

Reimagining Criminal Justice Through the Lens of The African Union

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**Submitted in partial fulfilment of the requirements of the Degree of
Doctor of Philosophy**

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ABSTRACT

In 2014 the African Union (AU) and African states set in motion the establishment of African justice mechanisms for addressing international crimes including a new section of the African Court of Justice and Human and Peoples' Rights, the International Criminal Law Section (ICLS). In this thesis it will be determined whether or not there is a need for this new regional criminal court and what role it might play in the international criminal justice system.

It is clear that the existing system has a number of shortcomings particularly in the areas of: universal jurisdiction; accountability; complementarity; ownership; and immunity. There is also a wider question as to whether the original purposes of international criminal law (ICL) are being effectively fulfilled. In this thesis it is determined that the new regional court does not need to be a competitor court to the International Criminal Court (ICC) but can offer complementary jurisdiction to strengthen international criminal justice and develop ICL in the same manner that the ad hoc courts and ICC have done. It is also shown that the new court is a legitimate response, albeit with some weaknesses, to the inequalities of the international system and has the potential to create a forum through which African states can increase their ownership. The new court will have the ability to address many of the underlying crimes leading to conflicts thereby linking the judicial organ to the AU's peace and security agenda. By placing the ICLS into the African Peace and Security Architecture, a more holistic understanding of the new court is achieved. This helps to erode the misconception that the initiative is pursued purely as an anti-ICC mechanism.

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LIST OF ABBREVIATIONS

ACDEG –	African Charter on Democracy, Elections and Governance
ACJ –	African Court of Justice
ACtJHR –	African Court of Justice and Human Rights
ACHPR –	African Commission on Human and Peoples’ Rights
ACtHPR –	African Court on Human and Peoples’ Rights
AFLA –	Africa Legal Aid
African Court –	African Court of Justice and Human and Peoples’ Rights
APSA –	African Peace and Security Architecture
ASF –	African Standby Force
ASP –	ICC Assembly of State Parties
Assembly –	African Union Assembly
AU –	The African Union
AU REC/RM MOU -	Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and North Africa
AUCA –	Constitutive Act of the African Union
AU Model Law –	African Union Model Law on Universal Jurisdiction
Banjul Charter -	African Human and Peoples’ Rights Charter
CAR –	Central African Republic
CAT –	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
DRC –	Democratic Republic of Congo
EAC –	Extraordinary African Chambers
ECCC -	Extraordinary Chambers in the Courts of Cambodia
ECOWAS –	Economic Community of West African States
EU –	The European Union
HRW –	Human Rights Watch
ICC –	International Criminal Court
ICCPR -	International Covenant on Civil and Political Rights
ICESCR –	International Covenant on Economic, Social and Cultural Rights
ICJ –	International Court of Justice

ICL –	International Criminal Law
ICLS –	International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights
ICTR –	International Criminal Tribunal for Rwanda
ICTY –	International Criminal Tribunal for the Former Yugoslavia
IHL –	International Humanitarian Law
IHR –	International Human Rights
ILC –	International Law Commission
Impunity Report–	Panel of the Wise, Peace, Justice and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity
LRA –	Lord's Resistance Army
Malabo Protocol –	Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights
Mbeki Report –	Report of the African Union High-Level Panel on Darfur
MOU –	Memorandums of Understanding
NATO –	North Atlantic Treaty Organisation
NGOs –	Non-Governmental Organisations
UN -	United Nations
OAU –	Organization of African Unity
OTP –	Office of the Prosecutor
PCRD –	Policy on Post-Conflict Reconstruction and Development
PIL -	Public International Law
Prep Com -	Ad Hoc Committee and Preparatory Committee on the Establishment of an International Criminal Court
PSC –	Peace and Security Council
PSC Protocol –	The Protocol Relating the Establishment of the Peace and Security Council of the African Union
REC/RMs –	Regional Economic Communities and Regional Mechanisms
SA –	South Africa
SAPS –	South African Police Service
SADC -	Southern African Development Community
SCSL –	Special Court for Sierra Leone
SOFAs –	Status of Force Agreements
STL –	Special Tribunal for Lebanon

TJ –	Transitional justice
TJPF –	Transitional Justice Policy Framework
UCG -	Unconstitutional change of government
UK -	United Kingdom
UJ –	Universal Jurisdiction
UN –	United Nations
UNAMID -	United Nations and African Union Mission in Darfur
UNCh –	United Nations Charter
UNGA –	United Nations General Assembly
UNSC –	United Nations Security Council
USA –	United States of America
UNCLOS -	1982 United Nations Convention on the Law of the Sea
VCLT –	Vienna Convention on the Law of Treaties

List of Latin principles

Aut dedere aut judicare –	Either extradite or prosecute
De lege ferenda -	With a view to the future
Erga omnes -	Towards all
Hostes humani generis -	Enemies of humankind
Immunity ratione personae-	Personal immunity
Immunity ratione materiae –	Functional immunity
Jus cogens -	Compelling law / peremptory norms
Lex desiderata -	Law as desired
Lex lata –	The law as it exists
Nullum crimen sine lege -	No crime without law
Ne bis in idem -	Double jeopardy
Nulla poena sine lege -	No penalty without law
Obiter dicta -	Said in passing
Opinion juris sive necsittis -	An opinion of law
Proprio motu -	By ones' own motion or initiative
Ultra vires -	Beyond one's legal the power or authority

Chapter 1

Introduction

1.1 Overview

With the establishment of the International Criminal Court (ICC) in 1998 a permanent court capable of addressing international crimes was finally in place, reducing the need for ad hoc or permanent tribunals. Yet, despite this, in 2009 the African Union (AU) decided to explore the possibility of endowing the organisation's judicial organ with criminal jurisdiction. From the outset there has been much scepticism over the proposed court as set out in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).¹ Many see the new AU court as an attempt to replace the ICC² or to shield African leaders from accountability. It is argued in this thesis that such assumptions are an inaccurate and incomplete assessment of the situation.

The concept of international courts is not new and much literature exists concerning the judicial mechanisms utilised in Africa.³ There is also scholarship concerning regionalism and universalism in human rights, the emergence of the regional human rights courts and the development of the ICC.⁴ Much of this literature starts with the assumption that the International Criminal Law Section (ICLS) of the African Court of Justice and Human

¹ Max du Plessis, 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes' (*EJIL:Talk!*, 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/>> accessed 2 April 2005; Amnesty International, 'Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court' (Amnesty 2016).

² Max du Plessis, 'A New Regional International Criminal Court for Africa?' (2012) 25 *South African Journal of Criminal Justice* 286; Amnesty International (ibid) 9.

³ See Part I and II of this thesis.

⁴ William Schabas, 'Regions, Regionalism and International Criminal Law' (2007) 4 *New Zealand Yearbook of International Law* 3; Timothy Shaw, J. Andrew Grant and Scarlett Cornelissen (eds), *The Ashgate Research Companion to Regionalisms* (Ashgate: 2011) and Lorenzo Fioramonti (ed) *Civil Society and World Regions: How Citizens Are Reshaping Regional Governance in Times of Crisis* (Lexington Books 2013) as cited by Lorenzo Fioramonti, 'The Evolution of Supranational Regionalism: From Top-down Regulatory Governance to Sustainability Regions?' (2014) UNU-CRIS Working Paper W-2014/2, 6; Rudolf Bernhardt, 'International Protection Of Human Rights: Universalism And Regionalism' in Seinho Yee and Jacques-Yvan Morin (eds), *Multiculturalism and International Law: Essays in Honour of Edward McWinney* (Martinus Nijhoff 2009).

and Peoples' Rights (African Court) is intrinsically anti-ICC and thus undermines accountability. By contrast, in this thesis, extensive research on the ICC, its shortcomings, and its relationship with Africa is utilised to investigate if there really is a case for Africa establishing a regional criminal court. It will be shown that the idea for an African criminal court actually predates the ICC. Instead of assessing the ICLS as an alternative mechanism, an objective of this thesis is to identify the purpose behind the new court and whether it offers anything of benefit to the international system.

When a state fails to discharge its responsibility to prosecute international crimes, the ICC is not the only mechanism deployed by international law for fighting impunity. The principle of universal jurisdiction (UJ) permits unconnected states to prosecute certain international crimes before domestic courts. While the ICC was established partly in response to the inability of UJ to fight impunity, both mechanisms are investigated to establish whether there is a need for an African regional criminal court.

The overarching question addressed in this thesis is whether there is a need for a regional criminal court in Africa. In order to answer this, it is necessary to examine a number of other questions. First, whether UJ contributes to the need for a regional criminal court. Second, whether the set up and actions of the ICC itself contributes to the need for a regional criminal court. And finally, what contribution the ICLS might make to international criminal justice.

While the research question focuses on the need for an African regional criminal court, the issues and international system's shortcomings identified in this thesis are pertinent for other regions. Therefore, while the thesis discussion is centred around an African regional criminal court this does not preclude the need for other regional criminal courts, or for the ICLS to serve as an example for the development of additional regional mechanisms. Where reference is made to the need for a regional criminal court, unless otherwise stated, this denotes an African regional criminal court.

This is the first comprehensive examination of the proposed regional criminal court as a contribution to and not a detraction from ICL.⁵ It is argued in this thesis that both

⁵ The EU has recently proposed establishing a European Prosecutor. European Council Press Release, '20 member states agree on details on creating the European Public Prosecutor's office

internal and external factors have led to the development of the ICLS and that the current dual system of international and national courts has left space for a complementary regional mechanism which African states can use to fulfil their accountability obligations. Existing scholarship concerning ICL and transitional justice (TJ) is utilised to assess the ICLS. The theories of and approaches to accountability are placed into the AU institutional objectives, to assess to what extent the ICLS is compliant with international law and what contribution a permanent regional court can make.⁶

The devaluing of African initiatives and values is countered in this thesis. It is shown that the current understanding of the ICLS as an anti-ICC response is incorrect and prejudices the development of ICL. The generally accepted view that there is a fundamental difference between what the international community wants from international justice and accountability and what African states want is also shown to be incorrect. African states are advocating for a broader notion of justice than the current debate allows for. It is argued in this thesis that the true point of divergence is in the scope of accountability and the means by which to achieve it.

A central point made in this thesis is that the ICLS, as an organ of the AU, must be placed into the African Peace and Security Architecture (APSA). This allows a holistic depiction of the court and prevents oversimplification and misunderstanding of the judicial mechanism. Simply claiming that the ICLS is a response to AU and some African states' concerns regarding the ICC does a disservice to all concerned. This also enables African concerns to be dismissed, and the moral high ground to be adopted by ICC advocates, demonising African states who raise legitimate concerns.⁷ The narrative that the ICC is the only direction in which ICL should develop is effectively dismissed.

Adopting a narrow view of justice and de-coupling it from reconciliation enables a false sense of accountability to be achieved and raises doubts over the motivation for pursuing criminal justice. The ICLS is potentially a key method by which the AU and African states can exert ownership of the process and develop an ecosystem of harmoniously

(EPPO)' (8 June 2017) <<http://www.consilium.europa.eu/en/press/press-releases/2017/06/08-epo/>> accessed 29 June 2017.

⁶ To distinguish between the ICLS and the ICC the use of 'the new court' refers to the ICLS and 'the international court' to the ICC.

⁷ Dire Tladi, 'When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic' (2014) 7 African Journal of Legal Studies 381, 382.

working organs and bodies. While, for a variety of reasons, this ecosystem has not yet been fully realised, this fact alone does not mean any AU attempts should be automatically dismissed or discarded for not fitting a particular narrative.

Overall, it is argued that there is a need for an African regional criminal court based on the international system's shortcomings. Neither UJ nor the ICC are adequate tools for fighting impunity within Africa because they undermine domestic prosecutions and ignore key concerns and the underlying crimes which lead to conflicts. Additionally, corporate actors and complicity of external states is overlooked fuelling the dissatisfaction of African states with the inequality of the international system and the ICC's double standards. The ICLS can provide innovative solutions to the inadequacies of both UJ and the ICC while recognizing that the new court is not without its own flaws that need to be addressed. It is entirely possible for regional systems to develop and support the international accountability initiatives.

1.2 Theory⁸

ICL is 'a body of international rules designed both to proscribe certain categories of conduct [...] and to make those persons who engage in such conduct criminally liable'.⁹ But despite being 'the criminal law of the international community',¹⁰ and one of the newer branches of public international law (PIL),¹¹ the theoretical basis of ICL does not follow that of PIL. ICL theory is 'all over the place'¹² and under theorised while PIL's theory is vast and diverse.¹³ This difference can be explained by the background to ICL which has influenced the approach, or lack thereof, to a theoretical foundation. ICL and international criminal justice has been shaped by events and practice as opposed to

⁸ This thesis acknowledges that the theories presented are more nuanced than can be presented in one chapter. What is provided in this chapter is a basic overview to highlight to the reader the main issues and theoretical approaches.

⁹ Antonio Cassese et al., *Cassese's International Criminal Law* (3rd edn, OUP 2013) 3.

¹⁰ Alexander Zahar & Göran Sluiter, *International Criminal Law* (2nd edn, OUP 2012) vii.

¹¹ Cassese et al. (n 9) 4.

¹² Sarah Nouwen, 'International Criminal Law: Theory all over the place' in Anne Orford and Florian Hoffman (eds), *Oxford Handbook of the Theory of International Law* (OUP 2016).

¹³ On the theories of PIL see Anne Orford and Florian Hoffman F, (eds), *Oxford Handbook of the Theory of International Law* (OUP 2016); Andrea Bianchi, *International Law Theories: an Inquiry into Different Ways of Thinking* (OUP 2016).

theory.¹⁴ Hence the underpinning stems from domestic criminal law, international human rights (IHR) and international humanitarian law (IHL) theories and purposes. Consequently, the arguments for ICL and the pursuit of justice are varied and at times contradictory.¹⁵

While IHR and IHL focus on state and collective responsibility, ICL is concerned with individual responsibility through the pursuit of accountability in the form of punishment through prosecution. Given the focus on criminal accountability, ICL turns to domestic criminal law theories on punishment as a basis for its prosecutions. It is to this theoretical argument that this section now turns and the meaning and justification for punishment adopted is that provided by John Rawls:

A person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by a trial according to the due process of law, provided that the deprivation is carried out by the recognised legal authorities of the State, that the rule of law clearly specifies both the offence and the attached penalty, that the courts construe statutes strictly, and that the statute was on the book prior to the time of the offence.¹⁶

Accordingly, the purpose of a criminal trial is to impose punishment and promote accountability.

The next section considers the theoretical basis for ICL prosecutions and punishment in two distinct parts: domestic criminal law; and IHR and IHL. This will then be used throughout the thesis to analyse whether there is a need for a regional criminal court in Africa.

¹⁴ Nouwen, 'Theory all over the place' (n12) 738.

¹⁵ On the contradictions of ICL see Darryl Robinson, 'The Two Liberalisms of International Criminal Law' in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010).

¹⁶ John Rawls, 'Two Concepts of Rules' in Samuel Freeman (ed), *John Rawls: Collected Papers* (Harvard University Press 1999) 26.

1.2.1 Domestic Criminal Law Theories of Punishment and International Criminal Prosecutions

The two theoretical approaches applied to prosecution and punishment follow the Kantian (Deontological) and Utilitarian schools of thought.¹⁷

1.2.1.1 The Deontological Approach

The Kantian school of thought, attributable to Immanuel Kant's work,¹⁸ focuses on retribution and how the court and society are prevented from treating the perpetrator as a means to an end, but rather as an end themselves.¹⁹ Therefore, punishment is not to be used to advance a societal goal but only for the crime actually committed. The rationale being to ensure retributive punishment is fair and just as:

Punishment by a court (*poena forensis*) [...] can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted on him only because he has committed a crime [...] He must previously have been found punishable before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens. The law of punishment is a categorical imperative.²⁰

Known as "just desert", the punishment is required to be as severe as the crime committed, no more and no less. A non-consequentialist approach is used to focus on retribution as justification for punishment and the level of punishment suffered, which should be proportionate, is linked to the perpetrator's 'moral wrongdoing'²¹ while all other considerations are irrelevant. Hence, punishment is determined by weighing up the harm done and the degree of responsibility.²² Even with a variety of retributive theories and approaches the underlying characteristic is that of "just desert",²³ and while

¹⁷ George Fletcher, 'The Theory of criminal Liability and International Criminal Law' (2012) 10 *Journal of International Criminal Justice* 1029.

¹⁸ *Ibid* 1031; See Immanuel Kant, *The Metaphysics of Morals* (Gregor M tr, CUP 1996).

¹⁹ Kant (n 18) 6.332.

²⁰ *Ibid* 6.332.

²¹ J. W. Harris, *Legal Philosophies* (2nd edn, OUP 2004) 53.

²² *Ibid* 60.

²³ Ralph Henham, 'The Philosophical Foundations of International Sentencing' (2003) *Journal of International Criminal Justice* 64; On the various types of retribution see I. Cottingham, 'Varieties of Retributivism' (1979) 29 *Philosophical Quarterly*, 238 as cited in Ralph Henham, 'The Philosophical Foundations of International Sentencing' (2003) *Journal of International Criminal Justice* 74; On the retributive theories under Kant and Thomas Aquinas see, Peter Kortiasky, 'Two

the effect of retribution cannot be empirically tested the severity of the punishment imposed 'is rooted deep in a society's culture'.²⁴

1.2.1.2 Utilitarian Theories

The converse is Utilitarian Theory, which its founding philosopher Jeremy Bentham explained in his seminal work:

By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness.²⁵

His view on punishment was that it 'was in itself an evil, and could only be justified as far as it prevented some greater evil'.²⁶ The notions of pain and pleasure are used to measure happiness and consequences,²⁷ which in turn is used to determine whether a punishment is justified based on the premise that it is correct to choose the path promoting the most happiness. Subsequent utilitarian theories have modified Bentham's approach by moving away from the pain and pleasure list while maintaining the underlying rationale. Distinctions have been drawn between act-utilitarianism ('an act is right if it has best consequences') and rule-utilitarianism ('an act is right if required or permitted by a rule where the general following of that rule would have best consequences').²⁸

For legal utilitarian philosophers the approach adopted is ideal-rule-utilitarianism.²⁹ Under such an approach, what an individual does is considered right if a rule permits such action or requires it and, when the rule is obeyed by all, it has better consequences than 'any other rule governing the same act'.³⁰ For utilitarians when the social conditions point towards the action being less wrong or morally culpable a lesser sentence should

Theories of Retributive Punishment: Immanuel Kant and Thomas Aquinas' (2005) 22(4) History of Philosophy Quarterly 319.

²⁴ Ian Dunbar and Anthony Langdon, 'Justifications and Purposes of Imprisonment' in Yvonne Jewkes and Gayle Letherby (eds), *Criminology: A Reader* (Sage 2006) 322.

²⁵ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* as cited in Harris, (n 21) 41.

²⁶ Harris (n 21) 53.

²⁷ Ibid 41.

²⁸ Ibid 43.

²⁹ For example, John Stuart Mill, as explained in Harris (n 21) 43-4.

³⁰ Ibid.

be given.³¹ There are usually complex social contexts in which the international crimes have been committed and the moral culpability may be less obvious where society has condoned the acts. Thus, it may follow that in such situations it is inappropriate to impose strict or severe sentences.³² However, as explained below, this may in fact go against some of the other aims of ICL and criminal prosecutions.

The above theories on punishment have influenced the development of both domestic and international criminal law but it has been questioned whether they are appropriate in the African context. Western legal systems and misplaced Western notions of justice and accountability are felt to be foreign to those understood locally,³³ as the local mechanisms may adopt a different understanding and approach which prevents the international method from being accepted.³⁴

Yet, when looking at the practice of international tribunals and courts, Robert Cryer finds the thinking behind pursuing criminal accountability is based on naturalism which is hidden behind legal positivist arguments.³⁵

Naturalism reflects the notion of a human society as articulated by the likes of Grotius and later returned to, and developed, by Hersch Lauterpacht. While Grotius argued for natural law which encompassed a right to intervene in times of injustice, Lauterpacht viewed natural law as the expression of the international society's self, incorporating the general principles, contractual agreement, and customs 'which no civilized community

³¹ Ibid 61.

³² On the differences in sentences imposed for international crimes by international courts and tribunals than under domestic law sentences see Mark Drumbl, 'A Hard Look at the Soft theory of International Criminal Law' in Leila Nadya Sadat and Michael P. Scharf (eds), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff Publishers 2008) 10; Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 11.

³³ Jeremy Sarkin & Erin Daly, 'Too Many Questions, Too Few Answers: Reconciliation' (2004) 35 *Columbia Human Rights Law Review* 661; Antony N. Allot, 'African Law' in J. Duncan & M. Derrett (eds), *An Introduction To Legal Systems* (Frederick a Praeger 1968); Laurence Juma, 'Africa, its Conflicts and its Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives' (2005) 13 *Michigan State Journal of International Law* 417; Okechukwu Oko, 'The Challenges of International Criminal Prosecutions in Africa' (2007) 31(2) *Fordham International Law Journal* 343.

³⁴ Oko (n 33).

³⁵ R Cryer, 'The Philosophy of International Criminal Law' in A Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar Cheltenham 2011) 232–67.

can afford to ignore'.³⁶ While the theory of natural law has been found lacking because of its use to justify colonialism³⁷ and the disempowerment of certain actors, it is still of value. Koskenniemi finds the theory useful when 'basic aspects of the world are questioned' following a crisis or transformative period,³⁸ while Gordon claims naturalism retains its relevance with regards to the dialectical and hegemonic perspective.³⁹

In contrast to naturalism, legal positivism seeks to remove the connection to morality and human dignity by instead focusing on formal legal status. As such, importance is placed on those legal bodies which make law, observed through court decisions, custom, treaties and other legislative instruments. Recent positivists include Hans Kelsen and Herbert Hart and while 'positivism is not popular and no longer claimed to be used',⁴⁰ it is still highly influential in the practice of international law as 'the dominant approach amongst international lawyers'.⁴¹

This return to naturalism and positivism, as opposed to solely relying on Kantian and utilitarian theories, can be attributed to ICL's background incorporating IHR and IHL thinking. There is a shift away from states as the primary focus of international law to one where human dignity and human values are taking centre stage⁴² as IHR and IHL view 'sovereignty in elemental opposition to normative progress'.⁴³

Therefore, the domestic criminal law theories alone are insufficient to understand ICL. This is further reflected in the justifications put forward for ICL and the accompanying pursuit for international criminal justice. The next section sets out these justifications as a means through which to analyse whether there is a need for an African regional criminal court.

³⁶ Hersch Lauterpacht, *The Function of Law in the International Community* (reissue OUP Oxford 2011 [1933]) 429–30 as cited in Geoff Gordon, 'Natural Law in International Legal Theory: Linear and Dialectical Presentations' in Anne Orford and Florian Hoffman (eds), *Oxford Handbook of the Theory of International Law* (OUP 2016) 292.

³⁷ Geoff Gordon, *ibid*, 297.

³⁸ M Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2011) 26 *International Relations* 3 as cited in Gordon (n 36) 304.

³⁹ Gordon (n 36) 305.

⁴⁰ Jörg Kammerhofer, 'International Legal Positivism' in Anne Orford and Florian Hoffman (eds), *Oxford Handbook of the Theory of International Law* (OUP 2016) 407.

⁴¹ Robert Cryer et al. *Research Methodologies in EU and International Law* (Hart 2013) 39.

⁴² Dylan Bushnell, 'Re-thinking International Criminal Law: Re-Connecting Theory with Practice in the Search for Justice and Peace' (2009) 28 *Australian Year Book of International Law* 61.

⁴³ Robinson (n 15) 153.

1.2.2 Justifying International Criminal Prosecutions: The Purpose of International Criminal Law

1.2.2.1 A Domestic Criminal Law Understanding

Most literature identifies the following justifications for punishment pursuant to ICL:⁴⁴

- Retribution
- Deterrence
- Reconciliation

Retribution would fall under the Kantian approach given its focus on punishment for punishment's sake based on the crime committed, while deterrence and reconciliation are utilitarian because the focus is aimed at the consequence of the punishment.⁴⁵

1.2.2.1.1 Retribution

Retribution is based on the notion of punishment for the violation of the law and the perpetrator deserving punishment as well as potential vengeance motivations.⁴⁶ The latter is linked to the oft-heard claims of victor's justice.⁴⁷ Yet, international criminal prosecutions are typically seen to have moved beyond the retributive only purpose

⁴⁴ M. Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law & Contemporary Problems* 9; Ralph Henham and Mark Findlay, 'Rethinking International Criminal Justice?' in Ralph Henham and Mark Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (Ashgate 2011); Christopher W Mullins and Dawn L Rothe, 'The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment' (2010) 10 *International Criminal Law Review* 771; Jan Klabbers, 'Just Revenge? The Deterrence Argument in International Criminal Law' (2001) *Finnish Yearbook of International Law* 249; Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24(3) *Human Rights Quarterly* 573; Henham (n 23); Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (3rd edn, OUP 2014); Zahar & Sluiter (n 10).

⁴⁵ For a different view on Kant's work on deterrence see B. Sharon Byrd, 'Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in its Execution', (1989) 8(2) *Law and Philosophy* 151.

⁴⁶ Fletcher, 'The Theory of Criminal Liability' (n 17) 1032.

⁴⁷ Kirsten Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 12(4) *European Journal of International Law* 1085.

characteristic of post-World War II (WWII) prosecutions.⁴⁸ It is often claimed that ICL punishment incorporates additional purposes beyond mere retribution.⁴⁹

While retribution as a purpose of ICL can be criticised, Harris explains its appeal to the average person's understanding of justice and, as such, is still a common feature of punishment's purpose.⁵⁰ It is highly unlikely that this aim of punishment will disappear as a justification for prosecuting international crimes given its connection to justice and thus, the purpose and aims of ICL. The public outcry against many international crimes and the fact certain acts shock the whole of humanity's values mean retribution and vengeance are likely to always play a role.⁵¹

1.2.2.1.2 Deterrence

Another of the most commonly cited purposes of ICL is that of deterrence which has been promulgated by the ad hoc tribunals, the ICC and other international institutions. The ICTY confirmed deterrence is a part of its considerations 'when imposing sentences';⁵² the ICTR considered it in terms of both sentencing and more generally,⁵³ as did the SCSL.⁵⁴

The theory underlying deterrence centres on two distinct forms: specific deterrence and general deterrence.⁵⁵ Specific deterrence assumes an individual's experience of punishment will alter their subsequent behaviour so as to avoid future imprisonment. General deterrence on the other hand is not focused on specific perpetrators but people more broadly. The assumption being that if punishment is provided for, shown to be

⁴⁸ Ruti G. Teitel, 'Transitional Justice Genealogy (Symposium: Human Rights in Transition)' (2003) 16 *Harvard Human Rights Journal* 69, 73; A H J Swart, Comments on Teaching International Criminal Law' (1988-90) 1 *Touro Journal of International Law* 335, 341.

⁴⁹ n 44; Daniel Joyce, 'The Historical Function of International Criminal Trials: Re-Thinking International Criminal Law' (2004) 73 *Nordic Journal of International Law* 461.

⁵⁰ Harris (n 21) 60.

⁵¹ Klabbers (n 44) 265; On the 'deep intuitive duty to punish those who inflict great evil on innocent victims' see Fletcher, 'The Theory of Criminal Liability' (n 17) 1032.

⁵² *Prosecutor v. Kupreškić et al.* (Judgment) ICTY-95-16-T (14 January 2000) para 848.

⁵³ On sentencing see *The Prosecutor vs. Ildephonse Hategekimana* (Judgement and Sentence) ICTR-00-55B-T (6 December 2010) para 732; On general deterrence see *The Prosecutor vs. Elizaphan and Gerard Ntakirutimana* (Judgement and Sentence) ICTR- 96-10 & ICTR-96-17T (21 February 2003) para 772.

⁵⁴ *Prosecutor vs. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Sentencing Judgment) SCSL-04-15-T (8 April 2009) para 13.

⁵⁵ Dunbar and Langdon (n 24) 323 and 324.

implemented, and people are aware of this, it will deter them from committing crimes. Yet, for deterrence to be effective specific factors are required which include certainty, immediacy, severity and comprehensibility.⁵⁶

However, despite the persistent reiteration of this aim the actual deterrent impact is highly disputed.

1.2.2.1.3 Reconciliation

Reconciliation is distinct from the other two objectives in that it seeks to go beyond typical criminal justice and accountability by assuming prosecutions and trials enable the affected society to heal.⁵⁷ Due to what reconciliation seeks to achieve many of the concepts and terminology comes from biomedical work on trauma.⁵⁸

The legal community's influence over the promotion of human rights norms, its enforcement and institutions has resulted in criminal prosecutions and courts being adopted as a means through which to achieve justice. Therefore, punishment 'serves the societal goals of re-enforcing acceptable norms, removing potential threats to a new regime and deterring future abuses'.⁵⁹ The overall aim is to help society and the affected communities move forward, heal and rebuild themselves into stable environments where international crimes are neither normalised nor condoned.

Through the use of trials it is possible for victims to be heard, facts and information about the violations and abuse to become public record, and the assignment of individual guilt can shift the focus away from collective guilt. These factors are considered to promote reconciliation by helping societies come to terms with the events, gain closure and start rebuilding upon different norms. Individual accountability promotes reconciliation as it removes collective guilt, enabling a new narrative which removes the stigmatisation of the acts from those groups in whose name they were

⁵⁶ Mullins and Rothe (n 44) 773; James McGuire has advocated for a fifth factor - alternative means by which the perpetrator can achieve the goal otherwise sought through his conduct - explained in Dunbar and Langdon (n 24) 325.

⁵⁷ Bassiouni, 'Searching for Peace' (n 44) 23-24; Julie Mertus, 'Only a War Crimes Tribunal: Triumph of the International Community, Pain of the Survivors' in Belinda Cooper (ed), *War Crimes: The Legacy of Nuremberg* (TV Books 1999) 232-7.

⁵⁸ Fletcher and Weinstein (n 44) 597.

⁵⁹ *Ibid* 590.

committed, to those directly responsible for planning the acts.⁶⁰ Thus, promoting unity within communities and society at the national level as opposed to victim communities only. The underlying assumption is 'that holding a people accountable for direct or indirect involvement with or passive acquiescence to the crimes committed inhibits the possibility for rebuilding a nation'.⁶¹ However, concerns have been raised as it is not necessarily understood what reconciliation means for individuals and there is very little empirical research on what is required for a society to rebuild.⁶²

Nevertheless, the increase in reconciliation as a purpose of ICL is acknowledged by academics and the ICTR.⁶³ The Security Council Resolution authorising the tribunal's creation includes 'national reconciliation' as a purpose.⁶⁴ However, the extent to which this was pursued is questionable.⁶⁵

It must be asked whether courts can realistically discharge such a mandate. There is concern over the use of theological and medical concepts to justify such an aim for legal prosecutions.⁶⁶ As already noted, there is a lack of evidence as to what a post conflict society requires to rebuild. Added to this are criticisms regarding the pursuit of individual guilt over acknowledging and addressing the collective guilt and collective nature of the conduct.⁶⁷ It is hard to see how ICL, enforced through courts, can live up to such a purpose. Furthermore, the claimed cathartic experience of witnesses providing evidence is not universally applicable, as not all benefit from participation and for those who do there is no guarantee of positive long-term effects.⁶⁸

⁶⁰ Dwight Macdonald, *Memoirs of a Revolutionist* (Farrar 1957) as cited in Aryeh Neier, 'Rethinking Truth, Justice and Guilt after Bosnia and Rwanda' in Carla Hesse and Robert Post (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia* (Zone Books 1999) 45.

⁶¹ Fletcher and Weinstein (n 44) 601.

⁶² *Ibid* 600.

⁶³ Zahar & Sluiter (n 10) vii.

⁶⁴ Preamble UNSC Res 955 (8 November 1994) UN Doc S/Res/955.

⁶⁵ International Crisis Group 'International Criminal Tribunal for Rwanda: Delayed Justice (ICG Africa Report No. 30, 7 June 2001) 19 <<https://www.crisisgroup.org/africa/central-africa/rwanda/international-criminal-tribunal-rwanda-delayed-justice>> accessed 31 January 2017.

⁶⁶ Fletcher and Weinstein (n 44) 600.

⁶⁷ *Ibid*.

⁶⁸ On the cathartic benefits see Oliver Diggelman, 'International Criminal Tribunals and Reconciliation: Reflections on the Role of Remorse and Apology' (2016) 14 *Journal of International Criminal Justice* 1073, 1074; On the short-term benefits of the cathartic experience see Fletcher and Weinstein (n 44) 593-4.

This is further complicated when there is a lack of remorse displayed and insincere apologies offered.⁶⁹ There are also links to the ideological belief of the perpetrator and the context in which such crimes are committed. The cumulative effect is the potential for a trial to prevent reconciliation amongst those victims and segments of society who feel there has been no justice or remorse shown, or apology received.

1.2.2.2 An International Human Rights and Humanitarian Law Understanding

For Hannah Arendt the purpose of trials, and by analogy ICL, is for justice only.⁷⁰ Yet, Werle and Jeßberger take the view that ICL 'protects 'peace, security and [the] well-being of the world'', due to its ability to enforce and protect the fundamental values of the international community.⁷¹ The link between ICL and peace and security finds its origin in the legacy of Nuremberg and in the ways used to legitimise the UNSC's establishment of the ICTY and ICTR.⁷² This demonstrates a positivist instrumentalist view of what ICL is meant to achieve, which in turn is legitimised by 'moralist ideals of humanity'.⁷³

Others argue against this based on the undemocratic nature of the values and rules and the dominance by certain states, yet Werle and Jeßberger dismiss these objections using the 'universally recognized minimum standard of civilization, which is a necessary condition for any democratic process'.⁷⁴ Additionally, ICL's core notion of humanity 'contributed significantly to strengthening protection for individual human rights',⁷⁵ despite IHR and IHL's focus on the protection of collective entities through state responsibility, as opposed to the individualistic approach of domestic criminal law.⁷⁶

It can therefore be concluded that in the relevant scholarship ICL's purpose is expanding beyond punishment, accountability and justice to include a greater role in peace and security promotion. At the same time, too many purposes can lead to confusion and the pursuit of cross-purposes. While the concepts and framework for accountability and punishment are clear the theoretical framework of ICL, and thus how to achieve its

⁶⁹ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books 1994).

⁷⁰ Ibid 253.

⁷¹ Werle and Jeßberger (n 44) 33.

⁷² Bushnell (n 42) 64.

⁷³ Ibid 67.

⁷⁴ Werle and Jeßberger (n 44) 34.

⁷⁵ Bushnell (n 42) 70.

⁷⁶ Robinson (n 15) 147-8.

purpose, is less so.⁷⁷ From the above, it becomes clear that despite being a branch of PIL, the justificatory theories on which ICL relies are not those of PIL.⁷⁸

Increasingly, additional roles are being attributed to ICL weakening the above domestic criminal law rationales and the overall purpose of accountability. These include truth-telling, providing a historical record, encouraging national prosecutions, rehabilitation, ending conflicts and promoting peace and security.⁷⁹ While some are identified as part of the objectives of reconciliation all have received wide-ranging criticism.⁸⁰ Even though these additional roles prove difficult to address through criminal prosecutions, advocacy efforts from human rights groups, the need for retribution and the symbolism of holding the key instigators and perpetrators accountable ensure prosecution remains the primary narrative for international criminal justice.⁸¹

The above shows that there is a no one single theory through which ICL can achieve individual accountability.⁸² Instead, there is a mixture of theory and aims from the Kantian (retribution) to the Utilitarian (deterrence and reconciliation) approaches. The aims of ICL are consistent with pursuing a judicial course of action and in fact it can be said that international criminal justice calls for the punishment of perpetrators by a court of law. Nevertheless, serious concerns have been expressed as to the appropriateness of these aims and the ability of a judicial approach to deliver them.

1.2.3 A Theoretical Alternative: Transitional Justice

As the above illustrates the objectives of ICL might be achieved if a broader approach is adopted and one such method is TJ. Defined as 'the ways countries emerging from

⁷⁷ M Damaška, 'What Is the Point of International Criminal Justice' (2008) 83 Chicago-Kent Law Review 348; Caroline Fournet, 'Mass Atrocity: Theories and Concepts of Accountability – on the Schizophrenia of Accountability' in Ralph Henham and Mark Findlay (eds), *Exploring the Boundaries of International Criminal Justice* (Ashgate 2011); Henham (n 23); For a different approach to theorising ICL see Nouwen (n 12).

⁷⁸ Swart (n 48) 339-342. Klabbers (n 44) 250.

⁷⁹ Damaška (n 77); M. Cherif Bassiouni, 'Justice and Peace: The Importance of Choosing Accountability over Realpolitik' (2003) 35 Case Western Reserve Journal of International Law 191; Bassiouni, 'Searching for Peace' (n 778); Fournet (n 77); Joyce (n 49); Werle and Jeßberger (n 44); Drumbl, 'A Hard Look at the Soft theory' (n 32).

⁸⁰ Damaška (n 77); Joyce (n 49).

⁸¹ For example, the work of human rights organisations such as Human Rights Watch and Amnesty International.

⁸² On the various theories of ICL see Nouwen, 'Theory All Over the Place' (n 12).

periods of conflict and repression address large scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response',⁸³ TJ is the 'umbrella term for approaches to deal with the past in the aftermath of violent conflict or dictatorial regimes'.⁸⁴

Originally there was no specific theoretical framework to TJ, but this did not stop it from being utilised in numerous situations of gross human rights violations. Nowadays, the theoretical basis is argued to stem from moral universalism and political liberalism.⁸⁵ Liberalism has been described as the 'dominant political expression of progressive thought in the modern age, but it itself encompasses a range of doctrines...centr[ing] on the core ideas of autonomy, of universal rights, of equal citizenship and democracy'.⁸⁶ It can also be seen as a theoretical means by which to 'blend international relations and law, and politics and constitutionalism'.⁸⁷ Applying liberalism enables an analysis of international law using liberal political theories and thus liberalism encompasses many other doctrines/theories and is typically seen in interdisciplinary studies. There are two distinct ways to use liberalism: as an internal critique or external critique.⁸⁸ The main critique of liberalism is that it reflects the views and bias of liberal elites and applies 'domestic political theories' to international law.⁸⁹

TJ theory is dominant by two distinct approaches: First, TJ pursues justice and prosecutions to prevent the perpetrators escaping justice and to halt the return to conflict or lawlessness if there was impunity. Second, is the focus on capacity development and the potential for prosecutions to leave a 'lasting legacy in the countries concerned'.⁹⁰

⁸³ International Center for Transitional Justice 'What is Transitional Justice' available at <<https://www.ictj.org/about/transitional-justice>> accessed 31 January 2017.

⁸⁴ Susanne Buckley-Zistel et al., 'Transitional Justice Theories: An introduction' in Susanne Buckley-Zistel et al. (eds), *Transitional Justice Theories* (Routledge 2014) 1.

⁸⁵ Vasuki Nesah, 'Theories of Transitional Justice: cashing in the blue chips' in Anne Orford and Florian Hoffman (eds), *Oxford Handbook of the Theory of International Law* (OUP 2016) 787.

⁸⁶ Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knop (ed), *Gender and Human Rights* (OUP 2004) 19.

⁸⁷ Daniel Joyce, 'Liberal Internationalism' in Anne Orford and Florian Hoffman (eds), *Oxford Handbook of the Theory of International Law* (OUP 2016) 486.

⁸⁸ Cryer et al. (n 41) 44.

⁸⁹ *Ibid* 45.

⁹⁰ Secretary General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004) UN Doc S/2004/616.

The key feature of TJ is its context specific approach with additional aims including the recognition of the dignity of individuals, redress, acknowledgement of violations, and prevention.⁹¹ Other scholars have expanded on this and argue it must provide for: truth; a public platform for victims; accountability and punishment; the rule of law; compensation for victims; institutional reform; long-term development; and reconciliation and public deliberation.⁹² Such objectives are compatible with those of ICL, however a key distinction is that TJ makes allowance for delaying prosecutions while simultaneously utilising alternative methods to achieve its aims and purpose. Under TJ there are four interlinked aspects: criminal prosecutions; truth seeking initiatives; reparations; and reform of law and related institutions, which are not to be used in isolation.

TJ's strength is in its analysis of the prevailing political, legal and social conditions before determining what is appropriate and at what stage to implement the initiatives. It is a move away from the 'cookie cutter approach', seeking the broadest inclusion possible and it appreciates that at times it may be that 'the most meaningful ways of redressing massive human rights violations do not fit with conventional concepts of accountability'.⁹³

The various theoretical bases for ICL and the multiple aims of international courts and the pursuit of criminal prosecutions identified in this section form the basis of the analysis which is undertaken throughout the thesis. In turn, this is used to argue for the need for an African regional criminal court.

1.3 Methodology

The research methodology utilised is socio-legal based as the main question lacks a purely doctrinal dimension. The primary concern is with the relationship between law and politics, and the social and political reasons influencing the creation of the ICLS. Adopting a purely legal doctrinal approach would prevent the wider context from being considered. In addition, the concepts of justice and accountability, as understood in the

⁹¹ International Center for Transitional Justice (n 83).

⁹² David Crocker as cited by Susanne Buckley-Zistel et al. (n 84) 4-5.

⁹³ International Center for Transitional Justice (n 83).

AU context, have greater implications for those in whose name lawyers undertake prosecutions. As the ICLS comprises one third of the judicial organ of a regional institution it is difficult to isolate it from institutional ideology and aims, which are not always legal in nature but have legal consequences.

Two main methods were used to answer the research questions. Firstly, desk-based research for the documents related to the ICC and ICLS negotiations. The treaties, conventions and policy documents of the organisations, institutions and programme bodies were consulted to understand and ensure their aims were included in the analysis. Cases, articles, books, blogs, opinion pieces and newspapers have also been used. However, as the Malabo Protocol was only adopted in 2014, and has yet to enter into force, there is not a vast amount of literature on the subject. Throughout my time writing this thesis more scholars have engaged with the topic and where relevant scholarship has been published, I have attempted to include it in my analysis and thesis as far as possible up to 30 June 2017.

The second method used was semi-structured interviews, undertaken as field work, with AU, African state and ICC officials. This was to verify and supplement desk-based research and add to the originality of the thesis. Semi-structured interviews were chosen to enable a more natural flow to the interviews and promote a conversation as opposed to an inflexible structured approach. From these interviews I gained an insight into perceptions which were missing or unclear in the official documents or simply unavailable due to the lack of publicly available materials.

Prior to undertaking the fieldwork, I sought ethics approval from my university's Ethics Board. I was granted approval in April 2015 as my interviews did not present any ethical concerns and was of extremely low risk: the potential participants were adults with no identifiable vulnerability, were unpaid and the interviews would be conducted on official premises or other public venues and not the individual's home. Furthermore, the questions to be asked were unlikely to uncover illegal activities, cause stress or anxiety to the interviewee, and were not of a personal sensitive nature.

In identifying the interviewees I approached each African state embassy in Addis Ababa and the ICC's Jurisdiction, Complementarity and Cooperation Division with a request to interview an official, accompanied by the list of questions/topics to discuss.⁹⁴

- What is your understanding behind the International Criminal Law Section (ICLS) of the African Court? (historical background)*
- What were the main driving factors?*
- Is there any element of marginalisation by Western states and dissatisfaction with the UN and ICC which are contributing factors to the ICLS' establishment?
- What advantages and/or disadvantages will the ICLS have over the ICC?*
- Are there any commonly held misconceptions about the ICLS or why the AU is pursuing this initiative?
- Which states were against or less supportive of extending jurisdiction?
- Is [state of the official] in support of the ICLS? If so, why? and if not, what are the hurdles to support?
- How does the presence or threat of ICC involvement impact on peace and security initiatives undertaken by the AU?*
- Is there anything you feel I should know which I have not covered in the above questions?*

I interviewed 6 state officials and 1 ICC official.⁹⁵ The decision was made to limit the number of ICC officials interviewed because the main purpose of the interview was not to garner insight into the ICC's vision for the new court.

The officials were willing to discuss the issues on the condition that it be anonymised as they provided the information in their personal capacity. Before each interview, I confirmed with the official that the data would be anonymised in my thesis. Additionally, I recorded interviews with 3 African state officials and the ICC official, the other 3 African state officials requested I took notes only. The interview notes and recordings are stored on my laptop, with password protection, in accordance to my university's policy on data collection.

⁹⁴ Questions included with the ICC interview request indicated by *.

⁹⁵ On the challenges securing interviews see section 1.4 of this thesis.

1.4 Challenges and Caveats

When conducting research relating to Africa, it is easy to make the mistake of treating the continent as a monolithic group with no discernible differences or views. In this thesis African states, ideas and concepts are not treated homogeneously. However, it is inevitable when discussing the AU and its member states to refer to them as 'Africa'. Care has been taken to avoid misrepresentation of the views of states as much as possible yet generalisations have been made on the assumption that common AU perspectives 'provide examples of common values'.⁹⁶

One of the hardest challenges when researching the AU is the lack of publicly available material. Despite an official website, which is difficult to navigate, key sections are either missing links or simply non-existent. While the AU makes available a selection of the organisation's key documents anything beyond this is difficult to find. Unlike researching the United Nations (UN), with its wealth of available information, there is little transparency in the negotiations and meetings of AU bodies. There are no public records of meeting notes, travaux préparatoires, or other such documents. Due to capacity constraints the AU is unable to provide official transcriptions of meetings and debates.⁹⁷ Therefore, reliance has been placed on the summarised reports by AU bodies and the Assembly and Executive Council decisions. Some debates may have been held and issues discussed which have been omitted from this thesis due to lack of access or availability. It is also often difficult to identify positions taken by individual states. Reliance is therefore placed on second hand accounts to identify positions taken and fill the gap left by non-existent records of debates. The majority of the work and negotiations of the AU are conducted behind closed doors and this lack of transparency is an institutional weakness.

The field research and interviews were undertaken towards the beginning of the research in a three month trip to Addis Ababa, Ethiopia from May to July 2015.⁹⁸ The AU proved a valuable source of information for early documents unrelated to the specific ICLS negotiations but was unhelpful in relation to the specific documents requested on the

⁹⁶ Interview with African State Official (Addis Ababa, Ethiopia, 24 May 2015).

⁹⁷ Ibid.

⁹⁸ The AU Headquarters is in Addis Ababa, Ethiopia, and all African states have representatives in situ.

court. An AU official explained that this was because no decision had been taken on the classification of the documents. Despite the initial willingness of the AU official to discuss the negotiating process and their involvement, attempts to follow up either in person or via email were unsuccessful. I did gain access to AU summit documentation from other contacts. However, due to the lack of official transcripts and lack of access to the confidential reports I was unable to scrutinise any records of the actual debates during the negotiation stage.

Attempts to interview African state officials based in Addis Ababa proved challenging. Nevertheless, I was able to interview officials from three of the five main regions,⁹⁹ the majority of whom had been directly involved in the negotiations. I also have had email correspondence with additional state officials as well as face to face meetings during attendance at various conferences throughout my research. The interviews proved fruitful and key themes and a common understanding on the court become apparent. Yet, these findings are not representative of all African states and are insufficient for empirical analysis. However, this anecdotal evidence is important in advancing the limited research on the ICLS to date. An unexpected finding from the interviews was the role played by the judges of the African Court of Human and Peoples' Rights in the Malabo Protocol negotiations. The AU official interviewed explained how the judges played a role throughout the negotiation stages and suggested that I interview them. While this would undoubtedly have enriched the findings, funding limitations prevented this as the Human and Peoples' Rights Court is located in Arusha, Tanzania.

Finally, a constant challenge when researching a topic like the ICLS amidst the ongoing tensions between the ICC and AU, and the organisation's internal politics, is the sudden changes to the landscape. During the writing of this thesis, several African states threatened and/or started withdrawal processes from the ICC. Some of these states subsequently recanted their withdrawal or changed their stance due to changes in governments.

Additionally, for decades the AU has not been fully representational of all African states. Morocco withdrew its membership in protest about the AU's recognition of the Western Sahara which the North African country does not recognise as an independent state but

⁹⁹ The five regions being Central, East, North, South and West Africa.

as a part of its own territory. However, in January 2017 Morocco re-joined the AU, presenting new challenges to referring to the AU as a group in consensus.¹⁰⁰

1.5 Structure

In Chapter 2 the ICLS is placed in context. A brief overview of the evolution of the AU and its prioritisation of peace and security is presented so it is possible to understand the ideological background of the organisation and identify its objectives. The landscape of international criminal justice within Africa is described in order to trace the evolution of the justice mechanisms and their stated aims, and to set out how Africa got to the point of establishing its own regional criminal court. The penultimate section delves into the various African proposals for a regional criminal court from the 1960's to date, to determine how far back the idea goes and what the motivating factors were. As the ICC was created during this timeframe African state engagement with the Rome Statute negotiations is considered. Finally, the drafting history of the Malabo Protocol is addressed and the issues and rationales promulgated at the time are highlighted.

The thesis is then separated into three distinct parts each dealing with a different judicial mechanism. Part I concerns UJ and whether its scope and use contributes to the need for an African regional criminal court. In Part II the focus shifts to the ICC and finally, using the findings of the previous parts, in Part III the ICLS is evaluated.

1.5.1 Part I

Part I starts with an exploration of the principle of UJ, its purpose and what it offers in the fight against impunity. In Chapter 3 there is an investigation of the crimes covered under UJ through an examination of both treaty and customary law. As states unconnected to the crime use UJ before their domestic courts, the international law on immunity is studied to bring to light the limitations it places on the prosecutions. The

¹⁰⁰ AlJazeera, 'Morocco rejoins the African Union after 33 years' (*AlJazeera*, 31 January 2017) <<http://www.aljazeera.com/news/2017/01/morocco-rejoins-african-union-33-years-170131084926023.html>> accessed 29 June 2017.

very limited scope of UJ and the rationale for upholding immunity for state officials is highlighted as well as the impact on the ability of UJ to fight impunity.

In Chapter 4 the discussion moves to consideration of state practice and African UJ legislation. Best efforts have been made to obtain primary sources such as copies of legislation where provided in English to check the accuracy of statements and interpretations. However, reliance in this chapter is placed predominantly on secondary sources. Given the subject matter of this thesis, the UJ prosecutions considered only relate to African individuals. In assessing the cases pursued by both African and non-African states the limited use of UJ becomes apparent. The AU's model law on UJ is examined, and together with the findings on African UJ legislation, this chapter establishes the differences between the AU's approach and international law's approach to UJ. In the final section the prosecution of Habré before the Senegalese courts is considered to determine whether this precedent contributes to the need for a regional criminal court. Focusing on the uniquely enabling factors surrounding the former Chadian President's trial, the ability to replicate the use of UJ in other African states is considered.

It is concluded in Part I that UJ is of limited use in the fight against impunity and that these shortcomings contribute to the need for an African regional criminal court.

1.5.2 Part II

The focus in Part II of the thesis shifts to the ICC. To determine whether the set up and operation of the ICC contribute to the need for an African regional criminal court, the Rome Statute, the international court's judgments, and the Office of the Prosecutor's (OTP) policies and practices are scrutinized. The structure reflects the five evaluative criteria employed by this thesis (accountability, complementarity, ownership, immunity and purpose).

In Chapter 5 it is asked if accountability before the ICC contributes to the need for a regional criminal court by investigating the court's jurisdictional and institutional capacity. The various provisions which set out and/or impact the court's jurisdiction in the Rome Statute are considered. The OTP's policies and practice provide the other points of reference in order to assess how the court and Prosecutor have responded to

the jurisdictional and institutional capacity framework in pursuing individual criminal responsibility. It is argued that the ICC's form of accountability is inadequate to address the range of actors, crimes and situations occurring in Africa, thereby demonstrating a need for a regional criminal court.

The ICC is a court of last resort with primary responsibility for prosecuting crimes remaining with states. As such, the principle of complementarity is considered in Chapter 6. The first half of the chapter concentrates on complementarity as admissibility criteria, looking at the court's interpretation and the impact this has on encouraging domestic prosecutions. The policy approach to complementarity makes up the remaining part of the chapter and focuses on positive complementarity as defined by the Prosecutor and court. It is concluded that instead of encouraging domestic prosecutions, the ICC has adopted a restrictive interpretation to complementarity at the expense of national efforts.

The focus then turns to the ICC's impact on African ownership over the justice process and prosecutions. African states and the AU have expressed dissatisfaction over the double standards and inequality of the international system. In Chapter 7 African states' and the AU's relationship with the ICC are explored. It is asked whether or not the international court has facilitated or hindered African involvement and ignored their preferred approaches. It is shown that the role granted to the United Nations Security Council (UNSC) has the potential to introduce inequality into the court structure, undermining the ICC as well as AU peace and security efforts. It is concluded that the policies and practice of the ICC takes away ownership from African states and the AU, which is only made worse by the UNSC's use of the court.

The law on immunity prevents both national and international courts from prosecuting Heads of States and Government and certain state officials. Yet, the ICC has a provision excluding such protection, meaning no individuals are beyond the reach of the court. However, the court has struggled to prosecute senior state officials and the question raised in Chapter 8 is whether the practice of the ICC establishes a customary law exception to immunity. It is argued that such an exception has not yet materialised as the elements for establishing a custom have not been satisfied. Therefore, the lack of immunity has not removed the need for an African regional criminal court.

Lastly, Chapter 9 asks if the ICC advances any of the theories or purposes of ICL and international prosecutions. Using the findings of Chapter 5 to 8, it is argued that the ICC does not achieve ICL's aims, nor those of TJ providing the basis for a need for an African regional criminal court. Finally, the notion of regional criminal courts is briefly considered to see how such courts can contribute to ICL's purposes and address any shortcomings of the ICC.

It is concluded that what the ICC offers in terms of accountability, complementarity, ownership, immunity and purpose contributes to the need for an African regional criminal court. Together with the findings of Part I, it is argued that the identified shortcomings in the mechanisms demonstrate the need for a regional criminal court.

1.5.3 Part III

The focus in Part III is whether the ICLS can offer ICL and the AU something that neither UJ nor the ICC can as well as addressing problems identified in Part I and II. As the Malabo Protocol has yet to enter into force reliance is placed on the Protocol, international law principles and the AU's legal and institutional frameworks. As part of the AU's judicial organ the ICLS is an international court like the ICC, therefore, the appropriate point of comparison is with the ICC and not UJ.

Utilising the evaluative criteria set out in Part II, in Chapter 10 the purpose of the African Court and whether the AU's structure and ideology are evident are established. This provides the opportunity to examine whether the purpose of the ICLS differs from the ICC's and ICL purposes generally. It is argued that the ICC is inadequate to fulfil the purposes pursued by the ICLS. The ICC provides for a very specific form of justice – criminal in nature – whereas the AU's notion of justice is broader because of the importance placed on peace and security and the lens applied to conflict analysis.

In Chapter 11, the approach to accountability is interrogated, highlighting the distinction from the ICC. The ICLS' ability to prosecute a wider range of actors, including corporations, and crimes offers a region-centric approach to accountability addressing some of the shortcomings of the ICC. The inclusion of definitions for the core crimes,

building on those of the ICC and its jurisprudence, help situate the ICLS as a complementary and not an alternative mechanism.

The Malabo Protocol has been heavily criticised for not referring to the ICC in its complementarity provision. However, it is argued in Chapter 12 that the Protocol sets out a relationship of cooperation and assistance. Such an approach reflects the concerns of the AU over its marginalisation and undermining of its peace and justice initiatives. This chapter also includes an interpretation approach to the admissibility criteria that incorporates both the ICC and the Regional Economic Communities and Mechanisms (REC/RMs). The inclusion of REC/RMs' courts expresses the continental structure and broadening complementarity.

In Chapter 13, it is concluded that the Malabo Protocol provides an unparalleled opportunity to advance African ownership, promote Pan-Africanism and the AU's focus on peace and security. The purpose of the ICLS means it should be situated within APSA to further the fight against impunity, address the underlying causes of conflicts and promote the AU's notion of justice. However, the institutional weaknesses of the AU are presented as these may create barriers to achieving the purposes of the ICLS and its ability to promote ownership. Given the ICC's undermining of national prosecutions and the absence of capacity building it is argued that there is a need for the ICLS to take up this role. Placement within APSA locates the court in the best position to do this.

In Chapter 14 the most controversial aspect of the Protocol, the immunity provision, is considered. The aim is to determine the extent to which the upholding of immunity negates the solutions offered by the ICLS to the international system's shortcomings. It is concluded that adopting a personal immunity interpretation to Article 46A bis will limit the number of state officials covered by the provision. As undesirable as the provision is it is also the strongest argument to prove the ICLS is not anti-ICC. By protecting such individuals from prosecution, the jurisdiction of the ICC is left unaffected.

The conclusion set out in Chapter 15 brings together the findings from Part I – III to establish that there is a need for an African regional criminal court based on the shortcomings of UJ and the ICC. The ICLS is an attempt by the AU to address these

shortcomings, notwithstanding flaws in the Malabo Protocol which need to be addressed.

Chapter 2

The African Criminal Court in Context

On 27 June 2014 the AU Assembly adopted the Malabo Protocol¹⁰¹ introducing criminal jurisdiction to the African Court. The Protocol has yet to enter into force as fifteen ratifications are required¹⁰² and only eleven states are signatories with no ratifications to date.¹⁰³ When the Protocol comes into force, the African Court will be composed of three sections: General Affairs; Human and Peoples' Rights; and the International Criminal Law Section.¹⁰⁴ Therefore, the ICLS will not be an independent court within the AU structure but a section within the AU's judicial organ. The new court will be made up of a Pre-Trial Chamber; a Trial Chamber; an Appellate Chamber;¹⁰⁵ an Office of the Prosecutor governed by Article 22A; a Presidency and Vice Presidency;¹⁰⁶ a Registry¹⁰⁷ authorised to establish a Victims and Witnesses Unit and Detention Management Unit; and a Defence Office.¹⁰⁸ All are common features of international courts and hybrid tribunals.¹⁰⁹

2.1 The AU and the Importance of Peace and Security

To understand the AU's approach to the African Court and criminal justice, the background and context of the organisation must be taken into account.¹¹⁰ The AU was established in 2000 in response to the waning relevance of and dissatisfaction with its

¹⁰¹ Decision on the Draft Legal Instruments, Assembly/AU/Dec.529 (XXIII) adopted during the Assembly of the Union, Twenty-Third Ordinary Session 26-27 June 2014, Malabo, Equatorial Guinea.

¹⁰² Article 11 Malabo Protocol.

¹⁰³ As of 8 February 2018, <https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf> accessed 14 May 2018.

¹⁰⁴ Article 6 African Court Statute (hereafter ACS).

¹⁰⁵ Article 16(2) ACS.

¹⁰⁶ See Article 22 ACS.

¹⁰⁷ Article 22B(9) ACS.

¹⁰⁸ Article 22C ACS.

¹⁰⁹ Examples of international courts include The International Criminal Tribunal for Yugoslavia, The International Criminal Tribunal for Rwanda, The Special Court for Sierra Leone, the Special Tribunal for Lebanon, and the Extraordinary Chambers in the Courts of Cambodia.

¹¹⁰ Tim Murithi, 'The role of the African Peace and Security Architecture in the implementation of Article 4(h)' in Dan Kuwali and Frans Viljoen (eds), *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act* (Routledge 2014) 141-2.

predecessor, the Organization of African Unity (OAU). The OAU was set up to unite Africa, fight colonialism and later the Apartheid systems in Southern Africa and South Africa. The driving force was the Pan-African ideology which helped to spread and grow African solidarity.¹¹¹

Yet, while the OAU's credibility was built on its stance against anti-colonialism and support of African independence, this focus 'inexorably masked the growing culture of repression' and human rights violations occurring within the newly independent countries.¹¹² Despite the OAU being ill-equipped to deal with the numerous conflicts that erupted across the continent the Mechanism for Conflict Prevention, Management and Resolution was established by the organisation. This proved ineffective and gross violations of human rights continued. Eventually African states became disillusioned with the OAU's inability to address peace and security and the heavy reliance on the international community for assistance.

After deliberation and consideration and appraisal of continental priorities, a decision was made to replace the OAU.¹¹³ The AU was established in 2000 to 'take up the multifaceted challenges that confront our continent and peoples'.¹¹⁴ No longer fighting for decolonisation, the organisation's priorities were to: strengthen the African identity through Pan-Africanism; solidify the newly independent states by defending 'sovereignty, territorial integrity and independence' of states;¹¹⁵ and address peace and security and associated matters.¹¹⁶ In line with these priorities, Articles 2 and 3 of the Constitutive Act of the African Union (AUCA) enumerated the organisation's fourteen aims and sixteen objectives. While socio-economic development matters are included, of particular relevance to criminal justice and peace and security are those regarding: unity and solidarity;¹¹⁷ sovereignty, territorial integrity and independence;¹¹⁸ promotion and

¹¹¹ Timothy Murithi, *The African Union: Pan-Africanism, Peacebuilding and Development* (Routledge 2005). On Pan-Africanism see Abdulqawi A. Yusuf, *Pan-Africanism and International Law* (Hague Academy of International Law 2014).

¹¹² Ademola Abass, 'African Peace and Security Architecture and the Protection of Human Security' in Ademola Abass (ed), *Protecting Human Security in Africa* (OUP 2010) 249.

¹¹³ OAU, Sirte Declaration, adopted at the Fourth Extraordinary Session of the Assembly of Heads of State and Government, 8-9 September 1999, Sirte, Libya. EAHG/Draft/Decl. (IV) Rev.1.

¹¹⁴ Preamble AUCA. The AU was established in 2000 and inaugurated in 2002.

¹¹⁵ Article 3(b) AUCA.

¹¹⁶ Preamble AUCA, Article 3 sets out the AU's objectives.

¹¹⁷ Article 3(a).

¹¹⁸ Article 3(b).

defence of African common positions;¹¹⁹ promotion of peace, security and stability;¹²⁰ promotion of democratic principles and institutions;¹²¹ protection and promotion of human rights;¹²² and the harmonisation with regional economic communities' policies.¹²³

Seeking to promote the self-reliance of African states within its framework and social justice¹²⁴ Article 4 reiterates some of the aims as organisational principles.¹²⁵ The historical disappointment in the OAU is reflected in the reinforcement of the AU's 'respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities',¹²⁶ and the condemnation and rejection of unconstitutional changes of governments.¹²⁷

The prioritisation of peace and security, as a means to improve the socio-economic and development conditions of Africa, has influenced the AU's organisational approach to justice.¹²⁸ The linking of these issues has resulted in a broader conceptualisation and understanding of the justice, peace and security needs of the continent. However, over the years the AU has faced financial capacity and capability restraints hindering its ability to achieve its aims and objectives.

In response to the limitations, and the ever-increasing demands of the African continent that were not contemplated at the time of the AU's creation, alternative sources and avenues of funding are being explored.¹²⁹ This in part has been a result of the proactive role granted to the AU Commission Chairperson in response to the inaction of the now defunct OAU.¹³⁰ The role of the Commission Chairperson is key in shaping the approach adopted by the AU. While previously the Commission had often sought out external financial assistance, recently a more introspective and insular approach has been pursued. There has been a lessening of dependencies on outside states and partners

¹¹⁹ Article 3(d).

¹²⁰ Article 3(f).

¹²¹ Article 3(g).

¹²² Article 3(h).

¹²³ Article 3(l).

¹²⁴ Article 4(k) and (n).

¹²⁵ Article 4(a), (m) and (n).

¹²⁶ Article 4(o).

¹²⁷ Article 4(p).

¹²⁸ Chapter 10.2 of this thesis.

¹²⁹ Scale of Assessment and Alternative Sources of Financing the African Union (Assembly/AU/Dec. 578(XXV)) 2015.

¹³⁰ Abou Jeng, *Peacebuilding in the African Union Law, Philosophy and Practice* (CUP 2015) 173-4.

through prioritising financial independence in line with the institutional psychology of Pan-Africanism and the prioritisation of peace and security.

2.2 The Pursuit of International Criminal Justice within Africa

Africa has suffered from conflict for decades.¹³¹ In response, the UN established the ad hoc International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). With the establishment of the ICC, the international court became the default mechanism for addressing conflict related crimes.

The ICTR was the UNSC's response to the 1994 genocide.¹³² The tribunal was never intended to be a permanent mechanism but rather to fulfil a very specific and limited purpose: to prosecute instances of genocide and violations of international humanitarian law committed within the territory of Rwanda 'between 1 January 1994 and 31 December 1994'.¹³³ A retributive judicial mechanism was favoured by the UNSC and Rwandan government¹³⁴ because of the scale and gravity of the atrocities committed,¹³⁵ the cyclical nature of violence and impunity within the country.¹³⁶ With only a few states finding potential for reconciliation to be simultaneously promoted.¹³⁷

¹³¹ 59% of conflicts worldwide occur within Africa. Out of 42 ongoing conflicts 22 are in Sub-Saharan Africa and 3 in North Africa. See the Armed Conflict Database of the International Institute for Strategic Studies <<https://acd.iiss.org/en>> accessed 25 September 2015.

¹³² UNSC Resolution 955 (n 64).

¹³³ *Ibid.*

¹³⁴ See Spain and the UK's comments UNSC 3400th Meeting, Friday 1 July 1994, UN Doc S/PV. 3400, 3 and 7; Russia's preference supported retribution in order to send a clear signal of no toleration for IHL and international norm violations, UNSC 3453rd Meeting, Tuesday 8 November 1994, UN Doc S/PV. 3453 2; and for Rwanda's preference see Letter Dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council, UN Doc S/1994/1115. On the theories of retribution and Rwanda's preference for the ICTR see Jason Benjamin Fink, 'Deontological Retributivism and the Legal Practice of International Jurisprudence: the Case of the International Criminal Tribunal for Rwanda' (2005) 49(2) *Journal of African Law* 101.

¹³⁵ Matthew Saul, 'Local Ownership of the International Criminal Tribunal for Rwanda: Restorative and Retributive Effects' (2012) 12 *International Criminal Law Review* 427, 437.

¹³⁶ Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (CUP 2008) 157.

¹³⁷ Preamble UNSC Res 955; Russia and Pakistan, UNSC 3453rd Meeting (n 134) 2 and 10 respectively; contrast with the position of Czech Republic, UNSC 3453rd Meeting (n 134) 6-7.

The SCSL was established following the Sierra Leone civil war at the request of the Sierra Leone Government.¹³⁸ It sought 'assistance from the United Nations Security Council in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace'.¹³⁹ Eventually, an agreement was reached for the establishment of the SCSL¹⁴⁰ to prosecute those with the 'greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996'.¹⁴¹

Once again a temporally, geographically and substantively limited court was established, albeit a unique and potentially revolutionary hybrid mechanism with high expectations.¹⁴² While retribution was part of the court's purpose,¹⁴³ it was also to end impunity and contribute to the process of national reconciliation and to the restoration and maintenance of peace'.¹⁴⁴ Yet the ability of the SCSL to promote reconciliation has been seriously questioned.¹⁴⁵

With the creation of the ICC the international criminal justice project gained a permanent criminal court. The international court was meant to reduce the need for future ad hoc mechanisms by providing a permanent forum to address impunity. At present thirty-three African states are ICC members making it the largest regional grouping of states. The sizable number of African state parties has been thought to stem:

¹³⁸ On the legacy of the SCSL see Charles Chernor Jalloh (ed), *The Sierra Leone Special Court and its Legacy: the impact for Africa and international criminal law* (CUP 2014).

¹³⁹ Annex to the letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council UN Doc S/2000/786, 2. <www.rscsl.org/Documents/Establishment/S-2000-786.pdf> accessed 04 April 2017.

¹⁴⁰ Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, 2178 UNTS 137, <www.rscsl.org/Documents/scsl-agreement.pdf> accessed 04 April 2017.

¹⁴¹ Article 1, Special Court for Sierra Leone Statute UN Doc S/2002/246, appendix II. The SCSL never did apply local law.

¹⁴² Robert Cryer, 'A "Special Court" for Sierra Leone' (2001) 50 *International and Comparative Law Quarterly* 435; Nicole Fritz and Alison Smith, 'Current Apathy for Coming Anarchy: building the Special Court for Sierra Leone' (2001) 25 *Fordham International Law Journal* 391; Micaela Frulli, 'The Special Court for Sierra Leone: Some Preliminary Comments' (2000) 11 *European Journal of International Law* 857, 869.

¹⁴³ Preamble (n 140).

¹⁴⁴ Preamble, UNSC Resolution 1315 (2000) UN Doc S/RES/1315.

¹⁴⁵ Lydia A. Nkansah, 'Justice Within the Arrangement of the Special Court for Sierra Leone Versus Local Perception of Justice: a Contradiction or Harmonious?' (2014) 22(1) *African Journal of International and Comparative Law* 103; Charles Chernor Jalloh, 'Special Court for Sierra Leone: Achieving Justice?' (2010-11) 32 *Michigan Journal of International Law* 395; Antonio Cassese 'Report on the Special for Sierra Leone: submitted by the Independent Expert' (12 December 2006) <www.rscsl.org/Documents/Cassese%20Report.pdf> accessed 04 April 2017.

out of frustration with the existing international institutions, including the Security Council and the African Union, whose initiatives have proven to be unable to address conflict in the region in a satisfactory manner. It is as if Africa has volunteered itself for the International Criminal Court, and for good reason.¹⁴⁶

This view has been challenged by Kamari Clarke who argues that African states joined the ICC, in part, to demonstrate their commitment to good governance and facilitate their active engagement with the international system.¹⁴⁷ The ICC has become synonymous with Africa as ten out of eleven of the international court's current investigations relate to an African situation.¹⁴⁸

In conjunction with other international courts and tribunals the above three mechanisms have contributed greatly to the advancement of ICL. The ICTR set the precedent for the first genocide ruling by an international court, as well as defining rape as a genocidal act.¹⁴⁹ The SCSL was the first to find individuals guilty of the crime of recruiting child soldiers.¹⁵⁰ However, there are legitimate concerns over the ICC's inclusivity and the replication of the international system's inequalities.¹⁵¹

Notwithstanding the existence of the ICC and the experiences with the ICTR and the SCSL, it is both positive and heartening that African states are open and receptive to the idea of a regional criminal court. With the adoption of the Malabo Protocol the landscape of criminal justice within the continent has shifted. However, many assume that the Malabo Protocol was a direct response to the dissatisfaction of African states and the AU with the ICC, particularly with regards to the indictment of Sudanese President Omar al Bashir.¹⁵² For example, du Plessis dismisses claims by the AU that the ICLS is not 'motivated by anti-ICC sentiment'¹⁵³ based on: tensions with the ICC and the

¹⁴⁶ Schabas (n 4) 14.

¹⁴⁷ Kamari Maxine Clarke, 'Why Africa?' in Richard H Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (Brill 2016) 326-332.

¹⁴⁸ Georgia is the only non-Africa active case and investigation out of ten.

¹⁴⁹ *The Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T.

¹⁵⁰ *The Prosecutor v Alex Tamba Brima, Bria Bazzy Kamara, Santigie Borbor Kanu*, SCSL-04-16-T-613.

¹⁵¹ Chapter 7 of this thesis.

¹⁵² Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', (2011) 9 *Journal of International Criminal Justice* 1067; du Plessis (n 1); Amnesty International (n 1).

¹⁵³ du Plessis (n 2) 289.

UNSC; the upholding of immunity within the protocol; the Malabo Protocol's failure to mention the ICC or any institutional relationship to the international court; and the apparent 'belief' by African states that non-African courts should not be holding African leaders to account.¹⁵⁴ This perspective ignores other key factors at play.¹⁵⁵ There are tensions between the AU and the ICC but it would be naive to see this as the only factor as the perspective does not acknowledge the background to the Protocol's adoption and the challenges the ICC and ICL face.

2.3 African Proposals for a Regional Criminal Court (1960's – 2014)

One of the major disadvantages of seeing the Malabo Protocol as anti-ICC is the dismissal of the numerous regional debates and discussions held over the need for a regional court. Prior to the ICC's establishment the question of a regional court was raised by African states and recommendations made for its establishment.¹⁵⁶ The OAU and African states considered proposals for the inclusion of international crimes during negotiations for the African Charter on Human and Peoples' Rights (Banjul Charter). However, despite recognising the proposal's value, criminal accountability was never included¹⁵⁷ because it was felt unnecessary as the UN was discussing proposals for an international court and the Apartheid Convention held the promise of a penal court.¹⁵⁸

2.3.1 African States Support the Establishment of the ICC

African states supported the establishment of an ICC style court for many reasons, including the horrific history of apartheid and the adoption of the International

¹⁵⁴ Ibid.

¹⁵⁵ See Ademola Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', (2013) 24 *European Journal of International Law* 933, 935; Frans Viljoen, 'A Human Rights Court for Africa, and Africans' (2004-5) 30 *Brooklyn Journal of International Law* 1. 4-5; International Convention on the Suppression and Punishment of the Crime of Apartheid, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976 (hereafter Apartheid Convention).

¹⁵⁶ The AU-EU Expert Report on the Principle of Universal Jurisdiction, Brussels, 16 April 2009, 8672/1/09 REV 1 (hereafter AU-EU Expert Report); Report of the Committee of Eminent African Jurists on the Case of Hissene Habre (hereafter Habré Committee Report) <www.hrw.org/legacy/justice/habre/CEJA_Report0506.pdf> accessed 30 June 2016.

¹⁵⁷ On the development of the African Human Rights system see Christof Heyns, *Human Rights Law in Africa 1996* (Kluwer Law International: 1996).

¹⁵⁸ Viljoen (n 155) 4-5.

Convention on the Suppression and Punishment of the Crime of Apartheid.¹⁵⁹ The Convention on the Prevention and Punishment of the Crime of Genocide had envisioned and enabled an 'international penal tribunal [with] jurisdiction' over the crime of genocide.¹⁶⁰ Coupled with the UN discussions over an international court,¹⁶¹ an assessment by African states of their capabilities and resources would have made the international system more attractive. Within this context African states, to varying degrees, were involved in the negotiations leading up to the creation of the ICC. They were present during the Ad Hoc Committee and Preparatory Committee on the Establishment of an International Criminal Court (Prep Com) meetings held between 1995-1998,¹⁶² which was the first opportunity for African states to wield influence on the type of court that would emerge.

Alongside the international meetings regional discussions were also taking place. As the Apartheid regime of South Africa had recently ended, 'the issue of human rights and the issue of punishment of apartheid as a crime was high on the agenda of most African countries, and particularly within SADC [the Southern African Development Community]. This is why SADC took the lead in promoting the court'.¹⁶³ On the initiative of the South African Ministry of Justice and a local non-governmental organisation (NGO), Lawyers for Human Rights,¹⁶⁴ SADC convened meetings over a two-year period with the aim of 'fostering a better understanding of the proposed court', looking at the potential 'implications and benefits', and to develop a common position.¹⁶⁵ The meetings

¹⁵⁹ Article V, the Apartheid Convention states 'Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction'.

¹⁶⁰ Article VI, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, Vol 78, pg 277 (hereafter Genocide Convention).

¹⁶¹ Viljoen (n 155).

¹⁶² On the establishment of the Ad Hoc and Preparatory Committees see UNGA Res 49/53 (9 December 1994) Res A/Res/49/53; UNGA Res 50/46 (18 December 1995) A/Res/50/46; UNGA Res 53/105 (26 January 1999) A/Res/53/105; UNGA Res 54/105 (25 January 2000) A/Res/54/105; UNGA Res 55/105 (19 January 2001) A/Res/55/155; UNGA Res 56/85 (18 January 2002) A/Res/56/85; UNGA Res 57/23 (3 February 2003) A/Res/57/23.

¹⁶³ Interview with ICC Official (The Hague, The Netherlands, 16 February 2016). The SADC members are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, Swaziland, South Africa, the United Republic of Tanzania, Zambia and Zimbabwe.

¹⁶⁴ The International Criminal Court Monitor 'Regional Reports' (Issue 6, November 1997) 8 <<https://www.iccnw.org/documents/monitor06.199711.pdf>> accessed 1 December 2015

¹⁶⁵ Statement by H.E. Ambassador Khiphusizi J. Jele Permanent Representative of South Africa on Behalf of Member States of the Southern African Development Community (SADC) before the

culminated in 'the adoption of ten basic principles of consensus' on an International Criminal Court (SADC 10 Principles)¹⁶⁶ which sought an 'effective, independent and impartial' international court¹⁶⁷ where the possibility for a UNSC veto in relation to the court's business was prevented.¹⁶⁸ The principles were adopted by SADC and therefore, can be viewed as the official position of the organisation's member states.

The experience of these states was such that they realised their best chance of getting their views across, developing a strategy and thus having an 'impact', would be to negotiate as a bloc during the multilateral negotiations.¹⁶⁹ This is clearly seen from how the SADC Members behaved during the Rome Conference.¹⁷⁰ Also Lesotho's subsequent 'lobbying drive [...] to co-ordinate the African group on issues pertaining to the ICC' also helped shape the approach and increased SADC's influence during the Rome Conference.¹⁷¹

In a more inclusive regional meeting, Senegal hosted the Pan-African Conference [Dakar Conference]¹⁷² aiming to 'trigger greater political will in the months leading up to the Rome Diplomatic Conference'.¹⁷³ This was to be achieved by 'rais[ing] awareness amongst African governments and people about the implications of the International Criminal Court'.¹⁷⁴ It should be noted that this was done with the support of the NGO No Peace Without Justice¹⁷⁵ and through co-sponsorship and co-chairing along with George Soros

Sixth Committee of the 52nd General Assembly, Regarding Agenda Item 150: Establishment of an International Criminal Court, New York – 21 October 1997. <<https://www.iccnw.org/documents/SouthAfricaSADC6Comm21Oct97.pdf>> accessed 30 October 2015.

¹⁶⁶ Preamble, SADC Principles.

¹⁶⁷ Principle 2.

¹⁶⁸ Principle 5.

¹⁶⁹ Sivu Maqungo, 'The Establishment of the International Criminal Court: SADC's participation in the negotiations' (2000) 9(1) African Security Review 1.

¹⁷⁰ See UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June–17 July 1998) (14 April 1998) UN Doc A/CONF.183/13 (Vol.II) (hereafter Rome Conference Negotiation Minutes).

¹⁷¹ Maqungo (n 169) 3.

¹⁷² The Conference took place 5-6 February at the Meridian President Hotel, Dakar, Senegal. <<http://www.npwj.org/node/7961#sthash.FM0bFzgg.dpuf>> accessed 27 November 2015.

¹⁷³ Fanny Benedetti, Karine Bonneau & John L Washburn, *Negotiating the International Criminal Court: New York to Rome 1994-1998* (Martinus Nijhoff Publishers 2014) 82.

¹⁷⁴ No Peace Without Justice Press Release, '25 African States met at Pan African conference in Dakar 5-6 February and declared their support for an independent and effective Permanent International Criminal Court (ICC)' (9 February 1998).

¹⁷⁵ No Peace Without Justice is an international non-profit whose work focuses on promoting and '[c]ampaigining for the Protection and Promotion of Human Rights, Democracy, the Rule of Law

from the Open Society.¹⁷⁶ The Dakar Conference had delegates from 25 African states¹⁷⁷ who were encouraged to develop an independent approach towards the ICC.¹⁷⁸ The outcome of the conference was the adoption of the Dakar Declaration on the Establishment of the International Criminal Court. Once again, the preference of the states was for an 'independent, permanent, impartial, just and effective' court, free of the political influence of the UNSC.¹⁷⁹

Interestingly, the Dakar Declaration mimics the wording of the Prep Com negotiations in that the principle of complementarity was to apply in situations where the domestic judicial system is 'unwilling or unable' to take legal action.¹⁸⁰ Thus, the link is established between these side events to the Ad Hoc Committee meetings and Prep Com in the earlier stages. The commitment of most African states to the negotiation process provided continental understanding of the legal implication for these member states:

for the first time, African countries from all parts of the continent participated actively in a committee session and cooperated closely on many issues on the basis of principles adopted by representatives of members of the Southern African Development Community in September 1997, and the Dakar declaration adopted by government and NGO representatives at a conference in Senegal in February 1998.¹⁸¹

Subsequently, Africa was represented at the Rome Conference by 47 African states¹⁸² and the OAU.¹⁸³ Furthermore, the official records show that African states were represented

and International Justice' with no links to any African state or political party. <<http://www.npwj.org/About-NPWJ/Overview.html>> accessed 01 December 2015.

¹⁷⁶ <http://www.npwj.org/node/7961#sthash.FM0bFzgg.dpuf> accessed 24 November 2015.

¹⁷⁷ Algeria, Benin, Burkina Faso, Cameroon, Cape Verde, Ethiopia, Gabon, Gambia, Guinea, Guinea Bissau, Egypt, Ivory Coast, Lesotho, Morocco, Mauritania, Namibia, Nigeria, Rwanda, Senegal, South Africa, Sudan, Tunisia, Uganda, Zimbabwe and Zambia.

¹⁷⁸ Working Session 2 "The International Criminal Court and the approach of African Countries" as per the official programme obtained via email correspondence with No Peace Without Justice, November 2015.

¹⁷⁹ Dakar Declaration.

¹⁸⁰ Ibid.

¹⁸¹ Christopher Keith Hall, 'The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998) 92(3) *The American Journal of International Law* 548, 556.

¹⁸² Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Djibouti, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Sudan, Swaziland, Tanzania (United Republic of), Togo, Tunisia, Uganda, Zambia and Zimbabwe. Rome Conference Negotiation Minutes, 5-41.

within the Vice-Presidents of the Conference,¹⁸⁴ the General Committee of the Conference,¹⁸⁵ the Committee of the Whole,¹⁸⁶ the Drafting Committee,¹⁸⁷ and the Credentials Committee.¹⁸⁸ Thus, there would have been a level of understanding of the international court's objectives and resulting expectations placed on the ICC. However, despite the large number of African states present during the negotiations not all of those states went on to sign and ratify the Rome Statute.

Regardless, the Rome Conference Plenary Meetings provide evidence of African state support for an international criminal court to end impunity as 'the legitimate concern of the community of nations to ensure that atrocious crimes did not go unpunished.'¹⁸⁹ While no African state opposed the ICC's creation, the one common factor shared amongst all African and non-African states alike was the desire for the court to be free from political interference. There were reservations over the role the UN and the accompanying level of interference in internal state affairs.¹⁹⁰ Mirroring the SADC 10 Principles and Dakar Declaration, the generalised view was for a permanent, independent, impartial, credible, just and fair international court.¹⁹¹ It was also made clear that the international court would neither eradicate the need for other mechanisms in the future and 'should not be regarded as an end in itself',¹⁹² nor obviate the need for ad hoc tribunals.¹⁹³ This position was in conflict with that of the International Law Commission (ILC) which envisioned the court working 'in close relationship with the United Nations [and] would therefore obviate the need for further ad hoc tribunals.'¹⁹⁴

¹⁸³ The OAU sent two representatives; the Deputy Permanent Observer to the United Nations and a Legal Adviser from the OAU Secretariat.

¹⁸⁴ Algeria, Burkina Faso, Egypt, Gabon, Kenya, Malawi, Nigeria and Tanzania, Rome Conference Negotiation Minutes, 45.

¹⁸⁵ *ibid.*

¹⁸⁶ Lesotho, *ibid.*

¹⁸⁷ Cameroon, Ghana, Morocco, South Africa and Sudan, *ibid.*

¹⁸⁸ Zambia, *ibid.*

¹⁸⁹ Mr Imbiki (Madagascar) 7th Plenary meeting, Thursday, 18 June 1998, A/CONF.183/SR.7 para 29.

¹⁹⁰ For example Uganda, 8th Plenary Meeting, Thursday, 18 June 1998 at 3.10pm, A/CONF.183/SR.8 para 69; Swaziland, 7th Plenary Meeting (*ibid.*) para 42; and Gabon, 6th Plenary Meeting, Wednesday, 17 June 1998 at 3.05pm A/CONF.183/SR.6 para 95; Sudan 9th Plenary Meeting, Friday, 17 July 1998, at 10.35 A/CONF.183/SR.9 para 75.

¹⁹¹ See plenary meetings, UN Doc A/CONF.183/13 (Vol.II).

¹⁹² Mr Assamoah of Ghana, 4th Plenary Meeting, Tuesday, 16 June 1998 at 3.10pm A/CONF.183/SR.4 para 37.

¹⁹³ Mr Nteziryayo of Rwanda, 6th Plenary Meeting, Wednesday, 17 June 1998 at 5.05pm A/CONF.183/SR.6 para 110.

¹⁹⁴ Mr Crawford, 2nd Plenary Meeting, Monday, 15 June 1998, at 3.10pm A/CONF.183/SR.2 para 104.

An important issue was the type of legal system the international court would follow. African states do not share a common legal system or history. Libya called for a court which was inclusive of all legal systems as '[W]estern values and legal systems should not be the only source of international instruments'.¹⁹⁵ This was a common concern for all African states where the legal system is not based on, or solely on, the English common law or Roman civil law. All African states present envisioned an international court complementary to the national system¹⁹⁶ whereby domestic prosecutions would be given preference, unless the national court was unable or ineffective.¹⁹⁷ Yet, complementarity was not to be used to supplant national jurisdiction or be a supervisory body performing a watchdog function.¹⁹⁸

While certain states wanted the court to be truly universal with its competency recognised by all,¹⁹⁹ the consensus was in favour of automatic jurisdiction by state consent when signing up to the treaty and not an opt-in/opt-out system.²⁰⁰ There was more disagreement over how cases and situations were to come before the court and the Prosecutor's ability to initiate their own investigations and prosecutions. The majority were in favour of granting such powers but wanted the Pre-Trial Chamber to exercise some form of control.²⁰¹ Three African states rejected this approach: Egypt 'for practical and legal reasons' not expanded upon;²⁰² Nigeria as granting 'such power without any safeguards might entail the risk of political manipulation which would not augur well for the independence of the Court';²⁰³ and Sudan on the basis that the 'Prosecutor should be under reasonable and logical control, and should not act ex officio'.²⁰⁴ As only three out of 47 states objected, there was clear support for the Prosecutor to enjoy such powers.

¹⁹⁵ 6th Plenary Meeting (n 193) para 83.

¹⁹⁶ Rome Conference Negotiation Minutes.

¹⁹⁷ Burundi, 8th Plenary Meeting (n 190) para 69; Egypt 9th Plenary Meeting (n 190) para 87; Kenya 3rd Plenary Meeting, Tuesday, 16 June 1998, at 10.10am A/CONF.183/SR.3 para 64.

¹⁹⁸ Ghana 4th Plenary Meeting (n 192) para 38; Sudan 7th Plenary Meeting (n 189) para 2.

¹⁹⁹ Burundi foresaw a court where '[n]o State should be entitled to refuse recognition of the Court's competence', 8th Plenary Meeting, Thursday (n 190) para 60.

²⁰⁰ Lesotho 2nd Plenary Meeting (n 194) para 70; Sierra Leone, 4th Plenary Meeting (n 192) para 53; Namibia 4th Plenary Meeting (n 192) para 57; Uganda 8th Plenary Meeting (n 190) para 71.

²⁰¹ Guinea 5th Plenary Meeting, Wednesday, 15 June 1998, at 10am A/CONF.183/SR.5. para 19 and Senegal Namibia 4th Plenary Meeting (n 192) para 16.

²⁰² Egypt Mr El Masry, 9th Plenary Meeting (n 190) para 87.

²⁰³ Nigeria Mr Ibrahim, 7th Plenary Meeting (n 189) para 88.

²⁰⁴ Sudan, Mr Alhadi, 9th Plenary Meeting (n 190) para 77.

Proposals for NGOs, states or individuals to be able to initiate investigations received little support.²⁰⁵

The consensus was for the international court to be independent from the UN, but the role of the UNSC and the UN General Assembly (UNGA) was harder to resolve. Proposals included the UNSC having no role in referring cases,²⁰⁶ referrals but no veto permitted²⁰⁷ and only referrals in line with its mandate.²⁰⁸ African states voiced concern over the political nature of the UNSC and manipulation of its work which would impact on the investigations deferred or obstructed.²⁰⁹ The UNGA was felt to play a more minor role over procedural aspects, except by Sudan who believed a 'role in punishing war criminals [and] the right to express reservations should also have been granted' to the UNGA.²¹⁰ This preference may be because the UNGA is less manipulated by the UNSC Permanent Five Members due to the voting requirements.

The records of the Rome Conference negotiations show that African states were fully supportive of an independent court (free from political influence of the UN and states) which would be fair, just and effective. The role of the Prosecutor was to be fairly broad, but with oversight controls, while the UNSC's role was limited and not to be used for political reasons. The likelihood of achieving this was always dubious given the political nature of the UNSC. The divergent positions of African states expressed throughout the negotiation process is reflected in the uptake on membership to the ICC.

Many of the concerns and objections held by African states have been consistent throughout their dealings with the ICC.²¹¹ This is a consequence of the package deal offered by the Rome Statute.²¹² According to the Algerian representative Mr. Bouguetaia, this 'all or nothing' approach necessitates in that '[t]he text of the Statute of the Court

²⁰⁵ Mr Kirabokyamaria, 8th Plenary Meeting (n 190) para 71.

²⁰⁶ Angola, 8th Plenary Meeting (ibid) para 53; Democratic Republic of Congo, 7th Plenary Meeting (n 189) para 93.

²⁰⁷ Botswana, 8th Plenary Meeting (n 190) para 66.

²⁰⁸ Namibia, 4th Plenary Meeting (n 192) para 57.

²⁰⁹ This concern re-emerge in relation to Darfur, Sudan and the case against Sudanese President Omar Al-Bashir and with the referral of the situation in Libya. See Chapter 7.2 of this thesis.

²¹⁰ Sudan, Mr Alhadi, 9th Plenary Meeting (n 190) para 78.

²¹¹ Particularly in relation to the UNSC referral of the situation in Darfur, Sudan and the Sudanese government's stance towards the investigation and cooperation.

²¹² Hakan Friman, 'The International Criminal Court: Negotiations and Key Issues' (1999) 8(6) African Security Review 1, 2.

met some, if not all, of his major concerns. He still had some regrets and some fears, but hoped that, with time, those fears would be overcome'.²¹³

The ICC emerged as a universal international criminal system, a court addressing international crimes that was open to all states.²¹⁴ Distinguishing itself from previous international courts and tribunals, the primary responsibility for the prosecution of the crimes lies with states therefore, the ICC is a court of last resort.²¹⁵ While the ICC is considered to be a universal system of justice, the reality is that until every single state is a party to the Rome Statute this universal aspiration will never be realised. The fact the UN has near universal membership, and also has the ability to refer situations to the ICC, does not alter the lack of universal nature of the ICC's jurisdiction. Given the reality of the UN system, the UNSC's Permanent Members' veto power and power politics, certain states will forever be out of the reach of the ICC.

2.3.2 African States Pursue the Creation of a Regional Criminal Court

Concurrently in 1998, a protocol amending the Banjul Charter created an independent African Court of Human and Peoples' Rights (ACtHPR) entering into force in 2005. Yet, when the AU was established in 2000 it had its own judicial organ, the Court of Justice (ACJ). Proposals to merge the two courts were put forward although initially rejected.²¹⁶ During one such debate in 2005 the then Nigerian President Obasanjo suggested the merged court could have different divisions dealing with specific matters, including 'a division for cross-border criminal issues or whatever'.²¹⁷ While not explicitly calling for international criminal jurisdiction, he had called for a judicial mechanism through which crimes of concern to the region could be addressed. The AU Assembly eventually decided to merge the ACtHPR and the ACJ, but neither international nor transnational criminal jurisdiction was included.²¹⁸ The Malabo Protocol would go on to build on

²¹³ 9th plenary meeting (n 190) para 91.

²¹⁴ Article 5 Rome Statute lists the crimes as a) genocide, b) crimes against humanity, c) war crimes and d) aggression.

²¹⁵ Article 1 and 17 Rome Statute.

²¹⁶ Decision on the Draft Protocol of the Court of Justice, Executive Council, EX/CL/59 (III), determined the two courts should remain 'separate and distinct institution[s]'.
²¹⁷ Report of the Decision of the Assembly of the Union to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Executive Council, Sixth Ordinary Session, 24-28 January 2005, Abuja, Nigeria, EX.CL/162, 2.

²¹⁸ AU Assembly decision on the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/Dec. 83(V).

Obasanjo's idea of including transnational crimes as well as crimes of concern within the continent.

Separate to this, concerns over the use of UJ by non-African states culminated in calls for a regional court.²¹⁹ For example, the debates over the prosecution of former Chadian President Hissène Habré²²⁰ resulted in the AU Assembly setting up a Committee of Eminent African Jurists (Habré Committee), 'mandated to make concrete recommendations on the above [Habré] matter as well as ways and means of dealing with issues of a similar nature in the future'.²²¹ Consequently, the Habré Committee, reflecting on the merger of the two African Courts, proposed granting it criminal jurisdiction over 'crimes against humanity, war crimes and violations of Convention Against Torture'.²²² The Committee's report further recommended strengthening the ability of national and regional institutions to protect human rights and, most importantly, 'ensure [...] exposure to international criminal law norms for judges and law enforcement agencies in Africa, to ensure they are equipped to handle such international crimes'.²²³

Amongst the regional discussions over establishing a judicial system the African Charter on Democracy, Elections and Governance (ACDEG) was adopted in 2007. The AU took the opportunity to translate its vehement opposition to unconstitutional changes of government and move beyond sanctions, calling for criminal accountability where individuals 'may also be tried before the competent court of the Union'.²²⁴ As the only judicial organ was the ACJ no criminal jurisdiction existed,²²⁵ making it plausible that the treaty drafters were taking cognisance of the potential future criminal jurisdiction of the AU's court. The ACDEG provides an example of an instrument reflecting the context and ongoing debates over ways to address criminal accountability within African courts.

Overall, the momentum to build regional capacity to pursue crimes of concern to the continent is evident from as early as the development of the African human rights

²¹⁹ AU-EU Expert Report.

²²⁰ For an in-depth explanation on the key developments see Human Rights Watch <<https://www.hrw.org/tag/hissene-habre>> accessed 29 June 2017.

²²¹ Habré Committee Report, para 2.

²²² Ibid para 35.

²²³ Ibid para 39.

²²⁴ Article 25(5) ACDEG.

²²⁵ The merged ACTJHR protocol has yet to enter into force.

system. Therefore, it is misrepresentative and overly simplistic to see the Malabo Protocol's creation of the ICLS as solely an anti-ICC response. But, this is not to imply that the ICC had no influence at all. Instead, the broader context, expectations and influences at play need to be brought into any analysis of the need for the new court and its potential contribution to ICL.

2.4 Drafting the Malabo Protocol

While the concept of an African regional criminal court goes back decades, the history of the Malabo Protocol is presented from the date of the first official decision taken by an AU organ to pursue amending the ACtJHR.

During the February 2009 Summit, the AU Assembly, addressing the concerns over the use of UJ, called on the AU Commission 'to examine the implications of the Court [merged ACtJHR] being empowered to try international crimes'.²²⁶ When the Commission followed up in 2010, the Assembly took a further decision 'request[ing] the Commission to finalise the study on the implications of empowering the African Court on Human and Peoples' Rights to try international crimes [...] and report [...] in January/February 2011'.²²⁷ Consequently the Commission engaged a consultant organisation 'to produce a detailed study with comprehensive recommendations and a draft legal instrument amending the Protocol on the Statute of the African Court of Justice and Human Rights'.²²⁸

During June and August 2010 the Commission's Office of the Legal Counsel received a draft proposal. This proposal was then part of the validation workshops hosted by the Pan African Parliament in late 2010. In attendance were the Commission's officials, legal

²²⁶ Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction - Doc. Assembly/AU/3 (XII), Decision Assembly/AU/Dec. 213 (XII), (February 2009) adopted by the Assembly at its 12th Ordinary Session, Addis Ababa, Ethiopia, February 2009.

²²⁷ Decision Assembly/AU/Dec.271(XIV) adopted by the Assembly at 14th Ordinary Session, Addis Ababa, Ethiopia, February 2010.

²²⁸ Don Deya, 'Worth the Wait: Pushing for the African Court to exercise jurisdiction for international crimes' (Open Society Initiative for Southern Africa 2012) 24 <http://www.osisa.org/sites/default/files/is_the_african_court_worth_the_wait_-_don_deya.pdf> accessed 30 June 2016. The consultant organisation was the Pan African Lawyers Union (PALU).

counsel and advisors from the various AU bodies and the REC/RMs.²²⁹ The closed nature of the workshops has been criticised for not including state representatives, civil society and other experts in the field.²³⁰ The AU, as an institution, lacks transparency and the approach taken to the workshops is in contrast to that of the Rome Statute negotiations and preparatory meetings. Furthermore, there are concerns over not including AU member states as the success of the African Court rests solely on states buy in. The Commission missed an opportunity to ensure state understanding of the court which is crucial to building support continentally.

Instead, it was only in 2011 that African Government participation occurred when in March, May, October and November expert meetings were convened which provisionally adopted a draft protocol.²³¹ A review of the draft was conducted by another expert meeting in May 2012, followed by a meeting of the African Ministers of Justice and Attorneys General whom supported the draft.²³²

During the process, while never hindering progress, the issue of how to define the crime of unconstitutional changes of government (UCG) proved to be a major point of contention because of its political nature.²³³ Another issue was how to adopt a definition with a penalty that would deter the conduct,²³⁴ while refraining from derailing the Unconstitutional Changes of Government Convention. Specifically, there were difficulties over how to reconcile the collective action nature of the crime with individual criminal responsibility,²³⁵ and to avoid creating a right to overthrow or encourage unconstitutional changes.²³⁶ It is hard to understand why the AU and states continued with the process given the inability to reach consensus over a UCG definition. There may

²²⁹ Ibid 24.

²³⁰ du Plessis (n 1); Frans Viljoen, 'AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol' (*AfricLaw*, 23 May 2012) <<https://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/>> accessed 30 June 2016; Amnesty International (n 1) 9-10. The validation workshops were not completely void of any non-AU presence, the Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa had representatives present, see Deya (n 228) 24.

²³¹ Deya (228) 24.

²³² The Report, the Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General on Legal Matters, Min/Legal/Rpt.

²³³ Report, the Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General – Draft Protocol on Amendments to the AfCtJHR EX.CL/773(XXII) 3.

²³⁴ Ibid para 11(iii).

²³⁵ Ibid para 11(ix).

²³⁶ Ibid para 11(x).

have been a strong desire for the Protocol's adoption process to be concluded to establish the regional court, or it is possible that states may have been pushing for adoption without the inclusion of the specific crime.

In July 2012, despite support for the Draft Protocol, the Assembly did not adopt the instrument but instead requested further studies be done on the financial implications of establishing such a court and on a definition of UCG.²³⁷ In December 2013, the Commission considered the study's finding that the human resources financial implications would be 'marginal',²³⁸ and that progress had been made on the definition of UCG. Regardless, the Assembly was dissatisfied with the submissions received and called for further consideration.²³⁹

It was only in May 2014 that a Ministerial Meeting of the Specialized Technical Committee on Justice and Legal Affairs successfully adopted a definition of UCG and considered the draft Protocol's immunity provision for Heads of State and Government.²⁴⁰ Finally, the Assembly adopted the Protocol during the 23rd Ordinary Session of the AU held in Malabo, Equatorial Guinea in June 2014. It became known as the Malabo Protocol named after the city in which it was adopted.²⁴¹

Within five years, the AU had managed to adopt a protocol to empower its judicial organ with criminal jurisdiction. This quick turnaround has been criticised for being rushed and without any real consultation process.²⁴² While the Malabo Protocol 'went through

²³⁷ Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Decision Assembly/AU/Dec. 427 (XIX) para 2.

²³⁸ Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes; EX.CL/773 (XXII) Annex 2 Rev, para 4. The report's finding that the costs are marginal is most likely due to the phased in approach to the resourcing of the court identified in the Report.

²³⁹ January 2012 Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, EX.CL.Dec. 766(XXII) para 2 and 3; Doc.PRC/Rpt(XXV), EX.CL.Dec. 766(XXII) para 3.

²⁴⁰ Opening Statement by Prof. Vincent O. Nmehielle, Legal Counsel and Director for Legal Affairs of the African Union Commission, 1st Session of the Specialized Technical Committee on Justice and Legal Affairs (Government Legal Experts) as cited by Amnesty International (n 1) 11 footnote 47. Prior to this meeting, immunity was not an issue considered by the draft protocol, Deya (n 228); confirmed by the Report of the Meeting of Ministers of Justice And/Or Attorneys General on Legal Matters 14 and 15 May 2012, Addis Ababa, Ethiopia Min/Legal/Rpt. (part of EX.CL/731 (XXI); The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs EX.CL/846(XXV) Rev.1.

²⁴¹ Assembly/AU/Dec.529 (XXIII) (n 101).

²⁴² du Plessis (n 1).

the normal processes of the AU [...] but then if you go into the content, then you can always raise issues from the content itself, but on the processes, it followed exactly that what they require for it to get to where it is now'.²⁴³ According to the AUCA, the Assembly has the power to 'take decisions on the reports and recommendations from the organs of the Union'²⁴⁴ and 'establish any organ of the Union'.²⁴⁵ It was pursuant to these powers that the Malabo Protocol came to be. As the 'supreme policy and decision-making organ',²⁴⁶ the Assembly is made up of Member states' Heads of State and Government who 'determines the AU policies, establishes its priorities'²⁴⁷ and 'can create any committee, working group or commission as it deems necessary'.²⁴⁸ The body tasked to consider the expansion of the merged ACTJHR's jurisdiction was the Commission, the secretariat of the organisation, thus, the logical and appropriate organ to assign the task.

For a draft protocol to be adopted by the Assembly such decisions are taken by 'consensus or, failing which, by a two-thirds majority of the Member States of the Union'.²⁴⁹ The way the Malabo Protocol was adopted conformed to the institutional procedure and the involved organs and bodies are permitted under the AUCA to perform those tasks. Thus, the Malabo Protocol is a legally binding treaty, and furthermore, there was no *ultra vires* act due to the engagement of a consultant by the Commission.

What is evident from the drafting process is the push to gain as many concessions that could be managed at the time, most obviously with the fourteen crimes enumerated.²⁵⁰ The thinking surrounding the crimes was that 'if we are establishing a court, why wait another twenty years, let's all put them [the crimes] together. So that is why you have all that list of other crimes besides genocide, war crimes and crimes against humanity'.²⁵¹

Whether adopting the Malabo Protocol was undertaken to: broaden international criminal justice beyond the international level's approach to include those of the

²⁴³ Interview with African State Official (Addis Ababa, Ethiopia, 29 April 2015).

²⁴⁴ Article 9(1)(b) AUCA.

²⁴⁵ Article 9(1)(d) AUCA.

²⁴⁶ *African Union Handbook 2016* (African Union Commission and New Zealand Ministry of Foreign Affairs and Trade 2016) 12 <<http://www.au.int/en/sites/default/files/auhb-2016-english-pdf-final-january-2016.pdf>> accessed 30 June 2016.

²⁴⁷ *Ibid* 16.

²⁴⁸ *Ibid* 16.

²⁴⁹ Article 7(1) AUCA.

²⁵⁰ Article 28A ACS.

²⁵¹ Interview with African State Official (Addis Ababa, Ethiopia, 8 May 2015).

region,²⁵² in preference to the ICC or UJ prosecutions by non-African states,²⁵³ or simply as an important development for the African Court,²⁵⁴ the Protocol is ground breaking as, to date, no other regional court has criminal jurisdiction.²⁵⁵

African States and the AU have pursued a regional criminal court for decades. However, given the existence of the ICC and the ability of domestic courts to prosecute international crimes is there a need for an African regional criminal court?

²⁵² Report of the Ministers of Justice Attorneys General EX.CL/478 (XIV) 14; AU-EU Expert Report; Progress Report of the Commission on the Hissene Habre Case – Assembly/AU/9(XVI)Rev. 1

²⁵³ Libya and Sudan's view in Report of the Meeting of Ministers of Justice and/OR Attorneys General on Legal Matters (n 240) 4.

²⁵⁴ Egypt's view, *ibid.*

²⁵⁵ The European Union has proposed a more limited body, the European Public Prosecutor's Office, mandated to 'investigate and prosecute EU-fraud and other crimes affecting the Union's financial interests'. <http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm> accessed 25 June 2017.

Part I

The AU and Prosecutions under Universal Jurisdiction

In *Part I*, the first of the research sub questions - whether UJ contributes to the need for an African regional criminal court – is answered. The analysis starts in Chapter 3 with an investigation into the purpose and scope of UJ as a mechanism for fighting impunity. While UJ prosecutions before domestic courts offer a forum to pursue accountability, under international law state officials are protected from coming before the court of another state. The extent to which an immunity plea in relation to a domestic court's prosecution of international crimes inhibits UJ is the final factor considered in Chapter 3.

The discussion then moves on to consider state practice in Chapter 4, which includes the African response to European UJ prosecutions. The similarities between African and non-African states is highlighted to dispel any assumption that the AU and African states are opposed to the concept of UJ. The last section of this chapter focuses on the prosecution of Habré before the Senegalese court, exploring whether a promising precedent has been set for future African UJ prosecutions. The critical analysis undertaken in both chapters provides the basis of the conclusion that UJ is of limited use in the fight against impunity, and as such, contributes to the need for an African regional criminal court.

Chapter 3

Domestic Prosecutions of International Crimes

Prior to the establishment of international courts the only way to address international crimes was through national courts. Today, despite the emergence of international courts and the ICC, the relevance of and need for national prosecutions has not diminished. In fact, it is thought to be the most appropriate way to address international crimes.²⁵⁶

However, when the state within which the crimes occurred chooses not to, or is unable to prosecute, other states can step in. In such cases, one method by which to base a prosecution on is UJ. This is the most contentious principle of jurisdiction because there is neither a nationality nor a territory link to the crime, accused or victim. Yet, it enables any state to pursue cases related to specific international crimes in an attempt to reduce impunity.

Therefore, given the ability of any state to use UJ as a jurisdictional basis, this chapter investigates how UJ contributes to the need for an African regional criminal court by scrutinizing its purpose, how the crimes covered assist in meeting its purpose, and what limitations are placed on the principle.

3.1 Purpose of Universal Jurisdiction

At its most basic form UJ provides a jurisdictional basis for the prosecution of certain crimes by any state, unconnected to the commission of the crime, the place it occurred, the accused or the victim because the conduct is of universal concern.²⁵⁷ The purpose of

²⁵⁶ Mark S Ellis, *Sovereignty and Justice: Balancing the Principle of Complementarity between International and Domestic War Crimes Tribunals* (Cambridge Scholars Publishing 2014).

²⁵⁷ Kenneth C Randall, 'Universal Jurisdiction Under International Law' (1988) 66 *Texas Law Review* 785, 788 as cited in Steven W Becker, 'Universal Jurisdiction: How Universal Is It? A Study of Competing Theories' (2002-3) 12 *Palestine Yearbook of International Law* 49, 50; Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2(3) *Journal of International Criminal Justice* 735.

UJ is thus to contribute to ending impunity, by providing a means by which to address international crimes when the state in question cannot or will not prosecute. Yet, the jurisdictional principle of UJ lacks a common definition which causes complications in its application.²⁵⁸ Due to the many diverse approaches and differing terminological use of UJ generalising the principle and determining an understanding proves problematic,²⁵⁹ and has 'probably been among the reasons why confusion has surrounded its legal significance'.²⁶⁰

Given the diverse definitions and conceptualisation of UJ a group of prominent jurists sought 'to clarify an increasingly important area of international criminal law' by developing The Princeton Principles.²⁶¹ The premise being, that international interests are harmed by the commission of certain crimes, and there was a need to 'legitimize the controversial idea that ordinary national courts should be able to hear charges against anyone found within their jurisdiction who is alleged to have committed a serious crime under international law'.²⁶²

The Princeton Principles were intended to further the cause of UJ, end impunity and promote a universal standard of accountability. Therefore, many of the principles reflect aspirational elements as opposed to a grounding in state practice and law.²⁶³ For example, Principle 3 enables prosecution in the absence of national UJ legislation,²⁶⁴ but does not address its compatibility with the principles *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no penalty without law). The authority for UJ

²⁵⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Dissenting Opinion of Judge ad hoc van den Wyngaert) [2002] ICJ Rep 121, paras 44-45 (hereafter *Arrest Warrant case Dissenting Opinion*).

²⁵⁹ Bassiouni notes five distinct meanings of universality, demonstrating the wide meaning of universality in 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia Journal of International Law* 81, 152; Luc Reydams separates UJ into three categories: co-operative general universality, co-operative limited universality and unilateral limited universality, in *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2003) Chapter 2.

²⁶⁰ Bassiouni (n 259) 152.

²⁶¹ Marks M, Press Release, 'Jurists Announce "Princeton Principles"' (23 July 2001) <<https://www.princeton.edu/news/2001/07/23/jurists-announce-princeton-principles>> accessed 16 June 2017.

²⁶² Ibid.

²⁶³ Macedo S, et al. 'Princeton Principles on Universal Jurisdiction' (Princeton University Program in Law and Public Affairs 2001) 39, <https://lapa.princeton.edu/hosteddocs/unive_jur.pdf> accessed 15 May 2015.

²⁶⁴ 'With respect to serious crimes under international law as specified in Principle 2(1), national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it'.

treaty crimes stems from an explicit provision, which contradicts Principle 3's attempt to remove the need for legislation.²⁶⁵ Additionally, states have implementing procedures which must be adhered to. In contrast, a customary law-based UJ prosecution would neither violate *nullum crimen* nor *nulla poena sine lege* as the conduct would already have been classified as an international crime by custom.

In contradiction to Principle 3, Principle 11 requests that 'a state shall, where necessary, enact national legislation to enable the exercise of universal jurisdiction and the enforcement of these Principles'. The only logical explanation for this inconsistency is the distinction made between 'serious crimes under international law'²⁶⁶ and 'the application of universal jurisdiction to [...] other crimes under international law'.²⁶⁷ Yet, the Princeton Principles provide no guidance as to which crimes are covered as neither the mention of 'the nature of the crime',²⁶⁸ nor the 'category of offences generally regarded as universal concern'²⁶⁹ clarify the matter.

Overall, the Princeton Principles demonstrate the problem of claiming the law is one thing when the discussion is not focused on the law as it exists (*lex lata*), but rather with a view to the future (*de lege ferenda*) or the law as desired (*lex desiderata*). Thus, it is hard to see how the principles provide clarity or further the cause of ending impunity. Instead, it entrenches further confusion and raises further points of contention.

UJ, in theory, is meant to reduce impunity for international crimes by providing a means by which any state can prosecute the conduct. However, the international community has not produced any concrete measures to establish clear guidelines on UJ, to improve clarity and its consequent use. But, at the regional level the AU has attempted to develop its own approach²⁷⁰ in response to the use of UJ by non-African states over Africans and to increase the principle's utility for African states.

²⁶⁵ On the distinction between treaty and customary crimes, see section 3.2 of this chapter.

²⁶⁶ Principle 2(1).

²⁶⁷ Principle 2(2).

²⁶⁸ Principle 1.1.

²⁶⁹ Randall (n 257) 50.

²⁷⁰ As evidenced by Report of the Commission on the Use of the Principle Of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General, EX.CL/411(XIII) as adopted at the Thirteenth Ordinary Session of the Executive Council, 24-28 June 2008, Sharm El Sheikh, Egypt (hereafter Report of the Commission on UJ); AU-EU Expert Report; the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences,

The AU agrees that the purpose of UJ is to end impunity²⁷¹ by acting as a gap filler and not a replacement for national or international prosecutions.²⁷² Its definitional approach reflects this and the basic premise of UJ is

the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction. In other words, universal jurisdiction amounts to the claims by a state to prosecute crimes in circumstances where none of the traditional links of territoriality, nationality, passive personality or the protective principle exists at the time of the commission of the alleged offence.²⁷³

While states' primary responsibility for prosecuting their own international crimes is emphasised,²⁷⁴ UJ is needed because states do not discharge this obligation. What's more 'certain crimes are of such heinous character and of most serious concern to the international community that they must not go unpunished'.²⁷⁵ Yet, while the nature of the crime is important, 'moral reprehensibility cannot be equated to universal jurisdiction'.²⁷⁶

However, African states have come to view UJ as a political tool used by European states against African state officials.²⁷⁷ Therefore, the AU's view is that it's the scope of UJ and not its existence which is contested.²⁷⁸ Consequently, in May 2012, the AU adopted The African Union (Draft) Model Law on Universal Jurisdiction over International Crimes (AU Model Law). This was done in an attempt to control the development of the

<http://www.africalegalaid.com/download/policy_document/Policy_Document.pdf> accessed 25 March 2016 (hereafter Cairo-Arusha Principles); and the African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes EX.CL/731 (XXI)c, adopted at Twenty-First Ordinary Session of the Executive Council, 9-13 July 2012, Addis Ababa Ethiopia (hereafter AU Model Law).

²⁷¹ Article 3(a) AU Model Law.

²⁷² Edward Kwakwa, 'The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: Developing the Frontiers of the Principle of Universal Jurisdiction' (2002) 10 African Yearbook of International Law 407, 411.

²⁷³ AU-EU Expert Report, para 8. As a document endorsed and adopted by the AU it is possible to equate the report to the organisation's official view and approach.

²⁷⁴ AU Model Law Preambular para 4.

²⁷⁵ AU Model Law Preambular para 1.

²⁷⁶ Report of the Commission on UJ, para 40.

²⁷⁷ AU-EU Expert Report.

²⁷⁸ Report of the Commission on UJ, para 9.

principle and that of ICL '[i]nstead of leaving the subject of UJ to a group of Western states'.²⁷⁹

Hence, the AU and African states have sought to protect sovereignty and promote the principle of non-interference through adopting a policy, and not a legal approach, to UJ.²⁸⁰ While UJ emerged in an era when no permanent international criminal court existed, this is no longer the case. The AU uses this to its advantage by encouraging ICC referrals as a check against the use of UJ and by removing the need for such prosecutions.²⁸¹ However, there are limitations to the ICC's usage as its jurisdiction is only for crimes committed after 2002 and the international court requires membership or acceptance of its jurisdiction by an official declaration.²⁸²

Overall, the purpose of UJ has not significantly changed under the AU's approach, however the manner in which it is to be achieved and by whom is the point of divergence. The following section investigates what UJ can achieve in its pursuit to end impunity and to assess whether the principle contributes to the need for a regional criminal court.

3.2 The Scope of Universal Jurisdiction

For African states and the AU to have created a regional criminal court, the means by which UJ addresses international crimes must be lacking. The way in which UJ seeks to fulfil its purpose, and assists in ending impunity, can contribute to the need for the regional criminal court if it does not address the needs of African states in terms of criminal prosecutions.

²⁷⁹ A Dube, 'The AU Model Law On Universal Jurisdiction: An African Response to Western Prosecutions Based on the Universality Principle' (2015) 18(3) PER 450, 457 <<http://dx.doi.org/10.4314/pelk.v18i3.01>> accessed 28 March 2016.

²⁸⁰ Report of the Commission on UJ, para 40.

²⁸¹ Ibid, para 91.

²⁸² Rome Statute Article 11(1) and (2).

This section interrogates the crimes under UJ. Although the nature of the conduct must be heinous and of concern to the international community,²⁸³ the act must be established by either treaty or by customary international law as a UJ crime.

3.2.1 Universal Jurisdiction Treaty Law Crimes²⁸⁴

While treaties provide an unequivocal means to designate a crime of UJ concern, only four crimes are definitively included:²⁸⁵ the crime of piracy as provided for in the Convention on the Law of the Sea;²⁸⁶ the crime of apartheid under the International Convention on the Suppression and Punishment of the Crime of Apartheid;²⁸⁷ torture under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);²⁸⁸ and enforced disappearances under the International Convention for the Protection of All Persons From Enforced Disappearances.²⁸⁹

Attempts to expand the reach of UJ treaty crimes are made by including the *aut dedere aut judicare* (extradite or prosecute) provisions, but the distinctions between treaty based UJ crimes and the principle of *aut dedere aut judicare* should not be blurred.²⁹⁰ As the scope of UJ is hotly contested it would be better to secure agreement on the principle's fundamentals before trying to expand it.²⁹¹ For example, with Article 1 of the Genocide Convention. While a laudable attempt to include the conduct as UJ, the Genocide Convention is not the correct method to classify the crime as such because the

²⁸³ Section 3.1 of this chapter.

²⁸⁴ For an in-depth analysis on the different approaches of treaties to UJ see Reydams (n 259) Chapter 3.

²⁸⁵ Ibid chapter 3. The AU-EU Expert Report, footnote 5 lists the UJ treaties identified by the Ad Hoc Expert Group.

²⁸⁶ Article 105.

²⁸⁷ Article IV(b).

²⁸⁸ Article 5(2) 2.

²⁸⁹ Article 9(2).

²⁹⁰ On the distinctions see Reydams (n 259) Chapter 1; Bassiouni (n 259); Julia Geneuss, 'Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction' (2009) 7 Journal of International Criminal Justice 945, 949.

²⁹¹ On the controversy see Reydams (n 259) 28; Geneuss (n 290) 949; George P Fletcher, 'Editorial Comments: Against Universal Jurisdiction' (2003) 1 Journal of International Criminal Justice 580; Becker (n 257).

treaty does not explicitly provide for UJ.²⁹² Furthermore, customary international law does not appear to support this expansion.²⁹³

Despite the ability of treaties to establish UJ there are limitations for their applicability because no obligations arise for non-state parties unless expressly agreed otherwise.²⁹⁴ However, the United States of America (USA) has nevertheless tried to impose UJ obligations, including the use of *aut dedere aut judicare* provisions, against non-state parties.²⁹⁵ Regardless, treaty law is very clear as to which states UJ provisions apply to. It applies only to states which are a party to the treaty.

In brief, very few treaties explicitly provide for UJ restricting the number of crimes and the principle's ability to contribute to ending impunity. Yet, as customary international law also establishes UJ conduct the limitation of treaty crimes may be overcome, potentially negating the need for an African regional criminal court to fill the gap.

3.2.2 Universal Jurisdiction Customary Law Crimes

For conduct to be considered a UJ customary crime it must be 'general practice accepted as law'.²⁹⁶ To satisfy this requirement three elements must be met:²⁹⁷ the state practice must be consistent and of appropriate duration, although no time frame is set out for said practice to emerge;²⁹⁸ there must be generality of the practice, which requires general acceptance by the majority of states, or uniform practice amongst states;²⁹⁹ and it must reflect *opinio juris sive necessitatis* (accepted as law) although some inconsistencies or state objections do not negate the practice's customary nature.³⁰⁰ However, the ability

²⁹² Reydams (n 259) 47; William Schabas, *Genocide in International Law: The Crime of Crimes* (CUP 2000); A. Hays Butler, 'The Growing Support for Universal Jurisdiction in National Legislation' in Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press 2004) 73.

²⁹³ On customary international law and UJ see section 3.2.2 of this chapter.

²⁹⁴ Article 34 and 35 Vienna Convention on the Law of Treaties 1155 U.N.T.S. 331, 8 I.L.M. 679 (hereafter VCLT).

²⁹⁵ James Crawford, *Brownlie's Principles of Public International Law* (8th edn, CUP 2012) 471.

²⁹⁶ Article 38(1)(b) International Court of Justice Statute. The ICJ has recognised the circular nature, as being 'axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States', *Continental Shelf case (Libyan Arab Jamahiriya v. Malta)* (Merits) [1985] ICJ Rep 13, 29–30, § 27.

²⁹⁷ Crawford (n 295) 24–30.

²⁹⁸ *North Sea Continental Shelf cases* (Merits) [1969] ICJ Rep 43, § 74.

²⁹⁹ *Asylum case (Colombia v. Peru)* (Merits) [1950] ICJ Rep 277.

³⁰⁰ *Fisheries Case (United Kingdom v Norway)* (Merits) [1951] ICJ Rep 138.

of a persistent objector to negate a custom's establishment in law, or the applicability of that custom in relation to the objecting state, is unclear. Provided no other state condones the objection and it is not officially adopted by the objecting Government such conduct does not bar a customary law from existing.³⁰¹

If customary law requirements were applied, certain conduct can be said to be a UJ crime. While piracy has been codified within the 1982 United Nations Convention on the Law of the Sea (UNCLOS) it is still the most commonly cited customary UJ crime.³⁰² As piracy is committed on the High Seas, outside any state's jurisdiction, it is of universal interest that every state has jurisdiction over those accused of being *hostes humani generis* (enemies of humankind).³⁰³ Similarly, certain war crimes committed during an international and/or a non-international armed conflict were developed through state practice and later became customary law.³⁰⁴ While the 1949 Geneva Conventions largely codified the customary practice,³⁰⁵ not all associated treaties have reached customary status.³⁰⁶

³⁰¹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, 98, § 186.

³⁰² Reydam's (n 259) Chapter 2. For an alternative view on piracy not falling under UJ see Tasmin Paige, 'Piracy and Universal Jurisdiction' (2013) 12 *Macquarie Law Journal* 131.

³⁰³ Joaquín Alcaide Fernández, 'Hostes humani generis: Pirates, Slavers, and Other Criminals' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) <<http://www.oxfordhandbooks.com/view/10.1093/law/9780199599752.001.0001/law-9780199599752-e-6>> accessed 28 March 2016.

³⁰⁴ The International Committee of the Red Cross, 'Study on the Customary International Law: Rule 157 Jurisdiction over War Crimes' (Customary IHL Database) <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule157> accessed 28 March 2016.

³⁰⁵ The 1949 Geneva Conventions consist of: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

³⁰⁶ The debate over the customary law status of the Additional Protocols to the Geneva Conventions, generally holds that such status is not extended to either the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, or the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

The categorisation of other core international crimes is unclear³⁰⁷ because the arguments for inclusion are based on 'disparate, disjointed, and poorly understood' jurisprudence to meet the state practice threshold.³⁰⁸ As tempting as it is to use the notions of *jus cogens* (compelling law)³⁰⁹ and obligations *erga omnes* (towards all) to base a UJ claim,³¹⁰ this does not address the problem of a lack of a legal obligation imposed on states to exercise jurisdiction.³¹¹

However, the literature is supportive of imposing such an obligation to prosecute because state practice 'offers just about sufficient support to ground a right to do so in custom'.³¹² This is unconvincing as the legislation and types of trials using UJ do not reflect a monolithic approach to the core crimes. Furthermore, state practice is either sufficient or not, yet the assessment is that the evidence is '*just about sufficient*' (emphasis added). Likewise, customary law does not permit the exercise of UJ *in absentia* as it remains controversial.³¹³ States' opposition and protest to *in absentia* trials clearly go against the method by which customary law develops.³¹⁴

As highlighted above, under international law states are able to pursue a UJ case categorically based on the customary law crimes of piracy and a limited number of war crimes. When it comes to the core-crimes of aggression, genocide and crimes against humanity a customary basis is contested. States who are party to the relevant treaties may pursue UJ cases for the crimes of piracy, apartheid, torture, and enforced disappearances.

³⁰⁷ The core crimes are aggression, crimes against humanity, genocide and war crimes.

³⁰⁸ Stephen Macedo, 'The Princeton Principles on Universal Jurisdiction' in Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press 2004) 18.

³⁰⁹ Also known as peremptory norms.

³¹⁰ On customary law and the obligation to extradite or prosecute see Miša Zgonec-Rožej and Joanne Foakes, 'International Criminals: Extradite or Prosecute?' (2013) Chatham House Briefing Paper July 2013 IL BP 2013/01, 3-6.

<https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713bp_prosecute.pdf> accessed 28 March 2016.

³¹¹ For an explanation over the concepts and the uncertainty surrounding them see, M. Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligation Erga Omnes*' (1996) 59(4) *Law and Contemporary Problems* 63.

³¹² Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005) 87.

³¹³ *Reydams* (n 259) 224.

³¹⁴ *Ibid* 230.

For the AU this form of UJ is insufficient to address genuine regional concerns. As such, the AU Model Law calls on African states to legislate to provide for UJ over 'international crimes and for connected matters',³¹⁵ including the crimes of genocide, crimes against humanity, war crimes, piracy, trafficking in drugs and terrorism.³¹⁶ The addition of trafficking and terrorism offences is unique to Africa reflecting regional concerns. Previous attempts at carving out a regional niche to UJ included 'acts of plunder and gross misappropriation of public resources, trafficking in human beings and serious environmental crimes'.³¹⁷ This was done in an attempt to adopt a contextual approach to UJ in response to African concerns.³¹⁸ The ICJ recognised this when the draft version of the Cairo-Arusha Principles was referred to as reflective of the African understanding and perspective.³¹⁹

While UJ coverage is limited it is supported by the ICC in providing a forum for the majority of the crimes to be prosecuted when a state is unable or unwilling to prosecute.³²⁰ Yet, while the AU Model Law incorporates crimes outside of the ICC's jurisdiction there is no supporting mechanism, thus sole responsibility is left with African states. As the AU lacks the authority to impose implementation of the AU Model Law alternative ways to address the resulting impunity needs exploration. Additionally, in response to Africa's perceived abuse of UJ by non-African states, the AU Assembly called for a study into the possibility of extending the African Court of Justice and Human Rights' (ACTJHR) jurisdiction to include international crimes.³²¹

3.3 Immunity as a Limitation of Universal Jurisdiction

UJ fights impunity by providing a way for unconnected states to prosecute specific crimes of concern to the international community. However, it is limited by its stated

³¹⁵ Article 1 AU Model Law.

³¹⁶ Article 8 AU Model Law.

³¹⁷ Cairo-Arusha Principle 4.

³¹⁸ Kwakwa (n 272) 412-13. On the potential for an inappropriate use of UJ based on the lack of context and inability to take into account the society's needs, see Chandra Lekha Sriram, '*Universal Jurisdiction: Problems and Prospects of Externalizing Justice*' (2001) 12 *Finnish Yearbook of International Law* 47.

³¹⁹ *Arrest Warrant* case Dissenting Opinion, 154. This does ignore the fact the Cairo-Arusha meetings do not fully represent African states.

³²⁰ The ICC does not have jurisdiction over piracy.

³²¹ Assembly/AU/Dec.213(XII) (n 226).

specific crimes and by those individuals capable of being prosecuted. For UJ prosecutions to occur jurisdictional competence is required, but the ability of domestic courts to adjudicate is limited by the immunity afforded to state officials. Therefore, the extent to which immunity prevents UJ from fulfilling its purpose is interrogated to answer whether this is a contributing factor to the need for an African regional criminal court.

The individual immunity plea bars the court from adjudicating on the criminal charges related to a state official. While this is undesirable for the fight against impunity, the immunity has specific clear rationales and is not all-encompassing. Two theories underlie the immunity: functional necessity theory, based on the need of state officials to carry out their functions unimpeded by other states or treaty-based institutions,³²² and representative character theory, which considers the state official the representative and personification of the state and thus afforded the applicable state immunities.³²³ While these are both distinct theories, in practice neither one has been exclusively used in either international conventions or case law.³²⁴

Regardless of the theory, the state official is granted immunity not 'for their personal benefit', but in relation to the state's immunity.³²⁵ This reflects the fundamental principle of sovereign equality in interstate relations and international law, regardless of any 'differences of an economic, social, political or other nature'.³²⁶ Consequently, the notion that adjudicating on the conduct of another state would violate the principle that all 'States are judicially equal'³²⁷ has been translated into individual immunity. Therefore, the dignity of the status of the office is upheld rather than that of the individual per se.³²⁸

The law on immunity distinguishes between an act done in a personal or official capacity. Thus, two distinct types of immunity exist. The broadest of the two is personal

³²² International Law Commission 'Preliminary report on immunity of state officials from foreign criminal jurisdiction' (ILC 60th Session, 2008) A/CN.4/601, para 87 (hereafter ILC Preliminary Immunity Report).

³²³ Ibid.

³²⁴ See preamble, Vienna Convention on Diplomatic Relations 1961; preamble and Article 43, 1969 Vienna Convention on Special Mission; *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 (hereafter *Arrest Warrant* case Judgment).

³²⁵ *Arrest Warrant* case Judgment, para 53.

³²⁶ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res, 2625 (XXV) (1970) A/RES/25/2625.

³²⁷ Ibid.

³²⁸ Hazel Fox and Phillipa Webb, *The Law of State Immunity* (revised 3rd edn, OUP 2015) 547.

immunity (immunity *ratione personae*) covering both acts done in an official and personal capacity. The immunity is granted because of the status and office of the individual and therefore is limited to who it applies to – typically Heads of State and Government and certain other senior state officials.³²⁹

The second type is functional immunity (immunity *ratione materiae*) which covers acts done in an official capacity. The immunity is dependent on the 'nature of the act' and the official capacity within which it was performed.³³⁰ The purpose of which is to protect the conduct of states and state functionaries not the individual conduct of officials, whether private or not. Overall, immunity should be seen as 'a question of right'³³¹ and an international legal obligation.³³²

While immunity prevents UJ prosecutions, it is procedural and not substantive in nature, thus it is not a permanent barrier.³³³ The individual is not removed from the legislative jurisdiction of the state, instead it merely protects them from 'the law enforcement process in the State from whose jurisdiction immunity exists but not from the law of that State'.³³⁴ Hence immunity and jurisdiction are linked but separate concepts, an important distinction often confused in the literature.³³⁵ Therefore, the individual's responsibility is not excused or removed and the laws are still relevant. It is the enforcement and judgment of the law which is prevented while the immunity applies. Once the immunity ceases to apply criminal proceedings are possible. Consequently, immunity is not the same as impunity.³³⁶

³²⁹ Akande and Shah 'Immunities of State Officials, International crimes and Foreign Domestic Courts' (2010) 21(4) European Journal of International Law Volume 815, 825.

³³⁰ Fox and Webb (n 328) 543.

³³¹ ILC Preliminary Immunity Report, para 35.

³³² *Arrest Warrant* case Judgment, 33.

³³³ Fox and Webb (n 328) 543; Dire Tladi, 'The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff' (2015) 13 Journal of International Criminal Justice 3, 16; O'Keefe, *International Criminal Law* (CUP 2016) 543-4; ILC Preliminary Immunity Report, para 64-77; *Arrest Warrant* case Judgment, para 60; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99, para 93 (hereafter *Jurisdictional Immunities* case).

³³⁴ ILC Preliminary Immunity Report, para 64.

³³⁵ *Ibid* para 64-77; *Arrest Warrant* case Judgment, para 59; O'Keefe, *International Criminal Law* (n 333) 498; Xiaodong Yang, *State Immunity in International Law* (CUP 2012) 424.

³³⁶ *Arrest Warrant* case Judgment, para 60.

3.4 Immunity and UJ Before Foreign Domestic Courts

While immunity clearly limits a court's ability to use the UJ principle, the nature of the conduct is paramount and is considered to be of concern to the whole international community. Therefore, questions have been raised over the ability to set aside immunity when prosecuting international crimes before domestic courts. Given the difference between personal and functional immunity this section asks what impact the distinction has on UJ prosecutions and, consequently, the overall contribution to the need for an African regional criminal court.

UJ crimes are regarded as such because of the nature of the conduct which is of concern to the international community. Therefore, it may seem counter-intuitive that Heads of State and Government are entitled to 'full immunity from criminal jurisdiction and inviolability' and any similar act of a state which would 'hinder [them] in the performance of [their] duties'.³³⁷ Yet, the reasoning is that if the immunity was not upheld the Head of State or Government would be subject to 'a constraining act of authority'.³³⁸ Furthermore, state practice grants immunity for incumbent Heads of State and Government from criminal proceedings regardless of the act being personal or official.³³⁹

Under international law Heads of State and Government enjoy personal inviolability.³⁴⁰ As 'the Head of State acts in a public capacity with effect on other jurisdictions, it seemed appropriate to accord the same privileges and immunities on the acts of a Head of State as were accorded to the state itself'.³⁴¹ Thus, incumbent Heads of State and Government enjoy broad and comprehensive immunity. While this makes sense for his or her official (public) acts it is not as easily explained when considering their private conduct. As a result, certain states grant Heads of State private conduct immunity similar to that of the Head of a Diplomatic Mission.³⁴² Although this is not universally accepted, the ICJ supported the line of reasoning in their application of customary rules

³³⁷ Ibid para 54.

³³⁸ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177, para 170 (hereafter *Certain Questions of Mutual Assistance* case).

³³⁹ Chapter 4 of this thesis.

³⁴⁰ *The Exchange v. McFaddon* 11 U.S. 116 (1812), 137-8. Emphasis added.

³⁴¹ Fox and Webb (n 328) 550.

³⁴² See the UK and Australian practice as explained in Fox and Webb, *ibid* 550-1.

on diplomatic immunity to a Head of State.³⁴³ Nevertheless, Fox and Webb's argument for considering Heads of State and Government a unique category not related to diplomatic immunity is more convincing.³⁴⁴

The personal immunity of senior state officials follows the same rules as for that of Heads of State or Government. Despite the attempted prosecutions of officials enjoying personal immunity, state practice has upheld immunity before domestic courts.³⁴⁵ In the ICJ *Arrest Warrant* judgment the Democratic Republic of Congo's Minister of Foreign Affairs' immunity was upheld, although it is not clear which type of immunity the court discussed.³⁴⁶ Therefore, personal immunity prevents a domestic court from pursuing a UJ prosecution against a select few state officials. Thus, the ability of UJ to fight impunity is hindered.

While there is no official list defining senior state officials, those considered the official representative of the state are likely to fall into this category when applying the representative theory.³⁴⁷ Also, applying the functional theory, concerning officials who perform the functions of the state, would be impeded by criminal proceedings and would fall into this category.

The ICJ has upheld immunity for senior state officials,³⁴⁸ whether they applied personal or functional immunity is unclear.³⁴⁹ Although personal immunity should be extended to any minister acting as a state representative who travels officially,³⁵⁰ the counter argument is that such an approach is incorrect because of the lack of a comparable effect on the dignity and sovereignty than when the official is a Head of State.³⁵¹ Yet, state

³⁴³ *Certain Questions of Mutual Assistance* case, para 174.

³⁴⁴ Fox and Webb (n 328) 550; Canadian Minister of Foreign Affairs, 'Memorandum of the Legal Bureau of the Canadian Minister of Foreign Affairs, 31 January 1981' (1981) *Canadian Yearbook of International Law* 325 as cited in Fox and Webb, 552.

³⁴⁵ Table 1, pages 82 – 89 and Section 4.2 of this thesis.

³⁴⁶ *Arrest Warrant* case Judgment, para 59. Under the VCLT, during overseas trips a Minister of Foreign Affairs is the official representative of the state.

³⁴⁷ VCLT Article 7(2)(a).

³⁴⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Preliminary Objections, and Merits) [2002] ICJ Rep 3 para 53 (hereafter *Arrest Warrant* case Preliminary Objections).

³⁴⁹ Tladi, 'The Immunity Provision' (n 333) 6.

³⁵⁰ *re Mogaz*, 12 February 2004; *re Bo Xilai*, 8 November 2005, England, Bow Street Magistrates' Court: 128 ILR 709 and 713. The opposite view is held by Fox and Webb (n 328) 566.

³⁵¹ Akande and Shah (n 329) 825.

practice and the ICJ have taken the broader approach.³⁵² In the *Congo v Rwanda* case the ICJ reiterated that Heads of Government and Ministers of Foreign Affairs are representatives of states,³⁵³ but declined the immunity for those officials whose functions are by nature predominantly internal.³⁵⁴ The state will need to prove that the official in question is part of 'its organs, agencies or instrumentalities' to benefit from the immunity defence.³⁵⁵ Therefore, the number of individuals who can claim immunity for a UJ prosecution as a senior state official is more limited and defined than it first appears. Furthermore, former senior state officials are afforded functional immunity only³⁵⁶ making UJ prosecutions over these individuals a viable option.

Contrastingly, former Heads of State enjoy functional immunity only as they are neither state representatives nor performing state functions. Official acts performed during their tenure however will be subject to functional immunity after the individual has left office. Such an application of immunity protects the official conduct to prevent other states adjudicating on official state conduct by prosecuting the individual official. Accordingly, criminal proceedings over conduct not of an official character cannot be subject to an immunity plea.

However, for those officials granted functional immunity, any crimes committed in a personal capacity are not protected whereas the conduct will be if it is part of their official duties. While this limits the applicability of UJ an exception based on the conduct's characterisation as an international crime has been raised.³⁵⁷ Should such an exception exist UJ prosecutions against an increased number of state officials would be possible.

³⁵² The Swiss courts have proposed the Minister of Atomic Energy may have immunity *ratione personae*, *Evgeny Adamov v Federal Office of Justice*, Switzerland, Federal Tribunal, First Public Law Chamber, No 1A.288/2005, Judgment of 22 December 2005, para 3.4.2 (in *obiter dictum*); before the English courts the Israeli Minister of Defence and the Chinese Minister of Commerce including International Trade had their immunity upheld, see *re Mofaz* (n 350) and *re Bo Xilai* (n 350). The English courts, however, rejected the immunity *ratione personae* for the Head of the Executive Office of Mongolian National Security Council, *Khurts Bat v The Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin) (2012) 147 ILR 633, 55-62.

³⁵³ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda)* (Jurisdiction and Admissibility of the Claim) [2006] ICJ Rep 6, 47.

³⁵⁴ *Certain Questions of Mutual Assistance* case, 185-6.

³⁵⁵ *Ibid* 196.

³⁵⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Joint Separate Opinion) [2002] ICJ Rep 3, para 89.

³⁵⁷ *Fox and Webb* (n 328) 556.

The classical approach finds no exception to immunity barring acts committed in a private capacity. For this approach the ICJ *Arrest Warrants* judgment does not distinguish between the position of an incumbent and former official as it undermines the functional justification and purpose of such immunity. What's more, immunity was not perceived as a bar to prosecutions.³⁵⁸ There are four main arguments for why the *Arrest Warrant* case does not distinguish between former and incumbent Officials.³⁵⁹

First, the immunity is that of state immunity and therefore exists without interference regardless of the change in status of the individual. It is hard to see how a former Head of State can be viewed in this light as personal immunity is justified on the basis of the individual being the representative of the state, which a former Head of State is not. It is harder still to see why the same breadth of immunities as state immunity should be applied to such an individual when acting in a private capacity. Contrastingly, the status of the acts undertaken by a former official as part of their official capacity does not change when the person leaves office. For such acts the law on state responsibility provides a more appropriate method of liability as it is placed on the state. Additionally, the *Arrest Warrant* case identifies four situations where prosecutions can still be brought against such an individual.³⁶⁰

Second, if immunity or amnesty is not provided there would be little to no incentive for a sitting Head of State to relinquish power, incentivising them to extend their term indefinitely.³⁶¹ As a result the perpetrators will remain in a position to continue committing crimes and, should the conduct in question end, the individual would still enjoy impunity. While the argument on the lack of incentive to relinquish power appears convincing – note should be taken of the recent case of The Gambia³⁶² and also that of the deferral request of the ICC prosecution against Sudanese President Omar al Bashir³⁶³

³⁵⁸ *Arrest Warrant* case Judgment, para 61.

³⁵⁹ Fox and Webb (n 328) 559.

³⁶⁰ *Arrest Warrant* case Judgment, para 61.

³⁶¹ Principle 7 Princeton Principles.

³⁶² 'Showdown in The Gambia a lesson for 'Big Men' (*The Times, South Africa*, 20 January 2017) <<http://www.timeslive.co.za/thetimes/2017/01/20/Showdown-in-The-Gambia-a-lesson-for-Big-Men>>

accessed 14 March 2017.

³⁶³ David Bosco 'How international justice makes it harder for dictators to step down' (*Washington Post*, 20 January 2017)

<https://www.washingtonpost.com/news/global-opinions/wp/2017/01/24/how-international-justice-makes-it-harder-for-dictators-to-step-down/?utm_term=.83acf741c36b> accessed 14 March 2017; Sara Darehshori and Elizabeth Evenson 'Peace, Justice, and the International Criminal Court'

- it is not inevitable that individuals will remain in power. Former Gambian President Jammeh initially refused to step down when threatened with prosecution, however he relinquished power shortly after losing the election.

Third, the assumption that if one removes functional immunity for former Heads of State it would also be removed for all other officials enjoying the same immunity is flawed. This would create an unacceptable level of potential intervention by third states into the working of another state. As the exception is limited to international crimes interference from UJ prosecutions is likely to be limited. This would be in line with state practice and the prosecution of low-level state and military officials for core international crimes.³⁶⁴

Fourth and finally, are the concerns raised about the political impact such an approach would have. There would be a negative impact on 'international communications and good relations between States' which is not ideal and is also likely to impede on the equality of states.³⁶⁵ A point stressed in the *Arrest Warrant* case, by the ILC Special Rapporteur and by the AU and European Union (EU).³⁶⁶

The alternative to the classical approach, accepts an immunity exception whereby the status of the accused is no defence when it comes to international crimes.³⁶⁷ This was the approach adopted by England's House of Lords in the *Pinochet (No 3)* judgment.³⁶⁸ Despite former officials enjoying functional immunity for criminal acts, Pinochet was found to have no applicable immunity plea because the alleged conduct (torture) was considered *jus cogens* and prohibited accordingly under international law (as per the Convention Against Torture). However, there was no consistent reasoning for the

(2010) Oxford Transitional Justice Research Working Papers Series, 1 and 3 <<https://www.law.ox.ac.uk/sites/files/oxlaw/darehshoriandevenson20101.pdf>> accessed 14 March 2017.

³⁶⁴ Fox and Webb (n 328) 559.

³⁶⁵ Ibid.

³⁶⁶ *Arrest Warrant* case Joint Separate Opinion, para 95; ILC Preliminary Immunity Report, para 96; AU-EU Expert Report, 35-6.

³⁶⁷ Fox and Webb (n 328) 557-561.

³⁶⁸ *Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147.

removal of the immunity in the judgments and this has ultimately limited the influence and persuasiveness of the judgment.³⁶⁹

However, the alternative approach relies on *obiter dicta* in the *Arrest Warrant* case and the possibility of an immunity exception where a treaty obligation to prosecute an international crime exists when the accused is in the forum state.³⁷⁰ The focus is therefore on the *jus cogens* nature of the crime and international prohibition with the need to protect 'fundamental human rights [...] and the standing of the individual victim'.³⁷¹ While relying on the state practice of prosecuting low-level officials, it is hard to equate such prosecutions as infringing on the dignity of the state or diminishing interstate relations. Despite the existence of superior rules in international law,³⁷² relying on the *jus cogens* nature of the crime ignores the ICJ's finding that immunity and *jus cogens* are 'two sets of rules [that] address different matters'.³⁷³ Thus, basing a UJ prosecution on the grounds of the discussed exception under international law is problematic.

While neither the classical or alternative approach provides a means to address the limiting impact of immunity on UJ, it has been suggested that serious international crimes be treated as 'neither normal State functions nor functions that a State alone [...] can perform'.³⁷⁴ However, the legal fiction of this is hard to ignore as the distinguishing feature between private criminal acts and official conduct tantamount to an international crime is reliance on the state apparatus for its commission.³⁷⁵ It also has the effect of introducing an unwanted intrusion by the *ultra vires* concept into the matter.³⁷⁶ A more convincing and compelling approach is based on Lord Hoffman's interpretation of the *Arrest Warrant* case's Joint Separate Opinion. He asks whether torturing people

³⁶⁹ On the ambiguity see Roseanne van Alebeek, 'The Judicial Dialogue between the ICJ and the International Criminal Courts on the Question of Immunity' in Larissa van den Herik, Carsten Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff 2012) 100 – 111.

³⁷⁰ Fox and Webb (n 328) 559.

³⁷¹ *ibid.*

³⁷² International Law Commission, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (2006) 2(2) Yearbook of the International Law Commission, 32.

³⁷³ *Jurisdictional Immunities* case, 63.

³⁷⁴ *Arrest Warrant* case Joint Separate Opinion, 85.

³⁷⁵ Dapo Akande, 'The Application of International Law Immunities in Prosecutions of International Crimes' in Harrington, Milde and Vernon (eds), *Bringing Power to Justice? The Prospects of the International Criminal Court* (McGill University Press 2006) 47.

³⁷⁶ Fox and Webb (n 328) 560.

could be an exercise of the functions of a Head of State, 'which is a very different question from whether it could be an official act for the purpose of common law immunity *ratione personae*'.³⁷⁷ Therefore, 'immunity may be separated from the concept of attribution'.³⁷⁸

On the whole, the academic literature is more in favour of creating an exception for functional immunity than state practice demonstrates.³⁷⁹ As previously stated, the lack of clear reasoning in the *Pinochet* case prevents any particular legal argument from being advanced. The *Arrest Warrant* judgment is again of limited use in that it did not specify whether functional or personal immunity is addressed. Ostensibly claiming that the act is not an official act is illogical given the reliance on the state apparatus or participation. Furthermore, when state responsibility is taken into account, merely having conduct treated as an official act does not automatically excuse the state from responsibility.³⁸⁰

The argument is also not advanced by the justification of the *jus cogens* nature of the crimes and the UJ requirement for punishment for such crimes.³⁸¹ Customary international law does not impose an obligation based on the *jus cogens* nature and thus, the argument cannot be relied on. This is different to treaty obligations which are imposed on state parties.³⁸² For crimes dependent on official capacity, a *jus cogens* exception 'cannot logically co-exist with' functional immunity,³⁸³ and has not been endorsed or applied by state practice. Thus, the ability to set aside immunity and prosecute *jus cogens* crimes before a foreign domestic court is still unclear despite limited state practice pointing towards the prosecution of former State officials.³⁸⁴

³⁷⁷ *Jones v Minister of the Interior of the Kingdom of Saudi Arabia and Anr (Secretary of State for Constitutional Affairs and Others Intervening) Mitchell and Ors v Al-Dali* [2006] UKHL 26; [2006] 2 WLR 1424, 87.

³⁷⁸ Fox and Webb (n 328) 560.

³⁷⁹ This is reflected in the 5th Princeton Principle.

³⁸⁰ Fox and Webb (n 328) 572.

³⁸¹ Randall (n 257); Diane F. Orentlicher 'Settling accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 Yale Law Journal 2537. The opposite view is articulated in Akande and Shah (n 241) 832-838; Bassiouni, 'International Crimes' (n 311).

³⁸² *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, 5 and 122(i) and (ii) (hereafter *Questions Relating to the Obligation to Prosecute or Extradite* case).

³⁸³ Akande and Shah (n 329) 843.

³⁸⁴ Chapter 4, Table 1.

If there is any exception to functional immunity it would apply more for low-level officials, who are afforded functional immunity to protect state sovereignty both during and after their tenure in office; former senior state officials; and more recently with former Heads of State and Government under the Pinochet and Habré precedent.³⁸⁵ Thus, UJ prosecutions are not possible against all state officials necessitating an alternative mechanism not subject to the same limitations.

The AU's regional approach to UJ and immunity replicates international law and consequently, the accompanying prosecutorial limitations.³⁸⁶ However, despite being criticised for preventing the development of international law and the harmonisation of laws,³⁸⁷ state practice has yet to demonstrate any inclination to disregard personal and functional immunities for Heads of State and certain senior state officials. Furthermore, the complete removal of all immunity 'would be more likely to damage than to advance chances of international peace' because of the impact on diplomatic relations and the dissuading of peacekeeping forces due to potential legal action.³⁸⁸

Despite upholding immunity, it will not apply 'in situations where these crimes are covered by a treaty to which the State and the State of nationality of such officials are parties and which prohibits immunity'.³⁸⁹ Thus, the AU Model Law wording enables ICC and non-ICC AU members to adopt the Model Law as implementing both instruments can conform to the international law on immunities. Additionally, only the jurisdictional immunities 'under international law' are to be enforced, therefore, should the law develop and further restrict which officials are entitled to immunity, Article 16(1) will apply. An unintended consequence of the immunity provision is the potential lack of harmonisation amongst African states. Yet, this is no different from the situation globally.³⁹⁰

³⁸⁵ On the Habré prosecution see section 4.4 of this thesis.

³⁸⁶ Article 16(1) AU Model Law.

³⁸⁷ Bernard Ntahiraja, 'The Present and Future of Universal Jurisdiction in Africa Lessons from the Hissène Habré Case' in HJ van der Merwe and Gerhard Kemp (eds), *International Criminal Justice in Africa, 2016* (Strathmore University Press 2017) 20.

³⁸⁸ As per Lord Browne-Wilkinson, Macedo et al (n 263) 49 footnote 20.

³⁸⁹ Article 16(1) AU Model Law.

³⁹⁰ On how Europe takes different approaches to immunity and UJ see Reydams (n 259) Part II.

3.5 Conclusion

UJ is a means by which to fight impunity when states fail to fulfil their primary responsibility for prosecuting crimes of concern to the whole international community. However, as ICL developed and with the establishment off the ICC, African states increasingly saw UJ as a gap filler, not a replacement for international courts. This is partly a reaction to the AU's perception of European states using UJ as a political tool. In an attempt to circumvent UJ from becoming purely Western state led, the AU adopted the AU Model Law on UJ for its member states, in turn further protecting African sovereignty.

The ability of UJ to end impunity is intertwined with the crimes under its jurisdiction pursuant to treaty and customary law. While UJ conduct is conceived of as "heinous" and of concern to the international community, there are a limited number of crimes applicable: piracy; apartheid; torture; enforced disappearances; and certain war crimes. The inclusion of genocide and other core crimes are still contested. From the perspective of African states, the crimes included are insufficient and fail to take a contextual approach to regional situations and concerns. At the same time, the ICC provides a supporting mechanism for the majority of UJ crimes, but there is no comparable judicial body capable of addressing the additional crimes of the AU Model Law. There appears to be little reason for punishment of UJ crimes beyond retributive aspects and the application of naturalism and moral universalism – that the crimes are so heinous as to affront the whole of humanity. The limited notion of 'humanity' is insufficient to address African concerns and as such contribute to the need for a regional criminal court of their own which does.

Even when an unconnected state is able to pursue a UJ prosecution, the limitations of immunity still apply. Presently, international law prevents adjudication of cases against state officials who enjoy personal immunity. When it comes to functional immunity, the trend over the years has been to slowly erode away that protection. Currently, low-level officials, former senior state officials and, occasionally, former Heads of State and Government have been subject to successful UJ prosecutions. While immunity does not equate to impunity, it does present a hurdle to prosecutions, limiting the applicability of UJ and potentially reducing any deterrent effect.

Given its current structure, UJ contributes to the need for an African regional criminal court because its limited range and breath are insufficient in an African context, and the accompanying constraints governing immunity, protect key individuals from prosecution. An African regional criminal court is required to counteract these limitations.

Chapter 4

State Practice and Universal Jurisdiction

The previous chapter has shown that UJ is an imperfect tool in the fight against impunity because of its structural limitations. What remains to be identified is whether the use of UJ by both African and non-African states has compensated for these limitations.

To gauge whether the use of UJ contributes to the need for an African regional criminal court, this chapter starts with an examination of UJ cases pursued by non-African states. The response of African states to the UJ prosecutions is then considered. Finally, the focus moves to the African legislative approach and whether any UJ prosecutions have been successfully undertaken within Africa. The findings from this chapter and Chapter 3 are brought together to determine whether there is a need for an African regional criminal court.

4.1 Non-African States' Use of Universal Jurisdiction

There a significant number of cases before the courts of non-African states against alleged African perpetrators. The African states concerned have either experienced civil war or have a regime that has committed gross human rights violations. Regardless of the validity of African concerns and disquiet over the use of UJ by non-African states, whether state practice contributes to the need for an African regional criminal court needs to be answered. As a review of individual state's UJ laws is beyond the scope of this thesis, reliance is placed on Luc Reydams study on UJ for the understanding of legislative approaches.³⁹¹ Table 1 sets out, in alphabetical order, a non-exhaustive list of such cases and investigations from which observations and implications are made over the need for a regional criminal court.³⁹²

³⁹¹ Reydams (n 259).

³⁹² This list is not an exhaustive representation of every UJ case brought against an African individual by a non-African state. Cases may be missing due to language constraints and reliance on secondary sources. There is no inclusion of cases dealing with piracy because of the uncontroversial nature of such prosecutions. For Table 1 see pages 82 – 89.

TABLE 1 – UNILATERAL CASES AGAINST AFRICAN INDIVIDUALS BY NON-AFRICAN STATES

PROSECUTING STATE	AFRICAN STATE CONCERNED	OFFICIAL / CITIZEN	INFORMATION	OUTCOME	YEAR	CRIMES CHARGED
France	Algeria	Alleged Relizane militia leaders	Algerian officials refused rogatory commission request by France to investigate Relizane Case (Mohamed brothers) Abdelkader Mohamed and Hocine Mohamed . Investigation commenced after 2003 request by International Federation for Human Rights and the Ligue des Droits de l'Homme filed with Office of the Prosecurot with the NimesTribunal. December 2014 final order to bring accused to trial, which was appealed by the defendants. Jan 2016 saw the repel of the final order for trial by the Investigation Chamber of the Court of Appeal in Nimes	Appeal ongoing	2003 - ongoing	Torture
Switzerland	Algeria	Official and Military General	Victims filed criminal complaint in France 2001 against Khaled Nezzar . New complaint filed in Switzerland in Oct 2011 as he was travelling to Geneva where arrested. Federal Criminal Court heard Nezzar's appeal to the procedure due to immunity claim. Immunity argument rejected on the basis of not applying to international crimes	Under judicial supervision as investigation ongoing. Immunity not upheld	2011 - ongoing	War crimes
Belgium	Cameroon	Head of State and 11 officials	President Paul Biya and 11 other officials had complaint filed against them by opponents	Dismissed due to immunity and change in law in 2003	2001	War crimes, Torture & Arbitrary arrests

Belgium	Central African Republic	Head of State	Complaint in Belgium against President Ange-Félix Patasse	Dismissed on grounds of immunity	2001	Gross human rights violations
Belgium	Côte d'Ivoire	Head of State	Complaint in Belgium against President Laurent Gbagbo	Dismissed on grounds of immunity	2001	Crimes against humanity
Belgium	Democratic Republic of Congo	State Official	Public Prosecutor v Ndombasi , 16 April 2002, Court of Appeal of Brussels	Lead to the Arrest Warrant Case before the ICJ. Arrest Warrant revoked	2002	Incitement of genocide
Spain	Equatorial Guinea	President and Other State Officials	Obiang Nguema et al. , 23 December 1998, Audiencia Nacional (Central Examining Magistrate N° 5)	Upheld immunity	1998	
Belgium	Liberia	Former Liberian Commander of the NPFL (front line)	Victims filed complaint with Belgian authorities in 2012 as accused Martina Johnson was living in Belgium at the time	Under investigation	2012	Crimes against humanity & War crimes
USA	Liberia	Former Rebel Commander	Victims filed complaint and Alieu Kosiah arrested in Nov 2014. Judge determined detention would hold	Under investigation, accused under provisional detention	2014-ongoing	War crimes

USA	Liberia	Former Head of States son	Case brought against son of Former Liberian President Charles Taylor . Case was an off shot of investigations into arms trafficking and Taylor's involvement. The USA relied on law that enables prosecution for torture when the accused is either present in the territory, a legal resident or a citizen	Convicted and sentenced to 97 years	2009	Torture
France	Mauritania	Army officials	Fédération Internationale des Ligues des Droits de l'Homme et al. v Ould Dah , 8 July 2002, Court of Appeal of Nîmes/1 July 2005, Nîmes Assize court (France) – went to European Court of Human Rights 17 March 2009, upheld universal jurisdiction for acts of torture Ould Dah v France, Application N° 13113/03 , decision on admissibility, 17 March 2009 (ECHR)	Amnesty did not apply to France, only would apply to local jurisdiction which granted the amnesty. Accused left France, convicted in absentia	2005-2010	Torture & 'Brutalities'
Belgium	Mauritania	Head of State	Complaint against President Maaouya Ould Sid'Ahmed Taya	Dismissed on grounds of immunity	?	?
Spain	Morocco	State Official	Hassan II , 23 December 1998, Audiencia Nacional (Central Examining Magistrate N° 5)	Dismissed on grounds of immunity	1998	Genocide
Spain	Morocco	State Officials	Sahara , 30 October 2007, Audiencia Nacional (Central Examining Magistrate N° 5) – After changes to UJ law in 2014 issues arose as to the ability to continue the case. Prosecution argued territorial jurisdiction still applicable, judge accepted this based on facts the alleged crimes took place before Spain had left the territory	11 Indictment issued for officials and 7 international arrest warrants in May 2015	2007-present	Genocide & Torture

Belgium	Morocco	State Official	Complaint filed in Belgium (pre-Sharon and pre-5 Aug 2003) against Minister for the Interior Driss Basri	Did not go forward	?	?
France	Morocco	Head of Moroccan Intelligence Services	3 separate complaints filed against the accused Abdellatif Hammouchi , first one was in May 2013, the second and third both filed the same day in February 2014 to the Specialised Unit in France	Under investigation	2013 - ongoing	Torture
Spain	Nigeria	Boko Haram leader and members	The International Foundation Baltasar Garzon (FIBGAR) filed complaint in 2014 against Abubaka Shekau Leader of Boko Haram and members of the group. Spanish Prosecutor opened an investigation based on these facts	Under investigation	2014-ongoing	Crimes against humanity & Terrorism
France	Republic of Congo	General, Overall Superintendent of the Armed Forces & Gendarmerie	NGOs filed a complaint in 2001 alleging torture and crimes against humanity by Norbet Dabira in Dec 2001 (along with President Denis Sassou Nguesso and Minister of the Interior Pierre Oba). Dabira indicted in August 2013	Indicted, under investigation	?	Crimes against humanity & Torture
France	Republic of Congo	Head of Police and other officials	Ndengue et al. , 10 January 2007, Court of Cassation. Dec 2001 complaint filed against Jean François Ndengue and others. In 2001 NGOs and victims filed a complaint before a French court. After numerous appeals, in 2008 French Supreme Court allowed the investigation to continue	Investigation under way. This led to Republic of Congo pursuing an ICJ case (France never accepted jurisdiction)	2001-ongoing	Genocide, Crimes against humanity & War crimes

France	Republic of Congo	Head of State	Complaint filed against President Denis Sassou Nguesso . This was part of the complaint filed against Ndengue and others	Dismissed due to immunity	2	Genocide, Crimes against humanity & War crimes
France	Rwanda	Former head of Sainte-Famille parish, Kigali	Dupaquier e al. v Munyeshyaka , 127 ILR 134, 6 January 1998 Court of Cassation (France). European Court of Human Rights criticised France for exceeding reasonable time for bringing accused to trial. Rwanda had tried him in absentia in 2006. ICTR issued arrest warrant for him, but in Feb 2008 declined jurisdiction and referred it to the France	French courts dismissed the case, however the civil parties appealed.	2	Genocide, Crimes against humanity & Torture (complicity in)
Belgium	Rwanda	Citizens	Public Prosecutor v Higaniro et al. , 8 June 2001, Brussels Assize Court. Complaints filed in 1994 and investigation began in 1997. Rogatory commissions were allowed by Rwanda. The ICTR had not taken over the prosecution and was aware of Belgium pursuing the case	Convicted, sentences ranging from 12-25 years	1995-2001	War crimes
Belgium	Rwanda	Citizens	Nzabonimana and Ndashyikirwa , 29 June 2005, Brussels Assize Court. Following complaints filed in Belgium, both arrested in 2002 while living in Belgium. Trial began and finished in 2005	Convicted, sentenced to 12 and 10 years	2005	War crimes
Belgium	Rwanda	Major in Rwandan Army	Ntuyahaga , 5 July 2007, Brussels Assize Court. ICTR found him not guilty and charges withdrawn. Surrendered to Belgian authorities in 2004. Trial began in 2007.	Convicted, sentenced to 20 years (appeal denied)	2007	Genocide, Crimes against humanity & War crimes

Spain	Rwanda	State officials	Rwanda , 6 February 2008, Audiencia Nacional (Central Examining Magistrate N° 4). International arrest warrants issued for a number of Rwandan officials. A result of complaints filed by victims families (the victims had been Spanish)	Case dismissed. Indictment did not include President Kagame due to immunity while sitting head of state	2008-2015	Crimes against humanity, Terrorism & Genocide
France	Rwanda	Head of the Central Intelligence Services	After a criminal complaint was filed in February 2009, the Office of the Prosecutor of the Specialised unit in March 2013 requested the accused Pascal Simbikangwa indicted.	Sentenced to 25 Years imprisonment. Appealed filed March 2014	2009-2014	Genocide & Crimes against humanity
France	Rwanda	Former Rwandan Mayors	Octavien Ngenzi and Tito Barahira	Convicted in 2016, sentenced to life imprisonment, verdict currently on appeal	2016 - ongoing	Genocide & Crimes against humanity
Germany	Rwanda	Mayor of Muvumba commune	After arresting Onesphore Rwabukombe based on a Rwandan international arrest warrant, Germany denied the extradition request based on concerns over the fairness of the trial	December 2015 - Convicted and sentenced to life imprisonment, decision on appeal	2008-2015	Genocide
Germany	Rwanda	Head of FDLR and Deputy Head	Arrest warrant issued by Germany Federal Court of Justice Nov 2009 for Murwanashyaka and Musoni . Higher Regional Court of Stuttgart held trial which ended Sept 2015. Judgment on appeal. The charges of crimes against humanity were dropped, as were a number of counts of war crimes	Convicted and sentenced, under appeal	2009-2015	Crimes against humanity, War crimes, Belonging to terrorist group

Sweden	Rwanda	Citizen	Clever Berinkindi detained September 2014, indicted by Stockholm District Court Sept 2015, trial started Sept 2015. Swedish court undertaken trips to Rwanda as part of the investigation and trial. Tried due to his having obtained Swedish citizenship	Trial ongoing	2014-ongoing	Genocide, Crimes against humanity & Gross offence
France	Rwanda	Head of State	Both a French and Spanish Magistrate claimed evidence which implicated Paul Kagame in an international crime related to the Rwandan genocide, but upheld his immunity. See Tribunal de Grand Instance de Paris, Cabinet de Jean-Louis Bruguière, Ordonnance de soit-communié Delivrance de mandats d'arrêts internationaux (November 17, 2006)	Immunity upheld	☐	Crimes relating to terrorism & Assassination
Canada	Rwanda	Citizen	After a five year investigation Désiré Munyaneza was arrested in 2005. Jan 2007 rogatory mission to Rwanda to interview witnesses. Quebec Superior Court found him guilty in May 2009 on all charges	Convicted sentenced to 25 years no parole. Appeal refused	2005 - 2014	Genocide, War Crimes & Crimes Against Humanity
Norway	Rwanda	Citizen - member of Interahamwe militia	Sadi Bugingo arrested in Norway (May 2011) pursuant to a Rwandan arrest warrant issued in 2008. Feb 2013 sentenced in Norway. Bugingo appealed to the Borgarting Court of Appeal (Oslo) in Aug 2014. Dec 2014 confirmed verdict and conviction upheld in Jan 2015	Convicted, 21 years imprisonment	2011-2015	Aiding and Abetting Genocide & murders

Sweden	Rwanda	Citizen	2009 Gacaca court sentenced Stanislas Mbanenande in absentia. Arrested in Dec 2011 in Sweden due to Interpol's issuance of a red notice. Nov 2012 Stockholm district court issued indictment, trial held Nov 2012 - Jun 2013 where convicted and sentenced to life imprisonment. Appeal upheld conviction and sentence Jun 2014. Case based on his having citizenship - active personality principle.	Convicted, life sentence	2011-2015	Genocide
Spain	Rwanda (DRC, SA have residence of some of the individuals)	High-ranking officials of Rwandan Patriotic Front/Army. Commanding officer of Directory Military Intelligence (DMI)	Families of victims filed criminal complaint in 2005. In 2008 the Spanish National Court issued indictment and arrest warrant (both international and European) for 40 high ranking officials. Rogatory missions went to Rwanda, DRC and SA. Sept 2015 the Supreme Court closed the case provisionally due to procedural requirements. General Karenzi Karake (DMI Commander) arrested at Heathrow in June 2015 and released on conditional bail after a hearing. The Crown Prosecution Service did not consider the extradition request satisfied all legal requirements and he was released in August 2015 whereupon he returned to Rwanda.	Provisionally closed	2005-2015	Genocide, Torture, Crimes against humanity War crimes Terrorism Membership of terrorist group
France	Tunisia	State Official	Ghabri et al. c Ben Saïd 15 December 2008, Strasbourg Assize Court	Convicted in absentia	2010	Torture
England	Zimbabwe	Head of State	Re Mugabe ILDC 96(UK 2004) 14 January 2004, Bow Street Magistrates' Court (England UK)	Upheld immunity - arrest warrant denied	2004	?
France	Zimbabwe	Head of State	Complaint against Mugabe rejected in 2003 in France	Upheld immunity	2003	?

First, both treaty and customary law UJ crimes as well as contested crimes have been prosecuted.³⁹³ The cases include charges of genocide (sixteen), crimes against humanity (fifteen), war crimes (twelve), torture (ten), terrorism (five) and gross human rights violations (two).³⁹⁴ The modes of liability for the crimes include the inchoate offences of incitement, complicity and belonging to a terrorist group. The majority (39%) of cases relate to the Rwandan genocide, which accounts for the high number of genocide charges. While the basis of genocide as a UJ crime is contested, UNSC resolutions impose legal obligations on all states to prosecute crimes related to the Rwandan genocide and may account for the high number of prosecutions. Furthermore, despite the relatively high number of crimes against humanity charges, neither treaty nor customary law has definitively included such crimes. Some of these cases were dismissed, or are still under investigation, making it difficult to conclusively say there is sufficient state practice for a custom to have developed. Out of the thirty-eight cases only eleven have led to a conviction, while seventeen are still ongoing or in the investigative stage.

Table 1 demonstrates that prosecutions were initiated against a mixture of Heads of State and Government, state officials, militia, rebels and ordinary citizens. While militia, rebels, and ordinary citizens have not posed any procedural problems, thirteen cases have dealt with individuals who put forward an immunity plea.³⁹⁵ The one decision to date which did not uphold immunity based their decision on the fact that such immunity does not apply to international crimes,³⁹⁶ a controversial position.

On the whole immunities for incumbent Heads of State and Government are consistently upheld. However, for state officials there is no consistent application upholding either amnesties or immunity. The determining factor appears to be the prosecuting state's law and their interpretation of immunities and amnesties.³⁹⁷ It is this lack of recognising state officials' immunities which has caused tension between African

³⁹³ See Chapter 3.2 of this thesis.

³⁹⁴ On the zones of impunity which emerge from the externalisation of justice, see Chandra Lekha Sriram and Amy Ross, 'Geographies of Crime and Justice: Contemporary Transitional Justice and the Creation of 'Zones of Impunity'' (2007) *The International Journal of Transitional Justice* 45.

³⁹⁵ On immunity before domestic courts see Chapter 3.3 of this thesis.

³⁹⁶ The case against Khaled Nezzar, table 1.

³⁹⁷ On the interpretation of immunities see Chapter 3.3 and Chapter 8 of this thesis.

and prosecuting states, occasionally resulting in the filing of a complaint before the ICJ.³⁹⁸

A disproportionate number of cases are tried by Belgium, France and Spain. Of the thirty eight cases, France has attempted to prosecute twelve (32%), Belgium ten (26%) and Spain six (16%). This is not surprising given these states' broad UJ legislation, in particular Belgium.³⁹⁹ Eighteen of the cases have been pursued by former colonial powers with only four of the ten prosecuting states not having a direct colonial legacy.⁴⁰⁰ Given the historical context and legacy of such states, the 'courts of former colonial powers should be extremely careful in taking the lead in the prosecution and trial of suspects of international crimes'.⁴⁰¹ The tumultuous relationship between the states raises questions over whether there is sufficient divestment of interest by the prosecuting state. Concerns over hypocrisy and political sensitivities exist⁴⁰² such as the continued impunity for the colonial powers and their past crimes. Belgium's impartiality in relation to the Rwandan genocide is questionable due to concerns over the withdrawal of Belgian peacekeepers prior to the start of the genocide, despite knowledge and warnings given of the potential for further international crimes.⁴⁰³ As will be shown in this chapter, African states have shown great scepticism over the impartiality of their former colonial masters' involvement in UJ prosecutions, and the perceived continued interference in their State sovereignty. The historical context has also enabled African state officials guilty of

³⁹⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Preliminary Objections, and Merits) [2002] ICJ Rep 3 (hereafter *Arrest Warrant* case Merits); *Certain Criminal Proceedings in France (Republic of the Congo v France)* (Merits) [2003] ICJ Rep 102; the application by Rwanda against France before the ICJ, however France never accepted the court's jurisdiction. ICJ Press Release, 'The Republic of Rwanda applies to the International Court of Justice in a dispute with France' (18 April, 2007) <<http://www.icj-cij.org/presscom/files/1/16921.pdf>> accessed 28 March 2016.

³⁹⁹ On the domestic UJ laws see Reydams (n 259) Chapters 6, 9 and 14 of this thesis. On Belgium's UJ law post the 2003 amendment see Malvina Halberstam, 'Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?' (2003-04) 25 *Cardozo Law Review* 247.

⁴⁰⁰ Canada, Norway, Sweden and Switzerland.

⁴⁰¹ Harmen 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.

⁴⁰² van der Wilt, *ibid*; A. Salomon, 'The politics of prosecution under the convention against torture' (2001) 1 *Chicago Journal of International Law* 310; Luc Reydams, 'The rise and fall of universal jurisdiction' (2010) Leuven Centre for Global Governance Studies Working Paper 37, 25.

⁴⁰³ Human Rights Watch, 'Leave None to Tell the Story: Genocide in Rwanda' (*Human Rights Watch Report*, 1 March 1999) <<https://www.hrw.org/reports/1999/rwanda/Geno15-8-01.htm#TopOfPage>> accessed 30 November 2017.

committing UJ crimes, to portray the prosecutions as 'an attack by outsiders on the nation'.⁴⁰⁴

Yet, this argument should not be overstated. While there are genuine concerns about a previous colonial power interfering in a former colony, the evidence does not point towards the former colonial state always pursuing the cases itself. Rather, it is the role played by civil society and the general priority of human rights in the society that has driven things forward. Many of the cases are a result of victims, their families or NGOs filing complaints. European states have a broad approach as to who can request the opening of an investigation, particularly in civil law systems, whereby victims or a local prosecutor are able to initiate investigations as per the applicable rules on criminal procedure.⁴⁰⁵ The active role NGOs and civil society take in ensuring participation in the initiation of claims, providing evidence and supporting victims and their families in seeking a legal remedy is key in bringing such cases before courts.⁴⁰⁶ European courts have become attractive because of the lack of recourse for victims and their families to judicial remedies in the respective domestic courts.

Additionally, other legal obligations may play a role in a court pursuing a UJ case. For example, the UNSC has adopted numerous resolutions calling on all states to cooperate and assist in the investigation, arrest, prosecution or extradition of the Rwandan genocide fugitives.⁴⁰⁷ This reflects the link between the UNSC, the maintenance of peace and security and the pursuit of criminal prosecutions. Following the end of the 1994 Rwanda genocide, many of the perpetrators sought refuge in Europe and were subsequently arrested in the prosecuting states' territory. Both the Norwegian and Swedish cases resulted from a Rwandan arrest warrant and Interpol red notice respectively, but the suspects were never extradited to Rwanda due to concerns over the human rights situation and the use of the death penalty. Instead, the states successfully prosecuted the individuals before their domestic courts. A similar situation occurred in the Canadian prosecution.⁴⁰⁸

⁴⁰⁴ Sriram (n 318) 62.

⁴⁰⁵ Reydams (n 259) 221.

⁴⁰⁶ Florian Jeßberger and Julia Geneuss, 'Litigating Universal Jurisdiction' — Introduction' (2015) 13(2) *Journal of International Criminal Justice* 205.

⁴⁰⁷ Most recently in UNSC Res 2150 (16 April 2014) UN Doc. S/RES/2150.

⁴⁰⁸ Table 1.

Finally, despite relying on UJ, table 1 points towards accompanying jurisdictional links: territory and nationality. Typically, the accused is present in the territory or is due to travel to the prosecuting state. For example, the two Swiss prosecutions were a result of the accused being in the country. Notwithstanding the accompanying jurisdictional link UJ is still applicable: the crime was committed outside the territory of the prosecuting state and the accused was not a national at the time of the alleged commission. There have been instances when the victim was a national of the prosecuting state and the passive personality principle was relied on together with UJ.⁴⁰⁹ There have been *in absentia* trials and two convictions fall into this category,⁴¹⁰ highlighting the rarity of such trials. This is in contrast to the approach promoted by the AU in the AU Model Law which excludes trials *in absentia*.⁴¹¹

Overall, the use of UJ by non-African states has been concentrated before those courts with the broadest domestic UJ legislation, fuelled by the active role of NGOs and the ability of victims and their families to file complaints. It is unlikely that it is a state policy to pursue UJ prosecutions, rather it is dependent on third party initiatives. Therefore, very few states have utilised UJ reducing its impact on impunity and contributing to the need for an African regional criminal court. When used, UJ prosecutions have targeted state officials, rebels and citizens alike, but are limited by the applicability of immunity for Heads of State and senior state officials. Thus, until such immunity is no longer applicable, there is de facto impunity, unless the individual leaves office. The ability of UJ prosecutions to contribute to international criminal justice and accountability is severely limited by the small number of recognized crimes, especially given that the inclusion of crimes against humanity and terrorism are controversial and legally uncertain. The lack of customary law permitting trials *in absentia*, has required the presence of the alleged perpetrator in the jurisdiction. Effectively this limits the ability of UJ to contribute to justice and accountability by reducing the number of applicable courts before which to file a complaint. Additionally, while UJ prosecutions contribute to retribution, there is little deterrence as certainty and immediacy of a UJ prosecutions is absent. Given the geographical distance of the UJ prosecution from the location of the crime the link to reconciliation is dubious.

⁴⁰⁹ See the Swedish cases brought against Rwandan nationals in Table 1.

⁴¹⁰ Table 1.

⁴¹¹ Article 4 AU Model Law.

4.2 African Responses to Universal Jurisdiction Cases before Non-African State Courts

Despite both African and European states sharing a mutual understanding of UJ and a joint aim of ending impunity,⁴¹² the AU and African states expressed concern over:

- 1) The abuse of UJ based on political and/or other grounds resulting in the targeting of Africans.
- 2) The use of UJ against incumbent state officials and the implications for African and EU state relations. This is tied in to the perceived double standards in the principle's application.
- 3) The abuse by Western states undermining African states' dignity and that of their officials, which risks eroding friendly relations.
- 4) The international stigma attached to attempted UJ prosecutions.
- 5) Being subjected to European jurisdiction goes against sovereign equality and independence, of particular concern when utilised by a former colonial power.
- 6) The disregard of immunities for state officials constrains the state's functioning on the international plane.⁴¹³

In response to the perceived abuse of the principle of UJ by non-African states the AU Assembly decided to explore extending the ACTJHR jurisdiction to include international crimes.⁴¹⁴ These concerns were raised before the UNSC and UNGA where UN members were asked to 'impose a moratorium on the execution of those warrants *until* all the legal and political issues have been exhaustively discussed between the African Union, the European Union and the United Nations'.⁴¹⁵ The AU also managed to include the matter in the immunity work of the ILC.

While the validity of the African perspective is debatable,⁴¹⁶ placing value judgments on which states, methods and interpretations are more valuable or able to develop the law

⁴¹² AU-EU Expert Report, para 2 and R1.

⁴¹³ AU-EU Expert Report, Section IV.1, 35-7.

⁴¹⁴ Assembly/AU/Dec.213(XII) (n 226).

⁴¹⁵ Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, AU/Dec.199(XI), para 8 (emphasis added).

⁴¹⁶ On the AU-EU Expert Report and the validity of African concerns see Charles Chernor Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary assessment of the African Union

are not helpful.⁴¹⁷ For example, when such value judgments ignore the legal colonialism context or justifying the use of such framing. It may be difficult to determine '[w]hether more traditional forms of justice and alternative dispute resolution mechanisms [...] are an adequate reaction to systemic criminality'. However, the fact that '[i]t may take a lifetime for Western observers to grasp the finesses of communal justice'⁴¹⁸ does not mean traditional mechanisms shouldn't be accepted or have a role to play. A stronger argument would be based on the ability of traditional justice mechanisms to meet fair trial standards and appropriateness for dealing with mass atrocities and the possible remedies and reparations. Furthermore, this type of argument should not be used to ignore legitimate concerns of African states which may positively contribute to ending impunity.

Yet, outside of the AU institutional response, and despite the ferocity of African criticism towards the exercise of universal jurisdiction by non-African States, the reality has been that of mixed reactions. Cases concerning ordinary citizens or government opponents have generated little criticism. This is demonstrated by the numerous UJ cases brought relating to the 1994 Rwandan genocide and the Rwandan government's accompanying engagement.⁴¹⁹ However, this cooperation occurs only where the prosecution concerns those with whom there is no government or state link. For example, President Kagame was extremely vocal against French attempts to prosecute nine Rwandan government officials for their alleged crimes against the Rwandan Patriotic Army, breaking off diplomatic ties in response to the French arrest warrants.⁴²⁰

African state cooperation is manifested in several ways. By rogatory missions whereby the prosecuting state's court officially requests judicial or investigative assistance channelled through formal diplomatic processes. Such missions are vital for UJ prosecutions which by nature involve extra-territorial work and rely on cooperation for investigative and evidentiary purposes. If African states were truly opposed to the

Perspective on Universal Jurisdiction' (2010) 21 Criminal Law Forum 1; Geneuss (n 290); van der Wilt (n 401).

⁴¹⁷ For an example of a value judgment see, Van der Wilt (n 401) 1063-5.

⁴¹⁸ Ibid 1064.

⁴¹⁹ Table 1, Désiré Munyaneza; Clever Berinkindi; Ntuyahaga; Public Prosecutor v Higaniro et al.

⁴²⁰ - 'Rwanda/France - arrest of top Rwandan officer re-launches plane investigation' (*JusticeInfo.Net*, 12 November 2008) <<http://www.justiceinfo.net/en/component/k2/en-en-121108-rwandafrance-arrest-of-top-rwandan-officer-re-launches-plane-investigation1157511575.html>> accessed 16 June 2017.

exercise of UJ they would not cooperate on any front with the prosecuting state.⁴²¹ Given this, the use of these investigative trips by certain European states into the territory of the respective African state can demonstrate cooperation and tentative support for the prosecution. At the very least it demonstrates a lack of obstruction. However, this is not to say there are no other motivating factors, such as prosecutions against political opponents which may be more accurately described as 'strategic manoeuvring'.⁴²²

The strongest reaction against UJ prosecutions emanate from cases against Heads of State and Government and other senior state officials.⁴²³ This is hardly surprising given the law on immunity and the importance of state sovereignty.⁴²⁴ A high-profile example is the ICJ *Arrest Warrant Case* brought by the Democratic Republic of Congo (DRC) against Belgium over the issuance of an arrest warrant for a senior DRC official.⁴²⁵ Similarly, French attempts to exercise jurisdiction over three sitting Rwandan officials, while upholding the immunity of Rwandan President Kagame, resulted in an ICJ application.⁴²⁶ Yet, due to France not accepting the court's jurisdiction the case was never heard.⁴²⁷ Table 1 shows that immunity based opposition is typically concerned with incumbent state officials and Heads of State and Government. A similar situation has developed around the ICC. Divisions emerged once the ICC ventured into the uncharted territory of an international criminal justice mechanism by issuing an arrest warrant for a sitting Head of State – Sudanese President Omar Al Bashir.⁴²⁸

African opposition is not limited to prosecutions by European courts but also other African domestic courts. South Africa's (SA) police have refused to investigate claims of

⁴²¹ Investigative trips are identified in Reydams (n 259); Jalloh (n 416); van der Wilt (n 401).

⁴²² Similar has been argued with regards to the ICC self-referrals by African states, see Chapter 6.2 of this thesis.

⁴²³ One very high-profile case concerned the DRC's Minister of Foreign Affairs Mr Abdulaye Yerodia Ndombasi, for whom a Belgian court issued an international arrest warrant. This resulted in the *Arrest Warrant Case* before the ICJ. See Table 1.

⁴²⁴ Chapter 3.3 of this thesis.

⁴²⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3.

⁴²⁶ The Officials where the Chief of General Staff to the Rwandan Defence Forces, Chief of Protocol attached to the Presidency and a Rwandan Ambassador to India. See n 398.

⁴²⁷ France has not signed up to the ICJ's compulsory jurisdiction as provided under Article 36(2), and thus was under no obligation to accept the jurisdiction.

⁴²⁸ *The Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")* (Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-1 (4 March 2009).

torture against Zimbabwean state officials despite court judgments requiring otherwise, including a 2014 Constitutional Court ruling.⁴²⁹

Moreover, such immunity objections are not unique to African states. China, Israel and the USA have also publicly denounced European courts' attempts to initiate investigations or arrest their officials during European trips.⁴³⁰ The USA were so vehemently opposed to an attempted Belgian UJ prosecution that it is widely thought that Belgium amended its legislation to narrow the scope and applicability of UJ.⁴³¹

Table 1 demonstrates that African states accept the principle of UJ. They are supportive, or at the very least not obstructive, of cases against ordinary African citizens and political opponents. Only when it concerns a sitting state official or Heads of State and Government do African states become uncooperative and oppose the prosecutions on grounds of immunity. This is not a uniquely African stance, as above shows.

If African states accept and recognise UJ there should be evidence of the concept in domestic legislation and a show of potential cases within the continent, which will minimise the potential for the abuse of UJ prosecutions by non-African states. The next section considers to what extent there is evidence of UJ within the continent and what this could mean for addressing international criminal justice and, ultimately, the need for an African regional criminal court.

4.3 Universal Jurisdiction under African States' Domestic Legislation

While an in-depth analysis of every African states' legislation is beyond the scope of this thesis,⁴³² an analysis of scholarship and reports is undertaken to find out what makes

⁴²⁹ National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC) (30 October 2014).

⁴³⁰ Louise Arimatsu, 'Universal Jurisdiction for International Crimes: Africa's Hope for Justice?' (April 2010) Chatham House Briefing Paper IL BP 2010/01, 11-12; Human Rights Watch 'Belgium: Universal Jurisdiction Law Repealed' (*HRW*, 1 August 2003) <<https://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed>> accessed 28 March 2016.

⁴³¹ Human Rights Watch (n 430).

⁴³² For an overview of African UJ legislation see Table 2, pages 100 – 102.

African States' UJ legislative approach contributory to the need for an African regional criminal court?

The AU-EU Expert Report included a survey of publicly available African states' laws to 'highlight common observed and notable features of this law and practice'.⁴³³ The crimes included in their implementing UJ legislation includes both treaty and customary law crimes and the contested offences, encompassing breaches of the 1949 Geneva Conventions, crimes against humanity, genocide, war crimes, and terrorism.⁴³⁴ Despite a large number of African states being a Party to the Torture Convention, very few have implemented the offence within their UJ legislation.⁴³⁵ Overall, there appears to be little difference if the state follows a common law or civil law tradition, nor if the state has implemented legislation through incorporation or ratification.

African states, similarly to European states, include requirements for the exercise of UJ.⁴³⁶ Provided the domestic law has stipulated the crime, states are able to exercise UJ subject to procedural requirements. These include: necessitating the presence of the accused before initiating proceedings; needing the Attorney General, Director of Public Prosecutions or Prosecutor to initiate the proceedings; or limiting jurisdiction to the higher courts only.⁴³⁷

Only three of the fifty-five African states⁴³⁸ have removed the procedural barrier regarding immunity in relation to the core international crimes, with the exception of aggression.⁴³⁹ The reason for removing immunity, is most likely a result of the state's implementing legislation being adopted in relation to the ICC as the three states are members of the international court.⁴⁴⁰ Furthermore, as no other African states have

⁴³³ AU-EU Expert Report, Section II.1 footnote 11.

⁴³⁴ AU-EU Expert Report para 16 and footnotes 12-33.

⁴³⁵ AU-EU Expert Report para 16.

⁴³⁶ Reydams (n 259) Part II.

⁴³⁷ AU-EU Expert Report para 18, footnotes 45-65; Dube (n 279) 465-475.

⁴³⁸ The number of African states is contested as neither the United Nations nor Morocco recognise the Saharawi Arab Democratic Republic. However, because of Saharawi Republic's status as an AU member this thesis includes it as a state.

⁴³⁹ AU-EU Expert Report para 17, footnotes 40-42 which identifies The Democratic Republic of Congo's Penal Code, Book 1, Section VI, article 21-3; Niger's Law N° 2003-025 of 13 June 2003 article 208.7; and South Africa's Implementation of the Rome Statute of the International Criminal Court Act 2002, S4(1).

⁴⁴⁰ The DRC ratified the Rome Statute in April 2002, Nigeria ratified in September 2001 and South Africa ratified in November 2000.

followed, it can hardly be claimed that a regional custom of not applying immunity for core crimes has emerged.⁴⁴¹ Interestingly, the Pact on Security, Stability and Development in the Great Lakes Region's Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination remove immunity for these crimes.⁴⁴² As eleven states from the Great Lakes region are party to the Protocol there may be the potential to claim a (sub)regional customary international law recognising the inapplicability of immunity for the core crimes.⁴⁴³ However, given the lack of actual state practice in implementing this provision, and the specific refusal to recognise this by states in that region, this is unlikely to be substantiated. A treaty which is never implemented is not good evidence in establishing a custom.

Overall, African states' legislation addresses crimes of a treaty and customary nature, but even with the inclusion of the contested crimes of genocide and terrorism it does not address the conduct identified as being of regional concern.⁴⁴⁴ As only three states have removed the procedural barrier of immunity for UJ prosecutions for three of the core crimes little has changed with regards to the limiting impact immunity has. In fact, additional hurdles have been implemented through the procedural requirements. Sadly, there is little within African states' domestic law on UJ that minimises the need for an African regional criminal court that can contribute to the various purposes of pursuing international criminal prosecutions: there is little to no deterrence, reconciliation, improvement of peace and security, and no transitional justice approaches adopted.

⁴⁴¹ The ICJ held regional practices can be considered as regional customs and thus international law, when there is a common culture or other common attribute. *Asylum Case (Colombia v Peru)* (Judgment) [1950] ICJ Rep 266.

⁴⁴² Article 12.

⁴⁴³ The eleven states being: Angola, Burundi, Central African Republic, The Democratic Republic of Congo, Kenya, The Republic of Congo, Rwanda, Sudan, Tanzania, Uganda and Zambia. With the succession of the Republic of South Sudan in 2011, the Protocol will apply to them as part of their membership to the International Conference on the Great Lakes Region.

⁴⁴⁴ See AU Model Law's inclusion of trafficking in drugs and the Cairo-Arusha's principles.

Table 2 – African States Universal Jurisdiction (UJ) Laws⁴⁴⁵

State	Genocide	Crimes Against Humanity	War Crimes	Terrorism	Civil Law Tradition Ratified GC & Accepted UJ on This Basis	Torture	Immunity for Core Crimes Abrogated	Limitations to UJ					
								Territory Presence	Initiated	Initiated by Director of Public Prosecutions	Initiated by Prosecutor	No Jurisdiction for Low-level Courts	
Algeria			✓		✓	✓							
Angola					✓								
Benin													
Botswana			✓						✓				✓
Burkina Faso	✓	✓	✓		✓								
Burundi	✓	✓	✓		✓	✓	✓					✓	
Cabo Verde	✓		✓			✓							
Cameroon		✓			✓	✓							
Central African Republic					✓								
Chad					✓								
Comoros	✓	✓	✓		✓	✓							
Congo	✓	✓	✓		✓								
Côte d'Ivoire	✓		✓		✓								
DR Congo	✓	✓	✓		✓	✓	✓	✓				✓	
Djibouti			✓		✓	✓							

⁴⁴⁵ Based on available information from AU-EU Expert Report; Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update' (October 2012).

Egypt					✓							
Equatorial Guinea												
Eritrea	✓	✓	✓		✓	✓						
Ethiopia	✓	✓	✓					✓				
Gabon	✓	✓	✓		✓	✓						
Gambia	.	.	✓									
Ghana	✓	✓	✓									
Guinea			✓									
Guinea Bissau												
Kenya	✓	✓	✓						✓			
Lesotho			✓						✓			
Liberia												
Libya					✓							
Madagascar			✓			✓						
Malawi			✓							✓		
Mali	✓	✓	✓	✓		✓						
Mauritania												
Mauritius	✓	✓	✓									
Morocco						✓						
Mozambique			✓									
Namibia			✓						✓			
Niger	✓	✓	✓									
Nigeria			✓				✓		✓			✓
Rwanda	✓	✓	✓									
Sahrawi Rep.												

São Tomé and Príncipe												
Senegal	✓	✓	✓					✓				
Seychelles			✓						✓			
Sierra Leone			✓						✓			
Somalia		✓										
South Africa	✓	✓	✓				✓	✓				
South Sudan												
Sudan	✓	✓	✓									
Swaziland			✓						✓			
Togo												
Tunisia					✓	✓						
Uganda	✓	✓	✓							✓		
UR of Tanzania			✓						✓			
Zambia												
Zimbabwe	✓		✓						✓			

Turning to African state practice, while at the time of the AU-EU Expert Report '[n]o African State is known to have exercised universal jurisdiction effectively', there have been recent attempts.⁴⁴⁶ SA had to consider its ability to exercise UJ in terms of initiating an investigation into alleged torture committed in Zimbabwe of Zimbabwean nationals residing in SA.⁴⁴⁷ The SA Constitutional Court confirmed the ability of the South African Police Service (SAPS) to open an investigation into the allegations without requiring the presence of the accused in the territory.⁴⁴⁸ However, despite the ruling SAPS have yet to open an investigation, weakening any UJ precedent in either SA or Africa. More recently, former Chadian dictator Hissène Habré has been tried before a court in Senegal on the basis of UJ, which will be considered in detail in the next section.

4.4 The Prosecution of Former President Hissène Habré

The recent prosecution of Hissène Habré was the first UJ prosecution of its kind in Africa.⁴⁴⁹ Following the overthrow of Chadian President Habré in December 1990, bringing an end to his notoriously repressive rule, he fled to Senegal.⁴⁵⁰ 1992 saw the release of the Nation Truth Commission's report documenting 40 000 cases of torture by the Habré regime. Encouraged by what is known as the Pinochet precedent and the English court's decision on former heads of state immunity,⁴⁵¹ a Chadian victim's group

⁴⁴⁶ Para 19.

⁴⁴⁷ For a discussion on the case, see Gerhard Werle and Paul Christoph Bornkamm, '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; Christopher Gevers, 'The Application of Universal Jurisdiction in South African Law' (*EJIL:Talk!*, 24 April 2012) <<http://www.ejiltalk.org/universal-jurisdiction-in-south-africa/>> accessed 28 March 2016; Max du Plessis 'South Africa's police must investigate Zimbabwe torture allegations' (*ISS*, 10 November 2014) <<https://www.issafrica.org/iss-today/south-africas-police-must-investigate-zimbabwe-torture-allegations>> accessed 28 March 2016.

⁴⁴⁸ National Commissioner of the South African Police Service (n 429) para 48.

⁴⁴⁹ On the Habré prosecution see Sarah Williams, 'The Extraordinary African Chambers in the Senegalese Courts: an African Solution to an African Problem?' (2013) 11 *Journal of International Criminal Justice* 1139; Sofie A. E. Høgestøl, 'The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight Against Impunity' (2016) 34(3) *Nordic Journal of Human Rights* 147; M Bronner, 'Our Man in Africa', (*Foreign Policy Magazine*, 20 July 2015) <<http://foreignpolicy.com/2014/01/24/our-man-in-africa/>> accessed 30 November 2017; Reed Brody, 'The Prosecution of Hissène Habré – An African Pinochet' (2000-2001) 35 *New England Law Review* 321.

⁴⁵⁰ For a timeline of the events, see Human Rights Watch, 'Chronology of the Habré Case' (*HRW*, April 27, 2015) <<https://www.hrw.org/news/2015/04/27/chronology-habre-case>> accessed 30 November 2017.

⁴⁵¹ *Pinochet* case (n 368).

together with Human Rights Watch (HRW) compiled a case against Habré. In January 2000 they brought a private complaint before the Senegalese courts. While the *Tribunal régional hors-classe de Dakar* confirmed the charges, the *Cour d'Appel de Dakar* overturned the ruling determining that Senegal had no jurisdiction as the acts occurred in Chad, which the *Cour de Cassation* confirmed. These decisions are widely agreed to have been reached under political pressure from the then Senegalese President, Abdoulaye Wade.

Following the *Cour d'Appel de Dakar's* decision, the victims filed criminal complaints in both Chad (October 2000) and Belgium (November 2000). Additionally, in April 2001, in response to the lack of jurisdiction before the Senegalese courts the victims filed a complaint before the UN Committee against Torture for violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Meanwhile, in early 2002, Belgian investigators travelled to Chad to conduct interviews and site visits, eventually issuing an international arrest warrant for Habré in September 2005. Belgium used Senegal's failure to fulfil its *aut dedere aut judicare* (prosecute or extradite) obligation as the basis for the extradition request sent to Senegal. Subsequently leading to an ICJ complaint being filed. Despite the ICJ's confirmation of Senegal's *aut dedere aut judicare* obligation Habré was never extradited.⁴⁵² Instead, in November 2005, Senegal placed Habré at the disposal of the President of the AU, resulting in the establishment of the Committee of Eminent African Jurists to recommend options for prosecuting Habré.⁴⁵³

Accordingly, Senegal challenged its ability to prosecute Habré by bringing a case before the Economic Community of West African States (ECOWAS) court, which incorrectly

⁴⁵² *Questions Relating to the Obligation to Prosecute or Extradite* case, 422. Senegal was found to be in breach of its obligation to prosecute or extradite Habré, and must 'without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him.' ICJ Press Release, 'Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal): The Court finds that the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him' (20 July 2012) 2012/24 <<http://www.icj-cij.org/docket/files/144/17084.pdf>> accessed 28 March 2016.

⁴⁵³ African Union, Report of the Committee of Eminent African Jurists on the Case of Hissène Habré (May 2006), para 27 – 29, <https://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Rep0506.pdf> accessed 30 November 2017.

found Senegal was prevented from undertaking a domestic prosecution due to the retroactive application of the law on the crimes charged which would violate the principle *nullum crimen sine lege*.⁴⁵⁴ Yet, the ECOWAS court did call on Senegal to try Habré before an international ad hoc style court.⁴⁵⁵ In the end, the AU and international community supported the establishment of the Extraordinary African Chambers (EAC) within the Senegalese courts. On 30 May 2016, before the EAC, Habré was 'convicted of crimes against humanity, war crimes, and torture, including sexual violence and rape'.⁴⁵⁶

4.4.1 Universal Jurisdiction under the Extraordinary African Chambers

The unclear status of the EAC as a domestic court or an internationalised court presents challenges for the applicability of UJ. Under the principle of UJ only domestic courts can prosecute the alleged perpetrator, whereas internationalised courts apply different jurisdictional bases. Given the EAC is placed 'within the Senegalese judicial system' it is not a separate or distinct judicial mechanism.⁴⁵⁷ Thus, the EAC is more akin to a domestic prosecution as opposed to a hybrid court on two main grounds: First, the limited participation of international judges and their involvement in other aspects of the court's work. Despite the EAC including international judges, this is limited to two judges from AU member states and no international personnel or advisers. This is hardly international compared to the level of international employees in the ICTR, ICTY and SCSL.

Second, both the substantive and procedural law relied on are from Senegalese law and not international law.⁴⁵⁸ The level of involvement from an outside party, i.e. the AU, is

⁴⁵⁴ *Hissein Habre v. Republic of Senegal* (Judgment) ECW/CCJ/JUD/06/10 (18 November 2010) para 58.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ Human Rights Watch, 'The Trial of Hissène Habré' (n 220). His conviction for rape was overturned on appeal on the grounds that 'the Trial Chamber exceeded its powers of re-characterising the crimes when it convicted the accused of a crime that did not feature in the indictment, and did not afford equal treatment to the parties to the case'. Forum Chambres Africaines 'Press Release Final appeal decision in the Hissein Habré case before the EAC' (27 April 2017) <<http://forumchambresafricaines.org/press-release-final-appeal-decision-in-the-hissein-habre-case-before-the-eac/?lang=en>> accessed 30 November 2017.

⁴⁵⁷ Article 1(1) Agreement Between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System.

⁴⁵⁸ *Ibid* Article 1(4). This provision was subsequently changed by Article 16 of the Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7

likened 'to situations in which national institutions receive assistance, finance, and training, but are not considered to be internationalized'.⁴⁵⁹ Therefore, despite having some of the characteristics of a hybrid tribunal the EAC is in fact not a hybrid court, but a domestic prosecution at 'the limit of the category of internationalized criminal tribunals'.⁴⁶⁰

This has far reaching implications for how UJ is applied. International and hybrid courts' jurisdiction is bound by law to cover a specific time period. Either from the date of the court's establishment,⁴⁶¹ or as set out in the constitutive instrument.⁴⁶² However, domestic UJ prosecutions only need to determine whether the crime was criminalised under international law at the time of commission. Pursuant to Article 15 of the International Covenant on Civil and Political Rights (ICCPR)

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 when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.⁴⁶³

Thus, it is for the EAC to determine if the crimes Habré was charged with were crimes at the time of their commission. The EAC has

the power to prosecute and try the person or persons most responsible for crimes and serious violations of international law, customary international law and international conventions ratified by Chad,

June 1982 to 1 December 1990 (hereafter EAC Statute). Article 17(1) sets out procedural law to apply. For an English translation see, <http://forumchambresafricaines.org/docs/Statute_of_the_Extraordinary_African_Chambers.pdf> accessed 30 November 2017.

⁴⁵⁹ Williams (n 449) 1147.

⁴⁶⁰ Ibid.

⁴⁶¹ For example, The ICC has jurisdiction over crimes committed from 2 July 2002 onwards, or from the date the statute entered into force for the State if after July 2002.

⁴⁶² Article 1(1) of the SCSL Statute limits jurisdiction to crimes committed in Sierra Leone 'since 30 November 1996'. Article 1 ICTR Statute, limits jurisdiction to crimes committed 'between 1 January 1994 and 31 December 1994'.

⁴⁶³ Article 15 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). Echoed in Senegal's Constitution, Art. 9, Constitution de la Republique du Senegal du 22 Janvier 2001.

committed in the territory of Chad during the period from 7 June 1982 to 1 December 1990.⁴⁶⁴

In contrast to the ECOWAS judgment, if this is satisfied, there will be no violation of the *nullum crimen sine lege* principle.

The charges against Habré consisted of crimes against humanity, torture and war crimes. As Habré was president from 1982 – 1990 to avoid retroactivity the conduct needs to have been criminalised under international law during that period. Under treaty law torture is a crime and Senegal ratified the CAT in 1986 and Chad acceded to CAT in 1995. Therefore, for both states, torture would not have been a crime for the duration of Habré's dictatorship. Plus, as held by the ICJ, torture was a customary law crime at the time.⁴⁶⁵

War crimes are generally accepted as customary law crimes with the exception of internal armed conflicts. While there are legal arguments that such crimes have become customary crimes following the ICTR and ICTY judgments they would not have been criminal under customary law at the time of commission in the 1980s.

For crimes against humanity their inclusion as a customary crime is contested, making it uncertain whether it is a UJ crime. Nevertheless, the Nuremberg Tribunals enabled individual responsibility and the Extraordinary Chambers in the Courts of Cambodia (ECCC) held that since at least 1975 crimes against humanity have been customary law crimes.⁴⁶⁶

Finally, as a former Head of State, Habré is entitled to functional immunity.⁴⁶⁷ However, since the Pinochet case it is accepted that there is no immunity for former Heads of State and Government for international crimes. Nevertheless, if the EAC had held there was an

⁴⁶⁴ Article 3(1) EAC Statute. Chad is a party to the CAT since 1995, the 1949 Geneva Conventions since 1970 and the Geneva Convention Additional Protocol II since 1997.

⁴⁶⁵ *Questions Relating to the Obligation to Prosecute or Extradite* case, para 99.

⁴⁶⁶ *Kaing Guek Eav alias Duch* (Judgment) 001/18-07-2007/ECCC/TC (26 July 2011) § 292. However not all crimes may have been distinct crimes against humanity, for example *Kaing Guek Eav alias Duch* (Appeal Judgment) 001/18-07-2007/ECCC/SC (3 February 2012) § 180.

⁴⁶⁷ Chapter 3.3 of this thesis.

applicable immunity Chad had already waived his immunity, consequently nullifying the issue.⁴⁶⁸

4.4.2 A Unique Situation or Potential for Replication?

Whether the reasoning for prosecuting Habré was political (to prevent a European court passing judgment on a former African leader) or based on the firm belief in promoting UJ by African courts, this case has set an important precedent. It is no longer possible for former Heads of State to avoid prosecution in Africa. Furthermore, the AU and African states have demonstrated they will not necessarily shield perpetrators from prosecution. Although the question remains whether the likes of the EAC or other UJ prosecutions are likely across Africa.

The prosecution of Habré was not without its challenges and from the beginning certain factions sought to obstruct the process. Following the initial filing of the complaint to the Senegalese courts, and the election of then President Abdoulaye Wade, steps were taken to prevent the prosecution. Wade placed pressure on the courts and even transferred judges in order to obstruct the investigation and prevent judgments being made.⁴⁶⁹ The *Cour d'Appel de Dakar's* quashing of the complaint and the ECOWAS decision created further legal hurdles to the prosecution, but these were ultimately overcome. Additionally, Senegal repeatedly raised concerns over the costs of the prosecution and its own limited financial capacity.⁴⁷⁰

However, the numerous enabling factors proved more influential. Internal factors included the choice of Senegal as the forum because its 'democratic tradition' and review of the constitution and criminal laws helped facilitate the court's jurisdiction.⁴⁷¹ The removal, by election, of Wade created the political climate to remove the pressure on and interference in the court system, compounded by the Minister of Justice's

⁴⁶⁸ L'immunité de Hissène Habré. définitivement levée, letter from M. Koudji-Gaou, 7 October 2002, <<http://www.hrw.org/legacy/french/press/2002/tchad1205a.htm>> accessed 30 September 2013.

⁴⁶⁹ Brody (n 449) 328-330.

⁴⁷⁰ Williams (n 449) 1143.

⁴⁷¹ Ntahiraja (n 387) 30.

background as a human rights advocate and President of the ICC's Assembly of State Parties (ASP).⁴⁷²

At the international level, there was the support or willingness from Chad for Senegal to prosecute Habré: as seen by their waiving of his immunity and their cooperation with the investigation.⁴⁷³ However, the Chadian government has used the demonization of Habré for their own political purposes over the years, casting doubt over whether its support was due to a belief in the pursuit of justice or for political reasons. Arguably, the strongest enabling factor was the role of local and international NGOs. From the end of the Habré regime they had continued to seek ways to keep the matter before the courts of various states and international bodies,⁴⁷⁴ which was made possible by the international community's financial contributions.⁴⁷⁵ In addition, external pressure placed on Senegal to extradite or prosecute came from the Belgian extradition request,⁴⁷⁶ followed by the Belgian complaint before the ICJ with the court ruling against Senegal,⁴⁷⁷ as well as from the UN Committee Against Torture finding against Senegal and their lack of compliance to their obligations under the CAT.⁴⁷⁸

At the continental level, the report of the Committee of Eminent African Jurists put further pressure on Senegal, and the AU, to find an appropriate African forum in which to prosecute Habré. Ultimately, the AU provided both support and financial assistance to the EAC.

Perhaps more importantly, at least from a legal standpoint, was the Pinochet precedent and the removal of the immunity defence.⁴⁷⁹ The case had shown it was legally possible

⁴⁷² Ibid 31.

⁴⁷³ *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*

(Application Instituting Proceedings of 17 February 2009) <<http://www.icjci.org/docket/files/144/15054.pdf>> accessed 30 November 2017.

⁴⁷⁴ Brody (n 449); Human Rights Watch, 'Chronology of the Habré Case' (n 368).

⁴⁷⁵ Ntahiraja (n 387) 33.

⁴⁷⁶ *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*,

Application Instituting Proceedings of 16 February 2009, §6 available <<http://www.icjci.org/docket/files/144/15054.pdf>> accessed 30 November 2017.

⁴⁷⁷ *Questions Relating to the Obligation to Prosecute or Extradite* case, para 122.

⁴⁷⁸ Committee against Torture, 'Decisions of the Committee Against Torture under Art. 22 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment' (17 May 2006) UN Doc CAT/C/36/D/181/2001, paras 9.6–9.12.

⁴⁷⁹ *Pinochet case* (n 368).

to prosecute a former head of state for torture and potentially other international crimes before domestic courts. Without this, it is unlikely an African court would have attempted such a prosecution.

While such an enabling environment may be rare in Africa, the Habré prosecution offers the potential for future continental prosecutions. The EAC has demonstrated there is the appetite for ending impunity and for victims to receive justice. What's more, an African court was able to undertake a prosecution against a former Heads of State creating ownership for African states, the AU and victims. Given the concern of the AU over the perceived abuse of UJ by Western states, this can go a long way in addressing this issue. The EAC prosecution was able to utilise predominantly national personnel, with the support of two African judges, undertake credible investigations and deliver an enforceable verdict. Such an approach will lead to improvement in judicial and institutional capacity in Senegal and throughout the continent if further such prosecutions are pursued. It may even contribute to deterring future crimes if African leaders perceive a prosecution as being likely. The EAC's reliance on UJ meant the crimes, which were committed more than two decades ago, were within the court's competence. Furthermore, as the judgment came from within the Senegalese judicial system there was no need to find a state willing to imprison Habré, unlike if he had been tried before an international court. The costs of the prosecution were significantly less than those of international and hybrid courts,⁴⁸⁰ which could address the financial constraints faced by many African states, especially when financially supported by the AU and the international community. This would also lead to the reduction in overall costs to the international community while advancing international criminal justice.

However, whether other African states will follow Senegal's lead remains to be seen. While a large number of states have UJ legislation it covers a limited number of crimes. Many states are also still facing their own repressive regimes and weak NGO and CSO presence remains a challenge for many victims' communities to assist in mobilising and undertaking the work required for filing a complaint. Yet, the possibility exists for UJ prosecutions to become more common, even if clustered around certain states.⁴⁸¹ This

⁴⁸⁰ Kerstin Carlson, 'The Trial of Hissène Habré' (*IntLawGrrls*, 24 May 2016) <<https://ilg2.org/2016/05/24/the-trial-of-hissene-habre/>> accessed 30 November 2017.

⁴⁸¹ This does not ignore the zones of impunity which emerge as a result. See Sriram and Ross (n 394).

has been the European experience where the majority of cases are heard before a limited number of courts.

4.5 Conclusion

While there is undeniably a lack of UJ prosecutions taking place within Africa, both African and non-African states have passed UJ legislation. The crimes covered include both treaty and customary law based crimes and the contested crimes lacking a true UJ characteristic. Both African or non-African states include a mixture of crimes against humanity, genocide, war crimes, terrorism and breaches of the 1949 Geneva Conventions. The effect of this is to limit the applicable crimes and consequently, the likelihood of pursuing a UJ prosecution. Nevertheless, for existing crimes there are less stringent time frames than under international and hybrid courts.⁴⁸²

Unsurprisingly, prosecutions by non-African states are dominated by the three states with the most conducive judicial systems and the broadest UJ legislation. This is similar to the situation in Africa where only SA and Senegal have thus far considered UJ prosecutions. The ability to translate such practice into state policy is uncertain. The majority of complaints are filed by victims, their families and NGOs, demonstrating the need for a strong civil society and access to the courts. This is currently lacking across the majority of African states.

Despite the limited number of UJ prosecutions, attempts to bring cases against citizens, rebels and state officials have been undertaken. This lack of discrimination is positive but is mitigated by the consistent upholding of sitting Heads of State and Government and senior state officials' immunities. While the legality of the approach has been discussed in Chapter 3, the impact is to reduce the relevance of UJ prosecutions for addressing UJ crimes at the domestic level. Furthermore, such prosecutions have resulted in a backlash and criticism of the perceived abuse of UJ by African and non-African states alike. This dispels the myth that it is only African leaders and states opposed to such prosecutions considering the protests of China, Israel and the US.

⁴⁸² International and hybrid courts are bound by their temporal and geographical scope as set out in their constitutive instruments.

The likelihood of future UJ prosecutions by African states has been bolstered by the Habré prosecution, although the particular enabling environment and other factors limit this, but not completely. The advantages for capacity, including financial, and ownership concerns are addressed, offering an opportunity for African states to demonstrate their willingness to address impunity, even if only for former Heads of State and Government.

Nevertheless, the limited number of applicable crimes and the problems associated with filing complaints curtails the ability of UJ prosecutions to address international criminal justice alone. UJ prosecutions further the retributive aspects of ICL, but Chapters 3 and 4 demonstrate there is little contribution made to deterrence due to the uncertainty and delay in bringing prosecutions before national courts. The contribution made to peace and security is potentially improved with the Rwandan genocide prosecutions, yet this still lacks implementation. UJ has left many crimes unaddressed and ICL purposes unfulfilled. Given that the international criminal court is unable to address all situations and crimes left by UJ, there is a space for an African regional criminal court.⁴⁸³

⁴⁸³ See Part II of this thesis.

Part II

The Interrelationship Between the AU and the ICC

Part II moves from the domestic level explored in *Part I* to the ICC's prosecution of international crimes. The aim being to answer whether the set up and actions of the ICC itself contributes to the need for an African regional criminal court. Each of the chapters focus on separate evaluative criteria starting with accountability in Chapter 5. As the ICC adopts accountability of a criminal nature an examination of the Rome Statute and the international court's policies and practices is undertaken. Chapter 6 focuses on the ability of the ICC to encourage domestic prosecutions as part of the principle of complementarity. Chapter 7 investigates the international court's impact on African ownership, exploring whether the ICC positively engages with AU and African states, and how the relationship contributes to creating a need for an African regional criminal court. In Chapter 8, the focus shifts to the ICC's removal of immunity for all state officials and what this has contributed to ICL and the need for an African regional criminal court. Bringing together the findings from the four chapters, Chapter 9 considers the theoretical basis for prosecution and the purpose of ICL and the ICC. The inability of the international court to live up to ICL's enumerated aims is argued as a contributing factor to the need for an African regional criminal court. Furthermore, the additional purposes attributed to ICL and TJ are argued as another factor which requires an African regional criminal court which goes further than the ICC's purpose to be established.

Chapter 5

The ICC and Accountability

The ICC offers accountability of a criminal nature with accompanying penal sanctions and that is how the term is used throughout Part II unless otherwise stated. Whether this contributes to the need for an African regional criminal court is the focus of this chapter. To answer this question an assessment of: the geographical and temporal reach; which individuals can be prosecuted; how the ICC gains jurisdiction; and the type of crimes under its scope is undertaken. This is followed by an appraisal of the institutional workings of the ICC and its capacity, cooperation and enforcement mechanisms. The purpose of this chapter is not to pass judgment on the Office of the Prosecutor (OTP) nor to come up with solutions, instead the practice and policies are scrutinised to see whether they contribute to the need for an African regional criminal court.

In an effort to become more transparent⁴⁸⁴ the ICC OTP has published numerous papers and reports indicating their understanding of their role and the overall approach taken to international criminal justice.⁴⁸⁵ Over the years, the OTP has tried to adapt its approach based on lessons learned, and with the change in Prosecutor in 2012 also came

⁴⁸⁴ This was partly in response to calls for greater transparency and the negative impact the OTP's silence was having on public perceptions of the court and creating misunderstanding about its work.

⁴⁸⁵ See OTP, Paper on some policy issues before the Office of the Prosecutor, September 2003 (hereafter 2003 Policy Paper); OTP, Annex to the 'Paper on some policy issues before the Office of the Prosecutor', September 2003 (hereafter 2003 Policy Paper Annex); Referrals and Communications, September 2003 (hereafter 2003 Referrals and Communications); OTP, Report on the Activities During the First Three Years (June 2003-June 2006), September 2006 (hereafter First Three Years Report); OTP, Report on Prosecutorial Strategy, September 2006 (hereafter 2006 Prosecutorial Strategy); OTP, Policy Paper on the Interests of Justice, September 2007 (hereafter 2007 Policy Paper); OTP, Prosecutorial Strategy 2009-2012, February 2010 (hereafter 2009-12 Prosecutorial Strategy); OTP, Strategic Plan June 2012-2015, October 2013 (hereafter 2012-15 Strategic Plan); OTP, Policy Paper on Preliminary Examinations, November 2013 (hereafter 2013 Policy Paper); OTP, Strategic Plan 2016-2018, July 2016 (hereafter 2016-18 Strategic Plan); OTP, Report on Preliminary Examination Activities 2011, December 2011 (hereafter 2011 Preliminary Examination Report); OTP, Report on Preliminary Examination Activities 2012, November 2012 (hereafter 2012 Preliminary Examination Report); OTP, Report on Preliminary Investigations 2013, November 2013 (hereafter 2013 Preliminary Investigations Report); OTP, Report on Preliminary Examination Activities 2014, December 2014 (hereafter 2014 Preliminary Examination Report); OTP, Report on Preliminary Examination Activities 2015, November 2015 (hereafter 2015 Preliminary Examination Report); OTP, Report on Preliminary Examination Activities 2016, November 2016 (hereafter 2016 Preliminary Examination Report).

a change in strategy.⁴⁸⁶ However, these changes did not bring with them a drastic change in strategy and approach to accountability.

5.1 Jurisdictional Limitations

The ICC is able to provide for accountability in those instances where it has jurisdiction and anything outside of this is beyond its scope. Whether these jurisdictional elements contribute to the need for an African regional criminal court is examined by referring to: the court's temporal and geographical jurisdiction; which individuals; what crimes are covered; and how the international court gains jurisdiction.

5.1.1 Temporal and Geographical Jurisdiction

While states are free to create legal obligations through treaties, two general principles of law restrict what criminal jurisdiction can be imposed: *nullum crimen sine lege* (non-retroactivity of the law); and *nulla poena sine lege* (no penalty without law). The Rome Statute explicitly recognises these principles,⁴⁸⁷ therefore the ICC's temporal jurisdiction is limited to the date of entry into force – 1 July 2002.⁴⁸⁸ Consequently, international crimes which took place before July 2002 remain outside of the court's jurisdiction. This limits the ICC from contributing to the purpose of ICL for any crimes committed before such time. For states ratifying the Rome Statute after this date jurisdiction is limited to the date of entry for that state, unless the state declares otherwise.⁴⁸⁹ While any other mechanisms established by treaty would have exactly the same limitation, national systems are more likely to fill this gap. As Chapter 3 concluded the principle of UJ is not bound by such rigid timeframes. All that needs to be satisfied is that the crime was designated as such, by either treaty or custom, at the time of

⁴⁸⁶ Luis Moreno Ocampo was the first Prosecutor (2003 - 2012), succeeded by Fatou Bensouda (2012 – present). On the strategy see section 5.2 of this chapter.

⁴⁸⁷ Article 22 and 23 respectively.

⁴⁸⁸ Article 11(1) and Article 126.

⁴⁸⁹ Article 11(2).

commission.⁴⁹⁰ Alternatively, it is still possible for a UN style ad hoc court to be established with a specific time frame provided for.⁴⁹¹

A further limitation is the geographical scope of jurisdiction. The ICC is permitted to exercise jurisdiction over crimes committed in a member state's territory where the accused is a national of a member state, where a non-member state accepts jurisdiction, or is referred to the international court by the UNSC.⁴⁹² Consequently, the ICC is severely limited by its membership and reliant on the UNSC to hold non-member states to account.⁴⁹³ The hope for a universal international criminal court has not yet been achieved and the potential for accountability before the international criminal court reduced.

A possible result of these limitations, is the Court's disproportionate focus on Africa given it's the court's largest group of members.⁴⁹⁴ Until recently all situations related to an African country.⁴⁹⁵ Yet, the African-centric caseload does not necessarily mean the ICC is biased⁴⁹⁶ as not all situations are under the ICC's jurisdiction. While many of the cases were self-referrals the context must be considered as there are genuine concerns over the undue influence and pressure exerted by former Prosecutor Ocampo and European countries.⁴⁹⁷ Furthermore, some of the double standards and bias issues

⁴⁹⁰ Chapter 3.2 of this thesis.

⁴⁹¹ For examples, see Article 8 Statute of the ICTY, Article 7 Statute of the ICTR, Article 1 Statute of the SCSL and Article 1 Statute of the STL. Additionally, it could be possible for national and regional definitions of crimes to be utilised.

⁴⁹² Article 12(2), Article 12(3) and Article 13(b) Rome Statute.

⁴⁹³ Section 5.1.3 of this chapter.

⁴⁹⁴ 33 of the international court's 123 member states are African.

⁴⁹⁵ The *proprio motu* investigation into Georgia was authorised in January 2016 by the Pre-Trial Chamber I. *Situation in Georgia*, Decision on the Prosecutor's request for authorization of an investigation, ICC-01/15-12 (27 January 2016).

⁴⁹⁶ Tor Krever, "Africa in the Dock: On ICC Bias" (*Critical Legal Thinking*, 30 October 2016) <<http://criticallegalthinking.com/2016/10/30/africa-in-the-dock-icc-bias/>> accessed 21 April 2017; Chief Charles Achaleke Taku, 'Has the International Criminal Court Inappropriately Targeted Africa?' (*ICC Forum*, March 2013) <<http://iccforum.com/africa>> accessed 14 June 2017; Abdul Tejan-Cole, 'Is the ICC's exclusively African case docket a legitimate and appropriate intervention or an unfair targeting of Africans?' (*ICC Forum*, March 2013) <<http://iccforum.com/africa>> accessed 18 June 2017.

⁴⁹⁷ See Chapter 6 of this thesis. Krever (n 496); Phil Clark, 'Chasing Cases: The ICC and the politics of state referral in the Democratic Republic of the Congo and Uganda' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2010) 1187-8, 1198-9, 1203; Michael Otim and Marieke Wierda, 'Justice at Juba: International Obligations and Local Demands in Northern Uganda' in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society 2008) 22; Paul D. Schmitt, 'France, Africa, and the ICC: The Neocolonialist Critique and the Crisis

regarding non-member states are in fact not an ICC issue, but rather a UNSC issue.⁴⁹⁸ The political workings and priorities of the UNSC Permanent Five members' prevent the referral of certain situations meaning that justice is subject to the politics of the UN regime.⁴⁹⁹

It has been claimed that there is simply not enough evidence or precedent from the OTP's own *proprio motu* investigations to say there is inappropriate targeting.⁵⁰⁰ However, while there is undeniably a number of situations worthy of ICC investigation in Africa, the OTP does not diversify its prosecutions to other regions just as worthy of the international court's investigation.⁵⁰¹ The implication is that politically weak and easily manipulated states are vulnerable to ICC intervention,⁵⁰² raising doubt over the notion of a fair and just international mechanism and undermining the court's credibility. This is made more apparent by the unusually quick dismissal of cases where powerful states have interests,⁵⁰³ creating a sense of exceptionalism that these states either do not commit such crimes or that their domestic courts will prosecute, neither of which is true.

5.1.2 Individuals under Jurisdiction

ICL deals with individual criminal liability for international crimes and as such the ICC has jurisdiction over natural persons proven to have contributed to the commission of crimes through the various modes of liability and direct participation.⁵⁰⁴ As the international court's aim is to hold to account those contributing to the cause of conflicts and ICL violations, while simultaneously helping restore peace and security,

of Institutional Legitimacy' in Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (Cambridge University Press 2016).

⁴⁹⁸ For example, calls for crimes committed in Iraq by UK troops to be investigated as a result of the court's ongoing preliminary examination. Most recently calls for the situation in Syria to be referred to the ICC have been prevented by the UNSC's Permanent Members' veto power.

⁴⁹⁹ The UNSC Permanent Members are China, France, Russia, The United Kingdom and the United States of America.

⁵⁰⁰ Margaret M. deGuzman, 'Is the ICC Targeting Africa Inappropriately?' (*ICC Forum*, March 2013) <<http://iccforum.com/africa>> accessed 21 April 2017.

⁵⁰¹ David Chuter, 'The ICC: A Place for Africans and Africans in Their Place?' in Vincent O. Nhemielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing 2012) 179-80.

⁵⁰² Interview with African State Official (Addis Ababa, Ethiopia, 24 May 2015); Chuter (n 501) 179.

⁵⁰³ ICC Press Release 'ICC Pre-Trial Chamber I requests Prosecutor to reconsider decision not to investigate situation referred by Union of Comoros' (16 July 2015) ICC-CPI-20150716-PR1133.

⁵⁰⁴ Article 25 Rome Statute.

such a limited approach is problematic.⁵⁰⁵ To fully address international crimes, there needs to be a broader conceptualisation as to what and who drives the crimes.⁵⁰⁶ Whilst traditionally ICL only envisions individual liability of the natural person, an additional approach is possible – corporate criminal liability. By focusing on natural persons, there is potential for those corporations involved in committing or enabling the commission of international crimes to go unpunished.⁵⁰⁷ The concept of corporate criminal liability is not one which is widely accepted and was rejected during the Rome Conference Negotiations.⁵⁰⁸ However, the unintended gap left by the Rome Statute does not address the range of actors involved and the underlying causes of conflict.⁵⁰⁹ Corporations across all regions have been implicated in international crimes both directly and indirectly.⁵¹⁰ Not holding to account these entities increases the need for a regional court to provide recourse.

5.1.3 How the ICC Gains Jurisdiction

Having explored which individuals are within the ICC's jurisdiction, the focus turns to examining how they come before the court. According to Article 13 the ICC gains jurisdiction in one of three ways: self-referrals by the concerned state; UNSC referrals; and the Prosecutor initiating a *proprio motu* investigation. This section considers whether the *proprio motu* investigations and UNSC referrals impact accountability and contribute to the need for an African regional criminal court. For further discussion on how self-referrals have reduced the level of accountability and legitimacy of the ICC see Chapter 6 of this thesis on complementarity.

⁵⁰⁵ Chapter 9 of this thesis.

⁵⁰⁶ On corporate involvement in international crimes see Ken Roberts, 'Corporate Liability and Complicity in International Crimes' in Sébastien Jodoin and Marie-Claire Cordonier Segger, *Sustainable Development, International Criminal Justice, and Treaty Implementation* (CUP 2013) 190; International Commission of Jurists, 'Corporate Complicity and Legal Accountability', Report of the International Commission of Jurists Expert Legal Panel on Corporate complicity in International Crimes, <<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf>> accessed 22 December 2017. The ICC Prosecutor has noted the illegal business practices in the DRC which fuelled the conflict, as cited in Sriram and Ross (n 394) 60.

⁵⁰⁷ Harmen van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities' (2013) 12 Chinese Journal of International Law 43.

⁵⁰⁸ French proposal, Working Paper on Article 23, A/Conf.183/C.1/WGPP/L.5/Rev.2, 3 July 1998, para 5-6.

⁵⁰⁹ Whether this is an appropriate aim for the ICC and ICL is disputed in the literature. The ICC does not see addressing the underlying causes of conflict as being part of its role, OTP, Policy Paper on the Interests of Justice, September 2007, 9.

⁵¹⁰ van der Wilt, 'Corporate Criminal Responsibility' (n 419).

The Prosecutor's *proprio motu* investigations are the least represented before the ICC as only three of the ten international court situations are a result of such investigations. Still, this does not mean the ICC is failing in terms of accountability as there may be no need for the Prosecutor to use this power if the other methods of gaining jurisdiction are utilised. In addition, the Prosecutor's powers are curtailed as only information received that relates to member states is admissible. Furthermore, as the OTP has limited capacity consideration of the available resources and other admissibility criteria will need to be explored beforehand.⁵¹¹

A UNSC referral pursuant to Chapter VII can potentially mitigate the limitations of *proprio motu* investigations over non-member states,⁵¹² as happened with both Sudan and Libya. Yet, the UNSC is not a reliable organ to address accountability. UNSC referrals are hindered by the Permanent Members' veto powers as seen recently in the case of Russia and China vetoing a resolution referring the Syrian situation.⁵¹³ Questions also surround the impartiality of UNSC referrals and the de facto impunity enjoyed by the Permanent Members and their allies' due to the veto power.⁵¹⁴ In addition, the lack of UNSC follow up has negatively impacted on ICC investigations when states' lack of cooperation is left unchecked. In such instances politics overrides the legal possibilities and cases and situations are not investigated.⁵¹⁵

An additional problem has been non-states actively undermining the ICC. For example, the USA has adopted Status of Force Agreements (SOFAs) with numerous states with the sole aim of preventing USA nationals coming before the international court. While the

⁵¹¹ See section 5.3 of this chapter.

⁵¹² Article 13(b) Rome Statute.

⁵¹³ UN Press Release, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution' (22 May 2014) SC/11407. <<https://www.un.org/press/en/2014/sc11407.doc.htm>> accessed 18 December 2017.

⁵¹⁴ Mark Kersten, 'The Security Council's Appalling Record of Referring Situations to the ICC' (*Justice in Conflict*, 23 May 2014) <<https://justiceinconflict.org/2014/05/23/the-security-councils-appalling-record-of-referring-situations-to-the-icc/>> accessed 28 June 2017; Ian Black, 'Russia and China veto UN move to refer Syria to international criminal court' (*The Guardian*, 22 May 2014) <<https://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court>> accessed 28 June 2017.

⁵¹⁵ See Mark Kersten, 'Between justice and politics: The ICC's intervention in Libya' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015); Carsten Stahn, 'Justice civilisatrice? The ICC, post-colonial theory, and faces of 'the local' Libya' in Christian De Vos, Sara Kendall and Carsten Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015).

ICC itself is not to blame for these agreements, the process of how situations and cases come before the court has enabled a loophole to be exploited. The impact of which is to grant *de facto* impunity to a category of nationals.

5.1.4 The Crimes under the Rome Statute

The ICC has jurisdiction over the four core crimes under international law: crimes against humanity; war crimes; genocide; and aggression.⁵¹⁶ During the Rome Conference negotiations, there was little debate necessary for agreement to include jurisdiction over genocide, war crimes and crimes against humanity. There were concerns over aggression and in particular the lack of definition.⁵¹⁷ There was no clear scope of the crime, nor was it clear who would determine what was and was not an act of aggression.⁵¹⁸ Morocco's view that '[t]o include the crime of aggression would be premature',⁵¹⁹ turned out to be true. The definition was left unresolved and to be agreed at a later date.⁵²⁰ The crime of aggression only came into effect in 2017 following ratification by thirty state parties and the adoption of a decision by the ASP.⁵²¹

Despite the ease of agreement over the inclusion of most of the core crimes, many of the problems plaguing these crimes and their definitions have been reinforced by the Rome Statute. For example, the genocide definition is taken from the Genocide Convention which has been criticised for not covering certain groups persecuted during international and non-international conflicts.⁵²² Also, the double intention hurdle has to be overcome by satisfying both 'a general intent as to the underlying acts, and an ulterior intent with

⁵¹⁶ Article 5 Rome Statute.

⁵¹⁷ See Rome Conference Negotiation Minutes.

⁵¹⁸ Article 39 United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI Move to background first mention of statute (hereafter UNCh), mandates the UNSC to determine acts of aggression. Due to the political nature of a determination and the accompanying repercussions, some states were unhappy granting this power to the court without any clearly provided for definition.

⁵¹⁹ Morocco Mr Taib, 6th Plenary Meeting (n 193) para 106.

⁵²⁰ ASP Resolution RC/Res.6 adopted at the 13th plenary meeting, on 11 June 2010 <https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> accessed 22 December 2017.

⁵²¹ ASP, Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression, 27 November 2017, ICC-ASP/16/24 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-24-ENG.pdf> accessed 22 December 2017; ICC Press Release, 'Assembly activates Court's jurisdiction over crime of aggression' (15 December 2017) ICC-ASP-20171214-PR1350. <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1350>> accessed 22 December 2017.

⁵²² Cryer, *Prosecuting International Crimes* (n 312) 246.

regard to the ultimate aim of the destruction of the group'.⁵²³ As the ICC and states did not address these contentious points the Rome Statute has limited potential in the area to ensure perpetrators are punished appropriately. This may encourage states to build on the genocide convention and ICC jurisprudence and seek alternative definitions from other judicial mechanisms more relevant to the requirements of a region or conflict situation.

The OTP's prosecutorial focus, adopted in support of their approach to investigations and prosecutions,⁵²⁴ has further reduced the scope of the crimes. The Prosecutors have identified three areas of focus: sexual and gender-based crimes; crimes related to and impacting children; and most recently environmental crimes.⁵²⁵ While the OTP does not only bring cases related to these areas, placing a particular focus on or privileging three specific areas when there are also other types of crimes means the latter are overlooked. It would be of less concern if the ICC was adequately supported by national prosecutions with a complementary and supplementary focus. However, potential underexplored areas become evident from the limited national prosecutions, the very limited number of cases before the ICC and the narrowing down of focus and emphasis.

5.1.4.1 Missing Crimes

ICC offences are described as 'the most serious crimes of concern to the international community as a whole',⁵²⁶ implying that there are other crimes considered less serious which are not appropriately addressed at the international level. Yet, the ICC has recognised that certain crimes, beyond its mandate, are likely to simultaneously occur contributing to the escalation and continuation of conflicts.⁵²⁷ Whether to include crimes such as terrorism, drug-trafficking, crimes against UN and associated personnel was discussed prior to and during the Rome Conference negotiations, but proved yet

⁵²³ Kai Ambos, 'What does 'intent to destroy' in genocide mean?' (2009) 91 *International Review of the Red Cross* 833, 834 and footnote 1.

⁵²⁴ See section 5.2.2 of this chapter.

⁵²⁵ 2012-2015 Strategic Plan, strategic goal; OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014 (hereafter 2014 Gender-Based Crimes Policy Paper); 2016-2018 Strategic Plan, strategic goal 2; OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016, para 41 (hereafter 2016 Case Selection Policy Paper); OTP, Policy on Children, November 2016.

⁵²⁶ Preamble and Article 5(1) Rome Statute.

⁵²⁷ 2016-2018 Strategic Plan, para 30, 93 and 94.

another point of contention.⁵²⁸ For example, during the Rome Statute negotiations Caribbean states wanted to address the issue of drug trafficking which was of particular concern to them.⁵²⁹ This is an area where it is not always possible for national criminal systems to assume jurisdiction, as the transnational aspect of such crimes require a cross border aspect and cooperation. However, the view adopted was that such matters are best left to domestic judicial mechanisms and that their inclusion had the potential to weaken the international court and international crimes.⁵³⁰ Nevertheless, the DRC was also supportive of a broader scope of crimes, as '[t]he Court should have jurisdiction to deal with genocide, war crimes and crimes against humanity and other offences to be defined by the Conference',⁵³¹ provided there was consensus amongst those states present. In fact, many African states were supportive of the inclusion of treaty crimes, albeit not necessarily all the crimes proposed. Some supported terrorism,⁵³² some drug trafficking⁵³³ and others supported crimes against UN and associated personnel.⁵³⁴

Yet, despite the willingness of some states to include a broad range of crimes, these were never included. While recognising the practical reasons for adopting a lowest common denominator approach to drafting international treaties,⁵³⁵ many other crimes which are linked to the core crimes, or fall short of the threshold, remain unaddressed.⁵³⁶ By not including other crimes the ability of the ICC to address such violations, contribute to peace and security, and end conflicts and other situations of gross violations decreases.⁵³⁷ Reducing the impact the ICC has on ICL's purposes related to deterrence and peace and security. Not to mention the limited contribution made to transitional justice. If domestic systems do not address these crimes, there will be *de facto* impunity. A heavy reliance on national courts is often misplaced. To date national courts are often errant or

⁵²⁸ Summary of the Proceedings of the Preparatory Committee During the Period 25 March – 12 April 1996, 7 May 1996, A/AC.249/1, para 12 (hereafter Prep Com Summary). On calls to include crimes see Egypt, 9th Plenary Meeting (n 190) para 85; Nigeria, 7th Plenary Meeting (n 189) para 86.

⁵²⁹ Cassese et al. (n 9) 263.

⁵³⁰ Prep Com Summary, para 12.

⁵³¹ Mr Ruberwa, 7th Plenary Meeting (n 189) para 93.

⁵³² Algeria, Republic of Congo and Nigeria, Rome Conference Negotiations Minutes.

⁵³³ Algeria, Madagascar, Nigeria, Rome Conference Negotiations Minutes.

⁵³⁴ Nigeria, Rome Conference Negotiations Minutes.

⁵³⁵ For a discussion on the effect of adopting a lowest common denominator approach see William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 153.

⁵³⁶ Section 5.1.2.1 of this chapter.

⁵³⁷ Chapter 9 of this thesis.

incapable of addressing the “lesser” crimes and transnational crimes.⁵³⁸ Furthermore, national systems are often incapable of addressing these crimes in conflict and post-conflict environments when the judiciary and domestic institutions have been weakened.⁵³⁹

The ICC is unlikely to be able to agree on an expansive list of crimes if all states are not interested or consider it a crime of concern to the international community.⁵⁴⁰ By contrast, a regional court can take an expanded region-centric approach to the crimes under its jurisdiction and attempt to deal with its own specific problems and further the aims of ICL and transitional justice. It is unrealistic to expect the international criminal court to address region specific issues when its role is to apply universally accepted standards and reflect the seriousness of the crimes as considered by the international community as a whole. An African regional criminal court could address the narrow focus of the ICC’s crimes without questioning the international court’s validity and expand the potential for accountability.

5.2 Institutional Capacity Limitations

The Rome Statute has created certain jurisdictional limitations that contribute towards the need for an African regional criminal court. Alongside this, whether the court’s working environment exacerbates the jurisdictional limitations and creates its own need for an African regional court will be interrogated. To do this, this section starts with a discussion on whether the court’s finances limit accountability and contribute to the need for this regional criminal court.

⁵³⁸ Chapters 3-4 of this thesis.

⁵³⁹ 2016-18 Strategic Plan, 33; OHCHR ‘Rule-of-Law Tools for Post-Conflict States: Mapping the justice sector’ (United Nations 2006), foreword.

⁵⁴⁰ Preamble and Article 5 Rome Statute. On the state-centric nature of ICL which shapes what crimes and individuals are pursued, see Sriram and Ross (n 394) 54.

5.2.1 Budget Constraints

The calls to fund the court through the UN budget were never adopted to avoid any appearance of bias or undue influence.⁵⁴¹ Instead, funding is sourced from assessed member contributions, UNGA approved UN funds and voluntary contributions. This funding structure means contributions are neither guaranteed, adequate nor easily responsive to changes in needs.⁵⁴² For example, during the November 2016 ASP plenary meeting a group of states unsuccessfully sought to limit the budget.⁵⁴³ Additionally, the voluntary contributions' income creates uncertainty, negatively impacting on the ability of the ICC to plan and respond quickly to new situations and cases.

Additionally, the secrecy surrounding private contributions received raise impartiality concerns.⁵⁴⁴ One of the largest contributors is the European Union (EU),⁵⁴⁵ which also funds pro-ICC organisations such as the Coalition for the International Criminal Court (CICC) an NGO which targets individual states and heavily advocates for ICC membership. While this alone does not undermine the ICC, the EU's statement that it will not fund the new court through its AU funding does imply a conflict.⁵⁴⁶ The EU's interests in the international criminal justice project are clear: the EU will not accept any perceived challenge or move away from the ICC, a court which certain European states

⁵⁴¹ See discussions on funding during the 4th plenary meeting, Tuesday, 16 June 1998, A/CONF.183/SR.4. The approach was also adopted because of the USA's domestic law, which prevents funding of the ICC, see Tladi, 'When Elephants Collide' (n 7) 394-5.

⁵⁴² Jonathan O'Donohue, 'The 2005 Budget of the International Criminal Court: Contingency, Insufficient Funding in Key Areas and the Recurring Question of the Independence of the Prosecutor' (2005) 18(3) *Leiden Journal of International Law* 591; Lilian Ochieng, 'ICC investigations threatened by budget crisis' (*Daily Nation*, 25 November 2013) <<http://mobile.nation.co.ke/news/International-Criminal-Court-Budget-Cases-Hague/1950946-2087758-format-xhtml-135ubdkz/index.html>> accessed 22 December 2017; Human Rights Watch, 'Briefing Note for the Sixteenth Session of the International Criminal Court Assembly of States Parties' (HRW, 20 November 2017) <<https://www.hrw.org/news/2017/11/20/human-rights-watch-briefing-note-sixteenth-session-international-criminal-court>> accessed 22 December 2017.

⁵⁴³ Elizabeth Evenson and Jonathan O'Donohue, 'States shouldn't use ICC budget to interfere with its work' (*OpenDemocracy*, 23 November 2016) <<https://www.opendemocracy.net/openglobalrights/elizabeth-evenson-jonathan-o-donohue/states-shouldn-t-use-icc-budget-to-interfere-w>> accessed 30 November 2016.

⁵⁴⁴ Rome Statute Article 116 permits voluntary contributions from a range of actors including, 'Governments, international organizations, individuals, corporations and other entities'.

⁵⁴⁵ General Secretariat of the Council, 'The European Union and the International Criminal Court' (February 2008) 16-7 <https://www.consilium.europa.eu/uedocs/cmsUpload/ICC_internet08.pdf> accessed 20 June 2017.

⁵⁴⁶ Interviews with African State Officials, (Addis Ababa, Ethiopia, May – June 2015).

do not even consider applicable to themselves.⁵⁴⁷ This is in direct contrast to the new court where EU and other non-African states and businesses may be subject to criminal liability.⁵⁴⁸

5.2.2 Policies and Prosecutorial Approach Under Resource Constraints

As a direct result of the above budget constraints there are limited resources; both financial and human. The ICC has been given a challenging mandate and has to do a lot with little. The international court has grown exponentially since its establishment, and it is questionable whether there will ever be enough staff and/or resources to address all admissible situations.

Due to the resource constraints, and the practicality of deploying staff across investigations, the OTP adopted a focused investigation and prosecution approach where investigative teams looked at specific cases.⁵⁴⁹ This approach resulted in very few cases being brought and many individuals were either overlooked or not prioritised.⁵⁵⁰ Furthermore, very little deterrent effect was felt as individuals at lower levels were overlooked and investigations and prosecutions were slow. The policy shifted with the new Prosecutor to in-depth, open ended investigations while still maintaining focus.⁵⁵¹ As a result, the OTP is more adaptive to information and evidence it finds, increasing the likelihood of individuals coming before the court. One of the Prosecutor's policies is 'quality over quantity of cases',⁵⁵² a pragmatic strategy given the ICC's working

⁵⁴⁷ Rahim Kanani, 'Kenneth Roth, Executive Director of Human Rights Watch, on the State and Future of Human Rights Philanthropy and Policy' (*Huffington Post: The World Post*, 12 April 2011) <https://www.huffingtonpost.com/rahim-kanani/kenneth-roth-executive-di_b_848130.html> accessed 30 January 2018; Henry Richardson, 'African Grievances and the International Criminal Court: Issues of African Equity under International Criminal Law' (2013) Temple University Legal Studies Research Paper Series No. 2013-24, 109 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2285474> accessed 27 March 2016.

⁵⁴⁸ Chapter 11.1.2 of this thesis.

⁵⁴⁹ Susana SáCouto and Kathryn Cleary Thompson, 'Investigative Management, Strategies, and Techniques of the ICC's OTP' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 335.

⁵⁵⁰ K Glassborow, 'ICC Investigative Strategy Under Fire' (*Institute for War & Peace Reporting*, 27 October 2008) <<https://iwpr.net/global-voices/icc-investigative-strategy-under-fire>>; E Baylis, 'Outsourcing Investigations' Legal Studies Research Paper Series, Working Paper No. 2010-20 (September 2009) 133.

⁵⁵¹ 2012-15 Strategic Plan, 6.

⁵⁵² 2016-18 Strategic Plan, para 5.

environment and capacity. However, the overall outcome is that very few cases are before the ICC and many accused are still unprosecuted.

The Rome Statute provides for 'jurisdiction over the most serious crimes of concern to the international community as a whole'.⁵⁵³ As the ICC can only deal with so much, the strategy is to focus on those who 'bear the greatest responsibility',⁵⁵⁴ significantly narrowing the scope of the OTP's work. Originally, those bearing the greatest responsibility included individuals in the 'highest echelons of responsibility'⁵⁵⁵ and 'the leaders of the State or organisation allegedly responsible for those crimes'.⁵⁵⁶ With the new prosecutor the approach changed to accommodate the OTP's experience and challenges in achieving this: lower level perpetrators are tried as part of a strategy of building cases from the bottom up.⁵⁵⁷ There is a caveat, only those low-level individuals whose 'conduct was particularly grave and has acquired extensive notoriety' will be looked at.⁵⁵⁸ Other low-level individuals are therefore unlikely to be held accountable.

Despite the intention for national prosecutions to play a role, this reliance is often misplaced. In ICC situations national judicial systems are typically weak or either unable or unwilling to investigate and prosecute.⁵⁵⁹ Reliance on national prosecutions to supplement the policy approach is a major shortcoming as many individuals are effectively granted impunity. While acknowledging the ICC is a court of last resort for those bearing the greatest responsibility it is highly improbable, and perhaps impossible, for a national court to prosecute all the other offenders. What's more, the OTP's inconsistent implementation of the policy further hinders its capacity while eroding accountability. For example, the ICC cases chosen in Ituri, DRC do not reflect the policy as the international court has been unable to pursue those in the 'highest echelons of responsibility' as had been hoped.⁵⁶⁰ Additionally, the budgetary limitation means the ICC has had to focus and prioritise certain situations and cases over others. In practice, this means that there is a gap between what could be and what is looked at. National

⁵⁵³ Preamble Rome Statute.

⁵⁵⁴ First Three Years Report, 9.

⁵⁵⁵ 2009-12 Prosecutorial Strategy, para 19.

⁵⁵⁶ 2003 Policy Paper, 7.

⁵⁵⁷ 2012-15 Strategic Plan June 2012-2015, 6.

⁵⁵⁸ Ibid.

⁵⁵⁹ 2016-18 Strategic Plan, 33; OHCHR (n 539) foreword.

⁵⁶⁰ Such as Omar al Bashir, Saif Gaddafi, Joseph Kony, Uhuru Kenyatta and William Ruto. Despite the OTP's 2012 concessions, the bottom up approach is still fundamentally at odds with ending impunity on a large scale.

courts are not proving capable of filling this accountability gap and are themselves subject to resource and expertise limitations. From the above, it becomes evident that the ICC may be lacking in fulfilling ICL's purpose and the basis for pursuing international prosecutions.

5.2.3 Reliance on Cooperation and its Consequences

According to the ICC 'we would not be able to succeed in our work if we did not have cooperation from the states'.⁵⁶¹ Although the Rome Statute provides for investigation without the situation state's cooperation,⁵⁶² the likelihood of a successful investigation and prosecution severely decreases. Many situations have government involvement, or complicity, and without cooperation and with restricted access to information and witnesses the OTP has turned to third party information. With this type of information there are always concerns about reliability and the Trial Chamber heavily criticised the OTP for its reliance on such information.⁵⁶³ However, the ICC's lack of cooperation should not be overstated as 'despite all that you hear about the AU and so on, individual African countries are cooperating with the ICC'.⁵⁶⁴

This limitation is not unique to the ICC, UJ prosecutions before domestic courts are also capacity dependent on national legislation and state cooperation, which is not always forthcoming. State practice shows willingness to cooperate for low-level officials and ordinary citizens but not when it comes to high level officials and Heads of State and Government, leaving an accountability gap.⁵⁶⁵

The ICC was designed as an independent judicial system investigating and prosecuting individuals, regardless of official position. Yet one of the major stumbling blocks, linked to reliance on cooperation, is the international court's lack of enforcement powers. The ICC is completely dependent on states to implement its decisions, comply with arrest

⁵⁶¹ Interview with ICC Official (The Hague, The Netherlands, 16 February 2016).

⁵⁶² Article 57(3)(d) Rome Statute.

⁵⁶³ Beth S. Lyons, 'The Intermediary Industry and the ICC' (IntLawGrrls, 6 June 2014) <<https://ilg2.org/2014/06/06/the-intermediary-industry-and-the-icc/>> accessed 3 December 2016; International Bar Association, 'The ICC's Trials: An Examination of Key Judicial Developments at the International Criminal Court' (28 May 2010) 28. <http://www.ibanet.org/ICC_ICL_Programme/Reports.aspx> accessed 30 November 2016.

⁵⁶⁴ Interview with ICC Official (The Hague, The Netherlands, 16 February 2016).

⁵⁶⁵ Chapter 4 of this thesis.

warrants and help protect witnesses. The lack of an enforcement mechanism is a nod to state sovereignty and the general aversion to an international police or military force.⁵⁶⁶ However, the concession negatively impacts on accountability. When states support the enforcement of judgments and cooperate, the ICC gets closer to reaching its aim and ICL's rationale. However, some states are unwilling to enforce ICC decisions. This is typically in relation to immunity and Heads of State and Government,⁵⁶⁷ as:

arrest is something else, but in terms of cooperation, receiving cooperation from African states, there is nowhere where an African state [...] has said, no we wouldn't cooperate with you. Of course except for Kenya, but again, it has not been as pronounced as "no we are not going to cooperate", it has been discreet, it has been delays.⁵⁶⁸

The effect of this is that some individuals will never come before the ICC or any national court. While there is symbolic value in judgments which are not enforced, there is still *de facto* impunity. Without an international police force or willing national government to enforce the ICC judgments this will never change and constitutes the reality in which the ICC operates.

The ICC is very aware of its limitations. Their admission that security concerns and issues of access contribute to decisions regarding which situations to investigate is very telling. The lack of any police/military force through which to protect its staff and witnesses, enforce judicial decisions and cooperation, or ensure access, negatively impacts on its work. This leads to *de facto* impunity as perpetrators are essentially protected by this lack of access and the inability to arrest.⁵⁶⁹ Additionally, some human

⁵⁶⁶ UN, 'Why does the UN not have a standing reserve?' <<http://www.un.org/en/peacekeeping/issues/military/>> accessed 30 November 2016; Thalif Deen, U.N. Rules Out Creation of a Standing Army' (*InterPressService*, 27 December 1996) <<http://www.ipsnews.net/1996/12/united-nations-un-rules-out-creation-of-a-standing-army/>> accessed 30 November 2016.

⁵⁶⁷ Chapter 8 of this thesis.

⁵⁶⁸ Interview with ICC Official (The Hague, The Netherlands, 16 February 2016).

⁵⁶⁹ For example, Sudanese President Omar al Bashir. Conor Gaffey, 'South Africa Loses Appeal over Sudan President Al-Bashir Arrest Warrant' (*Newsweek*, 15 March 2016) <<http://europe.newsweek.com/south-africa-omar-al-bashir-darfur-genocide-appeal-436928?rm=eu>> accessed 30 November 2016; Toby Sterling, 'ICC refers Uganda, Djibouti to U.N. for failure to arrest Sudan's Al-Bashir' (*Reuters*, 12 July 2016) <<http://www.reuters.com/article/us-warcrimes-sudan-un-idUSKCN0ZS245>> accessed 30 November 2016; On the concerns over ICC witness protection in relation to Kenya see Blake Evans-Pritchard, Simon Jennings, 'Action Urged on ICC Witness Protection' (*Institute for War & Peace Reporting*, 28 March 2014) <<https://iwpr.net/global-voices/action-urged-icc-witness-protection>> accessed 30 November 2016; Johnny Magdaleno, 'Disappearance of Key Witness Raises Concerns Over Tampering in ICC

rights organisations have expressed concern over the lack of witness protection and enforcement powers which may in fact lead to a lack of cooperation.⁵⁷⁰

5.3 Recognition of Space for Additional Accountability Mechanisms

The ICC is a court of last resort and its intervention is rare. While the OTP has continually sought to entrench its presence, this has not ended impunity and/or brought complete accountability. This raises doubts over the international court's ability to contribute to deterrence and peace and security as aims of ICL. While the Rome Statute enumerates a very specific type of court with strict jurisdiction limitations, it does not limit future international law developments nor the categorisation of international crimes.⁵⁷¹ The vast number of international crimes committed and potential perpetrators are too profuse for any one institution to cope with.⁵⁷² Hence, the OTP recognised the valuable role others have to play in the fight against impunity with collective responses needed as the court 'can only address a handful of cases'.⁵⁷³ This is linked to the ICC's limited resources, a point that is regularly made, which has shaped OTP policies and prosecutorial strategy.⁵⁷⁴ The fact that the international court has admitted that 'us as the ICC have never claimed monopoly on justice'⁵⁷⁵ makes it hard to argue against a mechanism or initiative broadening accountability in line with international law.

Kenya Case' (*Vice News*, 23 January 2015) <<https://news.vice.com/article/disappearance-of-key-witness-raises-concerns-over-tampering-in-icc-kenya-case>> accessed 30 November 2016; Christian M. De Vos, 'Investigating from Afar: The ICC's Evidence Problem' (2013) 26 *Leiden Journal of International Law* 1009; H.E. Judge Hans-Peter Kaul, 'Keynote' (The International Criminal Court –Current Challenges and Perspectives, Salzburg Law School on International Criminal Law, Salzburg, 8 August 2011) <<https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911salzburglawschool.pdf>> accessed 30 November 2016.

⁵⁷⁰ Human Rights Watch, 'Human Rights Watch Comments on the ICC Office of the Prosecutor Draft Policy Paper on Case Selection and Prioritisation' (*HRW*, 3 May 2016 <<https://www.hrw.org/news/2016/05/03/human-rights-watch-comments-icc-office-prosecutor-draft-policy-paper-case-selection>> accessed 2 December 2016.

⁵⁷¹ Article 10 and Article 22(3) Rome Statute.

⁵⁷² 2007 Policy Paper, 7-8; 2016 Case Selection Policy Paper, para 5.

⁵⁷³ 2016-18 Strategic Plan, para 96.

⁵⁷⁴ 2006 Prosecutorial Strategy, para 16; 2012-15 Strategic Plan, para 64; 2016-18 Strategic Plan, para 3; 2013 Preliminary Examinations Report, para 51.

⁵⁷⁵ Interview with ICC Official (The Hague, The Netherlands, 16 February 2016).

The ICC's acceptance that crimes beyond its mandate are helping to facilitate conflict and impact on peace and security⁵⁷⁶ highlights the need for a mechanism to address this. Article 22(3) of the Rome Statute recognises the ability for such conduct to be characterised as criminal under international law should states develop a custom or establish a treaty.⁵⁷⁷ This does not exclusively need to happen at the international level. Regions can play a role as regional customary law is accepted as law for that region only.⁵⁷⁸ While domestic prosecutions are a logical solution, given the need for cross-border cooperation, these systems may not be set up to prosecute the crimes or be too corrupt to effectively tackle these issues. As the ICC is unlikely to expand its list of crimes states can address region specific crimes and accountability through a regional mechanism or regional state practice. Given the desire for the inclusion of additional crimes during the Rome Conference negotiations, this leaves the option open to those states to develop international law and design supporting mechanisms. Thus, both ICC member and non-member states can subject themselves to new, non-conflicting, principles, obligations and crimes through customary law and/or treaties.

5.4 Conclusion

The need for an African regional criminal court is evident from the limited accountability mechanism offered by the ICC. This is compounded by the limited crimes prosecuted under the Rome Statute that do not address the underlying causes, a fact the ICC itself has acknowledged.⁵⁷⁹ It was never intended that the ICC would deal with all international crimes and the budgetary and resource constraints negatively impact on what can be pursued. While any other judicial mechanism would also require state cooperation, the ICC has managed to secure cooperation in the majority of its work. It is only those highly contentious matters of Heads of State and Government and other senior state officials' immunity where cooperation has been severely lacking.

⁵⁷⁶ 2016-18 Strategic Plan, para 30.

⁵⁷⁷ 'This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute'.

⁵⁷⁸ *Asylum* case (n 441).

⁵⁷⁹ 2007 Policy Paper, 9.

There is no one factor reducing the level of accountability before the ICC. Instead jurisdictional and institutional capacity limitations play a part. The international court's jurisdiction is hampered by its membership, reliance on UNSC action for non-Member States and its limited temporal reach. Furthermore, the ICC is unable to address a plethora of crimes yet is expected to contribute to the advancement of peace and security. The narrow pursuit of those claimed to bear the greatest responsibility is questionable. The policies and practices of the OTP have led to only a select few cases being pursued, a lack of a consistent approach, unclear working practices and a potential failure to live up to the principles and objectives of ICL and the ICC. African states did not expect discriminatory and selective investigations and prosecutions,⁵⁸⁰ but a court which would at least have considered all sides without ignoring the responsibility and complicity of other actors in the conflict. But the ICC is constrained in its ability to deliver accountability and does not fairly apportion blame to all sides and actors.

Overall, the Rome Statute and OTP policies and practices have contributed to an accountability gap, while the international court recognises the role other actors can play is an appreciation of the international court's own limitations and the need for additional mechanisms.

⁵⁸⁰ Taku (n 496); Plenary meetings, Rome Conference Negotiations Minutes.

Chapter 6

The ICC and Complementarity

Given that the previous chapter established how the ICC's accountability contributes to the need for an African regional criminal court, the next step is to investigate whether the ICC's complementarity principle also bears relevance. While the recent UN Ad Hoc Tribunals had primacy over national courts⁵⁸¹ the ICC does not. Instead, the Rome Statute protects sovereignty by ensuring the primary responsibility for prosecuting international crimes lies with national courts through the use of the complementarity principle.⁵⁸² As such Article 17 specifies the admissibility criteria to ensure the court is one of last resort. The ability of national prosecutions to mitigate the ICC's accountability gap is limited and, as this thesis concluded in *Part I*, UJ is incapable of ending impunity. Applying complementarity, the international and national systems are not 'mutually exclusive, rather the fundamental idea is that the two systems exist simultaneously to complete the functions of one another'.⁵⁸³

There is no explicit mention of complementarity, or its meaning, within the Rome Statute. Instead its usage was adopted by the Rome Statute negotiators and subsequent commentators to explain the relationship norms between the ICC and domestic courts.⁵⁸⁴ Thus, this chapter explores how the principle of complementarity has come to

⁵⁸¹ ICTY Statute, Article 9(2), ICTR Statute Article 8(2).

⁵⁸² On the development of complementarity as a concept see Mohamed M. El Zeidy 'The genesis of complementarity' in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2014). On the importance of state sovereignty within complementarity see Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 *Max Planck Yearbook of United Nations Law* 595; Schabas, *The International Criminal Commentary* (n 535) 447; Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (CUP 2013) 16 and 409; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute) ICC-01/09-02/11 (30 May 2011) para. 40.

⁵⁸³ El Zeidy (n 582) 73.

⁵⁸⁴ H. Duffy and J Huston, 'Implementation of the ICC Statute: International Obligations and Constitutional Considerations' in C Kreß and F Lattanzi, *The Rome Statute and Domestic Legal Orders, Vol 1: General Aspects and Constitutional Issues* (II Sirente 2000) 29. This thesis does acknowledge the Rome Statute's Preambular reference to the court being 'complementary to national criminal jurisdictions'.

refer to the admissibility criteria under the Rome Statute, as well as being a policy approach.⁵⁸⁵

To determine whether the ICC's complementarity contributes to the need for an African regional criminal court, this chapter evaluates the legal admissibility criteria and associated tests. Subsequently, the OTP's policy approach to complementarity is investigated and finally, which mechanisms and courts fall under ICC complementarity.

6.1 Complementarity as an Admissibility Criteria

While Article 17(1) includes gravity and double jeopardy (*ne bis in idem*) provisions, complementarity is provided in Article 17(1)(a) and (b) whereby a case is inadmissible before the ICC when:

- 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

This is not to say Article 17 considerations only occur at this stage as preliminary investigations also take Article 17 into account.⁵⁸⁶ From the above provisions, complementarity poses two distinct questions. The first is whether a case has been or is being investigated or prosecuted. According to the ICC Appeals Chamber, in order for a case to satisfy 'being investigated or prosecuted' the 'national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court'.⁵⁸⁷ This is known as the *same conduct same person* test, yet the

⁵⁸⁵ Nouwen (n 582).

⁵⁸⁶ Schabas, *The International Criminal Court Commentary* (n 535) 452. The requirement being for Article 17 to be applied in accordance to Article 18 and Rule 55(2) of the Rules of Procedure and Evidence.

⁵⁸⁷ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute') ICC-01/09-01/11 OA (30 August 2011) para 40.

international court has held that the test does not require the national case to be identical to that of the ICC.⁵⁸⁸ Where this is answered in the negative, the state is considered to be inactive and the case is admissible.

Following an affirmative answer to Article 17(1)(a) the second complementarity question is whether the state is unwilling or unable to prosecute. Article 17(2) provides guidance as to when a state should be found unwilling:

- a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

And Article 17(3) sets out the guidance for determining inability:

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

6.1.2 The 'Same Conduct Same Person' Test

The requirement that the national investigations and prosecutions must cover the same individual and substantially the same conduct is overly restrictive and will be shown to go against sovereignty – which Article 17 is meant to protect.⁵⁸⁹ Many have criticised the same conduct same person test⁵⁹⁰ for 'impos[ing] structural limits on national

⁵⁸⁸ *The Prosecutor v. Saif Al-Islam Gaddafi* (Separate Opinion of Judge Sang-Hyun Song) ICC-01/11-01/11 OA 4 (21 May 2014); *The Prosecutor v. Saif Al-Islam Gaddafi* (Dissenting Opinion of Judge Anita Ušacka) ICC-01/11-01/11 OA 4 (21 May 2014).

⁵⁸⁹ Schabas, *The International Criminal Court Commentary* (n 535); Benzing (n 582).

⁵⁹⁰ Kevin Jon Heller, 'Radical Complementarity' (2016) 14 *Journal of International Criminal Justice* 637; Dov Jacobs, 'The ICC and Complementarity: A Tale of false promises and Mixed up Chameleons' (*Post-Conflict Justice*, 11 December 2014) <<http://postconflictjustice.com/the-icc-and-complementarity-a-tale-of-false-promises-and-mixed-up-chameleons/>> accessed 6 January

proceedings that are inconsistent with the ICC Statute and counterproductive in practice'.⁵⁹¹ One of the key concerns is the test's impact on building cases from the bottom up - where lower level individuals are investigated in order to gain evidence and build a case against higher level individuals. This method proved successful at the ICTY⁵⁹² and the ICC OTP has adopted it.⁵⁹³ Yet, the Pre-Trial Chamber and Appeals Chamber rejected the approach when Kenya argued that it was not inactive but gathering evidence against top level individuals through a bottom up approach.⁵⁹⁴ The lack of explanation by the Chambers for the decision has rightly been criticised.⁵⁹⁵

The 'substantially same conduct' requirement further, unnecessarily, restricts prosecutions at the national level in two ways. In terms of situations under investigation before the ICC, a state can challenge admissibility subject to an assessment by the Pre-Trial Chamber

against certain criteria defining a 'potential case' such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).⁵⁹⁶

A state seeking to prosecute the crimes will be faced with the challenge of having to wait and see which cases the ICC brings and then challenge admissibility, regardless of the stigma from the investigation on the state's reputation.⁵⁹⁷ Or the state can focus its national investigations on the individuals and conduct contained in the OTP's

2018. On the criticisms and the admissibility criteria see Rod Rastan, 'What is 'Substantially the Same Conduct'?: Unpacking the ICC's 'First Limb' Complementarity Jurisprudence' (2017) 15(1) *Journal of International Criminal Justice* 1.

⁵⁹¹ Heller (n 590) 639-40.

⁵⁹² Carla Del Ponte, 'Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY' (2006) 4 *JICJ* 545.

⁵⁹³ 2012-15 Strategic Plan, 6.

⁵⁹⁴ *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Application on Behalf of the Government of the Republic of Kenya Pursuant to Art. 19 of the ICC Statute, Ruto, Kosgey, and Sang & Muthaura, Kenyatta, and Ali) ICC-01/09-01/11 and ICC-01/09-02/11, Pre-Trial Chamber II (31 March 2011) para 71. (hereafter Kenya Admissibility Challenge).

⁵⁹⁵ Heller (n 590) 644.

⁵⁹⁶ *Situation in the Republic of Kenya* (Corrigendum of the Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Situation in the Republic of Kenya) ICC-01/09, Pre-Trial Chamber II (31 March 2010) para 50. (Kenya Article 15 Decision).

⁵⁹⁷ Nouwen (n 582) 26.

authorisation request. Neither of these options benefit international criminal justice because of the resulting inaction while the state waits to see which cases the ICC brings, stifling alternative and/or broader approaches.⁵⁹⁸ The scale of incidents, crimes committed and victims are numerous,⁵⁹⁹ making it hard to predict which individuals the ICC will target, especially given the OTPs willingness to target mid-level individuals.⁶⁰⁰ A further disproportionate effect is the implications for poorly resourced states which are less able to adapt and adjust to ICC investigations in such a manner. The dilemma is either to wait until the ICC has finished or to continue and challenge admissibility per case. This is of particular concern in states suffering from underdeveloped or compromised judicial systems, and even more so in situations where the conflict is ongoing and/or when the domestic system is struggling to function normally.⁶⁰¹ Overall, there is a narrowing of focus of investigations at the national level, which defeats the overall purpose of international criminal justice to end impunity.

At the individual case level, the 'substantially same conduct' test fares no better. There has been a lack of consistent interpretation as to when a national case 'sufficiently mirrors' that of the OTP.⁶⁰² While there was some uncertainty over whether the conduct needed to be 'the same'⁶⁰³ or 'substantially the same',⁶⁰⁴ the *Al Senussi* decision further complicated the matter by calling for comparison of the 'temporal, geographic and

⁵⁹⁸ Stahn (n 515) 57; Clarke, *Fiction of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge Studies in Law and Society, CUP 2009) 3 and 13

⁵⁹⁹ M. Konforta and M.M. Vajda, 'The Principle of Complementarity in the Jurisprudence of the ICC' (2014) 3 *Zagrebačka Pravna Revija* 18.

⁶⁰⁰ 2012-15 Strategic Plan, 6.

⁶⁰¹ On the value and practicality of pursuing criminal justice in ongoing conflicts see Leslie Vinjamuri, 'The ICC and the Politics of Peace and Justice' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 28.

⁶⁰² *The Prosecutor v. Saif Al-Islam Gaddafi* (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', Gaddafi and Al-Senussi) ICC-01/11-01/11, Appeals Chamber, (21 May 2014) para 73 (hereafter *Gaddafi Appeal Judgment*).

⁶⁰³ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art. 19(2)(b) of the Statute, Ruto, Kosgey, and Sang) ICC-01/09-01/11, Pre-Trial Chamber II (30 May 2011) para 55.

⁶⁰⁴ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", Muthaura, Kenyatta, and Ali) ICC-01/09-02/11 OA, Appeals Chamber (30 August 2011) para 39.

material parameters' of the investigations,⁶⁰⁵ only for the Appeals Chamber to bring back consideration of 'the degree of overlap [...] with the focus being on whether the conduct is substantially the same'.⁶⁰⁶ The practical effect is that domestic prosecutions which are not closely aligned to the ICC's are deemed insufficient on an admissibility challenge, which undermines the national system and its pursuit of international criminal justice. This limits the deterrent effect of ICL, minimises the contribution to peace and security and reconciliation by narrowing the scope of prosecutions and the method through which international criminal justice is pursued. Additionally, the ICC is seen to adopt a context insensitive understanding to the domestic attempts in direct contrast to the approach of TJ.

Two examples clearly highlight this. The first is the ICC's Lubanga prosecution. Despite the local courts charging him with crimes against humanity and genocide, the absence of the charge of recruitment of child soldiers led to the ICC finding the case admissible.⁶⁰⁷ With the decision the international court nullified the domestic prosecution and any chance of the DRC exercising its sovereign right to prosecute Lubanga. The ICC's approach to the Lubanga prosecution has undermined international criminal justice, the international court's role as a mechanism of last resort, and Article 17's complementarity principle. Second is the case against Côte d'Ivoire's former first lady Simone Gbagbo. In March 2015, an Abidjan court held Simone Gbagbo guilty of 'crimes including disturbing the peace, organizing armed gangs and undermining state security',⁶⁰⁸ imposing a twenty-year sentence. However, the ICC held the OTP's case against her admissible because the national prosecution did not replicate the OTP's charges.⁶⁰⁹ Thus, Simone Gbagbo is held accountable at the national and international level, which is a needless overlap and a waste of already limited resources.⁶¹⁰ Given the length of the sentence

⁶⁰⁵ *The Prosecutor v. Saif Al-Islam Gaddafi* (Decision on the admissibility of the case against Abdullah Al-Senussi, Gaddafi and Al-Senussi) ICC-01/11-01/11, Pre-Trial Chamber I (11 October 2013) para 75.

⁶⁰⁶ *Gaddafi Appeal Judgment*, para 72.

⁶⁰⁷ William Schabas, *An Introduction to the International Criminal Court* (3rd edn, CUP 2007) 181-2.

⁶⁰⁸ Ange Aboa, 'Ivory Coast jails ex-first lady for 20 years over poll violence' (*Reuters*, 10 March 2015) <<https://www.reuters.com/article/us-ivorycoast-politics-trial/ivory-coast-jails-ex-first-lady-for-20-years-over-poll-violence-idUSKBN0M60KO20150310>> accessed 6 January 2018.

⁶⁰⁹ *The Prosecutor v. Simone Gbagbo* (Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo') ICC-02/11-01/12 OA, Appeals Chamber, (27 May 2015) para 14.

⁶¹⁰ On the ICC's resource constraints see Chapter 5.2 of this thesis.

imposed domestically exceeding that sought by the OTP, questions are raised over what is gained by the ICC's prosecution.⁶¹¹

In conclusion, this admissibility test is overly restrictive forcing national prosecutions and investigations to take the same prosecutorial direction as the ICC. Thus, complementarity narrows the scope of accountability, limiting the number of cases domestically and creating a dependence on the ICC to shape the investigation and approach to take.

6.1.3 When is a State 'Unwilling and Unable'

While the 'shielding the person' element of Article 17(2)(a) has yet to be adjudicated before the court,⁶¹² what is an unjustified delay (Article 17(2)(b)) has been defined. A state will be considered unwilling when an unjustified delay is 'inconsistent with an intent to bring the person concerned to justice'.⁶¹³ In the *Al Senussi* decision, the Pre-Trial Chamber held that 'Libya has continued progressively to conduct its investigation ... [and that] a period of less than 18 months between the commencement of the investigation [...] and the referral of the case [...] cannot be considered to constitute an unjustified delay'.⁶¹⁴ When determining the conduct of the domestic proceedings, as per Article 17(2)(c), the court must apply the prescribed limits of Article 17(2) and 'not one that involves an assessment of whether the due process rights of a suspect have been breached per se'.⁶¹⁵ Instead it should

generally be understood as referring to proceedings which will lead to a suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility, in the equivalent of sham proceedings that are concerned with that person's protection.⁶¹⁶

⁶¹¹ Heller (n 590) 638.

⁶¹² Schabas, *The International Criminal Court Commentary* (n 535) 467.

⁶¹³ Article 17(2)(a) Rome Statute.

⁶¹⁴ *The Prosecutor v. Saif Al-Islam Gaddafi* (Decision on the Admissibility of the Case against Abdullah Al-Senussi) ICC-01/11-01/11 (13 October 2013) para 227 and 229.

⁶¹⁵ *The Prosecutor v. Saif Al-Islam Gaddafi* (Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi") ICC-01/11-01/11-565 (24 July 2014) para 2.

⁶¹⁶ *Ibid* para 2.

The Article 17(2)(a)-(c) guidelines are considered overly complex,⁶¹⁷ leaving questions unanswered, particularly in relation to what happens when a state is inactive but is neither unwilling nor unable. Schabas finds Article 17(2) 'leads inexorably to the conclusion that the issue of unwillingness or inability simply does not arise if there has been no investigation or judicial activity at the national level with respect to the case'.⁶¹⁸ The matter then becomes an issue of gravity for admissibility purposes.⁶¹⁹ Typically the provision is considered to require some sort of judicial activity or investigation, however some have argued genuine non-judicial efforts, such as truth and reconciliation commissions, are enough to satisfy the complementarity criteria.⁶²⁰ Following the Prosecutor's statements on Darfur that the traditional reconciliation mechanisms are 'an important part of the fabric of reconciliation for Darfur, as recognized in [UNSC] resolution 1593 (2005)',⁶²¹ the ICC may find truth commissions or similar sincere initiatives constitute an investigation and not a genuine unwillingness on behalf of the state, but this is unlikely.⁶²²

6.1.4. The Gravity Requirement

While not part of complementarity gravity is one of the admissibility criteria of Article 17 and is in line with the overall aim of the court to prosecute the most serious crimes.⁶²³ It

⁶¹⁷ Schabas, *The International Criminal Court Commentary* (n 535) 455.

⁶¹⁸ *Ibid.*

⁶¹⁹ *The Prosecutor v. Germain Katanga* (Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07 OA 8 (25 September 2009) para 78; *The Prosecutor v. Jean-Pierre Bemba Gombo* (Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges') ICC-01/05-01/08 OA 3 (19 October 2010) para 109.

⁶²⁰ Daniel D. Ntanda Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues' (1999) 10 CLF 87, 119–20; Michael P. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 Cornell International Law Journal 507; Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 JICJ 695; Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in Kai Ambos et al. (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer-Verlag, 2009) 19–103; Anja Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' (2003) 7 Max Planck Yearbook of UN Law 553.

⁶²¹ UNSC 5459th Meeting, Wednesday 14 June 2006, UN Doc. S/PV.5459, 3.

⁶²² Schabas, *The International Criminal Court Commentary* (n 535) 455.

⁶²³ See n 131.

is therefore important to consider how gravity and the OTP policies have impacted on complementarity.

When a 'case is not of sufficient gravity to justify further action by the Court'⁶²⁴ it is inadmissible. Yet, while the court 'has rejected the application of a high threshold in defining gravity',⁶²⁵ the OTP has taken the opposite approach.⁶²⁶ The gravity threshold makes sense to prevent the court being inundated with 'peripheral complaints involving minor offenders, possibly in situations where the major offenders were going free'.⁶²⁷ But the actual cases pursued are required to meet an additional test as the OTP only pursues the 'most responsible for the most serious crimes within the situation'.⁶²⁸ However, this approach to gravity was not adopted in the OTP's assessment of the initial cases.⁶²⁹ It was only employed by the OTP to justify its one sided prosecutions of the Lord's Resistance Army (LRA) in Uganda⁶³⁰ and similarly in the decision not to pursue an investigation into the conduct of UK troops in Iraq.⁶³¹ The OTP's insistence that its policy of impartiality is not the same as 'equivalence of blame' undermines the gravity assessment by ignoring half the context of the situation and privileging victims.⁶³² While the gravity criteria may allow the ICC to focus on one side of the conflict, the prosecutions do not reflect the true extent of the conflict and crimes committed. This lack of 'equivalence of blame' can explain why only one-sided prosecutions occur in relation to Uganda and the DRC.⁶³³ The OTP's approach creates impunity and inaccurate perceptions of blame.

⁶²⁴ Article 17(1)(d) Rome Statute.

⁶²⁵ *The Prosecutor v. Mbarushimana* (Separate Opinion of Judge Silvia Fernández de Gurmendi) ICC-01/04-01/10 OA 4 (30 May 2012) para 10.

⁶²⁶ Schabas, *The International Criminal Court Commentary* (n 535) 462.

⁶²⁷ ILC, Summary record of the 2330th meeting, UN Doc. A/CN.4/SR.2330, 9

⁶²⁸ 2013 Preliminary Examinations Report, para 66.

⁶²⁹ Schabas, *The International Criminal Court Commentary* (n 535) 462.

⁶³⁰ Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal meeting of Legal Advisors of Ministries of Foreign Affairs, New York, 24 October 2005, 7; Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties, 28 November—3 December 2005, The Hague, 28 November 2005, 2.

⁶³¹ Letter of Prosecutor dated 9 February 2006 (Iraq), 8.

⁶³² 2016 Case Selection Policy, para 20.

⁶³³ Phil Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda' in Nicholas Waddell and Phil Clark (eds), *'Courting Conflict? Justice, Peace and the ICC in Africa'* Royal African Society 2008, 42; Otim and Wierda (n 497) 22.

6.2 Complementarity as a Policy or Big Idea

In addition to complementarity as an admissibility criteria, complementarity has also developed as a big idea or policy, taking a 'more literal meaning'⁶³⁴ or what the Prosecutor has termed positive complementarity.⁶³⁵ Positive complementarity entails the promotion of national prosecutions simultaneous to the OTP undertaking preliminary examinations and investigations, even while ICC trials are ongoing.⁶³⁶ The Prosecutor further saw the potential for negotiating the division of labour between a state's domestic courts and the ICC.⁶³⁷ Complementarity as a big idea, and the division of labour advocated for, is shaped by "norm entrepreneurs" and the UNSC members who have turned the concept into a political consideration.⁶³⁸ While the OTP and NGOs promote implementation of the Rome Statute at the domestic level through an obligation on states to prosecute, this is not an Article 17 requirement.⁶³⁹

The OTP approached complementarity in the context of its limited resources, deciding to focus on high-level perpetrators, encourage national prosecutions of lower level individuals, 'or work with the international community to ensure the offenders are brought to justice by some other means'.⁶⁴⁰ While the former Prosecutor Ocampo talked about positive complementarity from the beginning of his tenure, it was only in 2006 that the terminology was adopted.⁶⁴¹

Since 2007, two years after starting work, the OTP adopted a policy of publicising the situations under examination in a bid to encourage national prosecutions.⁶⁴² However, the approach to encouraging domestic cases has shifted. Initially the Prosecutor stated his intention for complementarity was to include capacity building through improving

⁶³⁴ Christian M. De Vos, 'Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan. By Sarah M.H. Nouwen' (2014) 84(1) *British Yearbook of International Law* 372.

⁶³⁵ OTP, Policy Paper on Preliminary Examinations (DRAFT), 4 October 2010, para 94.

⁶³⁶ Luis Moreno-Ocampo, 'A positive approach to complementarity: the impact of the Office of the Prosecutor' in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011) 26.

⁶³⁷ Luis Moreno-Ocampo, 'Statement of the Prosecutor to the Diplomatic Corps', 12 February 2004.

⁶³⁸ Nouwen (n 582) 23.

⁶³⁹ *Ibid* 20.

⁶⁴⁰ 2003 Policy Paper, 3.

⁶⁴¹ 2006 Prosecutorial Strategy.

⁶⁴² Moreno-Ocampo, 'A positive approach' (n 637) 26.

national jurisdictions' 'efficiency'.⁶⁴³ He has since stated that the ICC is not in a position to train lawyers and prosecutors, nor to undertake rule of law reform, as 'such activities belong to other rule of law organisations'.⁶⁴⁴ Most likely such a response was influenced by the ASP's report on complementarity that:

Positive complementarity refers to all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support or technical assistance, but instead leaving these actions and activities for the States to assist each other on a voluntary basis.⁶⁴⁵

This is not a position adopted by all commentators. Some argue that the ICC should offer material support to fulfil its policy of promoting national prosecutions.⁶⁴⁶ Given the international court's capacity limitations, the OTPs approach makes sense as states are meant to be primarily responsible for prosecutions. Yet, the expertise of the ICC is kept in house. Under Article 93(10)(a) the ICC is able to offer assistance in the prosecution of international crimes provided it does not affect any future admissibility issues. The original approach of the OTP was not to offer direct involvement in capacity building, financial or technical assistance.⁶⁴⁷ After 2012 this was changed to a policy of assisting where appropriate in collaboration with others.⁶⁴⁸ The impact of this is to leave many of the states in which the ICC intervenes still unable to address accountability issues.⁶⁴⁹ Therefore, only those cases and individuals the ICC considers appropriate to prosecute will be addressed. There may be very few national prosecutions, those which do take place may fall short of international standards and not reflect the severity of the crimes committed or address victim's concerns. Ultimately, the ICC will not make any impact in the long term on the fight against impunity or further TJ aims.

⁶⁴³ Moreno-Ocampo, 'Address to the Assembly of State Parties' (n 630).

⁶⁴⁴ Moreno-Ocampo, 'A positive approach' (n 637) 25.

⁶⁴⁵ ASP, Report of the bureau on stocktaking: complementarity, 18 March 2010, para 16.

⁶⁴⁶ Mark Ellis, 'International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions' (2009) 1(1) *Hague Journal on the Rule of Law* 79.

⁶⁴⁷ 2009-12 Prosecutorial Strategy, para 17.

⁶⁴⁸ 2012-15 Strategic Plan, para 66.

⁶⁴⁹ See the failure of the OTP to effect change due to a lack of partnership and cooperation in the DRC as argued by Géraldine Mattioli and Anneke van Woudenberg, 'Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo' in Nicholas Waddell and Phil Clark (eds), *'Courting Conflict? Justice, Peace and the ICC in Africa'* (Royal African Society 2008) 58.

Regardless of whether one agrees with this argument, there are concerns with the OTP's positive complementarity approach and the lack of promotion of national prosecutions. Despite the OTP and the Prosecutor's claimed success of positive complementarity in Colombia,⁶⁵⁰ Georgia⁶⁵¹ and Guinea,⁶⁵² many are in disagreement,⁶⁵³ partly due to the lack of empirical data and research to back up these claims.

The initial self-referrals also cast doubt over the ICC encouraging domestic prosecutions. While Article 13 was included for states to self-refer, it was never envisaged to be the most utilised method as demonstrated by the lack of attention paid to the provision during the negotiations.⁶⁵⁴ The use of the provision has led to claims of OTP bias and manipulation of states to gain a referral. For example, Uganda has 'one of the most proficient and robust [judicial systems] in Africa' and was willing to prosecute members of the LRA.⁶⁵⁵ However, instead of supporting national prosecutions and developing capacity to address the crimes,⁶⁵⁶ then Prosecutor Ocampo persuaded President Museveni to refer the situation.⁶⁵⁷ The OTP has been accused of prioritising the justification of its existence and pursuing a speedy first trial over supporting national prosecutions.⁶⁵⁸ Consequently, the OTP under charged the accused in relation to the available evidence and accusations.⁶⁵⁹ Whether true or not, the perception adds to the perceived marginalisation of African states and an undermining of their ownership over the process.

⁶⁵⁰ Moreno-Ocampo, 'A positive approach' (n 637) 30.

⁶⁵¹ 2011 Preliminary Examination Report, 100.

⁶⁵² Ibid 102.

⁶⁵³ Christopher Hall, 'Positive complementarity in Action' in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011); William Burke-White, 'Reframing Positive complementarity: reflections on the first decade and insights from the US federal criminal justice system' in Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011).

⁶⁵⁴ Rome Conference Negotiation Minutes.

⁶⁵⁵ Clark, 'Chasing Cases' (n 497) 1202.

⁶⁵⁶ Ibid 1190-6.

⁶⁵⁷ Clark, 'Chasing Cases' (n 497) 1187-8, 1198-9, 1203; Otim and Wierda (n 497) 22; Nouwen (n 582) Chapter 3.

⁶⁵⁸ William Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49(1) *Harvard International Law Journal* 53; Nouwen (n 582) 138-142.

⁶⁵⁹ M Cherif Bassiouni and Douglass Hansen 'The Inevitable Practice of the Office of the Prosecutor' (*ICC Forum*, March 2013) <<http://iccforum.com/africa>> accessed 21 April 2016.

In Ituri, DRC local courts had successfully conducted trials for international crimes. Yet, despite having the capacity, willingness and the accused, Lubanga, in custody the OTP and ICC ignored this. Instead, the ICC used President Kabila's claim that the judicial system was unable to cope with the prosecution⁶⁶⁰ to justify the prosecution of Lubanga in the Hague. The ICC would subsequently try Lubanga for the recruitment of child soldiers as opposed to the crimes against humanity and genocide charges that the national prosecutions would have pursued. In this example the ICC actively undermined a national prosecution, reflecting the court's disinterest in sharing prosecutions with national institutions.⁶⁶¹ Such practice also demonstrates a disregard of the affected state, raising questions over the genuineness of international efforts to pursue accountability. The ICC appears to have created a system of dependence where a select few actors/mechanisms are considered the champions in fighting impunity,⁶⁶² with the local mechanisms being incapable or inadequate for the task.

In addition, the pressure Ocampo placed on African states to refer their respective situations appears to have been done at the expense of investigating government officials and linked rebel groups who commit crimes. In Uganda, not a single case has been brought against any member of the government or military personnel; in the DRC situation only opposition rebels are being prosecuted and investigated despite the well documented reports of government forces' crimes,⁶⁶³ and similar approaches have been adopted in relation to the Central African Republic (CAR).⁶⁶⁴ It is highly unlikely Ocampo or any other ICC Prosecutor would pressure one of the court's member states to

⁶⁶⁰ *Situation in the Democratic Republic of Congo* (Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, International Criminal Court Pre-Trial Chamber I) ICC-01/04-01/07 (10 February 2006) 35.

⁶⁶¹ On the removal of jurisdiction from local Ituri courts in the DRC see Clark, 'Chasing Cases' (n 497) 1190-6. Similarly, see the arguments on Libya's ability to try Saif Gaddafi as presented in Manisuli Ssenyonjo, 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders' (2013) 13 *International Criminal Law Review* 385, 401-6.

⁶⁶² On the development of a heroes/villains narrative in ICL see Tladi, 'When Elephants Collide' (n 7) 382.

⁶⁶³ DRC opposition rebels, documented government crimes Global Centre for the Responsibility to Protect, 'DRC: Populations at Risk - Imminent Risk' (*ReliefWeb*, 17 April 2017) <<http://reliefweb.int/report/democratic-republic-congo/drc-populations-risk-imminent-risk-17-april-2017>> accessed 20 June 2017; Mirna Adjami and Guy Mushiata 'Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court', *ICTJ Briefing* (May 2010) <<http://www.ictj.org/sites/default/files/ICTJ-DRC-Impact-ICC-2010-English.pdf>> accessed 20 June 2017.

⁶⁶⁴ To date no prosecutions have been brought against individuals linked to either governments or state officials.

refer the situation if they did not feel the state was in a weak political position. Thus, it is likely Ocampo used the political interests of the leaders as a means of inducement.⁶⁶⁵ This detracts from the ICC's independence and perceptions of fairness, while also fuelling discontent locally through privileging certain victims, contributing to local tensions and making reconciliation difficult. Ultimately, ending impunity, helping the effected societies reconcile and promoting peace and security are not achieved, while at the same time states lose trust in the ICC.⁶⁶⁶

6.3 Does the ICC have Sole Responsibility

While the ICC is an international institution which has brought many advantages to ICL it is not the only response to justice permitted,⁶⁶⁷ and has 'never claimed monopoly on justice'.⁶⁶⁸ The ICC has recognised this when considering the interests of justice⁶⁶⁹ and has stated that it considers itself just one possible response and it may in fact be 'insufficient' to address accountability fully.⁶⁷⁰ It has appreciated that there may be other means by which to resolve situations,⁶⁷¹ and national and international efforts may be combined to come up with a solution.⁶⁷² While this relates more to the issue of justice and its role at the peace and security level - the ICC does not consider it appropriate to determine the political aspects of the interests of justice as the international court's mandate is limited to criminal justice only.⁶⁷³ The ICC considers itself merely one institution or tool that international criminal justice and justice more broadly can utilise. Additionally, the ICC has advocated for a division of labour in addressing accountability.⁶⁷⁴ As the ICC does not consider itself the last word on ICL issues, nor on

⁶⁶⁵ Valerie Freeland, 'Rebranding the State: Uganda's Strategic Use of the International Criminal Court' (2015) 46(2) *Development and Change* 293; Krever (n 496).

⁶⁶⁶ On the importance of trust in international relations see Andrew H. Kydd, *Trust and Mistrust in International Relations* (Princeton University Press 2007).

⁶⁶⁷ Chapter 5.3 of this thesis.

⁶⁶⁸ Interview with ICC Official (The Hague, The Netherlands, 16 February 2016).

⁶⁶⁹ 2007 Policy Paper, 7-8.

⁶⁷⁰ *Ibid* 7.

⁶⁷¹ *Ibid* 8.

⁶⁷² 2003 Policy Paper, 7.

⁶⁷³ 2007 Policy Paper, 8; 2003 Policy Paper, 7.

⁶⁷⁴ 2003 Policy Paper, 5.

responses to crises and crimes, why should we. Or as Nouwen argues, seeking alternatives to the ICC is upholding complementarity.⁶⁷⁵

6.4 Conclusion

The ICC was never intended as a rival to national prosecutions, but rather as a complementary court of last resort.⁶⁷⁶ Pursuant to Article 17, which respects sovereignty, national prosecutions are to be encouraged to ultimately help tackle impunity. This was, and still is, the preferred approach of the ICC and the institution welcomes complementary prosecution efforts.⁶⁷⁷ However, this expectation has not been met for a number of reasons. First, the 'same person same conduct' test narrows the focus of investigations and prosecutorial efforts as the national focus becomes fixated on satisfying the ICC requirements, discouraging independent state action and preventing alternative approaches or broader initiatives being implemented. It makes more sense for national and ICC investigations to cover as broad a range of perpetrators as possible, rather than forcing a particular focus.

Second, the different thresholds of gravity held by the court and OTP have helped justify one sided prosecutions in Uganda, the DRC and CAR, and decisions to not pursue cases even when no domestic prosecutions are likely.

Third, complementarity as a big idea prevents capacity building while creating a dependency due to expertise being kept in house and the strict Article 17 admissibility tests. Despite complementarity's positive aim of encouraging domestic prosecutions, it is a highly questionable tactic as national prosecutions have actively been undermined in Uganda and the DRC while prioritising the OTP's own interests. This creates the perception that local initiatives are not good enough or incapable of conducting prosecutions, further undermining ownership and agency, local reconciliation and efforts to improve peace and security.

⁶⁷⁵ Nouwen (n 582) 24.

⁶⁷⁶ On the court being a 'last resort' see the ICC official website, <<https://www.icc-cpi.int/about>> accessed 30 November 2016.

⁶⁷⁷ Interview with ICC Official (The Hague, The Netherlands, 16 February 2016).

While there is a clear distinction to be made between complementarity as admissibility criteria and policy approach, both have resulted in removing ownership from those states the ICC relies on and those most in need of developing their national capability. The picture that emerges is of a court which seeks a division of labour, recognising its limitations and acknowledging the space for additional mechanisms and initiatives. This chapter concludes that there is a need for an African regional court to assist the ICC, especially given the lack of genuine encouragement of national prosecutions by the OTP and the strict Article 17 interpretation by the ICC judges.

Chapter 7

The Question of African Ownership

So far this thesis has ascertained that the structural inequalities within the ICC system facilitate a focus on unstable and post conflict situations which tend to be in weaker states.⁶⁷⁸ African states and the AU are not looking to be the 'controlling authority' in dispensing international criminal justice, instead they seek a form of ownership 'more akin to having a stake in the program'.⁶⁷⁹ The limited Rome Statute crimes do not address the underlying causes of conflict, skewing the accountability narrative, narrowing justice and contributing little to peace and security.⁶⁸⁰ Clarke contends that the crimes included in the ICC's jurisdiction were purposely kept small and narrow in focus to minimise the chance of Western states being indicted as, for example, their complicity in Africa's resource conflicts is not within the definitions of the crimes.⁶⁸¹ This is further exacerbated by the claims that those states with close ties to powerful Western states will not be prosecuted.⁶⁸²

Certain self-serving African states have manipulated this double standard to justify their withdrawal from the ICC.⁶⁸³ The Gambia's withdrawal may have been prevented with the change in leadership, but it also speaks to a larger issue – ICC and international criminal justice double standards undermine the credibility of the international court, its independence and its ability to strengthen international criminal justice.

The aim of this chapter is to determine whether the ICC impacts on African states' ownership and how, if at all, this contributes to the need for an African regional criminal court. As Chapter 5 and 6 explored accountability and complementarity as part of the reasoning for an African regional criminal court, the first half of this chapter investigates

⁶⁷⁸ Stahn, *Justice civilisatrice* (n 515) 61.

⁶⁷⁹ Paul D Williams, 'Keeping the Peace in Africa: Why "African" Solutions Are Not Enough' (2008) Carnegie Council for Ethics in International Affairs 315.

⁶⁸⁰ Clarke, *Fiction of Justice* (n 598) 3.

⁶⁸¹ Clarke, 'Is the ICC targeting Africa inappropriately or are there sound reasons and justifications for why all of the situations currently under investigation or prosecution happen to be in Africa?' (*ICC Forum*, March 2013) <<http://iccforum.com/africa>> accessed 21 April 2017.

⁶⁸² Taku (n 496); Ssenyonjo (n 661) 424-7.

⁶⁸³ The Gambia has used such a claim as one of the reasons for its intended withdrawal, although it has since rescinded its intention to withdraw; Krever (n 496).

whether these elements also undermine African ownership. The analysis then moves to investigate the former Prosecutor's conduct, whether a contextual approach was adopted and whether the AU's peace and security initiatives have been impacted by the ICC. The resulting perceptions of justice will then be set out.

The second half scrutinises the UN and the international community's role within the ICC framework and whether this contributes to the need for an African regional criminal court. The UNSC's handling of the Article 16 deferral requests is the first point of analysis. This is followed by an assessment of whether the inequality of the international system has been replicated within the ICC structure. Finally, this chapter moves on to assess whether the use of the ICC by UNSC members and former African colonial powers contribute to the need for an African regional criminal court.

7.1 The ICC and African Ownership

7.1.1 The ICC's Pursuit of Accountability

In Chapter 5 the level of accountability offered by the ICC was concluded to be limited. The OTP's case selection is meant to be representative of the crimes committed and suffered by the victims, and later of those affecting the communities.⁶⁸⁴ While this approach makes practical sense given the large numbers of crimes and accused the consequence is that certain crimes are unexplored as certain crimes, individuals, victims and communities are prioritised over others. The ICC ignored the desires and wishes of the local community in Uganda when these were not in line with the court's strategy or those of its donors,⁶⁸⁵ removing ownership over the process. This raises doubts as to in whose name the ICC is pursuing justice, the international community or victims and victim communities.⁶⁸⁶ Additionally, it calls into question any reconciliatory or TJ basis for the international court.

⁶⁸⁴ 2016 Case Selection Policy Paper, para 45.

⁶⁸⁵ Nouwen (n 582) 142.

⁶⁸⁶ Section 7.1.4 of this chapter.

The OTP's decision that it is not always necessary to look at both sides of a situation does not reflect the true extent of the conflict and crimes committed.⁶⁸⁷ The ICC has not looked into crimes committed by the self-referring governments of CAR, the DRC, or Uganda. This removes the agency of unrecognised victims from having their crimes acknowledged, from having any ownership role in the process and threatens reconciliation and peace and security.

7.1.2 The Principle of Complementarity

The discussion on complementarity in Chapter 6 highlighted a number of points impacting on ownership. First, the 'same person same conduct' test has resulted in a reduction of sovereignty despite the opposite being stated in Article 17's objective.⁶⁸⁸ The resulting narrow focus on prosecutions has undermined the ability of states to own the justice process and their ability to pursue innovative and broader approaches. Second, the bad faith of self-referrals by some states enabled the ICC to be manipulated and used for the government's own political interest, preventing any true efforts being undertaken locally. Third, complementarity as a policy or big idea results in the ICC keeping its expertise in-house while leaving capacity building to other actors, creating a dependency on the court. This can only lead to a reduction in ownership as states are not in a position to pursue justice nationally or seek help from the institution with expertise.

Yet, the most damaging aspect of complementarity on ownership has been the ICC's undermining of domestic prosecutions. For example, Lubanga had been implicated nationally for a large number of crimes across various areas in the DRC, but the Prosecutor focused on a relatively small geographical area and a select number of crimes,⁶⁸⁹ simultaneously ignoring the ability of local courts to prosecute. The local court's role was reduced to that of 'unable' or not good enough, therefore a genuine attempt at claiming ownership over the process was diminished.

⁶⁸⁷ 2016 Case Selection Policy Paper, para 20.

⁶⁸⁸ Chapter 6.1.2 of this thesis.

⁶⁸⁹ Mattioli and van Woudenberg (n 649). Similar concerns have been raised over the representative nature of the crimes in the cases of Lubanga, Ongwen and Gbagbo and Blé Goudé, see Human Rights Watch, 'Comments on the Draft Policy Paper' (n 570) footnote 1.

7.1.3 The Role of the Former Prosecutor

The conduct of the first, now former, Prosecutor Luis Moreno-Ocampo negatively impacted on the perception of the international court. In particular, his perceived bias and unequal treatment of states caused tension by replicating the inequalities of the international system and reducing ownership.⁶⁹⁰

Ocampo's close alignment to Western powers⁶⁹¹ and his visibly close relationship with the White House – the administration of a non-ICC State – was inappropriate and opened the OTP up to claims of undue influence and political bias. His decision and dubious reasoning not to open an investigation into the Palestinian flotilla case was due to the USA's and close ally Israel's interests.⁶⁹² This was challenged by the Pre-Trial Chamber where the matter was taken to be reconsidered.⁶⁹³ The discrepancy between the speed at which the flotilla decision was taken and Ocampo's decision to open an investigation into Libya makes it hard to ignore the criticisms of political interference and double standards.⁶⁹⁴

It is not only with regards to the handling of investigations that the ICC has seen fit to chastise Ocampo. Following a prejudicial interview with Philippe Sands on the prosecution and case against Saif Gaddafi, the Trial Chamber reprimanded the 'inappropriate behaviour on the part of the Prosecutor'.⁶⁹⁵ Furthermore his prejudgment of al Bashir's guilt over charges of genocide is inexcusable as the trial has yet to commence.⁶⁹⁶

Concerns over Ocampo's conduct is not unique to those African states under investigation, many have criticised and queried his management style.⁶⁹⁷ While African

⁶⁹⁰ See section 7.2.1 of this chapter.

⁶⁹¹ Ssenyonjo (n 661) 424-5; Krever (n 496).

⁶⁹² Ssenyonjo (n 661) 425-6.

⁶⁹³ See n 503.

⁶⁹⁴ Kersten 'Between justice and politics' (n 515) 463.

⁶⁹⁵ *Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision on the "OPCD Request for authorization to submit observations concerning Guardian Article dated 15 July 2010") ICC-02/05-01/09 (13 September 2010) para 6.

⁶⁹⁶ Ssenyonjo (n 661) 423-4.

⁶⁹⁷ William Wallis, "Lunch with the FT: Luis Moreno-Ocampo" (*Financial Times*, 23 September 2011) <<https://www.ft.com/content/8dce2894-e4fc-11e0-9aa8-00144feabdc0?mhq5j=e1>> accessed

states have accused Ocampo of targeting Africa, there is the possibility that these states are not opposed to the ICC as an institution but rather the Prosecutor's approach to pursuing justice: turning a blind eye to non-African atrocities while securing the interests of Western powers.⁶⁹⁸ In short, replicating international inequalities within the ICC system and international criminal justice, at the same time ignoring context.

7.1.4 The Need for a Contextual Approach

Carsten Stahn describes the ICC's approach as decontextualized, despite requiring local buy in.⁶⁹⁹ According to Stahn, the division between "us" and "them" has resulted in using the local in a narrow manner with little concern for long-term impacts and contextual knowledge,⁷⁰⁰ therefore removing any real inclusion of local initiatives and reducing ownership. He links this to the fact that international criminal justice usually focuses on the 'crime and perpetrators' while ignoring social realities.⁷⁰¹ This is evidenced by the fact crimes committed 'in the context of protective or military action in foreign states' are excluded,⁷⁰² and the focus on a few select individuals distorts the reality of the conflict and possibly oversimplifies matters.⁷⁰³ Consequently, the court fails to address the underlying causes of conflict, preventing the ICC from attaining its aim of fighting impunity, promoting deterrence and reconciliation, and contributing to peace and security.⁷⁰⁴ Although, this may not be solely the fault of the court, as ICC advocates also have a role in this.⁷⁰⁵

7.1.5 African Union Peace and Security Initiatives

The ICC's inability to contribute to peace and security is further undermined by its lack of context and insensitivity to the AU's peace and security agenda and initiatives. As a justification for establishing international courts and the pursuit of international

20 June 2017; Eric Stover, Victor Peskin, Alexa Koenig, *Hiding in Plain Sight: The Pursuit of War Criminals from Nuremberg to the War on Terror* (University of California Press 2016) 289.

⁶⁹⁸ Ssenyonjo (n 661) 427; Kersten, 'Between justice and politics' (n 515) 474; Krever (n 496).

⁶⁹⁹ Stahn, 'Justice civilisatrice' (n 515) 50.

⁷⁰⁰ Ibid 60.

⁷⁰¹ Ibid 49.

⁷⁰² Ibid 61.

⁷⁰³ Ibid 67-8. For a counter argument see Damaška (n 77).

⁷⁰⁴ Clarke, *Fiction of Justice* (n 598) xviii; Clarke, 'Is the ICC targeting Africa inappropriately' (n 681).

⁷⁰⁵ Stahn, 'Justice civilisatrice' (n 515) 62.

criminal justice is based on the UNSC and improving peace and security, this factor cannot be ignored. The AU prioritises peace and security as part of its non-indifference policy⁷⁰⁶ and is mandated to 'promote peace, security, and stability on the continent'.⁷⁰⁷ While the UNSC has primary responsibility for maintaining international peace and security,⁷⁰⁸ the relationship of the UN and regional organisations is unclear. Beyond having a role in peace and security regional organisations did not have a clearly defined position under the UNCh.⁷⁰⁹

Tensions have arisen between the UNSC, ICC and African states over situations when both the ICC and the AU are undertaking efforts to re-establish peace.⁷¹⁰ The cases of Sudan and Libya are illustrative of the issue. The ongoing conflict in Darfur, Sudan has seen years of AU and UN negotiations, with the ICC gaining jurisdiction through a UNSC referral in March 2005.⁷¹¹ While the AU initially had little opposition to ICC presence and investigation, following the issuance of the warrant of arrest for President Omar al Bashir the AU voiced its objection. Their concern is that as the regional organisation they are responsible for peace and security, yet their ongoing endeavours are undermined by the ICC's pursuit against al Bashir.⁷¹² A matter which the AU has brought before the UNSC in the form of an Article 16 deferral request.⁷¹³

Libya was, arguably, a more direct attack on and undermining of AU efforts.⁷¹⁴ Following the February 2011 uprising the AU sent an envoy of prominent African leaders and negotiators to Tripoli in an attempt to negotiate peace. However, the North Atlantic

⁷⁰⁶ On the establishment of the AU and its ideological underpinning, see Chapter 2.1 of this thesis.

⁷⁰⁷ Article 3 AUCA.

⁷⁰⁸ Article 1(1) UNCh.

⁷⁰⁹ Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) 1446.

⁷¹⁰ On whether there should be a right of referral for all regional bodies to the ICC as a means to ensure peace and security are dealt with properly see Phoebe Okowa, 'The Security Council, the African Union and the International Criminal Court: Anatomy of a Problematic Relationship' in Jonas Ebbesson, Maries Jacobsson et al. (eds), *International Law and Changing Perceptions of Security: Liber Amicorum Said Mahmoudi* (Brill Nijhoff 2014) 229.

⁷¹¹ UNSC Res 1593 (31 March 2005) UN Doc. S/RES/1593.

⁷¹² Interviews with various African State Officials (Addis Ababa, Ethiopia, April - June 2015).

⁷¹³ Section 7.2.2 of this chapter.

⁷¹⁴ On the handling of the Libya situation and the fall of the Gaddafi regime see M. Cherif Bassiouni, 'The NATO campaign: an analysis of the 2011 Intervention' in M. Cherif Bassiouni (ed), *Libya: From Repression to Revolution: A record of Armed Conflict and International Law Violations 2011-2013* (Martinus Nijhoff Publishers 2013); Kersten 'Between justice and politics' (n 515); Dire Tladi, 'Security Council, the use of force and regime change: Libya and Cote d'Ivoire' (2012) 37 South African Yearbook of International Law 22.

Treaty Organisation (NATO), invoking UNSC Resolution 1972, undertook a bombing campaign in the same area despite knowledge of the African groups' imminent arrival.⁷¹⁵ This was in addition to the rapidly adopted UNSC referral of the situation to the ICC and the OTP's quick uptake of the investigation which side-lined and undermined AU peace efforts. To justify the side lining of the AU, the organisation is argued to lack impartiality because of Gaddafi's patronage and investment in multiple African states and the AU.⁷¹⁶ However, the UNSC and NATO members' also have interests in Libya and dealings with the Gaddafi regime.⁷¹⁷ Thus, the hypocrisy of the UN and NATO's claims cannot be ignored.

Overall, the ICC undermined AU peace and security efforts in such a manner as to negate any ownership of the process and in determining the course of peace, security and justice within the continent. This went against one of the most important reasons for why the AU was originally set up – to manage peace and security within the continent.⁷¹⁸ Additionally, it calls in to question whether ICC prosecutions further peace and security.

7.1.6 Relative Approaches to Justice

Lastly, the rhetoric and discourse surrounding ICC prosecutions negatively impacts ownership. The hero/villain narrative typically adopted places the ICC and its proponents as the "heroes", while those who question, criticise, oppose or don't cooperate are the "villains".⁷¹⁹ This narrative results in the ICC shaping the perception of justice and controlling how it should be meted out.

This can clearly be seen when the AU and African States queried the ICC's approach, resulting in their demonization and causing increased tensions with the international court. While not excusing the illegal individuals' conduct, the argument put forward is

⁷¹⁵ Imed Lamloum, 'African mediators in Libya as NATO hits tanks' (*The Age*, 10 April 2011) <<http://www.theage.com.au/breaking-news-world/african-mediators-in-libya-as-nato-hits-tanks-20110410-1d9ip.html>> accessed 21 April 2017.

⁷¹⁶ Linnea Gelot, 'The Role and Impact on the African Union' in Dag Henriksen and Ann Karin Larssen (eds), *Political Rationale and International Consequences of the War in Libya* (OUP 2016); Jeffrey Gettleman, 'Libyan Oil Buys Allies for Qaddafi' (*New York Times*, 15 March 2011) <<http://www.nytimes.com/2011/03/16/world/africa/16mali.html>> accessed 19 June 2017.

⁷¹⁷ Hugh Roberts, 'Who Said Gaddafi had to go?' (2011) 33 *London Review of Books* 8, 11.

⁷¹⁸ Chapter 2.1 of this thesis.

⁷¹⁹ Tladi, 'When Elephants Collide' (n 7) 382; Stahn, 'Justice civilisatrice' (n 515) 78.

that by utilising this discourse the ICC has prevented discussion on legitimate concerns and unfairly demonised states and the AU, focusing on the wrong aspect of the debate. Consequently, the international court does not take into account the views of all its members, creating a hierarchy, the exact opposite of the intention behind the ICC.

It is not only the court and its advocates that have manipulated perceptions of justice but African states themselves.⁷²⁰ All sides have manipulated the concept of justice and the ICC's work resulting in multiple perceptions, making it hard for the court to be fair, just and independent.⁷²¹ Unfortunately, some states have tried to assert ownership by utilising the ICC for their own national political interests to retain or gain power. For example, Uhuru Kenyatta and William Ruto manipulated perceptions of the ICC investigation in Kenya to assist their chance of winning the national election which in turn enabled them to claim immunity.⁷²² Similarly, Sudanese President al Bashir stirred up anti-ICC sentiments to ensure his election victory.⁷²³ Ugandan President Museveni dealt with his opposition and increased his patronage through the ICC's work.⁷²⁴

7.2 The Role of the United Nations

It is clear that the approach of the ICC and the OTP has directly reduced the level of ownership of African states, but this is not the fault of the court alone. The use of the ICC by the UN system has fundamentally eroded African ownership over the justice initiatives. This section considers whether African concerns with the ICC are a direct result of UN action and the replication of the international system's inequality.

⁷²⁰ On the importance of perceptions of justice, how they emerge and their impact see Clarke, *Fiction of Justice* (n 598); Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (Cambridge University Press 2016).

⁷²¹ Nouwen (n 582); Clarke, Knottnerus and Volder (n 720).

⁷²² Thomas P Wolf, 'A 'Criminal Investigation', Not a 'Political Analysis'? Justice Contradictions and the Electoral Consequence of Kenya's ICC Cases' in Clarke, Knottnerus and de Volder (n 720).

⁷²³ Nouwen (n 582) 254.

⁷²⁴ Ibid 117.

7.2.1 Replication of Inequality

The direction of international criminal justice is considered by some prominent academics to be skewed against certain states and actors.⁷²⁵ As Chuter argues, '[t]he great myth of international justice (and I do not use that term unkindly) is that the law is the same for all, and that context makes no difference'.⁷²⁶ The focus of the ICC on Africa, to the detriment of pursuing other situations just as worthy of attention, and the ignoring of situations concerning powerful states are examples of the practice leading to this belief.⁷²⁷ Yet, the dissatisfaction of African states and the AU goes beyond the ICC, also including continued dissatisfaction with the international governance system of the UN and the marginalisation of African views.⁷²⁸ In fact it covers a plethora of disappointments and disillusionment with the international order⁷²⁹ including UN bodies and institutions such as the Bretton Woods institutions, based on their structure and decision-making powers, the actions and decisions taken.⁷³⁰

This inequality is raised as a key factor in the removal or reduction of African ownership resulting in states' dissatisfaction with the ICC and it not living up to expectations.⁷³¹ The long-held African dissatisfaction with the international and UN system has spilled over into the work of the ICC due to the UNSC's interactions with and usage of the court.

⁷²⁵ Richardson (n 547); Charles C. Jalloh, Dapo Akande and Max du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *African Journal of Legal Studies* 5, 8.

⁷²⁶ Chuter (n 501) 178.

⁷²⁷ Chapter 5.1.3 of this thesis.

⁷²⁸ Okowa (n 710); Ibrahim A. Gambari, 'The Role of Africa in the United Nations' (2012) 34 *American Foreign Policy Interests* 178, 180 <<http://www.ncafp.org/ncafp/wp-content/uploads/2012/10/Gambari-Speech-PDF.pdf>> accessed 21 April 2017.

⁷²⁹ On the marginalisation and inequality within the global order see Immanuel Wallerstein, *World-Systems Analysis: An Introduction* (Duke University Press 2004).

⁷³⁰ Adebayo Adedeji, 'An African Perspective on Bretton Woods' in Mahbub ul Haq, Richard Jolly, Paul Streeten, Khadija Haq (eds), *The UN and the Bretton Woods Institutions: New Challenges for the Twenty-First Century* (Palgrave Macmillan 1995); On attempts to recolonise Africa through international institutions like the Bretton Woods system see Charles Mubita, 'Africa: How the Bretton Woods Use Aid for Recolonisation' (*New Era*, 29 April 2016) <<http://allafrica.com/stories/201605021156.html>> accessed 19 June 2017. Numerous African states have called for reform of the UNSC, see Marina Macalhães Barreto Leite Da Silva, 'United Nations Security Council Reform: An African Perspective' (*Accord Conflict Trends*: 2015/3, 23 October 2015) <<http://www.accord.org.za/conflict-trends/united-nations-security-council-reform/>>. accessed 19 June 2017; UN 'In UN speech, South African President calls for reform of Security Council' (*UN News Centre*, 28 September 2015) <<http://www.un.org/apps/news/story.asp?NewsID=52021#.WUfydhPyveQ>> accessed 19 June 2017.

⁷³¹ On the ICC's purpose see Chapters 1.2 and 9 of this thesis.

There have been perceived undermining of African initiatives, double standards and politicisation of ICC justice in favour of a powerful few and their allies.

Evidence of such African concerns emerged during the court's negotiation phase. While common ground on the overall structure and procedural aspects was easy to find, with the majority favouring a separate independent court, conflicting views were held with regard to the role of the UNSC and the UNGA. Proposals included no referral role for the UNSC,⁷³² a referral role with no veto permitted,⁷³³ and referrals in line with the UNSC's mandate.⁷³⁴ African concerns centred on the political nature and manipulation of the UNSC and the impact of this on investigations being deferred or obstructed.⁷³⁵ Generally, African states preferred that the UNSC's role was kept to determining acts of aggression in line with Chapter VII of the UN Charter (UNCh). Regarding the UNGA, a more minor role in terms of procedural aspects was preferred. Sudan however called for the UNGA to have 'a role in punishing war criminals [and] the right to express reservations should also have been granted',⁷³⁶ possibly because the UNGA is less open to manipulation by the UNSC's Permanent Members.

The concerns raised over the UNSC's role are clearly demonstrated by the treatment of the Article 16 deferral requests and the UNSC and Western states' use of the ICC as a foreign policy tool.

7.2.2 Article 16 Deferral Requests

Under Article 16 of the Rome Statute the UNSC has the power to defer an investigation or prosecution for twelve months (renewable) and the use of this has led to criticisms about the double standards applied.⁷³⁷ From early on, the request of the USA (one of the UNSC Permanent Members) to protect non-ICC members peacekeepers from the ICC's

⁷³² Angola, 8th Plenary Meeting (n 190) para 53, Democratic Republic of Congo, 7th Plenary Meeting (n 189) para 93.

⁷³³ Botswana, 8th Plenary Meeting (n 19-) para 66.

⁷³⁴ Namibia, 4th Plenary Meeting (n 192) para 57.

⁷³⁵ This criticism re-emerged with the UNSC's referral of the situation in Darfur, Sudan to the ICC, and again with the referral of the situation in Libya.

⁷³⁶ Sudan Mr Alhadi, 9th Plenary Meeting (n 190) para 78.

⁷³⁷ Juliet Okoth, 'Africa, The United Nations Security Council and the International Criminal Court: The Question of Deferrals' in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds), *Africa and the International Criminal Court* (Asser Press 2014) 206.

jurisdiction has been renewed yearly,⁷³⁸ providing impunity for such individuals unless national courts investigate and prosecute. Such a pre-emptive, broad brush use of Article 16 is in direct contrast to the Sudan case where an issue of international peace and security following a UNSC referral of the situation to the ICC was ignored.

After the arrest warrant for Sudanese President al Bashir was issued African states and the AU requested an Article 16 deferral.⁷³⁹ However, the response to such a request was lacklustre.⁷⁴⁰ The UNSC did put the matter on its agenda but did not debate the issue beyond the scope of the United Nation Mission in Darfur's (UNAMID) mandate extension,⁷⁴¹ resulting in no Article 16 deferral. This poor handling of the request showed a disregard for the concerns of the regional organisation mandated to deal with peace and security within Africa, as well as being the partner organisation of the UN in tackling the conflict in Darfur.⁷⁴² Furthermore, for the UNSC to not address a matter of peace and security, which it is mandated to do, may be seen as the UNSC using the law as and when it suits their 'political objectives'.⁷⁴³

The discarding of the request and ignoring of AU concerns resulted in the regional body's decision to adopt a non-cooperation stance towards the ICC.⁷⁴⁴ However, not all African states supported the decision, but admittedly Chad's opposition may have been motivated by political reasons.⁷⁴⁵ Furthermore, the impact of this non-cooperation decision has only been with regards to the arrest of al Bashir, as the ICC 'would not be able to succeed in [its] work if we did not have cooperation from the [African] states'.⁷⁴⁶

Disquiet over Article 16 deferrals was made worse by the UNSC's dismissal of Kenya's request regarding the prosecutions of President Kenyatta and Deputy President Ruto. However, unlike the Sudan case, the Kenyan request was discussed. The UNSC

⁷³⁸ Jalloh, Akande and du Plessis (n 725) 16-21.

⁷³⁹ Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/13 (XIII), Addis Ababa, July 1-3, 2009, 8; Communiqué of the 207th Meeting of the Peace and Security Council at the Level of the Heads of State and Government (29 October 2009) Doc. PSC/AHG/COMM.1(CCVII) 5.

⁷⁴⁰ Tladi, 'When Elephants Collide' (n 7) 390-1; Jalloh, Akande and du Plessis (n 725).

⁷⁴¹ Jalloh, Akande and du Plessis (n 725) 21.

⁷⁴² The AU and UN are partners in the United Nations African Mission in Darfur (UNAMID).

⁷⁴³ Tladi, 'When Elephants Collide' (n 7) 397.

⁷⁴⁴ Doc. Assembly/AU/13 (XIII) (n 651) 10.

⁷⁴⁵ Ssenyonjo (n 661) 390-1.

⁷⁴⁶ Interview with ICC Official (The Hague, The Netherlands, 16 February 2016).

concluded that it was not permitted to grant the request as the matter was neither an Article 16 issue nor a UNSC matter as it did not relate to international peace and security.⁷⁴⁷

The failure of the UNSC to agree to an Article 16 deferral does not demonstrate bias or unequal treatment, but the disregarding of legitimate concerns and the failure to adequately consider both requests does. This undermining and dismissal of the AU and African states' deferral requests does diminish their ownership in the process before the UN institution. It is problematic that the UNSC can consistently renew Article 16 deferrals when it concerns the USA's troops but is unwilling to even debate a request when it relates to the President of the non-ICC member Sudan. Leaving issues of legality to one side,⁷⁴⁸ the message such a resolution sends in relation to future potential cases undermines the purpose and spirit of the Rome Statute and the provision. It also calls into question how international courts are perceived to contribute to peace and security, if at all, and which organisation's approach is followed. The ICC was not envisioned as a court to hold only non-powerful states to account, but a universal court applicable to all.

Finally, claims that al Bashir's deferral is sought merely to ensure his impunity⁷⁴⁹ are overstated. An Article 16 deferral applies for a period of 12 months after which the UNSC can either renew it or allow the ICC prosecution to continue. At no time did African states or the AU call on the UNSC to permanently defer the case, their issue is instead the impact of the arrest warrant on their peace efforts and the unnecessary prolonging of the conflict.⁷⁵⁰ As the timing and not the propriety of the arrest warrant and prosecution are the issue,⁷⁵¹ should it emerge that the deferral is merely being used to protect al Bashir, then the UNSC is under no obligation to renew it. Genuine consideration of the deferral requests would not detract from the seriousness of the crimes. Instead, it would demonstrate the UNSC discharges its Rome Statute obligations in a manner where no state's concerns are privileged. Whereas currently powerful states, such as the USA, are afforded protection from non-existent prosecutions and investigations.

⁷⁴⁷ Tladi, 'When Elephants Collide' (n 7) 397.

⁷⁴⁸ Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 *Leiden Journal of International Law*, 195–222.

⁷⁴⁹ Rowland J V Cole, 'Africa's Relationship with the International Criminal Court: More Political than Legal' (2013) 14 *Melbourne Journal of International Law* 670, 697.

⁷⁵⁰ Similar reservations were expressed in relation to the ICC referral over the situation in Libya. See Ssenyonjo (n 661) 395.

⁷⁵¹ Jalloh, Akande and du Plessis (n 725) 22.

7.2.3 The Politics of UNSC Referrals

UNSC ICC referrals do not necessarily reflect the will of the community of states,⁷⁵² and with the court being used as a foreign policy tool by powerful states UNSC referrals are unevenly applied.⁷⁵³ The UNSC's reasoning behind the referral of the Libya situation has been criticised for its use of the ICC.⁷⁵⁴ The purpose of the referral is claimed to have been done to effect regime change by using the ICC as a political negotiation tactic. Such arguments appear credible because: the stance of NATO, the ICC and the Transitional National Council reflected no place for the Gaddafi regime;⁷⁵⁵ the OTP initiated an investigation uncharacteristically quickly, raising doubts over the Prosecutor's impartiality and his own political motivations;⁷⁵⁶ and finally, the UNSC did not follow up or support the ICC after the overthrow of Gaddafi, indicating a lack of UNSC commitment to the prosecutions.⁷⁵⁷ Similar UNSC inaction is evident in relation to the ICC ASP referrals on non-cooperation by ICC members.⁷⁵⁸

Outside of the UNSC some Western states have used the ICC as a foreign policy tool. Both the Mali and Côte d'Ivoire situations have suffered from the influence of a foreign government pushing for self-referrals.⁷⁵⁹ The colonial history of this intervening state negatively impacts on the perception of justice.⁷⁶⁰ This can be seen as a reduction in ownership perpetrated by a former colonial master. Additionally, the ability of the intervening states to potentially commit international crimes, while subsequently having their actions legitimised as the "heroes" for ICC involvement,⁷⁶¹ is duplicitous and undermines the notion of an independent and fair international court. Thus, it becomes harder to argue for deterrence, reconciliation, promotion of peace and security or TJ as justification for ICC prosecutions.

⁷⁵² Cole (n 749) 677.

⁷⁵³ Chuter (n 501) 172.

⁷⁵⁴ Bassiouni, 'The NATO campaign' (n 714); Kersten 'Between justice and politics' (n 515).

⁷⁵⁵ Bassiouni, *Libya: From Repression to Revolution* (n 626).

⁷⁵⁶ Kersten 'Between justice and politics' (n 515) 463.

⁷⁵⁷ Ibid 467.

⁷⁵⁸ Pursuant to Article 112 Rome Statute, the ASP is the management and oversight body of the court.

⁷⁵⁹ Krever (n 496); Schmitt (n 497).

⁷⁶⁰ Schmitt (n 497) 138 and 142.

⁷⁶¹ Ibid 138; Stahn, 'Justice civilisatrice' (n 515) 61.

Overall, the role envisioned for the UNSC was in the interests of justice alone, but it has subsequently been manipulated into serving the political self-interest of a few powerful states. The handling of the Article 16 deferrals requests, the referral of Libya, and the self-referrals of Mali and Côte d'Ivoire are demonstrative of the inequality of the international system playing out at the international criminal justice level. This undermines African ownership of the processes and reduces agency before the institutions by imposing a hierarchy and unequal approach.

7.3 Conclusion

The ICC has not fully dispensed impartial justice. Instead, it has an almost exclusively African case load which has undermined domestic efforts to pursue justice and does not allow for local contexts. The perception created is of an out of touch discriminatory court going against regional and national interests. Additionally, the international court produces little to no value in promoting peace and security while simultaneously ignoring and undermining African efforts to deal with such matters, despite the AU's mandate. Consequently, the ICC's international criminal justice undermines African ownership creating dependencies and, in the long run, hindering the fight against impunity.

Chapter 5 and 6 of this thesis identified the limitations of ICC accountability and complementarity. Together with the removal of ownership and replication of the international system's inequality, they make the case for an African regional criminal court to remedy the shortcomings.

While it is tempting to dismiss African and AU efforts based on previous failures,⁷⁶² this is overly simplistic and disrespectful. Africa lacks capacity, but this does not justify the disregard shown by the ICC and UNSC. Placing ownership within the continent will reduce dependency on the ICC,⁷⁶³ minimising perceptions of inequality and improving

⁷⁶² Mba Chidi Nmaju, 'A Review of the Shortcomings and Consequences of the African Union's Peace Ideals: The Interventions in Libya and Cote D'Ivoire' (2013) 7 Human Rights and International Legal Discourse 112.

⁷⁶³ Section 7.2.1 of this chapter. On the dependency the ICC creates see Stahn, 'Justice civilisatrice' (n 515) 53.

capacity shortcomings. The continual marginalisation of African states and the double standards adopted by the UN and ICC undermines trust, a fundamental for good international relations and the smooth operation of institutions. Should Africa lose trust in the ICC it will be a result of the international court not living up to expectations, the misuse of its judicial power and the reproduction of the international system's deficiencies.

The need for an African regional criminal court is therefore strongly based in the notion of claiming back ownership for international criminal justice, enabling regional contextualisation, increasing continental capacity and a closer alignment to peace and security and the goals of the AU.⁷⁶⁴ This would move international criminal justice towards a TJ approach at the same time as improving the likelihood of ICL living up to its rationale and purpose.

⁷⁶⁴ On the peace and security goals of the AU see Chapter 2.1 of this thesis.

Chapter 8

The ICC and the Issue of Immunity

When examining UJ Chapter 3 concluded that immunity limits which individuals can be prosecuted, negatively impacting the fight against impunity. However, the ICC is an international court and has explicitly removed immunity as a barrier to prosecution.⁷⁶⁵ To assess whether the ICC's lack of immunity contributes to the need for an African regional criminal court, this chapter seeks to answer whether the ICC creates a customary law immunity exception for all international courts.

One of the founding principles of international law and international relations is the sovereign equality of states.⁷⁶⁶ When the ICC attempted to prosecute a sitting African Head of State (al Bashir) 'the whole backlash then started from there'⁷⁶⁷ between Africa and the international court as immunity seeks to guarantee sovereign equality.⁷⁶⁸ Despite ICC member states waiving immunity before the court,⁷⁶⁹ only former Heads of State and Government have ever been prosecuted before international courts and tribunals. Charles Taylor went before the SCSL when he was no longer Liberia's President; Slobodan Milošević was no longer in power when his own country surrendered him to the ICTY, making any immunity claim by him mute;⁷⁷⁰ and Saddam Hussein was prosecuted by the Iraqi Special Tribunal after the USA overthrew him, although his trial has been heavily criticised for lacking legality and for victor's justice.⁷⁷¹

⁷⁶⁵ Article 27(1) Rome Statute.

⁷⁶⁶ R. P. Anand 'Sovereign equality of States in international law (Volume 197) in *Collected Courses of the Hague Academy of International Law Online* (Brill: Nijhoff 1986) 52 <http://referenceworks.brillonline.com/media/pplrdc/er197_052-100.pdf?id=the-hague-academy-collected-courses/equality-of-states-in-an-unequal-world-a-historical-perspective-197-ej.9789024735211.009_228.4#pagemode=bookmarks&page=1> accessed 19 June 2017.

⁷⁶⁷ Interview with ICC Official (The Hague, The Netherlands, 16 February 2016).

⁷⁶⁸ Chapter 3 of this thesis.

⁷⁶⁹ Article 27(2) Rome Statute.

⁷⁷⁰ Any immunity is waived by the state of nationality in such an instance.

⁷⁷¹ Dave Johns, 'Sadam's Road to Hell: Defining Justice Victors' Justice?' (*FrontLine World*, 24 January 2006) <http://www.pbs.org/frontlineworld/stories/iraq501/defining_victors.html> accessed 20 June 2017; Amnesty International, 'Iraq: Amnesty International deplores execution of Saddam Hussein' (*Amnesty International UK*, 30 December 2006) <<https://www.amnesty.org.uk/press-releases/iraq-amnesty-international-deplores-execution-saddam-hussein>> accessed 20 June 2017.

Consequently, no African state or the AU envisioned one of their incumbent leaders being brought before the ICC without its consent.

However, under UNSC Resolution 1593 the situation in Darfur, Sudan was referred to the ICC and the immunity enjoyed by al Bashir and other senior state officials was considered inapplicable.⁷⁷² While Sudan is not an ICC member state it is a member of the UN and, according to UNCh Articles 25 and 103, members will carry out UNSC decisions and UNCh obligations take precedence over any other international obligation, including customary law.⁷⁷³ Yet Sudan has routinely sought to invoke immunity for al Bashir, as has the AU by encouraging its members not to cooperate with the ICC.⁷⁷⁴ This has led to accusations that the AU and Africa states are seeking to protect their leaders and promote impunity.⁷⁷⁵

While it is of course possible that African states may condone al Bashir's actions and seek impunity for him and other leaders who commit atrocities, this thesis argues that it is the prosecution of a sitting Head of State or Government, the interpretation of immunity under international law and sovereign inequality which is really at stake. As the ICC only has jurisdiction over Sudan due to a UNSC referral, Africa's relationship with the UN and the replication of international inequalities, discussed in Chapter 7, has to be taken into account, in particular the Article 16 deferral requests. Furthermore, the pursuance of the case against Kenyatta and Ruto, even after elected to President and Deputy President of Kenya respectively, led to non-cooperation from the member state. Consequently, the case was dropped due to lack of cooperation and witness tampering.⁷⁷⁶ Yet, the court's decision not to require the presence of the accused during the trial⁷⁷⁷ demonstrates recognition of the interference such prosecutions can have on

⁷⁷² UNSC Res 1593 (n 711).

⁷⁷³ Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunity' (2009) 7 *Journal of International Criminal Justice* 333, 348.

⁷⁷⁴ The AU has publicly condemned the ICC's decision to pursue cases against sitting Heads of State and Government, see Decision on Africa's Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (October 2013); Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII), Assembly/AU/Dec.334(XVI).

⁷⁷⁵ Okoth (n 737) 206.

⁷⁷⁶ *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the withdrawal of charges against Mr Kenyatta, ICC-01/09-02/11-1005 (13 March 2015) (hereafter Kenyatta Withdrawal Decision).

⁷⁷⁷ ICC Press Release, 'Trial Chamber V(b) conditionally excuses Uhuru Muigai Kenyatta from continuous presence at his trial starting on 12 November 2013' (18 October 2013) ICC-CPI-20131018-PR954.

sovereignty and on the day to day running of a country. Most recently, the immunity and sovereignty issues arose again in relation to Libya and the attempted prosecution of Gaddafi and his son Saif.⁷⁷⁸ Following the death of Gaddafi, the matter is no longer before the ICC or the UNSC.

This position is supported by the fact that African states and the AU are 'not saying the ICC is targeting Africans, they are saying the ICC is targeting African leaders'.⁷⁷⁹ This is an important distinction to make as 'there was not much of an outcry, even when we [the ICC] arrested Gbagbo, there was not much of an outcry that we were targeting him, because he was not a leader at that time'.⁷⁸⁰ Similarities are seen in the objections to UJ raised by African states and in relation to Sudan who 'have been cooperating with us [the ICC] initially [...] genuine cooperation, we have got an agreement with the Sudanese Government for them to assist us with arresting the LRA'.⁷⁸¹ It was only when their President was indicted that tensions occurred. The issue here appears to be more one of interpretation of immunity for Heads of State and Government and the respect of sovereignty. How does this interpretation issue contribute to the need for an African regional criminal court? This chapter starts by looking at the two categories of immunity (functional and personal) and whether this has created interpretation differences.

8.1 Immunity Before International Courts and Tribunals

As the number of international courts and tribunals has increased so too has consideration of immunity for international crimes. While it is possible to distinguish between international criminal mechanisms established by the UN and other treaty-based institutions, this section deals with them simultaneously to avoid repetition of the

⁷⁷⁸ HRW, 'Libya: Surrender Saif al-Islam Gaddafi to ICC: Brigade Holding Ex-Leader's Son Alleges He's Free' (*HRW*, 15 June 2017) <<https://www.hrw.org/news/2017/06/15/libya-surrender-saif-al-islam-gaddafi-icc>> accessed 23 June 2017; Stephanie Nebehay, 'Gaddafi son's trial unfair, should be sent to ICC: U.N.' (*Reuters World News* 21 February 2017) <<http://www.reuters.com/article/us-libya-gaddafi-un-idUSKBN1600W8>> accessed 23 June 2017; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Public redacted-Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11-344-Red (31 May 2013).

⁷⁷⁹ Interview with ICC Official (The Hague, The Netherlands, 16 February 2016).

⁷⁸⁰ Ibid.

⁷⁸¹ Ibid.

issues. As with immunity before domestic courts, there are distinct categories of immunity – functional and personal – afforded to the different levels of official.⁷⁸²

8.1.1 Functional Immunity

Functional immunity is not necessarily a barrier to prosecution before foreign domestic courts, although whether this is a customary rule or treaty law exception is less clear. For a custom to create an exception the three elements of duration and consistency, generality of practice, and *opinio juris* (accepted as law) must be satisfied.⁷⁸³ The customary rule exception was first articulated in the ICJ *Arrest Warrant* judgment and then restated in the *Certain Immunities* case and is typically based on the nature of the crime or the nature of the tribunal.⁷⁸⁴ These two factors will be the focus of this section to explore whether it reflects the doctrinal position.

First, the nature of the crime being international in character is repeatedly used as justification for removing immunity before international and foreign domestic courts.⁷⁸⁵ There is ample state practice for setting aside low-level state officials' functional immunity but less so for more senior officials.⁷⁸⁶ Arguing that the nature of the crime is *jus cogens* (compelling law) is highly controversial, as even when courts have relied on it as part of their reasoning it was to reinforce jurisdiction claims and not as a basis in itself.⁷⁸⁷ Cassese finds functional immunity undermines international criminal justice and the Nuremberg trials' paradigm of the irrelevance of official capacity, which creates an international obligation to exercise jurisdiction.⁷⁸⁸ However, it is unclear why he does not distinguish between criminal responsibility and immunity in the analysis. Additionally, the creation of an obligation on states to exercise jurisdiction is problematic as it is difficult to implement. Cole's argument that the *jus cogens* obligation has reached customary law status overriding sovereign immunity is based on the ICC provisions and international human rights laws' accountability requirements.⁷⁸⁹ Yet, it is

⁷⁸² See Chapter 3 of this thesis.

⁷⁸³ Crawford (n 295) 24-27; Chapter 3.2.2 of this thesis.

⁷⁸⁴ *Arrest Warrant* case Joint Separate Opinion, para 89; *Jurisdictional Immunities* case, para 78.

⁷⁸⁵ Chapter 3.3.1 of this thesis.

⁷⁸⁶ Cassese et al. (n 9) 241.

⁷⁸⁷ Yang (n 335) 429.

⁷⁸⁸ Cassese et al. (n 9) 247-8.

⁷⁸⁹ Cole (n 749) 686 footnote 111.

hard to see how this obligation has reached the status of customary international law,⁷⁹⁰ particularly given human rights treaties typically do not impose individual criminal responsibility.⁷⁹¹

Second is the nature of the tribunal. As the ICJ rightly stated immunity does not equate to impunity due to the possibility of an international criminal court having jurisdiction.⁷⁹² Before these judicial mechanisms there is a trend denying functional immunity, although it must be noted that these tribunals benefit from provisions explicitly addressing immunity. For example, the ICTR Statute Article 6(2), ICTY Statute Article 7(2) and SCSL Statute Article 6(2) adopt identical wording whereby '[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.' Consequently, a state official is prevented from using immunity as a procedural plea in the proceedings.

Yet, this is not to say there is complete removal of immunity under international law as the nature of the tribunal and court has played an important role in the exclusion. The UN ad hoc tribunals (ICTY and ICTR) were unique in their being established pursuant to UNSC Chapter VII powers, benefitting from the associated binding nature of the provisions and ability to disregard international law principles and rules.⁷⁹³ When it comes to the other treaty based institutions, like the SCSL and ICC, the immunity provisions are only applicable to state parties, those non-state parties who formally accept jurisdiction, and those non-state parties referred to the court by a UNSC resolution.

Despite the ICJ being unable to find a customary exception for personal immunity it has been said there is a functional immunity exception.⁷⁹⁴ All international criminal courts and tribunals have precedent and provisions addressing immunity, supported further by

⁷⁹⁰ Chapter 3.3.1 of this thesis.

⁷⁹¹ Yang (n 335).

⁷⁹² Such as The International Criminal Court; the UN ad-hoc tribunals of The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda; the hybrid courts of The Special Court for Sierra Leone, Special Tribunal for Lebanon, the Extraordinary Chambers in the Courts of Cambodia, The Special Panels of the Dili District Court, and The Extraordinary African Chambers.

⁷⁹³ Article 25 and 103 UNCh.

⁷⁹⁴ *Arrest Warrant* case Judgment, para 59.

the lack of legal argument challenging the approach to functional immunity. The ICJ *Arrest Warrant* case expressing the possibility of an international court having such jurisdiction demonstrates there was an envisioned situation in which immunity was not a barrier to proceedings. The ICTY then took up this role and addressed the matter in the Milošević,⁷⁹⁵ Krištić,⁷⁹⁶ and Blaškić⁷⁹⁷ cases, finding a valid immunity exception provision. Whereas the ICTR had no challenges to its exercising jurisdiction where functional immunity could be argued, similarly the ICC has had little challenge over the prosecution of former President Laurent Gbagbo.

The lack of state objection to the above prosecutions, especially Milošević, is used as evidence for state acceptance of the immunity exception, but this is unpersuasive. While the judicial bodies have found immunity inapplicable, the institutions are limited in scope, both geographically and temporally. Thus, the impact of the immunity exception is narrow because most states are unlikely to object to the lack of protection when there is little to no chance of it applying to them, as such these courts would be perceived as a "safe court".⁷⁹⁸ The same holds true for the ICC as immunity is waived by state consent, ensuring states control before which court and under what circumstances they do not have immunity. Taking into account the lengthy negotiations and debate surrounding the ICC's establishment it is impossible to extend this agreement to any subsequent international court without explicit state agreement. Additionally, the lack of universal membership to the ICC further erodes any claims that states have not objected and accepted a customary exception to immunity. Accordingly, the lack of state objection is not acquiescence to the creation of a customary exception.

Overall, as customary international law requires *opinio juris*, the most state practice can be said to reflect is the acceptance of an exception to immunity before specific courts and tribunals based on either a Chapter VII decision or limited applicability due to a bilateral/multilateral treaty. To conclude otherwise would contradict the general

⁷⁹⁵ *Prosecutor v. Milosevic* (Decision on Preliminary Motions) ICTY-IT-99-37-PT (8 November 2001) para 28 <http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm> accessed 14 March 2017.

⁷⁹⁶ *Prosecutor v. Kristic* (Decision on Application for Subpoenas) ICTY-IT-98-33-A, (July 1, 2003) para. 26.

⁷⁹⁷ *Prosecutor v. Blaskic* (Objection to Issue of Subpoenae duces tecum) ICTY-95-14-AR 108 bis (29 October 1997) para 38-42.

⁷⁹⁸ On the selectivity of justice and the notion of safe courts, see Cryer, *Prosecuting International Crimes* (n 312) 232-238.

principles and rules on treaty law, such as Article 34 under the Vienna Convention on the Law of Treaties (VCLT) which prevents third parties from being bound by treaty provisions they are not a party to. Otherwise, it would enable states to do collectively what they are not entitled to do individually, therefore despite the Nuremberg trials, the ICTY, and SCSL incorrectly finding there is a customary law exception,⁷⁹⁹ it is more accurate to say that there is evidence of such a trend emerging but it has not yet reached the status of a custom.⁸⁰⁰

8.1.2 Personal Immunity

The claim there is 'customary international law which creates an exception to Heads of State immunity' before international courts⁸⁰¹ is not universally accepted.⁸⁰² As a principle of international law states enjoy immunity⁸⁰³ which provides the basis for individual immunity for state officials.⁸⁰⁴ The argument for this customary law exception is based on four grounds: the ICJ *Arrest Warrant* judgment holding that international courts *may* have jurisdiction and are not barred by immunity; functional immunity's rationale lacks applicability before international courts; international practice supports the exception; and the prioritisation of human rights through broadening of its protection and increased accountability.⁸⁰⁵

First, relying on the ICJ judgment is problematic. While the DRC's Minister of Foreign Affairs immunity was upheld, there is a lack of clarity as to whether the immunity

⁷⁹⁹ Cassese et al. (n 9) 242-5. There is an argument that the ICJ implicitly recognises the exception. However, it is hard to see how because the court stipulated situations where function immunity is possibly inapplicable, not that there is a customary rule exception.

⁸⁰⁰ The opposite view is adopted by Cassese which this author finds to be based on normative reasoning as opposed to doctrinal. Ibid 245.

⁸⁰¹ *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09, Pre-Trial Chamber (12 December 2011) para 43 (hereafter Malawi Decision); Dapo Akande 'ICC Issues Detailed Decision on Bashir's Immunity (...At long last...) But Gets the Law Wrong' *EJIL: Talk!* (15 December 2011) <<http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir-s-immunity-at-long-last-but-gets-the-law-wrong/>> accessed 14 March 2017; Micaela Frulli, 'Piercing the Veil of Head-of-State Immunity: The Taylor Trial and Beyond' in Charles Chernor Jalloh (ed), *The Sierra Leone Special Court and its Legacy* (Brill: Nijhoff 2015) 329.

⁸⁰² O'Keefe, *International Criminal Law* (n 333) 545; Cole (n 749) 686.

⁸⁰³ Yang (n 335) 426; Martin Dixon, Robert McCorquodale and Sarah Williams, *Cases & Materials on International Law* (5th edn, OUP 2011) 304.

⁸⁰⁴ Chapter 3.3 of this thesis.

⁸⁰⁵ Cassese et al. (n 9) 320-2.

discussed by the ICJ was personal or functional.⁸⁰⁶ The inclusion by the ICJ of a jurisdictional condition (that international courts 'may' have jurisdiction)⁸⁰⁷ prevents such courts from automatically ignoring an immunity defence. The practice of other international courts and tribunals does not support the exclusion either. The ICTY and ICTR statutes explicitly prevents immunity from being a procedural barrier,⁸⁰⁸ as does the Rome Statute.⁸⁰⁹ It is impossible to rely on the ICC provision to support an exception claim as the Rome Statute does not apply to all states and uncertainty surrounds its applicability to non-state parties.⁸¹⁰ The ICC's Article 27(2) immunity provision has been confirmed by the court as a waiver of immunity by its member states and for those states accepting the jurisdiction pursuant to an Article 12 declaration.⁸¹¹

Second, the personal immunity of Head of State and Government and senior state officials' is based on state immunity - the prevention of interference and adjudication of a state's actions by another state, and the principle of sovereign equality and good relations amongst states.⁸¹² International courts may not appear to impact on state relations and sovereign equality in the same way as domestic courts⁸¹³ because they deal with vertical not horizontal relationships.⁸¹⁴ However, that is illogical as international courts 'are often created by states'⁸¹⁵ and to pretend otherwise would permit states to do collectively what they are unable to do individually, subverting the underlining rationale of immunity.⁸¹⁶

Despite the often held assumption that international courts are impartial and independent, the reality is politics do play a role. For example, the ICC's independence was queried over the referral of the Sudan situation and the use of the court as a political

⁸⁰⁶ Tladi, 'The Immunity Provision' (n 333) 6.

⁸⁰⁷ Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98(3) *The American Journal of International Law* 407, 418.

⁸⁰⁸ Article 7(2) and Article 6(2) respectively.

⁸⁰⁹ Article 27(2).

⁸¹⁰ Contrast Akande, 'International Law Immunities' (n 807) and Cole (n 749) 687, with Cassese et al. (n 9) 324-5.

⁸¹¹ Malawi Decision, para 18.

⁸¹² Chapter 3.1 of this thesis.

⁸¹³ On this argument as made by the ICC, see Ssenyonjo (n 661) 410.

⁸¹⁴ Akande, 'International Law Immunities' (n 807) 416; Cassese et al. (n 9) 324-5; Fox and Webb (n 328) chapter 2.

⁸¹⁵ Akande 'ICC Issues Detailed Decision' (n 801)

⁸¹⁶ *Ibid*; Akande, 'International Law Immunities' (n 807) 418.

tool by the UNSC and the international community.⁸¹⁷ Additionally, the donor pressure placed on Malawi to arrest and surrender al Bashir, should he have attended the scheduled AU Summit there, directly resulted in the decision of Malawi to no longer host the Summit to avoid addressing the immunity issue.⁸¹⁸ It is difficult to claim there is no interference when financial aid is used as a political tool to achieve the prosecution of a Head of State. While not the action of the international court itself the matter still goes to the crux of immunity's rationale, preventing state interference and protecting sovereign equality of states. Furthermore, the ICC, in its concession to excusing Kenyatta's appearance before the court, recognised that its actions can interfere in a Head of State discharging his duties.⁸¹⁹

Third, the nature of a tribunal as a customary rule exception argument also suffers from deficiencies. Relying on the SCSL's prosecution of Charles Taylor is flawed as the judgment has been criticised for incorrectly stating the law and for its inappropriate legal justifications.⁸²⁰ While the jurisdiction stemmed from the nature of the court being an international tribunal,⁸²¹ this confused the tribunal's nature with its legal foundation. The SCSL sought to place its establishment within the UNCh Chapter VII framework, however the statute is actually a bilateral treaty institution and not a Chapter VII court.⁸²² Thus, the SCSL is distinct from the ICTY and ICTR, which were established pursuant to a Chapter VII decision. Unlike the SCSL, The ICTY and ICTR's decisions are binding on all UN member states, as per Article 25 UNCh, and the UNSC was able to set aside a principle of international law (the immunity of Heads of States and Government).⁸²³ Nevertheless, the SCSL judges did not rely on the Chapter VII framework to deny immunity.

⁸¹⁷ Lee J. M. Seymour, 'The ICC and Africa: Rhetoric, Hypocrisy, Management, and Legitimacy' in Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (CUP 2016) 119.

⁸¹⁸ Ssenyonjo (n 661) 393.

⁸¹⁹ ICC Press Release, 'Trial Chamber V(b)' (n 777).

⁸²⁰ Micaela Frulli, 'The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities?' (2004) 2 *Journal of International Criminal Justice* 1118, 1123.

⁸²¹ *Prosecutor v. Charles Ghankay Taylor* (Decision on Immunity from Jurisdiction) SCSL-2003-01-I (31 May 2004) para 49 and 53.

⁸²² Established by agreement between Sierra Leone and the UN and not with the UNSC. See Frulli, 'Charles Taylor's Immunity' (n 821) 1124.

⁸²³ O'Keefe, *International Criminal Law* (n 333) 498; Frulli, 'Piercing the Veil' (n 801) 327-8; Frulli, 'Charles Taylor's Immunity' (n 821) 1119-1127; Akande, 'International Law Immunities' (n 807); for an alternative view see Cassese et al. (n 9) 321-2.

The ICC, adopting an opposing approach, held a referral of non-state parties by the UNSC provides evidence to the customary rules on immunity.⁸²⁴ Such reasoning is nonsensical as it is highly questionable whether states such as China, Russia and the USA consider their participation in the UNSC referral as accepting all Heads of States' immunity is excluded before the ICC because it is an international court.⁸²⁵ Additional arguments for the ability of the ICC to set aside customary international law immunity utilise the court's framework and the primacy of the Rome Statute before that of treaties and principles of international law, therefore Article 27(2) applies over any customary rule.⁸²⁶ However, the ICC is not part of the UN system, unless related to a UNSC referral, and has no 'superior authority over other international conventions'.⁸²⁷

Further doubts over state practice arise as, despite successful prosecution of certain sitting state officials, no incumbent Heads of State and Government or senior state officials have ever been successfully prosecuted. As discussed on page 163, Charles Taylor, Saddam Hussein and Slobodan Milošević were former Heads of State when prosecuted. Similarly, before the ICC, Laurent Gbagbo is the former President of Côte d'Ivoire. The immunity issue for the international court's attempted prosecution of an incumbent Heads of State (Uhuru Kenyatta) was negated because Kenya is a member state and any immunity has been legally waived.⁸²⁸ Regarding non-member states Sudan and Libya, the removal of immunity is based on the UNSC's ability to set it aside as part of the referral. While the immunity issue has become moot following Gaddafi's death, for al Bashir it is still highly controversial.⁸²⁹ Consequently, the state practice does not support the customary exception to immunity.

It is also impossible to ignore the fact that the ICC is not a universal court as over one third of all states are non-members. As customary law requires *opinio juris* and state practice, the non-member states' conduct together with the limited scope of the ICC and its express immunity provision does not satisfy this. Furthermore, this conduct may be categorised as a persistent objector as the objection is clear.⁸³⁰ Although in this author's

⁸²⁴ Malawi Decision, para 43; Akande, 'The Legal Nature of Security Council Referrals' (n 773).

⁸²⁵ Akande 'ICC Issues Detailed Decision' (n 801).

⁸²⁶ O'Keefe, *International Criminal Law* (n 333) 546.

⁸²⁷ Fox and Webb (n 328) 562.

⁸²⁸ The case has subsequently been withdrawn, Kenyatta Withdrawal Decision. On the waiver of immunity see the Malawi Decision, para 18.

⁸²⁹ Cassese et al. (n 9) contrasted with Akande, 'International Law Immunities' (n 807).

⁸³⁰ Crawford (n 295) 28.

view it is more than mere persistent objector behaviour and rather a lack of evidence for state practice, especially when considering the concept of 'safe courts' and the accompanying influence of the lack of state objection.⁸³¹

Finally, it is hard to dismiss the increase in accountability mechanisms and their expanding scope, especially given the permanent nature of the ICC. However, while international law is broadening the scope of human rights protection and accountability, this is not through criminalising conduct but rather by obligating states to suppress such conduct. This misunderstanding is explained by Xiaodong Yang as the criminal and penal terminology used within human rights conventions creates a false sense of individual responsibility, while not acknowledging such treaties impose only state liability and the opportunity to pursue civil remedies and compensation.⁸³²

The human rights prioritisation seen in Cassese's argument that upholding immunity 'would mean to bow to traditional concerns of the international community (chiefly, respect for state sovereignty)', whilst respecting human rights and justice demands state sovereignty be overridden by the international community.⁸³³ This is unpersuasive as merely arguing the moral justification for a customary rule exception does not make it legally true. State practice and the situations in which immunity is removed are not trumped by any customary international law or *jus cogens* norms of human rights.⁸³⁴ Thus, the fourth and final ground for a customary law exception focuses on a normative argument to advance a desirable standard of behaviour while disregarding certain doctrinal aspects.⁸³⁵

Overall, the arguments for a personal immunity customary law exception are not convincing. There is inadequate duration and consistency of practice and no generality of practice or *opinio juris*.

⁸³¹ See section 8.2.1 of this thesis.

⁸³² Yang (n 335) 427-8.

⁸³³ Cassese et al (n 9) 245-6.

⁸³⁴ On *jus cogens* and immunity see Chapter 3.5.2 of this thesis.

⁸³⁵ On the distinction between normative and doctrinal debates see Tladi, 'The Immunity Provision' (n 333) 4.

8.2 Conclusion

Immunity of Heads of State and Government and state officials has played an important role in promoting and securing sovereign equality amongst all states. Yet, the emergence of international criminal justice mechanisms has sought to limit immunity's applicability through specific provisions in the constitutive instruments. The ICC has successfully removed immunity pursuant to Article 27(2) and Article 98 for member states, non-member states accepting jurisdiction, and UNSC referred cases, thus offering the potential for an all-encompassing level of accountability where no one is outside its reach. Consequently, a customary international law exception belief has developed. The conclusion of this chapter disputes this on the basis that the conditions required for a custom to develop have yet to be met. For functional immunity, neither the nature of the crime or the tribunal provides a sufficient argument. Despite the seriousness of international crimes, and the all too common involvement of state officials in their commission, there is no clear exception to immunity based on the conduct being an international crime and the principle of *jus cogens*. While a trend is evident for such an exception emerging this is narrowly confined to specific courts and tribunals.

Furthermore, regarding personal immunity, there is insufficient state practice to support the above assertion. While the *Arrest Warrant* case provides that immunity may be exercised by international courts with jurisdiction and thereby preventing impunity, it is a conditional and not automatic jurisdiction. Additionally, the rationale underpinning immunity stands as politics is inevitably at play within the workings of international courts. The nature of the court also fails to have sufficient *opinio juris* due to the unlikelihood of states intending UNSC referrals to reflect acceptance of the removal of immunity for all Heads of States before an international court. Finally, despite the broadening of human rights protections this is misunderstood as imposing individual responsibility instead of the actual state responsibility through suppressing the conduct. It may be welcomed from a moral and normative standpoint, but the law has not yet developed to such a standard.

The ICC is able to pursue any individual under its jurisdiction regardless of immunity, yet has been unsuccessful and there remain a number of individuals outside its scope. Basing a customary exception on the nature of the crimes is problematic as it implies

other conduct is less serious and subject to immunity. Despite the fact lesser conduct facilitates conflicts and the commission of core international crimes immunity would be upheld. To date, there is no clear customary law exception to immunity. Given this, an African regional criminal court could provide a forum where prosecutions are pursued in an equal and fair manner without politics interfering, and help clarify any customary law exception while furthering the justifications for establishing international courts.

Chapter 9

The Purpose of the ICC

By exploring the various aspects of the ICC framework, practices and policies, this thesis concludes that the limitations of accountability, complementarity, ownership and immunity contribute to the need for an African regional criminal court. This chapter now turns to the purpose of ICL and the ICC to figure out how this contributes to the need for an African regional criminal court based on the theoretical foundation and justification for international prosecutions and courts. The chapter starts by reflecting on the purpose of the ICC before moving to consider how the findings of Chapters 5 to 8 support the rationale for the ICC and international prosecutions. The final section of the chapter draws the above findings together setting out the extent to which there is a need for an African regional criminal court based on the role regional courts play.

It may appear counter-intuitive to analyse these purposes at the end of *Part II*, but to illustrate whether the ICC fulfils ICL's aims, an examination of the international court, its practices and policies was first required.

9.1 The ICC's purpose as evidence of ICL's rationale

Having considered the meaning of punishment within the contrasting normative philosophical approaches justifying its use in Chapter 1, it is now appropriate to consider which theories, aims and purposes are put forward by the ICC.

Chapter 1.2 of this thesis established that ICL is grounded in domestic criminal law, IHR and IHL theories reflecting naturalism, positivism, moral universalism, liberalism, deontological and utilitarian approaches. The background to which has sought to justify the establishment of international courts and their accompanying prosecutions and punishment on the grounds of: seeking retribution; promoting deterrence; contributing to reconciliation; and peace and security. With the emergence of TJ theories, the scope of international courts and prosecutions took on additional roles beyond those traditionally seen in ICL. This section sets out the enumerated purpose of the ICC to gauge which of ICL's rationale and objectives the international court finds it contributes

towards. This will be used to analyse to what extent the ICC furthers ICL, enabling an assessment of the need for an African regional criminal court.

The ICC adopts the moral right approach to sentencing and finds the objective behind it is for retributive and deterrence approaches.⁸³⁶ While reconciliation is not directly addressed in terms of punishment, the Trust Fund for Victims is considered by the international court as a means by which reconciliation can be achieved.⁸³⁷ The ICC's contribution towards peace and security is reflected in the international court's argument that it contributes to ending conflicts.⁸³⁸ Finally, the TJ aspirations of the international court are captured by Christian Rodriguez who finds that the ICC 'plays an important role' in those states moving towards 'democratic and human rights norms ... [through] encouraging the development of domestic judiciaries'.⁸³⁹ However, the ICC's policy approach on positive complementarity calls this into question.

Overall, the main justifications for international courts and prosecutions are enumerated in the judgments and work of the ICC. The next section of this chapter questions whether the international court has lived up to its purpose and whether this contributes to the need for an African regional criminal court.

⁸³⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo, et al.* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/0501/13, Trial Chamber VII, (22 March 2017) para 19. Also see *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016) para 67; On deterrence more generally see *The Prosecutor v. Germain Katanga* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/04-01/07-3484-tENG-Corr (23 May 2014) para 37-38; *The Prosecutor v. Jean-Pierre Bemba Gombo* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/05-01/08-3399 (21 June 2016) para 10.

⁸³⁷ ICC, 'How the Court Works' <<https://www.icc-cpi.int/about/how-the-court-works>> accessed 18 October 2018.

⁸³⁸ ICC Press Release 'Justice plays a "crucial role" in maintaining international peace and security: ICC Prosecutor briefs the United Nations Security Council' (24 October 2014) ICC-OTP-20141024-PR1055 <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1055>> accessed 31 January 2017.

⁸³⁹ C Rodriguez, 'Libya and the International Criminal Court: A Case Study of Shared Responsibility' (2013) 4 *People Ideas and Things Journal* <<http://pitjournal.unc.edu/article/libya-and-international-criminal-court-case-study-shared-responsibility>> accessed 12 October 2018.

9.2 The ICC and ICL Rationales in Practice

In this section each of ICL's rationales for establishing international courts will be taken in turn to assess whether the ICC fulfils these stated aims. This will then be used to consider whether there is a need for an African regional criminal court.

9.2.1 Retribution

If retribution is understood in line with the ICTY that prosecutions are not pursued for revenges sake but as 'duly expressing the outrage of the international community at these crimes',⁸⁴⁰ then the ICC is likely to fulfil this purpose. The Trial Chamber expressly stating retribution is a purpose in its sentencing appears to comply with the domestic criminal law understanding of punishment. However, given the theoretical understanding of retribution and the outrage that accompanies the commission of ICC offences, this justification will likely always be expressed by any international court. There are some concerns over the true extent to which retribution can be relied on because of the accompanying societal goals which the ICC, scholars and practitioners place on international courts in contradiction to the theoretical understanding.

9.2.2 Deterrence

In order for deterrence to be met the international court needs to demonstrate that prosecutions before it are a matter of certainty, have an element of immediacy, the punishment imposed is severe and there needs to be comprehensibility of the law surrounding the offences.⁸⁴¹

Taking each factor in turn shows the limited value of deterrence by the ICC. First, with respect to certainty research has shown that deterrence is only effective when accompanied by the likelihood of being caught.⁸⁴² Yet, there is a slim chance of an individual being charged by the international court. As we have seen, the ICC's form of accountability limits which individuals and crimes are brought before it and, together with the international court's complementarity approach, the scope of ICL has been narrowed. The selective nature of the prosecutions is further reflected in the one-sided

⁸⁴⁰ *Prosecutor v. Zlatko Aleksovski* (Judgment) ICTY IT-95-14/1-A (24 March 2000) 185.

⁸⁴¹ See Chapter 1.2.2.1.2 of this thesis.

⁸⁴² Dunbar and Langdon (n 24) 325.

prosecutions, limited ICC membership and the international court's inability to pursue cases against the world's major powers and their allies.⁸⁴³ This uncertainty is not specific to the ICC as the problems are compounded by the specific conflict and temporal limitations placed on the ad hoc tribunal and courts' jurisdiction,⁸⁴⁴ and the weak judicial systems of many states transitioning from a conflict situation to peace.⁸⁴⁵ Therefore, a far greater quantity of international crimes are committed than are brought before either national or international courts. Until this changes and there is a real chance of coming before the ICC, ICL and the ICC will not deter individuals from committing crimes.

One of the greatest challenges for the ICC, in terms of certainty, is the lack of an international law enforcement system negatively impacting the probability of being caught and brought before a court.⁸⁴⁶ Where a state itself is committing the crimes national law enforcement systems are not a viable option. It also may be hard to rely on third states to intervene given other international law principles and obligations surrounding intervention including the principles of sovereignty and territorial integrity.

Immediacy is also sorely lacking. While the ad hoc tribunals took time to be established, the ICC has not fared much better due to the admissibility considerations and the ways of gaining jurisdiction. The time taken between the court opening its first investigation in the DRC in June 2004, the start of the first trial in January 2009 and the reaching of the verdict in March 2012 is deeply concerning. This is exacerbated by the fact that Thomas Lubanga, the accused, had been in ICC custody since March 2006 despite the ability of local courts to prosecute him.⁸⁴⁷

Furthermore, the severity of punishment under ICL and before the ICC has been called into question,⁸⁴⁸ impacting both retribution and deterrence considerations. Many have

⁸⁴³ Chapter 5.1.3 of this thesis.

⁸⁴⁴ Article 1 ICTY Statute; Article 1 ICTR Statute; Article 1 SCSL Statute; Article 1 Statute of the Special Tribunal for Lebanon, U.N. Doc. S/RES/1757 (May 30, 2007) Attachment; and Article 1 Law on the Establishment of the Extraordinary Chambers, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) (Cambodia), as amended by NS/RKM/1004/006 (Oct. 27, 2004).

⁸⁴⁵ 2016-18 Strategic Plan, 33; Drumbl, 'A Hard Look at the Soft theory' (n 32) 4.

⁸⁴⁶ Dunbar and Langdon (n 24) 324.

⁸⁴⁷ Chapter 6.1.2 of this thesis.

⁸⁴⁸ Drumbl, 'A Hard Look at the Soft theory' (n 32) 11.

criticised ICL for treating the extraordinary through ordinary means,⁸⁴⁹ yet the main issue of severity of punishment is evidence of less severe and shorter sentences than domestically established.⁸⁵⁰ For example, the ICC imposed a lesser sentence for Simone Gbagbo than that of the Cote d'Ivoire national courts for the ordinary crimes she was charged with.⁸⁵¹ This is not unique to the international court, there was a mismatch between the sentences meted out by the ICTR, which does not impose the death penalty, with that of the Gacaca courts for which the death penalty is permitted.⁸⁵²

Finally, the comprehensibility of ICL for the average person is questionable and, while a complete answer is beyond the scope of this thesis, it is possible to point to factors which may influence comprehensibility.⁸⁵³ ICL is concerned with actions which are illegal under international law and ideally also under national law. However, this does not take into account those situations where the conduct is legal under domestic legislation or permitted and/or encouraged through official policies, thereby creating conducive environments for such acts to flourish. Additionally, the deterrence theory assumes that the perpetrator is tantamount to the common criminal, meaning, the perpetrator is a rational but deviant actor. Yet, considering the context in which international crimes are committed there is a strong likelihood the perpetrator believes in the moral correctness of his actions and therefore may lack remorse. There may also be a permissive societal environment and ideological cause which facilitated the commission of the crimes.⁸⁵⁴ The perpetrator is unlikely to be a rational actor for deterrent purposes when the perpetrator believes what he is doing is permitted or justified and there is no cost.⁸⁵⁵ Given the strong evidence that international criminals are not motivated by deviant behaviour but rather by political and ideological considerations, or opportunistic, deterrence is a hard aim to achieve.⁸⁵⁶

⁸⁴⁹ Jens David Ohlin, 'On the Very Idea of Transitional Justice' (2007) 8 *Whitehead Journal of Diplomacy and International Relations* 51, 63.

⁸⁵⁰ Drumbl, 'A Hard Look at the Soft theory' (n 32) 11.

⁸⁵¹ Heller (n 590) 638.

⁸⁵² On the consequences for both deterrence and retribution see Damaška (n 77).

⁸⁵³ On the lack of ICL knowledge and the so the so-called Western-type legal systems and rules in Africa see Oko (n 33) 367-8.

⁸⁵⁴ Drumbl, 'A Hard Look at the Soft theory' (n 32) 8; Klabbers (n 44) 252.

⁸⁵⁵ Klabbers (n 44) 264.

⁸⁵⁶ Drumbl, 'A Hard Look at the Soft theory' (n 32) 8; Klabbers (n 44) 252-3.

Overall it is clear that while deterrence is a laudable aim and part of the purpose of ICL taken up by the ICC, the reality of its impact is minimal.⁸⁵⁷ As Jan Klabbers argues, while punishment for the sake of punishment may not sit well with our liberal sentiments, given the limited deterrent impact of ICL it may be the best justification.⁸⁵⁸

9.2.3 Reconciliation

While the extent to which a court can contribute to reconciliation is debatable,⁸⁵⁹ as it is a purpose of ICL and a rationale for the ICC there is a need to consider the justification. The accountability offered by the international court does little to address reconciliation due to the limited number of prosecutions and lack of enforcement powers. The result is that many perpetrators of ICC offences remain at large where it is possible for their victims to come into routine contact with them. The negative effect of this is used by TJ theories to argue for prosecutions and justice to prevent re-traumatisation and the return to conflict/lawlessness as a result of impunity.⁸⁶⁰

In terms of the ICC complementarity, the international court has been limited in its ability to promote reconciliation due to the favouring of certain victims and crimes, and its strict admissibility requirements preventing alternative methods which could better serve reconciliation from being explored.⁸⁶¹ Furthermore, the ICC has been unsuccessful in encouraging national prosecutions for a number of reasons and in some instances has undermined them,⁸⁶² reducing the international court's impact on promoting reconciliation through prosecutions at the domestic level.

9.2.4 Peace and Security

ICL's instrumentalist purpose of maintaining peace and security⁸⁶³ is taken up by the ICC through the international court's efforts to help end conflicts. Yet, it is unclear how a court can contribute to ending conflicts when it conducts its work in ongoing conflict

⁸⁵⁷ M. Cherif Bassiouni, 'Perspectives on International Criminal Justice' (2009-10) 50 *Virginia Journal of International Law* 269; Mullins and Rothe (n 44); Fletcher, 'The Theory of Criminal Liability' (n 17); Klabbers (n 44); Henham (n 23).

⁸⁵⁸ Klabbers (n 44) 265.

⁸⁵⁹ Chapter 1.2.2.1.1 of this thesis.

⁸⁶⁰ See Section 1.2.3 of this chapter.

⁸⁶¹ Chapter 7 of this thesis.

⁸⁶² Chapter 7.

⁸⁶³ On this instrumentalist purpose see Bushnell (n 42).

situations. It might actually have the opposite effect of prolonging a conflict or sustaining a situation.⁸⁶⁴

Additionally, there are concerns over how the ICC has been used to undermine the AU's peace and security agenda as well as the UNSC's use of the international court. While the AU gives way to UNSC decisions on the maintenance of peace and security, conflicting approaches to peace and security can undermine the legitimacy of the international court in this regard. This is seen most clearly in the Libya situation and with the UNSC's lack of engagement with the Article 16 deferral requests and their impact on international peace and security.

9.2.5 Transitional Justice

TJ offers a broader approach to the pursuit of justice than ICL as it incorporates more than criminal prosecutions.⁸⁶⁵ However, the analysis undertaken in this section is limited to the two dominant approaches as identified in Chapter 1.2.3 of this thesis which address TJ and prosecutions: to prevent the re-emergence of lawlessness and/or conflict; and the capacity development and the lasting legacy of prosecutions.

The ICC is mandated to pursue those bearing the greatest responsibility for international crimes. Yet, as *Part II* of this thesis has shown the international court has had to adapt and pursue lower level individuals than originally envisioned. Additionally, only a small number of individuals accused of international crimes have been prosecuted over the twenty year existence of the ICC. Therefore, the chances of victims perceiving perpetrators are benefiting from impunity is high, especially when there is no accompanying national prosecutions or justice initiatives. In spite of this, there is little empirical evidence supporting the claim that ICC prosecutions, or a lack thereof, have led to the re-emergence of conflicts or lawlessness within the situations under investigation. What's more the ICC has tended to ignore the political and social conditions in favour of its own prosecutions, at the expense of local community wishes.

⁸⁶⁴ Recently, in The Gambia, where then President Yahya Jammeh having conceded defeat in the elections, refused to relinquish power due to threats of his prosecution before the ICC. While not excusing his holding on to power, the impact of a potential ICC prosecution contributed to destabilising the situation. Arguably, if ICL and the ICC are to end conflicts and contribute to peace and security, it would have been better for a successful change of leadership before threatening/pursuing criminal prosecutions. 'Showdown in The Gambia' (n 362); Bosco (n 363).

⁸⁶⁵ See Chapter 1.2.3 of this thesis.

Prosecutions are argued by Vsuki Nesah as possessing ‘future orientated capacity building functions ... [and] can constitute a “lasting legacy in the countries concerned”’.⁸⁶⁶ As a permanent court with a limited number of prosecutions it is too early to fully judge the ICC’s legacy, particularly as all the situations under investigation are ongoing. However, what is clear from Chapters 5 to 7 is that there is no capacity development and evidence of a lasting legacy at the national level. Unlike with the SCSL, the ICC’s approach to complementarity, both in terms of admissibility and as a policy, has undermined domestic efforts at prosecutions, kept the international court’s expertise in house, and narrows the focus of investigations through ‘the same person same conduct’ test.

Overall section 9.2 of this chapter demonstrates that despite ICL’s numerous justifications for establishing international courts and pursuing prosecutions, the ICC falls short across all five rationales. Taken together with the international court’s limited accountability, context insensitive pursuit of justice, complementarity approach prioritising prosecutions in the Hague over encouraging national prosecutions and judicial development, and the removal of African state ownership over the justice and peace and security agenda, there is an opportunity for an African regional criminal court to address these shortcomings.

9.3 The Role of Regional Criminal Courts

To date the creation of international courts have been dependent on the UN and the priorities of the international community at large. The result being mechanisms which do not reflect the reality of the offence committed and the situation on the ground. However, should a region develop an accountability mechanism with both ICL and TJ elements, a region-centric approach could be adopted. Within such a mechanism, the region’s priorities and additional purpose could be included. The benefit of a regionalised approach is that it could move accountability from a single state viewpoint to a more inclusive regional one taking into account the transboundary and regional

⁸⁶⁶ Nesah (n 85) 790.

impact of the crimes and actors.⁸⁶⁷ There is also the potential for regional courts to address the shortcomings of the ICC to positively contribute to ICL while supporting (and developing) the basis for establishing international courts.

9.5 Conclusion

The purpose of ICL is to hold individuals accountable, punish as appropriate and simultaneously contribute towards international peace and security. The ability of the ICC to advance these purposes is questionable. While retribution is easily achieved with every successful prosecution, deterrence and reconciliation prove more challenging. In terms of deterrence the ICC's investigations and prosecution's lack certainty, the time taken to bring an investigation to trial reduces the international court's immediacy, its sentencing practice lack severity in comparison to domestic prosecutions for normal crimes, and the level of comprehensibility has yet to be fully demonstrated. Furthermore, the practice of the OTP and the international court has reduced possibilities for reconciliation, while it remains to be seen whether the current ICL system can achieve this. As ICL's aims have expanded what the ICC has to offer has not. The international court has not successfully encouraged domestic prosecutions and its record shows a one-sided bias due to the case selection and privileging of victims and certain crimes. However, the ability to adopt a more transitional justice approach to international criminal justice may provide an opportunity to create a regional system which promotes and better meets the aims of ICL. This will need to be achieved in a different way than that of the ICC which has done little to contribute to TJ in terms of fighting impunity at a local level, capacity development and a lasting legacy in the situations where the international court intervenes.

The argument advanced in this chapter and throughout *Part II* is that the ICC suffers from numerous shortcoming in terms of its infrastructure, policies and practice, which in turn prevent the purpose of international courts and prosecutions from being

⁸⁶⁷ On why a regional approach to transitional justice is worth looking into, see Amy Ross and Chandra Lekha Sriram, 'Closing Impunity Gaps: Regional transitional justice processes?' (2013) *Transitional Justice Review* 3.

achieved. It is these key features and shortcomings which contribute to the need for an African regional criminal court.

Having established there is a need for such a regional court, *Part III* scrutinises the International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights. The aim being to gauge the extent to which the new court will address the identified shortcomings of the international system and contribute to ICL.

Part III

Establishing an African Regional Court

Part III draws on the conclusions of *Part I and II* to answer what contribution the ICLS might make to international criminal justice. Using the evaluative criteria from *Part II* the chapters in this Part make the case that the new court, established under the Malabo Protocol, offers a regional approach to international criminal justice from which Africa would benefit. The ICLS is a unique court with wider reaching aims than either the ICC or ICL's original purposes cater for. The new court offers a broader form of accountability addressing both crimes and actors which more accurately reflect the experience of Africa than the international court does. The continental structure is reflected within the complementarity envisioned, which will likely encourage prosecutions at the national, (sub)regional, and international level. Chapter 13 argues that the opportunity for African ownership to be significantly improved is provided by the ICLS provided the new court is situated within the AU framework, specifically, within APSA. The final chapter of *Part III* focuses on the most controversial aspect of the new court – the immunity provision. Chapter 14 argues that while the provision is unwelcome on a normative level, from a doctrinal perspective it does not violate international law. Additionally, the immunity, which is concluded as being personal immunity, is not actually the doom and gloom picture that the literature makes out. Instead, it appears to be a reflection of African states' concerns over the erosion of sovereignty and the protection the provision offers is confined to a very select few.

Despite the positive picture painted, *Part III* does raise the weaknesses and challenges the adoption of the Malabo Protocol presents to international criminal justice. The AU's institutional weakness are made clear, while the deficiencies in the Protocol's provisions are placed in their context. Overall, *Part III* argues that the ICLS offers a means through which to promote Pan-Africanism and solutions to the international system's shortcomings, although in an imperfect manner.

Chapter 10

The International Criminal Law Section of the African Court

UJ prosecutions and the ICC are flawed tools for addressing international crimes. However, does the AU's proposed regional criminal court offer solutions to the international system's shortcomings? The first step in answering this question is to examine the purpose of the ICLS to establish any similarities with ICL and the ICC. Thus, this chapter delves into the aims and objectives set out in the new court's constitutive instrument – the Malabo Protocol. Also considered is whether the AU's approach to justice influences the ICLS' purpose and how, if at all, this contributes to addressing the international system's shortcomings.

The establishment of the ICLS is alleged to be driven by anti-ICC sentiments,⁸⁶⁸ but interviews conducted with African state and AU officials do not reflect this. Instead four key motivations were revealed: the abuse of the UJ principle; the indictments against sitting African leaders; the selectivity of ICC justice and African concerns being ignored by the international system; and as part of the fight against impunity.⁸⁶⁹ Also, the consultant hired to draft the Malabo Protocol includes the need to create the crime of unconstitutional change of government as per the ACDEG.⁸⁷⁰

The AU's official decisions and reports show support for the development of international criminal justice approaches beyond those available at the international level.⁸⁷¹ The preference is for a local or regional approach in contrast to the context insensitivity of the ICC and other non-African states' jurisdiction.⁸⁷² In fact, Egypt felt it

⁸⁶⁸ du Plessis, 'A New Regional International Criminal Court' (n 2) 289.

⁸⁶⁹ Interviews with African State and African Union Officials (Addis Ababa, Ethiopia, April - June 2015).

⁸⁷⁰ Deya (n 228). See ACDEG Article 25(5), 'Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union'.

⁸⁷¹ EX.CL/478 (XIV) (n 252) 14; AU-EU Expert Report; Progress Report of the Commission on the Hissene Habre (n 252).

⁸⁷² see Libya and Sudan's position in the Report of the Meeting of Ministers of Justice and/Or Attorneys General on Legal Matters 14 and 15 May 2012, Addis Ababa, Ethiopia Min/Legal/Rpt. (part of EX.CL/731 (XXI)) 4.

was an important development for the African Court to have international criminal jurisdiction.⁸⁷³

Whatever the motivation, the Malabo Protocol is an innovative and bold approach as a regional criminal court has not been attempted before.⁸⁷⁴ While the motivations for establishing the African Court are multifaceted, if the ICLS is anti-ICC one would expect this to be reflected in its purpose, and consequently, on its ability to address the international system's shortcomings.

10.1 The ICLS' Aims and Objectives

The ICC is an independent criminal court, whereas the ICLS is part of the judicial organ of the AU. How this structure impacts the new court's purpose is the first point explored.

Under the AUCA the African Court of Justice (ACJ) is the 'principal judicial organ of the Union'.⁸⁷⁵ Following the merger of the ACJ with the African Court on Human and Peoples' Rights (ACtHPR)⁸⁷⁶ the ACJ was replaced as the AU's judicial organ by the merged African Court of Justice and Human Rights.⁸⁷⁷ With the Malabo Protocol the ICLS was introduced into the merged court, which was renamed the African Court of Justice and Human and Peoples' Rights (African Court).

Although the AUCA is silent as to the role of its judicial organ, the Malabo Protocol clearly sets out the objectives and the principles meant to guide the African Court's work. The African Court is to play a 'pivotal role' in advancing the AU's institutional aims and direction,⁸⁷⁸ strengthening commitments to peace and security, and 'promot[ing]

⁸⁷³ Ibid 4.

⁸⁷⁴ The European Union has proposed a more limited body, the European Public Prosecutor's Office, to 'investigate and prosecute EU-fraud and other crimes affecting the Union's financial interests'. http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm accessed 25 June 2017.

⁸⁷⁵ Article 2 Protocol of the Court of Justice of the African Union. Article 5(1)(d) AUCA establishes the ACJ as an organ of the Union and Article 18 provides for the Court of Justice's establishment.

⁸⁷⁶ AU Assembly, Assembly/AU/Dec.45 (III) Third Ordinary Session, 6-8 July 2004, Addis Ababa, Ethiopia; Assembly/AU/Dec.83(V) Fifth Ordinary Session, 4-5 July 2005, Sirte, Libya.

⁸⁷⁷ Article 1 Protocol on the Statute of the African Court of Justice and Human Rights.

⁸⁷⁸ Preamble Malabo Protocol.

justice and human and peoples' rights'.⁸⁷⁹ Such purposes are seen in ICL's justification for international courts as a contributor to peace and security and the need to strengthen the protection of individual human rights.⁸⁸⁰ At the same time, 'the political and socio-economic integration and development of the Continent' is to be promoted.⁸⁸¹ Such a role is unprecedented for an international court and is not envisaged under ICL's original purposes of retribution, deterrence and reconciliation, but is more reflected of TJ. The additional new court's purposes are in contrast to the ICC's which, as an independent court, does not have to reconcile with other organisations' objectives or consider the political integration or socio-economic development of its member states.⁸⁸²

The ICLS acts as a preventative body by complementing 'national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples' rights'.⁸⁸³ By ensuring accountability and deterring future violations the new court is in keeping with ICL's purpose. But, as this thesis concluded, the ICC's deterrent effect has been minimised by its selective prosecutions.⁸⁸⁴ Thus, the ICLS will need to avoid this as the new court's ability to deter future crimes is dependent on the immediacy and certainty of its prosecutions, the severity of its punishment and the comprehensibility of its decisions.⁸⁸⁵

Like UJ prosecutions and the ICC, the ICLS is to contribute to the AU's 'commitment to fighting impunity'.⁸⁸⁶ However, the authenticity of the AU and African states' commitment has been questioned because of the Malabo Protocol's immunity provision.⁸⁸⁷ Such claims demonstrate an inadequate understanding of the organisation's aims, objectives, programmes and its conceptualisation of justice, reconciliation, peace

⁸⁷⁹ Ibid.

⁸⁸⁰ See Chapter 1.2 of this thesis.

⁸⁸¹ Ibid.

⁸⁸² Chapter 9 of this thesis.

⁸⁸³ Preamble Malabo Protocol.

⁸⁸⁴ Chapter 9.2.2 of this thesis.

⁸⁸⁵ Ibid.

⁸⁸⁶ Preambular para 12, Malabo Protocol. On the AU's principles see Article 4 of the AUCA, particularly Article 4(o).

⁸⁸⁷ Simon Alison, 'AU members decide this week on whether leaders accused of serious crimes by the African Court will get immunity' (*JSS Today*, 24 June 2014) <<https://issafrika.org/iss-today/think-again-at-the-new-african-court-will-power-mean-impunity>> accessed 20 June 2017; Interview with African State Official (Addis Ababa, Ethiopia, 8 May 2015).

and security. The genuineness of certain African states to ending impunity may be doubted,⁸⁸⁸ but the Malabo Protocol is not evidence of such.

A more accurate assessment is that, for the AU and its member states, it is a matter of timing and not the prosecutions themselves which raise concerns, as seen in the debates on al Bashir's arrest warrant and the referral of Libya to the ICC.⁸⁸⁹ For the AU, a criminal prosecution that ignores the peace and security imperatives should be resisted⁸⁹⁰ as judicial measures can further obscure the dynamics of the varied and complex issues surrounding conflict resolution and post-conflict reconstruction.⁸⁹¹ While not excusing the inadequate and sometimes stalled efforts of the AU, it should not be forgotten that the AU is a young institution still finding its identity. It has to address a plethora of justice and peace and security issues with limited capacity and capability. At the same time, the organisation is trying to work within the international system alongside the often (perceived) marginalisation of their efforts and preferred approaches.⁸⁹²

The picture emerging is one of an ICLS intrinsically linked to the AU's organisational aims and objectives.⁸⁹³ Thus, the importance of peace and security, the defence of sovereignty and Pan-Africanism cannot be ignored by the new court, as these are fundamental to the organisation.⁸⁹⁴ Yet, these notions do not appear as part of the original purposes of ICL or the ICC. Instead, the ICLS has to mix ICL's purposes with those of a political organisation designed to address the multifaceted challenges of Africa. It will be up to the new court to reconcile the AU's institutional objectives with ICL's more traditional ones, particularly in terms of contributing to peace and security.

The fact the AU has linked justice with peace, reconciliation and its internal structure entwines politics and the new court. Given that the ICC has been unable to prevent politics from creeping into its work, despite claiming to be an apolitical entity, the ICLS

⁸⁸⁸ Ibid.

⁸⁸⁹ See Chapter 7.2.2 of this thesis.

⁸⁹⁰ On how the different framing of conflict analysis leads to different approaches see Sarah Nouwen, 'The Importance of Frames: The Diverging Conflict Analyses of The United Nations and The African Union' (2013) 107 Proceedings of the ASIL Annual Meeting 330.

⁸⁹¹ Interview with African State Official (Pretoria, South Africa, 11 November 2015).

⁸⁹² Chapter 7 of this thesis.

⁸⁹³ Articles 3 and 4 AUCA.

⁸⁹⁴ Chapter 2.1 of this thesis.

as an AU organ adopts a different approach. An acknowledgment of a level of politicisation within the pursuit of ICL is reflected in how the AU understands and conceptualises justice, the new court and its approach to peace, security and continental development. This then enables a different discussion which forces the questions and uncertainties raised in *Part II* over the purpose of ICL and the intended outcomes of establishing international criminal courts to be confronted.

10.2 African Notions of Justice

The previous section has shown how the ICLS' placement within an AU organ has expanded the new court's purpose beyond that of the ICC. This section investigates whether the AU's notion of justice impacts the new court's purpose and addresses the international system's shortcomings.

In developing an approach to justice the AU has produced a number of reports and recommendations regarding conflicts and accountability which have been institutionalised.⁸⁹⁵ While no legal obligations are imposed on member states, the reports' value is in their indicating the AU's preferred approach and concept of justice.

In keeping with current ICL trends, the primary responsibility for prosecution is placed on states,⁸⁹⁶ and in recognition of the ICC's limitations and in hopes of improving 'broader social functions and [to] leave legacies of change in the justice system' of the state.⁸⁹⁷

The AU's Pan-African heritage is evident in the justice policies as efforts are made to 'entrench African values in international accountability mechanism'.⁸⁹⁸ But, at no point

⁸⁹⁵ For example, the Policy on Post-Conflict Reconstruction and Development (hereafter the PCRD); Report of the African Union High-Level Panel on Darfur (29 October 2009) PSC/AHG/2(CCVII) (hereafter the Mbeki Report); African Union Panel of the Wise, *Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity*, (The African Union Series, International Peace Institute February 2013) (hereafter the Impunity Report); and Draft African Transitional Justice Policy Framework, annexed to Panel of the Wise Impunity Report (hereafter the TJPF).

⁸⁹⁶ Mbeki Report 245; Impunity Report 18.

⁸⁹⁷ Mbeki Report 254.

⁸⁹⁸ Impunity Report 63.

does the organisation seek international criminal justice approaches that do not adhere to core international law principles.⁸⁹⁹ For example, when developing the Policy on Post-Conflict Reconstruction and Development (PCRD) international standards and legal norms were included, but African instruments and approaches were given the same level of respect and status.

A consequence of the above is the linking of justice to reconciliation, human rights and peace. A mirroring of the justifications for the establishment of international courts. These objectives are felt to be 'interconnected, mutually dependent and equally desirable',⁹⁰⁰ particularly because of the overlapping themes and elements surrounding justice and reconciliation.⁹⁰¹ The AU's Panel of the Wise identified that peace, justice and reconciliation are considered a manifestation of the peace versus justice dilemma,⁹⁰² but argue that this is based on two incorrect assumptions: that peace processes are narrowly viewed as 'solely about ending conflicts';⁹⁰³ and that justice is retributive in nature permitting 'prosecution or criminal accountability' only.⁹⁰⁴

For the AU, prosecutions do not play an exclusive role in dispensing justice or in post-conflict situations. Justice is more than merely prosecution because retribution is not the overarching goal.⁹⁰⁵ As Africa was a testing ground for TJ, with both judicial and non-judicial methods used, African values were expressed and influenced the policy and legal approaches adopted.⁹⁰⁶ Similarly, the ICC has recognised how the responsibility to protect doctrine has 'refocused attention on ways to manage and end impunity'.⁹⁰⁷

Despite linking justice to peace and reconciliation, the two are not a 'substitute for robust legal measures', instead prosecutions should complement justice and 'enhance

⁸⁹⁹ Impunity Report 3.

⁹⁰⁰ Mbeki Report, 'letter of transmittal' iv.

⁹⁰¹ This is not the result of a misunderstanding of the concepts but rather the questions asked, Mbeki Report 201.

⁹⁰² For developments in the debate see Mark Kersten, 'Bringing Conflict into the Peace Versus Justice Debate' (*Justice in Conflict*, 9 December 2014) <<https://justiceinconflict.org/2014/12/09/bringing-conflict-into-the-peace-versus-justice-debate/>> accessed 28 June 2017.

⁹⁰³ Impunity Report 11.

⁹⁰⁴ Impunity Report 11.

⁹⁰⁵ TJPF 19.

⁹⁰⁶ Impunity Report 58.

⁹⁰⁷ Impunity Report 63.

the prospect of reconciliation'.⁹⁰⁸ When prosecutions occur they should be at the local, regional and international levels.⁹⁰⁹ Therefore, while accountability is required⁹¹⁰ criminal prosecutions do not play an exclusive role as a wider more encompassing process is advocated for,⁹¹¹ including the development of a package of interventions related to justice.⁹¹² This is something the ICC has been unable to achieve.⁹¹³ For example, the ICC has achieved little in terms of reconciliation in Darfur, Sudan because of the 'dominant discourse on justice and politics in Sudan'⁹¹⁴ and the selective number of prosecutions.

In light of the AU's broader concept of justice, accountability and reconciliation need to be balanced.⁹¹⁵ This requires the root causes of the conflict to be addressed⁹¹⁶ helping create sustainable peace while advancing justice. The AU considers prosecutions are insufficient for dealing with mass violations as the judicial 'mechanism[s] often only satisfies the need of some victims and of directly concerned societies'.⁹¹⁷ As the AU's work on peace and security addresses a wider range of actors and issues than prosecutions, the Draft African Transitional Justice Policy Framework (TJPF) responds to the organisation's overall objective by determining that prosecutions can be supplemented with other measures.⁹¹⁸ The effect of which is to tie the work of the ICLS into the broader peace and security agenda of the AU. This is in furtherance of the peace and security justification for establishing international courts.

Contrary to the ICC's approach the AU finds it impossible to undertake prosecutions during conflicts,⁹¹⁹ except in those instances where the spoilers to the situation are removed from the conflict or peace process as happened in Yugoslavia.⁹²⁰ The ICC has come up against numerous challenges during its investigations in the DRC, impacting

⁹⁰⁸ Mbeki Report 319.

⁹⁰⁹ TJPF 27-29.

⁹¹⁰ Mbeki Report 285.

⁹¹¹ Mbeki Report para 205.

⁹¹² Mbeki Report 317.

⁹¹³ Chapter 5 of this thesis.

⁹¹⁴ Mbeki Report 244.

⁹¹⁵ Mbeki Report introductory note.

⁹¹⁶ TJPF 26.

⁹¹⁷ TJPF 26.

⁹¹⁸ TJPF 26.

⁹¹⁹ Mbeki Report 81.

⁹²⁰ Impunity Report 11.

which cases and situations have been pursued.⁹²¹ Consequently, there is a need to find 'creative ways to address this issue within the limitations of the international law on amnesty'.⁹²² Therefore, compliance and the promotion of African perspectives, not impunity, is the overall goal of improving criminal justice for the AU.⁹²³

Moving beyond the original aims of ICL, the AU adopts a TJ sequencing approach to justice. Prosecutions are to be implemented after peace and reconciliation attempts have been made. This suggests that while prosecutions can contribute to peace and reconciliation they are not the dominant method by which to achieve them. While prosecutions may not be possible during the conflict or peace negotiations, investigations however should be undertaken.⁹²⁴ At the same time, national and international justice initiatives should be included in the ongoing peace talks.⁹²⁵ To balance TJ obligations with the AU objectives of ending conflict, restoring public order and addressing the 'underlying causes of the conflict or repression',⁹²⁶ accountability should not be pursued at the expense of sequencing mechanisms.

The AU is not blind to the challenges sequencing brings, instead the trade-offs produced are recognised and accepted.⁹²⁷ Whenever justice is at issue a contextual approach is needed.⁹²⁸ Unlike the current ICC and ICL approach traditional justice and reconciliation mechanisms have a role in ending impunity. However, not for the most serious violations as the mechanisms are an inappropriate method, ill-equipped to deal with such crimes.⁹²⁹ The inclusion of the traditional mechanisms is part of the AU's holistic strategy⁹³⁰ which views the mechanisms as offering rich possibilities as, by their nature, they are close to victims' groups.⁹³¹

⁹²¹ Chapter 5.2.3 of this thesis.

⁹²² Impunity Report 18.

⁹²³ Impunity Report 11.

⁹²⁴ Mbeki Report 295.

⁹²⁵ Mbeki Report 295.

⁹²⁶ TJPF 14-15 lists more objectives.

⁹²⁷ TJPF 9.

⁹²⁸ TJPF 24.

⁹²⁹ Mbeki Report 198. On the traditional method of paying *diya* in the Sudan context see para 212. On the inappropriateness and challenges in using these mechanisms see van der Wilt 'Universal Jurisdiction under Attack' (n 401) 1063-4.

⁹³⁰ Impunity Report 25.

⁹³¹ Impunity Report 25.

Traditional justice and reconciliation mechanisms help the AU move away from purely retributive justice and are an important part of the process. Yet, their use is dependent on adherence to the African Human and Peoples' Rights Charter (Banjul Charter) and other formal mechanisms.⁹³² Traditional justice mechanisms cannot be used as alternatives to formal criminal prosecutions to perpetuate impunity.⁹³³ When addressing the underlying causes of conflict, the mechanisms are limited to instances where there is a link to socio-economic rights and issues.⁹³⁴

A disconcerting trend is the introduction of a retributive character into these reconciliation mechanisms to prevent ICC jurisdiction.⁹³⁵ As prosecutions of human rights violations are thought to jeopardise reconciliation processes,⁹³⁶ the retributive nature negates any reconciliatory value the traditional mechanisms brought to the table, while ignoring ICL and TJ's other purposes. But care needs to be taken when using such mechanisms as the ability of tribal leaders to positively contribute to peace is not guaranteed.⁹³⁷ Traditional mechanisms are beneficial at the local level, but can pose challenges at the national level. In Sudan, the government has been able to manipulate the traditional mechanisms for their own political purposes.⁹³⁸ Thus, questions should be asked as to whether the mechanisms inadvertently benefit political agendas beyond justice and exactly whose justice is being pursued.

In the pursuit of a TJ approach, the AU's TJPF carves out roles for state and non-state actors to create partnerships. National actors lead in the planning, implementing and monitoring of TJ process; (sub)regional actors act as guarantors and support national actors; continental (AU) actors provide the necessary policy, legislative, technical and financial institutional support; and international actors are to partner with the AU,

⁹³² TJPF 19.

⁹³³ TJPF 19 and 26.

⁹³⁴ TJPF 20.

⁹³⁵ Ifeonu Eberachi, 'Who Will Save These Endangered Species? Evaluating the Implications of the Principle of Complementarity on the Traditional African Conflict Resolution Mechanisms' (2012) 20 *African Journal of International and Comparative Law* 22, 23.

⁹³⁶ Brian Walsh, 'Resolving the Human Rights Violations of a Previous Regime' (1996) 158(3) *World Affairs* 111 as cited in Lyn Graybill and Kimberly Lanegran, 'Truth Justice and Reconciliation in Africa Issues and Cases' (2004) 8 *African Studies Quarterly* 1, 4.

⁹³⁷ Brian A. Kritz and Jacqueline Wilson, 'No Transitional Justice without Transition: Darfur - A Case Study' (2011) 19 *Mich. St. U. Coll. L. J. Int'l L.* 475, 492.

⁹³⁸ Karin Willemsse, 'Darfur Tribal Courts, Reconciliation Conferences and 'Judea' in Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (Cambridge University Press 2016).

REC/RMs and individual states.⁹³⁹ In contrast to the ICC, which limits the role of these other actors, the TJPF seeks an ecosystem in which the various actors work in support of each other. In turn, the reliance on the ICC should be reduced as national and regional prosecutions are strengthened.⁹⁴⁰

Over the years, the AU has developed a notion of justice encompassing elements of both ICL and TJ and promoting the various justifications for establishing international courts. The result is a broad approach including more than prosecutions. The AU's institutional identity and ideology has been key in pushing for Pan-Africanism and greater involvement and ownership of the peace, security, justice and reconciliation processes. Additionally, the AU's experience with the ICC and UNSC has been negative in so far as the ICC's 'impartial use and lack of sensitivity to regional particularities' has gone.⁹⁴¹

Yet, the AU's implementation of its justice approach is not without its own problems. The Mbeki Report has been described as 'a remarkable blueprint'⁹⁴² and that its style 'should be chosen in future situations where there is genuine commitment' to justice.⁹⁴³ But, the AU's unclear strategy to conflict and post-conflict situations has crippled the organisation's ability to effectively discharge its peace, justice and reconciliation mandate.⁹⁴⁴ It is likely the AU's approach overextends the organisation,⁹⁴⁵ compounded by its overlapping mandates with those of the UN and REC/RMs which do not have clearly defined roles and responsibilities.⁹⁴⁶

Still, this alone is insufficient to dismiss the AU's broader approach to justice and lack of focus on prosecutions. The international legal community may have a 'prosecution preference',⁹⁴⁷ but the lens applied by the AU to crisis situations prevents this at the

⁹³⁹ TJPF 58.

⁹⁴⁰ TJPF 28.

⁹⁴¹ Lutz Oette, 'The African Union High-Level Panel on Darfur: A Precedent for Regional Solutions to the Challenges Facing International Criminal Justice' in Vincent Nmehele (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing 2012) 358.

⁹⁴² Ibid 366.

⁹⁴³ Ibid 368.

⁹⁴⁴ Ibid; Gustavo de Carvalho and Amanda Lucey, 'Fractured peacebuilding in the Central African Republic: Lessons for African Union engagement' (ISS Policy Brief 87 July 2016) 7-8; Tatiana Carayannis & Mignonne Fowlis, 'Lessons from African Union–United Nations cooperation in peace operations in the Central African Republic' (2017) 26(2) *African Security Review* 232.

⁹⁴⁵ Oette (941) 369; Graybill and Lanegran (n 936) 8.

⁹⁴⁶ de Carvalho and Lucey (n 944) 5 and 9.

⁹⁴⁷ Miriam Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding

continental level. By taking into account the political context of situations⁹⁴⁸ the AU typically see conflicts as an expression of governance failure and not through a criminal lens.⁹⁴⁹ For example, the UNSC members France, the UK and the USA see Sudan as a criminal state⁹⁵⁰ influencing their push for ICC involvement and prosecutions. Meanwhile, the AU views the situation as a governance issue and 'a failure of ability' by the Sudanese government,⁹⁵¹ influencing the Mbeki Report's approach and the necessity for additional non-prosecutorial mechanisms.⁹⁵² Similarly, the AU's preference for a political approach in Libya can be explained by the organisation's conflict analysis lens.⁹⁵³ This goes to the heart of the tensions between the ICC and AU – whether prosecutions contribute to ending conflicts – which the ICC has not done. As such, the disagreement over certain ICC and UNSC actions and the use of UJ by Western states cannot be seen as 'blanket opposition to justice',⁹⁵⁴ but rather the prioritisation of the TJ and peace and security approaches over retribution and deterrence.

10.3 Conclusion

The ICLS' purpose goes beyond that of the ICC's and the original aims of ICL. As part of the AU's principal judicial organ the new court is to: advance the institution's aims; strengthen the commitment to peace and security; promote justice and human and peoples' rights; promote political and socio-economic integration and development; act as a preventative and deterrent mechanism; and fight impunity. To fulfil these purposes, the new court will need to demonstrate it can: deliver accountability while simultaneously reinforcing that the primary responsibility lies with states; address the underlying causes of conflict; advance African values and leadership; promote ownership; increase national and regional capacity to ensure sustainability; improve peace and security to promote development; and balance accountability with reconciliation.

Transitional Justice' (2002) 15 Harvard Human Rights Journal 39 as cited in Graybill and Lanegran (n 936) 4.

⁹⁴⁸ Nouwen, 'The Importance of Frames' (n 890) 333.

⁹⁴⁹ de Carvalho and Lucey (944).

⁹⁵⁰ Nouwen, 'The Importance of Frames' (n 890) 334.

⁹⁵¹ Ibid 334.

⁹⁵² Ibid.

⁹⁵³ Ibid 331.

⁹⁵⁴ Impunity Report 2.

Part II concluded that the practice of the ICC and its OTP has reduced reconciliation, taken a de-contextualised approach to its investigations and prosecutions, and does not fulfil all of ICL's purposes. Whether the ICLS practice will undermine ICL's and its own purpose remains to be seen. Nevertheless, the ICLS has retributive aspects in its penal nature, but the AU's focus on reconciliation and peace and security, to ensure former enemies are able to peacefully coexist, prevents retribution from being its overarching purpose.

The ICLS, like the ICC, is a judicial mechanism mandated to pursue criminal accountability. It is not for the new court to implement the AU's policies on justice, peace and reconciliation. The ICLS' purpose can contribute solutions to the international system's shortcomings by: first, the AU's notion of justice offering the chance to build on the lessons learned from the international court to go beyond the original purposes of ICL and justification for establishing an international criminal court. Second, the new court can take into account the political context and other factors affecting peace and reconciliation efforts and, at the same time, advance African values and AU objectives. Third, the new court provides scope to build complementary relationships with other (sub)regional and international actors pursuing justice and fighting impunity. This has the potential to contribute to deterrence if prosecutions amongst the different courts are more certain, occur with some form of immediacy, severity of punishment and comprehensibility of ICL are improved.

The true test of how the ICLS's purpose provides solutions to the international system's shortcomings and, thus, the need for an African regional criminal court lies in its elaboration of its aims. The next step is therefore to determine how the new court's approach to accountability, complementarity, ownership and immunity fulfil its purpose and contribute to ICL.

Chapter 11

Accountability Before the African Court

To provide solutions to the ICC's shortcomings the ICLS' accountability will need to address the international court's institutional and jurisdictional limitations. Despite the AU's notion of justice including more than prosecutions, the meaning of accountability used here is the same as in *Part II* – criminal in nature with accompanying penal sanctions – because both the ICLS and ICC are judicial mechanisms. This does prohibit consideration of the African Court's contribution to justice through pursuing state responsibility for human rights violations,⁹⁵⁵ but this is beyond the scope of this thesis.

How can the ICLS positively respond to the shortcomings of the international system? This chapter begins by looking at the geographical and temporal reach of the court, the type of individuals it can prosecute, how jurisdiction is gained, and the offences included. Then the discussion moves to the institutional capacity of the new court supporting its accountability framework, to determine whether this contributes to the need for an African regional criminal court. Lastly, other identified hurdles to ICLS accountability are examined revealing both the differences and similarities to the ICC.

11.1 Jurisdictional Limitations

Chapter 5 concluded that the ICC's accountability is limited by its temporal reach and constrained by its membership. The international court is expected to advance peace and security, but actually can only consider core crimes for which only a select few cases have been pursued in a decontextualized manner, negating the deterrence, reconciliation, peace and security and TJ rationale for the international court. Does the ICLS provide a solution to these limitations?

⁹⁵⁵ This will be pursued by the African Court's Human Rights Section. For criticisms on the Malabo Protocol's impact on human rights see, Manisuli Ssenyonjo and Saidat Nakitto, 'The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting Impunity for African Union Heads of State and Senior State Officials?' (2016) 16 *International Criminal Law Review* 71; Amnesty International (n 1); du Plessis, 'A case of negative regional complementarity' (n 1).

11.1.1 Geographical and Temporal Jurisdiction

Indistinguishable from the ICC, the ICLS sets out its temporal jurisdiction in accordance to the principles *nullum crimen sine lege* (non-retroactivity of the law) and *nulla poena sine lege* (no penalty without law) – only crimes committed after the protocol has entered into force are within the new court’s competence.⁹⁵⁶ The Malabo Protocol will enter into force thirty days after ratification by fifteen AU Member States.⁹⁵⁷ For states which subsequently ratify the protocol, only those crimes committed on or after the date of ratification are within the new court’s jurisdiction.⁹⁵⁸ Accountability is limited by the new court’s inability to deal with past crimes which are left to national courts and the ICC.

Taking its cue from the ICC, only those crimes committed: in a member state’s territory or on board one of its vessels or aircraft; by a national of a member state against a victim who is a national of a member state; or against a vital interest of a member state are within the ICLS’ geographical jurisdiction.⁹⁵⁹ This last condition extends accountability beyond that of the ICC creating an opening to address the underlying causes of conflict and improve peace and security in a region-centric manner.⁹⁶⁰ However, no clarification is provided on what constitutes a vital interest leaving the possibility for misuse of the provision by states by, for example, bringing a claim against a political opponent under the guise of a threat to a vital interest of that state. The effect of which would be to undermine the legitimacy of the new court as a contribution to peace and security and TJ.

As the Rome Statute is open to all states to ratify it has the potential for truly universal membership. The ICLS, as part of a regional organisation’s judicial organ, does not. Membership is restricted to AU member states,⁹⁶¹ that being ‘the Continental African States, Madagascar and other Islands surrounding Africa’.⁹⁶² However, should all African

⁹⁵⁶ Article 46 E(1) ACS.

⁹⁵⁷ Article 11 Malabo Protocol.

⁹⁵⁸ Article 46 E(2) ACS.

⁹⁵⁹ Article 46E bis 2(a)-(d) ACS.

⁹⁶⁰ See section 11.1.4.2 of this chapter.

⁹⁶¹ Article 1 Malabo Protocol.

⁹⁶² Article 1(2) OAU Charter. See Article 27(1) AUCA which restricts ratification of the AUCA to ‘the Member States of the OAU’.

states ratify the Malabo Protocol the new court would offer universal continental accountability.

When ratifying the Malabo Protocol states sign up to all three of the African Court's sections. Yet, given that 'the slow pace of ratifications of all conventions and legal instruments of the AU is [sic] always being raised as a concern [during] almost every summit',⁹⁶³ it is doubtful that the protocol will come into force any time soon. Currently, only thirty out of fifty-five states are members of the ACTHPR.⁹⁶⁴ Even if all thirty states ratified the Malabo Protocol this would still leave twenty-five AU members as non-parties. Getting these twenty-five states to ratify the Malabo Protocol will be a challenge as 'how are they going to buy into this thing [the African Court] if you want them to also assume the criminal element of it'⁹⁶⁵ when they have yet to accept the human rights side of the court.

As a treaty-based institution the Malabo Protocol 'does not create either obligations or rights for a third State without its consent'.⁹⁶⁶ As such non-state parties can accept jurisdiction on an ad hoc basis 'by declaration lodged with the Registrar'.⁹⁶⁷ This method has been successfully used by the ICC to extend its reach when Côte d'Ivoire made a declaration accepting ICC jurisdiction in 2003,⁹⁶⁸ before it ratified the Rome Statute in 2013.

11.1.2 Individuals and Corporations under the Jurisdiction

When the Malabo Protocol is in force the new court will have jurisdiction over crimes effecting or committed in African states. Any individual over the age of eighteen,

⁹⁶³ Interview with African State Official (Addis Ababa, Ethiopia, 29 April May 2015).

⁹⁶⁴ As of the 15 June 2017. <[https://au.int/sites/default/files/treaties/7778-sl-protocol to the african charter on human and peoplesrights on the estab.pdf](https://au.int/sites/default/files/treaties/7778-sl-protocol%20to%20the%20african%20charter%20on%20human%20and%20peoplesrights%20on%20the%20estab.pdf)> accessed 6 April 2018.

⁹⁶⁵ Interview with African State Official (Addis Ababa, Ethiopia, 29 April May 2015).

⁹⁶⁶ Article 34 VCLT.

⁹⁶⁷ Article 46E bis ACS.

⁹⁶⁸ Republic of Côte d'Ivoire, Declaration Accepting the Jurisdiction of the International Criminal Court, 18 April 2003, <<http://www.icc-cpi.int/NR/rdonlyres/7DA08D8E-FF5E-40C8-92D7-F058D5B032F3/279779/ICDE2.pdf>> accessed 15 June 2017.

regardless of nationality, can be prosecuted for committing a Malabo Protocol offence⁹⁶⁹ provided the preconditions to exercising jurisdiction are satisfied.⁹⁷⁰

The exercise of such jurisdiction over non-nationals however may be challenged. For example, the USA's use of Status of Force Agreements with ICC member states has hindered the international court's ability to exercise jurisdiction over American nationals.⁹⁷¹ To avoid replication of this by the USA or any other country the AU and the ICLS should rely on the legal obligation of treaty signatories to not 'defeat the object and purpose' of the treaty.⁹⁷² Additionally, the organisation should call on its members to support the new court and take decisions accordingly.

Where the ICLS does excel in offering a solution to the ICC shortcomings is in the imposition of corporate criminal liability.⁹⁷³ Corporate complicity in African conflicts has been ignored by the ICC because of its individual criminal liability focus.⁹⁷⁴ In contrast, the new court pursues accountability reflective of the realities of the continent and offers improvements to peace and security and TJ by addressing the underlying causes of conflict.

11.1.3 How the ICLS Gains Jurisdiction

Again, the ICC's approach to gaining jurisdiction has shaped the ICLS' accountability with the three ways in which the court gains jurisdiction.⁹⁷⁵ First, with the uncontroversial method of state referral.⁹⁷⁶ Nevertheless, the ICC's use of this provision has raised concerns over the genuineness of the self-referrals to the international court by the DRC and Uganda.⁹⁷⁷ To ensure credibility, the ICLS will need to refrain from repeating the international court's experience and introduce safeguards to prevent states politicising the new court for their own gain.

⁹⁶⁹ Article 46D ACS.

⁹⁷⁰ See Article 46E bis ACS.

⁹⁷¹ On the impact of such agreements see Chapter 5.1.3 of this thesis.

⁹⁷² Article 18 VCLT.

⁹⁷³ Article 46C ACS.

⁹⁷⁴ On corporate complicity see Karolien Bais and Mijnd Huijser, *The Profit of Peace: Corporate Responsibility in Conflict Regions* (Routledge 2005).

⁹⁷⁵ Article 46H(2) ACS. Article 13 Rome Statute.

⁹⁷⁶ Article 46F(1) ACS.

⁹⁷⁷ See Chapter 6.2 of this thesis.

The ability of state referrals to contribute to accountability at the continental level is questionable. Despite the use of the ICC by African states, their track record in referring cases to the regional human rights mechanism is poor.⁹⁷⁸ The AU is trying to change African states' perception of continental mechanisms by calling for more active engagement and unity amongst its members to reform the organisation.⁹⁷⁹

The second way the court gains jurisdiction is by the Prosecutor initiating a *proprio motu* investigation.⁹⁸⁰ This is modelled on the ICC provision which, at the time, many African states supported.⁹⁸¹ That said, not all African states supported the Rome Statute provision⁹⁸² raising doubts over the extent to which the states are happy to grant such powers to the ICLS' Prosecutor. Regardless, the *proprio motu* method for gaining jurisdiction can increase accountability if the Prosecutor receives good quality and credible information. Yet, the inability to prosecute crimes committed in a non-member state can negatively impact on the perception of justice. The ICC has received large volumes of information relating to non-member states which the Prosecutor cannot act on. To avoid this, the ICLS Prosecutor and OTP must provide clear, detailed explanations as to why investigations are not pursued, which will enhance transparency and avoid misunderstandings and misinformation.

In a departure from the ICC, the third method is referral by the AU Assembly or Peace and Security Council (PSC).⁹⁸³ The provision pays deference to the AU's policy making organs with a peace and security mandate which can issue legally binding decisions. It also reflects the peace and security justification for establishing international courts by linking the work of the new court to these organs. The Assembly is composed of Heads of State and Government who meet twice yearly (usually end of January and June), too infrequent to ensure referral of situations befitting such prosecutions. The PSC meetings however are need dependent with the body being comparable to the UNSC with a rotating fifteen state membership. While the UNSC's use of its referral power and the

⁹⁷⁸ Cryer, *Prosecuting International Crimes* (n 312) 162.

⁹⁷⁹ Careien du Plessis, "AU Chair Urges African Leaders to Unite Behind Continental Body" (EWN, 29 January 2018) <<http://ewn.co.za/2018/01/29/au-chair-urges-african-leaders-to-unite-behind-continental-body>> accessed 13 March 2018.

⁹⁸⁰ Article 46F(3) ACS.

⁹⁸¹ Guinea 5th Plenary Meeting (n 201) para 19; Senegal 4th Plenary Meeting (n 192) para 16.

⁹⁸² See Rome Conference Meeting Notes; Egypt Mr El Masry, 9th Plenary Meeting (n 190) para 87; Nigeria Mr Ibrahim, 7th Plenary Meeting (n 189) para 88; Sudan, Mr Alhadi, 9th Plenary Meeting (n 190) para 77.

⁹⁸³ Article 46F(2) ACS.

accompanying politicisation of the ICC raise concern over the desirability of the inclusion of PSC and Assembly referrals, certain safeguards within the PSC may help mitigate the politicisation of the ICLS. For example, the rotating membership with no veto power prevents replication of the UNSC permanent members' use of their veto power from hampering an ICLS referral as PSC decisions are taken by consensus or two thirds majority.⁹⁸⁴ Furthermore, a PSC member is unable to participate in any decision when they are a 'party to a conflict or situation under consideration', instead the state is limited 'to present[ing] its case to the' PSC.⁹⁸⁵ Yet, there is no definition provided as to when a state is considered a party to a conflict. As such this safeguard is unlikely to fully prevent political manipulation of PSC decisions.

Nevertheless, the Assembly and PSC will need to address impartiality concerns and will also need to follow up on referrals. This is vital in dispelling claims that the new court is being used as a political tool, providing the opportunity for the two bodies to address any cooperation issues or other concerns of the ICLS Prosecutor. By assigning referral powers to both bodies the new court promotes ownership, African leadership and the advancement of African values and norms. Additionally, the level of assistance offered by the PSC can be enhanced by situating the ICLS into the African Peace and Security Architecture (APSA).⁹⁸⁶

All African states are AU members, increasing accountability as the Assembly and PSC can refer non-member states to the ICLS. Consequently, as with the UNSC ICC referrals, the Assembly and PSC help to fill a gap, although imperfectly, that would otherwise exist if only self-referrals and *proprio motu* investigations applied.

Unlike the ICC, only certain entities are permitted to submit cases to the African Court:

African individuals or African Non-Governmental Organizations 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 it directly. The Court shall not receive any case or application involving a

⁹⁸⁴ Article 8(13) PSC Protocol.

⁹⁸⁵ Art 8(9) PSC Protocol

⁹⁸⁶ Chapter 13 of this thesis.

State Party which has not made a Declaration in accordance with Article 9(3) of this Protocol.⁹⁸⁷

The original merged court permitted ‘individuals or relevant Non-Governmental Organizations accredited to the African Union and its organs’ to submit cases.⁹⁸⁸ The Malabo Protocol’s more restrictive approach has been criticised,⁹⁸⁹ but is unlikely to affect the working of the ICLS. Pursuant to Article 16 any entity can submit information to the ICLS OTP. It is then for the Prosecutor to assess ‘the seriousness of information received ... [and they] may seek information from States, organs of the African Union or United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate’.⁹⁹⁰

In general, the means by which the ICLS gains jurisdiction has done little to provide solutions to the ICC shortcomings. Where it does provide an improvement is in removing the accountability hurdle created by the UNSC Permanent Members’ veto power.

11.1.4 The Crimes under the Malabo Protocol

The ICC has proven unable to pursue a plethora of crimes as it focuses on the core international crimes only, hindering the international court’s ability to advance peace and security. To establish whether the ICLS addresses this shortcoming, this section considers the core crimes under the new court’s jurisdiction.

11.1.4.1 The Core Crimes

Matching the Rome Statute offences the Malabo Protocol includes genocide,⁹⁹¹ crimes against humanity,⁹⁹² war crimes,⁹⁹³ and aggression.⁹⁹⁴ However, there have been developments to the definitions used.

⁹⁸⁷ Article 16 ACS, replacing Art 30(f) of the original Merger Protocol.

⁹⁸⁸ Article 29 Statute of the African Court of Justice and Human Rights.

⁹⁸⁹ Amnesty International (n 1) 34.

⁹⁹⁰ Article 46G ACS.

⁹⁹¹ Article 28B ACS.

⁹⁹² Article 28C ACS.

⁹⁹³ Article 28D ACS.

Under the Protocol's crimes against humanity provision acts 'committed as part of a widespread or systematic attack *or enterprise*' are criminalised.⁹⁹⁵ The inclusion of enterprise expands accountability by encompassing joint criminal enterprises. This provides a solution to the ICC's inability to hold to account all the orchestrators of such crimes. But, the lack of a definition for enterprise is problematic.⁹⁹⁶

The war crimes definition merges both international and non-international armed conflict offences into one provision and adds fifteen crimes not provided for by the ICC.⁹⁹⁷ For example, the First Additional Protocol of the 1977 Geneva Convention gains explicit recognition which the Rome Statute was unable to achieve.⁹⁹⁸ In line with regional and international standards the defined age of child soldiers has risen from fifteen to eighteen.⁹⁹⁹ The ICC defines child soldiers as those under the age of fifteen preventing prosecutions and charges related to the use of sixteen and seventeen year olds, distorting the reality on the ground. The use of child soldiers is prolific across African conflicts, but by the Malabo Protocol not including their recruitment by non-state actors in international conflicts¹⁰⁰⁰ it has impeded the accountability of an otherwise welcome development.¹⁰⁰¹

For the ICC the most controversial provision was aggression, taking years before a definition was agreed.¹⁰⁰² The Malabo Protocol has developed the Rome Statute provision and made it more Africa relevant and reflective of the AU structure.¹⁰⁰³ For example, an act of aggression is defined with reference to a 'manifest violation' of: the UNCh; the

⁹⁹⁴ Article 28M ACS. For an indepth study of the individual crimes see Gerhard Werle and Mortiz Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (TMC Asser Press Springer 2017).

⁹⁹⁵ Article 28C(1) ACS, emphasis added.

⁹⁹⁶ Amnesty International (n 1) 17.

⁹⁹⁷ Articles 28D(b)(v), 28D(b)(xxviii)-(xxxiii), 28D(e)(xvi)-(xxii) and 28D(g) ACS.

⁹⁹⁸ Cryer, *Prosecuting International Crimes* (n 312) 270.

⁹⁹⁹ The African Charter on the Rights and Welfare of the Child; the Paris Principles and Commitments on the Involvement of Children in Armed Conflict 2007; the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict all use eighteen whereas, The Convention on the Rights of the Child and the Additional Protocols to the 1949 Geneva Conventions use fifteen.

¹⁰⁰⁰ Article 28D(b)(xxvii) ACS.

¹⁰⁰¹ Article 28D(e)(vii) ACS. See Kai Ambos, 'Genocide (article 28B), Crimes Against Humanity (Article 28C), War Crimes (article 28D) and the Crime of Aggression (Article 28M)' in Werle and Vormbaum (n 994) 44-45.

¹⁰⁰² Chapter 5.1.4 of this thesis.

¹⁰⁰³ See Articles 28M(A), 28M(B)(a) and 29M(B)(f) ACS.

AUCA; 'the territorial integrity and human security of the population of a State Party';¹⁰⁰⁴ and the AU Non-Aggression and Common Defence Pact.¹⁰⁰⁵ This definitional approach enables the ICLS to advance African values and further AU aims.

Accountability for aggression is further expanded as the new court includes conduct committed by 'non-State actor(s) or by any foreign entity'.¹⁰⁰⁶ This recognises that these actors can have a similar impact as state actors can. At the same time, the wider definition could be criticised.¹⁰⁰⁷ Caution needs to be exercised to avoid delegitimising and criminalising otherwise legitimate opposition groups and struggles which international law exempts from aggression.¹⁰⁰⁸ The incorporation of self-determination and popular uprising groups is unwelcome, yet the reality of which actors are involved in current conflicts forces ICL to respond to more than just state actors.¹⁰⁰⁹ It will be up to the Prosecutor and judges to prevent the new court from becoming a tool for dealing with political grievances and thereby losing credibility. If cautiously used, the provision could improve peace and security by addressing the underlying causes of conflict, as per ICL and the ICLS' purpose.

The ICC is restricted in pursuing an aggression prosecution by having to notify the UN Secretary-General in situations where no UNSC aggression determination has been made.¹⁰¹⁰ Six months after this notification, if the UNSC has made no determination or decided otherwise, the ICC Prosecutor can proceed with the investigation provided the Pre-Trial Division has authorised it.¹⁰¹¹ No such limitation is placed on the ICLS Prosecutor, turning the crime into a purely legal question. The result is the depoliticization of the most politicised crime in ICL and, potentially, increasing the likelihood of prosecution. There is the potential for ICL's aims of deterrence, peace and security and TJ to be advanced due to turning aggression into a legal consideration only.

¹⁰⁰⁴ Article 28M(A) and also see Article 28M(B)(a) ACS.

¹⁰⁰⁵ Article 28M(b)(f) ACS.

¹⁰⁰⁶ Article 28M(B) ACS.

¹⁰⁰⁷ Ssenyonjo and Nakitto (n 955) 87.

¹⁰⁰⁸ Mathew Lippman, 'The Right of Civil Resistance Under International Law and the Domestic Necessity Defense' 8(3) *Dickinson Journal of International Law* 349; Matthew Noah Smith, 'Rethinking Sovereignty, Rethinking Revolution' (2008) 36(4) *Philosophy & Public Affairs* 405.

¹⁰⁰⁹ Dan Saxon, 'Violations of International Humanitarian Law by Non-State Actors during Cyberwarfare: Challenges for Investigations and Prosecutions' (2016) 22(3) *Journal of Conflict and Security Law* 555; Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, 'International law and armed non-state actors in Afghanistan' (2011) 93(881) *International Review of the Red Cross*.

¹⁰¹⁰ Pursuant to Article 39 UNCh.

¹⁰¹¹ Article 15 *bis* (6)-(8) Rome Statute.

Regional organisations are permitted to deal with matters of peace and security,¹⁰¹² but the UNSC can still preclude the ICLS from exercising jurisdiction. A UNSC resolution imposing alternative action regarding the conduct, or a non-aggression determination, would be legally binding. Any advancement in accountability would be countered, at the same time raising questions over the international system's bias if the UNSC uses this power to derail legitimate legal proceedings to protect one of its Permanent Members and/or their allies.

Some developments are more restrained, lacking impact and engagement with the ongoing ICL debates. The inclusion of 'acts of rape or any other form of sexual violence' as genocidal conduct is welcome as it codifies the existing case law,¹⁰¹³ including that of the ICC. Yet, other issues are left unaddressed. For example, human rights groups, supported by some national precedent, have been advocating for political groups to be considered a protected category.¹⁰¹⁴ However, the lack of such a radical change to the definition can be explained by the Genocide Convention's definition being 'too settled to reopen'.¹⁰¹⁵

In brief, the ICLS core crimes have made some strides to provide solutions to the ICC's shortcomings in pursuing such prosecutions. The ability to introduce a more contextual approach increases the new court's relevance for Africa. In turn, the new court will be able to fulfil the additional purposes beyond the original ones of ICL – the promotion of peace and security and the AU's aims and objectives. Whether this has gone far enough in addressing all the problems arising from the ICC will be tested by the practice and policies of the ICLS OTP and judges.

Certain critics raise concerns over the different interpretations that may emerge between the ICC and ICLS and what this will mean for ICL and accountability.¹⁰¹⁶ Such criticism does not take into account the Malabo Protocol's replication of ICC provisions and the

¹⁰¹² Article 52(1) UNCh 'Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.'

¹⁰¹³ Article 28 B(f) ACS.

¹⁰¹⁴ Ambos, 'Genocide' (n 1001) 41.

¹⁰¹⁵ Cryer, *Prosecuting International Crimes* (n 312) 246.

¹⁰¹⁶ Amnesty (n 1) 29.

context specific nature of the expanded definitions. It is highly likely that the new court will take a similar approach to the Elements of Crimes as the international court, but with a more African focus and relevance. A similar contextual approach can be seen in the jurisprudence of the ICTR and SCSL.¹⁰¹⁷

11.1.4.2 The Additional Crimes

For the first time an international criminal court will seek to prosecute crimes beyond the core crimes.¹⁰¹⁸ Chapter 10 concluded that the purpose of the new court is more expansive than existing international criminal courts and tribunals: addressing underlying causes of conflict; advancing African values and norms; improving peace and security; and supporting AU institutional aims and objectives. However, does this provide a solution to the international system's shortcomings? This section starts by scrutinising the additional crimes under the new court's jurisdiction and what they offer that the ICC does not.

In contrast to the ICC, the ICLS seeks to address the underlying causes of conflict with a mixture of transnational and treaty-based crimes taken from various regional and international instruments.¹⁰¹⁹ These include the crimes of: unconstitutional change of government,¹⁰²⁰ piracy,¹⁰²¹ terrorism,¹⁰²² mercenarism,¹⁰²³ corruption,¹⁰²⁴ money laundering,¹⁰²⁵ trafficking persons,¹⁰²⁶ trafficking in drugs,¹⁰²⁷ trafficking in hazardous waste,¹⁰²⁸ and the illicit exploitation of natural resources.¹⁰²⁹

¹⁰¹⁷ The ICTR set the precedent for first genocide ruling by an international court in the *Akayesu* case as well as providing a definition of rape in the case. The SCSL was the first tribunal to find individuals guilty for the crime of recruiting child soldiers in *The Prosecutor v Alex Tamba Brima, Bria Bazzy Kamara, Santigie Borbor Kanu* (Judgment) SCSL-04-16-T-613 (20 June 2007).

¹⁰¹⁸ The Special Tribunal for Lebanon has prosecuted the crime of terrorism.

¹⁰¹⁹ See Table 3 page 212 of this thesis.

¹⁰²⁰ Article 28E ACS.

¹⁰²¹ Article 28F ACS.

¹⁰²² Article 28G ACS.

¹⁰²³ Article 28H ACS.

¹⁰²⁴ Article 28I ACS.

¹⁰²⁵ Article 28I Bis ACS.

¹⁰²⁶ Article 28J ACS.

¹⁰²⁷ Article 28K ACS.

¹⁰²⁸ Article 28L ACS.

¹⁰²⁹ Article 28L Bis ACS.

Criticism abounds over the 'extensive'¹⁰³⁰ list of ICLS crimes considered to be too broad,¹⁰³¹ and likely to slow the new court down.¹⁰³² This is made worse by the ability to add additional crimes which 'reflect developments in international law'.¹⁰³³ How enabling a court to evolve in accordance to international law can be seen as undesirable is not clear. But, the concern over the potential burden placed on the ICLS is valid given the current financial and capacity constraints of the institution.¹⁰³⁴ The new court's work will be delayed further given the vast number of applicable laws and treaties (international, regional and national) which can be taken into account.¹⁰³⁵ Yet, it can also be argued that the ability to take into account a wider range of legal instruments will improve judgments, reconciling the applicable international and regional approaches to help advance African values and norms, while simultaneously highlighting the complementary nature of the international and regional.

During the Rome Conference, the attempts to include drug-trafficking¹⁰³⁶ and other treaty-based crimes were unsuccessful.¹⁰³⁷ At the time, it was felt the non-core crimes were best left to national courts to deal with,¹⁰³⁸ reflecting the international community's lack of will to intervene in such matters.

Similarly, during the Malabo Protocol negotiations

'some countries were very vocal to say, "we just see a shopping list of crimes and most of these crimes are issues that we can address in our own countries without a problem, why are we including them in this" [...] the consultants were very adamant that it is a necessary thing to do.'¹⁰³⁹

¹⁰³⁰ Amnesty International (n 1) 15.

¹⁰³¹ Ssenyonjo and Nakitto (n 955) 86-90.

¹⁰³² du Plessis, 'A case of negative regional complementarity' (n 1).

¹⁰³³ Article 28A(2) ACS.

¹⁰³⁴ See section 11.2 of this chapter.

¹⁰³⁵ Amnesty International (n 1) 24.

¹⁰³⁶ Schabas, *An Introduction to the Criminal Court* (n 607) 10.

¹⁰³⁷ This included calls for offences related to nuclear weapons, money laundry, terrorism, drug-trafficking and other crimes against UN and associated personnel, see Rome Conference Negotiation Minutes.

¹⁰³⁸ Prep Com Summary, para 12.

¹⁰³⁹ Interview with African State Official (Addis Ababa, Ethiopia, 29 April May 2015).

Treaty-based crimes may be better prosecuted at the domestic level,¹⁰⁴⁰ but this ignores the current lack of such prosecutions. The core crimes may have no applicable statute of limitation, but both domestically and internationally many of the non-core crimes do reducing the ability of a national court to advance accountability. Article 28B of the Malabo Protocol avoids this by stipulating there are no applicable statutes of limitation to any of the crimes, ensuring the new court can contribute to accountability even when a domestic court cannot. Plus, UJ does not extend, at best, beyond the core crimes and the lack of ICC jurisdiction over the crimes means the conduct will go unaddressed, resulting in impunity.

Considering the ICC is insensitive to context, the non-core crimes reflect the African context. The AU links development with peace, security and accountability,¹⁰⁴¹ which reflects both ICL's peace and security and TJ objectives, at the same time the broader list of crimes is accepted by the ICC as being associated with conflicts.¹⁰⁴² The non-core crimes have been refined and expand on the existing international and/or regional instruments to reflect the continent's challenges. Examples include, the crime of unconstitutional changes of government. Despite requiring the prosecution of such conduct,¹⁰⁴³ the AU lacked an appropriate court in which to prosecute the offence. The most the organisation could do was suspend membership.¹⁰⁴⁴ Desiring a penalty which would act as a deterrent,¹⁰⁴⁵ it was thought appropriate to include the crime as an ICLS offence. Piracy made headlines in 2005 with the increase in such activity off the coast of

¹⁰⁴⁰ Ademola Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects' (2013) 60 *Netherlands International Law Review* 27, 34.

¹⁰⁴¹ See Chapter 10.3.2 of this thesis.

¹⁰⁴² 2007 Policy Paper, 9.

¹⁰⁴³ Article 25(5) ACDEG.

¹⁰⁴⁴ For example, Burkina Faso, Mali and Mauritania have been suspended due to coups d'état. BBC, 'AU to drop Mauritania after coup' (*BBC News*, 9 August 2008) <<http://news.bbc.co.uk/1/hi/world/africa/7551531.stm>> accessed 30 June 2016; Celeste Hicks, 'Mali Suspended from African Union' (*The Guardian*, 23 March 2012) <<https://www.theguardian.com/world/2012/mar/23/mali-suspended-african-union-coup>> accessed 30 June 2016; Aljazeera, 'African Union suspends Burkina Faso after military coup' (*Aljazeera*, 19 September 2015) <<http://www.aljazeera.com/news/2015/09/african-union-suspends-burkina-faso-military-coup-150919073352770.html>> accessed 30 June 2016.

¹⁰⁴⁵ See n 233, para 11(iii).

Table 3 – Origin of Malabo Protocol Crimes Definitions

Crime	Origin of Definition
Genocide	Rome Statute of the International Criminal Court The Convention on the Prevention and Punishment of the Crime of Genocide
Crimes Against Humanity	Rome Statute of the International Criminal Court
War Crimes	Rome Statute of the International Criminal Court First Additional Protocol of the 1977 Geneva Convention
Crime of Aggression	Rome Statute of the International Criminal Court References AU Non-Aggression and Common Defence Pact
The Crime of Unconstitutional Change of Government	The African Charter on Democracy, Election and Governance (ACDEG)
Piracy	1982 UN Convention on the Law of the Sea (UNCLOS) Djibouti Code of Conduct
Terrorism	OAU Convention on Prevention and Combating Terrorism
Mercenarism	OAU Convention on the Elimination of Mercenarism in Africa
Corruption	African Union Convention on Preventing and Combating Corruption
Money Laundering	African Union Convention on Preventing and Combating Corruption
Trafficking in Persons	UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (UN Trafficking in Persons Protocol)
Trafficking in Drugs	1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
Trafficking in Hazardous Wastes	1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Convention)

Somalia,¹⁰⁴⁶ with Nigeria also suffering from acts of piracy for many years.¹⁰⁴⁷ Sadly, Africa has become synonymous with corruption,¹⁰⁴⁸ with many of those committing the offence being a 'public official, his/her family member or any other person'.¹⁰⁴⁹ The inclusion of state officials' family members reflects the growing instances of such individuals being implicated in corruption scandals.¹⁰⁵⁰

This African relevance is recognised, and subsequently dismissed, by Amnesty International because the crimes 'are yet to be well articulated and established in international law'.¹⁰⁵¹ As the international community lacks the political will to address these crimes, and is complicit in the commission of some of the crimes, the lack of international articulation alone cannot be the determinative factor over whether a regional organisation is able to address continent relevant conduct. Additionally, ICL will be developed and the justification for prosecutions advanced.

The crimes based on African regional instruments attempt to reinforce the original treaty intention, advance African values and norms while promoting ownership, none of which the ICC does. There will also be harmonisation of laws at the continental level, encouraging adoption and enforcement domestically and sub-regionally.¹⁰⁵² Part of the AU's aim is to harmonise the laws amongst its members,¹⁰⁵³ which the new court will contribute to. Yet, while there are advantages to adopting definitions from existing instruments it may discourage those states not party to those treaties from signing and ratifying the Malabo Protocol if their original concerns are not adequately addressed.

¹⁰⁴⁶ 'Piracy 'on the rise' off Somalia' (*BBC News*, 8 November 2005) <<http://news.bbc.co.uk/1/hi/world/africa/4415196.stm>> accessed 30 June 2016.

¹⁰⁴⁷ 'Piracy report says Nigerian waters the most deadly' (*IRIN News*, 27 July 2004) <<http://www.irinnews.org/report/50843/nigeria-piracy-report-says-nigerian-waters-most-deadly>> accessed 30 June 2016.

¹⁰⁴⁸ This by no means implies other regions, states, Governments or private individuals are not involved in corruption scandals, or corruption more generally.

¹⁰⁴⁹ Articles 281(1)(a)-(d) ACS.

¹⁰⁵⁰ Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Hart Publishing 2014) Chapter 3, which identifies Equatoguinean, Nigerian and Angolan family members involved and benefiting from corruption.

¹⁰⁵¹ Amnesty International (n 1) 16.

¹⁰⁵² José E. Alvarez, 'Crimes of Hate/Crimes of State: Lessons from Rwanda (1999) 23 *Yale Journal of International Law* 365, 418-36.

¹⁰⁵³ Article 11(3) Protocol Relating to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament.

Despite the contribution the Malabo Protocol offences offer in addressing the ICC's shortcomings, the overly broad provisions and lack of definitions is thought to violate the principle of legality.¹⁰⁵⁴ This can be easily rectified by creating Elements of Crimes to assist the judges, providing further definitions and interpretation guidance in a similar manner to the ICC's Elements of Crime.

The crimes may develop differently between African national systems and the court.¹⁰⁵⁵ Yet, this would be no different than between the ICC and national systems, or between national systems themselves, which has not proved to be an insurmountable hurdle to accountability. As with the Rome Statute, there is nothing within the Malabo Protocol placing an obligation on member states to adopt implementing legislation.¹⁰⁵⁶ But, if the ICLS Elements of Crimes offer clear and coherent guidance, states and the REC/RMs would benefit. The new court's complementary provision can also help by taking any differences into account during an admissibility assessment.¹⁰⁵⁷ This would address the concerns over the narrowing of accountability by the ICC's interpretation of its admissibility criteria and positively contribute to ICL and the international system.¹⁰⁵⁸

The ICC is a limited accountability mechanism with little significance for peace and security and regional needs. On the whole, the ICLS offers a set of offences which attempt to address the core-crimes and those non-core crimes which underlie the causes of conflict.

11.2 Institutional Capacity Limitations

Accountability before the ICC was narrowed further because of the institutional limitations faced by the international court. To what extent is ICLS accountability likely to suffer the same fate? This section reviews the AU and ICLS institutional framework starting with the organisation's and the new court's budget.

¹⁰⁵⁴ Amnesty International (n 1) 17.

¹⁰⁵⁵ du Plessis, 'A case of negative regional complementarity' (n 1).

¹⁰⁵⁶ Nouwen, *Complementarity in the Line of Fire* (n 582) 20.

¹⁰⁵⁷ Chapter 12 of this thesis.

¹⁰⁵⁸ Chapter 6.1 of this thesis.

11.2.1 Budget Constraints

From the beginning, financial concerns plagued the Malabo Protocol's adoption process,¹⁰⁵⁹ resulting in a financial and structural framework based on pragmatism, gradualism, and flexibility.¹⁰⁶⁰ Building on the complementary nature of the ICC,¹⁰⁶¹ the new court is envisioned as a mechanism 'operating in an "ecosystem" where there are other organs and institutions that would share some of the division of labour'.¹⁰⁶² However, can the AU afford the new court?

International criminal prosecutions are expensive, with the ICC's 2018 budget estimated at €151,475,700 (about US\$186,761,178).¹⁰⁶³ In contrast the entire AU budget for 2018 is US\$769, 381,894.00 funded from member contributions (US\$318,276,795) and partner organisations (US\$451,105,099).¹⁰⁶⁴ Of this the ACtHPR is allocated US\$11,820,159.00, with \$10,581,742 funded by members and the \$1,238,417 program budget covered by partner monies.

If the new court is underfunded no matter what jurisdictional develops have been made accountability will not be achieved. The success of the ICLS 'depends on the AU member states, because they are the ones who contribute to the budget of the AU, if really they want a court to work, they will have to fund the court'.¹⁰⁶⁵ However, African states' track record in meeting their contribution obligations is lacking,¹⁰⁶⁶ reducing the prospect of a sustainable ICLS.

Despite the AU reviewing the financial implications of the new court there is still uncertainty surrounding the actual costs. One African state official is

¹⁰⁵⁹ See Chapter 2.5 of this thesis.

¹⁰⁶⁰ Report, the Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General – Draft Protocol on Amendments to the AfCtJHR EX.CL/773(XXII), Annexed Financial Report, para 14 (hereafter Annexed Financial Report).

¹⁰⁶¹ See Chapter 12 of this thesis.

¹⁰⁶² Annexed Financial Report, para 10.

¹⁰⁶³ ASP, Proposed Programme Budget for 2018 of the International Criminal Court, adopted Sixteenth Session, New York, 4-14 December 2017, ICC-ASP/16/10, Table 1.

¹⁰⁶⁴ Decision on the Budget of the African Union for the 2018 Financial Year Doc. PRC/Rpt(XXXIV), EX.CL/Dec.965(XXXI), adopted at the 31st Ordinary Session of the Executive Council, 27 June to 01 July 2017, Addis Ababa.

¹⁰⁶⁵ Interview with African State Official (Addis Ababa, Ethiopia, 8 May 2015).

¹⁰⁶⁶ Ini Ekott, 'The AU's Funding Woes Continue' (Good Governance Africa, 5 January 2017) <<https://gga.org/the-aus-funding-woes-continue/>> accessed 15 April 2018.

still not convinced that we have any idea of how much this court is going to cost us, because what was presented to member states was more of the salaries of the additional staff that is going to be needed [...] but there was no operational funding [...] You need money to do it, or you need countries to say [...] we have expertise, who will take over the witness protection, you need the buy in of countries too, accepting to host some of the accused people or suspects while the trial is going on, and all those. But all those things are things that are not clear at the moment, but we were informed that some of these things will be clear as we go on.¹⁰⁶⁷

If states are unsure of the costs it will prove difficult to motivate them to contribute, especially when the majority of African states already struggle to fulfil their AU contribution obligations. These concerns are echoed by commentators querying the ICLS' financial constraints.¹⁰⁶⁸ The inclusion of fourteen crimes, when the ICC only has four, compounds the concerns because it will overstretch an already underfunded organisation and court.¹⁰⁶⁹ This is before the cost of training judges and investigators has been taken into account.¹⁰⁷⁰

The African Court will share resources across its three sections and, as the AU has never had a functioning Court of Justice or a criminal court, the additional financial resources required are a matter of speculation. The extra resources will have to come from somewhere while minimising the financial consequences on other AU bodies. The AU has created a large number of institutions which are dependent on donor monies.¹⁰⁷¹ Whether this is a result of the organisation's grandiose plans for itself and its legacy¹⁰⁷² or a result of trying to satisfy donor funding conditions is debatable. Unfortunately, donors do influence the AU and African states¹⁰⁷³ and which institutions get established.¹⁰⁷⁴

As the new court's purpose includes the strengthening of peace and security, is it possible to use some of the AU's peace and security budget to fund the court?

¹⁰⁶⁷ Interview with African State Official (Addis Ababa, Ethiopia, 29 April May 2015).

¹⁰⁶⁸ Ssenyonjo and Nakitto (n 955) 87; Amnesty International (n 1) 25, 31; du Plessis (n 1).

¹⁰⁶⁹ Amnesty International (n 1) 29; du Plessis (n 1).

¹⁰⁷⁰ Amnesty International (n 1) 25-26.

¹⁰⁷¹ Ibid 31.

¹⁰⁷² Chapter 2.1 of this thesis.

¹⁰⁷³ Ssenyonjo (n 661) 393.

¹⁰⁷⁴ ISS notes the AU's independence depends on its ability to be self-sufficiently funded, Liesl Louw-Vaudran, 'A new financing model for the AU: will it work?' (*ISS Today*, 25 July 2016) <<https://issafrica.org/iss-today/a-new-financing-model-for-the-au-will-it-work>> accessed 10 April 2018.

This is unlikely as the programme budget is primarily donor funded. The AU partner countries have made it clear 'that we are not going to support this court at all with our money. So, we are basically not going to give you any funding as we are against the creation of this court'.¹⁰⁷⁵ While it is not for third parties to fund the court, the justification of the refusal on grounds of immunity is hypocritical.¹⁰⁷⁶ European states are just as reluctant to hand over their leaders and senior state officials to the international court, which certain officials consider inapplicable to them.¹⁰⁷⁷ Instead of holding the AU and African states to ransom, further undermining African ownership and reinforcing the inequality of the international system, the EU should live up to its perceived leadership role in human rights and international justice and assist with attempts to improve accountability at the regional level.

These donor threats

just fuelled emotions ... [and African states at an AU Summit responded by] saying "we don't care, they can go with their money, we will support this court financially ourselves" [...] now how are we going to have money for this court and other things, practically, it doesn't make sense.¹⁰⁷⁸

The funding structure of the ICLS leaves the issue of accountability vulnerable. This thesis has concluded that national courts and the ICC do not fully discharge their obligations in pursuing criminal justice because of financial restraints. Like the ICC, the new court's uncertain and inadequate funding means the ICLS will not easily respond to increases in its caseload and to new situations. One way to address the financial shortfalls is for the Assembly and PSC referrals to include an element of financial assistance from their own budgets.¹⁰⁷⁹ Yet, the Assembly's role in the financial sustainability of the court has been questioned because of the potential for dependency on the body and the political influence it may exert over the court.¹⁰⁸⁰ It remains to be seen how the Court can attract funds without compromising its independence.¹⁰⁸¹

¹⁰⁷⁵ Interview with African State Official (Addis Ababa, Ethiopia, 29 April May 2015).

¹⁰⁷⁶ Amnesty International (n 1) 31.

¹⁰⁷⁷ See n 152.

¹⁰⁷⁸ Interview with African State Official (Addis Ababa, Ethiopia, 29 April May 2015).

¹⁰⁷⁹ For a discussion on why this is appropriate, see Chapter 13.4 of this thesis.

¹⁰⁸⁰ Amnesty International (n 1) 29-30.

¹⁰⁸¹ Ssenyonjo and Nakitto (n 955) 90.

11.2.2 Policies and Prosecutorial Approach Under Resource Constraints

The ICC OTP's limited budget resulted in few cases pursued and minimal deterrence. This is compounded by the narrow approach to case selection and the policy of only pursuing those who bear the greatest responsibility, leaving national courts to fill the gap.¹⁰⁸² Can the ICLS avoid this?

By utilising its position as an AU organ the new court can encourage cooperation from states, the REC/RMs and the ICC to share the workload.¹⁰⁸³ The ability of the ICLS to pursue those bearing the greatest responsibility is curtailed by Article 46A bis' upholding the immunity of sitting Heads of State and Government and certain senior state officials.¹⁰⁸⁴ Instead, the ICLS OTP can carve out a strategy addressing lower level officials and those individuals not typically covered by the ICC. Counter-intuitively the immunity provision may result in greater accountability overall if the ICLS and ICC focus on different individuals accused of core-crimes. For the non-core crimes, the immunity provision restricts accountability, but not necessarily to a large degree.¹⁰⁸⁵

The Malabo Protocol does not prevent the new court from adopting a bottom up approach to investigations and sharing the information with the relevant state. Alternatively, the ICLS OTP can wait until the official is no longer in office to pursue a case. This would be in contrast to the ICC OTP's practice, potentially addressing the ICC's narrowing of accountability.

11.2.3 Reliance on Cooperation and its Consequences

As with the international court, the ability of the ICLS to deliver accountability will depend on cooperation from a range of actors: the situation state; state parties; other AU bodies and organs, in particular the PSC and Assembly; AU member states; other international courts and organisations; and non-African states. Article 46L(1) and (2) set out the type of cooperation and judicial assistance state parties are to give to the court. The preference for the ICLS to work in an "eco-system" is reflected in Article 46L(3) as

¹⁰⁸² Chapter 5.2.2 of this thesis.

¹⁰⁸³ Chapter 12 of this thesis.

¹⁰⁸⁴ On the Malabo Protocol's immunity see Chapter 14 of this thesis.

¹⁰⁸⁵ On the immunity provision and the non-core crimes see Chapter 14.3 of this thesis.

the court is 'entitled to seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and may conclude Agreements for that purpose'.

The Malabo Protocol grants wide leeway for cooperation yet, unlike under the Rome Statute, the ICLS Prosecutor cannot conduct an investigation without cooperation.¹⁰⁸⁶ This is unlikely to impact accountability as the success of an investigation without cooperation is highly circumspect. There is also no reason to suspect African states will not cooperate with the ICLS as the experience of the ICC shows that they do cooperate, albeit quietly.¹⁰⁸⁷

As part of the ICLS' purpose is to deter further crimes the court's ability to enforce its judgments is crucial.¹⁰⁸⁸ A unique characteristic of the ICLS is the ability to call on the AU's complementary organs and mechanisms.¹⁰⁸⁹ The ICC is incapacitated in certain areas due to security and access concerns, yet the new court could seek support from AU peace support operations. Alternatively, the AU could train its peace support personnel to assist in investigative work to support the ICLS' work.¹⁰⁹⁰

Finally, if the ICLS cannot enforce its judgments, the improvement to accountability will not materialise. At the same time, the new court will not live up to its purpose: to deliver accountability; address the underlying causes of conflict; advance African norms and values; prevent and deter future crimes; and contribute to ending impunity.¹⁰⁹¹ While there is symbolic value in the issuing of international judgments,¹⁰⁹² the political will of African states to enforce the new court's judgments is lacking. ACtHPR judgments have a very low enforcement rate,¹⁰⁹³ as do AU decisions generally,¹⁰⁹⁴ which needs to be

¹⁰⁸⁶ Article 57(3)(d) Rome Statute.

¹⁰⁸⁷ Interview with ICC Official (The Hague, The Netherlands, 16 February 2016).

¹⁰⁸⁸ Chapter 1.2.2.1.2 of this thesis.

¹⁰⁸⁹ Chapter 12 and 13 of this thesis.

¹⁰⁹⁰ On this possibility see Chapter 13.5.3 of this thesis.

¹⁰⁹¹ On the purposes of the new court see Chapter 10 of this thesis.

¹⁰⁹² Chapter 5.2.3 of this thesis.

¹⁰⁹³ Rachael Murray, 'Report on the 1997 Sessions of the African Commission on Human and Peoples' Rights – 21st and 22nd Sessions: 15-25 April and 2-11 November 1997' (1998) 19 Human Rights Law Journal 169, 171.

¹⁰⁹⁴ See Report of the Commission on the Implementation of Previous Decisions of the Executive Council and the Assembly, adopted at Thirty-Second Ordinary Session, 25-26 January 2018, Addis Ababa, Ethiopia, EX.CL/1049(XXXII).

addressed if African states are serious about increasing international criminal justice and improving peace and security across the continent.

11.2.4 Personnel Constraints

The bleak finances of the AU pose significant hurdles to accountability and the problem of finding qualified staff.¹⁰⁹⁵ A reality faced by the AU, but this also highlights the need to build continental capacity, which a regional criminal court can do better than the ICC and improve TJ. For example, the Sierra Leonean domestic judicial system 'has developed as a result of the Special Court for Sierra Leone [such that they] can safely try whosoever is found for war crimes etc. ... [yet] one can say if the ICC was in existence, one may suggest that it would need to refer to the ICC'.¹⁰⁹⁶ This capacity development would not have occurred had the ICC had jurisdiction because it does not address local capacity development.¹⁰⁹⁷

The complementarity provision partially sets out the scope for the ICLS to facilitate capacity development but the new court will still need to avoid falling into the trap of the ICC of keeping expertise in-house.¹⁰⁹⁸

The ability of ICLS accountability to offer a solution to the ICC's shortcomings is reduced by the allocated staffing quotas. The allocations are generally insufficient as the number of judges assigned to the new court is too low to provide an adequate number of judges from the initial trial to final appeal.¹⁰⁹⁹

11.3 Malabo Protocol Ratification

Regardless of the accountability increase the ICLS offers it is prevented from being achieved because the Malabo Protocol has not entered into force.

¹⁰⁹⁵ Amnesty International (n 1) 25.

¹⁰⁹⁶ Interview with African State Official (Addis Ababa, Ethiopia, 18 May 2015).

¹⁰⁹⁷ Chapter 6.2 of this thesis.

¹⁰⁹⁸ Ibid.

¹⁰⁹⁹ Amnesty International (n 1) 26; Ssenyonjo and Nakitto (n 955) 87.

The AU's ability to encourage its member states to ratify the Protocol is the biggest hurdle to accountability. The ACtHPR suffers from low membership which could be an indicator that the African Court is likely to suffer from ratification problems.¹¹⁰⁰ States are unable to pick and choose which African Court Section to join, and 'if you expect them [African states] to ratify and become states parties to all these three chambers, then it becomes a problem'.¹¹⁰¹

The slow ratification of AU treaties is an ongoing problem which 'has always been raised as a concern at almost every [AU] Summit, that we [African states] are not ratifying our own conventions. We are very good at creating all these instruments, but we don't want to become state parties'.¹¹⁰² Reasons for this include rationalism, constructivism and liberalism, but a more convincing argument is that 'the source of a given treaty, the subject-matter of the treaty and the perception that a treaty threatens sovereignty' are determinative factors.¹¹⁰³

Africa's experience with the ICC, and the UNSC's use of the international court, makes the prospect of another mechanism potentially eroding sovereignty less appealing. Yet, Clarke's explanation that African states ratified the Rome Statute partially because of the good governance requirement of international institutions points towards factors other than criminal justice and the threat to sovereignty as a motivation.¹¹⁰⁴

Overall, the Protocol's inclusion of individual responsibility for gross human rights violations, as a means to seek greater accountability, is redundant if fewer states sign up to the African Court. There will be an overall loss of accountability for the violations as even the human rights court will have lost members.¹¹⁰⁵ This is only a problem if the required fifteen ratifications never occur. Once the new court is in place the Assembly and PSC referrals can mitigate some of the accountability hurdles non-membership poses.¹¹⁰⁶ Admittedly this is not a perfect solution as it relies on one of the two bodies deciding to refer the situation.

¹¹⁰⁰ Ssenyonjo and Nakitto (n 955) 90.

¹¹⁰¹ Interview with African State Official (Addis Ababa, Ethiopia, 29 April 2015).

¹¹⁰² Ibid.

¹¹⁰³ Abass, 'The Proposed International Criminal Jurisdiction' (n 1040) 38.

¹¹⁰⁴ Clarke, 'Why Africa?' (n 147) 326-332.

¹¹⁰⁵ Ssenyonjo and Nakitto (n 955) 91.

¹¹⁰⁶ Chapter 12.1 of this thesis.

11.4 Conclusion

The ICLS offers a more comprehensive form of accountability than the ICC. Corporate criminal liability brings those actors complicit in numerous African conflicts within the court's jurisdiction, achieving a more holistic accountability that is reflective of African reality. At the same time, the fourteen crimes address a plethora of issues hindering justice, development and peace and security. Removing the context insensitive approach of the ICC the new court's accountability adopts a region centric approach in an attempt to address the problems which the international community and the ICC have no appetite for.

ICLS accountability offers solutions to the international system's shortcomings, but to achieve them and fulfil its purpose, the court and African states will need to tackle numerous obstacles. Most notably the organisation's financial constraints and the impact this has on the sustainability of the ICLS. A sufficient number of judges needs to be provided and all personnel should be suitably trained and qualified. None of the challenges are insurmountable should the AU and its member states genuinely commit to the new court.

Chapter 12

The African Court and Complementarity

The principle of complementarity encourages domestic prosecutions of international crimes, leaving international judicial mechanisms as a last resort. In Chapter 6, this thesis identified flaws in the international court's approach which undermines the complementarity principle. The ICC admissibility criteria is so narrowly interpreted that investigations and prosecutions have been limited. The international court fares no better even when complementarity is considered as a big idea or policy approach. The ICC actively discouraged national prosecutions and implemented no capacity development to speak of. The result is a system promulgating state dependencies on the ICC by undermining African ownership, while prioritising the OTP's interests.

Does the Malabo Protocol address these shortcomings? To answer this the chapter investigates how the court approaches complementarity at the national, (sub)regional and international levels. The next undertaking is the examination of the ICLS' admissibility criteria for any similarities to the ICC's, followed by the impact this has on accountability. The final point considered is whether there is an ICLS policy approach to complementarity which can rectify the ICC's inadequacies on the matter.

12.1 The Levels of Complementarity

Both the ICC and ICLS place the primary responsibility for prosecutions with national courts,¹¹⁰⁷ but the Malabo Protocol extends the principle of complementarity still further. The ICLS' jurisdiction is complementary to 'National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities'.¹¹⁰⁸ This creates three levels of prosecutions: the continental level (the ICLS); the (sub)regional level (the REC/RMs); and the national level (domestic courts). Missing from the complementarity provision is the international level (the ICC).

¹¹⁰⁷ Article 17 Rome Statute and Article 46H ACS.

¹¹⁰⁸ Article 46H(1) ACS.

Whether this affects the solutions offered by the Protocol in addressing the ICC shortcomings is scrutinised with reference to the levels of complementarity and AU working practices.

12.1.1 National and (Sub)Regional Complementarity

This section delves into the national and (sub)regional level of complementarity. The ICLS continues the trend of primary responsibility lying with the state, only stepping in when this method has failed.

Part of the new court's purpose is to strengthen peace and security, a matter which the AU works collaboratively on with the REC/RMs.¹¹⁰⁹ Article 46H(1) recognises this and continues the working practice, minus the hierarchical relationship usually adopted between the AU and REC/RMs.¹¹¹⁰ At present, this contributes little to the international system's shortcomings as none of the REC/RMs courts have criminal jurisdiction.¹¹¹¹ Albeit, the East African Court of Justice was rumoured to be extending its jurisdiction to include individual criminal liability.¹¹¹² The inclusion of the REC/RMs may seem premature, but the Malabo Protocol creates an opportunity to widen accountability by encompassing the (sub)regional level, preventing future conflicts of interest.

¹¹⁰⁹ The AU recognises eight REC/RMs: Arab Maghreb Union; Common Market for Eastern and Southern Africa; Community of Sahel-Saharan States; East African Community; Economic Community of Central African States; Economic Community of West African States; Intergovernmental Authority on Development; Southern African Development Community.

¹¹¹⁰ Articles IV(iii) and (iv), and Article XX(i) Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and North Africa (hereafter AU REC/RMs MOU).

¹¹¹¹ There is no known REC/RM court which has successfully adopted international crimes into its court's jurisdiction. The (sub)regions are unopposed to expanding jurisdiction, however, they are waiting to see how the ICLS functions to learn from the new court's experience and hopefully receive support. Discussion with participant judge at the 'Geographies of Justice Workshop' hosted by the Peace and Security Training Centre, Institute of Security Studies, Ethiopia, November 2014.

¹¹¹² Despite claims the East African Community had extended the East African Court of Justice's jurisdiction, the court does not appear to have been endowed with it and the court's website makes no reference to international crimes <http://eacj.org/?page_id=27> accessed 30 June 2016; Christabel Ligam 'EACJ to handle criminal offences' (*The East African* 7 December 2013) <<http://www.theeastafrican.co.ke/news/EACJ-to-handle-criminal-offences/-/2558/2103006/-/bkbsq5/-/index.html>> accessed 30 June 2016.

If the REC/RMs courts introduce criminal jurisdiction 'there is going to be a proliferation of courts to try international crimes',¹¹¹³ with overlapping state membership.¹¹¹⁴ This could negate the broadening of accountability by encouraging additional mechanisms to pursue prosecutions, opening the ICLS up to delays and/or obstructing its ability to exercise jurisdiction. This can be minimised by adopting memorandums of understanding (MOUs) or formal policies on cooperation and with the interpretation of the admissibility criteria.¹¹¹⁵ Additionally, if more courts exist and work collaboratively ICL will be improved as the number of prosecutions is likely to increase, impacting on retribution, deterrence, peace and security and TJ.

Overall, the broader complementarity approach encourages a wider range of actors to take ownership of justice initiatives and increase accountability.

12.1.2 International Complementarity

The Malabo Protocol is silent over any international level complementarity. As the new court seeks to encourage prosecutions, criticism of the lack of reference to the ICC is unsurprising. The Protocol could be seen as the AU's way of substituting the international court,¹¹¹⁶ which would diminish African voices and authority regarding ICC governance.¹¹¹⁷ This chapter argues that by exploring the Protocol, such critiques are superficial, demonstrating an inaccurate understanding of the AU's background and the ICLS' relationship with the ICC. For example, the ICLS' immunity provision prevents the prosecution of certain senior state officials and Heads of State and Government.¹¹¹⁸ This impedes the court from becoming a substitute as there is no competing jurisdiction over such individuals.¹¹¹⁹

Certain African states argued for a provision setting out the relationship, but 'those who are not state parties to the ICC, they didn't want to mention anything in the protocol

¹¹¹³ Interview with African State Official (Addis Ababa, Ethiopia, 8 May 2015).

¹¹¹⁴ Abass, 'The Proposed International Criminal Jurisdiction' (n 1040) 45.

¹¹¹⁵ Section 12.3 of this chapter.

¹¹¹⁶ Amnesty International (n 1) 9.

¹¹¹⁷ du Plessis, 'A New Regional International Criminal Court' (n 2) 293.

¹¹¹⁸ Ssenyonjo and Nakitto (n 955) 94.

¹¹¹⁹ For more on immunity see Chapter 14.

talking about the ICC, saying that it is a neo-colonialist instrument'.¹¹²⁰ The compromise was an administrative agreement,¹¹²¹ but the uncertainty surrounding the issue means African states do not 'understand how [the ICLS] was going to affect those who are already state parties [to the ICC] and how is it going to work with the ICC'.¹¹²²

If the Malabo Protocol enters into force, 'there are going to be two courts [...] and we are going to be the same state parties to the two instruments',¹¹²³ and the jurisdictional conflicts will need to be addressed. Treaties do not bind third parties,¹¹²⁴ placing the ICC beyond the AU's remit as the organisation cannot impose its will on the international court without the ICC's consent. Given the lack of guidance, despite states calling for clarification on the matter,¹¹²⁵ the Malabo Protocol has done itself a disservice. The uncertainty regarding the relationship is a major barrier to ratification with negative implications for accountability and for the new court fulfilling its purpose.

The lack of international complementarity does not narrow accountability as it is not the first time an AU treaty does not mention an international actor with concurrent competence on a matter. The UNSC has primacy over the maintenance of international peace and security,¹¹²⁶ yet the AU's RECs MoU on Peace and Security¹¹²⁷ and The Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol) grants the AU 'primary responsibility for promoting peace, security and stability in Africa'.¹¹²⁸ Clearly in violation of the UNCh and international law, two interpretations can be used: that the AU does not seek to conflict with Article 24(1) UNCh;¹¹²⁹ or more accurately, given the PSC Protocol Article 17's recognition of the UNSC, Article 16 is situated within the principle of subsidiarity and the hierarchical relationship between the AU and the REC/RMs.¹¹³⁰ Both AU and REC/RMs highest

¹¹²⁰ Interview with African State Official (Addis Ababa, Ethiopia, 8 May 2015).

¹¹²¹ Ibid.

¹¹²² Interview with African State Official (Addis Ababa, Ethiopia, 29 April 2015).

¹¹²³ Interview with African State Official (Addis Ababa, Ethiopia, 8 May 2015).

¹¹²⁴ Article 34 VCLT.

¹¹²⁵ Interview African State Official (Addis Ababa, Ethiopia, 29 April 2015).

¹¹²⁶ UNCh Chapter VIII deals with regional organizations and Article 24 grants the UNSC 'primary responsibility for the maintenance of international peace and security'.

¹¹²⁷ Article IV(ii) AU REC/RMs MOU.

¹¹²⁸ Article 16 PSC Protocol.

¹¹²⁹ Abass, 'African Peace and Security Architecture' (n 24).

¹¹³⁰ Article IV(iii) and (iv), and Article XX(i) AU REC/RMs MOU.

decision-making bodies are composed of Heads of State and Government, legally permitting them to agree to the hierarchical relationship.

There is no hierarchical relationship between international courts and the ICC is willing to assist and work with the new court. However, 'there is still some resistance to involve [them]',¹¹³¹ which the AU can be faulted for. It may be possible to interpret the Malabo Protocol in such a way as to take into account the legitimate concerns over the ICC while at the same time incorporating the ICC into complementarity decisions. If so, this would contribute to the ICLS' ability to offer a solution to the ICC's narrow application of the complementarity principle.

12.2 Complementarity as an Admissibility Criteria

Can the ICLS admissibility criteria provide an interpretation which includes the ICC at the same time as addressing the international system's shortcomings?

Unlike the Rome Statute, the Malabo Protocol explicitly refers to complementarity in Article 46H. The admissibility criteria, based on the Rome Statute,¹¹³² sets out the test for when the ICLS can exercise its complementary jurisdiction:

- a) The case 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;
- 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 to prosecute;
- c) The person concerned has already been tried for conduct which is the subject of the complaint;
- d) The case is not of sufficient gravity to justify further action by the Court.¹¹³³

¹¹³¹ Interview with ICC Official (The Hague, The Netherlands, 16 February 2016).

¹¹³² Article 17(1) Rome Statute.

¹¹³³ Article 46H(2) ACS.

The criteria seek to ensure primary responsibility for prosecutions remains with states, and the ICLS as a court of last resort. Subsections a) and b) set out the two-part complementarity test taken at the preliminary investigative stage and when a case comes before the court. Mimicking the ICC provision, the first question is whether the case is being investigated or prosecuted; and second, is the state in question unwilling or unable to prosecute. Subsections c) and d) cover the *non bis in idem* principle and gravity respectively.

A problem with the Protocol's drafting process is the copy and paste approach adopted. Provisions from the Rome Statute are copied into the Protocol which contradict with its other provisions, purposes and aims. For example, despite the Malabo Protocol including complementary jurisdiction with the REC/RMs courts Article 46H refers to states only. The implication being only national investigations and prosecutions are applicable, which is illogical because the Protocol and the AU seek to develop an ecosystem of judicial mechanisms. By only including states the ICLS' contribution to addressing the ICC's shortcomings is limited as it does not encourage prosecutions by the REC/RMs and ignores the international court's role in ending impunity.

Part of the ICC's admissibility criteria includes the 'same person same conduct' test, which Chapter 6 concluded narrows accountability and reduces ownership by African states. The ability of the ICLS to offer a solution to these shortcomings depends on it adopting alternative interpretations.

There is no obligation to follow other international courts' judgments, although decisions of the ICJ and regional human rights courts are 'given great deference and considered 'highly persuasive''.¹¹³⁴ The ICC considers external decisions to be merely persuasive,¹¹³⁵ only considering them when no precedent from within the court's own jurisprudence exists.¹¹³⁶

¹¹³⁴ Stewart Manley, 'Referencing Patterns at the International Criminal Court', (2016) 27 EJIL 191, 196.

¹¹³⁵ *The Prosecutor v. Thomas Lubanga Dyilo* (Decision) ICC-01/04-01/06-2842, Trial Chamber, (14 March 2012) para 603.

¹¹³⁶ D Terris, C Romano and L Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (OUP 2007) 120.

A different interpretation of the 'same person same conduct' test is therefore possible. If done to prevent replication of the international court's restriction on sovereignty, which hinders a bottom up approach to cases, accountability and ownership would be improved.

Additionally, whereas the ICC's admissibility criteria shape national prosecutions to mirror its own,¹¹³⁷ the new court can use a more context sensitive approach by working with national and (sub)regional courts to inform the same person same conduct test decisions. This will increase accountability by adhering to a more successful division of labour than the ICC accomplishes. A by-product of a more active division of labour is the reduction in the need for ICLS prosecutions helping relieve some of the financial pressures on the new court while improving continental capacity. This would advance TJ as well as positively contributing to ICL's development.

The ICC's application of the 'unwilling or unable genuinely to carry out the investigation or prosecution'¹¹³⁸ test is problematic. The Lubanga case and the Uganda situation raise doubts over whether the 'genuinely' aspect of the test has been consistently applied.¹¹³⁹ The Malabo Protocol has removed the term "genuinely", but despite the criticism that this will open the floodgates¹¹⁴⁰ the actual impact will be minimal because the guidance for determining unwilling and unable is identical to that under the Rome Statute.¹¹⁴¹ The ICLS will need to protect itself from states claiming inability for self-serving political reasons and should refrain from pursuing cases as a means to justify its own existence and undermining the purpose of ICL.

Overall, the new court's admissibility criteria can offer a solution to the ICC's narrow interpretation of the test to encourage prosecutions and broaden accountability. What it does not do is provide an express method by which to include complementarity at the international and (sub)regional level.

¹¹³⁷ Chapter 6 of this thesis.

¹¹³⁸ Article 17(1)(a) Rome Statute.

¹¹³⁹ Chapter 6.1.3 of this thesis.

¹¹⁴⁰ Abass, 'The Proposed International Criminal Jurisdiction' (n 1040) 44.

¹¹⁴¹ Compare Article 46H(3) and (4) ACS with Article 17(2) and (3) Rome Statute.

12.3 The Inclusion of the ICC and REC/RMs

How can the ICLS attempt to address the ICC's shortcomings without any direct reference to the international court? There are two ways this can be achieved: through the court's cooperation and assistance provision; and judicial interpretation of the admissibility criteria.

12.3.1 International Cooperation and Assistance

Article 46L(3) entitles the ICLS 'to seek cooperation or assistance ... [from] regional or international courts, non-States Parties or co-operating partners of the African Union'. This provision reflects the AU's dissatisfaction with the ICC's work and relationship with Africa. The international court has done little to improve national, let alone regional or continental, capacity to prosecute international crimes and build a strong judiciary.

Article 46L(3) provides an opportunity for the kind of cooperation and assistance many had hoped the ICC would provide and for which national judiciaries have criticised the international court for.¹¹⁴² For example, in response to the ICC ASP President's concerns over the new court an African state official explained

What [the ICC] needs to do, because they [the ASP President] were concerned that now they were going to have a court that competes with them [...] is to mobilize funding internationally to assist member states to improve the justice systems so that we have the capacity to try these crimes, and make sure that all of us, we have signed and ratified, we domesticate the Rome statute, and that, most parties, most countries would eventually sign, then you would have universal jurisdiction [...] she said it was not a primary mandate.

Where the ICC shied away from mutual cooperation and assistance, Article 46L(3) encourages all courts and actors involved in fighting impunity within African to work together, increasing accountability and African ownership over the process. If the ICLS uses the provision, and receives genuine support and assistance from AU partners and other courts including the ICC, there is the potential to reduce African dependency on donors and the international court's prosecutions. This would support TJ and improve

¹¹⁴² Clark, 'Chasing Cases' (n 497) 1190-6.

peace and security if the bodies work collaboratively, both objectives of establishing international courts.

The ICC does nothing to address the capacity of Africa to pursue prosecutions. The ICLS' cooperation and assistance provision enables the new court to approach Africa specific courts like the residual mechanisms for the ICTR and the SCSL as well as other non-African courts. This increases institutional knowledge and helps the ICLS learn from other courts and domestic prosecutions, something the Malabo Protocol has been accused of not doing.¹¹⁴³

Article 46L(3) removes aspects of the political difficulties in including the ICC directly by setting out a relationship in which Africa benefits. To avoid repeating ICC mistakes the ICLS will need to address the reluctance of the AU and certain members to engage with the international court, as evidenced by the organisation's resistance to setting up an ICC liaison office at the AU and in their not seeking ICC assistance when drafting the Malabo Protocol.¹¹⁴⁴ To be a viable solution, the new court will need to improve the institutional relationship than currently exists between the AU and the ICC.

12.3.2 The Interpretation of the Admissibility Criteria

The Malabo Protocol admissibility criteria only refers to states. This is contrary to Article 46H(1) levels of complementarity as it ignores the REC/RMs and the ICC, replicating the latter's limited approach to complementarity. The ICC has been criticised for its needless replication of prosecutions in relation to Simone Gbagbo following a successful national prosecution and, again, with the Lubanga prosecution given the ability of the DRC to try him.¹¹⁴⁵ Both instances have negatively impacted justice and accountability, not to mention the unnecessary use of scarce resources.

Despite the lack of a hierarchy between international criminal courts providing 'no legal reason that the ICC would defer to the ACTJHR',¹¹⁴⁶ both the international court and the ICLS need to reconcile their jurisdiction to avoid competing claims and unnecessary

¹¹⁴³ Amnesty International (n 1) 15.

¹¹⁴⁴ Joomlasupport, 'AU rejects ICC office in Africa' (*The Observer* 28 July 2010)

<<http://observer.ug/news-headlines/9485-au-rejects-icc-office-in-africa>> accessed 12 May 2018.

¹¹⁴⁵ Chapter 6.1.2 of this thesis.

¹¹⁴⁶ Amnesty International (n 1) 22.

overlapping prosecutions. Can the ICLS avoid exacerbating the situation and potentially rectify ICC shortcomings?

Miles Jackson proposes a legally sound method of bringing regional courts into the ICC framework which the new court can also adopt.¹¹⁴⁷ Achieved through questioning whether a prosecution by the ICLS can constitute a prosecution 'by a State which has jurisdiction over it' and thus, be inadmissible before the ICC.¹¹⁴⁸ Conversely, this can be applied by the ICLS to overcome the exclusion of the ICC and the REC/RMs and encourage such prosecutions.

The basis of Jackson's hypothesis is that 'a genuine prosecution by a lawfully constituted regional tribunal should be seen as prosecution by a state such that the case is inadmissible before the ICC'.¹¹⁴⁹ To reach this conclusion, 'the proper understanding of the legal relationship between states and regional tribunals and the contextualized application of the principles of treaty interpretation' was applied.¹¹⁵⁰

When establishing international courts states delegate their national jurisdiction to the legally constituted court.¹¹⁵¹ States cannot do collectively what they are not able to individually,¹¹⁵² but collective responses to international crimes are permitted.¹¹⁵³ The VCLT requires provisions to be interpreted using the terms ordinary meaning, taking into account the context, object and purpose of the treaty.¹¹⁵⁴ Since the Rome Statute is 'akin to the constituent instrument of an international organization [...] the objectives assigned to the organization by its founders play a more central role'.¹¹⁵⁵

Both the ICC and ICLS objectives include ending impunity while leaving primary responsibility for prosecutions with states. Consequently, a state's decision to delegate

¹¹⁴⁷ Miles Jackson, 'Regional Complementarity: The Rome Statute and Public International Law' (2016) 14 *Journal of International Criminal Justice* 1061.

¹¹⁴⁸ Article 17(1)(a) Rome Statute. For those who argue 'state' cannot be interpreted in any way but strictly see Max du Plessis, 'Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes' (2012) 235 *Institute for Security Studies Paper*.

¹¹⁴⁹ *Ibid* abstract.

¹¹⁵⁰ *Ibid* 1062.

¹¹⁵¹ *Ibid* 1066.

¹¹⁵² *Ibid* 1067.

¹¹⁵³ Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *Journal of International and Comparative Law* 618, 626.

¹¹⁵⁴ Article 31.

¹¹⁵⁵ *Ibid* 1065.

jurisdiction to a regional court is commensurate to a state prosecuting the case. If the ICLS adopts this interpretation an African state which referred a matter to either a REC/RMs court or the ICC would be asserting ownership over the process, something which the ICC has undermined.

Plus, complementarity has the protection of sovereignty at its core¹¹⁵⁶ and this interpretation sees referrals as the 'use of sovereignty for international ends' when prosecuting international crimes.¹¹⁵⁷ When a state delegates its jurisdiction to a lawfully constituted (sub)regional or international court it should be viewed as the state exercising its sovereignty.¹¹⁵⁸

The AU and the new court seek to 'defend the sovereignty ... of its Member States'¹¹⁵⁹ and this interpretation does just that. As has been pointed out by this thesis, the genuineness of the ICC self-referrals has been called into question.¹¹⁶⁰ The ICLS should take this into account to prevent political manipulation by a state and should not pursue cases to justify its own existence.¹¹⁶¹

On the whole, Article 46H's omission of reference to the ICC and REC/RMs can be overcome. By encouraging prosecutions at the national, (sub)regional, continental and international level the ICLS offers a solution to the narrow focus of investigations and prosecutorial efforts of the ICC while positively contributing to ICL.

12.4 The Implications of Complementarity for Accountability

The ICLS' version of complementarity encompasses more mechanisms than the ICC, encouraging a greater division of labour. But the financial burden from multiple memberships and the accompanying contribution requirements may prove too

¹¹⁵⁶ Chapter 6 of this thesis; On how ICC goals are not always in opposition to sovereignty, see Jackson (n 1147) 1068.

¹¹⁵⁷ Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round' (2006) 16 *European Journal of International Law* 979, 986.

¹¹⁵⁸ Jackson (n 1147) 1069.

¹¹⁵⁹ Article 3(b) AUCA.

¹¹⁶⁰ Chapter 6.1.3 of this thesis.

¹¹⁶¹ Clark, 'Chasing Cases' (n 497).

cumbersome for some African states,¹¹⁶² especially for those already struggling to meet their current contribution obligations.¹¹⁶³ This may be at the expense of accountability as the various mechanisms become financially unsustainable.

For ICLS complementarity to be a solution to the ICC's shortcomings such burdens will have to be minimised, if not fully overcome.

The concern over the onerous costs implementing legislation place on states¹¹⁶⁴ is disproportionate to what is actually required. Neither the Rome Statute nor the Malabo Protocol obligate states to enact implementing legislation, only requiring cooperation.¹¹⁶⁵ The apprehension over the necessary work required to draft the legislation is not convincing.¹¹⁶⁶ When the Rome Statute was adopted the same issues would have applied and, if raised, would likely have been seen as an excuse to avoid addressing impunity.

For the states which have already adopted ICC implementing legislation, little work needs to be done in relation to the core crimes because the ICLS provisions closely resemble the Rome Statute. These states and the new court 'cannot ignore jurisprudence that has been established by the ICC or other tribunals, so if anything, [...] if they've got progress, they can only improve'.¹¹⁶⁷

If states chose to adopt implementing legislation for the non-core crimes more work will be required. Yet, as the crimes are based on existing suppression treaties states should have started to address the issues already, which would only improve accountability both nationally and continentally in the long run. It may also contribute to reconciliation by re-enforcing acceptable norms and standards to be applied to such prosecutions.

The Malabo Protocol reflects the AU's objective to encourage the harmonisation of laws amongst its Members. This would increase capacity and the potential of national prosecutions if the offences are incorporated into domestic law by removing the need to

¹¹⁶² du Plessis, 'A case of negative regional complementarity' (n 1).

¹¹⁶³ Ekott (n 1066).

¹¹⁶⁴ Amnesty International (n 1) 29.

¹¹⁶⁵ Nouwen, *Complementarity in the Line of Fire* (n 582) 20.

¹¹⁶⁶ Amnesty International (n 1) 29.

¹¹⁶⁷ Interview with ICC Official (The Hague, The Netherlands, 16 February 2016).

rely on UJ and international courts to pursue such cases. In turn, emphasising that primary responsibility to prosecute lies with states.

If the above, onerous cost critique, had raised concerns over the desirability of harmonising laws that would be different. But, as the Malabo Protocol does not require implementing legislation the criticism is based on a misunderstanding as well as being an unconvincing argument.

12.5 The Notion of Positive Complementarity

The ICC coined the term positive complementarity which encompasses the promotion of national prosecutions alongside the OTP's preliminary examinations, investigations and trials.¹¹⁶⁸ But the ICC has not lived up to this, which has been compounded by the narrowing of the concept by the ASP's report on complementarity.¹¹⁶⁹

Does the Malabo Protocol offer a fix for this? Nothing explicitly refers to positive complementarity but a similar omission did not prevent the ICC OTP from developing the approach.¹¹⁷⁰

The ICC has decided capacity building is beyond its mandate, but this is not so for the ICLS. Part of the new court's purpose is to build capacity and advance AU aims and objectives, providing a legal argument for positive complementarity's applicability. This reflects a TJ approach to prosecutions and justice as well as the contribution to peace and security justification for international courts.

The AU Decisions and Reports call on states to develop national capacity and 'ensure that they investigate or prosecute ... [as they] should explore the full range of options for deliver[ing] local justice before considering recourse to international tribunals'.¹¹⁷¹ The need for the capacity and capability improvement was to limit the use of the ICC 'except

¹¹⁶⁸ Chapter 6.2 of this thesis

¹¹⁶⁹ See n 645.

¹¹⁷⁰ Chapter 6.2 of this thesis.

¹¹⁷¹ Report of the Commission on the Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC) [Assembly/AU/DEC.221 (XII)] Assembly/AU/13(XIII) MinICC/Rpt. R7.

when it deems that national courts are unable or unwilling, thereby avoid[ing] the perception of foreign interference in African affairs'.¹¹⁷²

Also, the decisions, documents and reports addressing justice, peace and security find capacity building is a crucial step for states reclaiming ownership over international criminal justice and development. It provides the opportunity to incorporate African values and norms into the processes, contextualise the situations, and enables a balancing of accountability and reconciliation at the national level.

There is also a need for the court to undertake this role based on the new court's inability to prosecute Heads of State and Government and senior state officials. The respective state's national courts are the only other option, besides the ICC, which can pursue such prosecutions and should be supported in such endeavours. While it is unlikely a state will prosecute its own Head of State or Government, the Habré precedent shows the need for creating a judicial system capable of such prosecutions for when it does become viable. This will help address accountability and the gap left by the Protocol's immunity provision.¹¹⁷³

The ICLS has a clear mandate to undertake capacity building, which can help rectify the undermining of national prosecutions by the ICC and the dependencies created by keeping the international court's expertise in house. This would follow the capacity development experienced in Sierra Leone with the SCSL as opposed to the ICC's practice.

The African Court is likely to be underfunded and a positive complementarity approach can minimise the impact of this on accountability. By building national and REC/RMs capacity more robust judicial systems will emerge, alleviating the dependency on both the ICC and the ICLS over time. This will reduce financial pressures on the new court if prosecutions were not its main focus but instead the concentration would be on capacity development and investigative and prosecutorial assistance.

¹¹⁷² 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) – EX.CL/607(XVII) para 14.

¹¹⁷³ On the immunity provision's impact on accountability see Chapter 14 of this thesis.

12.6 Conclusion

The strength of the ICLS is in its more inclusive approach to complementarity than the international court, reflecting the continental structure and addressing certain ICC shortcomings.

The most significant way the Protocol's complementarity offers a solution to the ICC's limitations is by helping to build national and (sub)regional capacity, increasing ownership, African expertise and knowledge of ICL and investigative techniques, At the same time creating a continental ecosystem to address justice, peace, and security thereby positively contributing to the international system.

The ability of the new court to take a different interpretation to the admissibility criteria than that of the ICC creates the opportunity to rectify the international court's narrowing of accountability and prosecutorial focus. The 'same person same conduct' test can be reinterpreted by the ICLS in a manner which promotes ownership and encourages accountability at the national and (sub)regional level. By preventing unnecessary overlaps in prosecutions, complementarity and accountability will be improved as the different courts have more freedom to help end impunity. More prosecutions before various judicial mechanisms create additional opportunity for the retributive aspects of ICL to be achieved, possibly contributing to deterrence, and improving peace and security by ensuring victims do not perceive perpetrators as enjoying impunity and thus reducing the likelihood of conflicts re-emerging.

The court does not use its complementarity provision to position itself as an alternative to the ICC. The lack of reference to the international court should not be overstated or used to argue the ICLS is anti-ICC and anti-accountability. What the Malabo Protocol has done is to set out a cooperation and assistance relationship with the international court to minimise the chance of the ICC continuing to undermine national prosecutions and decrease the continent's dependency on it. This shifts the approach away from Africa's subjugation towards ownership and collaboration.

By adopting Jackson's proposal on how to interpret 'state' under the admissibility criteria the new court can encourage prosecutions, protect sovereignty and avoid conflicts of

interest with the ICC. In turn, both the ICC and ICLS can fulfil their purpose and create a true division of labour for international prosecutions.

Chapter 13

Reasserting African Ownership

The ICC has a context insensitive approach which has undermined African states' efforts at pursuing accountability and has ignored the AU's attempts to address conflict situations. The result has been the creation of dependencies on the international court at the expense of African capacity, further marginalising Africa and subjecting it to double standards in the fight against impunity. Does the ICLS provide solutions to these shortcomings and also increase ownership?

To answer this, this chapter investigates whether the accountability and complementarity approaches of the new court contribute any resolutions. The ICLS position within the AU judicial organ is then explored to gauge whether this creates any opportunities which can address the ICC's shortcomings at the same time as furthering the new court's purpose. The meaning of ownership used here is the same as that employed in Chapter 7 – having a stake in the international justice and peace and security initiatives as opposed to complete control over the courts and international system.¹¹⁷⁴

13.1 The ICLS' Accountability Approach and Complementarity

Chapter 11 has shown how the ICLS offers a wider form of accountability than the ICC. The ability of the court to pursue both individuals and corporations for core and non-core crimes provides a more robust method to address the underlying causes of conflict and improve peace and security. Does this contribute to ownership and provide a solution to the ICC's shortcomings?

Possibly one of the biggest improvements to ownership is how the non-core crimes address Clarke's criticism that the ICC crimes shield Western states from their

¹¹⁷⁴ Chapter 7 of this thesis.

complicity in African resource conflicts.¹¹⁷⁵ This broader range of crimes are more reflective of the violations occurring within Africa than of those offences and prosecutions pursued by the ICC. The non-core crimes also recognise those African concerns that the international community is unwilling to pursue,¹¹⁷⁶ providing a more region-centric approach to the crimes. Plus, the impact of the ICC's narrow focus on accountability is minimised without challenging the international court directly.¹¹⁷⁷

The inclusion of corporate criminal liability further exposes corporate actors' complicity and role in conflicts, enabling African states and the AU to overcome some of the hurdles to peace and security ignored by the ICC and international system.

13.2 Ownership Through Accountability and Complementarity

The ICC has undermined capacity development with its restrictive interpretation of the admissibility criteria and its limited approach to positive complementarity. The international court is unable (and perhaps unwilling) to recognise the continental structure and roles of the AU and REC/RMs in pursuing justice, peace and security. In contrast, the ICLS adopts a more inclusive approach in an attempt to encourage prosecutions at the national and (sub)regional level. Does this contribute solutions to the ICC's shortcomings?

The ICLS is mandated to assist in building state capacity, which is the single most effective way to promote ownership. For states to have a stake in the justice and accountability process there needs to be relevant expertise and capabilities to pursue prosecutions and other peace and security initiatives. The new court is perfectly positioned to make use of its comparative advantage as part of the regional organisation that brings together all the REC/RMs and states to develop expertise, share best practices and act as a repository for methods for addressing justice, peace and security. The ICC is neither in the position to nor willing to take on this role.

¹¹⁷⁵ Clarke, 'Is the ICC targeting Africa' (n 681).

¹¹⁷⁶ Chapter 10 of this thesis.

¹¹⁷⁷ Chapter 5 of this thesis.

By not positioning itself as a competitor court to the ICC the ICLS' complementarity provision promotes ownership through reflecting the continental structure and working relationships between the different African actors. For example, the harmonious and complementary role of the ICLS is supported by the African Court's objective to 'complement the protective mandate of the' African Commission on Human and Peoples' Rights (ACHPR).¹¹⁷⁸ While the Human Rights Section of the African Court deals specifically with human rights issues ICL has human rights elements to it,¹¹⁷⁹ which the new court can address in the form of individual responsibility for state-based violations. Furthering the IHR and IHL understanding of ICL and justifying international courts through the peace and security approach and TJ's moral universalism and political liberalism basis.

The ICC's undermining of national prosecutions and ignoring of AU efforts to address the situations in Sudan and Libya reduced African ownership.¹¹⁸⁰ To encourage a more equal relationship with the international court, the UN and other actors, Article 46L(3) carves out a cooperation and assistance approach whereby neither the agency of the new court nor its ownership of the process is challenged. This reinforces the lack of a hierarchical relationship between international criminal courts, a point which at times seems to be overlooked.

Despite heavy criticism of the Protocol for not referencing the ICC,¹¹⁸¹ adopting Jackson's rethinking of the admissibility criteria provides a sound method to bring the ICC and REC/RMs into the ICLS framework. Thinking of state referrals as an act of sovereignty in delegating their responsibility to prosecute promotes ownership if a state freely decides to self-refer.

The Malabo Protocol offers solutions to redress the ICC's undermining of ownership through an inclusive approach to complementarity with the national, (sub)regional, continental and international levels working together.

¹¹⁷⁸ Article 4 Malabo Protocol.

¹¹⁷⁹ M. Cherif Bassiouni, *International Criminal Law Volume I: Sources Subjects and Contents* (3rd edn, Martinus Nijhoff 2008) 157.

¹¹⁸⁰ Chapters 6.1.2 and 7.1 of this thesis.

¹¹⁸¹ See Chapter 12.1.2 of this thesis.

13.4 The Court's Placement within the African Union

The ICLS is in a unique position that no other international criminal court has been able to benefit from – its inclusion in a regional organisation's court. Chapter 10 has already shown the impact this has on the expanded purpose of the court and by situating the court into the overall organisational structure, and applying the AU's concept of justice, a more holistic understanding of the new court is achieved. In turn, many of the ownership and agency challenges can be addressed.

This thesis does not argue that the politicisation of international criminal justice in and of itself is detrimental. Rather, a bias one-sided application which replicates the inequality of the international system does a disservice to ICL by delegitimising the associated judicial mechanisms. This was seen in *Part II* of this thesis where the UNSC, NATO, former ICC Prosecutor and the self-referring states sought to manipulate the type of accountability pursued. While the AU's linking of peace, security and justice automatically politicises the initiatives, if safeguards are put in place to limit the negative aspects it is not a *fait accompli* that the political challenges faced by the ICC and its relationship with the UNSC will be replicated with the new court.

Does the AU's notion of justice address the international system's ownership shortcomings?

Peace and security form a basis for the establishment of international criminal courts,¹¹⁸² and they are fundamental to the AU.¹¹⁸³ As such, the notion of justice incorporates peace and reconciliation as inseparable elements because durable peace requires both accountability and reconciliation.¹¹⁸⁴ This interlinking shifts the new court's purpose from the original ICL ones to include transitional justice aims. Broader than the ICC's purpose the ICLS' objectives include

strengthening the commitment of the Africa Union to promote sustained peace, security and stability on the Continent and to promote justice and human and peoples' rights as an aspect of their efforts to promote the objectives of the political and socio-economic integration and

¹¹⁸² See Chapter 1.2 of this thesis.

¹¹⁸³ Chapter 2.1 of this thesis.

¹¹⁸⁴ Mbeki Report 2.

development of the Continent with a view to realizing the ultimate objective of a United States of Africa.¹¹⁸⁵

The ICLS is expected to advance the policy and ideological underpinnings of the AU, while at the same time the new court can develop its own identity through how it interprets and promotes the organisation's objectives to reinforce the continental principles and values.¹¹⁸⁶ For example, the non-core crimes originating from AU/OAU instruments can increase ownership by interpreting the elements in line with the continental context.

Where within the AU's framework should the ICLS sit to solidify the Malabo Protocol's approach to ownership and offer a viable solution to the ICC's shortcomings? The new court needs to be situated alongside other AU institutions which complement its purpose and mandate.

13.5 The African Peace and Security Architecture

This section explores the African Peace and Security Architecture (APSA) and its capabilities to assess whether the ICLS should be situated within this framework. APSA's focus is 'built around structures, objectives, principles and values, as well as decision-making processes relating to the prevention, management and resolution of crises and conflicts, post-conflict reconstruction and development',¹¹⁸⁷ which ICLS' purposes complement.¹¹⁸⁸ To help APSA discharge its broad mandate, five pillars (composed of AU organs and bodies) are used: the PSC,¹¹⁸⁹ the Commission,¹¹⁹⁰ the Panel of the Wise,¹¹⁹¹ the

¹¹⁸⁵ Preamble Malabo Protocol.

¹¹⁸⁶ Article 31 and 32 VCLT.

¹¹⁸⁷ AU, African Peace and Security Architecture: African Union's blue print for the promotion of peace, security and stability in Africa <<http://www.peaceau.org/uploads/african-peace-and-security-architecture-apsa-final.pdf>> accessed 28 June 2017.

¹¹⁸⁸ The AU's different approach to framing conflict analysis through a criminal and political lens shapes the promotion of TJ over the UN and ICC's exclusive criminalisation focus. Nouwen, 'The Importance of Frames' (n 890).

¹¹⁸⁹ Article 6 and 7 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (hereafter PSC Protocol).

¹¹⁹⁰ Article 10 PSC Protocol.

¹¹⁹¹ Article 11 PSC Protocol.

Continental Early Warning system,¹¹⁹² the African Standby Force,¹¹⁹³ and the Peace Fund.¹¹⁹⁴

Despite not being included in the AUCA, the APSA gained prominence through the PSC,¹¹⁹⁵ whose goal is to 'enhance our capacity to address the scourge of conflict [...] and to ensure that Africa, through the African Union, plays a central role in [...] peace, security and stability'.¹¹⁹⁶ As the PSC is the 'standing decision-making organ for the prevention, management and resolution of conflicts'¹¹⁹⁷ it is key to addressing impunity and promoting ownership.

How does APSA achieve its goal and does it improve ownership? Roadmaps have been adopted which set out the approach to be taken, supported by each of the five pillars.¹¹⁹⁸ Most recently the 2016-2020 APSA Roadmap (hereafter the Roadmap) uses the PCRCD to conceptually link justice within the APSA.¹¹⁹⁹ The Roadmap seeks to improve self-reliance and promote Pan-Africanism through consensus and synergy between the AU and the REC/RMs.¹²⁰⁰ The ICLS supports this through its complementary provision and the relationship envisioned with the REC/RMs courts.

A strategic priority is to engage in conflict prevention through 'addressing the root, proximate and structural causes of conflict',¹²⁰¹ in particular narcotics, piracy, human trafficking and small arms proliferation which the new court's crimes cover. A clear link is therefore made for a peace and security justification for establishing the new court. Cooperation amongst states is the best method to combat these crimes, therefore regional and continental legislation makes sense as it offers a means to address these issues. A benefit of such legislative measures is the removal of the dependence on bilateral agreements while imposing minimum standards.

¹¹⁹² Article 12 PSC Protocol.

¹¹⁹³ Article 13 PSC Protocol.

¹¹⁹⁴ Article 21 PSC Protocol.

¹¹⁹⁵ Article 2 PSC Protocol. This protocol also provides the legal basis for APSA.

¹¹⁹⁶ Preamble PSC Protocol.

¹¹⁹⁷ Article 2 PSC Protocol.

¹¹⁹⁸ The roadmaps typically cover a four-year period.

¹¹⁹⁹ African Peace and Security Architecture Roadmap 2016-2020, 39 (hereafter Roadmap).

¹²⁰⁰ Roadmap, 10.

¹²⁰¹ Roadmap, 23.

Yet, the Roadmap does not explain how to achieve its objective of 'promot[ing] peace, security, and stability on the continent',¹²⁰² and other emergency situations or restoring peace, short of the Assembly's directing the Executive Council on conflict management.¹²⁰³ This is when the AU's notion of justice can be utilized to find ways to support peace and security. For example, transitional justice approaches addressing both peace and justice elements can be adopted as the PSC is able to: perform 'any other function as may be decided by the Assembly', including coordinating and conducting humanitarian action 'to restore life to normalcy in the event of conflicts or natural disasters'¹²⁰⁴ and peace building activities during and after conflicts.¹²⁰⁵ Additionally, the referral powers of the Assembly and PSC provide a way to incorporate the ICLS into the peace and security agenda.

APSA comprehensively provides an ownership role for the AU and its members states through addressing peace, security and justice matters. While the UNCh grants primary responsibility for international peace and security to the UNSC,¹²⁰⁶ the PSC Protocol bestows 'primary responsibility for promoting peace, security and stability in Africa'¹²⁰⁷ to the AU. But, as this thesis concluded, this provision is not in conflict with international law as it should be interpreted as reflecting the hierarchical relationship between the AU and REC/RMs and not that of the UNSC.¹²⁰⁸

13.6 The ICLS in the Context of Peace and Security

While the ICC finds peace and security beyond its mandate¹²⁰⁹ the ICLS cannot ignore the AU's institutional objective of promoting peace and security. Does situating the new court within APSA contribute to improving ownership and address the ICC's shortcomings?

¹²⁰² Article 3(f) AUCA.

¹²⁰³ Article 9(g) AUCA.

¹²⁰⁴ Article 15 PSC Protocol.

¹²⁰⁵ Article 14 PSC Protocol.

¹²⁰⁶ UNCh Chapter VIII deals with regional organizations, and Article 24 grants the UNSC 'primary responsibility for the maintenance of international peace and security'.

¹²⁰⁷ Article 16 PSC Protocol. This was reiterated in Article IV(2) AU REC/RMs MOU.

¹²⁰⁸ Article 17 PSC Protocol and Chapter 12.2.2 of this thesis.

¹²⁰⁹ 2007 Policy Paper, 8; 2003 Policy Paper, 7.

13.6.1 Justice, Reconciliation and Peace and Security

To start with both APSA and the ICLS (through the AU's notion of justice) see peace and security as important to the socio-economic development of the continent and a means to achieving stability. While 'ICL does not fit as well into [the peace and security structure] as everyone thought',¹²¹⁰ the AU has to reconcile its key mechanisms for addressing these issues. Unlike the ICC, which only pursues accountability, it would be illogical for the AU to isolate two of its key mechanisms for addressing peace, security, justice and reconciliation from each other. Additionally, by linking the ICLS to peace and security the AU is replicating the justification of the UNSC in establishing the ICTY and ICTR, contributing to the development of ICL and TJ.

13.6.2 The Role of the PSC under the Malabo Protocol

The PSC's mandate and role within the AU structure and APSA means its referral power to the ICLS is significant to peace, justice and reconciliation.¹²¹¹ States are able to request intervention by the AU to 'restore peace and security'¹²¹² and should the PSC determine criminal prosecutions necessary it can refer such situations to the court. Additionally, other APSA bodies can recommend the use of the new court which the PSC and Assembly can adopt, as happened when the Mbeki Panel called for the establishment of a hybrid court in Sudan.¹²¹³

The ability of the AU to intervene in situations of grave concern¹²¹⁴ has traditionally been understood as meaning military intervention, reflecting states' concerns at the time.¹²¹⁵

¹²¹⁰ Interview with African State Official (Pretoria, South Africa, 11 November 2015).

¹²¹¹ Article 46F ACS.

¹²¹² Article 4(j) AUCA.

¹²¹³ Chapter 10.3.2.2 of this thesis.

¹²¹⁴ Article 4(h) AUCA. Situations where core crimes are committed are thought to be the basis for such an intervention. See the proposed amendments to Art 4(h) in the Protocol on Amendments to the Constitutive Act of the African Union <https://au.int/sites/default/files/treaties/7785-treaty-0025_-_protocol_on_the_amendments_to_the_constitutive_act_of_the_african_union_e.pdf> accessed 23 April 2018.

¹²¹⁵ Dan Kuwali, 'The rationale for Article 4(h)' in Dan Kuwali and Frans Viljoen (eds), *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act* (Routledge 2014); Dan Kuwali, 'The meaning of 'intervention' under Article 4(h)' in Dan Kuwali and Frans Viljoen (eds), *Africa and the Responsibility to Protect: Article 4(h) of the African Union Constitutive Act* (Routledge 2014).

This understanding prevents an article 4(h) intervention from including referral to the ICLS. However, given that the AU's notion of justice incorporates peace and security, and the destructive impact of the ICC over ownership and other transitional justice interventions, there is a case to be made for interpreting this intervention to include criminal prosecutions.

The need for military intervention is not completely replaced given the practicalities of conducting investigations and prosecutions during ongoing conflicts.¹²¹⁶ Here the use of military action to reduce the intensity of the conflict or its complete termination would be followed by criminal prosecutions. This is most likely a purely academic debate as the PSC has never taken an Article 4(h) decision despite the numerous occasions it could have done so.

13.6.3 Reconciling AU and ICLS Objectives

Unlike the ICC, the ICLS has been given a more challenging task to deliver on numerous objectives. It is to fight impunity, promote peace and security and address the underlying causes of conflict while also advancing African values and norms for a continent lacking monolithic cultures and needs. Two examples illustrate how situating the ICLS within APSA enables the new court's purpose to be reconciled with that of the AU's, promote ownership and contribute to developing ICL and TJ.

First, the AU is 'relatively, quickly, successful in the peace and security area'¹²¹⁷ whereas international prosecutions are slow.¹²¹⁸ The organisation's peace and security agenda adopts a contextual approach to situations, including a policy of transitional justice. It may be that adopting a sequential approach, whereby the immediate peace and security challenges are dealt with first with prosecutions making up part of the subsequent initiative, will help address the ongoing hurdles to peace and to the underlying causes of the conflict.

Second, the preventative objective of the ICLS is part of the AU's objective to fight impunity. The new court seeks to achieve prevention with complementary prosecutions

¹²¹⁶ Impunity Report, 11.

¹²¹⁷ Interview with African State Official (Pretoria, South Africa, 11 November 2015).

¹²¹⁸ Chapter 5.2.2 of this thesis.

by national and (sub)regional courts. While deterrence is required for prevention, for both the ICLS and ICC this is hard to achieve because of the lack of an enforcement mechanism and the uncertainty surrounding prosecution. However, APSA can support the work of the new court and contribute to enforcement and deterrence. A radical proposal, worth further research, is the use of the African Standby Force (ASF) to assist in the enforcement of arrest warrants.¹²¹⁹ As the ASF is not a peacekeeping force but rather a peace support force¹²²⁰ there is a case to be made for such powers being within their mandate. Adding further weight to the proposal is the role of the PSC within the new court and the ability to decide on ASF involvement in situations the council has referred. Yet, the issue surrounding troop accountability for crimes committed while in situ is paramount.¹²²¹ Additionally, states may not welcome this usage of the ASF because of concerns over the PSC's political manipulation.

13.6.4 The Mutual Dependence between the ICLS and APSA

Like the ICC, the ICLS will never be able to deliver full accountability as the new court 'does not mean you will have hundred percent justice [...] over the ICC'.¹²²² Limitations in capacity aside, the ICLS can contribute to accountability when working together with national, regional and international levels. APSA's approach to peace and security is to work with states, REC/RMs and international partners to achieve its goals, an experience that will be useful to the new court. Situating the ICLS within APSA perfectly locates the new court to advance the AU's aims and policy direction as expected of it.¹²²³ It would also contribute to capacity development in the area of ICL and prosecutions, an objective of TJ.

¹²¹⁹ The ASF was officially declared operational in June 2016. Declaration adopted during the 9th Ordinary Meeting Of The Specialized Technical Committee On Defence, Safety And Security held 4 June 2016, Addis Ababa, Ethiopia, <<http://www.peaceau.org/uploads/9th-stcdss-final-declaration-english-.pdf>> accessed 23 April 2018.

¹²²⁰ Article 13(3) PSC Protocol.

¹²²¹ David Smith and Paul Lewis, 'UN peacekeepers accused of killing and rape in Central African Republic' (*The Guardian*, 11 August 2015) <<https://www.theguardian.com/world/2015/aug/11/un-peacekeepers-accused-killing-rape-central-african-republic>> accessed 28 June 2017; Stewart M. Patrick, 'The Dark Side of UN Peacekeepers' (*Newsweek*, 8 August 2015) <<http://www.newsweek.com/why-are-un-peacekeepers-still-sexually-abusing-children-361065>> accessed 28 June 2017; UN, 'UN peacekeepers exempted from war crimes prosecution for another year' *UN News Centre* (12 June 2013) <<http://www.un.org/apps/news/story.asp?NewsID=7402#.WVdveRPyeQ>> accessed 28 June 2017.

¹²²² Interview with African State Official (Addis Ababa, Ethiopia, 18 May 2015).

¹²²³ Chapter 10 of this thesis.

When addressing peace and security the AU is not only concerned with core international crimes, as the ICC is, but also the socio-economic and other underlying causes of conflict. The new court's ability to promote peace and security and address the underlying causes of conflict, by including the non-core crimes, mirrors the aims of APSA. This provides a means to address concerns brought up by the Roadmap over conduct contributing to fragility,¹²²⁴ which is beyond the mandate of the ICC. Plus, the ICLS's aim to promote justice and human and peoples' rights is linked to the root causes contributing to instability and conflicts.

As the only permanent regional or international judicial mechanism able to address the underlying causes of conflict it is within this area where the new court has the greatest potential to contribute to justice, peace and security, and TJ. However, the effect of the immunity provision may limit this for both the ICLS and APSA.¹²²⁵ Nevertheless, the inclusion of core and non-core crimes enables a more accurate representation of criminal liability and the reality of the situation than that provided by ICC. Consideration of the facilitating environment for international crimes and those actors involved increases the chance of an African understanding of justice being met,¹²²⁶ and for the new court to contribute towards reconciliation, peace and security and TJ objectives.

As this thesis concludes, the AU's notion of justice can improve ownership over the justice and peace and security processes. The inclusion of non-judicial mechanisms means the ICLS is not exclusively responsible for the promotion of accountability and for ending impunity. It will be up to the new court and the REC/RMs courts to complement and support national systems to prosecute. The ICLS should be seen as one of many elements to be utilised, as appropriate, in post-conflict situations.

The ICLS is only capable of dispelling criminal accountability but it can contribute to the AU's broader notions of justice, including peace and security, if states cooperate and the full range of crimes are pursued. Should the new court find it is working in opposition to the AU's notion of justice both institutions' credibility will be reduced, negatively impacting ownership.

¹²²⁴ Roadmap, 19.

¹²²⁵ Chapter 14 discusses the immunity provision and its impact on accountability.

¹²²⁶ African in the sense of what is put forward by the AU.

The new court's symbolic, and real, value is in the reduction of dependencies on the international court and international system to address continental challenges. To achieve this states need to live up to their legal, political and moral obligations and by implementing AU decisions and instruments.¹²²⁷ States cannot take a passive role while at the same time calling for the AU to oversee peace, security and justice, yet relegate the new court to the sideline through lack of membership. But, the new court 'will never unite [Africa], because justice by itself, it divides, justice tries to bring forth the truth [...] most people hate the truth, so they will always be opposed [to the ICLS]'.¹²²⁸

13.7 Conclusion

The ICLS is unlike any other international criminal court. As part of the AU's judicial organ it must be seen in a wider context – that of the organisation's Pan-African ideology and focus on peace and security. The new court demonstrates an attempt to make ICL more relevant to Africa through a contextualised approach increasing the AU's and states' level of ownership, predominantly by adopting TJ justifications for its establishment. This has been achieved by the inclusion of non-core crimes and corporate criminal liability to address the underlying causes of conflict.

As a means by which to address the ICC's ownership shortcoming the ICLS can only achieve so much on its own. By situating the new court within the APSA its purpose can be better fulfilled and, more importantly, its additional objectives not applicable to the ICC are contextualised. For example, the role of the PSC in both APSA and the ICLS means there will be a permanent court which the council can make use of as part of its conflict and post-conflict mandate. The new court can promote peace and security while simultaneously fighting impunity, shifting the peace versus justice debate to reflect the AU's preference for transitional justice.

The AU's notion of justice includes more than criminal prosecutions seeking to impact reconciliation, peace, security and socio-economic development. Whether one agrees with the stated objectives and aims of the Court or not, this holistic understanding and

¹²²⁷ Interviews African State Officials (Addis Ababa, Ethiopia, May - June 2015).

¹²²⁸ Interview with African State Official (Addis Ababa, Ethiopia, 8 May 2015).

placement means the ICLS becomes a key tool that states and the AU can utilise in their efforts to address accountability, conflict prevention and post-conflict reconstruction.

The five pillars of APSA can be mobilised to improve capacity creating self-reliance within the continent in line with the Pan-African ideology. Perhaps the strongest argument for the Court being situated within APSA is that it will reduce current dependencies on an imperfect international court that replicates the inequalities Africa has long complained of.

Chapter 14

Understanding Immunity under the Malabo Protocol

Chapters 11 thru 13 have shown the potential for the ICLS to positively contribute to international criminal justice and to address the international court's shortcomings through the new court's approach to accountability, complementarity and ownership. The last remaining question is whether immunity, as provided for by the Malabo Protocol, supports, limits or negates these developments? This chapter starts by scrutinising the immunity provision before moving on to its compliance with international law. The impact of the provision on the new court's purpose is the final test in determining what influence immunity has over the Malabo Protocol's solutions to the ICC's shortcomings. As the African Court is an international court only the law of immunity before such courts is discussed.

The original draft African Court statute contained an immunity provision similar to that of the ICC,¹²²⁹ but coinciding with the timing of the inclusion of states into the drafting process the provision was changed in 2012.¹²³⁰ In light of the renewed opposition to ICC indictments of African Heads of State and Government, and within the context at the time, it appears likely that the change was in response to the international court.¹²³¹ African states chose to take a purely doctrinal approach to immunity instead of the normative interpretation of the original draft. Consequently, negative assumptions over the motivation and purpose of the provision abound in the literature.¹²³²

The reality is not that simple. The inequality within the international system and double standards exhibited by the ICC play a role, as does the lack of a homogenous approach to

¹²²⁹ Early drafts contained Article 46B(2) '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', as cited in Ssenyonjo (n 661) 414.

¹²³⁰ Deya (n 228); Opening Statement by Prof. Vincent O. Nmehielle, Legal Counsel and Director for Legal Affairs of the African Union Commission, 1st Session of the Specialized Technical Committee on Justice and Legal Affairs (Government Legal Experts) as cited by Amnesty International (n 1) 11, footnote 47; EX.CL/731 (XXI) (n 152); EX.CL/846(XXV) Rev.1 (n 152).

¹²³¹ Tladi, 'The Immunity Provision' (n 333) 4.

¹²³² Amnesty International (n 1); Viljoen, 'AU Assembly should consider human rights implications' (n 230); du Plessis, 'A case of negative regional complementarity' (n 1).

immunity amongst African states. Arguably the change in the provision was key to ensuring the protocol was adopted by the Assembly as the Rome Conference experience shows that certain states never signed up to the international court because of their concerns over immunity.¹²³³

14.1 The Immunity Provision

This thesis concluded that different types of immunity (personal and functional) prevent prosecution of certain individuals, shaping the level of accountability possible. The ICC does not uphold either immunity but, regardless, has been unable to pursue Heads of State and Government. Does the ICLS immunity provision affect the new court's ability to offer solutions to the ICC's shortcomings? This section examines what type of immunity the Malabo Protocol provides for.

The most controversial provision of the Malabo Protocol is Article 46A bis¹²³⁴ which upholds immunity for Heads of State and Government and senior state officials:

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 clumsily drafted provision creates uncertainty over whether personal or functional immunity is applicable; and which 'other senior state officials based on their functions' are protected.¹²³⁵ Article 46A bis has been criticised for granting impunity to Heads of State and Government and senior state officials.¹²³⁶ Functional immunity is thought to apply,¹²³⁷ but the more convincing interpretation is that the provision protects personal immunity only.¹²³⁸ The VCLT treaty interpretation rules provide for consultation of the

¹²³³ Sudan in particular has been very consistent in its objections to the assertion that immunities for Heads of States apply even when related to alleged international crimes being committed.

¹²³⁴ Amnesty International (n 1); Viljoen, 'AU Assembly should consider human rights implications' (n 230); du Plessis, 'A case of negative regional complementarity' (n 1).

¹²³⁵ For an analysis of the different legal interpretations see Tladi, 'The Immunity Provision' (n 333) 7-8.

¹²³⁶ Ibid.

¹²³⁷ Ssenyonjo and Nakitto (955) 93.

¹²³⁸ Tladi, 'The Immunity Provision' (n 333) 8.

AU's position on the issue.¹²³⁹ The organisation does not distinguish 'between the immunities of heads of states and those of other senior state officials'.¹²⁴⁰ For this reason, "based on their functions" should be seen as evaluative criteria for which senior state officials to include.¹²⁴¹ This would support the ICJ's focus on the nature of the function¹²⁴² and whether the official's function, as a representative of state, is predominantly internal or external.¹²⁴³

The AU discussed the provision 'and its conformity with international law, domestic laws [...] and jurisprudence [... the] challenges inherent in widening immunities',¹²⁴⁴ the lack of a definition and the problems surrounding 'providing an exhaustive list'.¹²⁴⁵ As a compromise, the Malabo Protocol leaves the determination of which functions and officials are protected to judges on a case-by-case basis. On the one hand this is problematic as it creates uncertainty and the potential for inconsistent application and interpretation. On the other hand it removes the political dynamics involved in the drafting process from influencing the individuals included, which likely would have slowed down the drafting process. Thus, the judges can interpret the provision to minimise the immunity provision's scope, increasing the number of individuals within the court's jurisdiction.

Personal immunity only applies for the duration of the official's tenure in office and Article 46A bis is limited to the period the individual is in office. Despite functional immunity being disregarded as a defence by previous international courts, under international law such protection would apply regardless of employment status. This makes it hard to argue the Malabo Protocol provides for functional immunity.

¹²³⁹ Articles 31 and 32 VCLT.

¹²⁴⁰ Tladi, 'The Immunity Provision' (n 333) 8; Ext/Assembly/AU/Dec.1 (n 686) §9; EX.CL/846(XXV) Rev.1 (n 152) para 26.

¹²⁴¹ EX.CL/846(XXV) Rev.1 (n 152) para 26.

¹²⁴² *Arrest Warrant* case Joint Separate Opinion, para 53; *Certain Questions of Mutual Assistance* case, para 196.

¹²⁴³ *Armed Activities on the Territory of the Congo* case (n 265) para 47; *Certain Questions of Mutual Assistance* case, para 185-6 rejected the claim by Djibouti that its Procureur de la République and Head of National Security had immunity before French courts.

¹²⁴⁴ EX.CL/846(XXV) Rev.1 (n 240) para 25.

¹²⁴⁵ *Ibid.*

Overall, the personal immunity before the ICLS is a more limited form of protection than functional immunity by applying only to those senior state officials who satisfy the 'based on their functions' criteria.

14.2 Compliance with International Law

The purpose behind Article 46A bis is 'to address the categories of individuals who should be covered by immunities while serving their tenure [...] pursuant to the relevant Assembly Decisions' on immunity.¹²⁴⁶ During discussions on jurisdiction of particular concern was immunity and its conformity with customary law and the Vienna Conventions.¹²⁴⁷ Chapter 8 concluded that the ICC's approach to immunity has not created, nor is it reflective of, a customary law exception, but does Article 46A bis violate international law?

The trend amongst international courts is to include a provision removing immunity as a barrier to prosecution. The Malabo Protocol's failure to follow suit has raised doubts over its compliance with international law. Despite the claim that the *Arrest Warrant* Case removed immunity for senior state officials, and by analogy Heads of State and Government,¹²⁴⁸ international law does not reflect this.¹²⁴⁹ The ICJ decision does not enable international criminal courts to automatically disregard immunities, rather recognising there are instances where such courts *may* exercise jurisdiction.¹²⁵⁰ For example, the ICTY, the ICTR and SCSL provisions do not remove immunity but instead disregard immunity as a defence.¹²⁵¹ In practice, the individual still benefits from inviolability, but if they come before the court there is no immunity defence to rely on. This reflects the difference between jurisdiction and responsibility with the provisions addressing the responsibility side¹²⁵² although, practically, the defence exclusion 'seem[s] implicitly to treat that status as of no relevance as a bar to its jurisdiction'.¹²⁵³ The ad hoc

¹²⁴⁶ Ibid para 24.

¹²⁴⁷ See Sudan's position in EX.CL/731 (XXI) (n 240) 4; Ethiopia's position on immunity and the *proprio motu* powers of the Prosecutor, R EX.CL/731 (XXI) (n 240) 5.

¹²⁴⁸ *Arrest Warrant* case Judgment, para 61.

¹²⁴⁹ Chapter 2.2.5 of this thesis.

¹²⁵⁰ *Arrest Warrant* case Judgment, para 60.

¹²⁵¹ Fox and Webb (n 328) 555. A.

¹²⁵² Ibid 555-6.

¹²⁵³ Ibid 556.

tribunals and the SCSL relate to specific conflicts and timeframes limiting the applicability of their immunity exception.

The ICC immunity provision does not provide concrete proof of an exception as the scope of the provision is not without its detractors;¹²⁵⁴ the waiver of immunity is only applicable for its members, which has yet to reach universal status; and Article 27 has a contentious nature within the Rome Statute with various perspectives over third parties and immunity under the law of treaties. Hence, an exception to immunity based on the tribunals and the ICC provisions alone does not acknowledge that the exclusion stems from the constitutive instruments and the consent of states for those specific institutions.

The ICC argues customary international law denies immunity because nothing within that law specifically grants it.¹²⁵⁵ If this were the case there would be no need for a specific stipulation removing immunity or disregarding the defence. Logically, it seems that states assumed immunity was present and the issue needed to be addressed explicitly. The ICC Pre-Trial Chamber's view is that if no evidence of a customary rule upholding immunity exists there is also no evidence of a rule having developed denying immunity. This is hard to accept because the judgement lacks explanation.¹²⁵⁶ The habit of the ICC to conflate UNSC actions and Chapter VII powers with the establishment of customary international law only serves to reduce the credibility of the argument.¹²⁵⁷ Furthermore, the ICC lacks consistent reasoning for the removal of immunity for third party states, weakening any exception claim.¹²⁵⁸

If one accepts that customary law neither permits nor prohibits immunity, then 'Article 46*Abis* is neither reflective of nor inconsistent with customary international law'.¹²⁵⁹ Thus, negating the criticisms that the Malabo Protocol provision violates international law.

¹²⁵⁴ These debates focus on Article 27 and 98 of the Rome Statute, see Akande, 'The Legal Nature' (n 773); Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest (2009) 7 Journal of International Criminal Justice 315.

¹²⁵⁵ Malawi Decision, 23.

¹²⁵⁶ *Ibid* 43.

¹²⁵⁷ For an explanation of this position see Tladi, 'The Immunity Provision' (n 333) 13-4.

¹²⁵⁸ Abel Knottererus, 'The immunity of al-Bashir: The Latest Turn in the Jurisprudence of the ICC' (*EJIL: Talk!* 15 November 2017) <<https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence-of-the-icc/>> accessed 1 April 2018.

¹²⁵⁹ Tladi, 'The Immunity Provision' (n 333) 15.

Chapter 8 established that international law has not conclusively removed immunity before all international criminal courts.¹²⁶⁰ Article 46A bis is therefore not in violation of international law, and is in keeping with the rationale for immunity.¹²⁶¹ Despite the rationales for state immunity and for Heads of State and Government being the same,¹²⁶² others contest this on the grounds that the 'sovereign equality of states – does not apply to the exercise of jurisdiction of international courts and tribunals since, though created by states, they are not themselves states'.¹²⁶³

The contrary is argued here. The forum of the prosecution is irrelevant as the effect is the same – interference with state functioning and, if successfully prosecuted and enforced, regime change. For example, the use of the ICC in Libya by the UNSC demonstrates that an international court is not free from manipulation by states for their own benefit at the expense of sovereignty.¹²⁶⁴ Additionally the attempted prosecutions of Kenyan President Kenyatta and Deputy President Ruto highlights the link between sovereign equality and regime change, with the ICC recognising its role in interfering with the ability of the accused to perform their official duties.¹²⁶⁵

If a sitting Head of State or Government is found guilty, penal measures are imposed preventing them from remaining in office. The ability of the state and its citizens to determine their own domestic trajectory and internal workings of that state are compromised. This may appear less problematic regarding Heads of State and Government who remain in power through unconstitutional or dictatorial means, but the legal reality is nevertheless the same. Plus, any cooperation, assistance or other support received from a state in bringing the accused before the court, when the state is under no other legal obligation, equates to interference and breaches sovereign equality.

¹²⁶⁰ Chapter 8 of this thesis.

¹²⁶¹ For a discussion on the rationales and different concepts of immunity see Fox and Webb (n 328) Chapter 2. However, Tladi takes the opposite view that 'the rationale for immunity of states and its officials --- sovereign equality of states --- does not apply to the exercise of jurisdiction of international courts and tribunals since, though created by states, they are not themselves states.' 'The Immunity Provision' (n 333) 13. This thesis argues that it is irrelevant whether it is a state or an international court which seeks to exercise jurisdiction, the effect would be the same – the interference with the functioning of a State. Additionally, if the opposite view is adopted, the international court would be placed above the state, and states are unlikely to agree to such a hierarchical system without their explicit consent (as with the ICC). The fact not all states have ratified the Rome Statute demonstrates the unwillingness to adopt this hierarchical approach.

¹²⁶² On the rationale for Head of State immunity see Chapter 2.2.2 of this thesis.

¹²⁶³ Tladi, 'The Immunity Provision' (n 333) 13.

¹²⁶⁴ Chapter 7.1.5 and 7.2.3 of this thesis.

¹²⁶⁵ ICC Press Release, 'Trial Chamber V(b)' (n 777).

Removing the immunity would also introduce a hierarchical system as international criminal courts are granted the ability to circumvent restrictions placed on states, yet states cannot confer powers they do not themselves possess.¹²⁶⁶ This is why immunity can only be removed as a prosecutorial barrier by state consent, or a UNSC Chapt VII decision. The lack of universal ratification of the Rome Statute demonstrates states unwillingness to accept the complete removal of immunity, whether or not for self-preservation.

On the whole, the rationale for Heads of State and Government immunity before international courts is the same as state immunity because of the effect of its removal. The arguments proposed here are not used to justify the actions of such individuals, but rather to demonstrate that the rationales are comparable.

In conclusion, Article 46A bis does not violate international law but upholds the rationale for personal immunity for Heads of State and Government and other senior officials based on the official's functions. It does however go against the trend of international criminal courts removing immunity as a procedural barrier to prosecution.

14.3 Pursuing Justice versus Impunity

The ICLS' purpose significantly shapes how the new court proposes to address the shortcomings of the international system. If personal immunity is upheld in accordance to Article 46A bis does this limit or negate the ICLS' contribution to the need for an African regional criminal court?

The first step in answering this lies in identifying which of the new court's purposes are likely to be impacted by the immunity. These include: delivering accountability; addressing the underlying causes of conflict; advancing African values and norms; ensuring states have primary responsibility for prosecutions; improving peace and security; promoting AU aims and objectives; fighting impunity; seeking individual and

¹²⁶⁶ Henry G. Schermers & Niels M. Blokker, *International Institutional Law: unity within division* (4th edn, Martinus Nijhoff 2004) §209.

corporate criminal responsibility; preventing and deterring crimes; and promoting justice. Additionally, immunity will influence complementarity and ownership and agency.

Chapter 11 concluded that the ICLS offers a significant increase in accountability due to the inclusion of non-core crimes, the accompanying ability to address the underlying causes of conflict and corporate criminal responsibility.

Immunity will not impact corporate criminal responsibility because the individuals covered are not protected. For state owned corporations international law is clear, commercial dealings are not covered by immunity.¹²⁶⁷ But, when it comes to the non-core crimes and the ability to tackle the underlying causes of conflict immunity does present challenges. Typically, the crimes require some form of official complicity¹²⁶⁸ and the immunity provision prevents the Heads of State and Government and a small category of senior state officials from being prosecuted, reducing accountability overall. However, not all state officials are exempt. This is an important distinction as many of the crimes rely on the complicity of state officials whose functions are unlikely to fulfil the immunity provision's criteria. The limited scope of Article 46A bis' can minimise the impact of immunity on accountability.

This more limited interpretation offered by personal immunity circumvents the concerns expressed that Article 46A bis will maintain the status quo of only low-level rebels being prosecuted.¹²⁶⁹ Instead, only the highest official (Heads of State and Government) and a select few other senior officials will be beyond the new court's reach while they remain in office. Thus, a more positive picture emerges, albeit not perfect. The ICLS is permitted to pursue cases against high-level rebels as well as many senior state officials, though the extent to which it will remain to be seen.

Whether intended or not, the immunity provision contributes to both accountability and complementarity as it prevents the ICLS from becoming a substitute for the ICC.¹²⁷⁰ The international court will remain the forum in which sitting Heads of State and

¹²⁶⁷ Fox and Webb (n 328) Chapter 12.

¹²⁶⁸ n 418.

¹²⁶⁹ Ssenyonjo and Nakitto (n 955) 93-4.

¹²⁷⁰ Tladi, 'The Immunity Provision' (n 333) 14-15.

Government and certain senior state officials can be prosecuted. As argued before the new court will deal with those other officials as a complement to the ICC, leaving the controversial and paralysing aspects of immunity to the international court.¹²⁷¹ The Malabo Protocol's immunity provision also reduces the need for the ICC to pursue lower level individuals, instead bringing the international court back to its original purpose by it focusing on those bearing the greatest responsibility.

The provision reflects the new court's envisioned position within an ecosystem of mechanisms including national, REC/RMs and international courts contributing to the fight against impunity. The ICLS has the potential to alter the trajectory of international criminal justice within Africa by 'expand[ing] the reach of international criminal justice ... [a]ssuming African states that are not party to the ICC Statute become party to the expanded African Court, then the reach of the international courts to potential situations and perpetrators becomes enlarged'.¹²⁷² While African state officials raised doubts over the likelihood of ratification,¹²⁷³ the case can be made that the immunity provision makes it harder for states to reject membership to the African Court without appearing to support impunity.

The practical effect of upholding immunity means the responsibility to prosecute a sitting Head of State or Government falls to the individual state, reiterating their primary responsibility to prosecute. While this is part of the purpose of the new court the reality is that if the state or ICC does not prosecute the incumbent Head of State or Government will be out of reach of any court until they vacate office.

Amnesty International views the immunity provision as preventing deterrence,¹²⁷⁴ but this is an oversimplified statement. As an aim of ICL it is hard to prove deterrence

¹²⁷¹ As this author articulated during a workshop hosted by the Institute of Security Studies, 'The principle of Complementarity and the African Court – Lessons from the ICC' (Geographies of Justice Workshop, Peace and Security Training Centre Institute of Security Studies, Addis Ababa, Ethiopia, November 2014).

¹²⁷² Tladi, 'The Immunity Provision' (n 333) 14.

¹²⁷³ Chapter 11.3 of this thesis.

¹²⁷⁴ Amnesty International (n 1) 24. On the possibility that international criminal prosecution do not act as a deterrent because of the reasoning behind the crimes commission see Patrick Wegner, 'International Criminal Law and Deterrence – A Pointless Endeavour?' (*Justice in Conflict*, 25 October 2011) <<https://justiceinconflict.org/2011/10/25/international-criminal-law-and-deterrence---a-pointless-endeavour/>> accessed 30 June 2016.

occurs, particularly when the conduct is linked to ideological reasoning.¹²⁷⁵ The immunity provision also does not equate to impunity as the individuals concerned can be prosecuted after they leave office. This point was made by the ICJ in the *Arrest Warrant* case,¹²⁷⁶ with the precedent for such prosecutions in Africa having been set with Senegal's trial of former Chadian dictator Hissène Habré. Moreover, the court will not apply immunity in all situations. For example, when faced with the crime of an unconstitutional change of government the individuals involved can be prosecuted despite being the de facto Heads of State or Government. The AU does not legally recognise such a regime as the legitimate government, and as part of the organisation's judicial organ the ICLS will have to find the immunity inapplicable.¹²⁷⁷ This may prove challenging to implement if the sitting government uses unconstitutional means to retain their position as it is not clear whether the AU will denounce them as unconstitutional.

The critique that Article 46A bis is at odds with AU principles and objectives¹²⁷⁸ demonstrates an inaccurate prioritisation of the organisation's aims and ignores its background. Matters of peace and security are paramount to the AU's existence and greatly influence its practice and policies. The preferred approach is to balance the need for reconciliation with prosecutions.¹²⁷⁹ Therefore, the immunity provision enables the new court to contribute to the fight against impunity (albeit imperfectly) and promote justice, while at the same time abiding by the AU's aim of defending sovereignty. This is a fundamental principle of international law relied on by African states to address the inequality in the international system, and as such is unlikely to be disregarded by their regional court.¹²⁸⁰

¹²⁷⁵ See Chapter 1.2.2.1.2 of this thesis.

¹²⁷⁶ *Arrest Warrant* case Judgment, para 60.

¹²⁷⁷ The AU does not recognise illegitimate governments following an unconstitutional change of government, suspending the state's membership to the organisation as per Article 25 ACDEG.

¹²⁷⁸ Amnesty International (n 1) 27.

¹²⁷⁹ Chapter 10.3.2 of this thesis.

¹²⁸⁰ On the importance of sovereignty see Chapter 10.3.1 of this thesis.

14.4 Conclusion

As undesirable as the Malabo Protocol's immunity provision may be there is no legal reason that the approach of the ICC and other ad hoc tribunals has to be followed. This fact, coupled with the lack of a customary law exception, means Article 46A bis does not violate international law.

The ICLS provides diverse and innovative solutions to the ICC and international system's shortcomings. Despite appearing to take the fight against impunity significantly backwards, in fact the immunity provision has mixed repercussions. Only personal immunity is upheld for a select few individuals - Heads of State and Governments and certain senior state officials. The senior state officials covered are limited as the personal immunity is 'based on their function', similar to the ICJ's criteria. By not providing a definitive list of which functions and officials are protected the new court's judges can adopt a restrictive interpretation and further limit the applicability of personal immunity.

The impact of immunity on the ability of the new court to fulfil its numerous purposes is both positive and negative. It does limit accountability to the extent that a select few high-ranking individuals are exempted from prosecution, but only while they are in office. The ability to address the underlying causes of conflict is minimally affected as those officials likely to be complicit in the commission of the non-core crimes are unlikely to have functions justifying immunity. The status quo of prosecuting low-level rebels may persist, but the ICLS will have jurisdiction over high-level rebels and state officials and it will be up to the Prosecutor to ensure the cases reflect the reality of the situation. This criticism is also more damning of the ICC because that court has the ability to prosecute any state official but has consistently been unsuccessful.

Immunity forces the ICLS to encourage and support national prosecutions of those individuals outside its jurisdiction, furthering the aims of the envisioned judicial ecosystem across the continent and internationally. The AU has numerous aims and objectives related to promoting peace, security and justice alongside the defence of sovereignty and socio-economic development. The ICLS has to reconcile broader often

overlapping and contradictory purposes than the ICC, which requires a transitional justice approach to be adopted.

Chapter 15

Conclusion

The international legal system currently offers two ways to fight impunity: by pursuing either UJ or ICC prosecutions. In this thesis it has been asked whether there is a further need for a regional criminal court in Africa. Answering this central question required an understanding of whether the gaps and shortcomings of UJ and the ICC help to make this case. The conclusions presented in *Part I* and *II* indicate that the international system is composed of imperfect mechanisms. These imperfections create the need for an African regional criminal court that would address these flaws, strengthen efforts to fight impunity, and fulfil the agenda for peace and development on the African continent.

15.1 UJ the ICC and the Need for a Regional Criminal Court

Limited crimes

The core crimes are offences of concern to the international community yet the manner in which these crimes are considered and prosecuted does not reflect a sensitivity to the challenges of African conflict situations, nor does it address regional concerns. Furthermore, the crimes are insufficient in fulfilling the purposes of ICL and that of the ICC because they do not contribute to peace, promote deterrence, reconciliation or advance TJ. The inability of the international court and UJ to question conduct and activities which facilitate violent conflict is the biggest hurdle to establishing a successful preventative mechanism. Overlooking the underlying crimes leaves open the potential for conflict resurgence and the commission of further crimes and undermines the basis for TJ.

Attempts to expand UJ crimes by relying on human rights obligations is not effective. The use of human rights has blurred the lines between suppression obligations and the imposition of state responsibility with individual criminal responsibility.

The ICC has pursued prosecutions and investigations which do not fully represent the crimes committed due to the focus on the core crimes. The international court also ignores many of the actors who are directly and indirectly complicit in the commission of the crimes. Coupled with the inability to pursue corporate criminal liability, the limited crimes do not sufficiently address the ICL purposes of deterrence, prevention or reconciliation, let alone those of TJ.

Few cases pursued

Relatively few international prosecutions have been pursued and this means there is a limited contribution to the fight against impunity. Despite UJ legislation across numerous states, very few states actually pursue such cases. This is because UJ cases are not typically based on state policy, but rather on the ease of access to courts and the involvement of NGOs.

Even though the AU has adopted a UJ model law and African domestic legislation incorporates UJ crimes to varying degrees, there has been no increase in such prosecutions. Given the lack of strong NGOs across the continent and the procedural hurdles imposed by the African states' legislation, the lack of UJ prosecutions is unsurprising. With the successful Habré prosecution Africa demonstrated its capability to use UJ but the numerous external and internal pressures placed on Senegal to prosecute cannot be easily replicated.

Dependency

It has been shown in this thesis that the capacity constraints of the ICC have limited and shaped the OTP's policies in such a way that accountability has been narrowed. The OTP's positive complementarity policy does little to offset this narrowing as neither capacity building nor a division of labour have been undertaken. In fact, the evidence points to the opposite – active undermining and removal of cases from national jurisdictions. The strict interpretation of the 'same person same conduct' test, forces a particular prosecutorial focus if states want to challenge admissibility.

The complementarity principle was meant to ensure that the ICC was a court of last resort, however it has not fulfilled this role. Instead, there is a narrowing of accountability and a reduction in the number of individuals prosecuted due to the strict ICC admissibility requirements. Despite claiming to pursue those bearing the greatest responsibility the ICC has not done this. Instead it has used the gravity test to justify its one-sided investigations in both Uganda and the DRC.

Furthermore, budget constraints at the ICC have impacted negatively on the cases pursued. Taken together with security and access concerns it could be said that the ICC has pursued cases which are to its own benefit and has justified its own existence at the expense of local initiatives and communities. It is inevitable that an international court, claiming to deal with cases from across the globe, will have capacity constraints. However, the selectivity of prosecutions cannot be adequately justified and lends credence to those suspicious of political motivations.

Instead of encouraging domestic prosecutions the ICC has created dependencies and made it hard for states to assume their primary responsibility in pursuing prosecutions. In the international court's rush to launch its first prosecutions, the complementarity principle has been narrowly interpreted. States are given little choice but to adopt the ICC's investigative and prosecutorial focus or risk their efforts being insufficient for an admissibility challenge. This was most clearly demonstrated by the Lubanga and Simone Gbagbo prosecutions. The resulting overlap in prosecutions not only sees domestic prosecutions relegated to a lower status than those of the ICC, but wastes the already overstretched resources of the international court.

Inequality in the international system

The problem with both UJ and the ICC is that they have inadvertently replicated the inequality of the international system. UNSC referrals were meant to circumvent the restrictions on pursuing non-ICC member states. However, the UNSC Permanent Members' veto power and the political determination of the referrals prevent this method from being a reliable gap filler. What results is de facto impunity for the Permanent Members and their allies.

Furthermore, the use of UJ has been predominantly undertaken by former colonial powers and this has made African states suspicious of their motives. The role played by France in encouraging the self-referrals of Mali and Côte d'Ivoire to the ICC is of concern given French complicity and any crimes committed by its military in these situations are overlooked. The structural inequalities in the international systems persist and influence the ICC itself, even though the pursuit of international criminal justice is premised on political impartiality.

While the ICC's immunity provision in theory helps to fight impunity, the unfortunate unintended consequence is that it may actually assist in any regime change agenda, perpetuating the international system's inequality. The use of the ICC in the situation in Libya by the UNSC bears the hallmarks of political manipulation of the international court in order to remove the Gaddafi regime. This is shown by the quick turnaround time within which the Prosecutor opened the investigation and the subsequent lack of follow up after the Gaddafi regime had been overthrown. Until there is a realistic chance of every state being subjected to a UNSC referral the pursuit of international criminal justice is biased. Politically weak states may rightly fear the misuse of the ICC by the UNSC Permanent Members.

Similar to its shortcomings in the broader international system, the ICC has also undermined AU peace and security initiatives in Sudan and Libya due to the different conflict analysis lens applied. The difference between criminalisation and the wider societal context is important in determining the preferred approach and in understanding what will contribute to ending a conflict.

African ownership has been severely undermined by the ICC and by the UNSC's use of the international court. It has been shown that the ICC has created an adverse dependency at the expense of African states, and then used that same dependency and African inability and lack of capacity to justify the international court's interventions.

Immunity

Despite the Rome Statute removing immunity as a barrier to prosecution the ICC has been unable to successfully prosecute a sitting Head of State or senior state official. The

prosecution of the non-member state Sudan's President is complicated given its origin as a UNSC referral, while the prosecutions against Kenyatta and Ruto highlight the difficulties the court faces in prosecuting a member state which has waived immunity. It has been concluded that there are other factors at play beyond the law on immunity which prevent the ICC from pursuing these cases.

The consistent opposition to prosecutions of sitting Heads of State and Government and senior state officials is not unique to African states. As discussed, China, Israel and the USA have opposed attempts to use UJ against their senior officials, while certain European states do not consider the ICC to apply to them. As a result, international criminal justice increasingly seems to be an instrument of strong states against weaker states which again reinforces systemic inequalities and bias.

While there may not be widespread trust that African states will pursue genuine prosecutions, these states feel they have credible reasons and excuses given the ICC ignores their concerns and demonises any legitimate challenges they make against the international court.

It has been established that the international system's shortcomings are such that there is a need for a regional criminal court within Africa to address these gaps, and to act as a counter balance to the broader structural inequalities inherent in the international system which impinge on the role of the ICC. The original purpose of ICL prosecutions was to encourage deterrence, prevention and reconciliation. Yet, as has been shown in this thesis, both UJ and the ICC have not lived up to these aims. The international court has demonstrated the limitations of this understanding of ICL's purpose. While peace and security and TJ are also used as theoretical and practical justifications for the establishment of international courts, neither UJ nor the ICC have contributed to this aspect of the international system.

To act as a deterrent, there needs to be certainty, immediacy and comprehensibility of the prosecutions and severity of punishment. There are very few UJ or ICC prosecutions which reduces the level of certainty. The length of time taken to bring a case to trial reduces the immediacy as well. In *Part I* of this thesis it was demonstrated that the reason for pursuing UJ cases is not based on state policy but rather the ease of access to

courts and the involvement of NGOs. Regarding the sentences imposed, it has been shown that international punishments are more lenient than domestic sanctions such as in the ICC sentencing of Simone Gbagbo.

Nevertheless, the track record for prevention is hard to gauge as there is little actual prevention offered given that both the ICC and UJ are decontextualized mechanisms and are far removed from the actual underpinnings of violent conflict in Africa. While it is not necessarily the role of another domestic court to take into account the context of a case pursued there are grounds for arguing that the ICC should. The international court has claimed that it contributes to ending conflicts, but the evidence set out in this thesis does not support this claim. Instead, the ICC has pursued one-sided prosecutions ignoring certain African and non-African governments' involvement as well as ignoring the underlying causes of the conflict.

Although generally the ability of trials to contribute to reconciliation is disputed, in the case of the ICC it is concluded that bias, one-sided prosecutions and the undermining of national efforts to prosecute and address the crimes does little to support reconciliation.

15.2 The Solutions Offered by the ICLS

The ICLS is an international criminal court with purposes additional to those of the ICC that must also be taken into account alongside the pursuit of criminal justice. It is through these other purposes that the Malabo Protocol and the new court offer solutions to the shortcomings of the international system.

In contrast to the ICC the ICLS takes a region-centric approach, pursuing international criminal justice as it is understood at the international level but at the same time applying the AU's notion of justice. The result is a broadening of purposes including those which seek to address a multitude of African concerns.

The level of accountability offered by the ICLS surpasses that of both ICC and UJ prosecutions. Not only does the new court include the core crimes but the numerous underlying causes of conflict and conduct of concern to the region are represented by

the non-core crimes. The scope of the offences facilitates the linking of justice with peace and security in an attempt to find durable solutions to conflicts and contributes to furthering this justification for establishing international courts. The international community is disinterested in pursuing crimes of regional concern. Therefore, African states, like other regions, have been left to find ways to address their own concerns outside of the international framework. The AU is best placed to tackle the non-core crimes. It is not appropriate for an outside entity to determine continental priorities, especially a mechanism like the ICC which lacks contextual understanding. Furthermore, given its regional proximity the AU is not influenced by the broader structural inequalities of the international system.

An essential element of the AU's region-centric accountability approach is the incorporation of corporate criminal responsibility into the Malabo Protocol. The ICC does not address such actors despite their complicity in the crimes under OTP investigation. With the ICLS the corporate actors are subject to investigation and prosecution. This will hopefully address the actions of these entities which have long destabilised Africa, fuelling conflicts and violating the rights of ordinary citizens. This will advance ICL's retributive, peace and security purposes and incorporates TJ approaches.

In addition, the biggest contribution made by the ICLS and Malabo Protocol is in offering a solution to the reduction in ownership caused by the ICC over the justice process and also peace, security and reconciliation. The complementarity principle has been formulated to reflect the continental structure and encourage prosecutions at the national and (sub)regional levels, resulting in greater self-reliance and capacity development which the ICC has significantly undermined.

This is not achieved by positioning the ICLS as an alternative to the ICC. Instead, the Malabo Protocol attempts to redress the imbalance in the ICC relationship, which reproduces the international system's inequalities, by creating a cooperation and assistance dynamic. The lack of reference to the ICC or REC/RMs in the admissibility criteria is easily overcome by interpreting Article 46H to include state referrals to other courts as a sovereign act. This enables the new court to defend sovereignty (an aim of the AU) while encouraging the pursuit of accountability. There is no legal reason why both

the ICC and ICLS cannot pursue different cases in order to achieve greater accountability overall.

The ICLS can create its own identity and become as regionally relevant as possible. The AU and African states may never have their interests completely aligned with the ICC and international community. The AU's use of its Pan-African ideology to create a regional mechanism capable of promoting regional interests without contradicting or violating international law justifies the ICLS' inclusion in the APSA. Locating the new court within the APSA framework helps to fulfil the ICLS' purpose of promoting the aims and objectives of the AU while simultaneously fighting impunity through pursuing individual and corporate criminal responsibility.

The placement within APSA enables the ICLS to be used as a tool to assist in addressing the underlying causes of conflict as well as the core crimes, taking into account the AU's preference for the concurrent pursuit of justice, peace and reconciliation. As a permanent court included in the peace and security agenda of APSA the ICLS significantly improves ownership over the justice and peace processes. African norms are considered important and on an equal level to those of the international community. By accommodating peace and security with justice and reconciliation the AU's lens of conflict analysis becomes evident. The ICC has been unable to contribute to peace as it can only find solutions through criminalisation at the expense of the political context. The more holistic understanding and approach to conflicts demonstrated by the AU's notion of justice calls for the sequencing approach of TJ to be used and not by prosecutions first and foremost. The ICLS provides a means by which the AU and its members can demonstrate that they are not opposed to accountability. The new court will become part of the pursuit of peace and justice and not part of the peace versus justice debate, offering an opportunity to strengthen the international system and the basis for pursuing prosecutions before international criminal courts.

The most radical of all solutions examined in this thesis is the proposed enforcement mechanism. The ASF is part of APSA which may be used to support the work of the ICLS to enforce warrants, create safe environments for investigations and/or assist in the investigative stages if appropriately trained. However, further research is needed to explore the legalities of this as well as the feasibility aspect.

Overall, it has been concluded in this thesis that the Malabo Protocol and the ICLS do provide solutions to the continental issues which have plagued Africa for decades and offer a mechanism which furthers ICL and TJ purposes.

15.3 The Limitations of the ICLS

The main limitation of the ICLS stems from the very same thing that makes the court an attractive solution to the international system's shortcomings – its inclusion in an AU organ.

As innovative as the ICLS is the AU's institutional weaknesses and capacity constraints are the greatest hurdle to implementing any of the solutions and contributions identified in this thesis. Just as the ICC has suffered from funding uncertainty, the ability of the AU to fund and sustain the new court has yet to be proved. The AU's peace and security efforts have suffered from inadequate personnel and funding shortfalls. As it has been argued that the ICLS should be placed within APSA, it is likely the new court will suffer the same fate. Taking into account the reliance on donor money and the fact that it is impossible to use its programme budget to fund the court, already the future of the ICLS looks uncertain.

While the Malabo Protocol offences are needed the definitions have suffered as a result of the drafting process. The copy and paste approach using the Rome Statute and other international instruments has been at the expense of the principle of legality. Significant work still needs to be done to provide well thought out elements of the crimes to make the definitions compliant with legal principles and implementable.

The Malabo Protocol has not removed political considerations from the workings of the ICLS. The role given to the PSC and Assembly to refer cases, while welcome, creates the potential for continental politics to influence which situations get referred. However, given the lack of permanent PSC membership and no veto powers the likelihood of the problems which have arisen with UNSC referrals and protection of certain members and their allies being replicated is reduced. Nevertheless, the new court might have replaced

broader international structural and political shortcomings with those of the continental region instead.

While the Malabo Protocol's immunity provision goes against the current trend amongst international courts it is not in violation of international law. It has been concluded that the impact on accountability is reduced by applying personal immunity only for a very select few individuals. This is an imperfect compromise to the complete removal of immunity but does not fully negate the other developments and solutions offered by the ICLS.

Finally, the legal uncertainties surrounding the Malabo Protocol prevent states from signing and ratifying the protocol. While African states are slow to support their own regional mechanisms, the lack of clarity may prove to be the largest hurdle to overcome resulting in the ICLS becoming redundant before it is even established.

15.4 Concluding Comments

It has been argued throughout this thesis that the Malabo Protocol and the ICLS do not undermine ICL and the fight against impunity as has been claimed in the majority of the literature. Instead, the mechanism is a more nuanced response to the multifaceted challenges raised by the international system's pursuit of criminal justice. It offers the opportunity for an international court to explicitly address the reasoning for establishing international courts through greater focus on reconciliation, peace and security and TJ. Something the current system merely pays lip service to. While the literature continues the hero/villain narrative to discourage opposition to the ICC, the result is a lack of critical engagement concerning the international court's shortcomings effectively preventing any other mechanism from making a significant contribution to ICL.

It is concluded in this thesis that there is a need for a regional criminal court in Africa, and potentially in other regions too. This research will help to shift the focus away from seeing the ICLS and Malabo Protocol as anti-ICC rhetoric, towards a discussion of ways to fix the flaws in the Protocol. The findings in this thesis provide a way to approach the current debates on the ICC and ICLS and dispel the school of thought which sees the

new court as a challenge to the international court. Instead, the ICLS should be seen as a complement to the international system, and as an attempt to deal with regional issues in a region-centric manner. The ICC is never going to take up the nuanced challenges facing Africa and remains an inappropriate mechanism to do so because it is a decontextualized judicial mechanism.

Additionally, this thesis shows that the ICLS is not an anti-ICC instrument. It is not against accountability and pursuing criminal justice, instead the ICLS should be thought of as opposed to the narrow accountability provided by the ICC and in favour of breaking free from the inequalities of the international system which Africa has experienced for decades.

While it is tempting to dismiss African and AU efforts as lacking in substance given previous failures, this is overly simplistic. Africa lacks capacity but this does not justify the disregard shown to the organisation and the Malabo Protocol. Placing ownership within the continent will prevent the current dependency on outside assistance from the ICC and the perpetuation of inequalities and capacity shortcomings. It may also force the development of a more proximate judicial capacity, sensitive to contextual nuances. The continual marginalisation of African states and the double standards adopted by the UN and ICC undermine trust, a fundamental for good international relations and for the smooth operation of institutions. If Africa loses trust in the ICC as an institution it would be because the international court does not live up to expectations, misuses its power and reproduces the deficiencies of the international system.

With the new court, the AU is taking steps to become more self-reliant (in line with its Pan-African heritage) and asserting greater ownership over justice processes. This requires the AU to take a more inclusive approach to peace and security and show real commitment to fighting impunity. In addition to the research in this thesis, further work needs to be done on ways to strengthen the crimes set out in the Protocol to remove the uncertainty and overly broad definitions, and to create realistic implementable crimes which can truly advance justice, peace and reconciliation within Africa.

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