THE WORK OF THE INTERNATIONAL CRIMINAL COURT IN AFRICA
AND CHALLENGES FOR THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE

A thesis submitted in fulfilment of the requirements for the degree of
Doctor of Laws (LLD) at Nelson Mandela School of Law, University of Fort Hare

By

Godfrey Mupanga
(Student Number 201209736)

Supervisor: Professor N.S. Rembe
UNESCO ‘Oliver Tambo’ Chair of Human Rights,
University of Fort Hare, Alice, South Africa

Date of submission: June 2016
DECLARATION

I, Godfrey Mupanga declare that this thesis, ‘The Work of the International Criminal Court in Africa and Challenges for the Future of International Criminal Justice’, is my own work and all the sources and materials used or quoted have been duly acknowledged and properly referenced. I further declare that it has not been submitted for any degree at any university.

Candidate: Godfrey Mupanga

Signature ........................................

Date ........................................

Promoter: Professor N. S. Rembe

Signature ........................................

Date ........................................
Abstract

Within the first decade of the ICC’s existence, its case docket was composed of cases originating from Africa only. Relations between the African governments represented by the AU quickly deteriorated. The AU accuses the ICC of bias and unfair targeting of Africa. After the indictment of heads of states that include Omar Al Bashir of Sudan, Uhuru Kenyatta of Kenya and the late Muammar Gaddafi of Libya, the AU passed several resolutions where it reiterated its commitment to the rule of law and to combating impunity. The AU, however, instructed member states to cease all cooperation with the ICC. African states that are ICC members are now faced with conflicting obligations as a result of the AU resolutions. Moreover, the AU resolutions raise the spectre of a legitimacy crisis for the AU and a conflict between articles 27(2) and 98(1) of the Rome Statute.

Based mostly on desk research coupled with my experience working on human rights and access to justice programmes in Sudan, South Sudan, Somaliland, Ethiopia, Kenya, Uganda and Zimbabwe, this thesis considers the possibility that the ICC is suffering from a legitimacy crisis as a result of the fall out and the issues of unfair selectivity that are raised by the AU. Employing the Third World Approaches to International Law as an analytical framework, the study attempts to reconcile the apparent contradictions in the new outlook and rhetoric of the AU pursuant to its Constitutive Act and the instruction to member states to withdraw cooperation with the ICC. The thesis also proposes practical ways to resolve the conflicting obligations caused by the AU resolutions and by operation of customary international law immunity of high ranking state officials referred to the ICC by way of a Security Council resolution. The current situation gives the ICC the appearance of a weak institution that is only good for low hanging fruit, which has a negative effect on the legitimacy of the ICC.

Key Words: ICC, AU, Conflict of obligations, legitimacy, head of state immunity, articles 27 and 98 of the Rome Statute, TWAIL.
**Acknowledgement**

Professor N. S. Rembe has been an immense inspiration. His guidance throughout the duration of this study has been invaluable. More than that, I would not have completed this exercise without his encouragement and constant gentle prodding. It is for these reasons that I owe Professor N. S. Rembe, my promoter and supervisor, a deep debt of gratitude.

Ms Mkiva and Mr. Mninawa Nhanha were very kind to me during re-registration. I thank them very much for their kind assistance.

The idea of undertaking this study on the work of the ICC in Africa arose from many engaging discussions that I had with Dr. James Nyawo. I would like to thank him sincerely for being kind enough to allow me to read through and make comments on his research on selective enforcement of international criminal justice that he was carrying out under the guidance of Professor Schabas, first at the Irish Centre for Human Rights and then at Middlesex University.

Last, I make special mention of my wife, Esinath Zvikomborero Mupanga, my daughter Vimbayi and my son Mutsa for putting up with my many years away from home working in Sudan, South Sudan, Ethiopia, Kenya and Somaliland and undertaking this study.
This thesis is dedicated to my late father, Mwaroya Amon Mupanga. He never went to formal school, but he was so aware of the value of education that he taught himself to read and write and made sure that his children went to formal school.
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International Criminal Court Act, 2001

**Colombia**
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<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACP</td>
<td>African, Caribbean and Pacific</td>
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<tr>
<td>APRM</td>
<td>African Peer Review Mechanism</td>
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<td>ANC</td>
<td>African National Congress</td>
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<td>AU</td>
<td>African Union</td>
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<tr>
<td>CAR</td>
<td>Central African Republic</td>
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<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>ESAP</td>
<td>Economic Structural Adjustment Programme</td>
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<td>EU</td>
<td>European Union</td>
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<td>FARC</td>
<td>Revolutionary Armed Forces of Colombia—People's Army</td>
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<td>FDLR</td>
<td><em>Forces Démocratiques de Libération du Rwanda</em></td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ</td>
<td>International Commission of Jurists</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<td>IDP</td>
<td>Internally Displaced Persons</td>
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<tr>
<td>ISS</td>
<td>Institute of Security Studies</td>
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<tr>
<td>LRA</td>
<td>Lord’s Resistance Army</td>
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<td>MLC</td>
<td>Movement for the Liberation of Congo</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
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<td>NEPAD</td>
<td>New Partnership for Africa’s Development</td>
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<td>NGO</td>
<td>Non Governmental Organisation</td>
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<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>ODM</td>
<td>Orange Democratic Movement</td>
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<td>PNU</td>
<td>Party of National Unity</td>
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<td>PTC</td>
<td>Pre-Trial Chamber</td>
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<td>SADC</td>
<td>Southern Africa Development Community</td>
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<td>SPLM</td>
<td>Sudan People’s Liberation Movement</td>
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SWAPO South West Africa People’s Organisation
TWAIL Third World Approaches to International Law
UN United Nations
UNAMID African Union/United Nations Hybrid operation in Darfur
UNAMIR UN Assistance Mission in Rwanda
UNOSOM United Nations Mission in Somalia
UPDF Uganda People’s Defence Forces
USA United States of America
WTO World Trade Organisation
Chapter One

Introduction

1.1. Background to the Study

The Rome Statute, also called the Statute of the International Criminal Court, entered into force on 1 July 2002. The International Criminal Court (ICC) was officially established on 11 March 2003 after centuries of toying with the idea of a permanent international penal court. The ICC has jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.

In June 2010, the Review Conference of the Rome Statute in Uganda adopted a resolution to amend the Rome Statute to include the definition of the crime of aggression. The actual exercise of jurisdiction on the crime of aggression is subject to a decision of States Parties due on 1 January 2017. Under Article 13 of the Rome Statute, the Court can exercise jurisdiction over these crimes upon referral of a situation to the Prosecutor by a state party; upon referral of a situation to the Prosecutor by the United Nations (UN) Security Council acting under Chapter VII of the UN Charter; and upon proprio motu investigations initiated by the Prosecutor.

On 10 March 2012, after almost a decade of its existence, the ICC handed down its first judgment in the case of Prosecutor v Thomas Lubanga Dyilo.¹ The Court found the accused, Thomas Lubanga guilty of enlisting and conscripting children under the age of 15 as soldiers in the conflict in the eastern region of the Democratic Republic of Congo. While the judgment was celebrated around the world as a critical step in the fight against impunity for serious crimes of concern to the international community, most political establishments in Africa used it as fodder to feed the argument that the ICC was biased against Africa.

¹ ICC-01/04-01/06 Judgment pursuant to Article 74 of the Statute
1.2. Cases and Situations before the International Criminal Court

At the time of writing, the ICC is dealing with cases arising from situations in the Democratic Republic of Congo (DRC), Central African Republic (CAR), Uganda, Sudan, Kenya, Libya, Ivory Coast and Mali. The situation in the DRC was referred by the DRC Government in April 2004. On 23 June the Prosecutor announced that he was opening investigations. Thereafter, warrants of arrest were issued and charges of war crimes and crimes against humanity were confirmed against 6 individuals including Thomas Lubanga Dyilo², Germain Katanga and Mathieu Ngudjolo Chui³, Bosco Ntaganda⁴, Callixte Mbarushimana⁵ and most recently Sylvestre Mudacumura⁶. As alluded to above, Thomas Lubanga has now been convicted and sentenced to 14 years imprisonment. On 16 December 2011, the Trial Chamber I declined to confirm charges against Callixte Mbarushimana and he was released from custody on 23 December 2011.⁷

In the case of the CAR, which is a party to the Rome Statute, the government referred the situation to the Court on 7 January 2005. The Prosecutor announced his decision to open investigations on 22 May 2007 noting that this was the first time that the Prosecutor was opening an investigation in circumstances where allegations of sexual crimes including rape far outweighed allegations of killings.⁸ A warrant of arrest for Jean-Pierre Bemba Gombo for war crimes and crimes against humanity including rape, torture and pillaging was issued on 10 June 2008 replacing the warrant of arrest issued on 23 May 2008.⁹

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² The Prosecutor v Thomas Lubanga Dyilo ICC-01/04-01/06
³ The Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui ICC-01/04-01/07
⁴ The Prosecutor v Bosco Ntaganda ICC-01/04-02/06
⁵ The Prosecutor v Callixte Mbarushimana ICC-01/04-01/10
⁶ The Prosecutor v Sylvestre Mudacumura ICC-01/04-01/10
⁷ The Prosecutor v Callixte Mbarushimana ICC-01/04-01/10, Pre Trial Chamber I, Decision on Confirmation of Charges, 16 December 2011
⁹ The Prosecutor v Jean-Pierre Bemba Gombo ICC-01/05-01/08
Mr Bemba was arrested by Belgian authorities in May 2008 and turned over to the ICC in July 2008. On 21 March 2016, the trial chamber convicted Mr. Bemba of war crimes and crimes against humanity. The prosecution has been controversial in the DRC, where Bemba’s Movement for the Liberation of Congo (MLC) continues to function as an opposition party.

In December 2003, the Government of Uganda, a party to the Rome Statute referred the situation concerning the Lord’s Resistance Army (LRA), a rebel group that has waged war in Northern Uganda since the mid-1980s to the Court. In October 2005, the ICC unsealed warrants of arrest issued against LRA leader Joseph Kony and commanders Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya for war crimes and crimes against humanity including murder, forced abduction, sexual enslavement, and mutilation.¹⁰

None of the suspects has either been arrested or appeared before the Court. Otti was reportedly executed by fellow LRA rebels in October 2007. Lukwiya was killed in August 2006 in fighting with Ugandan forces.¹¹ On 11 July the Pre-Trial Chamber II handed down a decision to terminate the proceedings against Raska Lukwiya.¹² The other LRA commanders are thought to be constantly moving between Northern Uganda, South Sudan, DRC and CAR. Ugandan military operations, supported by the United States, to kill or capture senior LRA leaders in Congo, South Sudan, and Central African Republic are ongoing.

Proceedings against the LRA have caused controversy since it appears that the Government of Uganda referred the situation in order to deal with a nagging domestic opposition. The ICC’s work in Uganda has also caused controversy due to the commitment and determination of the Prosecutor’s Office to persist with the case when local communities that are affected by the conflict are calling for suspension of the

¹⁰ The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen ICC-02/04-01/05
¹¹ Notification Confirming the Death of Raska Lukwiya, ICC-02/04-01/05-270
¹² The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen ICC-02/04-01/05, Pre-Trial Chamber II, Decision to Terminate the Proceedings Against Raska Lukwiya, 11 July 2007
prosecution in order to allow for local traditional dispute resolution mechanisms to be deployed. This has tended to be referred to in simplistic terms as the peace versus justice debate.

As Sudan is not a party to the Rome Statute and has not consented to the jurisdiction of the Court, the situation in Darfur since 1 July 2002 was referred to the ICC by the Security Council by Resolution 1593 of 31 March 2005. As the humanitarian situation in Darfur deteriorated the UN Security Council issued a presidential statement on 2 April 2004 expressing deep concern over the humanitarian crisis. On 11 June 2004, the Security Council adopted Resolution 1547, which among other things, condemned all acts of violence and violations of human rights and international humanitarian law by all parties to the conflict. On 30 July 2004, acting under Chapter VII of the UN Charter, the Security Council further adopted Resolution 1556 where it determined that the situation in Sudan constituted a threat to international peace and security and urged investigation and prosecution of perpetrators of human rights violations.

Again acting under Chapter VII of the UN Charter the Security Council adopted Resolution 1564 on 18 September 2004. Under this resolution the Security Council urged the Secretary-General of the UN to establish a commission of inquiry to investigate violations of human rights and international humanitarian law in Darfur with a view to holding those responsible accountable. The commission of inquiry released its report in January 2005 where it found that war crimes and crimes against humanity had been committed in Darfur and strongly recommended referral of the situation in Darfur to the ICC in terms of Article 13(b) of the Rome Statute.

It is with this background that under Resolution 1593 of 31 March 2005, the UN Security Council referred the situation in Darfur to the ICC. Consequently, the Prosecutor

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16 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General
opened investigations and thereafter arrest warrants for war crimes and crimes against humanity were issued against a government official, Ahmad Muhammad Harun and a Janjaweed militia leader, Ali Kushayb on 27 April 2007; President Omar Hassan Ahmad Al Bashir on 14 March 2009 and 12 July 2010; and a government Minister, Abdel Raheem Muhammad Hussein. Summons to appear were issued against rebel leaders, Bahar Idriss Abu Garda; Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus. None of the three government officials and the militia leader has been captured or surrendered to the Court. The three rebel leaders voluntarily appeared before the Court and on 8 February 2010 the Court declined to confirm charges against Abu Garda.

It is the indictment of Omar Al Bashir, the President of the sovereign state of Sudan that set the ICC on a collision course with the African Union (AU), the regional bloc with the largest number of ICC members. Through resolutions of the AU Assembly, AU member states are under instructions to stop cooperating with the ICC. The AU resolutions have left AU member states that were amongst the most fervent supporters of the ICC early on with conflicting obligations. The case involving President Omar Al Bashir has also spilled into domestic courts raising serious controversy on the proper construction of head of state immunity in customary international law and under the Rome Statute.

The situation in Kenya arises from the post election violence of 2007 – 2008 where a range of human rights violations were committed. Kenya is a party to the Rome Statute. The situation in Kenya is the first instance where the Court has authorised an investigation proprio motu. Six Kenyan citizens, William Samoei Ruto and Joshua Arap Sang; Henry Kiprono Kosgey; Francis Kirimi Muthaura and Uhuru Muigai Kenyatta

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17 The Prosecutor v Ahmad Muhammad Harun and Ali Abdi-Al-Rahman (Ali Kushayb) ICC-02/05-01/07
18 The Prosecutor v Omer Hassan Ahmad Al Bashir ICC-02/05-01/09
19 The Prosecutor v Abdel Raheem Muhammad Hussein ICC-02/05-01/12
20 The Prosecutor v Bahar Idriss Abu Garda ICC-02/05-02/09
21 The Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ICC-02/05-03/09
22 ICC-02/05-02/09
23 The Prosecutor v William Samoei Ruto and Joshua Arap Sang ICC-01/09-01/11
24 The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta ICC-01/09-02/11
and Mohammed Hussein Ali voluntarily appeared in Court on 7 and 8 April 2011 and confirmation hearings took place in September and October 2011. The Court declined to confirm charges against Henry Kiprono Kosgey and Mohammed Hussein Ali. It is important to recall that ICC involvement in Kenya followed protracted domestic wrangling over how to ensure justice for victims of the electoral violence without upsetting the government’s fragile power-sharing agreement. The Waki Commission, which was set up to investigate the post election violence recommended an independent tribunal with international participation. Having accepted the recommendations of the Waki Commission, the government had then made an about turn and announced instead that it would set up a Truth Justice and Reconciliation Commission with no powers to prosecute suspects.

At the time of writing, the cases against Uhuru Kenyatta and William Ruto, the main protagonists in the Kenya situation, had dissipated. The cases against Kenyatta and Ruto were terminated in March 2015 and April 2016 respectively. The manner in which Kenyatta and Ruto managed their cases is a classical instance of the application of the game theoretic approach. Game theory proceeds from the assumption that as rational human beings, individuals seek to pursue their own interest and maximise their payoffs at the expense of others. This leads to conflict or competition. Games that are used to simulate situations of competition often place the interests of two players in direct opposition. In these games therefore, the greater the payoff for one player, the less for the other. In order to achieve a mutually beneficial outcome, the players must coordinate their strategies because if each player pursues his or her greatest potential payoffs, the shared outcome is unproductive.

The game, commonly known as ‘The Prisoner’s Dilemma’, illustrates the potential for cooperation to produce mutually beneficial outcomes. Out of this game, we can see that if Uhuru and Ruto, the two antagonists in the post election violence and main defendants in the cases, did not cooperate, their individual chances of winning the election would have been greatly reduced. This would have, in turn, also reduced their chances of successfully fighting their prosecutions by the ICC.
The two main defendants had two choices to make. The first was to cooperate with the other and win the presidential election, which would in turn allow both to control the levers of state power and thereby increase their chances of success in fighting the ICC prosecutions. The second choice was to defect, in which case either or both of them would lose the presidential election and control of state machinery and thereby reduce their chances of success in fighting the ICC prosecutions.

The manner in which Kenyatta and Ruto managed the ICC prosecution and the application of rational decision-maker theories provides lessons to the Prosecutor’s Office and future defendants, with profound effects on the future of international criminal justice in general.

Libya is another situation where the ICC assumed jurisdiction by way of a UN Security Council referral in terms of Article 13(b) of the Rome Statute. Libya is not a state party to the Rome Statute. By Resolution 1970 of 26 February 2011, the UN Security Council referred the situation in Libya since 15 February 2011, to the ICC. For all its hostility to the ICC, the USA for the first time voted in favour of resolution 1970. On 27 June 2011, the Court issued arrest warrants for crimes against humanity for then, Libyan head of state Muammar Gaddafi, his son Saif Al-Islam Gaddafi and intelligence chief Abdullah Al-Senussi. Following his death, proceedings against Muammar Gaddafi were terminated on 22 November 2011. It is pertinent to note that unlike the case of the Darfur situation where the Security Council took other measures before referral to the ICC, in the case of Libya, the Security Council made the referral to the ICC within 11 days of the commencement of the anti-government protests.

In the wake of the conflict that followed the Ivory Coast disputed presidential run-off vote in November 2010 investigations by Human Rights Watch showed that war crimes and crimes against humanity were being committed by both sides. Ivory Coast is not a party to the Rome Statute, but the Court is able to exercise jurisdiction on the strength

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25 The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi ICC-01/11-01/11
26 Human Rights Watch, ‘Cote d’Ivoire: Crimes Against Humanity by Gbagbo Forces’, March 15, 2011
of the government’s acceptance of the ICC jurisdiction in 2003 in terms of Article 12(3) of the Rome Statute and the confirmation of the acceptance of the Court’s jurisdiction by Ivory Coast in December 2010 and May 2011.

On 3 October 2011, the Court granted the Prosecutor's request for authorisation to commence *proprio motu* investigations into the situation in Ivory Coast. A warrant of arrest for crimes against humanity was subsequently issued for Laurent Gbagbo who was arrested and transferred to the ICC by Ivory Coast authorities in November 2011. On 18 July 2012 a delegation of the Government of Mali transmitted a letter to the Prosecutor referring the situation in Mali since January 2012 to the ICC. The Prosecutor has commenced an examination of the situation to determine whether the criteria stipulated in Article 53(1) for opening an investigation are fulfilled.

1.3. **Sketching the Problem: Response of the African Union**

1.3.1. **The problem of unfair selectivity**
Many of the people, Governments and Non Governmental Organisations that initially embraced the ICC with a lot of hope and enthusiasm were African. So far more than half of all African states have ratified the Rome Statute, and many have taken proactive steps to ensure effective implementation of its provisions. With 33 states parties, out of 54 countries, Africa is also the largest regional grouping on the Assembly of States Parties; four ICC judges are African, including the first vice president; and on 16 June 2012, Fatou Bensouda, a Gambian national assumed the office of the Prosecutor, having served as Deputy Prosecutor.

Yet, over the past few years, relations between the ICC and Africa have deteriorated considerably. The reasons for the deterioration in relations stem from accusations of the ICC’s bias and targeting of Africa over other parts of the world, the ICC’s perceived selectivity of cases and the potential impact of the ICC prosecutions on the peace

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27 *The Prosecutor v Laurent Gbagbo* ICC-02/11-01/11
processes. As shown above, even though the Prosecutor’s office has announced that it is considering other situations, it is clear that since its establishment, the Court, has so far opened cases against individuals in connection with alleged international criminal offences committed by Africans and in African countries. All the individuals with cases pending or currently underway are Africans. This is despite the admission by the Prosecutor that as of July 2009, he had received over 8137 complaints of human rights violations from more than 130 countries. Clearly, out of these 8137 complaints, the prosecutor of the ICC chose to act on allegations of human rights violations committed by Africans to the exclusion of international criminal offences within the jurisdiction of the ICC committed by Europeans, Americans and Israelis in other parts of the world including Iraq, Afghanistan and Gaza.

The selection of cases for ICC prosecution happened at a time when the AU was engaged in a dispute with the European Union over the abuse of universal jurisdiction by European states to, according to the AU, prosecute Africans. According to the AU, in their application of universal jurisdiction, the European states were placing unfair emphasis on Africans. Most AU states believed that the ICC would place some limitations on the power of the developed Western states to manipulate international criminal justice. But, as at the time of writing this thesis in 2015, the ICC case docket exclusively features Africans as defendants. According to African National Congress (ANC) Secretary General, Gwede Mantashe, ‘the ICC is turning out into what was not envisioned.’ This context and the exceptionalism of developed states in enforcing international criminal justice tend to highlight the appearance of unfair selectivity in the ICC case docket.

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1.3.2. The problem of legitimacy

The controversy of unfairly targeting Africa in and of itself tends to affect the legitimacy of the ICC. The threats of African states withdrawing from the ICC have proliferated. In a presidential debate in 2016, President Yoweri Museveni, reiterated his view that Uganda should withdraw from the ICC, which he described as partisan. Kenya went as far as debating the matter of withdrawing from ICC membership in parliament. Following the visit of Omar Al Bashir and the failure by the Government of South Africa to arrest him, the ruling African National Congress has hinted at withdrawing South Africa’s membership of the ICC. In November 2015, was reported that the Government of Namibia had approved the recommendation by the ruling South West Africa People’s Organisation (SWAPO) party withdraw the membership of Namibia from the ICC.31

The formal reason advanced by the Government of Namibia for the decision to withdraw is not based on the perceived unfairness of the ICC or the international criminal justice system in general. According to the Namibian Government, Namibia had ratified the Rome Statute in order to compliment its weak internal institutions that were weak at the time of independence. Now that the justice institutions in Namibia are strong, the priority for the government has shifted to development and in particular eradication of poverty.32

The reason cited is rather weak and justifies the suspicion that a general aversion for outside scrutiny may be the real reason for the withdrawal. It will be remembered that in 2007, the National Society of Human Rights lodged a submission to the ICC requesting the ICC to investigate former President Sam Nujoma, a former defence minister and two other former government employees for instigating, planning, supervising and aiding and abetting the disappearance of hundreds of Namibians along the Kavango River.33

The threat of a withdrawal enmasse of AU member states from the membership of the ICC and the threat of further fragmentation of international criminal justice through the

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32 Ibid.
33 Ibid.
establishment of a separate chamber with jurisdiction over international crimes that is similar to the ICC in the African Court on Human and Peoples’ Rights seems to set off red flags in the development of international criminal justice. If AU member states carry out the threat to withdraw enmasse, what effect will that have on the legitimacy of the ICC? Certain practices adopted by the Prosecutor’s office as well as perceived inconsistencies in the application of those practice have also tended to negatively affect the legitimacy of the ICC.

But how can one explain the sudden change of course by African states from being among the most fervent supporters of the ICC to become an antagonist over such a short period of time? The change of course by the AU happened at a time when it was completing its transformation from the OAU to the AU. A clear convergence of values can be gleaned between the ICC and the AU. Similarly in all its resolutions urging non-cooperation with the ICC, the AU continues to restate its commitment to eradicating impunity.

Yet, by questioning the legitimacy of the ICC, the AU threatens the existence of an institution that has the potential to help it in its goal of eradicating impunity and fostering the rule of law in African states. Rational choice analysis theories rather than any adherence to the norms of international criminal law, can be marshaled in attempting to gain an understanding of the initial excitement over the ICC project by African states and the sudden deterioration of relations and interest in the institution once it started working. But the AU decisions raise questions, not only about enforcement of international criminal law, but also about the very normative framework that underpins international criminal law.

An analysis of the views and attitudes of the AU and its member states towards the ICC through the lenses of the so called Third World Approaches to International Law (TWAIL) can help us to gain a deeper understanding of the positions taken by the AU. Moreover, the TWAIL approach can be employed as the theoretical framework for
understanding the dominance of cases arising from situations in Africa and the dominance of Africans as defendants in the caseload of the ICC.

1.3.3. The problem of customary international law on head of state immunity

The fall out between Africa and the ICC came to a head with the indictment and issue of warrants of arrest against President Omar Hassan al Bashir of Sudan in respect of the situation in Darfur. The Pre-Trial Chamber issued a warrant of arrest against President al Bashir on 4 March 2009 for war crimes and crimes against humanity and another one on 12 July 2012 for genocide. Al Bashir became the first sitting head of state in history to be indicted by the ICC. But, the ICC has no arrest powers of its own. It has no police force, military or territory of its own. The ICC lacks the means to enforce arrest warrants of its own initiative and a credible threat mechanism. Such powers belong to states. The ICC can only secure the arrest of suspects through states.

Consequently, the Registrar, as instructed by the Chamber then sent requests to Sudan, all states parties to the ICC statute and all UN Security Council members not party to the ICC statute for cooperation for the arrest and surrender of President Bashir. Sudan has not ratified the Rome Statute and is therefore not a member of the ICC. Yet, in issuing the warrants of arrest, the Pre-Trial Chamber did not consider that states might not be able to enforce the warrants of arrest due to the operation of customary international law on head of state immunity.

When states receive a request for cooperation from the ICC, they obviously have to follow their domestic laws on arrest and surrender of suspects. Any arrest in most states is most likely to be followed by a process of judicial review on the basis of the provisions of the national statute domesticating the ICC Statute or any other cooperation legislation in the arresting state. It is in this indirect system of executing warrants of arrest that the issue of immunity arises when the suspect is a high ranking state official.

Article 87 contains general provisions for Part 9 and empowers the Court to make requests for cooperation to States Parties and that it may seek assistance of non-States-Parties and intergovernmental organisations. It also includes a mechanism for
non-compliance. In article 87(3) the terminology adopted is ‘requested state’ as opposed to ‘state party’. This suggests that the provisions of article 87 on requests for cooperation apply to all requests, including those submitted to non-state parties.

The effectiveness of enforcement before the ICC is dependent on the support of states. Without the support of states, international criminal justice will remain elusive. The instruction to AU member states by the AU to cease cooperating with the ICC is therefore a matter of serious concern. Similarly, the threat by some African states to withdraw their membership of the ICC also raises serious concerns on the effectiveness of the ICC and the future of international criminal justice in general.

The Government of Sudan responded to the indictment of President al Bashir by expelling 13 international NGOs that the Government believed were providing information to the prosecutor of the ICC. On its part the African Union, in February 2009 responded by calling for a meeting of the African states parties to the Rome Statute to discuss the court’s work in Africa. The meeting was held on 8 and 9 June 2009 amid fears that African states parties would pull out of the Rome Statute.

As it turned out, however, African member states reiterated their commitment to the rule of law, good governance and combating impunity and made a number of recommendations that ranged from strengthening the capacity of national legal systems to prosecute crimes of international concern to the decision of the AU to investigate the idea of vesting criminal jurisdiction in the African Court on Human and Peoples’ Rights to prosecute serious crimes of international concern including genocide, crimes against humanity and war crimes.34

The African states parties to the Rome Statute noted some of the measures taken by the Sudanese authorities to address violations of human rights and international humanitarian law in Darfur as well as progress made by the African Union (AU) in

34 The idea of investigating the possibility of granting criminal jurisdiction to the African Court on Human and Peoples’ Rights was reached at by Decision of Assembly/Dec.213(XII) adopted in February 2009.
setting up the High Level Panel on Darfur led by former President of South Africa, Thabo Mbeki. More importantly, the African member states reiterated the importance of the UN Security Council deferring proceedings against President al Bashir in terms of Article 16 of the Rome Statute in the interests of achieving peace in Sudan. The UN Security Council gave short shrift to the AU recommendation to defer the warrant of arrest against President al Bashir. In turn, by a resolution of the Assembly, the AU decided that AU Member States shall not cooperate with the ICC on the implementation of the arrest warrant against President al Bashir pursuant to Article 98 of the Rome statute. Article 98 bars the Court from proceeding with a request to implement a warrant of arrest which ‘would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state....’

The AU responded in a similar manner with respect to the indictment and issue of a warrant of arrest against Colonel Gaddafi of Libya. The case of President Omar Al Bashir provided the ICC Pre-Trial Chamber with opportunities at different moments to clarify the law on head of state immunity in relation to states that are not party to the Rome Statute. A well reasoned decision on head of state immunity would have also settled the appearance of tension between articles 27(2) and 98(1) of the Rome Statute. Yet, both Pre-Trial Chamber I and Pre-Trial Chamber II, differently constituted on different occasions, have contrived to scuttle the opportunities. The pronouncements of the ICC on customary international law head of state immunity leave a lot to be desired. The pronouncements of the ICC on the regulation of head of state immunity by the Rome Statute through are also fraught with difficulties. In a recent decision, the South African Supreme Court of Appeal expressed the view that the tension between Articles 27 and 98 of the Rome Statute has not yet been authoritatively resolved.

As things stand right now, African states that are parties to the Rome Statute are faced with competing obligations under Article 27 of the Rome Statute that requires that they

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arrest and surrender all persons indicted by the court including President al Bashir and Article 98 that reaffirms sovereign immunity as well as resolutions of the AU that bar them from cooperating with the ICC.

1.3.4. The problem of conflicting obligations
Starting, with its decision on abuse of universal jurisdiction which was adopted in Sharm El Sheikh in July 2008, the AU Assembly, the supreme decision making body of the AU had adopted a number of decisions in January and July of each one of the subsequent years on the activities of the ICC in Africa. A permanent feature of all the decisions was the request to the UN Security Council to invoke its powers under Article 16 of the Rome Statute and defer the ICC case against President Al Bashir of Sudan. Without such a deferral, the AU instructed its members to withhold cooperation with the ICC and refrain from executing the warrant of arrest against President Al Bashir.

At an extraordinary session of the AU Assembly held in Addis Ababa in October 2013, the AU upped the ante in its opposition to the prosecution of heads of state and government by the ICC. In a decision calling for the suspension of the ICC cases against Kenyatta and Ruto, the AU Assembly directed Kenya to request the UN Security Council to invoke its powers under Article 16 of the Rome Statute and defer the cases against President Kenyatta and his deputy, William Ruto.37 The AU made so bold as to decide that “no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government…during their term of office.”38 Furthermore, the AU Assembly decided “that President Uhuru Kenyatta will not appear before the ICC” until both the UN Security Council and the ICC adequately addressed the concerns raised by the AU.39

It is axiomatic that the AU and the ICC are established independently of each other. Each organisation has the powers to make binding decisions for its member states. As the two are not set up in any hierarchy, there is a significant possibility that states to

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38 Ibid, Paragraph 10(i).
39 Ibid, Paragraph 10(ix).
which the ICC has directed a request for arrest and surrender of President Omar Al Bashir may find themselves in a situation where they have to choose between conflicting obligations. So far the ICC has resisted the invitation to engage with the problem of conflicting obligations that African states are faced with. Conflict of obligations, which is also referred to as conflict of norms or norm conflict is a very real likely common occurrence in view of the proliferation of law-making processes of global, regional and sub-regional bodies.

1.3.5. The problem of politicisation

Through its decisions, the AU has adopted a policy of non-cooperation with the ICC. The AU continues to complain of what it views as the abuse of the principle of universal jurisdiction by some European states and politicization and misuse of indictments against African leaders by the ICC. In popular discussions, African leaders continue to push the suggestion that the ICC is functioning as a tool for the neo-imperialist or neo-colonialist agenda of Western states.

In appearance, the attitude of the African states towards the ICC is characterised by inconsistencies. How can one explain the apprehension of Thomas Lubanga and others in the DRC and their prompt surrender to the ICC while refusing to enforce the warrant against Bashir or the relentless pursuit of Joseph Kony by the Uganda government while criticising the ICC for targeting Africans? The prompt apprehension of Gbagbo in Ivory Coast should serve as an indicator of Ivory Coast’s willingness to allow investigations by the ICC to go ahead. It should also indicate Ivory Coast’s commitment to execute ICC decisions. Inconsistencies may be an indication changes in the state interests of DRC, Uganda, and South Africa. Inconsistencies may also serve to prove the veracity of the theory that states that signed up to the Rome Statute did so with the intention of applying it against their domestic political opponents. Most governments expect to use the ICC to persecute their political opponents in a way that makes them look like they are cooperating with the ICC in fighting impunity for atrocity crimes.
This thesis draws from rational decision-making analysis theories that are rooted in the field of economics to try to explain and understand the behaviour of certain African states in cooperating with the ICC when the politics suits them and to try to predict how other actors like the ICC itself, the AU and other African states might behave in view of the outcomes of the ICC cases where the African state cooperated such as Kenya and where the African state has not cooperated such as Sudan. A dissection of the theories is beyond the scope of this thesis. Instead, where it is necessary, I offer in brief, only the central insights of the theories before applying the theories to the situations at hand.

The problem of politics and politicisation leads to the hypothesis that political leaders in Africa that supported the ICC at the beginning were driven by rational choice analysis rather than any adherence to the norms of international criminal law. Clearly, President Al Bashir plays an insignificant role in the political calculus of most African states. Politically, arresting Bashir brings no political mileage for them. If Bashir became a direct political opponent of any government in Africa, we can rest assured that the ICC warrants will be executed. Like Gbagbo, we can be sure that Bashir will be arrested and promptly surrendered to the ICC. The lack of will to cooperate with the ICC in executing the warrant of arrest against Bashir hardly comes as a surprise.

1.4. Key Research Questions
Besides consternation in some quarters in Africa as to why African leaders seem to have been increasingly targeted by the Court, the work of the ICC in Africa has opened up a can of worms of legal issues. A lot of issues that have arisen have a bearing on the future of international law in general and international criminal justice in particular. The following are the key issues arising from the ICC’s involvement in Africa that will be investigated in this study:

- Is the ICC targeting weak and poor African states that do not enjoy the protection of the UN Security Council? Has the ICC lost its legitimacy because of the charges that it has so far selectively targeted weak and poor African states?
• The manner in which the African Union has chosen to respond to the ICC’s work in Africa poses questions regarding the relationship between international criminal tribunals in general and the ICC in particular and political organs of the international community outside the UN. What effect do the decisions of the AU not to cooperate with the ICC in the case of President Omar al Bashir have on the prosecution of this particular case and the future of international criminal justice in general?

• African states that are members of the AU and parties to the ICC statute are now faced with competing obligations towards the AU and under the Rome Statute. So too is Sudan that is an AU member but is not a party to the ICC, but has obligations on the strength of the UN Security Council referral resolution read together with Article 25 of the UN Charter to cooperate in the arrest and surrender of President Omar Al Bashir. This begs the questions: What weight do the decisions of the AU not to cooperate with the ICC carry in international law? How can the conflicting obligations that African states are faced with be resolved?

• The apparent conflict between Articles 27 and 98 of the Rome Statute and the issue of head of state immunity under customary international law; Do high ranking state officials such as President Omar Al Bashir enjoy immunity from arrest and surrender under Article 98 of the Rome Statute? How should the apparent conflict between Articles 27 and 98 be resolved?

1.5. **Objectives and Relevance of the Study**

The objective if this study is to provide a nuanced exploratory analysis of the work of the International Criminal Court in Africa with a view to resolving some of the practical and legal dilemmas faced by the Court as it deals with its first cases. The Study will shed light on the diversity of ongoing debates surrounding the ICC’s work in Africa and stimulate further debate on ways to achieve a more collaborative relationship between the African Union and its member states on the one hand and ICC on the other, in order to ensure the continent’s continued and meaningful involvement in international criminal justice and the fight against impunity for the most egregious human rights violations.
The ICC only started operating about a decade ago. It is a fledgling institution still testing the waters and trying to find its feet in international criminal justice. In addition, the ICC is the first permanent judicial institution established to try serious crimes of international concern including genocide, war crimes and crimes against humanity. In the circumstances, there is still a lot for the court to learn as there is for researchers and practitioners of international criminal justice. The study will contribute to the body of research on the relatively new and evolving area of international criminal justice in general and the new international judicial institution. To the extent that it tries to clarify legal issues arising from the ICC’s work in Africa as well as make recommendations the research may be useful to international and national courts judges, international lawyers, academics and those interested in international criminal justice in Africa. One of the objectives of this research is to ensure that the ICC is better understood in Africa and that equipped with this understanding African states are better situated to comply with their obligations under the Rome Statute.

The debate that is going on regarding the relationship between the African Union and its member states on one hand and the ICC on the other tends to gravitate towards the accusation that the ICC is targeting Africa to the extent of fearing de-ratification of the ICC Statute by African states parties. Yet in all its resolutions to date the African Union has reiterated its unflinching commitment to combating impunity and promoting democracy, the rule of law and good governance in accordance with the letter and spirit of the Constitutive Act of the African Union. The concerns raised by the African Union seem to have substance and some of the decisions of the AU including examining the possibilities of clothing the African Court on Human and peoples’ Rights with criminal jurisdiction to try serious crimes of international concern require proper analysis in order to inform the relationship between the two institutions going forward.

Just like the establishment of the ICC, the possibilities of empowering the African Court on Human and Peoples’ Rights with criminal jurisdiction will be the first time that a regional human rights court is afforded such jurisdiction. This will have far reaching implications for the future of international criminal justice. This study therefore seeks to
proffer suggestions and recommendations on how the two institutions should relate with each other for the effective fight against impunity should the AU decision become reality.

Specifically, the research will put forward suggestions for the African Court, to complement and not compete with the ICC as well as strategies to prevent the relationship between the AU and the ICC from complete collapse. The research will make arguments in favour of proactive complementarity, which involves the ICC actively establishing programmes to improve the capacity of national jurisdictions including incorporating the Rome Statute in domestic laws to enable domestic legal systems to effectively deal with crimes covered by the Rome Statute.

The ICC has become a key factor in negotiations for peace in Darfur and Uganda. In Kenya the ICC was an important factor in the reform agenda and the constitution making process that ended in 2010. In Kenya there were well grounded fears that the intervention of the ICC might derail the reform process. In other parts of Africa where the ICC has been involved including Darfur and Uganda, the work of the ICC seems to be directly responsible for the stall in the negotiations for peace. As Clark Points out, the relationship between criminal trials and peace remains empirically under-researched.  

It is therefore necessary to study the impact of and implications for peace when international criminal justice is introduced in ongoing conflicts.

In some places, the ICC’s work in Africa seems to have a counterproductive effect. For example in the general elections of April 2010, President Al Bashir exploited the ICC proceedings to pose as a hero of African nationalism. In Kenya, William Ruto and Uhuru Kenyatta formed a political alliance after charges against both of them were confirmed by the ICC. During campaigns for the 2013 elections, their political alliance expertly played the victimisation card, portraying Ruto and Kenyatta as victims of international bullying of the weak by the ICC at the instigation of the West. In Zimbabwe, suggestions

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of international criminal litigation against the regime of President Robert Mugabe also seem to strengthen the regime in a similar manner rather than weaken it.

Ultimately, rather than end impunity, the ICC’s work on the continent seems to force offending leaders to cling to power while silencing the opposition by any means. This research will contribute to an understanding of these issues of international concern that are empirically under-researched.

The work of the ICC in Africa has raised some of the most vexing issues of international criminal justice confronted by the court in its inaugural decade. This study will help to address some of the practical, ethical and legal dilemmas posed by the current work of the ICC and in the process help to develop the law on international criminal justice as it evolves.

With respect to the conflict between Articles 27 and 98 of the Rome Statute, this research will contribute to international criminal law by presenting a more nuanced position that should be adopted by the ICC when faced with the dilemma of the duty to prosecute and punish perpetrators of international crimes on one hand and the customary international law obligation to respect immunities of state officials and conflicting decisions of regional bodies such as the AU on the other hand.

1.6. Research Methodologies

A considerable part of the research will be based on desk work. Various sources of information on the work of the ICC in Africa will be consulted. Research will be conducted at various institutions including the Law Library and the Institute of Development Studies of the University of Zimbabwe. A detailed desk review of the African cases before the ICC will be carried out. A combination of quantitative and qualitative methodologies to capture both statistics and the unique perspectives of the individuals that have worked with the ICC, experts on the ICC and international criminal justice as well as victims and communities that are directly affected by the work of the ICC in Africa will be employed.
This research will rely on the researcher's vantage point of having worked in some of the countries in East Africa where the work of the ICC is going on and at times when the issues of ICC indictments and arrest warrants were topical. The researcher's tenure in Darfur, Sudan coincided with the issue of the arrest warrants against President Bashir and the other accused persons in Sudan. The researcher's work with conflict affected communities in Darfur was intended to address some of the issues giving rise to the investigation by the Prosecutor of the situation in Sudan and the subsequent charges against the Sudanese government officials and the leaders of the Janjaweed militia. The research will draw on information gathered from security briefings and situation reports as well as meetings and informal discussions with UN and government officials, NGO workers as well as people dwelling in camps set up for those internally displaced by the war in Darfur.

Similarly, the researcher's time in Kenya coincided with the time that the Prosecutor opened investigations after the different actors in Kenya had failed to agree on how to investigate and deal with the post-election violence of 2007. The researcher will draw from the various formal and informal discussions with civil society leaders, staff of the national human rights commission of Kenya and common citizens. The information obtained from these experiences in Darfur and Kenya will be incorporated in the study. In this respect, the research will rely predominantly on the qualitative methodology to examine, analyse and interpret information gathered as well as the researcher's observations.

The researcher also plans to attend relevant national and international conferences and trainings on the international criminal court in general and the work of the international criminal court and international criminal justice developments in Africa in particular and present and discuss his ideas. This will help to test some of the ideas and stimulate debate on this subject. Conferences and trainings will also present opportunities to obtain information on aspects of this study. National and international conferences and trainings will also provide opportunities to conduct formal and informal discussions with experts in the field of international criminal justice.
In addition to desk work, if resources allow, field visits will be conducted to the ICC and other tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) based at The Hague. The researcher is currently in discussions with the International Commission of Jurists (ICJ) to be included in the ICJ programme that supports African lawyers to be able to visit the ICC and other international tribunals to learn about international criminal litigation. The visits will provide opportunities to observe proceedings during court sessions as well as to obtain information on aspects of this study through interviews with judges, prosecutors, defence lawyers and other employees of these courts. Informal discussions will also be held where interviews are inappropriate.

1.7. The Gaps in Existing Studies

Bassiouni points out that when he started his academic career about 4 decades ago, international criminal law was ‘largely regarded as esoteric’ and for many years he was the only one in US legal education to teach a course on the subject. The International Criminal Court has been in existence for only nearly a decade. Yet over this relatively short period of time a tremendous corpus of literature already exists on the subject of international criminal law and the ICC. However, no single comprehensive volume dealing with the ICC’s investigations and cases in Africa has been written.

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Most of the literature that exists seeks to enhance understanding of the ICC in general. Yet, there are still gaps in the understanding of the International Criminal Court. This proposed research is not a study of the ICC per se. It is limited to an analysis of the investigations in African and proceedings against African personalities and the responses of the Africa Union to those investigations and proceedings. In its first decade of existence, the ICC’s case docket comprises cases arising from situations in Africa only. This phenomenon has aroused debates on perceived unfair selectivity, which touch on the legitimacy of the ICC. The ICC’s work during its first decade of existence has also reignited debates on international law issues that include conflict of obligations and head of state immunity. Some African states have threatened to withdraw their membership of the ICC. The AU has made proposals for extending the jurisdiction of the African Court on Human and Peoples’ Rights to cover international crimes, which threatens to further fragment international law.

The manner in which the ICC has gone about its business in its first decade of existence will have a profound effect on the future of international criminal justice. What current the work of the ICC portends for the future prosecution of international crimes is the unique contribution that distinguishes this research from currently existing studies.

One of the existing publications that come nearest to the subject matter dealt with in this research is a study by Dr David Hoile on the International Criminal Court whose publication was intended to coincide with the ICC’s first review conference in Kampala, Uganda. Entitled ‘The International Criminal Court: Europe’s Guantánamo Bay?’ the study questions the legitimacy and international character of the ICC, especially given that with countries such as China, Russia, the United States, India, Pakistan and Indonesia not being parties to the Rome Statute, current states parties only represent just over one quarter of the world’s population. Hoile questions the independence of the ICC in view of its relationship with the UN Security Council and the fact that the European Union provides the ICC over 60 percent of its funding. A reading of this book

43 David Hoile *ibid.*
seems to confirm the allegation that Dr. Hoile acts a propagandist for the Government of Sudan.

Tim Allen’s book, ‘Trial Justice: The International Criminal Court and the Lord's Resistance Army’ is a study on the controversial involvement of the International Criminal Court in a live conflict in Northern Uganda. A non lawyer, Allen analyses the relationship between peace, justice, and reconciliation and provides valuable insight into how ICC activities can possibly be manipulated by political leaders. While noting that the ICC has confronted outright hostility from a wide range of groups, including traditional leaders, representatives of the Catholic and Anglican Churches, non-governmental organizations and at times even the Government of Ugandan that invited the ICC to become involved, Allen argues that opposition and hostility to the ICC is based upon ignorance and misconception. In this book, which is based on interviews with district officials, aid agencies staff, peace negotiators, LRA combatants, and numerous people living in internally displaced persons’ camps, Allen concludes that victims of the LRA atrocities in Northern Uganda are much more interested in punitive international justice than normally acknowledged, and that the ICC has made resolution of the war more likely. Unlike Dr. Hoile’s work, Allen’s study comes off as an objective piece of work, which takes into account numerous points of view expressed by individuals on both sides of the conflict. It however remains a non legal piece of work. This research differs from these works by providing dispassionate nuanced analyses of the reasons for the opposition to the ICC and insights into the relationship between peace, justice and reconciliation from a legal perspectives.

The International Crime and Terrorism Programme of the Institute of Security Studies (ISS) has produced a number of publications dealing with the work of the Rome Statute and the decisions of the AU.\textsuperscript{44} The African Guide to International Criminal Justice is a publication that was prepared following seminars attended by officials and lawyers from

the ICC, the AU and several African countries. A decision was made that the continent needed its own scholars and practitioners to prepare a text book for judges, prosecutors, defence lawyers and government officials that presents an African focused guide to international justice. The guide is intended to provide practical guidance to international criminal law. The recent book entitled *Africa and the Future of International Criminal Justice* is a collection of papers on various issues related to international criminal justice in Africa in general. The book does not focus on the work of the ICC but goes further to deal with the special ad hoc tribunals for Sierra Leone and Rwanda. None of the studies carried out by the ISS or others deals comprehensively with the relationship between Articles 27 and 98 of the Rome Statute as well as the legal effect of the AU decisions on states that are parties to the Rome Statute and members of the African Union. This is a feature that distinguishes this research from previous studies that have been carried out on the ICC and the decisions of the African Union. In addition, writers that touch on this subject tend to denude the legal value of the AU decisions since the decisions are largely actuated by political considerations and motivations. As a result the legal force of the AU decisions has not been sufficiently dealt with in the studies that currently exist. This research will contribute to the existing body of knowledge by carrying out a detailed analysis of the legal basis and binding nature of AU decisions on AU member states and evaluating the relationship between legal norms and regional obligations established by regional organisations and those established by general international law.

1.8. Delimitation and Limitation of the Study

This proposed research will only deal with the work of the ICC in Africa. The research will not deal with other situations outside the African continent that the Prosecutor of the ICC may from time to time consider for investigation. Furthermore, the research specifically analyses the responses of the African Union to the cases that are currently before the ICC. The research is therefore not a study of the ICC per se.

The field of international criminal law is one that is rapidly expanding and changing. As the cases that are before the ICC continue to pay out at The Hague and in domestic
courts, positions on the interpretation of the law and on matters of fact shift endlessly. Fixing the temporal range of the study becomes a real challenge, which in turn is a limitation of the study. In order to preserve some sanity in the analysis, I limit my study to developments happening at the ICC and positions with regard to factual matters and the law up to 31 May 2016 only.

It is pertinent to note that it was initially in respect of the prosecution of President Omar Al Bashir of Sudan that the AU fell out with the ICC. The AU passed similar resolutions directing AU member states to withdraw cooperating with the ICC in respect of the situations in Kenya and Libya. At an extraordinary summit held in 2013, the AU decided that ‘That President Uhuru Kenyatta will not appear before the ICC until such time as the concerns raised by the AU and its Member States have been adequately addressed by the UN Security Council and the ICC’.  

However, the defendants in the Kenya situation decided to appear before the court voluntarily. Therefore, unlike in the case against Bashir the prosecution did not seek an arrest warrant. The Pre-Trial Chamber obliged the prosecutor’s request to issue a summons to appear. In the case of Libya, Gaddafi died before the warrant for his arrest was executed. The question of head of state immunity has not arisen in respect of the situations in Kenya or Libya even though these situations involved the prosecution of high ranking government officials that are otherwise entitled to immunity.

A major part of the research will be based on desk research due to limited financial resource for research. Limited funds will mean limited participation in workshops and seminars as well.

This thesis engages the questions that are arising from the work of the ICC in Africa and reflected in the AU resolutions including the issues of the ICC’s legitimacy, conflict of

obligations and head of state immunity from a so called African perspective. In particular, the thesis applies some of the analytical tools of the rapidly growing Third World Approaches to International Law (TWAIL) to study the debates over the work of the ICC in Africa and the enforcement of international criminal justice on the continent.

Despite the growing amount of scholarship on the ICC’s work in Africa and on the ICC in general, many issues of concern to the Third World appear to be consistently overlooked. For example, one of the explanations advanced by the Prosecutor in defence of the accusations of unfairly targeting African states is that the majority of the situations where the prosecutor has opened investigations were referred to the Court by the African states themselves. This may be so, but, such an explanation is overly simplistic and portrays the foundational disciplinary fictions in international law such as an international system that is based on sovereign and equal states and the perceived universality of certain norms. Approaching the matters from a TWAIL perspective helps to question such foundational fictions. It also helps in identifying reasons why, despite the best efforts of African states in ensuring that the ICC was established, without far reaching and radical changes, the international legal system is incapable of providing justice for the Third World despite firmly vowing to do so.

This thesis rejects the romantic notion of an innocent third world and an evil and domineering first world. It is critical of African governments for seeking to jump ship out of the International Criminal Court and at the same time calls for more international action to fight impunity for international crimes in Africa. To this extent the discussion of the issues considered in this thesis bears a distinct TWAIL influence.

Taking a TWAIL approach allows for a reconceptualisation of the debate by shifting focus to broader legal issues, rather than focusing solely on the narrow questions raised and justifications made over the Afrocentric focus of the ICC’s case docket. A TWAIL approach seems to push the discussion beyond the confines of debating the merits or demerits of the ICC’s selection decisions and consider the legitimacy of the selection decisions in a broader sense.
But there are limitations to the TWAIL approach. The most obvious of these is that there is a real risk of engaging in relentless criticism of the West and casting African states in the mould of perpetual victim. Furthermore, a detailed dissection of the TWAIL discipline is beyond the scope of this thesis. Instead, Chapter 3 offers in brief, only the central insights of the theory before applying the theory in an attempt to make sense of the decisions of the AU regarding the work of the ICC on the continent.

1.9. Structure of the Study

This first part of the thesis will provide a brief background to the establishment of the International Criminal Court. The history of the efforts to establish an international criminal Tribunal will be traced from its early roots to the establishment of the ICC. Developments in international criminal justice leading up to the adoption of the Rome Statute and the establishment of the court will be analysed. The travaux preparatoire of the negotiations of the Rome Statute will be considered in analysing some of the structural problems of the court including UN Security Council referrals that have contributed in setting the court up on a collision course with the African Union. An in-depth analysis of the relationship between the ICC and the UN Security Council and Western powers will be carried out in an attempt to resolve questions around the independence of the International Criminal Court and the accusation that the court has avoided commencing investigations in countries that enjoy the protection of the UN Security Council and powerful Western nations.

Drawing on the researcher’s experiences of working on human rights programmes of international non-governmental organisations in East Africa including Kenya, Sudan and Uganda where the ICC has issued warrants, this section provides an exploratory analysis of the cases that the ICC has opened in Africa. The different issues that have arisen as a result of these cases are highlighted in this section. The court’s work is so intricately bound up with political power and political processes that without sound stewardship from the individuals that lead the work, the court risks losing its legitimacy. The current selection practices of the Prosecutor place the court in the position where it risks losing its legitimacy. Some ways in which the ICC can claw back some of its
legitimacy, including commencing investigations on other continents, are suggested in this section of the thesis.

While chapter 3 is largely concerned with an analysis of the early practices of the Prosecutor’s office in selecting situations and cases for investigations and prosecution, which seem to focus on Africa only so far, chapter 4 is an in-depth analysis of the response of the African Union to the Prosecutor’s selection decisions. This chapter brings the TWAIL approach to the fore and adopts distinctly African perspectives in trying to make sense of the ideological grounding of the decisions of the AU contained in the binding resolutions of the AU Assembly regarding the work of the ICC on the continent.

With a view to establishing the nature of the relationship between the ICC and other political organs of the international community outside the UN including regional bodies, this chapter also grapples with the decision of the AU to extend the jurisdiction of the African Court on Human and Peoples’ Rights to try serious cases of international concern. The decision threatens to further fragment international criminal justice. But, does it portend increased accountability for serious crimes of international concern committed in Africa?

The preceding chapter 4 deals with the ideological aspects of the AU’s decisions. Chapter 5 tackles the premise of conflicting obligations that is raised by the AU in directing its member states to cease cooperating with the ICC in respect of the arrest and surrender of President Omar Al Bashir. Due to the decisions of the AU, which, I argue, are binding on all AU member states, there is a significant possibility that any AU member state to which the ICC has directed a request for arrest and surrender may find itself in a situation where it has to choose between conflicting obligations. This chapter deals with this first set of conflicting obligations that arises from the direct conflict between AU resolutions and the requests for cooperation send to African Rome Statute states parties by the ICC. Practical ways of achieving a resolution of the conflict
between the AU resolutions and the ICC’s requests for cooperation to African states are considered in chapter 4.

The second set of conflicting obligations arises from the conflict between the ICC’s requests for cooperation on one hand and the operation of customary international law of head of state immunity on the other. The validity of the head of state immunity argument raised by the AU is tested in chapter 6 of this thesis. In this chapter 6, the apparent tension between obligations under Article 27 of the statute to arrest and surrender individuals indicted by the court and Article 98 that reaffirms the obligation to accord immunity to certain government officials under general customary international law is dealt with. In order to effectively deal with the issue and attempt a resolution of the apparent tension, the rule of customary international law pertaining to sovereign immunity is be analysed in this chapter. Suggestions on the possible means of resolving the conflicting obligations are made.

Chapter 7 contains the conclusions. Suggestions on how some of the controversies and legal dilemmas that have arisen out of the ICC’s work in Africa may be resolved are offered. The UN Security Council has an important role to play in ensuring effectiveness in the enforcement of international criminal justice. So far the UN Security Council has only referred situations too the Court and has not followed up on implementation of its referral resolutions. A more responsive UN Security Council may be what is needed to resolve the impasse between the AU and the ICC, stem further fragmentation of international criminal justice, ensure the effectiveness of the ICC and reinforce the legitimacy of the international criminal justice system anchored by the ICC. More importantly, this concluding section of the research endeavours to propose recommendations for the best means by which the African Union and its member states might engage with the ICC in order that the court may be improved in response to African concerns and interests.
Chapter Two

Setting the Stage: Developments in International Criminal Justice Leading up to the Formation of the ICC

2.1. Introduction

At the end of the Rome Diplomatic Conference for an International Criminal court on 17 July 1998, 120 countries voted in favour of the treaty to establish the International Criminal Court. Only 7 countries including USA, China, Libya, Israel, Qatar and Yemen voted against. There were 21 abstentions. In terms of Article 126(1) the Rome Statute of the International Criminal Court, entered into force on 1 July 2002.

The international Criminal Court is a permanent international institution with ‘jurisdiction over persons for the most serious crimes of international concern’. Although the establishment of a permanent court to try individuals for international criminal offences was a new development, the idea is not. From a review of the development of international criminal law and justice, it seems that the Rome Statute and the Court are merely the latest step in an historical evolution that is centuries old.

As pointed out by the International Coalition of the International Criminal Court, the history of the establishment of the International Criminal Court spans more than a century. Professor Schabas has shown that war criminals have been prosecuted since the time of the ancient Greeks and probably before that. However, prosecution of war crimes was only done in national criminal justice systems.

The idea of establishing an international criminal court to try perpetrators of atrocities has also often been voiced, but as Bassiouni points out, when he started his academic career about 4 decades ago, international criminal law was ‘largely regarded as

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47 Article 1 of the Rome Statute of the International Criminal Court
48 At www.iccnow.org, last accessed on 23 July 2012
esoteric’ and for many years he was the only one in US legal education to teach a
course on the subject.\textsuperscript{50} Some writers still question whether in its current state,
international criminal law has developed to the point where it may be regarded as a
legal ‘system’. In his review of the book, \textit{From Nuremberg to The Hague: The Future of
International Criminal Justice}, \textsuperscript{51} Drumbl posits that while the creation of the ICC
provides momentum to the reference to a new ‘system’ of international criminal justice,
‘international criminal law may be thought of as a patchwork of loosely connected
national, regional, international and hybrid judicial proceedings.’\textsuperscript{52}

It is essential to trace and state the development of international criminal law as a fully
fledged branch of public international law and the institutional framework to enforce this
relatively new field of law. An essential aspect of this enquiry is the examination of how
the individual human being has come to be regarded as a subject of international law.
This chapter sets the stage for the discussion of the ICC’s work in Africa by tracing the
normative development of international humanitarian law and international human rights
law and examining the historical progression of international justice institutions.

One of the criticisms of the ICC that are voiced by African leaders is that the ICC is not
pursuing the principles that led them to support the idea of an international criminal
court in the first place. In addition to providing a detailed understanding of the evolution
of the concept of individual criminal responsibility this chapter also attempts an analysis
of the milestones on the road to Rome and what motivated these milestones in order to
try to reach an understanding of the intention of the framers of the Rome Statute. The
purpose of the analysis in this chapter is to provide a historical legal framework that will
assist in the subsequent analysis of the work of the Court on the continent and to test the
criticism that the ICC has become what it was not originally intended to be. This
chapter takes a historical analysis. Because all the processes were either institutionally

York: Transnational Publishers, 1999
\textsuperscript{51} Philippe Sands, \textit{From Nuremberg to The Hague: The Future of International Criminal Justice}, Cambridge:
Cambridge University Press, 2003
linked or related to the conflict or reasons which gave rise to their establishment, they are best understood through a historical analysis.

2.2. In the Beginning

As stated by Schabas, war crimes were tried during the time of the ancient Greeks. Bassiouni points out the availability of evidence which shows the existence of tribunals in Greece in 405 BC to hold individual perpetrators of war crimes accountable. He cites other examples from Europe between the 13th and 17th centuries while Bos cites similar examples from Asia including China, India and Japan.

In many African communities, rules governing the conduct of war also existed for ages. For example, Ambassador Francis Deng refers to customary rules of war for Nilotic tribes that expressly forbade any form of violence against women. ‘[I]n our rules of war, you don’t kill a vulnerable person; you don’t kill a person who is disarmed; you don’t kill a woman; you don’t kill a child. This is something that is in our custom. But the conventions come and tell us, “Don’t do this, it is against the convention and should be done like this.” And yet we already have them in our own customary law, except that we were made to believe that we don’t have them because we have not recorded them.’

As a result, it is argued by Paul Bowers that rules governing the conduct of war and the responsibility of individual perpetrators for atrocities have always existed throughout history with variations between historical periods and in different cultures. Ciara Damgaard also points out that normative standards for holding individuals accountable

for violations of war crimes existed in many places.\footnote{Ciara Damgaard, Individual Criminal Responsibility for Core Crimes: Selected Issues: Heidelberg, Springer Verlag, 2008.}\footnote{Schabas, ibid.} It seems, however, that the rules governing the conduct of war and individual criminal responsibility for such crimes were mostly applied and enforced in domestic courts. The possibility of agreement among states on enduring structures for the prosecution and punishment of offenders remained fanciful. But, domestic prosecution of these serious crimes remained ineffective especially when perpetrators of the crimes remain in power.\footnote{Schabas, ibid.} As a result, looking at it from today’s vantage point, it seems that it was inevitable that in the long run alternatives to domestic prosecution of war crimes would be identified.

2.3. The First International Criminal Trial and its Significance to the Development of International Criminal Justice

When the International Military Tribunal at Nuremberg was set up after the Second World War, it was considered a strikingly new enterprise with no precedent and received a lot of criticism mainly for \textit{ex post} application of the law and creating a hitherto unknown offence of crimes against humanity. As noted by Gordon,\footnote{Gregory S. Gordon, The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law, Available at SSRN: http://ssrn.com/abstract=2006370} among those that supported the Nuremberg trials was George Schwarzenberger, an English jurist of Jewish-German descent who had fled Nazi persecution in the 1930s. Schwarzenberger published an article in the \textit{Manchester Guardian} of 28 September 1946, which drew comparisons between the Nuremberg trials that were then underway and the trial of Sir Peter von Hagenbach at Breisach in 1474.\footnote{Georg Schwarzenberger, A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474, \textit{The Manchester Guardian}, 28 September 1946, as cited in Gregory S. Gordon, ibid.}

In his newspaper article, Schwarzenberger expressed the view that the Hagenbach trial appeared to be the first international trial for crimes against humanity. In the trial the prosecution submitted that the crimes committed by Hagenbach outraged all notions of humanity and justice and constituted crimes under natural law. According to the prosecutor, the accused had ‘trampled underfoot the laws of God and men.’ In the \textit{High
Command Case the Nuremberg Tribunal cited the von Hagenbach trial and expressed the view that ‘the charges against him were analogous to ‘Crimes against Humanity’ in modern concept.’

The court rejected the defence’s preliminary objections to the court’s jurisdiction as well as Hagenbach’s defence of superior orders and found him guilty. The court imposed the death sentence. As Robert Cryer submits, the most cited comparison between the von Hagenbach trial, and modern trials, is the defence of superior orders. The rejection of the defence of superior orders gives the von Hagenbach trial some of its most fundamental importance in the development of international criminal law on the fight against impunity for atrocities. The case is also regarded as a model or standard for subsequent developments leading to the modern day recognition of rape as a war crime and individual criminal responsibility under international criminal.

For these reasons, Schwarzenberger concluded that the ‘roots of modern international criminal law go deeper than is commonly assumed.’ It was after Schwarzenberger’s article appeared that prosecutors in the Nuremberg trials began to rely on the Hagenbach trial in their arguments. It is now widely agreed that ‘the history of international criminal trials begins with the 1474 prosecution of Peter von Hagenbach.’

2.4. The Principle of Sovereign Equality of States

The Peace of Westphalia of 1648 ushered in the principles of sovereign equality of states and non intervention in the domestic affairs of other states. Under the Westphalian legal order sovereign states are horizontally juxtaposed with no higher authority and substantive norms consist of a network of reciprocal obligations that focus

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64 Michael P. Scharf & William A. Schabas, Slobodan Milosevic on Trial: A Companion, New York: Continuum, 2002
almost exclusively on inter-state relations. Only states are legal subjects under international law and breach of international law only gives rise to state responsibility. Individual human beings are not subjects of international law and may only be bound by international law through domestic legislation. Under the natural law system that ruled supreme before the Westphalian system, natural law was a universal law that regulated everything, and was applicable internationally by virtue of its universal nature. It bound individual human beings in the first place, and was by extrapolation also applicable to the conduct of states.

Under the natural law system therefore, the development of norms for individual criminal responsibility under international law was inevitable and very much a natural process. With the superimposition of the Westphalian positivist legal order over the natural law system, development of norms on the place of the individual human being in international law in general and individual criminal responsibility in international law in particular naturally stalled. Cerone writes that while the Westphalian system exists today, it has evolved over the centuries and the scope of matters regulated by international law widened with the expansion of global commerce and communications.

2.5. Developments During the 18th and 20th Centuries

It was as a result of events that occurred between the 19th and early 20th Centuries that there were developments in the law of armed conflict and the concepts of individual criminal responsibility for international crimes under international law and international prosecution of humanitarian abuses began to crystallise. As evidence of these developments Ciara Damgaard points out that there is evidence in the late 18th Century,
of individuals being tried in England and in the USA for international crimes that were not considered to be crimes under domestic law.\textsuperscript{69}

With the notable exception of the von Hagenbach trial, most attempts to deal with serious international crimes, especially war crimes, were through domestic and not international efforts. There were notable bilateral arrangements as well such as the Treaty of Amity and Commerce between His Majesty the King of Prussia and the United States of America of 10 September 1785.\textsuperscript{70} Article 24 of the treaty stipulated in detail how prisoners of war would be treated if the two states ever went to war. The treaty did not stipulate individual criminal sanctions on breach but it signified a step in the attempt to establish rules and prohibit certain conduct on the international plane in the event of war.

The Declaration of Paris Respecting Maritime Law of 16 April 1856\textsuperscript{71} signified the first multilateral attempt to codify in peace times the rules of the conduct of war. Negotiated only by Austria, France, Prussia, Sardinia, the Ottoman Empire and the United Kingdom most sea powers later acceded to the declaration. The declaration had 4 articles only which abolished privateering, addressed the neutral flag and neutral goods and provided elements necessary for a blockade to be valid.

Inspired by Henri Dunnant and sponsored by the Swiss Confederation, a conference was held which resulted in the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864. This first Geneva Convention established the basis upon which the rest of the rules of international law for the protection of victims of armed conflict developed. It established the great principle that combatants that are sick and wounded and therefore harmless as well as hospitals, ambulances and civilians providing aid and care for them must be respected and protected from hostile acts. The Convention also became the basis upon which the Red

\textsuperscript{69}Ciara \textit{Ibid}.
\textsuperscript{70}Available at the Avalon Project of the Yale Law School at http://avalon.law.yale.edu/18th_century/prus1785.asp
\textsuperscript{71}Available at the Avalon Project of the Yale Law School at http://avalon.law.yale.edu/19th_century/decparis.asp
Cross symbol received recognition as a means of identifying persons and equipment that should enjoy protection under the terms of this agreement.

The Geneva Convention of 1864 was subsequently updated in 1906, 1929 and 1949. Given that the 1949 revisions which resulted in the four Geneva Conventions of 12 August 1949 for the protection of war victims definitively established a framework for the punishment and serious violations of the provisions of the Conventions, the connection of the 1864 Geneva Convention to individual criminal responsibility for breach of international law is clear.

Isabelle Daoust, Robin Coupland and Rikke Ishoey\textsuperscript{72} write that as this first Geneva Convention was being negotiated, Russia had in 1863 developed a bullet that exploded on contact with a hard surface and had in 1867 modified it to explode on contact with soft surfaces such as human bodies. Realising the potential devastation of this bullet and wishing to ensure that other states did not develop such a weapon, the Tsar decided to convene an International Military Commission, whose final outcome was a Declaration Renouncing the Use in Time of War, of Explosive Projectiles under 400 Grammes Weight of 1868, commonly referred to as the St. Petersburg Declaration.

The St. Petersburg Declaration is the first formal agreement in which states agreed not to use certain weapons in war including ‘any projectile of a weight below 400 grams, which is either explosive or charged with fulminating or inflammable substances.’ The Declaration established two important principles of customary international that the sole legitimate objective of war should be to weaken the military forces of the enemy, and that the use of arms that needlessly aggravate the suffering of disabled men, or render their death inevitable is unjustified. These principles were later affirmed and formed the pivot of the Hague Conventions of 1899 and 1907.

\textsuperscript{72} Isabelle Daoust, Robin Coupland and Rikke Ishoey, ‘New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare’, (2002) 84 \textit{International Review of the Red Cross}, 345.
The two principles in the St. Petersburg Declaration were also laid down in the First Additional Protocol to the Geneva Conventions, which prohibits means and methods of warfare of a nature, that cause superfluous or unnecessary suffering. The spirit of the St. Petersburg Declaration has over the years inspired several treaties intended to prohibit use of weapons that cause unnecessary injuries and suffering including the recent Convention on Cluster Munitions that was concluded in Dublin on 30 May 2008 and opened for signature in Oslo on 3 December 2008. The principles established by the St. Petersburg Declaration are relevant to this day and the contribution of this declaration to the evolution of international criminal law and the norms of humanity that underpin world consensus in punishing international crimes committed in situations of international and non international armed conflicts is undeniable.

The Hague Conventions of 1899 and 1907 alluded to above, significantly contributed to the evolution of norms upon which international crimes are prosecuted today. In a series of meeting between 18 May and 29 July 1899, the states at the 1899 Conference executed four Conventions and three Declarations. The 1907 Conference expanded on the Conventions adopted at the 1899 Conference and adopted a series of 13 Conventions on the rules of conduct of war and the peaceful settlement of international conflicts. The 12th Convention Relative to the Creation of an International Prize Court

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75 Declaration on the Launching of Projectiles and Explosives from Balloons; Declaration on the Use of Projectiles the Object of which is the Diffusion of Asphyxiating or Deleterious Gases; and Declaration on the Use of Bullets which Expand or Flatten Easily in the Human Body.

76 Convention on the Pacific Settlement of International Disputes; Convention on the Limitation of the Employment of Force for Recovery of Contract Debts; Convention Relative to the Opening of Hostilities; Convention Respecting the Laws and Customs of War on Land; Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land; Convention Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities; Convention Relating to the Conversion of Merchant Ships into War Ships; Convention Relative to the Laying of Automatic Submarine Contact Mines; Convention Concerning Bombardment by Naval Forces in Time of War; Convention for the Adaptation to Maritime War of the Principles of the Geneva Convention; Convention Relative to Certain Restrictions with Regard to Certain Restrictions with Regard to the Exercise of the Right of
was never ratified and therefore it never entered into force, but it showed the desire to deal with war crimes through an international adjudication system.

One of the enduring contributions of The Hague Conferences and the Conventions that came out of the Conferences is the realisation by the participating powers that international justice through international courts could facilitate international peace and security. The Convention for the Pacific Settlement of International Disputes created a Permanent Court of Arbitration ‘with the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy...’

One of the often cited major weaknesses of this court is that it was not strictly speaking a permanent institution. All that existed were a ‘Permanent Administrative Council’ made up of diplomatic representatives of signatory powers to The Hague and a ‘record office’. Instead of judges, there was only a list of referees appointed by signatory states, from which judges could be selected to deal with a specific case. With all its weaknesses the Permanent Court of Arbitration is significant in that some scholars treat it as one of the earliest forerunners of the ICC.

Besides that, attempts to establish the Permanent Court of Arbitration also set in motion a new approach to resolve international disputes and maintain international peace and security through international justice administered by international judicial bodies. It has therefore been argued that through the Hague Conventions, the participating states ‘strove mightily to substitute the courtroom and its law for the battlefield and its dead’.

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Capture in Naval War; Convention Relative to the Creation of an International Prize Court (not ratified); and Convention on the Rights and Duties of Neutral Powers in Naval War.

77 Article 20, Convention for the Pacific Settlement of International Disputes.
78 Article 28, Convention for the Pacific Settlement of International Disputes.
79 Article 22, Convention for the Pacific Settlement of International Disputes.
One of the principal objectives of the USA for the 1907 Conference was to build on the court and establish an empowered, more effective international court of arbitration. Consequently, there were attempts, during the 1907 Conference, to make submission to the court’s jurisdiction compulsory for all signatory states. Through the Hague Conventions, the participant states succeeded in codifying the laws of war in a binding international treaty for the first time. However as international treaties, the Hague Conventions were intended to impose obligations on states and not individuals.

Moreover, while certain acts were declared illegal, the absence of sanctions for breach of such acts, suggests that the acts were not necessarily criminal. The Hague Conventions also failed to create an independent international court, with jurisdiction that would cut across national borders. It can be seen however, that these failures are a result of a number of reasons. Due to the concept of sovereignty at the time, states were not willing to cede their right to try criminals within their jurisdictions and they were not willing to be bound by the judgments of an international judicial organ.

In addition, international law at that time had not developed to a point where individual criminal responsibility was recognised and there was not in existence a settled law under which individuals could be held responsible. The importance of the Hague Conventions to the development of international criminal law becomes clear when one considers Professor Schabas’ view that within a short space of time the Hague Conventions were being used as a source of law regarding war crimes.

Professor Schabas posits that the codification of the laws and customs of war in the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia and in

82 Ibid.
83 Ibid.
84 Schabas, ibid.
85 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704
Articles 8(2)(b), (e) and (f) of the Rome Statute of the ICC is based on the 1899 and 1907 Hague Conventions. Willem van Genugten and Michael Scharf credit the Hague Conventions with launching the modern era of international humanitarian law. The Hague Conventions also formed the basis for the 1949 Geneva Conventions, the 1977 Additional Protocols and the Biological Weapons and Chemical Weapons Conventions.

It is worth noting that the Hague Conventions and the regulations annexed thereto are still in force. More importantly, the provisions of the Conventions have now achieved the status of customary international law. They are therefore enforceable and binding upon all states, even those that are not parties to the Hague Conventions.

2.6. Some Specific Domestic Developments

Meanwhile, there were domestic attempts that had significant effects on the development of international norms on international crimes and the concept of individual criminal responsibility under international law. One such domestic development is the very first attempt to gather the customs and usages of the laws of war in one document, now commonly referred to as the Lieber Code.

During the American Civil War (1861 – 1865), Francis Lieber, a professor of law at Columbia College in New York was commissioned by President Lincoln to draft a new code of war with rules that would regulate the conduct of the war. A board of Union
Army officers approved it and in 1863, on President Lincoln’s orders the code was incorporated into the Union Army General Orders as General Orders No. 100, Instructions for the Government of Armies of the United States, in the Field.

Although the Lieber Code was a domestic legal document intended for the US Army and therefore only binding on USA soldiers, it was founded on what was generally considered to be the customs and usages of the laws of war applicable during that era. Outside the USA the Lieber Code had a profound effect on the development of similar codes in other countries that include the United Kingdom, France, Prussia, Spain, Russia, Serbia, Argentina, and the Netherlands.  

The Lieber Code also had substantial effect on the Laws of War on Land Manual adopted by the Institute of International Law at Oxford on 9 September 1880 which was intended at ‘stating clearly and codifying’ the accepted customs and usages of the laws of war of that time. Like the Lieber Code, the Laws of War on Land Manual recognised individual criminal responsibility for violation of any of the rules contained therein. The greatest impact of the Lieber Code has been on international codes.

Consequently, the Lieber Code had profound influence on all subsequent work aimed at codification of international law on the conduct of war. Perhaps the enduring contribution of the Lieber Code to the development of international criminal law and the concept of individual criminal responsibility is that the concepts of modern international humanitarian law remain generally unchanged and are still based on the balance

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93 Ciara Damgaard, ibid.
between military necessity and effectiveness and protecting the lives and dignity of people in armed conflict, just as they were codified in 1863 in the Lieber Code.

The wars fought in the 19\textsuperscript{th} and 20\textsuperscript{th} centuries created opportunities for further development and clarification of individual criminal responsibility for acts that were later to crystallise and be recognised as crimes under international law. In a footnote, the decision of the US Supreme Court in the case of \textit{Ex parte Quirin}\textsuperscript{96} makes reference to commissions that were set up in a large number of cases during the Mexican War of 1846 – 1848 to try individuals for various offences arising from violations of the laws of war.

There is also reference in Damgaard’s work to the war crimes tribunals set up in the USA to try war crimes arising out of the Philippines-American War of 1899 – 1902 and the war crimes tribunals set up by the British to try war crimes committed during the Anglo-Boer War of 1899 -1902.\textsuperscript{97} Peter Judson Richards writes that the Anglo-Boer War resulted in the most vigorous use by Great Britain of military tribunals, which considered a wide range of civilian and military offences including murder and rape.\textsuperscript{98}

2.7. Gustave Moynier’s Proposals for an International Criminal Court

Researchers are able to trace a comprehensive proposal to set up a permanent international court to deal with international crimes as far back as the Franco-Prussian War of 1870 – 1871. In his 1870 commentary on the Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field, of 22 August 1864 (Geneva Convention), Gustave Moynier, one of the founders and long time President of the International Committee of the Red Cross, had wrestled with the idea of creating an

\textsuperscript{96}317 US 1 (1942).
\textsuperscript{97}Ciara Damgaard, \textit{Ibid}.
international court to enforce the Convention.\textsuperscript{99} Moynier initially rejected the idea of an international criminal court noting that the Convention was not law imposed by a sovereign. According to him, as a treaty, the Geneva Convention was a contract between equals who could not impose penalties upon themselves since there would be no one to enforce them. Moynier believed that the moral sanction of public opinion and the prospect of being ostracised by the civilised nations were sufficient to deter violations of the Geneva Convention.

In the typical approach to international law of his age, Moynier would rather states enacted domestic legislation to implement the Geneva Convention and impose penalties for violations. During the Franco Prussian War, both sides violated the Geneva Convention by committing atrocities. To Moynier's disappointment none of the states involved passed domestic legislation to enable it to punish violations of the Geneva Convention. In the circumstances, as public opinion was not sufficient to deter violations and states were not prepared to enact legislation to punish violations, in January 1872, Moynier proposed the establishment of an international criminal court to bring to justice individuals responsible for violations of the Geneva Convention of 1864.

Under Article 1 of Moynier's draft convention, if a war broke out between states parties to the Geneva Convention, a tribunal would be established. Its purpose would be to ensure implementation of the Geneva Convention by dealing with complaints of breaches of the Convention during the war. Experts such as Hall suggest that the tribunal proposed by Moynier would be a permanent institution.\textsuperscript{100} However, the relevant clauses of the draft convention on the establishment of the tribunal and on the selection of judges seem to suggest the opposite.

As stated above, the tribunal would be established in the event of a war between or among states that were parties. In terms of Article 2, the President of the Swiss


\textsuperscript{100} \textit{Ibid.}
Confederation would, as soon as war was declared, choose by lot, three states parties to the Convention that were not involved in the war, who would in turn each nominate an adjudicator. If the war involved two states, both belligerent states would be invited to each nominate an adjudicator. Where the war was among more than two states, the states fighting on the same side would be required to consult and select one adjudicator.

Furthermore, in terms of Article 2 of Moynier’s draft convention, the tribunal would not have a permanent seat. The five judges would meet ‘at a place which will be notified to them, on a provisional basis, by the President of the Swiss Confederation.’ The adjudicators would then decide on where the tribunal would seat and when to end the tribunal’s activities.\(^\text{101}\) It seems that after completing their mandate the adjudicators would return to their countries and relapse back into their private lives. Also, it seems that the tribunal proposed by Moynier would not have a permanent budget. In terms of Article 9, the belligerent states would be responsible for the costs of the tribunal including the adjudicators’ salaries and travelling expenses. Without long term secure funding and a permanent seat and without judges appointed and enjoying security of tenure, regarding the tribunal as a permanent institution seems to be a stretch.

The tribunal would adopt the adversarial approach in any hearing\(^\text{102}\) at the end of which the tribunal would pronounce its decision as a guilty or not guilty verdict.\(^\text{103}\) In addition, the tribunal would be empowered to award and fix amounts for damages and interest. The tribunal would apply the law as provided for in the Geneva Convention of 1864. Moynier however, contemplated that another treaty complementary to the Geneva Convention would be concluded. One of the things that would be covered under that treaty is the penalties that the tribunal would pass in the event of a guilty verdict.\(^\text{104}\) Enforcement of penalties imposed by the tribunal would be left to ‘interested

\(^{101}\) Article 3 of the draft Convention.
\(^{102}\) Article 4 paragraph 3 of the draft convention.
\(^{103}\) Article 5 paragraph 1 of the draft convention.
\(^{104}\) Article 5 paragraph 2 of the draft convention.
governments.105 Awards for damages and compensation would be implemented by the government of the offender.106

The whole idea of an international criminal tribunal was a very radical one at the time. Even more radical were two proposals on state cooperation and exclusive jurisdiction for the tribunal. The second paragraph of Article 4 of the draft convention provided for exclusive jurisdiction for the tribunal over all cases including those which the complainant state might wish to pursue and in all cases involving foreigners. Under the third paragraph of Article 4 all states parties would be required to provide 'every facility to the tribunal.'

It is also interesting to note that Moynier’s proposal contemplated public education raising awareness about the tribunal’s work. Under Article 8 of the draft convention, the tribunal’s judgments would be communicated to all states parties to the Geneva Convention. States parties to the Geneva Convention would where necessary, translate the judgments into their national languages and publish them in their official gazettes. Hall expresses the view that making the decisions of the tribunal widely known would have made the tribunal more effective as a deterrent.107

According to Hall, Moynier’s proposals were not received with enthusiasm by legal experts.108 For example Lieber questioned the effectiveness of the tribunal with no police force to enforce its decision.109 Lieber’s criticism resonates today where most of the individuals indicted by the ICC including President Bashir of Sudan have not yet been apprehended. Ultimately governments did not take up the proposal and the idea died.

105 Article 6 of the draft convention.
106 Article 7 paragraph 2 of the draft convention.
107 Christopher Hall, Ibid.
108 Ibid.
109 Ibid.
It is quite remarkable that at that time, Moynier was already thinking about an international tribunal to implement international humanitarian law, which was still in its early stages of development. Obviously, unlike the creators of the ICC that had witnessed the ad hoc tribunals, Moynier did not have the benefit of such experience of international criminal justice. But his proposal, unrefined as it might sound today, would have been a useful starting point for any subsequent project to establish an effective judicial mechanism to enforce international humanitarian law.

2.8. The Versailles Experiment

After the First World War there were public demands to punish people who were responsible for atrocities. The outrage caused by the loss of about twenty million lives during the war resulted in more concrete ideas about international mechanisms to establish and punish individual responsibility for war time atrocities. It is at this point in time that several projects for the creation of an international penal tribunal were advanced by various jurists, scientific groups and international organisations.

At the Paris Peace Conference, on 25 January 1919, the Allied and Associated powers decided to establish the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties. Composed of fifteen members, the commission was created to assess the legal liability of those responsible for the First World War. The commission was charged to inquire into and report on, *inter alia*, ‘the constitution and procedure of a tribunal appropriate for the trial’ of ‘breaches of the laws and customs of war committed by the forces of the German Empire and their allies.’

The commission conducted intensive investigations for a period of not less than two months and concluded that individuals responsible for violations of the laws and customs of war were liable for prosecution. The commission also concluded that each

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one of the victorious powers and their allies had the power and authority under international law to try war criminals.\textsuperscript{111}

However, other categories of charges were especially suited for trial by an international tribunal. Such categories included crimes committed against civilians and soldiers of several Allied nations, charges against persons of authority whose orders were executed and affected several Allied countries, and charges against persons of authority ‘however high their authority may have been, without distinction of rank, including the Heads of State.’\textsuperscript{112} This wording was intended for Kaiser Wilhelm II and other high ranking German and Turkish officials for whom the defence of sovereignty might apply.

The proposals for the international tribunal and to strip officials including heads of state of sovereign immunity were opposed by the USA representatives. The proposals for this ‘high tribunal’ were the first concrete steps in history by states to set up an international tribunal with jurisdiction to try international criminal offences. The high tribunal would be composed of 22 members. The tribunal would be provided for by the peace treaty. The law to be applied by the tribunal ‘shall be the principles of the law of nations as they result from the usages established among civilised peoples, from the laws of humanity and from the dictates of public conscience.’\textsuperscript{113} Together with the report, the commission submitted a list of 895 alleged war criminals for trial by the tribunal.\textsuperscript{114}

The commission also recommended the trial of individuals for acts that might not be considered as directly contrary to positive law, but which public conscience reproves.\textsuperscript{115} The commission advised the adoption of special measures including the creation of a special organ to deal with ‘acts which provoked the war and accompanied its

\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid.
\textsuperscript{114} Ibid.
\textsuperscript{115} Ibid.
inception.\textsuperscript{116} The American representatives opposed this recommendation. It seems that the discussions and difficulties that the commission faced in pinning down how to deal with those responsible for the war of aggression mirror the discussions on the crime of aggression that went on during negotiations for the Rome Statute and during the Kampala Review Conference.\textsuperscript{117}

The high tribunal recommended by the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties was ultimately provided for under the Treaty of Versailles. Article 227 declared the arraignment of William II of Hohenzollern, former German Emperor before a special tribunal of five judges appointed by USA, Britain, France, Italy and Japan. But, Kaiser William II was never tried and Article 227 was never implemented.

Although the experiment of an international \textit{ad hoc} tribunal to try a head of state was never carried out, the Versailles Treaty and contemplation of this experiment seems to have paved the way to new thinking and ideas on international criminal justice. Bellelli credits the Versailles precedent for establishing three principles that include: the principle of individual criminal responsibility for international crimes; the criminal responsibility of heads of state; and the possibility that sovereign immunity could be jettisoned and heads of state could be tried for international crimes.\textsuperscript{118}

In accordance with the proposals of the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, by reason of Article 228 of the Versailles Treaty, German recognised the right of the Allies to try by military tribunals and agreed to surrender, all person accused of violations of the laws and customs of war. In terms of Article 228 persons accused of violations against nationals of one of the Allied powers would be tried by military tribunals of that power. Persons accused of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{116}Ibid.
\item \textsuperscript{117}Kampala Review Conference.
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criminal acts against nationals of more than one of the Allied powers would be tried by military tribunals made up of members of the military tribunals of the Allied powers concerned.

There were, however, delays in bringing the relevant clauses of the treaty into operation, which allowed war criminals who suspected that their names were on the list presented under Article 228 of the treaty to escape. In addition to that, the repatriation of prisoners of war and the demobilization of the fighting forces made it difficult to collect evidence and to secure the attendance of witnesses before any tribunal.

Soon after the treaty entered into force, the Allies prepared a long list of those they wanted surrendered for trial and submitted it to the Germans. The German Government made representations, which were accepted by the Allies to the effect that arresting many of the people on the list would destabilize the country. The Germany Government made counter proposals for the Allies to submit the evidence and undertook to try the alleged war criminals before the German Supreme Court at Leipzig. The Allies tentatively accepted this proposal and presented cases to be tried by way of experiment before the German Supreme Court.

This acceptance of the proposal by Germany was motivated by political considerations including the need to avoid endangering the stability of the Weimar Republic.\footnote{Ibid.} Germany passed domestic legislation to enable it to assume jurisdiction to try alleged offenders before its Supreme Court at Leipzig. Pursuant to that law, which allowed the German Procurator General prosecutorial discretion, the Allies had to submit the cases and evidence. Out of the original list of 895 compiled by the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, the Allies submitted 45 names for prosecution.\footnote{Claud Mullins, The Leipzig Trials: An Account of the War Criminals Trials and a Study of Germany Mentality, London: H.F & G. Witherby, 1921.} Only 12 military officers were ultimately tried before the German Supreme Court. Only a few were convicted and received very light...
The German Government adopted a very mild approach towards the trials. Professor Schabas comments that the ‘Leipzig Trials’, as they became known, looked more like disciplinary proceedings than criminal trials.\textsuperscript{122}

The appraisal that the sentences were too light has been regarded as superficial by Mullins.\textsuperscript{123} This is because ‘to the Germans a sentence of imprisonment upon an officer carries a special stigma, and imports a blot upon the service to which he belongs.’\textsuperscript{124} He observes that the demand was for justice and not vengeance.\textsuperscript{125} Two judgments from the Leipzig trials on the sinking of two life boats, the \textit{Dover Castle} and the \textit{Llandovery Castle} and the murder of Canadian wounded and medical personnel stand out to this day as precedents on the defence of superior orders.\textsuperscript{126}

Political considerations were responsible for the failure by the major world powers to develop international law as it relates to criminal justice. The concern for ensuring peace in Europe overrode the demands for justice and the opportunity to create international tribunals to try international criminal offences was lost. However, the Versailles Treaty was the first international treaty to recognize individual responsibility for crimes committed against international law. It further recognized that such responsibility could not be limited to individuals of a certain rank or position.

\textbf{2.9. The Treaty of Sevres}

The 1919 Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties for Violations of the Laws and Customs of War, which investigated the responsibility of those who violated the laws of war, also recommended the prosecution of Turkish officials responsible for war crimes. The Treaty of Sevres, signed on 10 August 1920, between Turkey and the Allies was in many aspects similar

\textsuperscript{121} Ibid.
\textsuperscript{122} Schabas, Ibid.
\textsuperscript{123} Claud Mullins, \textit{ibid.}
\textsuperscript{124} \textit{Ibid.}
\textsuperscript{125} \textit{Ibid.}
\textsuperscript{126} \textit{Ibid.}
to the Treaty of Versailles. Articles 226 – 228 enshrined provisions for the trial and punishment of those responsible for crimes committed not only against Allied nationals, but also crimes committed by Turkish officials against subjects of the Ottoman Empire of different ethnic groups, particularly Armenians.

By reason of Article 226 of the Sevres Treaty the Turkish Government recognised ‘the right of the Allied Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Turkey or in the territory of her allies.’ Turkey was also obliged to surrender to the Allies ‘persons accused of having committed an act in violation of the laws and customs of war.’

In similar fashion to the provisions of the Versailles Treaty, the Sevres Treaty envisaged establishment of tribunals within Allied states to try Turkish citizens accused of crimes against citizens of those countries. Tribunals composed of members from different Allied states would also be established to try war crimes committed against citizens of more than one Allied state. Article 227 provided that ‘persons guilty of criminal acts against the nationals of one of the Allied Powers shall be brought before the military tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied Powers shall be brought before military tribunals composed of members of the military tribunals of the Powers concerned.’

Professor Schabas writes that Article 230 of the Treaty of Sevres was a major innovation by contemplating trial of Turkish criminals not only for war crimes, but also for what are today called ‘crimes against humanity.’

127 Under Article 230 the Turkish Government undertook:
‘to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.

The Allied Powers reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such tribunal.

In the event of the League of Nations having created in sufficient time a tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such tribunal, and the Turkish Government undertakes equally to recognise such tribunal.

However, the Treaty of Sevres was not formally ratified although Turkey signed it. As a result it never took effect. It was replaced by the Treaty of Lausanne of July 24, 1923, which included a declaration of amnesty for all offenses committed by the Turkish government and its agents between August 1, 1914, and November 20, 1922.

As Bassiouni wrote the Allied Powers did not press with implementation of the provisions of the Treaty of Sevres because of political concerns. They were concerned with communist Russia following the overthrow of the Tsarist regime by the Bolshevik Revolution of 1917. The stability of Turkey and keeping the new Turkish ruling elite in the Western camp rather than alienating it was of utmost importance to the Allies compared to the pursuit of justice. The decision not to carry out the trials was politically motivated. But that does not detract from the fact that the principle of individual criminal responsibility for war crimes and crimes against humanity had been recognised. In fact, the granting of amnesty suggests that the existence of the criminal offence was strongly recognised.

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129 Ibid.
2.10. Efforts to Establish an International Jurisdiction under the League of Nations

Efforts to set up a judicial organ with jurisdiction transcending international boundaries and the power to deal with penal sanctions for violations of international law were unsuccessful after the First World War. But the failed attempts at creating an international criminal court that were made were not futile. The attempts helped to focus the attention of international lawyers on this gap in international law.

Article 14 of the Covenant of the League of Nations stipulated that the League ‘Council shall formulate and submit to the Members of the League of Nations for adoption, plans for the establishment of a Permanent Court of International Justice.’ This stipulation provided stimulus to those who advocated for international trials for international crimes which had developed in connection with war crimes.131 Pursuant to Article 14, in February 1920, the Council of the League of Nations appointed an advisory Committee of Jurists and instructed it to draw up plans for the establishment of an International Court of Justice. As it was finally constituted, the members of the committee included such eminent jurists as Adatci of Japan; Altamira of Spain; Fernandes of Brazil; Baron Descamps of Belgium; Hagerup of Norway; de Lapradelle of France; Loder of the Netherlands; Lord Phillimore of Great Britain; Ricci-Busatti of Italy; and Elihu Root of the United States of America.132

Baron Descamps submitted 3 proposals under the heading of The Organisation of International Justice. The first proposal urged the maintenance of the existing Court of Arbitration, as established and confirmed by the Hague Conventions of 1899, and 1907

respectively. His third proposal provided for the Permanent Tribunal of International Justice. It is Baron Descamps’ second proposal that is most relevant in the context of this thesis. Descamps proposed that a High Court of International justice be set up with competence ‘to hear and determine cases which shall be submitted to it by the Assembly of the League of Nations or by the Council of the League, and which concern international public order, for instance: crimes against the universal law of Nations.’

Descamps considered that the question of the international criminal court was not unconnected but complementary to the court for which the committee had been set up. In any case it was best if the committee considered the proposal at that time since the world would ‘sooner or later establish’ such an institution. In this respect Baron Descamps foretold the establishment of the ICC.

In his remarks to the committee, Baron Descamps was under no doubt that international law at that time recognised the existence of international crimes especially in war time. Having established the existence of crimes under international law, Descamps also considered it undesirable to wait until crimes were committed before setting up ex post facto tribunals to deal with them. It was better to set up a tribunal before outrages were committed so that any prosecution could not be viewed as victor’s justice or an act of revenge.

Also, the proposed court would not be concerned with the past. It would act as a deterrent in order to prevent the perpetration of crimes against the laws of nations simply by reason of its ‘very existence.’ Baron Descamps was conscious of politicisation of an international criminal court. Consequently, he proposed a composition of the court that would ensure that all states were represented so that the ‘administration of international justice should be protected from all political

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133 Ibid.
134 Ibid, Page 499.
135 Ibid, pages 498 and 500.
Baron Descamps was truly a man living ahead of his time. All the issues that he tackled in his remarks in introducing his proposal for the High Court of International Justice were relevant when the world set out to establish the ICC. For example, the need to remove political influences from the workings of the court is still relevant to this day in the operations of the ICC. In fact, as will be shown below, most Africans who criticise the ICC for targeting poor African countries point to political meddling in the work of the ICC by the rich and powerful countries, some of whom have taken all manner of measures to place themselves outside the jurisdiction of the court.

The proposal to establish a High Court of International Justice was generally favourably received by members of the committee and stoically supported by Mr. de Lapradelle. It appears from the discussions that there was not much disagreement as to whether certain conduct may be regarded as criminal under international law. Disagreement mostly centred on how to deal with such crimes when they are committed. Lord Phillimore grouped crimes that may be committed by individuals into three categories that mirror the crimes stipulated in the Rome Statute of the ICC. These are acts committed in time of peace; crimes of war; and the crime of having made war.

The views expressed during the discussions that followed the presentation of the proposal are representative of the nature of the opposition to an international criminal court until the end of the Rome Conference in July 1998. The ideas expressed in discussing the proposal betray the understanding of international law at that time as it related to sovereignty, the real nature of international law and the place of the individual in international law. These issues delayed the development of international criminal law and consequently the setting up of a permanent world court to deal with international criminal offences.

\[136\] Ibid, page 498.  
\[137\] Ibid, page 499.  
\[138\] Ibid, page 507.
Mr. Ricci-Busatti,\textsuperscript{139} Mr. Root\textsuperscript{140} and Lord Phillimore\textsuperscript{141} considered the question whether the criminals targeted would be states or individuals. All three committee members expressed the view that only states and not individuals are subjects of international law. Individuals could not, therefore, be tried before an international tribunal applying international law. Another issue that concerned committee members was the question of sovereignty. Mr. Root worried about the creation of a ‘super–state’ with authority superseding the sovereign rights of states to try and punish criminal acts committed within states.\textsuperscript{142} He posed the question: ‘Are the Governments of the world prepared to give up their individual sovereign rights to the necessary extent?’\textsuperscript{143} According to Mr. Fernandes, since the criminals could be governments or government agents, ‘the jurisdiction of the court would be a danger to the sovereign rights of states, perhaps even a menace to peace.’\textsuperscript{144}

Opposition to Baron Descamps was based on a number of reasons. Some members of the committee felt that raking up the atrocities of the past would go against the ethos of the League of Nations. The strongest opposition to the proposal of Baron Descamps was expressed by Mr. Hagerup who viewed the proposal as ‘indisputably of a political nature.’ Mr Ricci-Busatti opposed the proposal with less passion than Mr. Hagerup. However, he also felt that even though the proposal referred to the future and not the past, ‘the past was necessarily bound up in the question and that the discussion was bound to have a political bearing.’\textsuperscript{145}

Mr. Ricci Busatti thought that the idea upon which the court’s jurisdiction was based was ‘unsound.’ This was because it was not clear ‘what was to be understood by a crime against the universal law of nations’ and it was not possible in international law to

\begin{footnotes}
\item[139] \textit{Ibid}, page 503.
\item[140] \textit{Ibid}, page 505.
\item[141] \textit{Ibid}, page 507.
\item[142] \textit{Ibid}, page 505.
\item[143] \textit{Ibid}, page 506.
\item[144] \textit{Ibid}, page 504.
\item[145] \textit{Ibid}, page 502.
\end{footnotes}
distinguish between civil law and penal law as is the case in national law. Mr. Ricci-Busatti did not think that it was desirable or useful to discuss this issue, which ‘was the subject of long and theoretical discussion in the Commission for the Establishment of Responsibilities and Penalties during the Conference at Paris.’

In the end the committee reached a compromise position by adopting three resolutions. The first and third resolutions dealt with the need for further work to be carried out to develop international law. The first resolution recommended that a conference of states be held ‘as soon as possible’ to continue the work of the Hague Conferences while the third resolution recommended the resuscitation of the Academy of International Law. The second resolution recommended that the League of Nations considered the proposal for the establishment of a High Court of International Justice as spelt out by Baron Descamps.

The Council of the League of Nations submitted the resolutions of the Committee of Jurists to the Assembly of the League of Nations with the recommendation that the first and second resolutions be examined in the same way. The Council of the League of Nations recommended that the issue of the establishment of the High Court of International Justice be referred for consideration by scientific bodies.

The Third Committee of the League on the Permanent Court of International Justice was dismissive of the proposal to establish a High Court of International Justice. It expressed the view that there was not yet in existence any defined notion of international criminal law recognised by all nations. ‘If it were possible to refer certain crimes to any jurisdiction, it would be more practical to establish a special chamber in the Court of International Justice.’ Any resolution on this subject could not, therefore, be adopted by the League of Nations. The idea of establishing a special chamber with

146 Ibid, page 503.
147 Page 503
criminal jurisdiction, in the International Court of Justice mirrors the proposal by the AU to empower the African Court of Justice with jurisdiction over atrocity crimes.

While presenting the report of the Third Committee to the Assembly of the League of Nations, the Rapporteur of the Third Committee expressed the view that the creation of the High Court of International Justice side by side with the Court of International Justice as proposed would be ‘useless.’ He argued that the existing practice and custom in international law of entrusting criminal jurisdiction to ordinary tribunals would be the best solution. He also argued that consideration of this problem at that point in time was premature and that the solution lied in establishing a criminal division in the Court of International Justice.

Consequently the court was not set up, but the issue did not go off the radar. In his report to the International Law Commission Ricardo J. Alfaro noted that in opposing Descamps’ proposal, there was never any suggestion that punishing international crimes was undesirable. The debates showed that an international criminal court was desirable and could be established if the difficulties associated with establishing such an institution were removed.\(^\text{149}\)

2.11. The Early Work of the International Law Commission

Individuals and non-governmental organisations remained interested in the issue of an international criminal jurisdiction. Addressing the British Grotius Society in 1922, Lord Cave pointed out that the Leipzig trials were inadequate and called for the prompt establishment of an international system for the prosecution of war crimes.\(^\text{150}\) The International Law Association was the first non-governmental organisation to take up the question. At its 1922 conference in Buenos Aires, Dr. Hugh H. L. Bellot presented a report in which he discussed the necessity of establishing a permanent international


criminal court. In his report Dr. Bellot used the example of the Leipzig trials to show that the existing system of dealing with war crimes was inadequate and left civilians vulnerable to military attacks. He referred to the possible deterrent effect of such a court. Dr. Bellot’s proposals included an international criminal court that could punish crimes committed during not only wars, but peace times as well. States as well as individuals would have standing to lodge cases with the court proposed by Dr. Bellot.

Thereafter the conference passed a resolution in which it expressed the opinion that the matter of the creation of an international criminal court was essential in the interests of justice, and it was an urgent one. At the instruction of the conference Dr. Bellot prepared a draft statute of the permanent international criminal court. He submitted the draft statute to the Thirty-Third Conference of the International Law Association held in Stockholm in 1924. As with previous proposals, Dr. Bellot’s proposed court was also criticised for possible infringement on national sovereignty. The specific suggestion that individuals could have standing before the court was also criticised on the basis that international law applied to states only and that individuals are not recognised as subjects of international law.

The Thirty-Third Conference of the International Law Association adopted a resolution in which it referred Dr. Bellot’s draft statute for review by a committee of the association called the Permanent International Criminal Court Committee. In its report back to the association at its next conference held in Vienna in 1926, this committee declared that ‘after careful study of the question it had come to the conclusion that the creation of a permanent international criminal court was not only highly expedient, but also practicable.’ Decrying the trial of war crimes by national courts, the committee declared that ‘it is international, not national, law which is broken, and violations of international law are more fittingly tried by an international court than by a national court’

152 Ibid.
and that ‘if the rule of law is to be established in the family of nations, it can only be satisfactorily established by the cooperation of all nations expressed through an international court.’\textsuperscript{153}

Under the draft statute as amended following discussions, the court would be established as a division of the Permanent Court of International Justice as originally contemplated by Baron Descamps. It would have jurisdiction over states and individuals accused of committing international crimes. The Council and the Assembly of the League of Nations were empowered to refer crimes to the court for trial. Only acts that were specified in the statute of the court or by the domestic law of the defendant as criminal would be tried by the court. The court would decide whenever disputes arose over its jurisdiction.

In respect of individuals, guilty verdicts would be executed by the state in which the accused was a subject or citizen. Judgments against states would be executed by any state party. The court would be composed of 10 judges and 5 deputy judges.

The jurisdiction of the court would extend to offences that included:
\\textsuperscript{154}\\textsuperscript{154}

\begin{itemize}
\item a) violations of international obligations of a penal character committed by the subjects or citizens of one state or by a stateless person against another state or its subjects or citizens;
\item b) violations of any treaty, convention or declaration binding on the states adhering to the court, and regulating the methods and conduct of warfare;
\item c) violations of the laws and customs of war generally accepted as binding by civilised nations.
\end{itemize}

\textsuperscript{153} Ibid.

The statute prepared by the International Law Association did not result in the creation of an international criminal court, but the exercise was an important step in the journey that ended with the Rome Statute and the creation of the ICC. Before then, the question of the establishment of an international criminal court had been discussed in abstraction. The International Law Association produced a draft that outlined the details of the constitution of such a court. The International Law Association draft provided an opportunity to examine in detail the possible structure and procedures of such an institution.\textsuperscript{155}

More importantly, the efforts of the International Law Association reinforced the point that there was in existence an identifiable body of international criminal law capable of application. Also, the proposal to include individuals as subjects of international law went against the prevailing views of the time. The proposal instigated debate that might not have happened and spurred others to consider this question, which was all important for the growth of international law.

Drafters of the Rome Statute clearly drew from this exercise. Article 13 of the Rome Statute that gives the UN Security Council the powers to the ICC mirrors the proposals by the International Law Association to empower the Council and the Assembly of the League of Nations to refer crimes to the court for trial. In negotiating the Rome Statute, African states do not seem to have insisted on empowering the General Assembly of the UN in lieu of, or together with the Security Council to refer situations to the ICC.

It seems that the lessons of the International Law Association proposal may now be playing a role in the suggestions by the AU to democratise international affairs as reflected in the proposal to allow the General Assembly of the UN to intervene in the event that the Security Council fails to satisfactorily act upon requests for deferral of cases pursuant to Article 16 of the Rome Statute.

2.12. The Work of the Inter-Parliamentary Union

At a meeting in Washington DC in 1925, the Inter-Parliamentary Union, considered a report on the question of an international criminal jurisdiction submitted by V.V. Pella, a professor of law at the University Bucharest. In advocating for individual criminal responsibility for offences against international law, Professor Pella laid out a number of principles with the intention of satisfying objections raised in debates. Offences were to be clearly defined in advance and the principle of *nulla poena sine lege* would apply.\(^{156}\)

Still, the idea first proposed by Baron Descamps of establishing the international criminal court as a constituent of the Permanent Court of International Justice continued to be flagged. Professor Pella proposed the establishment, within the Permanent Court of International Justice, of an international public prosecutor’s department and a chamber before which offenders could be arraigned.\(^ {157}\) At this meeting, the Inter-Parliamentary Union resolved to set up a permanent sub-committee:

‘a) to undertake the study of all the social, political, economic and moral causes of wars of aggression to find practical solutions for the prevention of that crime;

b) to draw up a preliminary draft of an International Legal Code.’\(^{158}\)

The work of the Inter-Parliamentary Union, an international organisation of parliaments of sovereign states, demonstrates authoritative expression of world opinion on the question of an international criminal court and undoubtedly added to the momentum for the proposal.


\(^{157}\) Ibid.

2.13. The Work of the International Association of Penal Law

Professor V.V. Pella took his views on the international criminal court to the International Association of Penal Law, a specialised body that he presided over. At the congress of the association held in Brussels in 1926, papers on the question of an international criminal jurisdiction by experts that included Professor V.V. Pella himself and Dr. Bellot were presented. This congress adopted conclusions prepared by Pella and Donnedieu de Vabres as bases for discussions.\(^{159}\) The congress adopted a resolution with no less than 12 points.\(^{160}\)

The resolution recommended that the International Court of Justice be granted criminal jurisdiction and that a prosecutor’s office be established within the court. The bench of the International Court of Justice would be expanded and new judges with expertise in criminal law would be appointed. The court would have jurisdiction to try states for unjust aggression and all other violations of international law and individuals for international criminal responsibilities.\(^{161}\) The offences and applicable penalties were to be defined and pre-established by international conventions.\(^{162}\)

Professor Pella was asked to prepare a draft statute of an international criminal court. The draft was adopted by the International Association of Penal Law in 1928 and communicated to the League of Nations and to governments that were represented at the 1928 congress. In 1946 Professor Pella revised this draft in view of changed

\(^{159}\)Ibid.


circumstances that included replacement of the League of Nations by the United Nations and the Permanent Court of International Justice by the International Court of Justice. This draft was used in subsequent discussions and attempts at setting up an international criminal court. The International Law Commission used Professor Pella’s draft as a basis for its discussions.

2.14. Regional Efforts: 1928 Havana Conference of Central American States

Early discussions of the subject of international criminal jurisdiction were not only limited to Europe. There were regional attempts as well such as the Code of International Law drawn up by participants at the Havana Conference of Central American states in 1928. This code defined piracy and the slave trade as violations of international. The draft code would only apply to states and did not go so far as to include individual criminal responsibility for such violations.

The Code of International Law was not directly related to the subject of the international criminal court as it was then debated. But discussions that took place during the drafting of the code stimulated debate and ideas on the question of an international criminal jurisdiction and ultimately contributed to the development of the norms around which international criminal law developed and is currently organised.

2.15. Consideration of the Court in Connection with the 1937 Convention on Terrorism

Support for the establishment of an international criminal court gained a new urgency following the assassination on 9 October 1934 of King Alexander of Yugoslavia and Louis Barthou, the French Foreign Minister. The Croatian nationalist assassin fled to

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163 Ibid, note 147.
165 Ibid.
Italy who refused to extradite him on the grounds that the crime was politically motivated.\textsuperscript{166} The French Government submitted a memorandum to the League of Nations on the need to suppress political crimes of an international nature. The memorandum contained proposals for the adoption of an international convention on terrorism and the establishment of an international criminal court to try individuals accused of acts of terrorism.\textsuperscript{167}

The League of Nations constituted a Committee of Experts, which considered representations from governments in addition to the proposals by the French Government and drafted two conventions on terrorism and on the creation of an international criminal court.\textsuperscript{168} The two conventions were adopted and opened for signature on 16 November 1937.\textsuperscript{169} The second convention on the creation of an international criminal court provided for trial by an international criminal court of persons accused of crimes defined in the first convention, the Convention for the Prevention and Punishment of Terrorism.\textsuperscript{170} The international criminal court was to be a permanent judicial body.\textsuperscript{171}

This Convention represents the first time that state agreed on to establish a permanent international criminal court. However, ultimately, out of nineteen states that signed it, only India ratified the terrorism convention. Thirteen states signed the Convention on an international criminal Court, but none ratified the Convention.\textsuperscript{172} States were not yet prepared to share their sovereign right to prosecute criminal offences with an

\begin{footnotesize}
\begin{enumerate}
\item ibid.
\item ibid.
\item ibid.
\item ibid.
\item ibid.
\item ibid.
\item ibid.
\item ibid.
\item ibid.
\item ibid.
\item ibid.
\end{enumerate}
\end{footnotesize}
international criminal court composed of foreign judges empowered to apply alien legal doctrines.\textsuperscript{173}

According to Ricardo J. Alfaro, the two conventions were 'significant for the fact that they embodied the principle of universality of repression of offences having an international scope and liable to disturb international peace.'\textsuperscript{174} The occasion of the adoption of the two conventions also ensured that the idea of an international criminal regime gained greater exposure with governments.\textsuperscript{175}

The adoption of the Convention for the Prevention and Punishment of Terrorism proved the possibility that the reach of international criminal law could be expanded to include other crimes in addition to war crimes. Up to this point, it seems that the question of individual criminal responsibility for international crimes was fairly settled. The desirability of setting up an international criminal tribunal was also at this point widely accepted. Most of the objections to an international criminal jurisdiction were based on the impracticable nature of setting it up.

\textbf{2.16. World War II Aftermath: Nuremberg and the Tribunal of the Far East}

It has been argued that the failure to put in place an effective system of international criminal justice after the First World War is one of the reasons for the outbreak of hostilities leading to the Second World War.\textsuperscript{176} Adolf Hitler is quoted as having stated, in 1939, in connection with his plans to undertake ethnic cleansing, 'who after all is today speaking about the destruction of the Armenians?'\textsuperscript{177}

\begin{itemize}
  \item Ibid.
\end{itemize}
The atrocities committed during the Second World War, brought the issue of prosecution and punishment of atrocity crimes to the fore. Even before the war had come to an end, the Allies started meeting officially and unofficially to discuss the intricacies of setting up an international tribunal to prosecute war criminals at the end of the war. For example, the London International Assembly was an unofficial body established by the Allies in 1941 where discussions of an international criminal tribunal took place.

The London International Assembly studied the question of war crimes prosecution and concluded that most crimes came within the jurisdiction of states and therefore most prosecutions could be dealt with by domestic courts. However, an international criminal court needed to be established in order to deal with crimes that fell outside the jurisdiction of any particular state or crimes which any state did not want to prosecute for political or other reasons. Such crimes included crimes committed against nationals of more than one state and crimes committed by heads of state.

To that end in 1943, the London International Assembly prepared a draft Convention for the Creation of an International Criminal Court. Under the draft, the prosecuting authority would be the 'United Nations Procurator General' who would ‘act on behalf of the United Nations as a whole.’\(^{178}\) In order to deal with the problem of execution of the orders of the court that blights the ICC today, an 'International Constabulary' would be established and be ‘charged with the execution of the orders of the court.’\(^{179}\)

The London International Assembly contemplated that a convention defining the main principles of international criminal law, the crimes and the applicable penalties would be agreed. Until such a convention was agreed, the law to be applied by the court would

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include international custom, international treaties, and general principles of criminal law recognised by the United Nations and judicial decisions and doctrines of highly qualified publicists.\(^{180}\)

Discussions on the question of an international criminal court while the Second World War was going on were also carried out in the International Commission for Penal Reconstruction and Development. Semi-official in character, this body of jurists was set up in London. This Commission expressed the view that most crimes that were being committed during the war that was going on fell within the jurisdiction of domestic courts and could be tried in the domestic courts of different countries. It adopted a resolution stating the conviction that ‘the time is ripe for the establishment of a Permanent International Criminal Court.’ However, several practical difficulties and objections relating to the advisability of creating such a court in order to prosecute war crimes committed during the Second World were raised.

Ricardo J. Alfaro posits that the St James Declaration of 1942 and the Moscow Declaration of 1943 have deep significance in the evolution of the idea of an international criminal court.\(^{181}\) The two declarations show the determination of the Allies to punish war criminals. While atrocities were being committed, nine Allied Governments met in London in January 1942 and signed in the Palace of St. James, the Inter Allied Declaration on Punishment of the War Crimes, commonly known as the St. James Declaration.

The Allies declared that at the end of the war they wanted to repress acts of vengeance by the public. They wanted, ‘through the channel of organised justice,’ those guilty or responsible for war crimes handed over to justice and punished.\(^{182}\) Those responsible for war crimes could be those who ‘ordered them, perpetrated them, or participated in

\(^{180}\)Article 27 of the Draft Convention for the Creation of an International Criminal Court (London International Assembly, 1943).


\(^{182}\)Ibid.
Bassiouni argues that the St. James Declaration was the first step towards the establishment of the International Military Tribunal at Nuremberg.  

At a conference in Moscow, United States, Britain and the Soviet Union signed the Moscow Declaration on German Atrocities of 30 October 1943. This declaration showed how the allies would deal with war crimes. German officers and members of the Nazi Party responsible for atrocities would be sent back to the countries in which they committed crimes and prosecuted in accordance with the laws of those countries. Major war criminals including leaders and other high officials who did not directly participate in the execution of crimes and whose offences had no particular geographic location would be ‘punished by joint decision of the Governments of the Allies.’

Following the declaration of the intention to try Nazi leaders for atrocities committed during the war, the Allies set up the United Nations War Crimes Commission ‘to set the stage for post-war prosecution.’ An official body, the mandate of this commission was to investigate and obtain evidence of the war crimes.

The commission was blighted by political problems including lack of support from the Allied Governments that had set it up. However the United Nations War Crimes Commission continued to operate until March 1948, and in the course of its existence had created a total of 8,178 files representing 36,810 individuals and groups on alleged

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183 Ibid.  
war criminals. The information collected was used mostly by governments in domestic prosecutions.

The United Nations War Crimes Commission was not institutionally linked to the International Military Tribunal at Nuremberg, but some of the most important notions elaborated by this Commission found their way into the Nuremberg Charter. Significantly, the United Nations War Crimes Commission also examined the question of establishing an international criminal court to try war crimes. In 1944, the Commission approved a draft of a Convention for the Establishment of a United Nations War Crimes Court. Like other previous proposals the draft convention was not adopted by governments, but the work of the United Nations War Crimes Commission in this respect is an important milestone on the creation of the International Criminal Court.

Although the St. James Declaration and the Moscow Declaration evinced an intention to deal with war criminals through the channels of organised justice, there remained some disagreements between the Allies on how to deal with major war criminals. Britain feared that the Nazis would use the trials as forums for propaganda and self-justification. Britain also felt that the blameworthiness of the major war criminals was 'so black that it was beyond the scope of any judicial process.'

In the circumstances Britain suggested that the major war criminals be summarily executed without trial. The Soviet Union, France and the USA on the other hand

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189 Arieh J. Kochavi, *ibid*.
190 Draft Convention for the Establishment of a United Nations War Crimes Court, UN War Crimes Commission, Doc. C.50(1), 30 September 1944
192 *ibid*.
193 *ibid*.
favoured the establishment of an international tribunal to try war criminals.\textsuperscript{194} The USA argued that summary execution of the major war criminals would be viewed as a political act, which would have the unintended effect of transforming the Nazis into martyrs.\textsuperscript{195} The USA urged the Allies to reject any 'action dictated by politics and not by fundamental principles of law and justice.'\textsuperscript{196}

In the end it was agreed that an international military tribunal would be set up for the purposes of trying war criminals. In August 1945, at a conference in London, USA, Britain, France and the Soviet Union concluded an agreement (the London Agreement) to establish an International Military Tribunal to try war criminals of the European Axis whose offences had no particular geographical location.

The Charter of the International Military Tribunal (the Charter) annexed to the London Agreement defined the constitution, principles, jurisdiction and functions of the tribunal.\textsuperscript{197} The principles of the Charter were widely accepted as the London Agreement and the Charter were formally adhered to by 19 other countries including Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia.\textsuperscript{198}

Composed of four members, each with an alternate appointed by each one of the four signatories to the Agreement, the Tribunal was to make decisions by majority vote. Each one of the four signatories would also appoint a chief prosecutor. The Charter set up a few simple rules which assured all of the elements of fair and full hearing, including counsel for the defence. The Tribunal would not be bound by technical rules of evidence.

\textsuperscript{194\textit{Ibid.}}
\textsuperscript{195\textit{Ibid.}}
\textsuperscript{196\textit{Ibid.}}
\textsuperscript{198\textit{Ibid.}}
Sadly, the Tribunal could pass the sentence of death upon conviction. The Tribunal was also authorised to issue orders of confiscation of stolen property. Article 22 of the Charter provides that the Tribunal would have its permanent seat at Berlin, but the first trial would take place in Nuremberg. As a result, the Tribunal is now commonly known as the Nuremberg Tribunal.

In terms of the provisions of the Charter, the jurisdiction *ratione personae* of the Tribunal would extend to both natural and juridical persons. Under Article 6, the jurisdiction would entail trying and punishing persons as individuals or members of certain organizations. In terms of Article 10, the Tribunal was authorised to declare an organisation to be criminal. In the case of such a declaration any of the Allied states could thereafter bring any members of that organization for trial within their domestic jurisdictions for such membership.

During negotiations for the Charter and the London Agreement, there was some debate over holding German leaders personally liable. Expressing a view that seemed to reflect the position of international law that time, Professor Gros, the French representative, argued that while it was morally and politically desirable, extending personal liability for war crimes was inconsistent with international law.\(^\ref{199}\) Justice Robert H. Jackson of the USA conceded the point by Professor Gros, but argued, as he did during discussion of the crimes to be charged, that international law grows, as does the Common-law, through decisions reached from time to time in adapting settled principles to new situations.\(^\ref{200}\)

Consequently, it was their ‘right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened international law.’\(^\ref{201}\) Sir David Maxwell Fyfe, the British representative, argued simply that since the war was ‘the result of the actions of fifteen to twenty people, it is a difficult conception that those

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\(^{201}\) Ibid.
people are not responsible for their own acts when it is admitted that they result in an international crime.\textsuperscript{202} By this, the conferees who negotiated the London Agreement and the Charter of the International Military Tribunal took an important step in settling the question of individual criminal liability for criminal offences under international law.

It may be important to note that even before the Charter was agreed, the question of individual criminal responsibility under international law was a subject of debate by jurists. In a paper published in 1943, Professor Hans Kelsen wrote that there are acts that are forbidden directly by international law. Surveying instances where general international law obliges individual criminal responsibility including war crimes, he argued that even if a trial for war crimes was held in terms of domestic laws, the acts punished are forbidden directly by international law, which in turn confers upon states the right to punish war criminals. Therefore, the legal basis of such a trial is international law which establishes the individual responsibility of the person committing the war crime. Hans Kelsen declared, ‘the doctrine that international law by its very nature cannot oblige individuals, and hence cannot have the character of criminal law is not correct.’\textsuperscript{203}

On its part, the Tribunal definitively settled the question when it rejected the defence that international law is concerned with the actions of sovereign states and provides no punishment for individuals. In an oft-quoted passage, the Tribunal held that ‘crimes against international law are committed by men and not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.’\textsuperscript{204}

Article 6 of the Charter also provides for the jurisdiction \textit{ratione materiae} of the Tribunal. It is clear from the St. James Declaration, the Moscow Declaration and the Yalta Conference that the Allies considered the breaches of international law that were taking


\textsuperscript{203}Hans Kelsen, ‘Collective and Individual Responsibility in International Law with Particular Regards to the Punishment of War Criminals’, (1943) 31 California Law Review, 530.

\textsuperscript{204}International Military Tribunal (Nuremberg), Judgment of 1 October 1946 at page 447.
place during the war as criminal offences. However, a gap existed in international since
‘no treaty, precedent, or custom determined by what method justice should be done.’205
In terms of the London Agreement and the Charter, therefore, the Tribunal would enjoy
criminal jurisdiction. The International Military Tribunal would function as an international
criminal court. The crimes within the jurisdiction of Tribunal included:
a) Crimes against peace, namely, planning or waging of aggressive war or conspiracy
   for the accomplishment thereof;
b) War crimes, namely, violations of the laws and customs of war, including murder,
   plunder of property and wanton destruction of towns and villages;
c) Crimes against humanity, namely, murder, extermination, any inhumane acts
   committed against any civilian population before or during the war and persecution
   on political, racial or religious grounds in execution of, or in connection with any
   crime within the jurisdiction of the tribunal.206

War crimes were easy to define in view of the treaties governing the conduct of war that
were then in existence including the Hague Conventions of 1907. As observed by
Justice Jackson, the rules of warfare at that time were ‘well established and generally
accepted by the nations.’207 Crimes against peace and crimes against humanity were
without clear precedent and debated at length during the negotiations. The difficulty in
reaching an agreement is similar to the difficulty faced by the negotiators of the Rome
Statute to reach an agreement on the crime of aggression.

During the negotiations, Professor Gros raised objections on the basis that these crimes
had no basis in international law or custom. Sir David Maxwell Fyfe dismissed the
objections remarking, ‘we declare what international law is.’208 Justice Jackson argued
that international law was open to growth and that ‘every custom has its origin in some

205 Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials,
206 The Charter of the International Military Tribunal.
207 Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials,
Law, 1.
single act. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law.\textsuperscript{209} According to Justice Jackson, the principles upon which crimes against humanity were based have been assimilated as a part of international law at least since 1907.\textsuperscript{210} In its judgment, the Tribunal also expressed the view that international law is not ‘static, but by continual adaptation follows the needs of a changing world.’\textsuperscript{211}

By linking acts defined as crimes against humanity with ‘any crime within the jurisdiction of the court’, the Allies were able to expand the jurisdiction of the Tribunal to include acts against civilians that might otherwise have been regarded as internal and within the jurisdiction of Germany. Under the principle of sovereignty as it existed, such acts were not of international concern and the Allies might not have dealt with them without interfering in the internal affairs of Germany. The formula adopted means that the charter therefore established an international standard of criminal liability for violations of human rights applicable during both war and peace.\textsuperscript{212}

One of the most significant contributions of the Charter can be found in Articles 7 and 8. Article 7 abrogated the doctrine of sovereign immunity. Official position including head of state would not absolve accused persons of individual responsibility for crimes. Under article 8 the defence of superior orders was rejected. As noted by Justice Jackson, a combination of sovereign immunity and superior orders would mean that no one would be held responsible for atrocities.\textsuperscript{213} The defence of superior orders could not apply in

\textsuperscript{210} Ibid
\textsuperscript{211} International Military Tribunal (Nuremberg), Judgment of 1 October 1946 at page 445.
the case of voluntary participation in a criminal or conspiratorial organization, such as the Gestapo. Superior orders could however be considered in mitigation.214

In its judgment, the Tribunal ruled that the defence of sovereign immunity cannot be ‘applied to acts which are condemned as criminal by international law.’215 With respect to the defence of superior orders, the Tribunal expressed the view that ‘individuals have international duties that transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state, if the state in authorising action moves outside its competence under international law.’216

For the sake of completeness, it is necessary to point out here that the International Military Tribunal established in terms of the London Agreement and the Charter indicted 24 German defendants, but 22 were eventually put to trial. At the end 19 defendants were convicted. 12 defendants were sentenced to death while seven were given various sentences of prison terms. Three defendants were acquitted.217

Nuremberg was a turning point in international criminal justice and in the process that culminated in the creation of the International Criminal Court. Until then, state sovereignty had been the overriding doctrine in international law. The Charter and the trial did away with the protective veil provided to perpetrators by the doctrine of sovereignty. This position has been adopted in later conventions of international criminal tribunals and the Rome Statute of the International Criminal Court.

In practice, the recent trials of Charles Taylor by the Special Court for Sierra Leone and Slobodan Milosevic by the International Criminal Tribunal for the Former Yugoslavia and the current warrant of arrest issued by the ICC against President Al Bashir of Sudan are live proof of the contribution of Nuremberg in curtailing the doctrine of state

214 Ibid.
215 International Military Tribunal (Nuremberg), Judgment of 1 October 1946 at page 447.
216 Ibid.
217 Ibid.
sovereignty. Also, before Nuremberg a state-centric regime of international law allowed governments to treat their citizens as they pleased within their borders.

The concept of state sovereignty worked to exclude other states from questioning the manner in which another state chose to treat its citizens. The Nuremberg trial started the definitive process of exercise of criminal jurisdiction at the international level to protect people who might otherwise not have received protection from the international community because of the operation of sovereignty. This process paved the way for the international criminal tribunals established in the former Yugoslavia and Rwanda and the International Criminal Court.

The London Agreement and the Charter of the International Military Tribunal for the first time made explicit and unambiguous what was theretofore, as the Tribunal declared, implicit in International Law, that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against the international society.

It is unfortunate that it took the world an inordinately long time to reach agreement on the crime of aggression, which was described by the International Military Tribunal as the supreme international crime. The Tribunal also settled the law on crimes against humanity, which hitherto was not very clear. Most importantly the Charter and the Tribunal settled the point that international law will hold individuals responsible for the commission of such international crimes.

Nuremberg also devised a workable procedure for the trial of crimes which reconciled the basic conflicts in Anglo-American, French, and Soviet procedures. If one adds the diversities of interests that existed among the four countries that negotiated the Charter,

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219 Ibid.
221 International Military Tribunal (Nuremberg), Judgment of 1 October 1946 at page 427.
and the differences in tradition, viewpoint and language, it will be seen that the negotiations were not easy. But the four countries were able to reach agreement on all important issues. A precedent was thereby created which showed that it was possible to agree a procedure among different legal systems for the prosecution of international crimes. The Nuremberg tribunal and trial acted as proof that an international criminal court had operated in the world and that the feasibility of such a court had been demonstrated.

The Allies also set up the International Military Tribunal for the Far East pursuant to the agreement signed at Potsdam on 26 July 1945 between USA, China and Britain. Unlike the Nuremberg Tribunal, the Tribunal for the Far East was more international with judges from 11 countries including China, India and Philippines. This Tribunal tried Japanese war criminals on terms and conditions similar to those of the Nuremberg Tribunal.

In December 1945, acting under the provisions of the Charter, the Allies enacted Allied Control Council Law No. 10, which allowed for subsequent trials of Germans before local war crimes tribunals. One of the major contributions of the Control Council Law is that the law removed the requirement of a state of war in crimes against humanity. This allowed the prosecution of crimes committed against German civilians including Jews before the outbreak of the Second World War in 1939.

2.17. Discussions of an International Criminal Court in the UN

2.17.1. Committee on the Progressive Development of International Law and its Codification
The UN having been fully established, discussions of an international criminal court took place in this organisation. At the first session of the General Assembly of the UN

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223 Ibid.
convened in New York, a few weeks after the Nuremberg judgment, the Charter of the International Military Tribunal and the judgment were recognised.

The Secretary General of the UN declared that ‘in the interest of peace and in order to protect mankind against future wars, it will be of decisive significance to have the principles which were implied in the Nuremberg trials, and according to which the German war criminals were sentenced, made a permanent part of the body of international law as quickly as possible.’\(^\text{226}\) The US President, Mr. Truman also stated the view that ‘a code of international criminal law to deal with all who wage aggressive war ... deserves to be studied and weighed by the best legal minds the world over.’\(^\text{227}\)

Consequently, following some debate on a proposal submitted by the US delegation, the General Assembly adopted two resolutions on 11 December 1946. Resolution 94(1) established a Committee on the Progressive Development of International Law and its Codification. The Committee consisted of 17 member representing Argentina, Australia, Brazil, China, Colombia, Egypt, France, India, Netherlands, Panama, Poland, Sweden, Soviet Union, United Kingdom, United States, Venezuela and Yugoslavia.

Resolution 95(1) affirmed ‘the principles of international law recognised by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal’ and directed the Committee ‘to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.

The question of the creation of an international criminal court featured prominently in the discussions of the Committee on the Progressive Development of International Law and


\(^{227}\) *Ibid.*
its Codification. Donnedieu de Vabres who represented France and was a judge of the Nuremberg Tribunal indicated that he had learnt from Nuremberg and presented a memorandum urging the establishment of the international criminal court.

Donnedieu de Vabres placed previous proposals into two categories. The first entailed empowering the Permanent Court of International Justice with jurisdiction in criminal matters. The other category entailed creation of a separate international criminal court. He recommended a combination of the two where a criminal chamber might be created in the Permanent Court of International Justice and creation of a special court along the lines of the court proposed in the 1937 Convention for the suppression of terrorism. The criminal chamber established within the Permanent Court of International Justice would deal with certain juridical matters as well as crimes against peace and crimes against humanity. The special court would deal with international crimes committed in times of peace, war crimes and all offences committed in connection with crimes against humanity by heads of states.

The proposal was debated at length. Representatives of Egypt, Poland, United Kingdom, Soviet Union and Yugoslavia felt that the question of an international criminal court fell outside the mandate of the committee. In the end, by a majority, the committee decided to draw the attention of the General Assembly to the fact that ‘implementation of the principles of the Nuremberg Tribunal and its judgment, as well as the punishment of other international crimes.....may render desirable the existence of an international judicial authority to exercise jurisdiction over such crimes.’

The report of the Committee on the Progressive Development of International Law and its Codification was submitted to the General Assembly. Following discussions in the Sixth Committee and a sub-committee of the Sixth Committee, it was decided the work

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of the formulation of the Nuremberg principles and the preparation of a code of offences against peace and security be entrusted to the International Law Commission.\textsuperscript{229}

\textbf{2.17.2. Discussions of an International Criminal Court in Connection with the Genocide Convention}

The question of an international criminal court was also discussed in the UN during the long debate that preceded the Convention on the Prevention and Punishment of Genocide. A resolution on the repression of genocide sponsored by India, Cuba and Panama, on 11 December 1946, in the General Assembly started the process which resulted in two drafts of a genocide convention.\textsuperscript{230} One was prepared by the Secretary General of the UN and the other was prepared by an \textit{ad hoc} committee established by the Economic and Social Council. Both drafts contained proposals on an international criminal court to deal with the crime of genocide. The Secretary General’s draft included a model statute for such an international criminal court similar to the one proposed in connection with the 1937 terrorism convention.\textsuperscript{231}

In the end however, only the Genocide Convention was adopted. Article 6 thereof contemplates the establishment of an international criminal tribunal with jurisdiction to try individuals accused of the crime of genocide. The importance of this article in today’s world where states may seek to wriggle from the purview of the ICC cannot be over-emphasised.

It is very feasible that this article can be used to empower the ICC to try individuals accused of genocide even though their states may not be parties to the Rome Statute. The ICC could exercise jurisdiction over such individuals as long as their states have ratified the Genocide Convention and have not made reservations in respect of the

\textsuperscript{229}Formulation of the Principles Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, UN General Assembly Resolution 177(II), 21 November 1947.

\textsuperscript{230}General Assembly Resolution 96(1) declared genocide a crime under international law. It stated that the punishment of this crime was a matter of international concern and called for the preparation of a convention on the subject.

application of article 6 of the convention. Indeed, it has been suggested that the problems of head of state immunity in the case of President Al Bashir, can be surmounted, in respect of the charge of genocide, by relying on the provisions of the Genocide Convention.

The development of normative human rights standards had a great effect on the development of international criminal law. On 10 December 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights as part of a package of measures to fulfil the promise of never again to allow atrocities such as had been committed by Nazi Germany to occur again. As we will see from the discussion below, a day before, on 9 December 1948, the United Nations Generally Assembly had adopted the Convention on the Prevention and Punishment of the Crime of Genocide. The Universal Declaration of Human Rights has become a bedrock document in international law, outlining the basic rights that individuals all over the world are entitled to.

Today, the Universal Declaration of Human Rights is the foundation for national laws as well as regional and international treaties and institutions promoting and protecting human rights. From then onwards, human rights became a legitimate matter of concern to the world and the manner in which a state chose to treat its citizens could now be questioned by other states without it being regarded as interfering in the internal affairs of fellow states. The Universal Declaration of Human Rights and the international human rights instruments adopted thereafter helped to firmly establish the norms upon which international crimes are based. Human rights developments also helped to redefine the boundaries of the doctrine of state sovereignty.

On 9 December 1948, by resolution 260(III), the General Assembly unanimously approved the Convention on the Prevention and Punishment of the Crime of Genocide.\(^{232}\) Article 2 of the Genocide Convention contains the definition of genocide, which has been incorporated word for word in Article 6 of the Rome Statute.

Significantly, Article 7 of the draft prepared by the ad hoc committee of the Economic and Social Council was later renegotiated and appeared in the Genocide Convention as Article 6. Under the Article, jurisdiction to try the crime of genocide is given to domestic courts and ‘such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.’

2.18. Studies by the International Law Commission

By the second part of Resolution 260(III), the General Assembly called upon the International Law Commission to study ‘the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions.’

In carrying out the study, the International Law Commission was asked to consider the possibility of achieving this objective by creating a criminal chamber in the International Court of Justice. Two Special Rapporteurs, Professor Ricardo Alfaro and Emil Sandstrom, were appointed in June 1949 and instructed to present reports for consideration by the Commission at its meeting in June 1950.

Each of the Special Rapporteurs prepared a report and presented them to the Commission. Both Professor Alfaro and Emil Sandstrom concluded that it was desirable to establish an international criminal court. While Sandstrom pointed to experiences of the two world wars to support this assertion, Professor Alfaro pointed to existing evidence by undertaking a comprehensive survey of the evolution of the idea of international criminal prosecution. Emil Sandstrom however, considered the pros and cons of establishing such a court and concluded that while it was desirable, establishing

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234 Study by the International Law Commission of the Question of an International Criminal Jurisdiction, UN General Assembly Resolution 260B(III), 9 December 1948.
235 Ibid.
such a court would not be practical and ‘would do more harm than good. The time
cannot as yet be considered ripe for the establishment of such an organ.’

Professor Ricardo Alfaro submitted that an international criminal court could be created
as a permanent body to try states and individuals for crimes that include genocide,
crimes against the peace and security of mankind and other crimes that may, by treaty,
be brought within the jurisdiction of the court. An international penal code would have to
be agreed among states. Under the regime for an international criminal court envisaged
in Professor Alfaro’s report, the UN Security Council would have a central role in
initiation of criminal proceedings. International criminal proceedings would be started by
the Security Council or by a state duly authorised by the Security Council. The two
Special Rapporteurs differed only on the question of whether the time was ripe for an
international Criminal Court to be established.

After discussion of the Special Rapporteurs’ reports, the Commission concluded that the
establishment of an international judicial organ for the trial of persons charged with
genocide or other crimes was both desirable and possible. The Commission also found
that it was possible to set up an international criminal tribunal as a chamber of the
International Court of Justice by amendment of the court’s statute which, in Article 34,
provides that only States may be parties in cases before the Court. It recommended,
however, against such a manner of establishing an international criminal tribunal.

The report of the International Law Commission on the question of international criminal
jurisdiction was transmitted to the General Assembly. After considering the report, the
General Assembly adopted resolution 489 (V) of 12 December 1950. By this resolution
the General Assembly expressed the view that ‘a final decision regarding the setting up
of such an international penal tribunal cannot be taken except on the basis of concrete
proposals.’

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237 I bid.
239 Preamble, Paragraph 4 of General Assembly Resolution 489 (V) of 12 December 1950.
The General Assembly, therefore, established a committee composed of representatives of seventeen Member States for the purpose of preparing preliminary ‘draft conventions and proposals relating to the establishment and the statute of an international criminal court.’\textsuperscript{240} The committee met at Geneva in August 1951 and formulated proposals together with a draft statute for an international criminal court. Under the draft statute it was proposed that the court should be a permanent structure but should function only on the basis of cases submitted to it. The draft statute was modelled in part after that of the International Court of Justice.\textsuperscript{241}

In accordance with the terms of General Assembly resolution 489 (V), the UN Secretary-General communicated the report of the Committee containing the draft statute, to Governments requesting their observations thereon. In 1952 the General Assembly passed resolution 687 (VII) of 5 December 1952. By this resolution, the General Assembly observed that a very small number of states had provided feedback on the report of the committee and the draft statute and that there was need for ‘further study of the problems relating to an international criminal jurisdiction.’

Further, the General Assembly decided to set up a new committee, with some changes in membership. Still comprised of representatives of seventeen member states, the committee met at the UN Headquarters in 1953. Bassiouni\textsuperscript{242} posits that the comments provided by the major powers showed that an international criminal court could not be accepted at that time. This is mostly because of the prevailing atmosphere of the Cold War. The new committee was established so that the major powers could shirk responsibility for killing international criminal adjudication a few years after the Nuremberg and Tokyo trials.\textsuperscript{243}

\begin{footnotes}
\footnotetext[240]{Paragraph 1 of General Assembly Resolution 489 (V) of 12 December 1950.}
\footnotetext[242]{\textit{Ibid.}}
\footnotetext[243]{\textit{Ibid.}}
\end{footnotes}
In view of the feedback obtained thus far, the committee established by resolution 687 (VII) was given the following terms of reference:

‘(i) to explore the implications and consequences of establishing an international criminal court and of the various methods by which this might be done;

(ii) to study the relationship between such a court and the United Nations and its organs;

(iii) to re-examine the draft statute.’\(^{244}\)

This new Committee made a number of changes to the 1951 draft statute. It also prepared alternative articles reflecting the positions if the court were to operate separately from the UN and if the court were to be closely linked with the UN. The report prepared by this Committee was placed before the General Assembly at its 1954 session. At this time the International Law Commission had been working on a draft code of offences against the peace and security of mankind. The General Assembly had also established a special committee on the question of aggression charged with the mandate to submit to the General Assembly ‘a detailed report with a draft definition of aggression.’\(^{245}\) The General Assembly considered that the question of defining aggression; the draft code of offences against the peace and security of mankind; and, the question of an international criminal court were closely linked. By resolution 898 (IX) of 14 December 1954, therefore, the General Assembly decided to postpone consideration of the question of an international criminal court until the crime of aggression was defined and the draft code of offences against the peace and security of mankind was in place.

The General Assembly took a similar decision at its 1957 meeting in resolution 1187 (XII) of 11 December 1957. The General Assembly continued to hold the view that since the question of an international criminal court was closely related both to the question of defining the crime of aggression and to the draft code of offences against the peace and

\(^{244}\) Paragraph 3 of General Assembly Resolution 687 (VII) of 5 December 1952.

\(^{245}\) General Assembly Resolution 895 (IX) of 4 December 1954.
security of mankind, consideration of the question of the international criminal court should be deferred until resolution of the two related issues had been achieved.

2.19. Consideration of the Court by the International Law Commission in Connection with Draft Code of Offences against the Peace and Security of Mankind

By way of background, the task of preparing a Draft Code of Offences against the Peace and Security of Mankind (draft code) was entrusted to the International Law Commission in 1947, by General Assembly resolution 177 (II) of 21 November 1947. It will be recalled from the discussion above that this resolution of the General Assembly is the same resolution that called on the Commission to formulate the Nuremberg principles.

Early on in the course of preparing this draft code, the Commission decided that it would deal only with the criminal responsibility of individuals and that no provisions should be included with respect to crimes by abstract entities. In reaching this decision the Commission drew on the ratio decidendi in the judgment of the Nuremberg Tribunal to the effect that crimes against international law are committed by individuals and not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. The offences in the draft code were characterised as crimes under international law, for which the responsible individuals shall be punishable.

Initially, the Commission refrained from providing for institutional arrangements for implementing the draft code as there was a parallel process afoot for the establishment of the establishment of an international criminal court. According to Professor Schabas, the draft code and the convention on an international criminal court could be understood by comparing the two to criminal or penal code defining crimes and general principles and a code of criminal procedure defining the institutional and procedural framework
that might be found in domestic jurisdictions. The separation of the work on the international criminal court and the draft code has been criticised for being inconsistent with good practice in legal drafting.

In 1951, the International Law Commission completed a Draft Code of Offences against the Peace and Security of Mankind and submitted it to the General Assembly. That same year, the General Assembly postponed consideration of the draft code to allow governments time to submit their comments and for the commission to continue to deal with the matter. In 1953, the commission asked Jean Spiropolous, the Special Rapporteur, to prepare a new report which would be submitted at the next session of the commission. In his report, the Special Rapporteur considered the comments received from governments and proposed changes to the text previously adopted.

In 1954, the Commission considered the report of the Special Rapporteur and adopted the revised and submitted it to the General Assembly.

Just as it had acted in respect of the question of an international criminal jurisdiction, the General Assembly in resolution 897 (IX) of 4 December 1954 decided to defer discussion of the draft code until the crime of aggression was defined. The General Assembly considered that as formulated by the Commission, the draft code raised problems that were closely related to those arising from the work on the definition of the crime of aggression then being dealt with by a special committee established by the General Assembly. As we can see, the General Assembly could not decide the question of an international criminal court until the draft code was in place and the draft code could not be discussed until the crime of aggression was defined.

In 1968 the Secretary-General of the UN raised the question of an international criminal court in connection with the agenda of the General Assembly. The General Committee

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of the General Assembly decided that prior to the completion of the General Assembly’s consideration of the question of defining aggression, it would not be desirable for the items “International criminal jurisdiction” and “Draft Code of Offences against the Peace and Security of Mankind” to be included on the agenda and that these items should be taken up only at a later session when further progress had been made in arriving at a generally agreed definition of the crime of aggression.\textsuperscript{249}

The definition of aggression was approved by General Assembly resolution 3314 (XXIX), of 14 December 1974. This resolution was adopted by consensus, but the definition of the crime of aggression never found its way into a multilateral convention.\textsuperscript{250} No work was immediately carried out on the draft code after agreement on aggression was reached. In its report in 1977 to the General Assembly, the International Law Commission, with the support of some states proposed that the Assembly reviewed the draft code adopted in 1954 taking into account developments in international law since then.\textsuperscript{251}

In 1974 the same question of an international criminal court was again brought up by the Secretary-General in a memorandum addressed to the General Committee when a draft definition of aggression was submitted to the General Assembly. In allocating the item on the question of defining aggression to the Sixth Committee, the Assembly commented that it had decided to take note of the Secretary-General’s observations and to consider whether it should take up again the question of a Draft Code of Offences against the Peace and Security of Mankind and the question of an international criminal jurisdiction.\textsuperscript{252} Accordingly, at its session in 1977 the General Assembly decided to include this matter on its agenda. Through resolution 33/97 of 16 December 1978 the General Assembly asked the Secretary-General to collect from

\begin{flushright}
\textsuperscript{251} (1977) 2 (Part 2) Yearbook of the International Law Commission, paragraph 111
\end{flushright}
governments and relevant intergovernmental organisation, comments on the draft code and to prepare a report to be submitted to the Assembly at its thirty-fifth session, in 1980.

At its session in 1980, following debate on the Draft Code of Offences against the Peace and Security of Mankind, the General Assembly adopted resolution 35/49 of 4 December 1980 where it noted that further comments and observations were required from governments and intergovernmental organisations. The General Assembly accordingly requested the Secretary-General to collect the comments and prepare a report to be submitted at the next session. The General Assembly also decided that it would give the issue of the draft code ‘priority and the fullest possible consideration.’

On 10 December 1981, the General Assembly adopted resolution 36/106 where it invited the International Law Commission to resume its work on reviewing the Draft Code on the Peace and Security of Mankind. The General Assembly requested the commission to review the draft code taking into account the results achieved by the process of progressive development of international law thus far. The International Law Commission complied with the request of the General Assembly and at its session in 1982 appointed Doudou Thiam of Senegal, Special Rapporteur for this topic and established a working group chaired by the Special Rapporteur. Substantial work was carried out between 1983 and 1991 with the Special Rapporteur submitting 9 reports to the International Law Commission.

In his first report, the Special Rapporteur dealt with general matters. He raised several questions that touched on the delimitation of the proper scope of the draft code.

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including the offences to be covered, the subjects of the law as well as implementation of the code. By the end of its session of 1984, the International Law Commission had resolved that the draft code should cover only the most serious international offences as determined by some general criteria and the existing international instruments.

The Commission had decided to remit back to the General Assembly the question of the subjects of the law ‘because of the political nature of the problem of the international criminal responsibility of states.’ Regarding implementation of the code, the Commission had also requested the General Assembly to state whether the mandate of the commission included preparation of a statute on an international criminal court to try individuals.

In 1991, the International Law Commission provisionally adopted a draft Code of Crimes against the Peace and Security of Mankind, which was a substantially revised version of the 1954 draft Code of Offences against the Peace and Security of Mankind.\textsuperscript{255} The new draft Code of Crimes against the Peace and Security of Mankind was transmitted to governments with a request for their comments and observations. The comments and observations were to be submitted no later than 1 January 1993.

Meanwhile, pressure had been mounting in the General Assembly to return to the question of the international criminal court. In 1987, within the context of the Cold War, President Gorbachev of the USSR renewed calls for the establishment of an international criminal court to try cases of terrorism.\textsuperscript{256} Then in 1989, Prime Minister Robinson of Trinidad and Tobago whose country was facing problems of drug trafficking and other related transnational crimes made proposals in the General Assembly for the establishment of an international criminal court to try cases of drug trafficking.\textsuperscript{257}

\textsuperscript{255}In 42/151, the General Assembly endorsed the recommendation by the International Law Commission to amend the English title of the topic to read: ‘Draft Code of Crimes against the Peace and Security of Mankind’.


In December 1989, therefore, by resolution 44/39 of 4 December 1989 the General Assembly requested the International Law Commission to address the question of an international criminal court with jurisdiction over crimes in the draft code including persons engaged in drug trafficking. The following year, by resolution 45/41 of 28 November 1990, the General Assembly renewed its call to the International Law Commission to continue work on the draft code as well as the question of an international criminal court ‘including the possibility of establishing an international criminal court or other international criminal trial mechanism.’

Thus in his 9th report in 1991, the Special Rapporteur, Doudou Thiam included a section on the establishment of an international criminal jurisdiction. Although the current mandate to look at the question of an international criminal court was related to the issue of drug trafficking, the International Law Commission went beyond that and considered a wider jurisdiction *ratione materiae* for the court.

In resolution 46/54 the General Assembly again invited the International Law Commission to consider further and analyse the question of the international criminal court and issues raised so far within the framework of the draft Code of Crimes against Peace and Security of Mankind. The 10th report prepared by the Special Rapporteur and presented to the commission in 1992 dealt entirely with the issue of an international criminal jurisdiction. The International Law Commission set up a working group on this topic, which in turn prepared a report with recommendations and proposals for an international criminal court.

The court proposed by the working group would not be a standing full time body and would not have compulsory jurisdiction. It would instead be established by a treaty agreed among states parties and would exercise jurisdiction only over private individuals and over crimes of an international nature defined in treaties and the Code of

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Crimes against the Peace and Security of Mankind. The International Law Commission endorsed the structure proposed by its working group as a workable system and considered that it had completed its mandate on the topic.

The General Assembly thereafter adopted resolution 47/33 where it invited governments to submit comments on the proposals made by the working group of the International Law Commission on the question of an international criminal jurisdiction. By this resolution, the General Assembly also requested the International Law Commission to commence work on a draft statute of an international criminal court based on the proposals of the working group and taking into account comments received from governments.

The International Law Commission reconvened the working group and christened it ‘Working Group on a Draft Statute for an International Criminal Court.’\(^{260}\) In 1993, this new working group, chaired by a new Special Rapporteur, James Crawford, prepared draft articles with commentaries of the Draft Statute of an International Criminal Court. These were then submitted to the General Assembly, which in turn transmitted it to governments and adopted resolution 48/31 inviting governments to submit their comments on the draft articles by 15 February 1994. By this resolution, the General Assembly also urged the International Law Commission to continue its work on the draft statute ‘as a matter of priority’ taking into account the draft articles and comments from governments.\(^ {261}\) The General Assembly also requested the International Law Commission to resume work on the draft Code of Crimes against the Peace and Security of Mankind.\(^ {262}\)

In 1994, the International Law Commission submitted its final draft of the draft Statute of an International Criminal Court to the General Assembly. In 1996, the International Law Commission adopted the final Draft Code of Crimes against the Peace and Security of Mankind.


\(^{261}\) General Assembly Resolution 48/31, paragraph 6.

\(^{262}\) General Assembly Resolution 48/31, paragraph 8.
The 1994 Draft Statute of the International Criminal Court dealt with various issues. As proposed in that draft, the international criminal court would be an independent permanent institution complementing existing national jurisdictions. As for its jurisdiction, the court would try individuals accused of only serious crimes of significant international concern. In Article 20 of the draft the commission did not deal with the full catalogue of all the crimes within the jurisdiction of the court since the commission was yet to conclude work on the Code of Crimes against the Peace and Security of Mankind.

The draft statute also dealt with some of the issues that raise controversies today including the relationship of the court with the UN. As is currently the case, the draft statute provided for an agreement to be entered into with the UN.\(^{263}\) It also provided for referral of cases to the court by the UN Security Council.\(^{264}\) Some of the articles of the draft statute were accepted as they were and are today part of the Rome Statute. It is clear that the 1994 International Law Commission draft of the Statute for an International Criminal Court and the 1996 draft Code of Crimes on the Peace and Security of Mankind played a major role in preparation of the final Rome Statute of the International Criminal Court.\(^{265}\)

The work of the International Law Commission on the draft Code of Offences against the Peace and Security of Mankind and the draft Statute for an International Criminal Court were also instrumental in the establishment of ad hoc tribunals for the Former Yugoslavia and for Rwanda that were set up in 1993 and 1994 respectively. The Draft Code of Crimes against the Peace and Security of Mankind helped to shed light on the substance of the law to be applied by the tribunals.

On the other hand the draft Statute for an International Criminal Court helped to establish the procedural aspects of bringing individuals charged with crimes of an

\(^{263}\) Article 2
\(^{264}\) Article 23
international nature before the tribunals. Indeed, while recognising that both instruments were non-binding at the time, the tribunal for the former Yugoslavia expressed the view that the instruments were authoritative as they reflected customary international law.266

2.20. Consideration of an International Criminal Jurisdiction in Connection with the Apartheid Convention

The question of an international criminal court was also discussed in the 1970s and early 1980s in connection with the implementation clauses of the Convention on the Suppression and Punishment of the Crime of Apartheid (hereinafter Apartheid Convention)267. Under Article I of the Apartheid Convention, apartheid is declared a crime against humanity. Furthermore, all policies and practices of racial segregation that fall under the ambit of apartheid as defined in Article II of the Apartheid Convention ‘are crimes violating the principles of international law’268 entailing ‘international criminal responsibility.’269

Consequently, like the Genocide Convention, the Apartheid Convention envisages the establishment of an international criminal court to try persons charged with the crime of apartheid. In terms of Article III of the Apartheid Convention, persons charged with the crime of apartheid may be tried by domestic courts with jurisdiction over those persons ‘or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.’

In 1972, an Ad Hoc Working Group of Experts of the UN Human rights Commission submitted a report on apartheid and international criminal law.270 The report dealt the modalities for setting up an international criminal court pursuant to Article V of the Apartheid Convention. The UN Human Rights Commission did not take any action on

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268 Article I.
269 Article III.
the report of the working group and no further work on the implementation of Article V of the Apartheid Convention was carried out until 1979.\textsuperscript{271}

Then in 1979, the UN Commission on Human Rights passed a resolution\textsuperscript{272} directing the \textit{Ad Hoc Working Group of Experts on Southern Africa and the Special Committee against Apartheid ‘to undertake a study on ways and means of ensuring the implementation of international instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, including the establishment of the international jurisdiction envisaged by the said Convention.’}\textsuperscript{273} Professor M. Cherif Bassiouni was appointed expert consultant to the group. Together with Professor Daniel H. Derby, they prepared a report where they recommended the establishment of an international criminal court.\textsuperscript{274}

In considering the question before them, the experts regarded implementation as the central consideration. They concluded that in the circumstances, implementation meant creation of an international criminal court. As a result, they prepared a ‘Draft Convention for the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes’ which they annexed to the report. This draft convention proposed to establish a tribunal as a permanent body\textsuperscript{275} consisting of organs that include: the court\textsuperscript{276} made up of 12 judges\textsuperscript{277}, the procuracy\textsuperscript{278}; consisting of an administrative division, an investigative division and a prosecutorial division\textsuperscript{279}; the secretariat with functions outlined in Article

\begin{footnotesize}
\textsuperscript{274} M. Cherif Bassiouni and Daniel H. Derby, \textit{ibid}.
\textsuperscript{275} Article II.
\textsuperscript{276} Article VII.
\textsuperscript{277} Article XIV.
\textsuperscript{278} Article VII.
\textsuperscript{279} Article XV(1).
\end{footnotesize}
XVI; and a standing committee of states parties\textsuperscript{280} consisting of one representative of each state party.\textsuperscript{281}

This draft convention was drawn pursuant to Article V of the Apartheid Convention. Therefore, the proposed tribunal would have jurisdiction over persons committing grave breaches amounting to the crime of apartheid.\textsuperscript{282} However, it was contemplated under the draft convention that states might, through a ‘supplemental agreement’ extend the reach of the court and agree other international crimes that may be tried by the tribunal.\textsuperscript{283} Under Article IV(3) the proposed court would have ‘universal jurisdiction with respect to the investigation, prosecution, adjudication and punishment of persons and legal entities’ committing crimes that fall within the jurisdiction of the court.

It would appear from the wording of Article VIII that a criminal process could be initiated by a complaint made by states parties, other states and inter-governmental organisations to the procuracy. It also seems that a complaint could also originate from the procuracy in a manner similar to the \textit{proprio motu} investigations by the prosecutor under the Rome Statute. The draft convention also had substantive provisions on the pre-trial process, elements of an international crime\textsuperscript{284} and defences\textsuperscript{285} as well as provisions to guarantee the right to a fair trial. Head of state immunity would not apply for prosecutions before the tribunal.\textsuperscript{286} There can be no gainsaying that the surrender and extradition and cooperation clauses of the Rome Statute have their foundation on the surrender\textsuperscript{287} and transfer of offenders and cooperation clauses of this draft convention.

\textsuperscript{280} Article III.
\textsuperscript{281} Article XVII.
\textsuperscript{282} Article IV(1).
\textsuperscript{283} Article IV(2)
\textsuperscript{284} Article XX11
\textsuperscript{285} Article XXV
\textsuperscript{286} Article XXIII
\textsuperscript{287} Article XXVIII
2.21. The Post Cold War Era: The Contribution of the *Ad Hoc* Tribunals

The end of the cold war in 1989, heralded new opportunities for multilateralism and possibilities to further develop international criminal law. The pressure of world public opinion on the gross violations of human rights and international humanitarian law during the war in the former Yugoslavia forced the UN to act. A giant leap in international criminal adjudication was the establishment, by the UN Security Council in May 1993 of the International Criminal Tribunal for the Former Yugoslavia (ICTY) at The Hague.\(^{288}\) Eighteen months later, following genocide and other serious violations of international human rights and humanitarian law in Rwanda, the UN Security Council also established the International Criminal Tribunal for Rwanda (ICTR) based at Arusha, Tanzania.\(^ {289}\)

Both the ICTY and the ICTR consolidated the idea of individual criminal responsibility for serious violations of rules of international law and the non applicability of certain defences including head of state immunity and superior orders. The provisions of Articles 5 and 6 of the statute of the ICTR and Articles 6 and 7 of the ICTY dealing with personal jurisdiction, individual criminal responsibility, irrelevance of government officials’ immunity and superior orders can be found in significantly detailed and improved form in Articles 25, 27 and 28 of the ICC Statute. There can be no gainsaying that the experiences of the ICTY and ICTR in interpreting and enforcing the provisions on individual criminal responsibility provided lessons to the framers of the ICC statute.

Detailed and comprehensive work processes established in the practice of the *ad hoc* tribunals for the Former Yugoslavia and for Rwanda meant that the wheel did not have to be reinvented when it came to developing the work processes of the ICC. Presumably, the ICC has benefitted from the mistakes, pronouncements and practices of *ad hoc* tribunals in matters such as framing of charges as well as organising and presenting evidence, among other matters.

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Arguably, the most enduring legacy of the ICTY and ICTR is to be found in the legal findings of the tribunals. The decisions of the tribunals have in many ways helped to clarify and extended the boundaries of substantive international criminal law. For example, the pronouncements of the tribunals on the legal requirements for the core international crimes and modes of liability have had a tremendous influence on both the development of the ICC Statute as well as some of the ICC’s earlier decisions.

The ICTY and ICTR statutes and the judgments of the tribunals broke new ground in elaborating the constitutive elements, scope and limitations of the crimes of genocide, war crimes and crimes against humanity. Most of the pronouncements of the ICTY and ICTR provided guidance to experts and states as they prepared and negotiated the Rome Statute. When it comes to crimes against humanity the ICTR in the case of *Prosecutor v Clement Kayishema and Obed Ruzindana*\(^{290}\) found that to be guilty of crimes against humanity the perpetrator must know that there is an attack on a civilian population and that his act is part of the attack. This issue was also addressed by the ICTY in the *Tadic* case\(^{291}\) where it was stated that the accused must have acted with knowledge of the broader context of the attack. This view on crimes against humanity conforms to the wording of Article 7 of the Rome Statute of the International Criminal Court.

In the same case of *Prosecutor v Clement Kayishema and Obed Ruzindana*\(^{292}\), the ICTR found that a single killing could constitute extermination if it were part of a mass killing. This characterisation of extermination found its way in the elements of crimes in the Rome Statute of the International Criminal Court. Furthermore, acts enumerated in the definition of crimes against humanity in Article 7 of the ICC Statute borrow heavily from the decisions of the ICTY and ICTR.

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\(^{290}\) Case No. ICTR-95-1-T, 21 May 1999
\(^{292}\) Case No. ICTR-95-1-T, 21 May 1999
One area of substantive international criminal law that has been illuminated by the decisions of the ICTY and ICTR has been the expansion of sexual violence jurisprudence to include sexual violence as violation of common article 3 of the Geneva Conventions, as a crime against humanity and as genocide. The Statute of the International Tribunal for the Former Yugoslavia includes several provisions that categorize the kind of violence perpetrated against women as violations of international humanitarian law. The *Tadic* case clearly established that rape and sexual assault, committed during conflict, are crimes against humanity.

The *Akayesu* decision is particularly significant for the broad definition of rape that was adopted. In that case the ICTR found that rape includes acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.\(^{293}\) The ICTR formulated rape as follows: "physical invasion of a sexual nature, committed on a person under circumstances which are coercive."\(^{294}\) Sexual violence, including rape, is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The Chamber noted in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion.\(^{295}\)

The ICTR also recognized, in deciding the *Akayesu* case, that rape could be used as a form of genocide, if committed with specific intent to destroy, in whole or in part, a particular group. The Chamber also noted that measures intended to prevent births within the group may be physical, but can also be mental.\(^{296}\) For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.\(^{297}\) There can be no gainsaying that by these pronouncements,

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\(^{293}\) *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T, Judgment of the Trial Chamber, paragraph 596.

\(^{294}\) *Ibid*, paragraph 597.

\(^{295}\) *Ibid*.

\(^{296}\) *Ibid*, paragraph 508.

\(^{297}\) *Ibid*. 

*Page 103*
the ICTR enriched the jurisprudence on sexual violence, which has become a preferred
weapon of war in conflicts such as the one in Darfur.

Under the ICTR statute, crimes against humanity are not linked with any conflict. Also,
the statute includes war crimes committed in an internal armed conflict. In a
fundamental contribution to international criminal law the ICTR is the first international
criminal tribunal with a mandate to adjudicate violations of international humanitarian
law in a non-international armed conflict.\textsuperscript{298} The ICTR therefore extended the ambit of
international humanitarian law and individual criminal responsibility for crimes
committed during civil wars. This is particularly important since most armed conflicts
nowadays are non-international.

But, the \textit{ad hoc} tribunals suffered from debilitating criticism that made the idea of the
ICC more attractive than it had ever been before. In the beginning diplomatic problems
resulted in some damaging start-up delays for both the ICTR and ICTY. There were
also questions of selective prosecution. For example questions were asked why the UN
could prosecute atrocities in Rwanda but not in neighbouring Democratic Republic of
Congo (DRC). But by the time of the atrocities in DRC in 1997, ‘tribunal fatigue’ had set
in.\textsuperscript{299} A permanent international criminal court remained the only viable option for
prosecuting the most serious crimes of international concern.

2.22. Use of Universal Jurisdiction and Other Mechanisms to Fight Impunity

Another development that fed the idea of a permanent international criminal court since
the end of the Cold War is the increased use of the concept of universal jurisdiction by
European states to fight impunity for egregious violations of human rights. In many
African states, the period following the end of the Cold War saw renewed commitment

\textsuperscript{298}Kingsley Chiedu Moghalu, \textit{International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents

\textsuperscript{299} Douglas Cassel, \textit{The Rome Treaty for an International Criminal Court: A Flawed but Essential First Step}, (1999) 6
to human rights and adoption of various mechanisms to address past human rights violations that include prosecutions and truth commissions, among other.

At the turn of the century, the Organisation of African Unity became the African Union (AU), adopting the Constitutive Act, which has provisions that show the organisation’s commitment to human rights and the fight against impunity for serious crimes of international concern. In addition to human rights, rule of law and good governance,\textsuperscript{300} the AU Constitutive Act states that the guiding principles of the AU include ‘condemnation and rejection of impunity’\textsuperscript{301} and ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.’\textsuperscript{302}

Undoubtedly, one of the most significant developments in international criminal law at the end of 1990s and beginning of the 2000s is the emergence of internationalised criminal jurisdictions to deal with past atrocities. Commonly referred to as ‘hybrid’ or ‘mixed tribunals’ or ‘internationalised’ courts these courts bring together elements of both national and international law in the organisation, structure and functioning of the court systems and in the application of laws and criminal procedure.\textsuperscript{303} Hybrid courts composed of international and local judges, prosecutors and support staff and applying a blend of international and domestic substantive and procedural law, were set up in Kosovo, East Timor, Sierra Leone and Cambodia, among others.\textsuperscript{304}

The total rejection of impunity for human rights violations can be seen in other justice mechanisms adopted by some states to address serious crimes of international concern on their territories. Among these are the Truth and Reconciliation Commission in South Africa set up to deal with the legacy of apartheid, the Truth and Reconciliation

\begin{itemize}
\item \textsuperscript{300} Article 4(m).
\item \textsuperscript{301} Article 4(o).
\item \textsuperscript{302} Article 4(h).
\item \textsuperscript{304} See the website of the Project on International Courts and Tribunals at http://www.pict-pcti.org/index.html
\end{itemize}
Commission in Sierra Leone, which dealt with crimes of international concern that were not prosecuted by the Special Court for Sierra Leone. All these measures, aimed at combating impunity for serious crimes of international concern had a profound effect on the development of international criminal law leading up to the establishment of the International Criminal Court.

The new urgency and willingness by many states to deal with human rights violations also had a profound effect on discussions on whether the ICC should have primacy over domestic courts as was the case with the ad hoc tribunals or whether its jurisdiction should only be complementary to domestic courts. In the end, the Rome Statute articulated the complementarity principle, which allows national courts to take precedence and envisions the ICC as a court of last resort. Increased use of universal jurisdiction and other mechanisms to fight impunity for human rights violations had the effect of changing the nature of the final product, the international criminal court, as it had been envisioned over the years.

2.23. The Final Steps: The Rome Statute of the International Criminal Court

The International Law Commission submitted the 1994 draft statute of an international criminal court to the General Assembly. It recommended that the General Assembly convened an international conference of plenipotentiaries to deliberate on the draft and conclude a treaty on an international criminal court.\textsuperscript{305} By Resolution 49/53 of 9 December 1994, the UN General Assembly decided ‘to establish an \textit{ad hoc} committee, open to all States Members of the United Nations or members of specialized agencies, to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries.’

The *ad hoc* committee was convened in 1995 and it met twice during the year and discussed several substantive and administrative issues related to the establishment of an international criminal court raised in the draft statute prepared by the International Law Commission. One of the major outcomes of the discussions of the *ad hoc* committee was the crystallisation of the concept of complementarity, which eventually changed the outlook of the court as it had been envisaged under the International Law Commission draft.

The introduction of the concept of complementarity meant that unlike the tribunals for the Former Yugoslavia and Rwanda, the new court could only proceed with a case if the domestic courts were unwilling or unable to prosecute. Although it did not engage in drafting, the discussions of the *ad hoc* committee also show the preponderance of opinion towards elaborating in detail the crimes under the jurisdiction of the court unlike the International Law Commission which had contended itself with only enumerating the crimes and relying on the Code of Crimes against the Peace and Security of Mankind for the details. In so doing, the *ad hoc* committee effectively put to an end the parallel processes of the Code of Crimes against the Peace and Security of Mankind and the Statute of the International Criminal Court.

The *ad hoc* committee submitted a report to the General Assembly. It was apparent that there were major differences among states over the International Law Commission draft and that there was therefore need for further discussion. The *Ad hoc* committee also recommended that discussions needed to be combined with the drafting of the text of the statute in order to prepare a consolidated text for the conference of plenipotentiaries. As a result, at its 50th Session in 1995, the General Assembly adopted resolution 50/46 of 11 December 1995 where it established the preparatory committee on the establishment of the International Criminal Court. The mandate of the preparatory committee, which was open to all UN member states and specialised agencies, was to prepare a ‘widely acceptable consolidated text of a convention for an

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international criminal court.'\(^ {307}\) In preparing the text the preparatory committee was required to be guided by the draft prepared by the International Law Commission. The preparatory committee was also required to take into account comments made by states on the International Law Committee draft, the report of the ad hoc committee and the contributions of other organisations.\(^ {308}\)

The Preparatory Committee on the Establishment of an International Criminal Court met from 25 March to 12 April and from 12 to 30 August 1996 and began preparing a widely acceptable consolidated text of a statute for an international criminal court. By paragraphs 3 and 4 of its resolution 51/207 of 17 December 1996, the General Assembly reaffirmed the mandate of the Preparatory Committee. In its resolution 52/160 of 15 December 1997, the General Assembly requested the Preparatory Committee to continue its work. In accordance with the terms of resolution 51/207, the committee met from 11 to 21 February, 4 to 15 August and 1 to 12 December 1997, and from 16 March to 3 April 1998.

At the end of its meetings the Preparatory Committee adopted the text of a draft statute on the establishment of an international criminal court and submitted it for consideration by the diplomatic conference of plenipotentiaries. The draft statute submitted by the preparatory committee had 116 articles.\(^ {309}\) Various changes had been made to the International Law Commission draft and a few of the original articles remained intact. Articles with disagreed language were indicated in brackets. John Washburn reckons that the draft statute had 1,700 brackets.\(^ {310}\) Most of the articles included alternative provisions.

\(^ {308}\) ibid.
The preparatory committee draft, for example had brackets around the definition of the crime of aggression as well as three options of how this crime might be defined. It also had a lot of brackets around provisions related referrals by the Security Council in Article 6 and the role of the Security Council and the relationship between the Security Council and the court in Article 10. All these clauses showed how difficult these issues would be to negotiate. Indeed, these issues proved difficult to conclude and the role of the UN Security Council in referring cases to the court and the way the Security Council has gone about this role is one of those issues that have caused consternation among African states.

Meanwhile, by resolution 52/160 of 15 December 1997, the General Assembly had decided that the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court would be held at Rome from 15 June to 17 July 1998, to finalise and adopt a convention on the establishment of an international criminal court. The diplomatic conference was attended by 160 states.

An unprecedented feature of the last steps in the efforts to create an international criminal court was the involvement of Non-Governmental Organisations (NGO) in the processes. NGOs were involved in the preparatory committee and in the diplomatic conference pursuant to General Assembly resolution 52/160. The acceptance of the participation of NGOs in the conduct of international affairs by states provides insight into the modern view of the status of non state actors in international law. Previously, the act of negotiating a treaty would have been regarded is outside the purview of non state actors. In 1998, although only to the extent as provided under resolution 52/160, NGOs found themselves making extensive contributions in the negotiations for a treaty to establish the international criminal court.

Various working groups were established to deal with the various parts of the draft statute. For example working groups were established to deal with general principles of criminal law, investigation and prosecution, the trial, penalties, appeal and review, International cooperation and judicial assistance, enforcement and applicable law. The
more difficult matters such as the jurisdiction of the court and the role of the Security Council were left in the hands of the Committee of the Whole.

In addition to the influence of NGOs well organised under the Coalition for the International Criminal Court, Professor Schabas refers to various positive and negative influences by some states and caucuses at the diplomatic conference, which made the negotiations difficult.\textsuperscript{311} The Non Aligned Movement caucus insisted on inclusion of the crime of aggression.\textsuperscript{312} The caucus of Arab and Islamic states insisted on prohibition of nuclear weapons and inclusion of the death penalty.\textsuperscript{313} The Southern Africa Development Community (SADC) led by post apartheid South Africa took various human rights positions.\textsuperscript{314}

The USA on the other hand threw spanners in the works at every opportunity and tried to rally opposition to the establishment of a permanent international criminal court.\textsuperscript{315} Consequently, in critiquing the work of the ICC so far, it should always be remembered that as a product of extensive compromise the ICC is far from perfect.

\section*{2.24. Conclusion}

Attempts at establishing individual criminal responsibility for violations of international law are centuries old. The development of the normative framework for conduct that qualifies as war crimes and crimes against humanity today, began to take shape with the conclusion of the Hague Conventions of 1899 and 1907. Still in force, these conventions set out the rules for land warfare and created a firm foundation upon which subsequent treaties were built. From the first recorded international criminal trial discussed above, the failed attempts to try the Kaiser after the First World War and the Nuremberg and Tokyo trials after World War 2, it can be seen that early enforcement of

\begin{flushleft}
\textsuperscript{311}Ibid. \\
\textsuperscript{312}Ibid. \\
\textsuperscript{313}Ibid. \\
\textsuperscript{314}Ibid. \\
\textsuperscript{315}Ibid. \\
\end{flushleft}
international criminal law was achieved mainly through victors’ justice. This criticism of victors’ justice was overcome when in 1993 the ICTY was established through a resolution of the UN Security Council with a mandate to try both sides to the conflict. Unlike in the past, for the first time in the implementation of international criminal law, the tribunal was imposed on both sides to the conflict and by the UN, an outside power.\textsuperscript{316}

It can be observed that after 1946 efforts to codify certain international criminal offences and consolidate individual criminal responsibility for these international crimes ran parallel to the efforts to establish an international criminal court in the initial stages. Yet, as Schabas\textsuperscript{317} and Bassiouni\textsuperscript{318} argue, the two processes are hardly independent of each other. They are intricately intertwined. From 1954 after the General Assembly passed resolution 898 (IX) the processes of defining international crimes and establishing an international criminal court were merged. The early hope created by the Nuremberg and the Far East Tribunal resulted in a flurry of activity in the late 1940s and early 1950s. However, any hope for further advances in international criminal justice quickly vanished as the Cold War hindered progress on developments in codification of international law and creating the institutional framework to enforce international criminal law.

During the period between the end of the Second World War and the end of the Cold War around 1990, a number of wars were fought and atrocities were committed, but no tribunals were set up to try international crimes committed. The Cold War stymied efforts at international criminal law making in the international community. As we can see from the discussion above, at sparse intervals, very tentative discussions continued to take place through the work of a small group of academics, the International Law Commission and in some of the sessions of the General Assembly. According to


Bassiouni, justice was the Cold War’s casualty.\textsuperscript{319} All the efforts on the international criminal court that were led by the UN in the post Second World War period were closely linked with efforts to codify certain international crimes.

The end of the Cold War heralded opportunities for concrete developments in international criminal adjudication. New initiatives in the form of ad hoc tribunals established in connection with conflicts in the former Yugoslavia and Rwanda showed that a permanent international criminal court was needed to fight impunity and establish an effective mechanism for accountability for war crimes, crimes against humanity and other egregious human rights violations. More importantly, the successes of these \textit{ad hoc} tribunals showed that an international criminal could be successfully established. In a way, this had a profound effect on who were opposed to the international criminal court based on doubts as to the feasibility of the project. Efforts to establish a permanent international criminal court took new urgency with the creation by the General Assembly, of an \textit{Ad Hoc} Committee on the Establishment of an International Criminal Court in 1994. Within a very short space of time, in July 1998, a diplomatic conference of plenipotentiaries in Rome adopted the Statute of the International Criminal Court.

The new urgency that started in 1994 should not be seen as a new initiative but merely the continuation of work that had started centuries before. Although they were four centuries apart, the von Hagenbach trial provided lessons to the Allies as the sought to include the arraignment of the Kaiser in the Treaty of Versailles. The failed attempts to prosecute the Kaiser after the First World War also provided lessons to the London Agreement and the Charter of the International Military Tribunal. The Nuremberg Tribunal and the International Military Tribunal for the Far East would lay the foundations for the future \textit{ad hoc} tribunals. In turn, the \textit{ad hoc} tribunals that include the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda established in 1993 and 1994 respectively by the United Nations Security Council under Chapter VII of the UN Charter set the basis for the creation of the

\textsuperscript{319}\textit{Ibid.}
International Criminal Court. No doubt, delegates at the diplomatic conference had much to learn from all the previous efforts.
Chapter Three

Controversy over Selection of Situations and Cases and its Effect on the Legitimacy of the Court and the Future of International Criminal Justice

3.1. Introduction

The coming into force of the Rome Statute and the establishment of the International Criminal Court (ICC) orchestrated a drumbeat of high expectations. The creation of the ICC raised hopes that henceforth international crimes would be prosecuted in a credible and consistent manner outside a context of power politics.\textsuperscript{320} African states that fervently supported the creation of the ICC believed, among other things that the event marked a departure from the victor’s justice that characterised not only the Nuremberg and Tokyo tribunals, but also the ad hoc tribunals for Rwanda and the former Yugoslavia.\textsuperscript{321}

The ICC was largely expected to be an independent judicial institution operating according to the basic requirements of the rule of law that include the principle of separation of powers. On the face of it, the ICC would have jurisdiction over crimes committed on the territory or by nationals of all states parties without distinction. The ICC would also deal with all grave situations where peace and security was endangered that were referred to it by the UN Security Council. Kofi Annan, who was then the United Nations Secretary-General, described the ICC as ‘a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.’\textsuperscript{322}

\textsuperscript{322} UN Doc. Press Release L/2890, 20 July 1998.
The jury is still very much out on whether such expectations have or have not been met. It seems, however, that during the slightly over one decade of its existence, the court has been dogged by controversies more than progress towards the much hoped for ‘forward march towards universal human rights and the rule of law’. Since its establishment, the ICC has come under heavy criticism for improper selectivity to the extent that some critics have argued that the ICC is undergoing a crisis of legitimacy.323

The improper selectivity for which the ICC is criticised relates to the emphasis that the prosecutor appears to be placing on Africa and African leaders. While investigating situations in Africa, the prosecutor seems to be ignoring situations on other continents that deserve the attention of the ICC. The appearance of focusing attention on Africa has attracted allegations of double standards. The court has been accused of arbitrariness and improper selectivity in applying the law to the disadvantage of weak and poor African states.

The mechanisms for triggering the involvement of the court in a state and the application of these mechanisms in practice so far have been the cause of much consternation among African governments. There has been controversy over the use of prosecutorial discretion as well as alleged shoddy collection of evidence by the office of the prosecutor.

This chapter highlights the more pertinent controversial issues that have arisen as a result of the cases that the ICC has opened in Africa and in the process attempt to answer the following questions: Is the ICC targeting weak and poor African states that do not enjoy the protection of the UN Security Council? Has the ICC suffered politically because of the charges that it has so far selectively targeted weak and poor African states?

The process of answering these questions will in turn help to establish whether current disagreements and resentment of the court’s selection decisions have reached the point where the ICC may be said to be suffering from a crisis of legitimacy. The controversies that the ICC has courted as a result of its case selection are discussed in the context of debates over the court’s legitimacy. It is argued that the controversies that the ICC has courted have not helped to enhance the legitimacy and effectiveness of the court at a time when it is trying to establish itself as a relevant and critical player in international criminal justice.

3.2. The Notion of Legitimacy in International Criminal Justice

3.2.1. An overview
Writing in the context of international environmental law in 1999, Daniel Bodansky pointed out that the question of legitimacy would ‘emerge from the shadows’ to become a central issue.324 Before then, the question of legitimacy was a concern in the domestic sphere and very rarely in international governance. It is only in recent times that the question of legitimacy in international law and international institutions has started to gain currency.

According to de Guzman, the study of institutional legitimacy in international governance is a vast and rapidly growing field of scholarly inquiry.325 This recent interest in legitimacy in international governance could be attributed to the emerging international legal order that addresses not merely states and state interests but individuals as well. As we can glean from the historical analysis of developments leading to the establishment of the ICC, persons and peoples are now at the core of the international legal order, and a non-sovereignty-based normativity is manifesting itself.326

However, as Steven Bernstein points out, most of the works tend to make passing references to the notion of legitimacy rather that making systematic analysis of the concept. In addition, current scholarship on the question of legitimacy in international governance tends to draw from diverse disciplines of study that include political science, philosophy, law and sociology. This has tended to produce a good measure of confusion of the meaning as well as the indicia of the notion of legitimacy.\textsuperscript{327}

With specific reference to the ICC, the initial legal enthusiasm and excitement over the pushing of frontiers in the normative and institutional development in international criminal justice has somehow ebbed. The debate has now shifted to more critical examination of the court’s work, including a possible crisis of legitimacy being suffered by the court. Activists that both support or oppose the ICC have started to critique and examine prosecutorial initiatives and judgments of the court. Legal scholarship has shifted to examination of the legal and moral justification of the decisions of the office of the prosecutor as well as the quality of justice that is dispensed by the court as a whole. Though couched in many different ways, it is clear that the central issues addressed in the critiques relate to the legitimacy and efficacy of the court.

It is important at this juncture to define legitimacy briefly and articulate the various elements or indicia of the notion of legitimacy. The legitimacy of the court will then be measured against these indicia. At this point in time, the legitimacy of the ICC is not obvious. It is a subject of intense debate. It seems that the debate over the legitimacy of the ICC will continue for a while.

The notion of legitimacy is a contested site and is often given several meanings in international scholarship.\textsuperscript{328} Rather than make a passing reference to legitimacy, this

\textsuperscript{327} Steven Bernstein, ‘Legitimacy in Global Environmental Governance’, (2005) 1 Journal of International Law & International Relations 139.

chapter will flesh out some of the salient elements of legitimacy and define the point at which an institution may be said to be suffering from a legitimacy crisis in order to allow for empirical application of the notion to the perceptions that the different stakeholders of the ICC hold towards it.

Some clarification of the meaning that is adopted for the purposes of this discussion is necessary before we go on to look at how the various issues related to the decisions made by the ICC in the selection of situations and cases that might stack up to these notions. Specifically, we shall identify the indicia for normative and sociological approaches to legitimacy and then evaluate the ICC’s selection decisions in light of these approaches.

3.2.2. Defining the notion of legitimacy
In the context of the ICC, legitimacy may be defined as justification of authority or justification for the exercise of authority by the court. Vivienne Collingwood posits that discussion of the legitimacy of an action or behaviour involves considering the rightfulness of an action or behaviour undertaken by the appropriate authority, in line with an agreed set of rules, and with appropriate or intended effects. The concept is multi-layered, simultaneously implying the constitution and existence of proper authority and the perception that the exercise of the authority in question is legitimate. In this respect, legitimacy has as much to do with constitutional principles as with personal opinions and morals. Consistent with this form of definition, Jean d’Aspremont and Eric De Brabandere propound two dimensions of legitimacy that include legitimacy pertaining to the source of power and legitimacy related to the exercise of power.

329Daniel Bodansky, *ibid*.
In fact, by most accounts, the theory of legitimacy is proffered in these two dimensions that are usually characterised as procedural or normative legitimacy on the one hand and sociological or substantive legitimacy on the other hand. Consistent with this popular approach, the examination of the questions of legitimacy and effectiveness of the court will differentiate between those arguments that are concerned with the structure or constitutional authority of the court or the content of the Rome Statute and those arguments that are focused on the operation of the court, in particular, the way the Rome Statute is being implemented.

3.2.3. Procedural or normative legitimacy of the ICC

Normative legitimacy involves an enquiry into the bases upon which the ICC’s stakeholders or constituency accept the authority of the court. In most domestic legal systems, laws get their normative legitimacy by reason of the fact that they are passed by the legislature which is elected for that purpose by the general population. There is a very direct and clear electoral foundation for the lawmaking exercise by parliament. No such link exists in respect of international law as there is no international legislative authority.

Normative legitimacy deals with the procedures that transform a norm into a legal norm. Spelt out differently, normative legitimacy addresses the procedures for the establishment of an institution that invest the institution with authority and therefore make the institution worth of obedience. Consequently, normative legitimacy involves the question of lawfulness or legality. The authority of the ICC to impose a set of rules by which individuals and states must abide with or regulate their conduct can be


established by objective criteria. A determination of the normative legitimacy of the ICC therefore involves an objective test.\textsuperscript{335}

There are several indicators of normative or procedural legitimacy. Sandholtz submits that institutions such as the ICC acquire procedural legitimacy when they are established by means and procedures that are regarded as consistent with accepted norms and standards.\textsuperscript{336} Also, if the purposes for which the institution is established are objectively regarded as consistent with the broader norms and values of international society, then the legitimacy of the institution is obvious.\textsuperscript{337} An important measure of the legitimacy of an international institution is the extent of opposition to its establishment. Put differently, consensus in a constituency or among stakeholders may be used as an indicator of legitimacy of an international institution.

The measurement of consensus may adopt a ‘state centric’ view or a ‘citizen centred’ view. In this respect, traditional critics may measure the legitimacy of the ICC in terms of the number of states that have ratified the Rome Statute to determine the degree of consensus among states.\textsuperscript{338} Cosmopolitan critics, on the other hand, measure the legitimacy of the ICC in terms of the degree of support that the ICC enjoys among individual citizens. The cosmopolitan moral view holds that individuals are the ultimate moral worth and are entitled to equal and impartial concern regardless of nationality.\textsuperscript{339}

In the case of the ICC, the source of its power is in the most part not contested by states that are parties to the Rome Statute. The consent of states through ratification of the Rome Statute is the basis for the legitimacy of the ICC pertaining to the source of power of the court. In this respect, the ICC acquires its procedural legitimacy by reason

\textsuperscript{335} Hitomi Takemura, Note 316 above.
\textsuperscript{337} Ibid.
\textsuperscript{339} Ibid.
of its establishment according to recognised existing rules and procedures. There is also evidence that might be called upon as proof of widespread support for the Court throughout the world. The Rome Statute was adopted after the majority of states at the Rome Conference voted in favour of the Statute. More than half of the 191 member states of the UN are now States Parties to the statute. As we noted in Chapter 1, many of the people, governments and non-governmental organisations that initially embraced the ICC with a lot of hope and enthusiasm were African.

Even though there are some recriminations over the ICC in Africa, the great majority of people are not opposed to the idea of a permanent independent international criminal court. Jean Ping, then Chairperson of the AU Commission, is widely quoted as having stated that “we Africans and the African Union are not against the International Criminal Court. That should be clear. We are against Ocampo who is rendering justice with double standards.”

To date more than half of all African states have ratified the Rome Statute, and many have taken proactive steps to ensure effective implementation of its provisions. With 34 states parties, out of 54 countries, Africa is also the largest regional grouping in the Assembly of States Parties; four ICC judges are African, including the first Vice President; and in June 2012, Fatou Bensouda, a Gambian national, assumed the office of the Prosecutor, having served as Deputy Prosecutor.

However, there are a few issues surrounding the establishment of the ICC that have caused questions to be raised on the authority of the court. It is important to note that most of the issues related to the original legitimacy of the ICC may not be within the control of the court. Although most of the issues are the responsibility of states parties

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341 As at 15 June 2016, out the total number of 124 states parties, African states are 34; 19 are Asia-Pacific states; Eastern Europe states 18; Latin America and Caribbean states 28; and Western Europe states and others 25. The information on ICC membership is available on the website of the ICC Assembly of States Parties at https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx
or the UN Security Council, they have had a negative effect on the legitimacy of the court.

Ainley has argued that the ICC was not automatically gifted with legitimacy from the beginning because the Rome Statute was not adopted by consensus at the Rome Conference as many had hoped for.\textsuperscript{342} As stated above, consensus in a constituency may be used as a measure of legitimacy. The adoption by consensus of the Rome Statute at the conclusion of the Rome Conference might have helped to automatically clothe the ICC with legitimacy from the beginning. Instead, the Rome Statute was adopted after the majority of states at the Rome Conference voted in favour of it. That majority did not include countries with large populations such as the US and China, which voted against it, nor India, which abstained, as well as Indonesia.\textsuperscript{343}

Hoile argues that states parties to the Rome Statute account for only about 27% of the world population.\textsuperscript{344} It follows that 70% of the world population is outside the jurisdiction of the court in the absence of the intervention of the UN Security Council.\textsuperscript{345} Referring to the number of states that have ratified the Rome Statute, the head of the European Commission Delegation to the UN also decried the lack of a ‘critical mass to ensure universalisation’ of the ICC.\textsuperscript{346} This lack of a critical mass is a matter that will continue to be raised by those opposed to the ICC in order to undercut the normative legitimacy of the court.

The case for the normative legitimacy of the ICC is not helped by the fact that even though more than half of the 193 member states of the UN are now parties to the statute, the big players in global politics remain either absent or actively opposed. The three most powerful states with permanent seats on the UN Security Council, the US,

\textsuperscript{342}Kirsten Ainley, \textit{ibid.}
\textsuperscript{343} \textit{Ibid.}
\textsuperscript{344} David Hoile, \textit{ibid.}
\textsuperscript{345} \textit{Ibid.}
China and Russia, have not ratified the treaty. Non-European nuclear powers such as Pakistan and North Korea have also not ratified the Rome Statute. The non-membership of the major powers including three of the five permanent UN Security Council members has tended to drag down the normative legitimacy of the ICC.

The Assembly of States Parties is dominated by European, African and Latin American states, which under normal circumstances might be marshalled as proof of widespread support for the Court. It can, however, not be denied that this seemingly widespread support is not by any stretch of imagination, proof of global consensus which would easily guarantee both power and legitimacy to the Court. The lack of global consensus becomes clearer if one considers the current situation where African states, the largest block within the Assembly of States Parties, have, over the past few years, been questioning the selection of situations by the court in ways which effectively raise critical questions over the legitimacy of the court.

Nouwen’s point about the inequality among states during the negotiation of the Rome Statute could be relied upon to impugn the procedures that were employed in the establishment of the ICC and therefore the procedural legitimacy of the court. Nouwen observes that most of the negotiations and drafting of the Rome Statute took place in various small informal working groups set to deal with a specific aspect of the Rome Statute. Smaller states that had small delegations and had language limitations were unable to participate and influence the discussions in these working groups.

Agreements that were reached in these informal groups were presented to all states in the plenary, including those that were unable to attend, as fait accompli. Most Western states that had large delegations were able to influence discussions in all the informal

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348 ibid.
working groups. France, for example, had 45 delegates and USA had 52 representatives and advisers. Chad, Eritrea and Liberia had 1 delegate each while Malawi, Mali, Rwanda and Namibia had 4 delegates each. States with small delegations missed most of the working groups and therefore the opportunity to influence the negotiations and outcome of the Rome Conference.

The size of the delegation, which made it impossible for weaker states to participate in working groups and language limitations which made it impossible for the weaker states to be meaningfully involved in the discussions, made it impossible for weaker states to participate on an equal basis with the more powerful and resourced states. The difficulties faced by smaller states with smaller delegations is aptly captured by Farhan Haq as he quotes a representative of one of the smaller countries' remarks: 'I can't keep up. I have to be everywhere at once.' Moreover, lack of other material resources to back up the delegations also made it difficult for smaller countries to keep up to speed with discussions. Farhan Haq quotes one delegate from a small European nation expressing the view that in addition to significant human resources, ‘you still need faxes, computers, an entire arrangement that most, smaller delegations simply don't have here.'

The larger delegations bombarded the conference with a flood of proposals, which kept the delegations of the smaller nations behind on the negotiations as they needed to study and review the proposals. Haq quotes one ambassador as having made the claim that many informal consultations were being conducted only among Western

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349 Ibid.
351 Sarah Nouwen, ibid.
353 Ibid.
354 Ibid.
states and that this was intentional.\textsuperscript{355} Nouwen suggests that the inequality in participation during the negotiations for the Rome Statute among states may be responsible for the apparent inequality in the application of the Rome Statute.\textsuperscript{356} The exclusion of the smaller states from most of the informal working groups where most of the clauses in the Rome Statute were agreed, tends to detracts from the normal argument of the original legitimacy of the ICC that is based on the theory that 191 sovereign states participated in the drafting of the Rome Statute on an equal basis and were free to ratify or not to ratify the statute.

The central role played by Non-Governmental Organisations (NGOs) in the establishment of the ICC has been raised to both prove and disprove consensus and therefore the normative legitimacy deficit of the ICC.\textsuperscript{357} Organised under the Coalition for the International Criminal Court, over 200 NGOs attended the 1998 Rome Conference and participated in negotiations for the Rome Statute.\textsuperscript{358} The Coalition for the International Criminal Court now includes 2500 NGOs in 150 different countries that continue to participate in meetings and conferences of the Assembly of States Parties and aggressively lobby for ratification of the Rome Statute.\textsuperscript{359} NGOs continue to be involved in the affairs of the ICC through the assistance that they extend to the office of the prosecutor in carrying out investigations. The involvement of NGOs in investigations was a cause of controversy in the Lubanga case.\textsuperscript{360}

\begin{thebibliography}{9}
\bibitem{355} Ibid.
\bibitem{356} Ibid, Sarah Nouwen, \textit{ibid}.
\bibitem{358} See website of the International Coalition for the International Criminal Court at http://www.iccnow.org/?mod=coalition
\bibitem{359} ibid.
\bibitem{360} \textit{The Prosecutor v Thomas Lubanga Dyilo}, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842.
\end{thebibliography}
If we take the cosmopolitan view, the central role played by NGOs might be a legitimating factor for the ICC since NGOs are made up of individual citizens of different countries. The direct involvement of individual citizens in the formulation of the Rome Statute as well as its implementation shows the support that citizens have for the ICC. This support by individual citizens bestows the ICC with normative legitimacy. If we take the realist state-centred view, however, the influence of NGOs acts as a drag on the ICC’s legitimacy. Unlike states, NGOs are composed of individuals that are not democratically elected. They are not accountable to any particular constituency apart from their members, direct beneficiaries and their donors. The central role played by NGOs may therefore be inimical to the legitimacy of the ICC.\(^{361}\)

Questions have also been raised as to the legitimacy of the ICC when it proceeds on the basis of UN Security Council referrals against citizens of states that are not parties to the Rome Statute or have not consented to the jurisdiction of the Court in terms of Article 12(3) of the Rome Statute.\(^{362}\) The position of the UN Security Council has not been helped by the fact that the permanent members of the Security Council wield immense powers in the referral process when three out of the five permanent members are not parties to the Rome Statute. It does not seem right in the eyes of most people that three of the five permanent members of the UN Security Council can refer citizens of other countries to the ICC while they enjoy the power to veto any referrals of their own citizens or close allies to the ICC.

As a member of the permanent five members of the UN Security Council, the USA enjoys the powers to refer to the ICC for prosecution, citizens of other countries that may not be parties to the Rome Statute while it wields the power to veto any attempt to refer any of its nationals. Furthermore, under the American Service Members’ Protection Act, the USA president is authorised to use ‘all means necessary and appropriate to bring about the release’ of US nationals or nationals of allied states

\(^{361}\) Jeff Handmaker, \textit{ibid}.

covered by the US, that may be detained or imprisoned in connection with the jurisdiction of the ICC.\textsuperscript{363} For example, given the close relations between the USA and Israel, it is most likely that the USA would use \textit{all means necessary}, including military force, to secure the release of any Israeli military personnel that may be detained for purposes of being surrendered to the ICC. The fact that states like the USA seem to have the best of both worlds has caused some consternation among other states. Most weak states including African states that supported the establishment of the ICC saw the ICC as their hope for holding more powerful states accountable and fostering the rule of law in international affairs, which is necessary for the protection of the weaker states. As the hope for an international court capable of treating like situations of egregious crimes alike and holding powerful states to account disappears among African states, so does the normative legitimacy of the ICC.

The five permanent members of the UN Security Council have shown that they will not be shy to exercise their veto powers where any referral is not desirable to them through various means. Recently, despite widespread support by more than 58 states\textsuperscript{364} and over 100 NGOs for the French draft resolution to refer the situation in Syria to the ICC\textsuperscript{365}, on 22 May 2014, Russia and China vetoed the UN Security Council resolution to refer Syria to the ICC. Furthermore, both resolutions 1593 referring the situation in Darfur and resolution 1970 referring the situation in Libya to the ICC contain a clause that exempts nationals of non-member third countries who might be implicated in crimes committed in the referred states. This practice of exempting nationals of some states that are not parties to the Rome Statute while subjecting nationals of other states that are equally not parties to the statute undercuts the ICC’s appearance of impartiality and

\textsuperscript{363} Section 2008, \textit{American Service Members’ Protection Act.}
\textsuperscript{364} The 58 States include Albania, Andorra, Australia, Austria, Belgium, Botswana, Bulgaria, Cape Verde, Chile, Cook Islands, Costa Rica, Cote d’Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ghana, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Libya, Liechtenstein, Lithuania, Luxembourg, Maldives, Malta, Marshall Islands, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, San Marino, Samoa, Seychelles, Slovakia, Slovenia, Spain, The Former Yugoslav Republic of Macedonia, Tunisia, United Kingdom, Uruguay, Switzerland.
independence.\textsuperscript{366} Human Rights Watch has criticised the practice of including this exemption clause and pilloried the UN Security Council for ‘inconsistency’, ‘selectivity’ and ‘double standards’.\textsuperscript{367}

States that are not parties to the Rome Statute are particularly aggravated by UN Security Council referrals especially as the question is increasingly being asked as to whether the Security Council as an institution has the necessary legitimacy in terms of its composition to take certain decisions.\textsuperscript{368} Former Secretary-General Kofi Annan, in his report ‘\textit{In Larger Freedom}’ also criticised the lack of legitimacy of origin of the Security Council, by stating ‘the Security Council has increasingly asserted its authority and, especially since the end of the cold war, has enjoyed greater unity of purpose among its permanent members but has seen that authority questioned on the grounds that its composition is anachronistic or insufficiently representative’.\textsuperscript{369} The Secretary-General therefore suggested to make it more broadly representative of the international community as a whole.

The politics of the UN Security Council, which is dominated by the USA, a state that is not party to the Rome Statute, but wields power to decide on referrals of other states will continue to be a problem for the ICC. Furthermore, as a rising power in global politics and within the UN Security Council, China seems to be keen to flex its muscles. It is not far-fetched to assume that China’s rising power is responsible for the situation where the ICC has said nothing about China’s failure to cooperate with the ICC even though President Bashir has visited China more than once and the visits are widely reported. As a member of the UN Security Council, which voted in favour of referring the situation in Sudan to the ICC, the least that China is expected to do is to allow President

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\textsuperscript{367}Ibid.
\textsuperscript{369} Report of the Secretary-General, ‘\textit{In larger freedom: towards development, security and human rights for all}’, UN Doc. A/59/2005 (21 March 2005), para. 165.
\end{flushleft}
Bashir to visit and to roll out the red carpet for him and to afford him all the diplomatic respects and ceremony accorded to visiting heads of state.

Moreover, there are questions as to the degree of freedom that weaker states were able to exercise to ratify or not ratify the Rome Statute as pressure was brought to bear on them from the European Union and the United States of America. On the one hand, pursuant to the provisions of the revised Partnership Agreement between the European Union (EU) and the African, Caribbean and Pacific (ACP) countries, development assistance from the European Union to the ACP partners was made conditional upon ratifying the Rome Statute. 370 On the other hand, one of the UN Security Council permanent members, the USA, continues to use inducements and threats of armed attacks against any state that might contemplate surrendering US citizens accused of crimes within the jurisdiction of the ICC to the court.

Since 2002, the US has sought to ensure immunity of US nationals from prosecution by the ICC by negotiating bilateral immunity agreements with other countries. Countries that sign these agreements agree not to surrender Americans accused of committing international crimes to the jurisdiction of the ICC. As a leverage, in 2002 the US Congress passed the American Service Members Protection Act, by which the US government threatened termination of economic aid, withdrawal of military assistance, and other painful measures against countries that chose to ratify the Rome Statute as well as those that refused to sign the bilateral immunity agreements.

Sarah Nouwen attributes the fact that Africa has the largest number of states parties to the Rome Statute as well as the largest number of states that have concluded bilateral immunity agreements with the USA to the carrot that the EU dangled through the Cotonou Agreement 371 and the big stick that the US wielded through the American


Service Members Protection Act.\textsuperscript{372} For some states parties to the Rome Statute, especially the ones that are regarded as weak and do not occupy important positions in the international community, consent to the creation of the court’s jurisdiction is more of a fiction than a reality.\textsuperscript{373}

Consequently, the original legitimacy of the Rome Statute based on the consent of sovereign states to be bound by the statute, particularly African states, can be questioned on the basis that there was tremendous pressure that was brought to bear on the African states through a mixture of measures made up of mostly incentives and threats from the European Union and the USA.

Related to the lack of informed consent and consensus among states in the adoption of the Rome Statute and limited participation by weaker states in the drafting and negotiation of the statute, is the phenomenon suffered by most African states of ratifying international human rights treaties without first sufficiently understanding the nature of the obligations imposed by the treaties. Nouwen calls such states ‘sleep walking ratifiers.’\textsuperscript{374} One of the causes of this phenomenon is that some states ratify human rights instruments in order to gain acceptance and recognition by the international community. In interviews with government officials in Uganda carried out during research for her recent book, Nouwen found out that relevant ministers had never read the Rome Statute prior to ratification and referral of the Lord’s Resistance Army to the ICC.\textsuperscript{375} It was only after the ICC process was seen as an obstacle to the peace process with the LRA that government ministers sought to understand the Rome Statute and the consequences of ratifying it.\textsuperscript{376}

The phenomenon of ‘sleep walking ratifiers’ seems to have extended further to self referrals. Governments that have referred situations in their own states to the ICC, such

\textsuperscript{372} Sarah Nouwen, \textit{ibid}.
\textsuperscript{373} \textit{Ibid}.
\textsuperscript{374} \textit{Ibid}.
\textsuperscript{375} Sarah Nouwen, ‘\textit{The Catalysing Effect of the International Criminal Court in Uganda and Sudan}’, (Cambridge: Cambridge University Press, 2013).
\textsuperscript{376} \textit{Ibid}.
as Uganda CAR and DRC do not seem to have fully understood the consequences of such referrals before making the referrals. In addition to reasons of self-preservation cited elsewhere in this thesis, there exists the possibility that such states were tricked or induced one way or the other, by powerful European states into making the referrals. After discovering the full extent of the consequences, including the possibility that such referrals might jeopardize peace efforts, the states sought to reverse course.

Informal discussions with civil society activists and some members of the public in Nairobi also suggest that the events leading up to the ICC being seized with the case of the situation in Kenya point to the phenomenon of sleep walking ratifiers in operation. The Commission of Inquiry set up to investigate the post 2007 elections violence in Kenya had recommended the establishment of a Special Tribunal, to be set up by statute, to deal with such cases. In an effort to leverage domestic prosecution of the cases, the Commission of Inquiry had further recommended the referral of the post-elections violence matters to the ICC in the event of a failure to establish a Special Tribunal.

Without enough knowledge of the operations of the ICC or the consequences of referring the cases to the ICC, the majority of the public opposed the establishment of the Special Tribunal and supported referral to the ICC. Also, the defeat in Parliament of the government sponsored bill and thereafter a private members’ bill to establish the Special Tribunal was not based on sufficient knowledge on the part of the majority of the parliamentarians of the consequences of going down this road. As a result, it was only after the ICC process had started and the consequences of ICC involvement dawned on the nation that on 5 September 2013, the Kenya National Assembly passed a motion for withdrawal from the ICC.

The phenomenon of ‘sleep walking ratifiers’ seems to have extended further. The coming into force of a new era of deeper respect for the rule of law and human rights and non-tolerance to impunity in Africa ushered in by the African Union and its Constitutive Act makes it easy to explain the tremendous interest in the Rome Statute
displayed by African states early on. But, if one considers the phenomenon of ‘sleepwalking ratifiers’, and the threats and incentives by the EU and the USA, we can see that there were other push factors besides a commitment to the struggle against impunity that explain the large numbers of African states that ratified the Rome Statute. The opposition to the ICC by states that were early supporters of the court attests to the fact that some states ratified the Rome Statute without adequately informing themselves of the consequences of doing so.

The undue delays in finalising the terms of the ICC’s jurisdiction over the crime of aggression speaks volumes of the super powers’ attempts to bend and fashion international law as they like in order to excuse themselves from being held accountable for their aggressive use of force over the years. At the time of negotiating the Rome Statute there was a lot of international jurisprudence on the crime of aggression. As we saw in Chapter 2, Article 231 of the Treaty of Versailles affirmed that the First World War was imposed ‘by the aggression of Germany and her allies,’ and Article 227 publicly arraigned the German Kaiser ‘for a supreme offence against international morality and the sanctity of treaties.’

During the Nuremberg trials, the defendants were indicted under Article 6 of the Charter of the International Military Tribunal, which established individual criminal responsibility for, inter alia, ‘crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression...’ The substance of the other charges was also based on the premise that aggressive war was proscribed by the international community. In its judgment, the International Military Tribunal at Nuremberg held that ‘to initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.’ The UN Charter was drafted to reflect this outlook, by unconditionally prohibiting any recourse to force by a state except in self-defence - narrowly defined as a response to a prior armed attack.
At the first session of the UN General Assembly convened in New York, a few weeks after the Nuremberg judgment, the Charter of the International Military Tribunal and its judgment were recognised following a call by the Secretary General to make the principles implied in the Nuremberg trials a part of international law ‘as quickly as possible...in the interest of peace and in order to protect mankind against future wars.’

Throughout the history of the attempts to develop a Draft Code of Offences against the Peace and Security of Mankind and to establish a permanent international tribunal with criminal jurisdiction, the question of peace and prevention of aggressive wars was cited as a major factor driving the movement. For example at the first session of the UN General Assembly the US President, Mr. Truman stated the view that ‘a code of international criminal law to deal with all who wage aggressive war ... deserves to be studied and weighed by the best legal minds the world over.’

It is noteworthy that by resolution 3314 (XXIX), of 14 December 1974, the General Assembly of the UN approved by consensus the definition of aggression. The draft Code of Crimes against the Peace and Security of Mankind, which, while non-binding, has been affirmed by the tribunal for the former Yugoslavia as authoritative as it is a reflection customary international law also, provides some clarification on the crime of aggression.

Despite all the precedents, it took an unduly long period of time for states to reach agreement on the definition of the crime of aggression and bringing the crime within the jurisdiction of the ICC. From the time of entry into force of the Rome Statute to the time that the Review Conference was held in Kampala from 31 May to 11 July 2010, it took states parties to the Rome Statute close to eight years to finally come to an agreement

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378 Ibid.
over a definition of the crime of aggression and mechanisms for the exercise of jurisdiction over the crime by the ICC. Even after all these matters were agreed upon and amendments to the Rome Statute effected, the court was still not able to exercise jurisdiction over the crime of aggression immediately. For the amendments to enter into force, they need to be ratified or accepted by at least 30. The amendments only take effect for the state party one year after the instrument of ratification is deposited.

Dapo Akande has noted that ratification of the Kampala amendments seems to be going slowly. By the end of 2012, almost two years after the amendments were adopted, only 3 states - Liechtenstein, Samoa and Trinidad & Tobago had ratified the amendments. By the end of September 2013, only 11 states had ratified the Kampala amendments. Given the fact that the amendments only take effect for each state party one year after ratification, the question that arises is whether the 30 ratifications will be achieved by 2016 for the amendments to enter into force in 2017.

Even after attaining the 30 ratifications, there are two further conditions that must be satisfied before the court can exercise jurisdiction over this crime. The amendments only take effect for each state party one year after the instrument of ratification is deposited. Furthermore, after securing the 30 ratifications, the states parties still need to make a decision on the activation of jurisdiction of the court over the crime of aggression. That decision of the states parties to activate the jurisdiction of the court can only be taken after 1 January 2017.

To put it into perspective, the court will not be able to exercise jurisdiction over the crime of aggression, described by the Nuremberg Tribunal as the ‘supreme international crime’, which according to the UN General assembly in 1946, needed to be resolved ‘as soon as possible’, until after at least 15 years from the entry into force of the Rome Statute.

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As if the delays in finalising the details of the crime of aggression, the jurisdictional regime and the conditions set forth for activating the court’s jurisdiction are not enough, any state party may lodge a declaration with the Registrar stating that it does not accept the jurisdiction of the court for the crime of aggression. In a clause that shows the lack of desire by powerful states to be subjected to the same laws and standards as other states, the Kampala amendments explicitly exclude non states parties from the jurisdiction of the court in respect of the crime of aggression when committed by that state’s nationals or on its territory.

This explicit exclusion of non states parties mirrors a similar clause that puts citizens of non states parties beyond the purview of the court in UN Security Council resolutions referring the situations in Darfur and Libya to the ICC. Yet, as noted by Professor Schabas, at the Rome Conference, member states of the Non-Aligned Movement coalesced and held out for inclusion of aggression among the core crimes within the jurisdiction of the ICC. One wonders whether the result might have been the same if the caucus of ‘the like-minded’, which comprised mostly European states, was the one advocating for the inclusion of the crime of aggression.

Richard Falk cynically attributes the about turn from treating the crime of aggression as the supreme crime when the defendants at Nuremberg were the losers and to treating aggression as a contested terrain, to the fact that each one of the countries that sat in judgement at Nuremberg engaged in aggressive wars and made non-defensive use of force in decades that followed the Nuremberg trials. In recent times, especially after 11 September 2001, some of the states that sat in judgment at Nuremberg, including the US and Britain, have been accused of waging wars of aggression in Afghanistan and Iraq. According to Falk, this reversal and regression is a perfect example of the

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381 UN Security Council Resolution 1593 of 31 March 2005 referring the situation in Darfur to the ICC and Resolution 1970 of 26 February 2011 referring the situation in Libya to the ICC.
382 William A. Schabas, ibid.
Janus faced geopolitics when it comes to accountability for international crimes. When the application of international criminal justice serves the cause of the powerful, it will be invoked. But when the same international criminal law is turned against the powerful states, those powerful states will pull out all the stops to avoid justice.\textsuperscript{384}

While questions have been raised, the legitimacy of the ICC pertaining to the source of power of the court is largely accepted. The ICC was created with the best of intentions. It seems that the ICC only started to struggle with maintaining its legitimacy soon after questions started being raised over the geographic concentration of cases on the African continent. The legitimacy of the ICC has only been a source of controversy to a limited extent. It is largely the legitimacy associated with perceptions as to the exercise of power by the court including the quality of decisions and the outcome of those decisions that has been a cause of controversy. This category of legitimacy is what we are mostly concerned with.

\textbf{3.2.4. Sociological or substantive legitimacy of the ICC}

Sociological legitimacy on the other hand, considers many other issues beyond the lawfulness or source of power of an institution that include morality, perceptions and popular attitudes about the authority of the institution. In the case of the ICC, perceptions about its authority relate not only to the manner in which the court came into existence but also whether the court is operating in accordance with generally accepted principles of right process.\textsuperscript{385}

The legitimacy of the court depends on the perceptions of its stakeholders to selection decisions. If, in their evaluation of selection decisions, stakeholders perceive the court as not appropriately selecting situations and cases as well as crimes to charge suspects, then the court’s legitimacy may suffer. The authority of the court is also based on the quality and the outcomes of the decisions that it makes. Because, sociological

\textsuperscript{384} \textit{Ibid.}

legitimacy involves looking at subjective opinions, feelings and perceptions that people have towards the ICC, this category of legitimacy therefore involves a subjective test.

While much of procedural legitimacy relates to the mechanism for the founding of an institution, much of the indicators for substantive legitimacy focus on the functioning of the institution. If the ICC is seen as functioning and making decisions in accordance with the original intent of the drafters of the Rome Statute stakeholders will largely have sufficient content and independent reason for complying with the decisions even when they disagree with them. Therefore, that the ICC is seen by its constituency as functioning in an acceptable and effective manner means is an indicator of the legitimacy of the court. The ICC might suffer from a crisis of legitimacy if its stakeholders develop the perception that the court is ineffective, incompetent or unfair in its functioning.

Since the indicia for the sociological or substantive legitimacy of the ICC include mostly the quality of decision making by the different structures of the court, developing fair internal standards for the court is one of the most important steps to ensure that the court retains its legitimacy. To be seen as fair, the internal standards developed must themselves be and enable decision-making by the ICC in the exercise of its specific functions to conform with the institutional law of the organisation, in this case, the Rome Statute and international law in general. The exercise of judicial powers by the ICC must be subjected to a legitimacy assessment principally through the procedures followed in the decision-making process.  

As a judicial institution, the ICC must be judged on the basis of the quality of its decisions, the impartiality and fairness with which it assesses individual criminal liability and the impartiality with which it determines sentences and other interlocutory remedies. To ensure legitimacy by the ICC through the procedural aspects of decision-making, the decisions taken should be in conformity with the legal obligations of the court, both in terms of the legal restraints stemming from the application of general

386  Eric De Brabandere, *ibid*. 

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international law and the legal restraints stemming from the Rome Statute, the founding
treaty, the rules of procedure and policy documents of the court. The perception of
the stakeholders of the court regarding the quality of the decision-making as well as the
other matters related to the fairness and impartiality of the ICC is what matters in
assessing the substantive legitimacy of the ICC.

It is important to note that the legitimacy of any international institution fluctuates over
time. Legitimacy will normally wax and wane depending upon political conditions and
the perceived rightness of decisions and choices made in pursuit of the institution’s
declared objectives. To maintain its legitimacy, the ICC must perform the task of
combating impunity for the most serious crimes of concern to the international
community as a whole assigned to it under the Rome Statute, while projecting the
appearance of fairness, impartiality and efficiency.

3.3. Applying the Substantive Legitimacy Indicia to Selection Decisions of the ICC

3.3.1. Overview
Before attempting to apply the indicators of substantive legitimacy to the ICC’s
decisions in the selection of situations and cases, it is necessary to recall the ring of
cautions over the application of sociological or substantive legitimacy as this involves non
determinate concepts such as morals and subjective personal perceptions. There is a
danger that discussion of legitimacy at the international level will usually reflect raw
power or attempts to gain the higher moral ground between protagonists in an
argument.

According to Collingwood, in discussions of legitimacy in international affairs the
powerful will always attempt to legitimise certain contested actions with reference to a
whole range of rules and principles that include moral or ‘civilising’ values and the
interpretation of international law and the underdog will always claim that such
behaviour is ‘illegitimate’ according to a set of competing standards.\footnote{Vivien Collingwood, \textit{ibid}.} As with terms such as ‘terrorism’, ‘civilisation’ or ‘freedom’, we will always encounter the risk that arguments about ‘legitimacy’ or ‘illegitimacy’ will tell us much more about attempts to gain the moral high ground in political debates, than give us any sense of the ‘truth’.\footnote{\textit{Ibid}.}

It deserves noting that supporters of the ICC’s work in Africa so far, carefully phrase their arguments in legal terms and refer to the clauses of the Rome Statute to show that the ICC prosecutor has not acted outside his mandate. Supporters also make reference to moral imperatives pointing to the interests of victims of egregious crimes committed by those accused before the ICC. Those who are opposed to the ICC action in Africa, including the AU and certain African states, also couch their arguments in competing standards that include neo-colonialism, double standards, hypocrisy and racial stereotyping.


### 3.3.2. The controversy of unfair selective application of the law

The current docket of active cases before the ICC includes cases arising from situations in Uganda, DRC, Central Africa Republic, Mali, Sudan, Libya, Cote d’Ivoire and Kenya. So far, the court has issued arrest warrants or summonses to appear in court against 30...
individuals. All of the 30 individuals are Africans. Two individuals, both Africans, have so far been convicted and sentenced to prison terms by the ICC.\textsuperscript{393} Yet, the ICC has not acted in other countries outside the African continent that equally deserve the court’s attention. Examples of such countries include Iraq, Syria, Afghanistan and Palestinian territories occupied by Israel where \textit{prima facie} evidence of war crimes and crimes against humanity has been documented. The prosecutor of the ICC has only kept situations in countries on other continents, including Georgia, Colombia, Honduras, Korea and Afghanistan under preliminary examination.

For example, in February 2006, the prosecutor decided that the requirements set out by the Rome Statute to seek authorisation to initiate an investigation in the situation in Iraq had not been satisfied.\textsuperscript{394} Nationals of states parties to the Rome Statute such as the United Kingdom servicemen against whom allegations of international crimes were raised have therefore not been investigated. Allegations of war crimes and crimes against humanity against American military personnel and private security companies for which \textit{prima facie} evidence exists have also not been investigated. As a consequence, the ICC has been accused of treating sovereign states differently and selectively applying the law to the disadvantage of weaker states.

There are also claims that in countries where referral was made to the court by the state in question, the ICC selectively applied the law to the disadvantage of political opponents of those governments. In Uganda, DRC and Central Africa Republic for example, it is alleged that the ICC is concentrating on and targeting parties that are in opposition to the governments. The ICC has not investigated government parties in those states to avoid offending the governments and to ensure their continued cooperation. Some commentators have also observed that the ICC has refrained from citing certain allies of the US government, such as the governments of Rwanda and

\textsuperscript{393}The Prosecutor v Thomas Lubanga Dyilo ICC-01/04-01/06-2842, Trial Chamber 1 judgment pursuant to Article 74 of the Statute, 14 March 2012; The Prosecutor v Thomas Lubanga Dyilo ICC-01/04-01/06-2901, Trial Chamber 1 decision pursuant to Article 76 of the Statute, 10 July 2012.
\textsuperscript{394}http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf
Uganda, for crimes committed in eastern DRC in order to avoid offending the US government.\textsuperscript{395}

It must be pointed out at the outset that selectivity in and of itself, is not necessarily contrary to the provisions of the Rome Statute. History shows us that international criminal justice is highly selective as the majority of war crimes and crimes against humanity go unpunished. As Gerry Simpson puts it, every war crimes trial is an exercise in partial justice.\textsuperscript{396} In the Celebici appeal case, the ICTY confirmed that ‘in many criminal justice systems the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction.’\textsuperscript{397}

Unlike all international criminal tribunals that preceded the ICC that were limited to very specific conflicts, the ICC has a much larger pool from which it may select situations and cases for investigation and prosecution. Yet, the ICC lacks the necessary human and financial resources needed to pursue all admissible situations and cases. The ICC makes its own decisions as to which situations merit the attention of the court. With only a handful of prosecutors and judges and limited financial resources, the ICC cannot possibly deal with every crime that falls within its jurisdiction. As a result, the ICC will have to deal with a few ‘emblematic episodes of international criminality’ if it is to be effective in its goal of ending impunity for the most serious crimes.\textsuperscript{398}

The task of selecting where to focus the court’s resources falls essentially to the office of the prosecutor. The inevitable result of the exercise of prosecutorial discretion is selectivity. Under the provisions of the Rome Statute, in exercising his or her discretion,


the prosecutor must consider factors that include gravity and complementarity, among others. The gravity principle requires that prosecutor must consider the relative seriousness of each case and each situation against that of other cases and situations that fall within the jurisdiction of the court. The complementarity principle, on the other hand, requires that in selecting cases, the prosecutor must consider if the case has been or is being investigated or prosecuted by the state that has primary jurisdiction. The application of the notions of gravity and complementarity means that the court has to deal only with very serious cases that are not being investigated or prosecuted in domestic courts.

From the time that it opened its doors and started investigating the first case referred to it, the ICC has been building up knowledge and smoothing the rough edges of its procedural practice as to case selection. The emerging practice in the exercise of prosecutorial discretion to open investigations in some situations and cases and not others has caused a great deal of controversy. The exercise of prosecutorial discretion by the ICC prosecutor so far has created the appearance and impression that only nationals of weak states that do not enjoy the support of powerful states will be subjected to international criminal justice. Referral of situations to the ICC by the UN Security Council has also contributed to the picture among some sections of the world community of a court that is biased against weaker states. This emerging practice is posing serious challenges to the legitimacy of the court among its various stakeholders that include states, intergovernmental organisations and affected communities.

3.3.3. Selectivity by operation of prosecutorial discretion

Prosecutorial discretion, which entails the power of the prosecutor to choose between two or more permissible courses of action, is fundamental to the impartiality and independence of the prosecutor and the court as a whole. In exercising his prosecutorial discretion, the ICC prosecutor must be guided by impartiality that entails investigating allegations against all parties; and independence that encompasses being free from

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399 See Article 17 of the Rome Statute.
external influence, since perceptions of impartiality and independence have a bearing on the court’s legitimacy and credibility.\textsuperscript{401}

Prosecutorial discretion is at the heart of international criminal justice. Unlike international criminal tribunals that preceded it, the ICC statute does not pre-define situations that the ICC is authorised to investigate. The ICC ultimately determines when and where it will intervene based on the criteria set out in the Rome Statute.\textsuperscript{402} Under the Rome Statute, the prosecutor decides whether or not to open preliminary examinations and where to open such examinations.

Rule 25 of the Regulations of the Office of the Prosecutor states that a preliminary examination of a situation may be initiated by the office of the prosecutor on the same grounds that an investigation may be carried out. The use of the word ‘may’ indicates discretion on the part of the prosecutor. After preliminary examinations, the prosecutor also decides whether or not to conduct an investigation. Where he decides to conduct an investigation the prosecutor further decides as to the individuals that should be charged as well as the nature of the charges to be preferred against those individuals. How the prosecutor exercises these discretionary powers can determine public perception as to the legitimacy of the ICC and whether the ICC is an effective and credible judicial body. This is because, as Luc Cote, the former Chief of Prosecutions of the Special Court for Sierra Leone observes, of all the organs of the court, the prosecutor is the public face of the court and therefore the best known to the common men and women on the streets.\textsuperscript{403}

Also, the prosecutor is involved in everything that happens at the various stages of the cases before the ICC. The prosecutor basically sets the international judicial machinery in motion by his decisions to commence investigation and to bring charges against


specific individuals.\textsuperscript{404} The prosecutor may decide to drop charges, thereby effectively terminating proceedings. Even though the prosecutor’s decisions are subject to judicial review, the importance of the central role that the prosecutor plays in these processes is very clear. The Council of Europe has observed that in most domestic jurisdictions, especially common law systems, it is the prosecutors and not judges who are primarily responsible for the overall effectiveness of the criminal justice system.\textsuperscript{405}

It is submitted that this observation applies to the ICC, which, although it combines some aspects of both civil and common law systems, is predominantly steeped in the common law system. Consequently, the proper role and key functions of the prosecutor as well as the extent of his powers were some of the most controversial matters that exercised the drafters of the Rome Statute and the delegates at the Rome Conference during the negotiations for the Rome Statute.

The 1994 Draft Statute for an International Criminal Court prepared by the International Law Commission (ILC) limited the entities that could refer cases to the court to states parties and the UN Security Council. The prosecutor had no powers at all to initiate investigations on his own. In fact suggestions by one member of the ILC that the prosecutor be authorised to initiate investigations in the absence of a complaint by a state party or the UN Security Council were shot down during deliberations in the ILC sessions. The dominant view within the ILC was that the court was envisaged as a facility available to states parties to its statute and in certain circumstances, the UN Security Council.\textsuperscript{406} Therefore, the majority of the members of the ILC ‘felt that the investigation and prosecution of the crimes covered by the statute should not be

\begin{flushleft}
\textsuperscript{404} Ibid.
\textsuperscript{405} Council of Europe, ‘The Role of Public Prosecution in the Criminal Justice System, Recommendation (2000) 19 Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000.
\end{flushleft}
undertaken in the absence of the support of a state or the Security Council, at least not at the present stage of development of the international legal system.\textsuperscript{407}

The question of whether to afford the prosecutor the powers to initiate investigations without a complaint from a state party or the UN Security Council could not go away. It arose again at the Preparatory Committee stage of the negotiations for the Rome Statute where debates have been categorized as following either the realist or the liberalist schools of thought.\textsuperscript{408} Liberals supported the establishment of a prosecutor with \textit{proprio motu} powers to initiate investigations while the realists’ camp opposed the idea of granting the prosecutor these powers. Both camps based their arguments on the need to insulate the court from politicisation that would adversely affect the legitimacy and credibility of the court.

For the liberals, limiting the prosecutor’s powers to initiate investigations only on the basis of complaints by quintessential political entities like states and the Security Council would lead to a prosecutor that is open to manipulation by states and politically motivated referrals. An independent prosecutor, uncontrolled by political actors like states and the Security Council, with powers to initiate proceedings \textit{proprio motu} was necessary for creating a credible and legitimate ICC capable of enforcing the rule of law and holding all persons accountable regardless of their power or positions. The liberals were championed by NGOs, which as we noted in Chapter two, were granted unprecedented privileges to participate in the negotiations for the Rome Statute.

The realists on the other hand, represented notably by the position of the US government were strongly opposed to the idea of a prosecutor with powers to initiate investigations \textit{proprio motu}. They were worried about a powerful and uncontrollable prosecutor involving the court in highly sensitive political situations. For the realists an independent prosecutor with discretion to proceed without being accountable to elected officials amounted to a non-state actor imposing itself on states in a manner that

\textsuperscript{407} Ibid, at page 46.

detracted from the sovereign equality of states. In a document circulated at the Rome Conference, the US government argued that granting the prosecutor *proprio motu* powers to commence investigations on the basis of statements from non-state entities including individuals and NGOs would flood and overwhelm the court with frivolous complaints. In the view of the US government and the realists' camp, it was necessary for states and the UN Security Council to provide the screen that was needed to shield the prosecutor from being inundated with frivolous and politicized complaints. As Danner has pointed out, the debate over whether to allow the prosecutor the power to initiate investigations *proprio motu* was essentially a fight over the proper scope of the prosecutor's discretion.409

The liberalists won the day as many delegates in the end were of the view that limiting the court's jurisdiction to cases referred to the court by the states and the Security Council only is what would subordinate the ICC to power politics and endanger the efficacy of the court. The danger of the prosecutor abusing his discretionary powers was far outweighed by the need for an independent and credible prosecutor. It was, however, conceded that a prosecutor with unfettered discretion was not a desirable outcome. In the end Germany and Argentina co-sponsored a proposal which reconciled the two positions. The proposal provided a regime for the limitation and supervision of the exercise of the prosecutor's discretion through judicial review by the pre-trial chamber of the court.

Under the Rome Statute, although not unlimited, the prosecutor enjoys broad discretionary powers. While the wide discretionary powers are important to guarantee the independence of the prosecutor, if not properly deployed, the discretionary powers can result in unjustified selective application of the law thereby leading to discrimination, which is specifically proscribed under the Rome Statute. Article 21(3) of the Rome Statute provides that the ‘application and interpretation of law pursuant to [Article 21 on the law to be applied by the court] must be consistent with internationally recognized

human rights.’ Such recognised human rights include the right to equality and equal protection of the law which entails equal application of the law to all without unjustified distinction. Article 21(3) of the Rome Statute also proscribes ‘adverse distinction founded on grounds such as gender…, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.’

3.4. Scope of Prosecutorial Discretion under the Rome Statute

The Rome Statute grants the prosecutor very broad discretion at the various stages of a case, which appears in the provisions of statute. This section will only deal with the exercise of prosecutorial discretion to select situations for investigation and the individuals to bring charges against.

The Rome Statute establishes the office of the prosecutor as a separate organ of the court under Article 42 and enjoins it to act independently and not ‘seek or act on instructions from any external source.’ The question of the prosecutor’s independence and impartiality is further provided for in paragraphs 5 and 7 of Article 42. Paragraph 5 requires the prosecutor not to be involved in any activity that might affect the confidence of the public in his independence while paragraph 7 requires the prosecutor to avoid participating in any matter in which his impartiality might reasonably be doubted on any ground.

The Regulations of the Office of the Prosecutor and the Staff Rules reinforce the independence of the office. Regulation 13 states that in all his activities, the prosecutor shall ensure that he maintains ‘full independence’ and should not ‘seek or act on instructions from any external source.’ Rule 101.3 of the Staff Rules enjoins staff members to ensure their independence from any person, entity or authority outside the court. Falling under prohibited conduct under this rule are any actions that may adversely reflect on the independence and impartiality of the court.
Article 13 of the Rome Statute stipulates a general discretion of the ICC to exercise jurisdiction. Following activation by any of the trigger mechanisms that include referral by states parties, referral by the UN Security Council or by the prosecutor himself using his *proprio motu* powers on the basis of information received from various sources including NGOs, the UN, intergovernmental organisations and individuals, ‘the court *may* exercise its jurisdiction’ (emphasis added). The use of the word ‘*may*’ in Article 13 clearly shows the intention of the drafters to allow the court the general discretion to decide whether to exercise its jurisdiction or not.

Paragraphs 1 and 2 of Article 53 of the Rome Statute shows that the prosecutor plays a lead role in the decision on whether any action will be taken on a referral or not. Only the prosecutor alone has the mandate and power to assess the information provided by the trigger mechanism and decide whether there is sufficient basis to proceed. Consistent with the provisions of the Rome Statute guaranteeing the independence of the prosecutor, the entities that provide the information may not dictate to the prosecutor as to whether he or she should or should not commence investigations.

However, Professor Ohlin has attempted to argue that a referral by the Security Council pursuant to its Chapter VII powers takes away the prosecutor’s general discretion to decide whether he should commence an investigation.\(^{410}\) This argument relies on the superior and binding nature of Security Council resolutions made in terms of Chapter VII of the UN Charter. In this respect, decisions on international peace and security are matters for the Security Council alone. The parties to the Rome Statute did not have the authority in the first place to grant discretion to the ICC prosecutor where the Security Council referred a situation after it determined that an ICC investigation was required in order to restore international peace and security.\(^{411}\)


\(^{411}\) *Ibid.*
However, the wording of the Rome Statute is quite clear that the Prosecutor has a wide discretion. The drafting history of the Rome Statute as evidenced by the debate between the realists and the liberals also shows that the intention was to establish an independent prosecutor under no direction of any entity including the Security Council. It is submitted that a proper reading of Article 53, leads to the conclusion that the prosecutor enjoys a wide discretion to determine whether to proceed with an investigation and, in turn whether to proceed with prosecution, who to prosecute and the charges to be preferred following an investigation.

Article 53(1) sets out the factors that the prosecutor is required to consider and take into account in deciding whether to initiate an investigation. These factors are ‘whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
(b) The case is or would be admissible under article 17; and
(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.’

These factors that the prosecutor is required to consider show the wide discretion that the prosecutor has. It is the prosecutor who must decide what is reasonable under subparagraph (a). It is the prosecutor who must make the initial assessment of the chances of the admissibility of a case. The Pre-Trial Chamber is the final arbiter of whether the case is admissible under Article 17. It is the prosecutor who must also make the initial assessment of the gravity of the case; the interests of victims and whether substantial reasons exist that make an investigation contrary to the interests of justice. The prosecutor's discretion as to whether an investigation or prosecution would serve the interests of justice is not unlimited as it is subject to review by the Pre-Trial Chamber.
In the context of this thesis, how the prosecutor exercises his discretion to determine what is in the interests of justice is of fundamental importance where, for example, Ugandan citizens in Northern Uganda and the AU have argued that ICC proceedings are jeopardising the prospects of achieving peace in Northern Uganda and in Darfur respectively. Communities in Northern Uganda and the AU argue that the interests of justice require that ICC proceedings against the LRA commanders and President Bashir be suspended if there is any chance for the peace negotiations to succeed.

Such broad concepts as ‘interests of victims’ and ‘interests of justice’ allow for the exercise of extensive discretion by the prosecutor. It was argued early on that identifying the guiding principles underpinning the exercise of prosecutorial discretion under Article 53(1) might help to mollify perceptions of the ICC as a political court and accusation of bias and boost the court’s legitimacy and credibility.412 In fact in the early days of the existence of the court, experts made a case for the establishment of ex ante standards and guidelines against which decision making in the prosecutor’s office may be scrutinised.

As early as 2003, Keith Hall predicted that the prosecutor’s office would come under tremendous pressure from the public and NGOs to investigate and prosecute every case of egregious violation of international criminal law that captures the attention of the public and the twenty-four hour television news channels even if some of the cases might fall outside the jurisdiction of the court.413 To avoid this situation, Hall made a strong case for the need for the prosecutor’s office to develop clear, simple and workable guidelines for making selection decisions.414 Hall also counselled that any

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414 Ibid.
guidelines on selection decisions should be made in consultation with civil society organisations and should be published widely.415

Publication of the guidelines helps to manage public expectations and ensures that reviews and criticisms of the prosecutor’s decisions to select some situations and not others that might be regarded by the public as equally deserving of attention is done on objective bases and in an appropriate manner.

Danner also foresaw that the ICC would face questions over its independence from political institutions and therefore its legitimacy as an independent judicial institution.416 Danner argued that the court’s legitimacy could be enhanced through transparent and impartial decision making that is underpinned by public articulation of ex ante prosecutorial guidelines that will act as a countervailing force to the prosecutor’s discretionary decisions.417

MacDonald and Haveman also proposed ‘objectifying’ the mostly subjective criteria set out in Article 53(1) of the Rome Statute that the prosecutor is required to consider in deciding whether to initiate an investigation.418 That process involves fleshing out in detail and identifying clearly the guidelines that the prosecutor would follow in exercising his/her discretion and deciding on whether the situations and cases that he/she selects satisfy the criteria set out in Article 53(1).

According to MacDonald and Haveman, ‘objectifying’ the Article 53(1) conditions will help to ‘avoid fuelling any already existing perceptions of the ICC as a political court, to minimize any accusations of bias, and to increase transparency and boost the credibility

415Ibid.
417Ibid.
of the court as a strictly judicial institution.’ Defining and clarifying the bases upon which the prosecutor’s office exercise his discretion helps to clarify the bases upon which he/she makes selection decisions. This is good for ensuring accountability and objectivity in the decision making process. Decision making that is accountable and can be explained on the basis of clearly defined and pre-existing rules and procedures can in turn affect the legitimacy of the court in a positive manner.

The office of the prosecutor has taken the advice of experts. Over the years, the prosecutor has compiled and published strategies\textsuperscript{419} and policy papers\textsuperscript{420} on various issues. The policy papers have helped to define the bases for the exercise of prosecutorial discretion. They have helped to explain the way that the prosecutor’s office makes decisions regarding situations in which to open investigation, the individuals that will be prosecuted and the charges that will be preferred against the selected accused persons.

3.5. Prosecutorial Discretion in Selection Decisions: The Emerging Practice of the Office of the Prosecutor

3.5.1. Inconsistent application of the gravity principle

Article 17(1)(d) of the Rome Statute provides that the Court shall determine that a case is inadmissible where the case is not of sufficient gravity to justify further action by the Court. As mentioned elsewhere the vision for the ICC was one of a court dealing only with those criminal offences of the most serious concern to the international community as a whole. In Article 5 therefore, the jurisdiction \textit{ratione materiae} of the ICC is limited only to the core international crimes that include genocide, crimes against humanity, war crimes, and the crime of aggression.


The test of gravity that is set out in Article 17(1)(d) of the Rome Statute has played a critical role in guiding the prosecutor’s decisions regarding preliminary examinations as well as selection of both situations and cases. Apart from the provisions of the Rome Statute evincing a vision of the ICC as a body that deals only with serious cases of international concern, there is nothing else in the Rome Statute that might shed some light on the meaning and scope of the concept of gravity. In its February 2006 decision on the situation in the Democratic Republic of Congo, the ICC Pre-Trial Chamber I held that to satisfy the gravity threshold: (i) the relevant conduct must be either systematic or large-scale, and (ii) due consideration must be given to the ‘social alarm’ such conduct may have caused in the international community. Over the past decade, experts have provided some ideas and recommendations and the ICC has built up some initial policy proposals and jurisprudence around this concept of gravity, but the appropriate scope of the term remains still very much a matter of substantial debate.

It seems that gravity will remain a matter of debate since arriving at a universal definition is unlikely and each situation will have to be considered on its own facts and context. If one adds to this mix the lack of consistency in the manner in which the prosecutor’s office has so far exercised its discretion to decline or proceed with an investigation on the grounds of insufficient or sufficient gravity, it becomes clear that substantial debate on this concept will remain. In fact, it is argued here that the lack of a core of settled meaning on the scope of the gravity threshold as well as the inconsistent application of the concept by the prosecutor’s office in making selection decisions has tended to raise questions on the motives and efficacy of the ICC and has, as a consequence, damaged the legitimacy of the court.

The prosecutor determined that he would not initiate an investigation against British forces in Iraq because he did not believe the gravity threshold was satisfied based on

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421 The Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision concerning Pre-Trial Chamber 1’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 24 February 2006.
the crimes allegedly committed there. In his report on the preliminary examination of the
situation in Iraq, the prosecutor stated that one of the key factors that he considers in
assessing the issues of gravity is the number of victims. The prosecutor declined to
seek authorisation from the Pre-Trial Chamber to commence investigations into the
situation in Iraq because the number of victims of crimes within the jurisdiction of the
court that include wilful killings and inhuman treatment was too small.423 In this respect,
the prosecutor considered the number of victims in Iraq to be ‘limited’ as compared to
the number of victims in Northern Uganda, DRC and Darfur, which he described as
‘thousands’ and widespread.424

In a policy document on preliminary examinations that was released a few years after
the Iraq controversy, the prosecutor argued rather disingenuously that his office had
decided to not investigate in Iraq because ‘the available information in relation to crimes
allegedly committed by state party nationals revealed a limited scale of conduct
constituting war crimes of wilful killing and inhumane treatment by members of national
armed forces.’425 It seems that while he refers to the crimes committed by state party
nationals, the prosecutor only really considered the crimes allegedly committed by
members of the national armed forces. It is very possible that the prosecutor did not
necessarily look at all crimes allegedly committed by nationals of other states parties in
addition to Iraqi nationals. It is also possible that the prosecutor decided to remain safe
and avoided inquiring into crimes allegedly committed by nationals of other states that
may not be parties to the Rome Statute on the territory of Iraqi, a state party. For if he
had, he probably would have commented on crimes allegedly committed by security
companies such as Blackwater Security Company.

423 Office of the Prosecutor, ‘OTP Response to Communications Received Concerning Iraq’, available at
424 Ibid.
The statistics that the prosecutor relied upon is in spite of figures from credible organisations such as Iraq Body Count that estimate that about 24,865 were killed in the first two years of the invasion of Iraq with 37% of the killings being committed by the US led coalition forces.\textsuperscript{426} In December 2005, then US President George Bush is reported to have put the figure of civilian casualties at ‘30,000, more or less.’\textsuperscript{427} Also, the figures that the prosecutor quoted are in spite of reports seen all over the world on 24 hours news channels. Journalists who were embedded with the US and British forces were able to send out reports of deaths, torture and abuse of suspected militiamen and civilians including women and children. Even if it is accepted, as it is the case, that in the absence of a declaration by non-states parties or a UN Security Council referral, the court does not have jurisdiction over crimes committed on Iraq territory by military personnel of non-states parties, it is inconceivable that estimates of the figures of wilful killings that may fall within the jurisdiction of the court were as low as the prosecutor purported to estimate them.

Evidence gathered by others seemed to suggest that crimes within the jurisdiction of the court might have been committed. In its 13\textsuperscript{th} human rights report, the UN Assistance Mission in Iraq painted a picture of dire human rights abuses in Iraq that included assassination of government officials.\textsuperscript{428} The report also painted a dire picture of the situation of detainees and the continued impunity for human rights violations. In addition, the crimes committed by individuals contracted by western security companies in Iraq seem to fall within the jurisdiction of the ICC.\textsuperscript{429} For example, in September 2007, Blackwater Security Company contractors killed 17 Iraqi civilians and wounded more than 20 others in a shooting incident in Nisour Square in Baghdad.\textsuperscript{430} How the prosecutor thought that these allegations were not serious enough to warrant an investigation by his office is difficult to fathom.

\begin{footnotes}
\item[428]David Hoile, \textit{ibid.}
\item[429]\textit{Ibid.}
\item[430]\textit{Ibid.}
\end{footnotes}
As stated above, in explaining his decision, the prosecutor compared the gravity of the situation in Iraq to the situations that the prosecutor was investigating, including Uganda, DRC and Darfur. The situations in Uganda, DRC and Darfur, according to the prosecutor, were more serious as they all involved ‘thousands of wilful killings as well as intentional and large-scale sexual violence and abductions’.\(^{431}\) But as we will see below, the charge sheet in the case of Thomas Lubanga Dyilo arising from the situation in DRC did not include any crimes of wilful killings and sexual offences. As we now know, the prosecutor only charged Lubanga with the less serious charges related to conscription and use of child soldiers. In the circumstances, the argument that the crimes committed in DRC, and the charges brought against Lubanga were more serious than the crimes allegedly committed in Iraq cannot be sustained.

In arriving at a decision not to pursue the matter of abuses committed by British servicemen in Iraq, the prosecutor does not seem to have considered the ‘social alarm’ that the invasion of Iraq as well as the crimes committed there caused to the international community. If he had, he would probably have reached a different conclusion. The widespread condemnation that the invasion and the abuses attracted suggests deep seated social alarm throughout the world. The unconvincing explanation given by the prosecutor gave credence to the suspicions of political influence and highlighted the allegation that the ICC was lacking in independence and impartiality and was unfairly targeting African situations for investigation and African personalities for prosecution.

In May 2014, the new prosecutor, Fatou Bensouda decided to reopen a preliminary examination of the situation in Iraq involving allegations of war crimes arising from abuse of detainees by British servicemen from 2003 through 2008.\(^{432}\) The prosecutor’s decision was motivated by a communication that was filed by the European Centre for

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\(^{431}\) Ibid.

Constitutional and Human Rights and the Public Interest Lawyers alleging, among other factors, ‘a higher number of cases of ill-treatment of detainees’. The prosecutor’s emphasis on the numbers to determine gravity is unfortunate. The moral outrage that the actions of the British servicemen caused throughout the world ought to have swayed the prosecutor more than the numbers.

Since 2009, the office of the prosecutor has kept under examination the situation in Guinea arising from the events of 28 September 2009, where it is alleged that about 156 persons were killed or disappeared and 150 women were subjected to rape and other forms of sexual violence, following violent suppression by government security forces of an opposition gathering at the national stadium in Conakry. If compared to other incidents where the prosecutor has closed examinations or investigations, the numbers of victims arising from this instance are relatively low. Yet, the only reason that prevented the prosecutor from opening an investigation in Guinea is that the government of Guinea has been conducting investigations that have so far ‘generated significant results.’ But for the investigations by the government, it seems that the prosecutor would have proceeded with an investigation notwithstanding that on the wording of the Rome Statute and some of the recent practice of the ICC, this situation is unlikely to meet the required gravity threshold.

Even though the office of the prosecutor may have analysed all the information on communications that it received in accordance with its methodology, to the ordinary men and women on the street, the ICC appears to be relying on technicalities to avoid opening investigations in places where investigations might not have sat well with powerful states, particularly the permanent five members of the UN Security Council. Meanwhile, twenty-four hour news channels all over the world beamed the war in Iraq showing images of civilians including women and children being injured, severe damages to civilian buildings and infrastructure as well as abuse including torture of civilians and militias by British and US troops. To the common men and women not

433 Ibid.
435 Ibid.
trained in legal niceties, the lack of intervention by the ICC tended to confirm the statement by former British Foreign Secretary, Robin Cook to the effect that the ICC ‘is not a court set up to bring to book Prime Ministers of the United Kingdom or Presidents of the United States.’

During the first few years of the court’s existence, the office of the prosecutor adopted a prosecutorial strategy that was anchored in a number of principles. One of these principles is focused investigations, by which the office undertook to focus its attention on the most serious crimes as well as individuals ‘who bear the greatest responsibility for these crimes.’ The office of the prosecutor has continued to profess the principle of focused investigations and prosecution. In its prosecutorial strategy 2009 – 2012, the office of the prosecutor further explains that pursuant to this policy of focused investigations and prosecutions it will ‘select for prosecution those situated at the highest echelons of responsibility.’

Yet the selection of the very first case in which the court rendered judgment defies the basis of focused investigation and prosecution. Clearly, Thomas Lubanga, who it was alleged suffered mental problems, did not sit at the top echelons of responsibility. Furthermore the charges that the prosecutor decided to settle for including the use of child soldiers were not the most serious offences committed in the DRC in general and by Lubanga himself in particular.

Expectations of the communities and victims were raised when Lubanga was arrested. Furthermore, in his opening statement, the prosecutor had argued that Lubanga’s group had recruited, trained and used hundreds of children to kill, pillage and rape. Yet, the actual indictment of Lubanga became an anti-climax as the charges related to killing, pillaging and rape were conspicuously absent from the charge sheet. Lubanga would be

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charged with comparatively less serious war crimes of enlistment, conscription and use of child soldiers. A sense of injustice prevailed among victims and human rights and women’s rights activist groups.

It seems that with a little more patience and attention to detail in investigating, the prosecutor might have unearthed more than enough evidence of sexual violence, including rape of young girls, by Lubanga’s forces. In September 2006, women’s rights and human rights activists in DRC issued a declaration on the arrest of Lubanga in which they expressed dissatisfaction at the limited charges being preferred against Lubanga. The human rights groups noted that the less serious charges brought against Lubanga risked ‘offending the victims and strengthen the growing feeling of mistrust in the work of the ICC in the DRC and in the work of the Prosecutor especially’. In a letter addressed to the ICC prosecutor, the Women’s Initiatives for Gender Justice expressed grave concern at the narrow charges, and in particular, the absence of charges for gender based crimes such as rape and other sexual violence offences for which they believed substantial evidence existed. Of much concern is the fact that the Women’s Initiatives for Gender Justice attributed the absence of charges for gender based crimes to ineffective investigations conducted by the prosecutor which were ‘limited in scope, poorly directed and displayed a lack of commitment to gather the relevant information and evidence’. On 7 September 2006, the Women’s Initiatives for Gender Justice became the first NGO to file before the Court, in respect of the absence of charges for gender-based crimes in the Lubanga case.

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440 Ibid.

441 A redacted copy is available at http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf

442 Ibid.

During the trial almost all of the testimonies of the prosecution’s witnesses mentioned the wide and pervasive rape of young girls by commanders of Lubanga’s forces. Rather incongruously, in May 2009, the representative of victims submitted a joint application on behalf of 27 victims who were participating in the trial requesting the Trial Chamber to add to the charges brought against Lubanga, the charges of sexual slavery and inhuman or cruel treatment. The application was eventually dismissed by the Appeals Chamber. However, the joint application by the 27 victims was effectively a challenge of the prosecutor’s decision and characterisation of the facts of the case. The discord between the victims and the office of the prosecutor as a result of the joint application caused considerable controversy and undermined public confidence in the ability of the office of the prosecutor to deliver meaningful justice to affected communities.

The prosecutor belatedly sought to rely substantially on the evidence of sexual violence and rape, which had arisen during the trial, in his sentencing submissions as an aggravating factor. Thomas Lubanga simply was not senior enough and the crimes with which he was charged were not serious enough.

The prosecutor used other considerations apart from gravity to select his first case in the DRC situation. Far from the bases enumerated in the Rome Statute and ICC policy documents, the prosecutor selected the case of Thomas Lubanga based on practical considerations involving, among other things, the likelihood of apprehending his suspect. Professor Schabas has argued that the decision to charge Lubanga was an example of the prosecutor exercising his prosecutorial discretion on the basis that the accused was accessible to a court starved of trial work and anxious to justify its existence. The selection decision in this case was clearly anything other than a conclusion naturally reached through an independent assessment of the relevant legal criteria detailed in the Rome Statute or the policy documents of the prosecutor’s office.

The inconsistent application of the principle of gravity as a criterion for selection of situations and cases in the exercise of prosecutorial discretion is eroding the public confidence in the work of the ICC in Africa and with it the legitimacy of the ICC on the continent. Consistency and treatment of like situations and cases alike will help to reduce allegations of bias, increase public confidence and enhance the legitimacy of the court on the continent. Criticism of the prosecutor’s selection of charges against Lubanga by local human rights and women’s rights organisations in DRC reveals failure by the prosecutor to ‘demonstrate coherent and effective strategies for delivering meaningful justice to affected communities.’

Wouters and Chan have also concluded that the inconsistent justification of gravity between various situations makes it very difficult to avoid perceptions of an underlying political motive and political influence in the office of the ICC prosecutor. Situations outside Africa deserving of the attention of the ICC such as Iraq and Syria have provided the office of the prosecutor with opportunities to widen the focus of the court beyond situations in Africa and establish the ICC as a truly global court. The failure by the prosecutor to investigate these situations has added credence to the perception that the ICC is only interested in African situations. Whether there is any substance in these perceptions is neither here nor there. The widespread existence of such perceptions and persistent questions on the effectiveness of the ICC to dispense justice, especially for affected communities, have the negative effect of detracting from the legitimacy of the ICC.

3.5.2. The decision to charge the Lord’s Resistance Army (LRA) leaders
The exercise of prosecutorial discretion in the selection of his first case in Northern Uganda bears out the argument that the prosecutor applies the gravity principle inconsistently. It has also provided support to the argument that the prosecutor acts on

political influence and therefore there is a serious deficit of independence and impartiality in the prosecutor’s office. In Northern Uganda, the office of the prosecutor has said that it has investigated crimes committed by both the LRA and the national army, the Uganda Peoples Defence Forces (UPDF), but has selected for prosecution only the crimes committed by the LRA because the crimes committed by the LRA were much more numerous and of a much higher gravity than the crimes allegedly committed by the UPDF. Yet, evidence exists to show that the UPDF has committed crimes of sufficient gravity to warrant prosecution by the ICC. There are reasons to believe that the real reasons for the ICC to choose LRA leaders and not Uganda Government personalities that bear responsibility for crimes committed by the UPRDF have less to do with the application of the principle of gravity and the comparative seriousness of LRA crimes than with political considerations.

The ICC referral by the Government of Uganda, the first ever by a state party to the ICC treaty purported to refer the ‘situation concerning the Lord’s Resistance Army’ to the ICC. The latter has since stated that the court had expanded the scope of its inquiry to cover the situation in northern Uganda, which has been interpreted to mean that the ICC is also looking at serious crimes within the jurisdiction of the ICC committed by the UPDF.

In theory the announcement by the ICC prosecutor that he was looking at atrocities committed by both sides to the conflict in Northern Uganda seems to be the fairest way of addressing the referral. The ICC may maintain its legitimacy in enforcing international criminal law against individuals accused of serious crimes of international concern if it is seen and regarded as a neutral and independent body. In this respect, the court must ensure, to the greatest extent possible, objectivity and transparency in the selection of cases by the prosecutor. If the ICC wishes to establish and retain legitimacy, it must investigate all serious crimes committed by all the actors in the conflict, including the Uganda government and the UPDF.
In practice, however, several things that militate against the notion of neutrality and independence of the court and have the effect of undermining the legitimacy of the ICC have happened right from the announcement of the referral. In view of the fact that serious abuses committed by the UPDF in Northern Uganda were known, the appellation of the referral as the ‘situation concerning the LRA, suggested straight away that the ICC would target the LRA and only investigate atrocities committed by the LRA, one party to the conflict and not the UPDF and the government, the other party to the conflict. Couching the referral in these terms evoked sceptical views of bias and lack of neutrality and independence by the prosecutor in selection decisions even before the investigations had commenced.

If there was any doubt over selectivity and that the prosecutor was investigating only one side, such doubts ceased to exist when in a press statement the prosecutor stated: ‘The Office of the Prosecutor has been investigating the LRA for two years, collecting information from many sources.’\(^{448}\) In that statement, not once referring to the serious crimes committed by the UPDF and the Uganda government, the prosecutor stated the belief at the ICC that the best way to stop the conflict in Northern Uganda and restore security to that region is to arrest the top leaders of the LRA.\(^{449}\)

The announcement by the prosecutor of the referral by the government of Uganda at a joint press conference with President Museveni at Hotel Intercontinental Hyde Park in London on 29 January 2004 seemed to contradict the ICC’s profession of neutrality and independence. The prosecutor presented the Government of Uganda as a partner of the ICC in combating international crimes. This approach and treatment of one side to the conflict in Northern Uganda seemed to cement the idea among critics that the ICC was being used by the Uganda government as a tool in its military strategy against a nagging opponent and a problem that the government had failed to resolve after close to two decades of combat. The independence of the ICC was also questioned and, as a result, the legitimacy of the court was put in grave danger.

\(^{448}\) Statement by Prosecutor Luis Moreno-Ocampo, ICC-OTP-20060706-146.
\(^{449}\) Ibid.
The prosecutor devised a programme of regular exchanges between the government and the prosecutor of the ICC. For example in a press release the prosecutor notified the world that the Minister for Security in the Government of Uganda, Amama Mbabazi, had visited the ICC as part of a regular exchange between the Office of the Prosecutor and the Government of Uganda. Apart from the regular exchange, because of security concerns the UPDF assisted the ICC by providing armed escorts for travel in Northern Uganda to carry out investigations, interview witnesses and the outreach programme of the court. The relationship that seemed to have developed between the ICC and the Uganda government and the subsequent frequent interaction between the two compromised the perceptions of the court’s independence and impartiality in the selection of individuals suitable for prosecution in the spirit of the Rome Statute. The close relationship of cooperation between the ICC and the Government of Uganda fed into and exacerbated the negative perceptions of the court in Uganda.

As mentioned above, the prosecutor later clarified that the ICC’s investigations are not limited to the LRA and that his office was actively seeking information about crimes allegedly committed by the UPDF. This attempted clarification by the prosecutor has not been supported by facts on the ground. To date, despite the existence of documented cases of UPDF abuses, not one UPDF officer or leader of the government has been charged. The sincerity of the ICC in attempting this clarification of the scope of the ICC’s investigations in Northern Uganda is therefore questionable. It seems that coming after widespread criticism, the correction of the scope of the referral to include serious crimes committed by the UPDF was an exercise of damage control by the ICC prosecutor.

Granted, the office of the prosecutor will continue to develop the definition of gravity until it has crystallised. But the limitation of the definition and constituent elements of this notion in order to exempt the UPDF seems to be inconsistent with the definition that appears in some of the policy documents of the office of the prosecutor. Even though the policy papers do not constitute the law and are not legally enforceable documents,
the office of the prosecutor would be expected to follow the policies laid out in its
documents in practice. In a policy paper published in September 2003, the office of the
prosecutor outlined some of the main criteria for determining the gravity of crimes.
These criteria include the scale and nature of the crimes, the manner of commission

The impression of a partnership presented by the joint press conference to announce
the referral of the ‘situation regarding the LRA’ to the ICC and the narrowing of gravity
seem to be tactics adopted by the prosecutor to keep the referral to its original
understanding of focusing on the LRA, and not the UPDF or the Government of Uganda
as the subject of the investigation.

As mentioned elsewhere in this thesis, impartiality, which requires that allegations
against all parties are investigated, and independence, which requires any such
investigations to be free from external influence, especially political influence are the
hallmark of the prosecutor of the ICC. In its draft policy paper on criteria for selection of
situations and cases, the office of the prosecutor writes that the: ‘duty of independence
goes beyond simply not seeking or acting on instructions. It also means that the
selection process is not influenced by the presumed wishes of any external source, nor
the importance of cooperation of any particular party, nor the quality of cooperation

Yet it seems that the cooperation of the Uganda Government to bring the LRA indictees
to book was a critical factor in the prosecutor deciding to not charge government
officials. It is alleged that the UPDF has committed gross violations of human rights as
well as acts and omissions that amount to offences within the jurisdiction of the ICC. A
few days before the ICC unsealed the warrants against the LRA leaders, Human Rights
Watch published a report in which it documented numerous instances in which the
UPDF has been responsible for committing rapes, torture, killings, arbitrary arrests, and detentions of the civilian population in Northern Uganda. Furthermore, the government of Uganda adopted a policy of encampment where civilians were forced to leave their homes to settle in camps for internally displaced persons. The army broadcasted ultimatums telling villagers they would be considered rebels if they refused to leave their homes. In some instances, the army shelled villagers who refused to move to the camps. The encampment strategy was part of scotched earth warfare or as Mathew Green puts it, “drain-the-lake-to-catch-the-fish” warfare designed to deprive the LRA of support by emptying the countryside.

By omitting the UPDF on the list of those suspected of committing atrocities in the north, the ICC gave credence to reports by politicians and organisations in Uganda that The Hague-based court was biased in indicting the LRA rebels. One of the accused persons, Vincent Otti, who was the second in the LRA command, but died at the hands of his comrades before he was arrested, was quoted on the issue of surrender and immunity from prosecution: ‘If the UPDF are included on the list of indicted commanders, I will definitely go to The Hague. Short of that, I will never go. It’s not only the LRA alone who committed atrocities in Northern Uganda. It’s both the LRA and the UPDF.’ Up to the present day the prosecutor’s work in Uganda is perceived by many of those in affected communities as one-sided and biased. Even those that were initially supportive of the ICC, including President Museveni, seem to have turned against it. As we will show below, the massive desertion from the ICC supporters’ camp is a matter that effectively dealt a blow on the legitimacy of the court.

3.5.3. The role of politics in selection decisions and legitimacy

In response to a question why the ICC prosecuted some people and not others, Mr Luis Moreno-Ocampo uttered these words: ‘I follow evidence. I am a criminal prosecutor. I

454 Institute for War and Peace Reporting, ‘Funding Problems Stall Juba Negotiations/LRA Hires Lawyers for Peace Talks/Otti Mocks Court’s Indictment Record/Bozize Probes LRA Incursions Reports’, 28 August 2007
455 See ‘Museveni’s Speech at Uhuru Inauguration’, New Vision, 10 April 2013.
am not a political analyst.’ He submitted that political considerations had no role whatsoever to play in his office’s decisions to select situations for investigation and cases for prosecution. Presenting a keynote address at the Council on Foreign Relations in Washington DC in 2010, Ocampo stated: ‘I apply the law without political considerations. But the other actors have to adjust to the law.’ Louis Moreno-Ocampo always insisted that the ICC has no role to play in politics and that the court stays clear of politics.

Yet a proper appraisal of the court in theory and in practice will show that the ICC is inextricably intertwined with politics. All the evidence available seems to show that in the exercise of prosecutorial discretion in selecting cases, the prosecutor has taken political considerations into account. As Allison Marston Danner has observed, the prosecutor of the ICC ‘sits at a critical juncture in the structure of the Court, where the pressures of law and politics converge.’ Recognising that the cases that appear before the court will invariably have political implications; and the high stakes of the subject matter that it deals with and the threat that its decisions can pose to powerful international interests, Danner exhorts the operatives of the ICC, including the prosecutor, that are vested with discretionary decision making powers to be sensitive in making decisions.

Perhaps the failure to realise this point and take the advice proffered by Danner has been one of the biggest undoing of the prosecutor’s office in making selection decisions. If the prosecutor’s office had a good appreciation of how its work is intertwined with politics, perhaps it might have noticed the perceptions and political consequences of unduly overcrowding its case docket with cases from one part of the world when there are other situations in other parts of the world that equally deserve the office’s attention.

457 Keynote address, Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Council on Foreign Relations, Washington DC, 4 February 2010.
459 Ibid.
3.5.4. Selection of the LRA for prosecution

It seems also that despite the denials, the prosecutor’s office in practice takes political considerations in making selection decisions. One good example is the selection of the LRA for prosecution and not Uganda Government officials. There is a groundswell of opinion that contends that President Museveni initially had little interest in defeating the LRA, either because his administration and the UPDF were able to exploit the conflict for political and personal economic gain, or because the conflict was perceived as a way to further marginalize the Acholi population, which, prior to the Museveni era, had dominated the Ugandan armed forces since the colonial period.

But over the years President Museveni consolidated his power and became a top beneficiary in Africa of U.S. Government security assistance and security cooperation programs. The LRA became an inconvenience. The ICC presented an opportunity to President Museveni to fight the LRA on another forum. Therefore, when the Ugandan government decided to refer the LRA to the ICC, it did so as part of a military strategy and international reputation campaign, rather than out of a conviction about law and justice. As proof that the referral was part of a military strategy, it can be gleaned from the case that the referral was initiated in the Ministry of Defence and not the Ministry of Justice as is normally the case.

It appears that one of the reasons for the exclusion of UPDF from prosecution has to do with the need to maintain stability in Uganda, a vanguard country in the protection of the interests of developed countries, especially the USA in a volatile region. Uganda is a stable country, which is located in an unstable and volatile region that hosts such war affected and failed states as DRC, CAR, South Sudan and Somalia. Its geographic location presents Uganda as an ideal platform from which to assert U.S. regional interests. It is public knowledge that the United States remains invested in the stability of South Sudan and Somalia. Historically, the U.S. has been the largest aid donor for South Sudan, including during the period before its secession from Sudan. In the UN system, in particular, in the UN Security Council, the United States supported and advocated for the sovereignty of South Sudan. As China continues to establish a
dominant position in Africa through aid and investment, Uganda presents the US with valuable economic counterweight to Chinese growing influence in the region. The US publicly promotes Uganda as a key player in regional politics in East Africa and the Great Lakes region.\textsuperscript{460} It is a very common secret that the US considers Uganda as being well positioned to assist in the advancement of U.S. interests in the region.

U.S. policymakers have noted Africa’s growing strategic importance to U.S. interests.\textsuperscript{461} Among those interests are the increasing importance of Africa’s natural resources, particularly energy resources, and mounting concern over violent extremist activities and other potential threats posed by uncontrolled spaces, such as piracy and illicit trafficking. Political instability and civil wars have created vast ungoverned spaces, areas in which some experts allege that terrorist groups may train and operate.\textsuperscript{462} Instability also heightens human suffering and retards economic development, which may in turn threaten U.S. economic interests.\textsuperscript{463}

Terrorist attacks on the U.S. embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya, in 1998, on targets in Mombasa, Kenya, in 2002 and more recently in Uganda in 2010 and Kenya in 2013 and 2014, and Somalia have highlighted the threat of increased violent extremism in the region and the increasing capabilities of terrorist groups in East Africa. The US government believes that some of the terrorist groups that are currently training and fighting in Somalia could be redirected to the United States.\textsuperscript{464}

\textsuperscript{462} Ibid.
\textsuperscript{463} Ibid.
\textsuperscript{464} Ibid.
Since 2001, the US State Department has maintained the LRA on its “Terrorist Exclusion List” sanctioned by the USA PATRIOT Act of 2001. In August 2008, the Treasury Department added Kony to its list of “Specially Designated Nationals and Blocked Persons” under Executive Order 13224.

In October 2007, United States Africa Command (AFRICOM) was launched as a sub-unified command of the US Europe Command and finally achieved a stand-alone status in October 2008. The strategic vision of the US Department of Defence in setting up AFRICOM was to promote U.S. strategic objectives by working with African states and regional organizations to help strengthen regional stability and security through improved security capability and military professionalization. On May 24, 2010, the US Congress passed the Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009. The Act states that ‘it is the policy of the United States to work with regional governments toward a comprehensive and lasting resolution to the conflict in northern Uganda and other affected areas’. The Obama Administration, like that of former President George W. Bush, views the UPDF as the United States’ primary partner in military operations against the LRA.

The US suspended military assistance to Uganda when in 2000 Uganda intervened in the war in DRC. Military assistance to Uganda resumed in 2003 when the UPDF withdrew from the DRC. Since resumption, military assistance to Uganda has expanded significantly, and Uganda is currently one of the top beneficiaries in Africa of U.S. security assistance and security cooperation programs. Without a shadow of doubt, the US needed stable partners to with to secure US national interests in East Africa and the Great Lakes region. Uganda presents the US with an opportunity to work with one of the most stable states in the region to achieve its strategic objective of protecting its national interests. Uganda is the largest troop contributor to the African Union Mission in Somalia (AMISOM). The US views AMISOM as critical to countering an insurgency led by Al Qaeda-affiliated forces.

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It seems that the US would do everything in its power to prevent the arraignment of its allies in the Uganda government before the ICC as this would undercut the stability of Uganda and scuttle its ability to serve as a countervailing force against terrorist groups in the region. In fact, despite all the information that is publicly available that chronicles details of abuses committed by UPDF, the U.S. Assistant Secretary of State for African Affairs Johnnie Carson expressed the view that the UPDF had been living up to the commitment to respect human rights and to refrain from committing abuses of civilians. He remarked: ‘We have continued to provide logistical support for [UPDF] operations on the condition that they remain focused on the mission, cooperate with the other regional governments, and do not commit abuses. They have lived up to those commitments.’

Yet the Congressional Research Services has expressed the view that increased U.S. reliance on the UPDF may impede U.S. diplomatic leverage vis-à-vis the Ugandan government’s domestic record on democracy, good governance, and human rights, which the State Department recently characterized as deteriorating.

It is inconceivable that the prosecutor would not have put these interests into consideration when he decided to charge the LRA and not the UPDF. Surely, the prosecutor would have thought about the effect that any indictment, especially of government officials, might cause on the national interests of powerful countries in the region. It has been pointed out many times that on the international arena, there is no state power to guarantee and ensure arrest of suspects and prosecution of crimes. According to Patrick Wegner, whether an investigation is initiated and whether the investigation leads to an actual arrest depends to a very large extent on a few powerful states that have their own priorities and national interests that might have nothing to do with international justice. Because the priorities and interests of these powerful actors

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impact investigations and prosecution of international crimes, international prosecutors have to realign themselves with these powers.\textsuperscript{468}

The evidence of the prosecutor having taken these interests into account can be gleaned from the scant justification based on gravity that suggests that the crimes committed by the LRA were more serious that the crimes committed by the UPDF and Uganda Government officials. As we have shown above, the evidence available does not support this argument. From all the evidence available, the acts committed by the UPDF, especially the mass displacement of villagers into IDP camps with very little or no food, amount to international crimes of a serious concern indictable under the Rome Statute. The realignment of prosecutor’s work with the priorities and interests of powerful states and the dependency of the prosecutor on these powerful states to effect arrests, facilitate investigations and to provide facilities to detain suspects and convicted criminals, creates an unbalanced relationship of dependency that contributes to an unfair selective approach in prosecutions. As we can see from the examples of Uganda and Iraq, the selectivity leads to the exclusion of allies of major powers and donors from prosecution. As a consequence the moral legitimacy and the neutrality of the ICC becomes doubtful as it fails to apply norms consistently and equally to all states. This affects effectiveness and legitimacy of the ICC in the eyes of the general public.

3.5.5. Afghanistan, Colombia and Gaza

As pointed out elsewhere, the ICC has not acted in other countries outside the African continent that deserve the court’s attention including Iraq, Syria, Afghanistan and Palestinian territories occupied by Israel where serious crimes of international concern including war crimes and crimes against humanity have been documented and reported. Moreover, no powerful states or individuals from powerful states have so far been investigated. Instead, the prosecutor of the ICC has kept situations in countries on other continents including Georgia, Colombia, Honduras, Korea and Afghanistan under preliminary examination. Unfair selectivity due to political considerations can also be

illustrated by the way the prosecutor has chosen to deal with the situations in Afghanistan, Colombia and Gaza,

Afghanistan acceded to the Rome Statute of the ICC on 10 February 2003. Therefore, in terms of Article 126(2) all offences that were committed by Afghan and foreign nationals on the Afghanistan territory from 1 May 2003 fall within the jurisdiction of the ICC. Hoile and others have documented several incidents after the Rome Statute entered into force for Afghanistan that might justify opening of investigations by the ICC. Examples include the Farah Massacre of 4 May 2009 where American bombers killed as many as 147 Afghan civilians, 93 of whom were children.

Another example which implicates NATO forces and has been a subject of much discussion is the bombing of fuel trucks on 4 September 2009 in Kunduz Province by American bombers where up to 90 civilians were killed. The trucks had been hijacked by the Taliban. They got stuck in the mud and hundreds of civilians had descended on the trucks to help themselves to the fuel. The bombing was ordered by a German NATO commander, but soon thereafter, the German Government repeatedly denied that civilians were killed and insisted that only insurgents were killed.

Germany is a state party to the Rome Statute. Furthermore, the bombings occurred on Afghanistan, which is a state party to the Rome Statute. Therefore the German service men that were responsible for the deaths of dozens of civilians on Afghanistan territory are clearly subject to the jurisdiction of the ICC. As for the American service men that

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470 Article 126(2) provides that for states that were not parties when the statute entered into force, the statute shall enter into force on the first day of the month after 60 days from the date of accession or ratification.
471 David Hoile, ibid.
were responsible for the deaths in Afghanistan are subject to the jurisdiction of ICC because the alleged criminal acts occurred on the territory of Afghanistan, a state party to the Rome Statute.

The widespread use of unmanned drones by the USA to conduct airstrikes on Afghanistan territory might amount to war crimes within the jurisdiction of the ICC. The UN also reported that in 2008 airstrikes by US, Nato and Afghan forces were responsible for over 828 civilian deaths including the bombing of a wedding party in Southern Afghanistan in November 2008 that killed about 40 civilians most of them women and children.\textsuperscript{474}

Considering gravity as defined by the prosecutor, it is clear that if the number of people that were unlawfully killed through airstrikes in Afghanistan are taken together with the widespread nature and intensity of the violence and the extent of the suffering caused by the airstrikes, the situation in Afghanistan after the Rome Statute entered into force for that country was more serious than the situation in Kenya and Guinea. But to date the prosecutor has not opened any investigations in Afghanistan. Afghanistan has remained under preliminary examination since 2007.\textsuperscript{475} In these circumstances it is not difficult to understand the argument that the prosecutor seems to be going for softer targets than the American and NATO forces in Afghanistan.

Under the current configuration of the world order and the current system of international criminal justice big powers or their political leaders, or lesser powers that however have a powerful friend on the UN Security Council, face little immediate prospect of being brought before an international court. It is a little over the top to argue that international law does not apply to these powers. It is, however, fair to put forward the argument that the current order is not well suited for the even application of international criminal justice to all without discrimination. It is always said that it is not


\textsuperscript{475} Information on the preliminary examination of Afghanistan is available on the website of the ICC at https://www.icc-cpi.int/afghanistan
sufficient for justice to be done; it must manifestly be seen to be done. In view of the unfair selectivity by the ICC and the Security Council, in Africa in general, the ICC is currently seen as biased. The perception of bias is negatively affecting the cause of international criminal justice and the mandate of the ICC.

In January 2009 the Palestinian Authority deposited an *ad hoc* acceptance of the ICC's jurisdiction and requested the ICC prosecutor to open an investigation into international crimes committed on the Palestinian territories by Israel.\(^\text{476}\) The prosecutor chose instead to consider whether the Palestinian Authority's acceptance of the *ad hoc* jurisdiction of the court gave the ICC the authority to prosecute crimes committed on the Palestinian territories.

The prosecutor interpreted the acceptance of the court's jurisdiction as a request to the prosecutor's office to make a determination on the statehood of Palestine. In the circumstances, the prosecutor concluded that this was not a proper role for his office. According to the prosecutor, it is for the relevant bodies of the UN to make a legal determination whether Palestine qualifies as a state for the purpose of acceding to the Rome Statute. The prosecutor declined to investigate the situation in Palestine on the technical ground that doing so would have entailed him making a political decision regarding the political status of Palestine.\(^\text{477}\)

By arriving at this decision the prosecutor steered clear of the possibility of opening an investigation of Israeli conduct in the Palestinian occupied territories, which would have risked the wrath of the US. Sure enough, risking the wrath of the US might put the new international criminal justice system in jeopardy. In the circumstances one wonders whether the prosecutor would have arrived at the same decision that is fraught with technicalities if this matter did not involve Israel, a very strong ally of the USA.


\(^{477}\) Ibid
As Israel is not a State Party to the ICC, and the US would most certainly veto any resolution suggesting that the Council refers the crimes committed in Palestinian territories to the Court, justice for the Palestinian victims remains a pipedream. The prosecutor’s decision was roundly criticised by human rights activist groups throughout the world including Human Rights Watch and international criminal justice experts. The decision appears to be inconsistent with the independence of the ICC. Therefore, it emboldened states that were accusing the ICC of bias and opened the ICC to further accusations of political bias. Until Palestinian statehood was legally established, the prosecutor’s decision firmly closed the door on access to the ICC for victims of international crimes committed in the Palestinian Territories.

The legal status of Palestine was eventually resolved. Palestine acceded to the Rome Statute and the prosecutor opened preliminary investigations in January 2015.\textsuperscript{478} It remains to be seen whether the preliminary investigations will mature into an investigation.

As we noted in the introductory chapter of this thesis, the prosecutor has kept the situation in Colombia under preliminary examination since June 2004. In November 2012, the office of the prosecutor produced an interim report on the preliminary examination of Colombia, which however, reached no conclusion on whether an investigation should be opened.\textsuperscript{479} As a result, the preliminary examination of the situation continued. The interim report suggests that the worst crimes were committed by the Colombian military under the watch of the ICC prosecutor. The report states the ‘false positive’ killings in which the military killed around 3,000 innocent civilians and dressed them up to appear as guerrillas ‘occurred with greatest frequency between 2004 and 2008.’\textsuperscript{480} This period also corresponds with the time when the US Government was providing the highest level of military aid to Colombia under Plan

\textsuperscript{480} \textit{Ibid.}
Colombia, which ran from 2000 to 2009. Kovalik cynically suggests that ‘perhaps the ICC was too busy trying Africans — apparently the sole target of ICC prosecutions – to have done anything to deter such crimes.’

The ICC concluded that some of the crimes committed in Colombia were systemic, approved by the highest ranks of the Colombian military, and that they therefore constituted state policy. However, the prosecutor did not decide to open investigations because the Government of Colombia had started proceedings against a wide range of individuals under the ordinary criminal justice system as well as under Law 975 of 2005, popularly known as the Justice and Peace Law. International criminal justice experts have rightly pointed out that the alleged perpetrators in Colombia are often part of criminal networks that have infiltrated the Colombian society at local, regional and national level, making criminal investigations extremely complex and resource demanding. In these circumstances, no ordinary criminal justice system is equipped to deal with that kind of massive criminality, and Colombia’s overburdened justice system is simply not capable of investigating the entire backlog of serious crimes related to the armed conflict.

The conclusion reached by the prosecutor that the government was dealing with the crimes, is also despite attempts by the Colombian Government at constitutional amendment before Congress to reform the administration of justice. If it had been passed, the proposed constitutional amendment would have had the effect of halting all

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482 Ibid.
483 Ibid.
485 Ibid.
criminal proceedings against members of Congress that are accused of having ties with paramilitary groups; and would have made it impossible for the judiciary to investigate members of Congress and other government officials. Overall, it would have eliminated the checks-and-balance system of the Constitution.

Given the enormity of the crimes and the numbers involved and the attempts by the government to shield some politicians from accountability, there are convincing reasons for the prosecutor to commence investigations in Colombia. It seems that the real reason for not commencing investigations in Colombia have to do with the real danger of having to investigate the conduct of US nationals which would attract the wrath of the US. The US has troops in Colombia to provide assistance to the Colombian military in the so-called War on Drugs and other counterinsurgency initiatives. If the ICC started investigations in Colombia, the prosecutor would have to inquire into charges of atrocities committed by US service men. The US and Colombia have concluded an agreement that prevents Colombia from surrendering US nationals to the ICC. That agreement does not however stop the prosecutor from investigating the conduct of US nationals, charging them in court or issuing warrants of arrest against them. Here again, politics and not the goals of international criminal justice, seems to be determining the course taken by the ICC in a situation that deserves an ICC investigation.

Despite attempts to shield politicians in Colombia, in comparing DRC, Uganda and Colombia the prosecutor has stated that his office identified the situations in the DRC, Uganda and Colombia as meeting the gravity threshold. But, upon preliminary examination, the DRC and Uganda revealed an absence of national proceedings, while national proceedings had been initiated in Colombia. As at 4 October 2010, the date of publication of the draft policy on preliminary examinations, the prosecutor was

489 ibid.
analysing the genuineness and focus of the domestic investigations and prosecutions in Colombia, including proceedings against paramilitary leaders, politicians, guerrilla leaders and military personnel. It is quite telling that the prosecutor pointed out that he was also analysing allegations of international networks working in Europe and supporting armed groups committing crimes in Colombia. The mention of Europe indicated to the great majority in Africa that the prosecutor would never bring the situation in Colombia before the ICC.

The lack of action, either by the Security Council or the prosecutor to deal with equally deserving situations such as Syria, Gaza, Afghanistan and Colombia is negatively affecting the legitimacy of the ICC. The failure to treat like cases alike, in the words of Richard Falk, exemplifies the Janus face of international criminal justice. The application of international criminal law is celebrated only when it serves the cause of the powerful, as in Libya and Sudan, and despised when it is turned against the powerful, as in Gaza and Afghanistan.

3.5.6. Inconsistent application of complementarity
A perusal of the cases that have come before the ICC reveals a great deal of inconsistency in the application of the principle of complementarity. Currently it seems that there is no cohesive and consistent articulation of what constitutes ‘ability’ and ‘willingness’ to investigate and prosecute. The current practice of the ICC in its approach to the principle of complementarity seems to be driven by politics and political considerations, especially those political considerations that are dictated by the rich and powerful states. The result is that justice that is dispensed at the ICC is supported and celebrated as long as it does not collide with the narrow national interests of powerful states.

490 Ibid.
491 Ibid.
The articulation of complementarity in Colombia, Kenya, Ivory Coast and Libya, for example, makes it difficult to completely understand the conception of complementarity that is followed at the ICC. Also, the treatment of complementarity by the ICC in Colombia, Kenya, Ivory Coast and Libya makes it impossible to reconcile the notion of complementarity as originally contemplated by the drafters of the Rome Statute and the conception of complementarity that is currently followed by the ICC.

The ICC is intended to be a court of last resort. The ICC must complement and not replace domestic criminal justice systems. The complementarity principle provides for the primacy of domestic jurisdiction. Under Article 17 of the Rome Statute, for the ICC to exercise jurisdiction, a state party with national jurisdiction over a particular matter must firstly not have in the past or currently carried out any investigations or secondly be either unable or unwilling to conduct a bona fide investigation or prosecution of the crimes alleged. States regard prosecution of criminal offences as an embodiment of sovereignty. Therefore, the powers of criminal prosecution are among some of the powers that most states tend to guard most jealously. The principle of complementarity can therefore be seen as the balance between achieving the goals of international criminal justice and the preservation of state sovereignty.

Under the regime designed to give primacy to local criminal jurisdiction under Article 17 of the Rome Statute, the first question in assessing complementarity is an empirical one: whether there are or have been any relevant national investigations or prosecutions. Although the literal meaning of the complementarity regime under the Rome Statute seems to be fairly clear, Brown argues that at the time of drafting, it was unclear how the principle would operate in practice. Indeed, the decisions of the Pre-Trial Chambers declaring the case against Saif Al-Islam Gaddafi admissible and the

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493 The terms used include Article 17(1)(a) “the case is being investigated or prosecuted”, Article 17(1)(b) “the case has been investigated” and 17(1)(c) “the person concerned has already been tried”.
case against Abdullah Al-Senussi inadmissible seem to confirm the point that the application of complementarity in practice remains moot. 495

Article 17 provides the framework for understanding complementarity, but does not provide details about how the concept might be applied in practice. The drafting history, however, shows that the drafters were clearer about the core of this principle that is necessary to strike the right balance between the objectives of international criminal justice and the exercise of sovereignty by the state with jurisdiction. The core of the settled meaning of the complementarity principle and the original intent of the drafters was whether the state is able and willing to carry out genuine investigations and prosecutions in order to avoid effectively granting impunity to suspects of serious crimes of international concern. 496

The Chambers of the ICC have adopted a very literal interpretation of Article 17(1)(a), 17(1)(b) and 17(1)(c). On this interpretation any admissibility challenge based on complementarity will fail unless there are actual investigations or prosecutions going on at the time of the challenge. Prospective or anticipated investigations will not be sufficient to sustain an admissibility challenge before the court. Institutional reforms to allow for effective and credible investigations and prosecutions are not enough to sustain an admissibility challenge. 497 Any admissibility challenge must be based on the concrete facts as they exist at the time of the application for an arrest warrant or a summons to appear. 498 If there are no or have not been national investigations or prosecutions, then cadit quaestio. The inquiry ends there. The ICC will assume jurisdiction without consideration of willingness or ability. It is only if there are, or have been, national investigations or prosecutions, that the court may then proceed to the next inquiry. This inquiry involves an assessment of the willingness or ability of the state

497 See the cases arising from the situation in Kenya.
498 Prosecutor v Joseph Kony et al, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, paragraphs 49-52.
to carry out genuine investigations. The inquiry of willingness or ability is the core of complementarity.

The treatment of the complementarity by the ICC in the case of Kenya deserves a more detailed explanation and analysis here as it is the first time that the court dealt with complementarity at both the ‘situation’ and ‘case’ stages. Hitherto, many legal issues related to a challenge of admissibility based on complementarity had not been previously addressed in the court’s jurisprudence. Also, the Kenya situation has, within a short space of time generated a lot of litigation and a huge volume of pleadings and jurisprudence.

It does not augur well for the ICC that the Government of Kenya challenged the admissibility of the cases arising from the situation in Kenya.499 What makes matters worse for the ICC is that the inordinately narrow approach to complementarity that was adopted by the court makes nonsense of the comprehensive plan for judicial reforms that was set in motion in Kenya. The admissibility challenge submitted by the Government of Kenya was premised on the reforms being the *sine qua non* to any investigations and prosecutions to take place. Yet the court ruled that in the absence of current domestic investigations of the same individuals for the same conduct being considered by the ICC, the case was admissible.500

The ICC would continue prosecution of the individuals against whom charges were confirmed because Kenya had failed to show that there were domestic investigations of the same people for the same conduct taking place. The ICC declared the cases arising from the situation in Kenya admissible since Kenya had not satisfied the so-called “*same person, same conduct rule,*” which means that Kenya needed to


demonstrate that its criminal justice system was investigating the ICC suspects for the same crimes that the ICC is seized.

Admittedly, the burden of the state challenging admissibility on the basis of complementarity increases as the case progresses before the ICC. At the stage when the prosecutor requests the Pre-Trial Chamber for authorisation to investigate, the state arguing inadmissibility on the basis of complementarity must show to the satisfaction of the court that the domestic investigations that it is carrying out or has carried out cover the same conduct and persons at the same level in hierarchy being investigated by the ICC. However, as the case progresses and reaches the stage where the prosecutor has identified specific individuals for prosecution and approaches the Pre-Trial Chamber for summonses or warrants of arrest to be issued, the burden of the state increases.

The state challenging admissibility must convince the court that it is investigating or has investigated the same persons for the same conduct that the ICC is seized with. Article 19(5) requires that the state makes its challenge ‘at the earliest opportunity’, perhaps in realisation of the increased burden if the state delays its admissibility challenge. But, in terms of Article 19(4), once the trial has started, the state cannot challenge the admissibility of a case before the ICC.

In her dissenting judgment in the Ruto, Kosgey and Sang case, Judge Usacka noted that complementarity is a core guiding principle of the Rome Statute. Without this principle, it may very well be that the Rome Statute might not have seen the light of day. Furthermore, as both the majority judgment and the dissenting opinion of Judge Usacka point out, the Rules of Procedure and Evidence of the ICC provide the Chamber considering an admissibility challenge with a very broad discretion on how to conduct the proceedings.

In view of this broad discretion, in the Kenya admissibility challenge case, the Pre-Trial Chamber and the Appeals Chamber lost an opportunity to develop the application of complementarity in practice in a creative and flexible manner that would suit all the different situations that might come before the court. Moreover, the narrow ‘same person and same conduct’ test adopted by the ICC detracts from the original intention to defer to domestic procedures as shown by the drafting history of the complementarity principle.

The regime of complementarity established by the court suggests that the Court may be unwilling to provide the type of deference to states that many nations interpreted the Rome Statute to require. It also seems to contradict the policy of positive complementarity that is advocated by the office of the prosecutor. Rather than help to implement the policy and practice of positive complementarity and defer to state sovereignty, the conception of complementarity adopted by the court in the case of the situation in Kenya creates an atmosphere of competition between states and the ICC as evidenced by the jockeying for jurisdiction that occurred.

It seems that through this approach the ICC favours speed and sophistication, and eschews deference to domestic proceedings. Given the unbalanced equality of arms between poor states and the ICC as well as differentiation in abundance of resources and sophistication, this approach will always disadvantage weak states that do not have as much resources and technical capacity as the ICC and will therefore always be slow to commence or proceed with investigations. As far as weaker and less sophisticated states are concerned, therefore, it seems that the ICC will face an uphill struggle to put the principle of positive complementarity, whose default standard is to defer to domestic proceedings into effect.

A reading of the policy briefings of the prosecutor’s office on complementarity suggests that the idea of admissibility on the ground that no investigations are or have been

carried out was intended for situations where inaction by a state may be the appropriate course of action. Examples of such situations quoted by the prosecutor’s office include instances where the state of the judicial system in a country with jurisdiction may agree with the prosecutor that a division of labour between the state and the ICC is the most effective approach. Other examples include instances where groups deeply divided by conflict may prefer a neutral arbiter to deal with criminal cases rather than any one of the two sides.

In keeping with positive complementarity, the prosecutor seeks to encourage and facilitate states to carry out their primary responsibility of investigating and prosecuting crimes. In this respect, the prosecutor’s office has stated that it will cooperate with and provide assistance to such states pursuant to article 93(10) of the Rome Statute to enable them to carry out genuine investigations and prosecutions. It appears from the policy documents of the prosecutor’s office that the policy of the office as a general rule, is to seek to undertake investigations and prosecutions only where there is a clear case of failure to act by the state concerned. This understanding of the situations where the prosecutor might seek to take over from the state with jurisdiction is consistent with the understanding that the core of complementarity is that the ICC prosecutor will spring into action only when the state is unwilling or unable genuinely to carry out the investigation or prosecution.

What constitutes unwillingness or inability to investigate or prosecute seems to be well settled on paper but not in practice. The policy documents produced by the prosecutor’s office to guide the court in the implementation of the principle of complementarity show that a state is unwilling if the national decision has been made and proceedings are or were being undertaken for the purpose of shielding the person concerned from criminal responsibility; there has been an unjustified delay which is inconsistent with an intent to

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504 Ibid.
505 Ibid.
506 Ibid.
507 Ibid.
508 Ibid.
bring the person concerned to justice; or the proceedings were not, or are not, being conducted independently or impartially.

Inability of a state to act is dependent on a finding of the total collapse of the criminal justice system of that country. According to the prosecutor’s office: ‘this provision was inserted to take account of situations where there was a lack of a central government, or a state of chaos prevailed due to the conflict or crisis, or public disorder leading to collapse of national systems which prevents the state from discharging its duties to investigate and prosecute crimes within the jurisdiction of the court.’

In view of these standards that are intended to ensure that the ICC complements the states with jurisdiction rather than compete with them, it is submitted that in the case of Kenya the ICC let go an opportunity to foster close cooperation and communication between the office of the prosecutor and the government of Kenya. This would have ensured that the situation arising from the 2007 – 2008 post-election violence was investigated, individuals found responsible were prosecuted, and impunity dealt with effectively while protecting the sovereignty of Kenya. Rather than interpret the provisions of Article 17 literally and dismiss offhand the reforms carried out by Kenya, the Pre-Trial and Appeal Chambers of the ICC ought to have been creative and entered into communication with the Government of Kenya especially as the latter had produced a schedule of the timeline of the investigations that it was prepared to undertake following the extensive reforms. Adopting this approach would have improved the ICC’s standing in the eyes of many people in Africa.

By dismissing as irrelevant the fact that reforms of the criminal justice system were underway in Kenya and by insisting on the ICC exercising jurisdiction over the cases in Kenya, the ICC seems to have failed to appreciate a couple of things. The first is that referral of the situation to the ICC had been included in the report of the Commission of

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509 Ibid.
510 Ibid.
Inquiry into the Post Election Violence as a threat to motivate the Government of Kenya to implement its recommendations.\textsuperscript{511}

The Commission of Inquiry into Post-Elections Violence, among other things, recommended the creation of a Special Tribunal to be established by an Act of Parliament and composed of Kenyans and regional and international personalities with the mandate to prosecute crimes committed as a result of post-election violence. In order to guarantee implementation of its findings the Commission of Inquiry provided that should the government fail or neglect to set up the Special Tribunal, its report and all its findings including a confidential list of names of persons against whom allegations of instigating the violence were made would be handed over to the ICC.

Although the list was kept private and confidential, it was known that the list included persons at the highest possible levels of government and those outside government that the commission believed, were responsible for various acts of post-elections violence. It deserves emphasizing that referral of the findings of the Commission of Inquiry and the confidential list to the ICC was meant to serve as an axe hanging over the coalition government to motivate implementation of the findings. It was hoped that the threat of an ICC referral would leverage domestic criminal investigations into the violence and prosecution of those at the highest levels of government who were responsible for fuelling the violence.

In dealing with the admissibility challenge of the Government of Kenya, both the Pre-Trial Chamber and the Appeals Chamber do not seem to have kept this in mind. The point probably need not have been the deciding factor, but it surely should have been one of those extrinsic considerations that the court needed to recognise before reaching a conclusion that there was inaction on the part of the Government of Kenya.

The deep-seated lack of trust of Kenyan institutions was the major reason why the case got to the ICC in the first place. So, when the bill to establish the Special Tribunal was presented in Parliament, parliamentarians from the two major parties and protagonists in the elections - the Orange Democratic Movement (ODM) and the Party of National Unity (PNU) - united to defeat it under the slogan: 'Don't be vague; let's go to the Hague.' Both parties sought to seek legal accountability of the other party, but to evade it for their own. Some parliamentarians even tried to bring forward a private members' bill to establish the Special Tribunal. This too was defeated.

Domestic remedies were opposed on the basis that the police and the prosecution division of the Attorney-General's Office had been so compromised that there was no hope for fair and transparent investigations and prosecutions. The Director of Public Prosecutions was particularly cited for lacking in independence. The Kenyan criminal justice institutions had been severely weakened and there was no strong sense of the rule of law in Kenya that would render genuine investigations possible. Under these circumstances, it was argued that it was not possible to hold credible criminal justice proceedings and to achieve access to justice for victims of the post-election violence.

Given these criticisms, it was evident that the capacity of the Kenyan criminal justice system to deal with the cases arising from the post-election violence may have been compromised. Furthermore, given the widespread nature of the violence and the enormity of the crimes committed during this period the criminal justice system of Kenya as it was constituted then, might not have had sufficient capacity to deal with the crimes. Reform of the criminal justice system was an integral part of and a *sine qua non* to a genuine investigation. In recognition of this fact, after its inauguration, the grand coalition government set in motion a comprehensive programme of reforms that included reform of the constitution and the justice system as a whole.

In August 2010, therefore, Kenya promulgated a new constitution. The promulgation of the new constitution was followed by a raft of judicial reforms. In June 2011, after an open application process and the most public and rigorous vetting procedure ever

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experienced in Kenya, a new Chief Justice, Deputy Chief Justice and Director of Public Prosecutions were confirmed by Parliament. An independently vetted judiciary was installed. The office of the Director of Public Prosecutions was separated from the Attorney General’s office. Before the reforms the Attorney-General was both the chief legal adviser to the government and chief prosecutor for the state. The Director of Public Prosecutions was answerable to the Attorney General. The relationship between these two offices caused a conflict of interest and had been one of the main causes of criticism of the criminal justice system.

Through these reforms, the Attorney-General remained as the chief legal adviser to the government and the Director of Public Prosecutions became the chief prosecutor. The separation of the two offices thereby ended the structural conflict of interest that existed before the reforms. The new Director of Public Prosecutions immediately established a task force to look into how to proceed with prosecution of ‘ordinary’ crimes committed during the post-election violence. Some of those ‘ordinary’ criminal prosecutions have been successfully concluded. 513 The new constitution also introduced reforms to policing in Kenya. The government moved with speed on aspects of police reform relating to capacity and efficiency as well as ethnic and political representation on recruitment and training matters. 514

By the time of the challenge by the Government of Kenya to the admissibility of the ICC cases, Kenya had enacted amendments to the Witness Protection Act in order to address the concerns for the safety of victims, intermediaries including human rights defenders and witnesses. A body to take responsibility for witness protection was set up. These reforms therefore dealt with some of the main causes for the lack of confidence by the public in the criminal justice system in Kenya. Such lack of confidence was one of the main reasons for the general public preference for referral of the cases arising from the post-election violence to the ICC.

513 Ibid.
514 Ibid.
Kenya has indeed undergone a radical constitutional change with credible institutions and systems being put in place to ensure good governance and the respect for human rights and the rule of law. The judicial reforms in Kenya inspired discussions and kindled the interest of the public in matters related to the rule of law. In a country that has struggled with violence and corruption since independence, this was an important first step towards a more stable judicial system, and ultimately, a more stable government.

It is difficult to understand how one could refuse or fail to recognise that the constitutional and judicial reforms were in fact the starting point of an investigation that the Government of Kenya might wish to carry out. Without the reforms, genuine investigations were not possible. Without reforms and therefore genuine investigations the only option would be for the ICC to remain seized with the cases in order to complement the incapable Kenyan criminal justice system. But, the reforms having been successfully implemented and credible institutions having been put in place, any suggestions of Kenya not willing or being unable to mount credible investigations and prosecutions fell away.

The policy of positive or proactive complementarity adopted by the prosecutor’s office evokes an ICC that communicates openly with states regarding situations of concern and an ICC that works to assist those states in strengthening their judicial systems in order to carry out domestic prosecutions. Perhaps the best course of action in dealing with the Kenya admissibility challenge would have been for the court to adjourn the hearing and allow Kenya time to implement the plan for investigations and prosecutions. The prosecutor would, meanwhile, have opened up channels of communication and engaged in dialogue with the Government of Kenya. In keeping with the principle of positive complementarity the prosecutor’s office would have sought to extend support to the investigations and prosecutions through providing information necessary for investigations, technical assistance to the Kenyan criminal justice system, and any other support related to witness protection.
The Government of Kenya even undertook to submit progress reports at specific intervals, a comprehensive timeline as well as a cut-off date to complete investigations. Opening dialogue with Kenya would have allowed the ICC to stay engaged with the Kenya situation. Through the reports, the ICC would have continued to monitor the local prosecutions of individuals responsible for the post-election violence in Kenya. In this way the court would have retained the capacity to assess the genuineness of the investigations and to make any necessary declarations in order to give effect to the objectives of the Rome Statute.

Engaging in dialogue with Kenya would have helped not only to strengthen the criminal justice system of Kenya, but the ICC too in achieving the goals of international criminal justice. After all, under the positive complementarity model, the most important contribution that the ICC can make towards meeting the objectives of international criminal justice is through engagement with states parties to the Rome Statute to strengthen domestic judicial institutions. Furthermore, an active and cooperative relationship between the ICC and states parties is crucial for the effectiveness and legitimacy of the court. By insisting on the expeditious disposition of the cases arising from the Kenya situation, the ICC lost an opportunity for its own redemption in its current struggles to establish and maintain legitimacy through the positive complementarity model.

The Rome Statute does not expressly allocate the burden of proof to establish admissibility of a case. But in deciding the admissibility of the Kenya cases, the ICC seems to have placed the burden on the state challenging admissibility. This approach defies the original idea of complementarity where the default position is to defer to domestic prosecution. What seems to fit in with complementarity is placing the burden of proof on the ICC prosecutor to show that the state with jurisdiction is not investigating, has not investigated or is unwilling or unable to investigate and prosecute.

Furthermore, the admissibility challenge should be submitted at the earliest possible opportunity. The heavy burden placed on the challenging state has
to bring sufficient proof that it is or has carried out investigations. In order to satisfy this burden, the state might have to wait until it has gathered sufficient proof to discharge the onus. Yet the longer the state waits and the case progresses before the ICC, the burden becomes heavier and more difficult to discharge. For a rich state with resources and an efficient legal system, discharging the burden is not much of a problem. Poor developing countries that have limited resources and less sophisticated criminal justice systems will always find it difficult to square up against the ICC in admissibility challenges.

Developing countries may have good reasons to feel aggrieved that the system of international criminal justice that they believed would apply equally to the rich and the poor and fervently supported is now stacked against them. One of the unfortunate results of the jockeying for jurisdiction between the ICC and Kenya is that even the Kenyan Parliament that originally supported the involvement of the ICC felt aggravated by the court and passed a motion for the withdrawal of Kenya’s ICC membership.

Besides sending a powerful signal of defiance to the international criminal justice system as a whole, which is a feeling that is becoming popular in Africa, the move by Kenya to withdraw seems to have set a precedent and emboldened other African states that might feel aggrieved enough to follow suit and withdraw from ICC membership as well. Namibia has set the process of withdrawing from the Rome Statute in motion. It remains to be seen whether a mass withdrawal from the Rome Statute by African countries might occur. But, even without a mass withdrawal, coming at a time when the ICC is struggling to establish and maintain legitimacy, the possible withdrawal of Kenya and Namibia undermines the ICC in Africa as a whole.

In the final analysis, one can discern differences and inconsistencies in the application of the complementarity principle in Kenya, Uganda, Libya and Ivory Coast. In the cases arising from the situation in Kenya the ICC seems to have applied the stiff and strict ‘same person, same conduct’ standard. This requires the state challenging admissibility
on the basis of complementarity to show that it is able and willing to investigate and prosecute the same individuals for the same crimes as those investigated by the ICC.

Yet in the case of Libya the prosecutor was not as dogged in resisting attempts by the Libyan National Transitional Council to conduct domestic trials of Saif al-Islam Gaddafi and Abdullah al-Senussi, as he was in the case of Kenya. In fact, in the admissibility hearing of the case against Abdullah al-Senussi, the prosecutor supported the argument by the Government of Libya that it was willing and able to prosecute the accused person.

One of the grounds that persuaded the court that Libya was willing and able to investigate and prosecute the case of Abdullah al-Senussi is the international assistance that Libya argued it had secured with regards to training of prosecutors and judges on national strategies for the investigation and prosecution of officials of Gaddafi’s regime. The Gaddafi government of which Al-Sennusi was a leading figure, had been dislodged by the new administration in Libya with weapons and other logistical and material support from the same international community that was now supporting the new administration with assistance to investigate and prosecute leading figures of the Gaddafi regime. The question that naturally arises in these circumstances is this: How likely is it that Libyan courts will act independently and treat Abdullah Al-Sennusi, a member of the vanquished Gaddafi regime with the level of impartiality consistent with international standards?


517 Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, Pre-Trial Chamber 1, Decision on Admissibility of the case against Abdullah Al-Senussi, 11 October 2013, paragraph 20.
The likelihood of any member of the Gaddafi government receiving a fair trial under the new administration in Libya is doubtful. Instead of celebrating the purported investigations and upholding the admissibility challenge by the new Government of Libya, the ICC ought to have declared the case admissible. By declaring the case inadmissible, the ICC played itself into the politics of regime change in Libya. The ICC seems to have confirmed the fear in some African countries that it is but a spanner in the toolbox of western powers bent on getting rid of certain undesirable governments in Africa that they condescendingly tag as ‘regimes’. The question lingers in the mind whether the prosecutor would have adopted a rigid stance in the Kenya case if, Raila Odinga, the preferred candidate, and his ODM party had won the presidential election in Kenya.

In the case of Uganda and Ivory Coast the ostensibly credulous acceptance of referrals by the prosecutor without analysing whether the states were able to investigate and prosecute evokes the phenomenon of outsourcing of justice by a victorious party. In both situations of Uganda and Ivory Coast, there does not seem to have been the suggestion that both governments were unwilling or unable to prosecute serious crimes committed in the two states. If anything, the establishment by the Uganda Government of a Special Division within the High Court to deal with individuals responsible for atrocities in Northern Uganda demonstrates that Uganda has the capacity to prosecute the LRA commanders. Furthermore, Uganda is among the countries in Africa that boast the most competent judiciaries.

The problem faced by the Government of Uganda was not that it could not investigate and prosecute, but that it could not arrest LRA commanders as they continuously crossed the borders into South Sudan, DRC and Central Africa Republic. Difficulty in apprehending suspects is not the inability to prosecute that is contemplated under Article 17 of the Rome Statute. In Ivory Coast, the government of Alassane Ouattara established a military tribunal and immediately commenced trials of former senior members of the defeated government of Laurent Gbagbo for serious crimes. While the trials were one sided and far from perfect, the establishment of this mechanism
suggested that Ivory Coast was willing and able to investigate and try individuals responsible for atrocities.

The act by the governments of Uganda and Ivory Coast of referring the LRA and Laurent Gbagbo to the ICC while domestic mechanisms with capacity to deal with the cases were in place amount to outsourcing justice and double standards which detract from the legitimacy of the ICC. Such deliberate selectivity in unwillingness to investigate and prosecute some individuals but not others is clearly contrary to the spirit of complementarity as originally conceptualised by the framers of the Rome Statute.

The treatment of complementarity in Kenya and Libya by the prosecutor and the outsourcing of justice to the ICC in Uganda and Ivory Coast have negative implications for the legitimacy of the ICC. In Ivory Coast, Uganda and Libya, the fact that only the vanquished were sent to the ICC invokes memories of victor’s justice that the ICC was specifically created to deal a deathblow. In Kenya too, the lingering feeling that the court might have adopted a less strict approach to complementarity if Odinga, who is not among the suspects and his ODM party had won the presidential election in 2013 will leave supporters of the ICC with a bad taste in the mouth as it also evokes victor’s justice and the regime change agenda. The emerging practice of repatriating convicts to serve out their sentences in the justice systems of states initially ruled to be unwilling and unable to try the cases also raise questions as to the kind of justice that the ICC is dispensing.

3.6. Testament to Possible Legitimacy Crisis

3.6.1. Bashir of Sudan, Uhuru and Ruto of Kenya

Apart from the public criticisms and perceptions held by people, two epic examples that might show the serious legitimacy crisis of the ICC are the re-election of President Bashir in Sudan in April 2010 and the election of Uhuru Kenyatta as President and William Ruto as his deputy in Kenya in March 2013. In both situations the individuals were elected when it was known to everyone that they were facing charges of serious
crimes of an international nature before the ICC. In fact, it seems that the ICC unwittingly helped these accused persons to win elections due to the abundance of sympathy with the individuals and public exasperation with the ICC in Sudan and Kenya.

President Omar al-Bashir of Sudan is one of the court’s main critics and a living testament to the legitimacy crisis currently characterising the ICC. He is currently in office, even though the ICC issued a warrant for his arrest in 2009 for his involvement in war crimes and human rights violations. In fact, president Bashir won the election for his current term of office in 2010, about a year after the warrant of arrest was issued. He continues to travel widely abroad and participate in meetings of heads of states and governments as the legitimate president of Sudan on equal footing with other presidents despite an international warrant of arrest hanging over his head.

In Kenya, Uhuru Kenyatta and William Ruto, who were suspects in two cases before the ICC were voted president and deputy president while the case was pending before the court. In both cases of al Bashir and Uhuru and Ruto, these suspects cleverly manipulated the ICC cases to their advantage. They were able to exploit anti-Western sentiments and fuelled the fire of public opinion against the court. The picture of President Uhuru Kenyatta in the dock in a court situated in Europe evoked strong memories of his father, Jomo Kenyatta’s trial by British authorities during the colonial era.

Furthermore, in informal interviews conducted with some members of the community in Eldoret in the Rift Valley in February 2014, it came out clearly that most members of the Kalenjin and Kikuyu communities in the Rift Valley see the alliance of William Ruto who is accused of sending Kalenjin militias to attack Kikuyu communities and Uhuru Kenyatta who is accused of criminal acts against Kalenjin communities, partly in retaliation for the attacks as an act of peace-making. Generally, both Kikuyu and Kalenjin communities in the Rift Valley that embraced peace despise the ICC prosecutions. They regard Uhuru Kenyatta and William Ruto as Messianic figures or
martyrs and the ICC prosecutions as an attack on the entire communities and not just the six individuals cited in the cases. That Uhuru Kenyatta and William Ruto were able to outwit the ICC in the popularity contest and successfully exploited these sentiments highlights one of the major weaknesses of the ICC that has a negative effect on its legitimacy.

In April 2010, about a year after the ICC issued the warrant of arrest against him Bashir won re-election with 68% of the vote. Although the poll was characterised by fraudulent practices and was declared by some international observers such as the EU and the Carter Centre as falling short of international standards, the African and Arab organisations including the AU and the Arab League certified the elections as free and fair. In a statement issued at the close of the polls, the UN Secretary-General appeared to be giving his tacit blessings to the elections. Despite his international status as a fugitive from international justice, Omar al Bashir was inaugurated as the legitimate head of state and government of Sudan.

Soon after the warrant of arrest against President Bashir was issued, Moreno-Ocampo, then the prosecutor of the ICC, expressed the view that like Slobodan Milosevic and Charles Taylor, President Bashir’s arrest was imminent. He was widely quoted saying, ‘as soon as Omar al-Bashir travels through international air space, he can be arrested.’ Five years later, in 2014, not only has Omar al Bashir not been arrested, he has also travelled abroad extensively including to countries that are parties to the Rome Statute like DRC, Nigeria, Malawi, Kenya and Chad, without any consequences. He has also travelled to China, one of the five permanent members of the UN Security Council. This has given the ICC an appearance of ineffectiveness which has had a negative

effect on the way that the ICC is viewed by the ordinary people. The inability to apprehend a suspect weakens the court’s credibility and legitimacy.\textsuperscript{521} Furthermore, the welcoming of Al Bashir by other countries, including members of the ICC, highlights the legitimacy deficit of the ICC among those countries.\textsuperscript{522}

In the case of Kenya, the re-election of Kenyatta and Ruto put some Western states in a very difficult position. Western states and international institutions like the UN have no option but to engage with President Kenyatta and his deputy, as Kenya is an economic power in Africa and a key regional ally especially in the fight against terrorism. Some supporters of Uhuru Kenyatta and William Ruto likened the presidential election of March 2013 to a referendum on the ICC case. The re-election of Uhuru Kenyatta and William Ruto to the office of president and deputy president respectively and the dynamics that arise from the re-election undermine rather than bolster the legitimacy of the ICC. Here are two suspected war criminals, who, instead of being isolated and ostracised by the international community, are the legitimate leaders of their country and are accepted as key allies by the international community in fighting the international crime of terrorism!

Politicians that are suspects before international criminal tribunals are usually ostracised. In fact, it seems that one of the most powerful ways in which international criminal justice can deter commission of international crimes is through naming and shaming suspects. But this has not been the case in the case of the Kenya suspects. The Kenya cases provide the best proof that in international affairs, self-interest trumps justice. States will put their own interests ahead of the goals of international justice. Consequently, states will ostracise suspects only when it fits with their national interests. For example, the ostracisation of President Bashir by Western powers sits comfortably with the interests of those states to see a change of regime in Sudan. The Government of Kenya seems to have identified that Western countries were not going

\textsuperscript{522}Ibid.
to put justice for victims of political violence in Kenya ahead of their own economic and security interests in the country.

Kenya is home to tens of thousands of Western expatriates working. Kenya is a regional hub for international organisations working in humanitarian settings in DRC, Central Africa Republic, Darfur, South Sudan and Somalia. Furthermore, there are many European and American businesses that invest in Kenya, make profits, expatriate the profits and pay taxes back home. The British army keeps a perpetual training program for its soldiers in Kenya. The US regards Kenya, which shares a long border with Somalia, as an indispensable ally in the unending war against Islamic terrorism in the region.

The manner in which different situations are treated depending more on the national interests of states rather than on the interests of victims of international crimes and the goals of international criminal justice has made the ICC to look like a convenient tool for use by states when it suites them. For an institution that was set up with a lot of promise and expectation of justice taking precedence of national interest, the current goings-on detract from the legitimacy of the court.

Erosion of the ICC’s legitimacy in Africa is further evidenced by the fact that public support for the prosecutions in Kenya continued to dropped significantly as the cases progressed. In 2013, surveys by pollsters Ipsos Synovate Kenya, showed support for the International Criminal Court cases dropping by 20 percentage points. In October 2011, about 59 percent of Kenyans surveyed supported trials at The Hague. By June 2013, that number had dropped to 39 percent.

The Kenya cases hold the record of the largest number of witnesses that have recanted their statements and withdrawn from the cases. As a result, charges against Francis Muthaura, Kenya's former civil service head were dropped as witnesses either recanted

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524 Ibid.
their statements or were too frightened to testify. In the trial of Ruto, which started in September 2013, the prosecutor had to resort to summonses to secure the attendance of seven witnesses who had withdrawn their evidence. Withdrawal of witnesses was the result of a mixture of security fears and failures in the office of the prosecutor’s office or the ‘chronic and pervasive structural and financial shortcomings of the victims and witnesses unit’.

3.7. Conclusion

As Justice Robert Jackson observed of the Nuremberg trials, ‘courts try cases, but cases also try courts’. Applied to the ICC, selection of situations and cases influence whether the stakeholders or the ICC’s constituency will regard the court as a legitimate and effective institution. The establishment of a permanent international criminal court in 2002 was indeed a momentous milestone in international justice. But a little over a decade into its life and with the entire case docket made up of cases arising from situations on the African continent and an all-African cast of accused persons, the broad international consensus in favour of the court seems to be fraying. Other situations outside the African continent that might deserve the attention of the ICC seem to be overlooked for geopolitical reasons or deference to regional interests.

Far from the romantic views of the court held by most Africans who were among the early advocates of the court that the ICC would be the instantiation of a global moral code – an institution that would rise above power politics, the first decade of the court’s work shows how bound up the court is with political power and political processes. A sure way for the ICC to claw back some of its legitimacy in Africa is to commence investigations on other continents. There are situations on other continents apart from Africa that deserve attention by the ICC.

That the Court is influenced by politics is evidenced by the selection decisions of the office of the prosecutor that reflect not just legal considerations but power and strategic

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considerations about which situations or cases certain states would like the Court to pursue or refrain from pursuing. It is also evidenced by the apparent extent to which the Court is undertaking a political task that involves disciplining some states while insulating others. This is clearly affecting the legitimacy of the court, but as explained above, the legitimacy of an institution such as the ICC will wax and wane.

As a young institution, the ICC is also experiencing growing pains. Therefore, too much must not be read into the legitimacy crisis that the ICC seems to be currently experiencing. Rather, the ICC must take this period and the events that are happening as a learning process. The court’s legitimacy will improve as policies of the court crystallise and additional states join, particularly if they include some of the larger, more powerful ones that have so far remained outside.

According to de Guzman, at the core of the ICC’s selective problem is the lack of sufficiently clear goals and priorities to justify its decisions.\textsuperscript{526} Other than its declaration of the mandate to strive to end impunity for the most serious crimes, the Rome Statute provides no guidance at all of the goals that the court should seek to achieve through the cases that it selects. The job falls on the ICC to expound on its goals. So far the office of the prosecutor has tried to explain how the office exercises prosecutorial discretion and selection of cases. But there seems to be a mismatch between the ideas articulated in the policy documents and the actual practice in the office of the prosecutor.

It bears noting that the ICC is still a youthful organization. Other international institutions have taken decades to gain their constituencies’ confidence. By comparison to other international organisations, the ICC has done reasonably well in terms of its acceptance and confidence towards it by its constituencies. It must be remembered that the idea of a world criminal court had been stillborn for decades due to politics including the politics of the cold war. As a result, much of the details in the Rome Statute that established the ICC constitute the best options arrived at by way of diplomatic compromise. In this

\textsuperscript{526} Margaret M. deGuzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’, (2012) 33 Michigan Journal of International Law 265.
respect, the Rome Statute is hardly a perfect document. It is the best that could be achieved at the time in order to make the idea of an International Criminal Court a reality.
Chapter Four

Making Sense of the Decisions of the African Union

4.1. Background: The Context in which the AU Decisions are made

Independence in Africa in the 1960s and 1970s in Africa did not translate into better protection and realization of human rights for the great majority of the populations. Newly independent states inherited arbitrary borders that split up ethnic groups thereby creating ethnic minority problems and exacerbating ethnic tensions.

With no chance of building up popular legitimacy among the disparate groups, the newly independent states soon found nation building a challenge. Inter-state wars all but disappeared with the 1963 decision of the Organization of African Unity (OAU) to accept colonial boundaries. But, new forms of intra-state conflicts soon developed among disparate ethnic groups often forced to co-exist within the same state boundaries by the colonial boundaries.

The new intra-state conflicts were fuelled by super-power rivalries during the Cold War as the competing super-powers supported and sustained undemocratic and oppressive regimes on the continent in pursuance of their broader Cold War goals. The end of the Cold War ushered in unrest and a number of states experienced violent conflicts since, without the support of the super-powers, some undemocratic regimes began to fall.

The United Nations Operation in Somalia (UNOSOM I and UNOSOM II) established in 1992 failed spectacularly and was withdrawn in 1995. In 1994, a UN peacekeeping mission failed to stop the genocide in Rwanda. These major failures of the new global security framework under the UN spurred African states to find their own answers to their myriad complex crises.

Yet, the OAU was outdated and no longer suitable for dealing with the new and complex emergencies facing the continent. So at the 29th session in Egypt in June 1993, the OAU Assembly of Heads of States and Governments established a mechanism for preventing, managing and resolving conflicts in Africa with the primary function of anticipating and preventing conflicts. The Mechanism for Conflict Prevention, Management and Resolution was established when the upshot of sensitivities around sovereignty was undue emphasis on the principle of non-interference in the internal affairs of states. The mechanism was to be guided by principles that include ‘the sovereign equality of Member States, non-interference in the internal affairs of States, the respect of the sovereignty and territorial integrity of Member States…’

At the end of the 20th century, several factors converged leading to the establishment of a number of institutions and initiatives with the aim of achieving greater human security on the continent. African leaders invoked concepts such as ‘African solutions for African problems’ and ‘African renaissance’ to resist what was viewed as Western bullying and militarism and the imposition of Western solutions to problems in Africa. In the spirit of self-reliance and genuine political independence, the AU set about establishing a comprehensive peace and security architecture. In 2001 African heads of states and governments adopted the New Partnership for Africa’s Development (NEPAD), to address critical challenges facing the continent including poverty, development and Africa’s marginalisation internationally. In 2003 the AU established the African Peer...
Review Mechanism (APRM) as the political anchor for sustenance of good governance and democracy on the continent.

To complete the process of reasserting itself as an equal partner on the world stage and in order to be relevant in addressing the new economic, social and political problems on the continent, the OAU underwent an institutional transformation and became the African Union. The peace and security architecture, the transformation from the OAU to the AU and the objectives and principles of the AU articulated in articles 3 and 4 of the Constitutive Act respectively, suggest a reorientation of the approach to peace and security on the continent away from the traditional strategic viewpoint that emphasises regime security, to a more people-centred approach of human security.

Human security is a wider approach that seeks to address ‘a wide array of challenges including social, economic and even environmental disruptions.’ In this spirit, Article 4(o) of the Constitutive Act provides that one of principles of the AU is ‘respect for the sanctity of human life, condemnation and rejection of impunity.’ Article 4(h) is often cited as one of the most progressive provisions of the AU Constitutive Act. This clause, which also finds expression in Article 7(1)(e) of the Peace and Security Protocol, equips the AU with a legal mandate to intervene in a member state where war crimes, genocide and crimes against humanity are being committed.

It could be argued that Africa is the only continent so far to legislate for the responsibility to protect. In this way the AU has provided its peace and security architecture with the clearest legal basis for military intervention in a member state to protect civilians from crimes of international concern.

The revolts in Libya, Tunisia and Egypt during the Arab Spring and the conflict in Ivory Coast following the 2010 disputed elections put the AU’s interpretation of the responsibility to protect into sharp focus. There was no consensus in the AU on the

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appropriate action to take. But opposition to the NATO-led intervention in Libya in 2011 and the involvement of France in Ivory Coast showed the AU’s aversion to the so called humanitarian intervention by external actors in peace and security issues. Following the doctrine of African solutions to African problems, most African leaders felt that in view of its legislation of humanitarian intervention, the AU has the primary obligation to intervene and to protect civilians in conflicts on the continent.\textsuperscript{533}

The transformation of the AU included the adoption of periodic strategic plans.\textsuperscript{534} One of the enduring features of the strategic plans is the prominence given to the role played by the AU Commission in combating impunity as well as in promoting, facilitating and coordinating enforcement of democratic principles, the rule of law and respect for human rights.\textsuperscript{535}

Jallow advances the thesis that the ICC seamlessly fits into the security architecture and overall trajectory of the AU.\textsuperscript{536} The ICC can complement the AU peace and security architecture by taking felons out of the scene. ICC prosecutions can have a deterrent effect on would be offenders. The ICC can also help to mobilise shame against leaders who start conflicts and prey on civilians. On the other hand the ICC needs the AU member states, since without the cooperation of the states, the ICC will not be able to gather evidence, interview witnesses, ensure witnesses are protected and execute arrest warrants.\textsuperscript{537} Moreover, both inaugurated in 2002, the AU and the ICC share the fundamental goal of fighting impunity for the perpetrators of serious crimes of international concern including war crimes, crimes against humanity and genocide.

\textsuperscript{535} \textit{Ibid}.
\textsuperscript{537} \textit{Ibid}
According to Jallow, there are aspects in the Rome Statute, the AU Constitutive Act and the AU peace and security instruments that are mutually reinforcing.\(^{538}\) Yet, despite the shared goals, a complex relationship has evolved between the two institutions. It is important to understand this context in which the AU decisions are made if one is to make any sense of the decisions and the complexity of the relationship that has developed between the AU and the ICC.

4.2. The Issues Raised in the AU Decisions

Among themselves, despite all the collective decisions on the ICC, individual AU member states do not view the work of the ICC in Africa in the same way. As we will show below, not all African states object to the indictment of Africans by the ICC including presidents Bashir, Kenyatta and Gaddafi (before his demise). Also, as stated elsewhere, AU member states were among the most enthusiastic supporters of the establishment of the ICC.

Yet, while some of these early enthusiasts supported and encouraged mass ratification of the Rome Statute by African states, the same enthusiasts were at the same time concluding bilateral immunity agreements with the USA. These agreements, concluded in terms of Article 98(2) are meant to prevent states that sign them from extraditing US citizens to The Hague for trial by the ICC. Other African states, however, resisted pressure from the USA to conclude these agreements. This seemingly contradictory behaviour of African governments is difficult to explain without the aid of a theoretic framework on why states act the way they do.

It was only after the indictment of an incumbent head of state, President Omar Al Bashir of Sudan, that the African Union started to review its relations with the ICC. The AU seems to have taken different views depending on the individuals cited in the cases as well as the manner in which the situations came before the ICC. The indictment of state presidents seems to be a major source of apprehension for the AU. The AU also seems

\(^{538}\) Ibid
to have objected to the ICC interventions in non-states parties pursuant to UN Security Council referrals. The position taken by the AU through its resolutions raises interesting and as yet unsettled questions of immunity of heads of state, the exercise of jurisdiction by the ICC in states that are not parties to the Rome Statute, the cooperation obligations of states parties and non-states parties in situations subjected to the jurisdiction of the ICC by UN Security Council referrals. UN Security Council referrals are a source of much consternation in the AU. Some people find it rather gaoling that three of the five permanent members of the UN Security Council, USA, China and Russia are not parties to the Rome Statute. This raises issues of legitimacy, which is dealt with in the preceding chapter.

This chapter employs the dialectic of Third World Approaches to International Law (TWAIL) in carrying out an in-depth analysis of the decisions of the AU regarding the work of the ICC on the continent. Specifically, TWAIL scholarship is used in this thesis as a theoretical framework that can assist in trying to understand the contradictory behaviour of states in showing enthusiasm about the ICC while concluding immunity agreements with the USA under article 98(2). The TWAIL approach is also employed throughout this thesis in an attempt to unravel the entangled and complex relationship between the AU and the ICC.

This chapter will also grapple with the question whether the current dominance of African cases and the fallout with the ICC creates opportunities for harnessing the AU objective of self-reliance and finding African solutions to African problems as well as more accelerated ratification and domestication of all the instruments in the African human rights system. If done in good faith, this can result in the positive effect of strengthening the institutions that comprise the African regional human rights system. Ultimately, using TWAIL scholarship, I attempt to establish whether the AU’s reproach of the work of the ICC is justified. This work will thereby contribute to the debate on the evolving complex relationship between the ICC and the AU.
4.3. Decisions of the AU on the ICC’s Work in Africa

4.3.1. On the application of universal jurisdiction

The first point to note is that the AU did not start to express dissatisfaction with prosecution of African personalities in respect of the ICC. Initial signs of dissatisfaction by African states under the auspices of the AU with the application of international criminal justice in Africa first arose when African states expressed some disquiet with the application of universal jurisdiction by European states.

Jallow argues that because of this history of the genesis of the AU’s sensitivities with the application of international criminal justice, the AU tends to conflate the application of universal jurisdiction by some states with the jurisdiction of the ICC. However, it is submitted that the conflation is neither a mistake nor an accident. It seems to be a matter of convenience since, whether it is the ICC or a European state applying universal jurisdiction to try an African leader, the AU effectively raises the exact same arguments of use, by the so-called developed states, of international criminal justice as a subtle tool to achieve a new form of oppression and destabilization of African states.

Furthermore, both the ICC and the doctrine of universal jurisdiction are concerned with the same matter of enforcement of international criminal law. A careful reading of the AU decisions will show the exasperation of the AU not only with the ICC, but the implementation of international criminal justice in general against African leaders by developed countries. The manner in which the AU seems to have been treated whenever it raised issues on the implementation of international criminal justice is equivalent to being shooed away by the back of a hand. For example, Rose Kabuye, the Chief of Protocol for the President of Rwanda was arrested in Germany at a time when the AU had requested the EU states for a moratorium on execution of arrest warrants while the two parties sought to clarify the principle of universal jurisdiction. The UN Security Council has also given similar responses whenever the AU has asked it to

539 Ibid.
use its powers under article 16 of the Rome Statute and defer proceedings against an African head of state.

The AU uses the same brush to paint the application of universal jurisdiction by European states and the justice dispensed by the ICC as targeting African political leaders. It is necessary, therefore, to briefly review the AU decisions on the application of universal jurisdiction against Africans by European states before dealing with AU decisions on the work of the ICC in Africa.

4.3.2. The concept of universal jurisdiction

It is well worth noting that the concept of universal jurisdiction is not a recent creation. It dates back at least to the 1600s when states cooperated to prosecute pirates on the high seas where no particular state had exclusive jurisdiction. The notion was extended to cover slave trade premised on two bases. Slave traders were usually caught on the high seas where, no particular state had the right to exercise jurisdiction. More importantly, slave trade was an offence so tainted with moral turpitude that the slave trader, just like the pirate, was deemed *hostis humani generis*, an enemy of humankind. The concept has been developed in the recent past to cover international crimes that are subject to the principle *aut dedere aut judicare*.

In chapter one of this thesis, we saw that after the Nuremberg and Tokyo Tribunals, efforts to establish a permanent international criminal tribunal suffered several false starts. As a result, the notion of universal jurisdiction gained traction as domestic courts acquired the authority to prosecute serious crimes including war crimes, genocide and crimes against humanity committed anywhere in the world. However, the politics of

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the Cold War stymied the exercise of universal jurisdiction by states. During the cold
war, universal jurisdiction was used sparingly. The end of the Cold War opened up new
possibilities for universal jurisdiction prosecutions.

The case of Augusto Pinochet marked a turning point in the understanding of the notion
of universal jurisdiction for egregious international crimes. Following this case,
several European states passed new laws affording their municipal courts universal
jurisdiction and those that already had such laws on their statute books, expanded the
reach of their universal jurisdiction laws.

It is trite that the obligation to prosecute the crimes of genocide and torture is now
considered a rule of customary international law that binds all states. In terms of the aut
didere aut judicare principle, all states have an obligation to investigate and prosecute
these crimes or to extradite the suspect to states willing to prosecute. Membership of
the Torture Convention or the Genocide Convention is not necessary. Consequently
torture and genocide are among serious crimes that are subject to universal jurisdiction.

In the USA, the Alien Tort Claims Act of 1789 grants powers to US Federal Courts over
‗any civil action by an alien for a tort only, committed in violation of‘ international law.
The statute grants jurisdiction over civil claims not criminal prosecution. It is through this
statute as well as the US Torture Victims Protection Act that US courts have adjudicated
cases involving grave human rights violations in other sovereign states without any
element tying the plaintiff or defendant or victims to the United States of America.
Recently, civil suits have been filed against individuals including President Robert
Mugabe of Zimbabwe for damages arising out of human rights violations in
Zimbabwe.

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545 Reservations to the Convention on Genocide Case (1951) ICJ Rep. 15; AG of Israel v Eichmann (1962) 36 ILR 1;
In view of the *aut didere aut judicare* obligation, a perusal of the oft-cited universal jurisdiction cases seems to suggest that the exercise of universal criminal jurisdiction by a state in the absence of any element tying the defendant to the forum state is problematic and controversial as a matter of policy and not necessarily as a matter of law.\footnote{Jonathan Garson, ‘Handcuffs or Papers: Universal Jurisdiction for Crimes of Jus Cogens, or is there Another Route?’, (2007) 4 Journal of International Law and Policy 5:1, also available online at https://www.law.upenn.edu/journals/jil/jilp/articles/4-1_Garson_Jonathan.pdf}

AU dissatisfaction with the application of universal jurisdiction by European states to target African political leaders can be traced back to the recommendation of the Ministers of Justice of AU member states of 18 April 2008.\footnote{See for example paragraph 1 of the Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/14(XI), Assembly/AU/Dec.199(XI).} Thereafter, institutions of the AU have over the years grappled with the perceived abuse of the principle of universal jurisdiction by European states.\footnote{Ibid.}

At its ordinary session in Sharm El-Sheik, Egypt, in July 2008, the AU Assembly, resolved, among other things, that the political nature and abuse of universal jurisdiction by ‘some non-African states’ against ‘African leaders, particularly Rwanda, amounts to violation of sovereignty, which destabilizes African states and could endanger international law and security. The AU Assembly resolved that AU member states shall not execute any warrants issued pursuant to universal jurisdiction.

The directive to AU member states not to execute any warrant of arrest is similar to the decisions taken by the AU in respect of the ICC warrant of execution against President Al Bashir. Apart from proposing the establishment of a body to regulate the exercise of universal jurisdiction, the AU Assembly also resolved to raise the matter at the UN Security Council and General Assembly and to meet with the EU to discuss the matter. Meanwhile, the AU called for a moratorium on the execution of all outstanding warrants.
until all sticky political and legal issues were ironed out between the parties concerned.\textsuperscript{550}

In November 2008, Rose Kabuye, the Chief of Protocol for the President of Rwanda, was arrested in Germany while travelling on business. The AU was particularly unhappy with the timing of this arrest. The arrest was in spite of the request by the AU for a moratorium on execution of outstanding arrest warrants. The arrest was also conducted while the technical expert group set up by the AU and the EU to study and clarify the AU and EU’s understanding of the principle of universal jurisdiction was still deliberating.

In its decision at the twelfth ordinary session held in Addis Ababa in February 2009, the AU Assembly introduced the idea of examining the possibility of empowering the African Court of Human and Peoples’ Rights with jurisdiction to try international crimes including genocide, crimes against humanity and war crimes.\textsuperscript{551} In subsequent decisions the AU reiterated its earlier positions and requested the EU to respect international law on immunity of state officials.\textsuperscript{552}

### 4.3.3. Decisions of the AU in respect of ICC proceedings in Sudan, Libya and Kenya

The ICC attracted the attention of the AU after it moved to target Sudanese President Bashir for prosecution. At this time, the context was charged with the AU locked in a dispute with EU states over the application of the principle of universal jurisdiction to try Africans for crimes of international concern. In January 2005, the UN International Commission of Inquiry on Darfur submitted its report, which found that war crimes and

\textsuperscript{550} \textit{Ibid.}


crimes against humanity were being committed in the conflict in Darfur. The Commission prepared a list of fifty-one potential suspects and recommended that the UN Security Council refer the conflict in Darfur to the ICC.

On 31 March 2005, the UN Security Council obliged by adopting Resolution 1593, in which it referred the situation in Darfur to the ICC. This decision was the first time that the UN Security Council invoked its powers under Article 13(b) of the Rome Statute to found jurisdiction for the ICC over a state not party to the Rome Statute. In April 2007, the ICC Pre-Trial Chamber issued arrest warrants for a government Minister, Ahmad Harun and a leader of the government-backed Janjaweed militia, Ali Kushayb.

Then on 14 July 2008, the ICC prosecutor requested the Pre-Trial Chamber to issue a warrant of arrest for President Omar Al Bashir. On 4 March 2009, the Pre-Trial Chamber obliged and issued a warrant of arrest for President Bashir for war crimes and crimes against humanity. The Pre-Trial Chamber issued a second warrant of arrest for President Al Bashir for a further charge of genocide in July 2010. It is this shot aimed at the highest levels of the Government of Sudan that got the AU excited.

Exactly a week after the prosecutor applied for an arrest warrant for President Bashir, the AU Peace and Security Council issued a communiqué decrying the timing of the ICC action in view of the delicate peace processes in Sudan. Expressing the view that a prosecution at that time would not be in the interests of victims or justice, the AU Peace and Security Council the AU Peace and Security Council requested the UN Security Council to suspend the proceedings against Bashir pursuant to its powers under Article 16 of the Rome statute.

In response, on 31 July 2008, the UN Security Council adopted resolution 1828 extending the mandate of UNAMID. In that resolution, the Security Council merely took

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note of the AU Peace and Security Council’s communiqué, but did not deal with the substance of the request to exercise its powers under Article 16 of the Rome Statute. On 5 March 2009, a day after the ICC issued the warrant of arrest for President Bashir the AU Peace and Security Council issued a communiqué repeating its concern over the timing of the ICC action in view of the delicate peace processes in Sudan. As a consequence, the AU Peace and Security Council once again requested the UN Security Council to suspend the proceedings against Bashir pursuant to its powers under Article 16 of the Rome statute. Article 16 of the Rome Statute provides that no investigation or prosecution may be commenced or continued for a year once the Security Council has the ICC to suspend proceedings. The AU was worried about the effects that criminal proceedings would have on the efforts to reach a peace agreement in Darfur. There were fears of the possible unraveling of the fragile Comprehensive Peace Agreement signed with the SPLM to end the long standing conflict in Southern Sudan.

Furthermore, it was also feared that the criminal proceedings against President Bashir might threaten the success of the impending referendum on the secession of Southern Sudan. Therefore, according to the argument of the AU, the timing of the ICC proceedings was not right as it was coming at a time when Sudan was on eggshells with respect to the peace processes in Darfur and in Southern Sudan. In this respect the request by the AU seems to be well founded and consistent with the intention of the framers of Article 16 of the Rome Statute. But the AU is neither party to the Rome Statute nor to the proceedings before the ICC. The Rome Statute does not have any provisions giving regional bodies the powers to submit such requests. It is therefore not clear whether the AU has the jurisdiction to act under the provisions of the Rome Statute and submit such requests.

On its part, the Security merely took note of the AU request and took no further action on the request. In its communiqué of 5 March 2009, the AU Peace and Security Council

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was unhappy that the UN Security Council had ‘failed to consider with the required attention the request made by the AU to implement the provisions of article 16 of the ICC Statute’.  

 Apparently offended and nonplussed by the response of the UN Security Council, in particular the apparent lack of seriousness in dealing with the request to defer the case against Bashir, at its 13th Summit held in July 2009 at Sirte, Libya, the AU Assembly of Heads of States adopted a resolution in which it directed that ‘AU member States shall not cooperate, pursuant to the provisions of article 98 of the Rome Statute relating to immunities, with the arrest and surrender of President Al Bashir.’ Thereafter, the AU Assembly passed several resolutions to the effect that member states will not cooperate with the ICC in any way in the prosecution of President Bashir.

The AU Assembly passed similar resolutions directing member states not to cooperate with the ICC in the prosecution of the cases in Libya and Kenya. It is obvious that the AU has issues with the ICC proceeding against high ranking government officials. As things stand, the AU resolutions on the work of the ICC in Africa relate to the cases against President Omar Al Bashir of Sudan, the late Muammar Gaddafi of Libya and President Kenyatta of Kenya and his deputy William Ruto. For example, even though there were two cases and no less than 6 defendants in the Kenya situation, the AU seemed to be concerned about President Kenyatta and his deputy only. In 2013, the African Union extraordinary summit made the decision that ‘President Uhuru Kenyatta will not appear before the ICC until such time as the concerns raised by the AU and its Member States have been adequately addressed by the UN Security Council and the ICC’.  

Furthermore, the AU requested that the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto, be suspended until they complete their terms of

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556 Ibid, paragraph 5.
office. In the same resolution the AU specifically directed its members that are ICC parties to include on the agenda of the Assembly of States parties, the practice at the ICC of proceeding against ‘sitting heads of state and government in Africa’.

4.4. An Initial Critique of AU Decisions

4.4.1. Overview

There are different ways in which one can look at and explain the AU decisions. The most cynical view is that the AU Assembly, which is made up of heads of states and governments wished to entrench impunity for African heads of states and governments. The pragmatist might explain AU decisions requesting deferral of proceedings from a practical point of view of the dangers that might be posed to the rest of the country if the leader of the country is required to spend considerable time away attending a trial at The Hague. Whether one agrees with the decisions is another matter. As we will show below, the fact of the matter is, and it is an important one in trying to make sense of the AU decisions, that they are based on the provisions of the Rome Statute and therefore seem at face value, to have a very sound basis in law.

In trying to make sense of the AU decisions, on abuse of international criminal justice to the prejudice of African leaders, there are other issues that are relevant to consider. A survey of universal jurisdiction cases in UK, France, Spain and Belgium shows that none of the cases against Africans was brought by European state-actors _mero motu_. European states that have indicted Africans have done so on the basis of complaints submitted by fellow Africans, mostly victims of the alleged criminal offences. Some of the cases have been commenced by NGOs at the instance of African victims that in most cases would have failed to obtain remedies at home. It seems fair to say that universal jurisdiction cases commenced in Europe or elsewhere are in most instances a direct result of the failure by the state with primary jurisdiction over the alleged offences to provide remedies to the victims of such offences.

\textsuperscript{558} Ibid, paragraph 10(ii).
\textsuperscript{559} Ibid, paragraph 10(vii)
The solution for curtailing use of universal jurisdiction by other states is fairly simple and within the capabilities of most African governments. A survey by Amnesty International shows that most African states have adopted legislation of some sort, especially in domesticating the Geneva Conventions, the Genocide Convention, the Rome Statute and the Torture Convention. This legislation obliges them to prosecute the core crimes or to extradite the alleged offender to a state that is willing to prosecute. The effect of this legislation is to allow the states to exercise universal jurisdiction over these core international crimes.

Furthermore, in most African states including Zimbabwe and Botswana for example, customary international law is regarded as part of the domestic law.\textsuperscript{560} This allows such states to prosecute the core crimes including genocide, torture, crimes against humanity and war crimes that they might or might not have any jurisdictional links with. Rather than make complaints of a generalised nature that may not withstand scrutiny, African states are better able to avoid the exercise of universal jurisdiction by other states over their citizens and leaders accused of core international crimes by prosecuting these crimes whenever they are committed by their nationals or on their soils.

Apart from the adoption of laws that allow them to deal with the core crimes under international law, by transitioning from the OAU to the AU, the African region effectively positioned itself for dealing with impunity for human rights violations and serious crimes of international concern. As we have noted, by allowing for the right of the AU to intervene in a member state where war crimes, crimes against humanity and genocide are being committed, the AU became the first regional body to legislate for and therefore operationalise the contentious principle of the responsibility to protect. Moreover, motives that include, bringing an end to the scourge of conflict, promotion of

human rights, democracy, good governance and the rule of law and closing the impunity gap run the gamut of the Constitutive Act of the African Union.\textsuperscript{561}

There may be issues of capacity in a few African countries, but by and large, the structures for prosecution of core international crimes that fall within their jurisdiction exist in most African states. And the goodwill of the African Union seems, on paper, to be abundant. There is no persuasive reason why African states should not prosecute war crimes, crimes against humanity, torture and genocide. The main reason for this failure is lack of political will to put the spirit of the AU Constitutive Act into practice and subordinating the objectives of the AU to the selfish motives of self-preservation and protection their own. If African states decide to take up the challenge and show serious signs of putting the spirit of the AU Constitutive Act into practice by prosecuting core crimes committed in their states or elsewhere on the continent, the prosecution of Africans by the ICC or European states pursuant to the exercise of universal jurisdiction will be the exception rather than the rule.

\textbf{4.4.2. Entrenching impunity for heads of states and governments}

The drafting and adoption of the Rome Statute came at about the same time that the AU was going through its transformation from the OAU. The AU eschews conflicts, use of force and impunity. It seeks to champion good governance, the rule of law and intervening in situations of war crimes, genocide and crimes against humanity. In this respect, the spirit of the AU Constitutive Act dovetails neatly with the letter and spirit of the Rome Statute. There is a clear convergence of values between the AU Constitutive Act and the Rome Statute. Yet the AU has directed its member states to disregard any obligations they might have to cooperate with the ICC.

The most cynical commentator would argue that most governments of states that make up the AU are driven by the motive of self-preservation and to protect their own self interests. When African governments sign up to an instrument that allows other states to intervene in their territories in situations of war crimes, genocide and crimes against

\textsuperscript{561} See for example paragraphs 8 and 9 of the Preamble as well as Articles 4(h), 4(m) and 4(o).
humanity, they do not anticipate that their nationals, not least the leaders themselves will ever be subjected to the jurisdiction of another state or an international tribunal.

Moreover, the governments expect that they will be able to use the provisions of such instruments to prosecute their political opponents both at home and abroad. They expect that at home, the prosecution of their opponents will lend a measure of legitimacy to their persecution of their opponents. Therefore, governments of African states that make up the AU condemn the ICC and demand that the prosecution be deferred when the ICC prosecutes one of the leaders of the AU member states in order to protect one of their own.

Because they are driven by self-interest and not the noble goals of the rule of law, good governance and combating impunity, the governments that make up the AU would not behave in a similar manner when it is a leader of the opposition that is being prosecuted. The evidence to support this view can be gleaned from the cases that came to the ICC by way of self-referrals by the African states. In these cases, the AU has not raised any complaints over the ICC prosecuting Africans. This is because in all the situations of self-referrals, no government officials have been indicted.

The ICC has tended to pursue individuals on the opposition side and not on the government side. The case of Uganda where the prosecutor held a joint conference with President Museveni to announce the referral by the Government of Uganda of the LRA to the ICC provides a good example. The referral seems to target only the LRA, yet the Uganda army has also been fingered in atrocity crimes in the war against the LRA.

### 4.4.3. A pragmatic view

From a very practical point of view, having the state president away in the Hague for extended periods of time attending a criminal trial, which might take years might cause a constitutional crisis in the country concerned. In states that have experienced coups in the past and are prone to this form of changing government, such as Sudan, the
likelihood of a coup taking place while the president is at The Hague attending trial is almost certain.

The AU eschews and has been very critical of unconstitutional changes of governments including coups. Article 4 of the Constitutive Act of the AU enumerates the principles and values that underpin the functioning of the AU including: ‘condemnation and rejection of unconstitutional changes of governments.’ Article 30 of the Constitutive Act straddles governments that come into power via unconstitutional means with pariah status. The effect of Article 30 is that it operationalises the principle enshrined in Article 4 by seeking to deny participation in activities of the AU to any government that comes into power through unconstitutional means. The AU has already shown its determination to bring the rejection of unconstitutional change of government to bear through the way that it has dealt with Madagascar. The idea of deferring criminal trials of heads of state and government is consistent with the letter and spirit of the AU Constitutive Act.

The directive was forcefully made in respect of the case of President Bashir that was commenced pursuant to a Security Council resolution adopted in exercise of its powers under Chapter VII of the UN Charter. In effect, therefore, not only has the AU asked its members to disregard their obligations under the Rome Statute, but also under the Charter of the UN, although admittedly, Security Council resolution 1593 imposes a peremptory obligation to cooperate with the court on Sudan only. AU member states that are parties to the ICC Statute have an obligation to comply with the provisions of the Rome Statute. They have an obligation to arrest and surrender President Bashir. All AU member states including those states that are not parties to the Rome Statute are ‘urged’ but not obliged to cooperate with the ICC.

It does not seem to make too much sense that such a drastic change of position would take place within a short period of time in international affairs. What has happened over a relatively short period of time, for African states to change their views towards the ICC from initial enthusiasm and fervent support to instructing its members to obstruct and subvert the work of the ICC? How is one to explain this abrupt change of views? The
instruction to AU member states to withhold cooperation with the ICC has the effect of
entrenching impunity for atrocities. It seems that when it comes to the prosecution of
heads of state and government, African leaders will tend to do anything to protect each
other.

4.5. The decisions of the AU are based in law
As we have seen, it was after the indictment of Presidents Bashir, Gaddafi and Uhuru
Kenyatta that the African Union met to review its relations with the ICC. At each one of
the meetings the AU requested the UN Security Council to defer proceedings against
each of these presidents. When the UN Security Council failed to act on the request to
defer proceedings, it was then that the AU resolved to direct its members to cease
cooperation with the ICC with respect to apprehending suspects and handing them over
to the court. The AU resolutions appear to be quite sound as they are based in law. The
decisions of the AU are based on Articles 21 and 98 of the Rome Statute itself. As such,
the requests made to the UN Security Council to defer proceedings so far relate only to
Presidents – individuals who might enjoy immunity as contemplated under Article 98(1)
of the Rome Statute.

4.6. Assessment of the AU’s Decisions from the Perspective of Third World
Approaches to International Law

4.6.1. Introduction
The AU decisions raise some questions not only about enforcement of international
criminal law, but also about the very normative framework that underpins international
criminal law. The norms underpinning the international criminal law that the ICC is
established to enforce are based on the liberal approach that emphasises the
universality of human rights for individual human beings. The Nuremberg trials and the
adoption of the Universal Declaration of Human Rights, as we saw in Chapter One of
this thesis, ‘ushered a new vision of international law predicated on respect for human rights and concern for the plight of humanity.’  

The AU and its member states certainly embrace human rights and protection of humanity. The AU Constitutive Act has several clauses that put human rights at the centre of the AU agenda. Almost all African states have ratified or acceded to the major international and regional human rights instruments including the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights. All the AU members include a bill of rights in their constitutions.

However, the AU decisions on the alleged abuse of universal jurisdiction and on the ICC’s work in Africa reflect that the AU and its member states continue to question the liberal ideals of human rights espoused by Western states. In the specific case of the exercise of universal jurisdiction by European states and prosecution of African leaders by the ICC, the AU views the normative framework that underpins these institutions as ‘imperialist, colonialist and even racist.’

But is there any substance to the suggestion by the AU that the ICC is functioning as a tool for the neo-imperialist or neo-colonialist agenda of the Western states? An analysis of the views and attitudes of the AU and its member states towards the ICC through the lenses of the so called Third World Approaches to International Law (TWAIL) can help to shed light on the position taken by the AU. TWAIL is also employed in this thesis as the theoretical framework for understanding the dominance of cases arising from situations in Africa and the dominance of Africans as defendants in the caseload of the ICC.

563 Dire Tladi, Ibid.
4.6.2. TWAIL: meaning, content and application to AU decisions

The term, ‘Third World’ was mostly used during the cold war to describe states that were neither industrialised and carried the label ‘First World’ nor communist and socialist then referred to as the ‘Second World’. Critics of TWAIL challenge the taxonomy ‘Third World’ on the basis of the end of the Cold War. Rajagopal advances one of the clearest ways to understand the continuing utility of using the terminology, ‘Third World’. 564 Third World can be understood as an ideological category comprising those states that were politically engaged with the dominant powers in the bipolar world order mainly through nonalignment. 565 It could also be understood as a geopolitical concept indicating specific areas on the world map that can be distinguished from the first and the second worlds in terms of political and economic organisation. 566 It can also be defined by a certain historical process in so far as it included those countries which suffered the experience of colonialism and imperialism.

A common thread that runs through the entities as understood in these three conceptualisations is the struggle for political independence from their colonial rulers that these entities waged and won. ‘Third World’ has also been popularly used to invoke images of all manner of vices associated with backwardness and barbarism such as poverty, squalor, corruption and violence, among others. In this sense, the category ‘Third World’ was constructed as the uncivilised deviant ‘other’ by the European during and after the colonial encounter.

This understanding is central to the development of international law if cognisance is taken of the view that international law developed during colonialism and that international law was used to justify the colonisation of the ‘Third World’, which was described as backward and uncivilised. Thus colonialism was justified as a ‘civilising

565 Ibid.
566 Ibid.
mission’ meant to assimilate the poor, corrupt, violent, backward and barbaric ‘Third World’ into the fold of universal international law.\textsuperscript{567}

The notion of ‘Third World’ retains its relevance in the post Cold War era not only for laying bare the hierarchical ordering of the international community, but also for locating the roots of this hierarchical ordering in the historical experience of colonialism and imperialism. The category ‘Third World’ continues to be relevant as a polemical or counter-hegemonic term designed to rapture received patterns of thinking. The current widening divide and inequality between North and South make the ‘Third World’ a reality.\textsuperscript{568}

One of the most attractive features of TWAIL is that unlike most theories, there is no single theoretical approach associated with the approach. Rather, the unifying thread among TWAIL scholars is a common political orientation and common concerns over the application of international law to those traditionally regarded as the ‘others of international law’, the Third World peoples.\textsuperscript{569}

Similar to the complex relationship between the ICC and Africa, two broad dialectics – one reactive and the other proactive – can be identified in the TWAIL discourse. Despite its criticism of international as a child of imperialism and colonialism, TWAIL advances a reformist agenda that acknowledges the potential of international law to transform the lives of third world peoples and to constrain the power of the authoritarian third world state and the dominating first world. This duality of engagement with international fits in very well with the positions that the AU and its members states have taken towards the ICC.

TWAIL holds that international law developed during the colonial era. Colonial relations that were characterized by marginalisation and domination of the colonised people by

\textsuperscript{567} Ibid.
\textsuperscript{568} Ibid.
Western powers shaped the fundamentals of international law. TWAIL faults international law for legitimising the subjugation and exploitation of ‘Third World’ peoples through colonialism. According to Bedjaoui, ‘international law made use of a series of justifications and excuses to create legitimacy for the subjugation and pillaging of the ‘Third World’, which was pronounced uncivilised.’\textsuperscript{570} International law recognised conquest as a means of acquiring territory and sovereign rights over African societies.\textsuperscript{571} International law also recognised unequal treaties that were obtained by trickery as means of acquiring sovereign rights over territory in Africa.

Rajagopal argues that the development of the basic doctrines of sovereignty during the colonial era mirrors the 17\textsuperscript{th} century development of the concept of childhood, which regarded the child as an inferior version of the adult, and therefore had to be developed into a responsible and mature adult.\textsuperscript{572} This idea resonated with colonialism, where the colonized peoples were portrayed as minors and their perceived primitive status was regarded as equivalent to childhood.

The peoples of the Third World were seen as minors and inferior versions of their colonizers. The Third World peoples therefore had to be redeemed and civilised. This characterisation of the Third World peoples as minors and inferior was central to the formulation of basic doctrines of sovereignty and intervention and their violent application to colonised peoples.

TWAIL rejects the idea that decolonization cleaned up international law of all the vices associated with its colonial and imperialistic origins. TWAIL scholars believe that international law is still a tool of oppression. Decolonisation only changed the form and not the substance of domination. Dominant groups continue to resort to international law to create relationships that undermine the autonomy of third world states in ways that are akin to colonisation. This, together with the ‘inability of third world states to resist the

\textsuperscript{572} Balakrishnan Rajagopal, \textit{ibid}.
overwhelming ideological and military dominance of the first world is what TWAIL scholars have come to regard as recolonisation.

For TWAIL scholarship, the modern forms of domination are subtle and rarely involve the use of force. They include: the ways in which Third World states are shipping their sovereign rights and powers to international institutions that are controlled by the First World; the arbitrary application of the principle of humanitarian intervention; unequal terms of trade that continue to deteriorate; the inequality in the global monetary system that is managed by the Bretton Woods institutions and the crushing indebtedness of Third World states; and the power of multinational companies. Bedjaoui regards the multinational companies as the equivalent of the charter companies that helped European powers to colonise Africa.

It is through conquest and subjugation of Third World peoples that international law acquired the characteristic of universality. Third World peoples were assimilated into this universality through techniques that include brutal military force and the concept of the ‘civilizing mission’. By this concept, non Western peoples are characterized as the ‘others’. They are barbaric, backward and violent. Therefore, these ‘others’ must be civilized, redeemed, developed and pacified. The concept of ‘civilizing mission’ justified the continuous intervention by the West in the affairs of the Third World societies and provided the moral basis for the subjugation and domination of the Third World.

The ‘civilizing mission’ concept has withstood the test of time and continues to reproduce itself in different benevolent forms including the democratisation and human rights mantra that posit a Third World that is lacking and deficient and in need of international intervention for its salvation. For TWAIL scholarship, the manner in which the ICC has gone about its business of selecting situations and cases qualifies it for one

of these seemingly benevolent forms that the ‘civilising mission’ continues to reproduce itself.

It is for this reason that TWAIL refuses to accept any notions of the universal character of the international legal system. TWAIL scholars point to a two-tiered system of ‘international’ law that legitimates and supports the actions of First World nations while concurrently criminalising the actions of their Third World counterparts.

4.6.3. Third World experience with colonialism

The Third World peoples’ experiences with colonialism, the justification of colonialism and use of force in the civilising mission, make the Third World peoples very sensitive about how the issues of material distribution and the balance of power affect the way in which concepts and norms of international law are produced, understood and applied.\(^{576}\) The Third World will always be suspicious of, and inquisitive about the ways in which any international institution or rule will affect the distribution of power between the weak Third World and the powerful Western states.\(^{577}\) It is these experiences, sensitivities and suspicions as understood from the TWAIL perspective that seem to inform the decisions of the AU and its member states on the current practice in the application of international justice in general and the work of the ICC in Africa.

Ismail has argued that colonialism was inherently racist, cruel, senseless, evil and dehumanising.\(^{578}\) The situation was worse with settler colonialism as in apartheid South Africa and racist Rhodesia where the law was used as an instrument of discrimination and oppression. The atrocities committed by the colonial powers have been documented and the fact is not in issue.\(^{579}\) For TWAIL it is noteworthy that these


\(^{577}\) Antony Anghie & B.S Chimni, *Ibid*.


atrocities committed by colonial powers against colonised peoples have never been the subject of concern for international law. It was only after European peoples were subjected to the tragedy of the holocaust that concern for atrocities committed within a state emerged. In fact, as Professor Schabas observes, the allies sought to establish a distinction between atrocities committed in an international and internal conflict because they were conscious of the effects that this would have on the way they treated indigenous peoples in their colonies.  

4.6.4. Challenging exceptionalism
TWAIL scholarship can also help us to understand and explain the inherent contradictions in the Prosecutor’s selection decisions that have antagonized the AU as Western exceptionalism. As we have seen, Sudan and Libya came before the ICC through referrals of the UN Security Council acting under Chapter VII of the UN Charter. Since both are not states parties to the Rome Statute, the Security Council imposed a mandatory obligation on Sudan and Libya to cooperate with the ICC. Yet in the same referral resolutions, the Security Council purported to exempt from the jurisdiction of the ICC, citizens of states not party to the ICC’s Rome Statute, who might have committed crimes within the jurisdiction of the ICC.

AU decisions reflect a rejection of Western exceptionalism that formally and informally precludes the application of the rules of international criminal law to Western states and integrates the existing power imbalances of the international system into international criminal law. The exceptionalism of the ICC means that its activities criminalise only the Third World. The African focus is more than geographic. It also includes the nationality of the actors involved. Taking charge of a situation permits the ICC to investigate anyone connected with that conflict, regardless of nationality. However, the ICC has chosen not to do so. Those who represent the United Nations and USA citizens are formally exempt from investigation by the ICC, presumably because peacekeepers (and

the ICC itself) are properly understood as saviours or the redeemer out to save helpless African victims from their savage and barbaric criminal leaders.\textsuperscript{582}

Similarly, Western actors, even when not operating under the ‘neutral’ front of international organizations, are not being investigated despite direct involvement in hostilities. Journalists have documented the involvement of the French in the conflict in CAR, including bombing raids on villages by French warplanes and the exploitation and grabbing of CAR resources by French corporations.\textsuperscript{583} There exists, evidence of role of French military, economic, and political actors in the causation and exacerbation of the conflict in the Central African Republic. Yet despite having the jurisdiction over French nationals in CAR, the ICC prosecutor has not investigated possible crimes committed by the French.

It seems that many African leaders found it an affront to their sensibilities that Western powers, responsible for some of the worst atrocities committed against Africans in the form of colonialism, should purport to project itself as the moral compass of the world.

Regarding the application of the principles of universal jurisdiction, it seems that the specific case of Belgium, whose law gave its courts the widest possible reach in the exercise of universal jurisdiction, African leaders were particularly unhappy in view of two recent events that had taken place. The first one relates not only to colonialism but to the peculiarly atrocious nature of King Leopold II’s rule in the Congo supremely well captured by Adam Hochschild in the book, \textit{King Leopold’s Ghost: A Story of Greed, Terror and Heroism in Colonial Africa}.\textsuperscript{584} The second one is that Belgium stands accused of playing a role in the genocide in Rwanda by pulling out its soldiers, who were the backbone of the UN Assistance Mission for Rwanda (UNAMIR), when the

genocide was going on.\textsuperscript{585} The fact that this country, which had failed to provide protection to civilians during the genocide could act as the moral compass of the world proved to be quite difficult to stomach for most African leaders.

4.6.5. Challenging the universality agenda

Modern International Criminal Law has its intellectual moorings in the human rights movement. TWAIL questions the claims of universalism in international law in general and in the human rights discourse in particular. In fact, Chimni argues that for TWAIL scholarship, the argument for universality of international law is an absurdity.\textsuperscript{586} Firstly, it leaves no space for recognizing the valid concerns of states and peoples subjected to a long period of brutal colonial rule.\textsuperscript{587} Secondly, the diversity of the social world, uneven global development and the reality that states are at different stages of development surely cry for special and differential treatment.

From a TWAIL perspective, the decisions of the AU reflect the false universality of the norms that underpin the system of international criminal justice under the Rome Statute. The Rome Statute purports to provide a complete list of crimes that are of the most serious concern to the international community as a whole. Yet, it is quite clear that the listed crimes are based on violations of civil and political rights, which are more of a concern of the west than the third world.

The Third World is more concerned about the need to preserve economic, social and cultural rights. The views expressed by some senior South African government officials following the Al Bashir saga demonstrate this point. Describing the court action seeking to compel South African authorities to arrest Sudanese President Omar Al-Bashir as ‘opportunistic’, the chairperson of the South African Parliament's International Relations and Co-operation Portfolio Committee expressed the view that the AU has serious

\textsuperscript{585} Linda Melvern, \textit{A people Betrayed: The Role of the West in Rwanda’s Genocide}, (New York: Zed Books, 2000);
\textsuperscript{587} \textit{Ibid}.

Despite the correlation between economic deprivation and poverty and the incidents of conflicts that create fertile conditions for commission of ICC crimes, the legal order established by the Rome Statute completely ignores crimes related to economic deprivation. In this respect, TWAIL scholarship would argue that the prevailing regime of international crimes is based on Western constructed laws. The current discord between the AU and the ICC betrays any claims to the universality of the norms from which the crimes are created.

Due to the prescription of universal norms to deal with atrocities arising from conflicts, Third World states have lost the power and authority to deal with the conflicts and the atrocities in ways that are suited to the existential conditions of the affected Third World peoples. The pleading by the Acholi people of Northern Uganda with the ICC Prosecutor to stop prosecuting the LRA rebels so that they can deal with the atrocities through their \textit{mato oput} traditional dispute resolution mechanism has not received the seriousness that a TWAIL scholar might consider it deserves. The Acholi people of Northern Uganda had experiences with violent and oppressive British colonial rule.\footnote{Hannes Tornberg, ‘Ethnic Fragmentation and Political Instability in Post-Colonial Uganda: Understanding the Contribution of Colonial Rule to the Plight of the Acholi People in Northern Uganda’, \textit{Human Rights Studies}, Lund University, Fall 2012, http://lup.lub.lu.se/luur/download?func=downloadFile&recordOid=3357725&fileOid=3357745} Their knowledge and perceptions of the ‘white man’s justice’ lead them to the conclusion that it is ‘retributive or punitive … it leads to polarization, hatred, bitterness, and alienation’ of the offender.\footnote{Ultimate Media Consult, ‘Acholi Want More Prominent Role for Mato Oput’, 9 December 2008, http://www.ugpulse.com/heritage/acholi-want-more-prominent-role-for-mato-oput/1025/ug.aspx}

Acutely aware of their existential conditions, the Acholi community in Northern Uganda does not see how a trial in The Hague can contribute to lasting peace and restoration of
relations in the community. For them, given their value systems, socialisation and their level of development ‘mato oput’ is one of the best justice systems in the world’ and is best suited to try war crimes and bring about justice and reconciliation in Northern Uganda.\(^{591}\)

### 4.6.6. The limits of ascribing individual criminal responsibility in atrocity crimes

TWAIL scholars eschew the narrow attribution of individual criminal responsibility to individuals without going to the root causes of the crimes. Powerful actors in the international system play a crucial role in creating the wider environment in which atrocities take place. In the case of the Rwanda genocide for example, the International Panel of Eminent Personalities tasked to investigate the genocide concluded that programmes introduced in Rwanda by international financial institutions exacerbated inflation, unemployment and land scarcity, which created fertile ground for an uprising.\(^{592}\) Mahmoud Mamdani also refers to the role that British colonialism played in the Darfur conflict.\(^{593}\) Thus, for TWAIL, any attempt to identify responsibility for atrocities and to create systems of accountability should also inquire into the roles that these powerful international actors played in promoting and exacerbating the situation.

TWAIL also questions whether a regime of individual accountability appropriately addresses situations where entire communities inflict massive violence against each other. Institutions that are established to deal with these situations should consider the direct ways in which powerful states that play the virtuous role of establishing the institutions of accountability may have promoted the very violence, which they now seek to address. The justice as dispensed by the ICC under the first Prosecutor, according to the AU failed the continent at many levels. It does not seek to deal with the foundational issues responsible for cultivating the situations in which crimes now prosecuted grew.

\(^{591}\) *Ibid.*


TWAIL posits that individual accountability for atrocities will be more effective if it is accompanied by accountability for international policies and practices that create the fertile conditions for internal conflicts to fester and degenerate. It is from this TWAIL perspective that the AU found issues with the indictment of Presidents Bashir and Kenyatta and Deputy President Ruto.

From a TWAIL perspective, initiatives to establish individual criminal responsibility always suffer from the danger of reproducing the civilising mission and victor’s justice. The selection of cases so far by the Prosecutor tends to feed the view of the ICC and the emerging international criminal justice system as a civilising mission. The exclusion of other states from the jurisdiction of the ICC in UN Security Council Resolutions referring the situations in Darfur and Libya to the ICC continue to raise disturbing questions about the ICC reproducing some of the colonial gestures and stereotypes. Based in Europe and funded mostly by European states, the ICC is in danger of being viewed as a civilising mission.

Linked with the failure to deal with the foundational issues is the danger of failing to produce an accurate historical record that the current selection of cases by the ICC presents. One of the purposes of international criminal trials is to create an accurate factual historical record of the conflicts under which the crimes are committed. A flawed narrative of conflict may arise from the current work of the ICC in Africa. This is a repeat of the ICTY and the ICTR that did not prosecute NATO and French actors despite abundant evidence of crimes that both committed in the former Yugoslavia and in the Rwanda genocide. At the ICTY and ICTR, the court processes constructed a narrative that ennobles Western armed intervention as ‘saving’ the helpless victims of the conflicts.

The group of defendants at the ICC is made up exclusively of African men. If the trend continues, the historical record will not contain any details of the role of Western powers acting through international politics and bold colonial attempts at economic exploitation that laid the foundations for the conflicts in the first place. The historical record will lack
the context and suggest that the conflicts arose from ethnic tensions of the sort that continuously simmer between savages, which required Western intervention as the savior. Mahmood Mamdani has tried to put the Darfur conflict into context by referring to the role of British colonialism in laying the foundations for the polarization of tribes which is responsible for the racialisation of the current conflict. But the ICC historical record on the Darfur conflict and indeed other conflicts in which the ICC is involved will be devoid of the international context of economic and political policies employed by Western government, multinational corporations, and international economic institutions that directly or indirectly created the conditions for ethnic tensions or supplied weapons and funded the conflicts. Posterity will stand misled by a narrative that presents conflicts in Africa as primarily military conflicts and ethnic wars while negating the roots of such conflicts and wars.

4.6.7. Explaining apparent contradictions in AU decisions from a TWAIL perspective

Decisions of the AU appear to be fraught with contradictions. As mentioned elsewhere, the AU fervently supported the establishment of the ICC. The majority of AU members are ICC members pursuant to their voluntary ratification of the Rome Statute. Yet, the AU continues to criticize the ICC as a tool in the neo-imperialism agenda of western powers. Furthermore, fighting impunity is one of the overarching objectives of the AU. In all its resolutions on the ICC, the AU declares its commitment to combating impunity. Yet, in the same vein, the AU directs its members to withhold cooperation with the ICC even though the ICC prosecutions have the effect of contributing towards combating impunity on the continent.

Similarly, apparent contradictions can also be gleaned from a subsequent resolution of the AU Assembly where the AU reiterated the instruction to its member states to withhold cooperation with the ICC while at the same time requesting 'member states to balance, where applicable, their obligations to the AU with their obligations to the

Rather than viewing it as a contradiction the commitment of the AU towards combating impunity while at the same time urging its member states to withhold cooperation with the ICC fits in very well with one of the two broad dialectics of the TWAIL discourse.

Githii has written that TWAIL acknowledges the messiness of law, recognising that the law has both transformative as well as regressive potential. Applying this central tenet of TWAIL, we can conclude that the AU decision that appears to be contradictory is in fact a healthy realisation that the ICC and the law that it seeks to enforce have the potential for both regression and transformation at the same time.

4.6.8. The transformative potential of the ICC regime

At independence, Third World states tended to retain most of the laws that were used by the colonial rulers to oppress and marginalise Third World Peoples. TWAIL scholars acknowledge that the independent Third World states have at times continued to use some of these draconian laws against their people and at other times resorted to state sponsored violence in order to entrench authoritarian rule and to silence the Third World peoples from expressing any sort of dissent or opposition to the government.

In recent times, therefore, TWAIL scholarship has developed some sharp criticisms of Third World states for taking certain decisions and acting in ways that are not in the interests of their peoples. It is for this reason that TWAIL has developed two of its most important characteristics. Firstly, as Anghie and Chimni posit, TWAIL seeks to understand international law through the actual lived experiences of the ordinary peoples of the Third World.

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595 Assembly/AU/Dec.296(XV) adopted at the 15th Ordinary Session of the AU Assembly on 27 July 2010 in Kampala, Uganda.
597 Antony Anghie & B.S Chimni, Ibid.
Secondly, despite its criticism of international as a child of imperialism and colonialism, TWAIL acknowledges the potential of international law to transform the lives of third world peoples and to constrain the power of the authoritarian third world state and the dominating first world. Makau Mutua writes that international law is still very much capable of involving all of us in a truly universal rubric.\footnote{Makau Mutua, \textit{Ibid}.}

TWAIL therefore aspires for the creation of an international law that truly reflects the needs and interests of peoples rather than interests of states and the leaders. The ICC and the normative framework that underpins the institution reflect the aspirations of third world peoples for a life with dignity and free from gross human rights violations. The language of the ICC is one that seeks to hold states and governments accountable for how they treat their people.

In this respect, from the actual lived experiences of third world peoples, the ICC’s transformative potential can already be seen through the international human rights norms that it seeks to enforce and the inroads that the ICC regime has made into the traditional view head of state immunity. The limitations that contemporary international criminal law places on head of state immunity means that government officials including sitting heads of state can be effectively held to account for the way they treat their own people through criminal trials. TWAIL supports the idea that international human rights norms can be used to protect third world peoples against the predatory third world state and other international actors.\footnote{Antony Anghie & B.S Chimni, \textit{Ibid}.}

The AU criticises the ICC and the prosecutor’s current practice of case selection at the ICC as part of a new global order that entrenches inequality and perpetuates the colonial zeitgeist of marginalization and domination of the peoples of the third world by developed, Anglo-European states. However, none of the resolutions of the AU has suggested that the ICC or the norms that underpin the ICC should be abolished or that African states parties withdraw their ICC membership \textit{en masse}. The AU and most

\footnotesize{\textit{\textsuperscript{598} Makau Mutua, \textit{Ibid}.} \textit{\textsuperscript{599} Antony Anghie & B.S Chimni, \textit{Ibid}.}
African governments that have expressed concerns at the work of the ICC call for the reform of the international criminal justice system rather than its abolition. They, in the TWAIL tradition, acknowledge the transformative potential of the court system and therefore, in principle seek the preservation of the court.

The AU only asked for deferral of the cases against Presidents Al Bashir and Kenyatta and Deputy President Ruto. In the case of Kenyatta and Ruto, the AU further requested the suspension of the proceedings until the two defendants complete their term of office.\textsuperscript{600} The request for suspension of the proceedings is made pursuant to the national laws and international principles of immunity of heads of state and other senior state officials and the prominent position that Kenya plays in the fight against terrorism at the regional, continental and global level.\textsuperscript{601}

The AU has also sought to organise its members that are states parties to the Rome Statute with a view to have them speaking with one voice on proposing amendments to the Rome Statute at the ICC Review Conference in Kampala. Recognising that the most difficult problems with the ICC that it was dealing had its origins in the skewed composition of the UN Security Council that excludes third world states and includes three members of the permanent five that do not see the need to subject themselves to the ICC justice system, the AU has also sought to influence reforms that might democratise the UN Security Council.\textsuperscript{602} Similarly, Jean Ping, the former Chairperson of the AU Commission was quite clear that the decisions of the AU do not mean that the continental body is opposed to the ICC. Rather, the AU is opposed to the manipulation of the ICC to promote and legitimize neo-liberal aspirations of western powers.

\textsuperscript{601}Ibid.
The recent decisions taken by the African National Congress (ANC) following the Al Bashir saga in South Africa are consistent with the approach of the AU. They provide a good example that demonstrates the point that the AU and its member states acknowledge the potential of international law to transform the lives of third world peoples. Despite calls for South Africa to withdraw, the ANC decided to call for SA to ‘suspend its membership of the International Criminal Court (ICC) until concerns about the institution’s perceived bias and unfairness are addressed’. It further called the South African government ‘to work together with the rest of the continent to protect the ICC from undue influence and restore its credibility within the continent.’

The calls for South African withdrawal were watered down to a suspension, which would allow the government to ‘take all these issues that the ANC has raised and go there to negotiate.’ The ANC called on the African Union to strengthen institutions such as the African Court on Human and People’s Rights so as to ‘protect the people of Africa against crimes against humanity, war crimes and crimes of aggression.’

By calling for the protection of the ICC and the strengthening of the African institutions designed to protect African citizens from international atrocity crimes, the ANC decisions are influenced by the TWAIL approach that seeks not only to exorcise the international criminal justice system of its Euro-centricity, but also to transform the system to be more sensitive to the concerns of third world states. The decisions taken by the ANC mirror the decisions taken by the AU.

As mentioned elsewhere, none of the decisions of the AU call for the abolition of the international criminal justice system that is applied by the ICC. Just as TWAIL posits that the rules of international law ought to be evaluated from the actualized experience of the Third World people rather than those of the states, the spirit of the AU

604 Ibid.
605 Ibid.
606 Ibid.
Constitutive Act reflects a particular awareness of the debilitating effects of the ‘scourge of conflict’ on the peoples of the continent and the experiences of the citizens with hunger, poverty, disease and atrocities like genocide.

In this respect, it could be argued that the spirit of AU Constitutive Act and the decisions that the AU has taken over the work of the ICC in Africa reflect a particular consciousness of the predatory tendencies of the Third World states. The TWAIL approach recognises the emancipatory appeal of international law and its potential to “eradicate the conditions of under-development in the Third World.” The transformation from the OAU to the AU, the inclusion of progressive provisions such as the responsibility to protect in the AU Constitutive Act, and the unrelenting reference to ‘unflinching commitment to the fight against impunity’ in its decisions reflects an awareness of the actual experiences of African peoples. The AU therefore seems to acknowledge the emancipatory appeal of international law and importance of an institution such as the ICC that can protect the citizens of the continent from atrocity crimes. The initial support for the ICC by African states can therefore be understood by deploying this central tenet of the TWAIL approach.

4.6.9. Despite AU decisions, the ICC continues to enjoy popular support in Africa

Anghie and Chimni argue that acceptance, by third world peoples of an international rule or institution that affects their lives is strong proof that the rule or institution is a just one. Conversely, rejection of an international rule or institution by third world peoples is proof of the injustice of that rule or institution.607

In the case of the ICC, the court enjoys popular support among ordinary citizens in most African states. Such support can be gleaned from the actions of civil society organisations on the continent. A great many of the leading civil society organisations in Africa are members of the international coalition for the ICC. Civil society organisations in Africa have been instrumental in advocating for the ratification of the Rome Statute by African states. Civil society organisations also continue to advocate for adoption of

607 Antony Anghie & B.S Chimni, Ibid.
legislation by African states parties to domesticate the states’ obligations under the Rome Statute.

Civil society organisations in Africa have expressed disappointment at the AU resolutions that seek to disengage the African states from all forms of cooperation with the ICC. In this respect, civil society organisations in Africa continue to advocate for the execution of outstanding arrest warrants against fugitives. Indeed it is local civil society organisations in Africa that have been at the forefront of using local justice systems to secure the arrest and surrender of President Omar Hassan Ahmed Al Bashir. During visits to Kenya in August 2010, Nigeria in July 2013 and South Africa in June 2015, local civil society organisations approached the courts for orders to compel the governments of Kenya, Nigeria and South Africa to comply with the Rome Statute obligations by arresting President Bashir and surrendering him to the ICC.608

In states where the ICC has opened investigations, local civil society organisations have been instrumental to the work of the Office of the Prosecutor in gathering evidence, identifying witnesses and protecting witnesses and victims. Although the use of local civil society organisations as intermediaries in investigations has caused some problems for the court, the overwhelming support rendered to the ICC by the organisations is strong evidence that the people accept the ICC and the normative framework that underpins it as potential agents for emancipation of the third world peoples. This divergence of views between the Third World states and the Third World peoples is one of the reasons why TWAIL considers the experiences of the ordinary Third World peoples and not the states or their leaders.

From the perspective of the TWAIL approach, the domination of the ICC caseload by Africans can be explained easily by the fact that third world states often act in ways that are against the interests of their peoples. In this respect, a case can be made to

608 In Kenya the Kenya Section of the International Commission of Justice approached the High Court of Kenya; in Nigeria, the Nigerian Coalition for the International Criminal Court, the Legal Defence & Assistance Project and the Women Advocate Research and Documentation Centre approached the Federal High Court of Nigeria; and in South Africa, the Southern African Litigation Centre approached the North Gauteng High Court.
distinguish between the views of the leaders in Africa and the ordinary citizens. The views expressed by the African leaders through the AU resolutions do not generally reflect or agree with the views of the ordinary citizens of their states.

The term, ‘Third World’ was mostly used during the cold war to describe states that were neither industrialised and carried the label ‘First World’ nor communist and socialist then referred to as the ‘Second World’. Critics of TWAIL challenge the taxonomy ‘Third World’ on the basis of the end of the Cold War. From a TWAIL perspective, ‘Third World’ encompasses those states whose common denominator is the history of subjugation by colonialism, chronic underdevelopment and marginalisation in the international system. According to Chimni, ‘once the common history of subjection to colonialism, and/or the continuing underdevelopment and marginalization of countries of Asia, Africa and Latin America is attached sufficient significance, the category ‘third world’ assumes life.’ The widening divide and inequality between North and South make the ‘Third World’ a reality.

4.7. Evaluation of the AU Complaint on Unfair Targeting of Africans for Prosecution

The preponderance of the evidence following a thorough survey of all universal jurisdiction cases that have been brought in European countries does not bear out the complaint of the African Union. As we can see from the survey of cases in European countries that have been at the forefront of using universal jurisdiction in their courts, the defendants in universal jurisdiction cases for international crimes including genocide, war crimes and crimes against humanity have come from all corners of the world. As many defendants in universal jurisdiction cases have come from Africa and South America as have from such powerful states as Israel, USA, Britain and China. In the circumstances, it seems a little far-fetched to allege that countries that are at the

610 Ibid, at page 5.
611 Ibid.
forefront of exercising universal jurisdiction have focused on Africans and in an improper manner. Several studies that have been carried out tend to disprove the allegation of targeting of African leaders that have been raised by African governments against European states.\textsuperscript{612}

However, the suggestion in the AU resolutions that there have been more Rwandans cited in universal jurisdiction cases than defendants from other African countries seems to be accurate. The specific mention of Rwandans in the AU resolution can be explained by this fact that more Rwandans than other Africans were cited as defendants. As a result the AU resolution on abuse of universal jurisdiction was initially proposed and sponsored by Rwanda. However, any suggestion in the AU resolutions that the focus on Rwandans is unfair and amounts to improper selectivity seems to be exaggerated and very far away from reality.

There are very valid reasons why there might have been more Rwandans than others cited as defendants in criminal cases. These reasons have to do with the atrocities committed during the genocide in Rwanda in 1994 and the establishment of an international criminal tribunal to try persons responsible for the atrocities. Also, the Government of Rwanda supported the universal jurisdiction prosecutions when it was its opponents that were in the dock.

In fact, it was due to the pressure applied on German authorities by the Rwanda government that Ignace Murwanashyaka, a Hutu leader of a militia group known as \textit{Forces Démocratiques de Libération du Rwanda} (FDLR), and his deputy, Straton Musoni were arrested in Germany in 2009.\textsuperscript{613} But once the shoe was on the other side and proceedings were commenced against government officials or their allies, the


Rwanda government raised complaints of unfair targeting. This is a very important point as it reflects the mindset of African states officials in coming up with resolutions on the ICC. While, the decisions of the AU seem to be based on the international law regarding head of state immunities, it is fair to say that in condemning ICC prosecution of African heads of state, the governments are motivated by self-preservation.

On the basis of available evidence it is clear that far from unfairly targeting Africans, the application of universal jurisdiction has been used against defendants from both powerful and less powerful states.

One of the reasons that have been advanced to explain the early interest in the ICC by African states is that African leaders believed that the institution of an independent judicial body such as the ICC would deliver equality between states. Leaders of African states were convinced that as a judicial institution, the ICC would help to curb the excesses of the powerful states and ensure equal treatment of weak and powerful states. African leaders believed that the ICC would bring defendants from powerful states that, despite their opprobrium, have hitherto escaped any censure due to power politics.

On the current evidence, African leaders missed the mark in entertaining the belief that the institution of the ICC would result in equality being achieved between rich and poor states and between powerful and weak states. However, the wide array of the nationalities of the defendants in universal jurisdiction cases seems to suggest that the application of this notion, especially before the recent amendments to domestic universal jurisdiction laws by some European states, is the solution to achieving the equality that leaders of African states believed the ICC would deliver.

Powerful individuals from Israel have been cited for crimes allegedly committed in Gaza, American and British leaders have been cited for allegations arising from Iraq and the Guantanamo facility and Chinese Government and Communist Party leaders have been cited for crimes in Tibet. In this respect, universal jurisdiction as it was exercised in
European countries before the amendments, seems to have done better at treating individuals from all states – poor and rich, weak and powerful – with equality than the ICC has done so far. Almost all situations and individuals throughout the world that might warrant investigations for alleged commission of international criminal offences have caused cases to be initiated in European courts pursuant to universal jurisdiction.614

4.8. Conclusion: What Lessons can be Drawn from the Contestation Between the AU and the ICC?

4.8.1. Enforcement of international criminal law: a law, justice, politics and diplomacy potpourri

The contestation between the AU and the ICC demonstrates that the application and enforcement of international criminal law plays out in a charged environment where law, politics, international relations, diplomacy and justice intersect. It is a playing field that involves many actors including governments, regional organisations, international institutions, victims and civil society.

In some instances, the enforcement of international criminal law could have an indirect impact on the diplomatic relations between states. As the ANC Secretary-General observed, the arrest of President Bashir in South Africa would have been tantamount to

a declaration of war against Sudan. Moreover, South Africa would have ‘become a pariah state, just like with apartheid’.\textsuperscript{615}

The contestation might not have the direct result of better and more effective enforcement of international criminal law, but there have been some positive results. Even though the AU was quite critical of the exercise of universal jurisdiction by European states, it seems that the AU now accepts that the exercise of universal jurisdiction is necessary to fight impunity. The AU drew up a model law on universal justice, to guide African states in adopting domestic legislation on universal jurisdiction. No other regional body has come up with a document such as the AU model law.\textsuperscript{616} So, in this respect, the AU has scored a first.

Still, within the context of employing the principles of universal jurisdiction to prosecute international crimes, the AU has also scored another first by setting up the Extraordinary African Chambers in the Senegalese courts to try former President of Chad Hissene Habre of crimes against humanity, war crimes and torture. The trial is the first instance where the courts of one state are sitting to try the former president of another state for alleged human rights crimes without a connection whatsoever between the suspect and the forum state.\textsuperscript{617}

Given the estranged relations between the AU and the ICC and criticisms by the AU of the ICC as one of the tools of neo-colonialism, this trial is considered a chance for the continent to show that it can hold its leaders to account. The trial of Hissene Habre can be marshalled to support the view that the AU means it when it claims to disavow impunity in the Constitutive Act and in its resolutions.

\textsuperscript{615} Sarah Evans, ‘Why state says bid to arrest al-Bashir was a mistake’, \textit{Mail & Guardian}, 15 July 2015.
The trial provides an answer to the cynical argument that governments of states that make up the AU are driven by the motive of self-preservation and to protect their own self interests. If this view is taken, some basis could be established for arguing that the AU’s criticism of the ICC may indeed be in good faith. The trial will also be a litmus test and a dry run for an African Court of Justice and Human Rights with jurisdiction to try criminal offences.

4.8.2. Fragmentation of international criminal justice

The decision by the AU to empower the African Court of Justice and Human Rights with criminal jurisdiction has the effect of further fragmenting the enforcement of international criminal law. Centralisation of the enforcement of international criminal justice within the ICC system has the distinct pay-off that international criminal law will be consolidated and developed in a systematic manner.

One of the major problems that AU states that are parties to both the ICC and the African Court of Justice and Human Rights will face is conflicting obligations that will most likely arise from conflicting requests from the two courts. How the AU states will address these conflicting obligation could very well be a key factor in determining the success or failure of the fight against impunity.
Chapter Five

AU Decisions and Conflicting Obligations

5.1. Introduction

The argument that the AU has raised over the work of the ICC in Africa can be split into two halves. One half of the argument is broadly centred on the issue of neo-colonialism. The AU argues that recolonisation is coming back in new forms. The developed world is now, among other soft tools, using international criminal justice and manipulating the ICC to create a relationship that undermines the autonomy of poor African states. This part of the argument is largely ideological. This thesis employs the dialectic of Third World Approaches to International Law (TWAIL) in an attempt to gain a deeper appreciation of the subtleties of the argument. As we can see in the preceding chapters of this thesis, the argument is fed by the perception of unfair selection of situations and cases by the Prosecutor’s office.

The selection of most of the cases for ICC prosecution happened at a time when the AU was engaged in a dispute with the European Union over the abuse of universal jurisdiction by European states to, according to the AU, prosecute Africans. According to the AU, in their application of universal jurisdiction, the European states were placing unfair emphasis on Africans.618 Most AU states believed that the ICC would place some limitations on the power of the developed Western states to manipulate international criminal justice. But, as at the time of writing this thesis in 2015, the ICC case docket exclusively features Africans as defendants. According to the ruling political party in South Africa, the ANC, ‘the ICC is turning out into what was not envisioned.’619 This context and the perceived exceptionalism of developed states in enforcing international

criminal justice tend to highlight the appearance of unfair selectivity in the ICC case docket.

The other half of the argument is centred on the question of conflicting obligations. There is a significant possibility that a State to which the ICC has directed a request for arrest and surrender may find itself in a situation where it has to choose between conflicting obligations. The first set of conflicting obligations arises from the conflict between AU resolutions and the requests for cooperation send to African Rome Statute states parties by the ICC. The second set of conflicting obligations arises from the conflict between the ICC’s requests for cooperation on one hand and the operation of customary international law of head of state immunity on the other. The validity of the head of state immunity argument raised by the AU is tested in another chapter of this thesis. This chapter considers ways of resolving the conflict between the AU resolutions and the ICC’s requests for cooperation to African states.

As the issues crystallise, it is now clear that the stronger part of the AU’s argument raises serious questions as to the role, if any, of head of state immunity in states parties obligations to cooperate with the ICC to arrest and surrender President Omar Hassan Ahmed Al Bashir. The issue is limited to President Bashir since the other ICC defendants that are affected by the AU decisions are now irrelevant. President Kenyatta and his deputy Ruto chose to appear before the ICC voluntarily, and proceedings against Gaddafi were terminated following his death.

Before dealing with the question of immunity, it is necessary to recognise that since the ICC issued arrest warrants for President Bashir, he has visited several states including Rome Statute states parties. The states visited that include Malawi, Chad, DRC and Djibouti did not execute the arrest warrants. All the states cited the AU resolutions in attempting to show that they were not in breach of their obligations under the Rome Statute to arrest and surrender President Bashir. In so doing, the states pointed to the conflicting obligations that they were faced with.
5.2. Conflict of Obligations

5.2.1. Binding AU Assembly decisions versus Rome Statute obligations
Conflict of obligations, which is also referred to as conflict of norms or norm conflict is a very real likely common occurrence in view of the multiplicity of law-making processes of global, regional and sub-regional bodies. In recent times, the need for regional integration and the establishment of economic blocks has resulted in the mushrooming of continental, regional and sub-regional organisations. Most of these organisations are established independently of each other and with powers to make binding decisions for their member states. As the organisations are not set up in any hierarchy, this recent development is one of the chief reasons for the common occurrence of norm conflict in today’s world.

Clearly, the AU legal order is distinct and independent from the legal order established under the Rome Statute. Both legal orders however, function under the same international law. Both institutions have the capacity to make binding decisions. In the case of the ICC, Part IX of the Rome Statute deals with the binding obligations of states parties in the enforcement of the statute. It establishes a regime of sanctions for states parties that fail to comply with their cooperation obligations. Article 87(7), for example provides that where a state has failed to comply with its obligations, the court may make a finding to that effect and refer the matter to the Assembly of States Parties or to the UN Security Council depending on the referral method.

In the case of the AU, however, not all decisions of the supreme decision making body, the Assembly are binding. Experts, including Professors Schabas, du Plessis and Gevers observe that the AU Constitutive Act has no express provisions that provide for powers to pass binding decisions. Having made that observation, the experts struggle to find reasons for concluding that decisions of the AU Assembly are binding. Yet, the

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reason to conclude that the AU Assembly decisions are binding can be found not only in Article 23 of the Constitutive Act, but also in the Rules of Procedure of the AU Assembly.

Rule 33(1) of the Rules of Procedure of the Assembly of the Union\textsuperscript{621} provide for the categories under which the decisions of the Assembly may be placed. In this respect, decisions of the AU Assembly that may be classified as “Regulations” and “Directives” are binding on all AU member states. All member states are required to take all measures to ensure the implementation of regulations and directives. Recommendations, Declarations, Resolutions and Opinions, on the other hand are not binding as they are intended to guide members and to harmonise their viewpoints.\textsuperscript{622} Article 23(2) of the AU Constitutive Act read together with Rules 33(2), 34 and 36 deal with the issue of sanctions for failing to comply with the binding decisions of the AU Assembly.

The peremptory language of the AU Assembly resolutions on withholding cooperation with the ICC in respect of arrest and surrender of President Bashir and on President Kenyatta not appearing before the ICC suggests that these decisions are directives and are therefore binding on member states including Kenya.

The principle *pacta sunt servanda* enshrined in Article 26 of the Vienna Convention on the Law of Treaties, which is now a rule of customary international law states that a treaty that is in force is binding on all parties and must be performed in good faith by all states parties to it. Both the Rome Statute establishing the ICC and the AU Constitutive Act are treaties and parties to both treaties must perform their obligations under both treaties in good faith. In explaining that the *lex posterior* principle may not apply in a case where the parties to the subsequent treaty are not identical to the parties of the earlier treaty, Article 30(4) of the Vienna Convention on the Law of Treaties states that

\textsuperscript{621}ASS/AU/2(1)-a, adopted at the First Ordinary Session of the Assembly of the African Union, Durban, South Africa, 9 – 10 July 2002.

\textsuperscript{622}Rules of Procedure of the Assembly of the Union, ASS/AU/2(I)-a, Adopted at the First Ordinary Session of the Assembly of the African Union, 9 – 10 July 2002, Durban, South Africa.
the State that is party to two incompatible treaties is bound vis-à-vis both of its treaty parties separately.

The principle *pacta sunt servanda* applies to both treaties with equal force. As in other multi-lateral organisations, members of the AU are required to comply with the binding decisions of the organisation. A member state of the AU that fails to comply with the binding decisions of the organisation may be subjected to appropriate sanctions as the AU Assembly may decide. Similarly, in terms of Article 87(7) Rome Statute states parties that fail to comply with their cooperation obligations under the Statute may be reported to the Assembly of states parties or to the UN Security Council as has been the case with states that have failed to cooperate in the arrest of Omar Al Bashir.

5.2.2. Does a conflict actually exist in the present case?

First, it is important to be clear about whether a situation of conflict of obligations, also called a conflict of norms, exist. The prevailing view in international law seems to favour a narrow definition. A conflict between two norms arises only where a party to two treaties ‘cannot simultaneously comply with its obligations under both treaties.’ In view of the multiplicity of law-making processes of global, regional and sub-regional bodies, conflict of obligations, which is also referred to as conflict of norms, is a very real likely common occurrence. However, it is in the jurisprudence of the Panel decisions of the WTO dispute settlement system that the problem of conflict of obligations has surfaced repeatedly.

In *Indonesia – Automobiles* the WTO Panel expressed the view that ‘in international law for a conflict to exist between two treaties . . . [their] provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations.’ The *Turkey – Textiles* Panel held that ‘[t]here is no conflict if the obligations of one instrument are

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stricter than, but not incompatible with, those of another, or it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another.\textsuperscript{625}

Applying this definition to the facts it is clear that AU members that are also ICC members cannot perform the obligations imposed on them by the AU decisions and by the Rome Statute at the same time. If they comply with their Rome Statute obligations and arrested President Bashir, they risk breaching their AU obligations. If they comply with their AU obligations and refrain from arresting President Bashir as they have so far done, they breach their obligations under the Rome Statute. Indeed, the ICC has made findings that the Rome Statute states parties that hosted President Bashir are in violation of their cooperation obligations under the Rome Statute.

The obligation to withhold cooperation with the ICC that the AU imposed on its member states that are parties to the Rome Statute creates a conflict of norms since a situation of mutually exclusive obligations thereby arises.

In the case involving Al Bashir’s visit to Malawi, the Pre-Trial Chamber expressed the view that Malawi was not faced with any conflicting obligations.\textsuperscript{626} However, in the case involving Al Bashir’s visit to DRC, a differently constituted Pre-Trial Chamber conceded that there a conflict existed not only between the decisions of the AU and the request by the court for cooperation, but also between the AU decisions and the Security Council resolution 1593, by which the situation in Darfur was referred to the ICC.\textsuperscript{627} Whether resolution 1593 can be implicated at this level is debatable. It is however, clear that the Pre-Trial Chamber concedes the existence of a dispute between the court’s request for

\textsuperscript{625} Turkey - Restrictions on Imports of Textile and Clothing Products, WTO Doc. WT/DS34/R, adopted on 31 May 1999, at paragraph. 9.88.
\textsuperscript{626} The Prosecutor v Omar Hassan Ahmad Al-Bashir ICC-02/05-01/09-139, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Request Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Al Bashir Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011.
\textsuperscript{627} The Prosecutor v Omar Hassan Ahmad Al-Bashir ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014.
cooperation and the AU resolutions directing AU member states to withhold cooperation with the ICC.

5.3. Resolving the Conflict of Obligations

5.3.1. Applying techniques of interpretation to avoid conflict

All sources of international law are considered equal. Therefore, unlike in domestic legal regimes, it is possible to find norm conflicts that are both unavoidable and irresolvable. 628 Thankfully, such circumstances are rare. In such rare instances, resolution of conflicts can be achieved by negotiated political deals. In the majority of cases, however, conflicts of obligations are capable of resolution.

International law has an established toolbox that lawyers and judges can muster to deal with situations of conflicting obligations. The first step in settling a situation of norm conflict is to try to avoid the conflict by applying interpretative techniques. 629 This may involve ‘reading down’ one of the obligations from its ordinary meaning so as to accommodate the other norm. In a civil claim for torture, the European Court of Human Rights was able to read the right of access to a court consistently with customary international law state immunity. 630 There is nothing, for example, that prevents the court from ‘reading down’ the ending impunity objective of the Rome Statute in a way that accommodates President Al Bashir’s customary international law head of state immunity.

If this view is adopted the conflict of obligations facing African Rome Statute states parties can be resolved in two distinct ways. One way is by invoking the AU resolution


630 Al-Adsani v The United Kingdom, ECHR, Application No. 35763/97, 21 November 2001.
adopted at its 15th Ordinary Session in Kampala in July 2010.\textsuperscript{631} That resolution reiterated the decision to withhold cooperation with the ICC in the arrest and surrender of President Bashir.\textsuperscript{632} It also included a paragraph in which the AU requests its member states to ‘balance, where applicable, their obligations to the AU with their obligations to the ICC.’\textsuperscript{633} According to Du Plessis and Gevers, this phraseology was included on the arguments of states whose domestic legislation to implement the Rome Statute requires them to cooperate with the ICC in the arrest and surrender of suspects.\textsuperscript{634}

By allowing member states this discretion, the AU defers to national sovereignty. Each state should individually determine the course of action that is appropriate for it in view of the undertakings and secondary bilateral agreements that the African states made when they ratified the Rome Statute. It will be remembered that most EU states made ratification of the Rome Statute a condition for extending development aid to African states under the framework of the Cotonou Agreement. African states that might be deemed to be deliberately reneging on their ICC obligations risk losing development aid from the EU. Similarly, other AU states that are parties to the Rome Statute entered into bilateral immunity agreements with the USA in terms of Article 98(2) of the Rome Statute.

What is more, there was no consensus among AU states on the issue of withholding cooperation with the ICC. Botswana, for example is known to have publicly declared its intention to comply with its ICC obligations as opposed to the AU resolutions. Other states as noted above were required by their domestic legislation to cooperate with the ICC. In these circumstances, it was not possible for the AU to reach a position that would address the diverse concerns of its members. The AU therefore decided to allow its member states some space to manoeuvre in fulfilling their obligations under the

\textsuperscript{632} Ibid, paragraph 5.
\textsuperscript{633} Ibid, paragraph 6.
\textsuperscript{634} Max Du Plessis and Christopher Gevers, ‘Balancing Competing Obligations, ISS Paper 225, October 2011.
Rome Statute and the AU binding resolutions. By allowing its members a measure of
discretion in this way, the AU made it possible for its member states to read down their
AU obligations to withhold cooperation in order to accommodate their cooperation
obligations under the Rome Statute.

5.3.2. Applying Article 16 of the Rome Statute to avoid or resolve conflicting
obligations

Article 16 of the Rome Statute provides another escape route. The conflicting
obligations can be resolved in a way that reconciles the ending impunity objective with
the head of state immunity that President Omar Al Bashir is entitled to under customary
international law if the UN Security Council yielded to the demand to invoke its powers
under article 16 and defer the prosecution of Omar Al Bashir. If the Security Council
defers the case, it means that the problem of conflicting AU and ICC obligations and the
issue of President Omar Al Bashir’s personal immunity will vanish.

Since under article 16 of the Rome Statute, the deferral only lasts for a year, the
Security Council could continue to defer the case until such a time that it becomes
possible to secure the appearance of Al Bashir before the ICC. As we noted above,
once a head of state leaves office, he sheds personal immunity and could possibly be
protected by functional immunity. But, also as we noted, acts that constitute criminal
offences may not be regarded as official functions of a head of state. It follows that the
Security Council could defer the prosecution of Omar Al Bashir as long as he remains a
high ranking official of the Sudan Government. As soon as he leaves office, Omar Al
Bashir loses the protection of personal immunity. Functional immunity will not protect
him since the crimes he is charged with may not be regarded as official acts.

The ICC could then try to enforce the warrant of arrest after Al Bashir leaves office, at
which point all the impediments that are currently preventing the arrest of Bashir would
have disappeared. Taking this course of action might delay justice, but it might save the
ICC from the appearing like an ineffective institution. It would also help the ICC to
recover its legitimacy as it will be seen as taking the concerns of the AU seriously.
On the strength of the manner in which the AU has dealt with the case of Hissene Habre, it is unlikely that the AU would resist and oppose the prosecution of Al Bashir if the Security Council deferred the prosecution until Al Bashir leaves office. The African Union entered into an agreement with Senegal to set up the Extraordinary African Chambers in the Senegalese judicial system to try Hissene Habre, the former President of Chad. The first of its kind, through the Hissene Habre case, the AU has shown that it is committed to fighting impunity.

If the conflict cannot be avoided by these techniques, the next step is to resort to the hierarchy between the norms, with one norm having primacy over the other. Resolution of norm conflicts by assigning priority to one norm over the other can be achieved through application of the *jus cogens* rule, Article 103 of the UN Charter, conflict clauses in treaties as well as the *lex posterior* rule.

5.3.3. Resolving conflicting obligations by resorting to hierarchy of norms

As we saw in the first chapter of this thesis, so far the Security Council has exercised its powers under article 13(b) of the Rome Statute in only two situations: the situation in Darfur, Sudan by way of resolution 1593 in March 2005 and the situation in Libya through resolution 1970 of 2011. The ICC decided to terminate the case against Muammar Gaddafi on 22 November 2011 following his death. Since the cases from the Libya situation have not contributed much to the controversies that are the subject of this research, the discussion in this thesis revolves around the Security Council referral of the situation in Darfur and the case against President Omar Al Bashir.

Under article 24(1) of the UN Charter, member states bestow the primary responsibility for maintain international peace and security on the Security Council. What is more, UN member states grant to the Security the legal authority to act on behalf of the full membership of the United Nations in international security matters. Under article 25 of

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636 Ibid.
the UN Charter, all members of the UN agree in advance to carry out the decisions of the Security Council.

The UN Charter therefore, gives the Security Council preeminent legal authority over international security affairs to the extent of allowing it to override some of the most important prohibitions under international law in the interests of the international community and its fundamental values.\textsuperscript{637} For example, under Chapter VII of the UN Charter, the Security Council can authorise the use of force, even though the UN is anchored on the policy fundamentals of disavowal of use of force and maintenance of international peace and security.

Vidmar observes that in practice, the Security Council interprets the notion of international peace and security widely.\textsuperscript{638} The Security Council regards gross and systematic violations of human rights within a state’s borders as threats to international peace and security.\textsuperscript{639}

Through its resolutions, the Security Council can create new international legal obligations that are binding on all UN members.\textsuperscript{640} Article 103 of the UN Charter establishes a hierarchy between obligations imposed by the Charter and obligations imposed by other treaties. It states: ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’ Obligations imposed by the Charter therefore take precedence over obligations imposed by other treaties. Academic writers argue that the evolution of international law requires us to read the terms ‘any other agreement’ in article 103 to

\textsuperscript{638} \textit{Ibid.}
\textsuperscript{639} \textit{Ibid.}
\textsuperscript{640} Resolutions of the General Assembly on the other hand do not generally create legal obligations. There is an exception to this rule when it comes to the UN budget and the assessment of UN dues payable by members.
include not only obligations under treaties, but also obligations and norms under customary international law.

The superiority of obligations under the Charter does not mean that the conflicting obligations under another treaty or customary international law are invalidated. The conflicting obligations are only suspended and yield to the Charter obligations in terms of priority of fulfilment. A state faced with such a conflict of obligations may suspend the duty to fulfil its obligations under the other agreement in order to meet the obligations under the Charter first. The state may, at a later stage, when the conflict has disappeared, fulfil the obligations under the other agreement.

In the case of enforcement of the warrants of arrest against President Omar Al Bashir, it could be argued that the obligations imposed by the AU acting in terms of the Constitutive Act of the AU are subordinate to the obligations that arise from resolutions of the Security Council acting under its Chapter VII powers. It could also be argued that the customary international law head of state immunity exception to the obligation to arrest and surrender President Al Bashir has no operation since the case came to the ICC by virtue of a Security Council resolution.

But these arguments on the primacy of the Security Council obligations over AU obligations and customary international law immunities could prevail, only if it was indeed the case that Security Council resolution 1593 imposes the obligation to cooperate with the ICC on not only Sudan, but other states as well. If the duty on states parties to arrest and surrender President Bashir is imposed by the Security Council resolution that referred the matter to the ICC, then, by reason of articles 25 and 103 of the UN Charter, the obligation of states parties to arrest and surrender President Bashir trumps obligations arising from the AU decisions as well as the head of state immunity that President Bashir might otherwise be entitled to under customary international law.

Indeed In the second decision on Chad’s continued hosting of Al Bashir without executing the two warrants of arrest, the Pre-Trial Chamber II expressed the view that
by reneging on its obligation to arrest and surrender Al Bashir to the ICC, Chad was in breach of its obligations arising, not only from the ICC’s decisions, but Security Council resolution 1593 of 2005 as well.\(^\text{641}\)

In the case involving DRC’s failure to arrest Al Bashir during a visit, the Pre-Trial Chamber II held that resolution 1593 implicitly removes President Bashir’s immunity.\(^\text{642}\) Therefore the matter of head of state immunity does not arise and DRC should have complied with the request to arrest President Bashir. In arriving at this decision, the Pre-Trial Chamber relied on the primacy of the Security Council resolution that removes immunity over customary international law on state immunity and decisions of the AU that confirm President Bashir’s immunity. The Pre-Trial Chamber II held that DRC was in breach of its cooperation obligations under the Rome Statute and resolution 1593 that referred the situation in Darfur to the ICC.\(^\text{643}\)

The reasoning of the Pre-Trial Chamber II in the case of non-compliance by DRC raises controversies to the extent that it entangles the Rome Statute states parties’ cooperation obligations with Resolution 1593. It seems that the Pre-Trial Chamber II was all too willing to implicate the automatic primacy of obligations created by the UN Security Council resolution. Yet, in its wording, Security Council resolution 1593 leaves no room for doubt as to the parties on whom it places the burden of a peremptory obligation to cooperate with the court. The Pre-Trial Chamber II itself referred to the wording of resolution 1593 to reach the conclusion that only Sudan is under a peremptory obligation to cooperate with the court in executing the warrants of arrest against President Al Bashir.\(^\text{644}\)

\(^\text{641}\) The Prosecutor v Omar Hassan Ahmad Al-Bashir ICC-02/05-01/09-151, Decision on the Non-Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, Pre-Trial Chamber II, 26 March 2013, Paragraph 21.

\(^\text{642}\) The Prosecutor v Omar Hassan Ahmad Al-Bashir ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014.

\(^\text{643}\) Ibid.

\(^\text{644}\) The Prosecutor v Omar Hassan Ahmad Al-Bashir ICC-02/05-01/09-227, Decision on the Prosecutor’s Request for a Finding of Non-Compliance Against the Republic of the Sudan, Pre-Trial Chamber II, Paragraph 15, 9 March 2015.
Also, the fact that the Chamber has consistently highlighted that only states that are parties to the Rome Statute are under an obligation to cooperate with the court, indicates that the Chamber is well alive to the fact that the obligation to cooperate in respect of the case of President Omar Al Bashir arises from the Rome Statute and not resolution 1593.\textsuperscript{645} Moreover, in a number of decisions ‘requesting’ non-party states to cooperate in the arrest and surrender of President Omar Al Bashir, the Pre-Trial Chamber has also shown that it is aware of the limits of resolution 1593 by holding that the Security Council can impose the obligation to cooperate on non-party states by adopting a resolution to that effect pursuant to its powers under Chapter VII of the UN Charter.\textsuperscript{646} It is only if the Security Council was disposed to adopting such a resolution that the obligation of states to cooperate with the ICC would flow directly from the UN Charter.\textsuperscript{647}

It is argued that making a determination of whether Rome Statute states parties that fail to execute the warrants of arrest against President Omar Al Bashir breach Security Council resolution 1593, is essentially a matter of construction of that Security Council resolution.

In its plain meaning the resolution places a peremptory obligation to cooperate with the ICC on the ‘Government of Sudan and all other parties to the conflict in Darfur’ only. All other states including Rome Statute states parties are merely ‘urged’ to cooperate with and provide assistance to the court. Operative paragraph two of the resolution states: ‘The Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and … urges all States ….to cooperate fully.’ It follows that

\textsuperscript{645} The Prosecutor v Omar Hassan Ahmad Al-Bashir ICC-02/05-01/09-222, Decision on the “Prosecution’s Notification of Travel in the Case of the Prosecutor v Omar Al Bashir”, Pre-Trial Chamber II, 23 January 2015, Paragraph 8. In this case the Chamber ‘invited’ Ethiopia to arrest and surrender President Al Bashir; The Prosecutor v Omar Hassan Ahmad Al-Bashir ICC-02/05-01/09-232, Decision Regarding Omar Hassan Ahmad Al Bashir’s Travel to the Kingdom of Saudi Arabia and the Arab Republic of Egypt, Paragraph 9, 24 March 2015; The Prosecutor v Omar Hassan Ahmad Al-Bashir ICC-02/05-01/09-224, Decision Regarding Omar Al Bashir’s Travel to the United Arab Emirates and his Potential Travel to the Kingdom of Saudi Arabia, the State of Kuwait and the Kingdom of Bahrain, Paragraph 9, 24 February 2015.

\textsuperscript{646} Ibid.

\textsuperscript{647} Ibid.
through this referral resolution, the Security Council places the duty to cooperate with the court on Sudan only. In its construction, the resolution specifically recognises that states, that are ‘not party to the Rome Statute, have no obligations under the statute’. The resolution, further ‘urges’ all other states to cooperate, which means that the resolution is only exhortatory and the obligation on all other states, apart from Sudan is optional.

As a matter of construction, the resolution places no peremptory duty at all, on both states parties and other non-party states, apart from Sudan, to cooperate with the ICC. For states parties, therefore, the duty to cooperate with the ICC in the arrest and surrender of President Omar Al Bashir does not flow from resolution 1593. Rather, the duty of states parties to cooperate with the court in the arrest and surrender of President Al Bashir flows only from the Rome Statute. It is respectfully submitted that the suggestion that Chad or DRC have an obligation to cooperate with the ICC by reason of resolution 1593 is patently untenable. As states parties to the Rome Statute, DRC and Chad’s obligations to arrest and surrender Bashir arise from the Rome Statute and not the Security Council Resolution.

Since the obligation to arrest President Bashir flows from the Rome Statute and not the Security Council resolution, it follows that the conflict of obligations from the Rome Statute and the AU decisions cannot be resolved by reference to a hierarchy that places obligations imposed by Security Council above any other obligations. An attempt to resolve the conflicting obligations by applying article 103 of the UN Charter is an unavailing undertaking. However, even if the states’ obligation to cooperate with the ICC flowed from the Security Council Resolution 1593, the possibility that this resolution may be tainted by illegalities may absolve states from any obligation created by the resolution. Accordingly, it is to the illegalities in resolution 1593 and the possibility of resolving conflicting obligations through disobeying such illegal resolutions that we turn.
5.3.4. Security Council decisions that contradict the ‘purposes and principles of the UN’: resolving conflicting obligations by relieving states of the obligation

When the Security Council adopted resolution 1593, it was clearly within its powers to impose a duty to cooperate on all states as it did in the resolutions that established the ICTR and ICTY. The Security Council chose to do no such thing, even though at the time that it passed resolution 1593, the Security Council was well aware that, it could, through its resolutions, even create new legal obligations where none existed before.648

This, however, is not to suggest that the UN Security Council powers in international security matters are absolute.649 UN Charter provisions that require the UN to act in accordance with the Charter and not to interfere in internal affairs of states provide examples of how the Charter places legal limits on the powers of the Security Council.650

It stands to reason that the Security Council cannot act ultra vires, even when it exercises its powers under Chapter VII of the Charter. The Security Council, acts ultra vires, for example, when it imposes an obligation that violates a peremptory norm of international law or jus cogens.651 The Security Council’s powers do not include, for example, authorising use of torture or commission of genocide. In the Bosnia Genocide case, Judge ad hoc Lauterpacht expressed the view that the primacy of UN Charter obligations enshrined in article 103 of the Charter cannot extend to a conflict between a Security Council resolution and jus cogens.652

Violation of jus cogens is only but one example of a situation where the Security Council might be held as having acted ultra vires. There could be other situations. For example,

651 Ibid, note 21.
it is self-evident that the Security Council’s powers under the Charter of the UN do not include doing things that are patently unlawful. It also stands to reason that, no matter how wide its remit might be, the Security Council, surely, may not do anything that might defeat the purposes and objectives of the UN Charter or the *raison d’être* of the UN organisation itself.

Controversially, the resolution of the Security Council that referred the situation in Darfur to the ICC included limitations on the court’s jurisdiction that might be regarded as *ultra vires* or unlawful. In the fourth paragraph of the preamble of resolution 1593, the Security Council takes ‘note of the existence of agreements referred to in Article 98(2) of the Rome Statute.’ This reference is to the bilateral non-surrender agreements that the US Government sought to sign with states that ratified the Rome Statute. Under these agreements, states give an undertaking that they will not surrender US citizens or employees of the US Government to the ICC.

The legality of these agreements under article 98(2) of the Rome Statute is in doubt since the drafting history suggests that only existing Status of Forces Agreements are the ones that are contemplated under article 98(2). The US has entered into these agreements with Rome Statute states parties pursuant to the 2002 *American Service-Members Protection Act*. The declared aim of this US federal law is: ‘to protect United States military personnel and other elected and appointed officials of the United States government against criminal prosecution by an international criminal court to which the United States is not party.’

The Act allows the US President to use military force to secure the release of any American or citizen of a US-allied country detained by the ICC or by any state for the purposes of surrender to the ICC. The Act further makes US support of and involvement

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in peacekeeping missions largely contingent on achieving immunity for all US personnel. The US has therefore made it a point to threaten to exercise its power to veto of any Security Council peacekeeping resolution unless the Security Council explicitly includes certain exemptions in the resolutions.

Consequently, in addition to the reference to bi-lateral non-surrender agreements, resolution 1593, explicitly excluded from the ICC jurisdiction any acts of peacekeepers in Darfur that are sent by states that are not party to the Rome Statute. In operative paragraph 6 of the resolution the Security Council decided that: ‘Nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.’

The UN Security Council included a similarly worded clause in the resolution that referred the situation in Libya to the ICC. It seems that this exemption clause will be a permanent feature in all future Security Council referrals of situations to the ICC. Otherwise, unless this clause is included, the USA will veto any such referrals, which means that the ability of the Security Council to exercise its authority in terms of article 13(b) of the Rome Statute will be permanently paralysed. Through the use of its veto powers, the USA will ensure that no cases will come to the ICC through a Security Council referral.

Under the Rome Statute, when the ICC is seized with a situation, it then has the authority to investigate anyone who might have committed crimes in connection with that situation regardless of nationality. However, through the exemption clauses, the Security Council has made sure that the ICC will not be able to do so. The US Government representative stated that the US had not opposed the adoption of resolution 1593 ‘because the resolution provides protection from investigation or
prosecution for United States nationals and members of the armed forces of non-State Parties. UN peacekeepers and US nationals are formally exempted from any investigation by the ICC in Darfur.

The effect of the exemption in resolution 1593 is that in proceeding against citizens of one state while disregarding the crimes of nationals of other states that are committed in the same situation, the ICC thereby acts inconsistently with internationally recognized human rights standards that proscribe discrimination. The ICC is also forced to violate guarantees of equal protection of the law. What is more the resolution effectively sanctions that the ICC acts in a way that is inconsistent with article 21(3) of the Rome Statute which includes nationality among grounds upon which any form of discrimination is considered unlawful.

The exemption that the Security Council has included in the two referral resolutions so far goes against some of the very foundational principles of the UN. The faith in fundamental human rights including the principles of equality and non-discrimination enshrined in the preamble and articles one and two of the UN Charter requires that international law be applied uniformly and consistently without discrimination between States. The exemption contained in the two Security Council resolutions referring the situations in Sudan and Libya to the ICC reeks of exceptionalism, which is contrary to the fundamental principles of the UN of equality and non-discrimination.

Furthermore, the UN is established on the principle of multi-lateralism, which underlines collective action to maintain international peace and security. Disavowal of aggression and use of armed force in general also runs the whole gamut of the UN Charter. Surely, use of armed force in order to secure the release of American nationals held by the ICC or any state on behalf of the ICC is clearly inconsistent with the ethos of the UN. Such an adventure might even result in a serious breach of international peace and security.

The Darfur referral resolution effectively recognises bilateral immunity agreements that may be tainted by not only a whole lot of illegalities but inconsistencies with the ethos of the UN organisation. The bilateral immunity agreements are entered into pursuant to a domestic piece of statute that threatens unilateral military invasion of ‘peaceful Holland’ in order to secure the release of Americans that might be held by the ICC for war crimes and crimes against humanity. Human Rights Watch derisively christened this statute, the Hague Invasion Act.\(^{655}\)

The content of the agreements and the circumstances under which the US obtained signatures from some states are legally questionable. With respect to content, a Rome Statute state party that concludes a bilateral immunity agreement effectively makes an undertaking to contravene its obligations under the Rome Statute if the state’s cooperation is required by the ICC to arrest or detain any American in connection with crimes within the jurisdiction of the ICC. The agreements require the states that sign them to handover any American wanted by the ICC to the US and not to the ICC.

It may very well be that the US will prosecute the wanted individual, but the effect of the agreements on any such prosecution is that the ICC’s oversight function that is contemplated by the complementarity principle is rendered useless. This function of the court under the complementarity regime is not only a fundamental principle underpinning the Rome Statute but it is also critical to shutting the door on impunity.\(^{656}\)

In this respect the bilateral immunity agreements that the US has pressured Rome Statute states parties to sign are clearly contrary to the letter and spirit of the Rome Statute as they appear to facilitate impunity. Yet, in terms of article 18 of the Vienna Convention on the Law of Treaties, Rome Statute states parties have an obligation to ‘refrain from acts which would defeat the object and purpose’ of the Rome Statute.

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The circumstances under which the US obtained signatures of most of the states that have signed the agreements reek of undue pressure and duress. The US brought intense pressure to bear on Rome Statute states parties, particularly poor and weak states, to enter into bilateral immunity agreements. Apart from threats of military invasion of any state that might be holding any US citizen on behalf of the ICC, the US also threatened withdrawal of military aid to Rome Statute states parties that refused to sign the bilateral immunity agreements.

There are indications that the US also used inducements to get some Rome Statute states parties to sign the agreements. For example, it is said that Uganda signed an immunity agreement with the USA in exchange for $200,000 worth of military aid. About $30 million worth of military aid extended to Philippines in 2003 was linked to the conclusion of a bilateral immunity agreement.

In fact, most poor African states found themselves in a very difficult situation as they were threatened with all sorts of adverse actions from the US and the European Union if they ratified or if they did not ratify the Rome Statute. The US’ carrots and sticks centred around military assistance and even military action while the EU largely acted through linking development aid to poor countries with membership of the ICC.

The European Union poured tremendous funding into pro-ICC NGOs to carry out intensive campaigns to bring pressure to bear on African states to ratify the Rome Statute. The EU also resolved to mainstream the ICC in all EU external relations. By this methodology, the EU would include ratification, accession and implementation of the Rome Statute in all negotiations with development partners. One concrete example of the implementation of this method in practice is the amendment of the Cotonou Agreement at the instance of the EU which was designed to coerce African nations into...

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657 Ibid.
658 Ibid.
ratifying the Rome Statute.\textsuperscript{660} The effect of the amendment was that any African, Caribbean and Pacific (ACP) state that refused to ratify the Rome Statute would be denied hundreds of millions of Euros worth of development aid.

The US on the other hand threatened to use military force against any state that might cooperate with the ICC to prosecute any American citizen. The US also threatened to withdraw military aid to states that refused to sign the bilateral immunity agreements. States that were benefiting from US assistance to deal with terrorist threats in North Africa, East Africa and the Sahel region were particularly vulnerable to this pressure as withdrawal of assistance exposed them to attacks.

Resolution 1593 specifically recognises and acknowledges agreements that undermine the ICC and legitimise impunity – the very evil that the ICC was established to bring an end. It creates a two-tier system of justice: one for US citizens and another for the rest of the world citizens. For these reasons, Security Council resolution 1593 attracts questions as to its legality. This legally questionable instrument ousts the jurisdiction of the ICC over nationals of non-party States acting in accordance with a Security Council mandate under Chapter VII-mandate UN Charter. The exemption of other non party states also has the effect of not only undermining and eroding the jurisdiction of the court, but modifying the terms of the Rome Statute as to the ICC’s jurisdiction as well. Whether the Security Council can lawfully modify or alter the terms of a treaty in this manner is questionable.

The limitation on the jurisdiction of the ICC with respect to crimes committed by peacekeepers that are nationals of a state not party to the Rome Statute produces differentiation in application of the law to peacekeepers. There cannot be any objective justification for this kind of differentiation between nationals of Sudan and nationals of other states carrying out peacekeeping activities in Darfur if they both commit war crimes in the process.

Yet, only objective differences can justify differentiation in the application of the law. The basis for differentiation in the case of resolution 1593 is arbitrary or politically motivated. It therefore fails the quality of foreseeability that is required for the differentiation to withstand scrutiny against the standards of the rule of law. Surely, how can states be expected to regulate their conduct when the grounds for exemption from the jurisdiction of the ICC are not based on any objective justification as is the case with the Security Council referral resolutions?

Thus, in the Sixth Committee of the General Assembly, the representatives of Bangladesh and China called for the uniform and non-selective enforceability of international law if the goals of the rule of law at the international level are to be realized.661 The Bangladesh representative spoke about ‘a rule based system to substitute right for might’ as well as ‘universal and non-selective application of the law’ as prerequisites for the rule of law in the conduct of international relations.662 The representative of China stated: ‘If, in international relations, states applied international law selectively or interpreted it unilaterally to their own advantage, or employed double standards when applying it, international law would be reduced to a tool of power politics.’663 The arbitrary manner of the differentiation of individuals that may or may not be investigated by the ICC for crimes committed in Darfur leads to selective application of the law, which is incompatible and inconsistent with principles of international law.

To summarise, it is argued that resolutions 1593 and 1970 through which the Security Council exercised its powers under article 13(b) of the Rome Statute to refer the situations in Darfur and Libya to the ICC are of questionable legality for a variety of reasons. The powers of the Security Council to create new obligations and the

662 Ibid, paragraph 34.
663 Ibid, paragraph 56.
requirement to act in accordance with the Charter mean that the Security Council can both make law and is itself constrained by the law.

Moreover, if the power of the Security Council to create new obligations is considered in the same way that Parliaments make law, it could be argued that the legal authority of the Security Council can be constrained by existing international law. By including an exemption of other non-party states from the jurisdiction of the ICC while referring a non-party state to the ICC, the Security Council may have acted not only ultra vires, but possibly unlawfully too.

If the illegality of the Security Council resolution 1593 is established, certain consequences must follow. It could be argued that failure by the Security Council to make decisions in accordance with the ‘purposes and principles of the United Nations’ relieves member states of the obligation to comply with such Security Council decisions. In a very informative monograph, Tzanakopoulos advances the argument that there are circumstances where legal justification for disobeying a Security Council resolution can be established.664

Writing in the context of sanctions, Tzanakopoulos posits that under the current international legal system, decentralised disobedience can be justified as a countermeasure to decisions of the UN Security Council that are perceived as unlawful.665 The disobedience should, however, not be done in an arbitrary or contemptuous manner or based on a parochial regional norm. It must be based on a rule that is recognized in international law.666 According to Tzanakopoulos, at the current stage of development of international law, disobeying Security Council decisions is potentially the only effective way in which states can induce the UN Security Council to comply with its international obligations.667

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665 Ibid.
666 Ibid.
667 Ibid.
For example, as a result of the decision of the European Court of Justice in the case of *Kadi*,\(^{668}\) which is discussed below, the UN was forced to introduce a review mechanism in the targeted sanctions regime.\(^{669}\) The Security Council created the office of an independent Ombudsperson before whom petitioners who wish to challenge their inclusion on the targeted sanctions list can assert their rights. In doing so the UN Security Council was actually attempting to bring the insufficient level of protection of fundamental rights in the UN process to the same level as the one prevailing in the EU legal system.\(^{670}\) Disobedience and refusing to automatically accept the primacy of Security Council obligations can be justifiable in certain circumstances and can serve as one way in which states might successfully address conflicting obligations.

### 5.3.5. Radical dualism: resolving conflicting obligations by adopting a strict dualist approach

One way in which a conflict of obligations arising from two distinct legal systems can be resolved is to adopt a pure dualist approach between the regional legal system and the global international system, in the same way that the European Court of Justice did in the *Kadi* case.\(^{671}\) In the context of the debate in issue, a dualist approach would entail emphasising the autonomy of the African regional system under which obligations arise from AU statutes and resolutions, from the international legal system that includes the Rome Statute and article 103 of the UN Charter. One of the ramifications of autonomy is that the ‘domestic’ African legal system reserves for itself the right to determine the extent of the authority of international law within the African regional system.

In the *Kadi* case the European Court of Justice annulled a regulation of the EU, which the EU had passed in order to implement a resolution of the UN Security Council on freezing assets of individuals and entities suspected to be associated with terrorism.


\(^{670}\) *Ibid.*

\(^{671}\) *Ibid.*
The applicants challenged an EU regulation that imposed economic sanctions on individuals and entities associated with Osama Bin Laden, the Al Qaeda and the Taliban on the basis that the regulation breached their fundamental rights guaranteed under European law. In particular, the applicants alleged breaches of their right to be heard, right to respect for property, and right to effective judicial review. The EU had adopted the regulation in order to implement resolution 1333 of 2000 of the UN Security Council. It is for this reason that in effect, the case involved a clash between a UN Security Council resolution and fundamental rights guaranteed in the European Charter. A review of the lawfulness of this EU regulation meant that the European Court of Justice was effectively undertaking a review of the UN Security Council resolution.

Indeed, the Court of First Instance went with the conventional approach. Paying close attention to the primacy of UN Charter obligations, the Court of First Instance ruled that reviewing the lawfulness of the regulation implied that the court was indirectly examining the lawfulness of the UN Security Council resolution. This, according to the Court of First Instance, was inconsistent with the provisions of articles 25, 48 and 103 of the UN Charter. On appeal, the European Court of Justice also highlighted the primacy of UN Charter obligations, but it was able to distinguish between a decision of the Security Council and a subsequent decision of the EU to give effect to the Security Council decision. The European Court of Justice annulled the European Union’s implementation of the Security Council’s targeted economic sanctions resolution on the ground that it violated EU human rights norms of due process and the right to property.

The resolution of the conflict of obligations in this case turned on the autonomy of the European legal order, which, as the court opined, exists separate from the general international legal order. It was not resolved by reference to the values or norms that were the subject matter of the court case. The court reasoned that the conflict involves obligations in two separate, autonomous legal orders between which no system of hierarchy can exist. On this distinction of the separate legal orders, the European Court of Justice was able to reach an outcome that put fundamental human rights first before an obligation flowing from a UN Security Council resolution adopted under Chapter VII.
of the Charter. The European Court of Justice effectively decided that EU states must abide by their domestic and EU legal obligations, ahead of the demands of the Security Council.\(^6\)

One of the possible results of this decision was that EU member states would be forced to violate their obligations arising from the Security Council resolution. However, the Security Council acted to arrest the situation by establishing the office of an independent Ombudsperson to deal with some of the due process issues that were of concern to the European Court of Justice. There is debate as to whether the steps taken by the Security Council are sufficient to make the Security Council targeted sanctions regime consistent with the human rights standards of the EU. But, the fact of the matter is that a regional group of states has decided that as a separate legal order, its human rights standards, within its jurisdiction must come first before any other obligation including UN Charter obligations. Any international law norms and obligations including those arising from the UN Charter, which seek to enter the EU jurisdiction, must conform to the human rights standards and conditions set by the EU itself.

Even though the European Court of Justice emphasised that it had no authority to rule on the lawfulness or otherwise, of UN Security Council resolutions, this judgment leaves a wide range of interpretations regarding the proper structure and hierarchy of the international legal order. In the context of the impasse between the AU and the ICC, the decision in \textit{Kadi} provides guidance as to another way in which states may sequence their obligations under international law where article 103 of the UN Charter is implicated. In the context of the wider accountability and rule of law issues on the international plane, the decision in the \textit{Kadi} case behoves the wonderment: are we in the era of a new bottom-up process in which regional bodies and their courts can bring pressure to bear on the UN Security Council to change some of its approaches to international law, especially where weaker states are involved?

If the approach in the case of *Kadi* is applied to the impasse between the AU and the ICC, it could be argued that the African regional legal order is independent and governed by its own rules of law. This makes it impossible to establish a hierarchy. Existing separate from all other systems, it is impossible to envisage a situation where the African Union constitutional principles enshrined in the Constitutive Act might yield to any international agreement including the Rome Statute and the UN Charter.

In the case of *Kadi*, the insufficient protection of fundamental rights in the UN processes required the adoption of a dualist conception of the interplay of EU law and international law to achieve a resolution. By analogy, the AU feels that the Security Council has not given attention to its request to defer the prosecution of President Al Bashir. The AU also posits that the ICC’s approach to Al Bashir’s personal immunity as an incumbent head of state is erroneous and that the dogmatic commitment to prosecution is jeopardising the chances of achieving a peace deal in Darfur. Just as the European Court of Justice did, the AU could adopt a dualist approach to the interplay between the AU regional system and the global system and hold that as an autonomous system that is separate from all else, with relevant institutions that have the competence to impose binding obligations on member states, there can be no question of establishing a hierarchy between the AU regional legal system and the UN global system.

There may also be other situations where other norms and values may trump UN Charter obligations. For example, in the case of *Al Jedda*, Lord Brown of Eaton-Under-Heywood suggested that a prohibition of capital punishment would trump a Charter obligation. The prohibition of the death penalty may not be regarded as having achieved the status of *jus cogens*. But it is a value of significant importance in Europe. For that reason, Lord Brown’s view may be taken as recognition of the existence of some regionally and culturally relative norms that might prevail over UN Charter obligations. An argument could be made on behalf of the AU that the history and experience of the peoples of Africa teaches us that in terms of sequencing,

673  *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, paragraph 152.

achieving peace and restoration of societal relations invariably comes first before any notions of justice. This is especially the case where the justice in issue is concerned more with allocation of blame and retribution than restoring societal relations.

In most African settings, justice, in the sense of equal application of the law, is generally not regarded as a trump or guard of people against one another. Rather, concepts of law and justice are mostly understood as spaces and means by which people negotiate their relationships of mutual dependence. A common characteristic that reinforces the legitimacy of the law in these settings is the participation of everyone that is affected in the processes of arriving at a just conclusion in any case. This differs from the Western understanding of the law as commands of a higher authority that are backed by sanctions. In most African customary systems’ conceptualisation of the law, imposition of sanctions and imprisonment do not enjoy any measure of prominence amongst characteristics that define the law.

The international community including the Security Council and the ICC must defer to the AU, especially now that it seems that even the more powerful states in Africa – South Africa, Nigeria and Kenya – are taking their cue from the AU. The interests of justice for both the suspects and the victims alike might better be served if the international community let the AU draw from these unique African norms that are not pontifical about prosecution and retribution, in dealing with the situations of conflict and gross violations of human rights that occur on the continent.

That, however, is not to suggest that the international community, which includes the Security Council and the ICC has no role to play in the Darfur situation. The argument is that the process undertaken by the ICC so far, particularly the warrants of arrest against President Al Bashir, may already have achieved a lot. The prosecutor of the ICC needs not brandish the arrest warrant all the time. The list of states that are not comfortable with executing the arrest warrant continues to grow. The ICC has reported these states to the Assembly of States Parties and to the Security Council. Both have not taken any
action. The prosecutor’s office needs to include the arrest warrant as one of the tactics in a larger strategy to secure the arrest of Omar Al Bashir.

Christopher Gosnell argues that the strategy of obtaining a warrant of arrest against Bashir and going public rather than obtaining a sealed warrant should be viewed as part of a long term pragmatic strategy. One of the things that the prosecutor’s office can do at the moment is to support the AU’s request to the Security Council to defer the case of President Bashir. This way, the Security Council could manage the ICC process using the powers granted to it under article 16 of the Rome Statute. This will leave, the AU, which forswears impunity, not only in its founding statute and resolutions, but has shown in the Hissene Habre case that it will follow through on the promise, to take the lead on the case.

If the Security Council suspended the case against President Al Bashir, the international community could still have a big role to play in supporting the AU to conclude a comprehensive peace deal that addresses not only the situation in Darfur, but armed rebel activity in Blue Nile and South Kordofan states as well as the interminable trans-border conflict issues with Central Africa Republic, South Sudan and Chad. As things stand, even though President Omar Al Bashir has not been arrested, the warrant of arrest could in itself have already produced certain desirable effects, such as the reinforcement of the opposition. The office of the prosecutor needs to soft-pedal the arrest warrant as a bargaining chip until such time as the moment is propitious for Al Bashir’s arrest and surrender.

A comprehensive peace deal followed by free and fair elections in a reconceptualised Sudan state might be what is required to end the conflicts in Darfur and other parts of Sudan, unseat Omar Al Bashir and for the ICC to get its suspect in custody. Once Al Bashir becomes a former head of state, it will be a lot easier for the ICC to secure his arrest pursuant to the two warrants of arrest than when he is an incumbent. Following

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675 C Gosnell ‘The request for an arrest warrant in Al Bashir: Idealistic posturing or calculated plan?’ (2008) 6 Journal of International Criminal Justice 841
the reasoning of Lord Brown of Eaton-Under-Heywood in the case of *Al Jedda*, norms and understanding of law and justice that are unique to Africa could take precedence over UN Security Council resolutions. If this were to be accepted, there is a chance that the impasse between the AU and the ICC that manifests itself in the case of President Omar Al Bashir might be resolved by the AU approach of sequencing peace and restoration of societal relations ahead of the retributive justice of the ICC.

Disobedience as a countermeasure to a perceived unlawful decision of the UN Security Council and a pure dualist approach to the relationship between the AU and the global legal systems might force the Security Council to act in terms of article 16 of the Rome Statute and defer the case against President Bashir. Perhaps, as Tzanakopoulos submits, this could be the most effective means of last resort to bring powerful actors to account.\footnote{Antonios Tzanakopoulos, *Ibid.*} The AU has however weakened its position and diluted the legal argument for disobedience and countermeasures by allowing member states the discretion to decide for themselves when they may or may not comply with their obligations to the AU or the ICC. As noted above, the resolution that the AU adopted at its 15th Ordinary Session in Kampala in July 2010 includes a paragraph requesting member states to ‘balance, where applicable, their obligations to the AU with their obligations to the ICC.’

5.4. Conclusion

In disposing of the case in which Malawi refrained from arresting President Omar Al Bashir, the ICC ruled that Malawi was not faced with any conflicting obligations. It seems, however that a conflict of obligations actually existed. If Malawi had gone ahead and complied with its obligations under the Rome Statute and arrested Omar Al Bashir, that would mean ignoring its obligations towards the AU as expressed in the Constitutive Act and the resolutions of the Assembly directing all AU members to desist from extending any assistance to and cooperating with the ICC in the arrest and surrender of Omar Al Bashir. In dismissing the genuine concern of African states regarding the conflicting obligations, the ICC effectively buried its head in the sand,
which has prevented the ICC and the African states concerned from engaging in consultations over a solution that might lead to the arrest and surrender of Omar Al Bashir being found.

In the case involving the DRC, however, the Pre-Trial Chamber seems to acknowledge the existence of conflicting obligations not only between the ICC request for arrest and surrender and the AU’s resolutions, but also between the AU resolutions and the UN Security Council resolution 1593, by which the situation in Darfur was referred to the ICC. It follows then, that the ICC has been inconsistent on the question of whether a conflict of obligations actually exists in the case of AU member states that have ratified the Rome Statute.

It is very possible that with individuals such as Robert Mugabe of Zimbabwe serving as chairpersons, the AU and some African states are playing politics over the matter of international criminal justice. By denying the existence of conflicting obligations in decisions characterised by questionable legal reasoning, the ICC is inadvertently helping to prop up the credibility of rogue regimes in Africa. Consequently, African presidents such as Robert Mugabe whose governments have very bad human rights records are seen as heroes of African emancipation when they criticize the ICC and call on African ICC states parties to withdraw their membership of the ICC. Although his government is clearly responsible for human rights violations and breaches of international humanitarian law in Darfur, Omar Al Bashir of Sudan now appears as a victim, even to such African governments as South Africa and Namibia that maintain comparatively better and sound human rights records.

Arguably, the easiest means to resolve the problem faced by African states is an article 16 deferral. A deferral of the case against Omar Al Bashir in terms of article 16 of the Rome Statute would extricate African states parties from the conflicting obligations caused by the AU resolutions contradicting the ICC and by operation of the law on head

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677 The Prosecutor v Omar Hassan Ahmad Al-Bashir ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014.
of state immunity. Deferral of cases under article 16 is, however, a function of the Security Council and not the ICC. So far the Security Council has tended to wash its hands off cases that it refers to the ICC. On the other hand the judges of the ICC are getting impatient with the Security Council for not following through with further assistance to the Court on the cases that get to the ICC via referral by the Security Council. In the case of Al Bashir’s visit to Chad, the Pre-Trial Chamber lamented the futility of the decisions and judgments of the ICC and the Security Council referral system in the absence of further Security follow-up action to enforce the judgments.678

A deferral of the case against Omar Al Bashir would involve sober consultations between the Security Council and all the relevant actors including the ICC, the AU and Sudan. Seeing as it is that Omar Al Bashir is unlikely to be arrested and surrendered to the ICC while he remains President of Sudan, it is difficult to fathom how it is that the Security Council has failed or neglected to see the wisdom of deferring the case of Omar Al Bashir before the ICC.

Far from fostering impunity, a deferral of the case against Omar Al Bashir would mean that the case is only dead in the water. As we will see in the next chapter, a deferral would fit well with the way head of state immunity would apply to President Bashir. Unless Sudan waives immunity, no national jurisdiction can lawfully arrest Omar Al Bashir while he remains president of Sudan. It is only after he ceases to be president that possibilities for his arrest will arise. It is in this sense that a deferral would release the African states parties from this web of conflicting obligations.

678 The Prosecutor v Omar Hassan Ahmad Al-Bashir ICC-02/05-01/09-151, Decision on the Non-Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, Pre-Trial Chamber II, 26 March 2013.
Chapter Six

AU Decisions and Sovereign Immunity under the Rome Statute

6.1. Introduction

The decisions of the AU are based on the provisions of the Rome Statute on immunity. When the matter of Bashir’s visit to Malawi and Chad was brought to the ICC, both states raised the issue immunity for Bashir. Additionally, both Malawi and Chad also raised the AU decisions as their basis for not arresting President Bashir. The chamber, found that both Malawi and Chad had breached their obligations under the Rome Statute. In considering the matter of failure by Malawi and Chad to arrest and surrender President Bashir, the ICC dealt with the issue of immunity.

However the question of immunity under customary international remains unsettled. The question that continues to linger is the extent to which head of state immunity under customary international law continues to protect a former head of state from indictment, extradition, prosecution and punishment for criminal acts committed while in office.679

Recently, with the indictment of Presidents Bashir and Uhuru Kenyatta by the ICC the question has been extended to include the extent to which customary international law immunities protect a sitting head of state in national courts seeking to exercise jurisdiction pursuant to an international instrument. Emerging trends in the interpretation and application of customary international law of head of state immunity make it difficult to definitively say whether the established rules of head of state immunity are still extant.

Under the Rome Statute, the relevant articles when it comes to immunities are Articles 27(2) and 98(1). Article 27(2) makes it clear that immunities due to the official capacity of a person shall not bar the ICC from exercising jurisdiction over the person. Article 98(1) on the other hand states that unless it has obtained a waiver of immunity, the ICC

may not request a state’s cooperation in surrender of a suspect if such a request would lead the state to ‘act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State’.

Article 27(2) seems to jettison immunities altogether under both national and international law while Article 98(1) suggests that there may be instances when immunities can be raised to defeat the ICC’s requests to states for surrender of suspects or other assistance. This apparent conflict between Article 27(2) and Article 98(1) of the Rome Statute is not yet settled and remains a live issue.

One of the pertinent questions that arise in attempting to make sense of the AU decisions is: what is the proper construction of immunity under the Rome Statute? This exercise necessarily involves an analysis of the relationship between the seemingly conflicting Articles 27(2) and 98(1) of the Rome Statute. With specific reference to Omar Al Bashir, the president of Sudan, a state that is not a party to the Rome Statute, it is necessary to examine the construction of immunity under the Rome Statute taking into account emerging trends and their impact on customary international law of head of state immunity.

Before dealing with the issue of immunity under the Rome Statute, however, it is necessary to briefly recapitulate the current state of development of state immunity under customary international law. This will allow us to put the discussion of immunity under the Rome Statute in its proper context.


6.2.1. Introduction

The notion of sovereignty entails that a state has authority over people, property and events within its territory. A state may exercise jurisdiction over people, property and events within its territory. A state may also lawfully exercise jurisdiction over disputes brought to the state for adjudication by agreement of the parties. As an exception to
exercise of jurisdiction, customary international law recognises that certain people, things and events are entitled to immunity from enforcement of municipal laws.

In this chapter, reference to head of state immunity is for convenience and consistency since the AU decisions that are a subject of this thesis relate to immunity of presidents Omar Al Bashir of Sudan and Uhuru Kenyatta of Kenya and to Muammar Gaddafi, who did not carry the title of president, but was the head of state of Libya. The discussion in this chapter concentrates on the case of President Omar Al Bashir since it is the most active and has generated a considerable amount of jurisprudence and academic writings. The case against Muammar Gaddafi was terminated following his death. Not much turns on President Uhuru Kenyatta who decided to appear before the ICC voluntarily before all charges were withdrawn in March 2015.680

It is important to stress that immunity relates only to enforcement of laws. Immunity has no bearing at all on the legal liability per se of a defendant. For this reason, it is often said that immunity does not mean impunity. As we will see from the discussion below, immunity only leads to two possible outcomes, none of which has the effect of exonerating the defendant from liability. Firstly, accountability is delayed until such a time that immunity can no longer avail the defendant. Secondly, immunity may also require accountability for international crimes to be diverted to an appropriate court, before which head of state immunity may not be raised as a substantive or procedural bar to prosecution.

This distinction is very important to understand since it seems that this is what is at play in Articles 27(2) and 98(1) of the Rome Statute. In fact, it is argued that the apparent conflict between these articles can be easily resolved by applying Article 27(2) to the question of the criminal liability of the defendant before the ICC and Article 98(1) to the question of enforcement before national courts. For example, in the absence of any waiver by Sudan, President Omar Al Bashir would be entitled to raise Article 98(1) if he

680 The Prosecutor v Uhuru Muigai Kenyatta, ICC-01/09-02/11-1005, Decision on the Withdrawal of Charges against Mr Kenyatta, Trial Chamber V(B), 13 March 2015.
was arrested and in any surrender proceedings that might follow in a national jurisdiction. He is, however, barred from raising immunity as a defence to the charges when the trial commences before the ICC.

Article 27(2) deals with substantive issues while Article 98(1) is procedural in nature. The question that has not been adequately addressed so far relates to the effect that the UN Security Council referral has on the immunity that President Bashir is entitled to under customary international law. To what extent might Article 98(1) avail President Bashir in view of the Security Council referral and the provisions of Articles 25 and 103 of the Charter of the United Nations? The answer to this question is of utmost importance as it determines the validity of the AU arguments and decisions regarding the prosecution of heads of state and other senior government officials by the ICC.

Another point to stress is the distinction between immunity and the concept of non-justiciability. A non-justiciable issue is one over which domestic courts are incapable of asserting jurisdiction. As a result, no judicial proceedings may be brought in the domestic courts over a non-justiciable issue. For example under the traditional “Act of State” doctrine domestic courts refrain from sitting in judgment of political issues about how a foreign state has acted within its own territory. Immunity on the other hand applies to situations where the domestic courts ordinarily have jurisdiction over the matter, but due to the identity of one of the parties, the courts are prevented from exercising that jurisdiction.

This distinction is important in trying to understand the arguments raised by the AU. A proper reading of the AU decisions on the prosecution of African heads of state and other senior government officials reveals an understanding of this distinction. The AU decisions do not suggest that President Bashir cannot be prosecuted due to the immunity that he is entitled to, but that the time is not opportune for the prosecution. The emphasis on the reference to its commitment to ending impunity shows that the AU acknowledges that immunity does not mean impunity. Consequently, the operative part

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of the AU decisions does not suggest termination of the proceedings altogether. It merely suggests a suspension of the prosecution for a period of one year to allow for the peace process to take precedence during that time.

6.2.2. Sovereign immunity

All states are presumed to be equal and sovereign. Therefore, a state’s dignity would be affronted if it was required to submit to the jurisdiction of the courts of another state. Consequently, states are granted immunity from jurisdiction of the courts of other states in both criminal and civil disputes. Immunity is based on the principle of international law, ‘par in parem no habet imperium’, which entails that an equal has no dominion over an equal. The principle comports with the international system of ‘sovereign equality of all’ states envisaged under article 2(1) of the UN Charter.

In the beginning, customary international law recognised absolute immunity for all activities of the state. There were no circumstances whatsoever, where a national court could sit in judgment of a legal issue involving a foreign state or its government. Such issues were akin to those issues that are regarded as ‘non-justiciable’. Once a defendant in a criminal or civil case was identified as a foreign state or a government of a foreign state, no domestic court would have any competence to assert jurisdiction over the case. Any action against such defendants was automatically barred in all national courts.682

Cases that illustrate the early practice of absolute immunity include The Schooner Exchange v Mcfaddon683, Parlement Belge684 and Porto Alexandre685, among others. In The Schooner Exchange case, Chief Justice Marshall of the US Supreme Court stated: ‘The full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as objects. One sovereign being in no

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682 The Porto Alexandre (1920) 1 ILR 146.  
683 (1812) 7 Cranch 116.  
684 (1880) 5 PD 197.  
685 (1920) 1 ILR 146.
respect amenable to another.....

The Parlement Belge case involved a vessel that was the property of the king of Belgium. In the Porto Alexandre case, the vessel in issue had been requisitioned by Portugal for public purposes. Although in both cases the vessels were also used for commercial activities, the courts upheld the vessels’ immunity. In both cases, the principle that a sovereign state could not be impleaded under any circumstances whatsoever before the courts of other states was upheld.

The 19th century and the first half of the 20th century were characterised by industrialisation and the rise of socialist and communist states respectively. One of the consequences of industrialisation was the increased involvement of states in commerce. States that adopted communism and socialism also became more involved in commercial activities through nationalised firms and establishment of corporations wholly owned by the states. The increased involvement of states in commercial activities rendered the concept of absolute immunity obsolete. This led to the development of the doctrine of restrictive immunity under which states grant immunity to foreign states for public or governmental acts of states (acts jure imperii) but not for private or commercial activities of the state (acts jure gestionis).

In the Cristina case, Lord Macmillan expressed the view that immunity was essentially a concession to the dignity, equality and independence of foreign states. Where foreign sovereigns ‘condescended to lay aside their dignity’ by engaging in commercial activities, Lord Macmillan expressed reservations whether immunity should be extended in such circumstances.

Notable cases from different jurisdictions including South Africa, Zimbabwe and Botswana that went on to affirm the restrictive immunity approach include Dralle v Republic of Czechoslovakia, Trendtex Trading Corporation Ltd v Central Bank of

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686 Ibid, at page 137.
688 Ibid, at page 498.
689 (1950) 17 ILR 165.
Nigeria, Inter-Science Research and Development Services (Pty) Ltd v Republica Popular De Mocambique, Barker McCormac (Pvt) Ltd v Government of Kenya, Bah v Libyan Embassy and International Committee of the Red Cross v Sibanda & Another. In Dralle v Republic of Czechoslovakia, the Supreme Court of Austria held that absolute immunity had lost its meaning and was no longer a rule of international law. In Trendtex v Central Bank of Nigeria, the UK Court of Appeal held that restrictive immunity was a firmly established rule of customary international law.

Today most states have codified the qualified or restrictive approach to state immunity. In the US, codification of the restrictive approach was preceded by the Tate Letter of 1952, which was issued by the State Department and confirmed that immunity would only be extended for public acts only and not for private acts. Several regional and bilateral treaties allow the restrictive approach to immunity. It seems fair to say, as the UK Court of Appeal stated in the Trendtex case, that restrictive immunity, under which immunity is granted for acts jure imperii, but not for acts jure gestionis is now a rule of customary international law.

6.2.3. Head of state immunity

Persons and entities that are entitled to immunity apart from foreign states include foreign diplomats, consuls, armed forces and heads of states as well as public vessels and international organisations. In the Arrest Warrant case, the ICJ stated that immunity avails ‘...certain holders of high-ranking office in a state such as the head of state, head of government and Minister of Foreign Affairs.’ The language used by the ICJ in this statement shows that this list of high ranking state officials that enjoy immunity from criminal and civil jurisdiction of other states is not exhaustive. In this thesis, I refer to the immunity of heads of state since it is the one that the AU raises in instructing its member states to refrain from enforcing the ICC arrest warrant against President Omar

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691 1980 (2) SA 111.  
692 1983 (4) SA 817 (ZS).  
693 2006 (1) BLR 22 (IC).  
694 SC-48-03, 2004 (1) ZLR 27.
Al Bashir. Head of state immunity is used interchangeably with immunity of high ranking state officials.

In recent years, the cases of former heads of state including Augusto Pinochet, Charles Taylor and Slobodan Milosevic sparked debate over the issue of immunity of incumbent and former head of state for criminal acts committed while in office. The indictment by the ICC of Omar Al Bashir and Uhuru Kenyatta, both sitting presidents of Sudan and Kenya respectively, kicked up a darker cloud of dust around the issue of immunity of an incumbent head of state. The proliferation of international tribunals, the rhetoric and practice on the fight against immunity and the lack of uniformity in usage by states have tended to cause confusion on the scope of application of head of state immunity in the modern reality.

In medieval times, the concept of sovereignty made no distinction between the state and the personal sovereign. The ruler and the state were synonymous and sovereignty was regarded as a personalised concept. From this conceptualisation of personalised sovereignty, the notion of head of state immunity arose as a derivative of state immunity. Consequently, early notions of immunity tended to vest this privilege in the personal sovereign, whose right to rule was regarded as flowing from God, the ultimate sovereign.

The divine right of kings as God’s earthly representatives gave birth to the conflation of ruler and state and the political absoluteness of monarchs, which in turn begot the notion of absolute immunity for states and heads of states. The decline of monarchies and the rise of democracy diminished personal sovereignty and drew a distinction between the ruler and the state. It is said that immunity attaches to the state. It is not an individual right. It is only extended to the head of state or high ranking state officials who are the personification of the state. The immunity attaching to the state can therefore be waived by the state.

International law recognises two types of immunity: functional immunity (*ratione materiae*) and personal immunity (*ratione personae*). Functional immunity puts all acts committed by an official of a foreign state while carrying out his or her public functions beyond the reach of the courts other states.

6.2.4. **Functional immunity (*ratione materiae*)**

This type of immunity is limited in that it only applies to official acts carried out by state officials while in office and it does not cover acts of a personal nature even if the acts are committed while in office. Functional immunity is substantive in nature and continues to protect state officials from the jurisdiction of the courts of other states even after leaving office.

The rationale behind functional immunity derives from the sovereign equality of states. As artificial legal persons, states can only act through their officials. Therefore, acts committed by state officials pursuant to their official capacities are regarded as acts of the state and not the officials personally. If domestic courts exercised jurisdiction over the acts of these foreign officials, this would amount to exercising jurisdiction over the foreign state for who the officials acted. Therefore functional immunity prevents courts from enquiring into the acts of foreign states through proceedings against officials who carried out the acts.\(^696\)

From these basic characteristics of functional immunity, it is clear that this type of immunity serves as a substantive bar to the exercise of jurisdiction by domestic courts over an incumbent head of state for acts committed while discharging his or her public functions. Since the immunity continues to apply even after the head of state has left office, it is also clear that functional immunity also protects a former head of state from the jurisdiction of the courts of foreign states, provided it can be shown that the acts were committed in the former head of state’s official capacity.

6.2.5. Personal immunity (*ratione personae*)

Personal immunity provides a procedural bar to proceedings in foreign courts. It applies to state officials while in office and covers both official acts and acts carried out in a private capacity before and after assumption of office. While the official remains in office, personal immunity is absolute and ensures total inviolability of state officials when traveling abroad. It does not matter that the visit is for official or private business. In *Republic of Austria v Altman*\(^{697}\), Justice Breyer expressed the view that personal immunity ‘is about a defendant’s status at the time of suit, not about a defendant’s conduct before the suit.’\(^{698}\)

However, the protection only lasts during incumbency. A head of state or high ranking state official sheds personal immunity upon leaving office. Once the official vacates his or her position, he or she can be sued in criminal and civil proceedings that are not covered by functional immunity. In *Ex King Farouk of Egypt v Christian Dior*\(^{699}\), the court held that while he remained king, King Farouk was protected by personal immunity from suit by Christian Dior for clothes that the king had bought for his wife. But once the king lost his royal status, Christian Dior could sue for recovery of the debt incurred by the king before his abdication as he was no longer entitled to claim immunity. In *Lafontant v Aristide*\(^{700}\), a US District Court ruled that Aristide was protected from suit in the USA by immunity even though Aristide had been overthrown as president of Haiti and sent into exile following a coup. The finding of immunity rested on the fact that fact that after the coup, the US Government did not recognise the military government, but continued to recognise Aristide as head of state of Haiti.

Domestic courts have also upheld personal immunity for incumbent heads of state and other high ranking state officials even where allegations of international crimes and breach of *jus cogens* rules of international law are concerned. For example, in *Tachiona*

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\(^{697}\) 541 U.S. 677 (2004).
\(^{698}\) *Ibid*, at page 708.
\(^{699}\) 24 I.L.R. 228 (CA Paris 1957).
\(^{700}\) 844 F. Supp. 128 (E.D.N.Y. 1994).
v Mugabe\textsuperscript{701}, the court upheld the immunity of President Mugabe and his Minister of Foreign Affairs even though the suit sought redress for egregious violations including torture, assault and execution, some of which were committed in personal capacities. The Gaddafi case involved the terrorist bombing of a French airliner which caused the death of 156 passengers and 15 crew members. The French Court of Cassation held that the serious crimes related to terrorism that were being alleged against Colonel Gaddafi did not constitute an exception to the principle of the jurisdictional immunity of an incumbent foreign head of state.\textsuperscript{702}

Personal immunity is similar to diplomatic immunity that is governed by the 1961 Vienna Convention on Diplomatic Relations. In fact, it is sometimes said that some of the principles of personal immunity such as inviolability are imported from diplomatic immunity.\textsuperscript{703}

6.2.6. The effect of the cases of Pinochet, Milosevic and Charles Taylor\textsuperscript{704}

At the turn of the 20th Century, serving and former heads of state, including Pinochet, Milosevic and Charles Taylor were arrested accused of atrocity crimes. These arrests together with the case of the arrest warrant issued in Belgium against a Congolese Minister of Foreign Affairs, produced jurisprudence which has had a profound effect on the development of customary international law on state immunity. In fact, in the Malawi decision, the ICC Pre-Trial Chamber I made reference to the increase in the number of incumbent or former heads of state prosecuted for international crimes to support the view that state immunity may not avail a defendant in cases prosecuted in international courts and tribunals.

\textsuperscript{701} 169 F. Supp. 2d 259 (S.D.N.Y. 2001).
\textsuperscript{702} 125 ILR 490 (2001) (Court of Cassation, France).
In its Report on Jurisdictional Immunities of States and their Property, the working group of the International Law Commission observed that national courts, had in some cases, shown sympathy for the argument that states are not entitled to plead immunity where there has been a violation of human rights norms with the character of jus cogens.\textsuperscript{705} In all the cases, the plea of sovereign immunity succeeded. But this was mostly prior to the cases of Pinochet, Milosevic and Charles Taylor.

One of the most enduring contributions of all these cases is that they confirmed that state immunity, which includes immunity of state officials, is still very much extant in customary international law. A sitting head of state, for example, enjoys personal immunities from criminal jurisdiction and inviolability before national courts of foreign states even when he or she is suspected of having committed acts that constitute atrocity crimes under international law.

The Pinochet case is a decision of a national court, but it has had tremendous impact on the development of customary international law of state immunity. Before the Pinochet case, a former head of state had never been required to submit to the criminal justice process of a friendly state that he or she was visiting to answer criminal charges arising from acts allegedly committed in the former head of state’s state.\textsuperscript{706} Yet, the House of Lords held that a former head of state could not rely on state immunity to avoid court process, where the former head of state is accused of international law prohibitions with \textit{jus cogens} status such as torture. This is because systematic torture can never be regarded as a legitimate state function.

The case of Charles Taylor before the Special Court for Sierra Leone established the point that the nature of a tribunal can determine whether the accused person has


immunity or not. In this case, whether Charles Taylor was protected by head of state immunity was dependent on whether the Special Court for Sierra Leone was a national or international court.\textsuperscript{707} According to the court, the distinction between national and international courts is important because immunity flows from the principle of sovereign equality of states, which prevents one state from sitting in judgment of another state’s conduct. Since the principle of sovereign equality, the basis of the concept of immunity, is not implicated in proceedings by international tribunals, immunity has no place in a prosecution by an international tribunal which is not an organ of any state.\textsuperscript{708}

The court ruled that the Special Court for Sierra Leone was an international court. Therefore Charles Taylor did not have any immunity as between the court and him. In any case, at the time that the case was argued, Charles Taylor had ceased to be head of state. ‘The immunity \textit{ratione personae} which he claimed had ceased to attach to him.’\textsuperscript{709}

In the context of the difficulties currently faced in attempts to execute the arrest warrant against President Omar Al Bashir, the case of Charles Taylor established the principle of non self-execution of a warrant of arrest issued in another state. In the case of Omar Al Bashir the principle could be stated as the non-self execution of a warrant of arrest issued and transmitted by the ICC to Rome Statute states parties. As the domestic legislation of states parties surveyed in this chapter shows, a request for cooperation and a warrant of arrest transmitted to a state by the ICC requires further action by the receiving state to give the request or warrant the force of law before it is executed. Unless the obligation is deemed to be established by the UN Charter or a valid treaty, the receiving state has ‘no obligation to execute the arrest warrant. That state asserts its sovereignty by refusing to execute it.’\textsuperscript{710}

\textsuperscript{707} \textit{The Prosecutor v Charles Ghankay Taylor}, at paragraph 49.

\textsuperscript{708} \textit{Ibid}, paragraph 51.

\textsuperscript{709} \textit{Ibid}, paragraph 59.

\textsuperscript{710} \textit{Ibid}, paragraph 57.
In the case of Omar Al Bashir, the obligations of states parties that have been asked to execute the warrants of arrest arise from a valid treaty – the Rome Statute and not from the Charter of the UN. If the problem was considered purely from this angle, an attempt to resolve the conflict faced by AU states over AU and ICC obligations would not require any resort to primacy of certain obligations over others. However, the ICC Pre-Trial Chamber II managed to bring in the question of primacy of UN Charter obligations through the back door, which means that the obligation of Rome Statute states to respect Omar Al Bashir’s immunity established by the AU resolutions and customary international law ranks lower than the obligation to arrest and surrender Omar Al Bashir to the ICC.

This, the Chamber achieved by finding that Al Bashir does not have any immunity by reason of UN Security Council resolution 1593. In the circumstances, the conflict facing AU member states is not between the Rome Statute and the AU resolutions. The conflict is between the AU decisions and resolution 1593. Said the Chamber, ‘the conflict actually lies between the decision of the African Union to retain the immunity of Omar Al Bashir and the UN Security Council resolution 1593(2005) which removed such immunity for the purpose of the proceedings before the court.’ The resolution of this conflict thus becomes an easy matter because of the primacy of UN Security Council decisions.

In all of the cases, the question that was not satisfactorily addressed is this: can a court or tribunal established by a treaty – as opposed to a tribunal established by the Security Council in exercise of its powers under Chapter VII of the UN Charter – remove immunity ratione personae of high ranking officials of third states? This is the question implicated in the case of President Omar Al Bashir that forms the foundation of the decisions of the African Union. This is the question that the ICC Pre-Trial Chambers have unfortunately failed to address in a systematic manner.

711 The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014, at paragraph 30.
6.2.7. Sequencing functional immunity and personal immunity

Robertson’s comment on the absolute nature of personal immunity of diplomats, which, I argue applies also to heads of state, aptly captures the sequence of application of functional immunity and personal immunity. He writes that absolute personal immunity lasts from the time of assumption of office to the time the official vacates the official position. ‘Thereafter, however, they shed that total immunity and wear its undergarment: immunity ratione materiae, covering only their actions done in the course of official duties.’

We can conclude, therefore, that a sitting head of state is entitled to absolute immunity and may not be impleaded in the courts of other state for both criminal and civil wrongs, the seriousness of the allegations notwithstanding. However, once the head of state leaves office and becomes a former head of state, he or she loses the protection of personal immunity and becomes entitled to functional immunity. Only acts committed in the former head of state’s official capacity are protected by functional immunity. As the case of former King Farouk of Egypt referred to above shows, the former head of state becomes liable for all acts committed in his or her private capacity.

As the case of Pinochet shows, upon shedding immunity ratione personae, a former head of state cannot seek the protection of immunity ratione materiae for acts that breach an international law prohibition that has achieved jus cogens status, such as the prohibition of torture committed systematically for policy reasons since such acts can never be regarded as legitimate state functions. It seems that other egregious violations such as genocide that have also achieved jus cogens dissolve the functional immunity that a former head of state might otherwise be entitled to under customary international law.

712 Geoffrey Robertson, Ibid.
6.3. Considering the AU Arguments in the Context of Articles 27(2) and 98(1) of the Rome Statute

6.3.1. The problem with Articles 27(2) and 98(1) of the Rome Statute

As we saw in the first chapter of this thesis, at the end of the Franco-Prussian War of 1870 – 1871, in January 1872, Gustave Moynier proposed the establishment of an international criminal court to bring to justice individuals responsible for violations of the 1864 Geneva Convention. Since then, efforts to set up a permanent international court with jurisdiction to try individuals for international criminal offences were afoot until the Rome Statute was adopted in July 1998.


It is argued that articles 27(2) and 98(1) are one of the unfortunate results of the political environment in which treaties are usually negotiated. In negotiations for treaties like the Rome Statute that threaten state sovereignty, it is not uncommon for states to resort to ambiguities or omitting explicit references in the final Act, to accommodate the disparate positions of states in order to secure political agreement.

Legislating for the irrelevance of official capacity in the prosecution of international crimes is not a new idea. Since the Treaty of Versailles held Emperor Willem of Germany liable for atrocities committed during World War I, the idea of holding heads of states personally liable for atrocity crimes was continuously promoted.\footnote{Otto Triffterer, ‘Article 27 – Irrelevance of official capacity’, in Otto Triffterer (ed), \textit{Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article}, (Nomos: Baden-Baden, 2008).} The rule was included in the Nuremberg Principles and all the \textit{ad hoc} war crimes tribunals that preceded the ICC since World War II included this provision in their founding.
documents. In fact, it has been argued that at the time of negotiating the Rome Statute the idea that official capacity may not be raised in defence of the charges or in mitigation of sentence had long crystallised as a rule of customary international law.\textsuperscript{715}

The existence of state or diplomatic immunity that is mentioned in articles 27(2) and 98(1) in national jurisdictions and customary international law is commonplace. The rule that the principle has no role to play in a prosecution by an international criminal court that is recorded in article 27(2) is quite logical and therefore unremarkable.

The weaknesses of the Rome Statute on the matters of irrelevance of official capacity, personal criminal responsibility of high ranking state officials and state or diplomatic immunity lies not in the substance of the articles that contain these concepts. Clearly, since one of the main purposes of state immunity is to protect and maintain the sovereign equality of states by preventing the affairs of one sovereign state from being impleaded in the courts of another, immunity has no application in an international criminal court. An international criminal court or tribunal acts on behalf of the entire international community and not one sovereign state. Therefore there is no question of one sovereign state being dragged and forced to appear in the courts of another sovereign.

Similarly, the customary international principle in article 98(1) regarding the need to obtain a waiver of immunity from a state before a high ranking official is arrested and detained in another state is also trite. Article 98(1) also acknowledges the rule that, as a treaty, the Rome Statute can only bind states parties. No legal obligations or rights flow from the Rome Statute for states that have not ratified or acceded to the Rome Statute without their consent. This principle on the need to obtain the waiver of a state that is not party to a treaty before obligations can be imposed is a rule of customary

international law that is recorded in article 34 of the Vienna Convention on the Law of Treaties.

The formulation of articles 27(2) and 98(1), which includes the wording of the articles and the directing of obligations towards a particular party and not the other, is one of the problems with the articles. The other problem associated with articles 27(2) and 98(1) is the inclusion of the issues dealt with in these clauses in different parts of the Rome Statute that deal with different issues.

Article 27 is in Part 3 of the Rome Statute that deals with general principles of international criminal law. Article 27(1) deals with the general principle that official capacity may not be invoked as a defence to a charge before the ICC. The second paragraph of article 27 provides that immunities that certain individuals may enjoy under customary international law may not be raised to prevent the ICC from exercising jurisdiction over such individuals. The principle of irrelevance of official capacity that is captured in article 27 as a whole is by and large a matter of substantive law. It reflects the spirit of the Rome Statute on the fight against impunity.

Article 27(2) reads: ‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.’ It is self evident that this second paragraph of article 27 also contains some elements that are encountered in procedural immunities such as arrest and surrender.

A literal reading of this paragraph leads to the conclusion that a suspect cannot rely on immunity provided under national or international law to avoid arrest for purposes of surrender to the ICC. But the ICC does not have a police force of its own or any other institutions that it can use to enforce its decisions. The ICC needs the cooperation of states to arrest suspects. This creates another layer of relationships. It can be safely stated as a matter of fact that in construction, the first paragraph of article 27 deals with
an issue of substantive law while the second paragraph deals with an issue of procedural law.

It is here, mixing substantive law issues with issues of a procedural law nature and a situation of multi-layered relationships that the problems begin. With respect to the different layers of relationships, the problems arise from the fact that the law on immunities applies differently to the different layers of these relationships.

Article 98 is in Part 9 of the Rome Statute, which deals with issues of cooperation of states with the ICC for the investigation and prosecution of crimes that fall within the jurisdiction of the ICC. The matters covered in Part 9 are more procedural than substantive. This part of the Rome Statute deals with the practicalities of assistance that states are required to extend to the ICC including arrest and surrender of suspects, interviewing of witnesses and collection of evidence, searches and seizures, service of court process and protection of victims and witnesses. Article 98 is a procedural fix that was designed to increase the comfort levels of states that eschewed impunity but were not yet ready for the jettisoning of customary law immunities altogether.716 In a manner of speaking, article 98 ensured that the baby was not thrown away with the bath water.

Article 98(1) reads: 'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.'

A literal reading of this paragraph shows that article 98(1) limits the scope of Article 27(2) and the main ideals of the Rome Statute of ensuring an end to impunity by preventing the ICC from requesting the arrest and surrender of suspects from non party states who are protected by state or diplomatic immunity unless the non party state has

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716 Meghan Jakobsen, ibid.
waived the immunities.\textsuperscript{717} Article 98(1) of the Rome Statute seems to confirm the existence of immunity of state officials under customary international law.

In the \textit{Arrest warrant Case}, the ICJ expressed an opinion that might help to achieve a better understanding of how the existence of official immunity may comfortably coexist with the ethos of the Rome Statute to strive for an end to impunity. The ICJ held that the notions of immunity from the criminal jurisdiction of a court and individual criminal responsibility do not denote the same thing. They are two different concepts.

The logical extension of this view is that the two concepts apply at different levels, with immunity applying to the relationship between the arresting state and the official of a non party state that is entitled to immunity and individual responsibility applying to the relationship between the official and the ICC.\textsuperscript{718} Immunity can be raised when a state seeks to arrest an official that is protected by immunity. But, once the official is brought before the ICC, immunity ceases to help that official to escape liability.

The ICJ stated: ‘While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.’\textsuperscript{719}

Procedural immunities can be looked at by distinguishing between cooperation between states, which is termed interstate or horizontal cooperation and cooperation between a state and the ICC, which is termed vertical or supranational cooperation. In matters of arrest and delivery of a suspect for prosecution, the Rome Statute distinguishes between these two forms of cooperation by referring inter-state cooperation as ‘extradition’, and cooperation between states and the ICC as ‘surrender’. Part 9 of the


\textsuperscript{719} \textit{Arrest Warrant Case}, paragraph 60.
Rome Statute provides for cooperation at these two levels. Gaeta has argued that immunities apply in horizontal cooperation but not in vertical cooperation. This argument fits in very well with the rationale for state immunity.

Furthermore, in terms of formulation, the fact that article 98(1) is addressed to the court and not to states parties presents its own problems. This is because it is states and not the court that might be faced with circumstances of conflicting obligations in respect of cooperating with the court and respecting state immunities. Yet the rationale for addressing article 98(1) to the court is quite understandable. To definitively determine the question whether any conflicting obligations exist is a matter that should be left to be determined by the court and not the parties. Leaving it to the states might result in a situation where the states effectively take the law into their own hands, leading to lack of uniform enforceability of international law and double standards contrary to the demands of the rule of law at the international level.720

This understanding of the two concepts leads to the conclusion that an incumbent head of a third state that is entitled to immunity, but over whom the ICC has jurisdiction, for example, may competently rely on customary international law immunity ratione personae and his total inviolability to avoid arrest and surrender. Such immunity, however, is temporary and only lasts up to the time that the official leaves office. Once the official leaves office, he or she may be arrested for any acts that amount to international crimes committed before and during his time in office. The official may not rely on immunity ratione materiae to escape arrest for such acts. It now seems to be generally accepted in jurisprudence of national and international courts and academic writings that acts that are condemned as criminal under international law cannot be regarded as legitimate official functions.721

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6.3.2. Compatibility of the AU’s argument with Article 98(1) of the Rome Statute

The AU relies on article 98(1) to argue that as an incumbent head of a state that is not party to the Rome Statute, President Omar Al Bashir enjoys absolute inviolability. Unless Sudan waives it, head of state immunity under customary international law protects President Omar Al Bashir from arrest. One can deduce the logical extension of this argument to be that according to the AU, it does not matter that the prosecution is being undertaken by an international court. What matters is that unless he voluntarily surrenders himself to the court, President Bashir would have to be arrested for him to be brought before the ICC.

Yet, the ICC has no arrest powers of its own. It has no police, military or territory of its own. It lacks the means to enforce arrest warrants of its own initiative and a credible threat mechanism. Such powers belong to states. The ICC can only secure the arrest of suspects through states. Cassese writes: ‘The ICTY is very much like a giant without arms and legs—it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, they cannot fulfill their functions.’

When states receive a request for cooperation from the ICC, they obviously have to follow their domestic laws on arrest and surrender of suspects. Arrests by most states are most likely to be followed by a process of judicial review on the basis of the provisions of the national statute domesticating the ICC Statute or any other cooperation legislation in the arresting state. It is in this indirect system of executing warrants of arrest that the issue of immunity arises when the suspect is a state official.

The effectiveness of enforcement before the ICC is dependent on state support. Without this state support, international criminal justice will remain elusive. Yet, politics and the law itself can be stumbling blocks to ensuring that justice does not remain elusive. Political interests of states are always changing. In most instances, it is the political

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interests of states that will determine whether the state will enforce an ICC warrant against a fugitive head of another state.

The failure by South Africa to arrest President Al Bashir is a good example of this point. Regarding the law, immunities that state officials are entitled to under customary international law can be invoked should another state seek to arrest the state official pursuant to an ICC warrant of arrest. Such immunities can avail officials of states that are not parties to the Rome Statute, but not officials of states parties.

By operation of Article 27(2), states that ratify the Rome Statute revoke the protection of immunities that is afforded to state officials by customary international law. The provisions of Article 27(2), however, have no force or effect for states that have not ratified the Rome Statute. Article 34 of the Vienna Convention on the Law of Treaties states that unless non-party states consent, a treaty does not create rights or obligations for the non-party states. As such the Statute cannot remove the official immunity enjoyed by a head of state of a non-state party.

Under Article 98(1) therefore, where the ICC proceeds against an official of a state that is not party to the Rome Statute, who is otherwise entitled to immunity, the ICC must first of all obtain a waiver of immunity from that state before it issues a request for arrest and surrender of the state official. Without a waiver of the state concerned, the ICC cannot competently issue a request for arrest and surrender of a state official that is protected by immunity. Such a request would cause the states requested for assistance to breach their customary international law obligations to ensure the inviolability of high ranking foreign state officials. That would be contrary to the letter and spirit of article 98(1) of the Rome Statute.

In the case of President Al Bashir, Sudan has insisted that it does not recognise the court and has refused to receive court process or to open up channels of

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723 Malawi Decision, paragraph 40.
communication with the court. The ICC has therefore not been able to formally communicate with Sudan to request a waiver of Al Bashir’s head of state immunity and no such waiver has been given by Sudan. In the absence of such waiver, the lawfulness of the request for the arrest and surrender of Al Bashir sent out by the ICC is therefore questionable.

The case is even stronger in respect of the request for arrest and surrender that was sent out to states parties before the decision of the Pre-Trial Chamber on the failure by the DRC to comply with the request. This is because it is only at this point, five years after the first warrant of arrest was issued, that the Pre-Trial Chamber addressed the issue of Al Bashir’s head of state immunity with a measure of clarity. Before then, two strands of the argument that there is no head of state immunity that might prevent states from arresting President Bashir, stand out from the early decisions of the Pre-Trial Chamber.

The first one is the oft misapplied dictum in the Arrest Warrant case to the effect that state immunity may not be invoked in a prosecution by an international court or tribunal. The second strand is that states are an integral part of the prosecution by the court. States are the agents through which the ICC exercises the ius puniendi of the international community. It follows, therefore, that the unavailability of immunities for President Bashir before the ICC must extend to any act of cooperation by any state that executes the warrants of arrest.

725 The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-227, Decision on the Prosecutor’s Request for a finding of Non-Compliance Against the Republic of the Sudan, Pre-Trial Chamber II, 9 March 2015.
726 The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014.
727 The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 13 December 2011; The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140-tENG, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 12 December 2011.
728 Malawi decision, ibid, at paragraph 44 and Chad decision, Ibid, at paragraph 13.
This reasoning by the Pre-Trial Chamber I, is rather nebulous. The AU rejects these arguments for purporting to alter customary international law on personal immunity and for rendering article 98(1) redundant.\footnote{On the Decision of the Pre-Trial Chamber of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of The Sudan', \textit{AU Press Release No.002/2012}, Addis Ababa, 9 January 2012.} As an incumbent head of state, the person of President Omar Al Bashir is absolutely inviolable, the seriousness of the alleged crimes or the forum undertaking the prosecution notwithstanding. Without first obtaining a waiver from Sudan, no state can arrest him without incurring responsibility under the customary international law of immunity \textit{ratione personae}. This is only one side of the argument and the AU and African states that have refused to arrest President Bashir seem to be labouring under this view that unless Sudan waives Al Bashir’s immunity, their hands are tied.

The other side of the argument, which is espoused by some academic writers, has been aptly captured by Triffterer in the following terms: ‘making the surrender of an official of a non-party state enjoying sovereign immunity dependent upon a waiver of that immunity by the non-party state concerned, could in practice bar the Court from exercising its jurisdiction over such a person, since the ICC Statute does not permit trials in absentia’.\footnote{Otto Triffterer, \textit{Ibid}.}

After missing several opportunities to definitively pronounce on the effect that a UN Security Council referral has on head of state immunity, in 2014, the Pre-Trial Chamber II of the ICC eventually relied on the primacy of UN Security Council decisions to strip President Omar Al Bashir of immunity.

Making reference to the \textit{ad hoc} tribunals, Schabas posits that the capacity of the UN Security Council to withdraw immunities that any person may enjoy is now \textit{lex lata}.\footnote{William A. Schabas, \textit{Introduction to International Law}, (Cambridge: Cambridge University Press, 2001), page 232.} The ICTR and the ICTY ‘have held that the obligation to co-operate mandated by the
Security Council acting under chapter VII prevails over any customary international law immunities that might otherwise exist’ pursuant to articles 25 and 103 of the UN Charter.\textsuperscript{732}

In the DRC case, the Pre-Trial Chamber II of the ICC eventually held that UN Security Council resolution 1593, by which the situation in Darfur was referred to the ICC nullifies any immunity that President Bashir might enjoy under customary international law. The Pre-Trial Chamber II expressed the view that by deciding that Sudan ‘shall cooperate fully’ and ‘provide any necessary assistance’ to the court, the UN Security Council thereby directed Sudan to remove all obstacles to the exercise of jurisdiction by the court. Those obstacles include immunities that President Omar Al Bashir is entitled to under customary international law.

The Pre-Trial Chamber has also held that the effect of a UN Security Council referral of a situation in a state that is not party to the Rome Statute is that it puts a non-party state in a position that is akin to that of a state party when it comes to cooperating with the court. In fact, ‘Part 9 of the statute and the relevant rules governing state-party cooperation, become applicable.’\textsuperscript{733} From the time of the referral all the provisions of the ICC Statute on cooperation with the court apply to that state as if it was a state party. Therefore, Sudan may not seek to assert head of state immunity for Omar Al Bashir. States parties to the Rome Statute are estopped by the provisions of the Statute from raising immunity in order to prevent execution of arrest warrants on President Bashir.\textsuperscript{734}

The AU rejects the argument that the UN Security Council referral resolution 1593 has the effect of withdrawing immunities of state officials. The AU relies on the wording of the resolution itself to support this argument. According to the AU, any resolution


\textsuperscript{733} Ibid, note 95 above at paragraph 15.

seeking to remove immunities granted to officials of states that are not parties to the Rome Statute should be explicit. If the Security Council had intended to take away President Bashir’s immunities, it would have said so in so many words in the body of resolution 1593.

The import of the AU argument is that Article 98(1) was included in recognition of the fact that as a treaty, the Rome Statute only binds states parties. Consequently, Article 98(1) cannot take away immunities that officials of states that are not parties to the Rome Statute are entitled to under customary international law. The position articulated by the AU is consistent with the position enunciated in the Arrest Warrant case. In that case it was stated that ‘immunity accorded to senior officials, *ratione personae*, from foreign domestic jurisdiction (and from arrest) is absolute and applies even when the official is accused of committing an international crime’.

It seems therefore that the argument that is raised by the AU is compatible, not only with the current development of customary international law, but the provisions of the Rome Statute. To suggest that conceding to the AU request would entrench impunity is to misunderstand the argument or the position of customary international law on state immunities. The requested the UN Security Council to defer the prosecution of President Omar Al Bashir in terms of article 16 of the Rome Statute. The AU has also requested that President Al Bashir’s immunity *ratione personae* be respected.

Yielding to the AU requests would lead to one result: the postponement of President Al Bashir, either by one year or until such a time that he is no longer head of state and has lost the protection of immunity *ratione personae*. Surely, postponing the prosecution of President Bashir to such a time that he is no longer a head of state would not amount to entrenching impunity.

6.4. States-Parties’ Legislation Domesticating the Rome Statute

Since the issue of immunity referred to in article 98(1) of the Rome Statute can only arise in domestic courts, it is necessary to look at the ways in which Rome Statute
states parties have sought to regulate immunity in domestic legislation. How the Rome Statute states parties have legislated on this issue can reveal their interpretation of their obligations to arrest and surrender suspects under the Rome Statute versus their obligation to respect customary international law immunities of officials of non-party states. Put differently, legislation domesticating the Rome Statute can be a window to states’ view of ways in which the duty in article 27(2) to disregard the official immunities of a suspect and the obligation in article 98(1) to respect customary international law immunities of non-party states’ officials can be reconciled. It may very well be that state parties have identified a way of resolving this conflict that is better than the methods so far adopted by the ICC in the case of President Omar Al Bashir.

Upon ratifying the Rome Statute, Kenya, South Africa and the UK took steps to enact legislation domesticate it and to provide for a mechanism to cooperate with the ICC in the arrest and surrender of suspects. One of the reasons why it is necessary for Rome Statute states parties to provide for mechanisms to cooperate with the ICC is that national laws relating to extradition of suspects will not apply where a suspect has been arrested for purposes of surrender to the ICC. Article 102 of the Rome Statute distinguishes surrender from extradition.

Under the ICC criminal justice regime extradition is delivery ‘of a person by one state to another as provided by treaty, convention or national legislation.’ Surrender is delivery of a person by a state to the ICC in terms of the provisions of the Rome Statute. By making this distinction, article 102 ensures that a suspect that is needed by the ICC cannot rely on grounds such as the double criminality rule and the political offence exception, to prevent surrender to the ICC as they would in an extradition.

The legislature in Kenya passed the *International Crimes Act, 2008*. The South African parliament passed the *Implementation of the Rome Statute of the International Criminal Court Act, 2002* (ICC Act). The UK adopted the *International Criminal Court Act, 2001* (UK Act). Out of this sample, the Kenyan legislation is the most comprehensive and arguably the best example in respect of the details that it provides for the system for
cooperating with the ICC. However, the manner in which state immunity is legislated in the Kenyan and South African statutes seems to betray some deficiencies in the understanding and conceptualization of the concept. The UK legislation on the other hand shows the best understanding of how immunity of high ranking officials of states that are not ICC members should apply in an ICC prosecution.

African Rome Statute states parties that have failed to arrest President Bashir citing conflicting obligations have attracted the ire of the ICC Pre-Trial Chamber for taking the law into their hands and usurping the functions of the court to determine whether a conflict actually exists. Article 98 of the Rome Statute that the AU refers to in its resolutions is addressed to the court and not states parties. As a result, article 97 of the Rome Statute read together with Rule 195 of the ICC Rules of Procedure and Evidence provide for the solution where a state holds the view that executing an ICC request for arrest and surrender presents problems.

The state is required to notify the court, providing relevant and sufficient information on the problems that might be caused by executing a request for arrest and surrender to enable the court to make a decision. It is important to note that it is the court, not the requested state that has the mandate to decide whether the request that it has sent out can cause problems for the requested state.

Under Rule 195, the court has the discretion to request the third state concerned to provide more information before the court can reach a decision. In the case of Al Bashir for example, upon receiving a request to arrest and surrender President Al Bashir, Malawi, Chad, Nigeria, DRC and Kenya should have notified the court of the conflicting obligation due to the AU resolutions as well as the head of state immunity that Al Bashir is entitled to under customary international law.

Out of all the Rome Statute states parties that President Omar Al Bashir has visited since the ICC arrest warrants were issued, only South Africa attempted to invoke the provisions of article 97 by opening consultations with the court, when it appeared that
President Omar Al Bashir would travel to South Africa to attend the AU meeting in South Africa. In the specific case of South Africa, the authorities had the further issue of the hosting agreement that they had signed with the AU under which South Africa was requirement to accord to all delegates, immunity from arrest and detention for the duration of the AU Summit. The issue involving South Africa is discussed in more detail below since it clearly brings out most the issues at state.

There is nothing that could have stopped these states from raising the geopolitical concerns that they have over attempting to arrest President Al Bashir. For example Kenyan authorities were concerned that arresting President Al Bashir would have triggered regional instability. The Kenya Government spokesperson put it succinctly when he stated: ‘If Sudan is destabilized it is us who would suffer, not the West.’ But, rather than purporting to decide this matter themselves, the states ought to have let the ICC decide on their concerns since this is a function of the court under the Rome Statute.

6.4.1. Kenya: International Crimes Act

There are many provisions in the Kenyan statute that show a good understanding of the need to consult with the ICC should the Kenyan authorities face any problems in executing the request for assistance. For example, sections 24 – 26 of the Kenyan International Crimes Act contemplate consultations between the ICC and the authorities in Kenya where the ICC has issued a request for assistance. Even in cases where Kenya wants to refuse providing assistance, the Act requires that Kenyan authorities consult with the ICC first. Section 26(3) states that if the request for assistance cannot be executed, Kenyan authorities should notify the ICC setting out the reasons why the request cannot be performed.

Sections 27, 62 and 115 of the International Crimes Act provide for the approach to article 98 of the Rome Statute that Kenyan authorities must adopt. If sections 27, 62 and 115 are read together with other sections of the Act on consultations with the court
such as sections 24 – 26, the picture that emerges is this: If upon receiving a request for arrest and surrender from the ICC, the Kenyan authorities determine that executing the request might cause Kenya to breach its other obligations, the authorities must immediately notify the court setting out the details of the anticipated problem.

The ICC would then review the information provided and determine whether the fear of conflicting obligations raised by Kenya are warranted. In the case of Omar Al Bashir, for example, Kenya would ideally point out the AU resolutions and the customary international law immunities that President Al Bashir is entitled to as an official of a state that is not party to the Rome Statute. If the ICC is so disposed, it could even request more information from the affected third state, in this case Sudan. Thereafter, the ICC must make a determination on whether its request places Kenya in a position where Kenya might be forced to act in a manner that is inconsistent with international law relating to state or diplomatic immunity.

Where the ICC has not yet made this determination, the Act requires that the request for cooperation by the court be postponed. The Kenyan Act correctly leaves the interpretation of article 98(1) of the Rome Statute in the hands of the ICC. In practice, Kenya had an opportunity to invoke these provisions when President Al Bashir visited Kenya in August 2010 to attend celebrations for the promulgation of a new constitution for Kenya. However, the authorities in Kenya failed to trigger the provisions of the International Crimes Act and open consultations with the ICC regarding the problem of conflicting obligations. This is in spite of the fact that the Registrar of the ICC had send an initial request to states parties, including Kenya to arrest and surrender Al Bashir on 6 March 2009 and a supplementary request on 21 July 2010.

Both the South African and UK statutes do not contain clauses on cooperation with the ICC that are as comprehensive as the Kenyan statute. The conceptualization of state immunity in the Kenyan Act however, is not the best. Section 27 of the International Crimes Act simply states that immunity or special procedural rules on official capacity of a defendant will not bar arrest and surrender proceedings in Kenya. Diplomatic
immunity is dealt with under the *Privileges and Immunities Act*, which incorporates specific provisions of the *Vienna Convention on Diplomatic Relations*. Unlike the *Diplomatic Immunities and Privileges* of South Africa, the Kenyan Privileges and Immunities Act, deals specifically with issues of diplomatic and consular relations. It does not provide for specifically for head of state immunity outside of diplomatic and consular relations.

A reading of all the relevant sections including section 27 of the International Crimes Act of Kenya leads to the conclusion that immunities that are accorded to high ranking officials by customary international law have no application in arrest and surrender proceedings in Kenya. In the case of *Kenya Section of the International Commission of Jurists v Attorney-General & Minister of State for Provincial Administration and Internal Security* (the ICJ case), the applicant advanced the argument that ‘the *International Crimes Act 2008*, like the Rome Statute, does not recognize immunity on the basis of official capacity.’ Rather astoundingly, the judge in this case held that the obligations outlined in the Rome Statute are customary international law. It is probably on these grounds that the issue of immunity was neither raised in argument nor dealt with in the judgment of the High Court of Kenya. For Kenyan authorities that issue is for the ICC to handle. This approach may be consistent with the *modus operandi* of leaving the determination of matters, such as international law immunity referred to under article 98(1) of the Rome Statute, in the hands of the ICC. However, the approach does not help us to understand how state immunity that is protected under customary international law might apply in Kenya.

Both the *International Crimes Act* and the High Court of Kenya nonchalantly dismiss the issue of immunity. Yet, article 2(5) of the Constitution of Kenya provides that general rules of international law are part of the law in Kenya. Kenya adopts a monist legal system as shown in article 2(6) of the constitution, which states that any treaty that is ratified by the state automatically becomes part of municipal law in Kenya. It is not very clear what is meant by ‘general rules of international law’ in article 2(5). It seems

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736 [2011] eKLR
however, that the framers intended this to include customary international law. If customary international law is part of Kenyan law, then surely Kenya would be required to respect immunities that are accorded to high ranking officials of foreign governments under customary international law.

In the context of the ICC, unless immunity has been waived, an incumbent foreign head of a state that is not a member of the ICC is inviolable. He or she is entitled to immunity *ratione personae* for as long as he or she remains a head of state. He or she may not be arrested or detained in a foreign state. It does not make any difference that the prosecution is done by the ICC or that the crimes alleged are egregious. The immunity *ratione personae* of a high ranking official is absolute during incumbency. The treatment of this aspect of customary international law in the Kenyan legislation and case law does not appear to be very sound.

6.4.2. UK: International Criminal Court Act

The UK *International Criminal Court Act* demonstrates streamlined procedures in the regime for cooperating with the ICC. This Act also envisages consultations between the UK authorities and the ICC in the event that the UK faces impediments in executing an ICC request for arrest and surrender. The provisions are not as comprehensive as the Kenyan *International Crimes Act*, but they specifically address state and diplomatic immunity in the context of arrest and surrender proceedings. Arguably, the best practice in the conceptualization of immunity of high ranking officials of states that are not parties to the Rome Statute can be found in the UK ICC Act.

Unlike most national statutes that tend to make sweeping statements on irrelevance of immunity or official capacity purporting to reflect article 27(2) of the Rome Statute, the UK ICC Act shows a clear understanding of the rule contained in article 34 of the Vienna Convention on the Law of Treaties. As a treaty, the Rome Statute binds only states that have ratified it. The dictum by the High Court of Kenya in the *ICJ case*, to the effect that the obligations set out in the Rome Statute are customary international law is unfounded.
With the understanding that the Rome Statute binds only states that have consented to be bound, section 23 of the UK ICC Act, distinguishes between officials of states that are parties to the Rome Statute and officials of states that are not parties to the Rome Statute. Section 23(1) states that immunity that might otherwise attach to an individual who is connected to a state that is a party to the Rome Statute will not prevent the courts from going ahead with arrest and surrender proceedings. It follows that suspects from Rome Statute states parties, may not rely on state or diplomatic immunity to prevent arrest and surrender proceedings in the UK.

With regards to suspects from states that are not Rome Statute states parties that are entitled to state or diplomatic immunity, section 23(2) of the UK ICC Act states that arrest and surrender proceedings against these individuals will only go ahead if the state that they are connected with has waived their immunity. Without first obtaining a waiver, state or diplomatic immunity of high ranking officials of states that are not ICC members can be a bar to arrest and surrender proceedings in the UK.

However, in terms of section 23(4), the Secretary of State must consult with the ICC and the third state concerned before deciding that diplomatic or state immunity prevents arrest and surrender proceedings from being undertaken against officials of states that are not parties to the Rome Statute. The UK ICC Act captures all the polemics at play on the issue of immunities in arrest and surrender proceedings.


This Act has the effect of incorporating all the provisions of the Rome Statute into national law. The overarching purpose of the ICC Act is to ensure the implementation of the Rome Statute in South Africa including providing for the ‘arrest of persons accused of having committed [genocide, crimes against humanity and war crimes] and their surrender to the ICC...’\textsuperscript{737} One of the specific objectives of the ICC Act is to ‘provide

mechanisms for the surrender to the Court’ of suspects.\textsuperscript{738} Chapter 4 of the ICC Act provides for an elaborate system for cooperating with the ICC in the arrest and surrender of persons as well as the judicial assistance that South Africa can extend to the ICC. The South African ICC Act bears out the words of the late Antonio Cassese that states are the artificial limbs that the international court with no enforcement mechanisms of its own can function effectively.\textsuperscript{739}

Section 4(2) of the ICC Act provides that the official capacity including head of state of a suspect is irrelevant as a defence or to mitigate sentence. This section retains the same effect as article 27(1) of the Rome Statute. Section 4(2) puts the principle of irrelevance of a suspect’s official’s capacity above all else. The principle should always be observed ‘despite any other law to the contrary, including conventional and customary international law.’

However, as it is based on article 27(1) of the Rome Statute, this section deals with the issue of liability and not immunity. It is a matter of substantive law regarding a defence to a charge and not procedural law regarding the exercise of jurisdiction by the courts in South Africa. The section deals with the same substantive law issues as article 27(1) of the Rome Statute, and not procedural immunities in article 27(2) of the Rome Statute. Section 4(2) of the South African ICC Act does not remove immunities or inviolability and is not intended to apply solely at the level of arrest and surrender. As a result, section 4(2) of the South African ICC Act does not take the debate on state and diplomatic immunities anywhere.

Although it does not specifically refer to immunity, section 10(9) of the ICC Act may be read as jettisoning immunities. The import of section 10(9) is that official position as head of state, a member of the security forces or any other government official may not prevent South African courts from surrendering any person to the ICC or committing that person to prison pending surrender. Unlike section 4(2) which trumps ‘any other law

\textsuperscript{738} \textit{Ibid}, section 3.  
\textsuperscript{739} \textit{Ibid}. 

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to the contrary’ including international law, section 10(9) enjoys no superior status. Therefore, in appropriate circumstances, where a law providing for immunity ranks higher than the principle enshrined in section 10(9), such law will prevail and immunity will prevent the South African courts from exercising jurisdiction.

The issue of diplomatic and head of state immunity in South Africa is covered by the *Diplomatic Immunities and Privileges Act 37 of 2001*. Section 4 of this Act recognises head of state immunity ‘in accordance with the rules of customary international law’. Section 6 of this Act recognises the immunity of state representatives participating in conferences and meetings held in South Africa for the duration of the meetings.

There are provisions in the ICC Act that contemplate situations where consultations will be required between South African authorities and the ICC. The provisions are however, not as comprehensive as the Kenyan Act. Unlike the Kenyan International Crimes Act, the South African ICC Act does not contain specific provisions that might reflect the South African legislature’s views on how articles 27(2) and 98(1) of the Rome Statute can be reconciled in practice. Also, unlike the UK ICC Act, the South African legislation does not contain specific provisions that might provide clues as to how South Africa might treat state and diplomatic immunity of high ranking foreign officials.

The issue of head of state immunity contemplated in article 98(1) of the Rome Statute arose when South African authorities declined to arrest President Bashir while he was attending an AU meeting in Johannesburg in June 2015. The circumstances surrounding South Africa’s failure to execute the ICC warrants after previously indicating that Al Bashir would be arrested if he set foot in South Africa raise a new dimension to the question of head of state immunity under the Rome Statute.

South Africa is the most developed state in Africa. It is also an exemplary state on issues of respect for human rights and the rule of law. The sudden change of course, the arguments raised by the Government of South Africa and the manner in which South African authorities ignored court orders that required the government to make
sure Al Bashir remained in the jurisdiction until the case was disposed of, suggest that short of a waiver by Sudan, it is unlikely that President Bashir will be arrested any time soon.

The events have also ignited fresh debate on the ICC and provided energy to ICC skeptics that are calling for South Africa to withdraw its membership. As late as October 2015, the National General Council of the ruling ANC resolved that South Africa must withdraw from the ICC. The principle reason cited is to the effect that the ICC has lost direction. It is no longer pursuing the principles behind its establishment.

6.5. Southern African Litigation Centre v Minister of Justice and Constitutional Development & 11 Others

6.5.1. Introduction

In this case the Gauteng High Court of South Africa had an opportunity to pronounce on South Africa’s duty to cooperate with the ICC in the arrest and surrender of President Bashir versus the immunity that President Bashir enjoys under customary international law as head of a state that is not party to the Rome Statute. The case arose from the visit to South Africa in June 2015 by President Omar Al Bashir to attend a summit of the AU.

When the ICC became aware of Al Bashir’s presence in South Africa, it made a formal request to South African authorities to execute the ICC arrest warrants. The Southern Africa Litigation Centre, a local civil society organisation launched an urgent court application to compel the South African government to comply with its obligations under the Rome Statute and the ICC Act by arresting President Omar Al Bashir and surrendering him to the ICC.

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741 ibid.
742 Case Number 27740/2015, High Court of South Africa, Pretoria.
While the court application was being heard, Al Bashir flew out of South Africa despite an interim order directing South Africa government officials to prevent his departure pending a final ruling on the arrest. If Al Bashir had not fled, the likelihood of success on a plea in bar of head of state immunity was rather slim. It seems that the court was determined to make sure that the arrest warrants were enforced regardless of the black letter provisions of the law.

South African law specifically allows every ICC suspect to be arrested and surrendered to the ICC ‘despite any other law to the contrary’ including international law relating to immunities that heads of state normally enjoy under other South African legislation or under international law. In the context of international criminal law and the ICC Act, this position was endorsed in October 2014 when the Constitutional Court found that South Africa’s ‘international and domestic law commitments must be honoured. We cannot be seen to be tolerant of impunity…We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity.’

Furthermore, the Government of South African had on two occasions in the past gone on record, stating publicly that Al-Bashir would be arrested if he came to South Africa.

In fact, a few hours after Bashir had fled the jurisdiction but before the fact was known to the court, the High Court handed down an order compelling the South African Government to take reasonable steps to arrest President Al-Bashir and detain him pending a formal request for his surrender from the ICC. After getting notification that Bashir had fled, the High court ruled that the government's failure to detain Al-Bashir was ‘inconsistent with the constitution of the republic.’

To what extent, if any, was President Omar Al Bashir entitled to immunity during his visit to South Africa in June 2015 to attend an AU Summit? The ICC Act is not very explicit on how article 27(2) and 98(1) may apply in practice in South Africa. A review of this

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744 *Ibid*, paragraph 12 of the cyclostyled judgment.
case as it was argued in the Gauteng High Court could help us to understand the views of South Africa, a state party to the Rome Statute, on the application of article 27(2) and 98(1) in practice.

6.5.2. The facts of the case and the parties’ arguments

In January 2015, the Republic of South Africa agreed to host an African Union Summit that was planned for June 2015. South African authorities argued that in order to facilitate the hosting of the AU Summit and concomitant with customary practice and municipal law, the South African Government signed an agreement with the AU Commission. In the agreement, South Africa undertook to accord members and staff members of the African Commission, delegates and other representatives of intergovernmental organisations attending the meeting, privileges and immunities set out in the General Convention on the Privileges and Immunities of the Organisation of African Unity.

The decision to extend the shield of immunity to delegates including heads of states at the AU summit was taken in terms of section 5(3) of the Diplomatic Immunities and Privileges Act. This section allows the Minister of Foreign Affairs the discretion to enter into agreements with recognised organisations and extend immunity to officials of such organisations. The Government had published a notice in the Government Gazette, which according to South African law gave the immunities and privileges in the host agreement the force of law in South Africa.

The picture that appears from a perusal of some of the pleadings in this case is this: The government of South Africa at the highest level had asked the Chief State Law Advisor for an opinion on President Bashir’s immunity from arrest while attending the AU meeting. The government had left no stone unturned in its deliberation of the issue. The South African Government at the highest level had carefully applied its mind to the issue and with expert advice, had decided that as a state hosting an AU meeting, South Africa’s duty under municipal and international law to protect the inviolability of
President Omar Al Bashir, a head of an AU member state, came first before all other obligations.\textsuperscript{745}

The applicant advanced the argument that South Africa was obliged by domestic and international law to arrest President Bashir as soon as he set foot in South Africa no matter what. Simply because the ICC had made a request to South Africa to arrest and surrender Bashir, South Africa was required to comply without asking questions.

It could be argued that under international law South Africa's obligation to arrest and surrender President Bashir arose from the Rome Statute, South Africa being a state party, and the UN Security Council resolution 1593. Although the obligations of other states except Sudan, under resolution 1593 are not worded in peremptory terms, the resolution could still be a source of the authority to arrest and surrender President Bashir to the ICC.

On the domestic plane, the \textit{Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act)}, which domesticated the Rome Statute required the Government of South Africa to arrest and surrender President Bashir if he happened to be on the territory of South Africa. What is more, the Constitution of South Africa places a duty on the government to abide by its international obligations. Both international law and municipal law are fairly clear on the obligation imposed on the Government of South Africa to act and cooperate with the ICC in executing the warrant of arrest against President Omar Al Bashir.

According to the applicant, South Africa could be absolved from this duty only if President Al Bashir enjoyed some sort of diplomatic immunity.\textsuperscript{746} Section 4 of the \textit{Diplomatic Immunities and Privileges Act} recognises head of state immunity from civil and criminal proceedings to the extent afforded to them under customary international law.

\textsuperscript{745} \textit{Ibid}, paragraph 21 of the cyclostyled judgment.
\textsuperscript{746} \textit{Ibid}, paragraph 23 of the cyclostyled judgment.
law. Under this Act the Minister of International Relations and Cooperation has the discretion to extend immunity to various categories of people.

6.6. The Decision of the Gauteng High Court and Analysis

6.6.1. Main aspects of the court’s ratio decidendi

The High Court made the observation that the General Convention on the Privileges and Immunities of the Organisation of African Unity has not been domesticated in South Africa. Therefore no legal right or obligations arise from it in South Africa. The court found that pursuant to the hosting agreement, South Africa agreed ‘to grant privileges and immunity to ‘Members of the Commission and the Staff Members, [and] the delegates and other representatives of Inter-Governmental Organisations’ attending the present African Union Summit.’ The court held that on this wording the hosting agreement only covers staff and members and delegates of the AU Commission and not heads of states participating in the AU meetings. The court ruled that the agreement, therefore, does not provide immunity to President Bashir.

The High Court also relied on the decision of the ICC Pre-Trial Chamber in the DRC case where it was held that the immunity that President Bashir might have otherwise enjoyed under customary international law was implicitly waived by the Security Council referral resolution. Referencing the Security Council resolution 1593 (2005) as well as articles 25 and 103 of the UN Charter on the primacy of Security Council decisions, the High Court ruled that the Government’s arguments based on immunities provided for in the host agreement were ‘misguided’.

747 Ibid, paragraph 28.4 of the cyclostyled judgment.
748 Ibid, paragraph 28.5 of the cyclostyled judgment.
749 Ibid, paragraph 28.7 of the cyclostyled judgment.
750 Ibid, paragraph 32 of the cyclostyled judgment.
6.6.2. Primacy of UN Security Council resolutions

In making this decision, it seems that the High Court of South Africa too hastily admits the primacy of the Security Council resolution. It would have been more helpful if the High Court had undertaken an analysis of the UN Security Council resolution 1593 and satisfied itself that the language used in the resolution leads to the conclusion that the Security Council intended to uplift immunities that high ranking Sudanese state officials might be entitled to under customary international law. Taking this course of action would be akin to what the European Court of Justice did in the case of *Kadi*.

Surely, it was within the powers of the South African High Court to enquire into the quality of the ICC orders and decisions that it was asked to endorse and enforce. In the increasingly dense juridical environment, domestic courts must not just accept to enforce decisions of international tribunals without making sure that such orders and decisions meet the basic requirement of consistency with the supreme law of the land. Within their jurisdictions, domestic courts should not act like junior partners of international tribunals. Rather, they must ensure that any international agreements, decisions, warrants and orders satisfy basic standards before they endorse and enforce them.

Grainne de Burca has argued that in the current overcrowded legal environment, experts are often concerned with the problem of conflicts between the different systems. Yet, lying in plain sight, but often missed, is the problem of a vacuum of legal responsibility. This problem is the bane of the UN Security Council, which has no internal mechanisms for review and accountability and yet municipal and regional legal systems often feel that they are constrained by the provisions of the UN Charter, in particular, article 103 to question acts and decisions of a superior authority. This vacuum leaves the Security Council essentially unaccountable.

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Through decisions such as *Kadi*, the EU has waded into this issue, forcing the Security Council to introduce a mechanism for review of, at least, its decisions that require states to impose sanctions on individuals and entities suspected of supporting terrorism. There is nothing that stops national courts from reviewing all the decisions and orders upon which they are asked to cooperate with the ICC and curtail the liberty of a suspect who happens to be within the courts’ jurisdiction.

The cooperation obligations under the Rome Statute as well as the cooperation regime under Chapter 4 of the South African ICC Act do not cast the national jurisdiction in a junior or inferior partnership role, destined to accept and enforce hook, line and sinker all the orders and decisions of the ICC. Section 8 of the ICC Act requires that any South African court processing a request for arrest and surrender from the ICC must be satisfied that *sufficient grounds* for the surrender of that person exist. There is no reason why the national courts should view their role as rubberstamping ICC requests for arrest and surrender.

Surely, amongst the documents that the South African High Court would examine in order to establish if sufficient grounds exist, include the instrument by which the case was referred to the ICC, the ICC’s decision confirming the charges and the arrest warrant issued by the ICC. It seems to be logical that the South African High Court would need to be satisfied that the due process was followed and that the request for arrest and surrender is based on processes that meet basic human rights standards.

It is for municipal courts to be imaginative and eclectic in the use of national law to enquire into the quality of requests for arrest and surrender from the ICC. For example, chapter 4 of the South African Constitution shows that South Africa adheres to the dualist tradition when it comes to the relationship between national and international law. Municipal law and international law are separate systems. In South Africa, municipal law is supreme. Section 2 of the Constitution of South Africa provides that the constitution is the supreme law of the land. As a matter of domestic law, when faced with a request for arrest and surrender of a suspect, the courts in South Africa must
determine whether the instrument that they are requested to endorse and implement is compatible with the rights guaranteed in the Constitution of South Africa.

If the South African High Court had taken this approach in the application filed by the Southern Africa Litigation Centre, it would have had to deal with the issue of immunity of President Bashir in the arrest and surrender proceedings. In establishing whether sufficient grounds exist for the surrender of the suspect, the High Court would have had to determine whether, as a matter of domestic law, the applicant had marshalled sufficient facts and proof, upon which the court could arrive at the conclusion that President Omar Al Bashir’s immunity had been removed.

In order to discharge the onus of showing that President Al Bashir’s immunity had been removed, the applicant would have had to refer to the UN Security Council resolution 1593 and to the decisions of the ICC where the Pre-Trial Chamber has held that President Al Bashir’s immunity was implicitly removed. Indeed, the High Court relied on the DRC decision and article 27(2) of the Rome Statute to suggest that President Al Bashir was not entitled to immunity from arrest in South Africa.752

By basing the non availability of immunity to President Bashir on article 27(2) of the Rome Statute, the South African High Court assumes that the Rome Statute binds Sudan even though Sudan has not ratified it. The High Court made reference to Security Council Resolution 1593 (2005) as well as articles 25 and 103 of the UN Charter to dismiss AU decisions as inferior and ranking lower than the obligation of a state party to arrest and surrender President Omar Al Bashir.753

It seems that the High Court of South Africa was too quick to accept and rely on the supremacy of UN Security Council decisions. If the High Court had paused for a moment and seriously considered the approach taken by the European Court of Justice in the case of Kadi, it would have seen that Security Council resolution 1593 is not

752 Ibid, paragraph 32 of the cyclostyled judgment.
753 Ibid, paragraph 32 of the cyclostyled judgment.
crafted with sufficient precision to allow for the conclusion that the resolution removed customary international law immunities that President Al Bashir is entitled to. Such an analysis would not have meant that the High Court was sitting to review UN Security Council decisions. Rather, the analysis could have been safely undertaken in the course of attempting to establish whether, as a matter of domestic law, ‘sufficient grounds’ exist to arrest and surrender President Bashir.

A determination of whether sufficient grounds exist to arrest and surrender President Al Bashir would have naturally led to an examination of the effect of the Security Council resolution on the question of immunity pursuant to the rule that only domestic law can introduce international law into domestic law. As a piece of international law, the Security Council resolution can only enter the domestic legal system under circumstances and conditions determined by municipal law. Since the duty to interpret domestic law falls to the High Court, it is for the High Court of South Africa to determine how the Security Council resolution and decisions of the Pre-Trial Chamber, as pieces of international law, shall apply in South Africa.

In the circumstances, it is for the High Court to determine, in accordance with the law that it is established to interpret, whether the head of state immunity that President Al Bashir is otherwise entitled to under the law of South Africa, which includes customary international law, can be said to have been removed by the Security Council resolution 1593. Without enquiring into this important aspect, how the High Court could be satisfied that sufficient grounds to arrest and surrender President Bashir once he set foot in South Africa exist is difficult to fathom.

If the South African High Court had examined all the documents including resolution 1593, it is highly unlikely that it would have stretched the words in paragraph 2 of that resolution, that require Sudan to ‘cooperate fully’ and ‘provide any necessary assistance to the court’ to mean that the Security Council intended, through these words, to remove the head of state immunity that President Al Bashir is entitled to in international law.
The principal authority on the interpretation of Security Council resolutions is a brief passage in the ICJ’s 1971 Namibia Advisory Opinion.\(^{754}\) The passage addresses a situation of determining whether a resolution is binding. The approach taken by the ICJ can be adapted to a situation such as the one under considering where we are trying to determine what the Security Council intended by using certain words in its resolution. The ICJ stated that: ‘the language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect…. [Regard must be had] to the terms of the resolution to be interpreted, the discussions leading up to it, the Charter provisions invoked and in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.’\(^{755}\)

Wood argues that identifying the legislative history of UN Security Council resolutions is a very difficult exercise. The nature of the process that a Security Council resolution goes through from drafting to being passed, is such that most of the negotiating history of Security Council resolutions is not on the public record.\(^{756}\) Addressing the issue of clarity when it comes to authorising the use of force, the Security Council itself has indicated its unease with legal ambiguity and the need to reduce the uncertainty in consent by the parties to whom the resolution is addressed.\(^{757}\)

As a result, the preponderance of opinions is that the UN Security Council has increasingly become more explicit in its resolutions. In one of its recent research reports, the Security Council stated that the clearer the language adopted, the better the prospects for effectiveness and credibility of Council decisions.\(^{758}\)

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The Security Council has expressed the view that whether a resolution is binding should be determined from the Council’s actual language in any given situation. It is self-evident that this general rule should apply with even greater force when we are talking about a Security Council resolution effecting radical or far reaching changes to entrenched and fundamental rules of customary international law. In *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, the ICJ held that the rule of international law relating to state immunity ‘is one of the fundamental principles of the international legal order.’\(^{759}\)

The ICC is not empowered to second-guess resolutions of the Security Council. The clear language of Security Council resolution 1593 bestows immunity on nationals of third states that might otherwise be liable for prosecution for offences committed in Darfur. The clear language of the resolution also recognises that the ICC can only exercise jurisdiction over nationals of third states if the concerned third states expressly waive their exclusive jurisdiction over those nationals.

By making express provision for exceptions and the need for express waivers for nationals of states that are not parties to the Rome Statute, it is logical to conclude that the Security Council, excluded as a matter of construction, any implied exceptions. State immunity derives from the well established principle of state sovereignty. Any changes or exceptions to this principle should be clear and unambiguous.

It is inconceivable that the framers of resolution 1593, careful as they were to expressly exempt nationals of certain states and expressly mentioning the deferral powers of the Security Council under article 16 of the Rome Statute and bilateral immunity agreements under 98(2), intended, by using the words, Sudan shall ‘cooperate fully’ and ‘provide any necessary assistance to the court’, to alter customary international law of immunities of high ranking Sudanese state officials. Surely, the Security Council members must have been aware that Sudan was unlikely to submit to the jurisdiction of

\(^{759}\) 2012 ICJ Reports 99, at 56, Judgment of 3 February 2012.
the court not least to allow its jealously guarded sovereignty to be trampled upon by voluntarily waiving state immunity.

It is only fair that the states to which the Security Council resolution is addressed have a reasonable opportunity to know what obligations are imposed and what rights or privileges are taken away. The resolution must be specific and transparent so that the states and individuals affected by the resolution are clear on how to order their behaviour. To borrow from the European Court of Human Rights ‘vaguely worded edicts, whose scope is unclear, will not meet this standard’ of clarity that is required in a legal instrument. Surely, a resolution that seeks to alter well known and entrenched customary international law should indicate in precise terms the scope and extend of the alterations. This must apply with more force when the changes to customary international law involve taking away vested rights of states.

In terms of the domestic law of South Africa, legal certainty and the requirement that legal norms should be clear and accessible are regarded as important principles of the rule of law. Without sufficient clarity, laws are left to the whim of public officials, which results in arbitrary decision-making. If the South African High Court had taken the opportunity to examine the instrument that it was being asked to endorse, chances are that it would have come to the conclusion that as a matter of South African law, President Omar Al Bashir is inviolable for as long as he remains in office. The High Court would have arrived at this conclusion after finding that despite the decision of the ICC, the wording of the Security Council Resolution 1593 was not sufficiently clear to lead to the conclusion that President Omar Al Bashir’s immunity as a sitting head of state had been implicitly removed.

6.6.3. The effect of the hosting agreement between the AU and South Africa
The South African High Court does not seem to have given weight to the fact that despite the wording of the hosting agreement, it is customary practice for the AU to enter into an agreement with a state that undertakes to host an AU meeting. It is also a

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760 Ferreira v Levin 1996 (1) SA 238; De Reuck v Director of Public Prosecutions, Witwatersrand Local Division 2004 (1) SA 406.
matter of customary practice for a state wishing to host an AU meeting to undertake to grant immunity to all delegates including staff of the AU and representatives of member states.

Clearly, South Africa and the AU had a meeting of minds on the fact that all delegates not only AU Commission members and staff will be granted immunity for the duration of the meeting. This intention can be gleaned from the reference in the hosting agreement to immunities set forth in section C and D, articles V and VI of the General Convention on the Privileges and Immunities of the Organisation of African Unity. Section C, article V (1) (a) and (g) of the OAU Convention specifically provides for the immunity from personal arrest and detention of ‘representatives of member states’ while attending conferences of the AU and while travelling to and from places where AU meetings are held.

The High Court expressed the view that South Africa had domesticated the Rome Statute through the ICC Act but has not done the same with regards to the decisions of the AU. Consequently, South Africa’s obligations under the Rome Statute have the force of law in South African municipal law. On the other hand South Africa has not acceded to the OAU Convention. Neither has South Africa taken any steps to domesticate the OAU Convention on privileges and immunities and AU decisions. Therefore, the status of AU decisions in ‘domestic law is persuasive at best.’ According to the High Court, it follows that South Africa’s obligations under the Rome Statute must rank higher than obligations arising from AU decisions.

However, on 5 June 2015, prior to the AU Summit, the Government of South Africa had published in the Government Gazette, Article VIII of the hosting agreement which provides for privileges and immunities, in its entirety. Article VIII(1) of the hosting agreement records that the: ‘Republic of South Africa shall accord the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organisations attending the Meetings, the privileges and immunities set

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761 Ibid, Note 723, paragraph 28.13.3 of the cyclostyled judgment.

Article V(1)(a) and (g) of the OAU Convention provides that ‘while exercising their functions and during their travel to and from the place of meetings’, representatives of Member States to conferences convened by the Organization, shall, be accorded certain privileges and immunities including ‘immunity from personal arrest or detention and from any official interrogation...’

Under South African law, publication of this notice in the Government Gazette gave Article VIII of the hosting agreement the force of law in South Africa. The provisions of Article VIII of the hosting agreement enshrine specific privileges and immunities extended by the AU to all its delegates and attendees of the AU Summit, which the country hosting an AU Summit, the Republic of South Africa in this instance, is required to uphold.

Publication of Article VIII of the hosting agreement in the Government Gazette had the effect of incorporating the privileges and immunities detailed in the General Convention on the Privileges and Immunities of the Organisation of African Unity that are accorded to delegates and attendees of the AU Summit, into domestic law in South Africa. Even though South Africa had not domesticated the OAU Convention, South Africa had entered into an agreement with the AU under which South Africa undertook to guarantee immunity of delegates as expressed in the OAU Convention.

What is more, by gazetting Article VIII of the hosting agreement, South Africa had in fact taken steps to domesticate only the relevant parts of the General Convention on the Privileges and Immunities of the Organisation of African Unity. Consequently, the obligation on South Africa to respect the inviolability and immunity of delegates including representatives of Member States does not flow from the General Convention on the Privileges and Immunities of the OAU as such. The obligation flows from the
terms and conditions of the hosting agreement and domestic law enacted through a notice in the Government Gazette of 5 June 2015.

Therefore, the suggestion that ICC obligations rank higher than AU obligations because the ICC obligations were legislated and have the force of law in South Africa is untenable. The relevant AU obligations also had the force of law in South Africa by reason of the hosting agreement and publication of the relevant section in the Government Gazette. The instrument providing for immunities of delegates during the AU Summit that was gazetted by the Government of South Africa on 5 June 2015 remained part of the law of the land unless it was repealed or struck down by the Constitutional Court.

In this respect, it does not seem to matter that South Africa has not domesticated the AU Convention. Nor does it seem to make any difference that the hosting agreement does not make specific reference to heads of states among the delegates that are entitled to immunity. What is important is the intention of the parties when they entered into the hosting agreement. Clearly, the reference to ‘delegates’ and the incorporation of Section C, article 4 of the OAU Convention evinces an intention to include heads of government and all ‘representatives of member states’ attending the AU meeting. Surely, it would be absurd to grant immunity to AU functionaries but not the heads of states that the functionaries serve.

It is necessary to point out that the provisions of the hosting agreement read together with the contents of the Government Gazette were only effective for the duration of the AU Summit in South Africa. The hosting agreement specifically provides for its termination two days after conclusion of the AU Summit.

Although it does not explicitly come out in the pleadings or the decision of the High Court, it appears that the clauses on immunity of delegates might have effectively turned the Sandton Convention Centre, the venue of the AU meetings, including all thoroughfares to and from the venue, into AU territory. The AU seems to have been
labouring under this impression. The AU Commission Chairperson, Nkosazana Dlamini Zuma, expressed the view that although it is located on the geographical space of South Africa, the Sandton Convention Centre was AU territory throughout the duration of the AU Summit.\footnote{Zuma assures AU al-Bashir would not be arrested – Mugabe’, News24, 16 June 2015, http://www.news24.com/SouthAfrica/News/Zuma-assured-AU-al-Bashir-would-not-be-arrested-Mugabe-20150616}

In a letter addressed to the South African President calling him upon to ensure that President Bashir would be arrested if he set foot in South Africa the Coalition for the International Court sought to distinguish South Africa from the UN headquarters in New York which is regarded as neutral territory.\footnote{‘Bashir Watch Coalition Letter to the Government of South Africa Re: Omar Al Bashir’s Invitation to the African Union Summit in South Africa’, Coalition for the International Criminal Court, 4 June 2015, available at http://www.coalitionfortheicc.org/documents/SALetterUpdated.pdf} The Coalition noted that: ‘South Africa does not constitute neutral territory in the same way that the United Nations headquarters in New York does (given its extraterritorial status), and therefore South Africa’s obligations under the Rome Statute still apply for an AU Summit convened on South African territory.’

The Headquarters Agreement between the UN and the USA Government establishes the site of the UN Headquarters in New York as international territory. The UN has no sovereignty over this territory, but it has limited police and legislative powers, a firefighting brigade and its own post office branch.\footnote{Hans Kelsen, The Law of the United Nations: A Critical Analysis of its Fundamental Problems, (New Jersey: The Lawbook Exchange Ltd, 2000).}

To try to equate the hosting agreement between South Africa and the AU, which is at best, \textit{ad hoc}, with the more permanent headquarters agreement between the UN and the USA Government would be to stretch it too far. The agreement between the UN and the USA Government could be compared to the agreement entered into between Ethiopia and the AU for the hosting of the AU headquarters in Addis Ababa.
It is trite that any ambiguities or grey areas in the hosting agreement should be interpreted so that the hosting agreement remains consistent with international law. An interpretation that would result in a breach of international law must be avoided. Reading the hosting agreement as excluding representatives of states outside the protection of sovereign immunity would lead to violation of both domestic law and customary international law on state immunity. The argument that can be sustained, in the circumstances, is that all delegates to the AU meeting were protected by immunity that was enshrined in the hosting agreement between the AU and South Africa. As a result, no delegate including state representatives could be arrested within the precincts of the venue of the meeting and while travelling to and from the meeting.

6.7. Untangling the Gordian Knot

Where then do all the varying opinions and positions on state immunity and the conflict that seems to have been created by the ICC’s request to Rome Statute states parties to comply with its request for cooperation in the arrest and surrender of President Omar Al Bashir leave us? As an incumbent head of state and in the absence of a waiver of immunity by Sudan, President Omar Al Bashir enjoys the protection of inviolability and may not be impleaded in a court of another sovereign. While he remains president and head of state of Sudan, President Omar Al Bashir enjoys personal immunity or immunity *ratione personae*.

Moreover, as I see it, the agreement entered into between South Africa and the AU on the hosting of the AU meeting which was duly gazetted and therefore became law in South Africa, protected all the delegates at the meeting and not only staff members and Commissioners of the AU. Assigning a contrary meaning to the agreement would result in an absurdity.

The immunity *ratione personae*, that President Omar Al Bashir enjoys is absolute. Therefore, President Omar Al Bashir is protected from arrest and detention in any other state. The fact that the prosecution for which the arrest is carried out is before the
International Criminal Court has no relevance at all to the absolute inviolability of President Omar Al Bashir as an incumbent head of state. A waiver by Sudan or by the UN Security Council is the only way that the cloak of inviolability covering President Omar Al Bashir can be pierced.

In the absence of a waiver of immunity envisaged in article 98(1), enforcing the ICC arrest warrants meant that South Africa would breach customary international law on head of state immunity. Disregarding the personal immunity of President Al Bashir by arresting and detaining him in South Africa would have meant violating the sovereignty of a friendly state, equivalent to a declaration of war. South Africa would have acted ‘inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State.’\(^\text{765}\)

However, to argue that President Omar Al Bashir enjoys absolute personal immunity and his arrest and detention in South Africa would have resulted in a breach of international law is not to suggest that President Omar Al Bashir may or should not be held personally responsible for the allegations of war crimes, crimes against humanity and genocide brought against him. President Omar Al Bashir remains liable to prosecution for the allegations. His immunity relates only to arrest and detention by another state.

Firstly, while he remains head of state, he can be arrested and detained in any country if Sudan or the Security Council explicitly waives his immunity. If that does not happen the case remains dead in the water until such a time that President Omar Al Bashir relinquishes office and becomes a former head of state whereupon he loses the protection of immunity \textit{ratione personae}. Once he becomes a former head of state, President Omar Al Bashir cannot find cover under immunity \textit{ratione materiae} since the crimes on the charge sheet cannot possibly be regarded as official acts. The other effect of personal immunity is that President Omar Al Bashir’s accountability for the alleged atrocity crimes could be diverted to an appropriate forum for adjudication.

\(^{765}\text{Article 98(1) of the Rome Statute.}\)
6.8. Consultations under Article 97 of the Rome Statute

It is submitted that the Government of South Africa acted in the correct manner to invoke the provisions of article 97 of the Rome Statute when it became clear that the attendance of President Omar Al Bashir at the AU meeting would present it with conflicting obligations. Recall the cold response given to the AU by the EU when it raised concerns about the application of universal jurisdiction by European states against African leaders. We can also recall the cold response given to the AU by the UN Security Council when the AU requested the Security to invoke its deferral powers under article 16 of the Rome Statute. The response of the ICC to the attempts by South Africa to open up consultations with the court over the difficulties that South Africa faced if it were to enforce the arrest warrants is similar in appearance to the cold responses given to the AU by the EU on the issue of universal jurisdiction and the UN Security Council on the request for a deferral of the case against President Omar Al Bashir.

The attempt by South Africa to open consultations with the court in terms of article 97 of the Rome Statute does not seem to have been dealt with in a very clear and respectful manner. The lack of clarity in the process arises from the fact that when South Africa indicated an intention to start consultations in terms of article 97 of the Rome Statute, the Prosecutor’s Office immediately filed what appears to be an urgent *ex parte* application to the Chamber, requesting for clarification of South Africa’s obligation to arrest President Omar Al Bashir and surrender him to the ICC.

It is South Africa that was faced with a situation of conflicting obligations. Therefore, South Africa was best placed to competently articulate its case regarding the conflict that it was faced with. Also, South Africa is the one that had first expressed an intention to start consultations with the court. Yet, the prosecutor’s urgent *ex parte* application seeking clarification on South Africa’s cooperation obligations seems to have become the main basis of what was supposed to be consultations under article 97. It may well be within the powers of the Prosecutor’s Office to approach the Chamber seeking clarification of South Africa’s obligations without notice to South Africa. The problem
arises from the appearance of the approach that both the prosecutor and the Pre-Trial Chamber II adopted.

The South African Government was quite rightly nonplussed by the fact that as the party that was faced with the conflict of obligations, it was not afforded an opportunity to be heard on the prosecutor’s urgent application or in the consultations contemplated in article 97 of the Rome Statute. South Africa was perplexed by the manner in which the Judge seems to have turned the consultations, which South Africa believed was a diplomatic process, into a judicial process based, not on the request for consultations by South Africa, but on the prosecutor’s urgent request for clarification of South Africa’s obligations. 766

Both the decision of Judge Tarfusser and the report of the registry show that in a 12 June 2015, meeting that was held by the judge with a delegation from the South African Embassy to the Netherlands, the Ambassador read a note verbale. 767 In the same meeting, South Africa gave notice of the ‘imminent arrival of the Chief State Law Adviser’ to put South Africa’s case across and to lead the process of the consultations. Yet, it would appear that the Judge, of his own accord, made two decisions that are difficult to explain. The first one is that the judge decided to make the prosecutor’s urgent request for clarification, one with South Africa’s request for consultations. The second one is to reach the conclusion that the meeting of 12 of June constituted the complete consultations. In disposing of the prosecutor’s urgent request for clarification of South Africa’s obligations regarding the arrest and surrender of President Omar Al Bashir, Judge Tarfusser held that ‘as there exists no issue which remains unclear or has not already been explicitly discussed and settled by the Court, the consultations under

766 ‘South Africa’s submission to the International Criminal Court regarding the matter of President Al Bashir of Sudan, Media Statement, 5 October 2015, Department of International Relations and Cooperation’, available at http://www.dirco.gov.za/docs/2015/suda1005.htm
767 The Prosecutor v Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-242, Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, Pre-Trial Chamber II, 13 June 2015; The Prosecutor v Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-243, Registry Report on the Consultations Undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the Departure of Omar Al Bashir from South Africa on 15 June 2015, Pre-Trial Chamber II, 17 June 2015.
article 97 of the Statute between the Court and the Republic of South Africa have therefore ended.\textsuperscript{768}

So, while South Africa sent a delegation from its embassy to notify the court that as a state party, South Africa was invoking article 97 and that a representative of the government was on his way to The Hague to carry out the consultations, the Judge regarded the meeting with the embassy delegation as the beginning and the end to the consultation process. While he was aware of the ‘imminent arrival of the Chief State Law Officer’ and without hearing the concerns of the South African Government, the Judge decided to terminate the consultations.

Rule 195 of the ICC’s Rules of Procedure and Evidence provides for the procedure that should be adopted where a state that is requested for assistance to arrest and surrender a suspect notifies the court that it faces a problem in executing the request. Rule 195(1) contemplates a situation where after giving notice, the requested state provides information on the nature of the problem that it faces. Any third state affected may also provide additional information.

From the South African Government’s point of view, the purpose of the meeting with the embassy delegation of 12 June 2015 was to give notice to the court that the request to execute the warrants of arrest against President Omar Al Bashir presented South Africa with conflicting obligations. The Chief State Law Officer who was travelling to The Hague would then provide the detailed information on the nature of the problem. Surely, the \textit{note verbale} that was read by the delegation during the meeting of 12 June could not be regarded as the information on the problem that is contemplated under Rule 195(1). There was also no attempt by the court to seek additional information from Sudan, the third state in this case.

Failure to consult with the court over problems faced by Chad, Malawi, Djibouti, Kenya and DRC in failing to execute the warrants of arrest against President Al Bashir, is one

\textsuperscript{768} Ibid.
the main findings of non-compliance with obligations consistently identified by the Chamber against these states parties. Yet, when South Africa sought to do the right thing by following the provisions of article 97 of the Rome Statute, the court does not seem to have considered South Africa’s problem with the seriousness that it deserved. The dismissive manner in which the court treated South Africa’s request for consultations tends to vindicate Rome Statute states parties like Chad, Malawi and DRC that did not bother to consult with the court before deciding not to execute the ICC warrants of arrest against President Bashir.

The emphasis that the Chamber puts on the failure by states parties to follow the provisions of article 97 of the Rome Statute, suggests that had Malawi, Kenya, DRC, Djibouti and Chad had consulted with the court when faced with conflicting obligations to comply with the court’s request and arrest President Omar Al Bashir on one hand and to respect President Omar Al Bashir’s immunity in domestic jurisdictions on the other, the court would have worked together with South Africa to find a workable solution to the conflict. Such a solution would entail the ICC obtaining custody of President Al Bashir without South Africa incurring international responsibility for violating the sovereignty of Sudan by infringing upon President Omar Al Bashir’s immunity *ratione personae*. By effectively terminating the consultations before they had actually started, the judge made nonsense of the diplomatic procedure contemplated under article 97 of the Rome Statute.

The request by South Africa is the first time in the history of the ICC that a state party sought to invoke the consultation process under article 97. There was an opportunity for the court to set a precedent on the amount of information required and the various possible ways in which the consultation process could be undertaken. The court missed a golden opportunity to clarify this procedure. As a result, South Africa resolved to raise the issues of consultations under article 97 and state immunity under article 98 of the Rome Statute with the Assembly of States Parties.769

\[\text{Ibid.}\]
South Africa argued that ‘the principles of justice were not adhered to...that a serious infringement of South Africa’s rights as a State Party [had occurred] and that the Court [had] acted against the letter and spirit of the Rome Statute.’\textsuperscript{770} In support of the views of the South African Government, a reading of the decision of Judge Cuno Tarfusser on the prosecutor’s urgent \textit{ex parte} request for clarification of South Africa’s obligations sounds more like a lecture on South Africa’s obligation to arrest and surrender President Al Bashir once he set foot in South Africa, than consultations between the court and a sovereign state to find a workable solution to the conundrum facing South Africa.\textsuperscript{771}

It has been argued that the ICC’s response to South Africa’s attempt to carry out article 97 consultation was not ‘in good faith and in a serious and sincere effort to assist South Africa’ to navigate the problem of conflicting obligations that it was faced with.\textsuperscript{772} In the TWAIL tradition, the cold response that South Africa got from the court evokes images of the dyadic parent-child relationship between Africa and Western supported institutions. The response bears out the argument made by TWAIL scholars that considers the ICC as a body developed and currently evolving under the traditional Eurocentric legal system.

The reality of it all is that the new international criminal justice system actually keeps Third World states in their status by marginalising their voices as international actors or not recognising their voices in the first place. Even though the judge was aware that the Chief State Law Officer was on his way to lead the consultations, he went ahead and terminated the process anyway.

From a TWAIL perspective, the response given to South Africa by the ICC reflects the vestiges of establishment of international law by European nations with themselves as the primary actors. African states are late-comers to the game; therefore, while they can

\textsuperscript{770} Ibid.
\textsuperscript{771} Ibid.
be placed within the system, they must occupy a different position. Non-Western states and peoples cannot engage in the same discourse as European states and peoples. Therefore, without even hearing what he had to say, the court decided that the Chief State Law Officer did not have anything of importance to say. As a child or secondary actor in international law, South Africa simply needed to be told what to do!

6.9. The problem with immunity so far

Since, at least Nuremberg, the human rights movement which gave birth to international criminal law has been pushing back on any limitations that the law might place on effective protection of human rights. A general trend of holding state officials more accountable, by among other things, enhancing the jurisdiction of national courts can be discerned. For example, most states and regional human rights bodies relax their rules on *locus standi* in cases where it is alleged that human rights violations have occurred.

The development of the doctrine of universal jurisdiction and the enactment of legislation by some states in order to enable their national courts to exercise universal jurisdiction over certain atrocity crimes also shows the trend towards more accountability. Yet, customary international law of official immunity continues to prevent domestic courts from exercising jurisdiction that they ordinarily possess.

As we can see, there have been changes to the law of official immunities. Certainly, the extent of protection afforded to high ranking state officials by operation of the doctrine of official immunity has been eroded. Developments in customary international law continue to chip away at immunities. But, developments that chip away at immunities have not moved at the same pace as developments in human rights and international criminal law. While human rights and international criminal law have developed very fast to ensure greater jurisdiction to states and international courts and tribunals to enforce human rights norms, the law relating to immunity has evolved at a rather sluggish pace.
It could be argued that there currently exists a mismatch between the norms underpinning the international criminal law system and customary international law official immunities, which creates an enforcement crisis. We are talking fighting impunity and ensuring accountability for atrocities at the highest levels of governments, while at the same time holding on to antiquated doctrines such as state sovereignty and immunity of state officials. Consequently, while immunity of state officials does not absolve the officials of liability altogether, the procedural or jurisdictional bar, which immunities impose, work as a drag on efforts to ensure greater accountability for atrocities and effective enforcement of human rights norms.

This is the problem that is reflected in the apparent friction between articles 98(1) and 27(2). How then can these problems that official immunity causes in the fight against impunity be resolved? The resolution involves striking a balance between official immunity, which ensures the smooth conduct of diplomatic and international relations based on comity on one hand and the total purgation of impunity for high ranking state officials who commit egregious violations of international criminal law.

There appears to be some confusion which results in an apparent misunderstanding of the difference between raising immunity as a defence to a charge and raising official immunity as a procedural bar to prosecution or any court action against an official. Decisions of the ICC and academic writings show an understanding of the conceptual differences in theory, but not in application. It seems that it is when it comes to applying the two concepts to actual situations that the difference between the two somehow gets lost.

The Pre-Trial Chambers of the ICC have had opportunities to pronounce on the issue of immunity of high ranking officials of states that are not Rome Statute States Parties. However, the decisions of the Pre-Trial Chambers on this issue have not been very helpful so far. In fact, these decisions might have contributed to some of the misunderstanding around immunity and the application of articles 27(2) and 98(1) of the Rome Statute. Decisions of the ICC on the failure by states parties to arrest President
Omar Al Bashir lack a consistent approach to the issue of immunity and the application of articles 27(2) and 98(1) of the Rome Statute. This has tended to contribute to misunderstanding of immunity and the application of articles 27(2) and 98(1) of the Rome Statute.

The ICC Pre-Trial Chambers have consistently resisted addressing the issue of immunity in decisions where the Chambers have issued warrants of arrest against high ranking officials of states that are not parties to the Rome Statute. In both the Al Bashir and Gaddafi warrants of arrest decisions, the Pre-Trial Chambers left the international law on immunities undisturbed by simply relying on the specific technical circumstances of the cases.773

The ICC had the opportunity to deal with the matter of immunity of a head of state that is not party to the Rome Statute in the cases involving the failure by Rome Statute states parties such as Malawi, Chad and DRC to arrest President Al Bashir during his visits to these states and surrender him to the ICC. It has to be stated at the outset that, with respect, the Pre-Trial Chamber’s manner of dealing with whether President Al Bashir is entitled to immunity and whether by reason of such immunity the ICC acted within the boundaries of its powers in sending a request to states to arrest President Omar Al Bashir, leaves a lot to be desired.

The Pre-Trial Chamber ought to have put the issue of articles 98(1) and 27(2) and the AU arguments to bed, once and for all. But, the decisions of the Pre-Trial Chamber did not do much to settle the debate. There are several passages in the Malawi decision, repeated in the Chad decision that are not backed up by rigorous legal reasoning, that however, seem to be acknowledged as authoritative or accepted uncritically within the international criminal law community. Examples of such statements include:

‘…to interpret article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified.’\textsuperscript{774}

‘…the international community’s commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass. …it is certainly no longer appropriate to say that customary international law immunity applies in the present context.’\textsuperscript{775}

‘….the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes.’\textsuperscript{776}

‘…unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions.’\textsuperscript{777}

These statements are at best only postulates and not matters of fact. They simply take it as axiomatic that international law does not recognize state immunity in cases prosecuted by international courts. Yet, this point can be disputed; especially when one considers the fact that the ICC can only secure the appearance of a suspect through states acting according to their own domestic laws. It is at this point in the case, where a high ranking official of a foreign state has to be arrested for purposes of surrender to the ICC that the problem of state immunity arises. These views expressed by the Pre-Trial Chamber 1, do not get to bottom of why, in a prosecution such as this one, immunity does not apply.

\textsuperscript{774} Malawi Decision, \textit{Ibid}, at paragraph 41.
\textsuperscript{775} Malawi Decision, \textit{Ibid}, at paragraph 42.
\textsuperscript{776} Malawi Decision, \textit{Ibid}, at paragraph 43.
\textsuperscript{777} Malawi Decision, \textit{Ibid}, at paragraph 44.
The statements do not consider that as a treaty, the Rome Statute applies only to states that have ratified it. States parties to the Rome Statute can be regarded as having agreed to give away state and diplomatic immunity in cases where the Rome Statute applies. The non-applicability of immunities arises from the operation of the statute and therefore only states parties are affected by it. Surely, the Pre-Trial Chamber, ought to have given legally supportable reasons why this assumption should apply to Sudan, which is not party to the Rome Statute. The acceptance of these propositions uncritically, tends to cause misunderstandings in the way state immunity should apply even in a prosecution by an international court or tribunal.

In both the Malawi and Chad decisions, the Pre-Trial Chamber I held that Article 98(1) had no application in these cases. However, the Pre-Trial Chamber did not shed any light on the circumstances under which article 98(1) might apply. The Chamber’s brief analysis and abrupt approach to this important issue does not help us in any way to understand the effect of article 98(1) and how it might apply as the Chamber simply disregards article 98(1) as if it does not exist. The effect of the decisions of the Pre-Trial Chamber I, in the Malawi and Chad cases is to render article 98(1) redundant and of no use. Yet, nothing about the negotiations in Rome suggests that states were ready to jettison customary law immunity of high ranking state officials altogether at this point in time.

The approach to article 98(1) that was taken by the Pre-Trial Chamber 1 in the Malawi and Chad decisions goes against the established rules in treaty interpretation such as the principle of effectiveness and the presumption against redundancy. These canons of construction posit that any interpretation must give meaning and effect to all the terms of a treaty. Anyone called upon to interpret a treaty has no freedom to adopt a reading that would diminish the ambit of any of the clauses of the treaty.\textsuperscript{778}

The negotiating history of the Rome Statute shows that a good number of states still considered state immunity an important part of international law and were anxious to preserve it. In any case, current state practice that shows that most states still do not regard the Rome Statute as having abolished state immunity can be gleaned from legislation adopted by states for the purposes of domesticating their obligations under the Rome Statute. The fact that most of the legislation in one way or another preserves customary international law state immunity is ample proof that the doctrine is still very much regarded as a necessity for the proper conduct of international relations.

According to the Pre-Trial Chamber I, states are indispensable in prosecutions by the ICC. States are the agents through which the ICC exercises the *ius puniendi* of the international community. In matters of execution of arrest warrants, the ICC can only work through national enforcement mechanisms. For these reasons, the exception to head of state immunity where a prosecution is undertaken by an international court extends to states when they cooperate with that court in matters of arrest and surrender of suspects. The judgment of the Pre-Trial Chamber, too hastily admits the existence of a relationship of a fiduciary nature between the ICC and Rome Statute states parties. The judgment does not seem to pay sufficient attention to the fact that Omar Al Bashir, the accused person, is a national of a state that is not party to the Rome Statute.

The inconsistent approach to the issue of immunity and the application of articles 27(2) and 98(1) of the Rome Statute can also be gleaned in the second Chad decision, which was delivered March 2013 by differently constituted Pre-Trial Chamber II. In this case (the second Chad decision) the Pre-Trial Chamber II found that Chad, a Rome Statute state party, was persistently disregarding the orders and requests for cooperation from the ICC to arrest and surrender President Bashir.

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780 *Ibid*.
781 *The Prosecutor v Omar Hassan Ahmad Al-Bashir ICC-02/05-01/09-151*, Decision on the Non-Compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, Pre-Trial Chamber II, 26 March 2013.
In the second Chad decision the PTC Chamber II expressed the view that by reneging on its obligation to arrest and surrender Al Bashir to the ICC, Chad was in contempt, not only of the ICC’s decisions, but Security Council Resolution 1593 of 2005. This is the first time, in all the decisions that the Pre-Trial Chamber had an opportunity to address the issue of immunity that the court alluded to the resolution that referred the situation in Darfur to the ICC in relation to obligations of states. It is respectfully submitted that this view is disagreeable, since Resolution 1593 places no legally binding obligation on Chad to cooperate with the Court. As a state party to the Rome Statute, Chad’s obligation to arrest and surrender President Al Bashir arises from the Rome Statute and not the Security Council Resolution.

However, reference to the Security Council resolution indicates that this Pre-Trial Chamber II, which was composed differently from the Pre-Trial Chamber 1 in the Malawi and first Chad decisions was alive to the existence of another source of obligations besides the Rome Statute. Unlike the Pre-Trial Chamber 1 in the Malawi and first Chad decisions, this Pre-Trial Chamber II that dealt with the second Chad decision seemed to be aware that some obligations in the case of arrest and surrender of President Al Bashir flowed from the Security Council resolution.

The major problem with the Pre-Trial Chamber II’s decision is that the judges did not make an attempt to pronounce on state immunity that Al Bashir might be entitled to as a head of a state that has not ratified the Rome Statute. Furthermore, even though the Pre-Trial Chamber II raised Security Council resolution 1593, it did not attempt to analyse how that resolution might affect Al Bashir’s immunity from arrest and detention by Rome Statute states parties. It seems that up to this point both Pre-Trial Chamber 1 and Pre-Trial Chamber II were only concerned with the relationship between the ICC and the Rome Statute states parties. The Pre-Trial Chambers did not bother to analyse the relationship and the law that applies between the Rome Statute state party and President Al Bashir, a head of a state that has not ratified the Rome Statute.

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782 Ibid, paragraph 21.
The Pre-Trial Chamber II as constituted in the second Chad decision eventually came to
the point a year later in the case involving the failure by DRC to arrest President Bashir
during a visit in February 2014.

There are scholars who have suggested that the UN Security Council referral of the
situations in Darfur and Libya to the ICC effectively makes the Rome Statute binding on
Sudan and Libya. Put differently, when the ICC jurisdiction over a situation in a third
state is triggered by a Security Council referral pursuant to article 13(b) of the Rome
Statute, it turns that third state into a Rome Statute state party. If this was the case, it
follows then that all the articles of the Rome Statute including article 27(2) apply to that
state.

In such cases, two arguments regarding state immunity can be raised in the alternative.
The first one is that states that ratify the Rome Statute are presumed to have waived
state immunity. A third state that is regarded as a state party by virtue of a Security
Council referral falls in the same category. State immunity in respect of such a state can
be presumed to have been waived in the same manner that immunity is presumed to be
waived by ratification or accession to the Rome Statute.

The alternative argument can be based on the primacy of UN Security Council
decisions. It could be argued that a UN Security Council referral to the ICC
automatically nullifies any customary international law immunities that any suspect
might be entitled to. In accordance with article 103 of the UN Charter, therefore, any
customary international law immunities are subordinate to the UN Security Council
decisions.

This, however, stands in contrast to what the ICC itself has said. The ICC Chamber has
stated that the effect of a Security Council referral is that the third state assumes all the
cooperation obligations outlined in Part 9 of the Rome Statute. The ICC Pre-Trial
Chamber seems to limit the provisions applicable to such a state to the cooperation
regime under Part 9 of the Rome Statute. In the DRC case, the Chamber extracted the
removal of immunity from the wording of the referral resolution. The Chamber stretched the words of the Security Council resolution such as Sudan shall ‘cooperate fully’ to imply that immunity would have no place in the proceedings.

There is a tendency to conflate the irrelevance of the defence of official capacity, which deals with individual criminal responsibility, with removal of immunities. One of the most important legacies of the Nuremberg trials that were captured in the Nuremberg principles is the notion that in prosecutions for atrocity crimes on the international plane, the accused person’s official capacity may not absolve him or her of criminal responsibility. Article 7 of the Nuremberg Charter states that: ‘The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.’

The International Law Commission formulated this provision as Principle III of the Nuremberg Principles in the following terms: ‘The fact that a person who committed an act which constituted a crime under international law acted as Head of State or responsible official does not relieve him from responsibility under international law.’ This principle has been imported into the statutes of every international tribunal and special internationalised court that has been set up to date. This provision and all that it entails appears as article 6(2) of the Statute for the Special Court for Sierra Leone, article 6(2) of the Statute of the ICTR, article 7(2) of the Statute of the ICTY and article 27(1) of the Rome Statute. It seems that one of the causes of misunderstanding of the concept of state immunity is the tendency to read this notion as wiping clean all forms of immunity by reason of official position.

Unlike the statutes of tribunals that preceded the ICC, the Rome Statute goes on in article 27(2) to specifically address the fact that state or diplomatic immunity or any other procedural rules that a high ranking government official might be entitled to under municipal or international law will not bar the court from exercising its jurisdiction over that high ranking government official. Yet, still, the tendency to conflate the principle of
individual criminal responsibility and state immunity persists. The drafters of the Rome Statute did not help matters by including these two principles, one dealing with a matter of substantive law and the other dealing with a procedural matter as paragraphs under the same article.

What appears to be one of the causes of some confusion in the position of the law on international customary law state immunity are the several *dicta* of international tribunals and courts that tend to be uncritically recited, and the assignment of different meanings to these *dicta*, often-times in ways that were not intended by the courts.

For example, there is the oft-quoted statement in the *Arrest Warrant Case* to the effect that an incumbent high ranking official ‘may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.’\(^{783}\) The different ways in which scholars have sought to give meaning to this dictum contributes to the current uncertainty and different views about the position of the law on this concept. This statement seems to be cited in all arguments that suggest that state immunity does not apply in a prosecution by an international criminal court or tribunal. Yet, the statement was made in the context of explaining that immunity from jurisdiction does not mean impunity. The court expressed this view in order to support the point that even high ranking officials that enjoy immunity may still be held criminally responsible for their actions in an appropriate court or at an appropriate time.

Also, in arguments by different counsel and decisions of the courts, the issue to be decided by the courts on the question of state immunity in any particular case, has tended to be couched in different forms. As a result, the way in which the courts have then gone on to decide the issue has at times depended on more than just the law. In the case of Charles Taylor, for example, one of the arguments that were made by the prosecution is that ‘the question whether there was any immunity from the exercise of

\(^{783}\) *Arrest Warrant Case*, paragraph 61.
jurisdiction must be distinguished from the question whether jurisdiction existed.’.\(^{784}\) Furthermore, the prosecution argued that ‘in a case where jurisdictional immunity applied, a court had jurisdiction but was barred from exercising it.’\(^{785}\) Whenever some of these statements and arguments are repeated, they tend to take a life of their own leaving the context behind. This has resulted in misunderstanding of the correct position of international customary law on state immunity.

### 6.10. Suggested Solution to the Immunity Problem

It is for the court, in particular the Office of the Prosecutor and the chambers to establish internal coherence and avoid, as far as possible, conflict of norms recognized in the different provisions of the Rome Statute. The Office of the Prosecutor can accomplish this through issuing guidelines and practice directives that flesh out and explain the practices of the office in dealing with situations of conflict. The guidelines can take the form of the policy guidelines on the exercise of prosecutorial discretion that have so far been published by the Office of the Prosecutor’s Office.

The chambers can also help the situation by developing legal rules that determine the relationship between different norms. For example, the Pre-Trial Chamber could have definitively pronounced on the question of state immunity early on in its decision on the warrant of arrest against President Omar Al Bashir. The Pre-Trial Chamber could have then taken advantage of the subsequent cases to explain the grey areas in its approach to the question of state immunity. Yet, the Pre-Trial Chamber waited until April 2014, when DRC failed to arrest Omar Al Bashir, to finally rule that by adopting the wording that Sudan shall ‘cooperate fully’ and ‘provide any necessary assistance to the court’ in resolution 1593, the UN Security Council ‘implicitly’ removed any immunity that President Omar Al Bashir might have been entitled to under customary international law.\(^{786}\)

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\(^{785}\) *Ibid.*

As an incipient international legal order that is in the process of building up and consolidating the *ius puniendi* that is delegated to it by the international community, the ICC chambers would have helped matters by expounding the ICC’s approach to the law of state immunity at an early stage. By delaying the definitive resolution of the issue of state immunity, the ICC Pre-Trial Chambers have allowed for speculation to thrive. Lacking proper guidance on the issue and not knowing how the ICC would treat the issue, different states have developed their own understanding of how state immunity applies when it comes to enforcing the ICC’s warrants of arrest. AU states, which are hyper-sensitive over the issue of sovereignty given their history with conquest, colonialism, and domination by Western states, have viewed the whole issue of state immunity and enforcement of the warrant of arrest against President Bashir with a distinct sense of *de jà vu*. It could be argued that the failure by the ICC to explain its approach to state immunity accounts for the poor relationship that has developed between the ICC and the AU.

Yet, even though the ICC Pre-Trial Chamber II has now explained that the Security Council referral resolution implicitly waives Al Bashir’s immunity, the AU remains unconvinced by the argument. In the *Jaworzina Advisory Opinion*, the Permanent Court of International Justice stated that, ‘it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it.’ So, it is only the Security Council that can authoritatively say whether, by including words such as Sudan shall ‘*cooperate fully*’ and ‘*provide any necessary assistance to the court*’ in resolution 1593, it intended to remove any customary international law immunities that any of the suspects that may be identified by the ICC may be entitled to. Indeed, there are instances in the recent past when the Security Council has done so through a subsequent resolution or a Presidential Statement. This is what is termed ‘authentic’ interpretation.

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787 *Question of Jaworzina (Polish-Czechoslovakian Frontier), Advisory Opinion* No. 8 of 6 December 1923, PCIJ Series B, No.8, at page 37.
In the case of resolution 1593, the Security Council has numerous opportunities to provide an ‘authentic’ interpretation. The Security Council could, for example, furnish an authentic interpretation of the effect of resolution 1593 on state and diplomatic immunity under customary international law in the context of article 98(1) of the Rome Statute when it sits to consider the reports of the ICC prosecutor.

The Security Council could adopt a resolution that makes it clear what the intention of the Security Council is with regards to the issue of immunity of high ranking officials of states that are not parties to the Rome Statute that the Security Council has referred to the ICC. Paragraph 8 of resolution 1593 invites the ICC prosecutor to address the Security Council within 3 months of the date of adoption of the resolution, and every six months thereafter.

There is nothing in law that prevents the Security Council, having received no less than 21 reports so far from the prosecutor, to take a thorough review of the reports and adopt another resolution as a follow-up to and to reinforce resolution 1593. In such a follow-up resolution, the Security Council could include a general clause that expressly removes any immunity that might attach to high ranking state officials indicted by the ICC in the Darfur situation, membership in the ICC, of the state that they are connected with, notwithstanding. Better still; the Security Council could even specifically uplift the head of state or diplomatic immunity that President Omar Al Bashir is entitled to under international law.

Were the Security Council to take any of these steps, it would have to make it clear that the resolution seeks to alter customary international law on immunity of high ranking officials of states that not parties to the Rome Statute in respect of the situation in Darfur only. This way, the Security Council will prevent the adoption of sweeping statements in future on irrelevance of immunity in an ICC prosecution.

The idea of jettisoning immunity altogether has support among academic writers. Tomuschat argues that, ‘… individuals who engage in criminal activities should, as a
rule, not be able to benefit from the functional position which they occupy within the structure of governance of the state on whose behalf they are acting. To hold them accountable may also operate as a useful deterrent from abusing posts of responsibility."\(^{788}\)

This would be an ideal situation. In reality, it is unlikely that this will happen in view of the entrenched positions of the permanent members of the Security Council. Among the five permanent members, not less than two would be conflicted if such a follow-on resolution was adopted. While it may not be opposed to such a resolution, the USA would be conflicted for quite obviously desiring the exemption of its citizens from the jurisdiction of the ICC to continue. Otherwise, without that guarantee, we can be assured that the USA will veto the resolution. But, continuing to include an exemption in the resolutions would serve to highlight the double standards of the Security Council when it comes to international criminal justice. This would reflect badly on the ICC. The general public will only see the ICC implementing the resolution. Therefore, to the general public the double standards will appear as the work of the ICC.

Furthermore, China and Russia are unlikely to take such a resolution lying down. Already, Russia and China have moved to veto a resolution that might have referred the situation in Syria to the ICC.\(^{789}\) Since the West, led by USA imposed sanctions on him, Sudanese President Omar al-Bashir has sought the assistance of non western countries including Russia and China. Russia and China enjoy strong economic and politically strategic relationships with Sudan. In Europe, Russia is Sudan's strongest investment partner and political ally. Globally, China is Sudan's biggest trade partner.\(^{790}\)

Both China and Russia continue to supply arms to Sudan even though there is a UN arms embargo on Darfur. In fact, 87% of Sudan arms are reportedly supplied by


Russia. With these sorts of relations, Russia and China are unlikely to accept any Security Council resolution that purports to alter customary international law on head of state immunity that President Omar Al Bashir is entitled to.

The solution of jettisoning immunity altogether is unlikely to materialise. States continue to cling to their sovereignty and the rights that come with it. Zappala has argued that to remove official immunities would increase the chances for victims to get redress, but such a move would be undesirable as it would be detrimental to the orderly and peaceful conduct of international relations. Professor Hazel Fox also observes that jettisoning state immunity altogether risks ‘creating total judicial chaos.’

6.11. Conclusion

The current state of the law relating to immunities can create significant impediments to execution of warrants of arrest against state officials. Since arrest and surrender can only be done by states, the application of personal immunity (ratione personae) prevents the arrest of sitting heads of states and other officials who represent their states in the international arena and fulfil diplomatic functions. This applies to sitting heads of government and officials of states that are not party to the Rome Statute. In terms of Article 98(1), the ICC is enjoined to first seek the consent or a waiver of the immunity of the state official from the non-state party concerned before it can issue a request for cooperation in the execution of warrants of arrest. Sitting heads of state and officials of states that are parties to the Rome Statute do not come under the cover of the application of personal immunity (ratione personae) as their states disavow immunity by ratifying the Rome Statute. The position of a sitting head of state or state official of a non-state party that comes to the ICC through a Security Council referral is not very clear.

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There are grounds to argue that a Security Council referral has the effect of turning a non-state party into some kind of a *quasi* state party. If this argument is accepted, then a sitting head of state or state official of a state that is referred to the ICC by way of a Security Council referral may be treated in the same way as a sitting head of state or official of a state party. Consequently, personal immunity (*ratione personae*) would not prevent execution of arrest warrants on such a head of state or official.

The contrary argument holds that whether immunity applies to a sitting head of state or official of a non state party that comes to the ICC by way of a Security Council referral is a function of the wording of the referral resolutions. The two referral resolutions so far do not explicitly withdraw immunity, even though the Security Council has the powers to do so. Furthermore, the Security Council is at liberty to address the resolutions to any state that is capable of apprehending suspects including states not party to the Rome Statute. If the Security Council took this course of action, the obligation to cooperate in the execution of the ICC warrants would not be limited to states parties only, thereby increasing the chances of quicker apprehension of suspects.

Yet, the two referral resolutions so far, “are vague and their addressees are not sufficiently determined”\(^7\). Consequently, sitting heads of state and officials of non states parties that are referred to the ICC by the Security Council so far enjoy personal immunity due to the lack of specificity of the referral resolutions and the absence of any waiver by the states concerned. Following this logic, President Bashir, for example enjoys personal immunity (*ratione personae*) and may not be held legally amenable to the criminal process of any state. This means that President Bashir may neither be arrested in any state nor forced to appear before the courts of any state in order to process his surrender to the ICC. If this argument succeeds, the AU and African states, including Rome Statute members that have refused to arrest President Bashir within

their jurisdictions citing the impediments imposed by head of state immunity are correct in their arguments.

In addition, the language used by the Security Council in the referral resolutions has not been forceful enough to communicate coercion. Normally, when the Security Council takes coercive action, the language of legal compulsion includes terms such as ‘decides’. In the Darfur and Libya referral resolutions, the Security Council ‘decided’ to refer the situations to the court, but it used much softer language in ‘urging’ states to cooperate with the court. Use of the term ‘decide’ imparts an enforceable imperative, while use of the term ‘urge’ does not.\textsuperscript{795} What is more, in the two referral resolutions, besides the use of soft language on states cooperation, the Security Council went further to recognise that non-states parties have no obligation under the Rome Statute.\textsuperscript{796} This further weakens the coercive impact of the referral.\textsuperscript{797} In the final analysis, the referral resolutions are couched in exhortatory rather than mandatory language. Therefore they do not impose any legal duty on any state other than the states with the situations that are being referred to the ICC.

The principle of equality attempts to make sure that no member of society should be made to feel that they are not deserving of equal concern, respect and consideration and that the law is likely to be used against them more harshly than others who belong to other groups. The principle of comity implies that a state or a group of states contemplating a criminal prosecution for human rights violations must consider whether it would accept a similar prosecution being brought against its own officials. ICC prosecutions so far do not seem to reflect respect of these principles of international law.

With regards to the AU member states cooperating with the ICC, history shows that state cooperation in the prosecution of international criminal offences is not always


\textsuperscript{796} UN Security Council Resolution 1593, paragraph 2 and UN Security Council Resolution 1970, paragraph 5.

\textsuperscript{797} Otto Triffterer, \textit{Ibid.}
forthcoming. According to Ryngaert, popular resistance against arrest has been a major challenge of international tribunals that were set up after the Nuremberg and Tokyo Tribunals.\textsuperscript{798} For example, the ICTR faced challenges in obtaining the cooperation of Rwanda, DRC and Kenya. The ICTY experienced the problem of cooperation with the republics and entities of the former Yugoslavia, Serbia and the Republika Srpska in particular. This is one of the reasons that explain the phenomenon of extensive outreach programmes that is a defining feature of international criminal tribunals. Perhaps the ICC needs to take a leaf out of these experiences and execute an extensive outreach programme to educate people about the work of the ICC, in particular, the principles that guide the selection of situations and cases.

All Rome Statute parties and states that referred situations on their own territories to the ICC are largely expected to cooperate because of the need to follow through with their referral commitment. Yet, even these states' cooperation appears to continue to be hobbled. For example Uganda appears to have changed its mind because the ICC cases against the LRA appear to be the main obstacle to peace negotiations with the LRA. On its part, the Office of the Prosecutor seems to have reneged on an implicit deal to target only the LRA rebels and not the government side. To evade arrest the LRA also fled Uganda and appear to be drifting in the areas bordering Uganda and South Sudan, DRC and Central Africa Republic.

DRC and CAR have referred situations in their own territories to the ICC and may be expected to offer a higher level of cooperation with the ICC in apprehending the LRA rebels for example. However, the three states on whose borders the LRA continues to operate are ravaged by ongoing conflict. Their law enforcement agencies are not particularly competent. On the contrary, law enforcement in South Sudan, DRC and CAR is known to be inefficient, badly organized, and prone to corruption.

The refusal of states parties such as Malawi, Chad, Kenya, Nigeria and South Africa to enforce the arrest warrants against Bashir may have emboldened Sudan and President Bashir. When even states parties are unwilling to comply with their international obligations towards an institution, the institution appears ineffectual which puts a big dent on the legitimacy of the institution. Furthermore, the failure of the Assembly of States Parties as a governing body to ensure enforcement of decisions of the ICC also detracts from the legitimacy of the court.

The ICTY and ICTR also encountered problems with respect to the cooperation of states in the arrest and surrender of suspects. The ad hoc tribunals were backed by the force of Chapter VII Security Council Resolutions. Cooperation with the tribunals’ requests for arrest and surrender was mandatory. Yet, considerations of domestic politics tended to trump international obligations – even obligations imposed on states by the Charter of the United Nations. According to Ryngaert, the Prosecutor needs to craft an elaborate diplomatic negotiation strategy if he wishes to secure the presence of the accused through arrest and surrender by states.\(^799\) Quite obviously, legal duties and obligations do not necessarily play a major role in such a strategy.

Yet, politics and the law itself can be stumbling blocks to ensuring that justice does not remain elusive. Political interests of states are always changing. In most instances, it is the political interests of states that will determine whether the state will enforce an ICC warrant against a fugitive head of another state. South Africa is a good example of this point.

Chapter Seven

Conclusion

7.1. A complex relationship

Many reasons could be cited to explain the overwhelming support of the ICC and the idea of an international criminal jurisdiction among African states early on. One reason is that Africa states believed that by supporting the idea of an international criminal court and including for example the crime of aggression among the crimes within the jurisdiction of the ICC would end the tendencies of the powerful states to interfere militarily in the affairs of less developed states.

In keeping with the TWAIL tradition, the belief entertained by most African states was that the institution of the ICC would transform international law by ensuring equality among states. But the expectation to ensure equality failed to materialise and the AU changed course. The fact that the ICC appeared to be entrenching inequality among states by targeting the weak caused the AU to view the ICC as a tool for neo-colonialism. By opening cases in Africa only in the first decade of its existence, the ICC seemed to confirm the skewed distribution of power among states and peoples. To the African states therefore, the ICC, after all, was not an agent of emancipation, but further subjugation of Africa and its peoples.

Another reason for early support for the ICC among African states is that African governments believed that they could use the ICC to stifle political opposition. Proof of this fact can be found in the fact that despite the protestations of the African states, the situations in Uganda, DRC, CAR, Ivory Coast and Mali were in fact referred to the ICC by the governments of these states. Furthermore, the story of the AU disenchantment with the ICC only begins with the indictment of President Omar Al Bashir.

It is pertinent to note that it is political leaders and ruling elites in Africa that are crying wolf over the work of the ICC on the continent. The wording of the AU resolutions also
betrays a body that is unhappy with the prosecution of one of its own. The arrest and surrender of President Omar Al Bashir could set a precedent. Many other leaders in Africa could potentially be subjected to prosecution by the ICC for international criminal offences committed in their states. By rallying behind Omar Al Bashir and resolving that President Kenyatta and his deputy shall not appear before the ICC, the AU sought to prevent a game-changing precedent from being created.

7.2. Targeting the weak, selectivity & legitimacy

The legitimacy of the court is weakened by the controversies that have bedevilled the court in its first decade of existence. Among several views expressed about the ICC is the view that funded predominantly by the Europeans, the ICC is an instrument of European foreign policy. As we have seen, however, the hard evidence does not seem to support the allegation of unfair targeting of Africans. But, the emerging practices of the prosecutor’s office in the exercise of prosecutorial discretion have not helped the situation.

Inconsistencies in the exercise of prosecutorial discretion and approach to gravity and complementarity and an apparent mismatch between the original conception of complementarity and its application in practice provide ample ammunition to detractors of the court. One of the unfortunate results of these emerging practices is that an appearance of targeting people in Africa to the exclusion of others was created, particularly in the first ten years of the court’s existence.

Since the targeting allegation is only a red herring, the debate over this issue has therefore been misplaced. It seems that rather than unfair targeting, a possible explanation of the concentration of the case docket in Africa can be found in the shifting geo-politics of the post Cold War Era. The end of the Cold War had many glad tidings for Africa. However, the end of the Cold War bankrupted the geopolitical importance of the African continent. With Africa’s allies in the non-aligned movement having

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recapitulated due to post-Cold War economic hardships, the situation has been characterised by the general lack of keen interest in what happens in Africa.

Also, there has been a tendency to use Africa as a laboratory to test new concepts and institutions. Recall how the International Monetary Fund and the World Bank, after the end of the Cold War embarked on forcing the Economic Structural Adjustment Programme (ESAP) down the throats of African states until they were choking. The measures that African states were forced to take had never really been tested anywhere and African states were used as a testing ground. Unsurprisingly, the ESAP programmes were a disaster and a source of some of the conflicts that international criminal justice is now involved with.

As a new institution, the ICC also needs a dry run before it can be implemented in situations where Western powers have deep strategic interests. Since the geopolitical importance of Africa has dwindled, no strategic Western interests are harmed by involving the ICC in Africa. In situations that implicate strategic Western interests such as Syria and Palestine, both the ICC and the Security Council have so far found ways of making sure that the ICC stays away.

African governments that insist on the argument that the ICC is targeting poor and weak states seem to deliberately ignore the hard evidence to the contrary that is there for all to see. The African governments and the AU have therefore deliberately sought to focus the debate on the wrong issue. The debate should rather focus on the relationship between the ICC, a judicial institution and political regional and global institutions such as the AU, the EU and the UN Security Council, for example. The role of such bodies in the work of the ICC, with whom they have a common interest in doing justice, but whose mandates are much wider to include peace and security, should properly be the focus of the debate.

In this respect, it is important to note that nothing really should surprise us about the conflict between the AU and the ICC as the conflict betrays the difference between the
two institutions with regards to their mandates and their raison d’être. Conflict between such institutions is an inevitable eventuality. Both institutions have an interest in justice, but each institution is designed to function radically differently in the attempts to achieve the objectives of justice. Compared with the AU, the ICC has a very narrow mandate that requires it to achieve the objective of justice through a commitment to prosecution of offenders. Only when the interests of justice dictate otherwise does the ICC refrain from prosecuting.

Of course, how the prosecutor of the ICC has interpreted the interests of justice in the cases of Kenya, Uganda and Sudan may be arguable, but the mandate of the court is to achieve justice through a trenchant enforcement of international criminal justice. The AU on the other hand is designed to ensure that the interests of justice are met through wide, often delicate political work including negotiations with perpetrators of criminal offences and military intervention that in many instances eschew prosecutions.

In view of this relationship, the problem arises from the fact that despite their common interest in justice, none of the organisations has an obligation towards the other. As I have argued elsewhere in this thesis, both the ICC and the AU rank equally in the international legal and political order. Only the UN Security Council ranks higher than other organisations in the international legal order by reason of the provisions of the UN Charter.

Under the Rome Statute the ICC has no obligation whatsoever towards the AU or any other regional organisation and similarly, the AU, has no obligation whatever towards the ICC. Yet with so much disaggregation of law-making regional bodies springing around the globe, it would improve things if the Rome Statute found a place to accommodate such bodies.

How the ICC can accommodate regional political organisations with law-making powers ought to be the debate that arises from the contestations between the ICC and the AU. Clearly, nothing in the discussions leading up to the Rome Conference and the
The establishment of the ICC suggests that such an issue ever arose for debate. It seems that a situation eventuating into such an impasse as has developed between the ICC and the AU was never foreseen.

By way of a recommendation, I do not see anything that prevents an amendment of the Rome Statute to allow referral of cases to the ICC, not only by such an unequal body as the UN Security Council, but also by regional bodies with law-making powers such as the AU. Fears of politicization and victimization can be dealt with by limiting firstly the regional bodies with referral powers to sufficiently representative bodies such as the AU, the EU and the Arab League, and secondly limiting the referral powers of the regional organisations to situations within their jurisdictions and states that are among their members.

The AU for example could only be competent to refer situations and cases in Africa while the EU could only be able to refer cases and situations arising from EU member states. This will decentralize referral powers and hopefully make the enforcement of the decisions of the ICC more likely and effective. Decentralisation of referral powers and responsibilities for enforcement of ICC decisions will help to deal with the current situation where the ICC has started to express discontent over the failure of the UN Security Council to follow up on cases that it refers to the court with assistance to enforce the decisions of the ICC.

In the current set up, the UN Security Council refers cases to the ICC and then washes its hands, leaving the ICC to carry the burden of ensuring that its decisions are enforced. The conflict that is currently developing between the ICC and the UN Security Council could be dealt with by defusing the referral powers and the corresponding responsibility to assist the court in enforcement to the regional organisations.

Furthermore, defusing referral powers will forestall the efforts by the AU to establish a criminal jurisdiction within its own regional system. Once the AU abandons this endeavour and the two ad hoc tribunals for Yugoslavia and Rwanda finally wind up their
work and shut down the court’s status as the only international criminal justice mechanism and its legitimacy will be boosted. Both operationally and financially, the ICC will then get undivided attention from states and regional law-making bodies, thereby improving its efficacy and legitimacy.

But meanwhile, how can the ICC recover from the legitimacy deficit? Damaska argues for ‘a radical unburdening of international criminal justice’ whereby the ICC should concentrate on the prosecution of prominent perpetrators of only a few well-chosen episodes of mass atrocity for which the strongest evidence exists.\(^\text{801}\) By punishing and stigmatizing the perpetrators of crimes committed in only a few well-selected and persuasively adjudicated episodes can the ICC fulfill its mandate and recover its legitimacy.\(^\text{802}\)

Furthermore, the legitimacy and credibility of the ICC as well as the aims of international criminal justice in general can only be sustained through a steady flow of cases from the four corners of the globe that deserve the attention of the ICC. At the moment, cases from other parts of the globe are a trickle, but things seem to be going in the right direction as far as appearances are concerned. On 27 January 2016, the ICC authorised the prosecutor to open *proprio motu* investigations in Georgia with a focus on South Ossetia.\(^\text{803}\) A preliminary examination carried out by the prosecutor shows that crimes within the jurisdiction of the court might have been committed by the three parties involved in the armed conflict – the Georgian armed forces, the South Ossetian forces, and the Russian armed forces.\(^\text{804}\)


\(^{803}\) *Decision on the Prosecutor’s request for authorisation of an investigation*, ICC-01/15, Pre-Trial Chamber I, 27 January 2016.

\(^{804}\) *Ibid.*
The current compliment of situations under preliminary examinations include Ukraine\textsuperscript{805}, the responsibility of UK officials in systematic abuse of detainees in Iraq\textsuperscript{806}, the conflict in Gaza and the vessels registered to the Comoros, Greece and Cambodia regarding the Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip in 2010.\textsuperscript{807} It is hoped that this wider geographic spread of cases will give the appearance of a court that is concerned with treating like situations alike.

### 7.3. Response of the AU

It is pertinent to note that the dim view over the legitimacy of the court among African leaders is a direct result of the failure by the UN Security Council to respond to several requests for the deferral of proceedings against African leaders in a serious manner. While it is the UN Security Council that neglected its requests, the AU decided to direct its anger towards the court, viewing international criminal justice as mere power politics and the institution of the ICC as a tool for the recolonisation of Africa.

These criticisms of the ICC by the AU and African leaders tend to be expressed in ways that fit well within the Third World Approaches to International Law framework. Unlike most scholarship on the ICC so far, the Third World Approaches to International Law framework lends formality to the arguments for and against the court. The Third World Approaches to International Law framework allow for an explanation of the apparent contradictions and the attraction of the arguments raised by the AU among governments of developing countries in general.

As argued elsewhere in this thesis, the manner in which the AU has sought to respond to the appearance of unfair selectivity and targeting by the ICC has had the unintended and rather uncomfortable consequence of creating conflicting obligations for AU member states that are ICC members.

\textsuperscript{806} Ibid.
\textsuperscript{807} ‘Preliminary examination, Registered vessels of Comoros, Greece and Cambodia’, available at https://www.icc-cpi.int/comoros
AU member states faced with the conflicting obligations can achieve a resolution of the conflicting by resorting to a paragraph in the AU resolutions that allows member states to balance their obligations to the AU with their obligations to the ICC. Through this paragraph, the AU made it possible for its member states to read down their AU obligations to withhold cooperation in order to accommodate their cooperation obligations under the Rome Statute.

But all the conflicts that have arisen between the ICC and the AU as well as the difficulties caused by the operation of the law on head of state immunity could be resolved if the UN Security Council agreed to defer the prosecution of President Al Bashir. A deferral of the case while Al Bashir remains President of Sudan would not mean entrenching impunity. It would simply make it easier for states that feel obligated at the law to respect the sovereignty of Sudan by affording President Bashir personal immunity.

The ICC warrant would remain in place and could be enforced once Al Bashir leaves office. It is difficult to understand why the UN Security Council has failed to see this possibility. It is also difficult to understand why the UN Security Council has not treated this issue of a deferral with the seriousness that it deserves. Perhaps, as pointed out above, the geopolitical importance of Africa has dwindled and no strategic Western interests are harmed by ignoring issues that are raised by African bodies.

7.4. Head of state immunity and the conflict in Articles 27 and 98 of the Rome Statute

With respect to the live case of President Omar Al Bashir, the problem rests in doing that which the drafters of article 98(1) seem to have contemplated. As an incumbent head of state, President Bashir should be afforded immunity from arrest and surrender. Through all means possible, the office of the prosecutor could negotiate with and apply
pressure on Sudan to waive immunity of high ranking state officials like President Bashir or to give up the lower ranking defendants for prosecution.

The rest of the international community could play the part of supporting and strengthening civil society and the political opposition in Sudan in order to weaken Omar Al Bashir’s power base and level the playing field. The international community could furthermore, promote democratic elections in Sudan. Once Omar Al Bashir vacates the seat of president of Sudan and becomes a former head of state, he sheds the personal immunity that he currently enjoys and becomes fair game for arrest and surrender. This would be a solution in the short term.

Another possibility in the short term is for the ICC as an institution to issue a practice direction on the approach that it will adopt on immunity of high ranking officials of states that are not parties to the Rome Statute. In this respect, the practice direction would clarify how article 98(1) of the Rome Statute is intended to apply in view of the provisions of article 27(2) of the same statute. Alternatively, the problems that are caused by the interpretation of articles 27(2) and 98(1) with regards to high ranking officials of states that are not ICC members could be put up for discussion at the meetings of the Assembly of States Parties with a view to amending both articles and making them less cumbersome and confusing.

Still, another short term measure to resolve the current difficulties caused by the confusion around the application of article 98(1) in view of the provisions of article 27(2) regarding the immunity of high ranking state officials is for the UN Security Council to amend resolution 1593. There is nothing at law that might prevent the UN Security Council from amending resolution 1593 and make it clear that there shall be no immunity to arrest and surrender for any high ranking state officials indicted pursuant to this referral.

As argued above, states that have passed legislation to implement the Rome Statute have different approaches to the issues dealt with in articles 27(2) and 98(1), which
reveals divergence in the understanding of these articles. In order to harmonise the manner in which Rome Statute states parties domesticate their obligations, the office of the prosecutor could draw up model legislation to guide states on how article 98(1) applies in view of the provisions of article 27(2).

In the long term, the problems can be settled by a complete extinction of the principle of head of state immunity from international law. It is probably time that international law jettisoned head of state immunity altogether. The rationale for which head of state immunity was established seem to have been overtaken by events and history. Continuing to observe personal immunity for incumbent high ranking officials allows individuals that have been indicted by the ICC to continue in power regardless. Yet, allowing indicted individuals to maintain their political power and remain free, as Omar Al Bashir has, tends to discredit the work of the ICC.808

7.5. An Expanded Criminal Jurisdiction for the African Court of Justice and Human Rights

As shown elsewhere in this thesis, the conviction held by African governments that European states were abusing universal jurisdiction and that the ICC was targeting African leaders motivated the AU to consider empowering the African Court on Human and Peoples’ Rights with jurisdiction to try crimes of international concern. This, the AU achieved when the Assembly of Heads of State and Government meeting in June 2014 in Malabo, Equatorial Guinea adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). The criminal jurisdiction of the expanded court is wider than that of the ICC and all the ad hoc tribunals before it. It includes up to 14 crimes most of which have never before prosecuted by an international criminal tribunal including unconstitutional change of government, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes and illicit exploitation of natural resources. A major concern is that the court will be overloaded.

Clearly, one of the issues that the AU currently has with the ICC and European states over the application of universal jurisdiction is immunity for high ranking government officials. As I have argued in this thesis, the approach to immunity from domestic legal systems for incumbent heads of state that are not ICC states parties that has been taken by the ICC and some states is problematic. Consequently, in the Malabo Protocol, the AU decided to correct this problem by including a clause that provides immunity from prosecution to sitting heads of state or any individuals acting as such during their tenure. Article 46A of the Malabo Protocol provides that ‘No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.’

By wording the immunity clause in the manner that it did, the AU overcorrected what it understands to be the anomaly in the approach of the ICC. As argued elsewhere in this thesis, the correct position of immunity under customary international law should be that sitting heads of states are not immune to prosecution as such for crimes of international concern. Rather, immunity for sitting heads of state may apply to exclude proceedings in domestic courts. The immunity clause gives credence to the suspicions held by many that the AU’s axe to grind with the European states over the application of universal jurisdiction and with the ICC is really about shielding high ranking government officials from being held accountable for atrocity crimes.
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