International Journal for Multidisciplinary Research (IJFMR)
E-ISSN: 2582-2160 ● Website: www.ijfmr.com ● Email: editor@ijfmr.com

The Complementarity Principle: Balancing State Sovereignty and The Prosecution of International Crimes in Africa

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Abstract

This article poses a question as to whether the complementarity principle provided under Article 17 of the Rome Statute provides appropriate tools to balance the rights of state sovereignty with their commitment to an independent international criminal justice system. In all eight situations that the ICC is currently investigating, questions have arisen about whether the quest for justice and accountability for the most heinous crimes of international concern should potentially limit states sovereignty. The purpose of this article is to evaluate the balance between state sovereignty and the International Criminal Court as far as the application of the complementarity principle is concerned, as well as to expound on the position of international law and domestic laws on the immunity of the heads of state in Africa. However, given that, under the Rome Statute, states have the latitude to try these same offences, it may be necessary to investigate crimes in a way that they could do so without necessarily compromising international criminal justice processes. This paper makes a critical discussion on whether the complementarity regime has catered for regional bodies motivated by the AU's recent anti-ICC declarations and the subsequent establishment of the Africa Criminal Court to complement the national courts of its Member States in prosecuting crimes under the jurisdiction of the ICC. The research aims to critically reflect on the balance between the ICC and the sovereign state. The article has revealed that the implementation of the principle of complementarity poses challenges in implementation and interpretation and thus remains a less effective means of putting an end to international crimes. Furthermore, this paper urges the need for the principle of complementarity to be rethought in terms of clarifying its content and scope.

Keywords: Complementarity principle, state sovereignty, UN and criminal justice

1.0 Introduction

The complementarity principle traces its origins to the draft of the Rome Statute establishing international criminal courts by the International Law Commission.[1] The nature of the international criminal court jurisdiction vis-à-vis national systems had to be determined to ensure that international crimes are fought and discouraged. According to Cryer, during the negotiations, there was an urgent need to agree on this notion of complementarity before even reaching any agreement on a new international criminal court.[2] This determination was so important to dispel the shadows of so-called state sovereignty already looming

[1] Robert Cryer et al An Introduction to International Criminal Law and Procedure 2 edition (2010) 153
[2] Schabas, W.A. "An Introduction to the International Criminal Court" (2007) 185.

over the role of the Court. Despite the agreement on the content to be afforded to the concept of the 'complementarity principle, it has not been clearly defined in the Rome Statute and not expressed in clear terms.[3] Indeed, the International Law Commission dedicated its effort to the draft of the ICC statute that should be complementary to national criminal justice systems[4] without spelling out how complementarity would be understood in practice.

The Rome Statute sought to resolve the uncertainty as legal scholars involved conducted an asymmetrical reading of its preamble coupled with Article 17 of the Rome Statute.[5] The so-called admissibility criteria for situations or cases are outlined under Article 17 of the Rome Statute; the preamble of the Rome Statute only states, "emphasizing that the ICC established under statute shall be complementary to national criminal jurisdictions," without going into further detail about this principle (emphasis added). The "principle of complementarity, defined in the preamble of the Rome statute and Article 17 concerning admittance standards, would appear to indicate that the ICC would only assist national courts in situations when they are either unwilling or unable to look into a particular crime.[6] Despite this lack of definition in the Rome Statute, complementarity would seem to reflect the idea of two or more things actingin concert to improve each other.[7] This definition (that seems to be consistent with that adoptedby plenipotentiaries at the Rome conference) is that suggested by the American English Dictionary, which defines the principle of complementarity as a principle of law which stipulates that jurisdictions will not overlap in legislation, administration, or prosecution of crime.[8] Whilst this definition does not fully reflect the intention of the drafters of the Rome Statute, it is persuasive for the reason that it is similar to the underlying intention of the drafters. Therefore, the combined reading of article 17 and the preamble means that any ICC intervention should be 'complementary' to national criminal courts. The Court is thus not designed to try all international crimes falling within its jurisdictional subject-matter and temporal and geographical jurisdiction: as the preamble points out, states remain primarily responsible for the fight against impunity in their domestic systems, stating 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.[9]

2.0 An overview of complementarity principles in Africa

In Africa, there has been an indication for some States unwilling to prosecute those alleged to have committed core international crimes and such unwillingness has brought the ICC to step in to investigate and or prosecute the cases. However, other States may be shielding perpetrators from being held accountable for the crimes committed. This has been the case of the African Union (AU) flexing its muscles against the ICC to oppose the indictment of some African leaders before it.[10] The Statute provides

[3] Supra, see footnote No. 2
[4] International Law Commission Draft Statute Report on the Work of its Forty-Sixth Session 2 May to 22 July (published in 1994 UN Doc A/49/10) 43–4
[5] Nsabimbona La complémentarité de la Cour pénale internationale à l'épreuve de la lutte contre l'impunité des crimes internationaux (unpublished LL.M thesis, Université de Montréal, 2016) 4.
[6] Preamble to the Rome Statute, para 6.
[7] Catherine, O. "The Complementarity Regime of the International Criminal Court, Springer, Berlin. (2017)
[8] Burke W. "Proactive Complementarity; The International Criminal Court and National Courts in the Rome System of Justice, University of Pennsylv Pennsylvania Carania Carey Law School "(2008) Volume 49, p70. Recognizing that national courts are often the most effective and efficient institutions at providing accountability, institutions at providing accountability, a policy of proactive complementarity seeks to promote the exercise of domestic jurisdiction over international crimes
[9] Preamble to the Rome Statute, para 6.
[10] Mark D. Kielsgard and Ken Gee-kin," prioritizing jurisdiction in the competing regimes of the international criminal court and the African court of justice and human rights: a way forward."(2017) Boston University press……

some guidance in the determination of these elements, but the precise thresholds are subject to much academic debate as well as judicial determination in the emerging case law of the ICC. Moreover, issues relating to fairness, amnesties, pardons, or other non-judicial mechanisms and their role in the determination of the admissibility of a case before the ICC have also been controversial and merit further exploration, not least because the Statute remains silent on how they fit with complementarity.[11] The incentive of avoiding the ICC's jurisdiction, described also as complementarity's "catalytic effect," may not encourage states to investigate and prosecute if the benefits of overseeing national prosecutions are outweighed or negated by the difficulties of engaging in the process of criminal justice for atrocities and the relative incapacity of national institutions. According to Art. 17(3) of the Rome Statute where 'inability' is in a particular case, the ICC shall consider whether 'due to the total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out proceedings.[12] An initiative to determine the unwillingness of the States, the ICC considers three conditions. First, the ICC shall consider whether the national proceedings intend to shield from the criminal responsibility. Second, the ICC shall examine if there is unjustifiable delay in proceedings that is inconsistent with the intent to bring a person to justice. Third, it shall consider whether the proceedings where not conducted independently, impartially or in manner consistent to bring the person to justice.[13] If the inability or unwillingness to investigate and prosecute is encountered, it may be necessary to shift the balance of advantages and disadvantages for and against prosecution to facilitate states fulfilling their role under the ICC's complementarity regime.[14] Over the years, a more positive approach to complementarity has been put forward, and its meaning as it was originally intended has begun to change.

The ability of states to fulfil this role has significance not only for their sovereign equality but also for the effectiveness of the ICC in fighting impunity and delivering justice that is meaningful for victims of mass atrocities.[15] However, the Rome Statute has no provision imposing obligations on the States parties to integrate the ICC Rules of Procedure and Evidence into their respective national legal systems. The ICC can only intervene where a state is genuinely unable or unwilling to carry out the investigation and prosecute the perpetrators.[16]

However, Article 17 of the Statute provides for complementarity with national jurisdictions to entertain any international crimes only when a state fails to act upon them. The complementarity principle enjoys the same standing as the principle of *aut dedere aut judicare* (where a state has the right to prosecute or adjudicate), as both require bilateral treaties between states. They are devoted to transitional, transboundary crimes being tried in the local court. The former requires the willingness of the state to prosecute, while the latter does not. The state has to be a member of an agreed-upon cooperation agreement

[11] Carsten Stahn, "Fair and Effective Investigation and Prosecution of International Crimes Inventory and State-of-the-Art: Context, Cluster 1 and Cluster 2(2014). p.6

[12]

[13] Article 17 Rome State.

[14] Julio, B.T. "National implementation of ICC crimes: impact on national jurisdictions and the ICC." Journal of International Criminal Justice 5.2 (2007): pg 421-440.

[15] Marshall, K.A. "Prevention and Complementarity in the International Criminal Court: A Positive Approach." Human Rights Brief 17, no.2 (2010):21-26.

[16] International Criminal Court jurisdiction and admissibility - Google Search, accessed on 2 February 2023

for the extradition and prosecution of international crimes.[17]Even though the complementarity principle gives the power to the state party to prosecute the international crime committed within its territory, this is not an avenue for an individual from a non-state party to abscond from international criminal liabilities. The state applies its domestic laws in investigating and prosecuting international crimes concerning the complementarity principle because the Rome Statute has no provision compelling the state parties to apply the rules and procedures of the ICC. A state is allowed to bring criminal proceedings in respect of certain crimes, subject to the location of the crime as far as universal jurisdiction is concerned, that enable the Court to admit international crimes committed by anybody anywhere.[18]

3.0 Domestic law and prosecution of International Crimes

The quest for justice and accountability for the most heinous crimes of international concern should necessarily limit states' sovereignty.[19] The complementarity principle provides sufficient tools to balance the sovereign rights of states with their commitment to prosecute international crimes committed on their territory, particularly in Africa. The problem relies on the implementation of the principle, where there is a tendency for some states in Africa to ignore the principle contrary to Article 17 of the Rome Statutes, but there is no provision that compels the state parties to apply the rules and procedures of the ICC. This situation leads the ICC to find itself in a dilemma about whether to investigate and prosecute or wait for the state to comply with the complementarity principle.[20]

Whether the state's desire to bring balance between sovereignty and the ICC is to what extent The complementarity principle violates the sovereignty principle in its applicability to African States. Given that states have the latitude to try the same offences through their domestic courts, it may be useful to investigate the ways in which they could do so without necessarily compromising international criminal justice processes.

The prosecution of international crime in domestic Court it has to be complied with the condition of ratification of the Rome Statute, even though the prosecution of crimes may be prosecuted under the customary international law in absences domestication of the Rome Statute. Each State have its own system of adopting the international instruments. Jurisdiction of International Criminal Court[21] is only vested upon the serious crimes such as Genocide, crimes against Humanity, war crime, crime of aggression[22], those are considered as the core crimes "shock the conscience of humanity" by threatening the protected values of the international community, namely, "the peace, security and well-being of the world[23]." Unlike the so-called transnational crimes, the core crimes are crimes regarded as part of international law whose criminalization and punishment do not depend on their recognition as such by any domestic legal framework and which attract direct individual criminal responsibility.

[17] Panov, S.M. "The Obligation Aut Dedere aut (Extradite or Prosecute) In International Law Scope Content Source and applicability of the obligation extradite or prosecute" (PhD thesis Birmingham Law School University of Birmingham 2016) p 43

[18] Supra, see footnote No.15

[19] Benzig, M. "The complementarity regime of the international criminal court: international criminal justice between states sovereign and fights against impunity, 2003, see also A. Von Bogdandy and Wolfrum, p. 594

[20] Derick, K.H., "The Principle of Complementarity through the Rome Statute:" A Critical Analysis of Its Content, Implementation, and Application, Case Study of the DRC (PhD University of Cape Town 2021), pp. 29–45.

[21] Article 4 of the International Rome Statute of 1998

[22] Article 5 of the International Rome Statute of 1998

[23] Triffterer O. and Bohlander M., "Establishment of the Court" in Triffterer O. and Ambos K. (eds.), The Rome Statute of the International Criminal Court: A Commentary (3rd Edn), Oxford, 2016, p. 18

The principle of utmost good faith operates in a manner that seeks to bridge the gap between the different jurisdictions and should not be divorced from the application of the principle of complementarity by the ICC. The complementary nature of the ICC is absolute. In Africa, at least, the Court is rapidly losing its legitimacy as an independent institution; it is no longer seen as an independent judicial institution. The dark history of colonization plays a major role in the conclusions drawn by many African states, but the epic failure in the interpretation and application of the principle of complementarity by the Court also plays its own part. The manner in which the Court has decided to deal with questions of admissibility and, essentially, complementarity is problematic. It is with all this in mind that one supports the idea that the ICC should not allow a case to appear before it if the state is genuinely prosecuting the same suspect regardless of the fact that the crimes are not the same or if the national prosecuting authority does not have the same prosecutorial strategy as the office of the Prosecutor. This is essential to the respect for a state's sovereignty, which is an element of an independent state for which a majority of the states in the Global South fought. Any decision of the Court that may be perceived as undermining that character of the state will be met with hostility.

4.0 Prosecuting international crimes in its domestic courts in Africa

Prosecution of international crime under domestic courts reflects requirements of international criminal law through comprehensive legal framework such as the statute establishing international criminal court which invoke three methods as pronounced by article 13 of Rome statute.[24]the provisions gives much power and discretion to the ICC prosecutor to launch and initiate investigation upon state referrals, only when he/she has satisfied the prerequisite conditions that core crime spelled under the Rome statute have been committed. If a State Party believes that a national of that State has committed crimes within the Court's jurisdiction or that the alleged crimes have been committed on its territory, it may submit the matter to the Court for investigation and/or prosecution under article 14 of the Statute.[25] When referring a situation to the Court, as opposed to a specific case, article 13(1) and 14(1) explicitly provide that the State may refer the situation to the ICC for investigation in case it is incapable to handle the situation.

In a carefully balanced fashion, the Rome Statute emphasizes the primacy of domestic jurisdiction over the core crimes and domestic judiciaries are regarded the default forum. This is evident in the language of article 18. It requires that the ICC Prosecutor's investigation be on hold while the domestic authorities continue with their investigation. This rule applies even in cases where the case has been referred to the ICC and the case meets the admissibility criterion

4.1 Prosecution of international crime in Uganda

Before looking into the question of the complementarity principle and its implication in dealing with impunity in a country like Uganda and subsequently how things would have changed, it is necessary to explain, in a nutshell, the historical overview of Uganda as a country making part of the East Africa Community and a state that has been characterized by conflicts and insurgencies since the early 1970s and late 1980s, after the fall of Idd Amin and the reign of current President, His Excellency Yoweri Kaguta Museveni. As some elites and legal scholars opine, the root cause of conflicts and insurgencies in Uganda is socio-economic inequality between the Northern Party and the Southern Party of the country. The sense

[24] Rome statute of 1998 establishing International Criminal Court (ICC)
[25] Supra

of marginalization has geared insurgence against the government, a plea that has not been denied since Museveni rose to power.

As the most recent and longest-running insurgency, the LRA insurgency is of particular importance to this thesis since it is the subject of an ICC referral.[26] A self-proclaimed prophet, Joseph Kony took over as leader of the LRA following the death of his cousin Alice Auma Lakwena[27] According to Kony, the insurgency was an attempt to spiritually purify the northern portion of the country and rule it according to God's 10 commandments, which he claimed Alice had passed on to him. According to the 2002 Human Watch report, this conflict was marked by grave abuses of human rights, including deliberate killing, torture, kidnapping, and conscription of minors into the rebel army, as well as other cruel actions such as amputation performed against civilians.[28]

Furthermore, the crimes perpetrated throughout the conflict were within the Court's jurisdiction, and comprised large-scale deliberate slaughter of civilians, as well as the violent cutting of tongues, ears, lips, and other appendages of civilians.[29] It is noteworthy that these crimes fall under the rubric of the Rome Statute's crimes against humanity and war crimes. This means that the Court had subject-matter jurisdiction over the situation in Uganda if the Ugandan government failed to investigate or prosecute genuinely. However, only crimes committed after Uganda joined the Rome Statute can be tried by the Court. It was also necessary to take action because the offenses were systematic and widespread.[30] Uganda was both a territory and a nation-state, with primary jurisdiction over investigating and prosecuting those responsible for the crimes.

Although the LRA attacks were carried out by persons from the country's northern regions, they were aimed not just at Museveni's administration but as part of a goal to spiritually purify the country, where the rebels also targeted civilians. Counter-attacks by the UPDF against the LRA were ineffective because the LRA was allegedly supported by Sudan. This Act called upon those who partook in the hostilities since 1986 to surrender arms and stop the conflict and promised that no consequence will come of their actions in the war.[31] Although this Act sought to provide the LRA with an incentive to stop the attacks, they continued to wage war. The United Nations High Commissioner for Human Rights also criticized Uganda's decision as an encouragement of the impunity culture and as inconsistent with international norms to hold criminals accountable.[32]

[26] See KP Apuuli, "Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda" (2005), African Journal of Conflict Resolution 37. See also S. Finnstrom, 2006, Journal of the International African Institute, 200–220.

[27] Marshall, A.K ''Prevention and Complementarity in the International Criminal Court: A Positive Approach'', Human Rights Brief, Vol. 17, No.2, 2010, pp.21

[28] See T. Nkonge, "Prosecution of International Crimes in Uganda: Prospects and Challenges: A Case Study of Thomas Kwoyelo alias Latoni v. Uganda," LLB Dissertation, June 2012, Makerere University, Kampala, 3.

[29] Supra

[30] El Zeidy (2005) International Criminal Law Review 91 (arguing that the crimes committed by the LRA constituted serious human rights violations and were committed on a massive scale and thus amounted to the war crimes and crimes against humanity).

[31]Amnesty Act 2000 (Uganda). Available at http://www.c-r.org/accord/uganda/accord 1/downloads/2000Jan_The_Amnesty_Act.doc> (accessed 25 August 2021)

[32] See UN High Commissioner for Human Rights, Report on the Mission Undertaken by Her Office, Pursuant to Commission Resolution 2000/60, to assess the Situation on the Ground with Regard to the Abduction of Chil- dren from Northern Uganda UN Doc. E/CN.4/2002/86 (2001) paras. 12-13.

4.2 Kenya experience on prosecution of international crimes

The post-election violence in Kenya was contrary to international law, in which various international treaties and conventions prohibit the commission of crimes against humanity and other serious crimes like genocide. What happened in 2007 had both faces of crime against humanity[33] and genocide.[34] The government, through its parliament, didn't vote for a local tribunal and henceforth opted for the International Criminal Court to probe, investigate, and indict the perpetrator for the offenses of crime against humanity and genocide. However, there is an unanswered fundamental question of whether the crime committed in Kenya reflects international crimes and whether it falls within the mandate of the ICC Court as per Article 53 of the Rome Statute on the duty and mandates to investigate. Without prejudice to the available legal jurisprudence of the court on the investigation of crime, the question of post-election violence in Kenya marks the failure of justice administration and the total failure of the domestic legal system, which left the ICC to investigate crime, which it has a limited mandate to procure. To answer the question herein above, the International Community intervened to obstruct the outbreak of genocide, provided that there was uncontrollable chaos that targeted one ethnic group over another but, there is still little evidence, as per the definition of genocide, of whether the violence amounted to genocide to destroy either partially or permanently. From this point of view, the legitimacy of the ICC in the post-election violence in Kenya is too remote.[35]

4.3 The Special Court for Sierra Leone

The UN Security Council created a Special Court for Sierra Leone with the mandate to prosecute those people who bear responsibility for violations and breaches of international humanitarian law as well as international law and domestic laws in Sierra Leone.[36] This court had set precedent as the first international tribunal to sit in the country where war crimes occurred, and the Special Court for Sierra Leone was expected to make justice more locally relevant. The court's first indictments and arrests targeted top commanders of all fighting groups, but its major success has been the indictment of former Liberian president Charles Taylor for his alleged role in facilitating and fueling the Sierra Leone conflict by supporting the RUF rebels.[37] Although indicted when he was still serving as head of state in 2003, Taylor was not arrested until later, after he had sought refuge in Nigeria and was later arrested and convicted for 50 years in prison by the International Criminal Court in the Hague.

[33] Crime against humanity means any acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, including Murder. Extermination, Enslavement, Deportation or forcible transfer of population, Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, Torture, Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

[34] Article 6 of the Rome Statute defines genocides as means any acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such as killing members of the group, Causing serious bodily or mental harm to members of the group, Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, Imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group.

[35] Supra

[36] See the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, January 16, 2002

[37] Jalloh, C. "The Law and Politics of the Charles Taylor Case." 43 Denv. J. Int'l L. & Pol'y 229 (2015

5.0 Hurdles of prosecuting international crimes in Africa's domestic court

The article demonstrates that by expanding the ability of states to deal with international crime, the tension that is currently developing between states and the ICC may be relieved. However, the Rome Statute has no provision imposing an obligation on the state parties to integrate ICC rules of procedure and evidence into their respective national legal systems. These uncertainties have made AU member states unwilling to implement Article 17 of the Rome Statute and henceforth complicate the fight against impunity and criminal justice in the region. Thus, from this perspective, the application of the principle will create critical legal gaps in international law and may create conflicts within the African continent.[38]

The purpose of having the complementarity principle is to create an avenue for African states to mend international criminal law in a way that addresses African concerns and prosecutes those alleged to violate international law. However, most African heads of state propagate the complementarity principle as applicable in their national domestic courts while at the same time being accused of violations of fundamental human rights. That means the complementarity principle, as provided by Article 17 of the Rome Statute, creates shields for criminals and henceforth complicates international criminal justice in Africa. At the end of it all, the question that this study will grapple with is whether the complementarity regime provides states with appropriate tools to balance their treaty obligations with their political rights. Does the regime constitute a balance conducive to a viable international criminal justice system as envisioned by the drafters of the Rome Statute, or does it have prospects of undermining the Court's integrity? will entail a review of the Court's jurisprudence on questions of admissibility of cases and assess how the decisions affect states' perspectives about the independence of the Court, particularly within the African continent.

In this article, two most fundamental questions were raised in order to mine necessary information on balancing state sovereign and prosecution of international crimes in Africa through complementarity principle as enshrined in Article 17 of the Rome statute. Those questions are described hereunder as follows: -

Ho: To what extent Complementarity principle balance States' sovereignty and International Criminal Court in the investigation and prosecution of International Crime.

Ho: To what extent Immunity of Head of States affect the applicability of the Complementarity principle.

It is revealed that the recognition of the sovereignty of states through the principle of complementarity represented an acceptable compromise between respect for statesovereignty and the development of an autonomous and independent judicial institution, basedon cooperation between states and the Court.[39] This assertion underlines the primary responsibility of states to repress crimes under international law, and also and above all the idea of the sovereignty of states parties and non- parties in criminal justice issues.[40] However, as argued above, the subjective nature of the admissibility criteria is prone to multiple interpretations by both states and the Preliminary Chamber, enabling states to evade their sovereign duties.[214] On the one hand, states applaud their national systems for fulfilling their sovereign duty to deal with crimes as a basis for the dismissal of the case by the Court, but on the other hand the Court will

[38] Amnesty International; "Legal and institutional implications of the merged and expanded African Court." AFR 01/3063/2016 (22 January 2016). https ://www.amnes ty.org/en/documents/afr01 /3063/2016/en/. Accesses 08th September 2020 at 9:20 A.M

[39] Tousignant opcit note 85. For more on the role of cooperation between the ICC and states see Beth van Schaack 'State Cooperation and The International Criminal Court: A Role for the United States?' (2011) available at https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?
article=1615&context=facpubs accessed on 27 June 2020

[40]

argue that national systems are ineffective, unable or unwilling to prosecute perpetrators. The Court has had todeal with such a dilemma. The situations of Libya and Kenya, as well as those of Sudan and the DRC, which will be discussed separately, clearly illustrate such a scenario.

Another challenges in regard to what extent Immunity of Head of States affect the applicability of the Complementarity principle. The finding to this question proves that, up to date no treaty that clearly prohibit the existence of the Immunity, however several situations have been confronting the Court and hence revoke the Immunity of the Head of State. For instance, Al-Bashir the former president of Sudan. Customary international law still acknowledges the immunity of a foreign state and its representatives, that is, state officials[41].The immunity granted to the state which the official represents with the intention that the official will be able to better carry out his function as a representative of his state, which promotes contact between states and the stability of international relations[42]. However, the immunity of the head of the states used as shield against the Court, even if state is Unwilling to investigate and to prosecute the international Crimes the court delay to intervene the situation in expectation that the state will act upon.

The ICC do not intervene the situation at early stage. However, if the atrocities were caused by official Government leaders it inevitable for the state to either to investigate and prosecute or to referral the situation to Prosecutor or United Security Council. Whether the Immunities of the head of State is there to protect the Sovereignty of the State? This question come to cover the role of the immunity where the immunity is granted to the state which the official represents with the intention that the official will be able to better carry out his function as a representative of his state, which promotes contact between states and the stability of international relations.

6.0 Conclusion

The principle of utmost good faith operates in a manner that seeks to bridge the gap between the different jurisdictions and should not be divorced from the application of the principle of complementarity by the ICC. The complementary nature of the ICC is absolute. In Africa, at least, the Court is rapidly losing its legitimacy as an independent institution; it is no longer seen as an independent judicial institution. The dark history of colonization plays a major role in the conclusions drawn by many African states, but the epic failure in the interpretation and application of the principle of complementarity by the Court also plays its own part. The manner in which the Court has decided to deal with questions of admissibility and, essentially, complementarity is problematic. It is with all this in mind that one supports the idea that the ICC should not allow a case to appear before it if the state is genuinely prosecuting the same suspect regardless of the fact that the crimes are not the same or if the national prosecuting authority does not have the same prosecutorial strategy as the office of the Prosecutor. This is essential to the respect for a state's sovereignty, which is an element of an independent state for which a majority of the states in the Global South fought. Any decision of the Court that may be perceived as undermining that character of the state will be met with hostility.

[41] Morten Bergsmo and ling Yan State Sovereignty and International Criminal Law 2012 Torkel Opsahl Academic E-Publisher Beijing p.49

[42] Morten Bergsmo and ling Yan State Sovereignty and International Criminal Law 2012 Torkel Opsahl Academic E-Publisher Beijing p.49

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