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APPLICATION OF THE PRINCIPLE OF COMPLEMENTARITY IN THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT IN NIGERIA AND GHANA: ISSUES AND CHALLENGES

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ABSTRACT

The International Criminal Court (ICC), as established by the Rome Statute of International Criminal Court, is clothed with jurisdiction over international crimes which are defined in the Rome Statute. To ensure respect for the sovereignty of States, the Rome Statute has incorporated in it the principle of complementarity giving the national courts of States the opportunity to try and determine cases bothering on international crimes failure of which the ICC may admit and determine them. Adopting the doctrinal research methodology, this article discusses the complementarity principle of the ICC as enshrined in the Rome Statute and the various challenges which could hinder the successful application of the principle of complementarity in Nigeria and Ghana. The article identifies non-domestication of the Rome Statute by the two States, immunity of Heads of States and Governments as bestowed on the executives by the Constitutions of Nigeria and Ghana,

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corruption amongst others as some of the challenges. Flowing from the foregoing, the article recommends that the domestication of the Rome Statute should be embraced wholly by African States including Nigeria and Ghana and the African Union should put much effort into the eradication of corruption to its barest minimum in Africa generally.

Keywords: Complementarity, International Criminal Court (ICC), Rome Statute, Nigeria, Ghana.

1. INTRODUCTION

Following the series of atrocities committed in the twentieth century[1] and the efforts of the international community to punish the perpetrators of the numerous atrocities, ranging from genocide, to crimes against humanity amongst others,[2] the agitation for the creation of a permanent international court saddled with the jurisdiction to try international crimes was heightened. This later culminated into the adoption of the Rome Statute of International Criminal Court,[3]which established the International Criminal Court[4] and clothes it with jurisdiction over certain international crimes which are genocide, crimes against humanity, war crimes and the crime of aggression.[5]

To protect the sovereignty of States as stated by the United Nations Charter, and customary international law, among other factors, the principle of complementarity is inculcated in the Rome Statute giving States the primary powers to investigate and prosecute persons accused of any of those crimes using the national courts or tribunals, failure (or inability) of which the ICC could intervene.

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[1] The twentieth century witnessed the occurrence of many atrocities which include the Armenian Genocide (1915), the First World War (1914), the Second World War (1939), and the Rwandan Genocide (1994) amongst others.

[2] The Nuremberg Charter created the Nuremberg Tribunal which was meant to try persons who committed various international crimes during the Second World War; subsequently, the International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) were established by the United Nations Security Council in 1993 and 1994 respectively to try those involved in the heinous crimes committed in former Yugoslavia and Rwanda respectively.

[3] Adopted on 17th July 1998, entered into force on 1st July 2002 and last amended in 2010. It is hereinafter referred to as 'Rome Statute' https://www.refworld.org/docid/3ae6b3a84.html accessed 22 January, 2020.

[4] Rome Statute, art 1. [ICC].

[5] ibid, arts 5, 6, 7, 8 and 8*bis*.

This article brings to the fore the challenges which could hinder the successful application of the principle of complementarity in Nigeria and Ghana whenever the need arises. The article is divided into parts which examine the ICC, the principle of complementarity under the Rome Statute, the challenges militating against the application of the principle, amongst others.

2. THE INTERNATIONAL CRIMINAL COURT

The desire for the creation of a Permanent International Criminal Court led to the adoption of the Rome Statute. The need for such court was first raised at the Paris Peace Conference in 1919, and efforts of the UN which dates back to the 1950s after the end of the World War II.[6] The agitation subsequently gathered momentum after 1989, when the UN General Assembly invited the International Law Commission[7] to prepare a draft statute for setting up of a Permanent International Criminal Court.

In 1994, a draft statute was submitted to the UN General Assembly for consideration. This became the Rome Statute which established the ICC as it provides that 'an International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern as referred to in this Statute.'[8] Though the ICC is established at the Hague in Netherlands, the Court may however sit elsewhere whenever it considers it desirable in accordance with the provisions of the Statute.[9]

On subject matter of jurisdiction, the ICC has jurisdiction over four categories of crimes namely: genocide, crimes against humanity, war crimes and the crime of aggression.[10] The ICC only has jurisdiction on crimes which occur after the entry into force of the Rome Statute and where a State

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[6] MR Phooko, 'How Effective the ICC has Been? Evaluating the Work and Progress of the ICC' [2011] (1) (1) *Notre Dame Journal of International and Comparative Law,* 184 https://scholarship.law.nd.edu/ndjicl/vol1/iss1/6 accessed 10 October, 2020.

[7] International Law Commission was established in 1947 by the UN General Assembly. It is a body of experts saddled with the mandate of helping develop and codify international law. The Commission is composed of thirty-four (34) individuals with expertise in international law and they are elected by the UN General Assembly.

[8] Rome Statute, art 1.

[9] ibid, art 3.

[10] ibid, arts 5, 6, 7, 8 and 8*bis.* It is necessary to state that while the ICC has exercised jurisdiction over the 1st three crimes, the ICC is yet to exercise jurisdiction over crime of aggression as same was defined in May 2010 at the ICC Review Conference held in Kampala.

becomes a party to the Statute after its entry into force, the ICC may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute for that State unless the State has made a declaration in accordance with article 12 paragraph 3 of the Statute.[11]

The ICC may exercise its subject matter jurisdiction if:

1. a situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
2. A situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.
3. The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.[12]

The ICC has jurisdiction over natural person rather than States and artificial persons.[13] A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment prescribed by the Rome Statute.[14] The official position of a person does not exempt such person from criminal responsibility nor does it reduce the gravity of sentence.[15] Also, a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his command.[16] Superior orders do not exempt a person accused of any of the crimes in article 5 from criminal liability unless where the person was under a legal obligation to obey orders of the government or the superior in question, the person did not know that the order was unlawful and the order was not manifestly unlawful.[17] The Rome Statute, however, states that orders to commit genocide or crimes against humanity are manifestly unlawful.[18]

[11] ibid, art 11 (1) and (2).
[12] ibid, art 13.
[13] ibid, art 25 (1).
[14] ibid, art 25 (2).
[15] ibid, art 27 (1).
[16] ibid, art 28.
[17] ibid, art 33 (1).
[18] ibid, art 33 (2).

On the issue of penalties, the Rome Statute does not endorse capital punishment as it provides that the ICC may impose on a person convicted of a crime in article 5 imprisonment for a specified number of years which may not exceed a maximum of thirty (30) years, a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. In addition to imprisonment, the Court may order payment of fine and a forfeiture of proceeds, property and assets derived directly or indirectly from that crime.[19]

Notwithstanding the fact that the ICC is a creation of a treaty (the Rome Statute), there are three circumstances where the ICC has jurisdiction over nationals of non-party States. They are as follows:

a. The ICC may prosecute nationals of non-party States in situations referred to the ICC Prosecutor by the UN Security Council;[20]
b. Non-party nationals are subject to ICC jurisdiction when they have committed a crime on the territory of a State that is a party to the Rome Statute; and[21]
c. Where a national of a non-party State has consented to the exercise of jurisdiction with respect to a particular crime.[22]

It is important to state here that generally, Africa 'has actively participated in developing norms of international criminal justice, human rights and rule of law.'[23] Two realities gave rise to the strong support given by Africa on the establishment of ICC; first was the Rwandan genocide; secondly, the need to find ways to prevent powerful countries from preying on weaker ones.[24]

The history of ICC's establishment and the involvement of African States in that history show that the ICC is a court created in part by Africans for the benefit of African victims of serious crimes. There was active participation of African States in the negotiation for the establishment of

[19] ibid, art 77.
[20] ibid, art 13 (b).
[21] ibid, art 12 (2) (a).
[22] ibid, art 12 (2) (a).
[23] Nsongurua J Udombana, *The Africa Union in International Law-Selected Studies* (John Archers Publishers Ltd, 2020), 284.
[24] OO Adelusi and T Adelusi 'A Legal Appraisal of the Exit of African Nations from the International Criminal Court' *Nasarawa Journal of Public and International Law (NJPIL)* [2017] (4) (1), 95.

the ICC. This includes the participation in discussion by African delegation from the creation of the ICC in 1993 when the International Law Commission presented a draft ICC Statute to the UN General Assembly, the active involvement of forty-seven (47) African States in drafting the Rome statute at the ICC Conference in 1998, the favourable voting for the adoption of the Rome Statute, *et cetera.*[25] In addition to the foregoing, large number of African States have ratified the Rome Statute. 22.87% of the 122 countries of the world which have ratified the Rome Statute are African countries. Also, while Senegal was the first State to ratify the Rome Statute, the Democratic Republic of Congo brought the Rome Statute into force as it was the 60th State to ratify same sixty (60) being the official number of ratifications it needed for a take-off.[26]

With the establishment of the ICC, the work of the Court started with Africa, as the first set of countries selected for investigation were African States of Uganda, Sudan and the Democratic Republic of Congo.[27] There have been subsequent cases involving Africans before the ICC as the ICC Prosecutor has opened cases against twenty-six (26) individuals relating to five African States, many of which have been referred to the ICC by the States concerned.[28]

3. COMPLEMENTARITY UNDER THE ROME STATUTE OF INTERNATIONAL CRIMINAL COURT

Complementarity is a principle which represents the idea that States, rather than the ICC, will have priority in proceeding with cases within their jurisdiction.[29] It is defined as a process by which the Office of the Prosecutor[30] of the ICC;

> …would actively encourage investigation and prosecution of international crimes within the Court's jurisdiction by States where there is reason to believe that such States

[25] TF Yerima, 'Proposed Criminal Jurisdiction of the African Court of Justice and Human Rights: Some Foreseeable Fundamental and Problematic Issues' *Kogi State University Law Journal* (2015) (7), 79.
[26] ibid, 79.
[27] MO Unegbu, 'International Criminal Court Takes Off with African States' in MO Unegbu and I Okoronye (eds), *Legal Developments in the New World Order; Essays on International Comparative and Public Law in Honour of Professor UO Umozurike (OON),* 219.
[28] Adelusi and Adelusi (n 24), 96.
[29] L Carter, 'The Principle of complementarity and the International Criminal Court: The Role of *Ne BisIn Idem*,' *MC George School of Law Scholarly*, 167.
[30] [OTP].

> may be able or willing to undertake genuine investigations and prosecutions and where the active encouragement of national proceedings offer a resource-effective means of ending impunity.[31]

Article 1 of the Rome Statute captured the idea of complementarity principle of the ICC as follows:

> An International Criminal Court ("The Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

In addition, Article 17 of the Rome Statute provides as follows:

1. Having regard to Paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:
   i. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution;
   ii. The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
   iii. The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 22, paragraph 3;
   iv. The case is not of sufficient gravity to justify further action by the Court.

[31] W Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' [2008] (19) *Criminal Law Forum,* 62.

It should be noted that the ICC is considered a court of last resort as it only investigates or prosecute serious crimes perpetrated by individuals when national courts are unwilling and/or unable to do so.[32] It means the ICC is not meant to supersede national jurisdiction of State Parties to the Statute in view of sovereignty of State Parties to the Statute as Paragraphs 7 and 8 of the Preamble to the Rome Statute have restated the principles of territorial integrity, political independence, sovereignty and non-intervention in the affairs of the State.

Apart from the jurisdictional regime established by the Statute, the principle of complementarity is the salient instrument to delineate the exercise of jurisdiction of the ICC from that of national authorities, including national courts, [33]and as such may well prove to be one of the most contentious features of the statute in its application.[34] It is clear why the principle of complementarity had been described as essential for the acceptance of the Statute by states, and is often referred to as the underlying principle,[35] the cornerstone[36] of the Statute, or the key concept of the ICC, which permeates the entire structure and functioning of the court.[37]

3.1 The Rationale Behind the Embodiment Of The Principle In The Rome Statute Of International Criminal Court

The Rome Statute is an international, multilateral treaty. By article 31 of the Vienna Convention on the Law of Treaties, provisions of a treaty shall be interpreted, inter alia; with regard to its object and purpose.[38] In order to better appreciate the principle of complementarity and to facilitate and structure the interpretation of the different provisions that define the

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[32] See Rome Statute, para 10 of the preamble and art 17.

[33]Cf. Report of the Preparatory Committee on the Establishment of an International Criminal Court, GAOR 51st Session, SUPPL. No-22(Doc.A/51/22),para, 153

[34] M Benzing, 'The complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', [2003*], Max Planck yearbook of United Nations Law*, (Vol. 7) 593.

[35] JJ Charney*, '*International Criminal Law and the Role of Domestic Prosecutions', [2001] *American Journal of International Law*, 120.

[36]E La Haye*, '*The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising its Jurisdiction', [1999], *NILR 46* .1.

[37] M Bergsmo, 'Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court and their Possible Implications for the Relationship between the Court and the Security' *Council Nord.J.INT'L L. 69* [2000], 87.

[38]The Rules of Interpretation codified in article 31 of the Vienna Convention on the Law of Treaties are also valid under Customary International Law:G./Dahm/J.Delbruck/R.Wolfrum,volkerrecht(2002)

concept substantively and procedurally, it is pertinent to enquire about the rationale of complementarity.[39]

The most apparent underlying interest that the complementarity regime of the Court is designed to protect and serve is the sovereignty of both State Parties and third parties.[40] Under general international law, States have jurisdiction over acts and omissions done within the State which are considered by the laws of the State to be criminal in nature through the courts or tribunals so established by the State. The exercise of criminal jurisdiction can be said to be a central aspect of sovereignty.[41]

As distinct from the right of States to exercise criminal jurisdiction over crimes contained in the Rome Statute, the Preamble refers to the duty of every State, which is not limited to State Parties to exercise its criminal jurisdiction over those responsible for international crimes. Thus, the purpose of the complementarity principle may be to ensure that States respect their international obligations, either by prosecuting the alleged perpetrators or by providing for an extradition to another State that is willing to prosecute. Moreover, and independent from the existence of a duty to prosecute, the complementarity regime is surely designed to encourage States to exercise their jurisdiction and thus make the system of international criminal law enforcement more effective.[42]

Another reason for the complementarity principle is the interest of the international community in the effective prosecution of international crimes, the endeavor to put an end to impunity and to make individuals responsible and accountable, and also for the sake of deterrence of the future commission of such crimes.[43] It is also necessary to close the gap between the prosecution on the international level, which are still only dedicated to few individuals and the prosecution of national of a State in their own legal systems, in order to actively fight against impunity by prosecuting a higher number of perpetrators.

A more practical reason for the principle of complementarity is the realization that the 'Court's scope for action will necessarily be limited for

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[39]The following discussion relates mainly to Article 17(1)(a) and (b) and the procedural scaffolding relating to these subparas

[40] RE Fife, 'The International Criminal Court: Whence it Came, Where it Goes', [2000] *Nord J.INT'L Law* 63-72.

[41]I Brownlie, *Principles of Public International Law* (5th edition, 1998) 289,303.

[42] D Sarooshi, 'The Statute of the International Criminal Court', [1999], *ICL Q48*, 387,395.

[43] Rome Statute Preamble, Paras: 4,5.

reasons of resource constraints.'[44]This is as a result of the fact that much resources are expended on investigation, and subsequent prosecution of accused persons by the ICC. This, on its own, can affect the effectiveness of the ICC in bringing to book those who have been accused of international crimes.[45]On the other hand, national courts of a State might be able to achieve more with lesser resources being closer to the people, the crime scene, the victims as well as the witnesses and the accused persons.

In addition to the foregoing, the principle pays tribute to the realization that the crimes under the jurisdiction of the Court are normally best prosecuted in the State where they have been committed. Conclusively, it must be stated that the principle of complementarity had been primarily designed to strike a balance between State sovereignty and the realization that, for the effective prevention and punishment of international crimes, the international community has to step in to ensure the realization of these objectives.[46]

4. CHALLENGES MILITATING AGAINST THE EFFECTIVENESS OF COMPLEMENTARITY IN NIGERIA AND GHANA

Nigeria and Ghana are countries in West Africa and both have ratified the Rome Statute. While The Republic of Ghana signed the Rome Statute on 18 July, 1998 and ratified same on 20th December, 1999, Nigeria signed the Rome Statute on 1st June, 2000 and deposited her instrument of ratification on 27th September, 2001. However, there are challenges which hinder the successful application of the complementarity principle, and these challenges if left untended, might have ample effect on international criminal justice in the two countries. Some of the challenges are discussed below.

4.1 Non-domestication of the Rome Statute

The principle of complementarity in Nigeria and Ghana is almost non-existent due to non-domestication of the Rome Statute and the absence of domestic laws which criminalise international crimes such as genocide, war

[44] Benzing (n 34), 599.

[45] BC Olugbuo, 'Nigeria and the International Criminal Court: Challenges and Opportunities' in Beitel van der Merwe (ed), *International Criminal Justice in Africa: Challenges and Opportunities* (Konrad Adenaver Stiftung, 2014) 92.

[46] SA Williams, 'Article 17' in O Trifterer, (ed) *Commentary on the Rome Statute of International Criminal Court* (Observers Notes, 1999).

crime, crimes against humanity and crime of aggression in the States under consideration. The position in Nigeria and Ghana are considered below.

4.1.1 Nigeria

Nigeria is one of the African countries which has ratified the Rome Statute. However, ratification of a treaty (which is an act of the executive arm of government) only does not amount to automatic application of the treaty in the country as the National Assembly is to take a further step by domesticating the treaty thereby giving it the force of law in the country. In accordance with the foregoing, the Constitution of the Federal Republic of Nigeria 1999 (as amended)[47] provides as follows:

> 1. No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.
> 2. The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.
> 3. A Bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.[48]

In addition to the above constitutional provision, the CFRN 1999 (as amended) also provides that:

> Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a

[47] [CFRN 1999].
[48] ibid, s12 (1-3).

> Law of a State, any subsidiary legislation or instrument under the provisions of a law.[49]

From the latter provision of the CFRN 1999, it is clear that no one can be charged for an offence except there is an Act of the National Assembly or a Law from a State House of Assembly which criminalises it by defining same as well as prescribing the sanction.

On the Rome Statute, there have been attempts to domesticate it in Nigeria. The first attempt was in 2001, the second attempt was in 2006 and the most recent attempt was in 2012 when the then Attorney-General and Minister of Justice set up an interministerial committee saddled with the responsibility of producing a draft of the Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill, 2012 which has been argued by many to be an improvement on the 2001 and 2006 Bills.[50]

Despite the fact that the Bill was gazetted on the 17th day of July, 2012 and sent to the National Assembly for consideration and subsequent enactment into law, there was no further progress on the Bill before the dissolution of the 7th National Assembly. As at today, there is no domestic law in Nigeria which exhaustively or adequately defines and punishes any of the international crimes over which the ICC has jurisdiction and going by the provisions of the CFRN 1999 in section 12 and section 32 (12), no action can be taken by the national courts against anyone accused of committing any of the offences in Nigeria.

It is noteworthy that from the Geneva Convention Act[51] which was enacted on 30th September, 1960 as a domesticated version of the Geneva Conventions of 1949, one can be prosecuted for war crimes in Nigeria although the provisions of this particular Act, in the opinion of the researcher, are not in detail enough; the Act is in dire need of amendments.

4.1.2 Ghana

Ghana, like Nigeria, has adopted the theory of dualism on the application of treaties. This theory subjects treaties to the process of domestication failure of which renders a treaty inapplicable and unenforceable by

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[49] ibid, s36 (12).
[50] Olugbuo (n 45) 93.
[51] Cap G3 Laws of the Federation of Nigeria 2004.

domestic/national courts.[52]Years after the ratification of the Rome Statute, Ghana is yet to domesticate the treaty. Although there was an attempt to domesticate same through a Bill titled International Criminal Court Bill, 2016, the Bill is yet to be enacted into law thereby depriving the Rome Statute the force it needs for it to be applied by Ghana's national courts.

However, there are other domestic laws from which recourse can be sought in the prosecution of some international crimes whenever the need arises. They are the Criminal Code of Ghana and the Geneva Convention Act, 2009. The former defines and punishes genocide as follows:

1. Whoever commits genocide shall on conviction be sentenced to death.
2. A person commits genocide where with intent to destroy, in whole or in part, any national, ethnical, racial or religious group he-
   A. Kills members of the group;
   B. Causes serious bodily or mental harm to members of the group;
   C. Deliberately inflicts on the group conditions of life calculated to bring its physical destruction in whole or in part;
   D. Imposes measures intended to prevent births within the group; or
   E. Forcibly transfers children of the group to another group.[53]

The Geneva Convention Act, 2009 is a domesticated version of the four Geneva Conventions of 1949 and the Protocols additional thereto. It defines war crimes in its section 1 and gives to the High Court of Ghana jurisdiction over the offences defined in section 1 of the Act. The Act also stipulates that a 'Court Martial or other military court may try a person for an offence which, under the Armed Forces Act, 1962 (Act 105) is triable by that court although the offence is also an offence under section 1.'[54]

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[52] NJ Udombana, 'Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter' [2004] (40) *Stan. J International Law, 105, 125.*

[53] Criminal code of Ghana, s49A.

[54] Geneva Convention Act, s2 (2).

4.2 Constitutional Immunity

One of the challenges posed to the smooth operation of complementarity in Nigeria and Ghana is the constitutional immunity[55] of the executives. Because of the enormous responsibilities and duties vested on the President of a country, most Constitutions have granted the President immunity in absolute or qualified form to enable him discharge his duties without hindrances in form of litigation against him in his personal capacity as the possibility of being sued could pose a serious distraction to him at the detriment of his official duties.[56] Such immunity could be absolute or qualified; while the former provides immunity in respect of civil and criminal proceedings, the latter provides immunity in respect of criminal proceedings only.[57]

Under the Nigerian Constitution, the President and Vice President are immune from any arrest, criminal liability or prosecution whatsoever, so long as they remain in office as executive heads. The Constitution provides as follows:

> 1. Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section-
>   a. No civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;
>   b. A person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
>   c. No process of any court requiring or compelling the appearance of a person to whom this section applies shall be applied for or issued;
>
> Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section

[55]Dapo Akande, 'International Law, Immunities and the International Criminal Court', [2004], *98 American Journal of International Law*, 407-333; Constitution of the Federal Republic of Nigeria 1999(as amended), s 308

[56] CM Fombad and ES Nwauche, 'Africa's Imperial Presidents: Immunity and Accountability' 10 https://repository.up.ac.za/bitstream/handle/2263/57942/Fombad_Africa_2012.pdf?sequence=1&isAllowed=y accessed 10 November 2020.

[57] ibid, 11.

applies, no account shall be taken of his period in office.

2. The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.
3. This section applies to a person holding the office of President or Vice-President…[58]

In Ghana, the Ghanaian Constitution provides as follows:

> Without prejudice to the provisions of article 2 of this Constitution, and subject to the operation of the prerogative writs, the President shall not, while in office, be liable to proceedings in any court for the performance of his functions, or for any act done or omitted to be done, or purported to be done, or purported to have been done or purporting to be done in the performance of his functions, under this Constitution or any other law.
>
> The President shall not, while in office as President, be personally liable to any civil or criminal proceedings in court.
>
> Civil or criminal proceedings may be instituted against a person within three years after ceasing to be President, in respect of anything done or omitted to be done by him in his personal capacity before or during his term of office notwithstanding any period of limitation except where the proceedings had been legally barred before he assumed the office of the President.[59]

The Ghanaian position on executive immunity seems to be broader than that of Nigeria as it seems that a President cannot be liable to any form of proceeding whether or not it has to do with his functions as a

[58] See CFRN 1999, s308.
[59] Constitution of Ghana, art 57 (4,5 and 6).

President while in office. It is also noteworthy that unlike the position in Nigeria, where the CFRN 1999 specifically states that the provision of section 308 (the immunity clause) applies to the President and the Vice-President, the Ghanaian Constitution is silent on the immunity of the Vice-President as a perusal of article 60 of the Constitution which is on the Vice-President has no provision on immunity for the Vice-President neither can it be found in any other part of the Constitution.

Immunity as conferred on the executive by the constitutions as discussed above is in direct conflict with the provisions of the Rome Statute which removes immunity of Heads of State[60] upon their indictments. The direct result is that States like Nigeria cannot afford to cooperate with the ICC if the President or Vice President is indicted for any of the international crimes over which the ICC has jurisdiction and the issue of complementarity cannot be given credence as the executives are immune from all arrest and prosecution. The existence of such immunity for executives is one of the reasons the African Union and the ICC continue having a frosty relationship.

4.3 Interference with the Independence of the Judiciary

Another form of obstacle to the actualization of the complementary jurisdiction of the ICC is the fact that there is no true independent and credible judicial system in African countries (Nigeria and Ghana inclusive) to prosecute international crimes. This is notwithstanding the constitutional provisions which accord to the judiciary the needed independence for it to function effectively and efficiently. In Ghana, the constitution provides that the judiciary shall be independent and shall only be subjected to the Constitution.[61] In addition, it provides that:

> Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever shall interfere with Judges or judicial officers or other persons exercising judicial power, in the exercise of their judicial functions; and all organs and agencies of the State shall accord to the courts such assistance as the courts may reasonably

[60] Rome Statute 1998, art. 27

[61] Constitution of Ghana, article 125 (1).

> require to protect the independence, dignity and effectiveness of the courts, subject to this Constitution.[62]

In Nigeria, there are also constitutional provisions which seek to protect and promote the independence of the judiciary as well as minimize the extent of interference by the other arms of government.[63] Despite the foregoing, there are many instances of interference most especially from the executive and its agencies and this, invariably, frustrates the primacy of national jurisdiction over international crimes which complementarity principle advocates. This is especially the case given that the appointment of judges and prosecutors in many African States including Nigeria and Ghana are politically determined which results in the appointment of judges and prosecutors with insufficient international criminal law expertise and experience. Resources and expertise in the Chamber of the Attorney-General of the countries under consideration are grossly insufficient.

4.4 Corruption

A greater challenge associated with the success of the operation in Africa, particularly Nigeria and Ghana, is the scourge of corruption ravaging the countries. Corruption has been defined as 'a systematic vice in an individual, society or a nation which reflects favouritism, nepotism, tribalism, sectionalism, undue enrichment, amassing of wealth, abuse of office, power, position and derivation of undue gains and benefits.'[64] It is argued that in a polity where judicial and political corruption is prevalent, States will be politically unwilling to accede to a principle that will indict or accuse state officials of committing core crimes.

Another cardinal stumbling block against the operation of this principle is the fact that the court is dependent on cooperation and support of State Parties. As the court generally has no executive powers and no police force of its own, it is totally dependent on full, effective and timely cooperation

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[62] ibid, art 127 (2).

[63] See the CFRN 1999, s17 (2) (e), s153 (1) which creates the National Judicial Council with the powers to recommend persons for appointment as Judges as well as removal from office whenever the need arises. See CFRN 1999, third schedule, part I.

[64] Gbenga Lawal, 'Corruption and Development in Africa: Challenges for Political and Economic Change' [2007] (2) (1) *Humanity and Social Sciences Journal,* 2.

from state parties.[65] Finally, the enormous difficulty of carrying out investigations and collecting evidence regarding mass crimes committed in regions which are thousands of kilometers away from the Hague, creates difficulty in access, which makes investigations unstable and unsafe.[66] Unfortunately, investigations by States concerned are always marred by factors such as corruption which has engrossed Nigeria and Ghana.

5. CONCLUSION

The article has briefly discussed the ICC, its jurisdiction as well as the role African countries played in the adoption of the Rome Statute and the takeoff of the ICC. It is obvious that notwithstanding the provisions of the Rome Statute on the principle of complementarity targeted at ensuring that the sovereignty of States is not jeopardized by the activities of the ICC, certain challenges identified above have hindered the successful application of the principle of complementarity in Nigeria and Ghana. It is therefore recommended that domestication of the Rome Statute by these States should be encouraged as this will go a long way in giving life to the principle of complementarity in Africa generally. Also, the problem of corruption and lack of independence of judiciary in so many African States should be tackled by the States involved. Immunity, though highly important for the effective functioning of the executive, should be qualified; constitutions of African States especially Nigeria and Ghana should specifically state that in the event of an allegation of international crimes against the executives, the immunity against all forms of legal proceedings will cease to be effective. This will ensure that the executives do not hide under their immunity to carry out heinous crimes. Also, national courts will find it easy to investigate and prosecute them for international crimes where necessary without running into the stumbling block of immunity. This will in turn boost the application of the complementarity principle in the countries under discourse and by extension, Africa generally.

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[65] Hans-Peter Kaul, 'The ICC: Key Features and Current Challenges, in the Nuremberg Trials,' *International Criminal Law since 1945,245*, (Herbert R. Regin Bogin and Christoph J.M. Safferlings eds.2006).246

[66] This point was emphasized by the former Chief Prosecutor Moreno-Ocampo in his address to the Fourth Assembly of States Parties to the Rome Statute in the HAGUE (Nov. 28,2005).