RATIONALE AND RATIONALITY OF SOUTH AFRICAN ICC WITHDRAWAL: ANALYSIS, CRITIQUE AND THE WAY FORWARD

Dissertation submitted for fulfilment of the requirements for the degree Master of Laws (LL.M) with specialisation in Public law at the University of the Free State

N Milnes
2014179689

Module: **LCON8900**
Supervisor: **Prof. C.F. (Neels) Swanepoel**

2020

DECLARATION

I, Nikki Milnes, declare that this dissertation is my own original work and it has not been presented to any other University or Institution for a similar or any other degree award.

Student:

Nikki Milnes ..... 09/12/2020 .....

Signature Date

Supervisor:

....

Signature Date

DEDICATION

I dedicate this dissertation to Dr David Malcolm Berman.

Dr Berman, you not only insured my survival following a complicated birth; you have been with me every step (and role) along the way; in every medical decision made and many personal developmental moments. You went above and beyond in making sure that I had the best possible start to my education. You have continuously motivated me to further my studies regardless of the circumstances I face.

Your input has been vital in getting me to where I am and shaping me into the woman I am today, even during the years that I was too shy to talk to you.

Thank you for believing in me and making me believe in myself.

This dissertation is a product of your dedication and inspiration.
Dr Berman, I am eternally grateful.
This is for you

ACKNOWLEDGEMENTS

I wish to extend my sincere gratitude to the following people for their contributions to this dissertation:

- To my supervisor, Professor C.F. (Neels) Swanepoel, for your assistance, guidance, and encouragement throughout the drafting of this dissertation.

- To Hesma Van Tonder, Research Librarian at the University of the Free state, for all of your assistance throughout the research for this dissertation.

- To Salochanna Golden, Susan de Kock and Mark Eccles for all of your assistance and inspiration throughout the development of this topic.

- To my parents, Warren and Wendy, and my brother, Malcolm. for your continuous support, unconditional love and patience. Without you, I would never have reached my dreams.

- To Dario and Bev Sperotto, for your never waiving love, faith and support.

- To Cornelia Geldenhuys and Helen Stewart for your assistance in editing this dissertation.

Each of you, in your own ways, helped to make this dissertation a reality.

Thank you

ABSTRACT

Informed by the strained relationship between the ICC, South Africa and the African Union, and the subsequent 2016 South African notice of withdrawal from the ICC, this dissertation considers whether the African Court on Justice and Human and Peoples Rights (ACJHPR) may be regarded as a viable substitute for the ICC and its system. It also considers the substantive issues that may arise out of South Africa's withdrawal, should it still wish to withdraw from the ICC, particularly with consideration of the continued protection of human rights and section 7(2) of the South African Constitution.

Considering a closed parameter of factors, the research demonstrates that after an initial strong show of support from Africa, the relationship between the ICC and the AU is disintegrating, mainly as a result of the Al Bashir matter. This led to: (a) South Africa filing a notice to withdraw from the ICC with the UN; and (b) the AU extending the jurisdiction of the ACJHPR to assume jurisdiction over the prosecution of individuals for international crimes.

The dissertation compares the jurisdictions of the ICC with that of the ACJHPR and finds that even though the provisions of the Rome statute were painstakingly deliberated upon, there are still areas that are lacking in clarity.

The research also shows that the Malabo **P**rotocol was drafted in haste, which will not only impact the definitions of the crimes within the court's jurisdiction but will also place an enormous financial burden on its contributors.

The most concerning aspect of the Malabo **P**rotocol relates to immunity. The immunity provision furthers the view that African leaders are reluctant to contemplate the possibility of being judged for their actions.

In the case of *Democratic Alliance v Minister of International Relations and Cooperation and Others,*[1] the Executive's decision to withdraw from the ICC was found to be procedurally unconstitutional. The court did not address the substantive validity of the withdrawal.

[1] *Democratic Alliance v Minister of International Relations and Cooperation and Others* (Council for the Advancement of the South African Constitution Intervening) 2017 (1) SACR 623 (GP).

In an attempt to address the question of whether a withdrawal from the ICC may constitute an unconstitutional "regressive measure", the researcher proposed the possibility of the Court declaring that a withdrawal may be constitutional, subject to the withdrawal taking place under court supervision in terms of a structural interdict. In this way, the court may ensure that a withdrawal from the ICC is not only procedurally correct but substantively justified.

In conclusion, the research finds that popular support for the Malabo **P**rotocol by African states seems bleak. It also seems unlikely that in its current form, the Protocol will ever become fully operational, simply because of its budgetary constraints. In the final instance, the research deduces that the ACJHPR will not become a viable substitution for the ICC and its system, mainly because of the immunity provisions in the Malabo **P**rotocol.

The researcher recommends that Article 46A bis of the Malabo **P**rotocol be removed so that no immunity is provided to any individual, regardless of official position. Article 46H of the Malabo Protocol should be amended to clearly provide for continued cooperation with the ICC. Moreover, the AU ought to consider a provision with the effect that cases over which the ICC has jurisdiction are referred to the ICC by the ACJHR. This stipulation should apply at least until such time as the ACJHR has established itself well enough. To this end, consideration should be given to a gradual phasing in of the crimes within the ACJHR jurisdiction.

Keywords: ICC; African Criminal Court; South Africa; withdrawal; Malabo Protocol; immunity; jurisdiction; budget; human rights; heads of state.

TABLE OF CONTENTS

TABLE OF FIGURES

LIST OF ABBREVIATIONS

ACHPR	African Court on Human and Peoples' Rights
ACJ	African Court of justice
ACJHPR	African Court of Justice and Human and Peoples' Rights
ASP	Assembly of State Parties
AU	African union
AUPD	African Union High-Level Panel on Darfur
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	*ad hoc* international tribunal for Rwanda
ICTY	*ad hoc* international tribunal for Yugoslavia
ILC	International Law Commission
OAU	Organization of Africa Unity
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
TRC	Truth and Reconciliation Commission
UCG	Unconstitutional change of government
UN	United Nations
UNCLOS	United Nations Convention of the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

The International Criminal Court (ICC) is one of the most important international institutions since the creation of the United Nations (UN).[2] This court established an entirely new era in the protection of fundamental human rights and makes provision for individual criminal liability for those guilty of committing the most heinous criminal acts that contravene international criminal, human rights and humanitarian laws.[3] The ICC is the first permanent international criminal court that aims to prevent impunity and to punish individuals who have committed the most serious of crimes which are in essence regarded as crimes against the international community.[4]

The court was established in 2002 and until recently, it had strong support from the African continent. Africa and South Africa played meaningful roles in the establishment of the ICC.[5] The relationship between the ICC, South Africa and the African Union (AU), however, has become strained.[6] In respect of South Africa, this is evident from South Africa's failure to arrest former Sudanese president, Al Bashir (Al Bashir) despite a request by the ICC, on the authority of an ICC warrant for his arrest and forwarded to South Africa on account of its ICC membership. Furthermore, the failure of the government to arrest him was in contempt of a South African court order to the South African government to arrest him. All this attracted significant national and international attention, as a result of which South Africa filed a notice to withdraw from the ICC with the UN.[7] However, South Africa has not, as of yet, formally withdrawn from the court, as its notice was declared unconstitutional and invalid.[8]

---

2 Du Plessis. "Africa and the International Criminal Court", 2013:1 http://www.csvr.org.za/ images/ cjc/africa_and_the.pdf (accessed 31/01/2020).

3 Du Plessis. "Africa and the International Criminal Court", 2013:1 http://www.csvr.org.za/ images/ cjc/africa_and_the.pdf (accessed 31/01/2020).

4 Du Plessis. "Africa and the International Criminal Court", 2013:1 http://www.csvr.org.za/ images /cjc/africa_and_the.pdf (accessed 31/01/2020).

5 Werle *et al* 2014:14.

6 Werle *et al* 2014:14.

7 The issue of this notice and the problems surrounding it are discussed in the case of *Democratic Alliance v Minister of International Relations and Cooperation and Others* (Council for the Advancement of the South African Constitution Intervening) 2017 (1) SACR 623 (GP).

8 *Democratic Alliance v Minister of International Relations and Cooperation*: par. 1.

In respect of the AU, the strained relationship became evident in 2009 when the ICC issued warrants of arrest for Al Bashir.[9] Since then the AU has voted to extend the jurisdiction of the African Court for Justice and Human and Peoples' Rights (ACJHPR) to assume jurisdiction over the prosecution of individuals for international crimes.[10] The criminal division of the ACJHPR is currently proposed in the Malabo Protocol by the AU.[11]

However, the support and functionality of AU protocols raise several concerns. As will later be discussed, the African Court on Human and Peoples' Rights (ACHPR) "has only recently become fully operational",[12] (that is the court without criminal competence) and the AU never acknowledged the African Court of Justice's (ACJ) entry into force.[13] Despite this, the AU adopted a Protocol in 2008[14] that sought to merge the ACJ with the ACHPR which, only 7 states (13 per cent of African states) have ratified to date. In June 2014, African Heads of State and governments adopted a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), which aims to grant the merged ACJHPR jurisdiction over international crimes. Only 15 of 55 AU member states have signed the protocol, and the protocol is yet to receive a single ratification.

In light of the above, the potential of support for this Protocol seems bleak. Furthermore, several other factors may also hinder support for the Protocol. For example, the Protocol possesses somewhat of an "all or nothing approach". This approach creates obligations that are said to be similar to the requirements of the Rome Statute.

Viljoen states that South Africa's intended withdrawal from the ICC may well be unconstitutional. As part of international law, as well as in terms of the South African

---

9 *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17: par. 3.

10 African Union, Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008 http://www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf (accessed 08/11/19).

11 African Union, Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights https://au.int/sites/default/files/treaties/36398-treaty-0045_protocol on amendmentsto_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rightse.pdf (accessed 06/11/19).

12 Naldia & Magliveras 2012:388.

13 This speaks the apparent haphazard approach that the AU adopted towards its protocols.

14 African Union, Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, http://www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf (accessed 08/11/19).

constitution, its police force must investigate high-priority crimes.[15] In other words, withdrawing from the ICC would jeopardise the international and constitutional duty on the South African police service to investigate other high priority crimes.

Despite these observations, the AU and some African states ostensibly present the ACJHPR as a substitute for the ICC and its system.[16] Legal scholars and commentators are apprehensive that the ACJHPR with criminal jurisdiction is a regressive step and presents a continuation of the impunity that violators of international criminal law often enjoy, mainly because of their political status as serving heads and high officials of State.[17]

1.2 CONTEXT AND METHOD OF THE STUDY

This dissertation is informed by the backdrop of the straining relationship between the ICC, Africa and South Africa, following the Al Bashir matter. It considers the possible challenges it may face in a hypothetical situation in which South Africa ratifies the Malabo **P**rotocol; the protocol receives the required number of ratifications and becomes operational. It considers the viability of the ACJHPR as a substitute for the ICC.

As its more important consideration, it also considers whether South Africa is able to validly withdraw from the ICC in light of its Constitutional obligations.

The research compares the respective jurisdictions of the ICC and the criminal division of ACJHPR as is proposed in the Malabo Protocol. Jurisdiction of the extended court in terms of analysis in this dissertation will include such aspects as jurisdiction over crimes, the definition of crimes, jurisdiction *ratione temporis*, pre-conditions to the exercise of jurisdiction, the exercise of jurisdiction, referrals by State Parties of situations, and issues of admissibility.

---

15 Viljoen (unpublished) "Five reasons why South Africa should not withdraw from the International Criminal Court Statute", 2015:5 https://www.chr.up.ac.za/images/centrenews/2016/files/_Five_reasons_why_South_Africa_should_not_withdraw_from_the_International_Criminal_Court_Statute.pdf (accessed 08/11/19).

16 For example, see the views of Ochieng "African Court No Substitute for ICC", https://iwpr.net/global-voices/african-court-no-substitute-icc (accessed 06/11/19).

17 For example, see the views of Ochieng "African Court No Substitute for ICC", https://iwpr.net/global-voices/african-court-no-substitute-icc (accessed 06/11/19).

Immunity against prosecution for international crimes will be a central focus analysing jurisdiction in this research with a concomitant analysis of universal jurisdiction and complementarity of jurisdiction.

The researcher will make use of a mixed methodology, consisting of a qualitative study of the black letter or "doctrinal research" approach, to assist in the evaluation of the relevant international and national instruments and case law. This approach is informed by the historical research method, to assist in investigating the historical developments that have led to the issues at hand. The research will further rely on academic commentary and case law pertinent to the research questions.

1.3 ACADEMIC RATIONALE

The Rome Statute,[18] which established the ICC, makes provision for a strong and independent prosecutor and a court that has legally binding enforcement powers.[19] Ratification of the Rome Statute notably affects the sovereignty of the ratifying state,[20] in the sense that member states bind themselves to universal values of human and humanitarian rights protection.

Though several treaties aim to protect human rights, in most cases, these treaties have weak enforcement mechanisms that pose little threat in the case of non-compliance. This means that states can ratify these treaties with no intention to comply.[21] However, in the case of the ICC, non-compliance can result in an investigation by the Prosecutor.[22] According to Dutton, it seems reasonable that states would bind themselves to treaties with weaker enforcement mechanisms. However, the fact that over 100 states have now committed to the ICC with its strong enforcement mechanisms, seem perplexing as states typically guard their sovereignty and are reluctant to join international treaties with strong enforcement mechanisms.[23]

South Africa signed the Rome Statute of the International Criminal Court, ratified it and promulgated the *Implementation of the Rome Statute of the International Criminal*

18 Rome Statute, 1988.
19 Dutton 2011:478.
20 Dutton 2011:478.
21 Dutton 2011:479.
22 Dutton 2011:479.
23 Dutton 2011:480.

Court Act 27 of 2002 (*the Implementation Act*[24]). In so doing, it complied with the South African Constitution.[25] Through the implementation of this Act,[26] the country committed itself to the prosecution of those responsible for the commission of international crimes by either its own courts, or where it is unable or unwilling to do so, by the ICC.[27]

In light of Dutton's view, South Africa's position therefore is that it had initially bound itself to a treaty with strong enforcement mechanisms, and in the researcher's view, more consonant with its Constitution in the protection of human rights, from which it now wishes to withdraw.

This dissertation also seeks to determine whether States could see the ACJHPR as an "African solution to African problems". Alternatively, whether it is a means to opt out of a treaty with strong enforcement mechanisms in favour of one with weaker enforcement mechanisms, that poses a lesser threat in the case of non-compliance, which has the potential, as Dutton puts it, to indicate a lack of intent to comply with the treaty.[28]

1.4 RESEARCH QUESTIONS AND OBJECTIVES FOR THE STUDY

The dissertation will aim to determine whether it is viable for South Africa to leave the ICC in favour of the African Court with its proposed international crimes jurisdiction. Put differently; by the identification of such aspects as the respective histories of the courts, their budgets, their jurisprudence and their jurisdiction, to establish their respective long-term sustainability.

As a subsidiary to this question, the research will consider the substantive issues relating to the intended withdrawal from the ICC by South Africa, which may render such withdrawal unconstitutional.

Alongside the above, this dissertation will consider the jurisdiction of both the ICC and the ACJHPR over a non-member state in instances of referrals by the UNSC.[29] In so doing, this dissertation aims to establish whether the intended withdrawal from the ICC

---

24 Implementation of the Rome Statute of the International Criminal Court Act 27/2002.
25 Constitution of the Republic of South Africa of 1996: sec. 231(4).
26 Implementation of the Rome Statute of the International Criminal Court Act.
27 Implementation of the Rome Statute of the International Criminal Court Act: preamble.
28 Dutton 2011:479.
29 UN Charter when the UN Security Council acts in terms of its Chapter VII- powers.

by South Africa and some African states and assuming ACHPR membership, will remove the criticism by the AU that the ICC is biased against African states.

Thus, following a comprehensive analysis of the various factors involved, this dissertation will consider whether it is practical and/or beneficial for South Africa to follow through with its intended withdrawal from the ICC.

1.5 OUTLINE OF CHAPTERS

Following this introductory chapter, Chapter 2 will evaluate the history, budget, jurisprudence and jurisdiction of the ICC. Chapter 3 will evaluate the history, budget, jurisprudence and jurisdiction of the ACJHPR. In addition, it will evaluate the provisions of the proposed Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, with specific reference to the proposed introduction of the **c**riminal jurisdiction section to the court. Chapter 4 will examine the substantive issues relating to South Africa's withdrawal from the ICC, should it choose to do so. Finally, following a comprehensive analysis of the various factors involved, the concluding chapter will provide an opinion on whether or not it is practical and/or beneficial for South Africa to follow through with its intended withdrawal from the ICC, and make some recommendations.

1.6 IN SUMMARY

After initially having strong support from Africa and South Africa, the relationship between the ICC, South Africa and the AU has become strained mainly because of the Al Bashir matter. This led to: (a) South Africa filing a notice to withdraw from the ICC with the UN,[30] and (b) the AU extending the jurisdiction of the ACJHPR to assume jurisdiction over the prosecution of individuals for international crimes.[31] This dissertation will make use of a mixed methodology, proceeding from the hypothetical situation in which South Africa validly withdraws from the ICC. It looks at the viability of the ACJHPR as a substitute for the ICC and its system. It looks at various aspects

---

30 The issuing of this notice and the problems surrounding it are discussed in the case of Democratic Alliance v Minister of International Relations and Cooperation: par. 31-77.

31 African Union, Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, http://www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf (accessed 08/11/19).

relating to jurisdiction as well as the manner of proper withdrawal from the ICC and South Africa's standing as a non-member state to evaluate whether or not it is practical and/or beneficial for South Africa to follow through with its intended withdrawal from the ICC.

CHAPTER 2: THE INTERNATIONAL CRIMINAL COURT

2.1 INTRODUCTION

This chapter analyses certain features of the ICC framework in order to facilitate the comparison with the ACJHPR in later chapters. The aim is to determine whether the ACJHPR could be a viable substitution for the ICC. The analysis of the ICC in this chapter is limited to the relationship between the ICC and South Africa, a brief discussion of the issue of African bias against the ICC, the history of the Court, its budget, jurisprudence and its jurisdiction.

2.2 BACKGROUND: SOUTH AFRICA AND THE ICC

2.2.1 The relationship in general

Werle *et al* state:

> *African people have suffered from mass human rights violations as much as anyone else, and probably more. The long civil war in Sierra Leone, the Apartheid system in South Africa, the genocide in Rwanda and the deadly conflicts in the Great Lakes Region are just some examples.*[32]

For this reason, the researcher departs from the premise that the African continent has in the past and continues to need a regional or international criminal court to hold those responsible for gross violation of human and humanitarian rights criminally liable.

It is a known fact that Africa and South Africa played an active role during the creation of the ICC;[33] even on a regional level, African countries attempted to reach a common stance on the creation of an International Criminal Court. The Regional Conference on the International Criminal Court held by the Southern African Development Community (SADC) in 1997 and 1999 is one example of efforts emanating from Africa in support of the establishment of an international criminal Court.[34]

---

32 Werle *et al* 2014:13.
33 Werle *et al* 2014:14.
34 Werle *et al* 2014:14.

South Africa signed the Rome Statute on 17 July 1998, ratified it on 27 September 2000 and in July 2002, promulgated the *Implementation of the Rome Statute of the International Criminal Court* Act 27 of 2002 (*the Implementation Act*).[35] Through the promulgation of the Implementation Act, the provisions of the Rome Statute became law in the Republic.[36] Through the implementation of this Act,[37] the country committed itself to the prosecution of those responsible for the commission of international crimes either by its own courts or by the ICC.[38] However, State practise would later renege on this commitment.

Prior to the promulgation of the Implementation Act,[39] the case of the *Azania Peoples Organisation v the President of the Republic of South Africa*[40] challenged the constitutionality of section 20(7) of the *Promotion of National Unity and Reconciliation Act.*[41] This section permits the granting of amnesty to individuals for acts or omissions committed with a political motive prior to 6 December 1993. Such amnesty absolves the perpetrator, the State or any other body or organisation from criminal and civil liability, provided certain requirements are complied with.[42] This is the type of situation that the *Implementation Act*[43] rectifies in that it determines that criminal accountability must flow from the violation of international core crimes irrespective of the status of the offender.

The *Implementation Act*,[44] in line with the Rome Statute,[45] does not recognise the immunity of state officials for the commission of international crimes, nor does it regard the official position as a mitigating factor in the punishment of crimes under its jurisdiction.[46] This reflects the commitment in terms of the Statute of Rome expressed

35 Stone 2011:306.
36 Constitution of the Republic of South Africa of 1996: sec. 231(4) states that: "Any international agreement becomes law in the Republic when it is enacted into law by national legislation …"
37 *Implementation of the Rome Statute of the International Criminal Court Act* 27/2002.
38 *Implementation of the Rome Statute of the International Criminal Court Act*: preamble.
39 *Implementation of the Rome Statute of the International Criminal Court Act* came into operation as of 16 August 2002.
40 *The Azania Peoples Organisation (AZAPO) and 3 others v The President of the Republic of South Africa and 6 others*, Constitutional Court of South Africa, Case CCT 17/96.
41 Promotion of National Unity and Reconciliation Act 34/1995.
42 Promotion of National Unity and Reconciliation Act: sec. 20(7).
43 *Implementation of the Rome Statute of the International Criminal Court Act* came into operation as of 16 August 2002.
44 *Implementation of the Rome Statute of the International Criminal Court Act*. Chapter 2: sec. 2.
45 Rome Statute, 1988.
46 *Implementation of the Rome Statute of the International Criminal Court Act*: Chapter 2: sec. 2(2).

clearly in the *Implementation Act*.[47] In the view of the researcher, this stipulation is in line with the South African Constitution in terms of the Constitution's commitment to the rule of law.

However, in the political sphere, this commitment has been absent. Between 2008 and 2009, the AU formed an African Union High-Level Panel on Darfur (AUPD) of which the then president of South Africa, Thabo Mbeki, was appointed as chair.[48] This panel was to,

> *… examine the situation in Darfur in-depth and submit recommendations on how best to effectively and comprehensively address the issues of accountability and combating impunity, on the one hand, and peace, healing, and reconciliation, on the other.*[49]

Former President Mbeki had expressed concerns that the warrant of arrest against Al Bashir could hinder the peace processes in Darfur, Sudan.[50] The AUPD itself had concerns about the broader political process in Sudan, including the holding of general elections that took place in April 2010.[51] On 21 July 2008, the AU Peace and Security Council requested the UN Security Council (UNSC) to "defer the process initiated by the ICC".[52] It argued that:

> *… attempts to prosecute the Sudanese President would jeopardise important efforts to settle the conflict in Darfur and might put the search for peace in Darfur at risk, prolong the suffering of the people of Sudan and destabilise the country as well as the region.*[53]

By this time the UN had received its own report on the situation in Darfur and the UNSC referred the situation in Darfur to the ICC for investigation under its Chapter VII powers.[54]

The South African perspective on the issue of immunity of serving heads of state, criminal accountability and peace negotiation instead of prosecution, had seemingly,

---

47 *Implementation of the Rome Statute of the International Criminal Court Act*.
48 Report of The African Union High-Level Panel on Darfur (AUPD) PSC/AHG/2(CCVII) 29 October 2009.
49 Report of The African Union High-Level Panel on Darfur (AUPD):iv.
50 Report of The African Union High-Level Panel on Darfur (AUPD).
51 Report of The African Union High-Level Panel on Darfur (AUPD): par. 241.
52 Report of The African Union High-Level Panel on Darfur (AUPD): par. 242.
53 Report of The African Union High-Level Panel on Darfur (AUPD): par. 242.
54 UN Resolution 1593 (2005) S/RES/1593 (2005) https://icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf (accessed 06/03/2020). The UNSC would later resolve this in a resolution that was supported by the AU. See Swanepoel 2018:173-184.

changed in 2009, despite the fact that the then president of South Africa, Jacob Zuma, confirmed to a CNN reporter that if Al Bashir were to set foot in South Africa, South African authorities would arrest him.[55] This, if complied with, would have been consistent with the Rome Statute[56] as well as the *Implementation Act.*[57] For this reason, Al Bashir declined an invitation to attend president Zuma's inauguration.

However, in 2015, South Africa hosted the 25th summit of the African Union. The South African government was required to provide guarantees to the AU that authorities would not arrest Al Bashir while he was attending this summit as a representative of Sudan (a member state of the AU).[58] In violation not only of the findings of the North Gauteng High Court,[59] but also that of the pre-trial chamber of the ICC,[60] the South African authorities assisted in and secured the safe and hasty departure of Al Bashir from the country.[61] The failure to arrest Al Bashir resulted in criticism both from members of the international community[62] and from the North Gauteng Division of the High Court, which stated:

> *A democratic state based on the rule of law cannot exist or function if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law.*[63]

The Pre-Trial chamber held that South Africa was under an obligation to arrest Al Bashir.[64] Alongside this, the Pre-Trial chamber also held that by not arresting Al Bashir, South Africa failed to comply with the Court's request and in so doing, prevented the Court from exercising its powers and functions.[65] A further discussion on the Al Bashir matter appears in regard to immunity below.[66]

---

55 Transcript: CNN's Christiane Amanpour Interviews President Jacob Zuma on 25/09/09, https://constitutionallyspeaking.co.za/transcript-ccns-christiane-amanpour-interviews-president-jacob-zuma-on-250909/ (accessed 06/05/19).
56 Rome Statute.
57 *Implementation Act* sec. 4(3)(c).
58 van der Vyver 2015:562.
59 *The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others* 2016 (1) SACR 161 (GP).
60 Prosecutor v Omar Hassan Ahmed Al Bashir Case ICC-02/05-01/09-242 (13 June 2015).
61 Van der Vyver 2015:563.
62 Van der Vyver 2015:565.
63 The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development: par. 37.2.
64 Prosecutor v Omar Hassan Ahmed Al Bashir Case ICC-02/05-01/09-242 (13 June 2015):38, par. 107-109.
65 See Further; Prosecutor v Omar Hassan Ahmed Al Bashir Case:44, par. 123.
66 See page: 35.

2.2.2 The issue of African bias

The strained relationship between the ICC, South Africa and the AU has led to accusations that the ICC, and its system is neo-colonial and western, which targets Africans.[67] African leaders' claim that the ICC is an 'imperial tool' that is targeting the African continent.[68] This is by no means a new objection and was observed as far back as the decolonisation and independence period of African nations after World War II.[69] However, the criticism that the ICC is an "imperial tool" is inapposite as it was instituted long after the African wave of decolonization and independence.

Academics have raised arguments both in support of and against this allegation. On the one hand, Bikundo claims that Africa has the worst crimes and has the least infrastructure available to deal with these crimes.[70] He goes further to say that Africa is both weak as well as culpable in relation to criminal prosecution of international crimes.[71] He explains that "the inability to prosecute implies weakness but being unwilling to do so constitutes culpability".[72]

On the other hand, at the time of writing this, the only investigations and prosecutions that have been made by the ICC have been in relation to situations in Africa. Save for the situations in Darfur and Libya (which were referred to the ICC by the UNSC), all situations in Africa were investigated by the ICC at the request of the countries concerned.[73] From this perspective, the allegation of bias seems to carry little weight, particularly in light of the fact that the ICC is currently conducting a preliminary inquiry into the situations in Georgia, Afghanistan, and Palestine. In light of this, Van der Vyver states:

> *The ANC's cause of grievance is, therefore, not the ICC but exposure by a South African court of the government's defiance of the rule of law and disrespect for judgments of a court of law.*[74]

---

68 See for example, Camron *et al* 2016:6-24.
69 Unpublished LLM dissertation Radboud University (Nijmegen, Netherlands) van Ham 2014:12.
70 van Ham 2014:12.
71 Bikundo 2012:29.
72 Bikundo 2012:30.
73 Bikundo 2012:30.
74 Van der Vyver 2015:578.
75 Van der Vyver 2015:579.

He also notes that the obligation to arrest Al Bashir will not be extinguished by South Africa's withdrawal from the ICC on account of the authority of the UNSC.[75]

Of particular importance in this regard, is the supremacy of international instruments, and in particular the UN Charter. Article 103 of the UN Charter stipulates that the obligations of UN Member States under the Charter prevail over obligations under any other international agreement in the event of a contradiction or conflict. The implication is that not only is the obligation not extinguished by withdrawal, but this obligation supersedes any obligation to the contrary.

Alongside the growing tensions between the ICC and the AU, the assembly of the AU took the decision that no charges shall be commenced or continued before any international court or tribunal against any AU head of State.[76]

2.3 HISTORY

The 20th century has been called one of the bloodiest centuries known to mankind,[77] having borne witness to 2 world wars and several other wars, as well as numerous atrocities, including apartheid, communism, ethnic cleansing, and genocide, to name a few.[78] States had attempted to prosecute those responsible for the commission of international crimes as early as World War I.[79] Under the Treaty of Versailles (1919), efforts were made to bring former German Emperor Kaiser William II before an international tribunal. However, only a few German officers were brought before the German Supreme Court at Leipzig, resulting in criticism as both sides had committed war crimes.[80] Several other attempts to formulate international tribunals followed after the Treaty of Versailles, including the two *ad hoc* international military tribunals that were formed by the UN in the wake of World War II, namely the International Military Tribunal at Nüremberg and the International Military Tribunal for the Far East.[81] Even

75 Van der Vyver 2015:579.
76 Werle *et al* 2014:189.
77 Nsereko 2004:256.
78 Nsereko 2004:256.
79 Bassiouni 1991:2.
80 Bassiouni 1991:2.
81 Nel & Sibiya 2017:82.

though these tribunals were subject to criticism,[82] they had set a new precedent in the attempts to formulate international tribunals.

As far as the ICC is concerned, the United Nations General Assembly (UNGA) adopted the Convention on the Prevention and Punishment of the Crime of Genocide in 1948.[83] Under this Convention, criminals could be tried by international penal tribunals with jurisdiction.[84] It also requested the International Law Commission (ILC) to assess the possibility of establishing an international judicial organ for the trials of persons charged with genocide.[85]

This process stalled during the Cold War era.[86] It resumed in 1989 when the UNGA sanctioned the ILC to develop a draft statute for an International Criminal Court.[87] During this time, the UN established the Yugoslavian (ICTY) and Rwandan (ICTR) *ad hoc* international tribunals. These tribunals gave impetus to the general international consensus for a permanent international criminal court.[88]

In 1994, the ILC presented its final draft statute for an ICC to the UNGA and recommended that a conference of plenipotentiaries convene to negotiate a treaty and to enact the Statute.[89] The Rome Conference took place from 15 June to 17 July 1998 in Rome, Italy, with 160 countries participating in the negotiations.[90]

The UN Diplomatic Conference of Plenipotentiaries adopted the Rome Statute on 17 July 1998: 120 states voted in favour of adoption, 4 states voted against and 21 abstained. By 31 December 2000, 139 states had signed the treaty. By 11 April 2002, 66 states had ratified it, and to date, 122 states have ratified the Rome Statute.[91]

---

82 Nel & Sibiya 2017:82.
83 Coalition for the International Criminal Court "History of the ICC" http://iccnow.org/?mod=icchistory (accessed 20/02/2020).
84 Coalition for the International Criminal Court "History of the ICC" http://iccnow.org/?mod=icchistory (accessed 20/02/2020).
85 Coalition for the International Criminal Court "History of the ICC" http://iccnow.org/?mod=icchistory (accessed 20/02/2020).
86 Dugard 2011:171.
87 Dugard 2011:171.
88 Dugard 2011:172.
89 Coalition for the International Criminal Court "History of the ICC" http://iccnow.org/?mod=icchistory (accessed 20/02/2020).
90 Coalition for the International Criminal Court "History of the ICC" http://iccnow.org/?mod=icchistory (accessed 20/02/2020).
91 Benedetti et al. 2014:173.

Considering the fact that there are approximately 174 world states, 70 per cent of states ascribed to the general thrust and ideas that the ICC represent.

On 1 April 2002, the 60th ratification necessary to trigger the entry into force of the Rome Statute occurred. It therefore took about three and a half years for the Rome Statute to come into effect.[92]

The ICC came into existence in 2002.[93] The Assembly of States Parties elected the 18 judges on 7 February 2003 per the procedure provided for in the Rome Statute.[94] The ICC is a permanent international criminal judicial organ that can bring charges on a worldwide basis for war crimes, crimes against humanity, the crime of genocide and the crime of aggression, once states agree on a definition of the crime of aggression.

In terms of its jurisdictional structure, it relies on the cooperation of member states and proceeds under the assumption that the primary duty to prosecute individuals, is upon states. This, in turn, implies that it relies on the political will of member states to ensure prosecution through its national courts. Quite clearly, some member states, under which South Africa, later reneged on the obligation because of which the AU ostensibly now wants its own Court which will prohibit the prosecution of heads of State and high officials.

2.4 BUDGET

The budget of the ICC is its means of effective implementation of its mandate. It provides not only "a blueprint of its structure and inner-workings, but also of its strategic priorities and challenges".[95] Through its annual budgetary cycle, the Court lays out the activities based on the judicial and operational assumptions foreseeable at the time. Still, it is simultaneously conscious of the financial constraints of its contributors;[96] contributions made by State Parties and the UN fund the Court.[97] One of the biggest challenges the Court faces is to develop fully reliable and accurate

92 Coalition for the International Criminal Court "History of the ICC" http://iccnow.org/?mod=icchistory (accessed 20/02/2020).
93 Wenqi 2006:88.
94 Wenqi 2006:95.
95 Zavala 2018:2.
96 Zavala 2018:2.
97 Rome Statute: art.115.

budget proposals.[98] This challenge is attributed mainly to the uncertainty attached to the judicial mandate of the institution.[99] As Zavala puts it:

> *While other international judicial organisations, as well as national judiciaries, are able to cope with fluctuations in its workload within given budgetary ranges, the nature of the Court, its mandate and the contexts in which it operates present unique challenges to the pursuit of full sustainability.*[100]

Despite its apparent difficulties, the ICC has consistently sought ways to become more efficient and cost-effective. One such example was the significant change that occurred in 2016 where, as opposed to a list of activities and requirements drawn independently by the judiciary, the Coordination Council took the lead in identifying the Court-wide priorities for the following year which should constrain the budget requirements.[101]

2.5 JURISDICTION

2.5.1 General

One of the most complicated aspects of the Rome Statute both legally and politically speaking, is the jurisdiction of the Court. The term "jurisdiction" is used in several places in the Rome Statute to identify the scope of the Court's authority. Article 5 is entitled "crimes within the jurisdiction of the court" and provides a list of punishable offences. Article 11 is labelled "jurisdiction *ratione temporis*," Article 12 is entitled "pre-conditions to the exercise of jurisdiction," but sets out the territorial and personal jurisdiction of the court. Article 19 requires the Court to "satisfy itself that it has jurisdiction in any case brought before it". In general, there are three jurisdictional requirements (1) subject-matter jurisdiction; (2) territorial or personal jurisdiction; and (3) temporal jurisdiction.

2.5.2 Jurisdiction over crimes and definition of crimes

The ICC, as a permanent institution, has the power to exercise its jurisdiction over persons for the most serious crimes of international concern.[102] In terms of the Rome

98 Zavala 2018:3.
99 Zavala 2018:3.
100 Zavala 2018:27.
101 Zavala 2018:28.
102 Rome Statute: art.1.

Statute, 'the most serious crimes of international concern' are war crimes, crimes against humanity, the crime of genocide and the crime of aggression. The ICC derives its jurisdiction from the Statute of Rome and has features of both customary international law and the following treaties: (1) the Genocide Convention; (2) the Geneva Conventions of 1949; (3) The Hague Conventions of 1899 and 1907; and (4) The Nüremberg Charter. The crimes codified in these instruments are identical to the jurisdictions of the ad hoc tribunals established by the UNSC. In addition, Article 70 defines offences against the administration of justice, potentially referring to a fifth category of crime for which prosecutions can occur.

However, mere compliance with a definition of a crime that falls within the jurisdiction of the Court is insufficient to trigger an investigation. The situation must also have sufficient gravity to justify further action by the Court. This is known as the "gravity threshold" and it functions as a limitation on the exercise of ICC jurisdiction.[103] This threshold considers the gravity of the case as well as the gravity of the situation.

The gravity of the situation refers to the identification of the period of time when and the place where the Prosecutor conducts an investigation. There are three modes of selecting situations: (1) a Security Council referral;[104] (2) a State Party referral;[105] and (3) an investigation by the ICC Prosecutor *proprio motu*.[106]

The gravity of the case refers to the Prosecutor conducting investigations "into a situation and chooses cases from the situation by identifying the suspected persons who have allegedly committed the crimes under the Court's jurisdiction".[107]

In order to demonstrate how painstakingly the international community through the ICC apparatus goes about the consensual definition of crimes and its elements; the section below investigates the process in regard to the formulation and interpretation of the definitions of the crimes within ICC jurisdiction. The purpose of this excursion is, amongst others, to juxtapose it to the researcher's and others' view that the Malebo Protocol was hurriedly composed. This hurriedness at least may create the impression that it was more urgent to get the protocol accepted by African states instead of

103 Rome Statute: art.17(1)(d).
104 Rome Statute: art.13.
105 Rome Statute: art.14.
106 Rome Statute: art.16.
107 Ochi 2016:3.

carefully considering the very wide and intricate range of issues which may arise. It also demonstrates the haste with which South Africa attempted to withdraw from the ICC.

2.5.2.1 War crimes

War crimes have been a concern to humanity since ancient times.[108] In 1919, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties considered international jurisdiction over war crimes.[109] The first prosecution would only occur after World War II at the International Military Tribunals of Nüremberg and Tokyo.[110]

War crimes in the Rome Statute, in and of itself is notable. This is because its inclusion was not a simple codification of pre-existing rules of international customary law.[111] Instead, Article 8 moves away from only including "international conflict" as an allowable context for war crimes, but now includes the possibility of war crimes in "non-international" conflicts.[112]

The length of Article 8,[113] dealing with war crimes, has been described as “staggering” when compared to its counterparts. This may bear testimony to its lengthy negotiations and complicated historical development. Article 8 is dependent on the presence of armed conflict either internationally or on a national scale.[114] Article 8 defines a total of 74 crimes as war crimes.[115] These crimes are split into 4 general categories: (1) grave breaches of the Geneva Conventions of 1949 (referring to international armed conflicts, which includes 11 of the 74 crimes.);[116] (2) serious violations of Article 3 common to the Geneva Conventions and which apply to national armed conflicts, which includes 7 of the 74 crimes;[117] (3) "serious violations of the laws and customs

108 Tsilonis 2019:127.
109 Tsilonis 2019:127.
110 Tsilonis 2019:127.
111 Tsilonis 2019:128.
112 Rome Statute.
113 Rome Statute.
114 Rome Statute: art. 8 (2)(b)-(c).
115 Rome Statute.
116 Rome Statute: art. 8 (2)(b).
117 Rome Statute: art.8 (2)(c); the Geneva Conventions of 1949; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949; Geneva Convention Relative to the Treatment of

applicable in international armed conflict",[118] which includes 35 crimes; and (4) "serious violations of the laws and customs applicable in armed conflicts not of an international character",[119] which consists of the remaining 21 crimes.[120]

Central to all four categories is the presence of armed conflict. Kolb and Hyde suggest that if at least one party considers itself in a state of war, then an armed conflict exists.[121] This holds true even if, at the time, neither party has declared war.[122]

Article 8(1) states explicitly that the ICC "shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". This gives rise to the question of whether an isolated incident would fall under ICC jurisdiction. Several state party delegations state that the principle of complementarity eliminates the need for ICC jurisdiction.[123] In other words, national courts would handle isolated incidents of war crimes; therefore, there would be no reason for the ICC to intervene.

This would be ideal, but it is not practical. In practice, it will most likely be the situation that national courts will not adjudicate isolated war crimes either for political reasons or reasons of national security.[124] The resulting situation is that, with this interpretation, the ICC has no jurisdiction, regardless of the State being unwilling or unable genuinely to carry out the investigation or prosecution,[125] or the gravity of the situation. Stated simply, with this interpretation, the Court will, in all probability, never prosecute isolated instances of war crimes. This also attests to the fact that the ICC has a conservative jurisdictional base and that the primary duty of prosecution for international crimes rests on states.

For this reason, Tsilonis suggests that the restrictive interpretation of Article 8 must not be followed.[126] Such an interpretation would not only contradict the ICC's aim to

---

Prisoners of War, 1949 and Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 1949.

118 Tsilonis 2019:128.
119 Tsilonis 2019:128.
120 Rome Statute: art. 8 (2)(d)-(e).
121 Kolb and Hyde 2008:75-76.
122 This represents the breadth of ICC jurisdiction.
123 Tsilonis 2019:140.
124 Tsilonis 2019:140.
125 Rome Statute: art. 17(1)(a).
126 Tsilonis 2019:141.

end the impunity of violators of international crimes, but also the following general rule of interpretation of the Rome Statute:

> *Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.*[127]

He also notes that the term "in particular" does not equate to "only". The drafters had considered using the word only, making the provision read "… in respect of war crimes only when committed …", but decided against it. In fact, in the *Bemba case*, the Pre-Trial Chamber II held that:

> *the term 'in particular' makes it clear that the existence of a plan, policy or large-scale commission is not a prerequisite for the Court to exercise jurisdiction over war crimes but rather serves as a practical guideline for the Court.*[128]

Another interesting situation arises in relation to *mens rea* in the commission of war crimes. For all crimes within ICC jurisdiction, the material elements must be committed with intent and knowledge.[129] Article 8(2) specifically refers to wilfulness in the commission of war crimes.[130] The term clearly indicates the *mens rea* required. Schabas states that the wilfulness of an action refers to the intention and thus is no different from Article 30(1).[131] However, this may not always be the case. It is reasonable to assume that the drafters included the term to serve a purpose.[132] To date, the Court has not addressed this issue.[133] This, in the researcher's view, does not impede the functionality of the provision.

Lastly, an aspect that academics often overlook in the literature is the exemptions to ICC jurisdiction over war crimes.[134] Article 124 allows a State becoming a party to the Statute to expressly not accept the jurisdiction of the Court with respect to war crimes for 7 years (from entry into force for that State) when the crimes are "alleged to have been committed by its nationals or on its territory".[135] Again, in the researcher's view,

---

127 Rome Statute: art.10.

128 Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" ICC-01/04 13 July 2006: par. 70.

129 Rome Statute: art.30(1).

130 Art 8(2)(a)(i) "wilful killing", art.8(2)(a)(iii) "wilfully causing great suffering", art.8(2)(a)(vi) "wilfully depriving a prisoner of war or other protected person of a fair trial" and art.8(2)(b)(xxv) "wilfully impeding relief supplies".

131 Schabas 2010:475.

132 Tsilonis 2019:133.

133 See Tsilonis 2019:32-138.

134 Tsilonis 2019:46.

135 Rome Statute: art. 124.

it attests to the conservative jurisdictional base of the ICC which defeats notions that the Court infringes on the sovereignty of states in an overly invasive manner.

2.5.2.2 Genocide

The "crime of all crimes", genocide, is one of the most prevalent crimes in international law.[136] Currently, there are at least five cases of potential genocide charges that are unfolding, including the Rohingya in Myanmar case, which the ICC is investigating, the Darfuris case in Sudan[137] and the Nuer and other ethnic groups case in South Sudan.[138] The Convention on the Prevention and Punishment of the Crime of Genocide (1951) was "the first international human rights protection treaty within the UN framework".[139]

Between 1992 and 1997, the international community painstakingly considered and debated the definition of genocide in this convention.[140] By the time the Rome Diplomatic Conference was held, genocide had been well defined in international law. Thus, the proposed provisions on genocide were accepted without any further discussion at the Rome Conference establishing the Court.[141]

Article 6 of the Rome Statute defines genocide as "*acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group*".[142] There are five such acts that constitute crimes of genocide listed under Article 6.[143] This definition is identical to the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.[144] This Convention makes provision for the conviction of a person for (a) genocide, (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide. (In the *Akayesu* case the Court

136 Tsilonis 2019:75.
137 See Reeves, "Don't Forget Darfur" 2016, https://www.nytimes.com/2016/02/12/opinion/dont-forget-darfur.html?_r=0 (accessed 20/10/2020).
138 See Biryabarema, "UK says killings in South Sudan conflict amount to genocide" 2017, https://www.reuters.com/article/us-southsudan-war/uk-says-killings-in-south-sudan-conflict-amount-to-genocide-idUSKBN17E2TF (accessed 20/10/2020).
139 Tsilonis 2019:77.
140 See Tsilonis 2019:77-79.
141 Tsilonis 2019:79.
142 Rome Statute, 1988: art. 6.
143 Rome Statute, 1988: art. 6 (a-e).
144 Prevention and Punishment of the Crime of Genocide of 1948.

confirmed that inciting directly and publicly others to commit genocide is a crime.);[145] (d) attempt to commit genocide; and (e) complicity in genocide.[146]

Interestingly, the interpretation of Article 6 requires an indirect exemption of Article 21(1)(b), which states that all the applicable treaties and the principles and rules of international law are secondary to the provisions of the Rome Statute. The interpreter will need to consider the provisions of the Genocide Convention and other sources of international law in order to interpret Article 6.[147]

Article 6 clearly states the elements of genocide. The *mens rea* here requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[148] In so doing, the *mens rea* required for genocide is more specific than Article 30's "with knowledge and intent". From this, the crime of genocide consists of two subjective elements: (1) a general subjective element; the commission of an act of genocide as per Article 6(a) with knowledge and intent (Article 30 (1)) and (2) an additional subjective element: the *dolus specialis* (specific intent) that the act must be committed with the 'intent to destroy in whole or in part' the targeted group".

Article 6 only applies to a closed group, that is national, ethnic, racial and religious groups. As such, Article 6 excludes political, social and professional groups or alliances from the Court's jurisdiction. Then Article 7 makes provision for the prosecution of acts "committed as part of a widespread or systematic attack directed against any civilian population"[149] as well as the 'persecution' of "any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender, or other grounds".[150] In this way, the ICC will still have jurisdiction over cases that would be excluded from the definition of Genocide.

Consequently, however, the stipulations in regard to genocide requires a clear understanding of the acts that satisfy the *mens rea* of the crime of genocide, as this determines whether the crime is genocide or a crime against humanity. Interestingly,

145 The Prosecutor v Jean-Paul Akayesu (ICTR-96-4).
146 Prevention and Punishment of the Crime of Genocide of 1948: art. 3.
147 Tsilonis 2019:79-80.
148 Rome Statute, 1988: art. 6.
149 Rome statute: art. 7(1).
150 Rome statute: art. 7(1)(h).

this differentiation has not, to date, been a point of contention as such and there is little commentary on it.

The ad hoc tribunals have however taken different approaches to the interpretation of identifying whether a group is a protected group for purposes of genocide or an identifiable group for purposes of crimes against humanity.[151]

In *Radislav Krstić*, the ICTY held that the Bosnian Muslims essentially constituted a national group and the defence did not challenge this.[152] The ICTR, in *Clément Kayishema & Obed Ruzindana*, adopted a purely subjective criterion in stating that a ”national group” can be self-identified, where the group distinguishes it as a national group, or it may be distinguished as such by others, which could include the perpetrators of the crime.[153] The ICTR, in the *Bagilishema* case, held that "if a perpetrator perceived a victim as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide".[154] Finally, in *Stakić*, the ICTY Appeals Chamber held that target groups must not be defined solely on how perpetrators stigmatise victims and it is, instead one of the factors that the Court considers.[155]

Considering these differing interpretations, Tsilonis suggests that it is "best to define a target group in an *ad hoc* manner, based on subjective as well as objective criteria”.[156] He goes further to say:

> *The execution of a large number of people/members of a national-socialist, neo-fascist political group by anarchist perpetrators, for instance, could never be legally considered as genocide (but primarily as a crime against humanity).*

Lastly, in relation to *mens rea* is the interpretation of the phrase 'partial destruction' of a group. It is clear from the provision that destruction of the entire group is not required. In practice, four different interpretations have developed:[157]

(1) the intent is the destruction of the entire group, but only a portion of the group is affected.[158] This interpretation is not consistent with the official records of the

---

151 The development is only briefly discussed here, for more please see Tsilonis 2019:84-86.
152 The *Prosecutor v Radislav Krstić* (Case No. IT-98-33-T): par. 559.
153 The *Prosecutor v Clement Kayishema and Obed Ruzindana*, (Case No. ICTR-95-1-T): par. 98.
154 The *Prosecutor v Ignace Bagilishema* (Case No. ICTR-95-1A-T): par. 65.
155 The *Prosecutor v Stakić* (IT-97-24-A): par. 25.
156 Tsilonis 2019:86.
157 These interpretations are only briefly discussed here, for more please see Tsilonis 2019:87-96.
158 Tsilonis 2019:87.

preparatory meetings for the Genocide Convention regarding the wording of Article 2 of the Genocide Convention which is also the definition in Article 6 of the Rome Statute.[159]

(2) The term, "destruction in part" implies "substantial" destruction. The United States, the ILC and the ICC's Preparatory Committee followed this approach. The ICC's Preparatory Committee stated that there is the "specific intention to destroy more than a small number of individuals who are members of a group".[160]

(3) The term 'part' in the phrase "in part" is interpreted to mean a "significant part" of the group.[161] This approach brings a quantitative aspect in considering the minimum number with which the group would be able to survive.[162] Though this approach is also not based on the preparatory works of the Genocide Convention, the Commission of Experts assembled by the UNSC in 1992 stated that the phrase "in part" does include, but is not limited to a qualitative feature.[163] This approach was accepted in 1994 by the Commission of Experts.[164]

(4) "*the phrase 'in whole or in part' uses the geographic aspect of the alleged criminal action as the principal criterion*".[165] This interpretation considers that the perpetrator may not have a global reach or even reach over the entirety of one territory.

As possible evidence of how the ICC conducts itself, a brief discussion of a current case before the ICC is set out below. This inclusion shows that even where a state is not a party to the statute, the state may still be subject to ICC jurisdiction where the actions of the non-member state affect a member state.

159 Tsilonis 2019:89.
160 Draft Statute for the International Criminal Court. Part 2. Jurisdiction, Admissibility and Applicable Law.
161 Tsilonis 2019:90.
162 Tsilonis 2019:91.
163 Tsilonis 2019:91.
164 Tsilonis 2019:93.
165 Tsilonis 2019:95.

2.5.2.2.1 A current case and immerging problem

The deportation of more than 700 000 Rohingya in August 2017 is "a textbook example of ethnic cleansing".[166] To date, Gambia has sought the assistance of the ICJ. The ICJ, considering the Convention on the Prevention and Punishment of the Crime of Genocide stated:

> *Myanmar must … take all measures within its power to prevent the commission of … (a) killing members of the group; (b) causing serious bodily or mental harm to the members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group.*[167]

A preliminary investigation into the deportation of Rohingya Muslims from Myanmar into Bangladesh has been launched by the ICC Prosecutor Fatou Bensouda,[168] following a decision by the ICC Pre-Trial Chamber I, which confirmed that the Court may exercise its jurisdiction. The Pre-Trial Chamber considered Article 7(1)(d) "deportation or forcible transfer of population" (a crime against humanity) in its determination of jurisdiction.[169]

The Rohingya investigation is noteworthy in 2 respects: (1) the Prosecutor asked the Court to interpret Article 12(2)(a) and the Pre-Trial Chamber I held that the Court has jurisdiction "if at least one element of a crime within the jurisdiction of the Court or part of such crime is committed on the territory of a State Party to the Statute".[170] Stated simply, although the alleged coercive acts that forced the Rohingya to flee took place in Myanmar (a non-member state), the deportation was not complete until the Rohingya refugees entered Bangladesh (a member state).[171] (2) This case is the first

166 Safi "Myanmar treatment of Rohingya looks like 'textbook ethnic cleansing', says UN" 2017, https://www.theguardian.com/world/2017/sep/11/un-myanmars-treatment-of-rohingya-textbook-example-of-ethnic-cleansing (accessed 20/10/2020).

167 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) CR 2019/21, Summary 2020/1: par. 77.

168 Wintour "Myanmar Rohingya crisis: ICC begins inquiry into atrocities" 2018 https://www.theguardian.com/world/2017/sep/11/un-myanmars-treatment-of-rohingya-textbook-example-of-ethnic-cleansing (accessed 20/10/2020).

169 Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-37: par. 52-61.

170 Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute: par. 64.

171 Tsilonis 2019:98.

instance of the Prosecutor seeking a ruling from the Court regarding jurisdiction or admissibility.[172]

This novel approach by the Prosecutor undoubtedly affects Myanmar's sovereignty; however, through an investigation the ICC, would not only give a ruling concerning the Rohingya victims but will simultaneously protect Bangladesh.

Tsilonis submits that this novel approach is reinforcing the ICC's status at a time where "the ICC appears to be losing power and efficacy due to States threatening to withdraw and abstention of the most powerful of states (US, China, Russia and Israel)".[173]

On the topic of withdrawal, Tsilonis makes mention of a situation that is a central concern of the research, namely the fact that there appears to be a growing trend of:

> *States (especially on the African continent at present) to withdraw from the Rome Statute. The implications of this are that, should the crime of genocide occur in the territory of such States after the time of their withdrawal from the Rome Statute, then it might be legally impermissible for the ICC to prosecute the commission of these and other serious international crimes because of its lack of jurisdiction.*[174]

It is unlikely that states will have the necessary capacity and resources to investigate and prosecute crimes of genocide. Tsilonis further opines:

> *It is a fact that investigations regarding genocide usually constitute extremely time and money-intensive legal operations that require special knowledge, expertise and a considerable number of jurists and investigators.*[175]

This fact was one of the considerations necessitating the formation of the ICC. From this view, it is clear that withdrawal from the Rome Statute could deprive countless victims of their fundamental human right to justice and reparation.[176]

The researcher submits that this situation depicts how the ICC conducts itself, the protections it affords to victims as well as the potential for a non-member state to be subject to ICC jurisdiction. As necessary as these interventions may be, the researcher submits that if this type of intervention were to apply to an African state that withdrew from the statute, the intervention may further the view that the ICC is bias against African states.

---

172 Rome Statute: 19(3).
173 Tsilonis 2019:99.
174 Tsilonis 2019:97.
175 Tsilonis 2019:97-98.
176 Tsilonis 2019:97.

2.5.2.3 Crimes against humanity

The International Military Tribunal in Nüremberg first persecuted crimes against humanity.[177] The want to prosecute what is now known as crimes against humanity, however, is traced back to at least 3 decades before the Nuremberg Tribunal in the Joint Declaration of France, Great Britain and Russia (1915).[178]

Unlike genocide, states had different opinions regarding what should be included in the definition of crimes against humanity, so much so, that the ILC in 1991 had abandoned the term 'crimes against humanity' in favour of 'systematic or mass violations of human rights'.[179] The ILC Working Group would nevertheless revive the term crimes against humanity in 1993.[180] The UNSC added to the difficulties by adopting 2 different definitions of crimes against humanity in the ICTY[181] and the ICTR[182] within the space of 18 months.[183] Though the acts listed remain the same in both statutes, the ICTY requires the act is "committed in armed conflict, whether international or internal in character". In contrast, the ICTR requires the act is "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".

This left legislators with the challenge of drafting a new definition of crimes against humanity that was both aware of the existing contradictions as well as a reflection of the different opinions of states. The resulting Article 7(1) defines crimes against humanity as acts "*committed as part of a widespread or systematic attack directed*

177 Tsilonis 2019:104.

178 France, Great Britain and Russia Joint Declaration, 1915 http://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.htm (accessed 23/10/2020).

179 Tsilonis 2019:104.

180 Tsilonis 2019:104.

181 Statute of the International Criminal Tribunal for the Former Yugoslavia, 2009: art.5 “crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.”

182 Statute of the International Criminal Tribunal for Rwanda: art.3 “crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.

183 Tsilonis 2019:105.

against any civilian population, with knowledge of the attack".[184] This article lists 11 acts that constitute crimes against humanity.[185]

Tsilonis summarises these crimes briefly:

> *(1) Murder; (2) Extermination; (3) Enslavement; (4) Deportation or forcible transfer of population; (5) Imprisonment or other severe deprivation of physical liberty; (6) Torture; (7) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation; (8) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender or other grounds (9) Enforced disappearance of persons; (10) The crime of apartheid.*[186]

Article 7 also specifically dedicates paragraph 2 to defining the terms: attack, extermination, enslavement, deportation or forcible transfer of population, torture, forced pregnancy, persecution, apartheid, enforced disappearance of persons[187] as well as paragraph 3, which defines gender.

This, in the researcher's opinion, reflects the time, effort and deliberation that went into the formulation of these provisions.[188]

2.5.2.4 Crimes of aggression

The Covenant of the League of Nations encouraged its members to "respect and preserve" against external aggression towards the territorial integrity and political independence of its members.[189] In addition, any war or threat of war was of concern to the League, which could take any action deemed wise and effectual to safeguard the peace of nations."[190] The covenant also required that the States arbitrated a dispute, and only three months after the council gave an award, could a war be declared.[191] It also included provision surrounding the manufacture and disclosure of implements of war.[192]

---

184 Rome Statute, 1988: art. 7.
185 Rome Statute, 1988: art. 7(1)(a-i).
186 Tsilonis 2019:106.
187 Rome Statute: art.7(2)(a-i).
188 There are academic conversations surrounding the interpretation of the terms “Widespread or Systematic” and “Pursuant to or in Furtherance of a State or Organisational Policy” that are not discussed in here. For more see Tsilonis 2019:110-126.
189 Covenant of the League of Nations, 1919: art.10.
190 Covenant of the League of Nations: art. 11.
191 Covenant of the League of Nations: art. 12.
192 Covenant of the League of Nations: art. 8.

The crime of aggression made its first appearance in international criminal law (as a crime committed by individuals, not states) in the International Military Tribunal in Nuremberg.[193] Just before the establishment of the International Military Tribunal in Nuremberg, the UN Charter was signed.[194] One of its purposes was to suppress acts of aggression or other breaches of peace.[195] It required its members to refrain from "the threat or use of force against the territorial integrity or political independence of any state".[196] Self-defense and collective security measures granted by the UNSC are the exceptions.[197]

Article 5 of the Rome Statute provides the ICC jurisdiction over crimes of aggression only once the state parties agree on a definition of the crime and set out the conditions necessary for prosecution.[198] In June 2010, after the conclusion of the Review Conference of the 111 state parties in Kampala, States took the decision to confirm the definition of the crime of aggression (Article 8B) and remove Article 5(2).[199] The Kampala amendment specified that the Assembly of States Parties would need to take a further decision to activate the Court's jurisdiction, no earlier than 2017: the amendment would need to be ratified by 30 state parties and only one year after the 30th ratification could the Court exercise jurisdiction.[200]

The 30th ratification occurred on 26 June 2016.[201] The ICC assumed jurisdiction over the crime of aggression on 17 July 2018.[202] As of the end of November 2019, 39 State Parties have ratified the Kampala amendment.[203] Interestingly, during the 9th, 10th and 13th sessions of the Assembly of States Parties (2010, 2011 and 2014, respectively) South Africa made concrete commitments to ratify the amendments on the crime of

193 Tsilonis 2019:151.
194 Tsilonis 2019:151.
195 UN Carter: art. 1(1).
196 UN Carter: art. 2(4).
197 Tsilonis 2019:152.
198 Rome Statute, 1988: art. 5(2).
199 Tsilonis 2019:158.
200 Handbook Ratification and Implementation of the Kampala Amendments on the Crime of Aggression to the Rome Statute of the ICC:3.
201 Handbook Ratification and Implementation of the Kampala Amendments on the Crime of Aggression to the Rome Statute of the ICC:3.
202 The Global Institute for the Prevention of Aggression “Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression”, 2019 https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/ (accessed 20/10/20).
203 The Global Institute for the Prevention of Aggression “Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression”, 2019 https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/ (accessed 20/10/20).

aggression but has not as of yet ratified it.[204] This is intriguing, given that during the drafting of the Rome Statute, African states held the opinion that the jurisdiction *ratione materiae* of the ICC should include the crime of aggression.[205]

Article 8 *bis* of the Rome statute, as amended, defines the crime of aggression as:

> *the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.*[206]

Article 8 bis contains a list of seven acts of aggression, which are identical to those in United Nations General Assembly Resolution 3314 of 1974.211.[207] An act of aggression is in general defined as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the UN".[208] Article 8 bis contains a list of seven acts of aggression, which are identical to those in United Nations General Assembly Resolution 3314 of 1974.211.

The inclusion of Article 8B and removal of Article 5(2) by the Kampala amendment also saw the introduction of Article 15 bis "Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)" and Article 15 *ter* "Exercise of jurisdiction over the crime of aggression (Security Council referral)", which is discussed under "Exercise of jurisdiction" below.

Tsilonis submits that the amended provisions on crimes of aggression present problems that are open to interpretation.[209] The provisions do not make it clear whether new state parties will be obliged to accept new amendments. This while existing state parties may choose not to ratify the amendments and therefore not be subject to ICC jurisdiction.[210]

---

204 The Global Institute for the Prevention of Aggression “Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression”, 2019 https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/ (accessed 20/10/20).

205 Nwayo “Activation of the Crime of Aggression: African States the missing link!”, 2019 https://www.kpsrl.org/blog/activation-of-the-crime-of-aggression-african-states-the-missing-link (accessed 20/10/20).

206 Rome Statute, 1988: art. 8 *bis* (1).

207 United Nations General Assembly Resolution 3314 of 1974.

208 Rome Statute, 1988: art. 8 *bis* (2).

209 Tsilonis 2019:64.

210 Rome Statute: art.121(1).

2.5.2.5 Offences against the administration of justice

The ICC was established to prosecute the most serious crimes of concern to the international community (the core crimes).[211] However, it is estimated that about one-third of cases before the ICC relates to the administration of justice (which is not a core crime).[212] The provision that would become Article 70, was the subject of significant amendment throughout the drafting process, as it was initially thought that offences against the administration of justice would be dealt with by the domestic courts concerned. However, these offences against the administration of justice now also fall under ICC jurisdiction. Article 70 contains an exhaustive list of the substantive offences against the administration of justice.[213]

Article 70 of the Rome Statute criminalises certain intentional acts which interfere with investigations and proceedings before the Court,[214] including giving false testimony,[215] presenting false evidence,[216] corruptly influencing a witness or official of the Court,[217] and so on. However, cases under Article 70 present several challenges for the Court.[218]

Article 70 provides the Court with jurisdiction over these cases but does not state which organ is competent to initiate investigations. It is not a core crime and is therefore not included in the provisions of Part 2 of the Rome Statute. Rule 165 of the Rules of Procedure and Evidence states that the Prosecutor may initiate and conduct investigations. The problem here is that none of the ICC chambers has the ability to direct investigations, including where "offences are alleged to have been committed by the prosecution, by an intermediary acting on its behalf, or by a prosecution witness".[219] There is a clear bias here in that if the Prosecutor suspects the defence has committed any of these offences, the Prosecutor may investigate it. However, if

211 Richardson 2017:742.
212 Richardson 2017:742.
213 Richardson 2017:742.
214 Rome Statute, 1988.
215 Rome Statute, 1988: art. 70 (1)(a).
216 Rome Statute, 1988: art.70 (1)(b).
217 Rome Statute, 1988: art. 70 (1)(c).
218 Only discussed briefly, for more see: Richardson 2017:750-763.
219 Richardson 2017:750.

the defence suspects the same of the Prosecutor, it does not have the power to investigate, nor can it request the chambers or a third-party investigate.[220]

Initially, it was thought that only the defence and not the Prosecutor would commit these offences. This proved entirely wrong in the *Lubanga* matter.[221] The Court stayed the matter twice as it could not guarantee a fair trial. In both instances, the Court suspected the prosecution and its intermediaries of conduct that could have amounted to Article 70 offences.[222]

There exists the possibility of conflicts of interest between Article 70 proceedings and main cases when they run in parallel. Such was the case in *Bemba II* where material relating to the main case was seized for use in the Article 70 proceedings.[223] In addition, the defence counsel, case manager and other associates of the accused were arrested and detained.

The third issue that arises relates to penalties and the use of pre-trial detention. *Bemba II* best illustrates this where a defendant served 11 months' pre-trial detention and was released "on the grounds that further detention would be disproportionate to the penalty applicable to the offences" and in the end that defendant was only sentenced to only 6 months' imprisonment.[224]

Specific to witnesses, two situations may arise: (1) where a witness willingly accepts a bribe or (2) where the witness is threatened.[225]

In addition to the above, it is clear that Article 70 proceedings, imperative as they are from the perspective of the fairness of the process, they may impede the Courts ability to fulfil its mandate (the prosecution of perpetrators of the most serious crimes).[226] This mainly relates to the resources available to the Court.

In an attempt to solve these issues, Richardson proposes the following: that Article 70 Offences are only prosecuted as a last resort.[227] Where prosecutions do occur: "target

---

220 Richardson 2017:750.
221 *Lubanga* (ICC-01/04-01/06).
222 Judgment pursuant to Art. 74 of the Statute, Lubanga (ICC-01/04-01/06-2842): par. 482-483.
223 First Appearance Transcript, Bemba *et al* (ICC-01/05-01/13-T-1-ENG CT WT):22, par. 1-3.
224 Decision ordering the release of Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fide'le Babala Wandu and Narcisse Arido, Bemba *et al* (ICC-01/05-01/13-703)
225 Richardson 2017:761-762.
226 Richardson 2017:762.
227 Richardson 2017:764-765.

only the most responsible, for their most serious offences, and use simpler modes of liability" and that article 70 cases do not run parallel with primary cases.[228] Alternatively, article 70 charges are referred to the national courts of the states concerned to be prosecuted.[229]

2.5.3 Temporal (*ratione temporis*) jurisdiction

Temporal jurisdiction refers to the passage of time. In other words, the expiry of times set out in the relevant Statute of limitations may curtail the right to litigate. Generally, temporal jurisdiction can function in one of two ways. Either the Court has lost temporal jurisdiction because the deadline for litigation has expired, or the parties launch a case within the prescribed time limitations. Thus, the Court has temporal jurisdiction within the prescribed time limitations. Specifically, the ICC has jurisdiction only concerning crimes committed after the entry into force of the Statute (1 July 2002).[230] Article 24 of the Rome Statute reiterates this as follows:[231]

> *If a State becomes a party to this statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3.*[232]

Stated differently, when States ratify the Statute after 1 July 2002, temporal jurisdiction for such a State Party begins after the entry into force for that State. The exception to this is where a non-party State has made a declaration, with the Registrar of the Court accepting the jurisdiction of the Court concerning the "crime" in question. This process was used in 2004 by Uganda. The ICC has no retrospective jurisdiction. This is consistent with the Law of Treaties.[233]

It is interesting to note that Article 22 of the Rome Statute provides for *nullum crimen sine lege* or "no crime without law". In this regard, the Rome Statute differs from its predecessors. In the territory of the former Yugoslavia, in a motion challenging the

---

228 Richardson 2017:765-769.
229 Richardson 2017:765.
230 Rome Statute, 1988: art. 11.
231 Rome Statute, 1988: art. 24(1) states: “No person shall be criminally responsible under this statute for conduct prior to the entry into force of the statute.”
232 Rome Statute, 1988: art. 11(2).
233 The 1969 Vienna Convention on the Law of Treaties, art. 28:” treaties are not given retroactive application “to any act or fact which took place or any situation which ceased to exist before the entry into force of the treaty with respect to that party” unless a contrary intention is expressed in the treaty or in some other way is established.

jurisdiction of the ICTY *in Prosecutor v. Milutinovic, Ojdamic and Scainovic*,[234] the Trial Chamber concluded that "the jurisdiction *ratione temporis* of the international tribunal was left open-ended, no doubt because the Security Council foresaw the continuation of the conflict".[235]

Likewise, in Rwanda in *Prosecutor v. Ngeze and Nahimana*,[236] on appeal from the Trial Chamber of the ICTR, the Appeals Chamber held that "no one may be indicted for a crime that was not committed between 1 January and 31 December 1994". Nevertheless, the cases noted that even though any accused person could not be held accountable for crimes committed before 1994, that reference could be made to such "for historical purposes or as information".

Temporal jurisdiction is made very clear by the Rome Statute. However, the issue of "continuous crimes" remains unresolved. Eboibi explains this with the following example:

> *In a case of an 'enforced disappearance', which is a crime against humanity punishable under Article 7 of the Rome Statute. Someone might have disappeared prior to entry into force of the Statute, but the crime would continue after entry into force to the extent that the disappearance persisted. It remains undecided and it will be for the ICC to determine how it should be handled.*[237]

2.5.4 Exercise of jurisdiction, referral of a situation by a state party and pre-conditions to the exercise of jurisdiction

In summary, Articles 12-14 of the Rome Statute state that the:

> *ICC may exercise its jurisdiction when the crime is committed on the territory of the Member State to the Rome Statute or when the perpetrator is a national of the Member State, or when the situation in question is referred to the court by the UNSC or when a Non-Party State ad hoc accepts the court's jurisdiction.*[238]

---

234 *Prosecutor v. Milutinovic, Ojdanic and Sainovic*, Case No. IT-99-37-PT, Jurisdiction, Trial Chamber, 6 May 2003.

235 *Prosecutor v. Ngeze and Nahimana*, Case Nos. ICTR 96-27-AR72 and ICTR 96-11-AR72, 5 Sept. 2000, par. 6.

236 *Prosecutor v. Milutinovic, Ojdanic and Sainovic* par. 6.

237 Eboibi 2012:33.

238 Statute of Rome: art 12-14. The gist of these stipulations is that when a State ratifies the Statute, that state agrees to the jurisdiction of the court. Cases can then be referred to the cort either by a state party, the UNSC or where the prosecutor initiates the investigation. Eboibi 2012:29.

*2.5.4.1 Exercise of jurisdiction over the **crime of aggression***

the ICC has jurisdiction over the crime of aggression where the aggressor is "in a position effectively to exercise control over or to direct the political or military action of a State".[239] Tsilonis summarised ICC jurisdiction over the crime of aggression in the following table:

	ICC Jurisdiction:	
	Victim State has ratified the amendments	Victim State has not ratified the amendments
Aggressor State has ratified the Rome Statute and accepted the crime of aggression amendments	Yes	Yes
Aggressor State has ratified the Rome Statute and not opted out	No	No
Aggressor State has not ratified and not opted out	No	No
Aggressor State has ratified and opted out	No	No
Aggressor State has not ratified and opted out	No	No

Figure 1: ICC jurisdiction over the crime of aggression following the Kampala Amendment[240]

2.5.5 The position of non-state parties

The ICC differs from national courts in that it does not have a police force or its own armed forces.[241] As such, it cannot take judicial action on its own and has to rely on the cooperation of states.[242] Thus, the ICC's ability to operate effectively is dependent mainly on cooperation by states.[243] The ICC needs the cooperation of both member and non-member states. However, as a matter of principle, treaties are only binding on member states (state parties).[244] Therefore, the obligation of non-party states to cooperate differs from that of state parties.[245]

The Rome Statute states this clearly. Article 86 provides that "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court".[246] Whereas

239 Rome Statute: art 25(3 bis.)
240 Tsilonis 2019:164.
241 Wenqi 2006:88.
242 Wenqi 2006:88.
243 Wenqi 2006:88.
244 Wenqi 2006:89.
245 Wenqi 2006:89.
246 Rome Statute: art. 86.

Article 87(5) states that the Court "may invite any State, not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis".[247] From this, it is clear that only state parties are under an obligation to cooperate. This is consistent with the Vienna Convention on the Law of Treaties which provides that a treaty does not create obligations or rights for a third State without its consent.[248] A third State is only under an obligation if the state parties intend the provision to create an obligation on the third State and the third State expressly accepts that obligation in writing.[249]

Although the above is a general principle of international treaty law, in some instances a non-party state may be under a mandatory obligation to cooperate with the ICC.[250] This is as a result of the relationship between the UNSC and the ICC, in particular, the authority of the UNSC under the UN Charter.[251] Of particular importance for present purposes is the fact that in terms of Article 12(3) of the Rome Statute, the ICC has jurisdiction over all cases referred to it by the UNSC.[252] As such, jurisdiction of the ICC will trigger when the UNSC refers a case to the Prosecutor under Chapter VII of the UN Charter.[253] When deciding on the admissibility of cases, a case will be inadmissible where it "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution".[254]

The first case in which the UNSC triggered the ICC's investigation mechanism in accordance with Article 13(b) was in 2005 with regard to the situation in Darfur, Sudan.[255] The International Commission of Inquiry submitted a report to the UN Secretary-General which stated that "the Sudanese judicial system is incapable and the Sudanese government is unwilling to try the crimes that occurred in the Darfur region and to require the perpetrators to assume the accountability for their crimes".[256] This report recommended that the UNSC refer the situation in Darfur to the ICC. The

247 Rome Statute: art. 87(5).
248 United Nations, Vienna Convention on the Law of Treaties, 23 May 1969: art. 34.
249 United Nations, Vienna Convention on the Law of Treaties: art. 35.
250 Wenqi 2006:90.
251 Wenqi 2006:90.
252 Rome Statute.
253 Rome Statute: art. 13(b).
254 Rome Statute: art. 17(1)(a).
255 Wenqi 2006:91.
256 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005.

UNSC, acting under Chapter VII adopted Resolution 1593 in which it "refer[ed] the situation in Darfur since 1 July 2002 to the ICC Prosecutor"[257] and stated:

> *that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognising that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organisations to cooperate fully.*[258]

It is important to note that Sudan is not a member of the ICC; it has signed but not ratified the Rome Statute. It is, however, a member of the UN.[259] As a result, it has an obligation to abide by the provisions of the UN Charter and obey the UNSC resolution by cooperating with the Court. It was through its obligations to the UN that the Pre-trial chamber regarded Sudan as being analogous to a member state. Consequently, Article 27(2) is applicable to Sudan, thus, immunities of Al Bashir as a Head of State under customary international law do not apply to proceedings before the ICC. In regard to its rights and duties, the Pre-Trial Chamber regarded Sudan as being analogous to those of States Parties.[260]

It follows from this that even if South Africa were to withdraw from the ICC, it still has obligations to the UN, meaning that if South Africa did withdraw from the ICC, withdrawal from the UN could also follow. This is as a result of Article 103 of the UN Charter which stipulates that the obligations of UN Member States under the Charter prevail over obligations under any other international agreement in the event of a contradiction or conflict.

2.5.6 Issues of admissibility

In terms of Article 53(1) to initiate an investigation, the Prosecutor must (1) have a "reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed"; (2) the investigation would be consistent with the principle of complementarity; and (3) the investigation serves the interests of justice.

---

257 Security Council Resolution 1593 of 31 March 2005: par. 2.

258 Security Council Resolution 1593 of 31 March 2005: par. 2.

259 A list of countries that have signed and ratified the UN Charter can be found at: https://www.un.org/en/member-states/#gotoS (accessed 01/03/2020).

260 Situation in Darfur, Sudan in the Case of *The Prosecutor V. Omar Hassan Ahmad Al-Bashir*: p. 32: par. 88.

The principle of complementarity means (a) that the ICC will only accept jurisdiction in the most serious instances of violation of crimes under its jurisdiction;[261] (b) the ICC jurisdiction complements national jurisdiction and will only be triggered if a Member State is unable or unwilling to prosecute offenders genuinely;[262] (c) that the ICC will always defer to the national jurisdiction of a State that has territorial jurisdiction over a crime or personal jurisdiction over the alleged offender or victim.[263] As such, the ICC relies on the cooperation of its member states.

Notably, the principle of complementarity has been criticised. In a 2008 article, Schabas raised questions about the actual application of the principle.[264] Schabas' view centers around what became known as 'self-referrals'. In 2003, Prosecutor Luis Moreno Ocampo began approaching member states and encouraging them to refer situations to the ICC.[265] In 2017 Tsilonis argued that the *Al-Senussi* case[266] (declared inadmissible before the ICC) is the first instance of the complementarity principle's implementation 11 years after the ratification of the Rome Statute.[267] The principle has made an appearance in some recent examples, including the situation between Russia and Georgia[268] as well as the Office of The Prosecutor's Report on Preliminary Examination Activities in 2016.[269] Based on this, the view exists that the ICC goes "beyond complementarity" and systematically supports the national capacity for prosecutions, in that where a national prosecution is possible, such national prosecution is preferable to victims, more cost-effective, and sustainable.[270] The previous Prosecutor introduced this concept, which is called "active complementarity". It is trite that the jurisdiction of the ICC is complementary to that of national jurisdictions. If national governments (particularly in Africa) were willing to initiate and

261 Rome Statute, 1988: art. 5.
262 Rome Statute, 1988: art.17.
263 Rome Statute, 1988: art.1.
264 Schabas 2008:5-33.
265 Schabas 2008:9.
266 Documents relating to this case can be found at: https://www.icc-cpi.int /pages/record.aspx?uri=1663102 (accessed 01/03/2020).
267 Tsilonis 2017:1257-1307 "The awakening hypothesis of the complementarity principle." http://crime-in-crisis.com/en/wp-content/uploads/2017/06/62-VIICTOR-KOURAKIS-FS_Final_Draft_26.4.17.pdf (accessed 01/03/2020).
268 The Situation in Georgia 2017 https://www.icc-cpi.int/CourtRecords/CR2015_19720.PDF (accessed 01/03/2020).
269 Statement of the Prosecutor of the International Criminal Court, Ms Fatou Bensouda, regarding the situation in the Kasaï provinces, Democratic Republic of the Congo 2017 https://www.icc-cpi.int/Pages/item.aspx?name=170331-otp-stat (accessed 01/03/2020).
270 For more information, please see Concannon 2000.

conduct prosecutions in their national courts, there is no need to involve the ICC with the prosecution.

As far as the investigation serving the interests of justice, the Prosecutor can only initiate an investigation if there are substantial reasons to believe that an investigation will serve the interests of justice after having given due consideration to the "gravity of the crime and the interests of victims".[271] Thus, this is not a mere question of there being substantial facts to warrant a prosecution; the Prosecutor must determine whether a prosecution would serve the interests of justice, taking into account all the circumstances. It is of course also required that the Pre-trial Chamber of the Court, on application by the Prosecutor must consent to prosecution.[272]

2.5.7 Universal jurisdiction

Brandon has defined Universal jurisdiction as:

> *the exercise of jurisdiction by a State over a person who is said to have committed a limited category of international crimes, regardless of where the offence took place and irrespective of the nationality of the offender or the victim.*[273]

Universal jurisdiction makes it possible for perpetrators of certain crimes to be punished by any state on behalf of the international community, "regardless of the status of the offence and the nationalities of the offender and the offended".[274] Within the conservative jurisdictional base of the ICC, it is clear that as far as member-states and cases referred to it by the UNSC are concerned, the ICC may exercise universal jurisdiction. One of the obvious problems that arise in the exercise of universal jurisdiction by a national court is the issue of immunity. As Swanepoel puts it:

> *Atrocities during which gross violations of human rights and humanitarian law occur, and which gives rise to possible criminal prosecution, is often ordered, planned and condoned by the people in control of the particular state's national power, who are factually and legally, immune from criminal prosecution and punishment under their national legal systems.*[275]

---

271 Rome Statute 1988: art. 53(1)(c)
272 Rome Statute 1988: art. 15(3).
273 Brandon 2005:22.
274 Swanepoel 2007:120.
275 Swanepoel 2007:124-125.

2.5.8 Immunity

What makes international criminal tribunals such as those of the ICTY, the ICTR, and the ICC unique is that they do not recognise the immunity of state officials for the commission of international crimes, nor does it regard the position as a mitigating factor in the punishment of these crimes. This, in theory, was supposed to remove a considerable obstacle that international criminal tribunals face in the fulfilment of their respective mandates.

Diplomatic immunity and immunity of individuals based on official capacity is of great importance in the Rome Statute.[276] Each paragraph of Article 27 serves a different purpose with the aim of making raising an immunity claim impossible. Article 27(1) makes it clear that official capacity is not a defence or a mitigating factor. At the same time, Article 27(2) constitutes a waiver of states parties' right to invoke the immunity of their Head of State before the ICC.[277]

However, the ICC "may not proceed with a request for surrender or assistance" that requires a state to act contrary to its obligations under international law or requires a waiver of immunity by a 3rd state without prior cooperation of that State.[278]

The immunity clause was a point of concern for African states in the Al Bashir matter, but notably not in the drafting of the Statute of Rome process. Al Bashir is accused of committing international crimes, including 5 counts of crimes against humanity, 2 counts of war crimes and 3 counts of genocide.[279] Nevertheless, he has been able to evade a warrant of arrest for seven years, despite having travelled to states that are members of the Rome Statute.[280]

Further to the discussion above, in 2005 the UNSC adopted Resolution 1593 which referred the situation in Darfur, Sudan (a non-member state) to the ICC.[281] Resolution 1593 requested states, regional and international organisations concerned to cooperate fully and invited the AU to cooperate with the ICC.[282] In 2009, the Pre-Trial Chamber I confirmed that Al Bashir's position as a sitting head of a non-member state

276 Tsilonis 2019:167.
277 Tsilonis 2019:168.
278 Rome Statute: art. 98.
279 Dyani-Mhango 2017:535-536.
280 Dyani-Mhango 2017:535-536.
281 UNSC Resolution 1593 (31 March 2005) UNSC Doc. SC/RES/1593.
282 UNSC Resolution 1593 (31 March 2005): par. 1-3.

did not affect its jurisdiction in this matter.[283] As such the ICC requested states to cooperate in the arrest and surrender of Al Bashir both in March 2009[284] and July 2010.[285]

The AU's response to the ICC reflects a conflict between Articles 27 and 98(1) of the Rome Statute and a conflict between fundamental principles; particularly in light of the fact that the recognition of state immunity is still customary international law.[286] Immunity for serving heads of state and high officials in that state is derived from the customary recognition of state immunity. International states are equal and states must have the power to conduct its business unfettered. This power, in turn, is ascribed to the notion of state sovereignty: no state is allowed to interfere in the business and doings of another. The more liberal notion in favour of a disregard for serving head of state or official status, as in the ICC jurisdictional regime, is predicated on the notion that international crimes can never be said to be lawful “state business” and further, that these violations are the concern of the whole international community.[287]

The AU reflected its stance for the continued protection of immunity in that during the period of 2010 to 2014 Al Bashir had visited (and in some cases on multiple occasions) Chad, the Republic of Kenya, Ethiopia, Malawi, Djibouti and the Democratic Republic of the Congo.[288] Every one of these countries is members of the AU.[289] On the other hand, Chad, the Democratic Republic of the Congo Kenya and Malawi are members of the ICC.[290]

In its decision on Malawi’s failure to arrest Al-Bashir,[291] the ICC stated that Malawi's and Chad's violation of their obligations under the Rome Statute was procedural, not substantive, because they chose to ignore the Court's request and did not reply to it

283 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-3: par. 41.

284 Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Situation in Darfur (ICC-02/05-01/09-7 1/6 EO PT).

285 Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Situation in Darfur (ICC-02/05-01/09-96 1/6 RH PT).

286 Tsilonis 2019:171-172.

287 Unpublished LLD dissertation University of the Free State, Swanepoel 2006: 337.

288 For more information, please see Van der Vyver 2015: 565-567.

289 A list of AU member states can be found at https://www.nti.org/learn/treaties-and-regimes/african-union-au/ (accessed 16/05/2019).

290 A list of ICC member states can be found at https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx (accessed 16/05/2019).

291 Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-139-Corr.

regardless of the presence of an actual or supposed right.[292] Both states failed to recognise the Court's authority under Article 119(1)[293] and they failed to notify the Court of a problem relating to execution in terms of Rule 195(1) of the Rules of Procedure and Evidence.

The Pre-Trial Chamber I stated that both state parties afforded Al-Bashir Immunity from arrest in line with customary law and Article 98(1) and conformed with AU decisions not to execute the warrant of arrest for Al-Bashir.[294] The Pre-Trial Chamber I has been criticised for dismissing the substantive issues raised in the case and dismissing the argument by stating it "has already rejected such an argument"[295] and that "the current position of Omar Al-Bashir as Head of a State which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case".[296] Unfortunately it did not make use of the potentially more convincing argument that the UNSC had removed Al-Bashir's immunity through its referral and thus, that there is no issue surrounding the application of Article 27(2).[297] The Pre-Trail Chamber II did eventually address UNSC removal of immunity in detail in its judgment against South Africa.[298]

The manner in which the Pre-Trial Chamber I handled this matter has led to criticism, to the effect that the ICC is disregarding the existence of Article 98(1).[299] What is more, the ICC recognised the conflict between Articles 27 and 98(1) but did not address the conflict. Instead, its justification is insufficient, unconvincing and unsatisfactory.[300]

---

292 Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir: par. 10.

293 Rome Statute: art.119(1) “any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court”.

294 Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al-Bashir, Al-Bashir: par. 8.

295 Decision Pursuant to the Article 87(7) on the Failure of the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmed Al-Bashir, Al-Bashir: par. 14.

296 Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3: par. 41.

297 Tsilonis 2019:175-177.

298 Discussed further below. See Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir ICC-02/05-01/09: par 57-78 and 107.

299 Tsilonis 2019:175-177.

300 Tsilonis 2019:77.

In its judgment against South Africa, the Pre-Trial Chamber II rejected South Africa's argument that the obligation to ensure that those who are suspected of international crimes are arrested and handed over at the court's request does not rest with member states.[301] South Africa's argument was rejected for 2 reasons: (1) if this narrow interpretation of article 27(2) were to be followed, the Court would never be able to exercise its jurisdiction,[302] and (2) state parities relying on "immunities or special procedural rules to deny cooperation with the Court" will create an insurmountable obstacle to the Court's ability to exercise its jurisdiction.[303]

Considering the vertical operation of Article 27(2), between a state party and the court, the Pre-Trial Chamber II held that immunity of a State Party or of its Head of State, is irrelevant and cannot be raised as a ground for refusing to cooperate with the Court.[304]

The irrelevance of immunities in Article 27(2) applies to member states only. As was stated above, in order for the ICC to request the assistance of a non-member state, it must first obtain a waiver of immunity from the non-member state concerned.[305]

However, as was briefly mentioned earlier, the Al Bashir matter was the first instance of the UNSC referring a situation to the ICC in terms of its Chapter VII powers. In this instance the jurisdiction of the ICC was triggered by the UNSC.[306] The obligations that stem from the referral do not originate from the ICC (as a result of membership to the Rome Statute). Instead, these obligations stem from the UN (as a result of membership to the UN Charter).[307] Sudan is a signatory to the UN Charter, consequently, a waiver of immunity in terms of Article 98 is not required.

Based on the above, the researcher submits the following view. Articles 27 and 98 were meant to remove an obstacle and prevent impunity. Unfortunately, the manner that the ICC has handled Malawi's and Chad's failure to co-operate, by not addressing

---

301 Swanepoel 2018: 178.

302 Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir: par 74; see also Swanepoel 2018: 178.

303 Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir: par 75.

304 Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir: par 77

305 Rome Statute: art. 98.

306 Rome Statute: art. 13.

307 Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir: par 83.

the conflicting provisions has created animosity and distrust between the ICC and African states. This animosity has created a situation under which Al Bashir has been able to evade a warrant of arrest for seven years. This, in effect, has denied the victims of the situation in Darfur access to justice. A situation which may have been avoided altogether if the ICC had taken the approach of the Pre-Trial Chamber II in the consideration of Malawi's and Chad's arguments.

2.6 CRITICISM AGAINST THE ICC

It is clear that the ICC was established with the best of intentions and took on an enormous mandate, and an overwhelming majority of world states supported this mandate. Unfortunately, questions are now being asked surrounding the efficacy of the Court.

Beyond the allegations of African bias discussed above, there is a perception that the ICC has not fulfilled the expectations of its founders.[308] Its proceedings are cumbersome and lengthy.[309]

Perhaps most concerning, is the fact that a number of the Courts accused are still at large. This, while an estimated €1.5 billion, has been spent to secure 3 convictions over the core international crimes.[310] There is of course the possibility that this is due to a lack of co-operation by States.

Over recent years the Court seems to be losing credibility. Most recently the controversy surrounding the U.S. and the situation in Afghanistan, with U.S. officials going as far as calling the Court “illegitimate” further tarnished the ICC’s reputation”.[311] Add to this that Russia and China attempted to prevent the Court’s investigation of the aforementioned situation in Myanmar.[312] The Philippines and Burundi have formally

308 Wilmshurst 2019 “Strengthen the International Criminal Court”, https://www.chathamhouse.org/2019/06/strengthen-international-criminal-court (accessed 01/11/2020).
309 Wilmshurst 2019 “Strengthen the International Criminal Court”. https://www.chathamhouse.org/2019/06/strengthen-international-criminal-court (accessed 01/11/2020).
310 Wilmshurst 2019 “Strengthen the International Criminal Court”. https://www.chathamhouse.org/2019/06/strengthen-international-criminal-court (accessed 01/11/2020).
311 See Cormier 2018:1043-1062.
312 See Kaufman 2018:93-112.

left the Court.[313] More than 30 countries have ignored ICC warrants of arrests for Al Bashir.[314] In 2016, Russia withdrew its signature (though it never ratified the statute).

An interesting situation is emerging as a result of the situation in Myanmar; there is a view that the situation in Myanmar created a precedent that the Court can rely on to bring the situations in Syria and Jordan within the jurisdiction of the Court.[315]

2.6.1 The ICC's response: an Independent Expert Review

Presumably as a result of the controversy surrounding the U.S and the situation in Afghanistan; the Assembly of States Parties (ASP) formed the Independent Expert Review (IER), in December 2019. Its mandate was to "identify ways to strengthen the ICC … to promote universal recognition of their central role in the global fight against impunity and enhance their overall functioning".[316] The IER released its final 348-page report on 30 September 2020, containing 384 recommendations which consist of "both short and long-term recommendations, with varying degrees of complexity, and urgency of implementation".[317]

In what follows is a very brief discussion on some of the IER's recommendations. It gives a prediction of the direction that the Court may be heading in and the steps that the Court could take to address some of the issues that it is currently facing.

(1) The Court should be restructured into a "Three-Layered Governance Model". Each layer will consist of an authority, an oversight body and a model of accountability (depicted in the table below) where the first layer is concerned with the core judicial and prosecutorial activity, which requires "absolute independence" and only

313 See Suyak 2019 "How does the International Criminal Court answer criticisms that it is illegitimate?", https://www.dw.com/en/how-does-the-international-criminal-court-answer-criticisms-that-it-is-illegitimate/a-48180371 (accessed 01/11/2020).

314 See Suyak 2019 "How does the International Criminal Court answer criticisms that it is illegitimate?", https://www.dw.com/en/how-does-the-international-criminal-court-answer-criticisms-that-it-is-illegitimate/a-48180371 (accessed 01/11/2020).

315 See "ICC urged to investigate Syria's forced deportations": https://www.aljazeera.com/news/2019/3/8/icc-urged-to-investigate-syrias-forced-deportations#:~:text=Syria%20is%20not%20a%20member,world's%20first%20permanent%20criminal%20tribunal (accessed 01/11/2020).

316 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020): par. 1.

317 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020): par. 23.

supervision through judicial proceedings.[318] The second layer relates to broader concerns of the administration of justice and sees the creation of a new oversight mechanism, in the form of "a Judicial Audit Committee".[319] The final layer is concerned with the administration of the organisation. "The Head of Chambers Staff should report to the Presidency on all matters relating to Layers 1 and 2, and the Registrar on issues relating to Layer 3."[320]

	The International Criminal Court		
	ICC/Court		ICC/IO
	Layer 1 Judicial & prosecutorial Activity	**Layer 2** Administration of Justice	**Layer 3** IO administration
Authority:	Presidency, Judges and Prosecutor	Presidency and Prosecutor	Registrar
Oversight:	Judiciary/Appeals Chamber	Judicial Auditees Committees, *ad hoc* judicial/prosecutorial investigative panels	ASP, CBS, AC, IOM
Accountability modalities:	Judicial Remedies	KPIs and inter-court comparisons	Internal & External Audit, KPIs (including intra-IO comparisons)

Figure 2: The ICC Three-Layered Governance Model[321]

(2) Each organ should focus on its core functions, prescribed by the Rome Statute, interpreted in line with the "Three-Layered Governance Model".[322] Moreover, an extended Coordination Council should bring these offices together regularly to enable the Court to work in harmony and with a unified purpose.[323]

---

318 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020): par. 28.

319 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020): annex. 1, par. 3.

320 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020): annex. 1, par. 11.

321 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020): annex. 1, par. 2.

322 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020): annex. 1, par. 5.

323 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020): annex 1, par. 6.

(3) UN administrative procedures should be used as a starting point to develop new internal policies.[324]

(4) The Court should take steps to instil internal trust and "re-shape the working culture at the Court".[325]

(5) Downsize to a single Deputy Prosecutor, with specified powers and functions. The Executive Committee should be regarded as an advisory body to the Prosecutor.[326]

(6) The incoming Prosecutor should delegate responsibility for the management of human resources to the Registry.[327]

(7) The Court's Financial Disclosure Programme should be extended to cover Judges; all elected officials should complete declarations of interests and a joint Ethics Committee and an Ethics and Business Conduct Office should be established.[328]

(8) The establishment of a specialised static team that will be assigned to the Pre-Trial Chambers to consider

> *in particular: (i) requests by the Prosecutor for authorisation to open an investigation; (ii) requests for the issuance of a Warrant of Arrest/summons to appear; (iii) challenges on admissibility and jurisdiction …*[329]

At the time of writing, this document is only 30 days old; as such, there is no academic commentary on the recommendations contained in it. It remains to be seen how the proposals contained in the document will be received by states, the Court and the public.

---

324 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020): annex.1, par. 7.

325 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020): annex 1, par. 8.

326 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020): annex 1, par. 16-17.

327 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020): annex 1, par. 22.

328 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020): annex 1, par. 26-31.

329 Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report 2020, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020):91.

At the very least, this document is indicative of the Court's awareness of the issues that it faces. At least as far as the formulation of the IER and the production of this report is concerned, it appears that the Court is taking steps to make improvements.

2.7 CONCLUSION/SUMMARY

The research in this chapter established that the idea of the ICC was, at first, supported by South Africa and through the promulgation of the Implementation Act,[330] the country committed itself to the prosecution of those responsible for the commission of international crimes either by its own courts or by the ICC.[331] However, the research has shown that state practice has not reflected this commitment. Further clouding this issue, is the allegation of "African bias". The research demonstrated arguments both for and against this allegation. However, van der Vyver made a crucial statement in relation to South Africa's position, stating that the government's issue is not with the ICC but instead with its Court's exposure of its defiance of the rule of law and disrespect for judgments of a court of law.[332]

As far as the ICC is concerned, this chapter has demonstrated that the idea of forming a permanent international criminal court existed as early as World War I, in the treaty of Versailles (1919).[333] It took 36 years (1948-1984) to draw up a draft statute. With 70 per cent of states ascribing to the general thrust and ideas that the ICC represents, it took only three and a half years for the Statute to come into effect.[334] It became operational in the following year. However, it is worth noting that it took 10 years before the Court would hand down its first judgment.

The research has shown that the Court receives funding from contributions made by 122 State Parties as well as the United Nations.[335] Despite this, the Court is still confronted with budgetary issues and even after 18 years of existence, the Court still

330 Stone 2011:306.
331 *Implementation of the Rome Statute of the International Criminal Court Act*: preamble.
332 Van der Vyver 2015:579.
333 Bassiouni 1991:2.
334 Coalition for the International Criminal Court “History of the ICC”, http://iccnow.org/?mod=icchistory (accessed 20/02/2020).
335 Rome Statute, 1988: art. 115.

battles to develop fully reliable and accurate budget proposals,[336] but is nonetheless consistently seeking ways to become more efficient and cost-effective.

As far as its jurisdiction, not only are crimes defined in the Rome Statute but in most cases are also defined (if not also further expanded on) in other international instruments. Despite this, there are still areas lacking in clarity, including, the crime of aggression, continuous crimes as well as areas that pose potential problems for the court, including Article 70 offences.

This chapter essentially sought to lay the groundwork for the following chapter. It looked at specific aspects of the ICC that may be relevant when attempting to determine the viability of the ACJHPR. It provided the comparative backdrop of three key issues that the ACJHPR could be faced with, namely jurisdiction, budgeting and immunity.

336 Zavala 2018:3.

CHAPTER 3: THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS

3.1 INTRODUCTION

This chapter aims to discuss some of the aspects that are relevant when attempting to establish the potential viability of the ACJHPR as a substitution for the ICC. It will consider aspects such as the history of the court, its budget and jurisdiction. Where necessary, it will contrast the analysis with the ICC. The ACJHPR with its proposed criminal jurisdiction as proposed in the Malabo Protocol is not yet in force.[337] This chapter will conclude that various aspects surrounding the African Court are problematic and collectively do not point in the direction of a fully operational court within the foreseeable future.

3.2 HISTORY

3.2.1 General

The predecessor of the AU, the OAU was established in 1963 after a number of multinational African states conferences held between the 1950s and 1960s with the aim of providing support to African states, which were still under colonial rule to incite change through non-violent means.[338] The OAU was subject to much criticism and was often called a "dictators' club" because the OAU did little to protect the rights and liberties of African citizens against the excesses of their own political leaders.[339]

In 1999, there was a call for the establishment of an African Union with the aim of furthering integration on the continent, and to address the social, economic and political problems that derive from globalisation.[340] The Constitutive Act of the AU was

---

337 As was stated in the introduction, only 15 of 55 AU member states have signed the protocol, but the protocol is yet to receive a single ratification.

338 African Union: About the African Union. Available at: https://au.int/en/overview (accessed 10/03/2020).

339 2002 news BBC report "African Union replaces dictators' club", 2002 http://news.bbc.co.uk/2/hi/africa/2115736.stm (accessed 10/03/2020).

340 Known as the Sirte Declaration. https://au.int/sites/default/files/decisions/9633-council_en_24_30_june_2009_executive_council_fifteenth_ordinary_session.pdf (accessed 10/03/2020).

adopted in July of 2000 and entered into force in May of 2001.[341] The AU was officially launched in 2002. This saw the introduction of an organisation that possesses the mandate to resolve inter-African disputes.[342]

The Constitutive Act made provision for the establishment of an (African) Court of Justice.[343] The court's statute, composition and functions were defined in a later protocol.[344] The AU introduced the Protocol of the Court of Justice of the African Union in July of 2003 (the 2003 Protocol).[345] The drafters modelled the 2003 Protocol on the International Court of Justice's charter (ICJ).[346] The 2003 Protocol was to enter into force one month after its 15th ratification, which only occurred in January of 2008.[347] However, the AU never acknowledged its entry into force, presumably because of the decision reached in 2004 to merge the ACJ with the African Court on Human and Peoples' Rights (the ACHPR).[348]

The ACHPR (the Protocol adopted in 1998 and entered into force in 2004):[349] has been signed and ratified by only 24 states. (This includes Kenya and South Africa.) Twenty-five states have signed but not yet ratified the Protocol (this includes Sudan), and five states have neither signed nor ratified this Protocol (including South Sudan).[350] In light of the fact that this Protocol has been in force for almost 15 years and that less than half of African States have signed and ratified it, may bear testimony of the sentiment expressed by Naldia and Magliveras that:[351]

> *It appear[s] that African leaders, especially of the older generation, are still reluctant to contemplate the possibility of being judged for their actions or omissions.*[352]

---

341 Constitutive Act of the African Union, 1 July 2000. https://au.int/sites/default/files /pages/34873-file-constitutiveact_en.pdf (accessed 08/11/19).
342 Naldia & Magliveras 2012:385.
343 Constitutive Act of the African Union: art. 18.
344 Constitutive Act of the African Union: art. 18(2).
345 African Union, Protocol of the Court of Justice of the African Union, 11 July 2003.Available at: https://au.int/sites/default/files/treaties/36395-treaty-0026_-_protocol_of_the_court_of_justice_of_the_african_union_e.pdf (accessed 08/11/19).
346 The choice to model the ACJ on the International Court Justice rather than on the Court of Justice of the European Union (ECJ) has been criticized. See, for example: Naldia and Magliveras 2012:389.
347 Naldia & Magliveras 2012:386.
348 Naldia & Magliveras 2012:386.
349 African Union, Protocol on the Statute of the African Court of Justice and Human Rights.
350 A list of countries that have signed and ratified this protocol can be found at: http://www.achpr.org/instruments/court-establishment/ratification/ (accessed 08/11/19)
351 A similar opinion Has been expressed by Naldia and Magliveras 2012:384.
352 Naldia & Magliveras 2012:447.

Despite entering into force in 2004, the 11 judges of the ACHPR were only appointed in 2006, and the court "has only recently become fully operational",[353] handing down its first judgment in December 2009.[354] To date the Court has received 217 applications and it has finalised 65 cases.[355]

In July 2008, the Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights (the 2008 Protocol).[356] The result is known as the African Court of Justice and Human and Peoples' Rights (ACJHPR). Having been adopted more than a decade ago, the 2008 protocol has not yet entered into force. At the time of writing; of the 55 African countries, 32 have signed it and only 7 have ratified it (15 states will need to ratify the protocol before it enters into force).[357] Kenya, South Africa, Sudan, and South Sudan are some of the countries that have neither signed nor ratified the 2008 Protocol.

The Human and Peoples' Rights division of the ACHPR only recently became fully operational.[358] The 2008 protocol is still not in force (and seems to be lacking in support)[359] Yet despite this, in June 2014, African Heads of State and governments, nevertheless adopted a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the ACJHPR Amendment), which revises the 2008 ACJHR.

The 2014 ACJHPR Amendment would also see the introduction of the Malabo Protocol which aims to grant the merged ACJHPR jurisdiction over international crimes. This introduces a third tier to the court. In other words, the court would consist of a general affairs section, a human rights section, and an International Criminal Law Section (which shall consist of three chambers: a pre-trial chamber, a trial chamber

353 Naldia & Magliveras 2012:388.

354 This was the case of *Michelot Yogogombaye v. the Republic of Senegal* No. 001/2008. http://hrlibrary.umn.edu/africa/comcases/1-2008.pdf (accessed 19/02/19).

355 Statistics relating to matters before the ACHPR can be found at: http://en.african-court.org/index.php/cases#statistical-summary (accessed19/02/19).

356 African Union, Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008 http://www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf (accessed 08/11/19).

357 A list of countries that have signed and ratified this protocol can be found at: https://au.int/sites/default/files/treaties/36396-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf (accessed 28/10/19).

358 Naldia & Magliveras 2012:388.

359 This conclusion is drawn based on the fact that after almost 15 years since coming into force, less than half of the member states of the AU have signed and ratified the 2008 Protocol.

and an appellate chamber).[360] The Criminal Law Section is the focus for present purposes.

The ACJHPR and the Malabo Protocols are not as of yet in force. Even if the merged court with international criminal jurisdiction is established, it would have no jurisdiction over sitting Heads of State and "senior state officials".[361] Some commentators believe that the step towards an “African-owned and own criminal jurisdiction” is supported primarily to undermine the ICC and the principle of accountability and in an ancillary sense, as an attempt to create a viable alternative African-owned forum for accountability.[362] Naturally, any international court, whether global or regional, will have limited resources and therefore not have the means to prosecute all persons involved in international atrocities.[363] As such a court focusses on those, who are most responsible. Most responsible individuals inevitably include the most senior government officials, including heads of state and military commanders.[364] This clearly shows the potential for an inevitable regression in the ability to prosecute those responsible for the commission of these crimes should the ACJHPR replace the ICC for the African continent.

3.2.2 Uncertainty regarding ratification

As things stand at present; only the ACHPR is functional, the ACJ is not yet operational and neither ACJHPR nor the Malabo Protocols have received the required number of ratifications. This could result in any one of five outcomes depending on the ratification of the protocols.[365]

---

360 Draft Amended Statute of the African Court of Justice and Human and Peoples’ Rights: art. 16

361 Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights: art. 46. https://au.int/sites/default/files/treaties/36398-treaty-0045_protocolonamendmentsto_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf (accessed 06/11/19).

362 *Democratic Alliance* v *Minister of International Relations and Cooperation and Others*: par. 65.

363 Viljoen 2015:5. (unpublished) https://www.chr.up.ac.za/images/centrenews/2016/files/Five_reasons_why_South_Africa_should_not_withdraw_from_the_International_Criminal_Court_Statute.pdf (accessed 08/11/19).

364 Viljoen 2015:5. (unpublished) https://www.chr.up.ac.za/images/centrenews/_2016/files/Five_reasons_why_South_Africa_should_not_withdraw_from_the_International_Criminal_Court_Statute.pdf (accessed 08/11/19).

365 Africa Centre for Open Governance 2016: Seeking Justice or Shielding Suspects? An analysis of the Malabo Protocol on the African Court. Available at: http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf (accessed on 16/03/2020):10.

1) Neither of the Protocols gets the required number of ratifications resulting in the ACHPR remaining the only functioning court of the AU.
2) Neither of the Protocols gets the required number of ratifications, but the ACJ becomes operational and functional, resulting in the ACJ functioning parallel to the ACHPR.
3) The ACJHPR Protocol receives 15 ratifications, but the Malabo Protocol does not, in which case the ACHPR and ACJ merge into a single court but without jurisdiction to try international crimes.
4) The Malabo Protocol receives the required 15 ratifications, but the ACJHPR Protocol does not, resulting in the third chamber existing without the requisite legal and institutional framework of the ACJHPR Protocol.
5) Both the ACJHPR protocol and Malabo Protocol receive the required ratifications, creating a merged court with jurisdiction over international crimes.

The fourth possible outcome:

> *would raise a number of complex issues under international law, such as whether crimes within the subject matter jurisdiction of the third chamber occurring after the ratification of the Malabo Protocol, but before the ratification of the Merger Protocol, could still be adjudicated. It is therefore questionable if the Malabo Protocol could in fact enter into force before the Merger Protocol.*[366]

3.3 BUDGET

As will later be discussed, the proposed court has an expansive jurisdiction. It will need a vast amount of money to ensure that the court is adequately staffed and capacitated to run international criminal trials.[367]

In 2009, the estimated unit cost of a single trial for an international crime was US$20 million,[368] which has undoubtedly increased exponentially over the last 11 years. Where this becomes concerning is that the AU's budget for the 2011 financial year amounted to US$256 754 447 (including the total allocation for the African Court on

366 Africa Centre for Open Governance 2016: Seeking Justice or Shielding Suspects? An analysis of the Malabo Protocol on the African Court. Available at: http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf (accessed on 16/03/2020):10.
367 Du Plessis 2012:9.
368 Du Plessis 2012:9.

Human and Peoples' Rights),[369] when compared to the ICC, that had a budget of US$134 million for that same time.[370]

Lubbe aptly describes this issue:

> *Even before the new criminal division was proposed, the court already had its hands full. With this addition, valid questions arise regarding the ability of the court, not only to meet its new obligations, but also the effect it will have on the court's ability to fulfil its human rights obligations.*[371]

In this regard, the AU can learn from the ICC. As was explained in Chapter 2, even after 18 years of existence, one of the challenges the Court faces is developing fully reliable and accurate budget proposals.[372] This challenge is primarily attributed to the uncertainty attached to the judicial mandate of the institution.[373] This should in itself, be a red flag for the AU as the ICC has this difficulty even though it only exercises jurisdiction over three crimes and receives contributions from 122 State Parties as well as the UN.[374] In contrast, the AU only has the contributions of 55 State Parties and select other donors who need to fund the AU itself, the general affairs section (which, considering its mandate, will be a bustling section),[375] the human rights section and the criminal law section with jurisdiction over 14 crimes.

Of even more concern is the fact that the

> *AU struggles to adequately finance its own operations, including its human rights treaty bodies. It funds less than 25 [per cent] of its budget (excluding peace and security budget which is funded almost 100% by donors).*[376]

To compound the issue even further, "some donors who have traditionally financed the AU (like the EU) have already indicated that they would not finance the ACJHR on account of the immunity clause".[377]

---

369 Du Plessis 2012:10.
370 Du Plessis 2012:10.
371 Author's translation. Lubbe 2014:226.
372 Zavala 2018:3.
373 Zavala 2018:3.
374 Rome Statute, 1988: art. 115.
375 Du Plessis 2012:6.
376 Amnesty International; 2016, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots https://www.amnesty.org/download/Documents/AFR016137 2017 ENGLISH.PDF (accessed 15/03/2020).
377 Amnesty International; 2016, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots https://www.amnesty.org/download/Documents/AFR016137 2017 ENGLISH.PDF (accessed 15/03/2020).

In 2016 Amnesty International published a report,[378] which brings to light a number of issues that are relevant for present purposes: (1) One of the biggest questions at hand is whether the court will have the capacity to deliver effectively and efficiently on its mandate. By way of comparison, the ICC has 18 judges that are dealing with three crimes. In comparison, the African Court will have only six judges dedicated to the International Crimes Section, dealing with 14 crimes. This on its own, presents a substantial potential capacity problem. (2) However, there is the potentially disastrous effect on the human rights jurisdiction of the court, given that the Malabo Protocol envisages the reduction of judges responsible for human rights issues from 11 to 5 judges. This will clearly significantly impact the capacity of the Court. Even more so in light of the fact that at the end of June 2016, the Court had received 101 cases, of which only 27 were finalised and 4 transferred to the African Commission. Based on this, it is not farfetched to say that the court was already battling to efficiently deliver on its mandate just in regards to human rights issues.[379] (3) the Court would require an estimated bare minimum of 211 staff members for the running of the African Court, at an estimated cost of US$4.42 million. Brought into context, the ICC has a staff complement exceeding 1 309.

Just based on the above, it is more than clear that budgeting could pose a massive problem. There are, however, two other budgetary aspects that the drafters seem to have overlooked in the Draft Amended Statute. These are the double obligation and competing interests (with the ICC) placed on its members as well as potential infrastructure limitations.

The Amnesty International report,[380] states that the AU has 55 member states, 34 (62 per cent) of which are also members of the ICC. These states will have obligations (including financial obligations) to both the ICC and the ACJHR. To complicate matters further, as will be discussed later, there is some overlap in the jurisdiction of the ICC and the ACJHR. This means that a situation is possible where both courts "*indict the same person and order his or her surrender, a state party to both the Rome Statute*

---

378 Amnesty International; 2016, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots https://www.amnesty.org/download/Documents/AFR016137 2017 ENGLISH.PDF (accessed 15/03/2020):5-10.

379 See also Du Plessis 2012:9-13.

380 Amnesty International 2016, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots. https://www.amnesty.org/download/Documents/AFR016137 2017 ENGLISH.PDF (accessed 15/03/2020):10.

and the Malabo Protocol may have to choose which obligation to fulfil and which one to breach".[381] The same issue may arise in requests for cooperation.

An aspect that does not seem to be covered, even in the literature, is the potential infrastructure limitations.[382] As it stands, Article 25 of the 2014 protocol states that: "*The Seat of the Court shall be same as the Seat of the African Court on Human and Peoples' Rights*."[383] It may also sit in the territory of a member state if the circumstances warrant such and the state consents to it.[384] The problem that the researcher foresees with this is the following: the AU initially intended the current seat of the court for the human rights section of the court. It was established above that it is foreseeable that all three sections of the court will have an overwhelming caseload when fully operational. The researcher is concerned that the current seat of the ACHPR will be insufficient to handle the expected caseload. This could potentially result in further expenditure to expand the court. Alternately, some may argue that the provision for the court to sit in the territory of a member state solves this issue. In this regard, the researcher has the view that this would result in even further expenditure, not only to the AU in terms of travel and accommodation costs for its staff, but also to the state concerned in terms of making adequate facilities available. In an attempt to solve this issue, the author acknowledges the existence of the infrastructure that was used for the former ICTR and proposes that consideration be given to using that infrastructure as an alternative.[385]

---

381 Amnesty International 2016, Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots. https://www.amnesty.org/download/Documents/AFR016137 2017 ENGLISH.PDF (accessed 15/03/2020):10.

382 To the author's knowledge, at the time of writing, no other author has considered this issue.

383 Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014: art.25(1).

384 Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014: art.25(1).

385 The Tribunal is located in Arusha, Tanzania, and has offices in Kigali, Rwanda. Its Appeals Chamber is located in The Hague, Netherlands.

3.4 JURISDICTION

3.4.1 Jurisdiction over crimes and definition of crimes

The Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights defines each of the crimes within its jurisdiction in Articles 28B to 28M.[386] However, for the court to have jurisdiction over these crimes, their substantive elements must be clear. In other words, African states will need to reach consensus regarding these crimes and their elements.[387] In the case of the ICC, the elements of genocide,[388] war crimes,[389] and crimes against humanity are clear.[390] These elements of crimes were painstakingly crafted over many years and debated in detail by the plenipotentiaries at the conference in Rome.[391]

The Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights provides the International Criminal Chamber with the power to try persons for the commission of: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression.[392] Thus, the International Criminal Chamber exceeds the current jurisdiction of the ICC.[393] The expansion has implications on an international, regional and domestic level.[394]

---

386 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights. http://www.iccnow.org/documents/African_Court_Protocol-July2014.pdf (accessed 08/11/ 19).

387 Martin & Jurgen 2012:258.

388 United Nations office on Genocide Prevention and Responsibility to Protect: Genocide. https://www.un.org/en/genocideprevention/genocide.html (accessed 08/11/19).

389 United Nations office on Genocide Prevention and Responsibility to Protect: war Crimes. https://www.un.org/en/genocideprevention/war-crimes.html (accessed 08/11/19).

390 United Nations office on genocide prevention and responsibility to protect: Crimes Against Humanity. https://www.un.org/en/genocideprevention/crimes-against-humanity.html (accessed 08/11/19).

391 United Nations, 1998 UN Diplomatic Conference Concludes in Rome With Decision To Establish Permanent International Criminal Court https://www.un.org/press/en/1998/ 19980720.l2889.html (accessed 08/05/20).

392 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art.28A

393 Rome Statute article 5 provides the jurisdiction of the ICC as "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court 0has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression."

394 Du Plessis 2012:5.

Moreover, the process to expand the African Court's jurisdiction, for whatever reason, has not been particularly transparent.[395]

Therefore, the AU expects the criminal division of the court to try not only the established international crimes but also a raft of other crimes indicative of other social ills that plague the continent.[396] This is particularly concerning. As Du Plessis puts it:

> *It took almost a decade for the ICC – a court dedicated to the prosecution of international crimes, with a far more limited jurisdictional focus on just three of the crimes that the African Court will be expected to tackle – to complete its first trial in the Lubanga matter.*[397]

Under the draft protocol, the court is "vested with an original and appellate jurisdiction, including international criminal jurisdiction".[398] The International Criminal Chamber is the focus of this dissertation; however, the research cannot ignore the general affairs and human rights sections as they play a part in some of the difficulties that the court could face.

Even at first glance, one of the more obvious difficulties is that the draft protocol attempts to create jurisdiction over several crimes that are not yet fixed in international criminal law.[399] This, in itself, is contrary to previous practice. For example: in the Resolution establishing the ICTY, the UN Secretary-General stated that:

> *the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise.*[400] *There was a general agreement that the definitions of crimes in the ICC statute were to reflect existing customary international law, and not to create new law.*[401]

The Malabo Protocol not only creates jurisdiction over several crimes that are not yet fixed in international criminal law, but these creations are the product of little or no deliberation by African states.

---

395 Du Plessis 2012:5.
396 Du Plessis 2012:6.
397 Du Plessis 2012:6.
398 Du Plessis 2012:6.
399 Du Plessis 2012:7.
400 UN Secretary-General, Report submitted pursuant to paragraph 2 of Security Council Resolution 808(1993), UN Doc. S/25704, 3 May 1993, at 34.
401 Kirsch 2003: Foreword.

3.4.2 'International crimes' and 'transnational crimes'

Legal scholars and practitioners of international law draw a distinction between 'international crimes' and 'transnational crimes', but this is not to imply consensus on the precise meaning of these terms as both terms have different definitions throughout the literature.[402] Generally speaking, 'international crimes' have been described as 'those offences over which international courts or tribunals have been given jurisdiction under general international law'.[403]

By contrast, 'transnational crimes' are those 'crimes with actual or potential trans-border effects.[404] That is to say, certain criminal conduct which transcends international borders, and which transgresses the laws of several states or have an impact on another country. The latter is, in other words the body of domestic criminal conduct that have cross border or extraterritorial origins and or effects.[405]

There still remains a lack of agreement among scholars, as to what features make some crimes 'international' and others 'transnational' in nature. Add to the definitional impasse, also the uncertainty surrounding the legal consequences of such crimes. Specific offences fall into these seemingly impermeable categories and the criteria for their inclusion in one basket or the other, is difficult.[406]

Bassiouni states that this uncertainty stems from the lack of a widely accepted definition of what an international crime is and the absence of universally accepted criteria regarding what qualifies specific penal prohibitions as crimes under international law.[407]

In an attempt to provide some clarity, Bassiouni, developed one of the earliest and most complete Workable Analytical Frameworks to clarify the concept of international crimes.[408] Under this framework, he proposes 10 features/penal characteristics that makes a crime an international crime in international treaty law.[409] Though the

402 Jalloh *et al* 2019:225.
403 Cryer *et al* 2014:3; see also Jalloh *et al* 2019:225.
404 Jalloh *et al* 2019:226.
405 Cryer *et al* 2014:3.
406 Jalloh *et al* 2019:226.
407 Jalloh *et al* 2019:226.
408 Bassiouni 2013:141.
409 Bassiouni 2013:142-143. These were: (1) explicit or implicit recognition of proscribed conduct as constituting an international crime, or a crime under international law, or a crime; (2) implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute,

framework has been subjected to some criticism, some general support among scholars exist for it as a useful starting (not ending) point for discussion.[410] Within this process, Bassiouni identified four main categories: (1) international crimes, (2) transnational crimes, (3) partly international crimes and (4) partly transnational crimes.

Alongside Bassiouni's 10 penal characteristics for what makes a crime an 'international crime', an approach has been advanced by the UN, which considers the existence of any one of four factors to be determinative of 'transnational crime' status.[411]

Jalloh states that by using Bassiouni's framework, we can probably judge whether some of the crimes within the African Criminal Courts jurisdiction offer a basis to regulate conduct as criminal in nature.

In applying this framework to the Malabo Protocol, Jalloh concludes that we can generally, sub-divide the 14 crimes included in the Malabo Protocol into Bassiouni's four main categories.[412]

In the discussion that follows, the researcher continues from the premise of Bassiouni's subdivisions and Jalloh's classification of the crimes and discusses each of the crimes within the jurisdiction of the proposed court. Starting with the International Crimes, and where necessary providing a brief comparison of the ICC crimes. This section serves to illustrate the haste with which the Malebo Protocol was composed.

3.4.2.1 International Crimes (ICC Crimes viz. a viz. the Malabo Protocol crimes)

International criminal law, as part of public international law, relies on the sources of international law.[413] Jalloh states:

---

punish; (3) criminalisation of the prohibited conduct; (4) duty or right to prosecute; (5) duty or right to punish the proscribed conduct; (6) duty or right to extradite; (7) duty or right to cooperate in prosecution, punishment (including judicial assistance); (8) establishment of a criminal jurisdictional basis; (9) reference to the establishment of an international criminal court or international tribunal with penal characteristics; and (10) no defence of superior orders.

410 See Cryer *et al* 2014:125.

411 Jalloh *et al* 2019:225.

412 Jalloh *et al* 2019:238.

413 These sources are listed in Article 38(1) of the Statute of the International Court of Justice as: treaties, custom, general principles of law, and as subsidiary means of determining the law, judicial decisions and the writings of highly qualified publicists.

> *to the extent that African States have included international crimes in the statute of their regional court, we might expect that they derive from the explicit recognition of the proscribed conduct as constituting a crime under international law.*[414]

This seems to have proven to be true in so far as these crimes largely conform to the internationally agreed definitions.[415] Of the 14 crimes in the Malabo Protocol, 4 are classified as international in nature: aggression, crimes against humanity, genocide and war crimes. In what follows is a brief discussion of these 4 crimes, in contrast to the provisions for them in the Rome Statute. The reason for this comparison is to demonstrate the potential problems the African court may encounter if these problems are not heeded before the court becomes operational.

3.4.2.1.1 Genocide

Chapter 2 gave the definition of Genocide as per the ICC. The only change in the Malabo Protocol is the inclusion of rape or any other form of sexual violence within the definition of genocide.[416] This may seem like a logical inclusion, particularly given the widespread sexual violence in African conflicts; however, this inclusion may be unnecessary. Sexual violence and, in particular, rape, is already covered by Article 28B(b) and (d): causing grievous bodily or mental harm and imposing measures intended to prevent births. Moreover, both the former ICTR and ICTY had regarded serious bodily or mental harm to include acts of sexual violence and, specifically, rape.[417] In fact, in the *Akayesu* case, the chamber used the example of rape[418] and held that rape could be a measure intended to prevent births.[419] Likewise, the ICC, in its 2010 indictment of Al Bashir for genocide, included subjecting 'thousands of civilian women, belonging primarily of the Fur, Massalit, and Zaghawa groups to acts of rape.

Though unnecessary, the inclusion may not be frivolous;[420] just because other provisions implicitly cover a particular form of conduct does not mean that the AU should not explicitly penalize this behaviour.[421] The drafters may have wanted to stress

414 Jalloh *et al* 2019:239.
415 Jalloh *et al* 2019:239.
416 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 28B(f).
417 Werle *et al* 2017:39.
418 The Prosecutor v Jean-Paul Akayesu (ICTR-96-4): par. 507.
419 The Prosecutor v Jean-Paul Akayesu (ICTR-96-4): par. 508.
420 The definition of genocide in the Malabo Protocol is slightly more progressive and reflective of recent jurisprudence than the definition in the Rome Statute.
421 Werle *et al* 2017:40.

the societal impact of this conduct.[422] These overlaps could however cause difficulties in the subsequent practical application.[423]

3.4.2.1.2 Crimes against humanity

Article 28C of the Malabo Protocol differs from Article 7 of the Rome Statute in three key areas.[424] First; as opposed to removing the "civilian population" element, it expands upon it by making it read; "widespread or systematic attack or enterprise directed against any civilian population ..."[425] The protocol defines the term "attack" but not the term "enterprise". Werle *et al* questions whether the term "enterprise" actually adds anything to the existing definition.[426] However, the view exists that the inclusion of the term "enterprise" here, may be as a result of the criminal responsibility of legal persons provided for by Article 46C; perhaps the drafters sought to clarify that legal persons can commit crimes against humanity.[427]

Secondly, torture as a Crime Against Humanity in Article 28C includes "cruel, inhuman and degrading treatment or punishment" but, again, only torture is defined, and this definition is identical to Article 7(2)(e) of the Rome Statute. Interestingly the definition of torture and "treatment" has developed in practice to be an "aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".[428] Where the "humiliation or debasement […] must attain a particular level and must, in any event, be other than the usual element of humiliation".[429] Thus, the Court regards the degree of severity of the punishment as the decisive factor.[430]

Finally, regarding "persecution" as a Crime Against Humanity, Article 28C uses the exact definition of Article 7(1)(h) of the Rome Statute without the requirement that the persecutory conduct takes place in "connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court" as stated in Article 7(1)(h)

422 Werle *et al* 2017:40.
423 Werle *et al* 2017:40.
424 Werle *et al* 2017:40.
425 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art.28C(1).
426 Werle *et al* 2017:40; Ambos 2014:58-59.
427 Garner 2004: 572; Werle *et al* 2017:40.
428 European Court of Human Rights, *Ireland v. the United Kingdom*, 18 January 1978, Case No. 5310/71, par. 167.
429 European Court of Human Rights, *Tyrer v. UK*: par. 30.
430 Werle *et al* 2017:40.

of the Rome Statute. In essence, the Malabo Protocol created the crime of persecution without stipulating how performance of the persecutory conduct must occur.[431]

In the researcher's view, the above attests to the fact that the Malabo Protocol was drafted in haste and with a lack of attention to details that had the potential to provide clarity and certainty.

3.4.2.1.3 War crimes

From the literature, there seem to be at least 9 potential points of contention with war crimes as defined in the Malabo Protocol of which only 4 will be discussed here.[432] Article 28D of the Malabo Protocol is a copy of Article 8 of the Rome Statute, bringing about the view that the drafters missed an ideal opportunity to remove the phrase "*in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes*", which is an unnecessary limitation of war crimes.[433] In a similar vein, the view exists that referring to the 1977 Additional Protocol I to the Geneva Conventions is a redundant inclusion because the Geneva Conventions are part of the "established framework of international law" to which both Article 8(2)(b) of the Rome Statute and Article 28D(b) of the Malabo Protocol refer.[434]

Article 28D(b)(v) sees the introduction of the crime of "international armed conflict". The main issue with this is that it is attempting to take a primarily international humanitarian law prohibition and turn it into a criminal provision without further justification. Ambos explains this by way of the following example:

> *[In] the case that a party to a conflict uses a dam for military purposes, an attack by the other party would then be justified by military necessity. By contrast, the Malabo Protocol's proposal implies that such attacks are absolutely prohibited and may, therefore, be criminalized.*[435]

In this regard, the author stresses that the drafters have provided a criminal offence, without providing for those instances in which the commission of the offence could be justified. The implication is that engaging in any "international armed conflict" is a

---

431 See for example; *Ireland v. the United Kingdom*; *Tyrer v. UK* and *Soering v. UK*, Case No. 14038/88.
432 See further, Werle *et al* 2017:42-49.
433 Ambos 2014:118-119.
434 Werle *et al* 2017:43.
435 Werle *et al* 2017:43.

criminal act that warrants prosecution, regardless of the circumstances that necessitated such action.

Interestingly, Article 28D removes the differentiation between international and non-international armed conflict crimes, suggesting the abolishment of the traditional two-box approach in favour of one common category of armed conflict -crimes.[436] This followed the same approach as the German Code of International Criminal Law.[437]

As much as one may criticise Article 28D of the Malabo Protocol, it ought to be acknowledged that where the Rome Statute only lists 12 acts that constitute violations in armed conflicts not of an international character, the Malabo Protocol lists 22 acts: including the use of nuclear weapons or other weapons of mass destruction. This bears testimony to the view expressed by Amnesty International that the Malabo Protocol covers areas or crimes which have particular relevance to the African continent.[438]

3.4.2.1.4 The crime of aggression

It may seem as though Article 28M of the Malabo Protocol states existing customary law, including of Article 8 *bis* of the Rome Statute. However, Article 28M does deviate from the latter in 3 key areas: (1) it establishes jurisdiction concerning State representatives as well as non-State actors;[439] (2) it refers to the Constitutive Act of the African Union as well as the Charter of the United Nations;[440] and (3) it lists human security of the population of a State Party among protected values.[441] This has led to the view that the "definition is largely in line with current international law on the subject but also reflects important regional features".[442]

As far as the establishment of jurisdiction concerning State representatives as well as non-State actors are concerned, Article 8 *bis*(1) of the Rome Statute limited its

436 For comparative purposes see Rome Statute: art.8.
437 Germany, International Criminal Code: sec 8-12. (English) https://casebook.icrc.org/case-study/germany-international-criminal-code (accessed 03/10/20).
438 Amnesty International 2016: Malabo Protocol Legal And Institutional Implications Of The Merged And Expanded African Court.
439 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art.28M(B).
440 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art.28M(A).
441 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 28M(A).
442 Jalloh *et al* 2019:314.

jurisdiction to 'person[s] in a position effectively to exercise control over or to direct the political or military action of a State'. In so doing, it limited jurisdiction to high-ranking civilian and military State officials.[443] The Malabo **P**rotocol restates this provision. The obvious issue is that Article 46A *bis* of the Malabo Protocol states that,

> *no charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.*[444]

In effect, charges may only be brought after official capacities cease.[445] In the researcher's view, this presents a dangerous situation as Article 46A *bis* acts as a shield against prosecution. It thus allows for the continuation of crimes of aggression, as well as the fact that any number of factors will influence belated prosecution, perhaps most notably, the political will to prosecute. At the very least, once official capacities cease, the official position does not absolve the person of criminal responsibility nor mitigate punishment.[446]

Article 28M(A) of the Malabo Protocol also establishes jurisdiction concerning non-State organisations (for example, Al Qaeda). However notable, this inclusion may be redundant as use of force by non-state actors are already covered by a number of articles of the Malabo Protocol including but not limited to, genocide; crimes against humanity; and war crimes.[447]

In relation to the Role of the *Constitutive Act* of the African Union as far as the use of force is concerned, Ambos states that Article 28M of the Malabo Protocol fails to introduce any limitation to the crime of aggression. Instead, it extends the "manifest violation" element to violations of the *Constitutive Act of the African Union* and in so doing implies that "manifest violation" of the UN Charter is not required.[448] Sayapin states that Article 28M of the Malabo Protocol "should not be read as juxtaposing the Constitutive Act *vis-à-vis* the Charter of the United Nations".[449] Instead, he states that the *Constitutive Act*'s rules should not be interpreted as contravening the Charter, but

---

443 Rome Statute: art. 8 *bis* (1).
444 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 46A *bis*
445 Jalloh *et al* 2019:317.
446 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 46B(2).
447 Jalloh *et al* 2019:317-319.
448 Werle *et al* 2017:49.
449 Jalloh *et al* 2019:319.

instead, should be read in conjunction with the UN Charter. This is because Article 52 of the Charter endorses the operation of regional arrangements.[450] As such, Article 4 of the *Constitutive Act* should be regarded as additional grounds for internationally lawful uses of force.[451] Consequently, the use of force in the Constitutive Act's Article 4 is not to be regarded as acts of aggression under Article 28M(A) of the Malabo Protocol, and should not entail individual criminal responsibility.[452]

It is the researcher's view that the latter argument presents a holistic and conducive argument as it considers the whole act, not just isolated provisions. In fact, the provision reads: "… *a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union …*"[453]

Lastly, Article 28M(A) of the Malabo Protocol provides for 'the territorial integrity and human security of the population of a State Party'. While territorial integrity is a well-established value protected by international law against aggression, human security of the population of a State Party is a new inclusion, which overlaps with the definition of crimes against humanity for the purpose of the Malabo Protocol.[454] Sayapin presents the view (with which the researcher agrees) that this inclusion may distort both concepts. As such, it is advisable to limit the notion of aggression to 'the territorial integrity' and 'human security of the population' as an aspect of crimes against humanity.[455]

3.4.2.2 Transnational Crimes: Piracy, Mercenarism, Money laundering, Trafficking in persons, Trafficking in drugs, Trafficking in hazardous wastes and Illicit exploitation of natural resources

Transnational criminal law has been defined as "the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects".[456] In this instance, "pertinent treaties describe a

450 *Constitutive Act of the African Union*: art.52.
451 Jalloh *et al* 2019:319.
452 Jalloh *et al* 2019:320.
453 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 28M(A). emphasis added
454 Jalloh *et al* 2019:320.
455 See Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 28C.
456 Boister 2012:13.

certain conduct and establish legal duties for the States Parties to treaties to criminalize this conduct under their domestic law".[457]

In applying Bassiouni's Framework, Jalloh states that Transnational crimes would consist of: Piracy, Mercenarism, Money laundering, Trafficking in persons, Trafficking in drugs, Trafficking in hazardous wastes and Illicit exploitation of natural resources. In what follows is a brief discussion of these crimes, in contrast to the provisions of, where applicable, other relevant treaties, so as to bring to light some of the positive and negative aspects relating to the inclusion of these crimes.

3.4.2.2.1 Piracy

Article 28F of the Malabo Protocol is a direct copy of Article 101 of the 1982 UN Convention of the Law of the Sea (UNCLOS)[458] (save for the inclusion of the term "boat") and reflects customary international law. In addition to being a transnational crime, piracy is a 'crime of universal jurisdiction' in terms of which customary international law allows for the prosecution of pirates by any state.[459] Because the crime of piracy affects the interest of individuals as well as the interests of states, its inclusion ought to be applauded. The crime of piracy is defined as:

> *an illegal act of violence, detention or depredation carried out by the crew or passengers of a private boat, ship or aircraft and directed against (persons or property on board of) another boat, ship or aircraft.*[460]

There appears to be no negative comments from legal scholars regarding the inclusion of piracy as a crime under the Malabo Protocol. It is well-known that this crime plagues eastern Africa, and so in this regard, its inclusion in the Malabo Protocol reflects the genuine needs of the African continent.

Necessary as the inclusion may be, several challenges may arise in interpreting and applying the crime of piracy as per the protocol. First is the definition. The crime consists of undefined terms, which would usually be defined by the relevant national legal system. In this instance, however, the Court will only be able to fall back on the

457 Werle *et al* 2017:75.
458 United nations, Convention of the Law of the Sea 1982.
459 O'Brien 2014:81, as a result of this, many authors argue in favour of an "international piracy court".
460 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 28F.

undefined concepts in Article 28N as well as potential general principles of law derived from national legal systems as stated in Article 31(1)(d).[461]

Second is the role of universal jurisdiction and powers of arrest over pirate vessels on the high seas. It is unlikely that this will be of direct concern to the court as it limits jurisdiction. However, Guilfoyle and McLaughlin give the following example:

> *There is the possibility a defendant might claim they were arrested on the high seas in some manner in violation of international law (such as Articles 105 and 110, UNCLOS on powers of arrest and prosecution over pirates) and therefore they should not be prosecuted. Briefly, though, one should note there is a possible textual argument arising under Article 105 UNCLOS that only the flag State of the government vessel which captures a pirate should be able to prosecute that pirate.*[462]

Finally, an issue that is still present in interpreting UNCLOS has been whether the words 'for private ends' excludes politically motivated violence as piracy.[463] Once again, it is the researcher's view that the above attests to the fact that the Malabo Protocol was drafted in haste and with a lack of attention to details, which had the potential to provide clarity and certainty.

3.4.2.2.2 Mercenarism

Article 28H of the Malabo Protocol seems to be based, in part, on the 1989 UN International Convention against the Recruitment, Use, Financing, and Training of Mercenaries[464] and, in part, on the 1977 OAU Convention for the Elimination of Mercenarism in Africa.[465] Article 28H defines a 'mercenary' as a person who is specially recruited to participate in a "concerted act of violence",[466] the elements of which are: mercenaries must be specially recruited, neither nationals nor residents of the state affected, and not members of the regular armed forces or sent on official duty.[467] In addition, they have to be "motivated by private gain". It distinguishes between two types of mercenaries; "conflict mercenaries" who are persons specially

---

461 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights.
462 Jalloh *et al* 2019:404.
463 Guilfoyle 2012:81-83; Jalloh *et al* 2019:404.
464 United Nations International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, 1989.
465 OAU Convention for the Elimination of Mercenarism in Africa, 1977.
466 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 28H (1)(b)(i)).
467 Werle *et al* 2017:83.

recruited to fight in an armed conflict as mercenaries[468] and "violence mercenary" who are specially recruited to participate in a "concerted act of violence" which is aimed at either overthrowing a legitimate government or otherwise undermining the constitutional order of a state, assisting a group of persons in obtaining power, or undermining the territorial integrity of a state, or at assisting a government in maintaining power.[469]

Article 28H also provides two distinct crimes of mercenarism; "passive mercenarism" it is an offence to "recruit, use, finance or train" mercenaries[470] and "active mercenarism" which criminalizes the mercenary him or herself if he or she participates directly in hostilities or in a concerted act of violence.[471]

The inclusion of the crime of mercenarism at international level is a progressive step.[472] The definition in Article 28H can be considered as a good effort to consolidate the regional norms of the 1977 OUA Convention, while still remaining consistent with the definition of the 1989 International Convention on mercenaries. The court will be able to establish the links between "offences defined in its Statute, such as the crimes of terrorism, piracy, trafficking in persons, illicit exploitation of natural resources or aggression with the crime of mercenarism, as an aggravating circumstance, if the first crime has been committed by individuals that fulfil all the conditions contained in Article 28 H".[473]

Unfortunately, Article 28 H lacks clarity in so far as it provides that the court may consider activities committed by mercenaries. However, it does not clearly state the accountability of activities carried out by a major actor, for example; private military and security companies.[474]

---

468 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 28H (1)(a).
469 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 28H (1)(b).
470 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 28H (2).
471 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 28H (3).
472 Jalloh *et al* 2019:469.
473 Jalloh *et al* 2019:470.
474 See also Wulf 2011:137-149.

3.4.2.2.3 Money laundering

Money laundering is dealt with at international level by several conventions, namely, the 1988 Vienna Convention,[475] the 2001 Palermo Convention[476] and the 2005 Merida Convention.[477] Unfortunately, criminalization of money laundering in the Malabo Protocol seems "to have taken place without due regard to both the substantive law and practical challenges that the African Court of Justice and Human and Peoples' Rights will have to overcome to fulfil its mandate".[478] Money laundering as *pe*r the Malabo Protocol presents a plethora of different problems. Broadly speaking, these relate to jurisdictional questions, evidentiary challenges, and asset recovery and reparations.

As far as jurisdictional questions are concerned. First, arguably one of the most critical issues relate to the principle of *nullum crimen sine lege.* There could well be a situation in which the Court lacks jurisdiction because the offence has not been criminalized under international, customary or conventional law.[479] This could be overcome based on the principle of legality, that is to say, that Article 28I*bis* not only sets out the Court's subject matter jurisdiction but also provides the applicable law (the provision is both jurisdictional and substantive.)[480] The only potential issue here is the absence of the *mens rea* requirement in Article 28I*bis.*[481] Secondly, the scope of the offence drastically limits its practical application in that only proceeds generated from corruption, or related offences fall within the court's jurisdiction. The reason for this limitation is unknown. Lastly, because of the drafting of the provisions, the jurisdictional preconditions for money laundering are limited to acts on the territory of a state party and acts by a national of a state party. There is also an unanswered question as to whether "acts of money laundering that are begun in a state party and completed in a non-state party such as Switzerland, fall under the scope of its territorial jurisdiction"?[482]

475 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.
476 UN Convention Against Transnational Organized Crime, 2001.
477 UN Convention Against Corruption, 2005.
478 Werle *et al* 2017:103.
479 Jalloh *et al* 2019:512-513.
480 See also O'Keefe 2015: par. 14.59.
481 Jalloh *et al* 2019:515.
482 Jalloh *et al* 2019:520.

In relation to evidentiary challenges, financial investigations would be necessary in cases of corruption and money laundering. The court would focus on documentary evidence to a much greater extent than is usually the case. Complex financial investigations require a multidisciplinary investigation team and it would undoubtedly be expensive.[483] In addition to this, the court obviously needs evidence. However, it does not have the capacity to directly compel banks or other private institutions to produce documentary evidence as such; it would be dependent on cooperation from states and international organizations.[484]

Lastly, asset recovery and reparations, Article 43 of the Malabo Protocol states, "the Court may order the forfeiture of any property, proceeds or any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member State".[485] Nevertheless, once again, the court would be dependent on cooperation from states and international organizations. Add to this that other tribunals have shown that an accused may not cooperate, may claim indigence while in reality having hidden vast wealth abroad, in overseas bank accounts under other names.[486]

Though each of these issues may be overcome, the view expressed by Rose cannot the ignored:

> *But the potential evidentiary obstacles go beyond the availability of financial and human resources, as the African Court also does not have the legal authority to impose cooperation obligations on non-states parties.*[487]

The researcher is concerned that the nature of this crime is such that the cost alone would add even more strain to a system, which is unlikely to have sufficient funding.

3.4.2.2.4 Trafficking in persons

Article 28J of the Malabo Protocol defines trafficking in persons the same as the United Nations Protocol for Trafficking in Persons.[488] It adopts the same three elements (action, means and purpose) and maintains the principle that consent is irrelevant.[489]

---

483 See Combs 2012:12.
484 See Du Plessis 2012:9-10.
485 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 43.
486 Jalloh *et al* 2019:526.
487 Jalloh *et al* 2019:527.
488 United Nations Protocol for Trafficking in Persons.
489 Werle *et al* 2017:118.

Human trafficking is a criminal offence as well as a violation of human rights; this results in State responsibility and individual criminal responsibility. Article 28J will allow the court to address both of these aspects.[490] State responsibility in human trafficking is a newer development. As such Article 28J may create an important contribution to its development.

Criminal jurisdiction over individual criminals and legal persons who commit human trafficking, notable as the inclusion may be, leaves a bit to be desired. The definition is somewhat restrictive in that legal persons can be held liable only if they take part in recruiting, transporting, transferring, harbouring or receiving trafficking victims. This will undoubtedly cover some cases; however, given the practical reality of human trafficking, the definition should have included stand-alone offences of slavery and forced labour, which could have been used against employers.[491]

Once again, a huge issue that cannot be ignored, relates to the available resources of the court. It is doubtful that the court will possess sufficient financial, human and other resources to conduct effective investigations and prosecutions, not to mention the support of witnesses such as witness protection, legal assistance, translation and/or interpretation.[492]

The inclusion of human trafficking is a commendable one, as this is a growing concern on the continent. Its inclusion sends a strong message to the perpetrators. Unfortunately, the financial implications have once again been overlooked.

3.4.2.2.5 Trafficking in drugs

Article 28K defines trafficking in drugs the same as the 1988 Vienna Convention.[493] However, it relies on international instruments for a definition of “drugs”, and as such, reference must “be made to the 1961 Single Convention on Drugs, the 1972 Protocol amending the Single Convention, the 1971 Vienna Convention on Psychotropic Substances, and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”.[494] Drug trafficking and drug cultivation within the

490 Jalloh *et al* 2019:552.
491 Jalloh *et al* 2019:548.
492 Jalloh *et al* 2019:548.
493 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.
494 Werle *et al* 2017:119.

jurisdiction of the African court's criminal chamber is an entirely new development; these offences are not within the jurisdiction of any other international tribunal.

This development is designed to respond to the dramatic increase in drug trafficking in parts of the continent, which presents a serious challenge for the AU and its member states. As such, the AU is rolling out an Action Plan on Drug Control. In the attempt to tackle problematic issues, the Court faces two significant difficulties: first, to ensure that only serious drug trafficking and serious drug cultivation offences are taken up into the jurisdiction of the court, and secondly, to effectively consider and make use of existing specialist law enforcement procedures and institutions directed towards drug law enforcement.

3.4.2.2.6 Trafficking in hazardous wastes

The list of hazardous wastes in Article 28L of the Malabo Protocol is identical to the list contained in the Bamako Convention.[495] However, it could be problematic that Article 28L(2)(b) bases an international criminal offence on a definition of hazardous waste that lies at the discretion of each national legislator. This could result in criminalization under international law in Africa differing from country to country.[496] This would obviously lead to uncertainty and difficulty in interpretation and application.

3.4.2.2.7 Illicit exploitation of natural resources

The criminal offence illicit exploitation of natural resources exists in neither the international nor the European levels.[497] However, the Protocol against the Illegal Exploitation of Natural Resources establishes the following obligation for every Member State: "each Member State shall ensure that such acts of illegal exploitation of natural resources are offences under its criminal law".[498] The offences listed in Article 28Lbis of the Malabo Protocol are copied verbatim from this Protocol.[499] Article 28Lbis, however, includes two other aspects: (1) illicit exploitation of natural resources is no longer only an offence under national law, but also under international law, and (2) there is a restriction of criminalization, as it only classifies particular behaviour as

495 UN Commission on Human Rights E/CN.4/RES/1991/47
496 Werle *et al* 2017:132.
497 Werle *et al* 2017:132.
498 Protocol against the Illegal Exploitation of Natural Resources, 2006: art. 12.
499 Werle *et al* 2017:133.

a crime under international law (if the conduct is "of a serious nature affecting the stability of a state, region or the Union").[500]

3.4.2.2.8 Absence of a Gravity Threshold

The biggest problem that arises in relation to transnational crimes within the Court's jurisdiction is the absence of a gravity threshold.[501] This means that a large number of cases likely of a trivial nature, may appear before the court.[502]

Naturally, a case will be inadmissible if it is of insufficient gravity to justify intervention by the court.[503] However, the protocol does not state at which stage in the procedure this threshold should be determined, nor does it provide criteria to set this threshold.[504]

3.4.2.2.9 Concluding concerns regarding the Transnational Crimes

First, there is a lack of legal certainty surrounding the definitions of piracy, and mercenarism, mainly due to the fact that the language used is often vague and ambitious.[505]

Secondly, the Malabo Protocol is silent on fundamental issues of criminal responsibility, such as the requirements of *mens rea*.[506]

Thirdly, specific to trafficking in persons and drugs, the definitions of these crimes follow the wording of international conventions. However, these conventions do not contain penal provisions since they do not provide for sanctions and they put the obligation on States Parties to criminalize.[507] As such, the Malabo Protocol ought not to have just copied the definitions under the conventions but should have reformulated them and given their constitutive elements (*actus reus*, *mens rea* and sanction).[508] Though sanctions are given in Article 43A, there is no general provision for *mens*

500 Werle *et al* 2017:134.
501 Jalloh *et al* 2019:345.
502 Jalloh *et al* 2019:345.
503 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art.46H(2)(d).
504 Jalloh *et al* 2019:345.
505 Werle *et al* 2017:84.
506 Werle *et al* 2017:84.
507 Werle *et al* 2017:119.
508 Werle *et al* 2017:119.

rea.[509] These crimes are therefore in direct want of the settled principles inherent in the maxims of *nullum crimen sine lege* and *nulla poena sine lege*.

In the fourth instance, specific to trafficking in persons, it would have been of benefit to include a provision stating that the court would have jurisdiction over the crimes if they are of such serious nature as to have an impact at the regional level.[510] In so doing, it could have reduced its caseload by allowing domestic courts to try less serious crimes.[511]

Fifthly, the definitions do not ensure that the Court's jurisdiction is focused and limited to acts of a, particularly serious or transnational character.[512]

In the sixth instance, in light of Article 28 N of the Malabo Protocol, a person commits the offence of trafficking in hazardous waste (Article 28L), even when he or she only attempts to traffic it.[513] This is logical on a national criminal justice level, but treating an attempted environmental crime and an accomplished offence equally may be unnecessary on an international level.[514]

Finally, in addition, the drafters have failed to "take into consideration the limitations laid out by international law. In many cases, it is sufficient to oblige the Member States to penalize certain criminal conduct in their national legal systems".[515] Stated differently, "sometimes less is more".[516]

3.4.2.3 Partly international crimes

In applying Bassiouni's Framework, Jalloh states that partly international crimes would consist of unconstitutional change of government and terrorism. In what follows is a brief discussion of these crimes, in contrast to the provisions of, where applicable, other relevant treaties.

509 Werle *et al* 2017: 120.
510 Werle *et al* 2017:120.
511 Werle *et al* 2017:120.
512 Werle *et al* 2017:85.
513 Werle *et al* 2017:134.
514 Werle *et al* 2017:134.
515 Werle *et al* 2017:135.
516 Werle *et al* 2017:135.

3.4.2.3.1 The crime of unconstitutional change of government

The crime of unconstitutional change of government (UCG) is one of the crimes under the merged court's jurisdiction that is not yet fixed in international criminal law and which is the most contentious of the crimes which the Malabo Protocol has introduced to its jurisdiction.[517] With 91 successful *coups* in Africa between 1952 and 2014,[518] it is clear that UCG is a concern on the African continent.[519]

By way of the Lomé Declaration of July 2000, the OAU attempted to develop a framework in response to the resurgence of UCG on the African continent. The definition of UCG as it appears in Article 28E, is essentially the same as what appeared in the Lomé Declaration save for the addition of: "Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution"[520] and "Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors."[521]

It appears from both the Lomé Declaration as well as Article 28E that the aim behind the inclusion of the crime of UCG is to prevent *coups*. However, its inclusion has already raised some concern, as it may inhibit constitutional and regime changes.[522]

3.4.2.3.2 Terrorism

Article 28G of the Malabo Protocol is a direct copy of Article 1 of the 1999 OAU Convention on the Prevention and Combating of Terrorism[523] (save for Article 28G (d)). Terrorism is not an easy term to define.[524] Generally, as opposed to criminalising terrorism itself, treaties tend to criminalise the acts used by terrorists.[525] The UN Draft Convention against International Terrorism is still ongoing, although at least there seems to be consensus in regards to the elements of the crime.[526]

---

517 Du Plessis 2012.
518 Dersso 2016:2.
519 See further, Werle *et al* 2017:57-70.
520 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art.28E(1)(e).
521 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art.28E(1)(f).
522 Martin & Jurgen 2012:259.
523 OAU Convention on the Prevention and Combating of Terrorism, 1999.
524 See Boister & Currie 2015:400.
525 Boister & Currie 2015:400.
526 Boister & Currie 2015:400.

Article 28G qualifies the crime of terrorism in two parts. First, the act must be illegal (it is illegal if it violates "the laws of the African Union or a regional community recognized by the African Union, or by international law)".[527] Secondly, the act must either endanger or violate important individual interests of a person or a group of persons or "cause or may cause damage to public or private property, natural resources or environmental or cultural heritage".[528]

In addition to this, Werle *et al* state that:

> *According to Article 28G(a)(1)–(3), the perpetrator must either intend to intimidate or coerce a government or the general public to do or abstain from doing something or must intend to disrupt public services. Subsection (a)(1)(3) adds a third variation of the specific intent, namely the intent to "create general insurrection in a State". With the exception of the OAU Convention, this third variation lacks any corresponding provision in international (treaty) law and, arguably, combines distinct legal concepts by reclassifying insurrection as terrorism.*[529]

Article 28G(D) states that international humanitarian law issues shall not be considered terrorist acts for the purpose of the Statute. This raises the question of whether the crime of terrorism is applicable during armed conflict.[530] To this, Werle *et al* state that Article 28G(D) must be read along with Article 28D, as terrorism is included under war crimes, and as such, "all acts committed in armed conflict, including acts of terrorism, are to be subsumed under the umbrella of the war crimes jurisdiction of the Court".[531]

Unfortunately, the definition does not ensure that the Court's jurisdiction is focused and limited to acts of a, particularly serious or transnational character.[532] For example, "the crime of terrorism includes minor incidents, such as minor damage to property if caused with the purpose to induce the general public to, say, go on strike".[533]

---

527 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 46H(A).
528 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 46H(A).
529 Werle *et al* 2017:80.
530 Werle *et al* 2017:80.
531 Werle *et al* 2017:80.
532 Werle *et al* 2017:85.
533 Werle *et al* 2017:85.

3.4.2.4 Partly transnational crimes

In applying Bassiouni's Framework, Jalloh states that Partly transnational crimes would consist of Corruption. In what follows is a brief discussion of this crime, in contrast to the provisions of, where applicable, other relevant treaties.

3.4.2.4.1 Corruption

Article 28I of the Malabo Protocol is, for the most part, based on what the African Convention on Preventing and Combating Corruption lists as "acts and practices" deemed to constitute corruption.[534] Article 28I goes further as it criminalizes corruption only if it is "of a serious nature affecting the stability of a state, region, or the Union".[535] As such, it seems to be referring to "grand corruption",[536] which may involve presidents and high state officials. This appears contradictory as these persons have immunity from prosecution under the Malabo Protocol.[537]

Traditionally, corruption was dealt with as part of criminal law, but has recently been seen as a global human rights issue.[538] This is because a corrupt act may violate human rights; and anti-corruption measures may result in human rights violations.[539] However, the Malabo Protocol fails to link "grand corruption" to widespread and systemic human right violations and in so doing it disregards the African Charter on Human and Peoples' Rights.[540]

3.4.3 Pre-conditions to the exercise of jurisdiction and Exercise of jurisdiction

Article 46Ebis of the Malabo Protocol provides the Preconditions to the exercise of jurisdiction which is a direct copy of Article 12 of the Rome Statute save for the additions of "When the victim of the crime is a national of that State"[541] and "Extraterritorial acts by non-nationals which threaten a vital interest of that State."[542]

---

534 African Union Convention on Preventing and Combating Corruption.
535 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 28I.
536 See further, Werle *et al* 2017:92.
537 Immunity is discussed later in Chapter 3.
538 Werle *et al* 2017:96.
539 Werle *et al* 2017:97.
540 Werle *et al* 2017:97.
541 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 46Ebis (2)(c).
542 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 46Ebis (2)(d).

Article 46F of the Malabo Protocol provides for the conditions to exercise jurisdiction and is a direct copy of Article 13 of the Rome Statute. From this, it seems that the drafters of the protocol have kept these aspects in line with established international law.

3.4.4 Complementary jurisdiction and issues of admissibility

Interestingly, Article 46H of the Malabo Protocol only refers to complementarity to that of the National Courts, and to the Courts of the Regional Economic Communities where expressly provided for by the Communities.[543] Article 27 refers to the complementarity of the African Commission and the African Committee of Experts[544] and Article 38 complementarity of other treaty bodies of the Union.[545] Yet again, the drafters have missed the opportunity to limit the caseload of the court which could have been achieved by introducing the "gravity threshold" used by the ICC.

Article 46H of the Malabo Protocol also deals with issues of admissibility. This time, the drafters, following the Rome Statute's example, used the provision to limit the caseload of the court introducing the "gravity threshold". In that, a case will be inadmissible if it is of insufficient gravity to justify intervention by the court.[546]

3.4.5 (Lack of) universal jurisdiction

Article 46E bis (2) of the Malabo Protocol does not rely on the principle of universal jurisdiction.[547] There are two possible reasons for this, (1) universal jurisdiction usually applies only to core international crimes (genocide, crimes against humanity and war crimes, and piracy). (2) the AU has been "highly critical regarding what is said to be an "abusive" exercise of universal jurisdiction by certain European states in respect of "African leaders" and state officials.[548]

The author draws attention once again, to the sentiment expressed by Swanepoel:

> *Atrocities during which gross violations of human rights and humanitarian law occur, and which gives rise to possible criminal prosecution, is often ordered, planned and*

543 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 46H.
544 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 27.
545 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 38.
546 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 46H(2)(d).
547 Werle *et al* 2017:170.
548 Werle *et al* 2017:170.

> *condoned by the people in control of the particular state's national power, who are factually and legally, immune from criminal prosecution and punishment under their national legal systems.*[549]

In light of the above, it seems as though Article 46E bis (2) is also acting as a shield against prosecution and thus allows for the continuation of crimes.

3.4.6 The issue of immunity

Arguably the defining feature of the Malabo Protocol is Article 46Abis which states:

> *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.*[550] *This provision is the origin of the view that the Malabo Protocol is a "protest treaty" against the ICC.*[551]

There are several points of concern regarding the drafting of this provision. It is rife with ambiguity. Article 46A *bis* seems to create different regimes of immunity; immunity *ratione personae* and immunity *ratione materiae.*[552] Looking at the ordinary meaning, it appears there is immunity *ratione personae* (Heads of State or Government and anybody acting or entitled to act in such capacity.)[553] As well as creating immunity *ratione materiae* (for senior officials based on their functions).[554] In light of this definition of immunity, immunity *ratione personae* would not be extended to Ministers for Foreign Affairs.[555]

The alternative interpretation would be that the provision only creates immunity *ratione personae,*[556] in terms of which senior officials, as defined by their functions, will enjoy the immunity of Heads of State or Governments.[557] The opinion has been expressed that the latter interpretation is likely what was meant by the AU.[558]

---

549 Swanepoel 2007:124-125.
550 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art. 46Abis.
551 Werle *et al* 2017:205.
552 Jalloh *et al* 2019:854.
553 Jalloh *et al* 2019:854.
554 Jalloh *et al* 2019:854.
555 This would, however, be contrary to the conclusions of the ILC and the ICJ Arrest Warrant case.
556 Jalloh *et al* 2019:854.
557 Jalloh *et al* 2019:854.
558 Jalloh *et al* 2019:854.

Naturally, arguments have been made both for and against the inclusion of this article. These views can be summarised as follows.[559]

Looking at arguments against this provision, the normative arguments focus on the fight against impunity. Containing statements such as the provision is detrimental to the advancement of democracy, detrimental to the rule of law, provides protection to perpetrators and denies justice to victims.[560] What this view fails to acknowledge is the fact that the expansion of the jurisdiction of the ACJHPR does not affect the jurisdiction of other courts.[561]

While the doctrinal arguments focus on consistency with international law, usually results in the citing of Article 27 of the Rome Statute,[562] supporters think that it is salvaging international law and reclaiming the foundational international principle of sovereignty by preserving immunity.[563] What this view fails to acknowledge is the fact that international law rules on immunity apply to the exercise of jurisdiction by domestic courts over officials of a foreign state and that customary international law neither requires immunity before international courts nor prevents it.[564]

In response, the AU itself has defended the need for immunities, namely that customary international law permits the granting of immunities for "Heads of State and other senior state officials during their tenure of office".[565]

The Rome Statute[566] does not recognise the immunity of state officials for the commission of international crimes, nor does it regard the official position as a mitigating factor in the punishment of crimes under its jurisdiction.[567] In comparison, 46A bis of the Malabo **P**rotocol acts as a shield against prosecution and thus allows for the continuation of crimes. Perhaps the most important is the political will to

559 See further, Werle *et al* 2017:208-211.
560 See Njeri 2014: The African Union's decision to support a court that provides immunity to heads of state undermines human rights. https://issafrica.org/iss-today/can-the-new-african-court-truly-deliver-justice-for-serious-crimes (accessed 27/07/2020).
561 Werle *et al* 2017:216.
562 See Murungu 2011:1067.
563 Werle *et al* 2017:216.
564 Werle *et al* 2017:216.
565 Jalloh *et al* 2019:858.
566 Rome Statute, 1988.
567 *Implementation of the Rome Statute of the International Criminal Court Act*: Chapter 2: sec. 2(2).

prosecute. At the very least, once official capacities cease, the official position should not absolve the person of criminal responsibility nor mitigate punishment.[568]

3.5 CONCLUSION/SUMMARY

Much like the ICC, the idea of establishing an African Criminal Court has long existed but came to realisation in 2009 with the request to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes.[569] This resulted in what is now known as the Malabo Protocol.

However, support for AU protocols seems bleak. At best, it takes quite a number of years for AU protocols to acquire the required number of ratifications. This in and of itself presents some problems, including the uncertainty regarding ratification of the protocols. Moreover, even when AU protocols enter into force, it takes an exceptionally long time for the protocols to become fully operational; The ACHPR entered into force in 2004 and "has only recently become fully operational",[570] and ACJ obtained the required number of ratifications in January of 2008. However, the AU never acknowledged its entry into force.

This chapter has brought to light some of the most crucial potential issues that the ACJHPR could face if it comes into existence based on the Malabo Protocol as it now stands. From a budgeting standpoint, when one considers the fact that even after 18 years of existence, one of the challenges the ICC faces is developing fully reliable and accurate budget proposals,[571] a challenge largely attributed to the uncertainty attached to the judicial mandate of the institution.[572] Even though it has the contributions of 122 State Parties and the United Nations,[573] and only has three crimes within its jurisdiction, funding for the ACJHPR presents a huge question. The AU only has the contributions of 55 State Parties and select other donors (some of whom "*have already indicated that they would not finance the ACJHR on account of the immunity*

568 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: Article 46B(2).
569 Werle *et al* 2017:3.
570 Naldia & Magliveras 2012:388.
571 Zavala 2018:3.
572 Zavala 2018:3.
573 Rome Statute, 1988: art. 115.

clause",[574] who will need to fund all 3 sections of the court. Further compounding this issue is the uncertainty regarding the capacity of the court to deliver effectively and efficiently on its mandate,[575] the fact that the Malabo Protocol envisages the reduction of judges responsible for human rights issues from 11 judges to 5.[576] This will clearly significantly impact the capacity of the Court[577] as well as the double obligation that will be placed on 62 per cent of the AU members.

In regard to jurisdiction, much can be said. This chapter has shown that the drafters of the Malabo Protocol missed a number of opportunities. With genocide, the Malabo Protocol could have been put on an equal footing with some national legislatures simply by including political groups in the list of groups. Furthermore, the failure to remove the unnecessary limitation of war crimes is just one example of these opportunities.

Likewise, a number of points of contention and lack of clarity also exist. For example: prosecution of crimes against humanity: the crime is created without stipulating how the proscribed conduct must be performed and the crime of international armed conflict attempts to turn a primarily international humanitarian law prohibition into a criminal provision without further justification.

Though the Malabo Protocol may indeed be heavily criticised, credit must be given where it is due. The Malabo Protocol is clearly attempting to address issues that plague the African continent.

In conclusion, the view expressed by Du Plessis is pertinent:

> *All things considered, the draft protocol appears to have been rushed into existence, and the result is a legal instrument that raises more questions than it provides answers to Africa's vast human right's needs. A positive outcome would be for the AU to set up a court that complements the work of the ICC, and is comprehensively funded, legally*

---

574 Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots. Available at: https://www.amnesty.org/ download/Documents /AFR016137 2017 ENGLISH.PDF (accessed 15/03/2020).

575 Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots. Available at: https://www.amnesty.org/ download/Documents /AFR016137 2017 ENGLISH.PDF (accessed 15/03/2020):5.

576 Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots. Available at: https://www.amnesty.org/ download/Documents /AFR016137 2017 ENGLISH.PDF (accessed on 15/03/2020):7.

577 Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots. Available at: https://www.amnesty.org/ download/Documents /AFR016137 2017 ENGLISH.PDF (accessed on 15/03/2020):7.

sound and politically capacitated to fearlessly pursue justice for the worst crimes affecting the continent.[578]

578 Du Plessis 2012:10.

CHAPTER 4: WITHDRAWAL FROM THE ICC

4.1 INTRODUCTION

As was mentioned in the introductory chapter, the main question proposed by the dissertation is to determine whether the ACJHPR could become a viable substitution for the ICC and its system. Given the drastic effect of withdrawing from the ICC and given the unsustainability of the African Court, it is necessary to consider how South Africa could lawfully withdraw from the ICC should it wish to do so. As such, while Chapters 2 and 3 considered the provisions of the Rome Statute and the Malabo Protocol respectively, this chapter will consider South Africa's national legislation and case law.

This chapter aims to consider whether national legislation (in particular the Constitution) would permit withdrawal from the ICC in favour of joining the ACJHPR, as it is currently proposed in the Malabo Protocol, with specific reference to the protection of human rights.

In this regard, the chapter is limited to South Africa's current position as it relates to the SADC tribunal moratorium and its attempted withdrawal from the ICC in light of the Al Bashir matter. The discussion on the attempted withdrawal only briefly considers procedural issues but focuses more on the substantive issues relating to the withdrawal.

4.2 SOUTH AFRICA'S CURRENT SITUATION

The research established that the Al Bashir controversy was one of the primary considerations behind the government's decision to withdraw from the ICC. Further to this, Swanepoel submits that South Africa's attempted withdrawal and its support for the moratorium on the Southern African Development Community Tribunal (SADC Tribunal) is indicative of a regression of the country's "political will to protect individuals against international human and humanitarian rights atrocities".[579]

[579] Swanepoel 2017:322.

4.2.1 Context of the intended withdrawal

As was briefly discussed in Chapter 2, in 2015, South Africa hosted the 25th summit of the AU. The South African government was required to provide guarantees to the AU that President Al Bashir would not be arrested while attending this summit as a representative of Sudan (a member state of the AU).[580] Once aware that Al Bashir had been allowed to attend the African Union summit, a pre-trial chamber of the ICC confirmed that South Africa was under a legal obligation to arrest and surrender Al Bashir despite competing obligations towards the ICC and the AU.[581] In addition to this, the Southern Africa Litigation Centre had sought an order to prevent Al Bashir from leaving the country until such time as the Court could make a ruling on his arrest and surrender him to the ICC.[582] During this case, It was alleged that the cabinet had taken the decision to grant immunity and that this decision trumps the duty to arrest Al Bashir.[583] In making its order, the Court found that the conduct of the government, in its failure to take steps to secure the arrest of President Al Bashir, was inconsistent with the Constitution[584] (South African law must be interpreted In a manner that ensures that it complies with international law),[585] its actions were also contrary to the *Implementation* Act as well as its obligations towards the ICC. Thus, the respondents are

> *compelled to take all reasonable steps to prepare to arrest President al Bashir without a warrant … and detain him, pending a formal request for his surrender from the International Criminal Court.*[586]

In violation not only of the findings of the North Gauteng High Court (and that of the pre-trial chamber of the ICC) but also South Africa's rule of law,[587] the South African authorities assisted in and secured the safe and hasty departure of Al Bashir from the country.[588] The failure to arrest president Al Bashir resulted in criticism both from

---

580 Van der Vyver 2015:562.
581 Prosecutor v Omar Hassan Ahmed Al Bashir Case ICC-02/05-01/09-242 (13 June 2015).
582 The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others [2016] (1) SACR 161 (GP).
583 The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others [2016] (1) SACR 161 (GP): para 5.
584 The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development: par.
585 The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development: par. 97.
586 The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development: par. 97.
587 Van der Vyver 2015:564.
588 Van der Vyver 2015:563.

members of the international community[589] and from the South African High Court, which stated:

> *A democratic state based on the rule of law cannot exist or function if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law.*[590]

In late 2016, South Africa, Burundi and Gambia submitted written notifications of withdrawal from the Rome Statute to the Secretary-General of the United Nations.[591] South Africa and Gambia would later withdraw their notification.[592] Article 127(1)[593] makes provision for a state party to withdraw from the Rome Statute by submitting written notification to the Secretary-General of the United Nations. This article does not require states to provide reasons for withdrawal. Burundi and Gambia had not given reasons, but South Africa had, citing alleged loss of credibility by the ICC, the UN Security council's failure to defer investigation or prosecution that pose a threat to peace and security in terms of Article 16, as well as conflicting international law obligations.[594]

However, in the case of South Africa's withdrawal, the correct procedures had not been followed. In October 2016, Minister of International Relations and Cooperation unilaterally submitted a notification of South Africa's withdrawal from the Rome Statute. This was done without prior parliamentary approval or public consultation.[595] A Parliamentary Bill followed this to repeal the Implementation of the Rome Statute in South Africa.[596]

The Democratic Alliance challenged the decision before the Gauteng High Court.[597] The Court held that the notice of withdrawal without prior parliamentary approval is inconsistent with section 231(2)[598] and is in conflict with the **doctrine of separation of powers.**[599]

---

589 Van der Vyver 2015:565.
590 The Southern Africa Litigation Centre v Minister of Justice and Constitutional Development: par. 37.2.
591 Ssenyonjo 2018:64.
592 Ssenyonjo 2018:64.
593 Rome Statute.
594 Ssenyonjo 2018:68-103.
595 See UN, South Africa: Withdrawal, C.N.786.2016.TREATIES-XVIII.10.
596 Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill, 2016,
597 *Democratic Alliance* v *Minister of International Relations and Cooperation and Others*: par. 57.
598 Constitution of the Republic of South Africa of 1996.
599 *Democratic Alliance* v *Minister of International Relations and Cooperation and Others.*

In 2017, the ANC again expressed its intention to withdraw from the ICC, arguing that the ICC was biased against the African States.[600] During the African Union Summit in 2018, leaders adopted a non-binding resolution, calling for African countries to leave the ICC.[601]

To date, South Africa is yet to withdraw from the ICC. As previously mentioned, in terms of the Rome Statute, in order to withdraw from the Statute, written notification is given to the Secretary-General of the UN. The withdrawal becomes effective one year after this submission unless the country provides a later date in its notification.[602] Naturally, however, the State must still abide by its own laws.

Below I briefly discuss the moratorium on the Southern African Development Community Tribunal. This is included for the following reasons: (a) from the events with this tribunal and South Africa's support for the 2014 SADC protocol, which effectively disbanded the tribunal, arose applicable jurisprudence. This jurisprudence can be gainfully applied in the context of South Africa's withdrawal from the ICC. (b) It generally demonstrates the current political climate in Southern Africa in terms of which governments are unprepared to subject themselves to the scrutiny and authority of the courts.

4.2.2 SADC tribunal moratorium

The SADC Tribunal was established in 1992. It sought to

> *achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration.*[603]

600 Wits School of Governance 2018 https://www.wits.ac.za/news/sources/wsg-news/2018/the-international-criminal-court-and-accountability-in-africa.html. (accessed 10/12/2018).

601 Wits School of Governance 2018 https://www.wits.ac.za/news/sources/wsg-news/2018/the-international-criminal-court-and-accountability-in-africa.html (accessed 10/12/2018).

602 Rome Statute: art 27.

603 Consolidated Text of the SADC Treaty: art.5(1)(a) https://www.sadc.int/documents-publications/show/4171 (accessed 30/10/2020).

The 2000 Protocol on the Tribunal allowed individuals to bring actions against governments.[604] Moreover, this treaty directly protected human rights by requiring states to act in accordance with human rights, democracy and the rule of law.[605]

The Tribunal applied this mechanism in the *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* case (2007),[606] with the Tribunal finding that the Zimbabwean government had discriminated against the applicants. The Zimbabwean government maintained that the judgment did not bind it.[607] In 2010, some of the applicants approached the South African High Court to register and enforce the order given by the Tribunal.[608] The Court granted the order. Zimbabwe appealed this decision before South Africa's Supreme Court of Appeal[609] and Constitutional Court.[610] Both appeals failed.

While this situation was unfolding, in 2011, the SADC heads of state placed a moratorium upon the Tribunal's mandate to hear new cases. They conveyed their intention not to reappoint or replace the Tribunal's 10 judges.[611] The Tribunal would later consider this decision to be "illegal and in bad faith".[612] The next decision (approved in 2014) would be a protocol to negotiate a new tribunal which can only adjudicate disputes between member states.[613] Stated differently, under this Tribunal; individuals are no longer able to approach the Tribunal.

In 2015, the Law Society of South Africa approached the Court for a declaratory order confirming that the South African President's decision to vote in support of the 2011

---

604 Protocol on Tribunal in the Southern African Development Community: art.15. https://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf (accessed 30/10/2020).

605 Consolidated Text of the SADC Treaty: art.4(c) https://www.sadc.int/documents-publications/show/4171 (accessed 30/10/2020).

606 *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* (2/2007) 2008 SADCT 2 (28 November 2008): p. 58. http://www.saflii.org/sa/cases/SADCT/2008/2.pdf (accessed 30/10/2020).

607 Swanepoel 2020:168.

608 Government of the Republic of Zimbabwe v Fick (47954/2011, 72184/2011, 77881/2009) [2011] ZAGPPHC 76 (6 June 2011) http://www.saflii.org/za/cases/ZAGPPHC/2011/76.pdf (accessed 30/10/2020).

609 Government of the Republic of Zimbabwe v Fick and Others (657/11) [2012] ZASCA 122 (20 September 2012) http://www.saflii.org/za/cases/ZASCA/2012/122.html (accessed 30/10/2020).

610 Government of the Republic of Zimbabwe v Fick and Others (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (27 June 2013) http://www.saflii.org/za/cases/ZACC/2013/22.html (accessed 30/10/2020).

611 Christie 2011 "SADC leaders slammed over tribunal shutdown", https://mg.co.za/ article/2011-07-01-sadc-leaders-slammed-over-tribunal-shutdown/ (accessed 30/10/2020).

612 Christie 2011 "SADC leaders slammed over tribunal shutdown", https://mg.co.za/article/2011-07-01-sadc-leaders-slammed-over-tribunal-shutdown/ (accessed 30/10/2020).

613 Fritz "Quiet death of an important SADC institution", 2014 https://mg.co.za/article/2014-08-29-quiet-death-of-an-important-sadc-institution/ (accessed 30/10/2020).

motion rendered the Tribunal ineffective and by signing the 2014 protocol, the Tribunal is only accessible by governments.[614] The High Court stated that the South African President's conduct was unlawful, irrational and thus unconstitutional.[615] The Constitutional Court, acting in terms of section 172(2),[616] confirmed that the conduct was unconstitutional.[617]

4.2.3 Regression of political will to protect individuals against international human and humanitarian rights atrocities

Having implemented the *Implementation Act*, South Africa acknowledged the removal of immunities as a defence by the ICC. Swanepoel states that it is unlikely for a government to conclude a treaty and enact legislation without being aware of its national and international obligations.[618] As such the South African government's decision to withdraw from the ICC is an indication of a drastic decline in the political will of the government to protect individuals against international human and humanitarian rights atrocities since ratifying the Rome Statute.[619]

Moreover, the SADC moratorium clearly violated individuals' right to access to justice despite the SADC Convention's protection of human rights.[620] Most damming of all is that both instances clearly indicate that the government pays little attention to the country's Constitution in dealing with international affairs on behalf of South Africa.[621]

In light of the above, the **r**esearcher critically questions whether the ACJHPR will ever fully operate, that is, in the current political climate in Africa.

---

614 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (20382/2015) [2018] ZAGPPHC 4; [2018] 2 All SA 806 (GP); 2018 (6) BCLR 695 (GP) http://www.saflii.org/za/cases/ZAGPPHC/2018/4.html (accessed 30/10/2020).

615 *Law Society of South Africa and Others v President of the Republic of South Africa and Others*: par. 72.

616 Constitution of the Republic of South Africa of 1996: sec 172(2) states that a High Court or Supreme Court of Appeal may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, has no force until it is confirmed by the Constitutional Court.

617 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC): par. 97. http://www.saflii.org/za/cases/ZACC/2018/51.html (accessed 30/10/2020).

618 Swanepoel 2020:337.

619 Swanepoel 2020:337.

620 Swanepoel 2020:337.

621 Swanepoel 2020:337.

4.3 PROCEDURAL ISSUES RELATING TO THE ATTEMPTED WITHDRAWAL

As previously stated, the Rome Statute makes provision for states to withdraw from the Statute. The State must, however, act in accordance with its own legislation. South Africa must also abide by its Constitution.[622] For these purposes, section 231 is crucial. Specifically, subsection 2, which states:

> *(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces unless it is an agreement referred to in subsection.*

In the case of *Democratic Alliance v Minister of International Relations and Cooperation and Others,* it was argued that, in light of the fact that the Constitution stipulates that Parliament must approve international agreements before they can bind South Africa, the same is true for withdrawing from such agreements and that the executive must seek parliamentary approval before giving notice of withdrawal from an international agreement.[623] The Court agreed and stated:

> *A notice of withdrawal, on a proper construction of s 231, is the equivalent of ratification, which requires prior parliamentary approval in terms of s 231(2). As correctly argued on behalf of the DA, the act of signing a treaty and the act of delivering a notice of withdrawal are different in their effect. The former has no direct legal consequences, while by contrast, the delivery of a notice of withdrawal has concrete legal effects in international law, as it terminates treaty obligations, albeit on a deferred basis in the present case.*[624]

As such, it held that the decision of the executive to deliver the notice of withdrawal from the Rome Statute of the ICC without the requisite prior parliamentary approval violated section 231 of the South African Constitution and was a breach of the principle of separation of powers.[625]

---

622 Constitution of the Republic of South Africa of 1996: sec 2, "law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

623 Democratic Alliance v Minister of International Relations and Cooperation and Others: par. 31.

624 Democratic Alliance v Minister of International Relations and Cooperation and Others: par. 47.

625 Democratic Alliance v Minister of International Relations and Cooperation and Others: par. 57.

4.4 SUBSTANTIVE ISSUES RELATING TO THE INTENDED WITHDRAWAL

Furthermore, in *Democratic Alliance v Minister of International Relations and Cooperation*,[626] the applicants challenged the decision to withdraw on substantive grounds. Arguing that a withdrawal would be unconstitutional as it would constitute a "retrogressive measure" in the protection of rights.[627] Section 7(2) of the Constitution provides a constitutional obligation to "respect, protect, promote and fulfil" the rights in the Bill of Rights.[628] The Court did not address this issue given the procedural invalidity of the withdrawal.[629]

Despite the courts' reluctance to address this, it is necessary for present purposes to look at this aspect as it will determine whether or not it is at all possible to withdraw from the ICC. To the researcher's knowledge, only 1 article by Woolaver has attempted to discuss the substantive issues relating to the withdrawal. Consequently, the researcher, in light of Woolaver's view, suggests some factors that may be taken into consideration by a court, should the need arise.

If a domestic court determined that withdrawing from a treaty would impair the protection of constitutional rights, such a decision would prohibit the executive and legislative from being able to withdraw even when a clause in the treaty expressly allows for an exit.[630] Woolaver expresses the opinion that such a decision would be an unprecedented, domestic limitation of the treaty-making capacity of government.[631]

Nonetheless, this would be an extensive domestic limitation of the treaty-making capacity of government. There are, however, situations in which such limitations would be justified. Woolaver provides the following examples: where a constitution required the State's membership of a particular treaty (this is rare but a possibility), or the situation where the Constitution provides for a duty to prosecute international crimes, but no domestic jurisdiction over such crimes exists.[632]

---

626 Democratic Alliance v Minister of International Relations and Cooperation and Others.
627 Democratic Alliance v Minister of International Relations and Cooperation and Others: par. 72.
628 Constitution of the Republic of South Africa of 1996: sec 7(2).
629 Democratic Alliance v Minister of International Relations and Cooperation and Others: par. 75-76.
630 Woolaver 2018:453.
631 Woolaver 2018:453.
632 Woolaver 2018:453.

In applying Woolaver's view, the researcher submits that the South African Constitution does not expressly require membership to the ICC. In contrast, the court has previously decided that the South African Police Service however,

> *has a duty in our domestic law to investigate crime and, in particular, high priority crimes like torture as a crime against humanity and the customary international law nature of the crime of torture underscores the duty to investigate this type of crime.*[633]

To reiterate: an international agreement becomes law in South Africa when it is enacted into law by national legislation.[634] This was achieved with the enactment of the *Implementation* Act. Put differently through the *Implementation* Act; the Rome statute became law in South Africa.

Thus, it follows as a natural consequence that if South Africa were to withdraw from the ICC validly, the implementation Act would need to be repealed. A Bill to repeal the Implementation of the Rome Statute in South Africa has been drafted (*Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill* [B23- 2016]).[635] According to its preamble the Bill gives effect to a decision by Cabinet that the Republic of South Africa is to withdraw from the Rome Statute.[636] This Bill was, however, withdrawn after the finding in the case of *Democratic Alliance v Minister of International Relations.*[637]

Alongside this, the International Crimes Bill [B 37–2017] was drafted. This Bill would not have applied to persons who are immune from the criminal jurisdiction of the courts of the Republic in accordance with customary international law or as provided for in the Diplomatic Immunities and Privileges Act.[638] In other words, the Bill provides for

---

633 *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] (12) BCLR 1428 (CC): par. 60(b).

634 Constitution of the Republic of South Africa of 1996: sec. 231(4).

635 Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill [B23-2016].

636 Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill: sec 2.

637 International Crimes Bill: Sec 2 (1). This bill seeks to:"(a) criminalise international crimes under the domestic law of the Republic; (b) regulate immunity in the Republic against prosecution for international crimes; (c) afford extra-territorial jurisdiction to South African courts to adjudicate international crimes; (d) provide for the investigation and prosecution of persons who commit international crimes; (e) ensure that persons who are accused of international crimes may be extradited to foreign States; (f) provide for the surrender of persons who are accused of international crimes to entities; (g) provide for cooperation between the Republic and entities in respect of persons who are accused of having committed international crimes; and (h) regulate afresh immunity from prosecution for the crime of torture."

638 International Crimes Bill: sec. 3(1).

diplomatic immunities. Its jurisdiction over crimes would have mimicked that of the ICC, with jurisdiction over war crimes,[639] crimes against humanity[640] and genocide.[641]

Bearing in mind that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state,[642] and the fact that all law or conduct inconsistent with the Constitution is invalid,[643] the more pertinent question is whether the constitutional obligation to "respect, protect, promote and fulfil" the rights in the Bill of Rights[644] limits the ability of the executive and legislative from being able to withdraw from the Rome Statute. That is a treaty that aims at protecting fundamental human rights as contained in South Africa's Constitution. To the researcher's knowledge, at this time, no literature considers the factors that ought to be considered in considering the *substantive* constitutionality of a withdrawal.

In light of this, the researcher suggests that in determining the constitutionality of a withdrawal by South Africa, consideration should be given to the following factors: the importance of the rights protected; whether the ICC actually functions as a deterrent against violations of these rights; and the availability of other mechanisms that protect these rights.[645]

4.4.1 Human rights and South Africa

Kemp suggests that the implementation and domestication of humanitarian and human rights norms depend on political will.[646] The leader of political will in South Africa is its governing party, the ANC. the ANC (established in 1912) was the leading liberation movement in the anti-apartheid struggle.[647]

The ANC was "an adherent to, but not always a practitioner of, the norms of international humanitarian law".[648] It bound itself to the Geneva Conventions and

639 International Crimes Bill: Schedule 1 part 3.
640 International Crimes Bill: Schedule 1 part 2.
641 International Crimes Bill: Schedule 1 part 1.
642 Constitution of the Republic of South Africa of 1996: sec. 8(1).
643 Constitution of the Republic of South Africa of 1996: sec. 2.
644 Constitution of the Republic of South Africa of 1996: sec. 7(2).
645 This is not a closed list but is meant to serve as a starting point for conversations around the substantive issues that could arise in the event that South Africa withdraws from the ICC.
646 Kemp 2017:422.
647 Kemp 2017:422.
648 Kemp 2017:424.

Protocol I[649] and subjected itself to the processes before the TRC.[650] The TRC stated that the ANC was a non-state actor and thus lacked the legal capacity to accede to the Geneva Conventions, yet, still held the Common Article 3 of the Geneva Conventions applicable.[651] This was in part because of the ANC's public pronouncements that it considered itself "bound by the core principles enshrined in international humanitarian law".[652]

Kemp states that the ANC's historical commitment to internationalism, humanitarianism, and the quest to end impunity for violations of humanitarian and human rights norms is well documented.[653] Unfortunately, this same commitment is currently in question.[654] He goes further to say that the ANC's animosity toward the ICC is ironic (specifically in light of its support for, and instrumental role in the formulation of the Rome Statute) because, had the ICC been in existence during the apartheid years, "would the ANC not also have utilized the avenue of an international criminal tribunal in the multifaceted struggle against apartheid"?[655]

South Africa's legal obligations to investigate and prosecute crimes under international law was dealt with by the Constitutional Court in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (often referred to as the "Torture Docket Case").[656] This case dealt with the South African police force's decision not to investigate the alleged torture by the Zimbabwean police against Zimbabwean nationals. The High Court declared the decision unlawful and constitutionally invalid. The appeal to the Supreme Court of Appeal was dismissed. The Constitutional Court was "to establish South Africa's domestic and international powers and obligations to prevent impunity and to ensure that perpetrators of international crimes committed by foreign nationals beyond [South Africa's] borders

649 Dugard 1989:105.
650 Kemp 2017:423.
651 Truth and Reconciliation Commission Final Report, vol. 6: 598. https://www.gov.za/sites/default/files/gcisdocument/201409/trc0.pdf (accessed 30/10/2020); see also Kemp 2017:422-428.
652 Truth and Reconciliation Commission Final Report, vol. 6: 599. https://www.gov.za/sites/default/files/gcisdocument/201409/trc0.pdf (accessed 30/10/2020).
653 Kemp 2017:428; see also Truth and Reconciliation Commission Final Report, vol. 6: 601. https://www.gov.za/sites/default/files/gcis_document/201409/trc0.pdf (accessed 30/10/2020).
654 Kemp 2017:423.
655 Kemp 2017:423.
656 National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre & Another [2015] (1) SA (CC)

are held accountable".[657] The Court held that the South African police has not only the power to investigate alleged international crimes, but a legal and constitutional duty to do so.[658]

The South African White Paper, "Building a Better World: The Diplomacy of Ubuntu" reflects the governments' policy on foreign affairs, stating that South Africa's "greatest asset lies in the power of its example".[659]

In light of the Torture Docket Case, the manner in which South Africa handled the Al Bashir matter once again, "points to a clear break with the past support by the ANC for the norms and enforcement mechanisms of international humanitarian and international criminal law".[660]

Considering the constitutionality of a withdrawal from the ICC, Section 7(2) of the Constitution provides a constitutional obligation to "respect, protect, promote and fulfil" the rights in the Bill of Rights.[661] Bearing in mind that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state[662] and the fact that all law or conduct inconsistent with the Constitution is invalid,[663] the more pertinent question is whether the constitutional obligation to "respect, protect, promote and fulfil" the rights in the Bill of Rights[664] limits the ability of the executive and legislative from being able to withdraw from the Rome statute. In this regard, there is very little literature.

It is evident that war crimes, crimes against humanity, genocide and crimes of aggression will affect any number of rights provided for by the Constitution, including, but not limited to equality, human dignity, life, freedom and security of the person, prevention of slavery, servitude and forced labour, freedom of religion, belief and opinion, citizenship, freedom of movement and residence and environment.[665] It is

---

657 National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre: par. 4.
658 National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre: par. 55.
659 White Paper on South African Foreign Policy, Building a Better World: The Diplomacy of Ubuntu:36 https://www.gov.za/sites/default/files/gcis_document/201409/final-draft-white-paper-sa-foreign-policy.pdf
660 Kemp 2017:433.
661 Constitution of the Republic of South Africa of 1996: sec. 7(2).
662 Constitution of the Republic of South Africa of 1996: sec. 8(1).
663 Constitution of the Republic of South Africa of 1996: sec. 2.
664 Constitution of the Republic of South Africa of 1996: sec. 7(2).
665 Constitution of the Republic of South Africa of 1996: sec. 9-13; 15; 20-21; 24.

plain to see how the events of World War II (or any war for that fact), apartheid, the human experimentation by Unit 731, the current situation in Myanmar and any other atrocities throughout history, clearly violates these and many other rights.

When considering a limitation of rights in the South African context, consideration is given to section 36 of the Constitution, which provides an assessment for determining whether a limitation of rights is reasonable and justifiable. Although it is possible for a court to consider an assessment of this nature, the researcher proposes a different approach.

In this regard, the researcher, envisaging the hypothetical situation in which the country withdraws from the Rome Statute and the country falls into a state of disarray, submits that consideration must be given to section 37 of the Constitution. This section considers states of emergency:

> *(1) A state of emergency may be declared only in terms of an Act of Parliament, and only when – (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order.*[666]

The researcher submits that the wording of the above provision is broad enough, particularly with the inclusion of the phrase “necessary to restore peace and order”, to include any situation of war, crimes against humanity, genocide and crimes of aggression.

Section 37 provides for what is called, “non-derogable rights”. Generally, derogation of rights allows governments to temporarily suspend the application of certain rights within a state of emergency.[667] Non-derogable rights, on the other hand, are rights that cannot be suspended even in a state of emergency. Put differently; even if the country is in a state of emergency, it is still required to provide for the non-derogable rights.

Section 37(5) of the Constitution provides the following table of Non-Derogable Rights.

666 Constitution of the Republic of South Africa of 1996: sec. 37(1).
667 Constitution of the Republic of South Africa of 1996: sec. 37(5).

Section number	Section title	Extent to which the right is protected
9	Equality	With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.
10	Human Dignity	Entirely
11	Life	Entirely
12	Freedom and Security of the person	With respect to subsections (1)(d) and (e) and (2)(c).
13	Slavery, servitude and forced labour	With respect to slavery and servitude
28	Children	With respect to: – subsection (1)(d) and (e); – the rights in subparagraphs (i) and (ii) of subsection (1)(g); and – subsection 1(i) in respect of children of 15 years and younger.
35	Arrested, detained and accused persons	With respect to: – subsections (1)(a), (b) and (c) and (2)(d); – the rights in paragraphs (a) to (o) of subsection (3), excluding paragraph (d) – subsection (4); and – subsection (5) with respect to the exclusion of evidence if the admission of that evidence would render the trial unfair

Figure 3: Table of non-derogable rights[668]

From the above, the extent of protection of the rights to equality, human dignity, life, slavery, servitude and forced labour are clear. Upon inspection of the relevant provisions, it can be seen that the freedom and security of the person is protected to the extent that people may not be tortured, treated or punished in a cruel, inhuman or degrading way or be subjected to medical or scientific experiments without their informed consent.[669]

The rights of children are non-derogable to the extent that children are protected from maltreatment, neglect, abuse or degradation and exploitative labour practices[670] if children are detained as a last resort: they must "be kept separately from detained persons over the age of 18 years; and treated in a manner, and kept in conditions, that

668 Constitution of the Republic of South Africa of 1996: sec. 37(5).
669 Constitution of the Republic of South Africa of 1996: sec. 12(1)(d)-(e); (2)(c).
670 Constitution of the Republic of South Africa of 1996: sec. 28(1)(d)-(e).

take account the child's age".[671] Lastly, children under the age of 15 must be protected in times of armed conflict and may not be used directly in armed conflict.[672]

The rights of arrested, detained and accused persons are non-derogable to the extent that

> *"Everyone who is arrested for allegedly committing an offence has the right to remain silent; to be informed promptly of the right to remain silent and of the consequences of not remaining silent; and not to be compelled to make any confession or admission that could be used in evidence against that person.*[673]

All rights that are afforded to an accused relating to the right to a fair trial except for the right to have a trial begin and conclude without unreasonable delay are regarded as non-derogable rights.[674] An accused also retains the right to receive information in a language that the accused understands and the right to have any evidence that would render the trial unfair excluded from the trial.[675]

Under normal circumstances, these and many more rights, the State provides on a daily basis. However, it is evident that if the country were to fall into a state of disarray, the protection, fulfilment and promotion of even just the non-derogable rights may become impossible, consider, for example, a state of war; the State will in all likelihood, despite its best attempts or intentions, not be able to ensure its citizens' right to life, human dignity, etc.

For this reason, it makes logical sense to belong to an independent body that is capable of intervening in situations where another party has caused the State of disarray that causes harm to the country and its citizens and even more so in a situation where the Government itself is in some way responsible for the harm caused.

In relation to South Africa's intended withdrawal, in a media statement, the South African Human Rights Commission (SAHRC) expressed concern regarding the decision to withdraw from the Rome Statute. It stated that "the commitment to the Rome Statute was a reaffirmation of South Africa's constitutional commitment to

671 Constitution of the Republic of South Africa of 1996: sec. 28(g)(i)-(ii).
672 Constitution of the Republic of South Africa of 1996: sec. 28(1)(i).
673 Constitution of the Republic of South Africa of 1996: sec. 35(1)(a)-(c).
674 Constitution of the Republic of South Africa of 1996: sec. 35(3)(a)-(c); (3)(e)-(o).
675 Constitution of the Republic of South Africa of 1996: sec. 35(1)-(5).

human rights and the rule of law".[676] In its statement, it quoted the late former President of South Africa, Nelson Mandela, who stated the following:

> *South Africa's future foreign relations will be based on our belief that human rights should be the core concern of international relations …*[677]

It concluded that "it is apparent that the constitutional values were not only intended to inform the government's interactions with its citizens but were also intended to inform the government's interactions with other nations".[678] The SAHRC had "availed itself to assist the South African government in any way possible, in order to ensure that its international relations policy reflects the highest ideals of our Constitution".[679] To date, no such meeting has taken place.

4.4.2 Human rights and the ICC

It is clear that there are a number of Human Rights protective measures in both the domestic realm (such as the Bill of Rights in the South African Constitution[680]) as well as in the international realm (such as the Universal Declaration of Human Rights;[681] known as the Human Rights framework). This framework establishes a number of Human Rights that ought to be protected, yet no enforcement mechanisms are provided.[682] In the absence of these mechanisms, all treaties providing for the protection of Human Rights merely serve as reminders of the importance of such

---

676 South African Human Rights Commission 2016: Media Statement: South African Human Rights Commission expresses concern at South Africa's withdrawal from the International Criminal Court. Available at: https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/ 468-media-statement-south-african-human-rights-commission-expresses-concern-at-south-africa-s-withdrawal-from-the-international-criminal-court. (accessed 10/07/2020).

677 South African Human Rights Commission 2016: Media Statement: South African Human Rights Commission expresses concern at South Africa's withdrawal from the International Criminal Court. Available at: https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/ 468-media-statement-south-african-human-rights-commission-expresses-concern-at-south-africa-s-withdrawal-from-the-international-criminal-court (accessed 10/07/2020).

678 South African Human Rights Commission 2016: Media Statement: South African Human Rights Commission expresses concern at South Africa's withdrawal from the International Criminal Court. Available at: https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/ 468-media-statement-south-african-human-rights-commission-expresses-concern-at-south-africa-s-withdrawal-from-the-international-criminal-court (accessed 10/07/2020).

679 South African Human Rights Commission 2016: Media Statement: South African Human Rights Commission expresses concern at South Africa's withdrawal from the International Criminal Court. Available at: https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/468-media-statement-south-african-human-rights-commission-expresses-concern-at-south-africa-s-withdrawal-from-the-international-criminal-court (accessed 10/07/2020).

680 Constitution of the Republic of South Africa, 1996.

681 Universal Declaration of Human Rights (1948).

682 Wits School of Governance: 2018. https://www.wits.ac.za/news/sources/wsg-news/2018/the-international-criminal-court-and-accountability-in-africa.html (accessed 10/12/2018).

rights.[683] A number of Human Rights courts currently exist; one example is; the European Court of Human Rights.[684] However, these courts are focused on States rather than the individuals that are responsible for violations of rights.[685] The ICC rectifies this by permitting the prosecution of individuals who have committed serious violations of International Law and is, thus, a means of protecting fundamental human rights.[686] Although the ICC is not seen as a Human Rights Court, it inevitably has the effect of protecting Human Rights through its judgments.

Having said this, the argument may be raised that the ICC, too, is not a sufficient human rights protector as it has only secured 3 convictions over the core international crimes,[687] and in any case has a complementary and therefore conservative jurisdictional base. For this reason, it is necessary to consider whether the existence of the ICC functions as a deterrent against human rights violations.

The ICC aims to deter violations of international law through its existence,[688] leading to the debate on whether the ICC deters individuals from committing large-scale human rights abuses.

Appel undertook an empirical analysis of the statistics to determine whether the ICC in fact deters individuals from committing large-scale human rights abuses.[689] He notes a similar point to that of Dutton that was mentioned in the introduction, that states with better human rights records are more likely to ratify the Rome Statute than those states who have a greater history of human rights violations.[690]

---

683 Wits School of Governance: 2018. https://www.wits.ac.za/news/sources/wsg-news/2018/the-international-criminal-court-and-accountability-in-africa.html (accessed 10/12/2018).

684 Wits School of Governance: 2018. https://www.wits.ac.za/news/sources/wsg-news/2018/the-international-criminal-court-and-accountability-in-africa.html (accessed 10/12/2018).

685 Wits School of Governance: 2018. https://www.wits.ac.za/news/sources/wsg-news/2018/the-international-criminal-court-and-accountability-in-africa.html (accessed 10/12/2018).

686 Wits School of Governance: 2018. https://www.wits.ac.za/news/sources/wsg-news/2018/the-international-criminal-court-and-accountability-in-africa.html (accessed 10/12/2018).

687 Wilmshurst 2019 “Strengthen the International Criminal Court”, https://www.chathamhouse.org/2019/06/strengthen-international-criminal-court (accessed 01/11/2020).

688 Rome statute: art. 2.

689 This was an in-depth study that used multiple methods of analyse of data that is only briefly discussed here.

690 Appel 2018:14.

Following an in-depth analysis of multiple different factors, Appel concludes that the ICC has influenced the human rights records of states since its entry into force in 2002.[691]

> *The empirical evidence suggests that the ICC is associated with greater human rights practices among ratifiers. While it is true that states that ratify the Rome Statute have on average better human rights records than non-ratifiers, it is also the case that the human rights practices of ratifiers have improved since the Court's establishment more than the human rights practices of non-ratifier states over time.*[692]

Having determined that the ICC may well function as a deterrent against human rights violations, it is necessary to consider what other institutions may be available to South Africa should it choose to withdraw from the ICC.

4.4.3 Domestic courts and international crimes

The above discussions established that by the nature of international crimes, human rights are adversely affected. The ICC is, however, not the only means of protecting these rights. In some instances, by virtue of national legislation that enacts treaties, domestic courts are given the jurisdiction to try international crimes.

Aside from the *Implementation Act*, South Africa is a signatory of the 4 Geneva Conventions of 1949 and the Additional Protocols of 1977. The Geneva Conventions require states to bring those who are alleged to have committed grave breaches of the 1949 Geneva Conventions before its own courts.[693] The Implementation of the Geneva Conventions Act was adopted in 2012.[694] This Act permits -

> *any court in the Republic [to] try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge relates was committed outside the Republic.*[695]

691 Appel 2018:19.
692 Appel 2018:19-20.
693 Convention I: art.49; Convention II: art.50; Convention III: art.129; Convention IV: art. 146.
694 The *Implementation of the Geneva Conventions Act* 8/2012.
695 The *Implementation of the Geneva Conventions Act*: art. 7(1)

Some other examples include *The Prevention and Combating of Torture of Persons Act*,[696] the *Protection of Constitutional Democracy Against Terrorist and Related Activities Act*,[697] and the *Prevention and Combating of Trafficking in Persons Act.*[698]

Given the range of protections afforded in the above, it is reasonable to ask whether membership to the ICC is entirely necessary and even more so, given the potential existence of the ACJHPR. The researcher submits the following view.

As was shown in the previous chapter, the human rights section of the ACJHPR will undoubtedly suffer as a result of the structure and mandate of the proposed Court. In the same light questions were raised as to the courts' ability to fulfil its mandate in relation to criminal cases.

Similarly, what cannot be ignored is that although the above-mentioned legislation provides human rights protections, in all instances, the treaties and subsequent legislation rely on the ability and willingness of domestic courts to try cases. The regression of the political will to protect individuals against international human and humanitarian rights atrocities was discussed above, alongside this, it must be born in mind that there may also be a greater possibility of cases being influenced by the political powers of the country. Lastly, international criminal cases tend to be lengthy and extensive meaning that it may not be possible for domestic courts to handle these cases. In this regard, the ICC provides a remedy in that it may assume jurisdiction where the member State is unwilling or unable genuinely to carry out the investigation or prosecution.[699]

4.4.4 The question of the constitutionality of withdrawal

Based on the above, it is clear that the withdrawal may well constitute a “retrogressive measure” in the protection of rights.

As was previously stated, the Court in *Democratic Alliance v Minister* declined to address these substantive grounds, unless and until further challenges are brought to legislation authorising a withdrawal from the ICC. As such it remains to be seen as to

696 The *Prevention and Combating of Torture of Persons Act* 13/2013.
697 The *Protection of Constitutional Democracy Against Terrorist and Related Activities Act* 33/2004.
698 The *Prevention and Combating of Trafficking in Persons Act* 7/2013.
699 Rome Statute: art. 17(1)(a).

whether or not the withdrawal will constitute a “retrogressive measure” in the protection of rights in the judgment of a South African court.

It must be noted, however, that a limitation to the executive’s powers to join and withdraw from treaties should be imposed with extreme caution because they will undoubtedly lead to states being reluctant to join a treaty.[700] In addition, practically all domestic constitutions reserve treaty-making capacity to the executive and legislative branches.

As far as the potential finding of unconstitutionality in terms of section 7(2) is concerned, considering the drastic impact of such a limitation on treaty-making capacity, without a clear constitutional obligation justifying substantive intervention, judicially enforced checks on withdrawal should be limited to procedural matters.[701]

In light of the fact that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state[702] and the fact that all law or conduct inconsistent with the Constitution is invalid,[703] gives rise to the question whether Section 7(2) may render the decision to withdraw unconstitutional.

This section discussed some of the aspects that a court could potentially take into account when considering the constitutionality of a withdrawal. Ultimately the research concludes that there is a regression in political will to protect individuals against international human and humanitarian rights atrocities. Although the ICC is not seen as a human rights court, it inevitably has the effect of protecting human rights through its judgments and literature shows that the ICC functions as a deterrent against violations of human rights.

A full analysis of all potentially relevant factors is well beyond the scope of this dissertation. Nevertheless, it remains to be seen what a court will determine if it is asked, again, to consider the substantive issues that may arise out of a withdrawal.

Considering the fact that limiting the executive's power to enter into and withdraw from treaties should be imposed with extreme caution because they will undoubtedly lead

700 Woolaver 2018:453.
701 Woolaver 2018:453.
702 Constitution of the Republic of South Africa of 1996: sec. 8(1).
703 Constitution of the Republic of South Africa of 1996: sec. 2.

to states being reluctant to join a treaty,[704] it is the researcher's opinion that the Court will most likely not declare a withdrawal unconstitutional. Instead, the Court may, if the issue is brought before it, be likely to issue a structural interdict.

It is proposed that if a court is confronted with the question on the substantive constitutionality of ICC withdrawal, and it decides that there are no grounds to prohibit the government's withdrawal, it may consider ordering a lawful withdrawal under court supervision. Section 172(1)(b) of the Constitution, provides that in constitutional matters, the courts may grant "any order that is just and equitable". With a structural interdict, the Court directs the actions of one or more of the parties, usually within given time frames.[705] The Court monitors the completion of these actions.[706] The role that structural interdicts play was discussed in *Pheko and Others v Ekurhuleni Metropolitan Municipality*.[707]

> *Supervisory orders arising from structural interdicts ensure that courts play an active monitoring role in the enforcement of orders. In an appropriate case, this guarantees commitment to the constitutional values of accountability, responsiveness and openness by all concerned, in a system of democratic governance. By granting the structural interdict, a court secures a response in the form of reports and thereby prevents a failure to comply with the positive obligations imposed by its order. Generally, the Court's role continues until the remedy it has ordered in a matter has been fulfilled.*[708]

This type of interdict has been used in some of South Africa's most controversial cases, including the CPS and Nkandla judgments.[709]

Structural interdicts have also been used in a number of cases involving systemic violations of rights. One such example is *City of Cape Town v Neville Rudolph* which considered the eviction of a group of illegal occupiers who were occupying a public park in the Valhalla Park area in 2001.[710] The Court ordered the City to comply with its constitutional obligations and to report back to the Court on the progress made in this regard.[711]

---

704 Woolaver 2018:453.
705 Swanepoel 2015:374-378.
706 Currie and de Waal 2013:199.
707 Pheko and Others v Ekurhuleni Metropolitan Municipality and Others (No 3) [2016] ZACC 20.
708 Pheko and Others v Ekurhuleni Metropolitan Municipality: par. 1.
709 Both cases are long, and complex, the complexities of these cases are beyond the scope of this dissertation and are included only to illustrate the application of structural interdicts.
710 City of Cape Town v Neville Rudolph and Others [2003] (11) BCLR 1236 (C).
711 City of Cape Town v Neville Rudolph: par. 218.

If a court is asked to determine the substantive constitutionality of a withdrawal, and finds no grounds to prohibit it, it may issue a structural interdict in terms of which the withdrawal from the ICC happens under court supervision. In such a process, the court is likely to order that the executive is required to take identified steps to ensure human rights protections are unaffected by the withdrawal.

Ultimately, the researcher concludes that it is unlikely that a court will declare a withdrawal unconstitutional only based on section 7(2). It is more likely for the court to consider other available means for protections and only in the, unlikely, circumstance that no other suitable mechanism exists will the court declare a withdrawal unconstitutional. Even then it is likely that the order will state something to the effect that the withdrawal will be unconstitutional until such a time as a suitable replacement is available.

4.5 CONCLUSION/SUMMARY

This chapter provided the context of South Africa's intended withdrawal, which centres around South Africa's failure to arrest Al Bashir while he attended the 25th summit of the African Union. Once again, the statement by Van der Vyver must be borne in mind:

> *The ANC's cause of grievance is, therefore, not the ICC but exposure by a South African court of the government's defiance of the rule of law and disrespect for judgments of a court of law.*[712]

The procedural issues relating to the attempted withdrawal may be summed up by a sentiment expressed by Woolaver, "the requirements for amending or undoing a legal action must mirror the requirements for creating that act".[713]

This chapter focused on the substantive issues relating to the intended withdrawal. Mainly whether Section 7(2) of the Constitution creates a situation in which withdrawing from the treaty would impair the protection of constitutional rights. In considering this, despite the lack of literature, it was determined that although there are other instruments of protection of human rights, the ICC supplements this protection by permitting the prosecution of individuals who have committed serious violations of international law and is, thus, a means of protecting fundamental human

712 Van der Vyver 2015:579.
713 Woolaver 2018:452. This is the *acte contraire* principle.

rights. Chapter 3 indicated that it was unlikely that the human rights section of the ACJHPR will be sufficient in this regard.

As such, there is a possibility that the withdrawal may well constitute a “retrogressive measure” in the protection of rights. The question that remains unanswered, and that needs to be answered by the South African courts is whether the constitutional obligation to “respect, protect, promote and fulfil” the rights in the Bill of Rights[714] limits the ability of the executive and legislative to withdraw from a treaty which promotes the very human rights protection the Constitution prescribes.

In an attempt to address the question, the researcher proposed the possibility of the Court declaring that a withdrawal may be constitutional, provided steps are taken to ensure human rights protections remain intact after the withdrawal by means of a structural interdict.

714 Constitution of the Republic of South Africa of 1996: sec 7(2).

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

Keeping Dutton's view that states would typically bind themselves to treaties with weaker enforcement mechanisms while being reluctant to join international treaties with strong enforcement mechanisms[715] in mind, this dissertation sought to determine whether the ACJHPR could be an "African solution to African problems". Alternatively, whether (in the South African context) it is a means to opt out of a treaty with strong enforcement mechanisms in favour of one with weaker enforcement mechanisms. This poses a lesser threat in the case of non-compliance, which has the potential to indicate a lack of intent to comply with the treaty.[716] To achieve this, the dissertation considered a closed group of factors within the context of the ICC and the ACJHPR. This chapter provides a summary of the observations made and gives an opinion based on these observations as to the viability of the ACJHPR as a substitute for the ICC and its system. Finally, it makes certain recommendations.

5.2 OBSERVATIONS IN THE CONTEXT OF THE ICC

Through the ratification of the Rome Statute and promulgation of the Implementation Act,[717] South Africa committed itself to the prosecution of those responsible for the commission of international crimes either by its own courts or by the ICC.[718] This commitment clearly wavered in the Al Bashir matter; culminating in South Africa filing a notice to withdraw from the ICC.[719]

In relation to the accusations that the ICC and its system is neo-colonial and western which targets Africans,[720] the research illustrated that the ICC investigated all but two situations in Africa that led to prosecutions at the request of the countries

715 Dutton 2011:480.
716 Dutton 2011:479.
717 Stone 2011:306.
718 Implementation of the Rome Statute of the International Criminal Court Act: preamble.
719 the issuing of this notice and the problems surrounding it are discussed in the case of Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening) 2017 (1) SACR 623 (GP).
720 See for example, Camron *et al* 2016:6-24.

concerned.[721] From this, it is the researcher's opinion that African states are willing to request the assistance of the ICC when it is conducive to their needs. Nevertheless, when the ICC acts on the authority of the UNSC, African states cry foul. It seems from this point of view that in some instances, African states are willing to accept the ICC and its systems, but in other cases, African states appear to be trying to protect the impunity of its heads of state. Specific to South Africa, the author agrees with the statement of Van der Vyver that its protest is not against the ICC, but against its own court's finding that it defies the rule of law.[722] These accusations culminated in the AU extending the jurisdiction of the ACJHPR to assume jurisdiction over the prosecution of individuals for international crimes.[723]

The idea of forming a permanent international criminal court can be seen as early as World War I.[724] It took 36 years (1948-1984) for a draft statute to be drawn. With 70 per cent of states ascribing to the general thrust and ideas that the ICC represents, it took only three and a half years for the statute to come into effect.[725] It became operational in the following year.

It has been shown that the court is funded by contributions made by 122 State Parties as well as the United Nations.[726] Despite this, the court is still confronted with budgetary issues and even after 18 years of existence, the court still battles to develop fully reliable and accurate budget proposals,[727] but is none the less consistently seeking ways to become more efficient and cost-effective.

As far as the jurisdiction of the ICC, it has been shown that not only are crimes defined in the Rome Statute but in most cases, they are also defined (if not also further expanded on) in other international instruments. Despite this, there are still areas lacking in clarity.

---

721 Van der Vyver 2015:578.
722 Van der Vyver 2015:579.
723 African Union, Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008. http://www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human -rights-en.pdf (accessed 08/11/19).
724 Bassiouni 1991:2/
725 Coalition for the International Criminal Court. http://iccnow.org/?mod=icchistory (accessed 20/02/2020).
726 Rome Statute, 1988: art 115.
727 Zavala 2018:3.

It was determined in the previous chapter that there is a possibility that the withdrawal may well constitute a "retrogressive measure" in the protection of rights. The question that remains unanswered, and that would need to be answered by the South African courts, is whether the constitutional obligation to "respect, protect, promote and fulfil" the rights in the Bill of Rights[728] limits the ability of the executive and legislative from being able to withdraw from the Rome Statute.

In an attempt to address this question the researcher proposed the possibility of the Court declaring that a withdrawal may be constitutional provided steps are taken to ensure human rights protections remain intact after the withdrawal. In order to supervise the withdrawal, it was proposed that the court retained supervision of the withdrawal by way of a structural interdict to ensure that adequate other measures existed to replace the loss in terms of human rights protection afforded by the Statute of Rome.

5.3 OBSERVATIONS WITHIN THE CONTEXT OF THE ACJHPR

Much like the ICC, the idea of establishing an African Criminal Court has long existed but, was realised in 2009 with the request by the AU that the implications of the Court with extended jurisdiction over criminal matters be investigated.[729] This resulted in what is now known as the Malabo Protocol.

However, support for AU protocols have always been bleak. At best, it takes quite a number of years for AU protocols to acquire the required number of ratifications.

The research brought to light some of the most crucial potential obstacles that the ACJHPR may face. Most significantly are the budgetary constraints. The AU only has the contributions of 55 State Parties and select other donors (some of whom "*have already indicated that they would not finance the ACJHR on account of the immunity clause*",[730] who will need to fund all 3 sections of the court. Further compounding this issue is the uncertainty regarding the capacity of the court to deliver effectively and

728 Constitution of the Republic of South Africa of 1996: sec. 7(2).
729 Werle *et al* 2017:3.
730 Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots. https://www.amnesty.org/download/Documents_/AFR016137_2017_ENGLISH.PDF (accessed 15/03/2020).

efficiently on its mandate.[731] The fact that the Malabo Protocol envisages the reduction of judges responsible for human rights issues from 11 judges to 5[732] Is of great concern. It attests to the fact that the establishment of an extended court has not been thoroughly considered.

In regard to the jurisdiction of the extended court, a number of issues were pointed out in this work. It has been shown in Chapter 3 that the drafters of the Malabo Protocol missed a number of opportunities to provide certainty and clarity.

As a whole, the researcher agrees with the view expressed by Du Plessis to the effect that the Malabo **P**rotocol seems to have been rushed into existence, resulting in an instrument that raises more questions than those for which it provides answers.[733]

5.4 POSITIVE ASPECTS OF THE MALABO PROTOCOL

The Malabo Protocol is heavily criticised, and this dissertation focused on these criticisms. However, credit must be given where it is due. The Malabo Protocol includes some aspects that are commendable and worthy of noting.

Article 22C provides for the creation of a Defence Office as a separate and independent organ of the court, "to protect the rights of the accused; require 'adequate facilities [for] defence counsel and persons entitled to legal assistance'; and creates a Principal Defender who will enjoy 'equal status with the Prosecutor' in respect of rights of audience and negotiations".[734]

Article 22B provides for the creation of a Victims and Witnesses Unit to provide "protective measures and security arrangements, counselling and other appropriate assistance".[735]

731 Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots. https://www.amnesty.org/download/Documents /AFR016137 2017 ENGLISH.PDF (accessed on 15/03/2020):5.
732 Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots. https://www.amnesty.org/ download/Documents /AFR016137 2017 ENGLISH.PDF (accessed 15/03/2020):7.
733 Du Plessis 2012:10.
734 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art 22C.
735 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art 22B.

Article 46M provides for the creation of a Trust Fund "for legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families".[736]

Article 46C provides for jurisdiction over legal persons, with the exception of States, in recognition of the fact that "Africa has not only suffered at the hands of individuals but also corporations".[737]

The additional ten crimes, problematic as they may be, are clearly attempting to address issues that plague the African continent.

5.5 THE ACJHPR AS A SUBSTITUTE FOR THE ICC

At its core, this dissertation sought to determine whether the ACJHPR could become a viable substitute for the ICC and its system. It is the opinion of the researcher that in its current form, the ACJHPR will not become a viable substitute. This view has been substantiated throughout this work, which is summarised below by way of conclusion.

Not only does support for the protocol seem bleak; it also seems unlikely that, in its current form, the protocol will ever become fully operational simply because of its budgetary constraints.

Most concerning, in its current form, is that it cannot be said that the ACJHPR will become a viable substitute for the ICC and its system simply because of the immunity provisions.

Based on this, the Researcher concludes that if South Africa were to withdraw from the ICC, in favour of the ACJHPR (in its current form) such would be a means to opt-out of a treaty with strong enforcement mechanisms in favour of one with weaker enforcement mechanisms, that poses a lesser threat in the case of non-compliance. This, in turn, has the potential, as Dutton puts it, to indicate a lack of intent to comply with the treaty.[738] This brings to mind the words of Chief Justice Mogoeng, in context of South Africa's former support of a resolution by the SADC, which effectively disbanded the Tribunal, which may once again ring true:

> *Our President's signature is symbolic of a warm welcome by South Africa of the stealthy introduction of impunified disregard for and violation of fundamental rights or*

736 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art 22M.
737 Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights: art 22C.
738 Dutton 2011:479.

key Treaty provisions. It inadvertently but in reality reassures all others that we would turn a blind eye to human rights abuses and non-adherence to the rule of law in their jurisdictions even if it affects our people.[739]

Moreover, critical questions were raised as to whether the ACJHPR will ever fully operate impartially and independently if African Heads of State are able to undermine its judgments, in the same manner, that it has done with the ICC and the SADC tribunal.

5.6 CONCLUDING RECOMMENDATIONS

Though it is often easy to find fault, it is often harder to find solutions to problems. The fact that this dissertation focused on criticisms of the Malabo Protocol is not meant to imply that these criticisms cannot be overcome. For this reason, the researcher provides the following recommendations.

These recommendations are made possible by virtue of the fact that Article 12 states amendments can be adopted by a simple majority of the Assembly, upon recommendation by a State Party or the Court.

5.6.1 Article 46A *bis* should be removed; no immunity should be provided to any individual, regardless of official position. Quite clearly the international community has moved on to a position, and as a result of the horrendous atrocities in this world over centuries, to a position where it realises that customary international law's position on immunity for political leaders is untenable.

5.6.2 Article 46H should be amended to show the Court's commitment to work with the ICC and make it clear to African states that being a member of the ACJHR, does not mean abandoning their obligations under the Rome Statute. In fact, it may be of benefit to the court to include a provision to the effect that cases over which the ICC has jurisdiction are referred to the ICC; at least until such time as the ACJHR has acquired sufficient capacity to handle these cases itself.

5.6.3 To this end, consideration should be given to phasing in the crimes within ACJHR jurisdiction. That is to start with a select few crimes and let the

739 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; par. 32.

provisions relating to other crimes come into effect as the ACJHR develops its capacity.

5.6.4 It is recommended that the definitions of crimes be revised, particularly by limiting the court's jurisdiction through the inclusion of a gravity threshold standard and universal jurisdiction as well as ensuring that the definition of all crimes conforms with the principle of legality.

5.6.5 That the Protocol's provisions regarding individual access to the Court be amended to allow for access by individuals where local remedies have been exhausted.

5.6.6 Lastly, that the number of judges appointed be revised, the Africa Centre for Open Governance suggests the number of judges should be expanded to at least 27 in order to have nine judges with experience at each of the Court's three jurisdictional bases.[740]

[740] Africa Centre for Open Governance 2016: Seeking Justice or Shielding Suspects? An analysis of the Malabo Protocol on the African Court. http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf (accessed 16/03/2020):10.

BIBLIOGRAPHY

BOOKS

AMBOS K

2014. Treatise on international criminal law: the crimes and sentencing. Oxford: Oxford University Press.

BASSIOUNI MC

2013. *Introduction to International Criminal Law*. The Netherlands: Brill Publishers.

BENEDETTI F, BONNEAU K & WASHBURN J

2012. *Negotiating the International Criminal Court: New York to Rome, 1994-1998.* The Netherlands: Martinus Nijhoff Publishers.

BRANDON B & DU PLESSIS M

2005. The prosecution of international crimes. A practical guide to prosecuting ICC crimes in commonwealth states. London: Commonwealth Secretariat.

COMBS N

2010. Fact-Finding without the Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions. Cambridge: Cambridge University Press.

CURRIE I AND DE WAAL J

2013. *The Bill of Rights handbook* (6th ed). Cape Town: Juta.

CRYER R, FRIMAN H, ROBINSON D & WILMSHURST E

2014. *An Introduction to International Criminal Law and Procedure* (3rd ed). Cambridge: Cambridge University Press.

DUGARD J

2011. *International law: A South African Perspective* (4th ed). Cape Town: Juta.

GARNER BA

2004. *Black's Law dictionary* (8th ed). St Paul: Thomson West.

KOLB R & HYDE R

2008. *An Introduction to the International Law of Armed Conflicts*. Oxford: Hart Publishing.

O'KEEFE R

2015. *International Criminal Law*. Oxford: Oxford University Press.

SCHABAS WA

2009. *Genocide in international law: the crime of crimes* (2nd ed). Cambridge: Cambridge University Press.

SCHABAS WA

2010. *The International Criminal Court: A Commentary on The Rome Statute.* Oxford: Oxford University Press.

TSILONIS V

2019. *The Jurisdiction of the International Criminal Court*. The Hague, The Netherlands.

JOURNALS AND ARTICLES

APPEL BJ

2018. In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations? *Journal of Conflict Resolution* 62(1):3-28.

BASSIOUNI MC

1991. The Time Has Come for an International Criminal Court 1(1) *Indiana International & Comparative Law Review*: 1-43.

BIKUNDO, E

2012. The International Criminal Court and Africa: Exemplary Justice. *Law and Critique* 23(1):21-41.

BOISTER N

2012. International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court? *Criminal Law Forum* 23:295-318.

CONCANNON B

2000. Beyond Complementarity: The International Criminal Court and National Prosecutions, A View from Haiti. *Columbia Human Rights Law Review* 201:201-245.

DU PLESSIS M

2012. Implications of the AU decision to give the African Court jurisdiction over international crimes. *Institute for Security Studies Papers* 235:1-14.

DUTTON YM

2012. International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court? *Criminal Law Forum* 23:295-318.

EBOIBI FE

2012. Jurisdiction of the international Criminal Court: Analysis, loopholes and challenges. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 3:28-46.

GUILFOYLE D

2012. Somali Pirates as Agents of Change in International Law-making. *Cambridge Journal of International and Comparative Law:* 81-106.

KAUFMAN ZD

2018. The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations 16(1). *Journal of International Criminal Justice*: 93-112.

KEMP G

2017. South Africa South Africa's (Possible) Withdrawal from the ICC and the Form the ICC and the Future of the Criminalization and Prosecution of Crimes Against Humanity, War Crimes and Genocide Under Domestic Law: A Submission Informed by Historical, Normative and Policy Considerations. *Washington University Global Studies Law Review* 16(3):411-438.

LUBBE HJ

2014. Aantekening: Internasionale strafregtelike jurisdiksie vir die Afrika-hof: problematiese aspekte en die implikasies daarvan. *LitNet Akademies*: 223-238.

MARTIN MW AND JURGEN B

2012. The proposed International Criminal Chamber section of the African Court of Justice and Human Rights: a legal analysis. *South African Yearbook of International Law* 37(1):248-268.

MURUNGU CB

2011. Towards a Criminal Chamber in the African Court of Justice and Human Rights. *Journal of International Criminal Justice* 9(5):1067-1088.

NALDIA, GJ & MAGLIVERAS, KD

2012. The African Court of Justice and Human Rights: A Judicial Curate's Egg. *International Organizations Law Review* 9:383-449.

NEL M & SIBIYA VE

2017. Withdrawal from the International Criminal Court: Does Africa have an alternative? *African Journal on Conflict Resolution* 17(1):79-103.

NSEREKO DDN

2004. Triggering the jurisdiction of the International Criminal Court. *African Human Rights Law Journal* 4(2):256-274.

O'BRIEN M

2014. Where security meets justice: prosecuting maritime piracy in the International Criminal Court. *Asian Journal of International Law*: 81-102.

RICHARDSON L

2017. Offences against the Administration of Justice at the International Criminal Court: Robbing Peter to Pay Paul? *Journal of International Criminal Justice* 15:741-771.

SCHABAS WA

2008. Complementarity in practice': some uncomplimentary thoughts. *Criminal Law Forum* 19:5-33.

SSENYONJO M

2018. State Withdrawal Notifications from The Rome Statute of the International Criminal Court: South Africa, Burundi And the Gambia. *Criminal Law Forum* 29(1):63-19.

STONE L

2011. Implementation of the Rome Statute of the international criminal court in South Africa. *Prosecuting international crimes in Africa*: 305-330.

SWANEPOEL C F

2007. Universal jurisdiction as procedural tool to institute prosecutions for international core crimes. *Journal for Juridical Science* 32(1):118-143.

SWANEPOEL C F

2015. South Africa's obligation as member state of the International Criminal Court: the Al-Bashir controversy. *Journal for Juridical Science* 40(1-2):50-68.

SWANEPOEL C F

2017. Die Suid-Afrikaanse regering se agteruitgang in sy benadering tot die beskerming teen internasionale mense- en humanitêre regsvergrype met verwysing na Suid-Afrika se onttrekking uit die Internasionale Strafhof, die moratorium op die tribunaal van die Suider-Afrikaanse

Ontwikkelingsgemeenskap (SAOG) en die realistiese kans op die vestiging van ’n houdbare permanente Afrika-strafhof. *LitNet Akademies* 14(1):322-344.

SWANEPOEL C F

2018. The Prosecutor v Omar Hassan Ahmad Al-Bashir, International Criminal Court, July 2017. *De Jure* 51(1):173-184.

SWANEPOEL C F

2020. The "warm welcome by South Africa of the stealthy introduction of impunified disregard for and violation of fundamental rights": A legal-political commentary on the SADC Tribunal jurisprudence in South Africa. *Acta Academica* 51(1):165-179.

VAN DER VYVER, JD

2015. The Al Bashir debacle. *African Human Rights Law Journal* 15(2):559-579.

WENQI Z

2006. On co-operation by states not party to the International Criminal Court. *International Review of the Red Cross* 88(861):87-110.

WOOLAVER H

2018. Domestic and International Limitations on Treaty Withdrawal: Lessons from South Africa's Attempted Departure from the International Criminal Court. *American Journal of International Law* 11:450-455.

WULF H

2011. The Privatization of Violence: A Challenge to State Building and the Monopoly of Force’ 18(1). *Brown Journal of World Affairs*: 137-150.

ZAVALA O

2018. The Budgetary Efficiency of the International Criminal Court. *International Criminal Law Review* 18(3):461-488.

CONTRIBUTIONS IN COMPILATION WORKS

JALLOH CC, CLARKE KM & NMEHIELLE VO

2019. The African Court of Justice and Human and Peoples' Rights in Context. Cambridge University Press. New York.

WERLE G & VORMBAUM M (eds.)

2017. *The African Criminal Court. A Commentary on the Malabo Protocol*. The Hague, The Netherlands: T.M.C. ASSER PRESS.

WERLE G, FERNANDEZ M & VORMBAUM L (eds.)

2014. *Africa and the International Criminal Court*. The Hague, The Netherlands: T.M.C. Asser Press.

INTERNET SOURCES

AFRICA CENTRE FOR OPEN GOVERNANCE

2016: Seeking Justice or Shielding Suspects? An analysis of the Malabo Protocol on the African Court. http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf (accessed 16/03/2020).

AFRICAN UNION

Year Unknown. About the African Union. https://au.int/en/overview (accessed 10/03/2020).

AMNESTY INTERNATIONAL

2016. Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots. https://www.amnesty.org/ download/Documents /AFR016137 2017 ENGLISH.PDF (accessed 15/03/2020).

BBC NEWS REPORT

2002. African Union replaces dictators' club.

http://news.bbc.co.uk/2/hi/africa/2115736.stm (accessed 10/03/2020).

BIRYABAREMA E

2017. UK says killings in South Sudan conflict amount to genocide. https://www.reuters.com/article/us-southsudan-war/uk-says-killings-in-south-sudan-conflict-amount-to-genocide-idUSKBN17E2TF (accessed 20/10/2020).

CHRISTIE S

2011. SADC leaders slammed over tribunal shutdown. https://mg.co.za/article/2011-07-01-sadc-leaders-slammed-over-tribunal-shutdown/ (accessed 30/10/2020).

COALITION FOR THE INTERNATIONAL CRIMINAL COURT

Year unknown. History of the ICC. http://iccnow.org/?mod=icchistory (accessed 20/02/2020).

CONSTITUTIONALLY SPEAKING

2009.Transcript: CNN's Christiane Amanpour Interviews President Jacob Zuma on 25/09/09. https://constitutionallyspeaking.co.za/transcript-ccns-christiane-amanpour-interviews-president-jacob-zuma-on-250909/ (accessed 06/05/19).

DU PLESSIS M

2013. Africa and the International Criminal Court. http://www.csvr.org.za/mages/cjc/africa_and_the.pdf (accessed 31/01/2020).

NJERI JK

2014. The African Union's decision to support a court that provides immunity to heads of state undermines human rights. https://issafrica.org/iss-today/can-the-new-african-court-truly-deliver-justice-for-serious-crimes (accessed 27/07/2020).

NWAYO J

2019. Activation of the Crime of Aggression: African States the missing link!

https://www.kpsrl.org/blog/activation-of-the-crime-of-aggression-african-states-the-missing-link (accessed 20/10/20).

OCHI M

2016. Gravity Threshold Before the International Criminal Court: an Overview of the Court's Practice. http://www.internationalcrimesdatabase.org/upload/documents/20160111T115040-Ochi%20ICD%20Format.pdf (accessed 20/02/2020).

OCHIENG L

Year unknown. African Court No Substitute for ICC. https://iwpr.net/global-voices/african-court-no-substitute-icc (accessed 06/11/19).

PERMANENT MISSION OF THE PRINCIPALITY OF LIECHTENSTEIN TO THE UNITED NATIONS, GLOBAL INSTITUTE FOR THE PREVENTION OF AGGRESSION, LIECHTENSTEIN INSTITUTE ON SELF-DETERMINATION AT PRINCETON UNIVERSITY AND INSTITUTE FOR INTERNATIONAL PEACE AND SECURITY LAW

2019. Handbook Ratification and Implementation of the Kampala Amendments on the Crime of Aggression to the Rome Statute of the ICC. https://crimeofaggression.info/documents/1/handbook.pdf (accessed 20/10/20).

REEVES E

2016. Don’t Forget Darfur. https://www.nytimes.com/2016/02/12/opinion/dont-forget-darfur.html?_r=0 (accessed on 20/10/2020).

SAFI M

2017. Myanmar treatment of Rohingya looks like 'textbook ethnic cleansing', says UN. https://www.theguardian.com/world/2017/sep/11/un-myanmars-treatment-of-rohingya-textbook-example-of-ethnic-cleansing (accessed 20/10/2020).

SAFI M

2018. Myanmar Rohingya crisis: ICC begins inquiry into atrocities. https://www.theguardian.com/world/2017/sep/11/un-myanmars-treatment-of-rohingya-textbook-example-of-ethnic-cleansing (accessed 20/10/2020).

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

2016: Media Statement: South African Human Rights Commission expresses concern at South Africa's withdrawal from the International Criminal Court. https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/468-media-statement-south-african-human-rights-commission-expresses-concern-at-south-africa-s-withdrawal-from-the-international-criminal-court (accessed 10/07/2020).

SUYAK F

2019. How does the International Criminal Court answer criticisms that it is illegitimate? https://www.dw.com/en/how-does-the-international-criminal-court-answer-criticisms-that-it-is-illegitimate/a-48180371 (accessed 01/11/2020).

THE GLOBAL INSTITUTE FOR THE PREVENTION OF AGGRESSION

2019. Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression. https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/ (accessed 20/10/20).

TRUTH AND RECONCILIATION COMMISSION

2003. Truth and Reconciliation Commission Final Report, vol. 6. https://www.gov.za/sites/default/files/gcis_document/201409/trc0.pdf (accessed 30/10/2020).

TSILONIS V

2017. The awakening hypothesis of the complementarity principle. http://crime-in-crisis.com/en/wp-content/uploads/2017/06/62-VIICTOR-KOURAKIS-FS_Final_Draft_26.4.17.pdf (accessed 01/03/2020).

UNITED NATIONS

Year Unknown. United Nations office on Genocide Prevention and Responsibility to Protect: war Crimes. https://www.un.org/en/genocideprevention/war-crimes.shtml (accessed 08/11/19).

UNKNOWN AUTHOR

2014. Quiet death of an important SADC institution. https://mg.co.za/article/2014-08-29-quiet-death-of-an-important-sadc-institution/ (accessed 30/10/2020).

UNKNOWN AUTHOR

2019. ICC urged to investigate Syria's forced deportations. https://www.aljazeera.com/news/2019/3/8/icc-urged-to-investigate-syrias-forced-deportations#:~:text=Syria%20is%20not%20a%20member,world's%20first%20permanent%20criminal%20tribunal (accessed 01/11/2020).

UNKNOWN AUTHOR

2020. Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report. https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 01/11/2020).

VILJOEN F

2015. Five reasons why South Africa should not withdraw from the International Criminal Court Statute https://www.chr.up.ac.za/images/centrenews/2016/files/Five_reasons_why_South_Africa_should_not_withdraw_from_the_International_Criminal_Court_Statute.pdf (accessed 08/11/19).

WILMSHURST E

2019. Strengthen the International Criminal Court. https://www.chathamhouse.org/2019/06/strengthen-international-criminal-court (accessed 01/11/2020).

WITS SCHOOL OF GOVERNANCE

2018. The International Criminal Court and Accountability in Africa. <https://www.wits.ac.za/news/sources/wsg-news/2018/the-international-criminal-court-and-accountability-in-africa.html (accessed 10/12/2018).

LEGISLATION

African Union Convention on Preventing and Combating Corruption, 2003.

African Union, Protocol of the Court of Justice of the African Union, 11 July 2003.

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

Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

Charter of the United Nations, 1945.

Colombian Penal Code, 1967.

Consolidated Text of the Treaty of the Southern African Development Community, 2015.

Constitution of the Republic of South Africa of 1996.

Constitutive Act of the African Union, 1 July 2000.

Covenant of the League of Nations, 1919.

Draft Amended Statute of the African Court of Justice and Human and Peoples' Rights.

Draft Statute for the International Criminal Court, 1994.

France, Great Britain and Russia Joint Declaration, 1915.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949.

Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 1949.

Geneva Convention Relative to the Treatment of Prisoners of War, 1949.

German International Criminal Code (Völkerstrafgesetzbuch), 2002.

Implementation of the Geneva Conventions Act 8/2012.

Implementation of the Rome Statute of the International Criminal Court Act 27/2002.

Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill [B23- 2016].

International Crimes Bill [B 37—2017].

Organization of African Unity Convention for the Elimination of Mercenarism in Africa, 1977.

Organization of African Unity Convention on the Prevention and Combating of Terrorism, 1999.

Organization of African Unity Sirte Declaration, 1999.

Prevention and Punishment of the Crime of Genocide of 1948.

Prevention and Punishment of the Crime of Genocide of 1948.

Promotion of National Unity and Reconciliation Act 34/1995.

Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33/2004.

Protocol against the Illegal Exploitation of Natural Resources, 2006.

Protocol on Tribunal in the Southern African Development Community, 2000.

Report of The African Union High-Level Panel on Darfur (AUPD).

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005.

Rome Statute, 1988.

Statute of the International Criminal Tribunal for Rwanda, 1994.

Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993.

The Prevention and Combating of Torture of Persons Act 13/2013.

United Nations Commission on Human Rights E/CN.4/RES/1991/47.

United Nations Convention Against Corruption, 2005.

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

United Nations Convention against the Recruitment, Use, Financing, and Training of Mercenaries, 1989.

United Nations Convention Against Transnational Organized Crime, 2001.

United Nations Convention of the Law of the Sea 1982.

United Nations General Assembly Resolution 3314 of 1974.

United Nations International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, 1989.

United Nations Protocol for Trafficking in Persons, 2000.

United Nations Secretary-General, Report submitted pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704.

United Nations Security Council Resolution 1593 (31 March 2005) UNSC Doc. SC/RES/1593.

United Nations Security Council Resolution 808 (1993), UN Doc. S/25704.

United Nations South Africa: Withdrawal, C.N.786.2016.TREATIES-XVIII.10.

United Nations Vienna Convention on the Law of Treaties, 1969.

United Nations, General Assembly Resolution 3314 of 1974.

Universal Declaration of Human Rights (1948).

White Paper on South African Foreign Policy, Building a Better World: The Diplomacy of Ubuntu, 2011.

CASE LAW

Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2) [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC) (17 April 2014).

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) CR 2019/21.

Black Sash Trust v Minister of Social Development [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) (Black Sash 1).

City of Cape Town v Neville Rudolph and Others 2003 (11) BCLR 1236 (C).

Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09-139-Corr).

Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute (ICC-RoC46(3)-01/18-37).

Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09-3).

Decision ordering the release of Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fide'le Babala Wandu and Narcisse Arido, Bemba *et al* (ICC-01/05-01/13-703).

Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening) 2017 (1) SACR 623 (GP).

Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11.

European Court of Human Rights, Ireland v. the United Kingdom, 18 January 1978, Case No. 5310/71.

Government of the Republic of Zimbabwe v Fick (47954/2011, 72184/2011, 77881/2009) 2011 ZAGPPHC 76 (6 June 2011).

Government of the Republic of Zimbabwe v Fick and Others (657/11) [2012] ZASCA 122 (20 September 2012).

Government of the Republic of Zimbabwe v Fick and Others (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC).

Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (ICC-01/04).

Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable' (ICC-01/04-01/06).

Law Society of South Africa and Others v President of the Republic of South Africa and Others (20382/2015) [2018] ZAGPPHC 4; [2018] 2 All SA 806 (GP); 2018 (6) BCLR 695 (GP)

Law Society of South Africa and Others v President of the Republic of South Africa and Others (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC).

Michelot Yogogombaye v. the Republic of Senegal No. 001/2008.

Mike Campbell (Pvt) Ltd v Republic of Zimbabwe (2/2007) 2008 SADCT 2.

National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC)

Pheko and Others v Ekurhuleni Metropolitan Municipality and Others (No 3) [2016] ZACC 20.

Prosecutor v Omar Hassan Ahmed Al Bashir Case ICC-02/05-01/09-242 (13 June 2015).

Prosecutor v. Milutinovic, Ojdanic and Sainovic, Case No. IT-99-37-PT, Jurisdiction, Trial Chamber, 6 May 2003.

Prosecutor v. Ngeze and Nahimana, Case Nos. ICTR 96-27-AR72 and ICTR 96-11-AR72, 5 Sept. 2000.

Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Situation in Darfur (ICC-02/05-01/09-7 1/6 EO PT).
Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Situation in Darfur (ICC-02/05-01/09-96 1/6 RH PT).

The Azania Peoples Organisation (AZAPO) and 3 others v The President of the Republic of South Africa and 6 others, Constitutional Court of South Africa, Case CCT 17/96.

The Minister of Justice and Constitutional Development v The Southern African Litigation Centre (867/15) [2016] ZASCA 17.

The Prosecutor v Clement Kayishema and Obed Ruzindana, (Case No. ICTR-95-1-T).

The Prosecutor v Ignace Bagilishema (Case No. ICTR-95-1A-T).

The Prosecutor v Jean-Paul Akayesu (ICTR-96-4).

The Prosecutor v Radislav Krstić (Case No. IT-98-33-T).

The Prosecutor v Stakić (IT-97-24-A).

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

Tyrer v United Kingdom, Merits, App No 5856/72.

UNPUBLISHED DISSERTATIONS AND THESES

Swanepoel CF

2006. The Emergence of a Modern International Criminal Justice Order. Unpublished LLD dissertation University of the Free State, South Africa. https://scholar.ufs.ac.za/bitstream/handle/11660/1952/SwanepoelCF.pdf?sequence=1&isAllowed=y (accessed 11/12/2020).

VAN HAM T

2014. How Post-Colonial is the International Criminal Court? Unpublished LLM dissertation Radboud University, Nijmegen, Netherlands. https://theses.ubn.ru.nl/bitstream/handle/123456789/2827/Ham%2C_Tim_van_1.pdf?sequence=1 (accessed 01/03/2020).