

# **The relationship between the proposed International Criminal Law Section of the African Court and the International Criminal Court**

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## **Abstract**

This dissertation presents an analytical literature study regarding the relationship between the International Criminal Court and the proposed International Criminal Law Section of the African Court. The realisation of the International Criminal Law Section of the African Court will place itself and the International Criminal Court within the same jurisdictional sphere with regard to the adjudication of international customary law crimes with respect to its African member states. It is noteworthy to point out that this complexity is fraught with political turmoil regarding Africa, the International Criminal Court and the United Nations Security Council. This complex issue has been acutely recognised by numerous academics and law experts. Neither the Rome Statute nor the Protocol makes any reference towards each other, leaving its respective African member states with the daunting and ambiguous task of navigating through this complexity in isolation. This dissertation aims to investigate, analyse and ultimately offer a plausible solution to this immediate concern. In order to accomplish the aforementioned, this study will firstly investigate and evaluate both constitutional treaties of both international courts, respectively. The issue pertaining to the endowment of immunity will also be separately evaluated, considering the conflicting approaches followed by both judicial institutions. Ultimately, all previous sections will be analysed in order to recommend amendments to the Protocol to align itself with international law and settled international practice. A complementarity scheme will be introduced on the basis of the progressive interpretation of positive complementarity to harmonise both courts within the same jurisdictional sphere. Lastly, this dissertation will be concluded by remarks recapitalising the main findings.

**Key phrases:** International Criminal Court, International Criminal Law Section, African Court, international law, international customary law, African Union, United Nations, Security Council, immunity, complementarity, jurisdiction, international crimes

## Opsomming

Hierdie verhandeling bied 'n analitiese literatuur studie oor die verhouding tussen die Internasionale Strafhof en die voorgestelde Internasionale Strafreë Afdeling van die Afrika-Hof. Die verwesenliking van die Internasionale Strafreë Afdeling van die Afrika-Hof plaas die laasgenoemde en die Internasionale Strafhof in dieselfde jurisdiksionele gebied met betrekking tot die vervolging van internasionale gewoontereglike misdade met betrekking tot die betrokke Afrika-lidstate. Dit is van kardinale belang om uit te lig dat hierdie kompleksiteit belaa is met politieke kwale in verband met Afrika, die Internasionale Strafhof en die Veiligheidsraad van die Verenigde Nasies. Talle akademici en regskeners is bewus van die manifestasie van hierdie kommerwekkende probleem. Nie die Rome Statuut of die Protokol verwys enigsins namekaar om hierdie problematiese kwessie aan te spreek nie en dus, laat sy onderskeie Afrika-lidstate met die uitdagende en onduidelike taak om die situasie te beredder in isolasie. Hierdie verhandeling is daarop gemik om hierdie onmiddellike kwessie te ondersoek, ontleed en uit einde, 'n moontlike oplossing te bied. Ten einde die bogenoemde te bereik, sal hierdie studie eerstens albei konstitusionele verdrae van beide internasionale howe ondersoek en evalueer. Die kwessie rakende die goedkeuring van immuniteit sal ook afsonderlik bestudeer word as gevolg van die uiteenlopende benaderings wat gevolg word deur beide geregtelike instellings. Daarna, sal al die voorafgaande onderafdelings gevalueer word om, uit einde, wysigings voor te skryf om die Protokol in lyn te bring met internasionale reg en gevestigde internasionale praktyk. 'N komplementariteit skema, gebaseer op die progressiewe interpretasie van positiewe komplementariteit sal voorgestel word om beide howe in dieselfde jurisdiksionele gebied te harmoniseer. Laastens sal hierdie verhandeling afgesluit word deur finale opmerkings wat die belangrikste bevindings herkapitaliseer.

**Sleutelwoorde:** Internasionale Strafhof, Internasionale Strafreë Afdeling, Afrika-Hof, internasionale reg, internasionale gewoontereg, Afrika-Unie, Veiligheidsraad, Verenigde Nasies, immuniteit, komplementariteit, jurisdiksie, internasionale misdade

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## List of Abbreviations

ACDEG	African Charter on Democracy Elections and Governance
ACHPR	African Court on Human and Peoples' Rights
ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights
AJ	African Court of Justice
AJIL	African Yearbook of International Law
American JIL	American Journal of International Law
ASP	Assembly of State Parties
AU	African Union
Auckland UL Rev	Auckland University Law Review
BU Int'l LJ	Boston University International Law Journal
BYIL	British Yearbook of International Law
CAR	Central African Republic
CHIL	Chatham House International Law
CICC	Coalition for an International Criminal Court
CILSA	Comparative and International Law Journal of Southern Africa
CILSA	Comparative and International Law Journal of Southern Africa
CIMT	Charter for the International Military Tribunal
CIMTFE	Charter for the International Military Tribunal for the Far East
Columbia LR	Columbia Law Review
DRC	Democratic Republic of Congo
ECHR	European Court of Human Rights
ECOSOC	United Nations Economic and Social Council
EJIL	European Journal of International Law
Fordham ILJ	Fordham International Law Journal
FRPI	<i>Forces de Résistance Patriotique d'Ituri</i>
Georgetown LR	Georgetown Law Review
HRLR	Human Rights Law Review
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLS	International Criminal Law Section

ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IJHR	International Journal on Human Rights
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
ISS	Institute for Security Studies
JICJ	Journal of International Criminal Justice
LRA	Lord's Resistance Army
New England LR	New England Law Review
NILR	Netherlands International Law Review
North-Western JIHR	North-Western Journal of International Human Rights
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-Operation and Development
OTP	Office of the Prosecutor
PFR	Patriotic Forces of Resistance
PICT	Project on International Courts and Tribunals
PSC	Peace and Security Council
SADC	Southern African Development Community
SALC	South African Litigation Centre
SCSL	Special Court for Sierra Leone
TJRC	Truth, Justice and Reconciliation Commission
UCP	Union of Congolese Patriots
UN TIP	United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCED	UN Conference on Environment and Development
UNODC	UN Office on Drugs and Crime
UNSC	United Nations Security Council
USHMM	United States Holocaust Memorial Museum

## Chapter 1

### 1.1 Introduction

The modern view of criminal justice, broadly, is that public concern with morality or expediency decrees expiation for the violation of a norm; this concern finds expression in the infliction of punishment on the evil doer by agents of the state, the evil doer, however, enjoying the protection of a regular procedure.<sup>1</sup>

In 2002, the International Criminal Court (ICC), was established by the *UN General Assembly, Rome Statute of the International Criminal Court* (last amended 2010) 17 July 1998,<sup>2</sup> which marked the birth of the first permanent judicial institution specifically created with the aim of prosecuting the most heinous crimes known to humanity, wherever they occur.<sup>3</sup> Africa, a continent plagued by gross human rights violations, played a pivotal role in its creation, motivated by its distinct determination to enhance the eradication of impunity.<sup>4</sup> Africa became firmly engaged in the ICC's modus operandi, considering that all situations brought before the court are of African origin.<sup>5</sup> Africa's sentiment towards The Hague-based court gradually changed when the ICC issued several arrest warrants for Sudanese sitting Head of State, Omar Al-Bashir, and Kenyan President Uhru Kenyatta and Vice-President William Rhuto. Africa's distaste regarding the ICC's modus operandi was further spurred on by the ICC's and United Nations Security Council's (UNSC) repudiation of suspension and amendment appeals from the AU and its supporting member states.<sup>6</sup>

In 2008, the *AU, Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008<sup>7</sup> was adopted, which constituted a merger between the proposed African Court of Justice<sup>8</sup> (ACJ) and the African Court of Human and

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1 Max Weber.

2 *UN General Assembly, Rome Statute of the International Criminal Court* (last amended 2010) 17 July 1998.

3 See chap 2 par 2 Establishment.

4 See chap 2 par 2.2.4 Africa's commitment to the establishment of a permanent international criminal court.

5 See chap 2 par 2.5 Current cases before the ICC.

6 See chap 3 par 3.2.2.2 Establishing the ICLS: anti-ICC sentiments.

7 *AU Protocol on the Statute of the African Court of Justice and Human Rights* 1 July 2008.

8 *AU Protocol of the Court of Justice of the African Union* 11 July 2003.

Peoples' Rights<sup>9</sup> (ACHPR), establishing the African Court of Justice and Human Rights (ACJHR). In 2012 the *AU Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Exp/Min/IV/Rev.7 2012 Revisions up to Tuesday 15th May 2012 (Draft Protocol)*<sup>10</sup> was drafted to expand the ACJHR's jurisdiction to prosecute international crimes. In 2014 the *Draft Protocol* was adopted constituting the *Protocol of the Statute of the African Court of Justice and Human Rights (Protocol)*, which would eventually establish the International Criminal Law section of the ACJHR (ICLS).<sup>11</sup> The ICLS is prepared to confront a raft of social ills tormenting the African continent, which include the adjudication of genocide, war crimes and crimes against humanity.<sup>12</sup> Considering that thirty-four African states are already state parties to the ICC, both courts will occupy the same jurisdictional sphere regarding the prosecution of the aforementioned crimes.<sup>13</sup> The *Rome Statute* and the *Protocol* however, only include states and not regional entities, such as the ICLS, within their complementarity framework. Thus, there exists no provision to address the imminent concern as to how the ICC and ICLS will function in harmony to appropriately address offences which fall within the jurisdiction of both courts. This issue is problematic in relation to which court would receive primacy over the prosecution of an offence.<sup>14</sup> This concern also pertains to the issue regarding the application of immunity by each respective instrument.<sup>15</sup> Furthermore, African member states are also left unassisted as to how they should comply with competing requests addressed from both institutions.<sup>16</sup> This legal uncertainty is of great concern considering the fact that if the two courts clash with respect to the interpretation and application of their jurisdictional sovereignty, their contribution to the indictment and prosecution of perpetrators will be severely diminished.<sup>17</sup>

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9 *Organization of African Unity (OAU), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights* 10 June 1998.

10 *AU Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Exp/Min/IV/Rev 7 2012 Revisions up to Tuesday 15th May 2012.*

11 *Assembly of the Union Twenty-Third Ordinary Session 26-27 June 2014 Malabo, Equatorial Guinea Assembly/AU/ / Decision on the Draft Legal Instruments Doc. Assembly/AU/8(XXIII).*

12 See chap 3 par 3.3.1 Crimes within the jurisdiction of the ICLS.

13 See chap 5 par 5.3.1 Crimes within the jurisdiction of the ICLS and ICC.

14 See chap 5 par 5.3.3 Complementarity.

15 See chap 5 par 5.4 Immunity.

16 See chap 5 par 5.5 Competing obligations.

17 See chap 5 par 6.1 Conclusion.

This ultimately leads to the research question as to what relationship will exist between the ICC and ICLS. In order to resolve this issue the *modus operandi* of each court will be analysed and evaluated, in addition to their interpretation and application of their respective treaties.<sup>18</sup> This analysis will be utilised to construct a basis upon which the relationship between these two courts will be determined. In addition, with regard to the findings made above, probable solutions will be drafted in an attempt to harmonise the ICLS and ICC within a complementarity framework in order to enhance the eradication of impunity on the African continent. These issues will be addressed through an analytical literature study, as discussed below.

Chapter two focuses predominantly on the establishment of the ICC. A brief discussion regarding the historical background and development regarding the creation of international criminal courts and tribunals will be given to illustrate the significance of an international criminal prosecution mechanism for international core crimes. Hereafter, the events leading up to the adoption of the *Rome Statute* will be discussed, in addition to its ultimate ratification and entry into force. Subsequently, Africa's commitment to the establishment of the ICC will be examined, in addition to its continued support after the aforementioned statute's enactment. This examination aims to illustrate the continent's determination to enhance efforts to achieve international justice.<sup>19</sup>

Hereafter an assessment will be conducted with regard to the international customary law crimes<sup>20</sup> which fall within the ICC's jurisdiction<sup>21</sup> and the various trigger mechanisms<sup>22</sup> the *Rome Statute* provides in order to bring a situation before the particular court. The aforementioned investigation aims to illustrate the jurisdictional reach of the ICC and its prosecutorial ability.<sup>23</sup> The *Rome Statute's* complementarity framework will also be examined, underscoring its preferential attitude towards its member states, exemplifying its original intent as a court of

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18 See chap 2, chap 3 and chap 4.

19 See chap 2 par 2 Establishment.

20 Aa 5-8 *bis* of the Rome Statute.

21 See chap 2 par 3.1 Customary International Law Crimes.

22 Aa 13-16 of the Rome Statute.

23 See chap 2 par 3.6 Trigger mechanisms of the ICC's jurisdiction.

last resort and its underlying objective to contribute to the advancement of national prosecution.<sup>24</sup>

Obligations conferred upon member states to the *Rome Statute* will be evaluated in order to determine their responsibility regarding the prosecution or surrender of perpetrators to the ICC. In addition, the issue of competing requests concerning other states will also be addressed to illustrate the ICC's supremacy in this regard.<sup>25</sup>

All cases and situations before the ICC will be briefly discussed to illustrate the application of the *Rome Statute* with regard to its jurisdictional sphere, complementarity and its endowment of obligations upon its member states.<sup>26</sup>

With regard to the contextual basis of the *Rome Statute* established in the previous sections, the ICC's accomplishments and failures over its past twelve years of existence will be investigated to determine whether the *Rome Statute* and ultimately, the ICC could be considered as a success with respect to the prosecution of international crimes.<sup>27</sup>

The *Protocol*<sup>28</sup> establishing the proposed ICLS will be examined in chapter three, following the same method of interpretation as illustrated in chapter two. The development of Africa's regional judiciary will be discussed to determine whether Africa's endeavour at delivering justice could be considered as a successful attempt thus far.<sup>29</sup> Hereafter, the events leading up to the *Protocol's* adoption<sup>30</sup> will be discussed. Consequently, an assessment will be carried out to determine the rationale behind the AU's proposition to expand the ACJHR's jurisdictional reach over international crimes, distinguishing between whether the ICLS will be

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24 A 17 of the *Rome Statute*.

25 See chap 2 par 4 Obligations of member states.

26 See chap 2 par 5 Current cases before the ICC.

27 See chap 2 par 6 The ICC: 12 years in progress.

28 *AU Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* Exp/Min/IV/Rev.7 2012 Revisions up to Tuesday 15th May 2012.

29 See chap 3 par 2.1 Leading up to the proposal of an International Criminal Law section.

30 See chap 3 par 2.3 The Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

constructed upon a legislative basis<sup>31</sup> or upon the AU's developing antagonistic attitude towards the ICC.<sup>32</sup>

With respect to the ICLS's jurisdictional reach, all fourteen crimes listed under the *Protocol* will be analysed and evaluated, to determine which crimes have international customary law status.<sup>33</sup> This is a significant assessment considering the substantial nexus between international customary law crimes and the notion of immunity.<sup>34</sup> The various trigger mechanisms of the ICLS will also be discussed to illustrate when and how a situation may be brought before the regional court. Also, the ICLS's complementarity in relation to its member states will be examined to illustrate its intent as a court of last resort.<sup>35</sup> Obligations conferred upon ICLS member states will be briefly outlined in addition to the judicial and cooperative assistance the ICLS may seek from its member states and other regional and international bodies.<sup>36</sup>

A detailed examination with respect to the notion of immunity will be conducted in chapter four relating to its application before international criminal courts regarding international customary crimes.<sup>37</sup> The origins of sovereign immunity will be briefly discussed with respect to its former absolute nature and consequently its restriction following the heightened recognition of human rights violations breaching *jus cogens* norms.<sup>38</sup> The different forms of immunity, namely *ratione materiae* and *ratione persona*, will be outlined due to their significance under international law and their attainment of international customary law status.<sup>39</sup>

The restriction of immunity before international courts and tribunals will be analysed and evaluated to illustrate its current position in contemporary international law.<sup>40</sup> Hereafter Africa's sentiment and response to the ICC will be

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31 See chap 3 par 2.2.1 Establishing the ICLS: the Constitutive Act and common law.

32 See chap 3 par 2.2.2 Establishing the ICLS: anti-ICC sentiments.

33 See chap 3 par 3 Jurisdiction of the ICLS.

34 See chap 4 par 6.2 The relationship between customary international law crimes and the notion of immunity.

35 See chap 3 par 3.5.4 Issues of admissibility: Complementarity.

36 See chap 3 par 4 Obligations of member states.

37 See chap 4 par 4.1 Immunity before international criminal courts and tribunals.

38 See chap 4 par 2.1 Sovereign immunity.

39 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

40 See chap 4 par 4.1 Immunity before international criminal courts tribunals.

exemplified, following an investigation of The Hague-based courts' application of the *Rome Statute's* immunity provision.<sup>41</sup> Consequently, immunity before the ICLS will be analysed with specific consideration regarding its exclusion from unaccustomed crimes and what it would ultimately imply. In addition, the inclusion of article 46*Abis* will be evaluated to determine if the endowment of immunity upon sitting Heads of State and senior government officials under the *Protocol*, deviates from contemporary international law, and the consequences thereof.<sup>42</sup> However, to establish the aforementioned, an analysis and evaluation will be conducted to determine whether the ICLS can be recognised as an international or hybrid judicial mechanism, which recognition is of vital importance in applying the notion of non-immunity as entrenched in international customary law.<sup>43</sup>

An analytical evaluation of chapters two, three and four is conducted in the fifth chapter in order to illustrate the similarities and inconsistencies between the *Rome Statute* and the *Protocol*. This assessment aims to establish the relationship between the proposed ICLS and ICC pursuant to each respective court's intent to deliver international justice. In order to establish the aforementioned, consideration will be given to the true rationale behind the establishment<sup>44</sup> of an international criminal court or tribunal.<sup>45</sup> Hereafter, the ICLS's projected contribution to the eradication of impunity<sup>46</sup> will be investigated with regard to its feasibility, determined through establishing the *Protocol's* conformity with international law and whether or not the ICLS's resources could be considered as sufficient to deliver impartial and coherent justice.

Crimes listed under both the *Rome Statute* and *Protocol* will be studied to determine the possibility of a mutual legal assistance relationship between these two courts regarding the prosecution of the said offences.<sup>47</sup> The implications of the ICLS's anticipated endeavour to prosecute crimes not yet fixed in international law will also be addressed, in addition to the significance of the absence of a

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41 See chap 4 par 5 Immunity before the ICC.

42 See chap 4 par 4 Immunity before the ICLS.

43 See chap 4 par 6.2 Criminal responsibility in terms of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

44 See chap 5 par 2 Establishment.

45 See chap 5 par 2.2 The rationale behind establishing an international criminal court.

46 See chap 5 par 2.3.2 Contributing to the eradication of impunity.

47 See chap 5 par 3.1 Crimes within the jurisdiction of the ICLS and ICC.

deferral clause.<sup>48</sup> The *Protocol's* reluctance to include a comprehensive provision to assist member states to implement the necessary domestic provisions will be discussed, highlighting the impact such lacuna will have on the effective contribution towards the ICLS's stated mission of enhancing and maintaining international peace and security.<sup>49</sup>

Whether the *Rome Statute* and the *UNSC* welcomes the inclusion of international regional courts will be deliberated upon the basis of a progressive interpretation of positive complementarity.<sup>50</sup> Regarding the possibility of the ICLS's inclusion in the *Rome Statute's* jurisdictional framework, a proposal will be drafted regulating the complementarity nature between these two courts and their respective member states.<sup>51</sup> The implications hereof will also be investigated to determine how it would affect Africa and the ICC and their current state of affairs.<sup>52</sup>

The dissimilar immunity provisions contained in both instruments will also be highlighted to emphasise the effects the dissimilarity will have on the relationship between the ICLS and ICC as well as to underscore the *Protocols*'<sup>53</sup> compliance with international law.<sup>54</sup>

Lastly the issue of competing obligations will be examined and evaluated to illustrate the potential challenges it will present when member states of both courts are obliged to fulfil their responsibilities in order to adhere to both the *Rome Statute* and *Protocol* respectively.<sup>55</sup>

Ultimately, this study intends to determine what relationship will be conceivable between the ICC and ICLS considering the procedural, technical and substantive dissimilarities contained in both instruments in addition to their conformity with international law. Based upon the determination made above, this study will

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48 See chap 5 par 3.2.1 The absence of a deferral clause in the Protocol; chap 5 par 3.2.3 The introduction of a deferral clause in the Protocol.

49 See chap 5 par 5.3.1 Crimes within the jurisdiction of the ICLS and ICC.

50 See chap 5 par 3.3 Complementarity.

51 See chap 5 par 3.3.4 Complementarity: the relationship between the ICC, ICLS and member states.

52 See chap 5 par 3.3.4.1 Analysis: Implications of the ICC and the ICLS functioning within a complementarity framework in the same jurisdictional sphere.

53 See chap 4 par 6 Immunity before the ICLS.

54 See chap 5 par 4 Immunity.

55 See chap 4 par 5 Competing Obligations.

further attempt to articulate a substantive proposal to include the ICLS and the ICC within a harmonised jurisdictional framework.<sup>56</sup>

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56 See chap 5 par 6.1 Conclusion.

## Chapter 2

### The International Criminal Court

#### 2.1 Introduction

This chapter will focus on the establishment, jurisdiction and obligations conferred upon member states of the ICC.

The aim of this chapter is to illustrate Africa's contribution towards the establishment of the ICC, the functioning of the ICC and how it has affected Africa over the last 12 years.<sup>57</sup>

In the discussion of the establishment of the ICC specific reference will be made to the adoption of the *Rome Statute* and Africa's subsequent commitment to the establishment of the first permanent international criminal court.<sup>58</sup>

The extent of the jurisdiction of the ICC will be closely examined, focusing on when a crime can be regarded as an international customary law crime<sup>59</sup> and which of these crimes fall within the jurisdiction of the ICC.<sup>60</sup> The various trigger mechanisms<sup>61</sup> will be analysed, explaining how a situation may be brought before the ICC.<sup>62</sup> The nature of the complementary of the ICC will be examined, emphasising when preference will be given to a member state's initiation of proceedings in the first instance.<sup>63</sup>

The general obligation of member states towards the ICC will be evaluated and specific reference will be given in the situation where competing obligations arise and when the ICC will be given preference.<sup>64</sup>

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57 See chap 2 par 2 Establishment.

58 See chap 2 par 2 Establishment.

59 See chap 2 par 3.1 Customary International Law Crimes.

60 Aa 5-8 *bis* of the *Rome Statute*.

61 See chap 2 par 3.6 Trigger mechanisms of the ICC's jurisdiction.

62 Aa 13-16 of the *Rome Statute*.

63 A 17 of the *Rome Statute*.

64 See chap 2 par 4 Obligations of member states.

All of the cases before the ICC will be investigated and the application of the concepts of jurisdiction, complementarity and the obligations of member states will be clearly indicated.<sup>65</sup>

Lastly, an evaluation will be conducted with respect to the successes and failures of the ICC over its 12 years of existence in order to establish if the concerned court should be regarded as a success so far. Africa's involvement and support pertaining to the development of the court is also emphasised to illustrate the relationship between Africa and the ICC.<sup>66</sup>

## **2.2 Establishment**

### *2.2.1 The need for a permanent international criminal court*

It took more than 75 years of commitment and the repetition of failures before the *Rome Statute* was adopted, signalling the establishing of the ICC. During those years severe atrocities were committed that deeply shocked the conscience of humanity. The loss of an estimated 170 million lives in more than 250 conflicts post World War II illustrates the various failures of the international community to implement a permanent institution to avert the perpetration of heinous crimes threatening international peace and security.<sup>67</sup>

Several tribunals had been established to deal with international crimes prior to the adoption of the *Rome Statute*. The International Military Tribunal<sup>68</sup> (IMT) in Nuremberg<sup>69</sup> was established to address the atrocities that occurred during the Nazi regime. It was followed by the Tokyo Tribunal (IMTFE),<sup>70</sup> which was responsible for prosecuting those who committed international crimes during the occupation of the south-east Asian nations by Japan.<sup>71</sup> In 1993 and 1994 two *ad hoc* tribunals were established, namely the International Criminal Tribunal for the

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65 See chap 2 par 5 Current cases before the ICC.

66 See chap 2 par 6 The ICC: Successes and failures over its 12 years of existence.

67 Sadat and Carden 2000 *Georgetown LR* 384-386.

68 *United Nations Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis* ("London Agreement") 8 August 1945.

69 USHMM 2013 <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007069>.

70 *Charter of the International Military Tribunal for the Far East* 1946.

71 New Jersey Hong Kong Network 1990 <http://cnd.org/mirror/nanjing/NMTT.html> .

former Yugoslavia<sup>72</sup> (ICTY) and the International Criminal Tribunal for Rwanda<sup>73</sup> (ICTR). These tribunals contributed towards establishing legal precedent<sup>74</sup> in international law by endorsing several views, including the following:<sup>75</sup> firstly, that crimes against humanity can be committed not only in time of war but also in time of peace; and secondly that war crimes can be carried out during an internal armed conflict. Dugard<sup>76</sup> states that these progressive views formed part of the debates held in Rome prior to the adoption of the *Rome Statute*.<sup>77</sup> Dugard<sup>78</sup> and Schabas<sup>79</sup> agree that these contributions, as stated above, did not just aid in guiding the drafters of the *Rome Statute*, but they also illustrated what a permanent international criminal court might look like.

However, the jurisdiction of these two tribunals was temporarily and geographically limited.<sup>80</sup> The need for the establishment of a permanent international institution to address international crimes committed anywhere in the world was identified.

### 2.2.2 *Leading up to the adoption of the Rome Statute*

In December 1989 the UN General Assembly requested the International Law Commission<sup>81</sup> (ILC) to draft a code<sup>82</sup> to address the notion of establishing an international criminal court responsible for the prosecution of crimes that threatened the peace and security of mankind. In 1990 the ILC received the eighth report from the special rapporteur, Doudou Thiam, regarding the aforementioned

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72 *UN Charter of the United Nations* 24 October 1945 1 UNTS XVI.

73 *UN Security Council, Security Council Resolution S/RES/955* (1994) 8 November 1994 S/RES/955 (1994).

74 *Prosecutor v Tadić* IT-94-1-AR72.

75 Schabas *Introduction to the International Criminal Court* 12-13.

76 Dugard *International Law* 172-173.

77 See Chap 2 par 2.2 Leading up to the adoption of the *Rome Statute*.

78 Dugard *International Law* 172.

79 Schabas *Introduction to the International Criminal Court* 13.

80 Cassese, Gaeta and Jones *Rome Statute* 30-45.

81 See aa 1 and 2 of the *Statute of the International Law Commission* 1947 Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.

82 *UN, General Assembly International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes* A/RES/44/39 4 December 1989.

draft code, which proposed and discussed the drafting of a statute for an international criminal court.<sup>83</sup> From 1991 to 1993 the latter special rapporteur presented three reports within the framework of international criminal jurisdiction for the establishment of an international criminal court. In 1994 the ILC was requested by the UN to continue its efforts on drafting the code as a matter of priority for the establishment of an international criminal court. In 1994 the ILC adopted the first draft statute of an international criminal court.<sup>84</sup> Thereafter the UN General Assembly established an ad hoc committee<sup>85</sup> open to all member states of the UN to review the draft as well as to organise an international conference of plenipotentiaries.<sup>86</sup> The UN General Assembly eventually decided to establish a preparatory committee to address further substantive and administrative issues regarding the draft.<sup>87</sup>

In 1997 the UN General Assembly decided to hold the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,<sup>88</sup> which was open to all UN Member States,<sup>89</sup> specialised agencies and the International Atomic Energy Agency in Rome between the months of June and July in 1998.<sup>90</sup>

The Preparatory Commission was finally established by the *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an*

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83 *UN Draft code of crimes against the peace and security of mankind (Part I & II)- including the draft statute for an international criminal court* A/CN.4/398 and Corr 1-3 11 March 1986.

84 UN 1998 <http://legal.un.org/diplomaticconferences/icc-1998/icc-1998.html>.

85 Part 2 of the *UN, United Nations General Assembly Establishment of an international criminal court* A/RES/49/53 9 December 1994. "Decides to establish an ad hoc committee, open to all States Members of the United Nations or members of specialized agencies, to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries."

86 *UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* 1998 <http://legal.un.org/diplomaticconferences/icc-1998/icc-1998.html>.

87 *UN General Assembly Establishment of an international criminal court* A/RES/50/46 11 December 1995.

88 *UN United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June – 17 July* Official Records Volume 1 *Rome Statute and the Final Documents Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* 1-3, 67-70.

89 UN 2014 <http://www.un.org/en/sc/members/>.

90 *UN General Assembly Establishment of an international criminal court* A/52/651 15 December 1997.

*International Criminal Court 1998*.<sup>91</sup> The Preparatory Commission's objective was to safeguard the establishment of the ICC without undue delay.<sup>92</sup>

In 1998 a Diplomatic Conference in Rome was held to finalise and adopt the Statute for the International Criminal Court.<sup>93</sup> Delegates from 150 countries, 47 from Africa, attended this conference.

### 2.2.3 *The Rome Statute*

The ICC was established by Article 1 of the *Rome Statute*, which states that:<sup>94</sup>

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

The *Rome Statute* was adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on the 17<sup>th</sup> of July 1998 in Rome, Italy. This multilateral treaty<sup>95</sup> came into force only on 1 July 2002, after it had been ratified by 60 countries.<sup>96</sup> As of 1 May 2013, 122 countries are state parties to the *Rome Statute*. Of these countries 34 are from Africa, 18 from Asia-Pacific, 18 from Eastern Europe, 27 from the Caribbean and Latin America and 25 from Western Europe and other states. It is noteworthy that Africa represents the largest block of member states of the ICC and the largest regional grouping in the Assembly of State Parties (ASP). This is coherent with the continent's extensive support prior to and during the establishment of the court, as discussed below.<sup>97</sup>

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91 Section F of the *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 1998*.

92 Cassese, Gaeta and Jones *Rome Statute* 40-50.

93 Scarff 1998 <http://www.asil.org/insigh20.cfm>.

94 *Rome Statute 1998*.

95 A 1 of the *United Nations, Vienna Convention on the Law of Treaties* 23 May 1969, United Nations Treaty Series 331. The *Rome Statute* is a multilateral constitutional treaty in the sense that it established the ICC and serves as its constitution.

96 A 126(1) of the *Rome Statute* "This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."

97 Du Plessis 2010 *ISS* 5.

#### 2.2.4 Africa's commitment to the establishment of a permanent international criminal court

The engaged involvement of African states prior to the establishment of the ICC can clearly be seen in the preparations leading to the adoption of the *Rome Statute*. Activities regarding the support for establishing a permanent international criminal court were organised throughout Africa, as is discussed below.<sup>98</sup>

90 African organisations became members of the Coalition for an International Criminal Court (CICC). These organisations urged their respective countries to become involved in the process of establishing a permanent and independent international criminal court.<sup>99</sup> The Southern African Development Community (SADC), for instance, played a vital role during the process of developing an international criminal court. Various experts who met in Pretoria in September 1997 were agreed upon the outcome of negotiations by the ILC on a draft statute.<sup>100</sup> The aim of this meeting was to make a meaningful impact through presenting an African perspective on the issue. Consequently, a set of principles was drafted and sent to each participant's respective state authority for endorsement. This set of principles was described as a 'wish list' which embodied suggestions for the International Criminal Court that Africa would want. The suggestions were the following:

- I. Crimes of genocide, war crimes and crimes against humanity would fall under the jurisdiction of the court
- II. Reservations to the statute (establishing the ICC) should not be permitted
- III. Adequate financial resources should be provided to the ICC for the establishment and maintenance of an effective working judicial system
- IV. The prosecutor of the ICC should have *proprio motu* powers to initiate proceedings/investigations
- V. States should be obliged to provide full cooperation to the court before, during and after proceedings.

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98 Du Plessis 2010 *ISS* 5-6.

99 Du Plessis 2010 *ISS* 6-7.

100 See chap 2 par 2.2 Leading up to the adoption of the *Rome Statute*.

These principles were also affirmed in the *Dakar Declaration for the Establishment of the International Criminal Court* 1998.<sup>101</sup> The former Organisation of African Unity (OAU) (now the AU) emphasised the significance of these principles and requested African states to show their support for the establishment of the ICC. The OAU later adopted the protocol in Burkina Faso in June 1998.<sup>102</sup> The *Dakar Declaration* and the similar SADC principles were eventually also used as guidelines at the Rome Conference prior to the adoption of the *Rome Statute*.<sup>103</sup>

Africans took a leading role in various issues addressed at the Conference. For example, the Lesotho delegate was elected as one of the vice-chairpersons of the conference and also the coordinator of the formulation of part 9 of the *Rome Statute*.<sup>104</sup> South Africa was involved in the formulation of part 4 of the *Rome Statute*<sup>105</sup> and also formed part of the drafting committee.<sup>106</sup>

Senegal became the first country to ratify the *Rome Statute*.<sup>107</sup> South Africa was the first African state to incorporate the *Rome Statute's* provisions into domestic law<sup>108</sup> by passing the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002* (ICC Act).<sup>109</sup>

To date, 34 African states have ratified the *Rome Statute*. Africa is also well represented in the ICC, with five of the 18 judges in the judiciary being from Africa: Sanji Mmasenono Monageng (First Vice-President) (Botswana), Akua Kuenyehia (Ghana), Joyce Aluoch (Kenya) Chile Eboe-Osuji (Nigeria) and Fatoumata Dembélé Diarra (Mali). The second Chief Prosecutor of the ICC appointed, Fatou Bensouda, is of Gambian nationality. Medard Rwelamira, a citizen of South Africa,

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101 *Dakar Declaration for the Establishment of the International Criminal Court* 1998.

102 OAU *Declaration and Decisions Adopted by the Thirty-Fourth Ordinary Session of the Assembly of Heads Of State and Government* AHG/Decl.1 (XXXIV) 8-10 June 1998.

103 Du Plessis 2010 *ISS* 5-6.

104 Part 9 International Cooperation and Judicial Assistance of the *Rome Statute*.

105 Part 4 Composition and Administration of the Court of the *Rome Statute*.

106 Du Plessis 2010 *ISS* 5-6.

107 UN 2014 [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII10&chapter=18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII10&chapter=18&lang=en).

108 *Coalition for the International Criminal Court* (CICC) 2014 *Summary Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities* (APIC)

109 *ICC Act*. See chap 2 par 2.4.4 Procedures under national law of state parties.

was the first director of the secretariat of the ASP before he passed away in 2006.<sup>110</sup>

Apart from the pro-ICC activities held prior the adoption of the *Rome Statute* and the vast number of African states that ratified the said statute, the commitment of Africa to the ICC's development is illustrated at a later date.<sup>111</sup> In 2005 the *African Commission on Human and Peoples' Rights* passed the *80th Resolution on the Renewal of the Mandate and Composition of the Working Group on Specific Issues Relating to the Work of the African Commission on Human and Peoples' Rights 2005*,<sup>112</sup> which encouraged African states to domesticate and implement the provisions of the *Rome Statute* and called on civil society organisations to work collaboratively in order to enhance the rule of international law and to strengthen the *Rome Statute*. In December 2007 an AU-EU summit<sup>113</sup> was held in Lisbon where the two unions' displayed their commitment to working together to end impunity regarding crimes against humanity, war crimes and genocide.<sup>114</sup>

Africa's prior involvement played a pivotal role in the establishment of the ICC. After the *Rome Statute* was adopted, Africa continued with its support in maintaining and enhancing the ICC's development to address the issue<sup>115</sup> of impunity which plague the continent.<sup>116</sup>

### **2.3 Jurisdiction of the ICC**

Attentive recognition will be given to the various issues pertaining to the element of jurisdiction under the *Rome Statute*. However, in order to confine this study specifically to the relationship between the ICC and the ICLS, only the following subject areas will be investigated: crimes within the jurisdiction of the *Rome Statute*, temporal jurisdiction, preconditions to the exercise of jurisdiction, the

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110 ICC 2013 [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx#a](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx#a).

111 Du Plessis 2010 ISS 5-7.

112 *80th Resolution on the Renewal of the Mandate and Composition of the Working Group on Specific Issues Relating to the Work of the African Commission on Human and Peoples' Rights 2005*.

113 *AU-EU Summit Joint Strategy and First Action Plan 2007* 25-26.

114 Du Plessis 2010 ISS 24.

115 See chap 2 par 5 Current cases before the ICC.

116 Du Plessis 2010 ISS 11.

ICC's various trigger mechanisms, the deferral of an investigation or prosecution, the ICC's complementarity nature and issues pertaining to the admissibility of a situation before the court.<sup>117</sup>

### 2.3.1 Customary international law crimes

International law can be divided into two primary forms:<sup>118</sup> customary international law and treaties.<sup>119</sup> The provisions of a treaty are binding only upon states that are signatories to the instrument, whereas customary international law is binding upon a state whether it is a signatory to the concerned treaty or not.<sup>120</sup>

Article 38(1) (b) and (c) of the *UN, United Nations Statute of the International Court of Justice*, 18 April 1946<sup>121</sup> (*Statute of the International Court of Justice*) defines customary international law as "...international custom, as evidence of a general practice accepted as law," and "...the general principles of law recognized by civilized nations." The *Restatement of the Law, Third, Foreign Relations Law of the United States 1987* describes customary law as follows:<sup>122</sup>

- (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.
- (3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

Ultimately, two prerequisites exist for the creation of international customary law: Firstly, settled/consistent practice (*usus*) and secondly, an obligation to be bound thus, a sense of legal obligation (*opinio juris*).<sup>123</sup>

*Usus* is a crucial requirement, because custom is not an ideal norm but a practiced one.<sup>124</sup> Settled practice requires a general and widespread acceptance and a constant or uniform usage.<sup>125</sup> Proof of state practice can be found in a

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117 See chap 2 par 2.3 Jurisdiction of the ICC.

118 Goldsmith and Posner *Theory of Customary International Law* 1-3.

119 Paust *International Criminal Law: Cases and Materials* 4-5.

120 Meron 2011 <http://www.crimesofwar.org/a-z-guide/customary-law/>.

121 A 38(1)(b) of the *United Nations, Statute of the International Court of Justice*, 18 April 1946.

122 *Restatement of the Law, Third, Foreign Relations Law of the United States* 1987.

123 Dugard *International Law* 26-33.

124 Postma 2013 *Custom in International Law: A Normative Practice Account* 2-3.

125 *The Asylum case Colombia/Peru* ICJ Reports 1950 266.

variety of materials such as treaties, international and national legislation, and diplomatic correspondence.<sup>126</sup> Evidence of state practice, however, is not always readily available. If a state does not actively demonstrate its support for a particular rule, consent should be derived from a state's conduct, like its silent submission to adherence to a rule or its failure to object to a rule.<sup>127</sup> This leaves open the question of whether or not a nonconforming state would be obliged to adhere to a rule created by other states. The view of *Tanaka J* in his dissenting opinion in the *South West Africa Cases, Second Phase 1966 ICJ Reports 6*<sup>128</sup> was that Article 38(1)(b) of the *ICJ Statute*<sup>129</sup> leaves room for the exclusion of dissenting states when a customary rule is being created. In *South Africa Conrardie J* elaborated on the aforementioned statement in *S v Pentane 1988 3 SA 51 (C)*,<sup>130</sup> where he explained that if a state keeps on refusing to be bound by a rule while the rule is still being developed, that particular state would not be bound.<sup>131</sup>

State practice, as discussed above, should be given greater consideration than a state's rhetoric, speeches<sup>132</sup> or political statements.<sup>133</sup> There are cases where little or no practice can lead to the acceptance of a rule as customary. This exception has been highlighted in the judgment handed down in the *S v Pentane 1988 3 SA 51 (C)* case, which explained that:<sup>134</sup>

"...if all the states involved share an understanding that a particular rule should govern their conduct, such a rule may be created with little or no practice to support it."

However, in most cases the passage of time is an essential requirement for a practice to crystallize into a customary rule.<sup>135</sup>

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126 Dugard *International Law* 26.

127 Dugard *International Law* 26 "...its failure to protest against a rule in its formative stage".

128 *South West Africa Cases, Second Phase ICJ Reports 6 (1966) 291.*

129 A 38(1)(b) of *Statute of the International Court of Justice.*

130 *S v Pentane 1988 3 SA 51 (C) 64.*

131 Dugard *International Law* 29 "Both judicial and academic opinion support the view that a persistent objector is not bound in such a case."

132 1988 3 SA 51 (C) 59 F-G.

133 *South West Africa Cases, Second Phase ICJ Reports 6 at 169 1966.*

134 1988 3 SA 51 (C) 57G-H.

135 Dugard *International Law* 27-28.

Settled practice is not the only requirement needed to create customary law.<sup>136</sup> *Opinio juris* refers to the psychological part of customary law.<sup>137</sup> As said above, *opinio juiris* refers to a sense of legal obligation. A state must feel obliged to adhere to the rule agreed upon and should have the will to act accordingly. In the *Continental Shelf Case Germany/Netherlands/ Denmark 1969 ICJ Reports 3* the court stated that:<sup>138</sup>

The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or habitual character of the acts is not in itself enough.

International crimes are described as acts that threaten the peace and security of the international community. The responsibility for the suppression of these crimes is shared among all states, because they disrupt the public order of the international community as a whole and not only of a particular state. Their nature is established either by conventions or by their being rooted in customary law.<sup>139</sup>

The definition of genocide was created by Article 2 of the *UN, United Nations General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series*<sup>140</sup> (Genocide Convention). Genocide became part of customary international law immediately upon the adoption of the convention in 1948. Article 1 of the *Genocide Convention*<sup>141</sup> substantiates the customary nature of genocide. This provision explains that states party to the convention confirm that genocide is a crime under international law which they aim to prevent and punish.<sup>142</sup> In the *Advisory Opinion*

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136 Dugard *International Law* 29.

137 *Continental Shelf Case Germany/Netherlands/Denmark ICJ Reports 1969 3* 44-45.

138 *ICJ Reports 1969 3* 44.

139 Dugard *International Law* 157.

140 A 2 of the *UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series 277...*" In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, 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."

141 A 1 *Genocide Convention 1948*.

142 Ntoubandi *Amnesty for Crimes against Humanity* 140-143.

*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ 28 May 1951, the ICJ held that:<sup>143</sup>

The principles underlying the concerned Convention are recognised by civilised nations as binding on States even without any conventional obligation.

States made little progress, however, before 1945 in prosecuting individuals who committed genocide. State practice<sup>144</sup> was thus limited in terms of punishing the aforementioned crime, but states had a strong sense of legal obligation, which was sufficient to grant genocide the status of a customary international law crime.<sup>145</sup> In the case of *Adolf Eichmann v The Attorney General, Criminal Appeal 336/61 1962* the Supreme Court of Appeal stated that the universal jurisdiction over genocide is authorised by customary international law.<sup>146</sup> The Appeals Chamber of the ICTY, in the case of the *Prosecutor v Radislav Krstic IT-98-33-A 2004*,<sup>147</sup> also reaffirmed the customary international law status of genocide. The aforesaid Chamber stated that the *Genocide Convention* and the rules pertaining under customary international law forbid the physical and biological annihilation of a human group.<sup>148</sup>

Article 6(b) and (c) of the *United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945 (CIMT), defined war crimes and crimes against humanity respectively as:<sup>149</sup>

...violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or

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143 *Advisory Opinion Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ 28 May 1951.

144 Dugard *International Law* 26-33.

145 Ntoubandi *Amnesty for Crimes against Humanity* 140-141.

146 *Adolf Eichmann v The Attorney General, Criminal Appeal 336/61 1962*.

147 *Prosecutor v Radislav Krstic IT-98-33-A 2004 25-26*.

148 A 2 *Genocide Convention*.

149 Aa 6(b) and (c) of the *CIMT*.

religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The drafters of the CIMT together with the prosecutors and judges of the IMT expressed their view that this Charter "...codified the state of custom as it existed at that time; thus it was seen as a "...custom-creating act."<sup>150</sup> The IMT held that customary international law is the only reliable source from which the obligation to prosecute these crimes could be derived, from since a specialised convention was lacking.<sup>151</sup> Schabas<sup>152</sup> also states that the only obligation at that time to punish and prosecute individuals who were guilty of committing crimes against humanity "...existed by virtue of customary international law." The two crimes, as stated above, were also not addressed by states before 1945. States usually based their prosecution of an individual on the violation of customary rules of war contained in the *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899*<sup>153</sup> and the *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907*.<sup>154</sup> Ntoubandi applied the elements of international law on war crimes and crimes against humanity and concluded that state practice in this regard fell a bit short, but that the crimes themselves were strong in *opinio juris* and were thus not exempt from achieving customary law status. "They are therefore customary international law crimes par excellence." <sup>155</sup>

These crimes (genocide, war crimes and crimes against humanity) are documented in Articles 16, 17, 18 and 20 of the *International Law Commission's*

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150 Ntoubandi *Amnesty for Crimes against Humanity* 123.

151 Ntoubandi *Amnesty for Crimes against Humanity* 123-124.

152 Schabas *Convention for the Prevention and Punishment of the Crime of Genocide 2008. United Nations Audio-visual Library of International Law* 2.

153 *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.*

154 *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.*

155 Ntoubandi *Amnesty for Crimes against Humanity* 141.

*Draft Code of Crimes against the Peace and Security of Mankind of 1996.*<sup>156</sup> In the *Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, Official Records of the General Assembly, fifty-first session, Supplement No 80 Vol II*<sup>157</sup> it was stated that the aforesaid draft code is "...an authoritative instrument, parts of which may constitute evidence of customary international law."

From as early as 1945 and 1948 respectively, crimes against humanity, war crimes and genocide have been repeatedly described as having the status of customary international law by international criminal tribunals, academics, international conventions and draft codes. Finally, these crimes are also documented in the *Rome Statute*,<sup>158</sup> reaffirming that any individual who commits such offences will be guilty of an international customary law crime.

### 2.3.2 Crimes within the jurisdiction of the ICC

The most heinous crimes threatening global peace and security are listed in Article 5 of the *Rome Statute*,<sup>159</sup> namely: genocide, crimes against humanity, war crimes and the crime of aggression.

#### 2.3.2.1 Genocide

The crime of genocide is defined in the *Rome Statute*<sup>160</sup> as the killing, causing serious bodily or mental harm, inflicting conditions that cause harm, preventing births in the group through measures imposed, or forcibly transferring children of one group to another group. These acts should be accompanied by the intention to destroy a national, ethnic, racial or religious group in whole or in part.

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156 Aa 16, 17, 18 and 20 of the *International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind* of 1996.

157 *Report of the International Law Commission on the work of its forty-eighth session 6 May - 26 July 1996, Official Records of the General Assembly fifty-first session Supplement No 80 Vol II.*

158 Aa 5, 6, 7 and 8 of the *Rome Statute*.

159 A 5 of the *Rome Statute*.

160 A 6 of the *Rome Statute*.

### 2.3.2.2 Crimes against humanity

A crime against humanity is the perpetration of multiple, widespread or systematic acts against a civilian population. The scope of the acts referred to here is extensive. They include murder, extermination, enslavement, deportation, imprisonment, torture, various sexual assaults and the crime of apartheid.<sup>161</sup>

### 2.3.2.3 War crimes

War crimes are described as acts such as wilful killing, compelling a prisoner to make war, the taking of hostages, the directing of attacks against a civilian population or objects, and the directing of attacks against humanitarian or peacekeeping assistance which is not directly taking part in the open hostilities.<sup>162</sup> Most of these acts are proscribed under the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 1949.<sup>163</sup>

### 2.3.2.4 Crimes of aggression

Crimes of aggression<sup>164</sup> were added to the *Rome Statute* on 11 June 2010 at the *Review Conference of the Rome Statute of the ICC* in Kampala, Uganda.<sup>165</sup> However, the ICC would be able to exercise jurisdiction over a crime of aggression only following a decision taken by thirty state parties after the 1<sup>st</sup> January 2017.<sup>166</sup>

The crime of aggression can be defined as an act of planning, preparation or initiation by a person to direct a state military or political action which violates the *UN Charter*.<sup>167</sup> An act of aggression is described widely as the use of armed force by a state that violates the political independence, sovereignty and territorial integrity of another state. Any inconsistency which constitutes a transgression under the *UN Charter* also constitutes an act of aggression. The definition of aggression was determined in the *UN, Resolution 3314 (XXIX) 1974* on 14

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161 A 7 of the *Rome Statute*.

162 A 8 of the *Rome Statute* 1998.

163 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 1949.

164 A 8bis of the *Rome Statute* of 1998.

165 RC/Res.6 of the *Review Conference of the Rome Statute of the ICC* 2010.

166 A 15 bis5 (3) of the *Rome Statute*.

167 *UN Charter*.

December 1974<sup>168</sup> and includes the following acts: an invasion, attack, occupation or bombardment of armed forces on or against the territory of another state.

#### 2.3.4 *Jurisdiction ratione temporis*

Jurisdiction *ratione temporis* means that the ICC will have jurisdiction over a crime only if it was committed after the *Rome Statute* entered into force "...on the first day of the month after the 60<sup>th</sup> day following the date of the deposit of the 60<sup>th</sup> instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations", thus on 1 July 2002.<sup>169</sup> This entails that the temporal jurisdiction of the ICC is strictly prospective, a fact which consequently limits *ex post facto* prosecutions.<sup>170</sup>

#### 2.3.5 *Preconditions to the exercise of jurisdiction*

State parties of the *Rome Statute* confirmed their acceptance of the ICC's jurisdiction over the crimes listed in article 5 when they signed and ratified the latter Statute.<sup>171</sup> Regarding article 13(a) or (c) of the *Rome Statute*, which will be discussed below,<sup>172</sup> the ICC may exercise its jurisdiction if the crime was committed on the territory of such a state or on board an aircraft or vessel which is registered to that state or if the person accused of committing the crime is a national of the said state. The ICC may also exercise its jurisdiction if a non-party state expresses its acceptance of the court's jurisdiction over the crime in question by lodging a declaration with the registrar of the ICC.<sup>173</sup>

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168 UN Resolution 3314 (XXIX) 1974.

169 A 11 of the *Rome Statute*.

170 Cassese, Gaeta and Jones *Rome Statute* 543-550.

171 A 5 of the *Rome Statute*.

172 A 14 of the *Rome Statute*.

173 A 12 of the *Rome Statute*.

### 2.3.6 Trigger mechanisms of the ICC's jurisdiction

#### 2.3.6.1 Referral by a member state

Firstly, a situation can be referred to the ICC for investigation by a member state. A state party may refer a situation to the prosecutor of the ICC if one of the crimes listed in article 5 has been committed within the jurisdiction of the ICC. It is also stated that reference should be made to relevant circumstances accompanied by supporting documentation by the state referring the situation.<sup>174</sup>

The emphasis on referring a situation rather than a case assists in restricting accusations against specific individuals. Secondly, it aids member states to refer a situation to the ICC without their having to identify all the offenders.

Specifying relevant circumstances and providing supporting documentation is a key element regarding a referral of a situation. This is critical to aid the prosecutor to determine whether or not there is a reasonable basis to initiate an investigation.<sup>175</sup>

#### 2.3.6.2 Referral and deferral by the United Nations Security Council

A situation can be referred to the ICC if the UNSC is of the opinion that the crime in question threatens international peace and security. In this case it does not matter on whose territory the crime was committed or by whom.<sup>176</sup> Consequently it also entails that it does not matter whether the concerned state is a party to the *Rome Statute* or not. It should be emphasised that this constitutes a deviation from the *United Nations, Vienna Convention on the Law of Treaties 23 May 1969, United Nations Treaty Series vol 1155 p 331 (Vienna Convention)*.<sup>177</sup> Article 26 of the *Vienna Convention* states that any treaty in force will be binding only upon states that are parties to it. The general rule also dictates that a treaty does not

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174 Aa 13 and 14 of the *Rome Statute*.

175 Cassese, Gaeta and Jones *Rome Statute* 558-659.

176 A 13 of the *Rome Statute*.

177 A 26 of the *Vienna Convention Law of Treaties*.

create any obligations or rights for a non-party state (a third state) without its consent.<sup>178</sup>

However, the UNSC's fulfilment of its primary responsibility for maintaining international peace and security is derived from article 24 of the *United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI (UN Charter)*.<sup>179</sup> The *Rome Statute* specifically states that when the UNSC refers a situation, it will be acting under Chapter VII of the *UN Charter*. Firstly, article 39 of the aforementioned Charter states that the preliminary step of the UNSC should entail the determination of the existence of a threat and that the UNSC should thereafter decide which measures to implement. Provisional measures could be taken to prevent further deterioration of affairs. State parties concerned are obliged to adhere to these measures. These measures are chronologically listed and include economic sanctions and the use of air, sea or land forces.<sup>180</sup>

After the end of the Cold War the UNSC was perceived as a quasi-judicial dispute settler.<sup>181</sup> It also started to legislate and adopt various resolutions under Chapter VII. The UNSC has expanded its power under Chapter VII significantly since 1999, when it started imposing financial and travel sanctions upon persons being listed as suspected Al Qaeda members.<sup>182</sup> A Counter-Terrorism Committee<sup>183</sup> (CTC) was also established after the 9/11 attacks for the monitoring and surveillance of individuals suspected of being affiliated with terrorist groups.<sup>184</sup> Consequently the conduct of the UNSC came under scrutiny and gave rise to various questions on whether the UNSC was overstepping the authority conferred upon it by Chapter VII, and whether it was violating *jus cogens* norms<sup>185</sup> and human rights.<sup>186</sup> In 2008 the European Court of Justice (ECJ) reviewed the listing

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178 A 34 of the *Vienna Convention Law of Treaties*.

179 A 24 of the *United Nations, Charter of the United Nations* 24 October 1945 1 UNTS XVI.

180 Chap VII of the *UN Charter*.

181 Dugard *International Law* 488-489.

182 *UN Security Council, Resolution 1267 (1999)* Adopted by the Security Council at its 4051st meeting on 15 October 1999, 15 October 1999, S/RES/1267(1999).

183 *UN Security Council, Security Council resolution 1373 (2001)* [on threats to international peace and security caused by terrorist acts], 28 September 2001, S/RES/1373 (2001).

184 Dugard *International Law* 488-489.

185 Dugard *International Law* 38 "Peremptory norms, known as *jus cogens* norms, from which no derogation is permitted."

186 Dugard *International Law* 489-450.

of the Yassin Abdullah Kadi and Al Barkaat International Federation, which had been suspected of being associated with Al Qaeda. The ICJ also reviewed UNSC decisions made over the aerial incident that took place at Lockerbie.<sup>187</sup> The aforesaid encroachment also had academics concerned over the extent of the UNSC's powers under Chapter VII. Unease was expressed about the powers derived from Chapter VII and about the accountability and legitimacy of the UNSC's conduct.<sup>188</sup> Dumasani Kumalo, ambassador for South Africa at the U.N, stated at the UNSCs' 5615<sup>th</sup> meeting held in New York in 2007, that the UNSC was using Chapter VII as an umbrella for deriving powers to address situations where alternative resolutions were available.<sup>189</sup> Consideration should be given to the desirability of reviewing Chapter VII, in order to achieve certainty about the extent of the UNSC'S powers.

#### 2.3.6.3 Proprio motu powers of the prosecutor

The prosecutor herself can also initiate an investigation if a reasonable basis is found that an international crime has been committed. In accordance with article 15 of the *Rome Statute*, the prosecutor may initiate an investigation *proprio motu* in respect of the crimes listed in article 5 that fall within the jurisdiction of the ICC. The Prosecutor may seek aid from intergovernmental or non-governmental organizations, other states or organs of the UN when collecting information to establish if there is a reasonable basis to proceed with a formal investigation. If the prosecutor determines that a reasonable basis exists, a request by the prosecutor can be submitted to the Pre-Trial Chamber, where the latter will consider all relevant material that has been presented and, if satisfied, authorize the commencement of the investigation. The authorization should be concluded "...without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case." If it is concluded that a reasonable basis does not exist due to inadequate or lack of information, the prosecutor will inform those who provided the information. This does not, however, preclude the

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187 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v USA/UK) Provisional Measures ICJ Reports 3 1992.*

188 Schott 2007 *North-Western JIHR* 24-26.

189 UN SCOR 62d Sess 5615th mtg at 17 UN Doc S/PV 5615 (Jan 8 2007).

prosecutor from considering any further information that sheds light on new evidence pertaining to the same situation.<sup>190</sup>

### 2.3.7 *Exercise of jurisdiction over the crime of aggression*

Article 15 *bis* 5 explains that the crime of aggression falls within the jurisdiction of the ICC and that it may exercise its jurisdiction over the said crime only one year after the ratification of the amendments by 30 state parties. The latter provision is subject to the majority decision that will be concluded after 1 January 2017.

When a member state refers a situation regarding the perpetration of a crime of aggression to the ICC, the ICC will have jurisdiction, except where the member state expressed its refusal of acceptance in the past.

Before the prosecutor can initiate an investigation into the situation it is critical that a reasonable basis should be established. In coherence with the aforesaid, the UNSC should also determine that an act of aggression has been committed by the state in question. If this is established the prosecutor may proceed with further investigations, but in cases where no such determination is made by the UNSC the prosecutor may still initiate further proceedings subject to the authorization of the Pre-Trial Chamber.

The UNSC can also refer a situation on the suspicion that a crime of aggression was committed. Such a determination should be without prejudice to the ICC's own findings.<sup>191</sup>

### 2.3.8 *Deferral of investigation or prosecution*

The UNSC may request the ICC to suspend all current proceedings.<sup>192</sup> This suspension does not completely paralyse the ICC's involvement regarding the current situation. The Prosecutor can still lodge an investigation *proprio motu*, but the *Rome Statute* specifically states that a termination of proceedings should be upheld for a period of at least twelve months after the enactment of the

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190 Aa 13 and 15 of the *Rome Statute*.

191 Aa 15*bis*5 and 6 of the *Rome Statute*.

192 A 16 of the *Rome Statute*.

suspension thereof. This request may also be renewed by the council, grounded on the same conditions.<sup>193</sup>

### 2.3.9 *Issues of admissibility: Complementarity*

The ICC is intended to complement national jurisdictions in that it will intervene only if a member state cannot or will not prosecute a case itself.<sup>194</sup> The *Rome Statute* lists several situations where a case would be inadmissible, such as where a situation is being investigated or prosecuted by a state which has jurisdiction over it. This ensures the effective operation of the complementarity principle, in that the ICC grants the concerned judicial authority of the state party the opportunity to deal with the situation first. However, if the member state concerned is genuinely unable or unwilling to commence with proceedings with regard to the crime committed, the prosecutor may intervene.<sup>195</sup> The term "genuinely" is used as the criterion threshold in determining whether a case should be declared admissible or inadmissible before the ICC with respect to a state's inability or unwillingness. The criterion "genuinely" was approved rather than any other of the terms considered, which included terms such as "ineffective",<sup>196</sup> "good faith", "diligently" and "sufficient grounds", due their largely subjective nature.<sup>197</sup> Cassese, Gaeta and Jones explain that since the ICC should not be envisaged as an appellate body for reviewing national decisions, those involved in the discussion thought that "genuinely" was the most objective term available to them for use in this context, and could satisfy their intentions of establishing a court of last resort. In determining if a state is "genuinely" unable or unwilling to take appropriate action, each of the aforementioned terms has its own sense for the ICC to consider.<sup>198</sup>

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193 Cassese, Gaeta and Jones *Rome Statute* 649-655.

194 A 17(a) of the *Rome Statute*.

195 Cassese, Gaeta and Jones *Rome Statute* 671-678.

196 Preamble of the *UN International Law Commission, Draft Statute for an International Criminal Court* including Annex and Appendices I to III 1994 "Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective".

197 Lee *The International Criminal Court* 34; Cassese, Gaeta and Jones *Rome Statute* 674.

198 Cassese, Gaeta and Jones *Rome Statute* 673-678.

Unwillingness refers to situations where proceedings are being undertaken or a national decision was made for the purpose of shielding the person concerned from criminal responsibility. This includes an unjustified delay in bringing to justice the person that is under suspicion of committing a crime. Lastly, "unwillingness" also refers to situations where proceedings are not being conducted impartially or independently by the national state concerned.<sup>199</sup>

Inability, on the other hand, refers to the inadequacy of the national state's legal system to successfully carry out proceedings, and includes:<sup>200</sup>

...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 otherwise unable to carry out its proceedings.

#### *2.3.10 Preliminary rulings regarding admissibility*

The prosecutor of the ICC is obliged to inform all member states if an investigation is initiated in accordance with articles 13 and 15. Within one month the state concerned may notify the prosecutor that the aforementioned state is investigating or has investigated persons accused or suspected of committing crimes within the jurisdiction of the court. On the basis of the latter, the prosecutor may defer to the state's investigation. The prosecutor's deferral is subject to revision six months after the initial deferral, or if there has been a change in the inability or willingness of the state concerned to carry out the investigation. The Appeals Chamber is open for either the state concerned or the prosecutor for use against any ruling made. When the prosecutor has deferred an investigation, the state will keep the prosecutor updated about the progress of all relevant proceedings without undue delay. A state may contest a ruling of the court and challenge the case's admissibility under article 19.<sup>201</sup>

#### *2.3.11 Challenges to the jurisdiction and the admissibility of a case*

According to article 17, the ICC may determine a situation's admissibility when an arrest warrant or summons has been issued for an accused under article 58 and

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199 Aa 17 2(a)-(c) of the *Rome Statute*.

200 A 17(3) of the *Rome Statute*; Cassese, Gaeta and Jones *Rome Statute* 677-678.

201 Aa 13(a), (c), 15, 18 and 19 of the *Rome Statute*.

where a case over which the concerned state has jurisdiction requires the acceptance of jurisdiction in accordance with article 12.<sup>202</sup>

The admissibility of a case may be challenged by any person or state, as said above. The inquiry as to a case's admissibility may be brought forward prior the commencement of a trial or under article 17 1(c). The ICC may also grant leave for a challenge to be brought forward during the commencement of the trial.

If a case is challenged on the ground of its admissibility, this will not affect or alter any conduct carried out by the prosecutor or by the court before the initial challenge was issued. If the ICC has concluded that a case is inadmissible, the decision is open for review by the prosecutor if new facts contradicting the previous decision are obtained in the future.<sup>203</sup>

## **2.4 Obligations of member states**

The ICC is not equipped with a police or military unit to enforce the *Rome Statute*, and is therefore not in a position to apprehend or transport perpetrators or to procure evidence. The ICC depends on the cooperation of its member states to accomplish such tasks. Assistance and support from member states is thus critical for an effective and functional ICC.<sup>204</sup>

### *2.4.1 Cooperation and Judicial Assistance*

Requests for cooperation are predominantly addressed to state parties, but the court may also submit requests to intergovernmental organisations for different forms of assistance, such as providing additional information or documents.<sup>205</sup> The ICC may also invite a non-member state to provide assistance subject to the aforementioned state's acceptance of the court's jurisdiction on an *ad-hoc* basis.<sup>206</sup>

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202 A 12 of the *Rome Statute*.

203 A 19 of the *Rome Statute*.

204 Cassese, Gaeta and Jones *Rome Statute* 1608-1610.

205 A 89 of the *Rome Statute*.

206 Aa 12(3) and 87 of the *Rome Statute*.

#### 2.4.2 Member States

State parties are bound by the *Rome Statute* to provide assistance and support to the ICC.<sup>207</sup> The general obligation to cooperate will be applicable to member states only and cannot be imposed on non-party states. Obligations imposed on member states are not limited to an exhaustive list,<sup>208</sup> and some of the duties include assistance to be given in the form the identification of persons and their whereabouts, the questioning of persons, collecting evidence, the temporary transfer of persons, the surrendering persons<sup>209</sup> and bringing them before the court, the search or seizure of property or information, and any further support not contrary to the national legislation of the state in question.<sup>210</sup>

Article 94 provides states with the opportunity to request a postponement if an immediate attempt to carry out the request could interrupt an already ongoing investigation or prosecution of a case different from that to which the request relates.<sup>211</sup> A postponement may also be requested pursuant to article 18 or 19 of the *Rome Statute* regarding the admissibility of a case.<sup>212</sup> If any impediments exist regarding the execution of a request, the concerned state is obliged to enter into immediate consultations with the ICC.<sup>213</sup>

If a state party fails to comply with a request, however, and thus hampers the operations of the ICC, the latter may refer the matter to the UNSC or the UNSC may refer the matter to the ASP.<sup>214</sup>

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207 A 86 of the *Rome Statute*; Cassese, Gaeta and Jones *Rome Statute* 1610-1615.

208 A 93 of the *Rome Statute*.

209 Cassese, Gaeta and Jones *Rome Statute* 1626-1627 ...Article 89(3) provides that member states should act according to their respective national legislation when transferring the person to the court. Regarding the latter, article 88 renders an excuse of absent legislation (to perform tasks assigned) unjustifiable. Oosterveld, Perry and McManus 2001 *Fordham ILJ* 774-775. Legislation regarding the adoption of the *Rome Statute* into the national law of Canada, the United Kingdom and Switzerland provides guidance to states on how to execute their obligations towards the ICC with regard to the surrender of individuals to the ICC.

210 Cassese, Gaeta and Jones *Rome Statute* 1610-1615.

211 A 94 of the *Rome Statute*.

212 A 95 of the *Rome Statute*.

213 A 97 of the *Rome Statute*.

214 A 87(7) of the *Rome Statute*.

### 2.4.3 Competing requests

Article 90 deals with the dilemma that may occur when the receiving state receives a request from both the ICC and any other state for the extradition/surrendering of the same individual due to the same conduct.<sup>215</sup> Preference will be given to the ICC if a determination has been made pursuant either to article 18 or article 19 that the case at hand is admissible or pursuant to the requested state's notification, as described above.<sup>216</sup> If the ICC determines that the requesting state is a non-member of the *Rome Statute*, preference would be given to the ICC if it can be proven that the case is admissible. There is, however, an exception. If the requested state is under an international obligation to extradite the person to the requesting state, these relevant factors should be considered first: the respective dates of the requests, the territory where the crime was committed, the nationalities of the victims and the possibility of a subsequent surrender between the requesting state and the ICC.<sup>217</sup>

If an individual is wanted by another state, but for conduct that constitutes a crime different from that for which the ICC seeks the surrendering of the person, the ICC will enjoy preference in this regard. However, if there rests an international obligation on the requested state to extradite the person to the requesting state, the requesting state should take the abovementioned factors into account, but should predominantly focus on the nature and gravity of the conduct itself. If a case has been deemed inadmissible by the ICC and extradition to the requesting state is refused, the requested state should notify the ICC of this decision.<sup>218</sup>

It is noteworthy to point out that the *Rome Statute* is silent on conflicting requests if they would be addressed from other entities besides member or non-member states. This absence may prove problematic when competing requests are addressed to member states from intergovernmental organisations or other hybrid

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215 A 90 of the *Rome Statute*.

216 A 90 of the *Rome Statute*.

217 Oosterveld, Perry and McManus 2001 *Fordham ILJ* 774-776.

218 Cassese, Gaeta and Jones *Rome Statute Materials*. "Rule 186: In situations described in article 90, paragraph 8, the requested State shall provide the notification of its decision to the Prosecutor in order to enable him or her to act in accordance with article 19, paragraph 10."

or international courts. However, the analysis and evaluation hereof falls outside this chapter's scope.<sup>219</sup>

#### 2.4.4 Procedures under the national law of state parties

The ICC itself does not prescribe relevant procedures for state parties to enforce obligations accorded to them. It is the responsibility of each individual state to implement relevant provisions of the *Rome Statute* into national law.<sup>220</sup> There are two schools of thought regarding the domestication of international law, namely the dualist and the monist approach. In the dualist system international law can be applied by domestic courts only if it is adopted by domestic courts or if it is transformed into local law by legislation. The monist approach is that international law can be applied directly without being adopted by domestic courts or transformed by legislation.<sup>221</sup>

In this regard, dualist countries would be able to follow normal procedure for adoption.<sup>222</sup> However, as the *Rome Statute* impacts a wide range of national laws and contains a vast number of technical obligations for states parties, even monist countries, which would normally require only the ratification of a treaty to make it legally binding regarding municipal law, should in this instance also adopt implementing legislation.<sup>223</sup>

To date, only 43 out of the 122 member-states have implemented complementary and cooperative legislation.<sup>224</sup> Despite Africa's engaged involvement in the

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219 See chap 3 par 4.2 Competing Obligations.

220 Dugard *International Law* 54-57.

221 Dugard *International Law* 42.

222 Dugard *International Law* 54-56. For illustrative purposes, three principle methods are employed in South Africa. Firstly, provisions of the treaty are embodied in an act of parliament. The next step would be attaching the treaty in the form of a schedule to a statute and finally, the treaty will come into effect in municipal law through the executive power by means of a proclamation or government gazette.

223 ICCNOW 2013 [http://www.iccnw.org/documents/FS\\_CICC\\_Implementation\\_Legislation\\_en.pdf](http://www.iccnw.org/documents/FS_CICC_Implementation_Legislation_en.pdf).

224 ICCNOW 2012 [http://www.iccnw.org/documents/Global\\_Ratificationimplementation\\_chart\\_May2012.pdf](http://www.iccnw.org/documents/Global_Ratificationimplementation_chart_May2012.pdf). *International Criminal Court Rome Statute Implementation Report Card Part One Amnesty International* 2010.

establishment of the ICC,<sup>225</sup> only 6 of these 43 countries are from Africa. They are South-Africa, Mauritius, Kenya, Uganda, Senegal and Comoros.<sup>226</sup>

## **2.5 Current cases before the ICC**

There are currently eight situations before the ICC, all of which originated from Africa. In total there have been four referrals from the Democratic Republic of Congo (DRC), Uganda, the Central African Republic (CAR) and Mali respectively. The UNSC has referred two situations in total thus far, namely those of Sudan and Libya. The Prosecutor of the ICC has referred, *proprio motu*, two situations to the concerned court, that originated from Kenya and Côte d'Ivoire.<sup>227</sup>

With respect to situation of the DRC, Thomas Lubanga Dyilo, leader of the Patriotic Forces of Resistance (PFR), the military wing of the Union of Congolese Patriots (UCP), was sentenced on 10 July 2012 to a period of 14 years of imprisonment, marking the ICC's first conviction since its establishment in 2002. Germain Katanga (alleged commander of the *Forces de Résistance Patriotique d'Ituri* (FRPI)) was sentenced to 12 years of imprisonment on four counts of war crimes and one count of crimes against humanity on 7 March 2014.<sup>228</sup>

Regarding the situation in Uganda, the ICC has issued arrest warrants for 5 senior LRA leaders, Joseph Kony (alleged commander in chief of the Lord's Resistance Army (LRA)) Vincent Otti, Okot Odhiambo and Dominic Ongwen. The suspects are still at large.<sup>229</sup>

Concerning the allegations of crimes against humanity committed in the CAR, Jean-Pierre Bemba Gombo, president of the Movement for the Liberation of Congo, was arrested on the 24 May 2008. In addition of Aimé Kilolo Musamba,

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225 See chap 2 par 2.4 Africa's commitment to the establishment of a permanent international criminal court.

226 CICC 2013 *Implementation of the Rome Statute* <http://www.iccnw.org/?mod=romeimplementation&idudctp=10&show=all> ; Du Plessis 2012 ISS 10.

227 See chap 2 par 3.6.1 Referral and deferral by the United Nations Security Council .... "This is a clear deviation from the Law of Treaties. Article 26 of the *Vienna Convention* states that every treaty in force is binding only upon the states party to it."

228 ICC 2014 [http://www.icccpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icccpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx).

229 ICC 2014 [http://www.icccpi.int/\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icccpi.int/_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx).

Fidèle Babala Wandu, Jean-Jacques Mangenda Kabongo and Narcisse Arido were also indicted. Confirmation of the charges is still pending.<sup>230</sup>

The Prosecutor of the ICC used her *proprio motu* powers<sup>231</sup> to conduct an investigation into post-election violence that occurred in Kenya in 2007-2008. Authority was granted by the Pre-Trial Chamber and six arrest warrants were issued on 8 March 2011. The trial of President Kenyatta is set to resume on the 10 of October 2014 and Vice President Ruto's trial is still ongoing.<sup>232</sup>

On the 31 March 2005 the UNSC referred<sup>233</sup> the prosecution of those responsible for the crimes committed in Darfur, Sudan (a non-state party to the *Rome Statute*). The Pre-Trial Chamber I issued an arrest warrant for the Sudanese President Omar al-Bashir. The crimes Al-Bashir is suspected of committing include crimes against humanity<sup>234</sup> and war crimes.<sup>235</sup> The Sudanese President remains at large.<sup>236</sup>

On 16 May 2011 the Prosecutor applied to the ICC Pre-Trial Chamber I for an arrest warrant against the Libyan President Muammar al-Gaddafi, his son Saif al-Islam al-Gaddafi and Abdullah Al-Sensussi, the Libyan Head of Intelligence, for suspected crimes against humanity.<sup>237</sup> On the 21 May 2014 the case of Saif Al Islam Gaddafi was confirmed as admissible. The case of Al-Senussi was declared inadmissible due to Libya's explicit expression illustrating the country's genuine will and ability to conduct investigations domestically. The arrest warrant issued against Muammar al-Gaddafi was terminated following his assassination.<sup>238</sup>

Côte d'Ivoire recently ratified the *Rome Statute* on the 15 February 2013. On 30 November 2011 Laurent Koudou Gbagbo was arrested on charges of committing

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230 ICC 2014 [http://www.iccpi.int/\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.iccpi.int/_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx).

231 See par 3.6 Trigger mechanisms of the ICC's jurisdiction.

232 ICC 2014 [http://www.iccpi.int/\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.iccpi.int/_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx).

233 2.2.6.2 Referral and deferral by the United Nations Security Council.

234 See chap 2 par 3.2.2 Crimes against humanity.

235 See chap 2 par 3.2.3 War Crimes.

236 ICC 2014 [http://www.iccpi.int/\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.iccpi.int/_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx).

237 See chap 2 par 3.2.2 Crimes against humanity.

238 ICC 2014 [http://www.iccpi.int/\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.iccpi.int/_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx).

crimes against humanity<sup>239</sup> and was transferred to the ICC. Blé Goudé was surrendered to the ICC by the national authorities of Côte d'Ivoire and made his initial appearance before the ICC on the 27 March 2014.<sup>240</sup>

A detailed report referred to as the Situation in Mali, Article 53(1) Report of 16 January 2013<sup>241</sup> contains the grounds for admissibility and gravity<sup>242</sup> which form the basis of the Prosecutors' investigation into the Mali situation.<sup>243</sup> The investigation revolves around the several insurgency groups fighting for independence for the greater northern part of Mali known as Azawad.

## **2.6 The ICC: Successes and failures over its 12 years of existence**

The immense support the *Rome Statute* gained that resulted in its ratification and enactment four years thereafter is already a victory in itself. It specifically displays international desire for the establishment of a permanent mechanism aimed at eradicating impunity.<sup>244</sup>

The ICC is currently investigating eight situations, as described above, and several preliminary investigations have been launched into the states of Afghanistan, Chad, Colombia, the Comoros, Georgia, Guinea, Honduras, Nigeria, the Occupied Palestinian Territories, and the Republic of Korea.<sup>245</sup> Just in 2014 there has been one conviction, four confirmations of charges, and four decisions about the schedules of trials and two suspects have already been surrendered to the court. Regarding the ICC's progress to date, 2014 may be considered as a very successful year thus far.<sup>246</sup>

On the 15 June 2012 the ICC swore in its second chief prosecutor, Fatou Bensouda. This event was applauded by the international community and signified

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239 See chap 2 par 3.2.2 Crimes against humanity.

240 ICC 2014 [http://www.icccpi.int/\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icccpi.int/_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx).

241 ICC *Situation in Mali* Article 53(1) Report.

242 See *ICC Situation in Mali* Article 53(1) Report 28-34.

243 ICC 2013 [http://www.icccpi.int/\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icccpi.int/_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx).

244 Kotecha 2013 <http://justiceinconflict.org/2013/09/13/the-icc-what-counts-as-a-success/>.

245 ICCNOW 2014 <http://www.iccnw.org/?mod=casessituations>.

246 ICC 2014 [http://www.icccpi.int/\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icccpi.int/_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) accessed 10 August 2014.

an important step in resolving the then tensions between Africa and the ICC, which are discussed in more detail below.<sup>247</sup>

Several technical aspects of the ICC's operative structure have also been regarded as worthy achievements, specifically with regard to its complementarity nature. This has been regarded as a significant feature since it confines the ICC from becoming an unrestricted power and promoted the development of states' own national prosecution mechanisms. An example hereof can be seen in the Libyan situation regarding Abdullah Al-Sensussi, as discussed above.<sup>248</sup>

With the addition of the crime of aggression, which was adopted at the 2010 Kampala Review Conference, the ICC's flexibility to adapt to the ever changing environment of international law was highlighted.<sup>249</sup> Another innovative feature the ICC endorsed was the establishment of a trust fund for victims<sup>250</sup> and the opportunity for victims to participate in trials, thus contributing to greater legitimacy regarding proceedings.<sup>251</sup>

Although not all of the ICC's successes<sup>252</sup> are mentioned here, it is clear that the *Rome Statute* created a permanent international court in accordance with contemporary international customary law.<sup>253</sup> To date, the ICC boasts a membership of 122 countries, which leaves another 17 that have yet to accede to ratification.<sup>254</sup>

However, despite all its successes it has been argued that the ICC's victories have largely been paper victories, and that its promise has not yet been fully realised with respect to the prosecution and sentencing of perpetrators. Of the eight situations being investigated by the ICC there have only been two

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247 See chap 2 par 2.5 Current cases before the ICC; Donovan 2012 <http://www.internationalpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future/>.

248 See chap 2 par 2.5 Current cases before the ICC.

249 Donovan 2012 <http://www.internationalpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future/>.

250 ICC 2013 <http://www.icc-cpi.int/iccdocs/PIDS/TL/timeline.html>.

251 O'Brien 2008 "The International Criminal Court" 7.

252 ICC 2014 <http://www.icc-cpi.int/iccdocs/PIDS/TL/timeline.html>.

253 Bassiouni 2010 [http://www.insidejustice.com/intl/2010/03/31/cherif\\_bassiouni\\_international\\_criminal/](http://www.insidejustice.com/intl/2010/03/31/cherif_bassiouni_international_criminal/); Cassese, Gaeta and Jones *Rome Statute* 3.

254 ICCNOW 2014 <http://www.iccnw.org/?mod=casessituations>.

convictions in a period that stretches over a decade.<sup>255</sup> On 10 March 2012 the ICC convicted its first perpetrator, Thomas Lubanga Dyilo of Congo, and its second and most recent conviction (in 2014) was the Congolese commander of the FRPI, Germain Katanga. Bassiouni explains that with the ICC's extravagant budget (the approved budget totalled 163 113 591.56 US Dollars for 2014) and excessive bureaucratic employment surpassing 1100 personnel, the result of only two convictions so far is troublesome.<sup>256</sup> With such a low conviction rate within its 12 years of operation, the ICC has not assured the international community that there is a feasible basis for its continued existence. Bassiouni also raises the question of whether or not the money spent on the ICC wouldn't be better utilised if granted to the development of measures pertaining to conflict prevention or mitigation and not to prosecution.<sup>257</sup>

The existence of the ICC has also highlighted the problem of harmonising peace and justice. While there has been significant support for the notion that justice ultimately creates lasting peace, there have been several specific incidents which sparked tensions between the pursuit of international justice and peace initiatives.<sup>258</sup> The most significant example of this is the situation in Sudan. Since the indictment of President Al-Bashir, the AU has been strongly involved in various attempts to defer the investigation. The AU has explicitly stated that the ICC is jeopardising ongoing peace processes in the Darfur region, and thus ultimately undermining Africa in its attempt to achieve reconciliation.<sup>259</sup> This has been just one of the various accusations Africa has made about the ICC and its *modus operandi* over the past several years, which accusations are discussed more extensively in chapter three. However, it is noteworthy that since the ICC has investigated and tried only African situations, its current reputation is based largely on Africa itself. Prior to the adoption of the *Rome Statute*, the initial

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255 See chap 2 par 5 Current Cases before the ICC.

256 Bassiouni 2010 [http://www.insidejustice.com/intl/2010/03/31/cherif\\_bassiouni\\_international\\_criminal/](http://www.insidejustice.com/intl/2010/03/31/cherif_bassiouni_international_criminal/).

257 Bassiouni 2010 [http://www.insidejustice.com/intl/2010/03/31/cherif\\_bassiouni\\_international\\_criminal/](http://www.insidejustice.com/intl/2010/03/31/cherif_bassiouni_international_criminal/).

258 See chap 3 par 2.2.2 *Establishing the ICLS: anti-ICC sentiments*. ISS Seminar Report: *The International Criminal Court: Justice Slowly but Surely?* 2012 <http://www.issafrica.org/events/iss-seminar-report-the-international-criminal-court-justice-slowly-but-surely>. O'Brien 2008 "The International Criminal Court" 1-8.

259 See chap 2 par 2.5 Current cases before the ICC.

enthusiasm of Africa was significant, but this eventually diminished over time due to several occurrences such as the events in Sudan and Kenya, which still remain of critical concern for the AU.<sup>260</sup>

However, it should be underscored that the existence of the ICC represents the achievement of a significant milestone in international criminal justice. Cassese, Gaeta and Jones also states that:<sup>261</sup>

For all its imperfections, the Statute of the International Criminal Court ... was a major breakthrough in the effective enforcement of international criminal justice.

Wouters reassures us that since the ICC is the first of its kind and relatively new in the international justice department, it will continue to improve in time.<sup>262</sup> O'Brien also states that.<sup>263</sup>

The creation of the International Criminal Court is a potential step towards a more just society, in giving real substance to the concept of ending impunity for the worst crimes against mankind.

It is important to emphasise that Africa plays a pivotal role in the success of the ICC.<sup>264</sup> The pressing issues regarding the AU and the ICC might indicate that Africa is prioritising peace initiatives over justice, but it does not follow that Africa does not support justice.<sup>265</sup>

## **2.7 Conclusion**

The need for a permanent international criminal court was becoming more apparent throughout the years. The ICC's predecessors were effective but lacked the extensive geographical and enduring authority to prosecute perpetrators for the most severe international crimes regardless of their place of origin. Africa's

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260 See chap 3 par 2.2 The desire for an International Criminal Law section of the African Court; ISS 2012 <http://www.issafrica.org/events/iss-seminar-report-the-international-criminal-court-justice-slowly-but-surely>.

261 Cassese, Gaeta and Jones *Rome Statue* 3.

262 ISS 2012 <http://www.issafrica.org/events/iss-seminar-report-the-international-criminal-court-justice-slowly-but-surely>.

263 O'Brien 2008 "The International Criminal Court" 1-8.

264 See chap 2 par 2.4 Africa's commitment to the establishment of a permanent international criminal court.

265 ISS 2012 <http://www.issafrica.org/events/iss-seminar-report-the-international-criminal-court-justice-slowly-but-surely>.

support for the creation of such a court was evident from the start, a fact which effectively ensured the continent's involvement in the creation of the ICC and its comprehensive representation on all major stages with respect to its operation.<sup>266</sup>

The ICC is restricted, however, to trying only three of the most heinous crimes accorded international customary law status.<sup>267</sup> This at least ensures universal jurisdiction over any individual who may be guilty of committing these crimes. The jurisdiction of the ICC can be conferred upon a situation only by a referral from a member state, the UNSC, or the prosecutor using her *proprio motu* powers.<sup>268</sup> The ICC also intends to act only as a complementarity institution thus, granting states the opportunity to address related transgressions themselves. The ICC will therefore intervene only if a state is genuinely unable or unwilling to initiate the appropriate proceedings itself.<sup>269</sup>

The *Rome Statute* clearly defines what the ICC expects from its member states with regard to the obligations it imposes upon them. These duties include the surrendering of perpetrators to the ICC and incorporating domestic legislation to honour their obligations to the said court.<sup>270</sup>

In addition to Africa's involvement in drafting the *Rome Statute*, thus demonstrating their approval of the *modus operandi* of the court, 34 out of 54 African states agreed to be bound by the *Rome Statute* in order to enhance efforts to establish peace and eliminate impunity on the continent.<sup>271</sup>

However, the indictment of Al-Bashir, the incumbent Head of State of Sudan, illustrated the ICC's far jurisdictional reach. Although Sudan was referred upon the UNSC's discretion, Africa expressed great concern over the indictment of a sitting Heads of State, especially with respect to a non-member state. This led to accusations against the ICC, implying that the said court was targeting African

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266 Du Plessis 2010 *ISS* 5-7. See chap 2 par 2.3 *Rome Statute* and par 2.4 Africa's commitment to the establishment of a permanent international criminal court.

267 See chap 2 par 3.1 Customary International Law Crimes.

268 See chap 2 par 3.6 Trigger mechanisms of the ICC's jurisdiction.

269 See chap 2 par 3.9 Issues of admissibility: Complementarity.

270 See chap 2 par 4 Obligations of Member States.

271 See chap 2 par 2.3 The Rome Statute and 2.4 Africa's commitment to the establishment of a permanent international criminal court.

states and undermining Africa's efforts to resolve its own problems.<sup>272</sup> Despite Africa's dislike of the indictment, every member state is still obliged to surrender the concerned individual to the ICC in accordance with article 93 of the *Rome Statute*.<sup>273</sup> Africa is experiencing difficulty in acting accordingly, however. The continent soon expressed its feelings in the matter by requesting deferments and amendments to alter the ICC's procedural and substantive nature, specifically with respect to the notion of immunity.<sup>274</sup> The relationship between the ICC and Africa was even further weakened when the current President and Vice-President of Kenya were indicted.<sup>275</sup>

Despite its low successful prosecution track record, the *Rome Statute* has surely established the benchmark in international criminal prosecution, and given more time the ICC would certainly enhance its successes in the field.<sup>276</sup> However, although Africa has been a prominent figure in the establishment of the court, due to its recent disputes with the ICC it seems to be isolating itself now from the permanent court's continuous development.

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272 See chap 2 par 3.3 Trigger mechanisms of the ICC's jurisdiction.

273 Du Plessis 2010 *ISS* 5-7.

274 See chap 2 par 2.5 Current cases before the ICC.

275 See chap 2 par 2.5 Current cases before the ICC.

276 See chap 2 par 2.6 The ICC: Successes and failures over its 12 years of existence.

## Chapter 3

### The proposed International Criminal Law Section of the African Court

#### 3.1 Introduction

In this chapter an investigation of the proposed establishment of the ICLS will be conducted, including its jurisdiction over crimes and the obligations that will be conferred upon states that are parties to the *Protocol*.<sup>277</sup>

Under the establishment of the proposed ICLS, Africa's projected endeavour to establish an African court aimed at prosecuting international crimes will be examined.<sup>278</sup> The focus will be upon the supposed legal basis upon which the AU will establish the said court, and subsequently Africa's displeasure with the ICC, and the reason for the displeasure. The progress made by the ACHPR over its several years of existence will be discussed and evaluated. Thereafter, the unification of the ACHPR and the ACJ will be briefly explained. In addition to the aforementioned, the amendments to the *Protocol* that aim to establish a criminal law section will be discussed and analysed.<sup>279</sup>

The crimes listed in the *Protocol* will be individually analysed and evaluated in order to establish whether or not they rise to the level of international customary law status.<sup>280</sup> This analysis is of vital importance to the notion of immunity, which is firmly linked with customary international law crimes, as will be discussed in chapter 4.<sup>281</sup>

Thereafter a description will be given with regard to the obligations conferred upon member states of the *Protocol*, in addition to the judicial and cooperative

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277 AU Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Exp/Min/IV/Rev.7 2012 Revisions up to Tuesday 15th May 2012.

278 See chap 3 par 2.1 The desire for a regional international criminal law section of the African court.

279 See chap 3 par 2.3 The Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

280 See chap 3 par 3 Jurisdiction of the ICLS.

281 See chap 4 par 6.2 The relationship between customary international law crimes and the notion of immunity.

assistance the ICLS may seek from its member states, regional and international bodies.<sup>282</sup>

## **3.2 Establishment**

### *3.2.1 Leading up to the proposal of an International Criminal Law Section*

The ACHPR was established by the *Organization of African Unity (OAU), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998*<sup>283</sup> (ACHPR Protocol), which was adopted by the African Union's predecessor, the OAU. The ACHPR Protocol came into force on 25 January 2004 after it was ratified by 15 countries.<sup>284</sup> The ACHPR has jurisdiction over all situations pertaining to the application and interpretation of the *OAU African Charter on Human and Peoples' Rights ("Banjul Charter") 27 June 1981 CAB/LEG/67/3 rev 5 21 ILM 58 (1982)*<sup>285</sup> as well as any other relevant human rights instruments ratified by the states concerned.<sup>286</sup> Human rights issues are of higher priority, however, than settling disputes regarding general socio-political issues.<sup>287</sup>

The ACHPR handed down its first judgment on 25 December 2009 in the case of *Yogogombaye vs Senegal 001/2008 (ACHPR) 15 December 2009*.<sup>288</sup> The application was brought forward by a Chadian national, requesting the suspension of ongoing proceedings against the former President of Chad, Hissène Habré. The ACHPR held that according to Article 34 (6) of the *ACHPR Protocol*<sup>289</sup> the ACHPR had no jurisdiction over the case, since Senegal had not accepted the concerned court's jurisdiction in accordance with the particular article.<sup>290</sup> This provision has been subjected to scrutiny in that it ultimately denies access to

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282 See chap 3 par 4 Obligations of member states.

283 A 1 of the *Organization of African Unity (OAU), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights 10 June 1998*.

284 ACHPR 2013 <http://www.african-court.org/en/index.php/about-the-court/brief-history>.

285 *Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter") 27 June 1981, CAB/LEG/67/3 rev 5 21 ILM 58 (1982)*.

286 A 3 of the *ACHPR Protocol*.

287 Abass 2013 NILR 30-31.

288 *Yogogombaye v Senegal 001/2008 (ACHPR) 15 December 2009*.

289 A 34 (6) of the *ACHPR Protocol*.

290 001/2008 (ACHPR) 15 December 2009 40-42.

individuals if their state has not accepted the ACHPR's competence. Due to the grave human rights violations that plague the African continent and its people, the ACHPR should consider amending article 34(6)<sup>291</sup> to grant access to those who need it the most and remove the barrier, which arises from a lack of political will.<sup>292</sup> The judgment received additional criticism regarding its failure to engage in substantive human rights issues and its focusing more on technicalities regarding its legal procedure, such as the *locus standi*, consequently hindering the chances of arriving at a timely judgment. In addition, the actual rationale behind the judgment covered only a mere three pages, while the remaining ten pages were devoted to facts and procedural issues. This illustrated a lack of due diligence and comprehensiveness on the ACHPRs' part.<sup>293</sup>

In 2011 the ACHPR was applauded by the international community<sup>294</sup> for its decision in the *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya 004/2011 (ACHPR) 25 March 2011*<sup>295</sup> case, where the court issued provisional orders against Libya, stating that:<sup>296</sup>

- 1) The Great Socialist People's Libyan Arab Jamahiriya must immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party.
- 2) The Great Socialist People's Libyan Arab Jamahiriya must report to the Court within a period of fifteen (15) days from the date of receipt of the Order, on the measures taken to implement this Order.

Another noteworthy judgment was delivered by the ACHPR in the *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v The Republic of Burkina Faso No. 013/2011 (ACHPR) 28 March 2014* case.<sup>297</sup> The application highlighted the lack of effort from Burkina Faso's government to deliver justice regarding the alleged assassination of M. Norbert

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291 A 34(6) of the *ACHPR Protocol*.

292 Du Plessis 2012 *ISS* 2; Mgimba and Waters 2010 *AJIL* 28-29.

293 Mgimba and Waters 2010 *AJIL* 28-30.

294 Chambers of Nine Bedford Row 2012 [http://www.criminalinternationallaw.com/61/section.nc?form\\_12.replyids=69&startpointt150i53=60](http://www.criminalinternationallaw.com/61/section.nc?form_12.replyids=69&startpointt150i53=60).

295 *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya 004/2011 (ACHPR) 25 March 2011*.

296 004/2011 (ACHPR) 25 March 2011 24.

297 *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v The Republic of Burkina Faso No 013/2011 (ACHPR) 28 March 2014*.

Zongo, an investigating journalist and director of the weekly paper, *l'Indépendant*, and his companions, namely, Abdoulaye Nikiema, Ernest Zongo and Blaise Ilboudo. The ACHPR held that the state had violated its obligations under Article 7 as well as Article 9(2) of the *Banjul Charter*<sup>298</sup> due to its non-compliance with its obligations "...to act with due diligence in seeking, trying and judging the assassins of Norbert Zongo and his companions."<sup>299</sup> Both parties were given 30 days to submit their arguments before the ACHPR rules on a decision regarding reparations.<sup>300</sup>

The ACHPR can be regarded as a positive step in adjudicating human rights issues, which Africa desperately needs. It has a progressive fiscal foundation<sup>301</sup> and its administration has maintained a decent standard over the past several years.<sup>302</sup> However, its effectiveness is hindered by several impediments, such as the unfortunate drafting of article 34(6) of the *ACHPR Protocol*<sup>303</sup> and the lack of extensive engagement in human rights issues regarding its judgments.<sup>304</sup> However, considering its development to date, the ACHPR has shown that it is gradually taking shape administratively and judicially.<sup>305</sup>

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298 Aa 7 and 9(2) of the *Banjul Charter*.

299 Coalition for an Effective African Court on Human and Peoples' Rights 2014 [http://www.africancourtcoalition.org/index.php?option=com\\_content&view=category&layout=blog&id=42&Itemid=33&lang=en](http://www.africancourtcoalition.org/index.php?option=com_content&view=category&layout=blog&id=42&Itemid=33&lang=en).

300 No 013/2011 (ACHPR) 28 March 2014. IJR Centre 2014 <http://www.ijrcenter.org/2014/04/08/african-court-on-human-and-peoples-rights-issues-judgment-in-killing-of-investigative-journalist/>.

301 Nmehielle 2013 *Law Democracy & Development* 322-333 "In the last seven years the budgetary outlook of the Court has been progressive, but the budget effectively underspent as demonstrated for the three years – 2010-2012. In 2010 when the Court began to report publicly on its budget, its budget allocation was 7,939,375 USD, comprising 6,169,591 USD as operational budget and 1,569,784 USD as programme budget. Of this total budget allocation, 6,169,591 USD were from AU member states' contributions (operational budget) and the rest classified as 'programme budget; came from 'foreign partners' - 863,309 USD as an allocation from the European Union (EU) Support Programme for the African Union (EU-AU Support) and 906,475 USD as contribution by the German Technical Cooperation – (GTZ contribution), which the GTZ itself managed. In addition to the above regular budget, in 2010 the Court received the sum of 200,000 USD from the MacArthur Foundation in support of its library."

302 Nmehielle 2013 *Law Democracy & Development* 338.

303 Nmehielle 2013 *Law Democracy & Development* 338 "The lack of Article 34(6) declaration by a majority of the States Parties to the Court's Protocol leaves it with a limited constituency in its utilisation for human rights protection and enforcement."

304 001/2008 (ACHPR) 15 December 2009.

305 Nmehielle 2013 *Law Democracy & Development* 338.

In 2003 the *AU Protocol of the Court of Justice of the African Union, 11 July 2003*<sup>306</sup> was adopted and it entered into force in 2009, but the establishment of the would-be ACJ was superseded<sup>307</sup> by the adoption of the *Protocol on the Statute of the African Court of Justice and Human Rights*<sup>308</sup> on 1 July 2008. This protocol signalled a merger between the already existing ACHPR and the African Court of Justice into a single court, namely the ACJHR. The ACJHR will be the main judicial organ of the AU. The merged court will handle all legal disputes regarding the interpretation and application of the *Organization of African Unity (OAU) Constitutive Act of the AU 1 July 2000*<sup>309</sup> (*Constitutive Act*), AU treaties and all subsidiary legal instruments adopted within the framework of the AU, the *African Charter on Human and Peoples' Rights* and any question of international law.<sup>310</sup> However, the ACJHR is yet to come into existence, with 12 of 15 ratifications by African states still needed.<sup>311</sup>

### 3.2.2 *The desire for an International Criminal Law Section of the African Court*

#### 3.2.2.1 Establishing the ICLS: the Constitutive Act and common law

The reason for the establishment of an African court that vests with the extraordinary jurisdiction to try international crimes remains under scrutiny. However, the *Constitutive Act* provides a plausible basis upon which the ICLS may be created. Article 4(h) of the said act states that:<sup>312</sup>

The Union shall function in accordance with the following principles:

The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity;

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306 *AU Protocol of the Court of Justice of the African Union* 11 July 2003.

307 AFRICANLII 2013 <http://www.africanlii.org/node/53>.

308 A 2 of the *African Union, Protocol on the Statute of the African Court of Justice and Human Rights* 1 July 2008.

309 *Organization of African Unity (OAU) Constitutive Act of the AU* 1 July 2000.

310 Du Plessis 2012 *ISS* 3.

311 Coalition for an Effective African Court on Human and Peoples' Rights 2013 [http://www.africancourtcoalition.org/index.php?option=com\\_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12](http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12).

312 A 4(h) of the *Constitutive Act*.

Thus, African states are empowered by the concerned provision to maintain peace and security on the continent with respect to war crimes, genocide, and crimes against humanity.<sup>313</sup> However, Du Plessis points out that this provision evidently limits the AU to taking action with respect to only the three listed crimes.<sup>314</sup> In addition, Murungu also alleges that the intervention in article 4(h) in the *Constitutive Act* must be considered to be of a military and not a judicial nature.<sup>315</sup> This position gains traction through Kioki's<sup>316</sup> interpretation of the intervention clause.<sup>317</sup> Kioki explains that the *AU, Protocol Relating to the Establishment of the Peace and Security Council of the African Union*<sup>318</sup> (*PSC Protocol*) provides for the establishment<sup>319</sup> of an African Standby Force:<sup>320</sup>

...composed of multidisciplinary contingents with ... military components, to carry out peace support operations under Article 4 (h) and (j) of the Constitutive Act. The Force will operate at three possible levels: as an African Force under the AU; as a Regional Brigade at the level of a Regional Mechanism for conflict prevention, management and resolution; or at the level of a lead nation intervening on behalf of the African Union.

The provision indicates that any intervention carried out on behalf of article 4(h) will be of a military nature. Thus Murungu states that if article 4(h) is "...to be of any aid, it must be by analogy only."<sup>321</sup>

Notwithstanding the aforementioned, it should be noted that the AU is governed by the common law of international organisations developed significantly through UN practice.<sup>322</sup> Since all such inter-governmental bodies are regulated by the common law system, the interpretation of their internal acts and functions are subjected to the same legal regime.<sup>323</sup> Since the majority of these organisations

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313 Murungu 2011 *JICJ* 1080-1081; Du Plessis 2012 *ISS* 7-8.

314 Du Plessis 2012 *ISS* 8.

315 Murungu 2011 *JICJ* 1081-1082

316 Kioki 2003 *ICRC* 824.

317 A 4(h) of the *Constitutive Act*.

318 *AU Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

319 A 2(2) of the *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*.

320 Kioki 2003 *ICRC* 823-824.

321 Murungu 2011 *JICJ* 1080.

322 Evans *International Law* 26.

323 Du Plessis 2012 *ISS* 8.

are established by treaties, they are subjected to interpretation through article 31(1) of the *Vienna Convention*, which states that.<sup>324</sup>

...a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The International Court of Justice (ICJ) affirmed the aforementioned, stating:<sup>325</sup>

The constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.

In the ICJ's advisory opinion regarding the *UN General Assembly, Reparation for injuries incurred in the service of the United Nations* 3 December 1948, A/RES/258 it considered that:<sup>326</sup>

Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.

The *Vienna Convention* also states in article 31(2) that in:<sup>327</sup>

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: ...any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

The preamble of the *Constitutive Act* broadly describes its determination:<sup>328</sup>

...to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them to discharge their respective mandates effectively.

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324 A 31(1) of the *Vienna Convention*.

325 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* ICJ Reports 1996 226; *International Court of Justice (ICJ)* 8 July 1996 19.

326 *UN General Assembly, Reparation for injuries incurred in the service of the United Nations* 3 December 1948 A/RES/258.

327 A 31(2) of the *Vienna Convention*.

328 Preamble of the *Constitutive Act*.

In addition, the preamble of the *PSC Protocol* endorses the AU's desire:<sup>329</sup>

...to establish an operational structure for the effective implementation of the decisions taken in the areas of conflict prevention, peace-making, peace support operations and intervention, as well as peace-building and post-conflict reconstruction in accordance with the authority conferred in that regard by Article 5(2) of the Constitutive Act of the African Union.

Notwithstanding the limitations set out in Article 4(h) of the *Constitutive Act*, in addition to its vagueness with respect to its intervention clause, it may be concluded that "...if the AU's power to imbue the African Court with international criminal jurisdiction lies anywhere – it is in article 4(h) of the AU's Constitutive Act."<sup>330</sup>

### 3.2.2.2 Establishing the ICLS: anti-ICC sentiments

Prior to the adoption of the *Rome Statute*, Africa's support for the creation of a permanent international criminal court was evident.<sup>331</sup> The substantial display of Africa's involvement in establishing the ICC was overwhelming, where the continent's support continued after the *Rome Statute's* entry into force.<sup>332</sup> The Democratic Republic of Congo (DRC), Uganda, Central African Republic (CAR) and Mali all referred situations within their state to the ICC, relying on the court to investigate and prosecute those who were responsible for committing the particular customary international law crimes in reference.<sup>333</sup>

In 2005 the UNSC referred the situation in Sudan to the ICC, which consequently led to the indictment of its sitting Head of State, Omar Al-Bashir. Africa raised its concerns over the indictment of a sitting Head of State, specifically pointing out the UNSC's failure to defer the situation on the AU's request. This contretemps will be discussed in more detail below.<sup>334</sup>

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329 Preamble of the *PSC Protocol*.

330 Du Plessis 2012 *ISS* 8.

331 See chap 2 par 2.1.4 Africa's commitment to the establishment of a permanent international criminal court.

332 See chap 2 par 2.1.4 Africa's commitment to the establishment of a permanent international criminal court.

333 See chap 2 par 5 Current cases before the ICC.

334 Du Plessis 2012 *ISS* 67-70.

Another catalyst to the deteriorating relationship between Africa and the ICC was added in 2011. After concerns had been raised about the post-election violence in Kenya in 2007-2008, the prosecutor sought authority to initiate an investigation *proprio motu* into the situation. On 8 March 2011 the prosecutor of the ICC issued six arrest warrants, of which two were addressed to the President, Uhuru Kenyatta, and the Vice-President, William Ruto, of Kenya. Kenya informed the ICC of the state's intention to withdraw from the ICC several times,<sup>335</sup> supplying numerous reasons for doing so.<sup>336</sup> On 11 and 12 October 2013 an extraordinary AU summit was requested by the Minister of Foreign Affairs of Rwanda and Kenya<sup>337</sup> to discuss the possibility of all African member states withdrawing from the ICC.<sup>338</sup> However, the meeting did not lead to a mass withdrawal but to a declaration being drawn up which approved Africa's affirmation of granting immunity to sitting Heads of State and relevant government officials<sup>339</sup> from customary international law crimes such as genocide, war crimes and crimes against humanity.<sup>340</sup>

The following discussion will focus on several arguments that have been raised against the ICC.<sup>341</sup> Firstly, suggestions were made that the ICC is a hegemonic<sup>342</sup> instrument of western powers. Secondly, the AU contends that the ICC is undermining rather than assisting Africa in its efforts to resolve its current problems. Thirdly, focus is drawn to Africa's concerns over the ICC's relationship with the UNSC, specifically with regard to referrals and deferrals and the jurisdictional reach of the ICC over non-member states. Finally, the issue of the

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335 Jalloh 2013 <http://www.ejiltalk.org/kenya-should-reconsider-proposed-withdrawal-from-the-icc>.

336 See chap 2 par 2.5 Current cases before the ICC ... "Their motion claimed that there had been a significant change in governance since they, the latter, were elected "lawfully"... On 31 March 2011 Kenya stated to the ICC that the case against three of the accused were inadmissible. Kenya explained that they adopted a new constitution and legal forms which enables them to carry out prosecution of the said accused".  
Maqungo "The Implications of African States Withdrawing from the ICC".

338 AU Extraordinary 2013 <http://summits.au.int/en/icc>.

339 ISS 2013 <http://www.issafrica.org/events/whose-interests-were-served-in-addis-ababa-reviewing-the-aus-decision-on-its-relationship-with-the-icc>.

340 See chap 4 par 6.2 The relationship between customary international law crimes and the notion of immunity.

341 Du Plessis 2010 /ISS 13-18.

342 Oxford Dictionaries 2014 <http://www.oxforddictionaries.com/definition/english/> ... "Ruling or dominant in a political or social context."

AU's revulsion against the indictment of incumbent Heads of State will be addressed.

The first argument is based upon the allegation that the ICC is imbued with western traits and ultimately targets and discriminates against Africa - specifically because all current cases before the ICC are from Africa. This argument is also based largely upon the accusation that the OTP is not pursuing justice around the world, but that the prosecutor confines aspirations to pursue justice to Africa alone.

AU commissioner Jean Ping repeatedly stated on various occasions that Africa is being used as a laboratory to test the new, profound international law, this undermining Africa rather than assisting it, and unfairly targeting Africans rather than pursuing injustice around the world.<sup>343</sup> The African scholar, Mahmood Mamdani, states that the ICC is becoming part of a type of humanitarian order that draws on the history of modern western colonialism.<sup>344</sup> President Paul Kagame of Rwanda also labelled the ICC as a form of imperialism that specifically focuses on the economic and political proficiency of underdeveloped African countries.<sup>345</sup> These arguments can be very damaging to the ICC in the light of the unfortunate colonial past which Africa has endured, and may therefore find traction with dictators trying to avoid prosecution under international justice.<sup>346</sup>

These allegations should be considered questionable due to Africa's significant support during the creation of the ICC, its current engaged involvement with the court on all levels, including the judicial bench and prosecutor's office, and the fact that Africa represents the largest regional block of member states of the ICC.<sup>347</sup>

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343 Du Plessis 2010 /ISS 13-18 "...including in cases such as Colombia, Sri Lanka and Iraq".

344 Mamdani 2008 <http://www.thenation.com/doc/20080929/mamdani> "The fact of mutual accommodation between the world's only superpower and an international institution struggling to find its feet on the ground is clear if we take into account the four countries where the ICC has launched its investigations: Sudan, Uganda, Central African Republic and Congo. All are places where the United States has no major objection to the course charted by ICC investigations. Its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the United States doesn't oppose, like those of Uganda and Rwanda in eastern Congo, effectively conferring impunity on them."

345 Du Plessis 2010 /ISS 20-21.

346 Maqungo "The Implications of African States Withdrawing from the ICC".

347 Du Plessis 2010 /ISS 13-18.

The allegations that Africa is being targeted unfairly by the ICC can also be challenged. Currently all eight situations<sup>348</sup> under investigation before the ICC are from Africa, but four (DRC, Uganda, CAR and Mali) of these situations are state referrals, two (Sudan and Libya) UNSC referrals, and the other two (*Côte d'Ivoire* and Kenya) are *proprio motu* investigations.<sup>349</sup> The fact that African member states such as the DRC, Uganda, and CAR sought assistance from the ICC signifies that all of them share the desire to eradicate impunity and "to guarantee lasting respect for the enforcement of international justice".<sup>350</sup>

Regarding the allegation with respect to the OTP's lack of ambition to pursue justice globally, a brief explanation will be given with respect to the OTP's screening process.<sup>351</sup> During the 2003 Iraq war the crime of aggression had not yet been properly defined, which consequently prevented the ICC from exercising jurisdiction over complaints being lodged against the former British Prime Minister Tony Blair and the former Head of State of the United States of America (US), George W. Bush.<sup>352</sup> In addition, the US is not a member state of the ICC. Then again Sudan<sup>353</sup> is also not a member state to the ICC, but was still subjected to the ICC's jurisdiction. The difference between the situation in Sudan and Iraq (implicating the US) is that the UNSC referred the situation in Sudan to the ICC (regarding the crimes of genocide, war crimes and crimes against humanity, which are already fixed in international law), whereas in the situation regarding the US the crime of aggression still hasn't been ratified.<sup>354</sup> However, with respect to the United Kingdom (UK), ICC prosecutor Fatoua Besunda recently opened preliminary investigations into the situation of Iraq in the light of new information received that allegedly implicates officials of the UK for committing war crimes, specifically the abuse of detainees.<sup>355</sup> It might be noteworthy to point out that Iraq is also not a member state to the ICC, but the UK is and therefore may be held

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348 See chap 2 par 5 Current cases before the ICC.

349 See chap 2 par 2.5 Current cases before the ICC.

350 Du Plessis 2010 *ISS* 36-40.

351 Du Plessis 2010 *ISS* 13-18.

352 Hakki 2006 *IJHR* 6-8.

353 See chap 2 par 2.5 Current cases before the ICC.

354 See chap 2 par 3.2 Crimes within the jurisdiction of the ICC.

355 ICC 2014 [http://www.iccpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-iraq-13-05-2014.aspx](http://www.iccpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-iraq-13-05-2014.aspx).

accountable for crimes committed on foreign territory.<sup>356</sup> The Palestinian-Israeli conflict also took place outside the jurisdiction of the ICC because those two states are not members to the *Rome Statute*. Vast numbers of complaints had been addressed to the OTP's office to conduct an investigation under article 15 due to allegations made that crimes against humanity were being committed.<sup>357</sup> The OTP could investigate only complaints received after 1 July 2002 due to the restriction of its temporal jurisdiction,<sup>358</sup> and ultimately the prosecutor could not establish a reasonable basis to proceed with the aforementioned investigations. For illustrative purposes, by the end of 2006, 1732 complaints from over 103 countries had been filed, but after initial review 80% of the communications were found to have been manifested outside the jurisdiction of the ICC.<sup>359</sup>

Distress concerning the possibility that the prosecutor may have unprincipled aspirations to prosecute only Africans rather than to take action globally can also be laid to rest.<sup>360</sup> In the aftermath of the post-election violence that occurred in Kenya the AU established a panel of elders headed by the Ghanaian diplomat who served as the seventh Secretary-General of the UN, Kofi Atta Annan.<sup>361</sup> This panel found that the incident could not be regarded as a mere riot, but that grave crimes had been committed. Annan proposed that a tribunal should be established to prosecute those responsible. Unfortunately, the Kenyan Parliament could not reach consensus on the establishment of the proposed tribunal. In this instance the *Rome Statute*<sup>362</sup> stresses that if a state is unwilling or unable to initiate proceedings, the ICC holds the right to intervene. Consequently Kofi Annan communicated with the OTP and made a recommendation that the Prosecutor should investigate the situation herself and initiate proceedings *proprio motu* as she deemed fit since the Kenyan Parliament had failed to reach a solution.<sup>363</sup> According to Article 15 (2) of the *Rome Statute* the prosecutor may

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356 See chap 2 par 2.2.6 *Proprio motu* powers of the prosecutor.

357 Tareq 2012 <http://sundial.csun.edu/2012/02/israeli-occupation-of-palestine-is-a-crime-against-humanity/>.

358 See chap 2 par 3.3.4 Jurisdiction *ratione temporis*.

359 ICC 2006 [http://www.icc-cpi.int/iccdocs/asp\\_docs/library/organs/otp/OTP\\_Update\\_on\\_Communications\\_10\\_February\\_2006.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf).

360 Akande 2009 *JICJ* 333-352.

361 Maqungo "The Implications of African States Withdrawing from the ICC".

362 Art 17(a) of the *Rome Statute*.

363 Maqungo "The Implications of African States Withdrawing from the ICC".

seek additional information from various sources, as deemed appropriate, to assist in the analysis of a situation and thus to establish a reasonable basis to proceed with a prosecution.<sup>364</sup> At first the OTP was hesitant and requested that Kenya should rather refer the matter to the ICC on its own, but the Kenyan President refused to acquiesce to the request. It is noteworthy that through all the proceedings, as described above, the AU never raised any objection regarding the indecisive Kenyan Parliament nor the communications with the ICC. It was only after the elections had been held and Uhuru Kenyatta had been elected as President that the AU raised their concerns about the investigations regarding Kenya's incumbent Head of State.<sup>365</sup> Eventually the prosecutor used her *proprio motu* powers<sup>366</sup> to investigate a situation for the first time and indicted the high-ranking government officials.<sup>367</sup>

The second argument implies that the ICC is undermining Africa, rather than assisting the continent to deal with its problems. This statement was based firmly on the indictment of President Al-Bashir.<sup>368</sup> While the African states accuse the ICC of thwarting attempts towards reconciliation and peace in Sudan,<sup>369</sup> the ICC acted according to ideals shared by Africa, contained in the *Constitutive Act*<sup>370</sup> that highlight the suppression of impunity in relation to international crimes:

- (h) The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.

Since Sudan was not addressing the situation in Darfur through alternative measures, the realisation of peace and reconciliation relied ultimately, on the prosecution of individuals responsible for committing these crimes.<sup>371</sup> However,

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364 A 15(2) of the *Rome Statute*.

365 Maqungo "The Implications of African States Withdrawing from the ICC".

366 Du Plessis 2010 *ISS* 35 "One of the ways in which the drafters of the Rome Statute purported to assist the ICC prosecutor to choose from many complaints the appropriate ones for international intervention by the ICC was by means of the gravity criterion." See chap 2 par 3.3.4 *Proprio motu* powers of the prosecutor for further information.

367 See chap 2 par 2.5 Current cases before the ICC.

368 See chap 2 par 2.5 Current cases before the ICC.

369 *AU Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)* Doc. Assembly/AU/13(XIII).

370 A 4(h) of the *Constitutive Act*.

371 Akande, Du Plessis and Jalloh 2010 *ISS* 19-20.

the AU is of the opinion that the prosecution of Al-Bashir would only thwart ongoing peace processes in the region, indicating that Africa would want to avoid ICC prosecution in order to enhance the prospects for peace and reconciliation.<sup>372</sup> That said, the *Rome Statute* also acknowledges the fact that "...the pursuit of prosecutions is not an absolute or blind commitment."<sup>373</sup> Even though Sudan is not a member-state to the ICC, it is useful to note the ICC's complementary nature. Article 17 of the *Rome Statute*<sup>374</sup> stipulates that the ICC will intervene only if national prosecution and investigations have failed. Thus, as Akande, Du Plessis and Jalloh ask:<sup>375</sup>

What about states – like Sudan – that are not party to the Rome Statute? Article 17, which sets out the complementarity regime, provides that the ICC must defer to the investigation or prosecution of a "State which has jurisdiction over" the case. Sudan, though a non-party, can frustrate the ICC's exercise of jurisdiction by insisting that it is willing and able to prosecute the offenders allegedly guilty of war crimes and crimes against humanity in the Darfur region.

That said, The AU, *Report of the African Union: High Level Panel on Darfur (AUPD)* 29 October 2009 PSC/AHG/2(CCVII) drafted an outline of recommendations to achieve both justice and peace in the region. Although the report places emphasis on the need for prosecutions, it also highlights the need to interpret justice in a broad and deep context. The report expresses the opinion that:<sup>376</sup>

Justice and Reconciliation are inextricably linked and should be approached and implemented in an integrated manner. In particular, it is necessary that processes and proceedings for delivering justice and reconciliation are managed in a coordinated manner. The elements of the Response should include: (a) Measures to expand and strengthen the system of Special Courts to deal with crimes committed in the conflict in Darfur; (b) The establishment of a Hybrid Court to deal particularly with the most serious crimes, to be constituted by Sudanese and non-Sudanese judges and senior legal support staff, the latter two groups to be nominated by the African Union; (c) Measures to strengthen all aspects of the criminal justice system, including investigations, prosecutions and adjudication, paying attention to its capacity to handle sexual crimes in an effective manner; (d) Introduction of legislation to remove all immunities of State actors suspected of committing crimes in

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372 Du Plessis 2010 *ISS* 35-40.

373 Akande, Du Plessis and Jalloh 2010 *ISS* 19.

374 A 17 of the *Rome Statute*.

375 Akande, Du Plessis and Jalloh 2010 *ISS* 19.

376 *AU Report of the African Union: High Level Panel on Darfur (AUPD)* 29 October 2009 PSC/AHG/2(CCVII) 280-377.

Darfur; (e) Establishment of a Truth, Justice and Reconciliation Commission (TJRC) to promote truth telling and appropriate acts of reconciliation and to grant pardons as considered suitable.

The report ultimately stresses that justice and peace should be seen as complementary and not mutually contradictory. However, no formal announcements of attempts to institute judicial proceedings or truth commissions at national level have been made either by Sudan or by the AU.<sup>377</sup> Consequently, since Sudan "...had every opportunity to give effect to a harmonised approach to justice and peace"<sup>378</sup> and failed to take advantage of the opportunity, ICC prosecution remains the last resort to establish justice and subsequently peace in the Darfur region.

Before Al-Bashir was indicted, the *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004* Geneva 25 January 2005<sup>379</sup> was issued to the UNSC by the International Commission of Inquiry on Darfur, stipulating that the incidents in Sudan constituted extremely severe infringements of international law and recommending that the UNSC should invoke its powers under Chapter VII<sup>380</sup> by referring the situation to the ICC. The Commission included highly respected African and Arab figures, such as Therese Striggner-Scott (a barrister and a senior partner affiliated to a legal consulting firm in Ghana), Dumisa Ntsebeza (a former commissioner on the Truth and Reconciliation Commission in South Africa, who is also a serving judge in the High Court of South Africa) and Mohammed Fayek (former secretary-general of the Arab Organisation for Human Rights, Minister of Foreign Affairs, Information and Guidance for Egypt).<sup>381</sup> The International Commission of Inquiry on Darfur, which was clearly of African and Arab origin, symbolised Africa's stance against

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377 Akande, Du Plessis and Jalloh 2010 *ISS* 19-20.

378 Akande, Du Plessis and Jalloh 2010 *ISS* 19.

379 *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, Geneva 25 January 2005..."The Commission strongly recommends that the Security Council 3(b) of the ICC Statute. As repeatedly stated by the Security Council, the situation constitutes a threat to international peace and security. Moreover, as the Commission has confirmed, serious violations of international human rights law and humanitarian law by all parties are continuing. The prosecution by the ICC of persons allegedly responsible for the most serious crimes in Darfur would contribute to the restoration of peace in the region."

380 See chap 2 par 3.3.2 Referral and deferral by the UNSC.

381 Du Plessis 2010 *ISS* 24-54.

impunity. The Commission also concluded that the situation in Darfur met the criteria as stipulated in Chapter VII of the *UN Charter*<sup>382</sup> in that it threatened international peace and security. This enabled the UNSC to intervene and consequently led to Sudan's referral to the ICC. Thus, the International Commission of Inquiry on Darfur acted according to the ideals of the ICC and international justice by recommending that a UNSC's referral would be the best resolution to end the on-going massacre.<sup>383</sup>

Thirdly, Africa has raised its concerns over the ICC's relationship, with the UNSC, specifically regarding the power of referring<sup>384</sup> and deferring<sup>385</sup> a situation,<sup>386</sup> in addition to its distress over the referral of a non-ICC member state to the ICC. The argument is that the ICC is guilty of double standards, since the situation of Darfur was referred to the ICC by the UNSC, but the situation in Palestine, involving the ongoing conflict between the Israel and Palestine, was not.<sup>387</sup> The politicised nature of article 16 and the UNSC's emendation thereof cannot go unnoticed. As stated by Cryer:<sup>388</sup>

The purpose of article 16 was to allow the Council, under its primary responsibility for the maintenance of peace and security, to set aside the demands of justice at a time when it considered the demands of peace to be overriding; if the suspension of legal proceedings against a leader will allow a peace treaty to be concluded, precedence should be given to peace. The suspension of the proceedings would be only temporary. The subsequent practice of the Council quoting Article 16 would however have surprised those drafting the Statute.

A recommendation was made at the AU Experts' Meeting which took place from the 3-5 November 2009 subsequent to the AU Ministerial Meeting of 6 November in 2009 that article 16 of the *Rome Statute* should be amended to allow the UN General Assembly to exercise the power of referring and deferring a situation if the UNSC failed to act within the specified time frame. The recommendation was

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382 Chap VII of the *UN Charter*.

383 UHRC 2013 <http://www.unitedhumanrights.org/genocide/genocide-in-sudan.htm> "The genocide in Darfur has claimed 400,000 lives and displaced over 2 500 000 people. More than one hundred people continue to die each day; five thousand die every month."

384 A 13 of the *Rome Statute*.

385 A 16 of the *Rome Statute*.

386 Du Plessis 2010 *ISS* 67.

387 Tareq 2012 <http://sundial.csun.edu/2012/02/israeli-occupation-of-palestine-is-a-crime-against-humanity/>; Du Plessis 2010 *ISS* 67-68.

388 Cryer *et al An introduction* 138.

never adopted, however, and the AU expressed their deep regret that the UNSC had not acted upon their request for the suspension of proceedings against Al-Bashir or their proposed amendment to article 16.<sup>389</sup> This created a vision within Africa that the UNSC performs a cynical exercise of discrimination in the service of western powers.<sup>390</sup>

From the outset it should be emphasised that Sudan has shown limited ability and willingness to prosecute those responsible for the grave violation of human rights in Darfur.<sup>391</sup> Even though Sudan is not a state party to the ICC, the UNSC has recognised the vast number of human rights violations that have taken place there and has consequently concluded that an international response is needed in the interests of peace and justice.<sup>392</sup> It should be underscored that all 34 African member states agreed to article 16 when they ratified the *Rome Statute*, and also that they were in fact involved in drafting the said statute in Rome. It further needs to be stressed that the ICC cannot be held accountable for the UNSC's referral of Sudan, but that the ICC has, nonetheless, an obligation under the *Rome Statute* to fulfil when a matter is referred to it. It must also be emphasised, however, that other critical cases such as the situation concerning Israel and the US also require the appropriate international response. However, it is specious for the AU to attack the ICC for the UNSC's actions. It may be necessary to reiterate that the referral clause of the UNSC plays a pivotal role regarding the ICC's ability to ensure accountability for grave offences wherever they might occur, which includes crimes committed on the territory of non-member states.<sup>393</sup>

Fourthly, Africa expressed its distress regarding the indictment of sitting Heads of State.<sup>394</sup> Sudan has raised its objections towards the notion of non-immunity derived from article 27 of the *Rome Statute*<sup>395</sup> and stipulated that under article 98

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389 Akande, Du Plessis and Jhallo 2010 <http://www.ejiltalk.org/addressing-the-african-unions-proposal-to-allow-the-un-general-assembly-to-defer-icc-prosecutions/>.

390 Du Plessis 2010 *ISS* 69-74.

391 Akande, Du Plessis and Jalloh 2010 *ISS* 19-20; Maqungo "The Implications of African States Withdrawing from the ICC".

392 Akande, Du Plessis and Jalloh 2010 *ISS* 19-2; *Decision Assigning The Situation In Darfur, Sudan To Pre-Trial Chamber I Presidency of the ICC* 1-2.

393 Du Plessis 2010 *ISS* 67-74.

394 See chap 4 par 5.3 Immunity and cooperation with the ICC - the relation between article 27(1) and 98.

395 See chap 4 par Article 27 of the *Rome Statute*.

of the said statute<sup>396</sup> President Al-Bashir was entitled to immunity from prosecution. As has been made clear in chapter 4<sup>397</sup> there is no contradiction between Articles 27 and 98,<sup>398</sup> and thus Al-Bashir was never entitled to any form of immunity, giving the ICC free reign to indict the Sudanese president in accordance with article 27<sup>399</sup> and international customary law.<sup>400</sup> However, this did not discourage the AU from declaring that African states should adhere to its decision to reject any charges brought before an international criminal court or tribunal regarding the indictment of a sitting Head of State or senior government official.<sup>401</sup>

### 3.2.2.3 Establishing the ICLS: Analysis

Inherently, no inconsistency can be found when any region in the world wishes to establish a court vested with international criminal jurisdiction.<sup>402</sup> However, one may wonder why Africa has made this hasty and sudden decision to resolve all current problems on the continent. Considering the discussion above, the vast number of allegations piling up against the ICC causes a weighty concern regarding the AU's true intentions in establishing the ICLS. Ultimately it may be concluded that the deteriorating relationship between the AU and ICC may be the underlying reason for the establishment of an international African criminal court.<sup>403</sup>

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396 See chap 4 par Article 98 of the *Rome Statute*.

397 See chap 4 par 5.3 Immunity and cooperation with the ICC - the relation between article 27(1) and 98.

398 See chap 4 par 5.3 Immunity and cooperation with the ICC - the relation between article 27(1) and 98. *Decision Assigning The Situation In Darfur, Sudan to Pre-Trial Chamber I Presidency of the ICC* 1-2.

399 See chap 4 par 5.2 Article 27(2) and immunity *ratione personae*.

400 See chap 4 par 4 Immunity before international criminal courts and tribunals.

401 *AU Extraordinary Session of the Assembly of the AU* 12 October 2013 Addis Ababa, Ethiopia Ext/Assembly/AU/Dec 1 (Oct 2013).

402 Abass 2013 *NILR* 48-49. Thus, the ICLS doesn't face any judicial provisions acting as impediments regarding its establishment.

403 See chap 3 par 2.2.2 Establishing the ICLS: anti-ICC sentiments.

### 3.2.3 *The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*

Pursuant to a decision taken by the AU summit in February 2009, a request was addressed to the AU commission together with the ACHPR to investigate the implications of trying international crimes.

In January 2010 the AU commission contracted with the Pan African Lawyers Union to draft a legal instrument amending the *Protocol on the Statute of the African Court of Justice and Human Rights* rather than creating a new legal instrument.

However, this raises the question: can a protocol be amended if it has not yet entered into force? Amendments are permissible only to protocols that have already entered into force because, as Abass explains:<sup>404</sup>

This is due to the fact that amendments are warranted by the operationalization of a treaty – and, therefore, are reflections of parties to the instrument – and serve to reduce, increase, expedite or slow down the obligations of those parties therein.

The implications of this uncertainty, however, fall outside the scope of this chapter. Yet it is important to note that the amendment may pose a threat to the AU because Burkina Faso, DRC, Libya and Mali, which ratified the *Protocol on the Statute of the African Court of Justice and Human Rights*, were never consulted about the amendments regarding their attribution of adding international criminal jurisdiction. This may ultimately provide them with the option to withdraw their consent.<sup>405</sup>

From August 2010 till November 2010 workshops were held by the AU Pan-African Parliament to gain input for the drafting of the *AU Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* Exp/Min/IV/Rev.7 2012 Revisions up to Tuesday 15th May 2012 (Draft Protocol)<sup>406</sup> by the other legal and political bodies of the AU. A formal

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404 Abass 2013 *NILJ* 45-46.

405 Abass 2013 *NILJ* 46.

406 *AU Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* Exp/Min/IV/Rev 7 2012 Revisions up to Tuesday 15th May 2012.

meeting was held in Addis Ababa to consider the *Draft Protocol* in the specified period that extends from March 2011 till May 2011 and then again between October 2011 and November 2011. The November draft was the last version made available for public comment, but the latest version is entitled "revisions up to Tuesday 15<sup>th</sup> May 2012".<sup>407</sup>

At the Nineteenth Ordinary Session of the AU, which was held from 15-16 July 2012, the Heads of States decided that a few alterations<sup>408</sup> should be considered before they went through with adopting the *Draft Protocol*. These decisions directed the AU Commission and the ACHPR to do thorough research on the "financial and structural implications" of expanding the ACJHR's jurisdiction so that it could try international crimes. It was also stressed that the crime of the unconstitutional change of government should be more thoroughly defined. The issues discussed above were to be finalised and submitted for adoption at the 2013 AU Summit.<sup>409</sup> The *Draft Protocol* was not adopted but was sent back by the Assembly of African Heads of State, who recommended that the AU Commission should further determine the meaning of "popular uprisings",<sup>410</sup> since the term was not included in description of the jurisdiction of the court. Another assessment of the structural and financial implications of expanding the court's jurisdiction to try international crimes was also requested.<sup>411</sup> However, on 26-27 of July at the 23<sup>rd</sup> Ordinary AU Summit the *Protocol* was adopted by a unanimous vote.<sup>412</sup>

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407 *AU Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* Exp/Min/IV/Rev 7 2012 Revisions up to Tuesday 15th May 2012.

408 *Decision on The Protocol on Amendments To The Protocol on The Statute of The African Court of Justice and Human Rights* Doc.Assembly/AU/13(Xix)A.

409 Assembly of the Union Twentieth Ordinary Session 27-28 January 2013. Addis Ababa, Ethiopia, Decisions and Declarations, Assembly/AU/Dec.450-473(XX) Assembly/AU/ Decl.1-3(XX).

410 Abass 2013 *NILR* 40; The AU 2012 expert meeting recommended that the provision in Article 28E of the *Protocol* stipulates that the words "Any act of a sovereign people peacefully exercising their inherent right which results in a change of government shall not constitute an offence under this Article."...should be replaced with "where the Peace and Security Council of the African Union determines that the change of government through a popular uprising is not an unconstitutional change of government, the Court shall not be seized by the matter".

411 Abass 2013 <http://www.ejil.org/article.php?article=2433&issue=117>.

412 *Assembly of the Union Twenty-Third Ordinary Session 26-27 June 2014 Malabo, Equatorial Guinea* Assembly/AU/Decision on the Draft Legal Instruments Doc. Assembly/AU/8(XXIII).

### 3.2.3.1 Financial and administrative implications

International experience shows that running an international criminal court is an expensive exercise.<sup>413</sup> To put the fiscal aspects into perspective, the 2014 approved budget for the ICC adds up to 163 113 591.56 US Dollars (USD),<sup>414</sup> and the estimated cost of conducting trials runs to about USD 20 000 000 each.<sup>415</sup> The 2013 budget for the ICTR is USD 174,318,200,<sup>416</sup> and the Special Court for Sierra Leone's (SCSL) budget for 2012 came to USD 26,143,800.<sup>417</sup> Subsequently, the cost of prosecuting the former Liberian President, Charles Taylor exceeded USD 50 000 000.<sup>418</sup> To compare that to the 2014 approved budget for the ACHPR, a mere USD 8,619,585 was granted to the court concerned, and USD 5,645,467 to the ACHPR Commission.<sup>419</sup> It should be underscored that the combined budget of the aforementioned institutions does not cover the estimated cost of even a single criminal trial, not to mention that it forms only 8% of the ICC's total budget.

The ICLS consists of three Chambers: a Pre-trial Chamber, the Trial Chamber and the Appellate Chamber.<sup>420</sup> According to Article 4 of the *Protocol*,<sup>421</sup> six judges will be allocated to the ICLS, who will be assigned to the three respective Chambers, establishing a quorum, as follows: the Pre-Trial Chamber shall be constituted by one judge, the Trial Chamber by three judges and the Appellate Chamber by five judges.<sup>422</sup> It is important to note that if for example the ICLS hosts only one ongoing criminal trial, one judge allocated to the Pre-Trial Proceedings will not be able to preside in the Trial Chamber, where another three would be available only to the Trial Chamber and another five should be available

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413 Du Plessis 2012 ISS 9-10.

414 ICC-ASP/12/Res.1 Programme budget for 2014, the Working Capital Fund for 2014, scale of assessments for the apportionment of expenses of the International Criminal Court, financing appropriations for 2014 and the Contingency Fund.

415 Du Plessis 2012 ISS 9-10.

416 UN Agenda item 144, Financing of the International Criminal Tribunal for Rwanda, Fifth Committee Statement by Assistant Secretary-General, Controller, 13 December 2011.

417 UN Audit Report Special Court for Sierra Leone. Controls over implementation of the downsizing and completion strategy were generally adequate but additional measures are needed 31 March 2011 Assignment No. AA2010/290/01.

418 Sandefur 2012 <http://www.cgdev.org/blog/was-charles-taylor-trial-worth-price-tag>.

419 Decision on the Budget of the African Union for the 2014 Financial Year Doc. EX.CL/787(XXIII).

420 A 16 of the *Protocol*.

421 A 4 of the *Protocol*.

422 A 10 of the *Protocol*.

to preside in the Appellate Chamber. Thus, if a criminal trial occupies the Pre-Trial, Trial and Appellate Chamber, it would ultimately require a total of nine judges to the *Protocol's* proposed six. Thus the ICLS would face a shortage of the minimum number of judges needed to effectively carry out proceedings.<sup>423</sup> The court of the ICC, on the other hand, is staffed by eighteen judges. The Appellate Chamber consists of four judges, while the Trial and Pre-Trial chamber comprise of no fewer than six judges each.<sup>424</sup>

Referring to the ICC's prosecution track record, it is evident that an international criminal trial takes an immense amount of time and resources to complete.<sup>425</sup> The following should also be taken into account. The ICC is a court dedicated to the prosecution of only three customary international law crimes,<sup>426</sup> a far more restricted scope of crimes than the ICLS is prepared to take on.<sup>427</sup> In contrast with the ICLS, the ICC is financially<sup>428</sup> and judicially<sup>429</sup> well-equipped and even with all if those resources at the ICC's disposal, the effort and time that is invested in delivering justice in these trials is all but timely.<sup>430</sup> This certainly raises questions regarding the effectiveness, independence and impartiality of the proposed African Court in relation to its financial and personnel resources.

However, the financial and administrative implications of the ICLS fall beyond the scope of this chapter. If one were to assume that the lack of staff and fiscal requirements could be sufficiently addressed when the ICLS starts operating, other uncertainties would arise with respect to the ICLS's ambitious jurisdictional reach, which will be discussed below.

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423 Du Plessis 2012 *ISS* 7.

424 Aa 36, 39, 44 and 74 of the *Rome Statute*; Du Plessis 2012 *ISS* 7.

425 Du Plessis 2012 *ISS* 7.

426 See chap 3 par 2.2.1 Customary international law crimes.

427 A 28A of the *Protocol*; 14 Crimes.

428 Du Plessis 2012 *ISS* 9. "...a single trial for an international crime in 2009 was estimated to be US\$ 20 million. This is nearly double the approved 2009 budgets for the African Court and the African Commission standing at US\$ 7642 269 and US\$3 671 766, respectively".

429 See chap 2 par 2.1 Establishment.

430 Du Plessis 2012 *ISS* 6-7.

### 3.3 Jurisdiction of the ICLS

Attentive recognition is given to the various aspects pertaining to the element of jurisdiction under the *Protocol*. However, to confine this study specifically to the relationship between the ICC and ICLS, only the following subject areas will be investigated: crimes within the jurisdiction of the *Protocol*, the temporal jurisdiction, preconditions to the exercise of the jurisdiction, the ICL's various trigger mechanisms, the absence of possibility of the deferral of an investigation or prosecution, the ICL's complementarity nature, and aspects pertaining to the admissibility of a situation before the concerned court.

#### 3.3.1 Crimes within the jurisdiction of the ICLS

Article 28A states that the ICLS is vested with the power to prosecute the crimes dealt with below, with the acknowledgment of the possibility of incorporating additional crimes, subject to consensus between states parties. Article 28 (A) 2 of the *Protocol* states:<sup>431</sup>

The Assembly may extend upon consensus of the States Parties the jurisdiction of the Court to incorporate additional crimes to reflect the developments of international law.

This provision is of great significance because it allows the *Protocol* to evolve with the ever-changing developments of international law.<sup>432</sup> However, the focus of this section is on outlining the various crimes the ICLS is prepared to prosecute. In addition, each of these crimes is analysed and evaluated in order to establish which crimes attain the status of international custom.

##### 3.3.1.1 Genocide, Crimes against Humanity and War Crimes

The *Protocol* follows the *Rome Statute* closely in defining what genocide, crimes against humanity and war crimes are, and the type of conduct which constitutes the said crime.<sup>433</sup> The abovementioned crimes have entrenched international

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431 A 28(A)2 of the *Protocol*.

432 Abass 2013 *NILR* 36-37.

433 See chap 2 par 3.2 Crimes within the jurisdiction of the ICC.

customary law status, which means that they are crimes which threaten the foundation of public order in the international community.<sup>434</sup>

### 3.3.1.2 The Crime of Unconstitutional Change of Government

Military coups (sometimes referred to as *putschs*) that threaten established governments have grown in abundance throughout Africa. Mauritania and Guinea (2008), Guinea-Bissau and Madagascar (2009) and Niger (2009 and 2010) are examples where armed forces threatened democratic growth in Africa. Unconstitutional change of government can also take the form of the failure of incumbent governments to relinquish power to winning parties after a free and fair election. *Côte d'Ivoire* serves as an example, where Laurent Gbagbo refused to surrender his presidency after elections were held in 2010.<sup>435</sup>

The root of the prohibition of unconstitutional change of government can be found in Article 4 of the *Constitutive Act*.<sup>436</sup> This provision explicitly condemns and rejects the unconstitutional change of government. After the *AU Declaration on the Principles Governing Democratic Elections in Africa AHG/Decl.1 (XXXVIII) 2002 (Lomé Declaration)*,<sup>437</sup> the *African Union African Charter on Democracy, Elections and Governance 30 January 2007* affirmed its "...condemnation and total rejection of unconstitutional changes of government."<sup>438</sup> Following the ousting of democratically elected Egyptian President Mohamed Morsi, the AU emphasised its condemnation of the unconstitutional change of government by stating the following in the *Communiqué of the Peace and Security Council of the African Union (AU), at its 384th meeting on the situation in the Arab Republic of Egypt 5 July 2013*.<sup>439</sup> (The Council):

5. Recalls the relevant AU instruments on unconstitutional changes of Government, notably the Lomé Declaration of July 2000 and the African Charter on Democracy, Elections and Governance of January 2007, which provide for the automatic implementation of specific measures

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434 See chap 2 par 3.1 Customary international law crimes.

435 Omotola 2011 *Unconstitutional Changes of Government* 7-8.

436 A 4 of the *Constitutive Act*.

437 *African Union African Union Declaration on the Principles Governing Democratic Elections in Africa AHG/Decl.1 (XXXVIII) 2002*.

438 *African Union African Charter on Democracy, Elections and Governance 30 January 2007*.

439 *Communiqué of the Peace and Security Council of the African Union (AU) at its 384th meeting on the situation in the Arab Republic of Egypt 5 July 2013*.

whenever an unconstitutional change of Government occurs, and reiterates AU's condemnation and rejection of any illegal seizure of power;

6. States that the overthrow of the democratically elected President does not conform to the relevant provisions of the Egyptian Constitution and, therefore, falls under the definition of an unconstitutional change of Government as provided for in the instruments mentioned in paragraph 5 above. Accordingly, and as mandated by the relevant AU instruments, Council decides to suspend the participation of Egypt in the AU's activities until the restoration of constitutional order...

The crime of unconstitutional change of government is defined in the *Protocol* as:<sup>440</sup>

1. ...means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:
  - a. A putsch or coup d'état against a democratically elected government;
  - b. An intervention by mercenaries to replace a democratically elected government;
  - c. Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
  - d. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
  - e. Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;
  - f. Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.
2. For purposes of this Statute, 'democratically elected government' has the same meaning as contained in AU instruments.
3. Any act of a sovereign people peacefully exercising their inherent right which results in a change of government shall not constitute an offence under this Article.

When the Ministers of Justice and Attorneys General adopted the *Draft Protocol* in May 2012, they excluded the crime of unconstitutional change of government because they concluded that the definition of the crime named above is vague and requires more thought.<sup>441</sup> The definition of what constitutes an unconstitutional change of government remains ambiguous because of the lack of agreement on substantive elements. Thus, consensus among the states on what

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440 A 28E of the *Protocol*.

441 Du Plessis 2012 *ISS* 1.

constitutes an unconstitutional change of government has still to be achieved.<sup>442</sup>

Abass explains:<sup>443</sup>

The acts constituting unconstitutional changes in government, listed under Article 23 of the ACDEG (military coup d'état, the rigging of elections, and so on) have, for a long time, been practices which have been consistently rejected by the majority of African states, as evidenced by myriad treaties and declarations adopted over several decades to outlaw them. The ACDEG is therefore merely a codification of what had become a quintessential custom in Africa: the rejection of Unconstitutional Change of Government.

Even though Africa is evidently at the forefront regarding the condemnation of the commission of unconstitutional change of government, there still remains vagueness as to what exactly constitutes the said crime.<sup>444</sup> Thus, the prerequisite of *opinio juris* with respect to this offence remains unsatisfied.<sup>445</sup> This prosecution of this offence is also yet to succeed, and it thus falls short of obtaining the requirement of *usus*.<sup>446</sup>

In the light of the aforementioned, the crime of the unconstitutional change of government has not been embedded in international law as an international crime and consequently does not have the status of international customary law.<sup>447</sup>

### 3.3.1.3 Piracy

Piracy was codified from as early as 1958 in *Article 15 of the UN General Assembly Convention on the High Seas Chapter XXI Geneva 29 April 1958 Treaty Series Vol 450 11*<sup>448</sup> and in 1982 in the *Article 101 of the UN General Assembly Third United Nations Conference on the Law of the Sea 14 December 1983*

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442 Abass 2013 *NILR* 34-35.

443 Abass 2013 *NILR* 34.

444 Yihdego 2013 <http://www.ejiltalk.org/democracy-peoples-uprising-and-unconstitutional-change-of-government-in-egypt-the-african-union-principles-and-responses/>.

445 Du Plessis 2012 *ISS* 7; Yihdego 2013 <http://www.ejiltalk.org/democracy-peoples-uprising-and-unconstitutional-change-of-government-in-egypt-the-african-union-principles-and-responses/>.

446 Ayalew *African Court of Justice and Human and Peoples' Rights* 18, 44.

447 See chap 2 par 3.1 Customary international law crimes.

448 A 15 of the *UN General Assembly Convention on the High Seas Chapter XXI Geneva 29 April 1958 Treaty Series Vol 450 11*.

A/RES/38/59.<sup>449</sup> The UN Division for Ocean Affairs and the Law of the Sea<sup>450</sup> describes piracy as an act that:<sup>451</sup>

...threatens maritime security by endangering, in particular, the welfare of seafarers and the security of navigation and commerce. These criminal acts may result in the loss of life, physical harm or hostage-taking of seafarers, significant disruptions to commerce and navigation, financial losses to ship-owners, increased insurance premiums and security costs, increased costs to consumers and producers, and damage to the marine environment.

The *Protocol*<sup>452</sup> stipulates that piracy will consist of the following acts:

- a. any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private boat, ship or a private aircraft, and directed:
  - i. on the high seas, against another boat, ship or aircraft, or against persons or property on board such boat, ship or aircraft;
  - ii. against a boat, ship, aircraft, persons or property in a place outside the jurisdiction of any State
- b. any act of voluntary participation in the operation of a boat, ship or of an aircraft with knowledge of facts making it a pirate boat, ship or aircraft;
- c. any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

However, piracy is yet to be prosecuted in an international court, since no current international mechanism exists to adjudicate the said offence, but the UN Office on Drugs and Crime (UNODC) is supporting counter-piracy efforts in six states located near the Somali Basin region (Kenya, Seychelles, Mauritius, Tanzania, Maldives and Somalia), which has gained popularity for piracy-related activities throughout the years.<sup>453</sup> The prosecution of piracy therefore relies heavily on national legal systems. The prosecution of piracy has also taken place in the United Arab Emirates, Oman, Yemen, Madagascar, the Maldives, India,

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449 A 101 of the *UN General Assembly Third United Nations Conference on the Law of the Sea* 14 December 1983 A/RES/38/59.

450 UN Division for Ocean Affairs and the Law of the Sea 2013 <http://www.un.org/depts/los/index.htm>.

451 International Crimes Database 2014 <http://www.internationalcrimesdatabase.org/Crimes/Piracy>.

452 A 28F of the *Protocol*.

453 *UN Counter Piracy Programme Support to the Trial and Related Treatment of Piracy Suspects Issue Nine* July 2012.

Netherlands, the Republic of Korea, Japan, the United States of America, Spain, France, Italy and Malaysia.<sup>454</sup>

Even though piracy has yet to be prosecuted on international level, national prosecution, as already said, can be found in abundance,<sup>455</sup> satisfying the prerequisite of *usus*. Its universal pronouncement in international instruments<sup>456</sup> indicating its widespread acceptance also amounts to sufficient *opinio juris*.<sup>457</sup> Bassiouni states that piracy satisfies all the prerequisites to affirm its position in international customary law thus:<sup>458</sup>

(1) international pronouncements, or what can be called international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law (3) the large number of states which have ratified treaties related to these crimes (4) the ad hoc international investigations and prosecutions of perpetrators of these crimes.

Dugard affirms this and states that piracy is regarded as one of the international customary law crimes which was recognised in the earliest stages of criminal law development.<sup>459</sup>

#### 3.3.1.4 Terrorism

The *UN General Assembly Measures to Eliminate International Terrorism - Report of the Secretary-General* 6 September 1996 A/51/336<sup>460</sup> states that all member states of the UN condemn all acts of terrorism. These acts are intended to:<sup>461</sup>

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454 International Crimes Database 2014 <http://www.internationalcrimesdatabase.org/Crimes/Piracy>; *Counter Piracy Programme Support to the Trial and Related Treatment of Piracy Suspects Issue Nine* July 2012 16.

455 *Counter Piracy Programme Support to the Trial and Related Treatment of Piracy Suspects Issue Nine* July 2012 16.

456 A 15 of the *UN General Assembly Convention on the High Seas Chapter XXI Geneva* 29 April 1958 Treaty Series Vol 450 11; A 101 of the *UN General Assembly Third United Nations Conference on the Law of the Sea* 14 December 1983 A/RES/38/59.

457 Bassiouni 1996 *Law and Contemporary Problems* 68; Dugard 2012 *International Law* 158; International Crimes Database 2014 <http://www.internationalcrimesdatabase.org/Crimes/Piracy>.

458 Bassiouni 1996 *Law and Contemporary Problems* 68.

459 Dugard 2012 *International Law* 158.

460 *UN General Assembly Measures to Eliminate International Terrorism - Report of the Secretary-General* 6 September 1996 A/51/336.

461 *UN General Assembly Measures to Eliminate International Terrorism - Report of the Secretary-General* 6 September 1996 A/51/336.

...provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious, or any other nature that may be invoked to justify them.

This declaration assisted the international community in adopting the *UN General Assembly International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, No. 37517,<sup>462</sup> which prohibits the act of bombing any facility or place of public use or of transport resulting in serious bodily harm being inflicted. The atrocities that occurred in 2011 regarding the destruction of the World Trade Centre and the Pentagon sparked a mass reaction from the international community that consequently led to various resolutions being adopted prohibiting the funding, support and commissioning of acts of terrorism.<sup>463</sup> The *UN General Assembly Measures to Eliminate International Terrorism, Report of the Secretary-General* 6 September 1996 A/51/336<sup>464</sup> was adopted also to encourage states to fight terrorism by establishing legal policies and systems to facilitate the extradition and prosecution of persons accused of committing acts of terrorism.

Terrorism is described under the *Protocol*<sup>465</sup> as in the international instruments named above. The Protocol states that terrorism will constitute of:<sup>466</sup>

- A. Any act which is a violation of the criminal laws of a State Party, the laws of the African Union or a regional economic community recognized by the African Union, or by international law, and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
1. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
  2. disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
  3. create general insurrection in a State.

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462 *UN General Assembly International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, No. 37517.

463 *UN Security Council Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts]* 28 September 2001 S/RES/1373 (2001).

464 *UN General Assembly Measures to Eliminate International Terrorism – Report of the Secretary-General* 6 September 1996 A/51/336.

465 A 28G of the *Protocol*.

466 A 28G of the *Protocol*.

- B. Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in subparagraph (a) () to().
- C. Notwithstanding the provisions of paragraphs A and B, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.
- D. The acts covered by international Humanitarian Law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts.
- E. Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.

Regarding the vast number of conventions that are in force in addition to the historical occurrences relating to acts of terrorism, it can be concluded that a sense of legal obligation, *opinio juris*, among states is evident. Settled practice thus, the prosecution of terrorism, can also be found in abundance. Up until 2009 145 individuals have been charged and convicted of terrorism in the US alone, in relation only to the twin towers incident.<sup>467</sup> Between 11 September 2001 and the 31 of December 2009, 235 individuals in the UK were convicted of terrorism-related offences. There is no doubt that settled practice is evident throughout the world and satisfies the prerequisite of *usus*. Thus, international terrorism may be regarded as an international customary law crime.<sup>468</sup>

### 3.3.1.5 Mercenarism

Mercenaries usually have their origin in having been previously employed in the military or the police force. The vast number of hostilities in Africa, throughout the years, has led to an immense involvement of mercenarism in the continuing conflicts. As far back as 1977 mercenarism was condemned as a serious offence in the *OAU Convention for the Elimination of Mercenarism in Africa* CM/817 (XXIX) Annex II Rev.1 1977.<sup>469</sup> *The UN General Assembly International Convention against the Recruitment, Use, Financing and Training of Mercenaries*,

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467 *Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System* 2009 <http://www.justice.gov/opa/pr/2009/June/09-ag-564.html>.

468 Dugard *International Law* 163-165.

469 *OAU Convention for the Elimination of Mercenarism in Africa* CM/817 (XXIX) Annex II Rev 1 1977.

4 December 1989, A/RES/44/34<sup>470</sup> criminalised all acts relating to mercenarism including the use, financing, recruitment and training of mercenaries.

A mercenary is described under article 28H of the *Protocol* as:<sup>471</sup>

- a. any person who:
  - i. Is specially recruited locally or abroad in order to fight in an armed conflict;
  - ii. Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation;
  - iii. Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
  - iv. Is not a member of the armed forces of a party to the conflict; and
  - v. Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
- b. A mercenary is also any person who, in any other situation:
  - i. Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
    - 1. Overthrowing a legitimate Government or otherwise undermining the constitutional order of a State;
    - 2. Assisting a government to maintain power;
    - 3. Assisting a group of persons to obtain power; or
    - 4. Undermining the territorial integrity of a State;
  - ii. Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation;
  - iii. Is neither a national nor a resident of the State against which such an act is directed;
  - iv. Has not been sent by a State on official duty; and
  - v. Is not a member of the armed forces of the State on whose territory the act is undertaken.
- 2. Any person who recruits, uses, finances or trains mercenaries, as defined in paragraph (1) (a) or (b) above commits an offence.
- 3. A mercenary, as defined in paragraph (1) (a) or (b) above, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence.

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470 UN General Assembly *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, 4 December 1989 A/RES/44/34.

471 A 28H of the *Protocol*.

However, the prosecution of mercenarism is limited, since private security firms recruit ex-military and police personnel under circumstances that do not constitute mercenarism according to the conventions named above<sup>472</sup> and consequently settled practice is rarely seen. Concerning *opinio juris*, Kinsey reaffirms Dugard's view that:<sup>473</sup>

Those conventions introduced by the international community have focused on the prohibition of mercenary activities aimed at the sovereignty of legitimate states, the suppression of movements of national liberation, or national self-determination. Those activities undertaken by PMCs in Africa and other parts of the world have, in the majority of cases, fallen outside of this characterisation.

Arguably both requirements necessary for establishing customary law are not satisfied, and mercenarism is therefore not regarded as an international customary law crime. In addition, Abass stipulates that determining the endangerment of international criminal prosecution regarding the payment of persons to engage in conflict in another state is difficult, to say the least, and prosecution under national laws is more appropriate than international prosecution.<sup>474</sup>

### 3.3.1.6 Corruption

The following case should be underscored due to its definition of corruption that underlines the severity with which the offence of corruption is regarded. In South-Africa, in the *Glenister v President of the Republic of South Africa and Others* case,<sup>475</sup> corruption was defined as an act that:<sup>476</sup>

...undermines the democratic ethos, the institutions of democracy, the rule of law ...and which leads to the inability of a state to fulfil its socio-economic and development responsibilities derived from the Constitution.<sup>477</sup>

This characterisation suggests that corruption may undermine the constitutional state of a democratic country and must be regarded as a serious offence. The

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472 Dugard *International Law* 535-545.

473 Kinsey 2008 *Cultures and Conflicts* 7-8; Dugard *International Law* 535-545; *Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict* 27 of 2006.

474 Abass 2013 *NILR* 34.

475 *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347 (CC).

476 2011 3 SA 347 (CC).

477 *Constitution of the Republic of South Africa*, 1996.

fight against corruption has gained international attention on an immense scale. The *UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422*<sup>478</sup> (UNCAC) was created to endorse and toughen preventive measures against corruption and to facilitate international cooperation to combat corruption that plagues and thwarts the sustainable development of the rule of law. The *African Union Convention on Preventing and Combatting Corruption 11 July 2003*<sup>479</sup> and the *SADC Protocol against Corruption 2001*<sup>480</sup> endorse the views found in the UNCAC, but shift the focus to combatting corruption in Africa.

Article 28I of the Protocol states that corruption would entail:<sup>481</sup>

- a. The solicitation or acceptance, directly or indirectly, by a public official, his/her family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
- b. The offering or granting, directly or indirectly, to a public official, his/family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
- c. Any act or omission in the discharge of his or her duties by a public official, his/her family member or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party;
- d. The diversion by a public official, his/her family member or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position;
- e. The offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;

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478 Article 1 of the *UN General Assembly, United Nations Convention against Corruption 31 October 2003, A/58/422*.

479 *AU African Union Convention on Preventing and Combating Corruption 11 July 2003*.

480 *SADC Protocol against Corruption 14 August 2001*.

481 A 28I of the *Protocol*.

- f. The offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;
  - g. Illicit enrichment;
  - h. The use or concealment of proceeds derived from any of the acts referred to in this Article.
2. For the purposes of this Statute 'Illicit enrichment' means the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.

Although corruption is regarded as a grave concern to the international community, the possibility of either amending the *Rome Statute* to include corruption as an international crime or establishing a criminal tribunal to prosecute corruption does not seem feasible at this point.<sup>482</sup> Consensus<sup>483</sup> on what the exact definition should be is still unattainable and the political will among members of the Assembly of State Parties<sup>484</sup> (ASP) to reach a two-third majority vote for inclusion of the latter amendment seems unlikely at the moment, thus diminishing the chance that the condemnation of corruption may reach *opinio juris* in the near future. Negotiations on establishing a review mechanism for the UNCAC have also reached a standstill. Establishing a tribunal for the prosecution of corruption therefore seems undesirable at this stage, and this consequently rules out international settled practice.<sup>485</sup> Bantekas<sup>486</sup> and Palmer<sup>487</sup> are of the view that corruption should be tried as a crime against humanity. Although article 7 of the *Rome Statute*<sup>488</sup> provides sufficient justification to endorse this view, consensus

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482 Abass 2013 *NILR* 33.

483 Abdul 2012 <http://www.osisa.org/openspace/dont-bank-grand-corruption-becoming-international-crime-.abdul-tejan-cole>.

484 See chap 2 par 2.3 *The Rome Statute*.

485 Abdul 2012 <http://www.osisa.org/openspace/dont-bank-grand-corruption-becoming-international-crime-.abdul-tejan-cole>. "The negotiation process to set up an implementation review mechanism for the Convention was marked by prolonged deadlock and the resulting compromise led to a far from desirable result. Combined with the stalled attempt to establish an international piracy tribunal, this indicates that there is currently insufficient appetite for an international tribunal on corruption."

486 Bantekas 2013 *JICJ* 483-484.

487 Palmer 2012 *Combating Grand Corruption in Africa* 4-5.

488 See chap 2 par 3.2.2 Crimes against humanity.

has not been reached on the implementation of any one model for prosecution. In the light of the facts stated above, it is possible to conclude that whether or not corruption is an international crime is a matter still under consideration, and there is consequently no possibility of its current attainment of international customary law status.<sup>489</sup>

### 3.3.1.7 Money Laundering

The *UN Economic and Social Council (ECOSOC) United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* 19 December 1988<sup>490</sup> (ECOSOC Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances) was one the first international instruments criminalising money-laundering. The *UN General Assembly United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly* 8 January 2001 A/RES/55/25<sup>491</sup> and the *UN General Assembly United Nations Convention Against Corruption* 31 October 2003 A/58/422<sup>492</sup> broadened the scope by emphasising that money-laundering is a component of all other serious crimes and pertains not only to illegal drug-trafficking. The Financial Action Task Force (FATF) has released 40 recommendations<sup>493</sup> and 9 special recommendations<sup>494</sup> specifically to prevent money-laundering and to prohibit the financing of terrorism.<sup>495</sup>

For the purpose of the *Protocol*, money laundering is regarded as:<sup>496</sup>

...any act of –

- i. Conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the

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489 Abass 2013 NILR 33; Du Plessis 2012 ISS 7.

490 *UN Economic and Social Council (ECOSOC) United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* 19 December 1988.

491 *UN General Assembly United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly* 8 January 2001 A/RES/55/25.

492 *UN General Assembly United Nations Convention Against Corruption* 31 October 2003 A/58/422.

493 FATF 40 *Recommendations* October 2003 (incorporating all subsequent amendments until October 2004).

494 *FATF IX Special Recommendations* October 2001 (incorporating all subsequent amendments until February 2008).

495 UNODC 2013 <http://www.unodc.org/unodc/en/money-laundering/Instruments-Standards.html?ref=menuseide>.

496 A 281 *bis* of the *Protocol*.

purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action.

- ii. Concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences;
  - iii. Acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences
  - iv. Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.
2. Nothing in this article shall be interpreted as prejudicing the power of the Court to make a determination as to the seriousness of any act or offence.

Evidently, money laundering plays a pivotal role in enhancing the profitability of a vast number of criminal activities<sup>497</sup> such as terrorism, drug-trafficking and corruption. Its characteristics have gained international recognition, forming *opinio juris*, which has consequently led to settled practice among states regarding its prosecution.<sup>498</sup> As said above, it may be concluded that corruption justifies its achievement of *opinio juris and usus*, and thus establishes itself as an international customary crime. Abass and Schroeder<sup>499</sup> confirm this position, acknowledging that:<sup>500</sup>

...money laundering is an offence which we may concede is serious enough to merit international criminal jurisdiction.

### 3.3.1.8 Trafficking in Persons

The *Rome Statute*,<sup>501</sup> *UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002), 25 May 1993<sup>502</sup> (*Statute of the International Criminal Tribunal for the Former Yugoslavia*)

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497 Abass 2013 *NILR* 33.

498 *ECOSOC Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. UN General Assembly United Nations Convention against Transnational Organized Crime: resolution/adopted by the General Assembly 8 January 2001 A/RES/55/25. UN General Assembly United Nations Convention Against Corruption 31 October 2003 A/58/422.*

499 Schroeder 2001 *FBI Law Enforcement Bulletin* 3.

500 Abass *The Proposed International Criminal Jurisdiction for the African Court* 33.

501 A 7(1)(c) of the *Rome Statute*.

502 A 5(c) of *Statute of the International Criminal Tribunal for the Former Yugoslavia*.

and the *UN Security Council, Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994<sup>503</sup> (*Statute of the International Criminal Tribunal for Rwanda*) indicate that crimes against humanity manifest in different forms, especially in the context of slavery-related practices. Slavery takes different forms, which include the trafficking of persons, as stated in the *Rome Statute*:<sup>504</sup>

Enslavement means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

*Article 3 (a) of the UN General Assembly, United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing The United Nations Convention against Transnational Organized Crime* 8 January 2001<sup>505</sup> (*UN TIP Protocol*) also affirms that trafficking in persons includes "...slavery or practices similar to slavery". The *UN General Assembly, Slavery Convention* of 25 September 1926, 23 October 1953 A/RES/794 conferred the obligation upon member states as early as in 1926 to establish measures to eradicate slavery in all its forms.<sup>506</sup> The *UN TIP Protocol* is one of three<sup>507</sup> separate protocols that are supplementary to *The UN General Assembly, United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly, 8 January 2001 A/RES/55/25*,<sup>508</sup> which was specifically established to eradicate different forms and manifestations of organised crime, including the trafficking of persons. The steps to be taken to combat the crime were described as follows:<sup>509</sup>

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503 A 3(c) of the *Statute of the International Criminal Tribunal for Rwanda*.

504 A 7(2)(c) of the *Rome Statute*.

505 A 3(a) of the *UN General Assembly, United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing The United Nations Convention against Transnational Organized Crime* 8 January 2001.

506 A 3 of the *UN General Assembly, Slavery Convention* of 25 September 1926, 23 October 1953 A/RES/794.

507 *UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime* 15 November 2000 is also relevant as prohibiting the illegal trafficking of migrants.

508 *UN General Assembly, United Nations Convention against Transnational Organized Crime: resolution/adopted by the General Assembly* 8 January 2001 A/RES/55/25.

509 *UN General Assembly, United Nations Convention against Transnational Organized Crime: resolution/adopted by the General Assembly* 8 January 2001 A/RES/55/25.

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights.

Article 8 of the *UN General Assembly, International Covenant on Civil and Political Rights*, 16 December 1966, *United Nations, Treaty Series*, vol. 999, p. 171 (ICCPR) also stresses that:<sup>510</sup>

No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

Article 28J of the *Protocol* states that:<sup>511</sup>

1. 'Trafficking in persons' means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
2. Exploitation shall include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
3. The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (1) of this article shall be irrelevant where any of the means set forth in subparagraph (1) have been used;
4. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (1) of this article;

There is a clear similarity between the formulation of the offence's definition in the *Protocol* and *The Protocol to Prevent, Suppress and Punish Trafficking in Persons*, which conventionally refers to trafficking in persons as a form of enslavement.<sup>512</sup> As discussed above, trafficking in persons manifests in different forms, but ultimately results either in slavery<sup>513</sup> or in crimes against humanity.<sup>514</sup>

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510 A 8 of the *UN General Assembly, International Covenant on Civil and Political Rights* 16 December 1966 *United Nations Treaty Series* 171.

511 A 28J of the *Protocol*.

512 A 3 of the *UN General Assembly, United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing The United Nations Convention against Transnational Organized Crime* 8 January 2001.

513 Bassiouni 1996 *Law and Contemporary Problems* 68-69.

Both of the aforementioned crimes have also been entrenched in international customary law.<sup>515</sup>

As of 2014 the *UN TIP Protocol* has been ratified by 154 states, where the ICCPR has a membership of 168 state parties.<sup>516</sup> This illustrates the vast international condemnation<sup>517</sup> of human trafficking and satisfies the requirement of *opinio juris*. Due to the existence of international consensus regarding all acts of the trafficking of persons, the prosecution level is noteworthy. 5609 successful prosecutions were carried out worldwide between the years 2000 and 2010.<sup>518</sup> Thus, there is global<sup>519</sup> settled practice relating to the prosecution of human trafficking. Meeting both requirements,<sup>520</sup> the trafficking of persons is established as an international customary law crime.<sup>521</sup>

### 3.3.1.9 Trafficking in Drugs

In the 1920s and 1930s the UN's predecessor, the League of Nations,<sup>522</sup> recognised the significant increase in illicit drug trafficking. The Advisory Committee on the Traffic in Opium and other Dangerous Drugs was established to collect and analyse information concerning drug trafficking to encourage state parties to the *The Hague International Opium Convention 1912* 11 February

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514 International Crimes Database 2014 <http://www.internationalcrimesdatabase.org/Crimes/CrimesAgainstHumanity>; a 7(c) of the *Rome Statute*.

515 A 7 of *Rome Statute* a 5(c) Statute of ICTY; a 3(c) Statute of ICTR.

516 UN 2014 [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en).

517 Also see the *International Labour Organisation (ILO) Forced Labour Convention 1930* (No 29) *ILO Abolition of Forced Labour Convention 1957* (No 105) *ILO Minimum Age Convention 1973* (No 138) *ILO Worst Forms of Child Labour Convention 1999* (No 182).

518 *3P Anti-trafficking Policy Index* (2000-2010, 183 countries) (Cho, Dreher and Neumayer 2011). "The Anti-trafficking Policy Index evaluates governmental anti-trafficking efforts in the three main policy dimensions, based on the requirements prescribed by the UN TIP Protocol.

519 Free the Slaves 2013 <http://www.freetheslaves.net/SlaveryinHistory>.

520 See chap 2 par 3.1 Customary international law crimes.

521 Bassiouni 1996 *Law and Contemporary Problems* 68-69 "(1) international pronouncements, or what can be called international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes."

522 UN 2014 <http://www.un.org/pubs/cyberschoolbus/unintro/unintro3.htm>.

1915,<sup>523</sup> to actively participate in the fight against illicit drug trafficking.<sup>524</sup> Another international instrument specifically developed to eradicate drug trafficking was the *Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, 198 L.N.T.S 301*,<sup>525</sup> which was developed in the light of the latter Advisory Committee's findings.<sup>526</sup> The *ECOSOC Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* that came into force in the 1980s is the leading international instrument that criminalises the distribution and production of various narcotics. This Convention determines that state parties should exercise jurisdiction over the listed offences in their territory<sup>527</sup> and should also improve on their mutual legal assistance in the fight against drug trafficking.<sup>528</sup>

Due to the limited number of states that were affected by the trafficking of narcotics in the 1930s, the need for control over illicit substances was restricted. However, the *ECOSOC Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* changed the international community's perspective, and 188 countries became member states to this particular convention, thus engaging in the objective of eradicating the unlawful trafficking of narcotic drugs.<sup>529</sup> According to the *Protocol*, the offence stipulated as trafficking in drugs will consist of:<sup>530</sup>

- a. The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;
- b. The cultivation of opium poppy, coca bush or cannabis plant;
- c. The possession or purchase of drugs with a view to conducting one of the activities listed in (a);

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523 *The Hague International Opium Convention 1912*, 11 February 1915.

524 Boister 1997 *CILSA* 4 5 18-20.

525 *Convention for the Suppression of the Illicit Traffic in Dangerous Drugs June 26 1936*, 198 LNTS 301.

526 *Advisory Committee On Traffic in Opium and Other Dangerous Drugs: List of Illicit Transactions and Seizures Reported to the League of Nations Since April 22nd 1926* (Lausanne: Imp. réunies 1927).

527 A 4 of the *ECOSOC Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*.

528 Dugard *International Law* 162.

529 Boister 1997 *CILSA* 21.

530 A 28K of the *Protocol*.

- d. The manufacture, transport or distribution of precursors knowing that they are to be used in or for the illicit production or manufacture of drugs.
2. The conduct described in paragraph 1 shall not be included in the scope of this Statute when it is committed by perpetrators for their own personal consumption as defined by national law.
3. For the purposes of this Article:
  - a. 'Drugs' shall mean any of the substances covered by the following United Nations Conventions:
    - a. the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs of 1961;
    - b. The 1971 Vienna Convention on Psychotropic Substances.
  - b. 'Precursors' shall mean any substance scheduled pursuant to Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988.

The definition of "drugs" in the *Protocol* would include any of the substances<sup>531</sup> listed in the *1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs 1961 9 December 1975 A/RES/3444*<sup>532</sup> and the *UN General Assembly, Vienna Convention on Psychotropic Substances 1971*.<sup>533</sup>

Although there is such widespread ratification and acceptance of the *ECOSOC Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* that it achieves *opinio juris*, proof of settled practice is scarce. Douglas states that drug trafficking:<sup>534</sup>

...involving narcotics prosecutions lacking any ordinary jurisdictional nexus with the prosecuting State...would be very hard to find.

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531 Defined in the *Protocol* according to a 12 of the ECOSOC *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. Tables I and II include the following substances: Ephedrine, Acetone, Ergometrine, Anthracitic acid, Ergotamine, Ethyl ether, Isosafrole, Hydrochloric acid, Lysergic acid and Methyl ethyl ketone.

532 A 1 of the *UN General Assembly 1972 Protocol Amending the Single Convention on Narcotic Drugs 1961 9 December 1975 A/RES/3444* includes cannabis-leaves, resin, coca-bush and leafs, opium, poppy straw and all drugs listed under schedule I, II, III, IV.

533 *UN General Assembly 1971 Vienna Convention on Psychotropic Substances 1971 16 August 1976 A/RES/14956*.

534 Douglas 2012 <http://www.ejiltalk.org/drug-trafficking-at-sea-no-longer-a-crime-of-universal-jurisdiction-before-us-courts/>.

In the case of *US v Bellaizac-Hurtado* 700 F 3d 1245-2012,<sup>535</sup> the Supreme Court also argued that drug trafficking qualifies in the sense of a legal obligation (*opinio juris*) (due to the vast ratification of the latter convention) but falls short on acting according to the principles agreed upon, thus ruling out settled practice (*usus*). It is noteworthy to point out that the immense international effort in criminalising this offence internationally, ultimately achieved very little. Since both prerequisites are not met, the illicit trafficking of drugs does not qualify as an international customary crime.<sup>536</sup>

### 3.3.1.10 Trafficking in Hazardous Wastes

*The Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal* of 1989<sup>537</sup> determines that member states are obliged to prohibit the exportation of hazardous wastes<sup>538</sup> to other states that have notified the first-mentioned state of their prohibition thereof.<sup>539</sup> Principle 14 of the *Rio*

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535 *US v Bellaizac-Hurtado* 700 F 3d 1245-2012 "Treaties may constitute evidence of customary international law, but will only constitute sufficient proof of a norm of customary international law if an overwhelming majority of States have ratified the treaty, and those States uniformly and consistently act in accordance with its principles." Flores, 414 F 3d at 256. "Of course, States need not be universally successful in implementing the principle in order for a rule of international law to arise.... But the principle must be more than merely professed or aspirational."

536 Bassiouni 1996 *Law and Contemporary Problems* 68-69; see chap 2 par 2.2.1 Customary international law crimes; a 38(1)(b) of the *Statute of the International Court of Justice*.

537 A 9 of the *Final Act of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, adopted on 22 March 1989 UNEP/IG.80/3.

538 A 2 and Annex 1 of the *AU Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa* includes the following wastes: "All wastes containing or contaminated by radionuclides, the concentration or properties of which result from human activity, clinical wastes from medical care in hospitals, medical centres and clinics, wastes from the production and preparation of pharmaceutical products, waste pharmaceutical, drugs and medicines, wastes from the production, formulation and use of biocides and phytopharmaceuticals, wastes from the manufacture, formulation and use of organic solvents, wastes from the production, formulation and use of organic solvents, wastes from heat treatment and tempering operations containing cyanides".

539 A 8 of the *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*: "When a transboundary movement of hazardous wastes to which the consent of the States concerned has been given, subject to the provisions of this Convention, cannot be completed in accordance with the terms of the contract, the State of export shall ensure that the wastes in question are taken back into the State of export, by the exporter, if alternative arrangements cannot be made for their disposal in an environmentally sound manner within a maximum of 90 days from the time that the importing State informed the State of export and the Secretariat. To this end, the State of export and any State of transit shall not oppose, hinder or prevent the return of those wastes to the State of export."

*Declaration on Environment and Development, adopted at the UN Conference on Environment and Development (UNCED) in June 1992 endorses the view that.*<sup>540</sup>

States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.

*The Guidance Manual for The Implementation Of Council Decision C(2001)107/Final, as Amended on The Control of Transboundary Movements of Wastes Destined for Recovery Operations 2001* was created to provide a guideline to member states of the Organisation for Economic Co-Operation And Development (OCED)<sup>541</sup> to regulate the transportation of hazardous waste. The *Guidance Manual* stresses the importance of regulating hazardous waste to prevent severe degradation to the environment and human health.<sup>542</sup>

The trafficking of hazardous wastes is stipulated under the *Protocol* as an offence under article 28L, which was created largely in accordance with the *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*.<sup>543</sup>

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540 *Principle 14 of the Rio Declaration on Environment and Development, adopted at the UN Conference on Environment and Development (UNCED) in June 1992.*

541 *The Guidance Manual for The Implementation Of Council Decision C(2001)107/Final, as Amended, On The Control Of Transboundary Movements Of Wastes Destined For Recovery Operations 2001 ...* "The OECD is a unique forum where the governments of 30 democracies work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies. The OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD."

542 *Guidance Manual for The Implementation Of Council Decision C(2001)107/Final, as amended, on The Control of Transboundary Movements of Wastes Destined for Recovery Operations 2001*

543 *AU Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa 1994, Bamako, Mali, January 1998.*

Article 28L of the *Protocol* states that:<sup>544</sup>

1. For the purposes of this Statute, any import or failure to re-import, trans boundary movement, or export of hazardous wastes proscribed by the Bamako Convention on the Ban of the Import into Africa and the Control of Trans boundary Movement and Management of Hazardous Wastes within Africa, adopted in Bamako, Mali, in January 1991 shall constitute the offence of trafficking in hazardous waste. 2. The following substances shall be "hazardous wastes" for the purpose of this statute:
  - a. Wastes that belong to any category contained in Annex I of the Bamako Convention;
  - b. Wastes that are not covered under paragraph (a) above but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the State of export, import or transit;
  - c. Wastes which possess any of the characteristics contained in Annex II of the Bamako Convention;
  - d. Hazardous substances which have been banned, cancelled or refused registration by government regulatory action, or voluntarily withdrawn from registration in the State of manufacture, for human health or environmental reasons.
3. Wastes which, as a result of being radioactive, are subject to any international control systems, including international instruments, applying specifically to radioactive materials are included in the scope of this Convention.
4. Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, shall not fall within the scope of this Convention.
5. For the purposes of this Article, "failure to re-import" shall have the same meaning assigned to it in the Bamako Convention.
6. The export of hazardous waste into a Member State for the purpose of rendering it safe shall not constitute an offence under this Article.

That said, the international criminalisation of infringements of environmental law has made little progress thus far.<sup>545</sup> This could be accorded to a broad approach of criminalisation whereby only specific problematic issues are addressed and not the general threat the environment faces on a systematic basis.<sup>546</sup> Mégret states that:<sup>547</sup>

More generally, a drive to criminalize may raise fears of over-criminalization and excessive prosecutorial discretion. Indeed, the criminal law may not seem a very appropriate tool for complex environmental risk management given the uncertainties involved. Moreover, environmental law, both domestic and

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544 A 28L of the *Protocol*.

545 Drumbi 1998 *Fordham ILJ* 21-23.

546 Mégret 2011 *Columbia JEL* 241-242.

547 Mégret 2011 *Columbia JEL* 225-228.

international, may rely on administrative agencies to determine the frontiers of permissible and impermissible actions in ways that raise concerns about the accessibility and predictability of the law

Mégret also highlights the principle of state sovereignty as an impediment, stating that.<sup>548</sup>

Here, the main interest lies in respecting sovereignty and protecting against the premature internationalisation of issues that might effectively be treated domestically. The sovereignty argument is a particularly sensitive issue when it comes to criminal law, given the close association of criminal law with notions of domestic public order.

The prosecution of hazardous trafficking on international level is scarce, to say the least,<sup>549</sup> and international consensus has not yet been reached about defining "waste" and "hazardous."<sup>550</sup>

The right to a healthy environment has been considered as part of international customary law, but specificity<sup>551</sup> regarding the prosecution of acts that threaten this right has not yet been achieved internationally. This prevents the crime of trafficking in hazardous waste from achieving international customary law status.<sup>552</sup>

### 3.3.1.11 Illicit Exploitation of Natural Resources

Principle 2 of the *Rio Declaration on Environment and Development* explains that.<sup>553</sup>

States have, in accordance with the Charter of the United Nations and the principles of international law the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and

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548 Mégret 2011 *Columbia JEL* 204 255-256 "Here, the main interest lies in respecting sovereignty and protecting against the premature internationalisation of issues that might effectively be treated domestically. The sovereignty argument is a particularly sensitive issue when it comes to criminal law, given the close association of criminal law with notions of domestic public order."

549 Nadelmann 1990 *International Organization* 481.

550 Hayman and Brack *International Environmental Crime* 16-17.

551 Nadelmann 1990 *International Organization* 481.

552 Berat 1993 *BU ILJ* 480-482; Mégret 2011 *Columbia JEL* 224 "Furthermore, the reliance of international environmental law on customary international and soft law instruments may raise legitimate concerns about respect for the legality principle and the idea of *lex certa*"; Abass 2013 *NILR* 32-33; Du Plessis 2012 *ISS* 7.

553 *Principle 2 of the Rio Declaration on Environment and Development*. Also affirmed in a 3 of the *UN Convention on biological diversity* Ch\_XXVII\_8 Rio de Janeiro 5 June 1992.

...the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

However, that sovereign right is limited<sup>554</sup> by treaty law such as the *UN Convention on Biological Diversity Ch\_XXVII\_8, Rio de Janeiro, 5 June 1992, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity Text and Annexes Cartagena Protocol on Biosafety Montreal 2000*,<sup>555</sup> *The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity 2010*<sup>556</sup> and *The African Convention on the Conservation of Nature and Natural Resources 2003*,<sup>557</sup> which states that its objectives are the elimination and thereafter the prevention of the illegal exploitation of natural resources in order to:<sup>558</sup>

protect or preserve in perpetuity specific outstanding natural features because of their natural significance, unique or representational quality, and/or spiritual connotations

The *Protocol*<sup>559</sup> defines the illicit exploitation of natural resources as:

- a. Concluding an agreement to exploit resources, in violation of the principle of peoples' sovereignty over their natural resources;
- b. Concluding with state authorities an agreement to exploit natural resources, in violation of the legal and regulatory procedures of the State concerned;
- c. Concluding an agreement to exploit natural resources through corrupt practices;
- d. Concluding an agreement to exploit natural resources that is clearly one-sided;
- e. Exploiting natural resources without any agreement with the State concerned;

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554 Bugge *Principles of International Environmental Law 2*.

555 *Cartagena Protocol on Biosafety to the Convention on Biological Diversity Text and Annexes Cartagena Protocol on Biosafety Montreal 2000*.

556 *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity 2010*.

557 Aa 8 and 9 of *the African Convention on the Conservation of Nature and Natural Resources 2003*.

558 *Annex 2 of The African Convention on the Conservation of Nature and Natural Resources 2003*.

559 A 28LBis of the *Protocol*.

- f. Exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff; and
- g. Violating the norms and standards established by the relevant natural resource certification mechanism.

Even though the condemnation of illicit exploitation is common, distinguishing legal acts from illegal acts where both have adverse effects on the environment is problematic, as Mégret states.<sup>560</sup>

In a world where much of the economy is based on the destruction of natural resources, drawing a distinction between legal and illegal destruction could be problematic. The difficulty in distinguishing between legitimate and illegitimate pollution, and the relativity that seems inherent in such an assessment, may make international criminal law of the environment appear to be a sliding scale, where the costs and benefits of each activity are constantly re-evaluated. This kind of ad hoc utilitarian calculus may be deeply antithetical to the needs of a liberal criminal law (understood as a criminal law that respects basic liberties) particularly the requirement of fair notice to would-be offenders.

The theory of harm brought about through modern criminal law would not easily be reconciled with harm done to the environment, because damage done to the environment may become evident only at a later stage, thus complicating modern international criminal law procedures.<sup>561</sup> Thus, the basis of prosecuting the illicit exploitation of natural resources is tenuous, to say the least.<sup>562</sup> In addition, the illicit exploitation of natural resources is basically burdened with the same impediments regarding the lack of the ability to deal with environmental crimes on a systematic basis, thus widening the gap between policy and established, settled practice.<sup>563</sup> The crime of the illicit exploitation of natural resources therefore falls short on satisfying both requirements to attain international customary law status.<sup>564</sup>

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560 Mégret 2011 *Columbia JEL* 222.

561 Feinberg *The Moral Limits of the Criminal Law* 29-31; Mégret 2011 *Columbia JEL* 222.

562 Abass 2013 *NILJ* 35.

563 See chap 3 par 2.2.1.10 Trafficking in Hazardous Wastes.

564 Abass 2013 *NILR* 32-33; Du Plessis 2012 *ISS* 7.

### 3.3.1.12 The Crime of Aggression

The crime of aggression gained significant attention as far back as 1919, when the said crime was addressed in article 10 of the *League of Nations, Covenant of the League of Nations, 28 April 1919*, which states that:<sup>565</sup>

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

The legal basis for prosecuting the crime of aggression dates back to 1946, when the IMT carried out a vast number of prosecutions<sup>566</sup> in accordance with article 6 (a) of the CIMT, which states:<sup>567</sup>

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression...

This wording is duplicated in article 5 (a) of the *CIMTFE*.

The crime of aggression is also incorporated into the *Rome Statute*<sup>568</sup> through the *RC/Res.6 of the Review Conference of the Rome Statute of the ICC 2010*<sup>569</sup> (Kampala Agreement). The crime is similarly defined pursuant to the *UN Resolution 3314 (XXIX) 14 December 1974*.<sup>570</sup>

The description of the crime of aggression in the *Protocol*<sup>571</sup> resembles the *Rome Statute's*<sup>572</sup> description, therefore<sup>573</sup> both documents entail the characterisation of

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565 A 10 of the *League of Nations, Covenant of the League of Nations* 28 April 1919.

566 The Global Campaign for the Prevention of Aggression 2013 <http://crimeofaggression.info/role-of-the-icc/definition-of-the-crime-of-aggression/>.

567 A 6(a) of the *CIMT*.

568 A 8bis3 of the *Rome Statute*.

569 *RC/Res.6 of the Review Conference of the Rome Statute of the ICC* 2010.

570 *UN Resolution 3314 (XXIX) 14 December 1974*.

571 A 28M of the *Protocol*.

572 A 8 Bis of the *Rome Statute*.

573 See chap 2 par 2.2.2.4 Crime of aggression.

similar conduct as an act of aggression regardless of whether a declaration of war is issued or not. Article 28M of the *Protocol* states that:<sup>574</sup>

- A. For the purpose of this Statute "Aggression" means the use, intentionally and knowingly, of armed force or any other hostile act by a state, a group of States, an organization of States or non-State actor(s) or by any foreign or external entity, against the sovereignty, political independence, territorial integrity and human security of the population of a State Party, which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union.
- B. The following shall constitute acts of aggression, regardless of a declaration of war by a State, group of States, organizations of States, or non-State actor(s) or by any foreign entity:
  1. The use of armed forces against the sovereignty, territorial integrity and political independence of any state, or any other act inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations.
  2. The invasion or attack by armed forces against the territory of a State, or military occupation however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of a State or part thereof.
  3. The bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.
  4. The blockade of the ports, coasts or airspace of a State by the armed forces of another State.
  5. The attack by the armed forces of a State on the land, sea or air forces, or marine and fleets of another State.
  6. The use of the armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the African Union Non-Aggression and Common Defence Pact or any extension of their presence in such territory beyond the termination of the agreement.
  7. The action of a State in allowing its territory, which it has placed at the disposal of another State to be used by another State for perpetrating an act of aggression against a third State. The sending by, or on behalf of a State or the provision of any support to armed bands, groups, irregulars, mercenaries and other organized trans-national criminal groups which may carry out hostile acts against a State, of such gravity as to amount to the acts listed above, or its substantial involvement therein. Technological assistance of any kind, intelligence and training to another state for use in committing acts of aggression against another State.

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574 A 28M of the *Protocol*.

Concerning the ICC, the definition of the crime of aggression was only recently reached at the Kampala Conference held in 2010<sup>575</sup> and its prosecution will be realised only after its adoption after the 1 January 2017.<sup>576</sup> That said, even though settled practice has not yet been established before the ICC, its prosecution has been subject to its prior manifestation as the crime against peace.<sup>577</sup> Dugard,<sup>578</sup> Bassouni<sup>579</sup> and Abass<sup>580</sup> have dubbed it the supreme international crime and affirmed its status of *jus cogens*.<sup>581</sup> The inclusion of the said crime in the *Rome Statute*<sup>582</sup> further confirmed its achievement of reaching sufficient *opinio juris* and *usus*, thereby establishing itself as an international customary law crime.<sup>583</sup>

### 3.3.2 Analysis

It may be assumed that the inclusion of these unaccustomed crimes emphasises the weight African states attach to them.<sup>584</sup> It is also important to note that classical international crimes such as genocide, war crimes and crimes against humanity occur less often than crimes such as piracy, the trafficking of persons and money laundering.<sup>585</sup> As Abass explains:<sup>586</sup>

The acquisition of jurisdiction by the African Court over such unorthodox "international" crimes, it is submitted, addresses the gap between the jurisdictional reach of the ICC and the occurrence in many African States Parties to the Rome Statute of many admittedly less familiar but ubiquitous and devastating crimes afflicting them.

The possibility of the prosecution of six unaccustomed crimes before an international court raises serious concerns in relation to the jurisdictional reach of the ICLS, specifically with respect to the notion of immunity.<sup>587</sup> However, the

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575 RC/Res.6 of the Review Conference of the Rome Statute of the ICC 2010.

576 A 15bis5(3) of the Rome Statute.

577 A 6(a) of the CIMT; a 5(a) of the CIMTFE; International Criminal Database 2014 <http://www.internationalcrimesdatabase.org/Crimes/CrimeOfAggression>.

578 Dugard *International Law* 186.

579 Bassiouni 1996 *Law and Contemporary Problems* 68.

580 Abass 2013 *NILR* 32-33.

581 See chap 3 par 2.2.1.8 Trafficking in Persons.

582 A 5(1)(d) of the Rome Statute.

583 Kreß and Von Holtzendorf 2010 *JICJ* 1181.

584 Abass 2013 *NILR* 32-33.

585 Du Plessis 2012 *ISS* 7-8; Abass *NILR* 32-33.

586 Abass 2013 *NILR* 36-37.

587 Du Plessis 2012 *ISS* 7-8.

implications of this fall outside this sphere of this chapter, and are addressed in chapter 5.<sup>588</sup>

### 3.3.3 *Jurisdiction ratione temporis*

The ICLS will have jurisdiction over a case concerning a member state only after the concerned state has ratified the *Protocol*. In addition, the *Protocol* is also vested with only temporal jurisdiction, which means that the ICLS will have jurisdiction over a case only when a crime is committed after the *Protocol's* entry into force.<sup>589</sup> In this note it is important to point that the ICLS would not be able to address any current situations before the ICC since its jurisdiction is not retrospective in nature. Thus, the ICLS cannot be regarded as a solution to addressing any existing frustrations the AU may have with respect to the ICC's current cases.<sup>590</sup>

### 3.3.4 *Preconditions to the exercise of jurisdiction*

When a state becomes a member to the *Protocol*, it thereby accepts the jurisdiction<sup>591</sup> of the ICLS regarding the crimes listed in article 28A. The ICLS will have jurisdiction over a situation if one or more of the listed crimes is committed within the territory of a member state or on board a vessel or aircraft which is registered to the concerned state. The jurisdictional reach of the ICLS extends over a person who is a national of a member state, who is accused of committing the particular crime, when a national of a member state was the victim, or when a member state is threatened by an extraterritorial act carried out by a non-national. The ICLS may exercise its jurisdiction on an *ad-hoc* basis if a non-member state lodges a declaration with the registrar of the ICLS explicitly expressing its acceptance of jurisdiction over a certain situation.

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588 See chap 4 par 6 Immunity before the ICLS.

589 A 46E of the *Protocol*.

590 Du Plessis 2012 *ISS* 11; see chap 2 par 5 Current situations before the ICC; see chap 3 par 2.2.2 Establishing the ICLS: anti-ICC sentiments.

591 A 46E of the *Protocol*.

### 3.3.5 *Trigger mechanisms of the ICLS's jurisdiction*

#### 3.3.5.1 Referral by a member state

The ICLS may exercise its jurisdiction over a situation in relation to a crime stipulated under article 28A if the situation is referred to the prosecutor of the Court by a member state.<sup>592</sup>

#### 3.3.5.2 Referral by the Assembly of Heads of State and Government of the AU or the Security Council of the AU

When a listed crime<sup>593</sup> is committed, it may be referred to the prosecutor of the ICLS by the Assembly of Heads of State and Government of the AU<sup>594</sup> or the Security Council of the AU.<sup>595</sup>

#### 3.3.5.3 *Proprio motu* powers of the prosecutor

*Proprio motu* powers are bestowed upon the Prosecutor of the ICLS.<sup>596</sup> This enables the Prosecutor to initiate an investigation into a situation based on the Prosecutor's own analysis. The analysis should be conducted by the Prosecutor through the consideration of information received. The protocol further states that the seriousness of the information should be evaluated, and that the Prosecutor may seek further information in an oral or written form from member states, organs of the AU or UN, intergovernmental or non-governmental institutions, or other dependable sources that will assist the prosecutor as deemed appropriate. The Prosecutor should establish a reasonable basis before authorisation may be sought from the Pre-Trial Chamber regarding the commencement of an investigation. If the Prosecutor is unable to find a reasonable basis regarding the situation at hand, the prosecutor should notify those who provided the information. The Pre-Trial Chamber should furthermore also conclude upon examination of the prosecutor's request that a reasonable basis exists. If both the Prosecutor and the

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592 A 46F(1) of the *Protocol*.

593 A 28A of the *Protocol*.

594 AU 2013 <http://www.au.int/en/organs/assembly> accessed.

595 AU *Protocol Relating to the Establishment of the Peace and Security Council of the African Union* 9 July 2002.

596 A 46G of the *Protocol*.

Pre-Trial Chamber conclude that a reasonable basis exists and the situation falls within jurisdiction of the ICLS, the Pre-Trial Chamber may authorise the Prosecutor to proceed with the investigation. The refusal of either the Prosecutor or the Pre-Trial Chamber does not prevent further evidence from being considered if received in the light of new facts arising.

#### 3.3.5.4 Issues of admissibility: Complementarity

The ICLS intends to complement national courts<sup>597</sup> and the courts of regional economic communities.<sup>598</sup> A situation will be deemed inadmissible if it falls within the jurisdiction of a state and that said state is currently in the process of investigations or prosecutions in relation to the situation concerned. According to the *Protocol*,<sup>599</sup> when a state has jurisdiction over a situation but fails to initiate investigations or appropriate procedures, either according to its unwillingness or inability, the situation will be deemed admissible. It also falls beyond the ICLS's reach to try a person with respect to a crime which that person has already been convicted or acquitted for. Insufficient gravity of the crime would also render a case inadmissible.<sup>600</sup>

The interpretation of a state's unwillingness and inability to initiate prosecutions in the *Protocol* is similar to that in the *Rome Statute*.<sup>601</sup> The "unwillingness" of a state would include situations where the state attempts to shield a person from criminal responsibility before the ICLS, an unjustified delay in proceedings, or when proceedings are not conducted impartially and independently. "Inability" would describe the event where the state concerned is unable to initiate prosecution or investigation into a case because of a significant or total breakdown or unavailability of the particular state's judicial system or the state's failure to acquire necessary evidence or to ensure the presence of the accused before the court.

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597 Regarding complementarity towards international courts please see chap 5 par 4.3.3 Complementarity.

598 A 46H of the *Protocol*.

599 A 46H of the *Protocol*.

600 Aa 46H(c) and (d) of the *Protocol*.

601 See chap 2 par 3.4 Issues of admissibility: Complementarity.

A significant absence from the *Protocol* is a provision to address the implementation of procedures under national law for a state to carry out its obligations conferred upon it by article 46L of the *Protocol*.<sup>602</sup> Even although such a provision is included in the *Rome Statute*,<sup>603</sup> to date only South-Africa, Mauritius, Kenya, Uganda, Senegal and Comoros (of the ICC African member states)<sup>604</sup> have enacted legislation honouring their obligations regarding complementarity and co-operation.<sup>605</sup> The absence of a comprehensive provision in the *Protocol* addressing the implementation of legislation for member states towards the ICLS diminishes even further the prospects that African states will domesticate legislation in order to carry out their responsibilities and ultimately contribute to the ICLS's success.<sup>606</sup>

### **3.4 Obligations of Member States**

#### *3.4.1 Co-operation and Judicial Assistance*

Member states are obliged by the *Protocol*<sup>607</sup> to cooperate with and assist the ICLS in its investigation and prosecution of persons accused of committing crimes as specified in the statute. The ICLS may also request assistance and cooperation from regional or international courts, non-member states or cooperating partners of the AU.

##### 3.4.1.1 Member States

Article 46L further determines that state parties will adhere to and comply with any request handed down from the ICLS within reasonable time. A non-exhaustive list further describes the tasks that may be handed down to member states, which includes the following: the finding, identification, apprehension, detention or extradition of persons; the production of various forms of evidence; the surrendering and transferring of persons to the ICLS; and the locating, identifying

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602 A 46L of the *Protocol*.

603 A 88 of the *Rome Statute*.

604 CICC 2013 <http://www.iccnw.org/?mod=romeimplementation&idudctp=10&show=all>; Du Plessis 2012 *ISS* 10.

605 Akande, Du Plessis and Jalloh 2010 *ISS* 19-20.

606 See chap 2 par 2.4.4 Procedures under national law of state parties.

607 A 46L of the *Protocol*.

and freezing or seizing of proceeds and assets with the possibility of forfeiture. Any form of further cooperation may be sought from a member state, except if it would be inconsistent with the particular state's national legislation.

### 3.4.2 *Competing Obligations*

Article 46L of the *Protocol*<sup>608</sup> fails to provide a more descriptive provision pertaining to the identification of institutions which it may consult for judicial assistance and cooperation, specifically with regard to the ICC. The implications of this absence fall outside of this chapter's scope, but the fact needs to be pointed out as the implications are to be analysed in chapter five.<sup>609</sup> It should be emphasised that no legal obligation exists for the *Protocol* to refer to the ICC in relation to its complementary nature. However, thirty-four African states are already member states to the *Rome Statute*, which confers its own responsibilities upon the aforementioned states. If African states holding ICC membership ratify the *Protocol*, they would ultimately be faced with the need to take a decision if the two courts request the performance of separate duties by the member states. Since the *Protocol* fails to describe its complementary nature in this regard, uncertainty would surely arise in relation to which court would receive primacy in this instance.<sup>610</sup>

## 3.5 **Conclusion**

The AU's commitment to the establishment of the ICLS remains strong, as its dislike of the ICC's *modus operandi* fundamentally outweighs arguments which otherwise substantiates its establishment on a judicial basis. The indictment of two sitting Heads of State, Al-Bashir and Kenyatta, may be regarded as having been the turning point in Africa's stance towards the ICC, and consequently the primary force behind the creation of an African court vested with international criminal jurisdiction.<sup>611</sup>

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608 A 46L of the *Protocol*.

609 See chap 5.

610 Abass 2013 *NILJ* 47-48.

611 See chap 3 par 2 Establishment.

The *Protocol* is silent on key aspects, including provisions pertaining to the hierarchy of the application of law.<sup>612</sup> In addition, the *Protocol* also fails to provide member states with the essential support regarding the enactment of national legislation<sup>613</sup> in order to fulfil the obligations it confers upon them.<sup>614</sup>

The *Protocol's* delayed adoption was caused predominantly by vagueness and uncertainty regarding the interpretation and definition of various provisions, in addition to the making of continuous requests for the re-evaluation of the structural and financial feasibility of creating an international African criminal court.<sup>615</sup>

Six of the 14 listed under the *Protocol* have not yet acceded to international customary level. The attempt to prosecute unaccustomed crimes may be a noble effort by Africa to enhance their censure.<sup>616</sup> However, it is sure to cause immense uncertainty regarding the jurisdictional reach of the ICLS,<sup>617</sup> specifically with respect to the notion of immunity.<sup>618</sup>

While the *Protocol* briefly describes the ICLS's co-operation and judicial assistance with respect to its member states, regional and international bodies, it remains silent on its relationship with the ICC.<sup>619</sup> No legal obligation is conferred upon the ICLS in its *Protocol* to make any reference to the ICC. This surely demonstrates the AU's attentive recognition of the fact that most of the African states it expects to become parties to the ICLS already owe various obligations towards the ICC. There will be bound to be ambiguity if member states are required by both the ICC and ICLS to honour their obligations towards each separate court.<sup>620</sup>

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612 See chap 3 par 3.8 Hierarchy of the application of law.

613 See chap 3 par 3.5.4 Issues of admissibility: Complementarity.

614 See chap 3 par 4 Obligations of Member States.

615 See chap 3 par 2.3 The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

616 Abass 2013 *NILR* 37.

617 See chap 3 par 3 Jurisdiction of the ICLS.

618 See chap 4.

619 See chap 3 par 4.1 Co-operation and Judicial Assistance.

620 Abass 2013 *NILR* 48.

## Chapter 4

### Immunity

#### 4.1 Introduction

In this chapter an analysis of the development of immunity is conducted, focusing specifically on the restriction of immunity before international courts and tribunals with respect to international customary law crimes.<sup>621</sup>

The origin of sovereign immunity is briefly discussed, pertaining to its former absolute nature and its significance in international law. Subsequently the emergence of the restrictive doctrine of immunity will be examined, specifically in relation to international crimes violating human rights and *jus cogens* norms.<sup>622</sup> In addition the different forms of immunity, namely *ratione materiae* and *ratione persona*, are briefly examined with the aim of determining their significance for international relations and state sovereignty, and immunity in its qualified form is discussed with respect to its attainment of the status of international customary law.<sup>623</sup>

The restriction of immunity before international courts and tribunals will be investigated, as well as its current position in contemporary international law.<sup>624</sup> The repudiation of immunity before the ICC will be examined, as will the reaction of African states to the enactment of the latter notion.<sup>625</sup>

Immunity before the ICLS will be discussed, as will the ambiguity it produces regarding the exclusion of immunity from international crimes that are not yet fixed in international law and its accordance of immunity to incumbent Heads of State and senior government officials.<sup>626</sup> In order to determine if this amounts to a deviation from contemporary international law, a brief examination of whether the

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621 See chap 4 par 4.1 Immunity before international criminal courts and tribunals.

622 See chap 4 par 2.1 Sovereign immunity.

623 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

624 See chap 4 par 4.1 Immunity before international criminal courts tribunals.

625 See chap 4 par 5 Immunity before the ICC.

626 See chap 4 par 4 Immunity before the ICLS.

ICLS qualifies as an international court or tribunal is conducted in order to clarify whether or not the restrictive doctrine of immunity is applicable.<sup>627</sup>

Lastly, an investigation will be conducted into the foreseeable difficulties the *Draft Protocol* will produce in relation to its inconsistency with modern international criminal law and the anticipated reaction the *Protocol* will receive from the international community, specifically from African states.<sup>628</sup>

#### **4.2 Immunity from jurisdiction**

States are vested with jurisdiction over all persons in their purview, which includes all their acts within the concerned state's territory. However, under customary international law state officials, ranging from Heads of State to senior government officials, diplomats and consuls, are accorded immunity from foreign jurisdiction under certain circumstances which are discussed below.<sup>629</sup> This discussion will ultimately illustrate that jurisdiction and the notion of immunity go hand in hand.<sup>630</sup>

The definition of immunity differs in the views of various academics and legal experts, and as inscribed in various international instruments.<sup>631</sup> The term "immunity" usually refers to the exemption of an entity, individual or property from the jurisdiction of a state, thus limiting the state's jurisdiction over that entity, individual or property. Being immune can be regarded overall as being exempted from the substantive and procedural jurisdiction of a state. With regard to immunity from foreign criminal jurisdiction, if a person is being indicted upon suspicion of having committed a crime in a foreign state the person would be exempted from that state's law enforcement and legal procedural action.<sup>632</sup>

The exemption of jurisdiction is based on the argument that all sovereigns are equal, and if they are subjected to the jurisdiction of another state they

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627 See chap 4 par 6.2 Criminal responsibility in terms of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

628 See chap 4 par 7 Analysis.

629 Dugard *International Law* 240.

630 Cassese, Gaeta and Jones *Rome Statute* 975.

631 Cassese, Gaeta and Jones *Rome Statute* 975-977.

632 *UN Preliminary report on immunity of State officials from foreign criminal jurisdiction* 2013 Treaty Series 231.

consequently surrender a fundamental right. Immunity is therefore an important principle in safeguarding the relations between states.<sup>633</sup> Cryer states that:<sup>634</sup>

The law of immunities has ancient roots in international law, extending back not hundreds, but thousands of years. In order to maintain channels of communication and thereby prevent and resolve conflicts, societies needed to have confidence that their envoys could have safe passage, particularly in times when emotions and distrust were at their highest. Domestic and international law developed to provide both inviolability for the person and premises of a foreign State's representatives and immunities from the exercise of jurisdiction over those representatives.

Akande and Shah<sup>635</sup> explain that granting immunity to the effective leader of a state, whether the Head of State or government, is an important aspect of maintaining the respective states' sovereignty. The restriction of the broad approach of immunity to Heads of State or government officials complements the respective states' standards of sovereignty and the rule of law.<sup>636</sup> Thus, "immunity reflects a basic state right based on the respect for a state's sovereignty and independence."

#### 4.2.1 *Sovereign immunity*

Sovereign immunity vests in the person or state of a foreign sovereign from the jurisdiction of foreign municipal courts. Sovereign immunity refers to the immunity vested in a Head of State, a state official, a state government or a department of a state government.<sup>637</sup>

The origin of sovereign immunity is based upon the earlier doctrines of monarchy.<sup>638</sup> With the emergence of constitutional governments, debates started to form as to whether immunities conferred upon an individual extended exclusively to monarchs or to other hereditary rulers as well.<sup>639</sup> The *Institut de Droit International* affirmed that an individual who is a Head of State of either a monarchy or a republic should be entitled to the same immunity because of the

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633 Dugard *International Law* 240.

634 Cryer *An introduction* 442.

635 Akande and Shah 2010 *EJIL* 818-822.

636 Akande and Shah 2010 *EJIL* 818-822.

637 Dugard *International Law* 240.

638 Nagan and Root 2012 *Emerging Restrictions on Sovereign Immunity* 39-41.

639 Foakes *The Position of Heads of State* 16.

vital importance of maintaining peace and security during international relations.<sup>640</sup> At this stage sovereign immunity was regarded as absolute.<sup>641</sup> One of the most decisive verdicts regarding foreign state immunity was the *Schooner Exchange v McFaddon* 11 US (7 Cranch) (1812) 116<sup>642</sup> case, which established that states were willing to grant immunity to all acts of foreign sovereigns and their governments.<sup>643</sup>

In the *Italy v Germany ICJ Reports 2012*<sup>644</sup> the ICJ affirmed the importance of the sovereign immunity principle and its key position in international customary law.<sup>645</sup> The ICJ's conclusion was based upon an extensive survey conducted by the ILC.<sup>646</sup> The survey concluded that:<sup>647</sup>

State practice...is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention.

State practice in this regard illustrates:

...that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.<sup>648</sup>

The ICJ also emphasized the importance of sovereign immunity in international law and in international relations as affirmed in article 2 of the *UN Charter*.<sup>649</sup> The latter principle envisages that each state possesses sovereignty over its own territory and persons within that territory as well as upon events flowing from the concerned states' sovereignty.<sup>650</sup>

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640 *Institut de Droit International* II AD 1181 1885-1891 1194.

641 Foakes *The Position of Heads of State* 16.

642 *The Schooner Exchange v McFaddon* 11 US (7 Cranch) 116 (1812) 116, 132 "...the rights of a foreign sovereign cannot be submitted to a judicial tribunal. He is supposed to be out of the country, although he may happen to be within it."

643 Dugard *International Law* 241-242.

644 *Germany v Italy (Greece Intervening)* ICJ Reports 2012 99. Ventura 2013 <http://www.ejiltalk.org/?s=GERMANY+V+ITALY>.

645 Sangeeta 2011 *HRLR* 555-558.

646 *Yearbook of the International Law Commission A/CN.4/SER.A/1980/Add.I* 1980 Vol II (2) 147.

647 *Yearbook of the International Law Commission A/CN.4/SER.A/1980/Add.I* 1980 Vol II (2) 147.

648 *ICJ Reports* 2012 99 56.

649 A 2 of the *UN Charter*.

650 *ICJ Reports* 2012 99 57...The ICJ points out that there is a difference between state immunity and immunity from international criminal prosecution. The latter court refers to the

### 4.3 The restriction of sovereign immunity and international crimes

However, the absolute nature of sovereign immunity was significantly disrupted by international commerce as state-owned trading companies grew.<sup>651</sup> Belgian courts were among the first to implement a more restricted/qualified approach regarding immunity in 1857, followed by the Italian courts.<sup>652</sup> However, it was only in 1952 that the US declared its acceptance of the restrictive doctrine due to the increasing involvement of states in commercial undertakings.<sup>653</sup> Eventually the UK submitted to the qualified doctrine where *Lord Denning* in the *Thai-Europe Tapioca Service Ltd v Government of Pakistan, The Harmattan* 1975 1 WLR 1485 case<sup>654</sup> determined that:<sup>655</sup>

...a foreign government which enters into an ordinary commercial transaction with a trader....must honour his obligations like other traders: and if it fails to do so it should be subject to the same laws and amenable to the same tribunals as they are.

However, it was only in 2004 that the notion of qualified immunity was adopted in the *United Nations Convention on Jurisdictional Immunities of States and Their Property* General Assembly resolution 59/38 of 2 December 2004 under Article 10.<sup>656</sup>

Consequently this notion became entrenched in customary international law<sup>657</sup> and today states may grant immunity to governmental public activities (*jure*

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*The R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte* (3) WLR 1,456 (H.L. 1998) case and stresses that "...the enforcement and those governing jurisdictional immunity (understood *stricto sensu* as the right of a State not to be the subject of judicial proceedings in the courts of another State) are distinct, and must be applied separately."

651 Dugard *International Law* 241-242; Foakes *The Position of Heads of State* 16.

652 Finke 2011 *EJIL* 859.

653 *Department of State Bulletin* 26 (1952) 984.

654 *Thai-Europe Tapioca Service Ltd v Government of Pakistan, The Harmattan* 1975 1 WLR 1485 1491F.

655 This ruling was later endorsed by section 28 U.S.C. § 1605(a)(2) of the *Foreign Sovereign Immunities Act* of 1976 implemented in the United States of America (US) and article 3 of the *State Immunity Act* 1978 adopted in the United Kingdom (UK) 2 years later.

656 *United Nations Convention on Jurisdictional Immunities of States and Their Property* General Assembly resolution 59/38 of 2 December 2004 "If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction."

657 Dugard *International Law* 241; see also *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular De Mocambique* 1980 2 SA 111; *Trendtex Trading Corporation v Central Bank of Nigeria* 1977 QB 529 CA 554 G-H.

*imperii*) but restrict immunity with respect to commercial undertakings (*jure gestionis*).<sup>658</sup> This distinction was necessary for national courts, since the option of dismissing a case on the basis of absolute immunity was no longer available.<sup>659</sup>

Inevitably, the restriction of immunity extended to human rights and international crimes as well. In the early 20<sup>th</sup> century, states which included Italy, Egypt, Greece and Belgium started to favour a restrictive approach by distinguishing between the sovereign and private behaviour of states and by granting immunity only to the latter. Western nations also started to endorse this notion, which emphasised that a breach of human rights and the violation of *jus cogens* norms should not be exempt from legal accountability.<sup>660</sup> Thus, this required a greater focus on the act itself and the type of immunity which was applicable.<sup>661</sup>

There are two types of sovereign immunity to distinguish between. The first is *ratione materiae*, also known as functional immunity, and the second is *ratione personae*, also referred to as personal immunity.

Functional immunity applies to all acts performed by any state official while exercising his<sup>662</sup> functions, irrespective of where these activities are carried out. This form of immunity does not expire if the official position of the individual concerned is terminated. Functional immunity usually applies to civil situations, because state officials do not usually carry out functions on foreign territory. An exception exists where officials are involved in international armed conflict, but humanitarian law provides that officials will not be prosecuted if they abide by the laws and customs of war.<sup>663</sup>

Functional immunity is subject to the *erga omnes*<sup>664</sup> effect, which determines that the conduct of a state official is carried out on behalf of the state and not in his

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658 Dugard *International Law* 241-243.

659 Foakes *The Position of Heads of State* 16.

660 Walker *Jurisdictional Immunities of the State* 255-257.

661 Foakes *The Position of Heads of State* 16-17.

662 The choice of the masculine pronoun here does not preclude any other gender.

663 Fleck *Humanitarian Law* 79, 82. Also see the *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land* The Hague 18 October 1907.

664 Dugard *International Law* 38-39: *Erga Omnes* refers to obligations which a state owes to the international community as a whole. All states thus have an interest in the enforcement of these obligations. See *Belgium v Spain* 1970 *ICJ Reports* 50 "By their very nature the

personal capacity. Consequently the state concerned is responsible for these actions, and not the official himself.<sup>665</sup> This constitutes a substantive protection against prosecution, in that it diverts responsibility from the official to the state. This description of *ratione materiae* was confirmed in the case of the *Prosecutor v Blaškić* (Objection to the Issue of *Subpoena Duces Tecum*) IT-95-14-AR108 1997), 110 ILR(1997) 607, 707 38.<sup>666</sup>

State officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity". This is a well-established rule of customary international law...

Personal immunity on the other hand attaches to the official's status or office. The basis for this immunity applies to acts performed by an official not only after his entry into office, but also prior to such entry. Personal immunity shields the individual from the jurisdiction of foreign states to ease the conduct of international relations.<sup>667</sup>

Where applicable, immunity *ratione personae* can be regarded as an absolute prohibition of criminal jurisdiction exercised by states. The nature of personal immunity also stretches beyond official acts to cases of private acts.<sup>668</sup> The ICJ held in the *Case Concerning the Arrest Warrant of 11 April 2000*<sup>669</sup> that Ministers of Foreign Affairs are entitled to immunity *ratione personae* and the absolute nature thereof covers both criminal and private activities. The ICJ stated that:<sup>670</sup>

It has been unable to deduce ... that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

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former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."

665 Cassese, Gaeta and Jones *Rome Statute* 975-978.

666 *Prosecutor v Blaškić* (Objection to the Issue of *Subpoena Duces Tecum*) IT-95-14-AR108 1997) 110 ILR (1997) 607 at 707 38.

667 Cassese, Gaeta and Jones *Rome Statute* 975.

668 Cassese, Gaeta and Jones *Rome Statute* 991-995.

669 *ICJ Reports* 2002 3 51, 55-58.

670 *ICJ Reports* 2002 3 51.

Customary international law, as discussed below, confers immunity *ratione personae* upon state officials or Heads of State.<sup>671</sup> Treaties, on the other hand, such as the *UN General Assembly, Convention on Special missions*, 1 December 1967, A/RES/2273,<sup>672</sup> the *UN Vienna Convention on Consular Relations*,<sup>673</sup> 24 April 1963 and the *UN Vienna Convention on Diplomatic Relations* 18 April 1961,<sup>674</sup> will usually be the main sources for the granting of immunity to state officials such as consuls or diplomats when representing their nations.

As stated above,<sup>675</sup> officials who are entitled to immunity *ratione personae*<sup>676</sup> include Heads of State,<sup>677</sup> Heads of Government,<sup>678</sup> diplomats<sup>679</sup> and Foreign Affairs Ministers.<sup>680</sup> Various state officials of senior and junior rank are bestowed with the authority to conduct international relations abroad, therefore the list of those individuals that will be accorded immunity is not exhaustive. Thus, immunity *ratione personae* is available to a very extensive group of individuals.<sup>681</sup>

The cases discussed below sustain the notion of support for the recognition of immunity as part of customary international law. The US<sup>682</sup> leaned strongly towards this notion in the *Li Weixum v Bo Xilai* DCC Civ No 04-0649 (RJL) 2006 case, and the UK expressed its support hereof in the *Re Bo Xali* 128 ILR (2005) case.<sup>683</sup> In the latter case the magistrate's court was willing to grant immunity to the Chinese Minister of Trade and Commerce because the court found that

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671 Akande and Shah 2010 *EJIL* 818.

672 Aa 29 and 31 of the *UN General Assembly, Convention on Special missions*, 1 December 1967 A/RES/2273.

673 A 41 of the *UN, Vienna Convention on Consular Relations*, 24 April 1963 "Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority....Except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect."

674 A 29 of the *UN, Vienna Convention on Diplomatic Relations* 18 April 1961 "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

675 See chap 4 par 2.1 Sovereign immunity.

676 Cassese, Gaeta and Jones *Rome Statute* 975.

677 *Djibouti v France* 2008 ICJ 170-171.

678 Dugard *International Law* 241-243.

679 Aa 29 and 31 *Vienna Convention on Diplomatic Relations* 1961.

680 Dugard *International law* 241-243.

681 Cassese, Gaeta and Jones *Rome Statute* 991-995.

682 See *Li Weixum v Bo Xilai*, DCC Civ No 04-0649 (RJL) 2006.

683 *Re Bo Xali* 128 ILR (2005) 713.

customary international law granted immunity *ratione personae* to the minister because of his involvement in a special mission. One of the most profound contributions in this regard was made by the German Federal Supreme Court in the Decision of 27 Feb 1984 Case No 4 StR 396/83 80 ILR (1989) 388 (Germany: Federal Supreme Court),<sup>684</sup> which stated that:

... irrespective of the UN Special Missions Convention, there is a customary rule of international law based on State practice and *opinio juris* which makes it possible for an *ad hoc* envoy, who has been charged with a special political mission by the sending State, to be granted immunity by individual agreement with the host State for that mission and its associated status, and therefore for such envoys to be placed on a par with the members of the permanent missions of State protected by international treaty law.

It is also important to note that this type of special mission immunity extends to matters concerning international crimes as well. In *Re Bo Xai*<sup>685</sup> immunity *ratione personae* was acknowledged against the backdrop of allegations of torture. However, it is important to note that the absolute exemption from criminal jurisdiction derived from immunity *ratione personae* applies only before national courts, as discussed below.<sup>686</sup>

However, with the passing of time the restrictive approach of sovereign immunity has gained more traction due to the immense expansion of human rights law<sup>687</sup> and the extensive recognition of international crimes.<sup>688</sup>

*The R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte*(3) WLR 1,456 (H.L. 1998)<sup>689</sup> may be regarded as the pinnacle of judicial case law endorsing the concept of stripping immunity from an individual regarding the commission of international crimes which violate human rights and *jus cogens* norms.<sup>690</sup> This case concerned the prosecution of General Augusto Pinochet, former commander of the Chilean army and President of Chile, who was arrested

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684 Decision of 27 Feb 1984 Case No 4 StR 396/83 80 ILR (1989) 388 (Germany: Federal Supreme Ct).

685 128 ILR (2005) 713.

686 Wirth 2002 EJIL 88; *Arrêt of the Cour de Cassation, Mouammar Gadhafi* 2001 No 1414; Zappalà 2001 EJIL 595-596.

687 Finke 2011 EJIL 854-856.

688 See chap 3 par 3.1 Customary international law crimes and 3.1.1 Crimes within the jurisdiction of the ICLS.

689 *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte* 3 WLR 1,456 (HL 1998)

690 Dugard *International Law* 253-254.

on an extradition warrant issued by a Spanish court<sup>691</sup> for allegedly committing international crimes which included torture.<sup>692</sup> Pinochet contended that the proceedings instituted against him were void because he committed the alleged offences in the sphere of his official duties as Head of State and was therefore entitled to immunity *ratione materiae*.<sup>693</sup> Phillips MR construed that the act of torture as a severe violation of human rights and a breach of *jus cogens* norms under international law. The severity of this breach rendered the offence inexcusable as an official act and therefore deprived it of its status as an official act of a Head of State.<sup>694</sup> Consequently, the House of Lords held that Pinochet did not enjoy immunity from prosecution.<sup>695</sup> Four of the seven Law Lords denied immunity in general (covering both forms of immunity, namely immunity *ratione-materiae* and *personae*) for international core crimes,<sup>696</sup> which include torture, crimes against humanity, war crimes and genocide.<sup>697</sup> This judgement was largely based upon the ratification<sup>698</sup> of the *UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, *United Nations, Treaty Series Vol 1465*<sup>699</sup> by the UK, Spain and Chile.<sup>700</sup>

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691 *R v Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No 2) (2000).

692 A 1 of the *UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, *United Nations, Treaty Series Vol 1465*. See chap 2 par 2.2.2.2 Crimes against humanity.

693 Cane, Conaghan and Walker *The New Oxford Companion to Law* 10.

694 Dugard *International Law* 254.

695 Torture is defined as a customary international law crime. Please see chap 2 par 3.1 Customary international law crimes and chap 3 par 3.3.1.8 Trafficking in Persons.

696 The term "core crimes" refers to international crimes which are vested with international customary law status.

697 Wirth 2002 *EJIL* 884; Bassiouni 2001 *VJIL* 87 "[A]n expanded panel of the House of Lords, in construing the scope of section 134 of the Criminal Justice Act of 1988, ruled that a head of state cannot claim immunity for torture, as it cannot constitute an official act. The Law Lords, however, held that Senator Pinochet was protected by immunity for the charges of murder and conspiracy to murder."

698 UN [https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en).

699 *UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 10 December 1984 *United Nations Treaty Series Vol 1465*.

700 UN 2014 [https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en). The UK also enacted provision 134 of the *Criminal Justice Act* (CJA) 1998 stipulating torture to be a crime in the UK.

Although the Pinochet case was endorsed<sup>701</sup> for its application of the restrictive approach regarding immunity, it also divided the academic and practice world.<sup>702</sup> Foakes states:<sup>703</sup>

The judgment of the UK House of Lords in Pinochet (No. 3)<sup>1</sup> was hailed by many as a new dawn in the struggle by victims, non-governmental organizations (NGOs), human rights lawyers and others to bring former leaders to account for international crimes committed while in office, and was seen as signalling an end to the impunity they formerly enjoyed. The decision spawned an extensive literature (mainly within Europe). Generally speaking, the writers concerned, although often differing in their view as to the underlying rationale for an exception to immunity, were certain that it is now well accepted that such an exception has emerged.

The disparity between the two sides occupied not just national courts but also spread to regional and international courts.<sup>704</sup> The ICJ in the *Arrest Warrant Case*<sup>705</sup> and the European Court of Human Rights (ECHR) in the *Al-Adsani v UK* (ECHR) App No 35763/97123 ILR (2001) 24<sup>706</sup> and *McElhinney v Ireland* (ECHR) App No 31253/96 2001 123 ILR (2001) 73<sup>707</sup> upheld the principle of sovereign immunity.<sup>708</sup> The ICJ contended that there was a lack of evidence to assume that customary international law provides an exception to immunity from criminal jurisdiction regarding high-ranking officials accused of committing war crimes or

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701 *Al-Adsani v UK (ECHR) App No 35763/97123 ILR (2001) 24*. The following dissenting opinions should be noted. Judge Ferrari Bravo stated that: "The Court, whose task in this case was to rule whether there had been a violation of Article 6 § 1, had a golden opportunity to issue a clear and forceful condemnation of all acts of torture. To do so, it need only have upheld the thrust of the House of Lords' judgment in *Regina v Bow Street Metropolitan Stipendiary and Others, ex parte Pinochet Ugarte* (No 3) (judgment of 24 March 1999 [2000] Appeal Cases 147), to the effect that the prohibition of torture is now *jus cogens*, so that torture is a crime under international law. It follows that every State has a duty to contribute to the punishment of torture and cannot hide behind formalist arguments to avoid having to give judgment." The joint dissenting opinion of Judges Rozakis, Caflisch, Wildhaber, Costa, Cabral Barreto and Vajić explained that "by accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognise that it is hierarchically higher than any other rule of international law, be it general or particular, customary or conventional, with the exception, of course, of other *jus cogens* norms. For the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule."

702 Finke 2011 *EJIL* 854.

703 Foakes 2011 *CHIL* 2.

704 Finke 2011 *EJIL* 854-855.

705 *ICJ Reports* 2002 3 51 55-58.

706 (ECHR) App No 35763/97123 ILR (2001) 24.

707 *McElhinney v Ireland* (ECHR) App No 31253/96 2001 123 ILR (2001) 73.

708 McGregor 2012 <http://www.ejiltalk.org/jones-v-uk-a-disappointing-end/>.

crimes against humanity.<sup>709</sup> The ECHR affirmed their support for this argument in *Al-Adsani*, where the court ruled in favour of sovereign immunity regarding the issue of whether or not states are under an obligation to grant access to their courts if a foreign sovereign is being accused of torture.<sup>710</sup>

It became clear that the train of thought regarding the restrictive doctrine was divided into the two following categories. The one side claimed that in the light of the existence of fundamental human rights norms and international crimes in contemporary international law, states are obliged to deny sovereign immunity to perpetrators, regardless of their official status. The other side endorsed sovereign immunity because of its vital importance in the preservation of peaceful relations among states. In the light of the case law discussed above, states tend to follow two approaches. The first approach envisages the application of sovereign immunity as a default rule as long as states are not subjected to any limitations (such as the *UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series Vol 1465 (CAT Convention)*<sup>711</sup> in Pinochet).<sup>712</sup> The second approach dictates that states grant immunity in favour of the international customary law status attached to sovereign immunity, as in the *Arrest Warrant case*.<sup>713</sup> Thus, states generally agree on sovereign immunity as a binding concept under international law but disagree on its application.<sup>714</sup>

Since there is no clear conformity on the operation of the restrictive doctrine, sovereign immunity should be regarded as a principle and not a rule. The significance of this distinction is explained by Dworkin:<sup>715</sup>

Principles ... conflict and interact with one another, so that each principle that is relevant to a particular legal problem provides a reason arguing in favour of, but does not stipulate, a particular solution. The man who must decide the problem is therefore required to assess all the competing and conflicting principles that bear upon it, and to make a resolution of these principles rather than identifying one among others as "valid".

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709 Wirth 2002 *EJIL* 878.

710 (ECHR) App No 35763/97123 ILR (2001).

711 A 1 of the *CAT Convention*.

712 3 WLR 1,456 (HL 1998).

713 *ICJ Reports* 2002 3.

714 Finke 2011 *EJIL* 856-857.

715 Dworkin *Colombia LR* 71-72.

Wirth<sup>716</sup> affirms that sovereign immunity is a principle in that it must be examined and analysed with respect to each separate situation in order to apply. Principles also provide upon their application a broader spectrum of discretion than rules, which are clear and concise and prescribe specific outcomes upon their application.<sup>717</sup>

With the passing of time the restrictive approach of sovereign immunity has gained more traction, specifically regarding its application concerning the violation of human rights and *jus cogens* norms.<sup>718</sup> The Hissène Habré case established a concrete statutory basis for the rejection of sovereign immunity from international crimes. Habré, the former president of Chad, was indicted in Belgium for allegedly committing crimes against humanity. Belgium requested the extradition of Habré but Senegal (the state in which Habré took refuge) refused to comply as they indicated that Habré enjoyed functional immunity because he had still been occupying the office of the president during the commission of the alleged acts.<sup>719</sup> The *UN Committee Against Torture* held that Senegal was violating its obligations under the *CAT Convention*<sup>720</sup> by not taking the measures necessary to establish jurisdiction over the offences.<sup>721</sup> Senegal adopted and applied various legislative alterations in 2007 in order to adhere to the obligations imposed upon it by the *CAT Convention*.<sup>722</sup> Eventually Senegal rejected Habré's claim to the immunity that had earlier been granted to him. In addition, the Committee of Eminent African Jurists on the case of Hissène Habré (the Committee of Eminent African Jurists) found that, due to the grave nature of Habrés' alleged conduct, he would not be able to shield behind immunity as a former Head of State.<sup>723</sup> It is important to note that in addition to the *CAT Convention's* preventing Habré from claiming immunity,<sup>724</sup> the Committee of Eminent African Jurists also analysed the nature of

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716 Wirth 2002 *EJIL* 872.

717 Wirth 2002 *EJIL* 872 "Rules are more specific than principles, and the degree of abstraction indicates the legal nature of the norm: it is either a rule or a principle."

718 Foakes 2011 *CHIL* 2-3.

719 Brody 2000 *New England LR* 323-330. Senegal ratified the convention in 1986.

720 A 5 of the *CAT Convention*.

721 Brody 2000 *New England LR* 321-330.

722 A 2 of the *CAT Convention*.

723 *AU Assembly of the Union Decision Assembly /AU/Dec 127(VII) and Dec103(VI) 2006.*

724 Wedgwood 2000 *Yale Law School Legal Scholarship Repository* 245 "The rehearing panel did not need to ground its immunity decision on the more controversial bases of customary

the crime itself, suggesting that there is something like international conformity in prosecuting perpetrators violating *jus cogens* norms.<sup>725</sup>

Another example is the case of current Suriname President, Dési Bouterse, in which the *Gerechtshof*<sup>726</sup> in Amsterdam sentenced the Head of State in *absentia*<sup>727</sup> to eleven years of incarceration for torture and drug trafficking. The Netherlands' Court rejected any claim to immunity that may have been attached to his official position at the time, stating that the offences could not be considered to fall within the sphere of his official duties as a Head of State.<sup>728</sup>

With respect to the aforementioned cases, Pinochet, Habré, and Bouterse, arguments which support the notion of non-immunity encompass the following principles: firstly, that immunity is bestowed only upon sovereign acts and that an international crime can never be a sovereign act because it violates *jus cogens* norms;<sup>729</sup> secondly that functional immunity<sup>730</sup> shields only officials performing official acts and that an international crime can never be an official act; and finally that the norm of *jus cogens* surpasses all other norms and any violation thereof establishes a breach of international law.<sup>731</sup>

However, the arguments above have been criticised.<sup>732</sup> The first point made by the critics is that international crimes could in some instances be recognised as official acts.<sup>733</sup> The European Court of Human Rights (ECHR)<sup>734</sup> and Akande and Shah<sup>735</sup> argue that the latter argument rests solely on the fact that the crime in

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law or *jus cogens*. Instead, the lords could argue that the limitation of official immunity was based on Chile's own agreement to the Torture Convention."

725 AU Assembly of the Union Decision Assembly /AU/Dec 127(VII) and Dec103(VI) 2006.

726 *Gerechtshof Amsterdam Nederlandse Jurisprudentie* (2011) No 51 302-303.

727 Duhaime 2014 <http://www.duhaime.org/Legal Dictionary/I/InAbsentia.aspx> "Usually used in reference to judgment or conviction against a person who did not attend trial."

728 Wirth 2002 *EJIL* 884-885.

729 3 WLR 1,456 (HL 1998).

730 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

731 Akande and Shah 2010 *EJIL* 818-825.

732 Foakes 2011 *CHIL* 9 "However, this analysis has been criticized as far too broad and has been specifically rejected by several courts, including the European Court of Human Rights."

733 Akande and Shah 2010 *EJIL* 818-825.

734 *Aikaterini Kalogeropoulou et al v Greece and Germany* (ECHR Decision on admissibility of individual complaint No 59021/00 12 December 2002).

735 Akande and Shah 2010 *EJIL* 830-835.

question is prejudiced by considering the act to be of such gross illegality that immunity cannot be permitted. Akande and Shah explain that.<sup>736</sup>

...at the stage of proceedings during which immunity is raised it will not yet have been established that the state has acted illegally. Indeed, it may turn out that the allegations made against the state or official are unfounded. It would therefore be wrong to assert that the state, by acting in a grossly illegal manner, has deprived itself of the rights which it would otherwise be entitled to in international law and has implicitly waived its immunity. This assertion would be especially problematic in criminal cases, where there is a presumption of innocence.

The presumption of innocence is a fundamental principle in criminal proceedings entrenched in international criminal law, as illustrated by constitutional treaties<sup>737</sup> such as the *Rome Statute*<sup>738</sup> and the *Statute of the International Criminal Tribunal for the Former Yugoslavia*.<sup>739</sup> In addition, whether or not an act is *jure imperii* for the purposes of sovereign immunity does not depend on the legality of the act, but on "...whether the act is intrinsically governmental."<sup>740</sup> The very purpose of immunity is to bar foreign domestic courts from determining the legality of an act performed by a foreign state. To determine whether an official act amounts to an international crime or not an investigation should be conducted to reveal the reasons behind the commission of the act. Thus, either the act was committed with respect to state policies or for the individual's own purposes while using state apparatus to commit the act. International crimes are usually committed by "...individuals invested with state authority and regularly undertaken for state rather than private purposes."<sup>741</sup>

The second argument has been criticised on the collective acceptance by courts<sup>742</sup> that the violation of *jus cogens* norms effectively strips the right of immunity. This principle is derived from the *Siderman de Blake v Republic of Argentina*<sup>743</sup> where it was explained that:

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736 Akande and Shah 2010 *EJIL* 830.

737 Dugard *International Law* 25-26 "The *Rome Statute* is a constitutional treaty in the sense that it established the International Criminal Court and serves as its constitution."

738 A 66 of the *Rome Statute*.

739 A 21(3) of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*.

740 Akande and Shah 2010 *EJIL* 830-831.

741 Akande and Shah 2010 *EJIL* 830-832.

742 See the case law discussion above concerning Pinochet, Habré and Bouterse.

743 965 F 2d 699 (CA 9th Cir. 1992) 718.

This argument begins from the principle that *jus cogens* norms 'enjoy the highest status within international law... and thus prevail over and invalidate ... other rules of international law in conflict with them... In short, they argue that when a state violates *jus cogens*, the cloak of immunity provided by international law falls away, leaving the state amenable to suit'.

This argument has been repudiated by the ECHR,<sup>744</sup> the ICJ,<sup>745</sup> Akande, Shah<sup>746</sup> and Foakes,<sup>747</sup> who express the opinion that even though offences such as torture, genocide, war crimes and crimes against humanity are established norms under international law which accords them preparatory norm status, not all rules prohibiting international crimes may rise to a level of a *jus cogens character*. The ICJ deliberated in its judgement in the *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v Belgium) 2002 ICJ<sup>748</sup> that immunity *ratione personae*<sup>749</sup> continues to apply to a Head of State or government official even when the latter is alleged to have committed acts that constitute international crimes "...unless it is asserted that the rule granting immunity *ratione personae* is itself a rule of *jus cogens*."<sup>750</sup> Akande and Shah further states that:<sup>751</sup>

Doubts whether many of the rules of international humanitarian law rise to the level of *jus cogens* can be seen in the debate about belligerent reprisals. To the extent that some violations of humanitarian law can be legally justified as belligerent reprisals, it is not possible to assert that those rules are *jus cogens* norms. Despite the considerable extension of the prohibition of belligerent reprisals in the First Additional Protocol to the Geneva Conventions, the prohibitions in that instrument cannot be regarded as representing customary international law – let alone *jus cogens* – given the opposition of countries such as the US, UK, and France to those provisions.

Wirth affirms Akande and Shah's position, stating that:<sup>752</sup>

Most scholars would probably agree by now that *ius cogens* is a valid category of norms in international law, yet everything else is disputed – such

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744 ECHR 2001 123 ILR (2001) 24; *Grosz v France ECHR (Grand Chamber)* (22 January 2008) 65831/01; Akande and Shah 2010 *EJIL* 838 "...These cases dealt only with the immunity of states from civil actions. However, if the ECHR had accepted the normative hierarchy theory and was of the view that the *jus cogens* prohibition prevailed over immunity in criminal cases, it is difficult to see how such a prohibition would not also override immunity in civil cases as well."

745 *ICJ Reports* 2002 3 100-111.

746 Akande and Shah 2010 *EJIL* 830-838.

747 Foakes *The Position of Heads of State* 18.

748 *ICJ Reports* 121 100-111.

749 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

750 Akande and Shah 2010 *EJIL* 830 "[T]he ICJ's decision is a further, albeit implicit, rejection of the argument under consideration."

751 Akande and Shah 2010 *EJIL* 833-834.

752 Wirth 2002 *EJIL* 867.

as how to determine which norms have acquired the status of *jus cogens* and which practical consequences this generates.

However, the exemption of immunity due to a violation of *jus cogens* norms which does not fall within the sphere of official duties, as explained by the courts regarding the prosecution of Pinochet, Habré and Bouterse, may be considered accurate. This is because the act of torture as a crime against humanity stands firmly established as an international crime which violates preparatory norms,<sup>753</sup> specifically *jus cogens*, under international law, and is recognised as such by the international community. This was affirmed by the joint dissenting opinion of Judges Rozakis, Caflisch, Wildhaber, Costa, Cabral Barreto and Vajić in the *Al-Adsani* case,<sup>754</sup> who stated that "...the prohibition of torture has gradually crystallised as a *jus cogens* rule." In addition, these acts cannot be regarded as official acts since state practice and *opinio juris* clearly condemn these acts as punishable under international criminal law.<sup>755</sup>

Thus, if it is to be determined if immunity needs to be lifted regarding an international crime, the act itself, the reason behind the commission of the act and the official status of the suspect who allegedly committed the act should be evaluated and analysed extensively. Ultimately, it needs to be established if the rule prohibiting the international crime is a rule of *jus cogens* nature.<sup>756</sup>

There are several more examples of states indicting and prosecuting individuals for international core crimes. Spain has taken the lead by indicting two former presidents of Guatemala, namely Rios Montt and Oscar Mejia Victores, for crimes which include torture and genocide.<sup>757</sup> A Belgian<sup>758</sup> court sentenced Rwandan

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753 A 53 of the *UN Vienna Convention on the Law of Treaties* 23 May 1969 United Nations Treaty Series 331. "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

754 (ECHR) App No 35763/97123 ILR (2001).

755 Akehurst 1975 *BYIL* 10; a 2 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

756 Bassiouni 1996 *Law and Contemporary Problems* 74.

757 Foakes 2011 *CHIL* 10 "...A Spanish court has also convicted a former Argentinian naval officer, Adolfo Scilingo, for torture and crimes against humanity committed abroad; a second Argentinian naval officer, Ricardo Cavallo, was also prosecuted, following his extradition from Mexico, although he was ultimately extradited to Argentina to face trial there."

758 Bassiouni 2001 *VJIL* 86-87 "Belgium, relying on universal jurisdiction, recently indicted the Democratic Republic of Congo's acting Minister of Foreign Affairs, Mr. Abdoulaye Yerodia

army major, Bernard Ntuyahaga, to 20 years imprisonment for war crimes and crimes against humanity.<sup>759</sup> Mauritanian general Ely Ould Dah and Tunisian official Khaled Ben were convicted of torture *in absentia* by a French court.<sup>760</sup> In addition to the conviction of Bouterse, the Netherlands also convicted Congolese official Sebastian Nzapali for torture.<sup>761</sup> Richard Dicker, Director of the International Justice programme at Human Rights Watch, stated that the Netherlands had clearly illustrated their position towards individuals accused of violating human rights. Dicker stated that "...with today's conviction of Sebastian Nzapali, the Netherlands became a 'no-go' zone for people who commit serious human rights crimes."<sup>762</sup> Denmark also attempted to prosecute the former chief of staff of the Iraqi Army, Nizar Khazraji, for war crimes, but he fled before the proceedings started.<sup>763</sup>

However, the principle of non-immunity<sup>764</sup> before national courts<sup>765</sup> differs from state to state.<sup>766</sup> Thus, to prove that an act is in breach of *jus cogens* norms or violates human rights will not suffice due to the lack of "...consistent state practice and case law" as discussed above.<sup>767</sup> On the other hand, the notion of stripping

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Ndombasi, for inciting to genocide in the Congo. Subsequently, the accused became Minister of Education, but that change of position did not moot the issue, which is why the ICJ is still considering the case. The accused is not a citizen of Belgium, and was indicted while he was in the Congo. Since there were no links to Belgium, this case is to be distinguished from that of four Rwandan defendants charged under the same Belgian law and convicted for crimes committed in Rwanda: they were all domiciled in Belgium and physically present on Belgian territory at the time of their arrest."

759 Hague Justice Portal 2007 <http://www.haguejusticeportal.net/index.php?id=7886>.

760 Foakes 2011 *CHIL* 10; *Ely Ould Dah v France* (13113/03) (2009).

761 HRW 2004 <http://www.hrw.org/news/2004/04/07/netherlands-congolese-torturer-convicted>.

762 HRW 2004 <http://www.hrw.org/news/2004/04/07/netherlands-congolese-torturer-convicted>.

763 Foakes 2011 *CHIL* 10.

764 Dugard *International Law* 251-252. According to the ICJ, following the *Arrêt of the Cour de Cassation Mouammar Gadhafi* case, the latter court still upholds that customary international law still recognises the immunity of senior government officials before domestic courts.

765 The investigation of immunity before national courts falls outside the scope of this chapter. Focus will be predominantly on immunity before international courts and tribunals.

766 Dugard *International Law* 251-252; Foakes 2011 *CHIL* 10 "On this basis, it has been suggested that the true rationale for an exception to immunity in the case of certain international crimes lies in the development of international conventions providing for the exercise by states parties of extra-territorial jurisdiction over such crimes, and demonstrating that international law now accepts that states may exercise jurisdiction over certain official acts of foreign states in the context of assigning individual criminal responsibility for such acts."

767 Wirth 2002 *EJIL* 870; *Democratic Republic of Congo v Belgium* ICJ Reports 3 2002 41 ILM.

immunity from those accused before international courts and tribunals is much more established, as discussed below.<sup>768</sup>

#### **4.4 Immunity before international criminal courts and tribunals**

##### *4.4.1 Immunity before international criminal courts and tribunals: prior to the establishment of the ICC*

In the aftermath of the First World War the *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* issued a report to the Preliminary Peace Conference which stated that:<sup>769</sup>

In these circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of States. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a State. But this privilege, where it is recognized, is one of practical experience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.

If the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind.

This report proposed the elimination of immunity from war crimes and the newly categorised crimes against the laws of humanity. As the report states, even if immunity remains possible before domestic courts, it should not hinder international courts from prosecuting individuals responsible for committing grave crimes, which include crimes perpetrated by Heads of State.<sup>770</sup> However, the report was strongly criticised during the Preliminary Peace Conference by the American representatives, who argued that Heads of State should be held accountable to the political and not to the judicial authority of their countries. The argument specifically refers to an incumbent Head of State or government actively

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768 See chap 4 par 4 Immunity before international criminal courts and tribunals.

769 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties 1920 *American JIL* 116.

770 Cassese, Gaeta and Jones *Rome Statute* 979-980.

performing his functions.<sup>771</sup> Article 227-229 of the *Treaty of Versailles* 225 Parry 188; 2 Bevens 235; 13 AJIL Supp. 151, 385 (1919) states that "...all persons accused of having committed acts in violation of laws and customs of war..." will be tried by the Allied and Associated Powers.<sup>772</sup> These provisions did not make any reference to level of rank and therefore it was assumed that even senior military commanders might be held accountable. However, neither the German Emperor nor German military officials were ever tried, thus illustrating that no international customary rule had yet evolved with respect to the stripping of immunity from those accused of perpetrating war crimes.<sup>773</sup>

After the Second World War the CIMT was adopted, establishing the IMT in Nuremburg. Article 7(2) of the CIMT explicitly states that no official position of a defendant will exempt him or her from criminal responsibility. This provision was regarded as the watershed in relation to the accordance of immunity before international tribunals.<sup>774</sup> The Tribunal affirmed its position during trial proceedings, where it was explicitly stated that:<sup>775</sup>

The principle of International Law, which under certain circumstances protects the Representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

Principle three contained in the *UN, Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal 1950*<sup>776</sup> placed emphasis on the fact that even if an international core crime were to be committed by a Head of State or senior government official, the status of the

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771 UNWCC *History of the United Nations War Crimes Commission* 38-39.

772 Aa 227-229 of the *Treaty of Versailles* 225; Parry 188; 2 Bevens 235; 13 AJIL Supp 151 385 (1919).

773 Cassese, Gaeta and Jones *Rome Statute* 980.

774 Cassese, Gaeta and Jones *Rome Statute* 979-980.

775 *Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg* Part 22 (22st August, 1946 to 1st October, 1946) 447.

776 Principle 3 of the *UN Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal 1950*. Also see a II(4)(A) of the 1945 *Control Council Law No 10* of a IV of the UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide* 9 December 1948 United Nations Treaty Series 277.

perpetrator would not diminish his legal accountability under international law.<sup>777</sup>

Nagan and Root explain that:

...The principle lesson of Nuremberg...was that when officials abuse sovereignty, they lose the protections of sovereignty, and that sovereign omnipotence was limited.

Bassiouni<sup>778</sup> affirms the aforementioned, stating that the substantive defence of immunity was eliminated upon the establishment of the IMT. However, the removal of immunity is subject<sup>779</sup> to the commission of specific international crimes as listed in the *CIMT*. These crimes include crimes against peace,<sup>780</sup> war crimes,<sup>781</sup> and crimes against humanity.<sup>782</sup>

Article 6 of the *CIMTFE* enshrined a similar non-immunity clause.<sup>783</sup> Evidently, immunity was also stripped for the same crimes that had been highlighted in the *CIMT*. During the 1977 trial of the Japanese Ambassador to Berlin, Hiroshi Ōshima, the Tokyo Tribunal found that:<sup>784</sup>

Oshima's special defence is that in connection with his activities in Germany he is protected by diplomatic immunity and is exempt from prosecution. Diplomatic privilege does not impart immunity from legal liability, but only exemption from trial by the Courts of the State to which an Ambassador is accredited. In any event this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction. The Tribunal rejects this special defence.

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777 *Situation In Darfur, Sudan The Prosecutor v Omar Hassan Ahmad Al Bashir Public Document 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* 2011.

778 Bassiouni 2001 *VJIL* 82-83.

779 Cassese, Gaeta and Jones *Rome Statute* 981.

780 A 6 of the *CIMT* "(a) Crimes against peace: namely, 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."

781 A 6 of the *CIMT* "(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

782 A 6 of the *CIMT* "(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

783 A 6 of the *CIMTFE* 1946.

784 Röling and Rüter *The Tokyo Judgment* 456.

Bassiouni indicates that such removal of substantial immunity implies that the official position of the defendant, whether a Head of State or diplomat, is rendered void as a defence. A progressive development of this position indicates that the stripping of immunity from perpetrators of these crimes forms part of international customary law.<sup>785</sup> However, it had been argued on the contrary that the removal of immunity is linked with certain legal instruments and legal procedures and consequently does "...not reflect the customary practice of states."<sup>786</sup> This argument is based upon a non-progressive development view and also upon the restrictive description of the CIMT and CIMTFE's objectives, confining them solely to the judgment and prosecution of perpetrators<sup>787</sup> affiliated with the European Axis.<sup>788</sup>

This argument however, lost traction following the establishment of the IMT's and IMTFE's institutional successors, namely the ICTY<sup>789</sup> and the ICTR.<sup>790</sup> The *UN UNSC Resolution 827 (1993)* Adopted by the *Security Council* at its 3217th meeting on 25 May 1993,<sup>791</sup> pursuant to which these tribunals were created, expressed the following objectives regarding individual criminal responsibility: the prevention and removal of threats to the peace and security of the world, the halting of the perpetration of international core crimes, and the restoration and maintenance of peace.<sup>792</sup> These objectives are much broader in scope, a fact that underlines the purpose of establishing the particular tribunals.<sup>793</sup> In addition, the non-immunity clause was also adopted in the *Statute of the International Criminal Tribunal for the Former Yugoslavia*<sup>794</sup> and the *Statute of the International Criminal*

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785 Bassiouni 2001 *VJIL* 83-85.

786 Bassiouni 2001 *VJIL* 84.

787 Damgaard *Individual Criminal Responsibility* 18.

788 USHMM 2013 <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005177> "The three principal partners in the Axis alliance were Germany, Italy, and Japan. These three countries recognized German hegemony over most of continental Europe; Italian hegemony over the Mediterranean Sea; and Japanese hegemony over East Asia and the Pacific."

789 *Statute of the International Criminal Tribunal for the Former Yugoslavia*.

790 *Statute of the International Criminal Tribunal for Rwanda*.

791 *UN UNSC Resolution 827 (1993)* Adopted by the Security Council at its 3217th meeting on 25 May 1993.

792 *UN UNSC Resolution 827 (1993)* Adopted by the Security Council at its 3217th meeting on 25 May 1993.

793 Damgaard *Individual Criminal Responsibility* 18-19.

794 A 7(2) of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*. "The official position of any accused person, whether as Head of State or Government or as a

*Tribunal for Rwanda*.<sup>795</sup> It should be noted that in both statutes war crimes,<sup>796</sup> genocide<sup>797</sup> and crimes against humanity<sup>798</sup> are highlighted as the core crimes to which immunity will not apply. In a judgement handed down by the ICTY in the *Prosecutor v Tihomir Blaskic* (Trial Judgement) IT-95-14-T (ICTY) 2000 the court stated that:

...those responsible for war crimes, crimes against humanity, and genocide cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.<sup>799</sup>

During its proceedings the ICTY endorsed the non-immunity clause as part of customary international law, stating in the *Prosecutor v Slobodan Milosevic, Case IT-99-37-PT, Decision on Preliminary Motions 2001*<sup>800</sup> case that it's not according immunity before international courts is "...indisputably declaratory of customary international law."<sup>801</sup> In addition, the indictment of Slobodan Milosevic must be regarded as a significant milestone in international criminal law. Neither the IMT nor the IMTFE made it clear whether an incumbent Head of State or government official may be stripped of immunity regarding international core crimes.<sup>802</sup> However, article 7(2) of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* states that:

The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.<sup>803</sup>

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responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

795 A 6(2) of the *Statute of the International Criminal Tribunal for Rwanda*; a 6(2) of the *Statute of the International Criminal Tribunal for Rwanda is identical to article 7(2) of the ICTY Statute.*

796 A 3 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* a 4 of *Statute of the International Criminal Tribunal for Rwanda.*

797 A 4 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* a 2 of *Statute of the International Criminal Tribunal for Rwanda.*

798 A 5 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* a 5 of *Statute of the International Criminal Tribunal for Rwanda.*

799 *Prosecutor v Tihomir Blaskic* (Trial Judgement) IT-95-14-T International Criminal Tribunal for the former Yugoslavia (ICTY) 2000 par 41. Also see *Prosecutor v Anto Furundzija* (Trial Judgement) IT-95-17/1-T International Criminal Tribunal for the former Yugoslavia (ICTY) 1998.

800 *Prosecutor v Slobodan Milosevic* Case No IT-99-37-PT Decision on Preliminary Motions 8 November 2001 28.

801 *Prosecutor v Slobodan Milosevic* Case No IT-99-37-PT Decision on Preliminary Motions 8 November 2001 28.

802 Bassiouni 2001 VJIL 84-85.

803 A 7(2) of the *Statute of the International Criminal Tribunal for the Former Yugoslavia.*

This provision enabled the ICTY to prosecute Slobodan Milosevic while he was still acting Head of State of the Federal Republic of Yugoslavia.<sup>804</sup> Article 2(6) of the *Statute of the International Criminal Tribunal for Rwanda*<sup>805</sup> reflects the same principle. The principle of indicting an acting Head of State for international core crimes is also confirmed in article 7 of the *Draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission at its forty-eight session, from 6 May to 26 July 1996, General Assembly, Official Records, 51th Session, Supp. N° 10; U.N. Doc. A/51/10*, which determines that:<sup>806</sup>

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as Head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

Article 6(2) of the *UN Security Council, Statute of the Special Court for Sierra Leone 2002 (Statute of the Special Court for Sierra Leone)*, which established the SCSL, also affirms that as an international court it will not accord immunity to a Head of State, government or senior official (whether incumbent or not) regarding criminal responsibility.<sup>807</sup>

The *Agreement on the Privileges and Immunities of the International Criminal Court, Adopted by the Assembly of States Parties, First session, New York, 3-10 September 2002, Official Records*<sup>808</sup> also contends that any privileges and immunities may be waived in accordance with the *UN General Assembly, Convention on the Privileges and Immunities of the United Nations* 13 February 1946.<sup>809</sup> Article 5 of *The Agreement on the Privileges and Immunities of the International Criminal Court*<sup>810</sup> explains that any person who enjoys such immunity regarding his independent functions for the UN may be stripped of that immunity in order to fulfil the UN's cooperation with the ICC.<sup>811</sup>

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804 Case IT-99-37-PT *Decision on Preliminary Motions* 2001.

805 A 2(6) of the *Statute of the International Criminal Tribunal for Rwanda*.

806 *International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind* adopted by the Commission at its forty-eight session from 6 May to 26 July 1996, *General Assembly, Official Records, 51th Session, Supp No 10; UN Doc A/51/10*.

807 A 6(2) of the *UN Security Council, Statute of the Special Court for Sierra Leone* 2002.

808 A 19 of the *UN General Assembly, Relationship Agreement Between the United Nations and the International Criminal Court* 20 August 2004 A/58/874.

809 *UN General Assembly, Convention on the Privileges and Immunities of the United Nations* 13 February 1946.

810 A 5 of *The Agreement on the Privileges and Immunities of the International Criminal Court*.

811 Aa 27, 87, 88, 89 and 98 of the *Rome Statute*.

The discussion above undeniably concludes that modern international law dictates that neither immunity *ratione personae* nor *ratione materiae* would be an effective shield against criminal proceedings before an international court or tribunal with respect to international core crimes.<sup>812</sup>

#### 4.5 Immunity before the ICC

Article 27 of the *Rome Statute* endorses the fact that any official capacity of any individual will be deemed irrelevant when that individual is charged with crimes listed in article 5. This article determines that.<sup>813</sup>

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.

The article further states that no immunities or procedural rules, under national or international law, which attach themselves to the relevant official's capacity will prohibit the ICC from exercising its jurisdiction over the individual in question.<sup>814</sup> Just as the non-immunity provision is envisaged in Article 7(2) of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, so does Article 27 of the *Rome Statute* explicitly state that even a sitting Head of State or government would not benefit from any form of immunity.<sup>815</sup> The Pre-Trial Chamber I of the ICC confirms:<sup>816</sup>

...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.

Van der Vyver asserts that article 27 is securely based:<sup>817</sup>

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812 Cassese, Gaeta and Jones *Rome Statute* 992-993.

813 A 27(1) of the *Rome Statute*.

814 A 27(2) of the *Rome Statute*.

815 Bassiouni 2001 *VJIL* 84-85.

816 *Situation In Darfur, Sudan The Prosecutor v Omar Hassan Ahmad Al Bashir Public Document 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* 2011 par 43.

817 Van der Vyver *Prosecuting President Omar Al Bashir* 9.

...on a sound norm of customary international law ... proclaiming that sovereign immunity does not apply to prosecutions in international tribunals

#### 4.5.1 Article 27(1) and immunity *ratione materiae*

Article 27(1)<sup>818</sup> and customary international law<sup>819</sup> stipulate that no official capacity would hinder the court from exercising its jurisdiction over an individual suspected of committing a crime as listed in article 5 of the *Rome Statute*.<sup>820</sup> This provision clearly demonstrates that acting one's official capacity while committing an international crime during the undertaking of public functions would be to no avail during criminal proceedings.<sup>821</sup>

Article 27(1) provides a list to illustrate the extensive reach of the ICC's power.<sup>822</sup> The list is non-exhaustive and includes several capacities<sup>823</sup> that would be deemed irrelevant to criminal jurisdiction. Heads of State and government officials are listed, to emphasise that even people vested with the highest level of authority will be fit for prosecution. Although they are not explicitly listed, officials of international intergovernmental organizations would also be held accountable for committing crimes that fall within the jurisdiction of the court.<sup>824</sup>

#### 4.5.2 Article 27(2) and immunity *ratione personae*

Personal immunity can be relied upon only if the authority of the receiving or territorial state gives consent to the concerned official to carry out his functions.<sup>825</sup> However, article 27(2) makes it clear that personal immunity would bring no relief from criminal proceedings.<sup>826</sup> Article 27(2) therefore does not make a significant change or contribution to international law regarding the concept of personal immunity.<sup>827</sup>

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818 A 27(1) of the *Rome Statute*.

819 See chap 4 par 4.1 Immunity before international criminal courts and tribunals: prior to the ICC.

820 A 5 of the *Rome Statute*.

821 Cassese, Gaeta and Jones *Rome Statute* 990-991.

822 A 27(1) of the *Rome Statute*.

823 A 27(1) of the *Rome Statute* "...official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official..."

824 See chap 2 par 3.2.2 Crimes within the jurisdiction of the ICC.

825 Cassese, Gaeta and Jones *Rome Statute* 992.

826 A 27(2) of the *Rome Statute*.

827 Cassese, Gaeta and Jones *Rome Statute* 992-993.

#### 4.5.3 Immunity and cooperation with the ICC - the relation between articles 27(1) and 98

At first glance it may seem that the coordination of articles 27<sup>828</sup> and 98<sup>829</sup> of the *Rome Statute* is fraught with complications in relation to the accord of immunity under international law. As discussed above, article 27 of the *Rome Statute* explicitly states that the ICC has the jurisdiction to exercise its authority over those individuals who enjoy personal immunity under international law. Article 98(2) seems to narrow down the scope of article 27 by making it seemingly compulsory for the ICC to obtain a waiver of immunity from member states and even non-member states of the ICC.<sup>830</sup> Article 98(2)<sup>831</sup> states that:

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

Firstly it should be remembered that the ICC's power rests on the effective cooperation of the international community. It would render article 27 pointless if the receipt of a request for the waiver of immunity would always be an obligatory precondition for states to adhere to their obligations towards the ICC, such as to detain or transfer an accused.<sup>832</sup> For articles 27 and 98 to co-exist, article 98 must be interpreted as follows. The term "third state" should be considered as the equivalent of the term "non-member state". Therefore, if a state is a member to the ICC, a request for the waiver of the immunity of an individual is not a prerequisite. With regard to a non-state party, a waiver would thus be required according to article 98. With reference to the aforementioned, depending on international relations between the receiving and sending state, the court may ask for the arrest, detention and or transfer of an individual without obtaining a waiver

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828 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

829 Aa 27(2) and 98 of the *Rome Statute*.

830 Van der Vyver *Prosecuting President Omar Al Bashir* 7-8.

831 Article 98(2) of the *Rome Statute*.

832 Van der Vyver *Prosecuting President Omar Al Bashir* 7-9.

of immunity. In accordance with article 98, the requested state is obliged by the *Rome Statute*<sup>833</sup> to comply with these requests.<sup>834</sup>

To conclude, article 98 does not depart from customary international law. The ICC may not call upon the sending state (for the arrest or transfer of an individual) to violate its obligations under international law, except where a waiver of immunity is obtained from the sending state. Thus, personal immunity can be relied upon if the individual enjoys personal immunity in a state which is not a state party to the *Rome Statute*. However, if the sending state is a party to the *Rome Statute* (or has accepted the *ad hoc* jurisdiction of the court) personal immunity cannot be relied upon, even if the individual is a Head of State or government.<sup>835</sup>

A recent event that highlighted the confusion regarding the interpretation of articles 98 and 27 of the *Rome Statute*<sup>836</sup> was the failure of Kenya, an ICC member state, to arrest Omar Al Bashir<sup>837</sup> when he visited Kenya on two separate occasions.<sup>838</sup> Kenya explained that immunity was awarded to Omar Al Bashir in his capacity as Head of State in accordance to article 98 of the *Rome Statute* and international law regarding sovereign immunity. The Pre-Trial Chamber I of the ICC opposed this interpretation and stated that article 98 was not applicable in this case and that President Omar Al-Bashir did not enjoy sovereign immunity under international law before international courts.<sup>839</sup> Van der Vyver endorses the ICC's interpretation of Article 98, which concludes that the sovereign immunity of Heads of State, derived from article 98, applies only in relation to national courts and not before international courts.<sup>840</sup> The ICC's reasoning is in line with contemporary

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833 See chap 2 par 4 Obligations of member states.

834 Cassese, Gaeta and Jones *Rome Statute* 991-996.

835 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

836 Aa 98(1) and 27 of the *Rome Statute*.

837 See chap 2 par 2.5 Current cases before the ICC.

838 Van der Vyver *Prosecuting President Omar Al Bashir* 3. "President Al Bashir was subsequently also hosted, on two occasions by the Republic of Kenya, also a state party to the ICC Statute: in August 2010 as a guest of the Kenyan Government at a function to celebrate the signing of Kenya's new constitution; and thereafter again as a participant in a summit for Inter-Governmental Authority for Development that was held in Nairobi on 30 October 2010 to discuss the forthcoming referendum for the secession from Sudan of the southern region of that country."

839 Barnes 2011 *Fordham ILJ* 1606-1608.

840 Van der Vyver *Prosecuting President Omar Al Bashir* 3-6.

international law. As discussed above,<sup>841</sup> the principle of non-immunity differs from state to state. This principle has been subjected to extensive debate<sup>842</sup> but its position in international customary law remains unchanged, thus a state is still entitled to award an individual immunity from prosecution before its domestic courts.<sup>843</sup> However, the principle of non-immunity with respect to international core crimes before international courts and tribunals is entrenched in international customary law.<sup>844</sup> In addition to the aforementioned, Kenya's ratification of the *Rome Statute* illustrates the state's explicit consent to adhere to articles 27(1) and article 89 (1).<sup>845</sup>

The obligations conferred upon Kenya by the *Rome Statute* to arrest and surrender Al-Bashir are not inconsistent with article 98 because the ICC is an international court, and no immunity in relation to international core crimes prevails before an international court or tribunal. Since it was presumed from the outset that no form of immunity was attached to Al-Bashir, there was no need to obtain a waiver<sup>846</sup> from the sending state (Sudan) before Kenya could arrest the Sudanese President.<sup>847</sup>

Another situation that illustrates the ambiguous interpretation of article 98 of the *Rome Statute* relates to Malawi's failure to apprehend and surrender Al-Bashir to the ICC following his visit Malawi, which is an ICC member state. President Bashir attended the summit of the Common Market for Eastern and Southern Africa

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841 See chap 3 par 3.1 Restriction of sovereign immunity and international crimes.

842 (ECHR) App No 31253/96 123 ILR (2001); (ECHR) App No 35763/97 123 ILR (2001) 24.

843 Van der Vyver *Prosecuting President Omar Al Bashir* 9 "[C]ustomary international law restricted sovereign immunity to prosecutions in national courts, and Article 27 endorsed that salient norm of customary international law." *Arrêt of the Cour de Cassation, Mouammar Gadhafi* 2001 No 1414. The ICJ concluded that it was unable to deduce "that any such an exception exists in customary international law in regard to national courts." Bassiouni 2001 *VJIL* 85 "Under existing customary international law, heads of state and diplomats can still claim procedural immunity in opposition to the exercise of national criminal jurisdiction." See also Dugard *International Law* 251-252; Foakes 2011 *CHIL* 10; No 04-0649 (*RJL*) 2006; 128 *ILR* (2005).

844 See chap 4 par 3.1 Restriction of sovereign immunity and international crimes; par 5.1 Article 27(1) and immunity *ratione materiae*; par 5.2 Article 27(2) and immunity *ratione personae*.

845 Aa 27(1) and 89(1) *Rome Statute*.

846 A 98 of the *Rome Statute*.

847 Van der Vyver *Prosecuting President Omar Al Bashir* 3-9.

(COMESA) on 14<sup>th</sup> October 2011. Malawi rejected the ICC's allegations of non-compliance and argued that:<sup>848</sup>

The Ministry wishes to state that in view of the fact that His Excellency Al Bashir is a sitting Head of State, Malawi accorded him all the immunities and privileges guaranteed to every visiting Head of State and Government; these privileges and immunities include freedom from arrest and prosecution within the territories of Malawi.

The Ministry further wishes to state that Sudan, of which His Excellency President Al Bashir is Head of State, is not a party to the Rome Statute and, in the considered opinion of the Malawi authorities, Article 27 of the Statute which, *inter alia*, waives the immunity of the Heads of State and Government is not applicable.

The Ministry also wishes to inform the esteemed Registry of the Court of the ICC that Malawi, as a member of the African Union, fully aligns itself with the position adopted by the African Union with respect to the indictment of the sitting Heads of State and Government of countries that are not parties to the Rome Statute.

The ICC contended<sup>849</sup> that Malawi had failed to cooperate with the court in accordance with article 119(1)<sup>850</sup> of the *Rome Statute*, which states that the ICC will have the sole authority in resolving judicial disputes between itself and member states. In addition, Malawi had also failed to uphold rule 195 (1), which states that:<sup>851</sup>

When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.

Malawi also argued that it had acted in accordance with article 98(1) of the *Rome Statute* with regard to its internal legislation, specifically article 17 of the *Malawi*

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848 Situation In Darfur Sudan *The Prosecutor v Omar Hassan Ahmad Al Bashir Public Document 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* 2011 par 1-5 and 7-8.

849 *Situation in Darfur Sudan The Prosecutor v Omar Hassan Ahmad Al Bashir* par 10-11.

850 A 119(1) of the *Rome Statute* "1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. 2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court."

851 *Situation In Darfur Sudan The Prosecutor v Omar Hassan Ahmad Al Bashir* par 11.

*Immunities and Privileges Act 1984*,<sup>852</sup> by awarding Omar Al Bashir immunity from arrest and detention. The ICC, however, states that article 98(1) applies only to international law, and this argument renders Malawi's internal law argument void.<sup>853</sup>

Regarding the right to immunity under international law, the ICC states that neither Malawi nor the AU (by extension) may justify its non-compliance with the ICC with respect to article 98(1) of the *Rome Statute*. The ICC describes the vast amount of state practice which supports the notion of non-immunity, which has its origins as far back as the aftermath of World War One. The ICC further describes the modern notion of denying immunity even to incumbent Heads of State for customary international law crimes before international courts. The ICC further contends that Malawi accepted article 27 and affirmed its support for the non-immunity principle when the latter state ratified the *Rome Statute*.<sup>854</sup> The ICC concluded that:<sup>855</sup>

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.

#### 4.5.4 Article 98 agreements

Regarding the inclusion of article 98(2) in the *Rome Statute*, the US responded by consulting with individual countries to sign specific types of agreements which entail that no current or former US government official, military personnel, non-US citizens employed in the US or US national will be transferred to the jurisdiction of the ICC. These agreements have been referred to as article 98 agreements, bilateral immunity agreements, impunity agreements and/or bilateral non-surrender agreements.<sup>856</sup> As of December 2006 the US State Department reported that 102 agreements had been signed, but only 21 of those agreements

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852 A 17 of the Malawi *Immunities and Privileges Act 1984*.

853 *Situation In Darfur, Sudan The Prosecutor v Omar Hassan Ahmad Al Bashir* par 21.

854 *Situation In Darfur, Sudan The Prosecutor v Omar Hassan Ahmad Al Bashir* par 23-41.

855 *Situation In Darfur, Sudan The Prosecutor v Omar Hassan Ahmad Al Bashir* par 43.

856 Georgetown Date Unknown [http://www.law.georgetown.edu/library/researchf/guides/article\\_98.cfm](http://www.law.georgetown.edu/library/researchf/guides/article_98.cfm).

had been ratified. 46 state parties to the ICC had signed the bilateral agreements, but only 13 had been ratified.<sup>857</sup>

There has been widespread criticism of these bilateral immunity agreements by international law experts<sup>858</sup> and even by high-ranking US government officials.<sup>859</sup> It has been argued that the US is misinterpreting article 98(2) and undermining the efforts of the international community to bring perpetrators of the most heinous crimes to justice.<sup>860</sup> Since these agreements obstruct the ICC from exercising complete jurisdiction over a state party these bilateral agreements are inconsistent with article 86<sup>861</sup> of the *Rome Statute* and thus ultimately defeat the purpose and vision of the ICC.<sup>862</sup>

## **4.6 Immunity before the ICLS**

### *4.6.1 Criminal responsibility in terms of the Draft Protocol*

The *Draft Protocol*<sup>863</sup> states that any person will be held criminally responsible if it is found that an offence has been committed under article 28A.<sup>864</sup>

If a subordinate commits an offence listed in article 28A, his superior(s) will be held criminally responsible if the latter should have known or should have foreseen that the acts committed were inevitable and failed to take the precautions necessary to prevent the act or failed to punish the perpetrators. Acting under instruction of a government or superior will not exempt that person from investigation or prosecution by the ICLS. However, the ICLS may consider the latter to be an incentive to mitigate punishment if this serves the best interests of justice.<sup>865</sup>

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857 Georgetown Date Unknown [http://www.law.georgetown.edu/library/researchf/guides/article\\_98.cfm](http://www.law.georgetown.edu/library/researchf/guides/article_98.cfm).

858 Georgetown Date Unknown [http://www.law.georgetown.edu/library/researchf/guides/article\\_98.cfm](http://www.law.georgetown.edu/library/researchf/guides/article_98.cfm).

859 CICC 2006 [http://www.iccnw.org/documents/HighOfficialQuotes\\_Current.pdf](http://www.iccnw.org/documents/HighOfficialQuotes_Current.pdf).

860 CICC *Status of US Bilateral Immunity Agreements* (BIAS) 2006.

861 A 86 of the *Rome Statute* stipulates that member states are obliged to cooperate fully with the ICC in its investigations and prosecutions of crimes within the jurisdiction of the court. See chap 2 par 4 Obligations of member states.

862 A 5 of the *Rome Statute*.

863 A 46B of the *Draft Protocol*.

864 A 28A of the *Draft Protocol*.

865 A 46B of the *Draft Protocol*.

The official capacity of any person, including that of a Head of State, will not be an effective shield in exempting that person from criminal responsibility before the ICLS.<sup>866</sup> A similar non-immunity clause can also be found in the *Rome Statute*.<sup>867</sup> However, in contrast to the *Rome Statute*, the *Draft Protocol*<sup>868</sup> stipulates that the provision will be applicable "without prejudice to the immunities provided for under international law". Considering that six crimes listed in the *Draft Protocol* are not vested with international customary law status, the drafters may have noticed the problem in providing a provision that strips immunity from any person for all crimes even if the individual concerned is entitled to immunity under international law with respect to the specific crime.<sup>869</sup> However, as Du Plessis<sup>870</sup> has indicated, the addition of the "without prejudice" clause does not simplify the interpretation of the provision and thus provides little assistance to member states, since all it accomplishes is to affirm the difficulty of interpreting the provision.

The development of the restrictive doctrine has come a long way between the establishment of the IMT and the establishment of the ICC. International customary law now provides that immunity before international courts have been stripped with respect to international customary law crimes. However, immunity still remains as an effective impediment in some instances recognised under customary international law.<sup>871</sup> Thus, if an official is shielded by the doctrine of immunity but the ICLS indicts the individual regardless, states would have to decide whether their agents would be responsible under international law or not.<sup>872</sup>

#### 4.6.2 *Criminal responsibility in terms of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*

The *Draft Protocol* was originally created with the intention of enforcing an absolute repudiation of immunity. Notwithstanding the problem of eliminating

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866 A 46 B(2) of the *Draft Protocol*.

867 A 27 of the *Rome Statute*.

868 A 46B(2) of the *Draft Protocol*.

869 Du Plessis 2012 *ISS* 6.

870 Du Plessis 2012 *ISS* 9.

871 See chap 4 par 7.1 The relationship between customary international law crimes and the notion of immunity.

872 Murungu and Biegon 2011 *PULP* 43-44.

immunity with respect to crimes that are not yet vested with the status of international customary law, the Protocol has taken a firm approach in stamping out impunity.<sup>873</sup> The reason behind the establishment of the ICLS, however, therefore remains unclear. One view has endorsed Africa's disagreements with the ICC following allegations which labelled the ICC as a "hegemonic instrument of western powers". In addition, accusations have been made that the ICC is targeting Africa and not pursuing justice around the world, supplementary to concerns about the Prosecutor's seeming lack of an aspiration to initiate prosecutions elsewhere.<sup>874</sup> The other view endorses the all-encompassing<sup>875</sup> ambitions of the ICLS to prosecute "unorthodox" crimes<sup>876</sup> such as corruption and the illicit exploitation of natural resources, which might be seen as an African response to the ICC's limited jurisdictional scope, indicating that there is a perception that the ICC lacks the determination to prosecute known crimes that have been plaguing the continent.<sup>877</sup>

In 2005 the ICC issued an arrest warrant for President Al-Bashir which prompted a worrisome response from Africa concerning the implications of indicting an incumbent Head of State, especially in relation to the troublesome situation in Darfur.<sup>878</sup> Following the ICC's rejection of the AU's request to suspend proceedings, another indictment followed, calling Kenyan President Uhuru Kenyatta and Vice-President William Ruto to stand trial before the Hague-based court.<sup>879</sup> In addition to the fact that international customary law had eradicated immunity for international core crimes tried before international courts<sup>880</sup> Kenya had also ratified the *Rome Statute*, thereby explicitly accepting article 27(1) and its obligations under article 89 of the said statute.<sup>881</sup> Even though Kenya should have been compelled by the *Rome Statute* and by the principles of international law to adhere to its obligations to honour the indictments, the latter state continuously

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873 See chap 3 par 2.1 The desire for a regional international criminal law section of the African court.

874 See chap 3 par 2.1 The desire for a regional international criminal law section of the African court

875 Du Plessis 2012 *ISS* 8-9.

876 See chap 3 par 3.1.1 Crimes within jurisdiction of the ICLS.

877 Abass 2013 *NILR* 33.

878 See chap 2 par 2.5 Current cases before the ICC.

879 See chap 2 par 2.5 Current cases before the ICC.

880 See chap 4 par 4 Immunity before international criminal courts and tribunals.

881 Aa 27 and 89 of the *Rome Statute*.

provided ambiguous excuses of government reform alleging that the cases were inadmissible before the ICC.<sup>882</sup> The AU also openly condemned these indictments of sitting heads of state and called upon African nations to "speak with one voice"<sup>883</sup> against the prosecution of incumbent Heads of State before the ICC. Consequently, both Ministers of Foreign Affairs from Kenya and Rwanda approached the AU to arrange an extraordinary meeting to discuss the possibility of a mass withdrawal of African states from the ICC.<sup>884</sup> On 12 October 2013 an Extraordinary Session of the AU was held in Addis Ababa,<sup>885</sup> where the AU decided that in order.<sup>886</sup>

...to safeguard the constitutional order, stability and integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.

Although the outcome of the extraordinary meeting did not result in a mass withdrawal, the decisions made constituted a serious deviation from international customary law.<sup>887</sup> In addition to the aforementioned, the AU Extraordinary Summit also called upon the ICC to suspend current proceedings against President Kenyatta and Vice-President Ruto until they had completed their terms in office.<sup>888</sup>

In June 2014 the 23<sup>rd</sup> Ordinary Session of the AU<sup>889</sup> was held in Malabo, Equatorial Guinea, where African leaders held a unanimous vote to grant immunity to sitting Heads of State and other high-level government officials before the proposed ICLS.<sup>890</sup> The approved immunity provision that will be incorporated

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882 See chap 2 par 2.5 Current cases before the ICC.

883 Aljazeera 2014 <http://www.aljazeera.com/news/africa/2014/02/african-union-urges-united-stand-against-icc-20142111727645567.html>.

884 Maqungo "The Implications of African States Withdrawing from the ICC".

885 AU *Extraordinary Session of the Assembly of the African Union, Addis Ababa, Ethiopia* 2013 <http://www.au.int/en/content/extraordinary-session-assembly-african-union>.

886 AU *Extraordinary Session of the Assembly of the African Union* 12 October 2013 Addis Ababa Ethiopia Ext/Assembly/AU/Dec 1 (Oct 2013).

887 See chap 4 par 4.1 Immunity before international criminal courts and tribunals: prior to the establishment of the ICC and par 5 Immunity before the ICC.

888 AU *Extraordinary Session of the Assembly of the African Union* 12 October 2013 Addis Ababa Ethiopia Ext/Assembly/AU/Dec 1 (Oct 2013). The ICC, however, did not suspend the proceedings. See ICC CPI 2014 [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx).

889 AU 2014 <http://summits.au.int/en/23rdsummit>.

890 Associated Press 2014 <http://america.aljazeera.com/articles/2014/7/1/africa-summit-immunity0.html#>.

into the anticipated *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, namely Article 46A*bis*, states the following:<sup>891</sup>

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

The change of Africa's sentiment towards the endowment of immunity is noteworthy. The initial *Draft Protocol* had taken a harsh line against affording immunity to any person committing any of the offences listed under article 28A of the *Protocol*.<sup>892</sup> Following the indictment of Al-Bashir, significant adverse effects on the attitude of Africa in relationship to the ICC were evident, as described above.<sup>893</sup> However, the non-immunity clause in the *Draft Protocol* remained in effect. The ICC's refusal to suspend its action against President Kenyatta and Vice-President Ruto, though, could be regarded as the tipping point in the AU's attitude towards the stripping of immunity from incumbent Heads of State and senior government officials, as noted after the Extraordinary AU Session held in 2013 and consequently the 23<sup>rd</sup> Ordinary AU Session held in 2014.<sup>894</sup>

At first glance the AU's decision constitutes a grave breach of international customary law.<sup>895</sup> However, before it can be concluded that article 46B and article 46A*bis* deviate from contemporary international law it needs to be determined whether the ICLS should be regarded as an international court or tribunal for the purposes of stripping immunity for international core crimes.

The ICJ concluded in the *Arrest Warrant Case*<sup>896</sup> that the immunity of Heads of State and other government officials will not be regarded as a bar in relation to criminal prosecution in "...certain international criminal tribunals." The judgment

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891 IJR Centre 2014 <http://www.ijrcenter.org/2014/07/02/African-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/>.

892 A 28A of the *Protocol*.

893 See chap 3 par 3.2.2.2 Establishing the ICLS: anti-ICC sentiments.

894 AU *Extraordinary Session of the Assembly of the African Union* 12 October 2013 Addis Ababa Ethiopia Ext/Assembly/AU/Dec 1 (Oct 2013). AU 2014 <http://summits.au.int/en/23rd-summit>.

895 See chap 4 par 4 Immunity before international criminal courts and tribunals and par 7.1 The relationship between customary international law crimes and the notion of immunity.

896 *ICJ Reports* 2002 3 61.

specified the ICC, the ICTY and the ICTR as examples of such tribunals, but also confirmed that such immunities would be applicable as a defence before other courts in third states, even with respect to international crimes.<sup>897</sup> It is important to note that a criterion for defining an international court or tribunal does not exist.<sup>898</sup> There are, however, several identifiable characteristics which could be of use in attempting to establish if a court or tribunal<sup>899</sup> may be regarded as an international judicial body.<sup>900</sup>

For an institution to be adjudged to be an international criminal court the judiciary of that court should not form part of the judiciary of one single state.<sup>901</sup> This is an important aspect, since the institution concerned needs to be independent of all national legal systems.<sup>902</sup> The ICTY, the ICTR, the SCSL and the ICC can be used as examples since all of them are designated as international and the judges who serve them are not confined to a single state's national judiciary.<sup>903</sup> Another issue to be taken into account is that international courts are complementary to national legal systems and take primacy over them.<sup>904</sup> Another important aspect of categorising an international tribunal relates to its application of international law. Hudson states that:<sup>905</sup>

...any international tribunal meeting characterised as such must function within established judicial limitations and must apply international law.

The constitutive documents of international judicial bodies may not necessarily explicitly state that the tribunal concerned will make its decisions upon the basis of international law, but that is considered to be an implied requirement.<sup>906</sup> However, this does not exclude an international body from applying domestic law where its

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897 *ICJ Reports* 2002 3 61.

898 *Armstrong Handbook of International Law* 276.

899 For the purposes of clarification, the terms international court and international tribunal will refer to an international judicial body as under discussion.

900 Damgaard *Individual Criminal Responsibility* 6.

901 Damgaard *Individual Criminal Responsibility* 317.

902 Hudson *International Tribunals* 10-104.

903 Damgaard *Individual Criminal Responsibility* 317-318.

904 Damgaard *Individual Criminal Responsibility* 317. A 9 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*; a 8 of the *Statute of the International Criminal Tribunal Rwanda*; a 1(3) of the *Statute of The Special Court for Sierra Leone*; a 17 of the *Rome Statute*.

905 Hudson *International Tribunals, Past and Future* 99.

906 Romano 1999 *PICT* 714.

constitutive statute directs it to do so.<sup>907</sup> Article 5 of the *Statute of the Special Court for Sierra Leone* confers the court with jurisdiction over crimes that resort under the *Prevention of Cruelty to Children Act, 1926*<sup>908</sup> and *Malicious Damage Act, 1861*.<sup>909</sup> With regard to the *Draft Protocol*, the SCSL also prosecutes crimes which are not fixed in international law, such as offences relating to the wanton destruction of property.<sup>910</sup> It is important to note that the Appeals Chamber of the SCSL affirmed that the court was recognized as an international court in the case of *Prosecutor v Charles Ghankay Taylor*, SCSL-2003-01-1 "Decision on Immunity from Jurisdiction" Appeals Chamber 31 May 2004.<sup>911</sup> It should be noted that the fact that an international court exercises jurisdiction over domestic crimes does not serve to make such crimes international in nature.<sup>912</sup> The General-Secretary of the UN endorsed this concept, stating that these domestic crimes are included precisely because they are "...either unregulated or inadequately regulated under international law."<sup>913</sup> Another characteristic of international tribunals relates to the adjudication, which is governed by a predetermined set of rules which should not be subject to modification by state parties.<sup>914</sup> The outcome of proceedings regarding the judgment delivered should also be legally binding.<sup>915</sup> In addition to the aforementioned, the following requirements also support a defining criterion<sup>916</sup> of determining whether or not an institution may be regarded as an international judicial body.<sup>917</sup> The judiciary should be independent and impartial, parties establishing the judicial body should have intended to establish an international criminal judicial body,<sup>918</sup> and the concerned judicial body will have jurisdiction only

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907 PICT 2014 <http://www.pict-pcti.org/courts/hybrid.html>; Damgaard *Individual Criminal Responsibility* 317; Hudson *International Tribunals, Past and Future* 10-104.

908 *Prevention of Cruelty to Children Act* 42 of 1926.

909 *Malicious Damage Act* 1861.

910 A 5 of the *Statute of the Special Court for Sierra Leone*.

911 *Prosecutor v Charles Ghankay Taylor* SCSL-2003-01-1 "Decision on Immunity from Jurisdiction" Appeals Chamber 31 May 2004.

912 Armstrong *Handbook of International Law* 277.

913 *Fourth report of the Secretary-General on the United Nations Mission in Sierra Leone* S/2000/455 19 May 2000 19-25.

914 Romano 1999 *PICT* 714; Damgaard *Individual Criminal Responsibility* 321; Part II Jurisdiction, admissibility and applicable law of the *Rome Statute*.

915 Romano 1999 *PICT* 714; Damgaard *Individual Criminal Responsibility* 333.

916 Damgaard *Individual Criminal Responsibility* 333.

917 PICT *Project on International Courts and Tribunals* 2014 <http://www.pict-pcti.org/courts/hybrid.html>; Damgaard *Individual Criminal Responsibility* 333.

918 UN *UNSC Resolution* 827 (1993) Adopted by the Security Council at its 3217th meeting on 25 May 1993; a 3 of the *Draft Protocol*; a 1 of the *Rome Statute*.

in cases where the state parties have either accepted its jurisdiction in general or by special agreement.<sup>919</sup>

Considering the *Draft Protocol*, the preamble explicitly states that:<sup>920</sup>

the present Protocol will complement national, regional and continental bodies and institutions in preventing serious and massive violations of human and people's rights ... ensuring accountability for them wherever they occur.

In addition, the ICLS states that it is conferred with international criminal jurisdiction.<sup>921</sup> This clearly indicates that the ICLS will not form part of a judiciary system of only one state. The ICLS also includes a provision similar to that of the *Rome Statute*, which determines that it will also be an institution which complements national jurisdictions.<sup>922</sup> The preamble also states that the ICLS aims to ensure accountability regardless of where the crimes occur, although its jurisdiction is limited to referrals from member states, the Assembly of Heads of State, the Government of the African Union, and the Peace and Security Council of the African Union, or if the prosecutor has initiated proceedings *proprio motu*.<sup>923</sup>

The *Draft Protocol* defines war crimes, genocide and crimes against humanity much as do other constitutive treaties such as the *Rome Statute*<sup>924</sup> and the *Statute of the International Criminal Tribunal for the Former Yugoslavia*.<sup>925</sup> The *Draft Protocol* also identifies crimes within the jurisdiction of the ICLS that have not yet attained conformity regarding their prosecution on an international level.<sup>926</sup> In this way it is rather like the *Statute of The Special Court for Sierra Leone*, which also vests its tribunal with jurisdiction to try international and national crimes, as shown above.<sup>927</sup> Article 21(2) of the *Draft Protocol* also confirms that its judgment

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919 A 12(1) of the *Rome Statute*.

920 Preamble of the *Draft Protocol*.

921 A 3 of the *Draft Protocol*.

922 A 46H of the *Draft Protocol*.

923 A 46F of the *Draft Protocol*.

924 A 5 of the *Rome Statute*.

925 See chap 3 par 3.1.1 Crimes within the jurisdiction of the ICLS; aa 3, 4 and 5 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*.

926 Du Plessis 2012 ISS 6.

927 See chap 3 par 3.1.1 Crimes within the jurisdiction of the ICLS; a 28A of the *Draft Protocol*; a 5 of the *Statute of the Special Court for Sierra Leone*.

will be regarded as final and legally binding.<sup>928</sup> The *Draft Protocol* also states that.<sup>929</sup>

The Court shall be composed of impartial and independent Judges elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence and experience in international law, international human rights law, international humanitarian law or international criminal law.

Finally, according to article 3 of the *Draft Protocol*, the ICLS qualifies these criteria by determining that its jurisdiction may be exercised over a case only if the member state concerned has generally agreed to it.<sup>930</sup>

Even though the criteria given are not exhaustive, it may be concluded that the ICLS satisfies the key prerequisites of establishing itself as an international court. The SCSL has a similar menu of crimes it may try, which includes both international and national offences. Regarding the aforementioned, the SCSL has been generally presumed to be a hybrid international-domestic body (a hybrid tribunal).<sup>931</sup> Hybrid tribunals<sup>932</sup> may be described as courts or tribunals which include a mixture of international and national statutes and rules.<sup>933</sup> Even though the ICLS qualifies as an international tribunal, the fact that the proposed criminal court intends to try cases of non-international nature may arguably affect this predetermination and sway it towards being more of a hybrid tribunal. In the context of the focus of this chapter, it should be established if hybrid tribunals are regarded as international courts or tribunals for the purpose of waiving the immunity of individuals accused of perpetrating international core crimes.<sup>934</sup> *The Project on International Criminal Courts and Tribunals* affirms that.<sup>935</sup>

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928 Aa 3 and 21(2) of the *Draft Protocol*.

929 Chap 3 Annexure; a 3 of the *Draft Protocol*.

930 A 3 of the *Draft Protocol*.

931 Damgaard *Individual Criminal Responsibility* 266-268.

932 PICT 2014 <http://www.pict-pcti.org/courts/hybrid.html>. The following institutions can serve as examples: the SCSL, the Special Panels for Serious Crimes in the District Court of Dili (East Timor), the War Crimes Chamber in the State Court of Bosnia and Herzegovina, the Supreme Iraqi Criminal Tribunal, and the Extraordinary Chambers of the Courts of Cambodia.

933 Damgaard *Individual Criminal Responsibility* 266; PICT 2014 <http://www.pict-pict.org/courts/hybrid.html>.

934 Damgaard *Individual Criminal Responsibility* 6.

935 PICT 2014 <http://www.pict-pcti.org/courts/hybrid.html>.

Within the wider class of international judicial bodies, the hybrid courts belong to a specific order: that of international criminal bodies. Like the ICC, ICTY and ICTR, their goal is to sanction serious violations of international law (in particular, international humanitarian law, and human rights law) committed by individuals and, as a consequence, deter future violations and help to re-establish the rule of law. To do so, internationalized criminal courts impose criminal penalties--the critical feature setting this group apart from all other international judicial bodies.

During the prosecution of Charles Taylor the Appeals Chamber considered the SCSL to be an international court in nature, thereby depriving the former Liberian President of immunity.<sup>936</sup>

We hold that the official position of the Applicant as an incumbent Head of State at the time when these criminal proceedings were initiated against him is not a bar to his prosecution by this court. The Applicant was and is subject to criminal proceedings before the Special Court for Sierra Leone.

In addition to the SCSL's affirmation of its approach to eradicate immunity, other hybrid tribunals also explicitly rule out any form of immunity regardless of rank.<sup>937</sup> Article 29(2) of the *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea* 27 October 2004 (NS/RKM/1004/006) states that:<sup>938</sup>

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

Article 15(2) of the *UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences* UNTAET/REG/2000/15 (6 June 2000) determines that:<sup>939</sup>

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 panel from exercising its jurisdiction over such a person.

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936 SCSL-2003-01-1 "Decision on Immunity from Jurisdiction" Appeals Chamber 31 May 2004 53-56.

937 Van Schaack 2014 *Just Security* 1-6.

938 A 29(2) of the *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* 27 October 2004 (NS/RKM/1004/006).

939 A 15(2) of the UNTAET Regulation No 2000/15 on the *Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences* UNTAET/REG/2000/15 (6 June 2000).

It may be concluded that irrespective of whether a criminal court is being regarded as an international or hybrid judicial body, the non-immunity clause remains in effect in international customary law regarding international core crimes.

## 4.7 Analysis

### 4.7.1 *The relationship between customary international law crimes and the notion of immunity*

As pointed out earlier in this chapter, the jurisdiction to prosecute and the notion of immunity go hand in hand.<sup>940</sup> Immunity however, has been restricted with the passing of time.<sup>941</sup> Genocide, war crimes and crimes against humanity have inevitably found their place amongst the worst crimes to shocks the consciences of humankind.<sup>942</sup> Thus, people accused of crimes vested with international customary law status will be stripped<sup>943</sup> of immunity before any international court or tribunal.<sup>944</sup> Bassiouni explains that:<sup>945</sup>

The establishment of a permanent international criminal court having inherent jurisdiction over these crimes would be a convincing argument for the proposition that crimes such as genocide, crimes against humanity and war crimes are part of *jus cogens* and that obligations *erga omnes* to prosecute or extradite flow from them. Piracy,<sup>946</sup> terrorism,<sup>947</sup> trafficking in persons<sup>948</sup> and the crime of aggression<sup>949</sup> are also regarded as customary international law crimes.

The *Draft Protocol*,<sup>950</sup> however, lists six additional crimes from which is stripped the immunity<sup>951</sup> that is traditionally accorded to officials by international customary law,<sup>952</sup> namely, unconstitutional change of government,<sup>953</sup> mercenarism,<sup>954</sup>

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940 See chap 4 par 2 Immunity from jurisdiction and par 2.1 Sovereign immunity.

941 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

942 See chap 3 par 3.1.1.1 Genocide, crimes against humanity and war crimes.

943 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

944 See chap 4 par 4 Immunity before international criminal courts and tribunals.

945 Bassiouni 1996 *Law and Contemporary Problems* 74.

946 See chap 3 par 3.1.1.3 Piracy.

947 See chap 3 par 3.1.1.4 Terrorism.

948 See chap 3 par 3.1.1.8 Trafficking in persons.

949 See chap 3 par 3.1.1.12 The crime of aggression.

950 A 46B of the *Draft Protocol*.

951 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

952 Du Plessis 2012 *ISS* 8.

953 See chap 3 par 3.1.1.2 The Crime of Unconstitutional Change of Government.

954 See chap 3 par 3.1.1.5 Mercenarism.

corruption,<sup>955</sup> trafficking in drugs,<sup>956</sup> trafficking in hazardous wastes,<sup>957</sup> and the illicit exploitation of natural resources.<sup>958</sup> Officials cannot be held responsible for committing crimes that do not violate *jus cogens* norms.<sup>959</sup> Immunity still remains an effective impediment in some instances, as recognised under international customary law,<sup>960</sup> and therefore the prohibition of immunity is dependent on the crime itself being recognised under international customary law.<sup>961</sup> Du Plessis<sup>962</sup> states that:

There is a further important reason of principle why it is laudable to limit jurisdiction to crimes that are accepted under customary international law, or at least amongst African states. That is because under international criminal law jurisdiction over international crimes is twinned with the notion of immunity for such crimes.

#### 4.7.2 *The implications of Article 46B and Article 46Abis on international customary law*

Regarding article 46B, African states were initially left with two choices. AU member states would have to choose between respecting their own immunity and the immunity of others, and they might ultimately refuse to become member states to the ICLS. They also may either ratify the *Draft Protocol* at the risk of violating that immunity.<sup>963</sup>

The development of contemporary international law has evolved to such an extent that individuals of the highest rank, such as Ministers of Foreign Affairs and Heads of State, can be held accountable for international crimes. Thus, efforts in marginalising impunity have dramatically advanced over the years.<sup>964</sup>

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955 See chap 3 par 3.1.1.6 Corruption.

956 See chap 3 par 3.1.1.9 Trafficking in drugs.

957 See chap 3 par 3.1.1.10 Trafficking in hazardous wastes.

958 See chap 3 par 3.1.1.11 Illicit exploitation of natural resources.

959 Du Plessis 2012 *ISS* 8.

960 See chap 4 par 7.1 The relationship between customary international law crimes and the notion of immunity and par 2 Sovereign Immunity.

961 See chap 4 par 7.1 The relationship between customary international law crimes and the notion of immunity.

962 Du Plessis 2012 *ISS* 8-9.

963 Du Plessis 2012 *ISS* 8-9.

964 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

However, growing disparity between the AU, its supporting states<sup>965</sup> and the ICC have led to unfortunate changes in Africa's attitude towards the eradication of impunity. Firstly, the AU called upon African states to align themselves with its decision in nonconformity with the ICC or any international court or tribunal for that matter regarding the indictment of any incumbent Head of State or government.<sup>966</sup> Ethiopian Prime Minister Hailemariam Desalegn stated that the AU's recent decisions:<sup>967</sup>

...clearly reflected our [the AU's] disappointment as far as Africa's relationship with the ICC is concerned.

Unsurprisingly, the outcome of the 23<sup>rd</sup> Ordinary AU Session confirmed its recent decisions and declarations by approving that immunity which vests in a sitting Head of State or government official will prevail over any charge or obligation to appear before any international court or tribunal, including the ICC and the ICLS.<sup>968</sup> The newly introduced article 46*Abis* awards to incumbent Heads of State and government officials an immunity that is traditionally waived under international law.<sup>969</sup>

Considering that the ICLS satisfies the key criterion of an international or hybrid tribunal, the non-immunity principle envisaged in international customary law remains in effect and applicable before the aforementioned African court. Thus, the conclusion must be drawn that articles 46B and 46*Abis* constitute grave deviations from contemporary international law.

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965 Which include Kenya, Rwanda and Malawi (as indicated above). See also *Situation In Darfur, Sudan The Prosecutor v Omar Hassan Ahmad Al Bashir Public Document 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* 2011. "The Ministry also wishes to inform the esteemed Registry of the Court of the ICC that Malawi, as a member of the African Union, fully aligns itself with the position adopted by the African Union with respect to the indictment of the sitting Heads of State and Government of countries that are not parties to the Rome Statute."

966 *AU Extraordinary Session of the Assembly of the African Union* 12 October 2013 Addis Ababa Ethiopia Ext/Assembly/AU/Dec 1 (Oct.2013).

967 Think Africa Press 2013 <http://thinkafricapress.com/legal/au-and-icc-how-they-voted>.

968 *AU Extraordinary Session of the Assembly of the African Union* 12 October 2013 Addis Ababa Ethiopia Ext/Assembly/AU/Dec 1 (Oct 2013). Associated Press African leaders vote to give themselves immunity from war crimes 2014 <http://america.aljazeera.com/articles/2014/7/1/africa-summit-immunity0.html#> accessed 4 July 2014.

969 See chap 4 par 4.1 Immunity before international criminal courts and tribunals: prior to the establishment of the ICC and par 5 Immunity and the ICC.

Article 46B remains an ambiguous provision due to its elimination of immunity through a principle which is supposed to be applicable only to international customary law crimes. This will arguably not sit well with African states that are already adamant about refusing the prosecution of individuals who qualify to stand trial with respect to international core crimes.<sup>970</sup>

With the addition of Article 46A*bis*, African Heads of State<sup>971</sup> won't have to be fearful of prosecution anymore regarding the perpetration of human rights offences.<sup>972</sup> Another problem associated with the concerned immunity provision is the ill-defined term of "senior government officials," who would also benefit from this recent amendment. The term could be broadly interpreted and could ultimately be utilised by member states as they see fit in order assist their highest ranking authorities and ultimately provide the means to evade prosecution. Granting immunity to Heads of State and senior government officials would also possibly encourage them to cling to power improperly, since the advantages of holding on to an important position would render any form of investigation or prosecution void.<sup>973</sup> The immunity provision not only contradicts international law but also contradicts national law, as in the case of South-Africa's position towards the prosecution of perpetrators committing grave offences.<sup>974</sup> There is no doubt that the establishment of an African Court to try serious crimes is an honourable attempt by Africa to reduce impunity on a continent that still suffers daily atrocities performed by powerful people who disregard the very essence of human rights and the rule of law. However, this form of blanket immunity provided by Article 46A*bis* renders Africa's attempt to enhance accountability pointless.<sup>975</sup> Considering the progress Africa has made in recent years to put an end to impunity, such as in the prosecution of Hissène Habré, and its significant support shown in the establishment of the ICC, article 46B<sup>976</sup> shows a significant

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970 Du Plessis 2012 *ISS* 9.

971 See chap 4 par 6.2 Amendments to the *Draft Protocol* regarding immunity.

972 See chap 4 par 4 Immunity before international courts and tribunals.

973 *ISS* 2014 <http://www.issafrica.org/iss-today/can-the-new-african-court-truly-deliver-justice-for-serious-crimes>.

974 *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002.

975 *ISS* 2014 <http://www.issafrica.org/iss-today/can-the-new-african-court-truly-deliver-justice-for-serious-crimes>. *Amnesty International, Benin et al Open Letter to AU member states* 5th May 2014.

976 A 46B of the *Draft Protocol*.

misinterpretation of international law, as does article 46*Abis*, which ultimately reflects that Africa has taken a step backwards in the fight against impunity.<sup>977</sup>

#### **4.8 Conclusion**

The doctrine of sovereign immunity remains a fundamental principle in safeguarding the sovereignty of states and international relations. However, with the acute recognition of accumulating human rights violations, this notion has progressively developed to hold those with greatest responsibility, judicially accountable.<sup>978</sup>

The absolute nature of sovereign immunity, which previously attached to the official capacity of Heads of State and government officials has been effectively restricted. This notion is derived from the breach of preparatory norms, specifically *jus cogens*.<sup>979</sup>

No form of immunity, immunity *ratione personae* nor *materiae*,<sup>980</sup> will attach to any person, whether a Head of State or senior government official, if indicted before an international court or tribunal. The latter notion is entrenched in international customary law.<sup>981</sup>

The ICC followed its counterparts in the repudiation of immunity in all forms. While the latter symbolises a firm approach to end impunity in its most threatening form, the AU, its member and non-member states has developed an antipathy towards the indictment of sitting heads of state and government officials.<sup>982</sup>

Following these significant developments, the endowment of immunity by the *Protocol* follows two trains of thought. Firstly, the *Protocol* strips immunity from crimes that are not yet fixed in international law. Denying immunity with regard to

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977 Think Africa Press 2013 <http://thinkafricapress.com/legal/au-and-icc-how-they-voted>; IJR Centre 2014 <http://www.ijrcenter.org/2014/07/02/African-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/>; ISS 2014 <http://www.issafrica.org/iss-today/can-the-new-african-court-truly-deliver-justice-for-serious-crimes>.

978 See chap 4 par 2.1 Sovereign immunity.

979 See chap 4 par 4 Immunity before international criminal courts and tribunals.

980 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

981 See chap 4 par 4 Immunity before international criminal courts and tribunals.

982 See chap 4 par 5 Immunity before the ICC.

offences that have not yet achieved international consensus as being apt for international prosecution would prevent the achievement of any measure of clarity.<sup>983</sup> Secondly, the AU recently decided that the no incumbent Head of State or senior government official will be indicted before the ICLS on any charge.<sup>984</sup>

Considering the fact that the ICLS qualifies as an international court, its application of the non-immunity clause should be in line with contemporary international customary law.<sup>985</sup> The aforementioned international norm is followed by all the ICL's counterparts which include the ICC, ICTY, ICTR and the SCSL. Thus, article 46B and 46A*bis* of the *Protocol* deviates severely from international law and will ultimately lead to a future fraught with difficulties with respect to its contribution towards the eradication of impunity and building effective relations with states and its judicial counterparts.<sup>986</sup>

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983 See chap 4 par 7.1 The relationship between customary international law crimes and the notion of immunity.

984 See chap 4 par 6 Immunity before the ICLS.

985 See chap 4 par 4.6.2 Criminal responsibility in terms of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights

986 See chap 4 par 7 Analysis.

## Chapter 5

### The relationship between the proposed International Criminal Law section of the African Court and the International Criminal Court

#### 5.1 Introduction

The aim of this chapter is to analyse and evaluate the relationship between the ICC and the ICLS. The purpose of establishing<sup>987</sup> an international court will be briefly discussed,<sup>988</sup> which discussion will be followed by an assessment of the ICLS's projected feasibility and its compliance with international law in determining if the new African court would effectively contribute to the eradication of impunity.<sup>989</sup>

Crimes within the jurisdictional reach of both the ICC and ICLS will be compared and evaluated in order to determine the probability of mutual legal assistance between the two courts.<sup>990</sup> The absence of a deferral clause in the *Protocol* and the significance thereof will be examined,<sup>991</sup> followed by a proposal to amend the *Protocol* accordingly.<sup>992</sup>

The question regarding the inclusion of regional criminal courts in the *United Nations General Assembly Rome Statute of the International Criminal Court (last amended 2010) 17 July 1998*<sup>993</sup> (Rome Statute) and in international law will be analysed, which analysis will be predominantly based upon the progressive interpretation of positive complementarity.<sup>994</sup> A complementarity framework, including the ICC, the ICLS and their respective member states will be introduced<sup>995</sup> as will the implications it presents.<sup>996</sup>

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987 See chap 5 par 2 Establishment.

988 See chap 5 par 2.2 The rationale behind establishing an international criminal court.

989 See chap 5 par 2.3.2 Contributing to the eradication of impunity.

990 See chap 5 par 3.1 Crimes within the jurisdiction of the ICLS and ICC.

991 See chap 5 par 3.2.1 The absence of a deferral clause in the Protocol.

992 See chap 5 par 3.2.3 The introduction of a deferral clause in the Protocol.

993 *United Nations General Assembly Rome Statute of the International Criminal Court (last amended 2010) 17 July 1998.*

994 See chap 5 par 3.3 Complementarity.

995 See chap 5 par 3.3.4 Complementarity: the relationship between the ICC, the ICLS and member states.

996 See chap 5 par 3.3.4.1 Analysis: Implications of the ICC and the ICLS functioning within a complementarity framework in the same jurisdictional sphere.

The relationship between the ICC and the ICLS regarding their respective immunity provisions<sup>997</sup> will be evaluated in addition to the *Protocols'* compliance with the relevant international law.<sup>998</sup>

Lastly the issue of competing obligations will be examined and evaluated to illustrate the potential challenges these will produce when member states of both courts are obliged to fulfil their responsibilities in order to adhere to both the *Rome Statute* and *Protocol*.<sup>999</sup>

## **5.2 Establishment**

### *5.2.1 Africa's change of commitment*

As described in chapter two,<sup>1000</sup> Africa was at the forefront with respect to the establishment of a permanent international criminal court. The continent's strenuous support was represented by its substantial involvement in the Coalition for an International Criminal Court (CICC), which was endorsed by African organisations which insisted on state participation regarding the creation of the anticipated international judicial mechanism. The Southern African Development Community's (SADC) wish list<sup>1001</sup> placed emphasis on fundamental principles regarding international criminal prosecution which eventually were incorporated in the *Dakar Declaration for the Establishment of the International Criminal Court 1998*<sup>1002</sup> and underscored and adopted by the Organisation of African Unity (OAU) (now the AU).<sup>1003</sup> Consequently, the above mentioned principles found their way to the Rome Conference, aiding the drafters of the *Rome Statute*.<sup>1004</sup> Africa was the predominant force behind the creation of part nine<sup>1005</sup> and part four<sup>1006</sup> of the *Rome Statute*, which was partly administered by a Lesotho delegate

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997 See chap 4 par 6 Immunity before the ICLS.

998 See chap 5 par 4 Immunity.

999 See chap 4 par 5 Competing Obligations.

1000 See chap 2 par 2.4 Africa's commitment to the establishment of a permanent international criminal court.

1001 Du Plessis 2010 *ISS* 6-7.

1002 *Dakar Declaration for the Establishment of the International Criminal Court* 1998.

1003 *OAU Declaration and Decisions Adopted By The Thirty-Fourth Ordinary Session Of The Assembly Of Heads Of State And Government AHG/Decl.1 (XXXIV)* 8-10 June 1998.

1004 Du Plessis 2010 *ISS* 5-6.

1005 Part 9: International Cooperation and Judicial Assistance of the *Rome Statute*.

1006 Part 4: Composition and Administration of the Court of the *Rome Statute*.

who also attained the position of vice-chairperson of the Diplomatic Conference of Plenipotentiaries.<sup>1007</sup> Africa's support grew after the *Rome Statute's* entry into force which led to 34 African states ratifying the latter statute. In addition, the *African Commission on Human and Peoples' Rights*<sup>1008</sup> urged African states to implement the necessary legislation to adhere to the responsibilities conferred upon them by the *Rome Statute*. The ICC is also well represented by Africa on all major stages including the judicial bench. Its chief prosecutor is an African, and so is the previous director of the secretariat of the Assembly of State Parties (ASP).<sup>1009</sup>

However, following the indictment of President Al-Bashir, President Uhuru Kenyatta and Vice-President William Ruto, the AU and its supporting states have grown cynical about the ICC and its *modus operandi*. The ICC was accused of being a dominant political instrument of western supremacy, which is described as undermining and targeting the African continent unfairly and thus jeopardising the restoration of peace and reconciliation. These accusations were countered, however, as discussed in chapter 3, illustrating that the AU and its supporting states differ greatly from the ICC and UNSC with respect to the pursuit of justice and ultimately of peace.<sup>1010</sup>

Deliberations started as early as 2009, determining the implications of imbuing the merged African Court of Justice and Human Rights (ACJHR) with international criminal jurisdiction. In 2012 the *AU Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Exp/Min/IV/Rev.7 2012 Revisions up to Tuesday 15th May 2012 (Draft Protocol)*<sup>1011</sup> was released for public comment. Thereafter the AU adopted the *Draft Protocol* (now the *Protocol*) at the 23rd Ordinary AU Summit.<sup>1012</sup> After the *Protocol* achieves its

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1007 Du Plessis 2010 ISS 5-6.

1008 *80th Resolution on the Renewal of the Mandate and Composition of the Working Group on Specific Issues Relating to the Work of the African Commission on Human and Peoples' Rights* 2005.

1009 ICC 2013 [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx#a](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx#a).

1010 See chap 3 par 2.2.2 Establishing the ICLS: anti-ICC sentiments.

1011 *AU Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Exp/Min/IV/Rev.7 2012 Revisions up to Tuesday 15th May 2012*.

1012 *Assembly of the Union Twenty-Third Ordinary Session 26-27 June 2014 Malabo, Equatorial Guinea Assembly/AU/ / Decision on the Draft Legal Instruments Doc. Assembly/AU/8(XXIII)*

fifteen required state ratifications it will enter into force and thus establish the ICLS.<sup>1013</sup>

### 5.2.2 *The rationale behind establishing an international criminal court*

The underlying principle behind the establishment of an international criminal court or tribunal is described in the *Rome Statute*, which begins:<sup>1014</sup>

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity...

Recognizing that such grave crimes threaten the peace, security and well-being of the world...

Affirming 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...

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes...

Even though the ICC's predecessors,<sup>1015</sup> which include the IMT,<sup>1016</sup> the IMTFE,<sup>1017</sup> the ICTY,<sup>1018</sup> the ICTR<sup>1019</sup> and the SCSL<sup>1020</sup> are restricted geographically and temporarily, all of them embodied the same shared principle<sup>1021</sup> which relates to the prosecution of those responsible for customary international law crimes regardless of their official capacity.<sup>1022</sup> Thus, with the non-immunity clause firmly entrenched in international customary law, international justice now negates the immunity of any high ranking official, including incumbent Heads of State and high-ranking government officials.<sup>1023</sup> This is a crucial development in international law, since crimes such as genocide, crimes against

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1013 A 11 of the *Protocol*.

1014 Preamble of the *Rome Statute*.

1015 Cassese, Gaeta and Jones *Rome Statute* 6-8; Virginia Law 2014 <http://lib.law.virginia.edu/imtfe/>.

1016 CIMT.

1017 CIMTFE.

1018 Chapter VII of the *UN Charter*.

1019 *UN Security Council, Security Council Resolution S/RES/955* (1994), 8 November 1994 S/RES/955 (1994).

1020 A 6(2) of the *Statute of the Special Court for Sierra Leone*.

1021 Schabas and McDermott *International criminal courts* Abstract.

1022 See chap 4 par 4 Immunity before international criminal courts and tribunals.

1023 See chap 4 par 4.1 Immunity before international criminal courts and tribunals: prior to the establishment of the ICC and 5 Immunity before the ICC.

humanity and war crimes are usually committed by those who attain the highest form of power.<sup>1024</sup>

Another crucial element for an institution to establish itself as an international criminal court is to be adequately equipped with all the necessary resources. To achieve timely, independent and impartial justice, a court should not be subjected to a shortage of personnel, lack of funds or poor administration. As discussed in chapter three, even though international courts and tribunals such as the SCSL, the ICTR<sup>1025</sup> and the ICC are financially<sup>1026</sup> and judicially<sup>1027</sup> well-equipped, the amount of resources and time it takes to deliver international justice is vast.<sup>1028</sup> Thus, any limitations placed upon the adjudication of international crimes could severely jeopardise the prospects of effective and impartial proceedings, which could result in deplorable justice.<sup>1029</sup>

### 5.2.3 *The ICLS: An attempt to evade the ICC or an African solution for African problems?*

As established in chapter four,<sup>1030</sup> the ICLS satisfies the general criteria regarding its recognition as an international criminal court. Even though it is considered that the rationale behind the establishment of the ICLS leans towards the AU's frustration with the ICC,<sup>1031</sup> inherently no inconsistency can be found when any region in the world establishes a court vested with international criminal jurisdiction.<sup>1032</sup> However, with respect to this chapter, the legitimacy of creating such a court is not in question as much as the feasibility thereof. This raises serious concerns regarding the new African court's ability<sup>1033</sup> to promote justice

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1024 Schabas *An introduction to the International Criminal Court* 1-4.

1025 *UN Agenda item 144, Financing of the International Criminal Tribunal for Rwanda, Fifth Committee Statement by Assistant Secretary-General, Controller* 13 December 2011.

1026 Du Plessis 2012 *ISS* 9.

1027 See chap 2 par 2.1 Establishment.

1028 See chap 2 par 6 The ICC: Successes and failures over its 12 years of existence; Du Plessis 2012 *ISS* 9.

1029 Du Plessis 2012 *ISS* 7-10.

1030 See chap 4 par 6.2 Criminal responsibility in terms of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

1031 Du Plessis 2012 <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>.

1032 Abass 2013 *NILJ* 48-49.

1033 See chap 3 par 2.3.1 Financial and administrative implications.

and ensure accountability,<sup>1034</sup> especially with regard to the ICLS's commitment to act in accordance with international law.<sup>1035</sup>

### 5.2.3.1 Feasibility

Referring to the ICC's track record, it is evident that international criminal justice takes an immense amount of time and resources to deliver. The financial and administrative prospects of the ICLS inspire a serious concern as to whether the court will be sufficiently equipped to deal with the prosecution of the extensive number of crimes the *Protocol* lists.<sup>1036</sup> Murungu and Du Plessis emphasise that any limitations placed on adjudicating these trials will severely jeopardize the legitimacy and impartiality thereof.<sup>1037</sup> The Hissène Habré case<sup>1038</sup> serves as a relevant example of the implications of the lack of resources with respect to international criminal adjudication in Africa. A decision by the *UN Committee against Torture* stated that by not extraditing Habré to Belgium for crimes committed in Chad, the Senegalese state violated provisions 5(2) and 7 of the CAT Convention.<sup>1039</sup> Thus, the obligation rested upon the government of Senegal to adhere to its international duties regarding the prosecution of Habré. The AU eventually recommended that Senegal should try Habré on behalf of Africa. Thereafter, Senegal attempted to make various legal reforms<sup>1040</sup> to enable its

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1034 Preamble of the *Protocol*.

1035 See chap 4 par 7.2 Implications of Article 46B and Article 46*Abis* on international customary law

1036 See chap 3 par 2.3.1 Financial and administrative implications.

1037 Murungu 2011 *JICJ* 1084; Du Plessis 2012 *ISS* 6.

1038 See chap 2 par 2.3.4 Immunity and International criminal courts and tribunals.

1039 Aa 5(2) and 7 of the *UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series Vol 1465 85 "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1. 3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings."

1040 See Murungu 2011 *JICJ* 1075-1077 for further information.

national judiciary body to prosecute Habré. However, the African state failed to implement the necessary legal provisions and the lack of financial means contributed to the trial's postponement. Efforts to rectify the impediments causing the trials' delay were limited, and only after the ICJ ordered<sup>1041</sup> Senegal to either extradite or try the former Chadian President did Senegal eventually adhere to its international obligations to effectively apprehend and charge Habré.<sup>1042</sup> The Hissène Habré situation presented a unique opportunity for Africa to make its voice heard on the world stage regarding the prosecution of customary international law crimes. Africa's failure and remediation hereof only after the ICJ's ruling did not convince the world of Africa's willingness eradicate impunity. Du Plessis, Maluwa and O'Reilly endorses the aforementioned, stating that the AU is still faced with the stalled attempts<sup>1043</sup> of Senegal to try the former Chadian leader, and that AU members are frustrated with the "...*slow pace of the proposed trial of Habré, in Senegal.*"<sup>1044</sup>

#### 5.2.3.2 Contributing to the eradication of impunity

The continuous development of international mechanisms aimed at eradicating impunity through the prosecution of international crimes has gained great momentum over the years. In addition to its development, the notion of accountability has advanced, and it now extends to any individual accused of committing the particular offences.<sup>1045</sup> As has been indicated, those who bear the greatest responsibility usually attain the highest form of power and are sitting Heads of State or other high-ranking government officials such as Ministers of

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1041 *Belgium v Senegal* 2012 ICJ Reports 118-121 "The Court emphasizes that, in failing to comply with its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, Senegal has reneged on its international responsibility. Consequently, Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally wrongful acts. Senegal must therefore take, without further delay, the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr Habré."

1042 HRW 2013 <http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-afri-can-chambers-senegal#5> "There was no progress in the case until Macky Sall defeated Abdoulaye Wade in Senegal's presidential elections in March 2012, and the International Court of Justice ordered Senegal to bring Habré to justice..."

1043 HRW 2013 <http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-afri-can-chambers-senegal#5>.

1044 Du Plessis, Maluwa and O'Reilly 2013 *International Law* 8-9.

1045 Needham 2011 *Auckland ULR* 248.

Foreign Affairs.<sup>1046</sup> Thus, the international norm of stripping immunity from incumbent Heads of State or high-ranking government officials has become firmly entrenched in international customary law. This principle has been developed and implemented by the IMT, the IMTFE, the ICTY, the ICTR, the SCSL, the ICC,<sup>1047</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>1048</sup> and the Special Panels of the Dili District Court (East Timor Tribunal).<sup>1049</sup>

However, the AU's intention behind the creation of the ICLS is subjected to severe scrutiny due to its recent adoption of its eccentric policies, which have ultimately found their way into the *Protocol*.<sup>1050</sup> The adoption of Article 46*Abis* excludes sitting Heads of State and senior government officials from any form of accountability before the ICLS, which immunity they otherwise would not have enjoyed before any other international criminal court or tribunal.<sup>1051</sup> As emphasised in chapter four, this illustrates a great deviation from contemporary international law.<sup>1052</sup> The *Protocol's* isolation regarding its nonconformity towards international customary law and settled international practice indicates that the ICLS is unable to effectively contribute to the eradication of impunity.<sup>1053</sup>

### **5.3 Jurisdiction**

#### *5.3.1 Crimes within the jurisdiction of the ICLS and ICC*

The international core crimes listed under the *Rome Statute* and *Protocol*, namely genocide, war crimes, crimes against humanity and the yet to be ratified crime of

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1046 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

1047 See chap 4 par 6.2 Criminal responsibility in terms of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

1048 A 29(2) of the *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* 27 October 2004 (NS/RKM/1004/006).

1049 A 15(2) of the *UNTAET Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences* UNTAET/REG/2000/15.

1050 Associated Press 2014 <http://america.aljazeera.com/articles/2014/7/1/africa-summit-immunity0.html#>.

1051 See chap 4 par 4 Immunity before international criminal courts and tribunals.

1052 See chap 4 par 7.2 Implications of Article 46B and Article 46*Abis* on international customary law.

1053 IJR 2014 <http://www.ijrcenter.org/2014/07/02/African-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/>.

aggression have been fully recognised as international customary law crimes.<sup>1054</sup> The *Protocol* lists four additional international customary crimes which the ICLS is prepared to take on board.<sup>1055</sup> Member states bound to the *Rome Statute*<sup>1056</sup> and/or *Protocol* are obliged under each instrument to either prosecute or surrender the accused to the appropriate court.<sup>1057</sup> This obligation is known as the *aut dedere aut judicare*.<sup>1058</sup> Regarding the *Rome Statute*, its preamble explicitly supports this notion:

Affirming 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...

The *Protocol* also endorses national prosecution, as follows:<sup>1059</sup>

Convinced that the present Protocol will complement national, regional and continental bodies and institutions in preventing serious and massive violations of human and people's rights in keeping with Article 58 of the Charter and ensuring accountability for them wherever they occur...

With respect to the *aut dedere aut judicare* principle, the ICJ held in its ruling in the *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, *ICJ Reports 2012*<sup>1060</sup> case that when Senegal became a member state to the *CAT Convention* it was obligated to adopt and implement all necessary provisions into its domestic law and, in so doing, to criminalise the act of torture and establish its jurisdiction over it in order to carry out prosecutions.

Contrary to the *Protocol*, the *Rome Statute* explicitly states that its member states are obliged to incorporate the necessary national provisions and legal reforms into their domestic legislation in order to fulfil their obligations under the *Rome Statute*, which include the prosecution or surrendering of individuals. In this regard, even

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1054 See chap 2 par 3.1 Customary international law crimes and chap 3 par 3.1.1 Crimes within the jurisdiction of the ICLS.

1055 See chap 3 para 3.1.1.3 Piracy, 3.1.1.4 Terrorism, 3.1.1.7 Money Laundering, 3.1.1.8 Trafficking in Persons.

1056 The Preamble and a 88 of the *Rome Statute*.

1057 See chap 2 par 3.9 Issues of admissibility: Complementarity and chap 3 par 3.5.4 Issues of admissibility: Complementarity

1058 Zgonec-Rožej and Foakes 2013 *Chatham House IL* 1.

1059 Preamble of the *Protocol*.

1060 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* *ICJ Reports* 2012 99–104.

though its preamble clearly states that national prosecution should be a member states' first recourse, the *Protocol* fails to make the necessary provisions for member states to carry out their domestic proceedings, as discussed in chapter three.<sup>1061</sup> The interrelationship between national and international legal instruments is complicated, the truth of which statement is illustrated by the fact that only six of the thirty-four African ICC member states have to date incorporated the provisions of the *Rome Statute* in their national legislation.<sup>1062</sup>

However, focus is drawn to the prosecution of the *Protocol's* six unaccustomed crimes.<sup>1063</sup> As Du Plessis notes, the elements of the crimes in the *Protocol* may differentiate in accordance with a member state's national legislation "...thus requiring a major re-write of many of the domestic laws of African states." Another concern revolves around the fact that several of these crimes are not incorporated in a state's domestic legal system, so that a "...careful introduction of these crimes to ensure cooperation"<sup>1064</sup> would be required, as would "...special legislation to create the domestic legal basis enabling them to bring a prosecution at home of a national accused of international crimes committed elsewhere."<sup>1065</sup> The problem with incorporating crimes such as the unconstitutional change of government,<sup>1066</sup> corruption, trafficking in hazardous wastes and the illicit exploitation of natural resources, which have not gained international consensus with respect to their exact definition, in addition to the complications this produces regarding their prosecution, will leave member states with a daunting task with respect to their criminalisation in national legislation.<sup>1067</sup> It is therefore unlikely that African leaders will embrace the prosecution of such crimes, and this will surely affect their disposition regarding the *Protocol*.<sup>1068</sup>

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1061 See chap 3 par 3.5.4 Issues of admissibility: Complementarity.

1062 Du Plessis 2012 *ISS* 10; Du Plessis 2008 *Institute for Security Studies* 156.

1063 See chap 3 par 3.1.1 Crimes within the jurisdiction of the ICLS.

1064 Du Plessis 2012 *ISS* 10.

1065 Du Plessis 2008 *ISS* 156. See chap 2 par 4.4 Procedures under the national law of state parties.

1066 See chap 3 par 2.3 The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. *Decision on The Protocol on Amendments To The Protocol on The Statute of The African Court of Justice and Human Rights Doc.Assembly/Au/13(Xix)A*.

1067 Abass 2013 *NILJ* 39; Du Plessis 2012 *ISS* 10.

1068 Abass 2013 *NILJ* 39-40.

Nevertheless, as it has been said in chapter three,<sup>1069</sup> the prosecution of ten additional crimes should also be considered in a positive light. As Abass states:<sup>1070</sup>

The fact that the Rome Statute does not cover such crimes as corruption, unconstitutional changes of governments, mercenarism and so on, which affect the majority of African states, is perhaps the strongest case in favour of the prosecution of international crimes by the African Court.

This is because it underscores the more common problems Africa faces on a larger scale with respect to the frequency of the occurrence of such crimes as opposed to international core crimes such as genocide, crimes against humanity and war crimes.<sup>1071</sup> However, it is important to emphasise with respect to the relationship between the ICC and ICLS that genocide, war crimes and crimes against humanity are the only crimes listed under both the *Protocol* and the *Rome Statute*.<sup>1072</sup> With respect to the Protocol's recent immunity amendment, the prospects of judicial assistance between these two courts regarding the prosecution of the particular crimes are severely diminished if the individual indicted happens to be a Head of State or senior government official.

### 5.3.2 *Trigger Mechanisms*

#### 5.3.2.1 The significance of a deferral clause

The *Rome Statute*<sup>1073</sup> makes provision for the UNSC to suspend any current proceedings before the ICC.<sup>1074</sup> This is based upon Chapter VII of the *UN Charter*, which authorises the UNSC to intervene with "...respect to threats to the peace, breaches of the peace and acts of aggression."<sup>1075</sup> The deferral clause was established with the aim of harmonising international peace and security with the ICC's judicial functions.<sup>1076</sup> Before the UNSC can suspend investigations or proceedings, the existence of an actual threat to international peace and security

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1069 See chap 3 par 3.1.2 Analysis.

1070 Abass 2013 *NILJ* 49.

1071 Abass 2013 *NILJ* 36-37; Du Plessis 2012 *ISS* 7-8.

1072 See chap 2 par 3.2 Crimes within the jurisdiction of the ICC and chap 3 par 3.1.1 Crimes within the jurisdiction of the ICLS.

1073 A 16 of the *Rome Statute*.

1074 See chap 2 par 2.2.6.2 Referral and deferral by the United Nations Security Council.

1075 Chapter VII of the *UN Charter*.

1076 Cassese, Gaeta and Jones *Rome Statute* 644-648.

must be established.<sup>1077</sup> Due to Chapter VII's restrictive nature, if the UNSC exercises its power regarding the initiation of a deferral, this is far from an arbitrary decision. The UNSC has an absolute obligation to provide concrete reasons as to why an investigation or prosecution should be suspended, in line with the principles set out in Chapter VII. Further limitations include the maximum period of suspension, which is restricted to no more than 12 months, after which it may be renewed. Without explicitly stating whether the ICC has discretion to adhere to a deferral or not, the legality of the deferral clause is ensured through an extensive review of the judicial organs of the ICC, which must be conducted prior to the implementation of the suspension.<sup>1078</sup>

With respect to the *Protocol*, no such deferral clause exists. Although the deferral clause has been subjected to severe criticism,<sup>1079</sup> its existence remains crucial.<sup>1080</sup>

### 5.3.2.2 The absence of a deferral clause in the Protocol

As discussed earlier, although the formation of the *Protocol* was seemingly rushed,<sup>1081</sup> the possibility that the Pan African Lawyers Union neglected to insert a deferral clause and the AU Commissions' negligence in not noticing this substantial void is worrisome. However, as it has been stated,<sup>1082</sup> there was a noticeable sense of urgency from Africa to establish the *Protocol*.<sup>1083</sup> Thus, the disregard for a provision for deferment may not have been purposeful.

Its exclusion, however, may also be based upon one of the assumed motives for the proposed ICLS's establishment - an African solution for African problems. With regard to the UNSC's reluctance to defer the investigations and prosecution against Omar Al-Bashir, the AU acquired a substantial distaste of the UN's and UNSC's unwillingness to involve Africa in this issue.<sup>1084</sup> Thus, it should be of no

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1077 A 39 of Chapter VII the *UN Charter*.

1078 Cassese, Gaeta and Jones *Rome Statute* 652-654.

1079 See chap 3 par 2.2.2 Establishing the ICLS: anti-ICC sentiments.

1080 Cassese, Gaeta and Jones *Rome Statute* 652-654.

1081 See chap 3 par 3.6 Conclusion and Du Plessis 2012 *ISS* 11.

1082 See chap 4 par 2.2.2 Contributing to the eradication of impunity.

1083 Du Plessis 2012 <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/> acce.

1084 See chap 2 par 2.5 Current cases before the ICC.

surprise that the *Protocol* does not confer the power of deferment upon the UNSC in this instance.

That said, the sole discretionary power of the ICLS to suspend an investigation or prosecution does not promote an expectation of its impartiality or that it will cooperate internationally with respect to the maintenance of international peace and security. This lacuna may ultimately constitute a breach of Article 52 of Chapter VIII of the *UN Charter*, which states that:<sup>1085</sup>

1. Nothing in the present Charter precludes 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.

In addition, article 4(j) of the Constitutive Act grants:<sup>1086</sup>

- (j) the right of Member States to request intervention from the Union in order to restore peace and security;

It may therefore be stressed that a provision to empower an external entity such as the UN or the AU to independently and impartially suspend criminal investigations and prosecutions for the purpose of maintaining international peace and security is of vital importance in international law. Thus, the absence of such a provision rings inconsistent with Article 4(j) of the *Constitutive Act* and Article 52 and *The Purposes and Principles of the UN* of the *UN Charter*.<sup>1087</sup>

### 5.3.2.3 The introduction of a deferral clause in the Protocol

It would thus be laudable to assume that if an external body should be empowered to defer a situation before the ICLS, it would unquestionably be the AU. The *Constitutive Act*<sup>1088</sup> explains that the Assembly of the AU embodies the same *modus operandi* as the UN regarding its arrangement of collective decision

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1085 A 52 of Chap VIII of the *UN Charter*.

1086 A 4(j) of the *Constitutive Act*.

1087 A 4(j) of the *Constitutive Act*, a 52 and *The Purposes and Principles of the UN* of the *UN Charter*.

1088 A 7 of the *Constitutive Act*.

making.<sup>1089</sup> As in the UN, a two-thirds majority vote of the Assembly of the AU must be reached before a decision is approved.<sup>1090</sup>

According to the statutorily-based argument that the establishment of the ICLS is based upon article 4(h) of the *Constitutive Act*, it may be considered that the same provision establishes a comprehensive basis to create a deferral clause in the *Protocol*.<sup>1091</sup> The *Constitutive Act* stipulates that the AU may intervene pursuant to a decision undertaken by the Assembly of the AU with respect to "grave circumstances, namely: war crimes, genocide and crimes against humanity."<sup>1092</sup> Apart from the fact that the aforementioned provision covers only three of the ICLS's fourteen listed offences,<sup>1093</sup> it may be argued that the interpretation of the term "intervention" may include measures of judicial nature, thus suspending an investigation or prosecution before the ICLS.<sup>1094</sup>

If such a deferral were to be triggered through a collective voting system which needed to attain a two-thirds majority,<sup>1095</sup> the suspension of an investigation or prosecution would rest on a thoroughly comprehensive mechanism ensuring the involvement of all African states. This would ensure the ICLS's impartiality and its international cooperation in accordance with the *UN Charter and Constitutive Act*.<sup>1096</sup>

### 5.3.3 Complementarity

#### 5.3.3.1 Careful Drafting

The *Protocol* explicitly states, like the *Rome Statue*, that the ICLS will be complementary to national jurisdictions, intervening only if a member state is unwilling or unable to prosecute a crime itself.<sup>1097</sup> In addition, the *Protocol* also states that its complementarity extends to "...Courts of the Regional Economic

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1089 A 18 of the *UN Charter*.

1090 Aa 5, 6, 7 of the *Constitutive Act*.

1091 See chap 4 par 2.2.1.3 Finding a legal basis.

1092 A 4(h) of the *Constitutive Act*.

1093 See chap 3 par 2.2.1 Establishing the ICLS: the *Constitutive Act* and common law.

1094 Murungu 2011 *JICJ* 1081-1082.

1095 A 7 of the *Constitutive Act*; AU *The Assembly* 2014 <http://www.au.int/en/organs/assembly> accessed 18 August 2014.

1096 Aa 1 and 53 of the *UN Charter*; a 4(j) of the *Constitutive Act*.

1097 See chap 3 par 3.3.6 Issues of admissibility: complementarity.

Communities<sup>1098</sup> where specifically provided for by the Communities."<sup>1099</sup> However, to determine the relationship between these courts and the ICLS falls outside the scope of this chapter.

Emphasis is placed upon the *Protocol's* silence with respect to its complementarity status towards the ICC. Du Plessis, Martin, Jürgen and Abass<sup>1100</sup> underscore the seriousness of the *Protocol's* reluctance to incorporate the ICC in its legal framework. Considering that the ICLS and ICC will be occupying the same legal universe,<sup>1101</sup> the overlapping of jurisdictional spheres is inevitable. Thirty-four African states are already state parties to the ICC. If these African states also ratify the *Protocol*, it undoubtedly raises the question of which court would receive primacy,<sup>1102</sup> considering that both courts vest with the jurisdiction to try genocide, war crimes and crimes against humanity.<sup>1103</sup> The question of primacy also extends to the issue of the obligations imposed upon member states by both the ICLS and ICC. Neither the *Rome Statute*<sup>1104</sup> nor the *Protocol*<sup>1105</sup> provides any form of clarification as to how the issue of competing obligations should be addressed. This issue will be specifically discussed below.<sup>1106</sup>

That said, the *Protocol* does state, however, that it intends to:<sup>1107</sup>

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1098 IJRC 2014 <http://www.ijrcenter.org/regional-communities/> Courts and Tribunals of Regional Economic Communities. Courts of the regional economic communities usually have the competence to adjudicate individual complaints regarding violations of international human rights law. The list of courts of the regional economic communities is non-exhaustive, but may include the following institutions: the Court of Justice of the European Union, the Economic Community of West African States Court of Justice, the Southern African Development Community Tribunal (currently suspended); the Caribbean Court of Justice, the Court of Justice of the Andean Community, the East African Court of Justice, the Common Market for Eastern and Southern Africa Court of Justice (ECOWAS Court of Justice), and the Central American Court of Justice.

1099 A 46 of the *Protocol*. Such as the Economic Community of West African States Court of Justice. For more information see ECOWAS Court of Justice *Community Court of Justice* 2014 <http://www.court.ecowas.org/site2012/index.php?lang=en> accessed 18 August 2014.

1100 Du Plessis 2012 *ISS* 11; Abass 2013 *NILJ* 47; Martin and Jürgen *The proposed criminal chamber* 15-18.

1101 See chap 3 par 3.3.1.1 Genocide, Crimes against Humanity and War Crimes.

1102 Du Plessis 2012 *ISS* 10; Abass 2013 *NILJ* 46-48.

1103 See chap 2 par 3.2 Crimes within the jurisdiction of the ICC and chap 3 par 3.1.1 Crimes within the jurisdiction of the ICLS.

1104 See chap 2 par 4.3 Competing requests.

1105 See chap 3 par 4.2 Competing Obligations.

1106 See chap 5 par Competing Obligations.

1107 Preamble of the *Protocol*.

...complement national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples' rights in keeping with Article 58 of the Charter and ensuring accountability for them wherever they occur;

The *Protocol's* brief reference to continental bodies constitutes a very broad category of global institutions, but still falls short of defining which intuitions it complements and the extent thereof. In addition to the aforementioned, the *Protocol* also makes it possible for the ICLS to request assistance from international courts.<sup>1108</sup> These entities will be analysed in the next section<sup>1109</sup> to determine if the ICC's existence is broadly recognised in the *Protocol's* legal and complementarity framework.

### 5.3.3.2 Continental Bodies and the request for assistance from International Courts and Tribunals

The term continental refers in the first instance to one or more of the seven large areas of land of which the earth consists,<sup>1110</sup> but the term is also an adjective like "international" or "global".<sup>1111</sup> A "body," on the other hand is in this context an "...organized group of people with a common purpose or function: a regulatory body" or in some senses an "...international bod[y] of experts."<sup>1112</sup>

Then again, article 46 L (3)<sup>1113</sup> states that the ICLS may seek the:

...co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and may conclude Agreements for that purpose.

Since this provision does not confine its reference to which international courts it may seek assistance from, it may be assumed that this list too is non-exhaustive.<sup>1114</sup>

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1108 Preamble and a 46 L of the *Protocol*.

1109 See chap 5 par 3.3.2 Continental Bodies and the request for assistance from International Courts and Tribunals.

1110 Oxford 2014 <http://www.oxforddictionaries.com/definition/english/continental?q=continental>.

1111 Thesaurus 2014 <http://thesaurus.com/browse/continental>.

1112 Oxford 2014 <http://www.oxforddictionaries.com/definition/english/body?q=bodies>.

1113 A 46L(3) of the *Protocol*.

1114 Harvard Law Library 2013 <http://guides.library.harvard.edu/intlcourttribunals>. East African Court of Appeal, European Court of Human Rights, European Court of Justice, Extraordinary Chambers in the Courts of Cambodia, Inter-American Court of Human Rights, International Criminal Court, International Court of Justice, Permanent Court of International

To understand the rationale behind these provisions, as discussed above, Article 31 of the *Vienna Convention*<sup>1115</sup> needs to be consulted. However, since the legal instrument establishing the ICLS is considered a protocol, clarity needs to be established as to why the *Vienna Convention*<sup>1116</sup> is to be used as an interpretation medium for its analysis. The *UN Treaty Collection* defines protocols as "...agreements less formal than those entitled treaty or convention."<sup>1117</sup> With respect to this issue, the *Protocol* needs to be considered as an amending protocol due to the fact that it is a "... instrument that contains provisions that amend one or various former treaties."<sup>1118</sup> However, it is important to note that this evaluation loses traction, since the *AU Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008* has not yet entered into force and thus falls short of establishing itself as a treaty. Without delving further into these technicalities, it suffices to say that for the purposes of this chapter the *Protocol* will be considered as an amending protocol as defined by the *UN Treaty Collection*.<sup>1119</sup>

The term "protocol" is a complementary addition to a treaty addressing either new procedures or new or emerging concerns. Since a protocol is considered optional it will thus not have binding force upon member states of the original treaty until independent ratification is achieved with respect to that protocol.<sup>1120</sup> If the *Protocol* is independently ratified from the Protocol on the Statute of the ACJHR,<sup>1121</sup> it will like the latter instrument be eventually conceived as a constituting treaty

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Justice, International Criminal Tribunal for Rwanda, International Criminal Tribunal for Yugoslavia, International Tribunal for the Law of the Sea, Iran-USA Claims Tribunal, Special Court for Sierra Leone, Special Tribunal for Lebanon.

1115 A 31 of the *United Nations, Vienna Convention on the Law of Treaties* 23 May 1969 United Nations Treaty Series 331.

1116 A 31 of the *Vienna Convention*.

1117 UN 2014 [https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1\\_en.xml#protocols](https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml#protocols).

1118 UN 2014 [https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1\\_en.xml#protocols](https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml#protocols).

1119 UN 2014 [https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1\\_en.xml#protocols](https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml#protocols).

1120 UNICEF 2005 <http://www.unicef.org/crc/files/Definitions.pdf>.

1121 Please note that the ACJHPR still requires twelve ratifications before it can enter into force. To date only three states have ratified the protocol. For further information see *Coalition for an Effective African Court on Human and Peoples' Rights* 2014 [http://www.africancourtcoalition.org/index.php?option=com\\_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12](http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12). See also Abass 2013 *NILJ* 45-46 about issues concerning the amendment of a unratified protocol.

establishing an international institution - in this case, the ICLS. Therefore, if the *Protocol* enters into force, its informal nature as a protocol will change and it will consequently become just as binding as the treaty it complements.<sup>1122</sup> For the purpose of this analysis, the *UN Treaty Collection* stipulates that the designation of international instruments is interchangeable and that the *Vienna Convention* applies to all of these instruments,<sup>1123</sup> including protocols, regardless of their designation.<sup>1124</sup>

Article 31 of the *Vienna Convention*<sup>1125</sup> stipulates that a treaty must be interpreted according to the ordinary meaning of its words and in the context and light of the purpose of the treaty, including the text of the preamble and its annexes. If both provisions<sup>1126</sup> are interpreted in the light of article 31 of the *Vienna Convention*, the term continental bodies may refer to various judicial institutions, law enforcement agencies, NGOs and various other international organisations. That said, there remains little doubt that the ICC's existence is, at least, broadly recognised by the *Protocol*, even though no explicit provision exists regarding its relationship with the aforementioned.

The nature of the cooperation and assistance that may be sought from international courts, tribunals or continental bodies should also be briefly examined. The question revolves around what the terms 'assistance' and 'cooperation' could mean. Article 46L lists a range of duties that the ICLS may request from a member state pertaining to any particular situation, but no specific tasks are listed with regard to the aid sought from international courts. This is also true of the *Rome Statute*.<sup>1127</sup> It may be concluded only that the nature of the

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1122 *Protocol on the Statute of the ACJHR*.

1123 UN 2014 [https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1\\_en.xml#protocols](https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml#protocols). These international instruments include: Agreements, Charters, Conventions, Declarations Exchange of Notes, Memoranda of Understanding, *Modus Vivendi*, Protocols, Signatories and Parties, Treaties.

1124 UN 2014 [https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1\\_en.xml#protocols](https://treaties.un.org/pages/Overview.aspx?path=overview/definition/page1_en.xml#protocols).

1125 A 31 of the *Vienna Convention* "General rule of interpretation 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes."

1126 The preamble and article 46 L of the *Protocol*.

1127 A 87 of the *Rome Statute*.

assistance or cooperation sought between the two institutions would be determined through mutual agreement from time to time.<sup>1128</sup>

### 5.3.3.3 Co- existing with the Rome Statute

The Committee of Eminent African Jurists convened for the purposes of the Hissène Habré case discussed earlier<sup>1129</sup> expressed the opinion with reference to the possibility of establishing an African international criminal court that:<sup>1130</sup>

...there is room in the Rome Statute for such a development and that it would not be a duplication of the work of the International Criminal Court.

It should be emphasised that the *Rome Statute* cannot be labelled as the supreme authority in the international criminal jurisdiction hierarchy.<sup>1131</sup> In addition, there is no provision in the *Rome Statute*, under international treaty law or customary international law that explicitly prevents the AU or its member states from establishing a regional criminal court prosecuting offences similar to those dealt with by the ICC. Since the *Rome Statute* precludes the ICC from prosecuting crimes such as corruption, mercenarism and the unconstitutional change of government, there may be a strong case for an African court to be brought into existence with the powers to prosecute the said offences.<sup>1132</sup>

A progressive interpretation of positive complementarity suggests that since no explicit provision exists in the *Rome Statute* ruling out the existence of regional courts conferred with jurisdiction over the same crimes as the ICC, there is room to accommodate such courts.<sup>1133</sup> On the other hand, if the *Rome Statute* is interpreted in a negative light with respect to complementarity, this would rule out the possibility of accommodating regional courts such as the ICLS, exactly because there is no explicit provision to support their establishment.

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1128 A 46 L of the *Protocol* "The Court shall be entitled to seek the co-operation or assistance of regional or international courts ... and may conclude Agreements for that purpose."

1129 *Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, submitted to the Assembly of the African Union Ordinary Session July 2006*. See chap 5 par 2.3.2 Contributing to the eradication of impunity.

1130 Murungu 2011 *JICJ* 1075.

1131 Murungu 2011 *JICJ* 1080-1082.

1132 Abass 2013 *NILJ* 49.

1133 Murungu 2011 *JICJ* 1081.

The following discussion focuses on numerous discussions, reports, commentary and official documents which encompass the ICC's and UNSC's views concerning their acceptance of regional courts with respect to international criminal justice.

#### 5.3.3.3.1 Progressive interpretation of positive complementarity

Following the *Report on the Bureau of Stocktaking: Complementarity ICC-ASP/8/51 Resumed eighth Session New York 2010*,<sup>1134</sup> it was contemplated that the notion of positive complementarity should be enhanced with the aim of contributing towards the extermination of impunity. Article 17 of the *Report on the Bureau of Stocktaking: Complementarity ICC-ASP/8/51 Resumed Eighth Session New York 2010* states that:<sup>1135</sup>

The actual assistance should thus as far as possible be delivered through cooperative programmes between States themselves, as well as through international and regional organizations and civil society

Even though this report envisages the enhancement of national prosecution through positive complementarity, it also underscores that:<sup>1136</sup>

Such assistance rendered under positive complementarity can broadly be divided into three categories: ... legislative, technical, capacity building and physical infrastructure to ... national courts or other forms of support to special war crimes divisions of domestic institutions and hybrid tribunals, as appropriate.

Article 39 of the Review Conference further states that the ASP recognises the numerous international and regional organisations which carry out various legal activities and that the latter organisations could, in cooperation with states, "...explore ways in which the Rome Statute system could be further strengthened through positive complementarity."<sup>1137</sup>

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1134 S C1(17) *Report on the Bureau of Stocktaking: Complementarity ICC-ASP/8/51 Resumed eighth Session New York 2010*.

1135 S C1(17) *Report on the Bureau of Stocktaking: Complementarity ICC-ASP/8/51 Resumed eighth Session New York 2010*.

1136 S C1(17)(a), (b) and (c) of the *Report on the Bureau of Stocktaking: Complementarity*. ICC-ASP/8/51 Resumed Eighth Session New York 2010.

1137 A 39 of the *Report on the Bureau of Stocktaking: Complementarity*. ICC-ASP/8/51 Resumed Eighth Session New York 2010.

On the 21 April 2005 the UNSC released the *UNSC Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting on 31 March 2005*,<sup>1138</sup> which initiated the referral of the Sudan situation to the ICC<sup>1139</sup> in accordance with article 16 of the *Rome Statute* and Chapter VII the *UN Charter*.<sup>1140</sup> The resolution mentioned above affirmed that non-state parties are not under any obligation to cooperate with the ICC, but nevertheless, it also urged them, regional and international organisations to assist the court in this situation. This acknowledged the ICC's and the UNSC's acceptance of the existence of regional organisations and agencies, especially in paragraph four, which states that the resolution invites the ICC and the AU to provide recommendations on how to:<sup>1141</sup>

...facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity.

In the light of judicial cooperation contemplated here, the inclusion of regional mechanisms would ease efforts to protect witnesses, collect evidence, and ensure the apprehension of the accused and ultimately their prosecution.<sup>1142</sup> The affirmation of the support for regional efforts is repeated in the *travaux préparatoires* regarding the *Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya ICC-01/09*.<sup>1143</sup>

Another example of the ICC's and UNSC's accommodating attitude towards regional organisational inclusion can be found in the *Situation in Darfur, Sudan in the Case of the Prosecutor v Bahar Idriss Abu Garda Public Redacted Version Decision on the Confirmation of Charges 2010* concerning the situation in

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1138 *UNSC Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting on 31 March 2005.*

1139 *Decision Assigning The Situation In Darfur, Sudan To Pre-Trial Chamber I Presidency of the ICC 1-2.*

1140 Chapter VII of the *UN Charter*.

1141 *UNSC Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting on 31 March 2005 1.*

1142 *South African Litigation Centre 2012 Report on Positive Reinforcement: Advocating for International Criminal Justice in Africa 59.*

1143 *ICC Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya 3-4 ICC-01/09.*

Sudan.<sup>1144</sup> The declaration pointed out that in the pursuit of international peace and security, the existence of regional agencies or agreements is not ruled out,<sup>1145</sup> upon condition that they are constituted in a manner consistent with the *Purposes and Principles of the United Nations*.<sup>1146</sup>

The *UNSC Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting on 31 March* further confirms:<sup>1147</sup>

...the need to promote healing and reconciliation and encourages in this respect the creation of institutions ... in order to complement judicial processes and thereby reinforce the efforts to restore long lasting peace, with the African Union and international support as necessary.

#### 5.3.3.3.1.1 Analysis

With respect to the discussion above, support for a progressive interpretation of positive complementarity is evident. The ICC and the UNSC not only welcome the idea of there being a regional prosecution mechanism but specifically underscore the potential success such an institution may bring with respect to the eradication of impunity.<sup>1148</sup>

Abass and Murungu<sup>1149</sup> endorse the opinion that a court such as the ICLS can co-exist in parallel with the ICC. Abass goes further and seemingly condemns the view that the allegations stipulating that the *Rome Statue* forbids the establishment of regional courts such as the ICLS saying that such a view not only fails comprehensively to appreciate international law but also disastrously implies that there is a hierarchy of rank among international criminal tribunals.<sup>1150</sup>

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1144 *Situation in Darfur, Sudan in the Case of the Prosecutor v Bahar Idriss Abu Garda Public Redacted Version Decision on the Confirmation of Charges* 2010 par 34.

1145 A 52(1) of the *UN Charter*.

1146 A 53 of the *UN Charter*.

1147 *UNSC Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting on 31 March* 4-7.

1148 *UNSC Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting on 31 March* 1.

1149 Abass 2013 *NILJ* 46-50; Murungu 2011 *JICJ* 1081.

1150 Abass 2013 *NILJ* 48-49.

#### 5.3.3.4 Complementarity: the relationship between the ICC, the ICLS and member states

Since the ICC came into operation all of the situations before the court have originated from Africa.<sup>1151</sup> This illustrates the fact that Africa is in serious need of judicial development.<sup>1152</sup> It could therefore be argued that regional organisations such as the ICLS could assist the ICC in its efforts to enhance criminal prosecution on the continent.<sup>1153</sup> *Neier* affirmed this standpoint and also suggested that:<sup>1154</sup>

...if a functioning African Court were established within the African Union, it could give the ICC more leeway to examine issues in other regions of the world.

However, considering the matter from a technical point of view it should be noted that the ICLS will be completely independent of the ICC, and that there is no hierarchy among international criminal courts or tribunals.<sup>1155</sup> This implies that there is no obligation upon either the ICC or the ICLS to submit to the other and that both courts could co-exist on an equal basis.<sup>1156</sup> But, since neither court is compelled to defer to the other, the relationship between the ICC and the ICLS will be based solely upon their being united in their determination to pursue the ends of achieving international criminal justice.<sup>1157</sup>

For a three-tier complementarity system to be effective, crimes which fall within the jurisdictional reach of both the ICLS and the ICC should also be admissible before both courts on the same basis. As discussed below, admissibility before the two courts rests on the same basic principles. Article 46F of the *Protocol* and

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1151 See chap 2 par 5 Current cases before the ICC.

1152 See chap 4 par 3.3.2 Co-existing with the Rome Statute and chap 3 par 3.2.1 The desire for a regional international criminal law section of the African court.

1153 Curry 2005 *Human Rights Brief* 6 "Neier found a need for more hybrid tribunals and regional courts, saying that the International Criminal Court (ICC) cannot be seen as a panacea for all international crimes. The ICC's temporal jurisdiction limits it to cases that occurred after July 1, 2002, and it lacks access to certain regions of the world. Neier believed that there might be a need to create more hybrid ad hoc courts to deal with specific conflict situations and a need to strengthen existing regional court systems. He saw the lack of regional human rights mechanisms in Asia and the Middle East as especially problematic, and worried that atrocities in those regions could go unpunished."

1154 Curry 2005 *Human Rights Brief* 6.

1155 Abass 2013 *NILJ* 48.

1156 Murungu 2011 *JICJ* 1075.

1157 Abass 2013 *NILJ* 47.

Article 17 of the *Rome Statute* list corresponding criteria regarding the admissibility of a case. The admissibility test envisaged in the *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*<sup>1158</sup> derived from the Pre-Trial Chambers' *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*<sup>1159</sup> identified the "two limbs" of the said test. Firstly, complementarity should be determined according to article 17(l) (a)-(c) of the *Rome Statute*. Secondly, the gravity of the situation should be evaluated according to article 17(l) (d).<sup>1160</sup> It may be expected that the ICLS will follow the same approach as the ICC to determine admissibility. However, contrary to the *Rome Statute*,<sup>1161</sup> the exclusion of the word "genuinely" from article 46 H (2) (b) of the *Protocol*<sup>1162</sup> "...the decision resulted from the unwillingness or inability of the State to (*genuinely*) prosecute" may be interpreted as lowering the evidential standards of the prerequisite that states show an honest and definite inability to prosecute.<sup>1163</sup>

In addition, the crimes of genocide, war crimes and crimes against humanity should be identically defined in both the *Protocol* and the *Rome Statute*, so that it would constitute an offence under both instruments. As already said, it may be dully noted that the definition of the crimes contained in both the *Rome Statute* and the *Protocol* is similar in all relevant aspects.<sup>1164</sup>

With respect to complementarity, the relationship between the ICC, the ICLS and their concerned member states could be arranged as follows.

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1158 Pre-Trial Chamber II ICC *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* par 40.

1159 *Pre-Trial Chamber II 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* par 52.

1160 *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* par 52–53.

1161 A 17(1)(a) of the *Rome Statute* "...unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."

1162 A 46H(2)(b) of the *Protocol*.

1163 Abass 2013 *NILJ* 44.

1164 See chap 3 par 3.3.1.10 Genocide, crimes against humanity and war crimes.

#### 5.3.3.4.1 Member states to both the Rome Statute and the Protocol

##### 5.3.3.4.1.1 Referrals from member states

As indicated in chapters two and three,<sup>1165</sup> the ICC<sup>1166</sup> and the ICLS<sup>1167</sup> intend to complement national jurisdictions. Thus, intervention by both courts depends on the concerned member state's willingness and ability to carry out domestic proceedings.

If a member state is unable to conduct the necessary investigations and prosecutions it may refer the case to either the ICC<sup>1168</sup> or the ICLS.<sup>1169</sup> This raises the question of which court an African state party should give preference to. Since both the *Protocol* and the *Rome Statute* fail to address this issue, member states are left unassisted to navigate a path between these two courts.<sup>1170</sup> The history and current relationship between Africa and the ICC could be utilised as a comprehensive starting point to determine which court African state parties are likely to choose. Since it was concluded in chapter three that the creation of the ICLS is motivated by anti-ICC sentiments,<sup>1171</sup> African states will most likely favour the new African criminal court over the ICC. In addition, African states may also deem the ICLS more suited to their purposes considering the aforementioned court's origin and its mandate to address African problems.<sup>1172</sup> Of course, the principles of sovereignty and complementarity entail that the primary responsibility for adjudicating the most heinous crimes remains with the state in question.<sup>1173</sup> How a state goes about fulfilling this responsibility remains "a policy choice and a matter of state referral."<sup>1174</sup>

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1165 See chap 2 par 2.2.7 Issues of admissibility: complementarity and chap 3 par 3.3.6 Issues of admissibility: complementarity.

1166 A 17(a) of the *Rome Statute*.

1167 A 46H of the *Protocol*.

1168 See chap 2 par 3.6.1 Referral by a member state.

1169 See chap 3 par 3.5.1 Referral by member state.

1170 Du Plessis 2012 *ISS* 10; Abass 2013 *NILJ* 46-49; Du Plessis 2012 <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>.

1171 See chap 3 par 2.2.2 Establishing the ICLS: anti-ICC sentiments.

1172 See chap 3 par 2 Establishment and par 3.1.1 Crimes within the jurisdiction of the ICLS.

1173 Janssens *A New Star on the Stage* 24-25.

1174 Manirakiza *Africa and the Future of International Criminal Justice* 19.

The ICC has to rely on the good faith of member state who chose to refer matters to it as the appropriate institution to deal with their quarrels.<sup>1175</sup> With the anticipated availability of the ICLS for this purpose, African states might prefer the ICLS, considering the *Protocol's* less stringent setting of the standard of the criteria required for showing a state's unwillingness or inability to deal with a case in its own domestic courts.<sup>1176</sup>

It is also necessary to point out that not all African states would necessarily prefer the ICLS as their choice of a court of last resort. Botswana has been a loyal supporter of the ICC throughout the years, denouncing the AU's call for suspending proceedings against Kenyan President Uhuru Kenyatta and Vice President William Ruto in addition to giving its explicit support for the arrest warrants issued for the late Muammar Gaddafi and Al-Bashir.<sup>1177</sup>

#### 5.3.3.4.1.2 Referrals from other entities

The *Rome Statute* provides for the UNSC to refer a matter to the ICC in accordance with Chapter VII of the *UN Charter*,<sup>1178</sup> as in the case of Sudan and Libya. On the other hand, the *Protocol* also empowers the Assembly of Heads of State and Government of the AU or the Peace and Security Council of the AU (PSC) to refer a situation to the ICLS.<sup>1179</sup>

If a situation falls within the jurisdiction of these entities, conflict may arise if the UNSC or the Assembly of Heads of State and Government of the AU or the PSC are entitled to refer the same situation to their respective courts. Thus, the issue of primacy will be contested, and neither the *Rome Statute* nor the *Protocol* provides any relevant guidelines.

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1175 Janssens *A New Star on the Stage* 24-25.

1176 Abass 2013 *NILJ* 44.

1177 Ministry of Foreign Affairs and International Cooperation 2014 <http://www.gov.bw/en/News/Botswana-stands-by-the-International-Criminal-Court-/>.

1178 See chap 2 par 3.6.2 Referral and deferral by the United Nations Security Council.

1179 See chap 3 par 3.5.2 Referral by the Assembly of Heads of State and Government of the AU or the Security Council of the AU. See chap 2 par 3.11 Challenges to the jurisdiction and the admissibility of a case.

However, it may be argued that as all African states are bound to the *UN Charter*, specifically under article 25 in this regard, a referral from the UNSC to the ICC may not be contested, since the aforementioned article states that:<sup>1180</sup>

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

This argument is further supported by article 103 of the UN Charter, which states that:<sup>1181</sup>

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

According to this provision, African states, which collectively include the AU and its organs, are compelled to accept and support the decisions of the UNSC.<sup>1182</sup>

Given the raft of acrimonious disagreements between the AU and UNSC, the notion of prohibiting the AU and its organs from submitting a situation to its own international criminal court would not be enthusiastically endorsed.<sup>1183</sup> For the sake of harmonising the two courts under the shared umbrella of the quest for justice and peace, an alternative solution should be considered.

If the Assembly of Heads of State and Government of the AU or the PSC wished to challenge the jurisdictional exercise of the ICC in this regard, articles 17 and 19 of the *Rome Statute*<sup>1184</sup> might provide a plausible basis for such a contest.<sup>1185</sup> Article 19 stipulates that a case could be declared inadmissible before the ICC if according to article 17:<sup>1186</sup>

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...

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1180 A 25 of the *UN Charter*.

1181 A 103 of the *UN Charter*.

1182 Abass 2013 *NILJ* 36; Janssens *A New Star on the Stage* 29-30.

1183 See chap 3 par 2.2.2 Establishing the ICLS: anti-ICC sentiments.

1184 Aa 17 and 19 of the *Rome Statute*.

1185 Janssens *A New Star on the Stage* 23-26.

1186 A 17 of the *Rome Statute*.

In terms of a progressive interpretation of positive complementarity,<sup>1187</sup> the ICC should recognise the ICLS as a mechanism which aims to enhance the elimination of impunity. The UNSC has specifically expressed the need to create institutions to assist the conduct of judicial proceedings and restore peace in Africa, in cooperation with the AU.<sup>1188</sup> This clearly establishes a basis upon which the ICC may declare a case inadmissible, if it is determined that the ICLS is carrying out genuine investigations and prosecutions pursuant to referral from the Assembly of Heads of State and Government of the AU or the PSC. This would also address the desire of the UNSC to cooperate with the AU, in addition to that part of the preamble of the *Rome Statute* which underscores the need to enhance national and international cooperation.<sup>1189</sup>

#### 5.3.3.4.1.3 The *proprio motu* powers of the Prosecutor

As previously pointed out, both constitutive treaties, the *Rome Statute*<sup>1190</sup> and the *Protocol*,<sup>1191</sup> authorise their respective prosecutors to initiate an investigation *proprio motu* where appropriate.<sup>1192</sup> The issue of complementarity yet again comes into play if both prosecutors intend to initiate an investigation *proprio motu* with respect to the same situation regarding the same offence, subject to its admissibility before both courts.

If the prosecutor of the ICLS wishes to contest its preference over the ICC with respect to the same situation, Article 53 of the *Rome Statute* may be of assistance. According to the aforementioned provision, the prosecutor may determine that there is no reasonable basis to proceed with an investigation, considering that:<sup>1193</sup>

...there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

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1187 See chap 5 par 3.3.3.1 Progressive interpretation of positive complementarity.

1188 *UNSC Resolution 1593 (2005)* Adopted by the Security Council at its 5158th meeting on 31 March 4-6.

1189 *UNSC Resolution 1593 (2005)* Adopted by the Security Council at its 5158th meeting on 31 March 4-6; Preamble of the *Rome Statute*; Janssens *New Star on the Stage* 26-29.

1190 See chap 2 par 3.6.3 *Proprio motu* powers of the prosecutor.

1191 See chap 3 par 3.5.3 *Proprio motu* powers of the prosecutor.

1192 A 15(3) of the *Rome Statute*; a 46G(3) of the *Protocol*.

1193 A 53(1)(c) of the *Rome Statute*.

As discussed above,<sup>1194</sup> according to *UNSC Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting on 31 March 2005*,<sup>1195</sup> the UNSC welcomes recommendations from the ICC and AU to enhance regional prosecution. Thus, the ICC should recognise the ICLS's judicial efforts in facilitating the work of the prosecutor of the ICC by conducting proceedings on a regional level in the fight against impunity. Consequently, the prosecutor of the ICC may refrain from continuing with an investigation if it is found that it would not serve the interests of justice to retain primacy over a situation which could be adequately addressed by the ICLS.

#### 5.3.3.4.2 African states holding membership to either the Rome Statute or the Protocol only

African States that hold membership to either the *Protocol* or the *Rome Statute* only will not be affected by the complementarity structure discussed above. This means that African member states of the ICC will not be affected by the existence of the ICLS or be subjected to that court regarding any criminal investigations or prosecutions. ICLS member states too will also fall only within the jurisdictional sphere of the ICLS regarding criminal proceedings, with no interference from the ICC. However, one exception remains. As illustrated in the *Al-Bashir* case,<sup>1196</sup> the UNSC may refer a situation to the ICC, disregarding a state's affiliation with the ICC or ICLS. In terms of the *Protocol*, the Assembly of Heads of State and Government of the African Union and the PSC are imbued with the same powers. This possible clash between the different entities should be addressed in the manner suggested above.<sup>1197</sup>

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1194 See chap 5 par 3.3.3.1 Progressive interpretation of positive complementarity.

1195 *UNSC Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting on 31 March 2005* 4-6.

1196 See chap 2 par 2.5 Current cases before the ICC.

1197 Concerns revolving around the jurisdictional reach over non-member states of the different entities, such as the UNSC, have been discussed in chapter 3 par 2.2.2 Establishing the ICLS: anti-ICC sentiments.

#### 5.3.3.4.2 Analysis: Implications of the ICC and the ICLS functioning within a complementarity framework within the same jurisdictional sphere

Based on the above discussion it is necessary the implications of the situation that would arise if the ICC would eventually apply its complementarity framework to regional courts such as the ICLS.

##### 5.3.3.4.2.1 The prosecution of incumbent Heads of State would remain unaffected

Both Articles 17(c) and 20 (3) of the *Rome Statute*<sup>1198</sup> and article 46H (c) of the *Protocol*<sup>1199</sup> embody the principle of *ne bis in idem*. This principle signifies that a case would be deemed inadmissible if the concerned individual had already been tried for the conduct which forms the subject of the complaint.

With respect to the individual concerned it is important to note the different positions the ICC and ICLS holds regarding the prosecution of incumbent Heads of State and high-ranking government officials. Regarding the ICLS, African leaders voted in favor of article 46*Abis*, which grants immunity to sitting Heads of State and other high-level government officials<sup>1200</sup> at the 23rd Ordinary Session of the AU.<sup>1201</sup> Contrary to the *Protocol*,<sup>1202</sup> the *Rome Statute* explicitly strips any form of immunity from any person, including sitting Heads of State and related government officials.<sup>1203</sup> The application of the *ne bis in idem* principle within a complementarity framework regarding the ICLS and ICC gives rise to the following conclusion. Since the ICC is the only court vested with the jurisdiction to try incumbent Heads of State in this regard, it would essentially be impossible for a complementary-based challenge to arise, since the ICLS would not be able to bring the same charges against the same individual with respect to the same conduct.<sup>1204</sup> Thus, the AU's decision has effectively eliminated a prior valid

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1198 Aa 17(c) and 20 (3) of the *Rome Statute*. See chap 2 par 3.12 *Ne bis in idem*.

1199 A 46H(c) of the *Protocol*. See chap 3 par 3.5.4 Issues of admissibility: Complementarity.

1200 IJR Centre 2014 <http://www.ijrcenter.org/2014/07/02/African-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/>.

1201 AU 23rd Ordinary Session of the AU 2014 <http://summits.au.int/en/23rdsummit> accessed on 5 July 2014.

1202 A 46*bis* of the *Protocol*.

1203 A 27 of the *Rome Statute*.

1204 *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 27-32.

complementarity-based argument regarding the relationship between the ICLS and the ICC.<sup>1205</sup>

#### 5.3.3.4.2.2 Uncooperativeness on the ICLS's part may contribute to evidence of the absence of genuine investigations and prosecutions

Since it has been concluded that the establishment of the ICLS was predominantly motivated by anti-ICC sentiments,<sup>1206</sup> the possibility exists that the new African court may be subjected to inappropriate influence exerted by the AU regarding its ongoing confrontations with the ICC.<sup>1207</sup> This may result in unjustifiable delays before the ICLS, hampering its projected deliverance of independent and impartial justice.<sup>1208</sup> If this is the case, the ICC would ultimately intervene in accordance with article 17 (1) (a) of the *Rome Statute*,<sup>1209</sup> which states that a case will be deemed inadmissible before the court except where there is the presence of genuine inability or unwillingness to carry out investigations and prosecutions. However, this would be the case only when a situation falls within the jurisdictional sphere of both courts.<sup>1210</sup>

#### 5.3.3.4.2.3 Genuine inability or unwillingness to investigate and prosecute

As indicated,<sup>1211</sup> the *Protocol* neglected to include the criterion threshold of "genuinely"<sup>1212</sup> in its complementarity provision.<sup>1213</sup> Since this omission is likely to depreciate evidential standards, opportunistic states may exploit this void<sup>1214</sup> in either of two ways. Firstly, states may misrepresent their efforts to carry out effective investigations or prosecutions in order to escape the jurisdictional reach of the ICLS. The ICC would be more attentive in this regard due to the inclusion of

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1205 Stephanie 2014 <http://www.internationaljusticeproject.com/complementarity-a-brewing-battle-between-the-african-court-and-icc/>.

1206 See chap 3 par 2.2.2 Establishing the ICLS: anti-ICC sentiments and par 2.2.3 Establishing the ICLS: Analysis.

1207 Du Plessis 2012 *ISS* 11; Stephanie 2014 <http://www.internationaljusticeproject.com/complementarity-a-brewing-battle-between-the-african-court-and-icc/>.

1208 Aa 3 and 46H of the *Protocol*.

1209 A 17(1)(a) of the *Rome Statute*.

1210 Stephanie 2014 <http://www.internationaljusticeproject.com/complementarity-a-brewing-battle-between-the-african-court-and-icc/>.

1211 See chap 5 par 3.3.4.1.1 Referrals from member states.

1212 See chap 2 par 3.9 Issues of admissibility: Complementarity.

1213 A 46(2)(b) of the *Protocol*.

1214 Abass 2013 *NILJ* 44.

the criterion "genuinely" as a threshold. Secondly, states may effectively convert the ICLS from a court of last resort to a court of first recourse,<sup>1215</sup> thereby not developing their own national prosecution systems and ultimately negating the concept of complementarity.<sup>1216</sup>

#### 5.3.3.4.1.4 The ICLS should not be regarded as just an alternative forum

As seen in the Libya situation,<sup>1217</sup> the Pre-Trial Chamber I declared the case of the former intelligence officer inadmissible. This decision was pursuant to Libya's affirmative proclamation reassuring the ICC that the state was genuinely willing and able to carry out domestic investigations and prosecutions against Al-Senussi. Based on the ICC's complementarity framework, this effectively removed the situation from the ICC's jurisdiction.<sup>1218</sup> On the other hand, the situation in Kenya produced a different outcome. Pursuant to the six arrest warrants issued by the ICC regarding the post-election violence which occurred in 2007-2008, Kenya issued a declaration arguing that it had adopted a legislative framework enabling it to carry out domestic proceedings itself against the accused. The ICC determined in this case that Kenya had not shown any genuine evidence that it was willing and able to carry out the said proceedings.<sup>1219</sup> Thus, the ICLS needs to genuinely prove that it is conducting an actual investigation and/or prosecution of a situation and not just simply expressing its mere availability as an alternative forum.<sup>1220</sup> If the ICLS fails to prove the aforementioned, the ICC will surely reinstate its own investigations, which would inevitably lead to a confrontation regarding both courts and its respective member states.

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1215 Abass 2013 *NILJ* 44.

1216 Preamble of the *Protocol*.

1217 See chap 2 par 2.5 Current cases before the ICC.

1218 *Situation in Libya in the Case of the Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi Decision following the declaration of inadmissibility of the case against Abdullah Al-Senussi before the Court* ICC-01/11-01/11 1-6.

1219 See chap 2 par 2.5 Current cases before the ICC.

1220 Stephanie 2014 <http://www.internationaljusticeproject.com/complementarity-a-brewing-battle-between-the-african-court-and-icc/>.

## 5.4 Immunity

Article 27 of the *Rome Statute*<sup>1221</sup> clearly stipulates that the official position of any person will not exempt such an individual from any form of criminal responsibility before the ICC.<sup>1222</sup> As already stated,<sup>1223</sup> the ICC has repeatedly confirmed and applied the envisaged non-immunity principle to the extent of the indictment of sitting Heads of State such as Omar Al-Bashir and Uhuru Kenyatta.

As already established,<sup>1224</sup> the *Protocol* denies immunity to any individual<sup>1225</sup> except in the case of sitting Heads of State and senior government officials. The addition of article 46*Abis*,<sup>1226</sup> which evidently deviates from contemporary international law, grants immunity to the individuals described above and consequently acquits them from any form of criminal responsibility under the *Protocol*. In addition, it should also be restated that the AU endorses this notion for all AU members before any international court or tribunal.<sup>1227</sup>

Regarding the origin, creation and development of the notion of immunity before both respective courts,<sup>1228</sup> the possibility of harmonisation is slim. Any expectations of a relationship imbued with mutual assistance between the ICLS and ICC in this regard would be false.

It is also noteworthy that the *Protocol's* reluctance to adhere to the well-established international norm of non-immunity may have even more severe implications. As established in chapter four, stripping immunity from any individual, including Heads of State, specifically with regard to international

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1221 A 27 of the *Rome Statute*.

1222 See chap 4 par 5 Immunity before the ICC.

1223 See chap 2 par 2.5 Current cases before the ICC.

1224 See chap 4 par 6.2 Criminal responsibility in terms of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

1225 A 46B of the *Protocol*.

1226 See chap 4 par 6.2 Criminal responsibility in terms of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

1227 *AU Extraordinary Session of the Assembly of the African Union* 12 October 2013 Addis Ababa Ethiopia Ext/Assembly/AU/Dec 1(Oct 2013). See chap 4 par 6.2 Criminal responsibility in terms of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

1228 Chap 4 par 4.1 Immunity before international criminal courts and tribunals: prior to the establishment of the ICC, par 5 Immunity before the ICC and par 6.2 Criminal responsibility in terms of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

customary law crimes, is a recognized preparatory norm in modern international law.<sup>1229</sup> Article 53 of the *Vienna Convention* states that:<sup>1230</sup>

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Since Article 46*Abis* of the *Protocol*<sup>1231</sup> breaches article 53 of the *Vienna Convention*, the *Protocol* should certainly be considered for revision to ensure its own survival, since it would otherwise be rendered void and unenforceable.<sup>1232</sup>

Thus, an effective relationship between the ICC and ICLS with respect to immunity would be possible only if the *Protocol* were to abandon its recent immunity amendment and follow the *Rome Statute* by incorporating and applying the established international customary law norm of non-immunity.<sup>1233</sup>

## **5.5 Competing obligations**

Both the *Rome Statute*<sup>1234</sup> and the *Protocol*<sup>1235</sup> confer their own set of obligations upon their respective member states. Considering that thirty-four African states are already members to the *Rome Statute*, ICC member-states which join the ICLS will surely be confronted with the complex issue of complying with requests from both judiciary institutions.<sup>1236</sup> Since the *Rome Statute* addresses the issue of competing obligations<sup>1237</sup> only with respect to states, the question of obligations addressed by both the ICC and the ICLS to member states is left unanswered.<sup>1238</sup>

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1229 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

1230 A 53 of the *Vienna Convention*.

1231 A 46*Abis* of the *Protocol*.

1232 A 69 of the *Vienna Convention* "...the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force."

1233 See chap 4 par 7.1 The relationship between customary international law crimes and the notion of immunity.

1234 See chap 2 par 4.2 Member States.

1235 See chap 3 par 4.1.1 Member States.

1236 Oosterveld, Perry and McManus 2001 *Fordham ILJ* 10; Du Plessis 2012 *ISS* 10.

1237 Aa 90(6)(a)-(c) of the *Rome Statute*.

1238 See chap 2 par 4.3 Competing requests.

Without prejudice to the requirement under international law that states adhere to particular obligations conferred upon them, the *Rome Statute* states that obligations owed towards the ICC should be given preference.<sup>1239</sup> However, as there is no hierarchy among international criminal courts the provision loses traction with respect to the ICLS.<sup>1240</sup>

A similar situation has presented itself in the past with respect to the ICC and the AU. In the matter of the arrest warrant issued by the ICC for President Al-Bashir, Chad, Djibouti, Kenya and Malawi has all been faced the issue of competing obligations from both institutions. To date, all ICC state parties still have the legal obligation to arrest and surrender Al-Bashir to the ICC if he were to enter their respective territories, in accordance with an arrest warrant issued by the Pre-Trial Chamber I in 2009.<sup>1241</sup> The PSC requested the suspension of proceedings in accordance with article 16 of the *Rome Statute*<sup>1242</sup> just one week after the arrest warrant was issued. In addition, the AU repeatedly requested African states to defy AL-Bashir's indictment. Chad, in 2010 and Djibouti, Kenya and Malawi<sup>1243</sup> in 2011 failed to apprehend the Sudanese president when they were able to do so, thus confirming their allegiance to the AU rather than to the ICC.<sup>1244</sup>

Chad, Kenya and Malawi attempted to justify their nonconformity with the ICC by claiming that the immunity which vested within a sitting Head of State, AL-Bashir in this case, prevailed over any indictment before an international court. These excuses ring hollow, however, considering that article 27 of the *Rome Statute* explicitly rules out any form of immunity, including that of an incumbent Head of State.<sup>1245</sup> Consequently Chad, Djibouti and Kenya have all been referred to the

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1239 See chap 2 par 4.3 Competing requests.

1240 See chap 5 par 3.3 Complementarity.

1241 *Situation in Dafür, Sudan In the Case of the Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar Al Bashir") Public Document Warrant of Arrest for Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09.

1242 A 16 of the *Rome Statute*.

1243 *Pre-Trial Chamber I 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 13-12-2011 par 43 and 47.

1244 See chap 4 par 5.3 Immunity and cooperation with the ICC - the relation between aa 27(1) and 98. Goldstone 2013 *SALC* 57.

1245 See chap 4 par 5.3 Immunity and cooperation with the ICC - the relation between aa 27(1) and 98. See chap 4 par 5 Immunity before the ICC.

UNSC and the ASP in accordance with article 89(9) of the *Rome Statute*.<sup>1246</sup> Even though the UNSC and the ASP are authorised to take any measures necessary in this regard, these institutions have failed to take any action further.<sup>1247</sup>

This illustration of ICC member states responding to a competing institution's appeals rather than to those of the ICC does not exhaust the possibility of conflict arising from the existence of competing obligations. The UNSC's and the ASP's reluctance to follow up upon the implementation of the measures necessary to shed light upon the actions of member states in this regard clouds the issue further.

That said, emphasis should be placed upon the AU's acute awareness of the fact that the majority of African states were already member states to the ICC during the initial drafting of the *Protocol*.<sup>1248</sup> Du Plessis<sup>1249</sup> and Abass note this fact and state that the inclusion of the ICC in the *Protocol*:<sup>1250</sup>

...would have, at the very least, gone a long way to demonstrate the Union's good faith and acute awareness that most of the states it expects to ratify the Draft Protocol already owe many obligations to the ICC, and that its own court shall be complementary, not antagonistic towards, or purposelessly duplicatory of, the ICC's efforts.

The burden therefore of rectifying this issue rests largely upon the AU, which needs to provide guidance to member states as to how the contretemps is to be resolved. It also follows that even though the *Rome Statute* is not binding upon the AU itself, the majority of its member states are also members to the ICC, and this *de facto* prevents the AU from making any directives to state parties to ignore their obligations towards the ICC.<sup>1251</sup>

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1246 A 89(9) of the *Rome Statute*; see chap 2 par 4.3 Competing requests.

1247 Goldstone 2013 *SALC* 57.

1248 See chap 2 par 2.4 Africa's commitment to the establishment of a permanent international criminal court. *80th Resolution on the Renewal of the Mandate and Composition of the Working Group on Specific Issues Relating to the Work of the African Commission on Human and Peoples' Rights* 2005.

1249 Du Plessis 2012 <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>.

1250 Abass 2013 *NILJ* 47.

1251 Janssens *A New Star on the Stage* 19.

## 5.6 Conclusion

The establishment of the ICLS should be considered as a praiseworthy attempt<sup>1252</sup> by Africa to end the continent's suffering of recurring mass human rights violations.<sup>1253</sup> However, its admirable intention is clouded by the likelihood of the ICLS's future lack of resources<sup>1254</sup> and the *Protocol's* reluctance to adhere to the standards of international law, thus severely jeopardising the courts feasibility and the possibility of its contributing to the eradication of impunity.<sup>1255</sup>

The *Protocol* further provides an array of crimes the ICLS will endeavour to prosecute, but the possibility of domesticating crimes that have not yet even been properly defined or criminalised presents an array of difficulties. In addition, the *Protocol* as an international instrument fails to provide its anticipated member states with the necessary legal framework to investigate and prosecute the said offences, thus severely diminishing the new African criminal court's possible effectiveness. Any form of judicial assistance between the ICC and ICLS will not be conceivable if the individual indicted is a sitting Head of State or senior government official.<sup>1256</sup>

The absence of a deferral clause in the *Protocol* not only breaches international law standards ensuring the ICLS's impartiality and independency, but contradicts the burden of the AU's own dispute with the UNSC, considering the aforementioned council's reluctance to suspend the indictment of President Al-Bashir.<sup>1257</sup> The inclusion of a deferral clause governed by the AU would ultimately fill this lacuna.<sup>1258</sup>

Neither the *Rome Statute* nor the *Protocol* presents any clarity on complementarity<sup>1259</sup> between the ICC and ICLS.<sup>1260</sup> However, the *travaux*

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1252 See chap 5 par 2 Establishment.

1253 See chap 5 par 2.2 The rationale behind establishing an international criminal court.

1254 See chap 5 par 2.3.1 Feasibility.

1255 See chap 5 par 2.3.2 Contributing to the eradication of impunity.

1256 See chap 5 par 3.1 Crimes within the jurisdiction of the ICLS and ICC.

1257 See chap 5 par 3.2.1 The absence of a deferral clause in the Protocol.

1258 See chap 5 par 3.2.3 The introduction of a deferral clause in the Protocol.

1259 Abass 2013 *NILJ* 46-48.

1260 See chap 5 par 3.3 Complementarity.

*prepratoires*<sup>1261</sup> surrounding the *Rome Statute* and the *UN Charter* ultimately illustrates the ICC's and the UNSC's acceptance of regional judicial institutions such as the ICLS through its progressive interpretation of positive complementarity.<sup>1262</sup>

Since it is established that the ICLS can be recognised as a complementary institution occupying the same legal universe as the ICC, there exist several grounds upon which the ICLS can challenge the admissibility of a situation before the ICC. However, the rationale behind these contests should be devoted towards the enhancement of international justice, constituting a relationship where the ICLS would complement and facilitate the work of the ICC in Africa.<sup>1263</sup> Notwithstanding the AU's reasons for the creation of the ICLS, the African court's success will depend on its actual, impartial and effective investigation and prosecution efforts. Thus, any attempt by the AU to use the ICLS as a diversion to stall or impede prosecution in Africa would be futile.<sup>1264</sup>

The *Protocol's* endowment of immunity to sitting Heads of State and senior government officials<sup>1265</sup> not only significantly breaches international law but also diminishes the possibility of mutual assistance between the two courts, and thus effectively prevents the formation of any relationship between the ICC and ICLS.<sup>1266</sup>

The *Rome Statute's* and *Protocol's* reluctance to address the issue of competing obligations from other judicial intuitions presents a minefield of difficulties<sup>1267</sup> which would ultimately undermine the success and effectiveness of both courts. This scenario is partially illustrated by the opposing attitudes of the ICC and AU towards the indictment of Al-Bashir.<sup>1268</sup> The AU had the opportunity, in the

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1261 ICLS 2014 [http://www.iclklamberg.com/Statute.htm#\\_ftn153](http://www.iclklamberg.com/Statute.htm#_ftn153).

1262 See chap 5 par 3.3.3.1 Progressive interpretation of positive complementarity.

1263 See chap par 3.3.4 Complementarity: the relationship between the ICC, ICLS and member states.

1264 See chap 5 par 3.3.4.1 Analysis: Implications of the ICC and the ICLS functioning within a complementarity framework in the same jurisdictional sphere.

1265 See chap 4 par 6 Immunity before the ICLS.

1266 See chap 5 par 4 Immunity.

1267 Du Plessis 2012 /SS 10.

1268 See chap 4 par 5 Competing obligations.

*Protocol*,<sup>1269</sup> to resolve this dilemma, but it instead remained silent on the ICC's existence, a fact which indisputably does not augur well for any future relationship between the ICC and ICLS.<sup>1270</sup>

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1269 See chap 3 par 4 Obligations of member states.

1270 Du Plessis 2012 <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>; Abass 2013 *NILJ* 47.

## Chapter 6

### 6.1 Conclusion

The ICC could be considered to be the judicial benchmark with respect to international criminal prosecution.<sup>1271</sup> Unlike its predecessors, the ICC's jurisdictional reach is not geographically or temporarily limited and extends not only over its member states but over non-state parties as well, pursuant to a UNSC referral. The ICC is committed to prosecute only the most severe international crimes, namely genocide, war crimes, and crimes against humanity, within a complementarity framework which provides states with the opportunity of first recourse to deliver appropriate justice. Africa had participated intensively in the creation of the *Rome Statute*, after engaging in significant preparatory regional efforts towards establishing such an entity. Following the Statute's enactment Africa's support was evident, as can be judged from the great number of African states which ratified the Statute, and from the fact that four out of the eight situations before the court are state referrals from Africa. In addition, the continent is well represented throughout The Hague-based court on all major stages.<sup>1272</sup>

However, the ICC's and the UNSC's application of the authoritative *Rome Statute* has severely disgruntled the AU and its supporting African states over time. Specific reference should be made to the indictment of Sudanese President Al-Bashir, and Kenyan President, Uhuru Kenyatta and Vice-President William Ruto. These indictments were firmly condemned by the AU and its supporting states, which condemnation eventually formed the underlying rationale behind Africa's hostile attitude towards the ICC and the UNSC.<sup>1273</sup> This crippled relationship was further weakened by the immense amount of opposition the AU faced from the UNSC and ICC with respect to the continent's requests for the suspension of the indictments and to its proposal to amend the *Rome Statute* accordingly.<sup>1274</sup> In response, Africa accused the ICC of being a hegemonic instrument of western powers, which was undermining the continent in its efforts to achieve peace.

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1271 See chap 2 par The ICC: Successes and failures over its 12 years of existence.

1272 Du Plessis *International Criminal Court* 5-7; See chap 2 par 2.3 *Rome Statute* and par 2.4 Africa's commitment to the establishment of a permanent international criminal court.

1273 See chap 5 par 5.2.1 Africa's change of commitment.

1274 See chap 2 par 2.5 Current cases before the ICC.

These continuing adverse occurrences undoubtedly formed the contextual basis<sup>1275</sup> upon which the continent is creating its own international African criminal court, the ICLS.<sup>1276</sup>

Despite the *Protocol's* recent approval by the AU, its final adoption has been delayed due to numerous requests for structural, financial and substantive reassessments.<sup>1277</sup> In addition to the ICLS's ambition to prosecute international core crimes, the court is also determined to try six crimes<sup>1278</sup> that have not acceded to international customary law status.<sup>1279</sup> This endeavour could be considered as a notable and honourable attempt by Africa to address recurrent social ills which trouble the continent repeatedly. However, the *Protocol* fails to adequately address the difficulties this ambitious proposition presents with regard to the introduction and domestication of these crimes in a concerned state's national legislation.<sup>1280</sup>

The *Protocol* exemplifies its complementarity nature towards its member states but grossly neglects to address its relationship with the ICC. Even though there rests no legal obligation upon the *Protocol* to make any reference to the *Rome Statute*, it would surely have assisted to clarify relations between the two courts, considering that thirty-four African states are already members to the ICC. Like the *Rome Statute*, the *Protocol* stresses the importance of the legal obligation imposed upon member states to fulfil their responsibilities towards the ICLS. However, the *Protocol's* silence on the ICC causes further ambiguity with respect to which court would receive primacy in this regard.<sup>1281</sup>

As explained in chapter four, the notion of immunity remains as a significant trait of state sovereignty. However, since the growth in the incidence of human rights

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1275 Du Plessis 2010 *ISS* 5-7.

1276 See chap 3 par 2 Establishment.

1277 See chap 3 par 2.3 The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

1278 Abass 2013 *NILR* 37.

1279 See chap 4.

1280 See chap 5 par 5.2.2 The rationale behind establishing an international criminal court.

1281 See chap 3 par 4.1 Co-operation and Judicial Assistance; Abass 2013 *NILR* 48.

violations, such immunity has been restricted<sup>1282</sup> in accordance with the desire to insist on the accountability of those who breach *jus cogens* norms.<sup>1283</sup>

Contemporary international law now affirms that no form<sup>1284</sup> of immunity will attach to any individual, irrespective of that person's capacity, if indicted before an international court with respect to international customary law crimes.<sup>1285</sup> Consequently the notion of non-immunity has been embedded in international customary law and was accordingly adopted by the *Rome Statute*. Even though settled practice and international conformity with respect to qualified immunity has been reaffirmed in international law, African states have displayed an immense amount of resistance towards this norm.<sup>1286</sup>

Consequently Africa has declared, contrary to international law, that no African sitting Head of State or senior government official will be held accountable before any international court or tribunal. This declaration has subsequently been incorporated in the *Protocol* as well.<sup>1287</sup> Since the ICLS is considered as international criminal court, it is compelled to follow the international norm of stripping immunity from any person, regardless of that person's official capacity, which includes sitting Heads of State and senior government officials. On the other hand, the ICLS removes immunity from those accused of unaccustomed crimes, which removal of immunity does not app in any other international court.<sup>1288</sup> The *Protocol* deviates significantly from international law, a fact which deepens concerns regarding its relationship with the ICC and its anticipated ability to deliver satisfactory criminal justice.<sup>1289</sup>

Chapter five brings together the previous chapters in order to appropriately analyse and evaluate the relationship between the ICC and ICLS. The true rationale behind the establishment of any international criminal court is embodied in the CIMT, the CIMTFE, the Statute of the ICTY, the Statute of the ICTR, the

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1282 See chap 4 par 2.1 Sovereign immunity.

1283 See chap 4 par 4 Immunity before international criminal courts and tribunals.

1284 See chap 4 par 3 Restriction of sovereign immunity and international crimes.

1285 See chap 4 par 4 Immunity before international criminal courts and tribunals.

1286 See chap 4 par 5 Immunity before the ICC.

1287 See chap 4 par 6 Immunity before the ICLS.

1288 See chap 4 par 7.1 The relationship between customary international law crimes and the notion of immunity.

1289 See chap 4 par 7 Analysis.

Statute of the SCSL and the *Rome Statute*, all of which have the purpose of prosecuting perpetrators who commit international customary law crimes regardless of their official capacity. To achieve this objective a court or tribunal should be adequately equipped with sufficient personnel and financial resources.

Although the ICLS generally satisfies the criterion of being regarded as an international or hybrid court, its fallacies are vast. The *Protocol* not only contradicts international law by granting immunity to Heads of State and other senior government officials but is also subjected to immense personnel and financial shortages. All of these flaws will undoubtedly diminish the new African's court chances of achieving timely and impartial justice and will therefore diminish the prospects of an effective relationship with the ICC.<sup>1290</sup>

It should be envisaged that at first glance the ICLS could be considered as an honourable attempt<sup>1291</sup> by Africa with regard to judicial criminal development, considering that it intends to prosecute<sup>1292</sup> not only international crimes but also six unaccustomed crimes, which include the unconstitutional change of government, mercenarsim, corruption, the trafficking of drugs, the trafficking of hazardous waste and the illicit exploitation of natural resources.<sup>1293</sup> Although the ICLS aims to prosecute offences from which African states suffer repeatedly, the *Protocol's* reluctance to properly define these crimes leaves member states with the daunting task of having to domesticate these crimes in their national legislation. In addition, the *Protocol* fails to provide states with the appropriate legislative support to incorporate and implement the necessary legal provisions to investigate and adjudicate the offences concerned. This lacuna only weakens member states' prosecutorial ability, which is contradictory to the underlying principle of complementarity and further hampers the ICLS's chances of success.

With respect to the ten additional crimes which fall under the jurisdiction of the ICLS, it could be regarded as self-explanatory that no relationship between the

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1290 See chap 5 par 2.3.2 Contributing to the eradication of impunity.

1291 See chap 5 par 2 Establishment.

1292 See chap 5 par 2.2 The rationale behind establishing an international criminal court.

1293 See chap 5 par 3.1 Crimes within the jurisdiction of the ICLS and ICC.

ICC and ICLS will be conceivable.<sup>1294</sup> However, focus should be directed to the crimes of genocide, war crimes and crimes against humanity, which are covered by both the *Rome Statute* and the *Protocol*. The description and admissibility criteria of these crimes are largely similar, which improves the possibility of a relationship between the two courts on the mutual legal assistance basis. However, if the person indicted for these crimes holds an official capacity as a serving Head of State or senior government official, as determined by article 46A*bis*,<sup>1295</sup> no relationship will be conceivable between the two judicial entities. The *Protocol* should be amended in accordance with international law, which requires the revocation of article 46A*bis*, if any mutual legal assistance relationship is to be possible.

The *Rome Statute*'s deferral clause is envisaged as a significant provision to ensure the ICC's impartiality. The inclusion of a provision which empowers an independent entity to review, and if necessary, defer a situation is consistent with the *Purposes and Principles of the UN* and the universal desire to ensure and maintain international peace and security.<sup>1296</sup> The *Protocol* fails to deliver such a provision, an absence which will surely cast serious doubt on the ICLS's impartiality. Consequently, this study recommends the inclusion of a deferral clause in the *Protocol*, regulated by the AU with respect to its collective and transparent decision making structure. This amendment will prevent the ICLS from becoming an unregulated entity of power, thus ensuring the court's impartiality and its adherence to international law standards.<sup>1297</sup>

Neither the *Rome Statute* nor the *Protocol* makes any reference to the other in its complementarity structure. Since the ICC and the ICLS will occupy the same jurisdictional sphere with respect to their shared African member states and the adjudication of their common offences, this study proposes a harmonisation of both jurisdictions on the basis of the progressive interpretation of positive complementarity. Even though the *Rome Statute* does not explicitly include judicial regional mechanisms in its complementarity framework, the *travaux*

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1294 See chap 5 par 3.1 Crimes within the jurisdiction of the ICLS and ICC.

1295 A 46A*bis* of the *Protocol*.

1296 *Purposes and Principles of the UN* of the *UN Charter*.

1297 See chap 5 par 3.2.3 The introduction of a deferral clause in the *Protocol*.

*prepratoires* surrounding the *Rome Statute* and the *UN Charter* not only welcome the implementation of regional judicial prosecution entities but endorses it.<sup>1298</sup> This proposal provides, firstly, that with respect to referral by a member state, the concerned state party will have the discretion to choose either court. Secondly, if a situation is deemed appropriate for a UNSC referral on the one hand and an Assembly of Heads of State and Government of the AU or the Peace and Security Council of the AU referral on the other, the ICLS may endorse its preference on the basis of Article 17 and 19 of the *Rome Statute*. Thirdly, if the prosecutors of both entities are entitled to initiate an investigation and prosecution in a situation, the prosecutor of the ICC may determine that a case should rather be tried before the ICLS if that serves the interests of justice.<sup>1299</sup> Considering that there exists no such thing as a hierarchy of international courts, this study stresses that any contest regarding the admissibility of a case before any two courts should be unbiased and based upon the common desire to achieve international justice thus, filling the impunity gap.<sup>1300</sup>

Article 46*Abis Protocol* represents a major set-back for international law. By excluding sitting Heads of State and senior government officials from any form of accountability,<sup>1301</sup> this provision not only severely refutes international law but renders any effective relationship with the ICC inconceivable. The only possible way to achieve a favourable relationship with the ICC will be the revocation of Article 46*Abis*.<sup>1302</sup> Article 46B of the *Protocol* is also problematic. It is accepted in international law that immunity still remains a significant trait of sovereignty and that it still acts as an effective bar to criminal prosecution from unaccustomed crimes. Thus, this provision needs to be revised in adherence with international law and to grant immunity to individuals of a particular status from prosecution for crimes not yet vested with international customary law status.<sup>1303</sup>

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1298 See chap 5 par 3.3.3.1 Progressive interpretation of positive complementarity.

1299 A 53 of the *Rome Statute*.

1300 See chap par 3.3.4 Complementarity: the relationship between the ICC, ICLS and member states; chap 5 par 3.3.4.1 Analysis: Implications of the ICC and the ICLS functioning within a complementarity framework in the same jurisdictional sphere.

1301 See chap 4 par 6 Immunity before the ICLS.

1302 See chap 5 par 4 Immunity.

1303 See chap 4 par 4.7.1 The relationship between customary international law crimes and the notion of immunity.

Another problematic issue arises when member states of both the ICC and ICLS are obliged to comply with requests issued respectively from each constitutional treaty. Since both the *Rome Statute* and the *Protocol* fail to address the concern of competing obligations, member states are left unassisted in this regard to navigate through this complexity.<sup>1304</sup> Opposing requests to member states from the AU and ICC regarding the surrender of Al-Bashir exemplified this dilemma and forced African states to decide which court they would adhere to. Consequently, Al-Bashir remains at large and the African continent remains in turmoil. The *Protocol's* recognition of the ICC in its jurisdictional framework would have gone a long way towards displaying the AU's intention to assist the ICC in its objective of eradicating impunity on the continent, and would have contributed to preventing similar situations from arising in the future.<sup>1305</sup> Since the AU was undoubtedly aware of the vast number of African states which are already parties to the *Rome Statute*, the responsibility for resolving this issue rests on the concerned regional entity. The AU will be responsible for providing the appropriate guidelines for African states to follow, keeping in mind that the AU is *de facto* prohibited from prioritising any decisions which will ultimately result in member states ignoring their obligations to the ICC.<sup>1306</sup>

Thus, for an effective relationship to exist between the ICC and the ICLS this study proposes the following: the amendment of article 17<sup>1307</sup> of the *Rome Statute* to explicitly include regional judicial entities such as the ICLS in its complementarity structure; the revision of article 46H of the *Protocol* to include the ICC in its complementarity framework;<sup>1308</sup> and the deletion of article 46A*bis* of the *Protocol* so that the ICLS would be able to act in accordance with the standards of international law.<sup>1309</sup> In addition, the issue of competing requests needs to be

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1304 Du Plessis 2012 *ISS* 10.

1305 See chap 4 par 5 Competing Obligations.

1306 Du Plessis 2012 <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>; Abass 2013 *NILJ* 47; Janssens *A New Star on the Stage* 19.

1307 See chap 5 par 3.3.4 Complementarity: the relationship between the ICC, ICLS and member states.

1308 See chap 5 par 3.3.4 Complementarity: the relationship between the ICC, ICLS and member states.

1309 See chap 5 par 4 Immunity.

addressed in the *Protocol* and the *Rome Statute* to assist member states in navigating through their obligations and to prevent future discrepancies.<sup>1310</sup>

That said, the immense number of procedural and substantive complexities the *Protocol* faces suggests that it is highly unlikely that the ICLS will deliver impartial and satisfactory international criminal justice.<sup>1311</sup> With regard to the true rationale behind the ICLS's establishment,<sup>1312</sup> it also remains doubtful that any meaningful relationship will exist between the new African court and the ICC. Thus, considering the *Protocol* in its current state, the existence of ICLS would probably only undermine the ICC's current operations and the development of international criminal justice.<sup>1313</sup>

Africa's controversial approach towards the establishment of its first international criminal court may be derived from its unfortunate colonial past considering that the attainment of independence is still a relatively new concept for the continent.<sup>1314</sup> This is because of the fact that formal European political control had only given way by the year 1990.<sup>1315</sup>

Thus, the indictment of Africa's sitting heads of states in the continent's early stages of the development of liberation does, evidently, not sit well with the African community. These judicial interventions may prompt underlying fears of destabilisation which may have largely contributed towards Africa's hostile attitude towards the ICC and UNSC. These international entities therefore need to be more attentive to the needs of their African members, as in such matters as the various appeals issued from the continent following the Sudan and Kenyan indictments.<sup>1316</sup> On the other hand, Africa should also recognise the fundamental role it plays within the international community, which ultimately requires the continent to act in accordance with settled international practice. If Africa prefers

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1310 See chap 5 par 5 Competing Obligations; chap 2 par 4.3 Competing requests

1311 See chap 5 par 2.3.2 Contributing to the eradication of impunity.

1312 See chap 3 par 2.2.2 Establishing the ICLS: anti-ICC sentiments.

1313 See chap 5 par 6 Conclusion; Du *Plessis* 2012 <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>; Abass 2013 *NILJ* 46-50.

1314 Maungo "The Implications of African States Withdrawing from the ICC".

1315 *Africana Age* 2011 <http://exhibitions.nypl.org/africanaage/essay-challenge-of-decolonization-africa.html>.

1316 Maungo "The Implications of African States Withdrawing from the ICC".

to stray from international customary law, it may gradually lose the support of its international counterparts. Thus, the only viable solution for the continued development of international justice at this stage would require the harmonisation of the ICC's determination to indict an individual regardless of his official capacity and the AU's appeal to ensure the respectful treatment of its leaders.<sup>1317</sup>

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<sup>1317</sup> Abass 2013 *NILR* 50.

## **Bibliography**

### ***Literature***

Abass 2013 *NILR*

Abass A "The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects" 2013 *Netherlands International Law Review* 27-50

Akande 2009 *JICJ*

Akande D "The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities" 2009 *Journal of International Criminal Justice* 333-352

Akande, Du Plessis and Jalloh 2010 *ISS*

Akande D and Du Plessis M and Jalloh CC "An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC" 2010 *Institute for Security Studies* 1-36

Akande and Shah 2010 *EJIL*

Akande D and Shah S "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" 2010 *European Journal of International Law* 815-852

Akehurst 1975 *BYIL*

Akehurst M "Custom as a Source of International Law" 1974–1975 *British Yearbook of International Law* 1-53

Armstrong *Handbook of International Law*

Armstrong D *Routledge Handbook of International Law* 1<sup>st</sup> ed (Routledge New York 2009)

Ayalew 2012 *African Court of Justice and Human and Peoples' Rights*

Ayalew AT *African Court of Justice and Human and Peoples' Rights: Prospects and challenges of prosecuting unconstitutional changes of government as an international crime* (LLM Dissertation University of Pretoria 2012)

Bantekas 2013 *JICJ*

Bantekas I "Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies" 2013 *Journal of International Criminal* 466-484

Barnes 2011 *Fordham ILJ*

Barnes GP 2011 "The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir" *Fordham International Law Journal* 1585-1613

Bassiouni 1996 *Law and Contemporary Problems*

Bassiouni CM "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'" 1996 *Law and Contemporary Problems* 63-74

*Bassiouni 2001 VJIL*

Bassiouni CM "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice" 2001 *Virginia Journal of International Law* 82-134

Berat 1993 *BU ILJ*

Berat L "Defending the Right to a Healthy Environment: Toward a Crime of Geocide In International Law" 1993 *Boston University International Law Journal* 327-348

Boister 1997 *CILSA*

Boister N "The historical development of international legal measures to suppress illicit drug trafficking" 1997 *The Comparative and International Law Journal of Southern Africa* 1-21

Brody 2000 *New England LR*

Brody R "The Prosecution of Hissène Habré - An African Pinochet" 2000 *New England Law Review* 321-335

Bugge *Principles of International Environmental Law*

Bugge Chr H *Principles of International Environmental Law* (University of Oslo Oslo Date Unknwon) 1-9

Cane, Conaghan and Walker *The new Oxford companion to law*

Cane P, Conaghan J and Walker DM *The new Oxford companion to law* (Oxford University Press 2008)

Cassese, Gaeta and Jones *Rome Statute Vol 1*

Cassese A, Gaeta P and Jones JRWD *The Rome Statute of the International Criminal Court: A Commentary Vol 1* (Oxford University Press New York 2002)

Cassese, Gaeta and Jones *Rome Statute Vol 2*

Cassese A, Gaeta P and Jones JRWD *The Rome Statute of the International Criminal Court: A Commentary* Vol 2 (Oxford University Press New York 2002)

Cassese, Gaeta and Jones *Rome Statute Materials*

Cassese A, Gaeta P and Jones JRWD *The Rome Statute of the International Criminal Court: A Commentary Materials* (Oxford University Press New York 2002)

Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties 1920 *American JIL*

Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties 1920 *American Journal of International Law* 95-154

Cryer *et al* *An introduction*

Cryer R, Friman H, Robinson D and Wilmshurst E *An introduction to international criminal law and procedure* (Cambridge University Press Cambridge 2007)

Curry 2005 *Human Rights Brief*

Curry T "Review of Conference: 'International Criminal Tribunals in the 21st Century' " 2005 *Human Rights Brief* 6-10

Damgaard *Individual Criminal Responsibility*

Damgaard C *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* 1<sup>st</sup> (Springer-Verlag Berlin 2008)

Dworkin 1977 *Columbia LR*

Dworkin R "Taking Rights Seriously" 1977 *Columbia Law Review* 818-826

Drumbl 1998 *Fordham ILJ*

Drumbl MA "Waging war against the world: the need to move from ear crimes to environmental crimes" 1998 *Fordham International Law Journal* 122-153

Dugard *International law*

Dugard J *International law: A South African Perspective* 4<sup>th</sup> ed (Juta Cape Town 2012)

Du Plessis 2012 *ISS*

Du Plessis M "Implications of the AU decision to give the African Court jurisdiction over international crimes" 2012 *Institute for Security Studies* 1-14

Du Plessis 2010 *ISS*

Du Plessis M "The International Criminal Court that Africa Wants" 2012 *Institute for Security Studies* 1-82

Du Plessis 2008 *ISS*

Du Plessis M "Complementarity and Africa: The promises and problems of international criminal justice" 2008 *Institute for Security Studies* 155-170

Du Plessis, Maluwa and O'Reilly 2013 *International Law*

Du Plessis M, Maluwa T and O'Reilly A "Africa and the International Criminal Court" 2013 *International Law* 1-13

Evans *International Law*

Evans MD *International Law* 1st ed (Oxford University Press Oxford 2003)

Feinberg *The Moral Limits of the Criminal Law*

Feinberg J *The Moral Limits of the Criminal Law: Harm to Others* Vol 1 (Oxford University Press New York 1984)

Fleck *Humanitarian Law*

Fleck D *The Handbook of Humanitarian Law of Armed Conflict* 2<sup>nd</sup> ed (Oxford University Press Oxford 2008)

Finke 2011 *EJIL*

Finke J "Sovereign Immunity: Rule, Comity or Something Else?" 2011 *The European Journal of International Law* 853-881

Foakes 2011 *CHIL*

Foakes J "Immunity for International Crimes?" 2011 *Chatham House International Law* 1-16

Foakes *The Position of Heads of State*

Foakes J *The Position of Heads of State and other Senior Officials in International Law* 1<sup>st</sup> ed (Oxford University Press London 2014)

Goldsmith and Posner *Theory of Customary International Law*

Goldsmith JL and Posner EA *A Theory of Customary International Law* 1999 John Olin Law & Economics Working Paper No 63 (2nd series) 1-82

Goldstone 2013 *SALC*

Goldstone R "Chapter 7: Ensuring Cooperation with the ICC" 2013 *South African Litigation Centre* 54-61

Hakki 2006 *IJHR*

Hakki MM "War crimes and the war in Iraq: Can George W Bush and Tony Blair be held legally responsible?" 2006 *International Journal on Human Rights* 1-8

Hayman and Brack *International Environmental Crime*

Hayman G and Brack D *International Environmental Crime: The Nature and Control of Environmental Black Markets* (Royal Institute of International Affairs London 2002)

Hudson *International Tribunals*

Hudson MO *International Tribunals, Past and Future* (Carnegie Endowment for International Peace and Brookings Institution Washington 1994) 10-104

Janssens *A New Star on the Stage*

Janssens *A New Star on the Stage: the African Criminal Court How will the Court fit into the jurisdiction of the ICC?* (LLM-Thesis University of Amsterdam Amsterdam 2013)

Kinsey 2008 *Cultures and Conflicts*

Kinsey C "International Law and the Control of Mercenaries and Private Military Companies" 2008 *Cultures and Conflicts* 1-15

Kioki 2003 *ICRC*

Kioki B "The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention" 2003 *International Committee of the Red Cross* 807-825

Kreß and Von Holtendorff 2010 *JICJ*

Kreß C and Von Holtendorff L "The Kampala Compromise on the Crime of Aggression" 2010 *Journal of International Criminal Justice* 1179-1217

Lee *The International Criminal Court*

Lee RSK *The International Criminal Court: the making of the Rome Statute: issues, negotiations and results* (Martinus Nijhoff Publishers Kluwer 1999)

Manirakiza *Africa and the Future of International Criminal Justice*

Manirakiza P *Africa and the Future of International Criminal Justice* (Eleven international Publishing The Hague 2012)

Maqungo "The Implications of African States Withdrawing from the ICC"

Maqungo S "The Implications of African States Withdrawing from the ICC" (Unpublished paper presented by the Institute for Security Studies in Pretoria on 10 October 2013 concerning the withdrawal of African States from the ICC)

Martin and Jürgen *The proposed criminal chamber*

Martin WM and Jürgen B *The proposed criminal chamber section of the African court of justice and human rights: a legal analysis* 1-25

Mégret 2011 *Columbia JEL*

Mégret F "The Problem of an International Criminal Law of the Environment" 2011 *Columbia Journal of Environmental Law* 195-257

Mgimba and Waters 2010 *AJIL*

Mgimba LM and Waters SJ "Jurisprudential Analysis of the African Court on Human and Peoples' Rights: from 2004 – 2010" 2010 *African Yearbook of International Law* 1-30

Murungu 2011 *JICJ*

Murungu CB "Towards a criminal chamber in the African Court of Justice and Human Rights" 2011 *Journal of International Criminal Justice* 1067-1088

Murungu and Biegon *Prosecuting International Crimes*

Murungu C and Biegon J *Prosecuting International Crimes in Africa* (Pretoria University Law Press Pretoria 2011)

Nadelmann 1990 *International Organization*

Nadelmann EA "Global Prohibition Regimes: The Evolution of Norms in International Society" 1990 *International Organization* 479-526

Nagan and Root 2012 *Emerging Restrictions on Sovereign Immunity*

Nagan WP and Root JL *Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the UN Charter, and the Application of Modern Communications Theory* (UFL College of Law 2012) 1-115

Needham 2011 *Auckland ULR*

Needham J "Protection or Prosecution for Omar Al Bashir? The Changing State of Immunity in International Criminal Law" 2011 *Auckland University Law Review*

Nmehielle 2013 *Law Democracy & Development*

Nmehielle VO "Seven years in business: Evaluating developments at the African Court on Human and Peoples' Rights" 2013 *Law Democracy & Development*

Ntoubandi *Amnesty for Crimes Against Humanity*

Ntoubandi FZ *Amnesty for Crimes Against Humanity Under International Law* (Koninklijke Brill NV Leiden 2007)

O'Brien "The International Criminal Court"

O'Brien P "The International Criminal Court 10 Years after the Rome Statute – Successes Achieved and Challenges Ahead" (Unpublished paper delivered on 2008 at the International Society for the Reform of Criminal Law Dublin) 1-8

Omotola 2011 *Unconstitutional Changes of Government*

Omotola JS *Unconstitutional Changes of Government in Africa What Implications for Democratic Consolidation?* (Nordiska Afrika Institutet Uppsala 2011)

Oosterveld, Perry and McManus 2001 *Fordham ILJ*

Oosterveld V, Perry M and McManus J "The Cooperation of States with the International Criminal Court" 2001 *Fordham International Law Journal* 767-839

Palmer 2012 *Combating Grand Corruption in Africa*

Palmer R *Combating Grand Corruption in Africa: Should it be an international crime?* (Open Society Initiative for Southern Africa 2012) 1-5

Paust *et al International Criminal Law*

Paust JJ *et al International Criminal law: Cases and Materials* (Carolina Academic Press North Carolina 1996)

Postma *Custom in International Law*

Postma GJ *Custom in International Law: A Normative Practice Account* (University of North Carolina Chapel Hill 2013) 1-25

Romano 1999 *PICT*

Romano CPR "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle" 1999 *Project on International Courts and Tribunals* 709-751

Sadat and Carden 2000 *Georgetown LR*

- Sadat LN and Carden SR "The New International Criminal Court: An Uneasy Revolution" 2000 *Georgetown Law Review* 381-474
- Sangeeta 2011 *HRLR*
- Sangeeta S "Jurisdictional Immunities of the State: Germany v Italy" 2011 *Human Rights Law Review* 555-558
- Schabas *An introduction to the International Criminal Court*
- Schabas WA *An introduction to the International Criminal Court* 1st ed (Cambridge University Press Cambridge 2002)
- Schabas *An Introduction to the International Criminal Court*
- Schabas WA *An Introduction to the International Criminal Court* 2<sup>nd</sup> ed (Cambridge University Press Cambridge 2004)
- Schabas and McDermott *International criminal courts*
- Schabas W and McDermott Y *International criminal courts* (The Wiley-Blackwell Encyclopaedia of Globalization, 2012)
- Schabas *Convention for the Prevention and Punishment of the Crime of Genocide*
- Schabas WA "Convention for the Prevention and Punishment of the Crime of Genocide" 2008 *United Nations Audiovisual Library of International Law* 1-6
- Schott 2007 *North-Western JIHR*
- Schott J "Chapter VII as Exception : Security Council Action and the Regulative Ideal of Emergency" 2007 *North-Western Journal of International Human Rights* 24-80
- Schroeder 2001 *FBI Law Enforcement Bulletin*
- Schroeder WR "Money Laundering: A Global Threat and the International Community's Response" 2001 *FBI Law Enforcement Bulletin* 1-7
- Röling and Rüter *The Tokyo Judgment*
- Röling BV and Rüter CF (eds) *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE) 29 April 1946 - 12 November 1948 Vol I* (APA University Press Amsterdam BV Amsterdam 1977)
- UNWCC *History of the United Nations War Crimes Commission*
- UNWCC *History of the United Nations War Crimes Commission and the Development of the Laws of War* 1948 1-574
- Van der Vyver *Prosecuting President Omar Al Bashir*

Van der Vyver J *Prosecuting President Omar Al Bashir in the International Criminal Court* (University of Pretoria, Pretoria 2010)

Van Schaack 2014 *Just Security*

Van Schaack "Immunity Before the African Court of Justice & Human & Peoples Rights – The Potential Outlier" 2014 *Just Security* 1-7

Walker *Jurisdictional Immunities of the State*

Walker L *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No 143 3 February 2012)

Wedgwood 2000 *Yale Law School Legal Scholarship Repository*

Wedgwood R "Augusto Pinochet and International Law" 2000 *Yale Law School Legal Scholarship Repository* 241-254

Wirth 2002 *EJIL*

Wirth S "Immunity for core crimes? ICJ's Judgement in the Congo v Belgium Case" 2002 *European Journal of International Law* 877-893

Zappalà 2001 *EJIL*

Zappalà S "Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Gadhafi* Case before the French Cour de Cassation" 2001 *European Journal of International Law* 595-612

Zgonec-Rožej and Foakes 2013 *Chatham House IL*

Zgonec-Rožej M and Foakes J "International Criminals: Extradite or Prosecute?" 2013 *Chatham House International Law* 1-16

### **Case Law**

*Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v The Republic of Burkina Faso* No. 013/2011 (ACHPR) 28 March 2014.

*Adolf Eichmann v The Attorney General, Criminal Appeal* 336/61 1962

*African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* 004/2011 (ACHPR) 25 March 2011.

*Aikaterini Kalogeropoulou et al. v Greece and Germany (ECHR, Decision on admissibility of individual complaint no. 59021/00, 12 December 2002)*

*Arrêt of the Cour de Cassation, Mouammar Gadhafi* 2001 No 1414

*Belgium v Spain* ICJ Reports 501970

*Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* 2002 ICJ 121

*Decision of 27 Feb 1984 Case No 4 StR 396/83 80 ILR (1989) 388 (Germany: Federal Supreme Ct).*

*Democratic Republic of Congo v Belgium* ICJ Reports 3 2002 41 ILM

*Gerechtshof, Amsterdam, Nederlandse Jurisprudentie* (2011) No 51

*Germany v Italy (Greece Intervening)* 2012 ICJ Reports 99

*Glenister v President of the Republic of South Africa and others* 2011 3 SA 347 (CC)

*Grosz v France ECHR (Grand Chamber)* (22 January 2008) 65831/01

*Inter-Science Research and Development Services (Pty) Ltd v Republica Popular De Mocambique* 1980 (2) SA

*Li Weixum v Bo Xilai*, DCC Civ No 04-0649 (RJL) 2006

*Prosecutor v Anto Furundzija* (Trial Judgement) IT-95-17/1-T International Criminal Tribunal for the former Yugoslavia (ICTY) 10 December 1998

*Prosecutor v Charles Ghankay Taylor* SCSL-2003-01-1 "Decision on Immunity from Jurisdiction" Appeals Chamber 31 May 2004

*Prosecutor v Radislav Krstic* IT-98-33-A 2004 25-26

*Prosecutor v Slobodan Milosevic* Case n° IT-99-37-PT Decision on Preliminary Motions 8 November 2001

*Prosecutor v Tadiac* IT-94-1-AR72

*Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06

*Prosecutor v Tihomir Blaskic* (Trial Judgement) IT-95-14-T International Criminal Tribunal for the former Yugoslavia (ICTY) 2000

*Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v USA/UK) Provisional Measures* ICJ Reports 3 1992

*Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* ICJ Reports 2012

*R v Bow Street Magistrates ex parte Pinochet* (Nos 1 & 3) [2000] 1 AC 147

*R v Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No 2) (2000)

*R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte* No (2) and (3) WLR 1,456 (HL 1998)

*Re Bo Xali* 128 ILR (2005)

*S v Pentane* 1988 3 SA 51 (C)

*Schooner Exchange v McFaddon* 11 US (7 Cranch) 116 (1812)

*Thai-Europe Tapioca Service Ltd v Government of Pakistan, The Harmattan* 1975 1 WLR

*The Asylum case Colombia/Peru* ICJ Reports 1950

*Trendtex Trading Corporation v Central Bank of Nigeria* 1977 QB 529 CA

*Yogogombaye v Senegal* 001/2008 (ACHPR) 15 December 2009

### **Legislation**

*Constitution of the Republic of South Africa*, 1996

*Federal Act on International Mutual Assistance in Criminal Matters (IMAA)* 1981 (last amended 1 January 2013)

*Foreign Sovereign Immunities Act* 1976

*Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002

*Malawi Immunities and Privileges Act* 1984

*Malicious Damage Act* 1861

*Prevention of Cruelty to Children Act* 42 of 1926

*Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict* 27 of 2006

*Restatement of the Law, Third, Foreign Relations Law of the United States* 1987

*State Immunity Act* 1978

### **International Instruments**

*Advisory Committee on Traffic in Opium and Other Dangerous Drugs: List of Illicit Transactions and Seizures Reported to the League of Nations Since April 22nd, 1926* (Lausanne: Imp. réunies, 1927)

*AU Report of the African Union: High Level Panel on Darfur (AUPD)*, 29 October 2009, PSC/AHG/2(CCVII)

*Amnesty International, Benin et al Open Letter to AU member states* 5th May 2014

Organization of African Unity (OAU) *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights* 10 June 1998

*AU Assembly of the Union Twenty-Third Ordinary Session 26-27 June 2014 Malabo, Equatorial Guinea Assembly/AU/ Decision on the Draft Legal Instruments Doc. Assembly/AU/8(XXIII)*

*AU Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa* 1994 Bamako, Mali January 1998

*AU Declaration on the Principles Governing Democratic Elections in Africa AHG/Decl.1 (XXXVIII) 2002 AU, AU Convention on Preventing and Combating Corruption* 11 July 2003

*AU Draft protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Exp/Min/IV/Rev.7 2012 Revisions up to Tuesday 15<sup>th</sup> May 2012*

*AU Extraordinary Session of the Assembly of the African Union 12 October 2013 Addis Ababa, Ethiopia Ext/Assembly/AU/Dec.1 (Oct 2013)*

*AU Protocol on the Statute of the African Court of Justice and Human Rights* 1 July 2008

*AU Protocol Relating to the Establishment of the Peace and Security Council of the AU* 9 July 2002

*AU Assembly of the Union Decision Assembly /AU/Dec. 127(VII) and Dec.103(VI) 2006*

*AU-EU Summit Joint Strategy and First Action Plan 2007*

*Cartagena Protocol on Biosafety to the Convention on Biological Diversity Text and Annexes Cartagena Protocol on Biosafety Montreal 2000*

*CICC Status of US Bilateral Immunity Agreements 2006*

*Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907*

*Dakar Declaration for the Establishment of the International Criminal Court 1998*

*Decision Assigning The Situation In Darfur, Sudan To Pre-Trial Chamber I Presidency of the ICC (The Hague Netherlands 2005)*

*Decision on the Budget of the African Union for The 2014 Financial Year Doc EX.CL/787(XXIII)*

*Decision on The Protocol on Amendments to The Protocol on The Statute of The African Court of Justice and Human Rights Doc.Assembly/Au/13(Xix)*

*Department of State Bulletin 26 (1952)*

*FATF 40 Recommendations October 2003 (incorporating all subsequent amendments until October 2004)*

*FATF IX Special Recommendations October 2001 (incorporating all subsequent amendments until February 2008)*

*Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (UN Doc A/CONF.183/10)1998*

*Fourth report of the Secretary-General on the United Nations Mission in Sierra Leone S/2000/455 19 May 2000*

*Genocide Convention Act 1949 (as amended) [Australia] 27 of 1949 as amended 12 July 1949*

*Guidance Manual for The Implementation Of Council Decision C(2001)107/Final, as Amended, on The Control of Transboundary Movements of Wastes Destined for Recovery Operations 2001*

*ICC-ASP/12/Res.1 Programme budget for 2014, the Working Capital Fund for 2014, scale of assessments for the apportionment of expenses of the International Criminal Court, financing appropriations for 2014 and the Contingency Fund*

*ILO Abolition of Forced Labour Convention 1957 (No 105)*

*ILO Forced Labour Convention 1930 (No 29)*

*ILO Minimum Age Convention 1973 (No 138)*

*Institut de Droit International II AD 1181 1885-1891*

*International Committee of the Red Cross (ICRC) Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 12 August 1949 75 UNTS 287*

*International Criminal Court (ICC) Report of the Preparatory Commission for the International Criminal Court Addendum Part II Finalized draft text of the Elements of Crimes 2 November 2000 PCNICC/2000/1/Add.2*

*International Criminal Court Rome Statute Implementation Report Card Part One Amnesty International 2010*

*Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea 27 October 2004 (NS/RKM/1004/006)*

*Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion ICJ Reports 1996 226, International Court of Justice (ICJ), 8 July 1996

*LO Worst Forms of Child Labour Convention* 1999 (No 182)

*OAU Declaration and Decisions Adopted by the Thirty - Fourth Ordinary Session of the Assembly of Heads of State and Government AHG/Decl.1 (XXXIV)* 8-10 June, 1998

Organization of African Unity (OAU) *African Charter on Human and Peoples' Rights* ("Banjul Charter") 27 June 1981 CAB/LEG/67/3 rev 5 21 ILM 58 (1982)

Organization of African Unity (OAU) *Constitutive Act of the African Union* 1 July 2000

*Pre-Trial Chamber I 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 13-12-2011

*Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, submitted to the Assembly of the African Union, Ordinary Session* July 2006

*Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564* of 18 September 2000 Geneva 25 January 2005

*Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996* Official Records of the General Assembly, Fifty-first session Supplement No 80 Vol II

*Review Conference of the Rome Statute* of the ICC 2010 RC/Res.6

*SADC Protocol against Corruption* 14 August 2001

*Situation In Darfur, Sudan The Prosecutor v Omar Hassan Ahmad Al Bashir Public Document 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* 2011

*African Convention on the Conservation of Nature and Natural Resources* 2003

*The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* 2010

*The Trial of German Major War Criminals , Proceedings of the International Military Tribunal sitting at Nuremberg* Part 22 (22 August 1946 to 1 October 1946) 447

*Treaty of Versailles* 225 Parry 188; 2 Bevens 235; 13 AJIL Supp 151 385 (1919)

*UN Agenda item 144, Financing of the International Criminal Tribunal for Rwanda, Fifth Committee Statement by Assistant Secretary-General, Controller* 13 December 2011

*UN At Eighth Session of Preparatory Commission For International Criminal Court, Four Working Groups Announce Completion Of Assignments* 2001

*UN Convention on biological diversity* Ch\_XXVII\_8 Rio de Janeiro 5 June 1992

*UN Counter Piracy Programme Support to the Trial and Related Treatment of Piracy Suspects Issue Nine:* July 2012

*UN Draft code of crimes against the peace and security of mankind (Part I & II)-including the draft statute for an international criminal court A/CN.4/398 and Corr.1-3* 11 March 1986.

*UN Economic and Social Council (ECOSOC) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* 19 December 1988

*UN General Assembly 1971 Vienna Convention on Psychotropic Substances* 1971 16 August 1976 A/RES/14956

*UN General Assembly 1972 Protocol Amending the Single Convention on Narcotic Drugs* 1961 9 December 1975 A/RES/3444

*UN General Assembly Convention on the High Seas Chapter XXI* Geneva 29 April 1958, Treaty Series Vol 450 11

*UN General Assembly International Convention against the Recruitment, Use, Financing and Training of Mercenaries* 4 December 1989 A/RES/44/34

*UN General Assembly Measures to Eliminate International Terrorism – Report of the Secretary-General* 6 September 1996 A/51/336

*UN General Assembly Third United Nations Conference on the Law of the Sea* 14 December 1983 A/RES/38/59

*UN General Assembly United Nations Convention against Corruption* 31 October 2003 A/58/422

*UN General Assembly United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly* 8 January 2001 A/RES/55/25

*UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, United Nations, Treaty Series Vol 1465

*UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide* 9 December 1948 United Nations Treaty Series Vol 78 277

*UN General Assembly, Convention on the Privileges and Immunities of the United Nations* 13 February 1946

*UN General Assembly, International Convention for the Suppression of Terrorist Bombings* 15 December 1997 No 37517

*UN General Assembly, Relationship Agreement Between the United Nations and the International Criminal Court* 20 August 2004 A/58/874

*UN General Assembly, Reparation for injuries incurred in the service of the United Nations*, 3 December 1948 A/RES/258

*UN General Assembly, Slavery Convention* of 25 September 1926, 23 October 1953 A/RES/794

*UN Preliminary report on immunity of State officials from foreign criminal jurisdiction* 2013 Treaty Series Vol 14000 231

*UN Resolution 3314 (XXIX)* 14 December 1974

*UN SCOR 62d Sess 5615th mtg at 17 UN Doc S/PV 5615* (Jan 8 2007)

*UN Security Council Security Council resolution 1373 (2001) on threats to international peace and security caused by terrorist acts* 28 September 2001 S/RES/1373 (2001)

*UN Security Council Statute of the International Criminal Tribunal for Rwanda (last amended on 13 October 2006)* 8 November 1994

*UN Security Council Statute of the Special Court for Sierra Leone* 16 January 2002

*UN Security Council, Resolution 1267 (1999) Adopted by the Security Council at its 4051st meeting on 15 October 1999, 15 October 1999, S/RES/1267 (1999)*

*UN Security Council, Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts], 28 September 2001, S/RES/1373 (2001)*

*UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)* 25 May 1993

*UN Vienna Convention on the Law of Treaties* 23 May 1969, United Nations Treaty Series Vol 1155 331

*UN At Eighth Session Of Preparatory Commission For International Criminal Court* Four Working Groups Announce Completion Of Assignments 2001

*UN International Law Commission, Draft Statute for an International Criminal Court* including Annex and Appendices I to III 1994

*UN Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* 1950

*UN General Assembly Establishment of an international criminal court* A/RES/50/46 11 December 1995

*UN General Assembly International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes* A/RES/44/39, 4 December 1989

*UN Vienna Convention on Consular Relations* 24 April 1963

*UN Vienna Convention on Diplomatic Relations* 18 April 1961

*UN Vienna Convention on the Law of Treaties* 23 May 1969 United Nations Treaty Series Vol 1155 331

*UN Yearbook of the International Law Commission, 1980 Vol. II* A/CN.4/SER.A/1980/Add.I

*UN Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")* 8 August 1945

*UN Charter of the United Nations* 24 October 1945 1 UNTS XVI

*UN Convention on Jurisdictional Immunities of States and Their Property* General Assembly resolution 59/38 of 2 December 2004

*UN General Assembly Rome Statute of the International Criminal Court* (last amended 2010) 17 July 1998

*UN Security Council Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002) 25 May 1993

*UN Vienna Convention on Diplomatic Relations* 1961

*UN Statute of the International Court of Justice* 18 April 1946

*UNSC Resolution 1593 (2005)* Adopted by the Security Council at its 5158th meeting on 31 March 2005 1-7

*UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences* UNTAET/REG/2000/15 (6 June 2000)

### **Internet Sources**

Abass A 2013 *Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges* <http://www.ejil.org/article.php?article=2433&issue=117> accessed 12 November 2013

Abdul TC 2012 *Don't bank on grand corruption becoming an international crime* <http://www.osisa.org/openspace/dont-bank-grand-corruption-becoming-international-crime-abdul-tejan-cole> accessed 30 October 2013

ACHPR 2013 *Brief History* <http://www.african-court.org/en/index.php/about-the-court/brief-history> accessed 5 November 2013

Africana Age *The Challenge of Decolonisation in Africa* 2011 <http://exhibitions.nypl.org/africanaage/essay-challenge-of-decolonization-africa.html> accessed 20 September 2014

Akande D, Du Plessis M and Jhallo C 2010 *AU Proposal* <http://www.ejiltalk.org/addressing-the-african-unions-proposal-to-allow-the-un-general-assembly-to-defer-icc-prosecutions/> accessed 05 October 2013

Aljazeera 2014 *African Union urges united stand against ICC* <http://www.aljazeera.com/news/africa/2014/02/african-union-urges-united-stand-against-icc-20142111727645567.html> accessed 23 July 2014

AU 2013 *Extraordinary Session of the Assembly of the AU, Addis Ababa, Ethiopia* <http://www.au.int/en/content/extraordinary-session-assembly-african-union> accessed 11 November 2013

AU 2013 *Functions of the Assembly* <http://www.au.int/en/organs/assembly> accessed 22 November 2013

AU 2014 *23rd Ordinary Session of the AU* <http://summits.au.int/en/23rdsummit> accessed 5 July 2014

Bassiouni CM 2010 *The Failures, Challenges, and Future of International Criminal Law* [http://www.insidejustice.com/intl/2010/03/31/cherif\\_bassiouni\\_international\\_criminal/](http://www.insidejustice.com/intl/2010/03/31/cherif_bassiouni_international_criminal/) accessed 7 August 2014

Chambers of Nine Bedford Row 2012 *The ACHPR Flexes its Muscles in respect of the Situation in Libya* [http://www.criminalinternationallaw.com/61/section.nc?form\\_12.replyids=69&startpointt150i53=60](http://www.criminalinternationallaw.com/61/section.nc?form_12.replyids=69&startpointt150i53=60) accessed 28 July 2014

CICC 2006 *Quotes from High Officials Opposing the US Campaign for Bilateral Immunity Agreements* [http://www.iccnw.org/documents/HighOfficialQuotes\\_Current.pdf](http://www.iccnw.org/documents/HighOfficialQuotes_Current.pdf) accessed 5 July 2014

CICC 2013 *Implementation of the Rome Statute* <http://www.iccnw.org/?mod=romeimplementation&idudctp=10&show=all> accessed 31 July 2014

CICC 2012 *Implementation of legislation* [http://www.iccnw.org/documents/FS\\_CICC\\_Implementation\\_Legislation\\_en.pdf](http://www.iccnw.org/documents/FS_CICC_Implementation_Legislation_en.pdf) accessed 8 July 2013

Coalition for an Effective African Court on Human and Peoples' Rights 2014 *Ratification Status: Protocol on the Statute of the African Court of Justice and Human Rights* [http://www.africancourtcoalition.org/index.php?option=com\\_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12](http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12) accessed 15 April

Donovan D 2012 *International Criminal Court: Successes and Failures of the Past and Goals for the Future* <http://www.internationalpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures-of-the-past-and-goals-for-the-future/> accessed 7 August 2014

Douglas G 2012 *Drug trafficking at sea: no longer a crime of universal jurisdiction before US Courts?* <http://www.ejiltalk.org/drug-trafficking-at-sea-no-longer-a-crime-of-universal-jurisdiction-before-us-courts/> accessed 30 October 2013

Du Plessis M 2012 *A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes* <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/> accessed 17 August 2014

ECOWAS 2014 Court of Justice *Community Court of Justice* <http://www.court.ecowas.org/site2012/index.php?lang=en> accessed 18 August 2014

Free the Slaves 2013 *About Slavery* <http://www.freetheslaves.net/SlaveryinHistory> accessed 30 October 2013

Georgetown 2008 [http://www.law.georgetown.edu/library/research/guides/article\\_98.cfm](http://www.law.georgetown.edu/library/research/guides/article_98.cfm) accessed 20 July 2013

Georgetown Date Unknown *International Criminal Court - Article 98 Agreements Research Guide* [http://www.law.georgetown.edu/library/research/guides/article\\_98.cfm](http://www.law.georgetown.edu/library/research/guides/article_98.cfm) accessed 5 July 2014

Hague Justice Portal 2007 *Belgian court sentences Rwandan army major* <http://www.haguejusticeportal.net/index.php?id=7886> accessed 21 July 2014

HRW 2014 *Article 16* <http://www.hrw.org/news/2008/08/15/article-16> accessed 5 March 2014

HRW 2004 *Netherlands: Congolese Torturer Convicted* <http://www.hrw.org/news/2004/04/07/netherlands-congolese-torturer-convicted> accessed 21 July 2014

HRW 2013 *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal* <http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-african-chambers-senegal#5> accessed 14 August 2014

ICC 2013 *The Global Campaign for the Prevention of Aggression Role of the ICC* <http://crimeofaggression.info/role-of-the-icc/definition-of-the-crime-of-aggression/> accessed 18 November 2013

ICC CPI 2014 <http://www.icccpi.int/enmenus/icc/press%20and%20media/press%20releases/Pages/otp-statement-iraq-13-05-2014.aspx> accessed 19 May 2014

ICC CPI 2014 *Office of the Prosecutor of the ICC* [http://www.icc-cpi.int/iccdocs/asp\\_docs/library/organs/otp/OTP\\_Update\\_on\\_Communications\\_10\\_February\\_2006.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf) accessed 8 November 2013

ICC CPI 2014 *Situations and Cases* [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx) accessed 23 July 2014

ICC 2014 *Kenya Ratifies Rome Statute* [http://icc-cpi.int/en\\_menus/asp/press%20releases/press%20releases%202005/Pages/Kenya%20ratifies%20rome%20statute.aspx](http://icc-cpi.int/en_menus/asp/press%20releases/press%20releases%202005/Pages/Kenya%20ratifies%20rome%20statute.aspx) date accessed 21 April 2014

ICC 2014 *Pre-Trial Chamber II commits Bosco Ntaganda to trial* [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1013.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1013.aspx) accessed 13 June 2014

ICC 2013 *Situations and cases* [http://www.icccpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icccpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) accessed 23 July 2013

ICC 2013 *Structure of the Court* [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx#a](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx#a) accessed 8 October 2013

ICCNOW 2014 *Cases & Situations* <http://www.iccnw.org/?mod=casessituations> accessed 7 August 2014

ICCNOW 2012 *Global Ratification* [http://www.iccnw.org/documents/Global\\_Ratificationimplementation\\_chart\\_May2012.pdf](http://www.iccnw.org/documents/Global_Ratificationimplementation_chart_May2012.pdf) accessed 20 July 2013

ICLS 2014 *Database & Commentary* [http://www.iclklamberg.com/Statute.htm#\\_ftn153](http://www.iclklamberg.com/Statute.htm#_ftn153) accessed 8 April 2014

IJR 2014 *Centre African Union Approves Immunity for Government Officials in Amendment to African Court of Justice and Human Rights' Statute* <http://www.ijrcenter.org/2014/07/02/African-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/> accessed on 5 July 2014

International Crimes Database 2014 *Piracy* <http://www.internationalcrimesdatabase.org/Crimes/Piracy> accessed 30 July 2014

ISS 2014 *Can the new African Court truly deliver justice for serious crimes?* <http://www.issafrica.org/iss-today/can-the-new-african-court-truly-deliver-justice-for-serious-crimes> accessed 24 July 2014

ISS 2012 *Seminar Report: The International Criminal Court: Justice Slowly but Surely?* <http://www.issafrica.org/events/iss-seminar-report-the-international-criminal-court-justice-slowly-but-surely> accessed 7 August 2014

Jalloh C 2013 *Kenya Withdrawal* <http://www.ejiltalk.org/kenya-should-reconsider-proposed-withdrawal-from-the-icc> accessed 7 October 2013

Kotecha B 2013 *The ICC: What Counts as a Success?* <http://justiceinconflict.org/2013/09/13/the-icc-what-counts-as-a-success/> accessed 7 August 2014

Mamdani M 2008 *The new humanitarian order* 2008 <http://www.thenation.com/doc/20080929/mamdani> accessed 5 November 2013

McGregor 2012 *Jones v UK: A Disappointing End* <http://www.ejiltalk.org/jones-v-uk-a-disappointing-end/> accessed 19 June 2014

Meron T 2011 *Crimes of war* <http://www.crimesofwar.org/a-z-guide/customary-law/> accessed 25 September 2013

Ministry of Foreign Affairs & International Cooperation 2014 *ICC lauds Botswana* <http://www.gov.bw/en/News/Botswana-stands-by-the-International-Criminal-Court/> accessed 20 August 2014

Ventura MJ 2013 *Greece v Italy* <http://www.ejiltalk.org/?s=germany+v+italy> accessed 2 October 2013

New Jersey Hong Kong Network 1990 <http://cnd.org/mirror/nanjing/NMTT.html> accessed 19 September 2013

Sandefur J 2012 *Was the Charles Taylor Trial Worth the Price Tag?* <http://www.cgdev.org/blog/was-charles-taylor-trial-worth-price-tag> accessed 30 July 2014

Scarff MP 1998 <http://www.asil.org/insigh20.cfm> accessed 20 July 2013

Stephanie NG 2014 *Complementarity: A Brewing Battle between the African Court and ICC?* <http://www.internationaljusticeproject.com/complementarity-a-brewing-battle-between-the-african-court-and-icc/> accessed 12 August 2014

Seikaly T 2012 *Israeli occupation of Palestine is a crime against humanity* <http://sundial.csun.edu/2012/02/israeli-occupation-of-palestine-is-a-crime-against-humanity/> accessed 21 November 2013

Thesaurus 2014 *Continental* <http://thesaurus.com/browse/continental> accessed 19 of August 2014

Think Africa Press 2013 *AU and the ICC – How They Voted* <http://thinkafrica.press.com/legal/au-and-icc-how-they-voted> accessed 23 July 2014

UHRC 2013 *Genocide in Darfur* <http://www.unitedhumanrights.org/genocide/genocide-in-sudan.htm> accessed 8 November 2013

UN 2014 *Current Members* <http://www.un.org/en/sc/members/> accessed 5 March 2014

UN 2014 *UN Treaty Collection* [https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en) accessed 20 June 2014.

UN 2013 *Division for Ocean Affairs and the Law of the Sea UN Division for Ocean Affairs and the Law of the Sea* <http://www.un.org/depts/los/index.htm> accessed 30 July 2014

UN 1998 *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* <http://legal.un.org/diplomaticconferences/icc-1998/icc-1998.html> accessed 16 June 2014

UNODC 2013 *UN Instruments and Other Relevant International Standards on Money-Laundering and Terrorist Financing* <http://www.unodc.org/unodc/en/money-laundering/InstrumentsStandards.html?ref=menuside> accessed 28 October 2013

USHMM 2013 <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007069.20> accessed September 2013

USHMM 2013 *Holocaust Encyclopaedia* <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005177> accessed 22 July 2014

Virginia Law 2014 *The Tokyo War Crimes Trial* <http://lib.law.virginia.edu/imtfe/> accessed on 20 April

Yihdego Z 2013 *Democracy, Peoples' Uprising and Unconstitutional Change of Government in Egypt: The African Union Principles and Responses* <http://www.ejiltalk.org/democracy-peoples-uprising-and-unconstitutional-change-of-government-in-egypt-the-african-union-principles-and-responses/> accessed 30 July 2013