FIGHTING IMPUNITY THROUGH PROSECUTION OF INTERNATIONAL CRIMES IN AFRICA

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ABSTRACT

Over the years, it has become increasingly difficult to sustain any discourse on the challenges facing Africa without mentioning impunity for atrocious acts. Impunity has habitually characterised political instability on the continent and often led to civil unrest. Impunity continues to expose African civilians to horrendous human rights violations, such as war crimes, genocide, crimes against humanity, torture, rape, extra-judicial executions, corruption and autocratic rule. Arguably, in the last few decades, almost all African countries have experienced conflicts that resulted in serious human rights violations. Unfortunately, these atrocities were met in the past with either a total lack of accountability or only half-hearted measures. This necessitated a regional response in line with principles of the African Union (AU) that, inter alia, underscore good governance, respect for human rights, and accountability for past crimes. Several initiatives to root out impunity were introduced both at the regional and international level.

The initiatives at the international level entailed setting up a number of ad hoc tribunals on the African continent to undertake prosecution. The eventual adoption and entry into force of the Rome Statute establishing the International Criminal Court (ICC) raised considerable hope, with some commentators describing it as a 'Grotian' moment for international law. At its inception in 1998, the ICC was seen as a permanent solution to the problem of accountability for past crimes. A majority of African states took part in the negotiations, adoption, signature and ratification of the Rome Statute. In 2003, the Democratic Republic of Congo (DRC) was the first state to trigger the ICC's jurisdiction through the self-referral mechanism. Subsequent efforts by African states through such 'self-referrals' ensued. In sum, in addition to DRC, Uganda, Central African Republic (CAR) and Mali have referred situations in their countries to the ICC. Unfortunately, this euphoria has come to naught.

Enthusiasm about the ICC and the promise it held as a solution to impunity seems to have faded away, with much criticism directed to it amidst AU calls for an African solution to Africa's problem of impunity. The Gambia, Burundi

and South Africa submitted notices to withdraw from the ICC. Although the Gambian notice has been withdrawn and a South African court invalidated the South African withdrawal, as it was procedurally irrational (resulting in the government revoking its withdrawal notice), there are impending threats that Namibia, Kenya and Uganda as well as South Africa (should it meet the relevant domestic procedural requirements) could seek to withdraw.

This study identifies two central themes that, arguably, have informed the AU's discontent about the ICC. They are: the perceived bias of the ICC against Africa; and the divergent opinions in the 'peace versus justice' debate. These are covered in chapters two and three of this thesis, respectively. Chapters four and five interrogate African approaches to their concerns against the ICC in addressing the problem of impunity. While chapter four discusses the criminal mandate of the African Court of Justice and Human Rights, chapter five considers traditional African approaches and truth and reconciliation commissions. Chapter six then concludes the study.

This dissertation seeks to answer four research questions: What are Africa's concerns about the prosecution of international crimes at the ICC? On what bases does Africa have these concerns? Do African approaches add value to the fight against impunity in Africa and how can one strengthen them? Is a regional criminal mechanism - which takes into consideration African approaches or perspectives – the solution to fighting impunity in Africa?

DECLARATION

I, EVELYNE ASAALA OWIYE, do hereby declare that this research is my original work and that, to the best of my knowledge and belief, it has neither been submitted previously nor is currently being submitted to any other university for a degree or diploma. Where someone else's work has been used, due acknowledgment has been given and reference made accordingly.

Signed

Date: 17 September 2019

DEDICATION

I dedicate this work to God. Only You, God, understand my past, present and future. Thy will be done.

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LIST OF ABBREVIATIONS

ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights
ACtHPR	African Court of Human and Peoples' Rights
AU	African Union
AUPD	African Union Panel on Darfur
ASP	Assembly of States Parties (Rome Statute)
CAR	Central African Republic
CCR	Centre for Constitutional Rights
CEO	Chief Executive Officer
CIR	Corruption Index Ratings
CNDP	Congres National pour la Defense du Peuple
DRC	Democratic Republic of Congo
ECCHR	European Center for Constitutional and Human Rights
EU	European Union
HRC	Human Rights Committee
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICD	Internationa Crimes Division
ICID	International Commission of Inquiry into Darfur
ICJ	International Court of Justice
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal of the former Yugoslavia
IDPs	Internally Displaced Persons
ILC	International Law Commission
IMT	International Military Tribunal (Nuremberg)
ISS	Institute for Security Studies
JCCD	Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor
LRA	Lord's Resistance Army

LRF	Lord Resistance Force
NATO	North Atlantic Treaty Organization
NGOs	Non-Governmental Organisations
NPFL	National Patriotic Front of Liberia
OAU	Organization of African Unity
OECD	Organisation for Economic Co-Operation and Development
OIC	Organisation of Islamic Cooperation
OTP	Office of the Prosecutor
PCIJ	Permanent Court of International Justice
PSC	Peace and Security Council
PTC	Pre-Trial Chamber
SADC	Southern African Development Community
SAII	South African Institute of International Affairs
SAPS	South African Police Service
SCSL	Special Court of Sierra Leone
STL	Special Tribunal for Lebanon
TI	Transparency International
TJRC	Truth, Justice and Reconciliation Commission
TRC	Truth and Reconciliation Commission
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US/USA	United States of America
VCDR	Vienna Conventions on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties

PART 1:

INTRODUCTION AND BACKGROUND TO THE STUDY

CHAPTER 1
INTRODUCTION

1.1 Introduction and background to the study

'Impunity' is a term familiar to Africa in many respects. It has habitually characterised the political instability on the continent, often leading to civil unrest. Impunity continues to expose African civilians to horrendous human rights violations such as genocide, war crimes, crimes against humanity, torture, rape, extra-judicial executions, corruption and autocratic rule.[1] This study takes note of the application of the notion of impunity to a broader array of situations: social impunity,[2] political impunity[3] and individual impunity.[4] It adopts the meaning associated with the common usage of the term – 'the exemption from accountability, penalty, or punishment for perpetrators of illegal acts'[5] – and places the focus on international crimes[6] defined in the Rome Statute of the International Criminal Court, 1998 (Rome Statute),[7] and with specific focus on the approach to these crimes in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and

[1] C Villa-Vicencio 'Transitional justice and human rights in Africa' *Human rights in Africa* (2009) 34; Open Society Foundation 'Putting complementarity in practice: Domestic justice for international crimes in DRC, Uganda and Kenya' (2011) https://www.opensocietyfoundations.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf (accessed 5 September 2013); African Commission on Human and Peoples' Rights '235: Resolution on Transitional justice in Africa' 23 April 2013 http://www.achpr.org/sessions/53rd/resolutions/235/ (accessed 6 February 2014).

[2] F Gutierrez 'The peace process with the paramilitaries in Colombia: Sustainability, proportionality and the allocation of guilt' in M Bergsmo and P Kalmanovitz (eds) *Law in peace negotiations* (2009) 162-163. According to Gutierrez, this is a post-conflict condition in which, even after a conflict has ceased, groups that during the conflict enjoyed privileges, abused other groups, or generally engaged in human rights violations, continue to maintain a similarly privileged position without being held to account for their abuses.

[3] Ibid. These are political entities which in certain regions of a country, or even countrywide, are associated with human rights violations yet continue their acts of violation without being held to account.

[4] Ibid. These are criminals who engage in acts amounting to massive human rights violations, yet the systems fail to hold them criminally accountable.

[5] S Opotow 'Psychology of impunity and injustice: Implications for social reconciliation' in MC Bassiouni (ed) *Post-conflict justice* (2002) 202.

[6] Para 4, Preamble to the Rome Statute defines international crimes as 'serious crimes of concern to the international community.'

[7] The Rome Statute limits international crimes to crime of aggression (based on a 2010 amendment to the Statute), genocide, crimes against humanity and war crimes.

Human Rights, 2014 (Malabo Protocol).[8] Impunity entails the condonation of the commission of the said crimes, be it through amnesties, pardons, indifference, or the inability or unwillingness to hold the responsible individuals accountable, particularly through prosecution. It is argued in this thesis that prosecution is not only a widely accepted mechanism in societies undergoing social, political and economic transformation[9] but also an internationally recognised duty incumbent on states.[10]

Almost all African countries have experienced local or regional conflicts in the last three decades. Several United Nations (UN) reports have documented the recurrent nature of civil wars being fought in Africa, particularly during political transition.[11] Rwanda, for example, experienced protracted civil wars from 1960s to 1990s that later culminated in genocide in 1994.[12] Similar occurrences have been in evidence in the Democratic Republic of Congo (DRC), Central African Republic (CAR), Sierra Leone, Sudan, Ghana, Ethiopia, Eritrea, Guinea, Chad, Côte d'Ivoire, Kenya and Mali.[13] South

[8] The Malabo Protocol is not yet in force, with 11 signatories and no ratifications, as at the time of writing (see 'List of countries which have signed, ratified/acceded to the Protocol), https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf (accessed 15 May 2018)).

[9] See generally, R Teitel *Transitional justice* (2000); D Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 2537; J Rowen 'Social realities and philosophical ideals in transitional justice' (2008) 7 *Cardozo Public Law Policy & Ethics Journal* 98.

[10] K Obura 'Duty to prosecute international crimes under international law' in C Murugu and J Biegon (eds) *Prosecuting international crimes in Africa* (2011) 11.

[11] UN 'Causes of conflict in Africa and the promotion of durable peace and sustainable development in Africa' Report of the Secretary-General, UN Doc. A/52/871 - S/1998/318 (1998) paras 4, 10-13; UN 'Causes of conflict in Africa and the promotion of durable peace and sustainable development in Africa' Report of the Secretary-General, UN Doc. A/52/871 - S/1998/318 (2014) para 6.

[12] PJ Magnarella 'The background and causes of genocide in Rwanda' (2005) 3 *Journal of International Criminal Justice* 801-822.

[13] J O'Connell 'Here interest meets humanity: How to end the war and support reconstruction in Liberia, and the case for modest American ledership' (2004) 17 *Harvard Human Rights Law Journal* 207; SM Kilonzo 'Silent religiosity in a snivelling nation: The role of religious institutions in promoting post-conflict reconsilliation in Kenya' (2009) 17 *Africa Media Review* 95; G Heaner 'Religion, law and human rights in post-conflict Liberia' (2008) 8 *Africa Human Rights Law Journal* 458; GA Aneme 'Apology and trials: The case of the red terror trial in Ethiopia' (2006) 6 *Africa Human Rights Law Journal* 64; HRW *'They killed them like it was nothing': The need for justice in Côte d'Ivoire post-election crimes* (2011) https://www.hrw.org/sites/default/files/reports/cdi1011WebUpload.pdf (accessed 19 November 2013); HRW 'Ten long years: A briefing on Eritrea's missing political prisoners' (2011) https://www.hrw.org/report/2011/09/22/ten-long-years/briefing-eritreas-missing-political-prisoners (accessed 19 November 2013); HRW 'Forgotten and afraid: Lawlessness, rape and impunity in Western Côte d'Ivoire' (2010) http://www.hrw.org/sites/

Sudan, the youngest state on the continent, is the most current victim of this trend. The people's revolutions in Tunisia, Egypt and Libya, coupled with the unconstitutional change of government in Madagascar without any sanctions against Andry Nirini Rajoelina and his allies, attest to the levels of impunity in Africa.[14] Sierra Leone, Kenya and Libya have made attempts to hold the alleged perpetrators of past atrocities, particularly perpetrators bearing the greatest share of responsibility, accountable under international criminal law mechanisms.[15]

While most of the abovementioned countries introduced piecemeal or half-hearted local prosecutions, others 'such as Liberia, Sudan, Mozambique and Angola, have dealt with the question of justice by deciding (expressly or otherwise) to avoid it'.[16] This leaves the impunity gap unresolved in most African countries. Even in those countries that attempted prosecution at the international level, it has commonly been the case that governments are

default/files/reports/cotedivoire1010webwcover_0.pdf (accessed 19 November 2013); The African Centre for the Constructive Resolution of Disputes (ACCRD) 'The report by the AU Panel of the Wise: Strengthening relations with similar regional mechanisms' (2013) 20 on regional dimensions of conflict in Africa, http://www.accord.org.za/publication/the-african-union-panel-of-the-wise/ (accessed 1 March 2017).

[14] HRW 'Work on him until he confesses: Impunity for torture in Egypt' (2011) http://www.hrw.org/sites/default/files/reports/egypt0111webwcover_0.pdf (accessed 19 November 2013); International Federation for Human Rights (FIDH) 'The conviction of Khaleed Ben Said: A victory against impunity in Tunisia' http://fidh.org/IMG/pdf/Bensaid550ang2010.pdf (accessed 17 December 2013); International Crisis Group 'Tunisie: lutter contre l'impunité, restaurer la sécurité' http://www.crisisgroup.org/en/regions/middle-east-north-africa/north-africa/tunisia/123-tunisia-combatting-impunity-restoring-security.aspx?alt_lang=fr (accessed 17 December 2013); UN 'Report of the International Commission of Inquiry on Libya' A/HRC/19/68, 2 March 2012, http://www.ohchr.org/EN/NewsEvents/Pages/LibyaReport.aspx (accessed 17 December 2013); Africa Institute of South Africa 'Unconstitutional changes of government in Africa: An assesment of the relevance of the Constitutive Act of the African Union' Policy brief number 44 March 2011 http://www.ai.org.za/wp-content/uploads/downloads/2011/11/No-44.-Unconstitutional-Changes-of-Government-in-Africa.pdf (accessed 4 February 2014).

[15] The Special Court of Sierra Leone issued a total of 13 indictments, the ICC OTP exercised her *proprio muto* powers in Kenya leading to an indictment of six people, and the UNSC referred the situation in Libya to the ICC. See generally https://www.icc-cpi.int/pages/cases.aspx#Default=%7B%22k%22%3A%22%22%7D#2ae8b286-eb20-4b32-8076-17d2a9d9a00e=%7B%22k%22%3A%22%22%7D (accessed 23 March 2017) for all ICC cases and http://www.scsldocs.org (accessed 23 March 2017) for cases of the SCSL.

[16] All these countries offered blanket amnesties to all the perpetrators. See for example Liberia's Comprehensive Peace Agreement, signed on 18 August 2003; E Asaala, 'Exploring transitional justice as a vehicle for social and political transformation in Kenya' (2010) 10 *African Human Rights Law Journal* 377.

reluctant to hold the actual perpetrators of these crimes to account.[17] Thus, while in most countries impunity is clearly manifested through lack of accountability for those responsible for crimes committed during conflicts, in several others, impunity seems to co-exist with peacetime. Zimbabwe[18] and Uganda[19] are examples of countries where crimes against humanity, repressive rule, torture, extra-judicial killings and corruption continue to ravage seemingly 'peaceful' states, again with total impunity.

Impunity negatively affects the very core of the human rights corpus. Not only are democracy and good governance relegated to the periphery, but millions of people lose their lives while others are displaced.[20] Access to public services has become a luxury as torture, corruption, rape and other forms of sexual violence continue to be inflicted on citizens. In the same vein, despotic rule and oppression of political opponents seem to have been incorporated into the governmental objectives of most African states. Kitissou, for instance, describes Charles Taylor's regime in Liberia as a criminal presidency.[21] According to Kitissou, Taylor manipulated the electoral machinery that propelled him to power and his seven-year rule was also characterised by sharp contradictions between law in theory and law in practice.[22] Immediately before his presidency, Taylor – who was the then leader of an armed group, the National Patriotic Front of Liberia (NPFL) – committed hideous crimes against humanity, war crimes and other serious violations of international humanitarian law.[23] How such a presidency could be expected to champion

[17] HRW 'Turning pebbles: Evading accountability for post-election violence in Kenya' (2011) http://www.hrw.org/sites/default/files/reports/kenya1211webwcover_0.pdf (accessed 19 November 2013).
[18] A Bourbon 'Human Rights litigation in Zimbabwe: Past present and future' (2003) 3(2) *African Human Rights Law Journal* 195; RH Hassmann 'Mugabe's Zimbabwe, 2000-2009: Massive human rights violations and the failure to protect' (2010) 32 *Human Rights Quarterly* 898; HRW 'Perpetual fear: Impunity and cycles of violence in Zimbabwe' (2011) http://www.hrw.org/sites/default/files/reports/zimbabwe0311NoPage8Full.pdf (accessed 19 November 2013).
[19] K Twinomugisha 'The role of the judiciary in the promotion of democracy in Uganda' (2009) 2 *Africa Human Rights Law Journal* 9-22; HRW 'Letting the big fish swim: Failures to prosecute high-level corruption in Uganda' (2013) http://www.hrw.org/sites/default/files/reports/uganda1013_ForUpload_1.pdf (accessed 19 November 2013).
[20] See generally (n 13 and 14 above).
[21] M Kitissou 'Conflicting stories and contending images of Africa' (2008) 5(2) *African Renaissance* 9.
[22] Ibid.
[23] *Prosecutor v Charles Ghankay Taylor,* Appeal Judgment, SCSL-03-01-A (26 September 2013) SCSL Appeals Chamber, paras 5-9.

democratic rule is the most difficult question to answer. Arguably, such a description of Taylor would resonate with many of today's African leaders, especially those who came to power through the barrel of the gun.

These manifestations of impunity necessitated a regional response in line with the African Union's (AU) principles that underscore, inter alia, good governance, peace and stability, respect for human rights and accountability for past crimes.[24] Several initiatives to root out impunity were initiated both at the regional and international level. The initiatives at the international level led to the establishment of several ad hoc tribunals in Africa to undertake prosecution.[25] Eventually, the adoption and entry into force of the Statute establishing the International Criminal Court (ICC) raised considerable hope, with some commentators describing it as a 'Grotian' moment for international law.[26] At its inception in 1998, the ICC was thought to offer a permanent solution to the problem of accountability for past crimes. With a clearly defined mandate that embodies a philosophy of resisting impunity,[27] the ICC exercises jurisdiction over the most serious crimes of concern to the international community.[28] Its objectives are therefore to prosecute the perpetrators bearing the greatest responsibility for these crimes and to ensure reparation to victims.[29]

This perhaps explains the initial excitement about the ICC among member states of the AU. The majority of African states took part in the negotiation, adoption, signature and ratification of the Rome Statute.[30] The Southern African Development Community (SADC), for instance, adopted not only the Principles of Consensus on the Court prior to the enactment of the Rome

[24] Article 4, Constitutive Act of the AU.
[25] MC Bassiouni 'Accountability for violations of international humanitarian law and other serious violations of human rights' in MC Bassiouni (ed) *Post conflict justice* (2002) 4; C Aptel and W Mwangi 'Developments in international criminal justice in Africa during 2009' (2010) 10 *Africa Human Rights Law Journal* 265.
[26] CC Jalloh 'Africa and the International Criminal Court: Collision course or cooperation' (2011-2012) 34 *North Carolina Central Law Review* 203.
[27] Para 5, Preamble to the Rome Statute.
[28] (n 7 above).
[29] Article 75, Rome Statute.
[30] Thirty-four African states are parties to the Rome Statute. In comparison to other continents, Africa has the largest membership of the Court. M du Plessis 'The International Criminal Court and its work in Africa: Confronting the myths' ISS Monograph No. 173 (2008); M du Plessis 'The International Criminal Court that Africa wants' ISS Monograph No. 172 (2010).

Statute in 1997, but also the Pretoria Statement of Common Understanding on the ICC, affirming its continued support for the Court and recognising the need to adopt implementing legislation.[31] In 2003, the DRC was the first state to trigger the ICC's jurisdiction through the self-referral mechanism. There were subsequent efforts by African states and the international community to rid the continent of impunity through 'self-referrals' and referrals by the United Nations Security Council (UNSC) to the ICC.[32] In sum, the DRC, Uganda, Central African Republic (CAR) and Mali have referred the situations in their respective countries to the ICC. The UNSC referred the situation in Sudan and Libya, while the prosecutor exercised its *pro prio motu* powers with respect to Kenya, Côte d'Ivoire and Burundi.

Unfortunately, this euphoria has come to naught. The enthusiasm surrounding the ICC as the solution to impunity seems to have faded away, with numerous criticisms having been made of the ICC amidst calls by the AU for non-cooperation with the ICC in the execution of specific arrests warrants, withdrawal of African states from the Rome Statute and an African solution to Africa's problem of impunity.[33] This sour relationship was prompted by the ICC's issuance of an indictment of a sitting African head of state, al-Bashir,[34] which the AU has called on African states not to cooperate in its execution as explained subsequently. Moreover, the AU and African states place emphasis on the need for peace, especially where prosecutions are destabilising

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[31] Statement by Ambassador Khiphusizi J Jele, the then permanent representative of South Africa on behalf of SADC before the sixth committee of the 52nd General Assembly regarding the establishment of an international criminal court, http://www.iccnow.org/index.php (accessed 23 March 2017).

[32] For African cases referred to the ICC and their respective trigger mechanisms, see International Criminal Court, 'Situations under investigation', https://www.icc-cpi.int/pages/situations.aspx (accessed 27 April 2018); C Aptel and W Mwangi 'Developments in international criminal justice in Africa during 2008' (2008) 8 *Africa Human Rights Law Journal* 274; A Usacka 'Promises fulfilled? Some reflections on the International Criminal Court in its first decade' (2011) *Criminal Law Forum* 473-492.

[33] On withdrawal and African solution, see AU Assembly 'Decision on the International Criminal Court (ICC)', Assembly/AU/Dec.622(XXVIII), Doc. Doc. EX.CL/1006(XXX), 28th Ordinary Session, 30 - 31 January 2017, para 8; AU 'Withdrawal Strategy Document' (Version 12.01.2017) para 8, available at https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf (accessed 30 April 2018). ACCRD, 'The report by the AU Panel of the Wise' (note 13 above) 30.

[34] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, (Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-1 (4 March 2009) Pre-Trial Chamber I; *Prosecutor v Omar Hassan Ahmad Al Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-94 (12 July 2010) Pre-Trial Chamber I.

national and or regional peace and security.[35] Whereas, the ICC emphasises justice through prosecution.[36] The Gambia,[37] Burundi[38] and South Africa[39] submitted notices to withdraw from the ICC. The Gambian notice was subsequently withdrawn[40] and a South African court invalidated, on procedural grounds, the South African withdrawal,[41] resulting in the South African government revoking its withdrawal notification as well as its withdrawal of a parliamentary bill that had sought to repeal the International Criminal Court Act 27 of 2002 (ICC Act of South Africa), which incorporated the Rome Statute into South African domestic law.[42] Nonetheless, there are impending threats of withdrawals by Namibia, Kenya and Uganda as well as South Africa (should it meet the relevant domestic procedural requirements).

These events have given strong impetus to the demand for a home-grown – continental – solution to the problem of impunity in Africa.[43] Some post-conflict African states have sought to use traditional African approaches or truth and reconciliation commissions (TRCs) as alternative means of accountability for international crimes. For example, although coming before the institution of

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[35] See, for example, AU Assembly 'Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC)' Assembly/AU/Dec.245(XIII) Rev.1, Doc. Assembly/AU/13(XIII), 13th Ordinary Session, 1–3 July 2009, para 3; AU Assembly 'Decision on international jurisdiction, justice and the International Criminal Court' Assembly/AU/Dec.482(XXI), Doc. Assembly/AU/13(XXI), 21st Ordinary Session, 26 - 27 May 2013, paras 4 and 5; AU Assembly 'Decision on Africa's Relationship with the International Criminal Court (ICC)' Ext/Assembly/AU/Dec.1(Oct.2013), Extraordinary Session, 12 October 2013, para 5; AU PSC 'Communique of the 142nd meeting of the Peace and Security Council, Addis Ababa Ethiopia' PSC/MIN/Comm(CXLII), 21 July 2008, para 3; UN 'South Africa: Withdrawal', 'Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court', 19 October 2016, C.N.786.2016.TREATIES-XVIII.10 (Depository Notification, 25 October 2016).

[36] *Prosecutor v Omar Hassan Ahmed Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir) ICC-02/05-01/09-3 (4 March 2009) Pre-Trial Chamber I, para 8, 223 and 236.

[37] UN 'Gambia: Withdrawal', 10 November 2016, C.N.862.2016.TREATIES-XVIII.10 (Depositary Notification, 11 November 2016).

[38] UN 'Burundi – Withdrawal', 27 October 2016, C.N.805.2016.TREATIES-XVIII.10 (Depository Notification, 28 October 2016).

[39] UN 'South Africa: Withdrawal' (n 35 above).

[40] UN 'Gambia: Withdrawal of notification of withdrawal', 10 February 2017, C.N.62.2017.TREATIES-XVIII.10 (Depositary Notification, 16 February 2017).

[41] *Democratic Alliance v Minister of International Relations and Cooperation and Others* 22 February 2017 (3) SA 212 (GP).

[42] UN 'South Africa: Withdrawal of notification of withdrawal', 7 March 2017, C.N.121.2017.TREATIES-XVIII.10 (Depositary Notification, 7 March 2017); T Gqirana 'Rome Statute Repeal Bill withdrawn from Parliament' http://www.news24.com/SouthAfrica/News/rome-statute-repeal-bill-withdrawn-from-parliament-20170314 (accessed 21 March 2017).

[43] (n 33 above).

the ICC, Rwanda has utilised the traditional approach of *gacaca*[44] and there have been proposals for using *mato oput*[45] in Uganda. Zimbabwe,[46] South Africa,[47] Sierra Leone,[48] Liberia[49] and Kenya[50] have also, at some point, specifically established TRCs to deal with atrocities in a reconciliatory and restorative manner.

It is also worth noting the Extraordinary African Chambers in Senegal, an internationalised court which was created under the auspices of the AU to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990.[51] Uganda and the DRC too have established national mechanisms with specific mandates to prosecute international crimes. In addition, the search for an African solution for impunity has re-ignited the demand for reforms within the regional structure to bestow the African Court of Justice and Human Rights (African Court or ACJHR)[52] with a mandate over international and transnational crimes. This has led to an amendment of the

[44] K Lahiri 'Rwanda's *Gacaca* courts a possible model for local justice in international crime' (2009) 9 *Interntional Criminal Law Review* 325. According to Lahiri, *gacaca* literally translates as 'grass' or 'lawn' since those involved in dispute resolutions would ordinarily sit on the grass or lawn. This is an ancient method of dispute resolution in Rwanda. It involves respected members of the community – who are known as 'inyangamugayo', that is, one who detests disgrace – serving as judges in a process of resolving civil matters.

[45] L Hovil and JR Quinn 'Peace first, justice later: Traditional justice in Northern Uganda' Refugee Law Project Working Paper No. 17 (2005) http://www.refugeelawproject.org/files/working_papers/RLP.WP17.pdf (accessed 10 April 2014). According to Hovil and Quinn, *Mat oput* entails the drinking of bitter roots as a ritual of reconciliation. It is a cleansing ceremony carried out traditionally by the Acholi of Northern Uganda and is used only when a member of one clan has killed a member of another clan.

[46] Established in 1985 by the ZANU-PF government to investigate the killings of an estimated 1,500 political dissidents and other civilians in Matabeleland in 1983.

[47] Promotion of National Unity and Reconciliation Act 34 of 1995, Republic of South Africa.

[48] The TRC was first articulated in article VI(2) of the Lomé Peace Agreement as one of the national structures of peace consolidation and reconciliation. The Lomé Agreement was subsequently ratified by the parliament of Sierra Leone as the Lomé Peace Agreement Ratification Act No. 3 of 1999. By virtue of article VI, the government of Sierra Leone established the TRC as one of transitional justice mechanism by enacting the TRC Act no. 4 of 2000.

[49] Established by President Ellen Johnson-Sirleaf on 22 June 2006 to investigate human rights abuses that occurred between 1979 and 2003.

[50] The Truth Justice and Reconciliation Act of 2008. The TJRC was established in response to the harrowing two-month period of violence that devastated Kenya in the aftermath of disputed presidential elections in December 2007.

[51] Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990; S Williams 'The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?' (2013) 11(5) *Journal of International Criminal Justice* 1139-1160.

[52] Except otherwise indicated, 'African Court or ACJHR' is used through out the thesis with respect to the Court's criminal mandate/section. Where necessary, International Criminal Law Section of the African Court terminology is used instead.

protocol establishing the African Court, by incorporating international and transnational crimes.[53]

This background gives texture to this study's central issue – the concerns articulated by the AU, its member states, African intergovernmental bodies and civil society in the search for an African solution to the challenge of impunity in Africa. This study argues that these concerns, are signals that the African continent requires a system that identifies with African perspectives on international criminal justice. In this regard, the study identifies key themes in the points of divergence between the AU and African states, on the one hand, and the ICC, on the other. While there could be numerous other grievances that the AU and African states have against the ICC, the study focuses on the main ones to have been identified in the AU's policy papers against the ICC, and specifically those that are most prevalent and most representative in AU policy documents and literature on ICC's relationship with Africa.[54] The study seeks to understand these themes from the AU's and some African state's perspectives. It further compares the AU's approaches or perspectives with the current system of the ICC, with the intention of establishing if a possible solution in the form of a regional mechanism that reflects the best aspects of both perspectives is warranted. The study is, however, mindful of scholarly warnings that much of what has been presented as AU or African states' approaches to international criminal justice, particularly the demands made by the political class, may be motivated by less noble ideals in order to sabotage the ICC.[55]

This study, therefore, investigates whether the AU and some African states both have anything unique to offer to international criminal justice. Despite their involvement in the adoption of the Rome Statute, African states – in the recent past – perceive the ICC as dominated by Western condescension

[53] Malabo Protocol (n 8 above).
[54] AU 'Withdrawal Strategy' (n 33 above) paras 7 makes general reference to AU concerns against the ICC including the linkage between peace and justice. An example of a grievance that this study does not focus on is the fear of the ICC jurisdiction itself as being universal jurisdiction. MC Bassiouni 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practice' (2001) 42 *Virginia Journal of International Law* 81 (argues that ICC jurisdiction itself is universal jurisdiction).
[55] See, for example, M du Plessis, OA Maunganidze and A Louw 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions' ISS Paper No. 214 (2012).

towards Africa.[56] Perhaps this is largely informed by a Western ideological bias in terms of which the Third World is regarded as 'barbaric, unsophisticated, dangerous and a threat to modern civilization'.[57]

This study remains positive, though, that the position being espoused by the AU and African states is likely to be informed by traditional African theories such as *ubuntu*,[58] and certain African values and procedural approaches such as *ujamaa*,[59] *gacaca*, *mato oput,* all of which could add significant value to international criminal justice through their incorporation into a regional mechanism with jurisdiction over international crimes. While the ethos underlying these African values and procedural approaches may not be uniquely African,[60] their significance is most pronounced in African communities, as they can be traced to many indigenous African communities.[61]

1.2 Statement of the problem

The AU and some African states have had a difficult relationship with the ICC. This has been so mainly with respect to two issues: the perceived ICC bias

[56] M Ssenyonjo 'The International Criminal Court arrest warrant decision for President Al Bashir of Sudan' (2010) *International & Comparative Law Quarterly* 59, 205; Du Plessis, Maunganidze and Louw 'African efforts to close the impunity gap' (n 55 above); Du Plessis 'The International Criminal Court that Africa wants' (n 30 above); G Fraser 'Desmond Tutu should not have snubbed Tony Blair' *The Guardian* 3 September 2012, http://www.theguardian.com/ commentisfree/2012/sep/03/desmond-tutu-snubbed-tony-blair (accessed 12 November 2014).

[57] R Chow 'Violence in the other country: China as crisis, spectacle and woman' in CT Mohanty, A Russo and L Torres (eds) *Third World women and politics of feminism* (1991) 81, 89 as considered in the African context by E Bonthuys 'Accommodating gender, race, culture and religion: Outside legal subjectivity' (2002) 18 *South African Journal of Human Rights* 41, 55; M Pieterse 'Traditional African jurisprudence' in C Roederer and D Moellendorf (eds) *Jurisprudence* (2004) 438.

[58] Pieterse 'Traditional African jurisprudence' (n 57 above) 438. Pieterse defines *ubuntu* as entailing notions of human interdependence, solidarity and communalism.

[59] This is a philosophy developed by the the first Tanzanian president, Julius Nyerere. Its core emphasis was on the 'familyhood' and 'communalism' of traditional African societies. It was founded on a philosphy of development whose three essentials include freedom, equality and unity; B Ibhwaho and JI Dibua 'Deconstructing Ujamaa: The legacy of Julius Nyerere in the quest for social and economic development in Africa' (2003) 8(1) *African Journal of Political Science* 59; EM Cornelli 'A critical analysis of Nyerere's Ujamaa: an investigation of its foundations and values' PhD Thesis University of Birmingham (2012) http://etheses.bham.ac.uk/ 3793/1/Cornelli_12_PhD.pdf (accessed 12 December 2014); T Majoy and TM Mulvihill 'Julius Nyerere (1922-1999) an African philosopher re-envisions teacher education to escape colonialism' (2009) 3(1) *New proposals: Journal of Marxism and Interdisciplinary Inquiry* 15.

[60] Pieterse 'Traditional African jurisprudence' (n 57 above) 438.

[61] Ibid.

against Africa; and the divergent interpretations given to the notions of peace and justice by the AU and ICC. Although the AU and some African states have articulated these grievances in various forums,[62] they are often ignored as they are seen to be embracing impunity.[63] This has exacerbated the sour relationship between the AU and ICC, thus motivating the AU to promote an African solution to Africa's problems regarding impunity.

While the ICC system may be operating according to its objective 'to shun impunity', regard must also be paid to Africa's concerns. This is because the sour relationship has hampered the war against impunity in the continent, with African states having over time, and fuelled by the AU's non-cooperation and withdrawal calls, become reluctant to cooperate with the ICC in the arrest and surrender of specific indicted individuals, al-Bashir being the current example. The importance of this study is that it provides a forum to interrogate the concerns of the AU and African states and to understand the positions they have taken – a deeper understanding which can help to forge a lasting solution.

1.3 Central assumptions

This study makes two central assumptions. First, the reluctance by African states and the AU to relate effectively with the ICC compromises the fight against impunity in the African continent. Secondly, a regional criminal justice mechanism – which takes into consideration African perspectives – would be more acceptable and effective in combating impunity in the African continent.

1.4 Research questions

This study seeks to investigate the following questions:

1. What are Africa's concerns about the prosecution of international crimes at the ICC?
2. On what bases does Africa have these concerns?
3. Do African approaches add value in the fight against impunity in Africa

[62] See for example, AU 'Withdrawal Strategy' (n 33 above); UN 'South Africa: Withdrawal' (n 35 above); Discussion under point 3.3.2.2.
[63] Du Plessis, Maunganidze and Louw 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions' (n 55 above).

and how can one strengthen them?

4. Is a regional criminal mechanism - which takes into consideration African approaches or perspectives – the solution to fighting impunity in Africa?

1.5 Aims and significance of the study

This study is important in view of the high levels of impunity in Africa, coupled with the AU's call for an African solution to Africa's problems of impunity. Neither this call by the AU nor the enthusiasm displayed by African states at the negotiation, adoption, signature and ratification of the Rome Statute should be ignored. As such, research is needed to elucidate the perspectives that underlie the demand for 'an African solution to Africa's problem of impunity'.

Hence, this study identifies themes linked to the question of impunity in Africa that inform Africa's concerns about the ICC, concerns that have led to calls for an African court with a criminal mandate over international crimes. It then interrogates these themes from the perspective of contemporary best practices in international criminal justice and African approaches to the same, doing so with a view to considering a regional mechanism which – both substantively and procedurally – is embedded within an African vision and which has a mandate over international crimes. Arguably, such a mechanism can provide a sound framework for combating impunity on the African continent. Noting that some of the African perspectives may be motivated by deleterious intentions that are dangerous to the war against impunity, this study seeks to re-evaluate them while retaining Africa's vision and at the same time striking a balance with the ICC system. More importantly, some of the African approaches or perspectives may provide a model and a guide to good practice in certain of the most controversial areas in international criminal law.

1.6 Conceptual clarification

Certain concepts articulated in this thesis require elaboration as they are central to understanding the arguments made. These are the concepts of

'international crimes' as distinct from 'transnational crimes', 'Africa', 'justice' and 'complementarity'. Historically, different schools of thought have influenced the manner in which academics and entities appreciate the nuances of these concepts. These divergent views are significant in understanding the grievances of African states and the AU against the ICC.

1.6.1 International and transnational Crimes

International crimes refer to 'offences over which international courts or tribunal have been given jurisdiction under general international law'.[64] These are 'the most serious crimes of concern to the international community as a whole'[65] or 'acts which violate a fundamental interest protected by international law.'[66] The Rome Statute limits international crimes to crime of aggression (based on a 2010 amendment to the Statute), genocide, crimes against humanity and war crimes.[67]

The distinction between international crimes and transnational crimes is not a settled matter. Scholarly writings differ on how to distinguish between the two categories of crimes and other related terms.[68] According to Charles Jalloh, 'international criminal law and transnational criminal law literature remains confused as to the proper basis to distinguish between "international crimes" and "transnational crimes"'.[69] He defines international crimes as creating direct penal responsibility for individuals under international law as opposed to transnational crimes which provides for indirect criminal liability for individuals by imposing responsibility on the respective member states to a treaty to criminalise certain conduct under their domestic legal frameworks. [70] Claus Kreß similarly underscores the ambiguous nature of international criminal law and refers to the use of 'crimes of international concern' terminology in treaties as distinguished from 'transnational crimes' (using the latter for

[64] R Cryer H Friman, D Robinson and El Wilmshurst *An introduction to international criminal law and procedure* (2nd edn) (2010) 4.
[65] Para 4, Rome Statute.
[66] Cryer et al. *An introduction to international criminal law and procedure* (n 64 above) 4.
[67] Article 5 and 8*bis*, Rome Statute.
[68] See, for example, CM Bassiouni, *Introduction to International Criminal Law* (2012) 142.
[69] CC Jalloh, 'The nature of the crimes in the African Criminal Court' (2017) 15 *Journal of International Criminal Justice* 825.
[70] Ibid, 803.

purpose of conceptual clarity, with reference to crimes that have not passed the international crimes threshold).[71] Kreß states one of the 'four most important' deinitions of international criminal law as 'a body of international treaties dealing with crimes of a transnational character'.[72] Therefore, according to this definition, transnational crimes are a component of international criminal law.

Other scholars that have provided different frameworks for distinguishing these concepts include Robert Cryer et al., who distinguish international crimes from transnational crimes on the basis that the latter refers to crimes that have actual or potential transboundary effect.[73] However, international crimes can also have transboundary aspects. Additional criteria is, therefore, necessary in distinguishing the two concepts. For transboundary crimes, they argue that the traditional legal source of criminal prohibitions on individuals is national law and international law only regulates the aspects of inter-state cooperation.[74] Thus, transnational crimes have traditionally been enforced through rules of national jurisdictions.[75] Where the transnational crimes involves a foreign element, then treaties concluded by the relevant states come into play to regulate inter-state cooperation.[76] Remarkably, the Malabo Protocol changes these two positions by proscribing these crimes at a regional level.

1.6.2 The concept of Africa

'Africa' is usually understood as referring to the clearly defined boundaries that comprise the continent of Africa. There is, however, no legal person under international law by the name of Africa. The term 'Africa' is used in this thesis to refer to the multifarious voices of the continent regarding the topic of impunity for international crimes. Recognising that there is no single voice on the various issues under study, this thesis thus takes the term 'Africa' to

[71] C Kreß, 'International Criminal Law' (2009) *Max Planck Encyclopedia of Public International Law*, para 8, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1423?prd=EPIL (accessed 2 July 2019).
[72] Ibid, para 6.
[73] Cryer et al. *An introduction to international criminal law and procedure* (n 64 above) 5-6.
[74] Ibid.
[75] Ibid.
[76] Ibid.

mean, variously, the AU, African (heads of) states, African intergovernmental and regional bodies, as well as African non-governmental organisations (NGOs) and African scholars. Understanding 'Africa' in this way enables this study to bring clearly to the fore the various, often conflicting, interests that exist within the concept of 'the African-continental polity'. The term Africa is thus used where the multiple voices largely agree on the same point even if a few of them hold a different view. It therefore reflects the majority opinion, while attributing, where relevant, specific standpoints/grievances to specific entities in the thesis.

The study further distinguishes the meaning of Africa in this context from that of 'traditional Africa'. The latter does not refer to the multiple political opinions, but cultural practices traditionally undertaken by several communities on the continent.

1.6.3 The concept of justice

This study acknowledges that there are numerous ways of conceptualising the notion of justice. It therefore narrows its approach by establishing a dichotomy between the ICC and traditional African conceptions of justice. Although justice in African traditional societies can be articulated from several standpoints, this study considers traditional African conceptions of justice through the lens of the *gacaca* and *mato oput*. The study focuses on these two traditional procedures as illustrative examples because they have been used by post-conflict African states within the context of international crimes.

It should be noted that most writings on the notion of justice in the context of fighting impunity for international crimes have used Western standards to measure the effectiveness of traditional African conceptions of justice.[77] As such, African approaches have always fallen short and have thus been declared ineffective tools in the war against impunity for international crimes. This study argues that the failure to acknowledge the differing conceptions of justice is at the centre of the tension between the ICC and AU.

[77] J Fierens '*Gacaca* courts: Between fantasy and reality' (2016) *Journal of International Criminal Justice* 912.

1.6.3.1 Justice as articulated by the ICC

The ICC's conception of justice combines both retributive and restorative forms of justice albeit, with greater emphasis on retribution.[78] The theory of retribution is often traced back to Emmanuel Kant's concept of free will.[79] According to Kant, ethical behaviour consists in choices that are moral in the order of priority.[80] As such, offenders 'should be punished only because and to the extent that they deserve it'.[81] This theory is, thus, fault-based. It focuses 'on the necessity of punishing those who have violated societal norms, irrespective of the possible future benefits of prosecution, on the basis that the offender[s] deserve punishment for what they have done'.[82] Essentially, criminal liability is important either because 'the offender deserves punishment or because punishment makes society safer, whether through deterrence, rehabilitation, or incapacitation'.[83] Retribution therefore emphasises on the injury to society and the public dimension of the crime, as opposed to the harm occasioned to the individual victims. According to Friedrich Hegel, without focusing on the public nature of the offence, the punishment would be nothing less than personal revenge.[84] The general demands of retributive justice impose a moral duty to punish all offenders to the full extent their moral deserts demand.[85] This school of thought further emphasise that criminal justice has 'an upper limit on the severity of just punishment'.[86] And that 'this upper limit is the soul of retributive justice'.[87] According to Michael Cahill, retributivism 'adopts a backward-looking perspective on the moral duty to

[78] Paragraph 4, Preamble to the Rome Statute underscores the need to prosecute and punish the most serious crimes of international concern; Article 75, Rome Statute provides for reparation of victims; C Garbett 'The International Criminal Court and restorative justice: victims, participation and the processes of justice' (2013) *Contemporary Justice Review: Issues in Criminal, Social and Restorative Justice* 198-199.
[79] I Kant *Ground work of the metaphysic of morals* (1785 reprinted in 1964) 89; I Kant, *The philosophy of law* (1796 reprinted in 1887) 198.
[80] Ibid.
[81] SP Garvey 'Punishment as atonement' (1999) 46 *UCLAL Review* 1801,1835-36.
[82] Cryer et al. 'An introduction to international criminal law and procedure' (n 64 above) 24.
[83] A Gruber 'A distributive theory of criminal law' (2010) 52(1) *William and Mary Law Review* 4.
[84] GWF Hegel *Philosophy of right* (1967) 218-220.
[85] M Cahill 'Retributive justice in the real world' *Washington University Law Review* (2007) 825.
[86] L Crocker 'The upper limit of punishment' (1992) 41 *Emory Law Journal* 1060.
[87] Ibid.

punish past wrongdoing'.[88] As such, retribution is a justificatory theory and not prescriptive.[89] This implies that retribution as a theory does not explain 'how legal institutions are supposed to make retribution real'.[90] It is limited to the content of criminal law and not their implementation. As such, its principles may identify what conduct should be criminalized, and even the proportionate punishment, but it does not tell us how or whether 'actual legal institutions should go about the task of imposing punishment that is morally deserved in the abstract.'[91] This, according to Cahill, limits the theory to providing a moral philosophy but not a legal system.[92] Thus, making the principle of desert-based punishment unsatisfying and incomplete. For it to be a complete theory of justice, retribution should recognise and consider the relations, between, and offer guidance to all the players and institutions that comprise the legal system.[93]

These nuances to the theory of retribution are adopted in this study and this should be distinguished from the common definition of retribution that equates the concept of retribution with revenge. In this regard, Antonio Cassese posits that 'trials establish individual criminal responsibility over collective assignation of guilt…; justice dissipates the call for revenge, because when the Courts metes out to the perpetrator his just desserts, then the victims' calls for retribution are met…'[94]

From the ICC's perspective, retributive justice is evident through prosecution and punishment of perpetrators of international crimes. Punishment is key to accused persons found culpable for committing international crimes. The Rome Statute provides for imprisonment not exceeding a maximum of 30 years, life imprisonment in case of extreme gravity of the crime or as justified by the circumstances of the convicted person, and in addition to imprisonment, a fine or forfeiture of proceeds, property and assets derived

[88] Cahill 'Retributive justice in the real world' (n 85 above) 818.
[89] Ibid.
[90] Ibid.
[91] Ibid, 821
[92] Ibid
[93] Ibid, 821
[94] A Cassese 'Reflections on international criminal justice,' 61 *The Modern Law Review* (1998) 1-10, at 6.

from the crime.[95]

Restorative form of justice on the other hand shifts the focus from the crimes committed to the harm occasioned to the victims of the crime.[96] Though still contested, restorative justice has been defined as 'a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.'[97] Howard Zehr provides a more elaborate description:

> crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation and reassurance.[98]

Three key principles stand out from the illustrative definitions. First, is its central focus on the victims. The theory focuses on the harm and how to mend it in the aftermath of the offence or 'the making things right.' Second, is the focus on the role of the broader community in the restorative agenda. Third, is the call for perpetrators to be held accountable: privately to the victim, or members of the community affected by their actions or generally to the entire public.[99] The offenders have an obligation to repair the harm committed to the victim and the community in general. This theory perceives crime as 'an offence against people and relations instead of a mere violation of legal norms'.[100] Unlike retribution which exclusively focuses on the offender and the public dimension of the crime, restorative justice thus provide a balance between the public and private dimensions of international crimes. The theory therefore seeks to restore the victim, the offender and the whole community. The questions of 'what' to restore and 'how' to restore are left to be determined by the participants of the respective process.[101]

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[95] Article 77, Rome Statute.
[96] ZD Gabbay 'Justifying restorative justice: A theoratical justification for the use of restorative justice practices' (2205) 2 *Journal of Dispute Resolution* 357.
[97] Ibid, 200.
[98] H Zehr *Changing lenses: A new focus for crime and* justice (1990) 181.
[99] Gabbay 'Justifying restorative justice: A theoratical justification for the use of restorative justice practices' (n 97 above) 358.
[100] Z D Gabbay 'Holding restorative justice accountable' (2005) 8 (85) *Cardozo Journal of Conflict Resolution* 87.
[101] Gabbay 'Justifying restorative justice: A theoratical justification for the use of restorative justice practices' (n 97 above) 358;.

Underlying this theory is the 'belief in the power of relationships and social capital, combined with a commitment to build, nurture and, when necessary, repair these relationships in the community.'[102] John Braithwaite distinguishes three categories of values that underlie a restorative justice process.[103] They include: first, 'the values that must be honoured and enforced as constraints.'[104] These comprise 'non-domination and empowerment, specific upper limits on sanctions, respectful listening and equal concern for all stakeholders, and accountability and respect for fundamental human rights.'[105] Second, are values that participants should 'actively encourage in restorative processes.'[106] These include: 'restoration of human dignity, property loss, damaged relationships and emotional restoration; provision of social support for the development of human capabilities; and prevention of future injustice.'[107] Third, are the values that the participants can only hope for. The participants cannot urge those involved to manifest them. These include: remorse, apology, forgiveness and mercy.[108]

Restorative form of justice is manifested through the ICC's reparations program and victim participation.[109] Reparations have traditionally been viewed as restorative forms of justice and not retributive. However, it can be argued that reparations in the ICC dispense both retributive and restorative forms of justice. On the aspect of holding the perpetrator accountable, the ICC punishes perpetrators of international crimes through reparation orders. The ICC Appeals Chamber has confirmed that reparations ordered against the accused person are in themselves retributive in nature.[110] Also that the culpable ought to, 'where appropriate', compensate 'victims, their families or

[102] B Hopkins 'Restorative justice and social justice' (2012) *2 Nottigham Law Journal* 122.
[103] J Braithwaite 'Restorative Justice and Therapeutic Jurisprudence' (2002) *Criminal Law Bulletin* 247.
[104] Ibid, 88.
[105] Gabbay 'Holding restorative justice accountable' (n 100 above) 88; Ibid, 247.
[106] Ibid.
[107] Braithwaite 'Restorative Justice and Therapeutic Jurisprudence' (n 103 above) 253; Gabbay 'Holding restorative justice accountable' (n 100 above) 89.
[108] Braithwaite ;Restorative Justice and Therapeutic Jurisprudence' (n 103 above) 252-253; Gabbay, 'Holding restorative justice accountable' (n 100 above) 89.
[109] Garbett 'The International Criminal Court and restorative justice' (n 78 above) 199.
[110] *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, ICC-01/04-01/06 A A 2 A 3 (3 March 2015) Appeals Chamber, para 65.

dependants'.[111] In this context, punishment can be said to be used as a restorative principle as opposed to pure retributive theory. Accordingly, punishment in this context can be used in a manner that exemplifies the constituent elements of both retribution and restoration.

Participation of victims arises under article 68 of the Rome Statute. The ICC is under an obligation to take appropriate measures to protect the safety and physical and psychological well-being of victims and witnesses. In this regard, the Court may conduct proceedings in camera, or take evidence through electronic means or other special means; it may also consider views from victims where their personal interests are affected; the victims and witness unit may also advise the Court and the prosecutor on the most appropriate protective measures.[112] The ICC, therefore, metes out both retributive and restorative forms of justice.

In dispensing the above forms of justice, the ICC is always guided by international human rights standards. The finalisation of the Rome Statute, as Katherine Ann Snitzer observes, was evidence 'of the existence of a social system built on universal respect for the idea of human rights.'[113] Hence, the Rome Statute establishing the ICC embodies a raft of human rights standards that must be observed, relating to the rights of accused persons, victims and witnesses. They include: the elements of fair trial, and due process guarantees such as competent courts, legal representation, witness protection and reparations.[114] International human rights standards are, therefore, a central determinant of an effective mechanism of combating impunity for international crimes through prosecution in the ICC.

1.6.3.2 African conceptions of justice

African conceptions of justice underscores reconciliation, restoration, reparation, and sometimes punishment. 'African communal life revolves

[111] Ibid, para 66. See also GP Fletcher 'The place of victims in the theory of retribution' (1999) 3 *Buffalo Criminal Law Review* 51, 52-55, 58-59.
[112] Article 68, Rome Statute.
[113] Ibid, 16.
[114] Article 67(1), 66,20, Rome Statute.

around the principle that all life is protected by the supernatural forces.'[115] This has greatly influenced the manner in which traditional African societies conceptualise the notion of justice. Thus, the notion of punishment in traditional Africa societies has a direct link to the spiritual world. Although African conceptions of justice vary from one community to another, common in these conceptions are the elements of reconciliation, restoration, reparation, punishment and sometimes the influence of the spiritual world. Traditional African approaches, thus, perceive justice as a holistic concept embodying retributive, reconciliatory and restorative justice measures. Some of the value-content in these conceptions – restorative and retributive justice for example – are similar to those found in the ICC process. Reconciliatory processes are, however, completely missing in the ICC conception of justice.

Regarding punishment, some traditional African conceptions resemble that of the ICC while in others punishment is conceived within the spiritual realm, as opposed to the ICC understanding. For example, punishment under the *mato oput* process is partly carried out by spirits who send misfortunes to the offending clan, thus prompting the need for the process to appease these spirits.[116] The offending persons therefore undergo one aspect of punishment before being subjected to the *mato oput* process. Punishment is also effected through the notion of public shame, by subjecting the perpetrator to the public process. In the *gacaca* process for example, even though punishment is understood in a sense similar to that of the ICC, the ultimate goal of the mechanism is reconciliation and restoration.[117] This notwithstanding, there are procedural aspects of punishment that do not resemble the ICC notion of punishment.

Reparations are also a common phenomenon in both the ICC justice system and the values underlying traditional African theory of justice. In the gacaca process, upon completion of a case, the complainant would claim for

[115] MB Ramose 'An African perspective on justice and race' https://them.polylog.org/3/frm-en.htm (accessed 12 June 2018).
[116] P Bako 'Does traditional conflict resolution lead to justcie? – The *Mato Oput* in Northern Uganda' (2009) 3 *Pretoria Student Law Review* 102.
[117] Ibid.

reparations.[118] Similarly, compensation of victims is a key feature in the *mato oput* process.[119] Reparations play a key role in ensuring the realisation of both restorative and conciliatory forms of justice.

Furthermore, the mechanisms used to dispense these forms of justice are also of importance. The notion of a competent mechanism or 'tribunal' is perceived differently under the ICC and traditional African processes. Within the African conception of justice, a competent panel would consist of persons of high integrity with contextual experience and wisdom.[120] Yet a competent bench means something entirely different in the ICC sense: a bench that is well schooled in the area and therefore possessing the technical knowledge to address the matter.[121] The heavy presence of public participation in the traditional processes, coupled with total absence of legal representation, reinforces these differences. Unfortunately, most of the criticisms of African traditional processes entail evaluating them according to Western standards; as such, some scholars have found African traditional processes to be ineffective and inappropriate in combating impunity for international crimes. [122]

Although the AU has never voiced the varying conceptual understanding of justice as one of its grievances against the ICC, it can be argued that the AU's point about pursuing justice in a way that does not compromise peace indirectly speaks to this. This study, thus, argues that these conceptual differences cannot be ignored as a fundamental factor that unconsciously influences the AU's resentment of the ICC.

It is noteworthy, however, that the 'whole object [of African law] is to maintain an equilibrium, and the penalties of an African law are directed not against the specific infractions, but to the restoration of the equilibrium'.[123] It is at the level

[118] P Uvin 'The *Gacaca* tribunals in Rwanda' in D Bloomfield, T Barnes and L Huyse (eds) *Reconciliation after violence conflict: A Handbook* (2003) 118.
[119] See discussion under point 5.3.1.2.
[120] International Institute for Democracy and Electoral Assistance (IDEA) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2008) 33.
[121] See for example, article 36, Rome Statute for the qualification, nomination and election of judges of the ICC.
[122] J Fierens '*Gacaca* courts: Between fantasy and reality' (2016) *Journal of International Criminal Justice* 912.
[123] JH Driberg 'The African conception of law' (1934) 16 (4) *Journal of comparative legislation and international law* 231.

of dealing with perpetrators of crime that African law then differs with the ICC's conception of justice. While the ICC emphasises prosecution, the African theory of justice underscores the need for reconciliation and restoration. This is the reason why most African traditional approaches, such as *mato oput* and *gacaca*, emphasise reconciliation, reparation and forgiveness. Thus, the relevant elements necessary for locating effective mechanisms in the fight against impunity within a traditional African process are elements of reconciliation, restoration, reparation and sometimes punishment. Unfortunately, the Malabo Protocol does not incorporate traditional African theories of justice. This study, nonetheless, establishes the clear disconnection between the ICC and traditional African processes' conception of justice.[124]

1.6.4 Complementarity

The doctrine of complementarity basically underscores the primacy of national courts over the ICC in exercising jurisdiction over international crimes.[125] The doctrine effectively comes to play during the pre-trial stages, like the preliminary inquiries or the pre-investigation stage. It is an 'ongoing process and may be revisited several times before commencement of trial'.[126] The concept of complementarity is then manifested when determining whether a case will be admissible before the Court or not.[127] The Court has in turn

[124] See discussion under point 1.6.3 above.

[125] C Bassiouni 'Introduction to international criminal law' in C Bassiouni (ed) *Post-Conflict Justice, International and Comparative Criminal Law Series* (2002) 58; H Steiner and P Alston *International human rights in context: Law, politics, morals* (2007) 1299; Para 10, Preamble & article 1, Rome Statute; ICC-OTP 'Paper on some policy issues before the office of the prosecutor' (2003) 4-5 http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (accessed 30 March 2017); D Sarooshi 'Prosecutorial policy and the ICC: Prosecutor's *proprio motu* action or self-denial?' (2004) 2 *Journal of International Criminal Justice* 941-942.

[126] K Ambos 'The Colombian peace process (Law 975 of 2005) and the ICC'S principle of complementarity' in C Stahn and MM El Zeidy (eds) *The International Criminal Court and complementarity: From theory to practice* Vol. 2 (2011) 1080.

[127] In making this decision, the Court follows the criteria established under article 17 (1), Rome Statute: '…The Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted un- der article 20, paragraph 3;

interpreted admissibility as 'the criterion, which enables the determination of whether it is for a national jurisdiction or for the Court to proceed.'[128]

Complementarity has been theorized in numerous antagonism. Key to this thesis are the notions of 'positive or negative' as well as 'vertical or horizontal' complementarity. Complementarity is positive when the national courts effectively exercise their jurisdiction to hold the perpetrators of international crimes accountable through prosecution.[129] The contrary is described as negative complementarity.[130] This general understanding of complementarity, where one court operates higher in the hierarchy than the other, is what some scholars have called vertical complementarity.[131] This can be contrasted with horizontal complementarity, where a court enjoys the same jurisdictional space as the other.[132] A new version of positive complementarity has been described as 'hybrid complementarity' — where the ICC extends support and mutual assistance to its member states in undertaking national prosecution of international crimes and at the same time using threats.[133]

1.7 Literature review

Against the aforementioned background, a thematic approach is adopted in considering the literature on this topic. The study considers literature on the two central themes that arguably have informed AU's and some African state's discontentment with the ICC. These are the perceived ICC bias against Africa and divergent opinions in the 'peace versus justice' debate. In addition, the study reviews literature that interrogates AU's and some African states' approaches to fighting impunity for international crmes, specifically the Malabo Protocol's jurisdiction over international crimes and traditional African

(d) The case is not of sufficient gravity to justify further action by the Court.'

[128] *Prosecutor v Kony and others,* ICC Pre Trial Chamber II, ICC-02/04-01/05, Decision on the admissibility of the case under article 19 (1) of the Statute (10 March 2009) para 34.

[129] W Colish 'The International Criminal Court in Guinea: A case study of complementarity' (2013) 26(2) *Revue Québécoise de Droit International* 23, 37-39; WW Burke-White 'Proactive complementarity: The International Criminal Court and national courts in the Rome system of international justice' (2008) 49 *Harvard International Law Journal* 54.

[130] C Stahn 'Taking complementarity seriously: On the sense and sensibility of 'classical', 'positive' and 'negative' complementarity' in Stahn and El Zeidy (eds) (n126 above) 260.

[131] C Ryngaert 'Horizontal complementarity' in C Stahn & MM El Zeidy (eds) *International Criminal Court and complementarity: From theory to practice* (n 126 above) 855.

[132] Ibid.

[133] Colish 'The International Criminal Court in Guinea: A case study of complementarity' (n 129 above) 34.

approaches and TRCs in the context of prosecuton of international crimes.

1.7.1 The perceived ICC bias against Africa

The AU has on several occasions expressed concern about what it terms as the ICC's 'misuse of indictments against African leaders'.[134] African scholars too have lamented what they regard as the ICC's nearly exclusive or selective or biased focus on Africa.[135] Indeed, all *ongoing prosecutions* currently being conducted by the ICC are centred on Africa. Upon the indictment of al-Bashir,[136] the AU adopted a resolution expressing its great displeasure at this[137] and appealing to member states not to cooperate in the arrest and surrender of al-Bashir.[138] Several African countries heeded this call. For example, in 2011, al-Bashir visited Chad and Malawi without these Rome Statute states parties making any attempt to arrest him.[139] Kenya similarly snubbed its obligations under the Rome Statute when, at its invitation, al-Bashir attended the official ceremony promulgating the country's new Constitution of 2010; moreover, it also fought a Kenyan High Court decision calling upon it to effect his arrest in the future.[140] Likewise, in February 2014,

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[134] AU Assembly, Assembly/AU/Dec.482(XXI) (n 35 above), para 4; AU Assembly, Ext/Assembly/AU/Dec.1(Oct.2013) (n 35 above), para 4.

[135] M Mamdani 'Darfur, ICC and the new humanitarian order: How the ICC's "responsibility to protect" is being turned into an assertion of neo-colonial domination' (2008) http://www.pambazuka.org/en/category/comment/50568 (accessed 11 June 2014); Du Plessis 'The International Criminal Court and its work in Africa' (n 30 above); African Network on International Criminal Justice 'Reflections on the Africa Union ICC relationships' (2014) http://www.icj-kenya.org/dmdocuments/books/reflections%20on%20 the%20african%20union%20icc%20relationship.pdf (accessed 16 June 2014); AU summits in February and July 2009.

[136] See (n 34 above).

[137] AU Assembly, Assembly/AU/Dec.245(XIII) Rev.1 (n 35 above), para 2.

[138] Ibid, para 10.

[139] See, generally, *Prosecutor v Omar Hassan Ahmad Al Bashir* (Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-139-Corr (13 December 2011) Pre-Trial Chamber I; *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-140-tENG (13 December 2011) Pre-Trial Chamber I. Also see W Mwangi and T Mphepo 'Developments in international criminal justice in Africa during 2011' (2011) *African Human Rights Law Journal* 274.

[140] *Kenya Section of the International Commission of Jurists v Attorney General, The Minister of State for Provincial Administration and Internal Security,* Final Judgment, [2011] eKLR, 30 May 2014.

the DRC reneged on its obligation to arrest al-Bashir following his visit.[141] Djibouti, South Africa and Nigeria have also invited and received al-Bashir despite the arrest warrants.[142]

Similarly, following the indictment of the late Muammar Gaddafi and the subsequent issuance of a warrant of arrest on 27 June 2011 by the Pre-Trial Chamber (PTC),[143] the AU again called upon its member states not to cooperate in his arrest and surrender to the ICC.[144] While no sitting head of state from other parts of the globe has been indicted or subject to prosecution before the ICC, the ICC has indicted sitting African heads of state. Some African scholars have regarded this as a malicious expedition against weak states.[145] The AU has, thus, criticised the ICC for its perceived lack of independence, which exposes it to manipulation in favour of Western countries.[146] The indictment of African heads of state has also triggered the perception of the ICC as a 'neo-colonial tool' for Africa.[147]

Regarding lack of independence from the West, the AU has publicly expressed its dissatisfaction about the ICC, particularly the Office of the Prosecutor (OTP) and the role of the United Nations Security Council (UNSC)

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[141] *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court), ICC-02/05-01/09-195 (9 April 2014) Pre-Trial Chamber II; PI Labuda 'The International Criminal Court in the Democratic Republic of Congo: A decade of partnership and antagonism' in K Clarke, AS Knottnerus and E de Volder (eds) *Africa and the ICC: Realities and perceptions* (2016).

[142] *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar al-Bashir) ICC-02/05-01/09-302 (6 July 2017) Pre-Trial Chamber II; OA Maunganidze and A du Plessis 'The ICC and the AU' in C Stahn (ed) *The law and practice of the International Criminal Court* (2015) 67; O Imoedemhe 'Unpacking the tension between the African Union and the International Criminal Court: The way forward' (2015) 23 *African Journal of International and Comparative Law* 89-90.

[143] *Situation in the Libyan Arab Jamahiriya* (Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi) ICC-01/11-13 (27 June 2011) Pre-Trial Chamber I.

[144] AU Assembly 'Decision on the implementation of the Assembly decisions on the International Criminal Court' Assembly/AU/Dec.366(XVII), Doc. EX.CL/670(XIX), 17th Ordinary Session, 30 June - 1 July 2011, para 6.

[145] A Ciampi 'The proceedings against President Al Bashir and the prospects of their suspension under article 16 ICC Statute' (2008) 6 *Journal of International Criminal Justice* 885-886; CC Jalloh 'Regionalizing international criminal law' (2009) 9 *International Criminal Law Review* 462; CS Igwe 'The ICC's favourite customer: Africa and international criminal law' (2008) 2 *Comparative and International Law Journal of Southern Africa* 322.

[146] AU 'Withdrawal Strategy' (n 33 above) para 2. The strategy talks about perceived selectivity and inequality due to ICC's predominant focus on Africa.

[147] S Odero 'Politics of international criminal justice: the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator theory' in C Murugu and J Biegon (eds) *Prosecuting international crimes in Africa* (2011) 154.

in the Court processes.[148] The OTP's ability to exercise *priopro motu* powers has historically attracted criticism not just from African states and the AU but the United States of America (US or USA) as well.[149] During the drafting period, USA expressed its fear over exposing its military force stationed across the globe.[150] William Schabas also notes the legality of ICC's jurisdiction over third states as USA's central concern against the ICC.[151] Bruce Broomhall, however, observes that US criticisms of the Rome Statute, and in particular of the prosecutors' *proprio motu* powers, were an attempt to fight for its ability to control the ICC processes.[152] Indeed, Schabas's argument that America wanted a court that would fit within the framework of the Charter of the United Nations (UN Charter) and which was subordinate to the UNSC fits in well with Broomhall's argument.[153] The US's veto power in the UNSC was sufficient control over the Court's processes. The AU has also expressed specific concern about the prosecutor's exercise of his or her *proprio motu* powers and even went further to call on the African state parties to the Rome Statute of the ICC to prepare guidelines and a code of conduct for the OTP's exercise of *proprio motu* powers.[154]

Regarding the OTP's selection and prioritisation of situations and cases, this chapter argues that while grave human rights violations have been witnessed in several parts of the globe, the selection and prioritisation of the situations and cases being subjected to ICC jurisdiction through the exercise of *proprio motu* powers seems biased and lacking in any neutrality. For example, this study argues that the prosecutor has been too slow to act in the cases involving Georgia,[155] Palestine, Ukraine, Colombia and Iraq. Indeed, after

[148] AU Assembly, Assembly/AU/Dec.366(XVII) (n 35 above) paras 3, 4 and 6; AU Assembly, Assembly/AU/Dec.245(XIII) Rev.1 (n 35 above) paras 2, 8-11; AU 'Withdrawal Strategy' (n 33 above) paras 3-4.
[149] G Conso 'The basic reasons for US hostility to the ICC in light of the negotiating history of the Rome Statute' (2005) 3 *Journal of International Criminal Justice* 316-317.
[150] DJ Scheffer 'The United States and the International Criminal Court' (1999) 93(1) *American Journal of International Law* 18.
[151] WA Schabas 'United States hostility to the International Criminal Court: It's all about the Security Council' (2004) 15(4) *European Journal of International Law* 710.
[152] B Broomhall 'Towards a US acceptance of the International Criminal Court' (2000) 64(1) *Law and Contemporary Problems* 142.
[153] Schabas 'United States hostility to the International Criminal Court' (n 151 above) 712.
[154] AU Assembly, Assembly/AU/Dec.245(XIII) Rev.1 (n 35 above) para 11.
[155] See *Situation in Georgia* (Decision on the Prosecutor's request for authorization of an investigation, ICC-01/15-12 (27 January 2016), Pre-Trial Chamber I.

authorisation by the PTC to initiate investigations in the various situations, the OTP took about three weeks in Côte d'Ivoire and nine months in the Kenyan cases to indict alleged perpetrators; it has, however, taken the OTP close to two years in Colombia and four years for Palestine and Ukraine, yet all these situations are still under preliminary examination.[156] While the OTP seems swift in exercising its *proprio motu* powers in African-based cases, a lot of laxity is evident concerning cases from elsewhere, where similar powers have been used. This study notes that jurisdictional challenges have contributed to the OTP's slow action in some situations, such as in Palestine.[157] However, using just jurisdictional challenge as a justification for slow action is problematic as other non-African based cases, where there was jurisdiction, have equally witnessed delays. Yet, in all African cases, the OTP has consistently acted very swiftly.

This study, nonetheless, argues that the AU's position on the ICC is muddled in complexity and sometimes confusion. This is due to the fact that there exists no single continent-wide African position. As for the perceived ICC bias against Africa, the majority of African civil society and victim groups[158] hold a contrary view. For these groups, the ICC validates their efforts to root out impunity on the continent.[159] The position on the ICC therefore varies depending on the meaning one apportions to the notion of Africa. Yet this study disagrees with those scholars who readily dismiss the AU's complaints as mythical and lacking any substance.[160]

The question of ICC bias against Africa has also arisen in the context of the role of the UNSC in the Court processes. Controversy surrounds the UNSC's powers of referral and deferral of situations and cases before the Court, which as stated by the AU, 'raise questions about perceived fairness of the international justice system as a whole'.[161] The AU also referred to 'a

[156] ICC 'Preliminary examinations', https://www.icc-cpi.int/pages/pe.aspx (accessed 1 May 2018).
[157] OTP 'Report on preliminary examination activities' (2015) para 48 https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf (accessed 3 June 2018).
[158] Du plessis 'The International Criminal Court and its work in Africa' (n 30 above).
[159] Ibid.
[160] Ibid; Du Plessis, Maunganidze and Louw 'African efforts to close the impunity gap' (n 55 above).
[161] AU 'Withdrawal Strategy' (n 33 above) para 3.

perception of a double standard against African States', as UNSC decisions 'are made in the interests of its Permanent Members rather than the legal and justice requirements', noting that such 'interests are not always in line with those of Africa'.[162]

Using the examples of Israel, Palestine, Syria, Guantanamo Bay and the role of American forces in Iraq, this study argues that the UNSC has selectively exercised its referral powers with respect to African-based situations, yet heinous crimes committed in other areas go unnoticed. Despite the imminent possibility of a veto, the study argues that the UNSC ought to have made attempts to refer the Gaza situation much earlier, or it could as well refer the other incidences mentioned above. The AU has also lamented the UNSC's refusal to use its power of deferral to defer the indictment of the Sudanese president as well as in the Kenyan cases.[163] Yet the UNSC has preeemptively deferred cases relating to any 'would-be' American national indictees of the ICC. This argument is based on resolution 1422 of 12 July 2002, in which the UNSC preemptively deferred the prosecution of US nationals for acts amounting to international crimes in the UN Missions in Bosnia and Herzegovina. The UNSC's resolution 1497 on establishment of a Multinational Force in Liberia had a similar effect of insulating the 'would-be' American indictees of the Court.[164] Again, resolution 1970 which, inter alia, referred Libya to the ICC, and the resolution 1593 referring the situation in Sudan to the ICC, have all attracted similar criticism, yet, neither Libya nor Sudan are states parties to the Rome Statute. The AU has found the effect of a referral in context of non-states parties – 'being legally bounded by a decision of the UNSC to a Statute' that a state has not ratified – as unacceptable, considering that African states face 'systematic disadvantage' when it comes ot UNSC

[162] Ibid, para 4.
[163] AU Assembly, Ext/Assembly/AU/Dec.1(Oct.2013) (n 35 above), para 3. It is instructive to note that the Court has since terminated the case against Uhuru Muigai Kenyatta, the current President of Kenya, for lack of sufficient evidence to prove, beyond reasonable doubt, his alleged criminal responsibility (see *Prosecutor v Uhuru Muigai Kenyatta* (Notice of withdrawal of the charges against Uhuru Muigai Kenyatta) ICC-01/09-02/11-983 (5 December 2014) Trial Chamber V(B); *Prosecutor v Uhuru Muigai Kenyatta* (Decision on the withdrawal of charges against Mr Kenyatta), ICC-01/09-02/11-1005 (13 March 2015), Trial Chamber V(B)).
[164] S/RES/1497 (2003), 4803rd meeting, 1 August 2003.

decisions.[165]

The ideological criticism of the ICC as a neocolonial hegemony is one that is not only expressly anchored in legal theory but evident in other academic writings and political utterances. Odero perceives the ICC as a continuation of the colonial philosophy by powerful states through the use of a criminal mechanism as a tool for controlling and dominating less powerful states.[166] The president of Rwanda has also claimed that 'Rwanda cannot be part of that colonialism, slavery and imperialism' [*sic*].[167] Similarly, referring to the ICC arrest warrant against al-Bashir, the then AU Chairperson, Muamar Gaddafi, termed it an attempt by the West to recolonise its former colonies.[168]

This study argues that these fears are well founded within the school of thought of Third World Approaches to International Law (TWAIL). International law as a concept provides the channel through which 'dominant social forces in society maintain their domination not through the use of force but through having their worldview accepted as natural by those over whom domination is exercised'.[169] Those who characterise the ICC as a neocolonial hegemony would therefore argue that the ICC – just as in colonialism – is alienating Africa from its values while reinforcing Western ones at their expense.[170] Inherent in traditional African conceptions of justice are the values geared towards restoring lost societal equilibrium through reconciliation and restoration. Although there could be aspects of punishment, this is normally not the central focus of this notion. In fact, punishment, as discussed in chapter four, is regarded as being executed mostly by the spiritual world.

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[165] AU 'Withdrawal Strategy' (n 33 above) para 4.
[166] S Odero 'Politics of international criminal justice: The ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator theory' in Murungu and Biegon (eds) *Prosecuting international crimes in Africa* (n 10 above).
[167] Du Plessis 'The International Criminal Court and its work in Africa' (n 30 above) 1.
[168] 'Sudan leader in Qatar for summit' *BBC News* London 29 March 2009) http://news.bbc.co.uk/2/hi/7970892.stm; K Ambos 'Expanding the focus of the African Criminal Court' in WA Schabas et al. (eds) *The Ashgate research companion to international criminal law: Critical perspectives* (2013) 505.
[169] BS Chimni 'Third World approaches to international law: A manifesto' (2006) 8 *International Community Law Review* 15.
[170] T Major and TM Mulvihill 'Julius Nyerere (1922-1999), an African philosopher, re-envisions teacher education to escape colonialism' (2009) 3 *Journal of Marxism and Interdisciplinary Inquiry* 15.

1.7.2 The 'peace versus justice' debate

The ICC's conception of justice, as earlier stated, combines both retributive and reparative measures, with greater emphasis on retribution.[171] The Rome Statute, nevertheless, foresees the possibility of a deferral of cases in the interests of international peace and security.[172] The few instances, discussed in chapter two below, in which the AU has sought to utilise this measure have, nonetheless, been turned down. This has exacerbated the already poor relationship between the AU and the ICC. The AU and African state practices, by contrast, underscore the need for peace and for justice to be pursued in a way that does not compromise peace. The AU has placed emphasis on peace where, for instance, it sees ICC prosecution as compromising peace efforts.[173] This study, however, takes note that the AU is empowered to use of force in the exceptional circumstances involving the commission of genocide, war crimes, crimes against humanity and the crime of aggression, as per article 4(h) of the Constitutive Act of the AU, 2000 (AU Constitutive Act).

The AU has, nonetheless, criticised ICC's emphasis on prosecution and punishment. It argues that the ICC position is politically biased and impedes peace processes in Africa.[174] The AU's grievances in the peace-versus-justice debate relates to three key issues: the need to recognise immunity of heads of states and senior state officials while in office; the need to grant amnesty to warring groups; and the need for the peaceful coexistence of citizens.[175]

The question as to whether heads of states or senior state officials alleged to have committed international crimes can justifiably claim both personal and functional immunity before international tribunals is still a contentious issue

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[171] (n 78 above).
[172] Article 16, Rome Statute.
[173] See n 33 above.
[174] Withdrawal strategy (n 33 above); L Davis 'The ICC: A straw man in the peace-versus-justice debate' Briefing paper for the Oslo Forum Africa Mediators Retreat (2013), https://www.osloforum.org/sites/default/files/ Africa-Mediators-retreat-BP-ICC.pdf (accessed 6 March 2015).
[175] These issues are reflected in, for example, AU Assembly 'Decision on the abuse of the principle of universal jurisdiction' Assembly/AU/Dec.243(XIII) Rev.1, Doc.Assembly/AU/11(XIII), 13th Ordinary Session, 1-3 July 2009, para 6; AU Assrmbly, Assembly/AU/Dec.245(XIII) Rev.1 (n 34 above) paras 7, 8 and 10; Communique of the 142nd meeting of the Peace and Security Council, PSC/MIN/Comm(CXLII) (n 33 above) paras 3 and 14.

(particularly from the AU's standpoint),[176] despite its exclusion in the statutes of several international tribunals.[177] Akande, Max Du Plessis, Paula Gaeta, Amnesty International, Cherif Bassiouni and Adam Day, among several other scholars and some tribunals, have variously held the opinion that immunity *ratione materiae* does not apply to international crimes.[178]

The International Military Tribunal at Nuremberg underscored the irrelevance of official position.[179] The International Court of Justice (ICJ) has underscored the inviolable nature of immunities *ratione personae* in foreign national courts even where international crimes have been committed, except where such immunity is waived or if the statute of a specific tribunal excludes it.[180] The position under the Rome Statute is mired in confusion, as it is capable of multiple interpretations. Contrary to article 27 of the Rome Statute, which abhors immunity in totality, article 98(1) of the Rome Statue, in the context of state cooperation, recognises immunity for state officials from non-states parties where such is provided for under international law. This study argues that 'international law' in this context would range from bilateral agreements or multilateral treaties between two or more states or customary international law. Yet if customary international law as established by the ICJ is anything to go by, state officials from non-states parties to the Rome Statute therefore enjoy immunity before foreign domestic proceedings unless their state waives it according to article 98(1). This section thus grapples with the dilemma that, in the absence of a waiver of immunity, compliance with an ICC call for states parties to cooperate in the arrest and surrender of heads of states indicted by

[176] Article 46A *bis*, Malabo Protocol.
[177] Article 7, Statute of the International Tribunal for the former Yugoslavia; article 6, Statute of the International Tribunal for Rwanda; article 6, Statute of the Special Court for Sierra Leone.
[178] D Akande 'The jurisdiction of the International Criminal Court over nationals of non-parties: Legal basis and limits' (2003) 1 *Journal of International Criminal Justice* 638; Amnesty International 'Bringing power to justice: Absence of immunity for heads of state before the International Criminal Court' AI Index: IOR 53/017/2010 (2010); P Gaeta '*Ratione materiae* immunities of former heads of state and international crimes: The Hissen Habré case' (2003) 1 *Journal of International Criminal Justice*; D Akande 'International law immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 413; MC Bassiouni 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practice' (2001) 42 *Virginia Journal of International Law* 81, 84; A Day 'Crimes against humanity as a nexus of individual and state responsibility: Why the ICJ got *Belgium v Congo* wrong' (2004) 22 (3) *Berkeley Journal of International Law* 49.
[179] Principle 7, Nuremberg Principles.
[180] *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*) Judgment [2002] ICJ Reports 3, paras 54, 55 and 58.

the Court would amount to violation of these states international law obligations.[181] The study further adopts the theory that the UNSC, acting under chapter VII of the UN Charter, has powers to waive immunity when it decides to refer non-member states to the Rome Statute to the ICC.[182] Yet this brings into perspective the position of the UN Charter in relation to immunity for heads of states and the role of the UNSC in maintaining international peace and security. An important development within the AU which points to the fact that immunity and speficially the relationship between articles 27 and 98 is still contentious is the AU's decision to seek 10 interpretative clarification from ICC Assembly and (2) advisory option from ICJ on the issue.[183]

In contrast to the Rome Statute position, the AU has adopted a controversial position that heads of state and other senior state officials enjoy immunity from prosecution before the proposed International Criminal Law Section of the African Court.[184]

Garth Abraham has criticised this amendment, saying it 'represents a major setback in the advance of international criminal justice; in fact, it can only be construed as in the interests of those African leaders fearful of an end to a culture of impunity'.[185] Yet again, some African states parties to the Rome Statute have adopted the content of article 27 of the Rome Statute in their domestic legislation, thereby denying immunity to their own state officials for international crimes.[186]

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[181] D Tladi 'Immunities (Article 46A*bis*)' in G Werle and M Vormbaum (eds) *The African Criminal Court: A commentary on the Malabo Protocol* (2017) 212.
[182] *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir) ICC-02/05-01/09-242 (13 June 2015) Pre-Trial Chamber II, paras 6-7; *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court), ICC-02/05-01/09-195 (9 April 2014) Pre-Trial Chamber II, paras 29-31.
[183] AU Assembly 'Decision on the International Criminal Court', Assembly/AU/Dec.672(XXX), Doc. EX.CL/1068(XXXII), Thirtieth Ordinary Session, 28- 29 January 2018, para 5.
[184] Article 46A *bis*, Malabo Protocol.
[185] G Abraham 'Africa's evolving continental court structures: At the crossroads?' South African Institute of International Affairs' Occasional Paper No. 209 (2015) 14.
[186] Article 50(2)(n), Constitution of Kenya 2010; section 27(1), International Crimes Act of Kenya (2008); section 4(2)(a), ICC Act of South Africa; article 25(1), Acts Supplement No. 6

Regarding amnesties, this study notes that modern societies in transition from repression to democracy embrace prosecution as the preferred choice of accountability in international criminal justice.[187] Moreover, Cryer et al's review of international practice of both ad hoc and permanent tribunal reveal that international law prohibits amnesty for those who bear the highest responsibility in the commission of international crimes,[188] yet it does not expressly do so for other categories of perpetrators. Louise Mallinder argues that amnesty may still offer the best prospects for peace, if not justice.[189] The International Committee of the Red Cross (ICRC), Mahnoush Arsanjani, and Andreas O'shea further underscore a positive feature of amnesties as the promotion of peace and reconciliation.[190] As such, some conditional amnesties are granted to the perpetrators of atrocities in exchange for peace and reconciliation. National state practice in Argentina, Cambodia, Chile, El Salvador, Guatemala, Haiti, Uruguay, and South Africa have previously granted amnesty to perpetrators of international crimes within their respective territories as part of a peace arrangement.[191]

Despite the important role played by amnesties in post-conflict states, the greatest concern for this study is whether amnesties are lawful in international criminal law or whether there are criteria that are acceptable under international criminal law through which they can be lawfully administered in the context of international crimes.

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to the Uganda Gazette No. 39 Vol. CIII of 25 June 2010, ICC Act of Uganda; article 7, Burkina Faso, Loi 052-2009/AN du 03 December 2009.

[187] Obura 'Duty to prosecute international crimes under international law' (n 10 above) 28.

[188] Cryer et al. *An introduction to international criminal law and procedure* (n 64 above) 31.

[189] L Mallinder 'The role of amnesties in conflict transformation' in C Ryngaert (ed) *The effectiveness of International Criminal Justice* (2009) 195; J Dugard 'Dealing with crimes of a past regime: Is amnesty still an option?' (1999) 12 *Leiden Journal of International Law* 1001.

[190] ICRC 'A commentary on article 6 Additional Protocol II to the Geneva Conventions para 4687 https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=DDA40E6D88861483C12563CD0051E7F2 (accessed 11 February 2015); MH Arsanjani 'The International Criminal Court and national amnesty laws' (1999) *American Society of International Law* 66; A O'Shea *Amnesty for crime in international law and practice (2002),* 2 in Angermaier 'The ICC and amnesty: Can the Court accommodate a model of restorative justice?' (2004) 1(1) *Eyes on the* 131.

[191] *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) para 32; El Salvador: Supreme Court of Justice, Decision on the Amnesty Law - Proceedings No. 10-93 (20 May 1993); A Cassese *International Criminal Law* (2003) 315

The Rome Statute highlights the need to fight impunity and ensure criminal accountability of individuals who engage in international crimes.[192] Arguably, the Rome Statute rests on a philosophy of retributive justice which cannot be reconciled with amnesty. The study argues, however, that several provisions of the Rome Statute are amenable to being interpreted as flexible enough to recognise amnesties. They include the UNSC's deferral powers under article 16 of the Rome Statute; the prosecutorial discretion in initiating investigations and prosecutions under article 53 of the Rome Statute; and the possibility under article 17(1)(b) that a state could conduct investigations, then decide not to prosecute a person accused of international crimes on the basis of an amnesty law.

The AU has deliberately ignored the notion of amnesty within its relevant regional framework, as the Malabo Protocol speaks only of pardons and commutation of sentences.[193] This study argues that in isolated cases of vicious suffering inflicted on victims and where prosecutions are likely to cause more instability and further threaten peace, perpetrators of international crimes should be held accountable through alternative accountability mechanisms. This is not to imply either that one adopts blanket or unconditional amnesties, or that amnesties should apply to those who bear the highest responsibility for the crimes.

The study further assesses the general duty to prosecute and the question of whether this imposes restraints on amnesty. It agrees with the position that a state's obligation to prosecute arises not only from its conventional obligation,[194] but also – in some instances – under customary international law.[195] For example, both the Geneva Conventions of 12 August 1949 (Geneva Conventions) and the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (Genocide Convention) impose

[192] Para 5, preamble to the Rome Statute.
[193] Article 46K, Malabo Protocol.
[194] Articles 4 and 6, Convention on the Prevention and Suppression of the Crime of Genocide (1948); articles 49 and 54, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949); article 7, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (1982).
[195] Orentlicher 'Settling accounts' (n 9 above) 2552.

what has been termed an 'absolute' duty to prosecute.[196] In fact, the ICJ has since acknowledged the customary international law nature of the Genocide Convention.[197] Yet this obligation to prosecute has inherent limitations. Whereas the Genocide Convention limits the absolute duty to prosecute to the offence of genocide alone, the Geneva Conventions limit the scope of this duty to prosecute to grave breaches that occur within the context of an international armed conflict.[198] Given this scenario, the study argues that save in the case of a customary international law or treaty obligation to prosecute, there is no express legal constraint on the utilisation of amnesty. The notion of accountability for human rights violations could be taken as well to mean that perpetrators can be subjected to other forms of accountability apart from formal prosecution. Roth Arriaza, Linda Keller and John Dugard concur that the general customary nature of the duty to prosecute is an emerging discourse that remains in dispute due to lack of state practice.[199]

1.7.3 The Malabo Protocol and African State practices: Jurisdiction over international crimes

In response to the foregoing grievances the AU's suggested solutions can easily be collapsed into two: the adoption of the Malabo protocol and African State practices. These are those solutions that are most representative of AU member states and likely to be the most effective in the fight against impunity in Africa.

The AU has adopted the Malabo Protocol incorporating a criminal mandate for international and transnational crimes within the structure of the African Court.[200] This development has attracted both positive and negative

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[196] *Reservations to the Convention on Genocide*, Advisory Opinion [1951) ICJ Reports 8.
[197] Ibid.
[198] Article 2, Geneva Conventions I, II, III, and IV.
[199] N Roth-Arriaza 'Non-treaty sources of the obligation to investigate and prosecute and provide redress' Roth Arriaza (ed) *Impunity and human rights in international law and practice* (1995) 39; LM Keller 'Achieving peace without justice: The International Criminal Court and Ugandan alternative justice mechanisms' (2008) 23 *Connecticut Journal of International Law* 240; J Dugard 'Possible conflicts of jurisdiction with truth commissions' in Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A commentary* Vol. 1 (2002) 698; CP Trumbull IV 'Giving amnesties a second chance' (2007) 25 *Berkeley Journal of International Law* 283, 291-93; H Gropengieber and J Meibner 'Amnesties and the Rome Statute of the International Criminal Court' (2005) 5 *International Criminal Law Review* 276.
[200] Article 14, Malabo Protocol.

reaction[201] as to whether it will eradicate the AU's grievances about the ICC. It is notable, however, that literature on this is limited, given the novelty of the issue.

Regarding the expanded jurisdiction of the Court to include transnational crimes, Stephen Lamony argues that this overstretches an already heavily burdened Court.[202] Lamony fails to see the positive effort created by including transnational crimes in the Protocol. Ademola Abass acknowledges this positiveness to be addressing the long-standing question over the jurisdictional gap over these crimes.[203] This study does not focus on the additional (transnational) crimes, as its focus is limited to whether and how the Malabo Protocol's provisions on international crimes address the AU's concerns about the ICC.

The Malabo Protocol has introduced noticeable innovations in its definition of some of the ICC crimes. The key issue is whether these new variations in any way address the AU's concerns about the ICC. Regarding the crime of aggression, unlike the Rome Statute, which restricts it to states, the Malabo Protocol extends it to non-state actors. The Protocol also changes the body responsible for making a preliminary determination of crime of aggression. Under the Rome Statute, save in the exceptional circumstances specified under the Statute, it is the UNSC, while under the Malabo Protocol, it is the AU Peace and Security Council (PSC) which is given this mandate.[204] Notably, literature on the variation in the definition of this crime is scarce. A preliminary survey of the legal frameworks establishing these mechanisms reveals the unclear and sometimes confusing nature of what the AU has done. For example, most of its innovations do not speak to its grievances against the ICC. In other respects, the Malabo Protocol does not clarify the

[201] A Abass 'The proposed international criminal jurisdiction for the African Court: Some problematical aspects' (2013) 60 *Netherlands International Law Review*, 33; M du Plessis 'Implications of the AU decision to give the African Court jurisdiction over international crimes' (2012) ISS Paper no. 235; S Lamony 'African Court not ready for international crimes' http://africanarguments.org/2012/12/10/african-court-not-ready-for-international-crimes-–-by-steven-lamony/ (accessed 1 January 2015) page 1.
[202] Lamony 'African court not ready for international crimes' (n 201 above).
[203] Abass 'The proposed international criminal jurisdiction for the African Court: Some problematical aspects' (n 201 above) 33.
[204] Article 15*bis* (6) and (7) of the Rome Statute; Article 7 (o), Protocol Relating to the establishment of the Peace and Security Council of the AU of 2002.

role of the UNSC vis-à-vis the AU PSC regarding referral of cases to the Court as well as in preliminary determinations of crimes against aggression. Similarly, the definition of war crimes introduces certain elements that have been informed by Africa's history of, inter alia, slavery, apartheid and discrimination.[205] It also introduces what Kai Ambos criticises as the absolute nature of the prohibition of attacks on works or installation.[206] Moreover, it absolutely proscribes the use of nuclear weapons and weapons of mass destruction as amounting to war crimes.[207]

Regarding the crime of genocide, the Malabo Protocol has made one addition, namely 'acts of rape or any other form of sexual violence'.[208] Ambos has criticised this move as amounting to 'over- or multiple charging'.[209] Ambos further criticises the Malabo Protocol's failure to include political groups within its list of groups in the *chapeau* provisions of this crime.[210] Although it is a criticism with which this study agrees, the study further argues that an amendment of this nature is likely to create the perception of exclusively targeting political rebels as opposed to leaders who are bestowed with immunity while in office.[211]

Furthermore, a progressive feature of the Malabo Protocol is its explicitly inclusion of corporate criminal liability for international crimes, which as Chantal Meloni observes, 'is in line with the development of international criminal law'.[212] Joanna Kyriakakis also acknowledges the innovativeness of this legal aspect even though she acknowledges its possible challenges.[213]

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[205] Article 28D, Malabo Protocol.
[206] K Ambos 'Genocide (article 28B), crimes against humanity (article 28C), war crimes (article 28D) and the crime of aggression (article 28M)' in G Werle and M Vormbaum (eds) *The African Criminal Court: A commentary on the Malabo Protocol* (2017) 44.
[207] Article 28D(g), Malabo Protocol.
[208] Article 28B(f), Malabo Protocol.
[209] Ambos 'Genocide (article 28B), crimes against humanity (article 28C), war crimes (article 28D) and the crime of aggression (article 28M)' (n 206 above) 44.
[210] Ibid.
[211] See discussion under chapter 4, point 4.2.1.3 (d).
[212] C Meloni 'Modes of Responsibility (Article 28N), Individual Criminal Responsibility (Article 46B) and Corporate Criminal Liability (Article 46C)' in Werle and Vormbaum (eds) *The African Criminal Court* (n 206 above) 139.
[213] J Kyriakakis **'**Article 46C: Corporate Criminal Liability at the African Criminal Court' *African Court of Justice and Human and People's Rights in context,* C. Jalloh, K. Clarke, V. Nmehielle, eds, (2017 Forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2970864 (accessed 28 May 2018).

Another notable aspect of the Malabo Protocol is the relationship question − the relationship between the African Court, the ICC and subregional and national criminal courts, which is likely to raise numerous concerns. Probable challenges are envisaged in three key areas: hierarchy of international courts or tribunals, complementarity[214] and the immunity question. Regarding the hierarchy question, this study agrees with the numerous scholars who argue that international law knows no hierarchy of international courts and tribunals.[215] The International Law Commission (ILC) has also accepted that international criminal courts, too, are not hierarchically organised.[216] Aldo Zammit Borda describes their jurisdiction as 'self-contained'.[217] It is on this premise that chapter four argues that both the ICC and the African Court occupy the same status in the realm of international criminal justice.[218] Neither of the two courts ranks higher than the other; thus, one court cannot operate as an appellate court for the other.

Concerning the aspect of complementarity, this study disagrees with Chacha Murugu's argument that the Rome Statute neither expressly nor implicitly recognise regional courts jurisdiction over ICC crimes.[219] It argues to the contrary that regional courts are created through collective acts of states at a regional level. It therefore agrees with Ademola Abass that a court created by a multilateral treaty does not require the approval of another multilateral treaty to justify its existence.[220] Besides, states do not conclude international treaties to the exclusion of all other treaties.[221] It is on this basis that the study

[214] See point 1.7.2, chapter one for the definition of complementarity.
[215] D Terris, CPR Romano and L Swigart *The International judge: An introduction to the men and women who decide the world's cases* (2007) 120; AZ Borda 'Precedents in international criminal courts and tribunals' (2013) 2(2) *Cambridge Journal of International and Comparative Law* 293; C Leathley 'An institutional hierarchy to combat the fragmentation of international law: Has the ILC missed an opportunity?' (2007) 40 *New York University Journal for International Law and Politics* 259; S Spelliscy 'The proliferation of international tribunals: A chink in the armor' (2001) 40 *Columbia Journal of Transitional Law* 145.
[216] ILC 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law' Report of the study group of the International Law Commission, Finalized by Martti Koskenniem, UN Doc. A/CN.4/L.682 (2006).
[217] Borda 'Precedents in international criminal courts and tribunals' (n 215 above) 293.
[218] See discussion under point 4.2.4.1, Chapter four.
[219] C Murugu, 'Towards a criminal chamber in the African Court of Justice and Human Rights' *Journal of International Criminal Justice* (2011) 1077.
[220] A Abass 'Historical and political background to the Malabo Protocol' in G Werle and M Vormbaum *The African Criminal Court: A commentary on the Malabo Protocol* (n 206 above) 21.
[221] Ibid.

concludes that the Malabo Protocol cannot be legitimised through the provisions of the Rome Statute.

Generally, the discourse on complementarity is narrowed between the ICC and national prosecuting agencies. This study, however, agrees with Patryk Labuda, who argues for the need to redefine complementarity as not being limited to prosecutions.[222] The argument favours the position taken by this study, which advocates for embracing other accountability measures, in addition to prosecution, for international crimes. This, as explained further in the thesis, necessitates the recognition of traditional African approaches to justice.

African states' practice regarding national prosecution of international crimes has majorly been through special divisions in relevant national courts, military tribunals or extratordinary courts. Uganda established an International Crimes Division (ICD) of the High Court in 2008.[223] Although this was meant to improve national prosecution of international crimes, particularly so with regard to the Lord Resistance Army (LRA) related cases, Sharon Nakandha[224] and Prudence Acirokop[225] acknowledge that these mechanisms have faced numerous challenges. Similarly, the International Centre for Transitional Justice (ICTJ) found the Military tribunals of the DRC, prosecuting international crimes, and its governing legislation to be falling short of international standards on several fronts. [226] The sum effect of these challenges has compromised the effectiveness of these national prosecution efforts as complementarity mechanisms in the fight against impunity for

[222] P Labuda 'How effective is the ICC? Complementarity and cooperation in Congo' presentation during the conference, *The Nuremberg Principles 70 years later: Contemporary challenges* 2015.
[223] This was redesignated in 2011 through Legal Notice No. 10 of 2011, The High Court (International Crimes Division) Practice Directions 2011 clause 3.
[224] S Nakandha 'The Kwoyelo case at the ICD: The realities of complementarity in practice' https://www.ijmonitor.org/2016/05/the-kwoyelo-case-at-the-icd-the-realities-of-complementarity-in-practice/ (accessed 3 March 2018).
[225] P Acirokop, *Accountability for Mass Atrocities: The LRA Conflict in Uganda*, LLD thesis, University of Pretoria (2013), Chapter 5, https://repository.up.ac.za/bitstream/handle/2263/23898/06chapter6.pdf?sequence=7 (accessed 3 March 2018).
[226] ICTJ 'The Accountability landscape in Eastern DRC: Analysis of the National Legislative and Judicial Response to International Crimes (2009–2014)' https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Prosecutions-2015_1.pdf (accessed 5 March 2018).

international crimes. The prosecution of Hissèn Habrè's is yet another incident that was riddled with numerous uncertainties which ended with a conviction before an Extraordinary Senegalese Court.

1.7.4 Traditional African processes and TRCs

In addition to prosecution efforts at national, regional, ad hoc and international courts, post-conflict African state practice has shown use of traditional justice processes to fight impunity for international crimes. Rwanda has previously used the *gacaca* traditional process, and there have been proposals to use *mato oput* in Uganda for ICC indictees.[227] Other examples of traditional African approaches to justice within Uganda, though not used for accountability of international crimes, include *Nyono Tong Ngweno* and *Gomo Tong*.[228] The study, however, focuses on the traditional procedures of *gacaca* and *mato oput* with the aim of assessing their suitability as an accountability measure for international crimes. These processes were chosen for the simple reason that they have been used by the respective post-conflict African states within the context of international crimes. As such, they provide this study with a sound basis for comparing the effectiveness of the ICC with that of traditional African processes for holding the perpetrators of international crimes accountable.

A survey of most African countries' national legal frameworks reveals that some of them use traditional mechanisms for low-level criminal cases.[229] This has made it easier for these mechanisms to have been embraced in the post-conflict period. Jacques Koko,[230] the Institute for Democracy and Electoral Assistance (IDEA),[231] Peter Uvin,[232] Lauren Haberstock,[233] Gordon,[234] Patricia

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[227] C Rose 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth-telling and reparations' (2008) 28(2) *Boston College Third World law Journal* 361; Bako 'Does traditional conflict resolution lead to justcie? – The *Mato Oput* in Northern Uganda' (n 116 above) 102.

[228] Rose 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth-telling and reparations' (n 227 above) 360.

[229] Section 8 of the Judicature Act of Kenya; section 211(3) of the Constitution of the Republic of South Africa, 1996.

[230] JL Koko 'The *Gacaca* courts in Rwanda twenty years after the genocide' *Conflict Perspectives* 24 April 2014 http://conflictperspectives.imtd.org/index.php/regions/africa/104-the-gacaca-courts-in-rwanda-twenty-years-after-the-genocide (accessed 17 June 2016).

[231] IDEA *Traditional justice and reconciliation after violent conflict: Learning from African experiences* (2008) 33.

Bako[235] Cecily Rose,[236] have all engaged in a detailed description and analysis of different aspects of the *gacaca* and *mato oput* processes. A study of this literature leads this study to conclude that, despite the differences in the two cultural processes, there are certain commonalities in them. This implies, as stated previously, that there exist shared African values in the conceptual understanding of the notion of justice. The study concurs with Paul Rusesabagina and Tom Zoellner's observation about the inherent differences between traditional African processes and those of the ICC.[237]

Post-conflict African states have also used Truth, Justice and Reconciliation Commissions (TJRCs) or TRCs**.** As already pointed out above, Zimbabwe, Sierra Leone, South Africa and Liberia, Uganda and recently Kenya have all established TJRCs in their post-conflict periods.[238] It must be noted, however, that TRCs are not unique to Africa and thus not a traditional African specific approach as such.[239] Nevertheless, state practice in post-conflict African states has broadly embraced this mechanism.

Regarding TRCs, Ruti Teitel,[240] Paul van Zyl[241] Candrall,[242] Priscilla Hayner[243]

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[232] P Uvin 'The *Gacaca* tribunals in Rwanda' *Reconciliation after violent conflict* International Institute for Democracy and Electoral Assistance (2003) 117.

[233] L Haberstock 'An analysis of the effectiveness of the *gacaca* court system in post-genocide Rwanda' (2014) 8(4) *Global Tides* 9.

[234] GS Gordon 'Complementarity and alternative justice' (2009) 88(3) *Oregon Law Review*, 247.

[235] Bako 'Does traditional conflict resolution lead to justice? The *Mato Oput* in Northern Uganda' (n 116 above) 102.

[236] Rose 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth-telling and reparations' (n 227 above).

[237] P Rusesabagina and T Zoellner *An ordinary man: An autobiography* (2006) 197.

[238] See (n 46-50 above).

[239] P de Greiff, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff' Human Rights Council 9 August 2012; PB Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2 ed (2011). Latin America is commonly seen as the place of origin for the development of truth commissions. While Uganda implemented the first truth commission in the region 1974 and Bolivia from 1982-1984. Priscilla Hayner explains, 'the first widely known truth commission was set up in Argentina in 1983', though was not referred to as a 'truth commission' at that time (rather as the National Commission on the Disappeared).

[240] R Teitel *Transitional justice* (2000); AG Reiter, TD Olsen and LA Payne, 'Transitional justice and civil war: Exploring new pathways, challenging old guideposts' (2012) 1(1) *Transitional Justice Review* 138.

[241] P van Zyl 'Promoting transitional justice in post-conflict societies ' in A Bryden and H Hanggi (eds) *Security governance in post-conflict peacebuilding* (Geneva Centre for the Democratic Control of Armed Forces, 2005) 211.

[242] B Crandall 'Truth commissions in Guatemala and Peru: Perpetual impunity and transitional justice compared', *Peace, Conflict and Development* (2004) 4

Makau Mutua,[244] and Cryer et al.[245] are some of the scholars who have written on the nature and significance of TRCs. Cryer et al.[246] consider the controversial debate as to whether TRCs can complement the ICC.

Three procedural questions stand out in relation to the complementarity nature of TRCs to the ICC. First, do TRCs conduct investigations or prosecutions within the meaning of article 17? Second, do investigations conducted outside a criminal justice process like a TRC suffice the test of a state action under article 17? Only when these two questions are answered in the affirmative, will the court proceed to determine the third question – the inability and unwillingness question stated below. Thus, under the Rome Statute, a case is admissible in case of inaction of a state regarding investigations and prosecution, as well as inability or unwillingness to investigate or prosecute.[247] The third question is therefore whether proceedings before TRCs comprise investigations or prosecutions. Gordon sets out the nature of proceedings before TRCs as comprising the recording of statements; allowing victims to publicly share their experiences of the atrocity period; sometimes using subpoena orders to compel witnesses and conduct searches and seizure; conducting public hearings; and, finally, publishing a report.[248] In most cases, the TRCs have investigatory powers.

Cryer et al argue that where there is some form of inquiry accompanying an amnesty, as was the case with the South African TRC, it could constitute an investigation sufficient to render a case inadmissible before the ICC.[249] Yet almost all TRCs have an inquisitorial character – does this mean that all TRC proceedings qualify as rendering a case inadmissible under the Rome Statute?

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http://www.peacestudiesjournal.org.uk/dl/perpetualimpunity.PDF (accessed on 25 May 2015).

[243] Hayner *Unspeakable truths: Transitional justice and the challenge of truth commissions* (n 239 above).

[244] MW Mutua 'Beyond Juba: Does Uganda Need a national truth and reconciliation process?' (2007) 13 *Buffalo Human Rights Law Review* 29.

[245] Cryer et al. *An introduction to international criminal law and procedure* (n 64 above) 159.

[246] Ibid.

[247] Article 17, Rome Statute.

[248] GS Gordon 'Complementarity and alternative justice' (2009) 88 (3) *Oregon Law Review*, 649.

[249] Cryer et al. *An introduction to international criminal law and procedure* (n 64 above).

Article 17, Rome Statute is not clear on the type and nature of national proceedings sufficient to render a matter inadmissible. The court has, however, underscored that not all domestic proceedings are sufficient state action to render a case inadmissible under article 17.[250] The question is therefore whether investigations conducted by TRCs supurses the test under article 17. The express criminal mandate over international crimes under the Rome Statute suggests the drafters' intention for the Court to be complemented by national mechanisms that have criminal mandate over similar crimes. More so, article 1 of the Rome Statute provides that the Court 'shall be complementary to national criminal jurisdictions.' The complementarity nature of TRC's to the ICC should therefore be understaood through this narrow interpretation of article 17. Darryl Robinson notes that an investigation in its broad sense incudes investigations conducted by TRCs as long as it retains the possibility of a prosecution at the end.[251] Cryer et al. further acknowledge that the purposes of the investigations envisaged under article 17(2)(a) and (c) of the Rome Statute should be to bring the concerned party to justice.[252] The notion of justice within the confines of the Rome Statute is largely prosecutorial and, to a limited degree, concerns reparations. Since TRCs do not prosecute, it becomes obvious that proof of this kind of investigation does not render a case inadmissible under the Rome Statute.

1.8 Methodology

The study employed desk research, drawing from primary and secondary sources on the subject. Relevant literature by international criminal law experts, legal practitioners within international criminal justice systems, ad hoc international criminal tribunals and the ICC as well as literature on the African Court was analysed. Judicial decisions of these courts and tribunals (that are or have been operational) was also analysed in order to gain understanding on two main factors: Africa's grievances in respect of ICC prosecution, and African approaches to and perspectives on combating impunity. A key strength in considering primary sources, particularly judicial decisions is that it

[250] Kenya Authorization Decision, 183
[251] D Robinson 'Comments on chapter of Claudia Cárdenas Aravena' in JK Kleffner & G Kor (eds) *Complementary views on complementarity* (2006) 141, 144.
[252] Ibid.

allowed for the capturing of experts' perspectives as well as the first-hand experience of practitioners in international criminal justice systems, a procedure which led to important insights.

1.9 Chapter overview

This dissertation is divided into three parts. Part one is an introduction to the study. It comprises chapter one, which provides a historical overview of impunity in Africa and the responses to it. The chapter also sets out the literature review, conceptual framework, research methodology, and the aims and significance of the study.

Part two proceeds to critically analyse African concerns about the international criminal justice system. These are captured in two themes: the notion that the ICC is biased against Africa and the 'peace versus justice debate'. These themes are discussed in chapters two and three, respectively. Essentially, part two answers research question one: What are Africa's concerns about the prosecution of international crimes at the ICC?

Part three comprises chapters four, five and six. It interrogates the proposition of an African solution to Africa's problem of impunity. Chapter four offers a critique of the proposed African Court with jurisdiction over international and transnational crimes as well as African states' practice regarding national prosecution of international crimes, using special divisions in relevant national courts, military tribunals or extratordinary courts. Chapter five then considers the use of traditional African procedures such as *gacaca* and *mato oput* as well as the use of TRCs in post-conflict African states. This chapter further establishes the feasible relationship between the traditional African approaches considered and already existing regional and sub-regional systems as well as the ICC. Chapter six thus draws conclusions and makes recommendations on the way forward. Most importantly, part three answers research questions two, three and four: On what bases does Africa have these concerns? Do African approaches add value in the fight against impunity in Africa and how can one strengthen them? Is a regional criminal mechanism - which takes into consideration African approaches or perspectives – the solution to fighting impunity in Africa?

PART 2:
AFRICA'S CONCERNS REGARDING THE PROSECUTION OF INTERNATIONAL CRIMES AT THE ICC

CHAPTER 2
THE PERCEIVED BIAS OF THE INTERNATIONAL CRIMINAL COURT AGAINST AFRICA

2.1 Introduction

Following the coming into force of the Rome Statute on 1 July 2002, the structures of the ICC were established in 2003 and its staff hired in readiness to combat the world's most hideous crimes.[1] This has not been fully achieved, however, owing to a legitimacy crisis that keeps pulling the Court and the African region apart from each other. Although African states were a critical component in the evolution of the ICC, their current relationship with the Court is fundamentally full of tension. This is mainly due to the perception that the ICC is biased against Africa.

The origin of this perception is, however, not old, and lies in the eventual operationalisation of the Court within the African region. The ICC has and is currently conducting investigations or prosecution in nine African countries: CAR, Côte d'Ivoire, DRC, Kenya, Libya, Mali, Sudan, Uganda and Burundi.[2] It is further conducting preliminary examinations in Gabon, Guinea and Nigeria.[3] With regard to other regions: the OTP has ongoing preliminary examinations in Afghanistan, Columbia, Iraq/UK, Palestine, The Philippines, Ukraine and Venezuela; it closed preliminary examinations in Hondurus (for lack of 'reasonable basis to proceed with an investigation'), Korea (due to non-satisfaction of 'the statutory requirements to seek authorisation to initiate an investigation') and registered vessels of Comoros, Greece and Cambodia (for lack of 'reasonable basis to proceed with an investigation'); and is conducting

[1] ICC Assembly of State Parties 'Election of the Registrar of the ICC' 6 October 2017; ICC 'Swearing in ceremony of the deputy prosecutor of the ICC' 3 November 2003, https://www.icc-cpi.int/NR/rdonlyres/73ED1AE1-1332-4504-91D8-77CA6A4517CA/277479/Swearing_Dy_Prosecutor_Investigation_Speech_LMO_En.pdf (accessed 23 May 2018).

[2] ICC 'Situations under investigation', https://www.icc-cpi.int/pages/situations.aspx (accessed 3 May 2018); ICC 'Trial stage', https://www.icc-cpi.int/Pages/trial.aspx (accessed 3 May 2018). See ICC 'Preliminary investigations', https://www.icc-cpi.int/pages/pe.aspx (accessed 1 May 2018).

[3] ICC 'Preliminary examinations', https://www.icc-cpi.int/pages/pe.aspx (accessed 3 May 2018).

an investigation in Georgia.[4]

The AU has previously expressed concern over what it termed as ICC's 'misuse of indictments against African leaders'.[5] It has further underscored 'the need for international justice to be conducted in a transparent and fair manner, in order to avoid any perception of double standard, in conformity with the principles of international law …'[6] The chairperson of the AU Assembly, during an AU summit, criticised the ICC process as flawed and having 'degenerated to some kind of race-hunting rather than the fight against impunity.'[7]

According to the chairperson, the ICC has not only deteriorated from its original intention of fighting impunity but it has also misplaced its focus. This underlies the reason why the AU is opposed to the ICC. It has thus been accentuated in the AU's ICC Withdrawal Strategy, which states that African states parties to the Rome Statute 'initially saw the ICC as a beacon of emancipation – a solution for their continent's injustices' but its predominant focus on Africa 'has created a suspicion about prosecutorial justice' and is seen by '[g]rowing numbers of African stakeholders' as 'reflective of selectivity and inequality'.[8]

Some African writers have echoed the above in their critique of the ICC on the basis of its predominant focus on Africa, with some raising concern over a 'one-sided application of international criminal law instrument to indict only weak individuals from generally poor African states'.[9] Prominent African

[4] Ibid; ICC 'Situations under investigation' (n 2 above).
[5] AU Assembly 'Decision on international jurisdiction, justice and the International Criminal Court' Assembly/AU/Dec.482(XXI), Doc. Assembly/AU/13(XXI), 21st Ordinary Session, 26 - 27 May 2013, para 4.
[6] Ibid, para 5.
[7] SA Dersso 'The International Criminal Court's Africa problem' *Al Jazeera* (2013), http://www.aljazeera.com/indepth/opinion/2013/06/201369851918549.html (accessed 22 February 2017).
[8] AU 'Withdrawal Strategy Document (Version 12.01.2017), paras 1 and 2, available at https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf (accessed 30 April 2018). See AU Assembly 'Decision on the International Criminal Court (ICC)' Assembly/AU/Dec.622(XXVIII), Doc. Doc. EX.CL/1006(XXX), 28th Ordinary Session, 30 - 31 January 2017, para 8, confirming adption of the ICC Withdrawal Strategy.
[9] See, for example, M Mamdani 'Darfur, ICC and the new humanitarian order: How the ICC's "responsibility to protect" is being turned into an assertion of neocolonial domination' (2008) http://www.pambazuka.org/en/category/comment/50568 (accessed 11 June 2014); M du Plessis 'The International Criminal Court and its work in Africa: Confronting the myths' ISS

leaders have also added their voice to the concerns. For example, Desmond Tutu – a prominent spiritual leader and Nobel Peace Prize laureate − has expressed frustrations regarding ICC selectivity in relation to accountability for those responsible for mass atrocities in the Iraqi war.[10]

Another example is Paul Kagame, President fo Rwanda (a non-state party to the Rome Statute), who has criticised the ICC of selectivity and bias, describing it as 'a form of "imperialism" that seeks to "undermine people from poor and African countries, and other powerless countries in terms of economic development and politics."'[11]

The ICC's indictment of sitting African heads of state triggered these kinds of sentiments. As further observed by the AU, '[t]he case of Sudan, with the indictment of President Omar Al Bashir, has illustrated this seeming ineqauality'.[12] Also that 'the selectivity of African cases before the ICC' has resulted in its 'call for solidarity among AU member states in their opposition to the proceedings launched against Al Bashir' and for the UNSC to defer the ICC's prosecutions against Al Bashir, Kenyatta, and Ruto'.[13] Currently, all senior state officials indicted by the ICC are from Africa. This creates a perception that the ICC inappropriately or unfairly focuses on situations from

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paper No. 173 November 2008; African Network on International Criminal Justice 'Reflections on the Africa Union ICC relationships' (2014), http://www.icj-kenya.org/dmdocuments/books/reflections%20on%20the%20african%20union%20icc%20relationship.pdf (accessed 16 June 2014); AU summits in February and July 2009; A Ciampi 'The proceedings against President Al Bashir and the prospects of their suspension under article 16 ICC Statute' (2008) 6 *Journal of International Criminal Justice* 885-886; CC Jalloh 'Regionalizing international criminal law' (2009) 9 *International Criminal Law Review* 462; CS Igwe 'The ICC's favourite customer: Africa and international criminal law' (2008) 2 *Comparative and International Law Journal of Southern Africa* 322.

[10] D Tutu 'Why I had no choice but to spurn Tony Blair' *The Guardian* (2012), https://www.theguardian.com/commentisfree/2012/sep/02/desmond-tutu-tony-blair-iraq (accessed 8 July 2014).

[11] WC Austin and M Thieme 'Is the International Criminal Court anti-African?' (2016) 28(3) *Peace Review: A Journal of Social Justice* 343; F Edroos 'Rwanda's Paul Kagame accuses ICC of bias against Africa' *Al Jazeera* (2018), https://www.aljazeera.com/news/2018/04/rwanda-kagame-accuses-icc-bias-africa-180429050656022.html (accessed 4 May 2018); P Kayitare 'Rwanda's Kagame slams 'selective' justice by ICC' (2013), http://www.inyenyerinews.org/democracy-freedom/rwandas-kagame-slams-selective-justice-by-icc/ (accessed 4 May 2018).

[12] AU 'Withdrawal Strategy' (n 8 above) para 4.

[13] AU 'Withdrawal Strategy' (n 8 above) para 4. As noted in chapter 1 (n 138), the case against Kenya has been withdrawn.

Africa as opposed to those elsewhere.[14]

On 6 March 2009, the PTC issued an arrest warrant against al-Bashir for war crimes and crimes against humanity committed in Darfur.[15] The Sudanese government considered this warrant to be a declaration of war against Sudan.[16] It expelled 13 foreign humanitarian agencies from its territory for fear of their collaboration with the ICC in collecting information from the victims.[17] Not only did cooperation between the government of Sudan and the OTP cease, but the government of Sudan also denied the OTP access to its territory, which was integral for conducting investigations.[18] A similar tension-prone relationship was witnessed in relation to UN Peacekeeping Forces, which were perceived as possible conduits through which the Court would execute arrest warrants or as likely to offer support to rebel groups.[19]

Despite several calls from the UNSC for Sudan to cooperate fully with the Court, none of them bore any fruit.[20] According to Sudan, the UNSC, as an instrument of the West, had 'repeatedly condemned Khartoum, imposed an arms embargo, demanded that it disarm the Janjaweed and accept UN Peacekeepers and then referred Darfur to the ICC'.[21] The AU adopted a resolution expressing its great displeasure[22] and calling upon member states not to cooperate in the arrest and surrender of al-Bashir.[23]

Similarly, in relation to Libya, the AU condemned the prosecutor's indictment

[14] See, for example, ICC Forum 'Africa question: Is the International Criminal Court (ICC) targeting Africa inappropriately?', http://iccforum.com/africa, http://iccforum.com/africa (accessed 3 May 2018) (discussing this perception).
[15] *Prosecutor v Omar Hassan Ahmad Al Bashir* (Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-1 (4 March 2009) Pre-Trial Chamber I.
[16] S Jones 'In the pursuit of justice: A comment on the arrest warrant for President Al-Bashir of Sudan' 6 *Eyes on the ICC* (2009-2010) 17.
[17] A de Waal 'Darfur, the Court and Khartoum: The politics of state non-cooperation' *Courting conflict?* in N Waddell and P Clark (eds) *Justice, peace and the ICC in Africa* (2008) 32-33
[18] OTP '15th ICC Prosecutor's report to the Security Council in application of Resolution 1953 (2005)' (2012) 2.
[19] Ibid.
[20] Statement by the President of the Security Council, 16 June 2008, S/PRST/2008/21.
[21] Ibid, 34.
[22] AU Assembly 'Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court' Assembly/AU/Dec.245(XIII) Rev.1, Doc. Assembly/AU/13(XIII), 13th Ordinary Session 1–3 July 2009, para 2.
[23] Ibid, para 10.

of the late Muammar Gaddafi[24] and the PTC's subsequent issuance of a warrant of arrest on 27 June 2011.[25] The AU again called upon its member states not to cooperate in any arrest and surrender of Gaddafi to the ICC.[26] It is worth noting in relation to the Libyan situation that Saif Gaddafi – one of the indictees with a warrant of arrest against him[27] – preferred to be prosecuted by the ICC instead of a domestic trial (in Libya),[28] as he was concerned that the domestic trial would be unfair, stating that 'the only way for Libya and the Libyan people to have justice is for the ICC to try this case in a fair, impartial and independent manner, and, in so doing, set standards, which Libya can follow on its future path to democracy and the rule of law'.[29] However, his choice and view should not be misinterpreted as demonstrating Libyan support for the ICC but should be understood within Libya's local politics.

In the Kenyan cases, Uhuru Muigai Kenyatta was indicted before he became the president of Kenya. Some critics then argued that Uhuru used this indictment as a basis to leverage himself to power – either on sympathy[30] or through manipulation in order to better his bargaining power against the ICC at the international level. Yet the truth of this criticism does not change the

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[24] AU Assembly 'Decision on the implementation of the Assembly decisions on the International Criminal Court' Assembly/AU/Dec.366(XVII), Doc. EX.CL/670(XIX), 17th Ordinary Session, 30 June - 1 July 2011, para 6.

[25] *Situation in the Libyan Arab Jamahiriya* (Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi) ICC-01/11-13 (27 June 2011) Pre-Trial Chamber I. Following his death, the case was terminated (see *Prosecutor v Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Decision to Terminate the Case against Muammar Mohammed Abu Minyar Gaddafi) ICC-01/11-01/11-28 (22 November 2011) Pre-Trial Chamber I).

[26] AU Assembly, Assembly/AU/Dec.366(XVII) (n 24 above) para 6.

[27] *Situation in the Libyan Arab Jamahiriya* (Warrant of Arrest for Saif Al-Islam Gaddafi) ICC-01/11-14 (27 June 2011) Pre-Trial Chamber I.

[28] Libya had indicated its intention to prosecute Saif, but the Court found Libya to be 'unable genuinely to carry out the investigation or prosecution', thus rendering the case admissible. For the grounds on which the Court arrived at this conclusion, see, generally, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Alsenussi* (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11-344-Red (31 May 2013) Pre-Trial Chamber I; *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Alsenussi* (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against SaifAl-Islam Gaddafi" ICC-01/11-01/11-547-Red (21 May 2014) Appeals Chamber.

[29] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Alsenussi* (Public Redacted Version of the Corrigendum to the 'Defence Response to the "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute"') ICC-01/11-01/11-190-Corr-Red (31 July 2012) paras 1-10.

[30] BBC News Africa 'Did the ICC help Uhuru Kenyatta win Kenyan elections?' (11 March 2013) http://www.bbc.com/news/world-africa-21739347 (accessed 8 July 2014).

reality that all the senior state officials indicted by the ICC are from Africa. The ongoing preliminary examination of situations in Colombia, Afghanistan, Palestine, The Philippines, Ukraine, Iraq/UK, and Venezuela, as well as the decision to investigate in relation to Georgia, is apparently not enough to appease Africa's concerns.

The African position on the ICC is, however, mired in complexity and sometimes confusion. As suggested in chapter one, there is no one continent-wide position in Africa. Regarding the contention that the ICC is anti-African or bias against Africa, African leaders have not been consistent in their criticism. In chapter one of this thesis, it is is noted that African leaders offered full support to the ICC idea not only through ratification but also self-referral of situations in their countries. The DRC, Uganda, Central African Republic (CAR) and Mali referred the situations in their respective countries to the ICC. The prosecutor's decision to indict the 'rebels' in these situations did not seem to ignite the criticism that the ICC had a biased focus on Africa. It is only later, when the prosecutor decided not only to indict the rebels but also African heads of state was the criticism on ICC's exclusive focus on Africa born. African leaders have come around to use cases against African heads of states as well as those cases emanating from their own self referrals to criticise the ICC for its exclusivity.

This has sparked contrary arguments by other African voices that the ICC enjoys broad support from the majority of African civil society and victim groups.[31] For these groups, it is contended, the ICC is an idea that validates their efforts to root out impunity on the continent.[32] An example cited in this regard is a response to the AU resolution to withhold cooperation with the Court in the arrest and surrender of al-Bashir. One hundred and sixty-four non-governmental organisations (NGOs) from Africa expressed their concern with the AU's position and called on African governments 'to remain steadfast in their support for justice for victims of worst crimes, including by reaffirming

[31] Du Plessis 'The International Criminal Court and its work in Africa' (n 9 above).
[32] Ibid.

their commitment to cooperate with the ICC'.[33]

The position on the ICC therefore varies depending on the meaning one gives to the cocept of Africa. Some scholarly and academic assessments of Africa's position reduce it to the simple proposition that the African continent is a home for impunity.[34] Adopting this hostile stance not only compromises any cooperation between the Court and the region but also cripples international efforts against impunity on the continent. Africa's concerns about the ICC cannot be underestimated. The more commentators dismiss these fears,[35] the more Africa suffers at the altar of impunity. This necessitates meaningful engagement with Africa's legal and political concerns.

This chapter thus engages with the perception that the ICC is bias against Africa. It considers the two main reasons that have been cited as influencing this perceived African bias: the apparent lack of independence of the ICC, which exposes it to manipulation in favour of Western countries; and the perception that the ICC is 'a neo-colonial tool' for Africa.

2.2 The ICC's lack of independence from the West

The AU has publicly expressed its dissatisfaction with the ICC, in particular with the OTP and and the UNSC's role in the Court processes.[36] Whereas the AU or African states do not properly locate all their concerns against the ICC within a legal context, this section analyses these concerns in a manner that anchors them in law. The argument about the ICC's lack of independence focuses on three key aspects of the Court: the exercise of the prosecutor's *proprio motu* powers, especially the OTP's selection and prioritisation of

[33] HRW 'Civil society urges African state parties to the Rome Statute to reaffirm their commitment to the ICC' http://www.hrw.org/news/2009/07/30/african-civil-society-urges-african-states-parties-rome-statute-reaffirm-their-commi (accessed 2 June 2014).
[34] F Simwaka 'Africa's retreat from the International Criminal Court is about impunity, not dignity' 8 November 2016 *Global Opinion* https://www.washingtonpost.com/news/global-opinions/wp/2016/11/08/africas-retreat-from-international-criminal-court-is-about-impunity-not-dignity/?utm_term=.bf5c4ea27c78 (accessed 3 March 2018); AZ Kromah 'Impunity, not neocolonialism: The harsh reality of Africa' Young diplomats http://www.young-diplomats.com/impunity-not-neocolonialism-harsh-reality-africa/ (accessed 3 March 2018).
[35] Du Plessis 'The International Criminal Court and its work in Africa' (n 9 above); M du Plessis, OA Maunganidze and A Louw 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions' ISS Paper No. 214 (2012) 3.
[36] AU Assembly, Assembly/AU/Dec.366(XVII) (n 24 above) paras 3, 4 and 6; AU Assembly, Assembly/AU/Dec.245(XIII) Rev.1 (n 22 above) paras 2, 8-11.

situations and cases;[37] the central role played by the UNSC in the various Court processes;[38] and the general international politics in the Court processes. The political aspects are, however, intertwined with the selection and prioritisation of cases by the OTP and the role played by the UNSC in the Court processes.

2.2.1 Concerns about the prosecutor's *proprio motu* powers

One remarkable provision of the Rome Statute is the independence accorded to the OTP. The prosecutor has powers to 'initiate investigations *proprio motu* [on his or her own volition] on the basis of information on crimes within the jurisdiction of the Court'.[39]

2.2.1.1 Historical concerns about the prosecutor's proprio motu *powers*

The prosecutor's *proprio motu* powers seem to have raised concerns as long ago as the drafting period. According to a draft of the Rome Statute by the ILC, only states parties and the UNSC could trigger the jurisdiction of the Court.[40] This draft was highly favoured by USA, China and India, which argued that although it supported the autonomy and effectiveness of the OTP, his or her powers ought to begin only when a case was referred to him or her by either a state or the UNSC.[41] In an official memorandum on the ICC, USA sought to have these powers excluded for fear that they would transform the Court into a political forum that would challenge the legitimate actions of responsible governments by targeting their military personnel.[42] USA seemed

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[37] M Bergsmo (ed) *Criteria for prioritizing and selecting core international crimes cases* (2009); M Bergsmo (ed) *Criteria for prioritizing and selecting core international crimes cases* 2nd edn (2010).

[38] D Akande, M du Plessis and CC Jalloh 'An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC' ISS Position Paper (2010) 13, http://www.elac.ox.ac.uk/downloads/AkandeDuPlessisJallohICCPositionPaper.pdf (accessed 5 June 2014).

[39] Article 15, Rome Statute.

[40] Article 25, Draft Statute of the International Criminal Court, 1994.

[41] DJ Scheffer 'The United States and the International Criminal Court' (1999) 93(1) *American Journal of International Law* 13; DJ Scheffer 'Staying the course with the International Criminal Court' (2001-2002) 35(1) *Cornell International Law Journal* 69; Q Kafayat 'The proprio motu power of the ICC Prosecutor: The reason some states have refused to ratify the Rome Statute' (2014) 2(1) *International Journal of Humanities and Management Sciences* 12-13, G Conso 'The basic reasons for US hostility to the ICC in light of the negotiating history of the Rome Statute' (2005) 3 *Journal of International Criminal Justice* 319.

[42] Conso 'The basic reasons for US hostility to the ICC in light of the negotiating history of the Rome Statute' (n 41 above) 316-317.

concerned about, inter alia, exposing its military force stationed across the globe to discretionary powers of the prosecutor.[43] The requirement of UNSC approval would enable it to veto any prosecution against its citizens. This prompted the US delegation to seek an amendment of the Rome Statute that would give a contributing state the primary role in initiating investigations of alleged crimes committed by forces sent by the contributing states to international military operations.[44] This proposal read as follows:

> In order to encourage contributions by States to promote international peace and security, and unless there has been a referral to the Court pursuant to article 13(b) of the Statute, the United Nations and the Court agree that the Court shall determine on its own motion pursuant to article 19(1) the admissibility of a case in accordance with article 17 when there is a request for the surrender of a suspect who is charged in such case with a crime that occurred outside the territory of the suspect's State of nationality.[45]

The proposal was never advanced, despite it having been presented to the Preparatory Committee of the Rome Statute. This was due to the change of political regime in the USA: the proposal was presented under the Clinton administration immediately before the Bush administration came to power. Other than its service members, the US also feared the possibility of the prosecutor using these discretionary powers to bring charges against its past presidents.[46] The US contended that 'it is not uncommon for ill-disposed countries to depict U.S. foreign policy decisions as criminal and that the ICC may end up providing a forum for such charges.'[47] India also argued that the prosecutors' priopro motu powers ridiculed an already established position that 'state consent should be a requirement to investigation and prosecution in all cases.'[48] While China feared that such powers would conmpromise the ability of the ICC to concentrate on the most serious crimes but would open it up to political influence rendering the Court unable to act independently and fairly.[49] It was also feared that the intrusive nature of criminal investigations,

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[43] Ibid, 318.
[44] Scheffer 'Staying the course with the International Criminal (n 41 above) 61
[45] Working Group on a Relationship Agreement between the United Nations and the International Criminal Court, Proposal Submitted by the United States of America, UN Doc. PCNICC/2000/WGICC-UN/DP.17 (2000) 1.
[46] Kafayat 'The proprio motu power of the ICC Prosecutor: The reason some states have refused to ratify the Rome Statute' (n 41 above) 13.
[47] Ibid.
[48] Ibid.
[49] Ibid, 14.

where the prosecutor had exercised *proprio motu* powers, would not only compromise the sovereignty of states but was destined to fail where the state refuses to cooperate.[50]

The eventual inclusion of the prosecutors' *proprio motu* powers within the Rome Statute drew negative reactions from various quarters. USA, for example, expressed its displeasure at what it termed as the prosecutor's unchecked powers to commence unfounded proceedings.[51] The country's experience with 'special prosecutors' has been used to support the view that such an institution is volatile.[52] The USA's fear that 'the *proprio motu* prosecutor might be politically motivated' has been critiqued by William Schabas as somewhat hypocritical, considering that the country 'has never been shy about giving "political" direction to the prosecutors of the ad hoc tribunals'.[53] He observes that the USA's concern is not really about 'politically-motivated prosecutors' but rather about being able to 'control them'.[54] Indeed, critics of the ICC prosecutor's *proprio motu* powers fear the 'prospects of a sequential collapse of U.S. efforts to maintain control over a case involving a U.S. citizen'.[55] USA therefore, seems interested in a court that would be at its disposal.

Scholarly writings on the Rome Statute negotiations do not document clear contestation by African negotiators in relation to the prosecutor's *proprio motu* powers. However, African scholars have acknowledged that developing states generally feared the possibility that the prosecutor would be influenced by powerful states into harassing them.[56]

Advocates for the *proprio motu* powers, however, underscored the need to learn from the mistakes of the Nuremberg and Tokyo tribunals where such

[50] DN Nsereko 'Triggering the jurisdiction of the International Criminal Court' (2004) 4 *Africa Human Rights Law Journal* 263.
[51] J Burroughs 'US opposition to the International Criminal Court' (2004) 1 *Eyes on the ICC* 147-148; V Haas 'Power and justice: The United States and the International Criminal Court' (2004) 1 *Eyes on the ICC* 167-168; W Schabas 'United States hostility to the International Criminal Court: It's all about the Security Council' (2004) 15(4) *European Journal of International Law* 716.
[52] Schabas 'United States hostility to the International Criminal Court' (n 51 above) 716.
[53] Ibid, 717.
[54] Ibid.
[55] DJ Scheffer 'Staying the course with the International Criminal Court' (2001-2002) 35(1) *Cornell International Law Journal* 60
[56] Nsereko 'Triggering the jurisdiction of the International Criminal Court' (n 50 above) 264.

powers were non-existent.[57] The NGOs for example fought for the inclusion of an independent presecutor in the Rome Statute.[58] They argued that limiting the entities that can trigger the ICC jurisdiction to the UNSC and states had the potential of politicizing the court.[59] The essence of this provision in the Rome Statute was hence to cushion the Court from power politics by conferring independence on the OTP as well as to circumvent the probable reluctance of either states or the UNSC to refer cases to the ICC, especially cases where their interests were at stake.[60] More so, even where the prosecutor acts proprio motu in relation to a UNSC permanent member, such a member might be insulated from the jurisdiction of the Court through the veto power or probable deferral mechanism.

Although German and Argentinian supported the *proprio motu* powers, they introduced a proposal that would check on the prosecutor's exercise of this discretion.[61] This proposal, which was later adopted as article 15 of the Rome Statute, required judicial review by the Pre-Trial Chamber of the prosecutor's decision to initate investigation. [62]

The matter did not escape notice in the inaugural speech of the first Chief prosecutor, Luis Moreno Ocampo.[63] While addressing the ICC Assembly of State Parties, he acknowledged the worries surrounding his task ahead and pointed out that embedded within the Rome Statute were checks and balances that would prevent any abuse of these powers.[64]

It was therefore anticipated that these powers would raise controversy during the implementation phase.

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[57] The prosecutors were subject to the guiding principles of selection agreed upon by the Allied states.
[58] AM Danner 'Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Article 15, Rome Statute.
[63] The OTP is currently headed by Fatou Bensouda who was voted in by the Assembly of State Parties. She took office on 15 June 2012, replacing Lui Moreno Ocampo.
[64] LM Ocampo ' ICC – Election of the Prosecutor, Statement by Mr. Moreno Ocampo' Assembly of State Parties to the Rome Statute, 22 April 2003, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/press%20releases/press%20releases%202003/Pages/election%20of%20the%20prosecutor_%20statement%20by%20mr_%20moreno%20ocampo.aspx (accessed 23 March 2016).

2.2.1.2 Africa's experience and concerns about the prosecutor's abuse of proprio motu *powers*

Despite their fears, African states offered their full support to the ideals of the ICC. This is illustrated by the enthusiasm displayed by African states in the negotiation, adoption, signature and ratification of the Rome Statute.[65] Not only does the African region comprise the largest body of member states to the Rome Statute when compared to other continents, but African states were also the first to explore the virgin jurisdiction of the ICC through self-referrals.[66] This cosy relationship has since ended.

The AU has expressed concerns about, inter alia, the prosecutor's exercise of his or her *proprio motu* powers; and went further to call on African states parties to the Rome Statute of the ICC to prepare guidelines and a code of conduct for the OTP's exercise of *proprio motu* powers for consideration in the review conference of 2010 at Kampala.[67] Unfortunately, these powers were not included in the Kampala review conference's agenda. The prosecutor's subsequent exercise of his *proprio motu* powers with respect to Kenya exacerbated the AU concern.

Kenya was the first instance in the region where the ICC prosecutor actively engaged his *proprio motu* powers. Recently, the prosecutor was granted authority to initiate investigations in Cote d'Ivoire[68] and Burundi[69] in accordance with article 15 of the Rome Statute.

These three countries are, so far, the only African countries in which the prosecutor has successfully exercised *proprio motu* powers.[70] Unlike in the Ivorian situation, where the Court's intervention received full acceptance and

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[65] See the introduction to chapter 1 of this thesis.
[66] Ibid.
[67] AU Assembly, Assembly/AU/Dec.245(XIII) Rev.1 (n 22 above) para 11.
[68] *Situation in the Republic of Côte d'Ivoire* (Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire') ICC-02/11-14-Corr (15 November 2011) Pre-Trial Chamber III.
[69] *Situation in the Republic of Burundi* (Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017), ICC-01/17-9-Red (25 October 2017; Date Public Redacted Version: 9 November 2017) Pre-Trial Chamber III.
[70] Currently, Georgia is the only non-African country in which the prosecutor has been authorised to open proprio motu investigations. See *Situation in Georgia* (Decision on the Prosecutor's request for authorization of an investigation, ICC-01/15-12 (27 January 2016) Pre-Trial Chamber I.

support of the Ivorian government,[71] the contrary was true for Kenya and Burundi. In Kenya, although the government challenged the admissibility of the prosecutors' exercise of his *proprio motu* powers, the Court was seized of the Kenyan cases on the basis that even though the Kenyan government claimed there were ongoing investigations, these were hypothetical promises and not investigations within the context of article 17(1)(a) of the Rome Statute.[72] According to the ICC, the Kenyan government wrote to its Police Commissioner asking him to institute investigations into the post-election violence suspects only two weeks after lodging the application challenging admissibility.[73]

In its challenge to admissibility, the government of Kenya also alleged that there were ongoing investigations, which was not the case then. In the opinion of the Court, there were no such investigations *as at the time of the proceedings.* This, coupled with the failure to specifically mention the suspects before the ICC as some of the people under the government's investigation, rendered the information given by the Kenyan government inadequate to sustain the application.[74] The Court emphasised that investigations or national proceedings within the meaning of article 17(1) must encompass the same conduct in respect of the same persons as at the time of the proceedings concerning the admissibility challenge.[75] This was contrary to Kenya's understanding of the notion of admissibility. In its submission, the government of Kenya had argued that the 'national investigations must ... cover the same conduct in respect of persons at the same level in the hierarchy being

[71] *Situation in the Republic of Côte d'ivoire*, ICC-02/11-14-Corr (n 68 above) paras 10-14.
[72] *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article (19)(2)(b) of the Statute), ICC-01/09-02/11-96 (30 May 2011) Pre-Trial Chamber II, paras 56, 58, 61, 62, 64, 65 and 66 *(Muthaura, Kenyatta and Ali),*; *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute) ICC-01/09-01/11-101 (30 May 2011) Pre-Trial Chamber II, paras 65, 66, 68 and 69 (*Ruto, Kosgey and Sang)*.
[73] Ibid.
[74] *Muthaura, Kenyatta and Ali*, ICC-01/09-02/11-96 (n 72 above) paras 56, 61, 65 and 66; *Ruto, Kosgey and Sang*, ICC-01/09-01/11-101 (n 72 above) paras 66 and 69.
[75] *Muthaura, Kenyatta and Ali*, ICC-01/09-02/11-96 (n 72 above) paras 49, 50, 51, 52, 58, 64 and 66. See also *Ruto, Kosgey and Sang*, ICC-01/09-01/11-101 *(*n 72 above) paras 53, 55 and 70.

investigated by the ICC'.[76] Moreover, given the fact that the said ongoing investigations in Kenya were with respect to all crimes committed during the 2007 post-election violence, the Court was uncertain whether the investigations involved the same persons and crimes being investigated by the ICC.[77]

Kenya's unrelenting challenge to the prosecutor's exercise of his *proprio motu* powers is, however, comprehensible. The OTP's policy has often underscored the fact that the Court's success will be measured not by the number of its prosecutions but by encouraging domestic prosecution of international crimes.[78] This does not seem to have been relevant in the Kenyan case, notwithstanding the state's initiatives – for which the ICC instead should have allowed more time in the interests of effective domestic prosecution. Although there have been doubts whether local prosecutions would have yielded a genuine process – given both the volatile, ethnocentric nature of Kenyan politics and likelihood of the government wishing to avoid self-embarrassment, seeing as a majority of those under the ICC investigations occupied central positions in Kenya's political class and most governance decisions revolved around them[79] – the Court's failure to give the Kenya sufficient time that would encourage the government in its local initiatives is worrying.

In Burundi, investigations targeted state agents and groups implementing state policies for having committed crimes against humanity against the civilian population.[80] The government of Burundi responded to the OTP's exercise of her *proprio motu* powers by withdrawing from the Rome Statute. This withdrawal took effect on 27 October 2017.[81] It is, however, debatable if the prosecutor's exercise of her *proprio motu* powers would have attracted the

[76] *Muthaura, Kenyatta, Ali*, ICC-01/09-02/11-96 (n 72 above) para 48, 49, 55 and 65; ICC Pre-Trial Chamber II, *Ruto, Kosgey and Sang*, ICC-01/09-01/11-101 (n 72 above) 59 and 60.
[77] Ibid.
[78] OTP 'Strategic plan: June 2012–2015' (2013), https://www.legal-tools.org/doc/954beb/pdf/ (accessed 30 May 2014); OTP 'Paper on some policy issues before the Office of The Prosecutor' (2003) 4-5, http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (accessed 30 May 2014).
[79] E Asaala 'The International Criminal Court Factor on Transitional Justice in Kenya' in K Ambos and O Maunganidze (eds) *Power and Prosecutions: Challenges and opportunities for international criminal justice in sub-Saharan Africa* (2012) 135.
[80] OTP 'Situation in the Republic of Burundi' https://www.icc-cpi.int/burundi (accessed 6 March 2018).
[81] Ibid.

same resentment if the investigations were to have targeted individuals and groups not connected to the respective governments.

In the isolated case of Guinea, the OTP has encouraged positive complementarity by encouraging national prosecution of perpetrators of international crimes committed during the massacre of hundreds of opposition party members on 24 September 2009 by Guinea's security forces.[82]

Stemming from these experiences, concerns have been raised about the OTP's abuse of these powers. In particular, the OTP has been criticised for taking advantage of her *proprio motu* powers to either influence or exert external pressure on state referrals. Paola Gaeta and William Schabas have rejected the widely accepted notion that, of the nine African country situations before the ICC, three – Uganda, DRC and CAR – were genuine 'self-referrals'.[83] According to the two authors, the prosecutor of the ICC influenced all these referrals.[84] This would imply that the prosecutor has indirectly taken advantage of his or her discretionary powers to influence the referral of an additional three African cases before the ICC. In fact, in the case of the DRC, upon authorisation by the PTC to open investigations, the prosecutor declared that, in the absence of a referral by the DRC, he was ready to exercise his *proprio motu* powers.[85] This kind of reaction from the OTP is likely to trigger the perception that its conduct may have been influenced by underlying political motives since such statements not only breach the Rome Statute provisions but also the OTP policy document itself.[86]

Articles 14 and 42 of the Rome Statute, together with rule 45 of the Rules of Procedure and Evidence of the Court, provide that the role of the prosecutor in state referrals is passive and the OTP acts only as the recipient of the

[82] OTP 'Déclaration à la Presse Guinéenne' (24 May 2010) para 5, https://www.icc-cpi.int//Pages/item.aspx?name=otp-stat-guinea-10-05-24 (accessed 7 May 2018); OTP 'Report on preliminary examination activities 2017' (2017), para 171, https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf (accesed 7 May 2018); W Colish 'The International Criminal Court in Guinea: A case study of complementarity' (2013) 26(2) *Revue Québécoise de Droit International* 23, 37-39.
[83] W Schabas 'The International Criminal Court at ten' (2011) *Criminal Law Forum* 503. P Gaeta 'Is the practice of "self-referrals" a sound start for the ICC?' (2004) 2 *Journal of International Criminal Justice* 949.
[84] Schabas 'The International Criminal Court at ten' (n 83 above).
[85] Gaeta 'Is the practice of 'self-referrals' a sound start for the ICC?' (n 83 above) 949.
[86] Ibid, 950.

referral. While state referrals by themselves do not raise legal concerns, the active role of the prosecutor in seeking the same is highly questionable. The Rome Statute contemplates positive complementarity to national jurisdictions in a manner that is passive. This implies that the ICC can only be seized of a matter where the relevant state is either unwilling or unable to prosecute. In fact, the Court's practice on complementarity itself, underscores this approach. In both the Kenyan and Côte d'Ivoire decisions authorising the prosecutor to investigate, the respective ICC chambers were satisfied on the admissibility aspect because of the 'absence of national proceedings against those appearing to be most responsible for the crimes'.[87]

At a policy level, the OTP also adopts positive complementarity which entails the prosecutor encouraging, and even assisting, national jurisdictions in prosecuting these crimes. This approach, nonetheless, has got its own limitations. The OTP acknowledges that its efforts in encouraging national prosecutions and working with national jurisdictions proceed only to the extent that they do not compromise any future admissibility proceedings.[88] The OTP notes that its interactions with national jurisdictions may extend to any of the following:

> monitoring activities, send in-country missions, request information on proceedings, hold consultations with national authorities as well as with intergovernmental and non-governmental organisations, participate in awareness-raising activities on the ICC, exchange lessons learned and best practices to support domestic investigative and prosecutorial strategies, and assist relevant stakeholders to identify pending impunity gaps and the scope for possible remedial measures.[89]

At policy level the prosecutor has adopted positive complementarity. At a practical level the prosecutor has, however, adopted a different form of positive complementarity. Although he/she encourages national prosecution, the prosecutor makes it clear that failure of national prosecutions would mean

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[87] *Situation in the Republic of Côte d'Ivoire*, ICC-02/11-14-Corr (n 68 above) para 206; *Muthaura, Kenyatta and Ali*, ICC-01/09-02/11-96 (n 72 above) paras 49, 50, 51, 52, 58, 64 and 66. See also *Ruto, Kosgey and Sang*, ICC-01/09-01/11-101 *(*n 72 above) paras 53, 55 and 70.

[88] ICC-OTP, 'Policy paper on preliminary examination' (November 2013) para 102, https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf (accessed 2 february 2018).

[89] Ibid.

that either he/she will exercise proprio motu powers to investigate.[90] Will Colish describes this version of positive complementarity as 'hybrid complementarity—a mixture of incentives and threats, on the one hand, and support and mutual assistance on the other'.[91]

Nowhere does the OTP policy itself acknowledge that its role is to positively influence state referrals. To the extent that the OTP engages in such activities, it only compromises its independence and impartiality, elements which are key in prosecuting international crimes.[92] The most appropriate inference to draw from these circumstances is that the exercise of the prosecutor's discretion in initiating investigation can thus far be discredited as not only having violated the spirit of the Rome Statute[93] but also the OTP's own prosecutorial policy.[94]

Interestingly, article 46G of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014 (Malabo Protocol) has adopted provisions akin to article 15 of the Rome Statute, implying that the AU has no issue with the very existence of a prosecutor with *proprio motu* powers. Arguably, it is seemingly the manner though, in which this power is exercised that aggrieves the AU and African states.

2.2.1.3 Questionable prosecutorial strategy in the selection and prioritisation of situations and cases by the OTP

Unlike the ad hoc tribunals, the Rome Statute makes an interesting distinction between 'a situation' and 'a case'.[95] In the ad hoc tribunals, the political body

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[90] Statement by the ICC prosecutor on the Situation in Guinea, 15 September 2010 https://www.icc-cpi.int/NR/rdonlyres/2F445DAF-DC4D-4D0C-9160-04634AED23EA/282481/TranslationofGuineaStatementREVIEWEDENG.pdf (accessed 6 May 2018).

[91] Colish 'The International Criminal Court in Guinea: A case study of complementarity' (n 82 above) 34.

[92] C Kreß '"Self-referrals" and "waivers of complementarity": Some considerations in law and policy' (2004) 2 *Journal of International Criminal Justice* 948.

[93] The preamble of the Rome Statute provides that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. Moreover, article 1 of the Rome Statute underscores the notion that the ICC '*shall* be complementary to national criminal jurisdictions' (emphasis added).

[94] OTP 'Strategic plan: June 2012–2015' (n 78 above); OTP 'Paper on some policy issues before the Office of the Prosecutor' (n 78 above).

[95] A 'situation' refers to the overall factual context over which the Court may exercise jurisdiction and from which individual cases may be developed. Normally, this is a general circumstance that is still under investigations. It may cover a particular geographical area or

establishing it – for instance, the UNSC – identifies a situation whereas the prosecutor only identifies cases.[96] Under the Rome Statute, a situation can be brought to the attention of the OTP in three instances: if it is referred by a state party to the Rome Statute, the UNSC or by the prosecutor herself through the exercise of *proprio motu* powers.[97] With respect to *proprio motu* powers, the prosecutor identifies both the situation and the case.[98] Similarly, under article 46G of the Malabo Protocol, the prosecutor identifies both situations and cases.

Within the OTP is the Jurisdiction, Complementarity and Cooperation Division (JCCD), the role of which is to confirm the ICC's jurisdiction in all its aspects (*rationae temporis, rationae materiae* and *rationae personae*). Having been satisfied of the jurisdictional element, the JCCD must then analyse the issues of gravity, complementarity and public interest. It then follows that the OTP must satisfy itself that a case would be admissible under article 17 of the Rome Statute before initiating an investigation.[99] Indeed, 'in determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c)'.[100]

Additionally, before applying to the PTC for authorisation to initiate an

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an entire country. On the other hand, a case is drawn from a situation. It refers to a situation that has been accepted by the Court and warrants of arrest or summons of appearance have been issued against alleged perpetrators. For example, we have Kenya as a 'situation' and the 'case' against Uhuru Muigai Kenyatta.

[96] The preamble and article 16, ICTY Statute; The preamble and article 15, ICTR Statute; The preamble and article 15, Statute of the Special Court for Sierra Leone.

[97] Article 13, Rome Statute.

[98] Article 15, Rome Statute.

[99] Article 53, Rome Statute.

[100] Rule 48, Rules of Procedure and Evidence of the ICC, adopted by the Assembly of State Parties on 3-10 September 2002. Article 53 (1), Rome Statute provides:

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

investigation in a matter, the prosecutor must 'notify all states parties and those states which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned'.[101] After this notification, a 'state may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes … which relate to the information provided in the notification'.[102] Where this is the case, the state may then request that the prosecutor defer the case to the state, in which case the prosecutor *must* comply, unless the PTC, upon the application of the prosecutor, authorises the investigation.[103] Ideally, the prosecutor cannot purport to exercise his or her *proprio motu* powers in the event that the case has been or is being investigated or prosecuted by the state that has jurisdiction.[104] Unless otherwise authorised by the PTC, the prosecutor's case will be declared inadmissible.

Once all the statutory requirements have been fulfilled, the OTP will then conduct investigations where the Statute and general practice allow. Indeed, this stance resonates with the spirit of the Rome Statute, which underscores 'effective prosecution' in order 'to put an end to impunity for the perpetrators of these crimes'.[105]

The criteria used in the selection and prioritisation of situations and cases by the ICC's OTP in the exercise of his/her proprio motu powers has also been at the heart of AU concerns. This is why the AU has unsuccessfully attempted to develop guidelines and a code of conduct to guide the exercise of these powers.[106] While grave human rights violations have been witnessed in several parts of the globe, the selection and prioritisation of situations and cases being subjected to ICC jurisdiction through the exercise of *proprio motu* powers seems biased and lacking neutrality, creating a perception of

[101] Article 18(1), Rome Statute.
[102] Article 18(2), Rome Statute.
[103] Ibid.
[104] Article 17(1), Rome Statute.
[105] Para 4 and 5, Preamble to the Rome Statute.
[106] AU Assembly, Assembly/AU/Dec.245(XIII) Rev.1 (n 22 above) para 11.

discrimination against the continent.[107] While the OTP seems swift in exercising her *proprio motu* powers in African-based cases, a lot of laxity is evident concerning cases from elsewhere where similar powers have been used. For example, the prosecutor has been too slow in the cases involving Colombia, Iraq, Palestine and Georgia.

On 31 March 2010, Pre-Trial Chamber II authorised the prosecutor to initiate investigations in Kenya.[108] Within the same year, the prosecutor had identified specific cases and even applied to the Court for indictment of these individuals.[109] Similarly, in Côte d'voire, the prosecutor was authorised to undertake investigations under article 15 of the Rome Statute on 3 October 2011. By 25 October 2011, the OTP had already identified individuals for indictment and, on that date, applied for issuance of an arrest warrant against Laurent Koudou Gbagbo.[110]

Burundi may not be a good example to use in this context, as at the time of writing, barely six months have passed since the Pre-Trial Chamber III authorised the prosecutor to initiate investigations under article 15 of the Rome Statute.[111] However, if the prevailing trends are anything to go by, it can be anticipated that the OTP will soon be applying to the Court for indictment of those identified as alleged perpetrators.

In contrast, while exercising similar powers in the situations involving Iraq/UK, the prosecutor rejected numerous complaints about grave violations by British troops in Iraq from 2003 to 2008.[112] He retorted that 'many more people were being killed in Uganda and in the Congo, so these areas deserved the

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[107] ICC Forum 'Africa question: Is the International Criminal Court (ICC) targeting Africa inappropriately? (n 14 above).
[108] *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr (31 March 2010) Pre-Trial Chamber II.
[109] *Situation in the Republic of Kenya* (Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali) ICC-01/09-31-Red (15 December 2010) Pre-Trial Chamber II; *Situation in the Republic of Kenya* (Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang) ICC-01/09-30-Red (15 December 2010) Pre-Trial Chamber II.
[110] *Situation in the Republic of Côte d'Ivoire* (Warrant of Arrest for Laurent Koudou Gbagbo) ICC-02/11 (23 November 2011) Pre-Trial Chamber III.
[111] *Situation in the Republic of Burundi*, ICC-01/17-9-Red (n 69 above).
[112] Schabas 'The International Criminal Court at ten' (n 83 above) 506

attention of the Court as a priority', an explanation that some scholars have dismissed as 'unconvincing', given the evidence of massive fatalities in Iraq.[113] Having terminated these examinations on 9 February 2006, the OTP was later compelled to reopen preliminary examination on 13 May 2014 after the receipt of new information about alleged crimes.[114] To date, this situation is still under preliminary examination; and despite there not having been any domestic prosecutions yet, the OTP has only observed that its office's admissibility assessment is intended to be complete 'within a reasonable time frame.'[115] It is, however, not clear what reasonable time frame would be and whether this can be compared to the case in Kenya, for example.

Similarly, in Georgia, on 27 January 2016, the Pre-Trial Chamber I of the ICC authorised the prosecutor to proceed with an investigation of crimes committed in Georgia that are within ICC jurisdiction.[116] At the time of writing, more than two years have elapsed without the OTP having provided any update on the progress of the preliminary assessments or any possible indictments.

Considering that these discrepancies occurred during the different tenures of Ocampo and Bensouda, one is likely to argue that the swiftness or otherwise in the selection and prioritisation of situations and cases depend on the different approaches adopted by the two prosecutors. Ocampos tenure, between 2003-2012, adopted the prosecutorial strategy of 'targeted investigations.' [117] The new prosecution strategy under the tenure of Fatou Bensouda adopted a wider approach to investigations: 'non-restrictive detailed investigations'.[118] It can thus be argued that the targeted approach under Ocampo corresponds to the swiftness of the process in the selection and prioritisation of cases manifested in the Kenyan and Ivoraian instances as

[113] Ibid.
[114] OTP 'Report on preliminary examinations activities 2015' (2015) para 24, https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf (accessed 4 March 2018); OTP 'Report on preliminary examination activities 2017' (n 82 above) para 174.
[115] OTP 'Report on preliminary examination activities 2017' (n 82 above) para 203.
[116] Situation in Georgia, ICC-01/15-12 (n 70 above).
[117] OTP 'Report on prosecutorial strategy' (2006) 6, https://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf (accessed 9 May 2018).
[118] OTP 'Strategic plan: June 2011-2015 (n 78 above).

opposed to the non-restrictive detailed investigations which broadens the scope thus informing the slow pace in the selection and prioritisation of cases. Yet, one cannot justifiably explain why a similar approach by Ocampo never played out equally in the Iraq/UK situation. Similarly, until the end of his tenure, Colombia remained under preliminary examination since June 2004.[119]

It is, however, laudable that the prosecutor has initiated preliminary examinations under article 15 of the Rome Statute with respect to, inter alia, Palestine following its accession to the Rome Statute, as well as with respect to the Ukraine following its declaration accepting the jurisdiction of the ICC.[120] Both situations have been under preliminary assessment since 16 January 2015 and 26 April 2014, respectively.[121] It is highly questionable if they will lead to indictments of any senior government officials, given the involvement of government agents from Israel, the Ukraine and Russian Federation,[122] and it remains to be seen how far these investigations will go.

Although one may also be tempted to site the situation in Colombia to advance the AU argument on bias, Colombia presents a complex situation. The situation in Colombia has to date been under preliminary examination since June 2004.[123] In November 2012, the OTP established that there was ongoing national prosecution of alleged perpetrators and thus declared the case inadmissible at the time.[124] Despite this positive complementarity approach, new crimes within the jurisdiction of the ICC were reported to be ongoing.[125] The OTP then decided that it was not prudent to close this preliminary examination. The OTP's further assessment established that national proceedings had failed to focus on persons who might bear the

[119] OTP 'Report on preliminary examination activities 2017' (n 82 above) para 121.
[120] See OTP 'Report on preliminary examination activities 2016' (2016) paras 109-191, https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf (accessed 22 March 2017); OTP 'Report on preliminary examination activities 2017' (n 82 above) paras 51-120.
[121] OTP 'Report on preliminary examination activities 2016' (n 120 above) paras 109 and 146; OTP 'Report on preliminary examination activities 2017' (n 82 above) paras 51 and 79.
[122] OTP 'Report on preliminary examination activities 2017' (n 82 above) paras 59-64 and 86-89.
[123] OTP 'Report on preliminary examination activities 2017' (n 82 above) para 121.
[124] OTP 'Transitional justice in Colombia and the role of the International Criminal Court' Keynote speech by James Stewart, Deputy Prosecutor, ICC, https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf (accessed 3 March 2018)
[125] Ibid.

greatest responsibility within the military hierarchy for the crimes alleged,[126] thus making the case admissible before the ICC. With the establishment of a Special Jurisdiction for Peace (SJP) in May 2017, the OTP expressed hope that the latter would prosecute those bearing the highest responsibility for the alleged crimes. The appointment of the magistrates and the Director of Investigations and Prosecution to the SJP was made only in October 2017. One could argue therefore that the SJP requires more time to deal with prosecutions.

Given the impossibility of prosecuting all crimes,[127] there is nothing inherently wrong with selective enforcement through prosecutorial discretion,[128] but the OTP ought to do more to create a perception of ICC legitimacy. Despite similarities in the magnitude of the atrocities elsewhere to those committed in Africa, the OTP opted not to select and/or prioritise some of these situations and their respective cases.

Although criticisms against the OTPs exercise of his/her proprio motu powers remain valid, it should be noted that political constraints linked to the UNSC's veto and deferral powers are likely to undermine any possible prosecution of leaders from powerful states, discussed above, like British, Russian or Israeli. It is important to bear in mind that the challenges inherent in any prosecution of leaders from other states go beyond the scope of the OTP. Not only does the issue of jurisdiction limit the OTP's exercise of its *proprio motu* powers in some respects, but power and politics also play an essential role in the processes of the Court.[129] For example, the political influence exerted especially by the permanent members of the UNSC, who hold the veto power, cannot be underestimated. This argument in itself remains speculative, however, since the prosecutor has thus far not sought to initiate proceedings against a UNSC permament member and then deal with its probable deferment later.

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[126] Ibid.

[127] K Ambos 'Comparative summary of the national reports' in L Abour, A Eser, K Ambos Abour and A Sanders *The prosecutor of a permanent International Criminal Court: Iinternational Workshop in Co-operation with the Office of the Prosecutor of the International Criminal Tribunals (ITCY and ITCR)* (2000) 525.

[128] R Cryer *Prosecuting international crimes: Selectivity and the international criminal law regime* (2005) 192.

[129] See discussion on UNSC politics under note 2.2.3 below.

Regarding the selection of cases, the OTP has since clarified its selection criteria. Taking into account the global nature of the ICC, the provisions of the Rome Statute on jurisdiction and admissibility, as well as logistical constraints, the OTP has underscored that, as a general rule, 'the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes'.[130]

Robert Cryer notes that 'when a law is theoretically general and yet in practice is applied only against a certain group or groups, the effect is the same as if it were explicitly targeted at those groups by its terms'.[131] The AU has thus complained about the legitimacy of the selectivity inherent in the prosecutorial strategy, contending that international criminal law is not applied equally.[132] In order for the ICC to salvage its apparently questionable legitimacy, it is essential that the OTP applies its principles consistently and coherently.[133] This entails that the ICC should apply its rules similarly to similar instances.[134] However, this is not the case.

2.2.2 Safeguards against the prosecutor's exercise of *proprio motu* powers

Legally speaking, the prosecutor's exercise of *proprio motu* powers is not absolute but is subject to various oversight mechanisms to guard against arbitrary and politically instigated prosecutions. Although these safeguards may not protect against all the conceivable abuses of the prosecutor's exercise of his or her *proprio motu powers*, they nonetheless significantly minimise such abuses. This has been achieved through, inter alia, the supervisory role of the PTC and the notion of 'interest of justice'. Still, African arguments contend that these safeguards, as demonstrated below, have been insufficient and thus lend credence to the critique of the ICC as an anti-African

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[130] OTP 'Paper on some policy issues before the office of the prosecutor' (2003) 4-5 http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (accessed 30 March 2017) 7.
[131] Cryer *Prosecuting international crimes: Selectivity and the international criminal law regime* (n 128 above) 195.
[132] AU 'Withdrawal Strategy Document' (n 8 above) paras 4-6.
[133] T Franck *Fairness in international law and institutions* (1995) 35.
[134] Ibid.

institution.

2.2.2.1 Supervisory role of the Pre-Trial Chamber

Where the OTP initiates investigations *proprio motu*, the prosecutor must first analyse the seriousness of the information at his or her disposal.[135] If it is concluded that such information provides a reasonable basis for an investigation, the prosecutor must then submit a request to the PTC seeking authorisation to conduct investigations.[136] It is the PTC that decides whether to grant such authority to the prosecutor or to deny the permission to conduct investigations.[137] In doing so, the PTC considers whether there is a 'reasonable basis to proceed with an investigation' and whether the case falls 'within the jurisdiction of the Court'.[138] Ultimately, the decision by the prosecutor as to whether or not to prosecute is only effective once confirmed by the PTC.[139]

The supervisory role of the PTC over the prosecutor's *proprio motu* powers became visible in the Kenyan and Ivorian cases. Here, the PTC established its primary jurisprudence on the understanding and application of its review powers over the prosecutor's *proprio motu* powers. In addition to elaborating on the notion of a 'reasonable basis to proceed with an investigation', the Court also considered the cases in all their aspects of jurisdiction, as discussed above, before granting the prosecutor permission to proceed with investigations.

Notably, the prosecutor can open an investigation if two of the three PTC judges agree.[140] Judges are persons of high integrity. Although not expressly stated by the AU, this study argues that a perception of political bias influencing the decision of the two or three judges in favour of western countries could be a factor informing African states' grievances against the

[135] Article 15(2), Rome Statute.
[136] Article 15(3), Rome Statute.
[137] Article 15(5), Rome Statute.
[138] Article 15(4), Rome Statute.
[139] Article 53(3)(b), Rome Statute.
[140] Article 57(2)(a), Rome Statute. The orders or rulings of the PTCs must be concurred with by a majority of its judges. Article 39 of the Statute further provides that the functions of a PTC may be carried out either by three judges or by a single judge. However, under article 57(2)(a), certain decisions, including authorisation of investigations, must be concurred with by a majority of its pre-trial judges.

ICC. Arguably, this provision could easily be perceived as favouring the strong Western interests in the Court that are contrary to AU's political interests. This study nonetheless argues that neither the Statute's requirement for two or three judges to issue authorisation to the prosecutor is fundamentally flawed, nor would Africa's concerns be remedied by an increase in numbers. The swiftness with which the OTP has moved regarding investigations and indictment of African individuals, coupled with the swiftness of the PTCs in authorising investigations and subsequent indictments in African-based cases, serves only to demonstrate a biased approach by both the OTP and PTC.

This study argues that constitutive incompetence is not the basis of the AU's concern with the PTC's supervisory powers; rather, it is the perceived bias arguably portrayed in the various Court processes. The argument is buttressed by the position of the Malabo Protocol, which adopts a much weaker PTC check of the prosecutors' *proprio motu* powers. Under the Malabo Protocol, only one judge is responsible for making such a determination.[141] This lower threshold than in its counterpart, the ICC, would imply that Africa might not have an issue with the PTC's procedural determination in the authorisation of investigations by the prosecutor. The Malabo Protocol recognises the importance of subjecting the prosecutor's *proprio motu* powers to checks. Thus, the AU's concern with this aspect of the matter relates far more to the perceived bias of the Court process itself than to the constitution of the Court as such.

2.2.2.2 Interest of justice

In certain cases, a case that qualifies for selection by the OTP – considering the issues of jurisdiction, admissibility, gravity and the interests of victims – is not pursued for the sole reason that it is not 'in the interest of justice'.[142] The Rome Statute is, however, silent on what 'interest of justice' entails. It makes explicit reference only to the gravity of the crime, the interest of victims, the age or infirmity of the alleged perpetrators and their role in the alleged crime

[141] Articles 10(3) and 46G(3), the Malabo Protocol.
[142] Article 53(1)(c) and 53(2)(c), Rome Statute. While article 53(1)(c) deals with the initiation of investigations, article 53(2)(c) refers to the initiation of prosecution.

as some of the factors to be considered by the OTP.[143] The fact that the Statute uses the term 'including' implies that this list is not exhaustive, giving latitude for discretion by the OTP to decipher the content and breadth of this concept. The OTP has since offered its interpretation of this notion.

'Victim's interest' has been interpreted by the OTP to include victim protection and the interest to see justice done.[144] In order to ascertain the interest of the victims, the OTP conducts dialogue with them as well as representatives of local communities.[145] Article 53(2)(c) of the Rome Statute also mentions all the circumstances of an accused as one of the considerations by the OTP before it decides not to proceed with a prosecution in the interest of justice. While the OTP goes for those who bear the highest responsibility, it has further acknowledged that in some circumstances this may not be in the interest of justice where the accused is terminally ill or has been a subject of grave human rights violation.[146] The OTP additionally admits that 'only in exceptional circumstances will it conclude that an investigation or prosecution may not serve the interest of justice'.[147]

Arguably, given the contentious nature of who a victim and a perpetrator were in the Kenyan situation, this issue perhaps ought to have convinced the OTP to conclude not to proceed with its investigations on Kenya 'in the interest of justice'. A victim has been defined as a person, either individually or collectively, who suffers harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights, through acts or omissions that violate his or her rights as guaranteed under domestic and international law.[148] According to Tucker, victims can be either direct or indirect.[149] Victims are direct when they experience first-hand

[143] Ibid.
[144] OTP 'Policy paper on the interest of justice' (2007) 5, http://www.icc-cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640/iccotpinterestsofjustice.pdf (accessed 30 May 2014).
[145] Ibid.
[146] Ibid.
[147] Ibid.
[148] Article 1, UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. See also section 2(g), Truth, Justice and Reconciliation Act of Kenya, Act 6 of 2008.
[149] A Tucker 'Rough justice: Rectification in post-authoritarian and post-totalitarian regimes' in J Elster (ed) *Retribution and reparation in the transitional justice to democracy* (2006) 287.

suffering either in person[150] or materially.[151] Victims are indirect when they 'are the family or heirs of the people who were subjected to suffering by authoritarian regimes'.[152]

In this regard, victimhood in the Kenyan context was a historical phenomenon which included a wide range of categories of persons: those whose land was illegally confiscated by the three post-independence regimes (from 1963-2007); those subjected to torture under the second regime after independence (the Moi regime, 1978-2002); the subjects of political murder under the three post-independence regimes; victims of arbitrary arrest and detention; victims of rape and enforced disappearance under the three regimes; those subjected to suffering because of corruption; and those displaced by the various 'ethnic clashes' and the post-election violence of 2007.

A practical answer of who is a genuine victim from a Kenyan standpoint is hard to find. Many accounts of victimhood flourish in the Kenyan context. For instance, given the change of regimes, there is a sense in which yesterday's perpetrators of gross violations have become today's victims. The broad definition of 'victims' under the ICC rules as well as the TJRC Act[153] has failed to address this confusion.

Yet, with respect to the ICC, the notion of 'victims' is limited to natural persons or institutions that suffer harm as a result of only those crimes over which the ICC has jurisdiction.[154] This implies that a majority of persons aggrieved under the abusive Kenyan regimes of Kenyatta (1963-1978), Moi (1978-2002) and Kibaki (2002-2012) may not be regarded as victims by the ICC. More so, it is possible that ICC reparation of some of the PEV victims, who are locally perceived to have been the perpetrators of gross violations in the past regimes, may spark further violence or tension. The limited nature of the definition adopted under the ICC could not therefore remedy the complex Kenyan problems, since the nature of human rights violations in Kenya are not

[150] This is harm to life, body or liberty.
[151] This is the loss of real or personal property. If personal, it can take the form of physical objects or financial assets.
[152] Tucker 'Rough justice: Rectification in post-authoritarian and post-totalitarian regimes' (n 149 above).
[153] Section 2 (g), TJRC Act of Kenya, Act 6 of 2008.
[154] Rule 85, Rules of Procedure and Evidence of the ICC.

limited to the five crimes over which the ICC has jurisdiction and to the context of post-election violence. The limitations of the ICC's jurisdiction *temporis* should have persuaded the OTP to arrive at a different conclusion altogether.

Regarding 'gravity', the OTP considers 'scale of the crimes, the nature of the crimes, the manner of their commission and their impact'.[155] It is important to distinguish between *situation gravity* and *case gravity*. At the stage of pre-investigations, article 53(1)(c) requires 'the assessment of potential cases' before the identification of alleged perpetrators and while the factual elements of a situation are not yet clearly defined.[156] Previously, attempts by the PTC to interpret the notion of gravity generally applicable to situations and cases[157] have been rejected by the appeals chamber[158] even though the chamber shied away from either agreeing with the prosecutor's interpretation of the same or proposing more concrete criteria for defining gravity. The difficulty inherent in conceptualising this concept later played out in the Ivorian case.[159] Here, the Court evaded the definition in principle of the term and instead focused on the methodology of evaluating the 'gravity' test.[160]

It is remarkable, however, that until November 2014, the prosecutor had not exercised this discretion with regard to concluding that an investigation or prosecution would not serve the interest of justice, taking into account the relevant factors.[161] It was in November 2014 when the prosecutor first reached the conclusion that, although there was 'reasonable basis to believe that war crimes were committed', taking into account the admissibility criteria under article 17(1)(d) of the Rome Statute, the information available was not of sufficient gravity to warrant further action by the Court or to provide a

[155] OTP 'Policy paper on the interest of justice' (n 144 above); article 68(1), Rome Statute.
[156] C Meloni 'The ICC preliminary examination of the Flotilla situation: An opportunity to contextualize gravity' (2016) 33 *Questions of International Law* 12.
[157] Article 19, Rome Statute; *Situation in the Democratic Republic of Congo* (Decision on the Prosecutor's Application for Warrants of Arrest, Article 58) ICC-01/04-520-Anx2 (10 February 2006) Pre-Trial Chamber I, para 64.
[158] *Situation in the Democratic Republic of Congo* (Judgment on the Prosecutor's appeal against the decision of the Pre-Trial Chamber I 'Decision on the Prosecutors application for warrants of arrest, article 58' ICC-01/04-169 (13 July 2006) Appeals Chamber, para 89.
[159] See generally, *Situation in the Republic of Cote d'Ivoire*, ICC-02/11-14-Corr (n 68 above).
[160] Ibid, paras 201-204.
[161] OTP 'Policy paper on the interest of justice' (n 144 above).

reasonable basis to proceed with an investigation.[162]

This was with regard to a referral on behalf of the Union of Comoros with respect to the Israeli interception and alleged commission of war crimes onboard a Comorian registered vessel, Flotilla, carrying humanitarian aid and bound for the Gaza Strip.[163] Taking into account regulation 29(2) of the Regulations of the Office of the Prosecutor, the OTP considered the following factors in its determination on gravity, namely 'the scale, nature, manner of commission of the crimes, and their impact'.[164] The OTP further noted that although article 8(1) of the Rome Statute threshold requirement that war crimes be committed 'as part of a plan or policy or as part of a large-scale commission of such crimes' was not a prerequisite for jurisdiction, it nonetheless 'provide[s] statutory guidance indicating that the Court should focus on cases meeting these requirements'.[165]

It was on this basis that the OTP concluded that the case which was likely to arise from the Flotilla incident 'would not be of sufficient gravity to justify further action by the Court, in light of the criteria for admissibility provided in article 17(1)(d) and the guidance outlined in article 8(1) of the Statute'.[166] In its review of the assessment of gravity, the PTC arrived at the opposite conclusion and urged the prosecutor to reconsider the decision.[167] The PTC found that the prosecutor had committed material errors in her determination of the gravity of potential cases. The PTC argued:

> [T]he presumption of Article 53(1) of the Statute, as reflected by the use of the word "shall" in the chapeau of that article, and of common sense, is that the Prosecutor investigates in order to be able to properly assess the relevant facts … [m]aking the commencement of an investigation contingent on the information available at the pre-investigative stage being already clear, univocal and not contradictory creates a short circuit and deprives the exercise of any purpose... [i]f the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the

[162] OTP 'Situation on registered vessels of Comoros, Greece and Cambodia: Article 53(1) Report' (6 November 2014) paras 3, 23 and 28, https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf (accessed 8 May 2018).
[163] Ibid.
[164] Ibid, para 22.
[165] Ibid, para 23.
[166] Ibid, para 24.
[167] *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation) ICC-01/13-34 (16 July 2015) Pre-Trial Chamber I.

> case would be admissible, the Prosecutor *shall* open an investigation, as only by investigating could doubts be overcome.[168]

The PTC also faulted an additional criterion introduced by the OTP in determining gravity. The prosecutor argued that it was not possible that senior commanders of the Israeli army were responsible for the crimes.[169] The PTC, however, observed that the prosecutor's decision not to investigate because there was no reasonable basis to believe that 'senior IDF commanders and Israeli leaders' were responsible as perpetrators or planners of the identified crimes did not answer the question at issue. The question at issue concerned 'the Prosecutor's ability to investigate and prosecute those being the most responsible for the crimes under consideration and not as such to the seniority or hierarchical position of those who may be responsible for such crimes'.[170] Thus, the notion of 'the most responsible' or the seniority or hierarchy of those likely to be responsible does not relate to the prosecutor's ability to investigate and prosecute those most responsible.[171] The prosecutor's argument on this point went contrary to its own prosecution strategy.

If the Flotilla incident is compared to the Kenyan situation, one wonders why the prosecutor so easily exercised his or her *proprio motu* powers in the latter. As pointed out above, the prosecutor in the Flotilla case took into consideration 'the scale, nature, manner of commission of the crimes, and their impact'[172] – on the basis of information availed to him and without any investigations – in determining the gravity aspect of the situation. The OTP was further guided by article 8(1) of the Rome Statute threshold requirement that war crimes be committed 'as part of a plan or policy or as part of a large-scale commission of such crimes'. Since the Flotilla incident did not fulfil this threshold, the OTP concluded (as mentioned) that the case that was likely to

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[168] *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-34 (n 162 above) para 13.
[169] *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia* (Prosecution's Response to the Government of the Union of the Comoros' Application for Leave to Reply in Support of its Application under article 53(3) of the Rome Statute (ICC-01/13-15)) ICC-01/13-17 (17 April 2015) Pre-Trial Chamber I, para 62.
[170] *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-34 (n 162 above) para 23.
[171] Ibid.
[172] Ibid, para 22.

arise 'would not be of sufficient gravity to justify further action by the Court'.[173]

In the same manner, the OTP noted that in terms of the threshold content of article 8(1) of the Rome Statute in the Flotilla case, any consideration of the threshold contents of article 7(2)(a) of the Rome Statute would have compelled the prosecutor to arrive at a similar conclusion in the Kenyan case: the threshold requirement that crimes against humanity must take into account the aspect of 'furtherance of a State or organizational policy to commit such attack'. In his dissenting opinion on the Kenyan decision authorising investigations, Judge Hans-Peter Kaul dismissed the prosecutor's interpretation of the notion of 'organization' as insufficient to fulfil the threshold of article 7(2)(a) of the Rome Statute.[174] Kaul argued that a private organisation or a group could only fit within article 7(2)(a) of the Rome Statute if they took on the character of a state.[175]

According to Claus Kress, any interpretation to the contrary undermines 'the significance of contextual requirements of crimes against humanity'.[176] The majority ruling, however, disagreed 'that the formal nature of a group and the level of its organization should not be the defining criterion. Instead … a distinction should be drawn on whether the group has the capability to perform acts which infringe on basic human values.'[177]

Some scholars agree with this line of thought too. According to Gerhad Werle and Florian Jessberger, the crucial factor ought not to be the internal structure

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[173] Ibid, para 24.
[174] *Situation in the Republic of Kenya* (Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya") ICC-01/09-19-Corr (31 March 2010) para 51-53; *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute), ICC-01/09-01/11-373 (23 January 2012) Pre-Trial Chamber II, para 8; *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11-382-Red (23 January 2012) Pre-Trial Chamber II, para 7.
[175] *Situation in the Republic of Kenya* (Dissenting Opinion of Judge Hans-Peter Kaul) ICC-01/09-19-Corr (n 174 above) para 51-52; *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* ICC-01/09-01/11-373 (n 174 above) para 8; *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta And Mohammed Hussein Ali*, ICC-01/09-02/11-382-Red (n 174 above) para 7.
[176] C Kress 'On the outer limits of crimes against humanity: The concept of organisation within the policy requirement: Some reflections on the March 2010 ICC Kenya decision' (2010) 23 *Leiden Journal of International law* 856.
[177] *Situation in the Republic of Kenya*, ICC-01/09-19-Corr (n 108 above) para 90.

of a group but its potential – in terms of personnel and physical capacity – to commit a widespread or systematic attack.[178] Arguably, restricting the meaning of an 'organisation' to a state or state-like entity is very limiting and is likely to undermine the deterrent effect of the ICC, especially with respect to those private organisations that have the ability to commit grave international crimes yet in themselves do not have state-like characteristics.

The new prosecution strategy under the tenure of Fatou Bensouda adopted a wider approach to investigations: 'non-restrictive detailed investigations'.[179] One would expect this broadened approach to investigate both high- and low-level perpetrators. In her explanation, the prosecutor in this case invoked the strategy of 'targeted investigations' adopted previously during the tenure of Luis Moreno Ocampo[180] and thus her emphasis on the need to investigate those who are the most senior within the context of those who bear the most responsibility.

The PTC in the Comoros situation also faulted the prosecutor's interpretation of the scale. Using the number of deaths (ten), injuries (50-55) and acts of indignity, the PTC concluded that these were 'compelling indicators of sufficient, and not of insufficient gravity'.[181] The Chamber also faulted the OTP's consideration of the nature of the crimes. In particular, the PTC lamented the premature determination that the inhumane acts did not amount to torture. According to the Court, the OTP failed to take into account the possibility of torture in its assessment. The Chamber also concluded, contrary to the OTP's version, that the manner in which the alleged crimes were committed was neither planned nor the result of a deliberate policy or plan. This was also the case with respect to the prosecutor's argument that the crimes did not have significant impact and therefore were not of sufficient gravity.

This reasoning resonates with the PTC's earlier observation on the general

[178] G Werle and F Jessberger *Principles of International Criminal Law* 3rd edn (2014).
[179] OTP 'Strategic plan: June 2011-2015 (n 78 above).
[180] OTP 'Report on prosecutorial strategy' (2006) 6, https://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf (accessed 9 May 2018).
[181] *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-34 (n 162 above) para 26.

guidelines regarding its review powers under article 53(1)(c), where the prosecutor decides not to proceed with an investigation in the interest of justice. Accordingly, the Court 'does not require the prosecutor to establish that an investigation is actually in the interest of justice'.[182] Thus, the prosecutor need not present evidence demonstrating that any prosecution will be in the interest of justice. The contrary is, however, true. Where the prosecutor decides that a prosecution is not in the interest of justice, 'he or she is under an obligation to notify the Chamber of the reasons for the decision, to enable the Chamber to exercise the power of review in accordance with Article 53 (3) (b) of the Statute'.[183]

The Flotilla incident marked the first judicial review of the prosecutor's decision not to open investigations under article 53(3) of the Statute. Aggrieved by this decision, the prosecutor appealed, lamenting the Court's invasion of her discretionary powers.[184] Indeed, as Chantal Meloni notes, the prosecutor believes in the almost absolute nature of her powers 'not to open an investigation'.[185] The Appeals Chamber dismissed this appeal, claiming that the impugned decision was not one of admissibility within the meaning of article 82(1)(a) of the Statute.[186] According to the Appeals Chamber, allowing 'the…appeal to be heard … would rupture the scheme for judicial review of decisions of the Prosecutor as explicitly set out in article 53, introducing an additional layer of review by the Appeals Chamber that lacks any statutory basis.'[187]

This implies that the Appeals Chamber has no powers to adjudicate over matters arising within the context of judicial review of the OTP's exercise of

[182] *Situation in the Republic of Cote d'Ivoire*, ICC-02/11-14-Corr (n 68 above) para 207.
[183] Ibid.
[184] *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Notice of Appeal of 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation') (ICC-01/13-34)) ICC-01/13-35 (27 July 2015) Appeals Chamber; and *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Prosecution's Further Submission concerning Admissibility) ICC-01/13-47 (14 August 2015) Appeals Chamber.
[185] Meloni 'The ICC preliminary examination of the Flotilla situation' (n 156 above) 6.
[186] *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Decision on the admissibility of the Prosecutor's appeal against the 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation') ICC-01/13-51 (6 November 2015) para 66.
[187] Ibid, para 60.

her discretion in the context of a decision 'not to open investigations'.

Thus, the exercise of this discretion is not absolute. Whenever the prosecutor makes such a decision, the Rome Statute makes it mandatory for him or her to inform the PTC for review.[188] Again, the prosecutor's decision becomes effective only after confirmation by the PTC. Some scholars, however, perceive the notion of 'interest of justice' as being so malleable as 'to provide any imaginative prosecutor with a rationale for what may be, in reality rather arbitrary choices'.[189] The PTC, nonetheless, holds the keys to curtail any arbitrary exercise of such powers by the OTP. Thus, although the OTP has the powers to decline opening an investigation into a situation – whether it is a state referral or a referral by the UNSC – the ultimate power lies with the Court itself. Notably, the prosecutor has exercised this power in an incident alien to Africa even though comparable incidences may have presented themselves in Africa much earlier for the prosecutor to seek proper guidance from the PTC on the manner of exercising this power. This only fortifies the perceived bias of Court.

2.2.3 Realpolitik and the role of the UNSC in the ICC

The UNSC is one of the central players in international criminal justice whose political success entails effective collaboration between the AU and the ICC. Nonetheless, general criticism against the UNSC may be traced back to the aftermath of World War II. In what was packaged as 'victors' justice', the 'big five' – China, the USA, France, Russia and Great Britain – formed themselves into permanent members of the UNSC, bestowing upon themselves the veto power. The constitution of the UNSC, coupled with the fact that chapter VII of the UN Charter grants the UNSC, which makes binding decisions, with primary jurisdiction over matters of peace and security, has exposed the UNSC to criticism amidst calls for the reform of its membership.[190]

Equally, the UNSC has faced regional criticism from the AU and its member

[188] Articles 53(1)(c) and 53(2)(c), Rome Statute.
[189] Schabas 'The International Criminal Court at ten' (n 83 above) 505.
[190] AS Akpotor and PE Agbebaku 'The United Nations reforms and Nigeria's quest for permanent seat' (2010) 24 *Journal of Social Science* 51; S Tharoor 'Security Council reform: Past present and future (2011) 24 *Carnegie Council for Ethics and Global Affairs.*

states for its imposing powers in numerous Court processes, specifically its referral and deferral powers. Indeed, it is argued in this section that the UNSC is at the centre of the collision between the AU and ICC.[191] In this regard, the section critically analyses the role of the UNSC in the processes of the ICC and the impact this has had on Africa's perception of the Court. In particular, it analyses the UNSC's powers of referral and deferral of situations and cases to the Court.

The UNSC and the ICC are independent entities.[192] The UNSC is able to refer a situation to the ICC, thus prompting the Court to exercise its jurisdiction over international crimes.[193] In line with these powers, the UNSC has previously referred the situation in Sudan and Libya to the ICC. However, it is of concern that the UNSC has exercised its referral powers with respect to African-based situations while heinous crimes committed in other areas go unnoticed.

In this regard, the case of Israel and Palestine is an illustration. Israel and Palestine have had conflicts tracing back to the first wave of immigration of Zionist Jews into Palestine in 1882.[194] This has continued during the ICC era. For example, following Hamas's electoral win in 2006 and 2007, Israel and Palestine have been involved periodically in hostilities.[195] On 27 December 2008, Israel launched the famous 'operation cast lead' against Palestine. During the three-week operation, Israel carried out 2,360 air strikes combined with ground assaults.[196] This left 50,000 Palestinians displaced, 1,300 dead and more than 5,300 wounded.[197] Of these, 34 per cent were children.[198] In

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[191] Other commentators also share this view. See, for example, D Tladi 'The African Union and the International Criminal Court: The battle for the soul of international law' (2009) 34 *South African Year Book on International Law* 29.

[192] Article 2(1) of the Negotiated Relationship Agreement between the International Criminal Court ad the United Nations 2004, ICC-ASP/3/Res.1, recognises the Court as an independent judicial body with international legal personality. Article 2(2) of this Agreement further calls upon the two institutions to respect each other's status and mandate.

[193] Article 13(b), Rome Statute.

[194] LS Neal 'The roots of the Israeli-Palestinian conflict: 1882-1914' Honors project paper, Illinois Wesleyan University (1995) 1 http://digitalcommons.iwu.edu/history_honproj/27 (accessed 31 January 2018).

[195] OTP 'Report on preliminary examination activities 2016' (n 120 above) para 113.

[196] Y Ronen 'ICC jurisdiction over acts committed in the Gaza strip: Article 12(3) of the ICC Statute and non-state entities' (2010) 8 *Journal of International Criminal Justice* 3.

[197] UNSC '6077th meeting' UN Doc. S/PV.6077 (2009) http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Gaza%20SPV6077.pdf (accessed 9 June 2014).

[198] Ibid.

response, Hamas bombed Israel, killing three civilians and wounding more than 500 others, while nine Israeli soldiers were killed in Gaza.[199] Again, on 7 July 2014, Israel launched 'operation protective edge' in which numerous atrocities were committed.[200] It has generally been agreed that international crimes – within the jurisdiction of the ICC – were committed in Gaza.[201] To date, these crimes do not seem to have persuaded the UNSC to refer these situations for possible investigation and prosecution.

Incidents in Guantanamo Bay parallel those over which the ICC jurisdiction has been or is being exercised in Africa. Although the UN found that Guantanamo Bay was characterised by massive violations of human rights and humanitarian law and called for its closure,[202] it is still in operation, with no condemnation or even attempts at a UNSC referral to the ICC. Similarly, in 2014, 'unthinkable atrocities' were committed in Syria under the leadership of Bashar Hafez al-Assad, yet the UNSC remained unmoved.[203] Moreover, the merciless killing of civilians in Iraq by American forces and the controversial use of drones,[204] which have been classified as possibly constituting war crimes,[205] have seemingly not attracted any form of intervention from the UNSC. This fortifies the perception that the UNSC serves the interests of the major powers.

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[199] Ronen 'ICC jurisdiction over acts committed in the Gaza strip: Article 12(3) of the ICC Statute and non-state entities' (n 196 above) 3-4.

[200] OTP 'Report on preliminary examination activities 2016' (n 120 above) para 114; OTP 'Report on preliminary examination activities 2017' (n 82 above) para 57.

[201] Human Rights Council 'Human rights in Palestine and other occupied Arab territories: Report of the United Nations fact-finding mission on the Gaza conflict' UN Doc. A/HRC/12/48 (2009) paras 482-1335, http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf (accessed 9 May 2018).

[202] UN Economic and Social Council 'Report on the situation of detainees at Guantanamo Bay' UN Doc. E/CN.4/2006/120 (2006) parts II, III and V; Centre for Constitutional Rights 'Report on torture and cruel, inhuman and degrading treatment of prisoners at Guantanamo Bay, Cuba' (2006) 14-29, https://ccrjustice.org/sites/default/files/assets/Report_ReportOnTorture.pdf (accessed 29 March 2017).

[203] Amnesty International 'Syria war: Unthinkable atrocities documented in report on Aleppo' https://www.theguardian.com/world/2015/may/05/syria-forces-war-crime-barrel-bombs-aleppo-amnesty-report (accessed 22 March 2017); BBC 'UN implicates Bashar al-Assad in Syria war crimes' *BBC News* (2 December 2013), http://www.bbc.com/news/world-middle-east-25189834 (accessed 22 March 2017).

[204] R Thakur 'International criminal justice: At the vortex of power, norms and a shifting global order' in C Samford and R Thakur (eds) *Institutional supports for the international rule of law* (2014) 43-44.

[205] P Alston 'Report of the Special Rapporteur on extra-judicial, summary or arbitrary executions' UN Doc. A/HRC/14/24/Add.6 (2010) paras 43 and 72. The UN Special Rapporteur, Philip Alston, argues that the use of drones may constitute war crimes.

While crimes of similar magnitude are committed elsewhere on the globe, the UNSC has been quick to refer African-based situations to the ICC and is most hesitant to refer situations from other regions. As far as Africa is concerned, the UNSC has adopted a very liberal interpretation of article 12 of the Rome Statute. The UNSC's referral of Libya and Sudan to the Court – both non-state parties to the Rome Statute – best exemplifies this.[206] Legally, this is a sound step. Article 25 of the UN Charter recognises the binding nature of UNSC decisions on member states. The UNSC's decisions on referral and deferral are made in terms of Chapter VII of the UN Charter. Thus, such referrals of UN member states do not necessarily require state consent.[207] Nonetheless, genuine questions such as why this should only be exercised in Africa must be tackled.

This study is, however, aware that attempts by the UNSC in this regard are likely to face challenges that may render prosecution efforts futile. For instance, it cannot be ignored that a probable veto by the US is most likely, given the reality that any such case directly implicates the US, which is a member of the UNSC. This brings into perspective the complex questions arising from the UNSC's referrals to the ICC.[208] Given the political dynamics of the UNSC, such referrals are likely to be 'nothing more than point scoring'.[209] This is because of the high probability of such a resolution failing to pass.

It is, however, not sufficient that the UNSC has made no such initiatives. Despite the imminent possibility of a veto, the UNSC ought to have made attempts to refer the Gaza situation much earlier. Similarly, it could have referred incidents in Guantanamo Bay and Syria. The failure to apply the doctrine of referral equally compromises the legitimacy of the UNSC's role in the Court's processes. A UNSC referral of non-African states is most likely to assuage the concerns of African states, the AU and like-minded scholars that

[206] UNSC Resolution 1593 (2005), adopted at its 5158th meeting, on 31 March 2005, UN Doc. S/RES/1593 (2005) – referring Sudan to the ICC; United Nations Security Council Resolution 1970, UN Doc. S/RES/1970 (2011) – referring Libya to the ICC.
[207] As they are member states to the UN Charter, it can be argued that Sudan and Libya are bound by their international obligations emanating from the Charter, specifically under article 39 and article 25.
[208] D Tladi 'ICC and UNSC: Point scoring and the cemetery of good intentions' *ISS Today* (10 October 2014), https://issafrica.org/iss-today/icc-and-unsc-point-scoring-and-the-cemetery-of-good-intentions (accessed 6 June 2017).
[209] Ibid.

the ICC is anti-African.

The Rome Statute allows the UNSC not only to refer cases to the ICC[210] in which international crimes have been committed, but also to defer cases from investigations or prosecution by the ICC:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; *that request may be renewed by the Council under the same conditions*.[211]

According to Nsereko, even though the wording is couched as a 'request', in reality, this is a command to the Court to defer its jurisdiction where the UNSC makes a deferral request.[212] Similarly, while the deferral is initially limited to 12 months, the UNSC has the power under article 16 of the Rome Statute to renew it under similar conditions, as the provision does not prohibit renewal of the request. This might go on indefinitely since the Rome Statute, as a result of its silence on renewals, does not seem to impose any time limitations on renewals, implying that the UNSC has the absolute power to obstruct any probable prosecution that may not be in its interest.

Connivance within the UNSC on how to maintain control over the Court seems to have begun much earlier during the drafting of the Rome Statute. It is worth noting that article 23(3) of the draft Rome Statute (drafted by the ILC) provides that

> [n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.[213]

This draft, which was the one most preferred by the 'big five' (UNSC permanent members),[214] essentially forbids the ICC from prosecuting any

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[210] Article 13(b), Rome Statute.
[211] Article 16, Rome Statute (emphasis added).
[212] Nsereko 'Triggering the jurisdiction of the International Criminal Court' (n 50 above) 268.
[213] 'Report of the International Law Commission on the work of its forty-sixth session: Draft Statute for an International Criminal Court' UN Doc. A/49/10, *Yearbook of the International Law Commission* 1994, Vol. II(2) 43-44, article 23(3), http://legal.un.org/ilc/publications/yearbooks/english/ilc_1994_v2_p2.pdf (accessed 5 June 2014).
[214] CC Jalloh, D Akande and M du Plessis 'Assessing the African Union concerns about article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *African Journal of Legal Studies* 16.

case arising from a situation that the UNSC was dealing with under Chapter VII of the UN Charter unless the UNSC so decided. Effectively, the UNSC had become the ICC's gatekeeper.[215] Through this provision, USA in particular wanted to have effective control of all ICC prosecutions.[216] It would therefore have the ability to block any unfavourable prosecutions, especially those relating to its nationals.[217] The draft of the ILC made it possible to bar the Court's jurisdiction from certain situations, especially where the interests of the 'big five' were at stake. Middle-power and developing countries found this provision an encroachment on judicial independence.[218] Although this particular provision was done away with, the Rome Statute in article 16 bestows deferral powers upon the UNSC. A deferral would effectively have similar consequences as was the initial intention – to keep the ICC at bay – even though article 16 does not include the circumstances under which the UNSC can make the deferral, which is, where the UNSC was dealing with a situation. It may be argued that the UNSC eventually managed indirectly to retain the ILC draft provisions intended to bar the Court from situations seized by the UNSC under Chapter VII of the UN Charter. In this case, the only difference is that there has to be a deferral.

The AU has seriously lamented the UNSC's discriminatory approach in the implementation of the referral power and its refusal to use its deferral power in the Sudanese and Kenyan cases. The AU has previously sought to have the UNSC defer the indictment of the Sudanese president as well as the Kenyan cases.[219] South Africa and Libya also jointly proposed the inclusion of a deferral of the ICC proceedings against al-Bashir in the resolution renewing the mandate of the AU/UN Hybrid Operation in Darfur (UNAMID).[220] The United Kingdom, the US and France opposed a deferral. The US threatened

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[215] Schabas 'United States hostility to the International Criminal Court' (n 51 above) 701-715.
[216] Ibid.
[217] Ibid.
[218] P Kirsch and T Holmes 'Developments in International criminal law: The Rome conference on the International Criminal Court: The negotiating process' (1999) 93 *American Journal of International Law* 2.
[219] AU Assembly 'Decision on Africa's relationship with the International Criminal Court (ICC)' Ext/Assembly/AU/Dec.1(Oct.2013), Extraordinary session, 12 October 2013.
[220] L Moss 'The UN Security Council and the International Criminal Court: Towards a more principled relationship' (2012) 7 *Friedrich Ebert Stiftung* http://library.fes.de/pdf-files/iez/08948.pdf (accessed 19 June 2017).

to veto a deferral, forcing the adoption of a compromised Resolution 1828 in which the UNSC took note of the AU's request for a deferral and its intentions to consider the issue further.[221] Kenya subsequently sought, prior to the termination of the case against Kenyatta, a UNSC deferral of its cases under article 16.[222] In January 2011, the AU endorsed this request.[223] The UNSC then engaged Kenya in a dialogue on 18 March 2011 and later in an informal discussion on 8 April 2011.[224] The subsequent inaction by the UNSC in these matters prompted the AU to express its displeasure.[225] As a result, the AU declared its non-cooperation with the ICC in so far as the arrest and surrender of al-Bashir were concerned.[226]

This further prompted the AU to recommend an amendment to article 16 of the Rome Statute to allow the UN General Assembly (UNGA) to exercise the power to defer cases where the UNSC had failed to do so within six months.[227] The basis of this proposal was UNGA Resolution 377(V), in which the UNGA resolved to consider matters of international peace and security in the event of inaction within the UNSC.[228]

The ICJ has upheld the validity of this resolution, holding that the UNGA could properly be seized of a matter in case of inaction on the part of the UNSC.[229]

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[221] Resolution 1828 (2008), adopted by the Security Council at its 5947th meeting, on 31 July 2008, para 9.
[222] Resolution 7060 (2013), adopted by the Security Council at its 7060th meeting, on 15 November 2013.
[223] AU Assembly, Assembly/AU/Dec.482(XXI), (n 5 above).
[224] Moss 'The UN Security Council and the International Criminal Court: Towards a more principled relationship' (n 220 above) 9.
[225] AU Assembly 'Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC)' Assembly/AU/Dec.245(XIII) Rev.1, Doc Assembly/AU/13(XIII), 13th Ordinary Session, 1–3 July 2009, para 9; AU Assembly 'Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec.270(XIV) on the second ministerial meeting on the Rome Statute of the International Criminal Court (ICC)' Assembly/AU/Dec.296(XV), Doc Assembly/AU/10(XV), 15th ordinary session, 25-27 July 2010, para 4.
[226] AU Asembly, Assembly/AU/Dec.245(XIII) Rev.1 (n 22 above) para 10; AU Assembly, Assembly/AU/Dec.296(XV) (n 222 above) para 5.
[227] AU Executive Council 'Report of the 2nd ministerial meeting on the Rome Statute of the International Criminal Court (ICC)' Min/ICC/Legal/Rpt.(II) Annex A, Doc. EX.CL/568(XVI) Annex 1, 16th Ordinary Session, 25 – 29 January 2010. See also Jalloh, Akande and Du Plessis 'Assessing the African Union concerns about article 16 of the Rome Statute of the International Criminal Court' (n 214 above) 9.
[228] UNGA Resolution 377(V) 'Uniting for peace' UN Doc. A/RES/377(V) A (1950), part A, para 1.
[229] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Reports 136 paras 13-42.

Thus, either UNGA and UNSC can deal with the same matter concerning the maintenance of international peace and security.[230] The AU's suggested proposal was hence not wide off the mark but well-grounded in international law and practice.

This suggestion, however, raised numerous genuine legal concerns. The first is the import of article 16 of the Rome Statute. In reality, the crimes under the Rome Statute entail some of those incidences that can be subject to the UNSC's mandatory powers under Chapter VII of the UN Charter. In this regard, the US ambassador to the Rome conference underscored the need for the two institutions to coordinate and to guard against conflicts of interest.[231]

This implies that if the UNSC is seized of a matter under chapter VII – conducting an investigation to determine whether it constitutes a threat to international peace – then the Office of the Prosecutor (OTP) must refrain from conducting any investigations in the matter where the UNSC requests otherwise. This further explains the import of article 23(3) of the draft Rome Statute. The spirit of the draftsmen seemed to guard against a conflict of interest between the ICC and the UNSC where the UNSC was dealing with a situation. In both the Sudan and Libyan cases, although the AU sought the UNSC to defer the situations, the UNSC was not seized of these situations. In fact, it was the UNSC that referred the two situations to the Court. It would have been ridiculous for the UNSC to seek a deferral of situations it was not dealing with, as there was no conflict of interest as envisaged under article 16.

Moreover, an African expert study group has asked whether the proposed change under article 16 fits well with the powers bestowed on the UNGA under the UN Charter or whether it introduces a conflict that will again necessitate an amendment of the UN Charter, since an amendment under the Rome Statute cannot purport to amend the UN Charter.[232] Alternatively, it may

[230] Ibid.
[231] Statement by Hon. Bill Richardson US ambassodor to the UN at the UN conference on the establishment of the ICC, https://www.legal-tools.org/en/browse/record/c2766e/ (accessed 7 May 2018).
[232] Akande, Du Plessis and Jalloh 'An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC' (n 38 above).

also be asked whether the Rome Statute can be amended in a way that conflicts with the UN Charter.

Some scholars have observed that the UNGA cannot make such a decision since, first, under the UN Charter, unlike the UNSC, it has no mandate to make binding decisions. In the case of the Rome Statute, it would only make sense if such a decision to defer were binding on the Court.[233] Moreover, the request for a deferral should be made when the situation in question is a threat to peace and security, in which case only the UNSC has a mandate to make such a determination.[234]

Since the UN Charter and the Rome Statute are two independent legal regimes, it has been argued that nothing bars the Rome Statute from providing the UNGA with the power to make binding decisions in relation to the deferral of cases.[235] Conversely, the UNSC cannot, in theory, exercise its powers under the UN Charter to make binding decisions to the ICC unless it has been expressly provided for under the Rome Statute, which article 16 does.[236] Similarly, the fact that the UN Charter bestows upon the UNSC the primary mandate over peace and security would not bar the UNGA from deferring cases, unless the UNSC is dealing with the matter. Besides, even though the maintenance of peace and security is a power vested primarily in the UNSC, the UN Charter also envisages some limited and secondary circumstances under which the UNGA can have such powers.[237] Although some international scholars have dismissed this stance by arguing that it would be unsuitable to change the roles of the UNGA and UNSC in relation to the ICC,[238] this study acknowledges the distinct legal nature of the two institutions and the possibility of different institutions playing different roles in each.

Interestingly, while it has become impossible for the UNSC to defer ongoing African cases, perhaps on sound legal grounds, in practice, it has been easy

[233] Ibid,13.
[234] Ibid, 10.
[235] Ibid, 13.
[236] Ibid.
[237] Articles 10, 12 and 14, UN Charter.
[238] Akande, Du Plessis and Jalloh 'An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC' (n 38 above) 15.

for the UNSC to pre-emptorily defer cases relating to any 'would-be' American national indictees of the ICC. However, this should not be read as a demonstration of the USA's ability or willingness to conduct prosecutions at national level. The following discussion dismisses such thinking. It should be noted, nevertheless, that although the USA is not party to the Rome Statute, the ICC can still exercise its jurisdiction over its citizens if they commit any of the crimes under the Statute on the territory of a member state.[239] Thus, generally, the legality of ICC's jurisdiction over third states is USA's central concern about the ICC,[240] hence its persistent opposition to the ICC process and its urge to search for ways to cushion its nationals.

For example, on 14 December 1995, the leaders of Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia signed a peace agreement.[241] This prompted the UNSC to adopt several resolutions aimed at settling the conflict in the region.[242] Key among these includes Resolution 1035 of 1995 establishing the United Nations International Police Task Force and a UN Civilian Office in Bosnia and Herzegovina (UN Mission in Bosnia and Herzegovina).[243] Resolution 1422 of 2002 is also remarkable in the sense that it was adopted immediately after the coming into force of the Rome Statute. This implied that members of the forces committing international crimes were likely to face prosecution before the ICC. USA sought to have its nationals exempted from prosecution at the ICC.[244] Initially, this proposal was overwhelmingly opposed by states.[245] USA, however, threatened to veto the resolution and also to withhold its funding of the UN peace-keeping operations

[239] Article 12(2)(a), Rome Statute.
[240] Schabas 'United States hostility to the International Criminal Court: It's all about the Security Council' (n 51 above) 710.
[241] Bosnia and Herzegovina – UNMIBH Mandate, http://www.un.org/en/peacekeeping/missions/ past/unmibh/mandate.html (accessed 8 June 2017).
[242] Para 2, Resolution 1035 on establishment of a UN civilian police force to be known as the International Police Task Force (IPTF) and a UN civilian office for the implementation of the Peace Agreement for Bosnia and Herzegovina, UN Doc. S/RES/1035 (1995).
[243] Ibid.
[244] Amnesty International 'The International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice' AI Index: IOR 40/006/2003 (2003), https://www.amnesty.org/download/Documents/108000/ior400062003en.pdf (accessed 8 June 2017).
[245] Ibid, 8.

if its text was not adopted.[246] On 30 June 2002, USA actualised its first threat and vetoed the draft resolution following the UNSC's refusal to adopt its text.[247] In fear of another USA veto, the UNSC accepted the compromised version incorporating the USA text that deferred all ICC investigations under article 16, to be automatically extended for 12 months, without limit. In its Resolution 1422 of 2002, the UNSC essentially gave USA nationals in the UN Missions in Bosnia and Herzegovina immunity from prosecution for future acts and omissions of theirs that amounted to international crimes. The resolution reads:

A deferral under article 16 was not applicable in this context. The ICC had not yet been seized of the matter. Despite heavy criticism and complaints about the discriminatory nature of this resolution,[248] it was renewed in 2003.[249] Again, a similar resolution was adopted in the same year with regard to the UNSC's Multinational Stabilisation force for Liberia.[250] UNSC Resolution 1970 which, inter alia, referred Libya to the ICC has attracted similar criticism, as Libya is not a member state of the Rome Statute.

While this seems *prima facie* an embrace of impunity, some scholars have adopted a more liberal interpretation. They argue, for example, that the only problem with this provision is procedural – that the exemption is only limited to the jurisdiction of the ICC and not of other national states.[251] As such, it is argued that this resolution was well-founded under the UN Charter, as it does not rubberstamp impunity since it is not concerned with the question of whether or not to have the individuals exempted from prosecution, but relates

[246] Ibid, 15.
[247] Ibid, 16.
[248]Security Council 4772 Meeting 12 June 2003, S/PV.4772, http://www.iccnow.org/documents/UNSCpv1422debate12June03.pdf (accessed 5 June 2014); N Jain 'A separate law for peacekeepers: The clash between the Security Council and the International Criminal Court' (2005) 16 *European Journal of International Law*; Jalloh, Akande and Du Plessis 'Assessing the African Union concerns about article 16 of the Rome Statute of the International Criminal Court' (n 214 above) 18-20.
[249] UN Doc. S/RES/1487 (2003).
[250] UN Doc. S/RES/1497 (2003).
[251] S Zappala '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) 1 *Journal of International Criminal Justice* 116 121-122.

to where they should be prosecuted.[252]

Such an interpretation is not only faulty but also ignores reality. Suggesting that this resolution allows the subjection of USA nationals to national justice processes is a pure fallacy. In fact, reacting in anger to the rejection of its proposal that a clause be inserted in the Rome Statute proclaiming that the Court will not have jurisdiction over American nationals, USA enacted domestic legislation called the American Service Members Protection Act 2002 (also known as the 'Hague Invasion Act'). With this law, it seeks to cushion its nationals and the citizens of 'allied countries' from the ICC and related national prosecutions, to the extent of envisaging, where necessary, the use of military force and penal sanctions against member states of the Rome Statute who may attempt to carry out such prosecutions.[253] State parties to the North Atlantic Treaty organisation (NATO), however, are exempt from these penal sanctions.[254]

Any objective interpretation of this type of legislation only serves to fortify the concept of USA exceptionalism from the ICC's processes. Notably, however, the Obama administration re-engaged with the ICC, albeit in a very cautious manner. During this era, the Secretary of State, Hillary Clinton, publicly regretted that USA was not a member state to the Rome Statute,[255] even though the country then neither ratified the Statute nor rejected the Bush administration's 'unsigning' of the Statute. In November 2009, USA participated for the first time in the annual meeting of ICC member states, the Assembly of State Parties,[256] and sent a delegation to the ICC review conference in Kampala in 2010. It remains to be seen what subsequent administrations will take in this apparent 'non-party cooperation'.

Although the UN Charter affirms equality among all nations 'large and

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[252] Ibid.
[253] Coalition for the International Criminal Court 'US Congress passes Anti-ICC "Hague Invasion Act"' http://www.iccnow.org/documents/07.26.02ASPAthruCon gress.pdf (accessed 4 June 2014).
[254] Ibid.
[255] JB Bellinger 'A global court quandary for the president' *Global Policy Forum* (2009), https://www.globalpolicy.org/international-justice/the-international-criminal-court/us-opposition-to-the-icc/48027.html (accessed 9 June 2017).
[256] B Evans-Pritchard and S Jennings 'US takes cautious steps towards ICC' *Global Policy Forum* (2009), https://www.globalpolicy.org/international-justice/the-international-criminal-court/us-opposition-to-the-icc/48027.html (accessed 9 June 2017).

small',[257] thereby abjuring any form of discrimination between them, these unequal standards were further made explicit in the Darfur case. While seeking criminal accountability for atrocities committed in Darfur, UNSC Resolution 1593 referred the situation in Sudan to the ICC. Interestingly, while accountability seemed most imminent for Sudan, the same resolution sought to shield USA nationals from similar accountability,[258] perhaps in a bid to prevent a USA veto. It is important to note that the existence of domestic prosecution of USA nationals was neither a factor that was considered during the adoption of this resolution, nor did the USA representative support the Court's jurisdiction over nationals of non-member states to the Rome Statute.[259] If anything, USA abstained from voting on the resolution. Paragraph 6 of this resolution reads:

> [N]ationals, current or former officials or personnel from a contributing state outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing state for all alleged acts or omissions arising out of or related to operations in Sudan... unless such exclusive jurisdiction has been expressly waived by that contributing state.[260]

The inclusion of this clause was profoundly criticised as discrimination on the basis of nationality.[261] Yet the ICC accepted the Sudan referral without condemning its exclusiveness. Moreover, the Court has not made any pronouncements regarding the discriminatory nature of these resolutions. Indeed, the UNSC's powers of referral and deferral have significantly affected the credibility and legitimacy of the Court.[262]

The centrality of the interest of the 'big five' and, USA in particular, in the role of the UNSC is also manifest with reference to the crime of aggression. Although it took until 2010 to get a definition of the crime incorporated in the Rome Statute, the ILC draft code already bestowed upon the UNSC the

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[257] Article 2(1), UN Charter.
[258] UNSC '5158th meeting' UN Doc. S/PV.5158 (2005), http://www.amicc.org/docs/SC%20Meeting%20Record%201593.pdf (accessed 9 June 2014).
[259] UN 'Security Council refers situation in Darfur, Sudan, to prosecutor of International Criminal Court' (2005) http://www.un.org/press/en/2005/sc8351.doc.htm (accessed 7 April 2016).
[260] Resolution 1593 (n 206 above).
[261] G Sluiter 'Obtaining co-operation from Sudan: Where is the law?' (2008) 6 *Journal of International Criminal Justice* 880-881.
[262] L Moss 'The UN Security Council and the International Criminal Court: Towards a more principled relationship' March 2012 http://library.fes.de/pdf-files/iez/08948.pdf (accessed 6 June 2017).

primary power to determine acts of aggression before any complaint relating to the crime is lodged under the Statute.[263] This reassured USA of its control of the Court in relation to the crime of aggression.[264] A similar provision was later incorporated under sub-articles 15*bis* (6) and (7) of the Rome Statute. Ultimately, the 'big five' have the monopoly to determine which acts amount to aggression before any probable investigations or prosecutions of the crime.

The UNSC is the entrusted ultimate custodian of political decisions on referral and deferral, especially regarding non-member states. The majority of its permanent members – with veto powers – are not parties to the Rome Statute. Its power of referral has been exercised only with regard to two African countries. How then does one strike a balance between the delicate reality of trusting UNSC custodianship of such powers and Africa's concern that the ICC is a stooge for the West? Perhaps what will ultimately mollify Africa's fears is 'a strong, independent and successful ICC'[265] devoid of 'cynical exercise of authority by great powers'.[266]

2.3 The ICC and the 'neo-colonial conspiracy' theory

Arguably, the bias in the UNSC's role in the Court processes is a major reason for the AU's perception of the ICC as a vehicle of Western imperialism.[267] Both academic scholars and politicians advance this political rather than legal criticism of the ICC. Based on the perspectives discussed below, this is only an ideological critique (that is, it does not go beyond ideology). Odero, for instance, describes the ICC's operations in Africa as a 'neo-colonial conspiracy'.[268] He perceives the ICC as a continuation of the

[263] Article 23(2), Draft Statute for an International Criminal Court (n 213 above).
[264] Schabas 'United States hostility to the International Criminal Court: It's all about the Security Council' (n 51 above) 717-718.
[265] Jalloh, Akande and Du Plessis 'Assessing the African Union concerns about article 16 of the Rome Statute of the International Criminal Court' (n 214 above) 12.
[266] W Schabas *The International Criminal Court: A commentary on the Rome Statute* (2010) 333.
[267] 'Peace, justice and reconciliation in Africa: Opportunities and challenges in the fight against impunity' Report of the AU Panel of the Wise (2013) 46 https://reliefweb.int/sites/reliefweb.int/files/resources/ipi_e_pub_peacejusticeafrica.pdf (accessed 15 April 2016); Tladi 'The African Union and the International Criminal Court' (n 191 above) 29, 61.
[268] S Odero 'Politics of international criminal justice: The ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator theory' in C Murungu C and J Biegon (eds) *Prosecuting international crimes in Africa* (2011).

colonial philosophy inasmuch as powerful states use this criminal mechanism as a tool for controlling and dominating less powerful states.[269] Paul Kagame – the Rwandan president – shares this viewpoint. He has previously dismissed the ICC, stating that 'Rwanda cannot be part of that colonialism, slavery and imperialism'.[270] Similarly, referring to the ICC arrest warrant against al-Bashir, the then AU Chairperson, Muamar Gaddafi, termed it 'an "attempt by [the West] to recolonise their former colonies"'.[271] The Organisation of Islamic Cooperation (OIC) also described al-Bashir's indictment as being 'selective and of double standards'.[272]

Perhaps the fear of African leaders and heads of states that view international criminal law as a neo-colonial hegemony is well founded. According to TWAIL, international law serves as a means through which 'dominant social forces in society maintain their domination not through the use of force but through having their worldview accepted as natural by those over whom domination is exercised'.[273]

Mahmood Mamdani, a respected African scholar who perceives the ICC as the 'new humanitarian order', echoes this.[274] In the language of Mamdani's new humanitarian order, citizens are not bearers of their full range of rights.[275] Rather, they are 'passive beneficiaries of an external responsibility to protect'[276] – recipients of charity. Accordingly, '[t]he emphasis on big powers as the protectors of rights internationally is increasingly being twinned with an

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[269] Ibid.
[270] Du Plessis 'The International Criminal Court and its work in Africa' (n 8 above) 1.
[271] 'Sudan leader in Qatar for summit' *BBC News* (29 March 2009), http://news.bbc.co.uk/2/hi/7970892.stm (accessed 10 May 2018); K Ambos 'Expanding the focus of the African Criminal Court' in WA Schabas et al. (eds) *The Ashgate research companion to international criminal law: Critical perspectives* (2013) 505.
[272] OIC 'Final communique of the expanded ministerial meeting of the Executive Committee on the latest developments in the Sudan' OIC/POL-03/EXE-COM/2008/FC/FINAL (4 August 2008) para 5 http://ww1.oic-oci.org/english/conf/exec/Final%20Communique-Sudan.pdf (accessed 6 May 2018); Tladi 'The African Union and the International Criminal Court (n 188 above) 62.
[273] BS Chimni 'Third World approaches to international law: A manifesto' (2006) 8 *International Community Law Review* 15.
[274] M Mamdani 'Darfur, ICC and the new humanitarian order: How the ICC's "responsibility to protect" is being turned into an assertion of neo-colonial domination' *Pambazuka News* (17 September 2008), http://www.pambazuka.org/en/category/features/50568 (accessed 20 June 2017).
[275] Ibid.
[276] Ibid.

emphasis on big powers as enforcers of justice internationally'.[277] This renders the ICC a Western court designed to prosecute African crimes. He further points out the colonial powers as the initiators of this era, when they claimed 'to protect the vulnerable groups'.[278] Certainly, TWAIL scholars argue that the expansion of colonialism was essentially not only key to the development of international law, but also accorded the character of universality to international law.[279]

While Africa suffered under colonialism, scholars on TWAIL further claim that international law was at the time used 'to justify and legitimise the suppression of Third World peoples and was therefore instrumental in the shaping of the power and subordination presently inherent in the colonial order'.[280]

Advocates of the ICC as a neocolonial conspiracy would therefore readily argue that the ICC – just like colonialism – is alienating Africa from its values while reinforcing Western values;[281] that Western values foster inequality where people from certain regions seem to be the prime targets of the Court.[282] Accordingly, skin colour and material wealth seem to be central determinants of ICC indictees.[283] African approaches to criminal justice, by contrast, underscore equality and togetherness as some of their traditional principles. This has prompted Africa to search for a home-grown solution within the sphere of international criminal justice. Ifeonu Eberichi further observes that the AU's resistance to the ICC is partly influenced by a general feeling that the ICC is being controlled by states that fan the rampant conflicts

[277] Ibid.
[278] Ibid.
[279] A Anghie and BS Chimni 'Third World approaches to international law and individual responsibility in conflicts' (2003) 2 *Chinese Journal of International Law* 84-89; CC Jalloh 'Regionalizing international criminal law' (2009) 9 *International Criminal Law Review* 496.
[280] Anghie and Chimni 'Third World approaches to international law' (n 279 above) 88; Odero 'Politics of international criminal justice' (n 268 above) 155; Jalloh 'Regionalizing international criminal law' (n 279 above) 496.
[281] T Major and TM Mulvihill 'Julius Nyerere (1922-1999), an African philosopher, re-envisions teacher education to escape colonialism' (2009) 3 *Journal of Marxism and Interdisciplinary Inquiry* 15.
[282] Ibid.
[283] D Tutu 'Why I had no choice but to spurn Tony Blair' *The Guardian* (2012), https://www.theguardian.com/commentisfree/2012/sep/02/desmond-tutu-tony-blair-iraq (accessed 8 July 2014).

on the African continent by supplying weapons.[284] Yet it is in these conflicts that numerous international crimes are committed, and while African leaders are quickly held to account, those responsible from the powerful states are never held accountable. As such, the international community which is complicit in conflicts in Africa lacks the moral authority to enforce accountability for international crimes resulting from such conflicts.[285]

As already conceptualized in chapter one and later in chapter four, inherent in traditional African conception of justice are the values geared towards restoring lost societal equilibrium through reconciliation and restoration. Although there could be elements of punishment, this is normally not the central focus of this notion. In fact, the aspect of punishment was mainly executed by the spiritual world. This notwithstanding, there are certain values of punishment introduced by the West through colonialism that seem to have taken hold within some parts of African society. Yet the aspect of punishment in the Western sense of the word does not exist in the ancient traditional processes, as is described and analysed in chapter four. In contrast, justice within the context of the ICC emphasises punishment.

These differences in value systems, which have led to indictments against African heads of state, are key factors, according to some commentators, informing the adoption of the Malabo Protocol.[286] Perhaps this is an initiative geared towards African self-reliance in prosecuting international crimes. Arguably, therefore, once this form of independence is eventually achieved, perhaps through the entry into force of the Malabo Protocol, it may appease the predominant fear among Africans that Africa is an experimental farm for the ICC,[287] or that the ICC is 'Europe's Guantanamo Bay' for Africans.[288] Yet it cannot be ignored that most post-independence African leaders have ruled with high levels of autocracy and, in most cases, contributed to the

[284] I Eberechi 'Armed conflicts in Africa and Western complicity: A disincentive for African Union's co-operation with the ICC' (2009) 3 *African Journal of Legal Studies* 55; O Imoedemhe 'Unpacking the tension between the African Union and the International Criminal Court: The way forward' (2015) 23 *African Journal of International and Comparative Law* 99.
[285] Ibid.
[286] C Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067-1088.
[287] Jalloh (n 1 above) 203.
[288] D Hoile *The International Criminal Court, Europe's Guantamo Bay?* (2010).

commission of heinous violations of human rights.

2.4 Conclusion

This chapter set out to examine the idea that the ICC has exclusively focused on Africa. To this end, it discussed various sets of ideas that inform the arguments made from an African perspective. The chapter has presented the arguments made by the AU, some prominent African leaders and a number of African scholars that the ICC lacks independence from the West, particularly in the OTP section of the Court. It has also lamented the central role played by the UNSC in the court processes. It further argues that the OTP and the UNSC continue to manipulate several Court processes to suit western interests. While there is nothing inherently wrong with selective enforcement of law because of prosecutorial discretion,[289] and also bearing in mind the reality that international criminal justice operates in an environment saturated with politics, such politics seldom reflect Africa's interests. One of the judges of the ICC has since acknowledged that even though politics and state interests present a delicate balance with the rule of law, the same continue to be an important obstacle to the effective operations of the Court.[290] This only bolsters the argument that while politics are central to ICC operations, Africa's political interests are hardly ever considered to be as important as those of the West.

Furthermore, the chapter has demonstrated that African scholars and some African heads of states perceive the ICC as a neocolonial tool to which the West clings so as to ensure continued control of their former colonies. According to African scholarly voices and the AU, this is the reason why African heads of state have been indicted before the ICC, unlike their counterparts from other parts of the globe who too, as is alleged, engage in similar atrocities. The chapter, however, acknowledges the complex nature of the AU grievance on Eurocentrism. It concedes that there exists no single voice on the continent on this concern. One is therefore likely to capture

[289] Cryer *Prosecuting international crimes: Selectivity and the international criminal law regime* (n 128 above) 192.
[290] HP Kaul 'The International Criminal Court: current challenges and perspectives' (2007) 6 (3) *Washington University Global Studies Law Review* 575.

several voices of those supporting the works of the ICC on the continent as well as those opposed to the ICC idea. Nevertheless, this study finds it important to validate these pronouncements as well as to search for a continental solution which is as inclusive of these voices as possible.

CHAPTER 3
THE 'PEACE VERSUS JUSTICE' DEBATE IN INTERNATIONAL CRIMINAL JUSTICE

3.1 Introduction

The strength of any criminal justice system lies in its ability to dispense justice and, in turn, guarantee restoration of peace, law and order amongst warring groups. Peace and justice are essential tenets for any criminal justice system. Despite their central importance in criminal justice, the debate on peace versus justice in international criminal law remains unsettled, with diverging opinions on the theory, policy and practice. Africa's protest against the ICC best exemplifies this contest.

The AU and African state practices, on the one hand, and the ICC, on the other, have maintained opposing positions on what these competing concepts of peace and justice entail and on how to prioritise them. While the AU and African state practices underscore the need for peace as a prerequisite for justice,[1] the ICC emphasises punitive justice.[2] Peace is essential for any post-conflict society. The ICC's emphasis on prosecution is equally beneficial in the sense that it deters would-be perpetrators and individualises guilt, thus marginalising abusive leaders.[3] Article 16 of the Rome Statute, nevertheless, foresees the possibility of a deferral of cases in the interest of international peace and security. The few instances, discussed in chapter two, in which the

[1] AU Assembly, 'Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC)" Assembly/AU/Dec.245(XIII) Rev.1, Doc. Assembly/AU/13(XIII), Thirteenth Ordinary Session, 1–3 July 2009, para 3; AU Assembly 'Decision on international jurisdiction, justice and the International Criminal Court' Assembly/AU/Dec.482(XXI), Doc. Assembly/AU/13(XXI), 21st Ordinary Session, 26 - 27 May 2013, paras 4 and 5; AU Assembly 'Decision on Africa's Relationship with the International Criminal Court (ICC)' Ext/Assembly/AU/Dec.1(Oct.2013), Extraordinary Session, 12 October 2013, para 5; AU PSC 'Communique of the 142nd meeting of the Peace and Security Council, Addis Ababa Ethiopia' PSC/MIN/Comm(CXLII), 21 July 2008, para 3.

[2] *Prosecutor v Omar Hassan Ahmed Al Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir) ICC-02/05-01/09-3 (4 March 2009) Pre-Trial Chamber I, paras 8, 223 and 236. As noted previously. despite an application requesting the Court not to issue arrest warrants against al-Bashir on the basis of its grave implications on the local peace process, the Court went ahead without any due consideration of this application and issued the said warrants of arrest.

[3] L Davis 'The ICC: A straw man in the peace-versus-justice debate' Briefing paper for the Oslo Forum Africa Mediators Retreat (2013), https://www.osloforum.org/sites/default/files/Africa-Mediators-retreat-BP-ICC.pdf (accessed 6 March 2015).

AU has sought to utilise this measure have nonetheless been turned down.

It is this unrelenting position by the UNSC that has been criticised. Critics thus argue that the ICC position is politically biased and impedes peace processes in Africa.[4] This has generated heated debate on the African continent since all the current 'cases' before the ICC are Africa-based, thus presenting the dilemma in a more practical sense than elsewhere.

Given the necessary conflict between the notions of peace and justice, this chapter examines the manifestations of these two notions. While the ICC's conception of justice combines both prosecutions and reparative measures, greater emphasis is placed on prosecution. Thus, within the ICC, the 'peace versus justice' debate is discussed in a context that generally juxtaposes retributive justice against peace; conversely, within a traditional African context, the notion of justice, as suggested in chapter one, involves a combination of retributive justice, reconciliation and restorative justice. Nevertheless, although the AU, as noted above, often prioritises peace, article 4(h) of the AU Constitutive Act authorises the use of force against a member state where genocide, crimes against humanity and war crimes are being committed. In addition, the Malabo Protocol foresees probable prosecution of grave breaches of international law.[5] This chapter examines these different perspectives of justice in the course of elaborating on the contest between the notions of peace and justice as an AU grievance against the ICC.

The ICC has adopted the Western conception of criminal justice which focuses more on retribution than restorative and reconciliatory justice. Yet a universal understanding of what 'peace' means is still lacking. While no international legal instrument defines the notion of peace, scholarly writings have ascribed conflicting meanings to this concept. To some, peace implies the absence of war; to others, it is the absence of factors likely to trigger violence, including prosecution.[6] Others regard it as the resumption of normalcy after a conflict.[7] These differences of interpretation have further

[4] Ibid.
[5] Article 28, Malabo protocol.
[6] JN Clark 'Peace, Justice and the International Criminal Court: Limitations and possibilities' (2011) 9 *Journal of International Criminal Justice* 539.
[7] Ibid.

complicated the discourse on peace and justice in international criminal law. For example, addressing the ICC on the basis of peace, the AU called upon the Court to reconsider its indictments of al-Bashir in Sudan, Gaddafi in Libya and the president of Kenya and his deputy.[8]

Three key issues have been cited by African leaders as necessitating the prioritisation of peace over justice: the need to recognise the doctrine of immunity of state officials; the need to grant amnesty to warring groups; and the need for peaceful coexistence of its citizens.[9] This chapter analyses these issues in a bid to understand Africa's position in the debate as well as weigh it against the ICC's position. Essentially, this chapter partially answers the first research question: What are Africa's concerns about the ICC? In answering this question, the study seeks to establish whether Africa's concerns in the 'peace versus justice' debate are legitimate.

Before dealing with these issues, however, the chapter begins with a broader consideration of various schools of thought, as this is relevant in determining whether peace and justice are independent or interdependent concepts.

3.2 'Peace and justice': Mutually exclusive or interdependent concepts?

In the contest between peace and justice for post-conflict societies, two schools of thought are clear and distinct. To begin with, there is the school that prioritises retributive justice through prosecutions as an accountability mechanism regardless of the consequences.[10] For example, under the Nuremberg Principles, justice was equated with retribution. The Nuremberg Charter stated that 'there shall be established an International Military Tribunal

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[8] See (n 1 above).

[9] AU Assembly 'Decision on the abuse of the principle of universal jurisdiction' Assembly/AU/Dec.243(XIII) Rev.1, Doc. Assembly/AU/11(XIII), 13th Ordinary Session, 1-3 July 2009, para 6; AU Assembly, Assembly/AU/Dec.245(XIII) Rev.1 (n 1 above) paras 7, 8 and 10; AU PSC, PSC/MIN/Comm(CXLII) (n 1 above) paras 3 and 14. As stated previously, while the issues of immunity and peaceful coexistence of citizens have been addressed at the regional level, the issue of amnesty has only manifested at national levels. For example, Chapter 4, Promotion of National Unity and Reconciliation Act 34 of 1995, Republic of South Africa; article IX, Peace Agreement between the government of Sierra Leone and the Revolutionary United Front (RUF) of Sierra Leone, grants absolute amnesty to Foday Sankoh, the leader of RUF and all combatants implicated in the atrocities http://www.sierra-leone.org/lomeaccord.html (accessed 3 August 2015).

[10] D Sharp 'Prosecutions, development and justice: The trial of Hissein Habre' (2003) 16 *Harvard Human Rights Journal* 147. Sharp dismisses commissions as tools used by abusive governments.

for the just and prompt trial and punishment of the major war criminals of the European Axis'.[11] Justice was implied to consist of prosecuting those persons alleged to have committed the crimes listed under the Charter and subsequently punishing them if found guilty. Similarly, although the ICC's conception of justice combines both prosecution and reparative elements, greater emphasis is placed on prosecution.[12] The Rome Statute calls upon 'every State to exercise its criminal jurisdiction over those responsible for international crimes',[13] and to ensure that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.[14]

This narrow definition of justice reflects the general acceptance of a retributive conception of justice in international criminal law even though the European and American systems take a more nuanced approach to several aspects of justice.[15] For example, in the *Velasquez-Rodriguez Case*, the Inter-American Court of Human Rights (Inter-American Court) observed that the state has a legal duty to prevent, investigate and punish any violation of the rights recognised under the American Convention on Human Rights.[16] The Inter-American Commission on Human Rights (Inter-American Commission) has adopted a similar approach that emphasises prosecution of international crimes.[17] Yet unlike the ICC, which has so far narrowed its reparative measures to monetary compensation,[18] the Inter-American system has taken a more elaborate approach to reparative justice. Noting that the Inter-American Court is merely a human rights tribunal with no prosecution mandate, its redress measures do not focus on prosecution. Instead, this

[11] Article 1, Charter of the International Military Tribunal (the Nuremberg Charter).
[12] Articles 5 and 75, Rome Statute.
[13] Para 4, Preamble to the Rome Statute.
[14] Para 6, Preamble to the Rome Statute.
[15] Sharp 'Prosecutions, development and justice' (n 10 above) 147.
[16] Judgment, Inter-American Court of Human Rights (Ser. C) No. 4 (1988) para 166.
[17] *Consuelo et al. v Argentina*, Report No. 28/92, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.83 Doc. 14 at 41 (1993); *Mendoza v Uruguay*, Report No. 29/92, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.83 Doc. 14 at 154 (1993).
[18] See for example, *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2) ICC-01/04-01/06 A A 2 A 3 (3 March 2015) Appeals Chamber.

system underscores numerous forms of remedies.

In the case of *Plan de Scinchez v Guatemala,* the Mayan community sought redress for the mass murder of more than 250 persons.[19] Other than requiring the state to investigate and punish the perpetrators, the Inter-American Court also ordered monetary compensation and a range of other non-monetary reparations: the establishment of a village house programme, medical and psychological treatment facilities for surviving victims, establishment of education and cultural programmes, and the translation of the judgment into the indigenous Mayan language.[20] In its earlier jurisprudence, the court had not only emphasised the duty of the respective states to investigate and punish the perpetrators of these offences but ordered extensive reparative measures that went beyond traditional monetary compensation and declarative orders.[21]

The European Court of Human Rights has also acknowledged that an effective remedy for grave human rights violations must include prosecution and punishment of high level individuals or those most responsible.[22] Unlike the Inter-American Court, though, the European Court had for a long time restricted its reparative measures to monetary compensation, declarative orders and costs.[23] In the 2000s, the Court slowly expanded its remedial base to include other orders such as restitution.[24]

International treaties establishing ad hoc tribunals have, however, adopted a narrow approach to the notion of justice by calling upon states to ensure the prosecution of individuals who commit international crimes.[25] The subsequent

[19] *Plan de Sánchez Massacre Case v Guatemala*, 2004 Inter-American Court of Human Rights (Ser. C) No. 105 (2004)
[20] Ibid.
[21] *Aloeboetoe et al. v Suriname*, Inter-American Court of Human Rights (Ser. C) No. 15 (1993).
[22] *Aksoy v Turkey*, Judgement of 18 December 1996, [1996] ECHR 68, [1997] 23 EHRR 553, para 98.
[23] *Scozzari and Giunta v Italy*, 2000-VIII European Court of Human Rights 471, 528. In this case, the Court acknowledged its lack of authority to issue explicit directions on remedial matters.
[24] *Brumdrescu v Romania* (Just Satisfaction), 2001-1 European Court of Human Rights 155, 163, 165.
[25] Article 4, The Genocide Convention; article 7, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984 and entered into force on 26 June 1987.

establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), each with specific mandatory provisions requiring prosecution of those responsible for crimes punishable under their Statutes, further underscores this trend.[26]

Proponents of this school of thought argue that 'trials are commonly thought to play the leading foundational role in the transformation to a more liberal political order. Only trials are thought to draw a bright line demarcating the normative shift from illegitimate to legitimate rule'.[27] It is argued that prosecuting leaders who violate human rights entrenches respect for the rule of law, while failure to do so breeds contempt of law and encourages future violations.[28] Thomas Hobbes observes that 'when a sovereign either cannot or will not protect its subjects from serious harm, then the sovereign loses exclusive jurisdiction over such criminal matters for there are some rights that no man can be understood … to have abandoned or transferred'.[29] It is this failure of a state to prosecute alleged perpetrators of heinous crimes that justifies an external intervention for prosecuting international crimes. Some scholars have gone further and pushed for the controversial agenda that the duty to prosecute international crimes is a *jus cogens* obligation.[30]

In contrast to this overall approach, there is a further school of thought which holds that peace must always be prioritised in all circumstances and, if need be, prosecutions should come in only much later.[31] This school of thought is predicated on the idea that failure to prioritise peace can lead to a vicious cycle of violence that subjects its victims to continuous suffering, as is the

[26] Article 1, Statute of the International Tribunal for the former Yugoslavia; article 1, Statute of the International Tribunal for Rwanda; article 1(1), Statute of the Special Court for Sierra Leone.
[27] R Teitel *Transitional Justice* (2000) 7.
[28] MP Scharf 'The amnesty axception to the jurisdiction of the International Criminal court' (1999) 32 *Cornell International Law Journal* 512.
[29] D Sharnak 'Justice and moral responsibility in the Congo' (2007) 4 *Eyes on the ICC* 71.
[30] JI Charney 'Universal international law' 87 *American Journal of International Law* 529, 541; IM Larbi 'International treaty obligations vs. international war crimes: Analysing United States article 98 agreement of the International Criminal Court in the context of international legal principles' (2004)1 *Eyes on the ICC* 177, 184.
[31] JL Goldsmith and SD Krasner 'The pitfalls of international idealism' 132(1) *Daedalus* 51; Sharnak 'Justice and moral responsibility in the Congo' (n 29 above) 69.

case in Uganda.[32] This line of thinking is not founded on support of impunity but on the rational fear of continuous grave suffering being visited on the people by those indicted and their supporters. This danger is particularly likely to arise in fragile democracies that are unable to withstand the destabilising effects that normally accompany prosecution of international crimes.[33] For this school of thought then, prosecution is not the most appropriate way of dealing with mass atrocities and is seen as capable only of impeding reconciliation efforts.[34] As such, prosecution is not able to completely deter would-be perpetrators who are likely to engage in similar atrocities. In addition, not only is retributive justice insufficient, but prosecutions may not effectively meet the needs of the victims and their families.[35]

The Democratic Republic of Congo (DRC) seems initially to have subscribed to this school of thought. Following the intense hostilities in North Kivu in 2009, the Congolese government negotiated a peace pact with a rebel movement (*Congres National pour la Defense du Peuple*, CNDP) operating within the area.[36] This led to the cessation of the hostilities and at the same time saw the integration of Bosco Ntaganda (the then leader of CNDP) and his soldiers into the regular Congolese army.[37] The government justified its actions as necessary for establishing peace in Eastern Congo.[38] This underlies the clamour and wrangling that ensued after the ICC's issuance of an arrest warrant against Ntaganda.[39] The Ntaganda case is quite complex, however, with the DRC, and even Ntaganda himself, at times seeming to prefer the ICC and other times not.

Despite these contesting notions of peace and justice, an emerging school of

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[32] The Ugandan case in relation to peace vs justice is discussed below.
[33] HL Packer *The limits of criminal sanction* (1968) 287; Sharnak 'Justice and moral responsibility in the Congo' (n 29 above) 70.
[34] M Minow *Between vengeance and forgiveness* (1998) 50; Sharnak 'Justice and moral responsibility in the Congo' (n 29 above) 70.
[35] R Gomez 'Transitional states, the ICC, and amnesties: Establishing an advisory commission' (2006) 57(3) *Eyes on the ICC* 69.
[36] PI Labuda 'The International Criminal Court in the Democratic Republic of Congo: A decade of partnership and antagonism' in MK Clarke, AS Knottnerus and E de Volder (eds) *Africa and the ICC: Realities and perceptions* (2016).
[37] Ibid.
[38] ICTJ 'Who is Bosco Ntaganda?' https://www.ictj.org/sites/default/files/ICTJ-DRC-Ntaganda-Facts-2009-English.pdf (accessed 9 March 2018).
[39] Labuda 'The International Criminal Court in the Democratic Republic of Congo' (n 36 above).

thought regards the dichotomy between them as fallacious.[40] This school of thought acknowledges that the two notions are capable of either coexisting side by side or facilitating one another.[41] Contrary to the ICC's narrow conception of justice, international criminal justice can be viewed as a holistic concept carrying with it both moral and legal obligations.[42] Not only is it concerned with isolating human rights violators, but it also prevents victims from seeking retribution through political violence – thus establishing peace. It further assists in establishing the truth about the commission of crimes as well as in instituting reparation measures for the victims.[43] Janine Natalya Clark regards justice as 'a multi-dimensional concept that encompasses judicial and non-judicial forms, retributive and restorative elements'.[44] In the words of Juan Mendez, the former president of the International Centre for Transitional Justice (ICTJ): 'A promise of impunity may well lead to a cease-fire; but lasting peace can only be built over a foundation of truth, justice, and meaningful reconciliation'.[45]

This school of thought requires a lot of compromises to be made to achieve peace and justice for warring groups. Perhaps this understanding may undo the knuckles that besiege the notions of peace and justice for international crimes in Africa. South Africa, for example, subscribes to this school of thought, as reflected in its notice to withdraw from the ICC which

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[40] M Wierda 'The positive role of international law in peace negotiations: Implementing transitional justice in Afghanistan and Uganda' in M Bergsmo and P Kalmanovitz (eds) *Law in peace negotiations* (2009); LM Keller 'The false dichotomy of peace versus justice and the International Criminal Court' (2008) 1 *Hague Justice Journal* 3; AU, 'Report of the African Union High-level Panel on Darfur (AUPD)' PSC/AHG/2(CCVII) (2009).; Clark 'Peace, Justice and the International Criminal Court' (n 6 above) 543; OA Maunganidze 'International Criminal justice as integral to peace building in Africa: Beyond the "peace v. justice" conundrum' in HJ van der Merwe and G Kemp (eds) *International Criminal Justcie in Africa* (2016) 50-52; J Galbraith 'The pace of international criminal justice' (2009) 31 *Michigan Journal of International Law* 83.

[41] Clark 'Peace, Justice and the International Criminal Court' (n 6 above) 543; RH Mnookin 'Rethinking the tension between peace and justice: The international criminal prosecutor as diplomat' (2013) 18 *Harvard Negotiation Law Review* 145; UNSC 'The rule of law and transnational justice in conflict and post-conflict societies' Report of the Secretary General, UN Doc. S/2004/616 (2004).

[42] Clark 'Peace, justice and the International Criminal Court' (n 6 above) 543.

[43] M Kersten 'Between justice and politics: The International Criminal Court's intervention in Libya' https://www.academia.edu/1558775/Between_Justice_and_Politics_The_International_Criminal_Courts_Intervention_in_Libya (accessed 19 February 2015).

[44] Clark 'Peace, justice and the International Criminal Court' (n 6 above) 543.

[45] JE Mendez 'National reconciliation, transitional justice, and the International Criminal Court' (2001) 15(1) *Ethics and International Affairs* 32.

acknowledged that 'we cannot apply international law in an idealistic view that strives for justice and accountability and thus competing with the immediate objectives peace, security and stability.'[46]

According to some scholars, Uganda's problems would also be better resolved through this more holistic approach to justice.[47] Uganda's referral to the ICC attracted much opposition amidst arguments that this would have a detrimental impact on prospects for peace.[48] Some commentators who previously supported ICC prosecution have since justified their arguments as necessary pressure on the LRA for encouraging peace negotiations.[49] Yet, other scholars argue that alternative non-prosecutorial mechanisms are likely to unlock this impasse.[50] This does not imply that these realist scholars rubber-stamp impunity; rather, they believe that through the alternative justice mechanism Uganda will not only gain peace but also achieve the goals underlying prosecution.[51]

It becomes apparent, then, that the notions of peace and justice are mutually interdependent. An attempt to separate the two and pursue one at the expense of the other is what has led to the current deadlock in the 'peace versus justice' debate in Africa. A successful methodology for addressing impunity would require a comprehensive approach, one that regards the notions of peace and justice as correlative with each other. This latter school of thought will inform the discourse in this chapter. Considering the varying schools of thought, it is important that AU's arguments for peace as a priority over prosecutions are critically analysed, not only to understand better the tension in the pursuit of justice in Africa, but also to establish whether these

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[46] 'Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court', para 6, contained in UN 'South Africa: Withdrawal', 19 October 2016, C.N.786.2016.TREATIES-XVIII.10 (Depository Notification, 25 October 2016).

[47] LM Keller 'Achieving peace without justice: The International Criminal Court and Ugandan alternative justice mechanisms' (2008) 23 *Connecticut Journal of International Law* 212.

[48] T Allen *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2006) 85, 186-187; Keller 'Achieving peace without justice' (n 47 above) 217; PC Diaz 'The ICC in Northern Uganda: Peace first, justice later?' (2005) 17, 2 *Eyes on the ICC* 25

[49] T Allen *Trial Justice: The International Criminal Court and The Lord's Resistance Army* (2006) 116; Keller 'Achieving peace without justice' (n 47 above) 217. Diaz 'The ICC in Northern Uganda' (n 48 above) 25.

[50] Keller 'Achieving peace without justice' (n 47 above).

[51] The Refugee Law Project, for example, argues that the ethos underlying prosecutions could as well be achieved through alternative mechanisms.

arguments can lead to positive contributions to the fight against impunity.

3.3 The doctrine of immunity of state officials

Immunity from prosecution for state officials is a historical phenomenon. International law has traditionally protected persons, agents or property of a sovereign state from the jurisdiction of foreign territory in which they are present. The doctrine of immunity arises from the need to protect these categories of persons from the jurisdiction of the foreign state to which they would otherwise be subject.[52] It is immunity from the jurisdictional authority of a state. This concept has its foundation in customary international law.[53]

Historically, heads of state enjoyed absolute immunity (both civil and criminal) from the jurisdiction of their own courts.[54] Through the principle of sovereign equality of states, the notion of sovereign immunity was borrowed by courts in foreign countries, implying that a head of state would never be brought before the courts of a foreign state since they are both sovereign and equal.[55] As states engaged in international commercial activities, it became evident that there was need to develop the notion of absolute immunity, as several categories of state agencies found themselves in foreign territories. This led to the distinction between 'acts done in the capacity of a state for which immunity attaches and those done in a private capacity'.[56] It formed the basis, furthermore, for the different types of immunities as they are currently known: immunity *ratione personae* and immunity *ratione materiae*.

3.3.1 Types of immunities

Also known as functional immunity or substantive immunity, immunity *rationae*

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[52] Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) Judgment [2002] ICJ Reports 3 (*Arrest Warrant)*. See separate opinion of Judges Higgins, Kooijmans, Buergenthal [3].
[53] *Arrest Warrant* (n 52 above) paras 51 and 52; article 31, Vienna Convention on Diplomatic Relations 1961 (VCDR).
[54] G Boas *Public international law: Contemporary principles and perspectives* (2012) 268; DS Koller 'Immunities of foreign ministers: Paragraph 61 of the Yerodia judgment as it pertains to the Security Council and the International Criminal Court' (2004) 20(7) *American University International Law Review* 13.
[55] R Cryer, H Friman, D Robinson and E Wilmshurst *An introduction to international criminal law and procedure* (1st edn) (2007) 422.
[56] Boas *Public international law: Contemporary principles and perspectives* (n 54 above) 270.

materiae applies to 'conduct carried out on behalf of a state'.[57] A state is barred from exercising its jurisdiction 'over foreign officials for acts carried out in the conduct of their official duties. Such acts are attributable to the state rather than the individual'.[58] Individual liability therefore does not arise.[59] The rationale underlying this is that the individual is a mere agent of his or her state.[60] The immunity is that of the state, not the individual, and it applies to both serving and former state officials.[61] Additionally, this immunity seeks to protect state dignity,[62] thereby allowing cordial relationship between states.

Immunity *rationae personae,* or personal or procedural immunity, on the other hand, accrues to the person by virtue of occupying certain offices.[63] Since this immunity attaches to the office and not the acts of the official, it does not distinguish between private and public acts,[64] hence the name 'procedural immunity'.[65] Immunities *rationae personae* automatically attach to sitting heads of state, heads of government, foreign ministers, diplomats and other officials in so far as they still occupy their offices.[66] The rationale for this immunity is to enable a country's international affairs to run smoothly without

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[57] C Gevers 'Immunity and the implementation legislations in South Africa, Kenya and Uganda' in K Ambos and A Maunganidze (eds) *Power and prosecution: Challenges and opportunities for international criminal justice in sub-Saharan Africa* (2012) 89; Koller 'Immunities of foreign ministers: Paragraph 61 of the Yerodia judgment as It pertains to the Security Council and the International Criminal Court' (n 54 above) 26.

[58] Boas *Public international law* (n 54 above) 272.

[59] A Cassese 'When may senior state officials be tried for international crimes? Some comments on the Congo v. Belgium case' (2002) 13 *European Journal of International Law* 853, 862; A Day 'Crimes against humanity as a nexus of individual and state responsibility: Why the ICJ got *Belgium v Congo* wrong' (2004) 22 (3) *Berkeley Journal of International Law* 489.

[60] Koller 'Immunities of foreign ministers' (n 54 above) 14.

[61] *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet* (No. 1); D Akande 'The jurisdiction of the International Criminal Court over nationals of non-parties: Legal basis and limits' (2003) 1 *Journal of International Criminal Justice* 638.

[62] S Wirth 'Immunities, related problems and article 98 of the Rome Statute' (2001) 12 *Criminal Law Forum* 429-430; Day 'Crimes against humanity as a nexus of individual and State responsibility' (n 59 above) 489; J Crawford *Brownlie's Principles of Public International Law* 8th edn (2012) 487.

[63] D Akande 'International law immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 409; Koller 'Immunities of foreign ministers' (n 54 above) 25.

[64] Koller 'Immunities of foreign ministers' (n 54 above) 25.

[65] Ibid; article 27(2) of the Rome Statute also refers to procedural immunities.

[66] A Cassese *International Law* 2nd edn (2005) 114-117, 120. State officers not entitled to personal immunities under customary international law include defence ministers, police officers whether senior or not, and military personnel; Akande 'International law immunities and the International Criminal Court' (n 63 above) 409.

fear or harassment.[67] This kind of immunity is therefore waived only upon leaving office.[68] In fact, upon leaving office, such a person will again be entitled to immunities *ratione materiae* even though these are only limited to those official acts he or she committed during his or her tenure in office.[69]

3.3.2 Immunity for international crimes in international tribunal

The question of whether state officials alleged to have committed international crimes can justifiably claim both personal and functional immunity before international tribunals is clouded in uncertainty in specific contexts as discussed subsequently. These challenges include the scope of application of these immunities and uncertainty on customary international law status of exceptions evidenced in international tribunals. Generally, immunities do not apply in international tribunals where member states decide to expressly exclude their application.[70] The International Military Tribunal at Nuremberg took the position that state representatives who author international crimes cannot 'shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings'.[71]

This reasoning was informed by the Nuremberg Principles, which underscore the irrelevance of official position.[72] Subsequent ad hoc tribunals and the ICC have taken a similar approach and discussed below. Yet, uncertainties still exist with respect to non-member states that are subjected to these tribunals, particularly non-state parties that have been referred to the ICC through UNSC referrals. More so, the AU has expressly provided for immunities under the Malabo Protocol. Thus, while the Nuremberg tribunal, ad hoc tribunals and the ICC have been categorical that immunity under international law does not

[67] Akande 'International Law immunities and the International Criminal Court' (n 63 above) 409-410; *Arrest Warrant* (n 52 above) para 53.
[68] P Gaeta 'Ratione materiae immunities of former heads of state and international crimes: The Hissen Habré case' (2003) 1 *Journal of International Criminal Justice* 187; *Arrest Warrant* (n 52 above) paras 54 and 55; D Akande 'The jurisdiction of the International Criminal Court over nationals of non-parties: Legal basis and limits' (n 61 above) 641.
[69] Article 39(2), VCDR; Gaeta 'Ratione materiae immunities of former heads of state and international crimes' (n 68 above) 188.
[70] Arrest Warrant (n 52 above) para 61.
[71] *Re Goering and Others*, 13 ILR (1946) 203, 221; *Attorney General of Israel v Eichmann* CrimA 336/61 [1962] IsrSC 16 2033, reprinted in 36 I.L.R. 277, the Supreme Court of Israel adopted a similar approach.
[72] Nuremberg Principle 7.

apply to international crimes, Malabo Protocol and the ICJ have taken a contrary view.

3.3.2.1 The ICJ position

In the *Arrest Warrant* case, the ICJ was called upon to give its opinion on the applicability of immunities *ratione personae* to incumbent ministers of foreign affairs from criminal jurisdiction of foreign national courts even when charged with international crimes. Hence, the ICJ's opinion is limited in relation to immunity in international courts exercising criminal jurisdiction, but relevant in understanding the position of immunity in customary international law.

Regarding *immunity ratione personae*, the Court confirmed the absolute nature of immunity *ratione personae*.[73] The ICJ further affirmed the applicability of immunities *ratione personae* from foreign jurisdictions by diplomatic and consular agents and holders of high-ranking state officers such as heads of state, heads of government and ministers of foreign affairs, in accordance with customary international law.[74]

The Court, however, further clarifed that in four circumstances, immunities enjoyed under international law by a sitting or former minister of foreign affairs will not be a bar to criminal prosecution. [75] The first situation, where such persons do not enjoy immunity in their own countries and can thus be prosecuted in their own countries, is self explanatory. The second situation indicates that a state can decide to waive immunity *rationae personae*, thus subjecting its official to prosecution before a foreign national court whether such an official is still in office or has left office. The third situation affirms that a foreign court can prosecute former state officials for crimes committed either before or after their taking office or acts committed during their tenure in office that were unofficial or private acts. In essence, where alleged crimes constitute part of the official duty of a former state official, it is the ICJ's suggestion that no prosecution can lie. It is thus the ICJ's position that a foreign court cannot exercise its jurisdiction over a high-ranking state official without the consent of his or her state unless such acts comprised the

[73] *Arrest Warrant* (n 52 above) paras 54 and 55.
[74] Ibid, paras 51 and 52.
[75] Ibid, para 61.

unofficial private acts. Though it would seem from the above ICJ interpretation that this is the case even where the said acts amount to international crimes, as discussed in detail below, a fair amount of judicial jurisprudence and scholarly writing argues that international crimes cannot constitute *rationae materiae*.[76]

The fourth situation implies that an international tribunal can exercise its criminal jurisdiction for international crimes over high-ranking state officials where its establishing statute expressly waives immunities. Indeed, this has been the case with the statutes establishing the ICTY, ICTR, SCSL and ICC.[77] This situation raises questions in the context of the applicability of an international court's jurisdiction to non-member states (as is the case under the ICC in the context of UNSC referral), especially so in view of the fact that under customary international law, such individuals still enjoy immunities. There have therefore been debates (discussed below) as to whether the Rome Statute provision on immunities *ratione personae* under article 27 applies to senior state officials of non-contracting states, particularly in the context of a UNSC referral.

3.3.2.2 The Rome Statute position

Under the Rome Statute, two provisions are central to any discussion on the application of official immunities in international criminal law. These are articles 27 and 98. Article 27 provides as follows:

> (1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 27 has the effect of removing immunities both at the national and international levels, the former applying when national authorities are acting in

[76] See discussion under point 3.3.2.3 below.
[77] Article 7(2), ICTY Statute.

response to a request by the Court.[78] Article 27 of the Rome Statute therefore suggests that any state official within the jurisdiction of states parties to the Rome Statute can never rely on any immunity (either immunity *ratione materiae* [27(1)] or immunity *ratione personae* [27(2)]) under international law to avoid the jurisdiction of the ICC. Article 98(1) of the Rome Statute, however, qualifies this kind of interpretation:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

While article 27 removes all forms of immunity, article 98 prohibits the Court from requesting its member states' assistance in the arrest and surrender or any other request where this may lead to breach of international law with respect to state or diplomatic immunity of a foreign person. Essentially, this provision requires member states to the Rome Statute to observe immunity with respect to individuals from non-member states. Clearly, the two provisions seem inconsistent with one another. The conflicting nature of immunity under the Rome Statute has been cited by South Africa as part of its grievances necessitating its withdrawal.[79] Several interpretations have thus been adopted with respect to immunity under the Rome Statute that emphasise either article 27 or article 98. There are two theories on how to address this seeming conflict.

The first theory is advanced by scholars who distinguish between immunities accruing to non-member states under article 98 and article 27 as it applies to member states.[80] In this regard, article 98(1) should be interpreted as barring the ICC from requesting its member states to assist with an arrest or surrender of state officials of non-member states, unless the latter waives their immunity. Dire Tladi thus agrees that 'the duty to cooperate under the ICC Statute cannot deprive non-States Parties of their rights in respect of

[78] D Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of International Criminal Justice* 337-338.
[79] UN 'South Africa: Withdrawal' (n 46 above) para 7.
[80] Akande 'The legal nature of Security Council Referrals to the ICC and its impact on Al Bashir's Immunities' (n 78 above) 339.

immunities under customary international law'.[81] This in itself is an acknowledgement of the applicability of immunities under international law to state officials of non-member states to the Rome Statute. Granted that the Rome Statute recognises immunities as a notion of customary international law, it follows that member states to the Rome Statute will be acting inconsistently with their obligation under international law if they were to arrest and surrender individuals from non-member states without the consent of such a state.

It should be noted, however, that such an international obligation will also depend on the status of customary international law in the domestic sphere. For example, in some countries like South Africa, customary international law is subject to the Constitution and legislation, if inconsistent with them.[82] This implies that since the domestic legislation – the ICC Act of South Africa – waives immunity in similar terms as under article 27 of the Rome Statute,[83] then the customary international law position on immunity will not hold as it is inconsistent with the legislation. Thus, from a domestic-law perspective, South Africa cannot raise customary international law on immunity as a ground for failing to effect the arrest of al-Bashir. Similarly, Kenya cannot shield itself under the umbrella of customary international law on immunities, since this is subject to its Constitution, which is the supreme law of the land and which waives immunities of the president (the highest state office) in relation to any international crime.[84] Since the application of the Kenyan Constitution is not limited to Kenyan citizens only but to Kenya's territorial boundaries, and considering that Kenya is a state party to the Rome Statute (which is part of the law of Kenya in terms of article 2(6) of its Constitution), not granting immunity to foreign heads of states before Kenyan courts would be consistent with Kenyan domestic law.

The above interpretation of article 98(1) of the Rome Statute implies that if al-

[81] D Tladi 'Immunities (Article 46A*bis*)' in G Werle and M Vormbaum (eds) *The African Criminal Court: A commentary on the Malabo Protocol* (2017) 212.
[82] Section 232, Constitution of the Republic of South Africa, 1996 ('Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament').
[83] Section 27(1) and (2), ICC Act of South Africa.
[84] Article 143(4), Constitution of Kenya, 2010.

Bashir and other heads of states indicted by the ICC from non-member states still enjoy immunity, then member states to the Rome Statute seemingly have a limited obligation to effect their arrest and surrender, depending on their domestic status of customary international law. A report by Amnesty International, however, adopts a highly controversial interpretation of this provision. According to the report, '[A]rticle 98 [1] of the Rome Statute affords no justification to any state to refuse to arrest and surrender a person sought in an ICC arrest warrant for genocide, crimes against humanity and war crimes.'[85] This includes officials from both member states and non-member states to the Rome Statute.[86] This is because, as the report argues, article 98(1) can be read only as referring exclusively to state or diplomatic immunity of property not addressed by article 27.[87] This approach is problematic, as it entirely ignores the actual interpretation of these legal provisions. Article 98 refers to 'the State or diplomatic immunity of a person or property'. The notion of property is used in the alternative to immunities of a person.

This first interpretational approach, however, raises crucial questions. Does it imply that the Rome Statute allows member states to renege on their customary law obligation when it calls upon its member states to cooperate in the arrest and surrender of indicted individuals from non-member states? What about the ICC cases against heads of state of non-member states, like al-Bashir and the late Gaddafi? If al-Bashir and Gaddafi were still entitled to international immunity under customary law, on what basis did the ICC call upon its member states to cooperate in his arrest and surrender? And relatedly, does a UNSC referral of a situation imply a UNSC waiver of any probable immunity? Can the UNSC waive this immunity?

Although the Rome Statute embodies a provision negating immunities for international crimes, this does not change the existing customary international law norm. It is very doubtful that states can confer upon themselves universal

[85] Amnesty International 'Bringing power to justice: Absence of immunity for heads of state before the International Criminal Court' AI Index: IOR 53/017/2010 (2010) 17.
[86] Ibid.
[87] Amnesty International 'Bringing power to justice' (n 85 above) 19.

jurisdiction through a treaty.[88] The provision under article 27 of the Rome Statute does not therefore imply that the customary international law on immunities ceases to exist. This provision is only binding on member states and is thus an exception to the rules of customary international law relating to immunities.[89] This is further supported by the fact that the requisite state practice, to prove otherwise, is absent.[90] Perhaps this is what the ICJ judgment failed to point out as the reason for refusing to accept Belgium's argument that there was a customary international law exception to the doctrine of immunity in cases of alleged international crimes.

The second and most convincing interpretation of the two conflicting provisions is that articles 27 and 98 of the Rome Statute render obsolete the notion of immunities for international crimes. Although the ICC has failed to consistently develop the theory, it holds that while high-ranking state officials of non-member states to the Rome Statute – but who are UN member states – enjoy immunity, the UNSC arguably has powers to change the order of this immunity by exercising its mandate under chapter VII of the UN Charter.[91] In another instance, the ICC has argued that the theory entails the power of a UNSC referral to subject a non-state party to the Rome Statute to the provisions of the Statute, including article 27(2), implying that in such a case no immunity applies on the ground of official capacity belonging to such non-state party 'that would otherwise exist under international law'.[92] In such a case, article 98(1) of the Rome Statute would therefore not apply as there is

[88] Akande 'The jurisdiction of the International Criminal Court over nationals of non-parties' (n 61 above) 623.
[89] Tladi 'Immunities (Article 46A*bis*)' (n 81 above) 211.
[90] See conflicting national and international practice as discussed in this section and also at section 3.3.2.3 on waiver of immunity.
[91] *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir) ICC-02/05-01/09-242 (13 June 2015) Pre-Trial Chamber II, paras 6-7; *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court), ICC-02/05-01/09-195 (9 April 2014) Pre-Trial Chamber II, paras 29-31.
[92] *Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar al-Bashir) ICC-02/05-01/09-302 (6 July 2017) Pre-Trial Chamber II, para 91.

no immunity that needs to be waived.[93]

The UN Charter permits the UNSC to take all necessary measures in the restoration of international peace and security where it determines a 'threat to the peace, breach of the peace, or act of aggression'.[94] This malleable discretion could as well include referring officials from UN member states to the ICC, even if their respective states are not parties to the Rome Statute.[95] Although some scholars have argued that the wording of a resolution by the UNSC affects the extent to which states are bound – in the sense that the obligation to cooperate could be expressly limited to only those states expressly mentioned or directed to do so by the UNSC's resolution, thus relieving this obligation of other member states[96] – this observation is however questionable. A resolution adopted by the UNSC is subsidiary in rank to the UN Charter. Since it is the UN Charter that binds all its members 'to accept and carry out the decisions of the Security Council in accordance with the present Charter',[97] then all member states to the UN will be bound by such a decision. Moreover, '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.[98] Thus, not only will the state officials from non-parties to the Rome Statute be bound by the Rome Statute provisions on immunity as though they were parties, but all UN member states will be obliged to cooperate with the Court in their arrest and surrender. In effect, the UNSC will have altered the order of immunity as a custom applicable to non-states parties to the Rome Statute.

For example, although Sudan is a member of the UN Charter, it is not party to the Rome Statute. However, Sudan is still bound by the Rome Statute as though it were a member by virtue of the UNSC's resolution 1593 adopted under chapter VII of the UN Charter referring the case to the Court.

[93] Ibid, para 93.
[94] Articles 39, 41 and 42, UN Charter.
[95] Indeed, article 13(b), Rome Statute, allows the ICC to exercise its jurisdiction on a referral by the Security Council under Chapter VII of the Charter of the United Nations.
[96] Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (n 78 above) 341.
[97] Article 25, UN Charter.
[98] Article 103, UN Charter.

Conversely, although resolution 1593 seems to mandatorily obligate only 'Sudan and all other parties to the conflict in Darfur' to cooperate with the Court,[99] it is also binding on all member states of the UN by virtue of article 25 and article 103 of the UN Charter. This explains the ICC finding that both the DRC and South Africa were bound by this resolution[100] despite the fact that the resolution is not expressly directed to them. Notably, however, inasmuch as the Security Council has selectively bestowed immunity on the basis of article 16, it has also been criticised for its selectivity in waiving this immunity under chapter VII of the UN Charter.[101]

A crucial question that arises in this regard is whether the act of ratifying the Rome Statute by a state sufficiently waives the right to immunity under customary international law of foreign officials from non-states parties who are within its jurisdiction. Should article 27 be interpreted in a manner that entirely ignores the express provisions of article 98(1)? Or can it be argued that the role of the UNSC under the UN Charter and the Rome statute sufficiently overrules customary international law as established by the ICJ in the *Arrest Warrant* case? If this is not the case, can contracting parties to the Rome Statute seek to rely on immunities *rationae personae* and immunities *rationae matariae*, especially when it comes to the arrest and surrender of heads of states from non-contracting parties?

In the *Al Bashir* case,[102] the ICC was seized with the opportunity to interpret these conflicting provisions. The PTC ignored any analysis of the ICJ's proposition and article 98 (1) of the Rome Statute as though they did not exist. The Court only emphasised its core values as combating impunity and the fact that al-Bashir's position as head of state did not bar it from exercising its jurisdiction.[103] Christopher Gevers[104] thus criticised the ICC for its failure to

[99] UNSC Resolution 1593, adopted at its 5158th meeting on 31 March 2005, UN Doc. S/RES/1593 (2005).
[100] *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-242 (n 91 above) paras 6-8; *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-195 (n 91 above) paras 28-31.
[101] See detailed discussion under section 2.2.3 of chapter 2 on the role of UNSC in the ICC on selective allocation and waiver of immunity.
[102] *Prosecutor v Omar Hassan Ahmed Al Bashir*, ICC-02/05-01/09-3 (n 2 above).
[103] Ibid, para 41.
[104] Gevers 'Immunity and the implementation legislations in South Africa, Kenya and Uganda' Ambos and Maunganidze (n 57 above) 87.

proffer a proper construction of immunity under the Rome Statute, particularly the relationship between articles 27(2) and 98(1). He argued that the ICC's inaction was being superseded by state practice, which was likely to have an indirect effect on the construction of these articles.

Indeed, the AU and its member states have sought to rely on article 98(1) of the Rome Statute to justify immunity in international crimes for heads of state.[105] Kenya made a proposal for amendment of article 27 of the Rome Statute. The proposal sought to 'pause' the prosecution of heads of state during their term in office.[106]

Although the AU attempted to have the ICC Assembly of States Parties (ASP) amend article 27(2) by expressly exempting serving heads of state from the Court's jurisdiction,[107] these efforts failed and instead the AU only got the ASP to amend procedural rules.[108] This failure would support the argument that the ASP felt that such immunity does not and should not apply. Yet states have been confused about their obligation in so far as cooperating in the arrest and surrender of al-Bashir to the ICC is concerned. This has forced the ICC to keep revisiting this issue to clarify the requisite state obligations as well as the non-applicability of immunity to international crimes for non-states parties to the Rome Statute who are UN member states, in the context of a UNSC referral.[109] Nevertheless, the ICC's reasoning has not been consistent, sowing

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[105] Akande 'The jurisdiction of the International Criminal Court over nationals of non-parties' (n 61 above); D Akande, M du Plessis and CC Jalloh 'An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC' (2010) ISS Position Paper (2010), http://www.elac.ox.ac.uk/downloads/AkandeDuPlessisJallohICCPositionPaper.pdf (accessed 5 June 2014).

[106] ICC Assembly of States Parties 'Report of the Working Group on Amendments' ICC-ASP/13/31, 13th Session, 8-17 December 2014, para 12 and Annex I VI. Kenya); 'Submission by the Republic of Kenya on amendments to Rome Statute of the International Criminal Court for consideration by the Working Group On Amendmentsun', contained in UN 'Kenya: Proposal of amendments' C.N.1026.2013.TREATIES-XVIII.10 (14 March 2014) (Depository Notification).

[107] Ibid; AU Assembly, Ext/Assembly/AU/Dec.1(Oct.2013) (n 1 above) para 10.

[108] ASP Resolution ICC-ASP/12/Res.7 'Amendments to the rules of procedure and evidence', adopted at its 12th plenary meeting (27 November 2013). Amendments were adopted on rules 100, 68 and 134 to the Rome Statute allowing excusal of an accused person from trial as well as change of the trial venue.

[109] *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-242 (n 91 above) paras 6-8; *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-195 (n 91 above) paras 28-31; *Prosecutor v Omar Hassan Ahmad Al Bashir,* ICC-02/05-01/09-302 (n 92 above) paras 91-97; *Prosecutor v Omar Hassan Ahmad Al Bashir (*Corrigendum to the Decision Pursuant to Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation

confusion rather than developing a cogent theory justifying the inapplicability of immunities to senior state officials from non-contracting parties.

Concerning al-Bashir's visit to Malawi, the government of Malawi argued, first, that it accorded al-Bashir immunities as a principle of public international law; secondly, that Sudan, being a non-member state to the Rome Statute, was not subject to the waiver of immunities under article 27 of the Rome Statute; and, thirdly, that Malawi acted in compliance with an AU resolution not to cooperate with the ICC in the arrest and surrender of sitting heads of states.[110] On the issue of immunities as a principle of public international law, the Court decided that, historically, immunities for heads of states had been rejected in international courts.[111] The Court further argued that the prosecution of heads of states in international courts had gained widespread recognition and acceptance in international law.[112] It also argued that Malawi was one of 120 state parties to the Rome Statute and that these states had thereby agreed to strip their heads of states of any form of immunity in relation to international crimes. This, according to the Court, was inconsistent with Malawi's refusal to arrest al-Bashir.[113] In the light of these reasons, the Court held that

> customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.[114]

In the case of the DRC, its government argued, inter alia, that it found itself in a delicate situation since article 98(1) of the Rome Statute prevented it from discharging its obligations as a state party in the absence of a state waiver of immunity of third states.[115] The DRC further argued that it was constrained by an AU order not to cooperate in the arrest and surrender of al-Bashir since

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Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al Bashir) ICC-02/05-01/09-139-Corr (13 December 2011) paras 22-43.

[110] *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139-Corr (n 109 above) para 8.

[111] Ibid, para 38.

[112] Ibid, para 38

[113] Ibid, para 40-41

[114] Ibid, para 43.

[115] *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-195 (n 91 above) para 18.

heads of states enjoyed immunity during their tenure in office.[116] In response, the PTC revisited and upheld the ICJ position on the inviolability of personal immunities 'before national courts of foreign States even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court'.[117] It sought, however, to distinguish this from the exceptional mandatory provisions under article 27(2) of the Rome Statute that such procedural immunities 'shall not bar the Court from exercising its jurisdiction over such a person'.[118] Regarding whether this mandatory provision applied to heads of states of non-contracting parties, the Court argued that the Rome Statute does not impose obligations on third states without their consent.[119] As such, their heads of states still enjoyed international immunity. According to the Court, the solution to resolving this conflicting obligation on member states lies in requiring a waiver of immunities by the third state under article 98(1) of the Rome Statute.[120]

The Court referred to UNSC resolution 1593 where it was decided that the 'Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'. According to the Court, since al-Bashir was entitled to procedural immunities, the mandatory requirement of full cooperation envisaged under this resolution had the legal effect of eliminating any impediment to proceedings before the Court, including the lifting of immunities.[121] Thus, the Court further argued that the cooperation of Sudan in relation to the waiver of immunities under article 98(1) had already been secured by virtue of this resolution.[122] Through this resolution, the UNSC implicitly waived al-Bashir's immunities under international law, thus posing no impediment at the horizontal level in his arrest and surrender.[123] Regarding DRC's argument that its failure to adhere to its obligations under the Rome Statute was due to conflicting legal obligations under the AU, which had called for 'non-

[116] Ibid, para 19.
[117] Ibid, para 25.
[118] Ibid.
[119] Ibid.
[120] Ibid, para 27.
[121] Ibid, para 29.
[122] Ibid.
[123] Ibid.

cooperation', the Court referred to the DRC's binding obligations under articles 25 and 103 of the UN Charter regarding the binding nature of UNSC resolutions and the supremacy of the UN Charter in relation to conflicting obligations.[124]

Similarly, South Africa has argued that al-Bashir enjoyed immunity from prosecution and arrest as a customary international law principle, and since there was no waiver in accordance with article 98, the ICC was precluded from requesting for his arrest and surrender to the Court.[125] According to South Africa, it was inappropriate to interpret resolution 1593 as waiving immunities.[126] What is more, paragraph 2 of the said resolution did not deal only with immunities and even if it were, its ordinary meaning suggests that 'Sudan would be obliged to waive immunities and that non-compliance with that duty would be a matter between Sudan and the Security Council'.[127] To hold otherwise would, according to South Africa, 'thrust the responsibility of the Council for acting against noncompliance with duties on Sudan onto individual states'.[128] South Africa therefore urged the ICC to interpret resolution 1593 in a manner consistent with international law principles on immunities. In its response, the Chamber reiterated the inviolability of heads of states' personal immunities in foreign national jurisdictions.[129] The Court further observed that 'the effect of a Security Council resolution triggering the Court's jurisdiction under article 13(b) of the Statute is that the legal framework of the Statute applies, in its entirety, with respect to the situation referred'.[130] Moreover,

> by deciding that Sudan shall cooperate fully with the Court, the Security Council … has also imposed on Sudan – acting under Chapter VII of the Charter of the United Nations – an obligation vis-à-vis the Court (to cooperate fully and provide any necessary assistance) which Sudan would not otherwise have as it has not ratified the Statute.[131]

In this regard, the Court observed that 'Sudan has rights and duties analogous

[124] Ibid, paras 30-31.
[125] *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-302 (n 92 above) para 32.
[126] Ibid, para 34.
[127] Ibid.
[128] Ibid.
[129] Ibid, para 68.
[130] Ibid, para 85.
[131] Ibid, para 87.

to those of States Parties to the Statute'.[132] Thus, 'article 27(2) of the Statute applies equally with respect to Sudan, rendering inapplicable any immunity on the ground of official capacity belonging to Sudan that would otherwise exist under international law'.[133] Article 98(1) of the Rome Statute therefore was not applicable as there was no immunity that needed to be waived.[134]

South Africa's second argument concerned competing legal obligations under the Host Agreement concluded between itself and the African Union, which required it to respect the immunities of al-Bashir.[135] Article VII(1) of the Host Agreement provides:

> The Government shall accord the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organizations attending the Meetings the privileges and immunities set forth in Sections C and D, Articles V and VI of the General Convention on the Privileges and Immunities of the OAU.

The Court, however, found that the above provision did not apply to al-Bashir since he was not in South Africa

> as a member of the Commission of the African Union, as a staff member of said Commission, or as a delegate or other representative of an inter-governmental organization, but attended the African Union Summit in Johannesburg in his capacity as Head of State of Sudan … no provision of the Host Agreement appears to confer on Omar al-Bashir any immunity from arrest.[136]

The AU has not only expressed its dissatisfaction with the Court's ruling on South Africa's legal obligation to arrest and surrender al-Bashir as being at 'at variance with customary international law' but has called on AU member states and 'particularly those that are also State Parties to the ICC, to oppose this line of interpretation of their legal obligations under the Rome Statute'.[137] Consequently, the AU has decided to seek 'a declaratory/interpretative clarification' from the ICC ASP on the relationship between articles 27 and 98 'and other contested issues relating to the conflicting obligations of States Parties to cooperate with the ICC' and an advisory opinion from the ICJ on the

[132] Ibid, para 88.
[133] Ibid, para 91.
[134] Ibid, para 93.
[135] Ibid, para 33.
[136] Ibid, para 67.
[137] AU Assembly 'Decision on the International Criminal Court' Assembly/AU/Dec.672(XXX), Doc. EX.CL/1068(XXXII), 30th Ordinary Session, 28-29 January 2018, para 3(i).

immunity question in relation to the relationship between articles 27 and 98 and states parties' obligations under international law.[138]

Similarly, concerning the non-cooperation of Jordan in the arrest and surrender of Al Bashir while on its territory, Jordan argued that Al Bashir enjoyed immunity ratione pasonae as a norm of customary international law.[139] His arrest by Jordan would therefore violate Jordan's obligations under customary international law.[140] As a non party to the Rome Statute, Jordan emphasised that Sudan had not waived Al Bashi'rs immunity from the jurisdiction of the ICC or that of Jordan.[141] As such, the relationship between Sudan and Jordan was governed by rules of customary international law as well as treaty laws.[142] More so, resolution 1593 did not expressly suspend the application of rules of customary international law or treaty law relating to immunities.[143] 'Only express provisions in Security Council resolutions can have the effect of requiring States to act in contravention of rules of general international law.'[144]

The Pre-Trial Chamber found that as a rule of customary international law, Al Bashir enjoyed personal immunity from the exercise of criminal jurisdiction by foreign national courts.[145] It further underscored that article 27(2) of the Rome Statute excluded immunity from arrest.[146] According to the PTC, article 27(2) had the following effects:

(i) it prevents States Parties from raising any immunity belonging to it under international law as a ground for refusing arrest and surrender of a person sought by the Court (vertical effect); and

[138] Ibid, para 5(i) and (ii).
[139] The *Prosecutor v Al Bashir* (Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir) PTC, ICC-02/05-01/09 (11 Decmber 2017) para 14.
[140] Ibid.
[141] Ibid, para 15.
[142] Ibid
[143] Ibid, para 16
[144] Ibid.
[145] The *Prosecutor v Al Bashir* (The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir") ICC-02/05-01/09, (12 March 2018) para 7
[146] Ibid.

(ii) it prevents States Parties from invoking any immunity belonging to them when cooperation in the arrest and surrender of a person to the Court is provided by another State Party (horizontal effect).[147]

Concerning the interpretation of article 98(1), the PTC observed that 'article 27(2) of the Statute ... excludes the application of article 98(1) of the Statute.'[148] And that article 98(1) 'provides no rights to States Parties to refuse compliance with the Court's requests for cooperation.'[149] It is this interpretation of article 98(1) that, inter alia, prompted the accused to appeal on the grounds that the PTC erred in its interpretation.[150] Concerning how the UNSC resolution 1593 affected Jordans legal obligation in relation to immunity, the PTC revisited its previous decision in the South African case discussed above. This formed another ground of appeal.

On Appeal Jordan faulted the PTC's finding that article 27(2) excludes the application of article 98(1) of the Statute.[151] It argued that article 27(2) only concerns with the ability of the Court to exercise its jurisdiction and not the question of arrest and surrender of a person to the Court.[152] Jordan pointed out that the only instance in which this provision may be relevant is in the arrest and surrender by a state party of its own officials.[153] In this regard, by virtue of the state joining the Rome Statute, it is estopped from refusing to cooperate with the court in accordance to articles 86 and 89 on the bases that such an official is entitled to immunity.[154] According to jordan, article 27(2) remains irrelevant in so far as 'the arrest and surrender of a person to the Court involves a State Party potentially surrendering an official of another State.'[155] Jordan further submitted that article 98, nonetheless, addresses the question of cooperation with the Court in relation to arrest and surrender of a

[147] Situation *in Darfur, Sudan, Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir), ICC-02/05-01/09-309 (11 December 2017), para 35.
[148] Ibid, para 32
[149] Ibid, para 41.
[150] Ibid, Para 41
[151] Para 16.
[152] Ibid.
[153] Para 18
[154] Ibid.
[155] Para 19

person to the Court involving a state arresting and surrendering a person of another state.[156] According to Jordan, this provision preserves immunities 'arising under customary or conventional international law in the absence of waiver.'[157] Unlike member states to the Rome Statute, Jordan emphasised that article 27(2) cannot be construed as an implicit waiver, 'of the conventional and customary international law immunities that [a state's] officials would otherwise enjoy from being arrested and surrendered to the Court by another State Party', in relation to non member states like Sudan.[158] Jordan referred to the interpetational rules of the Vienna convention and refuted the possibility of the the Statute to 'impose obligations on or deny rights to States that are not parties to the Statute, at least not without their consent.'[159] As such, Jordan underscored 'the exception to the exercise of the Court's jurisdiction provided in article 27(2) of the Statute should, in principle, be confined to those States Parties who have accepted it.'[160]

Jordan further found the PTC's decision that article 98(1) 'provides no rights to States Parties to refuse compliance with the Court's requests for cooperation' to be problematic.[161] According to the Jordan, 'article 98 refers to the "Court" not proceeding with a request, rather than referring to a "right of a State Party" not to comply with a request.'[162] This implies that any member state must immediately comply with the Courts' request to arrest and surrender whenever the Court makes it.[163] This absolutely denies the requested state any right. Including the determination of the question of immunity.[164]

Jordan further emphasized on article 86's provision that calls upon states to cooperate with the Court '… in accordance with the provisions of this Statute…'[165] Thus, member states must carryout their obligations under article 86 in a manner consistent to the limitations imposed by article 98.[166] The

[156] Para 19
[157] Ibid.
[158] Para 20
[159] Para 20.
[160] Ibid.
[161] Para 25-27.
[162] Para 26.
[163] Ibid.
[164] Ibid.
[165] Para 28
[166] Ibid.

Court, therefore, had no rights or powers to require a state to carryout an arrest and surrender in a manner that contravenes article 98.[167] Jordan further faulted the PTCs mandatory requirement of states to comply through a procedural interpretation of article 89(1) read together with article 98. According to Jordan,

> (1) the Court "transmits" a request to a State Party for arrest and surrender; (2) the State Party complies with the request but only "in accordance with the provisions of this Part"; (3) when relevant, the State Party notifies the Court that compliance would require the State Party to act inconsistently with its obligations under international law with respect to the immunity owed to another State or its officials; (4) the Court reviews whether compliance by the State Party would have such an effect; (5) if the Court concludes that compliance would have such an effect, then the Court may only "proceed" with its request if it "can first obtain" from the other State a waiver; and (6) if the Court concludes that compliance would not have such an effect, then the Court inform the State Party that article 98 does not apply.

Thus, a request by the Court does not mandatorily imply a state obligation to comply in the arrest and surrender. Jordan further dismissed the PTC's reasoning, following a similar one in the South African case that resolution 1593 had the effect of binding Sudan to article 27(2) as if Sudan was a member state to the Rome Statute.[168] As such article 98 Rome statute as well as president Al Bashirs immunity ratione personae did not apply in his arrest and surrender.[169] According to Jordan, the resolution does not affect Jordan's legal obligation under international law to accord immunity to Al Bashir.[170] First, neither does the resolution have an effect of applying the Rome Statute to Sudan as though it was a state party, nor does it bestow upon it rights and duties like member states.[171] 'Second, by requiring Sudan to cooperate fully with the Court, the resolution does not implicitly waive the immunity of President Al-Bashir, nor suspend Jordan's obligations under international law to accord such immunity.'[172]

[167] Ibid.
[168] Para 40
[169] Ibid.
[170] Para 41
[171] Ibid.
[172] Ibid.

Concerning the applicability of the Rome Statute to Sudan, Jordan, however, conceded that article 13(b) had the effect of subjecting Sudan to certain provisions of the Statute.[173] In this regard, according to the Jordan, there are two ways in which the Statute would apply to Sudan.[174] First some prosivions would apply to Sudan, being non party to the Statute, by virtue of the referral.[175] Second, are those provisions of the Statute that would become operative by vitrtue of resolution 1593.[176]

Jordan argued that article 13(b) concerns itself with the ICC's exercise of jurisdiction. As such, this provision makes the Statute apply to Sudan with respect to all its provisions relating to the aspect of jurisdiction.[177] Sudan is therefore not bound by the Statute's provisions on cooperation as it does not relate to the aspect of jurisdiction.[178] Jordan reasoned that if the referral, had the effect of subjecting Sudan to the provisions of the entire Statute, then paragraph 2 of the resolution, calling upon Sudan to cooperate fully with the Court, would not have been needed.[179] Similarly, article 27(2) is not binding on a non-party, in this case Sudan, by a mere UNSC referral as it does not concern itself with matters jurisdiction.[180] [I]immunities are simply a procedural bar that may, at times, prevent the Court from exercising whatever jurisdiction it possesses, or prevent States Parties from arresting and surrendering a person to the Court upon the latter's request.[181] The Court's jurisdiction continues to exist even if immunities apply and it may be exercised whenever those immunities cease to apply, for example when they are waived.'[182] Jordan underscored that 'immunity ratione personae enjoyed by a Head of State from foreign criminal jurisdiction ends when he or she ceases to hold that office, and therefore may no longer be invoked as against the exercise of jurisdiction.'[183] Jordan further reasoned that if it were to consider the Rome

[173] Para 56.
[174] Ibid.
[175] Ibid.
[176] Ibid.
[177] Para 58
[178] Para 59
[179] Ibid.
[180] Para 60.
[181] Ibid.
[182] Ibid.
[183] Para 62.

Statute as binding on Sudan in its entirety, and thus applying article 27(2), still the effects of this section would be limited by article 98.[184] Thus far,Jordan observed that 'since President Al-Bashir continues to enjoy immunity from the criminal jurisdiction of other States, the Court needs to obtain a waiver from Sudan before requesting States Parties to the Statute to arrest and surrender him to the Court.[185] More so, resolution 1593 cannot be read to have implicitly revomed president Al Bashir's immunity ratione personae.[186] Thus, for Jordan to arrest and surrender Al Bashir, the Court should have first sought a waiver of that immunity under article 98.[187]

The Appeal Chamber began by acknowledging that heads of state enjoyed immunity under customary international law.[188] A head of state from one state was immune from the criminal jurisdiction of another state.[189] This immunity, thus, operated in the context of relations between states.[190] According to the the Appeals Chamber, the effect of article 27(2) is that a head of state cannot raise this immunity as a bar to prosecutions before the ICC.[191] This is both a conventional law provision as well as a customary law provision.[192] This absence of immunity was also relevant when an international Court requested a state to effect the arrest and surrender of a head of state of another state.[193] Accordingly, the Appeals Chamber found that 'there was no rule of customary international law that would have given Mr Al-Bashir immunity from arrest and surrender by Jordan on the basis of the request for arrest and surrender issued by the Court. It follows that there was no ground for Jordan not to execute the request for arrest and surrender and that therefore it did not comply with its obligation to cooperate with the Court pursuant to articles 86 et seq. of the Statute.'[194]

[184] Para 62.
[185] Para 64.
[186] Para 77.
[187] Ibid.
[188] Para 101.
[189] Ibid.
[190] Ibid.
[191] Para 102.
[192] Para 103-113.
[193] Para 114.
[194] Para 117

Concerning the vertical effet of article 27(2), the Appeals chamber further disagreed with Jordans' argument that the application article 27(2) was limited to the ability of the Court to exercise jurisdiction. The Court underscored that article 27 and article 86 must be read together and any tension between them reconciled. According to the court, the best way to reconcile this tension is by 'reading article 27(2), both as a matter of conventional law and as reflecting customary international law, as also excluding reliance on immunity in relation to a Head of State's arrest and surrender.'[195] Furthermore, 'the reference to 'national law' would be meaningless if article 27(2) were considered to be unrelated to Part 9 of the Statute.'[196] Thus, 'article 27(2) is relevant not only to the adjudicatory jurisdiction of the Court, but also to the Court's 'enforcement jurisdiction' vis-à-vis States Parties to the Rome Statute.'[197] 'The term 'cooperate fully' in article 86 must be understood and interpreted in the context of article 27(2). A State Party would not be cooperating fully with the Court if, when faced with a request for the arrest and surrender of its Head of State, it refused to comply with this request, relying on Head of State immunity.'[198]

Concerning the horizontal effect of article 27(2), the Appeals Chamber further dismissed Jordan's argument that article 27(2) was only relevant in the relationship between the Court and State parties vis a vis their heads of state.[199] And as such, article 27(2) had no impact on the existence of heads of state immunities in the horizontal relationship between states.[200] The court could not find any persuading interpretation of article 27(2) that would allow state parties to invoke immunities in the horizontal relationship where the Court asked for an arrest and surrender of a head of state.[201]

Concerning the preservation of immunity and the need for the Court to obtain a waiver before making a request for arrest and surrender under article 98, the court held as follows:

[195] Para 122
[196] Para 125.
[197] Para 125
[198] Para 126.
[199] Para 127
[200] Ibid.
[201] Ibid.

> that article 98(1) of the Statute does not itself stipulate, recognise or preserve any immunities. It is a procedural rule that determines how the Court is to proceed where any immunity exists such that it could stand in the way of a request for cooperation. Accordingly, the existence of immunities must be established on the basis of the Court's sources of law, pursuant to article 21(1) of the Statute. As noted above, article 27(2) of the Statute prevents any reliance on Head of State immunity both vertically in the State Parties' relationship with the Court and horizontally in the relationship between States Parties when cooperation is sought by the Court. As a result, in the absence of Head of State immunity, article 98(1) of the Statute is not in its own right a fountain of immunity. In those circumstances, no waiver is required as there is no immunity to be waived. [202]
>
> …
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> Article 98(1) remains an important procedural safeguard as it requires the Court to consider whether a requested State owes an obligation to a 'third State' before proceeding with a request for arrest and surrender (or any other request for cooperation). Nevertheless, article 98(1) provides no basis for the presumption that immunity exists; it merely imposes a procedural requirement for the Court to consider whether any international law obligation exists and applies with regard to the requested State in a particular situation. In this case, the Pre-Trial Chamber correctly found that no such obligation applied.[203]

Concerning cooperation with regard to UNSC referrals, the Chamber observed that the Court is to be guided by two regimes. First is the regime under article 86 for member states or second, that under article 87(5) for non-member states.[204] The Appeals chamber further observed that 'in the absence of a comprehensive regime of cooperation spelt out in a Security Council resolution, with the clear intention of replacing the two cooperation regimes provided for in the Rome Statute,' the Court must always be is guided by these two regimes.[205] In the case of Sudan, although resolution 1593 did not provide a comprehensive cooperation framework, the Court resorted to the languge of the resolution calling upon Sudan to 'fully cooperate', which according to the Court, is binding on Sudan.[206] The notion to 'fully coperate' according to the Court 'means that the cooperation regime for States Parties to the Rome Statute is applicable to Sudan's cooperation with the Court, and

[202] Para 130
[203] Para 131
[204] Para 137.
[205] Para 137.
[206] Para 140

not article 87(5) of the Statute.'[207] According to the Court 'the latter regime is clearly inappropriate for a State that actually has a legally binding duty to cooperate with the Court.'[208] '[F]ull cooperation' in accordance with the Statute encompasses all those obligations that States Parties owe to the Court and that are necessary for the effective exercise of jurisdiction by the Court' including exclusion of immunities under article 27(2) of the Rome Statute.[209] Sicne there was no immunities, there was no need for the Court to seek for a waiver.[210]

Although the position under the Rome Statute is open to multiple interpretations, it is evident that the Court is keen on adopting any approach that renders the application of immunity obsolete in prosecuting international crimes before international tribunals. The Courts emphasis on interpreting the requirement of 'full coperation' under a UNSC resolution as subjecting non member states to the Rome Statute as though they were parties is, however, problematic. One wonders if the Court can arrive at a contrary view if a UNSC resolution referred a non-member states to the Rome Statute to the ICC without any reference to any level of cooperation. According to the Jordan case, in such cases, article 85 of the Rome Statute will apply, in which case then the Court will be compelled to seek for a waiver in such circumstances. Yet, from the Courts inconsistent approaches, the common denominator seems to be a total denial of immunity in matters relating to international crimes. It would have been better for the Court to get the UNSC's own interpretation of this resolution as a guide in the decision making.

Other than relying on customary international law, non-states parties to the Rome Statute have a leeway to conclude bilateral or multilateral immunity agreements, under article 98(1) and (2), bestowing immunity to their state officials.[211] Since customary international law obliges member states to international treaties to refrain from acts that defeat the object and purposes

[207] Para 141.
[208] Ibid.
[209] Para 143
[210] Para 144
[211] While article 98(1) relates to non-surrender where immunity exists, article 98(2) refers to circumstances normally unrelated to the protection accorded by sovereign immunity.

of such treaties,[212] treaty agreements under this provision would be limited exclusively to non-states parties to the Rome Statute. Interestingly, though, several states parties to the Rome Statute have concluded bilateral agreements with USA under article 98(2). The essence of these bilateral agreements is for the concerned states to shield American nationals from ICC prosecution. The provisions of these agreements are also reciprocal in that persons from member states to the Rome Statute benefit as well.[213]

While this does not imply ICC recognition of immunity for state parties to the Rome Statue, such an act by states that are parties to the Rome Statute is likely to influence future practice and understanding of immunities in international criminal law. To date, USA has concluded more than 50 agreements of this nature.[214] It is noteworthy, however, that the majority of these agreements were concluded through the coercion of ostensibly weak and unstable states.[215] Consequently, the agreements have gained the satirical name 'impunity agreements'.[216] Despite criticism that they contravene the Rome Statute, coupled with different interpretations that article 98 'was not intended to allow the conclusion of new Agreement but rather to prevent legal conflicts which might arise because of [already] *existing* agreements',[217] neither USA nor the ICC seems to be relenting.

USA has sought to distance itself from allegations that these agreements embrace impunity. These Agreements, it is argued, do not intend to protect

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[212] Article 26 of the Vienna Convention on the Law of Treaties 1969 (VCLT).
[213] Akande 'International law immunities and the International Criminal Court' (n 63 above) 427.
[214] V Haas 'Power and justice: The United States and the International Criminal Court' (2004) 1 *Eyes on the ICC* 171.
[215] Ibid, 173; Larbi 'International treaty obligations vs. international war crimes' (n 30 above) 181.
[216] Amnesty International 'International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes' AI Index: IOR 40/025/2002 (2002) https://www.amnesty.org/download/Documents/120000/ior400252002en.pdf (accessed 19 February 2015).
[217] Coalition for the International Criminal Court 'US bilateral immunity agreemnts or so-called "Article 98" agreements', CICC Factsheet, http://www.iccnow.org/documents/FS-BIAs_Q&A_current.pdf (accessed 24 May 2014); Haas, 'Power and justice' (n 214 above) 172; Larbi 'International treaty obligations vs. international war crimes' (n 30 above) 181-182; HP Kaul and C Kress 'Jurisdiction and cooperation in the Statute of the International Criminal Court: Principles and compromises' (1999) 2 *Year Book of International Humanitarian Law* 143, 165.

USA mercenaries or its officials engaged in unofficial acts.[218] According to USA's chief negotiator, had this been the intention, USA would have opted to use the phrase 'state of nationality' instead of 'sending state'[219] under article 98(2) of the Statute. The argument that the use of the latter terminology does not protect USA nationals does not make logical sense. Although it opens the application of this provision is open to every other state that has BIA in place, this automatically includes the USA.

It has further been argued that since article 98 of the Rome Statute does not clearly exclude new agreements, the US cannot be said to be acting in contravention of the Rome Statute.[220] Indeed, any literal interpretation of article 98(2) does not in any way bar its application to agreements concluded after the establishment of the ICC. Salvatore Zappala argues that the objects and purposes of these agreements are in tandem with the Rome Statute as they both seek to end impunity albeit in different forums.[221]

To the contrary, though, it is not true that article 98 compels the sending state to commence proceedings against such persons.[222] Article 98 requires only the consent of the sending states, in the absence of which it imposes no mandatory requirement of prosecution on the third state. Clearly, any literal interpretation of these bilateral agreements concluded with states parties to the Rome Statute cannot meet the threshold of interpreting a treaty in 'good faith', 'in … context' and 'in light of its purpose and objectives'.[223] This is especially so given the fact that non-member states have sought to conclude such agreements with member states to the Rome Statute. This study therefore agrees with Akande that, like article 98(1), article 98(2) should be

[218] DJ Scheffer 'Original Intent at the Global Criminal Court' *Wall Street Journal Europe*, 20 September 2002; Haas 'Power and justice: The United States and the International Criminal Court' (n 214 above) 172.
[219] Amnesty International 'International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes' (note 216 above).
[220] S Zappala 'The reaction of the US to the entry into force of the ICC Statute: Comments on UNSC Resolution 1422 (2002) and Article 98 Agreements' (2003) 1(1) *Journal of International Criminal Justice* 123; Larbi 'International treaty obligations vs. international war crimes' (n 30 above) 186.
[221] Zappala 'The reaction of the US to the entry into force of the ICC Statute: Comments on UNSC Resolution 1422 (2002) and Article 98 Agreements' (n 220 above) 124.
[222] Ibid.
[223] Article 31(1), VCLT.

construed as benefiting only non-states parties to the Rome Statute.[224] Yet this may be so only to a limited extent, since where a state is party to the UN Charter, then such immunity can be removed by virtue of a UNSC resolution imposing ICC jurisdiction.

3.3.2.3 Waiver of immunity for international crimes

Despite the inconsistencies under the Rome Statute, particularly in relation to non-state parties that enjoy immunity but are subject to the Court's jurisdiction through a referral in which case their immunity has not been waived, and the ICJ's position, some scholars and tribunals have variously held the opinion that immunity *ratione materiae* does not apply to international crimes.[225] Essentially, these courts and scholars have arrived at this conclusion through two major arguments.

On the one hand, some argue that immunities must yield, given the *jus cogens* nature of international crimes.[226] Those who adhere to this school of thought have found the ICJ's reasoning to be less convincing,[227] not to mention unfortunate.[228]

In relation to functional immunity, other scholars argue that international crimes can never comprise official functions of a state.[229] Some of them maintain that in the context of international crimes, customary international law allows one to derogate from the rule of immunities *rationae materiae* for

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[224] Akande 'International law immunities and the International Criminal Court' (n 63 above) 428.

[225] Akande 'The jurisdiction of the International Criminal Court over nationals of non-parties' (n 61 above) 638; Amnesty International 'Bringing power to justice' (n 85 above); Gaeta 'Ratione materiae immunities of former heads of state and international crimes' (n 68 above); Akande 'International Law immunities and the International criminal court' (n 63 above) 413; Cassese *International Law* (n 68 above) 108; MC Bassiouni 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practice' (2001) 42 *Virginia Journal of International Law* 81, 84; Day 'Crimes against humanity as a nexus of individual and state responsibility' (n 59 above) 49.

[226] Akande 'The jurisdiction of the International Criminal Court over nationals of non-parties' (n 61 above) 638; Cassese *International Law* (n 66 above) 108.

[227] Gaeta 'Ratione materiae immunities of former heads of state and international crimes' (n 68 above) 187.

[228] M du Plessis 'South Africa's implementation of the Rome Statute' in K Ambos and A Maunganidze (eds) *Power and prosecution: Challenges and opportunities for international criminal justice in sub-Saharan Africa* (2012) 37.

[229] *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet* (No. 1), [1998] 4 All ER 897 (HL); *R v Bow Street Stipendiary Magistrate and others, ex parte Pinochet* (No. 3), [1999] 2 All ER 97 (HL).

high-ranking state officials, including heads of state.[230] As such, they cannot be covered by immunity *ratione materiae.* Indeed, this philosophy has informed the practices in the ICTY, ICTR and the SCSL. The statutes establishing these tribunals contained provisions that expressly barred the application of immunities by ensuring prosecution of all persons responsible for serious violations.[231] This was underscored by the tribunals' practice, which considered the non-applicability of immunity to international crimes as a rule of customary international law.[232]

Max du Plessis suggests that states parties to the Rome Statute are obliged to prosecute international crimes irrespective of customary law notions of immunities.[233] Like-minded scholars also maintain their position on the redundant nature of article 98 of the Rome Statute and uphold the fact that immunity does not apply to prosecutions in an international tribunal as a norm of customary international law.[234] Thus, where international crimes are the subject of prosecution, it does not matter whether or not a state waives the immunities of the concerned state officer or whether the alleged crimes were committed as part of an official duty or private act. The ICC's practice of issuing arrest warrants for sitting heads of state and senior officials from non-states parties to the Rome Statute without such a state waiver in place supports this thinking.

Contrary to this thinking, however, the ICJ qualified the possibility of prosecuting senior state officials by limiting such eventualities to cases only where there is a state waiver or establishing treaty of the international court

[230] Cassese 'When may senior state officials be tried for international crimes?*'* (n 59 above) 853; Gaeta 'Ratione materiae immunities of former heads of state and international crimes' (n 68 above) 189; Larbi 'International treaty obligations vs international war crimes' (n 29 above) 177; Koller 'Immunities of foreign ministers' (n 54 above) 21.
[231] See n 77 above.
[232] *Prosecutor v Tihomir Blaškić* (Decision on the objections of the Republic of Croatia to the Issuance of *Subpoenna Duces Tecum*) IT-95-14-PT (18 July 1997) ICTY Trial Chamber; *Prosecutor v Slobadan Milosevic and others* (Decision on Preliminary Motions) IT-99-37 (8 November 2001) ICTY Trial Chamber, paras 28 and 31.
[233] Du Plessis 'South Africa's implementation of the Rome Statute' (n 228 above) 36-37.
[234] JD van der Vyver 'Prosecuting the president of Sudan: A dispute between the African Union and the International Criminal Court' (2011) 11 *Africa Human Rights Law Journal*, 683; Akande, du Plessis and Jalloh 'An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC' (n 105 above).

expressly providing for such an exemption.[235] Otherwise, according to the ICJ, there can be no foreign exercise of jurisdiction over international crimes for a serving senior state official who is protected by immunities *ratione persona*.[236]

Though within the context of foreign national courts, the ICJ's opinion is categorical that immunity *ratione personae* for serving senior state officials is absolute and subsists even where a state official is alleged to have committed international crimes.[237] The ICC in the immunity cases of Malawi, DRC and South Africa discussed above insisted that the ICJ's reasoning is limited to foreign national jurisdictions. The ICC itself has previously agreed that 'the rationale for foreign state officials being entitled to raise personal immunity before national courts is that otherwise national authorities might use prosecutions to unduly impede or limit a foreign state's ability to engage in international action'.[238] Contrary to the ICC's argument that this danger does not arise in case of international courts and tribunals,[239] this study argues that in all the cases discussed above concerning al-Bashir, the requirement of states by an international court to arrest and surrender a head of state has the effect of 'unduly imped[ing] or limit[ing] a foreign state's ability to engage in international action'. Arguably, this should justify the recognition of personal immunities of such officers, particularly where they have not consented to the jurisdiction of the Court in question.

It is, however, debatable whether there is sufficient state practice to establish a trend that can be said to have coalesced the practice of exempting international crimes to immunity into a new international custom, as alleged by some of these scholars.[240] First, although the prohibition of some international crimes has gained the status of *jus cogens,* it does not follow that non-

[235] *Arrest Warrant* (n 52 above) para 61.
[236] Ibid, para 58.
[237] Some scholars agree with the ICJ's thinking in this respect: Akande 'The jurisdiction of the International Criminal Court over nationals of non-parties' (n 61 above) 641; A Cassese *International Criminal Law* (2003) 284-285; Cassese *International Law* (n 66 above) 108; Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (n 78 above) 334; Akande 'International Law immunities and the International criminal court' (n 63 above) 410, 411.
[238] *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139-Corr (n 109 above) para 34.
[239] Ibid.
[240] See n 233 and 234 above.

recognition of immunity from prosecution for these crimes is also a *jus cogens*. The rules giving immunity should not be confused with the rules imposing individual criminal responsibility for international crimes. By analogy with the ICJ's analysis of state immunity, the rules on immunity

> are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought are lawful or unlawful.[241]

Moreover, scholars opposed to the application of immunities in prosecuting international crimes specifically refer to customs prohibiting functional immunities.[242] In fact, some of the proponents of this idea agree with the absolute nature of personal immunities while in office.[243] According to Steffen Wirth, immunity *ratione personae* for heads of state is immunity *erga omnes.*[244] This implies that as long as a head of state is on active duty, every foreign jurisdiction is under an obligation to respect his immunity.

Secondly, assuming that there exists a new norm exempting international crimes from any immunity, it would have to be shown that such a norm has acquired both the requisite 'state practice'[245] (*usus*) and the corresponding views of the norm by states as a binding norm *(opinio juris*).[246] A practice must therefore meet these two requirements for it to be said to have attained the status of a customary international law norm. In addition to concurring with Dire Tladi's emphasis on the practice of international ad hoc tribunals as constituting the requisite practice of denial of immunity for international crimes,[247] this study opines that international custom also stresses that such practice must be reflected in individual state practice, especially of those

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[241] *Jurisdictional Immunities of the States (Germany v Italy: Greece intervening)* Judgment [2012] ICJ Reports 99, para 93.
[242] Article 4, Convention on the Prevention and Punishment of the Crime of Genocide; see also (n 233 and 234 above).
[243] Cassese *International Law* (n 66 above) 119; D Akande 'International Law immunities and the International Criminal Court' (n 63 above) 410-411.
[244] Wirth 'Immunities, related problems, and article 98 of the Rome Statute' (n 62 above) 432.
[245] This implies that such a practice has acquired long-term and widespread compliance by many states. In the *North Sea Continental Shelf Case (Federal Republic of Germany/Denmark v Federal Republic of Germany/Netherlands*) Judgment [1969] ICJ Reports 3, para 74.
[246] This implies that states feel they are under a mandatory international legal obligation to comply with such a practice. See Cassese *International Law* (n 66 above) 157. Article 38(1)b of the ICJ Statute; *North Sea Continental Shelf* case (n 245 above) para 77.
[247] D Tladi 'Immunities (Article 46A*bis*)' (n 81 above) 213.

states whose interests are specifically affected.[248]

The interpretation of the concept of immunity for international crimes in the practice of states that have specifically prosecuted these crimes at a domestic level, though complicated, betrays any conclusive argument that international crimes are exempt from immunities under customary international law. In the *Fidel Castro,*[249] *Gaddafi,*[250] and *Sharon*[251] cases, Spain, France and Belgium, respectively, upheld the absolute nature of immunities *ratione personae* as a norm of customary international law*.* The UK courts have also previously held that neither UK law nor international law required the denial of immunities 'just because' the alleged offence contravened a rule of *jus cogens* or attracted universal jurisdiction.[252] Similarly, when Pinochet was denied immunity by the House of Lords, it was observed that the same would have applied if he were still the head of state at the time.[253] Again, in Kagame's alleged involvement in Rwanda's genocide of 1994, a Spanish magistrate observed that although he had evidence implicating Kagame, he could not charge him because as a sitting president, Kagame had immunity under customary international law.[254] In the case of Hissen Habré in Belgium, the then Chadian government adopted national legislation that waived Habré's immunity from foreign

[248] *North Sea Continental Shelf* cases (n 245 above) para 74.
[249] *Audiencia Nacional (Central Criminal Court)* Decision of 4 March 1999, Legal grounds 1-4.
[250] France's Appeals Court held that General Gaddafi did not enjoy diplomatic immunity even as a serving head of State. Thus, he was found criminally liable for the terrorist bomb attack on a France DC-10 airliner over Niger in 1989. This was overruled, however, by France's highest court (*Cour de Cessation,* Judgment of 13 March 2001) 218-219.
[251] *The Court of Cassation (Belgiums Supreme Court)* 12 February 2003. Belgium's highest court threw out a case against the then Israeli prime minister Ariel Sharon for war crimes.
[252] *Jones v Saudi Arabia UKHL* (2006) paras 27 and 28. The claimants in this case suffered systematic torture in the United Kingdom of Saudi Arabia. They sought to enforce in England their claim for compensation against the United Kingdom of Saudi Arabia. Their key argument was that the proscription of torture as a peremptory norm precludes the grant of immunity to states or individuals sued for committing the act. The case was dismissed. This holding followed a similar earlier case against the Kingdom of Kuwait in *Al-Adsani v United Kingdom* (2001) 34 EHRR 273.
[253] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm (accessed 10 March 2015); *Regina v Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division) http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm (accessed 10 March 2015). The House of Lords acknowledged the absolute nature of immunity *ratione personae.*
[254] Commentator 'The Spanish indictment of high-ranking Rwandan officials' (2008) 6(5) *Journal of International Criminal Justice* 1003.

national jurisdiction for crimes committed while head of state in Chad.[255] Relying on this, the Belgian authorities denounced the possibility of Habré claiming any immunity *ratione materiae* from Chadian authorities.[256] If the issue of exempting immunity in the prosecution of international crimes had coalesced at all into customary international law, then Chad's enactment of national legislation waiving Habré's immunities was unwarranted: it would have been superfluous for Chad to waive Habré's immunities if customary international law obviously obliged Belgium to prosecute him.

Although all of these examples involve national state court decisions and not international courts, their decisions in respect of immunity were informed by an analysis of the position under international law, in terms of both the relevant conventions and customary international law. Notably, states whose interests have specifically been affected have not recognised this norm as an international custom. It can thus be concluded that the practice of exempting immunity in prosecuting international crimes has not yet coalesced into a custom. Thus, although there are instances of exempting immunity for international crimes – particularly before international courts and before domestic courts where a state has ratified and domesticated a treaty exempting immunity – this does not mean the practice has become either *jus cogens* or an international law custom.[257]

Furthermore, in countering the scholars who insist that exemption of immunity for international crimes is a custom of international law, one is tempted to rely on the doctrine of a persistent objector under customary international law. The doctrine of 'a persistent objector' allows 'a nation that objects to an emerging customary norm to refuse to be bound by that norm even after the norm attains the status of customary international law'.[258] However, this objection must be clear and consistent in both the nascent stages of formation of the

[255] Gaeta 'Ratione materiae immunities of former heads of state and international crimes: The Hissen Habré case' (n 68 above) 187.
[256] Gaeta 'Ratione materiae immunities of former heads of state and international crimes: The Hissen Habré case' (n 68 above) 186, referring to the letter written to the Belgian authorities by the government of Chad.
[257] *S v Petane* HC SA (1988) wide ratification of AP I to Geneva Convention does not automatically mean settled practice.
[258] L Loschin 'The persistent objector and customary human rights law' (1996) 2 *U.C. Davis Journal of International Law & Policy* 148.

custom and when it has been duly formed.[259] Any actions to the contrary can be interpreted as consent.[260]

While it can be said that the objection by the AU to the non-application of immunities for heads of state in international criminal justice has been after the fact of the ICC,[261] some AU member states, such as Sudan and Libya, have persistently objected to this idea right from its formative stages and up until the advent of the Rome Statute, which they subsequently refused to ratify.[262] Arguably, therefore, such a persistent objector may seek to be exempt from a newly established customary norm.

It is questionable, though, whether a state would be willing to object to the bitter end to qualify as a persistent objector should the exemption of immunity for international crimes become a customary international law norm. First, this is because of the changing character of the notion of 'persistent objector'. According to Antonio Cassese, the international community has become more integrated, less individualistic and less anarchic.[263] As such, no state would withstand the pressure from the international community in the event that it attempted to exempt itself from a customary rule. Secondly, the notion of a persistent objector has no firm support in state practice.[264] It is therefore difficult for a state to disassociate itself from a rule of custom on the basis of being a persistent objector.[265]

3.3.2.4 The African Court's position

The AU holds the position that its serving heads of state enjoy absolute immunity from prosecution. This has been asserted specifically with respect to attempts to prosecute al-Bashir, Kenyatta, and, previously, the late Gaddafi. The AU has gone further and incorporated this position on head of state immunity within the statute of the proposed African regional criminal court:

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[259] Ibid.
[260] P Dumberry 'Incoherent and ineffective: The concept of persistent objector revisited' (2010) 59(3) *The International and Comparative Law Quaterly* 781.
[261] See generally n 1 above.
[262] African state parties to the Rome Statute https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx (accessed 1 September 2018).
[263] Cassese *International Law* (n 66 above) 163.
[264] Ibid.
[265] Article 13(b), Rome Statute.

> No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.[266]

The AU is on its way to developing a new norm on the issue of immunity for international crimes. However, the position it has adopted is problematic for several reasons. First, the provision above assumes that the Protocol is the primary international treaty on criminal law. What happens to African states that are likely to become parties to this Protocol and are also parties to the UN Charter and Rome Statute, which abjures any form of immunity? How does one reconcile a state's obligations under the different treaties?

Secondly, the Malabo Protocol does not clearly distinguish between immunity *ratione personae* and immunity *ratione materiae,* and is unclear on the nature of its immunity *ratione materiae.* Nevertheless, Garth Abraham makes a convincing case that, despite its vagueness, the provision bestows personal immunity.[267] The wording 'during their tenure of office' implies personal immunities since this type of immunity attaches to the office and exists only during ones' tenure in office. Yet the inclusion of 'other senior state officials based on their function' could naturally imply functional immunity. One could argue that the qualification on functional immunity is applicable only to senior state officers and not to all those officials listed earlier.

Another possible interpretation is that this provision applies to both types of immunities for all the listed state officials. This in itself is problematic, however. First, the provision can be taken as providing absolute personal immunity to a wide range of 'other senior state officers'. Given the nature of personal immunities, this implies that no senior AU state official can be prosecuted for international crimes until such time as the official relinquishes power. Regarding immunities *ratione materiae*, the Protocol envisages a possibility of future prosecution after the officers involved leave office.

While the recognition of these immunities is well anchored in customary

[266] Article 46A *bis*, Malabo Protocol.

[267] G Abraham 'Africa's evolving continental court structures: At the crossroads?' South African Institute of International Affairs' South African Institute of International Affairs Occasional Paper No. 209 (2015) 14. Abraham also interprets this provision as applying to personal immunities.

international law, their incorporation in the Malabo Protocol raise a few policy arguments about the wisdom of such a rule of international law and its likely impacts. For example, though it envisages the possibility of future prosecution after an officer leaves office, the Protocol does not seem to foresee the very real possibility that state officers who engage in the commission of international crimes may fail to relinquish power for fear of prosecution. Should such officers be left to continue with the atrocities until their tenure in office is over? What if they never leave office? It is also not clear who is included under the phrase 'other senior state officials'. How does one reconcile these immunities with the duty to hold accountable the perpetrators of past crimes as an effective remedy to the victims? In view of all these concerns, one needs no further analysis to foresee the confusion that is likely to hamper the AU in combating impunity through this legal framework.

As such, the Protocol has rightly raised eyebrows, with certain scholars calling it a rubber-stamp for impunity.[268] According to Abraham, for example, this amendment 'represents a major setback in the advance of international criminal justice; in fact, it can only be construed to be in the interest of those African leaders fearful of an end to a culture of impunity'.[269] What is more, Chacha Murugu, referring to the context of leaving office, observes that 'immunity of state officials is no longer a valid defence for the commission of international crimes'.[270] The sum effect of such a provision not only denies justice to victims but is detrimental to the fight against impunity,[271] signaling retrogression in the war against impunity for international crimes. Evidently, the need to recognise the immunity of heads of state and government and other state officials must have been a major driver in expanding the mandate of the African Court. It can be argued as well that African states' reluctance to ratify the Malabo Protocol[272] suggests that its adoption may have been mere

[268] Ibid, 15.
[269] Ibid, 14.
[270] C Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) *Journal of International Criminal Justice* 1077.
[271] JN Kariri 'Can the new African Court truly deliver justice for serious crimes?' ISS Today (2014) http://www.issafrica.org (accessed 10 March 2017).
[272] As noted in chapter 1 of this thesis, as at the time of writing, the Malabo Protocol had 11 signatories, with no ratifications. The AU itself has expressed 'concern at the slow pace of ratification of the Protocol' (see AU Assembly, Assembly/AU/Dec.672(XXX) (n 134 above) para 3(iii).

political posturing rather than an expression of genuine intention.

Even as the political elites within the AU insist on the recognition of immunity for state officials, some states such as Botswana have held different opinions especially where international crimes are alleged to have been committed.[273] Likewise, other African jurisdictions have adopted the content of article 27 of the Rome Statute in their domestic legislation, thereby denying immunity to their own state officials for international crimes.[274]

For its part, the AU argues that the position adopted under the Malabo Protocol resonates with customary international law.[275] Dire Tladi faults the AU's reasoning on two grounds, however. First, he argues that '[t]he rationale for immunity of states and their officials, namely, the sovereign equality of states, does not apply to the exercise of jurisdiction of international courts and tribunals since, though created by states, they are not themselves states'.[276] This study agrees with Tladi that international institutions created by states are themselves independent of states, in the sense that they are separate legal persons. However, the basis of negotiating the international treaties establishing these courts is in itself reliant on the principle of sovereign equality of states. Implicitly, states expect to be accorded similar status under international treaty law unless they expressly state otherwise in the negotiated legal instruments. This affirms the reasoning in the ICJ judgment that immunity *rationae personae* is excluded through such an express provision contained in the establishing statutes of international criminal tribunals. In fact, the very lack of sovereign equality of states in the practices of the ICC is at the heart of African states' grievances.

Tladi is not alone. Paola Gaeta has also previously argued that 'the very rationale for the rules of personal immunities is lacking when criminal

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[273] M Kersten 'Backing the ICC: Why Botswana stands alone amongst the AU states' http://justiceinconflict.org/2013/06/13/backing-the-icc-why-botswana-stands-alone-amongst-au-states/ (accessed 10 March 2015); Voice of America 'Botswana supports International Criminal Court' http://www.voanews.com/content/botswana-supports-international-criminal-court/1764960.html (accessed 10 March 2015).

[274] Article 50(2)(n), Constitution of Kenya 2010; section 27(1), International Crimes Act of Kenya (2008); section 4(2)(a), ICC Act of South Africa; article 25(1), ICC Act of Uganda (2010); article 7, Burkina Faso, Loi 052-2009/AN du 03 December 2009.

[275] AU Assembly 'Decision on Africa's Relationship with the International Criminal Court (ICC)' Ext/Assembly/AU/Dec.1(Oct.2013), Extraordinary Session, 12 October 2013, para 9.

[276] Tladi 'Immunities (Article 46A*bis*)' (n 81 above) 212.

jurisdiction is instead exercised by an international criminal court'.[277] Supposing that Tladi and Gaeta are correct, does this imply that the exercise of international criminal justice has no impact whatsoever on the sovereign equality of states? What about the need for consistency and certainty of legal norms in international criminal justice, especially in the fight against impunity? Dapo Akande has acknowledged the far-reaching consequences that the exercise of international criminal jurisdiction has on sovereign equality of states and their international relations.[278] It cannot be ignored that international criminal justice is entirely dependent upon state cooperation in facilitating its investigations and prosecutions. Thus, divorcing national state practices and the interstate doctrine of sovereign equality from the exercise of international criminal jurisdiction is tantamount to an artificial practice of international criminal jurisdiction.[279]

Secondly, Tladi argues furthermore that 'while the immunity of officials from the jurisdiction of the courts of *foreign states* can be shown to exist in the practice of states accepted as law, extending this immunity to international courts and tribunals would require evidence of practice of states accepted as law to this effect', which state practice does not exist.[280] In this regard, Tladi refers to ICC decisions seeking to exclude the application of immunities to international crimes.[281] Although there may seem to be a trend of excluding immunity for international crimes, this has been riddled with inconsistencies in the law of various key international treaties, including the Rome Statute itself. Indeed, the fact that all the treaties establishing ad hoc tribunals expressly had to exclude immunity implies that, in the event of failure to do so, immunity would have automatically attached to certain individuals under customary international law. The ICJ categorically observed that immunities as a custom would be exempt from application to international crimes where the

[277] P Gaeta 'Does president Al Bashir enjoy immunity from arrest?' (2009) 7(2) J*ournal of International Criminal Justice* 320.
[278] Akande 'International law immunities and the International Criminal Court' (n 63 above) 417.
[279] P Wardle 'The survival of head of state immunity at the International Criminal Court' (2011) 18 *Australian International Law Journal* 183.
[280] Tladi 'Immunities (Article 46A*bis*)' (n 81 above) 213.
[281] See, for example, *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139-Corr (n 109 above) para 22-43.

establishing statute of an international criminal court expressly provided so.[282] Thus, contrary to Tladi's criticism, Africa's arguments cannot be entirely irrelevant. They are in fact consistent with customary international law as well as ICJ's views.

This study opines that African states and the AU are more interested in protecting the dignity of their state officials, especially heads of state; rather than an act in furtherance of impunity for international crimes. To support this position, the AU has firmly reiterated its commitment to fighting impunity in the region, as reflected in article 4(o) of the AU Constitutive Act.[283] Article 4 of this Act underscores the principles of respect for human rights, sanctity of life, the rejection of impunity, and the need for member states to live in peace and security. In sum, these principles seek to protect civilian populations from violation of their human rights, particularly their right to life. In fact, where a government persistently abuses these rights to the extent of committing war crimes, crimes against humanity or genocide, article 4(h) and (j) bestows upon the AU the right to intervene militarily to restore peace and security. It is, however, noteworthy that article 4(h) has never been invoked before. The position taken in this regard is thus not certain. Nevertheless, the AU principle of non-indifference – which translates into a traditional African saying that 'you do not fold your hands and just look on when your neighbour's house is on fire'[284] – although not specifically in the context of prosecution, negates any tolerance of impunity.

Even in the extreme cases, like Sudan, where some leaders may refuse to relinquish power for fear of prosecution, the study remains positive that the AU is capable of dealing with such incidents. For example, in order to remove any obstacles to their accountability, African states should also adopt mechanisms that guarantee the removal from office of officials accused of international crimes to enable effective accountability measures to be taken against them, including possible prosecution.

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[282] *Arrest Warrant* (n 52 above) para 61.

[283] See also, paras 11–12, the Preamble to the Malabo Protocol; AU PSC, PSC/MIN/Comm(CXLII) (n 1 above) para 2.

[284] B Kioko 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85 *International Review of the Red Cross* 819-820.

Moreover, the threats by African states to withdraw from the Rome Statute should not be interpreted as an act furthering impunity. This study notes that these withdrawals are more complicated than that and could be motivated by a number of other factors. Since article 127 of the Rome Statute, which applies to withdrawals does not require states to provide reasons upon withdrawal, a state party may submit a notice to withdraw from the treaty without indicating its reasons for doing so, as did the Gambia and Burundi. The study, however, rules out that the urge to embrace impunity is one of the reasons for the withdrawals. For instance, South Africa, Uganda and DRC are among the African states to have loudly criticised the ICC, yet they are also some of the states whose domestic practice demonstrates positive complementarity in prosecuting international crimes.[285] Amidst its withdrawal from the Rome Statute, South Africa emphasised its commitment to the fight against impunity.[286] This implies that in some of these instances, acts of withdrawing or threatening to withdraw are, arguably, not informed by the urge to embrace impunity. Rather, the acts can be seen as a statement about political and legal grievances against the ICC that remain unresolved.

This study is persuaded by scholars who insist on the applicability of personal immunity as a norm of customary international law.[287] The study acknowledges that, unlike *immunity rationae personae* which is absolute, immunity *rationae materiae* can be ignored if the acts in question constitute international crimes or otherwise upon a waiver by the state concerned. This is because international crimes can never be deemed to be state functions.

There are, however, challenges with applying absolute immunities with the possibility of non-prosecution especially where leaders cling to power. The Malabo Protocol is open to multiple interpretations on the issue of immunity (discussed above), which have inherent limitations in so far as their effectiveness in the fight against impunity in the region is concerned. If the relevant clause is interpreted as according absolute personal immunity, this

[285] See discussion under point 4.3 below; OA Maunganidze and A du Plessis 'The ICC and the AU' in C Stahn (ed) *The law and practice of the International Criminal Court* (2015) 72-76.
[286] UN, C.N.786.2016.TREATIES-XVIII.10 (n 46 above) para 1.
[287] Cassese *International Law* (n 66 above) 119; D Akande 'International Law immunities and the International Criminal Court' (n 63 above) 410-411; Wirth 'Immunities, related problems, and article 98 of the Rome Statute' (n 62 above) 432.

would not only delay prosecution but in some instances, where leaders cling to power until their death, prevent prosecution. It is therefore not enough that the Protocol envisages the probability of future prosecution once an officer is out of office. Again, since all senior state officials are entitled to immunity, the Malabo Protocol is likely to be seen as targeting opponents of the government. The AU must therefore reconsider its position on this clause.

In addressing this challenge, the AU must consider the fact that imposing criminal accountability through the prosecution of sitting heads of state has so far proven to be an act of futility. If the Sudanese and Kenyan experiences are anything to go by, such leaders will always frustrate prosecution efforts, either by exacerbating the volatile conflicts or by refusing to cooperate with the prosecuting mechanisms, thereby compromising any effective prosecution.[288] Given that international criminal mechanisms do not have a police force to effect their arrest warrants and must depend on individual states to arrest suspects, enforcing such warrants becomes nearly impossible. Any legal framework on prosecuting international crimes must be sensitive to these realities in order to avoid the current situation where the law seemingly exists in vain. As to whether introducing absolute immunities for sitting heads of state and all other state officers is the correct way to go for Africa, this remains the most controversial debate in international criminal law. The study suggests two ways, discussed in the recommendation section, of addressing this dilemma.

3.4 National amnesty and international criminal justice

Amnesty is 'an act of oblivion within the competence of national jurisdiction'.[289] It is an act within a country's legislative authority 'which eliminates the

[288] See *Prosecutor v Uhuru Muigai Kenyatta (*Notice of withdrawal of the charges against Uhuru Muigai Kenyatta) ICC-01/09-02/11-983 (5 December 2014) Trial Chamber V(B). In the Kenyan case, the prosecutor of the ICC was forced to withdraw her case due to lack of sufficient evidence resulting from, inter alia, frustration of her witnesses (see http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/otp-statement-05-12-2014-2.aspx (accessed 4 August 2015)). This case can be compare with the historic indictment of Slobadan Milosevic by the ICTY while he was still the head of state of the Federal Republic of Yugoslavia, as well as with that of Charles Taylor while he was still the president of Liberia. In both cases, it proved difficult to subject these leaders to prosecution, while in office. Their trials only commenced after they stepped down from power.

[289] *Shorter Oxford English Dictionary* (1978) 60.

consequences of certain punishable offences, stops prosecution and quashes convictions'.[290] Andreas O'Shea defines it as 'immunity in law from either criminal or civil legal consequences, or from both, for wrongs committed in the past in a political context'.[291] Like immunities, amnesty is granted against formal prosecution. The distinction between amnesty and immunity is a very thin one. Apart from procedural distinctions in administering the two, the end result remains the same – no prosecution.

There are two main types of amnesties: blanket amnesties[292] and conditional amnesties.[293] These are adopted either through negotiated peace agreements or are self-awarded. According to Robert Gomez, self-amnesties always entail blanket amnesties, while most negotiated amnesties entail conditional amnesties.[294]

3.4.1 Amnesty under international law

Historically, amnesties have been used as a negotiating tool by dictators who often require it as a precondition for either ending violence or engaging in peace talks or stepping down from power.[295] Often, this has been a priority for countries seeking to expedite peaceful governmental transition and promote the interests of peace.[296] The trend is changing, following massive abuse by dictators who enacted or negotiated for blanket self-amnesty before cessation of war or stepping down from power.[297] Modern societies in transition from repression to democracy thus embrace prosecution as the preferred choice of accountability in international criminal justice. Although international law

[290] ICRC 'A commentary on article 6 Additional Protocol II to the Geneva Conventions', (1987) para 4617, https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=DDA40E6D88861483C12563CD0051E7F2 (accessed 11 February 2015).
[291] A O'Shea *Amnesty for crimes in international law and practice* (2002) 2; C Angermaier 'The ICC and amnesty: Can the Court accommodate a model of restorative justice?' (2004) 1(1) *Eyes on the ICC* 133.
[292] K Greenawalt 'Amnesty's justice' in RI Rotberg and D Thompson (eds) *Truth v justice: The morality of truth commissions* (2000) 189, 195.
[293] Greenawalt 'Amnesty's justice' (n 292 above) 189, 195.
[294] Gomez 'Transitional states, the ICC, and amnesties: Establishing an advisory commission' (n 35 above) 60.
[295] Ibid.
[296] Gomez 'Transitional states, the ICC, and amnesties: Establishing an advisory commission' (n 35 above) 59,60.
[297] For example, Augusto Pinochet by a military decree of 1978 granted himself unconditional and total amnesty for crimes committed between 1973 and 1978.

prohibits amnesty for those who bear the greatest responsibility in the commission of international crimes, it does not expressly do so for other cadres of perpetrators. Given the trend of prosecutions, the possibility that the UN, non-governmental organisations (NGOs) and international non-governmental organisations (INGOs) will champion for this position is not very distant. Indeed, soft law suggests that this discourse is under way.

The Princeton Principles on Universal Jurisdiction provides that '[a]mnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law, including war crimes, crimes against humanity and genocide'.[298] The UN Commission on Human Rights Resolution 2002/79 restates a similar position.[299] Treaty bodies have also maintained that amnesty by its very nature violates the victim of grave violations' right to an effective remedy.[300] Despite this trend, it has been argued that amnesty may still offer the best prospects for peace – if not for justice.[301] Jurisprudence from national courts indicates state practice in this regard.[302] Often, national courts cite Protocol II to the Geneva Convention, which encourages states to provide the broadest possible amnesties at the end of an armed conflict of a non-international nature.[303] The essence of this provision is 'to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided'.[304] It is, however, notable that this has been interpreted as limited to combatant immunity and not immunity from violation of humanitarian law.[305] In

[298] Princeton Principles on Universal Jurisdiction (2001), https://www1.umn.edu/humanrts/instree/princeton.html (accessed 10 March 2015).
[299] UN Commission on Human Rights Resolution 2002/79 on impunity, adopted at its 56th meeting, 25 April 2002, UN Doc. E/2002/23 - E/CN.4/2002/200 (2002) Chapter II.A, para 2.
[300] UN HRC *General Comment No. 20 (44) on article 7* UN Doc. IIRI\GEN\1\Rev.1\ at 30 (1994).
[301] L Mallinder 'The role of amnesties in conflict transformation' in C Ryngaert (ed) *The effectiveness of international criminal justice* (2009) 195; J Dugard 'Dealing with crimes of a past regime: Is amnesty still an option?' (1999) 12 *Leiden Journal of International Law* 1001.
[302] *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa (*1996) 4 SA 671 (CC) para 32; El Salvador: Supreme Court of Justice, Decision on the Amnesty Law - Proceedings No. 10-93 (20 May 1993); M Mssenyojo 'The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or amnesty?' (2007) 7 *International Criminal Law Review* 369.
[303] Article 6(5), Additional Protocol II to the Geneva Conventions of 12 August 1949.
[304] ICRC 'A commentary on article 6 Additional Protocol II to the Geneva Conventions' (n 290 above) para 4617.
[305] ICRC Draft Additional Protocols to the Geneva Conventions of August, 12 1949: Commentary' (1973) 141,143, http://www.loc.gov/rr/frd/Military_Law/pdf/RC-Draft-additional-

addition, the ICRC has sought to clarify that this provision does not cover international crimes.[306]

The outstanding feature of amnesties is the promotion of peace and reconciliation.[307] As such, some conditional amnesties are granted to the perpetrators of atrocities in exchange for peace and reconciliation. They are often accompanied by restorative justice mechanisms such as truth commissions rather than retributive justice mechanisms. The essence of amnesties has been to facilitate an end to civil wars or enable transition from authoritarian to democratic governments.[308]

Despite the important role played by amnesties in post-conflict states, the most disturbing question remains: whether amnesties are lawful in international criminal law or if there are criteria that are acceptable under international criminal law through which they can be administered lawfully to international crimes. Treaty obligations related to serious crimes merely call upon states to ensure prosecution of these crimes: they shy away entirely from clarifying the extent – if at all – that amnesties can be incorporated into the international criminal justice process in order to guarantee peace and reconciliation. The following sections consider jurisprudence on amnesty in the context of prosecution of international crimes.

3.4.2 Amnesty under the Rome Statute

The Rome Statute does not mention the applicability of amnesty to international crimes. Instead, it underlines the need to fight impunity and ensure criminal accountability of individuals who engage in international crimes.[309] Given this reality, one is tempted to argue that the Rome Statute is

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protocols.pdf (accessed 4 August 2015); MH Arsanjani 'The International Criminal Court and national amnesty laws' (1999) *American Society of International Law* 66; Angermaier 'The ICC and amnesty: Can the Court accommodate a model of restorative justice?' (n 291 above) 134; Y Naqvi 'Amnesty for war crimes: Defining the limits of international recognition' (2003) 85(851) *International Review of the Red Cross* 583, 605.

[306] Ibid.

[307] ICRC 'A commentary on article 6 Additional Protocol II to the Geneva Conventions (n 290 above); Arsanjani 'The International Criminal Court and national amnesty laws' (n 305 above) 66; Angermaier 'The ICC and amnesty: Can the Court accommodate a model of restorative justice?' (n 291 above) 131.

[308] Arsanjani 'The International Criminal Court and national amnesty laws' (n 305 above) 66.

[309] Para 5, preamble to the Rome Statute.

rooted in a philosophy of retributive justice which cannot be reconciled with amnesty.

During the Rome conference negotiations, the US delegation proposed the inclusion of amnesties in the draft statute in the interest of international peace and national reconciliation.[310] The US underscored the need to balance policies favouring prosecution with 'the need to close a door on the conflict of a past era' and 'to encourage the surrender or the reincorporation of armed dissident groups' and thereby facilitate the transition to democracy'.[311] Unfortunately, the issue of amnesty remained vague.[312] Perhaps it was left to the prosecutor and the judges of the Court to develop their own philosophy. John Dugard argues that the failure of the Rome Statute to deal with amnesty was a deliberate move to preserve the integrity of the ICC and to ensure prioritisation of prosecution over peace and national reconciliation.[313] This is supported by the preamble to the Statute, which affirms that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'. Helmut Gropengieber and Jörg Meibner claim that 'national proceedings which do not have the quality of a criminal proceeding cannot rule out prosecution by the Court'.[314] Implicitly, the Rome Statute does not recognise amnesty where international crimes have been committed. This study argues, however, that if this was the intention of the Rome Statute, then it would have said so clearly in the same manner it does with regard to several other principles of criminal law. An explicit provision on the principle of amnesty in the Rome Statute was key, given the controversial nature of this issue and the fact that international law did not make clear provisions for it in the context of international criminal justice.

Arguably, several provisions of the Rome Statute are capable of being

[310] MP Scharf 'The amnesty axception to the jurisdiction of the International Criminal court' (1999) 32 *Cornell International Law Journal* 508.
[311] Ibid.
[312] J Dugard 'Possible conflicts of jurisdiction with truth commissions' in Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A commentary* Vol. 1 (2002) 693, 700.
[313] Ibid, 693, 700.
[314] H Gropengieber and J Meibner 'Amnesties and the Rome Statute of the International Criminal Court' (2005) 5 *International Criminal Law Review* 287.

interpreted as flexible enough as to recognise amnesties in international criminal law. First, the UNSC can exercise its deferral powers under article 16 of the Rome Statute to defer a prosecution. This can be used to give either temporary or permanent de facto amnesty. It can be temporary in the sense that under article 16 such a deferral is only for 12 months; it can also be permanent in that article 16 does not exclude renewal of such a deferral. Furthermore, the Rome Statute does not specify the grounds upon which the UNSC can seek a deferral, nor does it exempt amnesty as one of the grounds upon which the UNSC can exercise its deferral powers.

It should be noted that these deferral powers are exclusively a preserve of the UNSC since the UN Charter bestows upon the UNSC the primary mandate to maintain international peace and security.[315] As such, the request for a deferral should ordinarily be made when the situation in question is a threat to international peace and security. Thus, it can be argued that since amnesties are extended in cases where there is a real threat to the peace and stability of a given state, a national amnesty law is likely to form the basis upon which the UNSC can seek a deferral, thereby a step towards recognising amnesties in international criminal law. The UNSC's actions in this regard can hence be said to be giving de facto effect to domestic amnesties.

Secondly, article 53 of the Rome Statute provides for prosecutorial discretion in initiating investigations and prosecutions. Upon evaluating information made available to him or her, or upon investigations, the prosecutor has the discretion to let go a matter that would otherwise be admitted by the Court on the grounds that prosecuting the same is not in the interest of justice.[316] In light of the detailed analysis of article 53 under point 2.2.2.2 above, it should be noted that the Rome Statute does not define the notion of 'in the interest of justice', nor does it exhaustively list the factors to be taken into account by the prosecutor when making such a decision.[317] This leaves the prosecutor with flexible discretion to determine the confines of these powers. It can be argued that, until the Court rules that such discretion does not include amnesty, an

[315] Chapter VII, UN Charter.
[316] Articles 53 (1)(c) and (2)(c), Rome Statute.
[317] See the detailed discussion in chapter 2, section 2.2.1.4 of this thesis of the notion of interest of justice under the Rome Statute.

ambitious prosecutor could make such a decision based solely on the existence of a national amnesty law if the 'interest of justice' requires him or her to refrain from prosecution. After all, it would not be in the interest of justice to proceed with a prosecution in the face of instability that necessitates an amnesty law.

Finally, there is the possibility of amnesty under article 17(1)(b), which provides that

> [h]aving regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> …
>
> The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute …

Would this provision imply that a state can conduct investigations, then decide not to prosecute a person accused of international crimes on the basis of an amnesty law? The nature of an amnesty law has no relation to the notions of unwillingness and inability to prosecute. Although the Rome Statute does not define the notions of unwillingness and inability, it sets out criteria on how to establish this. Unwillingness is established if the proceedings against the perpetrators of international crimes

> were or are being conducted or a national decision was made for the *purpose* of shielding the person concerned from criminal responsibility; or there are *unjustified delays* or the proceedings were or are not being conducted *independently and impartially* in a manner inconsistent with the intent to bring the person concerned to justice.[318]

According to the Rome Statute, three criteria must be followed in establishing unwillingness. One has to establish, first, that a state either conducted investigations or made a decision for purposes of shielding the perpetrators of international crimes from justice; secondly, that there are unjustified delays of subsequent proceedings; and thirdly, that the proceedings were partial and lacked independence. This study regards the three criteria as alternatives, given the use of 'or' to separate them in the text above, and thus one does not need to show all three.

[318] Article 17(2)(a), Rome Statute.

This study agrees with Holmes' interpretation of the first criterion.[319] In practice, as observed by Holmes, the court is likely to create and rely on a presumption of unwillingness where the investigations or prosecution of some perpetrators has led to 'sham proceedings'.[320] Holmes enumerates a list of other factors that the Court is likely to rely on when determining the intent of a state to shield the accused from international investigation and prosecution: obvious departures from normal legal procedures of a state such as bypassing the normal criminal procedures (whether civil or military) by appointing a special investigator who is politically aligned with persons close to the accused; and transfer of cases to secret tribunals. Moreover, article 17(2) of the Rome Statute obligates states in making their determination 'to have regard to principles of due process as recognized by international law'.[321] This would imply that the Court is likely to interpret any practice by a state that is inconsistent with established principles of international law as having been undertaken with the intent to shield the accused from justice.

Other scholars have also interpreted the term 'unwillingness' to mean simply 'sham trials' or 'sham investigations'.[322] For instance, according to Kai Ambos, 'the purpose' in the first part of the paragraph denotes the 'state's specific intention or desire to protect the individuals responsible'.[323] He underscores the need for bad faith as a constituent factor of the state's intention not to bring the persons to justice, which bad faith can only be inferred from circumstantial evidence.[324] The circumstantial evidence suggested by Ambos closely resembles that suggested by Holmes.[325]

Regarding the second criterion, a distinction has been drawn between 'justified delay' and 'undue delay'.[326] While the former leaves room for justified

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[319] E Asaala 'The International Criminal Court factor on transitional justice in Kenya' in K Ambos and O Maunganidze (eds) *Power and Prosecutions: Challenges and opportunities for international criminal justice in sub-Saharan Africa* (2012)126-127.
[320] JT Holmes 'Complementarity: National courts versus the ICC' in Antonio Cassese and others (eds) *The Rome Statute of the International Criminal Court: A commentary* (2002) 675.
[321] Ibid.
[322] JB Terracino 'National implementation of ICC crimes: Impacts of national jurisdictions and ICC' (2007) 5(2) *Journal of International Criminal Justice* 421, 440.
[323] K Ambos *The Colombian peace process and the principle of complementarity of the International Criminal Court* (2010) 66.
[324] Ibid.
[325] Ibid.
[326] Ambos *The Colombian peace process and the principle of complementarity of the*

delay, the latter does not. However, when considering such a justification, due regard must be paid to, inter alia, the principles of human rights, the complexity of the case, conduct of the parties, and length of ordinary criminal proceedings.[327] Thus, not all justifications are plausible, particularly those contrary to the objective of article 17, which is to bring the suspects to justice.

With respect to the independence and impartiality of proceedings, the ICC must be satisfied, not only of doubts concerning the impartiality and independence of the proceedings, but that these doubts led the Court to believe that the proceedings were conducted in a manner inconsistent with bringing the accused to justice.[328] Independence is associated with absence of external influence or pressure on tribunals and their proceedings.[329] Concerns about impartiality, on the other hand, is associated with possible bias of the tribunal's personnel.[330] Noting the overlap between the three areas of consideration entailed by the criteria for establishing unwillingness, it is likely that similar factors would lead to two conclusions, namely, that the trials were conducted in a manner that shields the perpetrators from criminal justice and that the trials were conducted in a manner inconsistent with bringing the person to justice. Therefore, to prove 'unwillingness' one has to provide indicators of the intent by the state to shield the persons concerned from liability or of the lack of independence of these trials.

Unlike the determination of unwillingness to prosecute, the determination of whether a state is unable to do so involves a more objective, hence less problematic, approach. The Rome Statute establishes a specific criterion of determining inability as follows: 'the Court considers whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or

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*International Criminal Court (*n 223 above) 68; J Stigen *The relationship between the International Criminal Court and national jurisdictions: The principle of complementarity* (2008) 289.

[327] Ambos *The Colombian peace process and the principle of complementarity of the International Criminal Court (*n 323 above) 68.

[328] Holmes 'Complementarity: National courts versus the ICC' (n 320 above) 676.

[329] Ambos *The Colombian peace process and the principle of complementarity of the International Criminal Court* (n 323 above).

[330] Ibid.

otherwise unable to carry out its proceedings.'[331] This criterion is, essentially, a determination of facts.

Literally, a 'total collapse' would refer to a judicial system that no longer works. On the other hand, a 'substantial collapse' has been interpreted to imply a judicial system that is 'damaged to an extent that is generally not capable anymore of ensuring the investigation of the case and the prosecution of individuals'.[332] According to some scholars, the notions of a 'total collapse' or 'substantial collapse' were purposely included in the Rome Statute with the rationale of precluding the Court from assuming jurisdiction merely because a conflict exists in a State and the judicial system is partially affected.[333] This underscores the primacy of national criminal proceedings, thus upholding the concept of complementarity. Unavailability can also be accorded the broadest literal meaning, namely, 'the non-existence of something, the non-accessibility of something, and the non-usefulness of a remedy irrespective of its existence and accessibility'.[334] Indeed, the Court has held that 'an evidentiary debate on the State's unwillingness or inability will be meaningful only when doubts arise with regard to the genuineness of the domestic investigations or prosecutions'.[335]

The two notions can thus be summarised as entailing dubious investigations or political decisions calculated at shielding an accused person from justice or partial and delayed criminal proceedings, or a total or substantial collapse or unavailability of a nation's judicial system.[336] By contrast, although conditional amnesties are designed to shield a person from prosecution, they are neither baseless, nor made arbitrarily. In fact, in some instances conditional amnesties are preceded by investigations which inform the decision as to who

[331] Article 17(3), Rome Statute.
[332] Ambos *The Colombian peace process and the principle of complementarity of the International Criminal Court (*n 323 above) 81; Stigen *The relationship between the International Criminal Court and national jurisdictions* (n 329 above) 316.
[333] Holmes 'Complementarity: National courts versus the ICC' (n 320 above).
[334] Ambos *The Colombian peace process and the principle of complementarity of the International Criminal Court* (n 323 above) 59.
[335] *Prosecutor v Saif-Al Islam Gaddafi and Abdulla Al-Senussi* (Decision on the Admissibility of the case against Abdulla Al-Senussi), ICC-01/11-01/11-466-Red (11 October 2013) Pre-Trial Chamber I, para 27.
[336] See section 2.2.2 of chapter 2 for a detailed discussion on the notions of unwillingness and inability.

is entitled to them. Scharf thus dismisses the 'common misconception that granting amnesty from prosecution is equivalent to foregoing accountability and redress'.[337] According to Sharf, amnesties are often tied to other accountability measures that are less intrusive than prosecution[338] yet still adhere to the fundamentals of a criminal justice system: prevention, deterrence, punishment and rehabilitation.[339] Ultimately, shielding an accused person from prosecution under conditional amnesty is calculated to achieve reconciliation and peace rather than rubber-stamp impunity. It can be argued therefore that a decision not to prosecute based on this kind of an amnesty law does not amount to 'unwillingness or inability' not to prosecute, thus validating such a decision.

Moreover, article 17 is not specific about the type of investigation required. The nature of some conditional amnesties would easily qualify as an investigation under article 17(1)(a) and (b). In this regard, the best example comes from South Africa, where amnesty was not automatically given to every individual who applied for it. Such a decision was arrived at after an elaborate procedure. First, an individual was required to make an application for amnesty to the Truth and Reconciliation Commission (TRC).[340] This would be passed on to a specialised committee on amnesty that conducted investigations to establish the genuineness of the application.[341] These investigations would then enable the committee to make an appropriate decision on the application. In sum, an amnesty will be recognised under the Rome Statute only if it qualifies as borne of an investigation under article 17(1)(a) and (b).

The ICC has, however, made clear its position on the application of article 17(1)c where the 'person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3'.

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[337] MP Scharf 'The amnesty exception to the jurisdiction of the International Criminal Court' (1999) 32 *Cornell International Law Journal* 512.
[338] Ibid.
[339] Ibid.
[340] Article 19, Promotion of National Unity and Reconciliation Act 34 of 1995 (TRC Act of South Africa).
[341] Ibid.

In *Prosecutor v Saif Al-Islam Gaddafi*,[342] the defence challenged the admissibility of the case on the basis that a Tripoli criminal court had convicted him of conduct that was similar to that alleged before the Court. Gaddafi was, however, later released pursuant to an amnesty law. The defence submitted that Gaddafi had been tried and sentenced to death together with other members of the former regime. The defence thus adopted the following criteria of inadmissibility:

> i. that Dr. Gadafi has already been tried by the Libyan national courts [...];
> ii. that the national trial was with respect "to the same conduct" as that alleged in this case [...];
> iii. national proceedings were not for the purpose of shielding within the meaning of Article 20(3)(a) [...]; and
> iv. national proceedings were not otherwise lacking in sufficient independence or impartiality, nor did they involve egregious due process violations, to the extent that the proceedings were incapable of providing genuine justice within the meaning of Article 20(3)(b) [...].[343]

According to the defence, these criteria rendered inadmissible the case against Saif Al-Islam. The Court agreed with the defence on the methodology of determining admissibility in light of the principle of ne bis in idem, so long as the interpretation was consistent with international human rights standards.[344] The Court differed with the defences' interpretation of what triggers article 20(3). According to the defence, a trial on merit by a national court leading to a decision of either an acquittal or a conviction triggered the principle of ne bis in idem under article 20(3). The Court had a different opinion:

> The Chamber does not fully adhere to the broad interpretation endorsed by the Defence regarding the nature of the decision required in order to satisfy article 20(3) of the Statute. The formulation 'a trial by the Court is not permitted under article 20, paragraph 3' suggests that the person has been the subject of a completed trial with a final conviction or acquittal and not merely a trial 'with a verdict on the merits' or a mere 'decision on conviction or acquittal by a trial court' as the Defence suggests. In

[342] (Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute') ICC-01/11-01/11 (5 April 2019).
[343] Para 26
[344] Para 31

> other words, what is required, as the OPCV correctly pointed out, is a judgment which acquired a res judicata effect.[345]
>
> …
>
> although the Chamber agrees with the Defence that a decision on the merits of the case 'on conviction or acquittal' is required, it still considers – contrary to the Defence's position – that finality is equally required for such a decision or judgment on the merits.[346]

The Court underscored the need 'for a final judgment on the merits, where such judgment has acquired a res judicata effect.'[347] Relating to article 21(3) of the Rome Statute, the Court further observed that article 20(3) must be applied and interpreted 'in light of internationally recognized human rights'. As such for a trial to warrant a prohibition of a second trial, there must be 'a final decision or judgment of acquittal or conviction.'[348] Although Gaddafi had been tried and convicted on 28 July 2015, this was a decision of the first instance Tripoli Court of Assize and in principle still subject to appeal before the Court of Cassation.[349] Besides, the judgement had been rendered in absentia, implying further that it was not a final judgment of conviction. As according to Libyan national law, 'once the person is arrested, his trial should start a new.'[350]

The chamber upheld the prohibition of amnesties for international crimes.[351] it further underscored the need to interpret the Statute in a manner consistent with internationally recognized human rights standards, which standards proscribe amnesties for grave breaches of human rights.[352] The chamber thus found the application of the amnesty law incompatible with international law, including international human rights.[353] 'This is so, in the context of the case sub judice, due to the fact that applying Law No. 6 of 2015 would lead to the inevitable negative conclusion of blocking the continuation of the judicial process against Mr Gaddafi once arrested, and the prevention of punishment

[345] Para 36.
[346] Para 36.
[347] Ibid.
[348] Para 45.
[349] Para 48.
[350] Para 48.
[351] Para 61
[352] Ibid.
[353] Para 78.

if found guilty by virtue of a final judgment on the merits, as well as denying victims their rights where applicable.'[354]

3.4.3 Amnesty under the Malabo Protocol

The AU has deliberately ignored the notion of amnesty within the Malabo Protocol. The Malabo Protocol is silent on possible utilisation of amnesties for international crimes. Indeed, the adoption of blanket amnesties would be in contravention of the AU Constitutive Act, which condemns impunity.[355] The AU legal framework speaks only of pardons and commutation of sentences.[356]

The application of such pardons and commutation of sentence is, however, not absolute, as it is subject to the final verdict of the African Court.

While this position is politically correct, given the trend at the international level, this study argues that in isolated cases of vicious suffering occasioned on victims and where prosecutions are likely to cause more instability and further threaten peace, perpetrators of international crimes should be held accountable through alternative accountability mechanisms. This is not to imply either that one adopts blanket or unconditional amnesties, or that the amnesties should apply to those who bear the highest responsibility for such crimes – these two measures are likely to be counterproductive in the fight against impunity.

Instead, those who qualify for amnesty should not be subjected to prosecution; but be held accountable through alternative justice mechanisms. Conversely, those who may not qualify for amnesty should be subjected to full prosecution. Keller observes that alternative justice mechanisms, when necessary, can readily acquire local legitimacy and, moreover, as with prosecutions, equally further the goals of international criminal justice.[357] This study, however, appreciates that – as is true, *mutatis mutandis*, of the ICC – alternative justice mechanisms might not be the 'be-all and end-all' in delivering all the necessary elements for advancing the ethos of international

[354] Ibid.
[355] Article 4(o), AU Constitutive Act.
[356] Article 46K, Malabo Protocol.
[357] Keller 'Achieving peace without justice: The International Criminal Court and Ugandan alternative justice mechanisms' (n 47 above) 261.

criminal justice.

While the South African amnesty is unique in the sense that neither the jurisdiction of another state nor that of an international tribunal to prosecute the perpetrators was involved, it perhaps closely resembles what the AU should adopt. In South Africa, the probable threats posed by the likely prosecutions of the architects of apartheid became a reality when the transitional negotiations between the National Party and the ANC came to a stalemate and there was the possibility of a resurgence of civil war.[358] South Africa hence adopted conditional amnesty,[359] thereby illustrating Arsanjani's contention that in certain exceptional cases, only amnesties provide 'a feasible option for stopping bloodshed and even enhancing aggregate human rights, in the absence of ability or the willingness of the international community to get involved'.[360]

South Africa's settling for a TRC accompanied by amnesty provisions was thus a concession to the stark realities of the time.[361] A South African court has underscored the importance this amnesty held as the only way to ensure 'full disclosure' of the truth by the perpetrators in the TRC proceedings.[362] The Court further disagreed with an interpretation of the constitutional right to access justice as something limited to accessing the court, declaring such an interpretative approach to be an abstract and empty promise in South Africa's circumstances.[363]

Yet, the Malabo Protocol neither adopts conditional amnesties nor does it contain many flexible provisions, like those under the Rome Statute, that could be interpreted to allow amnesty. There is only one possibility of interpreting amnesty under the Malabo Protocol. Article 46H of the Malabo Protocol adopts article 17(1)(b) of the Rome Statute word for word. This implies that the interpretation of article 17(1)(b) of the Rome Statute would equally apply to article 46H under the Malabo protocol. It is, however,

[358] Angermaier 'The ICC and amnesty: Can the Court accommodate a model of restorative justice?' (n 291 above) 141.
[359] See generally chapter 4 or sections 16-22, TRC Act of South Africa.
[360] Arsanjani 'The International Criminal Court and national amnesty laws' (n 305 above) 66
[361] Section 3(d), TRC Act of South Africa.
[362] *AZAPO* case (n 301 above).
[363] Ibid.

noteworthy that Malabo protocol does not have the Rome Statute equivalent of article 16 and 53 allowing for deferral and the prosecutor's discretion in initiating investigations and prosecutions.

3.4.4 The duty to prosecute and amnesty for international crimes

It is generally agreed that customary international law prohibits genocide, war crimes, crimes against humanity, and acts of aggression.[364] It is therefore the position that a state's obligation to prosecute arises not only from its conventional obligation,[365] but also – in some instances – in customary international law.[366] Both the Geneva Conventions and the Genocide Convention impose what has been termed as an 'absolute' duty to prosecute.[367] In fact, the ICJ has since acknowledged the customary international law nature of the Genocide Convention.[368]

Yet while the Genocide Convention limits the absolute duty to prosecute to the offence of genocide alone, the Geneva Convention limits the scope of this duty to prosecute grave breaches that occur within the context of an international armed conflict.[369] Additionally, from a human rights perspective, the state has an obligation to protect and promote victims' right to a judicial process and an effective remedy.[370] Arguably, the state should conduct

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[364] T Meron *Human rights and humanitarian norms as customary law* (1989) 210; D Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 2552; *Prosecutor v* Duško *Tadić* (Opinion and Judgment), IT-94-1-T (7 May 1997) ICTY Trial Chamber, paras 618-623 on the general history of crimes against humanity; G Mettraux 'Crimes against humanity in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and for Rwanda' (2002) 43, 1 *Harvard International Law Journal* 244; The Princeton Principles on Universal Jurisdiction (n 222 above), Principle 2(1); Angermaier 'The ICC and amnesty: Can the Court accommodate a model of restorative justice?' (n 291 above)140.

[365] Articles 4 and 6, Convention on the Prevention and Suppression of the Crime of Genocide, 1948; articles 49 and 54, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. 1949; article 7, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, 1984.

[366] Y Dinstein *International Criminal law* (1985) 225; Orentlicher 'Settling accounts' (n 364 above) 2552.

[367] Article 4, Genocide Convention

[368] *Reservations to the Convention on Genocide*, Advisory Opinion [1951] ICJ Reports 15, 23.

[369] Article 2, Geneva Conventions I, II, III, and IV.

[370] Article 13, European Convention on Human Rights; *Consuelo et al v Argentina*, Report No. 28/92, OEA/Ser.L/V/II.83 Doc. 14 at 41 (1993) Inter-American Commission on Human Rights, O.A/Ser.L/V/II.83 Doc 14 at 41 (1993); *Mendoza v Uruguay* (n 16 above); *Masacre las Hojas v El Salvador*, Report No. 26/92 Inter-American Commission on Human Rights, OEA/Ser.L/V/II.83 Doc. 14 at 83 (1993); *Banjos Altos Case,* Judgment of 14 May 2001, Inter-American Court of Human Rights (Ser. C) No. 75 (2001) para 41.

investigation and prosecution of those responsible as failure to do so would amount to a breach of the states' human rights obligations.[371]

It is, however, the view in this study that an approach towards 'the duty to prosecute' international crimes as a norm of customary international law that excludes other forms of accountability is problematic. While it may be conceded that the prohibition of certain crimes has coalesced into international custom or *jus cogens* and that a state has an obligation to hold accountable those responsible, it follows neither that the duty to prosecute is the only measure of accountability nor that the same is always a requirement of customary international law. The notion of accountability for human rights violations could as well mean that the perpetrators can be subjected to other forms of accountability other than formal prosecution. So long as the adopted mechanisms bring about justice and restore peace, promote human rights standards, democracy and good governance, and enjoy broad support among the locals, then it suffices as a form of accountability measure.[372] Several other scholars, as well as the practice of regional treaty bodies, indicate concurrence that the general customary nature of the duty to prosecute is an emerging discourse that remains disputed due to lack of state practice.[373]

Though not related to international crimes, the Inter-American Court and the European Court of Human Rights have dealt with the issue of amnesty and prosecution. The Inter-American Court, in *Velasque-Rodriguez Case*,[374] gives us the first illustration. This case concerned the offences of wrongful detention, torture and possible disappearance. Angel Manfredo Velásquez Rodríguez, a student at the National Autonomous University of Honduras, and others were detained and taken to the cells of public security forces where

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[371] Article 2, International Covenant on Civil and Political Rights (1966); UN HRC *General Comment No. 31 on Nature of the General Legal Obligation on States Parties to the Covenant* UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) para 18; *Bautista de Arellana v Colombia,* Communication No.563/1993, UN Doc. CCPR/C/55/D/563/1993 (1995), para 8(6).
[372] Arsanjani 'The International Criminal Court and national amnesty laws' (n 305 above).
[373] N Roth-Arriaza 'Non-treaty sources of the obligation to investigate and prosecute and provide redress' Roth Arriaza (ed) *Impunity and human rights in international law and practice* (1995) 39; Keller 'Achieving peace without justice' (n 47 above) 240; Dugard 'Possible conflicts of jurisdiction with truth commissions' (n 312 above) 698; CP Trumbull IV 'Giving amnesties a second chance' (2007) 25 *Berkeley Journal of International Law* 283, 291-93; Gropengieber and Meibner 'Amnesties and the Rome Statute of the International Criminal Court' (n 317 above) 276.
[374] *Velasque-Rodriguez Case* para 166.

they were subjected to harsh interrogation and torture. The police and security forces denied the detention, however, despite the fact that Rodríguez went missing and could not be traced. Although the Inter-American Commission specifically requested the Court to issue an injunction requiring the Honduran government to institute criminal proceedings, the Court did not do so. Instead, it only ordered the Honduran government to pay compensation to the victims, despite the Court's observation that the state has a legal duty to prevent, investigate and punish any violation of the rights recognized under the Convention.[375] And that '[i]f the State apparatus acts in such a way that the violation goes unpunished ...it has failed to comply with its duty to guarantee the free and full exercise of those rights to the person within its jurisdiction.'[376] Unfortunately, the Court did not explain why prosecution was not an appropriate remedy. The Court's remedy, nonetheless, illustrates that prosecution is not always the only remedial measure.

The Inter-American Commission adopted a similar approach in *Mendoza et al. v Argentina*.[377] This case concerned Lucas Matías Mendoza and three others. As children they were subjected to a juvenile justice system that allowed them to be treated like adult offenders. They were subjected to torture and inhuman and degrading treatment which led to the death of one of them and the other's loss of sight. Again, although the Court underscored the state's obligation to investigate and prosecute those responsible for the violations,[378] it narrowed its remedy to differenet forms of reparations and damages, without an explanation as to why prosecution was not the appropriate remedy.

It should, however, be noted that in both cases, Honduras and Argentina had an amnesty law in place, indicating that a state must not always institute criminal proceedings.[379] One notable feature of these respective amnesty laws is that the concerned amnesties were blanket amnesties. As such, they had the effect of shielding the violators from total accountability (whether civil

[375] Ibid, paras 174, and 194.
[376] Ibid, 176.
[377] Judgement of 14 May 2013, http://www.corteidh.or.cr/docs/casos/articulos/seriec_260_ing.pdf (accessed 4 August 2015).
[378] Para 234.
[379] The full stop law of 1986 (Law No. 23,492) and the due obedience law of 1987 (Law No. 23,521) of Argentina.

or criminal), thus qualifying to be termed as an embrace of impunity. Thus, amnesty was not an appropriate accountability measure in the two cases discussed above.

The American Commission adopted a different approach in *Masacre Las Hojas v El Salvador* when it, inter alia, ordered investigations and criminal punishment for those responsible for the massacre of approximately 74 people by members of the Salvadoran security force.[380] Interestingly, the American Commission used the arguments advanced by the Inter-American Court in *Velásquez Rodriguez case* (para 174 and 176) to justify the need for investigations and punishment but unlike the Court, the Commission concluded that El Salvador could not invoke its national amnesty laws as a justification for failing to comply with its international obligations in violation of article 27 Vienna Convention on the law of treaties.[381]

In a later case, *Barrios Atlos*,[382] the Inter-American Court underscored the importance of criminal sanctions for serious human rights violations and dismissed the application of amnesty laws because they intended to prevent investigations and punishment. Even then, the Court did not see prosecution as the only remedy as it proceeded to make additional orders on reparation.[383] The UN Human Rights Committee (UNHRC) in its General Comment No. 20 has applauded emphasis on investigation and prosecution for human rights violations. Yet in the case *Bautista de Arellana v Colombia*, the UNHRC held that

> the Covenant does not provide a right for individuals to require that the state criminally prosecute another person. The Committee nevertheless considers that the State Party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearance of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations …[384]

The European Court has approached this issue most cautiously. Although in *Aksoy v Turkey*[385] it acknowledged that an effective remedy for grave human

[380] *Masacre Las Hojas v El Salvador* para 5(a) of the conclusion.
[381] *Masacre Las Hojas v El Salvador* para 12.
[382] Judgment of 14 May 2001, Inter-American Court (Ser.C) No. 75 (2001) para 41-44.
[383] *Masacre Las Hojas v El Salvador* para 6 of the conclusion.
[384] Communication No. 563/1993, UN Doc. CCPR/C/55/D/563/1993 (1995) para 8(6).
[385] *Aksoy v Turkey* (n 22 above) para 98.

rights violations must include prosecution and punishment, it has not ordered a single state to do so.

Given these varying positions, controversies abound regarding the inclusion of amnesties in peace agreements in Africa.[386] Contemporary scholars in these issues are divided between those who underscore the important role of amnesties, particularly during peace processes,[387] and those who view them as a contravention of the international obligation to prosecute where the same exist.[388]

The Lomé Peace Agreement of Sierra Leone is instructive as it contained a blanket amnesty clause.[389] This prompted the UN to include a disclaimer barring the application of this amnesty to international crimes of genocide, crimes against humanity and other serious violations of international humanitarian law.[390] This allowed the Special Court of Sierra Leone to exercise its jurisdiction over these crimes. In *Prosecutor v Morris Kallon and Brima Bazzy Kamara,*[391] for example, the accused persons claimed that they were entitled to amnesty as granted by the government of Sierra Leone under the Lomé Agreement. The Court, however, identified itself as an international court while the amnesty law being referred to was a national law. It further observed that Sierra Leone could not extend amnesty to 'crimes under international law that are the subject of universal jurisdiction'.[392] It was the Court's further observation that

> a state cannot sweep such crimes into oblivion and forgetfulness which other states

[386] A Armstrong and G Ntegeye 'The devil is in the details: The challenges of transitional justice in recent African peace Agreements' (2010) *Africa Human Rights Law Journal* 6.
[387] L Mallinder 'The role of amnesties in conflict transformation' in C Ryngaert (ed) *The effectiveness of international criminal justice* (2009) 195.
[388] K Obura 'Duty to prosecute international crimes under international law' in C Murugu and J Biegon (2011) 28.
[389] Article IX, Peace Agreement between the government of Sierra Leone and the Revolutionary United Front (RUF) of Sierra Leone, grants absolute amnesty to Foday Sankoh, the leader of RUF and all combatants implicated in the atrocities http://www.sierra-leone.org/ lomeaccord.html (accessed 3 August 2015).
[390] Ibid; S/RES/1315/2000, United Nations Security Council Resolution 1315 (2000), adopted by the Security Council at its 4186th meeting on 14 August 2000, preamble para 5; article 10, Agreement for and Statute of the Special Court for Sierra Leone, 16 January 2002; Angermaier 'The ICC and amnesty: Can the Court accommodate a model of restorative justice?' (n 291 above) 146.
[391] (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) SCSL-04-15-PT-060-I , ICL 24 (SCSL 2004) (13 March 2004) Appeals Chamber.
[392] Ibid, para 71.

> have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*.

The SCSL seems to have been following in the footsteps of its predecessor, the ICTY. In *Prosecutor v Anto Furundžija*,[393] the ICTY observed that the *jus cogens* proscription of torture delegitimises any amnesty law for the offence of torture.[394]

The push for a blanket amnesty versus ICC prosecutions by the Lord's Resistance Army (LRA) has also created a serious peace-versus-justice impasse in Uganda. Despite the gruesome violations orchestrated by the LRA, the rebel group has vowed not to down its arms or end atrocities until an amnesty is extended to all those facing ICC prosecutions.[395] In fact, the LRA has demanded informal traditional justice mechanisms in the place of any formal prosecutions.[396] The Ugandan government has been unwilling to withdraw formal prosecution against the LRA in exchange for traditional mechanisms as previously agreed to by the LRA. A conditional amnesty would be significant in this regard as it would lead to cessation of the continued atrocities. Failure to adopt an amnesty in such a case results in unending suffering of innocent civilians – especially from Northern Uganda – who continue to be subjected to gruesome atrocities.[397] Yet this cannot be extended to those who bear the highest responsibility, as this would be contrary to the spirit of the Rome Statute itself and Uganda's legal obligations.

A survey conducted in Northern Uganda in 2005, for example, revealed that the people of Northern Uganda wanted peace, trials and punishment, and even though they initially may have objected to trials, this was not based on principle but the ineffectiveness of the Ugandan courts.[398] Although strong

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[393] (Judgment) IT-95-17/1-T (10 December 1998) Trial Chamber, (1998) 38 ILM 317.
[394] Ibid, para 155.
[395] Keller 'Achieving peace without justice' (n 47 above) 210.
[396] P Harera and G Matsiko 'LRA asks government to legalise traditional justice' Monitor Online (Uganda), June 22, 2007, http://www.monitor.co.ug/artman/publish/news/LRA_asks_government_to_legalise_traditional_justice (accessed 23 March 2017).
[397] Keller 'Achieving peace without justice' (n 47 above) 211.
[398] Office of the High Commissioner for Human Rights 'Making peace our own: Victims' perceptions of accountability, reconciliation and transitional justice in Northern Uganda' http://www.ohchr.org/english/docs/northern_Uganda_august2007.pdf (accessed 12 March 2017); International Crisis Group 'Peace in Northern Uganda?' Africa Briefing No. 41 (13 September 2006), http://www.crisisgroup.org/

support for accountability still persists, a further survey conducted in 2007 indicated a drop in the numbers in support of prosecution from the initial 61 per cent to 41 per cent.[399] Since the ICC cases have been withdrawn and transferred back to the local courts, the full implementation of the peace agreement remains uncertain.[400] According to some commentators, this has been brought about by a misunderstanding of local prosecution to mean alternative traditional justice measures.[401] An annexure to the original agreement clarifies this by creating a division within the High Court to prosecute those alleged to have committed serious crimes.[402] The Ugandan national processes must be alive, however, to alternative justice mechanisms, which may require the adoption of conditional amnesties for those who do not bear the highest responsibility. This will not only enhance the efficiency of the accountability system but also guarantee peace and stability.

There is need to reconcile the current standoff between national recognition of amnesty and recognition of amnesty in international criminal courts versus the duty to prosecute. The general trend towards addressing impunity for past atrocities suggests that extending amnesties for international crimes has got no *locus standi* vis-à-vis a state's international obligation to prosecute. Much emphasis is placed on the state's obligation to prosecute and punish the perpetrators as amnesties are presumed to be an illegality. This narrow approach to the notion of justice is informed by a restrictive approach to the theory of retributive justice.[403] Underlying this theory is a philosophy that ensures that alleged perpetrators receive punishment proportionate to their crimes.[404] This theory is defendant-centred and in so far as the victims are

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library/documents/africa/central_africa/b041_peace_in_northern_uganda.pdf (accessed 12 November 2015).

[399] Keller 'Achieving peace without justice' (n 47 above) 228.

[400] Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, 29 June 2007, http://www.iccnow.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf (accessed 22 March 2017).

[401] Keller 'Achieving peace without justice' (n 47 above) 228.

[402] Annexure to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, 19 February 2008, http://www.usip.org/pubs/usipeace_briefings/2008/accountability_reconciliation_annex.pdf (accessed 3 May 2014).

[403] M Maiese 'Retributive justice', http://www.beyondintractability.org/essay/retributive-justice (accessed 10 March 2015).

[404] Ibid.

involved, they are treated as mere by-products.[405] In practice, the victims are involved only at the level of giving evidence. While this theory seeks to protect the defendant from getting punishment beyond what they deserve, it also yields justice to the victim by holding the perpetrators accountable, albeit in a limiting sense. In this regard, a state dispenses with its affirmative duty to the victims of crimes by 'recognizing and repudiating victimization, and reaffirming the victim's equal value and standing in the society'.[406] Criminal prosecution and punishment certainly achieve these. Notably, however, there is a possibility that non-penal instruments may also achieve similar objectives.

As already suggested, although a state has an obligation to prosecute international crimes, this is not the only accountability mechanisms open to a post-conflict state. Where needs be, this can be combined with, or altogether give way to, non-penal alternatives which may achieve certain important rights or policies. Save in the case of the genocide and torture conventions, which bestow upon state an absolute and arguably customary international law obligation to prosecute international crimes, the accountability measures to be adopted in addressing other international crimes are not necessarily provided for under customary international law. Thus, accountability measures for international crimes could take a variety of forms in order to dispense different forms of justice to the victims. As mentioned in chapter 2 of this thesis, justice does not always imply prosecution and it does not bar those involved from facing alternative accountability measures. The major challenge with retributive justice is that it fails to adequately balance justice for victims and the need to effectively deal with past atrocities without necessarily triggering further violence.[407] As such, restorative measures incorporating limited amnesties, which focus on the normative rather than the punitive objectives of criminal law, is most appropriate.[408] 'If non-penal methods impose a sufficient degree of accountability and justice',[409] it may be possible for international criminal law to eliminate the controversy surrounding the peace-versus-justice debate by embracing these alternatives. For example, in the case of South

[405] E Blumenson 'National amnesties and international justice' (2005) 2 *Eyes on the ICC* 1, 5.
[406] Ibid, 7; Naqvi 'Amnesty for war crimes' (n 306 above) 587.
[407] Naqvi 'Amnesty for war crimes' (n 306 above) 583.
[408] Ibid.
[409] Blumenson 'National amnesties and international justice' (n 406 above) 2.

Africa, its TRC has been hailed as having been morally acceptable, particularly with regard to victims.[410] The complex situation in South Africa must, however, be acknowledged. Despite these praises, complaints from dissatisfied voices have been on the rise over the years.[411] Majority of these tension revolve around two issues. First, is the concern over the 350 names of alleged perpetrators whose names were forwarded to the National Director of Public Prosecution (NDPP) for prosecution for either their failure to give full disclosure of events or were denied amnesty for other reasons. In an interesting turn of events, the post arpartheid government extended amnesty to all the 350 provoking numerous suits by victims in search of criminal justice. Second, is government's fear of having its senior officers, who either did not apply for amnesty or were denied amnesty by the TRC prosecuted. Vusi Patrick Pikoli, the NDPP from 1 2005 to 23 September 2007 attests to the high levels of political interference in his attempts to prosecute high level persons who had either not applied for amesty or had been denied amnesty.[412] In a swon affidavit to the Court, Pikoli associates his attempts at these prosecutions to be part of the reasons that led to his suspension from duty by the then President, Thambo Mbeki.[413] A former special prosecutor in the offie of the NDPP for 40 years has also lamented to intese political interference in these cases.[414]

Amnesty laws arise out of necessity, given that the prevailing circumstances are characterised by instability. They are founded on the need to secure peace by preventing civil war and facilitating transition to a democratic regime.[415] In fact, amnesties are sometimes the only option for stopping bloodshed and enhancing human rights, especially where international

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[410] Blumenson 'National amnesties and international justice' (n 320 above) 8.
[411] In the *AZAPO* case, for example, the families of Steve Biko and Griffiths Mxenge, who were murdered, unsuccessfully challenged the constitutionality of amnesty under the TRC Act; *Thembisile Phumelele Nkadimeng v The NDPP* cane no. 36554/2015, in the HC of SA, Gauteng Division, Pretoria*; Nokuthula Simelane v The NDPP*.
[412] Supporting affidavit, para 8, https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Vusi-Pikoli-Affidavit-Simelane.pdf
[413] Ibid.
[414] Anton Rossouw Ackerman, Affidavit to Court, https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Anton-Ackermann-Affidavit.pdf.
[415] *AZAPO* case, para 19.

intervention is lacking.[416] The provisions of article 27 of the Vienna Convention on the Law of Treaties, 1969 (VCLT), however, bar states from invoking national law to defeat objectives of treaty obligations. This poses a great challenge to states that adopt national amnesty laws in contravention of their treaty obligations. It thus calls for reappraisal and possible reform at the international law level in order to give recognition to amnesty laws. The flexible provisions of the Rome Statute, coupled with the philosophy of maintaining international peace and security that underlies the adoption of the UN Charter, justify the arguement that in certain exceptional circumstances international criminal law should seek to legitimise and recognise amnesties in foreign and international courts. These, however, would give effect to amnesties in a very limited sense. The ideal situation would entail reforms at the international level, accompanied by substantive policy guidelines.

The arguments made in this thesis are borne of awareness of the fact that peaceful resolution of conflict must take into account human rights obligations. The latter demand accountability for human rights violations as recognised in regional and international treaties, thereby obliging states to adopt measures to ensure the perpetrators are brought to book. It is not the thesis' submission, however, that these amnesties should be blanket and unconditional. Limited or conditional amnesty is not equivalent to impunity: it neither foregoes accountability nor forecloses redress for victims.[417] Limited amnesty can be structured in a manner that would still give the victims justice.[418] In a similar vein, John Dugard argues that international criminal justice may as well seek to distinguish between permissible and impermissible amnesties, while limiting international recognition to the former.[419] Other scholars also underscore the need for international law to recognise limited amnesties.[420]

Arsanjani suggests that the lawfulness of every amnesty should be decided

[416] Arsanjani 'The International Criminal Court and national amnesty laws' (n 305 above) 66.
[417] Gomez 'Transitional States, the ICC, and amnesties: Establishing an advisory commission' (n 35 above) 62.
[418] Ibid.
[419] Dugard 'Dealing with crimes of a past regime: Is amnesty still an option?' (n 301 above) 1009. According to Dugard, between the rival notions of prosecution and amnesty are truth and reconciliation commissions. While blanket, unconditional amnesty should not be permitted, amnesty accompanied by a truth commission should be permitted instead of prosecution.
[420] Naqvi 'Amnesty for war crimes' (n 233 above) 588.

on a case-by-case basis, bearing in mind the crimes subjected to amnesty, alternative remedies provided to victims in the absence of prosecution, whether the amnesty was broadly supported by the local population, whether the amnesty enabled the emplacement of a democratic government, whether the amnesty is constructed in a manner that supports human rights, and what the conditions of human rights would be in the absence of the amnesty.[421] It will not be the case that all amnesty law is acceptable in international criminal justice. A concrete criterion should be put in place to ensure that those who do not fulfil the same are exempt from the benefits and will be subjected to prosecution.

As in international law, there is a lacuna in the regional law on conditional amnesties. Exceptional circumstances explained in this chapter of this thesis may call for conditional amnesties. This can be achieved through the recommendation stated under section 6.4.1.5 of chapter 6 of this thesis.

3.5 The need for peaceful coexistence of citizens versus international criminal justice

The AU has also emphasised the need for stability and peaceful coexistence of the citizenry at the expense of justice.[422] For instance, it strongly criticised the ICC indictment of al-Bashir,[423] the late Gaddafi,[424] Kenyatta[425] and his deputy Ruto,[426] claiming it to be tantamount to compromising peace in the respective states.[427] With regard to Libya, fo example, the AU maintained that indicting Gaddafi 'seriously' complicated its efforts to broker 'a negotiated political solution to the crisis in Libya', which would have also addressed, 'in a mutually-reinforcing way, issues relating to impunity and reconciliation'.[428] It

[421] Arsanjani 'The International Criminal Court and National Amnesty laws' (n 305 above) 66-67.
[422] I Souare 'Human rights and conflict resolution in West Africa: The case of Charles Taylor' (2008)1, 1 *Africa Renaissance* 18.
[423] *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-3 (n 2 above).
[424] *Situation in the Libyan Arab Jamahiriya* (Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi) ICC-01/11-13 (27 June 2011) Pre-Trial Chamber I.
[425] *Prosecutor v Uhuru Muigai Kenyatta*, ICC-01/09-02/11, https://www.icc-cpi.int/kenya/kenyatta (accessed 23 March 2017).
[426] *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, https://www.icc-cpi.int/kenya/rutosang (accessed 23 March 2017).
[427] See n 1 above.
[428] AU Assembly 'Decision on the implementation of the Assembly decisions on the International Criminal Court' Assembly/AU/Dec.366(XVII), Doc. EX.CL/670(XIX), 17th

then declined to effect any arrest and surrender of Gaddafi to the ICC.[429] While expressing its strong conviction to root out impunity, the AU declared that 'justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace'.[430]

Although critics would quickly ask why the AU has not taken similar steps in the case of the DRC or CAR over prosecution of international crimes, it is notable that the AU has voiced its concerns mainly with respect to indictments issued against senior government officials or serving heads of states. In fact, the real argument has been that the ICC is targeting democratically elected leaders, thereby undermining democracy and good governance in Africa, which in turn destabilises peace. This was raised in the Kenyan cases following Kenyatta's election as president and the UNSC's refusal to defer his case.[431] It is also still the issue in Sudan. Of concern to this study is whether the allegation that the ICC undermines democracy by prosecuting democratically elected leaders in Africa and in turn compromising peace is legitimate.

Notably, there are instances (see below) where the OTP has actually embraced the need to promote peaceful coexistence of local citizens in its situation- and case-selection strategies. Yet this has still evoked criticism from both scholars and local communities. For example, in the Kenyan context, concerns have been raised as to the prosecutor's avoidance tactics of the then real 'power wielders'.[432] The prosecutor has been criticised for playing party-politics by ensuring the balance between those being investigated from the two warring parties: the prosecutor initiated investigations against six individuals – three from the Party of National Unity (the then ruling party) and

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Ordinary Session, 30 June - 1 July 2011, para 6. See also CBC News 'Gadhafi's indictment hinders peace: African Union', http://www.cbc.ca/news/world/story/2011/07/02/world-african-union-gadhafi.html (accessed 23 March 2017); G Ford 'The African Union says "up yours" to the International Criminal Court', http://warisacrime.org/content/african-union-says-yours-international-criminal-court (accessed 23 March 2017).

[429] AU Assembly, Assembly/AU/Dec.366(XVII) (n 340 abovae) para 6.

[430] AU PSC, PSC/MIN/Comm(CXLII) (n 1 above) para 3.

[431] The Kenyan case against Kenyatta has since been withdrawn by the prosecutor for lack of sufficient evidence to prosecute the case (n 211 above).

[432] E Asaala 'The International Criminal Court factor on transitional justice in Kenya' (n 249 above) 119.

three from the Orange Democratic Party (the then opposition party).[433] Although it was a sound approach for the prosecutor to take into account the local political realities, thereby seeking to ensure peace and stability, sectors of the public still felt the prosecutor was evading investigations against the masterminds since they were the then wielders of power.[434]

Related sentiments have been articulated with respect to the prosecutorial strategy deployed in Uganda. The public and several organisations have expressed concern over the failure by the OTP to take action against the Uganda People's Defense Force (UPDF) and government officials despite their commission of international crimes.[435] William Schabas, for instance, portrays the awkward situation in which the OTP found itself after negotiating with President Yoweri Museveni to refer the LRF case to the ICC on the understanding that his men in government would not be indicted, only to find out later that the Museveni government too had actually engaged in war crimes and crimes against humanity.[436] Despite his earlier commitment to cooperate with the ICC, Museveni, when later questioned about the possibility of the ICC investigating the government's conduct, quickly reneged on it and emphasised that Uganda would prosecute cases related to its own government,[437] leaving the prosecutor in a quandary. Local studies, however, reveal 'that any prosecutions that might take place in the future will hold the [government of Uganda] accountable in the same way as the LRA'.[438]

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[433] Ibid, 135.
[434] Nation Group 'Go for Kibaki and Raila, lawmaker tells ICC' *Daily Nation* (15 July 2009) 34; 'Blame game begins' *Kenya Times* (12 July 2009) 1.
[435] L Hovil and JR Quinn 'Peace first, justice later: Traditional justice in Northern Uganda' Refugee Law Project Working Paper No. 17 (2005) 15, http://www.refugeelawproject.org/files/working_papers/RLP.WP17.pdf (accessed 4 June 2014); HRW 'Uprooted and forgotten: Impunity and human rights abuses in Northern Uganda' (2005) Vol. 17 No. 12A, http://www.hrw.org/reports/2005/uganda0905/uganda0905.pdf (accessed 5 June 2014).
[436] Schabas 'The International Criminal Court at ten' (n 80 above) 503. See also C Aptel and W Mwangi 'International criminal justice in Africa during 2008' (2008) *Africa Human Rights Law Journal* 277; LF Horton 'Prosecutorial discretion before international criminal courts and perceptions of justice: How expanded prosecutorial independence can increase the accountability of international actors' (2010-2011) 7(1) *Eyes on the ICC* 36.
[437] A Taylor 'Uganda and the ICC: Difficulties in bringing the Lord's Resistance Army leadership before the ICC' (2009-2010) 6 *Eyes on the ICC* 31.
[438] Hovil and Quinn 'Peace first, justice later' (n 349 above) 15; HRW 'Uprooted and forgotten' (n 347 above).

Patryck Labuda documents similar comments about the DRC.[439] Although reports clearly link the governments' military to numerous atrocities in the DRC, the OTP narrowed down its investigations to political opponents of the government of President Kabila.[440] This could possibly have been a strategy to avert more violence and ensure peaceful coexistence of the locals. Yet this has led to criticism of partiality and politicisation of the OTP's prosecutorial strategy in the DRC. Phil Clark aptly describes the prosecutor's conduct as having 'chased cases' out of self-interest to appease states as opposed to creating a perception of ICC legitimacy.[441]

Eugene Bakama, however, observes that the mode of referral has a direct impact on the OTP's investigative strategy.[442] He argues that since, in the case of self-referrals, subsequent investigations are focused mostly on one side of the conflict, thereby creating the perception of partiality by the OTP, one can also appreciate the OTP's dilemma in attempting to balance the numerous interests often present in post-conflict situations, an effort that remains essential for ensuring the peaceful coexistence of citizens.[443]

Yet, the criticism on indictment of democratically elected leaders is more complex than it appears. Contrary to the general perceptions, the African leaders so far indicted by the ICC have themselves undermined peaceful co-existence of citizens (or national peace and stability) through for instance holding on to power following fraudulent elections. For example, the ICC indicted the Kenyan president, Kenyatta, before he became president. It is after this indictment that he vied for and won the presidential seat. Notwithstanding allegations of irregularities in the elections,[444] the Supreme

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[439] PI Labuda 'The International Criminal Court in the Democratic Republic of Congo: A decade of partnership and antagonism' in MK Clarke, AS Knottnerus and E de Volder (eds) *Africa and the ICC: Perceptions of justice* (2016) 280.
[440] Ibid; EB Bope 'The International Criminal Court and the fight against impunity in Africa: Current challenges' in HJ van der Merwe and G Kemp (eds) *International Criminal Justice in Africa* (2016) 97.
[441] P Clark 'Chasing cases: The ICC and the politics of state referral in the Democratic Republic of Congo and Uganda' in C Stahn and MM El Zeidy (eds) *The International Criminal Court and complementarity: From theory to practice* Vol. 2 (2011) 40-42.
[442] Bope 'The International Criminal Court and the fight against impunity in Africa: Current challenges' (n 352 above) 89-90.
[443] Ibid.
[444] *Odinga and 5 others v Independent Electoral and Boundaries Commission and 3 others (2013).*

Court of Kenya initially shied away from invalidating presidential elections despite its very own findings that irregularities had occurred.[445] This has prompted the study's argument that the Kenyan president used his indictment to leverage himself to power at all costs, never minding the implications this could have for peace and stability in the country. Similarly, in the case of Sudan, since the ICC indicted al-Bashir in the year 2009, he has held on to power. In the year 2010, for example, al-Bashir emerged as the winner of the presidential elections despite complaints of electoral manipulations.[446] The accompanying electoral malpractices have had negative impacts on the peace and stability of the respective states.

3.6 Conclusion

The tension between notions of peace and justice manifests itself through the application of immunity and amnesty in international criminal law. It also emerges in the discourse on the need to maintain peaceful coexistence of local citizens, particularly in relation to the ICC's indictment of duly elected heads of state and government. Although the tension between peace and justice is real in Africa, the two notions should be read as interrelated and not necessarily in opposition to each other. This is especially so because the transitional process in post-conflict societies ought to be holistic. In some instances, this may call for recognition of limited immunity and amnesty for the sake of lasting peace. It may also call for a cautious utilisation of alternative justice mechanisms other than prosecution. Accountability does not limit itself to prosecution, as there are several other ways of holding such individuals accountable and, at the same time, achieving the objectives of both peace and justice. This will not only defuse the tension between peace and justice, but will also ensure that states adhere to their obligation to hold accountable individuals who commit international crimes.

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[445] Report by the Supreme Court of Kenya on its *suo moto* motion to re-tally certain polling stations.

[446] The Carter Centre 'Observing Sudan's 2010 national elections April 11-18 2010 final report' http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/FinalReportSudan-Apr2010.pdf (accessed 10 March 2015).

PART 3:
INTERROGATING THE 'AFRICAN SOLUTIONS' TO AFRICA'S PROBLEM OF IMPUNITY

CHAPTER 4
THE MALABO PROTOCOL AND AFRICAN STATE PRACTICES: A CRITIQUE OF THEIR JURISDICTION OVER INTERNATIONAL CRIMES

4.1 Introduction

Chapters 2 and 3 of this thesis engaged critically with Africa's concerns about the ICC. On the basis of these concerns, the AU has proposed alternative approaches to addressing impunity in the continent. Like the grievances discussed in the previous chapters, the solutions put forward by the AU too are numerous. This study, however, hones in on those suggested solutions that are most representative of AU member states and likely to be the most effective in the fight against impunity in Africa. Most important of all, the solutions discussed here are those that have been triggered by the preceding grievances.

Nevertheless, despite its myriad of complaints, the AU has to date not adopted a comprehensive regional policy that addresses all the concerns raised. While some suggested approaches are visible, others are dotted all over and are discernible only from subregional practices or state practices. State practice and subregional state institutions that have displayed visible efforts towards prosecution of international crimes in a manner to complement the ICC includes that in Uganda, the DRC and the Extraordinary African Chambers in Senegal, the latter being an internationalised court created under the auspices of the AU to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990.[1]

Thus, while some of these approaches have been adopted as essential frameworks of the AU, others are still at the proposal stage; others are yet to be placed on the AU agenda. The most visible regional approach of all is the AU's adoption of the Malabo Protocol which establishes an International Criminal Law Section in the African Court, with a mandate over international and transnational crimes.

[1] *Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin* 1982 *au 1er décembre* 1990.

One of the most noticeable impacts of Africa's grievances against the ICC within the AU has been the unceasing call for a regional institution with jurisdiction over international crimes. These calls have attracted much political and academic discussion. Though states have been slow to ratify the protocol, a majority of African leaders seem enthusiastic about the idea. Yet, some scholars are sceptical, appealing for caution as the idea matures into implementation.[2] This chapter argues that a regional body with jurisdiction over international crimes – though a legally sound idea – has to be streamlined in order to evade foreseeable challenges if is at all to achieve its objective of fighting regional impunity. In view of the practical challenges that are apparent with regard to the definition of crimes, financial deficiencies, the independence of the Court, and general difficulties attendant on establishing the Court (whether as a criminal chamber or general court) and the relationship between the African Court and the ICC, it is pertinent for the AU to reconsider these issues before the Court is operationalised.

This chapter seeks to, first, with respect to the Malabo Protocol, bring out the character of the African Court as currently constituted; the reasons currently informing the creation of the Court; how the expanded jurisdiction of the African Court, *in practice,* fits into the bigger framework of the ICC; as well as other innovative aspects of the Malabo Protocol that speak to Africa's grievances against the ICC. In this regard, the chapter provides a critique of the character of the Court and the crimes over which it has jurisdiction; and establish the genuineness of the call for an African solution to Africa's problem on impunity. Secondly, the chapter provides a critique of post-conflict African state practices relating to the prosecution of international crimes. African states' practice regarding national prosecution of international crimes has majorly been through special divisions in relevant national courts, military tribunals or extratordinary courts

As such, this chapter is divided into two main parts. The first discusses the

[2] S Lamony 'African court not ready for international crimes' *African arguments* http://africanarguments.org/2012/12/10/african-court-not-ready-for-international-crimes-—-by-steven-lamony/ (accessed 8 February 2016); A Abass 'The proposed international criminal jurisdiction for the African Court: Some problematical aspects' (2013) 60 *Netherlands International Law Review* 33.

contributions under the Malabo Protocol. This part is subdivided into four subsections. The first provides a historical overview of the emergence of the idea of a regional body with a prosecutorial mandate over international and transnational crimes. The second subsection is an in-depth analysis of selected legal issues – in relation to the African Court – in order to establish any innovativeness in the African system that specifically addresses Africa's concerns. The issues under analysis include the jurisdiction of the Court, trigger mechanisms, definition of crimes and the relationship between the proposed African Court and the ICC as well as the notion of corporate liability for international crimes. This section does not undertake an article-by-article exposition of the relevant Protocol establishing the Court. Rather, it focuses on selected themes that are key to the processes of the Court and which also speak to Africa's concerns about the ICC.

The third subsection considers political issues that are vital to both the establishment and effective operations of the Court. The most pertinent question in this regard is why the AU and African leaders insist on a regional body without efforts at reinforcing the independence of their own domestic judicial, prosecutorial and other related local systems necessary in order to implement a similar mandate. Is it a possible explanation that the calls for a regional body are motivated by efforts to rid Africa of the ICC through mechanisms that continue to perpetuate impunity? Or are these mechanisms a genuine response to Africa's concerns?

The second part of the chapter provides a critique of post-conflict African state practices that have undertaken actual prosecution of international crimes at either a national or subregional level.

This chapter therefore seeks to partially answer the second, third and fourth research questions: On the basis of what approaches or perspectives does Africa have these concerns? Do African approaches add value in the fight against impunity in Africa and how can one strengthen them? Is a regional criminal mechanism - which takes into consideration African approaches or perspectives – the solution to fighting impunity in Africa? In particular, the chapter will focus on the contribution of state practices to the prosecution of

international crimes as well as the contribution of the Malabo Protocol. The overall concern is whether these two distinct approaches address Africa's concerns about the ICC and whether the eventual operationalisation of the regional court with mandate over international crimes will eradicate AU concerns about the ICC.

4.2 The Malabo Protocol

4.2.1 Origin of the African Court, trigger mechanisms and the core international crimes

4.2.1.1. Tracing the origin of a regional body with a criminal mandate

The idea of an African Court with a criminal mandate is not new. It was first considered in the 1970s during the drafting of the African Charter on Human and Peoples' Rights (African Charter),[3] but the deliberations did not materialise into a regional body with criminal mandate over international crimes. The notion re-emerged in 2000 with the enactment and adoption of the Constitutive Act of the AU (AU Constitutive Act).[4] Besides being a socio-political force for integrating the continent, the Constitutive Act is underlain by yet another philosophy, to shun impunity and unconstitutional change of governments.[5] Thus far, not only does the Act create a Court of Justice as one of the organs of the AU,[6] but it also makes the establishment of such a court mandatory.[7] Accordingly, in 2003, the AU adopted the Protocol of the Court of Justice of the African Union (ACJ Protocol)[8] establishing the African Court of Justice (ACJ) with 'jurisdiction over all disputes and applications referred to it', concerning, inter alia, the 'interpretation and application' of AU Constitutive Act, the 'interpretation, application or validity' of AU treaties and subsidiary legal documents, and questions of international law.[9]

Notably, however, an express criminal mandate was not bestowed upon this Court. Its mandate was broadly embodied in principles that sought to promote

[3] A Abass 'Historical and political background to the Malabo Protocol' in G Werle and M Vormbaum *The African Criminal Court: A commentary on the Malabo Protocol* (2017) 15-16.
[4] Entered into force on 26 May 2001.
[5] Article 4, AU Constitutive Act.
[6] Article 5, AU Constitutive Act.
[7] Article 18, AU Constitutive Act.
[8] Adopted by the AU Assembly on 11 July 2003 in Maputo, Mozambique.
[9] Articles 2 and 19, ACJ Protocol.

democracy, good governance, regional integration, respect for human rights and sustainable development.[10] It incorporated neither core international crimes, nor transnational crimes.

The establishment of the ACJ as a different institution posed a major challenge to the AU, thus necessitating a merger of the Court of Justice with the African Court on Human and Peoples' Rights (ACtHPR). The ACtHPR was established under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998 (ACtHPR Protocol), with jurisdiction' over 'all cases and disputes submitted to it concerning the interpretation and application of the [African] Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned'.[11] The ACtHPR is currently operational as a stand-alone court until it is absorbed into the ACJHR once the latter becomes operational.[12]

Having an additional structure was deemed undesirable, given its financial implications for the AU.[13] It was argued that, even though the two institutions were different in terms of structure, there were potentially common areas such as jurisdiction.[14] Despite criticism from international human rights bodies,[15] these efforts culminated in the adoption in 2008 of the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR 2008 Protocol). This Protocol provides in part as follows:

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[10] Articles 4 and 5, AU Constitutive Act.

[11] Articles 1 and 3, ACtHPR Protocol. The Protocol, as at the time of writing, had 30 ratifications (see See 'List of countries, which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf (accessed 16 May 2018).

[12] Chapter II (transitional provisions), Malabo Protocol.

[13] M Hansungule 'African Courts and African Commission on Human and Peoples' Rights' in Anton Bösl and Joseph Diescho (eds) *Human rights in Africa: Legal Perspectives on their protection and promotion* (2009) 3, http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/8_Hansungule.pdf (accessed 16 May 2013); 'Summary of Procedures of the First Meeting of Experts/Judges and the PRC on the Draft Protocol of the Court of Justice of the African Union, 22-24 April 2003' Expt.Judg/draft/Prot/ACJ/Rpt. (1), para 31.

[14] Ibid.

[15] Amnesty International 'African Commission on Human and Peoples' Rights: Oral statement on Item 11: The establishment of the African Court on Human and Peoples' Rights' AI Index: IOR 10/005/2005 (23 November 2005).

> The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted on 10 June 1998 in Ouagadougou, Burkina Faso and which entered into force on 25 January 2004, and the Protocol of the Court of Justice of the African Union, adopted on 11 July 2003 in Maputo, Mozambique, are hereby replaced by the present Protocol and Statute annexed […].[16]

To this end, the two courts would be 'merged into a single Court and established as 'The African Court of Justice and Human Rights' (ACJHR).[17] The Protocol is yet to come into force, as only six states (Benin, Burkina Faso, Libya, Mali, Congo and Liberia), as at the time of writing, have ratified it, as opposed to a required threshold of 15 ratifications (stipulated in article 9(1) of the Protocol) in order to bring it into force.[18]

The idea of incorporating transnational crimes and core international crimes within the ACJHR subsequently emerged and was considered at various levels of the AU.[19] In 2006, the AU established a committee of eminent jurists to examine and advise on the possibility of trying the Chadian president, Hissène Habré, in Africa. In its report, this committee underscored the inevitability of the establishment of a regional body with a criminal mandate over 'crimes against humanity, war crimes and violations of the Convention against Torture…'[20]

The ICC's arrest warrant against al-Bashir of Sudan lent further impetus to the drive for an African Court with a mandate over international crimes[21] and led to an amendment of the ACJHR 2008 Protocol establishing the ACJHR. It is this amendment – the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) – that incorporates transnational crimes and core international crimes within the

[16] Article 1, ACJHR 2008 Protocol.
[17] Article 2, ACJHR 2008 Protocol.
[18] See 'List of countries, which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights' https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_3.pdf (accessed 15 May 2018).
[19] In 2004, the then chairman of the General Assembly and heads of states of Africa, President Olusegun Obasanjo of Nigeria, suggested an integration of the two courts.
[20] Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, paras 35 and 39, http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf (accessed 15 April 2013).
[21] *Prosecutor v Omar Hassan Ahmen Al Bashir* (Decision on the Prosecution's application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir) ICC-02/05-01/09-3 (4 March 2009) Pre-Trial Chamber I.

ACJHR[22] and introduces an International Criminal Law Section of the Court.[23] The Malabo Protocol, as at the time of writing, has been signed by only 11 states (Benin, Chad, Comoros, Congo, Ghana, Guinea Bissau, Kenya, Mauritania, Sierra Leone,São Tomé and Principe and Uganda), and ratified by none.[24] Although one cannot rule out the possibility of this Protocol garnering the required ratifications to come into force, the possibility of not acquiring the required ratifications – coupled with the reluctance shown by member states to ratify the Protocol - is a reality that may keep the Court at bay for a long time.

4.2.1.2 Trigger mechanisms for the international criminal jurisdiction of the African Court

A referral to the prosecutor of the African Court can be done by a state party, the Assembly of heads of state and government of the AU, the AU PSC, and the prosecutor through the exercise of his or her *proprio motu* powers.[25] Other than the addition of the Assembly of heads of state and government and the omission of the United Nations Security Council (UNSC), the Protocol adopts provisions similar to the Rome Statute as far as the trigger mechanisms of the International Criminal Law Section are concerned.

As discussed in chapter 2 of this thesis, some of the AU's concerns about the ICC revolve around international politics within the UNSC as well as the global politics of the UNSC. The latter observation is informed by the reality that the UNSC's problems are anchored within international power differentials and inequalities. The main concern is whether or not the new African Court with a criminal mandate will be able to address this global power issue.

The Malabo Protocol does not include the UNSC as an organ that can trigger the jurisdiction of the Court. Instead, it is the AU's PSC that has been

[22] Articles 28A-N, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, STC/Legal/Min/7(I) Rev.1 (adopted in Malabo in July 2014) (Malabo Protocol).
[23] Article 6, Malabo Protocol changing article 16 of the ACJHR 2008 Protocol.
[24] See 'List of countries which have signed, ratified/acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights', https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf (accessed 15 May 2018).
[25] Article 46F and 46G, Malabo Protocol.

bestowed with this role. Seemingly, this resolves the AU's concerns about the UNSC. One could argue, however, that in acting under Chapter VII of the UN Charter, the UNSC could adopt a resolution requesting the International Criminal Law Section of the African Court to consider a matter. Although such a referral may not be legally binding on the African Court, it cannot be denied that the global power exerted by the UNSC might influence the way in which the Court deals with the matter. At any rate, in such a case, if the International Crminal Law Section of the Court fails to take up the matter, then the UNSC would still have the leeway to refer the matter to the ICC, which may not be an option for African-based cases. In light of the global political power wielded by the UNSC, therefore, a UNSC referral to the International Criminal Law Section of the African Court is likely to be perceived to be *de facto* binding on the Court itself.

Moreover, such a UNSC referral could also mean that all AU member states who are also UN member states are under an obligation to adhere to the UNSC resolution to either ensure prosecution of the relevant matter or to cooperate with the African Court, by virtue of article 25 of the UN Charter. Thus, while the Court may have no legal obligation to adhere to the UNSC's request, its member states will be under a legal obligation to cooperate in the prosecution of the relevant individuals so long as they are members of the UN Charter. African states thus have to accept and comply with such a decision made by the UNSC.

One of the AU concerns against the ICC relating to referral is that the UNSC refers non-states parties to the Rome Statute – with the effect of them being legally bound by a decision of the UNSC to a statute they have not ratified. [26] This, the AU considers to be unacceptable, and considering, as it states, the systemic disadvatange that African states face when it comes to UNSC decisions.[27] Yet, article 46F(2) of the Malabo protocol does not specifically require that the referral must relate to state parties to the Protocol. So how does that address AU's concerns regarding UNSC referring non-state parties – with the effect of them being legally bound by a decision of the UNSC to a

[26] AU withdrawal strategy doc (n 8 above) para 4.
[27] Ibid.

statute they have not ratified? If the Assembly or PSC refers a non-state party, and subject to the binding nature of their decisions, will the effect not be same – the non-state party being legally bound by a decision of the PSC/Assembly to the Protocol that it has not ratified?

Although the Malabo Protocol has expressly ignored the UNSC as an entity that can trigger the criminal jurisdiction of the African Court, what it has adopted is essentially similar in principle to what exists under the Rome Statute. If Africa's grievances about the UNSC's referral powers to the ICC are at all genuine, then entirely ignoring this role within the African legal framework does not adequately assuage Africa's concerns. Besides, like the UNSC, the AU PSC is also a political body (with states that might have varying individual interests), hence one cannot rule out the possibility of politics within the PSC impacting on its referral practice. This study argues that the AU approach does not effectively address any of the AU's concerns against the role of the UNSC on its referral of cases.

Africa has also raised concerns about the prosecutor's *proprio motu* powers in relation to referral of African-based cases. The structures adopted by the AU, however, raises questions as to whether this new institution resolves its problems. The Malabo Protocol adopts a very low threshold on its oversight mechanisms over the exercise of these *proprio motu* powers. Only one judge suffices to authorise the prosecutor to institute investigations. This implies that if Africa's concern about the possible bias of a three-bench judge in the ICC process is true, then a one-bench judge should pose even more of a concern about the likelihood of bias. It, thus, seem that Africa's concerns over the ICC OTP's *proprio motu* powers do not arise from the oversight role of the PTC but from the general perception of ICC bias.

Moreover, the African model is uncertain on what the prosecutor's subsequent actions should be in relation to referrals by a state party, the AU Assembly of Heads of State and Government or the AU PSC. Should the prosecutor proceed to investigate such referrals, or will the Court adopt guidelines similar to those under article 53 of the Rome Statute, allowing the prosecutor to review such a referral and subjecting his or her subsequent decisions to a

further review of the Court?

In view of the convoluted nature of AU's remedies to its concerns on the two aspects above, this study argues that it is possible that Africa does not appreciate exactly where the problem lies. Its approach to the concern about the role of the ICC OTP and the UNSC clearly indicates the possibility that Africa's solution may not cure its concerns. Although the concerns on these two matters may seem minor and unconvincing, this study dismisses the criticism that Africa adopted the Protocol as a mere political statement and with no genuine intent of seeking accountability for international crimes.[28] As noted in the previous chapter AU and African states advance fighting impunity as a key goal.[29] Nonetheless, Africa needs to adopt a more philosophically nuanced approach to address its opposition to the ICC in this regard.

4.2.1.3 The African Court's mandate over core international crimes

The Malabo Protocol confers criminal jurisdiction to the African Court over genocide, crimes against humanity, war crimes, unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money-laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression.[30] Some critics perceive this conferment as expanding the mandate of an already overstretched Court.[31] The inclusion of crimes such as money-laundering, corruption, illicit exploitation of natural resources and unconstitutional change of government has, nonetheless, generally been perceived as addressing the long-standing question over the jurisdictional gap that exists between the regional human rights and international criminal justice system.[32] It is also commendable that the Court will be able to apply a much broader body of international law when rendering its decisions.[33]

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[28] M du Plessis 'The International Criminal Court and its work in Africa: Confronting the myths' ISS paper No. 173 November 2008; E Asaala 'The African Court of Justice and Human and Peoples' Rights: An opportunity for international criminal justice?' in B van der Merwe (ed) *International criminal justice in Africa: Challenges and opportunities* (2014) 36.
[29] Article 4(o), AU Constitutive Act.
[30] Articles 28A-N, Malabo Protocol.
[31] Lamony 'African court not ready for international crimes' (n 2 above).
[32] A Abass 'The proposed international criminal jurisdiction for the African Court: Some problematical aspects' (2013) 60 *Netherlands International Law Review* 33.
[33] Articles 19 and 20, ACJHR 2008 Protocol.

In the light of the above, this section is specifically concerned with how the Malabo Protocol's provisions on international crimes seek to address the AU's concerns and whether it will alleviate them. The contribution of the Malabo Protocol in this regard can be ascertained at two levels: the first at the definitional level and the second in relation to the choice of crimes over which the Court will have jurisdiction. The crimes of piracy, terrorism, money-laundering, trafficking in persons, trafficking in drugs and hazardous waste, unconstitutional change of government, mercenarism and corruption are innovations at a regional level. With the adoption of the Malabo Protocol, the African Court stands to become the first supranational criminal tribunal bestowed with jurisdiction over these crimes. However, this section will not focus on this category of crimes as they do not fall under the jurisdiction of the ICC. As stated in chapter 1 of this thesis, the study is limited in scope to Africa's concerns about the ICC, which thus restricts its focus to ICC crimes. Additionally, while the conception of Rome Statute crimes may not be too different, Africa has introduced some noticeable variations in the manner in which some of the ICC crimes are defined. For example, the definitions of crimes against humanity, war crimes, crime of aggression and genocide embody innovations that make unique substantive contributions to international criminal law. Hence, the focus is on these four crimes.

Generally, Rome Statute crimes and their elements have been dealt with extensively in literature concerning international criminal law.[34] Hence, the following section analyses the three crimes with specific emphasis on Africa's innovations and unique contributions and on whether this addresses its concerns against the ICC. It also points out certain definitional weaknesses

[34] For more information, A Cassese *International law* 2nd edn (2005) 436-450; G Werle and F Jessberger *Principles of international criminal law* 3rd edn (2014) 289-546; R Cryer, H Friman, D Robinson and E Wilmshurst *An introduction to international criminal law and procedure* 2nd edn (2010); A Cassese, G Acquaviva, M Fan and A Whiting *International criminal law: Cases and commentary* (2013); G Mettraux 'Crimes against humanity in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and for Rwanda' (2002) 43, 1 *Harvard International Law Journal* 244; ME Badar 'From the Nuremberg Charter to the Rome Statute: Defining the elements of crimes against humanity' (2004) 5 *San Ndiego International Law Journal* 109; S Chesterman 'An altogether different order: Defining the elements of crimes against humanity' (2000) 10 *Duke Journal of Comparative & International Law* 214-315; A Day 'Crimes against humanity as a nexus of individual and state responsibility: Why the ICJ got *Belgium v Congo* wrong' (2004) 22 (3) *Berkeley Journal of International Law* 506 citing D Robinson 'Defining crimes against humanity at the Rome conference (1999) 93 *American journal of International Law* 43.

that require attention. It should be noted that some crimes elicit more criticism than others, necessitating much more attention than others.

a. Crimes against Humanity

The Malabo Protocol introduces two aspects in relation to the crime against humanity. Firstly, is the term 'enterprise' used in the alternative to 'attack' within its chapeau definition of this crime. Although the Protocol defines the term 'attack' it does not define 'enterprise'. This terminology should be understood within the Malabo Protocol's contextual innovations. Unlike the Rome Statute's traditional individual criminal responsibility, the Malabo Protocol adopts the innovative notion of corporate liability for international crimes.[35] This implies that under the Malabo Protocol, corporate entities will also be held criminally liable for crimes against humanity. Secondly, in additional to torture, Malabo Protocol adds the notion of 'cruel, inhuman and degrading treatment or punishment.' These terminologies are not new in international law. Kai Ambos correctly notes the distinction between these two terms is one of severity.[36] The degree of severity for 'torture' is much higher than that of 'cruel, inhuman and degrading treatment or punishment.' This implies that under the Malabo Protocol, the degree of accountability for crimes against humanity is much lower in this respect. This has the impact of expanding the levels of accountability for crimes against humanity. Though contextually relevant, these new additions do not speak directly to AU's grievances against the ICC.

b. The crime of aggression

The Charters of the Nuremberg[37] and Tokyo[38] tribunals were the first to introduce the crime of aggression, referred to at the time as crimes against peace. Sergey Sayapin notes that the highly politicised nature of this crime

[35] See detailed discussion under point 4.2.2 on corporate criminal responsibility.
[36] K Ambos 'Genocide (article 28B), crimes against humanity (article 28c), war crimes (article 28D) and the crime of aggression (article 28M)' in Werle and Vormbaum (eds) *The African Criminal Court* (n 3 above) 42.
[37] Article 6(a), Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945 (Nuremberg Charter).
[38] Article 5(a), International Military Tribunal for the Far East Charter, Tokyo, 19 January 1946 (amended Charter dated 26 April 1946) (Tokyo Charter).

not only made the prosecution of this crime nearly impossible for decades, but also delayed efforts to find a definition for the crime under the Rome Statute, which was not possible until the 2010 Kampala Conference.[39]

Like the Rome Statute, the Malabo Protocol refers to the crime of aggression. The Rome Statute definition and that of the Malabo Protocol are similar in that they both build on the definition in the Nuremberg Charter. The latter defines crimes against peace as 'planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'.[40]

While under the Nuremberg Charter it appears as though anyone could be prosecuted for crimes against peace, the Rome Statute and the Malabo Protocol specify that the accused person must be 'a person in a position to effectively exercise control over or direct the political or military action of a State, of an act of aggression …'[41] The crime of aggression is therefore a leadership crime under the two legal frameworks.

The Rome Statute also requires that an act of aggression must be the act of a state. Accordingly, under the Rome Statute, the crime of aggression is the use of 'armed force by a State against the sovereignty, territorial integrity or political independence of another State …'.[42]

The Malabo Protocol, however, introduces a small variation. Under this Protocol, an act of aggression can be an action either of a state or an 'organization, whether connected to the State or not'.[43] Thus, while the Rome Statute restricts the crime of aggression to states as both the aggressor and the object (victim), the Malabo Protocol does not limit the aggressors of this crime to states. It only limits the objects of this crime to states. An aggressor for crime of aggression also applies to organisations, including those

[39] S Sayapin 'The crime of aggression in the African Court of Justice and Human and Peoples' Rights', https://www.academia.edu/25874281/The_Crime_of_Aggression_in_the_African_Court_of_Justice_and_Human_and_Peoples_Rights (accessed 2 March 2017).
[40] Article 6(a), Nuremberg Charter.
[41] Article 8 *bis*, Rome Statute; article 28M, Malabo Protocol.
[42] Article 8 *bis*, Rome Statute.
[43] Article 28M, Malabo Protocol.

independent of any state. The Malabo Protocol, therefore, moves away from the traditional conceptualisation of the crime as a state-initiated crime and introduces non-state actors as perpetrators of the crime.

This innovation under the Malabo Protocol on the crime of aggression does not address any of the AU's grievances against the ICC. First, one does not understand the necessity of changing the international criminal law position that limits the crime of aggression to state actors. If Africa were concerned with addressing the menace of rebel groups, could this not be adequately prosecuted under the crimes of genocide or crimes against humanity or war crimes?

Perhaps a more convincing approach to explaining the Malabo Protocol's reference to organisations not connected to a state or 'foreign entity' within the context of crime of aggression is to consider legal persons such as multinational corporations. Notably, the Protocol does not limit its jurisdiction to the traditional individual criminal liability, but also incorporates corporate criminal liability. Contrary to what some scholars argue, namely that the very nature of a corporation does not permit it to commit this crime on its own unless it works in conjunction with armed forces,[44] this study argues that a private military contractor such as Executive Outcomes, or Xe as it is also known, would not need to partner with other armed forces if it wanted to engage in an act of aggression. Be that as it may, this interpretational challenge does not speak to any of the AU grievances against the ICC, though it remains to be seen how the African Court will deploy this accountability measure against legal persons.

Another noteworthy aspect of the definition of the crime of aggression and its implications for non-state actors is the requirement that the character, gravity and scale of an act of aggression 'constitutes a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union'.[45] Underlying the concept of 'manifest violation of the Charter of the United Nations' is the tension between human rights and state sovereignty. The

[44] K Ambos 'Genocide (article 28B), crimes against humanity (article 28c), war crimes (article 28D) and the crime of aggression (article 28M)' in G Werle and M Vormbaum (eds) *The African Criminal Court* (n 3 above) 50.
[45] Article 28M(a), Malabo Protocol.

existing definition of this concept in this regard has been one with limited reference to states' 'responsibility to protect'.[46] This notion is founded on the idea of sovereignty of states and it 'places the primary responsibility of protection on the territorial state, but allows for collective external intervention, in the last resort, in the event of a failure on the part of the territorial state'.[47] In order to fulfil the requirement of 'a manifest violation', it would have to be demonstrated that the state (on its own or as part of a collective effort) failed to protect its citizens from heinous crimes. Manifest violation of the UN Charter thus refers to the failure by a state to fulfil certain obligations within the domain of 'responsibility to protect'. Yet, 'manifest violation' in the context of the crime of aggression displaces traditional connotation of being preceded by an atrocity which then prompts responsibility to protect. In this context, 'manifest violation' concerns not any possible atrocity, but rather whether the use of force by a state is itself a 'manifest violation' of the Charter.

Understandably, the UN system has traditionally perceived these crimes as state crimes, as opposed to the Malabo Protocol position, which introduces the phenomenon of non-state actors. The UN system understanding, therefore, implies that non-state actors are incapable of 'manifest violation' of the UN Charter, as the responsibility to protect is explicitly placed on states. Additionally, the UN Charter does not apply to non-state actors but to states only.[48]

For its part, one of the AU objectives under the Constitutive Act is to 'defend the sovereignty, territorial integrity and independence of its Member States.'[49] Notably, however, the Constitutive Act is not clear if the the violation of this sovereignty is limited to states. Malabo Protocol, therefore, opens the door to non state actors engaging in an act of aggression that violates the sovereignty of member states as recognised under the Constitutive Act.

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[46] UN General Assembly Resolution 60/1 '2005 World Summit Outcome' UN Doc. A/RES/60/1 (2005).
[47] EY Omorogbe 'The African Union, responsibility to protect and the Libyan crisis' (2012) 59 (2) *Netherlands International Law Review* 143 citing AJ Bellamy *Responsibility to protect* (2009) 21-28; C Stahn 'Responsibility to protect: Political rhetoric or emerging legal norm?' (2007) *American Journal of International Law* 111; R Thukur *The United Nations, peace and security: From collective security to the responsibility to protect* (2006) 255.
[48] Article 3, UN Charter.
[49] Article 3, Constitutive Act of AU

Another problematical issue that is likely to arise in this regard is this: Who makes the determination on an act of aggression? Under the Rome Statute, a state referral or the prosecutor's exercise of *proprio motu* powers in relation to crimes of aggression is allowed.[50] If the UNSC has made a determination, then the prosecutor may proceed;[51] if the UNSC has *not* made a determination, then the prosecutor may proceed six months later with PTC approval.[52] The UNSC's powers to make this determination emanate from article 39 of the UN Charter, which authorises it to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' and to 'make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security'.

Since the UNSC enjoys primary responsibility over matters of peace and security, one would question whether it can make such a determination for cases before the African Court. This is particularly so because the Malabo Protocol defines the crime of aggression partly as an act that 'constitutes a manifest violation of the Charter of the United Nations…' Yet within the UN Charter framework, it is the UNSC that enjoys the primary authority over matters of peace and security. The Malabo Protocol is also not clear whether such a determination can be made by the AU through its PSC,[53] or whether such a determination is necessary in the first place, or whether the prosecutor will always have the right to proceed.

Clearly, there is an overlap of responsibility between the AU PSC and the UNSC with respect to acts of aggression. The AU PSC has the mandate to 'examine and take such appropriate action within its mandate in situations where the national independence and sovereignty of a Member State is threatened by acts of aggression …'[54] The UNSC has a similar mandate under 39 of the UN Charter. However, article 52 of the UN Charter allows

[50] Article 13 and article 15*bis*, Rome Statute.
[51] Article 15*bis* (6) and (7), Rome Statute.
[52] Article 15*bis* (6) and (7), Rome Statute.
[53] The PSC was established under by virtue of article 2 of the Protocol Relating to the establishment of the Peace and Security Council of the African Union, 2002 (PSC Protocol), which also provides that the PSC's is established pursuant to article 5(2) the Constitutive Act.
[54] Article 7(o), PSC Protocol.

> the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Regional organisations that act inconsistently with those principles and purposes would then be in conflict. The question thus is whether a determination of an act of aggression by the AU PSC would be seen as inconsistent or not. But a determination by the AU PSC of a regional act of aggression does not in any way violate the purposes and principles of the UN. If anything, such efforts will be geared towards fighting impunity and therefore guaranteeing international peace and security. This, it is argued, rules out the possibility of any conflict between the powers of the UNSC and the AU PSC in determining crimes of aggression. Although the two are independent institutions with independent normative frameworks, the objectives of their activities are within the principles of the UN Charter. It is thus anticipated that the two organs will work in close collaboration towards adopting appropriate measures to restore international peace and security. Indeed, the AU has made it mandatory for the PSC to 'cooperate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security'.[55] The AU has acknowledged, furthermore, the necessity 'to maintain sustained interaction between the UN and the Regional Organisations in order to build particularly the operational capacities of the organisations'.[56]

Nonetheless, let us consider an extreme hypothetical scenario in which the UNSC, while acting under Chapter VII of the UN Charter, determines an act of aggression over which the African Court has jurisdiction. It then proceeds to adopt a resolution to the effect that, for purposes of maintaining international peace and security and until the UNSC decides otherwise, no UN member state can undertake any kind of prosecution. By virtue of articles 25 and 103 of the UN Charter, such a resolution will be binding on all UN member states and any international agreement to the contrary will be void. This will, in effect, oust the powers of prosecuting the matter in UN member states.

[55] Article 17(1), PSC Protocol.
[56] AU Executive Council 'The common African position on the proposed reform of the United Nations' *The Ezulwini consensus*, Ext/EX.CL/2 (VII) (2005) page 7, para 1.

Suppose that the AU PSC goes further and determines the very same acts as acts of aggression and therefore calls upon the African Court to exercise its criminal jurisdiction. This presents a possible tension-prone relationship between UNSC and the AU member states. Can the AU PSC proceed with the determination and press for prosecution oblivious of the UNSC resolution? Does such a resolution by UNSC limit the powers of the AU PSC with respect to referring the matter for prosecution to the African Court? Nothing precludes the PSC from determining whether there is an act of aggression or not. What would be precluded, as stated above, would be UN member states undertaking any prosecution. Arguably too, while such a UNSC resolution is legally binding on its member states, it does not legally bind regional entities like the African Court; thus, such prosecution may proceed oblivious of the UNSC resolution.

This hypothetical scenario would require a high threshold, however – a vote by majority members and also no veto from the permanent members of the UNSC.[57] The possibility of not achieving the necessary votes or the likely use of a veto could be overcome if the UNSC and the PSC were to work closely together within the spirit of the UN Charter and the PSC's Protocol in undertaking appropriate measures to restore international peace and security.

It may also be questioned whether the UNSC's determination in this regard would affect the independence of either the ICC or the African Criminal Court. With regard to the ICC, it is submitted that such a determination does not amount to a violation of the independence of the Court. If anything, the Rome Statute recognises the important role of the UNSC in matters concerning international security. Not only does the Rome Statute allow referrals by the UNSC,[58] it also allows the UNSC its primary role of determining acts of aggression.[59] Similarly, African states are members to the UN Charter; and the Malabo Protocol defines crimes of aggression as a violation of the UN Charter.[60] Thus, it recognises the need for the African Court to work together with the UN in restoring international peace and security through the

[57] Article 27, Charter of the United Nations.
[58] Article 13 (b), Rome Statute.
[59] Article 15*bis* (7), Rome Statute.
[60] Article 28M (A).

prosecution of crimes of aggression. Although the AU has complained about the UNSC's powers of referral and deferral, the UNSC's role in the determination of the crime of aggression does not speak clearly to any specific grievance Africa has against the ICC. Arguably, UNSC's role in this regard could be related to the grievance of referring non-state parties if the determination is made in relation to a non-state party. As stated above, referring a non-state party seems to be a possibility under Malabo protocol as well. This would thus assuage general fears of the UNSC as an entity full of inequalities.

c. War crimes

The Nuremberg Charter defined war crimes as 'violations of the laws or customs of war'[61] and listed several acts as comprising these violations.[62] International criminal law has adopted this definition, albeit with detailed elaboration.

The Malabo Protocol adopts the Rome Statute's definition with minimal adjustments.[63] Informed by Africa's history, it lists the following acts as war crimes if committed in an armed conflict of an international character: unjustified delayed repatriation of prisoners of war; apartheid and other inhuman and degrading practices based on racial discrimination; making non-defended localities and demilitarized zones the objects of attack; slavery; collective punishment and despoliation of the wounded, sick, shipwrecked or dead.[64] The Malabo Protocol also criminalises the act of

> [i]ntentionally launching an attack against works or installations containing dangerous forces in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated.[65]

Ambos criticises the absolute nature of this offence, maintaining that the crime is based on a humanitarian law prohibition under article 56 of Additional

[61] Article 6(b), Nuremberg Charter.
[62] Ibid.
[63] Article 28D, Malabo Protocol.
[64] Article 28D(b)(xxviii-xxxiii), Malabo Protocol.
[65] Article 28D(b)(v), Malabo Protocol.

Protocol 1 to the Gevena Conventions.[66] He argues that the principle as reflected in the latter Protocol is not absolute since article 56(2) allows for attacks on the works or installations in question if used for military purposes.[67] Yet the Malabo Protocol incorporates the offence in an absolute manner without exception.[68] While Ambos' argument is reasonable, one may counterargue that the definition of the offence itself implies the possibility of such an exception. For instance, one would interpret the Malabo Protocol provision as implying that such attacks are allowed only where a prior assessment has been conducted and it is established that the likely loss of life or injury to civilians will not be excessive when compared to the overall military advantage of the attack. The offence is only committed where 'such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated'.[69]

Notably, article 28D(b) fails to introduce a proviso similar to that under the Rome Statute's article 8(2)(b)(xx), on the type of weapons prohibited in the offence of 'employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict'. It can be argued, however, that such weapons are deemed to be prohibited by customary international law.[70] Hence, this study urges the African Court, in exercising criminal jurisdiction over war crimes, to follow the criteria laid down under the Rome Statute. This is important as it will ensure consistency of international criminal law in norm development.

Ambos also criticises the Malabo Protocol's failure to explicitly include non-state actors in subparagraph (b)(xxvii) which criminalises '[c]onscripting or enlisting children under the age of eighteen years into the national armed forces or using them to participate actively in hostilities' even though such

[66] Ambos 'Genocide (article 28B), crimes against humanity (article 28C), war crimes (article 28D) and the crime of aggression (article 28M)' (n 44 above) 44.
[67] Ibid.
[68] Ibid.
[69] Article 28D(b)(v), Malabo Protocol.
[70] Ambos Genocide (article 28B), crimes against humanity (article 28C), war crimes (article 28D) and the crime of aggression (article 28M)' (n 44 above) 44.

national armed forces do so for the purposes of armed conflict not of an international character. A literal interpretation of this provision has the effect of excluding non-state actors from accountability of this offence. An alternative approach, it can be argued, is that the phrase 'or using them to participate actively in hostilities' could as well be interpreted as referring to any other conscription of children, including that by non-state actors. Arguably, the latter does not limit such usage to government forces but includes other actors. Although child conscription by non-state actors is not one of the AU's grievances against the ICC, it remains a great concern on the continent, necessitating adequate attention in order to ensure maximum accountability.

Critics argue that the term 'national' was introduced for the purposes of limiting the scope of this crime to official armed forces and that the meaning of the term 'armed forces' in international humanitarian law is understood to be that which is defined under domestic legislation.[71] Moreover, the ICC has previously expanded the notion of 'national' to include non-governmental acts or acts by rebel groups.[72] This study agrees with the reasoning of the judges in the *Lubanga* case that 'the adjective "national" does not necessarily lead to an interpretation of the term as meaning governmental forces'.[73] A narrow interpretation of the term 'national' to mean government forces is problematic in that it seeks to exclude non-state actors from accountability, given that the term 'national', as interptreted by the ICC, does not necessarily limit its meaning to government armed forces only.

In relation to armed conflict not of an international character, the Malabo Protocol declares that the use of nuclear weapons or other weapons of mass destruction amounts to a war crime.[74] The study opines that Africa perceives itself as a probable victim of nuclear weapon and weapons of mass destruction. Yet the Protocol frames the offence in an absolute manner (that is, allowing no exceptions). This necessitates reconsideration of the prohibition, which perhaps should be subject to the principles of necessity and

[71] Ambos Genocide (article 28B), crimes against humanity (article 28C), war crimes (article 28D) and the crime of aggression (article 28M)' (n 44 above).
[72] Ibid, 44-45; *Prosecutor v Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06-803-tEN (29 January 2007) Pre-Trial Chamber I, para 277.
[73] *Prosecutor v Thomas Lubanga Dyilo* (n 70 above) para 277.
[74] Article 28D(g), Malabo Protocol.

of proportionality. The latter requires that any use of force must be proportionate to the threat, while the former dictates that only the minimum necessary force should be used.[75] Generally, International Humanitarian Law has shunned the use of nuclear weapons because its destructive nature can be contained neither in space nor time.[76] In its advisory opinion of 1996, the ICJ was, however, not clear on the lawfulness of use of these weapons in an extreme case of self-defence.[77] This necessitates a recommendation that the Malabo Protocol be further amended or the African Court adopts rules that clarifies this already seemingly controversial exception. This could be in line with the recommendations of chapter 6 of this thesis. Save in these circumstances, the understanding of war crimes within the African Court parallels that of the ICC.

d. Genocide

The crime of genocide was not included in the Nuremberg Charter. In fact, it was defined only later on in the Genocide Convention of 1948 to mean

> [a]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[78]

Like the ad hoc international tribunals and the ICC,[79] the Malabo Protocol has adopted this definition, with one addition, namely, 'acts of rape or any other

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[75] S Casey-Maslen 'The use of nuclear weapons and human rights' (2015) 97 *International Review of the Red Cross* 664.

[76] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Reports 226, para 35; N Grief 'Nuclear weapons: The legal status of use, threat and possession' *International Humanitarian law and nuclear weapons: Examining the humanitarian approach to nuclear disarmament* (2011) Issue 1, 8.

[77] *Legality of the Threat or Use of Nuclear Weapons* (n 76 above).

[78] Article 2, Genocide Convention.

[79] Article 2(2), ICTR; article 4(2), ICTY; article 6, Rome Statute ; Article 2 of the United Nations International Convention on the Prevention and Punishment of the Crime of Genocide of 1948. In fact, in *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T (2 September 1998) Trial Chamber I, para 495, the court upheld the fact that the Genocide Convention has since then coalesced into customary international law.

form of sexual violence'.[80] This addition may have been inspired by the ICTR judgment in the *Akayesu* case, which held that the definition of torture included rape, thus confirming that rape could constitute a war crime or a crime against humanity under certain circumstances.[81] Since the Malabo Protocol adopts a definition similar to that of ad hoc tribunals and the ICC, the African Court should thus follow the interpretation of genocide developed in other international criminal justice fora, with an increased emphasis on rape and sexual violence qualifying as genocide.

Although rape has previously been interpreted within the context of 'causing serious bodily or mental harm to members of the group' or 'imposing measures intended to prevent births within the group',[82] an explicit inclusion of these acts as amounting to genocide only reinforces the seriousness attached to this act, particularly given the reality that rape is often used as a weapon in conflict-prone areas of the African region.[83] The fears expressed by Ambos of 'over- or multiple charging' may therefore not outweigh the achievements likely to be made by this innovation.[84] Besides, any possible multiple charging can easily be surmounted by proper checks within the OTP or within the pre-trial processes of the court.

Nevertheless, this innovative definition of rape does not engage with any of Africa's grievances against the ICC. The study, also, agrees with Ambos' criticism of the Malabo Protocol's failure to include political groups within its list of groups in the *chapeau* provisions of this crime.[85] Political opposition is a phenomenon that most African leaders shun. This has contributed to heinous atrocities towards these groups, yet such acts may not be covered under the auspices of international crimes. Moreover, an amendment of this nature is likely to create the perception of targeting political rebels as opposed to official

[80] Article 28B(f), Malabo Protocol.
[81] *Prosecutor v Akayesu*, Judgment (n79 above) para 597.
[82] Ambos 'Genocide (article 28B), crimes against humanity (article 28C), war crimes (article 28D) and the crime of aggression (article 28M)' (n 44 above) 39, 40; *Prosecutor v Akayesu*, Judgment (n79 above) para 507.
[83] HRW 'Central African Republic: Sexual violence as a weapon of war' https://www.hrw.org/news/2017/10/05/central-african-republic-sexual-violence-weapon-war (accessed 6 May 2018)
[84] Ibid.
[85] Ambos 'Genocide (article 28B), crimes against humanity (article 28C), war crimes (article 28D) and the crime of aggression (article 28M)' (n 44 above) 40.

leaders, who are bestowed with immunity while in office. All the same, the attempt by the Malabo Protocol to close the impunity gap in so far as sexual offences are concerned cannot be underestimated.

4.2.2 Corporate liability for international crimes

In addition to traditional individual criminal responsibility, the Malabo Protocol adopts the innovative notion of corporate liability for international crimes. This is the first post-World War II international treaty to bestow criminal liability on corporate acts.

4.2.2.1 Key historical developments on corporate criminal liability for international crimes

a. National practices

The doctrine of corporate criminal liability was first articulated in domestic justice systems, particularly through the development of common law. Traditionally, common law shied away from apportioning criminal liability to inanimate entities, mainly due to the difficulty inherent in apportioning the mental element of the guilty mind to corporations, given their inanimate nature.[86] The revolution to hold corporations criminally liable began at the domestic level and within the realm of civil law. It was rationalised that

> if corporations could benefit from the skills of their human elements, they should also bear the burden arising from the criminal conduct of those individuals, not just on the basis that they acted for the company (which imputes vicarious liability), but that they acted as the company.[87]

Liability was, however, not imputed to every employee. A distinction was drawn between those who made the company decisions and those who executed the decisions. The former were deemed to be the mind, while the latter were mere hands that executed the decisions of the former.[88] Lord Denning captures this distinction in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*.[89] Similarly, this distinction was further applied in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* to hold the respective

[86] G Williams *Criminal Law: The General Part* (1961) 856.
[87] QC Pinto and M Evans *Corporate criminal liability* (2008) 39; AO Nwafor 'Corporate criminal responsibility: A comparative analysis' (2013) 57(1) *Journal of African law* 83.
[88] Nwafor 'Corporate criminal responsibility' (n 87 above) 83.
[89] [1957] 1 QB 159 at 172 CA.

corporations responsible under civil law.[90]

This practice of holding corporations liable was later borrowed from civil law and adopted into domestic criminal law.[91] According to Macnaghten J, 'It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to the body corporate'.[92] At this early stage of development, national courts adopted a derivative approach in the manner in which they apportioned the mental element of the corporation. Thus, those who were regarded as the masterminds of the corporations – those who initiate policies – are the ones whose blameworthy minds were imputed to the corporation and were held criminally liable as if they were the company itself, thus fulfilling the *actus reus* and the *mens rea* elements for corporate criminal liability.

Yet, in as late as 2014, some domestic jurisdictions were still grappling with the civil-criminal dimensions of corporate liability. For example, in the *Kiobel* case,[93] a group of Nigerian nationals residing in the US sued Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c, which were Dutch and British (respectively) incorporated corporations, under the Aliens Tort Statute, alleging that the corporations aided and abetted the Nigerian government in violating the laws of nations in Nigeria.[94] The US Second Circuit rejected corporate liability under the US Alien Tort Statute (ATS), on the ground that 'customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international [criminal] tribunal has ever held a corporation liable for a violation of the law of nations'.[95]

The US Supreme Court, however, did not apply the doctrine of corporate liability because:

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[90] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705 at 713.
[91] *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* [1944] KB 146 at 156
[92] *Lennard's Carrying* case (n 88 above).
[93] *Kiobel v Royal Dutch Petroleum Company* 133 Supreme Court 1659 (2013) (*Kiobel* [SC]), https://scholar.google.com/scholar_case?case=15509503170515180438&hl=en&as_sdt=6&as_vis=1&oi=scholarr (accessed 23 October 2017.
[94] Ibid 1663.
[95] *Kiobel v Royal Dutch Company* 621 F.3d 111 (2d Cir. 2010), 120.

> The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach — such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches "*any* civil action" suggest application to torts committed abroad; it is well established that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality.[96]

The Supreme Court barred this suit while upholding the presumption against the extraterritorial application of the ATS. According to the Court, '[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.'[97] The doctrine of corporate liability was therefore not considered.

The majority of African countries have adopted this derivative approach of national courts in apportioning corporate criminal liability to domestic crimes.[98] Rwanda, however, provides a more progressive domestic legal framework on corporate criminal liability for international crimes. This is particularly so because the relevant law, Organic Law No. 01/2012 of 2 May 2012, expressly extends Rwandan courts' jurisdiction over international and cross-border crimes to all legal persons.[99] However, no corporation has been found criminally liable within the context of international and transnational crimes on the basis of this law.

b. The Nuremberg approach

The International Military Tribunal of Nuremberg maintained that international crimes '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'.[100] In this regard, the German and Japanese industrialists who supported the Nazi regime were all subjected to individual prosecution without any reference to the doctrine of corporate criminal liability of their respective entities.[101] The underlying reason at the time was noble. The purpose of this

[96] Kiobel [SC] (n 95 above) 1665.
[97] Ibid, 6669.
[98] For example, section 3(1), Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya), defines a person to include a company or association or body of persons, corporate or unincorporated. See also section 332 of the Criminal Procedure Act 51 of 1977 of South Africa.
[99] Articles 15 and 33, Organic Law No. 01/2012 of 2 May 2012.
[100] *Trial of the major war criminals before the International Military Tribunal, Nuremberg*, Vol. I, 1947, p. 223, www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf (accessed 1 February 2017).
[101] The trial of Bruno Tesch and Two Others (*The Zyklon B Case*) 1–8 March 1946, *Law reports of the trials of war criminals*, Vol. I; Trial of Friedrich Flick and Five Others, 20 April–22

approach was to gravitate away from state responsibility, which had been the norm before. The move at the time was designed to increase accountability by holding individual government officials accountable instead of allowing them to hide behind the organisation of the state. Nonetheless, the failure to expressly impute corporate criminal liability not only stifled the development of corporate criminal liability but also informed the practice of subsequent international criminal tribunals.

However, articles 9 and 10 of the Nuremberg Charter allowed for groups or organisations to be declared as criminal in nature.[102] In this regard, mere membership in a criminal organisation was regarded as criminal, irrespective of whether one's participation in the organisation was voluntary or not. Persons who had no knowledge of the criminal purposes or acts of the organisation were excluded from criminal liability unless they were personally implicated in the commission of acts. The notion of 'criminal organisation' was defined through the aspects of 'criminal conspiracy or complicity', 'knowledge' and 'personal liability'.[103] Thus, some scholars argue that the notion of criminal organisation laid the foundation for the doctrine of corporate complicity in international crimes.[104]

It is also noteworthy that the Allied Control Council (governing occupied Germany at that time) – even before the trials – imposed several sanctions

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December 1947, *Law reports of the trials of war criminals*, Vol. IX; Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others, US Military Tribunal, Nuremberg, 17 November 1947–30 June 1948, *Law reports of trials of war criminal*, Vol. X; I G Farben Trial, Case No. 57, US Military Tribunal, Nuremberg, 14 August 1947–29 July 1948, *Law reports of war criminals*, Vol. X. For further discussion on these cases, see J Chella 'The complicity of multinational corporations in international crimes: An examination of principles' PhD thesis, Bond University (2012) 200-201.

[102] Article 9 states: 'At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization …'. Article 10 states: 'In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.'

[103] *Trial of the major war criminals before the International Military Tribunal*, Washington (1947) 262, 268, 273; H van der Wilt 'Joint criminal enterprise: Possibilities and limitations' (2007) 5 *Journal of International Criminal Justice* 93-95.

[104] E Engle, 'Extraterritorial corporate criminal liability: A remedy for human rights violations?' (2006) 20 *St. John's Journal of Legal Commentary* 287, 291. For further information, see Chella 'The complicity of multinational corporations in international crimes' (n 101 above) 201.

against legal persons for violations of international law. This was done in accordance with Control Council Law No. 10. The sanctions covered under this law include dissolution of legal personality and seizure of the assets of the corporation for reparations.[105]

c. The practice in ad hoc tribunals and under anti-corruption treaties

Subsequent international criminal tribunals fail to expressly recognise the doctrine of corporate criminal liability. The statutes establishing the ICTY, ICTR, SCSL and the Special Tribunal for Lebanon (STL) do not have express provisions on the applicability of the doctrine of corporate liability for international crimes. Notably, however, the jurisdiction of these tribunals is limited to natural persons and not legal persons.

Although all the treaties establishing international *ad hoc* tribunals never had express provisions on corporate liability for crimes, it can be argued that the doctrine of corporate liability still applies, at least in theory, under the principle of 'organisational complicity' embodied in the notions of aiding and abetting adopted by most international treaty law.[106] This could arguably be interpreted in favour of corporate liability, though in a very limited derivative sense. For criminal liability arising from complicit acts 'does not have its own inherent criminality, but rather, it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise.'[107]

The ICTY has previously held corporations criminally liable through the notions of aiding and abetting.[108] Although the ICTR brought charges against executive officers of a local media outlet, Radio télévision libre des mille collines, and the respective executives found guilty of inciting genocide, no

[105] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity 306 (Dec. 20, 1945); see also *Flomo v Firestone Nat'l. Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011).
[106] Article 7(1), ICTY Statute; article 6(1), ICTR Statute; article 6(1), SCSL Statute.
[107] *Khulumani v Barclay National Bank Ltd.*; *Ntsebeza v Daimler Chysler Corp*, US Court of Appeals for the Second Circuit, 12 October 2007, 05-2141-cv, 05-2326-cv., 46-47.
[108] *Prosecutor v Jovica Stanišić,* Appeal Judgment, IT-03-69-A (9 December 2015) Appeals Chamber, paras 92-109, *Prosecutor v Vujadin Popović*, Appeal Judgment, IT-05-88-A (30 January 2015) Appeals Chamber, paras 1732 and 1758.

specific orders were made with respect to the corporate itself.[109]

The STL, however, considered the applicability of corporate criminal liability to international crimes in the *Al-Jadeed* case.[110] This was a contempt of court case in which Al Jadeed, a Lebanese TV broadcasting company, together with its deputy head of news and political programmes, was held to be in contempt of court for publishing confidential witness information in a case before the STL and refusing to remove this information from its website following an order by the STL's pre-trial chamber.[111] Although neither the statute establishing the STL nor its rules of procedure expressly provided jurisdiction over legal persons, in the *Al-Jadeed* case, the Appeals Chamber found that this jurisdiction existed under rule 60 *bis* of the STL's rules of procedure and evidence. Rule 60 *bis* bestows the STL with inherent powers to 'hold in contempt [any *person*] who knowingly and willfully interferes with its administration of justice'. The Appeals Chamber gave a broad interpretation of the term 'person' to include both natural and legal persons. The Pre-Trial Chamber, however, lamented the failure of the Appeals Chamber to provide clear guidance on the applicable elements in attributing corporate criminal liability.[112] In its final finding, the Pre-Trial Chamber drew inference from Lebanese law that adopts a derivative approach in the manner in which it apportions corporate criminal liability.[113] It thus concluded that Ms. Al Khayat, the media company's deputy head of news and political programmes, could not be found guilty on the basis of the available evidence.

Notably, however, although corporations were involved in Rwanda's genocide,[114] there was no attempt to hold them criminally liable.[115] Similarly, corporate involvement in the war in Sierra Leone and other regions was never

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[109] *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze,* Appeal Judgment, ICTR-99-52-A (28 November 2007) Appeals Chamber, paras 1051,1096, 1113–1114.
[110] *Al-Jadeed S.A.L. and Al Khayat*, Judgment, STL-14-05/T/CJ (18 September 2015).
[111] Special Tribunal for Lebanon, *Rules of procedure and evidence,* STL-BD-2009-01-Rev.9, adopted on 3 April 2017.
[112] Para 55.
[113] Paras 69-72.
[114] NHB Jørgensen 'A reappraisal of the abandoned Nuremberg concept of criminal organisations in the context of justice in Rwanda' (2001) 12(3) *Criminal Law Forum* 371, 376; Chella 'The complicity of multinational corporations in international crimes' (n 101 above) 201.
[115] Chella 'The complicity of multinational corporations in international crimes' (n 101 above) 202-204.

pursued.

Two anti-corruption treaties specifically prescribe corporate criminal liability. The Organisation for Economic Co-operation and Development (OECD) Convention, for example, urges member states to take necessary measures 'to establish the liability of legal persons for the bribery of a foreign public official'.[116] Where the legal system of its members does not apply criminal responsibility to legal persons, the Convention further calls upon its members to 'ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials'.[117]

In similar vein, article 26 of the UN Convention against Corruption allows criminal sanctions against legal persons, and further provides that 'such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence'. This implies that corporations should be held criminally liable independently of the individual persons who committed the crime. This would allow both the corporation *and* the individual to be held accountable for the same act. Thus far, corporations have become subjects of international criminal law, yet, ordinarily, they were not recognised as such.

4.2.2.2 Corporate liability for international crimes under the Rome Statute

Like its predecessors, the Rome Statute of the ICC limits the jurisdiction of the Court to natural persons.[118] Attempts to have an express provision targeting the criminal liability of legal persons were thwarted when article 23(6) and (7) on criminal responsibility of legal persons, article 76 on penalties applicable to legal persons, and article 99 on enforcement of fines and forfeitures, were all expunged from the draft statute.[119] Nonetheless, an argument can be made

[116] Article 2, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted on 21 November 1997.
[117] Ibid, article 3(2).
[118] Article 25(1).
[119] United Nations 'Report of the preparatory committee on the establishment of an International Criminal Court' United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 5 June - 17 July 1998, A/CONF.183/13(Vol. I) (2002), http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf (accessed 19 May 2018).

that, under the doctrines of complicity or responsibility for superiors and commanders, an employee of a corporation could be prosecuted for crimes committed by or on behalf of the corporation.[120]

The OTP has also indicated its readiness to investigate cases involving businesses.[121] The OTP has thus received several article 15 communications, concerning, for example, the alleged offences committed by Chevron in Ecuador.[122] The victims in this case are seeking remedy for crimes against humanity resulting from the pollution and contamination produced as a consequence of Chevron's exploitation of Ecuador's natural resources. The communication calls upon the ICC to exercise its jurisdiction and investigate the conduct of the chief executive officer (CEO) of Chevron and any other corporate officer of this company in avoiding enforcement of the judgment of Ecuadorian courts. The Ecuadorean National Court of Justice, Ecuador's highest court, imposed a fine of $9.5 billion on Chevron, to pay Amazonian farmers who were the victims of its pollution. [123]

The OTP, however, decided that there was no jurisdictional basis to proceed with investigation at the time.[124] This marks a missed opportunity to pronounce on on the controversial aspect of corporate criminal responsibility as well on the individual criminal responsibility of agents or employees of corporations. Hopefully, there might be opportunity in future based on new information reflecting crimes under ICC jurisdiction.

In the Kenyan case of *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang*,[125] the prosecutor brought charges against the executive officer of a media company, Joshua Arap Sang. On 5 April 2016,

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[120] Articles 25(3) and 28, Rome Statute.
[121] JH Jennett, R Karmel, J Zerk and S Powles 'Corporate responsibility for international crimes' *Royal Institute of International Affairs* 19 May 2015.
[122] The formal complaint submitted to the ICC is available at http://chevrontoxico.com/assets/docs/2014-icc-complaint.pdf (accessed 19 May 2018).
[123] *Aguinda v Chevron Texaco*, Case No. 002-2003, Judgment of the Lago Agrio, Ecuadorian Provincial Court of Justice of Sucumbios (14 February 2011), http://chevrontoxico.com/assets/docs/2011-02-14-judgment-Aguinda-v-ChevronTexaco.pdf.
[124] See OTP Letter, OTP2014/036752 (16 March 2015), http://freebeacon.com/wp-content/uploads/2015/04/ICC-letter.pdf (accessed 19 May 2018).
[125] *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11-373 (23 January 2012) Pre-Trial Chamber II.

the Trial Chamber vacated the charges against Ruto and Sang.[126] This was not an acquittal, as the Trial Chamber emphasised that the prosecution could reopen the case if new evidence were found.[127] Due to the premature withdrawal of this case, the issue of corporate liability of the media house was not explored, even to the extent of reparations.

It should be noted, though, that the ICC has not been actively involved in investigating corporate criminal liability in either its pending cases or those already determined.

4.2.2.3 Corporate liability for international crimes under the Malabo Protocol

Although no *travaux preparatoire* exist on this aspect, the contextual history of the Malabo Protocol reveals that corporate criminal responsibility was adopted in its second draft. In February 2009, the AU Assembly directed the AU Commission 'to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010'.[128] This directive was not to be interpreted as limiting the jurisdiction of the court to core international crimes.[129] Instead, it was deemed to include other crimes of international and transnational concern, including corruption.[130] A further examination of these crimes revealed the role played by corporations, thus necessitating the inclusion of corporate criminal liability in the second draft. Crimes primarily perpetrated by corporations, such as illicit exploitation of resources, money-laundering and trafficking in hazardous waste were also included in this draft. During the negotiations of the treaty, deliberations on the application of corporate criminal liability were thus limited to transnational crimes and not the

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[126] *Prosecutor v William Samoei Ruto and Joshua Arap Sang* (Decision on Defence Applications for Judgments of Acquittal) ICC-01/09-01/11-2027-Red-Corr (5 April 2016) Trial Chamber V(A).
[127] Ibid, para 464.
[128] AU Assembly, 'Decision on the implementation of the Assembly decision on the abuse of the principle of universal jurisdiction' Assembly/AU/Dec.213(XII), February 2009, para 9. See also AU Assembly, 'Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC)" Assembly/AU/Dec.245(XIII) Rev.1, Doc. Assembly/AU/13(XIII), Thirteenth Ordinary Session, 1–3 July 2009, para 5.
[129] Report of the study on the implications of expanding the mandate of the African Court of Justice and Human Rights to try serious crimes of international concern, (2011) para 48 (copy on file with the author).
[130] Ibid.

core international crimes.

Impunity of corporations in international criminal law is exhibited in a dual perspective: 'those related to the accountability challenges surrounding transnational corporate activity and those that inhere to international crimes'.[131] Although discussions under Malabo Protocol were centered on corporate liability in relation to transnational crimes, it cannot be that the drafters were only concerned with one aspect of impunity – impunity for transnational crimes and not that for core international crimes. Besides, since the Malabo Protocol does not expressly limit the application of corporate criminal liability to transnational crimes, it is certain that the African Court's criminal chamber would also apply the concept of corporate criminal liability to core international crimes.

Although article 46B of the Malabo Protocol embodies the doctrines of complicity or responsibility for superiors, similar to those under the Rome Statute, the Protocol goes further and explicitly adopts the doctrine of corporate criminal liability as follows:

> 1) For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
> 2) Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act, which constituted the offence.
> 3) A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
> 4) Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
> 5) Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
> 6) The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.[132]

This provision clarifies specifically the *mens rea* elements necessary to impute corporate liability. However, in order to prove corporate liability, the criminal elements of *actus reus* and *mens rea* must both be imputed to the corporation.

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[131] J Kyriakakis 'Corporations before international criminal courts: Implications for the international criminal justice project' (2017) 30 *Leiden Journal of International law* 223.
[132] Articles 46C, Malabo Protocol.

a. Mens reus and actus rea for corporate criminal liability

To prove *actus reus* of a corporation, one has to prove the specific elements of the crime in question. It must be proven that the acts or omissions of the corporation constituted the elements of the relevant crime.

The *mens rea* element comprises two aspects: the corporate intention to commit the crime and the corporate knowledge of the offence in question. The 'intention' part is proved once it is established that a policy of the corporation allowed the commission of the act that constitutes the offence. By analogy with the ICC's interpretation of a policy, such a policy need not be express but can also be inferred from a series of events.[133] This implies that under the Malabo Protocol, the existence of a policy could as well be construed from implied acts or omissions permitted by the corporation. Corporate knowledge, on the other hand, will be deemed proven if it is established that the actual or constructive knowledge of the relevant information of the commission of the offence was possessed within the corporation. Again, such knowledge may either be actual or constructive.[134] It is irrelevant whether such information was divided between corporate personnel.

The Malabo Protocol adopts an entirely different approach in the manner in which it attributes *mens rea*. Rather than following the traditional method applied by national courts, in which the state of mind of the 'masters' of a corporation is used as the *mens rea* of the corporation, the Protocol finds a direct way of imputing *mens rea* to the corporation itself as an entity. In this case, corporate criminal liability under the Malabo Protocol is not derived from the criminal liability of natural persons but is purely organisationally based.[135]

After proving corporate liability for the international crime, two questions remain unanswered. First is the concern as to whether this corporate criminal liability should be extended to individual criminal liability with respect to the

[133] *Prosecutor v Germain Katanga* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014) Trial Chamber II, para 1109; *Prosecutor v Tihomir Blaškić* (Trial Judgment) IT-95-14-T (3 March 2000) ICTY Trial Chamber, para 203; ME Badar 'From the Nuremberg Charter to the Rome Statute: Defining the elements of crimes against humanity' (2004) 5 *San Ndiego International Law Journal* 115

[134] Chesterman 'An altogether different order: Defining the elements of crimes against humanity' (2000) 10 *Duke Journal of Comparative & Internationa Law* 321.

[135] J Kyriakakis 'Corporate Criminal Liability at the African Criminal Court' Briefing Paper – ACRI meeting, Arusha (2016) 4.

personnel of the corporation. The Malabo Protocol bestows jurisdiction over both individuals and corporates. This implies that individuals who commit the prohibited crimes to the required threshold will be held criminally liable for the crimes. The concern arises when a corporate that has been found guilty of the listed crimes passes on this criminal liability to its personnel through the concept of vicarious liability, which persons may otherwise not have been held accountable.

As stated in article 46B of the Malabo Protocol, 'the criminal liability of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes'. The import of this provision is twofold. First, it acknowledges that corporate criminal liability does not shield the individuals involved from criminal liability. Thus, corporate criminal liability will also involve the prosecution of natural persons. The second import leads us to the second concern: How does this liability translate into individual criminal liability? Once the existence of corporate liability has been proven, natural persons who are the actual perpetrators or accomplices to the offences will also be held criminally liable. Borrowing from earlier national practice, this will not involve all the employees of the corporation but the masterminds of these entities.

Yet this may not always be the case. The Malabo Protocol opens itself up to actual perpetrators and accomplices to corporate crimes. Persons accused of international crimes are required to fulfil a very high threshold to be held criminally liable, in the sense that they must be those bearing the highest criminal responsibility. The Protocol should be interpreted as lowering these standards with respect to persons held criminally liable as a result of corporate criminal liability. This is so because, in the context of corporate criminal liability, the natural persons held criminally liable will be the actual perpetrators or accomplices, in which case not all of them might bear the highest responsibility for international crimes. It is also possible that the actual acts of the respective crimes may not be committed by agents of the corporation themselves but independent organs or groups of persons working in concert with the organisation. Does this therefore imply that the actual perpetrators of these crimes should be brought to book under the concept of

corporate criminal responsibility? It remains to be seen how the African Court will interpret these controversial issues. Of significance is that persons who engage in corporate or collective criminal activity will still be held individually responsible.

The notion of vicarious liability does not apply in its strict sense, however. The prosecution has to go further and prove that the natural persons were the actual perpetrators or accomplices in the same crimes. It is, however, not clear whether the prosecution of the natural persons would happen subsequent to or simultaneously with that of the legal person. The Malabo Protocol is not clear on this. Although this is a matter of the rules to be adopted by the courts, it is submitted that the prosecution of the natural persons should always follow that of the corporate. It makes logical sense that once a corporate has been found criminally liable, then the actual perpetrators and accomplices should be held to account for their actions. Any other way of looking at this is likely to lead to duplication of resources, especially where the individuals are found criminally liable, yet the corporate criminal liability is found to be non-existent.

The Malabo Protocol, therefore, makes a significant contribution by clarifying how to prove corporate criminal liability as well as individual criminal liability for the actual perpetrators or accomplices of the corporate acts. Unlike the ICC, prosecution of international crimes in Africa is likely to put more emphasis on corporate criminal liability, both of national and transnational character. This has much contextual relevance, given that the majority of African conflicts – Sierra Leone, DRC, Angola and Liberia - are resource-based and fuelled by multinational corporations that commit heinous crimes in the process of extracting and exporting natural resources, often with impunity.[136]

For example, it has been documented that most of these resources are under

[136] 'Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo' UN Doc S/2002/1146 (2002); 'Final Report of the Monitoring Mechanism on Angola Sanctions' UN Doc. S/2000/1225 (2000); 'Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone' UN Doc. S/2000/1195 (2000).

the control of rebel groups that commit gross violations.[137] The complex nature of most multinational corporations poses a great challenge to national prosecutions in countries that are victims to their violations. In most instances, either the countries in question are complicit in the crimes or they lack the institutional capacity to prosecute these entities due to the immense powers of the corporations. Corporate criminal jurisdiction over these organisations is therefore a major achievement for the African region. Additionally, this regional achievement is likely to catalyse concerted national efforts towards pursuing corporate criminal liability for international crimes. African states should therefore adopt or realign their national legislation to allow corporate criminal liability for international crimes at the national level.

All the same, corporate criminal liability does not speak directly to any particular AU grievance against the ICC. It can be argued, nonetheless, that the fact that the West owns most of the world's multinational corporations is possibly the reason why it has not been enthusiastic to embrace the notion of corporate criminal liability for international crimes. Were it not for these corporations fuelling and facilitating the vicious cycle of violence on the continent, then the continuous commission of` international crimes would not be witnessed in Africa.

Some dissenting voices may argue that corporate criminal liability is not necessarily a good thing for Africa given that the practical implications, for instance punishment of innocent shareholders and loss of employment, would be a negative economic move. It is this study's position, though, that Africa must sanitise corporate investment in the region. It must dictate the conditions under which foreign corporations operate while in the region; corporations must comply with the local laws of the countries in which they operate. African states cannot tolerate the fuelling, facilitation or commission of international crimes by corporations for mere economic gain. It is important that the Malabo Protocol approach be promoted, so that corporations that invest in Africa adhere to relevant human rights standards.

[137] Ibid.

b. The defects in corporate criminal liability

The Malabo Protocol's provision on corporate criminal liability, however, has a few defects. First, the Protocol does not prescribe the punishment applicable to corporates found criminally liable for any international or transnational crimes, or to the natural persons who either acted as the actual perpetrators or accomplices of the same. It is important to distinguish this latter category from the other general perpetrators of the listed international crimes. This is because the other category of offenders has to meet a very high threshold to be held criminally liable. They must be those bearing the highest criminal responsibility. As previously mentioned, in the context of corporate criminal liability, however, the natural persons held criminally liable will be the actual perpetrators or accomplices, in which case not all of them might bear the highest responsibility for international crimes. Thus, the Protocol must prescribe the punishments and penalties to be levied against corporate entities found criminally liable as well as against the categories of offenders vicariously held liable in concert with the corporate entity.

Secondly, the Protocol offers a uniform, one-size-fits-all application of corporate criminal liability to all Malabo Protocol crimes – whether international or transnational in nature. While this may pose no challenge with respect to international crimes that embody an in-built threshold requirement to prove the crimes, it is likely to raise challenges with respect to transnational crimes. Unlike international crimes, Malabo protocol does not provide for criteria for a gravity test for transnational crimes. Gravity is an essential factor when the Court is analysing the cases to be taken on. With respect to core international crimes, both the Rome Statute and Malabo Protocol have embedded the gravity test in the contextual definition of these crimes. For example, to prove genocide, one must prove not just the listed acts but that the listed acts were intended to 'destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[138] Similarly, crimes against humanity require the prosecution to prove not just the listed acts but that the acts were committed 'as part of a widespread or systematic attack directed

[138] Article 6, Rome Statute; Article 28B, Malabo Protocol.

against any civilian population, with knowledge of the attack'.[139] Again, to prove war crimes, the prosecution must prove that the listed acts were 'committed as part of a plan or policy or as part of a large-scale commission of such crimes'.[140] This is the test that is most likely to be followed by the African Court in so far as the Rome Statute crimes are concerned. In this regard, corporate criminal liability will be applied with certainty and within a clear context of the threshold question. Only when the required gravity of the listed crimes is fulfilled will the corporate character of the legal person be held to account for its involvement. This certainty of norm application is, however, missing in the case of transnational crimes as provided in Malabo Protocol.

How should the Court determine which transnational cases involving legal persons to take on board or not? Using the crime of terrorism or piracy as examples, should it prosecute all terrorism or piracy cases referred to it? Would this therefore imply that whatever the level of involvement of legal persons in any of these cases, the African Court will hold all the corporations criminally liable? Or what gravity test should the Court employ in deciding which cases to take or not? While it is true that a corporation can commit any crime, it is important for an international criminal court to focus on cases where corporations bear the highest criminal responsibility. The Malabo Protocol must address itself to this reality in order to avoid opening up the Court to all manner of cases with a transnational character involving corporate criminal liability for any kind of involvement at whichever level. Failure to do so exposes the African Court to being overwhelmed with cases which might affect its effectiveness.

Additionally, the clause on corporate criminal responsibility applies to all corporations and only excludes the state. While it is an advantage inasmuch as it subjects both private and public corporations to criminal accountability for international as well as transnational crimes, it poses a challenge to the African Court, especially when it comes to investigating international crimes perpetrated by state-owned corporations or corporations in which the state holds shares. To some extent, the African Court may seem to be investigating

[139] Article 7, Rome Statute; Article 28C, Malabo protocol.
[140] Article 8, Rome Statute; Article 28D, Malabo protocol.

the state, and this may not auger well with the states involved. Although the acts of these corporations do not translate into official acts of state, the probability of state reluctance in cooperating in the investigations cannot be denied, which in turn would risk compromising the effectiveness with which corporate crimes are prosecuted. Moreover, going by regional prosecution of international crimes, while it is easy to prosecute persons out of power, it has become almost impossible for states to effectively cooperate in prosecutions of persons in power or those within the circles of power.

Another potential issue related to state cooperation has to do with non-member states to the Malabo Protocol. The African Court will exercise its criminal jurisdiction where a member state to the Malabo Protocol is '[t]he State on the territory of which the conduct in question occurred … [or]... [the] [e]xtraterritorial acts by non-nationals which threaten a vital interest of that State'.[141] Given the nature of transnational crimes, it is possible that a corporation found guilty by the African Court is registered in a state that is not party to the Malabo Protocol. This presents a challenge in enforcing the Court's orders and decisions, particularly where the relevant state is a beneficiary of the acts of the corporation that has been found guilty. Nonetheless, the Court should adopt relevant guidelines on how to proceed in such circumstances in order to address this anomaly. The specific recommendations in this regard are provided for in section 6.4.2, chapter 6 below.

4.2.3 Political considerations

Africa has thus bestowed upon its regional court jurisdiction over both international and transnational crimes as part of its efforts against impunity. Nonetheless, as much as international criminal justice is a legal issue, it does not operate in a vacuum but within a political context. Regional politics is thus a cardinal component of the probable regional criminal justice system. A system of this kind must guard against political interference compromising its core mandate. Conversely, political considerations related to the independence of the African Court, as well as the actual political motives

[141] Article 46E *bis*, Malabo Protocol.

behind the establishment of the Court, will be among the key determinants of the Court's effectiveness once established. A brief reflection on AU politics is therefore necessary.

The AU concerns against the role of the UNSC in the ICC and the ICC OTP have a direct relation to the probable independence of the African Court. A favourable political atmosphere, aspects of remuneration, security of tenure and mode of appointment are the other key political determinants of the independence of any justice system.

4.2.3.1 Appointments

Regarding appointments, discretion has been given to states to nominate judges to the African Court.[142] These nominees are then elected by the AU Executive Council and, finally, appointed by the AU Assembly. The nomination stage already politicises the process of appointment. The Malabo Protocol does not make any provisions on the role of the civil societies in this appointment process, yet they too are important players in international matters. While it is true that states are the central players in international law, the lesson drawn from the experience of the ACtHPR and national courts demonstrate that the allegiance expected of political appointees is unparalleled. For example, in 2008, the Ugandan government blocked the reappointment of Justice George Kanyeihamba to the ACtHPR and instead put forward a 'politically convenient' nominee, Joseph Mulenga.[143] Kanyeihamba is an ardent critic of the Ugandan government's poor human rights record.[144] A secret memo, from the then Permanent Secretary in the Ministry of Foreign Affairs, James Mugume reads as follows:

> Whereas he is eligible for re-election, it may be advisable to weigh Hon. Justice Kanyeihamba's utterance published in the local newspapers that he shall vigilantly

[142] Article 4 (Annex), Malabo Protocol.
[143] G Mukundi *Report on African Court on Human and Peoples' Rights: Ten years on and still no justice* (Minority Rights Group International 2008) 17. Citing email correspondence with Sheila Nabachwa of the Ugandan Foundation for Human Rights Initiative (FHRI) and the East African representative of the Coalition for an Effective African Court on Human and Peoples' Rights, 5 June 2008; see also 'Uganda's government accused of blocking the re-election of judge to African Court', http://www.voanews.com/english/Africa/2008-06-23-voa4.cfm (accessed 5 July 2008).
[144] GW Kanyeihamba *The blessings and joy of being who you are* (2012). In chapter 39 of this book, Kanyeihamba documents numerous violations during his tenure as a Supreme Court judge of Uganda.

> ensure that Uganda is held accountable at the said African Court for (what he perceives to be) government's continuous abuses of human rights.[145]

This experience resonates with the practice in most African countries. Governments will always seek friendlier appointees who are likely conduits to use in protecting individuals taken to the court for accountability. This in itself is a danger to the fight against impunity.

4.2.3.2 Remuneration

The main reason why the AU agreed on a merger of the ACJ and the ACtHPR was due to the cost of the growing number of AU institutions, one the AU could not afford.[146] African states' record of financial contribution to international bodies like the UN and the ICC has been wanting,[147] so it is doubtful whether the AU will be able to provide the International Criminal Law Section of the Court with the funding necessary to guarantee its independence.

The easiest way out would have been for the AU to revise the Malabo Protocol and leave the ICC with jurisdiction over international crimes, then concentrate on transnational crimes, but this is not feasible given their unresolved concerns with the ICC. Nonetheless, the African Court may decide as well to continue to exercise its criminal jurisdiction over Rome Statute crimes. In this regard, the AU must ensure financial safeguards are provided to guarantee effective investigation and prosecution of all these cases. The AU must therefore devise ways of funding the additional structure and not rely on donor funding. Prompt and periodic remittance of funds to the Court by its member states should thus be made compulsory.

4.2.4 The relationship between the African Court and the ICC and subregional and national criminal courts

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[145] M Mubangizi 'Uganda: Critical judge loses African Court job to friendlier Joseph Mulenga' *The Weekly Observer* http://www.africafiles.org/article.asp?ID=18801 (accessed 28 February 2017).

[146] Coalition for an Effective African Court on Human and Peoples' Rights, 'The African Court of Justice and Human Rights' http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=6%3Aafr-court-integrate&catid=7%3Aafrican-union&Itemid=12&lang=en (accessed 16 May 2013).

[147] See for example the UN PeaceKeeping 'How we are funded' https://peacekeeping.un.org/en/how-we-are-funded (accessed 6 May 2018) for a general overview of the extent of contribution by African states to the UN from 2013-2018.

The probable relationship between the African Court, the ICC and subregional and national criminal courts is likely to raise numerous concerns, with challenges envisaged in three key areas: hierarchy, complementarity and the immunity question.

4.2.4.1 The place of the African Court in the hierarchy of international criminal courts

Generally, international law knows no hierarchy of international courts and tribunals.[148] As Shane Spelliscy notes, '[i]nternational judicial system has no *de jure* supreme body charged with issuing definitive interpretations of the law.'[149] The ILC has previously refused to consider a hierarchy for international courts and tribunals even though it has considered how substantive law, in the light of the Vienna Convention on the Law of Treaties of 1969 (VCLT), creates a hierarchy of norms.[150] Every international tribunal is formally distinct from the other.

International criminal courts, too, are not hierarchically organised.[151] Most of them have what Aldo Zammit Borda terms 'self-contained jurisdictions'.[152] The inapplicability of the doctrine of binding precedents from decisions of other international criminal courts and tribunals underscores this point.[153] As such, both the ICC and the African Court (with specific reference to its criminal mandate) occupy the same status in the international criminal justice realm: neither of the two courts ranks higher than the other. Thus, one court cannot

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[148] D Terris, CPR Romano and L Swigart *The International judge: An introduction to the men and women who decide the world's cases* (2007) 120; AZ Borda 'Precedents in international criminal courts and tribunals' (2013) 2(2) *Cambridge Journal of International and Comparative Law* 293; C Leathley 'An institutional hierarchy to combat the fragmentation of international law: Has the ILC missed an opportunity?' (2007) 40 *New York University Journal for International Law and Politics* 259.

[149] S Spelliscy 'The proliferation of international tribunals: A chink in the armor' (2001) 40 *Columbia Journal of Transitional Law* 145.

[150] ILC 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law' Report of the study group of the International Law Commission, Finalized by Martti Koskenniem, UN Doc. A/CN.4/L.682 (2006).

[151] Ibid.

[152] Borda 'Precedents in international criminal courts and tribunals' (n 148 above) 293.

[153] Borda 'Precedents in international criminal courts and tribunals' (n 148 above) 292-294; According to Borda, this is based on three grounds: the application of the doctrine of sources of international law, respect for the principle of legality, and the protection of individual rights in criminal law. Indeed, article 38 of the ICJ Statute recognises judicial decisions as a subsidiary source of law. This is further qualified by article 59 of the Statute, which provides that '[t]he decision of the Court has no binding force except between the parties and in respect of that particular case'.

operate as an appellate court for the other. Under the doctrine of *ne bis in idem*, save in exceptional circumstances, the ICC cannot take over a matter already heard and determined by the International Criminal Law Section of the African Court and vice versa. The African Court can thus be said to be operating in horizontal complementarity to the ICC with respect to the Rome Statute crimes.

All the cases in which the ICC has discussed the notion of complementarity concern national jurisdiction. In any event, article 17 of the Rome Statute does not envisage regional tribunals. Rather, it underscores the ICC's complementarity to national jurisdictions. It is in this regard that there are a few concerns over the need to guard against duplicity of mandate. From the jurisdictional competences accorded to the two courts, it is evident that there is an overlap of their mandate.[154] 'Effective international governance and state compliance requires a common understanding of the normative content of international law, which is usually achieved through norm clarification by judicial organs'.[155] Underlying this philosophy is the need to ensure coherence in application of international norms. Duplicating the mandate of the ICC through the African Court may undermine this spirit. This necessitates streamlining their respective mandates so as to allow one court to exercise the overlapping jurisdiction as suggested by Herman van der Wilt. Van der Wilt suggests a model that envisages a division of labour between the African Court and the ICC[156] based on either the nature of crimes, where, for instance, the African Court focuses on transnational and corporate crimes while leaving international crimes to the ICC.[157] Not only would this alleviate the cost of the yet-to-be operationalised African Court in the exercise of its criminal jurisidction, but it would eradicate the danger of producing conflicting jurisprudence on similar issues.

This notwithstanding, the African Court could as well proceed and exercise its

[154] Both courts have jurisdiction over war crimes, crimes against humanity, genocide and the crime of aggression.
[155] D Juma, 'Lost (or found) in transition? The anatomy of the new African Court of Justice and Human Rights' (2009) *Max Planck Yearbook of United Nations Law* 13.
[156] H van der Wilt 'Complementary jurisdiction (article 46H)' in G Werle and M Vormbaum (eds) *The African Criminal Court* (n 3 above) 199, 200.
[157] Ibid.

criminal mandate as enshrined in the Malabo Protocol. It can be argued that, in legal theory, the African Court is an independent and separate institution from the ICC, thus capable of exercising its criminal mandate independently of any external interference. In fact, the Rome Statute principle of complementarity to national criminal jurisdiction[158] could, arguably, also extend to criminal jurisdiction of regional courts, albeit at the horizontal and not the vertical level. Thus, in light of the detailed discussion on complementarity under point 4.2.4.2 below the ICC should consider proceedings before it inadmissible in case of genuine proceedings before a regional court. Contrary to Chacha Murugu's argument that the Rome Statute neither expressly nor implicitly allows regional courts jurisdiction over ICC crimes,[159] regional courts are created through collective acts of states at a regional level. A court created by a multilateral treaty does not require the approval of another multilateral treaty to justify its existence.[160] Moreover, states do not conclude international treaties to the exclusion of all other treaties.[161] So long as the latter concluded treaty does not violate the principles of the former. Thus, neither should one seek to legitimise the Malabo Protocol through the provisions of the Rome Statute, nor did the act of African states' signature and ratification of, or accession to, the Rome Statute exclude all other related treaties. The only inference in this regard would be that regional courts enjoy horizontal as opposed to vertical complementarity at the state level in relation to the ICC. It is, however, important that the African Court observes consistency in the interpretation of legal norms, unless where the law allows variation that is specific to Africa. The African Court and the ICC could as well view their overlapping mandate as an added advantage and seize the opportunity to learn from each other, thus improving the prospects for further evolution and development of international criminal law.

Concerned about the problem of possibile hierarchy, Herman van der Wilt raises the question: What if the UNSC bypasses the African Court and refers

[158] Article 1, Rome Statute.
[159] C Murugu, 'Towards a criminal chamber in the African Court of Justice and Human Rights' *Journal of International Criminal Justice* (2011) 1077.
[160] Abass 'Historical and political background to the Malabo Protocol' (n 3 above) 21.
[161] Ibid.

an African head of state to the ICC?[162] Indeed, article 46F of the Malabo Protocol does not envisage the UNSC as one of the organs that can refer a situation to the African Court. This implies that the UNSC could bypass the African Court. One could argue, however, that while acting under Chapter VII of the UN Charter, and as already highlighted above, the UNSC could request that the African Court considers the matter.

Since such a referral also 'obliges' all UN member states to cooperate, by virtue of article 25 of UN Charter, then African states have to accept and comply with the decision. This would imply that the African Court's ability to exercise its criminal jurisdiction in this regard is centrally subject to the powers of the UNSC even though this is not expressly provided for under the Malabo Protocol.

4.2.4.2 The complementarity and immunity question

One major shortcoming of the Malabo Protocol is that it seems not to foresee probable intercourse between the ICC and the African Court. The Malabo Protocol only envisages the Court's complementarity to subregional courts and national courts.[163] Yet it is important to consider how complementarity is likely to operate between the African Court and the ICC. Are there certain circumstances under which the ICC can be seized of a matter within the region? If so, how does the Protocol cure the possibility of competing jurisdictions, especially where either an African state or a party to a case prefers the ICC to the probable International Criminal Law Section of the African Court, as happened in *Prosecutor v Saif-Al Islam Gaddafi and Abdulla Al-Senussi*, where the party preferred the ICC to the Libyan national court?[164]

In a hypothetical scenario, suppose that a senior 'state officer A' is indicted by the African Court for international crimes over which the ICC too has jurisdiction and the matter has also been referred to the ICC in accordance with the rules of the Rome Statute. Arguably, since the Rome Statute is supportive of efforts to end impuity for perpetrators of international crimes, the

[162] H van der Wilt 'Complementary jurisdiction (article 46H)' (n 156 above).
[163] Article 46 H, Malabo Protocol.
[164] *Prosecutor v Saif-Al Islam Gaddafi and Abdulla Al-Senussi* (Decision on the Admissibility of the case against Abdulla Al-Senussi) ICC-01/11-01/11-466-Red (11 October 2013) Pre-Trial Chamber I.

ICC would probably not interfere in such a case at a regional level. However, this study argues that where issues of unwillingness or inability of the African Court arise, the ICC may proceed with the trial of 'state officer A' since it is also interested in the need to 'put an end to impunity […] and thus to contribute to the prevention of such crimes'.[165] Otherwise, the African Court will enjoy the monopoly of prosecuting 'state officer A'.

Yet, if the ICC were to take up the matter, it would have to begin by determining the preliminary issue of admissibility. Essentially, the ICC would ask if the African Court was unwilling or unable within the context of immunity to exercise criminal jurisdiction. It is, however, not so clear whether the issue of admissibility will even arise in the first place. Article 17 of the Rome Statute speaks of investigations and proceedings by states, but is noticeably silent with respect to regional or other international institutions. It is therefore up to the ICC either to amend article 17 to expressly provide for regional prosecutions and investigations, or to elaborately interpret the meaning of unwillingness and inability to comprise the aspect of upholding immunity by regional entities.

In order to remain on the course of fighting impunity, the ICC should effectively interpret the 'inability' to prosecute clause to include the upholding of immunity, particularly by regional tribunals. Any fears that this has the sum effect of establishing a hierarchy between the African Court and the ICC must be dispelled. If the African Court does not assert criminal jurisdiction, then the ICC will not be overruling any decision by the African Court. A hierarchy, in this context, only exists if, for example, the ICC were to decide that individual A in the hypothetical case is not entitled to immunity under the African Court, *and* that the African Court is then obligated to prosecute or at least not recognize A's immunity.

The second level of the question concerns forum-shopping due to overlapping mandate. Suppose 'state officer A' prefers prosecution before the ICC rather than the African Court, as in the case of Saif mentioned above. Both international human rights law and international criminal law are silent on an

[165] Preamble para 5, Rome Statute.

accused person's right to choose a forum for his or her prosecution. Such a right thus does not exist. Having multiple international criminal tribunals with overlapping jurisdiction is also not proscribed under international law. In fact, this only enhances the chances of holding international criminal perpetrators accountable. As Joost Pauwelyn and Luiz Eduardo Salles note, 'multiple courts are better than no courts at all'.[166] The concern on which forum will eventually prosecute should depend on the applicable principles of international criminal law, such as the most convenient forum, whether the court that was first seized of the matter has jurisdiction, and whether the case is admissible.

The third level of this question is this: supposing that 'state officer A' raises the immunity clause to his advantage during trial by the African Court, does the immunity clause under the Malabo Protocol then vitiate this complementarity relationship between the African Court and the ICC? While the African Court may exercise its mandate and grant immunity under the relevant clause, this does not bind the ICC, which is an independent and separate institution with 'self-contained jurisdiction'. As such, the ICC could be seized of the trial of 'state officer A' who initially has been accorded immunity under the Malabo Protocol. The ICC will not do so as an appellate jurisdiction, but will exercise its inherent original jurisdiction as an independent and separate Court. Fortunately, neither the Malabo Protocol nor the decisions of the African Court bind the ICC. As such, the ICC still has jurisdiction over such heads of state and senior government officers who may enjoy immunity before the African Court. Also, the principle of *stare decisis*[167] does not apply to international tribunals. This means that an African Court decision according immunity to state officer A is no authority in ICC litigation.

This kind of approach is not only essential in the war against impunity but also underlines the operational independence of the two courts. It should thus be expected that in certain circumstances, the ICC can be seized of a matter within the African region and with respect to individuals who have been

[166] J Pauwelyn and LE Salles 'Forum shopping before international tribunals: (Real) concerns, (Im)possible solutions' (2009) 42 *Cornell International Law Journal* 80.
[167] This is the principle where judicial decisions act as authority in subsequent judicial litigations.

accorded immunity under the Malabo Protocol. This is particularly so with respect to states parties to the Rome Statute or UN member states. The latter who are not party to the Rome Statute may also find themselves subject to the jurisdiction of the ICC through a UNSC referral as a measure taken under Chapter VII of the UN Charter. This is not an innovation, as it has happened before in the case of Sudan and Libya.

One may be tempted, however, to argue with regard to the latter example that the doctrines of *ne bis in idem* and double jeopardy bars the ICC from determining the matter. *Ne bis in idem* bars the ICC only where the person has been convicted or acquitted.[168] In the latter scenario in the African Court, the person is not 'acquitted' by raising the immunity question, which is a procedural bar. Similarly, the doctrine of double jeopardy does not apply since immunity is merely a procedural bar and it does not prevent such a person from being tried and then being either acquitted or convicted after the trial.

It is therefore certain that in view of the immunity clause, the African Court is likely to pronounce jurisprudence that contradicts that of the ICC as well as other international ad hoc tribunals. If this happens, it may be an area of conflict between the operations of the two institutions. Moreover, while the African Court might be able to still recognise immunity of a head of state, the UNSC might prohibit any state from recognising that immunity. Again, this points to a very likely conflict area between the UNSC and African UN member states.

With the immunity clause in place, no head of state or senior government officer who is still in power will be arraigned before the African Court. Seemingly, the African Court will be the preserve of low-level role-players involved in the perpetration of international crimes. In most cases, the African Court is likely to be rendered unable to prosecute, thus defeating the very purpose for which it was created. Although the African Court has the legal mandate to respect the immunity of senior state officers and heads of states, which the ICC does not have, the two institutions should nonetheless work independently and within their respective mandates.

[168] Article 20, Rome Statute.

It is the opinion in this study that antagonism between the ICC and African Court is unhelpful in the war against impunity for international crimes. The two institutions need to agree on modalities to address any such antagonism. For example, the African Court could give its opinion on measures to be taken to have the implicated leader relinquish his or her position in order to facilitate prosecutions. The ICC, on the other hand, could work with the African Court towards realising these efforts rather than compete for criminal jurisdiction.

The Malabo Protocol, however, envisages the African Court's complementarity to both subregional courts and national courts.[169] The application of the notions of inability and unwillingness will therefore apply in both instances. Thus, a finding by the African Court that a case be deferred to a national or a subregional mechanism is not remote. At the ICC, such a finding is possible when the Court determines the willingness and ability of national mechanisms to carry out prosecutions.[170] Chapter two of this thesis illustrated the Kenyan government's efforts to have the ICC defer its cases to a domestic mechanism in the spirit of complementarity.[171] It emerged there, however, that this request was devoid of the political will that would render it genuine. Similar difficulties were experienced in the trial of Hissène Habrè and in the East African Court of Justice's bizarre proposal to prosecute the Kenyan cases even though the court had no criminal jurisdiction.

Such occurrences lead us to the next concern regarding these deferrals of cases to domestic or regional courts. Who should ensure effective positive complementarity where the concerned governments either are conducting sham investigations or prosecutions, or there is a likelihood of their violating international human rights standards, as was the situation in the case of Saif mentioned above? Is it likely in practice that the African Court will monitor and

[169] Article 46H, Malabo Protocol.
[170] *Prosecutor v Saif-Al Islam Gaddafi and Abdulla Al-Senussi,* ICC-01/11-01/11-466-Red (n 164 above) para 27.
[171] *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article (19)(2)(b) of the Statute) ICC-01/09-02/11-96 (30 May 2011) Pre-Trial Chamber II, paras 56, 58,61, 62, 64, 65 and 66; *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute) ICC-01/09-01/11-101 (30 May 2011) Pre-Trial Chamber II, paras 65, 66, 68 and 69.

guard against these eventualities? This study suggests that a body with a monitoring and evaluation mandate over such deferral instances be established within the OTP of the African Court to ensure effective complementarity and report any cases of negative complementarity. In the latter cases, the OTP of the African Court should be allowed to proceed with investigations and prosecution.

Another potential way out of this quagmire, according to Patryk Labuda, is to redefine complementarity as not limited to prosecutions.[172] Indeed, the argument is in favour of embracing other accountability measures in addition to prosecution for international crimes. This would imply that the African Court should recognise the usage of traditional African approaches as discussed in chapter 5 below. This will be effective only if the African Court embraces limited amnesty, particularly with respect to perpetrators who do not bear the highest responsibility.[173] Yet, for reasons explained in chapter 6, the study proposes that these traditional mechanisms should not be allowed to deal with those who bear the highest responsibility but with the lower cadre of perpetrators. Notably, the effectiveness of most national and subregional courts in prosecuting international crimes is uncertain given the reality that this is an area that is still developing. This necessitates substantive reforms at these levels to ensure effective complementarity between national, subregional and regional mechanisms in prosecuting international crimes.

Ademola Abass raises an important concern about the application of complementarity in multiple membership to subregional courts and the question of which subregional court should be seized with jurisdiction where the relevant state is a member to multiple groups.[174] These are issues that can be dealt with procedurally through the establishment of rules to guide states in managing the interrelationships between these different institutions. Every subregional tribunal should be able to foresee multiple membership and provide for it adequately. This calls for close cooperation among all the

[172] P Labuda 'How effective is the ICC? Complementarity and cooperation in [the] Congo', presentation during the conference *The Nuremberg Principles 70 years later: Contemporary challenges* 2015.
[173] See discussion under section 3.4, chapter 3 of this thesis.
[174] Abass 'Historical and political background to the Malabo Protocol' (n 3 above) 25.

subregional tribunals whenever they bestow this kind of criminal jurisdiction on themselves.

Interdependence between the African Court and the ICC as well as subregional and national criminal courts and tribunals is inevitable. For instance, there will be instances where some African-based cases can be prosecuted before the ICC. There is also a possibility of having cases which have been heard already and determined under national or subregional mechanisms find their way before the African Court. These instances of interdependence make it necessary to maintain coherence by means of having a structured relationship among all these tribunals. Any inconsistency in jurisprudence, particularly between the international mechanisms, or uncertainty in the latter's relationship with each other, is likely to undermine their legitimacy.

Article 46H of the Malabo Protocol acknowledges that the African Court shall be complementary to national and regional economic institutions. This provision goes further to lay down a clear admissibility criterion similar to that under article 17(1) of the Rome Statute. However, it fails to give formal structure to the relationship between these institutions. To avoid disorder, there is hence a need for the development of a formal structure regulating the way in which the various tribunals relate to one another. This study recommends the structural relationship discussed under section 6.4.1.3 of chapter 6 of this thesis.

4.2.4.3 Cooperation

The Malabo Protocol makes it mandatory for its states parties to cooperate with the Court in broadly every area concerning investigation, prosecution and enforcement of court orders regarding persons accused of committing crimes within the jurisdiction of the Court.[175] Cooperation is key to the success of the African criminal justice system, as numerous court processes rely purely on state cooperation. For example, in order for African states to fully cooperate within the context of the Malabo Protocol, states would be expected to promulgate laws and procedures to facilitate investigations, arrests and

[175] Article 46L, Malabo Protocol.

surrender, and enforcement of the Court's orders.

If the ICC trend is anything to go by, however, securing African state cooperation with the African Court is likely to be fraught with challenges. Several African states have demonstrated a total lack of political commitment to the ICC, especially where members of their governments have been indicted. In Uganda, for example, President Museveni's government was first to refer the LRA case.[176] However, when it became clear that the ICC would soon indict members of government, the President arrest and surrender of al-Bashir vehemently opposed the notion of the ICC and dismissed it as a neocolonial ploy.[177] In addition, the AU adopted a resolution calling upon its members not to cooperate in the arrest and surrender of al-Bashir.[178] Several states, including Kenya, Malawi, Djibouti, the DRC, Chad and South Africa, accorded al-Bashir protection while he was in their territory. At the domestic level, the local communities affected by the atrocities – including victims – in all these cases have lost trust in domestic institutions and look forward to any other meaningful intervention.[179] The Malabo Protocol, however, removes this problem by granting al-Bashir immunity.

One could certainly argue that the African state's unwillingness to cooperate with the ICC arose not out of a general desire not to cooperate with any international criminal process but in reaction to the fact that the process involved indicting a sitting head of state. In this regard, it is hoped that African states' cooperation with the African Court will be much more constructive in spirit and in deed. Nonetheless, such lack of cooperativeness is evident too in African states' embrace of negative complementarity. Even in countries which, like Kenya, seem democratic at all levels of governance, a culture of holding the real 'wielders of power' judicially accountable is glaringly absent, given that national courts continue to wallow in the deeply entrenched culture of protecting the status quo. Also if the ACtHPR's experienceis anything to go

[176] WA Schabas 'The International Criminal Court at ten' (2011) *Criminal Law Forum* 503.
[177] A Taylor 'Uganda and the ICC: Difficulties in bringing the Lord's Resistance Army leadership before the ICC' (2009-2010) 6 *Eyes on the ICC* 31.
[178] AU Assembly 'Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court' Assembly/AU/Dec.245(XIII) Rev.1, Doc. Assembly/AU/13(XIII), 13th Ordinary Session 1–3 July 2009, para 2.
[179] See discussion in chapter 2, section 2.2.2, of this thesis.

buy, some states will certainly not cooperate. For example, mere compliance with its provisional measures decisions has been a challenge. And compliance with its decisions (judgments/reparation orders) has been mixed or slow.

Kenyan and South African courts present an especially interesting picture in the context of international criminal justice. Whilst the AU declared its non-cooperation with the ICC in the arrest and surrender of al-Bashir, a Kenyan High Court judge was bold enough to hold that, should al-Bashir step foot in Kenya again, he should be arrested.[180] This did not sit well with the government of the day. Regarding a subsequent constitutional question as to whether the current president was fit to vie for presidency given the fact that he was an ICC indictee, the same High Court declared its lack of mandate to deal with a presidential election petition, regardless of the fact that this was not an election petition per se but a matter of constitutional interpretation based on the integrity requirements of public officers.[181] What is most saddening is the fact that the Kenyan judicial system had supposedly undergone drastic reforms. However, fear of holding 'real wielders of powers' accountable remains a major problem. In an interesting turn of events, the East African Legislative Assembly, in April 2012, unanimously resolved to have the ICC cases related to the current Kenyan president referred to the East African Court for prosecution regardless of the fact that the said court has no criminal mandate.

Similarly, South African High Court and Court of Appeal have both upheld South Africa's duty to arrest al-Bashir.[182] A South African court invalidated, on procedural grounds, a subsequent attempt by South African government to withdraw from the Rome Statute.[183] Resulting in the South African

[180] *Kenya Section of the International Commission of Jurists v Attorney General and Minister of State for Provincial Administration and Internal Security,* Final Judgment, [2011] eKLR; ILDC 1804 (KE 2010), 28 November 2011.
[181] *International Centre for policy and conflict and 5 others v Attorney General and 4 others,* Constitutional and Human rights Division Petition No 552 of 2012 (2013) eKLR, http://kenyalaw.org/CaseSearch/view_preview1.php?link=119030658917561929345559 (accessed 17 March 2017)3.
[182] *South Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* 2015 (5) SA 1 (GP).
[183] *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP).

government revoking its withdrawal notification as well as its withdrawal of a parliamentary bill that had sought to repeal the International Criminal Court Act 27 of 2002 (ICC Act of South Africa), which incorporated the Rome Statute into South African domestic law.[184]

The trial of Hissène Habré in Senegal is yet another key indicator of vitiated levels of cooperation towards effective prosecution of international crimes in Africa. While giving Senegal the responsibility to try the former Chadian president, the Committee of Eminent African Jurists was emphatic as regards its support for a mechanism that upheld the principle of 'total rejection of impunity'.[185] The subsequent events in Senegal can only be described as a call for a denial of justice. Despite the delays in the trial's commencement, the AU did nothing to ensure the enforcement of its resolution. It is, however, noteworthy that the Extraordinary African Chambers in Senegal has finally prosecuted and convicted Habrè.[186]

The Malabo Protocol does not contain a provision on the sanctions to be taken against a state that defaults on the requirement to cooperate. The practice under the Rome Statute is that if a state fails to cooperate, 'the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'.[187] Moreover, although the Protocol allows the Court to seek assistance from non-state parties and international courts or other partners and conclude agreements in that regard, it is not clear how such

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[184] UN 'South Africa: Withdrawal of notification of withdrawal', 7 March 2017, C.N.121.2017.TREATIES-XVIII.10 (Depositary Notification, 7 March 2017); T Gqirana 'Rome Statute Repeal Bill withdrawn from Parliament' http://www.news24.com/SouthAfrica/News/rome-statute-repeal-bill-withdrawn-from-parliament-20170314 (accessed 21 March 2017).

[185] See generally Report of the Committee of Eminent African Jurists on the case of Hissène Habré http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf (accessed 16 May 2013).

[186] *Ministère Public v Hissene Habré*, Judgment of 30 May 2016, Chambre Africaine Extraiordinaire d'Assises http://www.chambresafricaines.org/pdf/Jugement_complet.pdf (accessed 11 February 2017). For further reading on the judgment, see S A E Høgestøl 'The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight against Impunity' (2016) 34(3) *Nordic Journal of Human Rights* 147-156. Habré is, however, appealing his conviction 'Communiqué de presse: Démarrage des audiences du procès en appel (accessed 29 December 2016); http://www.chambresafricaines.org/index.php/le-coin-des-medias/communiqu%C3%A9-de-presse/649-communiqu%C3%A9-de-presse-d%C3%A9marrage-des-audiences-du-proc%C3%A8s-en-appel.html (accessed 11 February 2017).

[187] Article 87 (7), Rome Statute.

agreements will be enforced.

Arguably, in the light of the immunity clause *under* the Malabo Protocol, this kind of challenge is not likely to arise with the African Court. With low-level character of perpetrators (who do not enjoy immunity) remaining the key focus of the African Court, it is most likely that African states will fully cooperate with the Court in their arrest and surrender.

4.3 African state practices in prosecuting international crimes

Uganda, the DRC and Senegal (via the Extraordinary African Chambers) are the only regional states with practices that demonstrate visible effort in seeking the prosecution of international crimes and in a manner that complements the ICC.

Uganda established an International Crimes Division (ICD) of the High Court in 2008.[188] It was anticipated that the ICD would improve national prosecution of international crimes, particularly so with regard to the LRA-related cases. Once it was fully operationalised, its first trial was against Thomas Kwoyela, a former LRA commander arrested in the DRC in 2008. He was arraigned in court in September 2010 and his trial began only in July 2011 after several delays. These delays, according to Sharon Nakandha, were due to the numerous challenges the ICD faces as a result of its budgetary constraints. Chief among these challenges is the lack of key internal structures such as a victims and witness unit and an outreach unit.[189] This is what, for example, compelled the Court to postpone Kwoyela's trial by months. Although the government offered the use of its media to reach out to affected communities, it was important for the court to reach out physically to Northern Uganda, which may not have been possible due to constrained resources. Another serious challenge bedevilling Uganda's ICD is the lack of adequate human resources. Appeals from the ICD are subject to the ordinary Appeal Courts,

[188] This was redesignated in 2011 through Legal Notice No. 10 of 2011, The High Court (International Crimes Division) Practice Directions 2011 clause 3.
[189] S Nakandha 'The Kwoyelo case at the ICD: The realities of complementarity in practice' https://www.ijmonitor.org/2016/05/the-kwoyelo-case-at-the-icd-the-realities-of-complementarity-in-practice/ (accessed 3 March 2018).

which handles numerous other civil and criminal matters,[190] but the human resource of these courts have not been bolstered.[191] It is feared that this is likely to lead to adjournments of many cases due to lack of forum, as has been the situation with ordinary cases.[192] In addition, in a constitutional petition in November 2011, Kwoyela challenged his prosecution on the basis of an Amnesty Act. Not only was the amnesty law declared constitutional, but the court also ordered the ICD to cease Kwoyela's trial.[193]

As regards DRC, following its ratification of the Rome Statute in 2002, the Military Penal Code was passed in the same year. This formed the basis upon which the military tribunals were initially the only tribunals prosecuting international crimes. The International Centre for Transitional Justice (ICTJ) has, however, found some of the provisions of this legislation falling short of the Rome Statute standards. For example, its mode of responsibility falls short of the command responsibility under article 28 of the Rome Statute; its definition of war crimes and crimes against humanity falls short of the Rome Statute definitions; and it omits penalties for war crimes and also provides for the death penalty.[194] To remedy this situation, judges have referred directly to Rome Statute provisions since the DRC is a monist state. In April 2013, Parliament passed the Law on the Organization, Functioning and Jurisdiction of the Courts (LOCJ), granting civilian courts (particularly, Courts of Appeals) jurisdiction over the prosecution of core international crimes.[195]

A study conducted by the ICTJ found that 'between January 2009 and December 2014, judicial authorities in the DRC had opened 39 cases related

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[190] P Acirokop, *Accountability for Mass Atrocities: The LRA Conflict in Uganda*, LLD thesis, University of Pretoria (2013), Chapter 5, https://repository.up.ac.za/bitstream/handle/2263/23898/06chapter6.pdf?sequence=7 (accessed 3 March 2018).
[191] Ibid.
[192] Ibid.
[193] *Thomas Kwoyelo Alias Latoni v Uganda* Constitutional Petition No.036/11 [Arising Out of HCT-00-ICD-Case No. 2/10] Ruling of the Court of 22 Sept 2011 (Constitutional Court of Uganda) at para 625.
[194] ICTJ 'The Accountability landscape in Eastern DRC: Analysis of the National Legislative and Judicial Response to International Crimes (2009–2014)' https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Prosecutions-2015_1.pdf (accessed 5 March 2018).
[195] Projet de loi modi ant et complétant la loi organique No 13/011-B of April 11, 2013 portant organisation, fonctionnement, et compétences des juridictions de l'ordre judiciaire en matière de répression des crimes de génocide, des crimes contre l'humanité et des crimes de guerres, April 2014.

to events that had occurred between 2002 and 2014 in eastern DRC (Ituri, North Kivu, and South Kivu)'.[196] This is a very small number compared to the mass atrocities committed during the period under investigation.[197] Political pressure where special interests are at stake, coupled with lack of political will, especially from the neighbouring Rwandan government, in relation to proceedings against foreign armed groups, have been cited as the major challenges contributing to the low levels of investigation.[198] In addition, due to limited access to areas where serious crimes have been committed, the DRC judicial system relies on information from external partners such as the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), UN agencies, and NGOs.[199] As a result, 'whenever crimes occur outside of the realm of an international partner's area of intervention, little or no information is gathered and no investigations or prosecutions are initiated'.[200] Given these challenges, it is impossible to argue that the DRC judicial system provides an effective positive complementarity mechanism in the fight against impunity for international crimes.

In the third instance, the Extraordinary African Chambers (EAC) in Senegal was established as an internationalised court under the auspices of the AU to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990.[201] This period corresponds to Hissèn Habrè's rule in Chad. On 30 May 2016, the EAC convicted Habrè for war crimes, crimes against humanity and torture.[202] This conviction is significant for a number of reasons.

First, the history preceding Habrè's prosecution is so riddled with uncertainties that one would have expected a different verdict from the Senegalese courts. In January 2000, Senegal commenced criminal proceedings against Hissen Habré, a former president of Chad who was exiled in Senegal, for crimes against humanity and torture. Senegal's appeal court held that it had no

[196] Ibid.
[197] Ibid.
[198] Ibid.
[199] Ibid.
[200] Ibid.
[201] *Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin* 1982 *au 1er décembre* 1990.
[202] (n 186 above).

jurisdiction to prosecute Habré for the alleged crimes since Senegal had not enacted legislation implementing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment of 1984 (UN Convention against Torture) and that Habré was a non-Senegalese and the alleged crimes had been committed outside of Senegal.[203] Senegal's highest court, the Cour de Cassation, later upheld this decision.[204]

Belgium sought the extradition of Habré to Belgium to stand trial for the alleged crimes. Senegal's rejection of the extradition was applauded by the AU, which called upon Senegal to ensure his prosecution.[205] The AU mandated 'the republic of Senegal to prosecute and ensure that Hissen Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial'.[206] This was never done. Hence, in February 2009, Belgium instituted proceedings against Senegal before the ICJ, claiming Senegal was in breach of its international treaty and customary law obligations. The ICJ duly found Senegal in breach of its international conventional obligation to expedite investigations and subsequent prosecution of Habré.[207] The Court argued that article 27 of the VCLT, which reflects customary international law, could not allow Senegal to rely on its internal law to defeat its international law obligation.[208]

In July 2015, Habré's trial recommenced before a Senegalese court and led to his conviction, which gives renewed hope that an African court can convict a former sitting head of state for international crimes. Arguably, since the establishment of the court under the auspices of the AU involved other African states, the conviction confirms that African states have resolved to allow zero tolerance of impunity for international crimes.

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[203] *Questions relating to the obligation to prosecute or extradite* (*Belgium v Senegal)* Judgement, [2012] ICJ Reports 422, para 76 (referring to Court of Appeal (Dakar), *Chambre d'accusation, Public Prosecutor's Office and François Diouf* v. *Hissène Habré,* Judgment No. 135, 4 July 2000).
[204] Ibid (also referring to Court of Cassation, *première chambre statuant en matière pénale, Souleymane Guengueng et al.* v *Hissène Habré,* Judgment No. 14, 20 March 2001).
[205] AU Assembly 'Decision on the Hissen Habré case and the African Union' Assembly/ AU/Dec.127 (VII), Doc. Assembly/AU/3 (VII), 7th Ordinary Session, 1-2 July 2006.
[206] Ibid, para 5(iii).
[207] *Belgium v Senegal* (n 203 above) para 70.
[208] Ibid, para 113.

4.4 Conclusion

This chapter set out to interrogate the AU and African states' own judicial approaches towards addressing impunity at the regional level. It has established that the creation of a regional court with a mandate over international and transnational crimes stands out as the most visible approach adopted at the regional level.

Five significant lessons emerge from the analysis of the origin, nature, and content of the subject matter jurisdiction of the African Criminal Court. First, although the origin of the idea of an African court with criminal jurisdiction is traceable to the adoption of the AU Constitutive Act, it is the trial of African leaders in international courts that gave impetus to its eventual creation. Second, the Malabo Protocol makes limited innovative contribution to the aspect of trigger mechanisms. These relates both directly and indirectly with some of the AU grievances against the ICC. Third, there are lessons regarding the crimes listed under the Malabo Protocol, their definitions and scope. On the definition of crimes, this chapter analysed the proposed substantive criminal jurisdiction of the African Court as provided for in the Malabo Protocol. The chapter placed emphasis on core international crimes with innovations and unique contributions to substantive international criminal law contained therein as well as on definitional weaknesses that require attention. It argued that some of the innovations in the Malabo Protocol are likely to make a valuable contribution to justice in Africa and also to substantive international criminal law. These crimes are tailored for Africa and can, in theory, make a valuable contribution to justice on the continent. An overview of the nature of these crimes and their importance to Africa confirms that Africa has made some noticeable contributions in substantive international criminal law, particularly in relation to the definition of international crimes. Although the Malabo Protocol largely adopts the Rome Statute's definitions of international crimes, it makes some innovative additions to crimes against humanity, war crimes, the crime of aggression and genocide. Yet, majority of these innovations do not address AU's concerns against the ICC.

Fourth, the Protocol also makes a commendable innovation on the doctrine of

corporate criminal liability. Thus, unlike the situation in the ICC and other international tribunals, the prosecution of international crimes in Africa is likely to put emphasis on corporate criminal liability both of a national and transnational character. Although this new contribution does not in any way address AU's and African states concerns about the ICC, it remains significant in fighting impunity for corporations who have for a long time engaged in or facilitated international crimes in Africa with impunity.

Finally, the potentially destructive nature of the immunity clause as it relates to the crimes under the Malabo Protocol is of great concern and must be addressed accordingly. Moreover, one needs to look at how the expanded jurisdiction of the African Court will fit in practice into the larger project of international criminal justice. It remains to be seen whether the African Court with criminal jurisdiction will fully address impunity on the continent and also eradicate AU's concerns against the ICC.

Concerning African states' practice regarding national prosecution of international crimes through special divisions in national courts, military tribunals or extratordinary courts, this chapter has established that these mechanisms have faced numerous challenges. These challenges have compromised the effectiveness of these national prosecution efforts as complementarity mechanisms in the fight against impunity for international crimes.

CHAPTER 5
TRADITIONAL AFRICAN APPROACHES TO JUSTICE FOR INTERNATIONAL CRIMES AND TRUTH COMMISSIONS: SUITABLE ALTERNATIVE PATHS TO ACCOUNTABILITY?

5.1 Introduction

The war against impunity for international crimes in Africa has brought to the fore several regional initiatives. Other than prosecution efforts at national and regional courts, post-conflict African state practice suggests the incorporation of traditional justice concepts and systems within the broad ambit of international criminal justice system. For example, the utilisation of traditional African approaches like *gacaca* in Rwanda and proposals for using *mato oput* for ICC indictees in Uganda have all been anchored on the need for accountability for past atrocities.[1] They are therefore essential tools in the fight against impunity from the continent. Another state practice advanced by most post-conflict African states is the use of truth, justice and reconciliation commissions (TJRCs) or truth and reconciliation commissions (TRCs). Zimbabwe, Sierra Leone, South Africa, Liberia, Uganda and Kenya have all specifically established TRCs.

This chapter analyses the traditional procedures of *gacaca* and *mato oput* with the aim of assessing their suitability as an accountability measure for international crimes. As mentioned in preceding chapters, the choice of these processes is neither exhaustive, nor are these the only traditional processes to justice. Other examples of traditional African approaches to justice within Uganda include *Nyono Tong Ngweno* and *Gomo Tong*; similarly, Botswana has *Kgotla,* while Kenya has *Esilulu, Kithiitu* and the like. The study, however, focuses on the two processes mentioned, simply because they are the only mechanisms that have either been proposed or used by post-conflict African states in holding perpetrators accountable for international crimes. As such, they provide this study with a sound basis for comparing the ICC and traditional African processes in terms of their effectiveness in holding

[1] It should be noted that these mechanisms have been used before for accountability of non-ICC offences. See discussions under point 5.3.1.1 and 5.3.1.2 below.

perpetrators of international crimes accountable. This chapter also analyses the use of TRCs as an alternative mechanism for justice. It must, however, be noted that TRCs are not unique to Africa and thus not a traditional African specific approach as such. Nevertheless, state practice in post-conflict African states has broadly embraced this mechanism.

This chapter seeks to answer research questions two, three and four namely: On the basis of what approaches or perspectives does Africa have these concerns? Do African approaches add value in the fight against impunity in Africa and how can one strengthen them? Is a regional criminal mechanism - which takes into consideration African approaches or perspectives – the solution to fighting impunity in Africa?

To answer these questions, this chapter is divided into five sections. After this brief introduction, the second section provides a background to the use of African traditional approaches as an accountability measure for international crimes in post-conflict African states. The third section is an analysis of selected traditional African processes. In particular, it critiques *gacaca* and *mato oput* traditional procedures. The section is both descriptive of the various approaches and also analytical, in the sense that it assesses the weaknesses and strength of these approaches in the fight against impunity for international crimes. The fourth section anchors these traditional procedures in the contemporary international criminal law debate. The final section discusses TRCs and their suitability as an accountability mechanism for international crimes.

5.2 Contextualising traditional African approaches to justice in the fight against impunity for international crimes

The adoption of African traditional approaches in the fight against impunity is not new to most post-conflict African societies. Despite their perceived flaws, traditional approaches to justice have been taken in seeking accountability for historic crimes in post-conflict African states. In Rwanda, for example, the *gacaca* courts were formalised and eventually contributed to justice in the post-genocide period. Similarly, Uganda has experimented with *mato oput* in its transitional justice period.

In a study by the AU on accountability and reconciliation of local communities in South Sudan, the majority of Southern Sudanese suggested the use of customary law courts for transitional justice.[2] In fact, in its report, the AU acknowledged that 'in many developing and post-conflict societies where formal justice lacks capacity and does not have legitimacy among the people, various forms of customary courts step into the gap to deliver justice'.[3] Further, in the controversial peace-versus-justice debate, an emerging school of thought conceptualises the notion of justice in a manner that reflects African arguments and, in particular, African traditional practices. It sees justice as a holistic concept carrying with it both moral and legal obligations. As such, it does not limit the concept of justice to prosecution but regards it as multi-dimensional and as encompassing judicial and non-judicial forms as well as retributive and restorative elements.[4]

The approaches adopted by post-conflict societies towards accountability through traditional fora are informed by pre-existing traditional mechanisms. The majority of African countries use traditional mechanisms for low-level criminal cases, albeit in a limited sense.[5] This is indicative of a culture of using customary law courts or traditional approaches in establishing accountability for local crimes. The AU report by the Commission of Inquiry on South Sudan noted the following:

> South Sudan has a rich and long history of Chiefs' Courts, which precedes its encounter with colonialism. For many years … traditional courts were the mainstay of justice in South Sudan. Today, while they are formally disassociated from the formal justice system in the sense that they fall administratively under local government (counties), they are said to handle over 90% of all cases, underscoring their centrality in the delivery of justice in South Sudan.[6]

The reasons for the continued use of customary courts as an easy alternative

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[2] *Report of the African Union Commission of Inquiry on South Sudan* 15 October 2014, para 297 http://www.peaceau.org/uploads/auciss.final.report.pdf (accessed 16 February 2017).
[3] *Report of the African Union Commission of Inquiry on South Sudan* (n 2 above) para 292.
[4] See discussion under section 3.2 in chapter three of this thesis.
[5] Most commonwealth African countries have statutory provisions allowing the use of customary law, albeit to a limited degree. For example, section 8 of the Judicature Act of Kenya lists customary law as a source of law in the country. Moreover, although they are not recognised by the law, Kenya still has traditonal *barazas* which are used in villages by local chief as traditional courts to solve disputes among villagers; section 211(3) of the Constitution of the Republic of South Africa, 1996 calls on South African courts to apply customary law 'when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.
[6] *Report of the African Union Commission of Inquiry on South Sudan* 1 (n 2 above) para 286.

forum lie in people's familiarity with them and the fact that those presiding over cases are well-known to the communities. Moreover, the courts have flexible procedures and combine retributive with restorative forms of justice, mediation and reconciliation; all of which are necessary to achieve holistic justice.[7] The practice of using traditional approaches for accountability for domestic crimes is what informs the ease with which post-conflict societies have sought to use traditional mechanisms for criminal accountability for international crimes. Essentially, these societies look into their past atrocities and their present manifestation through the lens of African traditions in the effort to forge solutions to contemporary problems.

This chapter notes that the conception of justice among African communities is as diverse as the communities themselves. Nonetheless, a study of these traditional approaches to justice in post-conflict African societies establish a trend that can help fortify an African conception of justice in its traditional sense. After one understands the trend in Africa's traditional approaches to justice, it then becomes easy, first, to validate Africa's concerns against the ICC. Of importance is to establish whether these concerns are founded in the variance of the conception of criminal justice between Africa and in the ICC. Secondly, the chapter assesses the suitability of these approaches in the fight against impunity for international crimes. By considering these questions, one is then able to make appropriate recommendations on whether or not to integrate African approaches to justice within the regional framework, on how to strengthen them, and on how these approaches should relate to the ICC, the African Court and subregional courts. The following section considers selected traditional approaches.

5.3 Selected traditional approaches

5.3.1 Traditional procedures

5.3.1.1 Gacaca

The word *gacaca* is derived from the Kinyarwanda word *umugaca,* meaning a

[7] *Ibid,* para 287, 290, 291. This is in the context of South Sudan's continued use of customary courts within its local government justice system today.

soft plant that is comfortable to sit on.[8] *Gacaca* in Kinyarwanda therefore represents a lawn, where people sat to settle disputes.[9] It is literally translated as 'justice on the grass'.[10] In modern terminology, it can be called 'a traditional village-based court'.[11] During these *gacaca* gatherings, the lineage head (*mwami*) was the ultimate arbiter and was assisted by the *abiru*, the guardians of tradition.[12] These individuals were chosen by the community and charged with the responsibility to settle disputes, punish, or order compensation against the perpetrators, with the primary aim of restoring order and social harmony.[13] Traditionally, *gacaca* was hence an informal arbitration of dispute, the legitimacy of which was founded on the willing participation of the community.

This traditional justice system underwent evolution at different stages. With colonialism, *gacaca* was subject to colonial written laws and the hierarchy of the colonial court system.[14] Despite being under state power, *gacaca* continued to dispense justice as a customary conflict resolution court, even though the local judges (*inyangamugayo*) were subject to state supervision.[15] This made *gacaca* a quasi-judicial body as new rules on administration of justice were slowly introduced.

In the aftermath of Rwanda's genocide, the ordinary justice system was virtually non-existent.[16] A commission established by the then Rwandan president, Pasteur Bizimungu, proposed that *gacaca* be formalised to deal with the accountability question for an estimated 130,000 persons for offences related to genocide.[17] The 1996 Genocide Law structured *gacaca* into four

[8] International Institute for Democracy and Electoral Assistance (IDEA) *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2008) 33.
[9] JL Koko 'The Gacaca courts in Rwanda twenty years after the genocide' *Conflict Perspectives* 24 April 2014 http://conflictperspectives.imtd.org/index.php/regions/africa/104-the-gacaca-courts-in-rwanda-twenty-years-after-the-genocide (accessed 17 June 2016).
[10] IDEA *Traditional Justice and Reconciliation after Violent Conflict* (n 8 above) 33.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] IDEA *Traditional Justice and Reconciliation after Violent Conflict* (n 8 above) 34.
[15] Ibid.
[16] Ibid, 35.
[17] IDEA *Traditional Justice and Reconciliation after Violent Conflict* (n 8 above) 37.

tiers: cell, sector, district, and province, with respective appellate jurisdiction.[18] It further categorised the kinds of crimes to be dealt with by each tier.[19] These ranged from simple theft to homicide cases. On 26 January 2001, the Transitional National Assembly of Rwanda amended this law by adopting Organic Law No.40/2000.[20] The amendment was meant to encourage perpetrators to admit guilt, show remorse and get pardon.[21] To this end, *gacaca* underwent a legal and social transformation in which relevant laws were enacted, new judges appointed, and informal training undertaken.

During court sessions, the entire community was to be present and act as the 'general assembly'.[22] It was the community that then elected the bench from among them, which comprised persons of high moral standards.[23] The community could also discuss the offences and provide testimony for and against the accused.[24] The court therefore would draw its evidence primarily from the testimony of the community and that of the accused person. This can be viewed as one of the strengths of the *gacaca* courts: the process encouraged public participation and transparency of proceedings. As such, the mechanism was able to bring out 'hidden grievances and resentment', thus promoting truth and dialogue between perpetrators and victims.[25]

Another notable aspect of *gacaca* was plea-bargaining: by this means, *gacaca* would not only establish the truth or a historical account of the events by making the accused to disclose as much information as possible but also require accused persons to offer a public apology before their confessions were accepted.[26] *Gacaca* also levied punishments in form of fines and imprisonment. These public confessions then resulted in reduced sentences.

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[18] Chapter V, Organic Law No. 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990.
[19] Article 2, Organic Law No. 08/96.
[20] Organic Law No. 40/2000 of January 26, 2001, setting up gacaca courts and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity, committed between 1 October 1990 and 31 December 1994.
[21] The preamble, Organic Law No. 40/2000.
[22] P Uvin 'The *Gacaca* tribunals in Rwanda' in D Bloomfield, T Barnes and L Huyse (eds) *Reconciliation after violence conflict: A Handbook* (2003) 117.
[23] Ibid.
[24] Ibid.
[25] L Haberstock 'An analysis of the effectiveness of the *gacaca* court system in post-genocide Rwanda' (2014) 8(4) *Global Tides* 9.
[26] Uvin '*The Gacaca* tribunals in Rwanda' (n 22 above) 39.

The public condemnations coupled with the punitive aspects of *gacaca* were important deterrent aspects of the process. Another distinctive feature of *gacaca* was the reparation aspect. The *gacaca* proceedings required the listing of all forms of damage suffered by the surviving victims, such as loss of property and injury to relatives or self.[27] Upon completion of a case, a claimant would use this statement of their loss to claim reparations from a public fund.[28] Despite its retributive nature, *gacaca* was also characterised by reconciliation and restorative justice, giving the *gacaca* a holistic outlook with holistic outcomes and thus qualifying as a viable solution for addressing impunity.

Nevertheless, *gacaca* trials have been criticised on several fronts, usually on the basis of Western notions of justice. As such, these traditional processes always fall short of the expected standards. Overall, *gacaca* has been disapproved for compromising due process, thus denying accused persons their right to fair trial. Although *gacaca* courts held competences similar to ordinary courts,[29] some of their procedural aspects came under scrutiny for allegedly affecting the justice that these institutions dispensed. First, *gacaca* has been criticised for having lay judges presiding over the crimes of genocide and crimes against humanity. These judges, entirely unfamiliar with methods of legal interpretation, were bound to face difficulties, particularly given the complex nature of international crimes. It has been argued that this incompetency denies an accused person the right to fair trial in the sense that the presiding judges are unlikely to appreciate the nature of the crimes within the context of international criminal law as well as enforce international human rights standards.

But this kind of criticism is based on a misunderstanding of the true *gacaca* process. Not only did these lay judges possess what Timothy Longman calls

[27] Uvin 'The *Gacaca* tribunals in Rwanda' (n 22 above) 118.
[28] Ibid.
[29] Article 39, Organic Law No. 16/2004 Establishing the organisation, competence and functioning of gacaca courts charged with prosecuting and trying the perpetrators of the crime of, genocide and other, crimes against humanity, committed between 1 October 1990 and 31 December 1994. This is with regard to investigation, prosecution and judgment.

'contextual competence',[30] but, as pointed out above, *gacaca* was only used for low-level and less complex cases. As such, there was no need for these laymen to possess the complex knowledge of the due process required by international standards. Besides, having a fully trained judge preside over *gacaca* would effectively change *gacaca* court into an ordinary court, thus depriving it of its traditional character. Indeed, the existence of *gacaca* courts of this nature would be irrelevant and counterproductive as they completely negate the traditional justice model inherent in the *gacaca*.

Secondly, it has been argued that the right to legal representation was not recognised under *gacaca's* procedures.[31] This effectively compromises the right of an accused to legal representation. Notably, however, the traditional manner in which *gacaca* was conducted did not necessitate a legal representative. The entire community was given the right to participate either for or against an accused person, a community that had directly experienced crimes allegedly committed by an accused. Their evidence – whether in defence or accusation - of the accused person was based on actual facts of their experiences and not legalese. A decision by the bench, based on these presentations, was therefore regarded as direct justice to the victims as opposed to legal arguments. Moreover, given the fact that the presiding judges were laymen, it would have been counterproductive to have a trained legal representative. Phil Clark views the exclusion of legal representatives as fair since most accused persons could not afford them; by excluding them, *gacaca* became more participatory.[32]

Thirdly, it is also argued that the lack of documentary evidence in *gacaca* trials was highly compromising to due process.[33] This not only undermined evidentiary rules, but also weakened the outcome of *gacaca* courts. Apart

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[30] T Longman 'Justice at the grassroots? Gacaca trials in Rwanda' in N Roht-Arriaza and J Mariezcurrena (eds) *Transitional justice in the twenty-First century: Beyond truth versus justice* (2006) 219 cited in S Thomson and R Nagy 'Law, power and justice: What legalist fails to address in the functioning of Rwanda's *gacaca* courts' (2011) 5 *The International Journal of Transitional Justice* 18.

[31] Article 64, Organic Law No. 16/2004.

[32] P Clark 'Hybridity, holism and 'traditional' justice: The case of gacaca courts in post-genocide Rwanda' (2007) 39 (4) *George Washington International Law Review* 765-837.

[33] A Corey and SF Joireman 'Retributive justice: The *gacaca* courts in Rwanda' (2004) 85 African Affairs 83.

from the lack of use of physical evidence,[34] *gacaca* trials had no police and judicial investigations.[35] Yet, as already pointed out, the trials were discursive in nature. They relied entirely on testimony given by perpetrators, victims and bystanders.[36] Verbal testimony was sufficient to sustain a verdict.[37] One may argue, however, that the process left accused persons with no protection against misrepresentation of facts. This anomaly seems to have been cured by the requirement to corroborate the evidence adduced during the public participation processes.

Fourthly, it is argued that *gacaca* courts further lacked credibility in that some of its judges had been implicated and potential witnesses threatened.[38] Threats against witnesses indicate the weaknesses in the witness protection program as well as the security of *gacaca* judges. Christopher Le Mon, for example, documents a chilling account of numerous witnesses in *gacaca* courts who were killed across the country in a brutal manner, including the president of a *gacaca* court in Gisanza.[39] These incidents raised fears among the public and largely contributed to a decline in public participation.[40] Yet not even the Western court system has water-tight witness protection. The ICC OTP has previously acknowledged that her reasons for her withdrawal of Kenyatta's case was due to deaths of 'several people who may have provided important evidence regarding Mr. Kenyatta's actions … while others were too terrified to testify for the Prosecution'.[41]

Fierens further argues that the genocide effectiveness was such that perpetrators, co-perpetrators and accomplices could simply establish *gacaca*

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[34] Ibid.
[35] Corey and Joireman 'Retributive justice' (n 33 above); B Ingelaere 'Does the truth pass across the fire without burning?' Locating the short circuit in Rwanda's *Gacaca* courts' (2009) 47 (4) *Journal of Modern African Studies* 516.
[36] Ingelaere 'Does the truth pass across the fire without burning?' Locating the short circuit in Rwanda's *Gacaca* courts' (n 35 above) 516.
[37] Ibid.
[38] J Fierens '*Gacaca* courts: Between fantasy and reality' (2005) *Journal of International Criminal Justice* 12.
[39] CJ Le Mon 'Rwanda's troubled *gacaca* courts' (2007) 14(2) *Human Rights Brief* 17–18.
[40] Ibid
[41] *Prosecutor v Uhuru Muigai Kenyatta* (Notice of withdrawal of the charges against Uhuru Muigai Kenyatta) ICC-01/09-02/11-983 (5 December 2014) Trial Chamber V(B)*;* OTP 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta' (5 December 2014), https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2 (accessed 21 May 2018).

courts among themselves.[42] Several other commentators have acknowledged the sustained criticism that *gacaca* court was manipulated for political ends.[43] This has been termed the Tutsi version of victor's justice or revenge trials.[44] This already creates a perception of partiality, which undermines an accused's right to fair trial. Yet this criticism is not entirely true. *Gacaca* courts were not created arbitrarily. There was a proper legal framework for its incorporation in the transitional period as a traditional mechanism. It is therefore not entirely true that perpetrators would simply team up with co-perpetrators and accomplices and set up a *gacaca* court. An assertation of this kind only fuels widespread misconceptions about Africa's traditional mechanisms of justice.

This study therefore holds the view that *gacaca* may have some weaknesses but that these are not sufficient to write off this mechanism as an accountability measure for international crimes. *Gacaca,* as an alternative accountability mechanism, remains relevant in the war against impunity for international crimes and should be incorporated within the regional system as recommended in sectin 6.4.2, chapter 6 below.

5.3.1.2 The mato oput *ritual*

Translated into 'drinking the herb of the Oput tree, blinding-bitter' in the Acholi language, *mato oput* is a traditional justice mechanism commonly practised among the Acholi people of Northern Uganda.[45] The reason why *mato oput* has featured prominently as a potential accountability mechanism for international crimes in Africa, as opposed to the accountability traditions of other Ugandan clans, is because the top five LRA members (Dominic Ongwen, Joseph Kony, Okot Odhiambo, Vincent Otti, and Rasak Lukwiya, with the last two having since then been confirmed as dead) indicted on 13

[42] Fierens '*Gacaca* courts (n 38 above) 12.
[43] MA Drumbl *Atrocity, punishment and international law* (2007) 193; Corey and Joireman 'Retributive justice: The *gacaca* courts in Rwanda' (n 33 above); J Sarkin 'The tension between justice and reconciliation in Rwanda: Politics human rights, due process and the role of the *gacaca* courts in dealing with the genocide' (2001) 45 (2) *Journal of African Law* 149; Haberstock 'An analysis of the effectiveness of the *gacaca* court system in post-genocide Rwanda' (n 25 above) 10.
[44] Ibid.
[45] GS Gordon 'Complementarity and alternative justice' (2009) 88 (3) *Oregon Law Review*, 247.

October 2005 by the ICC come from this community.[46] Upon the ICC's issuance of their indictments, the LRA Chief, Joseph Kony, was the first to seek the use of *mato oput* as an alternative to the impending ICC prosecutions.

Peace talks between the government of Uganda and the LRA resulted in a peace accord in 2008 that contemplated the establishment of a truth commission and the institution of *mato oput*. However, Kony refused to sign it until the ICC dismissed its indictments against the LRA leaders.[47] In 2008, the president of Uganda, Yoweri Museveni, heeded Kony's plea and urged the ICC to dismiss its indictments against the LRA leaders in favour of traditional mechanisms.[48] It should be emphasised, though, that this mechanism has never been used in the context of accountability for international crimes, as was the case with *gacaca*. This is merely a proposal by the Acholi community, the LRA leaders, the President of Uganda, academic debate among scholars, and civil society.

Traditionally, the Acholi people do not use prosecutorial systems of justice to settle disputes regarding violent crimes[49] that have led to either intentional or accidental killing.[50] Rather, they use the *mato oput* custom. Although *mato oput* has elements of retribution, much of the emphasis is on reconciling and restoring relations of the family and clan of the perpetrator and the victim. It is more of a form of restorative than retributive justice.[51] The process is usually undertaken when misfortunes have befallen the offending clan, thus leading to social pressure on the perpetrator or his or her family to seek reconciliation.[52]

Within the *mato oput* process, punishment is therefore carried out by the spirits occasioning misfortune. It is the spiritual world that punishes offenders,

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[46] See generally, 'Situation in Uganda: ICC-02/04', https://www.icc-cpi.int/uganda (accessed 11 January 2017).
[47] Gordon 'Complementarity and alternative justice' (n 45 above) 622-623.
[48] Ibid.
[49] E Blumenson 'The challenge of a global standard of justice: Peace, pluralism and punishment at the International Criminal Court' (2006) *Columbia Journal of Transitional Law* 810-812.
[50] C Rose 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda: A proposal for truth-telling and reparations' (2008) 28(2) *Boston College Third World Law Journal* 361.
[51] P Bako 'Does traditional conflict resolution lead to justcie? – The *Mato Oput* in Northern Uganda' (2009) 3 *Pretoria Student Law Review* 102.
[52] Ibid.

thus compelling them to initiate a *mato oput* process as a way of cleansing themselves. This is because the Acholi people believe in the notion of the 'living dead', a belief that influences the manner in which disputes are resolved and reconciliation achieved.[53] These misfortunes brought by the spiritual world were a serious punishment that, just as in modern-day criminal justice punishments, deterred offenders and the community from committing similar offences. Arguably, this form of punishment was not only effective but could also be equated with modern-day notions of retributive justice.

The *mato oput* process occurs in four distinct stages: the separation of clans of the perpetrator and victim; mediation; compensation and, finally, the *mato oput* reconciliation ceremony. The completion time of the process is not certain. In some cases, it takes weeks; in others, months or years.[54]

The first process of *mato oput* entails *the separation of the clans* of the perpetrator and the victim.[55] According to Gordon, 'This separation requires the complete suspension of relations between the families of the perpetrator and the victim, during which time the clans are forbidden to intermarry, trade, socialize, or share food and drink'.[56] The rationale for the separation is to help the two clans sober up from the raging desire for revenge.[57]

The second step in the *mato oput* justice system is *mediation*. This is conducted before a group of elders who establish the cause of conflict by questioning the parties.[58] Here, the two families are expected to come up with an account of the facts of the offence committed – the circumstances of the crime and its motives – along with an expression of remorse and voluntary confession by the perpetrator.[59] The remorsefulness of the perpetrator, which results in him or her confessing to the offence and seeking rectification, is significant in the sense that it appeases the spirit of the dead and stops the

[53] Ibid.
[54] Ibid.
[55] Gordon 'Complementarity and alternative justice' (n 45 above) 247; Rose 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda' (n 50 above) 362.
[56] Ibid.
[57] Ibid.
[58] Blumenson 'The challenge of a global standard of justice' (n 49 above) 805.
[59] Ibid.

latter from tormenting the perpetrator and his or her family.[60]

After the perpetrator accepts responsibility and seeks forgiveness, the elders lay down the terms of *compensation*.[61] The family of the perpetrator is then expected to raise compensation from their clan members and pay it to the family of the victim.[62]

The *reconciliation ceremony* marks the final step of the process and it seeks to seal the reconciliation. This step is presided over by the local chief, *rwot moo,* and involves the communities of the two families for purposes of reconciliation. It entails the following elaborate steps:

> First, the offending party beats a stick to broadly symbolize *mato oput's* restorative purpose and then runs away to signify acceptance of guilt for the murder. Second, the parties cut in half a sheep and a goat and exchange opposite sides. The offending clan supplies the sheep, which represents the *cen,* or misfortune, haunting the clan of the offender, while the injured clan supplies the goat, which symbolizes unity and a willingness to forgive and reconcile. Third, the clans eat *boo mukwok,* spoiled boo, or local greens, which signifies that tension between the clans persisted long enough for food to spoil, and also symbolizes the clans' readiness to reconcile after this long period of time. Fourth, a representative from each party drinks *oput,* bitter root, from a calabash. The root represents the bitterness between the clans, and drinking it symbolizes washing away the bitterness between them. Fifth, both parties cook and eat the *acwiny,* liver, of the sheep and the goat to show that their blood has been mixed and united and to symbolically wash away the bitterness within the blood of the human liver. One of the last rituals involves consuming *odeyo,* the remains of a saucepan, which is thought to free the parties to eat together again. The ceremony is not complete until the parties have eaten all of the food prepared for the day; finishing the food means that no bitterness remains between the two clans.[63]

The *mato oput* process is symbolic in nature. The sharing of the bitter roots symbolises reconciliation between the perpetrator and victim as well as the two communities and their unwillingness to repeat the offence and experience the bitterness caused by the offence in the future. The modern sense of punishment of the perpetrator may seem to be greatly downgraded in this process. Yet, within the *mato oput* traditional process, punishment is first carried out by the spirits, as opposed to leaving the entire aspect to those overseeing the process. It is the spiritual punishment that prompts a process which is more reconciliatory. The study opines that the notion of immunity of

[60] Rose 'Looking Beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda' (n 50 above) 362.
[61] Blumenson 'The challenge of a global standard of justice' (n 49 above) 806.
[62] Gordon 'Complementarity and alternative justice' (n 45 above) 248.
[63] Rose 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda' *(*n 50 above) 363-364.

leaders never existed under the *mato oput* process as the spiritual world does not distinguish between leaders and subjects.

Punishment could also perhaps be exhibited through humiliation. It can be argued that by making an accused go through the process and publicly acknowledge his or her wrongs was in itself punitive. Moreover, the perpetrators and their clans were deemed to have been punished by the spirits, who send misfortunes prompting the *mato oput* process. From an African perspective, these aspects of punishment are effective and could measure up to imprisonment in the Western sense. Yet from an ICC perspective, this is an ineffective punishment, given the fact that article 76 of the Rome Statute contemplates punishment only in the form of fines, imprisonment and forfeiture.

Arguably, the *mato oput* system dispenses a holistic form of justice that emphasises restorative, reconciliatory and retributive justice as understood within the traditional African sense. Punishment (in its modern sense) is limited almost to the point of non-existence. This should not, however, disqualify the process as an alternative mechanism in international criminal justice. The most important concern should be how to strengthen this mechanism as a tool for accountability to complement other mechanisms in the war against impunity for international crimes on the continent. It is time that international criminal justice redefined accountability in such a way as to take these traditional approaches into consideration as well.

The difference between the ICC and *mato oput* dispensation of punishment could perhaps be explained in two ways. First, traditional African approaches never anticipated dealing with mass atrocities – which are in the nature of international crimes, or what Mark Drumbl calls extraordinary crimes.[64] Patricia Bako, for instance, has criticised *mato oput* for its failure to distinguish between crimes.[65] For example, whereas the LRA engaged in heinous acts, including 'cutting off hands, breasts, lips and ears, civilian abduction and recruiting child soldiers', all of which amount to crimes against humanity, these would be dealt with in similar manner to any other ordinary crime under

[64] Drumbl *Atrocity, punishment and international law* (n 43 above) 4.
[65] Bako 'Does traditional conflict resolution lead to justice?' (n 51 above) 105.

the *mato oput* mechanism, thus undermining their gravity. However, Bako fails to point out the effectiveness of this mechanism if it were to apply to low-level perpetrators of these crimes, as was the case in *gacaca* courts. She also uses Western notions of justice such as due process to evaluate the effectiveness of *mato oput*, forgetting that this is a totally different system and one designed and operated differently. Secondly, the *mato oput* system was structured to settle disputes around inter-clan or -tribal killings. By contrast, the atrocities witnessed in Uganda were not limited to the Acholi community but affected the entire country, with victimhood spreading beyond the clans or tribes that would otherwise have conducted the *mato oput*.

Notably, some aspects in the *mato oput* system are similar to those in *gacaca*. For example, despite their procedural differences, what they have in common is an emphasis on three forms of justice: the elements of restoration, reconciliation and retribution, as well as some aspects of rules of natural justice. The latter include the right to be heard and by a panel of 'competent' personalities. This can be said too of most other traditional African approaches that are yet to be used in a post-conflict situation.[66] Arguably, it is possible therefore to harmonise their similarities within a national or regional or subregional framework, as recommended under section 6.4.2 of chapter 6, in the quest to develop a mechanism that incorporates traditional African approaches in the war against impunity.

5.3.2 Understanding Africa's concerns about the ICC from the perspective of African traditional procedures of accountability

Like most authors, this study remains sceptical as to whether these traditional approaches – in their current form – are suitable and can deal effectively with accountability for international crimes for all cadres of perpetrators. This notwithstanding, some elements embodied in these approaches are vital to any criminal justice system and are similar to the ethos of the ICC, for example the rules of natural justice that accord an accused person the right to

[66] For example, within Uganda, there are also the Nyono Tong Ngweno and Gomo Tong. In Botswana, there is Kgotla, et cetera. For more information, see Gordon 'Complementarity and alternative justice' (n 45 above); Rose 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda' (n 50 above).

be heard and by a 'competent' panel.[67] This discussion is, therefore, anchored within the substantive analysis of the value of western justice and traditional African justice as discussed under point 1.6.3 of chapter one of this thesis. As with the ICC and African Court, accused persons under the African traditional mechanisms were duly accorded the right to be heard before a final verdict was pronounced. Although the definition of competency may be different, the panels of wise men chosen to settle disputes in African traditional mechanisms were deemed competent in the circumstances.

An underlying commonality in these approaches is that the African conception of justice is holistic, combining elements of retributive, reparative and restorative measures. By adopting traditional approaches to accountability, post-conflict state practice envisages a holistic approach to the notion of justice. It can therefore be concluded that though the procedural elements of these cultures may seem different, the substantive trend established by these cultures is deeply informed by shared African values in the conceptual understanding of the notion of justice. Moreover, some of these values are similar to those found in the ICC process. They include the right of an accused person to be heard, the competency of the tribunal or panel, and lack of bias. Underlying all these is the right of an accused to be presumed innocent. Regrettably, while the aspects of restoration are partially provided for under the Rome Statute, reconciliatory processes are completely missing in the Western conception of justice. Thus, it would be useful if these traditional approaches were to be integrated within the African criminal law system of accountability for international crimes.

At this point, a valid question is whether Africa's concerns about the ICC are informed by these traditional approaches or the variance – at a practical level – between the notion of justice under the African approaches and that under the ICC system.

First and foremost, central in Africa's traditional approaches to justice are aspects of punishment, reconciliation and forgiveness. In some instances,

[67] This right is guaranteed in various human rights treaties, for example article 14(3)(d) of the International Covenant on Civil and Political Rights and article 7 of the African Charter on Human and Peoples' Rights.

punishment is conceived within the spiritual realm as opposed to modern day understanding. Regarding the *gacaca*, even though punishment is understood in a similar way to the Western sense, the ultimate goal of the mechanism is reconciliation and restoration. Essentially, the conception of justice in the traditional African sense emphasise reconciliation and restoration, even though there still exist aspects of punishment even though this may not always resemble ICC conception of punishment as defined in chapter 1 of this thesis. On the other hand, the ICC's conception of justice is both retributive and reparative, with more emphasis placed on the former than the latter.

Moreover, the notion of a competent tribunal is also understood differently. Within the African conception of justice, a competent panel would consist of persons of high integrity with contextual experience and wisdom, whereas a competent bench means something entirely different in the Western sense – a bench that is well schooled in the area and therefore possessing the technical knowledge to address the matter. The strong presence of public participation in traditional processes, coupled with a total absence of legal representation, adds to these differences. Thus far, at a practical level, there is a clear divergence between these two sets of understandings of justice.

Scholars of transitional justice seeking to distinguish between international criminal law and transitional justice in its broad sense compound this challenge.[68] Within transitional justice discourse, the ICC process is devoid of reconciliation and restorative forms of justice, as these are better dealt with through other mechanisms. This already magnifies the tension between the traditional African and the ICC understanding of the notion of justice. While traditionally, Africans may expect a mechanism like the ICC to dispense the three different forms of justice, all it gets is prosecution and a limited approach to reparation.

This is not to say that the reconciliation and restorative processes in traditional approaches are beyond reproach. For example, central to an effective reconciliatory justice system is the ability of communities to reunite with one another. Forgiveness is an essential prerequisite for successful reconciliation.

[68] Drumbl *Atrocity, punishment and international law* (n 43 above) 19.

Critics have, however, pointed out the weaknesses inherent in overestimating the forgiving capacity of human beings, for example in Uganda, the Acholi People in the *mato oput* ceremony.[69] Bako documents instances where those who underwent this procedure as former LRA combatants have subsequently been stigmatised by the community, which is an obstacle to full reintegration.[70]

In addition, it is important to ask whether this variance is what has informed Africa's grievances against the ICC. Chapter 2 of this thesis considered AU arguments about the biased nature of the ICC. Although the arguments were restructured in a legal manner, it is clear that, at neither the AU level, nor at the state party level, has there been any such discussion on the variance of the definitions of justice from a traditional African perspective and that of the ICC. Most of the documented grievances turn around politics, power and race.

Chapter 3 of this thesis discussed the developments in the conception of justice in the context of the ICC and the African Court in particular, aspects of the immunity of heads of state and other state officials as well as amnesty and their overall impact on the 'peace-versus-justice debate'. Chapter 3 also identified an emerging school of thought that interprets justice in a holistic sense akin to African traditional approaches. It is of great concern, however, that the AU has not explicitly stated that its position is based on these traditional approaches. The inherent difference in the conceptions of justice cannot be ruled out as an unconscious and fundamental factor that, arguably, partially influences Africa's resentment of the ICC.

Paul Rusesabagina and Tom Zoellner have made significant observations in this regard:

> The adversarial system of justice practiced in the West often fails to satisfy [Africans], I am convinced, because it does not offer warring parties the opportunity to be human with each other at the end. Whether you were the victim or the aggressor you had to strip yourself of pride and recognize the basic humanity of the fellow with whom you were now sharing a banana beer. There was public shame in this system, true, but also a display of mutual respect that closed the circle. Everyone who showed up to hear the case was invited to sip the banana beer too, as a symbol of the accused

[69] Rose 'Looking beyond amnesty and traditional justice and reconciliation mechanisms in Northern Uganda' (n 50 above) 366.
[70] Bako 'Does traditional conflict resolution lead to justice?' (n 51 above) 107.

> man's reconciliation with the entire people. It was like a secular communion. The lasting message for all that gathered there was that solutions could always be found inside-inside communities and inside people.[71]

An argument can be made that, having been socialised in these traditional approaches, African leaders are likely to find it difficult to fully embrace international criminal law norms that give no recognition to their very own traditions. Even though one may find this observation odd, given that most of these African states have traditional Western-style criminal justice systems at their national level, the manner in which these criminal justice systems were introduced into African nations through the imposition of colonial policies should not be forgotten. Despite their resentment, African nations had limited power to influence colonial rule and its legalities. This perhaps explains why the majority of African states still have African traditional or customary law courts – indeed, customary law is a source of law in most African states.

Arguably, this helps one understand the actual yet unacknowledged genesis of Africa's concerns about the ICC. Thabo Mbeki has previously admitted that Africans' confidence in themselves and their systems partly derives from rediscovering their traditional past. [72] Criminal accountability is not an exception to this rediscovery. Indeed, some African countries are walking down this path within the context of national justice systems. In Kenya, for example, the 2010 Constitution makes it mandatory for the Kenyan judiciary to embrace 'alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms…'[73] Borrowing the analogy by Keep and Midgley, it is vital that Africa's regional system transforms in order to embrace the positive values of African societies.[74] The African Charter guarantees the 'promotion and protection of

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[71] KE MacMillan 'The practicability of amnesty as a non-prosecutory alternative in post-conflict Uganda' (2007) 6:199 *Cardozo Public Law Policy and Ethics Journal* 213; P Rusesabagina and T Zoellner *An ordinary man: An autobiography* (2006) 197.

[72] T Mbeki 'The African Renaissance, South Africa and the world', Public speech at the United Nations University (9 April 1998), http://archive.unu.edu/unupress/mbeki.html (accessed 21 May 2018. See also CBN Gade 'Restorative justice and the South African Truth and Reconciliation process' (2013) 32 (1) *South African Journal of Philosophy* 24.

[73] Article 159 (c), Kenyan Constitution of 2010.

[74] Keep and Midgley 'The emerging role of ubuntu-botho in developing a consensual South African legal culture', *Paper presented at the annual meeting of the Law and Society Association, Berlin, Germany*, 25 July 2007, 48; C Himonga, M Taylor and A Pope

morals and traditional values recognized by the community'.[75] In this regard, the regional criminal justice system is legitimate only if it embraces the diversity in African traditions. This calls for the regional criminal system to embrace pluralism of legal norms.

Nonetheless, the most important question in this regard is whether these traditional approaches are suitable to address the challenge of impunity for international crimes. A pan-Africanist would easily answer this question in the affirmative. Yet there is a hidden danger that incorporating the principles underlying these mechanisms may entail their formalisation to fit in with the Western style form of justice. Of significance is whether the formalisation of these traditional approaches would change the traditional nature of their mechanisms. This study argues that 'formalisation' could just entail writing the process as originally conceived into the international system. Although this may create some tensions, they could be resolved in favour of the traditional process. As was the case in the *gacaca* tribunals, the substantive nature of the law applicable underwent formalisation over different periods of time, yet *gacaca* retained its traditional procedural rules with only minimal distortion of its general structure, and its gradual formalisation served only to increase its legitimacy.

In this study, it is opined that changing these traditional approaches to align with the Western-style justice system ends their 'traditional' character in the usual sense of the word and transforms them into modern procedures. Besides, changing some of the traditional principles to suit the requirements of international criminal law may also lead to further destruction of the cultural elements if not well adjusted. Essentially, there would be no difference between completely changing this traditional mechanism and creating modern additional tribunals to deal with the question of impunity at the expected levels. Therefore, if the approach of complete overhaul is adopted, these traditional approaches will automatically lose their identity and nature as traditional approaches.

'Reflections on judicial views of Ubuntu' (2013) 16(5) *Potchefstroom Electronic Law Journal* 372.

[75] Article 17 (3), African Charter on Human and Peoples' Rights.

This runs the risk of making them lose legitimacy, which in turn compromises their traditional deterrent effect. As Dietrich asserts, 'deterrence works best when criminals accept both the law and the courts as legitimate'.[76] Like other transitional mechanisms, local accountability mechanisms must be based on local needs and priorities.[77] This has the sum effect of broadening local participation.[78] It is therefore this study's further opinion that the best way forward for Africa is to incorporate its traditional African approaches within its regional criminal justice system. This can be achieved with minimal modifications of these processes and with certain limitations regarding the exercise of their jurisdictions, particularly over those who bear the highest responsibility for international crimes. Yet, unless African states leave the Rome Statute, going back to pure traditional mechanisms as an alternative to international criminal justice is not an option for Africa, given the obligations binding on African states through their ratification of the relevant international criminal treaties.

This notwithstanding, the legal framework already adopted at the regional level envisages only retributory measures. The African Court system, in relation to its criminal jurisdiction, largely resembles the ICC. Its provisions do not pay any due consideration to African traditional approaches to justice. The regional legal framework neither recognises traditional approaches to justice in post-conflict states, nor does it bar inclusion of these traditional approaches within it. The conduct of African leaders and experts seems to indicate allegiance to modern-day principles of international criminal law, whereas traditional approaches are slowly being relegated to the periphery. In fact, African traditional approaches were not a factor that was given due consideration during the drafting of the relevant protocol and its subsequent amendment.

This brings into perspective the legitimacy of the ICC criticism based on African

[76] J Dietrich 'The limited Prospects of deterrence by the International Criminal Court: Lessons from domestic experience' (2014) 88(3) *International Social Science Review* 9.
[77] SK Hellsten 'Working Paper No 2012/06 Transitional Justice and Aid' (United Nations University World Institute for Development Economics Research 2012) X, 1.
[78] H Haider 'Helpdesk research report: Factors contributing to transitional justice effectiveness' Governance and Social Development Resource Centre (2011) 3.

traditional processes versus the argument that the ICC exercise of jurisdiction is chiefly based on those allegedly most responsible. It seems obvious that the application of traditional approaches may pose challenges precisely in such cases. This criticism is thus either illegitame or misconceived. This necessitates appropriate recommendations as pointed out in chapter 6 of this thesis.

5.4 Truth and Reconciliation Commissions as an alternative accountability mechanism and their relationship with the African Court national and subregional mechanisms as well as the ICC

As already noted, post-conflict African states often deploy TRCs as a response to atrocities. Truth commissions fall within the broader discipline of transitional justice and constitute a transitional justice mechanism.[79] The term 'transitional justice' denotes judicial and non-judicial mechanisms and approaches targeted at responding to and remedying past human rights violations.[80] Transitional justice mechanisms are commonly understood to include prosecutions, truth commissions (and other truth- seeking mechanisms), reparations, institutional reform, vetting and dismissals, as well as customary practices such as forgiveness and reconciliation ceremonies,[81] though this is not a closed list.[82]

The value of truth-seeking rests in its contribution to the creation of a 'historical record', and in so doing, to preventing manipulation and deliberate rewriting of history and denial of atrocities by perpetrators.[83] Truth commissions are conceived of as having the potential not only to lay bare the violations of the past but to give an opportunity to the government, citizens and perpetrators to acknowledge the wrongfulness of past violations.[84] The

[79] E Asaala and N Dicker 'Truth-seeking in Kenya: Assessing the effectiveness of the Truth, Justice and Reconciliation Commission of Kenya' (2013) 1(2) *Africa Nazarene University Law Journa*l 133.
[80] R Teitel *Transitional Justice* (2000); AG Reiter, TD Olsen and LA Payne, 'Transitional justice and civil war: Exploring new pathways, challenging old guideposts' (2012) 1(1) *Transitional Justice Review* 138.
[81] United Nations Security Council 'The rule of law and transitional justice in conflict and post-conflict societies' Report of the Secretary-General, UN Doc. S/2004/616 (2004) 4; R Jeffery, 'Enduring tensions: Transitional justice in the Solomon Islands' (2013) *The Pacific Review.*
[82] P de Greiff 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence', Human Rights Council 9 August 2012;
[83] ICTJ 'Truth and Memory', http://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory (accessed 27 August 2015).
[84] P van Zyl 'Promoting transitional justice in post-conflict societies ' in A Bryden and H Hanggi (eds) *Security governance in post-conflict peacebuilding* (Geneva Centre for the

truth commission model is based on the premise that the truth-telling process will 'educate and [make future generations] cognisant of their nation's violent history and that these acts will not be repeated'.[85] The model also relies on the notion that truth-telling can facilitate understanding, forgiveness and the restoration of the dignity of the victim, and therefore a peaceful future for that country.[86] In this vein, Desmond Tutu suggests that confession 'supports the new culture of respect for human rights and acknowledgement of responsibility and accountability'.[87] Makau Mutua points to the multidimensional role of truth commissions: cleansing the past, moral reconstruction, and reconciliation after truth and justice.[88]

Proponents of truth-seeking point to the value of the truth in promoting accountability, understanding, acknowledgement of responsibility, respect for human rights,[89] tolerance, empathy,[90] forgiveness and reconciliation.[91] Furthermore, establishing the truth is seen as important in order to 'restore the dignity of victims by helping them to find out what happened'.[92] Truth-seeking may also determine institutional responsibility for abuses and thereby inform recommendations for institutional reform so as to prevent future abuses.[93] Priscilla Hayner points to the value of truth-seeking in confronting the legacy of past conflict in order to lay a foundation on which to build a new society.[94] Certainly, these attributes of truth-seeking (where the conditions are right) might create a sound foundation for peace, healing, justice and reconciliation.

Truth-seeking is also esteemed for its perceived ability to 'help victims find closure by learning more about the events they suffered, such as the fate of

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Democratic Control of Armed Forces, 2005) 211.

[85] B Crandall 'Truth Commissions in Guatemala and Peru: Perpetual impunity and transitional justice compared', *Peace, conflict and development* (2004) 4 http://www.peacestudiesjournal.org.uk/dl/perpetualimpunity.PDF (accessed on 25 May 2015).

[86] ICTJ 'Truth and Memory' (n 83 above).

[87] D Tutu *No future without forgiveness* (1999).

[88] MW Mutua 'Beyond Juba: Does Uganda need a national truth and reconciliation process?' (2007) 13 *Buffalo Human Rights Law Review* 29.

[89] Tutu *No future without forgiveness* (n 87 above).

[90] J Gibson *Overcoming Apartheid: Can truth reconcile a divided nation?* (2004).

[91] ICTJ 'Truth Commissions' (2008) http://ictj.org/sites/default/files/ICTJ-Global-Truth-Commissions-2008-English.pdf (accessed 27 August 2013).

[92] Ibid.

[93] PB Hayner *Unspeakable truths: Transitional justice and the challenge of truth commissions* 2nd edn (2011).

[94] Ibid.

disappeared individuals, or why certain people were targeted for abuse'.[95] And so, logically, the question arises as to the extent, if any, to which truth-seeking has contributed to eradicating impunity – or merely burying past sins.

James Gibson warns that revealing the truth surrounding horrific events risks 'embitter[ing] people, making them far less likely to be willing to coexist together in the new democratic regime'.[96] Another critical issue that arises is that those with a vested political interest in covering up past crimes and the truth (that is, perpetrators with much to hide and much to lose) typically argue that truth-telling re-opens old wounds, which is 'counter to the peace and reconciliation process'[97] and therefore causes 'irreconciliation'.[98] Where those with vested political interests do testify before truth commissions (such as in amnesty applications), concerns have been raised that the truth is not disclosed but that information already in the public domain is regurgitated.[99]

Hayner similarly picks up on the idea of subjective nature of the truth, rejecting any notion of there being 'one truth' and, by extension, the ability of a truth commission to capture and communicate the 'whole truth'.[100] It is important to recognise that truth commissions cannot result in an 'irrefutable history of the past' and, as Hunt asserts, it may be 'historically dangerous', 'intellectually circumspect' and 'naïve' to think otherwise.[101]

One of the most nagging questions within the context of prosecuting international crimes has been whether TRCs can be deemed to be complementary to the ICC.[102] Notably, the relationship between TRCs and the ICC received little consideration in the negotiations process and its status was

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[95] ICTJ 'In search of the truth', http://ictj.org/in-search-of-truth/index.html (accessed 15 March 2013).
[96] Gibson *Overcoming Apartheid* (n 90 above) 3.
[97] Tutu *no future without forgiveness* (n 87 above).
[98] Gibson *Overcoming Apartheid* (n 90 above) 135.
[99] Ibid.
[100] Hayner *Unspeakable truths: Transitional Justice and the challenge of truth commissions* (n 93 above) 84.
[101] T Hunt 'Whose truth? Objective truth and a challenge for history' (2004) 15 *Criminal Law Reform* 193.
[102] R Cryer H Friman, D Robinson and El Wilmshurst *An introduction to international criminal law and procedure* (2010) 159; MP Scharf 'The amnesty axception to the jurisdiction of the International Criminal court' (1999) 32 *Cornell International Law Journal* 525. Scharf discusses the applicability of the principle of *ne bis in idem* in relation to proceedings between the two mechanisms.

never mentioned in the final Statute.[103] Within the Rome Statute, a case is admissible when there is evidence of inaction by the state concerned in terms of investigations and prosecutions,[104] or where the state has conducted investigations and subsequent inaction on prosecution resulted from the states unwillingness or inability to genuinely do so.

As stated in chapter one (section 1.7.4), three procedural questions stand out in relation to the complementarity nature of TRCs to the ICC. First, do TRCs conduct investigations or prosecutions within the meaning of article 17? Second, do investigations conducted outside a criminal justice process like a TRC suffice the test of a state action under article 17? Only when these two questions are answered in the affirmative, will the court proceed to determine the third question – the inability and unwillingness question.

Concerning investigations, the Rome Statute does not define an investigation. The OTP has attempted to define this term. In the admissibility challenge in the Katanga case, the OTP emphasised on 'procedurally significant [proceedings] that have been established and that could support the allegations that were made…,'[105] the prosecutor further highlighted the lack of witnesses and suspect interviews, lack of seizures of evidence, and absence of any fact-finding inquiries beyond a "single NGO report."[106] Aravena also defines an investigation from a procedural perspective as 'a systematic inquiry about the facts of a crime and about participation in it'.[107]

As previously noted, TRC proceedings involve the recording of statements; allowing victims to publicly share their experiences of the atrocity period; sometimes using subpoena orders to compel witnesses and conduct searches

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[103] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, at 40 (§ 174). (Proceedings of the Preparatory Committee during March-April and August 1996) GAOR. 51st Sess., Suppl. No. 22 (A/51/22): A/CONF.283/2/Add.1 of 14 April 1998, Art. 19.

[104] See discussion under section 2.2.1.2, chapter 2 of this thesis.

[105] Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Prosecution's Response to Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber "Motifs de la dgcision oral relative d l'exception dirrecevabilite de l'affaire," 28

[106] Ibid.

[107] CC Aravena 'The admissibility test before the International Criminal Court under special consideration of amnesties and truth commissions' *in Complementary views on complementarity: Proceedings of the international roundtable on the complementary nature of the International Criminal Court* (2006) 117.

and seizure; conducting public hearings; and, finally, publishing a report.[108] In most cases, TRCs have investigatory powers.

Article 17, Rome Statute is not clear on the type and nature of national proceedings sufficient to render a matter inadmissible. The court has, however, underscored that not all domestic proceedings are sufficient state action to render a case inadmissible under article 17.[109] The question is therefore whether investigations conducted by TRCs supurses the test under article 17.

Related and more controversial is when a TRC process is accompanied by amnesty. In this regard, the South African TRC is an example that illustrates investigatory powers even though it had an aspect of amnesty. An amnesty process comprised one aspect of South Africa's TRC model. All amnesty applications were submitted to a specialised committee that carried out investigations to enable it establish the genuineness of such an application.[110] Cryer, Friman, Robinson and Wilmshurst argue that the mere existence of an amnesty is a *prima facie* indicator that any criminal case arising from this situation would be admissible before the ICC, as the amnesty implies the absence of national investigations and prosecutions; alternatively, if there be any such efforts, it is likely to be interpreted as done for purposes of shielding an accused person from criminal responsibility.[111] The authors proceed to argue that where there is some form of inquiry accompanying an amnesty, as was the case with the South African TRC, it could constitute an investigation sufficient to render a case inadmissible before the ICC.[112] Nonetheless, they do not clearly set out the threshold of inquiry applicable in such instances. Besides, almost all TRCs have an inquisitorial character: Does this therefore mean all TRCs proceedings qualify as rendering a case inadmissible under the Rome Statute?

The other applicable question concering TRCs complementarity to the ICC is

[108] Gordon 'Complementarity and alternative justice' (n 45 above) 649
[109] Kenya Authorization Decision, 183
[110] Article 19, Promotion of National Unity and Reconciliation Act 34 of 1995, Republic of South Africa; see discussion under section 3.4.2, chapter 3 of this thesis.
[111] R Cryer H Friman, D Robinson and El Wilmshurst *An introduction to international criminal law and procedure* (2010) 159.
[112] Ibid.

whether investigations conducted by TRCs comprise a state action within the context of article 17. The express criminal mandate over international crimes under the Rome Statute suggests the drafters' intention for the Court to be complemented by national mechanisms that have criminal mandate over similar crimes. More so, article 1 of the Rome Statute provides that the Court 'shall be complementary to national criminal jurisdictions.' The complementarity nature of TRC's to the ICC should therefore be understaood through this narrow interpretation of article 17. Darryl Robinson notes that an investigation in its broad sense incudes investigations conducted by TRCs as long as it retains the possibility of a prosecution at the end.[113] Cryer *et al.* also acknowledge that the purposes of the investigations envisaged under article 17(2)(a) and (c) of the Rome Statute should be to bring the concerned party to justice.[114] The understanding of justice within the confines of the Rome Statute is largely prosecutorial and to a limited sense reparative. A prosecution constitutes 'opening and undertaking of a judicial criminal process'.[115] Since TRCs do not prosecute, it becomes obvious that proof of this kind of investigation does not render a case inadmissible under the Rome Statute. In its challenge to admissibility of the Kenyan case, the then ongoing TJRC process did not merit consideration as a bar to the admissibility question. The Courts' decision underscored the lack of on ongoing criminal prosecutorial process. The threshold required of criminal proceedings was taken even higher. Not only to require 'any criminal proceedings' but of those persons likely to be prosecuted by the ICC. The contrary would be true, however, if the Rome Statute adopted the expanded definition of justice in its holistic sense.[116] If this were to happen, then article 17 of the Rome Statute would have to be amended to make clear provisions on the threshold required of TRC investigations that would render a matter inadmissible before the ICC. This would clearly define the relationship between these mechanisms and the ICC and also ensure positive complementarity. This would result into a more holistic view of justice and thus perhaps be the best way of resolving Africa's

[113] D Robinson 'Comments on Chapter 4 of Claudia Cárdenas Aravena' in JK Kleffner & G Kor (eds) *Complementary views on complementarity* (2006) 141, 144.
[114] Ibid.
[115] Ibid.
[116] See expanded definition of justice under point 3.2 above.

grievances in the debate regarding peace and justice.

Similarly, TRCs do not complement the African Court. Like the Rome Statute, Malabo Protocol is completely silent on TRCs. Given their immense value discussed above, the AU must find away to incorporate them within the regional mechanism in a manner that will enhance the war against impunity. The AU should, thus, adopt guidelines on how TRCs can act complementarily to national and subregional courts in line with the recommendations under section 6.4.3, chapter 6.

5.5 Conclusion

This chapter set out to establish the character of traditional African approaches and TRCs to the question of impunity. It further sought to interrogate whether these approaches add value to international criminal justice and whether there is need for regional criminal mechanism to incorporate aspects of these traditional African approaches.

Firstly, this chapter established that, traditionally, most African communities use African traditional approaches as an accountability measure for ordinary crimes. This informs the readiness with which these mechanisms are adopted for accountability for international crimes in post-conflict African states. The chapter offers an in-depth analysis of selected traditional African procedures and how they have been utilised to address the question of impunity for international crimes in post-conflict African societies. It has critically laid down the procedures involved and established common trends, which the chapter argues informs Africa's conception of justice at the international level.

Secondly, this chapter further established that the traditional African procedures of *gacaca* and *mato oput* are not per se suitable to offer an alternative accountability measure for international crimes, particularly with respect to those who bear the highest responsibility. This is because of their very nature, which may not have contemplated the mass occurrence of international crimes. Despite the limitations above, the mechanisms can be strengthened to be effective. Thus, the chapter advocates for a regional system that gives limited recognition to traditional African approaches, in line

with the recommendations under section 6.4.2 of chapter 6 of this thesis. The chapter also advocates for retention of TRCs as they currently are.

CHAPTER 6
CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

The question of impunity is real in Africa. Almost all African states have variously experienced local or regional conflicts that have violated the rights of their citizens, leading to the commission of numerous international crimes. For countries like Uganda and Zimbabwe that appear to be 'peaceful states', research has demonstrated that their populations were subjected to numerous crimes whose threshold parallels that of international crimes, particularly crimes against humanity.[1] Criminal accountability for those responsible remains largely unaddressed, however.

This concern is what informed several regional initiatives around the question of accountability for international crimes. The creation of the ICTR, the SCSL, the Extraordinary African Chambers in Senegal, as well as the utilisation of traditional African procedures like *gacaca* in Rwanda and proposals towards using *mato oput* for ICC indictee in Uganda, were all anchored on the need to fight impunity from the continent. The creation of the ICC was thus a welcome idea for African states as they actively took part in the negotiations, adoption, signature and ratification of its establishing statute (the Rome Statute). Both regional and subregional African efforts were exerted towards full support for an effectively functional ICC. Not only did Africa record the highest regional member states to the Rome Statute but African states were also the first to trigger the jurisdiction of the ICC through self-referrals. This euphoria would soon turn sour, mainly with the referral of African heads of state and senior government officials to the ICC.

[1] A Bourbon 'Human rights litigation in Zimbabwe: Past present and future' (2003) 3(2) *African Human Rights Law Journal* 195; RH Hassmann 'Mugabe's Zimbabwe, 2000-2009: Massive Human rights violations and the failure to protect' (2010) 32 *Human Rights Quarterly* 898; HRW 'Perpetual fear: Impunity and cycles of violence in Zimbabwe' (2011) http://www.hrw.org/sites/default/files/reports/zimbabwe0311NoPage8Full.pdf (accessed 1 March 2017); See generally, K Twinomugisha 'The role of the judiciary in the promotion of democracy in Uganda' (2009) 2 *Africa Human Rights Law Journal* 9-22; HRW 'Letting the big fish swim: Failures to prosecute high-level corruption in Uganda' (2013) http://www.hrw.org/sites/default/files/reports/uganda1013_ForUpload_1.pdf (accessed 1 March 2017).

It is against this background that this study set out to investigate whether African arguments have anything new to contribute to international criminal justice that could address the question of impunity and at the same time offer guidance on fighting impunity for international crimes in Africa. It did so by answering four research questions. Firstly, what are Africa's concerns about the prosecution of international crimes at the ICC? Secondly, on what bases does Africa have these concerns? Thirdly, do African approaches add value in the fight against impunity in Africa and how can one strengthen them? Fourthly, is a regional criminal mechanism - which takes into consideration African approaches or perspectives – the solution to fighting impunity in Africa?

To answer the first question, I identified two central themes through which African concerns have been articulated. They include the perceived bias of the ICC against Africa, and the divergent opinions in the peace-versus-justice debate. These are evaluated one after another in different chapters of this thesis – chapters two and three, respectively. To answer the second, third and fourth questions, I critically considered what Africa has termed as *an African solution to Africa's problem on impunity.* These questions are answered in three separate chapters – chapter four offers a critique of the African Court's criminal mandate and African state practice in the prosecution of international crimes; and chapter five is a critique of the traditional African approaches and TRCs as alternative accountability mechanisms. Chapter six draws conclusions and makes recommendations on the best way forward. It is within these three chapters that questions two, three and four are all answered. Thus, other than offering an analysis of these mechanisms, the respective chapters also assess their suitability in the fight against impunity in Africa as well as how to strengthen them.

6.2 Research findings

6.2.1 The perceived bias of the ICC against Africa

Chapter 2 of the thesis set out to demonstrate that the ICC has focused predominantly on Africa in a manner that is perceived as bias. In order to do so, it discussed various schools of thought that inform the arguments from an

African perspective. The chapter laid down arguments by the AU and some African scholars that the ICC lacks independence from the West, particularly the OTP section of the Court. It also lamented the central role played by the UNSC in the court processes. It further argued that the OTP and the UNSC continue to manipulate Court processes to serve Western interests.

While there is nothing inherently wrong with selective enforcement of law because of prosecutorial discretion,[2] and also bearing in mind the reality that international criminal justice operates in a political environment, such politics seldom reflect Africa's interests. One of the judges of the ICC has since acknowledged that even though politics and state interest present a delicate balance with the rule of law, the same continues to be an important obstacle to the effective operations of the Court.[3] This only fortifies the argument that Africa's political interests are marginalised in the Court's operations and Western ones prioritised.

Furthermore, the chapter showed that African scholars and some African heads of states see the ICC as a neocolonial tool which the West uses to maintain control of its former colonies. According to African scholarly voices and the AU, this is the reason why African heads of state have been indicted before the ICC, unlike their counterparts from other parts of the globe who equally engage in similar atrocities. The chapter acknowledged the complex nature of the AU grievance on ICC bias. It conceded that there exists no single voice on the continent on this concern. Just like the voices of those opposed to the ICC idea, there exist several continental voices of entities supporting its works. Nevertheless, this study finds it important to validate these pronouncements as well as make the search for a continental solution as inclusive of all these voices as possible.

6.2.2 The 'peace-versus-justice' debate

The tension between the notions of peace and justice manifests itself through divergent views on four different matters, identified in chapter three of this

[2] R Cryer *Prosecuting international crimes: Selectivity and the international criminal law regime* (2005) 192.
[3] HP Kaul 'The International Criminal Court: current challenges and perspectives' (2007) 6 (3) *Washington University Global Studies Law Review* 575.

thesis. They are the conceptualisation of the notions of peace and justice and the application of immunity and amnesty in international criminal law. It also emerges in the discourse on good governance, particularly in relation to ICC indicting duly elected heads of state and government from Africa.

Regarding the conceptualisation of the notions of peace and justice, chapter 3 of this thesis found a reading of the two notions as inter-related and not necessarily in opposition as the most productive way of resolving the current tension. This is especially so because the transitional process for post-conflict society ought to be holistic. In some instances, this may call for recognition of limited immunity and amnesty for the sake of lasting peace. It may also call for a cautious utilisation of alternative justice mechanisms other than prosecution. This will not only demystify the distinction between peace and justice but also ensure that states adhere to their obligation to hold accountable individuals who commit international crimes. Accountability does not therefore limit itself to prosecution, as there are several other ways of holding such individuals accountable and at the same time achieving the objectives of both peace and justice.

Regarding the application of immunity for international crimes, chapter 3 identified the conflicting manner in which the notion of immunity is understood both in theory and in the practice of both national and international tribunals. One school of thought argues that immunities must yield to the *jus cogens* nature of international crimes. Another school of thought has further considered the non-applicability of immunity to international crimes as a rule of customary international law. In this regard, the chapter established that although the prohibition of international crimes has gained the status of *jus cogens*, it does not necessarily follow that the non-application of immunity for international crimes is also a *jus cogens.* It is also debatable as to whether this practice has coalesced into an international custom, for it lacks the requisite *usus* and *opinio juris*.

The Malabo Protocol is capable of multiple interpretations on the notion of immunity. However, all these forms of interpretation have the potential of compromising the fight against impunity in the region. Not only is prosecution

delayed, but in some instances, there is also a possibility that those leaders who cling to power until they die may never be prosecuted. It is therefore not enough that the Protocol envisages the probability of future prosecution once an officer is out of office. Perhaps this anomaly could be cured if the AU devised mechanisms to compel leaders alleged to have committed international crimes out of office. Moreover, certain interpretations of the immunity clause create a perception that the Malabo Protocol is targeting government opponents while protecting senior government officials. The AU should therefore reconsider its position on this clause. One possible way the AU could address this anomaly is by restricting the application of immunity to to low-level perpetrators in subregional and national courts with. It is, however, noted that within the context of complementarity, nothing bars the ICC from commencing its prosecution against such an officer who may have been duly accorded immunity from prosecution at the African Court.

Chapter 3 further examined the controversial practice of amnesty for international crimes and sought to distinguish between absolute amnesty and limited amnesty. It established that, save in the case of customary international law and treaty obligation, the obligation to prosecute international crimes is not absolute since prosecution is not the only measure of accountability. It therefore recommended a liberal interpretation of the notion of accountability for international crimes in a manner that will give recognition to limited amnesty. In fact, the chapter argued that the Rome Statute recognises limited amnesty. The chapter further established that, contrary to the perception that the ICC is targeting democratically elected leaders, it is African leaders who themselves have undermined democratic transitions to ensure they benefit from the influence, privileges and immunity that attach to such offices.

6.2.3 The Malabo Protocol and African State practices: A critique of their jurisdiction over international crimes

In response to the foregoing grievances chapter 4 has collapsed AU's suggested solutions into two: the adoption of the Malabo Protocol and African State practices. These are those solutions that are most representative of AU member states and likely to be the most effective in the fight against impunity

in Africa. Chapter 4, therefore, seeks to, firstly, with respect to the Malabo Protocol, bring out the character of the African Court as currently constituted; the reasons currently informing the creation of the Court; how the expanded jurisdiction of the African Court, *in practice,* fits into the bigger framework of the ICC; as well as other innovative aspects of the Malabo Protocol that speak to Africa's grievances against the ICC. In this regard, the chapter provides a critique of the character of the Court and the crimes over which it has jurisdiction; and establish the genuineness of the call for an African solution to Africa's problem on impunity. Secondly, the chapter provides a critique of post-conflict African state practices relating to the prosecution of international crimes.

Four significant lessons emerge from the analysis of the origin, nature, and content of the African Court. First, although the origin of the idea of an African court is traceable to the adoption of the Constitutive Act, it is the trial of African leaders in international courts that gave impetus to its eventual creation. Second, the Malabo Protocol makes limited innovative contributions to the aspect of trigger mechanisms. Its innovations do not, however, speak to the AU's grievances against the ICC. While the UNSC is central in the AU's complaints, the Malabo Protocol remains silent on the UNSC's role in the referral or deferral of cases from the African region.

Third, the chapter analysed the proposed substantive criminal jurisdiction of the African Court over ICC crimes as provided for in the Malabo Protocol, with specific emphasis on innovations and unique contributions to ICC crimes. The aim was to establish whether these innovations address AU's concerns about the ICC. Although the Malabo Protocol largely adopts the Rome Statute's definitions of international crimes, it makes some innovative additions to crimes against humanity, war crimes, the crime of aggression, and genocide. It is argued that although the innovations in the Malabo Protocol are likely to make a valuable contribution to justice in Africa and to substantive international criminal law, most of these definitional contributions do not directly address the AU's concerns about the ICC.

Fourth, the Protocol also makes a commendable innovation on the doctrine of

corporate criminal liability. Unlike under the ICC and other international tribunals, the prosecution of international crimes in Africa is likely to put more emphasis on corporate criminal liability, both of national and transnational character. Although corporate criminal liability does not specifically speak to any grievances the AU has against the ICC, chapter 4 raised the argument that the continued violation of human rights on the continent is actually facilitated and fuelled by Western-owned multi-national corporations that enjoy impunity. Thus far, the AU has greatly achieved by allowing these entities to be held corporately liable for international crimes.

However, the potentially destructive nature of the immunity clause as it relates to crimes under the Malabo Protocol is of great concern and must be addressed. Moreover, one also needs to look at how the proposed expanded jurisdiction of the African Court will in practice fit into the bigger project of international criminal justice. It remains to be seen whether Africa's suggested contribution will fully address the question of impunity on the continent.

African states' practice regarding national prosecution of international crimes has majorly been through special divisions in relevant national courts, military tribunals or extratordinary courts. Uganda established an International Crimes Division (ICD) of the High Court, the DRC utilised Military tribunals to prosecute international crimes and Senegal prosecuted Hissèn Habrè's in an Extraordinary Senegalese Court. Although these efforts were meant to improve national prosecution of international crimes, chapter 4 further established that they faced numerous challenges which, compromised their effectiveness as complementarity mechanisms in the fight against impunity for international crimes.

6.2.4 Traditional African approaches and TRCs

Other than criminal accountability through prosecution, post-conflict state practice also suggests the incorporation of traditional justice systems and TRCs within the broad ambit of international criminal justice system. Chapter 5 of this thesis therefore set out to establish the character of traditional African approaches as well as TRCs in relation to the question of impunity. It offered an in-depth analysis of selected traditional African procedures and how they

have been utilised to address the question of impunity for international crimes in post-conflict societies. It critically laid down the procedures involved and established common trends which, as argued in the chapter, inform Africa's conception of justice at the international level. It further sought to interrogate whether these approaches add value to international criminal justice and whether there is need for regional and subregional criminal mechanisms to incorporate aspects of these traditional African approaches. Although TRCs are not unique to Africa and thus not a traditional African specific approach as such, this chapter also undertook a critique of them as alternative accountability mechanisms and their probable relation with national and international criminal justice system.

Three key conclusions emerged from the discussion in the chapter. First, most African communities use traditional procedures as an accountability measure for ordinary crimes. This makes it easy for these mechanisms to be utilised for accountability in post-conflict situations. Secondly, the chapter established that the traditional African procedures of *gacaca* and *mato oput* are not, on their own, suitable to offer an alternative accountability measure for international crimes. This is because they were not intended to deal with extraordinary crimes – the mass atrocities at the heart of international crimes.

Moreover, these traditional mechanisms do not seem to play a central role in addressing Africa's grievances against the ICC. This explains why the already adopted African regional framework on fighting impunity through prosecution does not incorporate these traditional procedures. Nonetheless, despite their limitations, the mechanisms can be strengthened to be effective. The chapter therefore advocated for a regional system that gives limited recognition to traditional African approaches under the following two conditions. First, in order to be meaningful in dealing with contemporary problems of accountability, these mechanisms must be refashioned. Second, these mechanisms should be reserved for the second and third tier of perpetrators but not those who bear the highest responsibility.

Finally, this chapter concluded that the character of TRCs should be retained

as it is. These mechanisms should, however, be enabled to work alongside the national courts, subregional courts and the African Court. Regarding the question of complementarity, this section argues that in the same manner, TRCs do not complement the ICC, a similar approach should be adopted in its relationship with the African Court. However, the AU should adopt guidelines on how TRCs can act complementarily to national and subregional courts with respect to low-level perpetrators.

6.3 Conclusion

Based on these findings, this study makes the following five concluding remarks. Firstly, the reluctance by African states to effectively cooperate with the ICC has expanded the impunity gap in Africa, thus compromising the war against impunity. Secondly, the idea of an African Court with jurisdiction over international crimes would be a significant achievement in the war against impunity. Not only would justice be brought closer to and made more directly visible to those involved – the states, communities and victims in Africa – but it would assuage the concerns of those critics who regard the ICC as a neocolonial tool of the West. Thirdly, even though Africa's position on some of its concerns run contrary to the ICC's position, like the immunity question, the two institutions are independent from one another and should therefore be allowed to function independently. Yet, in order to function effectively, the African Court should strengthen certain aspects relating to its criminal mandate and its relationship to similar prosecuting mechanisms at the sub-regional and national levels. This study remains positive that an African Court could exercise its jurisdiction over international crimes effectively if it is accorded a workable legal regime and supported by regional political will. There is need for a robust consensus among the political class to support the African Court. If this Court lacks this political will, then it is likely to land into similar problems like the ICC. There is therefore a need for an enlightened political class, perhaps including experts, to work together with the local political class to drive this agenda. Although the presence of foreign experts may be of significance, ensuring the success of the African Court remains the primary responsibility of the African political class.

However, though autonomous, the African Court and the ICC should work in close collaboration and seize the opportunity to learn from one another, thus creating greater potential for further evolution and development of international criminal law. Fourthly, a regional mechanism which takes into consideration African approaches and perspectives is likely to be the solution to fighting impunity in Africa because it would be more acceptable in the continent. Finally, Africa's traditional procedures – as they currently are – need some limited refashioning in order to align them with the norms of international criminal accountability.

6.4 Recommendations

The above findings and conclusion inform the following recommendations.

6.4.1 Recommendations on the African Court

6.4.1.1 Subject matter jurisdiction of the Court

Subject to other proposals for amendments, the study recommends the implementation of an African Criminal Court with jurisdiction over international crimes. In many instances of crimes under international law committed in Africa by Africans against Africans, the *ius puniendi* of the international community might indeed better be exercised by an African Court. There may, however, be situations where the global level may be more suitable and therefore there is a need to firmly embed an African Court of criminal justice into a global system of international criminal justice. Of course, the significance of a regional African exercise of the *ius puniendi* of the international community in practice will depend on the immunity question, as noted below. If an African court will not be in a position to deal with those persons allegedly most responsible for crimes under international law, its relevance in practice will be reduced to cases of secondary importance. This necessitates a crucial policy choice to make as further recommended belowconcerning immunities in cases of crimes under international law.

In the alternative, African may also opt for a Court with a leaner and more

practical mandate. In this regard, the study recommends that since the ICC already has a mandate over international crimes such war crimes, crimes against humanity, genocide and crimes of aggression, the AU may reconsider its focus to other crimes under the Malabo Protocol. This will not only relieve the African Court of a bulging jurisdiction, but also save the AU from the financial burden of dealing with these crimes. The Court's International Criminal Law section could be mandated to work closely with the ICC on cases emanating from the continent. This recommendation is, however, most unlikely to gain support. Implementing it would mean that the African Court, in exercising criminal jurisdiction, would not replace the jurisdiction of the ICC, which appears to be one of the main reasons why the AU has proposed such a court.

A related recommendation is that, before the African Court's operationalisation, the AU should also establish a team of experts to reconsider some of the problematic definitional aspects of some of the Malabo Protocol crimes. For example, concerning war crimes, the absolute prohibition of use of nuclear weapons or other weapons of mass destruction amounts to a war crime should be subject to the principles of necessity and of proportionality. A further amendmend to the Malabo Protocol should spell out the instances of 'necessity' that would warrant use of nuclear weapons. For example, in cases of self-defence where the opponent uses nuclear weapon. In similar breadth, the gravity threshold that would warrant an act of use of nuclear weapon to amount to a war crime must be clearly spelt out. This could take into consideration the nature of victimhood and the method used.

6.4.1.2 Immunity

This study recommends three ways of addressing the immunity dilemma. First, there is the need for the prosecutor to be accorded adequate prosecutorial discretion taking into account the circumstances of every case. The prosecutor could adopt a detailed prosecutorial strategy that envisages the possible challenges of prosecuting sitting heads of state. Secondly, the AU may need to develop elaborate mechanisms on how to compel leaders accused of committing international crimes to step down from office in order to

facilitate accountability measures. The AU Assembly of Heads of State would be the most appropriate mechanism to carryout this function. Once a head of state is indicted by the Court for committing international crimes, the Assembly would simply adopt a resolution withdrawing the recognition of the head of state involved as such. Such a resolution will have the effect of denying the involved head of state the immunities they are entitled to, thus exposing them to arrest and prosecution within the region. The central role of the Assembly in this process, again, is likely to face criticism in the sense that other African heads of States are likely to protect one of theirs. As such, they may adopt favourable resolutions that are likely to circumvent justice. In the case of inaction by the Assembly, perhaps then the AU PSC should be bestowed with the initial mandate to make a similar resolution against such head of state. Still such a resolution must be implemented by the Assembly. These efforts are, however, likely to be frawned upon as violating the dignity of heads of states and the doctrine of state sovereignty. This necessitates a genuine political will from the Assembly. Elaborate policies can be adopted spelling out in detailed what is expected of every member state to the AU in this regard. The policies may also include guidelines on close collaboration between the various organs of the AU in the fight against impunity. The third way – and the best way forward - would be for the AU to rethink its position on immunity and repeal this clause.

6.4.1.3 Complementarity

Since the African Court and the ICC enjoy horizontal complementarity, this study recommends that they should work closely together, learn from one another and make a positive contribution to the development of international criminal law. For example, the two courts could agree to allow the ICC to exercise jurisdiction over the Rome Statute crimes while the African Court focuses on transnational and corporate crimes. Alternatively, the African Court could exercise the mandate in relation to ICC crimes so long as the two courts work together in exchanging evidence, jurisprudence and manpower. This would deter African states from withdrawing or threatening to withdraw from the ICC, since the two institutions would be understood to be, and seen as, collaborating in pursuit of a common cause – the war against impunity.

The Malabo Protocol deals with the Court's relationship with subregional courts and national courts. [4] The Protocol neither structures the relationship between these mechanisms nor addresses the possibility of competing jurisdiction. In this regard, this study recommends that African subregional courts should not bestow upon themselves jurisdiction over international and transnational crimes similar to those under the Malabo Protocol. If they do, then perhaps they can limit their jurisdiction to the lower-level cadre of perpetrators unless it is an appeal from national mechanisms. This is because there is a risk of not only duplicating resources but introducing inconsistency in jurisprudence in the fight against impunity at the regional level. Not only will the subregional courts be deemed independent from the African Court, but the doctrine of *ne bis in idem* would bar the regional court from taking over a matter that a subregional court has already determined.

Moreover, there is a likelihood of competition between subregional courts and tribunals and the African Court in the exercise of criminal jurisdiction. This will most likely render the African Court irrelevant in the long run since every region will be concerned with prosecuting individuals from their region, yet there may be no uniformity in how this is done or a general check on negative practices. It is important that subregional courts and tribunals entrust the regional court with dealing with all prosecutions of those who bear the highest responsibility for international crimes.

Subregional courts should instead focus their resources on supporting the African Court in the exercise of its criminal jurisdiction as well as national prosecution efforts. However, in the event that the subregional courts are bestowed with jurisdiction over international crimes, they should only function within an appellate system of international criminal jurisdiction. This implies that the African subregional legal frameworks must provide for an appellate system of international criminal law between national and subregional systems.

Post-conflict judicial systems are fraught with challenges ranging from lack of facilities to bias caused by the preceding conflict. Given these circumstances,

[4] Article 46 H, Malabo Protocol.

it is inevitable that those aggrieved by the decisions of judicial systems in this kind of environment have recourse to further appeals in subregional courts. Thus, African subregional courts should not be courts of first instance but should act as appellate courts in determining appeals from national judicial systems. The decision by the subregional courts should, however, be final, without a further appeal to the regional court.

A further appeal from the subregional courts to the African Court should not be allowed. Not only would this create a hierarchy between the two mechanisms, but it is likely to violate the procedural character enshrined in the Malabo Protocol. For example, the Malabo Protocol enumerates trigger mechanisms that differ entirely from what is expected at the subregional and national levels. In the latter cases, other than states, individuals can also trigger their criminal jurisdiction, yet this is not the case with the African Court. The African Court, through its trigger mechanisms under the Malabo Protocol could, however, seize jurisdiction of cases in national and subregional courts on the basis of 'inability' or 'unwillingness' to prosecute. Interesting, however, is the Malabo Protocol's exclusion of the term 'genuine' under its article 46H on complementary jurisdiction. This might undermine the honesty of such procedures as this implies that any investigations or prosecutions can be interpreted as having met the threshold to exclude such a case from the African Court's jurisdiction. This study recommends an amendmend to the Malabo Protocol, inserting the word 'genuine' under article 46H. Alternatively, the African Court can be proactive in its interpretation of this provision.

Ultimately, its the African Court that has the mandate to ensure effective positive complementarity. For example, where the admissibility of a case is being challenged on the basis of complementarity, it is up to the African Court to ensure that the claim against admissibility is genuine. Again, in the event that the African Court refers a matter back to national or subregional institutions, the African Court should continuously observe the developing events in that particular case up to the final stages of conviction and sentencing. Within the OTP, the African Court could establish a body of experts bestowed with the mandate to continuously monitor and evaluate the complementarity relationship of all these institutions. This body should be

guided by the criteria laid down under article 46H of the Malabo Protocol for determining admissibility, that is, to establish any inability or unwillingness to investigate or prosecute, the possibility of *ne bis in idem* and gravity test. The OTP should report its findings to the Court as to whether the efforts are authentic or not in order to allow the Court to give direction on the matter.

Regarding complementarity with national jurisdictions, this study recommends that since national courts have primary jurisdiction over all the perpetrators of international crimes, subregional institutions should establish a formal appeal process between national mechanisms and subregional mechanisms. Also, states whose justice system utilise traditional mechanisms should provide for a formal link between national criminal mechanisms and traditional approaches or procedures. Some general guidelines in this regard can be adopted at the AU level as explained below under section 6.4.2.

6.4.1.4 Cooperation

In the spirit of cooperation, member states to the Malabo Protocol should promulgate laws and procedures to facilitate arrests and surrender or investigations or the enforcement of the Court's orders. The Malabo Protocol does not contain a provision on the sanctions to be taken against member states that defaults on the requirement to cooperate. The AU should also clearly provide for sanctions for states who fail to adhere to this requirement.

Moreover, the Malabo Protocol should clearly provide for the enforcement of cooperation agreements signed between the Court and non-state parties and other international courts and partners. For example, the Protocol could allow the AU Assembly to adopt appropriate sanctions against the offending state. In the case of offending international courts and partners, the AU Assembly could also launch a formal complaint with their respective establishing authorities for appropriate action.

6.4.1.5 Conditional amnesty

Both international law and regional law do not provide for amnesties. Exceptional circumstances explained in chapter 3 under point 3.4 of this thesis may call for conditional amnesties. This can be achieved through the

recommendation that an expanded form of article 53 be incorporated in the Malabo Protocol. Such an expanded form would entail the acceptance of exceptional conditional amnesties as a component of the notion of 'the interest of justice'. Essentially, allowing the prosecutor the discretion to drop a case on the basis of 'the interest of justice' where the notion of interest of justice should be defined to include limited amnesty. Yet this scenario is unlikely to arise, given the thesis' argument that only favours limited or conditional amnesty in relation to low-level perpetrators. The AU nonetheless should adopt rules and regulations elaborating on what this limited amnesty entails. For example, the rules should clearly provide for the procedures of granting amnesties, requirements on investigations prior to issuance of the amnesty, and the categories of offenders or crimes over which such amnesties could be extended.

The AU could also allow limited and temporal amnesties where its PSC determines that pressing for prosecution in certain poses a real threat to regional security. This power should be structured in a manner that gives the PSC sufficient discretionary powers as it is the case with the UNSC under article 39 of the UN Charter.

If this model is adopted, then by extension, the ICC Prosecutor should also reconsider her present narrow interpretation of 'interest of justice' as contrasted with 'peace', discussed in chapter 3 of this thesis.

6.4.1.6 Independence of the African Court

With key appointments to the African Court having been placed entirely under the political arm of the AU, steps must be taken to guarantee the independence of the Court. For example, there could be a rule that requires a rigorous national process before the names of the nominees are forwarded to the government and finally to the African Court. The relevant rules should require an initial national nomination stage. In this stage, both the government and civil society should nominate an equal number of persons who must undergo a public vetting process that involves both institutions. Through this public vetting, only the names of persons of high integrity should be forwarded to the African Court. After government makes its nomination to the Court,

there should be established an independent board to undertake a regional public vetting process taking into consideration the proceedings at the national level. After this second rigorous process, the names of the most appropriate candidates should be forwarded to the AU Executive Council for their election before their appointment is done by the AU Assembly.

In order to protect the integrity of the Court from political influence, it is recommended that appointment of judges to the Court be rigorous and devoid of politics. Nomination of probable candidates to the bench should not be done by states alone but in conjunction with independent non-governmental organisations (NGOs) and national human rights institutions. This should be based on the individual's qualifications and not political patronage. Furthermore, provision should be made for two non-African expert judges in the International Criminal Law Section, atleast for the first ten transitional years. Not only will this guarantee neutrality on the bench but will also allow sharing of knowledge and experience in the prosecution of international crimes.

If this recommendation is adopted, Africa could be a model for the ICC with regards to ensuring the independence of the Court on the aspect of appointment.

6.4.1.7 Corporate criminal liability

It is recommended that Malabo Protocol be amended to prescribe the punishments and penalties to be levied against corporate entities found criminally liable as well as against the categories of offenders vicariously held liable in concert with the corporate entity.

Additionally, the clause on corporate criminal responsibility applies to all corporations and only excludes the state. This will have the sum effect of increasing culpability thus narrowing the gaps in the war against impunity for corporate crimes. Yet, this is likely to face great challenge. To some extent, states could perceive the African Court to be investigating them, thus withdraw their support, especially when it comes to investigating international crimes perpetrated by state-owned corporations or corporations in which the

state holds shares. To ensure cooperation in this instance, the OTP of the African Court should establish an outreach department which should continually engage with its member state governments in creating awareness on their works in the region. This is beacause, in many cases, governments rebel when they lack the relevant knowledge or feel excluded. Another second option would be for the outreach department to involve civil society to exert the necessary pressure to ensure cooperation from governments, including those whose coporate entities are under investigations or prosecution.

Where investigations or prosecution concern corporations owned by non-member states to the Malabo protocol, the Court should adopt mechanisms to ensure cooperation from the respective states. In this regard, the African Court should seek to sign cooperation agreement with elaborate guidelines on the nature and manner of cooperation. Hopefully, this will ensure maximum cooperation during investigations, prosecution and enforcement of its orders.

6.4.2 Recommendations on incorporating traditional African procedures within the African regional mechanism

Traditional justice procedures can be incorporated within the African Criminal justice system. While retaining their native traditional identities, the various African traditional procedures should be limited to resolving post-conflict disputes involving the second or third tier of perpetrators of international crimes within the African region. These should include those perpetrators whose level of involvement precludes them from prosecution by the proposed International Criminal Law Section of the African Court and subjects them to alternative national mechanisms. This would assuage any fears surrounding the challenge of treating all traditional approaches as monolithic and with the ability to complement the African Court. Every state is allowed to legislate on the manner in which their respective traditional approaches inter-relates with its national criminal justice system with respect to second- and third-tier perpetrators of international crimes. Those bearing most responsibility should, however, not be dealt with through these traditional mechanisms. This perhaps would call for a further amendment to the Malabo Protocol in order to offer further guidelines to states that decide to adopt the use of traditional

approaches in post-conflict situations. This amendment will enable the regional criminal system to give recognition to values of accountability from African traditional approaches without compromising the core values of international criminal law.

Concerning the distinction between the first tier, second tier and third tier of perpetrators, the study recommends guidelines that distinguish the degree of responsibility attached to the various categories of perpetratos.

A person should be classified in the first tier (most responsible) of criminal responsibility for international crimes either as an individual, jointly with another person or through another person when they participate 'as a principal, co-principal, agent or accomplice in any of the offences'.[5] The aspect of 'control over the commission of the offence'[6] is key for this category. Aiders and abettors who offer different forms of assistance to principal perpetrators of the crime should also be classified in this group. This form of assistance must, however, be substantial in the sense that 'the crime would have been substantially less likely without the assistance'.[7]

The second tier of perpetrators should comprise the actual perpetrators of the crime. The third tier should comprise these individuals privy to the knowledge and planning of the likely perpetration of international crimes but because of fear or other reasons, their inaction in bringing the matter to the authorities allow the perpetration of these offences.

States, on the other hand, will have to undertake three important roles in this regard. To begin with, they will have to ensure they harmonise all traditional approaches within their respective jurisdictions. This is because, in most countries, there are diverse communities with varied traditional approaches. Furthermore, traditional approaches should undergo some limited formalisation to enable their formal recognition. For example, there should be a linkage between national justice systems and the traditional mechanisms. This linkage could assume, for instance, the three forms suggested by

[5] Article 28N, Malabo Protocol.
[6] G Werle and F Jessberger *Principles of international law* 3rd edn (2014) 198.
[7] Ibid, 216-217.

Gregory Gordon.[8]

First, the traditional mechanisms can rely on national courts for enforcement of their orders.[9] Secondly, the national judicial system could be the ultimate appeal body for perpetrators aggrieved by decisions made by traditional mechanisms.[10] In this regard, every accused person will be expected to first pass through the traditional mechanism as a prerequisite of exhausting local remedies. This kind of linkage must be carefully crafted. Due consideration must be given to the nature of international crimes whose perpetrators and victims are likely to spread beyond a particular community or country, thus involving persons who do not necessarily ascribe to some of these traditional approaches. Thirdly, the traditional mechanisms could be integrated within the national judicial system, as was the case with *gacaca*.[11]

Furthermore, states will have to undertake a general documentation of the harmonised traditional approaches. As the anthropologist Tim Allen notes, there is a lack of systematic documentation of *mato oput* despite the variations in its practices and ceremonies even among the Acholi community itself.[12] Documentation would not only create certainty of procedures and substantive content of the practice, but also enable an easy linkage between the traditional mechanisms and any other formal criminal mechanisms, whether national or international. Documentation would also enable a precise articulation of the specificities that certain traditional concepts of justice entail, thereby ensuring consistency and transparency in their adjudication. As Metz suggests, it may also call for a refashioning of this concept in order to ensure that its ideals are construed in the light of current situations.[13] In doing the documentations, states may need to consult the respective communities in order to guard against false information.

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[8] GS Gordon 'Complementarity and alternative justice' (2009) 88 (3) *Oregon Law Review*, 677.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] T Allen 'War and justice in Northern-Uganda: An assessment of the International criminal Court's intervention' (2005), https://www.files.ethz.ch/isn/56421/2005-02_AllenICCReport.pdf (accessed 16 January 2017).
[13] T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 536.

The question as to how these traditional approaches relate to the ICC or the African Court will therefore not arise. This is because their target group will be very different. It is therefore the role of the respective states to ensure that it adopts appropriate rules and regulations that offer substantive guidance on the criteria to be used in identifying individuals who are subject to these traditional approaches. This could involve, for instance, categorising the offences, then allocating minor offences or misdemeanours to these traditional mechanisms.

Nonetheless, the possibility of a situation where a person indicted by the International Criminal Law Section of the African Court prefers to be subjected to this traditional mechanism instead must also be considered. If this were to happen, then the most difficult question of complementarity must be dealt with. Is there a complementary relationship between the traditional mechanisms and the African Court? The discussion in chapter 5 above portrayed the inability of these local mechanisms to act in a complementary relationship with international criminal tribunals with respect to those who bear the highest responsibility for international crimes. By ratifying international treaties, states bind themselves to diligently carry out their responsibilities under these treaties in good faith.[14] This implies that, with respect to fulfilling the Rome Statute and the Malabo Protocol principle of complementarity, a state must ensure that its municipal criminal mechanisms adhere to the required standards. This would require, for instance, the local traditional mechanisms to have investigatory powers as well as follow established rules of due process. Local traditional mechanisms that lack these aspects cannot therefore complement the African Court. Nonetheless, it is important that national criminal justice systems adopt a comprehensive definition of justice – and not just limit it to ICC-approach of justice but also extend it to traditional African approaches to justice.

National rules and regulations must also address the difficult question of conditional amnesty. Most traditional procedures grant amnesty or pardon as a prerequisite for reconciliation. Every state must make it clear whether conditional amnesty should be allowed, and if so, the conditions upon which it

[14] Article 26, Vienna Convention on the Law of Treaties, 1969.

is to be granted.

As recommended in section 6.4.1.6 above, an amendment to the Malabo Protocol could offer further guidance on the question of conditional amnesty, particularly with respect to second- and third-level perpetrators of international crimes. Although this study recognises that a state has an obligation to prosecute international crimes, it argues that this is not an absolute responsibility. The duty to prosecute does not exclude other measures of accountability. While the prohibition of some international crimes is a customary law and, in some instances, even *jus cogens* norms, it does not mean that prosecution of these crimes is the only accountability measure and that the requirement to prosecute is either customary international law norm or *jus cogens*.

Thus, in certain exceptional circumstances, discussed in chapter 3 of this thesis, international criminal law should legitimise and recognise limited or conditional amnesties, particularly in relation to those who do not bear the highest responsibility for international crimes. This is important especially at the grass-roots level in order to end the vicious circle of conflict and unending victimhood. In the event that states are willing to grant amnesty to low-level perpetrators, those granted amnesty could also be subjected to traditional mechanisms for purposes of reconciliation and restoration. Where any form of compensation is ordered, this should be taken into account as reparations.

The AU should therefore adopt an amendment to the Malabo Protocol recognising African traditional procedures. The AU should further adopt rules and guidelines to guide states on the applicability of traditional approaches within the context of international crimes. In particular, the rules should offer guidance on the relationship between these mechanism and national prosecution mechanism; the criteria applicable when deciding the levels of perpetrators to face the traditional mechanisms or national prosecution as well as those to face regional prosecution in the event of failure of national mechanism (Taking into consideration the recommendation on which courts should deal with which level of offenders) and the applicability of amnesties or pardons in these traditional approaches.

At the state level, every state should enact legislation to offer guidance on the manner in which their respective traditional approaches inter-relates with the state's national criminal justice system with respect to second- and third-tier perpetrators of international crimes. For example, national systems could have appellate jurisdiction over matters emanating from traditional mechanisms, or these traditional mechanisms could be integrated within the national criminal justice system. Every state should adopt the approach relevant to its context. States must also harmonise all traditional approaches within their respective jurisdictions. With the help of experts on tradition, states may also seek to refashion some elements of these traditional procedures and concepts in order to make them relevant to contemporary issues.

6.4.3 Recommendations on TRCs and their relationship with the African Court, subregional and national criminal mechanisms

The nature of TRCs is to dispense restorative rather than retributive justice. Bestowing them with a criminal mandate and structurally positioning them within the regional criminal justice system is likely to adversely affect their nature and compromise their original intent. TRCs should thus retain their current character and be allowed to work alongside the traditional and national mechanisms, African subregional courts and the African Court. This study recommends that, with proper guarantees of confidentiality, all accused persons going through these mechanisms should be given audience in the TRCs. Due regard must also be paid to any amnesty laws with respect to low-level perpetrators. Perpetrators entitled to amnesty may find it superfluous to be a witness before the TRC. It is therefore important that certain conditions are put in place on how these mechanisms relate to each other. For example, it could be a prerequisite that before considering any amnesty application, the alleged perpetrator entitled to amnesty gives evidence before the TRCs.

The question whether TRCs proceedings should be deemed complementary to the African Court, subregional courts and national courts is open to the AU and member states' discretion. The African Court, in the exercise of its criminal jurisdiction, may have limited discretion in allowing proceedings before TRCs to render a matter inadmissible before the Court. The AU may, for instance, adopt a broad definition of justice as embodying African

approaches and perspectives. In the light of discussion in this chapter of the thesis, TRCs should complement national and subregional courts, though in a limited sense – with regard to low-level perpetrators.

This implies that a low-level perpetrator appearing before TRCs should not be subjected to additional criminal proceedings either at the national level or subregional level. The AU, in consultation with member states, may adopt guidelines specifying the categories of crimes and the levels of perpetrators entitled to this exemption. Such an exemption would, however, not work in favour of those who bear the highest responsibility. Perhaps the only exception would be where the immediate prosecution of those who bear the highest responsibility endangers regional peace and security. The AU, through its PSC's determination of such incidents, may perhaps then defer the prosecution on this basis. Such a deferral by the AU PSC would be similar to to UNSC's deferral powers under article 16 of the Rome Statute. However, for purposes of consistency, the thesis recommends that both the ICC and the African Court must agree on the issue of the complementarity between the respective Courts and the TRCs. As it is, proceedings before TRCs are incapable of being deemed complementary to the African Court with respect to those bearing the highest responsibility for international crimes.

6.4.4 Recommendations for further research

This thesis acknowledges the challenge of impunity in Africa for international crimes. It has discussed in detail African concerns about the current international criminal justice system and suggested responses. Three areas necessitating further empirical research emerge in this regard. They include the challenge of mass atrocities and the suitability of international criminal law to bring this to an end; a critique of Africa's response to other global issues such as international economic developments in comparison to its response to international criminal justice developments; and documentation of traditional approaches and clarity on their meaning and content.

a. The challenge of mass atrocities and the suitability of international criminal law as a tool to end impunity

Empirical research must be conducted on mass atrocities and whether

international criminal justice is the best solution. For example, in a situation where an entire tribe rises up in arms and engages in international crimes, does the solution to the problems facing this community lie in prosecuting this entire clan? As Africa suggests some solutions to international crimes, which, are beyond prosecution, it is important to conduct further empirical study on the mass nature of international crimes in Africa and the suitability of international criminal law to deal with the question of impunity or whether the solution has deeper societal ramifications. International criminal law should be structured in a manner that allows it to respond more to the causes of mass atrocities than overly emphasise on penal law. This will finally settle the contests in the 'peace-versus-justice' debate if not assist in the re-definition of the very notion of 'justice'.

b. A critique of Africa's response to other global issues in comparison to its response to international criminal justice developments

The focus of this thesis is on Africa's response to developments in international criminal justice and specifically in relation to the ICC; nonetheless, there is need for further research on how Africa generally responds to other related global issues such as international economic developments. Is the African continent generally a permanent objector to new global developments or are there underlying philosophical explanations for how Africa behaves towards international issues?

c. Documentation of traditional approaches and concepts for clarity of their meaning and content

If traditional approaches and concepts are to make sensible contribution in the fight against impunity, empirical research must first be conducted to establish a documented record on their precise meaning and their content. This is very important particularly given the fact that traditional African procedures like *mato oput* have different aspects even among members of the same community. This unanimity is essential if these mechanisms are to make any meaningful contribution to international criminal law.

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