PUTTING THE RELATIONSHIP BETWEEN STATES AND THE ICC INTO PERSPECTIVE: THE VIABILITY OF NATIONAL COURTS IN DRIVING COMPLEMENTARITY IN AFRICA

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SUMMARY

This article discusses implementation challenges of the principle of complementarity; challenges in prosecuting sitting African Heads of state and nefarious warlords. The article highlights the disparity existing in physical security and remuneration between judges of national African courts and those of the ICC in similar jobs. While national judges are exposed to intimidation and influence from the most powerful in their jurisdictions, the ICC judges are provided with adequate protection and independence. Using the DRC and Kenya as case studies, this article asserts that where national courts intervene in prosecuting international crimes, heads of state would not be prosecuted. In most African states, the courts are spawned from the authoritarian regimes. This challenge renders the reliance on complementarity justice questionable.

1 INTRODUCTION

Pursuant to Article 17 of the Rome Statute on the admissibility criteria, the International Criminal Court (ICC) only assumes its jurisdiction in circumstances where a state has failed genuinely to investigate and

prosecute a given situation where crimes under its jurisdiction have been clearly committed.[1] These crimes include crimes against humanity, genocides and war crimes.[2]

Under the Rome Statute establishing the ICC, unlike most *ad hoc* security courts such as the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) that have primacy over national courts, the ICC peremptively defers to the competence of domestic courts.[3] As a result, the jurisdiction of the ICC is only triggered when the national courts are unable or unwilling to prosecute alleged offences.[4] This has become known as the principle of complementarity under international criminal law.

The principle of complementarity has grown to be accepted as being well suited to dealing with international crimes. This is so because the involvement of a public-law dimension appeared to be at odds with an absence of an underlying system of shared social ethics, given that the international regime knows no global sovereign and that morals differ from country to country.[5] Consequently, giving national courts primacy to take action in a situation where an international crime has been committed is the way to go.

The Preamble to the Rome Statute is clear that the ICC's jurisdiction will be complementary to that of local jurisdictions as enshrined in Article 17 of the Statute.[6] National implementation obligations taken up by states that show interest in becoming members of the Rome Statute are quite extensive. According to the Rome Statute, effective prosecution will only result if steps are taken from the national level, including international co-operation.[7]

Pursuant to Article 12 of the Rome Statute, a state accepts jurisdiction by becoming a state party, or if the state is a non-party to the Rome Statute, it can declare its acceptance of jurisdiction. Given that the ICC lacks most of the institutions required for the progressive handling of a criminal matter such as a police force and others, it has to rely on the assistance and cooperation of national mechanisms and state agencies.[8]

Implementation of the principle of complementarity calls for the concomitant engagement of the principle of jurisdiction. Jurisdiction ascertains the degree to which criminal acts committed are under the power

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1 Jurdi *The International Criminal Court and National Courts: A Contentious Relationship* (2016) 132.

2 Which crimes fall within the jurisdiction of the ICC? https://www.icc-cpi.int/about?ln=en (accessed 2018-11-03).

3 Burke-White "Implementing a Policy of Positive Complementarity in the Rome System of Justice" 2008 19 *Criminal Law Forum* 59.

4 *Ibid*.

5 Brandon and Du Plessis *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Common Wealth States* (2005) xi.

6 Du Plessis "Complementarity and Africa: The Promises of International Criminal Justice" 2008 *African Security Review* 156.

7 *Ibid*.

8 Du Plessis 2008 *African Security Review* 157.

of a state.[9] The general principle under international law is that for a person to be accused of committing crimes before a domestic court, one of the four principles, which include territoriality, active nationality, passive nationality and universal jurisdiction, must be recognised.[10]

The aim of this article is to analyse the most overwhelming challenges faced by a majority of African national courts in implementing the principle of complementarity. In the process of the analysis, this article engages with a number of factors that have the potential to inhibit the realisation of this objective. These are the independence of national courts in Africa, the independence of judges in Africa, physical protection provided by government to judges in Africa, and the degree to which the pay package of judges in Africa is commensurate with the mammoth task with which they are entrusted. These factors are compared with the same factors in relation to ICC judges.

The next section of the article reflects on the prosecution of heads of state who are still in office in Africa, and of nefarious warlords. Thereafter, the article elaborates on the security and remuneration of judges of national African courts *vis-a-vis* that of ICC judges in discharging similar duties. The discussion here refers to a lack of self-protection and the dangers to which African judges are often exposed, given that nefarious warlords or powerful heads of state who have been indicted may threaten the lives of judges, which serves as a disincentive for judges to entertain such matters. The article also establishes that the intervention by municipal courts is reminiscent of double standards, given that only rebels are likely to be prosecuted. Most African countries' constitutions provide immunity for their sitting heads of state. A majority of African countries are authoritarian and the courts are spawn of the regimes.[11] Yet, independence of the judiciary is a recognised tenet of the rule of law.[12]

2 THE PRINCIPLE OF COMPLEMENTARITY AND THE PROSECUTION OF HEADS OF STATE

The principle of complementarity attributes the primary jurisdiction over international crimes to national jurisdiction. Nevertheless, when national jurisdiction fails to carry out that mandate, then the ICC takes over that role. Although the criminal-law systems of national courts provide justice for victims and due process for accused persons under international law, these states have often been unable or unwilling to fulfil that mandate.[13]

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9 Brandon and Du Plessis *The Prosecution of International Crimes* 17.

10 *Ibid*.

11 Fombad "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa" 2010 55 *The American Journal of Comparative Law* 13.

12 Bedner "An Elementary Approach to the Rule of Law" 2010 *Hague Journal on the Rule of Law* 67–68.

13 Macedo "The Princeton Principles on Universal Jurisdiction" in Macedo (eds) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2004) 18.

Moreover, universal jurisdiction *in absentia* has been used by the Princeton Principles on Universal Jurisdiction[14] in its Principle 1 on the fundamentals of universal jurisdiction. This principle was also applied by the International Court of Justice in the *Democratic Republic of Congo v Belgium* (*Arrest warrant case*) of 2000.[15]

Ratification of the ICC Statute constitutes significant evidence of acknowledgment by states parties of their duty to reject impunity, to prosecute and to punish those who commit international crimes. The situation of two African states parties that have implemented the ICC Rome Statute at the national level (the Democratic Republic of Congo (DRC) and Kenya) is discussed hereunder.

2 1 The Democratic Republic of Congo (the DRC)

The Congolese justice system demonstrates the weaknesses and fundamental gaps and flaws that allow impunity to continue for past and current crimes committed in the DRC under international law.[16]

Despite efforts to bring about reforms to the justice sector and promote the fight against impunity by the ratification of the Rome Statute since March 2002, the outlook for justice at the national level remains bleak in the DRC. Few people have access to existing justice mechanisms, and confidence in the justice system is low. Victims and witnesses are reluctant to come forward, as there is no national system in place to protect them.[17]

Years have lapsed since the DRC ratified the Rome Statute in March 2002 but the DRC government has yet to meet its legal obligation to incorporate the statute into national law because the Senate must approve the Bill to that effect.[18] Such legislation is essential to ensuring complementarity between the Congolese national jurisdiction and the ICC, and also to strengthen the country's legal system so that it can end the ongoing cycle of impunity of all perpetrators for the most egregious international crimes they have committed in the country.[19]

Article 9 of the 2001 draft legislation, which prepared the DRC for the implementation of the ICC Rome Statute before ratification and the integration of its norms into the Congolese law, provides that it "applies to all in like manner, with no distinction made based on official capacity".[20] However, the 2001 draft legislation was replaced in October 2002 with the Draft Law implementing the ICC Statute (Draft 2 of October 2002).[21]

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14 The Princeton Principles on Universal Jurisdiction (2001) 2.

15 (11 April 2000) 2000 ICJ.

16 Murungu "Immunity of State Officials and the Prosecution of International Crimes" in Murungu and Japhet (eds) *Prosecuting International Crimes in Africa (*2011) 56.

17 Amnesty International "DRC: Neglected Congolese Victims Deserve Justice Now" (2019) https://www.amnestyusa.org/reports/drc-neglected-congolese-victims-deserve-justice-now/2/ (accessed 2019-03-30).

18 Murungu in Murungu and Japhet (eds) *Prosecuting International Crimes in Africa* 58.

19 Amnesty International "The Democratic Republic of Congo (DRC)" http://demandjusticenow.org/drc/ (accessed 2018-11-03).

20 Murungu in Murungu and Japhet (eds) *Prosecuting International Crimes in Africa* 58.

21 *Ibid*.

After ratification of the ICC Rome Statute, the Congolese parliament improved the Military Criminal Code (MCC) and granted the jurisdiction exclusive power over international crimes.[22] The military courts have proceeded to adjudicate over international criminal crimes committed in the DRC. For instance, the military court of garrison of Haut Katanga on 5 March 2009 convicted the Mayi Mayi commander Gédéon Kuyungu Matunga and 20 other combatants for serious crimes; it also invoked and applied the provisions of the Rome Statute in the case of *TMG de Mbandaka, Affaire Songo Mboyo, 12 April 2006, RP 084/05*[23] and many others.[24] In this case, the salary of soldiers had been stolen by a captain who was their commander and this resulted in mutiny in Songo Mboyo.[25] This was followed by reprisals by former rebels who awaited integration in the army according to a "global agreement."[26] The violence led to the rape and death of several women. The rape survivors laid charges against the TMG of Mbandaka and the military prosecutor charged the soldiers with the crime against humanity of rape.

Nevertheless, in the military justice system, officers defended soldiers under their command from justice and the political and military hierarchy protected senior military figures. This is of particular concern in a country where the army is one of the main perpetrators of crimes under international law.[27]

The DRC has signed and ratified many international instruments addressing international crimes – such as the Geneva Convention of 1946, the ICC Rome Statute, the African Charter on Human and Peoples' Rights (ACHPR) and the International Covenant on Civil and Political Rights (ICCPR), among others. Article 215 of the Constitution of the DRC stipulates that "lawfully concluded treaties and agreements have, when published, an authority superior to that of the law, subject to each treaty and agreement to its application by the other party".[28] Therefore, all perpetrators of international crimes including state officials must be prosecuted and punished for their crimes. Moreover, Article 10 of the 2002 Draft Bill provides that the law must be applied equally without discrimination or distinction based on the official position.[29] In other words, any state official, including the head of state, would in no case be exempt from criminal prosecution and responsibility. This law has been implemented by the Penal Code, but it fails to address the issue of distinction based on official position. Nevertheless, the DRC has ratified the Rome Statute and this treaty enforces that provision.

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22 Olugbuo "Positive Complementarity and the Fight Against Impunity in Africa" in Murungu and Biergon (eds) *Prosecution of International Crimes in Africa* (2011) 259.

23 Can also be cited as *Military Prosecutor v Eliwo Ngoy & Ors* RP 084/2006 12 April 2006.

24 Olugbuo in Murungu and Biergon (eds) *Prosecution of International Crimes in Africa* 260.

25 Imeodemhe *The Complementarity Regime of the International Criminal Court: National Implementation in Africa* (2017) 97.

26 The global agreement was so called because the Congolese war has been termed by commentators as "Africa's world war". Many African countries were involved in the war, including, among others, Burundi, Rwanda, Uganda and Zimbabwe.

27 Amnesty International http://demandjusticenow.org/drc/.

28 Art 215 of the Constitution of the Democratic Republic of Congo 2006.

29 Murungu in Murungu and Japhet (eds) *Prosecuting International Crimes in Africa* 59.

The provision also provides that "immunities or those special procedural rules that may attach to the official capacity of a person, pursuant to the law or under international law shall not bar the jurisdiction from exercising their competent jurisdiction over that person".[30] It is accordingly submitted that impunity cannot be tolerated, regardless of who orchestrates grave breaches. However, the authors believe that given the perception that Africans attach to the role of a president, it is recommended that this responsibility should be discharged with wisdom and prudence.

2 2 Kenya

The post-election crisis of late 2007 and early 2008 is considered to be the consequence of Kenya's historical politics.[31] Kenyan politics has been characterised by five negative factors: ethnicity, dictatorship, criminal gangs, political alliances and impunity.[32]

Subsequent to the announcement of the contested presidential election results on 30 December 2007, which gave a second term to Mwai Kibaki, Kenya was plunged into its worst political and humanitarian crisis from December 2007 to February 2008; violence caused the death of a thousand of people and the displacement of 300,000, both aspects having a serious ethnic character.[33]

Pursuing accountability for serious crimes committed in Kenya after the presidential election, the outcome of the Kenya National Dialogue and Reconciliation Accord of 28 February 2008 was to set up a Commission of Inquiry on Post-Election Violence (CIPEV), also referred as the Waki Commission after chairman Judge Philip Waki. The Waki Commission's mandate was to investigate the facts and surrounding circumstances related to the serious crimes committed after the presidential election, as well as the conduct of state security agencies in handling their responsibilities, and to make appropriate recommendations on these matters.[34]

In October 2008, the major recommendation of the Waki Commission was the creation of a Special Tribunal for Kenya. Both Kenyan and international judges had to seek accountability of individuals who bore the responsibility of international crimes. In December 2008, Kenya enacted the International Crimes Act 2008 to implement the Rome Statute in its legislation.[35]

Failing in their responsibility to prosecute perpetrators of the serious crimes, on 31 March 2010, Kenya handed over the case to the ICC, which

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30 *Ibid*.

31 Materu *The Post-Election Violence in Kenya: Domestic and International Legal Responses* (2015) 15.

32 *Ibid*.

33 Nicholas *The International Criminal Court and the End of Impunity in Kenya* (2014) 47.

34 International Centre for Transitional Justice "The Kenyan Commission of Inquiry of the Post-Election Violence" (2008) https://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf (accessed 2018-11-03) 1.

35 International Centre for Transitional Justice "Prosecuting International and Other Serious Crimes in Kenya" (April 2013) https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf (accessed 2018-11-03) 1.

authorised the prosecutor to act *proprio motu* to start an investigation into Kenyan post-election violence.[36]

The result of this investigation was that, in January 2012, charges were confirmed against Uhuru Kenyatta and William Ruto (elected in 2013 as president and deputy president of Kenya respectively); these included several counts of crimes against humanity such as killing (murder), forcible transfer of population, persecution, sexual offences and other inhumane acts.[37]

Despite their high-ranking office, the question of immunity *ratione personae* did not constitute a barrier to their prosecution according to the International Military Tribunal of Nuremberg and the ICC under Article 27 of the Rome Statute, the International Criminal Law Commission and some scholars.[38] In fact, Kenyatta and Ruto did not face criminal proceedings in their positions but rather in their personal capacity.[39]

In response to the result of the investigation, the Kenyan government decided to bring the case back to the country, based on Article 17 of the Rome Statute, in order to let the national courts, the East African Court and the African Court of Justice and the African Court of Human and Peoples' Rights prosecute the perpetrators.[40] Later in 2012, the Director of Public Prosecution (DPP) established a multi-agency with the mandate to prosecute the cases of post-election violence.[41]

All five counts of crimes against humanity are also punishable under Chapter XIX (killing), Chapter XV (sexual offences) and Chapters XXII and XXIV (protecting life and health) of the Kenyan Penal Code, which is more punitive than the ICC Rome Statute.[42]

Unluckily for the victims of post-election violence, on 5 December 2014, the prosecutor (Fatou Bensouda) withdrew the charges of crimes against humanity against President Kenyatta, citing absence of sufficient evidence to proceed, while the case of Ruto and other perpetrator are still pending before the ICC's Pre-Trial Chamber.[43] Moreover, the prosecutor accused the Kenyan government of refusing to handle important evidence in the case, and of intimidation of witnesses.[44]

Although Kenya has a criminal justice system that includes the International Criminal Act 2008 and constitutional protection for the most fundamental human rights, the post-election crimes remain a major problem owing to the lack of investigation or the lack of interest in prosecuting the

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36 Pedritti *Immunity of Heads of State and State Officials for International Crimes* (2014) 261.
37 *Ibid*.
38 Pedritti *Immunity of Heads of State* 262.
39 *Ibid*.
40 International Centre for Transitional Justice https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf 2.
41 *Ibid*.
42 Materu *The Post-Election Violence in Kenya* 94.
43 Novak *The International Criminal Court: An Introduction* (2015) 80.
44 *Ibid*.

crimes by the Office of the Director of Public Prosecutions.[45] Consequently, the International Crimes Division of the Kenyan High Court, proposed by a committee of the Judicial Service Commission (JSC) on 30 October 2012 and intended to prosecute post-election violence cases as well as other international and transnational crimes, may end up with no cases to prosecute.[46]

2 3 Obstacles to the principle of complementarity

Given these facts, it is important to highlight that the ICC functions differently from national criminal courts in a number of important respects. Despite the existence of all necessary provisions in the two African countries under survey, they have failed the litmus test to establish proper and genuine implementation of such provisions. The primary responsibility to investigate and to prosecute crimes lies with the national authorities.[47] The fundamental principle governing the functioning of the ICC is the principle of complementarity, in terms of which prosecutions are deferred to the national state.[48] The ICC also has limited jurisdiction based on the territorial principle and the active national principle, apart from the principle of complementarity between the ICC and national courts.[49] From the analysis of the DRC and Kenya, it is clear that notwithstanding the domestication of the ICC statute, this has not resulted in the prosecution of international crimes.

Although the ICC only functions effectively if a state ratifies the Rome Statute, the provisions of the ICC already constitute a braking impact on the state's justice system.[50] Nonetheless, the jurisdiction of the ICC is activated only when there is unwillingness by a state to prosecute crimes under Article 5 of the ICC Rome Statute (crimes against humanity, war crimes and genocide), or inability in the case of a collapse of the judicial system or a lack of effective means at national level.[51] Thus, the ICC can admit a case where there is a lack of implementation in the national legal system. Applicable international standards, including the Statute under Article 21 of the Rome Statute, are a consequence of "incapability" of national jurisdiction to provide justice in the given case.[52]

The ICC can act where its jurisdiction has been accepted by the state in which the crimes were committed. The ICC can also act in the process of

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45 Kenya for Peace with Truth and Justice "An Option for Justice? The International Crimes Division of the High Court of Kenya" (2014) http://kptj.africog.org/wp-content/uploads/2014/08/A_Real_Option_for_Justice_The_International_Crimes_Division.pdf (accessed 2018-11-03) 9.

46 International Centre for Transitional Justice https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf 2.

47 Gentile "Understanding the International Criminal Court" in Plessis (eds) *African Guide to International Criminal Justice* (2008) 113.

48 Lattanzi "The International Criminal Court and National Jurisdictions" in Politi and Nesi (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) 80.

49 Gentile in Plessis (eds) *African Guide to International Criminal Justice* 100.

50 Lattanzi in Politi and Nesi (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* 180.

51 *Ibid*.

52 Lattanzi in Politi and Nesi (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* 181.

implementation *lato sensu* (in general) where a state is not party to the Rome Statute, as a means of avoiding the commission of such crimes in the state's territory by its state officials or by its nationals in third states.[53] Moreover, the ICC may also intervene in terms of its powers under Article 13(b) of the Rome Statute if:

> "a situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the [United Nations] Security Council acting under Chapter VII of the UN Charter even for crimes committed by nationals of or on the territory of non-state parties."[54]

For instance, the situation in Darfur, Sudan since 1 July 2002 was referred to the prosecutor of the ICC by the Security Council on its Resolution 1593 (2005).[55]

Despite the useful framework put in place for the purpose of implementing complementarity, an important question still remains: which judge in a national jurisdiction has the temerity to prosecute a sitting head of state? What makes the situation more complex is that in most of these jurisdictions, judges depend on the executive for their promotion and financial remuneration, and most often, the executive also has powers to discipline the judges. These factors pose a challenge to the realisation of complementarity in Africa.

3 THE FAILURE OF THE STATE TO PROTECT JUDGES

This section seeks to demonstrate the failure of states to secure or protect the lives of judges in Africa when compared to ICC judges who discharge similar duties.

The point of departure is that the principle of complementarity leaves the primary duty to prosecute heads of state (where necessary, as explained above) in the hands of local judges. In the event of failure or inability to carry out this function, the ICC steps in.

It is commonly observed that although the local judge has a daunting task to accomplish compared to that of the ICC judge, he or she lacks adequate security in terms of remuneration and life or human security.

The local judge lives in the same jurisdiction as the warlord or head of state who he or she must indict. Nefarious warlords may threaten judges' lives or those of their families because local judges are not given adequate protection by government. Again, an indicted head of state who is being prosecuted tends to command enough financial resources and influence to mobilise an illegal militia or loyal patronage networks if such head of state should wish to make life unbearable for the judge – an inert incentive for the judge to drop a case or recuse himself or herself permanently.

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53 *Ibid*.

54 Gentile in Plessis (eds) *African Guide to International Criminal Justice* 101.

55 Security Council "Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court" (31 March 2005) http://www.un.org/press/en/2005/sc8351.doc.htm (accessed 2018-11-03).

To avoid encroachment on human rights, judges have a duty, according to theorists, to reach a judgment that ensures the sense of a just application of facts and substantive law.[56] However, in Africa, this is far from being true because most judicial organs are not independent but rather serve as a mouthpiece of authoritarian governments.[57] As a result, national courts' justice may only be reminiscent of the victor's justice and court – that is, justice as dictated by the strongest or more influential of the two parties

3 1 Financial security

Judicial independence is promoted by granting life tenure to judges, which ideally empowers them to decide cases and to make rulings according to the rule of law and judicial discretion, even if powerful interests oppose those decisions. Nevertheless, the financial security of judges in Africa seems to be a worrying issue as low payment only serves as a disincentive for judges to uphold the required standards.

3 1 1 Democratic Republic of Congo

Politicians in the DRC have constantly manipulated judges to the extent that judges are now accused of having become corrupt in order to supplement low salaries; that they are facing major independence challenges makes it more obvious that the judiciary may be vulnerable to corruption.[58] Some 1 700 judges of the DRC suspended a strike on 6 January 2004. The purpose of the strike was to demand better pay and working conditions, as well as greater independence of action. That the judiciary is not independent was among the reasons that their request for a salary increment could not be met.[59] This view suggests that an independent judiciary would enable judges to run their affairs without executive interference and as a result that the issue of their salary allocation should be fixed independently – probably to be voted on by Parliament, and not allocated by the executive. Whenever the salary of judges is allocated by the executive, a judge must defer to the authority of the executive for the latter to undertake any reform favourable to him or her.

Sambay Mutenda Lukusa, the president of the Gombe Court of Appeals and president of the judges' union, noted that "the financial question was part of our larger concern of ensuring an independent judiciary". At that time, the salaries of judges were between $15 (US) and $40 per month and they were asking for an increase in their salaries up to at least $950 per month and for payment of salary arrears.[60] However, there is still a problem of

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[56] Bedner 2010 *Hague Journal on the Rule of Law* 67–68.

[57] Lesirela *Providing for the Independence of the Judiciary in Africa: A Quest for the Protection of Human Rights* (LLM mini-dissertation) 2003 1.

[58] Anti-Corruption Resources Centre "Overview of Corruption in the Democratic Republic of Congo" (October 2010) http://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-the-drc/ (accessed 2018-11-03).

[59] Humanitarian News and Analysis "DRC: Judges Suspend Their Two Month Strike" http://www.irinnews.org/report/47909/drc-judges-suspend-their-two-month-strike (accessed 2018-11-03).

[60] *Ibid*.

financial autonomy and security that pushes judges to engage in corrupt practices. The judiciary receives less than one per cent of the budget of the country; they cannot live comfortably without being tempted by corruption to supplement the basic subsistence of their families – that is, health care, shelter, transport and education for their children and food for their families.[61]

Indeed, the Constitution provides that the judicial power has a budget to be included in the DRC's general budget.[62] The salary of judicial officials such as the First President of the Supreme Court, the Attorney General of the Supreme Court, the President of the Constitutional Council, the President of the Court of Auditors and the Commissioner of Law before the Constitutional Court has increased to 5 million francs ($3 192.61).[63]

However, the realities faced by judges, magistrates and the entire judicial support staff in the DRC are stark. Justice Dhekana has stated: "we don't even have a budget to run our office. To get money, we have to hassle the people in our cases." Every year, the judges write a report to the national government, explaining their needs. "Nothing ever happens".[64] Moreover, the judge also pointed out that they are not working in a professional and conducive space. For instance, there is no electricity in Bunia's judges' office, except for a small solar panel; no chairs existed until UN peacekeepers donated some furniture, and the clerk uses a typewriter for all his work.[65]

Unfortunately, the salary that Justice Dhekana receives as a judge at Bunia's court is $600, which cannot support his family.[66] Consequently, the judges extort money from the parties in the cases before them.[67]

3 1 2 Kenya

The government of Kenya provides funds to all staff members of the judicial power in terms of the Constitution of Kenya, which states in its Article 160(3)

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61 Rugege "Judicial Independence in Rwanda" 2006 424 *Global Business and Development* 533

62 Art 149(7) DRC Constitution states "The judicial power has a budget drafted by the Superior Council of the Magistrature and transmitted to the Government to be included in the general budget of the State".

63 APS "Le salaire des hauts magistrats porté à 5 millions par l'allocation d'une indemnité différentielle (ministre)" The salary of senior magistrates increased to 5 million by the allocation of a differential allowance (minister) 21 December 2011 http://www.seneweb.com/news/Afrique/le-salaire-des-hauts-magistrats-porte-a-5-millions-par-l-rsquo-allocation-d-rsquo-une-indemnite-differentielle-ministre_n_56162.html (accessed 2018-10-19).

64 York "Democratic Republic of Congo Teeters on Edge of 'Catastrophe'" (04 June 2017) https://beta.theglobeandmail.com/news/world/democratic-republic-of-congo-teeters-on-edge-ofcatastrophe/article35200017/?ref=http://www.theglobeandmail.com& (accessed 2017-10-11).

65 *Ibid*.

66 *Ibid*.

67 *Ibid*.

that "the remuneration and benefits payable to or in respect of judges shall be a charge on the Consolidated Fund".[68]

However, there are cases of corruption of the judiciary that tarnish its reliability. This was demonstrated in the case of a judge of the Supreme Court of Kenya, Philip Tunoi, who was accused by journalist Wilson Kiplagat of accepting a bribe amounting to $2 million (£1.4 million) from Dr. Evans Kidero to facilitate his victory to become the governor of Nairobi during the 2014 election.[69] This view was affirmed by his defeated opponent Ferdinand Waititu, who also claimed "he had fresh evidence indicating that Tunoi received Sh200 million to declare Kidero as the governor."[70] It is probable that more judges of the highest court in the land may have benefitted from the alleged bribe. Further evidence suggested that the bribe amount was not $2 million but about $3 million for four judges, but two of the judges were paid separately.[71]

The new Chief Justice, David Maraga, has also stated that ten per cent of staff in the judiciary are involved in this corruption, thereby tainting the image of the judiciary. This ethos has pushed the Chief Justice to wage a campaign against corruption in the judiciary.[72] Presently, the judiciary in Kenya is seen not only as a corrupt institution but its rulings are also seen as judicial populism. After the presidential election of 8 August 2017, the Supreme Court, composed of four judges, including Chief Justice David Maraga, agreed on the nullification of Uhuru's win. Despite the fact that two other judges Njoki Ndung'u and Jackton Ojwang made a decision on 1 September 2017 annulling the result of President Uhuru Kenyatta, he was retained as the President of Kenya.[73]

As a result of this diversity in views by the judges, politicians have in turn attracted different opinions depending on their political orientations. For politicians who occasionally manipulate the votes of the people, the nullification of Kenyatta's win has been seen as the emergence of judicial populism – that is, judges are seen as meddling with the popular choice. A critical analysis of the situation calls for an examination of the three powers: executive, legislative and judicial. The representatives in the legislative executive powers are voted for by the people in terms of Article 94(1) and (2) and Article 129(1) and (2) respectively of the Constitution.[74] In contrast, the

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68 Art 160(3) of the Constitution of Kenya 2010.

69 Osiro "Corruption in Kenya Supreme Court Judges Accused of Accepting Millions in Bribes" https://www.huffingtonpost.com/washington-osiro/corruption-in-kenya-supreme-court_b_9154580.html (accessed 2018-10-17).

70 *Ibid*.

71 *Ibid*.

72 Gitonga "There is Corruption in the Judiciary, says Chief Justice David Maraga" (21 October 2016) https://www.standardmedia.co.ke/article/2000220603/there-is-corruption-in-the-judiciary -says-chief-justice-david-maraga (accessed 2018-10-17).

73 Chengeta "Politics, Populism and the Law: Who Really Speaks for Kenyans?" (1 October 2017) https://www.standardmedia.co.ke/article/2001256132/politics-populism-and-the-law-who-really-speaks-for-kenyans (accessed 2017-10-17).

74 Art 94 states: "(1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament. (2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty." Art 129 states: "(1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution. (2) Executive authority shall be exercised in

judicial power – in particular, the judges of the Supreme Court – are chosen by the president of the country and the Judicial Service Commission in terms of Article 166(1)(*a*) and (*b*).[75] The election of a president of the country implies the choice of the people. However, judges, who have not been voted for by the people, may have taken the nullification decision in the interest of the people or they may have taken the decision following the procedure of election investigation.[76] For opposition leader Raila Odinga and his supporters, this decision is considered as a decision taken in favour of the people, but for President Uhuru Kenyatta and his supporters, it is also considered to be a decision against the people.[77]

Indeed, financial insecurity as mentioned above supports the malfunctioning of the judiciary. Although each Constitution provides for a budget allocated to the members of the judiciary, this seems to have been ignored resulting in complaints by members of the judiciary relating to low salaries. The low salaries suggest either that government is unwilling to pay the judiciary or there is a lack of money in the state coffers. Since it is in the interest of the executive to subjugate and manipulate the judiciary to act according to its dictates, the former reason is likely to be correct. These factors serve as obstacles to a national judge in dispensing justice relating to international crimes in the same manner as the ICC.

3 2 Independence of the judiciary

The principle of an independent judiciary originates in the theory of separation of powers, whereby the executive, the legislature and the judiciary form three separate branches of government. Independence means that the judiciary must be able to decide on a case without being influenced by the executive, the legislature or any powerful person.

However, experience in Africa shows that judges are often subjected to pressures of different kinds, thereby compromising their ability to exercise their responsibilities.

3 2 1 Democratic Republic of Congo

In the DRC, the Constitution provides that the judicial power is independent of the executive and the legislative power.[78] Neither the executive nor the legislative power has the right to give orders to judges in the exercise of their

a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit."

75 Art 166 states: "(1) The President shall appoint– (*a*) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and (*b*) all other judges, in accordance with the recommendation of the Judicial Service Commission."

76 Chengeta https://www.standardmedia.co.ke/article/2001256132/politics-populism-and-the-law-who-really-speaks-for-kenyans.

77 *Ibid*.

78 Art 149(1) of the Constitution of the Democratic Republic of Congo 2006 states: "The judicial power is independent of the Legislative Power and of the Executive Power".

judicial powers[79] However, the DRC's judicial system exemplifies a lack of independence relating to the administration of justice. Notwithstanding the principle of separation of powers enshrined in Article 149 of the Constitution, the executive continues to interfere with the judiciary.

In the DRC, military courts under the Military Criminal Code, which covers international crimes under the ICC Rome Statute, may only entertain serious crimes. However, several reasons make for a mediocre performance of the professional responsibilities of military justice,[80] such as financial insecurity as explained above, interference by the executive in the administration of justice in order to protect leaders of armed factions from being prosecuted in military courts, and political pressures on prosecutors and courts to abandon proceedings that have already begun against former allies among the leaders of rebel or resistance movements.[81]

On 12 May 2006, the former Mayi-Mayi chief of North-Katanga Gédéon Kyungu Mutanga received protection from his former allies in the government in Kinshasa. This took the form of pressure to influence the investigation and, instead of being held in a cell, he was held in pre-trial detention at the officers' mess of the armed forces of the DRC (FARDC).[82]

The murder of Maître Charles Katambay, a member of the NGO *Groupe des Sans Voix* (group of those who have no voice) of the DRC Bar Association and of an association for the defence of judges that occurred on 25 May 2003 by a soldier from RDC-Goma (the *Rassemblement Congolais Pour la Démocratie*, a guerrilla rebel faction) in front of his house in Uvira. His work related to human rights activities is suspected to be the reason for his assassination.[83] The murder of Maître Charles Katambay is a clear mishap and indication of the existing challenge of the physical protection of judges and legal personnel in general in national courts in Africa.

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79 Art 151(1) and (2) of the DRC Constitution states: "The Executive power may neither give orders to a judge in the exercise of his jurisdiction, nor decide on disputes, nor obstruct the course of justice, nor oppose the execution of a decision of justice. The legislative power may not decide on jurisdictional disputes, or modify a decision of justice, nor oppose its execution".

80 The Open Society Initiative of Southern Africa and AfriMAP "Democratic Republic of Congo Military Justice and Human Rights: An Urgent Need to Complete Reforms" (2009) http://www.geneva-academy.ch/RULAC/pdf_state/AfriMAP-and-The-Open-Society-Initiative-for-Southern-Africa-Discussion-Paper-The-Democratic-Republic-of-Congo-Military-justice-and-human-rights-An-urgent-need-to-complete-reforms-2009.pdf (accessed 2018-11-03) 7.

81 The Open Society Initiative of Southern Africa and AfriMAP http://www.geneva-academy.ch/RULAC/pdf_state/AfriMAP-and-The-Open-Society-Initiative-for-Southern-Africa-Discussion-Paper-The-Democratic-Republic-of-Congo-Military-justice-and-human-rights-An-urgent-need-to-complete-reforms-2009.pdf 12.

82 The Open Society Initiative of Southern Africa and AfriMAP http://www.geneva-academy.ch/RULAC/pdf_state/AfriMAP-and-The-Open-Society-Initiative-for-Southern-Africa-Discussion-Paper-The-Democratic-Republic-of-Congo-Military-justice-and-human-rights-An-urgent-need-to-complete-reforms-2009.pdf 7.

83 Refworld "Attack on Justice: Democratic Republic of Congo" (2 April 2003) www.refworld.org/pdfid/48abdd680.pdf (accessed 2018-11-03).

3 2 2 Kenya

Article 161(1) of the Kenyan Constitution provides for the independence of the judiciary.[84] However, the judiciary in Kenya also faces intimidation from the executive and legislative powers. After nullification of the August 2017 election results, judges have been threatened.[85] The Chief Justice David Maraga has denounced the intimidation of members of the judiciary by politicians. Judges and members of the judiciary often receive threats, especially from Uhuru Kenyatta's political party who are ready "to cut the judiciary down to size".[86] The Chief Justice has also disapproved of the conduct of the Inspector-General of the police, who has failed to provide security for the life and property of members of the judiciary who are under threat.[87]

Following the threats constantly received by judges, Femi Falana, human-rights lawyer, wrote to Diego Garcia Sayan, UN Special Rapporteur on the Independence of Judges and Lawyers, calling for an investigation into the attacks on the judges of Kenya:

> "I am writing to respectfully request that you use your good offices and position to urgently investigate recent reports of attack on judges in Kenya, and to make it very clear to the Kenyan authorities that your mandate will not accept intimidation, harassment or any form of attacks against judges and other actors of the justice system ... individual judges, particularly of the supreme court, as well as other judicial officers and staff have been attacked, threatened and negatively profiled on social media ... I am seriously concerned that these attacks are coming at a time when the judiciary is starting to hear the 339 petitions already filed in various courts. The attacks on judges and court officials would seem to be politically motivated".[88]

This struggle is meant to empower the judiciary to decide all the cases before it impartially in accordance with the law, without any restrictions, improper influences, and direct or indirect pressures from government or any powerful person for any reason. It is clear that most national courts and judges in Africa may be tempted to avoid certain cases relating to international crimes for fear of retaliation from the powerful whom they have indicted. The people indicted live in the same environment with the judges and also command numerous defence networks on the ground that could be directed against these courts. Conversely, for ICC judges, there are two reasons that those whom they prosecute may command little or no threat against them. First, judges are based in The Hague, disconnected from the

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84 Art 161(1) states: "In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."

85 BBC "Maraga Hits Back at 'Threats' over Kenya Election Re-Run" (19 September 2017) http://www.bbc.com/news/world-africa-41322927 (accessed 2017-10-19).

86 Muthoni "Maraga Accuses the Executive and Parliament of Attempting to Control the Judiciary" (20 September 2017) https://www.standardmedia.co.ke/article/2001255034/maraga-accuses-the-executive-and-parliament-of-attempting-to-control-the-judiciary (accessed 2017-10-19).

87 *Ibid*.

88 The Cable "Falana Asks UN to Investigate Attacks on Judges in Kenya" (26 September 2017) https://www.thecable.ng/falana-asks-un-investigate-attacks-kenyan-judges (accessed 2018-10-19).

environment of those prosecuted, thereby weakening the latter's influence. Secondly, the defence networks of the prosecuted are based in ground zero in Africa. This conclusively suggests that the ICC judge who indicts a sitting president or warlord is more inclined to act without fear or favour than the judge of a national court in Africa who is faced with numerous obstacles.

4 CONCLUSION AND RECOMMENDATIONS

4 1 Conclusion

Given the existence of numerous challenges for local African courts in complying with the principle of complementarity,, as demonstrated above, it is evident that much still needs to be done if this principle is to gain prominence in international criminal law. It should be noted that numerous dangers exist when states are allowed to refer cases to the ICC as delineated under the competence of referrals to the ICC. This is because in most African states, relinquishing power by an incumbent has not come easily.

The authors have discussed the various challenges that are faced by national courts in their attempt to implement the principle of complementarity. These shortcomings have stood in the way of local courts' addressing international crimes and dispensing justice to those who desperately need and deserve it. Owing to factors, among others, such as poor payment of local judges and lack of physical protection for them, it becomes difficult for these judges to rule in sensitive matters such as the prosecution of international crimes committed by the most powerful individuals in the state with the same degree of independence exercised by their counterpart-judges of the ICC.

National jurisdictions can only be said to be unable to prosecute international crimes within a domestic arena when the State has not yet domesticated the ICC Rome Statute. However, this article establishes that there are several national jurisdictions that have domesticated the ICC Statute, but which have nevertheless failed to prosecute these crimes. For instance, Kenya and the DRC, and also countries like South Africa, Chad and Malawi, among others, have failed to prosecute Al Bashir of Sudan for war crimes, even though they are parties to the Rome Statute. It follows that African national jurisdictions are unwilling to prosecute international crimes. Some of the challenges advanced above could explain why they are unwilling. In other words, it is suggested that these shortcomings exist as a result of the context within which justice is required to be meted out. The African environment is still predominantly governed and controlled by dictators and warlords who take no account of respect for human rights and justice.

Many citizens have become fed up with the authoritarianism of such African governments and have embraced rebellion as a last resort to overthrowing such illegitimate governments who have tightened their grip on power against the will of the people. Some of these countries are parties to the Rome Statute and some are not. A few examples of authoritarian governments in Africa are the DRC, Cameroon, Uganda and to a certain

degree, Nigeria. In the course of such struggles, gross human-rights violations are bound to be committed by both factions. In these situations, the State is always quick to refer actions by rebels to the ICC as a means of eliminating opposition to their authority under the thin guise of attempting to curb human-rights violations, given that government itself cannot be absolved of gross human-rights violations resulting from confrontations. The nature of the referrals of Thomas Lubanga from the DRC and Joseph Kony from Uganda can attest to this paradigm.[89]

For a state to accept jurisdiction over egregious crimes committed during an armed struggle by opposing warring factions simply means that the government is judge in its own cause; in most African states, as examined above, courts are spawn of the regime and separation of powers is mostly symbolic or nominal. As a consequence, national courts would rarely rule against a sitting head of state even if it were proven that he or she had committed gross human-rights violations.

Therefore, the principle of complementarity faces two major challenges or setbacks in its implementation domestically. If local courts intervene, the executive might manipulate the verdict to its advantage. Yet, the matter will only be referred to the ICC when it is politically expedient for the executive to do so, rather than when there is a genuine interest in meting out justice or rooting out impunity.

4 2 Recommendations

National interest should be considered in the course of responding to an international crisis. The principle of national jurisdiction to prosecute offenders in international human-rights law should be applied to everyone to avoid insubordination. If this view is ignored, a time will come when national courts start agitating against complementarity. For instance, it is said that Al Bashir has been targeted by the ICC over the commission of international crimes,[90] whereas George Bush and Tony Blair are still at large after committing the same international crimes in Iraq.[91] The standard for indictment or prosecution should be uniform across the board.

It is recommended that the international community should adopt measures that expressly define the position of former heads of state, particularly in Africa. While the Rome Statute seems to remedy the existence of immunity of heads of state by providing that every person regardless of their position is subject to the jurisdiction of the court in instances where human rights have been violated, this cannot guarantee an effective capacity to prosecute, given that the ICC constitutes merely a complementary capacity to national jurisdictions, and not an exclusive jurisdiction in international matters.

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89 Wanki "Exploring the Interrelationship between the Responsibility to Protect and the Principle of Complementarity in Africa: Conceptual Ambiguities and Contestable Assumptions" 2018 4 *Journal of South African Law* 822.

90 *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09.

91 Caplan "Bush and Blair Carry on Unpunished for the Crimes of the Iraq War" (2018) The Globe and Mail https://www.theglobeandmail.com/news/politics/bush-and-blair-carry-on-unpunished-for-the-crimes-of-the-iraq-war/article31118851/ (accessed 2019-04-10).

It is also recommended that the African Union, together with the ICC, should be able to adopt resolutions or declarations to enforce the independence of the judiciary in Africa. The salaries of judges should be voted on directly by Parliament and should include huge financial incentives to discourage judges from becoming corrupt so that they may discharge their duty without fear or favour. The ICC, the African Union and national governments must finalise a pact on the creation of a security unit exclusively for the maximum protection of judges involved with international crimes. Such a measure would encourage and embolden judges to discharge their mandate fearlessly. At the same time, this measure would discourage implicated heads of state and warlords from threatening judges because they would be aware of such maximum protection and their determination to root out criminal responsibility in terms of international law.

This process would also inspire confidence and it certainly culminates in establishing the independence of the judicial power over executive power in African jurisdictions. Proper independence of the judiciary can lead to implementation of the rule of law and respect for international human rights in Africa.

All African states should be persuaded to implement the Rome Statute principles in order to ensure that grave and atrocious international crimes do not go unpunished and in order to end impunity at the national level with the help of complementarity.