Regional Complementarity: The Rome Statute and Public International Law
Miles Jackson*

*Departmental Lecturer in Law, University of Oxford. I would like to thank Dapo Akande, Eirik Bjorge, Alison Macdonald, Giulia Pinzauti, and Antonios Tzanakopoulos for their comments and suggestions. I am also grateful to the anonymous reviewers and editors of the Journal of International Criminal Justice.

Abstract

Admissibility decisions in *Kenyatta, Gaddafi,* and *Gbagbo* at the International Criminal Court have brought increased attention to the principle of complementarity under Article 17 of the Rome Statute. However, little attention has been paid so far to a related admissibility issue: how do regional (and sub-regional) tribunals fit with Article 17. This article argues that a genuine prosecution by a lawfully constituted regional tribunal should be seen as prosecution by a state such that the case is inadmissible before the ICC. This conclusion follows from a proper understanding of the legal nature of the relationship between states and regional tribunals and the contextualized application of the principles of treaty interpretation enshrined in Article 31 of the Vienna Convention on the Law of Treaties. Moreover, it is consistent with the values underlying the central principle of complementarity and makes sense as a matter of policy.

1. Introduction

Admissibility decisions in *Kenyatta, Gaddafi,* and *Gbagbo* at the International Criminal Court (the ICC or Court) have brought increased attention to the principle of complementarity in the Rome Statute (the ICC Statute).[1] These decisions provide some clarity on a number of difficult issues of interpretation in respect of the rule on admissibility in Article 17 ICC Statute. Moreover, they have provoked widespread academic comment and criticism.[2]

---

[1] See Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', *Muthaura, Kenyatta, and Ali* (ICC-01/09-02/11 OA), Appeals Chamber, 30 August 2011; Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', *Gaddafi and Al-Senussi* (ICC-01/11-01/11-OA 4), Appeals Chamber, 21 May 2014; Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo', *Simone Gbagbo* (ICC-02/11-01/12 OA), Appeals Chamber, 27 May 2015.

[2] See e.g. F. Megret and M. Samson, 'Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials', 11 *Journal of International Criminal Justice* (2013) 571-589; P. McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism', 13 *Chinese Journal of International Law* (2014), 259–296; H. van der Merwe, 'The Show Must Not Go On: Complementarity, the Due Process Thesis and Overzealous Domestic Prosecutions', 15 *International Criminal Law Review* (2015) 40-75; K. Heller, 'Radical Complementarity', 14 *JICJ* (2016) 637.

This article focuses on a different question – one unaddressed in the case law of the ICC: how do prosecutions before regional (or sub-regional) tribunals fit with Article 17? Its argument is that a genuine criminal prosecution by a lawfully constituted regional tribunal means that the 'case is being … prosecuted by a State which has jurisdiction over it' for the purposes of Article 17(1)(a).[3] This conclusion follows from a proper understanding of the legal nature of the relationship between states and regional tribunals and the contextualized application of the principles of treaty interpretation enshrined in Article 31 of the Vienna Convention on the Law of Treaties (VCLT).[4] It is consistent with the values underlying the central principle of complementarity and, happily, makes sense as a matter of policy.

The analysis that follows is not directed at a specific regional tribunal. At present, it is most likely relevant to the ongoing debate about the criminal jurisdiction of the African Court of Justice and Human Rights.[5] However, it is not inconceivable that states establish other regional tribunals with subject-matter jurisdiction overlapping that of the ICC.[6] These may be continent-wide, as with the African Court, or multilateral, or even bilateral, where two states establish a criminal tribunal to prosecute crimes in a specific conflict. They may be permanent or temporary. In the (probable) long-life of the ICC, the rise of overlapping regional tribunals should be expected. For this reason, resolving this admissibility question is crucial.

Moreover, this question is largely unexplored in the literature, which is understandable given the absence of a currently functioning regional tribunal with overlapping temporal, personal, and subject-matter jurisdiction. Marari proposes that regional tribunals can be accommodated within the ICC Statute's provisions on complementarity.[7]

---

[3] Art. 17(1)(a) Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

[4] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[5] See C. Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' 9 *JICJ* (2011) 1067-1088; M. du Plessis, 'Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes' 235 *Institute for Security Studies Paper* (2012) 1-14; A. Abass, 'The Proposed International Criminal Jurisdiction of the African Court: Some Problematical Aspects' 60 *Netherlands International Law Review* (2013) 27-50.

[6] On the potential criminal jurisdiction of the East African Court of Justice, see K. Ambos, 'Expanding the Focus of the "African Criminal Court"', in Y. McDermott, W. Schabas, and N. Hayes (eds), *The Ashgate Research Companion to International Criminal Law* (Ashgate, 2016) 499-529, at 522-524. See also the potential appellate criminal jurisdiction of the Caribbean Court of Justice - Art. 25 Agreement Establishing the Caribbean Court of Justice (adopted 14 February 2001, entered into force 23 July 2002) 2255 UNTS 319.

[7] D. Marari, 'The Principle of Complementarity in the Rome Statute in relation to Concurrent Jurisdiction of Regional Courts Over International Crimes: The Case of the Proposed International Criminal Jurisdiction of the African Court of Human and Peoples' Rights' (LLM Thesis on File at the University of Lund, Sweden).

Benzing and Bergsmo are more tentative, but argue that states can discharge their obligations of prosecution through what they call 'internationalized criminal jurisdictions.'[8] Du Plessis, on the other hand, suggests that the prosecution of a case before the African Court would not bar the ICC from prosecuting on the basis that Article 17 specifically refers to 'states.'[9]

Before setting out the argument, three preliminaries are necessarily. First, this article will not focus on *investigation* by a State; it is solely concerned with the requirement of prosecution but assumes that the analysis applies with as much force to investigation. Second, it will assume that the proper interpretation of Article 17(1)(a) ICC Statute is the key to answering a wider question of how a regional tribunal fits with other provisions of the Statute. If the interpretation proposed herein fits with Article 17(1)(a), it can be made to fit with other relevant provisions that use the term 'state' or 'national'.[10] Third, it takes as a given that there is a genuine willingness and ability to prosecute the case at the regional level.

2. Interpreting Article 17(1)(a) ICC Statute

A. Preliminary Remarks

Article 17(1)(a) ICC Statute provides:

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

The question is whether a case that is being prosecuted in a regional tribunal can be seen as being prosecuted by a state in terms of Article 17(1)(a). The temptation at this point is to turn

---

[8] M. Benzing and M. Bergsmo, 'Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the International Criminal Court', in C. Romano, A. Nollkaemper, and J. Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: Oxford University Press, 2004) 407-416, at 411-413. See also Murungu, *supra* note 5, at 1081.

[9] Du Plessis, *supra* note 5, at 11.

[10] See e.g. Art. 17(2)(a) ICC Statute: 'In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

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

immediately to Article 31 VCLT, which we know to reflect customary law and which is inevitably invoked by tribunals facing difficult questions of interpretation.[11] Of course, that is a necessary step. Before that, however, it is worth saying one thing about the nature of the ICC Statute as a treaty.

Following Lowe, we should ask whether it is possible to speak of the law of treaties (and treaty interpretation) as a single whole. As he puts it:

> To lump together treaties declaring the course of international boundaries, treaties for the provision of specified sums of foreign aid, status of forces agreements, multilateral conventions on Antarctica or on the law of the sea or human rights, treaties establishing the European Union or the United Nations … or the World Health Organization, has the appearance of making sense only if one first designates them all as treaties.[12]

The issue is not that the same instrument covers a range of subject matter; it is that the same instrument – the treaty – is being used to effect radically different legal purposes. As McNair explained in 1930, whereas domestic law provides for a variety of legal instruments to achieve different purposes, in international law we have the treaty - 'the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out its multifarious transactions.'[13]

The present article cannot pursue this thought any further, except for one point: the nature of the treaty bears on how the canonical rules of interpretation in Article 31 VCLT play out. Lowe himself contrasts dispositive treaties – those that, say, establish an international boundary – from those that established the European Union.[14] In the case of the

---

[11] On the customary status of Article 31, see most recently *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections,* Judgment of 17 March 2016, p. 18, § 35, available online at http://www.icj-cij.org/docket/files/155/18948.pdf (last visited 23 July 2016); for the use of Article 31 by the ICC, see e.g. Decision on the Confirmation of Charges, *Lubanga,* (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, § 276; Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba,* (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, § 361.

[12] V. Lowe, 'The Law of Treaties; Or, Should this Book Exist', in C. Tams, A. Tzanakopoulos, and A. Zimmerman (eds), *Research Handbook on the Law of Treaties* (Cheltenham: Edward Elgar, 2014), 3-15, at 4.

[13] A. McNair, 'The Functions and Differing Legal Character of Treaties', 11 *British Yearbook of International Law* (1930) 100, at 101.

[14] Lowe, *supra* note 12, at 5-6.

former, it is appropriate to ask more directly: what exactly did the parties agree?[15] In the case of the latter – a treaty that establishes a new legal regime and relationships – it is appropriate for an adjudicatory body to give effect to the foundations and structures of that new legal order.[16]

In this respect, the institutional provisions of the ICC Statute are akin to the constituent instrument of an international organization.[17] Instruments of this kind have, as the ICJ put it, 'certain special characteristics.'[18] In interpretation, the objectives assigned to the organization by its founders play a more central role.[19]

Turning back to Article 17, decisions on admissibility by the Court are a central way through which the underlying structure of the legal order is given effect. In the application of the VCLT, it is entirely appropriate for the Court to focus on the object and purpose of the ICC Statute.[20] As will be argued below, such an approach suggests an interpretation of Article 17 whereby the Court declines to exercise its jurisdiction in the face of a genuine prosecution by a regional tribunal.

B. Text and Structure

With that it mind, we can turn to the VCLT. In some cases, the application of the VCLT to the ICC Statute will need to be modified by other rules of interpretation, particularly those that follow from the nature of the Statute as a *criminal* instrument.[21] For instance, the principle of *in dubio pro reo* demands ambiguous terms be interpreted in favour of the

---

[15] *Ibid*., at 8.

[16] *Ibid*., at 6.

[17] See S. Rosenne, *Essays on International Law and Practice* (Leiden: Martinus Nijhoff, 2007) 368; M. Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge: Cambridge University Press, 2014) 73-78.

[18] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports,* p. 157.

[19] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996,* p. 74-75, § 19. See further, D. Akande, 'International Organizations' in M. Evans (ed), *International Law* (4th edn, Oxford: Oxford University Press, 2014) 248-279, at 258-260.

[20] To be sure, Lowe suggests that it may be appropriate for a court to break out of the strictures of the VCLT. The present analysis simply uses Lowe's insight to support a particular application of Article 31 VCLT.

[21] See D. Akande, 'The Sources of International Criminal Law' in A. Cassese et al (eds), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 41-53, at 44-45.

defendant.[22] Rules of this kind bear less directly on the institutional aspects of the ICC Statute, including Article 17.[23]

So to Article 31: '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 the light of its object and purpose.'[24] The first step, then, is to start with the text.[25] In this respect, it is certainly the case that the prosecution by a state, in its ordinary meaning alone, refers to the exercise of prescriptive and enforcement jurisdiction by the state in its own criminal courts.[26] This was clearly in the minds of the drafters at the Rome Conference.[27] This follows from the term state itself, one that is used throughout the ICC Statute, from the use of the term 'national' throughout the Statute, and from the jurisprudence under Article 17. In this jurisprudence, it is (understandably) assumed without argument that the term prosecution by the state refers to the domestic institutions of the state concerned.

But that is only a starting point: the question remains whether prosecution by a regional tribunal *also* may be seen as prosecution by a state for the purposes of Article 17(1)(a). To make the argument proposed in this article, it is helpful to first address what is happening legally – or structurally – when an individual is prosecuted before a regional (or international) tribunal. In simple terms, states parties to the treaty delegate their national criminal jurisdiction to the regional tribunal.[28] Delegations of this kind are permissible under international law as a matter of first principles and are widely confirmed in practice.[29] As

---

[22] See Art. 22(2) ICC Statute.

[23] For an argument that the VCLT does not apply to the ICC Statute at all, see D. Jacobs, 'International Criminal Law' in J. Kammerhofer and J. D'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014) 451-474, at 468, 470. Jacobs' argument is founded on the principle of legality and its force in the application of the substantive provisions of the ICC Statute. Whatever the merits of this argument, it is less relevant to the institutional provisions of the Statute.

[24] Art. 31(1) VCLT.

[25] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 21-22, § 41. See further R. Jennings, 'General Course on Principles of International Law' 121 *Collected Courses of the Hague Academy of International Law* (1967) 323-619, at 544-547.

[26] See R. O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', 2 *JICJ* (2004) 735-760, at 736-737.

[27] See generally United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 June 1998, Official Records, A/Conf.183/13 (Vol. II).

[28] For the concept of 'delegation' as a species of the genus 'conferral' of powers, see generally D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford: Oxford University Press, 2005).

[29] D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', 1 *JICJ* (2003), 618-650, at 625-634.

Jessup put it in 1948: 'There is no novelty in the suggestion that states may delegate the exercise of some of their customary attributes.'[30]

This account of the jurisdiction of international and regional tribunals is the most plausible way to understanding the basic legal structure in play.[31] In this respect, two points are relevant. First, to understand the jurisdiction of international tribunals in this way is not to assert that there are no limits on the scope of that delegation.[32] That is a separate question. Second, there is some indication, in practice, that international courts see themselves as autonomous or sui generis, and that this view is particularly relevant for the resolution of questions relating to immunity and amnesty.[33] On the debate about immunity, in particular, it is hard to disagree with Schabas that 'it is unreasonable to believe that a group of States, acting collectively, can withdraw an immunity that exists under international law with respect to third states, when they cannot do this individually.'[34] More generally, however, there remain a number of difficult questions relating to the nature and responsibility of international tribunals and their relationship with their constituent states and third parties.

These issues are not addressed herein – the current analysis focuses only on the interpretation of a particular provision of the Rome Statute. The basic legal structure is raised simply to emphasize the critical relationship between the jurisdiction of states and the jurisdiction of international tribunals – an emphasis that serves as background to the central interpretive claim that follows. With this basic legal structure in mind, the suggestion that prosecution by a regional tribunal might be seen as prosecution by a state does not seem implausible.

---

[30] P. Jessup, *A Modern Law of Nations* (New York: MacMillan, 1948), at 18.

[31] For instance, despite wider disagreement, it seems that the central participants in the old debate about the jurisdiction of the ICC over nationals of non-state parties all accept this basic structural point. See e.g. M. Morris, 'High Crimes and Misconceptions: The ICC and Non-State Parties', 64 *Law and Contemporary Problems* (2001) 13, at 27; M. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position', 64 *Law and Contemporary Problems* (2001) 68, at 110; F. Megret, 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution in International Law', 12 *EJIL* (2001) 247, at 251; Akande, *supra* note 29, at 621. For a discussion of tribunals established by the Security Council, see S. Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Oxford: Hart, 2012) 254-271.

[32] In this respect, compare D. Luban, 'Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 569-588 and S. Wallerstein, 'Delegation of Powers and Authority in International Criminal Law', 9 *Criminal Law and Philosophy* (2015) 123-140.

[33] See e.g. *Decision on Immunity from Jurisdiction, Taylor* (SCSL-2003-01-I), Appeals Chamber, 31 May 2004, § 52: 'Be that as it may, the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.'

[34] W. Schabas, *An Introduction to the International Criminal Court* (3rd edn, Cambridge: CUP 2007) 232.

Indeed, if we approach the issue from another angle, it becomes clear that such an interpretation may, in a different context, make more sense as a matter of general international law. Imagine a regional treaty between all Latin American states. Article 1 of the treaty provides: 'Each state undertakes to investigate and prosecute crimes against humanity committed within its jurisdiction.' After a long-running conflict between Bolivia and Chile, one in which crimes against humanity are alleged to have been committed in both states and by nationals of both states, a peace agreement is signed.[35] As part of that settlement, Bolivia and Chile agree by treaty to set up a new tribunal with jurisdiction over crimes against humanity: the Bilateral Criminal Tribunal for Bolivia-Chile. The tribunal starts to investigate and institutes criminal proceedings against a number of suspects.

Imagine now that Peru, which is also a state party to the regional Latin American treaty, invokes the responsibility of Bolivia and Chile thereunder. The basis of its objection is that neither state is complying with its obligation under Article 1 of the regional treaty: neither *state* is prosecuting crimes against humanity committed within its jurisdiction. To spell out the example is to see that it does not make much sense. Indeed, in a related context, one concerning the *permissibility* of collective responses to international crimes, Akande has written:

> [I]t would be extraordinary and incoherent if the rule permitting prosecution of crimes against the collective interest by individual states – acting as agents of the community – simultaneously prevented those states from acting collectively in the prosecution of these crimes.[36]

As with the permissibility of collective responses, so it should be with understanding what constitutes compliance with the relevant obligation.[37] Of course, this example does not alone establish the appropriateness of the interpretation of the Rome Statute proposed herein. It does, however, show that from a different angle, a limited interpretation of the idea of prosecution by a state may sometimes make little sense. That forms the background to the

---

[35] Cf. *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection,* Judgment of 24 September 2015 available online at http://www.icj-cij.org/docket/files/153/18746.pdf (last visited 23 July 2016).

[36] Akande, *supra* note 29, at 626.

[37] See, relatedly, *Haya de la Torre Case, Judgment of June 13th, 1951: I.C.J. Reports 1951, p. 71,* at 79.

argument of the next section: the interpretation proposed herein coheres with a contextual and purposive understanding of the Article 17(1)(a).

C. Two Sides to Complementarity

Article 17(1)(a) prefaces its instruction to the Court with the phrase: 'Having regard to paragraph 10 of the Preamble and article 1…' Paragraph 10 of the Preamble emphasizes that the ICC is 'complementary to national criminal jurisdictions'; Article 1 provides the same.[38] Second, the object and purpose of the treaty as a whole is to establish a system of prosecution of international crimes structured by the principle of complementarity.

To interpret the phrase under consideration, it is necessary to draw out two sides to the complementarity principle. On one side, it is firmly rooted in state sovereignty – it affirms states' primary role in exercising criminal jurisdiction over international crimes.[39] This much is uncontroversial. Here, though, we should be careful not to frame that underlying sovereignty as purely antagonistic to the role of the Court and international criminal law more broadly. Cryer explains how the complementarity regime established by the ICC Statute may be seen as the *'use* of sovereignty for international ends', in this case the prosecution of international crimes.[40] That point aside, the sovereign power of state parties is central to understanding complementarity.[41]

On the other side, the principle of complementarity establishes a restrained role for the Court – what has been called one of 'last resort.'[42] In one sense, such a restrained role is the corollary of the primary role of states. But, in another sense, it is richer than that, in that it is (or should be) informed by recognition of the limitations of the ICC itself, both its design and operation, and of the difficulties inherent in the entire project of establishing a single

---

[38] Preamble to the ICC Statute; Art. 1 ICC Statute.

[39] See e.g. Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, *Muthaura, Kenyatta, and Ali* (ICC-01/09-02/11), Pre-Trial Chamber II, 30 May 2011, § 40: 'The Chamber is well aware that the concept of complementarity and the manner in which it operates goes to the heart of States' sovereign rights.'

[40] R. Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' 16 *European Journal of International Law* (2006), 979-1000, at 986.

[41] S. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court* (Cambridge: CUP, 2013) 58.

[42] M. Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', 7 *Max Planck Yearbook of United Nations Law* (2003) 591-632, at 599. For criticism of how complementarity has evolved in practice, see McAuliffe, *supra* note 2.

institution that prosecutes crimes committed across the world.[43] In this respect, it is worth highlighting two related difficulties – the disconnect between the Court and the (actual) communities in which the crimes occur and the Court's ongoing struggles with legitimacy in the cases it is able to prosecute.

So those are two sides of complementarity. The interpretation of Article 17(1)(a) proposed in this article is more consistent with both sides of the principle than an interpretation that limits it to prosecutions in the state's own domestic courts. As to the first side of the principle, the sovereignty of the state, the interpretation proposed herein recognizes that the state may *choose* to exercise its jurisdiction by the delegation of powers to a regional tribunal. This choice is an exercise of state sovereignty.[44] It is, as Jennings put it, a 'transformation and augmentation of [sovereignty] into new directions by harnessing it, through proper legal devices, to the making of collective decisions, and the taking of effective collective action, over international political problems.'[45]

As to the second side of the principle, the role of the Court as one of last resort, there is the simple point that if a regional tribunal is genuinely exercising jurisdiction, there is no impunity gap.[46] In addition, the interpretation proposed herein recognizes that regional tribunals may be better placed to realize many of the values that underpin complementarity – that is, its richer content. Two may be mentioned. First, regional courts, and particularly those that are bilateral or sub-regional, are likely to be more connected to the sites of violence and the communities affected. A future regional tribunal for Israel/Palestine, for instance, would probably benefit, all else being equal, from being locally based – the prospects for ownership, understanding, and representation might increase.[47] Second, the deferral of the ICC to regional tribunals might have a positive impact on its own legitimacy and, consequently, on political support for the institution. To take the obvious example, the African Union has repeatedly registered its unhappiness with the Court.[48] Whatever one thinks of this

---

[43] See generally C. de Vos, S. Kendall, and C. Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015).

[44] See Sarooshi, *supra* note 28, at 18.

[45] R. Jennings, 'Sovereignty and International Law', in G. Kreijen et al. (eds), *State, Sovereignty, and International Governance* (Oxford: Oxford University Press, 2002) 27-44, at 42. This understanding of sovereignty is applied to the principle of complementarity by Cryer, *supra* note 40, at 986.

[46] See Murungu, *supra* note 5, at 1081.

[47] Of course, there may be situations where local or regional prosecution is not possible.

[48] See most recently the establishment of the African Union Open-ended Ministerial Committee of Ministers for Foreign Affairs, which will meet with members of the Security Council to discuss the ICC – see UN Doc. S/2016/336, 12 April 2016.

unhappiness, it matters politically and for the Court's legitimacy. Regional complementarity, though not a panacea, might be a step in the right direction.

D. A Contextualized and Purposive Interpretation

What this analysis shows is that a contextualized and purposive interpretation of Article 17(1)(a) prompts the conclusion that a case being prosecuted in a regional tribunal should be seen as being prosecuted by the state.[49] Such an interpretation may be adopted by the Office of The Prosecutor (OTP) itself and confirmed by the Court if challenged.[50] Alternatively, if the OTP were to take the opposing position, the Court should reject its interpretation.

In practice, the interpretation proposed herein simply brings regional tribunals into the existing framework established by the ICC Statute. Of course, the existence of another layer has the potential to raise additional questions as to the relationships between the institutions. The principle of *ne bis in idem* will apply, as it does in the existing framework, though that raises the problem of what Stahn calls the 'race for judgment.'[51] In this respect, in drafting the constitutive instruments of new regional tribunals, states will need to heed to these relationships; attempts to address potential practical difficulties at the constitutive stage is a helpful.[52] As to the institutions themselves, the principle of comity, as informed by increased informal collaboration, may help to resolve jurisdictional issues.[53] More formally, relationship agreements, operating within the structural framework for resolution established by the ICC Statute, might offer a route towards practical resolution.[54] The coherence of the system – at the level of law, process, and practical cooperation – requires detailed attention to overlapping jurisdiction.

In the longer-term, depending on how both the ICC and new regional tribunals develop in law and practice, it may be necessary to reevaluate whether the principle of

---

[49] As noted previously, this article does not address related questions of the international responsibility of the state and/or tribunal for any wrongful acts.

[50] In this respect, see Marari, *supra* note 7, at 17 on the OTP's Informal Expert Paper on The Principal of Complementarity in Practice, 2003.

[51] See C. Stahn, 'Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?' in C. Stahn, *The Law and Practice of the International Criminal Court* (Oxford: OUP, 2015) 228, at 247-249. See also Benzing, *supra* note 41, at 618-619.

[52] Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: OUP, 2004) 281.

[53] Ibid, at 278-280.

[54] For a related discussion in the context of legal assistance, see G. Sluiter, 'Legal Assistance to Internationalized Criminal Courts and Tribunals' in Romano, *supra note* 8, at 379. See also art 4(1) ICC Statute: 'The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.'

complementarity is appropriate to structure every relationship between them. Complementarity is by no means the sole possible option.[55] This article only addresses the interpretation of Article 17(1)(a) ICC Statute in anticipation of a question of admissibility raised thereunder. In this respect, a case being prosecuted in a regional tribunal is 'being … prosecuted by a State which has jurisdiction over it'. It is thus inadmissible before the ICC.

3. Radical and Regional Complementarity

The principle of complementarity and the Court's interpretation of Article 17 have spawned widespread comment. The literature includes references to classical complementarity, negative complementarity, positive complementarity, proactive complementarity, constructive complementarity, and horizontal complementarity.[56] No attempt will be made to trace out each of these approaches and its relationship with the interpretation proposed in this article. It suffices to say that the proposed approach is consistent with theories of complementarity that point to a more restrained role for the ICC.

Along those lines, it is worth noting one theory proposed in the literature. In a recent article, Heller argues for what he calls radical complementarity. Radical complementarity is defined as 'the idea that as long as a state is making a genuine effort to bring a suspect to justice, the ICC should find his or her case inadmissible regardless of the conduct the state investigates or the prosecutorial strategy the state pursues.'[57] This approach is to be supported. For present purposes, it may be noted that the idea of regional complementarity proposed herein really sits as an institutional or geographical extension of an approach of this kind. The ways that a state might make a genuine effort to bring a suspect to justice include proceedings before regional tribunals.

4. Conclusion

In conclusion, it is worth revisiting Lowe's discussion of the law of treaties considered at the outset. Many of the interpretative questions that the ICC faces concern the application of

---

[55] See S. Nouwen and D. Lewis, 'Jurisdictional Arrangements and International Criminal Procedure' in G. Sluiter et al (eds), *International Criminal Procedure: Principles and Rules* (Oxford: OUP, 2013) 116; J. Kleffner, The Relationship between Internationalized Courts and National Courts' in Romano, *supra* note 8, 359.

[56] See most comprehensively, C. Stahn and M. El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011).

[57] Heller, *supra* note 2, 640.

criminal law to individuals. Here, whatever rules of interpretation it applies must include those demanded by the nature of the Court as a criminal tribunal.[58]

There will, however, be other cases that directly concern the institutional arrangements of the Court and its relationship with state parties. In these cases, the Court's interpretation of the ICC Statute should be bold and pragmatic.[59] It should be bold in setting out and developing the fundamental beams of the legal order established by Statute; it should realize the underlying premises of a system of prosecution structured by the principle of complementarity. It should be pragmatic in remaining aware that the Court, by design, operates in difficult political terrain – in conflicts, in questions of symbolic and real concern to state parties, and in matters that affect geopolitical stability. The interpretation of Article 17 proposed herein is both bold and pragmatic, while being explicable in terms of the general rules of treaty interpretation and fundamental principles of international law.

[58] See Akande, *supra* note 21; Jacobs, *supra* note 23.

[59] See the discussion of the early decisions of the European Court of Justice in Lowe, *supra* note 12.