



**Strathmore University**  
**Law School**

**INTERNATIONAL CRIMINAL JUSTICE VERSUS STATE SOVEREIGNTY.  
CASE STUDY: THE INTERNATIONAL CRIMINAL COURT AND AFRICA.**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE BACHELOR  
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## DECLARATION


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## ABSTRACT.

The objective of the study is to examine the rapid issues facing the court more so problems brought about by the very states that ratified the treaty establishing the court. To analyse this the study seeks to identify the basis of having the International Criminal Court and the criminal cases from different states before the ICC and how each case entails a lot of politics between the court, state's in question as well as other International Bodies such as the United Nations that have some "influence" over the court through the UN Security council. The study will use the theory of realism which states, that states are driven by their own interests and that international law is not law because the international system has no government and no institutions of administration on which law depends on, no legislature to make law, no executive to enforce, no judiciary to resolve disputes and develop the law. The study finds that the International Criminal Court has a role to play in ending impunity since most states are not willing to prosecute perpetrators of these crimes, the ICC may provide hope for victims of these heinous crimes, that the aspect of sovereignty is not the real issue behind African states unwillingness to cooperate but is an excuse to safeguard African leaders selfish diplomatic interests that are threatened by the court's jurisdiction, states are not willing to cooperate with the ICC and are not willing to prosecute international crimes under the Rome Statute The study further demonstrates that there is need to address the root causes of the conflict.

## **ACRONYMS/ ABBREVIATIONS.**

<b>ASP</b>	<b>Assembly of State Parties</b>
<b>AU</b>	<b>African Union</b>
<b>BIA</b>	<b>Bilateral Immunity Agreements</b>
<b>CAR</b>	<b>Central African Republic</b>
<b>DRC</b>	<b>Democratic Republic of Congo</b>
<b>ICC</b>	<b>International Criminal Court</b>
<b>ICTY</b>	<b>International Criminal Tribunal of Yugoslavia</b>
<b>LRA</b>	<b>Lord Resistance Army</b>
<b>RPE</b>	<b>Rules of Procedure and Evidence</b>
<b>SC</b>	<b>Security Council</b>
<b>SCSR</b>	<b>Special Court of the Sierra Leone</b>
<b>UN</b>	<b>United Nations</b>
<b>UNSC</b>	<b>United Nations Security Council</b>
<b>US</b>	<b>United States</b>

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# 1 CHAPTER 1.

## 1.1 BACKGROUND TO THE STUDY

Over the years, many have argued that the International Criminal Court (herein 'the ICC') has taken a visible and dominant role. The Court's hierarchical and agile system has made many consider it supranational.

Supranational<sup>1</sup> refers to power that surpasses national boundaries or governments as a policy that is planned and controlled by a group of nations. The concept of supranationalism<sup>2</sup> was brought about as an aspect in globalization where there was a need for more integration and cooperation amongst states. A supranational organization<sup>3</sup> is therefore an organisation, group, or union made of multiple countries that renounce a certain amount of government power to the organisation. On the other hand, sovereignty is defined as 'a system of political authority based on territory, mutual recognition, autonomy and control'<sup>4</sup>. It is "the common power of the state, the will of the nation organised in the state and right to give unconditional orders to all individuals in the territory of state"<sup>5</sup>.

From the above definitions, the ICC does not qualify as a supranational institution but it is important to note that due to the principle of complementarity<sup>6</sup>, the ICC statute contains a

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<sup>1</sup> The European Union and Supranationalism", section 2.3 *Regional Geography of the World: Globalization, People, and Places*

<sup>2</sup> Section 2.3 *Regional Geography of the World: Globalization, People, and Places*

<sup>3</sup> Section 2.3 *Regional Geography of the World: Globalization, People, and Places*

<sup>4</sup> Krasner, S, 'Rethinking the Sovereign State Model', *Review of International Studies*, Vol. 27, Special Issue, Dec 2001: pp. 17-43

<sup>5</sup> Leon Duguit (*Traite de Droit Constitutionnel (Constitutional Law Treatise)* Vol. 1, page 113).

<sup>6</sup> J. T. Holmes, "The Principle of Complementarity", in Lee (ed.), *The International Criminal Court: The Making Of The Rome Statute Issues, Negotiations, Results* (Transnational Publishers 1999), at 41-78.

The principle of complementarity governs the exercise of the Court's jurisdiction. The Rome Statute recognizes that States have the first responsibility and right to prosecute international crimes. The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings. The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings.

number of supranational elements<sup>7</sup>. These include; the power to conduct on sight investigations, the summons of a suspect and the issuance of an arrest warrant entailing direct effect and qualification of all orders issued directly by the ICC vis-à-vis individuals in the course of international proceedings<sup>8</sup>.

According to Dr. Luis Franceschi, the ICC is not, according to law, a foreign court, neither is it, in strict sense, an international organisation. It is a supranational court of subsidiary or complimentary nature, to which we bound ourselves willingly<sup>9</sup>.

So what exactly necessitated the creation of this court?

The main reasons for the ICC to come into existence after the end of the Cold War is that many crimes committed against humanity have been ignored by states either due to the national sovereignty and territorial integrity clause. Therefore, in recognizing and ratifying an international court like the International Criminal Court (ICC) a state delegates some of its authority to settle disputes to these independent supranational entities<sup>10</sup>.

When ratifying the Rome Statute, states were well aware of the risk as ratification entailed that states imposed on themselves the inalienable duty to enforce the Court's decisions as domestic decisions.

With this stated, why is it that states now claim to have their sovereignty infringed, yet they accepted to "cede" part of their sovereignty the moment they accepted to be members of the ICC?

In relation to the ICC, despite the fact that the court's agenda was to safeguard international Criminal Justice, why is there a conflict between state parties and the ICC, more so in Africa?

More than two-thirds of the members of the African Union (AU) are parties to the treaty establishing the International Criminal Court (ICC Rome Statute). Nevertheless over the years

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<sup>7</sup> S.R Luder *The Legal Nature of The International Criminal Court and the Emergence of Supranational Elements in International Criminal Justice* IRRC March 2002 vol. 84 page79- 91

<sup>8</sup> S.R Luder *The Legal Nature of the International Criminal Court*. 91

<sup>9</sup> Franceschi: *ICC is on trial in Africa* June 14, 2013. On 9 October 2015

<sup>10</sup> Slaughter, Anne-Marie. 2004. *A New World Order* 1-35

the Assembly of the AU has adopted various resolutions critical of the ICC and its practice. For example, In May 2013, the Kenyan government successfully lobbied AU members to adopt a resolution calling for the cases to be referred to Kenya for national proceedings to be taken, rather than being left to the ICC<sup>11</sup>. The resolution was supported by all states except Botswana.

The resolution also regrets that the AU request to the Security Council to use its powers under Article 16 of the Rome Statute to seek a deferral of the Bashir case was not acted upon<sup>12</sup>. It reaffirms that countries such as Chad, which previously welcomed Bashir, did so in conformity with the decisions of the AU Assembly and therefore should not be penalized.

The problems stated above raise a lot of questions.

## 1.2 STATEMENT OF THE PROBLEM.

During ratification, it is obvious that state parties assumed that creation of the ICC would be the best thing that happened to states. However as stated above, in recent years, many states, more so African states have expressed their dissatisfaction with the working of the ICC. On 13<sup>th</sup> October 2015, South Africa threatened to pull out of the ICC<sup>13</sup>. Their case was not remote. Kenya too has threatened severally to pull out<sup>14</sup> and indeed the Kenyan parliament voted in favor of pulling out from the court<sup>15</sup>.

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<sup>11</sup> Decision on International Jurisdiction, Justice and the International Criminal court (ICC) Assembly/AU/13(XXI) 21 May 2013 [http://iccnow.org/documents/AU\\_decisions](http://iccnow.org/documents/AU_decisions) on 9 October 2015

<sup>12</sup> Article 16 of the Rome Statute provides that 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

<sup>13</sup> <http://www.english.rfi.fr/africa/20151013-south-africa-pulling-out-international-criminal-court-reactions-and-implications> on 10 October 2015

<sup>14</sup> <http://www.nation.co.ke/news/politics/Kenya-issues-threat-to-pull-out-of-ICC/-/1064/2966586/-/d3d06g-/index.html> on October 10 2015

<sup>15</sup> <https://freedomhouse.org/blog/international-criminal-court-12-years-old> on October 10 2015

The court has been marred by many political wrangles which begs many questions including whether the court is serving the purpose for which it was established. Many authors<sup>16</sup> in this debate have argued that there is a clear tension between politics and law in the activities of the International Criminal Court (ICC). Although the ICC is a legal institution, it is surrounded by political actors. Further, it is an institution created by sovereign governments with different political interests to protect<sup>17</sup>. This tension will not disappear, and indeed some of it arises from contradictory provisions in the Rome Statute that established the ICC.

One of the most contentious issues is the relationship between the ICC and the United Nations Security Council (UNSC). States which do not ratify treaties should not, normally, be bound by the provisions of those treaties. However, the Rome Statute<sup>18</sup> makes it possible for the UNSC to refer states to the ICC even if they have not ratified the Rome Statute. This is how the situations in Sudan and Libya (neither of them party to the Rome Statute) came before the ICC. In addition, under Article 16 of the Rome Statute, the UNSC can also suspend ongoing ICC investigations (on any of its cases), if the investigation is seen as a threat to international peace and security. Some scholars<sup>19</sup> have argued these powers clearly prioritize politics over law.

Another contentious provision in the Rome Statute is Article 98. In a controversial interpretation of the provision, the US government has used it to demand states who have joined the ICC grant immunity for US citizens who might have committed international crimes (and find themselves in those states). The resulting 'bilateral immunity agreements' (BIAs) signed by several

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<sup>16</sup> Jack Snyder and Leslie Vinjamuri To prevent atrocities, count on politics first, law later *Open Democracy* 12 May 2015 <https://www.opendemocracy.net/openglobalrights/jack-snyder-leslie-vinjamuri/to-prevent-atrocities-count-on-politics-first-law-late> on 10 October 2015

<sup>17</sup> Benson Chinedu Olugbuo Law and politics at the International Criminal Court 24 August 2015 <https://www.opendemocracy.net/openglobalrights/benson-chinedu-olugbuo/law-and-politics-at-international-criminal-court> On 10 October 2015

<sup>18</sup> Article 16 *Rome Statute*, 2002

<sup>19</sup> Bergsmo, Morten & Jelena Pejic (2008) Article 16: Deferral of Investigation or Prosecution, in *Commentary of the Rome Statute of the International Criminal Court*. (pp. 595–604).

countries with the US government is purely the protection of political interests; these agreements clearly undermine the ICC<sup>20</sup>

In addition, The African Union, through its chairperson, Jean Ping, has on several occasions held the view that court is biased in its dealing with African cases and African leaders.

In response to this the ICC has stated that its focus on Africa is because no other continent has paid dearly for the absence of legitimate institutions of law and accountability, resulting in the culture of impunity. Not to forget that some cases are referrals from the African countries and the leaders in those countries requested the intervention of ICC.

Without a doubt, the court has also succumbed to political pressure in several instances. For example the court adopted new rules that allowed Kenya's president and vice-president to be absent during the hearing of their cases<sup>21</sup>. There have been proposals for amendment of the Rome Statute in order for accused persons not to be present in court and that incumbent heads of states do not face trial at the International Criminal Court. So does this show that African states are not willing to cooperate with the ICC and will do anything to ensure that perpetrators of these heinous crimes are not brought to book as whatever decisions they make, do not take into consideration the victims of the heinous crimes?

These therefore raises many questions. Did Countries foresee the above problems when signing and ratifying the Rome statute? Is the court biased in its dealings? Is the ICC accurately serving the purpose for which it was created which is to try cases to the ends of justice? Are there discrepancies in the statute governing the operation of the court? Will the Court be rendered a toothless bull dog if it succumbs to the political pressure from African countries?

This dissertation shall therefore address the above issues.

### 1.3 HYPOTHESES

While carrying out this research, the following hypothesis will stand to be proved:

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<sup>20</sup> Benson Chinedu Olugbuo Law and politics at the International Criminal Court 24 August 2015  
<https://www.opendemocracy.net/openglobalrights/benson-chinedu-olugbuo/law-and-politics-at-international-criminal-court> on 10 October 2015

<sup>21</sup> <https://freedomhouse.org/blog/international-criminal-court-12-years-old> on 15 October 2015

The ICC has a role to play in ending impunity especially in the African continent.

The ICC is the major institution that provides justice for victims of international crimes under the Rome Statute.

Investigations on ICC are hampered by reliance on state party cooperation and states more so African states are now not willing to prosecute matters.

African Countries are using the aspect of state sovereignty as an excuse to protect state leaders that have been summoned to the ICC to face charges subject to the court's jurisdiction.

#### 1.4 RESEARCH OBJECTIVES.

The specific objectives of this study shall be to; establish the jurisdiction of the ICC; establish the success of the court in meeting the objectives which led to its establishment; establish the challenges facing the court; establish ways of resolving the challenges facing the court.

#### 1.5 RESEARCH QUESTIONS.

What is the history that necessitated the establishment of the ICC?

Has the court been successful in carrying out the mandate that it was established to fulfil?

What challenges face the court in carrying out its duties?

Is the ICC really targeting African countries or is this just an excuse by The AU to safeguard its political agenda?

How can the challenges facing the court be resolved to ensure ends of justice are met for the victims of crimes against humanity and other crimes that meet the status of the court?

#### 1.6 JUSTIFICATION OF STUDY.

The study is based on the Justification that though the ICC was formed in order to safeguard International Criminal Justice, which is a modern human right, the ICC however has faced various problems while exercising its duties with allegations on challenging state sovereignty, not serving the purpose for which it was formed as well as bias within African states.

The paper shall therefore look into the above problems as well as address how the above problems can be solved if only states can resort to upholding the Principles of International Law in order to prevent supranational Intervention such as that of the ICC.

## 1.7 RESEARCH METHODOLOGY.

The research will use both primary and secondary data. I will also use the case study method to form a qualitative analysis whereby careful and complete observation of a situation or an institution is done and efforts are made to study each and every aspect of the concerned unit in minute details and then from the case data generalisations and inferences are drawn.

Other secondary data will be obtained from analysis and review of books, journals, published academic work and publications from key institutions.

## 1.8 CHAPTER SUMMARY.

### 1.8.1 Chapter 1

The first chapter of this dissertation is set to give a basic explanation of the problem intended to be studied. It gives an elementary description of the research problem as well as setting out the justification of the study and the objectives of the study.

### 1.8.2 Chapter 2

This chapter shall constitute a theoretical framework that is set to explain the various theories that expound on why the research problem under study exists. It shall use one or two theories to bring this to light by making generalisations about observations and shall also consist of an interrelated and coherent set of ideas.

### 1.8.3 Chapter 3.

This chapter shall deeply analyse the reasons for the formation of The International Criminal Court as well as examine its jurisdiction, powers and functions. Not to forget the chapter shall also look into the work the ICC has conducted in various African countries.

This chapter will also bring to light the various challenges facing the ICC in its implementation specifically in relation to the research topic.

### 1.8.4 Chapter 4

With regards to the information provided in the preceding chapter, this chapter shall form an analysis and discussion of the findings above as well as a comparison with other literature on the

related topic. These will generate an appreciation of the study and demonstrate the importance of addressing the problems identified in the findings.

1.8.5 Chapter 5.

Recommendations and Conclusions.

## 2 CHAPTER 2.

### 2.1 THEORETICAL FRAMEWORK.

In discussing the topic in question, I tend to refer to various schools of thought and theories.

The realist school of international relations, on the other hand, is based on the proposition that the state and state sovereignty remain the undiminished nuclei of the international system.<sup>22</sup> They are of the opinion that States are sovereign and thus autonomous of each other; no inherent structure or society can emerge or even exist to order relations between them.<sup>23</sup> They are bound only by forcible coercion or their own consent. In this case, states delegate their powers to supranational entities and this constitutes consent.<sup>24</sup> However, the question discussed in this school of thought is that why then would any State choose to expend its precious power on enforcement unless it had a direct material interest in the outcome? And if enforcement is impossible and cheating is likely, why would any State agree to co-operate through a treaty or institution in the first place?

The answer to this question is that States choose to create international law and international institutions, and may enforce the rules they codify because they are interested in the underlying material interests and power relations.<sup>25</sup> International law is thus a symptom of State behavior, not a cause<sup>26</sup>.

Constructivism in contrast seeks to explain systems and the interaction between systems and their parts. In this case states and international entities such as the ICC. Constructivists argue that the norm of State sovereignty has profoundly influenced international relations, creating a predisposition for noninterference that precedes any cost-benefit analysis States may undertake<sup>27</sup>.

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<sup>22</sup> MW Doyle *Ways of War and Peace: Realism, Liberalism, and Socialism* Norton New York 1997.

<sup>23</sup> JJ Mearsheimer 'The False Promise of International Institutions' (1994) 19(3) *International Security* 5-49.

<sup>24</sup> JJ Mearsheimer 'The False Promise of International Institutions' 5-49.

<sup>25</sup> JJ Mearsheimer 'The False Promise of International Institutions' 5-49.

<sup>26</sup> Anne Marie Slaughter, *International Relations, Principal Theories* Published in: Wolfrum, R. (Ed.) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011) 1-7

<sup>27</sup> Slaughter, *International Relations, Principal Theories* 5

These arguments fit under the institutionalist preface of explaining international co-operation, but based on constructed attitudes rather than the rational pursuit of objective interests as discussed in the realist school<sup>28</sup>. Perhaps because of their interest in beliefs and ideology, constructivism has also emphasized the role of non-State actors more than other approaches. For example role of international institutions as actors in their own right. While institutionalist theories, for example, see institutions largely as the passive tools of States, constructivism notes that international establishments may seek to pursue their own interests for example human rights protection even against the wishes of the States that created them<sup>29</sup>. This is the kind of situation seen with the ICC's propio motu right to institute investigations on state parties.

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<sup>28</sup> JG March and JP Olsen *Rediscovering Institutions: The Organizational Basis of Politics* The Free Press New York 1989

<sup>29</sup> MN Barnett and M Finnemore *Rules for the World: International Organizations in Global Politics* (Cornell University Press Ithaca 2004).

### 3 CHAPTER 3.

#### 3.1 UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT.

##### 3.1.1 What is the ICC?

The International Criminal Court<sup>30</sup> (“the ICC” or “the Court”) is a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression<sup>31</sup>.

##### 3.1.2 Why was it established?

Some of the most heinous crimes were committed during the conflicts which marked the twentieth century<sup>32</sup>. Unfortunately, many of these violations of international law have remained unpunished. The Nuremberg and Tokyo tribunals were established in the wake of the Second World War. In 1948, when the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, the United Nations General Assembly recognised the need for a permanent International Court to deal with the kinds of atrocities which had just been perpetrated<sup>33</sup>.

The idea of a system of international criminal justice re-emerged after the end of the Cold War<sup>34</sup>. However, while negotiations on the ICC Statute were underway at the United Nations, the world was witnessing the commission of heinous crimes in the territory of the former Yugoslavia and in Rwanda<sup>35</sup>.

In response to these atrocities, the United Nations Security Council established an *ad hoc* tribunal for each of these situations<sup>36</sup>.

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<sup>30</sup> Understanding the International Criminal Court [.http://www.icc-cpi.int](http://www.icc-cpi.int)- on 10<sup>th</sup> December 2015

<sup>31</sup> Article 5(1) *The Rome Statute 2002*

<sup>32</sup> Understanding the International Criminal Court [.http://www.icc-cpi.int](http://www.icc-cpi.int)- on 10 December 2015

<sup>33</sup> Understanding the International Criminal Court [.http://www.icc-cpi.int](http://www.icc-cpi.int)- on 10 December 2015

<sup>34</sup> Abbot Kenneth *On the development of international law and judicial institutions over the past few decades* 2000, Keohane, 2000 54 (3):401–19

<sup>35</sup> Abbot *On the development of international law and judicial institutions over the past few decades*

2000 Understanding the International Criminal Court [.http://www.icc-cpi.int](http://www.icc-cpi.int)- on 10 December 2015

<sup>36</sup> Understanding the International Criminal Court [.http://www.icc-cpi.int](http://www.icc-cpi.int)- on 10 December 2015

These events undoubtedly had a most significant impact on the decision to convene the conference which established the ICC in Rome in the summer of 1998<sup>37</sup>.

Therefore, on 17 July 1998, a conference of 160 States established the first treaty-based Permanent International Criminal Court. The treaty adopted during that conference is known as the Rome Statute of the International Criminal Court. Among other things, it sets out the crimes falling within the jurisdiction of the ICC, the rules of procedure and the mechanisms for States to cooperate with the ICC. The countries which have accepted these rules are known as States Parties and are represented in the Assembly of States Parties<sup>38</sup>.

The Assembly of States Parties, which meets at least once a year, sets the general policies for the administration of the Court and reviews its activities. During those meetings, the States Parties review the activities of the working groups established by the States and any other issues relevant to the ICC, discuss new projects and adopt the ICC's annual budget<sup>39</sup>.

Over 120 countries are States Parties to the Rome Statute, representing all regions: Africa, the AsiaPacific, Eastern Europe, Latin America and the Caribbean, as well as Western European and North America<sup>40</sup>.

The seat of the Court is in The Hague in the Netherlands. The Rome Statute provides that the Court may sit elsewhere whenever the judges consider it desirable. The Court has also set up offices in the areas where it is conducting investigations.

The Court is funded by contributions from the States Parties and by voluntary contributions from governments, international organisations, individuals, corporations and other entities.

### ***Difference with other courts.***

The ICC is a permanent autonomous court, whereas the *ad hoc* tribunals for the former Yugoslavia and Rwanda, as well as other similar courts established within the framework of the United Nations to deal with specific situations only have a limited mandate and jurisdiction<sup>41</sup>.

The ICC, which tries individuals, is also different from the International Court of Justice, which

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<sup>37</sup> Abbot *On the development of international law and judicial institutions over the past few decades* 2000

<sup>38</sup> Understanding the International Criminal Court <http://www.icc-cpi.int/> - on 10 December 2015

<sup>39</sup> Understanding the International Criminal Court <http://www.icc-cpi.int/> - on 10 December 2015

<sup>40</sup> Understanding the International Criminal Court <http://www.icc-cpi.int/> - on 10 December 2015

<sup>41</sup> Understanding the International Criminal Court <http://www.icc-cpi.int/> - on 10 December 2015

is the principal judicial organ of the United Nations for the settlement of disputes between States<sup>42</sup>. The ad hoc tribunal for the former Yugoslavia and the International Court of Justice also have their seats in The Hague.

The ICC does not replace national criminal justice systems<sup>43</sup>; rather, it complements them. It can investigate and, where warranted, prosecute and try individuals only if the State concerned does not, cannot or is unwilling genuinely to do so. This might occur where proceedings are unduly delayed or are intended to shield individuals from their criminal responsibility<sup>44</sup>. This is known as the principle of complementarity<sup>45</sup>, under which priority is given to national systems. States retain primary responsibility for trying the perpetrators of the most serious of crimes.

The primary mission of the International Criminal Court is to help put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes<sup>46</sup>.

### 3.1.3 Jurisdiction

When a State becomes a party to the Rome Statute, it agrees to submit itself to the jurisdiction of the ICC with respect to the crimes enumerated in the Statute. The Court may exercise its jurisdiction in situations where the alleged perpetrator is a national of a State Party or where the crime was committed in the territory of a State Party<sup>47</sup>. Also, a State not party to the Statute may decide to accept the jurisdiction of the ICC. These conditions do not apply when the Security Council, acting under Chapter VII of the United Nations Charter, refers a situation to the Office of the Prosecutor.

The ICC has jurisdiction only with respect to events which occurred after the entry into force of

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<sup>42</sup> Understanding the International Criminal Court [.http://www.icc-cpi.int](http://www.icc-cpi.int) - on 10 December 2015

<sup>43</sup> Preamble, *The Rome Statute*(2002)

<sup>44</sup> Luis Moreno-Ocampo, *A Global Web of Justice is Up and Running*, <http://www.iht.com/articles/2006/06/11/opinion/edocampo.php>. On December 10 2015

<sup>45</sup> Luis Moreno-Ocampo, *A Global Web of Justice is Up and Running*, <http://www.iht.com/articles/2006/06/11/opinion/edocampo.php>. On December 10 2015

<sup>46</sup> Preamble, *The Rome Statute*, 2002

<sup>47</sup> Article 12 Rome Statute, 2002

its Statute on 1 July 2002<sup>48</sup>. If a State becomes a party to the Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State, unless that State has made a declaration accepting the jurisdiction of the ICC retroactively<sup>49</sup>. However, the Court cannot exercise jurisdiction with respect to events which occurred before 1 July 2002<sup>50</sup>.

For a new State Party, the Statute enters into force on the first day of the month after the 60th day following the date of the deposit of its instrument of ratification, acceptance, approval or accession<sup>51</sup>.

The ICC prosecutes individuals, not groups or States. Any individual who is alleged to have committed crimes within the jurisdiction of the ICC may be brought before the ICC.

In fact, the Office of the Prosecutor's prosecutorial policy<sup>52</sup> is to focus on those who, having regard to the evidence gathered, bear the greatest responsibility for the crimes, and does not take into account any official position that may be held by the alleged perpetrators.

#### *3.1.3.1 Amnesty or immunity.*

No one is exempt from prosecution because of his or her current functions or because of the position he or she held at the time the crimes concerned were committed<sup>53</sup>. Acting as a Head of State or Government, minister or parliamentarian does not exempt anyone from criminal responsibility before the ICC<sup>54</sup>.

In some circumstances, a person in a position of authority may even be held responsible for crimes committed by those acting under his or her command or orders<sup>55</sup>.

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<sup>48</sup> Article 11(1) *Rome Statute*, 2002

<sup>49</sup> Article 11(2) *Rome Statute*, 2002

<sup>50</sup> Article 24 *Rome Statute* 2002

<sup>51</sup> Understanding the International Criminal Court <http://www.icc-cpi.int/> - on 10 December 2015

<sup>52</sup> Office of the Prosecutor, International Criminal Court, Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), [http://www.icc-cpi.int/library/cases/OTP\\_ReportUNSC\\_3-Darfur](http://www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur) on December 10th 2015

<sup>53</sup> Article 27(1) *Rome Statute*, 2002

<sup>54</sup> Article 27(1) *Rome Statute*, 2002

<sup>55</sup> Understanding the International Criminal Court <http://www.icc-cpi.int/> - on 10 December 2015

Likewise, amnesty cannot be used as a defense before the ICC<sup>56</sup>. As such, it cannot bar the Court from exercising its jurisdiction.

### 3.2 THE ICC MORE THAN DECADE LATER.

Since the ICC first came into existence in 2002, it has become an integral part of the international political relations and human rights systems. As of July 2008, 108 States Parties had ratified the Rome Statute, and the ICC prosecutor had taken up four country situations<sup>57</sup>. Although there have as yet been no convictions, some significant work has been done.

Pursuant to the Rome Statute<sup>58</sup>, the Prosecutor can initiate an investigation on the basis of a referral from any State Party or from the United Nations Security Council. In addition<sup>59</sup>, the Prosecutor can initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court received from individuals or organisations (“communications”).

To date, four States Parties to the Rome Statute – Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali – have referred situations occurring on their territories to the Court<sup>60</sup>. In addition, the Security Council has referred the situation in Darfur, Sudan, and the situation in Libya – both non-States Parties. After a thorough analysis of available information, the Prosecutor has opened and is conducting investigations in all of the above-mentioned situations.

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<sup>56</sup> Article 27(2) Rome Statute, 2002

<sup>57</sup> [https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) on 14 December 2015.

<sup>58</sup> Article 14(1) of The Rome Statute 2002- A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

<sup>59</sup> Article 15(1) of the Rome Statute 2002- The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

<sup>60</sup> [https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) on 14 December 2015.

### 3.2.1 Uganda.

In December 2003, the government of Uganda requested that the prosecutor open an investigation into the situation in northern Uganda<sup>61</sup>. Since then a field office has been established and five arrest warrants have been issued against senior leaders of the Lord's Resistance Army, including Joseph Kony. Peace negotiations were however requested by the government of Uganda and Joseph Kony.

### 3.2.2 Sudan. (Darfur)

Sudan is the only country under investigation so far that has not requested intervention. In March 2005, the United Nations Security Council adopted Resolution 1593, referring the situation in Darfur to the ICC<sup>62</sup>. The prosecutor accordingly opened an investigation in June 2005, and arrest warrants were issued for Ahmad Harun (former Sudanese Minister of State for the Interior) and Ali Kushayb (a former militia leader) in April 2007 on multiple counts of war crimes and crimes against humanity. These warrants remain outstanding, as the Sudanese government is not a State Party to the Rome Statute and rejects the ICC's jurisdiction. Since the warrants were issued, Harun has been appointed Minister of Humanitarian Affairs and Co President of the national committee responsible for investigating alleged human rights violations in Darfur.

More recently, the ICC prosecutor has asked the Pre-Trial Chamber to issue a warrant for Omar Hassan Ahmad al-Bashir, President of Sudan, alleging crimes against humanity, war crimes and genocide<sup>63</sup>. As of November 2008, this warrant had not been issued.

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<sup>61</sup> Coalition for the International Criminal Court, "Uganda" <http://www.iccnw.org/index.php?mod=ug> on 14 December 2015

<sup>62</sup> Coalition for the International Criminal Court, "Sudan (Darfur)" <http://www.iccnw.org/index.php?mod=sudan> on 14 December 2015

<sup>63</sup> Coalition for the International Criminal Court, "Sudan (Darfur)" <http://www.iccnw.org/index.php?mod=sudan> on 14 December 2015

### 3.2.3 Kenya.

The situation in Kenya represented a high-ranking accused at trial in two cases: The Prosecutor v. William Samoei Ruto and Joshua Arap Sang and The Prosecutor v. Uhuru Muigai Kenyatta. In March 2013, while awaiting trial on charges of crimes against humanity relating to the violence following the 2007 national elections, Uhuru Kenyatta and William Ruto ran for and were elected President and Deputy President of Kenya, respectively<sup>64</sup>. The Ruto and Sang trial began in September 2013, while the Kenyatta trial was then scheduled to commence on February 5, 2014. During pre-trial and trial, the accused were never placed in detention. Instead, they were “under the regime of summons to appear, on their own recognisances, and on their promises of continued cooperation with the processes of the Court.”<sup>65</sup>

#### **The Trial Chamber Decisions**

In June 2013, in response to a request from the Ruto defense, Trial Chamber V (a) held by majority that Ruto may be excused from trial with certain exceptions: he would be required to attend the opening statements of all parties and participants, the closing statements of all parties and participants, victims’ in-person presentations of views and concerns, the delivery of judgment, and any other attendance that the Chamber directed. The majority also ruled that, if applicable, Ruto must be present for the entirety of the sentencing hearings, the sentencing, the victim impact hearings, and the reparation hearings. The majority further held that Ruto’s excused absence from trial must always be related towards performance of his duties of state.<sup>66</sup> On October 18, 2013, a majority of the Kenyatta Trial Chamber excused Kenyatta from trial with the same exceptions, fully adopting the reasoning of the Ruto Trial Chamber majority and holding that “Ruto relief” was all the more applicable to President Kenyatta.

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<sup>64</sup> Prosecutor v. Ruto & Sang, Case No. ICC-01/09/01/11, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, 8–9 (June 18, 2013)

<http://www.un.org/apps/news/story.asp?NewsID=46499#.VUJFptJVhBc>. On December 12 2015

<sup>65</sup> Prosecutor v. Ruto & Sang, Case No. ICC-01/09/01/11

<sup>66</sup> Prosecutor v. Ruto & Sang, Case No. ICC-01/09/01/11, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, ¶ 110 (June 18, 2013) [http://www.icc-](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx)

[cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) on December 12 2015

A majority of the Ruto Trial Chamber subsequently granted the Prosecutor leave to appeal two issues: (1) the scope of the presence requirement in Article 63(1) and the extent of the Trial Chamber's discretion, if any, to excuse the accused from attending trial; and (2) whether the applicable law supports the Trial Chamber's test for an excusal of the accused.<sup>67</sup> Notably, Tanzania, Rwanda, Burundi, Eritrea, and Uganda filed joint observations, arguing that there was no legal basis to prevent the accused from discharging their political responsibilities in Kenya during trial, subject to the control of the ICC Trial Chamber.

### **The Appeals Chamber Decision**

The Appeals Chamber reversed the Ruto Trial Chamber, holding Trial Chamber discretion under Article 63<sup>68</sup> to be "limited" and "exercised with caution." The Appeals Chamber identified several limits on this discretion, such as that any absence must be limited to what is strictly necessary and that the accused must have explicitly waived his or her right to be present. The Appeals Chamber also recognized that, given that unforeseen circumstances could arise necessitating the accused's absence, Article 63(1) is not an absolute bar to the continuation of trial proceedings without the accused.

In light of the Ruto Appeals Chamber Decision, the Kenyatta Trial Chamber reconsidered its original decision and held that Kenyatta must be present at trial as a general rule, with any future excusal requests to be considered on a case-by-case basis.

### **The African Union and UN Security Council**

Though African countries have called for withdrawals from the Rome Statute at least as early as 2009<sup>69</sup>, their diplomatic attempts to halt and discredit the Kenya proceedings increased as the cases moved closer to trial. During an October 2013 extraordinary session of the African Union

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<sup>67</sup> Prosecutor v. Ruto & Sang, Case No. ICC-01/09/01/11

<sup>68</sup> If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required

<sup>69</sup> Dapo Akande, *Is Kenya Pushing for a Mass African Withdrawal from the ICC?*, on (Jan. 14, 2011), <http://www.ejiltalk.org/is-kenya-pushing-for-a-mass-african-withdrawal-from-the-icc> on December 12 2015

in Addis Ababa, the AU issued a “Decision on Africa’s Relationship with the International Criminal Court.” While affirming its “unflinching commitment” to fighting impunity, promoting human rights and democracy, the AU Assembly reiterated its concern regarding “the politicization and misuse of indictments against African leaders” at the Court, including the indictments against Kenyatta and Ruto. The AU thus decided that no international tribunal may commence proceedings against any African Union Head of State or government, thus “safeguarding the constitutional order, stability and, integrity of Member States.” It also called for the suspension and postponement of the *Kenyatta* and *Ruto* trials, respectively, until the UN Security Council considered a Kenyan request for deferral. The AU also moved to create a special group to engage the UN Security Council and a “fast track” expansion of the mandate of the African Court on Human and Peoples’ Rights to try international crimes<sup>70</sup>.

The following month, the UN Security Council rejected a Rwandan proposed resolution to suspend the *Kenyatta* and *Ruto* trials for one year. Seven Council members voted in favor of suspension (Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda, and Togo), none voted against, and eight abstained (Argentina, Australia, France, Guatemala, Luxembourg, South Korea, United Kingdom, and the United States)<sup>71</sup>.

### **The Assembly of States Parties (ASP)**

Less than two weeks later, at the twelfth session of the ASP, a Special Segment was held at the request of the African Union on “Indictment of Sitting Heads of State and Government and Its Consequences on Peace and Stability and Reconciliation.” The segment—which included a panel discussion with Professors Cherif Bassiouni and Charles Jalloh, and Githu Muigai, Attorney General of Kenya—reached a conclusion that amendment of the Rome Statute was unlikely but that there was “broad agreement” that the Rules of Procedure and Evidence (RPE)

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<sup>70</sup> African Union, Decisions and Declarations, Extraordinary Session of the Assembly of the African Union, Decision on Africa’s Relationship with The international Criminal Court (ICC), AU Doc. Ext/Assembly/AU/Dec.1 (Oct. 12, 2013), <http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20> On December 12 2015

<sup>71</sup> *UN Rejects Africa Bid to Halt Kenya Leaders’ ICC Trials*, BBC News (Nov. 15, 2013), on <http://www.bbc.com/news/world-africa-24961169>. on December 12 2015

could be amended to address AU concerns<sup>72</sup>. By November 27, 2013, the ASP adopted three new rules permitting the accused to not be physically present in the courtroom. First, Rule 134 permits the Trial Chamber to grant, on a case-by-case basis, the request of an accused subject to a summons to appear to be present through the use of video technology during parts of his or her trial<sup>73</sup>. Next, Rule 134 provides that an accused subject to a summons to appear may submit a written request to be excused and represented by counsel during parts of the trial.

The Trial Chamber shall only grant the request if satisfied that:

- (a) exceptional circumstances exist to justify such an absence;
- (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;
- (c) the accused has explicitly waived his or her right to be present at the trial; and
- (d) the rights of the accused will be fully ensured in his or her absence.

According to the rule, Trial Chambers must consider such requests on a case-by-case basis, with regard for the subject matter of the specific hearings. Furthermore, any absence must be limited to what is strictly necessary, without becoming the rule.

Finally, Rule 134 regards accused who must “fulfill extraordinary public duties at the highest national level.” Under this rule, such accused may also submit a written request to the Trial Chamber to be excused and represented by counsel and explicitly stating his waiver of the right to be present at trial. The rule also mandates that the Chamber rule on such request expeditiously

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<sup>72</sup>Assembly of States Parties, International Criminal Court, Twelfth Session, The Hague, Nov. 20–28 2013, *Special Segment as Requested by the African Union: “Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation,”* ICC-ASP/12/61 (Nov. 27, 2013), [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-61-](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-61-) on December 12 2015

<sup>73</sup>Assembly of States Parties, International Criminal Court, Twelfth Session, The Hague, Nov. 20–28 2013, *Special Segment as Requested by the African Union: “Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation,”* ICC-ASP/12/61 (Nov. 27, 2013), [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-61-](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-61-) on December 12 2015

and grant the request when alternative measures are inadequate, it is in the interests of justice, and the rights of the accused are fully ensured.<sup>74</sup>

The requisite two-thirds majority approved these amendments to the Rules of Procedure and Evidence.

### **Subsequent Developments**

In January 2014, the *Ruto and Sang* Trial Chamber, ruling on a defense request pursuant to Article 63(1) of the Rome Statute and Rule 134 of the RPE, conditionally excused Ruto from continuous presence at trial, provided he file a waiver and be physically present for essentially the same hearings enumerated in its June 2013 Decision. In making its determination, the Chamber reasoned that Rules 134 clarified Article 63(1) of the Statute and were not inconsistent with any of the Statute's other provisions. The Chamber also considered that all requirements of Rule 134 were satisfied. Though the Prosecutor subsequently applied for leave to Appeal the Trial Chamber's decision<sup>75</sup>, a majority of the Trial Chamber denied the motion. Furthermore, in September 2014, a majority of the *Kenyatta* Trial Chamber ordered him to appear at an October status conference it deemed a "critical juncture in the proceedings."<sup>76</sup> However, by December 5, 2014, the Prosecutor stated that she was withdrawing charges against Kenyatta on the ground that she lacked sufficient evidence for conviction, and on March 13, 2015, terminated proceedings in the case<sup>77</sup>.

Furthermore, in June 2014, the African Union voted to amend the Protocol on the Statute of the African Court of Justice and Human Rights, potentially paving the way towards establishing a domestic forum that would prevent a case from reaching the ICC on the principle of

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<sup>74</sup> [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-61-](http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-61-) on December 12 2015

<sup>75</sup> Prosecutor v. Ruto & Sang, Case No. ICC-01/09/01/11, Prosecution's Application for Leave to Appeal the Decision on Excusal From Presence at Trial Under Rule 134 (Feb. 24, 2014)

<sup>76</sup> Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on Defence Request for Excusal from Attendance at, or for Adjournment of, the Status Conference Scheduled for 8 October 2014 (Sep. 30, 2014), <http://www.icc-cpi.int/iccdocs/doc/doc1842118> on December 12 2015

<sup>77</sup> Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Decision on the Withdrawal of Charges against Mr Kenyatta (Mar. 13, 2015), <http://www.icc-cpi.int/iccdocs/doc/doc1936247> on December 12 2015

complementarity<sup>78</sup>. The Protocol—which will enter into force thirty days after the deposit of the instruments of ratification by fifteen Member States—governs the merger of the current African Court of Justice and the African Court on Human and People’s Rights into one main judicial organ of the AU. This Protocol has now been amended to include a provision regarding immunity for sitting AU leaders and senior state officials. However only, a few countries had ratified the Protocol.

### 3.3 CHALLENGES FACING THE ICC.

#### 3.3.1 Selective prosecution.

All the cases that the ICC is currently investigating and prosecuting are all crimes related to crimes allegedly committed in countries in Africa. This has raised questions as to whether this is an instance of the discrimination of international criminal law.

Countries from the global south have often complained of twisted power relations in the UN Security Council.

This imbalance has affected the ICC in that, under the Rome Statute, the Security Council has the power to refer cases to the court. The Security Council has indeed referred some cases. These include Libya and the Sudanese region of Darfur— but not others, such as Israel and Syria. The fact that the two situations that have been referred come from Africa tends to support the proposition that there is an anti-African bias. This has been effectively argued by John Dugard, in relation to Israel, in the most recent issue of the *Journal of International Criminal Justice*<sup>79</sup>.

There are justified reasons to pursue the cases that are under investigation or prosecution before the ICC. First and foremost it is clear that Africa has experienced a large number of atrocities and, statistically speaking, the rate of atrocity crimes committed on the continent would make it a natural focus for the court anyway. The victims of those crimes want justice. The people who

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<sup>78</sup> Protocol on the Statute of the African Court of Justice and Human Rights, art. 2, July 1, 2008, [http://au.int/en/sites/default/files/PROTOCOL\\_STATUTE\\_AFRICAN\\_COURT\\_JUSTICE\\_AND\\_HUMAN\\_RIGHTS](http://au.int/en/sites/default/files/PROTOCOL_STATUTE_AFRICAN_COURT_JUSTICE_AND_HUMAN_RIGHTS) on December 12 2015

<sup>79</sup> John Dugard, ‘Palestine and the International Criminal Court: Institutional Failure or Bias?’ *Journal of International Criminal Justice*, 11(3), 2013: 563–70.

complain about the bias tend to be African political elites, not the victims, who appear to be almost universally comforted by the fact that somebody or rather anybody, is paying attention to their plight<sup>80</sup>.

However, there is a candid problem, which has to do with perception and the need for the ICC to be seen to be acting in a just manner in order to maintain its authority. The universal objectives of international criminal law are inconsistent with a focus that is limited to African states, in a world in which many other states (particularly powerful ones) act with apparent impunity.

The refusal by Archbishop Desmond Tutu of South Africa in 2012 to share a stage with former British Prime Minister Tony Blair in Johannesburg, based on the latter's actions over the war in Iraq, called attention to this apparent moral ambivalence in relation to the way the ICC works.

Tutu's moral authority helped to demonstrate that this perception problem is very real.

Failure to take this problem seriously has provided some African politicians and officials with ammunition to argue that the ICC is selectively biased against Africa. This distracts from the very real plight of victims of war crimes and crimes against humanity which have taken place on the continent, and hence overlooking the need for international criminal justice.

### 3.3.2 The African Union (AU) position.

A large number of African states are states parties to the ICC's Rome Statute but the AU is very critical of the ICC and has adopted a number of resolutions reflecting this. However, most African states at one time strongly supported the ICC. They were very active in the negotiation of the Rome Statute in the late 1990s. This was a time of great optimism, particularly because the statute had not just the backing of African governments but also of African NGOs, grouped under the International Coalition for the ICC<sup>81</sup>.

In 2008, the chief of protocol to President Paul Kagame of Rwanda, Rose Kabuye, was arrested in Germany pursuant to a French arrest warrant in connection with the shooting down of the former Rwandan president's plane, which triggered the 1994 genocide<sup>82</sup> Kagame took up the issue at the UN, framing it as an abuse of universal jurisdiction by European states aimed at

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<sup>80</sup> Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, *Africa and the International Criminal Court*.

<sup>81</sup> Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, *Africa and the International Criminal Court*.

<sup>82</sup> Mark Tran, 'Rwandan President Kagame Threatens French Nationals with Arrest,' *The Guardian*, 12 November 2008, <http://www.guardian.co.uk/world/2008/nov/12/rwanda-france> on 14 December 2015.

humiliating African political leaders. These are just two examples in a series of cases in which European states relied on universal jurisdiction to harass, in the eyes of some observers, African leaders.

In 2008, the AU reacted to the increased use of universal jurisdiction in European states by adopting a resolution denouncing certain Western governments and courts for abusing the doctrine of universal jurisdiction and urging states not to cooperate with any Western government that issued warrants of arrest against African officials and personalities in its name<sup>83</sup>.

The watershed moment for the AU's relationship with the ICC came in March 2009, following the issuance of the first arrest warrant for President Omar al Bashir of Sudan<sup>84</sup>. For states parties to the Rome Statute, this transformed it from a 'paper commitment' with no real consequences into a very real commitment with potentially serious consequences.

The Bashir arrest warrant caused the relationship between the ICC and the AU to deteriorate for two reasons. First, members of the AU felt that the issuance of the arrest warrant was an impediment to the organization's regional efforts to foster peace and reconciliation processes in Sudan, and that the ICC failed to appreciate the effect that its actions were having on these efforts.

Secondly, diplomatic umbrage was taken over the indictment of a sitting head of state, which sparked a debate over whether the Rome Statute can legitimately extinguish diplomatic immunity in states that are not parties to it, such as Sudan<sup>85</sup>

The AU's opposition to the ICC has created a legal conflict for states that are parties to both institutions and different governments have chosen to resolve it in different ways. For instance, when President Jacob Zuma was due to be inaugurated in South Africa, invitations were sent out to all African heads of state, including President Bashir. As a party to the Rome Statute, South

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<sup>83</sup> Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/14(XI), [http://www.minec.gov.mz/index2.php?option=com\\_docman&task=doc\\_view&gid=12&Itemid=48](http://www.minec.gov.mz/index2.php?option=com_docman&task=doc_view&gid=12&Itemid=48) on 14 December 2015.

<sup>84</sup> International Criminal Court, 'Warrant of Arrest for Omar Hassan Ahmad al Bashir', 4 March 2009, <http://www.iccpi.int/iccdocs/doc/doc639078> on 14 December 2015.

<sup>85</sup> Article 27 of the Rome Statute 2002.

Africa would be required to arrest President Bashir, if he attended the event. Overnight this created a diplomatic scandal that was very difficult for South Africa to deal with. After two or three days' silence from the South African government on the issue, civil society representatives threatened to request declaratory relief from a court that if President Bashir were to arrive in South Africa there would be an arrest warrant issued for him. The government eventually took the position that it would be under an obligation to arrest Bashir if he arrived in South Africa, and the Sudanese president did not attend the inauguration. South Africa's position – that it is bound by the Rome Statute – has been clear and consistent since then. But it is likely that many other African states faced with a similar choice would side with the AU, not the ICC<sup>86</sup>.

In October 2011, when Bingu wa Mutharika was Malawi's president, Bashir attended a for the Common Market for Eastern and Southern African States summit in that country. Malawi issued a formal memorandum in support of its decision to host Bashir, in which it relied on (i) the AU's resolution, passed in response to President Bashir's arrest warrant, urging states not to cooperate with the ICC, (ii) the customary international law doctrine of head-of-state immunity and (iii) the fact that Sudan was not a party to the Rome Statute and could therefore not be bound by its suspension of immunity, to demonstrate that it was not under obligation to arrest him<sup>87</sup>.

However, in June 2012 the current President of Malawi, Joyce Banda, refused to allow Bashir to attend an AU meeting in Malawi, forcing the organizers to move the meeting just three weeks before it was scheduled.

### 3.3.3 Contentious issue of state immunity.

Under customary international law senior state officials, such as President Bashir, for whom arrest warrants were issued in 2009 and 2010, and President Kenyatta and his deputy William Ruto, whose trials are began in 2013, have immunity from legal proceedings.

There is a question to how the ICC is constrained by this prohibition.

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<sup>86</sup> Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, *Africa and the International Criminal Court..*

<sup>87</sup> 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, Case No. ICC-02/05-01/09, 12 December 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1287184> . On 14 December 2015.

The question of immunities is central to the AU. One interpretation of Article 27 of the Rome Statute, which provides that state immunity does not apply under the statute, is that it creates an exception to customary international law and allows heads of state and other senior state officials to be tried in this particular jurisdiction.

Article 98 of the Rome Statute appears to conflict with Article 27. Article 98 states that,

*ICC may not request cooperation or surrender from a state where that would require that state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the court can first obtain the cooperation of that third state for the waiver of the immunity.*

But there appears to be an acceptance that states parties, by virtue of becoming members of the Rome Statute, have waived the immunity of their own officials or have otherwise accepted that they do not have immunity. So, at least as far as states parties are concerned, Article 98 does not apply, and there is no immunity before the court.

The difficulty arises in respect of states that are not parties to the Rome Statute, such as Sudan. There are a variety of views on this issue. It has been argued that in this situation, it is irrelevant that Sudan is not a state party because the case was referred by a Security Council resolution, which is binding on all UN member states.

In 2012 the AU Assembly asked the AU Commission to consider whether it would be possible to request an advisory opinion from the International Court of Justice (ICJ) on the question of immunity. While this initiative may not be successful, it is commendable that the AU has sought to resolve this matter through respected international law channels.

There is however a need to address the root causes of the conflict.

## 4 CHAPTER 4.

### 4.1 ANALYSIS.

First and foremost, before going into details of case studies discussed above, there appears to be no substantive justification as to why African states claim the ICC infringes one's sovereignty. Only that just as in accordance to the theory of realism which I relied on in my theoretical framework, states are driven to act by the basic instinct of survival and the maintenance of their sovereignty. The perpetrators of the crimes in the Rome Statute are usually the heads of states or leaders who have a significant influence on people. When they are committing these atrocities they never remember that they are a sovereign state that has a duty to protect its people but as soon as they are indicted or warrant of arrest are issued they want to hide behind sovereignty to preserve their own interests. They also argue that neither justice nor peace should be pursued at the cost of the other but with the universalization of human rights this argument no longer holds water.

However, we see from the above arguments that the issue is not sovereignty but is clearly a general argument about the working capacity of the ICC and its constant relation to politics. Before the establishment of the ICC, international tribunals were often criticised for being a pure political manipulation in so far as judges at Nuremberg, for example, were exercising jurisdiction despite the lack of a precise body of law to refer to; due to this lack, shielding perpetrators of crimes amongst the Allies was indeed possible, and condemnations to this politicisation of the tribunal were frequent<sup>88</sup>.

It is seen that the substantive law derived from the Rome Statute grants the ICC's legitimate jurisdiction, escaping political bias against it; this solves the issue first raised to the Nuremberg Tribunal and subsequently ad-hoc tribunals of "no crime hence no punishment without a previous penal law"<sup>89</sup>.

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<sup>88</sup> P. Sands, *From Nuremberg to the Hague: The Future of International Criminal Justice* (2003)

<sup>89</sup> Domenico Carofiglio, King's College London. To what extent have politics restricted the ICCs Effectiveness. Dec 20<sup>th</sup> 2015. <http://www.e-ir.info/2015/12/20/to-what-extent-have-politics-restricted-the-iccs-effectiveness/> on 28 December 2015

So why does it seem that the Court is succumbing to political pressure?

As Cherif Bassiouni, a great advocate of the ICC, commented, at the conclusion of the Rome Conference, ‘the ICC reminds governments that real politics, which sacrifices justice at the altar of political settlements, is no longer accepted’<sup>90</sup>. However, in the book “Legalism: law, Morals, and political trials by Judith Shklar, she affirms that it must be acknowledged that law is a form of political action and like any form of political belief and behaviour it is a matter of degrees, of more or less, and of subtle differences<sup>91</sup>.

Nevertheless, despite the potential protection of the Court from political power thanks to the Statute structure (as explained in the previous section), the political significance of such a court of law seems inevitable when the Court is in operation, and the following case studies will explore this justice-politics interaction.

With regards to the situation in Sudan, the then Prosecutor Moreno-Ocampo manifested his concerns for the peace talks in Sudan; however he made clear that he would implement the law regardless of any political insinuations the process could bring about<sup>92</sup>. Despite the goodwill of the Prosecutor to abstain from considering political factors in the pursuit of pure justice, the ICC ended up being a political weapon in the struggles between Al-Bashir’s government and the rebels; in that context, the Court became ‘implicated in the distinction, and thus formation, of allies and enemies’<sup>93</sup>. By issuing arrest warrants for the Sudanese head of state and accusing the whole Sudanese bureaucratic and military apparatus of being stained with Darfuri blood, the ICC designated the state as ‘an enemy of mankind’ and thus ended up being political despite having legal purposes.

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<sup>90</sup> Gaynor, F., and L. K. Morris. ‘M. Cherif Bassiouni, The Legislative History Of The International Criminal Court’. *Journal of International Criminal Justice* 6.4 (2008): 815-819.

<sup>91</sup> Shklar, Judith N. *Legalism*. Cambridge, Mass.: Harvard University Press, 1986. Pg 143

<sup>92</sup> Charbonneau, Louis. ‘ICC Prosecutor Won’t Back Down On Sudan’s Bashir, Reuters United Nations July 18 2008. <http://www.reuters.com/article/us-warcrimes-sudan-idUSN1639809920080718> on 28 December 2015

<sup>93</sup> Nouwen, S. M. H., and W. G. Werner. ‘Doing Justice To The Political: The International Criminal Court In Uganda And Sudan: A Rejoinder To Bas Schotel’. *European Journal of International Law* 22.4 (2011) pg 246

With regards to the atrocities in the Darfur region of Sudan and after a series of UN Resolutions to stop the violence, the SC eventually referred the case to the ICC<sup>94</sup>. It was the first time a non-party state to the Statute would be subject to the jurisdiction of the Court without its invitation by signing the Rome Statute<sup>95</sup>

Moreover, as many have stated the Court could easily be accused of being a ‘political battlefield’ where the US and its allies fight their non-western enemies<sup>96</sup>; thus politics appears to restrict the ICC’s legal effectiveness.

The case of Sudan, however, shows that politics is not a peripheral agent which restricts the ICC’s efficiency; political implications are already part of the game when the Court is in action. Regardless of the will of the Prosecutor to stay away from politics, the ICC inevitably enters a political dimension when it makes a distinction of ‘friends and enemies’<sup>97</sup> and this is something which is inevitable. Therefore, it is impossible to assess whether politics restricts the Court’s effectiveness. This is because, insofar as a comprehensive formal valuation of the Court should be based on an acknowledgment and understanding of the political aspects of the ICC, defining away the ICC’s political dimensions eventually undermines the Court by making it look either hypocritical or supreme.<sup>98</sup>

In contrast, in the context of Uganda, the ICC had a similar role in differentiating between friends and enemies; however, in this case, the enemies were the rebels. In 2003, the Ugandan President referred Uganda to the ICC. This move suited both the Court and President Museveni in so far as it would be the first state referral for the ICC and an opportunity for the Ugandan government to further weaken the Lord’s Resistance Army (LRA) which had threatened peace in Uganda as well as the Uganda Government. The ICC stepping in by invitation of the government could only favour Museveni. The conduct of the ICC in Uganda, supported solely by the

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<sup>94</sup> Coalition for the International Criminal Court, “Sudan (Darfur)” <http://www.iccnw.org/index.php?mod=drc> on 28 December 2015

<sup>95</sup> Coalition for the International Criminal Court, “Sudan (Darfur)” <http://www.iccnw.org/index.php?mod=drc> on 28 December 2015

<sup>96</sup> Nouwen and Werner *Doing Justice to the Political* 2011 pg940.

<sup>97</sup> Nouwen and Werner *Doing Justice to the Political* 2011 pg942

<sup>98</sup> Nouwen and Werner *Doing Justice to the Political* 2011 pg946

government, would end up rendering justice to Museveni's side while turning the 'LRA from enemies of the Ugandan government into enemies of international community as a whole'<sup>99</sup>.

Once again, the ICC would make a political distinction between enemies (the LRA) and allies (Museveni's government) in legal terms. The politicisation of the situation in Uganda was even clearer when the government decided to begin national proceedings in the hope of convincing LRA to sign a peace agreement; as a reaction, the Prosecutor publicly condemned the consequent peace talks asserting that they would allow LRA to carry forward its criminal agenda regardless of the peace agreement<sup>100</sup>. This proved the political use of the ICC at convenience of the Ugandan government to scare the LRA and vice versa in that the political calculations of the Prosecutor were equally quite obvious. Mr Moreno-Ocampo knew that by admitting the Ugandan case before the Court, he would not have to deal with the protest of a state unwilling to cede its jurisdiction and, ultimately, the Prosecutor would embark on an uncomplicated investigation with high chances of success<sup>101</sup>. The case in Uganda demonstrated another intrinsically political aspect of the Court in that by admitting a case the ICC is necessarily relying either on the government of the host country or the SC due to the lack of its own police or standing military and generally for safety and security purposes. They therefore have to suck up to the two entities (state parties or SC) in order to guarantee their support. This adds weight to the political burden that the Court has to carry. This operational limit of the Court, in the case of Uganda, clearly shows how politics restricts its effectiveness: 'in the eyes of the victims of grave crimes, until the ICC undertakes the difficult task of addressing government atrocities, the Court won't have truly achieved the objectives it intends to achieve'<sup>102</sup>.

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<sup>99</sup> Nouwen and Werner *Doing Justice to the Political* 2011 pg949

<sup>100</sup> <sup>100</sup> Domenico Carofiglio, King's College London. To what extent have politics restricted the ICCs Effectiveness. Dec 20<sup>th</sup> 2015. <http://www.e-ir.info/2015/12/20/to-what-extent-have-politics-restricted-the-iccs-effectiveness/> on 28 December 2015

<sup>101</sup> Moreno-Ocampo, 'Remarks by the Prosecutor of the International Criminal Court', Chicago, 9 Apr. 2008

<sup>102</sup> <sup>102</sup> Domenico Carofiglio, King's College London. To what extent have politics restricted the ICCs Effectiveness. Dec 20<sup>th</sup> 2015. <http://www.e-ir.info/2015/12/20/to-what-extent-have-politics-restricted-the-iccs-effectiveness/> on 28 December 2015

Similar to Sudan however, the case of Uganda shows that regardless of the attempt to keep politics away from the Court ‘the probability of it being used in political struggles is inherent in its core business, as it entails adjudicating on international crimes. This however does not necessarily mean it betrays justice or the rule of law’<sup>103</sup>.

Whereas the previous cases showed how there are intrinsic political implications when the Court operates, the case of Libya embodies the politicisation of the Court by the SC as an external agent. When the SC needed to further legitimise the intervention in legal terms, it referred the case of Libya to the ICC. However, as soon as the court had served the political goals of these states, namely to marginalize and isolate Gaddafi and to legitimise the intervention itself, support for the Court’s mandate dwindled<sup>104</sup>.

The referral made by the SC did restrict the ICC’s effectiveness. With UN Resolution 1970<sup>105</sup>, the major stakeholders in the UN, chiefly the US, ensured that the Libya situation would be brought before the Court. They however made it clear that their military personnel and political elites would be shielded by its jurisdiction<sup>106</sup>; even worse, Resolution 1970 reports that the SC ‘decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011’<sup>107</sup>.

The question however is why this date in specific despite the fact that there are several other atrocities that were committed in Libya during Gaddafi’s 42 year rule.

As Kersten notes this time constraint would effectively shield many Western states from investigation about their affairs and relations with Gaddafi and his officials before 2011. The

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<sup>103</sup> Nouwen and Werner *Doing Justice to the Political* 2011 pg942

<sup>104</sup> Kersten, Mark. ‘Between Justice And Politics: The International Criminal Court’s Intervention In Libya’. 31 Mar. 2015 <http://utoronto.academia.edu/MarkKersten> on 28 December 2015.

<sup>105</sup> United Nations Security Council, Resolution 1970 26<sup>th</sup> Feb 2011, <https://www.icc-cpi.int/NR/.../1970> on 28 December 2015.

<sup>106</sup> Dunne, T. and Gifkins, J. ‘Libya and the state of intervention’, (2011), 65 *Australian Journal of International Affairs*, 51

<sup>107</sup> United Nations Security Council, Resolution 1970 26<sup>th</sup> Feb 2011, <https://www.icc-cpi.int/NR/.../1970> on 28 December 2015.

specific requirements of Resolution 1970 highlight how SC referrals can be very dangerous given the inevitable political nature they stem from.

In short, it can be learnt that the SC's referrals can easily end up with the SC's major stakeholders manipulating the Court for their own political purposes, thus limiting ICC's effectiveness. But even in this case, the matter still stands in an intrinsic political dimension of the Court when it is in operation rather than an external political influence as the SC<sup>108</sup>. To simplify it, if one imagines the Prosecutor commencing investigation in Libya proprio motu, he/she would eventually be compelled to ask for the support of Gaddafi, which was of course highly impractical, or the help of other states to conduct proceedings, and arrests. Hence, Kersten concludes that it is unlikely to think that the Prosecutor would investigate and prosecute Western personnel if able to do so only through the support of mainly Western states<sup>109</sup>.

As Ainley<sup>110</sup> argues, the Court is in fact obliged and 'incentivised to treat those states upon who it relies most heavily on with undue lenience or favour'.

These unavoidable political allegations arising at the operational level of the Court do seem to distract it from its very objective which is to pursue justice. In the end, what was important was the prosecution of those who had the greatest responsibility in war crimes, on the basis of gravity as selection criterion, which means that Gaddafi and his elite had to be judged; foreign actors, though involved, were not clearly the main perpetrators. The truth is that SC referral of Libya was a political operation from the beginning, given that the states referring became those who claimed, at the end of the conflict, that what happened to Gaddafi 'was up to the Libyan

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<sup>108</sup> Domenico Carofiglio, King's College London. To what extent have politics restricted the ICCs Effectiveness. Dec 20<sup>th</sup> 2015. <http://www.e-ir.info/2015/12/20/to-what-extent-have-politics-restricted-the-iccs-effectiveness/> on 28 December 2015

<sup>109</sup> Kersten, Mark. 'Between Justice And Politics: The International Criminal Court's Intervention In Libya'. 31 Mar. 2015 <http://utoronto.academia.edu/MarkKersten> on 28 December 2015

<sup>110</sup> Ainley, Kirsten. 'The International Criminal Court On Trial'. Cambridge Review of International Affairs 24.3 (2011): 309-333.

people'<sup>111</sup> thus, they would dismiss the jurisdiction of the Court altogether. Either as external agents or as inherent implications, politics did restrict ICC's effectiveness in the case of Libya.

However, it should not be forgotten that the structure of the Court, derived from the Rome Statute would allow the Prosecutor to reject referrals as stated in the previous chapter. However, it is also true that without SC referrals, the Court would not have some serious international crimes under its jurisdiction. It is a question of political differences and trade-offs that surround the Court rather than a choice between politics and justice<sup>112</sup>.

The situation in Kenya on the other hand represent the another paradox in that according to the African Union when the ICC's actions are deemed inconvenient to the state in question, especially when it involves African heads of state they are usually branded as "political" measures. However it is clear that the Trial and Appeals Chambers have continued to each face challenges interpreting their legal mandate because just as seen in the previous jurisdictions, they succumbed to political pressure to the extent of adopting new rules of procedure that were clearly inconsistent with The Rome Statute. Indeed, in the future, the Appeals Chamber may be called upon to revisit this issue and could strike down the recently-adopted rules as being inconsistent with Rome Statute provisions relating to the presence of accused at trial.

Not to forget, the actions taken by the ASP's show their willingness to proactively shape the RPE and course of proceedings, especially in legal matters with broader diplomatic implications. The ASP's engagement has transpired alongside other regional or international institutions, such as the AU and UN Security Council. Some would say that the ASP has improperly interfered with ongoing proceedings and infringed fundamental values enshrined in

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<sup>111</sup> Watt R.and Taylor, N., 'Muammar Gaddafi could stay in Libya, William Hague concedes', The Guardian, 25 July 2011, at <http://www.guardian.co.uk/world/2011/jul/25/gaddafi-libya-william-hague-plan>

<sup>112</sup> Domenico Carofiglio, King's College London. To what extent have politics restricted the ICCs Effectiveness. Dec 20<sup>th</sup> 2015. <http://www.e-ir.info/2015/12/20/to-what-extent-have-politics-restricted-the-iccs-effectiveness/> on 28<sup>th</sup> December 2015

the Rome Statute. Others frame the ASP's actions as necessary and pragmatic, particularly in the face of threats of withdrawal from the largest regional group of states in the ICC system<sup>113</sup>.

Finally, the Court continues to manage a complex relationship with Africa, especially given that all accused have thus far been African. The most recent developments regarding the African Court of Justice and Human Rights adds another layer of complexity to this dynamic, given that the ICC may ultimately need to rule on the admissibility of future cases in which the African Court has jurisdiction.

The ICC's mission of ending impunity for the perpetrators of the most serious crimes of concern to the international community is undoubtedly a noble one. In light of this recent chapter regarding high-ranking accused, it is clearer than ever that the ICC must pursue this legal goal in the midst of complex political and diplomatic realities.

Abandoning cases will do everything to suggest that prosecutions are misconceptions at the international level, with the grand exit clause for every brief: taking a leader to book for crimes of war, humanity and genocide will fail for want of ease and consensus<sup>114</sup>. It is therefore seen that "If the ICC acts, it will be very much criticised and if it fails to act it will be very much criticised. This however should never be an excuse as politics remains both an advancing cause and a crippling defect in the cause of international law.

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<sup>113</sup> Steven Arrigg Koh, Presence and Politics at the International Criminal Court Volume: 19; issue 11, June 01, 2015 The American Society of International Law <https://www.asil.org/insights/volume/19/issue/11/presence-and-politics-international-criminal-court> on 28 December 2015

<sup>114</sup> Domenico Carofiglio, King's College London. To what extent have politics restricted the ICCs Effectiveness. Dec 20 2015. <http://www.e-ir.info/2015/12/20/to-what-extent-have-politics-restricted-the-iccs-effectiveness/> on 28 December 2015

## 5 CHAPTER 5.

### 5.1 CONCLUSION

The study has established and proved the hypothesis that the ICC has a role to play in ending impunity, especially in the African Continent as that is where most crimes against humanity, genocide and war crimes are committed. All the accused persons and suspects hold the greatest responsibility and therefore need to be prosecuted.

With regards to the hypotheses that the ICC is succumbing to political pressure, the study has proved that politics seems to be inevitably part of the game when the Court operates in that: (i) the noninvolvement of the ICC lends itself to being an instrument 'for the labeling and frustration of enemies of a particular political group' as happened in Sudan<sup>115</sup>; (ii) for the fact that the Court operates in the context of ongoing conflict, as in Uganda, it can be easily exploited by the "good" side to defeat the enemy; (iii) the necessity of the Court to rely on the cooperation of states, chiefly the major stakeholders in the UN, makes the ICC easy prey for the SC's political calculations. All of this proves the hypotheses that the ICC is truly subject to political pressure as politics clearly limits the ICC's effectiveness, but as explained, these are politically inherent implications of the Court's operational capacity that can be acknowledged and adjusted through the Rome Statute but not avoided.

In light of the arguments hitherto made, it appears naïve, at least, to see the ICC as an apolitical body or a legal surrogate of the SC. For the time being, the Court is still heavily influenced by political bodies such as the SC, the African Union or states themselves, as shown by the four case studies. Nonetheless, the ICC is a relatively young institution whose structure, the Rome Statute, can substantially alter the degree of political control, as the first section demonstrated. By admitting that political implications are inherent in the Court's operations, it appears impossible to assess whether politics truly restricts its effectiveness. To recognise these political dimensions does not mean to diminish the legal and judicial value of the ICC.

Not to forget, in my opinion I believe that it is not the ICC, which is "failing" but "states refusing to join cause with the court against genocide, war crimes and crimes against humanity" that are damaging the cause.

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<sup>115</sup> Nouwen and Werner Doing Justice to the Political 2011 pg963

## 5.2 RECCOMENDATIONS.

Many have recommended that the establishment of an African Court may solve the ' ICC and Africa problem' however, we must not forget that time is ticking and we cannot wait as there is a great need for justice for the victims who have suffered as a result of the crimes subject to the jurisdiction of the Court.

The solution is only to address the real monster which is impunity and corruption amongst selfish state leaders. There needs to be a paradigm shift in order to guarantee impartiality with regards to ICC matters. Once people realize that the politics that come with impunity need to be addressed, then this will guarantee perpetrators are tried to the ends of justice regardless of the court of law used as justice will be a key agenda amongst African states rather than selfish diplomatic interests.

We must therefore consider investing universal jurisdiction in various African supreme or high courts, simply by passing statutes that give these courts authority to try cases related to the most egregious violations of human rights on the continent. Using the judiciaries of smaller states in Africa that have succeeded in earning the confidence of their people provides an alternative.

Though it may be a diplomatic, logistical and practical nightmare, it is less painful to witness than hearing people criticise a court for example that holds a men accountable for war crimes, crimes against humanity and crimes of aggression, rather than celebrate that something is finally happening to help bring justice to victims of such crimes.

Not to forget, in cases where Courts in the "territorial state" are sometimes inaccessible for victims for a variety of reasons, including the availability of domestic immunities or self-imposed amnesties and de facto impunity and security risks, especially when the crimes were state-sponsored, universal jurisdiction will pave way for another country take up the matter on behalf of those victims For instance, a domestic amnesty law in Chile protected former dictator Augusto Pinochet and other government officials in Chile, but the law was not able to stop proceedings filed against him in Spain using the doctrine of universal jurisdiction by victims who managed to escape his dictatorship.

Other than that there is need in Africa for greater enhanced political support for the work of the court and the entire international criminal justice. The fulfilment of the aims and objectives of the ICC on the African continent and particularly through the complementarity regime are dependent on the support of African states and administrations. They need to have a collaborative relationship between these stakeholders and the ICC.

The AU is called to affirm rather than cheapen the organisations commitment to eradicate impunity and ensure responsibility for perpetrators of crimes against humanity, war crimes and genocide. This is a time for African voices, regional organisations and civil society to speak out against distortions regarding the ICC's work in Africa. Criticism must be given but with an understanding that the courts position in Africa is one that needs strengthening and nurturing so that it can ensure that African interests are taken care of.

Without interfering directly in its operations, the Court's autonomy and independence would be preserved, thereby guaranteeing its effectiveness. Support of the ICC must also be reflected in the priorities of intergovernmental organisations in specific the African Union. They should strive to work towards compliance with the Court's decisions, and strengthen complementarity in the prosecution for international crimes. The UN Security Council should also continue to use, but in an impartial manner, its power of referral to the ICC

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