



UNIVERSITY *of the*
WESTERN CAPE

FACULTY OF LAW

**UNIVERSAL JURISDICTION IN RESPECT OF INTERNATIONAL CRIMES: THEORY AND
PRACTICE IN AFRICA**



A doctoral thesis submitted in fulfilment of the requirements for the degree *Doctor Legum*
in the Faculty of Law of the University of the Western Cape

**UNIVERSITY of the
WESTERN CAPE**

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PLAGIARISM DECLARATION

Universal Jurisdiction in Respect of International Crimes: Theory and Practice in Africa is my own original work and it has never been presented to any other institution of higher learning; and where the works of other people have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in fulfilment of the requirements for the award of the Doctor of Law Degree.

BUHLE ANGELO DUBE

DATE



ACKNOWLEDGMENT

To the All Knowing, the One who pre-existed everything, my God and Saviour. It is to you that I owe all my achievements, to which I have just added this Doctor of Law degree.

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DEDICATION

To my girls, Andile, Kecia, Petra and Angela, for bearing with me during prolonged days and nights of reclusive behaviour as I burnt the proverbial midnight oil.

To Luigi Dube (1937 – 2013):

Nyamazane, kaMthinta, kaMlambo, kaMjingathi, kaVin. Ngubhela bafazi namadoda! Nzalo ka Mgwagwanana. You were an inspiration, and you always believed in my dreams. Thank you, and may your soul rest in peace Dub' Elimthende!!

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ABSTRACT

The crimes of genocide, war crimes and crimes against humanity are customary international law crimes. The African continent has experienced quite a number of cases involving these crimes, and the continent's ability and willingness to prosecute offenders remains in doubt. As a result, in the past decade or so, non-African states have sought to institute proceedings against African leaders accused of perpetrating international customary law crimes. These attempts have taken two distinct formats, the first being the use of Universal Jurisdiction (UJ), and the second being the attempts by the International Criminal Court (ICC) to indict and prosecute African leaders. The African Union (AU) has vehemently opposed both these attempts on the grounds that they are inspired by neo-colonial thinking that is aimed at stifling peace and reconciliation efforts on the continent.

Proponents of UJ argue that this principle is fundamental to international justice and the global fight to end impunity for international crimes. UJ allows a state to exercise jurisdiction over crimes committed outside its territory and for which the normal jurisdictional links of nationality and passive personality do not exist. Although the concept of UJ has been part of international law for quite some time, its relevance today has been questioned by national courts and international judicial bodies. Its recent usage by both Belgian and French courts, as well as by international tribunals, such as the ICC, has attracted sharp criticism from many African states. Given that African states constitute the biggest block of signatory states to the Rome Statute, their voice cannot be ignored. Their principal concern is that the ICC is unfairly targeting African leaders for prosecution. The negative sentiment is also evidenced by some African leaders' deliberate refusal to comply with ICC requests or to cooperate in cases where warrants of arrest have been issued against African leaders, such as in the case of the Sudanese President, Omar Al Bashir, and the present prosecution of the Kenyan President, Uhuru Kenyatta and his deputy, William Ruto. Given the aversion shown by African states to ICC prosecution of state leaders, and attempts by some non-African states to resort to UJ in order to try African leaders, the question is whether African states themselves have a solution to the problem of impunity on the continent?

The answer might lie, partly, in the age old concept of UJ, where individual African states might be able to exercise jurisdiction over the international crimes of genocide, war crimes and crimes against humanity. It might also lie in the ability and willingness of African states to strengthen the

continent's own, regional institutions by setting up an African international criminal tribunal, or strengthening an existing one to deal with these issues. It therefore becomes important to assess what the African standpoint on UJ is, as against what the practical realities are. In other words, what continental or regional institutions exist to combat impunity for international crimes: what do states do in fact?



KEYWORDS

African Court

African Union

Crimes against humanity

Customary international law

Genocide

International Criminal Court

Immunity

Impunity

Jurisdiction

Sovereignty

Universal Jurisdiction

War crimes



LIST OF ABBREVIATIONS

ACC	African Criminal Court
ASP	Assembly of States Parties
AU	African Union
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMTFE	International Military Tribunal for the East
OAU	Organisation of African Unity
OTP	Office of the Prosecutor
PAP	Pan-African Parliament
PCA	Permanent Court of Arbitration
PCIJ	Permanent International Court of Justice
PSC	Peace and Security Council
UJ	Universal Jurisdiction
UN	United Nations
UNCAT	United Nations Convention against Torture Cruel and Degrading Punishment
UNCLOS	United Nations Convention on the Law of the Sea
UNSC	United Nations Security Council
UNGA	United Nations General Assembly

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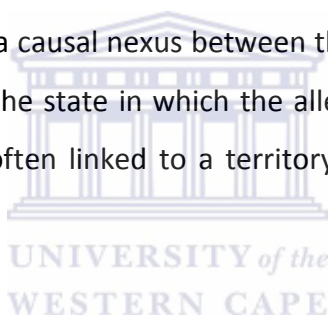


CHAPTER 1 – OVERVIEW OF THE STUDY

1. Background

The exercise of jurisdiction is at the heart of a smooth functioning domestic or international justice system.¹ The limitation of jurisdiction to the territory of a state is an expression of the sovereign equality of states.² The exercise of jurisdiction is an element of sovereignty, which invests a state with a monopoly over the functions of a state within its own particular territory.³ Thus, the authority to legislate, adjudicate and execute to the exclusion of all other states⁴ underpins the principle of the exclusive competence of the state in relation to its own territory.⁵ Accordingly, jurisdiction under international law refers to a state's competence to exercise its judicial, legislative and administrative powers.⁶ This thesis is concerned with the exercise of judicial jurisdiction.

It is a generally accepted rule of international law that, in order for a court of law to exercise criminal jurisdiction, there must be a causal nexus between the act complained of, the role player (the offender) and the territory of the state in which the alleged crime was committed. Criminal jurisdiction in international law is often linked to a territory because the crime was committed



¹ Ryngaert C *Jurisdiction in international law: United States and European perspectives*, Catholique Universite de Louvain (2008) 24. Ryngaert is of the view that the public international law of jurisdiction guarantees that the concerns of foreign nations are also accounted for, and that sovereignty-based assertions of jurisdiction by one state do not unduly encroach upon the sovereignty of other states. The law of jurisdiction is doubtless one of the most essential fields of international law. It offers a system of checks and balances, and acts as a buffer against the possibility of powerful states asserting their jurisdiction over affairs which are the domain of other states. It is closely connected to the customary international law principles of non-intervention and sovereign equality of states.

² See Muse RL 'A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996)' (1996–97) 30 *George Washington Journal of International Law & Economics* 207 - 270, 241–2. Muse states that sovereign equality entails that each nation possesses exclusive authority within its territory, but no authority within the territory of another. Each nation is therefore co-equal in rights and status with other nations, regardless of disparities in economic or military power.

³ The system of sovereign states became entrenched in a complex of rules that evolved from the seventeenth century to secure the concept of an order of states as an international society of sovereign states. These rules were formed through a normative trajectory in international law that did not receive its fullest articulation until the late eighteenth and early nineteenth centuries, when territorial sovereignty, the formal equality of states, non-intervention in the domestic affairs of other recognized states, and state consent as the basis of international legal obligation became the core principles of international society: see Held D 'Law of states, law of peoples' (2008) 8 *Legal Theory* 1-44, 4 available at <http://journals.cambridge.org/LEG> (accessed on 7 August 2013).

⁴ Dugard J *International Law* (2011) 146.

⁵ See Huber M in the 1928 *Island of Palmas Award*, United Nations Reports of International Arbitral Awards (RIAA) Vol II Award of 4 April 1928, 838.

⁶ Beale JH 'The jurisdiction of a sovereign state' (1923) 36 *Harvard Law Review* 241-263, 241 defines jurisdiction as 'the power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court'; Blakesley CL 'United States jurisdiction over extraterritorial crime' (1982) 73 *Journal of Criminal Law & Criminology* 1109-11631, 1109 defines jurisdiction as the authority to affect legal interests.

there, or by reason of the nationality of the perpetrator or the victim. This means that only acts intimately connected with a state generally fall within its jurisdiction.

The general territorial application of criminal laws has led national courts to decline to exercise jurisdiction over persons who commit crimes in other states. The limitation of jurisdiction to matters that take place on the territory of a state is in line with the respect for equal sovereignty of states.⁷ The basis of this rule is international comity,⁸ as Watermeyer CJ stated in *R v Holm*: 'An independent state does not claim a wider jurisdiction because it does not wish to encroach upon the corresponding rights of other independent states'.⁹ The court in *The State v Basson* had this to say about comity:¹⁰

[T]he rules of international comity . . . do not call for more than that each sovereign [s]tate should refrain from punishing persons for their conduct within the territory of another sovereign [s]tate where that conduct has had no harmful consequences within the territory of the [s]tate which imposes the punishment.

The presumption against extraterritoriality has also been used to bar civil suits emanating from the violation of international criminal law. For example, the US Supreme Court in the *Kiobel* case relied on this presumption to severely restrict the application of the Alien Tort Statute which had permitted civil claims in US courts emanating from atrocities committed abroad since 1789.¹¹ The court held that:

The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences and instead defers such decisions ...to the political branches.

This presumption against extraterritorial application of criminal law seems to be waning in light of the growing category of crimes that are subjected to one form of extraterritorial jurisdiction or another. The trend today, however, is for states to claim jurisdiction even over matters that

⁷ This point was stressed by the court in *The State v Basson* 2005 (1) SA 171 (CC), para 223. This case illustrates that the aspect of sovereignty expressed in the presumption against the extraterritorial operation of criminal law is not absolute. *In casu*, the court held that a South African court might exercise criminal jurisdiction over a conspiracy entered into in South Africa on the part of members of the South African Defence Force to murder opponents of the South African administration in Namibia during South Africa's occupation of the territory on the ground that there was a real and substantial link between South Africa and the crime.

⁸ Comity refers to the courteous behaviour of states towards each other, characterised by the restraint each state exercises in issues of jurisdiction. Sovereign equality of states is also the overriding principle when it comes to the exercise of jurisdiction over crimes that could likely be prosecuted by two or more states.

⁹ *R v Holm*; *R v Pienaar* 1948 (1) SA 925 (A), 930.

¹⁰ *The State v Basson* 2005 (1) SA 171 (CC) citing with approval Lord Diplock in *Treacy v Director of Public Prosecutions* [1971] AC 537 (HL).

¹¹ See the majority opinion of Roberts CJ in *Kiobel v Royal Dutch Petroleum Company* 569 US No.10-1491 (2013), 13.

occurred outside their territory. This is because of the various treaties that place an obligation on states to make certain crimes prosecutable in their own courts. The restraint from infringing on the sovereignty of other states with competing jurisdictional interests has led to the exercise of such jurisdiction being subject to the condition that the other state or states have not requested that the accused to be extradited to their territory to stand trial.

There are, of course, exceptions to the general rule of territorial jurisdiction. Treason has for a long time been, and continues to be, treated as such an exception in the domestic criminal law of most states, the reason being that the state that is threatened has a greater interest than any other state in punishing the offender.¹² Exceptions are also made in respect of transnational crimes where more than one state has an interest in holding the offender liable for the crime.¹³

The centrality of jurisdiction to state sovereignty has resulted in the state, as a law maker,¹⁴ gradually developing rules, customs and principles aimed at criminalising conduct that threatens its integrity and its very existence. This process of developing rules and laws is generally known as prescriptive jurisdiction.¹⁵ Even though prescriptive jurisdiction is about law making, it is not necessarily limited to the actions of the legislature.¹⁶ Prescriptive jurisdiction alone would not be effective in any territory without the ability to enforce the prescriptive rules. Hence adjudicative jurisdiction, that is, the power of the state to hear and decide on matters brought before it is also a crucial element.¹⁷ In fact, Hixson asserts that a state with prescriptive jurisdiction in relation to a

¹² This was laid down in *R v Neumann* 1949 (3) SA 1238 (S C) 1246 – 9. The *Neumann* case held that an alien who has taken the oath of allegiance to King George VI, even after his departure from the Union of South Africa, might still have enjoyed its protection and owed a consequent debt of allegiance. The Court held that the circumstances of his residence within the Union, notwithstanding his departure, was a matter to be determined by evidence in order to decide whether the accused owed allegiance to the state and whether his departure terminated it. The *Neumann* case and others after it concretised the position of our law that treason, unlike most offences is not per se tied down to territoriality. See also *S v Twala and Others* 1979 (3) SA 864 TPD.

¹³ See *The State v Basson* 2005 (1) SA 171 (CC) para 225, where the court held that there are exceptions to the territorial rule. *In casu*, the offence of conspiracy to commit crime was entered into in South Africa for crimes to be committed in Namibia, and the court found that it could exercise jurisdiction.

¹⁴ That is both courts and the legislature. Courts have contributed to the development of rules on jurisdiction through interpreting existing rules and developing the law. Parliament has enacted new rules to govern transnational crimes.

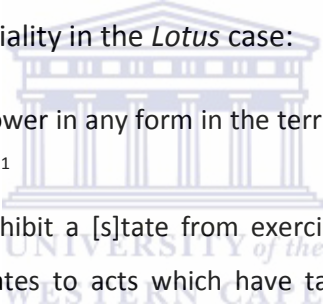
¹⁵ Prescriptive jurisdiction relates to a government's power to make laws. International law generally recognises that the justifying link for prescriptive jurisdiction may be found in territory, nationality, or the need to protect the state's national or security interests. See Donovan D & Roberts A 'The emerging recognition of universal civil jurisdiction', (2006) 100 *American Journal of International Law* 142 - 163, 142. Available at <http://documents.law.yale.edu/sites/default/files/Donovan100AmJIntL142%5B1%5D.pdf> (accessed on 17 July 2013)

¹⁶ Hixson argues that to prescribe refers to the law-making process, and it should not matter whether it arises out of the exercise of authority of the legislative, executive or judicial branch of government: Hixson K 'Extraterritorial jurisdiction under the Third Restatement of Foreign Relations Law of the United States' (1998) 12 (1) *Fordham International Law Journal* 127-152, 142.

¹⁷ *Ibid*, 150. Hixson defines adjudicative jurisdiction as the authority to subject persons or things to the process of a state's courts or proceedings.

particular matter may not necessarily have adjudicative and enforcement jurisdiction as well. Prescriptive and adjudicative jurisdiction are both given effect to by the third form of jurisdiction, namely enforcement jurisdiction, which relates to the state's power to enforce the laws which it makes. Enforcement jurisdiction is the authority to compel compliance or punish non-compliance with the laws of a state. These three are interrelated.¹⁸

Prescriptively, criminal law can and does concern itself with matters that take place abroad.¹⁹ However, in relation to enforcement, criminal law turns to a large extent on the territorial application of the legal rules governing this branch of law. This is in fact the case with most branches of law, including international law and international criminal law. The territoriality of criminal law, however, is not an absolute principle of international law. The Permanent Court of International Justice (PCIJ), the predecessor of the International Court of Justice (ICJ), had already pronounced on this point in the *Lotus* case,²⁰ and that position has become an accepted position in international law. The Court set out the following three central principles of international law pertaining to jurisdiction and territoriality in the *Lotus* case:

- 
- (a) A [s]tate may not exercise its power in any form in the territory of another [s]tate, unless there is a permissive rule to the contrary;²¹
 - (b) International law does not prohibit a [s]tate from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad. States have a wide measure of discretion to extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, which is only limited in certain cases by prohibitive rules;²² and

¹⁸ *Ibid.*

¹⁹ The exercise of legislative and adjudicative jurisdiction is an important part of state sovereignty. See Cryer R 'International criminal law vs state sovereignty: another round?' (2005) 16 *European Journal of International Law* 979 - 1000, 986.

²⁰ *The Case of the SS Lotus (France v Turkey)* 1927 PICJ Reports, Series A No.10. *In casu* a collision occurred on the high seas between a French vessel – Lotus – and a Turkish vessel – Boz-Kourt. The Boz-Kourt sank and killed eight Turkish nationals on board the Turkish vessel. The 10 survivors of the Boz-Kourt (including its captain) were taken to Turkey on board the Lotus. In Turkey, the officer on watch of the Lotus (Demons), and the captain of the Turkish ship were charged with manslaughter. Demons, a French national, was sentenced to 80 days of imprisonment and a fine. The French government protested, demanding the release of Demons or the transfer of his case to the French Courts. Turkey and France agreed to refer this dispute on the jurisdiction to the Permanent Court of International Justice (PCIJ). The case before the court was: Did Turkey violate international law when Turkish courts exercised jurisdiction over a crime committed by a French national, outside Turkey? If yes, should Turkey pay compensation to France? The court found that Turkey, by instituting criminal proceedings against Demons, did not violate international law. The full judgment is available at http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf (accessed 23 July 2013).

²¹ See the *Lotus* case paras 18 – 19.

²² *Ibid.*

(c) The territoriality of criminal law, therefore, is not an absolute principle of international law.²³

Jurisdiction is just as important to international crimes,²⁴ such as genocide, war crimes, crimes against humanity and piracy,²⁵ as well as ordinary crimes which have not yet met the threshold for an international crime, yet are of international significance, such as terrorism. John Dugard defines an international crime as a crime which threatens the good order not only of particular states but of the international community as a whole. This could be an offence under customary international law or under a particular treaty.²⁶ This resonates with the definition proffered by Luz Nagle, which views international law crimes as those domestic and international acts that affront and disrupt the rule of law. In other words, these are crimes construed to be so egregious as to shock humanity, such as genocide, crimes against humanity, and war crimes, and they became international crimes by consensus of the international community.

Jurisdiction also influences the extent to which international courts, such as the International Criminal Court (ICC) will be able to deal with violations of international law where domestic courts are unable or unwilling to do so.²⁷ This is particularly important given that the ICC's jurisdiction is complementary to that of domestic courts.²⁸ In other words, where domestic courts are unable or unwilling to prosecute international crimes, the ICC can step in and prosecute the offenders.²⁹

When a domestic court attempts to exercise jurisdiction over a matter which took place outside its territory, it does so in either of two ways. On the one hand, it can extend its jurisdiction to matters

²³ *Ibid*, para 20.

²⁴ Dugard J *International Law* (2011) 157.

²⁵ Nagle LE 'Terrorism and universal jurisdiction: opening a pandora's box?' (2011) 27:2 *Georgia State University Law Review* 338-378, 341 available at <http://digitalarchive.gsu.edu/gsulr/vol27/iss2/13> (accessed 7 August 2013).

²⁶ *Ibid*, 341. International crimes are created by customary international law, resulting from the desire of nations to conform to a consistent practice of and respect for legal obligations. The hallmark of customary international law is that it is binding on states in the absence of a treaty or convention in such a manner that a state cannot opt out of its duty to conform to a general international law. Whilst terrorism qualifies as a transnational crime, one of international concern, it has not yet reached the status of international crime under customary international law.

²⁷ The example of the Kenyan prosecutions for crimes committed during the post-election violence in 2007-08 is quite illustrative here. The ICC Office of the Prosecutor acted on its own initiative, after the approval of an ICC pre-trial chamber, to institute proceedings after Kenya failed to take action to ensure justice domestically. Kenya's leaders in 2008 initially agreed to set up a special tribunal to try cases related to the post-election violence, which claimed more than 1100 lives. But when efforts to create the tribunal or to move forward cases in ordinary courts failed, the ICC prosecutor opened an investigation. This had been recommended by a national commission of inquiry set up as part of an African Union mediated agreement to end the violence.

²⁸ Article 17 of the Rome Statute of the ICC regulates the complementarity principle. As a result, the court will not admit a matter that 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.

²⁹ According to Sedman, the provision of the Rome Statute on complementarity basically hinges on the question of whether the prosecution of an international crime can take place when one at a domestic level has already occurred. This necessitates a two-fold analysis: the principles of complementarity and that of *ne bis in idem*. See Sedman D 'Should the prosecution of ordinary crimes in domestic jurisdictions satisfy the complementarity principle?' in Stahn C & van den Herik L (eds) *Future perspectives on international criminal justice* (2010) 260.

which occurred outside its jurisdiction but which either affect its interests or harm its nationals. This means that the national court would be exercising extraterritorial jurisdiction. On the other hand, the domestic court could exercise jurisdiction without reference to any of the preceding links, but solely on the basis of the nature of the crime itself, that is under the umbrella of universal jurisdiction (UJ). UJ allows a domestic court to prosecute an offender for a crime committed elsewhere and where no other jurisdictional link connects the accused to the territory of the court.³⁰ Strict UJ applies only in the case of crimes under customary international law, in respect of which all states have a right to prosecute.³¹

A court exercises extraterritorial jurisdiction, in cases where a crime has been committed abroad, but the domestic court of the state of which the offender is a national or a citizen decides to prosecute him; thereby extending its jurisdiction outside its territory. This in most cases is mainly due to the offender's actions being in violation of his country's laws as well, even though committed outside its territory. So in most cases of extraterritorial jurisdiction, there is a link between the offender and the state prosecuting him, namely nationality,³² passive personality³³ and protection of the state.³⁴ As stated above, parallel with the concept of extraterritorial jurisdiction is UJ, through which crimes that threaten the fabric of the international legal order can be prosecuted regardless of where they are committed.³⁵ Where a court is seized of a matter in the exercise of UJ, there is often no causal nexus with the territory determining the matter, save for the presence of the accused, and the fact that his actions offend against the international legal

³⁰ Dugard J *International Law* (2011) 154.

³¹ *Ibid.* The following have been accepted as customary international law crimes: Piracy, slave-trading, war crimes, crimes against humanity, genocide and torture.

³² This principle refers to the international law doctrine that gives states the right to assert criminal jurisdiction over their own nationals, wherever they are in the world: see O'Keefe R 'Universal jurisdiction: clarifying the basic concept' (2004) 2 *Journal of International Criminal Justice* 735-760, 739; who puts forward the view that the state may criminalise conduct performed abroad by one of its nationals.

³³ This principle gives a state the right to assert jurisdiction over actors and conduct committed abroad, that is, outside the prosecuting state's territory where there has been an injury to a national of that state: see Kontorovich E 'The inefficiency of universal jurisdiction' (2008) 1 *University of Illinois Law Review* 389-418, 394.

³⁴ The protective principle of international law provides that states may exercise some jurisdiction in relation to an actor or conduct abroad that threatens their vital (usually security) interests. This doctrine is quite clear in the common law principle that states have jurisdiction over the crime of treason even when committed outside their territory. See generally Colangelo AJ 'A unified approach to extraterritoriality' (2011) 97 (5) *Virginia Law Review* 1019-1110.

³⁵ Traditionally, the extent to which states have been prepared to extend their jurisdiction beyond the confines of their borders has depended on their own legal traditions, as well as on the requirements and restrictions under international law. Even civil law countries, which were more inclined to exercise extraterritorial jurisdiction than common law states, were cautious in their approach to extraterritorial jurisdiction. As a result, they too would limit such exercise to prosecuting crimes such as treason, murder and bigamy. See Zerk J *Extraterritorial jurisdiction: Lessons for the business and human rights sphere from six regulatory areas* Working Paper No.59 Cambridge MA: JF Kennedy School of Government, Harvard University June 2010, 115.

order in which all states have an interest. It is not only the international community may defend itself with criminal sanctions against actions that offend against its legal order. Each individual state can, but is not obliged to prosecute such crimes.³⁶

The international crimes of genocide, war crimes and crimes against humanity have and continue to be committed on the African continent. Despite the many incidents of gross human rights violations accompanying the perpetration of these egregious crimes, African states have done little to bring the perpetrators to justice. This inaction has prompted foreign courts as well as the ICC to intervene. In the past decade, both Belgian and French courts have invoked UJ as a basis for indicting and prosecuting international crimes on behalf of the international community. The Office of the Prosecutor of the ICC also instituted proceedings against several African leaders. This, in turn, has incensed the AU, prompting a series of summit meetings to discuss how the AU would deal with what it perceived to be an invasion by Western states. Although the AU has not argued that the ICC is deliberately targeting African leaders by resorting to UJ, what irks the continental body is that the matters currently before the ICC are not all the result of self-referrals by the states concerned. These include the Libyan situation, which the AU believes must be allowed to be dealt with by the Libyan people themselves; the Sudanese situation, which the AU believes is a clear illustration of how a non-state party to the Rome Statute can be forced to submit to the jurisdiction of the ICC in a manner that undermines African efforts to foster peace and stability; and lastly the Kenyan situation which, according to the AU, violates 'well-founded rules' of customary international law on sovereign immunity.³⁷ These concerns have caused several African countries to call for a mass withdrawal of African states parties from the ICC Statute, a campaign that has failed to materialise.³⁸

1.2 Aims and objectives of the thesis

Although the concept of UJ on the continent dates back to the Anti-slavery Courts of the 19th Century, it is presently being used by non-African states mainly to prosecute African heads of state and senior African government officials. The decrease in the application of UJ could be attributed

³⁶ Jessberger F 'On behalf of Africa: Towards the regionalisation of universal jurisdiction?' in Werle G, Fernandez L and Vormbaum M (eds) *African and the International Criminal Court* (2014) 157.

³⁷ African Union 'Africa to Request Deferment of Indictments against Kenyan President and Vice President' 12 October 2013 available at <http://summits.au.int/en/icc/events/africa-request-deferment-indictments-against-kenyan-president-and-vice-president> (accessed 20 October 2013).

³⁸ See The Nation 'Sudan frustrated by AU failure to withdraw from ICC' available at <http://mobile.nation.co.ke/News/AU-summit-decision-on-ICC-is-frustrated/-/1950946/2030062/-/format/xhtml/-/yvae8e/-/index.html> (accessed 16 October 2013).

to the general restraint which states exercise, refraining from interfering in the domestic affairs of other states. This can further be explained by the fact that permissive jurisdictional rules, as laid out in the *Lotus Case*, have not always existed, or been clearly understood. Much of the continent's responses to UJ, even after the *Lotus* judgment, stem from attempts to prosecute African leaders for international crimes and other crimes of international concern.³⁹

Before the resurgence of the use of UJ, states within the international legal order relied on extradition in order to deal with offenders who had committed crimes within their borders but who were in other states.⁴⁰ Extradition involves the delivery by the requested state of an accused or convicted person to the requesting state which seeks to put him on trial or which has convicted him of a crime.⁴¹

States, therefore, conclude extradition treaties to secure the return of accused or convicted persons to their respective jurisdictions.⁴² However, the extradition of state leaders could often be easily defeated by considerations of sovereign immunity.

As the international legal and political landscape changed over time,⁴³ and the global call to end impunity⁴⁴ intensified, states turned to the use of these jurisdictional rules under UJ, which

³⁹ See AU Decision on the abuse of the principle of universal jurisdiction Doc.Assembly/AU/11(XIII), Assembly/AU/Dec.243(XIII) Rev.1, adopted by the 13th Ordinary Session of the AU on 3 July 2009 in Sirte, Libya.

⁴⁰ Ryngaert C 'Jurisdiction in international law' *Oxford monographs in international law* (2008) 9, states that in order to enforce laws or decisions governing transnational or foreign situations, states are required to resort to territorial measures. A sentence of imprisonment, for instance, could only be enforced if the convict is voluntarily present in the territory, or if his presence is brought about by means of extradition. Available at <http://fds.oup.com/www.oup.co.uk/pdf/0-19-954471-9.pdf> (accessed 6 August 2013).

⁴¹ Dugard J *International Law* (2011) 214.

⁴² *Ibid.*

⁴³ Arimatsu L 'Universal Jurisdiction for International Crimes: Africa's Hope for Justice?' Chatham House Briefing Paper (April 2010) IL BP 2010/01 4 available at www.chathamhouse.org.uk (accessed on 6 August 2013). Arimatsu is of the view that international law, through the principle of UJ has enabled states – acting alone but on behalf of the international community – to prosecute an individual before *domestic* courts irrespective of when, where and by whom such crimes were perpetrated. This indicates that the international sentiment is shifting and a culture of legal accountability is beginning to take root. Arimatsu lists a number of UJ prosecutions by domestic courts of states against foreign individuals where a traditional nexus does not exist. In 2002, the alleged involvement of Congo's president, the interior minister, and two senior military officials in crimes against humanity and torture committed in the Republic of Congo became the subject of a criminal investigation by the French courts on the basis of France's UJ laws on torture. In 2005 Senegal came under pressure for not using its jurisdiction under the United Nations Convention against Torture (UNCAT) to try Hissène Habré, the former president of Chad, for crimes against humanity and torture perpetrated by him during his presidency. Belgian courts, acting under Belgium's UJ laws, requested his extradition from Senegal. French courts also used UJ to bring proceedings against Rwandan national Rose Kabuye, former Chief of State Protocol, after her arrest on 9 November 2008 by German police who were acting on a French international warrant of arrest. She was charged with 'complicity to murder in relation to terrorism' under France's UJ laws, arising from her alleged involvement in the assassination of Rwanda's former President Juvenal Habyarimana, which had sparked the genocide in 1994.

⁴⁴ Impunity simply means the impossibility of bringing perpetrators of violations to account. Institutions such as the ICC are seen as critical to the fight to end impunity. See the Report of the Secretary General, 23 August 2004,

impacted on the legal regimes of various states.⁴⁵ As members of the international community most states realised that they have a direct interest in the prevention and prosecution of crimes committed against other states and against the international legal order. Despite this realisation, African states appear ambivalent when it comes to the application of the concept of UJ.⁴⁶

This thesis seeks to investigate and analyse the concept of UJ in the African context and then to illustrate, analyse and explain the existing ambivalence amongst African states to give effect to the principles of UJ. It assesses the willingness of African states to honour their international obligations as well as the cumulative effect this has on the continent's legal development and its commitment to ending impunity. The thesis, therefore, tracks the African legal developments in relation to the concept of UJ, given the cautious approach adopted by states and the African Union. The ambivalent attitude towards UJ contrasts sharply to the attitude towards extraterritorial jurisdiction as African state practice demonstrates an unquestioning embrace of the extraterritorial application of domestic laws, especially based on the protective principle.⁴⁷

The thesis, therefore, aims to:

- (1) trace the genesis of the concept of UJ;



S/2004/616, para 49 where it states that the ICC offers new hope for a permanent reduction in the phenomenon of impunity, and advances justice and the rule of law. See also Statement by the President of the Security Council, 26 June 2010, S/PRST/2010/11 in which the Security Council noted that the fight against impunity for the most serious crimes of international concern has been strengthened through the work of the ICC.

⁴⁵ Dugard J *International Law* (2011) 154. Dugard is of the opinion that this surge in the use of UJ can also be explained on the rise in multilateral treaties creating new international crimes and conferring wide jurisdictional powers upon states. See also Song SH President of the International Criminal Court *The International Criminal Court: A Global Commitment to End Impunity* (22 May 2013) Lecture presented at Bilgi University, Istanbul available at www.icc-cpi.org/iccdocs/presidency/130522-ICC-President-lecture-at-Istanbul-bilgi-University.pdf (accessed on 23 August 2013).

⁴⁶ See *AU Decision on the abuse of the principle of universal jurisdiction* Doc.Assembly/AU/11(XIII), Assembly/AU/Dec.243(XIII) Rev.1, adopted by the 13th Ordinary Session of the AU on 3 July 2009 in Sirte, Libya.

⁴⁷ The following AU member states provide for the exercise of UJ over genocide, crimes against humanity and war crimes: the Democratic Republic of the Congo (Penal Code, Book 1, Section VI, Article 3-6), the Republic of Congo (Law N° 8-98 of 31 October 1998), Ethiopia (Penal Code, Articles 17 and 18), Ghana (Courts Act 1993, Article 56(4)), Niger (Law No 2003-025 of 13 June 2003, Article 208.8), Rwanda (Organic Law No 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990), Senegal (Code of Criminal Procedure, Article 669), and South Africa (Implementation of the Rome Statute of the International Criminal Court Act 2002, Section 4). Mali establishes universal jurisdiction over genocide, crimes against humanity and terrorism (Law No 01-079 of 20 August 2001), Articles 29 to 31 (crimes against humanity and genocide) and Law No 08-025 of 23 July 2008, Articles 2 to 8 (terrorism). Certain AU member states grant universal jurisdiction over grave breaches of the Geneva Conventions 1949. These include Botswana (Geneva Conventions Act 1970, Section 3(1)), Kenya (Geneva Conventions Act 1968, Section 3(1)), Malawi (Geneva Convention Acts 1967, Section 4(1)), and Mauritius (Geneva Conventions Act 1996, Section 3(1)). See also AU Report, AU-EU Technical *Ad hoc* Expert Group on the Principle of Universal Jurisdiction (15 April 2009) available at http://www.africa-union.org/root/ar/index/Report%20UJ%20FINAL_English.pdf (accessed on 2 August 2013).

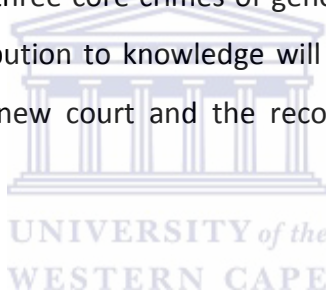
- (2) investigate the theory and practice of the concept of UJ in the African context. In other words, how has Africa dealt with perpetrators of international crimes;
- (3) assess the impact of the continent's stance towards UJ on the obligation to end impunity;
- (4) study the background to the AU's hostility towards the ICC and the possibility of withdrawal of African states from this multilateral treaty;
- (5) investigate the prospects of an African-centred UJ regime in light of current state practice;
- (6) evaluate the prospects of establishing a permanent African international criminal tribunal;
and
- (7) suggest a set of solutions that could ensure that African states act consistently in giving effect to UJ.

1.3 Significance of the study

The significance of this thesis lies in the fact that it will evaluate the genuineness of Africa's commitment to end impunity. The need to do this arises from the fact that former African heads of state, such as Idi Amin, Sani Abacha, Mobutu Seseseko, Mengistu Haile Mariam, Charles Taylor, Muammar Gaddafi, and others, who unleashed a reign of terror in their respective countries, resulting in massive human rights abuses, were largely left unmolested by the criminal justice system, even after leaving office. The AU has until now been overly protective of African heads of state under whose rule serious atrocities have been perpetrated. The continent of Africa continues to be the staging area for the commission of the crimes of genocide, war crimes and crimes against humanity, which are part of customary international law; and over which the ICC has jurisdiction. Africa's concerns are partly based on the fact that even where states have voluntarily joined the Rome Statute, the rules on sovereign immunity should apply to prevent the prosecution of sitting presidents. Another complaint by many African states is that where the ICC seeks to prosecute a president who is a leader of a state which is not a member of the Rome Statute, and that prosecution is pursuant to a referral by the United Nations Security Council (UNSC), that action amounts to forcibly subjecting the non-member state to the will of privileged states who sit permanently on the UNSC.

A key aspect of this thesis, and one which has not been thoroughly researched to date, will concern itself with the issue whether the AU, as a continental body, has developed any concrete notions on how to combat the impunity with which international crimes are committed in Africa. It is one thing to decry the workings of the ICC; it is another thing to propose or to come up with

concrete and realisable African alternatives to the present international criminal justice system. It is vital that Africa, as a burgeoning economic and political power block, be seen to assert itself more confidently on a number of international fronts, including the legal front. There is a need for African states to act in a consistent and predictable way, especially in their interactions with international bodies, for this is what underpins the continent's credibility as a trading partner and a guardian of international law. The further importance of this thesis will thus lie in studying the challenges and prospects of the AU's coming up with credible ways of meeting the norms of international criminal justice in relation to UJ. The thesis will therefore suggest a possible, plausible, and uniform roadmap for Africa's legal development and reform if impunity for international crimes is to be successfully stemmed on the continent. It should be emphasized at this point that the AU only adopted the Amendment Protocol to the Statute of the African Court of Justice and Human Rights which conferred criminal jurisdiction on the court in June 2014. As a result, no study has comprehensively dealt with the propriety or otherwise of this new court in the prosecution of perpetrators of the three core crimes of genocide, war crimes and crimes against humanity. This thesis' other contribution to knowledge will therefore be the assessment of the strengths and weaknesses of this new court and the recommendation for reform that it will suggest in the last chapter.



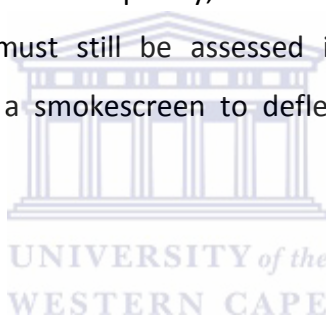
1.4 Research questions

The response of African states to the rise in the incidence of the international crimes, gives rise to the following three fundamental questions:

- (a) What are the historical and legal reasons underlying the scepticism among many African states of the ICC's exercising jurisdiction over African leaders? Are these well-founded?;
- (b) What impact does the current position of African states have in respect of their international obligation to end impunity?; and
- (c) Can the AU implement any internationally credible, alternative procedures for giving effect to UJ within the African context? And what are the realistic chances of such procedures materialising at present?

1.5 Hypothesis

The rise in negative sentiment towards the use of UJ by non-African states is largely fuelled by a perception that it is neo-colonial and a violation of the sovereign equality of states.⁴⁸ As a result,⁴⁹ African states have collectively condemned the attempts to use UJ to bring African leaders and personalities before foreign courts and international tribunals.⁵⁰ This has resulted in a galvanised political and legal stand point by African states, and which spurred some legal reforms towards the creation of an African alternative to countering impunity. This can be gleaned from the AU decision to increase the jurisdiction of the African Court of Human and Peoples' Rights through a merger with the African Court of Justice in 2005 (the Merged Court).⁵¹ In 2008, the AU took this a step further and began pondering over the idea of creating within this newly merged court a third chamber to have jurisdiction over international crimes. In 2014, the AU adopted the Amendment Protocol, thereby granting criminal jurisdiction to the Merged Court. Although this move should be commended for advancing the fight to end impunity, the willingness or determination of the AU to genuinely fight against impunity must still be assessed in order to determine if this new international criminal court is not a smokescreen to deflect ICC interventions on the African continent.



1.6 Literature review

It must be mentioned from the outset that this literature review is focused only on those authors and materials which define the scope of the thesis. In this regard, I have only utilised seminal works in the area of UJ.

⁴⁸ Arimatsu L 'Universal Jurisdiction for International Crimes: Africa's Hope for Justice?' Chatham House Briefing Paper (April 2010) IL BP 2010/01.

⁴⁹ In its decision of 3 July 2009 the AU reiterated the fact, in light of what it viewed as a skewed implementation of powers by the ICC Prosecutor and the UN Security Council, that the regional bloc together with its member states reserved the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent: see AU Decision of the Meeting of African states Parties to the Rome Statute of the International Criminal Court (ICC) Doc.Assembly/AU/13(XIII).

⁵⁰ In its resolution adopted by the 13th ordinary session of the Assembly, the AU called upon all concerned states to respect International Law and particularly the immunity of state officials when applying the principle of UJ: see *Decision on the abuse of the principle of universal jurisdiction* Doc.Assembly/AU/11(XIII) Assembly/AU/Dec.243(XIII) Rev.1, adopted by the Assembly of the AU at its 13th Ordinary Session on 3 July 2009 in Sirte, Libya.

⁵¹ The African Court on Human and Peoples' Rights is the most recent of the three regional human rights judicial bodies. It was established by a protocol which entered into force in 2004. The court basically has a human rights mandate, and not a criminal one. In July 2005 the AU Assembly decided that this court should be merged with the African Court of Justice to form one institution. The proposal for the merger was soon followed by a decision to increase the jurisdiction of the court to include criminal matters. This decision to extend jurisdiction to criminal matters was taken through Decision of the Assembly/AU/Dec.213 (XII) of February 2009. The aim was to clothe the court with jurisdiction over international crimes such as genocide, crimes against humanity and war crimes. In June 2014, the AU adopted the Amendment Protocol in Malabo, Equatorial Guinea effectively granting criminal jurisdiction to the Merged Court.

UJ was a mechanism devised to allow a state that had a tenuous connection with both the accused and the crime, or even the place where the crime is committed, to go ahead and try the offender. The incorporation of UJ into the domestic laws of states is partly a consequence of resolutions of the UNSC⁵² calling upon states to honour their international obligations and to end impunity.⁵³ Pursuant to these UNSC resolutions,⁵⁴ states enacted domestic legislation to counter the growing sense of impunity amongst criminals and to enforce their international law obligations.⁵⁵ Examples of such domestic laws are anti-terrorism laws,⁵⁶ laws aimed at implementing obligations under the Rome Statute,⁵⁷ and anti-piracy laws.⁵⁸

Even though Africa is faced with the commission of the serious international crimes under consideration, the AU displays an ambivalent attitude towards UJ. African states are keen to see ordinary perpetrators of crime prosecuted, even where only a tenuous jurisdictional connection exists.⁵⁹ But they are quick to cry foul when non-African states use the same permissive jurisdictional rules under UJ to prosecute African state leaders and personalities. It is the author's contention that this mischievous behaviour by the African bloc is sending out mixed signals on the status of UJ on the continent, and it is also helping to encourage a sense of impunity, which African states ought to be combating.

⁵² See UNSC Resolution S/Res/1325 (2000). The resolution emphasized the responsibility of states to put an end to impunity and prosecute those responsible for genocide, crimes against humanity and war crimes.

⁵³ Since UJ is largely accepted in relation to international crimes, which flow from customary international law, this obviates the need for states to ratify and domesticate treaties. Domestication is still relevant though, for crimes of international concern which have not yet attained the status of international crime such as terrorism. In such cases, the state wishing to exercise extraterritorial jurisdiction would be expected to ratify and domesticate the existing anti-terrorism conventions.

⁵⁴ Such as South Africa's Prevention and Combating of Torture of Persons Act No. 13 of 2013 (signed into law on 26 July 2013). The purpose of the Act is to give effect to the Republic of South Africa's obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; to provide for the offence of torture of persons and other offences associated with the torture of persons; and to prevent and combat the torture of persons within or across the borders of the Republic.

⁵⁵ Many African states embarked on the process of enacting anti-terrorism laws as a result of the UNSC's Resolution, calling upon states to do this. For example, Swaziland enacted the Suppression of Terrorism Act of 2008.

⁵⁶ For example South Africa's 2003 law aimed at preventing unconstitutional changes of government and terrorist activities: see in that regard the Protection of Constitutional Democracy against Terrorist and Related Activities Act No.33 of 2004.

⁵⁷ See for example, South Africa's law aimed at ensuring that the country's obligations under the Statute of the ICC are met. See in this regard the Implementation of the Rome Statute of the International Criminal Court Act No.27 of 2002.

⁵⁸ For example, Kenya has been involved in the prosecution of Somali pirates for acts committed outside Kenyan territory. Kenya's Merchant Shipping Act No.4 of 2009, in part, defines piracy as including any act against a ship, aircraft, persons or property in a place outside the jurisdiction of any state. This definition mirrors that found in Article 101, under Part VII of the United Nations Convention on the Law of the Sea of 1982. See also UNSC Resolution 1918 (2010) which calls on all states to criminalise piracy under national laws.

⁵⁹ The example of treason is instructive here. Treason is not necessarily an international crime, but a domestic offence for which states extend the reach of their laws extraterritorially, basing their jurisdiction on the allegiance owed by the perpetrator to the state. See the case of *R v Neumann* 1949 (3) SA 1238 (SC) 1246 – 9 which is authority for the position that where the individual owes allegiance to the state, either through citizenship or residence, the courts of that state have jurisdiction over treasonous acts performed abroad.

Immunity from the jurisdiction of both domestic courts and international tribunals is an important aspect of international law. The fixation on immunity is not limited to African states, but the entire international community of states has an interest in the immunity of its leaders. The major rallying point for African states against the prosecution of its sitting heads of state by both the ICC and foreign courts is that they enjoy immunity before these courts.

Stahn and van den Herik argue that such immunity operates within the domestic sphere,⁶⁰ that is on the horizontal plane and not on the vertical plane (where an international criminal tribunal is involved).⁶¹ On the horizontal plane, the sovereign of one state may not be subjected to the courts of another state. This is based on the principle of the sovereign equality of states. However, in the vertical plane, the compulsory collective security measures adopted by the UNSC under Chapter VII of the UN Charter do not allow for immunity to be raised successfully. The *Arrest Warrant* case⁶² before the ICJ emphasised the existence of the immunity of sitting heads of states in the domestic sphere, and this includes in the domestic courts of another foreign state. In *Prosecutor v Taylor*,⁶³ the accused tried to rely on the *Arrest Warrant* case to assert his immunity because at the launching of the indictment he was still a head of state. The Special Court for Sierra Leone found in favour of the prosecution, which had argued that customary international law permits international criminal tribunals to indict current heads of state, and since the Special Court for Sierra Leone was an international court and not a domestic one, the immunity referred to in the *Arrest Warrant* case did not arise here. Perhaps this line of reasoning in the *Taylor* case is partly responsible for African leaders framing their objections to the ICC's prosecution not only on the basis of immunity but also on the basis that ICC prosecutions undermine efforts of states for healing, reconciliation and the rule of law.

Africa's reliance on immunity from jurisdiction touches on both attempts to prosecute by the ICC and the domestic courts of Western states. As already stated above, UJ allows any state to prosecute alleged perpetrators of certain crimes,⁶⁴ even in the absence of a traditional nexus⁶⁵

⁶⁰ Stahn C and van den Herik L (eds) *Future Perspectives on International Criminal Justice* (2010) 194.

⁶¹ See *Prosecutor v Tihomir Blaskic* Prof. Peter Malanczuk, Request for leave to appear as *Amicus Curiae*, Case No. IT-95-14-PT, 7 April 1997, 14-15.

⁶² *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium) 2002 ICJ Reports 3.

⁶³ *Prosecutor v Taylor* Decision on immunity from jurisdiction, Case SCSL-2003-01-1, 31 May 2004, para 9.

⁶⁴ International law sought to end impunity for crimes committed by former heads of state whilst in office, and ensure justice by allowing states to prosecute perpetrators of genocide, crimes against humanity, war crimes, and other serious crimes under international law, wherever these may be committed. See the *Princeton University Programme in Law and Public Affairs, The Princeton Principles on Universal Jurisdiction, principle 1(1)*, (adopted 27 January 2001), 13 (hereafter *Princeton Principles*) available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf (accessed 14 July

with the crime, the alleged offender, or the victim.⁶⁶ This is because classical international law does not exclude a state's power in some cases⁶⁷ to exercise its judicial jurisdiction over offences committed abroad.⁶⁸ Quite often, in order to combat impunity for the crimes of genocide, war crimes, crimes against humanity, torture and forced disappearances, states assume an obligation, on the basis of customary international law, to exercise their jurisdiction over these crimes, even when they are committed abroad.⁶⁹ This is an example of UJ.

According to Cherif Bassiouni,⁷⁰ UJ is seen by many of its proponents as a panacea to the problem of impunity. It has thus become the preferred technique to prosecute offenders of international criminal law. Whilst aware of the advantages of UJ to international criminal justice, Bassiouni remains alive to the negative impact of its usage on international relations and politics. The high likelihood of politically motivated prosecutions is likely to create unnecessary frictions amongst states, and could lead to the breakdown of diplomatic relations. Bassiouni is of the view that whilst UJ has many useful purposes, it must nevertheless be used with caution in order to minimise its negative consequences.⁷¹

The author continues to assert that as much as proponents of UJ, such as prominent human rights organisations express overwhelming support for this concept, it is not as well established as they profess it to be.⁷² Bassiouni decries what he calls an effort by human rights organisations to draw up a list of countries with legal provisions that allow UJ, when in fact the provisions relied upon are not succinct. Because of this lack of clarity of UJ in the domestic sphere, its relationship with other international legal issues also remains unclear. He cites the example of immunity as a likely bar to the exercise of UJ, and argues that international opinion remains ambivalent.

2013). See the following internet address also for the Princeton Principles <http://www1.umn.edu/humanrts/instree/princeton.html> (accessed 22 July 2013).

⁶⁵ National courts administer justice by being seized of criminal matters committed in the state's territory. They also proceed against those crimes committed abroad by the nationals of the state they are in, or against the nationals of that state or against its interests. See the *Princeton Principles on Universal Jurisdiction* above, 23.

⁶⁶ South African Law Commission Project 107 *Sexual Offences Report* (December 2002) 291.

⁶⁷ These cases would include war crimes, crimes against humanity and genocide: see Colangelo AJ 'A unified approach to extraterritoriality' (2011) *Virginia Law Review* 5.

⁶⁸ For example, the Geneva Conventions of 12 August 1949 impose on the Contracting Parties an obligation not only to 'provide effective penal sanctions for persons committing, or ordering to be committed, ... grave breaches' of those conventions, but also to 'search for persons alleged to have committed, or to have ordered to be committed, such grave breaches', and to either 'bring such persons, regardless of their nationality, before its own courts', or to 'hand such persons over for trial to another High Contracting Party concerned.

⁶⁹ de Schutter O, *Report for the UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises (SRSG) on extraterritorial jurisdiction* (December 2006) 11.

⁷⁰ Bassiouni MC 'The universal jurisdiction for international crimes: Historical perspectives and contemporary practice' in Bassiouni MC (ed) *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms* (2008) 152.

⁷¹ *Ibid.*

⁷² *Ibid.*, 154.

Bassiouni's fears that improper use of UJ is likely to damage diplomatic relations amongst states rings true of the current position of the AU on the ICC's attempts to prosecute African leaders. The AU's recent summits, such as the October 2013 Extraordinary Summit, were called to address the possibility of the regional structure pulling out of the Rome Statute for the reasons cited above.

Bassiouni makes similar arguments to mine, in respect of the ICC's exercise of UJ. He differs from the stance of most authors in this regard. Whilst he is clear that none of the past attempts by international judicial organs to establish jurisdiction had been premised on UJ, there is an argument to be made in the manner in which the ICC exercises jurisdiction. The Rome Statute does not establish UJ for situations referred to it by states, but only a universal scope as to the crimes within the jurisdiction of the ICC.⁷³ Since referrals are made by a state party it is difficult to argue that the ICC's jurisdiction flows from the theory of UJ. It is the referral of matters to the ICC by the UNSC that constitutes UJ. In such referrals, the ICC is clothed with jurisdiction even if the matter complained of took place outside the territory of a state party, and involves the responsibility of nationals of non-parties.

William Schabas makes the argument that the conferment of UJ on the ICC through the UNSC referral mechanism is unfortunate. The recognition of UJ for customary international law crimes was not necessarily a deliberate thing. In the early stages of the development of UJ, the overriding consideration was that since these crimes were often committed on *terra nullius*, where no state could exercise territorial jurisdiction, it was largely acceptable for any state to prosecute the offenders.⁷⁴ Schabas further states that the ICC does not exercise UJ because a proposition to draft it into the Rome Statute was rejected during negotiations. He reveals that the thinking during the negotiations had been that what states can do in the domestic sphere, they can also do internationally. In other words, if states could exercise UJ over crimes which were not committed in their territories, they could also create an international court to do the same. Schabas only stipulates that such a move was met with objection and eventually did not find its way into the Rome Statute. Unfortunately, he does not proceed to treat the impact of the UNSC referral on the ICC's jurisdiction. My thesis departs from Schabas' approach and aligns with Bassiouni's assertion in that it makes the argument that despite the objection to UJ as envisaged during the negotiation process, the exercise of jurisdiction over matters referred to the ICC by the UNSC is an incident of UJ.

⁷³ *Ibid*, 164.

⁷⁴ Schabas W *An Introduction to the International Criminal Court* (2004) 74.

Dealing with UJ under the UN Convention against Torture (UNCAT),⁷⁵ Robert Cryer poses the question whether treaties alone can create UJ without universal ratification?⁷⁶ He then goes on to explain that broader jurisdiction would come about only if the conventions could be considered custom, otherwise third parties could protest such jurisdiction. Even though parties to these treaties may pool jurisdiction, by agreeing to waive their rights of protest with respect to other parties, those treaties cannot affect the rights of non-parties or impose an obligation on them not to protest an excessive claim of jurisdiction. Drawing inspiration from Louis Henkin,⁷⁷ Cryer argues that any attempt to assert broader jurisdictional rights must rely on the fact that such is permitted under customary international law. Currently, only the crime of torture can safely be placed in that category.

Whilst some of these authors have touched on the subject of UJ in general, the majority seem to align with the view that the ICC does not in practice exercise UJ.⁷⁸ My thesis departs from this stance in that I argue that to the extent that the UNSC referral relates to the actions of nationals of states which are not parties to the Rome Statute, it qualifies as an incident of UJ. Further, of those authors such as Bassiouni, who hold similar views to mine, their writings are focused on UJ and the ICC in general, and do not deal with the AU/ICC relations emanating from the use of UJ. This thesis therefore seeks to make a contribution to knowledge by demonstrating that even though proposals to include UJ in the Rome Statute did not succeed, the same effect was achieved by the inclusion of the provision allowing UNSC referrals.

My thesis will draw parallels from the stance of the AU towards the use of UJ by non-African states,⁷⁹ and the position of the AU in relation to the use of UJ by the ICC. To date there is no study that links these two cases. Once this link is established, the thesis will therefore be able to demonstrate that the concerns of African states are not far-fetched, but have a basis; this being the already demonstrated tendency to abuse the concept of UJ by Western states.

In this thesis I will further investigate alternatives or remedies for the African continent, in light of the current state sentiment towards UJ by both Western states and the ICC. To that end I will be

⁷⁵ Convention against Torture and Other Cruel, Inhumane or Degrading Punishment, adopted on 10 December 1984, General Assembly Resolution A/Res/39/46.

⁷⁶ Cryer R *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) 80.

⁷⁷ Henkin L *International Law: Politics and Values* (1995) 301.

⁷⁸ Ryngaert C 'The International Criminal Court and Universal Jurisdiction' Working Paper No.46 (March 2010) Leuven Centre for Global Governance Studies 4 available at https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp41-50/wp46.pdf (accessed 29 January 2014).

⁷⁹ For example the attempts to indict and prosecute African state officials by French and Belgian courts.

assessing the challenges and prospects of the newly established criminal chamber within the Merged African Court to handle prosecutions for the most egregious international law crimes. No author has made a thorough assessment of the readiness of the Merged Court to effectively dispense justice and that of African domestic judicial institutions to handle cases under the umbrella of UJ.

Some recommendations have been made in some quarters, that perhaps instead of the ICC Prosecutor dealing with matters arising from states, she should encourage bystander states to prosecute on the basis of UJ.⁸⁰ According to Cedric Ryngaert,⁸¹ this would ensure that where the state of commission of the crime is unable or unwilling to prosecute, a third state that is willing and able can proceed with the prosecution on the basis of UJ. This it is hoped would take away the animosity currently directed towards the ICC by African states, and would give effect to the complementarity principle. Whilst acknowledging that such a suggestion is to a limited extent plausible, my thesis seeks to demonstrate that to the extent that the bystander state would be a Western state, this approach would not work on the African continent. There is also little doubt that no other African state would be willing to proceed with such prosecution if it involves a head of state or a senior state official, given the current AU position. Ryngaert's arguments are also limited by the fact that his paper was focusing on the possibility of allowing bystander states to prosecute under UJ and was not specifically dealing with the African situation. It therefore does not take into account the specific concerns of the African region, which this thesis will aptly do.

John Dugard,⁸² a leading African scholar in the area of international law recognises that the ICC exercises limited UJ. Dugard states that at present UJ is not very effective, due to practical difficulties involved, in particular the collection of evidence. He makes the example of reluctance by Western states to cooperate or collect evidence in cases involving Israeli nationals, for fear of jeopardizing their relations with Israel. Dugard's opinion demonstrates that the aversion towards UJ is not only an African problem, but Western states harbour negative sentiments too. In his seminal work on international law,⁸³ Dugard does not address himself to the problems with UJ currently facing the international criminal law sector, especially the AU/ICC relations.

⁸⁰ Ryngaert C 'Jurisdiction in international law' *Oxford Monographs in International Law* (2008) 7.

⁸¹ *Ibid.*

⁸² Towards accountability: John Dugard interviewed 5 October 2010 available at <http://electronicintifada.net/content/towards-accountability-john-dugard-interviewed/9059> (accessed on 30 January 2014). Professor John Dugard is a former UN Special Rapporteur on Human Rights in the Occupied Palestinian Territories.

⁸³ See Dugard J *International Law* (2011) 157.

The aversion shown by African states towards the ICC and the usage of UJ is also largely recorded in the processes of the AU, its resolutions, decisions, press releases and media interviews. African states contend that even though a number of the African cases before the ICC are a result of self-referrals, others were not referred by the states concerned. The examples of Kenya and Sudan are instructive here. Even in those cases emanating from self-referrals, African states feel that the general treatment of African matters by the ICC shows contempt towards the continent. Speaking at its October 2013 Extraordinary Summit, AU Chairperson stated that:

[O]n a number of occasions, we have dealt with the issue of the ICC and expressed our serious concern over the manner in which the ICC has been responding to Africa's considerations. While similar requests (for deferral of prosecution) by other entities were positively received, even under very controversial circumstances, neither the ICC nor the UNSC have heeded the repeated requests that we have made on a number of cases relating to Africa over the last seven years.

He continued to state that Africa's goal is not and should not be a crusade against the ICC, but a solemn call for the organization to take Africa's concerns seriously.⁸⁴

As indicated above, even though the Rome Conference had rejected calls for UJ to apply in respect of cases referred to the ICC by states, the referral power of the UNSC satisfies the requirements of UJ. In cases that are referred to the ICC by the UNSC, there may not be any other connecting factor to establish jurisdiction. In essence, even if the crimes complained of were committed by a national of a non-state party, outside the territory of a state party and did not affect the nationals of any state party, the UNSC still has the authority to refer such a matter to the court.⁸⁵ Since there is no jurisdictional link connecting the matter with the court, this amounts to UJ. This could perhaps explain the AU's stance towards the ICC's exercise of jurisdiction. It should be noted also that as seen from the foregoing, the situations the African continent is not happy about did not necessarily result from self-referrals, even though the majority of African cases were referred to the ICC by the states themselves. The matter involving Sudan's President Al Bashir was the result

⁸⁴ See AU Press Release 'Africa to Request Deferment of Indictments against Kenyan President and Vice President' 12 October 2013 available at <http://summits.au.int/en/icc/events/africa-request-deferment-indictments-against-kenyan-president-and-vice-president> (accessed 15 October 2013).

⁸⁵ Libya for instance is not a party to the Rome Statute. Sudan as well had its matter referred to the ICC by the UNSC on the authority of Article 16 of the Rome Statute of the ICC even though it is not party to the Statute. This was done through UNSC Resolution 1970 (2011) S/Res/1970(2011) adopted at its 6491st Meeting on 26 February 2011 available at <http://www.globalpolicy.org/images/pdfs/Res1970.pdf> (accessed on 5 August 2013).

of a UNSC referral,⁸⁶ whilst the Kenyan one was the result of *proprio motu* action on the part of the ICC prosecutor.⁸⁷

At its October 2013 Extraordinary Summit the AU reiterated its commitment to fighting impunity, ensuring the rule of law, peace and stability on the continent. The AU Commission's Chairperson, Nkosazana Dlamini Zuma, pointed out that the AU has a strong policy position that the pursuit of justice should go hand-in-hand with the promotion of peace, security, stability and prosperity of African countries. This approach is further underlined by the fact that the AU stated that it is in the process of expanding the mandate of the African Court of Justice and Human Rights to try international crimes such as genocide, crimes against humanity and war crimes.⁸⁸

It is evident from the foregoing, that the concerns Africa has regarding the use of UJ by both the ICC and Western states have thus far been dealt with only in media reports, AU reports and resolutions as well as by a few scholars analysing these developments piecemeal. There is therefore, not one consolidated work on the issues as indicated in this thesis. This thesis attempts to do that.



1.7 Methodology

The main approach in the thesis will be an evaluation of the treatment of the concept of UJ by the AU, as well as by its individual members. It will narrow the focus to the following international crimes: genocide; war crimes; and crimes against humanity. The legal framework in respect of

⁸⁶ This was done through UNSC Resolution 1593 (2005), S/Res/1593(2005) adopted at its 5158th Meeting on 31 March 2005.

⁸⁷ Kenya has been a state party to the Rome Statute since 2005. On 31 March 2010, Pre-Trial Chamber II granted the Prosecutor's request to open an investigation *proprio motu* in the situation in Kenya. Following summonses to appear issued on 8 March 2011, six Kenyan citizens voluntarily appeared before Pre-Trial Chamber II on 7 and 8 April 2011. The confirmation of charges hearing in the case *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* were held from 1 to 8 September 2011. The confirmation of charges hearing in the case *The Prosecutor v Uhuru Muigai Kenyatta* took place from 21 September to 5 October 2011. On 23 January 2012, the judges declined to confirm the charges against Henry Kiprono Kosgey and Mohammed Hussein Ali. Pre-Trial Chamber II confirmed the charges against William Samoei Ruto, Joshua Arap Sang, Francis Kirimi Muthaura and Uhuru Muigai Kenyatta and committed them to trial. On 18 March 2013, the charges against Francis Kirimi Muthaura were withdrawn. The trial of William Samoei Ruto (Kenya's Deputy President) and Joshua Arap started on 10 September 2013 and the trial of Uhuru Muigai Kenyatta (Kenya's President) is scheduled to start on 5 February 2014. See http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (accessed on 28 January 2014).

⁸⁸ The AU through Decision Assembly/AU/Dec.213 (XII) of February 2009, taken in Addis Ababa, Ethiopia, by the Assembly of Heads of State and Government requested the AU Commission, 'in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, to assess the implications of recognizing the jurisdiction of the Court to try international crimes such as genocide, crimes against humanity and war crimes and to submit a report to the Assembly in 2010'. Further, through its Decision Assembly/AU/Dec.292 (XV) of July 2010, the Assembly requested the AU Commission to finalize the study on the implications of extending the jurisdiction of the African Court on Human and Peoples' Rights to cover international crimes such as genocide, crimes against humanity and war crimes and to submit, through the Executive Council.

these crimes as well as the legislation implementing obligations of states under the Rome Statute will be analysed. Evidence of African state practice will also be taken into account. The efforts by African states to sever ties with the ICC, and challenges and prospects of an African-based international criminal law forum will be assessed.

The thesis will be based on desktop research. The information will be obtained from primary sources such as treaties, protocols, draft laws, reports, decisions, communiqués and relevant secondary sources, particularly text books, journal articles, reports of international commissions and organisations, internet resources and other materials that are relevant to jurisdiction under international law, and under the headings of genocide, war crimes and crimes against humanity as listed above. Case law will also be examined for purposes of this study, and this will include jurisprudence from both domestic courts and international tribunals and how these two systems influence each other. Relevant national legislation from various African states will also be taken into account.

Whilst the thesis will be grounded in the place, history and development of the concept of UJ in the earlier chapters, it will not necessarily be limited to purely legal developments. A socio-political as well as historical analysis of the place and development of UJ on the continent will also be done. To that end, state practice and how the politics of some of the AU member states affect the overall stance of the AU will be analysed.

1.8 Chapter structure

Chapter 1 – Introduction of the subject matter and general overview of the thesis. This chapter sets out the legal controversy which forms the bedrock of this doctoral thesis, and the road map that is followed to address that controversy.

Chapter 2 – An analysis of the genesis of the concept of UJ. The chapter is a detailed examination of the historical development and current understanding of the concept of UJ and its relation to the obligation to end impunity in respect of the three core crimes.

Chapter 3 – An examination of the African legal framework on UJ, that is in the domestic legal frameworks of individual states, and under the broad scheme of the AU. In this regard, the continental attempts to develop a UJ model law are instructive.

Chapter 4 – An analysis of how the African continent has dealt with perpetrators of the three core crimes falling under the jurisdiction of the ICC, i.e. genocide, war crimes and crimes against

humanity, outside the ICC structures. In the chapter the African continent's declared aversion towards the ICC is contrasted with the current state practice. It also determines if indeed, Africa's commitment to impunity as contained in the Constitutive Act of the AU is reflected in practice.

Chapter 5 – An examination of the response of the continent to the use of UJ by foreign courts, as well as the indictment of African heads of state by the ICC. The chapter analyses what impact these two inroads into Africa had on the continent's attitude towards external legal intervention. It also seeks to understand in what ways Africa's response contributed to the development of international law.

Chapter 6 – An attempt to determine if there are any alternatives available to the African continent, in light of the failure of the campaign for an *en masse* withdrawal from the ICC in October 2013. In other words, the question is posed whether the African continent is capable of operating an international criminal court that is credible and effective in dealing with perpetrators of the core crimes. The chapter therefore traces the earliest attempts to create such a court, the recent developments in which various human rights protection mechanisms and adjudication forums were created, merged and had their jurisdiction expanded. To that end, the chapter analyses the challenges and prospects of the decision of African states to confer criminal jurisdiction upon the African Court of Justice and Human and Peoples' Rights in an attempt to determine if this move will finally assist the continent of Africa to effectively fight against impunity.

Chapter 7 – This chapter concludes and also proffer possible solutions to the current impasse in the international criminal justice sector in Africa. In essence, the chapter does, amongst other things, recommend possible amendments to the Amendment Protocol and its Statute to make the Merged African Court effective in the prosecuting perpetrators of the core crimes.

CHAPTER TWO - EVOLUTION OF THE PRINCIPLE OF UNIVERSALITY

2.1 Introduction

As indicated in the preceding chapter, jurisdiction in general is pivotal for a functional international legal order. The focus on jurisdiction in relation to international crimes is further heightened by the fact that prosecution of these crimes is often undertaken outside the *locus delicti*. This therefore necessitates the special attention that is given to extra-territorial jurisdiction in international law.¹ Extra-territorial jurisdiction effectively works as that bridge that allows for states to exercise jurisdiction over crimes committed elsewhere. Consequently, states bring alleged perpetrators of international crimes to trial before their courts on the basis of one of several principles, namely: territoriality, passive personality, nationality,² protective jurisdiction and universal jurisdiction (UJ).³

2.2 Generally accepted traditional grounds of jurisdiction in international law

2.2.1 The territoriality principle

The territoriality principle emanates from the basic international law principle that a crime committed in a state's territory is justiciable in that state.⁴ Courts often opine that conferring jurisdiction on the territorial state is based on the practical reasoning that the territorial state is the most reasonable place for a trial since witnesses and items of evidence are present there, and could more readily be accessed.⁵

Protection of sovereignty has also largely influenced the inclination towards territorial jurisdiction, thereby strengthening the traditional international law position that the geographical boundaries of a nation state provide the foundation for jurisdictional queries. In the 1600s the Treaty of Westphalia conceptualized a nation's power as ending at its territorial borders.⁶ This position persisted in the pre-twentieth century era, until the *Lotus* case laid down the rules for extra-

¹ Cryer R *Prosecuting International Crimes* (2005) 75.

² Cassese A *International Criminal Law* (2003) 277. See below for a discussion of this form of jurisdiction and the choice of this particular term.

³ Arajarvi N 'Looking back from nowhere: Is there a future for universal jurisdiction over international crimes?' (2011) 16 *Tilburg Law Review* 5 – 29, 7.

⁴ Dugard J *International Law* (2011) 149. See also *Bankovic v Belgium* (2002) 41 ILM 517; 123 ILR 94, para 59. This case views jurisdictional competence of the territorial state as having primacy of place.

⁵ Inazumi M *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (2005) 65.

⁶ Parrish A 'The Effects Test: Extraterritoriality's Fifth Business' (2008) 61:5 *Vanderbilt Law Review* 1455 -1505 , 1463, citing Gross L 'The Peace of Westphalia, 1648-1948' (1948) 42 *American Journal of International Law* 20 – 41, 28-29.

territorial jurisdiction.⁷ The principle of territoriality does not evoke as much controversy as do the other jurisdictional links.⁸ Dugard submits that if all states confined the exercise of their governmental function to their own territories there would not be much controversy around this principle.⁹ The territorial link allows a court to prosecute an offender in relation to a crime which took place on the territory of that state; or where the effects of the offence are felt on the state's territory, even if the offence was initiated outside.¹⁰

Verma is of the opinion that territorial jurisdiction has been supported by many international courts and international studies. It is much applicable to aliens as to citizens.¹¹ An alien can be exempted from this jurisdiction if he is able to show that (a) by reason of some special immunity he is not subject to the operation of the law, or (b) the local law is not in conformity with international law. Verma also posits that jurisdiction can be extra-territorial only if permitted by agreement or custom.¹² Although highly favoured as a primary jurisdictional link in international law, the territoriality principle is not absolute. This position was laid down in the *Lotus* case.¹³

International law is the language by which nations attempt to resolve competing legal interests.¹⁴ The fact that not all crimes that affect the state will take place on its territory increases the likelihood that more than one state may want to prosecute the offender. Where the offence is commenced and completed in the territory of the prosecuting state, and both victim and perpetrator are nationals of the territorial state, chances of competing legal interests are slim. However, competing jurisdictional interests may still arise if the crime had effects on a second state, or if either the victim or perpetrator was not a national of the state of commission. Competition for jurisdiction could also arise if the crime in question is of a heinous nature and

⁷ *The Case of the SS Lotus (France v Turkey)* 1927 PICJ Reports, Series A No.10. In this case, there was a collision on the high seas between a French vessel (the *Lotus*) and a Turkish vessel (the *Boz-Kourt*). The eight victims who were killed were Turkish nationals and the alleged offender was French. Turkey prosecuted Demons, the officer in charge, and sentenced him to 80 days imprisonment and a fine. The French Government protested, demanding the release of Demons or the transfer of his case to the French courts. The dispute was referred to the International Court of Justice to determine the question of whether Turkey violated international law when its courts exercised jurisdiction over a crime committed by a French national, outside Turkey. It was held that Turkey did not violate international law, since international law does not prohibit a state from exercising jurisdiction in its own territory in respect of any case which relates to acts which have taken place abroad. The court further underscored the position that the territoriality of criminal law is not an absolute principle of international law.

⁸ Dugard *J International Law* (2011) 146.

⁹ *Ibid.*

¹⁰ This is known as objective territoriality. Where the criminal act was commenced on the territory of the prosecuting state but completed in another state, the court still has jurisdiction under the principle of subjective territoriality.

¹¹ Verma *SK An Introduction to Public International Law* (1998) 53.

¹² *Ibid.*

¹³ *The Case of the SS Lotus (France v Turkey)* 1927 PICJ Reports, Series A No.10. The facts are set out above.

¹⁴ Blakesley CL 'Extraterritorial jurisdiction' in Bassiouni MC (ed) *International Criminal Law* (2008) 86.

therefore a threat to humanity as a whole. In such cases, there are bound to be more than one state competing for jurisdiction.¹⁵

As a result, international law developed other bases of jurisdiction to allow for the exercise of state power over crimes in instances where the territoriality principle is of no real value. This was one of the contributing factors to the development of universal jurisdiction as will be discussed below.

2.2.2 Passive personality

Apart from the territoriality principle, states can also exercise jurisdiction over matters occurring abroad involving their nationals in terms of the passive personality principle.¹⁶ In such cases, the state assumes jurisdiction over a particular matter because its national is a victim of the offensive conduct. The justification for exercising such jurisdiction is that each state has a perfect right to protect its citizens abroad and if the territorial state of the *locus delicti* neglects or is unable to punish the persons causing injury, the state of which the victim is a national is entitled to do so if the person responsible comes within its power.¹⁷ Under this principle, the sovereign asserting jurisdiction is concerned with the effect of the crime, rather than where it occurs.¹⁸ The requirement is that the victim of the crime must be a national of the prosecuting state, regardless of where the crime was committed.¹⁹ This is mainly caused by the state's desire to protect its nationals wherever they may be, as well as mistrust in the exercise of jurisdiction by a foreign territorial state.²⁰ States often apply this principle when a state's ambassadors or government officials are assassinated.²¹

This principle has been criticised for being the most aggressive basis for extra-territorial jurisdiction. Those opposed to it argue that the perpetrator cannot anticipate which law would be

¹⁵ Arajarvi is of the opinion that there is no clear-cut hierarchy of jurisdictions in cases of competing claims. However, on the practical level the territoriality principle seems to prevail, followed by the nationality principle. Passive personality, protective and universality principles are seen more as complementary if the territorial or national state is unable to or refuses to exercise jurisdiction. See Arajarvi N 'Looking back from nowhere: Is there a future for universal jurisdiction over international crimes?' (2011) 16 *Tilburg Law Review* 5 – 29, 7.

¹⁶ Echle R 'The passive personality principle and the general principle of *ne bis in idem*' (2013) 9 *Utrecht Law Review* 55 – 67, 60.

¹⁷ Boll M *Multiple Nationality and International Law* (2007) 130.

¹⁸ See *United States v. Aluminium Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945), where the Second Circuit held that 'any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the [s]tate reprehends'.

¹⁹ Arajarvi N 'Looking back from nowhere: Is there a future for universal jurisdiction over international crimes?' (2011) 16 *Tilburg Law Review* 5 – 29, 7.

²⁰ Cassese A *International Criminal Law* (2003) 281.

²¹ Zagaris B *International White Collar Crimes: Cases and Materials* (2010) 237.

applicable since he often does not know the victim's nationality.²² The premium that states place on the protection of their citizens even if they are perpetrators of crimes can also be seen in Article 36(1)(c) of the Vienna Convention on Consular Relations,²³ which requires that when a foreign national is detained, the country detaining him must give him immediate notice of his right to see and communicate with his consular representative.²⁴

Although initially criticised and rejected by states, this ground of jurisdiction has slowly been embraced over the past few decades.²⁵ In *United States v Benitez*,²⁶ the defendant, a Colombian national, was convicted of conspiring to murder US nationals working for the anti-narcotics agency in Columbia. It was held that the US gained jurisdiction on both the passive personality and protective principles.

The acceptance of the passive personality principle as a jurisdictional link was also demonstrated in the case of *United States v Yunis*.²⁷ *In casu*, the US prosecuted a Lebanese citizen for hijacking a Jordanian airplane in the Mediterranean in June 1985.²⁸ Since the offence took place outside American soil, the only nexus between the hijacking and the US courts was the presence of US nationals on the aircraft.²⁹

In principle states whose nationals are victims of crimes against humanity, war crimes and genocide could similarly exercise jurisdiction over offenders on the basis of passive personality. It is also expected that the territorial state would exercise jurisdiction based on the territoriality link. However, in reality the territorial state may not be willing or able to prosecute the offenders due to political considerations. Sometimes the state of commission (territorial state) and the state of the victims' nationality are the same. These core crimes are often committed by members of organised armed groups, some of whom may be agents of the state. This may leave victims without access to justice as the one state that could prosecute the perpetrators is either unwilling or unable to do so. Apart from exploring the possibility of using the nationality principle, third

²² Meyer J 'The vicarious administration of justice: An overlooked basis of jurisdiction' (1990) 31 *Harvard International Law Journal* 108 - 116, 113.

²³ Vienna Convention on Consular Relations of 24 April 1960 available at https://treaties.un.org/doc/Treaties/1967/06/19670608%2010-36%20AM/Ch_III_6p.pdf (accessed 27 March 2014).

²⁴ *Ibid.*

²⁵ McCarthy JG 'The passive personality principle and its use in combating international terrorism' (1989) 13:3 *Fordham International Law Journal* 298-327, 307.

²⁶ *United States v Benitez* 741 F.2d 1312 (11th Cir. 1984).

²⁷ *United States v Yunis* 681 F. Supp. 896 (D.D.C. 1988).

²⁸ *Ibid.*, 899.

²⁹ The court held that the US assertion of passive personality jurisdiction was proper under both international law and the domestic law of the US.

states could rely on the heinous nature of the crimes to exercise jurisdiction over the authors of such offences. Hence the inadequacies of this jurisdictional link could be mitigated by the universality principle.

2.2.3 Nationality principle

The jurisdictional link of passive personality and that of nationality are both incidents of jurisdiction based on nationality. Under passive personality, it is the nationality of the victim that connects the court with the accused thereby conferring jurisdiction upon the court to try him. Under the nationality principle, it is the nationality of the perpetrator that clothes the national court with jurisdiction. Available literature on the subject indicates that the term nationality is used interchangeably with active nationality or active personality.³⁰ I will adopt nationality to refer to the nationality principle and passive personality to indicate jurisdiction based on the nationality of the victim throughout this thesis.

The courts of the state of nationality of the accused have jurisdiction over his actions even if the offensive conduct took place outside the state's territory.³¹ States which follow the nationality principle often prosecute offending conduct committed abroad by their nationals whether or not those offences are criminal under the domestic law of that state where the offence took place.³² The prosecution is on the basis that nationality is a mark of allegiance which the person charged with the crime owes to his state of nationality.³³ The nationality principle also permits a sovereign to adopt laws that make it a crime for its nationals to engage in conduct that is not illegal in the place where the conduct is performed. Nationality is often used in cases of treason to prosecute violation of the state's integrity by its own nationals even if committed abroad.³⁴

³⁰ For example, both Cryer and Dugard refers to this ground as nationality, whilst Schabas calls it active personality.

³¹ Krings BL 'The principles of complementarity and universal jurisdiction in international criminal law: Antagonists or perfect match?' (2012) 4 *Goettingen Journal of International Law* 737 – 764, 742. See also Ireland-Piper D 'Prosecutions of extraterritorial criminal conduct and the abuse of rights doctrine' (2013) 9:4 *Utrecht Law Review* 68 – 89, 68.

³² Krings BL 'The principles of complementarity and universal jurisdiction in international criminal law: Antagonists or perfect match?' (2012) 4 *Goettingen Journal of International Law* 737 – 764, 742.

³³ Verma SK *An Introduction to Public International Law* (1998) 151.

³⁴ In the South African context, the case of *R v Neumann* 1949 (3) SA 1238 (SC) 1246 is instructive. In *Neumann*, a South African court was able to exercise jurisdiction over Neumann's treasonous acts even though committed abroad, on the basis that owing to his nationality, he still owed the state some allegiance. See also the American case of *Kawakita v United States* 343 US 717 (1952). *In casu*, a native born citizen of the US was also a national of Japan by reason of Japanese parentage and law. While a minor, he took the oath of allegiance to the US and then went to visit Japan on an American passport. When war broke out, he could not return to the US. During the war he reached majority in Japan and changed his registration from American to Japanese. He showed sympathy with Japan and hostility towards the US and even abused American prisoners of war who were forced to work at the factory that employed him. After Japan's surrender he registered as an American citizen, swore that he was an American citizen

By allowing states to apply their laws over their citizens abroad,³⁵ the nationality principle confirms the idea of the sovereignty of states not only over their territories, but also over their citizens. It further helps to emphasize the importance of territorial integrity by allowing states to maintain their interests and prevent any unlawful action that can be taken against them by persons overseas. It therefore ensures that the offending national cannot escape justice simply because none of the elements of the crime took place on the state's territory.³⁶

The American prosecution of the officer responsible for the Mai Lai massacre in Vietnam is instructive in this regard. American forces had killed the entire population of Mai Lai, a village in Vietnam during armed conflict, and this was considered a war crime. Although committed outside American territory, US courts exercised jurisdiction over Lt Calley based on the nationality link,³⁷ since no other state had requested the extradition of Lt Calley for the purposes of prosecution on the basis of any of the other jurisdictional grounds such as passive personality and UJ.

The development of the nationality principle was a response to the inadequacies of the territoriality principle. However, it also has its own shortcomings as a jurisdictional link. For instance, it only caters for offences which harm the state of nationality of the accused, and not necessarily interests of humanity in general. Hence this principle was of little help in fighting crimes against humanity, war crimes and genocide. The prosecution of such crimes often fails due to political considerations, especially in instances where the government in power is the one responsible for sponsoring these offences, even though committed abroad by its nationals. Unlike UJ, this principle attracts very little opposition.³⁸ As a result there isn't much academic discourse explaining the normative foundations of this principle. What stands out though from practice is

and had not done various acts resulting in expatriation. He returned to the US on an American passport. When charged with the crime of treason, his defence was that a person who has dual nationality can be guilty of treason only to the country where he resides, not the other country which claims him as a national. Since he resided in Japan, he owed his paramount allegiance to that country, and was in the eyes of American law, an alien enemy. His defence was rejected by the court on the basis that the definition of treason in the American Constitution does not contain a territorial limitation. Effectively, the US court could enquire into his alleged treasonous acts committed in Japan, even though he was registered as Japanese at the time of commission. In *Blackmer v United States* 284 US 421 (1932), the US Supreme Court upheld the issuance of a subpoena, pursuant to statute, to a US citizen residing abroad. The subpoena required his attendance in a US court as a witness. The reasoning of the court was that absent citizens are bound to take notice of the laws that are applicable to them and obey them. The court therefore exercises jurisdiction *in personam*.

³⁵ Liivoja R 'Service jurisdiction under international law' (2010) 11 *Melbourne Journal of International Law* 1 – 30, 10.

³⁶ Zagaris B *International White Collar Crimes: Cases and Materials* (2010) 234.

³⁷ *US v Calley* (1969) 41 CMR 96; (1973) 46 CMR 1131; (1973) 48 CMR 19.

³⁸ Liivoja R 'Service jurisdiction under international law' (2010) 11 *Melbourne Journal of International Law* 1 – 30, 13.

that it is influenced by the notion that what goes on between a state and its nationals does not concern any other state.³⁹

2.2.4 Protective principle

The protective principle enables a state to exercise its jurisdiction over foreigners, acting in foreign territory but threatening the national security of the prosecuting state. Verma states that this jurisdiction can be extended over conduct which affects a state's security, integrity and independence, including vital economic interests.⁴⁰ The rationale behind this is the concern of the state against whom such conduct is directed and the grave nature of the offences which may go unpunished simply because they do not violate the law of the land where they were committed.⁴¹

The recent case involving Nigerian oil militant Henry Okah is illustrative of the use of this principle by the courts of a foreign state.⁴² Okah was arrested, tried and convicted on charges related to terrorism in Nigeria pursuant to the South African Protection of Constitutional Democracy against Terrorism and Related Activities Act.⁴³ In this case, some of the crimes were committed in Nigeria, whilst others took place on South African soil. For example, the coordination of the terrorist activities was done in South Africa. Further, there were threats made against the South African Government and its nationals employed in Nigeria.⁴⁴ The court opined that the safety of South African citizens was threatened by the acts of the accused and that had to be punished appropriately.⁴⁵

This jurisdictional link is similar to UJ. However, the major difference between the two is that UJ protects values of the international community whereas the latter protects the national state's very own interests.⁴⁶ The protective principle is inadequate in prosecuting the core international law crimes. If the state of commission is unwilling or unable to prosecute, and the state on whose

³⁹ *Ibid.*

⁴⁰ Verma SK *An Introduction to Public International Law* (1998) 151.

⁴¹ Zagaris B *International White Collar Crimes: Cases and Materials* (2010) 234.

⁴² See *S v Okah* (SS94/11) [2013] ZAGPJHC 75. Okah was found guilty of 13 charges of terrorism, including orchestrating car bombings that killed at least 12 people during Nigeria's 2010 Independence Day celebrations. Okah is the leader of the Movement for the Emancipation of the Niger Delta (MEND), a rebel militant organization from the oil-rich Niger Delta region.

⁴³ See the South African Protection of Constitutional Democracy against Terrorist and Related Activities Act No.33 of 2004. Section 15(2) of the Act establishes extra-territorial jurisdiction for a court in South Africa to try offences of terrorism where the alleged perpetrator is found in South Africa, although the crimes were committed outside the territorial jurisdiction of the Republic.

⁴⁴ *S v Okah* (SS94/11) [2013] ZAGPJHC 75, para 11.

⁴⁵ *Ibid*, para 12.

⁴⁶ UJ is based on a joint concern of all states, the need to fight jointly against a form of criminality that affects all states. See Cassese A *International Criminal Law* (2003) 284.

territory the effects are felt is also not willing, this leaves only the state of the nationality of either the victim or the perpetrator the option to prosecute. In this case, the state of nationality of the victim is also the state on whose territory the effects are felt. Resort should therefore be to UJ provided the nature of the crime affects all humanity.

2.3 The short-comings of the traditional forms of jurisdiction

The foregoing sets out clearly the limitations and short-comings of the traditional forms of jurisdiction. Since prosecution of the core crimes often requires the indictment of perpetrators who are politically and financially established, the traditional forms of jurisdiction may not provide victims with access to justice. For instance, in genocide or war crimes cases, the government in power after the conflict may consist of the very perpetrators of these crimes. The current leadership in Kenya for instance, were indicted by the ICC for their role in the 2007 post-election violence. This is a clear example of perpetrators who become sitting heads of states and therefore become difficult to prosecute. In such instances neither the territorial link, nor the nationality links (both passive personality and nationality) would be of much use. Political will to pursue these perpetrators may not exist. Even where these crimes are committed in a foreign state by generals and other army personnel, the state of nationality of the accused may not be willing to extradite or to punish its forces for crimes committed against foreigners abroad. This therefore leaves the universality principle as the only effective alternative.

2.4 Evolution of the universality principle

2.4.1 Introduction

Legal scholarship only began to take interest in the universality principle for the purposes of exercising jurisdiction in respect of criminal prosecutions in the 17th century. However, some scholars do trace the universality principle all the way back to the era of Roman law.⁴⁷ For instance, Tamsin Paige concludes that the current use and understanding of the key term, *hostis humani generis* that formed the bedrock of the universality principle in the 17th century is actually a misnomer.⁴⁸ Paige explains that in around 1598, the term was resurrected when prosecuting pirates. But in Roman times the term had been used to refer to communities or states who engaged in the economic practice of raiding and thus in a state of constant unlawful war. In the

⁴⁷ Paige T 'Piracy and universal jurisdiction' (2013) 12 *Macquarie Law Journal* 131 – 154, 136.

⁴⁸ *Ibid*, as will be discussed in detail below.

17th century, the term took a different meaning when it was attributed to individuals who were subject to summary execution for unlawful acts of plundering.⁴⁹

What seems to have encouraged the spread of the universality principle is the fact that the concept of UJ is intimately connected to the idea that some international norms are *erga omnes*, or owed to the entire world community.⁵⁰ It is also connected to the concept of *jus cogens*, that certain international law obligations are binding on all states.⁵¹ As Jessberger notes, UJ is useful to punish perpetrators of the core crimes, which are directed against the interests of the international community.⁵²

2.4.2 The conception of the universality principle as from the 17th century

Whilst the idea of expanded jurisdiction in criminal justice predates the 20th century, the idea of conferring universal jurisdiction upon courts of a foreign state only began to be conceptualised as a legal issue after the 17th century in respect of piracy and slave-trading. Its roots go far in history, but the idea only began to be conceptualized as a general legal issue in the 20th century.⁵³ In its early stages of development the idea of UJ faced two major obstacles (i) in classical international law, states and not individuals were the exclusive subjects; and (ii) the premium placed by states on sovereignty also impeded early reception of the universality principle.⁵⁴

2.4.2.1 The emergence of broad or extended jurisdiction in the fight against piracy

As alluded to above, the principle of UJ has been applied under international law since the 17th century and it was first proclaimed in customary international law in relation to the crime of piracy.⁵⁵ Dugard also supports the position that the earliest known customary international crime

⁴⁹ *Ibid.*

⁵⁰ Abraham states that in the post-WWII era, the Nuremberg Tribunal which was set up to try war criminals fostered the emergence of idea of obligations *erga omnes* and *jus cogens* norms. An *erga omnes* obligation is one owed by a state to the international community as a whole; it is an obligation applicable to all states and all states have an interest in its protection. A norm of *jus cogens* on the other hand is a peremptory norm from which no derogation is permitted. See Abraham G 'Universal jurisdiction and the African Union – ...the wrong side of history' (2011) *African Yearbook on International Humanitarian Law* 129 – 150, 133.

⁵¹ This can also be gleaned from Justinian c 485-565 in the Roman era, where he opined that all nations are governed partly by their own particular laws, and partly by those laws which are common to all, and that natural reason appoints for all mankind.

⁵² Jessberger F 'On behalf of Africa: Towards the regionalisation of universal jurisdiction?' in Werle G, Fernandez L and Vormbaum M (eds) *African and the International Criminal Court* (2014) 157.

⁵³ Werle G *Principles of International Criminal Law* (2005) 2.

⁵⁴ *Ibid.*

⁵⁵ Cassese A *International Criminal Law* (2003) 284. See also Mugambi J 'Spain's expanded universal jurisdiction' (2007) 35:3 *Georgia Journal of International and Comparative Law* 495 – 538, 500.

was that of piracy.⁵⁶ Piracy often consists of heinous acts of violence or depredation committed indiscriminately against vessels and nationals of numerous states.⁵⁷

The earliest recorded cases involving piracy embraced the idea of a domestic court exercising UJ over pirates. Judicial thinking at the time justified this on the basis that piracy occurred on the high seas, far from territorial policing initiatives. This, therefore, meant that there was a high likelihood that pirates would quickly flee across the seas, making it impossible for states to pursue them.⁵⁸

The 1820 US Supreme Court case of *United States v Smith* is instructive in this regard.⁵⁹ *In casu* it was held that pirates being *hostis humani generis* (enemies of all humankind) are punishable in the tribunals of all nations. The court went on to state that all nations are engaged in league against pirates for the mutual defence and safety of all.⁶⁰

The reasoning in *United States v Smith* is in line with the main aim of jurisdiction based on the universality principle which is to bring to trial persons accused of international crimes, regardless of the place of commission of the crime or the nationality of the author or the victim.⁶¹ It should be noted, however, that UJ is not per se limited to criminal jurisdiction but can be extended to civil responsibility.⁶²

It is worth noting that at that stage, the concept of UJ *stricto sensu* had not developed. The courts did not even refer to it. Instead they used the analogous concept of *hostis humani generis* to emphasise that the perpetrators of piracy were enemies of all humankind; and that this fact entitled the courts of any state to prosecute them.

⁵⁶ Dugard J *International Law* (2011) 157.

⁵⁷ *Rex v Kidd* (1701) 14 How St Tr 123.

⁵⁸ Susumu T 'Suppression of modern piracy and the role of the Navy' NIDS Security Reports No.4 (March 2003) available at http://www.nids.go.jp/english/publication/kiyo/pdf/bulletin_e2002_2.pdf (accessed 13 March 2014).

⁵⁹ *United States v Smith* 18 US (5 Wheat.) 153 (1820). The accused in this case were part of a crew of an armed private vessel commissioned by the Government of Buenos Ayres. In March 1819 they mutinied and through acts of violence hijacked a vessel in the port of Margaritta. They appointed officers and proceeded on a cruise in the high seas. Whilst in the high seas they plundered and robbed a Spanish vessel. This meant that since the crew was from Buenos Ayres and they committed acts of violence against a Spanish ship on the high seas, none of the conventional forms of jurisdiction connected them with a US court. The court held that the US Government was empowered to legislate on the punishment of piracy which was a violation of the law of nations.

⁶⁰ *Ibid.*

⁶¹ Cassese A *International Criminal Law* (2003) 284.

⁶² Philippe X 'Principles of universal jurisdiction and complementarity: How do the two principles intermesh?' (2006) 88 *International Review of the Red Cross* 375 – 398, 377.

2.4.2.2 The emergence of the universality principle in the fight against slave-trading

Apart from its usage as from the early 17th century to combat piracy, UJ was also useful in quashing slave trading.⁶³ In slavery cases UJ was used to quash trading in slavery rather than the institution of slavery itself. This is because in terms of the Westphalian principle of state sovereignty,⁶⁴ the territorial state could assert jurisdiction over the already territorialised ownership and use of slaves, thereby impeding other states from making any such claims. In other words, those involved in ownership of slaves did so within the territory of a particular state, which could deal with prosecuting them.

Hajjar states that the only reason slave-trading rather than ownership of slaves contributed to the development of UJ lay in the difference in the places where these two acts were committed. Addressing the issue of the jurisdiction of territorial states over ownership of slaves, Hajjar states that the global environment of the 19th century was characterised by a racially and politically hierarchical maritime world dominated by European imperial states, and modern international law and order was a nascent project.⁶⁵ At that juncture, human beings were not subjects of international law.⁶⁶ Hence the heinousness of ownership of slaves vis-à-vis trading in slaves did not receive the same treatment. Since the ownership of slaves occurred on the territory of particular states, international law largely left the regulation of that industry to each state. However, since slave-trading occurred on *terra nullius*, the high seas, where no state could exercise jurisdiction, the international community sought to close the gap using the innovative link of UJ. Hence the focus was on slave-trading and not slavery, and this explains the push to exercise UJ over slave trading rather than slavery. In those circumstances, the practices of slave-trading and piracy were portrayed as a threat to peace and security for the international community and classified as heinous crimes. Those who perpetrated them were classified as *hostis humani generis*. Consequently no state could justify providing such perpetrators with a place of refuge. States were

⁶³ Hajjar L 'Universal jurisdiction as praxis: An option to pursue legal accountability for superpower torturers' in Sarat A and Hussain N (eds) *When Governments Break the Law* (2010) 89.

⁶⁴ The Peace Treaties of Westphalia of 1648 is widely regarded as the cornerstone of the modern, Western originated system of states and international organisation. The Westphalian System is a result of the Peace Treaties of Westphalia and Osnabruck in 1648 which formally marked an end to the 'Thirty Years War' that devastated massive parts of Europe between 1618 and 1648. The conventional view records, that the content of the Peace Treaties not only ended the war but also initiated the beginning of a new international system which is commonly considered, particularly in the discipline of international relations (IR), as the basis for the contemporary modern nation-state system based on sovereignty. This modern sovereign state system is often called the Westphalian System.

⁶⁵ Hajjar L 'Universal jurisdiction as praxis: An option to pursue legal accountability for superpower torturers' in Sarat A and Hussain N (eds) *When Governments Break the Law* (2010) 89.

⁶⁶ Today human beings are regarded as beneficiaries of international law even though they are still regarded as non-subjects. Dugard J *International Law* (2011) 1.

therefore convinced that each member of the international community had the legal power and responsibilities to prosecute or extradite such offenders.⁶⁷

2.4.3 Criticisms levelled at the analogy to piracy and slave-trading

In extending UJ to the other core crimes an analogy was made between the core crimes and piracy.⁶⁸ In the post-World War II era, the tribunals which prosecuted war criminals through the universality principle sought to justify this on the fact that like piracy, the Nazi and Japanese offences during the war involved violent and predatory action.⁶⁹ This was due to the fact that no specific precedent existed prior to WWII for subjecting war crimes and crimes against humanity to UJ.⁷⁰ The tribunals further stated that these offences were committed in locations where they could not be prevented or punished through other bases of jurisdiction.⁷¹

This analogy has been subjected to much criticism.⁷² One argument is that unlike in the case of piracy, criminal evidence is likely to be found within the belligerent states or a territorial state, rather than in the states which have the suspects in custody. That is, those states that eventually prosecuted perpetrators of crimes against humanity under the pretext of UJ. Tamsin Paige argues that notwithstanding the wide acceptance of the notion that pirates are *hostis humani generis* as the basis of UJ, this position is flawed. She makes a strong argument that jurisdiction to capture and punish pirates has always been premised upon the presupposition that the high seas are beyond the territory of any one sovereign, thus all sovereigns have a concurrent municipal jurisdiction over it.⁷³ Paige seems to corroborate Hajjar's position as illustrated in the cases of slavery and slave-trading. Whilst both were heinous in nature, only slave-trading was punishable and subjected to the universality principle. States such as Spain at that particular period continued to allow slave ownership and slave-trading. The motivation to subject slave-trading to the

⁶⁷ *Ibid.*

⁶⁸ Scharf MP 'ICC jurisdiction over nationals' in Sewall SB and Kaysen C (eds) *The United States and the International Criminal Court* (2000) 219.

⁶⁹ Morris MH 'Universal jurisdiction in a divided world: Conference remarks' (2001) 35 *New England Law Review* 337 – 361, 345.

⁷⁰ *Ibid.* Morris decries the fact that the flawed analogy between the universality principle in relation to piracy and that exercised over war crimes and crimes against humanity was not acknowledged by those who extended UJ to the latter crimes in post-WWII prosecutions.

⁷¹ Scharf MP 'ICC jurisdiction over nationals' in Sewall SB and Kaysen C (eds) *The United States and the International Criminal Court* (2000) 219.

⁷² Kontorovich argues that piracy did not become universally recognisable as a result of its perceived heinousness. See Kontorovich E 'The piracy analogy: Modern universal jurisdiction's hollow foundation' (2004) 45 *Harvard International Law Journal* 183 – 237, 186.

⁷³ Paige T 'Piracy and universal jurisdiction' (2013) 12 *Macquarie Law Journal* 131 – 154, 148.

universality principle was that traders used the high seas to transport their slaves, thereby avoiding the jurisdiction of any state.

According to Eugene Kontorovich, historical evidence does not support the view that slave-trading, like piracy exemplified a universal offence which entitled all states to prosecute offenders. He asserts that most international treaties on slave-trading created 'delegated jurisdiction' whereby several nations conveyed to one another the right to exercise some of their jurisdictional powers with respect to a particular offence. This effectively made each state an agent of the others.⁷⁴ Kontorovich continues to argue that such arrangements did not necessarily indicate or establish the universality of the aversion to the offence. Instead they are indicative of state consent by contracting parties to allow other states acting as their agents to prosecute outside the ambit of the traditional grounds of jurisdiction. This was not in any way a challenge to the Westphalian jurisdictional system and cannot therefore be considered as an example of UJ.⁷⁵

Kontorovich makes similar arguments against the idea that piracy is an early example of universal acceptance of the principle of universality. He states that no state practice supports the exercise of the universality principle over slave-trading. He argues that this misconception arose from 19th century treaties between the British, the US and a few other nations which had already banned slave-trade. This was not a universal development, but only the few states that had banned slave-trading were involved. These states entered into a series of treaties in terms of which each party was empowered to punish the slave-traders who were nationals of the contracting states. This resort to treaties according to Kontorovich is an indication that international custom did not recognise the right of third party nations to prosecute slave-traders,⁷⁶ which could have unambiguously established UJ over this crime.⁷⁷ In fact this was a reciprocal right that only these two contracting states enjoyed.⁷⁸ The fact that none of the treaties on slave-trading provided for

⁷⁴ Kontorovich E 'The piracy analogy: Modern universal jurisdiction's hollow foundation' (2004) 45 *Harvard International Law Journal* 183 – 237, 193.

⁷⁵ *Ibid.*

⁷⁶ See Additional Article to the Treaty for the Suppression of the African Slave Trade, entered into between the United States of America and her Britannic Majesty, of 7 April, 1862. It was ratified by the United States 5 March 1863. Ratifications exchanged, 1 April 1863 and it was proclaimed by the President of the United States, 22 April 1863.

⁷⁷ Kontorovich E 'The piracy analogy: Modern universal jurisdiction's hollow foundation' (2004) 45 *Harvard International Law Journal* 183 – 237, 193.

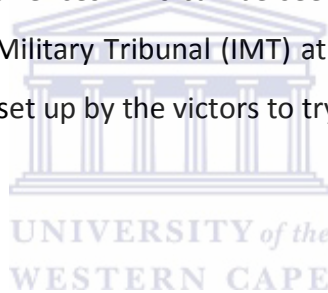
⁷⁸ The Additional Article to the Treaty for the Suppression of the African Slave Trade underscored that point and provided as follows:

Whereas, by the first article of the treaty between the United States of America and her Majesty the Queen of the United Kingdom of Great Britain and Ireland, for the suppression of the African slave-trade, signed at Washington on the 7th of April, 1862, it was stipulated and agreed that those ships of the respective navies of the two high contracting parties which shall be provided with special instructions for that purpose as hereinafter mentioned, may visit such merchant-vessels of the two nations as may, upon reasonable

UJ is also cited as the main reason why they cannot be the germ of a customary international law rule allowing states to exercise UJ over perpetrators.⁷⁹

The second criticism that has been levelled against the tendency to draw an analogy between piracy and the core crimes is that there is a real danger of political influence being thrust upon a trial especially in the case of war crimes.⁸⁰ Some critics even decry the tendency to draw an analogy between piracy and slave-trading in trying to situate the history of the universality principle. Indeed Madeline Morris indicates that whilst the case for UJ is compelling, the concept was created in haste and was characterised by long quiescent periods, followed by flurries of activity during which, in the press of events, facts were overlooked or exaggerated and flawed analogies were drawn.⁸¹

The core crimes do not take place on *terra nullius*, and hence the territorial state, or the state of nationality of either the accused or the victim ought not to be deprived of jurisdiction solely on the basis of the heinous nature of the offences. This can be seen in the criticisms that the trials that took place under the International Military Tribunal (IMT) at Nuremberg espoused more revenge than justice in that the tribunal was set up by the victors to try the vanquished.⁸²



grounds, be suspected of being engaged in the African slave-trade, or of having been fitted out for that purpose, or of having, during the voyage on which they are met by the said cruisers, been engaged in the African slave-trade contrary to the provisions of the said treaty; and that such cruisers may detain and send or carry away such vessels in order that they may be brought to trial in the manner thereafter agreed upon; and whereas it was by the said article further stipulated and agreed that the reciprocal right of search and detention should be exercised only within the distance of two hundred miles from the coast of Africa, and to the southward of the thirty-second parallel of north latitude, and within thirty leagues from the coast of the island of Cuba; and whereas the two high contracting parties are desirous of rendering the said treaty still more efficacious for its purpose, the plenipotentiaries who signed the said treaty have, in virtue of their Dill powers, agreed that the reciprocal right of visit and detention, as defined in the article aforesaid, may be exercised also within thirty leagues of the island of Madagascar, within thirty leagues of the island of Puerto Rico, and within thirty leagues of the island of San Domingo.

⁷⁹ Kontorovich E 'The piracy analogy: Modern universal jurisdiction's hollow foundation' (2004) 45 *Harvard International Law Journal* 183 – 237, 193.

⁸⁰ Inazumi M *Universal Jurisdiction in Modern International Law* (2005) 65.

⁸¹ Morris MH 'Universal jurisdiction in a divided world: Conference remarks' (2001) 35 *New England Law Review* 337 - 361, 339.

⁸² Abraham G 'Universal jurisdiction and the African Union – ...the wrong side of history' (2011) *African Yearbook on International Humanitarian Law* 129 – 150, 132. Abraham notes that even though criticised by some as the retrospective imposition of victor's justice upon the vanquished, the response of the Nuremberg Tribunal was to the effect that the wrongs committed were 'such an obvious and gross affront to human rights in every country that they were already a part of international law'.

2.5 The influence of the three core crimes in the development of the principle of universality in the post-World War II era: Nuremberg to date

Whilst the idea of UJ was originally applied to hold pirates and slave traders accountable for their crimes, the post-World War II period also offered fertile ground for the principle of universality to develop. The IMT at Nuremberg is largely accredited with having expanded the universality principle to include war crimes and crimes against humanity.⁸³ The idea of UJ was fundamental in establishing accountability in several post-World War II trials following the IMT.⁸⁴ Its expanded usage can also be explained by the adoption of new conventions containing explicit or implicit clauses on UJ.⁸⁵

Whilst the positions taken by various tribunals are largely cited as confirmation that the scope of application of UJ was indeed expanding, a close scrutiny of the key cases reveals a contradiction. But as will be shown in detail later, the jurisprudence of these tribunals was nevertheless an important factor in the evolution of UJ. The cases of *Eichmann*,⁸⁶ *Demjanjuk v Petrovsky*,⁸⁷ and *Pinochet*,⁸⁸ are often incorrectly cited as a clear demonstration of UJ being used to bring perpetrators of international crimes to justice. The cases of *Eichmann* and *Pinochet*, however, were not based on UJ. The *Eichmann* case also mentioned passive personality and the protective principle as a basis for jurisdiction. In *Pinochet* the Spanish nationality of some of the victims was an important connecting factor.⁸⁹

⁸³ See also Rikhof J 'Fewer places to hide? The impact of domestic war crimes prosecutions on international impunity' in Bergsmo M (ed) *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (2010) 69. Rikhof reiterates the point that this type of jurisdiction has been available for domestic criminal investigations for international crimes since the early 1950s as a result of the *Eichmann* case in Israel.

⁸⁴ Centre for Constitutional Rights 'Fact Sheet: Universal Jurisdiction' available at <http://ccrjustice.org/learn-more/faqs/factsheet%3A-universal-jurisdiction> (accessed 11 February 2014).

⁸⁵ Philippe X 'Principles of universal jurisdiction and complementarity: How do the two principles intermesh?' (2006) 88 *International Review of the Red Cross* 375 – 398, 378. See also discussion below.

⁸⁶ Nazi war criminal Adolf Eichmann had been apprehended in Argentina by Israeli intelligence agents and brought to trial in Israel. In a detailed opinion the court appealed to the idea of the natural law to find universal jurisdiction applied. The problem with this particular case is that even though the court seemed convinced that its actions were based on UJ, the fact that the victims were Jewish, and therefore Israeli citizens cannot be overlooked. It creates a connecting factor, that of passive personality.

⁸⁷ *Demjanjuk v Petrovsky* US Court of Appeal 6th Cir. 31.10.1985 ILR 70, 546. In this case it was stated that, 'The universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people...[and,] [t]herefore, any nation which has the custody of the perpetrators may punish them according to its law applicable to such offences.'

⁸⁸ House of Lords 24 March 1999 [1999] 2 WLR 827 (HL).

⁸⁹ Kemp G *Individual Criminal Liability for the International Crime of Aggression* (2010) 169.

2.5.1 The *Eichmann* case

Adolf Eichmann was a Nazi bureaucrat who was responsible for the deportation of hundreds of thousands of Jews from many European countries to concentration camps where they would be exterminated. He was kidnapped in Argentina in 1960 and brought to Jerusalem for trial. Israel put him on trial on charges of crimes against humanity committed against Jews outside Israeli territory. It is worth noting that the fact that Eichmann had to be abducted to be brought before the Israeli court indicates the difficulties with the universality principle. Israel could not exercise territorial jurisdiction since the crimes did not occur on Israeli soil; in fact Israel as a state did not exist at the time at the time of commission.⁹⁰ The country of his citizenship (Germany) was also not interested in exercising nationality jurisdiction over him. Neither was Argentina where Eichmann resided at the time of his kidnap. These circumstances presented international law with the first instance of a third-country trial for an international law crime, viz crimes against humanity.⁹¹ As a result, this case is largely touted as a great contributor to the development of UJ, which many scholars claim was used to bring Eichmann to trial.

What stands out in the *Eichmann* judgment is that crimes against humanity were not the primary or sole charge. Eichmann was found guilty of crimes against the Jewish people, of crimes against humanity, of war crimes and of membership in criminal associations. Thus the victim of the crimes in this instance was not humanity in general, which is a prerequisite of UJ, but the Jewish people. The reference to crimes against Jewish people is an element of passive personality. The court was creative in its reasons for exercising jurisdiction in the manner it did. It opined that Israel's right to punish the accused derives from two cumulative sources: a universal source (pertaining to the whole of human kind) which vests the right to prosecute and punish crimes of this order in every state within the family of nations; and a specific or national source, which gives the victim nation the right to try any who assault their existence.

The *Eichmann* case can be hailed for advancing, as a general principle, the idea that in certain circumstances sovereignty could be limited for such heinous crimes.⁹² In the final analysis, although this case contributed somewhat to the development of the universality principle, it is

⁹⁰ Israel only became a state on 14 May 1948.

⁹¹ Wilke C 'A particular universality: Universal jurisdiction for crimes against humanity in domestic courts' (2005) 12 *Constellations* 83 – 102, 87.

⁹² *Israel v Eichmann* 36 ILR 277, 294 [1962] (Isr.) 298 – 300. See also *R v Finta* 24 March 1994 ILR 104, 305 which advances the same position on sovereignty.

clear that the court lumped together passive personality traits whilst attempting to establish UJ through the addition of crimes against humanity and war crimes on the charge sheet.

2.5.2 The Monte case

In this case,⁹³ the defendant was not a national of one of the Axis powers, which were now prosecuting alleged war criminals. He was a Spanish national and was tried before a French military tribunal in Paris for murder and ill-treatment of Belgian and Spanish as well as French inmates at a concentration camp in Germany. This case too, did not turn solely on the universality principle, but there was a passive personality link connecting the accused with France, since some of the victims were French.⁹⁴

2.5.3 The Demjanjuk case

The case involved John Demjanjuk,⁹⁵ a native of Ukraine, one of the republics of the Soviet Union. Demjanjuk was admitted to the US in 1952 under the Displaced Persons Act of 1948 and became a naturalized US citizen in 1958. Demjanjuk was a guard at a Nazi concentration camp, Treblinka in 1942. Survivors identified him as a Ukrainian guard who was known as 'Ivan or Iwan Grozny', that is, 'Ivan the Terrible.' In 1981 a US court revoked Demjanjuk's certificate of naturalization and vacated the order admitting him to US citizenship. Israel later sought his extradition to stand trial in its courts. In granting the extradition, the court noted that the crimes for which Demjanjuk was sought were recognised by the international community as crimes of universal concern.⁹⁶ Israel was therefore within its rights to request the attendance of the accused at a trial to be conducted on the basis of the universality principle.

2.5.4 The Pinochet case

Augusto Pinochet was a former head of state of Chile. He rose to power through a military coup in 1973. In the years that followed, Pinochet ordered the torture, killing and disappearance of many political opponents. Some 25 years later in 1998, Pinochet was arrested in London at the request of a Spanish judge. Spain requested his extradition to stand trial for crimes against humanity. Although a legal order had been obtained for Pinochet's extradition, the British Home Secretary, citing Pinochet's deteriorating health decided to block the process.

⁹³ See United Nations War Crimes Commission XV Law Reports of Trials of War Criminals 43 (1947-49), 45-46.

⁹⁴ *Ibid.*

⁹⁵ *Demjanjuk v Petrovsky* 776 F.2d 571 (6th Cir. 1985).

⁹⁶ *Ibid.*, 404.

The Spanish request was not only premised on the nature of the crime (crimes against humanity) but also on the fact that some of the victims of Pinochet's torture were citizens of Spain. Just like the Eichmann case, the *Pinochet* case was also not based solely on UJ, but other jurisdictional links existed, such as passive personality.

2.5.5 The Canadian case of *R v Finta*

Canadian courts have jurisdiction to try individuals living in Canada in the event that they commit these core international law crimes on foreign soil.⁹⁷ The case of *R v Finta* is instructive in this regard.⁹⁸ *In casu*, the respondent who now lived in Canada was charged under the Canadian law with unlawful confinement, robbery, kidnapping and manslaughter of Jewish nationals during the Nazi regime's final onslaught. The crimes had occurred outside Canadian territory. There were in effect four pairs of alternate counts, one series as crimes against humanity and the other as war crimes. After the war a Hungarian court tried the respondent in absentia and convicted him of 'crimes against the people'. His punishment in that country became statute-barred and he later benefitted from a general amnesty. The Hungarian trial and conviction were found to be nullities under Canadian law and the amnesty was found not to be a pardon.⁹⁹ The pleas of *autrefois convict* or pardon were therefore not available. The court stipulated that the war crimes and crimes against humanity provision in Canada's criminal code stands as an exception to the general rule regarding the territorial ambit of criminal law. It noted also that it was Parliament's intention to extend the arm of Canada's criminal law in order to be in a position to prosecute these extraterritorial acts if the alleged perpetrators were discovered here. In dismissing the appeal the court held that the international aspect of these crimes would, pursuant to the principle of universality inherent in these grievous acts, continue to provide the jurisdictional link to Canada, so long as the international crimes were known to international law at the time and place of their commission.¹⁰⁰

2.6 The use of the universality principle after the Yugoslavia massacre

The universality principle has been re-stated and embraced by other tribunals in recent years. For instance, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), in its decision of 2 October 1995 on the defence motion for interlocutory appeal on

⁹⁷ See the Canadian Criminal Code RSC 1927, in particular section 7(3.71).

⁹⁸ *R v Finta* 1994 104 ILR 285.

⁹⁹ *Ibid.* See also the following article which the court cited with approval, Triggs G 'Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?' (1987) 16 *Melbourne University Law Review* 382 – 401, 389.

¹⁰⁰ *R v Finta* 1994 104 ILR 285.

jurisdiction in the case of *Prosecutor v Tadic*, stated that ‘universal jurisdiction [is] nowadays acknowledged in the case of international crimes’.¹⁰¹ In similar fashion, the Trial Chamber of the ICTY, in its judgment of 10 December 1998 in the case of *Prosecutor v Furundzija* reiterated that international crimes being universally condemned wherever they occur, every state has the right to prosecute and punish the authors of such crimes. It referenced the Israeli Supreme Court in *Eichmann*, and echoed by the US court in *Demjanjuk*, in re-stating that ‘it is the universal character of the crimes in question ... which vests in every state the authority to try and punish those who participated in their commission’.¹⁰²

2.6.1 The case of *Jorgic v Germany*

German prosecutors in the early 1990s were eager to prosecute war crimes suspects from the former Yugoslavia. A special unit had compiled about 100 cases against various citizens, and the aim was to rely on universal jurisdiction. The case of *Jorgic v Germany* is illustrative of this point.¹⁰³ Jorgic was a resident of Germany but was born in Bosnia, and was a national of Bosnia and Herzegovina, of Serb origin. He resided in Germany between 1969 and 1992.¹⁰⁴ He was arrested on return to Germany after a brief visit to Bosnia.¹⁰⁵ He was accused of setting up a paramilitary group which had participated in the arrest, detention, assault, ill-treatment and killing of Muslim men from three villages in Bosnia between May and June 1992. In September 1997 the Düsseldorf Court of Appeal found him guilty, in particular, of acting with intent to commit 11 counts of genocide, murder of 22 people and dangerous assault and deprivation of liberty. Stating that his guilt was of a particular gravity, the court sentenced him to life imprisonment.

The case was appealed all the way to the European Court of Human Rights where the sentence was finally confirmed. Jorgic sought to set aside the conviction on the basis that the German courts did not have jurisdiction to try his case since it involved alleged acts of genocide committed outside the territory of Germany by a foreigner against other foreigners. According to him, there was a general rule of international law, namely the duty of non-intervention, which, in principle, prohibited the German courts from prosecuting a foreigner living abroad for genocide purportedly committed by him in a foreign country against foreign victims.¹⁰⁶ He sought to rely in particular on

¹⁰¹ *Prosecutor v. Tadic* No. IT-94-1, para 62.

¹⁰² *Prosecutor v Furundzija* No. IT-95-17/1-T, para 156.

¹⁰³ *Jorgic v Germany* Case No.74613/01 available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81608#%7B%22itemid%22:%5B%22001-81608%22%5D%7D> (accessed 15 May 2014).

¹⁰⁴ *Ibid*, para 6.

¹⁰⁵ *Ibid*, para 8.

¹⁰⁶ *Ibid*, para 55.

Article VI of the Genocide Convention, to demonstrate that it excluded the jurisdiction of German courts over acts of genocide committed outside Germany by a foreigner against foreigners.¹⁰⁷ Jorgic's interpretation of Article VI was to the effect that the German courts did not have jurisdiction to try him or convict him of genocide, but only the territorial state where the crime was committed had that right.

The European Court, however, did not agree with Jorgic's assertion. It found that international law did not bar the German courts from trying the case. The court noted that indeed there was no other connecting factor, save for the gravity of the crime which made it a threat to all humanity. It further found that Article VI did not prohibit persons charged with genocide from being tried by national courts other than the tribunals of the state in the territory of which the act was committed.¹⁰⁸ Any other interpretation would not be reconcilable with the *erga omnes* obligation undertaken by the contracting states in Article I of the Genocide Convention to prevent and punish genocide.¹⁰⁹

2.7 The contribution of the prosecutions emanating from the Rwanda genocide

Whilst the prosecution of Nazi-era war criminals contributed to the development of UJ, the case of *Public Prosecutor v The Butare Four* also represents an incident of the use of UJ by a foreign court in a case not linked to the Nazi era.¹¹⁰ The accused, all Rwandan nationals were brought on trial in a Belgian court for their part in the 1994 genocide against Tutsi and the massacres of moderate Hutu committed on foreign soil.¹¹¹ The only connection the court had with the crime was the grave nature of genocide which it regarded as a threat to all humankind.

The four defendants in this case were two nuns, a factory owner and a university professor. Each was indicted for allegedly committing atrocities in the Butare prefecture in Rwanda during the Genocide. The nuns were accused of having forced Tutsis to leave the Sovo Convent when they knew that armed Hutu militia was gathered outside. Thousands of the Tutsis who had sought sanctuary were allegedly driven out and killed once outside. The university professor was accused of drawing up a list of Tutsi colleagues to be killed under the pretext of setting up an evacuation of Tutsis. He was also accused of taking part in the Tutsi killings, and authoring a manifesto for the

¹⁰⁷ *Ibid*, paras 17, 70-72.

¹⁰⁸ *Ibid*, para 20.

¹⁰⁹ *Ibid*, para 68.

¹¹⁰ *Public Prosecutor v the Butare Four, Cour d'Assises de Bruxelles* 8 June 2001.

¹¹¹ See generally Reydam's L 'Belgium's first application of universal jurisdiction' (2003) 1 *Journal of International Criminal Justice* 428 – 436.

militia. The factory owner was accused of using his factory as a training ground for extremist militia; and encouraging his employees to 'work' and achieve 'cleansing'. The four were charged with violations of humanitarian law under the Geneva Conventions of 1949. Genocide was not a charge because it was not a crime under Belgian law in 1994 when the alleged act took place. Under the 1993 law covering grave breaches of the Geneva Conventions and Additional Protocols I and II, Belgian courts had jurisdiction over such offences regardless of where they were committed, by whom or against whom. In a verdict delivered on 8 June 2001, all four defendants were convicted of international crimes arising from the Rwanda genocide and sentenced to custodial sentences, the maximum of which was 20 years.

Another instance where a foreign court used the universality principle to prosecute a foreign national for war crimes was that of *Niyontenze v Public Prosecutor*.¹¹² In this case, the accused, Fulgence Niyontenze, had committed war crimes in Rwanda against his fellow nationals, outside Swiss territory and no Swiss nationals were involved as victims. After the conflict he settled in Switzerland with his family. The court justified its exercise of jurisdiction over him on the basis of universal jurisdiction. The counts of war crimes were brought under Common Article 3 of the Geneva Conventions and Article 4(2)(a) of Additional Protocol II. The Swiss military court of final appeal upheld the 14-year sentence handed down to Niyontenze by a military court. The conviction for war crimes committed in an internal armed conflict was the first by a municipal court exercising UJ under the 1949 Geneva Conventions and Additional Protocols I and II. The Rwandan Government also lent its full support to the Swiss proceedings, including facilitating site visits.

All the cases enumerated above, beginning from the period immediately after WWII to recent cases in the Yugoslavia and Rwanda massacres, indicate a growing acceptance of UJ in respect of the core crimes.

¹¹² *Niyontenze v Public Prosecutor, Tribunal militaire de cassation (Switzerland) 27 April 2001*. On 27 April 2001 the Swiss military court of final appeal upheld a 14 year sentence handed down to Niyontenze by the lower military court. It is worth noting that the court found that the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) was relevant in this case. It thus accepted the criteria developed by the ICTR apropos war crimes and found that the 1949 Geneva Conventions were applicable in this case. The 14 year sentence handed down by the court also took into account the year Niyontenze had already spent in detention from 1996 to 2001.

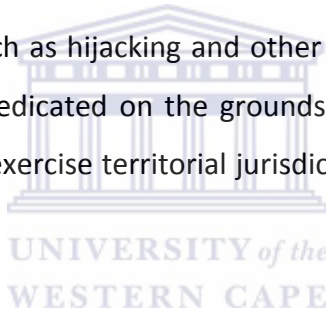
2.8 Conventional development of the universality principle

According to Cryer, the failure of national jurisdictions acting alone to suppress international crimes effectively might be the reason that new jurisdictional rules were developed.¹¹³ This led to two key developments in international law, (i) the creation of treaties permitting states to exercise jurisdiction on an expanded basis,¹¹⁴ and (ii) the rise of national UJ legislation and jurisprudence in different countries.¹¹⁵

Xavier Philippe makes mention of the Geneva Conventions of 1949 as having had tremendous influence on the re-emergence of UJ post World War II.¹¹⁶ The Conventions provide that:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.¹¹⁷

The Convention for the Suppression of Unlawful Seizure of Aircraft¹¹⁸ recognises the universality principle for particular offences, such as hijacking and other threats to air travel. Recognition for UJ over such crimes was largely predicated on the grounds that they were often committed in *terra nullius*, where no state could exercise territorial jurisdiction, or that they were transnational in nature.¹¹⁹



¹¹³ Cryer R *Prosecuting International Crimes* (2005) 79.

¹¹⁴ There are various conventions that place an obligation on states to punish and prosecute perpetrators of international crimes. These include the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 4 September 1956, 266 UNTS 3; International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 November 1973, 1015 UNTS 244; Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature 16 December 1970, 10 ILM 133; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature 23 September 1971, 10 ILM 1151; International Convention against the Taking of Hostages, adopted 12 December 1979, G.A. Res. 34/146, UN GAOR, 34th Sess., Supp. No. 99, UN Doc. A/34/819, 18 ILM 1456 (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, S. Treaty Doc. N. 100-20, 1465 UNTS 85

¹¹⁵ Cryer includes the UN Convention against Torture amongst the list of treaties that permit UJ. For example, South Africa's legislation aimed at clothing domestic courts with universal jurisdiction include (i) The Implementation of the Rome Statute of the International Criminal Court Act No.27 of 2002; (ii) The Prevention and Combating of Torture of Persons Act 2013; and (iii) the Protection of Constitutional Democracy against Terrorism and Related Activities Act No.33 of 2004.

¹¹⁶ Philippe X 'Principles of universal jurisdiction and complementarity: How do the two principles intermesh?' (2006) 88 *International Review of the Red Cross* 375 – 398, 378.

¹¹⁷ As mentioned in Article 49 of the Geneva Convention I; Article 50 of the Geneva Convention II, Article 129 of the Geneva Convention III, Article 146 of the Geneva Convention IV.

¹¹⁸ Convention for the Suppression of the Unlawful Seizure of Aircraft (1971) 860 UNTS 105.

¹¹⁹ Schabas W *Genocide in International Law: The Crime of Crimes* 2 ed (2009) 410.

According to Dugard, today piracy is codified in both the 1958 Geneva Convention on the High Seas and the United Nations Convention on the Law of the Sea (UNCLOS).¹²⁰ The crime of piracy is defined in the UNCLOS¹²¹ as consisting of any 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 passenger of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any [s]tate.

In terms of the UNCLOS, any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft qualifies as an act of piracy. Similarly any act of inciting or of intentionally facilitating any of the foregoing acts will amount to piracy.¹²²

The Genocide Convention's¹²³ contribution to the development of the universality principle came through Article 6. This article allows states or tribunals to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accused's nationality, country of residence, or any other relation with the prosecuting entity. Article 6 is thus a very controversial and difficult provision since it stipulates that genocide will be punished either by a competent tribunal of the territorial state,¹²⁴ or by 'such international penal tribunal as may have jurisdiction'. The choice of wording seems to suggest the introduction of complementarity. This controversy already played itself out in the *Eichmann* case. Little more than a decade after Article 6 was adopted, the Israeli courts dismissed Adolf Eichmann's claim that the provision was an obstacle to the exercise of UJ over genocide. It was held that despite the terms of the Convention, exercise of UJ was authorised by customary international law.¹²⁵

¹²⁰ Dugard J *International Law* (2011) 157.

¹²¹ Article 101 of the UNCLOS.

¹²² Article 101(b) and (c) of the UNCLOS.

¹²³ Convention for the Prevention and Punishment of the Crime of Genocide, adopted by General Assembly Resolution 260 (III) of 9 December 1948.

¹²⁴ Schabas is of the view that the territorial state faces many difficulties in attempting to exercise territorial jurisdiction over perpetrators of the crime of genocide. He states that the territorial state is unlikely to be willing to proceed, either because the perpetrators remain in power or influence, or perhaps because a post-genocide social and political *modus vivendi* is built upon forgetting the crimes of the past. This often presents itself in cases where peace is favoured over justice, in the process of national reconciliation and re-building. In such cases, UJ presents a workable alternative for those seeking justice, as they can approach tribunals external to the territorial state. See Schabas W *Genocide in International Law: The Crime of Crimes* 2 ed (2009) 410.

¹²⁵ Schabas W 'Introductory Note to the Convention for the Prevention and Punishment of the Crime of Genocide' available at <http://legal.un.org/avl/ha/cppcg/cppcg.html> (accessed 6 May 2014).

The drafting history of the Genocide Convention reveals the aversion of the drafters to the incorporation of the UJ in the final text. All the major powers suggested their own versions of the clause on jurisdiction, and the debate was very fierce. The Chinese version used directory wording, to the effect that, 'Genocide may be punished by any competent tribunal of the state, in the territory of which the crime is committed or the offender is found, or by such an international tribunal as may be established'.¹²⁶ The preference for directory over mandatory wording indicates that the subject of UJ has always been controversial. States like France indicated that they feared the inclusion of UJ might spark hostility in international relations.¹²⁷ The Soviet Union also opposed the internationalisation of the prosecution of genocide, preferring instead the granting of jurisdiction to the courts of the territorial state.¹²⁸ The final version of the provision was a revised version of the Chinese suggestion,¹²⁹ to include the word 'shall' in order to underscore the obligation to punish.¹³⁰

The controversy observed during the drafting stages of the Genocide Convention has lived on. There is today confusion over the nature of the universality principle as contained in the various conventions. Some scholars argue that it is merely permissive, whilst others are of the opinion that it imposes a duty to establish UJ over certain crimes. Christiane Wilke emphasises this point, when she states that there are different views on whether states exercising UJ have a right to prosecute or a duty to do so. She also cites the Genocide Convention and the Geneva Conventions as an example of conventional authority on the duty to prosecute and punish under UJ in specific circumstances,¹³¹ but asserts that international law in general grants the universal right to initiate prosecutions. In other words, international law is permissive, not obligatory. In addressing the school of thought that holds that UJ obliges states to prosecute, she posits that the duty created by UJ is an imperfect one. Such a duty falls upon all of humanity, and not on anyone in particular.

¹²⁶ Schabas W *Genocide in International Law: The Crime of Crimes* 2 ed (2009) 412.

¹²⁷ Egypt complained that it would be very dangerous if statesmen could be tried by the courts of countries with a political ideology different from that of their own, whilst the US labelled the universality principle the most dangerous and unacceptable. See Schabas W *Genocide in International Law: The Crime of Crimes* 2 ed (2009) 414.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, 413.

¹³⁰ Article 6 of the Genocide Convention provides that:

Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the [s]tate in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

¹³¹ Wilke C 'A particular universality: Universal jurisdiction for crimes against humanity in domestic courts' (2005) 12 *Constellations* 83 – 102, 88.

2.9 Universal jurisdiction in the post-International Criminal Court era

When states came together to draft and adopt the Statute of the ICC,¹³² there were arguments for UJ to be included as a ground of jurisdiction.¹³³ This motion did not receive the necessary support, as states feared it might impact negatively on the ratification process. It was felt that this would politicise the court, and make it impossible to get states to append their signatures on the treaty. As a result, UJ is currently not listed as a ground upon which the ICC could exercise jurisdiction.¹³⁴

Despite all this, it is submitted that the ICC still exercises some form of UJ whenever it acts pursuant to a referral from the UN Security Council in cases where the state under investigation is not party to the Rome Statute.¹³⁵ This point is discussed in detail in the forthcoming chapters.

2.10 Current understanding of the concept of universal jurisdiction

The problems linked to the development of the concept of UJ discussed above are exacerbated by the fact that there is no clear definition of UJ. There is neither a consensus on what UJ is or should be, nor a consensus regarding the crimes covered by the doctrine.¹³⁶ One definition advanced by

¹³² The UN convened the Preparatory Committee on the Establishment of an International Criminal Court from 25 March to 12 April and from 12 to 30 August 1996, whose task was to polish the already existing draft statute. This was followed by the diplomatic conference of plenipotentiaries in 1998 whose aim was to finalize and adopt a convention on the establishment of an international criminal court. The Assembly also decided that the Preparatory Committee would meet in 1997 and 1998 in order to complete the drafting of the text for submission to the Conference. The Preparatory Committee met from 11 to 21 February, from 4 to 15 August and from 1 to 12 December 1997, during which time the Committee continued to prepare a widely acceptable consolidated text of a convention for an international criminal court. This was followed by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held at Rome in 1998 (see General Assembly, in resolution 52/160 of 15 December 1997). The Conference had before it the draft statute which was assigned to the Committee of the Whole for its consideration. The Conference entrusted the Drafting Committee, without reopening substantive discussion on any matter, with coordinating and refining the drafting of all texts referred to it without altering their substance, formulating drafts and giving advice on drafting as requested by the Conference or by the Committee of the Whole and reporting to the Conference or to the Committee of the Whole as appropriate. On 17 July 1998, the Conference adopted the Rome Statute of the International Criminal Court, which was opened for signature on 17 July 1998 until 17 October 1998.

¹³³ Germany for instance wanted to have included in the Rome Statute a provision granting the court UJ over the core crimes. German's arguments were based on the rationale that states individually have a legitimate basis at international law to prosecute the core crimes on account of UJ. The ICC therefore had to have the same capacity as the contracting states. See Williams SA 'The Rome Statute on the International Criminal Court – universal jurisdiction or state consent – to make or break the package deal' in Schmitt MN (ed) *International Law Studies – International Law Across the Spectrum of Conflict* Vol 75, 544. The article is also available at <https://www.usnwc.edu/getattachment/91d9e125-005d-4691-8ff0-4b7c90d86d4b/The-Rome-Statute-on-the-International-Criminal-Cou.aspx> (accessed 20 May 2014).

¹³⁴ International Criminal Court 'Jurisdiction and admissibility' available at http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/jurisdiction%20and%20admissibility.aspx (accessed 20 May 2014).

¹³⁵ Article 13(b) of the ICC Statute empowers the Security Council to refer a situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

¹³⁶ Mugambi J 'Spain's expanded universal jurisdiction' (2007) 35 *Georgia Journal of International and Comparative Law* 495 – 538, 498.

the International Law Association Committee on International Human Rights Law and Practice regards UJ as the legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or victim.¹³⁷ Garth Abraham defines UJ as the assertion of jurisdiction by the domestic courts of one state in respect of crimes committed in the territory of another state by a national of another state against victims who are also nationals of another state.¹³⁸ Abraham continues to note that the crimes in question need not pose any threat whatsoever to the non-territorial state exercising UJ. Xavier Philippe submits that the principle of universality derogates from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the victim.¹³⁹ It therefore allows for the prosecution of international crimes committed by anybody, anywhere in the world.¹⁴⁰

The development of the universality principle was also characterised by the definition of the various crimes over which UJ could be exercised over the years. This was achieved through both case law and treaty law. For instance, it was noted in the *Hostage* case discussed above that:

An international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances.¹⁴¹

The grave nature of the crime and its deleterious effects on humanity in general are what make UJ a suitable jurisdictional link for prosecuting offenders. It is primarily the inherent nature of the crime, rather than any other connecting link, that makes the crime sufficient for jurisdiction to attach in the courts of the state into whose hands the criminal has fallen.¹⁴² In other words, the heinous nature and scale of the offence is what triggers UJ even in the absence of any other link. UJ could also be triggered by the inadequacy of national enforcement legislation with regard to offences committed in locations not subject to the authority of any state.¹⁴³

¹³⁷ International Law Association Committee on International Human Rights Law and Practice 'Final Report on the exercise of universal jurisdiction in respect of gross human rights offences' (2000) 2.

¹³⁸ Abraham G 'Universal jurisdiction and the African Union – ...the wrong side of history' (2011) *African Yearbook on International Humanitarian Law* 129 – 150, 130.

¹³⁹ Philippe X 'Principles of universal jurisdiction and complementarity: How do the two principles intermesh?' (2006) 88 *International Review of the Red Cross* 375 – 398, 377.

¹⁴⁰ *Ibid.*

¹⁴¹ *The Hostage* case, US Military Tribunal, Judgment of 19 February 1948, 10, available at <http://werle.rewi.hu-berlin.de/Hostage%20Case090901mit%20deckblatt.pdf> (accessed 26 February 2013).

¹⁴² *Ibid.*

¹⁴³ Bantekas I and Nash S *International Criminal Law* 2ed (2003) 96.

Even though there is no consensus on the definition of UJ and the crimes in respect of which it can be exercised, UJ unlike the other types of criminal jurisdiction recognised under international law, is not grounded in some concrete nexus between the forum state and the crime.¹⁴⁴ UJ is well suited for those crimes which are understood to undermine the foundations of the international community as a whole, and impair its very stability.¹⁴⁵ The competence of the court exercising UJ therefore derives from the universal character of the crimes committed, which gives every state the right to judge and punish the crimes in question.¹⁴⁶

There is no generally accepted definition of UJ in both customary international law and conventional law today.¹⁴⁷ Judge Van den Wyngaert in the *Arrest Warrant* case opined that despite the uncertainties that may exist concerning the definition of UJ, it has one clear advantage. She posits that the *ratio legis* of UJ is based on the international reprobation for certain very serious crimes such as war crimes and crimes against humanity. According to the judge, the main reason for the existence of the universality principle is to avoid impunity and to prevent suspects of such crimes finding a safe haven in third countries.¹⁴⁸ Judge Van den Wyngaert's position was corroborated by the opinion of Judge President Gillaume, in which he stated that the only established rule of international law conferring UJ on the courts of foreign courts was in relation to the crime of piracy.¹⁴⁹

Without attempting to define the concept, Bruce Zagaris states that the principle of UJ enables a state to exercise jurisdiction to prescribe for a class of offences known as *delicta juris gentium* or certain crimes under international law.¹⁵⁰ These acts constitute crimes under international law that the community of nations recognizes as warranting universal concern. The motivation for allowing states such prescriptive jurisdiction is that these crimes by their very nature threaten to undermine the very foundations of the enlightened international community. This, therefore,

¹⁴⁴ Zemach A 'Reconciling universal jurisdiction with equality before the law' (2011) 43 *Texas International Law Journal* 143-199, 144.

¹⁴⁵ *Eichmann*, 36 I.L.R. 277, 294 [1962] (Isr.).

¹⁴⁶ Bazylar MJ and Scheppach J 'The strange and curious history of the law used to prosecute Adolf Eichmann' (2012) 34 *Loyola of Los Angeles International and Comparative Law Review* 417-461, 441.

¹⁴⁷ See the opinion of Judge Van den Wyngaert in the case of *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* 2002 ICJ Reports 3, para 44.

¹⁴⁸ *Ibid*, para 45.

¹⁴⁹ See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002, para 15.

¹⁵⁰ Zagaris B *International White Collar Crimes: Cases and Materials* (2010) 239.

entitles each state to the right to exercise jurisdiction over the offender, even where the other jurisdictional bases are not present.¹⁵¹

As international relations developed, the inadequacies of the traditional forms of jurisdiction became much more pronounced in international criminal justice. According to James Fawcett, even before WWII there was a strong doubt as to the efficacy of the exercise of exclusive jurisdiction over war crimes by one state, based on the nationality of the victim or the offender or the locality of the crime.¹⁵² It was clear that national jurisdiction alone could not effectively suppress these core international law crimes. The world was intent on putting an end to impunity, and the inefficacy of the traditional jurisdictional links was, in a sense, a catalyst for impunity. Hence the emergence of the universality principle.

Today these core crimes are also designated as punishable crimes under the Rome Statute.¹⁵³ Dugard further emphasises that true UJ applies only in respect of crimes under customary international law, and empowers, but does not compel states to prosecute.¹⁵⁴ This seems to be the position in respect of UJ under customary international law *stricto sensu*, as Claus Kress emphasises that the criminalisation of certain conduct under international law does not necessarily coincide with the existence of a right of states to UJ. The latter must still be proven with respect to each crime under international law.¹⁵⁵

International law currently recognises two schools of thought in relation to the universality principle. The first is called the narrow notion of UJ, whilst the second is referred to as the broad notion of UJ.¹⁵⁶

2.10.1 The narrow notion of universal jurisdiction

The narrow notion of the universality principle is also known as conditional UJ. According to Cassese, this narrow version of the universality principle is widespread and largely embraced by states.¹⁵⁷ The narrow or conditional version is premised on the presence of the accused in the territory of the state that seeks to prosecute him. In other words, the state's ability to exercise

¹⁵¹ *Ibid.*

¹⁵² Fawcett J 'The Eichmann Trial' (1962) 38 *British Yearbook of International Law* 181 – 215, 204.

¹⁵³ De Wet E 'The prohibition of torture as an international norm of *jus cogens* and its implication for national and customary law' (2004) 15 *European Journal of International Law* 91 – 121, 97.

¹⁵⁴ Dugard J *International Law* (2011) 154.

¹⁵⁵ Kress C 'Universal jurisdiction over international crimes and the *institute de droit international*' (2006) 4 *Journal of International Criminal Justice* 561-585, 561, 572.

¹⁵⁶ Cassese A *International Criminal Law* (2003) 285.

¹⁵⁷ *Ibid.*

jurisdiction over such an accused is conditional upon his presence on its territory. This version of UJ reflects customary international law as established in relation to the crime of piracy.

The Geneva Conventions also embrace this version of the universality principle. These conventions, however, not only empower states to prosecute offenders found on their territory, but also enjoin states to do so. In the event that a state is unable to do so, it is under a duty to extradite the offender to another state that would be willing and able to do so. The Geneva Conventions in that regard entrench the principle of *aut dedere aut judicare*.¹⁵⁸

2.10.2 The broad notion of universal jurisdiction

Unlike its counterpart, the broad notion of UJ does not enjoy widespread acceptance. In fact it has been the basis of political jostling as African states raised their concerns about its usage by Western states in recent years. It differs markedly from the narrow version in that the accused person need not necessarily be present in the territory of the prosecuting state before legal process can be commenced against him. As a result, a warrant of arrest can be issued against an alleged offender who has no connection with the territorial state, and will likely never set foot on its territory.

Bassiouni argues that UJ is not as well established in conventional and customary international law as those advocating for it claim it to be. He cites major human rights organisations as some of those proponents of the universality principle that attempt to carve out a settled position for UJ by misinterpreting the domestic legal provisions of a number of states.¹⁵⁹

Bassiouni posits that the theory of UJ lies outside the concept of national sovereignty.¹⁶⁰ He continues to state that the universality principle displaces the right of the accused to be tried by the natural judge, which is a hallmark of the traditional exercise of territorial jurisdiction. Bassiouni does not expand on the concept of the natural judge, however, it is submitted that this is in reference to the territorial judge. There are therefore three points or rationale for this universality principle to be considered and accepted as a ground for the exercise of jurisdiction by a state which has no connection with the crime, the victim or the perpetrator. These are: (i) the fact that no other state can exercise jurisdiction on the basis of the traditional doctrines (that is territorially,

¹⁵⁸ See Article 49 of Geneva Convention I, Articles 50 of Geneva Convention II, Article 129 of Geneva Convention III and Article 146 of Geneva Convention IV.

¹⁵⁹ Bassiouni MC 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practice' in Bassiouni MC (ed) *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms* 3 ed (2008) 153.

¹⁶⁰ *Ibid*, 162.

nationality and protected interest); (ii) the fact that no other state has a direct interest in the matter; and (iii) that there is an interest of the international community at stake, hence the need for the prosecuting state to enforce it.¹⁶¹

2.11 The relationship between universal jurisdiction and the obligation to end impunity

Proponents of UJ argue that this concept holds out the promise of greater justice.¹⁶² Yet even its advocates concede that this weapon against impunity is potentially beset by incoherence, confusion, and, at times, uneven justice.¹⁶³

According to Bassiouni,¹⁶⁴ UJ has become the preferred technique by those seeking to prevent impunity for international crimes. However, there is a danger in that it can be used in a politically motivated manner, or to vex and harass leaders of other states. If used imprudently it could create unnecessary frictions between states and abuses of the legal process. These concerns, therefore, underlie the existing controversies and conflicts of opinion regarding UJ. As explained above there are two uncontroversial grounds of jurisdiction in international law, territoriality and nationality.¹⁶⁵ The right to assert territorial jurisdiction is a right inherent in sovereignty.¹⁶⁶

It is interesting to note that there is no rule of international law that places priority on UJ over the other forms of jurisdiction.¹⁶⁷ International customary law does not recognize any hierarchy among the different types of criminal jurisdictions. Even though some scholars contend that the state of commission of the crime has primacy of place, there is no conclusive evidence regarding the existence of a rule of customary international law which may provide for the priority of the territoriality principle.¹⁶⁸ The position that certain jurisdictional links, such as territoriality and nationality enjoy primacy of place has also found judicial favour in the *Arrest Warrant* case.¹⁶⁹

¹⁶¹ *Ibid.*

¹⁶² *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* 2002 ICJ Reports 3 para 45.

¹⁶³ Princeton University Programme in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction*, principle 1(1) (adopted 27 January 2001) available at http://lpa.princeton.edu/hosteddocs/unive_jur.pdf (accessed 14 July 2013).

¹⁶⁴ Bassiouni MC 'The history of universal jurisdiction and its place in international law in Macedo S (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* 40.

¹⁶⁵ Cryer R *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) 75.

¹⁶⁶ *Island of Palmas Case* (1928) 2 RIAA 829, 838.

¹⁶⁷ Jessberger F, Kaleck W, and Schueller A 'Concurring criminal jurisdictions under international law' in Bergsmo M (ed) *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (2010) 237.

¹⁶⁸ See also AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction Report (2009), 8672/1/09 Rev 1 Annex, para 14, at 11.

¹⁶⁹ See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* 2002 ICJ Reports 3.

2.12 Concluding remarks

When looking closely at the development of the universality principle, it is clear that its growth can be attributed to the fact that it allowed states to establish jurisdiction over crimes committed within an environment of lawlessness. This is due to the fact that both piracy and slave-trading were committed on the high seas. By implication, UJ in respect of the core crimes ought to operate only in situations where the state of commission of the crime fails to prosecute and can thus be regarded as the moral equivalent to the lawlessness of the high seas.¹⁷⁰ The drafting history of conventions such as the Genocide Convention also reveals that this was one of the considerations during the debates on whether to include UJ in such treaties or not.¹⁷¹ For example, India argued that comparing genocide with other UJ crimes such as piracy and slave-trading was not helpful, given the fact that the key consideration for conferring this kind of jurisdiction on piracy was that it took place on *terra nullius*. Arguments that UJ was recognised in cases of trafficking in women or piracy were explained by the Soviet Union as premised on the fact that it was difficult to determine the exact location where the crime was committed. This cannot be said of the crime of genocide, neither can it be said of crimes against humanity and war crimes. These core crimes are often committed on the territory of one or several states, which could have jurisdiction in respect of the territorial link. Further, such crimes often affect citizens of other third states, thereby conferring a passive personality link on those states.

The broad notion of UJ is too wide, for it allows states which have no connection whatsoever with the accused to prosecute him, even if he cannot be located on their territory. Many states view the exercise of broad UJ as an affront to their sovereignty. The *Arrest Warrant* case is instructive in this regard, as it demonstrates the political and diplomatic problems that arise as a result of the use of the broad notion of UJ.¹⁷²

¹⁷⁰ Wilke C 'A particular universality: Universal jurisdiction for crimes against humanity in domestic courts' (2005) 12 *Constellations* 87.

¹⁷¹ Schabas W *Genocide in International Law: The Crime of Crimes* 2 ed (2009) 414.

¹⁷² *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* 2002 ICJ Reports 3. In this case Rwanda hauled Belgium before the ICJ following a dispute in which Belgium was accused of violating Rwanda's sovereignty after the former indicted a Rwandan national, Yerodia, purportedly under UJ for crimes allegedly committed in Rwanda against Rwandan nationals. The warrant of Mr Yerodia's arrest was also issued in absentia.

CHAPTER THREE – THE CONCEPTUAL AND LEGAL FRAMEWORK OF THE UNIVERSALITY PRINCIPLE IN THE AFRICAN CONTINENT

3. Background

Recent developments in international criminal law, particularly in the area of UJ, have left an indelible mark on the continent. The legal, political and diplomatic wrangling that preceded the prosecution of Hissène Habré by Senegal, the prosecution of Rwandan nationals by Belgium and Switzerland, as well as the indictment of a former DRC minister of state by Belgium are pertinent examples. These contentious matters further underscore the hallmark of international law, which is its reliance on state consent for new rules of law to be accepted as such. Acceptance of a rule by states or a sense of obligation (*opinio juris sive necessitatis*)¹ should be accompanied by wide usage over time or what is called settled practice (*usus*),² and the confluence of these two gives birth to customary international law.

The universality principle is widely accepted as a competent jurisdictional link under customary international law,³ and no state in Africa disputes this in principle.⁴ The AU, in its October 2013 Extraordinary session, reaffirmed its previous Decisions on the abuse of the principle of UJ,⁵ whilst expressing its strong conviction that the search for justice is imperative in the fight against impunity. It further stressed that UJ-based prosecutions must be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace.⁶ These various Decisions of the AU, whilst denouncing the manner in which UJ has been used,⁷ have remained firm on its importance to international criminal justice.⁸

¹ Dugard J *International Law* (2011) 26.

² *Ibid*, 29.

³ See Henckaerts JM & Doswald-Beck L *Customary international humanitarian law* Vol. 1 Rules (2005) 604; See also Philippe X 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (2006) 88 *International Review of the Red Cross* 375-398, 386.

⁴ Even on the African continent, the staging area for recent misgivings about the principle of universality, the states are not opposed to the principle per se, but are concerned with the politicised manner in which it is being applied.

⁵ These include AU Decision on the abuse of the principle of universal jurisdiction, adopted in Sharm El Sheikh in July 2008, as well as a various AU Decisions on the activities of the ICC in Africa adopted in January and July 2009, January and July 2010, January and July 2011, January and July 2012, and May 2013.

⁶ See AU Decision on Africa's relationship with the International Criminal Court Ext/Assembly/AU/Dec.1-2(Oct.2013), adopted at the AU's Extraordinary Session on 12 October 2013 in Addis Ababa, Ethiopia.

⁷ See also AU Decision on international jurisdiction, justice and the International Criminal Court Doc.Assembly/AU/12(XXI), Assembly/AU/Dec.482(XXI), adopted at the 21st Ordinary Session of the AU 26-27 May 2013 in Addis Ababa, Ethiopia, para 4. Note that the Republic of Botswana was the only country to enter a reservation to the entire Decision.

⁸ *Ibid*, para 3.

Even though states agree on the importance of UJ, there is disagreement regarding the international law crimes over which this jurisdictional link should be employed. This has raised concerns over the manner in which the universality principle has sought to be used by both foreign courts and the ICC.⁹ This resulted in African and some non-African states uniting to denounce what they perceived as abuse of the principle by mainly Western states,¹⁰ which were allegedly pursuing a neo-colonial agenda against African states. To ensure that its reservations were placed in the international arena, the AU decided to request African states parties to the Rome Statute to inscribe on the agenda of the forthcoming sessions of the Assembly of States Parties the issue of the indictment of African sitting heads of state; and to highlight the consequences of such actions on peace, stability and reconciliation in the AU member states.¹¹

3.1 A brief overview of the position of universal jurisdiction in some Western and Asian states, and under the African Union legal framework

Outside the continent of Africa, states like Canada,¹² Belgium,¹³ France,¹⁴ the Netherlands,¹⁵ Spain,¹⁶ and Switzerland¹⁷ are keen adherents of the universality principle. For some of these

⁹ *Ibid*, para 4. The AU reiterated its concern on the politicisation and misuse of indictments against African leaders by the ICC as well as at the unprecedented indictments of and proceedings against the sitting President and Deputy President of Kenya.

¹⁰ See Sixth Committee Debate, 'Delegates cite abuse of universal jurisdiction, lip service to fight against impunity', Sixty-Eighth General Assembly, 14th Meeting, 18 October 2013, GA/L/3462. During the debate many state representatives voiced their concerns about the manner in which the principle of universality was being used by what they termed 'police states' in violation of international law. Their major concern was that this legal avenue was being politicized, and used in disregard of state sovereignty and the jurisdictional immunities that state officials enjoy under international law. Speaking at the Debate were representatives from a number of African states including Mozambique (which stressed that UJ has political consequences and up to now has been used by non-African states to prosecute African leaders unilaterally), Equatorial Guinea (whose representative expressed concern about the political nature and abuse of the principle of universality by what he referred to as 'police states'), Kenya (which urged caution when exercising the principle and not be used only as lip service in the fight against impunity as is currently the case), Lesotho (which raised concern that UJ is currently being used to serve the caprices of individual [non-African] states), and Uganda (whose representative called for a working group to assist states reach a consensus on the scope and application of the principle of UJ). Non-African states also raised similar concerns about the misuse of UJ. These include Iran (which raised concerns about the violation of jurisdictional immunities of heads of state), Azerbaijan (whose concerns included selectivity and politically motivated prosecutions), Cuba (which raised concerns about UJ being used to undermine the integrity of various legal systems), Italy (which called for a detailed study of the concept as it is currently a murky area), Israel (which called for additional state reports on the topic in order to deal with the inconsistencies in its application), and Viet Nam (whose concerns centred on sovereign equality, political independence and non-interference in the internal affairs of other states).

¹¹ See the Decision of the AU, Ext/Assembly/AU/Dec.1-2(Oct.2013), Decision on Africa's relationship with the International Criminal Court adopted on 12 October 2013 in Addis Ababa, Ethiopia, para 10(vii).

¹² Canada became the first country in the world to incorporate the obligations of the Rome Statute into its national laws when it adopted the *Crimes Against Humanity and War Crimes Act (CAHWCA)* on 24 June 2000. Canada was then able to ratify the Rome Statute on 9 July 2000. This move also necessitated that other laws pertinent to criminal law and procedure in Canada be amended accordingly. These include the Criminal Code, the Extradition Act and the Mutual Legal Assistance in Criminal Matters Act. The CAHWCA incorporates all the traditional forms of jurisdiction and also adds UJ as a permissible jurisdictional ground for the prosecution of the core crimes. This law is consistent with Canada's previous war crimes policy, as illustrated in the case of *R v Finta* 1994 104 ILR 285 which had been brought

states the initial approach was to adopt the broad notion of UJ, where the presence of the accused was not a prerequisite to the exercise of jurisdiction.¹⁸ However, political and diplomatic pressure forced the likes of Belgium to amend their laws and embrace the narrow version of UJ instead.¹⁹ For instance, Belgium first enacted the Act on the Punishment of Grave Breaches of International Humanitarian Law in 1993 to confer UJ over its courts in relation to war crimes. In 1999 the law was amended to include genocide and crimes against humanity. Section 7 of the 1993 Act allowed Belgian courts to prosecute a foreigner for offences committed abroad against another foreigner, even if the accused could not be found in Belgium. In that regard it embraced the broad notion of

under the Criminal Code RSC 1927, in particular Section 7(3.71), which involved prosecution of a foreigner for crimes committed against non-Canadian citizens outside Canada during the Nazi regime. This case was discussed in detail in Chapter 2 above. See Foreign Affairs, Trade and Development 'Canada's Crimes Against Humanity and War Crimes Act' available at <http://www.international.gc.ca/court-cour/war-crimes-guerres.aspx?lang=eng> (accessed 7 June 2014).

¹³ See Lamaitre R 'Belgium rules the world: universal jurisdiction over human rights atrocities' available at <http://www.law.kuleuven.be/jura/art/37n2/lemaitre.htm> (accessed 11 June 2014).

¹⁴ The French Code of Criminal Procedure (*Code de procédure pénale*) 1957, as amended by the Act of December 1992 in Article 689 which provides for UJ over offenses committed outside of France in cases where an international convention gives jurisdiction to French courts to deal with that particular offence. Although French law has incorporated UJ, based on treaty obligations in respect of certain offences, absolute UJ based on customary international law has not been established. As a result, UJ cannot generally be exercised in French courts in respect of certain *jus cogens* crimes, including crimes against humanity and genocide. See France 'Implementing the principle of universal jurisdiction in France' available at <http://www.fidh.org/en/europe/france/Implementing-the-principle-of> (accessed 11 June 2014). See also 'France' available at <http://www.hrw.org/reports/2006/ij0606/8.htm> (accessed 11 June 2014).

¹⁵ The Netherlands conferred UJ on its courts in respect of the core crimes through the International Crimes Act of 19 June 2003 (ICA). The only proviso is that the perpetrator is present in the Netherlands, and that the crimes were committed after the entry into force of the Act on 1 October 2003. The Wartime Offences Act of 10 July 1952, the Genocide Convention Implementation Act of 1964 and the Act implementing the Convention against Torture of 1988 cover situations where the core crimes were committed prior to this new Act. Dutch law prohibits UJ in absentia. See 'Netherlands' available at <http://www.hrw.org/reports/2006/ij0606/10.htm> (accessed 11 June 2014).

¹⁶ See Assam K 'Spain moves to curb legal convention allowing trials of foreign rights abusers' The Guardian available at <http://www.theguardian.com/world/2014/feb/11/spain-end-judges-trials-foreign-human-rights-abuses> (accessed 14 June 2014).

¹⁷ In 2011, Switzerland introduced several new aspects to its legislation and judicial organisation aimed at broadening its framework for the prosecution of the core crimes. The Swiss Criminal Code was revised to introduce a specific heading on crimes against humanity, which had until then been captured under the Swiss law as a common crime like murder, assault, rape or other serious crimes. It also transferred jurisdiction over these crimes from the military to civilian justice. The new law also provides for UJ over crimes committed abroad (Article 264m) and the exclusion of relative immunity (Article 264n). See Boillat L, Arnold R, and Heinrich S 'Challenges in prosecuting under universal jurisdiction' (2012) 54-2 *Politorbis* 41-46, 41.

¹⁸ See Nicolaou-Garica S 'Universal jurisdiction against Israeli officers' Middle East Monitor 28 July 2009 available at <https://www.middleeastmonitor.com/reports/by-silvia-nicolaou-garcia/54-universal-jurisdiction-against-israeli-officials> (accessed on 11 June 2014).

¹⁹ See the Decision of the AU, Assembly/AU/ /Dec.335(XVI), Decision on the abuse of the principle of universal jurisdiction Doc. EX.CL/640(XVIII), in which the AU noted its concerns on the abuse of the principle of universality by Western states. In the same decision, the AU called upon its members to furnish it with a list of pending UJ cases against African leaders in foreign courts. The AU further called upon its members to apply the principle of reciprocity on countries that have instituted proceedings against African state officials and to extend mutual legal assistance to each other in the process of investigation and prosecution of such cases. This was Africa's attempt to show the West that African courts could equally be the staging area for the prosecution of state officials from those Western states that were currently pursuing Africans; regardless of where the crime took place. The AU members further called for an international regulatory body with competence to review and/or handle complaints or appeals arising out of the abuse of the principle of UJ by individual states.

UJ, allowing for prosecution in absentia. The current legislation limits UJ to people who became Belgian citizens or residents after committing any of the core crime.

Another example is that of Belgium's failure to prosecute former Israeli state officials for the 1982 massacre at the Sabra and Shatila refugee camps in Beirut. A criminal complaint was brought before a Belgian court, under the universality principle, charging the then Prime Minister of Israel, Ariel Sharon and his army major general, Amos Yaron with the core crimes. The defence argued that Belgium lacked the legal authority to try Ariel Sharon and that he enjoyed immunity as head of government.²⁰ They also relied on the fact that an Israeli commission of enquiry had already disposed of the matter. One of the interesting arguments raised seemed to be an attempt to shoot down UJ on the basis of a lack of a real connection with the case. They claimed that since Belgium did not have any connection with the case, the Belgian courts did not have jurisdiction over it. All these arguments were rejected by the prosecution, which decided that the matter must go ahead. Having failed to challenge the criminal proceedings legally, Israel assisted by its ally, the US, resorted to political and diplomatic channels,²¹ exerting pressure on Belgium to remove itself from the case.²² Eventually the Belgian Ministry of Justice began the procedure to transfer the Sabra and Shatila case to Israel.²³

Spain's initial embrace of absolute UJ was in 2014 reversed by legislation adopted by a landslide majority in its legislature (329 votes in favour, 9 against and 6 abstentions). Under the new law, prosecutions can only be initiated if they involve a Spanish citizen, victims who had Spanish nationality at the time of the events, or if the person accused of the crime lives in Spanish territory. One of the reasons cited for the motion to amend the law was that it was necessary to eliminate UJ because it promises a lot but leads to nothing more than diplomatic conflicts; hence the decision to include the requirement that the accused must be in Spanish territory for a court

²⁰ See 'Sharon Trial: 12 February 2003 decision of Belgian Supreme Court explained' available at <http://electronicintifada.net/content/sharon-trial-12-february-2003-decision-belgian-supreme-court-explained/4413> (accessed 14 June 2014).

²¹ See Whitson SL 'Ariel Sharon's legacy is deeply disturbing' 14 January 2014 available at <http://www.hrw.org/news/2014/01/13/ariel-sharons-legacy-deeply-disturbing> (accessed 16 June 2014).

²² See Human Rights Watch 'Israel: Ariel Sharon's Troubling Legacy' 11 January 2014 available at <http://www.hrw.org/news/2014/01/11/israel-ariel-sharon-s-troubling-legacy> (accessed 16 June 2014).

²³ Garcia SN 'European efforts to apply the principle of universal jurisdiction against Israeli officials' Middle East Monitor (2009) available at <https://www.middleeastmonitor.com/downloads/reports/universal-jurisdiction-against-israeli-officials.pdf> (accessed 14 June 2014).

to be seized of a matter under UJ.²⁴ This is further testament to the futility, and ill-suited nature of the broad notion of UJ.

Spain's decision to change its UJ laws seems to be, to a considerable extent, a result of pressure exerted on the Kingdom by the People's Republic of China.²⁵ This came after a Spanish judge issued arrest warrants for five high-ranking Chinese officials over alleged human rights abuses in Tibet.²⁶

This demonstrates the aversion of the state of China to the universality principle.²⁷ Various international statements attributed to China also demonstrate its position regarding UJ.²⁸ Under the banner of the UN General Assembly's Sixth Committee deliberations, China has consistently made its position on UJ known. During the 65th Session of this committee, the Chinese representative stated that China's position is that under contemporary international law, piracy is the only crime in relation to which UJ may be invoked. Furthermore, that there is no consensus amongst states on whether UJ exists in cases other than piracy and on the scope and conditions for application of UJ, and no customary international law is established in this regard.²⁹ The Chinese representative was clear that pending an agreement by states on what UJ entails, as well as the crimes over which it should be exercised, each state should refrain from exercising jurisdiction over another state 'in the name of the so-called universal jurisdiction'. China harbours the same fears as do African states, that UJ threatens the immunity of state officials,³⁰ and that this has negative implications for international relations.

²⁴ Centre for Justice and Accountability 'Spanish congress enacts Bill restricting Spain's universal jurisdiction law' available at <http://www.cja.org/article.php?id=740> (accessed 23 October 2014).

²⁵ See 'Spain bows to Chinese pressure and backs law to curb pioneering judges' available at <http://www.euronews.com/2014/02/12/spain-bows-to-chinese-pressure-and-backs-law-to-curb-pioneering-judges/> (accessed 23 June 2014). The Spanish national court had issued arrest warrants for former Chinese President Jiang Zemin and four others as part of a probe into alleged genocide in Tibet.

²⁶ In October 2013, the Spanish High Court Judge Ismael Moreno indicted former Chinese President Hu Jintao for allegedly committing genocide in Tibet, an autonomous region in south western China. Moreno said he was competent to rule in the case, which was brought by two Spanish pro-Tibet groups, because one of the activists, Tibetan monk Thubten Wangchen, is a Spanish citizen. In November 2013, Moreno issued an arrest warrant for former Chinese President Jiang Zemin and former Prime Minister Li Peng, as well as three other former high-ranking Chinese officials, over allegations that they too committed genocide in Tibet. Moreno said there was sufficient evidence against the five officials to have them appear for questioning in a Spanish court.

²⁷ See 'China dismisses as absurd Spanish arrest warrants over Tibet' available at <http://www.reuters.com/Article/2013/11/20/us-china-tibet-spain-idUSBRE9AJ06720131120> (accessed 13 June 2014).

²⁸ Gatestone Institute 'Spain rethinks universal jurisdiction' available at <http://www.gatestoneinstitute.org/4149/spain-universal-jurisdiction> (accessed 16 June 2014).

²⁹ See Statement by Ms Guo Xiaomei at the Sixth Committee of the 65th Session of the UN General Assembly on Scope and Application of the Principle of Universal Jurisdiction 13 October 2010 available at <http://www.china-un.org/eng/hyyfy/t761247.htm> (accessed 23 June 2014).

³⁰ *Ibid.*

As will be discussed below, on the African continent itself there are only a few states that embrace the universality principle in relation to the core crimes. These include South Africa, Kenya, Uganda, Senegal, Mauritius, and Burkina Faso. The majority of African states steer clear of this principle. Although a number of African states have ratified the Rome Statute, for most of them the legislation aimed at implementing those obligations and introducing UJ for the core crimes is still in draft form.³¹

The AU's position on the universality principle has not been to dismiss UJ absolutely in principle. Instead the AU has consistently noted the utility of UJ in ending impunity, especially in light of Article 4(h) of the Constitutive Act of the AU.³² What the regional body has, however, continually decried is the manner in which this principle has been used by non-African states against African state officials. In its 2008 Session, the AU noted that there was a rise in the abuse of the principle of universality in respect of the core crimes, and that this will have negative consequences in international relations.³³ These issues will be discussed in detail in subsequent chapters.

3.2 The African Union Model Law on Universal Jurisdiction

The Model Law on Universal Jurisdiction (AU Model Law) that was adopted by the AU was a result of concerns that Africa had with the use of UJ by both non-African states and the ICC.³⁴ African states had raised objections in various AU Decisions taken over the years, particularly after 2008, to the manner in which European states had indicted African state officials. The AU Model Law represents a common position adopted by African states, and also indicates current legal thinking from the continent vis-à-vis UJ. It offers a malleable template for developing UJ legislation, which states can adapt to suit their domestic peculiarities. It also has the potential to ensure that African laws on UJ are harmonised in content, thereby minimising potential clashes similar to those brought about by the UJ laws of Western states.

³¹ A total of 11 African states currently have draft legislation for implementing ICC obligations and introducing UJ, whilst eight states have not signed the Rome Statute at all. A total of six states have enacted domestic legislation which introduce the universality principle in respect of the core crimes, namely: Kenya, Mali, Mauritius, Senegal, Uganda, South Africa

³² Article 4(h) of the Constitutive Act of the African Union provides that the AU 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'.

³³ See Decision of the AU, Assembly/AU/ Dec.199(XI), Decision on the Report of the Commission on the abuse of the principle of universal jurisdiction, Doc. Assembly/AU/14 (XI), available at <http://www.au.int> (accessed 14 June 2014).

³⁴ African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, EXP/MIN/Legal/VI, adopted by the Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7 – 15 May 2012 in Addis Ababa, Ethiopia.

In its preamble the AU Model Law registered the ambitions of the AU to end impunity, by ensuring that heinous crimes that affect the international community do not go unpunished.³⁵ It also alludes to the continent's aversion to grave circumstances, such as those involving the core crimes, and thereby recalls the AU's right to intervene in such circumstances as empowered by Article 4(h) of the AU Constitutive Act. The AU links this need to intervene to the need for effective prosecution in order to stem impunity for the core crimes. Accordingly, the AU highlights the fact that the only interference with a state's internal affairs will occur and be accepted as legitimate by the African bloc if it is done in line with international law itself, and in furtherance of the goal to fight impunity.

The provision setting out the purpose of the AU Model Law clearly demonstrates that the main aim of the AU was to be in control of the development of international criminal law, especially in the case of UJ. Instead of leaving the subject of UJ to a group of Western states, the AU decided to influence actively the growth of this branch of law. This resonates with international law norms, in that state practice determines what eventually becomes settled as norms, values and rules in international law. This is in line with judicial thinking in *S v Petane* in which the court clearly stated that customary law is founded on practice, not on preaching.³⁶ It also resonates with the sovereign equality of states. Hence the AU Model Law stipulates that its purpose is to provide a framework for individual countries to exercise UJ over certain international crimes. It is worth noting that the model's provision does not necessarily limit itself to the core crimes of genocide, war crimes and crimes against humanity. Instead it extends this jurisdiction to other international law crimes and other crimes of international concern. Hence it uses the wording 'international crimes' rather than 'international law crimes', 'core crimes' or 'atrocities crimes'. The AU Model Law does not define what an international crime is, save to list the categories of crimes over which states could employ the universality principle in national legislation as follows: genocide, war crimes, crimes against humanity, piracy, trafficking in narcotics, and terrorism.³⁷

The provision of the AU Model Law on jurisdiction differs markedly from the provisions of the Western states that initiated prosecution proceedings against African state officials in the past

³⁵ See preamble to the AU Model Law on UJ. In the preamble, African states recognise that the heinous nature of some crimes means that they should not go unpunished, and that this resonates with the obligations of African states under Article 4(h) of the AU Constitutive Act. It further recognises that the primary responsibility to end impunity, and to prosecute offenders rests with states, and that this will enhance international cooperation amongst states.

³⁶ *S v Petane* 1988 (3) SA 51 (C).

³⁷ See Article 8 of the AU Model Law.

decade,³⁸ particularly regarding the requirement of the presence of the accused. In Article 4 of the AU Model Law the presence of the accused is stipulated as a requirement only for the commencement of prosecution.³⁹ The AU Model Law is silent on whether presence is a prerequisite for the initiation of UJ-based investigations.⁴⁰ In other words, investigations can commence without the accused being present.

What is notable though in the AU Model Law is the rider introduced by Article 4(2). It provides that in exercising UJ the courts of the prosecuting state shall accord priority to the courts of the state in whose territory the crime is alleged to have been committed. The territorial state thus has a stronger connection with the crimes, and as such, even though all states are outraged by the heinous nature of the crimes committed, it is ultimately the territorial state that is affected most by the accused's conduct. It is only logical that it be given the chance to deal with the situation and find closure. Jessberger notes that the Article 4(2) provision introduces a hierarchy of jurisdictions by suggesting that priority should be given to the territorial state, provided it is willing and able to prosecute.⁴¹

However, it is worth noting that Article 4(2) was also couched to deal with the possibility of impunity, in that it gives preference to the territorial state only to the extent that it is willing and able to prosecute. Hence only cases where the territorial state is unwilling and unable to prosecute can any other state proceed on the basis of UJ. This is in line with the international law principle of complementarity.⁴² Xavier Philippe defines this principle as a functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primacy jurisdiction.⁴³ The principle is premised upon a compromise between respect for sovereignty of states and respect for the universality principle. It thus involves an acceptance by states that perpetrators of the core crimes may be punished through the creation and recognition of

³⁸ See the discussion above concerning the Belgian Act on the Punishment of Grave Breaches of International Humanitarian Law of 1993 (amended in 1999) which allowed Belgian courts to prosecute a foreigner for offences committed abroad against another foreigner, even if the accused could not be found in Belgium.

³⁹ Article 4 of the AU Model Law provides as follows: 'The Court shall have jurisdiction to try any person ...provided that such a person shall be within the territory of the [s]tate at the time of the commencement of the trial'.

⁴⁰ In Article 5, the AU Model Law empowers the National Prosecuting Authorities of states desiring to use UJ to prosecute offenders who are found in their territory.

⁴¹ Jessberger F 'On behalf of Africa: Towards the regionalisation of universal jurisdiction?' in Werle G, Fernandez L and Vormbaum M (eds) *African and the International Criminal Court* (2014) 160.

⁴² Even the ICC works on the principle of complementarity in terms of which the state has primacy of jurisdictional competence, unless it is unwilling or unable to prosecute. See the preamble as well as Article 17 of the Rome Statute.

⁴³ Philippe X 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (2006) 88 *International Review of the Red Cross* 375-398, 380.

international criminal bodies,⁴⁴ and in this case, the recognition of the right of third states to prosecute based on the grave nature of the offences.

Article 17 of the Rome Statute regulates complementarity of the ICC vis-à-vis national courts.⁴⁵ The drafters of the Rome Statute chose the word 'or' rather than 'and' which is the preferred term in the AU Model Law.⁴⁶ The complementarity envisaged in Article 4(2) of the AU Model Law is one between the domestic courts of different countries, all of which are desirous of prosecuting perpetrators of the core crimes. The choice of words is quite interesting, given the meaning of each of the words. Lourens du Plessis states that in determining the meaning of the text of a statute, one must bear in mind that each word in that statute must be given meaning.⁴⁷ This should be informed by the understanding that language in a statute is not used unnecessarily.

As stated above, in both the ICC and AU outlook on complementarity, the concepts of ability and willingness of the domestic court to prosecute are used. Under the Rome Statute, it should suffice that a state has failed to meet one of these elements. This means that if a state is willing to prosecute, but is otherwise unable to do so by reason of a collapsed judicial system or some other reason, this should be sufficient ground for the ICC to assume jurisdiction over the matter. However, given the use of 'and' in the AU Model Law, the understanding should be that both elements must be satisfied before any other court can exercise UJ over a particular matter. If strictly interpreted, the provision means that a capable state which is unwilling, and a willing state which is unable to prosecute, still retains primacy of jurisdiction, unless it can be proved that the two elements are simultaneously satisfied. The existence of just one of the two elements is not sufficient under the current wording of the AU Model Law. This is a much more stringent approach to complementarity, and may defeat the stated goal to end impunity.

As earlier stated, the AU Model Law does not necessarily limit itself to the core crimes, but includes other crimes of international concern. Notably omitted from its list of crimes are the crimes of slave-trading and slavery, which affected the continent in the 17th century. The draft does, however, list piracy which under customary international law is in the same category as

⁴⁴ *Ibid.*

⁴⁵ It provides that as regards admissibility of cases, the Court shall determine a case admissible where 'it 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'. The use of the word 'genuinely' works as a safeguard against states which would attempt to carry out a sham trial, in order to block the ICC or any other competent tribunal from being seized with jurisdiction.

⁴⁶ Article 4(2) of the AU Model Law provides that, 'the Courts shall accord priority to the court of the state in whose territory the crime is alleged to have been committed, provided that the state is willing and able to prosecute'.

⁴⁷ Du Plessis L *Re-interpretation of Statutes* (2002) 213.

slave-trading in terms of its heinous nature.⁴⁸ Perhaps the drafters were of the opinion that both slave-trading, and the exercise of UJ over this crime are already established under customary international law.⁴⁹ Unfortunately, the same cannot be said of the core crimes. Unlike piracy and slave-trading, even though the core crimes are established as crimes under customary international law,⁵⁰ there is no consensus that customary law confers UJ on states for their prosecution.⁵¹

The AU Model Law also takes into account one of the major concerns that the African continent under the auspices of the AU has consistently expressed over time, being that of immunity for sitting heads of states. Article 16 reaffirms the immunity of foreign state officials. It stipulates that foreign state officials who are entitled to jurisdictional immunity shall not be charged or prosecuted under this law. The provision makes an exception where the crimes in question are covered by a treaty to which both the prosecuting state and the state of the nationality of such officials are parties, and which prohibits immunity. This is in line with international law on jurisdictional immunities. The fact that it requires both the prosecuting state and the state of the suspect's nationality to be party to a treaty that excludes immunity for those crimes, also resonates with the international law principle that state consent is central to the formation of rules of international law.

The AU was eager to ensure that sovereign immunity was put into effect. Article 16(2) of the AU Model Law stipulates that the jurisdiction of the national court set out in Article 4 shall not extend to foreign state officials. The same provision prevents the prosecuting authority of each state from extending its prosecutorial powers to foreign state officials.

⁴⁸ Both slave-trading and piracy have formed the bedrock of the development of UJ since the 17th century, a development which has been gradually gaining momentum since the Nuremburg Trials.

⁴⁹ Cassese A *International Criminal Law* (2003) 284. See also Mugambi J 'Spain's expanded universal jurisdiction' (2007) *Georgia Journal of International and Comparative Law* 495 – 538, 500. See Dugard who also supports the position that the earliest known customary international crime was that of piracy. See Dugard J *International Law* (2011) 157.

⁵⁰ Cf Kontorovich, who asserts that historical evidence does not support the view that slave-trading, like piracy, exemplified a universal offence which entitled all states to prosecute offenders. Instead, he propounds a view that most international treaties on slave-trading created 'delegated jurisdiction' whereby several nations conveyed to one another the right to exercise some of their jurisdictional powers with respect to a particular offence. This effectively made each state an agent of the others. He also argues that piracy as well did not become universally recognisable as a result of its perceived heinousness. See Kontorovich E 'The piracy analogy: Modern universal jurisdiction's hollow foundation' (2004) 45 *Harvard International Law Journal*, 183 – 238, 186.

⁵¹ Mugambi J 'Spain's expanded universal jurisdiction' (2007) 35 *Georgia Journal of International and Comparative Law* 495 – 538, 498.

The AU Model Law's immunity provision stands in stark contrast to the provisions of some international instruments, including the Rome Statute,⁵² as well as the national legislation of some African states that provide for UJ in respect of the three core crimes.⁵³ The consequences of this will be discussed in detail in later chapters.

3.3 The requirement of presence for purposes of prosecution

The presence of the accused in the territory of the state intent on undertaking the prosecution against him is central to the determination of whether or not that state can exercise UJ over him. The two schools of thought, that is the broad and the narrow schools of UJ, turn on this point. The AU Model Law adopts the narrow version of UJ, by requiring the accused to be present on the territory of the prosecuting state for it to be clothed with jurisdiction under the universality principle. In that way, it aligns with the customary international law position that only the state where the accused is in custody may prosecute him,⁵⁴ that is the so-called *forum deprehensionis*.⁵⁵ The requirement of presence will be further discussed in respect of the national laws below.

3.4 The requirement of presence for purposes of investigation

International law is silent on the requirement of presence for the purposes of pursuing a UJ-based investigation against a foreigner who committed these core crimes against other foreigners abroad. The AU Model Law also does not address this point, but only limits itself to presence for the purposes of prosecution. In Article 5 it only empowers the national prosecuting agency of the state in whose territory the accused is found to initiate prosecution proceedings, and is silent about investigation.⁵⁶

⁵² Article 27 of the Rome Statute provides that:

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

⁵³ Similarly, the ICC-implementing legislation of South Africa (Section 4(2)(a) of the Implementation of the Rome Statute of the International Criminal Court Act No.27 of 2002), as well as South Africa's Prevention and Combating of Torture of Persons Act No.13 of 2013 (Section 4(3)(a)) clearly stipulate that the position or status of the accused and their perceived immunity shall not bar the court from proceeding against them.

⁵⁴ See Cassese A 'When may senior state officials be tried for international crimes? Some comments on the *Congo v Belgium Case*' (2002) 13 *European Journal of International Law* 853 – 875, 857-8.

⁵⁵ Cassese A *International Criminal Law* (2003) 285.

⁵⁶ Article 5 provides that, 'The Prosecuting Authority shall have the power to prosecute before the court any person in the territory of the [s]tate who is alleged to have committed a crime prohibited under this law'.

As there is generally no court involvement in the investigative phase of the proceedings, the wording of the AU Model Law should be understood to deal with cases that have gone beyond the investigative stage, cases which are ripe for adjudication. But as soon as there is court involvement, the accused's presence would be required so as to secure the jurisdiction of the court. This could be for the purposes of putting charges to the suspect.⁵⁷ This is a preferable approach, given that there is no customary law rule prohibiting investigations in absentia.

In the case of UJ-based investigations, however, there is a need to differentiate between presence and residency. Even though the AU Model Law is silent on the accused's presence as a prerequisite for UJ-based investigations to commence, the state intending to do so must remain alive to the futility of opening investigations against an accused person who is highly unlikely to ever enter its territory. Where there is a likelihood that the presence of the accused can be obtained either by him voluntarily entering the state's territory or via extradition, a UJ-based investigation in absentia as a prelude to a UJ-based prosecution therefore makes more sense. The likelihood of presence was one of the key considerations identified by the Constitutional Court of South Africa in determining whether a state can institute a UJ-based investigation.⁵⁸

3.5 The newly added criminal jurisdiction of the African Court on Human and Peoples' Rights

The efforts of the continent to be proactive and develop an autochthonous African framework to stem the culture of impunity for core crimes can also be seen in the recent adoption of a draft protocol aimed at amending the Statute of the African Court of Justice and Human Rights to grant this court jurisdiction to try international crimes.⁵⁹ The Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Draft Protocol) was adopted by the First Session of the Special Technical Committee (SCT) on Justice and Legal Affairs of the African Union in Addis Ababa on 16 May 2014.⁶⁰ The Ministerial Session of the STC on Justice and Legal affairs considered and adopted six other draft legal instruments and recommended them for consideration by the Assembly through the Executive Council at the Summit of the African Union in Malabo, Equatorial Guinea, in June 2014. Unlike the AU Model Law which protects sovereign immunity for state officials in domestic courts, the Draft Protocol seeks

⁵⁷ Amicus brief, submitted in support of the Respondent in the pending Constitutional Court case of *National Commissioner, SAPS v Southern African Human Rights Litigation Centre and Another CCT02/14*, paras 51 – 53.

⁵⁸ *National Commissioner, SAPS v Southern African Human Rights Litigation Centre and Another CCT 02/14*; [2014] ZACC 30, paras 63 – 64.

⁵⁹ The Draft in Article 3 confers international criminal jurisdiction upon the court.

⁶⁰ See <http://legal.au.int/en/content/first-session-special-technical-committee-justice-and-legal-affairs-african-union-concluded> (accessed 24 June 2014).

to ensure this immunity for state officials before this international criminal tribunal. This is a sharp departure from the practice of existing tribunals, such as the ICTY and the Special Court for Sierra Leone.⁶¹ The Trial Chamber in *Prosecutor v Radovan Karadzic* concluded that under customary international law an immunity agreement does not operate to remove the jurisdiction of an international court.⁶² The accused had sought to rely on a diplomatic agreement made in 1996 that he would not be tried before the Tribunal. The tribunal, convinced that according to customary international law, there are some acts for which immunity from prosecution cannot be invoked before international tribunals, rejected Karadzic's claims of immunity. Further, some national legislation for the prosecution of the core crimes also exclude immunity of state officials. For example the Mauritian International Criminal Court Act provides that 'it shall not be a defence ... nor a ground for a reduction of sentence for a person ... to plead that he is or was [h]ead of [s]tate, a member of a [g]overnment or Parliament, an elected representative or a government official of a foreign [s]tate'.⁶³ This development will be discussed in detail in chapters five and six below.

3.6 African states that embrace universal jurisdiction in relation to the core crimes

In analysing the countries on the continent that embrace UJ, each country's implementation of the Rome Statute will be considered. In essence, the focus will be on those countries which are party to the Rome Statute which codified the three core crimes, and will determine how each country's legislation for implementing the Rome Statute provides for the application of the principle of UJ in its courts, as well as other Acts for the implementation of the international obligations of various states, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Whether a state embraces the principle of universality or not will to a large extent be influenced by the place of international law in that particular jurisdiction. It is therefore important to determine whether a state follows the monist tradition or the dualist tradition. For monist states, international law and municipal law both form part of a single legal system, hence international

⁶¹ Former Sierra Leone president, Charles Taylor, unsuccessfully tried to rely on immunity *ratione personae*, claiming that he was still the sitting president of Sierra Leone at the time of indictment.

⁶² *Prosecutor v Radovan Karadzic: Trial Chamber Decision on the Accused's Second Motion for Inspection and Disclosure: Immunity Issue* ICTY-2008-IT-95-5/18-PT (17 December 2008) available at <http://www.icty.org/x/cases/karadzic/tdec/en/081217.pdf> (accessed 30 June 2014).

⁶³ Section 6(1) of the Mauritian International Criminal Court Act No.27 of 2011.

law becomes domestically applicable without any act of domestication. Dualist states on the other hand require ratification followed by an act of domestication.⁶⁴

3.6.1 South Africa's legal framework allowing universal jurisdiction

South Africa is a dualist country.⁶⁵ International law, save for customary law,⁶⁶ does not form part of the law of the Republic unless it has been domesticated by Parliament.⁶⁷ Whilst the core crimes which are now contained in the ICC Statute are accepted as established in customary international law, the exercise of UJ in respect of these crimes has not yet crystallised into custom. The exercise of UJ over these crimes still emanates from treaty law, and as such the normal rules relating to the application of treaty-based law in the domestic sphere are applicable. Hence South Africa embarked on the legislative process to domesticate two main treaties to enable it to prosecute the three core crimes, and to introduce UJ.

3.6.1.1 The Implementation of the Rome Statute of the International Criminal Court Act

South Africa is signatory to the Rome Statute.⁶⁸ In 2002, South Africa enacted a law to enable it to meet its obligations under the Rome Statute, the Implementation of the Rome Statute of the International Criminal Court Act (ICC Act).⁶⁹ The ICC Act empowers South Africa to investigate and prosecute the core crimes if such persons, after the commission of the crime are present in the territory of the Republic. Due to the controversy surrounding UJ, and the fact that customary international law has not yet crystallised to form solid rules on the requirement of presence, there is still on-going debate both locally and internationally.

The case discussed below, involving Zimbabwean victims of torture who sought to enforce South Africa's UJ obligations under the ICC Act clearly illustrate this contention.⁷⁰ What is clear though is that presence must be distinguished from residency. In other words, it must be established whether the perpetrator is merely briefly passing through the Republic, or is sufficiently

⁶⁴ Dugard J *International Law* (2011) 42.

⁶⁵ *Ibid*, 46.

⁶⁶ See Section 232 of the South African Constitution Act No. of 1996, which stipulates that, 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.

⁶⁷ See Section 231(2) of the South African Constitution, which provides that, 'An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in sub-Section (3).

⁶⁸ South African ratified the Rome Statute on 17 June 1998 and became the 23rd state party.

⁶⁹ The Implementation of the Rome Statute of the International Criminal Court Act No.27 of 2002.

⁷⁰ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* [2013] ZASCA 168.

established in the Republic to allow its justice machinery to engage with him.⁷¹ The debate on residency or presence is critical in determining if and when a state can commence UJ proceedings against a foreign perpetrator of the core crimes. This is because there are two schools of thought on this subject. The one side believes investigation in absentia is permissible under international law, and presence of the accused is only required once the actual trial starts. In other words, the suspect does not necessarily have to be in the territory of the forum state for it to commence UJ-based investigation against him. The other school of thought adheres to the thinking that investigation and initiation of prosecution should not be separated, they are as much a part of the state's pre-trial enforcement jurisdiction as is arrest. They should therefore all be subject to the requirement that the accused must be present. These issues are discussed in detail below.

3.6.1.2 The presence requirement in the initiation of investigations

The exercise of jurisdiction over crimes which occurred externally often relates to both the investigation of and the actual prosecution of those crimes. The requirement of the accused's presence in international law has largely been focussed on the prosecution of the offences alleged, rather than the investigation of those offences. State practice shows that Canada, Germany, the United Kingdom, the AU Model Law and the Princeton Principles permit investigations in absentia, and only Denmark and France require the suspect to be present.

The South African case that will be reviewed below turned on the refusal of the state prosecuting authority and the police service to initiate a UJ-based investigation of suspects who were not on South African soil. One of the key considerations that could have influenced the refusal is that investigations do not always lead to prosecution, and as such these two processes must be viewed separately as different stages of development of criminal proceedings.

3.6.1.3 The presence requirement in the initiation of prosecution proceedings

The ICC Act includes personal jurisdictional restrictions on the exercise of the universality principle. It specifies that South African courts can only exercise universal adjudicative jurisdiction over the core crimes if the accused comes to South Africa at some point after committing the crime.⁷² The ICC Act is ambiguous about whether presence is required for an investigation. All it

⁷¹ See, for example, the Spanish UJ legislation that was amended in 2014 to require that the perpetrator should either have become a citizen or permanent resident after the commission of the offence.

⁷² Section 4(3)(c) of the ICC Act provides that:

does is to state that the presence of the accused person is necessary in order to secure the jurisdiction of a South African court.

The case of *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre*,⁷³ discussed in detail in chapter 4 below illustrates the on-going debates regarding the presence requirement. In this case the Supreme Court of Appeal (SCA) was confronted with a claim that the national prosecution authority (NPA) was empowered to investigate serious allegations of torture committed outside the Republic.⁷⁴ The NPA had earlier refused to assist the Zimbabwean exiles when it was approached to investigate allegations of torture raised. The Centre was assisting Zimbabwean nationals who were now residing in South Africa, in an attempt to obtain justice for the torture they were subjected to in Zimbabwe by Zimbabwean government officials. The applicants relied on the provisions of the ICC Act, which recognises the crimes defined in the Rome Statute as crimes under South African law.

Both the High Court⁷⁵ and the SCA⁷⁶ held that the alleged conduct complained of is a crime in terms of South African law, notwithstanding that it was committed extra-territorially. The SCA noted that the legislation is silent on whether the alleged perpetrator is required to be present within the territory of the Republic at the time the investigation is initiated.⁷⁷ The court was,

(3) In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in sub-Section (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if

(c) that person, after the commission of the crime, is present in the territory of the Republic.

⁷³ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* [2013] ZASCA 168. The case was taken on appeal and is currently pending before the Constitutional Court of South Africa.

⁷⁴ In this case, Zimbabwean state security forces had raided the opposition party, the 'Movement for Democratic Change (MDC)'s headquarters and detained and tortured suspected as well as actual MDC supporters. All the elements of the crime took place in Zimbabwe, the perpetrators were Zimbabweans, and so were the victims. Two organisations (the Southern Africa Litigation Centre (SALC) and the Zimbabwe Exiles Forum (ZEF)) later assisted the victims, who now resided in South Africa to seek justice. They delivered a dossier to the NPA and the South African Police Service containing comprehensive evidence of the involvement of Zimbabwean officials in the perpetration of widespread and systematic torture, constituting a crime against humanity. To establish a link, the organisations stated that the perpetrators were frequent travellers to South Africa and as such could easily be subjected to the ICC Act. They therefore requested the NPA and SAPS to initiate an investigation in terms of their legal obligations stipulated in the ICC Act. The SAPS refused to oblige, citing the extra-territorial nature of the acts allegedly committed. The matter is still pending at the Constitutional Court, where it was heard on 15 May 2014. It is worth noting that the case was initially brought to court prior to the coming into force of the Prevention and Combating of Torture of Persons Act of 2013, discussed below.

⁷⁵ *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* (77150/09) [2012] ZAGPPHC 61; 2012 (10) BCLR 1089 (GNP); [2012] 3 All SA 198 (GNP), 50.

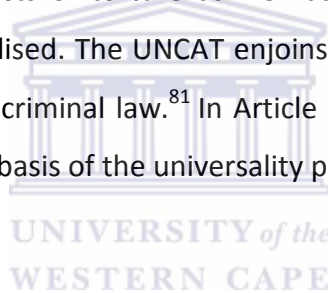
⁷⁶ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* [2013] ZASCA 168, paras 55 and 67.

⁷⁷ *Ibid*, para 51. The court found arguments that the allegations complained of are deemed to have taken place the moment the accused entered South African soil to be fallacious. It stated that the provision criminalises such conduct at the time of its commission, regardless of where and by whom it was committed. Further, that whilst the ICC Act does not expressly authorise an investigation prior to the presence of an alleged perpetrator within South African

however, alive to the futility of adopting a strict presence requirement, as this would defeat the purpose of the legislation and encourage impunity.⁷⁸ It is trite that the investigation of an alleged crime might or might not lead to prosecution. Whilst alive to the issues raised by the court, and also alive to the *lacuna* in international customary law on this point, it should be noted that where the third state can initiate investigations without infringing on the sovereignty of another state, then it should be permitted to do so.

3.6.1.4 The Torture Act of 2013

South Africa is party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).⁷⁹ This UN convention was domesticated by the Prevention and Combating of Torture of Persons Act (Torture Act).⁸⁰ Torture is codified by both the Rome Statute and the UNCAT. Under the Rome Statute, it forms part of crimes against humanity, provided they are committed in a systematic or a widespread manner; and is targeted at a civilian population. Under the Torture Act individual acts of torture as well as attempting, inciting, instigating, or commanding torture are all criminalised. The UNCAT enjoins states parties to ensure that all acts of torture are offences under their criminal law.⁸¹ In Article VI, the UNCAT empowers each state party to exercise jurisdiction on the basis of the universality principle in cases where the accused is present on its territory.⁸²



territory, it also does not prohibit such an investigation (para 55). The court found that there was nothing wrong with an investigation in absentia, provided that it happens on the state's own territory, or on the foreign state's territory only with its consent (para 56).

⁷⁸ *Ibid*, para 66. The SCA further indicated that there is no universal rule or practice against the initiation of investigations in the absence of alleged perpetrators. Further that it would be a waste of time and resources to invest in an investigation when the prospects of the alleged perpetrator ever setting foot in the Republic are slim. However, adopting a strict presence requirement would also do violence to the fight against impunity.

⁷⁹ South Africa ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1998.

⁸⁰ Prevention and Combating of Torture of Persons Act No.13 of 2013.

⁸¹ Article IV of the UNCAT. The same applies to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. The UNCAT already envisaged an element of universality, for it provides in Article IV sub-Article 2 that each state party shall make these offences punishable by appropriate penalties which take into account their grave nature. However, Article IV does not introduce UJ, it merely underscores the grave nature of the crime of torture. UJ in respect of this crime only comes through Article VI.

⁸² Article VI provides that:

Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any [s]tate [p]arty in whose territory a person alleged to have committed any offence referred to in Article IV is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that [s]tate but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

Article VI has a rider, which places an obligation on the prosecuting state to make an immediate preliminary enquiry into the facts. In other words, the UNCAT envisages a situation where the state must apprehend the suspect for purposes of investigation. Article VI is further buttressed by Articles XII and XIII which impose procedural fairness considerations.

In keeping with its obligations under the UNCAT, South Africa enacted Section 6 of the Torture Act⁸³ which provides for South African courts to exercise extra-territorial jurisdiction over acts of torture committed abroad.⁸⁴ The Torture Act is also silent on the presence of the accused in UJ-based torture investigations; it only expressly requires the presence of the accused for prosecution purposes.⁸⁵ The Act is worded such that it grants a South African court jurisdiction over extraterritorial acts of torture provided the accused is, after the commission of the offence present in the territory of the Republic. Since courts are not involved in the investigation stages of the proceedings, it stands to reason that the jurisdiction referred to here is judicial jurisdiction.

3.6.2 Senegal

Senegal completed the process of enacting legislation to implement its ICC obligations in March 2007, with the adoption of a law providing for complementarity and cooperation.⁸⁶ This, in part, paved way for the country to finally commence prosecution of former Chadian leader, Hissène Habré for international crimes allegedly committed during his tenure as president of Chad between 1982 and 1990. It is interesting to note that the Hissène Habré proceedings eventually took off after years of political, diplomatic and legal wrangling,⁸⁷ and after two other states (Belgium and Chad) made numerous extradition requests for him to stand trial in Belgian courts.⁸⁸ Although the proceedings commenced on 2 July 2013, with charges preferred against Hissène

⁸³ Prevention and Combating of Torture of Persons Act No.13 of 2013.

⁸⁴ Section 6(1) of the South African Torture Act, titled Extra-territorial jurisdiction, provides that:

A court of the Republic has jurisdiction in respect of an act committed outside the Republic which would have constituted an offence ...had it been committed in the Republic, regardless of whether or not the act constitutes an offence at the place of its commission, if the accused person –

...

(c) is after the commission of the offence, present in the territory of the Republic or in its territorial waters or on board a ship, vessel, off-shore installation, a fixed platform or aircraft registered or required to be registered in the Republic and that person is not extradited pursuant to Article 8 of the Convention.

⁸⁵ See Section 6(1) of the South African Torture Act.

⁸⁶ Senegal signed the Rome Statute on 18 July 1998 and ratified it on 2 February 1999, becoming the 1st state party. The implementation process was completed in March 2007 with the adoption of the law providing for complementarity and cooperation. The law was duly published in the National Gazette of the Republic of Senegal.

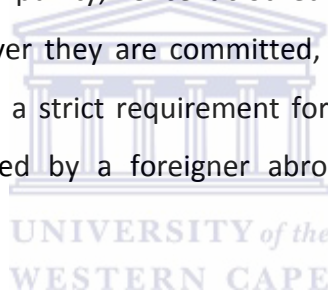
⁸⁷ Bodley A and Tefera SK 'The Extraordinary role of the Extraordinary African Chambers convened to try former Chadian leader Hissène Habré (2013) Issue 3 *Africa Law Today* 1-8.

⁸⁸ The political and diplomatic pressure brought to bear upon Senegal included interventions by the UN Secretary General, interventions plus a visit by the UN Committee against Torture, interventions by the UN Special Rapporteur on the Independence of Judges and Lawyers and the Special Rapporteur on Torture, interventions by the AU, the Economic Community of West African States, the European Union, and the European Parliament.

Habré,⁸⁹ this cannot, unfortunately, be attributed to Senegal's willingness to afford justice to the victim. This case will be discussed in detail in chapter four.

3.6.3 Kenya

Kenya is also a party to the Rome Statute, having ratified it in 2005.⁹⁰ Kenya enacted the International Crimes Act of 2008,⁹¹ which entered into force on 1 January 2009.⁹² The Kenyan Act makes a distinction between two types of jurisdiction that Kenyan courts can exercise. The first, which incorporates UJ in addition to the traditional forms of jurisdiction,⁹³ is contained in Section 8 of the Kenya ICC Act.⁹⁴ It governs the jurisdiction of the courts in respect of the core crimes listed in Section 6.⁹⁵ The second relates to offences that take place as a result of proceedings emanating from the prosecution of the core crimes under Section 8. It covers instances where an offender commits any of the offences listed in Sections 9 to 17, which include attempts to bribe officials, intimidate witnesses, fabricates evidence, obstructs officials etc. In doing this, Kenya was alive to the catalytic nature of such acts to impunity, hence it clothed its courts with jurisdiction to try such offences wherever and by whomever they are committed, provided the accused is present on Kenyan soil.⁹⁶ Presence is therefore a strict requirement for the commencement of prosecution proceedings for offences committed by a foreigner abroad and this is supported by state



⁸⁹ Hissène Habré was charged with crimes against humanity, torture and war crimes by the Extraordinary African Chambers and placed in pre-trial detention.

⁹⁰ Kenya signed the Rome Statute on 11 August 1999, and ratified on 15 March 2005, becoming the 98th state party.

⁹¹ Section 18 of this Act introduces UJ for Kenyan courts in respect of the core crimes.

⁹² The Kenyan Act is available at http://www.issafrica.org/anij/uploads/Kenya_International_Crimes_Act_2008.pdf (accessed 11 June 2014). Its short title states that this is an Act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions

⁹³ Section 8 provides that a person who is alleged to have committed any of the core crimes may be tried and punished in Kenya on the basis of territoriality (Section 8(a) - offence is alleged to have been committed in Kenya), or nationality (Section 8(b)(i) - at the time of commission the person was a Kenyan citizen or was employed by the Government of Kenya in a civilian or military capacity), or passive personality (Section 8(b)(iii) - the victim of the alleged offence was a Kenyan citizen), Kenya also introduces a novel form of passive personality, under which its courts assume jurisdiction if the victim was a citizen of a state that was allied with Kenya in an armed conflict (Section 8(b)(iv)). Kenya also interestingly provides for its courts to have jurisdiction over an offender who, at the time of commission of the offence, was a citizen of a state that was engaged in an armed conflict against Kenya, or was employed in a civilian or military capacity by such a state.

⁹⁴ Section 8(c) grants courts jurisdiction under the universality principle where the accused is present on Kenya soil after committing the offence.

⁹⁵ Section 6 of the Kenyan ICC Act stipulates that the core crimes under the Act shall assume the same meaning given in the Rome Statute.

⁹⁶ Section 18(c) of the Kenyan ICC Act provides that a person who is alleged to have committed an offence under any of Sections 9 to 17 may be tried and punished in Kenya for that offence if 'the person is, after commission of the offence, present in Kenya'.

practice.⁹⁷ Without exception the defendants in various UJ-based prosecution had taken up permanent residence in the forum state – as refugee, exile, fugitive, or immigrant – and resisted being ‘sent back to the countries in which their abominable deeds were done’.⁹⁸ The states of nationality of the accused in most instances acquiesced in or even supported prosecution. The fact that this rise in the use of UJ happened in relation to matters involving the territories of Rwanda and the former Yugoslavia also had an influence on the premium placed on the presence requirement. The prosecutor of the *ad hoc* international criminal tribunals for these countries and the UN Security Council had encouraged all states to search for and try suspects on their territory.⁹⁹ Further, extradition often was impossible, if not legally then practically.¹⁰⁰

3.6.4 Uganda

Uganda’s courts also enjoy UJ in respect of the core international crimes. The main enabling legislation is the International Criminal Court Act of 2010,¹⁰¹ which Uganda enacted pursuant to its obligations under the Rome Statute.¹⁰² Uganda makes four connecting factors prerequisite to the exercise of jurisdiction by its courts over a suspect who commits these crimes outside Uganda.¹⁰³ The perpetrator must be a citizen of or permanently resident in Uganda (nationality),¹⁰⁴ or the person must be employed by Uganda in a civilian or military capacity.¹⁰⁵ Also where the victim of the alleged crimes against a citizen or permanent resident of Uganda (passive personality) its courts will be clothed with jurisdiction.¹⁰⁶ The Act also provides that the courts will have jurisdiction where the person after committing the offence is present in Uganda.¹⁰⁷ It is not clear whether this relates to mere presence or the more established requirement of residency. The

⁹⁷ See generally Reydams L ‘The rise and fall of universal jurisdiction’ Leuven Centre for Global Governance Studies, Working Paper No.37 (January 2010). See for example, in the instances of UJ-based prosecutions in the courts of Austria, Canada, Germany, Denmark, Belgium, the United Kingdom, the Netherlands, Finland, France, Spain, and Switzerland for ‘war crimes’ committed abroad.

⁹⁸ *Ibid.*

⁹⁹ See Security Council Resolution 955 (1994) on the establishment of The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwanda Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

¹⁰⁰ *Ibid.*

¹⁰¹ The Uganda International Criminal Court Act 2010. Section 18 makes provision for jurisdiction of Ugandan courts over the core crimes, that combines both the traditional forms of jurisdiction and UJ.

¹⁰² Uganda signed on 17 March 1999, and ratified on 14 June 2002, becoming the 68th state party.

¹⁰³ In Sections 7, 8 and 9 the Ugandan Act states that the definitions of the core crimes as contained in the Rome Statute, and the Geneva Conventions in the case of war crimes, shall apply in Uganda.

¹⁰⁴ Section 18(a) of the Ugandan Act.

¹⁰⁵ Section 18(b) of the Ugandan Act.

¹⁰⁶ Section 18(c) of the Ugandan Act.

¹⁰⁷ Section 18 of the Ugandan Act introduces the universality principle in addition to the traditional forms of jurisdiction.

Ugandan Act is silent on presence for investigative purposes. The Act only expressly stipulates that presence shall be required 'for the purposes of jurisdiction'. However, it is not clear whether this relates to judicial jurisdiction as exercised by the courts, or prosecutorial jurisdiction by the national prosecuting authority for the purposes of putting charges to the accused, or enforcement jurisdiction through police investigative powers. Since there is no rule of custom prohibiting the commencement of investigations in the accused's absence, I submit that for investigative purposes under the Ugandan Act, the suspect need not be there.

3.6.5 Mauritius

Mauritius enacted the International Criminal Court Act No.27 of 2011 in order to give effect to its obligations under the Rome Statute.¹⁰⁸ The Mauritian ICC Act sets out the three core crimes and provides for Mauritian courts to have jurisdiction over perpetrators of these crimes.¹⁰⁹ Section 4 introduces the universality principle over and above the traditional forms of jurisdiction,¹¹⁰ namely nationality¹¹¹ and passive personality.¹¹² The aim of Section 4 is to provide Mauritian courts with a link to the crime or the accused, for acts committed abroad. The wording of the Section 4 does not necessarily indicate whether the presence is required for investigation or actual prosecution. It simply states that where the crime has been committed outside Mauritius, it shall be deemed to have been committed in Mauritius if the accused is afterwards present in Mauritius. It does not state whether this requirement relates to the courts or the police and other investigative institutions. It is submitted that the Mauritian provision is an open-ended one, subject to interpretation. The majority of UJ provisions in both domestic laws¹¹³ and in some

¹⁰⁸ Mauritius signed on 11 November 1998 and ratified on 5 March 2002, becoming the 53rd state party. The International Criminal Court Act No.27 of 2011 was proclaimed by Proclamation No.1 of 2012 and came into force on 15 January 2012. See Republic of Mauritius' Letter to the Secretariat of the Assembly of States Parties available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP11-POA-2012-MAU-ENG.pdf (accessed 23 June 2014).

¹⁰⁹ Section 5 of the Mauritian ICC Act provides that any person found guilty of the three core crimes shall be sentenced to penal servitude for a term not exceeding 45 years.

¹¹⁰ Section 4(3) provides that:

(3) Where a person commits an international crime outside Mauritius, he shall be deemed to have committed the crime in Mauritius if he –

...

(c) is present in Mauritius after the commission of the crime.

¹¹¹ Section 4(3)(a) clothes Mauritian courts with jurisdiction if the person committing the offence outside Mauritius) is a citizen of Mauritius, or (b) if he is not a citizen of Mauritius, he is ordinarily resident in Mauritius.

¹¹² Section 4(3)(d) empowers the court to exercise jurisdiction where the crime has been committed against a citizen of Mauritius or against a person who is ordinarily resident in Mauritius.

¹¹³ For example, as discussed above, the South African, Kenyan and Mauritian ICC Acts require the presence of the accused for courts to be seized with jurisdiction over a UJ-based prosecution. They are silent on the requirement of presence for purposes of initiating investigations.

treaties,¹¹⁴ are clear in their indications that presence of the accused is a requirement for prosecution. The absence of a customary law rule on the initiation of UJ-based investigations in absentia, favours the argument that presence is not a requirement for investigation, but only for prosecuting. This argument, however, does not carry much weight in the Mauritian case, since the Act itself does not stipulate what the presence is required for. It is submitted that in this case, presence should be required for both investigations and the initiation of prosecution.

3.7 Other African states currently developing their universal jurisdiction and ICC-implementing legislation

Apart from the above states, which have promulgated laws to implement their ICC obligations, and thereby introduced the universality principle, there is also a handful of states that are in the process of drafting their laws. Due to the ever-changing nature of drafts, they will not be discussed here, save to highlight those African countries which have taken a step towards incorporating UJ in their national legislation. The Democratic Republic of Congo (DRC), for example, is a party to the Rome Statute,¹¹⁵ and is currently engaged in the process of drafting national legislation to implement the Rome Statute. Nigeria's draft law incorporates UJ and envisages that Nigeria will require the accused's presence only at the stage of instituting proceedings.¹¹⁶ It provides in Section 23 that for acts committed abroad, proceedings may nevertheless be instituted against the offender in a court in Nigeria having jurisdiction to try offences under the draft Act and that court shall have all the powers to try the offence as if the offence had been committed within the territorial limits of the court's jurisdiction. Section 23 should be read together with Section 22, which contains the requirement for the presence of the accused for the institution of proceedings.

¹¹⁴ See the UN Convention against Torture, for example.

¹¹⁵ The Democratic Republic of Congo signed the Rome Statute on 8 September 2000. It later ratified it on 11 April 2002, participating in the simultaneous deposit at the special UN treaty ceremony to mark the 60 ratifications necessary for entry into force.

¹¹⁶ See Section 22 of the Crimes against Humanity, War Crimes, Genocide and Related Offences Bill 2012, which provides that:

- (1) Where an act constituting an offence under this Act is committed by a person outside the territory of Nigeria, proceedings may be instituted against that person for that offence in Nigeria if the person —
 - (a) is a citizen or permanent resident of Nigeria;
 - (b) has committed the offence against a citizen or permanent resident of Nigeria; or
 - (c) is present in Nigeria after the commission of the offence.

3.8 Concluding remarks

Whilst the Geneva Conventions enjoined states either to try or extradite offenders and perpetrators of grave breaches,¹¹⁷ the real impetus in the development of international criminal law is to be located outside the law of war. Perhaps this can be attributed to the fact that apart from war crimes, the other two core crimes could be committed in peace time, and as such required a well suited legal system and a tribunal structure to punish offenders. It was the jurisprudence of the various *ad hoc* international criminal tribunals,¹¹⁸ various treaties as well as global political and diplomatic lobbying that situated the need to punish not only perpetrators of war crimes, but also genocide and crimes against humanity.¹¹⁹

The Rome Statute and the obligations of states contained therein provided a springboard for the development of new legal frameworks, both on the African continent and abroad, aimed at giving effect to the obligations of states under international law. These new legal frameworks also developed within a milieu of widespread global impunity for these grave breaches.¹²⁰

The interactions that have taken place under the umbrella of the UN and the AU also demonstrate the hunger on the part of African states to meaningfully participate in the development of international law on the basis of sovereign equality with other states. Hence Africa as a collective has been very vocal on issues that it perceives as a corruption or abuse of established international customary law, such as the immunity of state officials in the courts of a foreign state. It also presents international law with challenges for the assertion that UJ over these core crimes is an established principle of customary law, since this assertion is not necessarily supported by state practice. Whilst a few states, such as Belgium, Spain, France and Switzerland have attempted, and at times succeed to prosecute foreigners on the basis of UJ, there is no evidence that this is indicative of widespread acceptance amongst states. In fact their recent recapitulation also does not bode well for such an assertion. The various amendments of UJ legislations, for

¹¹⁷ For the core crimes of genocide, war crimes and crimes against humanity, there is a treaty-based obligation *aut dedere aut judicare* only for grave breaches of the Geneva Conventions and Additional Protocol I. See 'International crimes: Extradite or prosecute' available at <http://www.chathamhouse.org/publications/papers/view/192991#sthash.LF58B8oA.dpuf> (accessed 25 June 2014).

¹¹⁸ For example, the International Criminal Tribunal for the Former Yugoslavia and The International Criminal Tribunal for Rwanda.

¹¹⁹ The occurrences in the former Yugoslavia and in Rwanda galvanised the revulsion of all of humanity and ultimately provoked the international community to respond to this situation. It spurred a determination to return to the legacy of Nuremberg in order to end the culture of impunity that had prevailed since. See generally Griffin M 'Ending the impunity of perpetrators of human rights atrocities: A major challenge for international law in the 21st century' (2000) 838 *International Review of the Red Cross* 369 – 389.

¹²⁰ The ICC, for example, was set up in response to this growing trend in impunity over the core crimes of genocide, war crimes and crimes against humanity.

example the 2014 Spanish amendment which now only confers jurisdiction if the perpetrator later becomes a citizen of or a permanent resident of Spain indicates that no such state practice exists. The persistent object of African states, as well as other concerned states such as China, Israel, the US and others militates against the view that UJ in relation to the prosecution of these offences is settled customary law.

The AU's resolve to come up with a sound legal framework on this issue which has divided the world can be seen in its attempts to strengthen not only domestic laws of its members, but also through the creation of a continental tribunal akin to the ICC.¹²¹



¹²¹ See the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the First Session of the Special Technical Committee (SCT) on Justice and Legal Affairs of the African Union in Addis Ababa on 16 May 2014.

CHAPTER FOUR – PROSECUTING CORE CRIMES: AFRICAN STATE PRACTICE AND ITS CONTRIBUTION TO INTERNATIONAL CRIMINAL JUSTICE

Part I

4. Background

As discussed above, the core crimes of genocide, war crimes and crimes against humanity have been recognised as international crimes for quite some time now.¹ Although ambivalence exists on how perpetrators of these core crimes should be punished,² there is general agreement amongst states that the international community needs to continually fight against and prevent the commission of these core crimes.³ Not only are these crimes established in customary international law,⁴ they are also codified through universally accepted international instruments such as the Geneva Conventions,⁵ which were designed to assist victims of violations that occur during times of conflict. Over the years, the limitation of the Geneva Conventions as a suitable

¹ Harlem M 'Importing core international crimes into national criminal Law', in Bergsmo M, Harlem M and Hayashi N (eds) *Importing Core International Crimes Into National Criminal Law*, FICJC Publications No. 1 (2007) 36. See also Van der Merwe HJ 'The prosecution of incitement to genocide in South Africa' (2013) 16:5 *Potchefstroom Electronic Law Journal* 328-369, 331.

² See generally Smeulers A 'Punishing the enemies of all mankind' (2008) 21 *Leiden Journal of International Law* 971 – 993. See also Drumbl A *Atrocity, Punishment, and International Law* (2007).

³ As indicated above, the AU has consistently indicated its commitment to ending impunity, punishing perpetrators of these core crimes and ensuring that victims are at the centre of all actions in sustaining the fight against impunity. See, for example, the AU Decision on the implementation of the decisions on the International Criminal Court (ICC), Doc.EX./731(XXI), Assembly/AU.Dec.419(XIX), para 2. See also the Security Council Resolution unanimously adopted on the twentieth anniversary of the genocide in Rwanda, in which the Security Council condemned genocide without reservation and called for recommitment to fight against genocide. See Resolution 2150(2014), adopted at the 7155th Meeting of the Security Council on 16 April 2014. The UNSC Resolution also acknowledged the important role played by regional and sub-regional arrangements in the prevention of, and response to, situations that may lead to genocide, war crimes and crimes against humanity. It especially noted Article 4(h) of the Constitutive Act of the AU in that regard. African countries serving as non-permanent members of the UNSC as of 2014 are Rwanda (serving up to 2014), Chad and Nigeria (both serving up to 2015).

⁴ Cassese A 'The Statute of the International Criminal Court: Some preliminary reflections' (1999) 10 *European Journal of International Law* 144 - 171, 151.

⁵ *Ibid.* Article 8(2)(a) of the Rome Statute defines war crimes to mean any of the listed acts constituting grave breaches of the Geneva Conventions, when committed against persons or property protected under the provisions of the relevant Geneva Convention. It proceeds to list a number of prohibited acts that would constitute war crimes, namely wilful killing, torture, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military necessity, compelling a prisoner of war or other protected person to serve in the forces of a hostile power, wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial, unlawful deportation or unlawful confinement, and taking of hostages. In Paragraph (b) the definition includes other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law. It goes on to list a number of acts that are proscribed as war crimes. These must take place within the context of armed conflict. In Article 8(2)(c) the Rome Statute makes provision for proscribed conduct occurring in the context of a non-international armed conflict. According to Cassese, these two classes, provided for in Article 8(2)(a) and (c), respectively, embrace two categories of crimes undoubtedly covered by international customary law: grave breaches of the Geneva Conventions and serious violations of Common Article 3 of the Geneva Conventions.

vehicle for galvanising and advancing international opposition to impunity for the core crimes was the absence of an international court that could enforce these obligations.⁶

Theoretically, states could prosecute persons found on their territory only to the extent that the alleged offences occurred on the prosecuting state's territory, or alternatively, on the basis of nationality, passive personality and protected interest. States could deal only with extraterritorial breaches of the Geneva Conventions if their enabling legislation provided for UJ. In cases where the offender escaped the territorial state, the only available avenue could be extradition to another state willing and able to prosecute him. Although extradition is established through the principle of *aut dedere aut judicare*, an attempt to rely on this principle alone for prosecuting offenders which is not accompanied by an appeal to UJ could also be subjected to the question of jurisdiction as highlighted above. The reliance on extradition also often proves to be problematic as it is susceptible to many legal impediments not related to jurisdiction, such as the lack of an extradition treaty between the two territories and the immunity of heads of states in the courts of a foreign state. Hence the reliance on the Geneva Convention alone as a tool for restraint of power did not bode well for the fight against impunity.

The Rome Statute and the obligations it imposes on member states represents a significant global move to provide for the punishment of perpetrators of the core crimes, with the exception of war crimes, even where they occur in peace time.⁷ The Rome Statute has enabled states to play a meaningful role in the fight against impunity in respect of these core crimes. States such as South Africa,⁸ Mauritius,⁹ Uganda,¹⁰ and Kenya¹¹ have enacted implementing legislation which broadens the jurisdictional reach of their enforcement powers through UJ, thereby ensuring that impunity

⁶ When Nauru and Montenegro acceded to the four Geneva Conventions of 1949 on 27 December 2006 and on 2 February 2007 respectively, these treaties became the first in modern history to achieve universal acceptance. They were formally accepted by all 194 states in the world and achieved universal recognition as the principal legal basis for protecting victims of war. However, the fact that these instruments are suited for times of conflict is also their limiting factor.

⁷ The definitional Articles of the Rome Statute do not necessarily limit themselves to crimes occurring in armed conflict, save for Article 8 which defines a war crime by reference to the grave breaches of the Geneva Conventions. Article 7 defines a crime against humanity as comprising of the following acts: murder, extermination, enslavement, deportation, imprisonment or severe deprivation of liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, any form of sexual violence of comparable gravity, persecution against any identifiable group, enforced disappearances of persons, the crime of apartheid, and other inhumane acts of a seminal character intentionally causing great suffering. For these acts to qualify they must be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

⁸ The Implementation of the Rome Statute of the International Criminal Court Act No.27 of 2002 and the Prevention and Combating of Torture of Persons Act No.13 of 2013 of South Africa.

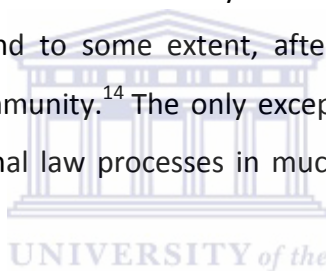
⁹ International Criminal Court Act No.27 of 2011 of Mauritius.

¹⁰ International Criminal Court Act of 2010 of Uganda.

¹¹ International Crimes Act of 2008 of Kenya.

has no place in a post-ICC world. Hence in assessing how Africa has dealt with perpetrators of the core crimes and how UJ has influenced that process, The focus will be on two key periods: (i) the period before the creation of the ICC; and (ii) the period after the creation of the ICC.

This approach is necessitated by the fact that from around the era of the Nuremburg Trials up to the early 1960s,¹² the majority of African states had not yet gained independence, and as such could not be involved in the prosecution of international crimes as fully fledged states.¹³ For African states, this period was characterised by wars of liberation and colonial dominance. With the exception of Ethiopia, which was never colonised, and a few other African states that had attained independence earlier, the majority of African states were not fully recognised as states capable of entering into relations with other states, including the ability to influence the development of international law. They interacted mostly with the larger global community through proxy, as colonies. To demonstrate this unequal relationship one needs to look no further than the denial of procedural and functional immunity to African leaders in the various colonies in the years before independence, and to some extent, after independence, whilst the colonial political leaders enjoyed relative immunity.¹⁴ The only exception was the Union of South Africa, which engaged with the international law processes in much the same manner as its European



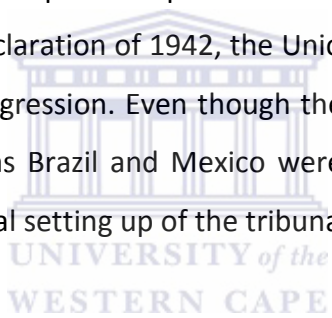
¹² The first attempt at setting up an international tribunal to deliberate on violations of the laws of war came after the First World War, when states convened the Paris Conference which unfortunately ended in failure. After the Second World War, states in the form of the Allies managed for the first time to establish an international criminal tribunal, the Nuremberg Tribunal. This also ushered in a new legal concept, that of international criminal law. On the opposite side of the conflict was what was known as the Axis countries (mainly Germany, Italy and Japan). On the side of the Allies were countries such as the US, the United Kingdom and its colonies, the Soviet Union, France and China. There were also minor members such as Bulgaria, Brazil, Mexico, Netherlands, Poland, Romania and Yugoslavia. Countries such as Denmark and Norway were invaded by the Axis but were not Allied nations. After the conflict, the four major Allied powers—France, the Soviet Union, the United Kingdom, and the United States—set up the international criminal tribunal in Nuremberg by signing the London Agreement of 1945.

¹³ In 1960, 17 African territories gained independence from European colonial rule. These 17 nations joined the UN's General Assembly and gave greater voice to the non-Western world.

¹⁴ Swaziland was under the administration of South Africa from 1894 to 1902, as a dependency of the Zuid-Afrikaansche Republiek (ZAR), with British approval. On the night of 9 April 1898 the reigning monarch, King Bhunu engineered the murder of one of his senior ministers, Mbabha Nsibandze, after a political fallout over taxation by the ZAR. The Transvaal Administration summoned King Bhunu to the capital, Bremersdorp. He initially resisted the summons but eventually complied on 21 May 1899 when the king arrived, accompanied by more than 2000 of his weapon-bearing warriors. Although proceedings did not take place on this day, the king would eventually be tried and acquitted, but fined £500, with £1 146 in costs for allowing public violence after extensive consultations between the British Government and that of the ZAR. See generally Jones HM 'Neutrality compromised: Swaziland and the Anglo-Boer War, 1899 – 1902' (1999) 11:3 *Military History Journal* available at <http://samilitaryhistory.org/vol113hj.html> (accessed 14 July 2014). See also Swaziland Discovery 2014 available at (<http://www.swazibusiness.com/discovery/manzini.html>) (accessed 13 July 2014). The taxation issues also affected King Dinizulu of Zululand. He was also arrested at the end of 1907 on suspicion of being behind a series of disturbances and guerrilla warfare in the territory. He was charged with high treason and found guilty on three charges of harbouring rebels. He was sentenced to four years' imprisonment and fined £100. The Union Government later released him in 1910. See Warwick P *Black People and the South African War, 1899-1902* (1983) 95.

counterparts, precisely because it was an occupying force as well.¹⁵ The statehood or lack thereof, is still being used today as a pretext for refusal by the ICC Prosecutor to investigate Israeli atrocities in Palestine.¹⁶

The incapacity of the colonies and the few newly independent states to engage with the international law process at that time should be contrasted to the engagement that the Allied powers and their associates had with the establishment of tribunals and prosecution of offenders through the IMT and the lesser known International Military Tribunal for the Far East (IMTFE).¹⁷ For example, the IMTFE Charter provided for the appointment of judges to the IMTFE from the countries that had signed Japan's instrument of surrender, namely: Australia, Canada, China, France, India, the Netherlands, Philippines, the Soviet Union, the United Kingdom, and the US. Each of these countries also supplied a prosecution team. The only African state that interacted with the trial was the Union of South Africa, which engaged with the Nuremberg process in a different manner. For instance, when plans to prosecute German political and military leaders were announced in the St James Declaration of 1942, the Union of South Africa joined the Allies in condemning Germany's policy of aggression. Even though the colonies of the United Kingdom as well as non-European states such as Brazil and Mexico were listed amongst the Allies, it is not clear what their role was in the actual setting up of the tribunal and the subsequent prosecution of offenders.¹⁸



Secondly, Africa's engagement with international criminal justice after this period was very limited. From the 1960s up to the 1990s, Africa's focus was on nation building,¹⁹ and international perceptions had not crystalized to the level where Africa could be seen as a significant player in international criminal justice.²⁰ Hence in the period after the Nuremberg Trials, there is no record of international criminal prosecution of Nazi-era war criminals by an African state, whereas there

¹⁵ When the UDHR was adopted after minor changes by the UN General Assembly on 10 December 1948, South Africa abstained from its adoption, together with states such as the Belorussian Soviet Socialist Republic (SSR), Czechoslovakia, Poland, Saudi Arabia, the Soviet Union, the Ukrainian SSR, and Yugoslavia.

¹⁶ Dugard J 'Palestine and the International Criminal Court' (2013) 11 *Journal of International Criminal Justice* 563 – 570, 565.

¹⁷ The IMTFE was created in Tokyo, Japan, pursuant to a 1946 proclamation by US Army General Douglas MacArthur, Supreme Commander for the Allied Powers in occupied Japan.

¹⁸ South Africa was an active participant when in late 1945, leaders of the world's nations met in San Francisco to form the UN. The UDHR, which they included in the preamble to the Charter of the UN is largely attributed to the inspiration given by the South African pre-apartheid leader Field-Marshal Smuts.

¹⁹ Bandyopadhyay S and Green E 'Nation-building and conflict in modern Africa' Discussion Paper Series, EOPP/2008/26 2 available at <http://sticerd.lse.ac.uk/dps/eopp/eopp26.pdf> (accessed 9 July 2014).

²⁰ The Charter of the Organisation of African Unity (OAU) was adopted in Addis Ababa, Ethiopia on 25 May 1963 and entered into force on 13 September 1963.

is a litany of such processes by non-African states.²¹ That Africa's major concern was nation building is evident in the contents of the Charter of the Organisation of African Unity (OAU), in which African states indicated in the preamble that they were determined to safeguard and consolidate their hard-won independence as well as their sovereignty and territorial integrity, and to fight against all forms of neo-colonialism. Hence the OAU listed amongst its objectives the defence of the sovereignty, territorial integrity and independence of African states, as well as promoting unity and solidarity amongst African states.²²

Glaringly scant within the OAU framework were references to human rights and the sanctity of human life. The focus of states was on the control of human and natural resources.²³ Article 2 of the OAU Charter generally focuses on the strengthening of political power for the newly emerged independent African states. For instance, the OAU was more concerned about securing a place in the larger global body politic, by promoting international cooperation, having due regard to the UN Charter and the UDHR, than it was with issues of human rights. These aspirations to consolidate the African position in the global space were tempered by the Article 3(2) provision on non-interference in the internal affairs of other states. Unlike the AU's Article 4(h), which allows for intervention by the Union in the event of grave circumstances, the OAU seems to have positioned itself from the very beginning to play a passive role in the area of human rights protection and holding errant states to account.

The inability of the OAU to intervene in the affairs of its members, even in the face of grave circumstances can be seen in the genocide in Rwanda in the early 1990s. The extent of the genocide shocked the conscience of mankind, to such an extent that there was international consensus on the need to punish those responsible. Hence this chapter will also analyse the contribution of the ICTR prosecutions to international criminal justice on the continent and globally. Since the ICTR was an international tribunal, the issues of UJ-based prosecution did not arise. However, there were UJ considerations stemming from the prosecution of perpetrators of the Rwandan genocide by foreign courts. There will therefore be an analysis of how such

²¹ See in this regard the cases of *Demjanjuk v Petrovsky* US Court of Appeal 6th Cir. 31.10.1985 ILR 70, 546; *Israel v Eichmann* 36 ILR 277, 294 [1962] (Isr.); *R v Finta* 24 March 1994 ILR 104; and the *Monte* case, United Nations War Crimes Commission XV Law Reports of Trials of War Criminals 43 (1947-49).

²² Article 2(c) of the OAU Charter.

²³ Musila GM 'African Union and the evolution of international criminal justice in Africa: challenges, controversies and opportunities' 4. The publication is available at https://www.academia.edu/5952514/African_Union_and_the_Evolution_of_International_Criminal_Justice_in_Africa_Challenges_Controversies_and_Opportunities (accessed 28 July 2014).

prosecutions contributed to the growth of Africa's jurisprudence on the prosecution of the core crimes.

Part II

4.1 International criminal justice in the pre-International Criminal Court era

As discussed above, from the 1960s up to the late 1970s and early 1980s, the focus of the continent remained state security and consolidation of state power, buoyed by the euphoria of self-governance. Human rights, and by necessary extension, the prevention and punishment of the core crimes, was subordinated to the pursuit of political freedom, eradication of colonialism and African solidarity. This stance drew much inspiration from the policy of non-interference in the internal affairs of other states. The violation of human rights was to a large extent viewed as an internal affair not warranting the intervention of the OAU or any of its members.

Because of this stance, the period after independence was characterised by unilateral unconstitutional changes of government and the widespread abrogation of independence constitutions. The examples of Malawi's Kamuzu Banda who amended the constitution to proclaim himself 'president for life';²⁴ Swaziland's King Sobhuza II, who abrogated the entire constitution, replaced it with a royal decree before assuming all legislative, executive and judicial powers;²⁵ and Uganda's Idi Amin who abrogated the constitution and ruled Uganda with an iron fist,²⁶ are instructive in this regard.²⁷

The adoption of the African Charter on Human and Peoples' Rights (African Charter) in 1981 offered some renewed hope, but the Charter would not come into force until 1986.²⁸ Although it

²⁴ Chilemba EM 'They keep saying, "My President, my Emperor, and my All": Exploring the antidote to the perpetual threat on constitutionalism in Malawi' 14. Paper presented at the Conference on Constitution-building in Africa, at the University of the Western Cape, Cape Town, Republic of South Africa 6 September 2013 available at www.communitylawcentre.org.za/constitution-making.../file (accessed 28 July 2014). See also Nkhata MJ 'Popular involvement and constitution-making: The struggle towards constitutionalism in Malawi' in Mbondenyi MK and Ojienda T (eds) *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives From Sub-Saharan Africa* (2013) 232.

²⁵ See the King's Proclamation to the nation of the 12 April 1973 available at <http://eisa.org.za/PDF/swa1973proclamation.pdf> (accessed 28 July 2014). See also Limpitlaw J *Media Law Handbook for Southern Africa* (2012) 282 available at <http://www.kas.de/wf/doc/4222-1442-2-30.pdf> (accessed 28 July 2014).

²⁶ See Mbazira C 'From military rule and no party state to multi-partism in Uganda' in Mbondenyi MK and Ojienda T (eds) *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives From Sub-Saharan Africa* (2013) 294.

²⁷ See 'Truth Commission in Uganda' available at <http://www.trial-ch.org/en/resources/truth-commissions/africa/uganda.html> (accessed 28 July 2014).

²⁸ The African Charter is sometimes called the Banjul Charter. It was adopted by the OAU in Nairobi, Kenya on 27 July 1981 and entered into force on 21 October 1986.

did not do much in respect of preventing the core crimes because it did not establish a forum with criminal jurisdiction, it did indicate a modicum of change in the OAU's world outlook. The African Charter set up the African Commission, a human rights forum with competence to issue recommendations only.²⁹ As such, the African Charter was ill-suited for fighting impunity for the core crimes.

The OAU's protectionist attitude towards faltering African state leaders and its unwillingness to intervene in domestic matters literally gave free reign to a number of African leaders who inflicted human suffering on a massive scale with impunity. The likes of former Zaire's Mobutu Sese Seko,³⁰ Idi Amin,³¹ and Chad's Hissène Habré, come to mind.

4.1.1 The establishment of the International Criminal Tribunal for Rwanda

By the 1990s, the continent was slowly taking note of the new wave of democratic reforms sweeping across the world. At the same time international criminal justice was going through a revival of its own. The grave human rights breaches and human suffering in the former Yugoslavia, as well as the genocide in Rwanda prompted the international community to establish *ad hoc* international criminal tribunals.³²

The responses of both the UN and the OAU to the genocide were reactionary rather than preventative. At some level though, the OAU had been seized of the conflict in the Great Lakes Region that preceded the genocide, albeit limited to political and diplomatic attempts to mediate between the warring factions.³³ However, the restraint put upon it by Article 3(1) and (2) of the

²⁹ The African Commission was established by Article 30 and its power to issue recommendations is governed by Articles 45 and 53.

³⁰ Mobutu died in exile in Morocco after being removed from power by Laurent Kabila. Mobutu was known for having an atrocious human rights record. Despite having a colourful career in inflicting large-scale human suffering, he died without facing justice.

³¹ Idi Amin Dada ruled Uganda from 1971 to 1979 and he became known informally as the 'Butcher of Uganda' for his brutal despotic rule. He was alleged to have carried out acts of torture, systematic murders and arbitrary imprisonments, before he was ousted from power by Ugandan nationalists. Idi Amin died in exile in Saudi Arabia without facing trial.

³² The setting up of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2003, also deserve mention, as this indicates the growing global momentum to eliminate impunity and hold perpetrators of core crimes accountable. The ECCC were established on 17 March 2003 following an agreement reached between the UN and the Cambodian government for an international criminal tribunal. The Chambers consist of both Cambodian and international judges, and have exclusive jurisdiction over selected crimes committed by the Khmer Rouge regime between 1975 and 1979. The Khmer Rouge seized power in Cambodia in 1975 and killed more than a million people during its four year rule.

³³ The OAU responded by appointing the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and Surrounding Events in 1998. The Panel submitted their report, titled 'Rwanda: The Preventable Genocide', which they requested should be transmitted to the UN Secretary-General for discussion by the UNSC. Its mandate included the investigation of the 1994 genocide in Rwanda and the surrounding events in the Great Lakes Region as part of efforts aimed at averting and preventing further wide-scale conflicts in that region. It was

OAU Charter made it difficult for the organisation to assist meaningfully in the prevention of the genocide,³⁴ as it did not have the equivalent of the AU's Article 4(h) power to intervene.³⁵ The UN on the other hand, was informed of the impending annihilation of Tutsis, but also did nothing to prevent this.³⁶ Only after the 1994 genocide did the UNSC, acting under Chapter VII of the UN Charter, create the ICTR to prosecute the international crimes committed during the Rwandan genocide. According to Akhavan, this prompted a shift from a model of partial so-called dictator's justice of the Nuremberg Trials to the so-called spectator's justice, which involves watching as civilians are slaughtered only to half-heartedly prosecute genocidaires afterwards.³⁷ In other words, even though international criminal justice was undergoing a revival, the approach was not a proactive one but reactionary, where tribunals were created in response to situations and on an *ad hoc* basis.

For security reasons, the Security Council decided to locate the seat of the tribunal in Arusha, Tanzania. The ICTR was clothed with jurisdiction to try, amongst other crimes, genocide, crimes

further asked to establish the facts the genesis of the genocide, that is how it was conceived, planned, and executed, and also to investigate the failure to enforce the UN Genocide Convention in Rwanda and in the Great Lakes Region. The Panel was also tasked with recommending measures aimed at redressing the consequences of the genocide and at preventing any possible recurrence of such a crime.

³⁴ This was highlighted in the Report of the International Panel of Eminent Personalities as a key factor that made intervention in Rwanda impossible. See Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and Surrounding Events 'Rwanda: The Preventable Genocide' (7 July 2000) para 11.4. The report is available at <http://www.refworld.org/pdfid/4d1da8752.pdf> (accessed 23 July 2014). The Panel was chaired by Sir Ketumile Masire (former President of Botswana), with Amadou Toumani Toure (former head of state of Mali) serving as vice-chair. The other members of the Panel were PN Bhagwati (former Chief Justice of the Supreme Court of India); Hocine Djoudi (former Algerian Ambassador to France); Ellen Johnson-Sirleaf (former Liberian Government Minister); Stephen Lewis (former Ambassador and Permanent Representative of Canada to the UN); and Lisbet Palme (Chairperson of the Swedish Committee for UNICEF, Expert on the UN Committee on the Rights of the Child).

³⁵ Article 3(1) bound members of the OAU to adhere to the principle of sovereign equality of all members states, whilst Article 3(2) bound states to the principle of non-interference in the internal affairs of states.

³⁶ The Rwanda genocide was a result of the re-awakening of latent ethnic divisions that were instilled by the colonialists in the past. The colonial regime had created a social climate where the minority Tutsi was deemed to be of a superior race than the Hutu. The genocide was preceded by conflict between the Government soldiers and the Tutsi rebels, the Revolutionary Patriotic Front (RPF) which, in October 1990 invaded Rwanda from Uganda where its troops had been hiding in exile. Immediately after the RPF raid, the OAU initiated peacemaking efforts with the aim of resolving the conflict. For the OAU in Rwanda and then in the Great Lakes Region, the 1990s were a time of well-meant initiatives, incessant meetings, commitments made, and commitments broken. The mediatory role of the OAU meant that it could do no more than bring adversaries together, and hope first that they would agree, and then hope that they did not violate their agreements. From 1 October 1990, Rwanda endured three and a half years of violent anti-Tutsi incidents, each of which in retrospect can be interpreted as a deliberate step in a vast conspiracy culminating in the shooting down, on 6 April 1994, of President Habyarimana's plane and the subsequent unleashing of the genocide. The Report of the Panel reveals that anti-Tutsi violence was revived immediately after the RPF invasion, when some organized anti-Tutsi massacres began (and ended only when the genocide itself ended). Massacres of Tutsi were carried out in October 1990, January 1991, February 1991, March 1992, August 1992, January 1993, March 1993, and February 1994. On each occasion, scores of Tutsi were killed by mobs and militiamen associated with different political parties, sometimes with the involvement of the police and army, incited by the media, directed by local government officials, and encouraged by some national politicians.

³⁷ Akhavan P 'The rise, and fall, and rise, of international criminal justice' (2013) 11 *Journal of International Criminal Justice* 527 – 536, 530.

against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Its jurisdiction *ratione temporis* was limited to crimes committed between 1 January and 31 December 1994. Notably, the founding instrument did not limit the jurisdiction *ratione personae* to only Rwandan citizens, but empowered the tribunal to hear cases involving crimes committed by Rwandans and non-Rwandans in the territory of Rwanda, as well as those committed by Rwandans in the territory of neighbouring states.

The ICTR was international in its character, with its bench staffed by judges elected through a UN General Assembly list submitted by the Security Council. Because this was an *ad hoc* tribunal, it had been envisaged that it would close down once it had completed its mandate. The exit strategy for this international tribunal was contained in UNSC Resolution 1503(2003) which contained a timeline,³⁸ not only for the winding down of the ICTR, but also of the ICTY. The UNSC called upon the ICTR, as part of its completion strategy, to aim to transfer cases involving intermediate and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda. This would allow the ICTR to achieve its objective of completing investigations by the end of 2004, completing all trial activities at first instance by the end of 2008, and completing all of its work in 2010.

Apart from lack of resources, the ICTR faced other challenges in its work. Despite the challenges faced, the ICTR's contribution to international criminal justice is very significant. Its rich jurisprudence is also critical for Africa's fledgling international criminal justice system, especially the newly created criminal chamber within the African Court of Justice and Human Rights. The ICTR's definition of genocide in the *Prosecutor v Akayesu* judgment³⁹ represents the first interpretation by an international criminal tribunal of the definition of genocide as set out in the Genocide Convention. The growth of Africa's jurisprudence in international criminal justice can rightly be attributed to the work of this *ad hoc* tribunal. For instance, in the same *Akayesu* judgment, the ICTR affirmed rape as an international crime.⁴⁰ This position was further affirmed and broadened by later judgments which found that rape may indeed be a constituent element of genocide.⁴¹

³⁸ UNSC Resolution 1503 (2003), 2003 S/RES/1503 (2003), adopted by the Security Council at its 4817th meeting on 28 August.

³⁹ *Prosecutor v Jean-Paul Akayesu* Case No. ICTR-96-4-T.

⁴⁰ The first case to set a major precedent by including sexual violence as an indictable crime by an international court was *Prosecutor v Dusko Tadic* ICTY Case No. IT-94-1-L.

⁴¹ See for example *Prosecutor v Musema* (Musema Trial Chamber Judgment and Sentence) Case No. ICTR-96-13-A and *Prosecutor v Niyitegeka* Case No. ICTR-96-14.

The ICTR also made headway in other respects, particularly in the area of immunity of heads of state. International criminal justice on the continent has largely been plagued by arguments over the immunity of heads of state from criminal prosecution. African state leaders have consistently decried attempts by foreign courts in that regard. However, the African voice is also pushing for respect for the immunity of state leaders, even where they appear before international tribunals. Whilst the law is settled on the immunity of heads of state in domestic courts, the same can definitely not be said of international courts. For example, in the *Arrest Warrant* case,⁴² the ICJ held that high-ranking state officials, such as heads of state, heads of government and ministers of foreign affairs enjoy immunity from jurisdiction in other states, both civil and criminal.⁴³ However, in the Charles Taylor case,⁴⁴ the Special Court for Sierra Leone held that immunity for heads of states cannot be relied upon before an international criminal tribunal, whilst in *Prosecutor v Milosevic*,⁴⁵ the ICTY also held that it was settled customary law that a head of state cannot plead his official position as a bar to criminal liability in respect of the core crimes before an international tribunal.⁴⁶ Even though the court in the *Arrest Warrant* case left open the question of what crimes can an incumbent state official be indicted for, the court in *Taylor* also assumed this position without deciding on the question of the nature of the crimes for which the accused, being a head of state can be indicted by an international court.

The ICTR made a meaningful contribution in the area of immunity, by becoming the first international criminal tribunal since the Nuremberg Trials to convict a head of government.⁴⁷ Its decision would later be cited by both the ICTY and the Special Court for Sierra Leone. The tribunal

⁴² See *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002.

⁴³ The court held that while jurisdictional immunity may well bar prosecution for a certain period or for certain offences, it cannot exonerate the person to whom it applies from all criminal responsibility. Immunities do not represent a bar in certain circumstances, the court referred to circumstances where such persons are tried in their own countries where the state they represent or have represented decides to waive that immunity; where such persons no longer enjoy all the immunities accorded by international law in other states after ceasing to hold the office of minister of foreign affairs, and where such persons are subject to criminal proceedings before certain in international criminal courts, where they have jurisdiction.

⁴⁴ *Prosecutor v Charles Ghankay Taylor* available at <http://www.rscsl.org/Taylor.html> (accessed 18 July 2014).

⁴⁵ *Prosecutor v Slobodan Milosevic* Case No. IT-02-05 ICTY.

⁴⁶ Milosevic did not raise the issue of immunity explicitly himself, but the ICTY decided to make a ruling on it following the submissions of *amici curiae*. The *amici* had submitted that the ICTY lacked jurisdiction over the person of President Milosevic. The prosecutors had argued that Article 7(2) reflects customary international law and this was buttressed by the ICTR's conviction of Jean Kambanda, the former Prime Minister of Rwanda, for his involvement in the 1994 genocide, an argument with which the Tribunal agreed. Article 7 was couched in the following terms: 'The official position of any accused person, whether as [he]ad of [s]tate or [g]overnment or as responsible [g]overnment official, shall not relieve such person of criminal responsibility nor mitigate punishment'. The *amicus*' submission was basically that the accused was disputing the validity of this Article.

⁴⁷ Jallow H and Bensouda F 'International criminal law in an African context' in du Plessis M (ed) *African Guide to International Criminal Justice* (2008) 36.

convicted Jean Kambanda, the Prime Minister of the Interim Government of Rwanda from April to July 1994, of genocide.⁴⁸ Kambanda was arrested by the Kenyan authorities, on the basis of a formal request submitted to them by the Prosecutor of the ICTR on 9 July 1997. He pleaded guilty to the six counts contained in the indictment, namely genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity (murder), punishable under Article 3(a) of the ICTR Statute and crimes against humanity (extermination), punishable under Article 3(b) of the ICTR Statute.

The court noted that the crimes were committed during the time when Kambanda was Prime Minister and that he and his government were responsible for the maintenance of peace and security. It found that Kambanda abused his authority and the trust of the civilian population, and that he personally participated in the genocide by distributing arms, making incendiary speeches and presiding over cabinet and other meetings where the massacres were planned and discussed. Having done all that, he failed to take necessary and reasonable measures to prevent his subordinates from committing crimes against the population. After verifying the guilty plea, the court found him guilty and sentenced him to life imprisonment.⁴⁹

The ICTR also provides examples of cooperation on the African continent in international criminal investigation and prosecution. Alleged perpetrators of the events surrounding the 1994 Rwandan genocide were arrested through cooperation with several African countries in 1998. Arrests have taken place in, among others, Cameroon, Kenya, Togo, Mali, Tanzania, Benin, Angola, Congo, Burkina Faso, South Africa, Zambia, Côte d'Ivoire, Uganda, Gabon, Senegal and Namibia.⁵⁰ This regional cooperation indicates the willingness and ability of African states to cooperate in international criminal investigations and prosecutions, and their support for the work of the ICTR. This is in line with the obligation to end impunity for the core crimes.

The work of the ICTR and the ICTY galvanized the calls for a permanent international tribunal towards the close of this decade. The adoption of the Rome Statute by the UN General Assembly marked an extraordinary development in the area of international criminal law. Although this is a global rather than an African tribunal, it deserves mention here because, as will become clear below, it did affect international criminal justice on the continent, both positively and negatively. The Rome Statute provided a platform for holding perpetrators of the core crimes accountable via

⁴⁸ *The Prosecutor v Jean Kambanda* Case No. ICTR 97-23-S, delivered 4 September 1998.

⁴⁹ *Ibid*, paras 39 and 44.

⁵⁰ Jallow H and Bensouda F 'International Criminal Law in an African Context' in du Plessis M (ed) *African Guide to International Criminal Justice* (2008) 28.

an international forum. It also allowed states to develop their domestic criminal justice systems by domesticating their obligations under the Statute, and also providing for the exercise of jurisdiction on the basis of the universality principle. The Rome Statute drew much criticism from African state leaders under the auspices of the AU, and the debates that ensued, some of which are still on-going, contributed to the development of international criminal justice.

4.2 International criminal justice after the International Criminal Court

The turn of the millennium saw some fundamental reforms in the African governance institutions. This is what some commentators refer to as the romantic phase of international criminal justice, characterised by utopian aspirations to punish war crimes.⁵¹ The OAU developed into the AU and with it came new hope that the outstanding cases, such as those of Charles Taylor, and Hissène Habré which were carried over from the 1990s would finally be dealt with, and that victims would finally find justice and closure. This was not an easy feat to achieve, particularly in the *Habré* case, the commencement of which was delayed by a long and convoluted legal, political and diplomatic tussle spanning over 20 years and across two continents.

Although this period witnessed heightened domestication of international obligations, such as the Rome Statute and UNCAT obligations, the actual enforcement of those obligations presented difficulties of a novel kind for the continent. The South African litigation in the case involving the Zimbabwe Torture Docket illustrates this point, and demonstrates that even though states have pledged to prevent impunity, when it comes to using domestic resources to prosecute foreign offenders for crimes committed on foreign soil against foreigners, the considerations are not just purely legal or political, but also financial.⁵² The Kenya post-election violence cases also demonstrate the tensions that can be brought to bear by an international tribunal's overbearing reach into the domestic sphere by deciding to be seized of matters that are otherwise best suited for the domestic courts. Thus the Uhuru Kenyatta case aptly demonstrates the need for complementarity between the ICC and domestic courts.

Hence the following section will be an exposition of the challenges, prospects and contributions of these various cases to the development of international criminal justice and, where it finds

⁵¹ Akhavan P 'The rise, and fall, and rise, of international criminal justice' (2013) 11 *Journal of International Criminal Justice* 527 – 536, 527.

⁵² See Applicant's written submissions, paras 4 and 55 in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* CCT 02/14.

application, the principle of universality on the continent. Such an analysis also offers an opportunity to determine the role of the AU in these developments, which in turn will assist in identifying what the state practice is in Africa in relation to the prosecution offenders accused of the core crimes.

4.2.1 The *Hissène Habré* case: A brief background

The prosecution of the former president of Chad, Hissène Habré in Senegal where he had sought refuge for the previous two decades is illustrative of the difficulties for Africa in attempting to prosecute perpetrators of the core crimes in general, and through using the universality principle in particular. After more than a 20-year delay, proceedings finally commenced against Habré in the courts of Senegal for international crimes allegedly committed during his tenure as president of Chad between 1982 and 1990. A brief analysis of the legal, political and diplomatic wrangling that preceded this case clearly demonstrates the difficulty attendant thereto.

The Habré case was initiated after the AU and Senegal, in August 2012 signed an agreement to establish a special court in the Senegalese justice system with judges appointed by the AU presiding over his trial.⁵³ The AU noted that it had no legal organ competent to try Habré at the time. It then mandated the Republic of Senegal to ensure that Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees of fair trial. It further mandated the Chairperson of the AU, in consultation with the Chairperson of the AU Commission, to provide Senegal with the necessary assistance for the effective conduct of the trial. The agreement came in light of a ruling by the ICJ the previous month, ordering Senegal to bring Habré to justice ‘without further delay’,⁵⁴ either by prosecuting him domestically or extraditing him to stand trial.⁵⁵ It is apposite to state at this point that the agreement was in some degree the culmination of years of legal and diplomatic efforts by the AU and other bodies to find a lasting solution to the Habré situation.

The legal battle to bring Habré to justice began soon after he sought refuge in Senegal following his ousting from power by Idriss Déby Itno in December 1990. A National Truth Commission set up by the authorities in Chad recommended the prosecution of Habré and his accomplices for the

⁵³ See AU Decision on the Hissène Habré Case and the African Union, DOC.ASSEMBLY/AU/3(VII), Assembly/AU/Dec.127 (VII). In this Decision, the AU noted that according to the terms of Articles 3(h), 4(h) and 4(o) of the Constitutive Act of the AU, the crimes of which Hissène Habré is accused fell within the competence of the AU.

⁵⁴ See ICJ ‘Questions relating to the obligation to prosecute or extradite (*Belgium v Senegal*)’ Press Release No.2012/24 of 20 July 2012 available at <http://www.icj-cij.org/docket/files/144/17084.pdf> (accessed 11 June 2014).

⁵⁵ See *Questions relating to the obligation to prosecute or extradite (Belgium v Senegal)*, Judgment, ICJ Reports 2012 422 available at <http://www.icj-cij.org/docket/files/144/17064.pdf> (accessed 11 June 2014).

reportedly systematic torture of over 40 000 victims.⁵⁶ It also recommended that reparations be offered to the victims. Despite such recommendations and the overwhelming number of victims, there was a lull in this matter until the *Pinochet* case caused a new wave of litigious pressure to be exerted on the authorities both in Chad and in Senegal to ensure the prosecution of Habré.⁵⁷ In the year 2000, a group of Chadian victims and the civil society group Chadian Association for the Promotion and Defense of Human Rights (AVCRP) filed a criminal complaint in Senegal, accusing Habré of torture, barbaric acts and crimes against humanity.⁵⁸

4.2.1.1 The role of the Senegalese Government: Legal and political impediments

The legal and political developments in the years 2000 and 2001 provide an interesting insight into the political will of Senegal either to assist or impede the prosecution of Habré. In the year 2000, a Senegalese court, after hearing the victims, decided to indict Habré for the crimes as alleged. The court then issued an order placing him under house arrest pending the determination of the matter.⁵⁹ This was the first time that an African was charged with atrocities by another African court. Up until this point, Africans had only been indicted in the courts of European states, such as the Swiss conviction of *Fulgence* and Belgium's *Butare Four* case.⁶⁰ The prosecutor initially supported Hissène Habré's prosecution but later relented, joining Habré's motion for dismissal of the indictment, possibly due to political pressure. Habré's legal team thereafter approached the Appeals Court, seeking an order for the dismissal of the decision to indict. Before the matter could be finalised, there were political moves to interfere with the judiciary in a manner that would favour Habré.⁶¹ The newly elected Senegalese President Abdoulaye Wade, transferred the judge who had initially endorsed the indictment, and removed him from the investigation.⁶² The

⁵⁶ Jessberger F 'On behalf of Africa: Towards the regionalisation of universal jurisdiction?' in Werle G, Fernandez L and Vormbaum M (eds) *African and the International Criminal Court* (2014) 168.

⁵⁷ *Pinochet* case House of Lords 24 March 1999 [1999] 2 WLR 827 (HL).

⁵⁸ Human Rights Watch World Report 2001 available at <http://library.law.columbia.edu/urlmirror/CHRLR/32CHRLR429/icc.html> (accessed 10 July 2014).

⁵⁹ See International Federation of Human Rights 'Chronology of the Hissène Habré Case' available at <http://www.fidh.org/en/africa/Chad/Hissene-Habre-Case/chronology-of-the-hissene-habre-case-9776> (accessed 25 July 2014).

⁶⁰ *Niyonteze v Public Prosecutor* Tribunal militaire de cassation (Switzerland) 27 April 2001 and *Public Prosecutor v the Butare Four* Cour d'Assises de Bruxelles 8 June 2001.

⁶¹ *Ibid.*

⁶² Sansani I 'The Pinochet Precedent in Africa: Prosecution of Hissène Habré' 32 available at <http://www.wcl.american.edu/hrbrief/08/2sansani.pdf> (accessed 25 July 2014).

president of the Appeals Court, who would have heard the appeal was also given a promotion, which effectively ensured that he would not be dealing with this matter anymore.⁶³

When the decision was eventually handed down weeks later, the issue of jurisdiction, particularly UJ was very central in the court's considerations. Hence when the Appeals Court dismissed the indictment, it cited as a reason the fact that Senegalese courts lacked jurisdiction since the crimes were committed by a foreigner against other foreigners outside Senegal.⁶⁴ The arguments advanced by Habré's lawyers included that under the Senegalese Penal Code, Senegalese courts had no competence to try crimes committed by foreigners on foreign soil.⁶⁵ They argued further that the UNCAT, which was ratified by Senegal in 1986, could not be relied upon as there was no domestic law enacted to implement it during the time that the offences are alleged to have occurred. Further, that when the enabling legislation was introduced in 1996, six years after the alleged offences took place, it did not contain a provision permitting the exercise of jurisdiction on the basis of the universality principle. These arguments swayed the Appeals Court to hold in favour of Habré and dismiss the indictment.

This is difficult to reconcile with the fact that Senegal is a monist country, and as such adheres to the doctrine of automatic incorporation. Once Senegal ratifies and publishes a treaty, it ought automatically to become part of the law of the land and can be relied upon before domestic courts.⁶⁶ This is buttressed by Section 98 of the Senegalese Constitution which provides that once ratified and published, a treaty shall have authority superior to that of the laws of Senegal, subject, for each treaty and agreement, to its application by the other party.

However, Section 97 of the same Constitution offers guidance, in that it provides that where an international agreement has a provision contrary to the Constitution, the authorization of ratification or approval may only intervene after the amendment of the Constitution. It can therefore be argued that even though Senegal ratified the UNCAT in 1985, provisions of the convention granting Senegalese courts jurisdiction based on the universality principle ran counter to the constitutionally protected right to a fair trial. As such, the contrary provisions of the UNCAT

⁶³ The President's influence on the judiciary was immense, given that at the time, the President sat as the chairperson of the Superior Council of Magistrates which was responsible for the appointment and removal of judges.

⁶⁴ Human Rights Watch 'Chronology of the Habré Case' available at <http://www.hrw.org/news/2012/03/09/chronology-habr-case> (accessed 7 July 2014).

⁶⁵ Article 669 of the Senegal Criminal Procedure Code.

⁶⁶ Adjolahoun HS 'Visiting the Senegalese legal system and legal research: A human rights perspective' (2009) available at <http://www.nyulawglobal.org/globalex/senegal.htm> (accessed 29 July 2014).

would require a constitutional amendment before the convention could be transformed into domestic law.⁶⁷

Although the court's finding that the 1996 law did not introduce UJ to Senegal was met with general disdain, contempt and ridicule,⁶⁸ it cannot legally be faulted. The courts of Senegal could not unilaterally assume that UJ applied in the Habré case if the enabling legislation was silent in that regard. Secondly, even if such an assumption was to be made, there could still be great difficulty in reconciling the pursuit of justice for the victims with the established principle of legality which frowns upon retroactive laws. The fight against impunity is also a fight for the preservation of the rule of law and fundamental rights, including the right to a fair trial and the principle of legality. Hence even in the fight against impunity, states still have obligations to ensure that accused persons are tried in accordance with the established principles of natural justice.

4.2.1.2 The Belgian extradition requests and their impact on the case

Following the political interference and the fact that Senegalese courts had refused to entertain the case, the victims instituted proceedings against Hissène Habré both in Chad and in Belgium. Whilst the claim in Chad rested on nationality, territoriality, and passive personality, the Belgian claim was premised on the fact that Belgian law at the time allowed for the wide version of UJ in respect of the crimes alleged. In the intervening period, there was a series of requests for extradition sent by Belgium to Senegal,⁶⁹ which the latter refused to entertain. These requests followed a decision by Hissène Habré's victims to seek his extradition to Belgium, where 21 of them, including three Belgian citizens, had filed suit in terms of Belgium's former law on UJ and the UNCAT. Belgian law at the time allowed Belgian courts to be seized of particular crimes of international concern,⁷⁰ such as genocide, crimes against humanity, and war crimes, no matter

⁶⁷ *Ibid.*

⁶⁸ The UN Special Rapporteur on the Independence of Judges and Lawyers, and the Special Rapporteur on Torture, made a rare joint and public expression of their concern to the government of Senegal over the dismissal and the surrounding circumstances. See in this regard Brody R 'The prosecution of Hissène Habré – "An African Pinochet"' (2001) 35:2 *New England Law Review* 321 - 335, 332. See also 'United Nations rights experts express concern over dismissal of charges against Hissène Habré' UN Press Release 2 August 2000.

⁶⁹ Following an international arrest warrant issued by Belgian courts against Hissène Habré, Belgium requested his extradition in September 2005. This was refused after the Dakar Appeals Court ruled that it had no jurisdiction to rule on the request. Two further requests were not acquiesced in, one sent on 15 March 2011, and a third sent on 5 September of the same year. The third request was declared inadmissible on procedural grounds. A fourth request delivered to the Senegalese embassy in Brussels on 17 January 2012 was also not honoured.

⁷⁰ Belgium first enacted the Act on the Punishment of Grave Breaches of International Humanitarian Law in 1993 to confer UJ over its courts in relation to war crimes. In 1999 the law was amended to include genocide and crimes against humanity. Section 7 of the 1993 Act allowed Belgian courts to prosecute a foreigner for offences committed abroad against another foreigner, even if the accused could not be found in Belgium. In that regard it embraced the

where they were committed, and regardless of the nationality of the perpetrators or that of the victims. The complaints against Habré were deemed admissible by the Belgian courts and an international arrest warrant was issued in September 2005.⁷¹ In November of the same year, the Court of Appeal in Dakar rejected Belgium's extradition request on the grounds that Habré enjoyed immunity from prosecution as a former head of state. Three years later, the Government of Chad, Habré's country of origin and the staging area of his atrocities, decided to try him in absentia, albeit for a case not related to the crimes committed during his tenure as president.⁷² The court found him guilty and sentenced him to death for his alleged role in attempting to overthrow the Chadian Government in February 2008. This behaviour begs the question why Chad did not request the extradition of Habré to stand trial in the land of his birth, for both his alleged involvement in the 2008 attempted putsch and the atrocities of the 1980s and 1990s. Perhaps this reactionary action was an attempt to purge the guilt and assuage the embarrassment caused by the prolonged silence of Chad on this matter.⁷³ It could further be attributed to the fact that a third state, Belgium which is also a non-African state, was gaining momentum in its attempts to secure the attendance of Habré at a trial within Belgian courts for his involvement in the 1980/90s atrocities.

Senegal's failure to acquiesce in the Belgian requests demonstrates the aversion that African states had with the indictment of African state officials, heads of states and former heads of states by foreign courts. Whilst the refusal to honour the Belgian requests is couched in legitimate legal grounds,⁷⁴ sight should not be lost of the fact that the AU had consistently condemned such foreign indictments as an abuse of UJ. It has in the past also called upon member states to refuse to cooperate with such indictments, proceedings or requests for extradition. What is worrisome,

broad notion of UJ, allowing for prosecution in absentia. The amended version of the legislation limits UJ to people who became Belgian citizens or residents after committing a core crime.

⁷¹ Human Rights Watch 'Options for Hissène Habré to face justice' Submissions before the Committee of Eminent African Jurists (April 2006) 7 available at http://www.hrw.org/sites/default/files/reports/chad1205_0.pdf (accessed 16 June 2014).

⁷² In August 2008, Habré together with 11 other Chadian rebel leaders were sentenced to death in absentia by a Chadian court for their alleged roles in attempting to overthrow the Chadian government in February 2008. Both the Chadian and Senegalese justice ministers were clear that this conviction will not affect the case against Habré in Senegal as it relates to events that occurred in a different time period. See 'Q & A on the Hissène Habré Case' available at <http://www.hrw.org/news/2008/09/01/q-and-hiss-ne-habr-case> (accessed 21 July 2014).

⁷³ Chad has never formally sought Habré's extradition. Even if it did its human rights record indicates the existence of a serious risk that Habré would be tortured or even killed. This, coupled with a weak judiciary, eliminates Chad's ability to guarantee Habré a fair trial.

⁷⁴ The Senegalese Appeals Court ruled that it lacked jurisdiction to rule on the extradition request, and the Government adopted a position under which Habré would remain in Senegal, pending a decision by the AU on the competent jurisdiction to try his case.

as shall be further illuminated below, is the reticence shown by Senegal to AU recommendations that it should prosecute Habré on behalf of Africa.

4.2.1.3 The role of the United Nations Committee against Torture

The Chadian and Belgian processes soon attracted the ire of the Senegalese political leadership, which saw President Wade threatening to expel Habré from Senegal. To stem this new threat, victims of the Habré atrocities approached the UN Committee against Torture in 2001,⁷⁵ alleging violation of the UNCAT.⁷⁶ In handling the matter, the Committee against Torture employed interim protective measures and called upon Senegal not to expel Habré and to take all necessary measures to prevent him from leaving the territory, unless this was done pursuant to an extradition request.⁷⁷

The Committee against Torture reached its finding in 2006, round about the same time that efforts of the AU to resolve the issue began to intensify. The Committee concluded that Senegal had failed to meet its obligations under the Convention. In its finding, it noted that in accordance with Article 5(2) of the UNCAT, Senegal was obliged to adopt the necessary measures, including legislative measures, to establish its jurisdiction over the acts referred to in the communication. It also found that Senegal was obliged under Article 7 to submit the Habré case to its competent authorities for the purpose of prosecution. In the event that it could not do this, since Belgium had already made an extradition request, Senegal would have to comply with that request or with any other extradition request made by another state under the UNCAT.

4.2.1.4 The efforts of the African Union in facilitating the prosecution of Hissène Habré

When the Habré matter began in the Senegalese courts in 2001, the AU's predecessor, the OAU, was still in existence. The weaknesses of the OAU institutions and their ill-suited nature to deal with issues of international criminal justice had already resulted in the push for reform, which

⁷⁵ See Report of UN Committee on the Convention against Torture adopted during the Twenty-Fourth Session on 17 May 2006. The Committee's decision is available at <http://www1.umn.edu/humanrts/cat/decisions/181-2001.html> (accessed 14 July 2014). The Committee concluded that Senegal's conduct was in violation of Articles 5(2) and 7 of the UNCAT and that it was incumbent on Senegal in accordance with its international obligations, to take steps not only to adapt its legislation but also to bring Habré to trial.

⁷⁶ See the communication of *Suleymane Guengueng et al v Senegal* Communication No. 181/2001 UN Doc. CAT/C/36/D/181/2001 (2006).

⁷⁷ The Committee against Torture, acting under Article 108, paragraph 9 of its rules of procedure, requested Senegal, as an interim measure, not to expel Hissène Habré and to take all necessary measures to prevent him from leaving the territory other than under an extradition procedure. Senegal acceded to this request.

culminated in the transition from the OAU to the AU in the same year.⁷⁸ The AU would, however, skirt around the issue for the next five years, until a reactionary impetus spurred by the Belgian attempts to exercise UJ in relation to the Habré case caused the continental body to put pressure on Senegal to commence proceedings.

After Belgium's numerous requests for extradition had been rejected, Senegal sought guidance from the AU Assembly, because of the status of the perpetrators. In January 2006, the AU adopted a Decision to set up a Committee of seven Eminent African Jurists⁷⁹ to consider all aspects and implications of the Habré case and to come up with viable options for his trial.⁸⁰ The AU Decision stipulated that the Eminent African Jurists would have to consider the following benchmarks when formulating their opinion:

- (a) Adherence to the principles of total rejection of impunity;
- (b) Adherence to international fair trial standards including the independence of the judiciary and impartiality of proceedings;
- (c) Jurisdiction over the alleged crimes for which Hissène Habré should be tried;
- (d) Efficiency in terms of cost and time of trial;
- (e) Accessibility to the trial by alleged victims as well as witnesses; and
- (f) Priority of an African mechanism.

In its report,⁸¹ the Committee of Eminent African Jurists noted that given the rejection of impunity by the AU Summit, coupled with recent developments in international criminal law, particularly the *Pinochet*⁸² and *Taylor*⁸³ cases, Habré cannot hide behind the immunity of a former head of state. To hold otherwise would be to defeat the principle of total rejection of impunity that was adopted by the Assembly.⁸⁴

⁷⁸ The Constitutive Act of the AU was adopted in Lome, Togo on 11 July 2000 and entered into force on 26 May 2001,

⁷⁹ The seven persons appointed by the Chairperson of the AU in their personal capacities as eminent jurists are Judge Guibril Camara (Senegal); Prof. Delphine Emmanuel born Adouki (Congo-Brazzaville); Prof. Michael Ayodele Ajomo (Nigeria); Robert Dossou (Benin); Judge Joseph S. Warioba (Tanzania); Anil Kumarsingh Gayan (Mauritius) and Prof. Henrietta Mensa-Bonsu (Ghana).

⁸⁰ The decision was taken at the AU Summit of Heads of State and Government in Khartoum, Sudan in January 2006, through AU Assembly Decision Assembly/AU/Dec.103(VI).

⁸¹ The Committee of Eminent African Jurists was also mandated to make concrete recommendations on the Hissène Habré matter as well as ways and means of dealing with issues of a similar nature in the future and to submit a report at the next Ordinary Session of the Assembly in July 2006.

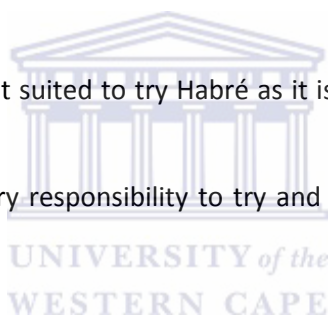
⁸² *Re Pinochet Ugarte* [1999] All ER (D) 18.

⁸³ *Prosecutor v Charles Ghankay Taylor* available at <http://www.rscsl.org/Taylor.html> (accessed 18 July 2014).

⁸⁴ It further noted that in view of the nature and gravity of the crimes alleged Hissène Habré cannot benefit from any period of limitation or prescription.

The Committee of Eminent African Jurists also noted that at the time of its deliberation in 2006, both the African Court on Human and Peoples' Rights whose Protocol had already entered into force and the Court of Justice of the African Union whose Protocol was still under the ratification process, did not have jurisdiction to hear criminal matters.⁸⁵ It therefore eliminated these two institutions from the list of institutions eligible to hear the Habré case. The Committee of Eminent African Jurists then proceeded to determine which other forum could be better placed to deal with this case. In that regard, it turned first to consider the two states that are intimately connected with the matter in question, namely Senegal and Chad,⁸⁶ given that both had the necessary link to the case, and both had ratified the UNCAT and made declarations under Article 22 of the same convention.⁸⁷ It then proffered the following possibilities as part of its first recommendation:⁸⁸

- (a) That an African option should be adopted;
- (b) That Habré should be tried by an African member state - Senegal or Chad in the first instance, or by any other African country;
- (c) That Senegal is the country best suited to try Habré as it is bound by international law to perform its obligations; and
- (d) That since Chad has the primary responsibility to try and punish Habré, it should cooperate with Senegal.



It is clear from the recommendations that the Committee of Eminent African Jurists did not countenance the possibility of a non-African state asserting jurisdiction over the matter, even if acting in terms of the universality principle. This could perhaps be explained by its terms of reference which had emphasised on the prioritisation of an African mechanism. Indeed the terms

⁸⁵ The Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights which would operationalize such a court was adopted by AU Decision on the draft legal instruments Doc.Assembly/AU/8/(XXIII), Assembly/AU/Dec.529(XXIII) adopted at its Twenty-Third Ordinary Session in Malabo, Equatorial Guinea 26 – 27 June 2014. The Decision is available at http://au.int/en/sites/default/files/Assemby%20AU%20Dec%20517-%20544%20%28XXIII%29%20_E.pdf (accessed 18 July 2014).

⁸⁶ Any of the 45 African states that had up to that time ratified the CAT were theoretically eligible as venues to try the case. However, such a move could likely have failed on the basis that none of the countries had UJ laws. For example, South Africa only recently enacted implementing legislation for the CAT in 2013. Further, there is a high likelihood that this approach could have raised concerns about the immunity of heads of states from the processes of the domestic courts of foreign states.

⁸⁷ Senegal ratified the Convention on 21 August 1986 and made the declaration under Article 22 of the Convention on 16 October 1996. The Article 22 declaration allows for individuals to submit communications to the UN Committee against Torture against states that have made such a declaration where the latter are accused of violating the rights contained in the CAT. In making the declaration under Article 22 of the Convention, a state party recognizes the competence of the Committee to decide whether or not there has been a violation of the Convention.

⁸⁸ See the Report of the Committee of Eminent African Jurists on the case of Hissène Habré available at http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Repor0506.pdf (accessed 15 July 2014).

of reference clearly demonstrate the AU's stance towards the use of UJ by non-African states. In narrowing down the scope of the terms of reference in this manner, the AU was effectively already positioning itself to deal with what it had come to perceive as abuse of UJ by non-African states. At some level this assertiveness on the part of the AU should be welcomed and commended as an attempt to shed the old restrictive skin of the OAU and ensure that the continent does contribute positively to the development of international law. The Committee of Eminent African Jurists was merely giving effect to those aspirations.

The second recommendation was that an *ad hoc* tribunal should be set up within an African country, as this would resonate with the need for an African solution.⁸⁹ It indicated that the power of the AU Assembly to set up such an *ad hoc* tribunal is based upon Articles 3(h),⁹⁰ 4(h)⁹¹ and (o),⁹² 9(1)(d)⁹³ and 5(1)(d)⁹⁴ of the Constitutive Act of the AU. It recommended that a tribunal, composed of five judges from the highest courts in their respective countries, be established.⁹⁵ It should be noted, that even though the Protocol establishing the African Court on Human and Peoples' Rights had already come into force, this court did not have criminal jurisdiction.⁹⁶ Similarly, the African Court of Justice had not received the necessary number of ratifications for its instrument to come into force.⁹⁷

The third option was for any African state which had ratified the UNCAT to take on the responsibility and exercise jurisdiction. The Committee was clear that whatever option the continent chose, the AU had to commit itself to assist the African state which would assume responsibility for the trial of Hissène Habré or host the *ad hoc* tribunal.⁹⁸ The AU eventually

⁸⁹ The Committee envisaged an *ad hoc* tribunal in much the same manner as hybrid and mixed courts that have in the past been established in Sierra Leone (2000), East Timor (2000), Kosovo (2000), Cambodia (2003), and Lebanon (2007).

⁹⁰ The promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.

⁹¹ The rights 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.

⁹² Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.

⁹³ Article 9(1)(d) provides that one of the functions of the Assembly shall be to establish any organ of the Union.

⁹⁴ Article 5(1)(d) lists the Court of Justice as one of the organs of the AU.

⁹⁵ It also noted that although there were concerns that an *ad hoc* tribunal in whatever form would cost a lot of money and create further delay in the trial of Hissène Habré, if states had the necessary political will, the process could be expedited.

⁹⁶ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted in Addis Ababa, Ethiopia on 10 June 1998 and entered into force on 25 January 2004.

⁹⁷ The Protocol on the Statute of the African Court of Justice and Human Rights was adopted in Sharm el-Sheikh, Egypt, on 1 July 2008.

⁹⁸ Amongst its recommendations on how Africa could deal with similar cases in the future, was that the African Court of Justice should be granted jurisdiction to try criminal cases. One recommendation was that the processes related to

decided that Habré must be tried on the continent, by Senegal, as recommended by the Committee of Eminent African Experts.⁹⁹

4.2.1.5 The role of Belgium's legal process before the International Court of Justice

In February 2009, Belgium approached the International Court of Justice (ICJ), seeking an order that Senegal either prosecute or extradite Habré. While awaiting a decision on the merits and following an earlier announcement by President Wade that Habré's house arrest would be ended, Belgium again approached the ICJ for interim measures. It sought an order directing Senegal to take the necessary steps to ensure that Habré remained in Senegalese territory. In response, Senegal gave assurances that Habré would be kept within its territory, prompting the Court to reject the request for provisional measures. In its 20 July 2012 ruling on the merits, the ICJ unanimously decided that Senegal had not fulfilled its international obligations. It ordered that Senegal should without further delay refer Habré's case to either prosecution or extradition. The ruling came at a time when AU processes aimed at creating the necessary forum for the prosecution of Habré were at an advanced stage, having started earlier with the work of the Committee of Eminent African Jurists in 2006. It can be argued that the contribution of this case to the Habré matter was very minimal, if at all.

4.2.1.6 The role of the Economic Community of West African states

The progress made under the AU mechanisms gave hope that the Hissène Habré matter would soon be determined with finality. However, more legal challenges were yet to come, even in respect of the AU brokered deal setting up the special tribunal, and these challenges added to further delays in this matter. The first challenge was launched against Senegal in 2008 before the Court of Justice of the Economic Community of West African States (ECOWAS Court), before the AU finalised its processes. In this challenge, Habré requested a declaration of the ECOWAS Court to the effect that Senegal had violated his rights by disregarding fundamental legal principles. He based his case on the argument that Senegal's legal reforms had produced laws that would enable the Senegalese courts to assert jurisdiction retroactively over his alleged international crimes. This,

the Habré proceedings should lead to the establishment of a single court at the AU level to confer criminal jurisdiction on that court. This would avoid dealing with grave circumstances in a reactionary and piecemeal fashion.

⁹⁹ AU Decision, *Sur le process d'Hissène Habré et l'Union Africaine*, Assembly/AU/Dec.127(VII), Assembly/AU/Decl.1-4(VII), Seventh Ordinary Session, Banjul, July 2006.

he contended, ran counter to his rights under the International Covenant on Civil and Political Rights (ICCPR), which prohibits retroactivity of laws.¹⁰⁰

In its judgment delivered in November 2010 the ECOWAS Court upheld Habré's claim.¹⁰¹ It ruled that Senegal must prosecute Hissène Habré before an extraordinary or *ad hoc* international tribunal. It found that the mandate which Senegal received from the AU was in fact to devise and propose all the necessary arrangements for the prosecution and trial of Habré to take place, within the strict framework of special *ad hoc* international proceedings.

Subsequent to the establishment of the tribunal proposed by the AU, and following the AU's request for Senegal to prosecute Habré on behalf of Africa, yet another challenge was lodged with the ECOWAS Court.¹⁰² In the second challenge Habré sought an order for the immediate suspension of all investigations and proceedings, alleging that the Extraordinary African Chambers (EAC) set up by the AU and Senegal, constituted an illegitimate court, and that because of this fact, his trial would be unfair. In its 5 November 2013 decision, the Court dismissed the case, holding that since the EAC was established pursuant to a treaty between Senegal and the AU, the ECOWAS Court had no jurisdiction to rule on the case. This approach by the ECOWAS Court demonstrates deference by the sub-regional court to the continental body, the AU. It is also indicative of the continent's resolve to root out impunity and to speak with one voice.

4.2.1.7 Senegal's final political commitment to the case: establishing the extra ordinary chambers

Pursuant to the AU request to stage the Hissène Habré trial, Senegal amended its constitution and adopted a law permitting UJ in order to clothe its courts with extra-territorial jurisdiction. This was in respect of torture, crimes against humanity, and genocide committed abroad.¹⁰³ Senegal also buttressed its UJ laws by inserting a provision in its constitution, shielding any action taken under the new law from possible constitutional challenge. Its constitutional amendment was craftily worded to provide that the principle of the non-retroactivity of criminal law does not bar the

¹⁰⁰ Article 15 of the ICCPR provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed.

¹⁰¹ *Hissène Habré v Republic of Senegal* Case Number ECW/CCJ/JUD/06/10 Judgment delivered on 18 November 2010.

¹⁰² *Hissène Habré v Republic of Senegal* Case Number ECW/CCJ/JUD/03/13 available at <http://www.courtecowas.org> (accessed 15 July 2014).

¹⁰³ AU Decision Assembly/AU/Dec.157(VIII) taken at its 8th Ordinary Session in Addis Ababa, 23 – 30 January 2007.

prosecution of acts 'which, when they were committed, were criminal according to the rules of international law relating to genocide, crimes against humanity and war crimes'.¹⁰⁴

The formation of the Extraordinary African Chambers followed an agreement signed by Senegal and the AU on 22 August 2012. Its composition is pan-African rather than fully international. The Statute provides for judges to be appointed by the President of the Commission of the African Union from a proposal by the Minister of Justice of Senegal.¹⁰⁵ Under Article 2 of the Statute, the EAC's Pre-Trial Chamber, which sits within the Tribunal Regional Hors Classe de Dakar, will be composed of four Senegalese judges, and two alternative judges also from Senegal. The Indictment Chamber consists of three Senegalese judges and an alternate judge. The Assize Chamber and the Assize Appeals Chamber have a slightly different composition in that they are both composed of a President holding the nationality of one of the member states of the AU, as well as two Senegalese judges and two Senegalese alternate judges. The judges are assisted by several Senegalese clerks appointed by the Minister of Justice of Senegal.¹⁰⁶ The Assize Chamber and the Assize Appeals Chamber, together with the Indictment Chamber, all sit within the Court of Appeal of Dakar. The prosecutorial team shall also be from Senegal and shall be appointed by the President pursuant to the recommendation of the Senegalese Minister of Justice.¹⁰⁷

The mandate of this tribunal is to try the main perpetrators, including Habré, of the crimes constituting serious violations of international law, both international customary law and the international conventions ratified by Chad, which were committed in Chad during the period from 7 June 1982 to 1 December 1990.

Under Article 4 of the Statute, the jurisdiction *ratione materiae* of this extraordinary tribunal extends to crimes of genocide, crimes against humanity, war crimes and torture. The Chambers have a discretionary power to initiate proceedings, allowing them to focus on the most serious crimes under their jurisdiction. In line with the recommendations of the Committee of Eminent African Jurists, Article 9 of the Statute of the EAC prevents the crimes that fall within its jurisdiction from being time-barred. The Committee had recommended that owing to the grave

¹⁰⁴ Human Rights Watch 'Senegal: Government Amends Constitution to Pave Way for Hissène Habré Trial' available at <http://www.hrw.org/news/2008/07/23/senegal-government-amends-constitution-pave-way-hiss-ne-habr-trial> (accessed 23 July 2014).

¹⁰⁵ Article 11 of the Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990.

¹⁰⁶ Article 13 of the EAC Statute.

¹⁰⁷ Article 12 of the EAC Statute.

nature of the offences alleged, perpetrators should not benefit from any limitation period or prescription.

In respect of jurisdiction *ratione personae* the Chambers have competence with respect to any person suspected of having been involved in international crimes, whether or not he is a state official or head of state. Articles 10 and 20 are aligned with the continent's fight against impunity. Article 10 precludes the official capacity of an accused from relieving him from his criminal responsibility. It also prevents the same capacity from being cited as a ground for mitigation of sentence. Article 20 provides that any amnesty granted to an accused whose crimes fall within the jurisdiction of the EAC shall not be a bar to prosecution. Because this is an international tribunal which is the result of a decision by the AU, of which both Senegal and Chad are members, the issue of UJ does not necessarily arise.

The Statute of the EAC also takes into account the *ne bis in idem* rule. This rule prevents double jeopardy in that it prevents a person who has previously been convicted or acquitted by a court from being prosecuted again for the same offences. In terms of Article 19(1) of the EAC Statute, no person shall be tried before the Chambers with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Chambers. The same holds true for a person who has been tried by another court for conduct also proscribed under Articles 5, 6, 7, or 8, which detail the crimes over which the EAC has jurisdiction. That person cannot be tried before the EAC with respect to the same conduct.¹⁰⁸ Despite the Chadian conviction of Habré in August of 2008 this provision would not likely prevent the EAC from being seized of the matter. This is because the proviso to Article 19(3) gives direction on how the EAC should go about determining whether the Ndjamenan conviction would act as a bar to Habré's prosecution by these Chambers. The proviso provides that where the following conditions are met, an accused cannot rely on the *ne bis in idem* rule:

- (a) where the previous proceedings were undertaken for the purpose of shielding the person concerned from criminal responsibility; or
- (b) where the proceedings were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

¹⁰⁸ Article 19(3) of the EAC Statute.

It is difficult to determine what the motivations of the Chadian Government were when it decided to conduct a trial in absentia, and eventually convict and sentence Habré and his cohorts to death. Based on the aversion shown by African states towards Western legal interventions, it can be argued that perhaps the intention was to prevent the courts of a non-African state, Belgium, from prosecuting an African former head of state. However, it cannot be determined with certainty whether Chad was merely conducting a trial of convenience or not.

But perhaps what would be of assistance is the fact that the 2008 conviction did not relate to the crimes committed in the period for which the EAC will be prosecuting him. The summary trial and death penalty were in respect of Habré's alleged role in supporting Chadian rebels who had attempted to take N'Djamena and seize power in February 2008. There is therefore a high likelihood that the intention of the Chadian Government was not to shield him as the charges for which he was convicted do not relate to the period between 7 June 1982 and 1 December 1990 for which the EAC has jurisdiction. Habré can therefore not claim the *ne bis in idem* rule in relation to Article 19(3)(a).

Since the 2008 conviction was not the result of proceedings related to the period between 7 June 1982 and 1 December 1990, the Article 19(3)(b) leg of the enquiry does not arise. Even if the conviction had emanated from allegations related to crimes committed in that period, it could still be faulted for failure to follow due process. Trials in absentia essentially violate Article 15 of the ICCPR. The Chadian prosecution was criticised by many commentators and UN officials for doing exactly that.¹⁰⁹ However, as indicated above, the Senegalese constitutional amendment has since taken care of the retroactivity concerns by making such conduct constitutional, provided customary international law already regarded the conduct as criminal at the time of commission. This effectively means that Habré may not be able to invoke the non-retroactivity principles as bar to his prosecution.

By mid-2014, the Habré matter had commenced with the EAC conducting investigations both in Senegal and Chad. Although teething problems were experienced, there is confidence that finally, after two decades of running a barrier course littered with seemingly unending legal, political and diplomatic obstacles, the victims of the core crimes can finally find justice and closure. Further, it is hoped that international criminal justice will finally benefit from the jurisprudence of this

¹⁰⁹ This move was criticised by UN High Commissioner for Human Rights Navanethem Pillay, who expressed concern that Habré could be tortured in Chad, prompting Senegal to suspend its planned repatriation of Habré to Chad.

tribunal. This case demonstrates the AU's changing role over time, and its eventual embrace of the imperative to end impunity for the core crimes.

4.2.2 The case of the Southern African Human Rights Litigation Centre: The Zimbabwe Torture Docket

South Africa was the first country on the continent to adopt legislation implementing the Rome Statute. Although a party to both the Rome Statute and the UNCAT and having enacted implementing legislation introducing UJ for the core crimes in respect of both international instruments, the only litigation experienced so far relates to South Africa's ICC obligations. Even though much can be said about core crimes committed in South Africa during apartheid, when South Africa transitioned into a democracy after the fall of apartheid, hard choices were made in which reconciliation and peace held sway, and the Republic opted for a Truth and Reconciliation Commission rather than prosecution of offenders.

In what has been largely referred to as the 'Zimbabwean Torture Docket', the legal question before court was whether the South African Police Service (SAPS) had a duty to initiate a UJ-based investigation under the ICC Act, even though the alleged offenders were not on South African territory. In this case, a group of Zimbabwean nationals, alleged that they were tortured by in Zimbabwe by Zimbabwean security agents. They alleged that these acts of torture were carried out in a widespread and systematic manner, and that even though the offences took place outside South Africa, the ICC Act nonetheless conferred jurisdiction on South African courts to hear the matter, provided the accused is after the commission of the offence present in the Republic.

When the victims approached SAPS, the latter refused to initiate investigations, since the accused were not on South African soil. Both the High Court and Supreme Court of Appeal held in favour of Southern African Human Rights Litigation Centre (SALC), which litigated on behalf of the victims, indicating that SAPS had a duty to initiate investigations even if the accused was not at that time present in South Africa. This is a form of absolute UJ, the former adherents of which, like Spain and Belgium, subsequently had to abandon after political pressure was brought to bear upon them.

The SAPS' argument before the Constitutional Court was that the ICC Act requires the accused to be present on South African soil before South Africa could have jurisdiction.¹¹⁰ The SALC argued that there was a need to split the prosecutorial process into two, (i) the investigation stage, and (ii) the prosecution stage. Their argument was that it is only the prosecution stage that required the presence of the accused on South African soil. The law is silent on whether the accused ought to be present or not during the investigation stage.

Werle and Bornkamm assert that the debate around whether the accused should be present or not for the purposes of investigation emanates from the fact that there is ambivalence amongst states on how the universality principle ought to be operationalized.¹¹¹ This is because despite being widely accepted in principle, the preconditions for its exercise are still controversial. They argue further that the presence of the accused in court must be distinguished from presence in the country that seeks to prosecute him, because presence in court is a matter of fairness and need not be addressed by the rules of jurisdiction. They conclude that there are no reasons why the suspect's presence in the country should be required at the investigating stage.¹¹² They advance three reasons to support their argument, two of which will be discussed shortly. These are: (i) a UJ-based investigation in absentia does not automatically interfere with the right of the territorial state; and (ii) the requirement of presence of the suspect at any stage of trial is not supported by state practice and *opinion juris*.

As regards the first reason the authors are quite right in their assertion, and in highlighting the possibility of such investigations may affect the principle of non-intervention in the affairs of other states. Their second reason, in the context of Africa may also find support in the fact that although the AU was opposed to UJ-based prosecutions by non-African states, their position was not directed at UJ per se, but its perceived abuse and the effects thereof on senior state officials. Be that as it may, the second reason may still be negated by recent development in Spain and Belgium,¹¹³ the key protagonists in the UJ-based prosecutions since the turn of the millennium.¹¹⁴

¹¹⁰ *National Commissioner, SAPS v Southern African Human Rights Litigation Centre and Another CCT 02/14.*

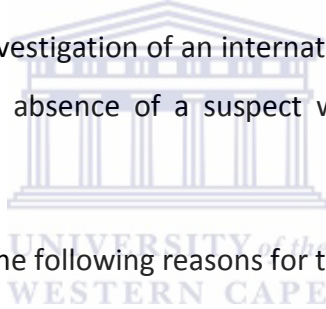
¹¹¹ Werle G and Bornkamm PC 'Torture in Zimbabwe under scrutiny in South Africa: The judgment of the North Gauteng High Court in *SALC v National Director of Public Prosecutions*' (2013) 11 *Journal of International Criminal Justice* 659 – 675, 665.

¹¹² *Ibid*, 666

¹¹³ Spain first invoked its UJ laws in 1998. In 2014, Spain beat a hasty retreat and changed its UJ laws as a response to the High Court issuing arrest warrants for Chinese Communist Party leaders for their alleged involvement in torture and genocide in Tibet during the 1980s and 1990s. The new amendment now bestows jurisdiction upon Spanish courts if the perpetrators are Spanish or the foreign victims subsequently acquire Spanish citizenship.

Whilst it is true that there is no prohibitive rule of international law that prevents investigations in absentia, such absence should not be interpreted as granting the SAPS carte blanche powers to initiate UJ-based investigations in absentia, without regard to any system of rational assessment of the effectiveness of such investigations. Hence for a state to merely investigate simply because it can without any prospects of the accused ever setting foot in the investigating state, whether voluntarily or via extradition, would be a waste of much needed resources.

Indeed, in November 2014, the Constitutional Court of South Africa handed down judgment in this case.¹¹⁵ It held that torture should be punished by South African courts, regardless of whether it takes place on South African soil or abroad. Hence the ban on torture means that the ‘torturer has become, like the pirate or the slave trader before him, *hostis humani generis*, an enemy of all humankind’.¹¹⁶ In dealing with the presence requirement, the Constitutional Court noted that there is no unanimity amongst international law scholars on whether presence is a requirement for investigation,¹¹⁷ and customary law is also less clear on the matter.¹¹⁸ It then held that the exercise of UJ for purposes of the investigation of an international crime committed outside South African territory, may occur in the absence of a suspect without offending the South African Constitution or international law.



The Constitutional Court advanced the following reasons for this position. These are:

- (i) Requiring presence for an investigation would render nugatory the object of fighting impunity for the core crimes.
- (ii) An anticipatory investigation does not violate fair trial rights of the suspect or accused person.
- (iii) Investigation in absentia assists in ascertaining a current or anticipated location of a suspect.
- (iv) Any possible next step that could arise as a result of an investigation, such as a prosecution or an extradition request, requires an assessment of information which can only be attained through an investigation.¹¹⁹

¹¹⁴ Belgium also amended its UJ law in 2003 to reduce its scope. The law regulating UJ was further repealed in August 2003, and its UJ provisions incorporated in the Belgian Criminal Code. Current Belgium law allows its courts to be seized of a matter involving an international crime regardless of where it occurred provided that the victims are Belgian nationals or had lived in Belgium for at least three years at the time the crime was committed.

¹¹⁵ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30.

¹¹⁶ *Ibid*, para 36.

¹¹⁷ *Ibid*, para 46.

¹¹⁸ *Ibid*, para 47.

¹¹⁹ *Ibid*, para 48.

The court further noted that UJ to investigate international crimes is not absolute but is subject to two limitations. First, there must be a substantial and true connection between the subject-matter and the source of the jurisdiction. In the case at hand, the court found that the substantial connection with South Africa arose from the international and heinous nature of the crime.¹²⁰ This is an element of subsidiarity and is informed by the principle of non-intervention in the affairs of another state must be observed.¹²¹ The court proceeded to state that UJ-based investigations are permissible only if the country with jurisdiction is unwilling or unable to prosecute and only if the investigation is confined to the territory of the investigating state.

The second limitation is the principle of practicality. The court held that before South Africa assumes UJ it must consider whether embarking on a UJ-based investigation is reasonable and practicable in the circumstances of each particular case, taking into account all relevant circumstances.¹²² This requires an assessment, amongst others, of whether there is a likelihood of the suspect ever setting foot in South Africa, either through their own voluntary presence or through extradition.¹²³ In the final analysis, the court held that the SAPS must investigate the matter.

4.2.3 The Kenyan election violence prosecutions

The ICC's involvement in the Kenya situation can be traced to the work of the Waki Commission, an international commission of inquiry established by the government of Kenya to investigate the post-election violence that occurred between December 2007 and February 2008. On 16 July 2009, a voluminous dossier consisting of six boxes was delivered by the Commission to the office of the Prosecutor of the ICC. Along with the dossier was a sealed envelope containing a list of suspects identified by the Waki Commission as those most responsible for the violence.

In November 2009, the Prosecutor of the ICC, using his *proprio motu* powers approached the Pre-Trial Chamber for authorisation to conduct an investigation into the 2008 post-election violence in Kenya. This is the violence that claimed 1220 lives, displaced hundreds of thousands and culminated in the rapes of hundreds. Since the crimes were committed as part of a widespread

¹²⁰ *Ibid*, para 78.

¹²¹ *Ibid*, para 61.

¹²² *Ibid*, para 63.

¹²³ *Ibid*, para 64.

and systematic attack against a civilian population, they constituted war crimes.¹²⁴ Several party leaders were implicated in this large scale human suffering. Although initial investigations named six suspects,¹²⁵ it is the indictment of William Ruto¹²⁶ and Uhuru Kenyatta¹²⁷ that drew a political backlash from both the Government of Kenya, and the AU.¹²⁸ In March 2010, Pre-Trial Chamber II authorized the ICC prosecutor to open the investigation. Kenyatta was charged as an indirect co-perpetrator of crimes against humanity for having committed murder,¹²⁹ deportation or forcible transfer,¹³⁰ rape,¹³¹ persecution,¹³² and other inhumane acts.¹³³ The prosecutor alleges that Kenyatta had control over the criminal Mungiki organization and directed it to commit the above crimes in the towns of Kibera, Kisumu, Naivasha, and Nakuru from 30 December 2007 to 16 January 2008.¹³⁴ Mr Ruto was also accused of being criminally responsible as an indirect co-perpetrator pursuant to Article 25(3)(a) of the Rome Statute for the crimes against humanity of murder, deportation or forcible transfer of population, and persecution.¹³⁵



¹²⁴ See Coalition for the International Criminal Court, 'Cases and situations – Kenya' available at Inconsistency in the implementation of the responsibility to protect during humanitarian crises: The case of Libya and Sudan (accessed 28 July 2014).

¹²⁵ The suspects included Uhuru Kenyatta, William Ruto, Head of operations at Kass FM in Nairobi, Joshua arap Sang, former civil service head Francis Muthaura, and former police commissioner Mohammed Hussein Ali.

¹²⁶ *Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11. Mr Ruto is currently the Deputy President of Kenya.

¹²⁷ *Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11. Mr Kenyatta is currently the President of Kenya.

¹²⁸ In its 11 – 12 October 2013 Extraordinary Session, the AU adopted a resolution calling upon the UN Security Council to suspend proceedings against President Kenyatta and Deputy President Ruto on the basis of Article 16 of the Rome Statute, citing selective prosecution by the ICC, Kenya's willingness to prosecute the matter domestically as well as the immunity of sitting heads of state.

¹²⁹ Article 7(l)(a).

¹³⁰ Article 7(1)(d).

¹³¹ Article 7(1)(g).

¹³² Article 7(1)(h).

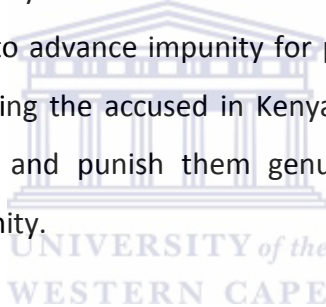
¹³³ Article 7(1)(k).

¹³⁴ On 23 January 2012, PTC II decided to move the cases against Ruto and Sang, and Muthaura and Kenyatta to trial following confirmation of charges hearings held in September and October 2011. At the same time, the court declined to confirm charges against Kosgey and Ali. In 2013 charges against Muthaura were withdrawn. The Kenyatta case was plagued with evidentiary challenges, as on 19 December 2012, the ICC prosecutor requested an adjournment of the trial date of 5 February 2013 in the Kenyatta case following the withdrawal of two key witnesses.

¹³⁵ *Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11. Also charged alongside Mr Ruto was Joseph Sang. Mr Sang was accused of having otherwise contributed (within the meaning of Article 25(3)(d) of the Rome Statute) to the commission of the following crimes against humanity: murder, deportation or forcible transfer of population, and persecution. Subsequent to these indictments, in *Prosecutor v Walter Osapiri Barasa* ICC-01/09-01/13 the ICC issued an arrest warrant for Mr Barasa, a journalist, whom it alleged is criminally responsible as a direct perpetrator, under Article 25(3)(a) or alternatively Article 25(3)(f) of the Rome Statute for three counts of offences against the administration of justice consisting in corruptly or attempting to corruptly influencing three ICC witnesses.

Subsequent to the naming of the six suspects, Kenya lodged an appeal on the basis of Article 19(2)(b) of the Rome Statute, claiming that Kenya was investigating the matter.¹³⁶ This appeal was not successful, and all the cases for which charges were confirmed by the court are still pending.

The attempts by Kenyan politicians in 2010, the withdrawal of ICC witnesses, coupled with the interference with witnesses by certain individuals within Kenya, indicate the difficulties of prosecuting powerful political figures on the continent. The lobbying that eventually saw the AU adopting a resolution in 2013, calling upon its members not to co-operate with the ICC proceedings, also indicates that chances of holding political office bearers accountable for committing the core crimes are slim. Even though the AU holds itself out as willing to intervene in the affairs of a member state in the event of grave circumstances, its actions in the Kenya post-election violence case indicate otherwise. The continent's decision to hold on to the claims of immunity by sitting heads of states before international courts, when this has already been repeatedly pronounced upon by many international tribunals such as the ICTR, ICTR and Special Court for Sierra Leone, also works to advance impunity for perpetrators of the core crimes. It is clear that Kenya's insistence on trying the accused in Kenyan courts was meant to shield them from the ICC, and not to decide and punish them genuinely for their involvement in the commission of crimes against humanity.



4.2.4 The case of the Kenyan arrest warrant against Al Bashir

The President of Sudan, Omar Al Bashir, faces charges of war crimes, crimes against humanity and genocide, allegedly committed in Darfur (Sudan), although Sudan is not a member state of the Rome Statute. The ICC has been trying to secure his arrest to stand trial for the crimes alleged, and has issued two sets of warrants. The 4 March 2009 warrant contains five counts of crimes against humanity against Al Bashir and the second one issued on 12 July 2010 three counts of genocide. On 6 March 2009 the Registrar of the ICC sent a request for cooperation to all states who are parties for the arrest and surrender of Al Bashir, should he enter their territories. A similarly worded supplementary request was sent on 21 July 2010. These requests also take the form of specific requests to specific countries whenever there is a likelihood that Al Bashir would be visiting those countries. For example, on 15 July 2013, the ICC requested Nigeria to immediately

¹³⁶ The Government of Kenya argued that the adoption of the new Constitution and associated legal reforms, such as the ICC-implementing legislation, enabled Kenya to conduct its own prosecutions. The challenge was rejected by the Pre-Trial Chamber II on 30 May 2011, which decision was confirmed on appeal.

arrest Al Bashir, on a visit to Abuja and to surrender him to the ICC.¹³⁷ Again, when reports circulated that Al Bashir may visit Uganda in 2010, the Ugandan Minister of Foreign Affairs announced that Al Bashir may be arrested on such a visit. However, Ugandan President Museveni denounced the statement and apologized to Al Bashir who eventually did not go to Kampala.

When Al Bashir visited Kenya in August 2010 and the Kenyan Government failed to arrest him, a human rights organisation approached the Kenyan High Court with an application for a provisional warrant of arrest against Al Bashir if and when he re-enters the territory. The application was premised on the existence of the two ICC warrants and requests for cooperation, as well as the apprehension that Al Bashir would in the near future enter the territory of Kenya. The application contended further that when Al Bashir came to Kenya in August of 2010, the Kenyan president had refused to have him arrested, and as such, there was a high likelihood that any similar requests in the future would be declined, unless there was a compelling order of court.

Holding that the Government of Kenya had violated its obligations under international law, and that the Rome Statute forms part of Kenyan law due to its incorporation via the 2008 International Crimes Act, the court found in favour of the applicant. Turning to the question of enforcement, the court held that in the event that the applicant found that it had no capacity to enforce the order, it could bring an application for the prerogative order of mandamus, to direct the minister in charge of Internal Security to arrest Al Bashir should he set foot in Kenya.¹³⁸ The Al Bashir case demonstrates the utility of the ICC-implementing legislation in the fight against impunity for core crimes.

4.2.5 The Special Court for Sierra Leone – the *Charles Taylor* case and others

At the turn of the millennium, Sierra Leone, like most states that had experienced conflict, was in dire need of a legal platform to address serious crimes against civilians and UN peacekeepers committed during the country's decade-long (1991-2002) civil war. To ensure justice for victims, the Sierra Leonean President, Ahmad Kabbah, approached the UN with a request to form a court that could try those responsible for perpetrating core crimes against Sierra Leoneans during the conflict. At that time there was a gap both at the global level, and at the African level, as Africa did

¹³⁷ See ICC Press Release 'Pre-Trial Chamber II requests Nigeria to immediately arrest Omar Al Bashir' 16 July 2013 available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr932.aspx (accessed 12 July 2014).

¹³⁸ See *Kenya Section of the International Commission of Jurists v Attorney General and Another* [2011] eKLR.

not have a suitable tribunal that could exercise jurisdiction over such offenders. The international community also did not have a permanent criminal tribunal to deal with this case as the depositary of the Rome Statute only received the 60th ratification that was necessary to trigger the entry into force on 11 April 2002, and it eventually entered into force on 1 July 2002.

The Special Court came into existence after the UNSC requested the UN Secretary-General through UNSC Resolution 1315(2000)¹³⁹ to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with the resolution.¹⁴⁰ The ensuing agreement signed on 16 January 2002 between the UN and the Government of Sierra Leone produced a hybrid court. The court was established to prosecute persons who bore the greatest responsibility for serious violations of both international humanitarian law and Sierra Leonean law, committed in the territory of Sierra Leone since 30 November 1996.¹⁴¹ The Special Court would function in accordance with the Statute of the Special Court for Sierra Leone, which was annexed to the agreement and formed an integral part of it.¹⁴² Since the court was staffed by both national and international judges and decided matters using both national law and international law, it differed from other international tribunals such as the *ad hoc* ICTY and ICTR and the permanent ICC. Nonetheless, it remained an international criminal tribunal.

The UNSC has also recommended that the subject matter jurisdiction of the special court should include the following crimes: crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. To that end, both the founding instrument and the preceding UNSC deliberations did not envisage UJ, as it focused solely on territorially defensible crimes.

In terms of jurisdiction *ratione personae*, the UNSC recommended that the special court should have personal jurisdiction over those persons who bore the greatest responsibility for the commission of the above crimes. This would include those leaders who, in committing such

¹³⁹ See UNSC Resolution 1315(2000) S/RES/1315 (2000) adopted by the Security Council at its 4186th meeting on 14 August 2000. The Resolution recognised the desire of the Government of Sierra Leone to request for assistance from the UN in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace.

¹⁴⁰ The UNSC expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone as well as UN and associated personnel and at the prevailing situation of impunity. The UNSC then requested the Secretary General of the UN to negotiate an agreement with the Government of Sierra Leone to establish an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law.

¹⁴¹ Article 1 of the Agreement for and Statute of the Special Court for Sierra Leone 16 January 2002 signed on 16 January 2002.

¹⁴² *Ibid*, Article 1(2).

crimes, threatened the establishment of and implementation of the peace process in Sierra Leone. Those lower down in the chain of command would be dealt with by the domestic criminal justice system of Sierra Leone. This approach is in keeping with the approach of most international tribunals from Nuremberg through to the ICTY and ICTR.

Alive to the legal, political and security considerations in prosecutions of such magnitude, the Statute of the Special Court also made flexible provision for the seat of the court. Even though it was designed to have its seat in Sierra Leone, the court could meet away from its seat if it considered it necessary for the efficient exercise of its functions, and could be relocated outside Sierra Leone if circumstances so required.¹⁴³

Although largely famed for its conviction of and imposing a 50-year imprisonment sentence on former president Charles Taylor, the court was not necessarily established to try Taylor alone. There are three other major cases that were also prosecuted by the court, and these are discussed below.¹⁴⁴

Charles Taylor was the leader of the National Patriotic Front of Liberia (NPFL) from 1989 to 1997. The NPFL was a rebel group that fought in Liberia to overthrow the government of Samuel K. Doe. From 1997 to 2003, Taylor was the democratic president of Liberia. On 7 March 2003, the Special Court approved a 17-count indictment,¹⁴⁵ which was kept under seal and eventually unsealed by the Prosecutor on 4 June 2003 while Taylor was attending a peace conference in Ghana. In August 2003, based on an agreement with African heads of state, Taylor left office after rebel forces had come close to entering the Liberian capital. He was granted political asylum in Nigeria. Taylor's removal from power followed the Comprehensive Peace Agreement facilitated by the then Nigerian President Obasanjo and ECOWAS.

¹⁴³ Article 10 of the Agreement for and Statute of the Special Court for Sierra Leone.

¹⁴⁴ These include the cases of *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused)* (2007), *Prosecutor v Samuel Hinga Norman, Moinina Fofafana and Allieu Kondewa (the CDF Accused)*, and *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF Accused)*.

¹⁴⁵ The Indictment which was subsequently twice amended, first on 16 March 2006, and then again on 29 May 2007, charged Taylor with eleven counts. In five counts he was charged with crimes against humanity, punishable under Article 2 of the Statute, namely: murder (Count 2); rape (Count 4); sexual slavery (Count 5); other inhumane acts (Count 8); and enslavement (Count 10). Five other counts charged violations of Common Article 3 and Additional Protocol II, punishable under Article 3 of the Statute, namely: acts of terrorism (Count 1); violence to life, health and physical or mental well-being of persons, in particular murder (Count 3); outrages upon personal dignity (Count 6); violence to life, health and physical or mental well-being of persons, in particular cruel treatment (Count 7); and pillage (Count 11). One count charged other serious violations of international humanitarian law, punishable under Article 4 of the Statute, namely conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities (Count 9).

Taylor was captured in March 2006 whilst trying to flee Nigeria where he had sought refuge since 2003. In the same month, Taylor was transferred from Nigerian custody to the custody of the Special Court for Sierra Leone where he faced trial.¹⁴⁶ The transfer came after President Obasanjo, responding to a request from Liberian President Ellen Johnson-Sirleaf, and in consultation with the AU and ECOWAS directed his immediate repatriation to Liberia, to be placed in the custody of the Government of Liberia.

The Charles Taylor indictment cited him for the following crimes: (i) crimes against humanity; (ii) violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law.¹⁴⁷ It envisaged three forms of criminal liability: (i) Individual Criminal Responsibility, in that he planned, instigated, ordered, committed or aided and abetted the planning, preparation and execution of the said crimes; (ii) Joint Criminal Enterprise, in that the crimes he was charged with amounted to or were involved within a common plan, design, purpose in which the accused participated or were a reasonably foreseeable consequence of the common plan, design and purpose; and (iii) Command Responsibility, in that he held positions of superior responsibility and exercising command and control over subordinate members of the alliance formed by the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), RUF/AFRC and Liberian fighters and so is responsible for the crimes committed in the indictment. In other words, he knew or had reason to know that his subordinates were about to commit the crimes alleged or had done so and he failed to take necessary and reasonable measures to prevent such acts or punish the perpetrator.

The trial was transferred to The Hague on 16 June 2006 after approval by the UNSC through Resolution 1688 and in line with Article 10 of the Statute of the Court.¹⁴⁸ The UNSC was motivated by the fact that Taylor's presence in the sub-region was an impediment to stability and a threat to the peace.

Although Taylor pleaded not guilty to all the counts in the indictment, the Special Court found him individually criminally liable under Article 6(1) of the Statute for aiding and abetting the commission of crimes. It further found him individually criminally liable under Article 6(1) of the Statute for planning the commission of crimes, charged in all eleven counts. The Trial Chamber

¹⁴⁶ *Prosecutor v Charles Ghankay Taylor* available at <http://www.rscsl.org/Taylor.html> (accessed 18 July 2014).

¹⁴⁷ See the Indictment against Charles Taylor available at <http://www.rscsl.org/Documents/Decisions/Taylor/003/SCSC-03-01-I-001.pdf> (accessed 18 July 2014).

¹⁴⁸ UNSC Resolution 1688 of 2006 S/RES/1688 (2006) adopted by the Security Council at its 5467th meeting on 16 June 2006.

found that the Prosecution failed to prove beyond a reasonable doubt that Taylor was criminally liable under Article 6(3) of the Statute. On 30 May 2012 the Trial Chamber sentenced Taylor to a single term of imprisonment of 50 years.¹⁴⁹

This case made a significant contribution to international criminal justice in general and African criminal justice in particular, especially in the area of immunity of heads of state. Taylor had made an application to set the matter aside on the basis that upon his indictment he was the president of Liberia,¹⁵⁰ and therefore entitled to immunity from the proceedings.¹⁵¹ Taylor relied on the ICJ judgment in *Arrest Warrant* case for the argument that as an incumbent head of state at the time of his indictment,¹⁵² he enjoyed absolute immunity from criminal prosecution. He argued that exceptions to diplomatic immunities can only derive from other rules of international law such as a UNSC resolution under Chapter VII of the UN Charter. He further argued that since the Special Court did not have Chapter VII powers, its orders should be deemed to have the quality of judicial orders from a national court. The court found that the agreement between the UNSC and the Government of Sierra Leone to establish the Special Court is for all intents and purposes an agreement between all the members of the UN and Sierra Leone. It is thus an expression of the will of the international community. The Special Court was therefore truly international and not a national court.¹⁵³

Having settled that the court was an international criminal court, the Special Court then turned to the question of absolute immunity. It found that the prohibition in the *Arrest Warrant* case only related to immunity in the national courts of a foreign state, and not an international criminal court such as the Special Court. The court cited with approval the ICJ decision in the *Arrest Warrant* case that an incumbent or former minister of foreign affairs may be subject to criminal

¹⁴⁹ On 26 April 2012 the Trial Chamber found Charles Taylor guilty on all eleven counts, on the modes of liability of planning of crimes and for aiding and abetting of crimes committed by rebel forces in Sierra Leone. On 30 May 2012 the former Liberian president was given a single sentence of 50 years in prison, which he is currently serving in a court in the United Kingdom.

¹⁵⁰ *Prosecutor v Charles Ghankay Taylor* Case Number SCSL-2003-01-131 May 2004.

¹⁵¹ Taylor had made an application, which he deemed to be made under protest and without waiving the immunity accorded to him as a head of state. In his application he requested the Trial Chamber to quash the indictment of 7 March 2003 issued by Judge Bankole Thompson. He further sought an order that the Warrant of Arrest and Order for Transfer and Detention issued on the same date by the same judge, and all other consequential and related orders granted thereafter by either Judge Thompson or Judge Pierre Bouter on 12 June 2003 against the person of President Charles Ghankay Taylor be declared null and void, invalid at their inception and that they be accordingly cancelled and or set aside as a matter of law.

¹⁵² See *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002.

¹⁵³ *Prosecutor v Charles Ghankay Taylor*, para 38.

proceedings before certain international criminal courts, where they have jurisdiction.¹⁵⁴ The court then concluded that Charles Taylor's official position as an incumbent head of state at the time when the criminal proceedings were initiated is not a bar to his prosecution by the Special Court.¹⁵⁵ Having found that the court was international in character, the court found it unnecessary to proceed to the question of which category of crimes a sitting head of state can be indicted for by an international criminal tribunal. Taylor's motion was therefore dismissed, and the law on immunity of heads of state in respect of the core crimes was settled, at least in a judicial sense, with certainty.

As indicated above, the Taylor case was not the only one being dealt with by this court. In the first case decided by the Special Court, the case of *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused)*,¹⁵⁶ the three accused were leaders of the AFRC. Brimba, Kamara, and Kanu were charged with seven counts of crimes against humanity and six counts of violations of Article 3 Common to the Geneva Conventions. The Special Court found the three guilty on 20 June 2007 and sentenced Kanu and Brima to 50 years' imprisonment, whilst Kamara received 45 years. In 2008, their appeal bid failed, with both judgment and sentence upheld.

In the case of Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa (the CDF Accused) the three accused were leaders of the former Civil Defense Forces (CDF) and were indicted separately on eight counts of war crimes, crimes against humanity, and other serious violations of international humanitarian law.¹⁵⁷ On 22 February 2007 Norman died in Dakar, Senegal, where he had gone for hip replacement surgery, prompting the Trial Chamber to terminate proceedings against him on 21 May 2007. On 2 August 2007 the Trial Chamber found Fofana guilty on four counts of war crimes and Kondewa guilty on five counts, including war crimes and other serious violations international law. It found both accused not guilty of crimes against humanity. Fofana was sentenced to six years' imprisonment and Kondewa to eight years, minus time served. In an appeal decided on 28 May 2008, the Appeals Chamber overturned Kondewa's conviction for enlisting child soldiers. It confirmed the guilty verdict for both Kondewa

¹⁵⁴ *Prosecutor v Charles Ghankay Taylor*, para 50.

¹⁵⁵ *Ibid*, para 53.

¹⁵⁶ *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* available at <http://www.rscsl.org/AFRC.html> (accessed 18 July 2014).

¹⁵⁷ *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa* available at http://www.rscsl.org/CDF_Trial_Chamber_Decisions.html (accessed 18 July 2014).

and Fofana in relation to a crime of collective punishment before increasing their sentences to 15 years' imprisonment for Fofana and 20 years for Kondewa.

In the case of Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF Accused) there were initially five accused persons, who were leaders of the former RUF.¹⁵⁸ They were indicted separately on 17 counts (later amended to 18 counts) of war crimes, crimes against humanity, and other serious violations of international humanitarian law. Sesay and Kallon, together with Foday Sankoh and Sam Bockarie were indicted on 7 March 2003, whilst Augustine Gbao was indicted a month later on 16 April 2003. After the deaths of Sankoh and Bockarie, the indictments against these two were withdrawn on 8 December 2003. On 28 February 2004 the Trial Chamber ordered a joint trial of the surviving accused, Sesay, Kallon and Gbao, and approved a consolidated indictment. On 6 May 2004 the Prosecution amended the consolidated indictment to add the crime of 'other inhumane act (forced marriage), a crime against humanity.' In February 2008, all three accused were found guilty and in April 2009 they were sentenced to 52 years' imprisonment for Sesay, 40 years for Kallon, and 25 years for Gbao. Their appeals were also unsuccessful.

It is clear from the silence of the OAU and the AU as from 2001 in relation to the events in Sierra Leone, that the OAU was reluctant to rein in Mr Taylor and his cohorts for their involvement in the core crimes, and this was largely because of the restraint embodied in its non-interventionist approach. It is unfortunate that when the AU succeeded the OAU, it was slow to thaw out of the self-induced comatose stance of its predecessor, even though it had a wonderful tool for intervention in the form of Article 4(h) of the AU Constitutive Act which allows it to intervene in the affairs of a member state in the event of grave circumstances.

4.2.6 The Ethiopian case involving Mengistu Haile Mariam

Domestic courts play a big role in the development of international criminal justice. Even though the period of the 1990s was still characterised by the OAU's non-interventionist approach, it can also be hailed as the period which brought a re-awakening for many states in Africa. The atrocities that were committed by those in power against powerless civilians could be regarded as the cause of the shifting mind sets about accountability of those responsible and earlier attempts to stem impunity for the core crimes. The case involving former Ethiopian junta leader, Mengistu Haile

¹⁵⁸ *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* available at <http://www.rscsl.org/RUF.html> (accessed 19 July 2014).

Marian, which spanned a total of 12 years, was the first trial on the African continent where representatives of an entire regime were investigated and tried before a national court, for violation of the Ethiopian Penal Code.¹⁵⁹

Ethiopia was ruled by Mengistu's military junta (known as the Dergue) from 1974 to 1987, which came to power through a popular uprising that dethroned the monarchy in 1974. The Dergue inaugurated its rule by sending some 60 senior officials of the former emperor's government to the firing squad. The Dergue was also accused of targeting individuals and groups, including some of its own members who were viewed as a threat to military rule. Mengistu fled to Zimbabwe after he, too, was ousted from power in 1991 by the Ethiopian People's Revolutionary Democratic Front.¹⁶⁰

In 1992, the Government of Ethiopia established a Special Prosecutor's Office (SPO) to investigate the widespread crimes committed during the Dergue period and to prosecute those responsible. Charges of war crimes and crimes against humanity were brought against the 72 top ranking Dergue officials, including Mengistu. In January 1997, the SPO announced that it was charging a total of 5198 people, of whom 2246 were already in detention. A total of 2952 were charged in absentia. All charges were based on the Ethiopian Penal Code of 1957.

Mengistu and his co-accused were charged with 211 counts of genocide and crimes against humanity. The government, however, was not able to secure his attendance at trial, and proceeded to try him in absentia. Of his 55 co-accused, the Government did not manage to secure the attendance of 25, and they too were tried in absentia. Mengistu and all 55 of his co-accused were found guilty by the Ethiopian Federal High Court in January 2007. Overall, the Ethiopian courts have convicted more than a thousand people since 1994.

Ethiopia's requests for Mengistu's extradition from Zimbabwe were declined. In 1999 when Mengistu visited South Africa for medical treatment, Human Rights Watch, citing South Africa's international obligations and Section 232 of the South African Constitution, requested that

¹⁵⁹ Jallow H and Bensouda F 'International Criminal Law in an African Context' in du Plessis M (ed) *African Guide to International Criminal Justice* (2008) 28.

¹⁶⁰ *Ibid*, 29.

Mengistu be brought to justice in South Africa's own courts. The organisation did not request his extradition to Ethiopia for fear of lack of a fair trial.¹⁶¹

South Africa did not respond directly to the Human Rights Watch correspondence, but certain statements attributed to the spokesperson of the Ministry of Foreign Affairs in the media indicate a reluctance to acquiesce in the requests. Amongst the reasons cited by South Africa for its refusal to acquiesce in the requests to try Mengistu were that he was a refugee in South Africa, and that there existed no extradition treaty between South Africa and Ethiopia. As such, it could not extradite him. South Africa did not invoke immunity, rightly so, because Mengistu had long been deposed. South Africa also claimed that to use its domestic courts to prosecute Mengistu would be inconsistent with its own reconciliation process.¹⁶²

Whilst at the time of the requests, customary international law, under which the alleged crimes fall, formed part of the law of South Africa,¹⁶³ there was no instrument to allow the courts to try Mengistu. This is because even though South Africa had ratified the UNCAT in 1988, it only enacted implementing legislation in 2013. Without specific legislation granting the courts jurisdiction on the basis of the universality principle, there was no way South Africa could try Mengistu in its courts.

Whilst the Ethiopian prosecution of those responsible for the Dergue atrocities is a good gesture in the fight against impunity, the manner in which the trials were conducted raises concern. The accused were kept in pre-trial detention for extended periods, and the courts faced heavy backlogs. The trials in absentia cannot be reconciled with the fair trial provisions of the ICCPR, to which Ethiopia is a state party.¹⁶⁴ However, all this notwithstanding, the Mengistu case and others like it are examples of a definite move to try perpetrators of genocide, war crimes and crimes against humanity.

¹⁶¹ Human Rights Watch 'Letter to South African Minister of Justice Urging Prosecution of Ethiopian Dictator' 25 November 1999 available at <http://www.hrw.org/news/1999/11/29/letter-hrw-south-african-minister-foreign-affairs> (accessed 22 July 2014).

¹⁶² *Ibid.*

¹⁶³ Section 232 of the Constitution of South Africa.

¹⁶⁴ Ethiopia acceded to the ICCPR on 11 June 1993.

Part III

4.3 Can African state practice be harmonised with the obligations of states under Article 4 of the AU Constitutive Act

Article 4 of the AU Constitutive Act lays down the principles that bind the members of the AU in their interactions with each other. Like its predecessor, the OAU Charter, the Constitutive Act of the AU still lists sovereign equality¹⁶⁵ and non-interference in the internal affairs of any member state as binding principles of the AU.¹⁶⁶ However, the redeeming feature of this provision lies in Article 4(h), which enshrines the right of the AU to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely genocide, war crimes, and crimes against humanity.¹⁶⁷ This Article should provide Africa with a tool to deal decisively with cases involving core crimes, by ensuring that a criminal tribunal is established and perpetrators are prosecuted in order to stem impunity.

All the above notwithstanding, the African continent's transition from the days of the OAU to the AU shows a sliding scale approach to international criminal justice, where the earlier years were characterised by a protectionist attitude. However, with the latter years, this environment was still conducive for impunity to breed, as the continental body was powerless to take action. Despite the continent's repeated assertions of its commitment to giving effect to a functioning international criminal justice, state practice on the ground does not seem to support the AU's declared willingness to punish those responsible for core crimes.

It is clear that the success of the ICTR and ICTY, coupled with the West's inability, and to a very large extent, unwillingness to prevent the Rwanda genocide, might have spurred the OAU to embark on a journey of introspection, which culminated in the calls for reform. The successes of the two tribunals for the first time showed the desirability of an international criminal tribunal to stem the rise in core crimes, and the need for the OAU to have the power to intervene, both in terms of prevention and punishment of those responsible.

The influence of the attempts to prosecute African state leaders by the domestic courts of foreign states can also not be overlooked. It is clear that at the turn of the millennium, as these foreign UJ-

¹⁶⁵ Article 4(a) of the AU Constitutive Act.

¹⁶⁶ Article 4(g) of the AU Constitutive Act.

¹⁶⁷ The same Article also binds states to respect the sanctity of human life, condemnation and rejection of impunity [Article 4(o)]; as well as respect for the rule of law [Article 4(m)].

based prosecutions gained momentum, Africa woke up to the realisation that there was a need to strengthen its legal framework and its institutions to deal with perpetrators of core crimes.

Even though a handful of African states also enacted ICC-implementing legislation, this has been of very little benefit, if at all, to the development of international criminal justice. The attempts by Kenya to shield its president from being prosecuted by the ICC by trying to rely on this law illustrates this point. When it became clear that the ICC would not relinquish the Uhuru and Ruto matters from its jurisdiction, Kenyan politicians sought to withdraw from the ICC and repeal all enabling legislation.

It is also difficult to reconcile the Article 4(h) right of the AU to intervene, with the insistence on the immunity of heads of state. African states have consistently relied on this perceived immunity in denouncing attempts by both the ICC and foreign courts to indict African state leaders.¹⁶⁸ Even when called upon to ensure prosecution on the continent, the AU produced an amendment protocol to the African Court which, although granting criminal jurisdiction, still subjected this to the immunity of heads of states.¹⁶⁹ This is despite the fact that the Constitutive Act of the AU, which empowers the Union to intervene in cases of grave circumstances, does not recognise this immunity. It only makes reference to state sovereignty, which African states have elected to interpret as meaning 'immunity of heads of states'.¹⁷⁰ This is even more problematic in that recognising the immunity of sitting heads of states would mean giving free reign to leaders who never leave office, either because they engineer every election to ensure victory, or because their territories are kingdoms,¹⁷¹ and are therefore in office for life. Such a position does not promote the aspirations of a well-functioning international criminal justice system that is victim centred and aimed at eliminating impunity for core crimes.

¹⁶⁸ See AU Assembly Decision Ext/Assembly/AU/Dec.1(Oct.2013), 'Decision on Africa's Relationship with the International Criminal Court (ICC)' adopted at its Extraordinary Session, held in Addis Ababa, Ethiopia on 11 – 12 October 2013.

¹⁶⁹ See Article 46B2 of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the 23rd Session of the AU Assembly in Malabo in June 2014, through Assembly/AU/Dec.529 (XXIII), 'Decision on the Draft Legal Instruments, Doc. Assembly/AU/8(XXIII)'.

¹⁷⁰ Article 3(b) provides only that one of the objectives of the AU shall be to defend the sovereignty, territorial integrity and independence of its member states, whilst Article 4(a) enjoins the AU to operate in accordance with the principle of sovereign equality of states. African states continually argue that the immunity of their presidents and senior state officials is an incident of this sovereignty, and attempts to prosecute them violates state sovereignty.

¹⁷¹ For example, Lesotho, Morocco and Swaziland are kingdoms led by monarchs who are immune from prosecution and hold office until they die.

4.4 Concluding remarks

What stands out though from the foregoing cases is that as seen in the Nuremberg Trials, Africa's prosecutions involve the dominant political successor being the prosecutor, and the defeated party, the accused. For instance, the *Mengistu* case proceeded as smoothly as it did because his regime was no longer in power. The same can be said of the *Charles Taylor*, *Hissène Habré* and other cases. Once again, as alleged at Nuremberg, international criminal justice seems to be characterised by victor's justice, rather than a genuine commitment to fighting impunity and punishing those responsible for the core crimes of genocide, war crimes and crimes against humanity. The African state practice reveals extensive lip service to the need to eliminate impunity and punish offenders for the core crimes. The absence of a permanent international criminal tribunal, coupled with the absence of legislation incorporating UJ in the domestic legal frameworks, has led Africa to create three ad hoc international tribunals, namely the Special Court for Sierra Leone, the ICTR and most recently the EAC. These piecemeal solutions to international criminal justice do not bode well for the growth of international criminal law, they weaken the fight against impunity. Such tribunals are costly to set up and to maintain, and are often preceded by very strong diplomatic and political opposition. It therefore stands to reason that Africa's greatest lesson from the foregoing is that the continent needs a permanent, future oriented international criminal tribunal, to deal effectively with perpetrators of the core crimes.

CHAPTER FIVE – THE AFRICAN RESPONSE TO UNIVERSAL JURISDICTION AND ICC PROSECUTIONS AND ITS CONTRIBUTION TO INTERNATIONAL CRIMINAL JUSTICE

5. Background

The inability of domestic courts to deal with perpetrators of the core crimes, coupled with the lack of a criminal tribunal at the AU level, as well as within the various RECs, created a fertile environment for impunity to thrive. That is why some human rights organisations welcomed the European incursion into Africa at the turn of the millennium. For them, UJ-based prosecutions by European courts presented an opportunity for victims to pursue justice which they would otherwise not have had.¹ Such prosecutions also represented a manifestation of the global outrage at the nature of the crimes,² and solidified the position that any state which obtains custody over the perpetrators could prosecute them for these crimes as enemies of humankind,³ the so-called *hostis humani generis*.⁴

All the above notwithstanding, international proceedings undertaken in line with widely accepted jurisdictional links, such as those undertaken by the two *ad hoc* international criminal tribunals (ICTR and ICTY), fare much better than unilateral UJ-based proceedings by foreign courts. This is partly because international tribunals such as the ICC, being creatures of multilateral treaties, derive their legitimacy from the state consent obtained through negotiation and ratification. As a result, international proceedings carried out in this manner have a greater ability to acquire

¹ Human rights organisations such as Human Rights Watch, the International Federation for Human Rights, Amnesty International and Global Policy Forum are on record as supporting the use of UJ by the courts of non-African states because of the benefits that flow from such prosecutions.

² See Jessberger F, Kaleck W and Schuller A 'Concurring criminal jurisdictions under international law' in Bergsmo M *Complementarity and the Exercise of Universal Jurisdiction For Core International Crimes* (2010) 236. The authors contend that the principles of UJ recognise the authority of each state to prosecute especially heinous crimes which due to their specific character affect the international community as a whole.

³ Smeulers A 'Punishing the enemies of all mankind' (2008) 21 *Leiden Journal of International Law* 971 – 993, 973. Smeulers notes that the perpetrators of the core crimes are *hostis humani generis*, because their crimes are so atrocious and gruesome that they go beyond human imagination. See also Ntoubandi FZ *Amnesty for Crimes Against Humanity Under International Law* (2007) 209. Ntoubandi asserts that the gravity of the core crimes entitles any State to prosecute perpetrators, including their own state of nationality. See also Kuwali D *The Responsibility to Protect: Implementation of Article 4(h) Intervention* (2011) 417, who asserts that the authority of a state exercising UJ is based solely on securing custody of the perpetrator.

⁴ Rahman and Billah assert that the basis of the universality principle is that the core crimes violate the universal interest, and offend conceptions of public policy and must be universally condemned. As such, any state which obtains the custody of the perpetrators can prosecute them on behalf of the community of nations. See Rahman M and Billah SM 'Prosecuting "war crimes" in domestic level: The case of Bangladesh' (2010) 1 *The Northern University Journal of Law* 14 - 23, 16. Sewall and Kaysen also reveal that in relation to customary international law crimes, any state could use its domestic courts to punish such perpetrators, and that in the absence of a treaty containing the *aut dedere aut judicare* principle, UJ is permissive rather than mandatory. It therefore permits any state to try perpetrators of the core crimes if they capture them. See Sewall SB and Kaysen C *The United States and the International Criminal Court: National Security and International Law* (2000) 185.

evidence through criminal co-operation than unilateral UJ-based prosecutions before a national court in a third party state, which would largely be viewed as an affront to national sovereignty.⁵

When Article 4(h) of the AU Constitutive Act was promulgated, it held out greater hope that the AU would be proactively involved in the prevention and punishment of the core crimes. Article 4(h) provides for the right of the AU to intervene in the affairs of a member state in the event of grave circumstances, such as genocide, war crimes and crimes against humanity. Empowered by such a provision, the AU regards as legitimate and acceptable any interference by the AU or its members in the domestic affairs of a fellow member, if the purpose is to prevent impunity in respect of the core crimes listed in Article 4(h). This position was affirmed in several AU Assembly Decisions made in the context of the exercise of UJ by the courts of a foreign state over crimes committed by non-nationals outside its territory.⁶

The attempts of the AU to embrace and implement UJ in relation to the punishment of perpetrators of the core crimes can also be seen in the Draft AU Model Law of 2011, as discussed earlier. This Model Law acknowledged that the draft was a product of Africa's misgivings with the current usage or abuse of UJ, and as a consequence of numerous decisions taken by the AU. Its preamble also recognised that certain crimes are of such a heinous character and of such serious concern for the international community, that they must not go unpunished. It also acknowledged that Article 4(h) buttresses this position by allowing intervention on the basis of the gravity of the core crimes. Hence, the Draft AU Model Law, coupled with Article 4(h), indicate the attitude of the African continent towards UJ, and the need to fight impunity for war crimes, genocide and crimes against humanity, and as such provide the basis of the practice of the AU on UJ over these crimes.

In drafting the Model Law, the AU aimed at generating a uniform code for its members, so that each state would use it as a blue print in developing legislation that would grant its courts jurisdiction on the basis of the universality principle. Perhaps this was done to limit the possibility that some African states would draft their prescriptive rules on the universality principle in a broad manner, such as including clauses that incorporate UJ in absentia, or others that remove the immunities of heads of states. This could be explained on the premium Africa places on state

⁵ Bassiouni states that if used in a politically motivated manner or if used to provoke leaders of other states, UJ has the potential to disrupt world order. This effectively deprives victims of their rights. See Bassiouni MC 'The history of universal jurisdiction and its place in international law' in Macedo S (ed) *Universal Jurisdiction: National Courts and The Prosecution of Serious Crimes Under International Law* (2004) 39.

⁶ Between 2008 and 2014, the AU issued several decisions condemning the abuse of the principle of universality by the courts of non-African states. These came from the AU Assembly, the PSC and the PAP.

sovereignty and the immunities of state officials, which is aptly captured in Section 3(f) of its Model Law⁷ and Article 46A *bis* of the Statute annexed to the Amendment Protocol⁸ which granted criminal jurisdiction to the African Court of Justice and Human Rights.⁹

5.1 The genesis of the problem

The stance of the AU towards the exercise of international criminal jurisdiction over the core crimes can be traced to two key developments in international law. In the first instance, the UJ campaign by non-African courts from around the turn of the millennium fuelled negative reactions from members of the AU. African states perceived such indictments as an affront to their sovereignty, and a violation of the immunities of state leaders under international law. In the second instance, the decision of the ICC Prosecutor to focus on cases emanating from Africa to the exclusion of other prosecutable cases from other regions also worsened its negative image amongst African states.¹⁰ As a result, Africa's early responses to both issues tended to treat them as one, and only in later years when UJ-based Western indictments abated did the AU begin to deal with each matter separately. For example, in its July 2012 Decision on the ICC, the AU welcomed the steps taken to follow up various Assembly Decisions on the abuse of the principle of UJ and encouraged member states to expeditiously enact or strengthen their national laws on UJ in line with the Draft AU Model Law.¹¹ Interestingly, the preceding statements were placed in the AU Decision on the ICC rather than within the one on the abuse of UJ. Hence this chapter also adopts a similar approach, and examines the continent's response to both UJ-based prosecutions by foreign courts and ICC prosecutions, and how these contributed to the development of international criminal justice in general and UJ in particular.

⁷ Section 3(f) provides that one of the objectives of the Model Law is to give effect to immunities enjoyed by state officials under international law. Section 16 also provides that the jurisdiction of courts exercising UJ shall apply subject to any international law on immunities.

⁸ Article 46A *bis* provides that:

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

⁹ The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, was adopted by the AU Assembly at its 23rd Ordinary Session in Malabo, Equatorial Guinea in June 2014 and has not yet come into force.

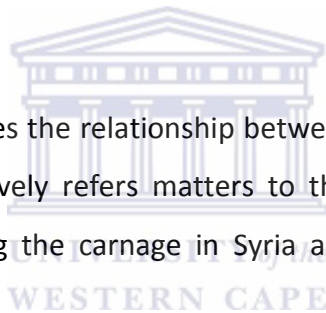
¹⁰ Murithi T 'The African Union and the International Criminal Court: An embattled relationship?' The Institute for Justice and Reconciliation Policy Brief 8 (March 2013), 5.

¹¹ See 'Decision on the Implementation of the decisions on the International Criminal Court (ICC)' Doc.EX.CL/731(XXI), Assembly/AU/Dec.419(XIX) adopted by the AU Assembly during its 19th Ordinary Session held between 15 – 16 July 2012 in Addis Ababa, Ethiopia, para 11.

Even though most commentators are of the opinion that the ICC does not exercise UJ,¹² there are instances where ICC prosecutions fall squarely within the universality principle.¹³ In relation to the domestic legislative enactments aimed at implementing the ICC obligations of states under the Rome Statute, Dugard, however, opines that such laws do confer upon the courts of a particular state some form of UJ. This is the power to try the three core international law crimes recognised by the Rome Statute, based on the principle of universality.¹⁴

Whilst the relationship between African states and the ICC is today polarised, this has not always been the case. In the negotiation stages of the Rome Statute, the idea of an international criminal court enjoyed a favoured position amongst African NGOs and governmental delegations, all of whom saw the ICC as an opportunity to stem impunity and encourage accountability.¹⁵ During the drafting process, the SADC states, led by post-apartheid South Africa, pushed for the ICC to have more authority in relation to human rights.¹⁶ The rate of ratification of the Rome Statute was also high amongst African states. Currently, 34 of the 54 states in Africa are parties to the Rome Statute.¹⁷

The animosity that now characterises the relationship between Africa and the ICC arose from the manner in which the UNSC selectively refers matters to the ICC. The referral of the cases of Libya,¹⁸ and Sudan,¹⁹ whilst ignoring the carnage in Syria and Israel,²⁰ bears testimony to such



¹² Ryngaert C 'The International Criminal Court and universal jurisdiction' Working Paper No.46 Centre for Global Governance Studies, Katholieke Universiteit Leuven (March 2010), 4. Even the ICC perceives itself as not having UJ because of the manner in which Article 13 of its Statute is worded. See in this regard International Criminal Court 'Jurisdiction and admissibility' available at http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/jurisdiction%20and%20admissibility.aspx (accessed 8 September 2014). See also Bekou O and Cryer R 'The International Criminal Court and universal jurisdiction: A close encounter' (2007) 56 *International and Comparative Law Quarterly* 49 - 68 , 50.

¹³ Dugard J *International Law* (2011) 155. Whilst Dugard aligns with the position that the ICC does exercise UJ, he also mentions that other commentators hold a contrary view.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, 173. Dugard makes the point that the number of African ratifications of the Rome Statute was significant.

¹⁶ Schabas W *An Introduction to International Criminal Law* 2ed (2004) 16.

¹⁷ As at 31 August 2014. See International Criminal Court 'The states parties to the Rome Statute' available at <http://www.icc-cpi.int/en> (accessed 21 August 2014).

¹⁸ Through UNSC Resolution 1970 (2011) the UNSC referred the situation in Libya since 15 February 2011 to the Prosecutor of the ICC. In this Resolution, the UNSC deplored what it called the gross and systematic violation of human rights in strife-torn Libya and demanded an end to the violence whilst at the same time imposing an arms embargo on the country and a travel ban and assets freeze on the family of Muammar Al-Qadhafi and certain Government officials. The UNSC was acting under Chapter VII of the UN Charter. In the same Resolution, the UNSC also recognized that states not party to the Rome Statute had no obligations to it, but urged all states and concerned organizations to cooperate fully with the Court's Prosecutor.

¹⁹ Through UNSC Resolution 1593 (2005) of 31 March 2005, the UNSC referred the situation in Darfur since 1 July 2005 to the Office of the Prosecutor of the ICC. In the same Resolution, the UNSC emphasised the need to promote healing and reconciliation. It further encouraged the creation of institutions involving all sectors of the Sudanese society, such as truth and reconciliation commissions, the AU and any international support that would be necessary.

claims.²¹ This misuse of the veto power extends beyond the sphere of international criminal justice and has resulted in UN member states calling for reform of the UN system.²² It has also led African states to conclude that the ICC has an anti-African bias.²³ These claims have formed the basis of the rallying cry of most politicians on the African continent,²⁴ but does not appeal to the victims, who appear to be almost universally relieved that somebody – anybody – is paying attention to their plight.²⁵ It also set in motion a sustained African campaign to end what African states perceived as the abuse of the principle of universality; whilst at the same time it opened a new avenue for African states to shape the development of international law.

5.1.1 The controversy of referrals by the United Nations Security Council

Apart from selective prosecutions, the fact that the ICC exercises UJ over non-states parties also polarised its relations with the AU. The ICC is a product of a multilateral treaty, the Rome Statute, and as such only states that are party to this instrument are bound by it. This is in line with Article 34 of the Vienna Convention on the Law of Treaties,²⁶ which provides that a treaty can bind only those states that are party to it. The Rome Statute, however, allows the ICC to be seized of a matter involving non-states parties where such a matter has been referred to it by the UNSC, acting under Chapter VII of the UN Charter, even if the state of the perpetrator is not a party to the Rome Statute, and the events did not occur in the territory of a state party. In other words, such cases are characterised by the lack of a connecting factor between the court and the case, save for the gravity of the crimes and their potential hazard to humanity in general. In such cases, the ICC is exercising jurisdiction under the universality principle. Some commentators argue that

²⁰ In May 2014, China and Russia used their veto power to block the adoption of a resolution drafted by France to refer Syria to the ICC. The draft resolution had been co-sponsored by 65 members of the UN.

²¹ See generally Dugard J 'Palestine and the International Criminal Court: Institutional failure or bias?' (2013) 11:3 *Journal of International Criminal Justice* 563 – 570.

²² Times Live 'President Jacob Zuma's speech before the UN: Full text' 25 September 2014 available at <http://www.timeslive.co.za/politics/2014/09/25/president-jacob-zuma-s-speech-before-the-un-full-text> (accessed 25 September 2014). President Zuma raised concern that because of the veto power, the UNSC remained helpless in areas that urgently required its intervention. He further noted that coupled with the concerns over the veto power, the UN system also needed reforms that would deal with the current exclusion of regions such as Africa in the UNSC. This would be in line with democratic principles and would result in a transformed UN system

²³ Du Plessis M, Maluwa T and O'Reilly A 'Africa and the international criminal court' July 2013 Chatham House Paper Series, 2 available at www.chathamhouse.org (accessed 24 July 2014).

²⁴ For instance, some commentators believe that the indictment of Uhuru Kenyatta and William Ruto boosted their popularity amongst parts of the Kenyan electorate. See Lynch G and Zgonec-Rozej M 'The ICC in Kenya' February 2013 Chatham House Paper Series AFP/ILP 2013/01, 2 available at www.chathamhouse.org (accessed 24 July 2014). See also BBC 'Did the ICC help Uhuru Kenyatta win Kenyan elections?' 11 March 2013 available at <http://www.bbc.com/news/world-africa-21739347> (accessed 30 July 2017).

²⁵ *Ibid.*

²⁶ Article 34 of the Vienna Convention on the Law of Treaties of 1969.

the ICC does not exercise UJ simply because it is not a domestic court.²⁷ Ryngaert argues that the ICC does not have jurisdiction based on the universality principle, at least in the strict sense of the word. His position is that the court's jurisdiction is strictly circumscribed and limited only to the territorial and nationality principles. He explains the exercise of jurisdiction following a UNSC referral as the exercise of jurisdiction based on the inherent powers of the UNSC to deal with threats and breaches of international peace and security. For this reason, Ryngaert is loath to label such jurisdiction as UJ.

This is a difficult position to align with, given the composition of the UNSC. Three of its five permanent members are not parties to the Rome Statute,²⁸ yet they are able to subject other non-states parties to the jurisdiction of the ICC, on the basis that the commission of the crimes is a threat to international peace and security. This is an incident of the universality principle.

Others argue that proposals to include UJ were rejected during the negotiation stage of the Rome Statute and for that reason UJ does not exist under the Rome Statute.²⁹ Germany, for instance, had made a proposal that the court be granted UJ. The German proposal was based on the rationale that states individually have a legitimate basis at international law to prosecute the core crimes listed in the Rome Statute on account of UJ. For this reason, Germany wanted the ICC to have the same type of jurisdiction.³⁰

The proposals for the inclusion of UJ were vehemently rejected by powerful states like the US.³¹ The US proposal in the negotiation stages of the Rome Statute was aimed at ensuring that the ICC did not have jurisdiction over nationals of non-states parties, as this would be in violation of the Vienna Convention on the Law of Treaties.³² It therefore accepted as fundamental the consent of the territorial state and the state of nationality of the accused person.³³ In the years after the

²⁷ Ryngaert C 'The International Criminal Court and Universal Jurisdiction' Working Paper No.46 Centre for Global Governance Studies Katholieke Universiteit Leuven (March 2010), 4.

²⁸ These are the US, Russia and China.

²⁹ See generally Williams SA 'The Rome Statute on the International Criminal Court – Universal Jurisdiction or State Consent – To make or Break the Package Deal' International Law Studies, International Law Across the Spectrum of Conflict, Essays in Honour of Professor LC Green on the Occasion of His Eightieth Birthday, Vol. 75 XXI available at <https://www.usnwc.edu/getattachment/91d9e125-005d-4691-8ff0-4b7c90d86d4b/The-Rome-Statute-on-the-International-Criminal-Cou.aspx> (accessed 8 September 2014).

³⁰ *Ibid*, 545.

³¹ The jurisdictional scheme ultimately adopted in the treaty rejected the universality principle and embraced jurisdiction on the basis of territoriality and nationality. See Morris MH 'Universal jurisdiction in a divided world: Conference Remarks (2001) 35:2 *New England Law Review* 337 - 361, 350.

³² Article 34 of the Vienna Convention on the Law of Treaties of 1969.

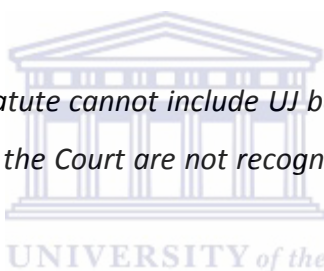
³³ See Williams SA 'The Rome Statute on the International Criminal Court – Universal Jurisdiction or State Consent – To make or Break the Package Deal' International Law Studies, International Law Across the Spectrum of Conflict, Essays in Honour of Professor LC Green on the Occasion of His Eightieth Birthday, Vol. 75 XXI, 547 available at

coming into force of the Rome Statute, the opposition of the US to the ICC's exercise of jurisdiction over its own nationals continued, largely based on the fact it is not a party to the Rome Statute.³⁴ Further reasons advanced by the US include the following:³⁵

- (i) *The US felt that the Rome Statute rejects the universality principle as a basis of jurisdiction by specifying that the consent of the state of the perpetrator's nationality or the state in whose territory the offence took place is required.*

This argument overlooks the fact that the exercise of jurisdiction by the ICC in cases referred by the UNSC constitutes an exception to the territorial and nationality requirement. In other words, even though the Rome Statute lists territoriality and nationality as the only two forms of jurisdiction, Article 13(b) allows the UNSC to avoid these two requirements in the interests of international peace and security. The UNSC referral is not a form of jurisdiction, hence the ICC's connection with matters referred to it in this matter can only be explained on the basis of the universality principle.

- (ii) *The US felt that the Rome Statute cannot include UJ because some of the crimes within the subject matter jurisdiction of the Court are not recognised as crimes of UJ under customary international law.*



Whilst this argument rings true of the current customary international law position in respect of the crime of aggression, the three core crimes are largely accepted customary international law crimes.³⁶ However, international law does not prohibit states from granting jurisdiction based on the territoriality and nationality link through a treaty as they did in the Rome Statute. The requirement is that there must be a prohibitive rule of international law, failing which

<https://www.usnwc.edu/getattachment/91d9e125-005d-4691-8ff0-4b7c90d86d4b/The-Rome-Statute-on-the-International-Criminal-Cou.aspx> (accessed 8 September 2014).

³⁴ For example, the UNSC adopted Resolution 1422 of 2002, which granted a 12-month blanket immunity from the ICC in order for its troops to serve in peacekeeping missions around the globe. This period was renewed for a further 12 months at the instance of the US. See UNSC Resolution 1442 (2002) adopted at its 4572nd meeting on 12 July 2002.

³⁵ The jurisdictional scheme ultimately adopted in the treaty rejected the universality principle and embraced jurisdiction on the basis of territoriality and nationality. See Morris MH 'Universal jurisdiction in a divided world: Conference Remarks (2001) 35:2 *New England Law Review* 337 - 361, 350.

³⁶ Arajarvi makes the point that evidence of state practice that a customary norm prohibiting war crimes and crimes against humanity emerged as early as the Nuremberg Trial. See Arajarvi N 'The role of the international criminal judge in the formation of customary international law (2007) 1:2 *European Journal of Legal Studies* 1 - 31, 8. See also the Customary Law Study of the International Committee of the Red Cross, particularly Rule 158. Rule 158 stipulates states must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate prosecute those suspects. They must also investigate other war crimes over which they have jurisdiction, and prosecute the suspects if appropriate. Rule 185 is the culmination of state practice which establishes this rule as a norm of customary international law.

states are permitted to act as such.³⁷ It would seem that through the Rome Statute, states went even further to allow ICC to proceed with a matter after referral by the UNSC, even in matters which lack the traditional forms of jurisdiction. Such a provision is a clear indication that states intended the ICC to have jurisdiction over the three core crimes, as well as the crime of aggression. They therefore consented to the ICC's exercising of territorial and nationality jurisdiction over these crimes. Where these two accepted forms of jurisdiction are absent, states, in adopting Article 13(b) of the Rome Statute, consented to have the ICC exercise jurisdiction, provided the UNSC referred the matter to the ICC.

(iii) The US felt that UJ cannot be delegated to a treaty-based international court such as the ICC.

This argument is flawed on two grounds. First, even though proposals for the inclusion of UJ in the ICC's jurisdictional links were rejected, states consented to the conferment of UJ upon the ICC in cases where none of the accepted forms of jurisdiction exists. States which ratified the Rome Statute were driven by the common desire to prevent human suffering,³⁸ promote accountability and punish perpetrators of the core crimes.³⁹ They were keen to ensure that perpetrators do not escape liability simply because the traditional forms of jurisdiction are absent. They therefore agreed to allow the political arm of the UN to refer such matters to the ICC. Effectively, they gave their consent for the ICC to exercise jurisdiction on the basis of the universality principle, even if the wording of Article 13 does not necessarily contain those specific words. Secondly, this argument is also flawed in that it seems to suggest that UJ cannot be delegated to an international tribunal simply because of its nature; or alternatively, simply because the ICC is an international tribunal and not a domestic court. All the forms of jurisdiction, such as the territoriality and nationality jurisdictions of the ICC, were initially

³⁷ *The Case of the SS Lotus (France v Turkey)* 1927 PICJ Reports, Series A No.10.

³⁸ Ocampo LM 'Building a future on peace and justice: The International Criminal Court' in Ambos K, Large J and Marieke V (eds) *Building a Future on Peace and Justice: Studies on Transitional Justice* (2008) 10. Ocampo states that when states negotiated and concluded the Rome Statute, they committed to put an end to impunity for the most serious crimes of concern to the international community and to contribute to the prevention of such crimes.

³⁹ The ICC was set up to ensure that violators do not escape punishment. Its guiding philosophy clearly indicates this intention of the part of states. Paragraphs 3 to 5 of the preamble of the Rome Statute state that:

Recognising 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 by taking measures at the national level and by enhancing international cooperation.

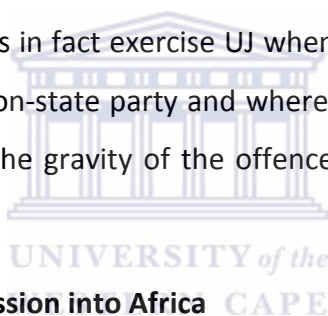
Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

exercised by domestic courts, and were only delegated to international tribunals when the demands of international criminal justice dictated so.

(iv) The ICC cannot exercise jurisdiction on the basis of the territoriality principle because a state cannot delegate its territorial jurisdiction to try an offender to an international court without the consent of the state of nationality.⁴⁰

This also overlooks the Article 13(b) power of the UNSC to override the territorial state by referring a matter which occurs on the territory of a non-state party. When states negotiated the Rome Statute they clearly intended to overstep the territorial state by using the instrumentality of the UNSC.

As indicated above, scholarly opinion is divided concerning the nature of the jurisdiction exercised by the ICC pursuant to a UNSC referral in matters that do not involve non-states parties and the territorial state. Some scholars are of the opinion that only domestic courts can exercise UJ. The author's position is that the ICC does in fact exercise UJ whenever it is seized of a matter referred to it by the UNSC, coming from a non-state party and where no other jurisdictional link connects that matter to the court, save for the gravity of the offences and their deleterious effect on all humankind.



5.1.2 The Western prosecutorial mission into Africa

Many courts of Western countries have been involved in UJ-based investigations, indictments and prosecutions of Africans accused of the core crimes. For example, Rwandan nationals have been prosecuted before the courts of France, Belgium, the Netherlands, and Sweden, amongst others, based on the universality principle. Belgium features greatly in the area of UJ-based prosecutions, particularly in cases emanating from the 1994 Rwandan genocide which were heard by the Belgian courts without much controversy. Perhaps this could be explained by the moral outrage that was shared globally regarding the Rwandan genocide. It could also be explained by the fact that the genocidaires prosecuted by Belgium were often ordinary private individuals, former members of the militia groups that perpetrated the genocide. They were not incumbent or former heads of state or senior state officials. When the focus of the prosecutions turned towards incumbent senior state officials, this immediately attracted the ire of the AU. Further, these UJ-based prosecutions worked well for Rwanda at the time as its criminal justice and other state institutions

⁴⁰ Scharf MP 'ICC jurisdiction over nationals' in Sewall SB and Kaysen C (eds) *The United States and the International Criminal Court* (2000) 214.

still required rebuilding, while the *ad hoc* tribunal, the ICTR also experienced case backlogs,⁴¹ as well as administrative and financial hurdles.⁴² Given such challenges, Rwanda, and to some extent other African states, were more welcoming of the European interventions.⁴³ For example, when Belgium convicted the Butare Four, Gasana Ndobwa, the first head of the Human Rights Commission of Rwanda indicated to reporters that he was satisfied with the proceedings.⁴⁴ These interventions also occurred at a time when African states, under the umbrella of the OAU, were guided by the principle of non-intervention in the affairs of other states.⁴⁵

Such interventions did not, however, elicit the same responses a few years later. In 2006, a French judge issued arrest warrants against nine Rwandan officers suspected of having been involved in the fatal attack against the aircraft of former Rwandan President Juvenal Habyarimana.⁴⁶ Rose Kabuye,⁴⁷ the chief of protocol at the president's office, was one of the officers against whom an arrest warrant was issued.⁴⁸ She was apprehended in Germany on 9 November 2008, and subsequently transferred to Paris.⁴⁹ She was indicted and later set free. Rwanda embarked on a counter-offensive,⁵⁰ and accused France of trying to destabilise Rwanda.⁵¹ The Rwandan Government also initiated a civil suit based on defamation against the French judge.⁵² Rwanda managed through sustained diplomatic and political interventions to successfully rally African

⁴¹ See Jallow HB 'The ICTR and the challenge of completion' available at http://www.unicttr.org/Portals/0/English%5CNews%5Cevents%5COct2006%5Cictr_completion.pdf (accessed 4 September 2014).

⁴² See Werrett M 'Challenges of proper completion and winding up of the *ad hoc* tribunal – ICTR' available at <http://www.unicttr.org/Portals/0/English%5CNews%5Cevents%5CNov2004%5Cwerrett.pdf> (accessed 7 September 2014).

⁴³ IRIN News 'Rwanda: Butare Four found guilty of war crimes by Brussels court' available at <http://www.irinnews.org/report/22029/rwanda-butare-four-found-guilty-of-war-crimes-by-brussels-court> accessed (4 September 2014).

⁴⁴ *Ibid.*

⁴⁵ Article 3(2) of the Charter establishing the OAU.

⁴⁶ Reyntjens F *Political Governance in Post-Genocide Rwanda* (2013) 148.

⁴⁷ In 2006, the French anti-terrorism unit published a research report accusing Rwandan President Paul Kagame of responsibility for the fatal plane crash. Oomen B 'Justice mechanisms and the question of legitimacy: The example of Rwanda's multi-layered justice mechanisms' in Ambos K, Large J and Marieke V (eds) *Building a Future on Peace and Justice: Studies on Transnational Justice* (2008) 190.

⁴⁸ Reyntjens F *Political Governance in Post-Genocide Rwanda* (2013) 150.

⁴⁹ Reyntjens suggests that Kabuye was deliberately sent on a mission to Germany by the Rwandan Government, knowing fully well that she would be captured. It would seem, based on Reyntjens' suggestion that Rwanda wanted to set in motion a chain of events that would allow it to condemn the violation of diplomatic immunity by the domestic courts of a non-African state. Until Mrs Kabuye was arrested pursuant to the warrant, any argument based on her diplomatic immunity ran the risk of being purely academic. See Reyntjens F *Political Governance in Post-Genocide Rwanda* (2013) 148.

⁵⁰ Oomen B 'Justice mechanisms and the question of legitimacy: The example of Rwanda's multi-layered justice mechanisms' in Ambos K, Large J and Marieke V (eds) *Building a Future on Peace and Justice: Studies on Transnational Justice* (2008) 190.

⁵¹ *Ibid.* Rwanda also accused the French of trying to appease their conscience for their role in the genocide, and stated that the French were merely looking for a scapegoat for their abominable acts.

⁵² *Ibid.*

support in its condemnation of what it termed 'abuse of universal jurisdiction'. The Pan African Parliament (PAP) was the first to condemn the indictments, stating that they violated the sovereignty of Rwanda.⁵³

State practice at the time indicated that whilst some European states were the forerunners in the use of UJ for the core crimes, their prosecutions were selective and informed by political considerations. For example, France and Germany were reluctant to prosecute high-level US officials for their role in the torture of detainees under US control.⁵⁴ Britain issued an arrest warrant against a former Israeli Minister, Tzipi Livni, only to withdraw it after it emerged that she was not in the UK.⁵⁵ Spain was also reluctant to prosecute high-level Chinese officials, and eventually amended its UJ laws in 2014,⁵⁶ as was the case in Germany, where prosecutors declined to proceed against former Chinese president Jiang Zemin, in 2003, former Uzbek interior minister Zokirjon Almatov, in 2005, and former US Secretary of Defence Donald Rumsfeld and many others.⁵⁷ These foreign courts did not, however, hesitate to charge senior African state officials for similar offences. None of the many individuals tried by European courts on the basis of UJ⁵⁸ was a national of a Western state.⁵⁹



⁵³ The PAP issued a declaration in this regard on 16 May 2008.

⁵⁴ The Centre for Constitutional Rights has for the past decade unsuccessfully tried to have several US officials, including former Secretary of Defence Donald Rumsfeld and former president George Bush brought to trial in France for their roles in the commission of acts of torture and crimes against humanity in the Guantanamo Bay detentions. See Centre for Constitutional Rights 'Universal jurisdiction: Accountability for US torture' available at <http://www.ccrjustice.org/case-against-rumsfeld> (accessed 7 September 2014).

⁵⁵ Black I and Cobain I 'British court issued Gaza arrest warrant for former Israeli minister Tzipi Livni' The Guardian 14 December 2009 available at <https://www.globalpolicy.org/international-justice/universal-jurisdiction-6-31/48557.html> (accessed 9 September 2014). Tzipi Livni was cited for her role in the Israeli offensive in Gaza during Operation Cast Lead. She was due to travel to London for a meeting but she later cancelled her attendance when she caught wind of the arrest warrant.

⁵⁶ Kassam A 'Spain moves to curb legal convention allowing trials of foreign rights abuses' The Guardian 11 February 2014 available at <http://www.theguardian.com/world/2014/feb/11/spain-end-judges-trials-foreign-human-rights-abuses> (accessed 5 September 2014).

⁵⁷ Foakes J 'Immunity for international crimes? – developments in the law on prosecuting heads of state in foreign courts', Chatham House Briefing Paper No.IL BP 2011/02 November 2011 11, available at http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bp1111_foakes.pdf (accessed 2 September 2014).

⁵⁸ Zemach A 'Reconciling UJ with equality before the law' (2011) 47 *Texas International Law Journal* 143 – 199, 143. The Augusto Pinochet case which went before the English courts also involved a former state leader from the Latin American region.

⁵⁹ See International Federation for Human Rights 'DRC/Senegal: Senegalese court follows up on complaint based on universal jurisdiction filed by FIDH and the families in the Chebeya-Bazana case' 26 August 2014 available at <http://www.fidh.org/en/africa/democratic-republic-of-congo/15935-drc-senegal-senegalese-court-follows-up-on-complaint-based-on-universal> (accessed 9 September 2014). The DRC failed to investigate and prosecute police officers allegedly involved in the torture and killing of two human rights defenders, Floribert Chebeya nad Fidele Bazana. The families of the two subsequently filed a criminal complaint before the court of Senegal. The matter was still pending before the Senegalese courts as at 9 September 2014, and the courts had not yet confirmed whether they would be seized of the matter.

The African position that the use of the universality principle against certain state officials violates international law also found judicial endorsement. As former ICJ President Gillaume stated in the *Arrest Warrant* case, permitting states to assert pure UJ would encourage the arbitrary for the benefit of the powerful, purportedly acting as agents for the ill-defined international community.⁶⁰ In the judge's words, allowing the courts of foreign states to use the universality principle to indict and prosecute state officials who enjoy immunity in the manner that Belgium did, would lead to judicial chaos, and plunge the law backwards instead of advancing legal development. This is because whilst international criminal courts have been created to deal with perpetrators of the core crimes, at no time was it envisaged that jurisdiction should be conferred upon the courts of every state in the world to prosecute such crimes.⁶¹

5.1.2.1 The impact of the Belgian indictments

Belgium's use of UJ was also selective as it did not readily prosecute suspects of these core crimes from other parts of the world. For example, following Belgium's conviction of the Butare Four in June 2001,⁶² and the conviction of Fulgence by Switzerland in the same year,⁶³ a lawsuit was brought against Israeli Prime Minister, Ariel Sharon, for his alleged involvement in the massacres that occurred in Beirut more than 15 years earlier. As with similar UJ-based indictments, this indictment had political ramifications for Belgium,⁶⁴ whose capital Brussels hosts the EU headquarters. Sharon refused to visit Brussels for fear of arrest, and this proved embarrassing for Belgium. Eventually Belgium did not pursue this legal process.⁶⁵ Belgium's state practice is not consistent, as indicated by its indictment of DRC minister of foreign affairs, Mr Yerodia, without due regard to the political consideration, as it did in the Sharon case. In fact, it had the audacity to pursue the matter with vigour when the DRC sued Belgium in the *Arrest Warrant* case.⁶⁶ Belgium

⁶⁰ See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002, para 15.

⁶¹ *Ibid.*

⁶² *Prosecutor v the Butare Four, Cour d'Assises de Bruxelles* 8 June 2001.

⁶³ *Niyontenze Fulgence v Prosecutor Tribunal Militaire de Cassation* (Switzerland) 27 April 2001.

⁶⁴ Seroussi J 'The cause of universal jurisdiction: The rise and fall of an international mobilisation' in Dezalay Y and Garth B (eds) *Lawyers and the Construction of Transnational Justice* (2013) 49.

⁶⁵ Nicolaou-Garcia S 'Universal jurisdiction against Israeli officials' available at <https://www.middleeastmonitor.com/reports/by-silvia-nicolaou-garcia/54-universal-jurisdiction-against-israeli-officials> (accessed 21 August 2014). Israel had unsuccessfully argued that Sharon enjoyed immunity before the Belgian courts.

⁶⁶ See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002.

lost the case after the ICJ held that foreign ministers of state enjoy immunity before the courts of a foreign state.⁶⁷

Again in February 2009, Belgium filed an application in the Registry of the ICJ, instituting proceedings against Senegal in respect of a dispute concerning Senegal's failure to carry out its obligation to prosecute former President of Chad Hissène Habré,⁶⁸ or to extradite him to Belgium for the purposes of criminal proceedings. Belgium based its claims on the UNCAT,⁶⁹ as well as on customary international law. It sought to prosecute Habré under the universality principle.

This saw the AU pressed to search for an African mechanism to deal with the Habré matter,⁷⁰ rather than allow the foreign court of a non-African state to pursue the matter under the universality principle, as will be discussed below and in later chapters.

5.2 Africa's response to foreign and international judicial interventions

Apart from the AU Assembly,⁷¹ the AU has a number of other political, deliberative and judicial organs, namely: the Pan African Parliament (PAP),⁷² the Peace and Security Council (PSC),⁷³ the Executive Council,⁷⁴ the AU Commission (Secretariat),⁷⁵ and the Court of Justice.⁷⁶ As of 2013, the AU embraced the Specialised Technical Committees (STCs),⁷⁷ which currently stand at 14 in number. The STCs are composed of Ministers or senior officials responsible for sectors falling

⁶⁷ *Ibid*, paras 54-55.

⁶⁸ Questions relating to the obligation to prosecute or extradite (*Belgium v Senegal*) ICJ Reports 2012 available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=144> (accessed 4 September 2014).

⁶⁹ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

⁷⁰ See AU Decision on the Hissène Habré case, Doc.Assembly/AU/11(XV), Assembly/AU/Dec.297(XV) adopted by the 15th Ordinary Session of the Assembly of the AU on 27 July 2010 in Kampala, Uganda. In para 3, the AU requested the Government of Senegal to prosecute and try Hissène Habré.

⁷¹ See Articles 5(1)(a) and 6 of the AU Constitutive Act, which established the Assembly of Heads of States and Governments of the AU.

⁷² Articles 5(1)(c) and 17 of the AU Constitutive Act. See also the Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament. The PAP was provided for under the AU Constitutive Act as well as the Treaty Establishing the African Economic Community. The Protocol establishing the PAP was adopted in Sirte, Libya on 2 March 2001 and entered into force on 14 December 2003. Its powers are currently purely advisory and consultative.

⁷³ Article 5 of the Protocol relating to the establishment of the Peace and Security Council of the African Union, adopted by the AU Assembly in Durban, South Africa on 10 July 2002 in terms of Article 5(2) of the AU Constitutive Act, and entered into force on 26 December 2003.

⁷⁴ Article 5(1)(b) AU Constitutive Act. See also Article 10 of the of the AU Constitutive Act which provides that the Executive Council shall consist of Ministers of Foreign Affairs or such other ministers or authorities as are designated by the governments of member states.

⁷⁵ Article 5(1)(e) AU Constitutive Act. Article 20 of the AU Constitutive Act stipulates that the Commission shall be the secretariat of the AU.

⁷⁶ Article 5(1)(d) AU Constitutive Act.

⁷⁷ Article 14 AU Constitutive Act.

within their respective areas of competence.⁷⁸ The STC on Legal Affairs was closely involved in the drafting of the Amendment Protocol and its Statute which granted criminal jurisdiction to the African Court. These organs also make pronouncements which add to the debates around UJ. They have mandates in varying degrees of relevance with regard to the fight against impunity, and by the necessary extension, they can influence Africa's response to the abuse of the universality principle by Western states.

The PSC released a brief statement on 11 July 2008, following a briefing by the Deputy Prosecutor of the ICC on some of the court's activities. In the statement the PSC highlighted the AU's concerns regarding the misuse of indictments against African leaders.⁷⁹ It emphasised that the pursuit of justice and the fight against impunity must be done in a way that does not impede or jeopardize efforts aimed at promoting lasting peace. The PSC relied on Paragraph 5 of the UNSC Resolution 1593 (2005), which called for consideration of healing and reconciliation in handling the Darfur situation. It also reiterated the concerns of the AU with regard to the misuse of indictments against African leaders.

Pursuant to the press release, the PSC issued a further communiqué in response to the ICC Prosecutor's application made on 14 July 2008 for an arrest warrant to be issued against the President of Sudan, Omar Al Bashir.⁸⁰ In this second statement, the PSC began by condemning the gross violation of human rights in Darfur. The communiqué further emphasized the ICC's complementarity with national jurisdictions.⁸¹ It also stressed the need for transparency in the conduct of international criminal justice in order to avoid perceptions of double standards. It noted that the actions of the ICC posed a threat to efforts aimed at promoting the rule of law and stability, as well as building strong national institutions in Africa.⁸²

The PSC then noted that in order to address the issues of combating impunity and promoting peace and reconciliation in a mutually reinforcing manner, the following needed to be taken into account:

⁷⁸ Article 14(3) AU Constitutive Act

⁷⁹ Peace and Security Council Press Statement, PSC/PR/BR/(CXLI), adopted at the 141st Meeting of the PSC on 11 July 2008 in Addis Ababa, Ethiopia.

⁸⁰ Peace and Security Council Communiqué, PSC/MIN/Comm(CXLII), adopted at the 142nd Meeting of the PSC on 21 July 2008 in Addis Ababa, Ethiopia.

⁸¹ *Ibid*, para 5.

⁸² *Ibid*, para 7.

- (i) It requested the UNSC in accordance with Article 16 of the Rome Statute to defer the process initiated by the ICC against Al Bashir as it would likely jeopardize on-going peace efforts.⁸³ It noted further, that under the circumstances, a prosecution may not be in the interests of victims and justice.
- (ii) It invited the Commission to establish an independent High-Level Panel to examine the situation and submit recommendations to the Council on how best the issues of accountability and combating impunity on the one hand, and reconciliation and healing on the other, could effectively and comprehensively be addressed. The PSC was influenced by the wording of the UNSC Resolution 1593 (2005) which called for the establishment of truth and reconciliation commissions, and the involvement of other role players, such as the AU, in the resolution of the Darfur situation. It is clear at this stage, that the PSC did not really envisage a situation where the UNSC would refuse to defer the matter, given that its referring resolution did make space for national processes to deal with this matter.
- (iii) The PSC further encouraged the Sudanese parties to ensure that issues of impunity, accountability and reconciliation and healing are appropriately addressed during the negotiations aimed at reaching a comprehensive peace agreement. Further, that in line with the principle of complementarity, the Government of Sudan would take immediate and concrete steps to investigate human rights violations in Darfur and bring to justice those identified as perpetrators.

As indicated above, the UNSC Resolution 1593 (2005) made reference to the possibility of using domestic mechanisms within the Sudan to deal with the alleged crimes of Al Bashir. Both the PSC and AU communiqués placed emphasis on domestic mechanisms, such as truth and reconciliation commissions, given that the ICC is complementary to national jurisdictions. There is no inherent hostility or contradiction between the objectives of the ICC and those of truth and reconciliation commissions per se.⁸⁴ Truth commissions can give victims a platform to speak, to tell their story and help in the discovery of truth.⁸⁵ They are therefore very central in reconciliation efforts and national healing processes, and it can be argued that the UNSC had this in mind when it included

⁸³ Security Council Report 'Sudan (Darfur) – Chronology of events' available at <http://www.securitycouncilreport.org/chronology/sudan-darfur.php?page=all&print=true> (accessed 22 August 2014).

⁸⁴ Robinson D 'Serving the interests of justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14:3 *European Journal of International Law* 481 – 505, 484.

⁸⁵ Minow M 'The hope for healing: What can truth commissions do?' in Rotberg R and Thompson D (eds) *Truth v. Justice: The Morality of Truth Commissions* (2000) 235.

Paragraph 5 in its referral resolution, to allow Sudan as the territorial state to employ the most suitable and effective method of dealing with the situation. The AU also shared similar sentiments in calling upon the authorities in Sudan to use its domestic mechanisms to bring perpetrators to justice, and to involve all interested and affected stakeholders in the process.

It is worth noting that Botswana has over the years shown alignment with the ICC and supported its work.⁸⁶ Botswana's president is on record as saying his country would arrest suspects wanted by the ICC who enter Botswana.⁸⁷ Also worth noting is Botswana's continued objection to some of the decisions of the AU and its position on the ICC's attitude towards Africa. For example, in 2011 following the AU Decision expressing concern regarding the ICC indictment of former Libyan leader, Muammar al Quadafi, Botswana released a statement rejecting the AU position.⁸⁸ It further reiterated Botswana's position in support of the ICC warrant of arrest and called on fellow members of the AU to support the ICC in carrying out its mandate to apprehend the Libyan leader, as a critical step towards alleviating the plight of the Libyan people, and paving the way for a new democratic dispensation in that country.⁸⁹ Botswana was later joined by states like South Africa, Malawi, Niger and Burkina Faso in affirming their commitment to arrest ICC suspects.⁹⁰

5.2.1 Placing the matter on the international agenda

In response to the rise of UJ-based prosecutions by Western states, African states pushed for the inclusion of an additional item titled 'Abuse of the principle of universal jurisdiction' on the agenda of the 63rd Session of the United Nations General Assembly (UNGA) in February 2009. As a result, UJ has featured prominently in UNGA deliberations since then.⁹¹ Following this session, the UNGA subsequently requested governments to submit observations and information on state practice

⁸⁶ African Arguments 'Politicizing the ICC process in Kenya will not let suspects off the hook' available at <http://africanarguments.org/2013/05/22/politicizing-the-icc-process-in-kenya-will-not-let-icc-suspects-off-the-hook-by-stephen-lamony-sunil-pal/> (accessed 8 September 2014).

⁸⁷ See International Coalition for the International Criminal Court 'Letter on ASP to ICC African states' available at http://www.iccnw.org/documents/Letter_on ASP_to_ICC_African_states_parties_November_2011.pdf accessed 8 September 2014).

⁸⁸ See AU Decision on the implementation of the Assembly Decisions on the International Criminal Court Doc.EX.CL/670(XIX), Assembly/AU/Dec.366(XVII) taken by the AU Assembly at its 17th Ordinary Session held between 30 June - 1 July 2011 in Malabo, Equatorial Guinea. In paragraph 6, the AU expressed concern at the manner in which the ICC Prosecutor handled the situation in Libya, pursuant to a UNSC referral through UNSC Resolution 1970 (2011). The AU further decided that its members would not cooperate with the ICC in the execution of arrest warrants.

⁸⁹ The statement is available at http://www.icc-cpi.int/iccdocs/asp_docs/Statement/Botswana-ST-08July11-ENG.pdf (accessed 8 September 2014).

⁹⁰ See Institute for Security Studies 'Letter to Foreign Ministers' available at http://www.issafrica.org/anici/uploads/19th_AU_Summit_Letter_to_Foreign_Ministers.pdf (accessed 8 September 2014).

⁹¹ Yee S 'Universal jurisdiction: Concept, logic and reality' (2011) 10 *Chinese Journal of International Law* 503 - 530, 504.

regarding the principle of universality. In the 63rd Session, the following resolutions were made, which are similar to the resolutions taken by the AU at its Sharm El-Sheikh session in 2008:

- (i) The abuse of the universality principle was a development that could endanger international law, order and security;
- (ii) The political nature and abuse of the principle of universality by judges from some non-African states against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these states;
- (iii) The abuse and misuse of indictments against African leaders have a destabilising effect that will negatively impact on the political, social and economic development of states and their ability to conduct international relations;
- (iv) The warrants that had already been issued would not be executed in AU member states; and
- (v) There was need for the establishment of an international regulatory body with competence to review and/handle complaints or appeals arising out of abuse of the principle of universality by individual states.

5.2.2 Developments after the Sharm El-Sheikh Declaration – the search for an African solution

From the Nuremberg Trial until the 1980s, there had been a lull in both the call for a permanent international criminal tribunal and the use of UJ by foreign courts. A number of factors gave rise to the calls for a permanent international criminal court. These include the increase in the number of international crimes provided by treaties outlawing hijacking, hostage taking, and torture.⁹² These factors were also buttressed by developments in the 1990s, a period characterised by great human suffering both on the African continent⁹³ and in Europe.⁹⁴ As a result, a slowly emerging system of international justice had become an increasingly viable option.⁹⁵ This emerging system promised a measure of solace to victims and their families. It also raised the possibility that national courts operating under the doctrine of UJ would prosecute perpetrators of genocide, war crimes and crimes against humanity.⁹⁶

⁹² Dugard J *International Law* (2011) 171.

⁹³ The 1994 Rwandan Genocide led to the creation of the *ad hoc* tribunal, the International Criminal Tribunal for Rwanda.

⁹⁴ The atrocities in the former Yugoslavia saw the UN establish the International Criminal Tribunal for the former Yugoslavia, which was also an *ad hoc* tribunal.

⁹⁵ In the 1990s, the calls for a permanent international criminal court were growing in strength. See 'Understanding the International Criminal Court' 3 available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (accessed 22 August 2014).

⁹⁶ See Global Policy Forum 'Universal jurisdiction' available at <https://www.globalpolicy.org/international-justice/universal-jurisdiction-6-31.html> (accessed 1 September 2014).

These developments caused many concerns for the AU, chief amongst which was the debilitating effect of the Western indictments of African state leaders on political, social and economic development. African states felt they could no longer conduct international relations freely in light of these UJ-based indictments. State officials would be afraid to travel abroad to conduct governmental business for fear of being indicted or arrested.

In 2008, two major developments happened that would contribute positively to the international criminal justice sector. First, the Draft Protocol on the Statute of the African Court of Justice and Human Rights was adopted.⁹⁷ This protocol would merge the African Court on Human and Peoples' Rights and the African Court of Justice to form a single court (the Merged Court). The Merged Court had only two chambers, a general affairs and a human rights chamber.⁹⁸ The merger paved the way for the AU to begin to consider the expansion of the Merged Court's jurisdiction to include a criminal chamber. However, this legal development would not come into effect until June 2014.

The second development was the adoption, during the same summit, of a decision adopting the report of the Commission on the abuse of the principle of universal jurisdiction.⁹⁹ In it, the AU decried the abuse of UJ by non-African states, and noted that this would endanger international law, order and security,¹⁰⁰ and was a violation of sovereignty and territorial integrity of African states.¹⁰¹ The AU further resolved that warrants issued by non-African states against Africans shall not be executed in AU member states.¹⁰² It also requested all UN member states, in particular EU states to impose a moratorium on the execution of those warrants until all the legal and political issues had been exhaustively discussed between the AU, the EU and the UN.¹⁰³ The AU also requested the AU Commission to set up a meeting urgently between the AU and the EU to find a lasting solution to the problem.¹⁰⁴

⁹⁷ Decision on the single legal instrument on the merger of the African Court on Human and Peoples' Rights and the African Court of Justice, Doc.Assembly/AU/13(XI), Assembly/AU.Dec.196(XI), taken by the AU Assembly at its 11th Ordinary Session held from 30 June – 1 July 2008 at Sharm El-Sheik, Egypt, para 2.

⁹⁸ These two chambers were established by Article 16 of the Protocol on the Statute of the African Court of Justice and Human Rights.

⁹⁹ See AU Decision on the Report of the Commission on the abuse of the principle of universal jurisdiction, Doc.Assembly/AU/14(XII), Assembly/AU/Dec.199(XI), taken by the AU Assembly at its 11th Ordinary Session held from 30 June – 1 July 2008 at Sharm El-Sheik, Egypt.

¹⁰⁰ *Ibid*, para 5(i).

¹⁰¹ *Ibid*, para 5(ii).

¹⁰² *Ibid*, para 5(iv).

¹⁰³ *Ibid*, para 8.

¹⁰⁴ *Ibid*, para 7.

In its following sitting in February 2009, the AU began the process to establish an African forum with criminal jurisdiction. Concerned with the continued indictments of Africans by the domestic courts of non-African states, the AU requested the African Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to examine the implications of the Merged Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes. The Commission was tasked to report to the Assembly the following year.

5.2.3 The African Union – European Union deliberations

As part of the AU's efforts to strengthen its institutions to align themselves effectively with emerging trends in international criminal law, an advisory Technical *Ad Hoc* Expert Group was constituted by the AU and the European Union (EU). The terms of reference for the Expert Group were concluded in January 2009. These included the provision of a description of the legal notion of the principle of UJ. In doing so, the Expert Group was expected to set out the distinctions between the jurisdiction of international criminal tribunals and the exercise of UJ and related concepts by individual states on the basis of their national laws. Further, it was required to outline the respective understandings of the AU and the EU sides regarding the principle of universality and its application. The Expert Group was also mandated to make recommendations related to the practice of the universality principle.¹⁰⁵ The Expert Group's Report was adopted by the 12th Meeting of the AU-EU Ministerial Troika in April 2009.

The Report made recommendations, some of which were taken into account by the AU. For instance, Recommendation 2 encouraged the AU to prepare a draft model law on UJ, which African states could adapt to their own national needs. The AU followed through on this recommendation, and adopted its Draft Model Law on UJ. The Report also recommended the conferring of criminal jurisdiction upon the African Court on Human and Peoples' Rights, which culminated in the Amendment Protocol that was adopted by the AU in 2014.¹⁰⁶

The Expert Group also recommended that states should avoid exercising UJ in a manner that impairs friendly international relations,¹⁰⁷ and that national courts of non-African states wishing to exercise UJ must take into account the immunities of the officials being indicted.¹⁰⁸ Further, it was

¹⁰⁵ See 'The AU-EU Expert Report on the Principle of Universal Jurisdiction' 8672/1/09REV1 (16 April 2009), 5.

¹⁰⁶ See Recommendation 3 of the Expert Report.

¹⁰⁷ See Recommendation 6 of the Expert Report.

¹⁰⁸ See Recommendations 7-8 of the Expert Report.

recommended that priority must be accorded to the territorial state, which is better placed to prosecute offenders since the crimes in question, while offending against the international community as a whole, the crimes primarily injure the community where they have been perpetrated,¹⁰⁹ the so-called *forum delicti*. In other words, it is the territorial state that suffers directly from the commission of a crime, even if that crime, much like the core crimes, is thought to injure humankind as a whole.

5.2.4 The arrest of Rwanda Chief of Protocol in Germany following a French arrest warrant

In its 12th Ordinary Session, held in Addis Ababa from 1 -3 February 2009,¹¹⁰ the AU expressed regret that in spite of its previous summit decisions calling for a moratorium, an arrest warrant had been issued in France against Mrs Rose Kabuye, Chief of Protocol to the President of Rwanda; and that this had created tension between the AU and the EU. Whilst reiterating its commitment to fight impunity in conformity with Article 4(h) of the Constitutive Act of the AU, it expressed regret at the continued indictment of African state leaders and senior state officials by the domestic courts of non-African states.¹¹¹ The AU noted that whilst it had requested a moratorium on such indictments pending the AU-EU deliberations, Germany had gone ahead to execute an arrest warrant issued by France against Mrs Rose Kabuye, a senior state official in the Rwandan presidency.¹¹² This, the AU continued, created tension between the AU and the EU.¹¹³ The AU viewed such actions as the misuse of UJ, the exercise of power by strong states over weak states.¹¹⁴ Its decision, condemning this, was therefore the only appropriate collective response to counter such abuse of power.

The AU proceeded to request the UN member states in general, and the EU member states in particular, to suspend the execution of warrants issued by individual EU states until all the legal and political issues had been dealt with between the AU, the EU and the UN.¹¹⁵ The AU also repeated the call for an appellate body in cases of abuse of UJ in its July 2010 Ordinary Session. In

¹⁰⁹ See Recommendation 9 of the Expert Report. The Expert Group also felt that the bulk of the evidence is likely to be found within the territorial state, hence the need to accord it priority in relation to the prosecution of offenders.

¹¹⁰ Decision on the implementation of the Assembly Decision on the abuse of the principle of universal jurisdiction, Doc.Assembly/AU.13(XII), Assembly/AU/Dec.213(XII), adopted at the 12th Ordinary Session of the AU held between 1 – 3 February 2009 in Addis Ababa, Ethiopia.

¹¹¹ *Ibid*, paras 3 and 4.

¹¹² Mrs Kabuye was arrested in Germany on 9 November 2008, pursuant to an arrest warrant issued by a French Magistrates Court.

¹¹³ Decision on the implementation of the Assembly Decision on the abuse of the principle of universal jurisdiction, Doc.Assembly/AU.13(XII), Assembly/AU/Dec.213(XII), adopted at the 12th Ordinary Session of the AU held between 1 – 3 February 2009 in Addis Ababa, Ethiopia, para 4.

¹¹⁴ *Ibid*, para 5.

¹¹⁵ *Ibid*, para 6.

the same decision, the AU repeated its call to assess the viability of conferring criminal jurisdiction upon the Merged Court.¹¹⁶ The AU was finally embracing the idea of an African solution for dealing with the perceived abuse of UJ; and this resonates well with the AU's declared fight against impunity for the core crimes.

In its 13th Ordinary Summit, the AU reiterated its calls for European states to respect international law, in particular the immunity enjoyed by state officials when applying the principle of UJ.¹¹⁷ In the same decision, the AU repeated its call for an international regulatory body with competence to review and/or handle complaints arising out of the abuse of UJ by individual states.¹¹⁸ The AU reiterated this call in its February 2010 Ordinary Session,¹¹⁹ as well as in its July 2010 Ordinary Session.¹²⁰

5.2.5 The indictment of Uhuru Kenyatta and William Ruto by the International Criminal Court

Between 2010 and 2013, the AU was grappling with two major international criminal justice controversies. The one involved the refusal of the UNSC to defer the case against Sudanese President Omar Al Bashir. The second one began with the exercise of the *proprio motu* powers of the ICC Prosecutor to indict Kenyan President Uhuru Kenyatta and his deputy William Ruto. The two were indicted by the Office of the Prosecutor, for their alleged involvement in the 2007 post-elections violence.¹²¹

At its Summit in May 2013, the AU Assembly urgently requested the ICC to refer the cases of Kenyatta and Ruto back to Kenyan courts. This request was not heeded, as in September 2013, the trial of Ruto started in The Hague.¹²² When the Ruto trial began, the AU repeated previous requests that Kenyatta and Ruto be allowed to choose which sessions they would attend, in order

¹¹⁶ *Ibid*, para 9.

¹¹⁷ See AU Decision on the abuse of the principle of universal jurisdiction, Doc.Assembly/AU/11(XIII), Assembly/AU/Dec.243(XIII)Rev.1 adopted by the 13th Ordinary Session of the Assembly of the AU held from 1-3 July 2009 in Sirte, Libya, para 6.

¹¹⁸ *Ibid*, para 5.

¹¹⁹ See AU Decision on the abuse of the principle of universal jurisdiction, Doc.EX.CL/540(XVI), Assembly/AU/Dec.271(XIV) adopted by the 14th Ordinary Session of the AU Assembly on 2 February 2010 in Addis Ababa, Ethiopia, paras 7 and 9.

¹²⁰ See AU Decision on the abuse of universal jurisdiction, Doc.EX.CL/606(XVII), Assembly/AU/Dec.292(XV) adopted by the 15th Ordinary Session of the Assembly of the AU on 27 July 2010 in Kampala, Uganda.

¹²¹ Holvoet M and Mema M 'The ICC and its deteriorating relationship with Africa in light of the Kenya cases: What should the European Union position be?' Institute for European Studies, Issue 2013/9 November 2013, 2.

¹²² The Ruto trial began on 10 September 2013 in the presence of the accused. See International Criminal Court 'Trial in the Ruto and Sang case: Relevant information and materials' available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/pages/ruto-sang.aspx (accessed 10 September 2014).

to allow them flexibility to continue with their constitutional duties back in Kenya.¹²³ The defence team of both Kenyatta and Ruto also lodged a request along the same lines.

Ruto presented a request to be granted permission not to be continuously present in court during his trial, in order to enable him to perform his functions of state as Deputy President of Kenya, while still remaining personally subject to the jurisdiction of the ICC for the purposes of inquiry into his individual criminal responsibility.¹²⁴ In two separate decisions, issued on 18 June¹²⁵ and 18 October 2013,¹²⁶ the Trial Chamber conditionally granted Ruto and Kenyatta's requests to be excused from being continuously physically present throughout the trial. The Trial Chamber's decision was motivated by the court's desire to accommodate reasonably the demanding functions of the offices of President and Deputy President. In the 18 June 2013 judgment in the Ruto trial, the Trial Chamber granted Ruto's request, on certain conditions. The first condition was that Ruto would have to first file a waiver with the Registry, before he could be allowed to be absent during proceedings. The second condition was that the absence must always be seen to be directed towards performance of Ruto's duties of state. Regarding the third condition, the Chamber listed eight different instances, during which Ruto would have to be present.¹²⁷ The Trial Chamber, in the Kenyatta case, granted the request with similar conditions to the ones in the Ruto trial.

The Trial Chamber's decision in the Ruto case was reversed by the Appeals Chamber in a unanimous decision delivered on 25 October 2013.¹²⁸ The Appeals Chamber held that the granting of an excusal not to be present during trial is a discretion enjoyed by the Trial Chamber. It also found that the Trial Chamber had interpreted the scope of its discretion too broadly and thereby exceeded the limits of its discretionary power; and as such had provided Ruto with what amounts

¹²³ *Ibid.*

¹²⁴ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11 Decision on Mr Ruto's request for excusal from continuous presence at trial, ICC-01/09-01/11-777, para 1.

¹²⁵ *Ibid.*

¹²⁶ *The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-02/11, Decision of the Trial Chamber on defence request for conditional excusal from continuous presence at trial, ICC-01/09-02/11-830.

¹²⁷ These instances are: (i) the entirety of the opening statements of all parties and participants; (ii) the entirety of the closing statements of all parties and participants; (iii) when victims present their views and concerns in person; (iv) for the entirety of the delivery of the judgement in the case; (v) for the entirety of the sentencing hearings, if applicable; (vi) for the entirety of the sentencing, if applicable; (vii) for the entirety of the victim impact hearings if applicable; (viii) for the entirety of the victim impact hearings, if applicable; and (ix) any other attendance directed by the Chamber.

¹²⁸ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11 Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for excusal from continuous presence at trial' available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/court%20records/chambers/appeals%20chamber/Pages/1066.aspx (accessed 10 September 2014).

to a blanket excusal before the trial had even commenced, and this had effectively made his absence the general rule and his presence an exception. It found further that the Trial Chamber had failed to explore whether there were any alternative options before granting Ruto's request.¹²⁹ It held that the decision as to whether the accused may be excused from attending part of his trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would be attend during the period for which excusal has been requested. It therefore reversed the decision of the Trial Chamber.¹³⁰ On 15 January 2014 the Trial Chamber V(a) made an oral ruling, excusing Ruto from continuous presence at trial subject to a set of conditions similar to the ones set out in its June 2013 decision.¹³¹ On 18 February 2014, the Chamber issued the 'Reasons for the Decision on Excusal from Presence at Trial under Rule 134quarter', which the Prosecutor appealed against unsuccessfully.¹³²

The reversal of the Trial Chamber's decision granting Ruto conditional absence from the trial prompted Kenya to call for the October 2013 Extra-Ordinary Summit.¹³³ The support for such a summit was overwhelming, as it attracted a two thirds support from the AU membership.¹³⁴

The Kenyatta trial was scheduled to begin on 7 October 2014.¹³⁵ However, a month before that date, on 5 September 2014, the Office of the ICC Prosecutor filed a notice in the Trial Chamber stating that it will not be in a position to proceed with the trial against Kenyatta. The Prosecutor cited the unresponsiveness of the Government of Kenya to its requests to be furnished with

¹²⁹ *Ibid*, 63.

¹³⁰ *Ibid*, para 65.

¹³¹ These instances are: (i) when victims present their views and concerns in person; (ii) for the entirety of the delivery of the judgement in the case; (iii) for the entirety of the sentencing hearing, if applicable; (iv) for the entirety of the sentencing, if applicable; (v) for the entirety of the victim impact hearings, if applicable; (vi) for the entirety of the reparation hearings, if applicable; (vii) for the first five days of hearing starting after a judicial recess as set out in regulation 19*bis* of the regulations of the Court; (viii) and for any other attendance directed by the Chamber either or other request of a party or participant as decided by the Chamber.

¹³² *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11 Decision on the Prosecutor's application for leave to appeal the decision on excusal from presence at trial under Rule 134quarter, ICC-01/09-01/11-1246, paras 1 – 4.

¹³³ Institute for Security Studies 'The AU's ICC summit: A case of elite solidarity for self-preservation?' 15 October 2013 available at <http://www.issafrica.org/iss-today/the-aus-icc-summit-a-case-of-elite-solidarity-for-self-preservation> (accessed 1 September 2014).

¹³⁴ *Ibid*.

¹³⁵ International Criminal Court *The Prosecutor v Uhuru Muigai Kenyatta* available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx (accessed 7 September 2014).

Kenyatta's financial and telephonic records that would enable it to prosecute him. If successful, this latest application would mark the fifth time the start of the trial has been postponed.¹³⁶

5.2.6 The October 2013 Extra Ordinary Summit – the failed bid to withdraw from the Rome Statute

The AU held its Extra-Ordinary Summit of the AU Heads of States and Governments on 11 – 12 October 2013, to discuss the relationship between the AU and the ICC. Ahead of this Summit, international media were awash with speculation that the AU member states would vote for a mass withdrawal from the Rome Statute as a result the ICC's handling of the case concerning Kenyatta and Ruto. Speaking at the 2013 Extra-Ordinary Summit, Kenyan President Uhuru Kenyatta labelled the ICC a toy of Western imperial interests and accused it of having strayed from what its creators intended it to be.¹³⁷ He lamented that the ICC had been reduced into a 'painfully farcical pantomime, a travesty that adds insult to the injury of victims'.¹³⁸ He asserted that the ICC was in contempt of the AU, whose objectives have continuously been subordinated to unsubstantiated claims by Western supported civil society activists.

5.3 The value of Africa's contribution to the development of international criminal justice

As earlier stated, the relationship between the AU and the ICC had already been strained by the ICC's focus on Africa. But things came to a head following the Prosecutor's application for an arrest warrant against Sudanese President Omar Al Bashir, prompting the PSC to adopt a decision in which it regretted the wrong timing of the Prosecutor's application.¹³⁹ This further fuelled the already growing perception that the African complaint that the ICC is biased towards Africa. This complaint is often dismissed on the basis that the matters currently before this court were actually referred by the states themselves, whilst only two cases came through UNSC referral.

¹³⁶ Reisman T International Criminal Justice Monitor 'Prosecution wants Kenyatta trial date vacated' 5 September 2014 available at <http://www.ijmonitor.org/2014/09/prosecution-wants-kenyatta-trial-date-vacated/> (accessed 8 September 2014).

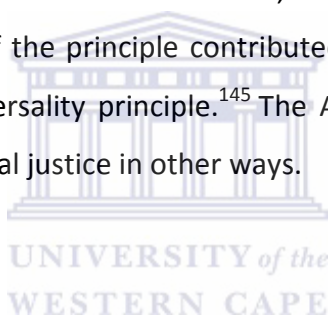
¹³⁷ DeGroot D 'Kenyatta: ICC a toy of Western imperial powers' EIR 18 October 2013, 45 available at http://www.larouchepub.com/eiw/public/2013/eirv40n41-20131018/44-45_4041.pdf (accessed 10 November 2014).

¹³⁸ *Ibid.*

¹³⁹ PSC Communiqué arising out of its 142nd Meeting held on 21 July 2008 in Addis Ababa, Ethiopia, PSC/MIN/Comm (CXLII) available at http://www.iccnw.org/documents/AU_142-communication-eng.pdf (accessed 23 August 2014).

These are the cases from Uganda, the Central African Republic, the Democratic Republic of the Congo and Mali which were the result of self-referrals by the states concerned.¹⁴⁰ However, this cannot be interpreted to mean a wholesale endorsement of the ICC by African states. This is because states often refer matters to the ICC for political reasons, as a means of dealing with political opposition. For instance, in the Uganda referral, the Ugandan Government did not fully comprehend that it could not simply refer the situations involving the opposition only, but the ICC reserved the right to investigate the situation as a whole, including the role of government officials. Du Plessis and Maluwa also echo the above sentiment, and assert that sometimes such referrals are nothing more than convenient ways of dealing with political problems.¹⁴¹

It is settled that UJ is an essentially contested topic.¹⁴² Hence, at the start of the African complaints about the indictment of senior state officials, there was a cloud of confusion surrounding the exact nature of the principle of UJ.¹⁴³ However, this confusion was not necessarily unique to Africa.¹⁴⁴ However, as will be discussed below, the debates that ensued as a result of Africa's misgivings about the use of the principle contributed to clearing the confusion amongst states on the meaning of the universality principle.¹⁴⁵ The African response also influenced the development of international criminal justice in other ways.



¹⁴⁰ Dunn TM 'The ICC and Africa: Complementarity, transitional justice and the rule of law' 12 July 2014 available at <http://www.e-ir.info/2014/07/12/the-icc-and-africa-complementarity-transitional-justice-and-the-rule-of-law/> (accessed 28 October 2014).

¹⁴¹ Du Plessis M, Maluwa T and O'Reilly A 'Africa and the International Criminal Court' July 2013 Chatham House Paper Series, 3 available at www.chathamhouse.org (accessed 24 July 2014).

¹⁴² Van der Wilt 'Universal jurisdiction under attack – an assessment of African misgivings towards international criminal justice as administered by Western states' (2011) 9 *Journal of International Criminal Justice* 1043 – 1066, 1062.

¹⁴³ This confusion can largely be explained by the lack of an internationally codified definition of UJ. See Yee S 'Universal jurisdiction: Concept, logic and reality' (2011) 10 *Chinese Journal of International Law* 503 - 530, 504.

¹⁴⁴ See O'Keefe R 'Universal jurisdiction – clarifying the basic concept' (2004) 2 *Journal of International Criminal Justice* 735 - 760, 735. Writing as early as 2004, four years before the AU began its political posturing on the principle of universality, O'Keefe posits that even judicial understanding of the concept of UJ is debatable. He cites the divergent opinions of judges in the *Arrest Warrant* case as evidence of this.

¹⁴⁵ The AU – EU Ministerial Troika also agreed that there was a misunderstanding of the principle of universality, and that there was a need to set up a technical *ad hoc* expert group clarify this. See 'The AU-EU Expert Report on the Principle of Universal Jurisdiction' 8672/1/09REV1 (16 April 2009), 4. The delegates at the 64th Session of the 6th Committee of the UNGA also expressed differing views on the scope of UJ, as well as uncertainty on over the crimes falling within UJ. See 'The Scope and application of the principle of universal jurisdiction' available at <http://www.un.org/en/ga/sixth/64/UnivJur.shtml> (accessed 10 September 2014).

5.3.1 Attempts to amend the deferral powers of the United Nations Security Council

The complaint by African states concerning the referral of cases to the ICC by the UNSC has centred around the disempowerment of the UNGA to intervene in such cases.¹⁴⁶ Hence, after its 2009 Decision taken at Sirte, the AU decided to convene a preparatory meeting of African states parties at expert and ministerial levels to prepare fully for the Review Conference of states parties held in Kampala in May 2010. The preparatory meeting was convened to address the following key issues:

- (i) Article 13 of the Rome Statute granting power to the UNSC to refer cases to the ICC;
- (ii) Article 16 of the Rome Statute granting power to the UNSC to defer cases for 1 year;
- (iii) Procedures of the ICC;
- (iv) Clarification on the immunities of officials whose states are not party to the Statute;
- (v) Comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute; and
- (vi) The possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution; particularly against senior state officials.

As mandated by the AU in its July 2009 Decision in Sirte,¹⁴⁷ the Ministerial Preparatory Meeting on the Rome Statute of the ICC held its meeting in Addis Ababa, Ethiopia, on 6 November 2009. It adopted specific recommendations which would be tabled at the June 2010 Kampala Session of the Review Conference of the ASPs to the Rome Statute.¹⁴⁸

The AU welcomed a novel recommendation which had been made by South Africa at the November 2009 ASP Meeting which sought to remedy the UNSC's inaction in cases of requests for deferral.¹⁴⁹ The South African proposal consisted of an amendment to Article 16 of the Rome Statute in order to allow the UNGA to defer cases for one year in situations where the UNSC would

¹⁴⁶ Akande D 'Addressing the African Union's proposal to allow the UNGA to defer ICC prosecutions' 30 October 2010 available at <http://www.ejiltalk.org/addressing-the-african-unions-proposal-to-allow-the-un-general-assembly-to-defer-icc-prosecutions/> (accessed 10 September 2014).

¹⁴⁷ See AU Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc.Assembly/AU/13(XIII), Assembly/AU/Dec.245(XIII) Rev1, para 8.

¹⁴⁸ See Introduction to the Report of the Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) EX.CL/568(XVI) adopted by the Executive Council of the AU at its Ordinary Session held between 25 – 26 January 2010 in Addis Ababa, Ethiopia.

¹⁴⁹ The South African proposal was submitted to the UN Secretary-General by the Permanent Mission of South Africa to the UN by a *note verbal* dated 18 November 2009.

have failed to take a decision within a specified time frame.¹⁵⁰ The South African recommendation was also endorsed by the Ministerial Preparatory Meeting.¹⁵¹

The South African recommendation for amending Article 16 was as follows:

- (i) No investigation may be commenced or proceeded with under the Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the UN, has requested the Court to that effect; that request may be renewed by the Council under the same conditions;
- (ii) A state with jurisdiction over a situation before the Court may request the UNSC to defer a matter before the Court as provided for in (i) above;
- (iii) Where the UNSC fails to decide on the request by the state concerned within 6 months of receipt of the request, the requesting party may request the UNGA to assume the UNSC responsibility under para 1 consistent with Resolution 377(V) of the UNGA.¹⁵² Resolution 377(V) is titled 'Uniting for peace' and makes provision for the UNGA to take remedial action in the event that the UNSC, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of peace or act of aggression. It allows the UNGA to consider the matter immediately with a view to making appropriate recommendations to members for collective measures. It allows the UNGA to convene an emergency special session to deal with such a matter.¹⁵³

When tabled before the ASP in November 2009, only two African states which are parties to the Rome Statute, namely Namibia and Senegal supported the proposal, whilst 13 non-African states parties were against it. Those opposed to the proposal raised concerns that there was not enough time to assess the merit of the proposal. There was also concern that the proposal broadened the scope for political interference with the activity of the ICC. Some raised doubts regarding whether the provision would be compatible with the Charter of the UN; and also that such a proposal posed complex issues such as the relationship between the organs of the UN systems. The ASP

¹⁵⁰ See AU Decision on the Report of the 2nd Meeting of States Parties to the Rome Statute on the International Criminal Court, Doc.Assembly/8(XIV), Assembly/AU/Dec.270(XIV) adopted by the 14th Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010.

¹⁵¹ *Ibid*, Recommendation 3.

¹⁵² UNGA Resolution 377(V) of 3 November 1950.

¹⁵³ See UNGA Resolution 377(V), para A1.

decided that the proposal would be discussed after the Kampala Review Conference of the Rome Statute. It was therefore deferred to the 9th Session of the ASPs in December 2010.¹⁵⁴

With the attempt to amend Article 16 having failed, the AU in its July 2010 Ordinary Session held in Kampala, Uganda, expressed its deep regret on the failure of the UNSC to acquiesce in its request to defer proceedings against President Al Bashir in terms of Article 16 of the Rome Statute.¹⁵⁵ It also repeated its decision that AU members states shall not cooperate with the ICC in the arrest and surrender of Al Bashir.¹⁵⁶ It also urged all member states to support the proposed amendment of Article 16 to empower the UNGA to act where the UNSC has failed to take a decision within a specified timeframe. The AU also rejected the request by the ICC to open a liaison office to the AU in Ethiopia.¹⁵⁷

5.3.2 Amendment of the rules of the International Criminal Court regarding presence at trial

Even though Kenyatta and Ruto failed to have their cases deferred, the response of the continent managed to influence the adoption of amendments to the ICC's rules on the presence of the accused at trial.¹⁵⁸ In November 2013 the ASP adopted changes to the Court's rules to allow those mandated to fulfil 'extraordinary public duties at the highest national level' to request to be excused from presence at trial and to be represented by their legal counsel.¹⁵⁹ The amendments also introduced Rule 134*bis* which permits an accused on request to appear before the court by way of video technology.

The ASP welcomed two forms of excusal from the court, through Rules 134*ter* and 134*quarter*. Rule 134*ter* regulates excusal from presence at trial for ordinary accused persons. It permits such accused persons to submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his trial. In such cases Rule 134*ter* (2) provides

¹⁵⁴ Akande D 'Addressing the African Union's proposal to allow the UNGA to defer ICC prosecutions' 30 October 2010 available at <http://www.ejiltalk.org/addressing-the-african-unions-proposal-to-allow-the-un-general-assembly-to-defer-icc-prosecutions/> (accessed 10 September 2014).

¹⁵⁵ See AU Decision on the progress report of the Commission on the implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc.Assembly/AU/10(XV), Assembly/AU/Dec.296(XV) adopted by the 15th Ordinary Session of the Assembly of the AU on 27 July 2010 in Kampala, Uganda, para 4.

¹⁵⁶ *Ibid*, para 5.

¹⁵⁷ *Ibid*, paras 7 and 8.

¹⁵⁸ Coalition for the International Criminal Court 'Cases and Situations – Kenya' available at <http://www.iccnw.org/?mod=kenya> (accessed 1 September 2014).

¹⁵⁹ See Resolution ICC-ASP/12/Res.7 on the Amendments to the Rules of Procedure and Evidence adopted at the 12th plenary meeting on 27 November 2013.

that the Trial Chamber can grant the request only if it is satisfied that the following conditions are met:

- (a) exceptional circumstances exist to justify such an absence;
- (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;
- (c) the accused has explicitly waived his right to be present at the trial; and
- (d) the rights of the accused will be fully ensured in his absence.

Rule 134*quarter* regulates excusal from presence at trial due to extraordinary public duties. It can be relied upon by an accused who is mandated to fulfil extraordinary public duties at the highest national level. Such an accused has to submit a written request to the Trial Chamber to be excused and represented by counsel only. The request must specify that the accused explicitly waives the right to be present at trial.¹⁶⁰

The Trial Chamber is enjoined to consider the request expeditiously. It can grant such a request only if alternative measures are inadequate, and if granting it would be in the interests of justice. It has a duty to ensure that the rights of the accused are fully ensured. Finally, in taking a decision whether or not to grant the request, the Trial Chamber must have due regard to the subject matter of the specific hearings in question. The decision is reviewable at any time.¹⁶¹

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The Trial Chamber's 15 January 2014 oral ruling granting Ruto's request for excusal was taken in line with these new rules.

5.3.3 Pronouncements on the immunities of heads of states and ministers of foreign affairs

The sustained call by the AU for Western states to respect the immunities of heads of states and senior state officials bore fruit. The judgment of the ICJ in the *Arrest Warrant* case, by 13 votes to three, solidified the position that ministers of foreign affairs enjoy immunity from the domestic courts of foreign states.¹⁶² It found that the issue of an arrest warrant against an incumbent Minister of Foreign Affairs of the DRC violated the obligation that Belgium had towards the DRC. This is the obligation to respect the inviolability and immunity of the incumbent minister of foreign affairs from criminal jurisdiction under international law.

¹⁶⁰ Rule 134*quarter* (1).

¹⁶¹ Rule 134*quarter* (2).

¹⁶² See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002.

However, that in the same judgment, the separate opinion of Judges Higgins, Kooijmans and Buergenthal dissented from the majority opinion regarding the immunities of ministers of foreign affairs. For this position, they relied on para 3.2 of the International Law Commission's Draft Article on Jurisdictional Immunities of states and their Property of 1991, which contained a saving clause for the privileges and immunities of heads of states, but failed to include a similar provision for ministers of foreign affairs.¹⁶³

The above notwithstanding, African states have been insistent on the immunity of senior state officials before the courts of foreign states.

5.3.4 The primacy of territoriality as a jurisdictional link

Under the universality principle, the *forum deprehensionis*, that is the state having custody of the perpetrator, is permitted to prosecute him on behalf of all humankind. The interactions of the AU and the EU and the litigation before the ICJ brought some clarity on the need for states to consider the strongest jurisdictional link when making decisions whether to prosecute or not under the universality principle. The territorial state, given its close connection with the offence, has been said to be the best suited state to prosecute a matter where there are competing bases of jurisdiction.¹⁶⁴ Art. 4(2) of the Draft AU Model Law also calls for courts to 'accord priority to the court of the state in whose territory the crime is alleged to have been committed, provided that the state is willing and able to prosecute'.

This is an endorsement of the view that universal jurisdiction is subsidiary to the principle of territoriality.¹⁶⁵ The universal authority draws its strength from the theory of the *forum deprehensionis*, that is, the court of the country in which the accused is actually held in custody.¹⁶⁶ The *forum deprehensionis* is contrasted with the *forum delicti*,¹⁶⁷ that is, the territorial state where the offence took place.¹⁶⁸ Recommendation 9 of the AU-EU Expert Group on UJ gives credence to

¹⁶³ See Separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002, para 81.

¹⁶⁴ See Recommendation 9 in the AU-EU Expert Report on the Principle of Universal Jurisdiction 8672/1/09REV1 (16 April 2009), 42.

¹⁶⁵ Akande D *European Journal of International Law: Talk 'The African Union, the ICC and universal jurisdiction: some recent developments* 29 August 2012 available at <http://www.ejiltalk.org/the-african-union-the-icc-and-universal-jurisdiction-some-recent-developments/> (accessed 10 September 2014).

¹⁶⁶ The *forum deprehensionis* is also known as the vagabond forum. See Bodgan M *Private International Law as Component of the Law of the Forum* (2012) 200.

¹⁶⁷ Gaeta P and de Vabres D 'Introductory note – the system of universal jurisdiction' (2011) 9 *Journal of International Criminal Law* 905 - 930, 906.

¹⁶⁸ The universality principle traces its origins to a text in Justinian's Code, C. III, 15, *Ubi de criminibus agi oportet*, 1. The code gave the power to prosecute criminally to both the court of the place where the offence was committed and

the position that the *forum delicti* is better placed to deal with allegations of the commission of core crimes since evidence will be easily accessible within the state of commission. Accordingly, any trial which takes place in a location far removed from the crime scene is a highly cumbersome affair.¹⁶⁹

Secondly, the primacy of the territoriality principle gives weight to the argument that despite the rhetoric about UJ being suited to deal with crimes that aggrieve the international community,¹⁷⁰ the legal order of the *forum deprehensionis* is not directly affected by the crimes. It is the territorial state that is directly affected by the commission of the core crimes,¹⁷¹ as it also has a duty under emerging customary international law to bring to justice perpetrators of the core crimes, at least with respect to crimes committed on the state's territory.¹⁷² As such, it ought to have primacy of place in a case with conflicting jurisdictional links. Recommendation 9 therefore acknowledged that the commission of the core crimes violates not only the rights of victims but also the general demand for order and security in that community where the offence took place.

The ICJ also pronounced on the primacy of the territoriality link in cases of competing jurisdiction.¹⁷³ In dismissing the exercise of UJ in absentia, Judges Higgins, Kooijmans and Buergenthal favoured the state of nationality, which in this case was also the territorial State. Judge President Gillaume in addressing the issue of whether Belgium had jurisdiction or not, which he felt the court did not address, noted that the attempt by Belgium to rely on UJ was incompatible with international law.¹⁷⁴ He further noted that states primarily exercise their

the court of the place where the culprit was arrested (*judex deprehensionis*). The concept was interpreted through the years, but it was finally Grotius' work in the 17th century that gave the theory of UJ its philosophical value and scope. See Gaeta P and de Vabres D 'Introductory note – the system of universal jurisdiction' (2011) 9 *Journal of International Criminal Law* 905 - 930, 907.

¹⁶⁹ Van der Wilt 'Universal jurisdiction under attack – an assessment of African misgivings towards international criminal justice as administered by Western states' (2011) 9 *Journal of International Criminal Justice* 1043 – 1066, 1062.

¹⁷⁰ Judge Gillaume in the Arrest Warrant case made reference to the 'ill-defined international community'. See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002.

¹⁷¹ Van der Wilt makes the statement that customary international law seems to corroborate the view that the territorial state, failing which the state of the perpetrator bears the primary responsibility for prosecuting international crimes. See Van der Wilt 'Universal jurisdiction under attack – an assessment of African misgivings towards international criminal justice as administered by Western states' (2011) 9 *Journal of International Criminal Justice* 1043 – 1066, 1048.

¹⁷² Robinson D 'Serving the interests of justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14:3 *European Journal of International Law* 481 – 505, 491.

¹⁷³ Inazumi M *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law* (2005) 218.

¹⁷⁴ See Separate opinion of Judge President Gillaume in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002, para 17.

criminal jurisdiction on their own territory, and will normally extend such jurisdiction to offences committed abroad only if the offender or the victim is a national.

5.3.5 Contribution to universal justice

At the beginning of the series of AU decisions condemning the abuse of UJ by Western states, especially against African state officials, the general understanding about the principle on the continent and beyond was scant. The debates between the AU, the EU and the UN helped to crystallise the nature and scope of the principle. The litigation that ensued between the DRC and Belgium also contributed by establishing a judicial position in the matter. Judge President Gillaume in the *Arrest Warrant* case took issue with Belgium's reliance on UJ as the sole jurisdictional link allowing it to prosecute Mr Yerodia.¹⁷⁵ He opined that international law knows only one true case of UJ, piracy, and that UJ in absentia as applied by Belgium was unknown in international law.¹⁷⁶

5.3.6 Other contributions

One of the major contributions of the debate on UJ was the clarification of the concept and the narrowing down of what the acceptable form of UJ is. In this manner, states that had consistently aligned themselves with the broad notion of UJ felt the need to change their laws to conform to acceptable standards. The political and diplomatic pressure that resulted led to a number of legal reforms in UJ laws of Western states. For instance, Belgium was heavily criticised and pressured to amend its laws, by both African states and Western states. The US also put pressure on Belgium, whose UJ laws were criticised for being too broad, leading to the enactment of an amendment in August 2003.¹⁷⁷ With the amendments, Belgium still retained UJ, but in a restricted form.¹⁷⁸ In 2010, France also moved from its 1995 law allowing absolute UJ to a restricted form of UJ.¹⁷⁹ France enacted Law No.2010-30, adapting its criminal law to the Rome Statute and it gave French courts jurisdiction to try cases of international crimes against a person who has committed crimes abroad within the Rome Statute, provided the person resides in France if the conduct is punishable under the laws of the state where the crime was committed or where such state is a party to the Rome Statute.

¹⁷⁵ *Ibid*, para 12.

¹⁷⁶ *Ibid*.

¹⁷⁷ Gahima G *Transnational Justice in Rwanda: Accountability for Atrocity* (2013) 196.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid*.

5.4 Concluding remarks

The foregoing indicates that the actions of both the ICC and the domestic courts of non-African states triggered the African response as discussed above. The legal developments that were highlighted took place within the milieu of a highly charged political and diplomatic setting. Hence the judicial interventions by both courts cannot be viewed in isolation, without taking into consideration the prevailing state sentiments on sovereignty, inviolability and immunity.

The ICC is a creature of statute, albeit a multilateral statute and as such its jurisdiction cannot be extended to non-states parties. This is because the jurisdiction of an international criminal tribunal is not drawn from customary international law. If non-states parties are involved, they may nevertheless clothe the ICC with jurisdiction by accepting its jurisdiction for the crime in question.¹⁸⁰ To hold otherwise would be in violation of Article 34 of the Vienna Convention on the Law of Treaties. Unless a state has voluntarily signed and ratified, or if not a member, has accepted the jurisdiction of the court under Article 12(3), the ICC Statute will play a limited role in the fight against impunity.

The UNSC referrals and the manner in which they have been used selectively are largely to blame for the ICC losing legitimacy amongst African states. This is because UNSC referrals act as an exception to the requirements of the territoriality and nationality links as pre-requisites to the exercise of jurisdiction by the court. Article 12(2) is clear that territoriality and nationality are only required in matters in which the Prosecutor is acting *proprio motu*¹⁸¹ and in situations which have been referred to the ICC by a state party in accordance with Article 14.¹⁸²

The usage of UJ by the domestic courts of foreign states also invited responses from the AU, which were aptly captured in the various press releases, statements, decisions and declarations at the AU level, as well as by AU member states in various UN platforms. These responses denounced what Africa called abuse of UJ by politically powerful states in the West against African states.

The responses of the African continent to both ICC indictments and UJ-based indictments by foreign states contributed, mostly positively, to the growth of international criminal justice in

¹⁸⁰ See Williams SA 'The Rome Statute on the International Criminal Court – Universal Jurisdiction or State Consent – To make or Break the Package Deal' International Law Studies, International Law Across the Spectrum of Conflict, Essays in Honour of Professor LC Green on the Occasion of His Eightieth Birthday, Vol. 75 XXI available at <https://www.usnwc.edu/getattachment/91d9e125-005d-4691-8ff0-4b7c90d86d4b/The-Rome-Statute-on-the-International-Criminal-Cou.aspx> (accessed 8 September 2014), 544.

¹⁸¹ See Article 13(c) of the Rome Statute.

¹⁸² See Article 13(a) of the Rome Statute.

general. It also contributed to the area of UJ by clearing up areas of misunderstanding regarding the nature and scope of the principle. The chapter has also clearly demonstrated that in instances where neither the territorial nor the nationality jurisdictional link exists, the ICC, despite being a creature of statute, finds itself exercising UJ over states which are not party to the Rome Statute.

It is a combination of these two factors that has fuelled the sustained campaign by African states to address what it saw as abuse of process by the ICC Prosecutor, the UNSC in its referral procedure and Western states in using their UJ laws to indict African state leaders and senior state officials.



CHAPTER SIX – A REVIEW OF THE PROTOCOL ON AMENDMENTS TO THE PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS

6. Background

Until 2014, Africa did not have a permanent court or tribunal with criminal jurisdiction to deal with perpetrators of the core crimes of genocide, war crimes and crimes against humanity. The efforts to create such a forum can be traced to the recommendations of the Group of African Experts who were commissioned by the AU in 2007-08 to give advice on the merger of the African Court on Human and Peoples' Rights with the African Court of Justice.¹ The aim was to come up with a new structure with extended jurisdiction to try criminal cases.² Throughout this chapter, I shall refer to the merged court with criminal jurisdiction as the African Criminal Court (ACC). As highlighted above, this development was partly a result of the AU's displeasure at the use of UJ by the foreign courts of non-African states.³ A further catalyst was the ICC's selective prosecution of Africans,⁴ despite the existence of many other cases in other parts of the world that the ICC has refused to investigate.⁵

This development has also been attributed to other factors, such as the need for the AU to honour its obligations under some of its other treaties in order to achieve efficiency in human rights protection.⁶ Some commentators identify the following factors to explain the AU's motivation to include a criminal law chamber within the newly merged court:⁷ (i) the challenges with Senegal's

¹ Deya D 'Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes' (March 2012) available at <http://www.osisa.org/openspace/regional/african-court-worth-wait> (accessed 28 July 2014).

² African Court 'Quick Facts' available at www.african-court.org/en (accessed 1 August 2014).

³ Langer M 'The diplomacy of universal jurisdiction: The political branches and the transnational prosecution of international crimes' (2011) 105 *American Journal of International Law* 1 – 49, 33.

⁴ Murithi T 'The African Union and the International Criminal Court' Institute for Justice and Reconciliation, Policy Brief No. 8 (March 2013), 3.

⁵ For example, after the 2008 Israeli offensive in the Gaza Strip, the Goldstone Report found that both sides had violated international humanitarian law. It called upon the UNSC to ensure that the two entities conduct investigations, failing which the UNSC should refer the situation in the Gaza Strip to the ICC. The Committee's Report was endorsed by the UN Human Rights Council, which also called upon all role players, including the UNSC to ensure they are implemented. Despite the Palestinian authorities lodging an Article 12(3) declaration recognising the jurisdiction of the ICC, the Office of the Prosecutor refused to act. See in this regard Ronen Y 'ICC Jurisdiction over acts committed in the Gaza Strip – Article 12(3) of the ICC Statute and non-state entities' (2010) 6 *Journal of International Criminal Justice* 3 – 27, 6.

⁶ Odinkalu C 'Concerning the criminal jurisdiction of the African Court – a response to Stephen Lamony' 19 December 2012 available at <http://africanarguments.org/2012/12/19/concerning-the-criminal-jurisdiction-of-the-african-court-%E2%80%93-a-response-to-stephen-lamony-by-chidi-anselm-odinkalu/> (accessed 3 August 2014).

⁷ Deya D 'Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes' (March 2012) available at <http://www.osisa.org/openspace/regional/african-court-worth-wait> (accessed 28 July 2014).

prosecution of Hissène Habré,⁸ and (ii) the need to give effect to Article 25(5) of the African Charter on Democracy, Elections and Governance,⁹ which requires the AU to formulate a novel international crime of unconstitutional change of government.¹⁰ Indeed, the newly created ACC was granted power to try perpetrators of the crime of unconstitutional change of government after the adoption of the instrument granting criminal jurisdiction to the ACC.

6.1 African Union processes leading to the adoption of the Amendment Protocol

Whilst the call for an African international criminal court intensified after the issue of the arrest warrant against Al Bashir by the ICC, the idea can be traced back to the 1960s. The idea of a court was first conceived in 1961 by a group of African jurists. It was envisaged that the African Charter would have both a commission and a court. A proposal to include a criminal chamber in the provisions of the African Charter on Human and Peoples' Rights failed for a number of reasons.¹¹ For instance, there was a feeling that doing so would be premature, as there were efforts at the UN level to create an international court to suppress crimes such as apartheid.¹² Although the idea was eventually abandoned when the OAU Charter was adopted in 1963, it would later resurface in the 1990s, driven largely by international human rights NGOs. Early drafts of the protocol aimed at establishing a court were tabled in 1993, impelled by the ineffectiveness of the African Commission.¹³

Apart from the problems arising from the actions of the ICC and the use of UJ by foreign courts, the need to create an African criminal court was further strengthened by the growing body of African instruments or treaties that continued to codify international crimes when the continent did not have a court to prosecute them.¹⁴

As a result, there were several milestones in the process leading up to the final adoption of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and

⁸ Kahombo B 'The project for the creation of a Pan-African criminal court' Working Paper (2013), 2 available at <http://the-rule-of-law-in-africa.com/wp-content/uploads/2013/07/Balingene1.pdf> (accessed 4 August 2013).

⁹ Du Plessis M, Maluwa T, and O'Reilly A 'Africa and the International Criminal Court' Chatham House July 2013, 9 available at www.chathamhouse.org (accessed 5 August 2013).

¹⁰ Adopted in Addis Ababa, Ethiopia on 30 January 2007 and entered into force on 15 February 2012.

¹¹ Abass A 'Prosecuting international crimes in Africa: Rationale, prospects and challenges' (2013) 24 *European Journal of International Law* 933 - 946, 937.

¹² *Ibid.*

¹³ Pityana B 'Reflections on the African Court on Human and Peoples' Rights', 1 available at www.unisa.ac.za/contents/about/principle/docs/Human&People.doc (accessed 11 August 2014).

¹⁴ Abass A 'Prosecuting international crimes in Africa: Rationale, prospects and challenges' (2013) 24 *European Journal of International Law* 933 - 946, 937.

Human Rights (the Amendment Protocol), which effectively set up the first permanent African Criminal Court in post-independence Africa, the ACC.¹⁵ This new court is different from the court that is currently operational, the African Court on Human and Peoples' Rights (African Court), which does not have criminal jurisdiction. The African Court was established through the Protocol to the African Charter on Human and Peoples' Rights in 1998.¹⁶ The African Court currently has its seat in Arusha, Tanzania. Its mandate is to complement the African Commission in protecting and promoting human rights.¹⁷ The African Court makes binding decisions.¹⁸ Its jurisdiction extends to all cases and disputes submitted to it regarding the interpretation and application of the Charter,¹⁹ the Court's Protocol and any other relevant human rights instruments ratified by the states concerned. It has both advisory and contentious jurisdiction,²⁰ but no criminal jurisdiction.²¹

When the AU succeeded the OAU, its Constitutive Act made provision for the establishment of a Court of Justice of the African Union.²² In July 2003, a protocol to establish this court was adopted in Maputo, Mozambique. The African Court of Justice was designed to be an inter-state court, to deal with disputes between members of the AU.²³

Although the protocol establishing the African Court of Justice eventually came into force on 11 February 2009, the court never became operational because the AU Assembly decided that it should be merged with the African Court on Human and Peoples' Rights to form the African Court of Justice and Human Rights (the Merged Court).²⁴ This was done through the Protocol on the Statute of the African Court of Justice and Human Rights (the Merger Protocol) which was adopted on 1 July 2008, but which has not yet come into force.²⁵ The Merger Protocol did not make

¹⁵ Du Plessis M 'Implications for the AU Decision to expand the African Court's jurisdiction' Institute for Security Studies, Paper 235, (June 2012), 4.

¹⁶ The Protocol was adopted by the AU's predecessor, the OAU at its 34th Ordinary Session in Ouagadougou, Burkina Faso and entered into force on 25 January 2004.

¹⁷ Article 2 of the Protocol establishing the African Court.

¹⁸ Article 30 of the Protocol establishing the African Court provides that, 'the [s]tate parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee execution'.

¹⁹ Article 3 of the Protocol establishing the African Court.

²⁰ Article 4 of the Protocol establishing the African Court.

²¹ To distinguish between this court and the one with criminal jurisdiction, I will refer to the existing court as the Merged Court, and the criminal court as the African Criminal Court (ACC).

²² Articles 5 and 18 of the AU Constitutive Act.

²³ Hansungule M 'African courts and the African Commission on Human and Peoples' Rights' 235 available at http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/8_Hansungule.pdf (accessed 5 August 2014).

²⁴ African Court 'Frequently Asked Questions' available at www.african-court.org/en (accessed 1 August 2014).

²⁵ The Merger Protocol was adopted by the AU Assembly at Sharm El-Sheikh, Egypt on 1 July 2008. As at 31 July 2014, the Merger Protocol had not reached the 15 ratifications required for it to come into force. It only had five ratifications, namely Benin, Burkina Faso, Congo, Libya, and Mali.

provision for criminal jurisdiction. The decision to merge the two courts was largely influenced by concerns that the AU could not support the growing number of AU institutions.²⁶

Despite the above legal developments, new challenges in international criminal law after the turn of the millennium required Africa to change its approach to how it handled perpetrators of the core crimes. The continent, realising the inadequacy of its institutions to deal with the growing number of violations, embarked on a process of legal reform. Beginning from February 2009, the AU Summit requested the AU Commission, in consultation with the African Commission and the African Court on Human and Peoples' Rights to examine the implications of empowering the merged African Court to try international crimes such as genocide, war crimes and crimes against humanity.²⁷ The task team was asked to report back to the summit in 2010.²⁸

After the AU Commission tabled its report, the AU Assembly appointed a consultant, the Pan-African Lawyers Union (PALU), in January 2010 to undertake a study and make recommendations on the subject. It was also tasked with drafting the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, (Amendment Protocol)²⁹ that would grant criminal jurisdiction to the already merged court.³⁰ The fact that the Merger Protocol had not yet come into force might have influenced the AU's decision to instruct the consultant to draft an amending protocol, rather than a whole new instrument.

The consultant submitted its first draft in June 2010.³¹ Several drafts submitted after that were subjected to scrutiny under the auspices of the PAP,³² before being adopted by the Meeting of

²⁶ Hansungule M 'African courts and the African Commission on Human and Peoples' Rights' 235 available at http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/8_Hansungule.pdf (accessed 5 August 2014). Hansungule states that during the deliberations towards the creation of the Merger Protocol, some delegates started questioning the wisdom of having so many institutions of justice, given the paucity of resources in the AU.

²⁷ AU Decision, 'Decision on the implementation of the Assembly Decision on the abuse of the principle of universal jurisdiction', Doc.Assembly/AU/3(XII), Assembly/AU/Dec.213(XII), para 9, adopted at the 12th Ordinary Session of the Assembly of the AU on 1 – 3 February 2009 in Addis Ababa, Ethiopia.

²⁸ Du Plessis M 'Implications of the AU decision to give the African Court jurisdiction over international crimes' Institute for Security Studies, Paper No.235 (June 2012), 4.

²⁹ *Ibid.*

³⁰ AU Decision, 'Decision on the abuse of the principle of universal jurisdiction', Doc.EX.CL/606(XII), Assembly/AU/Dec.292(XV), adopted at the 15th Ordinary Session of the Assembly of the AU on 27 July 2010 in Kampala, Uganda.

³¹ Deya D 'Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes' (March 2012), 24 available at <http://www.osisa.org/openspace/regional/african-court-worth-wait> (accessed 28 July 2014).

³² Du Plessis states that after PALU submitted the second draft in August 2010, two validation workshops were held in South Africa under the auspices of the Pan African Parliament. See Du Plessis M 'Implications of the AU decision to give the African Court jurisdiction over international crimes', Institute for Security Studies, Paper No.235 (June 2012), 4.

Government Experts and Ministers of Justice or Attorneys General on Legal Matters in May 2012.³³

Pursuant to the Meeting of Government Ministers in May 2012, the draft document was tabled before the Executive Council of the AU, which did not forthrightly endorse the 2012 version. The contentious issues were the definition of the crime of unconstitutional change of government and the immunity of heads of states.³⁴ The 2012 version of the provision on the crime of unconstitutional change of government contained an exception which recognised the right of a sovereign people to change government through peaceful means.³⁵ However, the lack of a definition of this new crime, together with the prospective recognition of popular uprising as a right inherent to a suppressed people, made it impossible to reach consensus on the issue.³⁶ Two years later, this impasse was still not resolved. At the Ministerial Meeting held in Addis Ababa, Ethiopia, prior to the adoption of the Amendment Protocol in Malabo, some delegates raised concern regarding the inclusion of the phenomenon of 'popular uprising' in the draft Amendment Protocol when it had not yet been defined by the Peace and Security Council. Others felt it should be included for precisely that reason, in order to allow the envisaged court to deal with it. Seeing that there was no consensus on the matter, a decision was taken to drop Paragraph Three of Article 28E, which had recognised the right of a people to change a government through peaceful means.³⁷ The immunity provision, as will be discussed below, also underwent a major overhaul.³⁸

Although spread over a few years, there were feelings amongst state representatives that the actual drafting process was rushed and undertaken without proper consultation of all stakeholders

³³ See Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Exp/Min/IV/Rev7, adopted at the Meeting of Government Experts and Ministers of Justice/Attorneys-General on Legal Matters, Addis Ababa, Ethiopia, 7 - 11 and 14 - 15 May 2012.

³⁴ The Executive Council noted the need for the AU to adopt a definition of the crime of unconstitutional change of government. It then requested the AU Commission, in collaboration with the AU Commission on International Law and the African Court, to submit this definition for consideration by the policy organs at the next Summit in January 2013. See Executive Council Decision, 'Decision on the Protocol on amendments to the Protocol on the Statute of the African Court on Human and Peoples' Rights', Doc.EX.CL/731(XXI)a, EX.CL/Dec.706(XXI), adopted at the 21st Ordinary Session 9 – 13 July 2012, para 3.

³⁵ The 2012 version of Article 28E of the Statute annexed to the Amendment Protocol provided that, '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'.

³⁶ See Opening Statement by Prof V Nmeielle at the 1st Session of the Specialised Technical Committee on Justice and Legal Affairs (Government Legal Experts) 6 – 14 May 2014, Addis Ababa, Ethiopia, 5.

³⁷ See Report of the First Ministerial Meeting, STC/Legal/Min/Rpt, 15 – 16 May Addis Ababa, paras 22-23.

³⁸ See Opening Statement by Prof V Nmeielle at the 1st Session of the Specialised Technical Committee on Justice and Legal Affairs (Government Legal Experts) 6 – 14 May 2014, Addis Ababa, Ethiopia, 2.

and interested parties.³⁹ The secrecy with which the drafters of this Amendment Protocol went about their business did not only affect members of the general public, but Governments as well,⁴⁰ the very stakeholders for whom the instrument would carry obligations.⁴¹ Three weeks after its adoption in Malabo in June 2014, the text of the Amendment Protocol was still not available on the website of both the AU and the consultant, PALU.

In the intervening period, the Conference of Ministers of Justice and Attorneys General was replaced by the Specialised Technical Committee (STC) on Justice and Legal Affairs,⁴² which now included Ministers and Experts responsible for issues such as human rights, constitutionalism and the rule of law.⁴³

6.2 Adoption of the protocol in Malabo

The First Meeting of the STC was held in Addis Ababa, Ethiopia, from 6 – 14 May 2014 (for legal experts) and 15 – 16 May 2014 (for Ministers). The ministerial portion of the meeting dealt with the two outstanding issues, immunity and the definition of the crime of unconstitutional change of government. It also focused on the minor technical improvements that the AU Commission had made to the draft Protocol and Statute, which had been endorsed by the Meeting of Experts.⁴⁴

The adoption by the AU Assembly of the Amendment Protocol in Malabo, Equatorial Guinea, in June 2014 was viewed as controversial, largely because of the provision on immunity for heads of states and senior state officials.⁴⁵ Civil society also expressed disapproval at the inclusion of heads of states and senior state officials in the immunity provision. Over 40 civil society groups endorsed

³⁹ See Du Plessis M 'A case of negative complementarity? Giving the African Court of Justice and Human Rights jurisdiction over international crimes' 27 August 2012 available at <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/> (accessed 29 July 2014).

⁴⁰ Du Plessis reveals that Governments had little more than a year to review the actual text of the draft protocol, and there was a shared sentiment amongst senior state legal experts that the process was rushed. See Du Plessis M 'Implications of the AU decision to give the African Court jurisdiction over international crimes' Institute for Security Studies, Paper No.235 (June 2012), 5.

⁴¹ *Ibid.*

⁴² See Opening Statement by Prof V Nmehielle at the 1st Session of the Specialised Technical Committee on Justice and Legal Affairs (Government Legal Experts) 6 – 14 May 2014, Addis Ababa, Ethiopia, 2.

⁴³ The AU adopted the use of STCs, as provided for under Articles 14 – 16 of the AU Constitutive Act. There are currently 14 such STCs, responsible for various areas of specialisation. STCs are expected to work in close collaboration with the various departments of the Commission so as to provide well informed inputs to the work of the Executive Council in their areas of specialisation. Hence the involvement of the STC on Justice and Legal Affairs in the drafting of the Amendment Protocol.

⁴⁴ See the Report of the First Ministerial Meeting, STC/Legal/Min/Rpt, 15 – 16 May Addis Ababa, para 21.

⁴⁵ International Justice Resource Centre 'African Union approves immunity for government officials in amendment to African Court of Justice and Human Rights' 2 July 2014 available at <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 9 August 2014).

an open letter to the AU in this regard.⁴⁶ The major concern for these human rights groups was that an immunity provision represented a departure from the AU's fight against impunity and the AU's obligations under the AU Constitutive Act,⁴⁷ particularly Article 4(o), which provides that the AU shall respect the sanctity of human life and reject impunity.⁴⁸ The effect of the provision, as will be discussed in detail below, is to immunise high-level perpetrators of the core crimes, and encourage indefinite hold on state power.

In the run up to the adoption of the Amendment Protocol, the debate focused mainly on the immunity provision, even though it contained other provisions that raise serious concerns for international criminal justice, such as the provisions on complementarity, corporate criminal liability, the *ne bis in idem* rule, and the enforcement mechanisms. These will be discussed below.

6.3 Will the new broom sweep clean?

Max du Plessis argues that the Merged Court, even before the inclusion of the criminal law chamber, already had a heavy workload.⁴⁹ With this new task, questions must be asked about its capacity to fulfil not only its newly found international criminal law obligations, but also about the effect that the stretching of its jurisdiction will have on its ability to deal with its general and human rights obligations. Du Plessis criticises the long list of crimes over which the ACC shall have jurisdiction, which means that it has to deal with other crimes, and not just the core crimes. Given the number of years it takes and the resources involved in the prosecution of a single case at the international level, questions of capacity, resources and effectiveness are pertinent at this stage.⁵⁰ Such criticisms seem justified, given the lack of resources and delays that plagued the Hissène

⁴⁶ Africa Legal Aid 'Immunity proposal for African leaders in the African Court of Justice and Human Rights' available at <http://www.africalegalaid.com/news/immunity-proposal-for-african-leaders-in-the-african> (accessed 8 August 2014).

⁴⁷ Subsequent to the adoption of the Amendment Protocol in Malabo, the Southern African Human Rights and Litigation Centre, which initiated the legal suit in the Zimbabwe Torture Docket, issued a joint statement together with the International Bar Association. In the statement, both organisations expressed alarm at the AU's endorsement of immunity for heads of states and stated that such a provision placed some members of the AU who were also party to the Rome Statute in direct conflict with this Statute, whose Article 27 excludes such immunity. See 'IBA and SALC express alarm at AU's endorsement of immunity for heads of State' 9 July 2014 available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=f0c41e45-693d-4712-98c8-3da28c2b949d> (accessed 7 August 2014).

⁴⁸ See Amnesty International and Others 'Open Letter to Ministers of Justice and Attorneys General and AU Member States' 5 May 2014 available at <http://www.amnesty.org/en/library/asset/IOR53/004/2014/en/0ef6fe09-a572-4ec9-bca6-1a11b4e90025/ior530042014en.pdf> (accessed 8 August 2014). Amnesty International was concerned that such immunity was a major retreat from the objectives of the AU and was inconsistent with the spirit of the AU Constitutive Act.

⁴⁹ Du Plessis M 'Implications for the AU Decision to expand the African Court's jurisdiction' Institute for Security Studies, Paper 235, (June 2012), 4.

⁵⁰ *Ibid.*

Habré case and the general duration of international criminal proceedings, as seen in the work of the ICTY, ICTR and the Special Court for Sierra Leone.

Sello Mabunda highlights three advantages that the ACC will have, namely: legitimacy, access to justice and enhanced effectiveness.⁵¹ He argues, quite correctly, that the perception that the inclusion of criminal jurisdiction will enable state leaders to evade prosecution by the ICC is misleading. He explains the expanded jurisdiction on the change of principle from the OAU's non-interventionist approach to the AU's principle of intervention in cases of grave circumstances. This, he argues is what grants the newly expanded jurisdiction of the ACC legitimacy over both the ICC and the domestic courts of non-African states.

Mabunda further argues that the ACC would bring easy access to justice on the continent. However, a reading of the provision on admissibility of cases, discussed below, does not support Mabunda's arguments in this regard. The drafters of the Amendment Protocol made the direct submission of cases by individuals and human rights NGOs to the ACC a bit cumbersome by requiring a prior declaration from the state concerned.⁵²

His third argument, that in dealing with international crimes the ACC would be much more effective than the ICC, does to some extent hold water. The fact that the ACC would have its seat in Africa would likely lead to quicker evidence gathering, and easier access to the crime scene, thereby reducing the chances of destruction of crucial evidence. Whilst these arguments ring true for crimes that are committed either by ordinary individuals, rebels or political opponents, the same cannot be said of perpetrators who constitute the incumbent government. All these promises of a quicker, easily accessible and more legitimate court process can be negated by a lack of political will on the part of governments whose intention is to protect their errant political leaders. The attempts to interfere with witnesses in the Kenya trials,⁵³ the difficulty in bringing Hissène Habré to justice, the difficulty in effecting warrants of arrest issued by the ICC against President Al Bashir, all testify to the challenges lying ahead for the ACC.

⁵¹ Mabunda CS 'The pros and cons of the criminal jurisdiction of the proposed African Court of Justice and Human Rights' Africa Institute of South Africa, Briefing Paper No.98, (November 2013), 2.

⁵² See Article 9(3) of the Amendment Protocol and Article 30(f) of its Statute.

⁵³ Lynch G and Zgonec-Rozej M 'The ICC intervention in Kenya' Chatham House (February 2013) 7 available at www.chathamhouse.org (accessed 5 August 2013).

6.3.1 Composition of the court

The Amendment Protocol makes provision for the transition from the African Court to the ACC. In terms of Article 4, which provides for the terms of office of the judge, 'upon the coming into force of the Protocol on the Statute of the African Court of Justice and Human Rights, the terms of the Judges of the African Court on Human and Peoples' Rights shall terminate'. However, to deal with the vacuum that would be created by the African Court judges leaving office, Article 4(2) provides that these judges shall remain in office until the judges of the Merged Court are sworn in. This provision was designed to ensure continuity of the key functions of the court during its transition period. A similar provision exists for cases which will be pending before the African Court at the time of coming into force of the Merged Court;⁵⁴ and the same for the Court's Registrar.⁵⁵

6.3.2 The Office of the Prosecutor

The Amendment Protocol introduced the Office of the Prosecutor (OTP) whose powers are set out in Article 46G. The Prosecutor has the power to initiate *proprio motu* investigations on the basis of information on crimes within the jurisdiction of the ACC.⁵⁶ This may, for example, be information sent to the OTP by individuals, victims, NGOs, intergovernmental organisations, the AU and its organs as well as the UN and its organs.⁵⁷ To give effect to the *de minimis* rule, the Prosecutor is bound to analyse the seriousness of the information received⁵⁸ by seeking additional information from other reliable sources. This is known as the preliminary examination by the Prosecutor. In situations where, after the preliminary examination the Prosecutor concludes that the information received does not constitute a reasonable basis for him to proceed with an investigation, he or she has an obligation to inform the party who supplied the information.⁵⁹ If, after making such a decision, new evidence or facts arise, the Prosecutor may reconsider the information.

The above provisions were designed to deal with the overzealous litigants who would otherwise over-burden the court with unsubstantiated claims. It ensures that the OTP embarks on an investigation only if there is sufficient evidence to support an indictment; and where there is

⁵⁴ Article 6 of the Statute annexed to the Amendment Protocol.

⁵⁵ Article 7 of the Statute annexed to the Amendment Protocol.

⁵⁶ Article 46G(1) of the Statute annexed to the Amendment Protocol.

⁵⁷ Article 46G(2) of the Statute annexed to the Amendment Protocol.

⁵⁸ In determining the seriousness of information received the OTP may seek additional information from the AU and its organs, the UN and its organs, NGOs and other reliable sources, to corroborate any information submitted to it.

⁵⁹ Article 46G(6) of the Statute annexed to the Amendment Protocol.

likelihood that the investigation will secure sufficient evidence to justify a prosecution or obtain a conviction.

In cases where the OTP decides that there is a reasonable basis to proceed with an investigation, the Prosecutor shall approach the Pre-Trial Chamber (PTC) for authorisation. The Prosecutor's discretion is not necessarily an unfettered one, but is checked by the judicial oversight of the PTC. The process of seeking authorisation by the PTC gives effect to the AU's aspiration of establishing a victim-centred court, as victims are entitled to make presentations before the PTC.⁶⁰

The PTC does two things: (i) it determines if on the information presented there is a reasonable basis to proceed with an investigation; and (ii) it determines whether the case appears to fall within the jurisdiction of the ACC. If the answer to these two enquiries is in the affirmative, the PTC must authorise the OPT to proceed with the investigation. The wording of the provision is carefully couched in the following terms, 'that the case appears to fall within the court's jurisdiction'. This was meant to be without prejudice to the admissibility and jurisdictional enquiries regarding the case that the ACC would have to engage in subsequent to the investigation.⁶¹ In a case where the PTC declines to authorise an investigation, the OTP may resubmit the matter if new facts or evidence regarding the same situation come to light.⁶²

6.3.3 Crimes under the new instrument

Article 14 of the Amendment Protocol introduces a new Article 28A of the Statute which lists the crimes over which the ACC shall have jurisdiction, and at the top of the list are the core crimes of genocide, war crimes and crimes against humanity. It then goes on to list other serious offences of international concern, namely: the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression. It basically contains four of the crimes listed under the Rome Statute,⁶³ three of those contained in the Statute of the ICTR⁶⁴ and four of those in the Statutes of the ICTY,⁶⁵ the Special Court for Sierra

⁶⁰ Article 46G(3) of the Statute annexed to the Amendment Protocol.

⁶¹ Article 46G(4) of the Statute annexed to the Amendment Protocol.

⁶² Article 46G(5) of the Statute annexed to the Amendment Protocol.

⁶³ Mabunda CS 'The pros and cons of the criminal jurisdiction of the proposed African Court of Justice and Human Rights' Africa Institute of South Africa Briefing Paper No.98 (November 2013), 3.

⁶⁴ The Statute of the ICTR provided that the Tribunal shall have jurisdiction over the following crimes: genocide (Article 2), crimes against humanity (Article 3) and violations of Article 3 Common to the Geneva Conventions (Article 4).

⁶⁵ The Statute of the ICTY listed four crimes. These were: grave breaches of the Geneva Conventions of 1949 (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4) and crimes against humanity (Article 5).

Leone⁶⁶ and the Extraordinary African Chambers (EAC).⁶⁷ The list is not a closed one, as the new provision empowers the AU to extend the list to accommodate newer crimes and new developments in international law.⁶⁸

Some critics argue that to saddle the ACC with 14 crimes is to exert unnecessary pressure on it. Du Plessis calls the decision to extend the court's ambit 'an overly ambitious jurisdictional reach'.⁶⁹ There is value in such assertions, as all the international tribunals, from Nuremberg through the ICTY and ICTR to the Special Court for Sierra Leone and most recently, the EAC, had to deal with fewer crimes than these. The decision to include such a long list of crimes may have negative implications in the fight against impunity. It will likely lead to a backlog of cases, and stretch the limited resources available to make this international criminal court function effectively.

There are also concerns that not all the crimes listed thereunder are international crimes, neither are they all customary international law crimes. Ademola Abass posits that for a crime to be prosecutable before an international tribunal, it must satisfy two requirements, (i) seriousness and (ii) international. It is necessary for the crime concerned to be recognised as 'international' and 'serious' enough by customary international law for the majority of the states designating it as such and/or for the crime to be a subject of a treaty in force for those states.⁷⁰ The major problem with the Amendment Protocol is that some of the listed crimes are not even crimes under the laws of some of the member states of the AU, such as unconstitutional changes of government. It is therefore doubtful how the ACC will be able to exercise jurisdiction in cases coming from states that do not recognise some of the listed crimes.

The drafters of the Amendment Protocol did a sterling job in defining the core crimes, which are defined in much the same way as the Rome Statute and the Statutes of the various *ad hoc* international criminal tribunals. This offers hope that the ACC will be able to draw from and employ the rich jurisprudence that has been already been developed by these international tribunals.

⁶⁶ The Statute of the Special Court for Sierra Leone lists genocide, crimes against humanity, war crimes and torture in Articles 4, and 5-8.

⁶⁷ The Extraordinary African Chambers only deal with four crimes, genocide, war crimes, crimes against humanity and torture. See Articles 5 – 8 of the EAC Statute.

⁶⁸ See Article 28A(2) of the Statute annexed to the Amendment Protocol.

⁶⁹ See du Plessis M 'A case of negative complementarity? Giving the African Court of Justice and Human Rights jurisdiction over international crimes' 27 August 2012 <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/> at (accessed 29 July 2014).

⁷⁰ Abass A 'The proposed international criminal jurisdiction for the African Court: Some problematic aspects' (2013) 60:1 *Netherlands International Law Review* 27 - 50, 34.

6.3.3.1 Defining genocide

Article 28B defines genocide as any of a number of acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such. It then proceeds to list the types of acts which, when committed with the necessary intention, would amount to genocide.⁷¹ The wording of the provision mirrors that in the Rome Statute, and the Statutes of the ICTR and ICTY, with one critical exception. It adds the 'acts of rape or any other form of sexual violence' amongst the list of constituent acts for genocide.⁷² This is a progressive legislative step, given that rape and sexual violence are often deeply embedded in the architecture of conflicts on the African continent. It also gives effect to existing jurisprudence from the African continent,⁷³ which has recognised rape as a constituent act of genocide.⁷⁴ Unlike the Statutes of both the ICTR and ICTY, the provision does not, however, make provision for acts of conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit and complicity in genocide.⁷⁵

6.3.3.2 Defining crimes against humanity

Article 28C defines crimes against humanity as consisting of any of the listed acts when committed as part of a widespread or systematic attack or enterprise, directed against any civilian population, with knowledge of the attack or enterprise.⁷⁶ The Article defines the crime in exactly the same way the Rome Statute does. In fact, it is a direct importation of the Rome Statute's Article 7, save for paragraph (f) which includes cruel, inhumane and degrading treatment or punishment as constituent acts for the crime of crimes against humanity. The Rome Statute only lists torture as a

⁷¹ These are: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group; and acts of rape that are intended to change the identity of a particular group.

⁷² Article 28B(f) of the Statute annexed to the Amendment Protocol.

⁷³ See Chenault S 'And since *Akayesu*? The development of ICTR jurisprudence on gender crimes: A comparison of *Akayesu* and *Muhimana*' (2008) 14 *New England Journal of International and Comparative Law* 221 - 237, 221.

⁷⁴ The *Akayesu* judgment was ground-breaking in its affirmation of rape as an international crime. See the following cases which affirmed this position: *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, *Prosecutor v Mikaeli Muhimana* ICTR-95-1B-T, para 20, and *Prosecutor v Alfred Musema* ICTR-96-13-A.

⁷⁵ Articles 2(3) of the Statute of the ICTR and 4(3) of the Statute of the ICTY clearly stipulated that these acts shall be punishable.

⁷⁶ It proceeds to list the constituent actions as: murder; extermination; enslavement; deportation or forcible transfer of a population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, cruel, inhuman and degrading treatment or punishment; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health.

constituent act. The Statute annexed to the Amendment Protocol is thus much broader than the definition contained in the statutes of the other international criminal tribunals.

6.3.3.3 Defining war crimes

War crimes are governed by Article 28D, which defines this crime as any of the listed offences, in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely any of the listed acts committed against persons or property protected under the provisions of the relevant Geneva Convention. It goes on to list wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile power; wilfully depriving a prisoner of war or other protected person of the right of fair and regular trial; unlawful deportation or transfer or unlawful confinement; and taking hostages.
- (b) Grave breaches of the First Additional Protocol to the Geneva Conventions of 8 June 1977 and other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law. It then lists 33 acts that constitute this offence.
- (c) Article 28D(1)(c) caters for armed conflicts not of an international character and serious violations of Article 3 Common to the four Geneva Conventions of 12 August 1949, and is aimed at protecting persons who are *hors de combat*. It therefore criminalises a set of acts committed against persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms, and those placed *hors de combat* by sickness, wounds, detention or any other cause.⁷⁷ It should be noted that this Article does not cover other situations of violence. The Statute is clear that paragraph 1(c) applies only

⁷⁷ Article 28D(1)(c) lists four acts, which when committed against persons who are *hors de combat* in a non-international armed conflict would amount to a violation of Common Article 3. These are: violence to the life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognised as indispensable.

to armed conflict not of an international character, and excludes situations of internal disturbances and tensions.

- (d) Article 28D(1)(e) covers other serious violations of the laws and customs of war applicable in armed conflicts not of an international character,⁷⁸ but not to other situations of violence.⁷⁹

6.3.4 Standing and admissibility of cases

Articles 9 and 3(1) and (2) of the Amendment Protocol regulate standing before the ACC. In terms of these provisions, the court is vested with original and appellate jurisdiction, including international criminal jurisdiction. The matters that the ACC is competent to hear are those that are referred to it in any other agreements that the AU members or the Regional Economic Communities (RECs) or other international organisations recognised by the AU may conclude amongst themselves or with the AU.

The Amendment Protocol extended the list of entities that are eligible to submit cases to the ACC to include the PSC and the newly established OTP. Under the Statute of the Merged Court prior to the Amendment Protocol, cases could be submitted by states and the organs of the AU. The submission of cases by NGOs and individuals was subject to the prior lodgement of a declaration by the state party against whom the case was initiated.⁸⁰ Despite the fact that the ACC now has criminal jurisdiction, individuals and NGOs still do not have direct access to the court. Submission of cases by individuals and NGOs is subject to the state against whom they are complaining having

⁷⁸ The provision lists 22 acts which when committed within the context of a non-international armed conflict would constitute serious violation of the laws and customs of war. These include: intentionally targeting a civilian population; intentionally targeting buildings, medical units and personnel using distinctive emblems; intentionally targeting installations, personnel and units involved in humanitarian assistance or peacekeeping; pillaging, enlisting child soldiers; committing rape, sexual slavery, enforced prostitution, enforced sterilization, forced pregnancy; declaring that no quarter shall be given; collective punishment, slavery, despoliation of the wounded, sick, shipwrecked or dead, targeting non-defended localities and demilitarized zones, launching indiscriminate attacks, intentionally using starvation of civilians as a method of warfare, employing bullets that expand or flatten easily in the human body, using poisoned weapons, and enforced physical mutilation or medical or scientific experiments.

⁷⁹ Article 28D(1)(f) of the Statute annexed to the Amendment Protocol.

⁸⁰ Article 29 of the Merger Protocol provides that the following entities are eligible to submit cases to the court: States who are parties to the Protocol, the Assembly, the PAP and other organs of the AU authorised by the Assembly. The same Article stipulates explicitly that the Court shall not be open to states which are not members of the AU and those that have not ratified the Protocol. Article 30 provides a list of other entities that can approach the Court, such as the African Commission, the Committee of Experts on the Rights and Welfare of the Child and African intergovernmental organisations accredited to the AU. For individuals and NGOs, the pre-requisite was the declaration required by in Article 8 of the Merger Protocol.

lodged a declaration accepting the jurisdiction of the ACC under Article 9(3).⁸¹ Where a state party has not made such a declaration, individuals and NGOs cannot bring matters directly to the ACC.⁸² Such a rule defeats the whole purpose of an African criminal court and leaves victims without a remedy, whilst at the same time perpetuating impunity. In cases where the Prosecutor does not use his *proprio motu* powers, and neither the Assembly nor the PSC is willing to refer a particular matter, the ACC will be of no use to individuals who suffer violations on the territories of states or are violated by nationals of states that have not entered the declaration. In this regard, the ACC is not victim-centred, and in making such a provision the AU contradicted all the statements it made over time through various declarations, in which it claimed that victims should be at the centre of international criminal justice.

By limiting the participation of individuals, the AU is treating perpetrators of the core crimes with kid gloves, and subjecting them to justice only where they have agreed by prior declaration to be held accountable. Given the politicised nature of international prosecutions, as seen in the Hissène Habré, Al Bashir and Uhuru Kenyatta cases, it is clear that the Assembly or any of its organs will be reluctant to refer state leaders to the court for any violations. Even if such referrals were to occur, they would not necessarily remedy the problem brought by the lack of direct access by individuals and NGOs. This is because a referral by the PSC, Assembly or any other organ of the AU is not necessarily a directive to the Prosecutor to prosecute. This office still has to use its discretion,⁸³ using evidence before it, in deciding on whether to prosecute or not.⁸⁴

The situation is further compounded by the reluctance of states to subject state leaders and senior state officials to prosecution. There remains a high likelihood that state-referred cases, depending on the political motivations for the referral,⁸⁵ would likely not meet the evidentiary threshold in an effort to shield the accused. In any case, there is no record of a state that has self-referred a

⁸¹ Article 9(3) of the Amendment Protocol provides that, 'any [m]ember [s]tate may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30(f)'.

⁸² Article 30(f) of the Statute annexed to the Amendment Protocol provides that:

African individuals or African NGOs with Observer Status with the African Union or its organs or institutions, but only with regard to a [s]tate that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly. The Court shall not receive any case or application involving a [s]tate [p]arty which has not made a Declaration in accordance with Article 9(3) of this Protocol.

⁸³ See generally, Dugard J 'Palestine and the International Criminal Court: Institutional failure or bias?' (2013) 11 *Journal of International Criminal Justice* 563 – 570.

⁸⁴ Schabas W 'Prosecutorial discretion versus judicial activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice* 731 – 761, 734.

⁸⁵ For example, Uganda's referral of its situation to the ICC was motivated more by its desire to deal with the impact of the Lord's Resistance Army for political reasons than it was by the desire to genuinely fight impunity and punish offenders.

matter involving its sitting president or even a former president. In comparison to cases that individuals and NGOs could submit directly, the latter are much more likely to be accompanied by well-researched and well-documented dossiers, with sufficient evidence to sustain a trial. Even though states often have the necessary wherewithal to conduct investigations, they often lack the political will to do so where senior state officials are involved. Human rights NGOs on the other hand, often do have the necessary tools and determination to conduct investigations, as seen in the Zimbabwe Torture Docket in South Africa,⁸⁶ and in the *Lubanga Dyilo* case before the ICC.⁸⁷

Writing in the context of a human rights court, Dan Juma finds fault with this restrictive access of individuals and NGOs to the court, and labels it paradoxical, especially in contrast to the unfettered access of states.⁸⁸ This decision to restrict access is flawed because it defies the conventional understanding of international human rights law that such forums are aimed at protecting the weaker party (the individual) from the conduct of the state. Juma argues further that the fatal flaw with this arrangement is the assumption it makes that states will be willing to lodge cases before the court.⁸⁹

Even though a matter submitted first to the African Commission can eventually be transmitted by the Commission to the Court, this tortuous route is not suited for a continent that is currently heavily afflicted by conflicts.⁹⁰ The requirement for a declaration remains very problematic. Whilst it could perhaps be defended when the court still had two chambers only, the general affairs and human rights chamber, there can be no justification for such in a court empowered to deal with violations of international criminal law. At least four of the crimes for which the ACC was established are the customary international law crimes of genocide, war crimes, crimes against humanity and piracy. Customary law is already established regarding the position that owing to the grave nature of these offences, every state is entitled to prosecute them. It is ironic that African states, speaking as a collective through the AU, would opt to limit the ACC's jurisdiction by legislating that only states which make a declaration can be brought to account at the instance of

⁸⁶ *National Commissioner, SAPS v Southern African Human Rights Litigation Centre and Another* CCT 02/14.

⁸⁷ See *Prosecutor v Thomas Lubanga Dyilo* Case No. ICC-01/04-01/06. See also Glassborow K, 'NGOs Defend ICC Role in Lubanga Case' 1 December 2006 available at <http://iwpr.net/report-news/ngos-defend-icc-role-lubanga-case> (accessed 31 July 2014). In the *Lubanga Dyilo* case, the Women's Initiatives for Gender Justice provided the prosecutor with a report on rape and sexual violence in the Ituri region of DRC, including interviews with over 50 women victims of gender-based crimes committed by a number of militias.

⁸⁸ Juma D 'A case of poacher turned gamekeeper' (2007) 4 *Essex Human Rights Review* 1 – 21, 3.

⁸⁹ *Ibid*, 4.

⁹⁰ Article 30(b) of the Merger Protocol lists the African Commission amongst the entities that are entitled to submit cases to the court.

an individual. Limiting access to the ACC in this manner cannot be reconciled with the obligation to end impunity.

6.3.5 Corporate criminal liability

The Amendment Protocol contains a provision incorporating corporate criminal liability, although this does not extend to states.⁹¹ This is a novel position,⁹² given that the ICC does not have jurisdiction over juristic persons.⁹³ It is also a welcome position, which resonates with the preamble of the Universal Declaration of Human Rights which urges all organs of society to promote respect for human rights.⁹⁴

Attempts to introduce corporate criminal liability in the Rome Statute through the French proposal did not succeed. The current provision under the Statute annexed to the Amendment Protocol is likely to affect many multinational corporations (MNCs) working in Africa, particularly those involved in or alleged to be financing conflicts.⁹⁵

The failure of international criminal law to subject corporations decisively to the jurisdiction of international criminal courts has much to do with the classical theory of subjecthood,⁹⁶ in terms of which only states were capable of holding legal rights and duties.⁹⁷ With the rise of human rights over the past six decades, the focus shifted to two actors, individuals and states,⁹⁸ where liability of individuals for human rights abuses could be attributed vicariously through the state actor.⁹⁹ The idea of a corporation being held criminally liable for its conduct constituting the core crimes began to emerge in the post-World War II Nuremberg Trials, particularly with the cases of *Krupp*¹⁰⁰

⁹¹ Article 46C of the Statute annexed to the Amendment Protocol, which provides that the ACC will have jurisdiction over legal persons, with the exception of states.

⁹² See the *travaux préparatoires* of the Rome Statute, Proposal submitted by France, A/CONF.183/C.1/L.3, in Summary Records of the Meetings of the Committee of the Whole 133.

⁹³ Gotzmann N 'Legal personality of the corporation and international criminal law: Globalisation, corporate human rights abuses and the Rome Statute' (2008) 1 *Queensland Law Student Review* 36 – 54, 38.

⁹⁴ Kamga SD and Ajoku OO 'Reflections on how to address the violations of human rights by extractive industries in Africa: A comparative analysis of Nigeria and South Africa' (2014) 17:1 *Potchefstroom Electronic Law Journal* 453 – 519, 454.

⁹⁵ *Ibid.*

⁹⁶ Dugard J *International Law* (2011) 81. See also Grant T 'Defining statehood: the Montevideo Convention and its discontents' (1999) 37 *Columbia Journal of Transnational Law*, 403 - 458, 405.

⁹⁷ Menon PK 'The international personality of individuals in international law: A broadening of the traditional doctrine' (1992) 1 *Journal of Transnational Law and Policy* 151 - 182, 151.

⁹⁸ Gotzmann N 'Legal personality of the corporation and international criminal law: Globalisation, corporate human rights abuses and the Rome Statute' (2008) 1 *Queensland Law Student Review* 36 – 54, 45.

⁹⁹ Acquaviva G 'Subjects of international law: A power-based analysis' (2005) 38 *Vanderbilt Journal of Transnational Law* 345 - 396, 345.

¹⁰⁰ In this case, the court held that the mere fact that a defendant was a member of the Krupp Directorate or an official of the firm was not sufficient to attribute guilt to the firm. It held that guilt must under the circumstances be

and *Krauch (IG Farben)*.¹⁰¹ Although in both cases it was the individuals rather than the corporations that were charged with war crimes and crimes against humanity, the reasoning of the court indicated the emergence of the recognition of criminal potential of the corporate entity.

The French proposal to include criminal responsibility of legal persons during the deliberations of the Rome Statute failed after the negotiating parties could not reach a consensus.¹⁰² The records indicate that the proposal was met with resistance by many delegations on the ground that either their legal systems did not provide for such a concept or that the concept was difficult to apply in the context of an international criminal court. France was advocating for a provision akin to the Nuremberg Charter's recognition of criminal responsibility of 'criminal organisations'. There was fear amongst delegates that because not all jurisdictions recognise corporate criminal responsibility, including these in the Rome Statute posed the risk that some states would not be able to enforce orders of the court. China's representative, for instance, pleaded for caution, given the sensitive political issues involved in dealing with the criminal responsibility of legal persons. Sweden and Denmark opposed the French proposal on the basis that the underlying idea of the ICC was individual criminal responsibility, not corporate criminal responsibility. Greece opposed it because Greek law did not recognise this type of criminal responsibility, whilst Slovenia thought the legal drafting required to cater for the criminal responsibility of juristic persons was too involved. The French proposal was misled since in the Nuremberg Trials, it was the individual and not the legal persons that were prosecuted.¹⁰³

personal. *United States v Krupp* Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No.10 (1950), Judgment of 31 July 1948, 1447.

¹⁰¹ *United States v Krauch and Others (IG Farben)* 8 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No.10 (1950). The indictment in this case contained five counts for which the defendants would face prosecution. Count one charged the defendants with the commission of crimes against peace through the planning, preparation, initiation, and waging of wars of aggression and invasions of other countries. Count two charged them with committing war crimes and crimes against humanity through participation in the plunder of public and private property in countries and territories which came under the belligerent occupation of Germany. Count three charged them with committing war crimes and crimes against humanity through participation in enslavement and forced labour of the civilian population of countries and territories occupied or controlled by Germany, the enslavement of concentration-camp inmates within Germany and the use of prisoners of war in operations and illegal labour. It also charged the mistreatment, terrorization, torture, and murder of enslaved persons. Count four charged the defendants Schneider, Buetefisch, and von der Heyde with membership in a criminal organization. Count five contained a charge of participation by the defendants in a conspiracy to commit crimes against peace. Counts one, two, three, and five each alleged that 'All of the defendants, acting through the instrumentality of Farben and otherwise with divers other persons', committed the acts charged therein. It is also stated in counts one, two, and three that said defendants 'were members of organizations or groups, including Farben, which were connected with the commission of said crimes'.

¹⁰² Proposal submitted by France, A/CONF.183/C.1/L.3, in Summary records of the meetings of the Committee of the Whole 133.

¹⁰³ *Ibid.*

The criminal liability of a natural person is often determined by the contemporaneity of the physical element (*actus reus*) and the mental element (*mens rea*). For juristic persons, the physical element is often carried out by animate agents, in the form of human beings on behalf of that particular corporation. Whilst the mental element is easier to determine in the case of natural persons than it is for juristic persons,¹⁰⁴ there are certain factors that would assist the court in such a determination, such as corporate culture or policy. The infliction of harm by a corporation can at times be the result of negligence or faulty judgment, and at times conscious premeditation.¹⁰⁵

However, the Amendment Protocol and its Statute seem to place under the jurisdiction of the ACC only those corporations that intentionally commit any of the core crimes, plus the other crimes of international concern listed in the Statute of the ACC.

The drafters of the Amendment Protocol and its Statute laid out specific indicators that must be used to determine corporate intention in the provisions of Article 46C(2) – (5). The first is that corporate intention may be established by proof that it was the policy of the corporation to do the act which constituted the offence.¹⁰⁶ In other words, if a corporation is accused of committing war crimes over and above proving the actual commission of the offence, the prosecution must prove that it was the policy of the corporation to commit the crime in question. Only where the policy provides the most reasonable explanation for the conduct of that corporation will the court find that intention exists.¹⁰⁷ If a different reasonable explanation exists for the corporation's conduct, or if the explanation arrived at by having regard to the policy is not a reasonable one, a link is not established between the policy of the corporation and its actions. In that case, even though the physical element exists, the mental element will not be established.

The drafters also included knowledge of the commission of the offence as an aid in the determination of corporate intention.¹⁰⁸ Where a corporation knew that its agents were committing a particular offence, and such conduct was either caused or encouraged by the organisation's corporate culture, corporate knowledge will be established.¹⁰⁹ The Statute does not

¹⁰⁴ Molan M *Sourcebook on Criminal Law* 2 ed (2001) 139.

¹⁰⁵ Beale SS 'A response to the critics of corporate criminal liability' (2008) 46 *American Criminal Law Review* 1481 - 1505, 1499.

¹⁰⁶ Article 46C(2) of the Statute annexed to the Amendment Protocol.

¹⁰⁷ Article 46C(3) of the Statute annexed to the Amendment Protocol.

¹⁰⁸ Article 46C(4) of the Statute annexed to the Amendment Protocol.

¹⁰⁹ Article 46C(5) of the Statute annexed to the Amendment Protocol provides that knowledge may be possessed within a corporation even though the relevant information was divided between corporate personnel. In other words,

define corporate culture. The 2012 version of the Statute did, however, define corporate culture as ‘an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place’.¹¹⁰ When the AU adopted the final version in 2014, Article 46C(7), which contained the definition, was omitted.

It is possible for natural persons to be tried together with juristic persons for their offending conduct, even though they were acting as agents of the corporation. Article 46C(6) provides that the criminal responsibility of corporations shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

These innovative provisions effectively shift the focus from warlords and aberrant presidents to the largely overlooked role players in international conflicts, corporations. Corporations have for a long time been criticized for operating in conflict areas and maximising profits through their involvement in these conflicts in a manner that violates human rights and international law.¹¹¹ These provisions ensure that both the executives who design and execute corporate policies that cause or encourage the commission of the core crimes, together with the organisations that they represent, do not escape justice simply because they are not political figures. This is because the growth of corporations in economic size, political influence and social power has made them complex entities,¹¹² with their own independent identity.¹¹³

The inclusion of corporate criminal liability is a progressive and very welcome development from the AU and must be commended for its contribution to international criminal justice. However, a weakness of this provision might lie in its wording. Unlike the provision setting out individual criminal liability, which requires actual knowledge or proof that the individual ought to have known about the offending conduct of subordinates, the provision on corporate liability does not go that far. The Statute makes superiors criminally liable for the actions of their subordinates if

the knowledge need not necessarily reside in one person only, even if it is distributed between a senior executive sitting in an office at the headquarters and a foot soldier on the ground at a site office, such information will still be regarded as knowledge of the commission of the offence possessed within that organisation.

¹¹⁰ Article 46C(7) of the 2012 version of the Statute annexed to the Amendment Protocol adopted by the Council of Ministers in Addis Ababa in July 2012.

¹¹¹ Graff J ‘Corporate war criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo’ Human Rights Brief 11 No.2 (2001) 23 available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?Article=1357&context=hrbrief> accessed 3 August 2014).

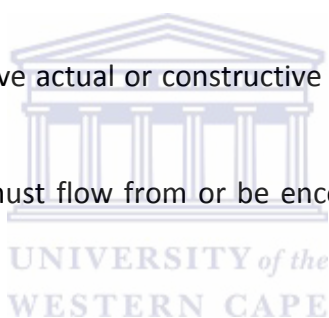
¹¹² Orland L and Cachera C ‘Corporate crime and punishment in France: Criminal responsibility of legal entities under the new French Criminal Code (1995) 11 *Connecticut Journal of International Law* 111 – 168, 114-117.

¹¹³ Friedman L ‘In defence of corporate criminal liability’ (2003) 23 *Harvard Journal of Law and Public Policy* 833 – 858, 844.

they had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take measures to prevent the acts or punish the perpetrators. For corporate criminal liability, the Statute makes reference to actual or constructive knowledge, without defining what constructive knowledge means. The current wording of the Statute raises concerns in that it sets a higher threshold for the individual criminal liability for military personnel than it does for civilian personnel such as company executives. For individuals, if it is proved that superiors ought to have known or having known, failed to punish their subordinates, they shall be guilty.

In summary, it can be gleaned from the above that for the ACC to find a corporation criminally liable there must be a physical action that is accompanied by the requisite mental element. For the mental element (corporate intention) to be proven the following conditions must be satisfied:

- (i) There must exist a corporate policy which offers a reasonable explanation for the corporation's conduct;
- (ii) The corporation must have actual or constructive knowledge of the offending conduct of its agents;
- (iii) The offending conduct must flow from or be encouraged by the corporate culture of the corporation.



Apart from the concerns raised above in relation to the wording of the provision on corporate criminal liability, there is also concern about the real chances of implementing this provision, given the fact that most multinational corporations operating in Africa are not African but are based in the Western states.

6.3.6 Jurisdiction *ratione temporis*

The Amendment Protocol introduces Article 46E, which stipulates that the ACC will only have jurisdiction over crimes committed after the entry into force of the Amendment Protocol and the Statute of the Merged Court. Contrary to assertions that the ACC was set up to shield African state leaders from the ICC, the amendment will not assist those individuals and African leaders currently indicted by the ICC.¹¹⁴ For states that become parties to the Amendment Protocol and the Statute after its entry into force, only matters occurring after the entry into force can be heard by the court. This effectively avoids the possibility of legal challenges based on the principle of non-

¹¹⁴ Mabunda CS 'The pros and cons of the criminal jurisdiction of the proposed African Court of Justice and Human Rights' Africa Institute of South Africa, Briefing Paper No.98 November 2013, 2.

retroactivity of laws. Any future offences that take place after the coming into force of the Amendment Protocol and its Statute shall fall within the jurisdiction of the ACC. This gives effect to the aspirations of the AU to move away from dealing with the core crimes through *ad hoc* tribunals, but to establish a future-orientated African mechanism. Such aspirations were first captured in the instruction of the AU to the Committee of Eminent African Jurists in 2006,¹¹⁵ which was tasked with making suggestions for a permanent court.

6.3.7 Jurisdictional links and pre-conditions

By becoming a party to the Amendment Protocol and its Statute, a state accepts the jurisdiction of the ACC in respect of the crimes contained in Article 28A. But for the court to exercise jurisdiction over a particular case, certain preconditions must exist that act as jurisdictional triggers. This means that the ACC will have jurisdiction only on the basis of the following:

- (a) Territoriality principle - the state party on the territory of which the conduct in question occurred or if the crime was committed on board a vessel or aircraft, the state of registration of that vessel or aircraft;
- (b) Nationality principle - the state of which the person accused of the crime is a national;
- (c) Passive personality principle - the state of which the victim of the crime is a national;
- (d) Protected interest principle - Where the offending conduct occurred abroad, the state whose vital interest is threatened by the extraterritorial acts of non-nationals.

For the ACC to exercise jurisdiction over a particular case, firstly, the state in whose territory the conduct occurred¹¹⁶ or whose national committed the crime¹¹⁷ or whose national was a victim of the crime¹¹⁸ or whose protected interest is threatened by the conduct in question must¹¹⁹ be a state party to the Amendment Protocol and its Statute. Secondly, any one or a combination of any of the four jurisdictional triggers listed above must be established.

The above jurisdictional triggers are much wider than those set out in the Rome Statute, which limits itself to territoriality and nationality.¹²⁰ The ACC will also have jurisdiction based on two further grounds, passive personality and protected interest, which are missing from the Rome Statute. Article 12 of the Rome Statute provides that the ICC can exercise jurisdiction over cases

¹¹⁵ See the Report of the Committee of Eminent African Jurists on the case of Hissène Habré available at http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Rep0506.pdf (accessed 15 July 2014).

¹¹⁶ This is jurisdiction based on the territoriality principle.

¹¹⁷ This is jurisdiction based on the nationality principle.

¹¹⁸ This is jurisdiction based on the passive personality principle.

¹¹⁹ This is jurisdiction based on the protected interest principle.

¹²⁰ Article 12 of the Rome Statute provides for these two jurisdictional links only.

referred to it by member states or initiated by the Prosecutor *proprio motu* only if the connecting links of territoriality and nationality exist.¹²¹ The Rome Statute makes an exception for referrals made by the UNSC acting under Chapter VII of the UN Charter,¹²² where these jurisdictional links are not a pre-requisite.¹²³ This means that the ICC is conferred with jurisdiction in a matter that does not involve a state party, is not referred by a state party, and is not initiated by the Prosecutor *proprio motu*. It is submitted here that when the UNSC does this, it effectively confers the ICC with UJ. This is because nothing connects the ICC with the crime or the accused, except the grave nature of the offence itself.

The drafters of the Amendment Protocol carefully avoided the problem raised by the UNSC referral of cases to the ICC by not including an exception the jurisdictional triggers in cases referred to the court by the PSC. Whilst Article 46(F)(2) of the Amendment Protocol empowers both the AU Assembly and the PSC to refer to the ACC a situation in which one or more of the crimes over which it has jurisdiction appears to have been committed, the preceding Article 46E *bis* still requires the jurisdictional triggers of territoriality, nationality, passive personality and protected interest to be satisfied as well. Unlike the Rome Statute, it does not contain an exception to the requirement for these triggers in the case of situations referred to the court by these organs of the AU. The controversy that arises from the conferment of UJ on the ICC by UNSC referrals therefore does not arise with the ACC.¹²⁴ And this fits in well with the international law position that obligations for states can only come about through consent, unless they emanate from a settled rule of custom. Hence there is no chance of the ACC imposing its jurisdiction over non-state parties.

In a matter where a non-state party is involved, there is provision for that state to lodge a declaration with the court's Registrar accepting the jurisdiction of the ACC. This is similar to Article 12(3) of the Rome Statute, which allows a non-state party to accept,¹²⁵ for a limited period the

¹²¹ Ronen Y 'ICC jurisdiction over acts committed in the Gaza Strip: Article 12(3) of the ICC Statute and non-state entities' (2010) 8 *Journal of International Criminal Justice* 3 – 27, 7.

¹²² Chapter VII allows the UNSC to refer a matter to the ICC where it is convinced that the matter is a threat to international peace and security.

¹²³ The UNSC is empowered by Article 13 of the Rome Statute to use its Chapter VII powers to refer to the ICC any situation in which one or more of the core crimes appears to have been committed.

¹²⁴ The UNSC referrals effectively confer upon the ICC jurisdiction over an offender regardless of where the offence took place and by whom it was committed, and regardless of whether the state concerned has ratified the Statute or accepted its jurisdiction. See generally Du Plessis M 'Africa and the International Criminal Court' conference paper presented at the Criminal Justice Conference, 7-8 February 2005, 5 available at http://www.csvr.org.za/images/cjc/africa_and_the.pdf (accessed 1 August 2014).

¹²⁵ Article 12(3) provides that:

jurisdiction of the ICC in relation to a particular crime. Most commentators are of the opinion that such a declaration does not constitute a referral but only provides jurisdiction.¹²⁶ This resonates with the position of the ICC itself, which is that an Article 12(3) declaration relates only to the scope of the ICC's jurisdiction, and does not trigger an investigation.¹²⁷ The effect of such a declaration is to accept the jurisdiction of the court with respect to the crimes referred to in Article 5 of the Rome Statute on an *ad hoc* basis.¹²⁸ Such declarations can only be followed by an investigation if there is a subsequent UNSC referral, a state party referral or authorization by the Pre-Trial Chamber to the Prosecutor to open an investigation.¹²⁹ The Article 12(3) declaration was crafted to align the Rome Statute with Article 34 of the Vienna Convention on the Law of Treaties, in terms of which an international instrument cannot bind non-state parties.¹³⁰ Scharf and Dowd state that such a declaration does not amount to a referral in the same fashion as a referral made by a state party.¹³¹ It must therefore be followed either by a referral by a state party or by the Prosecutor's initiation of an investigation *proprio motu*.¹³² The need for a non-state party to first lodge a declaration before the court can exercise jurisdiction over matters involving it, is necessitated by the fact that the Statute setting up the ACC is a multilateral treaty like any other, and will only bind states that ratify the founding instrument.¹³³

The past decade provided ample evidence of how African states would likely treat the declaration requirement. There is a high likelihood that non-State parties will not make such a declaration in

If the acceptance of a [s]tate which is not [p]arty to this Statute is required under paragraph 2, that [s]tate may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting [s]tate shall cooperate with the Court without any delay or exception in accordance with Part 9.

¹²⁶ Williams SA and Schabas WA 'Article 12' in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court* 2 ed (2008) 547, 569. See also Stahn C, El Zeidy MM, and Olasolo H 'The International Criminal Court's *Ad Hoc* Jurisdiction Revisited' (2005) 99 *American Journal of International Law* 421 - 431, 423.

¹²⁷ See International Criminal Court 'Declarations Art.12(3)' available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/registry/Pages/declarations.aspx (accessed 22 September 2014).

¹²⁸ Apart from the Palestinian declaration, the ICC also received two other declarations from Ivory Coast in 2003 which declaration was again confirmed in 2010, and one from Ukraine in 2014.

¹²⁹ See International Criminal Court 'Declarations Art.12(3)' available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/registry/Pages/declarations.aspx (accessed 22 September 2014).

¹²⁹ *Ibid.*

¹³⁰ See Case Matrix Network 'ICC commentary' available at <http://www.casematrixnetwork.org/cmnet-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/> (accessed 22 September 2014).

¹³¹ Scharf MP and Dowd P 'No way out? The question of unilateral withdrawals of referrals to the ICC and other human rights courts' Case Research Paper Series in Legal Studies Working Paper 08-21 (August 2008) 5.

¹³² Ronen Y 'ICC jurisdiction over acts committed in the Gaza Strip: Article 12(3) of the ICC Statute and non-state entities' (2010) 8 *Journal of International Criminal Justice* 3 - 27, 8.

¹³³ Article 46E *bis* of the Statute annexed to the Amendment Protocol clearly stipulates that states are bound to accept the jurisdiction of the Court as soon as they become party to the Protocol.

an attempt to shield their senior state officials from the court. Alternatively, they could lodge the declaration followed by self-referral for political reasons.

6.3.8 Barriers to prosecution: Immunity provisions and the *ne bis in idem* rule

Immunity provisions seek to prevent the court from exercising jurisdiction over the person of the accused on the basis of his status.

The *ne bis in idem* rule is another way to preclude a second court from being seized of a matter involving an individual who has already been convicted or acquitted by a court, if the second prosecution emanates from the same set of facts. The rule does, in a way, form part of the complementarity principle. For example, because of the ICTR's primacy of jurisdiction, its Statute provided that no person who had already been tried by the ICTY could be tried by a national court for the same acts.¹³⁴ This position differed from that provided by the *ne bis in idem* provision of the Statute annexed to the Amendment Protocol, as will be discussed below.

6.3.8.1 Immunity of heads of states and senior state officials

The most controversial of all the provisions throughout the drafting process has been the one on immunity of heads of states or government and senior government officials,¹³⁵ which is a radical departure from the 2012 version of the Amendment Protocol, as will be seen below.

Article 46A *bis* provides that:

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

Article 46A *bis* should be read together with Article 46B to the Statute, which provides for individual criminal responsibility.¹³⁶ Article 46B(4) excludes superior orders from being a bar to criminal responsibility, but stipulates that they may nonetheless be considered by the Court in mitigation of punishment.¹³⁷ The provision was also designed to ensure accountability of senior officers for the actions of their subordinates, and it provides essentially that the acts of foot

¹³⁴ See Article 10(1) of the ICTY Statute which provided that, 'No person shall be tried before a national court for acts constituting acts of serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal'.

¹³⁵ Article 46A *bis* of the Statute annexed to the Amendment Protocol.

¹³⁶ Article 46B(1) of the Statute annexed to the Amendment Protocol provides that, 'a person who commits an offence under this Statute shall be held individually responsible for the crimes'.

¹³⁷ Article 46B(4) of the Statute annexed to the Amendment Protocol.

soldiers shall not absolve their superiors.¹³⁸ Whilst these provisions are commendable, the immunity of heads of states introduced by Article 46B(2) is worrisome. It provides that:

Subject to the provisions of Article 46A *bis* of this Statute, the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment.

This effectively precludes the ACC from being seized of a matter involving any of the listed persons, in much the same way as they would be protected in proceedings before the domestic courts of a foreign state.

The question of immunity of heads of states was dealt with by the ICTY in the case of *Prosecutor v Milosevic*.¹³⁹ Although Milosevic did not raise this issue of immunity himself, the Tribunal decided to address it after the *amici curiae* had submitted that owing to Milosevic's status, the Tribunal did not have jurisdiction to try him. This was despite the fact that Article 7(2) of the Statute of the ICTY clearly stipulated that such a status can neither be a bar to prosecution nor a factor in mitigation of sentence. The *amici* contended that the accused should be understood to be denying the validity of the Article 7 provision.¹⁴⁰

The Tribunal found that such a challenge was baseless. The absence of immunity for heads of states before an international tribunal was part of customary international law and had been extensively codified through various international instruments beginning with the Nuremberg Charter.¹⁴¹ The Tribunal also found that there was ample evidence that this position is settled in customary law and in the many cases that had relied upon it.¹⁴² The ICTY therefore held that a head of state cannot plead his official position as a bar to criminal liability in respect of the core crimes before an international tribunal, and dismissed Milosevic's motion.¹⁴³

There are other international instruments that also preclude immunity of heads of states from being a bar to prosecution for the core crimes. These include Article IV of the Convention for the Prevention and Punishment of the Crime of Genocide, Principle III of the Nuremberg Principles,

¹³⁸ Article 46B(3) of the Statute annexed to the Amendment Protocol which provides that:

The fact that any of the acts referred to in Article 28A of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

¹³⁹ *Prosecutor v Slobodan Milosevic* Decision on Preliminary Motions, 8 November 2001, Case No. IT-99-37-PT.

¹⁴⁰ *Ibid*, para 27.

¹⁴¹ See Article 7 of the Nuremberg Charter and Article 6 of the IMFTC (Tokyo Tribunal) Charter.

¹⁴² *Prosecutor v Slobodan Milosevic* Decision on Preliminary Motions, para 29.

¹⁴³ *Ibid*, paras 31 and 34.

Article 6 of the ICCPR, Article 6(2) of the Statute of the Special Court for Sierra Leone, Article 27 of the Rome Statute, Article 10 of the Statute of the EAC, Article 7(2) of the ICTY Statute, Article 6(2) of the ICTR Statute,¹⁴⁴ Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind prepared by the International Law Commission in 1996.¹⁴⁵

African leaders had previously taken the immunity debate to the international level during the 12th Assembly of States Parties (ASP) of the ICC in November 2013. African states parties lodged a proposal on behalf of the AU for the Rome Statute to be amended to exclude sitting heads of states from prosecution for international crimes. The proposal was rejected by the ASP, but there were indications that there could be an attempt to table it again at the December 2014 ASP.¹⁴⁶

The Pre-Trial Chamber in *Prosecutor v Al Bashir* already rejected claims of immunity based on Al Bashir's position as a sitting head of state.¹⁴⁷ It held that in so far as the situation had been referred to the ICC by the UNSC acting under Article 13(b) of the Rome Statute, the Al Bashir matter fell within the jurisdiction of the Court, despite the fact that it refers to crimes committed by nationals of a state that is not party to the Rome Statute.¹⁴⁸ The Pre-Trial Chamber also held that the fact that the crimes were committed on the territory of a non-state party does not deprive the ICC jurisdiction because of the UNSC referral.

However, even amongst African states, the drive for immunity has not been unanimous. Botswana has supported the work of the ICC to the extent of calling for the ASP to broaden the Court's reach so that it can be seized of matters coming from non-states parties. Botswana believes this would offer justice to victims, irrespective of whether countries choose to become parties to the Rome Statute or not.¹⁴⁹ Botswana further noted with regret that the AU had formally decided not to cooperate with the ICC over the indictments and arrest warrants issued over some leaders.¹⁵⁰

¹⁴⁴ The provisions in the Statutes of both the ICTR and ICTY are identical, and provide that, 'the official position of any accused person, whether as [h]ead of [s]tate or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment'.

¹⁴⁵ *Prosecutor v Slobodan Milosevic* Decision on Preliminary Motions, paras 28 - 34

¹⁴⁶ Institute of Security Studies, ISS Today 'Can the new African Court truly deliver justice for serious crimes?' 8 July 2014 available at http://publicinternationalallawandpolicygroup.org/wp-content/uploads/2014/07/WCPW_071414_master3.html#rw3 (accessed 12 August 2014).

¹⁴⁷ See *Prosecutor v Al Bashir* ICC Pre-Trial Chamber decision of 4 March 2009, para 44.

¹⁴⁸ *Ibid.*

¹⁴⁹ See Keynote address by His Excellency Lt. General Seretse Khama Ian Khama, the President of the Republic of Botswana during the opening plenary of the 10th Session of the Assembly of States Parties to the Rome Statute of the ICC, New York, 12 December 2011, ASP10-ST-Botswana-ENG, para 19.

¹⁵⁰ *Ibid.*, para 33.

The 2012 version of the draft Amendment Protocol had contained a weaker immunity provision, worded thus:

Without prejudice to the immunities provided for under international law, the official position of any accused person, whether as [h]ead of [s]tate or [g]overnment, Minister or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

The AU Legal Counsel presented Article 46A *Bis* and explained that pursuant to the relevant Assembly Decisions, this Article was introduced to address categories of individuals who should be covered by immunity while serving their tenure.¹⁵¹ During deliberations, delegates raised concerns regarding the extension of immunity to senior state officials and its conformity with international law.¹⁵² There were further concerns that such a provision would be in conflict with the domestic law of member states and jurisprudence. They also decried the lack of a precise definition of senior state official, and the absence of an exhaustive list of persons who should be included in the category of senior state officials.¹⁵³

In the end, there was agreement that some senior state officials are entitled to functional immunities by virtue of their functions.¹⁵⁴ The meeting resolved that the provision should include the text 'senior state officials based on their functions'. The meeting also agreed that the interpretation of senior state official should be left to the ACC to determine on a case by case basis, taking into account their functions in accordance with international law.¹⁵⁵ At the close of deliberations the STC on Justice and Legal Affairs adopted the Amendment Protocol and recommended it for consideration by the AU Assembly through the Executive Council.¹⁵⁶

The weakness of the 2012 provision lay in the fact that properly interpreted, the provision could only protect sitting presidents and senior state officials from prosecution in their own courts and the courts of foreign states, provided such immunity had not been waived by the country they represent. They could therefore be unable to claim immunity before the ACC which is an international criminal court. This would be in keeping with international law as illustrated above.

¹⁵¹ The Report, the Draft legal instruments and recommendations of the Specialized Technical Committee on Justice and Legal Affairs, adopted at the 25th Ordinary Session of the Executive Council of the AU, 20 – 24 June 2014, Malabo, Equatorial Guinea, para 24.

¹⁵² *Ibid*, para 25.

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid*, para 26.

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid*, para 27.

To cure that weakness, the AU abandoned the previous wording and adopted the final provision, which stipulates in clear and unambiguous terms that for the duration of their tenure of office, heads of state and government, senior state officials and persons acting in those capacities shall not fall within the jurisdiction of the ACC.

Subsequent to the adoption of the Amendment Protocol in Malabo in June 2014, the legal counsel for the AU justified the immunity provision as a compromise that was arrived at in order to allow government officials to fully attend to their responsibilities while in office. The problem with this approach is that it assumes that a homogenous political arrangement exists across Africa, when that is not the case. Africa has a fairly sizeable number of presidents who never leave office, such as those who rig elections in order to win and continue to be in power.¹⁵⁷ Secondly, the provision, and its justification ignores the reality that some African states are kingdoms ruled by monarchs, and therefore their leaders only leave office when they die. These leaders are also constitutionally immune from both civil and criminal prosecution in their domestic courts. The states of Lesotho,¹⁵⁸ Morocco¹⁵⁹ and Swaziland¹⁶⁰ are clear examples of the problem brought about by the immunity provision.¹⁶¹



¹⁵⁷ Several countries with have presidents who are perpetually in office. For example Zimbabwe's Robert Mugabe has ruled the country since independence, serving first as a Prime Minister from 1980 - 1987, before ascending to the presidential throne where he has been sitting since 1987; Uganda's Yoweri Museveni has served since 1986; Equatorial Guinea's Teodoro Obiang Nguema has served since 1979; Angola's Eduardo dos Santos who has been in power since 1979; Sudan's Al Bashir who came to power in 1989; Cameroon's Paul Biya who has served since 1982; Republic of Congo's Denis Sassou Nguesso, who has serve since 1979, but temporarily lost control for five years in 1992; and until his resignation following mass demonstrations in November 2014, Burkina Faso's Blaise Compaore had been in power since 1987.

¹⁵⁸ Section 50 of the Lesotho Constitution provides immunity for the king in respect of things done or omitted to be done by him in his private capacity; and immunity from criminal proceedings in respect of all things done or omitted to be done by him either in his official capacity or in his private capacity. This immunity also exists for the duration of the period of appointment, of both regents and any other person authorised to exercise the functions of the office of the king. Such regent or authorised person cannot be held criminally liable for their actions or omissions relating to their time in office.

¹⁵⁹ Morocco's Constitution, adopted in July 2011 provides for the inviolability of the person of the king in section 46. See also Madani M, Maghraoui D and Zerhouni S 'The 2011 Moroccan Constitution: A critical analysis' (2012), 24 available at http://www.constitutionnet.org/files/the_2011_moroccan_constitution_english.pdf (accessed 11 August 2014).

¹⁶⁰ Section 11 of the Swaziland Constitution provides that the King (in his executive capacity as head of State) and *iNgwenyama* (in his customary capacity as leader of the Swazi nation) are immune from all legal suit in respect of all things done or omitted to be done by him.

¹⁶¹ This position has already found judicial favour in the case of *Commissioner of Police and Another v Maseko* [2011] SZSC 15 in which the Supreme Court of Swaziland overturned a decision of the High Court in favour of Maseko who sought an interdict directing the King's Office to return his cattle which had earlier been unlawfully confiscated by this office and the police. Subsequent to the Supreme Court decision, the Chief Justice issued several Practice Directives, notably Practice Directive No.4 of 16 June 2011 in which he directed all court registrars, judicial officers and attorneys that all suits citing the king in should not be admitted in the courts of Swaziland. See in this regard Dube A 'Does SADC provide a remedy for environmental rights violations in weak legal regimes? A case study of iron ore mining in Swaziland' (2013) 3 *SADC Law Journal* 259 – 278, 269-71.

The problems identified above are further compounded by the decision of the AU to omit Paragraph Three from Article 28E in the final version of the Amendment Protocol. Paragraph Three recognised the right of a people to change a government through peaceful means, and provided thus:

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.

Such a provision would have helped citizens and victims in the three listed territories to legally remove aberrant leaders from power through peaceful means. Once removed, the immunity that flows from the office of the monarch would cease to operate, thereby allowing the ACC or the domestic courts to exercise jurisdiction over them.

The problem with the term 'senior state official' is that it is an overly vague and broad concept.¹⁶² It goes well beyond any notion of functional immunity recognised by the ICJ.¹⁶³ The purpose of functional immunity is to preserve the ability of a head of state or foreign minister to travel to other countries to carry out foreign relations. The Amendment Protocol lists heads of states or government and senior state officials. It seems the drafters envisaged immunity for a broader category of officials than international law allows for even in the domestic courts of foreign states.

It would seem that the political organs and the judicial organs of the AU are not in harmony when it comes to the question of immunity for heads of states. The African Commission, for instance, adopts a different approach to the subject. In its Robben Island Guidelines,¹⁶⁴ the African Commission was clear that impunity can only be eliminated if states interpret the immunity of heads of states in line with prevailing international law norms. In Guideline No.16, the African Commission recommended that:

¹⁶² Ferstman C 'Should international courts exempt African leaders and their senior officials from genocide and war crimes prosecution?' 24 June 2014 available at www.opendemocracy.net/carla-ferstman/should-international-courts-exempt-african-leaders-and-their-senior-officials-ge (accessed 1 August 2014).

¹⁶³ See *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002.

¹⁶⁴ Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhumane or Degrading Treatment or Punishment in Africa, (Robben Island Guidelines) available at <http://www1.umn.edu/humanrts/instreet/RobbenIslandGuidelines.pdf> (accessed 3 August 2014).

In order to combat impunity [s]tates should...ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law.¹⁶⁵

Even though the Robben Island Guidelines are soft law, they do indicate that Africa is speaking with two voices on this issue. The African Commission is not a political organ, but a judicial one, inclined more towards judicial reasoning than political reasoning. The ACC will also likely follow that same line of reasoning. This has potential to cause political backlash of the same proportions as seen towards the ICC, should a judge hold that the immunity under international law does not include immunity from the criminal jurisdiction of an international tribunal, such as the ACC.

The AU position is also not in harmony with regional initiatives aimed at eliminating impunity for the core crimes. For instance, the countries in the Great Lakes region concluded the Protocol for the Prevention and punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all Forms of Discrimination.¹⁶⁶ The Protocol, which has been ratified by 12 states,¹⁶⁷ does not provide immunity for heads of states and governments.¹⁶⁸

As currently worded, the immunity clause also increases the likelihood that instead of being used as a forum to fight against impunity for the core crimes, the ACC might end up being used by African state leaders to deal with their political opponents,¹⁶⁹ thereby turning the court into a torment chamber for opposition parties and dissent activists.¹⁷⁰

6.3.8.2 The *ne bis in idem* rule

The Amendment Protocol also introduces Article 46I which provides for the *ne bis in idem* rule. Effectively an individual who has previously been convicted or acquitted by the ACC cannot be

¹⁶⁵ *Ibid.*

¹⁶⁶ The International Conference on the Great Lakes Region (ICGLR) has a regional committee aimed at operationalizing this protocol. It was established in Kampala, Uganda in September 2010 and formalised at the ICGLR's session in Kinshasa, DRC held from 25 – 26 November 2010.

¹⁶⁷ See International Conference on the Great Lakes Region 'Genocide prevention' available at <http://www.icglr.org/index.php/en/genocide-prevention> (accessed 4 August 2014).

¹⁶⁸ International Conference on the Great Lakes Region 'Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all Forms of Discrimination' 29 November 2006, Article 12.

¹⁶⁹ Dunn TM 'The ICC and Africa: Complementarity, transitional justice and the rule of law' 12 July 2014 available at <http://www.e-ir.info/2014/07/12/the-icc-and-africa-complementarity-transitional-justice-and-the-rule-of-law/> (accessed 28 October 2014).

¹⁷⁰ Abass A 'Prosecuting international crimes in Africa: Rationale, prospects and challenges' (2013) 24 *European Journal of International Law* 933 - 946, 936.

brought before the same court for the same conduct for which he was previously put on trial.¹⁷¹ The bar introduced by Article 46I(1) applies only to matters that originate from the ACC itself, and not to matters decided by a national or regional court that eventually find their way to the ACC.

Article 46I(2) governs situations where the prosecution of an individual who was previously convicted or acquitted by a domestic or regional court is subsequently sought at the ACC. The wording of the provision envisages that there will be exceptional circumstances under which the ACC may not be bound by the *ne bis in idem* rule in prosecuting an individual who has already been convicted or acquitted by any other court than the ACC.

The following are given as prerequisites for determining when the ACC may not be bound by the *ne bis in idem* rule: (i) where the previous proceedings were conducted for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court; or (ii) where the proceedings were otherwise not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intention to bring the person concerned to justice. Such proceedings may include trials in absentia.

The *ne bis in idem* rule was designed to deal with sham trials or trials of convenience. Trials of convenience can also be the easiest way out for a state which intends to protect its senior state officials from an international court. Such trials could be designed to arrive at an acquittal, thereby precluding any other court from retrying the accused on the same set of facts.

In terms of the amendment, the only thing that can be salvaged from a sham trial is the penalty. Any penalty imposed by another court, even if it was the consequence of a trial staged for the purposes of shielding the accused, shall be considered by the ACC in its sentencing proceedings.¹⁷² This provision mirrors similar enactments in the Statutes of the ICTY¹⁷³ and ICTR¹⁷⁴ which also provide that the penalty given by a court in a prior trial shall be taken into account in the sentencing proceedings of the tribunal, even if that prior trial is deemed to have been undertaken

¹⁷¹ The wording of Article 46I(1) is clear that an individual who is convicted or acquitted by the ACC cannot be prosecuted again by the same court. It provides that:

Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

¹⁷² Article 46I(3) of the Statute annexed to the Amendment Protocol.

¹⁷³ See Article 10(3) of the Statute of the ICTY which is similarly worded.

¹⁷⁴ See Article 9(3) of the Statute of the ICTR which is couched in similar terms.

in order to shield the accused.¹⁷⁵ The Amendment Protocol thus prevents cases of double jeopardy by ensuring that an accused does not suffer twice for the same conduct, by allowing the ACC to consider any penalty issued by another court, even if that penalty resulted from the conditions listed in Article 46I(2)(a) and (b).

6.3.9 Complementarity

The Amendment Protocol introduces Article 46H which regulates complementarity of jurisdiction. Complementarity is an incident of the relationship between one court, usually an international court, with other courts (international, regional or national) in terms of which primacy of jurisdiction is determined.

When the UNSC established the ICTY¹⁷⁶ and ICTR, it vested both tribunals with what was called concurrent jurisdiction, coupled with a primacy clause.¹⁷⁷ States often feel that primacy erodes their sovereignty, and this has a negative impact on the fight against impunity.¹⁷⁸ Bartram Brown agrees with this assertion, and argues that primacy compromises states' sovereign prerogatives by requiring them to defer to an international tribunal.¹⁷⁹ It also does so by requiring states to cooperate with the international court and to obey its orders concerning such matters as the production of evidence and the arrest and detention of persons.¹⁸⁰ It was the controversy brought about by the primacy of the two first tribunals that led to a new type of shared jurisdiction being adopted. Thus complementarity was born and by the time the ICC came into existence, the international community had embraced complementarity over primacy.¹⁸¹

At the core of the complementarity principle is the belief that an international court can only investigate and prosecute core international crimes when national jurisdictions are either unable

¹⁷⁵ Compare Article 20 of the Rome Statute which does not make any provision for the penalty emanating from a trial of convenience. It only empowers the ICC to continue with the trial of an accused person who would otherwise be able to plead *autrefois convict* or *autrefois acquit* in circumstances that render the earlier trial a sham trial.

¹⁷⁶ Article 9 of the Statute of the ICTY provided that the tribunal and national courts shall have concurrent jurisdiction to prosecute perpetrators of serious violations of the laws of war committed in the territory of the former Yugoslavia since January 1991. Sub-Article (2) thereof provided that the Tribunal shall have primacy over national courts. It could at any stage of the procedure formally request national courts to defer to the competence of the Tribunal.

¹⁷⁷ Solera O 'Complementarity jurisdiction and international criminal justice' (2002) 84:845 *International Review of the Red Cross* 145 – 172, 147.

¹⁷⁸ *Ibid.*

¹⁷⁹ Brown BS 'Primacy and complementarity' (1998) 23 *Yale Journal of International Law* 383 – 436, 387.

¹⁸⁰ *Ibid.*

¹⁸¹ El Zeidy MM 'The principle of complementarity: A new machinery to implement international criminal law' (2001-2002) 23 *Michigan Journal of International Law* 869 - 975, 897.

or unwilling to do so *genuinely*.¹⁸² It is premised on the realization that it is preferable that such crimes are investigated and prosecuted in the country where they occurred, the so-called *forum deprehensionis*.¹⁸³ The complementarity principle is essentially part of the admissibility principle of the ACC,¹⁸⁴ and as such avoids the controversies of the primacy principle.

The provision opens by affirming the complementarity of the jurisdiction of the ACC to that of the national courts of member states, and to the courts of the RECs.¹⁸⁵ This provision lacks further guidelines on how competing jurisdictions between courts of the various RECs *inter se* will be handled. The reality of the African landscape is that some states take up membership in more than one regional community, and therefore fall within the jurisdiction of the different courts established by these RECs. For example, some states which are members of SADC are also members of the East African Community of States as well as the Common Market for Eastern and Southern Africa (COMESA). For example, Tanzania is a member of both the SADC and the East African Community. Whilst none of these two sub-regional bodies have criminal courts yet, there is nothing preventing this in the future, as the East African Community is already in the process of holding dialogues around the possibility of establishing their own criminal court.¹⁸⁶ Even though none of the RECs have international criminal jurisdiction, some of the issues they are competent to handle also falls within the jurisdiction of the two other chambers of the Merged Court.

The complementarity provision of the Amendment Protocol is not clear on how the competing jurisdictions of the ACC and the ICC would be managed, in light of the possibility of overlapping membership to both the Amendment Protocol and the Rome Statute by some African states. Given the fact that both the ACC and the ICC have the mandate to prosecute the core crimes, the silence on the issue of how the two courts will relate will likely result in competing jurisdiction and duplicity of the work of the two international courts.¹⁸⁷

¹⁸² See Forum for International Criminal and Humanitarian Law 'The Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes' 4 September 2009 available at <http://www.fichl.org/activities/the-principle-of-complementarity-and-the-exercise-of-universal-jurisdiction-for-core-international-crimes/> (accessed 1 August 2014).

¹⁸³ Kress C 'Universal Jurisdiction over international crimes and the *Institute de Droit international*' (2006) 4 *Journal of International Criminal Justice* 561 – 585, 567.

¹⁸⁴ Ambos K *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court – An Inductive, Situation-based Approach* (2010) 35.

¹⁸⁵ See Article 46H(1) of the Statute annexed to the Amendment Protocol.

¹⁸⁶ *Avocats Sans Frontiers* 'African and the International Criminal Court: Mending fences' (2012) 14 available at http://www.asf.be/wp-content/uploads/2012/08/ASF_UG_Africa-and-the-ICC.pdf (accessed 18 October 2014).

¹⁸⁷ *Ibid.*

Article 46H(2) simply lays down a mechanism for determining which court will hear a particular case. The provision lists instances in which cases would be inadmissible before the ACC, and these include:

- (i) A case which is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable to carry out the investigation or prosecution. It is not clear how complementarity will work between the ACC and a court of a non-African state, as the Protocol and its Statute only binds African states. For example, if Belgium, acting under the principle of universality was seized of a matter that took place in the territory of an African state that is signatory to the Protocol, it is not clear how the complementarity relationship between Belgium and the ACC would work; especially if it could be demonstrated that Belgium was both willing and able to prosecute. In that scenario there would, at the very least, be three competing jurisdictions, the territorial state (situated in Africa), Belgium and the ACC.
- (ii) The second one relates to a case that has been investigated by a particular state with jurisdiction over it and such a state has decided not to prosecute the person concerned. However, where the decision not to prosecute resulted from either the unwillingness or inability of the state to prosecute, the case will nevertheless be admissible before the ACC.
- (iii) The third instance where a case may be rendered inadmissible involves the *ne bis in idem* rule. Cases involving a person who has already been tried for the conduct which is the subject of the complaint before the ACC will be inadmissible.
- (iv) The fourth relates to cases which are not of sufficient gravity to justify further action by the ACC. This corresponds with the *de minimis* rule under domestic criminal law.¹⁸⁸

In a matter where more than one court can have jurisdiction, there are two key considerations that can bar such a matter from being heard by the ACC, and these essentially flow from the principle of complementarity. These are: (i) the willingness and (ii) the ability of the state or domestic court to either investigate or prosecute a particular matter. Determining what constitutes inability or unwillingness requires the court to embark on a judicial journey whose purpose is to ascertain the intention of the state. These two requirements will assist the ACC to

¹⁸⁸ The *de minimis* rule is a doctrine by which a court refuses to consider trifling matters. See Martin EA and Law J (eds) *A Dictionary of Law* 6 ed (2006) 158.

eliminate trials of convenience and carry out its mandate of bringing justice to victims and punishing perpetrators effectively.

6.3.9.1 Determining the willingness of a state to investigate or prosecute

The Statute annexed to the Amendment Protocol empowers the ACC to embark on the process of measuring the unwillingness of a national court to prosecute or of the state to investigate. There are three types of unwillingness mentioned by Article 46(H)(3) and these mirror those contained in Article 17 of the Rome Statute.¹⁸⁹ The first covers sham trials and relates to situations where the proceedings were undertaken or the national decision to prosecute was made for the purpose of shielding the accused from criminal responsibility for the crimes falling within the jurisdiction of the court.

The second relates to undue prolongation of the proceedings. It stipulates that where there has been unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the accused to justice, this will constitute unwillingness to prosecute.¹⁹⁰ Much like the Rome Statute, the Statute of the ACC does not give a definition of 'unjustified delay' but leaves it to the court to make a decision.¹⁹¹ This, coupled with the omission of the words '*genuinely to carry out the investigation or prosecution*' from Article 46H(2) will lower the evidential standard of inability to prosecute before a matter can be referred to the ACC.¹⁹²

The approach taken in the provision is a welcome one, as it allows room for the ACC to determine, on a case by case basis what constitutes unjustified delay. It is a flexible approach which avoids the rigidity of provisions that stipulate a fixed time period within which the domestic court ought to prosecute. This does raise some concerns though, given that in cases such as the Al Bashir case, Africa has sought to justify its refusal to cooperate with the ICC by the reason that prosecuting him would jeopardise regional efforts of peace-making and reconciliation. There is no objective

¹⁸⁹ Article 17 of the Rome Statute provides that a case shall be inadmissible where:

- (a) The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 29, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

¹⁹⁰ Article 46H(3)(b) of the Statute annexed to the Amendment Protocol.

¹⁹¹ Yang L 'On the principle of complementarity in the Rome Statute of the ICC' (2005) 4 *Chinese Journal of International Law* 121 – 132, 123.

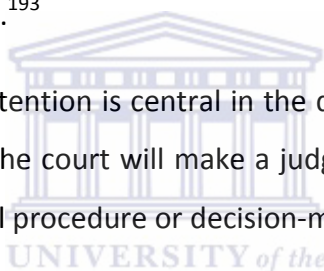
¹⁹² Abass A 'The proposed international criminal jurisdiction for the African Court: Some problematic aspects' (2013) 60:1 *Netherlands International Law Review* 27 - 50, 44.

standard to use to measure such an allegation, and if it is allowed to go unchecked, it has the potential to undo progress made in the fight against impunity.

I submit that determining undue delay will require the application of the standard of reasonableness to determine whether failure to prosecute after a given time period can objectively be justified. In other words, there must be a reason for the failure to prosecute, and that reason must be objectively reasonable. Determining what constitutes unjustified delay is a critical determination for the court to make, given that attempts to prosecute state officials, especially current and former heads of states, often drag on for a long time, as illustrated by the 20-year delay in the Hissène Habré case.

The third relates to lack of impartiality. Thus unwillingness will be established where the proceedings were not conducted independently or impartially. It must also be established that such proceedings were conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the accused to justice.¹⁹³

It is clear from the foregoing that intention is central in the determination of a state's willingness to investigate or prosecute. Hence the court will make a judgement on the intention of the state to determine what motivated its trial procedure or decision-making.¹⁹⁴



6.3.9.2 Determining the ability of a state to investigate or prosecute

Article 46H(4) governs the inability of states and domestic courts either to investigate or prosecute a matter falling within their jurisdiction. In determining inability, the ACC shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to secure the presence of the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

The wording of the Statute determines inability on the basis of judicial collapse or collapse of the entire national judicial system. This approach ignores the plight of kingdoms where monarchs, as state leaders are entitled to immunity from the jurisdiction of the courts in both their private and official capacities. It can be argued in such cases that even though there is no judicial collapse, such states cannot obtain the person of the accused or carry out proceedings due to the stature of the accused. Evidence and witnesses can also not be secured in such circumstances. The judicial

¹⁹³ Article 46H(3)(c) of the Statute annexed to the Amendment Protocol.

¹⁹⁴ Yang L 'On the principle of complementarity in the Rome Statute of the ICC' (2005) 4 *Chinese Journal of International Law* 121 – 132, 123.

system has effectively collapsed in relation to the one individual. In such cases, the state would be unable to prosecute because its constitution prevents it from doing so, even if it is willing.

Perhaps the redeeming feature of this provision is that it does not require both elements of inability and unwillingness to be satisfied. It is sufficient that one of them is satisfied. Hence in the scenario given above, the willingness of the state to prosecute the monarch would be defeated by its inability to do so, owing to the constitutional immunity. Thus inability and unwillingness are closely intertwined.

6.3.10 Penalties and enforcement of sentences

Article 43A governs penalties under the international criminal jurisdiction of the ACC. It excludes the death penalty as a competent sentence for persons convicted of international crimes under the Statute. It then emphasises that the ACC shall only impose sentences of imprisonment and pecuniary fines, which shall be pronounced in public and in the presence of the accused. The clear language used in the exclusion of the death penalty is to be commended as it gives effect to the fundamental value of human dignity and the right to life. Such a provision is critical, given that not all states in Africa have outlawed the death penalty.

Article 46(2) of the Statute provides that the jurisdiction of the court is final. Article 46J *bis* enjoins states parties to give effect to orders of the court without prejudice to the rights of *bona fide* third parties and in accordance with the procedure set out in their domestic laws. This is basically a turn to the common law rules on the enforcement of foreign judgments. A party seeking domestic enforcement of the ACC's orders in this way may encounter difficulty where the party being sued relies on sovereign immunity, which is recognised at common law in many states.

The case of *Government of Zimbabwe v Fick and Others* clearly illustrates this difficulty.¹⁹⁵ Fick and other Zimbabwean farmers had their property expropriated without compensation by the Government of Zimbabwe, following a constitutional amendment granting the Government such powers.¹⁹⁶ Faced with no remedy within the courts of Zimbabwe, the farmers approached the SADC Tribunal for relief, which found against the Zimbabwean Government.¹⁹⁷ When Zimbabwe refused to comply with the Tribunal's decision, the aggrieved farmers again approached the

¹⁹⁵ *Government of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC).

¹⁹⁶ Section 16B(3) of Zimbabwe's Constitutional Amendment Act 17 which excluded from the jurisdiction of the courts of Zimbabwe any challenge to compulsory acquisition of land by the Government.

¹⁹⁷ Hondora T 'Off the beaten track into the Savannah: The *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* ruling imperils SADC investment law' (2013) 3 *SADC Law Journal* 23 - 58, 27.

Tribunal for further relief. The Tribunal granted a costs order against Zimbabwe and referred the matter to the SADC Summit for appropriate action to be taken. Zimbabwe refused to honour even this order of costs, and the farmers turned to the courts of South Africa, a territory where the Government of Zimbabwe owned property. The farmers sought to execute the order of the SADC Tribunal in South African courts in like manner as an order issued by the domestic court of a foreign country.

One of the questions faced by the South African Constitutional Court in the *Fick* case was whether the costs order issued by the SADC Tribunal constituted a 'foreign judgment' that can be enforced in terms of the common law; and if not, whether the common law needed to be developed in that regard.¹⁹⁸ The Constitutional Court highlighted that in the case of *Purser v Sales*,¹⁹⁹ the Supreme Court of South Africa held that South African common law on the enforcement of foreign civil judgments provided only for the execution of judgments made by the domestic courts of a foreign state. It did not apply to the enforcement of judgments of the Tribunal, and that there was no other legal provision for the enforcement of such decisions. Given this *lacuna*, the Constitutional Court was then bound to develop the common law of South Africa in order to allow the enforcement of judgments or orders made by the Tribunal. This development of the common law, the Constitutional Court reasoned, would be based on South Africa's international obligations and would extend to the enforcement of judgments issued by international courts or tribunals.²⁰⁰ The court then held that the concept 'foreign court' shall also include the Tribunal.²⁰¹

Interestingly the Government of Zimbabwe had attempted to avoid responsibility by relying on sovereignty, arguing that as a sovereign state,²⁰² it was immune from the jurisdiction of South African courts in terms of the Foreign States Immunities Act,²⁰³ Section 3(1) of this law provides that immunity shall be forfeited where the state expressly waived its immunity. This provision, coupled with Article 32 of the SADC Tribunal Protocol, which provides that decisions of the Tribunal are binding and enforceable within the territories of SADC states, led the Constitutional Court to reject the Zimbabwean claim of immunity. It opined that Zimbabwe's agreement to be

¹⁹⁸ *Government of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC), para 39.

¹⁹⁹ *Purser v Sales* 2001 (3) SA 445 (SCA).

²⁰⁰ *Government of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC), para 53.

²⁰¹ *Ibid*, para 70.

²⁰² *Ibid*, para 16.

²⁰³ The South African Foreign States Immunities Act No.87 of 1981.

bound by the Tribunal Protocol, including Article 32, constitutes an express waiver in terms of Section 3(1) of the Immunities Act.²⁰⁴

The fact of the matter is that not all states have developed their common law in the same manner as South Africa did in the *Fick* case. The enforcement of orders of the ACC in the domestic courts of member states might well face the same barriers that the farmers in *Fick* faced before the Constitutional Court of South Africa developed the common law to be in line with both international law and the South African Bill of Rights. It is basically not clear how the AU intends to ensure enforcement of these provisions, given the culture of non-compliance that currently plagues the continent.

Apart from merely providing that states shall give effect to the orders of the ACC, the Amendment Protocol and its Statute does not indicate how a non-compliant state will be dealt with.

The enforcement mechanisms within the AU are either absent or weak. The Statute envisages that member states will act in accordance with their obligations and ensure that orders of the ACC are complied with. The Executive Council of the AU is notified of all judgments of the court, and this body shall monitor the execution of such judgments on behalf of the AU.²⁰⁵ Zimmerman and Baumler also cite naming and shaming as a possible mechanism to secure State compliance.²⁰⁶ This can be achieved through publication in the court's annual report of a state's failure to comply with the court's orders, in line with Article 57 of the Statute annexed to the Amendment Protocol.²⁰⁷ They argue that since this report is made public, and is also submitted to the AU Assembly, states will be embarrassed and this will help with compliance. The position they advance makes the assumption that all states are capable of being embarrassed. The decision by SADC to remove disputes between states and private persons from the jurisdiction of the SADC Tribunal after Zimbabwe refused to comply with its orders is testament to the fact that some states are not particularly concerned with how they are perceived internationally. Naming and shaming also does not offer any real tangible remedies for victims who are searching for justice. It is therefore doubtful that naming and shaming will be effective for the ACC.

²⁰⁴ *Government of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC), paras 33-35.

²⁰⁵ See Article 43(6) of the Merger Protocol. See also Zimmerman A and Baumler J 'Current challenges facing the African Court on Human and Peoples' Rights (2010) 7 *KAS International Reports* 38 -53, 47.

²⁰⁶ *Ibid*, 48.

²⁰⁷ Article 57 provides that:

The Court shall submit to the Assembly an annual report on its work during the previous year. The report shall specify, in particular, the pending and concluded investigations, prosecution and decisions and the cases in which a party has not complied with the judgment, sentence, order or penalty of the Court.

The method of naming and shaming would also not work, where the organs of the AU themselves are the ones at fault. The behaviour of the AU in dealing with Botswana's failure of to implement the African Commission's decision flowing from the matter of *Good v Botswana* is instructive in this regard.²⁰⁸ After this decision was adopted, Botswana informed the African Commission via a diplomatic note that it was not bound by the decision. The Executive Council of the AU failed to take action against Botswana in its 32nd – 33rd Activity Report, even though asked to do so by the African Commission. It chose instead to issue a general call reminding states to comply with decisions of the African Commission.²⁰⁹

The provision contained in Article 46 of the Merger Protocol was aimed at providing a more effective enforcement mechanism, and empowers the AU to compel a recalcitrant states to comply. It provides that the court shall refer a non-compliant State to the AU Assembly, which shall decide upon the measures to be taken to give effect to that judgment.²¹⁰ The AU Assembly is also empowered to act in terms of Article 23(2) of its Constitutive Act.²¹¹ The AU Assembly may, therefore, adopt other political and economic measures such as sanctions and suspension, to coerce a state to comply. The example of Egypt, which was suspended after an unconstitutional change of government is instructive.²¹² Although couched in weak terms, the wording of the Statute does advance the fight against impunity for the core crimes, only if there is political will on the part of the AU to deal decisively with defaulting states and if the political motivations that effectively led to the demise of the SADC Tribunal are not allowed to exist within the AU.

6.3.11 Lack of clarity in the provisions of the Amendment Protocol and its Statute relating to appeals

The manner in which the Amendment Protocol and its Statute have been drafted also presents problems. Some of its provisions are not clear, and this can be attributed to the piecemeal manner

²⁰⁸ *Kenneth Good v Republic of Botswana* Communication No.313/05. The case is available at <http://www.achpr.org/communications/decision/313.05/> (accessed 4 September 2014).

²⁰⁹ Killander M 'Human rights in the African Union during 2012 and 2013' (2014) 1 *African Human Rights Law Journal* 275 – 296, 283.

²¹⁰ Article 46(4) of the Merger Protocol.

²¹¹ Article 46(5) of the Merger Protocol. Article 23(2) of the Constitutive Act of the AU provides that:

Any member [s]tate that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communication links with other member [s]tates, and other measures of a political and economic nature to be determined by the Assembly.

²¹² Egypt was suspended from participation in the activities of the AU after a decision taken in July 2013, after the military overthrew the elected president Mohamed Mursi. The interim government insisted that what had happened was a popular revolution and not an unconstitutional change of government. Egypt was readmitted to the AU on 17 June 2014 after it held elections to elect new leaders in May 2014. See 'Communique 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.

in which the instrument was written. It can also be attributed to the decision of the AU to combine both civil and criminal jurisdictions under one court, instead of maintaining two separate courts. For instance, Article 18 introduced provisions on revision of and appeal against decisions of the different chambers of the Merged Court. In Article 18(1), the Statute annexed to the Amendment Protocol stipulates that in cases emanating from the General Affairs Section and the Human and Peoples' Rights Section, a revision shall be made in terms of Article 48 of the same Statute. However, Article 48 does not stipulate which chamber of the Merged Court will be responsible for such revision. It merely lays down the procedure to be followed in an application for review.

The other provisions of Article 18 address themselves to criminal appeals from the ACC. Articles 18(2) and (3) are further buttressed by Article 19(6), which clearly stipulates that '[t]he Appeals Chamber shall receive and conduct appeals from the Trial Chamber in accordance with Article 18 of this Statute'.

Despite all the above, it remains unclear if Article 18(4) relates to matters coming from the criminal chamber only, or it includes those matters arising from the two civil chambers of the Merged Court. The Article provides that '[t]he Appellate Chamber may affirm, reverse or *revise* the decision appealed against. The decision of the Appellate Chamber shall be final'.²¹³ The inclusion of the term '*revise*' denotes that the Merged Court's criminal Appellate Chamber will sit on appeals from the two other chambers as well, which would not be a strange arrangement in law, but might not be in keeping with current practice of international criminal law tribunals.

6.4 What does the new protocol mean for states that have already domesticated their obligations under the Rome Statute?

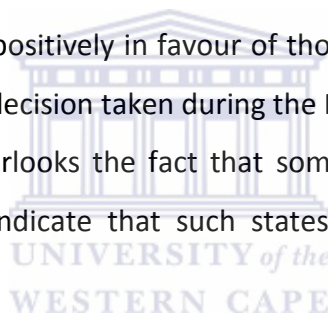
Several African states, including South Africa, Mauritius, Uganda and Kenya have enacted ICC-implementing legislation. After all, 33 African states are members to the Rome Statute. The Amendment Protocol is silent on the relationship of the new court and the ICC. It only regulates the relationship between the ACC and the domestic courts of member states as well as the Regional Economic Communities.²¹⁴ This leaves a *lacuna* on how the relationship that African states have with the ICC will be harmonised with their obligations under the Amendment Protocol and its Statute. It does not give direction on how cases of overlapping spheres of jurisdiction between the ACC and the ICC will be dealt with. There may also be cases of conflicting jurisdiction

²¹³ Emphasis my own.

²¹⁴ Article 46H(1) of the Statute annexed to the Amendment Protocol.

between the two courts. The ACC has more jurisdictional links than the ICC and this will probably lead to conflict. For example, during an unconstitutional change of government in state A, crimes against humanity are also committed and spill over to state B. State A is a member of the Rome Statute but not the Amendment Protocol and its Statute, whilst state B is a member of the African mechanisms only, and not of the Rome Statute. The perpetrators of both crimes are from state C. The crimes eventually affect or threaten the protected interests of state D. States C and D are also not party to the Rome Statute, but are party to the African mechanisms. In this case, there are competing jurisdictions.

The glaring absence of a regulatory regime seems to have emanated from an assumption by the AU that because of the frustrations of African states with the legal interventions of both the ICC and non-African states, a majority of African states will support this new court. This assumption overlooks the fact that in some of the decisions of the AU taken regarding the selective indictments of the ICC and the prosecution of senior African state officials by foreign domestic courts, not all African states voted positively in favour of those decisions. For example, Botswana entered a reservation to the entire decision taken during the May 2013 Ordinary Session not to cooperate with the ICC.²¹⁵ It also overlooks the fact that some states are not party to the Rome Statute, and there is nothing to indicate that such states will necessarily favour the African mechanism over the ICC.²¹⁶



There is also no evidence to suggest that the Draft AU Model Law that was adopted by the AU recently will be transformed into domestic legislation by states parties to the Amendment Protocol and its Statute, thereby granting their courts jurisdiction over the crimes contained in this instrument. Domestic enactments would assist in transforming the obligations of states parties under the Amendment Protocol into enforceable domestic legislation. But this has the potential of putting countries which are party to both the Rome Statute and the Amendment Protocol and its Statute on a collision course with the ICC. Given that the Amendment Protocol and its Statute do

²¹⁵ Au Assembly 'Decision on international jurisdiction, justice and the International Criminal Court', Doc.Assembly/AU/13(XXI), Assembly/AU/Dec.482(XXI), taken at the 21st Ordinary Session, Addis Ababa, Ethiopia, 27 – 27 May 2013. The Decision contains a footnote which highlights Botswana's reservation to the entire decision. The Decision highlights the AU's displeasure at the UNSC's refusal to defer proceedings in the President Al Bashir matter. It proceeded to state that the indictment of President Kenyatta and his deputy William Ruto posed a threat to on-going efforts to promote peace, national healing and reconciliation. It also affirmed its previous decisions, adopted in January and July 2008, July 2010, January and July 2011, January and July 2012 in which it called upon AU member states not to cooperate with the ICC.

²¹⁶ For example, Swaziland is not a party to the Rome Statute and the Protocol Establishing the African Court on Human and Peoples' Rights. As at 31 July 2014, there were 20 African states which are not party to the Rome Statute and 27 which were not party to the Protocol establishing the African Court. There is no indication that these states would warm up to an African mechanism simply because it is home grown.

not provide guidance on how the relationship between the ACC and the ICC is to be managed, this will lead the African continent back to the pre-ACC era, where accusations of meddling in African affairs will once again dominate the agenda of the AU.

Some commentators have suggested that the current state interest around the Amendment Protocol will soon dissipate because of the manner in which the instrument was adopted. In trying to ascertain the real reason behind the Amendment Protocol, Ademola Abass observes that the instrument was a result of protest on the part of African states.²¹⁷ He asserts that such treaties are adopted in response to a real or perceived iniquity or unjustness emanating from a pre-existing treaty, in this case, the Rome Statute and the usage of UJ by the domestic courts of Western states. Such treaties are transient in nature, and are driven more by ego than by a real desire for legal reform. Abass makes the argument that given the real reasons behind the adoption of the Amendment Protocol, and as the emotions that drove African states begin to dissipate, the process of ratification may be prolonged. There is also the possibility that such ratification and coming into force of the new instrument might not materialise at all. This, according to Abass, can be seen in the practice of African states over the past three decades, which indicate that treaties emanating from the UN stand a better chance of ratification than those from Africa.²¹⁸ The above would obviate the need to deal with conflicting treaty obligations.

Whilst the influence of emotions on the decision to create the ACC may not be ruled out entirely, Abass' assertions seem to overlook the fact that the African continent's grievances flow from a real threat to their judicial and political arrangements, from the actions of foreign domestic courts of the West, under the universality principle. The danger posed by selective referrals of matters involving non-states parties to the ICC are also not imagined, but real. Therefore, Abass' assertions that the Amendment Protocol may lose relevance because it was born out of emotions cannot be sustained.

6.5 Budgetary constraints

Article 46M makes provision for a Trust Fund to be established by a Decision of the AU Assembly. The envisaged work of the Fund is to provide legal aid for victims of crimes and human rights violations and their families. This Fund will also act as a repository for fines collected and assets

²¹⁷ Abass A 'Prosecuting international crimes in Africa' (2013) 60:1 *Netherlands International Law Review* 27 - 50, 42.

²¹⁸ *Ibid*, 38.

forfeited by order of the Court.²¹⁹ Again, here the refusal by states to comply with decisions of the AU and regional bodies paints a gloomy prospect for the viability of this Fund.

Out of a total budget of US\$308 million for the African Union for year 2014 the budget of the African Court on Human and Peoples' Rights was allocated a budget of US\$9 million,²²⁰ whilst the Assembly of States Parties allocated US\$164 million to the ICC. Of total budget of the AU, an amount of US\$126 million was obtained from member states and US\$170 million, which is more than half of the total budget, was secured from international partners, with the rest coming from African states.²²¹

A similar funding pattern within the ICC, which is currently heavily funded by western European states, has led some commentators to question its impartiality and functional independence.²²² It is because of this heavy reliance on European funding that some authors argue that the ICC is involved in 'lawfare',²²³ a situation where politically superior states utilise the international criminal law mechanisms such as the ICC to settle scores with less dominant states.²²⁴

What compounds the African problem is that African institutions do not seem to appreciate the meaning and financial impact of extending the jurisdiction of the Merged Court. For instance, the experts tasked with assessing the implications of increasing the jurisdiction of the Merged Court have been accused of taking a simplistic and over-optimistic view of the task they were given.²²⁵ Their conclusion had been that the only additional expenses likely to be incurred by expanding the court's jurisdiction would only be in the operations of the ACC. This conclusion was rejected by the AU Assembly, which requested the AU Commission to rework its recommendations and table a further report in May 2013.

The ACC will also face the same challenges in relation to funding.²²⁶ Depending on where its funding will come from, the ACC might as well be accused of being an instrument of lawfare. If

²¹⁹ Article 46M(2) of the Statute annexed to the Amendment Protocol.

²²⁰ Decision on the Budget of the African Union for the 2014 financial year, Doc.EX.CL/787(XXIII), EX.CL/Dec767(XXIII) adopted by the Executive Council of the AU at its 23rd Ordinary Session, 19 – 23 May 2013, Addis Ababa, Ethiopia.

²²¹ *Ibid.*

²²² Hoile D *Justice Denied: The Reality of the International Criminal Court* (2014) 15.

²²³ Commentators have defined lawfare as the use of law and judicial processes as instruments of warfare. See American NGO Coalition for the International Criminal Court 'Lawfare and the International Criminal Court: Questions and Answers' available at www.amicc.org (accessed 11 August 2014).

²²⁴ Hoile D *Justice Denied: The Reality of the International Criminal Court* (2014) 15.

²²⁵ Abass A 'Prosecuting international crimes in Africa: Rationale, prospects and challenges' (2013) 24 *European Journal of International Law* 933 - 946, 934.

²²⁶ Du Plessis M 'Implications for the AU Decision to expand the African Court's jurisdiction' Institute for Security Studies, Paper 235 (June 2012), 9.

such a perception exists, it has the potential to erode the legitimacy of that particular tribunal in the eyes of the community of states it is meant to serve. Once the court's legitimacy is tainted, states will be reluctant to utilise it, and the situation will lead to impunity.

The ACC's long list of crimes also makes funding a critical issue in determining whether this new forum will be able to dispense justice efficiently. Whilst its counterpart, the ICC which is sufficiently funded only deals with four crimes, the ACC has to raise funds for 14 crimes. Abass argues that the cost of prosecuting one international crime could well outstrip the annual budget of the African Court as a whole.²²⁷

6.6 Concluding remarks

There are concerns about the current failure of the AU to comply with recommendations of the African Commission.²²⁸ This is an indicator that the rule of law cannot be guaranteed under the new legal regime brought by Article 4(h) of the Constitutive Act of the AU. There is no indication that the poor human rights record of some African states, coupled with the manner in which they disregard decisions of the various human rights tribunals without consequence, will necessarily be eliminated by merely expanding the jurisdiction of the court.²²⁹ The failure and refusal of Zimbabwe to respect numerous decisions of the SADC Tribunal illustrates this point.²³⁰ Unless there is political will on the part of states, the new chamber may not achieve much in terms of ensuring justice for victims.

There are opinions that the ACC was established in order to protect African state leaders and prevent them from being prosecuted by the ICC.²³¹ The immunity provision introduced by the Amendment Protocol seems to support such a view.²³² Whilst Africa may not be faulted for pursuing an African mechanism which would restore legitimacy in international criminal justice on the continent amongst African for states, adopting a hard line approach to immunity in the

²²⁷ Abass A 'Prosecuting international crimes in African: Challenges and prospects' (2013) 24 *European Journal of International Law* 933 - 946, 944.

²²⁸ For a discussion on the compliance with the African Charter by African states, See generally Elvy SA 'Theories of state compliance with international law: Assessing the African Union's ability to ensure State compliance with the African Charter and Constitutive Act' (2012) 41 *Georgia Journal of International and Comparative Law*, 75 – 154.

²²⁹ *Government of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC).

²³⁰ *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC). See also *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008).

²³¹ Global observatory 'Leaders agree on immunity for themselves during expansion of African Court' 23 July 2014 available at <http://theglobalobservatory.org/analysis/788-leaders-agree-immunity-expansion-african-court.html> (accessed 11 August 2014).

²³² Ochieng L 'African Court no substitute for ICC' available at <http://iwpr.net/report-news/african-court-no-substitute-icc> (accessed 11 August 2014).

manner it did does not advance the fight against impunity. It also does not address the issues of abuse of UJ that the AU has been livid about.

The immunity provision, coupled with the requirement of an Article 9(3) and 30(f) declaration, might work to deny victims of the core crimes access to justice. Unlike the ICC, which does not require a further declaration before it can be seized of a matter brought by an individual or an NGO, the ACC requires states to do something more than merely ratify the instrument. This requirement is a relic borrowed from the era of human rights commissions and was aimed at getting states to support the work of human rights commissions. It is not suited for international criminal law, particularly when dealing with the core crimes. Even in the area of human rights, this requirement for the lodgement of a declaration could not be defended as it added to the ever increasing case backlog.²³³

Whilst the setting up of the ACC as a permanent international criminal court is welcomed, there are concerns arising from the possibility of regional courts on the African continent with criminal jurisdiction which are envisaged as complementary to the ACC. The efforts of the East African region to set up a criminal tribunal in this manner are quite advanced.²³⁴ The proliferation of regional courts with criminal jurisdiction also poses the risk that these courts will issue conflicting decisions in similar cases. This will not only open the door to forum shopping, but will also lead to the obfuscation of legal norms. The international community will therefore miss out on sound jurisprudence which is critical in the fight against impunity.

Immunity per se is not necessarily an entirely bad thing. At common law, the immunity enjoyed by a sovereign and minister of foreign affairs from the domestic courts of foreign states is primarily to

²³³ See Ali, who argues that the requirement for a declaration may in fact make the backlog worse, rather than reduce it. This is because as long as direct access to the court by individuals and NGOs is limited, the only possible route remains that of using the African Commission as a conduit, and this increases the backlog. See Ali AJ 'The admissibility of subregional courts' decisions before the African Commission or African Court' (2012) 6 *Mizan Law Review* 241 - 272, 262. The slow pace of finalising matters before the African Commission also means that deserving cases that could be referred by the African Commission via this secondary route are also delayed. This adds to the backlog as well. See in this regard Viljoen *F International human rights law in Africa* (2012) 460.

²³⁴ For example, the East Africa Legislative assembly during its 4th Meeting of the 5th Session held in Nairobi, Kenya on the 26th April 2012 resolved that the East African Community Council of Ministers should begin the process of requesting the transfer of proceedings for the accused four suspects in the respect to the 2007 Kenyan post-election violence from the ICC and instituting them in the East African Court of Justice on the basis that the acts complained of are contraventions of the East African Community Treaty. See Coalition for an Effective African Court on Human and Peoples' Rights 'EACJ to handle international criminal cases' 9 July 2012 available at http://www.africancourtcoalition.org/index.php?option=com_content&view=category&layout=blog&id=55&Itemid=69 (accessed 11 August 2014). See also East African Community 'Council of Ministers to Discuss Extended Jurisdiction for EACJ' available at http://www.eac.int/index.php?option=com_content&view=Article&id=1038:council-of-ministers-to-discuss-extended-jurisdiction-for-eacj&catid=146:press-releases&Itemid=194 (accessed 11 August 2014).

avoid disruption of state functions. It allows them to travel abroad on government or official business without having to worry about possible apprehension. This ensures that the state machinery continues to function well. To compel sitting heads of states and governments to attend trial proceedings can effectively disrupt government operations, as seen in the Kenyatta and Ruto trials.

In the pre-Amendment Protocol era, the AU gave much lip service to the fight against impunity, citing Article 4(h) of the Constitutive Act of the AU as evidence of its commitment. The absence of a criminal court on the African continent allowed these assertions to go untested for almost a decade. The real test came with the adoption of the Amendment Protocol, through which the AU allowed impunity to thrive under the guise of immunity. In one fell swoop, the AU undid all the work it had done in trying to strengthen its international criminal justice sector.



CHAPTER 7 - CONCLUSION AND RECOMMENDATIONS

7. Background

In this doctoral thesis a study of universal jurisdiction in respect of the core crimes of genocide, war crimes and crimes against humanity was undertaken by critically analysing the theory and practice regarding the application of UJ in Africa. In doing this, available literature such as studies, documents and reports on the African response to two distinct but closely related forms of legal intervention that kindled much debate on the African continent and abroad were reviewed. These interventions were those of the domestic courts of foreign states under the principle of UJ on the one hand, and the interventions of the ICC, particularly in matters involving states which are not parties to the Rome Statute, on the other.

7.1 Research question answered

7.1.1 Identifying the problem and setting out the roadmap for the thesis

Chapter 1 discussed the issue of jurisdiction in broad terms, and it identified the different forms of jurisdiction, namely territoriality, nationality, passive personality, protected interest and the universality principle. The chapter also established that the first four forms of jurisdiction are widely accepted by states, whilst the last one is very controversial. This controversy arises from the fact that unlike the other jurisdictional links, in the case of UJ there is no connecting factor between the crime, the perpetrator and the court, save for the gravity of the offence and its deleterious effect on humankind.

The first chapter also established that jurisdiction is central to state sovereignty, and that this centrality is the reason why extraterritorial jurisdiction attracts so much criticism from mostly the territorial state and the state of nationality.

As indicated in Chapter 1, the thesis set out to answer, and did indeed answer, the following questions:

- (a) What are the historical and legal reasons underlying the scepticism among many African states regarding the exercise of jurisdiction over African leaders by the ICC? Are these well-founded?;
- (b) What impact does the current position of African states have in respect of their international obligation to end impunity?; and

(c) Can the AU implement any internationally credible alternative procedures for giving effect to UJ within the African context? And what are the realistic chances of such procedures materialising at present?

In relation to Point (a) above, it has been established that selectivity of prosecution, by both the ICC and the domestic courts of non-African states triggered the negative African response to international legal intervention. This is discussed in detail below.

Point (b) departs from the standpoint that the African complaints were not merely an incident of politicking and were not without consequence. It was assumed that these complaints ought to have influenced the development of international criminal law and that these complaints and the attendant resolutions affected the obligation to end impunity, either positively or negatively. The thesis proved these assumptions to be correct. Indeed, the debates that took place at the AU level, as well as at the EU and UN levels, were closely connected to the critical issues in the fight against impunity. In fact, the discussions centred around the immunity of heads of states in the domestic courts of foreign states and the immunity of individuals before the ICC, whose states are not parties to the Rome Statute.

Although many advances have been made, such as the establishment of the ACC, there are also many setbacks. Africa's insistence on immunity for heads of states and senior state officials before the ACC, even for states which are parties to the Amendment Protocol does not bode well for the obligation to fight impunity. This is because Africa's position on immunity runs counter to all jurisprudence produced by the *ad hoc* tribunals,¹ the Special Court for Sierra Leone, the ICTR and the ICTY.² As discussed in Chapter 6, the African position on immunity is not in line with prevailing international law, and negates the continent's fight against impunity in relation to the three core crimes.

In relation to Point (c) above, the question was partially answered when the AU adopted the Amendment Protocol in June 2014, increasing the jurisdiction of the Merged Court to include criminal jurisdiction. What was left to be determined was whether the newly created criminal chamber would provide an internationally credible procedure for dealing with perpetrators of the core crimes. This was done in the preceding chapter where an analysis of the strengths and

¹ *Prosecutor v Charles Ghankay Taylor* available at <http://www.rscsl.org/Taylor.html> (accessed 18 July 2014).

² *Prosecutor v Slobodan Milosevic* Decision on Preliminary Motions, 8 November 2001, Case No. IT-99-37-PT.

weaknesses of the new chamber was presented, and the motivations of the AU in drafting the Amendment Protocol as it did were identified.

Chapter 1 also indicated that the significance of this thesis lay in the fact that not only would it critically assess the AU's misgivings about ICC prosecutions and UJ-based prosecutions, but that it would also make recommendations on how best Africa's legal development and reform can be handled if impunity for international crimes is to be stemmed successfully. In that regard, the preceding chapters in the thesis answered this question, and demonstrated existing weaknesses and areas of possible reform in the African international criminal justice system. In trying to address the contentious issues indicated in Chapter 1, the thesis in Chapter 5, as will be seen below, also pointed to possible reforms within the UN system as a means of restoring confidence in the ICC amongst African states.

7.1.2 Tracing the history of universal jurisdiction – a concept built on shaky foundations

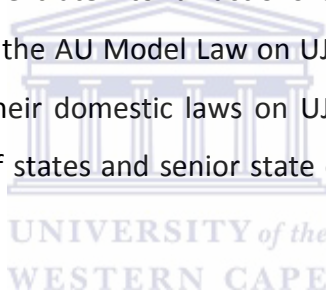
Chapter 2 traced the origins of the principle of universality. It also revealed that current international law does not prevent states from exercising UJ, provided there is no rule of international law prohibiting this. The chapter found that both the foundations of and the manner in which the principle of universality has developed are shaky. It found that in the prosecution of piracy, which is widely cited as the earliest evidence of the acceptance of the universality principle as a jurisdictional link, the actual basis for this being the fact that the crime occurred on *terra nullius*. Similarly, the crime of slave trading was also given as an example of an offence that was subjected to UJ since the 16th century because it was committed on the high seas. However, these arguments cannot be used to justify the use of UJ in respect of the three core crimes. Quite often the core crimes are committed within the territory of one or more states, and not on *terra nullius*.

By analysing a series of cases involving Nazi-era perpetrators prosecuted before the domestic courts of various European courts, the chapter revealed that none of those cases were based exclusively on UJ, but had other connecting factors as well. As a result, even though proponents of UJ point to those cases as early evidence of the acceptance of UJ, there is no evidence to support those arguments fully. For example, in the often cited case of *Israel v Adolf Eichmann*, the

jurisdictional link of passive personality also existed.³ In fact, Chapter 2 demonstrated that this link was the common link in most of the prosecutions emanating from the Nazi era.⁴

7.1.3 The African Union Model Law on Universal Jurisdiction – equipping domestic courts to try core crimes

The third chapter demonstrated that the interactions between the members of the AU and other states outside the African continent contributed to the development of international criminal justice in various ways. It also showed that whilst the AU denounced foreign legal intervention, it remained firm on the need to fight impunity in relation to the core crimes, and that this had to be done in a manner that does not undermine African efforts to ensure peace, reconciliation and regional stability. The chapter also revealed Africa's attempt to ensure a uniform code for its members in dealing with a range of international law crimes, including the three core crimes. It showed the AU giving guidance to its members on how to legislate on expanded jurisdiction for their courts in order to deal with extraterritorial actions of foreigners under the principle of universality. This was done through the AU Model Law on UJ which the AU urged its members to take into account when enacting their domestic laws on UJ. Quite notable in this model is the insistence on immunity for heads of states and senior state officials, which was also discussed in detail in Chapter 6.



7.1.4 Problems in respect of the piecemeal approach to punishing perpetrators of the core crimes in Africa

In Chapter 4, the thesis embarked on a detailed examination of how the African continent has dealt with perpetrators of the core crimes outside the structures of the ICC. The chapter therefore analysed what state practice existed and whether this was in line with Africa's stated commitment to the fight against impunity. Through an examination of key international criminal law developments such as the ICTR prosecutions, the establishment of the Special Court for Sierra Leone and the Extraordinary African Chambers which were set up to prosecute Hissène Habré, the chapter demonstrated that until 2014, Africa's approach to punishing perpetrators was piecemeal and reactionary. It concluded that this approach was not conducive to the fight against impunity. The chapter also made a key recommendation, namely that for the AU to deal with impunity in an

³ *Israel v Eichmann* 36 ILR 277, 294 [1962] (Isr.) 298 – 300.

⁴ *Demjanjuk v Petrovsky* US Court of Appeal 6th Cir. 31.10.1985 ILR 70, 546; *Israel v Eichmann* 36 ILR 277, 294 [1962] (Isr.) 298 – 300; *R v Finta* 24 March 1994 ILR 104,305; *The Monte case* United Nations War Crimes Commission XV Law Reports of Trials of War Criminals 43 (1947-49), 45-46.

acceptable manner there was a need to set up a permanent international criminal court, which the AU did in June 2014.

7.1.5 The genesis of the acrimonious relationship between the African Union and the International Criminal Court

In Chapter 5, the thesis concerned itself with identifying the genesis of the animosity between the AU and the ICC. It did this through an examination of the African response to the use of UJ by foreign courts as well as the indictments of African state leaders by the ICC. To that end, it reviewed the interactions of African states as subjects of international law with other stakeholders in the sphere of international criminal justice. It found that Africa's misgivings with the ICC cannot be viewed in isolation. First, they must be analysed in the context of similar concerns raised by the African continent in relation to the use of UJ by the domestic courts of Western states. Secondly, it must be viewed within the context of international politics, which so far has proven to exert a very strong influence in the development of international criminal law. The chapter concluded that the misgivings of the African continent about the prosecution of African heads of states by the ICC was fuelled by a number of factors, including the court's selective prosecution, the UNSC's selective referral of situations to the ICC, the failure of the UNSC to defer the Kenyatta and Ruto cases, and the UNSC referral of the situation involving Sudan's Al Bashir despite the fact that Sudan is not a party to the Rome Statute.

In identifying the ways in which Africa's response contributed to the development of international criminal law, the chapter revealed a number of positive results. These include the amendment of the ICC Rules which regulate the continuous presence of the accused at trial, and the attempts to amend the powers of the UNSC to defer matters that are pending before the ICC as per Article 16 of the Rome Statute.⁵ As indicated above, Rule 134*bis* which permits an accused on request to appear before the court by way of video technology was adopted,⁶ as well as Rules 134*ter* and 134*quarter* which regulated two distinct forms of excusal from the court. Rule 134*ter* regulates excusal from presence at trial for ordinary accused persons,⁷ whilst Rule 134*quarter* regulates

⁵ See AU Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc.Assembly/AU/13(XIII), Assembly/AU/Dec.245(XIII) Rev1, para 8.

⁶ See Resolution ICC-ASP/12/Res.7 on the Amendments to the Rules of Procedure and Evidence adopted at the 12th plenary meeting on 27 November 2013.

⁷ The new Rules can be accessed on the ICC portal at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf (accessed 7 October 2014).

excusal from presence at trial due to extraordinary public duties after making an application to the Trial Chamber and after satisfying certain conditions.⁸

7.1.6 The new African Criminal Court – challenges and prospects

Chapter 6 began by laying out the history of the international criminal justice sector on the African continent and how it has developed over the years. The chapter identified key factors that either stimulated or stifled the growth of this sector. These included factors such as the OAU's political objectives and its non-interventionist approach which saw African states refrain from being actively involved in the prevention and punishment of the core crimes. It also drew the linkages between the change of attitude as the OAU transformed into the AU and the gradual intervention by the latter, which drew its strength from Article 4(h) of the Constitutive Act of the AU. Chapter 6 demonstrated these linkages by presenting a brief history of how the various court structures of the AU developed, before embarking on a thorough analysis of the challenges and prospects of the newly created ACC under the Amendment Protocol and its Statute. It concluded that the ACC was the best solution to move the continent out of the reactionary and piecemeal approach to dealing with perpetrators of core crimes. However, the chapter also revealed very serious concerns, particularly in the areas of immunity of heads of states and the possible inability to enforce judgments of the ACC. It also identified the complementarity provision in the Amendment Protocol as problematic, given the overlap in membership of states to the various Regional Economic Communities (RECs). It also pointed out the lack of guidelines on the relationship the new court will have with the ICC.

The recommendations follow next.

⁸ For ordinary accused persons, Rule 134*ter* requires that the following conditions be met before an excusal is granted:

- (a) exceptional circumstances exist to justify such an absence;
- (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;
- (c) the accused has explicitly waived his right to be present at the trial; and
- (d) the rights of the accused will be fully ensured in his absence.

For state officials who require to be excused from continuous presence at trial, Rule 134*quarter* requires that they must submit a written request to the Trial Chamber to be excused and specify that they explicitly waive the right to be present at trial. It requires further, that the accused person must be one who is mandated to fulfil extraordinary public duties at the highest national level.

7.2 Demystifying the myth of legitimacy, popularity and functionality of the African Criminal Court

The ACC, because of its character as a home-grown African solution to the fight against impunity, has largely been touted as a forum that will enjoy legitimacy and popular participation.⁹ It was thought that an autochthonous forum like this would be embraced by African states that were aggrieved by the international legal intervention along politicised lines by both the ICC and the domestic courts of Western states.¹⁰

The above-mentioned sentiments were shared by politically powerful states on the African continent, such as South Africa. Speaking prior to the adoption of the Amendment Protocol, former South African Deputy President Kgalema Motlanthe also echoed calls for an African mechanism in light of the difficulties faced by the ICC.¹¹ He argued that the allegations of bias levelled against the ICC provided the necessary and sufficient grounds to re-imagine a new judicial scenario that could respond to the yearnings of ordinary Africans for justice. He argued that this could be achieved if Africa created its own international criminal court. Such a court would, unlike the ICC, provide a measure of elasticity in handling African cases, and be able to deal with matters in a pragmatic fashion. It would be an African entity, amenable to peculiar African conditions.¹²

It is also obvious from the statements of the AU Legal Counsel after the adoption of the Amendment Protocol that all that African leaders were concerned with was obtaining the support of all states, in order to speed up the ratification process.¹³ During a press conference held a few days after the adoption of the Amendment Protocol, the AU Legal Counsel indicated that the immunity clause was included in the Amendment Protocol as a means of getting African states to support the new instrument. He dismissed allegations that the Amendment Protocol contained blanket immunity for state leaders and other senior state officials, and explained that the

⁹ Mabunda CS 'The pros and cons of the criminal jurisdiction of the proposed African Court of Justice and Human Rights' Africa Institute of South Africa Briefing Paper No.98 (November 2013), 2.

¹⁰ See McNamee T 'The ICC and Africa' Brenthurst Discussion Paper No.2/2014 (May 2014) 11, who asserts that such institutions would serve as a bulwark against perceived challenges to Africa's sovereignty.

¹¹ 'Public lecture by Deputy President Kgalema Motlanthe' presented at the University of Pretoria 31 March 2014 available at <http://www.thepresidency.gov.za/pebble.asp?releid=17119> (accessed 30 September 2014).

¹² *Ibid.*

¹³ See Press Conference on the African Union Summit Decision on the Protocol on African Court on Human and Peoples' Rights 11 July 2014 at 1130hrs available at <http://summits.au.int/en/video/11-july-2014-1130-am-gmt3-press-conference-au-summit-decision-protocol-african-court-human-and> (accessed 30 September 2014).

immunity envisaged was functional immunity. This immunity would be enjoyed by leaders whilst in office.¹⁴

However, the fact that states support a particular international instrument should not be confused with legitimacy. A court can attract a great deal of support from state leaders who view it as expedient for them to join the multilateral treaty establishing it, without it being legitimate. Conversely an otherwise legitimate court may fall out of favour with state leaders due to its effectiveness in carrying out its mandate. For example, as indicated in Chapter 6, the SADC Tribunal was endorsed by all SADC member states and could hardly be called illegitimate.¹⁵ All the states in the SADC regarded it as a legitimate institution, with a mandate to effectively deal with disputes between states and their citizens. Its only undoing was its effectiveness in carrying out its mandate in the human rights violations cases instituted before it by dispossessed farmers against the Government of Zimbabwe.¹⁶ To ensure popular support for the tribunal,¹⁷ the SADC Summit first suspended the SADC Tribunal's operations before amending its jurisdiction so that it could hear only disputes between states.¹⁸ As a result, the SADC Tribunal no longer admits matters involving individuals or juristic persons.¹⁹

Since the ACC holds itself out as a forum whose focus is to dispense justice within the international criminal justice sphere and therefore eliminate impunity, it is imperative that any claims of legitimacy be divorced from notions of popular support. Legitimacy should instead be measured using an objective international standard, based on whether the African mechanism is capable of dispensing justice in a credible manner that advances the fight against impunity. Legitimacy often refers to justification for the exercise of authority by a tribunal.²⁰ It is premised on the belief that the tribunal possesses an appropriate or rightful claim on obedience. At the time of creation, tribunals enjoy two forms of legitimacy (i) procedural legitimacy, acquired when they come into

¹⁴ *Ibid.*

¹⁵ The SADC Tribunal was set up by Articles 9 and 16 of the SADC Treaty signed on 17 August 1992 and operationalized by the Protocol on Tribunal in the SADC.

¹⁶ The SADC Tribunal was suspended in 2010 after the Government of Zimbabwe refused to implement a ruling issued by the Tribunal relating to Zimbabwe's land reform programme in the case of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* SADC (T) Case No 2/2007, 28 November 2008.

¹⁷ See generally Dube A 'Does SADC have a remedy for environmental rights violations in weak legal regimes?' (2013) 4 *SADC Law Journal* 157 – 189.

¹⁸ The newly amended Protocol was adopted during the 34th Summit of SADC leaders in 2014. See Communiqué of the 34th Summit of SADC Heads of State and Government, Victoria Falls, Zimbabwe, 17-18 August 2014.

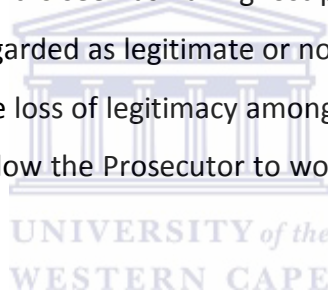
¹⁹ See 'SADC Tribunal' available at <http://www.sadc.int/about-sadc/sadc-institutions/tribun/> (accessed 14 October 2014).

²⁰ Danner AM 'Legitimacy and accountability of prosecutorial discretion at the ICC' (2003) 97:510 *The American Journal of International Law* 510 – 552, 536.

existence by means (procedures) that are accepted as consistent with prevailing norms and standards,²¹ and (ii) purposive legitimacy, which flows from the fact that the purposes served by an institution are seen as consistent with the broader norms and values of international society.²²

In dealing with an international tribunal, such as the ICC or ACC, legitimacy is closely tied to the manner in which the tribunal undertakes its adjudicative functions. This is what Wayne Sandholtz refers to as performance legitimacy, which requires that the functioning of such tribunals be seen as acceptably effective.²³ In other words, performance legitimacy is a measure of how the Office of the Prosecutor executes its mandate. Legitimacy is built into the expectation that the Prosecutor will be independent and exercise discretion in an unbiased manner.²⁴ It is the quality of decision-making that forms the bedrock of legitimacy, in other words, whether decision-making meets the minimum standards of fairness.

Whilst the ACC might have both procedural and purposive legitimacy, it runs the risk of being treated like the SADC Tribunal once it is seen as having lost performance legitimacy by being 'too legitimate'. Whether the court is regarded as legitimate or not is a function of perception. There is no legal remedy to cure any possible loss of legitimacy amongst African states, save to ensure that there are sufficient safeguards to allow the Prosecutor to work without interference from outside or from within.



Perhaps the solution to this problem lies in the age-old African practice of holding dialogues and conversations on contentious issues.²⁵ This would necessitate that the key organs of the AU should convene a dialogue in which they will hold honest and open discussions on these contentious issues. Such a dialogue should take the form of meaningful engagement, in that it must involve all parties concerned, and must be done in an honest and open manner. The aim must be for all parties to seek ways in which the unintended negative consequences of the ACC's operations can

²¹ Sandholtz W 'International criminal tribunals: Authority and legitimacy' Working Paper University of California, 3 available at (accessed 14 October 2014).

²² *Ibid.*

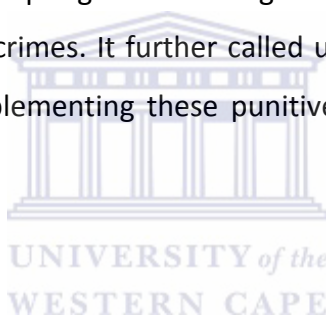
²³ *Ibid.*

²⁴ Danner AM 'Legitimacy and accountability of prosecutorial discretion at the ICC' (2003) 97:510 *The American Journal of International Law* 510 – 552, 536.

²⁵ Both the AU and SADC have deferred to this tradition in trying to resolve crisis in the cases of political violence in Burundi (2015) and the an attempted coup d'état in Lesotho (2015). See for example African Union 'The AU reiterates the need for dialogue and consensus in Burundi' available at <http://cpauc.au.int/en/content/au-reiterates-need-dialogue-and-consensus-burundi> (accessed 28 June 2015).

be mitigated.²⁶ The political organs such as the AU Assembly and the PSC would benefit quite substantially from dialoguing with the judicial organs, on the issues highlighted above. This is necessitated by the fact that to date, the dominant voice on the African continent has consistently been that of the political organs of the AU. Although the African Commission on Human and Peoples' Rights has on occasion denounced impunity for the core crimes,²⁷ its voice is drowned by the overly garrulous AU Assembly and the PSC.

Perceptions are quite often borne out of ignorance about a particular subject and dialogue has in the past been very useful in illuminating these issues with positive results. The AU-EU dialogue held at the height of the African criticisms of the use of UJ by Western states is instructive in this regard.²⁸ That process did not only clarify what UJ was and thereby removed existing misconceptions, it also made concrete recommendations which were accepted and implemented by the AU. For example, Recommendation 2 called upon African states to complement Article 4(h) of the AU Constitutive Act by adopting national legislative and other measures aimed at preventing and punishing the core crimes. It further called upon the AU Commission to consider preparing model legislation for implementing these punitive measures. This resulted in the AU Model Law on UJ.



7.2.1 Recommendation

It is strongly recommended therefore, that the AU should engage immediately in a dialogue on the legitimacy, popularity and functionality of the ACC, its intended purpose, possible negative consequences of its operations and how to mitigate them. The dialogue should involve all the key AU organs, that is both the political and the judicial organs. Independent African experts in international criminal law should also form part of this dialogue. This would be the first step towards dealing with any negative perceptions that African states might harbour against an ACC that might be perceived as overly effective, thus losing support.

²⁶ See the South African case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC), where the Constitutional Court laid down the requirements of the concept of meaningful engagement as a means of alleviating the unintended consequences of governmental action.

²⁷ Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhumane or Degrading Treatment or Punishment in Africa, (Robben Island Guidelines) available at <http://www1.umn.edu/humanrts/instree/RobbenIslandGuidelines.pdf> (accessed 3 August 2014).

²⁸ See 'The AU-EU Expert Report on the Principle of Universal Jurisdiction' 8672/1/09REV1 (16 April 2009) adopted by the 12th Meeting of the AU-EU Ministerial Troika in April 2009.

7.3 Impediments to creating an African Court with universal jurisdiction

In making the call for an African international criminal court, former South African Deputy President Kgalema Motlanthe intimated that such a court should be empowered to hear cases under the principle of universality. Whilst such calls sound noble and in line with Africa's commitment to punishing perpetrators of the core crimes, such a move would raise serious concerns, which would likely affect the legitimacy of the court in the eyes of African heads of states. The same problems which were experienced in Rome, before the adoption of the Rome Statute, could arise in the African context. For instance, empowering an international criminal tribunal under the universality principle amounts to conferring jurisdiction upon such a tribunal even over non-states parties. This would attract the same problems currently brought about by the UNSC referrals under Article 13(b) of the Rome Statute. It would also be difficult to reconcile this with Article 34 of the Vienna Convention on the Law of Treaties, which clearly stipulates that treaties cannot bind states that are not parties to them. What would further compound this problem is the fact that the Amendment Protocol and its Statute contain a long list of crimes which are not necessarily crimes under customary international law. Given the fact that the debate is still on-going regarding which international law crimes can be subjected to the universality principle, granting UJ to the ACC would only serve to cripple it and would likely affect its perceived legitimacy amongst African state leaders negatively.

The African continent has also made adequate provision for UJ in domestic legal systems, by adopting the AU Model Law and encouraging AU members to enact domestic laws in line with the AU Model Law. The fact that the Amendment Protocol has already been adopted without UJ would also make it difficult to introduce such a UJ clause at this stage, especially since a UJ-clause has the potential to subject senior state officials to the jurisdiction of the ACC, even for non-states parties. This would conflict with Africa's stated position on immunity for senior state officials, which under international law can only be enjoyed by ministers of foreign affairs and heads of states before the domestic courts and not international tribunals.²⁹ It is highly unlikely that such a broadened scope of the ACC would receive the necessary support from members of the AU. The sustained campaign to limit the scope of the ACC, using disputed immunity clauses is instructive in this regard.

²⁹ See *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002.

7.3.1 Recommendation

From a practical point of view, it is recommended that the current position, where the ACC does not have jurisdiction based on the universality principle, should be retained.

7.4 Establishing an appeal body for cases of abuse of universal jurisdiction by foreign courts

In many of its decisions regarding the abuse of UJ, the AU consistently called for the establishment of an international regulatory body with competence to review and or handle complaints or appeals arising out of the abuse of the principle of universality by individual states. The AU repeatedly voiced its condemnation of what it termed a blatant abuse of the principle of UJ by some non-African states and called for immediate termination of all pending indictments.³⁰

Whilst these are noble concerns and ones based on a real fear of interference with the sovereignty of African states by politically and economically powerful states, this proposition is problematic for international law. First it may lead to the redundancy of either this proposed structure or other pre-existing dispute resolution structures of international law, such as the ICJ and the Permanent Court of Arbitration (PCA). The ICJ has a good track record in dealing with disputes between states, and the example of the *Arrest Warrant* case is instructive in this regard.³¹ In this case, the ICJ was able to handle a dispute arising out of the abuse of the principle of universality to the satisfaction of all parties involved. The creation of too many judicial forums can therefore be deleterious to the development of international law.

Secondly, states could also use the offices of the PCA to settle disputes arising from the abuse of UJ.³² Even though largely dominated by trade and land disputes,³³ there is nothing to prevent the PCA from being seized of a dispute involving two states relating to the exercise of UJ if both states consent. For instance, during 2013, the PCA administered 30 cases arising under contracts between private parties and states or other public entities, and eight state-to-state arbitrations. These included the Arbitration between the Republic of Croatia and the Republic of Slovenia

³⁰ See AU Decision on the abuse of the principle of universal jurisdiction Doc.EX.CL/606(XVII), Assembly/AU/Dec.292(XV) adopted by the 15th Ordinary Session of the Assembly of the AU on 27 July 2010 in Kampala, Uganda, paras 3 and 4.

³¹ See *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) ICJ Reports, 14 February 2002.

³² The PCA rules are for us in arbitrating disputes involving at least one state, state-controlled entity or intergovernmental organisation. See Article 1 of the PCA Arbitration Rules 2012.

³³ See for example *The Government of Sudan/The Sudan Peoples' Liberation Movement/Army (Abyei Arbitration)* available at <http://www.pca-cpa.org/showpage.asp?pag-id=1306> (accessed 7 October 2014). On 11 July 2008, the Government of Sudan and the South Sudan Peoples' Liberation Movement deposited an Arbitration Agreement with the PCA. A final award was made on 22 July 2009.

concerning the maritime and land boundary between the two states; Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India concerning the delimitation of the maritime boundary between the two territories; and the ARA Libertad Arbitration (*Argentina v Ghana*).³⁴

The only disincentive to the use of the PCA could be the cost of arbitration involved. However, that does not detract from the fact that there are sufficient dispute resolution mechanisms under international law, to assist African states which are aggrieved by the abuse of the principle of universality.

7.4.1 Recommendation

Given the existence of these different dispute resolution mechanisms under international law, coupled with the fact that Africa has already created its own court to deal with perpetrators of the core crimes, such an appeal body is not recommended.

7.5 The difficulty of providing for direct access by individuals and non-governmental organisations

Historically, international criminal tribunals were *ad hoc* in nature. The Nuremburg Tribunal, the IMTFE, the ICTR, the ICTY, the Special Court for Sierra Leone and the Extraordinary African Chambers were all established to deal with particular crimes committed within a particular period in particular territories. As a result, the controversy regarding who can have access to these courts did not arise. After the World War II, as the era of human rights emerged, oversight bodies were also created to enforce the human rights obligations of states and offer justice for victims. This was done both at the UN level and at the regional level.

The African system previously operated with a human rights commission only,³⁵ and did not have a court until the adoption of the Protocol on the African Human Rights Court in 1998.³⁶ Even then, the court did not have criminal jurisdiction until the Amendment Protocol was adopted in June 2014. Similarly, both the European and the Inter-American human rights systems started out with

³⁴ Permanent Court of Arbitration Annual Report (2013) 8.

³⁵ Article 30 of the African Charter on Human and Peoples' Rights established the African Commission on Human and Peoples' Rights. The African Charter was adopted by the OAU in Nairobi, Kenya, on 27 June 1981 and entered into force on 21 October 1986.

³⁶ The Protocol on to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted in Addis Ababa, Ethiopia on 10 June 1998 and entered into force on 25 January 2004. Its mandate was to complement the protective mandate of the African Commission on Human and Peoples' Rights. It thus only had jurisdiction over human rights violations, and did not have criminal jurisdiction.

a human rights commission and a court. They both currently do not have courts with international criminal jurisdiction.

Access to these human rights courts is not without any hindrances. For example, in the Inter-American system, individuals have direct access only to the commission.³⁷ The court can be accessed only by the commission on behalf of aggrieved individuals.³⁸

Similarly, individuals did not always have direct access to the European Court of Human Rights. They had to first apply to the European Commission which would then proceed to the European Court on behalf of the aggrieved individual. In 1998 Protocol 11 came into force and abolished the European Commission, allowing direct access for individuals, and made the jurisdiction of the court mandatory for member states. The direct access meant that the filtering effect of the Commission had been removed, and a high number of cases made their way to the court. This led to case backlogs, reaching 160 000 cases in 2011.³⁹

Even though the European Court is a court of human rights and not a criminal tribunal, there are lessons to be learnt from it regarding how it has managed to deal with case backlogs caused by the flurry of cases sent directly to the court by aggrieved individuals. The European Court revealed in 2013 that it had managed to reduce case backlogs through innovative methods introduced by Protocol No.14 to the European Convention on Human Rights.⁴⁰ This new filtering mechanism gave the European Court an opportunity to weed out cases which were clearly inadmissible.⁴¹

Protocol No.14 introduced a new procedure according to which judges sit in single judge formations, assisted by rapporteurs from the court's registry and they decide cases that are clearly inadmissible or that can be struck out without further examination.⁴²

³⁷ The Commission was established by Article 106 of the Organisation of American States Charter and Article 33 of the American Charter on Human Rights adopted on 22 November 1969 in San Jose, Costa Rica and entered into force on 18 July 1978.

³⁸ The Inter-American Court of Human Rights was established under Article 33 of the American Convention on Human Rights. It has the optional competence to decide by means of a binding and final judgment on individual complaints. These are referred to the court either by the governments concerned or by the Commission. See Nowak M *Introduction to the International Human Rights Regime* (2003) 193.

³⁹ EU Court on Human Rights Press Release 'Reform of the Court: Filtering of cases successful in reducing backlog' ECHR 312 (2013) issued on 24 October 2013 available at hudoc.echr.coe.int/webservices/content/pdf/003-4546937-5490138 (accessed 22 August 2014).

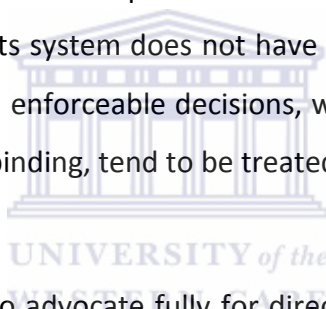
⁴⁰ Protocol No.14 to the European Convention on Human Rights of 1 June 2010.

⁴¹ European Court on Human Rights 'The Interlaken Process and the Court (2013) Report' available at http://www.echr.coe.int/Documents/2013_Interlaken_Process_ENG.pdf (accessed 21 August 2014), 10.

⁴² EU Court on Human Rights Press Release 'Reform of the Court: Filtering of cases successful in reducing backlog' ECHR 312 (2013) issued on 24 October 2013 available at hudoc.echr.coe.int/webservices/content/pdf/003-4546937-5490138 (accessed 22 August 2014), para 2.

Proponents of direct access for individuals argue that it could help the ACC to fight impunity and give victims of the core crimes access to real justice. It is the author's argument that in advocating for direct access by both individuals and NGOs to the General Affairs and Human Rights Chamber only, the organs of the Merged Court could be extended to include a filtering section similar to the one provided for under the European Protocol No.14 in order to reduce possible case backlogs.

Despite the benefits mentioned above, direct access by individuals presents some very serious problems to international criminal law. The advantages of direct access have been tested only within the context of human rights violations, and not within the context of international criminal law. First, international criminal justice employs coercive measures, such as warrants, subpoenas, incarceration etc., which the human rights system does not employ. Secondly, criminal prosecution also involves a criminal investigation and trial whose ultimate goal is to find the person that is truly responsible for the offence in order to punish him.⁴³ Thirdly, criminal proceedings also employ the services of a prosecutor with discretion on whether to initiate prosecution or not. The human rights system does not have such an office. Fourthly, the criminal justice system can issue binding and enforceable decisions, whilst the human rights system issues recommendations, which although binding, tend to be treated lightly by states and perpetrators of violations.



These differences make it difficult to advocate fully for direct access by NGOs and individuals to the ACC.

The other problem direct access raises is that its proponents do not clearly articulate what direct access entails. It is submitted that direct access can be understood in two forms. The first is a narrow form of direct access, and it mirrors state referral of cases to an international court. In this narrow sense, direct access can mean that when an NGO or an individual submits a complaint to the international criminal tribunal, the equivalent of a state referral, the Office of the Prosecutor is duty bound to consider the matter to determine if there is a reasonable basis to institute an investigation. Such referral would require the Office of the Prosecutor to engage in the process of determining how to proceed with the information received, and for the party (NGO or individual) who submitted the information to have a legitimate expectation of a response from the Office of the Prosecutor. This requires the Prosecutor to exercise his or her discretion as to whether or not to institute an investigation into the matter, based on the information received. Under the Rome

⁴³ Safferling CJM 'Can prosecution be the answer to human rights violations?' (2004) 5:12 *German Law Journal* 1469 - 1488, 1481.

Statute, direct access in this form is the exclusive preserve of states which are parties to the Statute and the UNSC. Under the African mechanism, direct access is currently enjoyed by states which are parties to the Amendment Protocol and its Statute, the Peace and Security Council, and the Office of the Prosecutor amongst others. Individuals and African NGOs with observer status with the AU or its organs can also gain access to the court directly where the state which is a party to the proceedings has made a declaration in accordance with Article 9(3) of the Amendment Protocol accepting such direct access.⁴⁴

The broad notion of direct access mirrors what currently obtains in the process of human rights redress under the various human rights commissions, such as the African Commission on Human and Peoples' Rights, and other human rights courts. Direct access in this sense basically means the ability of the aggrieved individual or an NGO to institute proceedings personally in the court in his or her or its name, or on behalf of another person or group of persons.

As indicated above, the proponents of direct access are not clear on exactly which form of direct access they are advocating.⁴⁵ Even though human rights activists lobbied hard for direct access to be given to individuals and NGOs, African governments resisted this. Eventually, the compromise of a declaration to be entered by states, allowing individuals and NGOs direct access to the Court, was reached.⁴⁶ Proponents of direct access argue that the current requirement of a declaration defeats the whole purpose of the ACC, i.e. to grant victims access to justice by punishing perpetrators of the core crimes. It is submitted that to the extent that the Prosecutor has *mero motu* powers to institute proceedings, coupled with the powers of member states and other AU organs to refer matters to the court, the denial of direct access to individuals and NGOs does not necessarily lead to impunity.

The problem with the demand for direct access to the court by NGOs is that it seems to arrogate powers to NGOs which they do not enjoy in both the domestic setting and under international law. At the domestic level, the state is *dominus litis* in criminal matters, including in the prosecution of genocide, war crimes and crimes against humanity. Individuals have access to domestic courts

⁴⁴ See Article 16 of the Amendment Protocol and its Statute introduces an amendment to Article 30(f) of the Merger Protocol.

⁴⁵ Journalists for Justice 'Briefing note on the extension of the jurisdiction of the African Court on Human and Peoples' Rights to deal with criminal matters' 14 February 2014 available at <http://www.jfjustice.net/briefing-note-on-the-extension-of-the-jurisdiction-of-the-african-court-on-human-and-peoples-rights-to-deal-with-criminal-matters/> (accessed 21 October 2014).

⁴⁶ Scaets S 'Africa's new court: Whistling in the wind' Chatham House International Law Paper Series IL BP 09/01 (March 2009), 2.

through the instrumentality of the public prosecutor. Alternatively, aggrieved individuals can benefit from the concept of private prosecution, which is discussed below. NGOs, however, do not have the power to prosecute the three core crimes at the domestic level, neither can they do so through the instrumentality of the public prosecutor. It is a given that the three core crimes are an affront to entire humankind, and as such, the right to prosecute perpetrators accrues to all states, and not juristic persons such as NGOs. Customary international law only recognises the rights of states as agents of humankind to prosecute perpetrators of these crimes. It is difficult, therefore, to comprehend how NGOs can be able to enjoy prosecutorial powers or direct access to an international court in relation to the three core crimes when they do not have those powers in the domestic sphere. The case for individuals is different, given that they do enjoy those rights and powers under domestic criminal law, and they are the subjects of the protection that customary international law seeks to provide by allowing any state to prosecute.

In light of the above, perhaps a few lessons can be learnt from the concept of private prosecution at the domestic level in order to advance an argument for direct access for individuals only, and not NGOs.⁴⁷ In most common law jurisdictions, the public prosecutor is the officer responsible for prosecuting at the public instance. The public prosecutor represents the state as *dominus litis*, and makes decisions on the institution and cessation of criminal proceedings against suspected perpetrators of crime at the domestic level.⁴⁸ However, where he or she declines to do so, an individual who has a direct and peculiar interest in the matter can initiate a criminal prosecution at the private instance. The requirement is often that the public prosecutor must first issue a *nolle prosequi*,⁴⁹ stating that he or she does not wish to proceed with the prosecution at the public instance.

It is doubtful whether there can be a complete importation of the *nolle prosequi* principle into the international sphere. Whilst extending direct access for individuals through a mechanism similar to the *nolle prosequi* might work, for a number of reasons the possibility of the *nolle prosequi* working for NGOs are slim. First, allowing direct access by NGOs would likely affect the perceived legitimacy of the ACC's proceedings negatively in the eyes of African states, since most human rights NGOs are already viewed as Western agents. This would likely expose the ACC to the same

⁴⁷ News24 'Girlfriend-killer found guilty in private prosecution' available at <http://www.news24.com/SouthAfrica/News/Girlfriend-killer-found-guilty-in-private-prosecution-20140710> (accessed 7 October 2014).

⁴⁸ Bassermann V 'Justice delayed is justice denied: Proposed law reform' October 1989 *Consultus* 113.

⁴⁹ *Crookes v Sibisi and Others* Case No. AR.368/09, KwaZulu-Natal High Court, Delivered 4 May 2010, para 15.

fate the SADC Tribunal suffered. Secondly, in the domestic sphere the *nolle prosequi* is used sparingly, as it allows only a small category of individuals to institute private prosecution, thereby granting them direct access to a domestic criminal court. The requirement is that the private prosecutor must have a direct interest in the outcome of the proceedings.⁵⁰ As van den Heever AJP put it, the aim of limiting direct access in this manner was:

[C]learly to prevent private persons from arrogating to themselves the functions of a public prosecutor and prosecuting in respect of offences which do not affect them in any different degree than any other member of the public; to curb, in other words, the activities of those who would otherwise constitute themselves public busybodies.⁵¹

For individuals at the domestic level, it is easy to determine if the private person has some substantial and peculiar interest in the issue of the trial. Often the interest arises from the kinship that exists between the individual and the deceased, and the fact that the murder of the individual has deprived the surviving relative of the kinship of the deceased.

Given the nature of the core crimes, this would be difficult to determine. This is because all the three crimes falling under the purview of this thesis require that the perpetrator must have committed the offences against a distinct group, and in a particular way. For example, to use the illustration of murder, to constitute crimes against humanity, the murder must be directed at a civilian population, with the perpetrator having knowledge of the attack and the murder must be committed as part of a widespread or systematic attack, and not as an isolated incident. Similarly, to establish genocide, any murderous acts must be committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group. For war crimes, the murder must occur within the context of conflict and must be committed as part of a plan or policy or as part of a large-scale commission of such crimes. Whilst an individual who is intent on prosecuting allegations of genocide privately has a peculiar interest in relation to his or her deceased relative(s), such interest cannot be proved in relation to the entire group that is decimated by the genocide. At best, the individual's interest should entitle him or her to prosecute privately only for the crime of murder, and not genocide.

⁵⁰ For instance, in the South African context, Section 7(1)(a) of the Criminal Procedure Act No. 51 of 1977 limits those who may bring a private prosecution to a husband, in respect of his wife; a wife or child or the next-of-kin of any deceased person where the death of that person is alleged to have been caused by the offence; the legal guardian or curator of a minor or lunatic if the offence was committed against the ward and generally any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the alleged offence.

⁵¹ *Attorney-General v Van der Merwe and Bornman* 1946 OPD 197, 201.

The solution to this problem might lie in the civil law concept of a class action. A class action allows one party to bring action on behalf of a class of persons, each member of which is bound by the judgment in such proceedings. A class action is often preceded by an application to court for certification to institute a class action.⁵² In order to remedy the problem that the individual intent on instituting a private prosecution against perpetrators of genocide only has a peculiar interest in relation to the murder of his or her next of kin, and not the entire group of victims, such an individual could be allowed to approach the ACC with an application to certify his or her prosecution as a class action. This would be a novel way aimed at producing a hybrid system of allowing individuals to gain access to the ACC directly, using the concept of *nolle prosequi*, subject to certification of the prosecution as a class action.⁵³

For the above-mentioned reasons, extending direct access for NGOs to the ACC would likely present some fundamental legal, political, administrative problems and require extensive amendments of the Amendment Protocol to cater for this. Further, prosecution at the private instance in the domestic sphere is a very expensive exercise, and importing it into the African international criminal justice sector might not solve the problems of individuals with resource constraints. This is because any form of financial assistance given to such individuals by NGOs would also run the risk of tainting them as agents of the West in the eyes of African states, which already perceive them as such.⁵⁴ However, the above notwithstanding, direct access to the ACC for individuals is strongly recommended.

7.5.1 Recommendation

7.5.1.1 It is recommended that direct access to the ACC should not be granted to NGOs.

7.5.1.2 It is recommended further that direct access by individuals and NGOs to the other two chambers of the Merged Court, the General Affairs and Human Rights Chambers should be retained, subject to the lodgement of a declaration by the state concerned in terms of the amendments suggested below.

⁵² Norton Rose Fulbright 'Class action now a reality in South Africa March 2013 available at <http://www.nortonrosefulbright.com/knowledge/publications/77139/class-actions-now-a-reality-in-south-africa> (accessed 17 October 2014).

⁵³ The South African courts have already pronounced on and expanded the use of the class action procedure to claims based on a violation of a right in the Bill of Rights. See *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC).

⁵⁴ 'Zimbabwe: International NGOs and aid agencies – parasites of the poor' 8 August 2011 available at <http://africanarguments.org/2011/08/08/parasites-of-the-poor-international-ngos-and-aid-agencies-in-zimbabwe-by-diana-jeater/> (accessed 17 October 2014).

7.5.1.3 It is recommended further that to guard against an influx of cases that may lead to case backlogs, the AU should adopt a mechanism similar to Protocol No.14 to the European Convention on Human Rights as a filtering mechanism in cases of direct access by individuals and NGOs to the General Affairs and Human Rights Chambers of the Court.

7.5.1.4 It is further recommended that Articles 9 and 30 of the Amendment Protocol to the Statute of the Merged Court be amended to grant NGOs access only in respect on the General Affairs and Human Rights Chambers. The following clause is therefore proffered as an amending clause:

Article 9 Signature, Ratification and Accession

...

(3) Any member state may, at the time of signature or when depositing its instrument of ratification or access, or at any time thereafter, make a declaration accepting the competence of *the General Affairs and Human Rights Chambers of the Court to receive cases under Article 30(g)*.

Article 30 Other entities eligible to submit cases to the Court

The following entities shall also be entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the states parties concerned:

...

(f) Individuals with a direct and peculiar interest in the matter as provided for in Article 22bis A;

(g) African non-governmental organisations with observer status with the African Union or its organs or institutions, but only with regard to a state that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to in directly. The Court shall not receive any case or application involving a state Party which has not made a Declaration in accordance with Article 9(3) of this Protocol.

7.5.1.5 It is further recommended that in relation to individuals, direct access should be granted to those individuals in like terms as in the domestic sphere through a novel method of combining of the concepts of the *nolle prosequi* and class action. The following set of provisions is proffered for amending the Statute of the Merged Court:

After Article 22 (Presidency and Vice-Presidency) insert the following as Article 22bis between Articles 22A and 22B:

Article 22bis

A. Private prosecution on certificate nolle prosequi

- (1) Subject to Article 22ter, in any case in which the Prosecutor declines to prosecute for an alleged offence-
- (a) any private individual who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;
 - (b) a husband, if the said offence was committed in respect of his wife;
 - (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or
 - (d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward, may, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence before this Court to try that offence.
- (2) (a) No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process a certificate signed by the Prosecutor that he or she has seen the statements or affidavits on which the charge is based and that he or she declines to prosecute.
- (b) The Prosecutor shall, in any case in which he or she declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).
- (c) A certificate issued under this subsection shall lapse unless proceedings in respect of the offence in question are instituted by the issue of the process referred to in paragraph (a) within six (6) months of the date of the certificate.

B. Security by private person

- (1) No private prosecutor referred to in Article 22bis A shall take out or issue any process commencing the private prosecution unless he or she deposits with the Registrar of the Court –
- (a) the amount the Court may from time to time determine by notice as security that he or she will prosecute the charge against the accused to a conclusion without undue delay; and

(b) the amount the Court may determine as security for the costs which may be incurred in respect of the accused's defence to the charge.

(3) Where a private prosecutor fails to prosecute a charge against an accused to a conclusion without undue delay or where a charge is dismissed under Article 22bis D, the amount referred to in sub-Article (1)(a) shall be forfeited to the African Union/Court.

C. Private prosecution in the name of private prosecutor

(1) A private prosecution shall be instituted and conducted and all process in connection therewith issued in the name of the private prosecutor.

(2) The indictment, charge-sheet or summons, as the case may be, shall describe the private prosecutor with certainty and precision and shall, be signed by such prosecutor or his legal representative.

D. Failure of private prosecutor to appear

(1) If the private prosecutor does not appear on the day set down for the appearance before this Court or for the trial of the accused, the charge against the accused shall be dismissed unless the Court has reason to believe that the private prosecutor was prevented from being present by circumstances beyond his control, in which event the Court may adjourn the case to a later date.

(2) Where the charge is so dismissed, the accused shall forthwith be discharged from custody and may not in respect of that charge be prosecuted privately again but the Prosecutor may at his or her instance or at the instance of the African Union prosecute the accused in respect of that charge.

E. Mode of conducting private prosecution

(1) A private prosecution shall be proceeded with in the same manner as if it were a prosecution at the instance of the Prosecutor.

(2) Where the accused pleads guilty to the charge, the prosecution shall be continued at the instance of the Prosecutor.

F. Prosecutor may intervene in private prosecution

The Prosecutor may in respect of any private prosecution apply by motion to the Pre-Trial Chamber to stop all further proceedings in the case in order that a prosecution for the offence in question may be instituted or, as the case may be, continued at the instance of the Prosecutor, and the Court shall make such an order, after taking into consideration all relevant circumstances.

G. Costs in respect of process

A private prosecutor shall in respect of any process relating to the private prosecution, pay to the Registrar of the Court the fees prescribed under the rules of court for the service or execution of such process.

H. Costs of private prosecution

- (1) The costs and expenses of a private prosecutor shall, subject to the provisions of paragraph (2), be paid by the private prosecutor.
- (2) The Court may order a person convicted upon a private prosecution to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence.

Provided further that where a private prosecution is instituted after the grant of a certificate by the Prosecutor that he or she declines to prosecute and the accused is convicted, the Court may order the costs and expenses of the private prosecution, including the costs of an appeal arising from such prosecution, to be paid out of the Defence Fund.

7.5.1.6 To remedy the problem raised by the lack of a peculiar interest in relation to the other victims of the offending conduct as articulated above, it is recommended that an individual seeking to institute a private prosecution for any of the core crimes should do so at his or her instance and on behalf of others in the same class.

Drawing from the jurisprudence of the constitutional court of South Africa in the case of *Mukaddam v Pioneer Foods (Pty) Ltd and Others*,⁵⁵ the following new provision is therefore recommended to be inserted after Article 22bis.

Article 22ter

- (1) Pursuant to the issue of a certificate in terms of Article 22bis, an individual seeking to institute prosecution at the private instance must first apply to this Court for certification of his or her action as a class action.
- (2) The Court shall grant such application after considering all relevant circumstances, including the following –
 - (a) the class on whose behalf the action would be brought consists of identifiable members, even if it is some and not all members that are capable of being identified.
 - (b) the class on whose behalf the action would be brought has been defined with sufficient precision that permits an objective determination of who qualifies as a member.
 - (c) the applicant has shown that the class has a cause of action which raises a triable issue.

⁵⁵ *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC).

- (d) *the various claims by members of the class must raise common issues of fact or law. The commonality must be of a nature that the determination of the issue may be achieved by deciding a single ground common to all claims.*
- (e) *The representative in whose name the class action would be brought is identified.*
- (f) *the representative must have the capacity to prosecute the class action, including funds necessary for litigation.*

7.6 Selective prosecutions both under universal jurisdiction proper and under the Rome Statute

It was established in Chapter 5 that the selectivity in the prosecution of offenders accused of committing the core crimes is not necessarily limited to ICC prosecutions. It can also be seen in the unwillingness of Western states to indict perpetrators of the core crimes who are nationals of powerful states.⁵⁶ For example, in 2013 China was quick to condemn Spain after its top criminal court indicted former Chinese leader Hu Jintao,⁵⁷ as part of an investigation into whether the Chinese government tortured and repressed the people of Tibet as part of an attempted genocide.⁵⁸ A group run by Tibetan exiles styled the Tibetan Support Committee had filed a lawsuit against Hu, alleging that he was responsible for a violent crackdown on Tibetan protesters by Chinese troops in 1989.⁵⁹ Owing to such pressure, the indictments were eventually withdrawn and the Spanish law was subsequently amended. The history of UJ-based prosecutions by Western states reveals that there is a correlation between the political stature of the suspect's state of nationality and the determination of whether or not they will be prosecuted. In fact, it is safe to conclude that any individuals that could not be indicted by the court of a Western state under the principle of universality enjoyed the same level of immunity before the ICC.

Even though the use of UJ by Western states seems to have abated in recent years, there is nothing to suggest that no new indictments against African state leaders and senior state officials will be made. There is also no indication that the establishment of the ACC, and the adoption of

⁵⁶ For example, Spain failed to pursue Chinese nationals accused of core crimes, and eventually amended its UJ laws to prevent them from being prosecuted by Spanish courts.

⁵⁷ See Voice of America 'China denounces Spanish court's Tibet Case against Hu Jintao' (14 October 2013) available at <http://www.voanews.com/content/reu-china-denounces-spanish-court-case-against-ex-president/1769123.html> (accessed 4 September 2014). The Chinese Government blamed the group of exiled Tibetans for trying to damage the 'extremely friendly' relations between China and Spain. The Government further blamed the group for having sinister political motives.

⁵⁸ Chang G World Affairs 'Former Chinese leader Hu Jintao indicted' (17 October 2013) available at <http://www.worldaffairsjournal.org/blog/gordon-g-chang/former-chinese-leader-hu-jintao-indicted> (accessed 4 September 2014).

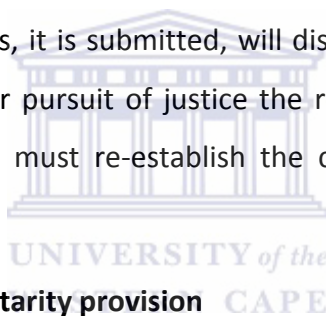
⁵⁹ Bacchi U International Business Times 'China's ex-president Hu Jintao indicted in Spain for Genocide against Tibetans' (11 October 2013) available at <http://www.ibtimes.co.uk/china-president-hu-jintao-genocide-tibet-charges-513252> (accessed 4 September 2014).

the AU Model Law will dissuade Western states from indicting Africans suspected of committing the three core crimes. The fact that five years after the adoption of the AU Model Law no African state has crafted legislation based on it further makes the possibility of Western states instituting criminal proceedings in their own courts against Africans under the principle of universality highly likely.

7.6.1 Recommendations

It is recommended that Africa should support its newly established ACC to enable it to deliver justice in a credible manner, by for instance amending the Amendment Protocol and its Statute to grant access to individuals as recommended above, and by removing immunity as recommended below.

It is further recommended that the AU must ensure that its members do enact domestic legislation fashioned after the AU Model Law to cater for the prosecution of perpetrators of the core crimes by domestic courts. This, it is submitted, will dissuade external legal intervention, as victims will be satisfied that in their pursuit of justice the remedy is to be found in the African mechanism. In other words, Africa must re-establish the confidence of victims in the African international criminal justice sector.



7.7 Problems of a weak complementarity provision

Article 46H(2) and (3) of the Amendment Protocol regulates the relationship between the ACC and the domestic courts of African states as well as between the ACC and the RECs. The main aim of complementarity provisions is to ensure that international tribunals remain courts of last resort, rather than courts of first instance. However, the current wording of Article 46H does not support such a position.

The omission of the word 'genuinely' has the effect of lowering the evidential standard of 'inability to prosecute' which is required before a matter can be referred to the ACC.⁶⁰ Ademola Abass argues that this will offer a leeway to opportunistic states to turn the ACC into a court of first instance rather than one of last recourse. This is because it would be easier to allege and prove 'inability to prosecute' rather than 'inability to genuinely prosecute'.⁶¹

⁶⁰ Abass A 'Prosecuting international crimes in Africa' (2013) 60:1 *Netherlands International Law Review* 27 - 50, 44.

⁶¹ *Ibid.*

7.7.1 Recommendation

It is recommended that Article 46H(2)(a) and (b) should be amended through the insertion of the word 'genuinely' to read thus:

Article 46H(2)

- (a) The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable *genuinely* to carry out the investigation or prosecution;
- (b) The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state *genuinely* to prosecute;

7.8 Lack of guidance on the relationship between the African Criminal Court and the International Criminal Court

Despite the fact that the ACC was established partly because of Africa's misgivings with the ICC, the Amendment Protocol does not contain any provisions detailing how these two institutions will relate to each other. It only contains complementarity provisions in relation to domestic courts and the RECs. It does not contain guidelines on how the relations between the ACC and the ICC will be managed, or if there will be a relationship at all.

It is obvious that after the Sudan-backed bid for African states to withdraw from the ICC failed in October 2013,⁶² the ICC remains relevant for the continent, especially for states that are parties to the Rome Statute. It is also obvious that the absence of guidelines on the relationship of the two courts was not accidental, but a deliberate act on the part of the AU. Africa was aggrieved by the operations of the ICC, that is, its selective prosecution. Africa also questioned the selective referrals of situations to the ICC by the UNSC. Hence, in crafting its Amendment Protocol, Africa decided not to mention anything about the ICC at all.⁶³ This was an attempt to prove that the African continent can sustain a credible international criminal justice regime, not connected to the

⁶² Namunane B 'Why African leaders failed to strike deal on ICC in Ethiopia' Daily Nation (13 October 2013) available at <http://mobile.nation.co.ke/News/International-Criminal-Court-AFRICAN-UNION-UHURU-KENYATTA/-/1950946/2031050/-/format/xhtml/-/qq3c5vz/-/index.html> (accessed 7 October 2014). See also 'Sudan expresses disappointment in AU summit for shying away from ICC pull out' Sudan Tribune (13 October 2013) available at <http://www.sudantribune.com/spip.php?article48421> (accessed 7 October 2014). The failure to agree on a mass withdrawal was blamed on divisions between the Anglophone and Francophone countries, with the former supporting the withdrawal bid, whilst the latter opposed it.

⁶³ Owing to the selectivity in prosecution, the ICC's current prosecutions in Africa is seen as an injustice towards the African continent and a form of judicial politics. See Murithi T 'Between political justice and judicial politics: Charting a way forward for the African Union and the International Criminal Court' in Werle G, Fernandez L and Vormbaum M (eds) *African and the International Criminal Court* (2014) 181.

ICC regime whose legitimacy continues to be questioned by the AU.⁶⁴ However unconscionable it may seem, there is nothing untoward with the omission of the ACC-ICC relationship in the provision on complementarity. This is because the two entities are creatures of statute, and do not fall into a single hierarchical order, even though they are both international tribunals. The Rome Statute is not binding on the AU as an entity, but binds only its members. As such, there is no real legal basis to demand a complementarity provision that deals with the ACC-ICC relationship.⁶⁵

Commentators who view the African mechanism as a misnomer are influenced by the perception that a regional international criminal court such as the ACC is incompatible with the Rome Statute. However, there is no basis for that. Article 92 of the UN Charter stipulates that, 'the International Court of Justice shall be the principal judicial organ of the United Nations'. Despite this provision, international law has plenty of dispute resolution mechanisms that states continue to use without derogating from the functionality or legitimacy of the ICJ. These include the Permanent Court of Arbitration and the World Trade Organisation. There is no basis in international law to expect any African international criminal law mechanisms to derive their existence from a multilateral treaty, the Rome Statute. To hold otherwise would be to accord supremacy to the ICC. As such, the relationship of the two entities can only be regulated outside of their founding instruments, through other means of international relations.

Perhaps this *lacuna* can be remedied through Africa's campaign to reform the UN system, particularly the UNSC. If Africa sustains its campaign for a transformed, more democratic and participatory UN system,⁶⁶ the majority of countries would be able to participate in decision-making in the UNSC, instead of the current system which allows the permanent five members to either support or veto decisions and subject non-states parties to the jurisdiction of the ICC. Such a reformed UN system would mean that African states would also be able to participate at the UNSC level, and could influence decision-making in the area of referrals of matters to the ICC. This platform would allow African states to grapple with the question of how to deal with the ICC in cases coming from the African continent in light of the absence of guidelines as indicated above.

⁶⁴ It should be noted that Botswana has continuously supported the work of the ICC, to the extent of entering a reservation to an AU decision on non-cooperation with the ICC.

⁶⁵ Abass A 'The proposed international criminal jurisdiction for the African Court: Some problematic aspects' (2013) 60:1 *Netherlands International Law Review* 27 - 50, 48.

⁶⁶ Times Live 'President Jacob Zuma's speech before the UN: Full text' 25 September 2014 available at <http://www.timeslive.co.za/politics/2014/09/25/president-jacob-zuma-s-speech-before-the-un-full-text> (accessed 7 October 2014). President Zuma raised concern that because of the veto power, the UNSC remained helpless in areas that urgently required its intervention. He further noted that coupled with the concerns over the veto power, the UN system also needed reforms that would deal with the current exclusion of regions such as Africa in the UNSC. This would be in line with democratic principles and would result in a transformed UN system.

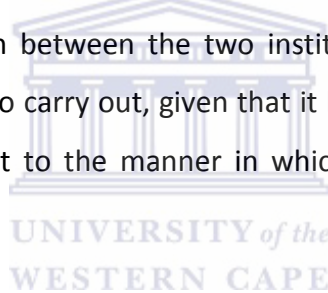
The lack of clear guidelines also creates other problems for African states on how to handle conflict between their existing ICC obligations and the newly acquired ACC obligations. It was established in Chapter 3 that a sizeable number of African states already have ICC-implementing legislation in place. If these states proceed to ratify the Amendment Protocol, and enact domestic legislation, as envisaged in the AU Model Law, there is bound to be conflict at some point.

7.8.1 Recommendations

It is recommended that Africa should retain the current complementarity provision in the Amendment Protocol.

It is further recommended that the AU should adopt guidelines on how the ACC and the ICC will relate to each other. These should be taken at the political level, outside the ambit of the Amendment Protocol.

It is further recommended that these actions should be buttressed by the establishment of formal means of institutional collaboration between the two institutions. Such a move should not be difficult for the continent of Africa to carry out, given that it has consistently indicated that it was not opposed to the ICC per se, but to the manner in which its Prosecutor selectively indicted Africans only.⁶⁷



7.9 The non-suitability of the immunity clause to the fight against impunity

Article 46A *bis* of the Amendment Protocol contains a clause providing for the immunity of heads of states and senior state officials whilst they are still in office. This clause was influenced by the worldview that looks at the state as an entity that is run by elected officials, who are accountable to the electorate, who hold office for a set period of time, and who can be removed from office using a particular legal or political mechanism. In presidential systems it can be argued that once a sitting president is cited for international crimes, an impeachment process can be initiated to remove them from office in preparation for handing them over to the ICC or the ACC. However, in some African states, even though legally possible, such impeachment proceedings are practically impossible to secure, given the amount of power and influence that the president wields. This is much more power through the help of collaborators such as army generals, security chiefs and other powerful politicians and influential actors in the private sector. These collaborators are often

⁶⁷ Abass A 'The proposed international criminal jurisdiction for the African Court: Some problematic aspects' (2013) 60:1 *Netherlands International Law Review* 27 - 50, 47.

equally keen to protect the president, given that in most instances they themselves are complicit in the commission of the core crimes. Such presidents in effect enjoy a form of *de facto* immunity. Apart from these problems within the presidential system, the kingdoms present a peculiar case of state officials who enjoy *de jure* immunity for life. The constitutions of the kingdoms of Lesotho, Morocco and Swaziland provide clearly that the monarchs in charge of these three territories enjoy immunity from criminal proceedings before their respective domestic courts. It is difficult to see how these countries would subject their leaders to the jurisdiction of an international court, when they are above the law at the domestic level. Unlike in the case of presidents who can be impeached, there is no legal mechanism for removing such monarchs from power, unless they abdicate.⁶⁸ Despite these challenges, the AU adopted the Amendment Protocol, granting such immunity to African heads of states and senior state officials before the ACC.

As indicated in Chapters 4 and 6 above, Africa's insistence on immunity remains a thorny issue for international criminal justice, especially given the jurisprudence of other international law tribunals that have pronounced on the issue of immunity of ministers of foreign affairs and sitting heads of states. The defence in the *Taylor* case argued unsuccessfully that Mr Charles Taylor enjoyed functional immunity by virtue of his position as a head of state, and that the warrant for his arrest was an attempt to frustrate his peace-building efforts in West Africa.⁶⁹ It further argued that the service of the warrant upon Mr Taylor whilst in Ghana was a violation of the principle of sovereign equality.⁷⁰ The defence's submission was built around the argument that the Special Court for Sierra Leone was not an international court, but a national one and as such could not indict a sitting head of state. Having found that it was indeed an international court, established by the UNSC to prosecute perpetrators of international crimes who bore the greatest responsibility, it reached the finding that immunity of heads of states cannot be claimed by an accused appearing before an international court.

Further, in the *Prosecutor Slobodan Milosevic*,⁷¹ the ICTY emphasized the fact that sitting heads of states do not enjoy immunity from criminal proceedings before an international tribunal. Both the

⁶⁸ See for example the King of Spain, who abdicated his throne in favour of his son in early 2014. The Spanish Government crafted a royal decree, signed by the Council of Ministers to allow the former king and queen to maintain their immunity from both civil and criminal proceedings. The current king enjoys that immunity as well. See Reuters 'Spain's former king Juan Carlos to get legal immunity' 20 June 2014 available at <http://uk.reuters.com/article/2014/06/20/uk-spain-king-immunity-idUKKBN0EV1PD20140620> (accessed 14 October 2014).

⁶⁹ *Prosecutor v Charles Ghankay Taylor* available at <http://www.rscsl.org/Taylor.html> (accessed 18 July 2014).

⁷⁰ *Ibid.*

⁷¹ *Prosecutor v Slobodan Milosevic* Decision on Preliminary Motions, 8 November 2001, Case No. IT-99-37-PT.

work of the Special Court for Sierra Leone and the ICTY was made much simpler by the fact that their founding statutes contained clauses that stated in clear and unambiguous words that perpetrators of the core crimes cannot claim any immunity before these tribunals. For example, Article 6(2) of the Statute of the Special Court for Sierra Leone provided that ‘the official position of any accused persons, whether as head of [s]tate or [g]overnment or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment’. Article 7(2) of the Statute of the ICTY and Article 6(2) of the Statute of the ICTR were worded in similar terms.⁷²

As indicated earlier, the abandoned draft version of the immunity clause that was contained in the 2012 draft of the Amendment Protocol was couched in much better terms that did not violate international law. It provided that:

Without prejudice to the immunities provided for under international law, the official position of any accused person, whether as head of state or government, minister or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

The advantage of such a clause was that it acknowledged the fact that any immunities claimed by perpetrators of the core crimes based on their positions would be subject to international law. In other words, to determine whether a sitting president was immune from prosecution, the ACC, under the 2012 version, would have had to look at the jurisprudence of the ICJ, the ICTY and the Special Court for Sierra Leone, and conclude that such immunity does not operate before an international tribunal. Effectively, under the 2012 version, African state leaders did not have any immunity before the ACC at all.

Article 46A *bis*, which contains the 2014 version of the immunity clause provides that:

No charges shall be commenced or continued before the court against any serving AU head of state or government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

The inclusion of the immunity clause in the final text of the Amendment Protocol in 2014 overlooks the fact that the ACC was set up to deal primarily with international crimes, and to focus

⁷² Both Article 7(2) of the ICTY Statute and Article 6(2) of the ICTR Statute provide that ‘the official position of any accused person, whether as head of [s]tate or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment’.

on those perpetrators who bear the greatest responsibility for the commission of the core crimes. It was not necessarily set up to deal with junior accomplices, since the domestic courts of African states can do that without much hindrance. International courts such as the ACC are created to deal with the legal vacuum that would be created due to the fact that heads of states enjoy immunity before foreign domestic courts, and in most instances, before their own courts. Hence international criminal courts provide a remedy for victims who would otherwise not have access to justice by virtue of this legal vacuum.

Insisting on immunity for heads of states also goes against the grain of the Article 4(h) right of the AU to intervene in the affairs of a member state in respect of grave circumstances. It effectively narrows the scope of intervention merely to peace-making and reconciliation efforts, which the AU has consistently invoked in the Darfur case and in trying to defend its stance in opposing the arrest warrant issued by the ICC against Al Bashir.⁷³

In light of the above, it is submitted that for the continent to deal effectively with impunity for the core crimes, the Amendment Protocol must be amended to remove this immunity. This would necessitate a complete deletion of Article 46A *bis* which protects sitting heads of states and governments, and senior state officials from the jurisdiction of the ACC.

Since Article 46A *bis* is closely linked to Article 46B which regulates individual criminal responsibility, this latter provision should also be amended to deal with its cross-referencing of Article 46A *bis*. Article 46B(2) provides that, '[s]ubject to the provisions of Article 46A *bis* of this Statute, the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment'.

In the event that the AU fails to amend the immunity provisions as suggested above, the African continent could pin its hopes on a progressive bench to interpret the current immunity provision in line with prevailing international law. However, even with a progressive bench, there is the risk of non-compliance with a judgment arrived at on the basis of what the AU might perceive as a violation of the immunity of African heads of states and senior state officials. Further, a progressive interpretation of the immunity clause is also dependent on a progressive and independent prosecutor preferring charges against a sitting president, and obtaining the go-ahead from the Pre-Trial Chamber to proceed with the prosecution. As discussed below, the current legal framework does not allow for an independent prosecutor.

⁷³ Bosl A and Diescho J (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 122.

7.9.1 Recommendations

It is recommended that Article 46A *bis* should be deleted completely from the Amendment Protocol and replaced with the following provision:

Article 46A bis

Individual criminal responsibility

- (1) The Court shall have jurisdiction over natural persons pursuant to this Statute.
- (2) A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

It is further recommended that following clause be adopted instead of the problematic provisions set out above.

Article 46B

Irrelevance of official capacity

- (1) For the avoidance of any doubt, 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, a government official or senior state official, or any person acting or entitled to act in such capacity, shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
- (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The last two provisions, that is, Article 46B(3) and (4), should be placed under the following heading and their wording improved in the following manner:

Article 46B bis

Responsibility of superiors

- (1) The fact that any of the acts referred to in Article 28A of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or

to punish the perpetrators thereof, *or to submit the matter to the competent authorities for investigation and prosecution.*

- (2) The fact that an accused person acted pursuant to the order of a Government or a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Court determines that justice so requires.

It is also recommended that once the Amendment Protocol and its statute have been amended as suggested above, the rules of the ACC should be drafted so as to permit heads of states and senior state officials to apply for leave to be excused from continual presence at trial. These rules should be fashioned after Rule 134*bis*, Rule 134*ter* and Rule 134*quarter* of the ICC.

The following are therefore recommended to ensure that trials involving a sitting president do not disrupt the functioning of the state:

Presence through the use of video technology

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial.
2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.

Excusal from presence at trial

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial.
2. The Trial Chamber shall only grant the request if it is satisfied that:
 - (a) exceptional circumstances exist to justify such an absence;
 - (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;
 - (c) the accused has explicitly waived his or her right to be present at the trial; and
 - (d) the rights of the accused will be fully ensured in his or her absence.
3. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.

Excusal from presence at trial due to extraordinary public duties

1. An accused subject to a summons to appear who is mandated to fulfil extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to

be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.

2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.

7.10 The role of the African Union in the appointment of Prosecutor

The manner in which the prosecutor of the ACC is appointed, coupled with the fact that on the African continent states are notorious for holding the judiciary hostage to the executive arm of government, militate against the independence of the prosecutor.⁷⁴ Article 22A(2) provides that the prosecutor and his or her deputies 'shall be elected by the Assembly [of the AU] from amongst candidates' who shall be drawn from states which are parties to the Amendment Protocol. These candidates must also be nominated by states that are parties to the Protocol. Unlike the appointment of the prosecutor of the ICC, the African method is open to political interference. The Rome Statute provides for the prosecutor to be appointed by secret ballot by a majority of the Assembly of States Parties (ASP).⁷⁵ Similarly, the ASP, and not a political formation of states, determines the remuneration of the prosecutor, deputy prosecutors, judges and the registrar of the ICC.⁷⁶

The weakness of the African approach is that even though candidates for the office of the prosecutor come from nationals of states parties, and are nominated by states parties, the final appointment is done by the entire AU Assembly, which will comprise of both states which are parties and those which are not parties to the Amendment Protocol. This effectively means that states that are not parties to the founding treaty will have an opportunity to influence how that treaty is implemented, by voting in favour of or against a particular candidate, and by determining

⁷⁴ Abass A 'The proposed international criminal jurisdiction for the African Court: Some problematic aspects' (2013) 60:1 *Netherlands International Law Review* 27 - 50, 43.

⁷⁵ See Article 42(3) of the Rome Statute.

⁷⁶ See Article 49 of the Rome Statute.

the remuneration of the prosecutor.⁷⁷ This is a worrisome provision, since it subjects the appointment of the prosecutor to the most political of the AU organs, its Assembly.⁷⁸

Whilst it is appreciated that the Amendment Protocol was adopted by an already existing organ, the AU, and therefore obviated the need to form an ASP, Africa needed to create an ASP to be responsible for the administration of its Amendment Protocol and its Statute. Africa ought to have created a management oversight and legislative body of the ACC. The advantage of such an arrangement would be that the political organs would have limited interaction with this international criminal justice mechanism, and this would guarantee its independence. However, under the circumstances, the creation of an ASP would not be feasible given the fact that the ACC is but a chamber of a larger court, with two other non-criminal law chambers, namely the General Affairs Chamber and the Human and Peoples' Rights Chamber.

7.10.1 Recommendation

In order to ensure the independence of the judges and the prosecutor of the ACC, it is recommended that Africa should consider a further amendment of the Amendment Protocol to contain a stronger provision on appointment of the ACC personnel.

The following clauses must be added to Article 22A which establishes the office of the prosecutor:

- (1) Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.
- (2) The remuneration and conditions of service of the Prosecutor and Deputy Prosecutors shall be determined by the Assembly on the recommendation of the Court made through the Executive Council. *These salaries and allowances shall not be reduced during their terms of office.*

7.11 The challenges of scarce resources and a list of crimes that is too broad

The ACC also runs the risk of not performing as a proper court should. This is because unlike the other international criminal courts it has a long list of crimes over which it has jurisdiction. On average, the other tribunals had jurisdiction over three crimes only. The Amendment Protocol also contains crimes which are not regarded as crimes proper under international law. According to

⁷⁷ See Article 22A(10) of the Statute annexed to the Amendment Protocol, which provides that, 'the remuneration and conditions of service of the Prosecutor and Deputy Prosecutors shall be determined by the Assembly [of the AU] on the recommendation of the Court made through the Executive Council'.

⁷⁸ Abass A 'The proposed international criminal jurisdiction for the African Court: Some problematic aspects' (2013) 60:1 *Netherlands International Law Review* 27 - 50, 43.

Ademola Abass, for a crime to qualify for prosecution by an international tribunal, it must be recognised as 'international' and 'serious' enough by customary international law for the majority of states designating it as such and/or must be a subject of a treaty in force in those states.⁷⁹ The criteria of 'seriousness' and 'international' must co-exist for the ACC to have jurisdiction over an international crimes, since international criminal tribunals are by their very nature reserved for the most serious international crimes.

The inclusion of crimes such as corruption and unconstitutional changes of government also increases the likelihood that this will affect the disposition of African leaders towards the Amendment Protocol negatively.⁸⁰

The reality of resource constraints, staff shortages and possible case backlogs will mean that the ACC cannot deliver justice on the three core crimes since it will be stretched over the other offences which do not even qualify as international law crimes. Nothing illustrates this point more clearly than the AU's struggle to raise funds to set up the Extraordinary African Chambers to try Hissène Habré. In 2014, the total budget of the AU was US\$308 000 000.⁸¹ Out of that amount, the African Court on Human and Peoples' Rights had a budget of US\$1 000 000,⁸² and the African Commission's budget was US\$4 000 000.⁸³ Generally, the AU's budget is largely funded by external donors, with only about 40 per cent of the funds coming from African states. Even then, only five countries, namely: South Africa, Libya, Egypt, Nigeria and Algeria provide about 65 per cent of the African contributions.⁸⁴ This effectively means that foreign donor funding that will be sourced will come with conditions attached, and this might prove to be a setback to Africa's fight against impunity as states will interpret such conditions as interference with their sovereignty.

⁷⁹ *Ibid*, 34.

⁸⁰ *Ibid*, 39.

⁸¹ Institute for Security Studies 'Think again: In defence of the African Union' 9 September 2014 available at <http://www.issafrica.org/iss-today/think-again-in-defence-of-the-african-union> (accessed 14 October 2014).

⁸² South African Foreign Policy Initiative 'Budget of the African Union for the 2014 financial year' 3 June 2013 available at <http://www.safpi.org/news/article/2013/budget-african-union-2014-financial-year> (accessed 13 October 2014).

⁸³ Killander M and Nkrumah B 'Human right in the AU during 2012 and 2013' (2014) 14 *African Human Rights Law Journal* 275 - 296, 277.

⁸⁴ Murdock H Business Day Live 'Obasanjo's AU funding proposal rejected' 1 April 2014 available at (accessed 14 October 2014).

7.11.1 Recommendations

An apposite recommendation here is for AU members to revise the list of crimes over which the ACC has jurisdiction, and limit these to only those that qualify as crimes of serious international concern.

It is recommended that the following crimes should be retained: genocide, war crimes, crimes against humanity, piracy and unconstitutional changes of government. The latter crime should be retained since Africa already has a charter criminalising it.⁸⁵

It is recommended further that the AU needs to prevail on its members to commit themselves to funding its own projects, including the ACC.

7.12 Corporate criminal liability

The inclusion of corporate criminal liability in the Statute of the ACC is very commendable, as it marks a departure from the classical theory of international law in which only states are subjects of international law. It recognises the role of multinational corporations (MNCs) in society. It is in line with the aspirations of the international community as contained in the Universal Declaration of Human Rights, which urges 'every individual and every organ of society' to strive to promote respect for human rights.⁸⁶ However, given that most corporations which are involved in areas where the three core crimes are often committed are MNCs with distinctly foreign nationalities, raises cause for concern. These MNCs in some instances have grown to be even stronger than the governments in place in the territories where they operate.⁸⁷

The governments of Western states have often used their political power to protect their citizens from being tried for committing the core crimes, and there is a high likelihood that they would protect their corporate citizens equally. As indicated in the preceding chapters, the examples of the role played by the US in preventing the Gaza situation emanating from Operation Cast Lead from being referred to the ICC⁸⁸ and the uneventful indictment of Ariel Sharon by a Belgian

⁸⁵ The African Charter on Democracy, Elections and Good Governance was adopted in Addis Ababa, Ethiopia on 30 January 2007 and entered into force on 15 February 2012.

⁸⁶ Kamga SD and Ajoku OO 'Reflections on how to address the violations of human rights by extractive industries in Africa: A comparative analysis of Nigeria and South Africa' (2014) 17:1 *Potchefstroom Electronic Law Journal* 453 – 519, 454.

⁸⁷ *Ibid*, 453.

⁸⁸ Robertson G The Guardian 'Gaza: How international law could work to punish international crimes' (1 August 2014) available at <http://www.theguardian.com/commentisfree/2014/aug/01/gaza-international-law-war-crimes-security-council> (accessed 7 October 2014).

court,⁸⁹ or the failed indictment of former Israeli Prime Minister, Tzipi Livni by a British court,⁹⁰ as well as the political pressure put on Spain by China to drop charges against Chinese senior state officials are illustrative of this point. It is difficult to comprehend how the US or China would allow their corporations to be brought before the ACC.

Even if such MNCs are brought before the ACC successfully, there is the possibility that the orders of the court may not be capable of enforcement. This is because in most instances MNCs are headquartered where their parent companies are registered, which is often in the territory of Western states. Their properties are also mostly to be found in those territories in which the parent company is incorporated. Any judgment of the ACC that has to be executed, for instance an order for attachment of the MNC's property in order to compensate victims, would require the cooperation of the courts of Western states. As highlighted in Chapter 6, this will require states with a common law heritage, for example, to develop their common law rules to treat orders of an international tribunal the same way as they would treat orders emanating from a foreign court. This will affect enforcement of orders issued by the ACC. The South African courts, for example, had to develop South African common law on the enforcement of foreign judgments, in order to afford justice to Zimbabwean farmers who sought to enforce an order issued by the SADC Tribunal in South African courts.⁹¹ Similar problems are likely to be experienced in francophone and lusophone African states, which predominantly follow the civil law tradition.⁹² Francophone countries use a procedure known as the *exequatur* for foreign judgments that require enforcement in the domestic court. The *exequatur* is aimed at declaring enforceable in a state a judgment or arbitration decision rendered in another state.⁹³ The latter set of states will also be required to develop their laws to allow the enforcement of judgments of international tribunals in the same manner as foreign judgments.⁹⁴

⁸⁹ Seroussi J 'The cause of universal jurisdiction: The rise and fall of an international mobilisation' in Dezalay Y and Garth B (eds) *Lawyers and the Construction of Transnational Justice* (2013) 49. See also Nicolaou-Garcia S 'Universal jurisdiction against Israeli officials' available at <https://www.middleeastmonitor.com/reports/by-silvia-nicolaou-garcia/54-universal-jurisdiction-against-israeli-officials> (accessed 7 October 2014).

⁹⁰ Black I and Cobain I 'British court issued Gaza arrest warrant for former Israeli minister Tzipi Livni' *The Guardian* 14 December 2009 available at <https://www.globalpolicy.org/international-justice/universal-jurisdiction-6-31/48557.html> (accessed 7 October 2014).

⁹¹ *Government of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC), para 70.

⁹² Adjolohoun HS 'Visiting the Senegalese legal system and legal research: A human rights perspective' April 2009 available at <http://www.nyulawglobal.org/globalex/senegal.htm# 4. Procedure for> (accessed 8 November 2014). See also Mwalimu C *Seeking viable grassroots representation mechanisms in African constitutions: Integration of indigenous and modern systems of government in sub-Saharan Africa* (2009) 74.

⁹³ Global Investment Centre *Senegal Business Law Handbook - Strategic Information and Basic Laws* (2012) 38.

⁹⁴ Adjolohoun HS 'Visiting the Senegalese legal system and legal research: A human rights perspective' April 2009 available at <http://www.nyulawglobal.org/globalex/senegal.htm# 4. Procedure for> (accessed 8 November 2014).

Western courts, particularly American courts, had until 2013 been open to litigants seeking justice for crimes committed by US corporations abroad. In the past, victims of human rights abuses committed abroad by MNCs who enjoyed American nationality had been made possible by several US pieces of legislation that allowed for suit to be brought against them for acts committed abroad against non-US citizens.⁹⁵ This was done through the American Alien Tort Statute of 1789.⁹⁶ This Statute had, for example, been used successfully in the case of *Filartiga v Pena-Irala*.⁹⁷

However, a change in American policy led to a change of trajectory in judicial reasoning.⁹⁸ In the case of *Kiobel v Royal Dutch Shell Petroleum*,⁹⁹ a lawsuit had been brought against the Royal Dutch Shell Petroleum Company by refugees who now resided in the US and who were accusing the MNC of aiding and abetting the Nigerian military in the systematic torture and killing of environmentalists in the 1990s.¹⁰⁰ The application was unsuccessful as the District Court found that only claims for aiding and abetting torture, crimes against humanity, and arbitrary detention were sufficiently defined under international law to be actionable under the Alien Tort Statute. On appeal to the US Court of Appeals for the Second Circuit, the court invoked a novel theory that international law does not hold corporations liable for human rights crimes and held that as such corporations could not be sued under the ATS.¹⁰¹

The matter was eventually brought before the US Supreme Court on the narrow question of whether a corporation could be sued under the Alien Tort Statute for violating international law.¹⁰² In its 2013 decision, the US Supreme Court severely limited the instances in which the Alien Tort Statute can be used. It held that where claims brought under the Alien Tort Statute flow from conduct that occurred outside the US, those claims must 'touch and concern the territory of the

⁹⁵ For instance, a series of lawsuits were instituted against the Royal Dutch Shell Oil Company in the US courts from around 2006 for environmental degradation and human rights violations in Nigeria. The cases were brought under the Alien Tort Statute which gave non-US citizens the right to file suits in US courts for international human rights violations, and the Torture Victim Protection Act, which allows individuals to seek damages in the US for torture or extrajudicial killing, regardless of where the violations take place.

⁹⁶ The Alien Tort Statute simply provides that, 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.

⁹⁷ *Filartiga v Pena-Irala* 630 F.2d 876 (2d Cir. 1980). *Filartiga* brought a lawsuit against *Pena-Irala* for torture committed abroad. The court found that official torture is prohibited by the law of nations, and that *Filartiga* had a claim under the Alien Tort Statute since *Pena-Irala* was accused of violating the law of nations.

⁹⁸ The US Government in its amicus brief in the first *Kiobel* litigation supported the plaintiff, arguing that corporations could be liable for their actions flowing from human rights violations. See the US Government's amicus brief at (accessed 18 October 2014).

⁹⁹ *Kiobel*, 456 F. Supp. 2d 457, 468 (S.D.N.Y. 2006).

¹⁰⁰ Centre for Justice and Accountability '*Kiobel v Shell*' available at <http://cja.org/section.php?id=510> (accessed 17 October 2014).

¹⁰¹ *Kiobel*, 621 F.3d 11 (2d Cir. Sept. 17, 2010).

¹⁰² *Kiobel v Royal Dutch Shell Petroleum Company* No. 10-1491 (US 2012)

United States ... with sufficient force to displace the presumption against extraterritorial application'.¹⁰³ The court went on to state that corporations are often present in many countries, and that it would reach too far to say that mere corporate presence suffices for the US courts to exercise jurisdiction over their extraterritorial acts.¹⁰⁴ The court stated that it was bound by the presumption against extraterritoriality, which guards against American courts triggering serious foreign policy consequences, and allows the courts to defer policy decisions to the political branches.¹⁰⁵

A similar case, brought by an American NGO against the Palestinian Authority for the death of an American citizen, was dismissed on similar grounds.¹⁰⁶

In the first *Kiobel* litigation (2010) the US Government had filed papers in support of the plaintiffs. In the second *Kiobel* litigation (2012), the US Government changed its tune and argued that the Supreme Court should refuse to recognize a suit brought under the Alien Tort Statute that 'challenged the actions of a foreign sovereign in its own territory' where, as in this case before court foreign plaintiffs were suing foreign corporate defendants for aiding and abetting a foreign sovereign's treatment of its own citizens in its own territory.

The above-mentioned circumstances indicate quite clearly that enforcing orders of the ACC in the countries where the headquarters of the MNCs that do business in Africa are often situated will be difficult.

Apart from the difficulties that will be encountered in dealing with Western courts, there is also the reality that in some African states the governments in power also run companies, which may find themselves in violation of the law for having committed any of the listed crimes in the Amendment Protocol. For example, the African National Congress, which is the ruling party in South Africa, also operates a corporate entity styled Chancellor House, which has interests in the energy and mineral extraction sectors.¹⁰⁷ In neighbouring Swaziland, there is a mining corporation whose shareholding is spread among an Indian MNC (50 per cent), the Government of Swaziland

¹⁰³ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), 14.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, 13.

¹⁰⁶ Centre for Justice and Accountability '*Mohamed v Palestinian Authority*' available at <http://cja.org/article.php?list=type&type=51> (accessed 18 October 2014). In *Mohamad v. Rajoub*, 664 F.Supp.2d 20, 22-24 (D.D.C. 2009), the District Court had dismissed the case, finding that the Torture Victim Protection Act's authorization of suits against 'individuals' extended only to 'natural person' defendants—i.e., individual human beings. The Supreme Court granted the Centre permission to consolidate the Mohamed case with the *Kiobel* case.

¹⁰⁷ Momberg E '*Chancellor House*' Amandla (13 September 2012) available at <http://www.amandla.org.za/amandla-magazine/current-issue/1595-chancellor-house--by-eleanor-momberg> (accessed 7 October 2014).

(25 per cent) and the king of Swaziland (25 per cent).¹⁰⁸ Given the immunity of the king as discussed above, it would be difficult to prosecute such an MNC in reality, even though legally it has a separate existence from its constituents.¹⁰⁹ The governments of these countries would be sorely tempted to protect such entities should they be cited for violations, given the amount of much-needed revenue that such a company generates for the purse of the ruling party or the monarch at the helm of the state.¹¹⁰

7.12.1 Recommendation

The likely problems listed above are more political than legal in nature, as they result from the political actions of states, as they pursue international relations. The judiciary, as seen in the *Kiobel* case, also tends to defer to the political branches of government. It is recommended that a political remedy must be sought.

7.13 Reform of the Rome Statute and rules of the International Criminal Court

Africa must continue its campaign to amend the Rome Statute or its rules insofar as they impact negatively on the ICC's relations with African states. The power of the UNSC to refer situations to the ICC under Article 13(b) has been at the very core of the African complaints. The ability of the UNSC to subject non-states parties to the jurisdiction of the ICC is an anomaly given that the Rome Statute does not enjoy universal ratification, and the fact that such a move violates Article 34 of the Vienna Convention on the Law of Treaties.

The Article 16 deferral powers of the UNSC also formed the basis of the African complaint. The current calls for a reformed UN system would easily take care of the African concerns. The South African proposal which was discussed in detail in Chapter 5 would allow the UNGA to be seized of a matter where the UNSC fails to act,¹¹¹ and thus be able to defer a matter which is pending before the ICC for a period of one year. This would accommodate African states that perceive the

¹⁰⁸ Bowles N 'Swaziland's Ngwenya mine extracts its ore and exacts its price' 31 August 2012 available at <http://mg.co.za/article/2012-08-31-00-swazilands-ngwenya-mine-extracts-its-ore-and-exacts-its-price> (accessed 21 October 2014).

¹⁰⁹ There is already established judicial reasoning on the immunity of the king of Swaziland from all suits in law. See *The Law Society of Swaziland v Simelane N.O. and Others* [2014] SZHC 179. See also Dube A 'Does SADC provide a remedy for environmental rights violations in weak legal regimes? A case study of iron ore mining in Swaziland' (2013) 3 *SADC Law Journal* 259 – 278.

¹¹⁰ The fact that Chancellor House is heavily invested in the extractive industries of countries which are politically repressed gives credence to such an assertion. For example, the 75 per cent stake that Chancellor House has in coal mining in Swaziland.

¹¹¹ The South African proposal was submitted to the UN Secretary-General by the Permanent Mission of South Africa to the UN by a *note verbal* dated 18 November 2009.

UNSC currently as an organ that is using the deferral powers in a manner which is politically tainted and which is biased against situations emanating from Africa. There is therefore a need for the members of the AU who are party to the Rome Statute to continue using the platform of the ASP to bring the required reforms, whilst at the same time pushing for the transformation of the UN system to reflect current notions of democracy, good governance and participation.

7.13.1 Recommendations

It is recommended that to deal with the referral powers under Article 13(b), African states should continue to campaign for reforms of the UN system in order to have participate meaningfully in the operations of the UNSC.

It is further recommended that those AU members who are party to the Rome Statute should continue to push for an amendment to Article 16 of the Rome Statute.

It is further recommended that the following provision be adopted as the amending clause in the Rome Statute:

Article 16

Deferral of investigation or prosecution

- (1) No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.
- (2) A state with jurisdiction over a situation before the Court may request the UN Security Council to defer a matter before the Court as provided for in (1) above.
- (3) Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under para 1 consistent with Resolution 377(v) of the UN General Assembly.

7.14 Concluding observations

This thesis has fully traced the roadmap set out in Chapter 1. The thesis therefore discharged its mandate in tracing the genesis of the concept of UJ and in investigating the theory and practice of

the concept of UJ in the African context in Chapter 2, which revealed that the foundations of the concept are very shaky, and not as solid as its proponents profess them to be.

The study has also demonstrated in Chapter 3 how Africa has dealt with or intends dealing with perpetrators of international crimes. This has been demonstrated through an analysis of the AU Model Law and the AU's requirement that its members enact corresponding domestic laws.

In the fourth chapter, the thesis illustrated how the African continent has dealt with perpetrators of the core crimes in light of the absence of a regional international criminal court. To this end, it indicated that there are indeed certain African states that use their ICC-implementing legislation to fight impunity. Chapter 4 also revealed the difficulty presented by the African continent's piecemeal approach to punishing perpetrators of international crimes, such as Hissène Habré.

The fifth chapter traced the origins of Africa's misgivings about both the ICC and UJ-based prosecutions by the courts of Western states, and the possibility of African states withdrawing from this multilateral treaty. It also assessed the impact of the continent's stance towards UJ as regards the obligation to end impunity. It concluded that the continent's misgivings were indeed well founded, as the actions complained of violated international law.

Faced with failure of the campaign to withdraw from the ICC, the sixth chapter investigated the prospects of an African-centred UJ regime in light of current state practice. To that end, it evaluated the challenges and opportunities presented by Africa's newly established international criminal tribunal, the ACC. The chapter was not an exhaustive treatise of the Amendment Protocol and its Statute, but a discussion of selected provisions which are likely to affect the dispensing of international criminal justice on the continent. An exhaustive precisely detailed analysis of the instrument's provisions was not part of the purview of this thesis.

Finally, in the last chapter, the thesis suggested a set of solutions that could ensure that African states act consistently in giving effect to UJ and in their fight to end impunity for the core crimes of genocide, war crimes and crimes against humanity. These included suggested reforms of the newly adopted Amendment Protocol in order to introduce better worded provisions to promote the fight against impunity.

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