

MIDLANDS STATE UNIVERSITY



**THE TROUBLED RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND
AFRICA: A DIAGNOSIS**

BY

STUDENT ID R167463W

**A dissertation submitted to Faculty of Law in partial fulfillment of the
Requirements for the Award of the Master of Laws (LLM) Constitutional and
Human Rights Law of Midlands State University**

Name of Supervisor: DR JAMES TSABORA

ACKNOWLEDGEMENTS

My very first thanks go to God the Almighty for giving me the energy, the mind, the wisdom and the knowledge to push through these studies.

Secondly and most importantly my thanks go to my supervisor, Doctor James Tsabora, a brilliant teacher of law, one who doesn't compromise on quality and one who is patient even with students with very busy schedules like myself. Doctor, I really appreciate the guidance and mentorship that I received from you.

Thirdly, I am sincerely grateful to the former Chief Justice of the Republic of Zimbabwe, the late Hon. Godfrey Guwa Chidyausiku for allowing me leave during the weekends to pursue my studies and for encouraging me never to give up even when balancing my office duties, which are quite busy, and my study needs was difficult.

Fourthly, my thanks go to the current Chief Justice Hon. Luke Malaba, a jurist with an unquenchable thirst for knowledge who gave me unwavering support during the period of my studies.

Fifthly, I thank my wife Phathekile Patience Msipa, my daughter Elizabeth and my sons Leon, Lesley, Leroy and Brandon for enduring weeks and weekends alone without me because of work and school commitments, to them I say, guys I owe you but I thank you for your understanding and will always love you.

To my mother Mrs Mulevhuwe Gumbo, I have no words with which I can show my appreciation and gratitude for having you as my mother. Up to this stage you still give us annual financial allowances just because we are your children not because we are in need. Thank you for the prayers and the love that is priceless.

I would like to thank my colleagues at work Walter Chikwana and Munamoto Mutevedzi for saying, "Why not" when I indicated to them that I intended to pursue these studies.

To all my classmates, guys thank you.

Last but not least to my PA, Patience Solomon, thank you for all the support throughout the period of my study.

DEDICATIONS

This work is dedicated to my late father Talipfi Msipa, who understood that education is more important than material wealth, to my mother Mrs Mulevhuwe Gumbo, to my wife Phathekile Patience Msipa, my daughter Elizabeth and my sons Leon, Lesley, Leroy and Brandon.

DECLARATION

I declare that '**The troubled relationship between the International Criminal Court and Africa: A diagnosis**' is my own work and all the sources I have used and quoted have been acknowledged as indicated by referencing.

SIGNED.....

ABSTRACT

The debate around the relationship between the International Criminal Court and African states has gained more prominence over the past decade, especially in light of the ever increasing atrocities not only on the African continent itself but around the globe as amply demonstrated on the increasing cost of civilian life in Georgia Syria and Gaza just to mention a few. Unfortunately, the debate has only been largely centred around two clear and entrenched positions, that is the Court biased against Africa and that the Court is simply not biased but working where the need is the greatest. This thesis is a response to an engagement with this debate. It critically examines the arguments from both sides of the aisle that is whether or not the ICC is biased against the African continent or simply focusing on it because the greatest number of internal conflicts are occurring there. Despite the often persuasive claims from both sides, with many of the arguments having a certain amount of merit, this thesis posits a different and novel position. It argues that that the issue is not a stark black and white as it may at first seem. It argues that it would be short-sighted to focus solely on the Court as biased or not biased against the African continent without taking into account that the Court operates in a global geopolitical context and thus may be used to achieve political ends not only by the more powerful states but even by African leaders themselves.

The thesis makes the point that the effectiveness of the Court is dependent on two factors, the consent of the state concerned and in its absence referral of a situation to the Court by the United Nations Security Council. Ultimately both factors have pitfalls and open the Court to be either abused for the attainment of political ends or be stonewalled from carrying out its mandate if it is not politically expedient. The argument is therefore made that rather than lay the blame squarely at the door of the Court as being responsible for its often negative relationship with African states, one should consider that the Court can and has been abused for political ends thus contributing to its perceived bias. It therefore argues that the Court should sail above the politics. Rather than challenge African states as merely grandstanding to avoid its scrutiny, the Court could meet its African criticisms head on and engage in honest dialogue with African states in order to build bridges that would help it operate more effectively on the

continent. At the same time, rather than trying to navigate the political minefield with each situation, the Court would do better in the fight against impunity if it assisted African states to capacitate their judicial systems to deal with international crimes and only step in when the state concerned has truly failed or is unwilling to prosecute. When the Court is seen as truly a Court of last resort rather than a busybody which steps in where it is not wanted or does the bidding of more powerful nations, it may soften the attitude of African states towards the Court.

ACRONYMS

ACJHR	African Court of Justice and Human Rights
AU	African Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of the International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States
ICRC	International Committee of the Red Cross (ICRC)
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of Former Yugoslavia
ILC	International Law Commission
LRA	Lord's Resistance Army
OPT	Occupied Palestinian Territories
OTP	Office of the Prosecutor
UN Charter	Charter of the United Nations
UNGA	United NATIONS General Assembly
UNSC	United Nations Security Council

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	i
DEDICATIONS	ii
DECLARATION	iii
ABSTRACT	iv
ACRONYMS	vi
CHAPTER 1	1
INTRODUCTION AND BACKGROUND	1
1.1 INTRODUCTION	1
1.2 BACKGROUND TO THE STUDY	3
1.3 PROBLEM STATEMENT	5
1.4 LITERATURE REVIEW	6
1.5 RESEARCH QUESTIONS	11
1.6 RESEARCH OBJECTIVES	11
1.7 RESEARCH METHODOLOGY	12
1.8 SIGNIFICANCE OF STUDY	13
1.9 LIMITATIONS	13
CHAPTER SYNOPSIS	13
CHAPTER 2	15
AFRICA'S GRIEVANCES WITH THE ICC SYSTEM	15
2.1 INTRODUCTION	15
2.2 THE NATURE OF AFRICAN STATES' GRIEVANCES AGAINST THE ICC	16
2.2.1 The allegation of bias	17
2.2.2 The allegation that the ICC is detrimental to peace on the African Continent	25
2.3 CONCLUSION	30
CHAPTER 3	31
THE ROME STATUTE REGIME AND MANIPULATION	31
3.1 INTRODUCTION	31
3.2 The Rome Statute Framework	31
3.3 The Rome Statute and the principle of state sovereignty	32
3.3.1 Analysis	33
3.4 The Rome Statute Referral System and International Politics	36
3.4.1 Analysis	37

3.5 The Rome Statute and the Immunity of Heads of State	39
3.5.1 Analysis	40
3.6 Bilateral International Agreements under Article 98 (2)	42
3.6.1 Analysis	44
4. Conclusion.....	46
CHAPTER 4	47
THE ICC AT WORK: CASE STUDY ANALYSIS	47
4.1 INTRODUCTION	47
4.2. BACKGROUND TO THE TWO REFERRALS.....	48
4.2.1 The Sudan referral.....	48
4.2.2 The Libyan referral	48
4.3 CONCLUSION.....	56
CHAPTER 5	58
RECOMMENDATIONS AND CONCLUSION.....	58
5. 1 INTRODUCTION	58
5.2 SUMMARY OF ARGUMENTS.....	58
5.3 THE WAY FORWARD	59
5.3.1 National-level capacity building.....	60
5.3.2 Establishment of an Effective Bi-lateral Dialogue Framework between the African Union and the ICC	62
5.3.3 Establishment of intermediary institutions to increase co-operation between the Court and the African Union.	64
5.3.4 A Fairer Approach in Situations Investigations, Referrals and Prosecutions	65
5.4 CONCLUSION.....	66
REFERENCEES	68

CHAPTER 1

INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

The state of the relationship between the International Criminal Court and the African continent, through its political organisation, the African Union, belies the acclamation and fanfare that greeted the coming into force of the Rome Statute and the establishment of the International Criminal Court in 2002. At that time, it was the first permanent international criminal tribunal been more pressing. As much as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia had done commendable work, they lacked the permanency and the universal status of an international criminal court. The main motivations for the continental support of the Court in Africa were the various atrocities committed on the continent in the 1990s, and the impunity that characterized their wake. For instances, such atrocities include those committed by the Lord's Resistance Army in Uganda and the increasingly gross human rights violations that had characterized the Somali Civil War, the Darfur Crisis, various politically related atrocities in West Africa, among others. Of the 124 countries, that are party to the statute 34 of them are from Africa, accounting for almost 30% of the parties and forming the largest bloc.¹

For African countries, the ICC was seen as a shield from predatory ravages of warlords and dictators who over the over the last half century had caused millions of casualties, untold suffering, human rights violations and other atrocities.² The ICC appropriately has jurisdiction over “the most serious crimes of concern to the international community as a whole”³ that is, genocide, crimes against humanity and war crimes.⁴ Its jurisdiction

¹ R. Lee *Introduction – The Rome Conference and Its Contributions to International Law* in Lee, R. (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results*. (1999), p14-15.

² Bassiouni M. Cherif , *Concerning the ICC Withdrawal Problem*, Invited Experts on Withdrawal Question, Office of the Prosecutor, ICC Forum, (2016).

³ Preamble to the Rome Statute of the International Criminal Court.

⁴ Article 5 (1) of the Rome Statute.

is limited to crimes occurring after the statute came into force on the 1st July 2002. Ultimately the jurisdiction if the Court is exercised by consent, that is through the treaty system. A state which is not a party to the statute may, by declaration, accept the exercise of jurisdiction of the court, with respect to a specific crime. However the jurisdiction of the Court may be exercised without the consent of the State concerned under articles 13 to 15 of the statute, whereby the Security Council acting under Chapter VII of the UN Charter may refer a situation, to the prosecutor.

Ultimately, at the core of the ICC's role lies the duty to enforce and induce compliance with specific norms of international law aimed at outlawing and preventing mass violence.⁵ Yet barely twenty years later, is that role as a shield against impunity mired in crisis. A number of African states have increasingly and openly criticized the ICC's execution of its mandate across the globe. Some African states have gone beyond words and taken the extraordinary step of withdrawing from the Court. On the 19th October 2016, South Africa became the first African country to withdraw from the International Criminal Court by delivering an instrument of withdrawal.⁶ Though it had to later withdraw the instrument of withdrawal after the High Court ruled that the withdrawal done illegally by the Executive, without passing through Parliament.⁷ Burundi swiftly followed suit on 27 October 2016, with Gambia announcing its withdrawal from the Court barely a month later on the 10th of November 2016, raising fears of a mass withdrawal or "Afrexit" from the Court.⁸ All this cast a dark shadow on the effectiveness of the ICC and its critical role as the champion of international criminal justice in Africa and the world at large.

⁵ "The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law" The UN Chronicle Vol. XLIX No. 4 2012.

⁶ "South Africa announces its withdrawal from ICC" CNN 21 October 2016.

⁷ "South African court blocks government's International Criminal Court withdrawal" The Independent 22 February 2017, found at <http://www.independent.co.uk/news/world/africa/international-criminal-court-icc-withdrawal-south-africa-racist-jacob-zuma-president-a7594346.html> (accessed 22/03/17).

⁸ Maupas S. "Will South Africa's move to quit ICC spark "Afrexit?" (2010).

1.2 BACKGROUND TO THE STUDY

Underlying the current tension and crisis is that Africa, the largest constituency of the ICC seems to have little or no confidence in the ability of the court to deliver the kind of justice it was designed to deliver, in an equitable way.⁹ Two particular grievances by African countries are at the forefront of the crisis. First the Court is now seen as biased against Africa on the ground that it seemingly ignores similar crimes that would warrant its attention on other continents, especially if committed by powerful states.¹⁰ Indeed, African perceptions were captured by then Ethiopia's Prime Minister, Haile Mariam Desalegn, who described the ICC as:

*"...hunting Africans because of their race".*¹¹

Similarly in announcing the decision to withdraw from the ICC, Gambia's information minister denounced the ICC as an:

*"International Caucasian Court for the persecution and humiliation of people of color, especially Africans."*¹²

In the same vein when Burundi's parliament voted to quit the court, one lawmaker called the Court:

*"a political tool used by [Western] powers to remove whoever they want from power in the African continent."*¹³

On the surface, therefore, it seems that such criticism is warranted. In particular, when it is considered that of the investigations and prosecutions in ten different situations, nine are situated in Africa,- including the Democratic Republic of the Congo, Uganda, the Central African Republic, Darfur, Sudan, Kenya, Libya, the Côte d'Ivoire, Mali and the

⁹ "Does the ICC have an Africa problem?" The Nation 29 March 2012.

¹⁰ Kersten M, *What the ICC Can Do to Improve its Relationship with African States*

Justice in Conflict, <https://justiceinconflict.org/2016/11/01/what-the-icc-can-do-to-improve-its-relationship-with-african-states/> (accessed 23/01/2017).

¹¹ Kersten M, *What the ICC Can Do to Improve its Relationship with African States*,

Justice in Conflict, <https://justiceinconflict.org/2016/11/01/what-the-icc-can-do-to-improve-its-relationship-with-african-states/> (accessed 23/01/2017).

¹² "Gambia is 3rd African nation leaving ICC", China Daily 26 October 2016.

¹³ De Vos C, *The Politics of Departure: Africa and the International Criminal Court*, IPI Global

Observatory, <https://theglobalobservatory.org/2016/11/international-criminal-court-south-africa-burundi-gambia/> (accessed 23/01/2017).

Central African Republic. In those situations ICC has indicted 39 people so far, all of whom are from Africa.¹⁴

Secondly, African states have argued that the ICC aside from allegation of bias against Africa, the ICC's work in Africa is detrimental to the continent's efforts to solve its problems.¹⁵ African states have stated repeatedly that the threat of prosecution by the ICC against rebels or sitting heads of state in the middle of peace negotiations for example as happened in Sudan and Rwanda is undermining peace efforts.¹⁶ In the view of African states, at times it is better to sacrifice justice so that peace may be attained.

Thirdly and more importantly, African leaders have argued that the ICC in indicting sitting Heads of State, has violated international law which guarantees immunity *ratione personae*, that is functional immunity that accrues to certain individuals by virtue of the office that they hold. This, African states argue, disturbs the international system and makes heads of states moving targets of powerful states. For example, in 2009, the ICC Pre-Trial Chamber 1 decided that the Court is not prevented by Sudan's immunity under international law from exercising its jurisdiction over the incumbent President of this non-party State, al Bashir.¹⁷ The court issued an arrest warrant for al-Bashir on 4 March 2009 on several counts of war crimes and crimes against humanity.¹⁸ To date, al Bashir is a fugitive of international criminal justice, particularly outside Africa. In Africa however, he continues to command support, sympathy and empathy from increasingly defiant heads of state who believe they are next in line for prosecution.

The reaction to the indictment of al Bashir was immediate. In June 2009, several African states, called on the African Union members to withdraw *en masse* from the Court in

¹⁴ "The International Criminal Court & Africa, Davidovic J, The Critique's September/October 2016 Issue "The Bright Continent: Illuminating The Challenges, Opportunities & Promises Of A Rising Africa".

¹⁵ Du Plessis M, 'The International Criminal Court that Africa Wants' (2010), ISS Monograph 172/10.

¹⁶ Du Plessis M(note 15 above).

¹⁷ *The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 41–45, <http://www.legal-tools.org/doc/e79f78/>.

¹⁸ International Criminal Court (4 March 2009). "Warrant of Arrest for Omar Hassan Ahmad Al Bashir". www2.icc-cpi.int/iccdocs/doc/doc639078.pdf.

protest against the indictment.¹⁹ Shortly thereafter, on 9 January 2012, the African Union Commission voiced its deep regret and its disagreement” with the decision of the Trial Chamber of the ICC. Indeed some African states sought to pass a Resolution in the African Union General Assembly exempting ICC warrants from being executed against sitting heads of states as this in their view violated international law.²⁰

It was therefore not surprising that the South African government in refusing to arrest Al Bashir on the occasion of the African Union (AU)’s 25th summit, in South Africa, made the same argument. The government defied a Court order from its own High Court, that it had an obligation under the Rome Statute to arrest Omar al-Bashir. The government stated:²¹

“We wish to give effect to the rule of customary international law, which recognises the diplomatic immunity of heads of state and others in order to effectively promote dialogue and the peaceful resolution of conflicts wherever they may occur, particularly on the African continent”²²

Arguably and as will be seen this argument has gained increasing traction with African States. At its core however, it strikes a huge blow on the relationship between Africa and the ICC, a court whose effectiveness is only possible if heads of states immunity is discarded.

1.3 PROBLEM STATEMENT

There is no doubt that the ICC, despite its noble beginnings, is facing not only an image but a credibility crisis in Africa. Three particular problems emerge and must be

¹⁹ "African Union Countries Rally Around Kenyan President, But Won't Withdraw From The ICC" International Business Times, 12 October 2012.

²⁰ "Decision of the AU Assembly on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction." Doc Assembly/AU/14 (XI), at the 11th Ordinary Session, 30 June–1 July 2008, Sharm El-Sheikh, Egypt.

²¹ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* [2016] ZASCA 17 (15 March 2016).

²² "Briefing to the media by Minister Michael Masutha on the matter of International Criminal Court and Sudanese President Omar Al Bashir," The South African Department of Justice and Constitutional Development http://www.justice.gov.za/m_statements/2016/20161021-ICC.html.

addressed. Firstly, is the question of whether the ICC is unjustly targeting African states in the execution of its mandate.

Secondly, is it really sustainable for African states to argue that the ICC is undermining the efforts by the continent to resolve armed conflict? In effect, is the ICC brand of justice not compatible with peace in Africa? If yes, should then justice be sacrificed to attain the peace?

More importantly in that regard, the legal question to explore is to what extent is the legal regime of the Rome statute open to manipulation for the purposes of bias, or unjustified, controversial prosecution. To what extent are the arguments by African countries that the ICC Statute in particular some of the provisions of the Rome Statute, violates international law which guarantees immunities *rationae materiae* for sitting Heads of State and senior government officials, valid, not to mention that the Rome statute imposes obligations on states that are not party to the treaty and thus violates international customary law. At the same time are the concerns with regards to the Rome Statute only shared by African states or are they common to the international community?

Finally, if a balance is difficult to strike, though it is necessary, another question is can the ICC institutional system be able to remedy the increasingly negative perceptions of bias, unmerited prosecutions of African personalities and a perceived contradiction of its actions with recognized norms of international law? All these issues within both the substance of the Rome Statute treaty and the ICC institutional system create legal problems that should be explored and examined.

1.4 LITERATURE REVIEW

There is an ever increasing body of research that centres around the relationship between African states and the ICC. Interestingly it is almost evenly split on the subject, with some scholars pointing out that the Court does indeed have a bias against Africa, and that such bias is as a result of the inherent structural weaknesses within the legal

regime of the ICC. Others argue that the Court has no bias against Africa, since most situations and prosecutions were referred by African states themselves. Other scholars further argue that the African states' argument about the immunity of sitting Heads of States is an expression of international customary law, while others argue that international crimes transcend immunity.

A brief consideration of the authorship on the subject makes clear the deep divide among international law scholars.

Dersso, argues that, the current revolt to the legitimacy of the ICC by African countries is not a rejection of the ICC or the values of international justice.²³ Instead it is a reaction to the structural flaws underlying the international legal order which, as it stands, now looks more like an Orwellian animal farm, where some are "more equal" than others. A legal order characterized by "might is right".

Certainly, when one considers the considerable and well documented atrocities that have been committed by the armed forces and leaders of the more powerful countries since 2002, that the ICC has remained silent on, despite the lack of domestic prosecutions, it is not too farfetched to suggest that the ICC might be selective in dispensing justice.²⁴ Leslie Vinjamuri ,points out that the most horrific mass atrocities in recent times have happened outside Africa yet the ICC has not been there.²⁵

However, other scholars firmly reject the view that Africa is being targeted by the Court. Roth, points out that, in five of the eight countries where the Court is prosecuting alleged criminals, namely in Uganda, Mali, Ivory Coast, the Central African Republic, and the DRC, the states themselves asked the Court to intervene. In the other two the Security Council acting under its mandate in the United Nations Charter referred the situations to the ICC. It was only in Kenya that the ICC acted of its own volition.²⁶

²³ Dersso S. *Africa's challenge to the ICC*, Al Jazeera In depth Opinion. 09 November 2016,

²⁴ "The International Criminal Court & Africa" The Critique's September/October 2016 Issue.

²⁵ "African Countries to Quit the International Criminal Court", The African Exponent 18 October 2016.

²⁶ Roth K, *Africa Attacks the International Criminal Court*, N.Y. Rev. of Books, (2016).

However Niang disputes this, arguing that the fact that some of these cases were referred to the court by African states themselves does not justify current prosecutorial configurations and ignores a reality that more egregious crimes have been or are being committed in Colombia, Yemen, Chechnya, Syria, and Iraq, to name a few, most of which involve dominant powers such as the United States, yet the ICC seems mute.²⁷

At the same time Mamdani argues that the action of the ICC issuing arrest warrants in the middle of peace negotiations as happened in Sudan, Libya and Uganda has detrimental effect on the peace process as it taking away a key option that is amnesty from the repertoire of instruments available to the government or the AU for ensuring peace.²⁸ In short the ICC in Africa prolongs war. This position finds favour with Manas who argues that at times justice must be sacrificed at the altar of peace if the object is to save lives in by cutting short a war.²⁹

However, Zainab Bangura, UN Special Representative on Sexual Violence in Conflict, argues that the threat of prosecution may actually bring peace by acting as a preventative tool by ending impunity for a crime and thereby reducing instances of that crime.³⁰

However, some scholars argue that all these arguments about bias and the ICC being an impediment to peace are much ado about nothing and that the real problem lies within the Rome Statute itself.

At the same time other states namely China,³¹ India,³² and the United States³³ have raised a particular grievance that to the extent that the Rome Statute imposes

²⁷ "Analysis: Moral Equivalence in International Relations," Niang A, Daily Maverick 20 October 2016.

²⁸ J. Namutebi, 'Mamdani urges reconciliation', New Vision, 5 December 2005.

²⁹ J.E. Manas "The Impossible Trade-off: "Peace" versus "Justice" in Settling Yugoslavia's Wars (2010).

³⁰ "Changing the equation: prosecution as prevention of war rape" The Guardian 07/06/13.

<https://www.theguardian.com/global-development-professionals-network/2013/jun/07/prosecution-prevent-war-rape> (accessed 23/01/2017).

³¹ Lu Jianping & Wang Zhixiang, China's Attitude Towards the ICC, 3 J. Int'l Crim. Just. 608, 611 (2005).

³² Statement of Dilip Lahiri, Explanation of India's Vote on the Adoption of the Statute of the International Criminal Court, in the international criminal court: global politics and the quest for justice 42, 43-44.

³³ Ralph J, (2007) Defending the Society Of States: Why America Opposes The International Criminal Court And Its Vision Of World Society, London, Oxford University Press.

international obligations on non-state parties, it violates Article 34 of the Vienna Convention on the Law of Treaties, which provides that “[a] treaty does not create either obligations or rights for a third State without its consent.”

Baudet, also adds a grievance points out that the system of a state referring a situation within its territory to the ICC under Article 14 (1) of the Rome Statute is capable of abuse and has been abused by unscrupulous African leaders. He cites the troublesome perception that in Congo the government not only asked the ICC to intervene and eagerly extradited opposition Jean Pierre Bemba to the ICC, a fortuitous circumstance that served the interests of the incumbent President Joseph Kabila.^{34 35}

At the same time Article 13 referrals by the United Nations Security Council are bothersome. Maguire argues that the fact that the Security Council, which is mostly made up of states not party to the Rome Statute, can refer a situation in the territory of a non-state party to the ICC, can be abused to the detriment of less powerful countries no to mention that. Such action goes against the entrenched principle of *pacta sunt servanda*, that a state is bound by a treaty it signs not to mention that that international law is a law of consent. In his view, applying the provisions of the Rome Statute on a non-state party to the treaty violates those two norms of international law.³⁶ This he argues has led to a negative perception of the ICC.

Other scholars argue further that, the Rome Statute has also contributed to the tension between the Court and African states, through its blatant contradiction with the international norm of immunities *rationae materiae* for sitting Heads of State and senior government officials. Particularly Article 27 of the treaty asserts that it shall apply equally to all persons without any distinction based on official capacity.

³⁴ Baudet THP *The significance of borders: why representative government and the rule of law require Nation States* (2012) p104.

³⁵ “Making Justice Count Lessons from the ICC’s Work in Côte d’Ivoire” Human Rights Watch, August 4 2015 <https://www.hrw.org/report/2015/08/04/making-justice-count/lessons-iccs-work-cote-divoire> (accessed 23/07/2017).

³⁶ Maguire R. *et al*, *Shifting global powers and international law: challenges and opportunities* [Challenges of Globalisation series], (2013) p111.

Jakobsen in this regard argues that Article 27, overarches with regards to the inviolability of sitting Heads of State and caused the Rome Statute to come into sharp conflict settled principles of international law.³⁷ Indeed the International Law Commission has stated that the principle of diplomatic immunity flows from customary international law.³⁸ In this regard she argues that an arrest or prosecution of a sitting Head of State under the Rome Statute would be a violation of customary law.

Other scholars however differ, and argue that the argument by African leaders is much more to do with African leaders seeking to shield themselves from criminal liability than any actual contradiction or violation of the international law within and by the Rome Statute, respectively.

Zapala, points out that, the crimes proscribed by the Rome Statute, cannot seriously be considered as legitimate performance of official duties and thus personal immunity *ratione personae* should not and cannot be invoked. In his view immunity under international law is only limited to official functions.³⁹

His views are echoed by Kreb who argues that crimes proscribed by the Rome Statute transcend immunity *ratione personae*.⁴⁰ He cites with approval the sentiments of the Special Court of Sierra Leone in the *Taylor case*, where the Court stated that the principle is now established that international law does not prevent a Head of State from being prosecuted before an international court for grave crimes.⁴¹

³⁷ Jakobsen M. "Immunity versus impunity? Reconciling Articles 27(2) and 98(1) of the Rome Statute" (2005) RGSL Working Papers No. 23 RIGA, 10.

³⁸ "Report of the International Law Commission on the work of its thirty-second session," UN GAOR, 35th Sess, Supp. No. 10, UN Doc. A/35/10 (1980) at 344.

³⁹ Zapala S "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes?" (2001)EJIL, Vol. 12, No. 3, 2001.

⁴⁰ Kreb C. "The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute", in Morten Bergsmo and LING Yan (editors), State Sovereignty and International Criminal Law, FICHL Publication Series No. 15 (2012).

⁴¹ *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, para 52.

This is view consistent with the decision of the ICTY Appeals Chamber in the *Blaskic (subpoena)* case, where the Court, those responsible for such crimes cannot invoke immunity from international jurisdiction even if they perpetrated such crimes while acting in their official capacity.⁴²

1.5 RESEARCH QUESTIONS

- (i) What are the complaints by African states against the ICC and are such complaints unique to Africa.
- (ii) What is the nature of the legal regime created by the Rome Statute and does such regime have space for manipulation, bias or controversial prosecutions?
- (iii) What are the implications of the controversial provisions and structural flaws of the Rome Statute legal regime and institutional system?
- (iv) How can the ICC institutional system remedy the unfavorable perceptions undermining its relationship with Africa?
- (v) What interpretive approach can be adopted in the application of controversial provisions of the Rome Statute in order to minimize controversy, bias, injustice and undermining of the letter and spirit of the statute?

1.6 RESEARCH OBJECTIVES

The research will have these main objectives:

- a) To explore the complaints by African States against the ICC.
- b) To explore the Rome Statute's legal regime and identify areas that are open to manipulation for purposes of bias, or unjustified, controversial prosecution.

⁴² *Blaskic (subpoena)* (ICTY, Judicial Reports, 1996).

- c) To examine the implications of both the controversial provisions and structural flaws on Africa's relationship with the ICC.
- d) To critically discuss the argument by African countries that some of the provisions of the Rome Statute are contrary to the customary law principles with regards to immunity *ratione personae* and whether such immunity can be invoked against crimes that are proscribed by the Rome Statute.
- e) To provide recommendations on how the ICC institutional system and can remedy the unfavorable perceptions undermining its relationship with Africa, and possibly other continents.

1.7 RESEARCH METHODOLOGY

This research will employ a desktop study, that is it will rely primarily on secondary data without fieldwork, that is, which is a qualitative research based on a review of literature, particularly both primary and secondary sources including treaties, international case law from international tribunals, academic books and journals dealing with immunity *ratione personae* for crimes that fall within the ambit of the Rome Statute and relevant law journal articles, and the electronic resources on the subject.

It will also employ a doctrinal approach to outline the law that governs the International Criminal Court, various legal principles, concepts and legal positions from through interpretation and discussions of primary sources of law such as the Rome Statute and also international customary law sources.

The research will also utilize a descriptive approach to describe the relationship between Africa and the ICC. In the same vein it will also utilise non authoritative sources like newspapers articles, though these will be employed more for information on global events as opposed to legal authorities. Finally, part of this research will employ a comparative analysis where the different approaches of the ICC will be studied and explored in order to illustrate whether there is uniformity, consistency and certainty in such approach. A number of case studies will be chosen to highlight whether the ICC has targeted certain suspects, or certain geographical areas whilst ignoring others.

1.8 SIGNIFICANCE OF STUDY

This research is particularly relevant to the present circumstance when African countries have contemplated a mass exit from the ICC and indeed three of them have actually followed through with such withdrawal from the Court.

1.9 LIMITATIONS

This research will be targeted in particular at the relationship between African States and the ICC as opposed to the ICC and the rest of the world. Where the ICC relationship with other states or continents is mentioned, it will be strictly for comparison's sake, to bring out a particular aspect of the relationship between Africa and the Court.

CHAPTER SYNOPSIS

Chapter 1

This Chapter will introduce the research and provide a background and a historical context of the relationship between the ICC and African states as it stands now. It will also lay out the problem statement, limitations of the research, literature review and the methodology that will be used in this study.

Chapter 2

This chapter explores the criticism laid against ICC by Africa, be it the AU or individual African states. It will in particular analyze two of the complaints, which are: the ICC is biased against Africa and secondly whether the ICC is detrimental to peace in Africa.

Chapter 3

Building on Chapter 2, this Chapter will examine the Rome Statute's legal regime to identify aspects of the treaty that are open to manipulation, which have led African states to perceive the Court as biased. In particular, it will focus on the complaint by

African states that that the provisions of the statute violate settled norms and principles of international customary law.

Chapter 4

This chapter explores specific situations where the court seems to have been used as a pawn in global politics, in particular the Libyan and Sudan referrals. It will be considered that the very fact that situations in Syria for example which deserved equal attention where not referred by the UNCSC to the court.

Chapter 5

This chapter provides a summary of the arguments that have been discussed and also discusses recommendations on how the ICC institutional system can remedy the unfavorable perceptions undermining its relationship with Africa, and other continents. It will also consider the various ways in which loopholes that lead to abuse of the Rome statute can be closed and concludes the research.

CHAPTER 2

AFRICA'S GRIEVANCES WITH THE ICC SYSTEM

2.1 INTRODUCTION

The, albeit stillborn, withdrawal of South Africa from the ICC, followed by Gambia, along with Kenya's saber-rattling, threatening to withdraw from the Court in 2015, again brought to the forefront the contentious relationship between the African continent and the ICC.⁴³ A relationship made unique by the fact that the continent that made up the largest regional bloc in advocating for the creation of an international criminal court, is barely 14 years later, leading the charge to leave the same Court

This Chapter will seek to examine the relationship between Africa and ICC. It will examine the nature of the grievances that African states have raised against the Court and test the validity of those complaints. In doing so it will focus on two particular complaints namely; that the ICC is biased towards Africa, that the ICC does more harm than good in Africa as it derails peace processes, which may be a more important goal than justice. In doing so it will also consider whether these complaints are unique Africa or they are shared by the international community as a whole. The Chapter will then conclude by introducing the third complaint which will be discussed in Chapter 3, which is that the Rome Statute itself is inherently weak, violates international customary law and has led to the perception of bias by the Court against weaker states.

In extrapolating and analysing the grievances against the Court by Africa, this Chapter will also seek to bring out that the ICC-Africa relationship cannot simply be defined by an overly simplistic dichotomy, wherein the Court is either viewed as bent on subjugating African states or as a misunderstood force for good that seeks to end impunity and punish the perpetrators of crimes that are a concern to humanity as a whole. It will also argue that while there is no question that Africa has grievances against the Court it would be wrong to generalize that Africa as a whole has the same concerns with the Court. Some countries have expressed their full support for the Court.

⁴³ "African Union members back Kenyan plan to leave ICC" *The Guardian* 01/01/2016.

2.2 THE NATURE OF AFRICAN STATES' GRIEVANCES AGAINST THE ICC

As the apparent loss of confidence by the African states in the Court that they by majority advocated for continues to resonate, there is no question that an urgent and compelling need exists to consider the various complaints African states have raised against the Court and their merit.

However, as preliminary step, it must be made clear that, it would be too simplistic to state that the continent is against the ICC. In fact, it is important not to overstate African opposition to the ICC. Africa is not monolithic and many states continue to support the ICC and its mandate.⁴⁴

Nigeria's Minister of State for Foreign Affairs, Nurudeen Muhammad, distanced his country from any exit from the ICC. In the same vein, Ghana's President John Dramani Mahama said in May 2013:

*"The ICC has important role to play in holding leaders accountable and has done a fantastic job in bringing some people who have committed genocide and mass murder to justice.... Nigeria is not the only voice agitating against [withdrawal], in fact Senegal is very strongly speaking against it, Cape Verde, and other countries are also against it."*⁴⁵

Even after the AU Sirte Resolution, of 3 July 2009, which basically sought to derail the arrest of Omar Al Bashir, some African states quickly condemned the Resolution as a betrayal of Africa's commitment to end impunity for human rights atrocities, and an international treaty violation. Botswana publicly came out in opposition of the move, stating:

"As a State Party to the Rome Statute of the ICC, Botswana will fully abide with its treaty obligations and will support the International Criminal Court in its endeavours to implement the provisions of the Rome Statute. "

⁴⁴ Kersten M, "What the ICC Can Do to Improve its Relationship with African States" Justice in Conflict, <https://justiceinconflict.org/2016/11/01/what-the-icc-can-do-to-improve-its-relationship-with-african-states/> (accessed 05/04/2017).

⁴⁵ Keppler E. AU's 'ICC Withdrawal Strategy' Less than Meets the Eye: Opposition to Withdrawal by States, Human Rights Watch, 01 Feb 2017, <https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye> (accessed 05/04/2017).

However there are of course many African states which are still bellicose towards the Court These are the states that are the focus of this research. It is only by critically assessing the nature and validity of their complaints, that one can come up with a response as to what can be done to ameliorate, the relationship between the Court and the African continent.

2.2.1 The allegation of bias

The assertion that the ICC is biased against Africa is not new. They have persisted for nearly a decade now and have only achieved greater prominence in the wake of recent threats by some African states to withdraw from the ICC.⁴⁶

It is a fact that the ICC in the ten different situations, that it is investigating at present, the majority that is nine of them are within the African continent, that is with the exception of Georgia. At same time of the 39 people indicted so far, all the indictees are from Africa.⁴⁷ Several African states and African scholars have taken this as evidence that Africa is being unfairly targeted by the ICC.

Indeed, the rhetoric in this regard has been strong and in some cases even vitriolic against the Court. In In 2008, Rwanda President Paul Kagame described the ICC as a:

“fraudulent institution.....that is “made for Africans and poor countries”⁴⁸

In the same vein Kenyan President Uhuru Kenyatta lamented that the rather than being a beacon of justice it had morphed into a tool to advance westerns interests. He argued:

“The ICC... stopped being the home of justice the day it became the toy of declining imperial powers”⁴⁹

⁴⁶ Kersten M, *What the ICC Can Do to Improve its Relationship with African States* Justice in Conflict, <https://justiceinconflict.org/2016/11/01/what-the-icc-can-do-to-improve-its-relationship-with-african-states/> (accessed 05/04/2017).

⁴⁷ Davidovic J, (note 14 above).

⁴⁸ Lamony, S. A. (2013). *“Rwanda and the ICC: Playing Politics with Justice.”* African Arguments. <http://africanarguments.org/2013/10/21/rwanda-and-the-icc-playing-politics-with-justice-by-stephen-a-lamony> (accessed 05/04/2017).

⁴⁹ *“Could Westgate deal a fatal blow to the ICC?”* BBC News 07/10/13 <http://www.bbc.com/news/world-africa-24562337> (accessed 05/04/2017).

Their rhetoric resonated well with the sentiments of the past African Union Chairperson Jean Ping who was quoted by the BBC as complaining that all those indicted by the ICC so far were African. While purporting to confirm that “the African Union was not against international justice,” he argued that, “it seems that Africa has become a laboratory to test the new international law.”⁵⁰

In his capacity as AU Chair, Ethiopian Prime Minister Hailemariam Desalegn noted in 2013 that:

*"African leaders have come to a consensus that the (ICC) process that has been conducted in Africa has a flaw... The intention was to avoid any kind of impunity... but now the process has degenerated to some kind of racial hunt."*⁵¹

Indeed, on the surface it seems that the argument has some merit. After all it is undeniable that while the ICC has been fixated on the African continent, there are many situations in the world that warrant its attention.⁵² As Niang argues, egregious crimes against humanity have been or are being committed in Colombia, Yemen, Chechnya, Syria, and Iraq, to name a few, most of which involve dominant powers such as the United States, Russia, and France, yet the ICC has not even taken the preliminary step of opening investigations.⁵³

This view finds support with, Mamdani who after reiterating that the Court has ignored some *prima facie* crimes against humanity in warzones all over the world instead choosing to have an unhealthy fixation with Africa concludes:

*"Its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity."*⁵⁴

⁵⁰ Vow to pursue Sudan over 'crimes', BBC News, 27/09/08, available at <http://news.bbc.co.uk/2/hi/africa/7639046.stm> (accessed 05/04/2017).

⁵¹ 'International Criminal Court is "hunting" Africans', Telegraph 27/05/2013.

⁵² 'Perspectives: Political Analysis and Commentary from Africa,' p. 21, http://www.boell.de/downloads/2012-08-Perspectives_Africa_1_12.p (accessed 05/04/2017).

⁵³ "Analysis: Moral Equivalence in International Relations," Niang A, Daily Maverick 20 October 2016.

⁵⁴ Mamdani M. "Saviors and Survivors: Darfur, Politics and the War on Terror" *Int J Transit Justice* (2009) 3 (3).

However, other scholars argue that there is absolutely no evidence of bias towards Africa by the ICC.

in five of the eight countries where the Court is prosecuting alleged criminals, namely in Uganda, Mali, Ivory Coast, the Central African Republic, and the DRC, the states themselves asked the Court to intervene. In the other two the Security Council acting under its mandate in the United Nations Charter referred the situations to the ICC. It was only in Kenya that the ICC acted of its own volition.⁵⁵

If indeed the Court was biased against Africa then it should have not have been investigating African situations at the behest and invitation of African states themselves through the system of self-referrals but rather of its own volition as the Prosecutor is empowered to under Article 15 of the Rome Statute.⁵⁶ This is even more interesting, given that the system of self-referral came as a surprise to the Court. When the Rome Statute was enacted, the idea behind state referrals as a trigger mechanism was that states would refer *each other* and not *themselves* to the Court.⁵⁷ Instead the Court found itself deluged with and having to accept invitations from the African member-states to investigate conflicts taking place on their territories.

In the same vein, the current Prosecutor of the Court Gambia's Fatou Bensouda, makes the observation that, the fact that African states themselves referred the majority of the African situations under investigation to the Court on their own volition should put to paid that the ICC is targeting the continent unfairly. As states are under little material pressure to join the ICC, and are under even less pressure to refer a case to the Court, self-referrals, she argues that the high rate of referrals by African states to the Court not only gives legitimacy to the Court but is triumph for international criminal law. She concludes in that regard:

⁵⁵ Madami (note 54 above).

⁵⁶ David Scheffer, 'How to Move Beyond South Africa's Notice of Withdrawal from the ICC', Just Security, 24/10/2016 available at <https://www.justsecurity.org/33778/move-south-africas-notice-withdrawal-icc/>. (accessed 05/04/2017).

⁵⁷ Schabas, William A. "Victor's Justice: Selecting "Situations" at the International Criminal Court," *The John Marshall Law Review*, (2010), Vol.43, Iss.3, pp.145.

*"the high rate of referrals in Africa could just as easily show that leaders on the continent were taking their responsibilities to international justice seriously."*⁵⁸

It is also submitted that, while the argument that the ICC is exclusively focusing on African might have carried some weight a few years ago, the situation on the ground is no longer the same as it was. As of 2017, the Court is currently analysing at least five situations outside Africa all of which are awaiting determination by the prosecutor as to whether or not to open formal investigations.⁵⁹

The court's alleged bias, Alex Whiting complains, is simply a malicious charge with no foundational basis. He argues that the Court itself has a considerable number of African staff from the judges to the current prosecutor himself. He points to the fact that five of the 21 judges, including the court's vice president, are Africans. In his view it would just be impossible for a Court staffed by so many African citizens to go on an anti-African agenda. He points further points out that:

*"The notion that the ICC Prosecutor targets Africa out of some kind of bias against the continent is both ludicrous and pernicious. The current Prosecutor is African (and was the Deputy Prosecutor under the first Prosecutor) and many of the prosecutors and judges at the Court are African. ... There is simply no agenda at the Court to single out Africa. Full stop."*⁶⁰

Of course, the critical question of why the ICC does not go after the bigger, more powerful Western nations will always remain at the core of the argument of those who allege bias by the Court. However, there is an important counter argument that cannot be ignored: that of complementarity.

As Abdul Tejan-Cole quite correctly points out the ICC is founded on the principle of complementarity. It can only exercise its jurisdiction where the domestic institutions of

⁵⁸ "Is Africa on trial?" BBC News 27/03/2012 <http://www.bbc.com/news/world-africa-17513065>.

⁵⁹ See Office of the Prosecutor, 'Report on Preliminary Examination Activities 2014', 2 December 2014 <http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>.

⁶⁰ Alex Whiting, 'South Africa's ICC Withdrawal: Why? And What Now?', Just Security, 22 October 2016, available at <http://www.justsecurity.org/33765/south-africas-icc-withdrawal-why-now/>. (accessed 05/04/2017).

the State Part are unable or unwilling to prosecute.⁶¹ In other words, the Court must defer to genuine national prosecutorial efforts.

Many African countries are be unable to prosecute even if they want to because usually wars would have destroyed their judicial systems to such an extent that they have no capacity to carry to prosecute the crimes in the Rome Statute. At other rimes it is simply because their legislatures have failed to domesticate the relevant laws.

Kenya is a prime example. Subsequent to ICC investigations Kenyan government reacted to the violence that followed 2007-2008 elections by appointing an inquiry, the Waki Commission. However, those efforts to prosecute those responsible for election violence through a national mechanism stalled in the Kenyan parliament. The Kenyan government repeatedly stalled on its promises to initiate proceedings and breached an agreement to self-refer the case to the ICC. In response, Chief Prosecutor Luis Moreno-Ocampo requested the PTC to open an investigation in November 2009. The judges agreed in March 2010.⁶²

In contrast, in the West, most of the countries have domestic judiciaries that are strong, well developed and independent enough to be able to prosecute abuses when they occur. In western countries there is usually no difficulty putting members of government on trial or members of their armed forces for that matter.

As an example, in the United States, after the Abu Ghraib prisoner abuse scandal, where members of the United States Armed Forces, in 2003 had abused detainees, the state immediately took positive action to investigate and punish the perpetrators. After the scandal leaked the United States Army, initiated an investigation which culminated in the 2004 Taguba Report, the official military inquiry conducted into the Abu Ghraib

⁶¹ “*Is The ICC Putting the African Continent on Trial?*” International Justice Monitor, A project of the Open Society Justice Initiative <https://www.ijmonitor.org/2012/03/is-the-icc-putting-the-african-continent-on-trial/>.

⁶² Lee J. M. Seymour *The ICC and Africa: rhetoric, hypocrisy management and legitimacy* in Eds. Clarke et al; *Africa and the ICC* (2016).

prisoner abuse by United States military forces in Iraq.⁶³ The report found systematic abuse had been committed on the detainees and included

*"sadistic, blatant and wanton criminal abuses" at Abu Ghraib, and listed some of them: "Breaking chemical lights and pouring the phosphoric liquid on detainees ... beating detainees with a broom handle and a chair; threatening male detainees with rape ... sodomising a detainee with a chemical light and perhaps a broomstick, and using military working dogs to frighten and intimidate detainees ... and in one instance actually biting a detainee."*⁶⁴

The Report concluded that,

*"egregious acts and grave breaches of international law" had been committed. The International Committee of the Red Cross (ICRC), argued that it was possible that the abuse qualified as war crimes.*⁶⁵

Eleven US soldiers were court martialled for dereliction of duty, maltreatment, aggravated assault and battery. Between May 2004 and March 2006, these soldiers were convicted, sentenced to military prison, and dishonorably discharged from service.⁶⁶

In the same vein after allegation that some British soldiers may have committed war crimes during the Iraqi War, between 2003 and 2009, British Ministry of Defence commissioned the Iraq Historic Allegations Team (Ihat), Investigation with indications that indictment of the alleged perpetrators if any were found, would begin after 2016, when Ihat completed the Investigation.⁶⁷ Interestingly the British Prime Minister's Office

⁶³ : Executive summary of Article 15-6 investigation of the 800th Military Police Brigade by Maj. Gen. Antonio M. Taguba, available on <http://www.msnbc.msn.com/id/4894001>] (accessed 05/04/17).

⁶⁴ "U.S. Army report on Iraqi prisoner abuse: Executive summary of Article 15-6 investigation of the 800th Military Police Brigade by Maj. Gen. Antonio M. Taguba," NBC News, May 4, 2004.

⁶⁵ "United States, The Taguba Report 2004," How Does The Law Protect In War, The International Committee of the Red Cross. <https://casebook.icrc.org/case-study/united-states-taguba-report>.

⁶⁶ "Iraq Prison Abuse Scandal Fast Facts" CNN News 05/03/2017 <http://edition.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/> (accessed 05/04/17).

⁶⁷ "British soldiers could face prosecution for crimes committed during Iraq conflict, investigators confirm" The Independent 01/01/2016 <http://www.independent.co.uk/news/uk/home-news/british-soldiers-could-face-prosecution-for-crimes-committed-during-iraq-conflict-investigators-a6793271.html> (accessed 05/04/17).

reiterated the principle of complementarity, when it issued a statement regarding the idea that British troops could go on trial for war crimes before the ICC, stating that

“The International Criminal Court (ICC) does not have the right to intervene because the UK already has a process in place to investigate allegations.”⁶⁸

It can be argued therefore, that the ICC is merely responding to Africa’s failure to prosecute its own mass atrocities. The same was reiterated by the current Prosecutor Bensouda who notes that even if a country has accepted the jurisdiction of the ICC, the court doesn’t have to open investigations there if “*credible national investigations or prosecutions*” are already taking place. Bensouda suggests this is not the case in some African contexts, despite the scale of the war crimes at stake.

This is in line with the sentiments of the former Prosecutor Louis Ocampo in 2006, who stated:

“With regard to complementarity, the Office [of the Prosecutor] emphasizes that according to the Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories. In this design, intervention by the Office must be exceptional – it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings. A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice.”⁶⁹

What is more interesting however, is that despite all the arguments that the ICC is biased against Africa no one has argued that the African situations under investigation or the Africans indicted by the ICC, should not be before the Court. As Abdul Tejan-Cole writes:

⁶⁸ “Downing Street slams idea British troops could be tried for Iraq war crimes at the Hague – after it emerged Tony Blair definitely WON’T face charges” The Mail Online 03/07/2016, available at <http://www.dailymail.co.uk/news/article-3672834/Army-s-fury-Iraq-stitch-Chilcot-report-used-prosecute-British-troops-war-crimes-Blair-WON-T-face-charges.html#ixzz4dIIlSuwge> (accessed 05/04/17).

⁶⁹ ICC: *Report on Prosecutorial Strategy*. Office of the Prosecutor, International Criminal Court 14 September 2006.

*“while it is true that the ICC can be lambasted for inconsistent case selection, there is not a single case before the Court that one could dismiss as being frivolous or vexatious.”*⁷⁰

Clearly, the argument that the ICC is biased against is a divisive subject with both sides being able to sustain their arguments. Unfortunately, if the ICC is indeed biased against Africa or is perceived as such by African the repercussions would be horrendous.⁷¹ African has no regional system or court to try crimes against humanity. The Malabo Protocol establishing the African Court of Justice, which will have criminal jurisdiction, despite having been adopted by the AU in 2014, is still yet to come into force because of the lackluster attitude of African states that has deprived it of the requisite 15 ratifications to enable it to come into force.⁷² This number is a measly number when weighed against the 53 member states of the AU, yet still in three years it has still not been achieved.

Thus the horrendous and undesirable alternative if Africa pulls out of the ICC, seems to be no prosecution at all.⁷³ As the ICC Chief prosecutor Fatou Bensouda, rightly explains:

*“The greatest affront to victims of these brutal and unimaginable crimes ... women and young girls raped, families brutalised, robbed of everything, entire communities terrorised and shattered ... is to see those powerful individuals responsible for their sufferings trying to portray themselves as the victims of a pro-western, anti-African court.”*⁷⁴

⁷⁰ “Is Africa on trial?” BBC News 27/03/2012 <http://www.bbc.com/news/world-africa-17513065> (accessed 05/04/17).

⁷¹ Du Plessis (note 15 above).

⁷² Amnesty International, Malabo Protocol: Legal And Institutional Implications Of The Merged And Expanded African Court, 22 January 2016, AFR 01/3063/2016, available at: <http://www.refworld.org/docid/56a9ddcf4.html> (accessed 19/05/2017).

⁷³ Roth K., (note 26 above).

⁷⁴ “Changing the equation: prosecution as prevention of war rape” The Guardian 07/06/13 <https://www.theguardian.com/global-development-professionals-network/2013/jun/07/prosecution-prevent-war-rape> (accessed 05/04/17).

2.2.2 The allegation that the ICC is detrimental to peace on the African Continent

The second main criticism that African states have against the ICC is that aside from allegation of bias against Africa, the ICC's focus on Africa is destabilizing the efforts of the continent to cure the cycle of armed conflict and violence.⁷⁵

Until the coming into force of the Rome Statute in 2002, international criminal justice usually stepped in after the fact, that is it usually came in in the form an *ad-hoc* tribunal at the end of conflict. However, the Rome Statute introduced a paradigm shift where the prosecution of a perpetrator can be initiated in the middle of an armed conflict. The warrants against the Joseph Kony, in Uganda and the indictment Al Bashir, for crimes committed in the course of the ongoing conflict in Darfur are a tribute to this evolution of international criminal justice.

Unfortunately, this apparently positive step has not been met with anything, but criticism by African states. This complaint is often brought to the fore in terms of the Sudan situation – and put simply, avers that the ICC's work on the continent is undermining peace efforts.⁷⁶ After the issue of an indictment by the Court in 2008 the African Union Peace and Security Council, requested a one-year deferral by the UN Security Council in terms of Article 16 of the Rome Statute. The AU argued that the indictment jeopardized ongoing peace efforts. The request was simply ignored. The ICC Pre Trial Chamber instead issued an arrest warrant for Bashir in March 2009. The AU's Peace and Security Council again called upon the UN Security Council to defer the case. In July 2009 after the second request had been ignored the AU Assembly expressed its deep regrets that its prior request for a deferral had “neither been heard nor acted upon.” It also decided that “AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan”.⁷⁷ At the July 2010 summit, chairperson of the AU Commission, Jean Ping, argued:

⁷⁵ Du Plessis M (note 15 above).

⁷⁶ Du Plessis M(note 15 above)

⁷⁷ See African Union, 'Decisions and Declarations,' Assembly/AU/13(XIII), 3 July 2009.

“We have to find a way for these entities [the protagonists in Sudan] to work together and not go back to war ... This is what we are doing but Ocampo doesn’t care. He just wants to catch Bashir. Let him go and catch him ... We are not against the ICC ... But we need to examine their manner of operating. There are double standards. There seems to be some bullying against Africa.”

This complaint was not only limited to the Sudan crisis. Earlier in 2006, President Museveni, of Uganda in light of the Juba peace talks between the government and the LRA and fearful that arrest warrants would get in the way, urged the ICC to drop charges against the LRA.⁷⁸ The request was ignored.⁷⁹ The LRA as expected pulled out of the talks and made it clear they would not be back until the warrants were withdrawn.⁸⁰

The same happened in the Libyan War. After the UN Security Council authorized a “no fly zone” over Libya on order to halt the government’s imminent attack on Benghazi, the Prosecutor immediately issued an arrest warrant against Muammar Qaddafi. It could not have been more ill-timed, as at that moment under the mandate of the AU President Zuma of South Africa was attempting to negotiate an end to the war. The AU complained about the warrant viewing it as one situation where criminal justice might intensify the conflict.⁸¹

It seems very much clear that the AU would rather see peace and justice, if any, later. To the AU, international prosecutions may also have the effect of obliterating the local incentives to negotiate, in consequence prolonging the conflict.⁸² Indeed Paisley elegantly summarizes this position. He argues that:

“[t]he wheels of justice must be allowed to turn at their own pace, but that they must not impede the peace process..... The experiences of Northern Ireland and South Africa

⁷⁸ Nouwen S and Werner W ‘Doing justice to the political: The international criminal court in Uganda and Sudan’, *European Journal of International Law*, 21(4) (2012), 941-965.

⁷⁹ Miša Zgonec-Rožej, *Palestine’s ICC Accession: Risks and Rewards*, (2015).

⁸⁰ Steven Groves and Brett Schaefer “*The U.S. Should Not Join the International Criminal Court*, (2009).

⁸¹ Priscilla Hayner, *Libya: The ICC Enters During War*, (2013) European Council On Foreign Relations: *International Justice and The Prevention Of Atrocities Project* (2013).

⁸² N. Grono, A. O’Brien (2008) *Justice in Conflict? The ICC and Peace Processes, in Courting Conflict?* (2008).

*show us that there is nothing more important than peace. If this means the International Criminal Court does not always intervene or deliver justice, it may be a price that is worth paying.*⁸³

This position finds favour with Manas who argues that at times justice must be sacrificed at the altar of peace in order to cut short a war and save lives. He points out that.

*“the pursuit of justice entails the prolongation of hostilities, whereas the pursuit of peace requires resigning oneself to some injustices”*⁸⁴

Commenting on the refusal by the ICC to defer the issuance of arrest warrants against the leader of the LRA in Uganda, Mamdani argued that the presence of the arrest warrants of the ICC imperiled the peace process as the government could no longer even place on the table the option of an amnesty. .⁸⁵ He argued that:

“By seeking to bring the rebels to justice, the ICC is contributing to the continuation of the northern [Uganda] war, rather than its resolution.”

What is beyond a doubt is that the Africa Union, faced with ever increasing conflicts across the continent and having limited resources to deploy peace keeping forces to all the conflicts, it sees the possibility of prosecution as posing a dangerous obstacle to its work of peace mediation work. Its greatest fear is apparently that merely raising the specter of justice will bring an end to an already fragile peace processes. Facing pressure to resolve an armed conflict, the AU often feels pressed to push justice to one side.⁸⁶

It cannot be denied that the argument of the African Union has merit. However, it must also be considered that the debate of peace versus just is not a straightforward dichotomy that can be cast in black and white. The two are not mutually exclusive.

⁸³ Ian Paisley “Peace Must Not Be the Victim of International Justice” *The New York Times*, 16/03/2012 http://www.nytimes.com/2012/03/17/opinion/peace-must-not-be-the-victim-of-international-justice.html?_r=2 (accessed 05/04/17).

⁸⁴ J.E. Manas (note 29 above).

⁸⁵ ‘Mamdani urges reconciliation’, *New Vision*, 5 December 2005.

⁸⁶ “International Criminal Court: Peace and Justice” Human Rights Watch 17/12/09.

It would be wrong to view the issue as simply as being cut and dried that where justice is sacrificed for peace, such peace will be achieved. It is a delicate balance, with a danger that peace deals sacrificing justice may eventually fail to produce peace as victims may retaliate against perpetrators leading to more instability and at the same time may encourage a culture of impunity.

To place this complex relationship into complex in the Sudan case, issuing the arrest warrant for Bashir was certainly justified. His government has indisputably supported the Janjaweed militias that have perpetrated crimes against humanity. He therefore must be held accountable ultimately.⁸⁷ However, premature efforts to bring Bashir to justice may be counterproductive. Indeed the decision to refer the case to the ICC and the subsequent decision to issue an arrest warrant for the sitting Sudanese head of state have aggravated an already fragile situation in Darfur put more innocent people at risk.. As Groves and Schaefer, aptly put it:

*“Bashir may ultimately decide he has nothing to lose and increase his support of the Janjaweed, encouraging them to escalate their attacks, even against aid workers and U.N. and AU peacekeepers serving in the African Union/UN Hybrid operation in Darfur (UNAMID). It could also undermine the 2005 peace agreement meant to reconcile the 20-year north-south civil war, which left more than 2 million dead...”*⁸⁸

Arguably then, the priority in Sudan is to reduce, stop the atrocities, restore peace and maintain it. Only once have these goals been achieved can justice be pursued by the Sudanese themselves through their courts, or if that is not possible through special chambers or even the Court itself.⁸⁹

However, and even more complex, while the threat of prosecution might prolong wars as the perpetrators would not want to be caught, it can also have an opposite effect. The threat of prosecution can end impunity as such perpetrators may fear the wrath of

⁸⁷ "Sudanese President Expels Aid Agencies," The Guardian, 05/03/2009.

⁸⁸ Groves and Schaefer (note 80 above).

⁸⁹ Groves and Schaefer (note 80 above).

international justice if caught. As Zainab Bangura, UN Special Representative on Sexual Violence in Conflict, argues:

*"Prosecution is prevention, and it has been shown that when you end impunity for a crime the instances of that crime go down."*⁸⁰

In this regard one may speak of the stabilizing effects of the mere threat of the prosecution.⁹¹

Peace and justice are inextricably connected. One cannot be completely achieved at the cost of the latter and *vice versa*. Both values reinforce and complement each other. The need of peace can and should be accommodated with demands of justice. However, if handled improperly, the two may clash.

It must be made clear that the facilitation of peace should amount to an acceptance of impunity.⁹² Peace cannot exclude justice. After all, punishing the individual perpetrators and rehabilitating the individual victims, eliminates the strife for vengeance against perpetrators by society and thus contributes to peace rather than derail it.⁹³

African states and the Court must tread carefully and strike an adequate and sustainable balance. In short they need to find a middle path on this issue before both fail in their goals. The ICC may not achieve the justice it wants, while the states may also not achieve the peace they wish for.

⁹⁰ "Changing the equation: prosecution as prevention of war rape" The Guardian 07/06/13 <https://www.theguardian.com/global-development-professionals-network/2013/jun/07/prosecution-prevent-war-rape> (accessed 05/04/17).

⁹¹ Changing the equation: prosecution as prevention of war rape" The Guardian 07/06/13 <https://www.theguardian.com/global-development-professionals-network/2013/jun/07/prosecution-prevent-war-rape> (accessed 05/04/17).

⁹² Krzan B. "International Criminal Court Facing the Peace vs. Justice Dilemma", (2017) *International Comparative Jurisprudence* Mykolas Romeris University.

⁹³ D. Nitsche *Der Internationale Gerichtshof ICC und der Frieden*. Eine vergleichende Analyse der Befriedungsfunktion internationaler Straftribunale (2007) pp303.

2.3 CONCLUSION

The African-led campaign against the ICC has imposed real costs and dented its legitimacy. If the situation is not addressed it could mark a huge step backwards for international accountability. African states have grievances against the Court, whether real or imagined they do exist.

However, it is submitted that the above discussed grievances seem to be unique to Africa. Of course that may conversely be because the ICC has largely focused on Africa. In fact as far as can be told it has not been seen in action that is issue an indictment or prosecute a non-African.

Yet that is not to say that other non-Africa countries do not have grievances against the Court. However, their grievances rather than focus on the activities of the ICC, they focus on the legal regimen of the Rome statute, For example, the United States argues that the statute opens the Court for political manipulation while, China, has refused to ratify the Rome Statute out of concern that it unduly interferes with what are essentially domestic affairs, which in turn impugns sovereignty of a State to govern its citizens.⁹⁴ African also adds its weight to the complaints against the Rome Statute arguing that it violates international customary law.

Clearly therefore rather than being just an issue of bias and detriment to the peace the real issue may lie with the Rome statute which is easy to manipulate as such Chapter 3 will address discuss the legal regimen of the Rome Statute.

⁹⁴ Steven Groves and Brett Schaefer (2009) The U.S. Should Not Join the International Criminal Court, The Heritage Foundation.

CHAPTER 3

THE ROME STATUTE REGIME AND MANIPULATION

3.1 INTRODUCTION

The previous Chapter has illustrated the fundamental reasons put forward as the basis for the breakdown of the relationship between Africa and the ICC. Most of the canvassed reasons are outside the actual provisions of the treaty establishing the ICC, and can be labelled political. It cannot however be possible that all this criticism against the Court can merely be because of its activities and its mere political existence. It is possible that the real problem may lie with the document that created and governs the activities of the Court, in particular the ICC treaty's actual provisions. It is therefore worth examining whether or not the problem exists in the tiny details constituting the treaty's legal provisions, and the extent of the perceived problems and flaws, and their implications to Africa's relationship with the ICC regime.

3.2 The Rome Statute Framework

It is notable that while the Rome Statute has been ratified by many countries, it has also not been signed by many on the basis of perceived inherent flaws. Indeed, after the Rome Conference, the United States publicly stated:

*"In Rome, we indicated our willingness to be flexible.... Unfortunately, a small group of countries, meeting behind closed doors in the final days of the Rome conference, produced a seriously flawed take-it-or-leave-it text, one that provides a recipe for politicization of the court and risks deterring responsible international action to promote peace and security"*⁹⁵

This Chapter examines the Rome Statute to see if there are inherent flaws in its legal regime that have led to a negative perception against the Court, especially from African states. However, in doing so, it will also seek to extrapolate whether these complaints

⁹⁵"America's Stake in Peace, Security, and Justice," U.S. Department of State, August 31, 1998, at http://www.state.gov/policy/remarks/1998/980831_scheffer_icc.html (accessed 30/08/2017).

against the Statute are unique to Africa. It will therefore integrate the criticisms of the Statute by African states and those by other states worldwide.

It would be impossible to go through the Rome Statute clause by clause to make an analysis of the possible flaws of each provision. Indeed, most of the complaints against the treaty regime do not attack the whole treaty. To that extent, this Chapter will therefore critically focus on the most topical complaints and by extension that have led to a negative perception of the Court by African States about the legal regimen on the Rome statute.

3.3 The Rome Statute and the principle of state sovereignty

One of the major concerns that have arisen from the Rome Statute is that it infringes on the bedrock principle of international law, that of state sovereignty. The very foundation of international public law is that treaties cannot be imposed on states without their consent and each sovereign state has the right to decline that the terms of a treaty be applicable to them. This customary law rule is enshrined in Article 34 of the Vienna Convention on the Law of Treaties which provides:

"A treaty does not create either obligations or rights for a third State without its consent."

However, Article 12 of the Rome Statute, provides that the Court, in addition to jurisdiction based on Security Council action under Chapter VII of the UN Charter and jurisdiction based on consent, the ICC will have jurisdiction to prosecute the nationals of non state parties if they commit a proscribed crime in the territory of a member state.⁹⁶

Africa, despite being the largest bloc in ratifying the treaty, has largely been clear and consistent in its opposition to this power of the Court. In 2008, the African Union Assembly stated:

"[t]he abuse of the Principle of Universal Jurisdiction is a development that could endanger international law, order and security," and any attempt to exercise universal

⁹⁶ Morris M, "The Jurisdiction of the International Criminal Court Over Nationals of Non-Party States", (2000) 6 *ILSA Journal of International & Comparative Law* 363-369.

jurisdiction against African leaders “is a clear violation of the sovereignty and territorial integrity of these states.”⁹⁷

This position had earlier been reiterated by the United States which stated that while foreign domestic courts could try its citizens for crimes committed in their territory, it did not recognize the power of an international tribunal to do when it was not party to the treaty establishing the same. Marc Grossman, the Under Secretary for Political Affairs, made this clear in 2002:

“While sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory, the United States has never recognized the right of an international organization to do so absent consent or a U.N. Security Council mandate.”⁹⁸

The argument is clearly that the Rome Statute violates international law as it allows the Court to prosecute citizens of non-state parties.⁹⁹ The United States and Africa are not alone in this regard.¹⁰⁰ China and India have also publicly voiced their concern over this part of the Rome Statute.¹⁰¹

3.3.1 Analysis

It is submitted that, the best way to understand this disparate position, would be to view it through the lens of two norms: the “old” norm of absolute state sovereignty versus the “new” norms of human rights.¹⁰² Does state sovereignty and the prerogatives of power continue to outweigh the human rights imperative? To put it another way, should a non-citizen who has committed crimes against humanity in state party’s territory, escape

⁹⁷ *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, 1 July 2008, A.U. Assembly, 11th Ord. Sess., A.U. Doc. Assembly/AU/14(XI).

⁹⁸ “*American Foreign Policy and the International Criminal Court*” Remarks to the Center for Strategic and International Studies Washington, DC 2002 <https://2001-2009.state.gov/p/us/rm/9949.htm>(accessed 30/08/2017).

⁹⁹ Groves S. and Schaefer B. (2009) “The U.S. Should Not Join the International Criminal Court”, (2009) *The Heritage Foundation Executive Summary Backgrounder No. 2307*.

¹⁰⁰ Groves and Schaefer (note 99 above).

¹⁰¹ Ralph J, *Defending The Society Of States: Why America Opposes The International Criminal Court And Its Vision Of World Society*, (2007).

¹⁰² Mills K “Bashir is Dividing Us”: Africa and the International Criminal Court,” (2012) *Human Rights Quarterly* 34 (2) 2012.

international justice because his home state is not a party to the Rome Statute. Especially in a situation where the aggrieved state is willing to hand him over to the ICC or unable to prosecute on its own?

However, it can also be argued on the counter that it would be too simplistic to accept that the Rome Statute imposes obligations on non-state parties. Orentlicher quite rightly argues that, the Rome Statute applies only to individuals, not to States.¹⁰³ Article 1 of the Rome Statute clearly sets forth that the ICC “shall have the power to exercise jurisdiction over persons for the most serious crimes of international concern.” Indeed, as famously stated by the Nuremberg International Military Tribunal:

*“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”*¹⁰⁴

However, this argument can on the other hand be countered with an opposing view that a state signs a treaty on behalf of its citizens, through the Head of State. Thus if a state has not consented to the jurisdiction of the ICC, its citizens should also not be subject to it wherever they are.

In any event, the Court only comes in as a Court of last resort, where the aggrieved state has refused to exercise jurisdiction or unable due to the collapse of its legal system.¹⁰⁵ It is therefore submitted that the complementarity principle contained in the Rome Statute is designed to encourage national legal systems to exercise jurisdiction and thus promotes sovereignty, as opposed to promoting the ICC to assert jurisdiction. Thus it can be said that the complementarity principle constitutes the most significant

¹⁰³ Orentlicher D.F, “Politics by Other Means: The Law of the International Criminal Court, 1999, 32 *CORNELL INT’L L. J.* 489, 491 (1999) (noting that “the ICC was established to enforce a body of law whose very essence is its direct application to individuals--not States”).

¹⁰⁴ Kzarn B, “International Criminal Court Facing the Peace vs. Justice Dilemma” (2016) *International Comparative Jurisprudence Volume 2, Issue 2*, December 2016.

¹⁰⁵ Nantulya P. (2017) *What’s Next for Africa and the International Criminal Court?* African Centre for Strategic Studies <http://africacenter.org/spotlight/whats-next-africa-international-criminal-court-icc/> (accessed 30/08/2017).

compromise to sovereignty and practically stays the exercise of jurisdiction if the case is being addressed within the domestic jurisdiction.¹⁰⁶

More importantly however, it is only in rare circumstances that the ICC can even initiate proceedings against any person *mero motu*. In fact, it is quite difficult for the Prosecutor to *mero motu* bring a matter before the Court. In the Rome Statute there are three ways for matter to end up before the Court, that is, referral by the United Nations Security Council; referral by the State Party¹⁰⁷ and the initiation of proceedings *mero motu* by the Prosecutor.¹⁰⁸ In the first two instances the Prosecutor has no discretion at all, with regards to bringing a matter before the Court.

In the final method, the Prosecutor may initiate *mero motu* proceedings *under* Article 15 of the Rome Statute. Even then the proceedings are not a foregone conclusion as they are subject to review by the Court, through the Pre Trial Chamber.¹⁰⁹ In terms of Article 15 the Prosecutor must first satisfy the Chamber that the case is admissible by virtue of no domestic proceedings being *lis pendens* against the individual alleged to have committed the crime, on the same facts or that the State is, or has been, unwilling or unable to carry out investigations and/or prosecutions.¹¹⁰ In this way it can be said that state sovereignty is a priority and is protected in all instances where the ICC acts.

It can therefore be argued that the attack that the Rome Statute violates the principle of state sovereignty may appear logical and solid on the surface, but it cracks under deeper scrutiny. Ultimately what is certain is that the Rome Statute tries to balance the two competing interests of national sovereignty against its mission of ending impunity. The Rome Statute was a compromise document and the Court has to read a very perilous and narrow path, navigating between politics and justice.

¹⁰⁶ W Schabas, *An introduction to the International Criminal Court* (2011) p11.

¹⁰⁷ Article 13(a)-(b) of the Rome Statute.

¹⁰⁸ Schabas W, 'Prosecutorial discretion versus judicial activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice*.

¹⁰⁹ Danner, A M, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", *American Journal of International Law*, Vol. 97, Issue 3 (July 2003), pp. 510-552.

¹¹⁰ Ventura M. (2015) "*Propriomotu investigation by the ICC Prosecutor*" The Peace and Justice Initiative <http://www.peaceandjusticeinitiative.org/implementation-resources/proprio-motu-investigation-by-the-icc-prosecutor> (accessed 02/09/2017).

3.4 The Rome Statute Referral System and International Politics

When Burundi's parliament voted to quit the court, one lawmaker called the Court:

*"a political tool used by [Western] powers to remove whoever they want from power in the African continent."*¹¹¹

In the same vein Kenyan President Uhuru Kenyatta lamented that the rather than being a beacon of justice it had morphed into a tool to advance westerns interests. He argued:

*"The ICC... stopped being the home of justice the day it became the toy of declining imperial powers."*¹¹²

In the 2017, session of the AU Assembly , Uganda's Foreign Affairs Minister, criticized the Court describing it as:

"ICC is currently discriminatory in the way they administer their justice and have become a political tool and inefficient."

This accusation has gained traction with many African states that are in favour of a mass "Afrexit" from the Court. The argument is usually contextualized around the relationship between the Court and the United Nations Security Council.

Under Article 13 of the Rome Statute, the Security Council can, acting under the Charter of the United Nations refer a situation to the Prosecutor. Disturbingly however, of the five permanent members of the Security Council, only France and the United Kingdom are part of the Rome Statute. Therefore the fact that three of the five members are not themselves parties to the Court, yet exercise such power to refer other non-parties for possible prosecutions damaging to the credibility of the Court.¹¹³ Certainly it may be argued it simply is neither logical nor just, that these permanent members can subject other state to that which they themselves refuse to be subject to.

¹¹¹*"The Politics of Departure: Africa and the International Criminal Court*, IPI Global Observatory, <https://theglobalobservatory.org/2016/11/international-criminal-court-south-africa-burundi-gambia/> (accessed 23/01/2017).

¹¹² "Could Westgate deal a fatal blow to the ICC?" BBC News 07/10/13 <http://www.bbc.com/news/world-africa-24562337> (accessed 02/09/2017).

¹¹³ Moss L. "The UN Security Council and the International Criminal Court Towards a More Principled Relationship" (2012), *Friedrich Ebert Stiftung*.

Thus, many question whether, through Security Council referrals, the ICC becomes a policy tool to advance the political interests of those states represented on the Security Council.¹¹⁴

The Council has twice made use of its powers to refer situations in non-party States to the ICC: in Sudan (Darfur) in 2005, and in Libya in 2011, bringing the debate to the fore again. The African Union argued that it was trying to negotiate peace in both regions; however, the Security Council ignored that and proceeded to refer the situations to the ICC thus derailing negotiations. The sum of the argument by the African Union is that the ICC was used as a tool to go after African leaders who were not desirable to the West¹¹⁵. From that perspective it would seem clear that perception that the ICC is a tool of the West is firmly grounded on a belief that the ICC is not independent of the UN Security Council which is a club of powerful Western nations.¹¹⁶

3.4.1 Analysis

It is submitted that to view the Court as being controlled by the Security Council or subject in some way to its control is simply wrong. As a starting point an earlier draft of the Rome Statute, produced in 1994 by the International Law Commission (ILC) and presented to the UN General Assembly was rejected since allowed the UNSC to veto any investigation in any situation by the Court if it felt it necessary.¹¹⁷

The present form of the Rome Statute however does not make approval by the UNSC a condition precedent for commencing investigation or prosecution. However as a compromise, the UNSC retains deferral power.

Secondly, while it is true that the prosecutorial power of the Prosecutor is subject to control, the source of such control is not political. Rather it is through the Pre-Trial

¹¹⁴ *The UN Security Council and the International Criminal Court, International Law Meeting Summary, with Parliamentarians for Global Action*: 16 March 2012.

¹¹⁵ Du Plessis M, (note 15 above).

¹¹⁶ De Waal (2012) *The African Union and the Libya Conflict of 2011*, The World Peace Foundation <https://sites.tufts.edu/reinventingpeace/2012/12/19/the-african-union-and-the-libya-conflict-of-2011/> (accessed 17/08/2017).

¹¹⁷ Schabas, W. A. 'United States Hostility to The International Criminal Court: It's All About The Security Council' (2004). *European Journal of International Law* 15.4 (2004): 701-720.

Chamber, which literally vets the admissibility of the cases.¹¹⁸ In that context therefore Schabas argues that the Court is independent of the Security Council and the Council has very little leeway to affect the operations of the Court.¹¹⁹

As Cherif Bassiouni, commented, at the conclusion of the Rome Conference:

*“the ICC reminds governments that realpolitik, which sacrifices justice at the altar of political settlements, is no longer accepted”*¹²⁰

Of course it must be admitted that the very process of referral of a situation by the Security Council can be used by the Security Council for political ends; that is refer a situation with a goal of having a particular or unfavourable political target prosecuted. The Court thus can be manipulated for a political end. However, as much as that may happen, it must be understood that this is an issue of the intrinsic political dimension of the Court when it is in operation rather than an external political influence on the Court. Even if a matter is referred to the Court via a political backdoor, the ultimate decision to prosecute and convict still lies with the Court.¹²¹

To therefore suggest that the Court is a lackey of the Security Council is an exaggeration. In fact, the Court by virtue of not being under the United Nations Treaty System, exercises a considerable amount of independence. Its substantive law is derived from the Rome Statute rather than politics, thus granting it legitimate jurisdiction, escaping political bias.¹²²

In fact, rather than view the relationship between the Security Council and the ICC as a source of ongoing concern and consternation, the Court must be regarded as a very valuable instrument at the disposal of the Council in its responsibilities to maintain international peace and security. It streamlines the process of ending impunity by dispensing with the need to set up *ad new ad hoc* tribunals in each and every situation

¹¹⁸ Schabas, (note 117 above).

¹¹⁹ Schabas, (note 117 above).

¹²⁰ Gaynor, F., and L. K. Morris. ‘M. Cherif Bassiouni, The Legislative History Of The International Criminal Court’. *Journal of International Criminal Justice* 6.4 (2008): 815-819. Web.

¹²¹ “To what Extent Have Politics Restricted the ICC’s Effectiveness?” E-International Relations Students. http://www.e-ir.info/2015/12/20/to-what-extent-have-politics-restricted-the-iccs-effectiveness/#_ftn1 (accessed 17/08/2017).

¹²² (note 121 above).

where grave crimes were taking place outside the Rome Statute system and domestic Courts were not dealing with the same.¹²³

Consequently, in view of this, there is little basis on the criticism by African states that the ICC referral system makes them targets of powerful nations, who cannot be prosecuted themselves as they can use the veto power to block any referral to the ICC of crimes occurring within their territory or committed by their citizens. More than anything the ICC places at the disposal of the Security Council a quick and efficient method to deal with impunity.

3.5 The Rome Statute and the Immunity of Heads of State

One of the most contentious issues that has arisen between African states and the ICC is the question of head of state immunity. The Court has been accused by African States of violating international law which guarantees immunity *ratione personae*, by indicting and issuing arrest warrants against seating African Heads of States. Indeed, while this argument had simmered with the indictment of Uhuru Kenyatta, the President of Kenya for political violence crimes, matters came to a head with the indictment of Sudan's President Omar al Bashir, for several counts of war crimes and crimes against humanity.¹²⁴

African states have argued that the problem lies with the Rome Statute itself. Particularly they cite Article 27 of the Rome statute which states that the statute shall apply universally on all person regardless of official or political capacity. After all it is well settled that concept of State and diplomatic immunity flows from customary international law as codified in Article 31 of the 1961 Vienna Convention on Diplomatic Relations.¹²⁵

¹²³ "The International Criminal Court and the United Nations Security Council: Perceptions and Politics" The Huffington Post 01/01/2017 http://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council_b_3334006.html(accessed 17/08/2017).

¹²⁴ International Criminal Court (4 March 2009). "[Warrant of Arrest for Omar Hassan Ahmad Al Bashir](http://www2.icc-cpi.int/iccdocs/doc/doc639078.pdf)" www2.icc-cpi.int/iccdocs/doc/doc639078.pdf(accessed 17/08/2017).

¹²⁵ "Report of the International Law Commission on the work of its thirty-second session," UN GAOR, 35th Sess, Supp. No. 10, UN Doc. A/35/10 (1980) at 344.

Indeed, the South African government in objecting to arresting al Bashir in 2016, pursuant to the ICC arrest warrant made clear its position:

*“We wish to give effect to the rule of customary international law, which recognises the diplomatic immunity of heads of state and others in order to effectively promote dialogue and the peaceful resolution of conflicts wherever they may occur, particularly on the African continent”*¹²⁶

These sentiments are in tandem with the view of many African states with regards to indictment and or arrest of sitting heads of state by the Court. Indeed, Jakobsen in this regard argues that Article 27 stepped beyond the boundaries of international customary by making sitting Heads of States violable.¹²⁷

3.5.1 Analysis

The arguments against immunity of heads of state seem to outweigh those for immunity of these senior officials from international criminal justice. It can be argued that, the crimes proscribed in the Rome Statute can hardly be considered as legitimate performance of official duties. Therefore it would be reckless to invoke personal immunity for such heinous acts.”¹²⁸

Indeed, the International Law Commission had previously found that this position was untenable. It argued in the 1996 Draft Code of Crimes against the Peace and Security of Mankind that

“It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some

¹²⁶ “Briefing to the media by Minister Michael Masutha on the matter of International Criminal Court and Sudanese President Omar Al Bashir,” The South African Department of Justice and Constitutional Development http://www.justice.gov.za/m_statements/2016/20161021-ICC.html (accessed 17/08/2017).

¹²⁷ Jakobsen M. “Immunity versus impunity? Reconciling Articles 27(2) and 98(1) of the Rome Statute”(2005) *RGSL Working Papers No. 23* RIGA, 10.

¹²⁸ Zappala S “Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes?” *EJIL*, Vol. 12, No. 3, 2001.

of the most fundamental rules of international law and threaten international peace and security.”

It can even be argued that the recognition that immunity cannot extend to grave breaches of international law and crimes against humanity is in itself a principle of customary international law. The Hague Conventions of 1899 and 1907 had provisions waived personal immunity for war crimes regardless of rank.¹²⁹ Similarly the Nuremberg Principles of 1950, which can be viewed as customary law as they were accepted by alkyl states recognized that official station does not relieve an individual of responsibility for conduct that is considered criminal under international law.¹³⁰ Indeed in the *Eichmann case* in 01961 the Israel Supreme Court held that Nuremberg Principles contained:

*“principles that have formed part of customary international law since time immemorial.”*¹³¹

The same was echoed by the House of Lords in the *Pinochet Case* wherein it was stated:

*“immunity rationae materiae cannot co-exist with international crimes”*¹³²

More recently other international tribunals seem to have reached the same conclusion that the crimes within the jurisdiction of the ICC transcend *immunity ratione personae*.¹³³ The Special Court of Sierra Leone (SCSL) in the *Taylor case*, held that a Head of State was not immune to prosecution for war crimes and crimes against humanity..¹³⁴

¹²⁹ Triffterer O, *Article 27 – Irrelevance of Official Capacity* in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer’s Notes, Article by Article*, (1999), p. 502.

¹³⁰ Zappala S, (note 128 above).

¹³¹ *Eichmann v. Attorney-general of Israel*: Supreme Court Decision Supreme Court of Israel (1962) 136 I.L.R. 277.

¹³² See *R v Bow St Magistrate, ex parte Pinochet Ugarte*, [1998] 4 All ER (Pinochet 1) at 938).

¹³³ Krieb C. “The International Criminal Court and Immunities under International Law for States Not Party to the Court’s Statute”, in Morten Bergsmo and LING Yan (editors), (2012) *State Sovereignty and International Criminal Law, FICHL Publication Series No. 15* (2012).

¹³⁴ *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-I, para 52.

This is view consistent with the decision of the ICTY Appeals Chamber in the *Blaskic (subpoena)* case, where the Court held that immunity *rationale personae* was not absolute and could not be invoked for war crimes and crimes against humanity.¹³⁵

This argument is taken further by Gaeta who puts it across elegantly that while *immunity rationale personae* may apply between two or more states, it cannot be said to apply between the Court and a State. She sums up eloquently

*“Clearly these immunities cannot be relied upon before the ICC; hence they cannot preclude the exercise of the Court’s jurisdiction.”*¹³⁶

It must not be forgotten that that the position being taken by African states might actually increase impunity. It is submitted that the persons who often have the means to carry out mass atrocities is more often than not, those who have the power, in particular Heads of States who command armed forces and state machinery. To interpret international law as excluding the worst perpetrators from prosecution would be a disaster and a huge backward step in the fight against impunity.

3.6 Bilateral International Agreements under Article 98 (2)

It would not be a complete discussion of the problems of the Rome Statute without an examination of the so called Article 98 agreements. Others have described them as impunity agreements¹³⁷ and they have contributed to the negative perception of the ICC. This is particularly because the goal of these agreements is to exempt the citizens of a state that signs them or elected individuals of that state from the reach of the ICC. The U.S is notable for such agreements in order to exempt its military and civilian personnel from the jurisdiction of the ICC. Indeed, it is submitted that such agreements

¹³⁵ *Blaskic (subpoena)* (ICTY, Judicial Reports, 1996).

¹³⁶ Gaeta P. (2002) *Official Capacity and Immunities*, pp199

¹³⁷ Human Rights Watch (2003) *“United States Efforts to Undermine the International Criminal Court Legal Analysis of Impunity Agreements”* found at <https://www.hrw.org/legacy/campaigns/icc/docs/art98analysis.htm>(accessed 17/08/2017).

may be the reasons why African states view some states as being more equal than others on the international stage.

Article 98 (2) of the Rome Statutes states:

“The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”

The international agreements mentioned in Article 98 (2) of the Rome Statute are the Article 98 agreements or bilateral immunity agreements, which are criticized. Since 2002, the United States has concluded at least one hundred such agreements with other states. They entail that the country on the other end will not hand over any Americans to the ICC, when such commit graves crimes that are within the province of the Rome

To encourage other states to sign an Article 98 agreement with the United States, various domestic laws have been passed, like American Service-Members' Protection Act, the so called Hague Invasion Act, which prescribes the cutting of military aid to countries who do not sign the agreement.¹³⁸ Given that many states rely on aid from United States, such law comes close to a threat.

The United States has argued that the provisions of Article 98 (2) recognises that countries can enter into such agreements. By providing specifically that a country is not required to act contrary to other international agreements it necessarily means that such agreements, usually called status of forces agreement (SOFAs) are recognized.¹³⁹ Indeed in a briefing held in London, Pierre-Richard Prosper, U.S. Ambassador-at-Large

¹³⁸Human Rights Watch U.S.: *'Hague Invasion Act' Becomes Law.*

<https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law>(accessed 05/07/2017).

¹³⁹Scheffer, David J, “Article 98(2) of the Rome Statute: America’s Original Intent” *Journal of International Criminal justice*, Vol. 3, No. 2, May (2005), p 333.

for War Crimes Issues, stated U.S. policy regarding bilateral non-surrender agreements thus:

“Article 98 clearly says that we are allowed to engage in these types of agreements, international agreements, with the states that allow for the conditions, to dictate the conditions of surrendering. Essentially it is that the consent of the sending state, which in this case would be the United States, is required before someone would be transferred to the court.”¹⁴⁰

In short the U.S. has interpreted this article to mean that its citizens cannot be handed over to the ICC by any state that has signed Article 98 agreement with it.

3.6.1 Analysis

It is submitted that Article 98 is open to abuse, and provides more fuel to critics of the ICC regime, particularly those that attack its impartiality. For instance, the United States is abusing Article 98 of the Rome Statute, for personal interests, and not in the interests of international criminal justice.

Firstly, Article 98 of the Statute was not intended to allow the conclusion of new agreements based on Article 98, but rather to prevent legal conflicts which might arise because of existing agreements, or new agreements based on existing precedent, such as new status of forces agreements. Article 98 was not intended to allow agreements that would preclude the possibility of a trial by the ICC.¹⁴¹

Thus Article 98 (2) was designed to address any potential discrepancies that may arise

It is not meant to create agreements that place some individuals out of reach of the Court when such individuals commit crimes that are of concern to the international community as a whole. Indeed, such an interpretation as taken by the United States

¹⁴⁰Tan, Jr *et al* "The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court." *American University International Law Review* 19, no. 5 (2003): 1115-1180.

¹⁴¹ Coalition for the International Criminal Court "US bilateral immunity agreements or so-called "article 98" Factsheet found at http://eradicatingecocide.com/wp-content/uploads/2012/06/CICC-BLAs_QA_current.pdf (accessed 25/08/2017).

would be contrary to, Article 27 of the Rome Statute which provides that no one is immune from the crimes under its jurisdiction.

As the Human Rights watch observes:

*Article 98 was included in the Rome Statute to provide an orderly and rational process for the handling of suspects among states cooperating with the Court. It was not intended to allow a state that has refused to cooperate with the Court to negotiate a web of agreements to secure exemption for its citizens or otherwise undermine the effective functioning of the Court.*¹⁴²

In effect states that sign such agreement with the US are acting in breach of their international obligations as they are taking active step in frustrating the operation of the Rome Statute, by immunizing some individuals from its reach. Article 18 of the Vienna Convention on the Law of Treaties codifies the customary international law rule against such conduct by requiring that states refrain from acts that would defeat the object and purpose of a treaty.¹⁴³ Also, Article 60 (3) of the Vienna Convention stipulates no state must engage in conduct that is essentially a "violation of a provision essential to the accomplishment of the object or purpose of the treaty."

It is widely accepted that the Rome Statute's object and purpose is to put an end to the regime of impunity that protects the perpetrators of all the most serious crimes of concern to the international community within the jurisdiction of the ICC.¹⁴⁴ Entering into effective arrangements with the US to shield impunity for the crimes over which the ICC will have jurisdiction hardly serves these goals. It only perpetuates impunity.

More disturbingly however, the agreements do not ensure that the states entering into such agreement with will investigate and, if necessary, prosecute alleged crimes. Their end goal is to ultimately deprive the Court of jurisdiction over certain persons. This laces

¹⁴² Human Rights Watch (2003) *"United States Efforts to Undermine the International Criminal Court Legal Analysis of Impunity Agreements"* found at <https://www.hrw.org/legacy/campaigns/icc/docs/art98analysis.htm> (accessed 25/08/2017).

¹⁴³ See Vienna Convention on the Law of Treaties, opened for signature May. 23, 1969, art. 18, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331 (1980).

¹⁴⁴ Tan, Jr (note 140 above).

any state party that accedes to such agreement at odds with its international obligations refrain from acts that would defeat the object and purpose of the Rome Statute.¹⁴⁵

It is submitted that this is one attack on the Rome Statute that may not be justified by any African state or any other state for that matter. There is nothing wrong with the statute. There is everything wrong with how the United States has chosen to interpret Section 98 (2). Whether this mistranslation is deliberate or accidental the fact remains that this is not a weakness in the Statute, but rather how some states, for their own political means have chosen to view it. While the Rome Statute admittedly has many weaknesses, this is not one of them.

4. Conclusion

It is clear that African states and indeed some members of the international community as a whole are convinced that the Rome Statute has politicized the Court, given it the power violate national sovereignty and international customary law. From the discussion in this Chapter it is clear that the issue is complex and both sides have a certain amount of merit.

Indeed, while it is all well to discuss, the theoretical weaknesses of the Rome Statute regime, in the abstract, it would help to put the issue of manipulation into perspective, if the practical application of the treaty in the real world is examined. Has the Rome Statute really been manipulated practically? The next chapter will focus on situations where the treaty has been applied to see whether such application lends credence to the allegations that the treaty is easy to manipulate for political ends.

¹⁴⁵ Crawford J *et al*, *"In the Matter of the Statute of the International Criminal Court and In the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute"* (2003).

CHAPTER 4

THE ICC AT WORK: CASE STUDY ANALYSIS

4.1 INTRODUCTION

A discussion of the Rome Statute, or the various relationships that have emerged from the application of the Rome Statute is inadequate without a detailed case study analysis of how the treaty has been applied in practice. Indeed, it is through the application of the treaty provisions that has resulted in mixed feelings in the international community in relation to the impartiality and independence of the ICC. For the purposes of this research, two case studies involving referrals of states or situations by the UNSC will be interrogated. In addition, other situations will be referred to without detailed study in order to enrich an understanding of the issues in this chapter.

There are only two situations so far that have been referred to the Prosecutor by the UNSC, that is those in Darfur, Sudan and in Libya. Arguably, no clearer situations exemplify the level of discord between the ICC and the AU, than the UNSC referrals of the situations in Libya and Darfur to the Prosecutor. In fact, these two referrals are such a quintessential representation of the discord between African states and the African Union that they deserve to be examined separately in their own Chapter. This Chapter therefore analyses the referrals of the Darfur situation and Libya by the Security Council and examines their legal implications and the impact not only on the work of the Court in Africa but the relationship between the Court and African States.²

Three particular aspects in relation to the referrals will be considered in this Chapter. Firstly, the question of whether the ICC was used as political pawn in the context of the two referrals will be discussed. Secondly, the Chapter, in the context of previous discussions throughout this thesis, will explore the extent to which the ICC acted impartially and independently in relation to the two referrals. Finally, the Chapter makes an assessment of the objective perceptions that arise from the referrals and indictments and how the ICC has acted throughout the referrals.

4.2. BACKGROUND TO THE TWO REFERRALS

4.2.1 The Sudan referral

On 31 March 2005, the UNSC adopted Resolution 1593, under Chapter VII of the UN Charter and under Article 13 of the ICC Statute, referring the situation in Darfur-Sudan to the ICC,¹⁴⁶ after an International Commission of Inquiry appointed by the United Nations Secretary General; presented its findings after an investigation into the violence in the Darfur Region of Sudan, that in just a year had killed tens of thousands. The Commission concluded that there were deliberate and indiscriminate acts against civilians, including rape, looting and torture, leaving about 1.65 million internally displaced persons.¹⁴⁷

In Resolution 1593, the UNSC specifically ordered that the Sudanese government cooperate with the ICC and its prosecutor, which order the Sudanese government simply ignored, by refusing to arrest and surrender President Omar al-Bashir. The Prosecutor, Luis Moreno Ocampo, formally opened an investigation on 6 June 2005. However beyond that nothing much has happened and Al-Bashir still remains in office.¹⁴⁸

4.2.2 The Libyan referral

Four years later on the 26th of February 2011 the UNSC unanimously passed Resolution 1970 referring the situation in Libya to the ICC.¹⁴⁹ The vote for Resolution

¹⁴⁶ UN Security Council, Security Council resolution 1593 (2005) [on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan], 31 March 2005, S/RES/1593 (2005), available at: <http://www.refworld.org/docid/42bc16434.html> [accessed 04/09/2017].

¹⁴⁷ UN (2005) 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General: Pursuant to Security Council Resolution 1564 of 18 September 2004', 25 January, Available at: http://www.un.org/news/dh/sudan/com_inq_darfur.pdf [accessed 04/09/2017].

¹⁴⁸ Du Plessis M *et al* "Justice and the Libyan crisis: the ICC's role under Security Council Resolution 1970", Briefing Paper Pretoria, 31 May 2011, Institute for Security Studies.

¹⁴⁹ UN Security Council, Security Council resolution 1970 (2011) [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya], 26 February 2011, S/RES/1970 (2011), available at: <http://www.refworld.org/docid/4d6ce9742.html> [accessed 04/09/2017].

1970 followed increasing reports of 'gross and systematic human rights violations committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful demonstrators'.¹⁵⁰

Subsequent to the UNSC's referral of the Libyan situation to the ICC, the Court issued arrest warrants for Muammar Qaddafi, Seif al-Islam Qaddafi, and Abdullah al-Senussi for crimes against humanity allegedly committed in Libya in February 2011 through their control of the state apparatus and security forces.¹⁵¹

While the referrals were initially welcomed especially by Human Rights groups, all over the globe as they were seen to be the right step towards the protection of civilians and the ending of impunity, they quickly became bogged down in the larger context of global politics and the unstable relationship between the Court and AU, as will be demonstrated. Rather than promote the relationship between the African continent and the Court, it is submitted that the referrals may have done more harm to the relationship than the good.

This Chapter considers some of the legal implications and the effects of both Resolutions on the Africa and ICC relationship.

(a) That the ICC is used as a pawn in global politics.

It is submitted that, that the two referrals exposed the weakness of the Rome Statute regime, which makes it easy for the ICC can be manipulated as a pawn in the global political game to take out perceived enemies of the more powerful states, in particular the permanent members of the UNSC. The arguments of bias and that have been made against the Court by African states sprang to the fore again.

It will be noted that that the atrocities in Sudan and Libya were not and are still not the only situations where war crimes and massive human rights violations have occurred.¹⁵²

¹⁵⁰ UN Human Rights Council, 15th Special Session, A/HRC/S- 15/2, 25 February 2011.

¹⁵¹ ICC, "Pre-Trial Chamber I Issues Three Warrants of Arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi," Press Release, 27 June 2011.

¹⁵² "Is the ICC a tool to recolonise Africa?" New African Magazine 31 March 2017, found at <http://newafricanmagazine.com/icc-tool-recolonise-africa/> [accessed 04/09/2017].

Indeed, around the time of the referrals, the Arab spring was rocking Islamic countries, like Syria and Yemen and there were reports of crimes against humanity in those states.¹⁵³ Yet the UNSC did not refer those situations to the ICC. This lack of action on Syria and other Arab Spring countries, it can be argued, is partly due to the strong ties between these states and some of the permanent members of the UNSC, which can protect their allies from investigation by blocking attempts to refer a case to the ICC. For example, Yemen close ties with the United States, and Syria has a bond of steel with both China and Russia.¹⁵⁴

Conversely, when it came to Sudan and Libya, the UNSC moved swiftly to pass resolutions referring the situations to the ICC especially since those two countries were largely not on friendly terms with most of the UNSC members. The vitriolic verbal attacks on the west by Gaddafi and his anti-western stance are matter of public record thus making his a target for the west.¹⁵⁵ Similarly, Omar Al Bashir, has never cosied up to the United States since assuming power in the early 1990s. Even more during Saddam Hussein's ill-fated adventure in Kuwait Sudan backed Iraq.¹⁵⁶

Unfortunately, the ICC has been caught up in this global political game. The fact that the UNSC, ignored other human rights violation in other parts of the globe and instead chose to focus on Africa, lends credence to the argument that the ICC is a tool by more powerful nations to take out those leaders that they view as undesirable and detrimental to their interests.

It is hard to dispute this argument. Indeed, in January 14, 2013, a letter sent by Switzerland to the UNSC on behalf of 57 states, , called for Syria's referral to the ICC.

¹⁵³ "Attacks in Syria and Yemen are turning disease into a weapon of war" PBS Newshour July 8 2017, found at <http://www.pbs.org/newshour/rundown/attacks-syria-yemen-turning-disease-weapon-war/> [accessed 04/09/2017).

¹⁵⁴ Chulov M., "Libyan Government Asks Why ICC Isn't also Seeking to Prosecute Syria," The Guardian, 15 May 2011.

¹⁵⁵ Lowe N (2009) *Mastering Modern World History*, London, Palgrave Master Series , MacMillan.

¹⁵⁶ "After 25 years as president, Sudan's al-Bashir shifts from Iran to Saudi Arabia" CTV News <http://www.ctvnews.ca/politics/after-25-years-as-president-sudan-s-al-bashir-shifts-from-iran-to-saudi-arabia-1.2403106>.

This letter was ignored.¹⁵⁷ Indeed, in December 2016, faced with the inaction of the Court and the UNSC, with regards to the clear deteriorating human rights situation in Syria, the United Nations General Assembly took the extraordinary step of adopting Resolution 71/248 and to establish an “International, Impartial and Independent Mechanism to assist in the Investigation and Prosecution of those Responsible for the Most Serious Crimes under International Law committed in the Syrian Arab Republic since March 2011.”¹⁵⁸

Though the UN General Assembly is powerless to refer a situation to the Court, the aim of the Independent Mechanism, which will work close with the Independent International Commission of Inquiry on Syria (established by the UN Human Rights Council in August 2011) will collect, consolidate, preserve and analyse evidence pertaining to violations and abuses of human rights and humanitarian law, in the hope that if the situation is referred to the Court the investigative ground work would already have been laid out.¹⁵⁹ To date, however, no recorded progress has been witnessed in the work of this institution or mechanism.

At the same time the lack of referral of the situation in Palestine and the occupied territories in Gaza has more than dented the reputation of the Court and lent credence to the view that the Court is a pawn in global politics. Amnesty International has summarized the alleged war crimes of Israel in Palestine and the occupied territories as follows:

“Israeli forces unlawfully killed Palestinian civilians, including children, in both Israel and the Occupied Palestinian Territories (OPT), and detained thousands of Palestinians from the OPT who opposed Israel’s continuing military occupation, holding hundreds in administrative detention. Torture and other ill-treatment of detainees remained rife and was committed with impunity. The authorities continued to promote illegal settlements in

¹⁵⁷ “UN Security Council: Heed Call for Justice in Syria 57 States Press for ICC Referral” Human Rights Watch January 14 2014, found at <https://www.hrw.org/news/2013/01/14/un-security-council-heed-call-justice-syria> [accessed 04/09/2017].

¹⁵⁸ UNGA Resolution 71/248, found at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/248 (accessed 04/09/2017).

¹⁵⁹ “Syria: UN approves mechanism to lay groundwork for investigations into possible war crimes” UN News Centre 22/12/2016 found at <http://www.un.org/apps/news/story.asp?NewsID=55862#.WceabPMjHIU> (accessed 04/09/2017)

the West Bank, including by attempting to retroactively “legalize” settlements built on private Palestinian land, and severely restricted Palestinians’ freedom of movement, closing some areas after attacks by Palestinians on Israelis. Israeli forces continued to blockade the Gaza Strip, subjecting its population of 1.9 million to collective punishment, and to demolish homes of Palestinians in the West Bank and of Bedouin villagers in Israel’s Negev/Naqab region, forcibly evicting residents.”¹⁶⁰

Yet as Kersten argues some of members of the Security Council consistently block any attempt to refer the situation to the Court as Israel is an ally. Indeed, Kersten comments:

“The UK and USA staunchly oppose the Security Council even considering a referral of the situation in the Occupied Palestinian Territories to the ICC Prosecutor. In particular, in March 2011, both voted against a UN Human Rights Council resolution which called for the Security Council to consider the step. The focus of permanent members on protecting their individual geopolitical interests and alliances over their mandate to maintain international peace and security.”¹⁶¹

However, blame cannot be placed squarely on the ICC as being biased or being tool of the west. It would certainly appear that the UNSC is to blame for the failure of the Court to intervene in Syria and Palestine and the occupied territories.¹⁶² After all the it is within the Council’s power to refer non-state parties to the ICC, and undeniably Russia and China have prevented such action through vetoes.¹⁶³

It must be noted that the Court can only act of its own volition, where the state concerned is party to the Rome Statute or has accepted the jurisdiction of the Court.¹⁶⁴

¹⁶⁰ “Israel and the Occupied Territories Report 2016/2017.” <https://www.amnesty.org/en/countries/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories/> (accessed 04/09/2017).

¹⁶¹ “The Security Council’s Appalling Record of Referring Situations to the ICC” <https://justiceinconflict.org/2014/05/23/the-security-councils-appalling-record-of-referring-situations-to-the-icc/> (accessed 04/09/2017).

¹⁶² Kirsten A. “The responsibility to protect and the International Criminal Court: counteracting the crisis,” *International Affairs*, 91 (1). pp. 37-54.

¹⁶³ In May 2014, a draft resolution (S/2014/348) to refer the situation in Syria to the ICC, co-sponsored by 65 countries and voted for by 13 of the 15 members of the UNSC. failed to pass due to Russian and Chinese vetoes. This was the fourth draft resolution on Syria vetoed by Russia and China – they also vetoed S/2011/612S/2012/77 and S/2012/538.

¹⁶⁴ Article 12 of the Rome Statute.

None of the Arab Spring countries (with the exception of Tunisia) is a member state, and the only way ICC investigations in those countries can be initiated is by means of UNSC referral.¹⁶⁵

Therefore, no matter how much the Court may wish to intervene, it simply cannot in Syria and Yemen. The only way to intervene would be by through a referral by the UNSC and unfortunately that body is mired in politics.

The Court can only act within the confines of its establishing treaty. More unfortunately when it acts under the auspices of a UNSC referral the politics of that organ can tend more often than not, to colour the work and the reputation of the Court and increase the negative perception of the Court by the African continent.

a) The ICC cannot work in an impartial manner in the context of the referrals.

While the ICC is an independent and impartial, at least as far as is presupposed by its parent treaty,¹⁶⁶ the wording of the two resolutions, that is Resolution 1593 and Resolution 1970, severely affect its independence and impartiality again increasing the negative perception of the Court as biased and being there to serve the interests of the more powerful nations, when it suits them.

Both resolutions contain a controversial provision excluding nationals, current or former officials or personnel of states other than Libya and Sudan from the court's jurisdiction in respect of alleged acts or omissions arising out of or related to UNSC authorised operations in those territories. Such persons might only be prosecuted if their home states waive their jurisdiction.¹⁶⁷

¹⁶⁵ Kirsten J. Fisher (2013) "*Libya, the ICC, and Securing Post-Conflict Justice*," The Middle East Institute.

¹⁶⁶ Preamble to the Rome Statute.

¹⁶⁷ Clause 6 of Resolution 1593/2005 and Resolution 1970/2011.

This provision would of course apply to any members of an international peacekeeping operation authorised by the Security Council. This provision was included at the insistence of the United States, as a pre-condition to allowing the resolution to pass.¹⁶⁸

The justification offered by the UNSC was that UN operations are dependent on states offering peacekeepers to maintain or restore international peace and peacekeeping operations would be jeopardized if those military officials would be subject to the jurisdiction of the Court.¹⁶⁹ However, it is a matter of speculation why the prosecution of UN peacekeeping soldiers suspected of international crimes could be detrimental to peace and security.¹⁷⁰

The argument is simply not sustainable. After all, the fight against impunity must be all encompassing and not selective. Any person suspected of committing atrocities covered by the treaty should be subject, regardless of where he committed them on the right side of the war, or not. Therefore, excluding peacekeepers from the jurisdiction of the Court, directly conflicts with the purpose of the Rome Statute itself, which is to prevent impunity and to work independently and impartially¹⁷¹ As the International Peace Institute correctly points out:

“While the ICC necessarily has jurisdiction over nationals from a state that is party to the Rome Statute, this language is intended to extend ICC jurisdiction to Libyan nationals, but exclude all other nationals of states that are not party to the Rome Statute. Thus, besides selectivity in its practice of referring cases to the ICC, here the Security Council also restricted the reach of the court. This is interpreted by some as a double standard undermining the credibility of the court.”¹⁷²

¹⁶⁸ Du Plessis M. *et al* (2011) “UNSC Referral of Libya Gives ICC the Opportunity to Prove its Worth”, Institute for Security Studies, found at <https://issafrica.org/iss-today/unsc-referral-of-libya-gives-icc-the-opportunity-to-prove-its-worth> [accessed 05/09/17].

¹⁶⁹ Harmen Van Der Wilt (2014) The Security Council and the International Criminal Court: Peace, Justice and ‘Realpolitik’ found at <http://www.nvvn.nl/artikel/the-security-council-and-the-international-criminal-court-peace-justice-and-realpolitik/pdf/> (accessed 05/09/2017).

¹⁷⁰ Zappalà, S ‘The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements’, *Journal of International Criminal Justice* 1 (2003), 114, 117-121.

¹⁷¹ Article 5 of the Rome Statute.

¹⁷² The International Peace Institute, “*The Relationship Between the ICC and the Security Council: Challenges and Opportunities*,” MARCH 2013 http://www1.regierung.li/uploads/media/IPI_E-Pub-Relationship_Bet_ICC_and_SC_2_02.pdf (accessed 05/09/2017).

It is submitted in this research that, once a situation has been referred to the Court, the Court should be able to act impartially and in pursuance of the objective of the Rome Statute. Certainly the fact that the UNSC can who or not the Court may prosecute, but renders null, the principle of the independence of the Court.

At same time it is debatable whether the Security Council can place limitations on the jurisdiction of the Court. The Court is created and subject to the terms of the Rome Statute in its operations, not the Security Council. While the Security Council can refer a matter to the Court, it is hard to justify the argument that it can also place restrictions on how the Court should act in that particular circumstance. The International Peace Institute, makes an elegant argument in this regard:

“However, it could be argued that the Security Council can only activate the Rome Statute as a whole, not selected part of it. Article 13(b) gives the Security Council the authority to refer a situation to the ICC, but does not imply any restrictions on the ICC’s jurisdiction. The Office of the Prosecutor, therefore, might not feel bound by the restrictions included in Security Council resolutions. Given their questionable legal foundation, and despite having been included in the text of the Security Council resolutions, these exemption clauses might not withstand judicial scrutiny in later ICC court proceedings.”

These legally questionable restrictions are not doing the Court any favours. They only tend to perpetuate the stereotype of the Court being an appendage of western powers, that is not only biased but compromised and dances to the whims of more powerful states.

b) The choice of ICC indictments in the context of the Resolutions is troublesome

Arguably, if the ICC is to liberate itself from any perception that the two referrals were nothing more than politics and the ICC was a pawn in the game, it must at least be seen to be prosecuting or indicting suspects independently and impartially in the context of the resolutions.

However, the ICC's own choice in who to prosecute cast aspersions on its impartiality. In Libya after warrant against Gaddafi and his sons were issued,¹⁷³ claims surfaced that anti-government rebels were responsible for other war crimes against civilians.

The International Commission of Inquiry on Libya actually came to the conclusion that concluded grave crimes were by both sides of the conflict.¹⁷⁴ Strangely and in the face of such evidence, the ICC has never indicted any rebel for atrocities committed during the conflict.

At a time when the global perception of the ICC is perhaps weakest, in Africa, ¹⁷⁵ these actions of the Prosecutor have done much to discredit any perceived independence of the Court and entrenched the idea that the Court only serves the bidding of the more powerful nations.

4.3 CONCLUSION

What is evidently clear from all the above is that the UNSC is in a powerful position, which it can and has used to shape the caseload of the ICC through the referral systems.¹⁷⁶ Unfortunately, the UNSC is a political body. Its decision to refer a situation to the ICC is more than likely largely influenced by political considerations as opposed to the desire to end impunity. The ICC thus may be used to pursue certain investigations to score political points.¹⁷⁷

It would not be a stretching of the truth to argue that the two referrals in this Chapter have done much more damage to the credibility of the ICC, than any other action.

¹⁷³ "Pre-Trial Chamber I Issues Three Warrants of Arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi," Press Release, 27 June 2011.

¹⁷⁴ "Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Law in Libya," A/HRC/19/68, 2 March 2012, paragraphs 808 – 810.

¹⁷⁵ "Africa: AU Summit Considers Draft Resolution on Withdrawal from ICC," The Star (Nairobi), 24 May 2013.

¹⁷⁶ "The ICC and Africa (Part 3) Courtside Justice", Justice Hub Organization <https://justicehub.org/article/courtside-justice-icc-and-africa-part-3> (accessed 31/07/17).

¹⁷⁷ Bethel Aregawi (2017) The Politicisation of the International Criminal Court by United Nations Security Council Referrals, African Centre for the Constructive Resolution of Disputes. Conflict Trends 2017 Vol 2.

Security Council referrals are not by their very nature wrong in principle. However, for the Court to be credible among African states, there is a real need for it to be seen to rise above the politics and act independently and impartially in carrying out its mandate.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

5.1 INTRODUCTION

In this research the tumultuous relationship between the ICC and African states has been extensively explored. In this concluding Chapter, it is only proper that a review of all the main arguments made in the preceding chapters be summarized before recommendations on how to smooth this stormy relationship can be proposed. This Chapter is therefore three pronged, that is, it will summarize the main arguments and propositions made in this research then, offer practical recommendations and strategies that can not only be adopted by the Court but even by African states themselves in order to restore a relationship which started on a hopeful note but, through political developments, seems to have soured in recent years.

5.2 SUMMARY OF ARGUMENTS

In Chapter 2, the grievances of African States were examined, namely that the ICC, is biased against African States and that the ICC in its intransigent pursuit of justice often was detrimental to peace on the continent. It was also argued on the contrary that the allegation of bias was more complex, than it first seemed, since the majority of African cases African states themselves referred situation to the Court. It was also pointed out that justice and peace cannot exist independent of each other, thus a middle road might have to be walked, that is balance the two rather than try achieve one independent of the other.

In Chapter 3, the argument that the Rome Statute's legal regimen itself made it easy for the Court to be manipulated by the more powerful states, to the detriment of smaller nations was explored. Specifically, the system of UNSC referrals to the Court was found to be troubling as it opened a loophole for politically motivated referrals. It was also argued that this could hardly be the Court's fault as in situations where the nations

in question were not party to the Rome Statute, the Court could only act where such state consented to its jurisdiction or the case was referred by the UNSC to it.

The argument by the African Union that the Rome Statute also violated international customary law by removing Head of State immunity was also examined and weighed against the counter that Heads of State immunity did not exist with regards to international crimes. The Chapter also examined the Article 98 (2) bilateral immunity agreements. An argument was made that this loophole in the Rome Statute could be used and had been used by national like the United State to place its citizens beyond the reach of the Court. An undesirable situation that did no good for the fight against impunity.

In Chapter 4, the research explored specific situations where the Court seems to have been used as a pawn in global politics, in particular with the Libyan and Sudan referrals. The argument was considered that, the very fact that situations in Syria for example, which deserved equal attention, were not referred by the UNSC to the Court only buttressed the perception that UNSC referrals to the Court were all a political chess game and the Court was just a pawn on the board.

5.3 THE WAY FORWARD

As demonstrated from the preceding chapters, the relationship between the ICC and the African continent is unquestionably rocky. In fact, not all the arguments by African states against the Court are unfounded. Some are hard to dispute as demonstrated in this research, for example that of political manipulation of the Court.

Of course the Court has defended itself and indeed some scholars have argued, as shown in this research that the arguments by African states have no merit. However, to simply dismiss the arguments and perceptions by African states would certainly be shortsighted, if not even dangerous, to the fight against impunity across the African

continent. These African criticisms of the Court are real or so widely perceived that they need to be treated as real if a way forward is to be mapped.

For the ICC to function effectively in this increasingly complex, global political minefield, it must secure the cooperation of African states , including those in Africa.¹⁷⁸ Literally, the ICC cannot go it without the largest bloc to the Rome Statute being on board with its work. This is particularly relevant seeing that the greatest number of wars together with attendant crimes against humanity has occurred largely on the African continent more than any other continent across the globe.

This research therefore proposes a few recommendations that may just prove to be oil on troubled waters and calm a tempestuous relationship.

5.3.1 National-level capacity building

It can be argued that one of the objective factors that would account for the Court being perceived as being biased, is the fact that it has investigated and prosecuted largely African situations, through the principle of complementarity. Unfortunately, most of the African states where the greatest atrocities and war occur, fall within a category of states that are unable to prosecute since more often than not conflict destroys or at least substantially incapacitates the judicial infrastructure. Indeed, it cannot be denied that, there is at least some correlation between fragile states, political violence, and weak judiciaries - all of which are variables that help establish weak state 'candidates' for ICC intervention.¹⁷⁹

For example, the fact that the International Criminal Tribunal for Rwanda (ICTR) has to be based in Arusha Tanzania as opposed to Rwanda where the genocide took place only drives home the link between conflict and a weakened judicial system.¹⁸⁰

¹⁷⁸ Mbaku J.M, "International Justice: The International Criminal Court and Africa, Foresight Africa: Top Priorities for the Continent" (2014), *The Brookings Institution: Africa Growth Initiative*.

¹⁷⁹ "The ICC and Africa (Part 3) Courtside Justice", Justice Hub Organization <https://justicehub.org/article/courtside-justice-icc-and-africa-part-3> (accessed 31/07/17).

¹⁸⁰ Mbaku (Note 179 above).

Therefore, a recommendation is made that, the ICC should stop jealously guarding its jurisdiction. It should see itself as it is: a Court of last resort. It should therefore be at the forefront of building up domestic judicial capacity, so that African states can deal with crimes committed in their jurisdictions. Such enhancement of national jurisdictions will largely rely on the Office of the Prosecutor encouraging national proceedings when possible and assisting in the modalities of the same.¹⁸¹

In this regard, *Avocats Sans Frontières* argues quite eloquently that:

*“The International Criminal Court also needs to demonstrate genuine support to the principle of complementarity by assisting States and regional bodies in building domestic initiatives that can exercise mandate over perpetrators of international crimes. Currently, it appears that the Court has not proactively taken on the role of assisting national courts to develop strong domestic systems to foster accountability. This could be attributed to the restrictive provisions of the Rome Statute which albeit recognizing the role of the ICC and individual states in the fight against impunity, does not contain a distinct provision that mandates the Court to assist national jurisdictions to develop strong national accountability mechanisms.”*¹⁸²

In the same vein Mutua insists that, rather than fulfilling the role of a ‘gentle civilizer’ of other states that did not have the capacity to obtain justice against the perpetrators of such grave crimes, the ICC should take a more serious role in supporting domestic legal procedures.¹⁸³

Indeed, most African states seem to be willing to prosecute perpetrators if means and ability are availed. To boot, the Central African Republic has recently created a hybrid tribunal to investigate alleged war crimes committed by anti-Balaka and Séléka forces. In response to crises that instigated ICC intervention, the governments of Kenya has

¹⁸¹ “Five Recommendations to Pacify Relations Between the ICC and Africa: Just Security <https://www.justsecurity.org/35078/recommendations-pacify-relations-icc-africa/> (accessed 31/07/17).

¹⁸² *Avocats Sans Frontières Africa and the International Criminal Court: Mending Fences*, McArthur Foundation, ASF, Jul. 2012.

¹⁸³ Mutua M., ‘Savages, Victims, and Saviors: the Metaphor of Human Rights’, *Harvard International Law Journal*, 2001 (42), p.201-245.

created institutions within its judiciary for example the International and Organised Crimes Division, to investigate and prosecute international crimes.¹⁸⁴

After all, as Hochschild quite aptly points out:

*“International tribunals are not like criminal courts in a well-functioning society, where most people caught committing a serious crime face a judge. They can only be selective and symbolic. ... No international court can ever substitute for a working national justice system.”*¹⁸⁵

In the same vein, it is also submitted that it is not only the ICC that should assist in capacity building of African States. The AU itself, the greatest critic of the Court, also has a role to play if it wants the ICC to take its focus off Africa. The AU should help its members undertake necessary institutional reforms to create locally focused and culturally relevant legal and judicial systems that can effectively prosecute those accused of impunity and hence minimize the need to call upon the ICC to intervene. Unfortunately, the AU has had very limited success imposing its will on its members.¹⁸⁶

5.3.2 Establishment of an Effective Bi-lateral Dialogue Framework between the African Union and the ICC

It is submitted that without honest and open dialogue between the ICC and African leaders and the AU as an organization the deep chasm between the ICC and Africa will only continue to widen. The ICC and the AU, while one is an international judicial body and the other a political organ share the same vision: to end impunity and to ensure accountability for gross violations, atrocities and harm. However, because of their differing natures, the two will approach this goal in different ways. The AU, is more likely

¹⁸⁴ (note 196 above).

¹⁸⁵ Hochschild, “The Trial of Thomas Lubanga,” *The Atlantic*, Dec. 2009.

¹⁸⁶ Mbaku, (note 179 above).

to address the issue from a political standpoint and emphasize peace and political reconciliation while ICC will pursue international prosecutions.¹⁸⁷

Notably, as shown in the preceding Chapters, these two different approaches have caused friction wherein the ICC has gone for retributive justice, while the AU pursued a “peace first, the justice later approach.” However, the fact that both bodies seek to end impunity albeit by different means should be seen as an opportunity for dialogue and compromise as opposed to creating a rift.

As a way of example, the AU could adopt a nuanced approach in which it supports ICC-related interventions to promote accountability for past crimes while at the same time always strike a balancing act between the attainment of peace and justice.¹⁸⁸ As Fatou Bensouda, the Prosecutor of the International Criminal Court has always argued, justice plays a crucial role in the attainment of attainable peace in post war situations.¹⁸⁹ Other scholars also point out that justice is the foundation of democracy and democratic institutions, and of international and local peace negotiations.¹⁹⁰ On the other hand the ICC, it could be argued, should be cognisant of the fact that it is operating in an international political sphere and the attainment of justice cannot be isolated from politics.¹⁹¹

To that end regular dialogue might occasionally result in a concession by the Court to schedule its proceedings in such a way as to enable political reconciliation and peace processes to conclude may be required before justice enters the fray.¹⁹² After all, more often than not, it is not that states are prepared to totally sacrifice justice and deterrence

¹⁸⁷ Murithi T. “Africa’s relations with the ICC A Need for Reorientation? Perspectives: Political Commentary and Analysis from Africa, (2012) *Heinrich Böll Foundation – Africa Issue1 of 2012*.

¹⁸⁸ Werle, G., L. Fernandez and M. Vormbaum (note 206 above).

¹⁸⁹ “Justice plays a “crucial role” in maintaining international peace and security: ICC Prosecutor briefs the United Nations Security Council” The International Criminal Court, Press Release 24/10/2014 found at <https://www.icc-cpi.int/legalAidConsultations?name=pr1055> (accessed 31/07/17).

¹⁹⁰ J Mayerfeld, ‘The democratic legacy of the International Criminal Court’, *Fletcher Forum of World Affairs*, 28(2), 2004.

¹⁹¹ McNamee, T. (2014). “The ICC and Africa – Between aspiration and reality: Making international justice work better for Africa”. *Discussion Paper 2/2014*. Johannesburg: Brenthurst Foundation, p.5.

¹⁹² McNamee, T. (note 193 above).

on the altar of peace. The fact that African states may ask for a deferral of the ICC proceedings pending peace talks, as they did in Sudan does not mean that they are condoning impunity. Indeed, Article 14 of the African Unions Constitutive Act entrenches, the stance of the continent against impunity and at the same many African countries like South Africa, Kenya, Uganda, Senegal, Mauritius and Burkina Faso have laws that recognize the universal jurisdiction principle in relation to international crimes.¹⁹³ Therefore the ICC can find a middle ground to defer its pursuit of justice until peace proceedings are at least finalized.

At the same time bi-lateral talks between Africa and the Court change the perception of the Court from that of its being an “imperialist tool” to an institution that can work hand in hand with them to fight against impunity on the African continent.¹⁹⁴ Arguably, therefore in the absence of dialogue and between the African Union and its members and the AU, the efficacy of the Court will continue to decline across the African continent.¹⁹⁵

5.3.3 Establishment of intermediary institutions to increase co-operation between the Court and the African Union.

It is suggested that the establishment of intermediary institutions to improve communication and co-operation between the African Union and the Court, could build bridges between the two institutions. Vilmer suggests that such structures could take the following forms:¹⁹⁶

a) ICC chambers in Africa. Vilmer argues that the ICC could, negotiate access to the ICTR (Tanzania), the Special Court for Sierra Leone or the Extraordinary African Chambers (Senegal). Regional venues, one in eastern Africa and at least one in western Africa, could provide the advantages of *in situ* trials thus reducing the ICC’s

¹⁹³ See *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others* 2016 (1) SACR 161.

¹⁹⁴ Avocats Sans Frontières (note 183 above).

¹⁹⁵ Murithi T, (note 207 above).

¹⁹⁶ Vilmer J.B (2016) “The African Union and the International Criminal Court: counteracting the crisis”, *International Affairs*, Volume 92, Issue 6, 1 November 2016.

“foreign” image and providing greater access to evidence, victims and witnesses without the risks.

b) An ICC liaison office at the African Union, such as the ICC has at the UN. This simple measure, supported by African civil society, would streamline relations between the two organizations. However, for the moment the AU has rejected this specific proposal.

c) An AU–ICC cooperation agreement, such as the one the ICC has already signed with the UN and EU. An agreement project was finalized in 2005 but the deterioration in relations has not allowed it to advance.

5.3.4 A Fairer Approach in Situations Investigations, Referrals and Prosecutions

To achieve long-term deterrence and prevention of crimes and credibility, the ICC must first be seen as a legitimate and credible threat to perpetrators all over the world, not just in Africa. To do so, the ICC must prosecute and investigate other regions other than Africa. The fact remains that war crimes are being committed across all the globe.

As shown in the preceding chapters, the ICC has been accused of bias and unfairly targeting Africa only. Unfortunately, the Office of the Prosecutor has failed to make a strong case against this charge, which can ultimately only be refuted by actions demonstrating that this Court is for all, through prosecution of other situations around the globe. In the absence of such actions, the perception across the African continent remains that the ICC is just for the selected and marginalised few, ensuring the decline of the Court’s efficacy across the African continent.¹⁹⁷

Admittedly, 2010 also saw preliminary examinations opened on crimes committed during the 2009 coup in Honduras, when the military ousted President Manuel Zelaya, and on war crimes committed by North Korean forces in the territory of the Republic of

¹⁹⁷ Schabas W, “*The International Criminal Court*”, (2010)p. 134–53.

Korea in 2010. Also, 2016 saw the opening of an investigation in Georgia by the Prosecutor. These examinations are ongoing, and welcomed by some but may not be enough given that despite being under investigation for years, not a single indictment has been issued out of those situations.¹⁹⁸

It is therefore argued, that the ICC needs to extend its influence universally, in order to justify its relevance. Attempts to sweep under the carpet concerns of bias simply will not wash and will only send wrong signals to other regions of the world that impunity will not be punished if you are not African.¹⁹⁹ It is only when the Court is seen to be dealing effectively with situations outside Africa that allegations of bias will simmer down, while its credibility rises across the globe.

5.4 CONCLUSION

It is submitted in conclusion that, while the problems between the Court and African states are real, they are not insurmountable. As demonstrated in this Chapter, the rift between the two is not an unbridgeable chasm and indeed it may be a few simple solutions that address complex problems between the parties.

It must be emphasized that none of these recommendations on their own can prove to be the panacea to soothe the relationship between African states and the Court. They can only work conjunctively with all of them supporting each other. They may not solve the relationship crisis but they are a first step to the wider acceptance and legitimacy of the Court's operations in Africa and ultimately contribute to the fight against impunity.

Of course it would take a genuine commitment by both sides to work together, for a bridge to be built between the Court and Africa states. Talking past each other and casting aspersions about each other without genuine effort to heal the rift, does not

¹⁹⁸ M Mutua. 'Savages, victims and saviors: the metaphor of human rights', *Harvard International Law Journal*, 42, 2001, pp 201–242; and R Nagy, 'Transitional justice as global project: critical reflections', *Third World Quarterly*, 29(2), 2008, pp 275–289.

¹⁹⁹ Chief Charles Achaleke Taku (2014) "Is the International Criminal Court (ICC) targeting Africa inappropriately?" Invited Experts on Africa Question, The ICC Forum <http://iccforum.com/africa> (accessed 31/09/17).

serve the interests of either side. It may actually serve the interests of the would-be perpetrators, more than anyone else.

There is still hope for the relationship to be mended and building bridges may one day in the future lead to the fight against impunity being won.

REFERENCES

INTERNATIONAL TREATIES

Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 18, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331 (1980)

United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html> [accessed 5 October 2017]

Organization of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000, available at: <http://www.refworld.org/docid/4937e0142.html> [accessed 5 October 2017]

Rome Statute of the International Criminal Court, 17 July 1998 and corrected by process verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000,

UNITED NATIONS RESOLUTIONS

UN Security Council, Security Council resolution 1593 (2005) [on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan], 31 March 2005, S/RES/1593 (2005), available at: <http://www.refworld.org/docid/42bc16434.html> [accessed 4th September 2017]

UN Security Council, Security Council resolution 1970 (2011) [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya], 26 February 2011, S/RES/1970 (2011), available at: <http://www.refworld.org/docid/4d6ce9742.html> [accessed 4 September 2017]

U.N. General Assembly Resolution 71/248 found at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/248 [accessed 4 September 2017]

AFRICAN UNION DOCUMENTS

“*Decision of the AU Assembly on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction.*” Doc Assembly/AU/14 (XI), at the 11th Ordinary Session, 30 June–1 July 2008, Sharm El-Sheikh, Egypt.

Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, 1 July 2008, A.U. Assembly, 11th Ord. Sess., A.U. Doc. Assembly/AU/14(XI).

Decision on the Draft Legal Instruments, Assembly/AU/Dec.529(XXIII).

TEXTS

Ball H. (2010) *Genocide: A Reference Handbook*, New York: Howard Bell.

Black D and Williams P. (2010) *The International Politics of Mass Atrocities: The Case of Darfur*, London: Routledge

Crawford J *et al*, (2003) *In the Matter of the Statute of the International Criminal Court and In the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Rome Statute*” *Joint Opinion in War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, Oxford. Oxford University Press.

Gaeta P. (2002) *Official Capacity and Immunities* in A. Cassese, P. Gaeta, and J.Jones, *The Rome Statute of the International Criminal Court – A Commentary*, Oxford University Press,

Grono N, A. O’Brien (2008) *Justice in Conflict? The ICC and Peace Processes, in Courting Conflict?* N. Waddell, P. Clark (Eds.), *Justice, Peace and the ICC in Africa*, London Royal African Society.

Groves S. and Schaefer B. (2009) *The U.S. Should Not Join the International Criminal Court*, The Heritage Foundation.

Lee J. M. Seymour (2016) *The ICC and Africa: rhetoric, hypocrisy management and legitimacy* in Eds. Clarke et al; *Africa and the ICC*: United Kingdom Cambridge University Press.

Lee R. (1999) *Introduction–The Rome Conference and Its Contributions to International Law* in Lee, R. (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results*. The Hague, Kluwer Law International.

Lowe N (2009) *Mastering Modern World History*, London, Palgrave Master Series, MacMillan.

Maguire R. et al, (2013) *Shifting global powers and international law: challenges and opportunities*, Routledge.

Manas J.E (1996) *The Impossible Tradeoff: “Peace” versus “Justice” in Settling Yugoslavia's Wars*, R.H. Ullman (Ed.), *The World and Yugoslavia's Wars*, New York Council on Foreign Relations

Moss L. (2012) *The UN Security Council and the International Criminal Court Towards a More Principled Relationship*, Friedrich Ebert Stiftung.

Ralph J, (2007) *Defending the Society of States: Why America Opposes The International Criminal Court And Its Vision Of World Society*, London, Oxford University Press.

Schabas W. (2011) *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press.

JOURNAL ARTICLES

Aregawi B. "The Politicisation of the International Criminal Court by United Nations Security Council Referrals, African Centre for the Constructive Resolution of Disputes". *Conflict Trends 2017 Vol 2*.

Avocats Sans Frontières (2012) "Africa and the International Criminal Court: Mending Fences", *McArthur Foundation, ASF*, Jul. 2012.

Bergsmo M. and Yan L. (editors), "The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute", (2012) State Sovereignty and International Criminal Law, *FICHL Publication Series No. 15*

Dempsey T. G "Reasonable Doubt the Case against the Proposed International Criminal Court" (1998) *Cato Policy Analysis No. 311*, July 16, 1998

Du Plessis M, '*The International Criminal Court that Africa Wants*' (2010), ISS Monograph 172/10

Gaynor, F., and L. K. Morris. 'M. Cherif Bassiouni, The Legislative History Of The International Criminal Court'. (2008) *Journal of International Criminal Justice* 6.4 (2008): 815-819.

Georgetown Law "International Criminal Court - Article 98 Agreements Research Guide," (2017) *Georgetown University Law Library*.

Groves S. and Schaefer B. (2009) "The U.S. Should Not Join the International Criminal Court", (2009) *The Heritage Foundation Executive Summary Backgrounder No. 2307*

Jakobsen M. Immunity versus impunity? Reconciling Articles 27(2) and 98(1) of the Rome Statute (2005) *RGSL WORKING PAPERS NO. 23 RIGA*, 10

Kreb C. "The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute", in Morten Bergsmo and LING Yan (editors), (2012) *State Sovereignty and International Criminal Law, FICHL Publication Series No. 15*

Kzarn B, "International Criminal Court Facing the Peace vs. Justice Dilemma", (2016) *International Comparative Jurisprudence Volume 2, Issue 2*, December 2016

Lawyers Committee for Human Rights, "Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction," (1998) *International Criminal Court Briefing Series*, Vol. 1, No. 8

Lu Jianping & Wang Zhixiang, "China's Attitude Towards the ICC", (2005) 3 *J. INT'L CRIM. JUST.* 608, 611

M Mutua. 'Savages, victims and saviors: the metaphor of human rights', *Harvard International Law Journal*, 42, 2001, pp 201–242; and R Nagy, 'Transitional justice as global project: critical reflections', *Third World Quarterly*, 29(2), 2008, pp 275–289.

Mamdani M. "Saviors and Survivors: Darfur, Politics and the War on Terror" *Int J Transit Justice* (2009) 3 (3) Roth K, "Africa Attacks the International Criminal Court" *N.Y. Rev. Of Books*, (2016)

Maupas S. "Will South Africa's move to quit ICC spark "Afrexit?" Foundation Hironnelle, Havard Humanitarian Initiative (2016), Oxford Transitional Justice Research.

Mayerfeld, 'The democratic legacy of the International Criminal Court', *Fletcher Forum of World Affairs*, 28(2), 2004

Mbaku J.M, "International Justice: The International Criminal Court and Africa", (2014) *Foresight Africa: Top Priorities for the Continent in 2014*, The Brookings Institution: Africa Growth Initiative.

McNamee, T. (2014). *"The ICC and Africa – Between aspiration and reality: Making international justice work better for Africa."* Discussion Paper 2/2014. Johannesburg: Brenthurst Foundation, p.5.

Miglin J, 'From Immunity to Impunity: Charles Taylor and the Special Court for Sierra Leone' (2007) 16 *Dalhousie Journal of Legal Studies* 22.

Mills K *"Bashir is Dividing Us": Africa and the International Criminal Court,* (2012) *Human Rights Quarterly* 34 (2) 2012,

Morris M, "The Jurisdiction of the International Criminal Court Over Nationals of Non-Party States", (2000) 6 *ILSA Journal of International & Comparative Law* 363-369

Murithi T. (2012) "Africa's relations with the ICC: A Need for Reorientation? Perspectives: Political Commentary and Analysis from Africa" (2012), *Heinrich Böll Foundation – Africa Issue 1 of 2012*

Nouwen S and Werner W 'Doing justice to the political: The international criminal court in Uganda and Sudan', (2012) *European Journal of International Law*, 21(4) (2012), 941

Orentlicher D.F, "Politics by Other Means: The Law of the International Criminal Court, 1999, 32 *CORNELL INT'L L. J.* 489, 491 (1999)

Priscilla Hayner, "Libya: The ICC Enters During War", (2013) *ECFR*, November 2013,

Roth K, "Africa Attacks the International Criminal Court" 2016, *N.Y. Rev. Of Books*,

Schabas W, 'Prosecutorial discretion versus judicial activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice*.

Schabas, W. A. 'United States Hostility To The International Criminal Court: It's All About The Security Council'(2004) . *European Journal of International Law* 15.4 (2004): 701-720

Schabas, W. A, "Victor's Justice: Selecting "Situations" at the International Criminal Court," *The John Marshall Law Review*, (2010), Vol.43, Iss.3, pp.145,

Scheffer, David J, "Article 98(2) of the Rome Statute: America's Original Intent" (2005) *Journal of International Criminal Justice*, Vol. 3, No. 2, May (2005)

Tan, Jr *et al* "The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court." (2003) *American University International Law Review* 19, no. 5 (2003): 1115-1180.

Triffterer O. "Article 27 – Irrelevance of Official Capacity" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article*, Nomos, Baden Baden, 1999, p. 502.

United Nations "The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law" (2012) *The UN Chronicle Vol. XLIX No. 4 2012*

Werle, G., L. Fernandez and M. Vormbaum (eds). "Africa and the International Criminal Court" *International Criminal Justice Series* (Vol. 1), 2014:187.

Zappala S "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes?" *EJIL*, Vol. 12, No. 3, 2001.

Zappalà, S 'The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements', (2003) *Journal of International Criminal Justice* (2003), 114, 117-121.

Internet Articles

"Concerning the ICC Withdrawal Problem, Invited Experts on Withdrawal Question, Office of the Prosecutor, ICC Forum, (2016) <http://iccforum.com/withdrawal>

“What the ICC Can Do to Improve its Relationship with African States”

Justice in Conflict, <https://justiceinconflict.org/2016/11/01/what-the-icc-can-do-to-improve-its-relationship-with-african-states/>

“The Politics of Departure: Africa and the International Criminal Court , IPI Global Observatory, <https://theglobalobservatory.org/2016/11/international-criminal-court-south-africa-burundi-gambia/>

“Rwanda and the ICC: Playing Politics with Justice.” African Arguments.

<http://africanarguments.org/2013/10/21/rwanda-and-the-icc-playing-politics-with-justice-by-stephen-a-lamony>

“United States, The Taguba Report 2004,” How Does The Law Protect In War, The International Committee of the Red Cross. <https://casebook.icrc.org/case-study/united-states-taguba-report>

“Peace Must Not Be the Victim of International Justice” The New York Times, 16/03/2012 http://www.nytimes.com/2012/03/17/opinion/peace-must-not-be-the-victim-of-international-justice.html?_r=2

“America's Stake in Peace, Security, and Justice,” U.S. Department of State, August 31, 1998, at http://www.state.gov/policy/remarks/1998/980831_scheffer_icc.html

“American Foreign Policy and the International Criminal Court” Remarks to the Center for Strategic and International Studies Washington, DC 2002 <https://2001-2009.state.gov/p/us/rm/9949.htm>

“What’s Next for Africa and the International Criminal Court?” African Centre for Strategic Studies <http://africacenter.org/spotlight/whats-next-africa-international-criminal-court-icc/>

“Propriomotu investigation by the ICC Prosecutor” THE PEACE AND JUSTICE INITIATIVE <http://www.peaceandjusticeinitiative.org/implementation-resources/proprio-motu-investigation-by-the-icc-prosecutor>

“The Politics of Departure: Africa and the International Criminal Court”, IPI Global Observatory, <https://theglobalobservatory.org/2016/11/international-criminal-court-south-africa-burundi-gambia/>

“The African Union and the Libya Conflict of 2011”, The World Peace Foundation <https://sites.tufts.edu/reinventingpeace/2012/12/19/the-african-union-and-the-libya-conflict-of-2011/>

“To what Extent Have Politics Restricted the ICC’s Effectiveness?” E-International Relations Students. http://www.e-ir.info/2015/12/20/to-what-extent-have-politics-restricted-the-iccs-effectiveness/#_ftn1

“United States Efforts to Undermine the International Criminal Court: Human Rights Watch 2003 Legal Analysis of Impunity Agreements” found at <https://www.hrw.org/legacy/campaigns/icc/docs/art98analysis.htm>

“Hague Invasion Act’ Becomes Law.” <https://www.hrw.org/news/2002/08/03/us-hague-invasion-act-becomes-law>

“Us Bilateral Immunity Agreements Or So called “Article 98”Agreements,” available at http://www.iccnw.org/documents/FS-BIAs_Q&A_current.pdf

“UNSC Referral of Libya Gives ICC the Opportunity to Prove its Worth”, Institute for Security Studies, found at <https://issafrica.org/iss-today/unsc-referral-of-libya-gives-icc-the-opportunity-to-prove-its-worth>

“The Relationship Between the ICC and the Security Council: Challenges and Opportunities,” International Peace Institute March 2013 found at http://www1.regierung.li/uploads/media/IPI_E-Pub-Relationship_Bet__ICC_and_SC__2__02.pdf

“The ICC and Africa (Part 3) Courtside Justice”, Justice Hub Organization <https://justicehub.org/article/courtside-justice-icc-and-africa-part-3>

“Five Recommendations to Pacify Relations Between the ICC and Africa” JUST SECURITY <https://www.justsecurity.org/35078/recommendations-pacify-relations-icc-africa>

“Things the ICC Could Do to Improve Its Communications and Standing”, Justice in Conflict <https://justiceinconflict.org/2015/11/10/seven-things-the-icc-could-do-to-improve-its-communications-and-standing/>

“Is the International Criminal Court (ICC) targeting Africa inappropriately?” INVITED EXPERTS ON AFRICA QUESTION, The ICC Forum <http://iccforum.com/africa>

South Africa’s ICC Withdrawal: Why? And What Now?’, Just Security, 22 October 2016, available at <http://www.justsecurity.org/33765/south-africas-icc-withdrawal-why-now/>.

“Is The ICC Putting the African Continent on Trial?” International Justice Monitor, A project of the Open Society Justice Initiative <https://www.ijmonitor.org/2012/03/is-the-icc-putting-the-african-continent-on-trial/>

“Executive summary of Article 15-6 investigation of the 800th Military Police Brigade” by Maj. Gen. Antonio M. Taguba, available on <http://www.msnbc.msn.com/id/4894001>]

“Perspectives: Political Analysis and Commentary from Africa,” found at http://www.boell.de/downloads/2012-08-Perspectives_Africa_1_12.p

“Africa in the Dock: On ICC Bias Critical Legal Thinking — Law and the Political —” <http://dare-think.com/2016/11/africa-in-the-dock-on-icc-bias>

“Amnesty International, Malabo Protocol: Legal And Institutional Implications Of The Merged And Expanded African Court,” available at: <http://www.refworld.org/docid/56a9ddcf4.html>

“US bilateral immunity agreements or so- called “article 98”FACTSHEET found at http://eradicatingecocide.com/wp-content/uploads/2012/06/CICC-BLAs_QA_current.pdf

“Palestine’s ICC Accession: Risks and Rewards, Royal Institute Of International Affairs (Jan. 8, 2015), found at <https://www.chathamhouse.org/expert/comment/16604>

“How to Move Beyond South Africa’s Notice of Withdrawal from the ICC”, Just Security, 24/10/2016 available at <https://www.justsecurity.org/33778/move-south-africas-notice-withdrawal-icc/>.

CASELAW

International case law

Prosecutor v. Charles Ghankay Taylor, Decision on Immunity from Jurisdiction, 31 May 2004, SCSL-2003-01-

Blaskic (subpoena) (ICTY, Judicial Reports, 1996.

Eichmann v. Attorney-general of Israel: Supreme Court Decision Supreme Court of Israel (1962) 136 I.L.R. 277

Domestic Case Law

Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others [2016] ZASCA 17 (15 March 2016)

Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others 2016 (1) SACR 161

ICC DOCUMENTS

“ICC: Report on Prosecutorial Strategy. Office of the Prosecutor, International Criminal Court 14 September 2006.

“Justice plays a “crucial role” in maintaining international peace and security: ICC Prosecutor briefs the United Nations Security Council” The International Criminal Court, Press Release 24/10/2014 found at <https://www.icc-cpi.int/legalAidConsultations?name=pr1055> (accessed 31/07/17)

ICC, *“Pre-Trial Chamber I Issues Three Warrants of Arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi,”* Press Release, 27 June 2011,

Office of the Prosecutor, *‘Report on Preliminary Examination Activities 2014’*, 2 December 2014 <http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>.

The Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3

AU DOCUMENTS

“Decision of the AU Assembly on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction.” Doc Assembly/AU/14 (XI), at the 11th Ordinary Session, 30 June–1 July 2008, Sharm El-Sheikh, Egypt.

UNITED NATIONS DOCUMENTS

‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General: Pursuant to Security Council Resolution 1564 of 18 September 2004’, 25 January, Available at: http://www.un.org/news/dh/sudan/com_inq_darfur.pdf [accessed 4 September 2017].

“Report of the International Law Commission on the work of its thirty-second session,” UN GAOR, 35th Sess, Supp. No. 10, UN Doc. A/35/10 (1980) at 344.

“Report of the International Law Commission on the work of its thirty-second session,” UN GAOR, 35th Sess, Supp. No. 10, UN Doc. A/35/10 (1980) at 344.

“Report of the Preparatory Committee on the Establishment of an International Criminal Court,” U.N. GAOR, 51st Sess., Supp. No 22, Vol. I, U.N. Doc. A/51/22 (1996), p. 35.

“Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Law in Libya”, A/HRC/19/68, 2 March 2012, paragraphs 808 – 810.

“Syria: UN approves mechanism to lay groundwork for investigations into possible war crimes” UN News Centre 22/12/2016 found at <http://www.un.org/apps/news/story.asp?NewsID=55862#.WceabPMjHIU>

UN Human Rights Council, 15th Special Session, A/HRC/S- 15/2, 25 February 2011.

UN Security Council, *Security Council resolution 1593 (2005) [on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan]*, 31 March 2005, S/RES/1593 (2005), available at: <http://www.refworld.org/docid/42bc16434.html> [accessed 4 September 2017]

UN Security Council, *Security Council resolution 1970 (2011) [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya]*, 26 February 2011, S/RES/1970 (2011), available at: <http://www.refworld.org/docid/4d6ce9742.html> [accessed 5 October 2017]

UNGA Resolution 71/248, found at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/248