

**BRIDGING THE GAP BETWEEN POLITICS AND INTERNATIONAL
CRIMINAL JUSTICE: A CLOSER LOOK AT ADVANCING THE
INDEPENDENCE OF THE PROSECUTOR OF THE
INTERNATIONAL CRIMINAL COURT**

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Declaration

I, WAYA NGUKU NDEGWA do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

CLAIRE ADIONYI

Abstract

The International Criminal Court is considered the embodiment of international criminal justice, fairness, rule of law, and impartiality. However, in recent times, these principles and values have tainted the view of the Court. There has been much dissatisfaction and discontent with the Court as it is viewed as a political Court rather than a Court which dispenses justice impartially. The root of the Court's tainted view lies with the fact that the Court is seen as a Court that makes political decisions rather than a Court which seeks to dispense justice. States have had questionable views with respect to the role of the Security Council which makes some of these decisions. Therefore, this paper assumed that the reason for the Court's tainted reputation is the lack of an independent Prosecutor.

This dissertation therefore aimed to investigate the following: whether the Security Council's powers should be transferred to the Prosecutor of the Court; whether the Prosecutor can further advance its independence under international law; and whether the Prosecutor should be able to foster new relations with states in order to obtain improved cooperation. Chapter 2 addressed the first issue, and found that the Security Council and the Court need to work hand in hand in the decision-making process of referring individuals responsible for international crimes. Chapter 3 found that in theory, the Prosecutor's independence would be advanced if they are able to prosecute crimes for individuals who have violated customary international law, however in practice, state sovereignty would override the mandate of the Prosecutor. Chapter 4 addressed the third question of improving relations with Africa, and the bias towards Africa was because most member states of the Statute are from Africa. The Chapter found that the Prosecutor and the AU need to foster continuous dialogue in order to ensure that impunity is not tolerated. Chapter 5 concludes the dissertation and recommends that the decision-making process of referring individuals to the Court would need input from states in order for them to cooperate with the Court, and ultimately allow the Court to be seen as an all-inclusive non-partisan Court.

List of abbreviations

ACHPR – African Court of Human and People’s Rights

ASP - Assembly of States Parties

AU – African Union

ICC – International Criminal Court

ICJ- International Court of Justice

ICL – International Criminal Law

ILC – International Law Commission

ICTY – International Criminal Tribunal for the former Yugoslavia

LRA – Lord Resistance Army

OTP – Office of the Prosecutor

PTC – Pre-Trial Chamber

RES – Resolution

SC – Security Council

UNGA – United Nations General Assembly

UNSC – United Nations Security Council

UNSG – United Nations Secretary General

UN – United Nations

UNGA -United Nations General Assembly

List of cases

A. Ad Hoc Tribunals

Prosecutor v. Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), International Criminal Tribunal for the Former Yugoslavia (ICTY), 2 October 1995.

B. International Court of Justice

Case Concerning the Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, ICJ Reports 1970.

Legal Consequences of The Construction of a Wall in the Occupied Palestinian Territory (2004), Advisory Opinion, ICJ Reports 2004.

Reservations to The Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951.

C. International Criminal Court

Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan 12 April 2019, ICC-02/17.

Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09.

The Prosecutor v Omar Hassan Ahmad Al Bashir, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011.

The Prosecutor v Omar Hassan Ahmad Al Bashir, Decision on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017 and ICC-02/05-01/09.

The Prosecutor v Omar Hassan Ahmad Al Bashir, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, 11 July 2016 and ICC-02/05-01/09.

The Prosecutor v. Saif Al-Islam Gaddafi, Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute, 5 April 2019, ICC-01/11-01/11.

List of legal instruments

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

Constitutive Act of the African Union, November 7 2000, OAU Doc. CAB/LEG/23.15.

Dakar Declaration for the Establishment of the International Criminal Court, 6 February 1998.

Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

Draft Decisions, Declarations, Resolution and Motion, Twenty Eighth Ordinary Session 30-31 January 2017, Assembly/AU/Draft/Dec.1

Resolution on the Ratification of the Treaty on the International Criminal Court, 24th Ordinary Session from 22nd – 31st October 1998 in Banjul Gambia, ACHPR/Res.27(XXIV)

Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6.

Rome Statute of the International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, at 10, 1 (2002), UN Doc PCNICC/2000/1/Add.1 (2000).

Statute of the International Court of Justice, 18 April 1946.

CHAPTER 1

1. Introduction

1.1 Background

The ICC is a permanent court which was established through a multilateral agreement, known as the Rome Statute, that entered into force on July 1, 2002.¹ The rationale behind the establishment of the ICC was the prosecution of individuals for the commission of crimes which affected and concerned the entire international community.² The initial building blocks towards the formation of the ICC included the Nuremberg and Tokyo Tribunals established after the Second World War.³ It was decided that the crimes the international community considered to be of serious concern as a whole must not undergo impunity.⁴ The ICC is a permanent Court which possesses institutional independence and enjoys distinct legal personality.⁵ Even though protecting the interests of states is the principal goal of public international law, the law must progressively aim to safeguard the interests of human beings.⁶

Despite the overall objective of the Court, it was been plagued with political problems. In 2017, the AU approved a plan during a summit in Addis Ababa for the mass withdrawal from the Court.⁷ The rationale behind withdrawing stemmed from the fact that out of the 10 official investigations on the ICC, all except one were focused on Africa.⁸ The summit heavily criticised the decisions of the Court to launch investigations and criticised the UNSC for being unwilling to address the concerns of African states.⁹

¹https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol30_2003/winter2003/irr_hr_winter03_usopposition/ on 6 December 2018.

² <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf> on 9 February 2019. The preamble of the Statute also provides that the court is the solution to preventing some of the atrocities experienced in the course of history, where millions of people have been victims of unimaginable atrocities that stunned humanities conscience.

³ The Second World War was a military conflict that was fought between States in the years 1939 till 1945.

⁴ Preamble, *Rome Statute*. These crimes of international concern are stated under Article 5 of the Rome Statute which includes: War Crimes, Genocide, Crimes against Humanity, and the Crime of Aggression.

⁵ Kreß C, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice' in Cassese A (eds) *The Oxford Companion of International Criminal Justice*, Oxford University Press, London, 2009, 143.

⁶ *Prosecutor v. Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), International Criminal Tribunal for the Former Yugoslavia (ICTY), 2 October 1995.

⁷ Fagiolo N, A "Big Fish Justice?" *The Thinker*, Quarter 3-2017 Vol. 73, 16.

⁸ Fagiolo N, A "Big Fish Justice?" 16.

⁹ Clarke K, Knottnerus A and Volder E, 'Africa and the ICC: An Introduction' in Clarke K, Knottnerus A and Volder E (eds) *Africa and the ICC Perceptions of Justice*, Cambridge University Press, Cambridge, 1.

Furthermore, besides the political criticism from the AU, the independence of the OTP has also been a serious concern for the Court. Problems with the OTP began when the ILC developed a draft Statute for the Court.¹⁰ Its provisions encompassed articles of the potential provisions of the Rome Statute. These articles revealed the potential conflict that would exist between the UNSC and the OTP when seeking to prompt the jurisdiction of the Court. Article 23(3) of the draft articles stated: “*No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.*”¹¹ This provision was met with mixed reactions from the drafters. Some members argued that it would not give the UNSC a veto over initiating prosecutions.¹² They also argued the provision is necessary for the UNSC to exercise their mandate under Chapter VII of the Charter.¹³ Other members argued that it was undesirable because the procedure for triggering the jurisdiction of the Court should not be prohibited through political decisions.¹⁴ Article 23 would later become a stepping stone to Article 16 of the Statute. Article 16 provides that the UNSC possesses powers of deferral, such that any investigation and/or prosecution cannot begin unless the UNSC adopts a resolution using their powers under Chapter VII of the UN Charter.¹⁵ The deferral power allows the UNSC to invoke its Chapter VII authority in making a referral, such that they become mandatory and binding expressions of international law.¹⁶ With this power, the UNSC narrows the discretion that the OTP has under the Statute in making decisions.¹⁷

1.2 Statement of the Problem

What are the institutional or administrative structures that exist in the Court which leads states to question the legitimacy of the Court? One questionable mechanism of the ICC is the power the UNSC possesses under Article 16. Despite the purpose of the UNSC being maintenance of

¹⁰ The Draft Statute was adopted in 1994 at its 46th session, and was submitted to the UNGA as part of the ILC’s report covering the work of that session. It is important to note here that this was only a draft.

¹¹ Article 23(3), *Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994*, 1994 vol. II (2).

¹² *Draft Statute for an International Criminal Court with commentaries*, ILC Report on the work of its 46th Session, 2005, vol. II, Part Two.

¹³ *Draft Statute for an International Criminal Court with commentaries*, ILC Report on the work of its 46th Session, 2005, vol. II, Part Two.

¹⁴ *Draft Statute for an International Criminal Court with commentaries*, ILC Report on the work of its 46th Session, 2005, vol. II, Part Two.

¹⁵ Article 16, *Rome Statute*.

¹⁶ Ohlin J, ‘Peace, Security and Prosecutorial Discretion’ Social Science Research Network, 2008, 189.

¹⁷ Ohlin J, ‘Peace, Security and Prosecutorial Discretion’ Social Science Research Network, 2008, 189.

international peace and coexistence,¹⁸ Article 16 has been a major point of contention since its inception and is the reason why some states, have opted to never become a party to the Treaty.¹⁹ The AU has also raised its concerns with regard to Article 16.²⁰

With respect to the OTP, they have power to initiate cases *proprio motu*²¹ or by referrals from state parties.²² Therefore, when the UNSC invokes its Chapter VII authority, it is not for the OTP to determine whether an investigation is appropriate given the “interests of justice” and the “interests of victims.”²³ This is exactly what the UNSC has already determined by invoking its Chapter VII authority to restore peace and security by making a referral to the court.²⁴ State obligation is crucial to the success of the Court.²⁵ Hence, when the UNSC exercises a power which other states question with hostility, it will affect the workings of the Court. The OTP has also issued reports to the UNSC stating that they have systematically failed to follow up on referrals of international crimes that it has made to the Court.²⁶

1.3 Statement of Objectives

The core objective that this paper seeks to investigate is whether the OTP is truly an independent organ of the Court separate from the functions of the UNSC. Further, this paper seeks to analyse potential decision-making processes that would advance the independence of the OTP.

¹⁸ Article 24, *Charter of the United Nations*

¹⁹ Fagiolo N, A “Big Fish Justice?” 16.

²⁰ Jalloh C, Akande D and Plessis M, ‘Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court’ Florida International University College of Law, 2011, 8. Available at

https://ecollections.law.fiu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1241&context=faculty_publications on 11 February 2019.

²¹ Article 15, *Rome Statute*. *Proprio motu* refers to cases initiated on the OTP’s discretion.

²² Article 14, *Rome Statute*.

²³ Article 53(1)(c), *Rome Statute*.

²⁴ Ohlin J, ‘Peace, Security and Prosecutorial Discretion’ Social Science Research Network, 2008, 189.

²⁵ Ngolo E, ‘Analysing the future of international criminal justice in Africa: A focus on the ICC’ 1 *Strathmore Law Review* 1, 2016, 109.

²⁶ *Twenty-seventh report pursuant to paragraph 8 of UN Security Council Resolution (UNSCR) 1593*, 4, 20 June 2018. The failure of following up on referrals has hindered the prosecution of suspects of crimes against humanity.

1.4 Justification of Study

Firstly, this paper questions why the ICC has been criticised by several countries. The criticism is of much concern such that the President of Rwanda, Paul Kagame alleged that the Court was “‘never about justice but politics disguised in justice.’”²⁷

This paper also questions whether the current setup of the ICC is the fundamental reason for the criticism and loss of confidence of the Court. For example, Sudan and Libya were referred to the ICC by the UNSC, where three of five countries (China, Russia and the US) are not even members of the Court.²⁸ Therefore, are international crimes triggered for political reasons?

1.5 Hypothesis

The UNSC use their referral and deferral powers under the Statute for political reasons. Thus, their powers should be transferred to the OTP, which would exercise this power with impartiality and freedom from influence, ensuring the ICC is not influenced by personal interests of member states that constitute the UNSC.

Furthermore, the independence of the OTP can only be realized if it means it should be able to cooperate more closely with countries and initiate investigations without statutory limitations.

1.6 Research Questions

The following are questions which this dissertation seeks to answer:

1. To what extent does the UNSC interfere as a political organ with the mandate of the OTP?
2. Should the OTP be able to initiate investigations beyond the scope provided for under Article 5 of the Rome Statute? And secondly, does the PTC interfere with the mandate of the OTP?
3. Should the OTP be able to foster/advance new methods of cooperation with international organizations and states, specifically in Africa?

²⁷ <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal> accessed on 19 February 2019.

²⁸ <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal> accessed on 19 February 2019. Even though the UNSC was determined to have leaders of the two countries charged with international crimes, critics have observed that efforts to refer countries like Syria have so far been frustrated by members of the UNSC.

1.7 Literature Review

Bergsmo and Kruger, argue that the Statute limits the OTP's powers.²⁹ They also stated that 'prosecutorial discretion is the principal manifestation of the statutory principle of prosecutorial independence.'³⁰ The power of prosecutorial discretion reflects the principles of prosecutorial independence.³¹ Prosecutorial independence is fundamental because the effectiveness of the criminal justice system lies on the OTP's responsibility.³²

Independence is a statutory principle integrated under Article 42(1) of the Statute where it provides that the OTP will act independently as a separate Court organ, and external sources shall not instruct any member of office.³³ However, according to Giuliano Turone, the independence of the OTP in the ICC system meets undoubtable limitations which deserve particular attention.³⁴

Turone argues that the Statute lacks a provision where it should consider the independence of the OTP in the performance of his/her investigative and prosecutorial functions, which needs to be protected and safeguarded from external attacks or limitations.³⁵ In other words, no provision of the Statute exists which would protect or safeguard the Prosecutor from limitations of independence or external attacks on its independence. The hypothesis presented in this paper argues that the independence of the OTP would be safeguarded if it obtained the powers the UNSC has under Chapter VII of the UN Charter.

The Rome Statute was also drafted paying very careful attention to the principle of state sovereignty and to the political primacy of the UNSC to limit in a significant way, the power and to affect the OTP independence.³⁶ Allisson Danner argues that there was scepticism that

²⁹ M. Bergsmo and P. Kruger, 'Article 54. Duties and Powers of the Prosecutor with Respect to Investigations' Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) 716. It is crucial to note here that their publication was written only a few years after the Rome Statute was ratified and was thus based on future predictions.

³⁰ M. Bergsmo and P. Kruger, 'Article 54. Duties and Powers of the Prosecutor with Respect to Investigations' 716.

³¹ M. Bergsmo and P. Kruger, 'Article 54. Duties and Powers of the Prosecutor with Respect to Investigations' 716.

³² Council of Europe, 'The role of Public Prosecution in the Criminal Justice System' Recommendation Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 4. Available at <https://rm.coe.int/16804be55a> accessed on 23 February 2019.

³³ Article 42, *Rome Statute*.

³⁴ Turone G, 'Powers and Duties of the Prosecutor' in Cassese A, Gaeta P and Jones J (eds) *The Rome Statute of the International Criminal Court: A commentary*, Volume II, Oxford University Press, New York, 2002, 1139.

³⁵ Turone, 'Powers and Duties of the Prosecutor' 1140.

³⁶ Turone, 'Powers and Duties of the Prosecutor' 1140.

an independent prosecutor would result in politically motivated proceedings.³⁷ On the other hand, Danner states that, advocates of the *proprio motu* power argued that limitation of the OTP's investigation powers to situations identified by overt political establishments by states and the UNSC would reduce the independence and the Court's credibility.³⁸

Furthermore, Turone also alleges that heavy conflicting interests exist between the independence of the OTP and national sovereignty of states, thereby affecting the function of the OTP. However, conflicting interests do not exist with the OTP but instead with the UNSC.³⁹

The independence of the OTP is highly jeopardised by the UNSC which is given a great power of obstruction of any potential investigation/prosecution through the adoption of a resolution, which is a power that exists under Chapter VII of the UN Charter.⁴⁰ The UNSC also possesses the power of veto under Article 27 of the UN Charter on substantive resolutions,⁴¹ which includes the interference of an initiative taken by the OTP. The powers of the UNSC therefore hinder the OTP from exercising their discretion and consequently interferes with their independence. Danner has argued that cases adjudicated by the ICC are pervaded with political consequences,⁴² therefore it is questionable whether the powers of the UNSC are justified yet the "OTP is a judicial, non-political organ with no political legitimation and liability."⁴³

Turone argues that the solution adopted by the Statute in relation to conflicting interests between the UNSC and the OTP is a difficult, complicated and contradictory compromise where the independence of the OTP as far as the investigation and prosecutorial powers are concerned, is far from being assisted by general system of institutional and protective safeguards.⁴⁴

³⁷ Danner A, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at The International Criminal Court' Guest Lecture Series of the Office of the Prosecutor, *icc-cpi.int*, 2005, 513.

³⁸ Danner A, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at The International Criminal Court' 513.

³⁹ For example, AU member states criticised the failure of the UNSC to respond to the AU requests resulted in African states to withhold cooperation from the Court with respect to Sudanese President Omar Al Bashir's arrest and surrender. See also Jalloh C, Akande D and Plessis M, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court' Florida International University College of Law, 2011, 5.

⁴⁰ Turone G, 'Powers and Duties of the Prosecutor' 1141.

⁴¹ Obura K, 'The Security Council and the International Criminal Court: When Can the Security Council Defer a Case?' 1, *Strathmore Law Journal*, 1, 2015, 122.

⁴² Danner A, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at The International Criminal Court' 510.

⁴³ Turone G, 'Powers and Duties of the Prosecutor' 1142.

⁴⁴ Turone G, 'Powers and Duties of the Prosecutor' 1143.

Shraga has also argued that the main question to examine with regard to the role of the UNSC is not what role politics play in determination of international criminal justice, but whether in playing its role, politics deprives the integrity of the judicial process and compromises its independence.⁴⁵ This paper argues that politics of the UNSC has affected the integrity of the judicial process thus the hypothesis formulated is that granting the OTP the powers of the UNSC is the solution.

Furthermore, Danner admits that the OTP sits at a crucial interval in the structure of the Court, where the pressure of law and politics congregate.⁴⁶ Danner underscores that the ability of the OTP to make personalised contemplations based on law and justice, rather than the self-interest or influence of any specific state (much like the members of the UNSC), transforms the Court from a political body wreathed with the trappings of justice to an institution with strong political undertones.⁴⁷ In other words, she argues that politics should not control the Court, rather the Court, through prosecutorial independence, should control politics.

1.8 Conceptual Framework

1.8.1 Concept of legality

The jurisprudence of the body of international criminal law is positivistic in nature and is based on the principle of legality.⁴⁸ Legality constitutes restraining from the arbitrary exercise of power by the judiciary.⁴⁹ This means that the powers of the UNSC should also not be arbitrary. In any modern legal system based on the principles of rule of law and democracy, investigation and prosecution should be supervised and carried on by a specific body whose nature is characterized by a balance between responsibility and independence.⁵⁰ Independence should be promoted by a system of institutional safeguards such as a Constitution.⁵¹ Therefore,

⁴⁵ Shraga D 'Politics and Justice: The Role of the Security Council' in Cassesse A (eds) *The Oxford Companion of International Criminal Justice*, Oxford University Press, London, 2009, 168.

⁴⁶ Danner A, 'Enhancing The Legitimacy and Accountability of Prosecutorial Discretion at The International Criminal Court' 510.

⁴⁷ Danner A, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at The International Criminal Court' 515.

⁴⁸ Jacobs D, 'Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories' in J. d'Aspremont and J. Kammerhofer (eds), *International Legal Positivism in a Post-Modern World*, Cambridge University Press, 2012, 4.

⁴⁹ Lingaas C 'Legal Positivism and Multidisciplinary Analysis in the Study of International Criminal Law: A Plea for an Integrative Approach' academia.edu, 4.

⁵⁰ Turone, 'Powers and Duties of the Prosecutor' 1139.

⁵¹ For example, in Kenya, under Article 157(10) of the Constitution, the DPP does not require consent of any person for commencing criminal proceedings and in the exercise of his or her powers or functions, and shall not be directed or controlled by any person or authority.

independence of the OTP stems from the principle of legality, such that there is a balance between the arbitrary exercise of control and the promotion of independence.

1.8.2 Separation of powers

In ICL, the OTP can be considered to constitute being a ‘judiciary.’⁵² Under Article 53, it is at the OTP’s discretion to decide whether there is reasonable basis to believe that a crime within the Court’s jurisdiction has taken place and the admissibility of the case under Article 17.⁵³

Therefore, they do make a decision to begin an investigation if there is a *prima facie* belief that crimes have been committed. In addition, the UNSC can be considered to be the executive, because they have power to make binding resolutions and also have the power to make referrals courtesy of their powers under Chapter VII of the UN Charter. However, this dissertation argues that the powers the UNSC has with respect to triggering prosecutions, are both judicial and executive in nature. Montesquieu in his spirit of laws has argued that when there is union between the legislative and executive powers in the same body or person, there can be no liberty.⁵⁴ Furthermore, this dissertation argues that prosecutorial discretion is limited due to the arbitrary power the UNSC has under Article 16. Montesquieu argues that if the judicial and executive power lies with one body, the life and liberty of the subject would be exposed to arbitrary control.⁵⁵ The ‘subject’ in this case refers to the ICC. Therefore, by applying Montesquieu’s separation of powers theory, the Court is subject to arbitrary control because the UNSC has legislative authority under Article 16, and also an executive power under Chapter VII. The fact that the Court is subject to arbitrary control, thereby limits the prosecutorial (or judicial) discretion held by the OTP.

1.9 Research Design and Methodology

The research which shall be undertaken is qualitative in nature, consisting of desktop research. The primary legal sources of data collection shall be used are legal instruments and court decisions. The secondary sources shall include books, journal articles, discussion papers, academic articles, reports, dissertations and theses, and internet sources.

1.10 Assumptions

This study assumes that the ICC will continue to function in the foreseeable future.

⁵² As per Article 42(3), they must have moral character, have extensive competence and experience in prosecuting trials of cases, and have possess outstanding knowledge and be fluent in the Court’s language.

⁵³ Article 53, *Rome Statute*.

⁵⁴ Montesquieu B and Secondat C, *The Spirit of Laws*, Batoche Books Kitchener, 2001, 173.

⁵⁵ Montesquieu B and Secondat C, *The Spirit of Laws*, 173.

1.11 Scope of Research/Limitations

Time is a limit which exists to conduct this research. Further, since most of the research is desktop research, there is a likelihood of bias as well as national prejudice from the various scholars whose opinions shall form most of the basis of the research.

1.12 Timeline/Duration

This paper shall be completed by December 2019.

1.13 Chapter Breakdown:

1.13.1 Chapter I

This Chapter gives an introduction and basic overview of the Court, the objectives that the paper seeks to address and the questions it seeks to answer in the subsequent chapters. It also addresses the political problems which plague the Court and identifies the factors that affect the independence of the OTP.

1.13.2 Chapter II

This Chapter will investigate whether decisions made by the UNSC have interfered with the independence of the OTP. The focus will be on analysing the discretionary powers of the UNSC under the Rome Statute. This chapter will analyse whether the UNSC have misused their powers ultimately interfering with the independence of the OTP.

1.13.3 Chapter III

This Chapter will investigate whether the OTP should have power to initiate criminal cases against individuals using a threshold in public international law. Furthermore, the chapter will analyse whether the PTC interferes with the independence of the OTP.

1.13.4 Chapter IV

This Chapter shall investigate whether there is a need for a new relationship between Africa and the OTP.

1.13.5 Chapter V

This Chapter will give its conclusions and provide a summary of the chapters discussed. This shall be followed by recommendations on the research problem.

CHAPTER II: SECURITY COUNCIL AND THE OFFICE OF THE PROSECUTOR: DOES THE FORMER INTERFERE WITH THE WORK OF THE LATTER?

2. Introduction

This chapter will investigate whether UNSC decisions have interfered with the independence of the OTP. The focus will be on analysing the powers of the UNSC under international criminal law. The UNSC have power to refer cases to the OTP stems from Chapter VII of the UN Charter.⁵⁶ The chapter will also focus on analysing the positive and negative impact of UNSC referrals, and their influence on the independence of the OTP. Furthermore, there shall be an analysis of the controversial deferral power under the UNSC with respect to its influence on the OTP.⁵⁷ The purpose of analysing the powers of the UNSC is with the goal of assessing whether the political powers of the UNSC have actually interfered with the mandate of the OTP.⁵⁸

2.1 Security Council Referrals and The Work of the OTP

This part shall be analysing whether referrals by the UNSC affect the mandate of the OTP.

It is important to note what constitutes independence of the OTP for the purposes of referrals being made. Independence extends beyond not seeking or acting on instructions of the UNSC: it means that the OTP decisions shall not be changed by the presumed or by any parties wishes.⁵⁹ In other words, the decision to prosecute an international crime shall not only be undertaken based on the instructions of the UNSC. It must also be done without the UNSC influencing the valuation by the OTP.

UNSC referrals are important because, with referrals, they are able to foster cooperation with the member state in question in ensuring crimes are effectively investigated and prosecuted.⁶⁰ Furthermore, they are binding in nature based on Article 25 of the UN Charter which binds

⁵⁶ Article 39 of the UN Charter gives the UNSC rights to maintain international peace and security, Article 13(b) of the Rome Statute gives the UNSC discretion to refer a matter concerning international crimes to the Court. The discretion is known as a referral.

⁵⁷ Article 16, *Rome Statute*.

⁵⁸ The mandate of the OTP is provided for under Article 42(1) of the Rome Statute, which states that the OTP shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.

⁵⁹ *Draft Policy Paper on Preliminary Examinations*, 4 October 2010, 6.

⁶⁰ Stahn C, 'Fair and Effective Investigation and Prosecution of International Crimes' International Nuremberg Principles Academy-
https://www.nurembergacademy.org/fileadmin/user_upload/Fair_and_Effective_Investigation_and_Prosecution_of_International_Crimes.pdf on 29 September 2019.

member states to carry out decisions made by the UNSC.⁶¹ Referrals are made in accordance with Chapter VII of the UN Charter, therefore they are binding on member states.⁶²

2.1.1 Positive impact of Security Council referrals on the work of the Prosecutor

The role of the UNSC under the UN Charter is: “*to determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken... to maintain or restore international peace and security.*”⁶³ This burden of maintaining peace and national security is conferred upon it by Members of the Charter.⁶⁴

The UNSC have used their power under Article 13 to refer the Court to crimes committed in Darfur (Sudan) and Libya through Resolutions 1593 and 1970.⁶⁵ Darfur and Libya have neither ratified the Rome Statute, but the UNSC referrals held them accountable for international crimes. Under both resolutions, the UNSC began the process of international criminal justice by referring the situation to the OTP.⁶⁶ Resolution 1593 provided: ‘the Government of Sudan and all parties to the conflict in Darfur, shall cooperate fully and provide any necessary help to the Court and the OTP.’⁶⁷ Further, Resolution 1970 provided: ‘the authorities in Libya shall fully cooperate with and provide any essential support to the Court and the OTP pursuant to the resolution...’⁶⁸ These two resolutions were fundamental to the work of the OTP to investigate international crimes, because it forced the two states to cooperate with the OTP. Previously stated, the Charter gives responsibility to the UNSC to foster international peace and security among Member states, and since Sudan and Libya are members of the Charter, both resolutions were binding.⁶⁹ Due to the binding nature of both resolutions, the two countries were forced to cooperate with the OTP.

⁶¹ Akande D, ‘The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities’ *Journal of International Criminal Justice* 2009, 341 —

<http://sites.uci.edu/internationaljustice/files/2012/11/Akande-Referrals-Immunities.pdf> on 29 September 2019.

⁶² Article 13(b), *Rome Statute*.

⁶³ Article 39, *Charter of the United Nations*.

⁶⁴ Article 24, *Charter of the United Nations*.

⁶⁵ <https://sites.uci.edu/internationaljustice/>, *The Council and the Court*, May 2013, 5.

⁶⁶ <https://sites.uci.edu/internationaljustice/>, *The Council and the Court*, May 2013, 6.

⁶⁷ UNSC S/RES/1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur Sudan, 1.

⁶⁸ UNSC S/RES/1970 (2011) on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya, 4.

⁶⁹ According to UN statistics, Sudan was admitted to membership of the UN on 12th November 1956, while Libya was admitted to the UN on 14th December 1955.

In a report addressed to the UNSC by the OTP, the report stated: ‘the OTP continues to cooperate with Libya and other states, as well as national and international organisations, to enhance the harmonisation of factfinding and prosecutorial strategies aimed at reducing the impunity gap for Rome Statute...’⁷⁰ These resolutions are an example of how states in the ILC Draft Commissions predicted that inclusion of the UNSC, would enable it to use their enforcement powers under Chapter VII to ensure all Member states are Court compliant and the OTP requests.⁷¹ Therefore, the UNSC resolution has positively contributed to the OTP exercising their mandate to investigate international crimes and cooperate with Libya.

2.1.1.2 Lack of Security Council enforcement and lack of state cooperation

Despite UNSC passing resolutions to foster international peace, the lack of zeal in UNSC follow ups on international cases, and state failure to cooperate with the Court lie in the argument proposed below by Louise Arbour.⁷² She highlights the main problems faced by international tribunals in prosecuting cases:

‘Committed as they purport to be to the ideal of international criminal justice, states are often unwilling to make the concrete contribution required of them, particularly if they are asked to disclose information that they view as politically embarrassing or adverse to their diplomatic or other interests.’⁷³ This inertia, ... is a major impediment to the ability of the Prosecutor to develop investigations in a timely and relevant fashion.’⁷⁴

Inasmuch as the UNSC has contributed to the OTP carrying out their mandate, the UNSC has failed to provide any substantial political, logistical, or legal sustenance for either investigations in both countries.⁷⁵ Despite Article 103 of the UN Charter giving binding Council resolutions over treaties, the Council confessed that they failed in resolution 1593 to

⁷⁰ *Seventeenth report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970*, 7, 8 May 2019.

⁷¹ Kirsch P and Robinson D, ‘Reaching Agreement at the Rome Conference’ in Cassese A, Gaeta P and Jones J (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Volume 1A, Oxford University Press, New York, 2002, 82.

⁷² Arbour L, ‘The Prosecution of International Crimes: Prospects and Pitfalls’ *Washington University Journal of Law & Policy*, 1999, 20, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1524&context=law_journal_law_policy on 25 July 2019.

⁷³ Arbour L, ‘The Prosecution of International Crimes: Prospects and Pitfalls’ 20.

⁷⁴ Arbour L, ‘The Prosecution of International Crimes: Prospects and Pitfalls’ 20.

⁷⁵ <https://sites.uci.edu/internationaljustice/>, *The Council and the Court*, May 2013, 7.

enforce a Chapter VII obligation of cooperation for UN members.⁷⁶ This failure by the UNSC has led to the Sudanese government showing disregard of Resolution 1593.⁷⁷

Ideally, although a state party agrees to be bound by the Court through ratifying the Statute, the ultimate decision to cooperate lies with the state.⁷⁸ Cooperation is vital for the OTP because their decision in preliminary examinations should not be influenced by the cooperation seeking process.⁷⁹

The significance of state cooperation is crucial to the success and functioning of the Court and strengthening independence of the OTP. Antonio Cassese has emphasised on this:

‘The decisions, orders and requests of international criminal courts can only be enforced by national authorities (or international organisations). Unlike domestic criminal courts, international tribunals have no enforcement agencies at their disposal: without the intermediary of national authorities, they cannot execute arrest warrants; they cannot seize evidentiary material, nor compel witnesses to give testimony, nor search the scenes where crimes have allegedly been committed. For all these purposes, international courts must turn to state authorities and request them to take action to assist the courts’ officers and investigators. Without the help of these authorities, international courts cannot operate.’⁸⁰

The PTC has also emphasised the importance of state cooperation:

‘States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to this Court when states have failed to prosecute those responsible for the crimes within its jurisdiction.’⁸¹

Aside from state cooperation, in an open address to the ICC President, it was stated that:

⁷⁶ securitycouncilreport.org, *The Rule of Law: The Security Council and Accountability*, January 2013, 30.

⁷⁷ securitycouncilreport.org, *The Rule of Law: The Security Council and Accountability*, January 2013, 30. The UNSC has however admitted that in the future, they should pursue a more consistent and vigorous line towards Sudan and states which disobey cooperation with the Court.

⁷⁸ Kimani P, ‘The Implications of Stripping Immunities of Heads of States on State Cooperation and the Effectiveness of Trial’ 1, *Strathmore Law Review* 2, 2016, 83.

⁷⁹ Draft Policy Paper on Preliminary Examinations, 4 October 2010, 6.

⁸⁰ Cassese A, ‘The Statute of the International Criminal Court: Some preliminary reflections’ *European Journal of International Law* (1999), 164 <http://ejil.org/pdfs/10/1/570.pdf> on 29 July 2019.

⁸¹ The Prosecutor v Omar Hassan Ahmad Al Bashir, *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, 12 December 2011, ICC-02/05-01/09.

‘A new chapter should be added to our relationship [relationship between UNSC and the OTP]. The OTP can make a substantial contribution, in proactively collecting information and monitoring situations under preliminary examination, and in investigating and prosecuting those most responsible for the most serious crimes.’⁸²

2.2 Impact of deferrals on the independence of the OTP

Article 16 of the Rome Statute provides that UNSC have the power to defer a case to the Court through a resolution under Chapter VII of the UN Charter. A prosecution cannot commence without UNSC approval.⁸³

Article 16 has been described as an intrusion by a political organ with the independent exercise of the Court’s jurisdictional function.⁸⁴ It is considered to be an interference being subordinated to a political body’s actions.⁸⁵

The decision to include Article 16 in the Statute was not an easy decision to arrive on as it included a compromise.⁸⁶ During the negotiations on the draft ILC articles, some states were concerned that ‘no similar priority was given to the UNSC under Article 12 of the UN Charter with respect to judicial decisions on legal questions to be rendered by the International Court of Justice.’⁸⁷ Doubts also existed as to whether Article 16 grants the OTP any choice in its decision to withhold or continue prosecution before the Court after a Chapter VII request.⁸⁸ The compromise that Article 16 gave was a balance between preserving a role for the UNSC to maintain peace and security without subjecting the Court to decisions made by the UNSC.⁸⁹

⁸² Mochokocho P, ‘Open Debate of the United Nations Security Council on “Peace and Justice, with a special focus on the role of the International Criminal Court”’ <http://iccnow.org>, 17 October 2012, http://iccnow.org/documents/Phakiso_Mochochoko_at_UNSC_17102012_2_.pdf on 28 July 2019.

⁸³ Article 16, *Rome Statute*.

⁸⁴ Condorelli L and Villalpando S, ‘Referral and Deferral by the Security Council’ in Cassese A, Gaeta P and Jones J (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Volume 1A, Oxford University Press, New York, 2002, 648.

⁸⁵ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, 28.

⁸⁶ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, General Assembly 50th Session, 1995, 25, UN Doc A/50/22.

⁸⁷ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, General Assembly 50th Session, 1995, 25, UN Doc A/50/22.

⁸⁸ Stahn C, ‘The Ambiguities of Security Council Resolution 1422 (2002)’ *European Journal of International Law*, 2003, 102, <http://ejil.org/pdfs/14/1/410.pdf> on 31 July 2019.

⁸⁹ Kirsch P and Robinson D, ‘Reaching Agreement at the Rome Conference’ 82.

States have also argued that the preservation of peace and security in the international community might require that the UNSC allow individuals who have committed these crimes to escape prosecution.⁹⁰

The rationale behind a deferral of the UNSC is that a request under Chapter VII implies the notion that prosecution by the ICC would interfere with efforts by the UNSC to fulfil their duty of international peace and security.⁹¹ Therefore, the UNSC ultimately decides whether or not to refer a case.

2.3 The Controversy of Resolution 1422

One of the controversial uses of the deferral power that the UNSC have used was in relation to a resolution they passed which gave immunity to peacekeepers.⁹² This resolution called for the Court to defer any exercise of jurisdiction for 12 months if a case arises that involved current or former officials from a state not party to the Rome Statute over acts or omissions relating to a UN peacekeeping mission.⁹³ Before the resolution was passed, the UNSG sent a letter to the US Secretary of State, highlighting some of the controversial proposals that the US had given with regard to Article 16 deferral powers of the UNSC and the independence of the OTP. It stated:

The United States has put forward a proposal invoking the procedure laid down in Article 16 of the Rome Statute of the ICC. This provision means that the UNSC can intervene to prevent the Prosecutor of the ICC to proceed with a particular case. The article, which is meant for a completely different situation, is now proposed to be used by the Security Council for a blanket resolution, preventing the Prosecutor from pursuing cases against personnel in peacekeeping missions.⁹⁴

Therefore, Resolution 1422 was contrary to the mandate of the OTP. Independence means being free from interference by a state or political organ like the UNSC, such that the OTP should be able to exercise their powers free from the political opinions or views of the UNSC.⁹⁵

⁹⁰ Yavas E, 'The Critical Analysis of the Relationship between the International Criminal Court and the United Nations Security Council' <https://dergipark.org.tr/download/article-file/155619> on 27 July 2019.

⁹¹ Obura K, 'The Security Council and the International Criminal Court: When Can the Security Council Defer a Case?' 129.

⁹² UNSC S/RES/1422 (2002) United Nations Peacekeeping, 1.

⁹³ Shaw M, *International Law*, 6 ed, Cambridge University Press, New York, 2008, 414 note 94.

⁹⁴ Stahn C, 'The Ambiguities of Security Council Resolution 1422 (2002)' 92 note 26.

⁹⁵ *Draft Policy Paper on Preliminary Examinations*, 4 October 2010, 6.

The problem brought by the resolutions was that it prevented the OTP from initiating a case *proprio motu* because the UNSC has established a rule that grants immunity to a few selected states. This immunity would prevent the OTP from prosecuting a case if it was in the ‘interests of justice.’⁹⁶ The threshold of interests of justice shall be elaborated on in the chapter that follows. Resolution 1422 not only critically limited the independent prosecutorial powers of the Court, a major achievement of the Conference in Rome, but it questioned the principle of equality before the law.

Therefore, Resolution 1422 prevented prosecutorial discretion for a matter which would have been in the interest of justice.

2.3.1. The exception of deferrals to Kenya and Uganda

Besides Resolution 1422, there has been cases where the UNSC has declined to use the power of deferral, in favour of international prosecutions. These cases include Kenya and Uganda. These two cases involved the UNSC declining to invoke Article 16 for the purposes of international prosecution. In Kenya, the OTP decided to open a case *proprio motu* by investigating the 2007-08 post-election violence.⁹⁷ Kenya objected to this and requested the UNSC to defer the case for one year.⁹⁸ The UNSC rejected Kenya’s request and instead advised Kenya to seek grounds for stopping an investigation under Article 19 on grounds of jurisdiction and admissibility.⁹⁹ Similarly, in Uganda, the Court issued warrants of arrest for members for the LRA, however their request to drop these arrest warrants were rejected by the OTP.¹⁰⁰ In these two cases, it is evident that the independence of the OTP was respected by the UNSC deciding not to intervene in the situation.

Despite the UNSC respecting the mandate of the OTP and its independence, problems still exist for the OTP with regards to initiating cases in countries that are not members to the Statute.¹⁰¹

⁹⁶ Article 53(c), *Rome Statute*. Before, initiating an investigation, the Prosecutor will decide whether it is in the interests of justice.

⁹⁷ Obura K, ‘The Security Council and the International Criminal Court: When Can the Security Council Defer a Case?’ 138.

⁹⁸ Obura K, ‘The Security Council and the International Criminal Court: When Can the Security Council Defer a Case?’ 138.

⁹⁹ Obura K, ‘The Security Council and the International Criminal Court: When Can the Security Council Defer a Case?’ 138.

¹⁰⁰ <https://www.securitycouncilreport.org/chronology/lra-affected-areas.php?page=3> on 3 August 2019

¹⁰¹ Syria for example is not a party to the Rome Statute, however there has been international pressure to call for the Syrian President to be referred to the ICC, but members of the UNSC, such as the US and Russia are against this motion. See <https://www.alaraby.co.uk/english/news/2018/1/27/un-chief-syria-should-be-referred-to-the-icc> accessed on 3 August 2019 and <https://www.bbc.com/news/world-middle-east-47483714> accessed on 3 August 2019.

2.4 Conclusion

In conclusion, the OTP and the UNSC must work collaboratively in order to sustain criminal justice. The UNSC cannot and should not interfere with the mandate of the OTP, because the mandate of the UNSC is to respect and uphold the provisions of the UN Charter. In addition, the research has attempted to show the positive and negative impact that the powers of the UNSC have on the OTP. Based on the evidence provided, referrals would only complement the work of the OTP if the UNSC enforces cooperation from the states liable. The lack of zeal by the UNSC in the situations of Libya and Sudan has resulted in the lack of criminal prosecution, leading to no justice for the victims of the wars. Furthermore, UNSC deferrals would promote independence of the OTP if the UNSC did not use this power for political reasons, such as promoting autonomy as they tried through resolution 1422. Instead, deferrals should be limited, and the opinions of the OTP and the Court should be taken into consideration before the UNSC exercises a deferral. It should not be used abruptly and arbitrarily. Based on the conceptual framework provided in the previous chapter, separation of powers is crucial to the effectiveness and reputation of the ICC. Consultation is key between the UNSC and the OTP in fulfilling the overall mandate of the Court in bringing perpetrators to justice.

CHAPTER THREE: ADVANCING PROSECUTOR INDEPENDENCE THROUGH INTERNATIONAL LAW PRINCIPLES; AND ESTABLISHING CLEAR BOUNDARIES WITH THE JUDICIAL ARM OF THE COURT

3.1 Introduction

The objective of this chapter is to assess whether granting the OTP powers to initiate crimes outside the Court's jurisdiction would advance its independence. As the previous chapter highlighted, international crimes have been committed with no sufficient investigation and thus no conviction.¹⁰² Having in mind that the goal of the Rome Statute is that serious crimes that alarm the international community must not go unpunished,¹⁰³ this chapter seeks to investigate whether this mandate of the Rome Statute can be achieved if the OTP is able to initiate crimes universally without any statutory restrictions. It is important to keep in mind that the OTP can only initiate crimes in accordance with the Statute.¹⁰⁴ *Proprio motu* can only be exercised by the OTP if the country is a member of the Rome Statute or if the country has accepted the jurisdiction of the Court.¹⁰⁵ Compared to the UNSC, these requirements are not necessary.¹⁰⁶ Furthermore, the OTP does not have capacity to authorise investigations as it requires judicial approval from the PTC.¹⁰⁷ Therefore, this chapter seeks to investigate the circumstances under which the OTP should initiate investigations without satisfying the procedural requirements of the Statute.

In addition, the relationship between the PTC and the OTP shall be assessed in order to determine whether judicial approval of the Court hinders the independence of the OTP.

3.2 Circumstances under which the OTP can prosecute international crimes

Before analysing whether the OTP should prosecute international crimes outside the provided functions provided in the Statute, it is crucial to break down the provisions of the Statute that relates to the initiating investigations. Article 53 highlights the threshold under which the OTP can start an investigation. The OTP shall institute an investigation if a reasonable basis

¹⁰² The previous chapter highlighted that crimes committed in Darfur, Sudan and Libya have not been properly investigated due to lack of cooperation with the Court, as there has been no justice for victims of war in both countries.

¹⁰³ Preamble, *Rome Statute*.

¹⁰⁴ See generally Article 13, 14, and 15 of the *Rome Statute*.

¹⁰⁵ Understanding the International Criminal Court

<https://www.icccpi.int/iccdocs/PIDS/publications/UICCEng.pdf> on 6 October 2019.

¹⁰⁶ See generally Article 13 and Article 16 of *Rome Statute*.

¹⁰⁷ Article 15(4), *Rome Statute*.

exists.¹⁰⁸ In order for there to be a reasonable foundation, Article 53 highlights the criteria which the OTP shall satisfy before instituting a case before the PTC. It includes: Article 53 provides:

- a) The information made available to the OTP provides a reasonable basis to believe a crime within the Court's jurisdiction was committed;¹⁰⁹
- b) The case would be admissible under Article 17.
- c) Notwithstanding the interests of the victims and gravity of the crimes, the OTP has substantial reasons to believe that the investigation is in the interests of justice.¹¹⁰

With regards to sub-article 53(1)(b), Article 17 highlights instances where a case would be inadmissible. An investigation cannot proceed with the Court if the crime committed is being tried by the state which has criminal jurisdiction over it. The Court would only step in where the state is unwilling or unable to prosecute and carry out the investigation and/or prosecution.¹¹¹

If this 3-part conjunctive test is satisfied, the OTP is obligated to inform the PTC. The reasonable basis mechanism shall have only been satisfied by the PTC, if it is satisfied upon examination of the three elements under article 53 of the Statute.

Furthermore, if the criteria established above has failed to be satisfied, the OTP must inform the PTC.¹¹²

3.2.1 *Jus Cogens* as additional criteria for prosecuting international crimes

In addition to the three elements under article 53, this paper proposes a fourth criteria for determining whether or not to proceed with an investigation. One of these principles are *jus cogens* norms. *Jus cogens* are 'a set of rules which are peremptory in nature from which no derogation is allowed under any circumstances.'¹¹³ Under this doctrine, states must respect essential principles that are shared among the international community.¹¹⁴ The paper proposes

¹⁰⁸ Article 53(1), *Rome Statute*.

¹⁰⁹ The information made available to the OTP normally comes from Commissions of Inquiry. For example, the information on whether there was a reasonable basis to proceed in Darfur, Libya and Kenya all came from Commissions of Inquiry.

¹¹⁰ Article 53(1), *Rome Statute*.

¹¹¹ Article 17(1)(a), *Rome Statute*.

¹¹² Article 53(2), *Rome Statute*.

¹¹³ Hossain K, 'The Concept of *Jus Cogens* and the Obligation Under the U.N. Charter' 3 *Santa Clara Journal of International Law* 1, 2005, 73.

¹¹⁴ Hossain K, 'The Concept of *Jus Cogens* and the Obligation Under the U.N. Charter' 73.

that the crimes under Article 5 which fall within the Court's jurisdiction, should be made *jus cogens* norms. There exists a consensus that has disclosed that 'genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture' are part of *jus cogens*.¹¹⁵ Under principles of international law, *jus cogens* only applies to treaties, however the ILC has advocated for these norms to apply beyond the law of treaties to state responsibility.¹¹⁶ The ILC have proposed that:

“An internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by the community as a whole constitutes an international crime.”¹¹⁷

The ILC has also proposed that when states breach their international obligation which result from international crimes, it would be essential to protect the international community. Protecting the interests of the international community has a close link with the doctrine of *jus cogens*.¹¹⁸

Furthermore, *jus cogens* and the doctrine of *obligato erga omnes* can be said to be 'two sides of the same coin'.¹¹⁹ *Obligato erga omnes* was defined by the ICJ as obligation of states towards the whole international community.¹²⁰ The ICJ has established some of the crimes which have achieved the level of *jus cogens* and that states have a duty to the international community to never derogate with regard to this crime.¹²¹ One of such crimes is genocide, which the ICJ has held to be a peremptory norm which states cannot derogate from.¹²² While

¹¹⁵ See generally Bassiouni C, 'International Crimes *Jus Cogens* and *Obligatio Erga Omnes*' sos-attentats.org, 267 and *Draft Code of Crimes against the Peace and Security of Mankind with commentaries* 1996.

¹¹⁶ Hossain K, 'The Concept of *Jus Cogens* and the Obligation Under the U.N. Charter' 76.

¹¹⁷ Article 19(2), *Draft Articles on State Responsibility*.

¹¹⁸ Hossain K, 'The Concept of *Jus Cogens* and the Obligation Under the U.N. Charter' 76.

¹¹⁹ Bassiouni C, 'International Crimes *Jus Cogens* and *Obligatio Erga Omnes*' sos-attentats.org, 270.

¹²⁰ *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, Preliminary Objections, ICJ Reports 1970, 32.

¹²¹ *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, Preliminary Objections, ICJ, 33.

¹²² *Reservations to The Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 12.

jus cogens and *obligato erga omnes* complement each other, they are distinct.¹²³ To consider them as synonyms is a risk to undermine the legal distinctiveness of each category.¹²⁴

In theory, the OTP should have the capacity to initiate an investigation solely on the basis of the crime being a *jus cogens* norm. This norm does not need states to be signatories to the Rome Statute as they are binding by nature. Because *jus cogens* is binding on states, it would force all states in breach of *jus cogens* to cooperate with the Court. In principle, states cannot be bound to treaties without their consent.¹²⁵ However, the implementation of *jus cogens* in order to force state cooperation is harder in practice. The principle of state sovereignty would enable states to be able to refuse cooperation with the Court. Instead, *jus cogens* would impose a duty on states to assist agents of international order (in this case it would be the OTP or the ICC) that have a right to seek reparation from violation of *jus cogens*.¹²⁶ States have a duty to refuse acknowledgement of a situation made by a grave breach of an obligation stemming from a peremptory norm of General International Law.¹²⁷ Based on this refusal, the OTP would be mandated to investigate the grave breach of international law, if the state itself cannot investigate the breach in itself.

The ICJ has not ruled on serious violations of *jus cogens* norms but has ruled on the violation of *obligato erga omnes*. As mentioned earlier, they are two sides of the same coin. In the ICJ case of *Legal Consequences of The Construction of a Wall in the Occupied Palestinian Territory*, the Court issued an advisory opinion on Israel violating *obligato erga omnes* because they disrespected and disregarded the self-determination of the people of Palestine.¹²⁸ With regards to the violation, the ICJ held that they are “to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”¹²⁹ Consequently, states have a duty to ensure that

¹²³ Mwenedata A and Sehorana J, ‘The Determination and Enforcement of *jus cogens* norms for effective human rights protection’ 21 *IOSR Journal Of Humanities And Social Science* 8, 2016, 76.

¹²⁴ Mwenedata A and Sehorana J, ‘The Determination and Enforcement of *Jus Cogens* Norms for Effective Human Rights Protection’ 76.

¹²⁵ *Reservations to The Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ, 6.

¹²⁶ Mwenedata A and Sehorana J, ‘The determination and enforcement of *jus cogens* Norms for effective human rights protection’ 77.

¹²⁷ Article 41(2), *Draft Articles on State Responsibility*.

¹²⁸ *Legal Consequences of The Construction of a Wall in the Occupied Palestinian Territory* (2004), Advisory Opinion, ICJ Reports 2004, 67.

¹²⁹ *Legal Consequences of The Construction of a Wall in the Occupied Palestinian Territory* (2004), Advisory Opinion, ICJ Reports 2004, 67.

they respect these principles. Due to the nature of *jus cogens* and *obligato erga omnes*, they cannot compel or force states to cooperate with the OTP or the Court.

In Libya, Sudan, and Kenya, these countries could have been said to have violated *jus cogens* based on the reports by commissions of inquiries provided by each state.¹³⁰ If these crimes have been said to have achieved a *jus cogens* nature, then these states would have been forced to prosecute the nationals accountable for the crimes.

3.3 The role of the Pre-Trial Chamber and the OTP

This part of the chapter shall analyse the role of the PTC when receiving requests from the OTP in order to initiate an investigation. The PTC acts as a jurisdictional hurdle to the functioning of the OTP.¹³¹ Where the OTP is of the opinion that a reasonable basis to proceed with the investigation exists, a request is forwarded to the PTC in order to authorize the investigation, along with necessary supporting evidence.¹³² If the PTC, upon examination of evidence provided by the OTP, is of the opinion that the case falls within the jurisdiction of the Court, it shall authorize the start of the investigation, subject to jurisdiction and admissibility requirements under Article 18.¹³³ The PTC is also entitled to refuse the commencing of an investigation, subject to the OTP presenting new evidence.¹³⁴

Furthermore, where a state has requested the OTP to intervene with investigations of nationals in a state, the OTP upon application to the PTC for approval, shall authorize the investigation.¹³⁵ In addition, the grounds upon which the PTC shall examine when deciding whether or not to authorize an investigation includes the admissibility test under Article 17.¹³⁶ Article 17 “acts a gatekeeper between a state’s primary duty to investigate and prosecute international crimes, and the Prosecutor’s independent ability to step in when that state is unable or unwilling to do so.”¹³⁷ Furthermore, an authorization to an investigation cannot be

¹³⁰ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 18 September 2004, Report of the International Commission of Inquiry on Libya, 8 March 2012, and The Kenyan Commission of Inquiry into Post-Election Violence, February 28, 2008. These commissions established that rape, murder, and other crimes against humanity were committed in each state

¹³¹ Bergsmo M, ‘Preliminary Observations on the Powers and Role of the Prosecutor of The International Criminal Court’ <https://www.legal-tools.org/doc/6cfff4b/pdf/> on 8 October 2019.

¹³² Article 15(3), Rome Statute.

¹³³ Article 15(4), Rome Statute.

¹³⁴ Article 15(5), Rome Statute.

¹³⁵ Article 18(2), Rome Statute.

¹³⁶ Article 17, Rome Statute.

¹³⁷ Ventura M ‘The ‘Reasonable Basis to Proceed’ Threshold in the Kenya and Côte d’Ivoire Proprio Motu Investigation Decisions: The International Criminal Court’s Lowest Evidentiary Standard?’ Social Science Research Network, 2013, 3.

approved by the PTC unless a state has failed to challenge the case's admissibility.¹³⁸ Therefore, it is clear the Rome Statute included a judicial obstacle for the OTP with regard to commencing investigations. If a matter successfully passes the jurisdictional limitations of the PTC and an investigation has begun, the OTP in principle shall be able to take control of the investigation and monitor its conduct.¹³⁹

The PTC has given rulings on admissibility in numerous cases. In the Libyan case, the PTC rejected admissibility claims by Gadaffi and stated that his defence team failed to satisfy that the case was inadmissible.¹⁴⁰ Therefore, it paved way for the OTP to have discretion in conducting investigations after the PTC gave judicial approval.

Furthermore, the PTC has established that besides a state's unwillingness or incapacity to prosecute a case, determining the gravity of the offence is crucial. The gravity assessment is mandatory in determination of whether the case is admissible by the PTC.¹⁴¹ The OTP demonstrates gravity in preliminary examinations "by the level of responsibility of potential offenders, the number and the seriousness of the crimes, the possible responsibilities within the command structure, and the impact on the victims."¹⁴²

3.3.1 Do inconsistent decisions by Pre-Trial Chamber become a conundrum for the independence of the OTP?

As mentioned earlier, the purpose of the PTC is to make decisions on whether preliminary examinations are admissible and whether they should be authorized. However, the PTC has been inconsistent with authorizing investigations for the OTP. Specifically, the analysis shall be on how the PTC has construed interpretation of 'interests of justice' under Article 53(1)(a) of the Statute. Interests of justice is the third element to satisfy for the OTP to initiate an investigation. According to OTP, the interpretation of 'interests of justice' is guided by the normal meaning of the words in line with the object and purpose of the Rome Statute.¹⁴³ The preamble of the Statute provides that state parties should be determined to put to an end

¹³⁸ Article 19, *Rome Statute*.

¹³⁹ Bergsmo M, 'Preliminary Observations on the Powers and Role of the Prosecutor of The International Criminal Court' <https://www.legal-tools.org/doc/6cff4b/pdf/> on 8 October 2019, 33.

¹⁴⁰ The Prosecutor v. Saif Al-Islam Gaddafi, *Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute*, 5 April 2019, ICC-01/11-01/11, 28.

¹⁴¹ *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 March 2010, ICC-01/09, 26.

¹⁴² *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 March 2010, ICC-01/09, 27.

¹⁴³ *Policy Paper on the Interests of Justice*, September 2007, 4.

impunity for grave crimes to the international community and work towards their prevention.¹⁴⁴ Furthermore, state parties must “guarantee lasting respect for and the enforcement of international justice.”¹⁴⁵ These two objectives guide the OTP in deciding whether an potential case would be in the interests of justice. In addition, other explicit factors that the OTP takes into account include: the gravity of the crime, the interests of victims, and the particular circumstances of the accused.¹⁴⁶ The PTC has given inconsistent decisions regarding interests of justice on two separate occasions. Their interpretation of this doctrine in *Kenya’s* case and in *Afghanistan’s* case represent two different extremes of this doctrine. Interests of justice is the threshold that the OTP uses for preliminary examinations. It is a factor that guides the OTP in determining whether a case is reasonable or not to proceed.

In the *Kenya* decision, the PTC established that it is at the discretion of the OTP to construe what entails ‘interests of justice’ and that the only obligation the OTP has is to inform the PTC.¹⁴⁷ The OTP is obligated to inform the PTC whether a case is or is not in the interests of justice.¹⁴⁸

However, in the *Afghanistan* decision, the PTC held that:

‘The current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited. Accordingly, it is unlikely that pursuing an investigation would result in meeting the objectives listed by the victims favouring the investigation, or otherwise positively contributing to it...

This, far from honouring the victims' wishes and aspiration that justice be done, would result in creating frustration and possibly hostility vis-a-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve.’¹⁴⁹

In other words, the PTC established that the mandate of the Court, which is ensuring that serious crimes do not go unpunished, would not be achieved. Despite the Chamber highlighting that the OTP took great lengths in their preliminary examinations, it would prove to be an

¹⁴⁴ Preamble, *Rome Statute* and *Policy Paper on the Interests of Justice*, September 2007, 4.

¹⁴⁵ *Policy Paper on the Interests of Justice*, September 2007, 4.

¹⁴⁶ *Policy Paper on the Interests of Justice*, September 2007, 4-7.

¹⁴⁷ *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 March 2010, ICC-01/09, 28.

¹⁴⁸ *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 March 2010, ICC-01/09, 28.

¹⁴⁹ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 April 2019, ICC-02/17, 30.

unsuccessful affair for the OTP in conducting a successful investigation.¹⁵⁰ This decision proves to be inconsistent with safeguarding the independence of the OTP. The *Afghanistan* decision proves to be a violation of the separation of powers doctrine established in the conceptual framework. Ideally, the purpose of the PTC is to authorise investigations the OTP has conducted, which shall be done if the requirements under Article 53(1) are fulfilled.¹⁵¹ By the PTC holding that the OTP would not be in a position to conduct a successful investigation due to co-operation, the PTC is overstepping its mandate enshrined under Article 15. It is the mandate of the OTP to enforce state co-operation.¹⁵² Furthermore, the PTC argued that victims who would cooperate willingly with the OTP in their investigation will lose hope and expectations of justice due to difficulties the OTP would have in obtaining evidence.¹⁵³ This loss of expectation would result in hostility towards the Court and negatively impact the goals of the OTP and the Court in general.¹⁵⁴ The problem with the PTC's argument of unrealistic expectations contributing to hostility, is that it would lead to any situation being subject to an investigation.¹⁵⁵ The Court as an institution itself is structurally incapable of meeting expectations of victims and even less with providing reparations for their loss.¹⁵⁶ By the PTC basing their argument that victims of war would not get justice, they overstepped the mandate of the OTP in deciding what would be best for the victims. Therefore, the PTC erred in their decision by interfering with the independence of the OTP in determining whether or not it should conduct investigations.

¹⁵⁰ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 April 2019, ICC-02/17, 29.

¹⁵¹ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 April 2019, ICC-02/17, 11.

¹⁵² Article 87, *Rome Statute*.

¹⁵³ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 April 2019, ICC-02/17, 31.

¹⁵⁴ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, 12 April 2019, ICC-02/17, 31.

¹⁵⁵ Heller K, 'ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision' dovjacobs.com, April 12 2019, <https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/> on 9 October 2019.

¹⁵⁶ Heller K, 'ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision' dovjacobs.com, April 12 2019, <https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/> on 9 October 2019.

3.4 Conclusion

The objective of this Chapter was to assess whether the OTP should be able to initiate investigations without statutory restrictions. It can decisively conclude that the OTP should be mandated to initiate investigations if the crime is *jus cogens*, and if it was committed by individuals who are not nationals to the Rome Statute. However, this would only work in theory and not in practice. Despite *jus cogens* being compelling law, ICJ jurisprudence has only gone so far to state that states should respect this doctrine as well as *erga omnes*. The advisory opinion on Israel violating *erga omnes* showed that the enforcement of failing to abide by this norm is lacking. Therefore, the OTP would have difficulty in enforcing these two norms of general international law. If the grave offences provided for under Article 5 of the Rome Statute are made to achieve a *jus cogens* nature, it would be at the state's discretion to obey the law and cooperate with the OTP. State discretion does not contribute to advancing independence of the OTP. If the state lacks the necessary resources to investigate the crime, then the OTP would step in and fulfil their mandate of ensuring that impunity does not take place. The investigation by the OTP would obviously be subject to fulfilment of the grounds under Article 53(1)(a)-(c) of the Statute. This would work in theory, but would be difficult in practice. Furthermore, with regards to the relationship between the OTP and the PTC, there needs to be comprehensive boundaries established between what the mandate of the OTP and PTC should be. Both institutions should be independent and not overstep on what their exclusive mandates are under the Statute. Due to the inconsistency by the PTC ruling on the mandate of the OTP in determining whether a situation supports achieving justice, a clear separation is needed to determine what the PTC is entitled to rule on and what the OTP should decide on. Ambiguity on the roles would affect the functions and independence of both institutions.

CHAPTER IV: PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT AND AFRICA: IS THERE A NEED FOR NEW RELATIONS BETWEEN THE COURT AND THE CONTINENT?

4. Introduction

The purpose of this Chapter is to investigate whether there is a need for a new relationship between the OTP and Africa. Over the past years, there has been strained relations between the Court and Africa. Since the inception of the Rome Statute in 2002, it has indicted 39 individuals from African states in 23 cases.¹⁵⁷ This perceived notion of bias has resulted in the relationship between the Court and Africa weakening. It cannot be stressed enough how the importance of a good relationship with Africa is fundamental to the work of the OTP. If Africa remains hostile to the ICC, it would hinder the ability of the OTP to conduct preliminary investigations in countries where there has been violation of international crimes. It is important to note here that the OTP is not a state which can conduct trade relations with other states, rather it is an organ of a court.¹⁵⁸ Therefore, the relationship with countries is not monetary in nature, rather it is a relationship tailored with the objective of achieving justice. It is further crucial to note that the hypothesis of this paper assumes that closer relationships with international bodies and states would advance the independence of the OTP. The ICC's relationship with Africa is crucial considering majority of the members of the Rome Statute are from Africa.¹⁵⁹ It is also worth noting that most initiations of investigations are at the OTP's initiative.¹⁶⁰ Considering that the Court lacks an agency of enforcement, without cooperation, the OTP would be unable to conduct investigations, execute search warrants, and collect evidence.¹⁶¹ In order to fulfil these functions, a good relationship with Africa is needed. Therefore, analysing its relationship with Africa is fundamental. This chapter will be structured in the following manner: it shall give a brief history of the African Union and provide a history of the Court's relationship with

¹⁵⁷ Muraya R, 'The African Unions claims against the International Criminal Court: Are they legitimate?' academia.edu, 2016, 1.

¹⁵⁸ Article 34(c), *Rome Statute*.

¹⁵⁹ Priya Pillai, 'The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability' asil.org, 22 August 2018 <https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court> on 9 November 2019.

¹⁶⁰ Priya Pillai, 'The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability' asil.org, 22 August 2018 <https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court> on 9 November 2019.

¹⁶¹ Cassese A and Gaeta P, *Cassese's International Criminal Law*, 3 ed, Oxford University Press, Oxford, 2013, 298.

Africa. Succeeding the brief history shall be an evaluation of how and why the relationship between the AU and the Court has declined. This shall include analysis of the AU Withdrawal Agreement, which was a resolution passed by the AU in its 28th ordinary session with the objective of all African countries withdrawing from the Rome Statute.¹⁶² Lastly, it shall examine whether Africa and the Court can mend their relationship.

4.1 Brief History of African Union and Africa's relationship with the ICC

The AU was established under Article 2 of the Constitutive Act of the African Union.¹⁶³ Some of their objectives include, promoting peace, safekeeping and stability in Africa, promoting democratic principles and institutions and good governance, and encouraging international cooperation with regards to the UN Charter.¹⁶⁴ Some of the objectives of the AU are consistent with the Rome Statute. These include reaffirming the purpose of the UN Charter, and recognising how grave crimes threaten peace and security of the international community.¹⁶⁵ Therefore, the objectives of the AU can be said to complement the work of the OTP, which is responsible for conducting the investigation crimes with the overall objective of ensuring peace and security.

Africa's relationship with the Court can be traced back to February 1998, where African representatives met in Dakar, Senegal to adopt the 'Dakar Declaration for the Establishment of the International Criminal Court.'¹⁶⁶ The Declaration called for the Court to be 'permanent, impartial, just and effective.'¹⁶⁷ It also advocated for the Court to function without being biased by the UNSC actions.¹⁶⁸ Furthermore, it stressed the independence of the OTP and its role to be definite; and that state cooperation is key in order to ensure the Court's effectiveness.¹⁶⁹

Furthermore, the AU, at its 36th Ordinary Session of Assembly of Heads of state and Government, condemned genocide, crimes against humanity and war crimes in Africa and

¹⁶² DRAFT DECISIONS, DECLARATIONS, RESOLUTION AND MOTION, Twenty Eighth Ordinary Session 30-31 January 2017, Assembly/AU/Draft/Dec.1.

¹⁶³ Article 2, *Constitutive Act of the African Union*, November 7 2000, OAU Doc. CAB/LEG/23.15.

¹⁶⁴ Article 3, *Constitutive Act of the African Union*.

¹⁶⁵ Preamble, *Rome Statute*.

¹⁶⁶ *Dakar Declaration for the Establishment of the International Criminal Court*, 6 February 1998, <http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf> on 10 November 2019.

¹⁶⁷ *Dakar Declaration for the Establishment of the International Criminal Court*, 6 February 1998, <http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf> on 10 November 2019.

¹⁶⁸ *Dakar Declaration for the Establishment of the International Criminal Court*, 6 February 1998, <http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf> on 10 November 2019.

¹⁶⁹ *Dakar Declaration for the Establishment of the International Criminal Court*, 6 February 1998, <http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf> on 10 November 2019.

agreed to liaise with institutions established to prosecute the offenders.¹⁷⁰ The AU further encouraged ratification of the Rome Statute.

In 1998, the ACHPR had also encouraged African states to ratify the Statute and take statutory measures to bring national laws to conform with the treaty.¹⁷¹ The ACHPR also noted the serious and worrisome situation of human rights in Africa, as well as the universal goal of ending impunity for atrocities which shock humanities' conscience.¹⁷²

Africa also played a pivotal part in drafting the Rome Statute.¹⁷³ African countries had participated in the conception of the Rome Statute at a presentation of a draft Statute by the ILC to the UNGA in 1993.¹⁷⁴ In 1998, African countries voted overwhelmingly for the creation of the ICC and a number of them took legislative measures to domesticate the provisions of the Statute into their laws.¹⁷⁵ As of 2012, 33 African states out of a total of 121 states were members to the Rome Statute.¹⁷⁶ The highest number of countries from any region are from Africa.¹⁷⁷

Therefore, Africa's relationship with the Court was positive and steadfastly supported the ICC. They supported less interference from the UNSC and called for independence of the OTP. However, this relationship has changed, as Africa is not speaking the same tone as it did through its numerous declarations.

4.2 African Union allegations against the Court in general

The AU has extensively blamed the ICC for only targeting African leaders and that the Court represents neo-colonial influences.¹⁷⁸ The targeting includes the cases of Ivory Coast, Kenya,

¹⁷⁰ *Declarations and decisions adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government*, Thirty Sixth Ordinary Session 10-12 July 2000 Lome Togo, AHG/Decl.1-6 (XXXVI), https://au.int/sites/default/files/decisions/9545-2000_ahg_dec_143-159_xxxvi_e.pdf on 10 November 2019.

¹⁷¹ 27 Resolution on the Ratification of the Treaty on the International Criminal Court, 24th Ordinary Session from 22nd – 31st October 1998 in Banjul Gambia, ACHPR/Res.27(XXIV) 98.

¹⁷² 27 Resolution on the Ratification of the Treaty on the International Criminal Court, 24th Ordinary Session from 22nd – 31st October 1998 in Banjul Gambia, ACHPR/Res.27(XXIV) 98.

¹⁷³ Cole R, 'Africa's relationship with the International Criminal Court: More Political than Legal' *Melbourne Journal of International Law*, 2014, 673, <http://classic.austlii.edu.au/au/journals/MelbJIL/2013/21.pdf> on 10 November 2019.

¹⁷⁴ Cole R, 'Africa's relationship with the International Criminal Court: More Political than Legal' 674

¹⁷⁵ Cole R, 'Africa's relationship with the International Criminal Court: More Political than Legal' 674

¹⁷⁶ Avocats Sans Frontières, 'Africa and the International Criminal Court: Mending Fences', academia.edu, 7.

¹⁷⁷ Priya Pillai, 'The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability' asil.org, 22 August 2018 <https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court> on 10 November 2019

¹⁷⁸ Murungu C, 'Immunity of State officials and Prosecution of International Crimes in Africa' Published LLD Thesis, University of Pretoria, Pretoria, 2011, 176.

Libya and Sudan.¹⁷⁹ These cases were a combination of UNSC referrals and on the OTP's initiative.¹⁸⁰ The AU has also argued that the issuing of arrest warrants and prosecuting of African state officials for international crimes affects the sovereignty of African states.¹⁸¹ The height of the distrust between the AU and the ICC can be attributed to the issuing of an arrest warrant for Sudan's President Al-Bashir.¹⁸² The AU argued that the arrest warrant is contrary to customary international law which grants immunity of prosecution to Heads of state. On the other hand, the Court has argued that Article 27 of the Rome Statute prevents immunity from Heads of state.¹⁸³ However, the analysis of state immunity goes beyond the scope of this paper.

The rationale behind the aggressive attacks on the ICC stems from the AU's attempt to fulfil their treaty obligations of being responsible for promoting and shielding issues of common interest to the continent.¹⁸⁴ Because the AU was seeking to defend the interests of the continent, it induced the AU to retaliate against the ICC resulting in conferring international criminal jurisdiction on its own court, the African Court of Justice and Human Rights.¹⁸⁵

In February 2009, the AU requested the UNSC to defer the Al-Bashir case in accordance with Article 16 of the Rome Statute.¹⁸⁶ However, by July 2009, the AU, in their ordinary session, criticised the UNSC for failing to defer the proceedings, which they argued had not been heard or acted upon.¹⁸⁷ Based on the refusal by the UNSC to defer the Al-Bashir case, the AU requested states not to withhold cooperation with the Court arguing that Al Bashir has state immunity.¹⁸⁸ Uganda, South Africa and Malawi all failed to cooperate with the Court in arresting Al-Bashir. With these 3 countries, the PTC found that, despite being state parties to the Rome Statute, they had failed in their obligations under Article 87(7) of the Rome

¹⁷⁹ Cole R, 'Africa's relationship with the International Criminal Court: More Political than Legal' 680.

¹⁸⁰ Cole R, 'Africa's relationship with the International Criminal Court: More Political than Legal' 680.

¹⁸¹ Cole R, 'Africa's relationship with the International Criminal Court: More Political than Legal' 680.

¹⁸² *Decisions, declarations, message of congratulations and motion*, Assembly of the African Union, Twelfth Ordinary Session from 1-3 February 2009 Addis Ababa Ethiopia, Assembly/AU/Dec.221(XII).

¹⁸³ Muraya R, 'The African Unions claims against the International Criminal Court: Are they legitimate?' 2.

¹⁸⁴ Article 3(d), *Constitutive Act of the African Union*.

¹⁸⁵ Mbori H, 'The merged African Court of Justice and Human Rights (ACJ&HR) as a better criminal justice system than the ICC: Are we Finding African Solution to African problems or creating African problems without solutions?' academia.edu, 1.

¹⁸⁶ *Decisions, declarations, message of congratulations and motion*, Assembly of the African Union, Twelfth Ordinary Session from 1-3 February 2009 Addis Ababa Ethiopia, Assembly/AU/Dec.221(XII).

¹⁸⁷ *Decisions and declarations*, Assembly of the African Union Thirteenth Ordinary Session 1-3 July 2009, Assembly/AU/Dec.245(XIII) Rev.1

¹⁸⁸ *Decisions and declarations*, Assembly of the African Union Thirteenth Ordinary Session 1-3 July 2009, Assembly/AU/Dec.245(XIII) Rev.1

Statute.¹⁸⁹ However, a deeper analysis of these decisions goes beyond the scope of this paper. Despite the intentions of the ICC to fight impunity, the AU has also associated the targeting of Africa with Western colonization.¹⁹⁰ These tensions have resulted in the intersection between achieving international criminal justice and Africa's geopolitics.¹⁹¹ Furthermore, the AU is not being a significant power bloc, but it still possesses a very influential voice.¹⁹² The intersection between justice and politics has left the OTP in a problematic position of contending with geopolitical considerations.¹⁹³

4.2.1 African Union allegations of Prosecutor interruption with peace processes

The AU's criticism of the OTP began in 2008 when the OTP requested the PTC to issue an arrest warrant against Sudan's President Al-Bashir.¹⁹⁴ The OTP's application contained 3 genocide counts, 5 counts of crimes against humanity and 2 counts of war crimes.¹⁹⁵ The AU expressed its conviction against the issue of the arrest warrant stating it would interrupt the peace process in Darfur, undermine efforts aimed at a long-lasting peaceful resolution and lead to destabilization with unavoidable consequences.¹⁹⁶ The AU's arguments can be said to be based on the idea that peacekeeping and political stability override justice.¹⁹⁷ Al-Bashir had taken steps to sign the Comprehensive Peace Agreement.¹⁹⁸

¹⁸⁹ ICC-02/05-01/09 *The Prosecutor v Omar Hassan Ahmad Al Bashir, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute*, 11 July 2016 and ICC-02/05-01/09, *The Prosecutor v Omar Hassan Ahmad Al Bashir, Decision on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*, 6 July 2017 and ICC-02/05-01/09 *The Prosecutor v Omar Hassan Ahmad Al Bashir, Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, 13 December 2011.

¹⁹⁰ Cole R, 'Africa's relationship with the International Criminal Court: More Political than Legal' 682.

¹⁹¹ Cole R, 'Africa's relationship with the International Criminal Court: More Political than Legal' 682.

¹⁹² Cole R, 'Africa's relationship with the International Criminal Court: More Political than Legal' 682.

¹⁹³ Cole R, 'Africa's relationship with the International Criminal Court: More Political than Legal' 682.

¹⁹⁴ Cayley A, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide' *Journal of International Criminal Justice*, 2008, 829, <http://article42-3.org/Cayley.pdf> on 12 November 2019.

¹⁹⁵ Cayley A, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide' 829.

¹⁹⁶ *Communique of the 142nd meeting*, 21 July 2008 Addis Ababa, Ethiopia, AU PSC/MIN/Comm(CXLII).

¹⁹⁷ Cole R, 'Africa's relationship with the International Criminal Court: More Political than Legal' 682.

¹⁹⁸ *The Comprehensive Peace Agreement between the Government of the Republic of Sudan and The Sudan's People Liberation Movement*, https://peacemaker.un.org/sites/peacemaker.un.org/files/SD_060000_The%20Comprehensive%20Peace%20Agreement.pdf on 12 November 2019.

The peace process has been described by the Wallensteen theory as being: ‘a formal understanding between parties where a signed document is produced; continuous existence of parties in dispute, not a situation of win or lose, but clashing parties accepting each other as parties in future dealings; and ending violent actions against each other.’¹⁹⁹ Scholars, such as Steve Odero, have argued that the issuing of the arrest warrant could be said to violate the Wallensteen theory.²⁰⁰ He has argued the issuing of the arrest warrant was ill-timed and interfered with the peace process in Sudan.²⁰¹ The actions of the ICC had the potential to jeopardize the existence of Al-Bashir’s party and the warrant is in disregard of sustainable peace in Sudan.²⁰² Therefore, any attempt of achieving international criminal justice, in absence of Al-Bashir’s position to the peace process and role in conflict, was self-defeating in itself.²⁰³ However, the peace process seemed to be of little relevance to the OTP considering that their mandate in selecting cases is supposed to be in the interests of justice.²⁰⁴ In 2007, the OTP Policy Paper highlighted the difference between interests of justice and interests of peace.²⁰⁵ The OTP have stated the situations in Darfur, Uganda and DRC required this distinction. This distinction was made in the Uganda case. It is important when deciding whether or not to seek an arrest warrant.²⁰⁶ The OTP highlighted that attempts by Uganda to resolve the conflict between the Ugandan government and the LRA represented interests of peace.²⁰⁷ Therefore reconciliation would amount to being in the interests of peace. This however did not stop the PTC granting arrest warrants for the suspects.²⁰⁸ However, for interests of justice, the OTP takes into account explicit factors, which were highlighted in the previous chapter.²⁰⁹ It is significant to note here that the issuing of arrest warrants in Uganda was not against a Head of

¹⁹⁹ Odero S, ‘Politics of international criminal justice, the ICC’s arrest warrant for Al Bashir and the African Union’s neo-colonial conspirator thesis’ in Chacha Murungu and Japhet Biegon (eds) *Prosecuting International Crimes in Africa*, Pretoria University Law Press, Cape Town, 2011, 151.

²⁰⁰ Odero S, ‘Politics of international criminal justice, the ICC’s arrest warrant for Al Bashir and the African Union’s neo-colonial conspirator thesis’ 151.

²⁰¹ Odero S, ‘Politics of international criminal justice, the ICC’s arrest warrant for Al Bashir and the African Union’s neo-colonial conspirator thesis’ 151.

²⁰² Odero S, ‘Politics of international criminal justice, the ICC’s arrest warrant for Al Bashir and the African Union’s neo-colonial conspirator thesis’ 153.

²⁰³ Odero S, ‘Politics of international criminal justice, the ICC’s arrest warrant for Al Bashir and the African Union’s neo-colonial conspirator thesis’ 153.

²⁰⁴ Article 53, *Rome Statute*.

²⁰⁵ Policy Paper on the interests of justice, September 2007, <https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf> on 12 November 2019.

²⁰⁶ Policy Paper on the interests of justice, September 2007, <https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf> on 12 November 2019.

²⁰⁷ Policy Paper on the interests of justice, September 2007, <https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf> on 12 November 2019.

²⁰⁸ <https://www.icc-cpi.int/uganda> on 12 November 2019.

²⁰⁹ They include the gravity of the crime, the interests of the victims and the accused’s circumstances.

state like in Sudan, rather against military rebels. Therefore, the AU's argument would be that the OTP seeking an arrest warrant against Al-Bashir, misconstrued the 'interests of peace' as 'interest of justice.' Prosecution should therefore be delayed in the interests of peace.²¹⁰ The interests of justice decision making is one of the reasons of the AU's loss of trust in the Court.²¹¹ Odero has argued it is inevitable for international criminal justice to operate outside political reality.²¹² Criminal justice functions in a political environment, and without a peace process that is successful, international criminal justice would remain a concept.²¹³ Therefore, interests of justice cannot be restricted to what the OTP advances, rather it must operate within the political environment.²¹⁴

One can argue that the OTP submitting to the political pressure of the AU is an interference with its judicial mandate of acting independently.²¹⁵ Furthermore, it is lacking at what stage the OTP would fit in the peace process.²¹⁶ A balance between the OTP exercising its statutory mandate and ensuring the AU's opinions are taken into account would ensure that the OTP can conduct criminal investigations. This balance is seen to be lacking.

4.2.2 African Union attempts to reduce the powers and influence of the Prosecutor

So far it has been established that it would be difficult for the OTP to remain independent from the political environment of states. As a response to the perceived bias of the Court prosecuting Africans, the AU has gone ahead to propose ways of reducing the powers of the OTP. The most notable of this is the ICC Withdrawal Strategy that was adopted in its 28th Ordinary Session.²¹⁷

Prior to the withdrawal strategy adopted in 2017, the AU, in its thirteenth ordinary session, expressed concern over the conduct of the OTP and requested state parties to the Rome Statute to:

²¹⁰ Cole R, 'Africa's relationship with the International Criminal Court: More Political than Legal' 684.

²¹¹ Odero S, 'Politics of international criminal justice, the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis' 154.

²¹² Odero S, 'Politics of international criminal justice, the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis' 154.

²¹³ Odero S, 'Politics of international criminal justice, the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis' 154.

²¹⁴ Odero S, 'Politics of international criminal justice, the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis' 154.

²¹⁵ Odero S, 'Politics of international criminal justice, the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis' 154.

²¹⁶ Cole R, 'Africa's relationship with the International Criminal Court: More Political than Legal' 684.

²¹⁷ *DRAFT DECISION ON THE INTERNATIONAL CRIMINAL COURT*, Twenty Eighth Ordinary Session, 30-31 January 2017, Addis Ababa Ethiopia, Assembly/AU/Draft/Dec.1(XXVIII) Rev.2. The analysis of the provisions of the collective withdrawal agreement goes beyond the scope of this paper.

‘prepare guidelines and a code of conduct for exercise of discretionary powers by the ICC Prosecutor relating particularly to the powers of the prosecutor to initiate cases at his own discretion under Article 15 of the Rome Statute.’²¹⁸

In the final withdrawal strategy²¹⁹, one of the proposals was for the ASP to reduce the powers of the OTP including reform initiatives.²²⁰ Under the Rome Statute, the ASP is established under Article 112. Each state party has one representative to the Assembly.²²¹ They have one vote, and ‘decisions on matters of substance must be approved by at least two-thirds of those present and voting.’²²² Therefore, a matter of substance would include reducing the powers of the OTP, as proposed by the AU. If the demands of the AU are satisfied by the ASP, it would ultimately extinguish the independence of the OTP. It would not be able to initiate investigations on its own motion, and it would not be able to decide if a case is in the ‘interests of justice.’

4.3 Conclusion

The purpose of this chapter was to investigate whether there is a need for a new relationship between the OTP and Africa. Based on the evidence provided, it can be concluded that Africa and the OTP do require a new relationship for the purposes of cooperation. Africa at first advocated for a Court that which would fight impunity; however, the prosecutorial bias and lack of demands being met have caused the AU to look for new measures of withdrawing from the Rome Statute. This includes the establishment an African Court with jurisdiction to try prosecutorial crimes. If successful, this proposal would interfere with the mandate of the OTP in Africa. Furthermore, the proposals by the AU to reduce the powers of the OTP are a further concern for international criminal justice. All these factors contribute to the need for new relations between the OTP and Africa. Additionally, it is inevitable that international criminal justice must operate within the realm of politics. Because state sovereignty is a fundamental aspect of international law, in order to achieve international criminal justice, the OTP must respond and find a way of addressing the concerns of Africa in order for them to cooperate. This chapter has established that the OTP refused to acknowledge the peace process in Sudan before issuing the arrest warrant for Al Bashir. Therefore, the OTP must find a way of not being

²¹⁸ DECISIONS AND DECLARATIONS, Assembly of the African Union Thirteenth Ordinary Session 1-3 July 2009, Assembly/AU/Dec.245(XIII) Rev.1

²¹⁹ The document is the final withdrawal strategy however the document reads as ‘draft withdrawal strategy’

²²⁰ https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf on 13 November 2019.

²²¹ Article 112(1), *Rome Statute*.

²²² Article 112(7)(a), *Rome Statute*.

easily coerced and intimidated by the geopolitics of Africa, but also ensure that they make the most rational decision and maintain their independence in the process.

CHAPTER V: CONCLUSIONS AND RECOMMENDATIONS

5. Introduction

This thesis set out to examine whether the OTP is an independent organ which can be isolated from the politics of international criminal justice. The paper has analysed the relationship between the significant agencies of the Court, such as the PTC and UNSC as well as Africa. All chapters have established that a good relationship with the mentioned entities is necessary for the OTP to be independent. The research problem investigated was whether there is need for a new decision-making process of triggering the jurisdiction of the Court, considering that the Court is seen as a political entity. In order to investigate this problem, the research methodology employed the use of sampling the relationship between the OTP and the UNSC and OTP and PTC. The fourth chapter used a case study method of analysing the relationship with Africa. This final chapter will set out a summary of findings from each chapter and give recommendations to the research problem as well as the findings. Lastly, the hypothesis assumed that the OTP should obtain the powers of the UNSC in order to become independent. Because politics and international criminal justice are not mutually exclusive, evidence has shown that the OTP would not be able to obtain international criminal justice if this power would be transferred. States would allege that an organ of a Court cannot challenge their sovereignty.

5.1 Summary of findings

In the second chapter, the aim was to investigate whether decisions by the UNSC have interfered with the mandate of the OTP. The chapter found that UNSC referrals would only complement the work of the prosecution if the UNSC enforces or pressurises cooperation from the states liable. Furthermore, the chapter found that the UNSC did not have zeal to ensure international criminal justice in Libya and Darfur, resulting in a lack of criminal prosecution. In addition, the UNSC deferrals would only promote independence of the OTP if the UNSC did not use this power for political reasons, such as promoting autonomy as they tried through resolution 1422. Based on the conceptual framework, separation of powers is crucial to the effectiveness and reputation of the ICC. Consultation is needed between the UNSC and the OTP with regards to exercising the powers of referral and deferral in fulfilling the overall mandate of the Court.

In the third chapter, the purpose was to assess whether granting the OTP powers outside the Rome Statute would advance its independence. It also sought to assess the relationship between

the PTC and the OTP to determine whether judicial approval of cases hinders the independence of the OTP. It was found that the OTP should be mandated to initiate investigations if the crime is *jus cogens* and was committed by nationals who are not party to the Rome Statute. However, this would only work in theory and not in practice. Despite *jus cogens* being compelling law, ICJ jurisprudence has only gone to the extent of adjudicating that states should respect this doctrine as well as the *erga omnes* doctrine. The OTP would therefore have difficulty in enforcing these two norms of general international law. In theory, the ability to conduct such prosecution would augment independence but would be more difficult in practice. Additionally, with regards to the relationship between the OTP and the PTC, there needs to be boundaries established between what the mandate of the OTP and PTC should be. Both institutions should be independent and not overstep on what their exclusive mandates are under the Statute. The findings showed that due to inconsistency by the PTC ruling on the mandate of the OTP in determining whether a case is in the interests of justice, a clear separation is needed to determine what the PTC is entitled to rule on and what the OTP should decide on. Ambiguity on the roles would affect the functions and independence of both institutions.

The purpose of the fourth chapter was to investigate whether there is a need for a new relationship between the OTP and Africa. The findings revealed that Africa and the OTP do require a new relationship for the purposes of cooperation. Africa at first advocated for a Court that which would fight impunity; however, the prosecutorial bias and lack of demands being met have caused the AU to look for new measures of withdrawing from the Rome Statute and attempt to establish an African Court with jurisdiction to try prosecutorial crimes. Moreover, the proposals by the AU to reduce the powers of the OTP are a further concern for international criminal justice. These factors contribute to the need for new relations between the OTP and Africa.

5.2 Recommendations

5.2.1 Prosecutor relationship with the UNSC

In order to ensure that the OTP is independent from the UNSC, the power of the UNSC to exercise deferrals should be limited, and the opinions of the OTP as well as the PTC should be taken into consideration before the UNSC exercises a deferral. It should not be used arbitrarily. This system of decision-making will ensure that the Court is not seen as a political organ that makes decisions based on what is in the best interests for the members. With respect to the conceptual framework provided on separation of powers, a system of separating the powers

and duties of the organs of the Court is needed in order to establish a fairer decision-making process.

With respect to the mandate of the Rome Statute being met²²³, the Statute needs to provide a new provision for giving the UNSC the duty to enforce cooperation with the Court. Despite Article 87 providing a means of cooperation, it would be insufficient if the UNSC is involved.

5.2.2 Prosecution outside the realm of the Rome Statute and the OTP relationship with the PTC

In order to ensure that serious crimes do not go unpunished, the ICJ needs to develop an advisory opinion of the circumstances under which states would be able to cooperate with the ICC if there has been a serious crime committed.

With regards to the relationship between the PTC and the OTP, the main problem that exists is who should have the mandate of deciding whether or not a case is in ‘the interests of justice.’ The Rome Statute can be amended or a protocol to the Rome Statute can be passed, in order to clarify whether the OTP or the PTC should have the final say on Article 53 of the Rome Statute and interests of justice.

5.2.3 New approaches to the Prosecutor of the ICC and Africa: should Africa’s demands be met, or should the Prosecutor exercise its mandate without interference?

In order to ensure that the OTP and Africa work hand in hand, it is crucial for the two to have a working relationship. Dialogue is necessary between the two in order to come to an understanding as to how to address the main concerns. Additionally, the UNSC should respond to the AU’s demands in a diplomatic manner that ensures that the AU does not feel neglected in the decision-making process. By the AU feeling included, it would ensure that they foster cooperation with the demands of the OTP when they need to conduct an investigation, or when they wish for African states to execute orders.

²²³ The preamble of the Statute provides that serious crimes of international concern, or grave atrocities must not go without a trial.

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