent 'one law for the strong, another for the weak' approach to ICL enforcement. This re-echoes Thucydides' finding for the root of the Peloponnesian war: 'the strong do what they can and the weak submit'.[5] A parallel approach was noticed in the pattern of prosecutions that have occurred at modern international criminal tribunals. The Nuremberg IMT and the Tokyo IMT prosecuted and punished defeated Nazi German and Japanese leaders respectively while no action whatsoever was taken for crimes committed by the victorious Allies. Similarly, the ICTY tried and penalised the personnel and agents of the former Yugoslavia but failed to indict suspected NATO personnel. The ICTR prosecuted and punished several suspects of Hutu ethnicity for crimes committed in Rwanda whereas none from the other side (Tutsi) was arraigned before the tribunal. Above all, the ICC's investigations and prosecutions have centred mostly on situations in weaker nations and its defendants also are frequently the defeated adversaries of the ruling regimes.

The thesis also found that the disconnect in ICrimJ appears to involve the enduring tension between the customary immunity of state officials and the responsibility to prosecute suspects regardless of their official capacity.[6] Notwithstanding the ICJ's attempt in the *Arrest Warrant* case to clarify the scope of the immunity doctrine,[7] international tribunals have struggled to bring serving state officials to justice for alleged international crimes committed in

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and the International Criminal Court: Who's Feeling Threatened?' (2004) *Journal of International Peacekeeping* 8(1): 143, 144.

[5] See Thucydides, *History of the Peloponnesian War*, Rex Warner (tran.), (Penguin Classics [431 BCE] 2000).

[6] Rome Statute of the ICC, 2187 UNTS 90, (17 July 1998) art. 27.

[7] See *Case of Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, Judgment, ICJ Rep (2002). See also Antonio Cassese, 'When May Senior Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case' (2002) *EJIL* 13(4): 853; Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) *JICJ* 7(2): 333.

office. Recent efforts have targeted mainly deposed officials like Milošević,[8] Taylor,[9] Gbagbo,[10] and Bemba[11] while processes began against sitting Kenyan officials Kenyatta[12] and Ruto[13] before they gained office were eventually withdrawn. Of these officials, only Taylor was convicted and punished; Milošević died before his case could be decided while Bemba and Gbagbo were acquitted.

Furthermore, Paul Gready's notion of 'distanced justice'[14] was found useful to highlight the mixed outcome of the interventions by international tribunals. Distanced justice obtains where international criminal courts process cases and prosecute defendants in locations geographically remote from where the crimes occurred. The upshot of this include a low ratio of victims' participation in the proceedings; lack of local input in the decision-making processes; indeterminate deterrent effect in the affected communities; as well as risks relating to evidence gathering and witness protection.[15] The geographic proximity problem between the ICC and its target situations is one of the reasons that critics have proposed countervailing models including the RCC model.[16] For Condorelli and Boutruche, such criticism of international tribunals is valid as the tribunals should be 'much closer to those for whom justice is administered.'[17] As Justice Goldstone puts it, 'I think the closer to home the justice is done the better.'[18]

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[8] *Prosecutor v Slobodan Milošević*, IT-02-54-T, (Decision on Motion for Judgment of Acquittal), 16 June 2004.
[9] *Prosecutor v Charles Ghankay Taylor*, SCSL-03-01-A.
[10] *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15 (11 March 2015).
[11] *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 (10 June 2008).
[12] *The Prosecutor v Uhuru Mungai Kenyatta*, ICC-01/09-02/11 (5 October 2011).
[13] *The Prosecutor v William Samoei Ruto and Joseph Arap Sang*, ICC-01/09-01/11 (5 April 2016).
[14] Paul Gready, 'Analysis: Reconceptualising transitional justice: embedded and distanced justice' (2005) *Conflict, Security & Development* 5(1): 3, 8-9.
[15] ibid.
[16] See William Burke-White, 'Regionalisation of International Criminal Law Enforcement: A Preliminary Exploration' (2003) 38 *TEXAS INT'L LJ* 729, 748.
[17] Luigi Condorelli and Léo Boutruche, 'Internationalized Criminal Courts and Tribunals: Are They Necessary?' in Cesare P R Romano, André Nollkaemper, and Jann K Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004) 435-36.
[18] See International Bar Association, 'Interview with Richard Goldstone - Transcript' (28 June 2017. <www.ibanet.org/Article/NewDetail.aspx> Accessed 8 October 2018.

A sociocultural proximity explanation of the disconnect also is conceivable. This form of proximity refers to an institution's acceptability or perceived legitimacy in its zone of operation by virtue of reflecting in its practices and goals the shared beliefs and norms of the area. As Matiangai Sirleaf notes, where such supporting beliefs are lacking, a legitimacy deficit can ensue as the institution may be accused of imposing extraneous rules[19] or being bereft of what Gready calls 'embedded justice'.[20] In this respect, Reinhard Wesel remarks that '[t]he national public in the industrialized countries is normally cognitively and emotionally far away from the peoples in the South afflicted more directly and more strongly by the "global" problems; the interests of both groups of people diverge strongly'.[21] Wesel's comment reinforces the contention that a global court like the ICC, situated in The Hague but tackling situations in Africa, might enjoy less legitimacy than a court that is situated in an African city and which shares closer sociocultural bonds with African states and peoples' experiences.[22]

Would regionalising ICL then offer a perfect solution to these problems? The moderate view in this thesis is that regional models like the proposed RCCs, regional exercise of universal jurisdiction, and regional hybrid tribunals could help to tackle several defects in the existing issues. But they will not cure all the ills in the system and could even aggravate the ills if they are set up to operate as a rival alternative to the existing arrangement. As some like Pellet[23] and Wilcox[24] have argued, since the core international crimes engender global discontent, they require global justice action rather than simply national or

[19] Matianga Sirleaf, 'Regionalism, Regime Complexes and International Criminal Justice' (2016) 54 *COL JTL* 699, 707-708.
[20] See Gready (n 14) 19.
[21] Reinhard Wesel, 'Public Opinion and the UN' in Helmut Volger (ed.), *A Concise Encyclopedia of the United Nations* (Martinus Nijhoff Publishers 2010) 584.
[22] See Richard Burchill, 'International Criminal Courts at the Regional Level: Lessons from International Human Rights Law' (2007) 4 *NZYIL* 25, sect. V; Sirleaf (n 19) 699.
[23] Alain Pellet, 'Internationalized Courts: Better Than Nothing …' in Romano *et al* (n 17) 439.
[24] See Francis O Wilcox, 'Regionalism and the United Nations' (1965) *International Organization* 19(3): 789, 811.

regional treatment. Thus, the kernel of our contention, as underlined in Chapter 4 and Chapter 5, is that an enhanced global criminal justice response through a constructive complementarity of international criminal courts could not only curtail the splintering of ICL jurisprudence and the weakening of international standards but also promote the harmonious development of international law.[25]

6.3 Contribution to the Literature

After analysing the adverted issues and controversies regarding the current state of ICL enforcement, this thesis supports the view that regionalising ICL application by means of the RCC model would likely strengthen the theory and practice of ICL. But the thesis also argues that the RCC model would not eradicate all present vexations and would be likely to generate a new set of problems. At the same time the model could help to bring ICrimJ system up to date with advancements in the related field of international human rights law. Accordingly, this thesis's new inputs can be summed up in four areas as follows.

First, in contrast to orthodox approach this study identified and clarified the identity or the essential features of international criminal courts, including: (i) constitutional legality, (ii) supranational jurisdiction, (iii) adjudicatory neutrality, (iv) international legitimacy, and (v) core material jurisdiction.[26] This disambiguation was partly inspired by Robert Woetzel's critique of the Nuremberg trials[27] and, to a lesser extent, by Sarah Williams's recent study of hybrid tribunals.[28] On the back of these basic properties the thesis underscored and assessed the major contentions that have dogged ICL enforcement by international criminal tribunals starting from the seminal Nuremberg IMT and its Tokyo counterpart to the *ad hoc* ICTY and ICTR as well as the permanent ICC.

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[25] Regina E Rauxloh, 'Regionalisation of International Criminal Court' (2007) 4 *NZYIL* 67.
[26] See the discussion in Chapter 2.
[27] Robert K Woetzel, *The Nuremberg Trials in International Law* (Stevens & Sons 1962).
[28] Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (OUP 2012).

Second, the thesis argued for the appointment of judges (in *ad litem* capacity) from active situations to assist in the trials at the international tribunals. A similar system is enshrined in the International Court of Justice's (ICJ) Statute and practice where in contentious proceedings the court allows disputing state parties to nominate *ad hoc* judges to the ICJ bench for as long as is necessary during the case.[29] If incorporated into ICL practice, this novel approach could go some way towards addressing the sociocultural proximity deficit of international tribunals. It would also leverage a basic feature of hybrid tribunals: direct collaboration between international and local judges.[30] The local judges would supply expert knowledge of the local context while the international judges would bring a degree of international legitimacy. The *ad litem* local judges may be most useful at the trial stages but the valuation as to where and when their expertise may be germane would be a call for the individual courts to make.

The third and fourth contributions relate to the method of cooperation between national courts, the future RCCs, and the ICC. In Chapter 5, the thesis proposed the subsidiarity and complementarity principles as two strategies capable of supporting future contacts between these three tiers of courts. The key novelty of that chapter is in the systematic reimagination of both principal doctrines. In the first place regarding subsidiarity, the thesis adopted its meaning under EU law[31] by affirming the competence of national courts as the first port of call with the appropriate jurisdiction to handle international crimes occurring territorially.

But the thesis goes further in analytically rethinking the subsidiarity doctrine as a basis upon which an embattled state can rely to formally request prosecutorial assistance from (i) neighbouring states; (ii) the relevant regional criminal court;

[29] ICJ Statute, arts. 31 & 35.
[30] See Williams (n 28) 58-59, 204.
[31] See TEU, art. 5(3).

or (iii) the ICC, in differing contexts. In the first case, the embattled state may request its neighbours to prosecute or extradite suspects that are residing abroad. The embattled state may also agree with a neighbouring state to transfer particular cases and defendants to face justice in the municipal courts of the neighbour. In the second context, the embattled state may request an RCC's aid with prosecuting principal suspects in circumstances where a conflict engages a plurality of states from the same region. In the third context, the ICC may be invited by the concerned state to assist: in the preceding scenario; in situations of hostilities between states from differing regions; and in contexts of allegations of serious crimes involving peacekeeping personnel.[32]

Additionally, the thesis adapted the Rome Statute's view of complementarity, which simply specifies that the ICC would intervene in a state where it has jurisdiction if that state is deemed to be unwilling or unable to bring perpetrators to justice.[33] Crucially, unlike the subsidiarity doctrine, complementarity permits the ICC, or an RCC for that matter, to intervene in a state regardless of the consent or invitation of that state. In other words, one of the key distinctions between the two doctrines is that, under subsidiarity, the determination of when to engage external courts rests with the embattled state whereas, under the complementarity regime, the reverse is the case. Upon this analysis, the thesis developed a three-tier conception of complementarity.

First-tier complementarity would describe the relations between an RCC and the municipal courts of its states-parties within the same region. This arrangement pays attention to the proximity discourse and can combat the 'distanced justice' problem of international tribunals. It recognises that 'locating prosecutions close to home is most likely to advance the socialization or transnational judicial

[32] We explained in Chapter 5 that prosecuting suspected peacekeepers at international criminal courts might be viewed more objectively than in the stricken states. However, such prosecutions may discourage some sending states from contributing to peacekeeping missions.
[33] See Rome Statute (n 6) art. 17.

process created by international justice.'[34] However, in situations where the relevant RCC lacks jurisdiction or in regions without RCCs, first-tier complementarity would represent the classic form of relations between national courts and the ICC, pursuant to the terms of Article 13 of the Rome Statute.

Second-tier complementarity would describe the relations between the ICC and the municipal courts of its states-parties that are simultaneously members of an RCC. As analysed in Chapter 5, this suggests that the ICC would be within its rights to intervene in situations where the national courts and the regional courts with the applicable jurisdiction are unable or unwilling to bring the relevant suspects to justice. This proposal would undoubtedly raise challenges, not least the likelihood of jurisdictional clashes between the ICC and the RCCs as well as the possibility of forum-shopping whereby defendants and prosecutors would be inclined to push for proceedings in courts where their interests would be best protected. Yet, the risk of these challenges arising can be considerably curtailed through the third-tier complementarity pathway.

Third-tier complementarity is conceived as essentially a principle of constructive consolidation of ICrimJ at the level of international criminal courts. This tier of complementarity aims to promote robust collegial and curial contacts between international tribunals through mutual exchanges of capacities, technical support, and relevant communications. Within this framework, the ICC as a sort of *primus inter pares*[35] would be well placed to act as a coordinating centre for global justice. By this means the ICC could substantially enable the embedment of ICL objectives and practice standards through, for instance, rendering advisory opinions to the RCCs on uniform interpretation of the Rome Statute and encouraging transfers and/or appeal of complex cases from the RCCs to the ICC.

[34] William Burke-White, 'A Community of Courts: Toward A System of International Criminal Law Enforcement' (2002) *MICH J INT'L L* 24(1): 1, 88.
[35] First among equals.

It is this thesis's contention that such constructive exchanges between the supranational international tribunals would be crucial, to rephrase Justice Arden, for achieving the grand objectives of establishing and protecting fundamental human rights principles around the world, of empowering the domestic judiciary and of strengthening the independence of the national courts as against other key institutions of their own state.[36] It is no secret that a weak or compromised local judiciary is a threat to justice for the victims/survivors of atrocity crimes.

6.4 Possible Implications of the Study

Overall, five possible implications of this study can be identified. First, it is unlikely that the proposed tripartite enforcement model can operate efficiently, if at all, without the enabling statutory footing in the respective courts' modes of proceeding. As was underlined in Chapter 4, the Rome Statute has no provisions regarding RCCs while its complementarity system is ranged simply between the ICC and national courts.[37] Likewise, the Malabo Protocol of the proposed African Court of Justice does not contain even a solitary mention of the ICC.

It is inspiring, nevertheless, that the Rome Statute contains an amendment procedure by means of which an RCC system can be integrated into relations with the ICC in light of the enhanced complementarity framework considered in this thesis.[38] As Condorelli and Boutruche point out, such an amendment may be more realistic if the proposed model is understood to be not a replacement but a complement to the ICC.[39] Similar recognition of the ICC also may be called-for in the statutes of the future RCCs. Moreover, the states parties to these international courts would need to take the necessary steps to incorporate

[36] Lady Justice Arden, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe' (2010) *Yearbook of European Law* 29(1): 3, 11.
[37] See Rome Statute (n 6) preamble, para. 10 and art. 1.
[38] ibid, art. 121.
[39] Condorelli and Boutruche (n 17) 435-36.

relevant aspects of the new enhanced model into national law. In this respect, it is disappointing that although the ICC has been operating for nearly 20 years, several of its members have yet to integrate applicable sections of the Rome Statute into domestic law.[40]

Second, one of the arguments advanced in favour of regionalising ICL is that the inventory of core crimes in the Rome Statute[41] is restrictive and fails to take into account other grave crimes that deeply concern states within regional groupings. Article 28A of the Malabo Protocol contains ten such crimes not listed in the Rome Statute, but whose gravity is said to be of concern to African states.[42] In Chapter 2, we saw that some of the 'extra' crimes including terrorism[43] and drug trafficking[44] have been of concern also to many non-African states. Hence, to enhance a putative collaborative regime between the ICC and the RCCs, it might be necessary to update the Rome Statute's Article 5 list of international crimes following the amendment procedure provided under Articles 121 and 123. Such amendments might consider only the gravest crimes that are not peculiar to any singular international region.

Third, the thesis has suggested a modified version of the United Nations' administrative regional formula as a possible regionalisation policy for the RCC model. Given that the UN's regional formula has been challenged by a number

[40] Kemp points out that of the 33 ICC states parties in Africa, only Senegal, Kenya, Mauritius, Uganda, and South Africa have adopted the relevant sections of the Rome Statute into domestic law. See Gerhard Kemp, 'The Implementation of the Rome Statute in Africa' in Gerhard Werle, Lovell Fernandez, and Moritz Vormbaum (eds.), *Africa and the International Criminal Court* Vol 1 (Asser Press 2014) 66-75.
[41] See Rome Statute (n 6) art. 5.
[42] For analysis of the Malabo Protocol's crimes, see Charles C Jalloh, 'A Classification of the Crimes in the Malabo Protocol' in Charles C Jalloh, Kamari M Clarke, and Vincent O Nmehiele (eds.), *The African Court of Justice and Human and Peoples' Right in Context* (CUP 2019) 225-56.
[43] Malabo Protocol, art. 28G.
[44] Ibid, art. 28K.

of states and many proposals have been tendered for its reform,[45] it is argued that the amended version in this study can also serve the UN's objectives in the long run. A regionalisation policy that is based notionally on continental lines and also on sub-regional affiliations takes into account the structural, cultural, and geopolitical differences between the UN member states. It also eschews the outmoded baggage of the Cold War era still noticeable in current policy especially in respect of Europe.

Fourth, as Birgit Reichenstein has argued, the global order does not advance simply by insisting on 'multilateralism at all costs,' but by the increase of the welfare of all participants, including by means of regional institutions.[46] Hence, it may be ambitious and inexpedient to float global entities that aspire to have meaningful domestic impacts without any mediating regional bulwarks. The regional criminal court model may serve as a useful halfway house or a crucial bridge between national courts and global courts at a time, rephrasing Oliver Franks' description of regionalism, 'when single nations are no longer viable, and the world is not ready to become one.'[47] As the principal guardian of global peace and security, the UN may need therefore to reaffirm the competence of regional entities to adopt regional measures to tackle international crimes. Such affirmation could be bolstered by creating an organ similar to the OHCHR that could be tasked with facilitating global, regional, and national efforts against mass atrocities.

Alternatively, the OHCHR's role could be expanded to cover both international human rights protection and international criminal justice prosecution. The

[45] Canada and Australia have at different times proposed changes to the current regional formula. See Ingo Winkelmann, 'Regional Groups in the UN' in Helmut Volger (ed.), *A Concise Encyclopedia of the United Nations* (Martinus Nijhoff 2010) 595-96.
[46] Birgit Reichenstein, 'Regionalization' in Helmut Volger (ed.), *A Concise Encyclopedia of the United Nations* (Martinus Nijhoff Publishers 2010) 601.
[47] Sir Oliver Franks, quoted in a speech by Harlan Cleveland, 'Reflections on the Pacific Community' (22 April 1963) *Department of State Bulletin* 48(1243): 614.

proposed extension would undoubtedly be controversial in light of the international community's traditional preference to separate human rights processes from criminal justice procedures.[48] Yet, the Malabo Protocol of the proposed African Court of Justice has at least indicated that retaining the traditional firewall of separation between both systems may be redundant at times.[49]

Fifth, judicial credibility and the capacity to enforce its decisions are critical to the effectiveness of any tribunal.[50] As seen in Chapter 2, the many recent negative press resulting from the ICC's alleged targeting of poor and stricken states appear to have dented the court's credibility in some quarters. The lack of comparable enforcement machinery to national courts also leaves the ICC and related international courts vulnerable to political manipulation and contempt. And it is unlikely at least ad interim that international tribunals would be directly allied with the enforcement powers of any state or group of states not least for the obvious reason that such alignments could further erode these courts' credibility.

To bolster the credibility of global criminal justice, however, the ICC and its ilk may need to take bolder and more consistent steps to investigate situations and indict alleged suspects notwithstanding their political offices or states of origin. As William Schabas points out, it remains a challenge to bring hard cases that concern powerful persons in major states before an international criminal tribunal.[51] In this respect, the recent ICC Appeal Chamber's approval of the

[48] See, for example, Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) *JICJ* 9(5): 1067 [questioning the legality and feasibility of introducing a criminal section into an existing human rights' court.]
[49] For analysis of the Malabo Protocol's novel ICL approach, see Neil Boister, 'Jurisdiction of the Criminal Chamber of the African Court of Justice and African Court of Justice and Human and Peoples' Rights' in Jalloh *et al* (n 42) 362-87.
[50] See Judge Mohamed Shahabuddeen, *Precedent in the World Court* (CUP [1996] 2007) 4. [commenting with respect to the ICJ's judicial and political credibility.]
[51] See William Schabas, 'The Banality of International Criminal Justice' (2013) 11 *JICJ* 545.

Afghan inquiry involving alleged war crimes committed by US, Afghan, and Taliban forces in Afghanistan since 1 May 2003 and related crimes committed elsewhere since 1 July 2002, may be a bold step in the right direction.[52]

6.5 Issues for Further Research

This thesis does not pretend to have offered comprehensive and compelling responses to all the pertinent issues that it has raised. But it hopes at least to have charted sensible ways to approach them. Further research could, for instance, look more in depth into the operational impact of regional institutions like the Inter-American Court of Human Rights. This may take a socio-legal approach and might involve field visits and interviews with key personnel so as to gain access to confidential materials and information to enable a more thorough empirical investigation of the subject. Such research could be useful in terms of assisting a more elaborate assessment of the efficacy and challenges of regional courts.

Similarly, further research could investigate why the Arab Court of Human Rights has struggled to get off the ground or why no credible regional human rights system exists in the Asia-Pacific region. Understanding the underlying factors behind these situations could help to estimate the chances of operating an RCC in those regions. It could also feed into broader analyses regarding factors that promote or hinder regional cooperation and development in international law.

In addition, embattled states seldom request third states for help in prosecuting their own nationals accused of committing atrocity crimes at home. This is an interesting issue that is linked to the application of the subsidiarity principle proposed in this study. Why is this practice uncommon and how could it enhance

[52] See *Situation in the Islamic Republic of Afghanistan*, ICC-02/17-138, 'Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan' Appeals Chamber Decision, 5 March 2020.

ICrimJ? If applied properly, this option could help to overcome the type of controversies that tends to stymie the exercise of universal jurisdiction.

New research could also explore why the ICC's complementarity policy has not worked well in situations that were not self-referred by the states concerned. For instance, in Sudan and Libya – two situations referred by the UNSC – the ICC has struggled to assert its jurisdiction. In Kenya and Georgia – two situations that were triggered by the prosecutor's *ex proprio motu* – the cases have either been abandoned or yet to be actively considered by the court. Does this pattern suggest that self-referral is perhaps the best means of accelerating cases at the ICC? Would states be more likely to refer cases to an RCC and to cooperate better with an RCC vis-à-vis the ICC? What would be the form of relations between the UNSC and the future RCCs? Could the UNSC have referral and/or deferral powers in the statutes of each of the RCCs? Pursuant to the terms of Article VII of the UN Charter, could the UNSC order the closure of an RCC? These are interesting questions that may require new studies.

It is worth restating that while the thesis has found considerable theoretical support for institutionalising RCCs, the latter's viability would be contingent upon the cooperation and political will of states within the relevant regions. It should also be clear that RCCs would not be in any way an absolute remedy for all existing ailments and concerns. Their capacities however could be considerably enhanced by preserving some working relationship with relevant courts in the global justice system. The thesis has theorised key principles that could support such a vital liaison within a tripartite complementarity of courts.

APPENDICES

List of Abbreviations and Acronyms

Journal Abbreviations

ACLR	American Criminal Law Review
AJICJ	African Journal of International Criminal Justice
AFR J INT'L & COMP L	African Journal of International and Comparative Law
AFR YB INT'L L	African Yearbook of International Law
AJIL	American Journal of International Law
AJLS	African Journal of Legal Studies
ALBERTA LR	Alberta Law Review
AM J JUS	American Journal of Jurisprudence
AMST LF	Amsterdam Law Forum
APSR	American Political Science Review
ARPS	Annual Review of Political Science
ASIL	American Society of International Law
ASIL Proc	Proceedings of the American Society of International Law
BERK J INT'L L	Berkeley Journal of International Law
BJC	British Journal of Criminology
BUF CLR	Buffalo Criminal Law Review
BUF HRLR	Buffalo Human Rights Law Review
BYIL	British Yearbook of International Law
CAL LR	California Law Review
CHIC J INT'L L	Chicago Journal of International Law
CILJSA	Comparative and International Law Journal of

	Southern Africa
CJIL	Chinese Journal of International Law
CLP	Current Legal Problems
COL LR	Columbia Law Review
COL JTL	Columbia Journal of Transnational Law
CORNELL INT'L LJ	Cornel International Law Journal
CRIM LF	Criminal Law Forum
DUKE J COMP & INT'L L	Duke Journal of Comparative and International Law
DUKE LJ	Duke Law Journal
ECLR	European Criminal Law Review
EJIL	European Journal of International Law
EMORY LJ	Emory Law Journal
EJC, CL&CJ	European Journal of Crime, Criminal Law and Criminal Justice
FILJ	Fordham International Law Journal
GEO JIA	Georgetown Journal of International Affairs
GEO LJ	Georgetown Law Journal
GLJ	German Law Journal
GOET J INT'L L	Goettingen Journal of International Law
HAGUE ACAD INT'L L	Hague Academy of International Law
HASTINGS LJ	Hastings Law Journal
HHRJ	Harvard Human Rights Journal
HILJ	Harvard International Law Journal
HIR	Harvard International Review
HLR	Harvard Law Review

HOUSTON J INT'L L	Houston Journal of International Law
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
HRR	Human Rights Review
ICLQ	International and Comparative Law Quarterly
ICLR	International Criminal Law Review
IJPS	Indian Journal of Political Studies
ILM	International Legal Materials
INT'L J TRANS J	International Journal of Transitional Justice
INT'L J CONST J	International Journal of Constitutional Law
IRRC	International Review of the Red Cross
ISQ	International Studies Quarterly
JAS	Journal of Asian Studies
JCL&C	Journal of Criminal Law and Criminology
JCMS	Journal of Common Market Studies
JICJ	Journal of International Criminal Justice
J INT'L L & INT'L REL	Journal of International Law and International Relations
JLAS	Journal of Latin American Studies
JLE	Journal of Legal Education
JLS	Journal of Legal Studies
JUFIL	Journal on the Use of Force and International Law
L&CP	Law and Contemporary Problems
LJIL	Leiden Journal of International Law
LLJ	Law Library Journal
LQR	Law Quarterly Review

MARQUETTE LR	Marquette Law Review
MAS	Modern Asian Studies
MAX PLANCK YUNL	Max Planck Yearbook of United Nations Law
MELB J INT'L L	Melbourne Journal of International Law
MELB ULR	Melbourne University Law Review
MICH J INT'L L	Michigan Journal of International Law
MICH LR	Michigan Law Review
MIL L REV	Military Law Review
MIN LR	Minnesota Law Review
MLR	Modern Law Review
NELR	New England Law Review
NILR	Netherlands International Law Review
NJIL	Nordic Journal of International Law
NPE	New Political Economy
NYILR	New York International Law Review
NYU J INT'L L & POL	New York University Journal of International law & Politics
NZYIL	New Zealand Yearbook of International Law
OJLS	Oxford Journal of Legal Studies
REV INT'L STUD	Review of International Studies
SAJCJ	South African Journal of Criminal Justice
SAJP	South African Journal of Philosophy
SANTA CLARA LR	Santa Clara Law Review
SLR	Stanford Law Review
STAN J INT'L L	Stanford Journal of International Law

TEMPLE INT'L & COMP LJ	Temple International and Comparative Law Journal
TEXAS L REV	Texas Law Review
TEXAS INT'L LJ	Texas International Law Journal
UC DAVIS L REV	University of California Davis Law Review
UTRECHT LR	Utrecht Law Review
VA J INT'L L	Virginia Journal of International Law
VA J INT'L CRIM L	Virginia Journal of International Criminal Law
WUGSLR	Washington University Global Studies Law Review
WIS INT'L LJ	Wisconsin International Law Journal
WPJ	World Policy Journal
YALE J INT'L L	Yale Journal of International Law
YBIHL	Yearbook of International Humanitarian Law

Other Abbreviations and Acronyms

AC	Appeals Chamber
ACC	Allied Control Council
ATCSA	Anti-terrorism, Crime and Security Act
AU	African Union
ACtHPR	African Court of Human and Peoples Rights
ASP	Assembly of States Parties
CAR	Central African Republic
CJEU	Court of Justice of the European Union
CUP	Cambridge University Press
DRC	Democratic Republic of the Congo

EAC	Extraordinary African Chamber
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
ETSPSC	East Timor Special Panels for Serious Crimes
EU	European Union
IACtHR	Inter-American Court for Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICL	International Criminal Law
ICJ	International Court of Justice
ICrimJ	International Criminal Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IST	Iraqi Special Tribunal
NATO	North Atlantic Treaty Organisation
OAS	Organisation of American States
OHCHR	Office of the High Commissioner for Human Rights

OTP	Office of the Prosecutor
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
PPUJ	Princeton Principles on Universal Jurisdiction
RCC	Regional Criminal Court
RPF	Rwandan Patriotic Front
RSCSL	Residual Special Court for Sierra Leone
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TFV	Trust Fund for Victims
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Authority in East Timor
US(A)	United States (of America)
USSR	Union of Soviet Socialist Republic
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
WWI	World War One
WWII	World War Two

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