

The African Union and the Development of African International Criminal Law

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vorgelegt von

Balingene Kahombo

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Erstgutachterin: Prof. Dr. Heike Krieger

Zweitgutachter: Prof. Dr. Helmut Philipp Aust

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Declaration

I declare that the thesis titled “The African Union and the Development of African International Criminal Law”, which I hereby submit for the degree Doctor of Philosophy, at the Law Department of *Freie Universität Berlin*, is my work and has not previously been submitted by me for a degree or examination at this or another university. Where secondary material is used, this has been carefully acknowledged and referenced in accordance with academic requirements.

Balingene Kahombo

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List of Abbreviations

ACCA	: African Coalition for Corporate Accountability
ACDEG	: African Charter on Democracy, Elections and Governance
ACHPR	: African Charter on Human and Peoples' Rights
ACmHPR	: African Commission on Human and Peoples' Rights
ACRI	: African Court Research Initiative
ACSRT	: African Centre for the Study and Research on Terrorism
AEC	: African Economic Community
AfCHPR	: African Court of Human and Peoples' Rights
AfCJHPR	: African Court of Justice and Human and Peoples' Rights
AfCJHR	: African Court of Justice and Human Rights
AICHR	: ASEAN Inter-governmental Commission on Human Rights
AMU	: Arab Maghreb Union
ANAD	: Agreement on Non-Aggression and Defence Assistance
AOHR	: Arab Organisation for Human Rights
APLFT	: Association for the Promotion of Fundamental Liberties in Chad
APSA	: African Peace and Security Architecture
ASEAN	: Association of South-East Asian Nations
ASP	: Assembly of States Parties
ATS	: Amphetamine Type Stimulants
AU	: African Union
AUCIL	: African Union Commission on International Law
AUPD	: African Union High-Level Panel on Darfur
AZAPO	: Azanian People's Organisation
BIA	: Bilateral Immunities Agreements
CAR	: Central African Republic
CARICOM	: Caribbean Community
CADSP	: Common African Defence and Security Policy
CCJ	: Caribbean Court of Justice
CEMAC	: Economic and Monetary Community of Central Africa
CEN-SAD	: Community of Sahel-Saharan States
CEPGL	: Economic Community of Countries of the Great Lakes
CFA	: <i>Communauté financière africaine</i> (African Financial Community)

CFTA	: Continental Free Trade Area
CICC	: Coalition for the International Criminal Court
CIPEV	: Commission of Inquiry on Post-Elections Violence
CMCA	: Commission on Mediation, Conciliation and Arbitration
CNDP	: <i>Congrès National pour la Défense du Peuple</i> (National Congress for the People's Defence)
CODESRIA	: Council for the Development of Social Science Research in Africa
COMESA	: Common Market for Eastern and Southern Africa
COPAX	: Council for Peace and Security in Central Africa
CSSDCA	: Conference on Security, Stability, Development and Co-operation in Africa
DRC	: Democratic Republic of Congo
EAC	: Extraordinary African Chambers
ECCAS	: Economic Community of Central African States
ECCC	: Extraordinary Chambers in the Courts of Cambodia
ECCHR	: European Centre for Constitutional and Human Rights
ECHR	: European Court on Human Rights
EComHR	: European Commission on Human Rights
ECOSOCC	: Economic, Social and Cultural Council
ECOWAS	: Economic Community of West African States
ESIL	: European Society of International Law
FATF	: Financial Action Task Force
FDLR	: <i>Forces Démocratiques de Liberation du Rwanda</i> (Democratic Forces for the Liberation of Rwanda)
FIDH	: <i>Fédération Internationale des Droits de l'Homme</i> (International Federation of Human Rights Leagues)
HRC	: Human Rights Committee
IACHR	: Inter-American Commission on Human Rights
ICC	: International Criminal Court
ICCLR	: International Centre for Criminal Law Reform and Criminal Justice Policy
ICCPR	: International Covenant on Civil and Political Rights
ICCTAP	: International Criminal Court Technical Assistance Program
ICEM	: International Commission of Enquiry on Mercenaries

ICGLR	: International Conference on the Great Lakes Region
ICJ	: International Court of Justice
ICTR	: International Criminal Tribunal for Rwanda
ICTY	: International Criminal Tribunal for the former Yugoslavia
IDP	: Internally Displaced Persons
IGAD	: Intergovernmental Authority for Development
IIL	: Institute of International Law
ILC	: International Law Commission
IMT	: International Military Tribunal at Nurnberg
IMTFE	: International Military Tribunal for the Far East
Inter-Am. Ct. H.R.:	Inter-American Court of Human Rights
IOM	: Independent Oversight mechanism
JEM	: Justice and Equality Movement
JRRD	: Justice and Reconciliation Response to Darfur
KNDR	: Kenya National Dialogue and Reconciliation
LMG	: Like-Minded Group
LTDH	: Chadian League for Human Rights
MAPROBU	: African Prevention and Protection Mission in Burundi
NATO	: North Atlantic Treaty Organisation
NGO	: Non-Governmental Organisation
OAS	: Organisation of American States
OAU	: Organisation of African Unity
OAU/AEC	: Organisation of African Unity/ African Economic Community
OECD	: Organisation for Economic Cooperation and Development
OHADA	: Organisation for the Harmonisation of Business Law in Africa
OIC	: Organisation of Islamic Cooperation
OMD	: Orange Democratic Movement
ONUCI	: Operation of United Nations in Côte d'Ivoire
OTP	: Office of the Prosecutor
PALU	: Pan-African Lawyers Union
PCHR	: Palestinian Centre for Human Rights
PCIJ	: Permanent Court of International Justice
PDF	: Popular Defence Force
PGA	: Parliamentarians for Global Action

PNU	: Party of National Unity
PTC	: Pre-Trial Chamber
RADDHO	: African Assembly for the Defence of Human Rights
REC	: Regional Economic Community
RPF	: Rwandan Patriotic Front
RUF	: Revolutionary United Front
S/REC	: Sub-Regional Economic Community
SADC	: Southern African Development Community
SADI	: <i>Société Africaine pour le Droit International</i> (African Society of International Law)
SADR	: Sahrawi Arab Democratic Republic
SALC	: Southern Africa Litigation Centre
SAPS	: South African Police Services
SCCED	: Special Criminal Court on the Events in Darfur
SCSL	: Special Court for Sierra Leone
SFDI	: <i>Société Française pour le Droit International</i> (French Society of International Law)
SLM/A	: Sudanese Liberation Movement/Army
SPLM	: Sudan Peoples' Liberation Movement
STC	: Specialised Technical Committee
TFV	: Trust Fund for Victims
TJRC	: Truth, Justice and Reconciliation Commission
TWAIL	: Third World Approaches to International Law
UK	: United Kingdom
UN	: United Nations
UNCLOS	: United Nations Convention on the Law of the Sea
UNGA	: United Nations General Assembly
UNIDIR	: United Nations Institute for Disarmament Research
UNSC	: United Nations Security Council
UNWCC	: United Nations War Crimes Commission
USA	: United States of America
VCLT	: Vienna Convention on the Law of Treaties
WGA	: Working Group on Amendments

General Introduction

Public international law should not be or remain an order of frustrations for any part of the world. It is never too late to build “a workable, rational, balanced and accepted general system of international law”¹ and thus avoid, if not eradicate, what Christian Tomuschat, probably inspired by Samuel Huntington,² has called the clash of civilisations through the use of international law devices.³

The need to reform international law as such is not new. It is a constant issue under discussion among international lawyers. On the one hand, some voices, being aware of the fact that the elimination of colonial administrations did not really amount to the entire decolonisation of the world,⁴ continue to claim for the decolonisation of international law.⁵ On the other hand, contrary voices have their roots in the phenomenon of what Obiora Okafor calls “newness claims” in international law, that is to say “a deeply political practice, a key political maneuver that allows proponents of radical international reforms to justify many of their preexisting imperial ambitions”⁶ in order to perpetuate “the historical and continuing experience of subordination at the global level”⁷ and serve hegemonic purposes.⁸

What is new, however, is that the debate has never been made in international criminal law as in the present time. It is particularly Africa, as a territorial set of 55 independent countries that

¹ S. Rosenne, ‘The Perplexities of Modern International Law. General Course on Public International Law’, 291 *Recueil des Cours de l’Académie de Droit International* (2001) 9-472, at 24.

² S. P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (London: Simon and Schuster, 1996). The book was initially published in 1993 and since then several re-editions have followed.

³ C. Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law’, 281 *Recueil des Cours de l’Académie de Droit International* (1999) 9-438, at 55.

⁴ S. J. Ndlovu-Gatsheni, *Coloniality of Power in Postcolonial Africa: Myths of Decolonization* (Dakar: CODESRIA, 2013), at 3.

⁵ S. Pahuja, *Decolonizing International Law. Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

⁶ O. Okafor, ‘Newness, Imperialism, and International Legal Reform in our Time: a TWAIL Perspective’, 43 *Osgoode Hall Law Journal* (2005)171-191, at 172 and 173.

⁷ *Ibid.*, at 174.

⁸ See M. Koskeniemi, ‘What is International Law for?’, in M. D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2010) 32-57, at 32, 50 and 51.

are members of the African Union (AU),⁹ which decides to make and develop African international criminal law in parallel with universal international criminal law. In fact, the Extraordinary African Chambers in charge of the trial of the former Chadian President, Hissene Habré, were created in 2012,¹⁰ after the AU's attempt to establish a hybrid criminal tribunal for Darfur in Sudan.¹¹ In June 2014, the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereafter the Malabo Protocol on the AU Criminal Court), vested with jurisdiction to try 14 types of crimes.¹² Therefore, African international criminal law is becoming a legal reality. At first sight, it presupposes a negative connotation¹³ because it appears to be the opposite to universal international criminal law of which it might reflect "a symptom of weakness"¹⁴ or undermine the applicability. However, to look at it in a positive way as with any regional law, African international criminal law may be a "laboratory of ideas and practices"¹⁵ which can, thanks to its "experimental anticipation",¹⁶ enable progress in other regions of the world and at the global level.¹⁷

Accordingly, it is important to determine its foundational bases, that is, the factors which inform its development, to illustrate its content, and to examine its relationship with the

⁹ Morocco was not member of the African Union (AU) created in July 2000. However, it reintegrated the organisation in January 2017. Morocco withdrew from the AU's predecessor, the Organisation of the African Unity (OAU), in 1984 after the admission of the contested state of Western Sahara, officially named the Sahrawi Arab Democratic Republic (SADR), which Morocco considers to be part of its territory. See G. Naldi, 'West Sahara: Suspended Statehood or Frustrated Self-determination', 13 *African Yearbook of International Law* (2005) 11-41, at 16-19.

¹⁰ Agreement on the Establishment of the Extraordinary African Chambers within the Courts of Senegal between the Government of the Republic of Senegal and the African Union (22 August 2012).

¹¹ B. Kahombo, 'The Project for the Creation of a Pan-African Criminal Court', 14 *African Law Study Library* (2013) 71-91, at 80-83.

¹² Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (27 June 2014).

¹³ S. Doumbe-Billé, 'Propos introductifs', in S. Doumbe-Billé (ed.), *Régionalisation du droit international* (Bruxelles : Bruylant, 2012) 10-17, at 10.

¹⁴ See R.P. Anand (ed.), *Asian States and the Development of Universal International Law* (Delhi, Bombay, Bangalore, Kanpur, London: Vikas Publications, 1972), at xxvi.

¹⁵ P. Daillier, M. Forteau and A. Pellet, *Droit international public* (8^e edn., Paris : LGDJ, 2009), at 86. The translation is mine.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

international legal system as a whole. But, with such a systemic character, the topic is not easy to study. Just the concept of African international criminal law may be a source of misunderstanding and significant controversy. Thus, this long introduction will provide preliminary clarifications on the concept in the particular context of this study (1), the problems that it raises (2) and its main structure (3).

1. The Particular Context of the Study

African international criminal law overlaps the notions of regionalism and universalism. Both notions appear to have a conflicting nature by excluding each other (regionalism v. universalism).¹⁸ But, it is generally admitted that they can also go together (regionalism and universalism) so as to reflect the legal cultural diversity of the world.¹⁹ Hence, the so-called “unity in diversity”.²⁰ In this regard, universalism does not mean a uniform world.²¹ African international criminal law develops on the basis of regionalism while general or global international criminal law evolves on that of universalism. In the context of this study, both notions of regionalism and universalism raise the issue of regionalisation (1.1) and potential regional fragmentation of international criminal law (1.2).

1.1. The Regionalisation of International Criminal Law

The concept of regionalisation refers to a process which implies “no more than a concentration of activity at a regional level”²² and may result in “the formation or shaping of regions”²³ or “the emergence of regional groups”²⁴ and arrangements. This process is in

¹⁸ S. P. Sharma, ‘Regionalism versus Universalism: in Institutional Building’, in R.P. Anand (ed.), *Asian States and the Development of Universal International Law* (Delhi, Bombay, Bangalore, Kanpur, London: Vikas Publications, 1972) 130-142, at 130.

¹⁹ Doumbe-Billé, above note 13, at 15.

²⁰ J. Crawford, ‘Universalism and Regionalism from the Perspective of the Work of the International Law Commission’, in United Nations, *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (New York: United Nations, 1997) 99-121, at 119.

²¹ M. Bennouna, ‘Droit international et diversité culturelle’, in United Nations, *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (New York: United Nations, 1997) 79-98, at 80.

²² L. Fawcett, ‘Exploring Regional Domains: a Comparative History of Regionalism’, 80 (3) *International Affairs* (2004) 429-446, at 433.

²³ *Ibid.*

²⁴ *Ibid.*

essence a consequence of international regionalism. Regionalism can be defined as a policy developed by a group of states that agree, given their common history, interests, aspirations and objectives, to deal with their mutual affairs at the level of their limited region in exclusion of any external state to their group.²⁵ In this sense, international regionalism develops not only on the basis of geography (the region), but also (and cumulatively) of a number of shared commonalities between participant states.²⁶ But, one basis can be predominant over the other, depending on each specific case. In practice, international regionalism is a world-wide phenomenon and may include a political, legal, economic, social and cultural dimension.²⁷

The regionalisation of international criminal law implies the transformation of this law into a “regional fact”²⁸ which is dealt with by participant states within the boundary of their region. This process is very problematic. It occurs in a branch of international law which is above all characterised by a very high degree of universality. Thus, to assume that international criminal law is regionalised is in fact to agree that the declaration of its absolute universality is in principle relative (1.1.1) given the revival of international regionalism (1.1.2).

1.1.1. The Relative Absolute Universalism

The universal character of international law stems from its historical roots. In fact, the systematisation of contemporary international law between the 15th and 19th centuries is a European heritage.²⁹ Following the conclusion of the peace treaties of Westphalia (1648), international law was developed as a body of rules governing the relationships between the emerging European sovereign states from the pope’s empire. However, several authors

²⁵ See M. Virally, ‘Les relations entre organisations régionales et organisations universelles’, in Société française pour le droit international (SFDI), *Régionalisme et universalisme dans le droit international contemporain - Colloque de Bordeaux (1976)* (Paris : Pedone, 1977)147-165, at 148.

²⁶ F. Borella, ‘Le régionalisme africain et l’Organisation de l’unité africaine’, 9 *Annuaire français de droit international* (1963) 838-885, at 839 ; Sharma, above note 18, at 133.

²⁷ Daillier, Forteau and Pellet, above note 15, at 86.

²⁸ J-C. Gautron, ‘Le fait régional dans la société internationale’, in Société française pour le droit international (SFDI), *Régionalisme et universalisme dans le droit international contemporain - Colloque de Bordeaux (1976)* (Paris : Pedone, 1977) 3-43.

²⁹ M. Yanagihara, ‘Significance of the History of the Law of Nations in Europe and East Asia’, 371 *Recueil des Cours de l’Académie de Droit International* (2014) 273-435, at 305.

suggest that it made its earliest steps in the ancient civilisations of Asia and Africa.³⁰ In this regard, Sergiei Aleksandrovich Korff writes:

As soon as there developed a cultural center of a certain level of civilization, a state of some prominence, there grew up simultaneously relations with the outside world that soon took the shape of a whole system of institutions. In other words, such a system was the necessary consequence of any civilization and was as old as human culture in general. One matter of importance must be remembered in this connection: the ancient peoples of Asia or Africa were well acquainted with international relations and law. Further, there is another striking consequence: the careful analysis of these relations of different ancient civilizations reveals a remarkable similarity in their lines of development. Take, for example, the history of ambassadorial missions, the question of extradition of fugitive criminals, the protection of certain classes of foreigners, and, above all, the sanctity of international contracts.³¹

Among these legal developments of the ancient civilisations, one may quote the peace and alliance treaty (Treaty of Kadesh), which was concluded in 1259 BC between ancient Egypt under Pharaoh Ramsès II and the Kingdom of Hittites (former Syria) under Hattusili III.³² The Treaty of Kadesh is said to be one of the oldest agreements in the history of international law,³³ although it was concluded between two political entities which were not equivalent to current modern sovereign states. It is also known that there was a pre-colonial African international law, as confirmed by keen scientific observers.³⁴ But, when European scholars

³⁰ J. I. Levitt, 'Introduction. Africa: a Maker of International Law', in J. I. Levitt (ed.), *Africa: Mapping New Boundaries in International Law* (Oxford and Portland/Oregon: Hart Publishing, 2008) 1-9, at 2 and 3. See also S. C. Neff, 'A Short History of International Law', in M. D. Evans (ed.), *International law* (Oxford: Oxford University Press, 2010) 3-31, at 4. This author also confirms that earlier practices of international trade that could be attached to international law already happened in the 6th century before Jesus Christ in Africa. But, he only doubts that these practices correspond to the required elaborate conception of international law as it is known since the European treaties of Westphalia (1648).

³¹ S. A. Korff, 'An Introduction to the History of International Law', 18 (2) *American Journal of International Law* (1924) 246-259, at 246-247.

³² Yanagihara, above note 29, at 297.

³³ P.-M. Dupuy, 'L'unité de l'ordre juridique international. Cours général de droit international public', 297 *Recueil des Cours de l'Académie de Droit International* (2002) 9-496, at 80. It seems that this treaty is also the first to have contained a clause of extradition. See M. Poutiers, 'L'extradition des auteurs d'infractions internationales', in H. Ascensio, E. Decaux and A. Pellet (eds), *Droit international pénal* (Paris: Pedone, 2000) 933-950, at 933.

³⁴ E. I. Udogu, 'Historicizing and Contextualizing the Discourse on African International Law and a Concise Overview of the Pacific Settlement of the Cameroon-Nigeria Bakassi Peninsula Dispute', 7 *African and Asian*

and diplomats began to develop and systematise practices and principles of international law, the contribution of the ancient civilisations was ignored. According to Masaharu Yanagihara, this situation was due to the lack of knowledge concerning these civilisations because of the scarcity of (written) documents and the invasion of the discipline by ideology which intended to distinguish between Europeans and non-European (barbarian) peoples.³⁵ The universality of the new formulated European discipline was a result of its expansion and exportation everywhere around the world as a legal production of the civilised nations, so-called in the 19th century, that is to say Christian people of Europe and those of European origin.³⁶ International law started being used to justify conquests and the colonisation of the rest of the humanity or uncivilised nations,³⁷ who were objects and not subjects of international law.

While colonisation was an aberration of the history, it enabled the transformation of the European legal product (former public European law) into universal international law applicable world-wide.³⁸ This universality was consolidated after new states had emerged from decolonisation, partly accepted international law as valid and binding on them and rejected some of its rules which were supposed to compromise their hard-won independence and sovereignty.³⁹

In this context, universalism as a policy must be associated with the imposition of international law on all states and its application worldwide. Therefore, the concept of universal, global or common international law which is used as a synonym for general

Studies (2008) 77-99, at 78-79; J. T. Gathii, 'Chapter 17: Africa', in B. Fassbender and A. Peters (eds.), *The History of International Law* (Oxford: Oxford University Press, 2012) 407-428, at 410-412; M.-C. Djiena Wembou and D. Fall, *Droit international humanitaire: Théorie générale et réalités africaines* (Paris/Montréal: L'Harmattan, 2000), at 167-168.

³⁵ Yanagihara, above note 29, at 293-294.

³⁶ Tomuschat, above note 3, at 30.

³⁷ A. Anghie, 'The Evolution of International Law: Colonial and Post-colonial Realities', 27 (5) *Third World Quarterly* (2006) 739-753, at 742 and 743-746.

³⁸ See J. Crawford, 'Chance, Order, Change: the Course of International Law. General Course on Public International Law', 365 *Recueil des Cours de l'Académie de Droit International* (2013) 9-390, at 233.

³⁹ Anand, above note 14, at xiii and xiv ; A. Mampuya Kanunk'a Tshiabo, *Emergence des Etats nouveaux et droit international* (Kinshasa : Presses Universitaires du Zaïre, 1984), at 166-180 ; M. Flory, 'Décolonisation et succession d'Etat', 12 *Annuaire français de droit international* (1966) 577-593, at 589-592 ; M. Bedjaoui, 'Succession of States in Respect of Matters other than Treaties', II *Yearbook of International Law Commission* (1977) 45-117, Part I.

international law.⁴⁰ In its origin, it looks like an imperial law. Its universality excludes the possibility of any retreat into legal particularism because in this sense, as Bruno Simma writes, “international law is all-inclusive”.⁴¹ The Hague multilateral conventions of 1899 and 1907 as well as the Covenant of the League of Nations of 1919 were likely adopted with this legal spirit in mind. The original preexisting regionalism was step by step replaced by more and more imposing universality.

During the 20th century, universalism became balanced by various sectors of regionalism, but international criminal law so far remained outside the process of regionalisation. While there is no allocation of functions between the world as a whole and the regions,⁴² international criminal law seems to reflect the triumph of universalism. This impression of absolute all-inclusive universal character of international criminal law was further influenced by the development of a sort of “objective universality”.⁴³ True, any system of law is objective as a set of abstract, impersonal, general and binding rules governing the relationships between its subjects and organising the society. If international law possesses the same character with respect to international society,⁴⁴ it is also true that it relies on the will of sovereign states that create its rules, notably by adopting treaties (having relative effects on the parties), which at the same time apply to them. However, the idea of “objective universality” is based on a particular category of substantive rules that are permanent (applicable until abrogation) and binding on states without their express consent.⁴⁵ These norms are obligations *erga omnes*, as proclaimed by the International Court of Justice (ICJ),⁴⁶ and peremptory norms of general

⁴⁰ Daillier, Forteau and Pellet, above note 15, at 50.

⁴¹ B. Simma, ‘Universality of International Law from the Perspective of a Practitioner’, 20 (2) *European Journal of International Law* (2009) 265-297, at 267.

⁴² C. Schreuer, ‘Regionalism v. Universalism’, 6 *European Journal of International Law* (1995) 477-499, at 484.

⁴³ Crawford, above note 38, at 239.

⁴⁴ In this sense, positive international law is primarily objective law, which is different from subjective law. In fact, subjective law is simply a prerogative which is conferred by objective law on its subjects. For example, the prerogatives that are conferred on human being in international human rights law, such as the right to life, and the right to be free from torture.

⁴⁵ See C. Tomuschat, ‘Obligations Arising for States without or against their Will. General Course on Public International Law’, 241 *Recueil des Cours de l’Académie de Droit International* (1993) 195-374.

⁴⁶ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, second phase, Judgment of 5 February 1970, I.C.J. Report 1970, para.33.

international law or *jus cogens* provided for in Vienna Convention on the Law of Treaties.⁴⁷ These categories of norms, which differ in the degree of their character,⁴⁸ have given legitimacy to the increasing legalisation of the international system through various international instruments⁴⁹ and the doctrinal praise of the concept of “international community”⁵⁰ as the global protector of mankind against serious violations of international law. Such a conception of the “international community” is not far from the idea of “legal cosmopolitanism”⁵¹ defended by Danilo Zolo, which would lead to the progressive reduction

⁴⁷ Vienna Convention on the Law of Treaties (23 May 1969), Articles 53 and 64. See also Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Articles 26, 40 and 41. See also International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’, II *Yearbook of International Law Commission* (2001) 30-143, Part II.

⁴⁸ It can be said that obligations *erga omnes* are international customary rules established for the protection of the interest of the international community as a whole, whereas *jus cogens*, more than being made up of obligations *erga omnes*, consists of peremptory norms, i.e. norms from which no derogation is permitted. But, it is difficult to clearly distinguish between these two categories of norms in the international legal system due to the lack of a pre-established unequivocal criterion of identification. See D. Hahim, ‘Le concept d’indérogeabilité en droit international: une analyse fonctionnelle’ (PhD Thesis, Institut de Hautes Etudes Internationales et du Développement de Genève 2012), at 148-152 ; J. Verhoeven, ‘Sur les ‘bons’ et les ‘mauvais’ emplois du jus cogens’, I *Anuário Brasileiro de Direito Internacional* (2008) 133-160, at 138-139 ; J. Brunnée, ‘International Law and Collective Concerns : Reflections on the Responsibility to Protect’, in T.M. Ndiaye and R. Wolfrum (eds), *The Law of the Sea, Environment Law and Settlement of Disputes -Liber Amicorum Judge Thomas A. Mensah* (The Hague: Martinus Nijhoff Publisher, 2007) 35-51, at 37-38; P.-M. Dupuy, ‘Normes internationales pénales et droit impératif (*jus cogens*)’, in H. Ascensio, E. Decaux and A. Pellet (eds), *Droit international pénal* (Paris: Pedone, 2000) 71-80, at 78-79.

⁴⁹ Apart from Article 53 of the Vienna Convention on the Law of Treaties of May 1969 and the jurisprudence of the ICJ in the *Barcelona Traction* (1970) and the *Genocide case* (1996), it is important to quote, among other instruments, the preamble of the ICC Statute.

⁵⁰ B. Simma, ‘From Bilateralism to Community Interest in International Law. General Course on Public International Law’, 250 *Recueil des Cours de l’Académie de Droit International* (1994) 217-384; C. Tomuschat, ‘International Law as the Constitution of Mankind’, in United Nations, *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (New York: United Nations, 1997) 37-50; I.I. Lukashuk, ‘The Law of the International Community’, in United Nations, *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (New York: United Nations, 1997) 51-68; M. Delmas-Marty, *Les forces imaginaires du droit (IV). Vers une communauté des valeurs* (Paris: Seuil, 2011), at 8-11.

⁵¹ D. Zolo, *Cosmopolis: Prospects for World Government* (Cambridge: Polity Press, 1997), at 97. The author seems to have been influenced in this idea by Hans Kelsen. See D. Zolo, ‘Hans Kelsen: Peace through International Law’, 9 *European Journal of International Law* (1998) 306-324, at 319-322.

of the sovereignty of states, jurisdictional centralism and the development of norms and centralised bodies for the verification and coercive application of the law.⁵² On its part, the ICJ underlined this universality of international law in its judgment of 11 July 1996 in the *Genocide* case recalling its *Advisory Opinion of 28 May 1951*.⁵³ It stated that not only were rights and obligations enshrined in the Genocide Convention obligations *erga omnes*,⁵⁴ but also that the condemnation of genocide and the required cooperation to release mankind from such an odious act both had a universal character.⁵⁵

It is remarkable that the institutions designed for enforcing international criminal law are connected with this conception of universality. At the level of the United Nations, the Security Council created the International Criminal Tribunal for the former Yugoslavia (ICTY)⁵⁶ and the International Criminal Tribunal for Rwanda (ICTR)⁵⁷ for the purpose of prosecuting international crimes committed in the territories of these two states.⁵⁸ Historically, these tribunals were successors to the experience of the International Military Tribunal at Nuremberg (IMT)⁵⁹ and the International Military Tribunal for the Far East (IMTFE) after World War II,⁶⁰ and to the failure of prosecutions against the emperor Wilhelm II, after World War I, according to Article 227 of the Treaty of Versailles of 28 June 1919.⁶¹ Other criminal jurisdictions were later established, such as the Special Court for Sierra Leone (SCSL)⁶² and

⁵² *Ibid.*

⁵³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, at 23.

⁵⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996, para.31.

⁵⁵ *Ibid.*

⁵⁶ SC Res. 827, 25 May 1993, para.2.

⁵⁷ SC Res. 955, 8 November 1994, para.1.

⁵⁸ The process to terminate their mandates was launched in 2012. See SC Res. 1966, 22 December 2010, para.1. In this paragraph, the UN Security Council decided ‘to establish the International Residual Mechanism for Criminal Tribunals (“the Mechanism”) with two branches, which shall commence functioning on 1 July 2012 (branch for the ICTR) and 1 July 2013 (branch for the ICTY), respectively (“commencement dates”), and to this end *decides* to adopt the Statute of the Mechanism in Annex 1 to this resolution’.

⁵⁹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal (8 August 1945).

⁶⁰ See Charter of the International Military Tribunal for the Far East (1946), Article 1.

⁶¹ See E. David, *Code de droit international pénal* (Bruxelles: Bruylant, 2004), at 995.

⁶² Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (16 January 2002).

the Extraordinary Chambers in the Courts of Cambodia,⁶³ which involved the United Nations and the states in which crimes were committed.⁶⁴ The summit of universalism in international criminal law was reached with the International Criminal Court (ICC). The ICC's creation was applauded as "the odyssey of the 20th century".⁶⁵ The Rome Statute of 17 July 1998 also achieved a very long process of codification of international criminal law, following several efforts such as those of the United Nations International Law Commission (ILC) through the codification of the Nuremberg Principles,⁶⁶ the Draft Statute for an International Criminal Court⁶⁷ and the Draft Code of Crimes against the Peace and Security of the Mankind.⁶⁸

In the context of such universalism, a room was opened for international criminal law only at the national level. What could be called the third way of international criminal law which is found at the regional level was not foreseen. In this regard, the ICC Statute provides that the permanent institution is complementary to national criminal jurisdictions⁶⁹ while both the ICTY and the ICTR are temporary tribunals with primacy over national courts of all states.⁷⁰

It follows that the emergence of African international criminal law implies that the supposed absolute universalism of international criminal law becomes relative. Despite the existence of rules binding on states without their consent and the increasing trend to enforce international

⁶³ Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (6 June 2003), Article 2; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with Inclusion of Amendments as Promulgated on 27 October 2004 (NS/RKM/1004/006).

⁶⁴ See E. David, *Principes de droit des conflits armés* (Bruxelles : Bruylant, 2012), at 931-934.

⁶⁵ A.S. Cehreli, 'L'odyssée du XX^e: la naissance de la Cour pénale internationale', 2 *Synergies Turquie* (2009) 113-122.

⁶⁶ International Law Commission, 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries', II *Yearbook of International Law Commission* (1950) 374-378.

⁶⁷ International Law Commission, 'Draft Statute for an International Criminal Court with commentaries', II *Yearbook of International Law Commission* (1994) 26-74, Part II.

⁶⁸ International Law Commission, 'Draft Code of Crimes against the Peace and Security of Mankind with commentaries', II *Yearbook of International Law Commission* (1996) 17-56, Part II. It is a more developed text than the one already elaborated in 1954. See International Law Commission, 'Draft Code of Offences against the Peace and Security of the Mankind', II *Yearbook of International Law Commission* (1954) 1-3.

⁶⁹ ICC Statute, Article 1.

⁷⁰ ICTY Statute, Article 9 (2); ICTR Statute, Article 8 (2).

criminal law at the universal level, states remain the masters of the game to structure or restructure the global legal system. The truth is that “international law is a process”⁷¹ subject to constant transformations that are dictated by sovereign states’ aspirations. It is in line with these aspirations that the development of African international criminal law is envisaged, in respect of both substantive and procedural norms.

1.1.2. The Revival of International Legal Regionalism

It is now possible to say that international criminal law is moving from universalism to regionalism. The regional level is a third way next to the universal and domestic levels.

According to the ILC, the concept of regionalism encompasses three different meanings.⁷² Firstly, it is “a set of distinct approaches and methods for examining international law”⁷³ and denotes “particular orientations of legal thought or historical and cultural traditions”,⁷⁴ such as the Third World Approaches to International Law (TWAIL).⁷⁵ Secondly, regionalism means “a regional approach to international law-making”.⁷⁶ In this sense, regions are understood as “privileged forums for international law-making because of the relative homogeneity of the interests and actors concerned”.⁷⁷ The ILC even perceives that “much of international law has developed in this way, as the gradual extension of originally regional rules to areas outside the region”.⁷⁸ In this regard, the ICJ declared that the principle of *uti possidetis*, originally established by Latin-American states,⁷⁹ then approved for reasons of stability in new states by the Organisation of African Unity (OAU),⁸⁰ was already a norm of general international law.⁸¹ Lastly, in its third meaning, regionalism refers to “the pursuit of geographical exceptions to

⁷¹ Crawford, above note 38, at 22 and 240.

⁷² International Law Commission, ‘Report of the International Law Commission. Fifty-seventh session (2 May-3 June and 11 July-5 August 2005)’, II *Yearbook of International Law Commission* (2005) 207-225, at 207.

⁷³ *Ibid.*, at 207 and 208.

⁷⁴ *Ibid.*, at 208.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, at 207 and 209.

⁷⁷ *Ibid.*, at 209.

⁷⁸ *Ibid.*, at 209.

⁷⁹ G. Albine, ‘Sur le nouveau principe général de droit international : l’*uti possidetis*’ (PhD Thesis, Université d’Angers 2006), at 50-96.

⁸⁰ *Ibid.*, at 97.

⁸¹ *Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment of 22 December 1986, I.C.J. Reports 1951, paras.20 and 22.

universal rules of international law”.⁸² Regionalism may then give rise either to “a rule or a principle with a regional sphere of validity in relation to a universal rule or principle”,⁸³ that is to say “the rule in question would be binding only on the States of the particular region”,⁸⁴ or to one which “imposes a limitation on the validity of a universal rule or principle”,⁸⁵ which means that “states concerned would be exempted from the application of an otherwise universal rule or principle”.⁸⁶

It follows from this ILC definition that regional international law does exist only in the second and the third meaning of regionalism, the first meaning being more about the methods used to interpret or orientate the understanding of international law. Therefore, where there is regional international law, there is always regionalism, but the opposite is not true. In fact, in order to assume that regional international law exists, there must be a normative system which is put in place and can be enforced by specific regional institutions, if not a tribunal. It is symptomatic to observe that the process of globalisation, the strengthening of which derives from the end of the split of the world, during the Cold War, in three different blocs (the liberal West, the communist East and the non-aligned states Group), did not break down the dynamic of regional groupings. Rather, what may be called the “new regionalism”⁸⁷ resulted in an extension in number of regional treaties and organisations,⁸⁸ particularly in Africa.⁸⁹

⁸² International Law Commission, above note 72, at 207 and 209.

⁸³ *Ibid.*, at 209.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Fawcett, above note 22, at 438. See also J. M. Pureza, ‘New Regionalism and Global Constitutionalism: Allies, not Rivals’, ESIL Conference Paper Series No.2 (1) (2012), at 4.

⁸⁸ See M. Diez De Valasco Vallejo, *Les organisations internationales* (Paris : Economica, 2002), part III.

⁸⁹ See A. Tchaméni, *Les évolutions du régionalisme africain : le fonctionnement des communautés économiques régionales* (Paris : L’Harmattan, 2013), at 17 ; R. Frimpong Oppong, ‘The African Union, the African Economic Community and Africa’s Regional Economic Communities : Untangling a Complex Web’, 18 *African Journal of International and Comparative Law* (2010) 92-103, at 93; B. Kahombo, ‘L’encadrement conventionnel des relations entre la République démocratique du Congo et le Congo-Brazzaville : tendances juridiques générales et justifications’, 15 *Librairie africaine d’études juridiques* (2013) 189-212, at 190-199 ; T. Kalala, *Code des organisations internationales* (Bruxelles : Bruylant, 2008) ; A. Mahiou, ‘Le cadre juridique de la coopération sud-sud. Quelques expériences ou tentatives d’intégration’, 241 *Recueil des Cours de l’Académie de Droit International* (1993) 9-194.

Historically, regionalism was recognised at the universal level by article 21 of the Covenant of the League of Nations of 28 June 1919.⁹⁰ Then, the Charter of the United Nations of 26 June 1945 broadly regulates it in Chapter VIII concerning “regional arrangements”.⁹¹ Elsewhere, the Charter relies on regionalism in order to guarantee an effective representation of all the regions of the world within the bodies of the organisation. It is clear, however, that regional agencies were expected to develop more in the field of peace and security.⁹² But, to borrow Simma’s expression, regionalism has become today all-inclusive, devoid of borders of competences, and deals with all possible legal issues, such as collective security, economic and trade law, human rights law and now relevantly international criminal law.

In Africa, regionalism can also be connected to Pan-Africanism, which is the main political ideology on the basis of which the principal objective of African unity is supposed to be achieved.⁹³ With this dynamic, the OAU,⁹⁴ the OAU/AEC⁹⁵ and the AU were created. Pan-Africanism was initiated in the 19th and the 20th centuries in the West Indies and in America by the African diaspora, led by William Du Bois, Sylvester Williams, Marcus Garvey and George Padmore, before being introduced in Africa by African leaders (Julius Nyerere, Jomo Kenyatta, Kwame N’krumah, Patrice-Emery Lumumba, etc.) after the Pan-African Congress of Manchester in October 1945.⁹⁶ During the first Conference of African Independent States

⁹⁰ This Article 21 provides: ‘Nothing in this Covenant shall be deemed to affect the validity of international engagements such as treaties of arbitration or regional understanding like the Monroe Doctrine for securing the maintenance of peace’. See J.R. Orue Y Arregui, ‘Le régionalisme dans l’organisation mondiale’, 53 *Recueil des Cours de l’Académie de Droit International* (1935) 1-96 ; J.M. Yepes, ‘La contribution de l’Amérique latine au développement du droit international public et privé’, 32 *Recueil des Cours de l’Académie de Droit International* (1930) 691-800.

⁹¹ UN Charter, Article 52 (1). See H. Saba, ‘Les accords régionaux dans la Charte de l’ONU’, 80 *Recueil des Cours de l’Académie de Droit International* (1952) 635-720.

⁹² See J. Combacau and S. Sur, *Droit international public* (7^e edn., Paris: Montchrestien, 2006), at 662.

⁹³ G. Padmore, *Pan-Africanism or Communism?* (London: Dennis Dobson, 1955); J. Woronoff, *Organizing African Unity* (the Scarecrow Press, Inc., Metuchen, N.J., 1970) ; S.C. Bitembo, ‘Questions autour de l’unité africaine’, 426 *Congo-Afrique* (June-July 2008) 486-491, at 486-489 ; O. Ndeshyo, *L’héritage de l’OUA à l’UA : la quête permanente de l’unité africaine* (Kinshasa : Editions universitaires africaines, 2010).

⁹⁴ See Charter of the Organisation of African Unity (25 May 1963).

⁹⁵ The OAU changed its nature when, in order to strengthen its institutional and legal framework, the African Economic Community (AEC) was established by the Treaty of Abuja of 3 June 1991 and then became, officially, the OAU/AEC, a continental organisation of integration for achieving African unity.

⁹⁶ See G. Padmore, *Panaficanisme ou communisme? La prochaine lutte pour l’Afrique* (Paris : Présence africaine, 1962), at 181-184.

held in Accra (Ghana) on 15 April 1958, the motto that “Africa must unite”,⁹⁷ in which Cheikh Anta Diop had later seen “the condition of survival of the African peoples”⁹⁸ in a divided world, was delivered. Beyond the objective of African unity, African regionalism aims to ensure that Africa carries its responsibility to bring African solutions to African problems. In other words, the continent claims that African problems shall be solved in Africa, by Africans, and within a strictly African framework.⁹⁹

In the field of international criminal law, this policy of self-reliance contrasts with the situation whereby the continent appears to be a great consumer, or even a place of experimentation, of global international criminal justice. In essence, Africa presents itself in a pessimistic way before the rest of the world. The continent seems to be the sanctuary of crises, conflicts, crimes and criminals, with no other way than dismissing the management of all these problems to the international community and particularly the United Nations. Furthermore, the “judicial strategy of surrounding criminals”¹⁰⁰ at the global level doesn’t prove to be entirely satisfactory. An international criminality, which is not specifically dealt with, tends to develop: unconstitutional change of government, illicit exploitation of natural resources, trafficking in hazardous waste in Africa, trafficking in human beings and other transnational crimes. The ICTR and even the ICTY are said to have produced mitigated results,¹⁰¹ while criticisms against the ICC reveal “the decline of the spirit of Rome”¹⁰² as well as the situation of a Court which is challenged, inefficient and in need of a reform.

⁹⁷ K. N’krumah, *L’Afrique doit s’unir* (Paris et Dakar : Présence africaine, 1994).

⁹⁸ C. A. Diop, ‘L’unité africaine, condition de survie des peuples africains’, in *Problèmes actuels de l’unité africaine* (Alger : SNED, 1973) 411-417, at 411. The translation is mine.

⁹⁹ See M. Bedjaoui, ‘Le règlement pacifique des différends africains’, 18 *Annuaire français de droit international* (1972) 85-99, at 85 ; P.-F. Gonidec, *Relations internationales africaines* (Paris : LGDJ, 1996), at 167. B. Kahombo, ‘La politique africaine commune de défense et de sécurité : fondement et cadre de mise en œuvre du pouvoir d’intervention de l’Union africaine dans les Etats membres’ (Unpublished *Mémoire d’études supérieures en droit public*, University of Kinshasa 2011), at 3-4.

¹⁰⁰ L. Katansi, *Cour pénale internationale, tribunaux pénaux internationaux, tribunaux pénaux nationaux. Crimes, châtements et dispositif d’encerclement des criminels de guerre dans la région des Grands Lacs africains* (Kinshasa : Presses Universitaires du Congo, 2010).

¹⁰¹ S. Sur, *Le rôle des juridictions pénales internationales : premier bilan et réformes* (Fribourg : Conference, 2008), at 7-10.

¹⁰² J. Fernandez, ‘Genèse et déclin de l’esprit de Rome’, 7 *Annuaire français de relations internationales* (2006) 59-76.

Under these circumstances, Africa decides to develop African international criminal law and to be an actor of distributing international criminal justice on the continent. This regional development would open the international legal system to reform. The *principle of regional territoriality*, according to which international crimes allegedly committed in the continent must be prosecuted and tried in Africa, by Africans and through African mechanisms of criminal accountability, could be adopted.

However, such a development can also be merely a sign of rhetoric, since African enterprises systematically depend on foreign assistance.¹⁰³ A deeper pessimistic view is the perception that the continent actually tends to favour the impunity of crimes that are committed by those who bear the greatest criminal responsibility, starting with high ranking state officials, who would enjoy immunities and may impede the proper functioning of the aforementioned African mechanisms of criminal accountability. This justifies Malick Ndiaye's apparent worries in the title of his book when he asked: "Impunity: till where is Africa ready to go?"¹⁰⁴ However, this question cannot prevent an optimistic view of the issue because universalism does not necessarily amount to better justice or the end of impunity either. Moreover, the problem of financial constraints is not insoluble. It is mainly a matter of political will.

Finally, it has to be noted that international law is always "the product of a process of claim and counterclaim, assertion and reaction by governments as representatives of states and by other actors at the international level".¹⁰⁵ Any eventual development of the international legal system which could stem from a regional dynamic is like a return to the roots of international law which are historically regional. The particularity that the dynamic comes from Africa could contribute to mitigate the perception of "Euro-centrism"¹⁰⁶ according to which international law is originally a legal product of Europe which was expanded world-wide by European states, the latter with their Oceanic (Australia and New Zealand) and northern

¹⁰³ P. E. Batchom, 'La double-présence au sein des institutions internationales', *CODESRIA Newsletter* (31 January 2014) 1-16, at 5.

¹⁰⁴ Malick Ndiaye (ed.), *L'impunité: jusqu'où l'Afrique est-elle prête* (Paris : L'Harmattan, 2012). The translation of this title in the text is mine.

¹⁰⁵ Crawford, above note 38, at 21.

¹⁰⁶ U. Baxi, 'Some remarks on Eurocentrism and the Law of Nations', R.P. Anand (ed.), *Asian States and the Development of Universal International Law* (Delhi, Bombay, Bangalore, Kanpur, London: Vikas Publications, 1972) 3-9, at 4-7; J.T. Gathii, 'International Law and Eurocentrity', *9 European Journal of International Law* (1998)184-211, at 184-186.

American allies (United States and Canada) keeping the monopoly, both politically, economically and scholarly, to dictate the future of the international legal system.¹⁰⁷ This revival of regionalism poses another contextual problem: the potential fragmentation of international criminal law.

1.2. The Potential Regional Fragmentation of International Criminal Law

The issue of fragmentation of international law is not new. It was subject of much debate among international lawyers during the period between 1914 and 1925.¹⁰⁸ Today, it is still an endless international legal debate.¹⁰⁹ The question arises as to the relationship between regional international criminal law and global international criminal law. The concept of fragmentation comes to mind as rupture of the unity which is supposed to characterise international law. In this regard, the development of African international criminal law can be considered, *prima facie*, as a factor of regional fragmentation of general international criminal law. Still, the doctrinal debate is too ambiguous about whether or not regional law represents a threat to that unity (1.2.1) and so the issue of fragmentation cannot challenge the relevance of the African initiative which may give rise to a new order of international criminal law (1.2.2).

¹⁰⁷ A.-M. Slaughter and W. Burke-White, 'The Future of International Law is Domestic (or the European Way of Law)', 47 (2) *Harvard Journal of International Law* (2006) 327-352, at 349-351; T. Ginsburg, 'Eastphalia and Asian Regionalism', 44 *UC Davis Law Review* (2010) 859-877, at 860 and 861. See also S. Kim, 'Eastphalia Rising: An Enquiry into the Emergence of Asian Perspective on International Law and Global Governance' (PhD Thesis, Indiana University 2009); T. Ginsburg, 'Eastphalia as a Return to Westphalia', 17 *Indiana Journal of Global Legal Studies* (2010) 27-45. It is important to note that the concept of 'Eastphalia' was used first by Sungwon Kim to depict how the rise of the Asian continent, and notably China, could affect international law. According to Ginsburg, in his 'Eastphalia and Asian Regionalism', Kim's assumption is that 'an Eastphalian order will be different from the Westphalian one that signifies the foundational principles of the modern state-centered international system' (*Ibid.*, at 859). But, as a euro-centrist scholar, Ginsburg himself thinks that the so-called 'Eastphalia order', based on Asian regional arrangements, is even an evidence of the Europeanisation of Asia in the matter of regional integration (*Ibid.*, at 860).

¹⁰⁸ A.-C. Martineau, 'Une analyse critique du débat sur la fragmentation du droit international' (PhD Thesis, Université d'Helsinki 2014), at 14; A.-C. Martineau, 'La fragmentation du droit international: un renouvellement répété de la pensée?', in European Society of International Law, *International Law: Do We Need It?* (Paris: conférence bi-annuelle, 18-20 mai 2006).

¹⁰⁹ See P.-M. Dupuy, 'Fragmentation du droit international ou des perceptions qu'on en a?', EUI Working Paper Law No. 2006/14, European University Institute (2006), at 12.

1.2.1. The Ambiguity of the Doctrinal Debate

The current debate on the legal fragmentation of international law started when the ICJ proclaimed, in the *Hostages Judgment* of 24 May 1980, the existence of legal “self-contained regimes”,¹¹⁰ i.e. those legal regimes consisting of “groups of rules that do not correspond to those of general international law and that contribute to fragmentation of international law”.¹¹¹ The diversity of branches of international law, the expansion of rules which they give rise to and their contradictory interpretation, as a result of the proliferation of international courts and tribunals, raise the question of maintenance or demise of the unity of international law. Several examples are given to illustrate the problem,¹¹² among them the historic contradiction between the ICJ and the ICTY, respectively in the *Nicaragua Judgment* of 27 June 1986 and the *Tadić* case in 1999, concerning the condition of attribution to states of the conduct of non-state actors: the ICJ decided on the basis of effective control,¹¹³ while the ICTY deliberately preferred to rely on the criterion of overall control.¹¹⁴ Two presidents of the ICJ, Stephen M. Schwebel in 1999 and Gilbert Guillaume in 2000, expressed their concerns over such a legal fragmentation before the United Nations General Assembly.¹¹⁵ Their voices seem to have

¹¹⁰ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Tehran)*, Judgment of 24 May 1980, I.C.J. Reports 1980, para.86. See also B. Simma, ‘Self-Contained Regimes’, 16 *Netherland Yearbook of International Law* (1985) 111-136; B. Simma and D. Pulkowski, ‘Of Planet and the Universe: Self-Contained Regimes in International Law’, 17 *European Journal of International Law* (2006) 483-529.

¹¹¹ T. Treves, ‘Fragmentation of International Law: the Judicial Perspective’, XVI (27) *Agenda International* (2009) 213-253, at 216.

¹¹² See P.-M. Dupuy, ‘The Unity of Application of International Law at the Global Level and the Responsibility of Judges’, 1(2) *European Journal of Legal Studies* (2007) 1-23, at 14-17; Simma, above note 41, at 278-286; A. Rachovitsa, ‘Fragmentation or Unity of Public International Law Revisited: Analyzing the European Convention on Human Rights when the European Courts takes Cognisance of Public International Law’ (PhD Thesis, University of Nottingham 2012).

¹¹³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, para.115.

¹¹⁴ *Tadić* (IT-94-1-A), Judgment, Appeals Chamber, 15 July 1999, paras.112-114. See also A. Cassese, ‘The Nicaragua and the Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’, 18 (4) *European Journal of International Law* (2007) 649-668, at 652-658.

¹¹⁵ Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly, 26 October 2000; Address to the Plenary session of the General Assembly of the United Nations by Judge Stephen M. Schwebel President of the International Court of Justice, 26 October 1999. The speeches can be found at the official website of the ICJ, <<http://www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1>> accessed 4 May 2014.

influenced the ILC which initiated a study of the issue to which two main reports were devoted, first in 2000 by Gerhard Hafner,¹¹⁶ and then in 2006 by a Study Group headed by Martti Koskenniemi.¹¹⁷

The question which relates to this debate is to know whether the development of African international criminal law, substantive and procedural/ institutional, should be combated as a threat to the unity of international criminal law, or promoted as a desirable and good achievement of regionalism in Africa. In this regard, the scholarship is ambiguous. Firstly, the question as such is not examined, although an answer may be drawn from one's understanding of the general debate on legal fragmentation. Secondly, the matter is very controversial, given the fact that the debate involves two main categories of international lawyers, that is to say those who hold extreme positions and the moderates.

In the category of extreme positions, one may distinguish between two opposed groups of international lawyers. The first one consists of alarmist international lawyers who are pure advocates of universalism and for whom, when faced with the danger of legal fragmentation, even a regional one, it is the unity of international law which must be protected and defended so as to avoid what Jean Combacau has called a 'bric-à-brac'¹¹⁸ to express the concern about the lack of order which may affect the international legal system. For Mireille Delmas-Marty, for example, the unity of international law would merely amount to "one world law",¹¹⁹ unified and not multiple.¹²⁰ The position is apparently shared by Pierre-Marie Dupuy for his obsession with the unity of the international legal order.¹²¹ This group also includes those

¹¹⁶ G. Hafner, 'Risks Ensuing from Fragmentation of International Law', II (2) *Yearbook of the International Law Commission* (2000) 143-150.

¹¹⁷ International Law Commission, 'Report of the International Law Commission -Fifty-eighth session (1 May-9 June and 3 July-11 August 2006)', General Assembly, Official Records, Sixty-first session, Supplement No. 10 (A/61/10), at 400-423; M. Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law -Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi', Fifty-eighth session Geneva (1 May- 9 June and 3 July-11 August 2006), General Assembly, A/CN.4/L.682, 13 April 2006.

¹¹⁸ J. Combacau, 'Le droit international : bric-à-brac ou système ?', 31 *Archives de philosophie du droit* (1986) 85-105.

¹¹⁹ M. Delmas-Marty, *Trois défis pour un droit mondial* (Paris: Seuil, 1998).

¹²⁰ *Ibid.*, at 95 and 104.

¹²¹ Dupuy, above note 33, second part and third part; Dupuy, above note 112; P.-M. Dupuy, 'Un débat doctrinal à l'ère de la globalisation: sur la fragmentation du droit international', 1 *European Journal of Legal Studies*

lawyers who call for an institutional hierarchy to combat the danger of fragmentation, like Christian Leathley¹²² and the two former president of the ICJ (Shwebel and Guillaume), and the proponents of the constitutionnalisation of international law, represented by Tomuschat,¹²³ who merely want to transform it into the law of the (*universal*) international community. In this sense, it seems that there is no room for admitting the existence of African international criminal law.

The problem with the position of this group of lawyers is that they tend to deny evidence of the diversity of the world, despite the fact that mankind or humanity is everywhere the same, as if the universality of international law would signify, by exaggeration, its uniformity or be tantamount to the unity of the international legal system. Moreover, in a constitutional perspective founded on the necessity to protect values common to mankind, it is doubtful that the alleged protector, the international community, only exists at the global level. Why can a community of states and peoples at the regional level not stand for the international community? After all, why can't this regional community of states and peoples pretend at least to act on behalf, or even in the interest, of the international community as a whole? The position of this group of lawyers is thus difficult to support. To borrow Michael Walzer's words, these lawyers seem to elaborate their position on universalism just on the paper.¹²⁴ Accordingly, their position is at odds with the fact that the world is currently diverse and heterogeneous.

On the other hand, the second group of lawyers holding an extreme position opposes that perception of universality, because it reflects a totalitarian, imperial and hegemonic perspective of international law which is a threat to the legitimacy of the contested global order.¹²⁵ On the contrary, these lawyers are stubborn advocates of international legal

(2007) 1-19, at 10-18; P.-M. Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', 31 *International Law and Politics* (1999) 791-807, at 792.

¹²² C. Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed the Opportunity?', 40 *International Law and Politics* (2007) 259-306.

¹²³ Tomuschat, above note 3, at 70-90; Tomuschat, above note 50, at 37-50.

¹²⁴ M. Walzer, *Guerres justes et injustes* (Paris: Gallimard, 2006), at 35.

¹²⁵ O. Okafor, 'Viewing International Legal Fragmentation from a Third World Plane: a TWAIL Perspective', in *Fragmentation: Diversification and Expansion of International Law -Proceedings of the 34th Annual Conference of the Canadian Council of International Law, October 26-28 (2005)* (Ottawa: Canadian Council of International Law, 2006)115-132, at 121 and 131; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2007). See also I. Duplessis, 'Le droit international a-t-il une saveur

pluralism which fits for the diversity of the world, politically, economically, socially and culturally. This is why Andreas Fischer-Lescano and Gunther Teubner have warned against “the vain search for legal unity in the fragmentation of global law”.¹²⁶ Okafor even argues that, because international law is not yet sufficiently expanded and diversified, what is actually needed is, not the search for that unity, but more fragmentation.¹²⁷ In Okafor’s view, fragmentation is not a legal pathology, but a solution to the reproduction of “the problematic and historical subordination of the third world within the global system”.¹²⁸ Thus, African international criminal law could be welcome.

The main criticism against the position of this group of lawyers is that its perception of legal fragmentation is extremely exaggerated and tends to create more anarchy within the international legal system. In addition, one should not overlook that the strategy for more uncontrolled fragmentation may be utilised instead by powerful states against weak countries. As Pureza has best noted, “powerful states use a twofold strategy to foster their dominant position: on one side, they claim their hierarchical superiority within multilateral institutions and regulatory frameworks; on the other, they promote institutional and regulatory fragmentation whenever they serve their agendas”.¹²⁹

Between both groups of lawyers in the category of extreme positions stands the category of moderate international lawyers. Like alarmist lawyers, moderates are also proponents of universalism. However, they differ from them, like pluralists, by their acceptance of the unavoidable character of legal fragmentation, which they perceive as pathology of the global law. But, this pathology should not be overstated¹³⁰ because “based on the information available at this time (...) a serious problem does not appear to exist”.¹³¹ International law could have appropriate legal devices to deal with rising threats of fragmentation. This group

coloniale ? L’héritage des institutions internationales multilatérales’, 42 *Revue Juridique Thémis* (2008) 311-357, at 356-357.

¹²⁶ A. Fischer-Lescano and G. Teubner, ‘Regime-Collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law’, 25 *Michigan Journal of International Law* (2004) 999-1046, at 1045-1046.

¹²⁷ Okafor, above note 125, at 117.

¹²⁸ *Ibid.*, at 129.

¹²⁹ Pureza, above note 87, at 11.

¹³⁰ Simma, above note 41, at 289.

¹³¹ J. I. Charney, ‘Is International Law Threatened by Multiple International Tribunals?’, 271 *Recueil des Cours de l’Académie de Droit International* (1998)101-382, at 351-355.

includes lawyers such as Crawford¹³², Koskenniemi¹³³, Simma¹³⁴, Jonathan Charney,¹³⁵ Rosalyn Higgins¹³⁶ and Tullio Treves.¹³⁷ No doubt that for this group of lawyers, the existence of African international criminal law could be admitted beside universal international criminal law.

The problem with the position of this group of lawyers is to overestimate solutions that general international law provides for in cases of fragmentation. Therefore, these lawyers also exaggerate their position by minimising the scope of the phenomenon of regionalisation. It must be observed that the problem of coordination between the universal and the regional levels is still not a matter of evidence. The ILC, with its Study Group on the fragmentation of international law, has only issued some classical solutions, dealing with regional international law generally as *lex specialis*.¹³⁸ As some ILC members have noted, this is not all that can be said on regionalism.¹³⁹ As a result, the ILC's work could simply serve as a basis for analysis from which new perspectives can be drawn. This conclusion particularly applies to the relationship between general international criminal law and African international criminal law in view of the need to establish a new order of international criminal law.

1.2.2. The New Perspective: Towards a New Order of International Criminal Law

The diversity of doctrinal perceptions on the fragmentation of international law is symptomatic of the complexity of the issue. As Georges Abi-Saab writes, everything depends upon the "level of analysis"¹⁴⁰ that each author actually decides to take, "because everybody doesn't look at the same thing at the same aspect, or from the same angle or distance".¹⁴¹ But,

¹³² Crawford, above note 38, at 228-229.

¹³³ M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 553-579, at 575-576.

¹³⁴ Simma, above note 41.

¹³⁵ Charney, above note 131.

¹³⁶ R. Higgins, 'Respecting Sovereign States and Running a Tight Courtroom', 50 *International & Comparative Law Quarterly* (2001) 121-132, at 122.

¹³⁷ Treves, above note 111, at 227.

¹³⁸ International Law Commission, above note 72, at 211.

¹³⁹ *Ibid.*

¹⁴⁰ G. Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks', 31 *International Law and Politics* (1999) 919-933, at 919.

¹⁴¹ *Ibid.*

in a whole, all the views come to “different faces of the same coin”.¹⁴² Besides, the divergence of doctrinal perceptions enables identification of two correlative issues in the debate, i.e. the existence of only one international legal system and the distinctive question of the unity of international law. Basically, international law constitutes the normative part (substantive, procedural and institutional) of the international legal system, which includes additional aspects related to ideology, culture, history and philosophy that very often influence the manner in which the normative part is interpreted, understood, modified, applied or abrogated.

The unity of international law does not mean its universality.¹⁴³ It could rather imply the fact that international law consists of the combination of both fragments of universal and regional (sub-regional) international law. These two categories of law may be on their side split into various disciplines or distinct legal regimes (human rights, criminal law, humanitarian law, collective security, trade law, etc.). These legal regimes can also be considered in generic terms as systems (orders) or sub-systems of international law. This is particularly the case with the concepts of African, American or European systems of human rights protection,¹⁴⁴ or the United Nations and the AU collective security systems.¹⁴⁵ In other words, it is this diversity of the two main fragments (universal and regional) of international law which makes its unity. However, all these fragments belong to the same international legal system/order which gives them the power of their legitimacy (interstate consent, treaties and customs, protected common values of justice, peace and order, mutual respect for sovereign equality of states, etc.). After all, there is no denial of this unity simply because of a lack of normative coherence (existence of normative antinomies) between fragments (normative systems) or various disciplines pertaining to them. The lack of coherence is a different problem which

¹⁴² *Ibid.*

¹⁴³ See K. Zemanek, ‘The Legal Foundations of the International System. General Course on Public International Law’, 266 *Recueil des Cours de l’Académie de Droit International* (1997) 9-336, at 62.

¹⁴⁴ See M. Mubiala, *Le système régional africain de protection des droits de l’homme* (Bruxelles : Bruylant, 2005) ; A. D. Olinga, ‘Les emprunts normatifs de la commission africaine des droits de l’homme et des peuples aux systèmes européen et interaméricain de garantie des droits de l’homme’, 62 *Revue trimestrielle des droits de l’homme* (2005) 499-537.

¹⁴⁵ See A. Mampuya Kanunk’a Tshiabo, *Désuétude du système de sécurité collective* (Kinshasa : Presses Universitaires du Zaïre, 1986) ; O. Ndeshyo, ‘Le système africain de sécurité collective’, *Annales de la Faculté de droit de l’Université de Kinshasa* (2007)161-190.

must be taken into account in the development of any legal system and its solutions may be variable.

Accordingly, it can be admitted that international legal fragmentation constitutes “a healthy phenomenon”.¹⁴⁶ It shows the growth of international law and the fact that states, despite crises and their regional specificities, are more confident in it as a tool for the regulation of international relations. In the framework of regionalism, the development of African international criminal law is itself the proof of that confidence, but also of the will to reform the entire system in order to establish a new order of international criminal law which would be equitable and serve the interests of all states and peoples, regardless of their regional origin.

This development, together with the aforementioned principle of regional territoriality, is likely to reshape relationships between the existing enforcement mechanisms of international criminal law at the universal, regional and domestic levels. African international criminal law will imply the adoption of specific rules (substantive norms, institutional and procedural mechanisms) additional to those which already exist in general international criminal law or the adaptation of the latter to global developments. The substantive norms relate to the extensive list of crimes to be dealt with at the regional level and the expansion of the scope of the definitions of some core international crimes such as war crimes and aggression. The procedural and institutional mechanisms of criminal accountability are embodied in the system of African regional criminal justice to put in place and its coordination with the international legal system as a whole. As such, the study of African international criminal law is amply justified. It is conducted in the light of Rowland Cole’s observation, noting that “legal doctrines do not develop from a vacuum. They are shaped in response to prevailing needs, and are the reflections of the conditions of prevailing problems that stimulate thought”.¹⁴⁷

¹⁴⁶ Abi-Saab, above note 140, at 925.

¹⁴⁷ R. Cole, ‘Africa’s Approach to International Law: Aspects of the Political and Economic Denominators’, 18 *African Yearbook of international law* (2013) 287-310, at 291.

2. The Question of African International Criminal Law

It has already been explained that public international law or the law between nations,¹⁴⁸ the so-called *jus gentium* (law of nations),¹⁴⁹ encompasses one universal legal fragment which coexists, in the framework of regionalism, with a variety of regional international laws such as African, European and American international law.¹⁵⁰ However, in principle, what is called *African international criminal law* constitutes one of the various disciplines that can be attached to the fragment of African international law.¹⁵¹ From this schematic setting, it is now possible to deeply clarify its legal existence, precise its meaning, scope and development under the aegis of the AU, the problems it raises and how they will be approached and scrutinised in this study. All these problematic issues can be examined in two points, namely the landmark of the legal development of the concept of African international criminal law (2.1) and the axes of its analysis (2.2).

2.1. The Landmarks of the Legal Development of the Concept

There are two principal ideas demonstrating that African international criminal law does exist: on the one hand, the existence of African international law on the basis of which it develops is no longer challenged (2.1.1); on the other hand, African international criminal law has its own object (2.1.2).

2.1.1. The Existence of African International Law

A long time ago, it was not easy to defend the existence of African international law. Today, this existence has become uncontested.¹⁵² It seems that the term “African international law” was used, for the first time, by Pinto Accioly in his ‘*Tratado de derecho internacional público*’ (treatise of public international law) in 1945,¹⁵³ before the beginning of African

¹⁴⁸ J. H. Currie, *Public international law* (Toronto: Irwin Law Inc, 2008), at 1.

¹⁴⁹ J. Salmon, *Dictionnaire de droit international public* (Bruxelles : Bruylant, 2001), at 382.

¹⁵⁰ See O. Ndeshyo, *Le système d'intégration africaine* (Kinshasa : Presses Universitaires du Zaïre, 1984), at 10.

¹⁵¹ For example, African regional human rights law; African regional collective security law; African regional economic and trade law; and African regional fluvial law.

¹⁵² Tchaméni, above note 89, at 18.

¹⁵³ H. P. Pinto Accioly, *Tratado de derecho internacional público* (Rio de Janeiro: Imprensa nacional, 1945), at 76; quoted by F. Borella, ‘Le droit international africain et l’OUA’, in *Problèmes actuels de l’unité africaine* (Alger: SNED, 1973) 177-197, at 189. He explained that he got the information from L.C. Green, ‘De l’influence des nouveaux Etats sur le droit international’, 1 *Revue générale de droit international public* (1970) 78-106.

independences in 1957.¹⁵⁴ In 1963, short after the creation of the OAU, François Borella, commenting on the new African regionalism, also invoked the expression,¹⁵⁵ while Pierre-François Gonidec was probably the first, later in 1965, to raise the following central question: “Does African international law exist?”¹⁵⁶

In 1969, Boutros-Ghali pointed out that such law obviously existed thanks to the important normative action of the OUA which had already adopted a number of specific rules governing inter-African relations.¹⁵⁷ One year later, Joseph-Marie Bipoun-Woum published his historic but old book entitled *‘Droit international africain: problèmes généraux, règlement des conflits’*.¹⁵⁸ Since then, it had become more common to invoke the expression, including in the Anglophone scholarship.¹⁵⁹ But, authors who did not explicitly make use of the concept of African international law were ready to recognise the African region as “an innovator and generator”¹⁶⁰ of norms of international law, meaning that this region was “a legal marketplace, not a lawless basket case”¹⁶¹ contributing to the development of international law as a whole.¹⁶² Only some minor objections were formulated by authors such as Auguste Mampuya, who suggested that African international law did not exist because it was not a new legal order distinct from the preexisting international legal system.¹⁶³ However, besides the fact that his book published in 1984 is no longer updated, he might have forgot that the specificity of a normative system and the existence of one international legal order are, as

¹⁵⁴ Ghana was the first African country to accede to independence on 6 March 1957.

¹⁵⁵ Borella, above note 26, at 853.

¹⁵⁶ P.-F. Gonidec, ‘Note sur le droit des conventions internationales en Afrique’, 11 *Annuaire français de droit international*(1965) 866-885, at 879. See also P.-F. Gonidec, ‘Existe-t-il un droit international africain?’, 5 (2) *African Journal of International and Comparative Law* (1993) 243-259.

¹⁵⁷ B. Boutros-Ghali, *L’Organisation de l’unité africaine* (Paris : Armand Colin, 1969), at 5.

¹⁵⁸ J.-M. Bipoun-Woum, *Droit international africain: problèmes généraux, règlement des conflits* (Paris: Librairie générale de droit et de jurisprudence, 1970).

¹⁵⁹ Udogu, above note 34, at 78-80.

¹⁶⁰ Cole, above note 147, at 288.

¹⁶¹ Levitt, above note 30, at 1.

¹⁶² T. Maluwa, *International Law in Post-Colonial Africa* (Leiden/London/Boston: Kluwer Law International, 1999); T. Maluwa, ‘Legal Aspects of the Niger River under the Niamey Treaties’, 28 *Natural Resources Journal* (1988) 671-697, at 697. See also T.O. Elias, *Africa and the Development of International Law* (Leiden: Kluwer Academic Publishing, 1972).

¹⁶³ Mampuya, above note 39, at 195-209.

already indicated, two different issues that should not be conflated.¹⁶⁴ Furthermore, in his recent *Treatise of Public International Law*, published in 2016, Auguste Mampuya has changed his position and now admits the existence of African international law.¹⁶⁵ Thus, in view of such a widespread convergence of scholarly views, Gonidec argues that time has come to write a “*Treatise of African International Law*”.¹⁶⁶ The existence of this discipline was definitely sealed after the creation of the African Union Commission on International Law (AUCIL), entitled to codify international law in Africa, with a particular attention to “African customary international law arising from the practice of member states”.¹⁶⁷

Three main arguments can be presented in favour of the existence of African international law. First of all, it appears that the ICJ has implicitly accepted the existence of regional international law. The question was expressly raised in the *Asylum Case*, in which Colombia alleged that it was competent, as the country granting the contested diplomatic asylum to Haya de la Torre, to qualify the offence for the purpose of said asylum by a unilateral and definitive decision binding on Peru, the defendant state, pursuant to a regional custom appertaining to American international law.¹⁶⁸ The Court dismissed the contention, but it did not oppose the fact that regional customary law could exist. Colombia was only unable, in the Court’s view, to prove it and in such a manner that it had become binding on Peru irrespective of its consent.¹⁶⁹

¹⁶⁴ *Ibid.*, at 196 and 202. On his side, Adam Kpodar seems to consider that African international law is only a matter of legal activism in Africa. See A. Kpodar, ‘A propos du militantisme juridique: le droit international africain’, in *Comment fabrique-t-on le droit ?* (Libreville : Institut français du Gabon, 2013), Symposium juridique de Libreville (21-22 novembre 2013), at 3.

¹⁶⁵ A. Mampuya Kanunk’a-Tshiabo, *Traité de droit international public* (Kinshasa : Médiaspaul, 2016), at 143-174. See also B. Kahombo, ‘Présentation du Traité de droit international public du professeur Auguste Mampuya : Regards croisés sur le régionalisme africain’, 19 (2) *Recht in Afrika – Law in Africa – Droit en Afrique* (2016) 209-237, at 217-221.

¹⁶⁶ P.-F. Gonidec, ‘Towards a ‘Treatise’ of African International Law’, 9 *African Journal of International and Comparative Law* (1997) 807-821, at 809-818.

¹⁶⁷ Statute of the African Union Commission on International Law (4 February 2009), Article 4 (a). See also B. Tchikaya, ‘L’Union africaine et le nouveau droit international’, 44 *Géopolitique africaine* (2012) 145-154, at 149.

¹⁶⁸ *Colombian-Peruvian Asylum Case*, Judgment of November 20th 1950, I.C. J. Reports 1950, at 276.

¹⁶⁹ *Ibid.*, at 277-278.

Secondly, it is argued that there is no objective reason to refuse the existence of African international law, whereas American and European¹⁷⁰ regional laws are admitted.¹⁷¹ In his dissenting opinion in the *Asylum Case*, Judge Alvarez, who was probably the greatest advocate of American international law, noted:

“this expression does not mean, as may appear at first sight and as many would have us believe, an international law which is peculiar to the New World and entirely distinct from universal international law, but rather the complex of principles, conventions, customs, practices, institutions and doctrines which are peculiar to the Republics of the New World. Certain jurists have sought to call this complex the ‘peculiarities of international law in America’. This is merely a question of terminology. The designation ‘American international law’ has triumphed”.¹⁷²

In the *Frontier Dispute* case between Burkina Faso and Niger,¹⁷³ Judge Yusuf tried, like what his former Chilean colleague did in regard to American international law, to insist, in his separate opinion, on the existence of “public law of Africa applicable to all African states”.¹⁷⁴ The principle of respect of borders existing on achievement of independence belongs to this body of law¹⁷⁵ and is different from the principle of *uti possidetis* which originates from the Latin-American region.¹⁷⁶ This is also the case of the AU’s right to intervene in a member

¹⁷⁰ See F. Sudre, *Droit international et européen des droits de l’homme* (7th edn., Paris : Presses Universitaires de France, 2005).

¹⁷¹ Ndeshyo, above note 150, at 10. The historic and old book on the issue remains that of K. Strupp and A. Alvarez, *Eléments de droit international public universel, européen et américain* (2nd edn., Paris : Editions internationales, 1930).

¹⁷² Dissenting Opinion of Judge Alvarez, *Colombian-Peruvian Asylum Case*, Judgment of November 20th 1950, I.C. J. Reports 1950, at 293.

¹⁷³ *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, I.C.J. Reports 2013.

¹⁷⁴ Separate Opinion of Judge Yusuf, *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, I.C.J. Reports 2013, para. 29. In this paragraph, Judge Yusuf notes: ‘(...) the OAU/AU principle is specific to the African continent where it is considered as part of the public law of Africa applicable to all African States, but has no claim to being a general principle or a customary rule of international law’.

¹⁷⁵ See AHG/Res.16 (I), Resolution Concerning Border Disputes among African States, 1st Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Cairo (Egypt), 17-21 July 1964, para.2. See also Constitutive Act of the African Union, Article 4 (b).

¹⁷⁶ Separate Opinion of Judge Yusuf, *Frontier Dispute (Burkina Faso/Niger)*, above note 174, paras.26-28, 30-36 and 47. In these paragraphs, Judge Yusuf opines that the two principles are different at three levels: 1) origin and purpose; 2) legal scope and content; 3) legal nature. In particular, in paragraph 26, he writes: ‘The relationship between title and *effectivités* in the determination of the boundary to be respected was never spelled

state in the event of genocide, war crimes and crimes against humanity, and the rejection and condemnation of unconstitutional changes of government. In brief, it is not doubtful that what Judge Yusuf has referred to is African international law.¹⁷⁷

Thirdly, and last, the status of Africa as a specific region is no longer contested;¹⁷⁸ it has become a matter of truism and does not need to be anymore demonstrated.¹⁷⁹ However, it is important to note that the continent's institutional organisation characterises its regional uniqueness. It is now very far different from Latin-America with which it used to be compared.¹⁸⁰ The specificity of the African regional model is based on its pyramidal and hierarchical character insofar as the continent contains three levels of Pan-African relations and cooperation (continental, regional and sub-regional), which are coordinated from the

out or even mentioned in OAU or AU documents. In view of the above-described diversity and complexity of the process of independence of African States, the varied legal regimes under which the delimitation of their boundaries was carried out before independence (e.g., international treaties, administrative boundaries, trusteeship agreements), and the sharply divided opinions among African States at the time of independence, it appears that the OAU/AU deliberately refrained from engaging in a detailed consideration of legal issues, such as whether title to territory, possession or *effectivités* should prevail. Similarly, these organisations declined to lay down, as part of the public law of Africa, a specific peaceful method applicable to the settlement of all potential boundary disputes among all African States, or to the determination of the course of such boundaries'. In paragraph 27, he adds: 'Instead, the Pan-African organizations limited themselves to the affirmation of a general and broad principle of respect of the boundaries of member States in order to safeguard peace and stability in the continent. In other words, neither the Cairo Resolution nor the AU principles have gone so far as the Spanish-American States in defining a specific method to be used to determine the course of African boundaries. This does not, however, mean that African States cannot or have never had recourse, in the settlement of bilateral disputes, to the use of *uti possidetis juris* as a principle applicable to the delimitation of their boundaries or as a method of ascertaining the pedigree of such boundaries. As clearly indicated by the Judgments of the Court referred to above, they have indeed done so and will most probably continue to do so in the future particularly with respect to former administrative boundaries inherited from the same colonial power'. And in paragraph 47, he concludes that the ICJ 'could have seized this opportunity to clear up the confusion between *uti possidetis juris* and the OAU/AU principle on the respect of existing boundaries', which stems from its judgment of 22 December 1986 in the case of the *Frontier Dispute between Burkina Faso and the Republic of Mali*).

¹⁷⁷ See also A. A. Yusuf, 'Pan-Africanism and International Law', 369 *Recueil des Cours de l'Académie de Droit International* (2013) 161-359.

¹⁷⁸ I. Semuhire, *Les organisations internationales, le régionalisme international, le régionalisme international africain : présentation générale, évolution et perspectives d'avenir* (Bern and New York : Peter Lang, 1996).

¹⁷⁹ Tchaméni, above note 89, at 18.

¹⁸⁰ See J.C. Gautron, 'Le régionalisme africain et le modèle interaméricain', *Annales africaines* (1966) 49-86.

summit by the AU, and stand above the national levels of member states.¹⁸¹ It is crucial to know what these three levels of Pan-African relations actually mean and draw from there some consequences regarding the definition of African international law.

The terminology differs a little bit from the one which has been so far used.¹⁸² A Pan-African region is not the continent as a whole but a geographical space of cooperation within a limited group of African states. According to the Treaty of Abuja (Nigeria) of 3 June 1991 instituting the African Economic Community (AEC), now part of the AU,¹⁸³ there are only five Pan-African regions (Northern, Southern, West, East and Central Africa)¹⁸⁴ in which eight recognised Regional Economic Communities (REC) exist.¹⁸⁵ Each of these regions can contain, but not necessarily, one or several sub-regions in which various Sub-Regional Economic Communities (S/REC) are established.¹⁸⁶ Contrary to the concept of Pan-African region, a sub-region is defined by the Treaty of Abuja as a set of at least three African states of the same or several regions.¹⁸⁷ In other words, any Sub-Regional Economic Community must consist of at least three AU member states. These three levels of Pan-African relations constitute what is called the African institutional system of integration.¹⁸⁸ A number of

¹⁸¹ O. Ndeshyo and B. Kahombo, *Manuel de droit communautaire africain. Tome I. Introduction générale : objet, sources, caractéristiques et domaines* (Kinshasa : éd. Etat et Société, 2011), at 171.

¹⁸² This terminology is sometimes a source of confusion by some authors, and therefore Pan-African regions are dealt with in the same way as Pan-African sub-regions in violation of the Treaty of Abuja. See for example K. Neri, 'La sous-régionalisation', in S. Doumbe-Billé (ed.), *Régionalisation du droit international* (Bruxelles : Bruylant, 2012) 209-240, at 215 and 228.

¹⁸³ Ndeshyo, above note 93, at 433-449. See also the Constitutive Act of the African Union, Article 33.

¹⁸⁴ Treaty Establishing the African Economic Community (3 June 1991), Article 1(d).

¹⁸⁵ Assembly/ AU/DEC.112 (VII), Decision on the Moratorium on the Recognition of the Regional Economic Communities (REC), 7th Ordinary Session of the Assembly of the African Union, Banjul (The Gambia), 1-2 July 2006. The eight Regional Economic Communities are the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority for Development (IGAD) and the Southern African Development Community (SADC).

¹⁸⁶ For example, the Economic and Monetary Community of Central Africa (CEMAC), established by the Treaty of 16 March 1994; and the Economic Community of Countries of the Great Lakes (CEPGL), created by the Convention of Gisenyi (Rwanda) of 20 September 1976.

¹⁸⁷ Treaty Establishing the African Economic Community, Article 1 (e).

¹⁸⁸ Ndeshyo and Kahombo, above note 181, at 20.

African international organisations of simple cooperation are joined to them, when they are recognised by the AU, the coordinator and protector of the objective of African unity.¹⁸⁹

Therefore, other non-recognised arrangements and agencies, like the Organisation for the Harmonisation of Business Law in Africa (OHADA), established by the Treaty of Port-Louis (Maurice) of 17 October 1993, are outside that system.¹⁹⁰ Such arrangements and agencies can even be open to non-African states,¹⁹¹ but the rules, practices and judicial mechanisms that they may develop are not part of African international law, in a Pan-African legal perspective. Moreover, African international law should not be confused with the laws of the AU which is generally referred to in the Statute of the AUCIL,¹⁹² since it is just one part of it, simply a normative system peculiar to the continental organisation. However, the meaning of African international law extends to all African rules adopted or prescribed at the continental, regional, sub-regional (and even bilateral) levels of Pan-African cooperation, of which purpose is to regulate and above all the specific and exclusive relationships between African states, looking for their own solutions in various fields to particular African problems.¹⁹³ The nature of these rules may vary, but they mainly include African international treaty law and customary international law, applicable by specific African political or judicial institutions.¹⁹⁴ These rules are incorporated in African instruments from general international law through adoption by African states on a bilateral basis or within the multilateral framework of Pan-African cooperation. This is the premise from which the object of African international criminal law can be presented.

¹⁸⁹ See Mano River Union (MRU) and International Conference on the Great Lakes Region (ICGLR).

¹⁹⁰ B. Kahombo, 'L'adhésion de la RDC à l'OHADA: vers la prospérité nationale par l'unification du droit?', 11 *Librairie africaine d'études juridiques* (2012) 103-122, at 110-111. See also O. Ndeshyo and J.-P. Segihobe, 'Présentation', in O. Ndeshyo (ed.), *Mélanges Célestin Nguya-Ndila. La République démocratique du Congo : les défis récurrents de décolonisation et de développement économique et social* (Kinshasa : Editions CEDESURK, 2012) 13-30, at 28.

¹⁹¹ See Treaty of Port-Louis (Maurice) of 17 October 1993 Establishing the Organisation for the Harmonisation of Business Laws in Africa (OHADA), Article 53. This Article opens the OHADA to any interested non-African state. Such a provision cannot be found in any other treaty establishing a Pan-African organisation.

¹⁹² Statute of the African Union Commission on International Law, Article 4.

¹⁹³ See Bipoun-Woum, above note 158, at 8; Ndeshyo, above note 150, at 11-12.

¹⁹⁴ Borella, above note 153, at 189-190.

2.1.2. *The Object of African International Criminal Law*

In 1971, the question was raised as to whether what the OAU Charter named the principle of “unreserved condemnation, in all its forms, of political assassination as well as of subversive activities (...)”¹⁹⁵ in Africa, later strengthened by the Accra Declaration on the problem of subversion,¹⁹⁶ could lead to the emergence of African international criminal law.¹⁹⁷ The question increased in interest just after the adoption of Additional Protocol I to the Geneva Conventions (1949) in June 1977, which provides that “a mercenary shall not have the right to be a combatant or a prisoner of war”.¹⁹⁸ The OAU Convention for the elimination of mercenarism in Africa was subsequently adopted.¹⁹⁹ It defines mercenarism as a crime against peace and security in Africa.²⁰⁰ It also provides –what was a premier in the world –that each member state should punish it “by the severest penalties under its laws including capital punishment”.²⁰¹ These normative developments together with the OUA’s will to prosecute the crime of apartheid committed in South Africa and Namibia pushed Oswald Ndeshyo and Raphael Nyabirungu to undertake, later in 1977, a research project raising the following monumental question: ‘does African criminal law exist?’²⁰² With the creation of the AU Criminal Court and the possibility to create hybrid courts or to delegate the exercise of regional criminal jurisdiction to a member state, the answer to this question is today in the affirmative.

¹⁹⁵ OAU Charter, Article 3 (5). See also AU Constitutive Act, Article 4 (o).

¹⁹⁶ AHG/Res. 27 (II), Declaration on the Problem of Subversion, 2nd Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Accra (Ghana), 21-26 October 1965.

¹⁹⁷ J.-M. Bipoun-Woum, ‘Le droit international africain et son objet : recherche du régionalisme international comparé’, in *Problèmes actuels de l’unité africaine* (Alger : SNED, 1973)198-225, at 215.

¹⁹⁸ Additional Protocol I to the Geneva Conventions, Article 47 (1).

¹⁹⁹ Adopted in Libreville (Gabon) on 03 July 1977 and entered into force on 22 April 1985.

²⁰⁰ OAU Convention for the Elimination of Mercenarism in Africa, Article 1 (2).

²⁰¹ *Ibid.*, Article 7.

²⁰² O. Ndeshyo and R. Nyabirungu Mwene Songa, ‘Existe-t-il un droit pénal africain ?’(1977), unpublished doc (on file with the author). This project failed, apart from introducing the topic and the problems its raises in six pages. It seems that there was a problem of agenda, said professor Ndeshyo during the conversation held on 19 July 2013 in Kinshasa (DRC). See also B. Kahombo, ‘La doctrine Ndeshyo relative à l’intégration africaine pour une Afrique unie, intégrée, en paix et prospère’, in G. Bakandeja wa Mpungu (ed), *Quelle politique d’intégration pour quelle unité de l’Afrique du 21^{ème} siècle ? Débats théoriques et défis pour les Etats africains -Mélanges en hommage au doyen Oswald Ndeshyo* (Kinshasa : Presses de l’Université de Kinshasa, 2014) 79-107, at 87.

Furthermore, there is already a panoply of legal instruments, containing a criminal dimension, that have been adopted by the OAU or the AU,²⁰³ and by other Pan-African international organisations such as RECs.²⁰⁴ These legal instruments enrich the list of crimes against peace and security in Africa and offer an important basis for their definition as well as the technical methods or procedures to ensure their effective prosecution. In this regard, the African Charter of democracy, elections and governance provides that “perpetrators of unconstitutional change of government may also be tried before the competent court of the (African) Union”.²⁰⁵ Considering all this legal development, the existence of African international criminal law does no longer matter. It is a logical evolution of international law in Africa.²⁰⁶ Its development pre-dates –but has been influenced by it –the current contested system of global international criminal law with its institutions of criminal accountability, starting with the ICC.

In very simple terms, African international criminal law refers to penal aspects of African international law, in the same way as general international criminal law bears on penal aspects of universal international law.²⁰⁷ However, it is a very fresh legal discipline at the beginning of its development. At this stage, it is submitted that the object of African international criminal law refers to a set of African rules governing the investigation, the prosecution and the trial of crimes against peace and security in Africa by African mechanisms of criminal accountability, established in the continent, whether at the national, sub-regional, regional or continental level.

The list (a sort of code) of the crimes in question might not necessarily correspond or be limited to those over which universal judicial institutions have so far exercised their

²⁰³ See OAU Convention on the Prevention and Combating of Terrorism (14 July 1999); African Union Convention on Preventing and Combating Corruption (12 July 2003); Protocol to the OAU Convention on the Prevention and Combating of Terrorism (8 July 2004); Non-aggression and Common Defence Pact (31 January 2005); African Charter on Democracy, Elections and Governance (30 January 2007); etc.

²⁰⁴ Southern African Development Community Protocol against Corruption (14 August 2001), Convention on the Fight against Terrorism in Central Africa (27 May 2004).

²⁰⁵ Article 25 (5). Emphasis is mine.

²⁰⁶ A. Soma, ‘Le régionalisme africain en droit international pénal’, 120 (3) *Revue générale de droit international public* (2016) 515-544, at 517.

²⁰⁷ See K. Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001), at 3; R. Cryer, H. Friman, D. Robinson and E. Wilmschurst, *An Introduction to International Criminal Law* (Cambridge: Cambridge University Press, 2007), at 3.

jurisdiction. Such a list is to be fixed by Africa itself and could reflect its peculiar preoccupations which may not be those of universal concern. This is the case with the inclusion of the crime of illicit exploitation of natural resources. The principal objective is to make the continent capable to prosecute and judge by itself the main presumed perpetrators of such crimes in Africa, which put in danger the African regional public order. In other words, all those who, individuals or corporations, Africans or non-Africans, commit crimes against peace and security in Africa should be prosecuted, tried and eventually punished by the competent African mechanisms of criminal accountability.

African international criminal law can also be envisaged as a new security paradigm for the continent, integrated into the Common African Defence and Security Policy²⁰⁸ next to five other domains: conflict prevention and proactive/preventive diplomacy; peaceful settlement of African disputes; regional military intervention and peace support operations; disarmament; and post-conflict reconstruction mechanisms.²⁰⁹ It strengthens the continent's means to deal with an increasing international criminality against which the classical techniques of international recourse to armed force (humanitarian intervention and peace support missions) appear less effective and, in some cases, inoperative, such as in the case of illicit exploitation of natural resources and trafficking in hazardous waste in Africa. Even international sanctions, in particular economic ones, are of little help. They reach hardly their targets and so, very often, only innocent victims become indeed affected.²¹⁰

Like general international criminal law,²¹¹ African international criminal law is a mixed legal discipline where may converge rules originating from universal international law, including humanitarian international law, regional human rights and collective security law, and even to some extent national criminal law. All these disciplines should impact on the law applicable

²⁰⁸ See Constitutive Act, Article 4 (d); Protocol Relating to the Establishment of the Peace and Security Council of the African Union (9 July 2002), Articles 3 (e) and 7 (h); Ext/Assembly/AU/1-2/(II), Solemn Declaration on a Common African Defence and Security Policy, 2nd Extraordinary Session of the Assembly of the African Union, Sirte (Libya), 27-28 February 2004.

²⁰⁹ Kahombo, above note 99, at 10-13.

²¹⁰ A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), at 4.

²¹¹ See M.C. Bassiouni, 'The Discipline of International Criminal Law', in M.C. Bassiouni (ed.), *International Criminal Law. Volume I. Sources, Subjects and Contents* (3rd, Leiden: Martinus Nijhoff Publishers, 2008), at 5-6 and 9-10.

by the AU Criminal Court. This is a problem of legal sources which will be examined later in the present study.

2.2. The Axes of Analysis

What are the main problems posed by African international criminal law? How to study its current development? Indeed, the complexity of the topic dictates some methodological choices among what deserves or not to be examined. For this purpose, it can be resorted to a systemic approach (2.2.1) even though the treatment of the issue will also be influenced by Pan-African and TWAIL's thoughts (2.2.2).

2.2.1. The Search for a Regional Legal Regime in a System-Oriented Approach

The choice of the systemic approach to this study is based on the fact that the development of African international criminal law has to be examined as an entirety. The primary goal does not consist of analysing in detail each part of this new legal discipline but to determine the bases for its development, to illustrate its content and to examine the principles that should govern its relationship with the global system of international criminal justice. Just a positivist view,²¹² notably in the Kelsen's approach to pure normativism (*wertfrei*),²¹³ would not suffice because it does not seize all the problems posed by African international criminal law in a holistic and interdisciplinary perspective. The positivist approach is crippled by its exaltation of the technical pure description of existing legal norms from various known formal sources of law.²¹⁴ However, the study of the development of African international criminal law, the content of which may be found in disparate provisions and instruments, requires an original systematisation which actually goes beyond the mere technical examination of the legal rules

²¹² See H. Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1945); N. Bobbio, *Teoria generale del diritto* (Torino: Giappichelli, 1993); N. Bobbio and D. Zolo, 'Hans Kelsen, the Theory of Law and the International Legal System: a Talk', 9 *European Journal of International Law* (1998) 355-367, at 359-360; M. Troper, *La philosophie du droit* (3rd edn., Paris: Presses Universitaires de France, 2013), at 19-21; P. Raynaud, 'Positivisme juridique et démocratie', in D. de Béchillon, V. Champeil-Desplats, P. Brunet and E. Millard (eds), *Mélanges en l'honneur de Michel Troper. L'architecture du droit* (Paris: Economica, 2006) 871-881, at 871-872.

²¹³ Dupuy, above note 33, at 27-31. See also L. Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford: Oxford University Press, 2007).

²¹⁴ H. J. Morgenthau, 'Positivism, Functionalism and International Law', 34 (2) *American Journal of International Law* (1940) 260-284, at 261; A. Ouedraogo, 'Eléments d'une philosophie du droit international en Afrique', 18 *African Yearbook of International Law* (2012) 41-80, at 43, 59-60.

laid down. This systematisation must include other parts of the legal system, such as the institutions in charge of the application of the law, the history, the philosophy, the politics and the ideology which stand behind the development of African international criminal law. In this regard, the study goes beyond positivist formalism. However, this does not mean that positivist analyses as such become irrelevant for this study. It simply implies that the study will also rely on political and policy arguments that go beyond the techniques of international law by questioning a number of legal norms, institutions, reforms and the balance of power within the international legal system.²¹⁵ The truth is that “lawyers do not fulfill their function if they fail to take account of the extra-legal environment in which legal work takes place”.²¹⁶

In theory, a system is a totality consisting of different elements, dynamic and organised in such a manner to reach a certain degree of coherence, in interaction and under the influence of internal and external parameters to the system’s environment.²¹⁷ It is a holistic and interdisciplinary approach which prioritises, not just an isolated element, but the totality, its dynamic and evolution and the necessary coherence of its components dictated by their interaction.²¹⁸ The systemic approach can be applied in this study in three different ways.

First, the study will search to know the main factors deriving from the international legal system which justify the development of African international criminal law. One axis of

²¹⁵ O. Corten, *Méthodologie du droit international public* (Bruxelles: Editions de l’Université Libre de Bruxelles, 2009), at 57 and 60. Instead, many authors, especially in the USA, suggest the need to take into account parameters external to legal rules in order to better understand, in an interdisciplinary manner, the functioning of the international legal system. See A.-M. Slaughter, ‘International Law and International Relations’, 285 *Recueil des Cours de l’Académie de Droit International* (2000) 9-250, at 26; G. Shaffer and T. Ginsburg, ‘The Empirical Turn in International Legal Scholarship’, 16 *American Journal of International Law* (2012) 1-46, at 1; E. M. Hafner-Burton, D. G. Victor and Y. Lupu, ‘Political Science Research on International Law: the State of the Field’, 16 *American Journal of International Law* (2012) 47-97, at 47-48.

²¹⁶ A. Paulus, ‘Book Reviews’, 12 (5) *European Journal of International Law* (2001) 1027-108, at 1029. See also O. Korhonen, *International Law Situated: An Analysis of the Lawyer’s Stance towards Culture, History and Community* (The Hague/London/Boston: Kluwer Law International, 2000).

²¹⁷ P. Braillard, *Théorie des systèmes et relations internationales* (Bruxelles : Bruylant, 1977), at 53 ; Ndeshyo, above note 150, at 21 and 23 ; T. Muhindo Malonga and M. Muyisa Musubao, *Méthodologie juridique. Le législateur, le juge et le chercheur* (Butembo : Presses universitaires de Graben, 2010), at 77-80.

²¹⁸ See Ouedraogo, above note 214, at 72 ; G. Abi-Saab, ‘Cours général de droit international public’, 207 *Recueil des Cours de l’Académie de Droit International* (1987) 9-464, at 35, 41 and 107 ; E. Morin, *Introduction à la pensée complexe* (Paris : Editions du Seuil, 2005), at 29 ; C. Focarelli, *International Law as a Social Construct : the Struggle for Global Justice* (Oxford : Oxford University Press, 2012), at 256.

analysis is the external environment related to the crisis of general international criminal law of which Africa claims to be a political victim.²¹⁹ The fact is that some African state officials have been prosecuted by non-African countries before their national courts on the basis of the principle of universal jurisdiction (Belgium, France, Germany, Spain, etc), while other proceedings are or have been conducted by the ICC in Africa, some against a handful of former and incumbent African Heads of State (Ivory Coast, Kenya, Libya, Soudan), allegedly without paying attention to crimes committed in other parts of the world. The situation has led the AU to the conviction that African states and the continent suffer from judicial imperialism.²²⁰ The AU thus disapproves “the abusive use of the principle of universal jurisdiction”²²¹ and some parts of the ICC’s judicial work in Africa,²²² such as the prosecution of President Omar Al Bashir of Sudan. What are the grievances that the continent has against these proceedings? In which dimensions can the overall crisis manifests itself in regard to Africa? What kinds of legal reforms are demanded by the AU and/or its member states? How to justify that, despite the claim for these reforms, Africa continues to develop its own regional international criminal law?

Another axis of analysis is the internal environment related to the development of African regional public order. What can one understand by this expression? Is it a political concept or a legal one? It is also observed that the norms of *jus cogens* appertain to universal international law and are in the heart of the parallel notion of (*universal*) international public order.²²³ But, could there be an African regional public order without any ‘regional’ norm of *jus cogens*? What could be the foundations of African regional public order and the implications of its existence on the development of African international criminal law?

Second, the systemic approach is useful for the definition of the content of African international criminal law. To illustrate how this law is so far developed, this study focuses on

²¹⁹ Kahombo, above note 11, at 76.

²²⁰ *Ibid.*

²²¹ See Assembly/AU/Dec.199 (XI), Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction (Doc. Assembly/AU/14 (XI)), 11th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 30 June - 1 July, 2008, paras.5-8.

²²² Assembly/AU/DEC.221 (XII), Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan, 12th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 1-3 February 2009, paras.2, 3 and 4.

²²³ Salmon, above note 149, at 788-789; Dupuy, above note 33, at 281; P.-M. Dupuy and Y. Kerbrat, *Droit international public* (11th edn., Paris : Dalloz, 2012), at 440.

two selected aspects. On the one hand, what would be the punishable crimes at the African regional level? Is it already possible to speak of a code of crimes against peace and security in Africa? How does Africa realise this codification and on the basis of which criterion of crimes selection? To what extent such a code is different from the ICC Statute? Who can be responsible for these crimes? Is the establishment of the AU Criminal Court a good thing? What would be, in terms of legal sources, the law applicable by it? Would this regional criminal court capable to try all the crimes over which it is given jurisdiction? Under which conditions could it represent a viable system of regional international criminal justice in Africa?

On the other hand, the repression of international crimes also implies a national dimension.²²⁴ Questions arise as to the role of AU member states, their availability to apply African international criminal law or to support the administration of criminal justice at the regional level. Of particular interest is the issue of judicial co-operation in criminal matters which very often subordinates the effective exercise of jurisdiction when criminals would try to hide behind national borders and/or behind the differences of state legal systems in order to escape justice. How would the problem be solved by the AU? Are there African treaties or arrangements or techniques of judicial co-operation which can help in the application of African international criminal law? Would there be any fruitful cooperation with the envisaged AU Criminal Court? Would it be possible and relevant to adopt a continental treaty dealing with judicial co-operation in criminal matters (extradition, police collaboration, etc.) between African States, on the one hand, themselves, the AU and other Pan-African intergovernmental organisations, on the other hand, for the protection of African regional public order?

Finally, in its third application, the systemic approach commands the study of the potential relationship between African international criminal law and the global system of international criminal justice. One key point would be the state of relationship and coherence between the African region, the national and universal levels. The question will be examined with due regard to potential judicial conflicts resulting from the duplication of the ICC by the AU Criminal Court, in addition to national courts and other competent Pan-African tribunals.²²⁵

²²⁴ A. Cassese and M. Delmas-Marty (eds), *Juridictions nationales et crimes internationaux* (Paris : Presses universitaires de France, 2002), at 2.

²²⁵ Such tribunals can be created in the framework of Regional or Sub-Regional Economic Communities.

This problem of coordination of different tribunals goes beyond the work of the ILC on the fragmentation of international law.²²⁶ As Treves writes, “it (ILC) says nothing (...) of the parties’ rights to choose freely the competent judge, be it unilaterally when permitted by applicable rules, or by agreement, and of all the questions arising from the possible coexistence of competent judges”.²²⁷ Which principles or rules could be applicable to solve any possible judicial collision? Furthermore, which role could the Security Council play in the administration of justice by the AU Criminal Court as a way to assume its primary responsibility to maintain peace and security in the world?

In the end, the study will discuss some prospects for the future of the system of international criminal justice. A particular attention will be paid to the aforementioned principle of regional territoriality, which prioritises international prosecutions and trials *in situ*, but in cooperation between states, different regions and the world in order to avoid any risk of impunity. The regionalisation of the ICC will be envisaged in connection with this principle. The goal is to explore alternative options for establishing a system of international criminal justice, which is multi-level, regionalised, integrated, unified and so coherent. This system could be one which guarantees effective participation of all states and regions in the enforcement of international criminal law, regional ownership of criminal justice and protection of the interest of mankind. As such, the study is under the influence of Pan-African and TWAIL thoughts.

2.2.2. The Influence of Pan-African and TWAIL Thoughts

It is very hard, in a study based on a systemic approach, to hide some personal sensibilities.²²⁸ First of all, the reflections will be nourished by Pan-African thoughts. On the one hand, two main, but opposed, epistemological paradigms are generally invoked in African studies: afro-pessimism and afro-optimism.²²⁹ Between these two paradigms there is a different understanding about Africa’s capacity to stabilise the continent or to develop its own means of individual and collective “self-reliance within the framework of the (African) Union”.²³⁰

²²⁶ See International Law Commission, above note 117.

²²⁷Treves, above note 111, at 233.

²²⁸ Abi-Saab, above note 218, at 29.

²²⁹J.-P. Foirry, *L’Afrique : continent d’avenir ?* (Paris : Ellipse Marketing S.A., 2006), at 10.

²³⁰ Constitutive Act of the African Union, Article 4 (k). See also A. Ntumba Luaba, ‘La mise en œuvre du Plan d’action et de l’Acte final de Lagos’, 168 *Zaire-Afrique* (October 1982)453-472.

Pessimists think that Africa must accept to be ruled from abroad because it is an incapable continent of all evils and misfortunes: political crises, armed conflicts, criminality and barbarianism, corruption, terrorism, diseases, under-development, coup d'état, impunity, etc. It is condemned to definitely remain in a situation “of chaos without way out, of tragedy without relief, of powerlessness without remedy (...)”.²³¹ In this pessimistic perspective, the development of African international criminal law seems to be an unrealistic idea and has no positive prospect. It would not lead to African self-reliance in criminal matters within the framework of the AU, but to the consolidation of impunity for international crimes in Africa.

In contrast, optimists would like to present another picture of the continent,²³² which is supposed to know its specific problems, willing, motivated and capable to solve them by its own means.²³³ After all, it is the continent of the future,²³⁴ even with respect to the development of public international law. While this study considers that Africa must overcome numerous challenges to achieve effective regional justice, it relies on this optimistic view and demonstrates how African international criminal law may be a useful tool to realise the cardinal AU's principle of “respect for the sanctity of human life, condemnation and rejection of impunity (...)”²³⁵ and the teleological objective to “promote peace, security, and stability on the continent”²³⁶ in order to “ensure the well being of the African peoples”.²³⁷

On the other hand, the study develops a maximalist Pan-African view on African international criminal law, instead of a minimalist perspective which is reluctant to the building of the African community with self-reliance mechanisms which leaves more powers to the summit (the AU) to the detriment of lower levels of Pan-African relations (regions and sub-

²³¹ The translation is mine. The original French version is more precise and refers to Africa as a continent of ‘chaos sans issue, du tragique sans apaisement, de l'impuissance sans remède (...)’. See G. Balandier, *Afrique ambiguë* (Paris : éd. Plon, 2008), at ii.

²³² *Ibid.*, at iv-xi.

²³³ See O. Ndeshyo and A. Ntumba Luaba, *La stratégie de l'Organisation de l'unité africaine pour le développement : le cadre institutionnel* (Kinshasa : Presses Universitaires du Zaïre, 1981), at 8 ; J.-C. Djereke, *L'Afrique refuse-t-elle vraiment le développement ?* (Paris : L'Harmattan, 2007), at 9.

²³⁴ Foirry, above note 229.

²³⁵ Constitutive Act of the African Union, Article 4 (0).

²³⁶ *Ibid.*, Article 3 (f).

²³⁷ African Union Non-aggression and Common Defence Pact, Preamble, para.8.

regions).²³⁸ Therefore, the study focuses more on the role of the AU (and its member states) in the development of African international criminal law than on the contribution of RECs and S/RECs or other Pan-African organisations of cooperation. As a matter of legal policy, multiplying and scattering regional mechanisms of criminal accountability must be avoided. Rather, for the better protection of African regional public order, it is preferable to adopt one continental code of crimes against peace and security in Africa, one African criminal jurisdiction within the AU's institutional system and one continental treaty dealing with judicial cooperation in criminal matters, binding on African states, the AU and other relevant Pan-African international organisations.

Secondly, and last, the study borrows the critical viewpoint from TWAIL,²³⁹ the aim of which is to reveal, behind formal legal norms, the state of unfair subordination of powerless countries and regions of the world through the use of international law,²⁴⁰ and then to try to defang this law of "its imperialist and exploitative biases".²⁴¹ Even if this TWAIL approach is not strictly followed throughout the study, it is helpful to explain if and how, in the past years, international criminal justice was manipulated, if not misused, to the detriment of Africa. The reflection will be combined with the idea that many African countries were, notwithstanding, among the main supporters of the system of international criminal justice, including the ICC, which is now supposed to be directed against their nationals. The development of African international criminal law will be examined in such a manner to identify, in terms of

²³⁸ On this cleavage between maximalist and minimalist Pan-Africanism, see Woronoff, above note 97, at 127-154, M. Asuka and K. Elombe, *L'Organisation de l'unité africaine. Vingt ans après. Des espoirs déçus ?* (Kinshasa : Presses Universitaires du Zaïre, 1988), at 30-35, N. Van Chein, 'Les politiques d'unité africaine' (PhD Thesis, Université de Paris 1973) ; F. Sassou Attisso, *De l'unité africaine de N'Kroumah à l'Union africaine de Kadhafi* (Paris : L'Harmattan, 2008).

²³⁹ See B.S. Chimni, 'The Third World Approaches to International Law: a Manifesto', 8 *International Community Law Review* (2006) 3-27; O. Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?', 10 *International Community Law Review* (2008) 371-378.

²⁴⁰ M.A. Attar and R. Thompson, 'How the Multi-Level Denomination of International Law-Making Can Effect Popular Aspirations towards Self-Determination', 3 *Trade, Law and Development* (2011) 65-102, at 67.

²⁴¹ J. T. Gathii, O. Okafor and A. Anghie, 'Africa and TWAIL', 18 *African Yearbook of International Law* (2012) 9-13, at 9.

solutions, concrete reforms which could lead Africa and the rest of the world to a fair system of international criminal law.²⁴²

3. The Structure of the Thesis

This study suggests that there are solid bases for the development of African international criminal law. These bases are not simply found in the crisis observed within the global system of international criminal law, but also and mainly in the policy of self-reliance of the AU and its member states aiming to protect and defend the African regional public order through regional institutions of criminal accountability for perpetrators of crimes against peace and security in Africa.

Thus, the thesis contains two main parts. Part one elaborates on the crisis of universal international criminal law. It demonstrates that the latter crisis overall manifests itself in four different ways in relation to Africa: the decline of state sovereignty with the perception of unequal power sharing between states and with the international community; the alleged abusive exercise of universal jurisdiction by European states in African situations; the divergence of views on the ICC jurisdiction and its work in Africa; as well as the contention over the unheeded claim for legal reforms by the AU and its member states. Part two focuses on the regionalisation of international criminal law as a solution to this crisis. It deals with three regional pillars of the development of African international criminal law. The first one is the emerging notion of African regional public order, the violation of which may constitute a crime against peace and security in Africa. The second pillar is the promotion of a system of African regional criminal justice, including an African criminal jurisdiction. The third and last pillar relates to the coordination of the relationships between African international criminal law and the global system of international criminal justice.

²⁴² Anghie, above note 125, at 318; L. Eslava and S. Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International law', 3 *Trade, Law and Development* (2011) 103-130, at 110-112.

Part I. The Crisis of Universal International Criminal Law

The 20th century can be characterised as a revolution for international law. Many of the classic principles, rules and legal theories have fundamentally changed, starting with state sovereignty, criminal jurisdiction and immunities for state officials, in response to the increasing humanitarian and political concerns over the need to protect human rights and dignity.²⁴³ New institutions proliferate (United Nations, other intergovernmental organisations and international courts) while other actors have emerged in international relations (new states, non-governmental organisations and multinational corporations). A number of rules and values common to mankind, the violation of which cannot be tolerated, are widespread. The motto is that impunity must cease. The international community has become a subject of international law²⁴⁴ and plays a central role in the administration of international justice.

However, there are serious disagreements on the content of the existing legal system, the risks it presents,²⁴⁵ the manner in which rules and principles are interpreted, implemented or applied to specific situations and cases. The problem is referred to as “the crisis of international law”,²⁴⁶ that is to say “the major crisis of international legal system that emerged from the horrors of the World War II and aimed at adhering justice, preventing aggressions and protecting victims”.²⁴⁷ International law now seems to be in need of reform in order to

²⁴³ R. G. Teitel, *Humanity's Law* (Oxford: Oxford University Press, 2011), at 8.

²⁴⁴ A.A. C. Trindade, ‘Quelques réflexions sur l’humanité comme sujet du droit international’, in D. Alland, V. Chetail, O. de Frouville and J. E. Viñuales (eds), *Unity and Diversity of International Law : Essays in Honour of Professor Pierre-Marie Dupuy* (Boston/Leiden : Martinus Nijhoff Publishers, 2014) 157-173, at 166-171.

²⁴⁵ See F. Johns and W. G. Werner, ‘The Risks of International Law’, 21 (4) *Leiden Journal of International Law* (2008) 783-786.

²⁴⁶ See R. Domingo, ‘The Crisis of International Law’, 42 *Vanderbilt Journal of Transnational Law* (2009) 1543-1593; M.P. Scharf, A. Centner and K. McClain, ‘Foreword: International Law in Crisis’, 44 *Case Western Reserve Journal of International Law* (2011) 1-11, at 5 and 9.

²⁴⁷ N. Mammadov, ‘The Crises of International Law and Governance: Causes and Consequences’, *Azernews* (08 October 2015), <<http://www.azernews.az/analysis/88576.html>> accessed 16 January 2016.

continue its unachieved expansion and revolution.²⁴⁸ The future of international law is thus widely open and subject to regular debate.²⁴⁹

In international criminal law, the crisis has a broad dimension. It relates in part to the insufficient coverage of new contemporary issues and cells of conflicts, such as financial crimes, attacks against the environment, the resurgence of piracy “after hundreds of years of dormancy”,²⁵⁰ terrorism, organised and transnational crimes and the liability of legal persons. The existing legal system also faces a problem of conception owing to inherent contradictions in policy choices: monist system against dualist order, liberal law against authoritarian system against state sovereignty,²⁵¹ prosecutions and justice versus promotion of peace and reconciliation, protection of human security versus state national security. The perpetration of massive atrocities meanwhile continues around the world. It looks as if legal norms are not a deterrent to criminals. International institutions, such as the UN Security Council and the ICC, which have been empowered to defend the law and to apply it, have shown their own weaknesses.²⁵² They are contested and suspected of disregarding the law on the basis of which they are supposed to perform their functions. The de-legitimisation of (global) international criminal law has become a concrete problem. It means that when legal and political contestations come pouring in, legitimacy erodes because of an insufficient regional and state adherence to the fundamentals of the system of international criminal law.

A deep analysis is necessary in order to illustrate how such a legal crisis appears in relation to Africa. The study focuses on the exercise of criminal jurisdiction, which is basically a sovereign right of every state.²⁵³ However, no state can claim today to have the right to exclusive jurisdiction over international crimes committed in its territory. Competing criminal

²⁴⁸ J.-L. Halpérin, *Five Legal Revolutions since the 17th Century: an Analysis of a Global Legal History* (London: Springer, 2014), at 151, 160-162.

²⁴⁹ See L. Oppenheim, *The Future of International Law* (Oxford: Oxford University Press, 1921); A. Cassese (ed.), *Realizing Utopia: the Future of International Law* (Oxford: Oxford University Press, 2012).

²⁵⁰ Scharf, Centner and McClain, above note 248, at 3.

²⁵¹ D. Robinson, ‘The Identity Crisis of International Criminal Law’, 21 *Leiden Journal of International Law* (2008) 925-963, at 926 and 931.

²⁵² Mammadov, above note 247.

²⁵³ Covenant of the League of Nations, Article 15 (8); UN Charter, Article 2(7). See also P.C. Ulimubenshi, ‘L’exception du domaine réservé dans la procédure de la Cour internationale. Contribution à l’étude des exceptions dans le droit judiciaire de la Cour internationale’ (PhD Thesis, University of Geneva 2003), at 7, 27-149.

jurisdictions now exist between states and the international community. In this regard, state sovereignty has widely declined. While this development in law is potentially a good thing for the fight against impunity, it appears that the existence of extensive, tough and inflexible legal rules is in fact a source of difficult acceptance of the international legal system by many states. There are contestations against the exercise of criminal jurisdiction in different situations and cases. True, these contestations are proper to any legal system.²⁵⁴ However, they also signal the existence of symptoms showing that there is a crisis in international criminal law. Such a crisis relates to the decline of state sovereignty over domestic criminal jurisdiction (1), the rise of objections against the system of international criminal justice (2) and the contention over the claim for legal reforms (3).

1. The Decline of State Sovereignty on Domestic Criminal Jurisdiction

Jurisdiction is a legal concept which comes from Roman law. Literally, it means to speak (*dicere*) the law (*jus*). However, it possesses a wider meaning under international law. Classically, jurisdiction designates the lawful powers that a state may exercise, as an attribute to its legal personality and sovereignty,²⁵⁵ i.e. its independence (the power or even the duty to exercise the functions of a state in exclusion of any other –or even the international community –, but in accordance with international law),²⁵⁶ to determinate and realise its own political organisation, or “to define and enforce the rights and duties, and control the conduct,

²⁵⁴ See A. Wiener and U. Puetter, ‘The Quality of Norms is What Actors Make of It: Critical Constructivist Research on Norms’, 5(1) *Journal of International Law and International Relations* (2009) 1-16, at 7.

²⁵⁵ P.-M. Dupuy, *Droit international public* (4th edn, Dalloz: Paris, 1998), at 54-55.

²⁵⁶ See International Law Commission, ‘Draft Declaration on Rights and Duties of States, with commentaries’, *Yearbook of International Law Commission* (1949) 287-290, at 287. This text was attached to General Assembly resolution 375 (IV) of 6 December 1949. Its Article 1 reads: ‘Every state has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government (...)’. The case-law also assimilates sovereignty to independence. See notably *Island of Palmas Case* (Decision of 4 April 1928); *Blaskic* (IT-95-14-AR 108 bis), Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber, 29 October 1997. In this case, whereby the ICTY discussed the question of whether it had the power to deliver a compulsory order against Croatia as a sovereign state, the Tribunal declared that ‘(...) under customary international law, states, as a matter of principle, cannot be "ordered" either by other states or by international bodies’ (para.26). See also Daillier, Forteau and Pellet, above note 15, at 466-467; M.N. Shaw, *International Law* (5th edn., Cambridge: Cambridge University Press, 2003), at 189.

of natural and juridical persons”,²⁵⁷ essentially within its national territory. This definition allows the distinction between prescriptive jurisdiction (i.e. the power to legislate or to establish legal norms) and enforcement jurisdiction (i.e. the power to implement and apply the law so laid down to persons, things and situations).²⁵⁸ Furthermore, the concept of jurisdiction means the powers that international law confers on the international community to deal with problems of common concern to all its members. It may also refer to a court as an institution or to its competences (substantive, personal, temporal and territorial). A court then exercises the powers of a state or jurisdiction conferred on the international community.

There is a diversity of rules and principles on the exercise of criminal jurisdiction because of the diversification of municipal legislation. There is no common international code applicable to the exercise of extraterritorial criminal jurisdiction.²⁵⁹ But, international law governs and limits the exercise of every criminal power. In the case concerning the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, the ICJ recalled that sovereign equality of states “is one of the fundamental principles of the international legal order”²⁶⁰ and “has to be viewed together with the principle that each state possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the state over events and persons within that territory”.²⁶¹ Hence, criminal law, and by the way criminal jurisdiction, is fundamentally a matter of territorial character in all national legal systems.²⁶² According to former judge Weiss, “this is a question of public security, and of public order,

²⁵⁷ C. Ihenetu-Geoffrey, ‘Rethinking Jurisdiction under International Law’, From Selected works of Chinedu Chibueze Ihenetu-Geoffrey (24 May 2012), at 5 <http://works.bepress.com/chinedu_ihenetugeoffrey/11/> accessed 2 February 2016.

²⁵⁸ Dupuy, above note 255, at 74-74; D.W. Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’, 53 (1) *British Yearbook of International Law* (1983) 1-26, at 1.

²⁵⁹ H. Ascensio, ‘Etude : l’extraterritorialité comme instrument’ Contribution to the Work of the UN Secretary-General’s Special Representative on Human Rights and Transnational Corporations and Other Businesses (10 December 2010), at 3 <http://www.diplomatie.gouv.fr/fr/IMG/pdf/1_2PESP_2_Etude_lextraterritorialite_comme_instrumentx_cle84485e.pdf> accessed 3 February 2016.

²⁶⁰ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February, I.C.J. Reports 2012, para.57.

²⁶¹ *Ibid.*

²⁶² *The Case of the S.S. “Lotus” (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J., Series A. –No.10, at 20. See also G. Gilbert, *Responding to International Crime* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), at 75-76.

which a state cannot ignore without neglecting its duty as a state, and one which arises whatever the nationality of the delinquent may be".²⁶³

However, the territoriality of criminal jurisdiction is not absolute. The principle of state sovereignty is challenged by the expansion of criminal phenomena due to the progress of international communication and exchanges. Although occurring abroad, these phenomena may have connections with the territorial state, thus justifying the latter's right and interest to target offenses committed in a foreign country. In addition, the principle of state sovereignty has been humanised in order to protect human beings against international crimes.²⁶⁴ International law now allows the prosecutions of presumed criminals outside their home country. In the *Tadić* case, the ICTY acknowledged this evolution as follows:

the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A state-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.²⁶⁵

These types of criminal jurisdiction other than that of the territorial state and their lawfulness are already abundantly commented on.²⁶⁶ However, it is still necessary to indicate to which extent they imply the decline of state sovereignty in a manner that would be provocative of

²⁶³ Dissenting Opinion of Judge Weiss, *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J., Series A. –No.10, at 44.

²⁶⁴ See A. Peters, 'Humanity as the A and Ω of Sovereignty', 20 (3) *European Journal of International Law* (2009) 513-544, at 521 and 527.

²⁶⁵ *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para.97.

²⁶⁶ See J. Fenston and H. De Saussuret, 'Conflict in the Competence and Jurisdiction of the Courts of Different States to Deal with Crimes Committed on Board Aircraft and the Persons Involved Therein', 1 *McGill Law Journal* (1952) 66-89; F. A. Mann, 'The Doctrine of Jurisdiction in International Law', 111 *Recueil des cours de l'Académie de droit international* (1964)1-162 ; K. M. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice* (London: Kluwer Law International, 1996); J. A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Area' Corporate Social Responsibility Initiative Working Paper No. 59 (Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2010), at 115-143 <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf> accessed 3 February 2016.

contestations and disagreements by states and regions of the world. In this regard, legal developments have occurred in two principal directions: the existence of competing criminal jurisdictions between states and the international community (1.1) and the rise of a duty (rather than discretion) on the forum state to exercise its jurisdiction over relevant crimes committed in its territory (1.2).

1.1. The Expansion of Competing Criminal Jurisdictions

The issue of competing criminal jurisdictions is not new. It was extensively discussed by the Permanent International Court of Justice (PICJ) in the *Lotus* case.²⁶⁷ State sovereignty over criminal jurisdiction is challenged by the controversial extraterritorial jurisdiction of other states (1.1.1) and the jurisdiction of the international community as whole (1.1.2).

1.1.1. The Scope of Extraterritorial Jurisdiction

By definition, state extraterritorial jurisdiction, as opposed to its territorial jurisdiction, “connotes the exercise of jurisdiction, or legal power, outside (its) territorial borders”.²⁶⁸ It may be prescriptive or enforcement (executive and adjudicative) power. It is prescriptive when it comes to the regulation by a state of conducts of persons, situations and events within the territory of another state. It is an enforcement power when a state tends to implement, through its executive or judicial authority, its own law in the territory of a foreign state. The issue may lead to a conflict. As far as state sovereignty is concerned, bones of contention appear about the sources of extraterritorial criminal jurisdiction (1.1.1.1) and its extent under international law (1.1.1.2).

1.1.1.1. The Diverging Conceptions on the Sources of Extraterritoriality

Two opposed conceptions have to be distinguished here. The first one is inspired by the PCIJ in the *Lotus* case, in which France contested that Turkey had jurisdiction to prosecute her citizen for offences which were allegedly committed in the high seas, out of a collision between a French ship (*Lotus*) and a Turkish one, and so outside its national territory. Even if the PCIJ was of the view that the matter also fell under the territorial jurisdiction of Turkey,²⁶⁹

²⁶⁷ *The Case of the S.S. “Lotus”*, above note 262, at 20.

²⁶⁸ A. J. Colangelo, ‘What is extraterritorial jurisdiction?’, 99 *Cornell Law Review* (2014) 1303-1352, at 1304. See also Salmon, above note 149, at 491.

²⁶⁹ *The Case of the S.S. “Lotus”*, above note 262, at 25.

owing to the fact that the effects of those offenses also occurred on a ship flying the Turkish flag, it advanced an important liberal dictum on extraterritoriality which acknowledged the freedom of any state to entertain its jurisdiction outside its borders, unless there was a prohibitive rule of international law. The PCIJ stated that “all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty”.²⁷⁰ The dictum furthermore clarified:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.²⁷¹

This approach is said to be sovereign state-oriented²⁷² and finds its regional resonance in the Pan-American Convention on Rights and Duties of States, the so-called Montevideo Convention of 26 December 1933.²⁷³ It may have become inconsistent with the state of contemporary international law which has developed, beyond interstate relationships, on the communitarian basis of values and interests common to mankind.²⁷⁴ The critique also mentions the fact that several judges dissented in the *Lotus case*, even though the PCIJ established a presumption in favour of extraterritoriality. Furthermore, it is advanced that the dictum is so weak on the matter because the Court rather ruled much more on the basis of

²⁷⁰ *Ibid.* at 19.

²⁷¹ *Ibid.*

²⁷² See A. Mills, ‘Rethinking Jurisdiction in International Law’, 84 (1) *British Yearbook of International Law* (2013) 187-239, at 190-194.

²⁷³ Article 3 of this Convention reads: ‘The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competences of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law’. Emphasis is mine.

²⁷⁴ P. Gaeta, ‘The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes’, in A. Cassese (ed.), *Realizing Utopia: the Future of International Law* (Oxford: Oxford University Press, 2012) 596-606, at 600.

territoriality in addition to the fact that victims were Turkish nationals.²⁷⁵ Finally, the question should be whether international law authorises extraterritoriality rather than whether it prohibits it,²⁷⁶ since everything which is not expressly prohibited is not necessarily allowed at the present day. The sovereignty conception is then unclear on whether or why extraterritoriality is permissible.²⁷⁷ According to former Judge Alvarez, in post- League of Nations era, one must take into account the rights of other states and other factors relating to “the new international law”,²⁷⁸ including the Charter of the United Nations and the general interests of international society.²⁷⁹

Therefore, the second conception on criminal jurisdiction suggests that states may resort to extraterritorial powers if they are only expressly provided for by international law. In this sense, the sovereign state-oriented approach is supplanted by a constitutional perspective under the terms of which it is up to international law to allocate powers to states rather than the latter deriving from their sovereignty.²⁸⁰ In other words, a state has criminal jurisdiction if it can justify possessing a title of such kind under international law. This approach has founded the theory of grounds/heads/titles of criminal jurisdiction under international law and is perceptible even in the work of the Institute of International Law (IIL) with Christian Tomuschat as *Rapporteur*.²⁸¹ Concerning international crimes, titles of jurisdiction may exist

²⁷⁵ O. de Schutter, ‘Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations’, Report for the Special Representative to the UN Secretary General on the Issue of Human Rights and Transnational Corporations and other Enterprises (2006), at 26 <<http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf>> accessed 3 February 2016.

²⁷⁶ See Dissenting Opinion of Judge Lord Finlay, *The Case of the S.S. “Lotus” (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J., Series A. –No.10, at 52.

²⁷⁷ A. Orakhelashvili, ‘State Jurisdiction in International Law: the Complexities of Basic Concepts’, in A. Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham/Northampton: Edward Elgar Publishers, 2015) 1-49, at 11.

²⁷⁸ Individual Opinion of Judge Alvarez, *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951, I. C.J. Report 1951, at 152.

²⁷⁹ *Ibid.* See also Dissenting Opinion of Judge Shahabuddeen, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, at 396.

²⁸⁰ Gaeta, above note 274, at 600; Mills, above note 272, at 194.

²⁸¹ See Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes, Seventeenth Commission (*Institut de droit international*), Krakow Session -2005, 26 August 2005, paras.2 and 3.

in conventional provisions or, where not provided for by a treaty, under customary international law.

The main critique against this constitutional approach to extraterritorial criminal jurisdiction is that it makes believe that states would be members of an international (constitutional/political) federation as if each one has specifically renounced its original sovereignty. Such an anti-state approach seems to be in contradiction with the world diversity and contemporary international law itself which in contrast variously reaffirms the relevance of state sovereignty.²⁸² According to Jean D'Aspremont, the constitutional distribution of criminal jurisdictions among states does not exist under international law.²⁸³ It is nothing but "a construct of legal scholars",²⁸⁴ which does not correspond with any positive rule of international law²⁸⁵. He agrees with the Lotus dictum and suggests that it "should not be taken for more than what it really is, i.e. the expression of the idea that international law does not distribute jurisdiction among states".²⁸⁶

Both conceptions are equally and partly mistaken. It is only their combination which can permit to see better into the matter. As Sir Robert Jennings has rightly put it, sovereignty has been transformed, rather than surrendered by states.²⁸⁷ The institution is still relevant to international law. It only evolves into new directions and is under control through proper legal devices to enable the making of collective decisions and the taking of effective collective actions over international political problems²⁸⁸ and to protect certain values.

²⁸² UN Charter, Article 2 (1). See also UNGA Res.2625 (XXV), 24 October 1970: Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

²⁸³ J. d'Aspremont, 'Multilateral versus Unilateral Exercises of Universal Criminal Jurisdiction', 43 *Israel Law Review* (2010) 301-329, at 311.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*, at 313.

²⁸⁷ R. Jennings, 'Sovereignty and International Law', in G. Kreijen, M. Brus, J. Duursma, E. De Vos and J. Dugard (eds), *State, Sovereignty and International Governance* (Oxford: Oxford University Press, 2002) 27-44, at 42.

²⁸⁸ *Ibid.*

At least, both conceptions allow admitting that state sovereignty is not absolute and remains subject to limitations under international law.²⁸⁹ This has been further acknowledged in the Advisory Opinions of both the PCIJ and the ICJ, concerning respectively the disputed domestic character of the French *Nationality Decrees Issued in Tunis and Morocco*²⁹⁰ and the *Legality of the Threat or the Use of Nuclear Weapons*.²⁹¹ In particular, for many international (and even transnational) crimes, states have lost their freedom to fix the criminal jurisdiction they would individually desire to entertain. International law already prescribes one for them which must be established under their domestic laws. For example, the United Nations Convention against torture stipulates for states parties the obligation to take domestic measures establishing universal jurisdiction over this crime.²⁹² The same duty is provided for by the United Nations Convention against mercenarism of 4 December 1989.²⁹³ This obligation is limited to contracting parties in pursuance with the principle of the relative effect of international treaties. But, it may evolve into a customary rule. In other cases, international law only permits but does not impose on states any kind of criminal jurisdiction. This is particularly acknowledged for the exercise of universal jurisdiction over war crimes,²⁹⁴ including those committed during non-international armed conflicts.²⁹⁵

²⁸⁹ See also S. Theron, 'Que reste-t-il du *dictum* de la jurisprudence du Lotus selon lequel "les limitations de l'indépendance des Etats ne se présument pas"?' , 3 *Droit écrit* (2002) 75-87, at 77-81.

²⁹⁰ *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion of 7 February 1923, P.C.I.J., Series B, No.4, at 24. The Court particularly stated: 'The question of whether a certain matter is or not solely within the jurisdiction of a state is an essential relative question. It depends upon the development of international relations'.

²⁹¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, para.22.

²⁹² Article 5.

²⁹³ Article 9.

²⁹⁴ Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002, para.46. See also L. Benavides, 'The Universal Jurisdiction Principle: Nature and Scope', 1 *Anuario Mexicano de Derecho Internacional* (2001) 19-96, at 19, 49-50; W. B. Cowles, 'Universality of Jurisdiction over War Crimes', 33 (2) *California Law Review* (1945) 177-218.

²⁹⁵ D. Plattner, 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts', 30 (278) *International Review of the Red Cross (IRRC)* (1990) 409-420, at 417-418; T. Graditzky, 'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts', 38 (322) *IRRC* (1998) 29-56; T. Meron, 'International Criminalization of Internal Atrocities', 89 (3) *American Journal of International Law* (1995) 554-577.

Moreover, where no title of jurisdiction directly emanates from international law, states remain free in principle to establish the one they desire under their domestic laws. Several international treaties even obviously stipulate this possibility after imposing a kind of criminal jurisdiction to be established by states parties. For example, both aforementioned conventions affirm that they do not “exclude any criminal jurisdiction exercised in accordance with national law”.²⁹⁶ The same is provided for by the International Convention for the protection of all persons from enforced disappearance (20 December 2006)²⁹⁷ and the Montreal Convention for the suppression of unlawful acts against the safety of civil aviation (23 September 1971).²⁹⁸ But, it is important to recall that the freedom must be exercised “without prejudice to the norms of general international law”,²⁹⁹ i.e. customary international law and general principles of law. In this regard, the initial distinction between prescriptive and enforcement extraterritorial criminal jurisdiction finds its application here. Both aspects are independent of each other.³⁰⁰ It means that it may be possible that the power to prescribe rules on a given type of criminal jurisdiction over certain acts or events which take place abroad remain total, while these rules must not be implemented and enforced within the territory of another state over which the latter also possesses and exercises its sovereign authority. In this sense, what may be called unilateral extraterritorial criminal jurisdiction is not in essence affected by any problem of legality. It is the exercise of the authority to enforce jurisdiction abroad which is prohibited. The prosecuting state should wait until the offender, who is not its national, enters its territory before enforcing its jurisdiction. This territorial entry basically means that the accused person willingly submits himself to the jurisdiction of the forum state. Reversely, it is difficult to admit the lawfulness of the jurisdiction of a state which first abducts a suspect from the territory of a foreign country and then brings him to its own justice. The major precedent in this regard is the case of Adolph Eichmann in 1960s after his abduction by Israel from Argentina. The problem is that there is a prior illegality (*culpa praecedens*), consisting of the violation of the territorial integrity of a foreign state and the

²⁹⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984), Article 5 (3); International Convention against the Recruitment, Use, Financing and Training of Mercenaries (4 December 1989), Article 9 (3).

²⁹⁷ Article 9 (3).

²⁹⁸ Article 5 (3).

²⁹⁹ International Convention for the Suppression of the Financing of Terrorism (10 January 2000), Article 7(6).

³⁰⁰ R. O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’, 2 *Journal International Criminal Justice* (2004) 735-760, at 741.

illegal use of force contrary to the Charter of the United Nations, which might normally nullify the (adjudicative) jurisdictional power acquired by force.³⁰¹ Other limitations and contestations can derive from the double incrimination principle, the doctrine of the abuse of right or the law of immunities for state officials from foreign criminal courts.³⁰² This distinction is thus central to all kinds of heads of extraterritorial jurisdiction.

1.1.1.2. The Extension of Heads of Extraterritorial Criminal Jurisdiction

Crimes are no longer punishable only in the country where they were committed. The Grotius's idea that no criminal would peacefully enjoy in a state impunity or the fruits of his crime committed abroad has gained much legal success.³⁰³ Developments have occurred not only on the types of heads of jurisdiction to take into account but also on the extensive list of international crimes subject to extraterritoriality and the justification behind this to trump state sovereignty.

One of these developments has been the extension of the meaning of the territoriality principle with regard to the localisation of the commission of the crime (*locus commissi delicti*). The assumption is that the place where the injurious effects of a crime have been produced is also the place where it has been committed. This is what is known as the "effects doctrine",³⁰⁴ which was already challenged by several dissenting judges in the *Lotus* case. It seems as if it found another application in the *Lockerbie* case, when the United Kingdom and the United States of America sought the extradition of two Libyan citizens for prosecutions in Scotland, where occurred the alleged terrorist destruction of the Pan Am 103 aircraft on 31 December 1988. Instead, Libya contested the procedures and claimed at the same time for its

³⁰¹ Even if the Security Council agreed that Eichmann deserved prosecutions under the principle of universal jurisdiction, it warned that such an action which affected "the sovereignty of a member state and therefore cause international friction, may, if repeated, endanger international peace and security". Israel was even requested to make appropriate reparations in accordance with the UN Charter and other rules of international law. See SC Res.138 (1960), 23 June 1960, paras.1-2.

³⁰² Individual Opinion of Judge Alvarez, above note 278, at 152; D'Aspremont, above note 283, at 314-315.

³⁰³ Separate Opinion of Judge Gilbert Guillaume, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002, para.4. See also Y. S. Kraytman, 'Universal Jurisdiction – Historical Roots and Modern Implications', 2 *Brussels Journal of International Studies* (2005) 94-129, at 121.

³⁰⁴ A. Aust, *Handbook of International Law* (2 edn., Cambridge: Cambridge University Press, 2010), at 45.

jurisdiction over the presumed offenders, present on its territory.³⁰⁵ It was however opined, for example in the *Lotus* case, that the *locus commissi delicti* is not the place where the effects of the crime are produced, but the place where it has been committed and “where the person responsible for that act was at the time when it was committed”.³⁰⁶ The effects doctrine may only be justified where the crime and its effects can be distinguished, i.e. “when there is a direct relationship between them; for instance, a shot fire at a person on the other side of the frontier”.³⁰⁷ It is perhaps because of this controversy that the effects doctrine was conventionally overturned in the law of the sea.³⁰⁸

More familiar are developments on the nationality principle. It means that a state may entertain its extraterritorial criminal jurisdiction either when the offender (active personality) or the victim of the crime perpetrated abroad by a foreigner (passive personality) possesses its nationality. Active personality is widely practiced in national legal systems, since nationals of a state are normally submitted to the laws of their home countries. Sometimes, it is subordinated to the incrimination of the same facts in the state of the commission of the crime (double incrimination principle)³⁰⁹ in order to respect the legality principle, or even extended to foreigners who have their permanent residence in the prosecuting country.³¹⁰ For some

³⁰⁵ Shaw, above note 256, at 580.

³⁰⁶ Dissenting Opinion of Judge Weiss, above note 263, at 47.

³⁰⁷ Dissenting Opinion of Judge Loder Finally, above note 276, at 37.

³⁰⁸ United Nations Convention on the Law of the Sea (10 December 1982), Article 97 (1). This Article stipulates: ‘In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national’. It is the restatement of Article 11 (1) of the Convention on the High Seas, concluded in Geneva on 29 April 1958.

³⁰⁹ See Rwanda Penal Code (2 May 2012), Article 12; Burundi Penal Code (22 April 2009), Article 10 (1); Central African Republic Code of Criminal Procedure (6 January 2010), Article 337.

³¹⁰ See Kenya Sexual Offences Act (21 July 2006) Cap.3 s.41 (1). Section 41.1 on Extra-territorial Jurisdiction provides: ‘A person who, while being a citizen of, or permanently residing in Kenya, commits an act outside Kenya which act would constitute a sexual offence had it been committed in Kenya, is guilty of such an offence and is liable to the same penalty prescribed for such offence under this Act’. See also Uganda Penal Code Act (1950) Cap.2 s.4; Council of Europe, ‘Extraterritorial Criminal Jurisdiction’, Report prepared by the Select Committee of Experts on Extraterritorial Jurisdiction (PC-R-EJ), set up by the European Committee on Crime Problems (CDPC), 1990, at 13.

states, only the accomplice of such crime committed abroad would be prosecuted.³¹¹ However, it has been found that civil law states more likely resort to passive personality than common law countries, and that its existence and exercise are often controversial,³¹² despite its acceptability in principle.³¹³ This principle is based on the obligation for a state to protect its citizens living abroad.³¹⁴ It should not be conflated with the classic principle of diplomatic protection, whose aim is not the prosecution by that state of a crime committed abroad against its national, but to internationally endorse its citizen's claim for a remedy against a foreign state which has failed to provide it to him under domestic law in breach of international law. In some cases, even in African countries close to the civil law system, the double incrimination principle and the presence of the accused on the territory of the prosecuting state are required.³¹⁵

Another development is made up of the protection principle under which a state may ascertain its jurisdiction when a foreigner has perpetrated an offence against its vital or security interests abroad. In many states, this jurisdiction is exercised over crimes such as counterfeiting of the national currency or seal and treason.³¹⁶ The presence of the offender in the territory of the prosecuting state is often required,³¹⁷ but several states also problematically provide for a possibility of prosecutions and trial *in absentia*.³¹⁸

This kind of extraterritoriality should not be conflated with the universality principle.³¹⁹ Their difference lies upon the kind of crimes subjected to each other. For the protection principle, offenders are foreigners who commit a crime against a vital or security interest of the

³¹¹ Central African Republic Code of Criminal Procedure, above note 309; Rwanda Penal Code (2 May 2012), above note 309.

³¹² J. G. McCarthy, 'The Passive Personality Principle and Its Use in Combating International Terrorism', 13 (3) *Fordham International Law Journal* (1989-1990) 298-327, at 302.

³¹³ International Bar Association, 'Report of the Task Force on Extraterritorial Jurisdiction' (2008), at 14 <<http://documents.law.yale.edu/sites/default/files/Task%20Force%20on%20Extraterritorial%20Jurisdiction%20-%20Report%20.pdf>> accessed 4 February 2016.

³¹⁴ McCarthy, above note 312, at 301.

³¹⁵ Burundi Penal Code, above note 309; Central African Republic Code of Criminal Procedure, above note 309.

³¹⁶ International Bar Association, above note 313, at 149-150.

³¹⁷ *Ibid.*, Article 10 (2); and Article 341.

³¹⁸ See DRC Penal Code (30 January 1940), Articles 3 (5) and 181-220.

³¹⁹ See L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford: Oxford University Press, 2003).

prosecuting state, while universal jurisdiction is much more applicable to international crimes, whose perpetrator may be prosecuted irrespective of his nationality and that of the victim, or any other connection with the prosecuting state, except his presence within its territory.³²⁰ In the *Furundzija* case, in which the accused was convicted by the ICTY notably for acts of torture, it was held that the reason is that international crimes concerned are condemned by the entire community of states and so each one possesses an interest and the right to prosecute their authors,³²¹ considered as the enemies of all mankind (*hostes humanis generis*).³²² However, it must be emphasised that the universal condemnation of a crime is by far a different and separate issue from the assertion of (adjudicative) jurisdiction. The former does not necessarily imply the latter. Likewise, (adjudicative) universal jurisdiction does not require in every case that the crime at stake is globally prescribed and outlawed. In addition, it does not amount to global jurisdiction in favor of whichever state. It is less than that. Indeed, any pronouncement on the exercise by a state of universal jurisdiction over international crimes must be determined on a case-by-case basis. The rationale of this kind of jurisdiction relates to the idea of international solidarity to ensure justice and to combat impunity, rather than that of the nature of the crimes in question or the traditional individualism of each state based on its sovereignty. International cooperation is required here for the sake of the entire humanity.³²³ Its realisation is one of the cardinal objectives of the United Nations.³²⁴

But, this global conception of universal jurisdiction only relates to an expanded list of crimes over which “multilateral universal jurisdiction” is possible in accordance with (universal) treaties and (general) customary international law. This notably applies to piracy, torture, slavery, war crimes, forced disappearance, genocide and crimes against humanity.³²⁵ It does

³²⁰ M. Henzelin, *Le principe de l'universalité en droit pénal international -Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité* (Bruxelles : Bruylant, 2000), at 29.

³²¹ *Furundzija* (IT-95-17/1-T), Judgement, Trial Chamber II, 10 December 1998, para.156.

³²² B. S. Brown, ‘The Evolving Concept of Universal Jurisdiction’, 35 (2) *New England Law Review* (2001) 383-397, at 383.

³²³ See C. Nyst, ‘Solidarity in a Disaggregated World: Universal Jurisdiction and the Evolution of Sovereignty’, 8 *Journal of International Law and International Relations* (2012) 36-61.

³²⁴ UN Charter, Article 1 (3).

³²⁵ Y. Beigbeder, *International Justice against Impunity: Progress and New Challenges* (Leiden/Boston: Martinus Nijhoff Publishers, 2005), at 48-53. See also C.K. Hall, ‘Contemporary Universal Jurisdiction’, in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (Leiden/Boston: Martinus Nijhoff Publishers, 2003) 111-137; J.-M. Henckaerts and L. Doswald-Beck (eds),

not cover crimes which states may subject to their “unilateral universal jurisdiction”, through either their domestic laws³²⁶ or pursuant to some specific regional arrangements. In principle, as mentioned above, there is no problem of legality if the double incrimination condition is met, and provided that the enforcement is sought when the accused is present on the territory of the prosecuting state as in the case of the exercise of multilateral universal jurisdiction. It is probably for the latter reason that the former ICJ President, Gilbert Guillaume, said that (enforcement) universal jurisdiction *in absentia* –which can only be lawfully viewed in the aspect of prescriptive jurisdiction –was unknown under international law,³²⁷ except maybe informative and prospective investigations for future consideration. That is not the case for the jurisdiction of the international community.

1.1.2. The Jurisdiction of the International Community

This is another facet of the decline of state sovereignty. Today, international law confers on the international community the power to decide on matters of common interests to its members. The jurisdiction of the international community is to be exercised over international (and potentially transnational) crimes, whereas the notion of extraterritoriality includes in most of the cases domestic offences. The decline of state sovereignty then appears as a consequence of the moralisation of the international system through a sort of humanisation of international law³²⁸ to fight impunity (1.1.2.1) and the diversification of sources of criminal powers conferred on the international community (1.1.2.2).

1.1.2.1. The Shift towards Global Legal Moralisation and Humanitarianism

International crimes which are the target of international criminal jurisdiction are generally acts of collective violence and so group crimes *par excellence*.³²⁹ They are committed under

Customary International Humanitarian Law, Volume I: Rules (Cambridge: Cambridge University Press, 2005), at 604 (Rule 157).

³²⁶ See DRC Penal Code, Article 3 (1). This provision extends the principle of universal jurisdiction to any offence punishable by more than two months. See also Rwanda Penal Code, Article 16. It provides for universal jurisdiction over crimes such as genocide denial or revisionism, money laundering, cross-border theft of vehicles with the intent of selling them abroad and information and communication technology related offences.

³²⁷ Separate Opinion of Judge Gilbert Guillaume, above note 303, para.9.

³²⁸ See T. Meron, ‘The Humanization of Humanitarian Law’, 94 (2) *American Journal of International Law* (2000) 239-278.

³²⁹ A. Smeulers, ‘Pushing the Enemies of All Mankind’, 21 (4) *Leiden Journal of International Law* (2008) 971-993, at 973.

the mask of a state sovereignty or even a non-state entity. Initially, the problem was to find a justification as to how individuals who may have acted under such masks are held responsible through a direct action of the international community. There are two justifications in this regard.

The first one stems from the moral duty to detach perpetrators of international crimes from their institutional settings. Atrocities committed are so odious that they should make transparent the legal personality of the entity in the name of which perpetrators may have acted. So to speak, it is to individuals, not abstract entities, to which international law must apply. The ICTR Prosecutor underlined this idea in the *Kanyabashi* case in 1997 in order to reaffirm the jurisdiction of the Tribunal and beforehand the authority of the Security Council over individuals. He recalled what was said during the Nuremberg trial in 1946 as follows:

It seems intolerable to every sensitized human being that the men who put their good will at the disposition of the state entity in order to make use of the power and the material resources of this entity to slaughter, as they have done, millions of human beings in the execution of a policy long since determined, should be assured immunity. The principle of state sovereignty which must protect these men is only a mask; this mask removed, the man's responsibility appears.³³⁰

Many idealist lawyers and philosophers called for the establishment of a permanent international criminal jurisdiction to directly enforce such individual responsibility.³³¹ It seems that the initial call was a doctrinal proposal by Gustave Moynier to the *Institut de Droit International* in 1872.³³² But, it was considered too premature to deserve legal consideration.³³³ Step by step, the idea made its own history which is well documented today.³³⁴ With its achievement, a monist perception of international criminal law seems to

³³⁰ *Kanyabashi* (ICTR-96-15-T), Decision on the Defence Motion on Jurisdiction, Trial Chamber, 18 June 1997, para. 34.

³³¹ Fernandez, above note 102, at 65. See also Q. Saldana, 'La justice pénale internationale', 10 *Recueil des Cours de l'Académie de Droit International*(1925) 227-425.; V. Pella, *La guerre-crime et les criminels de guerre -Réflexions sur la justice pénale internationale : ce qu'elle est et ce qu'elle devrait être* (Neuchatel : Braconnière, 1964).

³³² J.-A. Carrillo-Salcedo, 'La Cour pénale internationale : l'humanité trouve une place dans le droit international', CIII *Revue générale de droit international public* (1999) 23-28, at 23.

³³³ *Ibid.*

³³⁴ See M. P. Scharf, 'The Politics of Establishing an International Criminal Court', 6 *Duke Journal of Comparative and International Law* (1995) 167-173; L. Rao Penna, 'The International Criminal Court', 1 *Singapore Journal of International and Comparative Law* (1997) 227-277, at 232-236; P. Kirsch and V.

have taken the lead over the dualist approach (distinctive national and international law). Everything tends towards the progressive realisation of a single “cosmopolitan criminal law”,³³⁵ bypassing the mask of state sovereignty as the consequence of the “ultimate individual responsibility towards “the global community of mankind”.³³⁶ The rationale behind this move is that international crimes, which may be repressed in any competent country, also empower the entire international community with the right and even the moral duty to prosecute them because they are of concern to all its members, even if not directed against each one in particular.³³⁷ This limitation of state sovereignty was also underlined by the ICTY in the *Tadić* case.³³⁸ The direct action of the international community is so essential owing to the fact that the responsibility of perpetrators high ranking within the state institutional settings may not be easy to enforce at the domestic levels. Either their own state would be incapable or unwilling to send them to justice or a foreign state’s jurisdiction would usually

Oosterveld, ‘The Preparatory Commission for the International Criminal Court’, 25 (3) *Fordham International Law Journal* (2001) 563-588; M.C. Bassiouni, *Introduction au droit pénal international* (Bruxelles: Bruylant, 2002), at 183-228; W.A. Schabas, *An Introduction to the International Criminal Court* (3rd edn., Cambridge: CUP, 2008), at 1-10; A. Sottile, ‘Le terrorisme international’, 65 *Recueil des Cours de l’Académie de Droit International* (1938) 87-184, at 157. See also K. J. Heller and G. Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford: Oxford University Press, 2013); United Nations, ‘Historical Survey of the Question of International Criminal Jurisdiction (Memorandum Submitted by General Secretary) (1949) A/CN.4/7/Rev.1, <http://legal.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf> accessed 1 June 2016.

³³⁵ R. Jennings, ‘Cosmopolitan Subjects: Critical Reflections on Dualism, International Criminal Law and Sovereignty: Lessons for the African Union from the Yugoslavia Tribunal’, 7 *African Journal of Legal Studies* (2014)321-350, at 327.

³³⁶ F. Mégret, ‘What Sort of Global Justice is ‘International Criminal Justice’?’, 13 *Journal of International Criminal Justice* (2015) 77-96, at 86.

³³⁷ Smeulers, above note 329, at 974-975.

³³⁸ *Tadić* (IT-94-1), Decision on the Defence Motion on Jurisdiction, Trial Chamber, 10 August 1995, para.42; *Tadić* (IT-94-1-AR72), above note 265, para.59. In this paragraph, the Appeals Chamber approved the decision of the Trial Chamber and recalled: ‘Before leaving this question relating to the violation of the sovereignty of states, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one state. The Trial Chamber agrees that in such circumstances, the sovereign rights of states cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community’.

have to face serious practical problems of judicial and diplomatic nature to secure international cooperation.

The second justification is a move towards an increasingly global humanitarianism. The concept of humanitarianism may be understood here as both an ideology and a world policy. As an ideology, it contains the moral idea of having a certain sensibility to human sufferings, especially when values common to mankind are massively or systematically disregarded. In the past, human conscience was awoken on this basis to condemn, reject and abolish slavery and colonisation. As a policy, humanitarianism implies the duty to prevent the commission of widespread atrocities, to protect their victims or more generally to ensure respect for human rights, where a state fails to do so within its own territory. On 5 October 1987, the former French president, François Mitterrand, declared: “because it is proper to every human, the suffering is universal. No state can claim the ownership of sufferings it provokes or shelters”.³³⁹

Historically, this idea goes back to the nineteenth century, particularly in Europe, where great powers (England, Russia, Germany, France and Italy) were keen to unilaterally intervene abroad in order to “rescue a group of foreign nationals from oppression at the hands of their rulers”.³⁴⁰ Hence, humanitarianism is designed to, and more broadly the “New International Humanitarian Order”,³⁴¹ trump state sovereignty in order to safeguard some human rights standards³⁴². It strengthens the role of the international community to protect mankind against heinous atrocities and crimes, irrespective of the region and the state where they occur or the nationality of the perpetrators.

³³⁹ J. B. Moussavou-Moussavou, ‘Du devoir d’ingérence humanitaire au droit d’ingérence humanitaire’, 13 *Revue africaine de politique internationale* (1993) 9-14, at 11. The original version of the quotation in this paper reads as follows : ‘(...) parce qu’elle est celle de chaque homme, la souffrance relève de l’universel (...). Aucun Etat ne peut être tenu pour propriétaire des souffrances qu’il engendre ou qu’il abrite’. The translation is mine. The declaration was to some extent a political impetus to the joint initiative of the organisation ‘Médecins sans Frontières’ and the University of Paris to promote humanitarian interventions, before the takeover of the issue by the United Nations General Assembly in 1988.

³⁴⁰ S. C. Neff, *War and the Law of Nations: a General History* (Cambridge: Cambridge University Press, 2008), at 219 and 123-125.

³⁴¹ See United Nations, ‘Report of the Secretary General ‘New International Humanitarian Order’ (7 August 2006) UN Doc.A/61/224, at 2-4.

³⁴² M. Mamdani, ‘The New Humanitarian Order’, *The Nations* (28 September 2008), <<http://www.thenation.com/article/new-humanitarian-order?page=0,0>> accessed 30 March 2015).

This move has favoured the development of various legal tools necessary to discharge this responsibility: *jus cogens* and obligations *erga omnes*, humanitarian assistance, humanitarian military interventions, coercive international political sanctions, etc. In the field of judicial humanitarianism, the Security Council established *ad hoc* tribunals, for the former Yugoslavia in 1993 and for Rwanda after the genocide in 1994.³⁴³ While these tribunals were temporally limited jurisdictions, set up to address specific humanitarian situations, the need for a permanent judicial mechanism at the disposal of the international community became urgent. This justifies the establishment of the ICC which targets crimes that nobody would bear that they remain unpunished because no one would survive if they continued to be perpetrated. The Court is expected to have a deterrent effect on any of the would-be international criminals.³⁴⁴

In essence, this kind of humanitarianism praises the theory of “human security” (i.e. that of individuals as opposed to the state)³⁴⁵ and the doctrine of “the responsibility to protect”³⁴⁶ which has its resonance in the “2005 World Summit Outcome”.³⁴⁷ Sovereignty is then understood, since the post-Cold War time, as a concept amounting to state responsibility to discharge its duties, beginning by the exercise of effective control over its territory and the insurance of security to its citizens and foreigners under its jurisdiction.³⁴⁸ In other words, if a

³⁴³For the International Criminal Tribunal for the former Yugoslavia (ICTY), see SC Res. 827 (1993), 25 May 1993, para.2. For the International Criminal Tribunal for Rwanda (ICTR), see SC Res. 955 (1994), 8 November 1994, para.1.

³⁴⁴ A. M. Manirabona, ‘La Cour pénale internationale et la prévention des atrocités en Afrique : le difficile passage de la rhétorique à la réalité’, 69 *Revue du Barreau du Québec* (2010) 277-315, at 281.

³⁴⁵ UN Development Programme, *Human Development Report 1994* (New York and Oxford: Oxford University Press, 1994), at 22-40; UN General Assembly, ‘Report of the Secretary-General on the Work of the Organization’ (30 August 2000) General Assembly Official Records Fifty-fifth session Supplement No. 1 (A/55/1), para.31.

³⁴⁶ See ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, December 2001); United Nations, ‘A More Secure World: Our Shared Responsibility -Report of the Secretary General’s High-Level Panel on Threats, Challenges and Changes’ (2004), paras.199-203 <http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf> accessed 25 April 2016.

³⁴⁷ UNGA Res. 60/1 (2005), 16 September 2005, paras.138-140.

³⁴⁸ See F. M. Deng, ‘Reconciling Sovereignty with Responsibility: A Basis for International Humanitarian Action’, in J.W. Harbeson and D. Rothchild (eds), *Africa in World Politics: Post-Cold War Challenges* (Boulder, Co: Westview Press, 1995) 295- 310; F. M. Deng, S. Kimaro, T. Lyons, D. Rothchild and I. W. Zartman (eds),

sovereign state fails to protect its own people, by incapacity or (political) unwillingness, that responsibility must be exercised by the international community.³⁴⁹ This evolution of humanitarianism is purported to rescue victims of atrocities in countries failing to comply with their primary obligations which derive from the powers of state sovereignty and aims to enforce international law in the name of the whole of humanity. Thus, sovereignty defines not only state legal rights but also chiefly its duties vis-à-vis other states and the international community to assume its national responsibility. In case of failure, the international community may play a substitution role. The manner in which it will have to act to discharge its own (collective) responsibility will depend upon the sources of the powers it wishes to exercise. Any variation in this respect is simply a problem of policy and legal choices.

1.1.2.2. The Sources of the International Criminal Jurisdiction

The identification of the sources of criminal powers of the international community depends on which international body or institution is entitled to act on its behalf. Two main cases can be distinguished.

First, the recourse to the Charter of the United Nations which highlights the competences of the Security Council and the General Assembly to maintain international peace and security, or to oversee the respect for human rights. Each of these political bodies may rely on the UN Charter to *unilaterally* legislate and create an adjudicative penal mechanism to repress international crimes, namely genocide, crimes against humanity and war crimes. The option which is so far well known, commented on and debated is the establishment of *ad hoc* criminal tribunals by the Security Council acting under Chapter VII.³⁵⁰ This is a limitation to state sovereignty in application of article 2 (7) of the UN Charter. It is an option whereby the undefined and flexible expression of “threats to international peace and security”,³⁵¹ which was initially linked to military conflicts,³⁵² is extended to the perpetration of international

Sovereignty as Responsibility: Conflict Management in Africa (Washington, DC: Brookings Institution Press, 1996); A. Etzioni, ‘Sovereignty as Responsibility’, 50 (1) *Orbis* (2006) 71-85.

³⁴⁹ See K. Quashigah, ‘The Future of the International Criminal Court in African Crisis and its Relationship with the R2P Project’, 21 *Finnish Yearbook of International Law* (2010) 89-99, at 90-91.

³⁵⁰ See W. A. Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006), Part 1.

³⁵¹ UN Charter, Article 39.

³⁵² I. Österdahl, *Threat to Peace: the Interpretation by the Security Council of Article 39 of the UN Charter* (Uppsala: Iustus Förlag, 1998), at 85; R. Cryer, ‘The Security Council and Article 39: A Threat to Coherence?’,

crimes. As a consequence of this extension, the struggle against impunity and the search for justice have become a legitimate objective for the Security Council.

On the other hand, the power of the General Assembly is controversial.³⁵³ Some authors consider that this body lacks a coercive authority such as the one enshrined in Chapter VII of the UN Charter in order to establish a criminal jurisdiction.³⁵⁴ Arguably, the matter is also among those for which the General Assembly is forbidden to make recommendations under the UN Charter.³⁵⁵ However, other commentators think that this body even holds more authority than the Security Council for the creation of *ad hoc* criminal tribunals.³⁵⁶ One reason is that it is a plenary body of all member states which thus possesses sufficient international legitimacy to take such measures.³⁵⁷ Another reason results from articles 10 and 11 of the UN Charter vesting the General Assembly with the power to discuss and make recommendations on any question within the United Nations jurisdiction. Under article 13 (1) of the UN Charter, it is also competent in the field of human rights to initiate studies and make recommendations, while there is no explicit provision of such kind in favour of the Security Council.³⁵⁸ Moreover, the practice within the General Assembly has developed in such a manner to circumvent the blockage of the Security Council in the exercise of its power for the maintenance of international peace and security. In such case, the General Assembly may discuss any issue which is not under active consideration before the Security Council. Furthermore, with notable exception to article 12 (1) of the UN Charter,³⁵⁹ the General Assembly may act pursuant to the “Uniting for Peace Resolution” of November 1950, when the Security Council fails to exercise its primary responsibility for the maintenance of

1 (2) *Journal of Conflict & Security Law* (1996) 161-195, at 172-173; M.L. de la Serna Galván, ‘Interpretation of Article 39 of the UN Charter (Threat to the Peace) by the Security Council: is the Security Council a Legislator for the Entire International Community?’, XI *Anuario Mexicano de Derecho Internacional* (2011) 147-185, at 159.

³⁵³ S. A. Ndiaye, ‘Le Conseil de sécurité et les juridictions pénales internationales’ (PhD Thesis, Université d’Orléans 2011), at 174-178.

³⁵⁴ *Ibid.*, at 176.

³⁵⁵ K. Lescure, *Le Tribunal pénal international pour l’ex-Yougoslavie* (Paris : Montchrestien, 1994), at 65.

³⁵⁶ T. Christakis, *L’ONU, le Chapitre VII et la crise yougoslave* (Paris : Montchrestien, 1996), at 191-192.

³⁵⁷ Ndiaye, above note 353, at 174.

³⁵⁸ Christakis, above note 356, at 191-192.

³⁵⁹ Article 12 (1) of the UN Charter stipulates: ‘While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests’.

international peace and security.³⁶⁰ Lastly, even if General Assembly recommendations are not coercive like resolutions of the Security Council acting under Chapter VII, the ICJ has held that they are not merely hortatory.³⁶¹ Some recommendations may indeed be decisions binding on member states, even though not coercive, as stated in the advisory opinion in *Certain Expenses of the United Nations*.³⁶² The opinion is confirmed by the reference to decisions of the General Assembly under article 18 (2) of the UN Charter on important questions which include the maintenance of international peace and security. But, enforcement measures of the General Assembly should be decided with the consent of the state concerned as non-coercive practices in peace keeping operations require.³⁶³ A tribunal established by the General Assembly would thus be its subsidiary organ, pursuant to article 22 of the UN Charter.³⁶⁴

The second source of power of the international community to exercise criminal jurisdiction is based on legal consensus among stakeholders concerned rather than on unilateral measures decided under the UN Charter. This leads to treaty-based criminal courts. The best example in this respect is the ICC Statute concerning four categories of crimes: aggression (crime against peace), genocide, crimes against humanity and war crimes. It is a treaty between states, which somewhat recalls a similar experience after World War II with the Nuremberg Tribunal, except for the fact that the London treaty of 8 August 1945³⁶⁵ was not concluded by the international community as such but by four victorious powers (United States of America, Soviet Union, Great Britain and France) exercising sovereign territorial authority of the

³⁶⁰ See UNGA Res. 377 (V) A, 3 November 1950, para.1.

³⁶¹ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, at 163.

³⁶² *Ibid.*

³⁶³ For example, the General Assembly has resorted to its power under the the “Uniting for Peace Resolution” when it established the United Nations Emergency Force in Middle East (UNEF I) in the context of an armed conflict opposing France, Great Britain to Egypt after the nationalisation of the Suez Canal. However, the decision to intervene was taken with the consent of interested belligerent parties. See R. Pinto, ‘L’affaire de Suez : problèmes juridiques’, II *Annuaire français de droit international* (1956) 1-16. See also UNGA Res.998 (S-I), 4 November 1956, para.2; UNGA Res.1000 (ES-I), 5 November 1956, paras.1-3.

³⁶⁴ Article 22 of the UN Charter provides: ‘The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions’.

³⁶⁵ See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal.

defeated Nazi German state as occupying foreign powers.³⁶⁶ Besides the ICC Statute, a treaty-based jurisdiction has also been experienced in the case of internationalised criminal tribunals.³⁶⁷ The best example in this series is the SCSL. It is a nationalised international tribunal³⁶⁸ since it was established under a bilateral treaty between the United Nations and the government of Sierra Leone³⁶⁹ as a hybrid Court in composition (national and international staff) and jurisdiction (prosecution of international crimes and domestic crimes under Sierra Leonean legislation).³⁷⁰ Compared with the ICC, it is also an autonomous judicial institution from domestic courts systems, whose creation was however recommended by the Security Council.³⁷¹ As such, it differs from internationalised national tribunals,³⁷² especially in Cambodia, East Timor and Kosovo, which constitute a specific participation of the international community in the exercise of criminal jurisdiction over international and domestic crimes by primarily municipal courts. In these cases, the UN involvement has ranged from acting as a transitional/interim administrator (which exercises territorial powers) establishing hybrid special panels of judges within the District Court in Dili in East Timor³⁷³ and local courts in Kosovo,³⁷⁴ to providing judicial assistance (namely the allocation of international judges and prosecutors working with their national counterparts), under a

³⁶⁶ C. K. Lamont, *International Criminal Justice and the Politics of Compliance* (Farnham/Burlington: Ashgate, 2010), at 6.

³⁶⁷ P. Pazartzis, 'Tribunaux pénaux internationaux internationalisés : une nouvelle approche de la justice pénale internationale ?', *XLIX Annuaire français de droit international* (2003) 641-661, at 643 and 646.

³⁶⁸ *Ibid.*, at 643-644.

³⁶⁹ See Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (with Statute).

³⁷⁰ Another example is the Special Tribunal for Lebanon (but only for the prosecutions of some crimes under Lebanon criminal law). It became operational in application of Security Council Resolution 1757 (2007) of 30 May 2007. But, the Tribunal was established on the basis of a bilateral agreement between the United Nations and the Government of Lebanon, attached to the said resolution. See Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon (2006).

³⁷¹ SC Res.1400 (2002), 28 March 2002.

³⁷² Pazartzis, above note 367, at 646.

³⁷³ Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences within the District Court in Dili in East Timor (United Nations Transitional Administration in East Timor, UNTAET/REG/2000/15, 6 June 2000).

³⁷⁴ Pazartzis, above note 367, at 650.

bilateral agreement with the territorial state,³⁷⁵ to the Extraordinary Chambers in the Courts of Cambodia (ECCC)³⁷⁶, created under Cambodian law.³⁷⁷

Unlike the UN unilateral criminal measures, the treaty-based court procedure may have the disadvantage of being slow in realisation, owing to the complexity of international negotiations and diverging constitutional requirements for treaty ratifications among states. It is probably the reason why the international community opted for the establishment of ad hoc tribunals under Chapter VII of the UN Charter in order to ensure “prompt and effective action”³⁷⁸ to deal with urgent humanitarian matters in the former Yugoslavia and Rwanda. However, a treaty remains relevant insofar as it enables to reconcile state sovereignty with the interest and action of the international community. Towards consenting states (those which ratify the founding treaty or the states not parties which provide an *ad hoc* acceptance of the jurisdiction it establishes for a particular situation), it is not a compulsory measure and more less a coercive one. It is only constitutive of a voluntary limitation of state powers. However, the jurisdiction may unwillingly affect third parties in some cases.

With regard to the ICC Statute, three hypotheses can be distinguished. The first one was revealed by the ICTY in the *Furundzija* case later in December 1998, and was reaffirmed in the *Tadić* case in 1999.³⁷⁹ The Tribunal held that “the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallize them”,³⁸⁰ therefore valid in effects towards those who are not parties to it. However, it is clear that those codified international customs remain distinct from the conventional instrument, in a manner that, as the ICJ stated in the

³⁷⁵ Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea.

³⁷⁶ S. Nouwen, ‘Hybrid Courts –The Hybrid Category of a New Type of International Courts’, 2 (2) *Utrecht Law Review* (2006) 190-214, at 210.

³⁷⁷ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004; Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, Article 1.

³⁷⁸ UN Charter, Article 24 (1).

³⁷⁹ *Tadić* (IT-94-1-A), above note 114, para.223.

³⁸⁰ *Furundzija* (IT-95-17/1-T), above note 321, para.227.

North Sea Continental Shelf Cases in 1969³⁸¹ and particularly in the *Nicaragua Judgment* of 27 June 1986, both sources of law retain their separate legal existence.³⁸² It means that a third party to the ICC Statute is indeed bound by the relevant customary rule it codifies but not the conventional instrument itself as such. The ICC Statute is not even all identical to customary law since, in some other various areas, “it creates new law or modifies existing law”,³⁸³ beginning by its institutional part. The second hypothesis is an eventual extension of the ICC jurisdiction on citizens of third states without consent of the latter,³⁸⁴ but on the ground that the crime was committed on the territory of a state party or by its national on the territory of a third party³⁸⁵. The nationality must be assessed according to principles of international law if the presumed offender simultaneously belongs to a state party and a third one.³⁸⁶ It must also be established either at the time of the commission of the crime (even if change of nationality occurs after commission) or at the time of the prosecution or punishment (even if the crime was committed before changing nationality) in conformity with principles of international law allowing a complete control by a state (party) over its nationals.³⁸⁷ The third and last hypothesis is the referral of a situation in a third state to the ICC Prosecutor by the Security Council acting under Chapter VII of the UN Charter.³⁸⁸ Examples are provided here by the referral of the situations in Soudan and Libya to the ICC jurisdiction, respectively in 2005 and 2011.³⁸⁹

³⁸¹ *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, I.C.J. Reports 1969, paras.63 and 65.

³⁸² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, I.C.J. Reports 1984, para.73; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, above note 113, paras.43 and 177.

³⁸³ *Furundzija (IT-95-17/1-T)*, above note 321, para.227.

³⁸⁴ See G. Hafner, ‘The Status of Third States Before the International Criminal Court’, in M. Politi and P. Nesi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Aldershot: Ashgate Publishing, 2001) 239-254.

³⁸⁵ ICC Statute, Articles 12 (2) and 13 (a) and (c).

³⁸⁶ Z. Deen-Racsmany, ‘The Nationality of the Offender and the Jurisdiction of the International Criminal Court’, 95 (3) *American Journal of International Law* (2001) 606-623, at 612.

³⁸⁷ *Ibid*, at 614.

³⁸⁸ ICC Statute, Article 13 (b).

³⁸⁹ SC Res. 1593 (2005), 31 March 2005, para.1; SC Res. 1970 (2011), 26 February 2011, para.4.

Put together, extraterritoriality and international criminal jurisdiction do not theoretically leave any risk of non-prosecution and thus impunity for international crimes. It appears that states are now bound to exercise their domestic criminal jurisdiction unless the crimes concerned are prosecuted and tried by a foreign court or by the international community.

1.2. The Duty on States to Exercise Domestic Criminal Jurisdiction

This is another kind of limitation of state sovereignty. It underlines the primary role of states to investigate and prosecute international crimes. In other words, national courts, rather than the ICC or any other international tribunal,³⁹⁰ remain in the heart of the global system of international criminal justice. Conceptually, the duty to exercise municipal jurisdiction must be distinguished from the obligation for states to establish such jurisdiction³⁹¹ or the duty to entertain a precise head of jurisdiction as it has been mentioned above. Where a type of jurisdiction has not been obligated to a state, its duty to exercise municipal jurisdiction, in its very basic adjudicative aspect, leaves a major margin for establishing and exercising one which it believes fits better as a matter of legal criminal policy. In essence, the exercise of domestic jurisdiction contains two separate but interdependent obligations (1.2.1) which may become a source of misunderstandings, disagreements and crisis due to the weak legal flexibility for territorial states in case of non-compliance (1.2.2).

1.2.1. The Result of Two Separate and Interdependent Obligations

Since jurisdiction is a prescriptive and executive/adjudicative power, the duty to exercise it must contain both aspects as well. Logically, a state would only be capable to exercise its municipal (enforcement) jurisdiction if it is beforehand available under its domestic legal order. Thus, the duty to take or to prescribe national implementation measures to this effect

³⁹⁰ Other commentators think the opposite. The ICC is considered as the centre of the global criminal justice system. As such, its Statute was welcome by the UN General Assembly (UNGA) in January 1999. See UNGA Res. 53/105 (1999), 26 January 1999, paras.1 and 3. See also R. Bar Haim, 'Une vision du droit pénal international: "l'humanisme judiciaire". Régulation du droit pénal international par la codification des garanties internationales d'équité du procès pénal' (2010) *Revue québécoise de droit international (Hors-série)* 341, at 345; M. Du Plessis, 'The International Criminal Court and its Work in Africa: Confronting the Myth', Institute for Security Studies Paper No.173 (November 2008), at 1.

³⁹¹ A state may have the duty to exercise its municipal jurisdiction. This would simply mean that it is also and before all obliged to establish it. However, the opposite is not true. A state may have the obligation to establish its municipal jurisdiction, but not necessarily to exercise it.

(1.2.1.1) is a distinct obligation from the duty to extradite or prosecute (*aut dedere aut judicare* principle) the presumed criminals (1.2.1.2).

1.2.1.1. The Duty to Take National Implementation Measures

Implementation measures designate the means by which a state gives effect to international law under its domestic legal order. In most of the cases, they are legislative or executive measures. They can be prescribed, not only for the implementation of an obligation, but also outside binding commitments if international law only provides for hortatory measures for the application of which a state decides to opt at the municipal level. The manner in which a state may achieve such implementation under its domestic legal order chiefly depends upon national constitutional requirements and procedures.³⁹² Classically, a distinction is made between the theories of monism and dualism.³⁹³ The monist approach suggests that international law and national laws are part of a single legal system.³⁹⁴ Thus, international law automatically becomes part of national law with primacy of the former or the latter, depending on the provisions of the constitutions of each state.³⁹⁵ However, in the view of dualism, both types of law belong to separate legal systems (international and municipal) and so, to implement international norms under domestic legal orders, international law must be subject to a means of *transformation* into national law.³⁹⁶ Therefore, it would have equal status to the one which is attached to the legal instrument of transformation under national legal system.

These theories are today exceeded by the development of international law. For example, the mitigation of dualism is evidenced by the direct action of the international community against individuals. In addition, even individuals may directly hold some rights from international law that they can internationally oppose to their respective states. This is plainly evidenced by the development of human rights law. As for monism, it is evident that operational rules of international law for the exercise of criminal jurisdiction are not self-executing in that they cannot automatically be given effect under domestic legal order. In any case, even when

³⁹² E. Denza, 'The Relationship between International and National Law', in M. D. Evans (ed.), *International Law* (1st edn., Oxford: Oxford University Press, 2003) 415-442, at 420.

³⁹³ *Ibid.*, at 421.

³⁹⁴ *Ibid.* See also A. Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), at 17-22.

³⁹⁵ M. Dixon, *International Law* (7th edn., Oxford: Oxford University Press, 2013), at 98.

³⁹⁶ *Ibid.* See also Denza, above note 392, at 421.

international law has obligated states to exercise their municipal (adjudicative) jurisdiction or restricted this exercise to a precise head of jurisdiction, it is up to each one to allocate such jurisdiction to its national courts, to criminalise the facts if necessary, to fix the penalties, to determine the necessary procedures for investigation, prosecutions and trials, as well as the relevant municipal rules governing the international police or judicial cooperation.³⁹⁷

The specific type of national measures to take would depend on each international treaty. Thus, the obligation to enact legislation conferring jurisdiction to municipal courts, criminalising international crimes or attaching to them appropriate penalties under domestic law is found in numerous multilateral treaties.³⁹⁸ The best example is provided by the Genocide Convention which, after forbidding genocide as such, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide,³⁹⁹ stipulates:

the Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.⁴⁰⁰

A similar obligation exists under the Geneva Conventions in regard to the enactment of domestic legislation providing for penalties for perpetrators of their grave breaches. In essence, this obligation stipulate that “the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches”⁴⁰¹ of these treaties. It also applies to grave breaches stipulated by their Additional Protocol I⁴⁰² and fits for such kind of measures that

³⁹⁷ Shaw, above note 256, at 574.

³⁹⁸ Convention against Torture, Article 4; Convention against Mercenarism, Article 7; International Convention for the Protection of all Persons from Enforced Disappearance, Article 4, 6 and 7 (1); Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Article 3; International Convention against the Taking of Hostages, Article 2; etc.

³⁹⁹ Article III.

⁴⁰⁰ Article V.

⁴⁰¹ G I, Article 49 (1); G II, Article 50 (1); G III, Article 129 (1); G IV, Article 146 (1). See also K. Dörmann and R. Geiß, ‘The Implementation of Grave Breaches into Domestic Legal Orders’, 7 *Journal of International Criminal Justice* (2009) 703-721, at 706-710.

⁴⁰² See GP I, Article 85 (1): ‘the provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this

should be taken by contracting parties under their general obligation to respect and ensure respect for international humanitarian law.⁴⁰³

However, like the Geneva Conventions concerning the suppression of grave breaches, the Genocide Convention does not obligate to legislate on a particular head of (adjudicative) jurisdiction to ensure effective national prosecutions. States parties remain free in their choices in this respect. Conversely, many other conventions impose to take domestic measures establishing such jurisdiction. For example, the Convention against torture,⁴⁰⁴ the United Nations Convention against mercenarism,⁴⁰⁵ the International Convention for the protection of all persons from enforced disappearance,⁴⁰⁶ the Montreal Convention for the

Protocol'. See also GP I, Article 86 (1): 'The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so'.

⁴⁰³ GC I, GCII, GCIII, GCIV and GP I, Article 1 Common. See also C. Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?', 21 (1) *European Journal of International Law* (2010)125-171, at 127.

⁴⁰⁴ Article 5: '1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate. 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article. 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law'.

⁴⁰⁵ Article 9: '1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in the present Convention which are committed :(a) In its territory or on board a ship or aircraft registered in that State; (b) By any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in that territory. 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles 2, 3 and 4 of the present Convention in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article. 3. The present Convention does not exclude any criminal jurisdiction exercised in accordance with national law'.

⁴⁰⁶ Article 9: '1. Each State Party shall take the necessary measures to establish competence to exercise jurisdiction over the offence of enforced disappearance: (a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is one of its nationals; (c) When the disappeared person is one of its nationals and the State Party considers it appropriate. 2. Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its

suppression of unlawful acts against the safety of civil aviation,⁴⁰⁷ the International Convention for the suppression and punishment of the crime of apartheid (30 November 1973),⁴⁰⁸ the International Convention against the taking of hostages (17 December 1979)⁴⁰⁹ and the International Convention for the suppression of acts of nuclear terrorism (14 September 2005)⁴¹⁰ require domestic legislation on universal jurisdiction.

international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized. 3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law’.

⁴⁰⁷ Article 5: ‘1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases: (a) when the offence is committed in the territory of that State; (o) when the offence is committed against or on board an aircraft registered in that State; (c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board; (d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State. 2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 (a), (b) and (c), and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article’.

⁴⁰⁸ Article IV (b): ‘The State Parties to the present Convention undertake to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons’.

⁴⁰⁹ Article 5: ‘1. Each State party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed : a) In its territory or on board a ship or aircraft registered in that State; b) By any of its nationals, or if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory; c) In order to compel that State to do or abstain from doing any act; or d) With respect to a hostage who is a national of that State, if that State considers it appropriate. 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article. 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law’.

⁴¹⁰ Article 9: ‘1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when: (a) The offence is committed in the territory of that State; or (b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or (c) The offence is committed by a national of that State. 2. A State Party may also establish its jurisdiction over any such offence when: (a) The offence is committed against a national of that State; or (b) The offence is committed against a State or government facility

Concerning the specific case of the Rome Statute, there is no express obligation for states parties to enact domestic legislation for the national prosecution of ICC crimes (genocide, crimes against humanity, war crimes and aggression). As Gerhard Kemp has argued, this is “a weaker international criminal law treaty compared to others”.⁴¹¹ It only contains two minor provisions in this regard. First, concerning the offences against the administration of justice, the Rome Statute obliges each state party to extend “its criminal laws penalising offences against the integrity of its own investigative or judicial process to offences against the administration of justice”,⁴¹² referred to in article 70 (1), “committed on its territory, or by one of its nationals”.⁴¹³ Second, article 88 imposes that states parties ensure that “there are procedures available under their national law for all of the forms of cooperation which are specified under part IX of the Statute concerning “international cooperation and judicial assistance”. This provision is bound for ensuring respect for vertical obligation to cooperate between states parties and the ICC. There is no such provision for horizontal obligation to ensure cooperation between states parties themselves, except for the interstate cooperation relating to cases of competing requests,⁴¹⁴ “that is, those cases where the ICC has made a request for cooperation from a state party and, at the same time, another state, whether party

of that State abroad, including an embassy or other diplomatic or consular premises of that State; or (c) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or (d) The offence is committed in an attempt to compel that State to do or abstain from doing any act; or (e) The offence is committed on board an aircraft which is operated by the Government of that State. 3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established under its national law in accordance with paragraph 2 of the present article. Should any change take place, the State Party concerned shall immediately notify the Secretary-General. 4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article. 5. This Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its national law’.

⁴¹¹ G. Kemp, ‘The Implementation of the Rome Statute in Africa’, in G. Werle, L. Fernandez and M. Vormbaum (eds), *Africa and the International Criminal Court –International Criminal Justice Series, Volume 1* (The Hague: Asser Press/Springer, 2014) 61-77, at 62.

⁴¹² Article 70 (4) (a).

⁴¹³ *Ibid.*

⁴¹⁴ D. Tladi, ‘A Horizontal Treaty on Cooperation in International Criminal Matters: the Next Step for the Evolution of a Comprehensive International Criminal Justice System’, 29 *Southern African Public Law* (SAPL) (2014) 368-387, at 377.

to the Statute or not, has made a similar request".⁴¹⁵ In spite of these legal deficiencies, one may argue that the Rome Statute also seems to generally require the enactment of domestic legislation as a practical consequence of giving effect to the principle of complementarity indicating that states parties hold the primary responsibility for the repression of ICC crimes.⁴¹⁶ This is confirmed in article 17 (1) referring to "a state which has jurisdiction"⁴¹⁷ as a pre-condition in the assessment of whether it is unwilling or unable to prosecute in order to admit the ICC's intervention. Obviously, such jurisdiction must be indicated and established by each state concerned under domestic law.⁴¹⁸ Otherwise, the lack of appropriate legislation would amount to inability to exercise state jurisdiction,⁴¹⁹ thereby possibly rendering the case admissible before the ICC.

Thus, all these examples come to one conclusion. There is not a general duty on states to take pre-determined national implementation measures for the prosecution of all international crimes. Each treaty possesses its specificities and obligates only those contracting parties. The possible customary character of the obligation to enact national implementation measures for a particular crime would depend on another question: whether the duty to extradite or prosecute such a crime is also in itself of customary nature.

1.2.1.2. The Duty to Extradite or Prosecute

Translation of the maxim *aut dedere aut judicare*, the duty to extradite or prosecute is a heritage of Grotius' scholarly construction of the principle *aut dedere aut punire* (to extradite

⁴¹⁵ *Ibid.*

⁴¹⁶ See J. B. Terracino, 'National Implementation of the ICC Crimes', 5 *Journal of International Criminal Justice* (2007)421-440, at 421-422.

⁴¹⁷ Article 17 (1) of the ICC Statute reads: '(...) the Court shall determine that a case is inadmissible where: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute (...)'

⁴¹⁸ J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: the Principle of Complementarity* (Leiden/Boston: Martinus Nijhoff Publishers, 2008), at 190-191; G. Werle, *Principles of International Criminal Law* (2 edn., The Hague: Asser Press, 2009), at 119.

⁴¹⁹ Stigen, above note 418, at 313-314 and 316-319.

or punish).⁴²⁰ Its rationale is “to ensure that those who commit crimes under international law are not granted safe haven anywhere in the world”.⁴²¹ They must be brought to justice “by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction”.⁴²² The principle must not be conflated with universal jurisdiction. On the one hand, while the exercise of universal jurisdiction may only be permissive under certain circumstances, the duty to extradite or prosecute makes the exercise of domestic jurisdiction mandatory.⁴²³ On the other hand, the state on the part of which such obligation to prosecute exists will exercise only a title of jurisdiction which is already established for its municipal courts. It may be universal jurisdiction, active or passive personality, etc.⁴²⁴ In addition, the duty generally encompasses an alternative, depending on the state’s choice, whether it decides to prosecute or to extradite the presumed offender, if requested by another state having jurisdiction to try him.⁴²⁵ However, when a choice between multiple requests for extradition must be made, it is advisable that the responsive decision is taken with due regard to the state closer to the crime (notably by the place of commission or by the nationality of the offender). As the ILC has commented on the issue in its Draft Code of Crimes against the Peace and Security of the Mankind (1996), there is no priority between either optional courses of action.⁴²⁶ Any state on which lays an obligation to prosecute will have discharged the obligation if that state had also opted for the extradition of the alleged perpetrator to another state “which indicates that it is willing to prosecute by requesting extradition”.⁴²⁷ Similarly, to

⁴²⁰ M. C. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press, 2011), at 269; H. Grotius, *De Jure Belli Ac Pacis*, BK.2, 1624, Ch.XXI, paras.3, 4, 5 (1) and 3.

⁴²¹ N. Roht-Arriaza, ‘Sources in International Treaties of an Obligation to Investigate, Prosecute and Provide Redress’, in N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York/Oxford: Oxford University Press, 1995) 24-38, at 25.

⁴²² International Law Commission (1996), above note 68, at 31.

⁴²³ Roht-Arriaza, above note 421, at 25.

⁴²⁴ International Law Commission, ‘Final Report on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*)’, II *Yearbook of the International Law Commission* (2014)1-19, para.18.

⁴²⁵ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, Judgment of 20 July 2012, I.C.J. Reports 2012, para.50. A. Da Rocha Ferreira, C. Carvalho, F. Graeff Machry and P. Barreto Vianna Rigo, ‘The Obligation to Extradite or to Prosecute (*aut dedere aut judicare*)’, 1 *UFRGSMUN/UFRGS Model United Nations Journal* (2013) 202-221, at 204.

⁴²⁶ International Law Commission (1996), above note 68, at 31.

⁴²⁷ *Ibid.*

execute its obligation, the state may surrender such presumed offender to an international criminal jurisdiction, like the ICC.

Serving as a basis for a mandatory exercise of domestic jurisdiction, the *aut dedere aut judicare* principle entails two implications on the state national criminal policy. First, the country concerned loses its discretion between prosecutions and non-prosecutions that could be dictated by national political and legal contexts which are specific to it. Non-prosecutions could occur only if from a preliminary inquiry of the alleged crimes, it is concluded that there is no sufficient evidence to submit the case to the competent national tribunal. Second, the state also loses control over the time of prosecutions. Any delay in this respect could be seen as an attempt to bypass the duty to prosecute or a failure to do so. Moreover, statutes of limitation for international crimes are hardly accepted. At least, they are inapplicable to genocide, crimes against humanity and war crimes.⁴²⁸ This is probably a rule of customary international law.⁴²⁹ In other cases, like the repression of enforced disappearances, it is required of those states which resort to statutes of limitations to ensure a long duration for their term, corresponding to the gravity of the crime.⁴³⁰

The duty to extradite or prosecute is imposed on the territorial state, i.e. the state of commission of the crime, the state of residence of the offender or the state where the latter is found (even occasionally). There is no such obligation for other states.⁴³¹ Sure, with respect to the *Genocide* case in 1996, the ICJ has noted that the obligation of each state to prevent and punish the crime of genocide is not territorially limited by the Genocide Convention,⁴³²

⁴²⁸ ICC Statute, Article 29; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (26 November 1968), Article 1; European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (25 January 1974), Article 1; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Article 28A (3); Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences within the District Court in Dili in East Timor, Section 17, para.17 (1); etc.

⁴²⁹ R.A. Kok, 'Statutory Limitations in International Criminal Law' (PhD Thesis, Amsterdam Centre for International Law (ACIL) 2007), at 325-327.

⁴³⁰ International Convention for the Protection of all Persons from Enforced Disappearance (20 December 2006), Article 8 (1).

⁴³¹ See G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd edn., Oxford: Oxford University Press, 2014), at 81-83.

⁴³² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, above note 54, para.31.

namely to the state on the territory of which the crime has been committed. Basically, besides the fact that genocide can also be tried by an international tribunal, the ICJ's statement may be true only for the exercise of prescriptive jurisdiction. But, under international law, the exercise of adjudicative powers over foreigners who reside in another country is only possible, except in the case of informative inquiry or mere request for extradition, when they are present on the territory of the prosecuting state. This is a requirement of state sovereignty, as already explained. It is also in this way that should be understood the ICTR's decision of 18 March 1999 in which the Tribunal encouraged "all states, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law".⁴³³

This duty to extradite or prosecute is formulated in numerous international treaties,⁴³⁴ including the said Genocide Convention,⁴³⁵ the Geneva Conventions and their Additional

⁴³³ *Ntuyahaga* (ICTR-98-40-T), Decision on the Prosecutor's Motion to Withdraw the Indictment, Trial Chamber, 18 March 1999, point 1 (On the Withdrawal of the Indictment), para.13.

⁴³⁴ Convention against Torture, Article 7(1); United Nations Convention against Mercenarism, Article 12; Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Article 7; International Convention against the Taking of Hostages, Article 8; International Convention for the Suppression of Acts of Nuclear Terrorism, Article 11 (1), etc. In all these treaties, except some slight different terms (particularly in the Convention against torture), the standard provision is similar to what the International Convention for the suppression of the financing of terrorism provides for in the following terms: 'the State Party in the territory of which the alleged offender is present shall, (...), if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State' (Article 10 (1)). However, Article 12 of the International Convention against the taking of hostages makes the following exception: 'In so far as the Geneva Conventions of 1949 for the protection of war victims or the Protocols additional to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'.

Protocol I.⁴³⁶ The best formulation is provided for by the International Convention for the protection of all persons from enforced disappearance which stipulates:

the State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.⁴³⁷

In contrast, the Rome Statute is a weaker instrument in this respect. It does not contain any express operative provision stipulating the duty on states parties and among themselves to exercise their national jurisdiction in prosecuting or extraditing alleged offenders of ICC

⁴³⁵ Article VI: ‘Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction’. Article VII: ‘Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force’.

⁴³⁶ GI, Article 49 (2); GII, Article 50 (2); GIII, Article 129 (2); GIV, Article 146 (2); GP I, Articles 86 and 88. For example, the Geneva Conventions commonly state: ‘Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case’. By the way, on this subject, it can be agreed with Luc Reydamas who writes: ‘(...) some read universal jurisdiction into the Geneva Conventions by pointing to the expression ‘regardless of their nationality’. To accept this interpretation is to believe that the drafters of the Genocide Convention had a complete change of mind on the jurisdiction issue when negotiating the Geneva Conventions less than a year later. This is unlikely. The jurisdiction clause of the Geneva Conventions should be read in light of the recommendations of the United Nations War Crimes Commission (UNWCC) during World War II. The Commission acknowledged that there were no fixed rules regarding the surrender of war criminals and that the ordinary rules of extradition were ‘defective’. Besides this general problem, it feared that Axis war criminals might thwart attempts to hold them accountable by fleeing to a neutral country. To avoid a repeat of history—after World War I the German Kaiser found safe haven in the neutral Netherlands which had no obligation to extradite or try him—the Commission prepared a draft convention for the extradition of Axis war criminals from neutral countries’. See L. Reydamas, ‘The Rise and Fall of Universal Jurisdiction’, in W. A. Schabas and N. Bernaz (eds), *Routledge Handbook of International Criminal Law* (London/New York: Routledge Taylor and Francis Group, 2011) 337-354, at 344-345.

⁴³⁷ Article 11 (1).

crimes.⁴³⁸ Only does the preamble of the treaty recall “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”⁴³⁹ in order to put an end to impunity for their perpetrators and thus to contribute to their prevention.⁴⁴⁰ It is worth noting that the preamble of a treaty is not binding on states parties. However, it may be freely domesticated under national law. In such case, the obligation will remain specific to the state concerned as a unilateral duty. For example, in the *Zimbabwe Torture* case, the Supreme Court of Appeal in Pretoria, followed by the Constitutional Court of South Africa, held that there was a national duty to investigate (irrespective of whether or not the alleged perpetrator is present in South Africa) and to prosecute under South African ICC Implementation Act of 2002.⁴⁴¹ As for the Rome Statute, it is possible that a duty to prosecute indirectly exists in application of the principle of complementary ICC jurisdiction giving priority on states parties to counter the impunity of criminal offenders. The duty can be also implied on the basis of article 80 of the Rome Statute which leaves the power to states parties to apply to ICC crimes penalties provided for by their national laws. Overall, it means that the whole system rests on the idea that states parties should themselves prosecute these crimes, the ICC intervening only in case of failure. Such an obligation for states to prosecute is a duty vis-à-vis the international community and not an obligation between contracting parties as may be understood under other international treaties. In this regard, the ICC Pre-Trial Chamber’s decision in the *Kenya Admissibility* case stated:

(the) Chamber is also conscious of the fact that States not only have the right to exercise their criminal jurisdiction over those allegedly responsible for the commission of crimes that fall

⁴³⁸ Tladi, above note 414, at 372.

⁴³⁹ ICC Statute, Preamble, para.6.

⁴⁴⁰ *Ibid.*, para.5.

⁴⁴¹ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (485/2012) [2013] ZASCA 168; 2014 (2) SA 42 (SCA); [2014] 1 All SA 435 (SCA) (27 November 2013) ; *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC) (30 October 2014), paras.5, 80-81 <<http://www.aidsfreeworld.org/Newsroom/Press-Releases/2014/~media/Files/Zimbabwe/SALCjudgement.PDF>> accessed 7 April 2016. See also Tladi, above note 414, at 374.

within the jurisdiction of the Court, they are also under an existing duty to do so as explicitly stated in the Statute's preambular paragraph 6.⁴⁴²

The question as to whether the duty to extradite or prosecute is also established under customary international law remains controversial. For example, Ilia Bantekas and Susan Nash think that the *aut dedere aut judicare* principle is only established by treaties.⁴⁴³ But, Cherif Bassiouni assumes that this principle is already a rule of customary international law regarding crimes against humanity.⁴⁴⁴ Such customary rule has also been recognised notably for war crimes, genocide, torture, apartheid and enforced disappearance.⁴⁴⁵ Scholars based their opinion on two principal arguments. First, there is a universal consensus, the expression of which is found in national laws, multilateral treaties and numerous non-conventional instruments of the United Nations,⁴⁴⁶ that these crimes must be prosecuted because they amount to violations of fundamental interests of the international community.⁴⁴⁷ Second, states that attempted not to comply with this duty have been declared by human rights monitoring mechanisms, beginning by the Inter-American Court of Human Rights since the

⁴⁴² *Situation in the Republic of Kenya* (ICC-01/09-02/11), Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Pre-Trial Chamber II, 30 May 2011, para.40.

⁴⁴³ I. Bantekas and S. Nash, *International Criminal Law* (3rd edn., London/New York: Routledge-Cavendish, 2009), at 91.

⁴⁴⁴ Bassiouni, above note 420, at 271.

⁴⁴⁵ See N. Roht-Arriaza, 'Non Treaty Sources of the Obligation to Investigate and Prosecute', in N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York/Oxford: Oxford University Press, 1995) 39-56; C. Kreß, 'War Crimes Committed in Non-International Armed Conflicts and the Emerging System of International Criminal Justice', 30 *Israel Yearbook on Human Rights* (2000) 103-177, at 163; Henckaerts and Doswald-Beck, above note 325, at 607 (Rule 158).

⁴⁴⁶ See UNGA Res.3074 (XXVIII), 30 November 1973: Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, UNGA Official Reports Supp. No. 30 (1973), at 78; UNGA Res. 40/34, 29 November 1985: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 40 UNGA Official Reports , Supp. No.53 (1985), at 213; UNGA Res. 44/162, 15 December 1989: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, UNGA Official Reports, Supp. No. 49 (1990), at 235; UNGA Res.47/133, 18 December 1992: Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133; ILC Draft Code of Crimes against the Peace and Security of the Mankind (1996), Article 9; etc.

⁴⁴⁷ Roht-Arriaza, above note 445, at 40-45; Werle and Jessberger, above note 431, at 80; Da Rocha Ferreira, Carvalho, Graeff Machry and Barreto Vianna Rigo, above note 425, at 208.

historic case of *Velásquez Rodríguez v. Honduras* in 1988,⁴⁴⁸ in breach of their international obligation to investigate and prosecute serious violations of human rights (of customary nature) in the territory under their jurisdiction.⁴⁴⁹

In short, where such a customary obligation to extradite or prosecute exists, it then becomes clear that the interdependent duty to take national implementation measures which derives therefrom must be customary by nature as well. After all, states are still confronted with persistent problems of non-compliance that may generate, because of a weak legal flexibility, crises in the system of international criminal justice.

1.2.2. The Risks of a Weak Legal Flexibility for the Territorial State

The weak flexibility of the law of criminal jurisdiction generates two main risks for the territorial state. They relate to the increasing traditional trend of the system of international criminal justice towards absolute criminal prosecutions and punishment of individual perpetrators (1.2.2.1) as well as to the potential consequences in case of failure to honor its obligation to prosecute (1.2.2.2).

1.2.2.1. The Trend towards Absolute Individual Criminal Prosecutions

It is important to hold individuals accountable for international crimes committed. International criminal law today focuses much more (if not exclusively) on prosecutions and sentencing goals.⁴⁵⁰ Before international courts, prison is even almost the sole penal sanction that may face a convicted person. In the framework of the ICC, fines and the forfeiture of proceeds, property or assets (directly linked to the crime committed) are envisaged only in

⁴⁴⁸ *Velásquez-Rodríguez v. Honduras*, Merits, Judgment of 29 July 1988, Inter-Am. Ct. H.R.(Series C No.4), paras.166 and 174 <http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf> accessed 9 April 2016. After having established the fact of the kidnapping by state military personnel or the police and the consequent disappearance of the Honduran student (para.147), Manfredo Velásquez, the Court specifically stated: ‘the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation’ (para.174).

⁴⁴⁹ *Ibid.* See also C. Tomuschat, ‘The Duty to Prosecute International Crimes Committed by Individuals’, in H.-J. Cremer, T. Giegerich, D. Richter and A. Zimmermann (eds), *Tradition und Weltoffenheit des Rechts – Festschrift für Helmut Steinberger* (Berlin/Heidelberg: Springer, 2002) 315-349.

⁴⁵⁰ K. D. Rutledge, ‘Stumbling Toward Justice: Crime and Punishment within International Criminal Law’, 34 *Environmental Law Reporter* (2004) 10615- 10631, at 10626-10630.

addition to imprisonment⁴⁵¹, but very probably for the purpose of securing further resources to the Trust fund for victims (TFV) or restitution to those who are entitled to reparations.⁴⁵² This policy may have some benefits (a), whereas it could also lead, if not inserted into a comprehensive approach to justice, to the denial of alternative mechanisms to criminal trials within the society which is primarily affected by the crimes committed (b).

a) The Alleged Benefits of the Sentencing Goal of Criminal Prosecutions

The presumed advantages of the sentencing goal of international criminal law vary in multiple aspects.⁴⁵³ First, criminal sentences constitute the punishment for the deviated behaviour in the society and proceed from the individualisation of guilty.⁴⁵⁴ As a matter of criminology, sentencing is associated with intimidation and deterrence effects on other potential criminals, since the end of impunity may lead the latter to abstain from violence and brutality as long as perpetrators of crimes are brought to justice, convicted and punished.⁴⁵⁵ The ultimate aim is in this respect the prevention and eradication of atrocities and crimes.⁴⁵⁶ But, it seems that the achievement depends upon the capability and the will of powerful states to back up international criminal justice.⁴⁵⁷ Prosecutions would then complement other contributing means, including collective sanctions or military (and even humanitarian) interventions, for the maintenance of peace and security or the promotion of reconciliation within a divided society. At least, this popular explanation⁴⁵⁸ was a shared conviction by the Security Council

⁴⁵¹ ICC Statute, Article 77(2).

⁴⁵² Rutledge, above note 450, at 10630.

⁴⁵³ *Ibid.*, at 10621-10625.

⁴⁵⁴ See A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *European Journal of International Law* (1998) 2-17, at 9-10.

⁴⁵⁵ P. Akhavan, 'Are International Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism', 31 *Human Rights Quarterly* (2009) 624-654, at 629.

⁴⁵⁶ *Ibid.*, at 624-625 and 652-654.

⁴⁵⁷ *Ibid.*, at 628. See also K. Rodman, 'Darfur and the Limits of Legal Deterrence', 30 *Human Rights Quarterly* (2008) 529-560, at 560.

⁴⁵⁸ See P. Akhavan, 'Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', 20 *Human Rights Quarterly* (1998) 737-816; F. Baroni, 'The International Criminal Tribunal for the Former Yugoslavia and Its Mission to Restore Peace', 12 (2) *Peace International Law Review* (2000) 233-252; K.C. Moghalu, 'Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions', in R. Thakur and P. Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (Tokyo: United Nations University Press, 2004) 197-223.

when it decided to establish the ICTY⁴⁵⁹ and the ICTR.⁴⁶⁰ Second, criminal prosecutions are said to be conducted in favour of the victims.⁴⁶¹ The latter have the right to justice and reparations through appropriate prosecutions. Otherwise, impunity would be “a betrayal of our human solidarity with the victims”.⁴⁶² Indeed, two principal objectives come into consideration to this effect. On the one hand, forgetting committed crimes should be avoided at best because peace and reconciliation must be based on the right of victims to know the truth and to get reparations.⁴⁶³ On the other hand, the feeling of impunity should be prevented given the fact that the failure to prosecute could push victims of crimes into self-justice and vengeance by turning themselves into new criminals. Such potential cycle of atrocities could destroy the whole society and perhaps the civilisation at the global level.

These stances are repeatedly highlighted by key proponents of international criminal justice. One important remark is that of the prosecutor Robert Jackson at the time of the first hearing of the Nuremberg trials in 1945. According to him, “[t]he crimes that we seek to condemn and punish have been so premeditated, perverse and devastating that civilisation cannot tolerate [that] they could be ignored because we would not survive if they were repeated”.⁴⁶⁴ On his

⁴⁵⁹ SC Res. 827 (1993), above note 343, Preamble. In paragraph 6, it is stated the conviction of ‘that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace’.

⁴⁶⁰ SC Res. 955 (1994), above note 343, Preamble. In paragraph 7, the Security Council stresses its conviction ‘that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace’.

⁴⁶¹ M.C. Bassiouni, ‘Searching for Peace and Achieving Justice: the Need for Accountability’, 59 (4) *Law and Contemporary Problems* (1997) 9-28, at 27; N.J. Kritz, ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’, 59 *Law and Contemporary Problems* (1996) 127-152, at 128-129.

⁴⁶² *Ibid.*

⁴⁶³ L. Joinet, ‘The Administration of Justice and the Human Rights of Detainees “Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)”, E/CN.4/Sub.2/1997/20/Rev.1 (2 October 1997), para.16 <https://www1.umn.edu/humanrts/demo/RightsOfDetainees_Joinet.pdf> accessed 20 April 2016. This report was prepared by Louis Joinet pursuant to resolution 1996/119 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, of the United Nations Human Rights Commission.

⁴⁶⁴ J.-P. Bazelaire and T. Cretin, *La justice pénale internationale* (Paris : Presses universitaires de France, 2000), at 42. The original quotation from this book reads as follows : ‘Les crimes que nous cherchons à condamner et à

side, the ICC Prosecutor, Fatou Bensouda, believed that the Trial Chamber's judgment of 21 March 2016, whereby Jean-Pierre Bemba was convicted, as a military commander, for murder and rape as crimes against humanity and for murder and pillage as war crimes, committed by soldiers under his effective authority and control in the Central African Republic (CAR), between October 2002 and March 2003,⁴⁶⁵ was a strong message to all war lords around the world. She underscored her opinion as follows:

(...) this Decision is to be celebrated. What this Decision affirms is that commanders are responsible for the acts of the forces under their control. It is a key feature of this decision that those in command or authority and control positions have legal obligations over troops even when they are sent to a foreign country. They cannot take advantage of their power and status to grant to themselves, or their troops, unchecked powers over the life and fate of civilians. They have a legal obligation to exercise responsible command and control over their troops – to provide sufficient training to ensure that their troops do not commit atrocities (...). This case is also noteworthy in that it has highlighted the critical need to eradicate sexual and gender-based crimes as weapons of war in conflict by holding accountable those who fail to exercise their duties and responsibilities that their status as commanders and leaders entail (...). We must continue to strive for the prosecution and accountability of those responsible for such crimes until they are a thing of the past.⁴⁶⁶

In addition, there is arguably empirical evidence that non-prosecutions may lead to the commission of new crimes.⁴⁶⁷ In Sierra Leone, for example, the civil war between the government forces and the rebels of the Revolutionary United Front (RUF), led by Foday Sankoh, had started in March 1991 and officially ended on 18 January 2002. It was characterised by massive killings of innocent civilians and other widespread violations of human rights and international humanitarian law. At the beginning of the peace process, the UN and the OAU sponsored an approach to political compromise granting amnesty for crimes

punir ont été à ce point prémédités, pervers et dévastateurs que la civilisation ne peut tolérer qu'ils soient ignorés car on ne pourrait survivre s'ils étaient réitérés'. The translation is mine.

⁴⁶⁵ *Bemba* (ICC-01/05-01/08), Judgment pursuant to Article 74 of the Statute, Trial Chamber III, 31 March 2016, para.752.

⁴⁶⁶ See International Criminal Court, 'Statement of the Prosecutor of the International Criminal Court Regarding the Conviction of Mr Jean-Pierre Bemba' (21 March 2016) <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-bemba-21-03-2016.aspx> accessed 13 April 2016.

⁴⁶⁷ Akhavan, above note 455, at 628-629.

committed (notably by rebels)⁴⁶⁸ and promoting the establishment of the Truth and Reconciliation Commission,⁴⁶⁹ instead of bringing the presumed offenders to justice. But, unexpectedly, rather than contributing to achieving peace and security, this policy of non-prosecutions had an incentive effect on the resumption of violence and atrocities after the conclusion of the Lomé Peace Agreement of 7 July 1999.⁴⁷⁰ As a result, the United Kingdom, the former colonial power, militarily intervened in the conflict and the rebel leader was arrested on 17 May 2000. More significantly, the UN Secretary General submitted to the Security Council his report on the establishment of the SCSL on 4 October 2000, in which amnesty granted under the aforementioned Lomé Peace Agreement was rejected as a bar to prosecutions of international crimes,⁴⁷¹ while the tribunal was finally created on 6 January 2002.⁴⁷²

⁴⁶⁸ See Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (7 July 1999) <http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/sierra_leone_07071999.pdf> accessed 20 February 2016. It is known as the Lomé Peace Agreement for Sierra Leone whose Article IX stipulated: '1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate steps to grant Corporal Foday Sankoh absolute and free pardon. 2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement. 3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organizations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality'.

⁴⁶⁹ E. Decaux, 'Les organisations internationales et les conflits armés : l'application de la protection internationale des droits de l'homme', in M. Benchikh (ed), *Les organisations internationales et les conflits armés* (Paris : L'Harmattan, 2002)131-157, at 156.

⁴⁷⁰ *Ibid.*

⁴⁷¹ UN Security Council, 'Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone' (4 October 2000) S/2000/915, paras.23-24.

⁴⁷² P. Turlan, 'Le Tribunal spécial pour la Sierra Leone : de la genèse aux premiers actes d'accusation', 11 *African Yearbook of International Law (AYBIL)* (2003) 313-339, at 313-315.

However, several authors suggest that the expected effects of criminal prosecutions and their sentencing goal partly remain a matter of rhetoric.⁴⁷³ In fact, prosecutions occur after atrocities. As such, *ex post* prosecutions cannot in principle impact on peace and security at the first sight. This is particularly obvious for *ad hoc* tribunals, especially the ICTR which was established after the completion of the Rwandan genocide.⁴⁷⁴ Moreover, perpetration of crimes on a large scale may continue, despite the commencement of prosecutions, and extends more and more the number of victims. Such continuation of crimes could result from the relative impunity that may be enjoyed by inferior perpetrators of crimes since prosecutions would necessarily focus much more on those who bear the great criminal responsibility (notably at the command level).⁴⁷⁵ It could also be caused by the radicalisation of indictees or their supporters as a consequence of their judicial stigmatisation or the irrationality of blind violence (crimes being often the expression of heinous feelings and hatred in a society).⁴⁷⁶ Worse, the status of victims is still weak.⁴⁷⁷ Before *ad hoc* tribunals (ICTR and ICTY), the victims could only appear as witnesses but do not benefit from any locus standing to request reparations *proprio motu*.⁴⁷⁸ The advent of the ICC has relatively improved this status.⁴⁷⁹ Although victims have not yet acquired any direct power to refer, in that status, crimes to the Court, they can become parties to the criminal trial in which they are entitled to formulate their claim for adequate reparations of injuries suffered.⁴⁸⁰ But, it is a fact that only a handful

⁴⁷³ Manirabona, above note 344, at 282-283 ; C. W. Mullins and D. L. Rothe, 'The Ability of the International Criminal Court to Deter Violations of International Criminal Law : a Theoretical Assessment', *International Criminal Law Review* (2010) 771-786, at 785 ;

⁴⁷⁴ M. H. Arsanjani and W. M. Reisman, 'The International Criminal Court and the Congo: From Theory to Reality', in L. N. Sadat and M. P. Sharf (eds), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Leiden: Martinus Nijhoff Publishers, 2008) 325-345, at 326.

⁴⁷⁵ Manirabona, above note 344, at 310.

⁴⁷⁶ *Ibid.*, at 295.

⁴⁷⁷ See A.-T Lemasson, 'La victime devant la justice internationale pénale' (PhD Thesis, Université de Limoges 2010), part II.

⁴⁷⁸ A.-M. de Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and the Trust Fund for Victims and their Families', 20 *Leiden Journal of International Law* (2007) 207-237, at 214.

⁴⁷⁹ *Ibid.*, at 218. See also M. Henzelin, V. Heiskanen and G. Mettraux, 'Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes', 17 *Criminal Law Forum* (2006) 317-344, at 317-318.

⁴⁸⁰ See notably Article 68 on the participation of victims in the trial process, Article 75 on the possibilities of reparative justice and Article 79 concerning the Trust Fund for Victims.

of victims would expect something from ICC's prosecutions, namely those directly concerned by a case, while the vast majority which is affected by the situation in which the crimes have been committed would remain out of the proceedings (natural persons, communities, other states, etc.). In short, it is not self-evident that criminal prosecutions would necessarily lead to the precise expected positive results of the sentencing goal. On the contrary, they may prevent or undermine the exploration of local alternative mechanisms to criminal trials.

b) The Potential Denial of Local Alternative Mechanisms to Criminal Prosecutions

The unavoidable character of criminal prosecutions, trials and punishment of alleged perpetrators of international crimes seems to be the heritage of the Nuremberg trials. Its logic (i) does not seem at first sight to accommodate any state's option for non-prosecution solutions (ii).

i) The Logic of Nuremberg

The "logic of Nuremberg"⁴⁸¹ suggests that "criminal justice is the only politically viable and morally acceptable response to mass violence",⁴⁸² whose primary aim is to punish the offenders and to safeguard the memory of victims. It has triggered "the paradigm of victim's justice"⁴⁸³ and has become "the cornerstone of the new human rights movement",⁴⁸⁴ especially after the end of the Cold War. As a consequence, criminal justice as a disputed matter generates a highly divisive and polarising trend.⁴⁸⁵ In fact, the basic cliché is the one between victims, survivors and offenders. In other circumstances, this cliché may turn into divisions between groups of people within a state when violence is based on religious, racial or ethnic differentiations. That was learnt between Bosnian Serbs and Bosnian Muslims in the Balkans.⁴⁸⁶ It is also perceptible between the majority Hutu and the minority Tutsi in Rwanda. Normally, during the course of the dispensation of such a victim-centred justice, it is possible that one group protests, when members of the other group celebrate prosecutions and enjoy

⁴⁸¹ M. Mamdani, 'The Logic of Nuremberg', 1 & 2 *CODESRIA Bulletin* (2014) 25-28.

⁴⁸² *Ibid.*, at 26.

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*

⁴⁸⁵ J. N. Clark, 'Peace, Justice and the International Criminal Court', 9 *Journal of International Criminal Justice* (2011) 521-545, at 523.

⁴⁸⁶ J. N. Clark, 'The State Court of Bosnia and Herzegovina: a Path to Reconciliation?', 13 *Contemporary Justice Review* (2010) 371-390, at 375.

the infliction of criminal sentences to the convicted persons belonging to the opposite community.⁴⁸⁷ The problem would be more perilous when justice institutions fail to conduct criminal prosecutions against alleged offenders from all belligerent parties to the conflict. This kind of justice, with its divisive and polarising posture, could increase rivalries, social and political tensions within a state rather than promoting peace and national reconciliation. It cannot be considered as the only option available for dealing with international crimes, including mass violence,⁴⁸⁸ in such a context that “no one is wholly innocent and no one wholly guilty”,⁴⁸⁹ given that each side may possess “a narrative of victimhood”.⁴⁹⁰

Theoretically, besides criminal prosecutions (national or international), four other options for dealing with international crimes, including mass atrocities, are generally invoked, namely the refusal to prosecute through amnesty or pardon, the recourse to truth and reconciliation commissions, the granting of reparations and other forms of redress to victims, and the imposition of non-criminal sanctions to offenders, such as the exclusion from the civil service, the police or the army.⁴⁹¹ It may be added to the list the traditional conflict resolution mechanisms based on traditions, customs and practices of justice within local communities of people in Africa. One of these mechanisms is generally known in the form of traditional tribunals. According to the African Commission on Human and Peoples’ Rights, a traditional court means “a body which, in a particular locality, is recognised as having the power to resolve disputes in accordance with local customs, cultural or ethnic values, religious norms or tradition”.⁴⁹² Such tribunals are not modern national court systems⁴⁹³ of the states imported

⁴⁸⁷ Clark, above note 485, at 523.

⁴⁸⁸ See M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), at 135.

⁴⁸⁹ Mamdani, above note 481, at 28.

⁴⁹⁰ *Ibid.*

⁴⁹¹ L. Huyse, ‘Amnistie, commission de la vérité ou justice?’, in A. Destexhe and M. Foret (eds), *Justice internationale: de Nuremberg à la Haye et Arusha* (Brussels: Bruylant, 1997) 81-84, at 81; J. E. Alvarez, ‘Alternatives to International Criminal Justice’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford/New York: Oxford University Press, 2009) 25-38, at 26-34; Werle and Jessberger, above note 431, at 84-87.

⁴⁹² African Commission on Human Rights, ‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003)’, in C. Heyns and M. Killander (eds), *Compendium of Key Human Rights Documents of the African Union* (5th edn., Pretoria University Law Press, 2013) 378-401, at 400.

⁴⁹³ P. Manirakiza, ‘Customary African Approaches to the Development of International Criminal Law’, in J. I. Levitt (ed.), *Africa: Mapping New Boundaries in International Law* (Oxford and Portland, Oregon: Hart

in Africa by way of colonisation. They are mechanisms designed for social conciliation and reconciliation. They do not normally apply written criminal law and classic sentences amounting to prison. Rather, they privilege participatory dialogue between offenders and victims, the amendment of the accused persons, the pardon by the victims, the reintegration of the convicted offenders into society, civil compensation to properties lost or damaged, as well as customary fines (e.g. payment of a cow, goat or local beer, etc., to the victims or the community) and any other communitarian retribution or sanction in the form of social services,⁴⁹⁴ etc. A well known and commented example⁴⁹⁵ of the involvement of traditional mechanisms in dealing with international crimes is the experience of the *Gacaca* tribunals in Rwanda,⁴⁹⁶ even though adapted to the circumstances of the 1994 genocide and thus allowed to apply criminal sentences.⁴⁹⁷ This diversification of available options shows that justice,

Publishing, 2008) 35-63, at 62; C. Ntampaka, *Introduction aux systèmes juridiques africains* (Namur: Presses universitaires de Namur, 2005).

⁴⁹⁴ See I. Eberechi, 'Who will save these endangered species? Evaluating the Implications of the Principle of Complementarity on the Traditional African Conflict Resolution Mechanisms', 20 (1) *African Journal of International and Comparative Law* (2012) 22-41, at 29-30.

⁴⁹⁵ See W. A. Schabas, 'Genocide Trials and Gacaca Courts', 3 *Journal of International Criminal Justice* (2005) 1-17; M. Rettig, 'Gacaca: Truth, Justice, and Reconciliation in Post Conflict Rwanda?', 51 (3) *African Studies Review* (2008) 25-50; P. Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers* (Cambridge: Cambridge University Press, 2010); P.C. Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation* (Oxford : Oxford University Press, 2012).

⁴⁹⁶ In the report of the OAU International Panel of Eminent Personalities on the Rwandan genocide, the *Gacaca* tribunals are described as follows: "To expedite their own procedures, to reduce its vast caseload, and to increase popular involvement in the justice system, the (Rwanda) government has developed a new law that introduces local tribunals inspired by a traditional mechanism for local dispute resolution called the *gacaca*. As one authority tells us, "Defining *gacaca* is a hard thing to do.... A *gacaca* is not a permanent judicial or administrative institution, it is a meeting which is convened whenever the need arises and in which members of one family or of different families or all inhabitants of one hill participate.... supposedly wise old men... will seek to restore social order by leading the group discussions which, in the end, should result in an arrangement that is acceptable to all participants in the *gacaca*. The *gacaca* intends to 'sanction the violation of rules that are shared by the community, with the sole objective of reconciliation'..." The objective is, therefore, not to determine guilt or to apply state law in a coherent and consistent manner (as one expects from state courts of law) but to restore harmony and social order in a given society, and to re-include the person who was the source of the disorder'. See OAU, 'Rwanda: the Preventable Genocide. Report of the International Panel of Eminent Personalities' (May 2000), Chapter 18, para.43 <<http://www.refworld.org/pdfid/4d1da8752.pdf>> accessed 27 May 2015.

⁴⁹⁷ See Organic Law n°40/2000 of 26/01/2000 Setting up Gacaca Jurisdictions and Organising Prosecutions of Offences Constituting the Crime of Genocide and Other Crimes against Humanity, Committed between October

which is a more complex notion, is not (and should not be) limited to prosecutions, trials and criminal sentences. It usually encompasses different things to different people and states.⁴⁹⁸ Normally, each option should remain available within a state because, although human rights may be universal, human wrongs to deal with are specific to each country, to each society and to victims.⁴⁹⁹ Non-prosecution should not necessarily be rejected.

ii) The Difficult Acceptance of Local Non-Prosecution Options

The current international criminal law potentially denies the validity of such alternative mechanisms to criminal trials. Non-prosecution options tend to be assimilated to enjoying impunity. As a result, they are either rejected or hardly accepted internationally. For example, to deal with Nazi crimes, besides the Nuremberg Tribunal which focused on the major perpetrators at the command level, the victorious occupying powers enacted the so-called Allied Control Council Law 10 whose article II (5) in relation to amnesty prescribed:

In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to benefits of any statute of limitation in respect of the period from 30 July 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.⁵⁰⁰

Human rights bodies, doing international criminal law by other means through their pronouncements on the human rights aspect of the legality of state investigations or prosecutions of international crimes,⁵⁰¹ also view blanket amnesties as a converse to the obligation to prosecute. On 10 March 1992, the Human Rights Committee espoused the same

1st, 1990 and December 31, 1994; Organic Law No 16/2004 19/06/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes against Humanity, Committed between October 1st, 1990 and December 31, 1994; etc. See also H. N. Brehm1, C. Uggen and J.-D. Gasanabo, 'Genocide, Justice, and Rwanda's Gacaca Courts', 30(3) *Journal of Contemporary Criminal Justice* (2014) 333-352, at 336-337.

⁴⁹⁸ H. Van de Merwe, 'Delivering Justice during Transition: Research Challenges', in H. Van de Merwe, V. Baxter and A.R. Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington DC: United States Institutes of Peace Press, 2009) 115-142, at 138.

⁴⁹⁹ Mamdani, above note 481, at 28.

⁵⁰⁰ See Nuerenberg Military Tribunals, 'Trial of War Criminals before the Nuerenberg Military Tribunals under Control Council Law No.10 –Volume I: 'The Medical Case' (Nuerenberg: October 1946-April 1949), at XVIII.

⁵⁰¹ See A. Huneeus, 'International Criminal Law by other Means: the Quasi-Criminal Jurisdiction of the Human Rights Courts', 107 *American Journal of International Law* (2013)1-44.

opinion in its general comment on the prohibition of torture.⁵⁰² In his report of 2 October 1997 to the 49th session of the Sub-commission on Prevention of Discrimination and Protection of Minorities (UN Human Rights Commission), concerning the question of impunity of perpetrators of human rights violations, Louis Joinet also recommended the rejection of amnesties given the need to combat impunity and to safeguard the rights of victims to judicial remedy and reparations.⁵⁰³ The Inter-American Commission on Human Rights espouses the same position, especially in *Carmelo Soria Espinoza v. Chile*⁵⁰⁴ and *Ignacio Ellacuria and others v. El Salvador*⁵⁰⁵ cases, since amnesty laws are said to be in contradiction with the duty of the state to investigate human rights violations, prosecute those responsible and avoid impunity.

More recently, the SCSL has rejected the amnesty provided for under the Lomé Peace Agreement for Sierra Leone of 7 July 1999 on the ground that it could not cover international crimes subject to universal jurisdiction under international law⁵⁰⁶ and that it had legal force only in respect of the Sierra Leone legal system, not before the Court.⁵⁰⁷ However, the Sierra Leone Truth and Reconciliation Commission, exercising a non-prosecution mandate, found

⁵⁰² UN Human Rights Committee (HRC), 'CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992), para.15 <<http://www.refworld.org/docid/453883fb0.html>> accessed 23 April 2016.

⁵⁰³ Joinet, above note 463, paras.30 and 32.

⁵⁰⁴ *Carmelo Soria Espinoza v. Chile*, Report No.133/99 of 19 November 1999, IACHR (Case 11.725), para.67 <<http://www.cidh.oas.org/annualrep/99eng/merits/Chile11.725.htm>> accessed 31 March 2016. In this paragraph, the Commission noted: 'States... have the obligation to prevent human rights violations, investigate them, identify and punish their intellectual authors and accessories after the fact, and may not invoke existing provision of domestic law, such as the Amnesty Law (...) to avoid complying with their obligations under international law. In the Court's judgment, the Amnesty Law... precludes the obligation to investigate and prevents access to justice (...).Consequently, it is the duty of the State to investigate human rights violations, prosecute those responsible and avoid impunity'.

⁵⁰⁵ *Ignacio Ellacuria and others v. El Salvador*, Report No.136/99 of 22 December 1999, IACHR (Case 10.488), para.220 <<http://www.cidh.oas.org/annualrep/99eng/Merits/ElSalvador10.488.htm>> accessed 31 March 2016. In this paragraph, the Commission concluded that amnesty law was a violation of the duty of the State to investigate, prosecute and punish perpetrators of human rights violations (here summary executions of civilians by state military forces in the course of a civil war), pursuant to the American Convention on Human Rights of 22 November 1969.

⁵⁰⁶ *Kallon and Kamara* (SCSL-2004-15-AR72 (E) and SCSL-2004-16-AR72 (E)), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004, paras.71 and 82.

⁵⁰⁷ *Ibid.*, para.71.

the rejection of that amnesty “to be too extreme and untenable a proposition”.⁵⁰⁸ It stated that amnesties should not be excluded entirely from the mechanisms available to those attempting to negotiate a cessation of hostilities after periods of brutal armed conflict, because “disallowing amnesty in all cases would be to deny the reality of violent conflict and the urgent need to bring such strife and suffering to an end”.⁵⁰⁹ On his side, William A. Schabas wrote:

The problem with the conclusions of the Special Court on the issue of amnesty is that they are too absolute. They most certainly go beyond existing law, as is evident from even a cursory reading of the judgment. Their effect, for example, is to condemn not only the peacemakers at Lomé but also a process in South Africa that was supervised by such noble souls as Nelson Mandela and Desmond Tutu. The Special Court is, of course, quite correct to note that a grant of amnesty under one jurisdictional regime cannot deprive another of the authority to prosecute where universal jurisdiction exists (...). But in declaring that Sierra Leone actually violated customary international law by granting the amnesty, the Special Court attempted to establish a principle that applies to all armed conflicts to the effect that peace cannot be bargained for amnesty. Ever. The corollary of such a claim can only be the assertion that war should continue, even where combatants are prepared to lay down their arms in return for an assurance that they will not be prosecuted.⁵¹⁰

The uncertainty of the amnesty issue is further confirmed by two treaties. First, under Additional Protocol II to the Geneva Conventions of 1949, there is an exhortation towards state authorities in power to grant “the broadest amnesty” to combatants in a civil war or those deprived of their liberty for reasons related to it.⁵¹¹ The practice does not so far well indicate whether such amnesty should be limited to offenses other than international crimes.⁵¹² For example, in South Africa, in the post-apartheid time, the Constitutional Court admitted, in its judgment of 25 July 1996, the validity of amnesty measures (after truth telling and upon

⁵⁰⁸ W.A. Schabas, ‘Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone’, 11(145) *University California Davis* (2004) 145-169, at 169.

⁵⁰⁹ Sierra Leone, ‘3A Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission’ (5 October 2004), Chapter six, para.11 <<http://www.sierra-leone.org/Other-Conflict/TRCVolume3B.pdf>> accessed 25 March 2016.

⁵¹⁰ Schabas, above note 508, at 168-169.

⁵¹¹ GP II, Article 6 (5).

⁵¹² See A. O’Shea, *Amnesty for Crime in International Law and Practice* (The Hague/London/New York: Kluwer Law International, 2002); L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford and Portland, Oregon: Hart Publishing, 2008).

application to the Committee on amnesty) provided for in the 1995 Promotion of National Unity and Reconciliation Act.⁵¹³ It made it known that prosecutions of offenders are not an (imperative) obligation (even though undoubtedly deserved) when what is sought is to encourage the disclosure of the whole truth and to reconcile people (victims, offenders and others) in one country which is confronted with its dolorous national story of violence and conflict of the past.⁵¹⁴ However, contrary to the example of the Lomé Peace Agreement for Sierra Leone of July 1999, the non-applicability of amnesties to genocide, crimes against humanity and war crimes was ascertained in the DRC⁵¹⁵ and implied by the Arusha Peace Agreement in Burundi.⁵¹⁶ Second, in such circumstances of uncertainty, the drafters of the Rome Statute left the matter unsolved regarding the ICC jurisdiction. It seems that the relevance of amnesties as a bar to the ICC's prosecutions would be decided on a case-by-case basis.⁵¹⁷ In particular, it would be up to the Prosecutor to use his discretionary power and assess, where such amnesties have been granted for individual cases, whether those prosecutions could serve the interests of justice or not.

Similarly, when any other non-prosecutions mechanism has been chosen in a particular circumstance, as an alternative to criminal trials, the ICC Prosecutor can determine if there is still a reasonable basis to proceed. The effectiveness of reparations provided to victims either through truth and reconciliation commissions or traditional conflict resolution mechanisms

⁵¹³ *The Azanian Peoples Organization (AZAPO) and Others v. The President of the Republic of South Africa* (CCT 17/96) [1996] (25 July 1996), paras.21 and 32 <<http://www.asser.nl/upload/documents/20120329T111715-AZAPO%20-%20Judgment%20-%2025-07-1996%20-%20South%20Africa.pdf>> accessed 28 April 2016.

⁵¹⁴ *Ibid.*, paras.17, 30-31. See also D. Kritsiotis, 'Humanitarian Warfare: Towards an African Appreciation', in J. I. Levitt (ed.), *Africa: Mapping New Boundaries in International Law* (Oxford and Portland, Oregon: Hart Publishing, 2008) 149-180, at 176-178; F. Z. Ntoubandi, *Amnesty for Crimes against Humanity under International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2007), at 168-172.

⁵¹⁵ B. Kahombo, 'Comment -The Congolese Legal System and the Fight against Impunity for the Most Serious International Crimes', in H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge: Cambridge University Press, 2015) 247-260, at 255.

⁵¹⁶ Arusha Peace and Reconciliation Agreement for Burundi (28 August 2000), Protocol I, Articles 6 and 8. See also B.D. Nibogora, 'La place du droit pénal dans le processus de justice transitionnelle au Burundi', 7 *Librairie africaine d'études juridiques* (2011) 66-89.

⁵¹⁷ L.S. Sunga, 'Ten Principles for Reconciling Truth Commissions and Criminal Prosecutions', in J. Doria, H.-P. Gasser and M.C. Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Leiden/Boston: Martinus Nijhoff Publishers, 2009)1071-1104, at 1101.

could be among indicators that criminal prosecutions have to be relinquished. Anyway, owing to the textual silence on the issue, it is important to fill the gap and to develop the rules applicable to the relationship between the ICC and these potential complementary justice mechanisms whose use (often relevant in transitional post-conflict periods) should not be assimilated to the failure to prosecute international crimes or to impunity.

1.2.2.2. The Consequences of the Failure to Prosecute

The territorial state runs some risks in case of non-compliance with its duty to prosecute. It may be subject either to an external judicial intervention (a) or to the application of international sanctions (b).

a) *The External Judicial Intervention*

When the territorial state fails to comply with its duty to prosecute, prosecutions may be ensured through the judicial intervention of a foreign state or the international community. Historically, the most remote type of intervention was devoted for humanitarian assistance by humanitarian organisations like the Red Cross. In the *Nicaragua Judgment* of 27 June 1986, the International Court of Justice (ICJ) acknowledged that such assistance could also be provided by a foreign state, on a non-discriminatory basis to the victims in need of help,⁵¹⁸ and without the use of force.⁵¹⁹ The consent of the territorial state is not required. Such a charitable interventions are distinct from humanitarian military interventions mandated by the Security Council acting under chapter VII of the Charter.⁵²⁰ The establishment of the system of international criminal justice then enables to include judicial interventions in the margin of international action.⁵²¹

Yet, under certain circumstances, as the ICJ declared in the *Corfu Chanel Case*, intervention can be regarded “as the manifestation of a policy of force”.⁵²² Extraterritorial or international

⁵¹⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, above note 113, para.243.

⁵¹⁹ *Ibid.*, para.268.

⁵²⁰ B. Schweizer, ‘Moral Dilemmas for Humanitarianism in the Era of “Humanitarian” Military Interventions’, 86 *International Review of the Red Cross* (2004)547-564, at 554-555.

⁵²¹ M. Bettati, *Le droit d’ingérence: mutation de l’ordre international* (Paris, Editions Odile Jacob, 1996), at 49-52, 141-144 and 265.

⁵²² *Corfu Channel case (United Kingdom v. Republic of Albania)*, Judgment of 9 April 1949, I.C.J. Reports 1949, at 35.

criminal jurisdiction being also a matter of powers, its exercise beforehand corresponds to the implementation of such a policy, before being a matter of justice dispensation. Both types of jurisdiction may serve the purpose of judicial dissuasion (*dissuasion judiciaire*),⁵²³ not only against potential individual offenders but also towards those states which may breach their international obligations.

As a result, there are two consequences. On the one hand, the exercise of power goes alongside with state foreign policy or international politics. Justice then becomes a tool of politics behind which are hidden motives of human rights protection and the struggle against impunity. The claim for this kind of justice (without borders) is a major characteristic of the post-Cold War time, after the collapse of the communist bloc, headed by the Soviet Union. The time for a judicial globalisation has come. A “new spirit of relative optimism”⁵²⁴ (notably on the part of former states of the Soviet Union) for global accountability institutions has emerged. On the other hand, the exercise of judicial intervention by states would necessarily benefit to the most powerful ones. There will probably be prosecutions by courts of some states or the international community against nationals of weak countries, while great powers’ citizens would enjoy blanket impunity. In this respect, the former ICJ President, Gilbert Guillaume, opining on the principle of universal jurisdiction (enforcement *in absentia*), warned:

International criminal law has itself undergone considerable development and constitutes today an impressive legal *corpus*. It recognizes in many situations the possibility, or indeed the obligation, for a State other than that on whose territory the offence was committed to confer jurisdiction on its courts to prosecute the authors of certain crimes where they are present on its territory. International criminal courts have been created. But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. *To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary, for the benefit of the powerful, purportedly acting as agent for an ill-defined "international community". Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.*⁵²⁵

⁵²³ See R.-K. Koude, ‘L’intervention internationale : de l’humanitaire à la dissuasion judiciaire’, *Cahiers de l’Institut des droits de l’homme de Lyon* (2006)105-120.

⁵²⁴ Cassese, above note 454, at 7.

⁵²⁵ Separate Opinion of Judge Gilbert Guillaume, above note 303, para.15. Emphasis is mine.

The potential risk of judicial chaos is aggravated by two additional problems. *Primo*, the fact that there is no legal instrument which pre-determines and organises how and when a state judicial intervention must be conducted in order to ensure prosecutions of crimes committed abroad and against nationals of a foreign country. If everything must depend upon judicial and scholarly legal constructions, arbitrary, repetitive prosecutions by national courts of different states and so conflicts are inevitable. It could be the case notably when a state has decided, after inquiry, not to prosecute, or if the accused person has been acquitted or sentenced with complacency. This is clearly a loophole in the system of international criminal justice.

It is a setback in comparison to the legal framework applicable to the relationship between states and international tribunals. In particular, as a reminder, the ICC which possesses a complementary jurisdiction to states parties may intervene only when the latter has failed, by incapacity or unwillingness, to comply with their duty to investigate and to prosecute.⁵²⁶ The assessment of state incapacity (inability) or unwillingness to prosecute should normally result into a judicial rather than a political decision. Even if subjectivity is not entirely impossible, the principle of complementarity is better than nothing since it is protective of the jurisdictional power/right of states. In this sense, it appears less compulsory than the coercive principle of primacy of ad hoc tribunals over national courts. Primacy means here that the competent ad hoc tribunal may formally request, at any stage of the procedure, national courts to defer the pending case to its jurisdiction.⁵²⁷ Instead, the principle of complementarity preserves “the ICC’s power over irresponsible states that refuse to prosecute”.⁵²⁸ Therefore, it can help push states parties to be more active for prosecutions,⁵²⁹ while the principle of jurisdictional primacy takes from states their primary power to prosecute in favour of the international community. In any case, like in the event of the exercise of extraterritorial jurisdiction, there is no guarantee against repetitive prosecutions after the accused has faced with proceedings before a national court. The double jeopardy principle (*ne bis in idem*) wholly operates only for decisions of international tribunals. According to this principle, it is prohibited to adjudicate the same (criminal) case (consisting of incidents/facts, incriminations

⁵²⁶ ICC Statute, Articles 1 and 17.

⁵²⁷ ICTY Statute, Article 9 (2); ICTR Statute, Article 8 (2). See also David, above note 64, at 783.

⁵²⁸ M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden/Boston: Martinus Nijhoff Publishers, 2008), at 158.

⁵²⁹ Arsanjani and Reisman, above note 474, at 327; David, above note 64, at 783-784.

and parties) more than once by the same tribunal or another court having jurisdiction⁵³⁰. But, as for the ICC, George Fletcher has rightly interpreted the issue as follows:

The ICC will respect its own judgments (which court would not?) but it will not respect judgments of member states unless it determines that the member state had “an intent to bring the person concerned to justice”. That is, the ICC will decide on a case-by case basis whether the judgments of other courts are worthy of its respect.⁵³¹

Politically, such one-side *ne bis in idem* principle would become harder to tolerate by states not parties, since they have not manifested their prior consent to this kind of scrutiny of final judgments of their own national courts, even when ICC’s proceedings are the result of a referral by the Security Council. Similarly, the ICC’s judicial intervention may have higher constitutional implications on the democratic governance of a non-member state than in a consenting or contacting party. In fact, for example, it may be that incumbent political leaders benefit from the suspension of criminal prosecutions until the end of their electoral terms pursuant to the constitutions in force in their countries. In this regard, the ICC’s judicial intervention could be criticised as being an attempt to national political independence (due to its potential impact on regime-change) and the democratic sovereignty of people to self-determination, to choosing their rulers. The tension is thus real between political independence, democracy and eventual international judicial interventions.

Secundo, the matter for a state to extradite its own nationals to a foreign country is not easy to resolve. Normally, the decision to extradite is governed by municipal law of the requested state. However, there is in principle an extradition treaty between parties as a matter of judicial cooperation. The problem then arises as to whether the state’s refusal to extradite its own citizens as an exigency of its domestic law could amount to the failure to prosecute.⁵³² True, the VCLT provides that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.⁵³³ National constitutions are also deemed to be part of internal law. But, the VCLT does not solve the matter since the refusal to extradite on the basis of national law is envisaged by the very treaty to perform, and there is no customary

⁵³⁰ See also G. Conway, ‘*Ne Bis in Idem* in International law’, 3 *International Criminal Law Review* (2003) 217-244, at 217.

⁵³¹ G. P. Fletcher, ‘Against Universal Jurisdiction’, 1 *Journal of International Criminal Justice* (2003) 580-584, at 582.

⁵³² Bantekas and Nash, above note 443, at 92.

⁵³³ Article 27.

rule which obliges a state to surrender its citizen to a foreign country.⁵³⁴ But, other penal conventions provide for a solution of compromise by making the decision of a state to extradite its own nationals dependent on the conclusion of an *ad hoc* agreement with the requesting state.⁵³⁵ This may imply that in the absence of such an agreement, the refusal of a state to extradite its own nationals in accordance with its domestic law will remain relevant. The issue can thus turn into a political and diplomatic affair. The adoption of international sanctions against the requested state which refuses to extradite is possible.

b) The Threat of International Sanctions

A form of reaction of the international community to atrocities and international crimes has already been explained. It refers to the establishment of international courts, military and judicial interventions. International sanctions constitute another form of that reaction.⁵³⁶ They are of different kinds in under international law. A distinction must be drawn between sanctioning the commission of alleged crimes committed and the sanctions of impediments to the administration of justice. The breach of the obligation to extradite or prosecute relates to the latter category. Its author runs the risk of being subject to two kinds of international sanctions. It may be either (political and economic) sanctions of collective security (i) or sanctions of the state responsibility (ii).

i) The Sanctions of Collective Security

Experimented for the first time under the League of Nations, collective security is a preventive and defensive international system of mutualisation of states' efforts and commitments to maintain peace and security through the implementation of decisions taken

⁵³⁴ See Dissenting Opinion of Judge Bedjaoui, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, para.12.

⁵³⁵ See International Convention for the Suppression of Terrorist Bombings (12 January 1998), Article 8 (2); International Convention for the Suppression of the Financing of Terrorism, Article 10 (2). Both provisions commonly stipulate: 'Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1 (*the obligation to extradite or prosecute*)'. Emphasis is mine.

⁵³⁶ Cassese, above note 210, at 3-5.

by a common political body empowered by all and by virtue of law to act on behalf of each of them. It entails a form of limitation to some individual prerogatives, for example the unilateral recourse to the use of armed force, in favour of the international community, presupposed more capable to deal efficiently with international threats to peace and security, with the support of all member states.⁵³⁷ Without being a monopoly of the United Nations,⁵³⁸ the most powerful forum of collective security is the Security Council acting under Chapter VII of the Charter. Some of its collective decisions lay down international sanctions. These sanctions are numerous and the list is not exhaustive. Under article 41 of the UN Charter,⁵³⁹ those sanctions “may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”. They are taken not only because international crimes should not go unpunished, but chiefly owing to the fact that monitoring the respect for human rights or humanitarian law, as well as the enforcement of justice are now viewed as essential for the maintenance of international peace and security.⁵⁴⁰ As Martti Koskenniemi writes, the Security Council has shown in this respect its “willingness to use its exceptionally ‘hard’ powers of enforcement,

⁵³⁷ See F. Bouchet-Saulnier, *Dictionnaire pratique du droit humanitaire* (Paris : La Découverte et Syros, 2000), at 419 ; Salmon, above note 149, at 1024-1025 ; C. Debbash, J-M. Pontier and J.-C. Ricci, *Lexique de politique* (7th edn., Paris : Dalloz, 2001), at 388.

⁵³⁸ Chapter VIII of the UN Charter also recognises the relevance and the validity of regional systems of collective security. See Ndeshyo, above note 150, at 161.

⁵³⁹ Article 41 of the UN Charter: ‘The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

⁵⁴⁰ Cryer, above note 352, at 175-182. See also M. Roscini, ‘The United Nations Security Council and the Enforcement of International Humanitarian Law’, 43 *Israel Law Review* (2010) 330-359, at 333-337; R. B. Lillich, ‘The Role of the Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World’, 3 *Tulane Journal of International & Comparative Law* (1994) 1-17, at 4. See also Article 94 (2) of the UN Charter which connects the Security Council to the judicial functions of the ICJ and stipulates: ‘if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment’. Even if this provision does not specify what measures the Security Council can adopt to enforce ICJ judgments, it has to be noted that they include, at least, those provided for in Chapter VII (Article 41).

binding resolutions, economic sanctions and military force for ‘soft’ purposes of international justice”.⁵⁴¹

Normally, as far as the exercise of state criminal jurisdiction is concerned, those sanctions are imposed as a consequence of the failure to carry out a pre-existing obligation to extradite or prosecute. But, innovatively, they can also follow the failure to discharge a duty to cooperate (through the surrender or extradition of the presumed offender, or via other means) that has been specifically created by a Security Council resolution, adopted under Chapter VII. This legal creativity to impose an obligation to cooperate may correct, although in part and only in a particular situation, the lack of a binding comprehensive legal framework organising (horizontal) state cooperation for the repression of international crimes. The legal construction is such that the failure to comply with this obligation to cooperate may be qualified, independently from the facts of the crimes in question, as a threat to international peace and security.⁵⁴²

Outside the UN Charter, a reference to the powers of the Security Council is made in a number of international treaties. For example, an implicit reference is found under Additional Protocol I of 1977 to the Geneva Conventions of 1949. This treaty commits contracting state parties, in situations of serious violations (i.e. war crimes) of the said Conventions and the Protocol itself, to undertake to act, individually or jointly, in cooperation with the United Nations and in conformity with the UN Charter.⁵⁴³ An explicit reference is found in the Rome

⁵⁴¹ M. Koskeniemi, ‘The Police in the Temple. Order, Justice and the UN: A Dialectical View’, 6 *European Journal of International Law* (1995) 325-348, at 341.

⁵⁴² K. Manusama, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), at 107-109. For example, in the Lockerbie case, the Security Council established that the lack of co-operation by Libya in prosecuting and punishing the perpetrators of the terrorist attack of December 1988, notably by not responding to the requests for their extradition to the United Kingdom or the United States of America, was a threat to international peace and security. See SC Res.748 (1992), 31 March 1992, Preamble, para.8.

⁵⁴³ GP I, Article 89. See also Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (13 January 1993), Article XII (3) and (4). These provisions read: ‘3. In cases where serious damage to the object and purpose of this Convention may result from activities prohibited under this Convention, in particular by Article I, the Conference (of States Parties) may recommend collective measures to States Parties in conformity with international law. 4. The Conference shall, in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council’. The brackets

Statute which provides that the Security Council may be informed of any matter of non-cooperation with the ICC in criminal proceedings which result from the situation of a third state which it has referred to the Prosecutor.⁵⁴⁴ Obviously, the information is designed to guarantee a follow-up of the matter, which does not exclude the adoption of sanctions against the state refusing to cooperate.

In practice, the Security Council is not obliged to impose sanctions. Everything depends on the context of each case and the contingencies of international politics. Rather than adopting sanctions, the Security Council may even prefer to invite the state concerned to respect its international obligation, to put an end to its breach, if it does not just expressly recall the duty to extradite the accused person or prosecute the crime in question.

The relevant example in this regard is the *Lockerbie* case. Two Libyan nationals and officials in the intelligence service of Libya were suspected of having caused a bomb to be placed aboard an aircraft on Pan Am flight 103, which bomb exploded causing the aeroplane to crash over the Scottish territory on 21 December 1988.⁵⁴⁵ Out of this terrorist attack, 270 persons (passengers and crew members) as well as 11 townspeople, most of them being British and American citizens, died.⁵⁴⁶ While the Libyan government indicated that it was willing to prosecute the suspects by its own courts, in accordance with the duty to extradite or prosecute under the Montreal Convention for the suppression of unlawful acts against the safety of civil

are mine. See again Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (18 May 1977), Article V (3). This provision stipulates: ‘Any State Party to this Convention which has reason to believe that any other State Party is acting in breach of obligations deriving from the provisions of the Convention may lodge a complaint with the Security Council of the United Nations. Such a complaint should include all relevant information as well as all possible evidence supporting its validity’.

⁵⁴⁴ ICC Statute, Article 87 (5) (b).

⁵⁴⁵ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, para.2.

⁵⁴⁶ J. Chappez, ‘Questions d’interprétation et d’application de la Convention de Montréal de 1971 résultant de l’incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni) (Jamahiriya arabe libyenne c. Etats-Unis) : mesures conservatoires, ordonnance du 14 avril 1992’, 38 *Annuaire français de droit international* (1992) 468-479, at 469.

aviation, the United Kingdom and the United States of America insisted that they should be extradited for prosecutions on their territories, since Libya itself was behind the attack.⁵⁴⁷

These irreconcilable claims were due to a reciprocal lack of confidence in the respective national authorities, supposedly not being in a good position to carry out fair trials against the suspects. However, the balance of power being in favour of the United Kingdom and the United States of America, the matter was brought to the Security Council, which adopted the resolution 748, imposing the duty on Libya to extradite its nationals as requested by the opponent states.⁵⁴⁸ This resolution deviated from the conventional stipulations in two ways. On the one hand, it ruled out the right of Libya to exercise its criminal jurisdiction under the aforementioned Montreal Convention. On the other hand, it created an obligation for Libya to extradite under Chapter VII, which was not owed by virtue of any other treaty between the parties. This is why the dispute was brought in two cases before the ICJ,⁵⁴⁹ Libya alleging violations of the Montreal Convention against the requesting states. More interesting, the Security Council imposed a series of sanctions on Libya, including the denial of transport and communications links, the freeze of financial resources, the ban of military supplies and the diplomatic isolation, for its persistent failure to comply with the new obligation to extradite.⁵⁵⁰ Finally, to put an end to the stalemate, an agreement was found between parties, later in December 1998, to make the suspects tried by Scottish judges under Scots law in a third and neutral state, the Netherlands.⁵⁵¹

After all, the Lockerbie case illustrated better the potential tensions and conflicts related to the lack of flexibility within the system of international criminal justice. There is so far no rule indicating “which state is entitled to exercise jurisdiction in any case where more than one

⁵⁴⁷ M. Morris, ‘Terrorism: the Politics of Prosecution’, 5(2) *Chicago Journal of International Law* (2005) 405-421, at 407.

⁵⁴⁸ SC Res.748 (1992), above note 542, para.1; SC Res.731 (1992), 21 January 1992, para.3.

⁵⁴⁹ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment of 27 February 1998, I.C.J. Reports 1998, at 9; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment of 27 February 1998, I.C.J. Reports 1998, at 115.

⁵⁵⁰ SC Res.748 (1992), above note 542, paras.3-6; SC Res. 883 (1993), 11 November 1993, paras.2-7.

⁵⁵¹ D.E. Arzt, ‘The Lockerbie “Extradition by Analogy” Agreement: “Exceptional Measure” or Template for Transitional Justice?’, 18 (1) *American University International Law Review* (2002) 163-236, at 166-170.

country claims this right”.⁵⁵² The role that the Security Council is called to play within this system is also questionable. The recourse to its exorbitant powers under Chapter VII of the UN Charter is not a license to do whatever it desires, irrespective of pre-existing rules of international law. Hence, the need to reconsider its relationships with the system of international criminal law in order to avoid any risk of arbitrary, diplomatic manipulations and contestations, capable to impede the efficiency of its actions.

ii) The Sanction of the State Responsibility

State responsibility is a consequence of a state’s internationally wrongful act, i.e. its action or omission which constitutes a breach of its obligation under international law⁵⁵³. Two possibilities must be distinguished in the present context. State responsibility may be triggered by another state for an interstate adjudication or by individuals who consider themselves as having been prejudiced by crimes committed before international human rights monitoring mechanisms. This responsibility for failing to extradite or prosecute differs from the one deriving from the commission of the underlying crimes by state organs or agents (as perpetrator, co-perpetrator or accomplice) or the state approval of those committed by private individuals.⁵⁵⁴ As the ICJ said in the case concerning *United States Diplomatic and Consular Staff in Tehran*, such approval is to translate private acts of individuals into acts of the state.⁵⁵⁵ The shining example relating to state responsibility for its failure to extradite or prosecute is the trial of the former Chadian President, Hissène Habré.

1°) The Case of President Hissène Habré

President Hissène Habré came to power as a result of a civil war on 7 June 1982. During his innings until 1 December 1990, he transformed acts of persecutions, torture and physical elimination of his opponents as a means of governance. He established and resorted to a political police known as the “*Direction de la Documentation et de la Sécurité*” (DDS) to this effect. Reportedly, his regime produced “more than 40,000 victims (of murder and torture),

⁵⁵² M. Plachta, ‘The Lockerbie Case: the Role of the Security Council in Enforcing the Principle *Aut Dedere aut Judicare*’, 2 (1) *European Journal of International Law* (2001) 125-140, at 130.

⁵⁵³ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Articles 1 and 2.

⁵⁵⁴ N. Roht-Arriaza, ‘Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitations, and Superior Orders’, in N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York/Oxford: Oxford University Press, 1995) 57-70, at 69.

⁵⁵⁵ *United States Diplomatic and Consular Staff in Tehran*, above note 110, para.74.

more than 80,000 orphans, more than 30,000 widows, and more than 200,000 persons who found themselves, due to this repression, to be without moral or material support”.⁵⁵⁶ On its side, Human Rights Watch reported to have discovered the files of the DDS in 2001.⁵⁵⁷ They allegedly revealed “the names of 1,208 persons who died in various jails, including one on the grounds of Habré’s presidential compound”⁵⁵⁸ and “a total of 12,321 victims of different forms of abuse”.⁵⁵⁹

Having been ousted from power by his own chief of the army, the then becoming President Idriss Deby, he fled abroad and finally settled in Dakar (Senegal). Criminal proceedings commenced against him in February 2000. Seven victims, backed by a coalition of human rights organisations,⁵⁶⁰ brought their complaint to the Regional Tribunal of Dakar. They were probably encouraged by the highly publicised prosecutions against Pinochet, the former Chilean President, which had started in England since 1999. As a result, on 3 February 2000, Judge Demba Kandji charged Hissène Habré with complicity in the perpetration of acts of torture, barbarity and crimes against humanity, and placed him under house arrest.⁵⁶¹ But, this saga was just the beginning of a protracted judicial battle at the end of which Senegal failed to prosecute the accused person by itself and alone or to extradite him to Belgium which made a request in this respect. It has to be noted that the Belgian request for extradition was made following several complaints brought by some victims, who had acquired the Belgian

⁵⁵⁶ Commission d’Enquête Nationale du Ministère Tchadien de la Justice, *Les crimes et détournements de l’ex-Président Habré et de ses complices* (Paris : Éditions L’Harmattan, 1993), at 97. The brackets are mine. See also Human Rights Watch, ‘Chad: The Victims of Hissène Habré Still Awaiting Justice’ 17 (10)(A) (2005), at 1-2 <<https://www.hrw.org/reports/2005/chad0705/chad0705.pdf>> accessed 5 May 2016.

⁵⁵⁷ Human Rights Watch, ‘The Trial of Hissène Habré: Time is Running Out for the Victims’ 2 (2007), at 4 <<https://www.hrw.org/legacy/backgrounders/africa/habre0107/habre0107web.pdf>> accessed 18 April 2016.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Ibid.*

⁵⁶⁰ Besides Human Rights Watch, the coalition is made up of the Chadian Association of Victims of Political Repression and Crimes (*Association tchadienne des victimes de la répression politique et de crimes*, AVCRP), the International Federation of Human Rights Leagues (FIDH), the Chadian League for Human Rights (LTDH), the Association for the Promotion of Fundamental Liberties in Chad (APLFT), the National Senegalese Human Rights Organisation, the African Assembly for the Defence of Human Rights (RADDHO), and the Association for the Victims of Repression in Exile (*Association pour les victimes de la répression en exil*, AVRE) and *Agir ensemble pour les droits de l’homme*.

⁵⁶¹ Human Rights Watch, above note 556, at 18-19.

nationality, before the investigating judge of the Brussels Court of first instance, Daniel Fransen, between 30 November 2000 and 11 December 2001.⁵⁶²

This failure of Senegal to discharge its international obligations was a consequence of three important judgments delivered by its own courts. First, on 4 July 2000, the Prosecution Division of the Dakar Court of Appeal delivered a judgment whereby it cancelled the initial proceedings before the Regional Tribunal of Dakar, in response to a motion raised by Hissène Habré's defence council.⁵⁶³ The Court ruled that Senegalese tribunals lacked jurisdiction to prosecute and try foreigners present on the territory of Senegal for alleged crimes committed (against alien) outside Senegal.⁵⁶⁴ The decision was based on the absence of any legislative implementation measure incorporating into the Code of criminal procedure such universal jurisdiction, including over torture-related offences under the UN Convention against torture, to which Senegal was already a party.⁵⁶⁵ Second, on 20 March 2001, the Senegalese Court of cassation upheld this ruling.⁵⁶⁶ Third, concerning the Belgium extradition request, following Hissène Habré's indictment on 19 September 2005 by the Belgian investigating judge, Daniel Fransen, for acts of torture, war crimes and crimes against humanity, the Prosecution Division of the Court of Appeal of Dakar held that it lacked jurisdiction to decide on the matter.⁵⁶⁷ This decision was based on the fact that the accused person enjoyed immunity from jurisdiction

⁵⁶² *Ibid.*, at 20. These complaints were based on crimes covered by the Belgian Law of 16 June 1993 concerning the punishment of serious violations of international humanitarian law, as amended by the Law of 10 February 1999, and by the Convention against torture

⁵⁶³ *Public Prosecutor's Office and Francois Diouf v. Hissène Habré*, Judgment No. 135 of 4 July 2000, Dakar Court of Appeal (Chambre d'accusation) <<https://www.hrw.org/legacy/french/themes/habre-decision.html>> accessed 18 April 2016.

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.* See also A. Cisse, 'La responsabilité pénale des chefs d'Etat africains en exercice pour crimes internationaux graves', in G. Doucet (ed.), *Terrorisme, victimes et responsabilité pénale internationale* (Paris : Calmann-Lévy, 2003) 247-254.

⁵⁶⁶ *Souleymane Guengueng et al. v. Hissène Habré*, Judgment No. 14 of 20 March 2001, Court of Cassation (Première chambre statuant en matière pénale) <<http://www.asser.nl/upload/documents/20121105T123352-Habre,%20Cassation%20Court,%20Senegal,%2020%20March%202001.pdf>> accessed 18 April 2016.

⁵⁶⁷ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, paras.5 and 26. See also *Avis de la Cour d'appel de Dakar sur la demande d'extradition de Hissène Habré (Extrait), Chambre d'accusation, 25 November 2005* <http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/habre_cour_dappel.pdf> accessed 18 April 2016.

due to his capacity as head of state at the time of the commission of the alleged offenses.⁵⁶⁸ The Court referred to the ICJ judgment in the *Arrest Warrant* case.⁵⁶⁹ But, the judgment was criticised for its support for “the thesis of perpetual immunity”⁵⁷⁰ and its trend to cover any act performed in an official capacity, notably international crimes. Yet, Hissène Habré was a former head of state, while the issue resolved in the *Arrest Warrant* case pertained to (personal) immunity from prosecutions against an incumbent state official, namely a minister of foreign affairs, at the time of issuance of the arrest warrant. Moreover, it seems that (functional) immunity was not applicable to Hissène Habré for its incompatibility with the Senegalese obligation to prosecute. On its side, Chad had already indicated that in its view the accused enjoyed no immunity as its former Head of state.⁵⁷¹ Consequently, Senegal had to face legal procedures engaging its international responsibility.

2°) *The State of Senegal on the Bench*

Two international procedures in relation to the trial of Hissène Habré were initiated against Senegal. The first one was a communication initiated before the Committee against torture, which has the power to consider individual complaints against a state party which recognises its competence to decide whether it is or not responsible for any alleged breach of the UN Convention against torture.⁵⁷² The complaint was lodged on 18 April 2001 following the above mentioned judgment of the Senegalese Court of Cassation of 20 March 2001. The Chadian victims were alleging violations by the state of Senegal of article 5 (2) and 7 of the said Convention, i.e. the breach of the obligation to take national implementation measures to establish its domestic jurisdiction over crimes such as those presumably committed by Hissène Habré and the subsequent failure to prosecute or extradite him to a third country willing to organise his trial. While Senegal declared that it had given the accused one month

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.* See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002.

⁵⁷⁰ S. Bula-Bula, ‘Senegalese Jurisdiction versus Belgian Universal Jurisdiction: Judgement of November 25, 2005 of the Court of appeals of Dakar concerning the Lack of Jurisdiction in the Extradition of Mr. Hissène Habré’, in S. Bula-Bula (ed.), *Pour l'épanouissement de la pensée juridique congolaise - Liber Amicorum Marcel Antoine Lihau* (Brussels/Kinshasa: Brylant et Presses de l'Université de Kinshasa, 2006) 319-333, at 325.

⁵⁷¹ Human Rights Watch, above note 556, at 21.

⁵⁷² M. Sepúlveda, T. van Banning, G. D. Gudmundsdottir, C. Chamoun and W.J.M. van Genugten, *Human Rights Reference Handbook* (Ciudad Colon : University for Peace, 2004), at 102.

to leave the territory of Senegal after the Court of Cassation decision,⁵⁷³ the Committee issued a preliminary ruling on 23 April 2001 calling on the defendant state to “take all necessary measures to prevent Hissène Habré from leaving the territory of Senegal except pursuant to an extradition demand”.⁵⁷⁴ On 13 November 2001, it declared the case admissible for two reasons. On the one hand, the complainants were indeed individuals subject to the jurisdiction of the defendant state in the dispute to which their communication referred⁵⁷⁵ in accordance with article 22 (1) of the UN Convention against torture.⁵⁷⁶ On the other hand, the Committee considered that the principle of universal jurisdiction enunciated in article 5 (2) and article 7 (1) of the said Convention implied that “the jurisdiction of States parties must extend to potential complainants in circumstances similar to the complainants”.⁵⁷⁷ On the merits, Senegal was found guilty of the alleged violations on 17 May 2006. The Committee thus made the following recommendation:

In accordance with article 5, paragraph 2, of the Convention, the State party is obliged to adopt the necessary measures, including legislative measures, to establish its jurisdiction over the acts referred to in the present communication. Moreover, under article 7 of the Convention, the State party is obliged to submit the present case to its competent authorities for the purpose of prosecution or, failing that, since Belgium has made an extradition request, to comply with that request, or, should the case arise, with any other extradition request made by another State, in accordance with the Convention. This decision in no way influences the possibility of the complainants’ obtaining compensation through the domestic courts for the State party’s failure to comply with its obligations under the Convention.⁵⁷⁸

The second international procedure was an interstate dispute between Belgium and Senegal before the ICJ. Belgium asked the Court to adjudicate and declare that Senegal breached its obligations under the Convention against torture and was obliged to cease these wrongful acts

⁵⁷³ Human Rights Watch, above note 557, at 6.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Guengueng et al. v. Senegal* (Communication No. 181/2001), Decision of 17 May 2006 (UN doc. CAT/C/36/D/181/2001), para.6 (3).

⁵⁷⁶ This Article provides that ‘a State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of *individuals subject to its jurisdiction* who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration’. Emphasis is mine.

⁵⁷⁷ *Guengueng et al. v. Senegal*, above note 575, para.6 (4).

⁵⁷⁸ *Ibid.*, para.10.

by submitting without delay the case of Hissène Habré to its competent authorities “for the purpose of prosecution, or, failing that, by extraditing him to Belgium without further ado”.⁵⁷⁹ The alleged breached obligations pertained to the failure to conduct a preliminary inquiry to establish the facts in view of potential prosecutions and the refusal to extradite him to the requesting state.⁵⁸⁰ True, Senegal had already taken those implementation measures (between 2007 and 2008) to bring its domestic law into conformity with the Convention against torture.⁵⁸¹ But, these measures were not simply sufficient to avoid responsibility for the failure to exercise its jurisdiction. There were unjustified delays in complying with its obligations in a manner which contrasted with the diligence with which its authorities should have acted in inquiring the facts, in violation of article 6(2) of the Convention against torture.⁵⁸² Moreover, for the Court, the subsequent violation of the obligation to prosecute under article 7 (2) fell in the year 2000 or 2001 after the dismissal of the decision of the Dakar Court of Appeal indicting Hissène Habré.⁵⁸³ All these violations covered acts that had been committed since 26 June 1987, the date when the Convention against torture came into force towards Senegal.⁵⁸⁴

The ICJ rested on two major arguments in support of its ruling. On the one hand, the Senegalese courts’ decisions being part of domestic law, Senegal could not invoke them as a justification not to perform its conventional obligations pursuant to article 27 of the VCLT.⁵⁸⁵ On the other hand, the compliance with these obligations could not be affected by the judgment of the ECOWAS Court of Justice of 18 November 2010 which held that amendments of the Senegalese Criminal Code for the purpose of Hissène Habré’s trial was a breach of the principle of non-retroactivity of penal laws and obliged Senegal to mobilise efforts in order to create an *ad hoc* tribunal of an international character,⁵⁸⁶ rather than prosecuting the accused person before its domestic courts.⁵⁸⁷ However, the ICJ did not

⁵⁷⁹ *Questions relating to the Obligation to Prosecute or Extradite*, above note 425, paras.71 and 118.

⁵⁸⁰ Convention against torture, Article 6 (2) and 7 (1).

⁵⁸¹ *Questions relating to the Obligation to Prosecute or Extradite*, above note 425, paras.47-48.

⁵⁸² *Ibid.*, paras.87-88.

⁵⁸³ *Ibid.*, para.116.

⁵⁸⁴ *Ibid.*, paras.100 and 104.

⁵⁸⁵ *Ibid.*, para.113.

⁵⁸⁶ *Hissène Habré v. Republic of Senegal*, Judgment N0: ECW/CCJ/JUD/06/10 of 18 November 2010, ECOWAS Court of Justice, paras.58 and 61.

⁵⁸⁷ *Questions relating to the Obligation to Prosecute or Extradite*, above note 425, para.111.

provide any argument in support of this position. Yet, Senegal had argued that the judgment of the ECOWAS Court of Justice was not a constraint of domestic nature, unlike its aforementioned national judicial decisions, and contended that it was also subject to the authority of this Court.⁵⁸⁸ In its view, Belgium objected that this judgment was not opposable to its domestic court.⁵⁸⁹ It advanced that if the forum state was confronted with a situation of conflict of two international obligations, it was the result of its own failings in implementing the Convention against torture.⁵⁹⁰

In this regard, one may argue that invoking such a judgment could amount to relying on one's own turpitudes, in that prior Senegalese illegal behaviours having led to that judgment should not justify current violations of the Convention against torture, alleged by Belgium.⁵⁹¹ But, a more convincing argument at the disposal of the ICJ was the relative authority of the *res judicata* principle generally attached to judicial decisions. According to this principle, courts' decisions under international law do not in principle possess binding force except between the parties and in a particular case.⁵⁹² In other words, a legal matter which has been judged once between parties cannot be adjudicated again in a manner which could enable to reverse the authority of the prior decision by the same court or another for the same purpose.⁵⁹³ This respect owed to the courts' decisions is a guarantee of judicial security between parties. It follows that the authority of the judgment of the ECOWAS Court of Justice could not affect the rights of Belgium, not just because it was not a party to that case, but, more important, given the fact that the ICJ was adjudicating and deciding on a different issue, i.e. the non-compliance by Senegal with its treaty obligations towards another contracting state.

After all, this overlapping of judgments of international tribunals (universal and regional) shows the extent to which Hissène Habré's trial was a hard case to handle. Senegal was

⁵⁸⁸ *Ibid.*, para.110.

⁵⁸⁹ *Ibid.*, para.108.

⁵⁹⁰ *Ibid.*

⁵⁹¹ This is a mere application of the principle '*nemo auditur propriam turpitudinem suam allegans*' (no one will be heard relying on his own turpitude), which is known in all major legal systems, notably in common and civil law systems.

⁵⁹² Article 59 of the ICJ Statute also stipulates: "The decision of the Court has no binding force except between the parties and in respect of that particular case".

⁵⁹³ See E. Harnon, '*Res Judicata* and Identity of Actions: Law and Rationale', 1 *Israel Law Review* (1966) 539-555, at 540; Y. Sinai, '*Reconsidering Res Judicata: a Comparative Perspective*', 21 *Duke Journal of Comparative & International Law* (2011) 353-400, at 353.

reluctant to extradite him to Belgium and to create a precedent whereby a former African Head of state was to be tried by a former European colonial power. Reasons behind this political will are numerous. Some pertain to the policy of self-reliance in dealing with African problems. In this respect, Hissène Habré deserved prosecutions by Africa itself. Other reasons, which are the imminent ones to explore, relate to objections against the system of international criminal justice.

2. The Rise of Objections against the System of International Criminal Justice

African objections against the system of international criminal justice reached a turning point in 2002. This year is historic for two main reasons. First, it marks the anniversary of the AU inauguration at Durban (South Africa), exactly at the same moment as the entry into force of the ICC Statute.⁵⁹⁴ While the contribution of Africa to the development of general international criminal law is widely recognised,⁵⁹⁵ the conclusion of the AU Constitutive Act of 11 July 2000 appears to be a renewal of the regional claim for legal autonomy in order to deal with African (criminal) matters by Africans themselves. Second, the general euphoria with which the advent of the ICC was welcome made forget the negative impact of the *Arrest Warrant* case of 11 April 2000 between the DRC and Belgium on the perception of international criminal justice in Africa. The ICJ judgment of 14 February 2002 in this case wakened some states that systematically started to oppose indictments and prosecutions of their leaders outside the continent, in some European countries,⁵⁹⁶ in application of the principle of universal jurisdiction. In this regard, the Republic of Congo, for example, initiated proceedings against France before the ICJ in December 2002.⁵⁹⁷ Previously, African states also raised objections against a number of provisions of the ICC Statute during the UN diplomatic negotiations convened in Rome in 1998, some years before their current criticisms against the ICC's judicial work in Africa.

These criticisms and contestations have been regarded as a setback in the development of international criminal law and a way to weaken its enforcement at the expense of common values to mankind that deserve universal protection.⁵⁹⁸ It does however appear that the values

⁵⁹⁴ The ICC Statute came into force on 1 July 2002, while the first summit of the AU, of which the Constitutive Act of 11 July 2000 entered into force on 26 May 2001, was held in Durban (South Africa) on 9 July 2002.

⁵⁹⁵ R. Adjovi, 'Introduction: l'Afrique dans le développement de la justice pénale internationale', 14 *African Yearbook of International Law* (2006) 3-28; P. Manirakiza, 'L'Afrique et le système de justice pénale internationale', 3 *African Journal of Legal Studies* (2009) 21-52, at 27-31.

⁵⁹⁶ See C. B. Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', 9 *Journal of International Criminal Justice* (2011) 1067-1088, at 1071.

⁵⁹⁷ *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Application Instituting Proceedings of 9 December 2002, I.C.J. General List, No.3, 2003, at 3 and 5.

⁵⁹⁸ D. Tladi, 'The African Union and the International Criminal Court: the Battle for the Soul of International Law', 34 *South African Yearbook of International Law* (2009) 57-69, at 65-66. See also P.-M. Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: a Response to Martti Koskienniemi', 16 (1) *European Journal of International Law* (2005) 131-137.

in question (justice, human rights, peace, reconciliation, end of impunity, etc.) and the need – even the duty- to protect them are not the problem at stake.⁵⁹⁹ The issue is rather the manner in which justice is regulated, sought and delivered,⁶⁰⁰ and the failure of global international criminal law to catch a number of problems which are of specific interest or concern to the African continent. Objections relate to many issues, in particular: abusive application of rules and principles of international criminal law, selectivity and partiality of justice, inequality of states before the law, political calculations behind institutions vested with the power to administer justice, policy choice of priorities between protected values and list of crimes subject to international prosecutions. The main actors of this crisis are African and European states, the AU, the EU, the UN Security Council and the ICC.

To sum up, African objections against the system of international criminal justice are diversified. They can be grouped and examined in two principal aspects, namely the disapproval of the presumed abuse of the principle of universal jurisdiction (2.1) and the contention over the ICC jurisdiction and its judicial work in Africa (2.2).

2.1. The Disapproval of the Abuse of the Principle of Universal Jurisdiction

Universal jurisdiction is one of the core principles of international criminal justice. Connected with the ICC justice system, it gives efficacy to the principle of complementarity because it expands the state basis for the exercise of extraterritorial jurisdiction in order to prosecute the offender.⁶⁰¹ African states do not contest the relevance of the principle of universal jurisdiction but acknowledge its useful role in the struggle against impunity.⁶⁰² In the view of the AU Assembly, the contention is rather over its blatant abusive application by some

⁵⁹⁹ B. Kahombo, 'Africa within the Justice System of the International Criminal Court: the Need for a Reform', KFG Working Paper Series, No.2, Berlin Potsdam Research Group "The International Rule of Law: Rise or Decline?" (Berlin: May 2016), at 38.

⁶⁰⁰ *Ibid.*

⁶⁰¹ B. L. Krings, 'The Principles of 'Complementarity' and Universal Jurisdiction in International Criminal Law: Antagonist or Perfect Match?', 4 (3) *Goettingen Journal of International Law* (2012) 737-763, at 740; X. Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How the Two Principles Intermesh?', 88 (862) *International Review of the Red Cross* (2006) 375-398, at 376; International Law Association, 'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences', Committee on International Human Rights Law and Practice, London Conference (2000), at 10.

⁶⁰² Assembly/AU/Dec.199 (XI), above note 221, para.3.

European states.⁶⁰³ This issue is far from being exclusively African. Other interstate contestations, including by countries such as Israel and the United States of America (USA), gave rise to the fear that the principle of universal jurisdiction was “on its last legs, if not already in its death throes”.⁶⁰⁴ This pessimistic point of view tells us much about the gravity of the problem rather than the potential end of the principle of universal jurisdiction. The reason is that it is equally possible that contestations of a rule or principle result in the consolidation of its binding force and legitimacy,⁶⁰⁵ especially when states have managed to reach a consensus which eliminates their respective disagreements on the matter.

The question which is to be addressed relates to the justification of African objections to the application of the principle of universal jurisdiction. Normally, when states want to defend their interests, they do not necessarily behave in accordance with some legal rationality. If they wish to divert from a legal principle or to provoke the modification of the applicable law, they will not hesitate to do so. If they say no and radically persist in their view, there would be no logic to invoke against them the rule or the principle the scope of which they reject or with the application of which they disagree. The analyser is then obliged to take the new postulations into account and try to find out the best ways to reconcile the conflicting positions in a manner that would preserve the defence of protected common values.

Thus, in order to grasp the significance and the content of the contestations against the abusive application of the principle of universal jurisdiction, it is important to link the discussion to the context in which the disagreement with European states has emerged. The broad context shows that the matter is part of a series of persistent contestations, which are aggravated by the African conception of state sovereignty (2.1.1), whereas the specific context reflects the irreconcilable character between the African objection and European judicial activism and interventionism in Africa (2.1.2).

⁶⁰³ Assembly/AU/Dec.243(XIII) Rev.1, Decision on the Abuse of the Principle of Universal Jurisdiction (Doc. Assembly /AU/11 (XIII)), 13th Ordinary Session of the Assembly of the African Union, Sirte (Libya), 1-3 July 2009, para.4.

⁶⁰⁴ A. Cassese, ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’, 1 *Journal of International Criminal Justice* (2003) 589-595, at 589.

⁶⁰⁵ N. Deitelhoff and L. Zimmermann, ‘Things We Lost in the Fire: How Different Types of Contestation Affect the Validity of International Norms’, Working Paper, No.18, Peace Research Institute Frankfurt (PRIF) (2013), at 1.

2.1.1. The Repetition of Persistent Interstate Contestations

International crimes are in many cases committed by state agents in their official capacity, sometimes with the tolerance, approval or direct support of the state.⁶⁰⁶ The subject raises two pivotal issues regarding the persistence of interstate contestations of the principle of universal jurisdiction: whether the adjudicative exercise of this kind of jurisdiction should be subordinated to the presence of the accused on the territory of the prosecuting state (2.1.1.1) and how the subjugation of state's own officials to the jurisdiction of a foreign country is perceived as compromise of sovereignty (2.1.1.2).

2.1.1.1. The Presence of the Accused in the Territory of the Prosecuting State

This question raises the issue of conceptions of the principle of universal jurisdiction. If no territorial connection with the presumed offender is required for it to be exercised and enforced, it becomes the so-called “absolute universal jurisdiction”, “universality *in absentia*” (*competence universelle par défaut*) or pure universal jurisdiction.⁶⁰⁷ Conversely, if the exercise of this jurisdiction is subordinated to conditions, one of which being the presence of the accused person on the territory of the prosecuting state, it becomes “conditional universal jurisdiction”.⁶⁰⁸ The problem which is open to debate is not only whether states may exercise universal jurisdiction in respect of international crimes but also and mainly whether this exercise is to be absolute or dependent on the condition of the presence of the accused person in the territory of the prosecuting state. The stakes are high given the fact that sovereign equality of states must be respected. In practice, the territorial presence of the accused person can limit the number of cases to open on the basis of universal jurisdiction and help secure some internal support (legitimacy) to criminal proceedings initiated by the prosecuting state.⁶⁰⁹ This territorial condition is also a guarantee of fair trial (*in absentia* trials being a

⁶⁰⁶ P. Gaeta, ‘International Criminal Law’, in B. Çali (ed.), *International Law for International Relations* (Oxford: Oxford University Press, 2010) 258-280, at 259.

⁶⁰⁷ A. Cassese, ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case’, 13 (4) *European Journal of International Law* (2002) 853-875, at 856.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ F. Lafontaine, ‘La compétence universelle et l’Afrique: ingérence ou complémentarité?’, 45 (1) *Etudes internationales* (2014) 129-151, at 134.

violation of international human rights law) so long as the accused person submits his means of defence against the accusation before the competent court.⁶¹⁰

The issue was particularly raised by the DRC against Belgium in the *Arrest Warrant* case. In its application of 17 October 2000, the DRC contended that the arrest warrant violated not only Yerodia's immunity as Congolese Minister of foreign affairs but also, the accused being outside of Belgium, the principle of sovereign equality of states insofar as no country is allowed to exercise its adjudicative authority with effect on the territory of another.⁶¹¹ Accordingly, the applicant concluded that article 7 of the Belgian Law of 16 June 1993 establishing absolute or unconditional universal jurisdiction of the Belgian courts over serious violations of international humanitarian law, as amended by the Law of 10 February 1999, pursuant to which the arrest warrant had been issued, violated international law.⁶¹²

Even if the DRC relinquished the contestation of unconditional universal jurisdiction of the Belgian courts in its final submissions to the ICJ – reason for which the Court did not itself rule upon it in accordance with the *non ultra petita* principle that prohibits any tribunal to

⁶¹⁰ See International Covenant on Civil and Political Rights (19 December 1966), Article 14 (3). It states: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; c) To be tried without undue delay; d) *To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing*; to be informed, if he does not have legal assistance, of this right: and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; g) Not to be compelled to testify against himself or to confess guilt'. It must also be noted that the UN ad hoc tribunals (ICTY and ICTR) as well as the ICC Statutes (respectively Articles 21 (4) (d), 20 (4) (d) and 63 (1)) do not admit in principle trials *in absentia*. The italics in the quotation are mine.

⁶¹¹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Application Instituting Proceedings of 17 October 2000, I.C.J. General List, No.121, 2000, at 3 and 7. Article 7 of the Belgian Law referred to in the DRC Application provided: 'The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed. For offences committed abroad by a Belgian against a foreigner, neither a complaint by the foreigner or his family nor an official notice from the authority in the country in which the offence has been committed shall be required'.

⁶¹² *Ibid.*, at 12.

make judgment on a matter which was not submitted by the applicant – judges invoked the issue in their opinions appended to the judgment of 14 February 2002. Was there any ground for the defendant state to exercise on the basis of its municipal law absolute universal jurisdiction under international law? The answer depends on the state of an international treaty (a) and customary international law (b).

a) *The Debate under International Treaty Law*

There is no treaty which provides for universal jurisdiction *in absentia* in international law, apart from the UN Convention on the suppression and punishment of the crime of apartheid of 1973. Basically, this Convention allows “any state party”⁶¹³ which has jurisdiction to prosecute and try persons responsible for acts of apartheid, “whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons”.⁶¹⁴ For other international crimes, the presence of the accused in the territory of the prosecuting state is always required for the exercise of universal jurisdiction.

This legal requirement has a historical justification. In fact, before examples of crimes subject to universal jurisdiction proliferated, many states were reluctant to accept the conventionalisation of such a broad jurisdiction. For example, the principle of universality was not included in the Genocide Convention of 1948, which is the first UN-sponsored treaty on international criminal law. Article VII of the draft treaty prepared by the UN Secretariat and laying down universal jurisdiction was rejected.⁶¹⁵ The USA submitted a proposal of amendment to the Sixth Committee of the UN General Assembly, which was accepted by other states and embodied in article VI of the final version of the Convention.⁶¹⁶ The new article provides that, on the one hand, the national courts competent to try acts of genocide are those of the state on the territory of which the crime is committed. This provision does not however preclude prosecutions on the basis of active and passive personality,⁶¹⁷ nor unilateral universal jurisdiction. On the other hand, an international criminal tribunal was foreseen to

⁶¹³ Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973), Article V.

⁶¹⁴ *Ibid.*, Article IV (a).

⁶¹⁵ United Nations, above note 334, at 32-33.

⁶¹⁶ *Ibid.*, at 42.

⁶¹⁷ V. Thalmann, ‘National Criminal Jurisdiction over Genocide’, in P. Gaeta (ed.), *The Un Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 231-258, at 242.

deliver justice with regard to those contracting parties that recognise its jurisdiction.⁶¹⁸ In the drafters' view, this international criminal tribunal could intervene only when the territorial state failed to comply with its obligation to prosecute genocide, in particular if committed or tolerated by the state authorities.⁶¹⁹

Furthermore, the principle of universality was not included in the Geneva Conventions of 1949.⁶²⁰ The contracting parties opted for the *aut dedere aut judicare* principle whose implementation is subordinated to the presence of the accused in the territory of the prosecuting state.⁶²¹ Even in the exceptional case of uncontested universal jurisdiction over piracy at that time,⁶²² it was implied that its exercise required the presence of the pirate in the territory of the prosecuting state. He may be caught in this territory or apprehended in the high seas or in any other place outside the jurisdiction of any state. The requirement aims to avoid positive conflicts of (adjudicative) jurisdictions by those states which could be eager to prosecute piracy.⁶²³ Only the state of apprehension has jurisdiction to prosecute by the courts established within its territory. This condition is also consistent with the law of the sea,⁶²⁴ which does not however preclude prosecutions on the basis of other traditional bases of jurisdiction such as the principle of personality.⁶²⁵

⁶¹⁸ B. Graefrath, 'Universal Criminal Jurisdiction and an International Criminal Court', 1 *European Journal of International Law* (1990) 67-88, at 69.

⁶¹⁹ United Nations, above note 334, at 38-39.

⁶²⁰ Reydams, above note 436, at 344.

⁶²¹ Cassese, above note 604, at 593.

⁶²² This jurisdiction is justified by 'the lack of any predetermined sovereignty over the high seas and by the régime of their freedom; thus, normally, the jurisdiction of the flag State serves as the mechanism which ensures respect for the law'. See Declaration of Judge Ranjeva, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002, para.6.

⁶²³ Cassese, above note 607, at 857.

⁶²⁴ See United Nations Convention on the Law of the Sea, Article 105; Geneva Convention on the High Seas, Article 19. In similar terms, these articles provide: 'On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. *The courts of the State which carried out the seizure* may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith'. Emphasis is mine.

⁶²⁵ E. Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', 45 (1) *Harvard Journal of International Law* (2004) 183-237, at 190.

As to the only existing exception of absolute universal jurisdiction, Luc Reydamas explains the reason of this fundamental change in states' policy, in reverse of what they supported at the time of the adoption of the Genocide Convention, as follows:

The prospect of establishing an international criminal court which both conventions envisage was much bleaker in 1973 than in 1948 and the prospect of the target countries adhering to the Convention was zero. More importantly, the Apartheid Convention was clearly drafted with three countries in mind, or more accurately three regimes, namely the white minority regimes in the former Rhodesia, Namibia, and the Republic of South Africa. The Convention is in fact tailored to the officials of regimes that were the last vestiges of colonialism in Africa. Therefore, states parties have little reason to fear reciprocity. No (former) apartheid official has ever been prosecuted in a third State. Interestingly, and tellingly, none of the countries that are now in the forefront of universal jurisdiction has signed the convention, let alone ratify. During the drafting Western countries considered the initiative redundant and took issue with the definition of the crime of apartheid (overly broad), its qualification as a crime against humanity - and the jurisdiction clause.⁶²⁶

Admittedly, the express imposition of the condition of the presence of the accused in the territory of the prosecuting state seems to have been an incentive for states to accept the exercise of universal jurisdiction under numerous multilateral international treaties. To use Anne-Marie Slaughter's words, this condition is, so to speak, the reflection of a sort of "universal jurisdiction plus".⁶²⁷ In this regard, the principle of the relative effect of international treaties requires that the state of nationality of the presumed offender or that of the commission of the crime is a party to the treaty on the basis of which such jurisdiction is exercised. In the *Arrest Warrant* case, the question thus became, for the ICJ judges opining on the issue, whether the exercise of universal jurisdiction *in absentia* was at least permitted under customary international law.

b) The Debate under Customary International Law

The ICJ judges delivered two different contradictory positions in the *Arrest Warrant* case, concerning the issue of universal jurisdiction plus the presence of the accused person on the territory of the prosecuting state.

⁶²⁶ L. Reydamas, 'The Rise and Fall of Universal Jurisdiction', Working Paper, No.37, Leuven Centre for Global Governance Studies (January 2010), at 19.

⁶²⁷ A.-M. Slaughter, 'Defining the Limits: Universal Jurisdiction and National Courts', in S. Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press: 2004) 168-192, at 171.

First of all, the President of the Court, Gilbert Guillaume, was of the view that, as a matter of customary international law, the exercise of universal jurisdiction requires the presence of the accused.⁶²⁸ *Ad hoc* Judge Bula Bula and Judge Ranjeva espoused the same opinion.⁶²⁹ Judge Rezek also wrote:

In no way does international law as it now stands allow for activist intervention, whereby a State seeks out on another State's territory, by means of an extradition request or an international arrest warrant, an individual accused of crimes under public international law but having *no factual connection with the forum State*. It required considerable presumption to suggest that Belgium was "obliged" to initiate criminal proceedings in the present case. Something which is not permitted cannot, *a fortiori*, be required. Even disregarding the question of the accused's immunity, the Respondent has been unable to point to a single other State which has in similar circumstances gone ahead with a public prosecution. No "nascent customary law" derives from the isolated action of one State; there is no embryonic customary rule in the making, notwithstanding that the Court, in addressing the issue of jurisdiction, acceded to the Respondent's request not to impose any restraint on the formative process of the law.⁶³⁰

On the contrary, *ad hoc* Judge Van Den Wyngaert suggested that international law permitted the exercise of universal jurisdiction *in absentia*, and there was no rule prohibiting it under customary international law.⁶³¹ Other judges, namely Higgins, Kooijmans and Buergenthal maintained that absolute universal jurisdiction was not prohibited under customary international law under certain conditions.⁶³² To give more authority to her assumption, *ad hoc* Judge Van Den Wyngaert particularly invoked the "Princeton Principles on Universal

⁶²⁸ Separate Opinion of Judge Gilbert Guillaume, above note 303, paras.4 and 15.

⁶²⁹ Separate Opinion of Judge *ad hoc* Bula-Bula, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002, paras.76-81; Declaration of Judge Ranjeva, above note 622, paras.8-11.

⁶³⁰ Separate Opinion of Judge Rezek, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002, para.6.

⁶³¹ Dissenting Opinion of Judge Van Den Wyngaert, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002, para.56.

⁶³² Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, above note 294, paras.59-60 and 79-85. The conditions they set out are: 1) all applicable immunities shall be respected; 2) the national State of the accused person shall be first given the opportunity to act upon the charges alleged; 3) the charges shall be laid by a prosecutor or an investing judge who acts in full independence, without links to or control by the government of the State; 4) it is reserved for only the most heinous international crimes.

Jurisdiction”,⁶³³ which were drafted by a group of scholars convened at the Princeton University (USA) between 2000 and 2001.⁶³⁴ Principle 1 (2) of this doctrine states that a competent and ordinary judicial body may try the accused person on the basis of universal jurisdiction, “provided the person is present before such judicial body”.⁶³⁵ But, in the following comment, the language is brought into clarity and holds that this principle “does not prevent a state from initiating the criminal process, conducting an investigation, *issuing an indictment*, or requesting extradition, when the accused is not present”.⁶³⁶ In addition, *ad hoc* Judge Van Den Wyngaert, relying on the *aut dedere aut judicare* principle as codified in the Geneva Conventions of 1949, in particular the Geneva Convention IV on the protection of civilians, unconvincingly argued that the prosecution of war crimes on the basis of universal jurisdiction was not subordinated, under customary international law, to the presence of the accused in the territory of the prosecuting state.⁶³⁷

A preliminary observation is that *ad hoc* Judge Van Den Wyngaert’s approach is in line with the constitutionalisation of jurisdictions between states which does not rest, as already indicated, on any sound basis under international law.⁶³⁸ The real issue at stake is rather whether international law *does not prohibit* or *permits* the exercise of absolute universal jurisdiction.

The answer to this question should be in the negative. The exercise of universal jurisdiction *in absentia* is incompatible with the principle of sovereign equality of states, which is part of customary international law, codified and specially protected by the UN Charter. This principle, which beforehand confines the powers of each state within its territory, remains the justification of any state criminal jurisdiction and the cornerstone of its limitations. It cannot be overturned by a contrary customary rule in the present case for two main reasons. First, the UN Charter is a special law in regard to customary international law.⁶³⁹ In this respect, the

⁶³³ See S. Macedo (ed.), *The Princeton Principles on Universal Jurisdiction* (Princeton: Princeton University, 2001), at 28.

⁶³⁴ Dissenting Opinion of Judge Van Den Wyngaert, above note 631, paras.57-58.

⁶³⁵ Macedo, above note 633, at 28.

⁶³⁶ *Ibid.*, at 44. Emphasis is mine.

⁶³⁷ Dissenting Opinion of Judge Van Den Wyngaert, above note 631, paras.59 and 62.

⁶³⁸ See chapter one of this Part concerning ‘the Diverging Conceptions on the Sources of Extraterritoriality’.

⁶³⁹ R. Kolb, ‘L’article 103 de la Charte des Nations Unies’, 367 *Receuil des Cours de l’Académie de Droit International* (2013) 9-252, at 214-215.

conflict norm is that special laws prevail over general rules. This assertion is not mitigated by the fact that states may have the obligation to prosecute international crimes in accordance with the *aut dedere aut judicare* principle. In essence, such an obligation is different from the manner in which it can be fulfilled, and particularly the rules concerning states' jurisdictional powers. In other words, the obligation to prosecute and the jurisdictional power of states are distinct pieces of law by far, even though they stay in interaction. A state prosecutes because it has jurisdiction, whereas it possesses jurisdiction for the purpose of prosecution. But, the obligation to prosecute does not confer jurisdiction nor does it allow infringing the territorial limits of the state's own powers. Second, there is no limitation to the territorial authority *between* states without their express consent. In contemporary international law, such a limitation is exceptionally possible, thus not as a matter of general rule, by virtue of collective decisions such as those which the Security Council can take in accordance with Chapter VII of the UN Charter.

Even authors who problematically attempt to find a customary rule enabling the exercise of universal jurisdiction *in absentia* have confessed their difficulty to establish it, owing to the discrepancy of available national practices.⁶⁴⁰ The main legislation which is generally invoked as legal practice not requiring the presence of the accused in the territory of the prosecuting state consists of western laws. Yet, this consideration is simply illogical, because one cannot rely on the legislation of the same states in which laws and judicial procedures are contested, mainly by non-western countries. A similar remark equally applies to their existing case-law. All of them lack legal representativeness of the community of states and particularly those countries which are most interested from other parts of the world. Establishing a customary rule in this way could amount, if one borrows Achilles Skordas's expression, to creating a "hegemonic custom".⁶⁴¹ In addition, even the leading western states on the matter (Belgium, Spain and Switzerland)⁶⁴² have amended, except Germany,⁶⁴³ their previous legislation in

⁶⁴⁰ R. Rabinovitch, 'Universal Jurisdiction in *absentia*', 28 (2) *Fordham International Law Journal* (2004) 499-530, at 511 and 529; M. P. Scharf, 'Jurisdiction with Respect to Crime: Universal Jurisdiction and the Harvard Research', in J. P. Grant and J. C. Barker (eds), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (Library of Congress Cataloging-in-Publication Data, 2007) 275-306, at 282-283.

⁶⁴¹ A. Skordas, 'Hegemonic Custom?', in M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003) 317-347.

⁶⁴² See *Loi du 23 avril 2003 modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire [Law of 23 April 2003]*, *Moniteur Belge* (7 May 2003); *Loi du 5 août 2003 relative à la répression des violations graves du droit international humanitaire*

order to subordinate the exercise of any universal jurisdiction to the territorial presence of the accused person.⁶⁴⁴ This is not a setback in law but a necessary effort to make national laws be

[Law of 5 August 2003], *Moniteur Belge* (7 August 2003) ; *Loi du 22 mai 2006 modifiant certaines dispositions de la loi du 17 avril 1878 contenant le Titre préliminaire du Code de procédure pénale, ainsi qu'une disposition de la loi du 5 août 2003 relative aux violations graves de droit international humanitaire* [Law of 22 May 2006], *Moniteur Belge* (7 July 2006). According to the Law of 23 April 2003, any prosecution on the basis of universal jurisdiction, even when the offender is not present in Belgium, was subordinated to the request of the Federal Attorney General (*Procureur fédéral*). The latter became the gatekeeper of any private complaint that had no longer to be admitted outside his hands. More radical, the Law of 5 August 2003 came to require that the presumed perpetrator of a crime under universal jurisdiction be resident in Belgium (Article 14), except where the Kingdom has an obligation to exercise jurisdiction over the case on the basis of a treaty to which it is a party. In addition, the victim of the crime must have been resident in Belgium for at least three years at the time of commission, if she is not a Belgium citizen (passive personality) (Article 16). Pursuant to the Law of 22 May 2006, the decision of the Federal Attorney General not to prosecute under universal jurisdiction may be subject to a review by an appellate panel of judges (Article 2).

⁶⁴³Völkerstrafgesetzbuch (26 June 2002), para.1. Under this paragraph, the German Code of Crimes against International Law provides : 'Dieses Gesetz gilt für alle in ihm bezeichneten Straftaten gegen das Völkerrecht, für die in ihm bezeichneten Verbrechen auch dann, wenn die Tat im Ausland begangen wurde und keinen Bezug zum Inland aufweist' (this Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany). However, the Public Prosecutor enjoys a wide discretion not to prosecute. See German Code of Criminal Procedure (Strafprozeßordnung) (7 April 1987), Sections 153 (c) and 153 (f), <https://www.unodc.org/res/cld/document/deu/1987/the_german_code_of_criminal_procedure_html/german_criminal_procedure_code_as_of_2013.pdf> accessed 30 June 2016. Under Section 153 (f), the Public Prosecutor may not prosecute in particular if: '1. no German is suspected of having committed the crime; 2.the offence was not committed against a German; 3.no suspect is, or is expected to be, resident in Germany; 4.the offence is being prosecuted by an international court of justice or by a country on whose territory the offence was committed, a citizen of which is either suspected of the offence, or suffered injury as a result of the offence. The same shall apply if a foreigner who is accused of a criminal offence that was committed abroad is resident in Germany but the requirements of the first sentence, numbers 2 and 4, are met and transfer to an international court of justice or extradition to the prosecuting state is admissible and intended'. Anyway, Germany has not yet exercised universal jurisdiction *in absentia* because the Office of the Public Prosecutor is said to be keen to reject complaints submitted by victims of crimes under international law and NGOs. See International Federation of Human Rights Leagues, 'Extraterritorial Jurisdiction in the European Union: a Study of the Laws and Practice in the 27 Member States of the European Union' (December 2010), at 139 <http://www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf> accessed 2 July 2016.

⁶⁴⁴ A. Lagerwall, 'Que reste-t-il de la compétence universelle au regard de certaines évolutions législatives récentes ?', 55 *Annuaire français de droit international* (2009) 743-763, at 751-760 ; R. B. Baker, 'Universal

consistent with international law. Moreover, contrary to the Princeton Principles on Universal Jurisdiction, the Institute of International Law restated the same condition in a resolution of 2005: “apart from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or an aircraft which is registered under its laws, or other lawful forms of control over the alleged offender”.⁶⁴⁵ Here, the major difference with the Princeton Principles is the exclusion of criminal indictments *in absentia*, while other pre-trial proceedings which might require mutual assistance between states (thus consent to them) may be legal. This is so convincing that such proceedings are normally discreet and do not amount to prosecutions. The latter commence only when individual suspects are indicted or with the issuance of arrest warrants.

Four other documents evidence the solidity of this position. First, the same condition was indirectly mentioned by the Draft Convention on Jurisdiction with Respect to Crime, elaborated by Harvard University in 1935. In fact, the forum state could exercise universal jurisdiction provided that surrender of the alien has been offered to other states for prosecution and remains unaccepted; which implies that the accused should be on the territory of the prosecuting state.⁶⁴⁶ Second, it is clearly mentioned in the comment of the first of the

Jurisdiction and the Case of Belgium: A Critical Assessment’, 16 (1) *ILSA Journal of International and Comparative Law* (2009) 141-167, at 155-160.

⁶⁴⁵ Resolution on Universal Criminal Jurisdiction with regard to the Crime of Genocide, Crimes against Humanity and War Crimes, above note 281, para.3 (b).

⁶⁴⁶ Harvard Draft Convention on Jurisdiction with Respect to Crime (1935), Art.10. In relation to crimes other than piracy, counterfeiting, crimes against the security of the state and those committed by alien in connection with the function for which he has been employed by the prosecuting state or as a personnel of a ship or an aircraft possessing its nationality, this Article stipulates the exercise of universal jurisdiction in the following terms: ‘A State has jurisdiction with respect to any crime committed outside its territory by an alien, other than the crimes mentioned in Articles 6, 7, 8 and 9, as follows. (a) When committed in a place not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed, *if surrender of the alien for prosecution has been offered to such other State or States and the offer remains unaccepted*, and if prosecution is not barred by lapse of time under the law of the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed. (b) When committed in a place not subject to the authority of any State, if the act or omission which constitutes the crime is also an offence by the law of a State of which the alien is a national, *if surrender of the alien for prosecution has been offered to the State or States of which he is a national and the offer remains unaccepted*, and if prosecution is not barred by lapse of time under the law of a State of which the alien is a

fourteen Principles on the Effective Exercise of Universal Jurisdiction, developed by the Non-Governmental Organisation (NGO), Amnesty International, in 1999.⁶⁴⁷ Third, the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences, elaborated and proposed to African states by legal experts convened by the NGO, Africa Legal Aid, do not envisage the matter explicitly.⁶⁴⁸ However, one can argue that the presence of the accused on the territory of the prosecuting state is implied by the fact that the exercise of universal jurisdiction is referred to in connection with principle 19 concerning the duty to extradite/surrender or prosecute, whose implementation requires that the offender is found in the territory of the forum state.⁶⁴⁹ Fourth, the territorial presence of the accused is an explicit condition for the organisation of any trial (but not for the exercise of the prosecution authority prior to that trial, in accordance with the principle of sovereign equality of states) before a

national. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of a State of which the alien is a national. (c) When committed in a place not subject to the authority of any State, if the crime was committed to the injury of the State assuming jurisdiction, or of one of its nationals, or of a corporation or juristic person having its national character. (d) When committed in a place not subject to the authority of any State and the alien is not a national of any State'. Emphasis is mine.

⁶⁴⁷ Amnesty International, 'Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction (1 May 1999) AI Index: IOR 53/001/1999, at 4 <<https://www.amnesty.org/download/.../ior530011999en.pdf>> accessed 1 June 2016. The related first principle reads as follows: 'States should ensure that their national courts can exercise universal jurisdiction over genocide, crimes against humanity, war crimes, torture, extrajudicial executions and "disappearances"'. Paragraph one of its comments indicates: 'States should ensure that their national courts exercise universal jurisdiction on behalf of the international community over grave crimes under international law *when a person suspected of such crimes is found in their territories or jurisdiction*. If they do not do so, they should extradite the suspect to a state able and willing to do so or surrender the suspect to an international court with jurisdiction. When a state fails to fulfill this responsibility, other states should request the suspect's extradition and exercise universal jurisdiction'. Emphasis is mine.

⁶⁴⁸ Africa Legal Aid, 'The Cairo - Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective' (21 October 2002), <www.africalegalaid.com/.../4321_366498_pSBb_The_Cairo-_Aru.> accessed 1 June 2016.

⁶⁴⁹ See Principle 19 which reads as follows : 'A State in whose territory a gross human rights offence suspect is found shall prosecute him or her in good faith or extradite or surrender him or her to any other State or international tribunal willing and able to prosecute such suspect. The absence of an extradition treaty or other enabling legislation shall not bar the extradition, surrender or transfer of such a suspect to any State or international tribunal willing and able to prosecute the suspect'.

foreign court under the African Union Model National Law on Universal Jurisdiction over International Crimes, adopted by the Executive Council on 13 July 2012.⁶⁵⁰

According to Antonio Cassese, the requirement of the territorial presence of the accused person implies in practical terms that “in most of cases the suspect’s (or accused’s) presence may not be short (say for a brief holiday)”,⁶⁵¹ because “otherwise there would be no time to conduct preliminary criminal proceedings leading to the issuance of an indictment (however, the mere presence may suffice when criminal proceedings have already been instituted in another state, which request the extradition of the alleged offender)”.⁶⁵² It can be added that the territorial state which has already conducted an informative investigation (*in absentia*) or sent a request for extradition may prosecute if the accused is found (even occasionally) in its territory. If, by any chance, he escapes or otherwise leaves the forum state after the launch of the proceedings, the international legality of the prosecutions would not be affected. The permanent territorial presence is not required.⁶⁵³ Accordingly, it is unnecessary to require that the accused person be resident in the prosecuting state (physically or just by holding a domicile there). Such kind of imposition is more restrictive than what international law actually requires.

In any case, should the aforementioned condition not be satisfied, it is submitted that the following acts of the prosecuting state could be violations of another state sovereignty: i) the lodging of an indictment act with a foreign court having jurisdiction and declared admissible; ii) the issuance of an arrest warrant and its international circulation; iii) the delivery of summons to appear before a foreign court, particularly if it is accompanied by an act of constraint in the event of default to appear; iv) the conduct of prosecutions/trials *in absentia*. In line with these restrictions, it is also submitted that any request for extradition should be free of an arrest warrant, because it is the power of the state where the accused person is present or resides to decide on his arrest as well as to provide an answer to the requesting state. These violations would encompass aggravated circumstances if the accused person stays in his home country or, *a fortiori*, if he is a state official.

⁶⁵⁰ African Union Model National Law on Universal Jurisdiction over International Crimes (13 July 2012), Article 4 (a).

⁶⁵¹ Cassese, above note 604, at 593

⁶⁵² *Ibid.*

⁶⁵³ F. Lafontaine, ‘Universal Jurisdiction: the Realistic Utopia’, 10 *Journal of International Criminal Justice* (2012)1277-1302, at 1285.

2.1.1.2. The Subjection of State Officials to Foreign Criminal Jurisdiction

It is a fact that the subjection of state's own officials, former or incumbent, to the criminal jurisdiction of a foreign country, which has no traditional connection with the crime (place of commission, active or passive personality), is a source of contestations of the principle of universal jurisdiction. In this regard, international criminal law seems to evolve in a reverse motion to the classic principle which requires that a sovereign state cannot be subjected to the jurisdiction of another state for international crimes. The ICJ recalled this rule in the dispute which opposed Germany to Italy concerning alleged German crimes related to the Second World War between 1943 and 1945 for which civil suits seeking reparation for injuries suffered by victims were lodged with Italian courts.⁶⁵⁴ As already indicated, the state reluctance to this evolution is aggravated when state officials are prosecuted abroad while they reside in their home country. Many states perceive this as a serious danger to their sovereignty (a), especially in the African context (b).

a) The Perception of a Serious Danger in the Relationship between Independent States

Prosecuting former or incumbent state officials abroad, before foreign courts having no proximate connection with the crime, is a controversial issue. Most of the criticisms reflect the way international politics affect international criminal law and justice.⁶⁵⁵ In 1948, when the Genocide Convention was adopted, it was by far the main argument in support of the rejection of the principle of universal jurisdiction, because the majority of negotiating states were of the view that:

(...) universal repression was against the traditional principles of international law and that it would lead national courts to judge the acts of foreign Governments, as genocide generally involved the responsibility of the State on the territory of which the crime was committed. Universal repression might therefore create dangerous international tensions.⁶⁵⁶

⁶⁵⁴ *Jurisdictional Immunities of the State*, above note 260, paras.37, 107 and 139 (1).

⁶⁵⁵ See Q. Trinh, H. Bannister and M. O'Brien, 'The Principle of Universal Jurisdiction', Research Paper of Mallesons Stephen Jaques (Humanitarian Law Perspectives and Australian Red Cross, 2010), at 11. See also M. Mutua, 'From Nuremberg to the Rwanda Tribunal: Justice or Retribution?', 6 *Buffalo Human Rights Law Review* (2000)77-91, at 79-82; R. Kolb, 'Les influences du droit international pénal sur le droit international public', 12 *Annuaire français de relations internationales* (2011)149-169.

⁶⁵⁶ United Nations, above note 334, at 33.

More interesting, during the discussion in the Sixth Committee of the UN General Assembly, Egypt rejected the principle because “it would be very dangerous if statesmen could be tried by courts of a country with a political ideology different from that of their own country”.⁶⁵⁷ The dangerousness perceived by Egypt related to the prevailing context of international relations at that time. The Cold War had just begun a year before in 1947,⁶⁵⁸ causing the division of the world into two major ideological blocs, the West and the East, headed respectively by the USA and the Soviet Union. In these circumstances, it seems that creating an international tribunal to try acts of genocide was perceived to be appropriate as it had appeared to be more compatible with the obligation to respect states’ sovereign equality. Even those hesitating countries which would have wished no conventional reference to such a tribunal were not opposed to the idea of an international criminal jurisdiction, but they indicated that “they were unable to vote for a provision which did not express a reality but only a hope”.⁶⁵⁹

It is curious to observe that, while African countries which were still under colonial domination did not participate in the UN negotiations of the Genocide Convention, those states which had opposed the principle of universal jurisdiction at that time, particularly western countries, have become most motivated to exercise it. There is in fact a trend towards a “hegemonistic jurisdiction exercised mainly by western powers against persons from developing countries”,⁶⁶⁰ to which it is imposed a certain conception of democracy, justice and the rule of law.⁶⁶¹

Yet, the dangerousness of universal jurisdiction, as perceived in 1948, has not totally disappeared. To be true, the Cold War is over. But, the world remains legally, politically, economically, socially and culturally divided. The cliché between western countries, the Arab states, the rising powers (Brazil, Russia, India, China and South Africa) and other states from the global south still persists. In this context, exercising universal jurisdiction over crimes

⁶⁵⁷ Thalmann, above note 617, at 235.

⁶⁵⁸ See M. Gounelle, *Relations internationales : mémentos* (6th edn., Paris : Dalloz, 2004), at 15 ; P. M. Defarges, *Relations internationales : questions mondiales* (Paris : Seuil, 1994), at 13.

⁶⁵⁹ United Nations, above note 334, at 41. See also Graefrath, above note 618, at 69.

⁶⁶⁰ M.C. Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, 42 *Virginia Journal of International Law* (2001) 81-162, at 155.

⁶⁶¹ See J. Verhoeven, ‘Vers un ordre répressif universel ? Quelques observations’, 45 *Annuaire français de droit international* (1999) 55-71, at 63.

allegedly committed by foreign state officials risks substituting “the tyranny of judges for that of governments”⁶⁶² which may use the legitimacy of the law to deal with political enemies or conflicts.⁶⁶³ The exercise of universal jurisdiction in this context can create new frictions and disputes while it ironically aims to resolve past ones.⁶⁶⁴ In addition, it offers the opportunity to prosecuting states, with different cultural values or conflicting perception on the society where the alleged crimes have been committed or the state of nationality of the offender, to judicially write the history of foreign nations. If justice is politicised, fears of falsification of historical facts and errors of any kind cannot be totally excluded.

Worse, there is a risk of selective justice. First of all, the forum state would be inclined to prosecuting foreign personalities and never its own officials (involved in the same situation) or those of friend states. For example, concerning the Spanish indictment of high-ranking Rwandan officials,⁶⁶⁵ notably for presumed crimes committed in relation to the circumstances of the genocide of 1994, nothing was initiated against the French officials who were themselves suspected by Rwanda of having been implicated in that criminal event. Likewise, in April 2000, when Belgium decided to indict the DRC’s Minister of foreign affairs, Abdoulaye Yerodia Ndomasi, it was questioned why the extermination of millions of Congolese in the territory under foreign occupation by Rwanda, Burundi and Uganda since August 1998 was of no concern to the Belgian authorities.⁶⁶⁶ All in all, this selectivity amounts to what Alan Morton Dershowitz has called “the hypocrisy of universal jurisdiction”,⁶⁶⁷ in reaction to the 2009 attempts to arrest and to prosecute Israeli officials in Great Britain.⁶⁶⁸ The declared aim would normally be to ensure justice, whereas indictments

⁶⁶² H. A. Kissinger, ‘The Pitfalls of Universal Jurisdiction’, *Foreign Affairs* (July-August 2001), <<https://www.foreignaffairs.com/articles/2001-07-01/pitfalls-universal-jurisdiction>>, accessed on 5 June 2015.

⁶⁶³ *Ibid.* See also Trinh, Bannister and O’Brien, above note 655, at 12.

⁶⁶⁴ D. Morrison and J. R. Weiner, ‘Curbing the Manipulation of Universal Jurisdiction’, Jerusalem Center for Public Affairs (Jerusalem: 2010), at 6.

⁶⁶⁵ See Commentator, ‘The Spanish Indictment of High-Ranking Rwandan Officials’, 6 *Journal of International Criminal Justice* (2008) 1003-1011.

⁶⁶⁶ Separate Opinion of Judge *ad hoc* Bula-Bula, above note 629, para.82.

⁶⁶⁷ A. M. Dershowitz, ‘The Hypocrisy of “Universal Jurisdiction”: Why Are Israel Officials Arrested While Hamas’ Leaders Are Honored?’, *Frontpage Mag* (6 Octobre 2009), <<http://www.gatestoneinstitute.org/848/the-hypocrisy-of-universal-jurisdiction>> accessed 5 June 2015.

⁶⁶⁸ *Ibid.* The authors writes :’ Last week, Israeli Defence Minister Ehud Barak -the former Dovish Prime Minister who offered the Palestinians a state on all of the Gaza Strip, 95% of the West Bank and a capital in East Jerusalem- was arrested when he set foot in Great Britain. (He was quickly released on grounds of diplomatic

might hide the intent to harass foreign leaders or governments. NGO are put into contribution, while the plaintiffs in the proceedings may even be opponents in exile in the forum state.⁶⁶⁹ This criticism is thus radical owing to the African conception of state sovereignty.

b) The Shield of the African Conception of Horizontal State Sovereignty

Sovereignty is a concept which has a specific connotation for African states in their relation with the rest of the world, and particularly former European colonial powers. Rwanda is the leading country to have strongly relied on this conception when President Paul Kagame declared in May 2008:

(...) lately, some in the more powerful parts of the world have given themselves the right to extend their national jurisdiction to indict weaker nations. This is total disregard of international justice and order. Where does this right come from? Would the reverse apply – such that a judgment from less powerful nations indicts those from the more powerful? This is mere arrogance which simply has to be resisted. (...) We envisage a world community in which sovereign nations govern themselves, and where the dignity of a nation's inhabitants is paramount whether a country is powerful or not.⁶⁷⁰

The AU-EU Expert Group on the Principle of Universal Jurisdiction restated the same concern of the African side by indicating that “indictments issued by European states against officials of African states have the effect of subjecting the latter to the jurisdiction of European states, contrary to the sovereign equality and independence of states”⁶⁷¹ and that “for African states, this evokes memories of colonialism”.⁶⁷² These indictments would amount

immunity because he was an official visitor.) And now Moshe Yaalon, an Israeli government minister and former Army Chief of Staff, was forced to cancel a trip he was scheduled to make in London on behalf of a charity, for fear that he too would be arrested’.

⁶⁶⁹ It was the case in the Belgian proceedings against the Congolese Minister of foreign affairs, Abdoulaye Yerodia Ndombasi. See Separate Opinion of Judge *ad hoc* Bula-Bula, above note 629, para.23.

⁶⁷⁰ Republic of Rwanda, ‘Paul Kagame’s Remarks at the “Facing Tomorrow Conference”, Jerusalem (Israel), 13 May 2008
<http://presidency.gov.rw/index.php?id=23&tx_ttnews%5Btt_news%5D=10&cHash=950c52f08187b85fe4ab857981ca4b73> accessed 20 June 2016.

⁶⁷¹ African Union and European Union, ‘Report of the AU-EU Expert Group on the Principle of Universal Jurisdiction’ (16 April 2009), 8672/1/09 REV 1, para.37.

⁶⁷² *Ibid.*

to an attempt to re-colonise Africa through the alibi of pursuing justice “under the guise of judicial independence and universal jurisdiction”.⁶⁷³

Two concepts are aligned with the African discourse on state sovereignty: colonialism and neo-colonialism. They are conceived as forms of imperialism and must be understood in the light of their historical, ideological and political contexts of inception. As Kenneth Omeje has pointed out, the term imperialism involves “forms of subjugation (including the actual exercise of behavioural influence) of one people or a country by another”.⁶⁷⁴ It derives from the concept of empire. In his words, “empires (...) stem from significant power asymmetries among political units, and this inequality consequently enables the domination of, and control by one party, the strong (metropole or core), over the weak satellites (periphery)”.⁶⁷⁵ Against this backdrop, colonialism, which was preceded by ten centuries of slavery and slave trade against Africans (from the ninth to the nineteenth),⁶⁷⁶ was at the climax between the nineteenth and twentieth century. It is generally associated with the following topical issues⁶⁷⁷: the reliance on the instrumentality and arrogance of organised violence; the exercise of (colonial) sovereignty with impunity for crimes committed; the abuse of the law and sovereign authority for private ends; the exacerbation of racial and cultural discrimination between peoples; and the fiction of humanitarian compassion and benevolence in support of the ideology of civilising the colonised peoples.⁶⁷⁸ Neocolonialism is then invoked to mean “a new form of colonialism after the end of the original form”.⁶⁷⁹ According to Kwame N’krumah, the first President of the Republic of Ghana, it is indeed “the last stage of imperialism”.⁶⁸⁰ It encompasses different aspects of domination, of political, legal, economic

⁶⁷³ J. Geneuss, ‘Universal Jurisdiction Reloaded? Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU–EU Expert Report on the Principle of Universal Jurisdiction’, 7 *Journal of International Criminal Justice* (2009) 945–962, at 946.

⁶⁷⁴ K. Omeje, ‘Debating Postcoloniality in Africa’, in K. Omeje (ed.), *The Crises of Postcoloniality in Africa* (Dakar: CODESRIA, 2015) 1-27, at 8.

⁶⁷⁵ *Ibid.*

⁶⁷⁶ E. M’Bokolo, ‘A Hundred and Fifty Years after France Abolished Slavery: The Impact of Slave Trade on Africa’, *Le Monde Diplomatique* (April 1998), <<http://mondediplo.com/1998/04/02africa>> accessed 22 June 2016.

⁶⁷⁷ Omeje, above note 674, at 10-15.

⁶⁷⁸ See A. Mbembe, *On the Postcolony* (California: University of California Press, 2001), at 32-35.

⁶⁷⁹ Omeje, above note 674, at 2-3.

⁶⁸⁰ K. Nkrumah, *Neocolonialism: the Last Stage of Imperialism* (London: Panaf Books, 1971).

and socio-cultural nature.⁶⁸¹ Neocolonialism is thus perceived as a way to perpetuate the colonial logic, to reinforce its legacy or the asymmetrical relationship between former colonial powers and newly (*formally*) independent states.⁶⁸² In this regard, it is believed that “the imperialists have shifted their focus from direct to indirect rule”.⁶⁸³

This nexus between sovereignty, colonialism and neo-colonialism has been stressed in various African legal instruments. For example, the Charter of the Union of African States, which is the first Pan-African intergovernmental organisation, founded by Ghana, Guinea (Conakry) and Mali in April 1961, assigned to the community the objective of consolidating the independence of member states and eliminating imperialism, colonialism and neocolonialism from the continent.⁶⁸⁴ The OAU Charter of 25 May 1963 also aimed “to eradicate all forms of colonialism from Africa”.⁶⁸⁵ In addition, it proclaimed the determination of member states “to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity (...), and to fight against neocolonialism in all its forms”.⁶⁸⁶ The AU recognises the significance of these objectives on the bases of which the Constitutive Act of 11 July 2000 was adopted.⁶⁸⁷

This nexus does not imply that African states view their sovereignty as absolute. Sovereignty is not and has never been a supreme power.⁶⁸⁸ Classically, international law tempers the exercise of sovereign rights in two manners. First, there is the notion of the limitation of state sovereignty. This notion applies when the state, keeping the entirety of its rights or powers,

⁶⁸¹ See Boutros-Ghali, above note 157, at 78-87.

⁶⁸² Omeje, above note 674, at 4.

⁶⁸³ A. Azikiwe, ‘The West's Neocolonial Adventure: Africa and the Struggle against Imperialism’, Pan-African News Wire and Global Research (1 March 2014), <<http://www.globalresearch.ca/the-wests-neocolonial-adventure-africa-and-the-struggle-against-imperialism/5371470>> accessed 22 June 2016.

⁶⁸⁴ Charter of the Union of African States (29 April 1961), Article 3. See Organisation Internationale de la Francophonie, *Le mouvement panafricain au vingtième siècle : recueil des textes* (Dakar : 2004), at 334.

⁶⁸⁵ OAU Charter, Article 2 (1) (d).

⁶⁸⁶ *Ibid.*, Preamble, para.7.

⁶⁸⁷ AU Constitutive Act, Preamble, paras. 2, 3 and 5.

⁶⁸⁸ R.P. Anand, ‘Sovereign Equality of States in International Law’, 197 *Recueil des Cours de l'Académie de Droit International* (1986)9-228; J. Combacau, ‘Pas une puissance, une liberté: la souveraineté internationale de l'Etat’, 67 *Pouvoirs* (1993) 47-58, at 50 ; L. Bal, ‘Le mythe de la souveraineté en droit international: la souveraineté des Etats à l'épreuve des mutations de l'ordre juridique international’ (PhD Thesis, Université de Strasbourg 2012).

loses the freedom to act as it desires because international law requires them to be exercised in a certain way.⁶⁸⁹ Second, there may be an abandonment of sovereignty in favour of a foreign state or the international community. There is an abandonment of sovereignty if the state, by virtue of a treaty, has conceded to any of the latter actors the power to exercise a part of its sovereign rights or powers in order to achieve common goods.⁶⁹⁰ In this case, the state becomes incompetent to act in favour of the jurisdiction of the external actor who has benefited from that concession of authority. Total abandonment of sovereignty is not conceivable, except in the context of the finalisation of a political process of community integration,⁶⁹¹ since it amounts to the demise of the state entity. In line with this conception, the PCIJ declined to see in the conclusion by a state of any treaty an abandonment of its sovereignty.⁶⁹² But, no doubt that it can limit its exercise.⁶⁹³ The issue is best illustrated through the conventionalisation of the principle of universal jurisdiction. There is not in it any abandonment of sovereignty, simply because of the consubstantiality of the notion with the theory of competing criminal jurisdictions. To be clear, at least in its multilateral dimension, the principle involves the idea of “shared sovereignty”,⁶⁹⁴ which is a specific restriction upon the exercise of sovereign powers, according to which each country keeps its right to contribute to the effective repression of international crimes committed abroad against aliens under the legal limits of the jurisdiction which is recognised to another state.

Such a contribution might be unequal. The reason is that the corollary of state sovereignty, the principle of equality, is a fiction. In fact, states are unequal. This inequality in turn impacts on the exercise of their powers. As a consequence, powerful states would likely contribute more to law enforcement than weak countries. The exercise of universal jurisdiction obeys the same logic. It is a difficult mechanism to handle by weak countries owing to its heavy diplomatic

⁶⁸⁹ *Nationality Decrees Issued in Tunis and Morocco*, above note 290, at 23. See also Combacau and Sur, above note 92, at 263; Ulimubenshi, above note 253, at 32.

⁶⁹⁰ Kahombo, above note 190, at 109.

⁶⁹¹ This is the case of the African continent. See AU Non-Aggression and Common Defence Pact, Article 4 (d). It provides: ‘As part of the vision of building a strong and united Africa, State Parties undertake to establish an African Army at the final stage of the political and economic integration of the continent (...)’.

⁶⁹² *SS Wimbledon (United Kingdom, France, Italy, Japan v. Germany)*, Judgment of 27 August 1923, P.C.I.J., Series A. –No.1, at 25.

⁶⁹³ *Ibid.*

⁶⁹⁴ See S. D. Krasner, ‘Building Democracy after Conflict: the Case for Shared Sovereignty’, 16 (1) *Journal of Democracy* (2005) 69-83, at 70.

costs as well as the practical difficulties and financial implications to sustain prosecutions by a distant state. As a commentator has noted, “every legal system contains rules perpetuating actual inequalities, and the international legal system is no exception”.⁶⁹⁵ Therefore, the concern over the power of western states to prosecute African officials should not be overestimated. Theoretically, universal jurisdiction is even a reciprocal and shared prerogative.

However, the matter remains one of serious concern at the political level. It looks as if African states would be palatable to limitations of their sovereignty or to its sharing with the international community, beginning by the regional community of states and peoples, rather than with non-African countries, in particular former colonial powers. In this regard, June Wanjiru Gichuki argues that “the fact that European countries used humanitarian grounds as a reason for colonising African states has made African states inherently wary of external allegations of munificence of humanitarian protection”.⁶⁹⁶ In the same vein, Jonathan Samkange suggests that “the exploitation and degradation that resulted from African societies losing sovereignty and control to a foreign colonial entity, has prompted post-colonial states in Africa to be fiercely attached to international rights, protections and recognition of that regained sovereignty”.⁶⁹⁷ There is a sense that the independence that they have fought for tends to be maliciously re-taken back through the means of legal devices. Yet, René-Jean Dupuy has warned that defending the primacy of international law should not let forget that sovereignty is a historic notion and that history cannot be overturned just through logical (legal) arguments.⁶⁹⁸ In the words of Charles C. Jalloh, “it is precisely the history of colonial domination between European and non-European states that makes it difficult, if not

⁶⁹⁵ M. Cosnard, ‘Sovereign Equality –the Wimbledon Sails on’, in M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003) 117-134, at 121.

⁶⁹⁶ J.W. Gichuki, ‘African States Sovereignty and the International Criminal Court: Case Studies in Analytical Context’, 1 (4) *African Journal of Democracy and Governance (AJDG)* (2014) 103-120, at 107.

⁶⁹⁷ *Ibid.*

⁶⁹⁸ R.-J. Dupuy, *Le droit international* (11th edn., Paris : Presses universitaires de France, 2001), at 4. See also F. Aumond, ‘Unité et diversité : réflexion sur l’œuvre de Jean-René Dupuy (1918-1997)’ (PhD Thesis, Université Angers 2010), at 57.

impossible, for the former colonists to render credible justice in relation to African cases- or to be perceived as doing so".⁶⁹⁹

Thus, it is better to become proactive and think about the best way to regulate the exercise of universal jurisdiction in a manner that would reduce, if not eradicate, the risks of political tensions between states in different regions. There is a need to articulate legal requirements common to all states and to harmonise their legislation. In particular, proximate prosecutions should be given priority, while farther external judicial interventions may remain very exceptional. Otherwise, persistent contestations would render the principle of universal jurisdiction ineffective or, at least, inefficient. The specific context of the African objection against the European judicial activism and interventions in Africa is a striking illustration.

2.1.2. The Contestation of the European Judicial Interventions in Africa

The multiplication of indictments against African leaders in European states resulted in a dispute with African countries. Both regional organisations, the EU and the AU, also stepped into the matter. The dialogue between the two parties did not cool down the tension. It is to the United Nations and its bodies that the African side referred the issue, either in order to secure judicial decisions on the matter before the ICJ or to request the UN General Assembly to search to find a common understanding of the principle of universal jurisdiction which might be acceptable and applicable for all. This involvement of almost the entire international community in the matter evidences the gravity of the African contestation. At the basis of it, there is a sort of paradox opposing narratives of justice to those of impunity (2.1.2.1), while the African side persists that some European states have been guilty of a blatant abusive application of the principle of universal jurisdiction which deserves to be specifically assessed (2.1.2.2).

2.1.2.1. The Paradox Characterising the Dispute

After the endurance by Africa of the colonial time, which was initially justified by international law through the idea of civilising other nations,⁷⁰⁰ the European judicial

⁶⁹⁹ C. C. Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', 21 *Criminal Law Forum* (2010) 1-65, at 62.

⁷⁰⁰ M. Koskeniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2004); M. Craven, 'Colonialism and Domination', in B. Fassbender

interventions in the continent appear as a repetition of the history. Again, unilateral interventions are based on the moral and humanitarian idea of justice for Africans, although the sores of slave trade and colonialism are not yet completely healed. These interventions also bear a paradox: the push for accountability through the indictments of African leaders in Europe (a) radically diverges from and may counter the culture of impunity of heinous crimes that offenders are said to enjoy within African countries (b).

a) The Indictments of African Leaders in European States

The increase in the number of indictments and prosecutions against Africans (in general) in Europe requires some preliminary observations (i), before invoking four main examples in order to highlight the scope of the matter, namely from France (ii), Belgium and Spain (iii) .

i) The Preliminary Observations

Before the end of the Cold War, cases brought before domestic courts on the basis of universal jurisdiction were very scarce. Until the case of Pinochet, the former Chilean President, whose extradition was requested by Spain to the United Kingdom for acts of torture in 1998, the reference to prosecutions under universal jurisdiction involved Nazi criminals. The outstanding example is the case of Adolph Eichmann, who was brought to trial under Israel's Nazi Collaborators (Punishment) Law of 1950.⁷⁰¹ He was convicted and sentenced by the District Court of Jerusalem to the death penalty for genocide, war crimes and crimes against humanity 11 December 1961.⁷⁰² Israel's Supreme Court of Justice upheld his judgment on 29 May 1962.⁷⁰³ However, the practical revival of universal jurisdiction was a post Cold War event and coincided with the creation of *ad hoc* tribunals and the ICC. Since the 1990s, criminal proceedings have relatively increased up to several hundreds of cases in

and A. Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012)863-889.

⁷⁰¹ See C. Oliver, 'The Attorney-General of the Government of Israel v. Eichmann', 56 (3) *American Journal of International Law* (1962)805-845.

⁷⁰² *Ibid.*

⁷⁰³ Amnesty International, 'Eichmann Supreme Court Judgment: 50 Years on, its Significance Today' (June 2012) IOR 53/013/2012, at 6-7 <<https://www.amnesty.org/download/.../24000/ior530132012en.pdf>> accessed 3 July 2016.

Europe.⁷⁰⁴ The initial proceedings involving Africans related to the Rwandan genocide of 1994. Belgium is the first European country to have dealt with the matter under its Law of 1993. It organised the so-called *Butare Four Case*, in which the four accused persons (Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango and Julienne Mukabutera) were convicted on 8 June 2001 by the *Cour d'assises de Bruxelles*, and sentenced for war crimes perpetrated in the Rwandan prefecture of Butare.⁷⁰⁵ Other cases in the same situation were initiated in countries such as France, Germany and the Netherland.⁷⁰⁶

All these proceedings relating to the Rwandan genocide did not provoke contestations from African states and the AU. It is also the case of the German prosecutions of crimes committed by the Rwandan rebellion, the *Forces démocratique de liberation du Rwanda* (FDLR), active in the Kivu provinces in the eastern part of the DRC. In particular, on 28 September 2015, the Higher Regional Court in Stuttgart (*Oberlandsgericht Stuttgart*) sentenced two political leaders of the FDLR, Ignace Murwanashyaka and Straton Musoni, who had their residence in Germany, respectively to thirteen and eight years of imprisonment. Ignace Murwanashyaka was convicted of aiding the commission of five war crimes while Straton Musoni was

⁷⁰⁴ This was an assessment made in 2010 by Wolfgang Kaleck, the General Secretary of the European Centre for Constitutional and Human Rights (ECCHR), during a conference held by International Federation of Human Rights Leagues in Brussels, from 9 to 11 November 2009. He also confessed that it was quite impossible to give a precise number of all the proceedings initiated in European states. See International Federation of Human Rights Leagues, 'Les stratégies judiciaires dans les procédures en compétence universelle : la place des victimes et des témoins' (November 2010), at 7 <http://www.redress.org/downloads/publications/UJ_Conference_Report_Final_Nov_2010_FRENCH.pdf> accessed 3 July 2016.

⁷⁰⁵ L. Reydam, 'Belgium's First Application of Universal Jurisdiction: the Butare Four Case', 1 (2) *Journal of International Criminal Justice* (2003) 428-436.

⁷⁰⁶ See C. Ryngaert, 'La compétence universelle sur le génocide et la torture en temps de guerre devant les tribunaux néerlandais : une évaluation des affaires afghanes et rwandaises (2007)', 2 (2) *The Hague Justice Journal* (2007) 14-40 ; A. Picard, 'Etude des arrêts et décisions de l'Oberlandesgericht de Francfort (18 février 2014) et de la cour d'assises de Paris (14 mars 2014) concernant les affaires Rwabukombe et Simbikangwa : comparaison des régimes allemand et français de répression du génocide', *Les Blogs pédagogiques de l'Université Paris Ouest* (2014), <<http://blogs.u-paris10.fr/content/etude-des-arr%C3%AAts-et-d%C3%A9cisions-de-loberlandesgericht-de-francfort-18-f%C3%A9vrier-2014-et-de-la-co>> accessed 3 July 2017.

sentenced for the leadership of a foreign terrorist group under the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*) of 2002.⁷⁰⁷

The main reason for the absence of contestation of the European proceedings, including the German prosecutions against the FDLR's leadership, is double. First, it is apparent that these proceedings were either acquiesced or demanded by Rwanda, the state of nationality of the accused. In the same vein, the DRC's government declared that it was satisfied with the punishment of the two leaders of the FDLR in Germany.⁷⁰⁸ Secondly, these proceedings resulted from a strong international demand. On the one hand, it is well known that the United Nations had several times and explicitly called for the prosecutions of crimes committed by armed groups in the DRC, in particular those perpetrated by the FDLR forces.⁷⁰⁹ On the other

⁷⁰⁷ See European Centre for Constitutional and Human Rights (ECCHR), 'Universal Jurisdiction in Germany? The Congo War Crimes Trial: First Case under the Code of Crimes against International Law –Executive Summary' (8 June 2016), at 13 <<https://www.ecchr.eu/en/documents/publications/ecchr-publications/studies-and-reports.html>> accessed 4 July 2016.

⁷⁰⁸ Radio Okapi, 'La condamnation de deux chefs des FDLR est « un signal fort », selon HRW' (29 September 2015), <<http://www.radiookapi.net/2015/09/29/actualite/securite/la-condamnation-de-deux-chefs-des-fdlr-est-un-signal-fort-selon-hrw>> accessed 4 July 2016.

⁷⁰⁹ This is the case for those crimes for which the two leaders of the FDLR were prosecuted, perpetrated between January 2008 and November 2009. It must be noted that this period was marked by military operations (the so-called Umoja Wetu operations) launched in December 2008 upon a secret bilateral agreement between the DRC and Rwanda, against the FDRL and in exchange of the dismantlement of the Rwandan backed rebels of the *Congrès national pour la défense du peuple* (CNDP), led by Laurent Nkunda. See UN Security Council, 'Final Report of the Group of Experts on the Democratic Republic of the Congo' (23 November 2009) S/2009/603, paras.345-346; SC Res.1896 (2009), 7 December 2009, preamble, para.8; M. Wetsh'okonda, 'L'Accord de Goma du 5 décembre 2008 relatif à l'opération conjointe relative au désarmement des « réfugiés » hutus à l'épreuve de la Constitution du 18 février 2006', *La Constitution en Afrique* (14 February 2009) <<http://la-constitution-en-afrique.org/article-27931972.html>> accessed 4 July 2016. The report of the UN Group of Experts 'documented a total of 1,199 human rights violations committed by elements of FDLR between February and October 2009' and made the recommendation that : '(...)the political and military leadership of FDLR should be held responsible for having ordered attacks on civilians. This conclusion has been drawn from direct testimonies, including testimonies of demobilized FDLR elements, who have consistently reported that Ignace Murwanashyaka was in direct contact with the FDLR military leadership on the ground. This conclusion has been corroborated from telephone log analysis, testimony from an active FDLR radio operator and from the FDLR legal statute (...)'. On its side, the Security Council took cognizance of the report and continued '*noting with great concern* the persistence of human rights and humanitarian law violations against civilians in the eastern part of the Democratic Republic of the Congo, including the killing and displacement of significant numbers of civilians, the recruitment and use of child soldiers, and widespread sexual violence, *stressing* that the

hand, the ICTR which was created with primacy jurisdiction over national tribunals to try persons who bore the greatest responsibility for the Rwandan genocide could not prosecute all the offenders.

Moreover, also supported by the OAU and the AU, the ICTR favoured some prosecutions by domestic courts on the basis of the principle of universal jurisdiction. In this regard, Harmen Van der Wilt writes:

Has the ICTR officially endorsed these prosecutions on the basis of universal jurisdiction or even orchestrated them? In some cases - the Swiss prosecution of *Fulgence Niyonteze* and the Canadian case *Mugesera* - no interference on the part of the ICTR took place. In other cases - *Augustin Ngirabatware* in Germany and *Laurent Bucyibaruta* and *Wenceslas Munyeshaka* in France - the suspects were arrested pursuant to international arrest warrants issued by the ICTR. In the French cases, the suspects were originally supposed to be transferred to the ICTR in order to face criminal proceedings, but the Tribunal ultimately decided to transfer the cases to French courts. (...) Belgium had deferred proceedings against a number of suspects at the request of the ICTR, while it had pursued prosecution of several others. In the case of *Mpambara*, the ICTR Prosecutor officially notified the Dutch Prosecutor's Office that he did not intend to prosecute *Mpambara* before the ICTR and that the ICTR would thus not exercise its primary rights.⁷¹⁰

It follows that the African contestations of indictments and prosecutions of African leaders in European countries would likely occur in two cases. First, contestations could be due to the accused's capacity as incumbent state officials at the time of prosecutions. This also seems to be the basic AU understanding of the matter when it expressed, in July 2009, "its deep concern that indictments have continued to be issued in some European States against African leaders and personalities".⁷¹¹ Second, contestations were possible because of the lack of support for those proceedings by the states of nationality of the indictees or when prosecutions were not strongly backed by the international community, including states and

perpetrators must be brought to justice, *reiterating* its firm condemnation of all violations of human rights and international humanitarian law in the country (...).

⁷¹⁰ H. Van der Wilt, 'Universal Jurisdiction under Attack: an Assessment of African Misgivings towards International Criminal Justice as Administered by Western States', 9 *Journal of International Criminal Justice* (2011) 1043-1066, at 1059-1060. See also J. Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity', 20 *Criminal Law Forum* (2009) 1-51, at 33; L. van den Herik, 'A Quest for Jurisdiction and an Appropriate Definition of Crime: Mpambara before the Dutch Courts', 7 *Journal of International Criminal Justice* (2009) 1117-1131, at 1118; Reydams, above note 705, at 430.

⁷¹¹ Assembly/AU/Dec.243(XIII) Rev.1, above note 603, para.4.

intergovernmental organisations at the regional level. Four examples may illustrate these assertions.

ii) The French Proceedings

It is not true that the dispute between European and African states concerning the application of the principle of universal jurisdiction dates back to the protests by Rwanda against the indictment of its 40 statesmen in Spain in 2008.⁷¹² In fact, the very first indictment was initiated in France against the Mauritanian captain, Ely Ould Dah, member of the intelligence military service. While attending an internship in France, he was accused of having ordered or directly participated in acts of torture and barbarism between 1990 and 1991 in relation to a supposed *coup d'état* fomented by black officers of the national army.⁷¹³ The French universal jurisdiction to try acts of torture was founded on the UN torture Convention, in spite of the Mauritanian Amnesty Law of 14 June 1993 which allegedly covered the crimes for which the accused was prosecuted.⁷¹⁴ The main reason for ignoring this amnesty in the French proceedings was that it could not be opposed to France in a manner that the principle of universal competence became ineffective on the French territory.⁷¹⁵ In a later procedure before the European Court of Human Rights, Ely Ould Dah raised the same issue of amnesty without success. The Court, having envisaged the relevance of an amnesty law only after trial and judgment, excluded it when it hindered the suspect from facing justice. *In specie*, the Court recalled that such amnesty was incompatible with the state obligation to investigate and prosecute the crime of torture and could not be opposed to a foreign country. The main paragraph of the Court's decision reads as follows:

It has to be said that in the present case the Mauritanian amnesty law was enacted not after the applicant had been tried and convicted, but specifically with a view to preventing him from being prosecuted. Admittedly, the possibility of a conflict arising between, on the one hand, the need to prosecute criminals and, on the other hand, a country's determination to promote

⁷¹² See Commentator, above note 665, at 1003-1004.

⁷¹³ See International Federation of Human Rights Leagues, 'Mauritanie : affaire Ely Ould Dah -Ely Ould Dah condamné ! Première condamnation pour torture en France fondée sur le mécanisme de compétence universelle' (November 2005), at 6 <https://www.fidh.org/IMG/pdf/GAJ_Ely_Ould_Dah_nov2005_OK.pdf> accessed 5 July 2016.

⁷¹⁴ *Ibid.*, at 9 and 11.

⁷¹⁵ *Cass. Crim.* 23 October 2002, Bull. Crim. n° 195, 2002, at 725 <<https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007070167>> accessed 5 July 2016.

reconciliation in society cannot, generally speaking, be ruled out. In any event, no reconciliation process of this type has been put in place in Mauritania. However, as the Court has already observed, the prohibition of torture occupies a prominent place in all international instruments relating to the protection of human rights and enshrines one of the basic values of democratic societies. The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law. In addition, the Court notes that international law does not preclude a person who has benefited from an amnesty before being tried in his or her originating State from being tried by another State, as can be seen for example from Article 17 of the Statute of the International Criminal Court, which does not list this situation among the grounds for dismissing a case as inadmissible.⁷¹⁶

But, Mauritania considered the French proceedings as an affront to the Mauritanian people and took counter-measures. It expelled the French military aid workers and repatriated her trainees from France.⁷¹⁷ In addition, the government re-established the visa service for any French citizen who would travel to Mauritania.⁷¹⁸ Consequently, very quickly, the accused person, who was arrested on 2 July 1999, was released under conditions on 28 September 1999, while the French government was suspected of having maneuvered so that he left the country and escaped justice on 5 April 2000.⁷¹⁹ After all, the trial was held *in absentia*. The *Cour d'assises de Nîmes/Gard* finally sentenced Ely Ould Dah to ten years of imprisonment on 1 July 2005.⁷²⁰ The judgment has never been executed and extradition is unexpected.⁷²¹ The same observation applies to the trial before the Strasbourg *Cour d'assises du Bas-Rhin* and the judgment in *absentia* for acts of torture of Khaled Ben Saïd, a senior police agent of

⁷¹⁶ *Ould Dah v. France (dec.)*, no. 13113/03, Decision of 17 March 2009, ECHR 2009-I, at 463-464.

⁷¹⁷ M.-L. Colson, 'Représailles de la Mauritanie pour laver l'«affront» français. Nouakchott renvoie les coopérants français et rétablit les visas', *Libération* (7 July 1999) <http://www.liberation.fr/planete/1999/07/07/represailles-de-la-mauritanie-pour-laver-l-affront-francais-nouakchott-renvoie-les-cooperants-franca_277639> accessed 4 July 2016.

⁷¹⁸ *Ibid.*

⁷¹⁹ International Federation of Human Rights Leagues, above note 713, at 17.

⁷²⁰ *Ibid.*, at 49-54.

⁷²¹ International Federation of Human Rights Leagues, 'Communiqué: appel pour l'extradition de Ely Ould Dah' (30 June 2006), <<https://www.fidh.org/fr/themes/actions-judiciaires/actions-judiciaires-contre-des-individus/Affaire-Ely-Ould-Dah/Appel-pour-l-extradition-de-Ely>> accessed 4 July 2016.

the Tunisian Ministry of interior affairs, who was sentenced to eight years of imprisonment on 15 December 2008.⁷²²

The second most striking example from France relates to the case of the *Disparus du Beach de Brazzaville*.⁷²³ Proceedings started on 5 December 2001 with a complaint submitted by the International Federation of Human Rights Leagues and others to the Public Prosecutor of the Paris *Tribunal de grande instance* against five incumbent officials of the Republic of Congo⁷²⁴: Sassou Nguesso (President of the Republic), General Pierre Oba (Minister of the interior affairs, public security and territorial administration), General Norbert Dabira (Inspector-General of the armed forces), General Blaise Adoua (Commander of the presidential military guards) and General Jean-François Ndengue (Head of the national police). They were accused of having committed acts of torture and forced disappearances as crimes against humanity in the course of repatriations of the Congolese refugees from the neighboring DRC, between April and June 1999, after the end of the civil war which began in the Republic of Congo in 1997.⁷²⁵ The United Nations denounced and took stock of some 353 names of forced disappeared persons.⁷²⁶ It seems that they were selected among the returnees by the security services at their arrival at the Beach of Brazzaville, isolated, checked whether they were former rebels or not, before finally disappearing.⁷²⁷

Oil was put on the fire when the French justice arrested General Norbert Dabira, who was found in his residence in France, on 23 May 2002, in order to interrogate him. His release and his failure to appear before the investigating judge for further interrogations caused the

⁷²² International Federation of Human Rights Leagues, 'L'affaire Khaled Ben Saïd: le premier procès en France d'un fonctionnaire tunisien accusé de torture' (March 2009), at 63-65 <https://www.fidh.org/IMG/pdf/Bensaid512fr2008_FINAL.pdf> accessed 7 July 2016.

⁷²³ See A. C. Makosso, E. Bosuku, O. Kande and E. Tambwe, *L'affaire des disparus du Beach de Brazzaville : mises au point pour l'Histoire* (Paris : L'Harmattan, 2007).

⁷²⁴ International Federation of Human Rights Leagues, 'République du Congo: affaire des "Disparus du Beach" de Brazzaville - Développements et enjeux des procédures en cours en France, en République du Congo et devant la Cour internationale de Justice: décembre 2001 - novembre 2007 (Novembre 2007), at 7 <<https://www.fidh.org/IMG/pdf/GAJRepCongoBeach400fr2007.pdf>> accessed 5 July 2016.

⁷²⁵ *Ibid.*, at 5-7.

⁷²⁶ UN Human Rights Council, 'Report of the Working Group on Enforced or Involuntary Disappearances on its Mission to the Republic of the Congo (24 September –3 October 2011): Addendum' (20 January 2012) A/HRC/19/58/Add.3, paras.75-80.

⁷²⁷ *Ibid.*, paras.69-74.

issuance against him of a French international arrest warrant on 15 January 2004.⁷²⁸ On his part, General Jean-François Ndengue was arrested in Paris and put in custody on 2 April 2004.⁷²⁹ Before these incidents, during his state visit in France on 18 September 2002, President Sassou Nguesso had been requested by the investigating judge of the *Tribunal de grande instance de Meaux*, through a *commission rogatoire* (warrant), to bestow his written testimony on the case,⁷³⁰ but in vain. Given the strong opposition of the Republic of Congo to these proceedings, General Jean-François Ndengue was released, with again the orchestration of the French government at 2:00 p.m., in the night of 3 April 2004, and went back to Brazzaville.⁷³¹ He was later acknowledged by the Versailles Court of Appeal enjoyment of immunities from the French jurisdiction on the ground that he was in a diplomatic visit in France.⁷³²

Meanwhile, the Republic of Congo lodged an application with the ICJ in 2003 and argued that France had violated, besides the question of immunities, the principle of universal jurisdiction in the following terms:

Violation of the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations, exercise its authority on the territory of another State, by unilaterally attributing to itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed in connection with the exercise of his powers for the maintenance of public order in his country.⁷³³

This allegation was not examined on the merits as the Republic of Congo decided to withdraw its application instituting proceedings and obtained, given the absence of objection on the part

⁷²⁸ International Federation of Human Rights Leagues, above note 724, at 7.

⁷²⁹ *Ibid.*, at 8.

⁷³⁰ *Ibid.*, at 7 and 12. See also *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, above note 597, at 5.

⁷³¹ International Federation of Human Rights Leagues, above note 724, at 13-14.

⁷³² *Versailles, Chambre de l'instruction*, 20 June 2007, Extrait des minutes du Greffe de la Cour d'appel de Versailles 2007, at 25
<https://competenceuniverselle.files.wordpress.com/2011/07/arrt_de_la_cour_dappel_d.pdf> accessed 5 July 2016.

⁷³³ *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, above note 597, at 7.

of France, the removal of the case from the list of the ICJ on 16 November 2010.⁷³⁴ But, attempts to make the national prosecutions cancelled have been several times rejected by the French justice.⁷³⁵ It is however difficult to predict if the failure of effective prosecutions in application of the principle of universal jurisdiction since 2001 would be overcome. Such a judicial failure can also be seen, even in a radical way, in regard to Belgium and Spanish proceedings with which much of the discourse on the African contestation of the abusive application of universal jurisdiction is connected.

iii) The Belgian and Spanish Proceedings

Chronologically, the most contentious proceedings which followed the indictment of Captain Ely Ould Dah in France was the Belgium arrest warrant of 11 April 2000, delivered by the investigating judge of the Brussels *Tribunal de grande instance* against Abdoulaye Yerodia Ndombasi, for war crimes and crimes against humanity. The DRC's Minister of foreign affairs was accused of having spread hatred messages and called for the extermination of Tutsi ethnic group, in the context of the war of aggression by Burundi, Uganda and Rwanda, backed by their Congolese rebel allies, to overthrow the Congolese government in August 1998.⁷³⁶ It has to be noted that this proceeding followed the attempt to indict Laurent-Désiré Kabila, the DRC reigning President, during his state visit in France in November 1998.⁷³⁷ The Public Prosecutor of the Paris *Tribunal de grande instance* immediately relinquished the procedure on the basis of head of state's immunity.⁷³⁸ However, the Congolese contestation

⁷³⁴ *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order of 16 November 2010, I.C.J. Reports 2010, at 637.

⁷³⁵ S. Abba, '« Disparus du Beach » de Brazzaville : les familles suspendues à la poursuite de l'instruction française', *Le Monde* (17 May 2016) <http://www.lemonde.fr/afrique/article/2016/05/17/disparus-du-beach-de-brazzaville-les-familles-suspendues-a-la-poursuite-de-l-instruction-francaise_4920787_3212.html> accessed 5 July 2016 ; V. Rambolamanana, 'République du Congo : un espoir en France pour les 353 "disparus du Beach"' (13 June 2016), <<http://www.justiceinfo.net/fr/crimes/27826-r%C3%A9publique-du-congo-un-espoir-en-france-pour-les-353-disparus-du-beach.html>> accessed 5 July 2016.

⁷³⁶ In particular, the accused, Mr. Abdoulaye Yerodia Ndombasi, has allegedly called on 'his brothers' to 'rise up as one to throw the common enemy out of the country' using all possible weapons, and then to have said of the enemies that 'they are scum, germs that must be methodically eradicated. We are determined to utilize the most effective remedy'. See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, above note 569, at 5.

⁷³⁷ International Federation of Human Rights Leagues, above note 713, at 30.

⁷³⁸ *Ibid.*

against the Belgium proceeding led to the famous *Arrest Warrant* case before the ICJ, whose judgment terminated the dispute in 2002, even if the Court did not rule on the controversial question of universal jurisdiction because the applicant who invoked the issue abstained to conclude on it.

The question of abusive application of universal jurisdiction reached a turning point when the investigating judge of the Spanish High Court⁷³⁹ (*Audiencia Nacional*),⁷⁴⁰ Fernando Andreu Merelles, indicted, on 6 February 2008, 40 Rwandan officials (all of them being high-ranking officers of the Rwandan national army) for genocide, war crimes, crimes against humanity and terrorism, allegedly committed in Rwanda and the neighboring DRC during the war of aggression of 1996 and 1998, as well as their continuation until 2003.⁷⁴¹ To compare with the Belgium proceedings, the Spanish indictment under the Organic Law on the Competence of the Courts of 1 July 1985 was like a judicial balance enabling to have, for the first time, foreign prosecutions of prominent suspects, Congolese and Rwandan, who had been involved in the DRC's armed conflicts, documented even by the United Nations⁷⁴², which caused the death of millions of people.⁷⁴³ The factual accusations were that the former rebels of the Rwandan Patriotic Front (RPF) against the government of the then Rwandan President Juvenal Habyarimana, and the Rwandan Patriotic Army (RPA), the new national army after genocide in 1994, "developed and implemented a criminal plan to eliminate the Hutu ethnic group and to take control over Rwanda and the Democratic Republic of the Congo ('DRC') (then Zaire)".⁷⁴⁴ In particular, according to an anonymous commentator for the *Journal of International Criminal Justice*, the indictment reportedly mentioned that:

-the RPF invaded Rwanda in 1990 causing the death of countless Hutus;

⁷³⁹ See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, I.C.J. Reports 2005, at 168.

⁷⁴⁰ Organic Law 6/1985 on the Competence of the Courts (1 July 1985), Article 65.

⁷⁴¹ Commentator, above note 665, at 1003-1004.

⁷⁴² Office of the United Nations High Commissioner for Human Rights, 'Democratic Republic of the Congo, 1993–2003: Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003' (August 2010), <http://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf> accessed 15 July 2015.

⁷⁴³ *Ibid.*, para.15.

⁷⁴⁴ Commentator, above note 665, at 1004.

- from 1990 to 1994, the RPF carried out a great number of military operations against civilians through the RPF's regular army and the Directorate Military Intelligence, and created special death squads such as the 'Network Commando' and the 'Death Squads';
- the leaders of the RPF planned and executed the attack against the then Rwandan President Habyarimana, in order to trigger a civil war and to take control over Rwanda;
- the RPF took control over Rwanda, generated a regime of terror and carried out mass killings, motivated by ethnic and/or political reasons;
- together with other military-political groups, the RPF invaded the DRC twice and systematically exterminated an undetermined number of Rwandan refugees and members of the Congolese civilian population; and
- the RPF created a criminal network of exploitation and pillage of the DRC's mineral resources in order to finance its wars, maintain its geo-strategic power and control in the area and pursue and implement its plan of extermination and domination.⁷⁴⁵

But, like his Congolese counterpart, late Laurent-Désiré Kabila, with respect to French tentative indictment of 1998, President Paul Kagame could not be prosecuted as an incumbent head of state because of his immunity from the Spanish domestic jurisdiction. Even though, the Rwandan protestation was strong after the arrest of the Chief Protocol of the Rwandan President, Rose Kabuye, in Frankfurt (Germany) where she arrived in a private visit (and thus no immunity)⁷⁴⁶ on 10 November 2008. It must be noted that the proceeding was initiated in Germany in execution of the French arrest warrant of 17 November 2006 against nine Rwandan senior military officers, allegedly involved in the shooting down of the aircraft of President Juvenal Habyarimana, killing him, the President of Burundi (Cyprien Ntaryamira), several ministers and high ranking military officers of both countries, as well as three French crew members (hence passive personality and not universal jurisdiction), on 6 April 1994. The arrest warrant was issued out of investigations of the French judge, Jean-Louis Bruguiere.⁷⁴⁷

⁷⁴⁵ *Ibid.*, at 1004-1005.

⁷⁴⁶ D. Akande, 'Prosecution of Senior Rwandan Government Official in France: More on Immunity', *EJIL: Talk* (24 December 2008), <<http://www.ejiltalk.org/prosecution-of-senior-rwandan-government-official-in-france-more-on-immunity/>> accessed 5 July 2016.

⁷⁴⁷ See *Tribunal de grande instance de Paris, Délivrance de mandats d'arrêt internationaux - Ordonnance de soit-communicé*, 17 November 2006, <http://www.olny.nl/RWANDA/Lu_Pour_Vous/Dossier_Special_Habyarimana/Rapport_Bruguiere.pdf> accessed 6 October 2015.

The attack against the aircraft of President Juvenal Habyarimana is so important that it is considered to have been the trigger of the Rwandan genocide. But, surprisingly, it has not led to any successful prosecution up to now. Thus, extradited to France on 18 November 2008, Rose Kabuye was released a day later and allowed to move back to her country. Prior to her release, Rwanda had decided counter-measures and ceased diplomatic relations with France, a country that he accused of complicity in genocide in a counter-report of 15 November 2007.⁷⁴⁸ Likewise, no one among the 40 indictees in the Spanish proceedings has been brought to justice more than eight years later. On 20 June 2015, General Karenzi Karake (the then head of the Rwandan intelligence services) was arrested in London (United Kingdom) on the demand of Spain, but he was quickly released after Rwanda reiterated his opposition to such prosecutions,⁷⁴⁹ with support from prominent British and American politicians.⁷⁵⁰ In this regard, the UK justice decided not to extradite General Karenzi Karake due to the lack of jurisdiction: there was no extradition offence because the relevant applicable laws⁷⁵¹ did not arguably cover acts of non-UK nationals or residents abroad.⁷⁵² On 24 September 2015, Spain

⁷⁴⁸ Republic of Rwanda, 'Commission nationale indépendante chargée de rassembler les preuves montrant l'implication de l'Etat français dans le génocide perpétré au Rwanda en 1994' (15 November 2007), <http://www1.rfi.fr/actu/fr/images/104%5CRapport_Rwanda.pdf> accessed 11 July 2016 ; C. McGreal, 'Top Rwandan Aide Chooses French Terror Trial', *The Guardian* (10 November), <<https://www.theguardian.com/world/2008/nov/10/rwanda-congo-kabuye>> accessed 5 July 2016. The Rwanda's National Independent Commission which investigated the matter even made the recommendation that the Rwandan Government should support individual or collective complaints of victims brought to justice against France or its agents (*Ibid.*, at 331).

⁷⁴⁹ K. Allen, 'Karake Arrest Strains Fragile UK-Rwanda Relations', *BBC World* (23 June 2015), <<http://www.bbc.com/news/world-africa-33241578>> accessed 5 July 2016; D. Smith and S. Burgen, 'Rwanda Complains after Spy Chief is Held in London over Alleged War Crimes', *The Guardian* (23 June 2013), <<https://www.theguardian.com/world/2015/jun/23/rwanda-spy-chief-karenzi-karake-arrested-london-alleged-war-crimes>> accessed 5 July 2016.

⁷⁵⁰ T. John, 'Why the Arrest of Rwanda's Intelligence Chief in the U.K. is Causing Waves', *Time* (23 June 2015), <<http://time.com/3932134/rwandas-intelligence-chief-uk/>> accessed 5 July 2016.

⁷⁵¹ See UK's War Crimes Act 1991, section 1(2); UK's International Criminal Court Act 2001, section 68.

⁷⁵² H. Alexander, 'Rwanda's Spy Chief Released by British Court', *The Telegraph* (11 August 2015), <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/rwanda/11795960/Rwandas-spy-chief-released-by-British-court>> accessed 5 July 2016.

also indicated that it relinquished the prosecutions, except if any of the 40 accused is found in Spain, and removed its arrest warrants previously issued against them.⁷⁵³

These proceedings do not constitute the entire story of indictments of African leaders in Europe. There have been many other unsuccessful complaints for international crimes against notably Presidents Robert Mugabe (Zimbabwe) in the UK, Laurent Gbagbo (Ivory Coast) and Ange-Felix Patasse (Central African Republic) in Belgium,⁷⁵⁴ President Obiang Nguema (Equatorial Guinea) and King Hassan II (Morocco) in Spain,⁷⁵⁵ as well as General Khaled Nezzar (Algeria) in France.⁷⁵⁶ While these indictments radicalised criticisms against the alleged abusive application by European states of the principle of universal jurisdiction, one may argue, on the contrary, that the multiplication of complaints and indictments against African leaders in Europe signaled that victims of egregious crimes needed justice that they were denied in Africa because of the culture of impunity that the suspects enjoy.

b) The Impunity of African Leaders in the African Continent

The scourge of impunity in African countries is viewed as an argument strengthening the legitimacy of the exercise by European states of universal jurisdiction over international crimes committed in Africa.⁷⁵⁷ But, there is no evidence of a total judicial inertia. A small experience to encourage does exist. This position can be verified by assessing the impact of European criminal proceedings on the struggle against impunity in African states (i), the poor performance of African domestic courts in the prosecutions of international crimes (ii) and the plausible causes of what appears to be a relative judicial inertia to deal with such crimes within the continent (iii).

i) The Relative Positive Impact of European Proceedings in African States

It could be expected that opposition to the indictments of African leaders in European states entails their systematic prosecutions by African states themselves. But, in general, the scourge

⁷⁵³ M. Ba, 'La Cour suprême espagnole a ordonné la levée des mandats d'arrêt visant 40 militaires rwandais', *Jeune Afrique* (8 Octobre 2015), <<http://www.jeuneafrique.com/270401/societe/la-cour-supreme-espagnole-a-ordonne-la-levee-des-mandats-darret-visant-40-militaires-rwandais/>> accessed 9 October 2015.

⁷⁵⁴ See African Union and European Union, above note 671, paras.24 and 26; Murungu, above note 596, at 1070-1071.

⁷⁵⁵ *Ibid.*

⁷⁵⁶ International Federation of Human Rights Leagues, above note 713, at 31.

⁷⁵⁷ Wilt, above note 710, at 1054.

of impunity prevails. For example, no criminal case was initiated against Abdoulaye Yerodia Ndomasi in the DRC after the failure of the Belgium proceedings. Instead, he was designated, short after the delivery of the ICJ judgment in February 2002, vice-President of the country in 2003.⁷⁵⁸ Exceptions to this observation are seldom to find. One may just recall the trial of the former Chadian head of state, Hissène Habré, in Senegal. In two other examples, European criminal proceedings have only had a very relative impact on African states on which lays the obligation to prosecute the alleged crimes in question.

First, the French proceedings in the case of the *Disparus du Beach de Brazzaville* led the Republic of Congo to accelerate the prosecutions it had launched in August 2000 pursuant to the Law of 31 October 1998.⁷⁵⁹ Fifteen suspects charged with genocide, war crimes and crimes against humanity were sent to the bench, of which three who were involved in the French proceedings (Generals Blaise Adoua, Norbert Dabira and Jean-François Ndengue).⁷⁶⁰ However, neither any minister nor President Sassou Nguesso was indicted. Even the inquiry commission which the transitional parliament established in August 2001 with the mandate to clarify the issue of forced disappearances in the country since 1992 suspended its work before being abolished on 7 August 2002.⁷⁶¹ Worse, President Sassou Nguesso declared that the national prosecutions were in fact initiated before the Brazzaville Court of Appeal in order to demonstrate that no massacre of Congolese returnees from refuge in the DRC had been

⁷⁵⁸ This was the result of the Congolese Dialogue, undertaken pursuant to the Lusaka Peace Agreement of 10 July 1999, in order to put an end to the war which had started in the country since 1998 and to form a government of national reconciliation having the mandate, among others, to lead the Congolese people to democratic elections and a new political order. Mr. Abdoulaye Yerodia Ndomasi was appointed by President Joseph Kabila as one of the four DRC Deputy Presidents, next to Arthur Zaidi Ngomba (from the non-armed opposition groups), Jean-Pierre Bemba (from the rebel group of the *Mouvement de Libération du Congo*) and Azarias Ruberwa (from the rebel group of the *Rassemblement congolais pour la démocratie*). After the 2006 general elections, Mr. Abdoulaye Yerodia Ndomasi was elected as a senator and he continues to act in this capacity until today.

⁷⁵⁹ Law No.8-98 Laying down the Definition and the Repression of Genocide, War Crimes and Crimes against Humanity (31 October 1998) <https://www.nottingham.ac.uk/shared/shared_hrlcicju/Congo-Brazzaville/Loi_No_8-98_portant_definitions_et_repression_des_crimes_.pdf> accessed 19 July 2016.

⁷⁶⁰ International Federation of Human Rights Leagues, 'Rapport d'une mission FIDH d'observation judiciaire au procès des "disparus du Beach" Brazzaville, été 2005' (December 2005), at 24 <<https://www.fidh.org/IMG/pdf/cg435f-2.pdf>> accessed 20 July 2016.

⁷⁶¹ UN Human Rights Council, above note 726, para.81.

committed.⁷⁶² The trial took place from 21 July to 17 August 2005. Consequently, without any surprise, the Court of Appeal acquitted all the accused.⁷⁶³ But, it recognised the occurrence of the alleged forced disappearances by ordering the Republic of Congo to pay compensations to victims. According to the Court, the state was responsible on the basis of a presumption of fault, even though no criminal offender could be identified among the indictees on the bench.⁷⁶⁴ The Court found that, at the time of repatriations, "the State ought to have ensured the scrupulous organisation of the general security measures justified by the state of war".⁷⁶⁵ Its judgment was upheld by the Court of Cassation on 5 July 2007.⁷⁶⁶

However, the trial was criticised for having been organised for the sole purpose of shielding those responsible from justice, and to impede the course of the French proceedings. The UN also highlighted the trial unfairness in the following terms:

the accused appeared in liberty at the hearings, as they had not been served with arrest warrants by the Indictments Chamber. According to various sources, the atmosphere at the trial was extremely tense. Some of the civil parties, led by their counsel, disputed the independence of the judgement pronounced. The civil parties said that they had been intimidated many times by the presence of people with weapons in the courtroom. Some people said they had decided before the trial not to become civil parties to the case or to testify in the hearing for fear of reprisals. No measures were adopted to provide protection for the victims or witnesses, although the accused held senior positions in the various State security services.⁷⁶⁷

Second, unlike Congo Brazzaville, Rwanda drew almost no judicial consequence from the Spanish proceedings. There is not a single case that has been opened in Rwanda in relation to the alleged crimes committed in the DRC. This confirms that when individuals are presumed to have perpetrated crimes with the support of their state, it is improbable that the latter endeavors to prosecute them. This lack of prosecutions in Rwanda even contravenes several

⁷⁶² Observatoire congolais des droits de l'homme et Fédération internationale des ligues des droits de l'homme, 'L'affaire des « Disparus du Beach » Congo- Brazzaville : Résumé des procédures nationales et internationales' (January 2006), at 6 <https://www.fidh.org/IMG/pdf/Recap_Beach_janvier_2007.pdf> accessed 20 July 2016.

⁷⁶³ *Brazzaville, Chambre Criminelle*, 17 August 2005, Extract. See International Federation of Human Rights Leagues, above note 760, at 23-26.

⁷⁶⁴ UN Human Rights Council, above note 726, para.87.

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *Ibid.*, para.83.

⁷⁶⁷ *Ibid.*, para.85.

Security Council resolutions.⁷⁶⁸ In the same vein, the deadly attack on Juvenal Habyarima's aircraft on 6 April 1994 remains unpunished. Rwanda opted for an offensive policy. It published a counter-report, named the Mutsinzi report, on 20 April 2009, in which it developed the theory, challenged by other experts,⁷⁶⁹ according to which this attack had not been committed by the RPF but by Juvenal Habyarimana's own army (from the Hutu majority) to prevent any power sharing he had accepted with the Tutsi rebels as a result of the Arusha peace process.⁷⁷⁰ Such report and all other contradictory findings on this tragic event substantiate the *de facto* impunity, whoever may be responsible for the attack in question,

⁷⁶⁸ SC Res.1291 (2000), 24 February 2000, para.15; SC Res.1565 (2004), 1 October 2004, para.19. In paragraph 15 of resolution 1291 (2000), the Security Council called on 'all parties to the conflict in the Democratic Republic of the Congo to protect human rights and respect international humanitarian law and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and (...) to refrain from or cease any support to, or association with, those suspected of involvement in the crime of genocide, crimes against humanity or war crimes, and to bring to justice those responsible, and facilitate measures in accordance with international law to ensure accountability for violations of international humanitarian law'. In paragraph 19 of resolution 1565 (2004), the Security Council states that it '*strongly condemns* violence and other violations of international humanitarian law and human rights, in particular those perpetrated against civilians, in the Democratic Republic of the Congo, and *demand*s that all parties and Governments concerned in the region, including the Government of National Unity and Transition, take without delay all necessary steps to bring to justice those responsible for these violations and to ensure respect for human rights and international humanitarian law, as appropriate with relevant international assistance, as well as to guarantee the security and well-being of the civilian population'.

⁷⁶⁹ See F. Reyntjens, 'A Fake Inquiry on a Major Event: Analysis of the Mutsinzi on the 6th April 1994 Attack on the Rwandan President's Aeroplane', Working Paper / 2010.07, Institute of Development Policy and Management, University of Antwerp (May 2010) <<https://core.ac.uk/download/files/153/6530163.pdf>> accessed 11 July 2016 ; F. Reyntjens, 'Une enquête faussée sur un événement majeur : analyse du rapport Mutsinzi sur l'attentat du 6 avril 1994 contre l'avion présidentiel rwandais', *L'Afrique des Grands Lacs (Annuaire 2009-2010)* 299-326. See also V. Thalmann, 'French Justice's Endeavours to Substitute for the ICTR', 6 *Journal of International Criminal Justice* (2008) 995-1002, at 1002. Under the footnote number 28, this author comments: 'An investigation was opened and conducted by a team of investigators led by Michael Hourigan, a former ICTR investigator concerning the circumstances of the shooting down on 6 April 1994. A memorandum was prepared in 1997 which revealed three sources who implicated President Kagame. Shortly after, it seems that Hourigan was told by UN officials to stop investigations. The document, considered as an internal document, was placed under seal by the President of the Tribunal. Copies of this memorandum were, however, released to parties during trials (...)'

⁷⁷⁰ See Republic of Rwanda, 'Committee of Experts Investigation of the April 6, 1994 Crash of President Habyarimana's Dassault Falcon-50 Aircraft' (20 April 2009), <<http://mutsinzireport.com/wp-content/uploads/2010/01/Falcon-Report-english.pdf>> accessed 11 July 2016.

whereas the best way to end the polemic could be to submit the matter to an independent commission of inquiry and tribunal.

The ICTR, which had jurisdiction to prosecute the crimes committed by all belligerent parties involved in the Rwandan genocide,⁷⁷¹ failed to address the attack of 6 April 1994. The main reason is that Rwanda systematically opposed any inquiry of crimes that would potentially implicate the RPF. The first ICTR Prosecutor, Louise Arbur, left the matter in a shadow. The second, Carl Del Ponte, who came in office in August 1999, tried to activate the issue. But, due to pressure by Rwanda, she was taken away from the ICTR in 2003 at the end of her four year-term.⁷⁷² It was decided that the ICTY Prosecutor should not any longer be in charge of the ICTR Prosecution Office. Yet, being aware of the risk of impunity, the Security Council precisely called upon states, through the resolution 1503 of 28 August 2003 relating to the ICTR completion strategy, “to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army (...)”.⁷⁷³ But, this indication was not followed by effects during the first four year-term mandate (2003-2007) of Carl Del Ponte’s successor, Hassan Bubacar Jallow,⁷⁷⁴ appointed on 4 September 2003.⁷⁷⁵ The ICTR arguably feared loss of cooperation if it had attempted to launch investigations and prosecutions without Rwanda’s support.⁷⁷⁶ It seems that there was also some partiality in the prosecutorial strategy, which permitted RPF members to avoid justice due to their consideration as the liberators from genocide.⁷⁷⁷ Finally, the new ICTR Prosecutor made it clear that Rwanda could deal itself with presumed crimes committed by its own officials, because he ought to complete his work with the tribunal, to select and concentrate on the most

⁷⁷¹ ICTR Statute, Article 1. This Article states: ‘The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute’.

⁷⁷² See C. Onana, *Les secrets de la justice internationale : enquêtes truquées sur le génocide rwandais* (Paris : Editions Duboiris, 2005).

⁷⁷³ SC Res.1503 (2003), 28 August 2003, para.3.

⁷⁷⁴ He was appointed for the first time on 28 August 2003. See SC Res.1503 (2003), 28 August 2003, para.3.

⁷⁷⁵ SC Res.1505 (2003), 4 September 2003.

⁷⁷⁶ Wilt, above note 710, at 1062.

⁷⁷⁷ L. Reydam, ‘The ICTR Ten Years On: Back to the Nuremberg Paradigm’, 3 *Journal of International Criminal Justice* (2005) 977-988, at 986.

serious cases,⁷⁷⁸ as if those crimes potentially committed by RPF members were not so grave to deserve his attention. In consequence, on 4 June 2008, in the aftermath of the Spanish proceedings, he spoke to the Security Council and averted:

In my last report to the Council I indicated that there had been some progress in the investigation of allegations against the members of the RPF. Rwanda has collaborated with us in this process as requested by the Council in its Resolution 1503 (2003). We have together been able to establish a prima facie case that on 5th June 1994 RPF soldiers killed some thirteen clergymen, including five Bishops and two other civilians at the Kabgayi Parish in Gitarama. Some of the perpetrators of this crime are reported to have died whilst others are now serving within the Rwanda Army. Following inquiries the Rwanda Prosecutor General has communicated to me his decision to shortly indict and prosecute four serving senior military officers of the Rwandan Army with murder and complicity to murder as war crimes in connection with this incident. Rwanda as you know shares concurrent jurisdiction with the ICTR over such offences. I have decided to hold in abeyance further action on my part on the clear understanding that any such prosecutions in and by Rwanda should be effective, expeditious, fair and open to the public. My office will also monitor these proceedings.⁷⁷⁹

This ICTR-Rwanda perspective has never gone farther. As in many other African countries, the culture of impunity prevails. The prosecution of African leaders for international crimes is still poor and very exceptional.

ii) The Poor Performance of African Domestic Courts

There are not a lot of examples of African leaders, in particular heads of states and governmental ministers in power, who have been effectively prosecuted and tried by domestic courts in the state of their nationality or of the commission of international crimes. This observation is not however specific to Africa. Even in Europe, examples are hard to find. Yet, there are situations in which European leaders might also have faced their own national justice for crimes allegedly committed in foreign countries (Iraq, Ivory Coast, Libya, Afghanistan, etc.). The main difference with African leaders is that the latter commit crimes against their own peoples. This makes a commentator say that “many of the practices from the

⁷⁷⁸ H.B. Jalloh, ‘Prosecutorial Discretion and International Criminal Justice’, 3 *Journal of International Criminal Justice* (2005) 145-161, at 150.

⁷⁷⁹ ICTR, ‘Statement by Justice Hassan B. Jallow Prosecutor of the ICTR, to the UN Security Council’ (4 June 2008) < <http://ict-archive09.library.cornell.edu/ENGLISH/speeches/jallow080604.html>> accessed 23 May 2016.

colonial period reappeared”⁷⁸⁰ and “the rule of law (expected) changed to the rule of force”⁷⁸¹ in numerous African states after accession to independence. But, a crime is a crime, regardless of the nationality of victims and perpetrators. It becomes hypocrisy when European states, particularly those which have initiated criminal proceedings against African leaders, push for accountability for international crimes in Africa, whereas their own presumed criminals benefit from a *de facto* impunity. This differentiation seems to reflect the perpetuation of the past cliché of civilised and uncivilised nations, and thus weakens the ideals of international justice that should be rather sought in equality of all the suspects and nations. The poor performance of African domestic courts in the fight against impunity can be illustrated by the limits of the exercise of jurisdiction by states over crimes committed on their territories (1°) and the relative default of other countries to resort to the principle of universal jurisdiction (2°).

1°) The Limits of the Exercise of Territorial Jurisdiction

A survey of the judicial situation in Africa shows that there are not many cases of prosecutions of African leaders before domestic courts of the states on the territory of which crimes are committed. In addition, problems of the quality of the work which is done sensibly reduce the merits of the small number of cases which does exist. This statement relies on three main examples.

The first one comes from Equatorial Guinea, which gained its independence from Spain on 12 October 1968. From that year, it had been ruled by Francisco Macias Nguema. His regime turned into a brutal dictatorship, characterised by the systematic oppression and elimination of his political opponents, murders, arbitrary detention, corruption, embezzlement of public funds, etc. Under the Constitution of 29 July 1973, which repealed the one of 1968, Francisco Macias Nguema acquired absolute political powers, including presidency for life. On 3 August 1979, he was overthrown out of a military coup by his own nephew, the then becoming President Teodore Obiang Nguema. On 5 September 1979, the new government decided to convene a special military tribunal to try the deposed dictator, as well as ten of his

⁷⁸⁰ L. Wohlgenuth and E. Sall, ‘Introduction’, in L. Wohlgenuth and E. Sall (eds), *Human Rights, Regionalism and the Dilemmas of Democracy in Africa* (Dakar: CODESRIA, 2006) 1-18, at 4.

⁷⁸¹ *Ibid.* The brackets are mine.

close collaborators.⁷⁸² The trial began on 24 September 1979. Francisco Macias Nguema and his collaborators were charged with several crimes, particularly genocide, committed between 5 May 1969 and 18 August 1979.⁷⁸³ This was the second time that genocide was tried by a national jurisdiction after the Israel experience of the *Eichmann* case in 1962. But, the law missed several aspects. On the one hand, the charges were mainly based on the Genocide Convention, which had never been ratified by Equatorial Guinea, and the Spanish Penal Code of 1971,⁷⁸⁴ which was not applicable to the country.⁷⁸⁵ In fact, the Constitution of 1968 provided that the Spanish legislation remained in force after independence until abrogated or modified by the competent Guinean authority.⁷⁸⁶ It was repealed in its entirety by the Constitution of 1973.⁷⁸⁷ On the other hand, the Genocide Convention could not allow prosecution for genocide of members of political groups. It only envisages three categories of protected groups: national, ethnic, racial and religious groups. But, despite these flaws, which were not addressed by the tribunal,⁷⁸⁸ Francisco Macias Nguema was convicted, sentenced to the death penalty. Unfortunately, he had no right to appeal and he was executed the same day of his conviction on 29 October 1979.

The second example is the trial of Colonel Mengistu Haile Mariam in Ethiopia, a country he has ruled between 1974 and 1991. He staged a military coup against the last Ethiopian emperor, Haile Selasie, before being himself ousted from power by rebels on 28 May 1991. He fled to Kenya and subsequently went in exile to Zimbabwe. Mengistu's pro Marxist-Leninist reign was marked by political terror and oppression of anybody who tried to oppose his dictatorship. The Special Prosecutor who was mandated to investigate his atrocities listed

⁷⁸² A. Artucio, 'The Trial of Macias in Equatorial Guinea: the Story of a Dictatorship', International Commission of Jurists (Geneva: 1979), at 21.

⁷⁸³ *Ibid.*, at 27.

⁷⁸⁴ It is the Law No. 44/1971 of 15 November 1971 which added Article 137bis to the Spanish Penal Code, implementing the genocide Convention of 1948, ratified by Spain on 13 September 1968. But, this Article includes "social groups" in addition to those which are mentioned under Article II of the genocide Convention. See J. Quigley, *The Genocide Convention: an International Law Analysis* (Hampshire/Burlington: Ashgate, 2006), at 17.

⁷⁸⁵ Artucio, above note 782, at 28-29.

⁷⁸⁶ *Ibid.*

⁷⁸⁷ *Ibid.*

⁷⁸⁸ Quigley, above note 784, at 32.

12.315 individuals who were killed and 2.681 victims of torture.⁷⁸⁹ Charges were filed against 5.119 suspects pursuant to the Ethiopian Penal Code of 1957. But, the most important trial related to the case of *Special Prosecutor v. Mengistu Haile Mariam and others* before the Federal High Court in Addis Ababa (Ethiopia).⁷⁹⁰ The former head of state and twenty-four of his co-accused were prosecuted in *absentia* for genocide, crimes against humanity and willful bodily injury, and convicted at the first degree on 12 December 2006.⁷⁹¹ The final judgment was issued by the Federal Supreme Court in 2008, whereby Mengistu Haile Mariam was sentenced to the death penalty.⁷⁹² Unlike the trial of Francisco Macias Nguema, the Ethiopian courts established the crime of genocide against political groups under a sound national legal basis, namely article 281 of the Ethiopian Penal Code of 1957.⁷⁹³ This expansion of the list of protected groups against genocide, in comparison to the Genocide Convention, was renewed in the more progressive Ethiopian Penal Code of 2004.⁷⁹⁴ But, among other limits, the Ethiopian prosecutions were one-side oriented. While crimes were committed by all parties to the civil war, none of the former rebel combatants was brought to justice and victims were not

⁷⁸⁹ F. K. Tiba, 'The Trial of Mengistu and Other Derg Members for Genocide, Torture and Summary Executions in Ethiopia', in C. Murungu and J. Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria: Pretoria University Press, 2011) 163-184, at 165.

⁷⁹⁰ See F.K. Tiba, 'The Mengistu Genocide Trial in Ethiopia', 5 *Journal of International Criminal Justice* (2007) 513-528.

⁷⁹¹ *Ibid.*, at 514.

⁷⁹² Tiba, above note 769, at 171.

⁷⁹³ This Article reads : 'Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or *political group*, organizes, orders or engaged in, be it in time of war or in time of peace: (a) Killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or (b) measures to prevent the propagation or continued survival of its members or their progeny; or (c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death'. Emphasis is mine.

⁷⁹⁴ Criminal Code of the Federal Democratic Republic of Ethiopia (Proclamation No.414/2004). Under Article 269, this Code states: 'Whoever, in time of war or in time of peace, with intent to *destroy, in whole or in part, a nation, nationality, ethnical, racial, national, colour, religious or political group*, organizes, orders or engages in: (a) killing, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever or causing them to disappear; or (b) measures to prevent the propagation or continued survival of its members or their progeny; or (c) the compulsory movement or dispersion of peoples or children or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to twenty five years, or, in more serious cases, with life imprisonment or death'.

granted reparations by the court. Anyway, the prominent convicted leader, Mengistu Haile Mariam, is still at large enjoying his safe haven in Zimbabwe.

The third example comes from the DRC, which is the first African country to have organised trials on the basis of the direct application of the ICC Statute in 2004. Three observations must be noted in relation to this experience. *Primo*, the period of time of the perpetration of atrocities brought before the Congolese justice is very restricted. All the cases relate to crimes which have been committed in the country from 2002 and beyond. The initial judgment was delivered by the Military Court of Appeal of Katanga (South-East of the DRC) on crimes against humanity.⁷⁹⁵ The case involved incidents which occurred in the area of Ankoro (North-East of Katanga) between the national army and several militias groups in November 2002. Previous atrocities in the context of the DRC's armed conflicts have not attracted the eyes of the Congolese justice. These atrocities are comprised of three distinct periods, namely the interethnic armed conflicts in the North and South Kivu provinces (1993-1996), the first war of aggression and rebellion which overthrew President Mobutu's government and dismantled the Rwandan refugees' camps in the east of the country (1996-1997), as well as the second war of aggression and rebellions against President Laurent-Désiré Kabila's regime (1998-2003).⁷⁹⁶ *De facto*, the vast majority of those serious criminal incidents listed by the UN Mapping Report of 2010, covering a ten-year period of atrocities (1993-2003), remain unpunished.⁷⁹⁷ *Secundo*, the offenders that are targeted by the Congolese justice are small fishes,⁷⁹⁸ among which there is not a single foreigner who resides abroad. The only prominent high ranking military officer to have been prosecuted by the Military High Court at the first and last degree (no appeal) is General Jerome Kakwavu. He was convicted of war crimes committed in the Ituri region (North-East of the DRC) between 2003 and 2005 and sentenced to ten years of imprisonment for his individual and command responsibility.⁷⁹⁹ The UN seems to have positively welcomed this conviction even if it deplored the light sentence handed

⁷⁹⁵ *Public Prosecutor and 54 Civil Parties v. Émile Tabwangu Kayembe and 29 Others*, Judgment of 20 December 2004, Military Court of Appeal of Katanga Province, RP 01/2003 (unpublished).

⁷⁹⁶ B. Kahombo, *L'Afrique des grands lacs: la paix recherchée dans l'incohérence de l'action de la communauté internationale* (Saarbrücken : Editions universitaires européennes, 2015), at 49-50.

⁷⁹⁷ See Office of the United Nations High Commissioner for Human Rights, above note 742.

⁷⁹⁸ Kahombo, above note 796, at 11.

⁷⁹⁹ *Public Prosecutor and Civil Parties v. Kakwavu*, Judgment of 7 November 2014, Military High Court, RPN n° 004/2010 (unpublished).

down by the Court and the lack of the right to appeal against the judgment.⁸⁰⁰ But, it does not appear that the *Kakwavu* case is indeed an outstanding example regarding the duty to fight the impunity of the most powerful criminals at the command level. In fact, General Jerome Kakwavu, a former militiaman, integrated the national army with his soldiers out of a peace process which was supported by the Congolese government in 2003. He was already a much weakened man at the time of his arrest in 2010, deprived of his military capabilities and having no interior support from the national political system. *Tertio*, the quality of judgments of the Congolese justice are prey to a lot of criticisms.⁸⁰¹ Except in one case, in which a lower civil tribunal sat to try genocide without possessing any substantive competence,⁸⁰² these judgments were issued by military courts which had exclusive jurisdiction over international crimes, pursuant to the Law n° 024/2002 of 12 November 2002 laying down the Military Criminal Code,⁸⁰³ before the reform of 2013⁸⁰⁴ and the adoption of the legislation

⁸⁰⁰ UN Security Council, 'Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo' (30 December 2014) S/2014/956, para.11.

⁸⁰¹ See M. Wetsh'okonda, *La République démocratique du Congo. La justice militaire et le respect des droits de l'homme : l'urgence du parachèvement de la réforme - Une étude d'AfriMAP et de l'Open Society Initiative for Southern Africa* (June 2009), at 4-13 <<http://www.congoforum.be/upldocs/4863208Fd01.pdf>> accessed 18 July 2016 ; Avocats Sans Frontières, *Case Study: the Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo* (Brussels: ASV, 2009) ; Avocats Sans Frontières, *Recueil de jurisprudence congolaise en matière des crimes internationaux : édition critique* (Brussels : ASV, December 2013).

⁸⁰² *Public Prosecutor and Civil Parties v. Kumba and Others*, Judgment of 17 December 2011, District Court of Kalamu/Kinshasa (*Tribunal de grande instance de Kalamu/Kinshasa*), RP 11.154/11.155/11.156 (unpublished). In fact, the Court just took the murder of a believer of the Kimbanguist Church for genocide without saying any word on the intent to destroy, totally or in part, a religious group. The murder in question was committed in relation to the political support provided by this group to President Joseph Kabila during the 2011 electoral process. It means that the murder was basically motivated by political reasons rather than religious ones. At that time, the Court could uphold genocide committed against a political group under the Military Criminal Code (Article 164) which was still in force. But, it preferred to directly apply the Rome Statute (rule of primacy of treaties over national laws), which does not include genocide against political groups.

⁸⁰³ Article 161.

⁸⁰⁴ Organic Law No.13/011-B of 11 April 2013 Laying down the Organization, the Functioning and the Competences Courts of the Judicial Order. Article 91 attributes jurisdiction over international crimes (genocide, war crimes and crimes against humanity) to (civil) Court of Appeal, except for presumed offenders who do not fall under its jurisdiction *ratione personae*.

implementing the ICC Statute in 2015.⁸⁰⁵ In this regard, the UN Mapping Report summarised the main criticisms against the performance of the Congolese military courts as follows:

It is undeniable that some Judges of the Congolese military justice system, inspired by the DRC's ratification of the Rome Statute of the ICC in 2002 and supported by the international community, rendered a small number of courageous decisions in relation to crimes under international law. Although they braved physical and psychological barriers as well as apparent political pressure to do so, all the cases studied nonetheless illustrate the significant operational limitations of the military justice system. Botched and dubious investigations, poorly drafted or inadequately substantiated court documents, irrational decisions, violations of due process and various instances of interference by the civilian and military authorities in the judicial process, are apparent defects that characterised some of these cases (...).⁸⁰⁶

These examples of poor justice in quality (in terms of law application and due process standards) and in number (not a lot of cases across the continent) are maybe more tolerable than nothing, as they seem to be well connected with concrete situations of brutality and atrocities. In other states, domestic courts stand in a worrying inertia. The principle of universal jurisdiction, which is available under national laws, remains largely unapplied, ineffective.

2°) *The Relative Default of the Exercise of Universal Jurisdiction*

Unlike European states, African countries have very little experience in the exercise of universal jurisdiction over international crimes. This observation is not due to the lack of legislation covering the matter. On the contrary, many African states possess universal jurisdiction laws. This has been widely recognised by the EU-AU Expert Group in its report of 2009.⁸⁰⁷ On his side, T. Ondo has tried to depict some characteristics of national legislation on universal jurisdiction in Africa.⁸⁰⁸ He has observed that, before even the European-African controversy over universal jurisdiction, several African countries had acknowledged the

⁸⁰⁵ See Law No.15/022 of 31 December 2015 Modifying and Complementing the Decree of 30 January 1940 Laying down the Penal Code; Law No.15/023 of 31 December 2015 Modifying and Complementing the Law No.024-2002 of 18 November 2002 Laying down the Military Criminal Code; Law No.15/024 of 31 December 2015 Modifying and Complementing the Decree of 6 August 1959 Laying down the Code of Criminal Procedure.

⁸⁰⁶ Office of the United Nations High Commissioner for Human Rights, above note 742, para.47.

⁸⁰⁷ African Union and European Union, above note 671, paras.15-16.

⁸⁰⁸ T. Ondo, 'La compétence universelle en Afrique: essai d'analyse', 1 *Revue de droit international et de droit comparé* (2011) 53-120.

principle of universal jurisdiction. The best example is the Ethiopian Penal Code of 1957 which provides for universal jurisdiction over “offenses committed in a foreign country against international law or universal order”,⁸⁰⁹ including genocide, crimes against humanity and war crimes.⁸¹⁰ This jurisdictional power was renewed in similar terms in the Penal Code of 2004.⁸¹¹ But, Ondo’s observation applies much to (Anglophone) countries rather than (francophone) states.⁸¹² For example, Kenya,⁸¹³ Nigeria,⁸¹⁴ Uganda⁸¹⁵ and Zimbabwe⁸¹⁶ adopted laws providing for universal jurisdiction over grave breaches of the Geneva Conventions of 1949.⁸¹⁷ These laws were colonial acts and re-promulgated after independence.⁸¹⁸ In the meanwhile, some states expanded their laws on universal jurisdiction to organised crimes and even domestic offenses of some seriousness. The best illustrations in this regard are the Ghanaian Courts Act 459 of 1993⁸¹⁹ and the DRC’s Penal Code of 1940.⁸²⁰ Since 2002, despite the aforementioned European-African controversy, the practice on

⁸⁰⁹ Article 17

⁸¹⁰ Articles 281-284.

⁸¹¹ Article 17.

⁸¹² Ondo, above note 808, at 77.

⁸¹³ Geneva Conventions Act (1968), Section 3 (1) and (2).

⁸¹⁴ Geneva Conventions Act (1960), Section 3 (1) and (2).

⁸¹⁵ Geneva Conventions Act (1964), Section 3 (1) and (2).

⁸¹⁶ Geneva Conventions Act (1981), Section 3 (1) and (3).

⁸¹⁷ African Union and European Union, above note 671, para.16.

⁸¹⁸ Ondo, above note 808, at 77.

⁸¹⁹ Section 56 (4). This provision provides: Any person (whether a citizen of Ghana or not) is liable to be tried and punished in Ghana for the respective offence if he does an act which if done within the jurisdiction of the courts of Ghana would have constituted any of the following offences - (a) slave trade or traffic in slaves; (b) piracy; (c) traffic in women or children; (d) falsification or counterfeiting or uttering of false copies or counterfeits of any official seal of Ghana or any currency, instrument of credit, stamp, passport or public document issued by the Republic or under its authority; (e) genocide; (f) any offence against the property of the Republic; (g) any offence against the security, territorial integrity or political independence of the Republic; (h) hijacking; (i) unlawful traffic in narcotics; (j) attacks on any international communications system, canal or submarine cable; (k) unauthorised disclosure of an official secret of the Republic; (l) an offence by or against a person in the employment of the Republic or a statutory corporation while acting in the course of the duties of such employment; (m) traffic in obscene publications; and (n) any other offence which is authorised or required by a convention or treaty to which the Republic is a signatory to be prosecuted and punished in Ghana wherever the offence was committed’.

⁸²⁰ Article 3. Among other conditions, the offense to prosecute under universal jurisdiction should be one which is punishable of at least more than two months of imprisonment.

universal jurisdiction has continued to flourish. The main reason pertains to the adoption by a number of states of the legislation implementing the ICC Statute. This is notably the case of South Africa,⁸²¹ Uganda,⁸²² Burundi⁸²³ and Senegal.⁸²⁴ Outside the ICC framework, the principle of universal jurisdiction is still recognised, sometimes in application of various international treaties on human rights. For example, South Africa applies it over terrorism.⁸²⁵ The principle is also known by states not parties to the ICC Statute. The most striking example is Rwanda, the leading state in the African contestations of European indictments against African leaders, which establishes it over various international, cross-border and domestic crimes.⁸²⁶ A part from the African Anglophone legislation, adopted before 2002,

⁸²¹ Implementation of the Rome Statute Act (2002), Section 4 (3).

⁸²² International Criminal Court Act (2010), Section 18.

⁸²³ Law No.1/05 Revising the Penal Code (22 April 2009), Article 10. This Act was preceded by two other important Laws, namely: Law No.1/004 of 8 May 2003 Laying down the Repression of the Crime of Genocide, Crime against Humanity and War Crime; Law No.1/011 of 30 August 2003 Relating to the Ratification by the Republic of Burundi of the Statute of the International Criminal Court.

⁸²⁴ Law No.2007-05 of 12 February 2007 Modifying the Code of Criminal Procedure Concerning the Implementation of the Rome Statute of the International Criminal Court, Article 2. This provision amended Article 669 of the Code of Criminal Procedure.

⁸²⁵ Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 (2004), Section 15 (2). It is here provided : ‘Any act alleged to constitute an offence under this Act and which is committed outside the Republic by a person other than a person contemplated in subsection (1), shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also in the Republic if that- (a) act affects or is intended to affect a public body, any person or business in the Republic; (b) person is found to be in the Republic; and (c) person is for one or other reason not extradited by the Republic or if there is no application to extradite that person’.

⁸²⁶ Organic Law N° 01/2012/OL Instituting the Penal Code (2 May 2012), Article 16; Law N° 30/2013 Relating to the Code of Criminal Procedure (24 May 2013), Article 209. In particular, Article 16 of the Rwanda Penal Code states: ‘Any person, whether Rwandan or foreigner, a Rwandan or foreign non-governmental organization or association, that commits, inside or outside the Rwandan territory, or cross-border crimes may, if apprehended on the territory of the Republic of Rwanda, be prosecuted and tried by Rwandan Courts in accordance with Rwandan laws as if any of the following crimes had been committed in Rwanda : 1° terrorism; 2° hostage-taking; 3° piracy; 4° drug trafficking; 5° illicit manufacturing and trafficking in arms; 6° money laundering; 7° cross-border theft of vehicles with the intent of selling them abroad; 8° information and communication technology related offences; 9° trafficking in human beings especially children; 10° slavery and torture; 11° cruel, inhuman or degrading treatment; 12° genocide, crimes against humanity and war crimes; 13° genocide denial or revisionism; 14° encouraging, mobilizing, assisting, facilitating or participating in any other manner, whether directly or indirectly, in the commission of any of the offences specified in this Article or any other related offences’.

notably the ones relating to the repression of grave breaches of the Geneva Conventions of 1949, the presence of the accused in the territory of the prosecuting state is expressly required. In any case, given the discrepancy of domestic laws in Africa, the UA has proposed a framework for their harmonisation through the Model National Law on Universal Jurisdiction, adopted in 2012, which covers genocide, crimes against humanity, war crimes, piracy, trafficking in drugs and terrorism.⁸²⁷

In practice, these legislative achievements remain largely unapplied. It appears that at least two countries have meaningful experience in prosecutions and trials on the basis of universal jurisdiction, namely Senegal and South Africa. Some two cases which were brought before courts in each of both countries can be highlighted.

Concerning Senegal, the first experience is that of the now well-known trial of Hissène Habré in 2000. The second experience relates to the *Paul Milambwe* case, which was triggered by a private complaint of 2 June 2014 for acts of torture before the investigating judge of the *Dakar Tribunal de grande instance*.⁸²⁸ Paul Milambwe was a senior officer of the DRC's national police, who fled the country after the assassination of Floribert Chibeya, a human rights activist, and the forced disappearance of his collaborator, Fidèle Bazana, on 2 June 2010. The tragic event occurred within the premises of the headquarters of the national police in Kinshasa where both victims sought to honor an appointment on the invitation of General John Numbi, the head of the police at that time. Major Paul Milambwe was the officer in charge of the security of John Numbi's office. He escaped the Congolese justice and found exile in Dakar, whereas his presumed co-authors were convicted of assassination, abduction and arbitrary detention by the Military Court of Appeal of Kinshasa/Gombe (first degree)⁸²⁹

⁸²⁷ EX.CL/Dec.708(XXI), Decision on the African Union Model National Law on Universal Jurisdiction over International Crimes (Doc. EX.CL/731(XXI)c), 21st Ordinary Session of the Executive Council of the African Union, Addis Ababa (Ethiopia), 9-13 July 2012.

⁸²⁸ International Federation of Human Rights Leagues, 'RDC / Sénégal : La justice sénégalaise fait suite à la plainte en compétence universelle de la FIDH et des familles dans l'affaire Chebeya-Bazana' (26 August 2014) <<https://www.fidh.org/fr/regions/afrique/rdc/15934-rdc-senegal-la-justice-senegalaise-fait-suite-a-la-plainte-en-competence>> accessed 23 July 2016.

⁸²⁹ *Public Prosecutor and Civil Parties v. Daniel Mukalay Wa Mateso and Others*, Judgment of 23 June 2011, RP N° 066/2011 - RMP N° 1046/MBJ/2010(unpublished).

and the High Military Court (on appeal),⁸³⁰ respectively on 23 June 2011 and 17 September 2015. However, the trial was severely criticised by human rights organisations as a parody of justice, acquitting some of the principal suspects and sentencing lightly those convicted, while General John Numbi, who was removed from power under pressure after the assassination, remained free and enjoyed impunity.⁸³¹ The *Paul Milambwe* case is still pending in Dakar. The suspect was officially indicted for acts of torture and assassination on 15 January 2015.⁸³²

In South Africa, the first experience to mention is the so-called *Zimbabwe Torture Case*. In fact, the Southern Africa Litigation Centre (SALC), an organisation promoting human rights in the southern African region, suspected seventeen (17) Zimbabwean state officials to have committed acts of torture in connection with a raid on opposition headquarters in Zimbabwe in March 2007. It lodged a complaint with the South African Police Services (SAPS) and South Africa's National Prosecuting Authority (NPA) in order to have the issue investigated and the acts of torture prosecuted as crimes against humanity under the Rome Statute Implementation Act 27 of 2002.⁸³³ The second experience relates to the so-called *Okah* case in which the South African High Court in Johannesburg issued its judgment on 21 January 2013.⁸³⁴ In this case, Henry Emomotimi Okah, a Nigerian citizen, was suspected of being involved in the planning and the organisation of terrorist attacks in Warri and Abuja (Nigeria), on 15 March 2010 and 1 October 2010 respectively, which caused the death of ten persons

⁸³⁰ International Federation of Human Rights Leagues, 'Verdict en appel dans l'affaire Chebeya: « une banalisation du crime d'état »' (24 September 2015) <<https://www.fidh.org/fr/regions/afrique/rdc/verdict-en-appel-dans-l-affaire-chebeya-une-banalisation-du-crime-d>> accessed 23 July 2016.

⁸³¹ *Ibid.* See also S. Roudil and G. Perrier, 'Rapport d'observation du procès « Chebeya - Bazana » en première instance devant la Cour militaire de Kinshasa-Gombe (République Démocratique du Congo) (Protection International : Novembre 2011) <<http://protectioninternational.org/wp-content/uploads/2012/04/rapport-chebeya-web.pdf>> accessed 23 July 2016.

⁸³² International Federation of Human Rights Leagues, 'Affaire Chebeya-Bazana : Inculpation de Paul Mwilambwe au Sénégal, en vertu de la compétence extraterritoriale' (9 January 2015) <<https://www.fidh.org/fr/regions/afrique/rdc/16754-affaire-chebeya-bazana-inculpation-de-paul-mwilambwe-au-senegal-en-vertu>> accessed 23 July 2016.

⁸³³ C. Gevers, 'The Application of Universal Jurisdiction in South African Law', *EJIL: Talk* (24 April 2012) <<http://www.ejiltalk.org/universal-jurisdiction-in-south-africa/>> accessed 15 June 2016; W. Ncube, 'Universal Jurisdiction in Africa: a Step towards Justice' (9 April 2015) <<http://africanlegalcentre.org/2015/04/09/wayne-ncube-universal-jurisdiction-in-africa-a-step-towards-justice/>> accessed 15 June 2016.

⁸³⁴ *S v Okah* (SS94/2011) [2013] ZAGPJHC 6; 2015 (2) SACR 561 (GJ) (21 January 2013).

and seriously injured 64 people.⁸³⁵ He was arrested in Johannesburg on 10 September 2010 and prosecuted in accordance with the Protection of Constitutional Democracy against Terrorist and Related Activities Act of 2004.

In this case, the decision on jurisdiction was quite easy to establish as the accused, finally convicted of terrorism, resided with his family in South Africa.⁸³⁶ However, in the *Zimbabwe Torture Case*, the SAPS and NPA refused to investigate the matter on the ground that, among other reasons, there was no jurisdiction to investigate because the suspects were neither present nor resident in South Africa.⁸³⁷ The SALC challenged this decision before the High Court in Pretoria, which found that there was a duty to investigate under the Implementation of the Rome Statute Act and pursuant to South African international law obligations.⁸³⁸ The position was upheld by the Supreme Court of Appeal; what led the NPA to raise the issue before the Constitutional Court of South Africa.⁸³⁹ In its order of 30 October 2014, the latter Court espoused the position of the Supreme Court of Appeal.⁸⁴⁰ It clarified that the territorial presence or residence in South Africa was a requirement for the exercise of enforcement jurisdiction “in relation to prosecutions and not investigations”.⁸⁴¹ According to the Constitutional Court, the initiation of such investigations only depends on the balance of certain factors in order to determine their practicability and reasonableness.⁸⁴² These factors may include considerations of resource allocation, the possibility to gather evidence, the anticipated presence of a suspect in South Africa and the principle of subsidiarity (which requires that primacy of action is left to a foreign state having a proximate connection with the crime if it is able and willing to investigate it).⁸⁴³

In any case, all these examples contrast with many other criminal situations which happen in Africa for which nobody is successfully brought to justice. One must now try to identify the

⁸³⁵ *Ibid.*, paras.1-3.

⁸³⁶ *Ibid.*, para.8.

⁸³⁷ Section 4 (1) and (3).

⁸³⁸ Ncube, above note 833.

⁸³⁹ *Ibid.*

⁸⁴⁰ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another*, above note 441, para.80.

⁸⁴¹ *Ibid.*, para.76.

⁸⁴² *Ibid.*, para.81.

⁸⁴³ *Ibid.*, paras.78, 79 and 81

reasons which favour this relative judicial inertia to prosecute and try perpetrators of international crimes in Africa.

iii) The Causes of the Judicial Inertia of African States

One of the prominent examples of impunity of African leaders for international crimes comes from Uganda. In this country, the former head of state and late dictator, Idi Amin Dada, who stood in power from 25 January 1971 to 11 April 1979, is said to have murdered more than 100,000 peoples.⁸⁴⁴ Other dictators such as Mengistu Haile Mariam and Hissène Habré did less than that. But, Idi Amin Dada did not answer his crimes in Uganda. He was removed from power by a Tanzanian-backed rebellion and died in exile in Saudi Arabia on 16 August 2003. The same impunity is seen in respect of crimes allegedly committed by Ugandan statesmen under President Yoweri Museveni (in power since 1986) in the DRC during the wars of aggressions of 1996 and particularly 1998, despite the acknowledgement of these crimes by the ICJ in its judgment of 19 December 2005⁸⁴⁵ and the African Commission on Human and Peoples' Rights.⁸⁴⁶ In both situations, the Ugandan Geneva Conventions Act (1964) remained unapplied and ineffective. This almost decorative legislation was complemented by the Ugandan ICC Act of 2010.

Likewise, in Central African Republic (CAR), two former dictators and heads of state, Ange Felix Patassé (1993-2003) and François Bozizé (2003-2013), played a crucial role in permanent crises affecting this country since the 1990s. But, none of them has been brought to justice. Ange Felix Patassé died in Douala (Cameroon) on 5 April 2011, while being accused of numerous crimes, particularly those committed during the civil war which took place between 2002 and 2003, at the end of which François Bozizé came to power. The arrest warrant which was delivered against him, on 22 August 2003, by the investigating judge of the *Tribunal de grande instance* of Bangui, Oradino Pamphile, was executed neither by

⁸⁴⁴ See M. Hansungule, 'The Principle of Complementarity in the Rome Statute in the Context of EU-Africa-EU', 8 (1) *The Bulletin of Fridays of the African Union Commission* (June 2014) 47-60, at 51.

⁸⁴⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, above note 739.

⁸⁴⁶ *Communication 227/ 1999 – Democratic Republic of Congo / Burundi, Rwanda, Uganda*, Decision of May 2003, 20th Activity Report of the African Commission on Human and Peoples' Rights: January –June 2006, at 111-131.

Cameroon nor Togo, the first country of his exile.⁸⁴⁷ Moreover, the prosecutions were based on ordinary offenses under the Criminal Code of 1962, which did not contain provisions on international crimes.⁸⁴⁸ On his part, François Bozizé enjoys the same impunity in his refuge in Cameroon after being overthrown by rebels, named the *Seleka*, backed by Chad, in March 2013. The Central African justice has accused him of 22 murders and 119 summary executions, 53 abductions and arbitrary detentions as well as the destruction of nearly 4,000 homes.⁸⁴⁹ The arrest warrant of 30 May 2013 which was issued against him for crimes against humanity and incitement to commit genocide⁸⁵⁰ under the new Penal Code of 10 January 2010⁸⁵¹ remains a dead letter. While the territorial state fails to prosecute, it is understandable that other African countries do not exercise universal jurisdiction.

To sum up, the relative inertia of African domestic courts in the prosecution of international crimes could have several different explanations. First of all, it is submitted that impunity seems to prevail owing to six interconnected facts, namely if: i) those persons to be prosecuted are the same to be in power; ii) the potential suspects benefit from the support of the authorities in power; iii) the leaders in power are reluctant to prosecutions as they might fear themselves the disclosure of unknown facts which may elucidate their own crimes before the public opinion; iv) the refusal of judicial cooperation by foreign states; v) the problem of immunities of states' officials; vi) the denial by different governments of the independence of the judiciary. As President Yuweri Museveni said, judges should “settle chicken and goat theft cases but not (...) determine the country's destiny”.⁸⁵² Beyond this dictatorship over the judiciary, judges and prosecutors may also fear for their personal physical security as they would deal with crimes of prominent offenders who possess influential means and ties of

⁸⁴⁷ International Federation of Human Rights Leagues, ‘Rapport de mission internationale d’enquête en République centrafricaine -Oubliées, stigmatisées : la double peine des victimes de crimes internationaux’ (October 2006), at 34-35 <<https://www.fidh.org/IMG/pdf/RCA457-2006.pdf>> accessed 21 July 2016.

⁸⁴⁸ *Ibid.*, at 32-33.

⁸⁴⁹ C. Bensimon, ‘RCA: François Bozizé visé par un mandat d'arrêt international’, *Radio France Internationale* (1 June 2013) <<http://www.rfi.fr/afrique/20130601-rca-bozize-mandat-arret-international-bangui>> accessed 19 July 2016.

⁸⁵⁰ *Ibid.*

⁸⁵¹ Law No.10.001 Laying down the Central African Penal Code (6 January 2010). Title IV of this Code is entirely devoted to genocide, crimes against humanity and war crimes (Articles 152-161).

⁸⁵² Hansungule, above note 844, at 55.

nuisance all over their countries.⁸⁵³ Basically, this is a problem of political will. Secondly, national courts may be limited in the exercise of their functions, not only because of insufficient or poorly qualified human resources and legal deficiency in domestic orders, but also and chiefly owing to the lack of materials and financial means necessary to deliver credible justice. This limitation can be explained by the situation of under-development and the fragility of states emerging from armed conflicts or political instability. *A fortiori*, a state could not be capable to administrate justice in extraterritorial cases when it is unable to do so for crimes committed on its territory or by its citizens.

Thus, in the case of *Ange Félix Patassé, Jean-Pierre Bemba and others*, the CAR's Court of Cassation issued the judgment of 11 April 2006 in which it confirmed the doubtless incapacity of the country's judicial services to conduct criminal investigations or prosecutions against the accused.⁸⁵⁴ But, it did not provide sufficient details on the constituent elements of this incapacity. The judgment only acknowledged that the judicial services were powerless enough to exercise with efficacy jurisdiction over persons who were all outside the CAR's territory.⁸⁵⁵ But, one could also explain this extraterritorial obstacle by the lack of equipment/financial means and the default of cooperation of third states where the suspects had found refuge or resided as citizens (Cameroon, DRC, France, Sudan and Togo). Regarding Jean-Pierre Bemba, in particular, this incapacity included the fact that, as vice President of the DRC (2003-2006), he was immune from the CAR's jurisdiction, as posited by the investigating judge of the *Tribunal de grande instance* of Bangui on 16 September 2004.⁸⁵⁶ More important, the CAR had no domestic law on the basis of which it could initiate prosecutions of international crimes. It was because of this series of incapacity, initially upheld by the Court of Appeal of Bangui in its judgment of 16 December 2004,⁸⁵⁷ that the first situation regarding the 2002-2003 armed conflict was referred to the ICC on 22 December 2004 (CAR I). In the same vein, it justified the referral to the same Court of the second situation regarding the 2012-2013 armed conflict, on 30 May 2014 (CAR II).

In such circumstances, to generalise the observation, one must wonder whether the allegation of the abusive exercise of universal jurisdiction by some European states over crimes

⁸⁵³ *Ibid.*

⁸⁵⁴ *Cass. Crim.* 11 April 2006, Expédition, Répertoire No. D06, 2006, at 3.

⁸⁵⁵ *Ibid.*

⁸⁵⁶ *Ibid.*, at 1. This was a procedural recall by the Court of Cassation, but not in the motivation of its judgment.

⁸⁵⁷ International Federation of Human Rights Leagues, above note 847, at 72-73.

committed in Africa is still tenable. The ICC or any other international criminal tribunal cannot deal with all the crimes and all the offenders who enjoy choking impunity in Africa.

2.1.2.2. The Alleged Abuse of Jurisdictional Power by European States

The previous contextual facts and developments can now enable to understand better the pertinence or the irrelevance of the allegation of abuse or misuse of the principle of universal jurisdiction by some European states against a number of African leaders. In this regard, it is important to seize the arguments in support of the allegation (a) before trying to mitigate the disagreement between both sides (b).

a) The Arguments in Support of the Allegation

Until 2008, the African contestations of European proceedings remained limited to the interstate level. Protests were raised through judicial applications before the ICJ (*DRC v. Belgium and Republic of Congo v. France*). The regionalisation of the matter commenced with Rwanda's protest against the indictment of its 40 officials in Spain. The reason why the conflict between Rwanda and Spain was not submitted, like the previous cases, to the ICJ or any other mechanism of peaceful settlement of interstate disputes is difficult to find. One must realise that Rwanda does not recognise the ICJ's jurisdiction contrary to Spain. But, this justification becomes a non-sense when it is observed that Rwanda had previously invited France, which declined the offer, to adjudication before the ICJ after the French justice had indicted nine Rwandan officials in 2006.⁸⁵⁸ In the light of this duplicity of the state behaviour, it can be assumed that the shift by Rwanda to the regional forum was deliberately intended to highly politicise the matter, to find a diplomatic support for the impunity of its officials from the community of African states and peoples as a whole and to provoke a debate about the common understanding on what should be the fundamental conditions for the exercise of universal jurisdiction in contemporary international law.

In those cases brought before the ICJ, it suffices to recall that two arguments were repeatedly advanced: violation of African states' sovereignty and immunities of their officials. These arguments are found in the pronouncements of various regional actors on the then Africa-Europe dispute over universal jurisdiction. The issue was initially invoked by Rwanda during the first meeting of Justice Ministers and/or Attorneys General of African states, gathered in

⁸⁵⁸ Thalmann, above note 769, at 996.

Addis Ababa on 18 April 2008. But, the Pan-African Parliament, the AU legislative body, is the first institution to have made a formal statement on the matter in May 2008. Through the so-called Johannesburg Declaration of the Pan-African Parliament on Universal Jurisdiction, it declared its firm resolution:

1. To condemn the action of the said French and Spanish Judges as a blatant affront to the sovereignty of an African Union Member state.
2. To urge the African Union Heads of State to add their voice in denouncing the attempt on the part of these judges at derogating on the well-established international standards of natural justice and self determination within a sovereign State.
3. In light of the concerns raised, to urge the African Union Commission to take up this concern through a comprehensive study on the subject and do come up with appropriate mechanisms to safeguard the sovereignty of its member states from the consequences of undue abuse and misinterpretation of principles of international law by some states for political gain (...).⁸⁵⁹

The International Conference on the Great Lakes Region (ICGLR), which is an organisation created in 2004 for the promotion of peace, security, integration and development in this part of Africa, followed and generalised the issue. At the end of the meeting of its Regional Inter-Ministerial Committee, held from 21 to 22 May 2008 in Brazzaville (Republic of Congo), the Ministers of foreign affairs of eleven member states made the statement that “working on the basis of the presentation by the delegation of Rwanda condemning the abuse of the principles of universal jurisdiction by some European judges”,⁸⁶⁰ they expressed concern that “the abuse was a blatant affront to the sovereignty of the member states of the ICGLR and other countries of Africa in general”.⁸⁶¹

It is in the light of these initial declarations that the AU Assembly decided to step in. From July 2008 to July 2012, it delivered a total number of seven decisions formulating the regional common position against the European indictments and arrest warrants against African

⁸⁵⁹ Pan-African Parliament, ‘Motion for a Resolution of Parliament on the Concerns by the Republic of Rwanda on the Indictments Issued against Top Civil and Military Leadership of the Republic of Rwanda’ (8 May 2008) <<http://jkanya.free.fr/rwandamotion.pdf>> accessed 28 July 2016. This motion was moved by Higiros Prosper (Rwanda), seconded by Lassane Sawadogo (Burkina Faso) and Gitobu Imanyara (Kenya).

⁸⁶⁰ International Conference on the Great Lakes Region, ‘Report of the Regional Inter-Ministerial Committee (RIMC) Meeting in Brazzaville-Republic of Congo’ (21-22 May 2008), at 16 <[http://www.icglr-rtf.org/uploads/21-22%20may%202008_RIMC-Brazzaville-Final%20Report%20%20\[1\].pdf](http://www.icglr-rtf.org/uploads/21-22%20may%202008_RIMC-Brazzaville-Final%20Report%20%20[1].pdf)> accessed 28 July 2016.

⁸⁶¹ *Ibid.*

leaders on the basis of universal jurisdiction, “thereby creating tension between the AU and the EU”.⁸⁶² This federation of voices was believed to be “the appropriate collective response to counter the exercise of power by strong states over weak states”⁸⁶³ and to put an end to a sort of judicial imperialism on the part of some western powers. The AU Assembly recalled that immunities of states officials should be respected.⁸⁶⁴ In the meantime, it urged and encouraged its member states to apply the principle of reciprocity so that they could defend themselves against the abusive exercise of universal jurisdiction by EU member states.⁸⁶⁵ Rwanda, for example, envisaged its own prosecutions of several French officials for their alleged implication in the 1994 genocide. In fact, Rwanda’s National Independent Commission which inquired into the matter made the recommendation that the Rwandan Government should support individual and collective complaints of victims brought to justice against France or its agents.⁸⁶⁶ In its decision of July 2008, the AU Assembly summarised three arguments against the European indictments of African leaders as follows:

- (i) the abuse of the principle of universal jurisdiction is a development that could endanger international law, order and security;
- (ii) the political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States;
- (iii) the abuse and misuse of indictments against African leaders have a destabilizing effect that will negatively impact on the political, social and economic development of states and their ability to conduct international relations (...).⁸⁶⁷

⁸⁶² Assembly/AU/Dec.213(XII), Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction(Doc. Assembly/AU/3 (XII)), 12th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 1-3 February 2009, para.4.

⁸⁶³ *Ibid.*, para.5.

⁸⁶⁴ Assembly/AU/Dec.243(XIII) Rev.1, above note 603, para.6; Assembly/AU/Dec.292(XV), Decision on the Abuse of the Principle of Universal Jurisdiction (Doc. EX.CL/606(XVII)), 15th Ordinary Session of the Assembly of the African Union, Kampala (Uganda), 25-27 July 2010, para.6.

⁸⁶⁵ Assembly/AU/Dec. 355(XVI), Decision on the Abuse of the Principle of Universal Jurisdiction (Doc. EX.CL/640(XVIII)), 16th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 30-31 January 2011, para.9; Assembly/AU/Dec. 420(XIX), Decision on the Abuse of the Principle of Universal Jurisdiction (Doc. EX.CL/731(XXI)), 19th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 15-16 July 2012, para.5.

⁸⁶⁶ Republic of Rwanda, above note 748, at 331.

⁸⁶⁷ Assembly/AU/Dec.199 (XI), above note 221, para.5.

Therefore, the AU Assembly requested the termination of all pending indictments in Europe and decided that none of the arrest warrants issued in this respect could be implemented in Africa.⁸⁶⁸ The question is now to finally assess whether this African allegation against European states remains totally pertinent. The facts show that the disagreement with European states should be mitigated.

b) The Mitigation of the Disagreement with European States

The starting point of discussion is the question as to whether the African allegation of the abuse of the principle of universal jurisdiction by some European states amounts to an abuse of right. Historically, the doctrine of abuse of right originates from national legal systems.⁸⁶⁹ It has already been a subject of numerous writings in international law.⁸⁷⁰ Rather than exhuming the existing theoretical debate among authors, it suffices to refer to some of the initial studies which were published on the issue.⁸⁷¹ Generally, the doctrine of abuse of right postulates that any possessor of a right should not exercise it in a manner which unduly harms the enjoyment of the right of another person or use it in the accomplishment of purposes for which it is not destined.⁸⁷² There is an abuse of right if the possessor is actually in a legal position to rely on his prerogative. If by its use or exercise he infringes the rules protecting the right of another subject, he does not abuse his own right because he does not possess any in such case but violates the law.⁸⁷³ Otherwise, the doctrine would be redundant in positive international law. That is why it is commonly accepted that the doctrine of abuse of right is useful only for those legal areas where there is a need to restrict the exercise by a state of its discretionary powers or those prerogatives for which it holds a margin of action which is not

⁸⁶⁸ Assembly/AU/Dec.292 (XV), above note 864, para.3; Assembly/AU/Dec.199 (XI), above note 221, para.5 (iv).

⁸⁶⁹ M. Byers, 'Abuse of Rights: An Old Principle, A New Age', 47 *McGill Law Journal* (2002) 389-431, at 391-397.

⁸⁷⁰ See P.H. Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011), at 69-81.

⁸⁷¹ N.S. Politis, 'Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux', 6 *Recueil des Cours de l'Académie de Droit International* (1925) 1-122 ; G. Schwarzenberger, 'Uses and Abuses of the « Abuse of Rights » in International Law', 42 *Transactions of the Grotius Society* (1956) 147-176 ; J.-D. Roulet, *Le caractère artificiel de la théorie de l'abus de droit en Droit international public* (Lausanne : La Baconnière, 1958).

⁸⁷² Byers, above note 869, at 391.

⁸⁷³ Schwarzenberger, above note 871, at 154.

conditioned or limited by the respect of distinct rules of international law. The reason is that any exercise of right must be free from the arbitrariness and unreasonableness of its holder towards other legal subjects as a command of the rule of law.⁸⁷⁴

In the light of these clarifications, it appears that what is largely at stake in the African allegation against European states is the violation of positive rules of international law to which the exercise of universal jurisdiction is subordinated, namely sovereignty, territorial presence of the accused and immunities. Considerations of abuse of right seem to appear only in relation to the alleged political end of the European proceedings and the unequal judicial treatment of potential offenders involved in the same African situations. But, on the merits, these two aspects of the African allegation have to be mitigated.

On the one hand, there has been some exaggeration on the part of Africa.⁸⁷⁵ The facts submitted to the jurisdictional power of European states were invented. All the proceedings are related to situations in which non-contested appalling crimes have been committed and of which perpetrators enjoy impunity in Africa. It is even cynical that those African leaders who could face justice for their own crimes stand at the frontline to object to the exercise of universal jurisdiction by some European states to the detriment of their victims and the interest of the entire humanity. Moreover, in some cases, it has been observed that the right to immunity of African leaders, such as Laurent-Désiré Kabila, Paul Kagame and Jean-François Ndengue, had been acknowledged by European judges and prosecutors. Effective trials for the substantive matter have not been organised. In some others cases, Africa seems to have conflated indictments on the basis of passive personality with the principle of universal jurisdiction. This is particularly the case of the French proceedings against Rwandan officials or the complaints of family members of Spaniard murdered victims that were lodged with the Spanish justice for the events which took place in Rwanda between 1990 and 1994.⁸⁷⁶

On the other hand, in contrast, there have also been some violations of international law on the part of European states. This is the case of the Belgium arrest warrant of 11 April 2000, delivered in total disregard of personal immunity of a minister of foreign affairs. In the same vein, indictments, arrest warrants and their circulation through media, between countries and

⁸⁷⁴ D. Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine', 9 (4) *Utrecht Law Review* (2013) 68-89, at 86-87.

⁸⁷⁵ African Union and European Union, above note 671, para.40.

⁸⁷⁶ Jalloh, above note 699, at 20-21.

by the International Police Organisation were issued against presumed offenders who were not present or found in the territory of the prosecuting states. This is particularly the case of the Belgium arrest warrant of 11 April 2000 again and the Spanish indictment of Rwandan officials in February 2008. One may add to this conclusion the abuse of right in some circumstances. For example, the launch of the Belgium arrest warrant against the DRC's Minister of foreign affairs occurred in the context of ongoing peace negotiations to end the war which started in 1998. As a consequence, the accused person could no longer travel at the precise moment when his functions were much needed by his country. This kind of judicial blockage of one country's foreign relations, its impact on the peace process and the continuation of the bloody armed conflict evidenced that Belgium's exercise of universal jurisdiction was not reasonable. The end of impunity of one man was not equivalent in interest to ending the war (with the involvement of at least eight countries) and thus curbing the number of its numerous victims. Worse, the politicisation of the prosecutions was very obvious. Even if proceedings were triggered by private complaints of victims, it seems that some of the plaintiffs were political opponents to the ruling government in Kinshasa.⁸⁷⁷ Therefore, it was doubtful whether Belgium was entirely engaged in the struggle against impunity or just in the harassment of an undesirable government in order to take control of its foreign policy or to make it adopt a certain line of political conduct.⁸⁷⁸ Actually, a country which wished justice to prevail should have *equally* paid attention to the DRC's occupied territory where the vast majority of reported crimes were perpetrated, rather than concentrating unreasonably on the case of one governmental member.

Finally, contrary to the position of some commentators,⁸⁷⁹ the abusive application of universal jurisdiction cannot be mitigated towards the African continent just on the ground that proceedings have been also conducted against nationals of states from other parts of the world: North and Latin America (United States of America, Argentina and Chile), Asia (China, Iran, Iraq, Israel and Palestine) and the Caribbean (Cuba).⁸⁸⁰ The reason is that these proceedings have raised similar contestations to those of African states. More important, it is precisely because of American and Israeli protests that the leading European countries on the

⁸⁷⁷ Separate Opinion of Judge *ad hoc* Bula-Bula, above note 629, para.23.

⁸⁷⁸ *Ibid.*

⁸⁷⁹ African Union and European Union, above note 671, para.40.

⁸⁸⁰ *Ibid.*

issue of universal jurisdiction modified their respective national legislation.⁸⁸¹ For example, the United States of America threatened Belgium with punitive counter-measures, notably to remove the headquarters of the North Atlantic Treaty Organisation (NATO) from its territory.⁸⁸² These protests confirm that there would rarely be domestic prosecutions of individuals from powerful states or their *protégés*.⁸⁸³ Thus, the judges and prosecutors should satisfy themselves with cases from weak countries such as the prosecutions of African leaders. But, the most insoluble question remains the refusal by African states themselves to have their officials and personalities be prosecuted outside their continent. This refusal looks like the negation of the principle of universal jurisdiction or the tentative restriction of its application in relation to geographical preferences and historical ties. It is in view of this development that a common understanding of the principle of universal jurisdiction should be promoted, the law re-articulated and reformed. It would be unwise to keep such jurisdictional power untouchable, or non-negotiable in the terms of the European perspective,⁸⁸⁴ while it could not lead anymore to effective prosecutions of crimes committed by prominent states' officials except politically unprotected small fishes. The law, which has to be equal to everybody and every country, must be adapted to contemporary circumstances. The same necessity of legal adaptation applies to the contention over ICC jurisdiction and judicial work in Africa.

2.2. The Contention over the International Criminal Court

As it is well known, the ICC Statute was adopted in Rome on 17 July 1998. It is perceived as the most important international organisation ever created in the world after the United Nations (UN) in June 1945.⁸⁸⁵ The historic significance of the adoption of this Statute was acknowledged by the General Assembly on 26 January 1999.⁸⁸⁶ The ICC's objective is to ensure justice for victims of the most serious international crimes such as genocide, crimes

⁸⁸¹ Jalloh, above note 699, at 56.

⁸⁸² *Ibid.*

⁸⁸³ K. Coombes, 'Universal Jurisdiction: a Means to End Impunity or a Threat to Friendly International Relations?', 43 *Georges Washington International Law Review* (2011) 419-466, at 446-447.

⁸⁸⁴ African Union and European Union, above note 671, para.41.

⁸⁸⁵ Du Plessis, above note 390, at 1; A. Bourgi, 'La Cour pénale internationale: le droit au service de la politique', in M. Ndiaye (ed.), *L'impunité: jusqu'où l'Afrique est-elle prête* (Paris: L'Harmattan, 2012) 59-64, at 59.

⁸⁸⁶ UNGA Res.A/RES/53/105, 26 January 1999, para.1.

against humanity, war crimes and aggression. It is expected to have a deterrent effect on any would-be international criminal, especially in countries and regions subject to widespread atrocities and armed conflicts.⁸⁸⁷ In order to discharge this mandate, the ICC consists of three main units and four organs. First, the judicial unit is composed of 18 judges and two organs, i.e. the Presidency of the Court and the appeals, trial and pre-trial divisions. Each division possesses, depending on the number of cases brought to the Court, one or several chambers. Second, there is the Office of the Prosecutor (OTP), headed by the Prosecutor and assisted by one or more Deputy Prosecutors, who are all elected for a non-renewable mandate of nine years. The OTP encompasses three main divisions, namely the Jurisdiction, Complementarity and Cooperation Division,⁸⁸⁸ the Investigation Division⁸⁸⁹ and the Prosecution Division.⁸⁹⁰ The third unit is the Registry which is mainly responsible for the non-judicial aspects of the administration and services of the Court.⁸⁹¹

The ICC Statute entered into force on 1 July 2002, earlier than what several commentators foresaw,⁸⁹² after the acquisition of the required sixty ratifications.⁸⁹³ Just this swift entry into force is indicative of the euphoria with which states and the international community welcomed the new judicial icon, giving the impression to a commentator that it is “the best instrument (...) to deliver justice and fight impunity at the international level”.⁸⁹⁴ But,

⁸⁸⁷ Manirabona, above note 344, at 281; A. Arieff, R. Margesson, M.A. Browne, M. C. Weed, *International Criminal Cases in Africa: Status and Policy Issues* (CRS Report for Congress Prepared for Members and Committees of Congress: 22 July 2011), at 26.

⁸⁸⁸ Its mandate is to conduct preliminary examinations, to provide advice on issues of jurisdiction, admissibility and cooperation, and to coordinate judicial cooperation and external relations for the OTP.

⁸⁸⁹ This Division is in charge of providing investigative expertise and support, coordinating field deployment of staff and security plans and protection policies, and providing crime analysis and analysis of information and evidence.

⁸⁹⁰ It prepares the litigation strategies and conducts prosecutions, including through written and oral submissions to the judges.

⁸⁹¹ The judicial aspects are discharged by the Presidency, which exercises functions such as the creation of chambers and the allocation of judges or cases to these chambers.

⁸⁹² L. Condorelli, ‘La Cour pénale internationale: un pas de géant (pourvu qu’il soit accompli...)’, *CIII Revue générale de droit international public* (1999) 7-21, at 8.

⁸⁹³ ICC Statute, Article 126 (1).

⁸⁹⁴ A. Mbata Mangu, ‘The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa: An Overview’, *XL (2) Africa Development* (2015) 7-32, at 9-10.

warnings were made against any blind triumphalism.⁸⁹⁵ Apparently, the ICC Statute was adopted in a hurry while “the idea of having a single and permanent international criminal court acting as a dominant source of international law enforcement [was still] unpalatable to states”.⁸⁹⁶ Hence, pessimism on the future of the world Court was beginning to replace the initial optimism.

Criticisms have progressively increased owing to the manner in which it accomplishes its mandate. Hostility against the Court’s work has generated what can now be termed “the ICC crisis”.⁸⁹⁷ Accordingly, to the initial divergence of views on the establishment of the Court (2.2.1) has succeeded a period of hostility against its judicial work in Africa (2.2.2), including the disagreement with the rules (and chiefly their interpretation) on the immunity of state officials before international criminal tribunals (2.2.3).

2.2.1. The Divergence of Views between States on the Court’s Establishment

The outcome of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC (15 June-17 July 1998) could show that negotiating parties have failed to find a global consensus on major legal aspects of the Court’s Statute. A number of unrealised legal expectations (2.2.1.1) have therefore led into the crisis of participation in the ICC (2.2.1.2).

2.2.1.1. The Unrealised Legal Expectations on the Part of African States

African states and regional organisations actively participated in negotiations regarding the ICC Statute.⁸⁹⁸ Forty-nine African countries,⁸⁹⁹ the OAU and the Southern Africa Development Community (SADC) were present. Despite this wide participation in the

⁸⁹⁵ Condorelli, above note 892, at 7-8.

⁸⁹⁶ R. JV Cole, ‘Africa’s Relationship with the International Criminal Court: More Political than Legal’, 14 *Melbourne Journal of International Law* (2013) 1-29, at 28.

⁸⁹⁷ K. Carlson, ‘The International Criminal Court: Challenges and Possibilities’, 6(1) *The Bulletin of Fridays of the Commission of the African Union* (2014) 37-40, at 37 and 39.

⁸⁹⁸ H. Jallow and F. Bensouda, ‘International Criminal Law in an African Context’, in M. Du Plessis (ed.), *African Guide to International Criminal Justice* (Pretoria: Institute for Security Studies, 2008)15-53, at 41-43; S. Maqungo, ‘The Establishment of the International Criminal Court: SADC’s Participation in Negotiations’, 9 (1) *African Security Review* (2000) 42-53; Du Plessis, above note 390, at 2-6.

⁸⁹⁹ The following states were not present: Equatorial Guinea, The Gambia, Seychelles, Somalia, Sahrawi Arab Democratic Republic and Southern Sudan.

negotiations, dissatisfaction with the outcomes of the United Nations Diplomatic Conference of Plenipotentiaries in Rome is perceptible. To demonstrate this assumption, two main preparatory documents to the Rome negotiations can serve as a means of evidence. On the one hand, some twenty-five African countries adopted the Dakar Declaration dated 6 February 1998 for the establishment of the ICC.⁹⁰⁰ It was also acknowledged by the OAU Council of Ministers on 27 February 1998 which appealed to all its member states to support the creation of the ICC.⁹⁰¹ On the other hand, the SADC principles of consensus on the ICC were approved by fourteen member states during the Pretoria meeting held from 11 to 14 September 1997⁹⁰². These two non-binding documents were variously reiterated in official declarations during the United Nations Diplomatic Conference in Rome.⁹⁰³ Therefore, they represented the shared vision by the majority of African states on the court which had to be created. In this respect, the first unrealised expectation refers to the Court's institutional status (b) and the second to the scope of its jurisdiction (b).

a) The Court's Institutional Status

The ICC's status within the international legal system was a disputed matter between the negotiating states in Rome. Controversies were particularly sharp on its relationship with the United Nations and the power of the Prosecutor.

It is worth noting that the ILC Draft Statute for an International Criminal Court of 1994 had resolved these issues in a manner which widely diminished the independence of the Court. True, the latter was built as an intergovernmental organisation, in the meaning of the Vienna Conventions on the law of treaties,⁹⁰⁴ and thus, enjoyed the status as a legal subject distinct

⁹⁰⁰ Dakar Declaration for the Establishment of the International Criminal Court in 1998 (6 February 1998), <<http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf>> accessed 12 March 2015.

⁹⁰¹ C.B. Murungu, 'Immunity of State Officials and Prosecutions of International Crimes in Africa' (PhD Thesis, University of Pretoria 2011), at 180.

⁹⁰² See Maqungo, above note 898, at 43-44.

⁹⁰³ United Nations, 'Summary Report of the Plenary Meetings and of the Meetings of the Committee of the Whole' UN Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court (Rome 15 June-17 July 1998) Official Records (New York 2002) UN Doc.A/CONF.183/13 (vol.II), at 65 and 83.

⁹⁰⁴ Vienna Convention on the Law of Treaties, Article 2 (1) (i); Vienna Convention on the Law of Treaties between States, and International Organisations or between International Organisations (21 March 1986), Articles 1 and 2 (1) (i).

from member states and any other international organisation. However, it could have operated only in the hands of states parties and the Security Council. This connection to the international system was reflected in two principal ways.

First, the Prosecutor was deprived of his proper power to initiate investigations and prosecutions. He could only act out of a referral by the Security Council, states parties accepting its jurisdiction and states parties to the genocide Convention.⁹⁰⁵ According to the ILC, this connection was necessary “in order to enable the Council to make use of the court, as an alternative to establishing ad hoc tribunals and as a response to crimes which affront the conscience of mankind”.⁹⁰⁶ However, the Security Council did not receive the power to defer investigations or prosecutions. The ICC’s Prosecutor was expected to remain free in order to conduct his action, without interference, until the end of the proceedings. Second, no prosecution in situations (maybe even referred to the Court) would have been commenced if the latter proceedings were 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 UN Charter, unless the Security Council otherwise decided.⁹⁰⁷ For the ILC, this was “an acknowledgement of the priority given by article 12 of the Charter, as well as for the need for coordination between the Court and the Council in such cases”.⁹⁰⁸ But, it can be objected that this argument is weak because article 12 of the UN Charter regulates the relationship between the General Assembly and the Security Council.⁹⁰⁹ It could not be diverted from its context for the purpose of making the judicial action of a new separate organisation dependent on the processes of a political body of the United Nations. Likewise, any referral for the crime of aggression could not be brought

⁹⁰⁵ ILC Draft Statute for an International Criminal Court (1994), Articles 23 (1) and 25 (1) and (2).

⁹⁰⁶ International Law Commission, above note 67, at 44.

⁹⁰⁷ ILC Draft Statute for an International Criminal Court, Article 23 (3).

⁹⁰⁸ International Law Commission, above note 67, at 45.

⁹⁰⁹ Article 12 of the UN Charter provides : ‘1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests. 2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters’.

to the Court by a state without the prior determination of the Security Council as provided for under Chapter VII of the UN Charter.⁹¹⁰

This vision was not shared by the Dakar and SADC groups of African states. They were in favour of a court which could be, as a separate institution from the United Nations, “independent, permanent, impartial, just and effective”,⁹¹¹ whose actions were not be prejudiced by political considerations.⁹¹² Consequently, they furthered the mandate of a Prosecutor with effective broad powers to act and initiate investigations *proprio motu*, outside the hands of states parties and the Security Council. The ICC was expected to be based on the sovereign equality of all states and the consent to its jurisdiction through ratifications, state referrals of situations or *ad hoc* acceptance by third parties. African states were opposed to any form of interference of the Security Council into the functioning of the ICC. There is not a better formulation than what the Ugandan representative declared: “[...] the role of the Security Council under Chapter VII of the UN Charter should not be allowed to influence the acceptability and the independence of the Court”.⁹¹³ Although this position evolved within the SADC group of states, only a mere referral of situations by the Security Council to the independent Prosecutor, but not the power of deferral of investigations or prosecutions, appeared bearable.⁹¹⁴ African states presumably feared to vest a political body dominated by five permanent members (five great powers and not a single African country) with the competence to decide which situation to investigate or even to influence the judicial choice of the Prosecutor. They wanted to avoid settlements of political scores through international judicial means.

By the end of the negotiations, these expectations were not fully realised. If the ICC is a distinct intergovernmental organisation, it is linked, pursuant to article 2 of the Statute⁹¹⁵ and

⁹¹⁰ ILC Draft Statute for an International Criminal Court, Article 23 (2).

⁹¹¹ Maqungo, above note 898, at 43. See also Dakar Declaration, above note 900.

⁹¹² *Ibid.*

⁹¹³ United Nations, above note 903, at 118.

⁹¹⁴ Maqungo, above note 898, at 47.

⁹¹⁵ This Article provides: ‘The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf’.

through a special agreement,⁹¹⁶ to the United Nations, with which it shares a number of objectives, i.e. the preservation of peace and justice in the world. Concerning the Court's connection with the Security Council, its independence has been more undermined. On the insistence of great powers and particularly the United States of America, the Security Council is vested with new exorbitant powers. It received the so-called competence to defer investigations or prosecutions,⁹¹⁷ which is actually a capability for paralysing the ICC's proceedings through a political decision. It was also attributed the power to refer to the Prosecutor, under article 13 (b) of the ICC Statute, situations implicating non-contracting states. This article is quite an unprecedented conventional provision which destroys the basic principle of the law of treaties requiring that international agreements should not produce effects on third parties without their consent. It seems that exceptions to this principle were (so far) simply scarce, if not impossible, to find.⁹¹⁸

Yet, one must observe that the Security Council does not enjoy any referral or deferral power in regard to *ad hoc* tribunals (ICTY and ICTR), which are in addition its subsidiary organs. Moreover, it is actually doubtful that Chapter VII of the UN Charter has allocated for this political body the power to impose a treaty on a third party under the alibi of maintaining international peace and security or avoiding the establishment of costly *ad hoc* tribunals. This strong dependency of a judicial institution on the will of a political body, if affirmed at a national level, would simply be a legal scandal, including in a dictatorial regime. Even if international law is different from national law, this comparison better illustrates the magnitude of powers granted to the Security Council. Therefore, the ICC is an actor of a politicised justice⁹¹⁹ which might highly fluctuate according to the course of international politics.⁹²⁰ This danger invokes the parallel high risk of selective justice in the hands of

⁹¹⁶ Negotiated Relationship Agreement between the International Criminal Court and the United Nations (2004). It was approved by the Assembly of States Parties on 7 September 2004 and the General Assembly on 13 September 2004. The entry into force followed on 4 October 2004. This treaty regulates the working relationship between these two organisations and establishes the legal foundation for cooperation within their respective mandates.

⁹¹⁷ ICC Statute, Article 16.

⁹¹⁸ Dupuy and Kerbrat, above note 223, at 338.

⁹¹⁹ M.L. Ceroni and D. Scalia, 'Juridictions pénales internationales et Conseil de sécurité: une justice politisée', 25 (2) *Revue québécoise de droit international* (2012) 37-71, at 54-65.

⁹²⁰ M. Ignatieff, 'We're so Exceptional', *The New York Review of Books* (5 April 2012), quoted by D. Hoile, *Justice Denied: The Reality of the International Criminal Court* (London: Africa Research Centre, 2014), at.9.

powerful states or the victorious parties to an armed conflict. The situation recalls the western historical roots of the system of international criminal justice in the aftermath of World War I and II. The most powerful state crushes the weaker country, makes himself or his allies innocent of any crime, and then imposes his moral supremacy through selective justice and law enforcement.

Concerning the ICC Prosecutor, his status is improved compared with the stipulations of the ILC Draft Statute of 1994. Of course, he is not the agent at the service of states parties or the Security Council as such. He enjoys the power to act and initiate investigations *proprio motu*,⁹²¹ including for the crime of aggression.⁹²² He is independent in his action after any referral of a situation to his office. In particular, he freely assesses whether to proceed with an investigation or not, or whether to prosecute or not. His decision is only placed under the judicial control of the Pre-Trial Chamber (PTC). In other words, the PTC can authorise the commencement of an investigation or review the Prosecutor's decision not to proceed or not to prosecute upon investigation in relation to a situation in which a crime falling under the ICC jurisdiction might have been committed.⁹²³ Furthermore, the Prosecutor is free in the selection of incidents to investigate, crimes and persons to be prosecuted. But, this is a discretionary power which does not fall under the judicial review of the PTC, meaning that the Prosecutor cannot be compelled to any choice in this respect. Even the Assembly of States Parties (ASP), which is a body outside the judicial structure of the Court, is theoretically incapable to politically control and to influence his judicial function. It can only "provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court".⁹²⁴ The dismissal of the ICC Prosecutor in the course of his nine-year-term mandate is thus apparently excluded. What's about the Court's jurisdiction?

b) The Scope of the Court's Jurisdiction

Previous developments have already shown that the ICC does not enjoy unlimited jurisdictional power or even a sort of universal jurisdiction to the effect that it can try any person who is suspected of having committed international crimes provided for by its Statute. Only crimes committed on the territory of a state which consents to the founding treaty of the

⁹²¹ ICC Statute, Article 15 (1).

⁹²² *Ibid.*, Article 15 bis.

⁹²³ *Ibid.*, Article 15 (3)- (5) and Article 53 (3).

⁹²⁴ *Ibid.*, Article 112 (2) (b).

Court or by nationals of that state in the territory of a non-contracting party are concerned. Sure, the eventual extension of the ICC jurisdiction to nationals of third states under this legal framework or out of a referral resolution of the Security Council has found a lot of resistance in Rome. But, at this stage, it is important to focus on three other specific bones of contention, that is to say the selection of crimes within the ICC jurisdiction, the Court's competence to try legal persons and the principle of complementarity.

Concerning the list of crimes, the initial approach of the ILC, with James Crawford as Special *Rapporteur*, did not aim to incorporate a list of international crimes in the ICC Statute.⁹²⁵ It was believed reasonable to leave the determination about which crime to try in the power of the Court in application of existing treaty and customary international law. It was not intended to establish a code of international crimes which was rather a separate topic on the ILC's table. In this regard, the ICC Statute was expected to be "primarily procedural and adjectival"⁹²⁶ and to line itself with the respect of the legality principal, very especially in the event of the Court's intervention in a non-contracting country. Therefore, in the ILC Draft Statute for an International Criminal Court of 1993, the Court was given jurisdiction over crimes "under a norm of international law accepted and recognised by the international community of States as a whole as being of such a fundamental character that its violation attracts the criminal responsibility of individuals".⁹²⁷

However, this approach was abandoned in the Draft Statute of 1994⁹²⁸ as well as in the ICC Statute of 1998. It was relinquished by the ILC because doing so would have given the Court a quasi-legislative function.⁹²⁹ Instead, during the United Nations Diplomatic Conference of Plenipotentiaries in Rome, negotiating states did not want to adopt the ICC Statute, with potential prosecutions against their high ranking officials, without knowing exactly in advance for which kind of international crimes.⁹³⁰ Even if the new approach consisting of

⁹²⁵Condorelli, above note 892, at 14-15. See also J. Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal', 88 *American Journal of International Law* (1994) 140-152.

⁹²⁶ International Law Commission, above note 67, at 36.

⁹²⁷ *Ibid.*

⁹²⁸ ILC Draft Statute for an International Criminal Court, Article 20.

⁹²⁹R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005), at 233; J. Crawford, 'The ILC Adopts a Statute for an International Criminal Court', 89 *American Journal of International Law* (1995) 404-416, at 411.

⁹³⁰ Condorelli, above note 892, at 14-15.

defining the crimes concerned under the Statute did not intend to create new progressive norms on criminal conducts either, it was the result of the need to find a political compromise on the list of crimes falling under the jurisdiction of the Court.⁹³¹

As for African states, they were favourable to the inclusion of genocide, crimes against humanity, war crimes and aggression in the ICC Statute. A part of them, like Libya, also wanted to extend the list to other crimes and include particularly financial, economic and environmental crimes.⁹³² But, the threshold of the gravity of crimes listed under the ICC Statute had been put so high that only “the most serious crimes of concern to the international community as a whole”,⁹³³ which “threaten the peace, security and well-being of the world”,⁹³⁴ were accepted, i.e. genocide, crimes against humanity, war crimes and aggression, even though the definition of the latter crime (aggression) was postponed for future considerations.⁹³⁵ As a result, the Court cannot deal with crimes which may be of specific concern to a community of states at the regional or sub-regional level. This selectivity of the substantive competence is somewhat a retreat in law compared with the ILC Draft Statute of 1994 which included, in addition to the list of four crimes agreed upon in Rome, “crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern”.⁹³⁶ If this provision could have the effect of covering more international crimes, there was a practical hindrance in that the Court could not receive unlimited resources, beginning by financial ones, in order to deal with so many crimes and offenders. Since the adoption of the ILC Draft Statute of 1994, it had been warned that the extension of the list of crimes beyond those which were of concern for the international community as a whole

⁹³¹ R. Cryer, ‘International Criminal Law vs. State Sovereignty: Another Round’, 16 (5) *European Journal of International Law* (2005) 979-1000, at 989-990.

⁹³² United Nations, above note 903, at 103.

⁹³³ ICC Statute, Preamble, para.4.

⁹³⁴ *Ibid*, para.3.

⁹³⁵ The definition was finally adopted during the Review Conference held in Kampala (Uganda) in 2010 and included in the ICC Statute under Article 8 *bis*. But, Article 15 *ter* (3) of the ICC Statute provides: ‘The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute’.

⁹³⁶ ILC Draft Statute for an International Criminal Court, Article 20 (e).

would have provoked the reluctance of many states (probably outside Africa) to consent to the ICC Statute.⁹³⁷

Concerning corporate liability, the SADC group of states requested that the ICC has jurisdiction over legal persons like companies and other forms of corporations.⁹³⁸ Emphasis must be put here on the liability of multinational corporations. These types of legal persons are suspected of being behind some of the most serious human rights abuses on the continent when they engage in business activities (i.e. control and plundering of natural resources, trade and trafficking of weapons) with states or non-states actors in areas affected by conflicts or of limited statehood.⁹³⁹ It has been demonstrated that many African countries in conflict are at extreme and high risks for corporate complicity in the perpetration of international crimes.⁹⁴⁰ Hence, it did not appear wise for the SADC group of states to have only individuals being criminalised, whereas a multinational company, for example, could make money in the blood of innocent people, to the detriment of their nation, and in impunity. One of the reasons why the ICC Statute did not target legal persons might be that remote conception dating back to the Nuremberg trials according to which international crimes are committed by men, not by abstract entities, and only the punishment of individual perpetrators of such crimes may contribute to the enforcement of international criminal law with efficacy.⁹⁴¹ In the same vein, William A. Schabas writes:

Proposals that the Court also exercise jurisdiction over corporate bodies in addition to individuals were seriously considered at the Rome Conference. While all national legal systems provide for individual criminal responsibility, their approaches to corporate criminal liability vary considerably. With a Court predicated on the principle of complementarity, it would have been unfair to establish a form of jurisdiction that would in effect be inapplicable to those States that do not punish corporate bodies under criminal law. During negotiations, attempts at encompassing some form of corporate liability made considerable progress. But time was simply

⁹³⁷ K. Ambos, 'Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint', 7 *European Journal of International Law* (1996) 519-544, at 523.

⁹³⁸ Maungo, above note 898, at 47 and 48.

⁹³⁹ J. Chella, 'The Complicity of Multinational Corporations in International Crimes: an Examination of Principles' (PhD Thesis, Bond University 2012), at 5-13.

⁹⁴⁰ *Ibid.*, at 10-11.

⁹⁴¹ W.A. Schabas, *An Introduction to the International Criminal Court* (2nd edn., Cambridge: Cambridge, 2004), at 101.

too short for the delegates to reach a consensus and ultimately the concept had to be abandoned.⁹⁴²

Finally, African states differently perceived the scope of the ICC jurisdiction in regard to the principle of complementarity. This principle reconciles the Court's jurisdiction and the sovereignty of states parties in that the latter states keep their jurisdictional primacy while the ICC subsidiarily intervenes in case of their failure to investigate or to prosecute the underlying crimes. Complementary jurisdiction was adopted for the ICC in order to gain much support for the Rome Statute. Without it, it was probable that many other states would not have accepted the new treaty.⁹⁴³ But, if the Court was expected to be complementary to national criminal justice systems, the Dakar Declaration added that complementarity also existed between the ICC and regional tribunals.⁹⁴⁴ It is worth noting that this complementarity was required on the eve of the establishment of the AU on 11 July 2000. It is imaginable that some African states already had in mind that the new organisation could be in a position to create a regional tribunal to deal with African criminal matters before any *external* international judicial action. After all, the ICC Statute intentionally ignored complementarity with potential regional criminal tribunals in favour of a binary system, ICC-national jurisdictions.⁹⁴⁵ That was also the option already agreed upon by the ILC in its Draft Statute of 1994.⁹⁴⁶ It means that there is no power sharing between stakeholders of universalism and defenders of a flexible regime in which regions could have a say in the matter. In the light of all these controversies, the subsequent crisis of participation to the Court is not a surprise.

⁹⁴² *Ibid.*

⁹⁴³ M. Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice and between State Sovereignty and the Fight against Impunity', 7 *Max Planck Yearbook of United Nations Law* (2003) 591-632, at 593.

⁹⁴⁴ Dakar Declaration, above note 900.

⁹⁴⁵ K. Rau, 'Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights', 97 *Minnesota Law Review* (2012) 669-708, at 692.

⁹⁴⁶ International Law Commission, above note 67, at 27. See Commentary on the Preamble, where it is stated: 'The Preamble sets out the main purposes of the Statute, which is intended to further cooperation in international criminal matters, to provide a forum for trial and, in the event of conviction, to provide for appropriate punishment of persons accused of crimes of significant international concern. In particular it is intended to operate in cases where there is no prospect of those persons being duly tried in national courts. The emphasis is thus on the Court as a body which will complement existing national jurisdictions [...]' (*ibid.*).

2.2.1.2. The Crisis of Participation in the Court

According to Sivu Maqungo, the draft of the Rome Statute was unacceptable for many delegations, including African states.⁹⁴⁷ But, despite the apparent failure to find a global legal consensus in Rome, which did not appear in official speeches of satisfaction to see the advent of the judicial icon, African states voted for the ICC Statute, signed and quickly ratified it in their vast majority. Senegal was the first country to become a member of the ICC on 2 February 1999. Statistically, by the end of August 2016, they constitute the largest group of states parties among 124 ICC members: 34 African states, 19 Asia-pacific states, 18 from Eastern Europe, 28 Latin American and Caribbean states and 25 from Western Europe, Northern America and Oceania.⁹⁴⁸ Only twenty-one other African countries have not yet joined the ICC.⁹⁴⁹

In comparison, the United States of America, China, Israel and India⁹⁵⁰ explicitly stated that they had not voted for the Rome Statute. Russia adopted and signed the new treaty, but it has never ratified it. The United States of America finally decided to sign it on 31 December 2000.⁹⁵¹ But, on 6 May 2002, it withdrew its signature, the new administration under President George W. Bush advancing that the country was not intending to become an ICC member.⁹⁵² It seems that the other three states that opted against joining the ICC were Arabic

⁹⁴⁷ Maqungo, above note 898, at 45.

⁹⁴⁸ International Criminal Court, 'The States Parties to the Rome Statute' <https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed 30 August 2017.

⁹⁴⁹ Algeria, Angola, Cameroon, Egypt, Eritrea, Ethiopia, Equatorial Guinea, Guinea Bissau, Libya, Mauritania, Mozambique, Rwanda, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Somalia, Sudan, Swaziland, Togo, Zimbabwe, Southern Soudan, Morocco.

⁹⁵⁰ The main reason for India was its firm opposition to the powers given in the ICC justice system to the Security Council, dominated by five permanent members with veto powers.

⁹⁵¹ E. P. Schwartz, 'The United States and the International Criminal Court: the Case for "Dexterous Multilateralism"', 4 (1) *Chicago Journal of International Law* (2003)223-235, at 224-225 and 228.

⁹⁵² M. G. Ituma, 'The Crossroad of Politics and Law: the Unfinished Debate between the United States and the International Criminal Court', 5 (2) *African Conflict and Peace Journal* (2012) 79-82, at 79. See also the USA letter sent the UN Secretary General, the depositary of the Rome Statute <http://www.amicc.org/docs/bolton.pdf>

countries, two from Africa: Libya, Iraq and “Algeria, Qatar or Yemen”.⁹⁵³ It is remarkable that no Asian Arabic country is a member of the ICC, except Jordan.

Thus, the crisis of participation in the ICC gives the impression that some states keep their sovereignty jealously untouchable, while others are subjected, by will, constraint or enticement, to the global criminal justice system. This phenomenon of unbalance of powers and inequality of states dictates the international attitude towards the ICC. The assumption can be chiefly illustrated by the case of African states’ non-membership (a) and membership to the Court (b).

a) The Justification of Non-membership

There are various reasons to be mentioned. First, some African states not parties to the ICC Statute are those which did not attend the United Nations Diplomatic Conference of Plenipotentiaries in Rome: Equatorial Guinea (under a non-opened dictatorial regime), Somalia (a failed state lacking a legitimate representative government), Sahrawi Arab Democratic Republic (recognised by the AU, but not the United Nations) and South Sudan (not yet born). While the Sahrawi Arab Democratic Republic cannot accede to the Statute due to its non-recognition as a state by the United Nations, the three other remaining countries are presumably not encouraged to join the ICC while being in a deteriorated relationship with Africa.

Second, speaking on behalf of the Group of Arab states, Sudan advanced several arguments as to why they disagreed with the proposed ICC Statute. Sudan notably pointed out: i) the fact that the treaty included general expressions concerning the crime of aggression, and that it would be many years before the Court could exercise its jurisdiction in that field; ii) the fear that the Security Council might be granted powers that could affect the role of the Court concerning any war criminal, regardless of country, religion, or nationality; and that the text adopted might increase the powers of the Security Council over and above those set out in Chapter VII of the UN Charter; iii) the Prosecutor should not enjoy powers *proprio motu* and must be put under reasonable and logic control.⁹⁵⁴ This position was shared by Afro-Arabic

⁹⁵³ M. Du Plessis, *The International Criminal Court that Africa Wants* (Pretoria: Institute for Security Studies, 2010), at 9; J. Charney, ‘Progress in International Criminal Law’, 93 *American Journal of International Law* (1999) 452-464.

⁹⁵⁴ United Nations, above note 903, at 126.

countries such as Algeria, Egypt, Libya, Mauritania and Morocco. As Libya clarified it, just at the beginning of the negotiations, the Court should not be established on the basis of hegemony and everything had to be done to avoid that those permanent members of the Security Council used their position to influence its work.⁹⁵⁵ Morocco even added the necessity of a court free from relations with non-governmental organisations (NGOs).⁹⁵⁶ It had to be avoided that a state having some control over an NGO (financially or by nationality) utilised their channel to indirectly influence the work of the Court. Furthermore, Libya considered it was not acceptable that the substantive jurisdiction of this Court confined to matters of interest for some states while ignoring different issues of concern to others, including drug trafficking, organised crimes, financial and economic crimes and aggression against the environment.⁹⁵⁷

Third, it is probably for quite similar reasons that some other African states remain reluctant to join the ICC. Angola, for example, underlined that “an international court should not have fewer guarantees of independence and impartiality than a national court in determining what crimes and criminals it would try”.⁹⁵⁸ In this regard, the power granted to the Security Council was not acceptable. On their side, Zimbabwe and Mozambique could not be far from this line, particularly as they shared a similar position as members of the SADC group of states. Rwanda added the fact that the Court could not apply the death penalty.⁹⁵⁹

Some of these disagreements were also raised by several great powers to justify their stance against the new Court. For example, the United States of America argued that they could not accept its Statute inasmuch as it extended the jurisdiction of the Court to nationals of third states, while it could not blindly believe in the independence of an apolitical prosecutor vested with *proprio motu* powers, without a risk of highly politicised justice against American citizens.⁹⁶⁰ This position was shared by China.⁹⁶¹ In addition, the United States of America

⁹⁵⁵ *Ibid.*, at 101-102.

⁹⁵⁶ *Ibid.*, at 103.

⁹⁵⁷ *Ibid.*

⁹⁵⁸ *Ibid.*, at 117.

⁹⁵⁹ *Ibid.*, at 103. However, since 2007, Rwanda has abolished the death penalty.

⁹⁶⁰ M. Wind, ‘Challenging Sovereignty? The USA and the Establishment of the International Criminal Court’, 2 (2) *Ethics ∞ Global Politics* (2009) 83-108, at 88-90; G. O’Connor, ‘The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court’, 27 (4) *Hofstra*

put it clear that this Court should have been entirely accountable to the Security Council for any investigation or prosecution.⁹⁶² However, India refuted the power granted to the Security Council which might arguably be destructive of the Court.⁹⁶³ It criticised this regime of inequality of states in favour of the permanent members of the Security Council, underlining the message that the Court was not created for their leaders and citizens.⁹⁶⁴ Worse, some members of the Security Council, not parties to the Statute, would illegitimately exercise the power to bind other states not parties.⁹⁶⁵ Finally, India questioned the independence of the prosecutor and the failure to criminalise the use of nuclear weapons.⁹⁶⁶

The question is now why the majority of African states joined the ICC, when a minority of them and some important great powers refused to do so, in the absence of any regime of reservation.⁹⁶⁷

b) The Justification of Membership

It is not easy to explain the *euphoric* attitude of the majority of African states to become ICC members. Each country possesses its own national specificities in how and why it intends to be bound by an international treaty. But, their votes, signatures and swift ratifications of the ICC Statute may depend on a number of cumulative and interconnected plausible factors. Two theses come here into consideration. The first one exposes the free consent of African states to the ICC Statute (i), while the second relies on the context of international pressure and strategy of enticement of weak countries to join the Court (ii).

Law Review (1999) 927-977, at 948-956; J. Fernandez, *La politique juridique extérieure des Etats-Unis à l'égard de la Cour pénale internationale* (Paris: Pedone, 2010), at 71-199.

⁹⁶¹ Hoile, above note 920, at 22-23.

⁹⁶² E. P. Schwartz, 'The United States and the International Criminal Court: The Case for "Dexterous Multilateralism"', 4 (1) *Chicago Journal of International Law* (2003) 223-235, at 125-128; C. Jeu, 'A Successful, Permanent International Criminal Court. "Is it Pretty to Think So?"', 26 (2) *Houston Journal of International Law* (2004) 411-441, at 433; Carlson, above note 897, at 38.

⁹⁶³ Hoile, above note 920, at 24.

⁹⁶⁴ *Ibid.*

⁹⁶⁵ *Ibid.* See also G. Tiwari, 'Why India Continues to Stay out of ICC?', A Contrario International Criminal Law (27 April 2013), <<http://acontrarioicl.com/2013/04/27/why-india-continues-to-stay-out-of-icc/>> accessed 3 August 2015.

⁹⁶⁶ *Ibid.*

⁹⁶⁷ Article 120 of the ICC Statute prescribes: 'No reservations may be made to this Statute'.

i) The Free Consent of African States to the ICC Statute

It is by far the most popular thesis in the literature explaining African states' free consent to the Rome Statute. The ICC Prosecutor, Fatou Bensouda, has authoritatively recalled it when she emphasises on Sir Mochochoko's comment on the issue which tells as follows:

Contrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, the historical developments leading up to the establishment of the Court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.⁹⁶⁸

Several reasons can be brought forward in support of the idea of African states' free consent to the ICC Statute. First, the elementary reason relates to the idea of diplomatic concessions inherent to any international negotiation. Second, there is a general impression that prior to the ICC creation, international criminal justice was already part of regional efforts to ensure respect for human rights.⁹⁶⁹ Thus, the consent to the ICC Statute was simply a reiteration of a common African will to struggle against impunity, to promote the rule of law and peace across the continent. The conviction seemingly became irreversible after the genocide that could have been prevented and avoided in Rwanda in 1994.⁹⁷⁰ This will is also testified by the 1996 warning by the OAU Council of Ministers, with support from the Economic Community of West African States (ECOWAS),⁹⁷¹ saying that it would call for the establishment of a war

⁹⁶⁸ F. Bensouda, 'International Criminal Court and Africa: the State of Play', <<http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/International-Criminal-Justice-and-Africa.pdf>> accessed 10 October 2015; P. Mochochoko, 'Africa and the International Criminal Court', in E. Ankumah and E. Kwakwa (eds), *African Perspectives on International Criminal Justice* (Ghana: Africa Legal Aid, 2005) 241-258; Du Plessis, above note 390, at 2.

⁹⁶⁹ See M. Kamto, 'Introduction générale : la Charte africaine des droits de l'homme et des peuples et les perspectives de la protection des droits de l'homme en Afrique', in M. Kamto (ed.), *La Charte africaine des droits de l'homme et des peuples et le protocole y relatif portant création de la Cour africaine des droits de l'homme -Commentaire article par article* (Brussels : Bruylant, 2011) 1-59, at 48-49.

⁹⁷⁰ OAU, above note 496.

⁹⁷¹ ECOWAS, 'Code of Conduct for the Members of the Council of State of the Republic of Liberia', 22 *ECOWAS Official Journal* (1996), at 119 at 121. It stipulated: 'Where a member or members of the Council are adjudged to be in breach of the provisions of the code of Conduct for members of the Liberian National Transitional Government (LNTG), and in particular, any act which impedes the implementation of the Abuja Agreement, appropriate steps shall be taken by the Chairman of ECOWAS', including the 'establishment of a

crimes tribunal to try those who bore the responsibility for gross violations of human rights and peace during the armed conflict which had started in Liberia in 1989.⁹⁷² Moreover, the OAU fully supported trials against perpetrators of the Rwandan genocide⁹⁷³ among them Jean Kambanda, former Rwanda Prime Minister in the course of atrocities, who was convicted and sentenced to life prison by the ICTR.⁹⁷⁴ Third, and last, it is repeated that the African involvement in the establishment of the ICC constitutes in itself another proof that their consent to its Statute was free.⁹⁷⁵ Arguably, the idea includes the African wide participation in the United Nations Diplomatic Conference of Plenipotentiaries in Rome as well as regional initiatives aiming to assist African states in the process of ratification and implementation of the Rome Statute.⁹⁷⁶ For example, this might be the case of the Windhoek Plan of Action on ICC Ratification and Implementation in SADC, adopted in May 2001.⁹⁷⁷ The Windhoek Plan of Action⁹⁷⁸ followed the Pretoria Statement on Common Understanding on the ICC in SADC Region, adopted on 9 July 1999,⁹⁷⁹ which “recommended to the relevant authorities the

war crimes tribunal to try human rights offences against Liberians’. This Code of Conduct was instituted by the ECOWAS Heads of States within the framework of the Peace Plan for Liberia. It was bound for the ruling Council in that time in Liberia and its members of the Liberian National Transitional Government (LNTG). See C. A. Odinkalu, ‘International Criminal Justice, Peace and Reconciliation in Africa: Re-imagining an Agenda beyond the ICC’, XL (2) *Africa Development* (2015) 257-290, at 269-270.

⁹⁷² CM/Res.1650 (LXIV), Resolution on Liberia, 64th Ordinary Session of the Council of Ministers of the Organisation of African Unity, Yaoundé (Cameroon), 1-5 July 1996 5 July 1996, para.12. In this paragraph, the OAU Council of Ministers warned : ‘Liberian warring faction leaders that should the ECOWAS assessment of the Liberian peace process during its next Summit meeting turn out to be negative, the OAU will help sponsor a draft resolution in the UN Security Council for the imposition of severe sanctions on them, including the possibility of the setting up of a war crime tribunal to try the leadership of the Liberian warring factions on the gross violations of human rights of Liberians’.

⁹⁷³ OAU, above note 496, Chapter 18, para.18 and 21.

⁹⁷⁴ *Jean Kambanda* (ICTR 97-23-A), Judgment, Appeals Chamber, 19 October 2000.

⁹⁷⁵ Jallow and Bensouda, above note 898, at 41; Du Plessis, above note 953, at 5. See also Murungu, above note 901, at 182-186; G. Werle and M. Vormbaum, ‘Afrika und der Internationale Strafgerichtshof’, *Juristen Zeitung* (10 June 2015) 581-588, at 581-582.

⁹⁷⁶ Kemp, above note 411, at 65.

⁹⁷⁷ *Ibid.*

⁹⁷⁸ See Final Document: Conference on International Criminal Court (ICC) Ratification and Implementation for the Southern African Development Community (SADC) Region (2001) <http://www.pgaction.org/pdf/pre/02_2001_WindhoekPlan.pdf> accessed 28 March 2016.

⁹⁷⁹ *Ibid.*

expeditious ratification of the ICC Statute in their respective countries”.⁹⁸⁰ More important, calls for ratification also emanated from continental institutions themselves, including the African Human Rights Commission⁹⁸¹ and the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA).⁹⁸²

However, the strength of some of these arguments may be partly mitigated by three main criticisms. First, they seem to rest on a basic conflation with the issue at stake. In fact, the African participation in the negotiation process of the ICC Statute and the belief in the international criminal justice system as a means to tackle impunity for gross violations of human rights in Africa evidence that African states also wanted and supported, like many other countries around the world, the establishment of the Court. But, these arguments do not tell anything more on the different issue as to whether African states freely decided to consent to its Statute, in spite of the fact that some of their primary aspirations were not met at the end of the United Nations Diplomatic Conference of Plenipotentiaries in Rome. Logically, both issues (wanting the creation of the Court and consenting to its founding treaty) may have distinct explanations and causalities. Moreover, concerning the so-called regional initiatives to boost African ratifications of the ICC Statute, it is important to note that not all of them were exclusively Africans by nature. For example, the Windhoek Plan of Action was the result of a conference,⁹⁸³ sponsored by Canada and the European Commission, hosted by Namibia and co-organised by two private organisations (based in the United States of America and Canada respectively), that is to say Parliamentarians for Global Action (PGA) and the International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR) with its International Criminal Court Technical Assistance Program (ICCTAP). Likewise, the Pretoria Statement on Common Understanding on the ICC emanated from a joint conference between SADC member states and the International Committee of the Red Cross, the

⁹⁸⁰ See ‘Pretoria Statement of Common Understanding on the ICC’, 12 *The International Criminal Court Monitor* (August 1999) 3, at 3 <<http://www.iccnw.org/documents/monitor12.199908.pdf>> accessed 29 March 2016.

⁹⁸¹ See R. Illa Maikassoua, *La Commission africaine des droits de l’homme et des peuples: un organe de contrôle au service de la Charte africaine* (Paris : Karthala, 2013), at 392.

⁹⁸² AHG/Decl.4 (XXXVI), Solemn Declaration on the Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA), 36th Ordinary Session of of the Assembly of Heads of State and Government of the Organisation of African Unity, Lomé (Togo), 10-12 July 2000, Stability Calabash (para.14 (1)).

⁹⁸³ See Conference on International Criminal Court (ICC) Ratification and Implementation for the Southern African Development Community (SADC) Region, Windhoek (Namibia), 28-30 May 2001.

Community Law Centre (South Africa), Amnesty International, Human Rights Watch, Lawyers for Human Rights (South Africa) and again Parliamentarians for Global Action.⁹⁸⁴

It follows that the thesis of (exclusive) free consent of African states to the ICC Statute seems to a some extent be weakened. The opposite, complementary, realistic and stronger thesis explaining better the ratification of the ICC Statute by the majority of African states could be the context of pressure which these states have faced and the international strategy aiming to attract them towards the new world Court.

ii) The Context of Pressure and the International Strategy of Enticement of African States

According to Serge Sur, many states among the 120, which adopted by a non-recorded vote the ICC Statute, were under pressure and excessive influence of NGOs.⁹⁸⁵ That created an unbalanced situation among states because that pressure proved to be efficient towards weak countries, but the said pressure had no chance to overcome resistance from those powerful ones or with sufficient national political support.⁹⁸⁶ The power and influence of NGOs rested above all on their massive participation in the negotiations process.⁹⁸⁷ The influential NGO Coalition for the International Criminal Court (CICC) accredited to Rome over 200 of its 800 member organisations (more than the number of negotiating states), with 450 representatives.⁹⁸⁸ It seems that the coordination and support of these NGOs by the CICC, its worldwide computer network and information system deeply influenced every aspect of the Rome Conference and justified much of its success.⁹⁸⁹ They formed an alliance with the Like-Minded Group (LMG) consisting of some sixty (60) countries (including Germany, Canada, Netherlands and Australia) that shared similar views on the Court which had to be created.⁹⁹⁰

⁹⁸⁴ R. Dicker, 'S. African Governments Adopt Common Approach to ICC Ratification', 12 *The International Criminal Court Monitor* (August 1999) 3, at 3.

⁹⁸⁵ S. Sur, 'Vers une Cour pénale internationale: la Convention de Rome entre les ONG et le Conseil de sécurité', CIII *Revue générale de droit international public* (1999) 29-45.

⁹⁸⁶ *Ibid.*, at 40.

⁹⁸⁷ C. C. Jalloh, 'The Role of Non-Governmental Organizations in Advancing International Criminal Justice', 1 (1) *African Journal of International Criminal Justice* (2015) 47-76, at 62-63.

⁹⁸⁸ J. Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century', 11 (2) *Peace International Law Review* (1999) 361-377, at 367.

⁹⁸⁹ *Ibid.*

⁹⁹⁰ *Ibid.*, at 368.

Much of the work was done during their private meetings,⁹⁹¹ with the support team of the United Nations, thus reflecting a serious lack of transparency. It is doubtless that the treaty adopted did not exactly correspond in all of its provisions to the true intent of many individual states. David J. Scheffer, an American negotiator, testified about the final forty-eight hours of the Rome Conference as follows:

The treaty text was subjected to a mysterious, closed-door and exclusionary process of revision by a small number of delegates, mostly from the Like-Minded Group, who cut deals to attract certain wavering governments into supporting a text that was produced at 2:00 a.m. on the final day of the Conference, July 17. (...) This “take it or leave it” text for a permanent institution of law was not subjected to rigorous review (...) and was rushed to adaption hours later on the evening of July 17 without debate. (...) Some provisions had never once been openly considered. No one had time to undertake a rigorous line-by-line review of the final text.⁹⁹²

Those wavering states voted for the ICC Statute thanks to the NGOs’ lobbying⁹⁹³ and the political mobilisation by member states of the LMG, which believed it was “a more robust instrument than even the ICC’s strongest supporters could sensibly have hoped for”.⁹⁹⁴ Rather, a wise course of events commanded to suspend the Rome Conference and convene new negotiations later to solve all the controversial legal issues.⁹⁹⁵

After this precipitous adoption of the ICC Statute, the pressure continued. According to Charles C. Jalloh, “once the treaty was adopted, African and other human rights NGOs quickly transformed themselves into an effective global campaign for swift achievement of the 60 ratifications required for the Rome Statute to enter into force”.⁹⁹⁶ This campaign was combined with a second factor: an international strategy of enticement of African states towards the ICC in the name of the struggle against impunity, required for economic and development partnerships. This is especially the case between the European Union (EU),

⁹⁹¹ *Ibid.*, at 374.

⁹⁹² D. J. Scheffer, ‘The United States and the International Criminal Court’, 93 (1) *American Journal of International Law* (1999) 12-22, at 20. See also G. Roberts, ‘Assault on Sovereignty: the Clear and Present Danger of the New International Criminal Court’, 17 (1) *American University International Law Review* (2001) 35-77, at 40.

⁹⁹³ C. C. Jalloh, ‘Regionalizing International Criminal Law?’, 9 *International Criminal Law Review* (2009) 445-499, at 450.

⁹⁹⁴ *Ibid.*

⁹⁹⁵ Scheffer, above note 992, at 21.

⁹⁹⁶ Jalloh, above note 993, at 450.

Africa, the Caribbean and the Pacific Group of States under the Cotonou Agreement of 23 June 2000.⁹⁹⁷ The strategy obviously tallied with that of NGOs, because the EU's objective was "to pursue and support an early entry into force of the Rome Statute and the establishment of the Court".⁹⁹⁸

Therefore, those authors who defend the exclusive free consent of African states to the ICC Statute do not hold *all* the facts on their side. The context of pressure, the strategy of enticement, the NGOs' extraordinary campaign for the ICC in the continent and their relay by media of propaganda have played a crucial role to convince most African states, even though not coercing them, to join the new Court. Sayman Bula Bula confirms this view when he writes:

(...) the majority of African states, except members of the Arab League –outside Comoros- which are not parties to the Rome Statute, have subscribed to the international agreement, either under foreign pressure, or after a quick and superficial overview on subsequent international obligations. (...) Governments have naively allowed judicial interference of extra-African powers (...).⁹⁹⁹

For example, the case of the DRC is pertinent. The alleged ratification of the ICC Statute happened in the aftermath of the assassination of President Laurent-Désiré Kabila on 16 January 2001. It is curious to observe that, at least, two other countries (Ivory Coast and Tunisia) have also acceded to this treaty only after violent changes of their governments.¹⁰⁰⁰

⁹⁹⁷ Article 11 (7) of the Cotonou Agreement prescribes: 'In promoting the strengthening of peace and international justice, the parties reaffirm their determination to: share experience in the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court; and fight against international crime in accordance with international law, giving due regard to the Rome Statute. The parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments'.

⁹⁹⁸ European Union, 'Council Common Position of 11 June 2001 on the International Criminal Court' (2001/443/CFSP) < <https://www.consilium.europa.eu/uedocs/cmsUpload/icc0en.pdf> > accessed 25 March 2015.

⁹⁹⁹ S. Bula Bula, *Droit international humanitaire* (Bruxelles : Bruylant-Academia, 2010), at 307-308. The french original of the quotation reads as follows : '(...) la majorité des Etats africains, à l'exception des Etats africains membres de la Ligue arabe -à part les Comores- qui ne sont pas parties au Statut de Rome, a souscrit l'engagement international, soit sous pression extérieure, soit à l'issue d'un survol rapide et superficiel des obligations internationales subséquentes'. The translation is mine.

¹⁰⁰⁰ Ivory Coast has ratified the Rome Statute on 15 February 2013 after the eviction of President Laurent Gbagbo in April 2011. According to the 'Décision CC n° 002/C/C/SG du 17 décembre 2003', the Ivorian *Conseil constitutionnel* (Constitutional Council) held that the Rome Statute was inconsistent with the

Benefits have been apparently taken from the weakness of the new governments, still affected by the emotion of dramatic events and with destroyed economies, to persuade them to join the ICC. In the DRC, the new President, Joseph Kabila, signed the Decree-law of 30 March 2002 (a legislative Act) to authorise the ratification of the Rome Statute.¹⁰⁰¹ The true ratification through a mere presidential decree, not a legislative act, as it was constitutionally required, never followed.¹⁰⁰² On the contrary, the Decree-law of 30 March 2002 was irregularly taken for ratification.¹⁰⁰³ It was acted upon by the depositary of the ICC Statute, the Secretary General of the United Nations, on 11 April 2002.¹⁰⁰⁴ Worse, while the President was deprived of any legislative authority,¹⁰⁰⁵ the national Parliament which had the power to authorise such presidential act of ratification was not associated to the procedure, although being able to sit and adopt laws in other fields of national interest.¹⁰⁰⁶ More striking, the Parliament was even able to adopt only a short period later an Act to authorise the President to ratify the AU Constitutive Act of 11 July 2000.¹⁰⁰⁷ As for the ICC, everything was done quickly and in a total lack of transparency.¹⁰⁰⁸ Officially, the enactment of the Decree-law of 30 March 2002 was simply justified by a matter of “emergency and necessity”.¹⁰⁰⁹ It is perhaps not useless to

Constitution of 23 July 2000, which allowed immunities and other forms of judicial privileges to a category of national authorities. The new regime of President Alassane Ouattara had then to amend the Constitution in order to accede to the Rome Statute. As for Tunisia, it has ratified the treaty on 24 June 2011 after the eviction of President Ben Ali as a result of political events relating to the so-called ‘Arab Spring’, in December 2010.

¹⁰⁰¹ Decree-law No. 0013/2002 of 30 March 2002 Authorising the Ratification of the Rome Statute of the International Criminal Court.

¹⁰⁰² J. Kazadi Mpiana, ‘La Cour pénale internationale et la République démocratique du Congo: 10 après. Etude de l’impact du Statut de Rome dans le droit interne congolais’, 25 (1) *Revue québécoise de droit international* (2012) 57-90, at 60.

¹⁰⁰³ J. Kazadi Mpiana, ‘La position du droit international dans l’ordre juridique congolais et l’application de ses normes’ (PhD Thesis, Sapienza Università di Roma 2012), at 141 and 171-180.

¹⁰⁰⁴ *Ibid.*, at 61.

¹⁰⁰⁵ See ‘Décret-loi constitutionnel n°003 du 27 mai 1997 relatif à l’organisation et à l’exercice du pouvoir en République démocratique du Congo, tel que modifié et complété à ce jour (textes coordonnés et mis à jour au 1^{er} juillet 2000)’, *Official Journal of the Democratic Republic of Congo* (May 2001) 91-101.

¹⁰⁰⁶ For example, Law No. 002/2001 of 3 July 2001 on the Trade Tribunals; Law n°016/2002 of 16 October 2002 Relating to the Labour Tribunals; Law n° 023/2002 of 12 November 2002 on the Military Judicial Code; Law n° 024/2002 of 12 November 2002 Laying down the Military Criminal Code.

¹⁰⁰⁷ See ‘Loi n°006/2002 du 07 juillet 2002 autorisant la ratification de l’Acte constitutif de l’Union africaine’.

¹⁰⁰⁸ Bula Bula, above note 999, at 302.

¹⁰⁰⁹ See Decree-law No. 0013/2002 of 30 March 2002 Authorising the Ratification of the Rome Statute of the International Criminal Court, preamble, para.3.

observe that it was signed at exactly the same date as the other irregular and unconstitutional presidential Decree-law which authorised the ratification of the aforementioned Cotonou Agreement between the EU, Africa, the Caribbean and the Pacific Group of States.¹⁰¹⁰ In other words, financial assistance to the new regime had to go with the option for the ICC. It does not mean that the DRC did not need international criminal justice on its territory. Rather, the manner in which this justice was sought is questioned by the darkness of the process followed to join the ICC, whose temporal jurisdiction moreover already excluded crimes committed in the country before 1 July 2002.

Thus, ratifications of the Rome Statute by African states became a way to look after their images before international partners by attempting to secure quasi certificates of good conduct about compliance with human rights obligations, the fight against impunity and the rule of law.¹⁰¹¹ Anyway, the ICC risked to be used against political opponents and to provoke national divisions. As soon as it started focusing on leading states officials, diplomatic hypocrisy ended and hostility grew up against the Court throughout the continent.

2.2.2. The Hostility against the Court's Judicial Work in Africa

The origin of the tension between African states and the ICC is dated back to 2009 with the delivery of the arrest warrant against the Sudanese President, Omar Al Bashir.¹⁰¹² However, even though the arrest warrant against President Omar Al Bashir has played an important role in worsening the situation, previous developments demonstrate that the Court was questionable since the adoption of its Statute in 1998. Some opposition started emerging at the dawn of its judicial activities in Africa, albeit in an unofficial manner. It is not the institution as such which generates hostility or becomes unwanted. Rather, criticisms are raised against its judicial work and strategy towards the continent. The ICC seems to have missed some political advises in order to succeed in the judicial ground.¹⁰¹³ It has exacerbated the situation

¹⁰¹⁰ See Decree-law No.011/2002 of 30 March 2002. See also Kazadi Mpiana, above note 1002, at 61.

¹⁰¹¹ P. E. Batchom, 'La double-présence au sein des institutions internationales', *CODESRIA Newsletter* (31 January 2014) 1-16, at 8.

¹⁰¹² See M. Kamto, 'L'affaire Al Bashir et les relations de l'Afrique avec la Cour pénale internationale', in *Africa and International Law: Reflections on the International Organization –Liber Amicorum Raymond Ranjeva* (Paris : Pedone, 2013) 147-170, at 156.

¹⁰¹³ T. Murithi, 'The African Union and the International Criminal Court: an Embattled Relationship' Policy Brief No.8 for the Institute for Justice and Reconciliation (IJR) (March 2013), at 6 and 8

instead of bringing remedies to its denounced weakness. Therefore, African states have radicalised their criticisms (2.2.2.1), while the ICC sinks into a defensive posture (2.2.2.2).

2.2.2.1. The Radicalisation of African Criticisms

The ICC started working in 2003, after the investiture of its first Prosecutor, Moreno Ocampo. By the end of August 2016, twenty-three cases in ten situations under investigations were already initiated before it.¹⁰¹⁴ Except the situation in Georgia in which the PTC has authorised investigations on 27 January 2016, all other situations relate to African countries: Uganda, DRC, Central African Republic (CAR), Sudan, Kenya, Libya, Ivory Coast and Mali. In others African states, the ICC Prosecutor leads preliminary examinations which normally precede formal openings of investigations: Burundi, Gabon, Guinea and Nigeria. These statistics illustrate, at the first sight, an active cooperation between African states and the ICC. Among nine situations under investigations, five have been brought by states parties themselves (Uganda, DRC, Mali, CAR I and II), two initiated by the Prosecutor *proprio motu* with support of the states concerned (Kenya and Ivory Coast),¹⁰¹⁵ while two others have been referred by the Security Council (Sudan and Libya).¹⁰¹⁶ The first case was that of Thomas Lubanga from the DRC, whose final judgment was issued on 1 December 2014.¹⁰¹⁷ All of these situations and cases are in the heart of the African position on the ICC (a) criticising that politics against African states have invaded the Court in the name of law enforcement and justice (b).

<<http://www.ijr.org.za/publications/pdfs/IJR%20Policy%20Brief%20No%208%20Tim%20Miruthi.pdf>> accessed 9 December 2015.

¹⁰¹⁴International Criminal Court, ‘Situations and Cases’, <https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> accessed 30 August 2017.

¹⁰¹⁵ About the situation in Kenya, the Prosecutor has initiated investigations on the basis of a Kenyan report sent to him by the Commission of Inquiry on Post-elections Violence (CIPEV) on 16 July 2009. Concerning Ivory Coast, the Prosecutor has acted before even the country becomes a state party to the ICC Statute (15 February 2013) but on the basis of a declaration of acceptance of the ICC jurisdiction under article 12 (3) of the Statute, made on 18 April 2003. This declaration was confirmed by the letter of 10 December 2010.

¹⁰¹⁶ See respectively SC Res. 1593 (2005), above note 389, para.1; SC Res. 1970 (2011), above note 389, para.4.

¹⁰¹⁷ *Lubanga* ((ICC-01/04-01/06 A5), Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction, Appeals Chamber, 1 December 2014.

a) The Development of the Common African Position on the ICC

At the beginning, the African-focused proceedings of the ICC were not opposed by states. Only some opposition parties in countries like the DRC, CAR and Ivory Coast have suspected the Court of being diverted from its mandate by governments which want to get rid of embarrassing political opponents (Jean-Pierre Bemba, Laurent Gbagbo, etc.). Later, inter-state criticisms emerged in addition to prior opposition of those countries which had in principle refused to join the ICC. However, they are of a different nature, politically and legally. They are formulated in the Common African Position on the ICC, pursuant to the Constitutive Act of the AU which stipulates that one of the objectives of this continental organisation is “to promote and defend African common positions on issues of interest to the continent and its people”.¹⁰¹⁸ This position constitutes a regional federation of protests against the Court’s work by all African states, except Morocco.¹⁰¹⁹ Its embryo was elaborated in the Communiqué of the Peace and Security Council (PSC) of 21 July 2008 which actually aimed to warn the ICC that the Prosecutor’s demand to inculcate an incumbent African head of state was unacceptable.¹⁰²⁰ This warning was approved by the AU Assembly in February 2009.¹⁰²¹ Since then, the AU has adopted various decisions that are binding to all its 54 member states on the issue. At this stage, it may just kept in mind that the Constitutive Act provides a general threat of sanctions in the event of non-compliance as follows:

(...) any member state that fails to comply with the decisions and policies of the Union may be subjected to (...) sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.¹⁰²²

The allergy to see high states officials tried outside the continent was already implicit when the AU mandated Senegal, in 2006, to try, on behalf of Africa, the former Chadian President, Hissène Habré, even though he was sought by Belgium as well. The position also coincides with the opposition against the so-called abuse of the principle of universal jurisdiction, particularly by a number of European states. But, despite this clearly polluted regional context, the ICC decided, besides prosecutions against several rebel leaders and Sudanese

¹⁰¹⁸ Article 3 (d).

¹⁰¹⁹ Morocco is neither a party to the Rome Statute nor a member of the AU.

¹⁰²⁰ PSC/MIN/Comm (CXLII), 21 July 2008, paras.3 and 9.

¹⁰²¹ Assembly/AU/DEC.221 (XII), above note 222, para.3.

¹⁰²² Article 23 (2).

officials, to indict and issue two arrest warrants against President Omar Al Bashir, as an indirect perpetrator or an indirect co-perpetrator, for war crimes and crimes against humanity,¹⁰²³ as well as for genocide.¹⁰²⁴ These indictments actually poisoned the ICC's relationship with the AU and its member states. Apart from Sudan, Ethiopia, Rwanda and Zimbabwe, Afro-Arabic countries like Algeria, Libya, Egypt and Mauritania were among the most irritated. They played a crucial role in the elaboration of the Common African Position on the ICC. Beyond the continent, they also succeeded to drag into opposition member states of the Organisation of Islamic Cooperation (OIC), which announced that the precedent would "adversely affect the credibility of the international legal system".¹⁰²⁵ Similar support was provided by the League of Arab States.¹⁰²⁶ What are the bones of contention concerning the judicial work of the ICC in Africa?

b) The Allegations of Politics behind the Means of Law and Justice

The AU has organised several meetings in order to consolidate the Common African Position on the ICC. The most important ones were held in October 2013, in June and November 2009. At each meeting, the ICC's judicial work was examined and criticised. Criticisms may be grouped in two branches, in addition to the general protest against the excessive procedural delays of trials, as illustrated by Thomas Lubanga and Jean-Pierre Bemba's cases.¹⁰²⁷ The first one is a critique of the suspicion of the collusion between the Court and some great powers (i), whereas the second branch deals with the avoidance of positive application of the principle of complementarity (ii).

¹⁰²³ *Al Bashir* (ICC-02/05-01/09), Warrant of Arrest for Omar Hassan Ahmad al-Bashir, Pre-Trial Chamber I, 4 March 2009.

¹⁰²⁴ *Al Bashir* (ICC-02/05-01/09), Second Warrant of Arrest for Omar Hassan Ahmad al-Bashir, Pre-Trial Chamber I, 12 July 2010.

¹⁰²⁵ Organization of Islamic Cooperation (OIC), 'The OIC Rejects the ICC's Arrest Warrant against Bashir', *10 OIC Journal* (January-April 2009) 23, at 23.

¹⁰²⁶ See N. Bakr and S. Abdel Shafi, 'Arab Official Positions towards President Al Bashir's Indictment', in E. Moreno (ed.), *The Gap between Narratives and Practices. Darfur: Responses from the Arab World* (Madrid: FRIDE Publications, 2009) <http://fride.org/download/OP_Darfur_President_alBashir2_ENG_mar10.pdf> accessed 15 August 2015.

¹⁰²⁷ For Thomas Lubanga, the final judgment of December 2014 was rendered eight years after his surrender to the Court on 16 March 2006. Jean-Pierre Bemba was arrested on 23 May 2008, but his judgment at the first instance was delivered only on 21 March 2016, almost eight years later.

i) The Suspicion of Collusion between the Court and Great Powers

On the one hand, African states and the AU have shown that they disagree with the strategy of the Prosecutor. Concerns have been raised about why only African situations are investigated by the ICC and not others from elsewhere around the world. It has also been questioned why cases drawn from these situations involved only Africans, while non-African actors arguably also participated in conflicts and atrocities in the continent.¹⁰²⁸ The problem posed here is thus that of the selection of situations to investigate and notably that of cases to be tried by the ICC. The AU has denounced the conduct of the ICC Prosecutor, “who has been making egregiously unacceptable, rude and condescending statements on the case of President Omar Al Bashir of the Sudan and other situations in Africa”.¹⁰²⁹ Concerning the arrest warrant of 27 June 2011 against Muammar Kadhafi, the former Libyan leader, the AU has expressed concerns on “the manner in which the ICC Prosecutor handles the situation in Libya”.¹⁰³⁰ This was probably a protest against two things. One might be the rapidity with which the Prosecutor decided to indict Muammar Kadhafi and his two followers (his son Saif Al-Islam Kadhafi and the head of military intelligence, Abdullah Al-Senussi). He spent only four months (for a preliminary examination and investigations) after the Security Council referral resolution of 26 February 2011, while he took almost four years before indicting President Omar Al Bashir of Sudan. This judicial action was perceived to be a quick support for the ongoing military campaign which resulted in the change of regime in Libya.¹⁰³¹ Another one refers to the problem of selective justice, since the ICC has targeted presumed offenders only from Kadhafi’s side. It seems to be an expression of victors’ justice.

The AU also expressed “its deep concern regarding the conduct of the Office of the Prosecutor and the Court and the wisdom of the continued prosecutions against African

¹⁰²⁸ I. Eberchi, ‘Armed Conflicts in Africa and Western Complicity: a Disincentive African Union’s Cooperation with the ICC’, 3 *African Journal of Legal Studies* (2009) 53-76, at 56-71 and 75-76.

¹⁰²⁹ Assembly/AU/DEC.296 (XV), Decision on the Progress Report of the Commission on the Implementation of the Decision Assembly/AU/DEC.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) (Doc. Assembly/AU/10 (XV)), 15th Ordinary Session of the Assembly of the African Union, Kampala (Uganda), 25-27 July 2010, para.9.

¹⁰³⁰ Assembly/AU/DEC.366 (XVII), Decision on the Implementation of the Assembly decisions on the International Criminal Court (Doc.EX.CL/670 (XIX)), 17th Ordinary Session of the Assembly of the African Union, Malabo (Equatorial Guinea), 30 June- 1 July 2011, para.6.

¹⁰³¹ Bourgi, above note 885, at 59-64.

leaders”,¹⁰³² in particular President Uhuru Kenyatta and his Deputy, William Ruto, for their alleged implication in the 2007-2008 post-electoral violence. This is so particular because it happened after the replacement of the first Prosecutor, Moreno Ocampo, by the new one, Fatou Bensouda, from The Gambia. The ICC Prosecutor has been suspected of being in collusion with some (geo-) political agenda of the most powerful countries, including states not parties to the ICC Statute like the United States of America.¹⁰³³ Great powers have indeed succeeded to take control of the Court.¹⁰³⁴ In the words of William A. Schabas, this judicial institution has become “far too deferential to the established (international) order”¹⁰³⁵ and in particular “marches in lock step with the permanent members”¹⁰³⁶ of the Security Council. Stephanie Maupas, who observed the functioning of the Court during the first twelve years of its existence for the French Journal “Le Monde”, also reveals that American officials of the State Department and National Security Council met with the ICC Prosecutor in The Hague and pressured him to request the arrest warrant against Muammar Kadhafi.¹⁰³⁷ The precipitous issuance of this arrest warrant occurred without any serious judicial investigations into the alleged crimes committed in Libya, on the basis of informations received by the OTP.¹⁰³⁸ Hence, the AU’s deep concern over “the politicization and misuse of indictments against African leaders by the ICC (...)”.¹⁰³⁹ On its side, Rwanda explicitly stigmatised this kind of collusion between the ICC and great powers at the Security Council after the failure to defer the situation in Kenya on 13 November 2013. It declared:

¹⁰³² Assembly/AU/DEC.547 (XXIV), Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) (Doc. Assembly/AU/18 (XIV)), 24th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 30-31 January 2015, para.4 (b).

¹⁰³³ F. Soudan, ‘Albert Bourgi : “La CPI est influence par les grandes puissances”’, *Jeune Afrique* (25 February 2014) <<http://www.jeuneafrique.com/134469/politique/albert-bourgi-la-cpi-est-influenc-e-par-les-grandes-puissances/>> accessed 1 September 2016.

¹⁰³⁴ J. Branco, *L’ordre et le monde : Critique de la Cour pénale internationale* (Paris : Fayard, 2016), at 231-233 and 235.

¹⁰³⁵ W. A. Schabas, ‘The Banality of International Justice’, 11 *Journal of International Criminal Justice* (2013) 545-551, at 551. The brackets are mine.

¹⁰³⁶ *Ibid.*

¹⁰³⁷ S. Maupas, *Le Joker des puissants: le grand roman de la Cour pénale internationale* (Villeneuve-D’Ascq : Don Quichotte éditions, 2016), at 20.

¹⁰³⁸ *Ibid.*, at 50.

¹⁰³⁹ Ext/Assembly/AU/DEC.1 (Oct.2013), Decision on Africa’s Relationship with the International Criminal Court (ICC), Extraordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 12 October 2013, para.4.

(...) Today's disappointing vote undermines the principle of the sovereign equality of states enshrined in the Charter of the United Nations, and confirms our long-held view that international mechanisms are subject to political manipulation and are used only in situations that suit the interests of some countries (...). (...) 'Our colleagues who did not vote in favour of the draft resolution have argued —as members have heard— that the Kenyan situation does not meet the threshold needed to trigger the application of article 16 of the Rome Statute. (...) That article was not proposed by an African State —not at all. It was proposed by some of the Western powers present at the Council table to be applied solely in their interest. In other words, article 16 was never meant to be used by an African State or any of the developing countries. It seems to have been conceived as an additional tool for the big powers to protect themselves and protect their own. Is that not so? That is how it appears here today. (...). Justice becomes so when the vulnerable and the strong have equal protection. It is unfortunate that the ICC will continue to lose face and credibility in the world as long as it continues to be used as a tool for the big powers against the developing nations. On the subject of the Court, let me say that, with respect to acting too precipitously, we have to be very careful about what the Council is stating. Let me say that, after five long years of procedures against Kenyan leaders, we were surprised that, suddenly, the ICC was willing to show flexibility on the very day that the African Contact Group was interacting with the Council. Whose hand was behind that? Why was it on that very day? Why did they decide that very day? (...) So how can the Council explain to me the fact that, all of a sudden, the Prosecutor said: "You know what? Let me give you four months now. It is okay, you do not need to go and bother that exclusive club. No. Get out of there." (...) No, it cannot work and it cannot continue like this. The Group was also surprised, actually, to learn that members of the Council were aware of that issue. Indeed, they asked us about the decision to request a postponement of the commencement of the case against the President of Kenya even before the decision was actually taken. That raises serious questions concerning the independence of the handling of this case.¹⁰⁴⁰

In this regard, the AU has stressed "the need for international justice to be conducted in a transparent and fair manner, in order to avoid any perception of double standard".¹⁰⁴¹ It has also claimed that indicting incumbent African leaders would constitute a threat to the sovereignty of African states, the integrity and dignity of the continent.¹⁰⁴²

It is submitted that the issue of the dignity of the continent relates to the colonial past of Africa. Colonialism as envisaged is perceived as a shame and a dishonor for the continent,

¹⁰⁴⁰ SC 7060th meeting, S.PV/7060 (15 November 2013), at 10-12.

¹⁰⁴¹ Assembly/AU/DEC.482 (XXI), Decision on International Jurisdiction, Justice and the International Criminal Court (ICC) (Doc. Assembly/AU/13 (XXI)), 21st Ordinary Session of the African Union, Addis Ababa (Ethiopia), 26-27 May 2013, para.5; PSC/MIN/Comm(CXLII), above note 1020, para.7.

¹⁰⁴² Assembly/AU/DEC.547 (XXIV), above note 1032, para.17 (c).

with the dehumanisation of its peoples. It is actually feared that another kind of domination (neocolonialism) resurges in Africa by means of international law and criminal justice. Powerful states are suspected to utilise the judicial way to get control of African states and their leaders. The ICC, which was a common enterprise, is arguably transformed *de facto* into a tool of neo-colonial agenda. This is exactly what President Paul Kagame said: “Rwanda cannot be part of that colonialism, slavery and imperialism”.¹⁰⁴³ President Uhuru Kenyatta of Kenya, a state party, has also criticised the politicisation of the Court and claimed to have been victim of humiliations within and outside the ICC during the prosecutions brought against him.¹⁰⁴⁴ According to him, the ICC is now used to try to provoke regime-changes in Africa or to secure countries favorable to policies of great powers.¹⁰⁴⁵

Another argument made by the AU is that the indictments of African leaders may endanger the poor security and stability within the continent. Yet, there is no need to give priority to expeditious justice in African countries where peace is not established. Therefore, the AU has averted the “strong (regional) conviction that the search for justice should be pursued in a way that does not impede or jeopardise efforts aimed at promoting lasting peace”.¹⁰⁴⁶ In the same vein, the immunity of third state officials from the ICC jurisdiction must be respected. According to the AU, “article 98(1) was included in the Rome Statute (...) out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of states that are not parties to the Rome Statute (...)”.¹⁰⁴⁷

¹⁰⁴³ N. Fritz, ‘Black-White Debate Does no Justice to a Nuanced Case’, *Business Day* (13 August 2008), quoted by Du Plessis, above note 390, at 1-2.

¹⁰⁴⁴ U. Kenyatta, ‘Speech by his Excellency Hon. Uhuru Kenyatta, President and Commander in Chief of The Defence Forces of the Republic of Kenya at the Extraordinary Session of the Assembly of Heads of State and Government of the African Union (12 October 2013), Addis Ababa (Ethiopia)’, in Hoile, above note 920, at 427-428.

¹⁰⁴⁵ *Ibid.*, p.425.

¹⁰⁴⁶ Assembly/AU/DEC.482 (XXI), above note 1041, para.4; PSC/MIN/Comm (CXLII), above note 1020, para.3. The words between brackets are mine.

¹⁰⁴⁷ African Union Commission, ‘On the Decision of Pre-Trial Chamber I of the International Criminal Court (ICC) pursuant to Article 87 (7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan’, Press Release n°002/2012 (9 January 2012) <<http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf>> accessed 17 September 2015.

It seems that the beneficiaries who are referred to are primarily the AU sitting heads of state or government or anybody acting or entitled to act in such capacity. In any case, the Court's intervention should remain the last resort in accordance with the principle of complementarity.

ii) The Avoidance of Positive Application of the Principle of Complementarity

The avoidance to give positive effects to the principle of complementarity is another point of disagreement. As a reminder, the complementarity of the ICC jurisdiction requires that states primarily investigate and prosecute international crimes, whilst the Court is to intervene only when they fail to do so and as a mechanism of last resort. The avoidance of this principle which prioritises, towards the ICC, the respect of the sovereign right of states to suppress such crimes has been particularly posited in respect of the situations in Kenya (1°) and in Sudan (2°).

1°) The Situation in Kenya

Kenya ratified the ICC Statute on 15 March 2005. The ICC's intervention in the country was caused by the events relating to the 2007-2008 post-electoral violence in which the right of Kenya to exercise its primacy rights to investigate and prosecute those persons allegedly responsible for crimes committed seems to have been disregarded or even denied.

- The Trigger of the ICC's Intervention

On 27 December 2007, Kenya organised the presidential election which turned to be a dual between the Party of National Unity (PNU), led by Mwai Kibaki, and the Orange Democratic Movement (ODM), headed by Raila Odinga. But, the election transformed itself into an ethnic contest. PNU was supported by the majority ethnic group Gikuyu, while ODM had most of its supporters from Kalenjin and Luo peoples. Mwai Kibaki, who was running for a second presidential mandate after the first one obtained in 2002, was announced the winner of the election by the Electoral Commission of Kenya on 31 December 2007. Raila Odinga and his ODM rejected this result and refused to go to court as he believed the judiciary was not independent to adjudicate fairly the matter. Soon after, the electoral contest left the place to post-election violence during which numerous offences amounting to crimes against humanity were allegedly committed (murders, rapes, pillages, destruction of private properties, etc.) by all sides to the crisis. Nairobi (capital city) and other five provinces, namely North Rift

Valley, Central Rift Valley, South Rift Valley, Nyanza Province and Western Province, were most affected.¹⁰⁴⁸

Violence lasted until 28 February 2008, when ODM and PNU finally concluded, out of the Kenya National Dialogue and Reconciliation (KNDR), an agreement under the AU mediation. Among other things, the KNDR agreement established a government coalition to rule the country, with Raila Odinga as Prime minister and a cabinet consisted of ministers from all sides. The agreement also established the Commission of Inquiry into Post-Election Violence (CIPEV) whose mandate covered the period between 28 December 2007 and 28 February 2008. The Commission was put under the leadership of the Kenyan judge, Philip Waki. Hence the denomination Waki Commission. It released its report on 15 October 2008 recommending that Kenya established a special tribunal to prosecute crimes related to the post-electoral conflict. The recommendation was based on three main reasons.¹⁰⁴⁹ First, there were doubts that the ICC Statute might be applicable to the situation in the absence of its legislative incorporation into the Kenyan legal order. Second, the International Crimes Act of 2008, which came into operation on 1 January 2009,¹⁰⁵⁰ could not be retroactively applied. Third, the ICC Statute could not cover all the offenses and the Court could not prosecute all the presumed perpetrators. But, the failure by the Kenyan Parliament to create such a special tribunal, owing to general fears of a politicised and partial justice for one side to the crisis against the other,¹⁰⁵¹ pushed the said Waki Commission to send to the ICC Prosecutor its findings and a secret list of individuals whom it believed were most involved and responsible for the crimes allegedly committed.

The ICC Prosecutor then accelerated the procedure. Upon his request of 26 November 2009, he received from the PTC, on 31 March 2010, the authorisation to investigate the alleged crimes against humanity related to the post-electoral violence, in the period fixed between 1

¹⁰⁴⁸ See P. Nyabul, 'The Government of Kenya and the ICC Relationship following the Post Elections Violence that Rocked Kenya in 2008', in M. Ndiaye (ed.), *L'impunité: jusqu'où l'Afrique est-elle prête* (Paris: L'Harmattan, 2012) 157-163, at 157-158.

¹⁰⁴⁹ L. M. Wanyeki, 'The International Criminal Court's Cases in Kenya: Origin and Impact', Institute for Security Studies Paper No.237 (August 2012), at 8.

¹⁰⁵⁰ International Crimes Act (2008), Article 1.

¹⁰⁵¹ Wanyeki, above note 1049, at 9.

June 2005 and 26 November 2009.¹⁰⁵² Later, on 8 March 2011, six Kenyan individuals were summoned to appear before the Court, including Uhuru Kenyatta and William Ruto, who became President and Deputy President of the country after winning the presidential election of March 2013.¹⁰⁵³ Prior to these indictments, Kenya adopted a new Constitution in 2010 and reformed its judiciary. Among other innovations, a Supreme Court was created,¹⁰⁵⁴ while the Constitution now provided that “the general rules of international law shall form part of the law of Kenya”.¹⁰⁵⁵ According to a commentator, such rules refer to customary international law of which “(...) the Constitution envisages the direct and automatic application (...) within the municipal law of Kenya, without further legislative intervention”.¹⁰⁵⁶ Instead, only treaties ratified by the country should need, in line with the dualist approach to international law, legislative domestication in order to be applied by the courts.¹⁰⁵⁷ In the light of this political and legal development, the dissatisfaction with the ICC’s intervention in Kenya led to attempts aiming to preserve the right of Kenya to investigate and to prosecute itself the crimes

¹⁰⁵² *Situation in the Republic of Kenya* (ICC-01/09-19), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, 31 March 2010, paras.207 and 211.

¹⁰⁵³ *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-01) , Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber II, 8 March 2011, para.57; *Ruto, Kosgey and Sang* (ICC-01/09-01/11), Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Pre-Trial Chamber II, 8 March 2011, para.59. At the time of their indictments, the accused held the following positions: Uhuru Kenyatta (Deputy Prime Minister and Minister of Finance), Francis Muthaura (Head of the Public Service and Secretary to Cabinet), Mohammed Hussein Ali (Chief Executive and Head of the National Postal Corporation and former Chief of Police), William Ruto (Minister of Higher Education, Science and Technology), Henry Kosgey (Member of Parliament), and Joshua Sang (Head of Operations of a private radio station, Kass FM).

¹⁰⁵⁴ Constitution of Kenya (2010), Article 163 (1) to (3).

¹⁰⁵⁵ *Ibid.*, Article 2 (5).

¹⁰⁵⁶ E. O. Asher, ‘Incorporating Transnational Norms in the Constitution of Kenya: The Place of International Law in the Legal System of Kenya’, 3 (11) *International Journal of Humanities and Social Sciences* (2013) 266-275, at 268.

¹⁰⁵⁷ *Ibid.*, at 271. This is also consistent with Articles 2 (6) and 94 (5) of the Constitution. Article 2 (6) states: ‘Any treaty or convention ratified by Kenya shall form part of the law of Kenya *under this Constitution*’. Article 94 (5) reads as follows: ‘No person or body, *other than Parliament*, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation’. Emphasis is mine.

presumably committed. In the box before the ICC, only remained four individuals against whom charges were confirmed by the PTC which committed them to trials.¹⁰⁵⁸

- The Denial of Kenya's Primary Jurisdictional Right

Three different actions were taken in order to enable all criminal proceedings relating to the 2007-2008 post-election violence to be conducted by Kenya itself. These actions are of political, diplomatic and judicial nature. But, none of them flourished.

First of all, Kenya brought the matter to the AU. The Pan-African organisation then made the option that the ICC's investigations and prosecutions should be deferred for two main reasons. On the one hand, it believed that deferral would allow for "a National Mechanism to investigate and prosecute the cases under a reformed judiciary provided for in the new constitutional dispensation, in line with the principle of complementarity".¹⁰⁵⁹ But, obviously, this reason is out of the reach of the Security Council which may act in this respect only if the suspension of ICC's proceedings contributes to the maintenance of international peace and security in accordance with Chapter VII of the UN Charter. On the other hand, the AU considered that the deferral request worked "in support of the ongoing peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence".¹⁰⁶⁰ In other words, as Ethiopia put it before the Security Council, the continuation of the ICC's action constituted itself a threat to stability in Kenya and the African region, which were facing the threat of terrorism.¹⁰⁶¹ The reason is that the ICC targets sitting senior state officials with direct impact on the normal functioning of the Kenyan political institutions and so distracts these officials from discharging their political and constitutional duties to stabilise the country.¹⁰⁶² This deferral option was also supported by the East African

¹⁰⁵⁸ For Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, see *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, para.429; for William Samoei Ruto and Joshua Arap Sang, see *Ruto, Kosgey and Sang* (ICC-01/09-01/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, 23 January 2012, paras.349, 366-367.

¹⁰⁵⁹ Assembly/AU/Dec.334(XVI), Decision on the Implementation of the Decisions on the International Criminal Court (Doc. EX.CL/639(XVIII)), 16th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 30-31 January 2011, para.6.

¹⁰⁶⁰ *Ibid.* See also Assembly/AU/Dec.366 (XVII), above note 1030, para.4.

¹⁰⁶¹ SC 7060th meeting, S.PV/7060, above note 1040, at 15.

¹⁰⁶² *Ibid.*

Community.¹⁰⁶³ In any event, the latter community suggested it could take with it the investigation and the prosecution in the place of Kenya, even though it had beforehand to confer to the East African Court of Justice criminal jurisdiction to this effect.¹⁰⁶⁴

In practice, the AU request was submitted to the Security Council by Azerbaijan, Burundi, Ethiopia, Gabon, Ghana, Kenya, Mauritania, Mauritius, Morocco, Namibia, Rwanda, Senegal, Togo and Uganda. But, the related draft resolution deferring investigation and prosecution against President Uhuru Kenyatta and Deputy President William Ruto was rejected.¹⁰⁶⁵ Among members of the Security Council, none voted against, while votes in favour from Azerbaijan, China, Morocco, Pakistan, the Russian Federation, Rwanda and Togo turned to be in the minority given the abstentions of eight members, including all western powers (Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom of Great Britain and Northern Ireland and United States of America).¹⁰⁶⁶

Second, the diplomatic dialogue with the ICC had also failed. On 29 July 2013, the President of the Court, Judge Song Sang-Hyun, rightly notified to the AU delegation that “the judicial nature of ICC does not allow it to take into account matters of a political nature”¹⁰⁶⁷ and that only the Security Council could defer cases under the Statute.¹⁰⁶⁸ But, the Prosecutor’s sensitivity to the AU request was disappointing while he possessed a margin of appreciation to suspend the investigation or the prosecution, before any judicial escalation, in order to allow positive application of the contended complementarity principle and so to cool down the tension with Africa. In her response to the AU delegation, Fatou Bensouda maintained, like the President of the Court, that Kenya should go to the Security Council for any matter of deferral.¹⁰⁶⁹ Furthermore, she made the observation that if Kenya had the primary responsibility to investigate and prosecute, article 143 (1) of its Constitution of 2010 precluded criminal proceedings against the President or a person performing the function of

¹⁰⁶³ Assembly/AU/DEC.482 (XXI), above note 1041, para.6.

¹⁰⁶⁴ Nyabul, above note 1048, at 161.

¹⁰⁶⁵ SC 7060th meeting, S.PV/7060, above note 1040, at 2.

¹⁰⁶⁶ *Ibid.*

¹⁰⁶⁷ Executive Council of the African Union, ‘Progress Report of the Commission on the Implementation of the Decision Assembly/AU/Dec.482 (XXI) on International Jurisdiction, Justice and the International Criminal Court (ICC)’, Ext/EX.CL/2(XV), Addis Ababa (Ethiopia), 11 October 2013, para.17 (v).

¹⁰⁶⁸ *Ibid.*

¹⁰⁶⁹ *Ibid.*, para.22 (vi).

that office during their tenure of office.¹⁰⁷⁰ But, she omitted that the same Constitution specified that “the immunity of the President under this article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity”.¹⁰⁷¹

Third, the remaining option was to challenge the admissibility of the cases before the Court. On 31 March 2011, Kenya filed to the PTC an application to this effect on the basis of article 19 (2) (b) of the ICC Statute. This article provides that “a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted” may submit such an application to the Court. The whole debate focused on the potential inadmissibility of the cases on the basis of article 17 (1) (a) of the Statute.¹⁰⁷² According to this provision, there is inadmissibility where “the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”. In this regard, Kenya claimed it was willing and able, after the enactment of the new Constitution and the judicial reform of 2010, to carry out its own investigations and prosecutions.¹⁰⁷³ In support of this claim, Kenya argued before the PTC that its competent authorities have opened investigations in the 2007-2008 post-election violence and that it would undertake further investigations¹⁰⁷⁴ for the success of which it requested the Court’s assistance through the transmission of all statements, documents and other types of evidence obtained by the Prosecutor.¹⁰⁷⁵ It committed itself to provide detailed progress reports on its own proceedings and readiness for trials to the Court by the end of July, August and September 2011, regarding their extensions to those suspects at the highest state level, who might be responsible for crimes committed.¹⁰⁷⁶ According to Kenya, it was not necessary that the state which claimed its

¹⁰⁷⁰ *Ibid.*, para.22 (ii).

¹⁰⁷¹ Article 143 (4).

¹⁰⁷² *Ruto, Kosgey and Sang* (ICC-01/09-01/11-101), Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Pre-Trial Chamber II, 30 May 2011, para.50; *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-96), Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, Pre-Trial Chamber II, 30 May 2011, para.46.

¹⁰⁷³ *Ibid.*, para.13 and para.12.

¹⁰⁷⁴ *Ibid.*, para.14 and para.13.

¹⁰⁷⁵ *Ibid.*, para.32 and para.28.

¹⁰⁷⁶ *Ibid.*, para.15 and para.14.

jurisdictional power investigate the same conducts and the same accused persons before the ICC. This is because the Court's determination must rely on the relevant state's proceeding at the time of the admissibility challenge.¹⁰⁷⁷ For Kenya, the investigation of the same conduct in respect of persons at the same level in the hierarchy would be therefore sufficient to declare the cases inadmissible under article 17 (1) (a) of the Statute.¹⁰⁷⁸

The PTC rejected the Kenyan application on 30 May 2011. First, it recalled the jurisprudence of the Appeals Chamber in *Germain Katanga and Mathieu Ngudjolo Chui* case regarding the three dimensions of the issue of complementarity under article 17 (1) (a) of the Statute, namely inaction of the state, unwillingness and inability.¹⁰⁷⁹ It found that Kenya was not investigating or prosecuting the same case and so, because of this inaction, the question of unwillingness or inability on its side was not at issue.¹⁰⁸⁰ Second, for the PTC, to determine whether Kenya was investigating the same case or not, it applied the "same conduct/same person" test. This test requires that, at the stage of prosecutions of identified individual suspects in concrete cases,¹⁰⁸¹ national investigations covered, for the question of inadmissibility, not only the same conducts but also the same suspects brought before the Court.¹⁰⁸² The PTC held that the request of the Court's judicial assistance was a different

¹⁰⁷⁷*Ibid.*, para.16 and para.15.

¹⁰⁷⁸ *Ibid.*

¹⁰⁷⁹ *Ibid.*, para.48 and para.44. See also *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1497), Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, Appeals Chamber, 25 September 2009, para.78. In this paragraph, the Chamber expressly held: '(...) in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute'. It is worth noting that the latter article relates to the gravity threshold of crimes to be tried by the Court.

¹⁰⁸⁰*Ibid.*, para.70 and para.66.

¹⁰⁸¹*Ibid.*, paras.50 and 54. At the stage of mere preliminary examinations or investigations, when there is not yet any concrete case, the "same conduct/same person" test is applied in relation to potential cases in the broad context of a situation.

¹⁰⁸² *Ibid.*, paras.55-58 and paras.51-54.

issue pertaining to cooperation with states parties and so did not have any relevance to the matter of admissibility.¹⁰⁸³ The impugned decision was confirmed by the Appeals Chamber on 30 August 2011.¹⁰⁸⁴

One of the three judges of the Appeals Chamber, Anita Ušacka, dissented with the majority decisions. The central argument in her opinion was that neither the PTC nor the Appeals Chamber gave sufficient weight to the sovereign right of Kenya to investigate and to prosecute, in line with the principle of complementarity, in balancing the interests at stake.¹⁰⁸⁵ The strict focus, without any adaptability to changing circumstances, on the non-existence of investigations into the same conducts and covering the accused persons before the Court was, according to her, a misapprehension of the issue,¹⁰⁸⁶ while anything indicated that the appellant state was not acting in good faith when stating that it intended to conduct investigations in Kenya.¹⁰⁸⁷ In the words of Charles C. Jalloh, the Court's approach actually turns the principle of complementarity into primacy of the ICC.¹⁰⁸⁸ He writes:

(...) the Court lost an opportunity to breathe life into the oft view of the ambit of the provision in an effect to encourage or promote national attempts to prosecute. In its interpretative stance, the Appeals Chamber gave itself wide latitude that could be invoked to engage in outright judicial

¹⁰⁸³ *Ibid.*, paras.34-35 and paras.30-31.

¹⁰⁸⁴ *Ruto, Kosgey and Sang* (ICC-01/09-01/11-307), Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 August 2011, paras.40-43 and 125 ; *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-274), Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 30 August 2011, paras.39-42 and 123.

¹⁰⁸⁵ Dissenting Opinion of Judge Anita Ušacka, *Ruto, Kosgey and Sang* (ICC-01/09-01/11-336), Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber H of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 20 September 2011, paras.28-30; Dissenting Opinion of Judge Anita Ušacka, *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-342), Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber H of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Appeals Chamber, 20 September 2011, paras.28-30.

¹⁰⁸⁶ *Ibid.*, para.28 and para.28.

¹⁰⁸⁷ *Ibid.*

¹⁰⁸⁸ C.C. Jalloh, 'Kenya vs. The ICC Prosecutor', 53 *Harvard International Law Journal* (2012) 269-285, at 276.

rejection of any legitimate national attempt to prosecute crimes that occur within a state thereby effectively turning complementarity into primacy.¹⁰⁸⁹

Moreover, the material content of the “same conduct/same person” test is much criticised in the scholarship.¹⁰⁹⁰ For example, concerning the so-called “same conduct” test, William A. Schabas has warned that the determination of admissibility should not be reduced to “a mechanistic comparison of charges in the national and the international jurisdiction”.¹⁰⁹¹ Rather, this determination “must involve an assessment of the relative gravity of the offenses tried by national jurisdiction put alongside those of the international jurisdiction, in order to see whether a crime contemplated by the Rome Statute is being prosecuted directly or even indirectly”.¹⁰⁹² That gravity criterion can be established on a case-by-case basis. Factors such as the types of charges, the number of incidents, the manner of commission of crimes or their impact on victims may be taken into consideration. But, another position suggests a sentence-based approach for offenses to be tried by a national jurisdiction, compared with the sentence the perpetrator would have received if he was tried by the ICC.¹⁰⁹³ This approach might be particularly relevant in the event of the ICC’s intervention in a state which may not have the corresponding legislation on international crimes, like a given state not party to the Court’s Statute, but which investigates or prosecutes them as ordinary offenses under its domestic law. Linked to this critique, the “same conduct/same person” test is also very strict in that it could deny the possibility for competent national authorities to investigate other crimes or to prosecute individuals other than those who are tried by the ICC without that being dictated by the independent national appreciation of the situation or the case in the light of available factual, evidentiary and normative data. According to Kevin Jon Heller, “adopting a complementarity heuristic that provides states with maximum flexibility to prosecute international crimes as ordinary crimes will level the complementarity playing-field between Western and non-Western states”¹⁰⁹⁴ and could also increase the willingness of non-member

¹⁰⁸⁹ *Ibid.*, at 278.

¹⁰⁹⁰ *Ibid.*, at 279-282.

¹⁰⁹¹ W. A. Schabas, *An Introduction to the International Criminal Court* (4th edn., Cambridge: Cambridge University Press, 2011), at 197.

¹⁰⁹² *Ibid.*

¹⁰⁹³ K. J. Heller, ‘A Sentence-Based Theory of Complementarity’, 53 (1) *Harvard Journal of International Law* (2012) 201-249, at 248-249.

¹⁰⁹⁴ *Ibid.*, at 248.

states to ratify the Court's Statute.¹⁰⁹⁵ But, this approach could not be applied to all cases.¹⁰⁹⁶ According to Carsten Stahn, "a case-by-case assessment, which makes best use of the existing flexibility under the Statute and takes into account "sentencing" criteria as part of the admissibility criteria under Article 17, might in the end present a more nuanced and suitable approach".¹⁰⁹⁷

Thus, considering the failure to give positive effect to the principle of complementarity in the situation in Kenya, the AU averted its deep regret that the decisions of the ICC on the admissibility challenge of the cases, dated 30 May and 30 August 2011 respectively, "denied the right of Kenya to prosecute and try alleged perpetrators of crimes committed on its territory in relation to the 2007 post-election violence".¹⁰⁹⁸ A similar criticism pertains to the situation in Sudan.

2°) *The Situation in Sudan*

The ICC intervened in Sudan in relation to the armed conflict which broke out in February 2003 in the west region of Darfur, where hundreds of thousands of innocent civilians were reportedly said to have been killed. The armed conflict opposed the Sudan People's Armed Forces (the Sudanese Armed Forces) and the Popular Defence Force (PDF) along with the *Janjaweed* militia against several rebel groups, including the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). Unlike Kenya, Sudan is not a state party to the ICC Statute. The situation in Darfur was referred to the ICC Prosecutor, out of the recommendation of the United Nations Commission of Inquiry on

¹⁰⁹⁵ *Ibid.*

¹⁰⁹⁶ C. Stahn, 'One Step Forward, Two Steps Back?: Second Thoughts on a "Sentence-Based" Theory of Complementarity -Responding to Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L.J. 85 (2012)', 53 *Harvard Journal of International Law* (2012) 183-196, at 184. This authors argues: 'In the ICC context, the symmetry argument is mostly a consequence of the interpretation of the notion of the "case" for jurisdictional purposes under the Statute and an assurance to domestic authorities that the ICC might not conduct proceedings under the *ne bis in idem* clause under Article 20(3) (which does not contain a strict symmetry requirement itself)' (at 189).

¹⁰⁹⁷ *Ibid.*, at 196.

¹⁰⁹⁸ Assembly/AU/DEC.482 (XXI), above note 1041, para.6.

Darfur,¹⁰⁹⁹ by the Security Council on 31 March 2005.¹¹⁰⁰ The ICC jurisdiction extends to crimes that have been committed in Darfur since 1 July 2002.¹¹⁰¹ The investigations commenced on 1 June 2005 and resulted in the indictments of six Sudan nationals, including its head of state, the former Minister of interior affairs (Ahmad Harun), the former Special Representative of the President in Darfur (Muhammad Hussein), one of the leaders of the *Janjaweed* militia (Ali Kushayb) and two rebels (Abu Garda and Abdallah Banda).¹¹⁰²

Like the situation in Kenya, the AU invoked primary jurisdiction of Sudan to investigate or prosecute crimes committed in Darfur region, without prejudice to the achievement of the peace and reconciliation process of the Sudanese people. In fact, the PSC urged the government of Sudan in its Communiqué of 21 July 2008, which was endorsed by the AU Assembly in February 2009, “to take immediate and concrete steps to investigate and bring the perpetrators (of serious crimes) to justice and to take advantage of the availability of qualified lawyers to be seconded by the AU and the League of Arab States (...)”.¹¹⁰³ Clearly, the continental organisation intended to support the Sudanese efforts to ensure justice, which had taken an important step with the establishment of the *Special Criminal Court on the Events in Darfur (SCCED)* with jurisdiction to deal with international crimes since 7 June 2005. In contrast, the ICC abstained from supporting this Sudanese initiative. Yet, until the situation escalated before the ICC with the indictment of President Omar Al Bashir, Sudan was cooperating with the Court and even the Prosecutor acknowledged that he had received relevant details on ongoing national investigations and prosecutions against the alleged perpetrators of crimes in Darfur from Sudanese authorities.¹¹⁰⁴ For example, the ICC Prosecutor received such details in relation to Ali Kushayb who was arrested on 26 November

¹⁰⁹⁹ United Nations, ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004’ (25 January 2005), para. 647.

¹¹⁰⁰ SC Res. 593 (2005), above note 389. This was a historic resolution since it was the first referral of a situation to the ICC by the Security Council. See also F. Aumond, ‘La situation au Darfour déferée à la CPI: retour sur une résolution historique du Conseil de sécurité’, CXII *Revue générale de droit international public* (2008) 111-134, at 113-114.

¹¹⁰¹ *Ibid.*, para.1.

¹¹⁰² On 8 February 2010, the Pre-Trial Chamber I refused to confirm the charges against Abu Garda. See *Garda* (ICC-02/05-02/09), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 February 2010, para.236.

¹¹⁰³ Assembly/AU/DEC.221 (XII), above note 222, para.8.

¹¹⁰⁴ *Situation in Darfur, the Sudan* (ICC-02/05), Prosecutor’s Application under Article 58(7), Pre-Trial Chamber I, 27 February 2007, paras.255-266.

2006.¹¹⁰⁵ But, the Prosecutor submitted to the PTC and the latter Chamber agreed with him that Sudanese proceedings did not cover the same conduct, namely the same counts of war crimes and crimes against humanity which were the subject of the case before the ICC.¹¹⁰⁶

True, the AU itself recognised the operational difficulties of the SCCED. Its own High-Level Panel on Darfur,¹¹⁰⁷ which had been established by the PSC on 21 July 2008,¹¹⁰⁸ and chaired by the former South African President, Thabo Mbeki, noted:

The SCCED initially operated as a roving court. It has dealt with cases in the three capitals of the states of Darfur: El Fasher, Nyala, and El Geneina. As a Darfur-wide court, it would have been expected to have a full docket with cases across the three states. However, during its visits to Darfur, the Panel did not find evidence of the kind of judicial activity, which the situation in Darfur ought to have generated. It was reported to the Panel that only 13 cases had come before the SCCED thus far; that these cases all involved ordinary crimes; and, that the only charges relating to a large-scale attack against civilians – the usual subject matter of war crimes and crimes against humanity – led only to convictions on theft that allegedly took place after the attack. Whatever the reasons cited for this outcome it was quite clear to all observers that the SCCED has so far accomplished very little. The major violations in Darfur have yet to be the subject of any serious judicial process.¹¹⁰⁹

But, in order to support the Sudanese efforts to ensure national criminal accountability in hard manageable cases, the AU High-Level Panel on Darfur came up with new proposals. In its report, entitled “Darfur: the Quest for Peace, Justice and Reconciliation”,¹¹¹⁰ it proposed an integrated “Justice and Reconciliation Response to Darfur (JRRD)”¹¹¹¹ in the place of the ICC in order to fight impunity and to achieve peace and reconciliation in Sudan. This mechanism could have consisted of four interconnected parts. First, a comprehensive, independent and

¹¹⁰⁵ *Ibid.*, para.257.

¹¹⁰⁶ *Harun and Kushayb* (ICC-02/05-01/0), Decision on the Prosecution Application under Article 58(7) of the Statute, Pre-Trial Chamber I, 27 April 2007, paras.19-21 and 24-25.

¹¹⁰⁷ It was mandated to examine the situation crisis in the region of Darfur and submit recommendations on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other hand, could be effectively and comprehensively addressed.

¹¹⁰⁸ PSC/MIN/Comm(CXLII), above note 1020, para.11 (ii).

¹¹⁰⁹ T. Mbeki, A. Abubakar, P. Buyoya, A. M. El Sayed, F. Mumba, K.A. Mohamed, R.A. Omaar, ‘Darfur: the Quest for Peace and Reconciliation. Report of the African Union High-Level Panel on Darfur (AUPD)’ (October 2009), PSC/AHG/2(CCVII) Peace and Security Council, Abuja (Nigeria), 29 October 2009, para.217.

¹¹¹⁰ *Ibid.*, at iv.

¹¹¹¹ *Ibid.*, para.320.

integrated national criminal justice process which includes investigations and re-invigoration of all aspects of the SCCED “as the principal forum for delivering criminal justice for crimes relating to the conflict in Darfur”.¹¹¹² Second, Sudan could establish a Truth, Justice and Reconciliation Commission (TJRC).¹¹¹³ Third, the AU High-Level Panel on Darfur recommended the creation of a Hybrid Criminal Court (AU-Sudan) which could be empowered to exercise “original and appellate jurisdiction over individuals who appear to bear particular responsibility for the gravest crimes committed during the conflict in Darfur, and to be constituted by judges of Sudanese and other nationalities”,¹¹¹⁴ but all of them being Africans.¹¹¹⁵ Fourth, the remaining job would be left to other “traditional mechanisms of justice to deal with those perpetrators who appear to bear responsibility for crimes other than the most serious violations”.¹¹¹⁶ Seemingly, the AU High-Level Panel on Darfur excluded the ICC in its proposed JRRD for various reasons. Above all, this Court had already raised contestations and credibility problems in Sudan. Then, though important for the situation in Darfur, the ICC is a jurisdiction of last resort. Finally, the report above noted that this Court was obliged “to take into consideration the fact that a state had taken or was taking effective justice measures to deal with relevant crimes”,¹¹¹⁷ according to the principle of (positive) complementarity.

However, again, the ICC did not support the AU proposals. It preferred to stick on the radical judicial interpretation of the principle of complementarity principle, with the “same conduct/same person” test. *De facto*, its actions became a response in contradiction with the AU JRRD; what might not have been the intent of the United Nations Commission of Inquiry on Darfur, chaired by the late Italian judge, Antonio Cassese,¹¹¹⁸ when it recommended that the Security Council referred the situation to the Prosecutor.

¹¹¹² *Ibid.*

¹¹¹³ *Ibid.*

¹¹¹⁴ *Ibid.*

¹¹¹⁵ *Ibid.*, para.331.

¹¹¹⁶ *Ibid.*, para.337.

¹¹¹⁷ *Ibid.*, para.339.

¹¹¹⁸ United Nations, ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004’ (25 January 2005), para.647.

Therefore, given the judicial escalation at the ICC, the AU made further steps in the radicalisation of its position. It formulated three principal responsive measures “in order to preserve and safeguard the dignity, sovereignty and integrity of the continent”.¹¹¹⁹ First of all, this time it requested the Security Council to defer, pursuant to article 16 of the ICC Statute, all the situations in which cases had been initiated against sitting African heads of state (Sudan, Libya and Kenya).¹¹²⁰ Secondly, the AU decided that no African states should comply with ICC’s arrest warrants against President Omar Al Bashir and the Libyan leader, Muammar Kadhafi, before his death.¹¹²¹ Thirdly, the understanding of the immunity regime was extended to include senior officials of *any* AU member states and thus would require the amendment of article 27 (2) of the ICC Statute.¹¹²² Against this position, many voices have risen to defend the ICC. What are the counter-arguments presented?

2.2.2.2. The Defence of the Court

Counter-arguments to African criticisms can be split in three groups: the alleged continuing support for the ICC in Africa (a), the vindication of the Office of the Prosecutor (b) and the search for justice before any political concern over peace (c).

a) The Continuing Support for the ICC in Africa

Presumably, the matter of African contestations against the ICC was underestimated. There have been advanced perceptions of division based on a pluralism of views on the Court in Africa.¹¹²³ In this regard, the AU’s position can be perceived to be distinct from the one of individual states or the position which is shared by the African peoples and civil society organisations. Arguably, one has to distinguish the AU’s contestations and the civil society’s

¹¹¹⁹ Assembly/AU/Dec.245 (XIII) Rev.1, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) (Doc. Assembly/AU/13(XIII)), 13th Ordinary Session of the Assembly of the African Union, Sirte (Libya), 1 – 3 July 2009, para.12.

¹¹²⁰ Assembly/AU/Dec.419 (XIX), Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/731(XXI), 19th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 15 - 16 July 2012, para.4; Assembly/AU/Dec.366 (XVII), above note 1030, para.6.

¹¹²¹ Assembly/AU/Dec.245 (XIII) Rev.1, above note 1119, para.10; Assembly/AU/Dec.366 (XVII), above note 1030, para.6.

¹¹²² Ext/Assembly/AU/DEC.1 (Oct.2013), above note 1039, para.10 (i).

¹¹²³ See C. Ero, ‘Understanding Africa’s Position on the International Criminal Court’, in The Foundation for Law, Justice and Society, *Oxford Transitional Justice Research: Debating International Justice in Africa* (Oxford: OTJR Collected Essays, 2008-2010)11-15, at 11.

voices approving the ICC's interventions in Africa.¹¹²⁴ Therefore, a number of authors suggest that despite criticisms, there is still a strong support for the Court across the continent.¹¹²⁵

However, this perception of division is actually inconsistent with the facts. First of all, it is worthy to recall that this Court owes its legal existence to the will of sovereign states, whose governments are supposed to be representative of their peoples. In this representation function, they do not go in competition with any civil society organisation, no matter how important it is. The ICC remained an interstate jurisdiction, created on the basis of an international treaty.

Secondly, the AU and its member states are not against the ICC as such. They simply disapprove a part of its proceedings and judicial strategy in Africa. True, there have been attempts by some states (Kenya, Uganda, Sudan, Zimbabwe, Ethiopia, Namibia, South Africa, etc.) to incite the entire regional group to reject and withdraw from the institution. However, this incitation may just remain a political and diplomatic instrument to pressure that African protests, requests and proposals for reform are duly considered by other ICC's member states and the rest of the international community, beginning by the Security Council. Still, Africa strongly needs justice to tackle mass atrocities across the continent and the ICC may continue to play a role in the matter. This explains why many African states have continued to stress the ICC importance during sessions of the ASP. Despite the crisis, some others countries have decided to refer new situations to the Prosecutor (Comoros, Mali and CAR II),¹¹²⁶ to actively cooperate with the Court in specific cases (DRC and Uganda), to ratify the Rome Statute (Seychelles, Tunisia, Cape Verde and Ivory Coast)¹¹²⁷ or to adopt domestic legislation to implement the ICC Statute at the national levels (Uganda and DRC).¹¹²⁸

¹¹²⁴ R. Nyabirungu Mwene Songa, 'L'action de la Cour pénale internationale en Afrique et l'Union africaine', *Annales de la Faculté de Droit de l'Université de Kinshasa* (2014) 252-274, at 267.

¹¹²⁵ Bensouda, above note 968; E. Keppler, 'Managing Setbacks for the International Criminal Court in Africa', *Journal of African Law* (2011)1-14, at 4-6 and 7-8. See also R. Lekalake and S. Buchanan-Clarke, 'Support for the International Criminal Court in Africa: Evidence from Kenya', Afrobarometer Policy Paper No. 23 (August 2015), at 4-8.

¹¹²⁶ Respectively on 31 May 2010, 13 July 2012 and 30 May 2014.

¹¹²⁷ Respectively on 10 August 2010, 24 June 2011, 10 October 2011 and 15 February 2013.

¹¹²⁸ See The International Criminal Court Act 2010, Acts Supplement to the *Ugandan Gazette No.39 Volume CIII dated 25th June, 2010*, at 1-69; Law No.15/022 of 31 December 2015 Modifying and Complementing the

Thirdly, it is a matter of fact that the Common African Position on the ICC, replaced in a plural Africa, may sometimes be violated by a few number of states or denounced by some civil society organisations. But these violations and denouncements evidence the strength of the AU position, which is combated, rather than a strong support for the ICC's controversial work on the continent. True, some disagreements appear between states from time to time about complying with the arrest warrants against President Omar Al Bashir.¹¹²⁹ Chad entered reservation to the AU non-cooperation decision in July 2009,¹¹³⁰ but it did not maintain such reservation to similar subsequent regional decisions. Botswana also made a reservation to the entire decision of May 2013, concerning the request for deferral of the situations in Kenya and Sudan by the Security Council, the claim for the primary jurisdiction of Kenya in line with the complementarity principle and the disapproval of the alleged misuse of indictments against African leaders.¹¹³¹ But, like Djibouti, Kenya, Malawi, the DRC, South Africa and many other countries, visited by Omar Al Bashir, Chad changed its position and chose to obey the AU decisions,¹¹³² despite regular ICC's protests and notifications of non-cooperation to the Assembly of States Parties and the Security Council.

Finally, the tension between the AU and the ICC shows that the Court is not powerful enough to work against the will of independent states and without sufficient regional support. There is always a need for a dialogue and common understanding with the most interested actors in the region concerned in order to ensure the success of judicial actions.¹¹³³ That could have avoided the suspension of the investigations in the Darfur region in Sudan on 12 December

Decree of 30 January 1940 Laying down the Congolese Penal Code, Law No.15/023 of 31 December 2015 Modifying the Law No.024-2002 of 18 November 2002 Laying down the Congolese Military Criminal Code, and Law No.15/024 of 31 December 2015 Modifying and Complementing the Decree of 6 August 1959 Laying down the Congolese Code of Criminal Procedure.

¹¹²⁹ See P.A. Kasaija, 'Kenya's Provisional Warrant of Arrest for President Omar al Bashir of the Republic of Sudan', 12 (2) *African Human Rights Law Journal* (2012) 623-640, at 623-640.

¹¹³⁰ Assembly/AU/Dec.245 (XIII) Rev.1, above note 1119.

¹¹³¹ Assembly/AU/DEC.482 (XXI), above note 1041.

¹¹³² See P. Oyugi, 'Cooperation Disputes between African States Parties to the Rome Statute and the International Criminal Court: Is the End Anywhere Near?', 2 *Speculum Juris* (2014) 123-142, at 125-141.

¹¹³³ A. Fall, 'Improving Political Dialogue to Address Contentious Issues: the Case of the International Criminal Court (ICC)', 6(1) *The Bulletin of Fridays of the Commission (AU)* (2014) 41-44.

2014,¹¹³⁴ while the Prosecutor had already withdrawn charges against President Uhuru Kenyatta on 5 December 2014 on the ground of a lack of evidence,¹¹³⁵ in the absence of witnesses willing and free from Kenyan pressure to testify before the Court. In the AU's view, a similar withdrawal must apply to the Kenyan Deputy President, William Ruto.¹¹³⁶ On 5 April 2016, the Trial Chamber vacated the charges against him and his co-accused, Joshua Sang. It terminated the case without prejudice to re-prosecution, not because of the AU call as such,¹¹³⁷ but given the fact that the Prosecutor did not present sufficient evidence on which the conviction could be have based,¹¹³⁸ mainly due to much obstruction to justice on the part of Kenya. This collapse of cases can also be a product of bad judicial strategies, which hinder the judicial cooperation because of the stubborn opposition between the Court and its member. Yet, the proceedings could have made progress in Kenya, with the ICC's support, had the complementarity principle been interpreted and applied with much flexibility. Anyway, there is still a trend to vindicate the Office of the Prosecutor.

b) The Attempt to Vindicate the Office of the Prosecutor

Here, the argument suggests that the Prosecutor and his office have nothing to do with African contestations. It is argued that African situations have been initiated by states themselves or with their support or through referrals by the Security Council. This argument though formally tenable is extremely fallacious in its merits. In fact, Africa's criticisms do not hinge on referrals of African situations to the ICC, including those by the Security Council which African member states have also voted for.¹¹³⁹ It is not right to argue that the Prosecutor and his office are blamed for referrals of African situations to the Court by African

¹¹³⁴ D. Smith, 'ICC Chief Prosecutor Shelves War Crimes Probe', *The Guardian* (14 December 2014), <<http://www.theguardian.com/world/2014/dec/14/icc-darfur-war-crimes-fatou-bensouda-sudan>> accessed 12 March 2015.

¹¹³⁵ *Kenyatta* (ICC-01/09-02/11-1005), Decision on the Withdrawal of Charges against Mr. Kenyatta, Trial Chamber V (B), 13 March 2015, para.4.

¹¹³⁶ Assembly/AU/DEC.547 (XXIV), above note 1032, para.8.

¹¹³⁷ *Ruto and Sang* (ICC-01/09-01/11-2027), Decision on Defence Applications for Judgments of Acquittal, Trial Chamber V(A), 5 April 2016, paras.211-2014.

¹¹³⁸ *Ibid.*, para.464.

¹¹³⁹ For the referral of the situation in Sudan, Benin and Tanzania voted in favor of the resolution 1593 (31 March 2005), while Algeria abstained. Instead, for the situation in Libya, all African states voted unanimously for the resolution 1970 (26 February 2011): Gabon, Nigeria, South Africa,

states themselves or the Security Council.¹¹⁴⁰ Such statement sheds a deliberate confusion on the role of the Prosecutor, who is actually the central engine for the ICC's success.¹¹⁴¹ In fact, there is a distinction between the power to refer situations to the Court and the Prosecutor's exclusive competence for the selection of cases. To this effect, the Prosecutor makes some discretionary choices of incidents to investigate, crimes and suspects to be brought before the Court. True, such exercise of discretionary powers cannot be envisaged as absolute,¹¹⁴² despite the Prosecutor's independence which is a principle necessary for the flexibility, the adaptability and efficacy of the system of criminal justice.¹¹⁴³ But, some of his choices and assessment do not fall under judicial control. For instance, in the situation in Darfur, the Sudan Workers Trade Unions Federation and the Sudan International Defence Group sought to intervene as *amici curiae*, pursuant to rule 103 of the ICC's Rules of Procedure and Evidence,¹¹⁴⁴ to contend that the Prosecutor's request for the indictment of President Omar Al Bashir (as well as several alleged commanders of organised armed groups in the Darfur region) and the issuance of an arrest warrant against him would not serve the interests of justice. The PTC dismissed the application, thereby refusing to grant a leave for that purpose, on the ground that the matters to which the applicants referred were "unrelated to any issue currently before the Chamber",¹¹⁴⁵ relevant for the proper determination of the case. To come to this conclusion, the PTC held that it received powers to review only the Prosecutor's decision not to proceed with an investigation or prosecution.¹¹⁴⁶ In particular, if he decides not to proceed in order to preserve the interest of justice according to available information in his

¹¹⁴⁰ Bensouda, above note 968, at 30.

¹¹⁴¹ H.-P. Kaul, 'The International Criminal Court: Current Challenges and Perspectives', 6 *Washington University Global Studies Law Review* (2007) 575-582, at 579.

¹¹⁴² See H. B. Jallow, 'Prosecutorial Discretion and International Criminal Justice', 3 *Journal of International Criminal Justice* (2005) 145-161, at 154-160.

¹¹⁴³ *Ibid.*, at 145-146 and 154.

¹¹⁴⁴ This Rule which deals with '*Amicus curiae* and other forms of submission' to the Court provides: '1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate. 2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1. 3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations'.

¹¹⁴⁵ *Situation in Darfur, Sudan* (ICC-02/05-185), Decision on Application under Rule 103, Pre-Trial Chamber I, 4 February 2009, para.32.

¹¹⁴⁶ *Ibid.*, para.21.

hands, the PTC may not confirm this decision,¹¹⁴⁷ but the Prosecutor remains free for subsequent analysis and considerations. Furthermore, if a case is initiated, the Chamber recalled that it was only competent to decide on the matter of admissibility¹¹⁴⁸ in accordance with article 19 (1) of the Court's Statute.¹¹⁴⁹ However, it lacked the power to review the Prosecutor's discretion in his assessment that the initiation of a given case would not be detrimental to the interests of justice.¹¹⁵⁰ That is his sole and full responsibility.¹¹⁵¹

Moreover, the selectivity of cases brought to the Court by the Prosecutor from the African situations is a concrete problem. It engenders a serious threat to the legitimacy of (global) international criminal justice (starting by its acceptance by interested stakeholders).¹¹⁵² In fact, the Prosecutor's judicial choice does not reflect the complexity of African crises and armed conflicts, whose actors are not exclusively Africans, even if the latter remain, in most cases, the primary actors directly responsible for atrocities. *External* participation in African crises and armed conflicts may take different forms: illicit trafficking of weapons likely to be used in the commission of crimes, illegal control over natural resources and illicit trade with armed groups in knowledge of the use of generated money in criminal activities, mercenarism, direct foreign military intervention, etc. For example, concerning Libya, the military campaign which overthrew Muammar Kadhafi in 2011 implicated the governmental army against Libyan rebels, supported by a coalition of NATO member states, headed by the United States of America, the United Kingdom and France. This was the so-called NATO military "Operation Unified Protector". At the Ivory Coast, and outside Ivoirians, two other forces were active in the country, namely the United Nations Peace Keeping Operation (ONUCI) since 27 February 2004, and the French troops acting in the framework of the so-called "Operation Licorne", in the course of an armed conflict which had started in 2002 and officially ended on 11 April 2011 with the capture of defeated President Laurent Gbagbo.

¹¹⁴⁷ ICC Statute, Article 53 (3) (b).

¹¹⁴⁸ *Situation in Darfur, Sudan*, above note 1145, paras.24-25.

¹¹⁴⁹ This provision states: 'The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17'. The latter Article 17 alludes to issues of admissibility, that is to say the Court's competence in relation with the principle of complementarity, including the gravity of crimes at stake.

¹¹⁵⁰ *Situation in Darfur, Sudan*, above note 1145, para.29.

¹¹⁵¹ *Ibid.*, para.30.

¹¹⁵² M. M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', 33 (2) *Michigan Journal of International Law* (2012) 265-320, at 271-274.

In the judicial field, the situation in Libya shows that non-Africans could also face ICC proceedings. The fact that there were contradictory reports on eventual crimes by NATO forces in this country¹¹⁵³ could have motivated the Prosecutor to have his own in-depth sight into the matter. But, this kind of failure or reluctance to investigate or to prosecute crimes potentially committed by powerful states is not new. The ICTY Prosecutor also refused to investigate NATO alleged crimes committed during the war and air bombings campaign against the former Yugoslavia from 24 March to 9 June 1999.¹¹⁵⁴ In the situation in Libya, a counter-argument could be found in the complementarity principle which may have prevented the ICC from investigating alleged committed crimes in favour of national jurisdictions. However, none of the concerned NATO member states (especially those which are parties to

¹¹⁵³ The Human Rights Council of the United Nations Inquiry Commission has Vindicated NATO Forces. See UN Human Rights Council, 'Report of the International Commission of Inquiry to Investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya' (1 June 2011) A/HRC/17/44, at 6; UN Human Rights Council, 'Report of the International Commission of Inquiry on Libya' (18 March 2012) A/HRC/19/68, at 17 and 21. Reversely, findings in a report issued by some organisations appertaining to the Arab civil society, with participation of one Sweden civil organisation, have incriminated NATO forces. See Arab Organisation for Human Rights (AOHR), Palestinian Centre for Human Rights (PCHR) and International Legal Assistance Consortium (ILAC), 'Report of the Independent Civil Society Fact-Finding Mission to Libya' (January 2012), para.196, at 201-204 <http://www.pchrgaza.org/files/2012/FFM_Libya-Report.pdf> accessed 26 September 2015.

¹¹⁵⁴ The Office of the Prosecutor first established an internal inquiry committee with the mandate 'to assess the allegations and material accompanying them, and advise the Prosecutor and Deputy Prosecutor whether or not there is a sufficient basis to proceed with an investigation into some or all the allegations or into other incidents related to the NATO bombing' (para.3 of the report below). The Prosecutor then hid himself behind the report delivered by this committee which simply vindicated NATO forces as follows: '[...]the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences' (para.90). Therefore, the committee recommended that no investigation be commenced by the Office of the Prosecutor (para.91). See International Criminal Tribunal for the former Yugoslavia, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (8 June 2000), <http://www.difesa.it/SMD_/CASD/IM/ISSMI/Corsi/Corso_Consigliere_Giuridico/Documents/72470_final_report.pdf> accessed 25 September 2015. See also A-S. Massa, 'NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia not to Investigate: an Abusive Exercise of Prosecutorial Discretion', 44 (2) *Berkeley Journal of International Law* (2006) 610-649, at 627-633 and 643-646.

the Rome Statute) seems to have initiated genuine criminal proceedings in this regard, despite several calls for investigations and eventual prosecutions by two authoritative western NGOs, Amnesty International and Human Rights Watch.¹¹⁵⁵ Obviously, there is a lack of (political) will to investigate and/or to prosecute the potential offenders. The same criticism applies to the situation at the Ivory Coast, where the French played a crucial military role during the armed conflict and particularly during the 2010-2011 post-electoral violence. Criminal investigations have been requested even by some French parliamentarians themselves, but to no avail.¹¹⁵⁶

The initiation of cases concerning non-African suspects could also be possible in the situation in the DRC, which involves a wide regional and international participation –direct or indirect –in atrocities.¹¹⁵⁷ The Prosecutor has chosen, outside those who had sponsored violence there, to focus on small fishes from the Ituri region, namely Thomas Lubanga, Bosco Ntaganda (his Rwandan presumed co-author), Germain Katanga and the acquitted Mathieu Ngudjolo. Worse, since the Congolese self-referral of 19 April 2004, he has done nothing so far, with his unfinished investigations, for the appalling events which continue to strike innocent civilians in northern Katanga, North and South Kivu provinces, except prosecutions of two presumed

¹¹⁵⁵ Amnesty International, ‘Libya: the Forgotten Victims of NATO Strikes’ (March 2012), <<http://www.amnesty.ch/de/laender/naheer-osten-nordafrika/libyen/nato-einsatz-die-vergessenen-opfer/bericht-libya-the-forgotten-victims-of-nato-strikes--maerz-2012.-22-seiten>> accessed 25 September 2015; Human Rights Watch, ‘Unacknowledged Deaths: Civilian Casualties in NATO’s Air Campaign in Libya’ (May 2012), <<http://www.hrw.org/sites/default/files/reports/libya0512webwcover.pdf>> accessed 25 September 2015. In this regard, Amnesty International called on NATO to ‘ensure that prompt, independent, impartial and thorough investigations are conducted into any allegations which may arise of serious violations of international law by participants in Operation Unified Protector and that the findings be publicly disclosed, and wherever there is sufficient admissible evidence, ensure that suspects are prosecuted in proceedings that fully comply with international fair trial standards’ (*ibid.*). And Human Right Watch recommended to NATO to ‘conduct transparent and impartial investigations into credible allegations of laws-of-war violations during NATO’s air war in Libya. Make public the findings and include recommendations for disciplinary measures or criminal prosecutions where violations are found’ (*Ibid.*).

¹¹⁵⁶ France, ‘Assemblée nationale : Proposition de résolution visant à créer une commission d’enquête sur le rôle de la Force Licorne en Côte d’Ivoire’ N° 131 (26 juillet 2012), at 5-7 <<http://www.assemblee-nationale.fr/14/pdf/propositions/pion0131.pdf>> accessed 26 March 2015.

¹¹⁵⁷ J. B. Mbokani, ‘La Cour pénale internationale: une Cour contre les Africains ou une Cour attentive à la souffrance des victimes africaines’, 26 (2) *Revue québécoise de droit international* (2013) 47-100, at 75-76.

leaders of the Rwandan rebellion (Callixte Mbarushimana and Sylvestre Mudacumura),¹¹⁵⁸ but quite second figures of the Congo tragedy.

Outside Africa, the Prosecutor can be blamed for his lack of initiative¹¹⁵⁹ where the criteria for the exercise of his powers are met: ICC jurisdiction, admissibility conditions (complementarity and gravity) and the interests of justice. Some preliminary examinations that have been opened either late and suspiciously in reaction to African criticisms or on communications by human rights organisations cannot be an excuse for him and his office.¹¹⁶⁰

c) The Interaction between Peace and Justice

If a court does not rely on a good prosecutor, the latter can blemish the reputation of the entire institution. He should be independent of mind, vigorous and firm in his judicial choices, cooperative, political, diplomat and strategist. These qualities are required by the state of the

¹¹⁵⁸ While Sylvestre Mudacumura is at large since the issuance of the arrest warrant of 12 July 2012, the Pre-Trial Chamber declined to confirm charges of war crimes and crimes against humanity against Callixte Mbarushimana – and the decision was confirmed by the Appeals Chamber- given that that the evidence submitted by the Prosecution was not sufficient to establish substantial grounds to believe that the accused was responsible within the meaning of Article 25 (3) (d) of the ICC Statute. The latter provision prescribes: ‘In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (...) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime’. See *Mbarushimana* (ICC-01/04-01/10), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 16 December 2011, para.339-340; *Mbarushimana* (ICC-01/04-01/10 OA 4), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”, Appeals Chamber, 30 May 2012, para.70.

¹¹⁵⁹ R. Adjovi, ‘L’Afrique et le droit international pénal’, 17 *African Yearbook of International Law* (2011) 3-11, at 10.

¹¹⁶⁰ By the end of August 2017, here are the on-going preliminary examinations: Afghanistan (2007), Colombia (2012), Iraq (re-opening in 2014 after closing in 2006), Ukraine (2014), Registered Vessels of Comoros, Greece and Cambodia (re-opened in 2015 after closing in 2013) and Palestine (2015). Moreover, the preliminary examination of the situation in Georgia commenced on 14 August 2008 and resulted into investigation proceedings only on 27 January 2016, i.e. more than seven years later. Other preliminary examinations of situations in the Republic of Korea (2011), Honduras (2010) and Venezuela (2006) have also been closed owing to the lack of reasonable basis to initiate investigations.

international relations in which the ICC operates, i.e. a politicised international society whose principal actors remain sovereign states, having diverging interests of every kind. Hence, the ICC Prosecutor must be aware of all the stakes, and political ones in particular, which may derive from his judicial action and take all the relevant contextual factors into consideration. He should not hide himself behind abstract and strict interpretation of formal provisions of the Court's Statute, while making unwise assessments and judicial choices.

If a crime is alleged to have been committed, nothing in the ICC Statute prevents the Prosecutor from initiating investigations or prosecutions with due regard to contextual factors on the ground,¹¹⁶¹ particularly peace process negotiations or agreement.¹¹⁶² No deadline is fixed between the commencement of investigations and when indictments may be launched. In addition, the expression "interests of justice" to which it is referred in article 53 (1) (c) and (2) (c) of the Court's Statute for the exercise of the Prosecutor's discretionary powers could receive a broad interpretation to allow, on a case-by-case evaluation, a decline of investigations or prosecution for the purpose of peace promotion. This could notably be the case if the proceedings might lead to the indictments and/or the issuance of arrest warrants against senior officials of states subject to armed conflicts or instability. Formally, the room exists for the Prosecutor. On the one hand, his assessment of whether the initiation of an investigation could not serve the interests of justice must be based on a number of factors. Article 53 (1) (c) expressly quotes the gravity of the crime (scale, nature, manner of commission of the crimes, and their impact) and the interests of victims.¹¹⁶³ But nothing indicates that these factors are exhaustive for the Prosecutor's evaluation that "there are

¹¹⁶¹ T. Murithi, 'Ensuring Peace and Reconciliation while Holding Leaders Accountable: the Politics of ICC Cases in Kenya and Sudan' (CODESRIA Conference on International Justice, Reconciliation and Peace in Africa: the ICC and Beyond, Dakar, 10-12 July 2014), at 21 <http://www.codesria.org/IMG/pdf/14_tim_murithi.pdf> accessed 16 April 2015.

¹¹⁶² L. A. Nkansah, 'International Criminal Court in the Trenches of Africa', 1 (1) *African Journal of International Criminal Justice* (2014) 8-37, at 34 and 36.

¹¹⁶³ In its Policy Paper on Preliminary Examinations of November 2013, it is explained: 'Pursuant to article 53(1)(c), the Office will consider, in particular, the interests of victims, including the views expressed by the victims themselves as well as by trusted representatives and other relevant actors such as community, religious, political or tribal leaders, States, and intergovernmental and non-governmental organisations'. See International Criminal Court, 'Policy Paper on Preliminary Examinations' (November 2013), para.68 <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf> accessed 27 March 2015.

nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”.¹¹⁶⁴ It seems that he may take into account other factors,¹¹⁶⁵ including the promotion of peace and security or national reconciliation processes. On the other hand, article 53 (2) (c) precisely requires him to consider “all the circumstances, *including* the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”¹¹⁶⁶ when he concludes, upon investigation, that there is not a sufficient basis for a prosecution. The use of the word “including” clearly indicates that the list of factors that have been quoted is not exhaustive. The reason why a wide interpretation of the expression “interests of justice” may be specifically relevant in respect of Africa is that African leaders (beginning by heads of state or government) need to receive positive support to stabilise their fragile countries rather than putting oil on the fire through expeditious prosecutions.

It is a concern that the Prosecutor maintains that “interests of justice” are not “interests of peace”,¹¹⁶⁷ while the ICC Statute has connected both indirectly in the preamble¹¹⁶⁸ and expressly in article 16.¹¹⁶⁹ Regarding this apparent conflicting relationship between peace and justice, a commentator has assumed that because of the duty upon states to investigate and to prosecute serious international crimes, there is a presumption in favour of prosecution.¹¹⁷⁰

¹¹⁶⁴Article 53 (1) (c) reads as follows: ‘(...) In deciding whether to initiate an investigation, the Prosecutor shall consider whether: Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice’.

¹¹⁶⁵ F.M. Rashid, ‘The Interests of Justice under the ICC Prosecutor Power: Escaping Forward’, in C. Esin, J. Johanssen, C. Lake, P. Schwartz, M. Tamboukou and F.M. Rashid (eds), *Crossing Conceptual Boundaries* (London: University of East London, 2013) 53-69, at 55.

¹¹⁶⁶ Article 53 (2) (c) provides: ‘If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: A prosecution is not in the interests of justice, taking into account all the circumstances, *including* the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;’. Emphasis is mine.

¹¹⁶⁷ International Criminal Court, above note 1163, para.69; ‘Policy Paper on the Interest of Justice’ (September 2007), at 1 <http://icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf> accessed 27 March 2015.

¹¹⁶⁸ ICC Statute, Preamble, paras.3-5.

¹¹⁶⁹ This is the case of deferral of investigations or prosecutions by the Security Council for the maintenance of international peace and security.

¹¹⁷⁰ M. Du Plessis, ‘A Critical Appraisal of Africa’s Response to the World’s First Permanent International Criminal Court’ (PhD Thesis through Publications, University of KwaZulu-Natal 2011), at 141.

But, this statement is based on a narrow conception of justice, which cannot be reduced to criminal prosecutions. Instead, the relationship may imply that (criminal) justice does not prevail over peace and vice versa, but both values should work together, and this connection must be each time reflected in a well-balanced prosecutorial strategy. Promoting peace, security and stability can be at least part of the interests of victims and then a substantial reason to believe that continuing investigations or prosecutions could not serve the interests of justice.

The AU High-Level Panel on Darfur (Sudan) captured this relationship between peace, justice and even reconciliation in its report to the PSC in October 2009. It stated:

It is self-evident that the objectives of peace, justice and reconciliation in Darfur are interconnected, mutually interdependent and equally desirable. However, it is also equally self-evident that the most urgent desire of the people of Darfur is to live in peace and security. This is a universal Sudanese demand, particularly underlined by the Internally Displaced Persons.¹¹⁷¹

The decline of investigations or prosecutions may be reconsidered at any time.¹¹⁷² Therefore, it could not be a source of impunity. Moreover, a claim for peace promotion should not be rejected just on the ground that it is of a political nature for which a judicial institution is not the appropriate forum.¹¹⁷³ If the ICC must be anti-politics,¹¹⁷⁴ it needs, however, not a politicised, but a more political Prosecutor¹¹⁷⁵ so that it becomes, not a court against states, but an institution truly anti-impunity.

The refusal to consider any factor of peace promotion in the prosecutorial strategy encourages, rather than avoids, deferral requests to the Security Council, whose success or failure to stop on-going investigations or prosecutions ultimately affects the credibility of the ICC. It is even inconsistent with the idea of positive or proactive complementarity, which requires that states' tribunals are incited and supported to carry out trials for ICC crimes by

¹¹⁷¹ Mbeki, Abubakar, Buyoya, El Sayed, Mumba, Mohamed, Omaar, above note 1109, para.293.

¹¹⁷² ICC Statute, Article 53 (4).

¹¹⁷³ Rashid, above note 1165, at 56.

¹¹⁷⁴ A. Tiemessen, 'The Anti-Politics of the International Criminal Court' Working Paper Series (Centre for Transitional Justice and Post Conflict Reconstruction)(2010), at 1-2 <<http://tjcentre.uwo.ca/documents/Tiemessen2.pdf>> accessed 4 May 2015.

¹¹⁷⁵ See also R. H. Mnookin, 'Rethinking the Tension between Peace and Justice: the International Criminal Court Prosecutor as Diplomat', 18 *Harvard Negotiations Law Review* (2013) 145-174, at 145-446.

themselves,¹¹⁷⁶ rather than “the ICC taking advantage of the situation and supplant national jurisdictions by intervening into the situation”.¹¹⁷⁷

It seems that the Court had to find “exemplary and successful handled cases”¹¹⁷⁸ to prove to the world that it was “a meaningful and useful institution”.¹¹⁷⁹ This explains, though only in part, the trials of individuals (small fishes) who could have been prosecuted, without problem, at the domestic level. It also enlightens the policy behind the strict interpretation of the principle of complementarity and the indictments of sitting heads of states and/or government. Even though, the ICC seems to have made only little judicial progress. In all three main controversial situations (Kenya, Soudan and Libya), it has not achieved any proceeding. On the contrary, cases collapse as illustrated by the termination of prosecutions against President Uhuru Kenyatta and his Deputy, William Ruto, regarding the Kenyan situation. All this judicial failure can be put on the account of the deficiency of flexibility on the part of the ICC, the perceived politicisation of its proceedings, its competition with hostile African states parties and the AU, the unwise prosecutorial strategy and the bad judicial choices of the OPT. A close related criticism pertains to the disagreement on the interpretation given to the rules of state officials’ immunity, particularly heads of state, before international criminal jurisdictions.

2.2.3. The Disagreement on the Irrelevance of State Officials’ Immunity

Immunity from criminal jurisdiction is a wide and very controversial issue. The topic is subject to extensive and various doctrinal developments regarding its applicability in the event of the commission of international crimes.¹¹⁸⁰ The disagreement between states is still

¹¹⁷⁶ W. Burke-White, ‘Proactive Complementarity: the International Criminal Court and National Courts in the Rome System of International Justice’, 49 *Harvard International Law Journal* (2008) 53-108, at 54-55.

¹¹⁷⁷ M. Hansungule, ‘The African Union and the International Criminal Court-ICC: Jurisdiction and Legality’, in M. Ndiaye (ed.), *L’impunité: jusqu’où l’Afrique est-elle prête* (Paris: L’Harmattan, 2012) 77-111, at 107.

¹¹⁷⁸ Kaul, above note 1141, at 577.

¹¹⁷⁹ *Ibid.*, at 578.

¹¹⁸⁰ R. Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (Leiden/Boston: Brill Nijhoff, 2015); B. Baban, *Mise en oeuvre de la responsabilité pénale du Chef d’Etat* (Bruxelles:Larcier, 2012); H. M. Kasrineh, ‘Immunity of Heads of State and its Effects on the Context of International Criminal Law’ (PhD Thesis, Hamburg University 2012); U.N. Nwosu, ‘Head of State Immunity in International Law’ (PhD Thesis, London School of Economics and Political Science 2011); Murungu, above note 901; A. Watts, ‘The Legal

very high. As already indicated, several African countries complained before the ICJ alleging violations of immunities of their officials from foreign domestic jurisdictions by some European states. But, the most important disagreement relates to potential immunities of sitting senior state officials, particularly heads of states, before international criminal tribunals. In essence, the issue of (personal) immunity before domestic courts seems to have found a satisfactory solution towards African countries since the ICJ ruling of 2002 in the *Arrest Warrant* case, contrary to the continuing controversy in respect of international criminal tribunals. The matrix of the debate is based on the African disagreement about the way the ICC interpreted and applied the relevant rules on immunity in *Omar Al Bashir* case. Two main questions are in the heart of the debate. First, is there any plea for state officials' immunity before international courts and in particular the ICC? Second, is the Security Council capable to remove immunities that may be recognised to state officials in relation to proceedings pending before the ICC?

The debate reached its climax during the 25th summit of the AU after the arrival of President Omar Al Bashir of Sudan in South Africa,¹¹⁸¹ the host country. At the request of the ICC Prosecutor, the PTC II rendered an urgent decision on 13 June 2015 to recall that "South Africa is under the duty under the Rome Statute to immediately arrest Omar Al Bashir and surrender him to the Court, as the existence of this duty is already clear and needs not be further reiterated".¹¹⁸² However, South Africa refused to obey the ICC's injunction as had done many other African countries visited by President Omar Al Bashir (Chad, Djibouti, Kenya, Malawi, Mauritania, RDC, Uganda, etc.). African countries argue that they cannot arrest and surrender the accused due to his immunity as head of state and according to the AU position on the issue. As a reminder, the AU has decided that none of its member states shall cooperate with the ICC and implement arrest warrants against any sitting African heads of state. The central position is that "no charges shall be commenced or continued before any international court or tribunal against any serving AU Head of State or Government or

Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 247 *Recueil des Cours de l'Académie de Droit International* (1994) 9-130.

¹¹⁸¹ It was the 25th ordinary session of the Assembly of the African Union, held in Johannesburg (South Africa), from 14 to 15 June 2015.

¹¹⁸² *Al Bashir* (ICC-02/05-01/09-242), Decision Following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa is under the Obligation to Immediately Arrest and Surrender Omar al-Bashir, Pre-Trial Chamber II, 13 June 2015, para.10.

anybody acting or entitled to act in such capacity during their tenure of office".¹¹⁸³ But, the PTC has totally refuted these arguments. Resorting to a different and even contradictory reasoning, it has ruled several times that President Omar Al Bashir does no longer enjoy any (personal) immunity before the Court, owing either to its conventional removal under the ICC Statute, or its exceptional waiver under customary international law, or again its *implicit* removal by the Security Council by virtue of resolution 1593 (2005).¹¹⁸⁴ According to the PTC, this resolution, which was adopted under Chapter VII of the UN Charter, prevailed over any other obligation, including the AU decision, pursuant to articles 25 and 103 of the United Nations Charter.¹¹⁸⁵

These ICC's findings on the rules of immunity are prey to a lot of criticism. First, there are important contradictions within its different decisions on the potential plea for state officials' immunity before international tribunals (2.2.3.1). Second, one may argue that it has created a serious misunderstanding on the intent and the power of the Security Council when the latter refers a situation to the ICC Prosecutor (2.2.3.2). Thirdly, the Court has tried to improve its ruling on immunity in its Decision of 6 July 2017 on South Africa's non-compliance with the request to arrest and surrender Omar Al Bashir (2.2.3.3).

2.2.3.1. The Potential Plea for State Officials' Immunity before International Tribunals

There are three different categories of ICC's decisions on heads of state immunity, delivered in *Omar Al Bashir* case. The initial decision was issued on 4 March 2009 with respect to the prosecution's application for an arrest warrant against the accused.¹¹⁸⁶ It was followed by the decisions of 12 and 13 December 2011 on the failure by Malawi¹¹⁸⁷ and Chad¹¹⁸⁸ to comply

¹¹⁸³ Ext/Assembly/AU/DEC.1 (Oct.2013), above note 1039, para.10 (i).

¹¹⁸⁴ *Al Bashir* (ICC-02/05-01/09-242), above note 1182, para.6.

¹¹⁸⁵ Article 25 of the United Nations Charter states: 'The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. Its article 103 prescribes: 'In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

¹¹⁸⁶ *Al Bashir* (ICC-02/05-01/09-3), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, Pre-Trial Chamber I, 4 March 2009.

¹¹⁸⁷ *Al Bashir* (ICC-02/05-01/09-139), 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, Pre-Trial Chamber I, 12 December 2011.

with the request for the arrest and surrender of Omar Al Bashir to the Court. The last decisions are those which were delivered on 9 April 2014¹¹⁸⁹ and on 13 June 2015¹¹⁹⁰ concerning the failure to cooperate by the DRC and South Africa respectively. Since then, several other decisions confirmative of the latter have been issued, particularly the decisions of 11 July 2016 on the non-compliance by Uganda¹¹⁹¹ and Djibouti¹¹⁹² with the request to arrest and surrender President Omar Al Bashir to the Court. Before analysing the main findings of the Court through all these decisions (b), it is better to clarify the legal issue at stake (a).

a) The Clarification of the Legal Issue at Stake

Immunities of state officials before international criminal tribunals are different from those to which they may be entitled before foreign domestic tribunals. Likewise, immunities of state officials differ from those which are granted by virtue of treaties to agents of intergovernmental organisations.¹¹⁹³ The ICC has ruled on immunities of state officials before international criminal tribunals. In the Decision of 9 April 2014, the PTC II has made clear that the central legal problem to be settled in *Omar Al Bashir* case pertains to the issue of personal immunity (immunity *ratione personae*) rather than functional immunity (immunity *ratione materiae*) before the Court.¹¹⁹⁴

¹¹⁸⁸ *Al Bashir* (ICC-02/05-01/09-140-t(ENG)), Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 13 December 2011.

¹¹⁸⁹ *Al Bashir* (ICC-02/05-01/09-195), Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar al-Bashir's Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014.

¹¹⁹⁰ *Al Bashir* (ICC-02/05-01/09-242), above note 1182.

¹¹⁹¹ *Al Bashir* (ICC-02/05-01/09-267), 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, Pre-Trial Chamber II, 11 July 2016.

¹¹⁹² *Al Bashir* (ICC-02/05-01/09-266), Decision on the non-compliance by the Republic of Djibouti 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 the State Parties to the Rome Statute, Pre-Trial Chamber II, 11 July 2016.

¹¹⁹³ See B. Kahombo, 'Les privilèges et immunités diplomatiques des agents internationaux : revue de la pratique internationale', in O. Ndeshyo (ed.), *Mélanges Célestin Nguya-Ndila. La République démocratique du Congo : les défis récurrents de décolonisation et de développement économique et social* (Kinshasa : Editions CEDESURK, 2012) 401-449, at 417-418.

¹¹⁹⁴ *Al Bashir* (ICC-02/05-01/09-195), above note 1189, para. 25.

By definition, functional immunity precludes criminal prosecutions against the beneficiary for official acts performed as a representative of a state (or even an intergovernmental organisation).¹¹⁹⁵ It is normally a definitive immunity (relevant even after cessation of public functions) based on the idea that legal persons are responsible for the consequences of acts performed by their representatives (or organs) in an official capacity. The purpose of this kind of immunity is to protect any of these legal persons, and especially the state itself,¹¹⁹⁶ against a foreign judicial control over its actions through criminal prosecutions against its current or former officials. In this sense, this type of immunity does not cover acts performed in a private capacity. In the event of the commission of serious international crimes, there is already a customary rule which provides for an exception before international tribunals.¹¹⁹⁷ In general, this rule may be written as follows: any official position of an individual shall in no case exempt him from criminal responsibility, even if he acted as head of state or government, nor shall it, in and of itself, constitute a ground for reduction of sentence under international law.¹¹⁹⁸ Therefore, with respect to prosecutions of state officials before international tribunals, article 27 (1) of the ICC Statute restating the same rule is declarative of customary international law.

Regarding prosecutions before national courts, the same emerging customary rule may be applicable.¹¹⁹⁹ The inconsistent character of functional immunity with the prohibitions of breaches of peremptory norms of international law (*jus cogens*) or other gross violations of

¹¹⁹⁵ See R.A. Kolodkin, 'Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction (International Law Commission)', Sixthly-second session (3 May-4 June and 5 July-6 August 2010), General Assembly (A/CN.4/631), 10 June 2010, at 12-13.

¹¹⁹⁶ See I. Wuerth, 'Foreign Official Immunity: Invocation, Purpose, and Exceptions', Vanderbilt Public Law Research Paper Number 13-22 (2013), at 13.

¹¹⁹⁷ D. Akande, 'International Law Immunities and the International Criminal Court', 98 *American Journal of International Law* (2004) 407-433, at 415.

¹¹⁹⁸ See the restatement of this rule in the following legal instruments: ICC Statute (Article 27(1)); ICTY Statute (Article 7 (2)); ICTR Statute (Article 6 (2)); Statute of the Special Criminal Court for Sierra Leone (Article 6 (2)), etc. See also legal instruments drafted by the International Law Commission (ILC): Draft Code of Crimes against the Peace and Security of the Mankind (1996), Article 7; Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries (1950), Principle III.

¹¹⁹⁹ See Akande, above note 1197, at 415.

human rights is also often invoked.¹²⁰⁰ The argument seems to be a heritage of the Pinochet trial (1998-2000).¹²⁰¹ But, it is highly contested because of the confusion it makes between violated primary rules of human rights pertaining to *jus cogens* and the secondary rule of functional immunity which, due to its different nature, could not be regarded as standing in conflict with the former and as a result be irrelevant.¹²⁰² This viewpoint relying on the distinction between substantive and procedural rules is approved by the ICJ. This is the case, outside the issue of immunity, of *Armed Activities on the Territory of the Congo*. In particular, the Court has made the observation that violation of *jus cogens*, namely the prohibition of genocide, does not imply of itself a basis for establishing its jurisdiction to entertain the dispute.¹²⁰³ More precisely, recalling the position which it had espoused in the *Arrest Warrant* case¹²⁰⁴ as well as in the case of *Certain Questions of Mutual Assistance in Criminal Matters*,¹²⁰⁵ the Court has said in its judgement of 3 February 2012 in the case concerning the

¹²⁰⁰ See C. Focarelli, 'Immunité des Etats et jus cogens: la dynamique du droit international et la fonction du jus cogens dans le processus de changement de la règle sur l'immunité juridictionnelle des Etats étrangers', CXII *Revue générale de droit international public*(2008) 761-794, A. Bianchi, 'L'immunité des Etats et les violations graves des droits de l'homme : la fonction de l'interprète dans la détermination du droit international', CVII *Revue générale de droit international public* (2004)63-101, at 90-95, J.-F. Flaus, 'Droit des immunités et protection internationale des droits de l'homme', *Revue suisse de droit international et de droit européen* (2000) 299-324.

¹²⁰¹ A. Bianchi, 'Immunity versus Human Rights: the Pinochet Case', 10 (2) *European Journal of International Law* (1999)237-277; Wuerth, above note 1196, at 15.

¹²⁰²C. Tomuschat, 'L'immunité des Etats en cas de violations graves des droits de l'homme', CIX *Revue générale de droit international public* (2005) 51-74, at 73; see also S. Knuchel, 'State Immunity and the Promise of Jus Cogens', 9 (2) *Northwestern Journal of International Human Rights* (2011) 149-183, at 181-182.

¹²⁰³ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of 2 February 2006, I.C.J. Reports 2006, para.64.

¹²⁰⁴ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, above note 569, para.60. In this paragraph, the ICJ emphasised: '(...) the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility'.

¹²⁰⁵ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, I.C.J. Reports 2008, para.196. In this paragraph, the Court said: 'The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby

Jurisdictional Immunities of the State that “(...) albeit in the different context of the immunity of State officials from criminal proceedings, the fact that immunity may bar the exercise of jurisdiction in a particular case does not alter the applicability of the substantive rules of international law”.¹²⁰⁶ Ingrid Wuerth has even argued that there is indeed no exception to the rule of functional immunity under customary international law.¹²⁰⁷ A certain doctrine has espoused the view that international crimes should not be regarded as official acts “because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform (...)”.¹²⁰⁸ But, empirically, in the context of the state, it appears less reasonable to conceive that such crimes are committed in a private capacity since their perpetration is facilitated by the mobilisation of official means and institutions (army, police, intelligence services, public funds, etc.).¹²⁰⁹ That is why one may agree with the other doctrine which suggests that any exceptional waiver of functional immunity before foreign national courts should be based on the obligation for a state to prosecute the crime concerned.¹²¹⁰ It means that the accused person should not enjoy functional immunity where a foreign state is bound by such obligation because “it would be contradictory to require prosecutions and at the same time to confer immunity from criminal prosecution”.¹²¹¹ Otherwise, the duty on the forum state to prosecute would remain meaningless and ineffective. That is particularly the case in regard to the obligation enshrined in the Convention against torture and other cruel, inhuman or degrading treatment or punishment of 10 December 1984.¹²¹² The matter should be therefore decided on a case-by-case basis.

engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs’.

¹²⁰⁶ *Jurisdictional Immunities of the State*, above note 260, para.100.

¹²⁰⁷ I. Wuerth, ‘Pinochet’s Legacy Reassessed’, 106 (4) *American Journal of International Law* (2012) 731-768.

¹²⁰⁸ Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, above note 294, para.85. See also A. Bianchi, ‘Denying State Immunity to Violators of Human Rights’, 46 *Austrian Journal of Public and International Law* (1994) 227-228.

¹²⁰⁹ M. Sassoli, ‘L’arrêt Yerodia: quelques remarques sur une affaire au point de collision entre les deux couches du droit international’, *CVI Revue générale de droit international public* (2002) 791-818, at 803.

¹²¹⁰ H. Krieger, ‘Between Evolution and Stagnation –Immunities in a Globalized World’, 6(2) *Goettingen Journal of International Law* (2014)11-49, at 20-21.

¹²¹¹ P. D’Argent, ‘Immunity of State Officials and Obligation to Prosecute’, *Cahiers du CeDIE Working Paper* 2013/04, 11, <http://www.uclouvain.be/cedie> (accessed on 18 March 2013).

¹²¹² Articles 4 and 5.

In contrast, personal immunity is a procedural bar to the exercise of criminal jurisdiction in foreign states, but only a temporary one. It precludes criminal prosecutions against a small number of representatives of a state (notably heads of state, heads of government and ministers of foreign affairs) as long as they remain in office.¹²¹³ It applies to both official and private acts. This type of immunity protects the free and effective exercise of public functions of the beneficiary as a matter of state sovereignty, without any impediment and interference of a foreign court.¹²¹⁴ It is a matter of customary international law as the ICJ held in the *Arrest Warrant* case in February 2002.¹²¹⁵ In this respect, the determining factor in assessing whether or not there has been an attack on the immunity of state officials lies in the subjection of the latter to a constraining act of authority of a foreign state.¹²¹⁶ Clarifying the rules in relation to heads of state, in particular, the ICJ stated that this protection included the obligation to respect their honor and dignity, in connection with their inviolability, through the abstention to pass confidential information from the offices of the judiciary of the foreign state to the media.¹²¹⁷ But, the question whether such immunity also applies before international tribunals remains very controversial. Concerning the ICC Statute, article 27 (2) provides for a conventional exceptional waiver of personal immunity of officials of states parties in the following terms: “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”. The PTC II discussed the issue concerning a national of a state not party (Sudan) and the effects of article 98 (1) which prescribes:

The Court may not proceed with a request for surrender or assistance which would require the requested 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.

¹²¹³ Akande, above note 1197, at 409; D. Akande and S. Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’, 21 (4) *European Journal of International Law* (2010) 815-852, at 818; Kolodkin, above note 1195, at 20-21.

¹²¹⁴ D’Argent, above note 1211, at 6; Akande and Shah, above note 1213, 818-819, M.A. Tunks, ‘Diplomats or Defendants? Defining the Future of Head-of-State Immunity’, 52 *Duke Law Journal* (2002)651-682, at 654-655.

¹²¹⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, above note 569, paras.51 and 53.

¹²¹⁶ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, above note 1205, para.170.

¹²¹⁷ *Ibid.*, paras.174-175 and 180.

It is commonly recognised that immunities of state officials other than diplomatic immunity (recognised to diplomats under customary international law and the Vienna Convention on Diplomatic Relations of 18 April 1961) and state immunity are implied by this provision.¹²¹⁸ In particular, heads of state immunity is an aspect of state immunity.¹²¹⁹ Likewise, even though this provision does not explicitly mention the arrest of the accused person, it may be argued that the hypothesis is implied by the fact that his surrender to the Court presupposes that he is beforehand arrested. The problem posed by article 98 (1) is therefore, in the context of the ICC's request for arrest or surrender of the accused person, who is a national of a third state (i.e. a non-contracting party or just a state not party), the respect of his inviolability in the territory of a state party where he would potentially enjoy personal immunity.

The PTC I failed to make this distinction between immunity *ratione materiae* and immunity *ratione personae* in its Decision of 12 December 2011 regarding the failure of the Republic of Malawi to comply with the cooperation request to arrest and surrender Omar Al Bashir.¹²²⁰ The confusion (perceptible in the entire reasoning) was even reiterated a day later in the Decision on the refusal of the Republic of Chad to cooperate with the Court.¹²²¹ Even though the PTC II corrected this conceptual problem, particularly in its decisions of 13 June 2015 and 9 April 2014, it brought some new legal defects into the Court's main judicial findings.

b) The Court's Main Findings

The Court's main findings on personal immunity encompass two principal aspects with their own legal defects. At the first place, there is the recourse to the UN Charter to reject Omar Al Bashir's personal immunity. The issue has explicitly arisen for the first time in the Decision of 9 April 2014 and confirmed in subsequent decisions, notable the one of 13 June 2015. Beyond the applicability of the UN Charter (i), the second aspect of the matter relates to three different and contradictory theses in support of the irrelevance of immunity before the same Court, on the same issue and in the same case (ii).

¹²¹⁸ J. M. Iverson, 'The Continuing Function of Article 98 of the Rome Statute', 4 *Goettingen Journal of International Law* (2012) 131-151, at 144-145.

¹²¹⁹ *Ibid.*, at 145. See also International Law Commission, 'Immunity of State officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat', Sixtieth session (5 May-6 June and 7 July-8 August 2008), General Assembly (A/CN.4/596), 31 March 2008, para.34.

¹²²⁰ *Al Bashir* (ICC-02/05-01/09-139), above note 1187, paras.36-43.

¹²²¹ *Al Bashir* (ICC-02/05-01/09-140-tENG), above note 1188, para.13.

i) The Recourse to the Charter of the United Nations to Reject the Plea for Personal Immunity

In its Decision of 13 June 2015, the PTC II accorded a prevalence effect to the Security Council resolution 1593 (2005) in order to solve an alleged conflict of obligations binding on South Africa, pursuant to articles 25 and 103 of the Charter of the United Nations. It decided that South Africa was under the duty to arrest and surrender Omar Al Bashir to the Court insofar as this resolution which arguably lifted his personal immunity overrode any other obligation to the contrary.

This decision is not convincing. In fact, if the Security Council had allegedly lifted the argument of immunity as a bar to the ICC jurisdiction, the obligation for South Africa to cooperate remained applicable under the ICC Statute rather than under the UN Charter. The Security Council did not create any obligation to cooperate with the Court under Chapter VII, neither for states parties nor for third ones, except for Sudan and other parties to the conflict in Darfur.¹²²² Accordingly, the said resolution could only be capable to prevail over any other contrary obligation about immunity, but not the obligation not to cooperate with the Court, which was not in conflict with any other one under the Charter of the United Nations. The primary condition of conflict of obligations for the applicability of article 103 of the Charter was not met.¹²²³

In other words, despite the Security Council resolution, South Africa's duty to cooperate under the ICC Statute continued to compete with the obligation not to cooperate pursuant to the decisions of the AU Assembly. The latter decisions fully remained in effect since their object goes far beyond the immunity claim arguably removed by the Security Council. In this respect, it is worth noting that the AU decisions regarding the obligation for member states not to cooperate with the ICC are based on many other reasons, including the search for peace that should not be jeopardised by expeditious criminal prosecutions,¹²²⁴ the claim for a positive complementarity for Sudan,¹²²⁵ the politicisation and misuse of indictments against African leaders,¹²²⁶ the protection of the dignity of the continent,¹²²⁷ etc. Therefore, at this

¹²²² SC Res. 1593 (2005), above note 389, para. 2.

¹²²³ See R. Kolb, 'L'article 103 de la Charte des Nations Unies', 367 *Recueil des Cours de l'Académie de Droit International* (2013) 9-252, at 123 and 127.

¹²²⁴ Assembly/AU/DEC.482 (XXI), above note 1041, para.4; PSC/MIN/Comm (CXLII), above note 1020, para.3.

¹²²⁵ Assembly/AU/DEC.221 (XII), above note 222, para.8.

¹²²⁶ Ext/Assembly/AU/DEC.1 (Oct.2013), above note 1039, para.4.

specific point of prevalence effect, the PTC II exceeded the object of the Security Council resolution 1953 (2005), violated the Charter of the United Nations and deprived the AU decisions binding on South Africa of their object. The same criticism applies to the failure of other African countries to cooperate on this issue with the Court, including the DRC. In contrast, in its decisions of 11 July 2016 on the non-compliance by Uganda and Djibouti with the request to arrest and surrender President Omar Al Bashir, the PTC II attempted to come back to one of the reasons raised by the requested states that it had never dealt with, namely the need to promote and realise permanent peace and stability in the region. The mere answer was simply that the Court could not rule on political considerations even though sensitive to them.¹²²⁸ In this regard, the PTC II stressed that “State Parties to the Statute must pursue any legitimate, or even desirable, political objectives within the boundaries of their legal obligations vis-à-vis the Court. Indeed, it is not in the nature of legal obligations that they can be put aside or qualified for political expediency”.¹²²⁹ But, it is difficult to follow the Chamber’s reasoning in that it denies that the pursuit of such political objectives in accordance with AU binding decisions is equally an obligation to take into account for member states of the regional organisation. Worse, its Decision of 13 June 2015, based on the one of 9 April 2014, stands into contradiction with previous findings on Omar Al Bashir’s personal immunity.

ii) The Paradox of Three Contradictory Theses on Head of State’s Personal Immunity

The Decision of 13 June 2015, based upon the one delivered on 9 April 2014, constitutes an important judicial change (*revirement jurisprudentiel*) in comparison with previous ICC’s decisions in *Omar Al Bashir* case. Three different and contradictory theses may be highlighted here. The first one was developed in March 2009. The PTC I invoked the ICC Statute and especially its article 27 (2) which provides for the irrelevance of personal immunity before the Court, before applying it to Omar Al Bashir as if Sudan was a state party.¹²³⁰ According to the Chamber, the denial of personal immunity to Omar Al Bashir was based on three reasons.¹²³¹ *Primo*, the purpose of the establishment of the ICC was to put an

¹²²⁷ Assembly/AU/DEC.547 (XXIV), above note 1032, para.17 (c).

¹²²⁸ *Al Bashir* (ICC-02/05-01/09-267), above note 1191, para.14; *Al Bashir* (ICC-02/05-01/09-266), above note 1192, para.14.

¹²²⁹ *Ibid.*

¹²³⁰ *Al Bashir* (ICC-02/05-01/09-3), above note 1186, paras.41-44.

¹²³¹ *Ibid.*

end to impunity. *Secundo* the provision of article 27 (2) of the Statute precluded such kind of immunity. *Tertio*, there was no lacuna in the ICC Statute, the Elements of Crimes and the Rules of Procedure and Evidence which might allow to refer to other rules of international law. But, it is obvious that reasons number one and three are beside the point, while number two is irrelevant, since article 27 (2) is a conventional provision which cannot apply to a third state. The second thesis was elaborated in December 2011. The PTC I relinquished its previous reasoning and said that the accused could no longer enjoy personal immunity because there was already an exceptional waiver of such immunity of sitting heads of state before international tribunals under customary international law.¹²³² The third thesis, in contrast, rejected all these findings. In its Decision of 9 April 2014, confirmed by the one of 13 June 2015, the PTC II started recalling that the ICC Statute, which is a multilateral convention governed by the law of treaties, could not impose obligations on third states without their consent.¹²³³ As a consequence, article 27 (2) was inapplicable in the present case. According to this Chamber, the removal of immunity was still required to allow the Court to proceed against Omar Al Bashir. In other words, such requirement recognised that the theory of exceptional waiver of personal immunity before international tribunals under customary international law was also legally inaccurate. In this regard, the PTC II rightly concluded:

It follows that when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise. The solution provided for in the Statute to resolve such a conflict is found in article 98(1) of the Statute. This provision directs the Court to secure the cooperation of the third State for the waiver or lifting the immunity of its Head of State. This course of action envisaged by article 98(1) of the Statute aims at preventing the requested State from acting inconsistently with its international obligations towards the non-State Party with respect to the immunities attached to the latter's Head of State.¹²³⁴

An abundant literature against the theory of exceptional waiver of personal immunity of sitting heads of state before international tribunals under customary international law already

¹²³² *Al Bashir* (ICC-02/05-01/09-139), above note 1187, paras.36-43; *Al Bashir* (ICC-02/05-01/09-140-tENG), above note 1188, para.13.

¹²³³ *Al Bashir* (ICC-02/05-01/09-195), above note 1189, para.26.

¹²³⁴ *Ibid.*, para.27.

existed.¹²³⁵ The PTC II seems to have paid attention to it, even if the scholarship in defence of the same exception was also available.¹²³⁶ A third and neutral position in this debate is supported by Dire Tladi, who thinks that customary international law does not require nor forbid (personal) immunity before international courts.¹²³⁷ His line of argument contains two parts.

On the one hand, he departs from the AU position that “as a general matter, the immunities provided for by international law apply not only to proceedings in foreign domestic courts but also to international tribunals”.¹²³⁸ This is because “states cannot contract out of their international legal obligations vis-à-vis third states by establishing an international tribunal”.¹²³⁹ He then assumes that there is no proof in support of the AU position insofar as in general, there is no specific rule granting immunity to state officials before international courts.¹²⁴⁰ According to Dire Tladi, the UA position might be relevant in the case of a tribunal established by a handful of states that exercise control over its jurisdiction.¹²⁴¹ But, this argument is unconvincing when applied to a court such as the ICC, because none of its 134 members can exercise control over its decisions.¹²⁴² It is an impartial institution, which is not an organ of a state, capable to affect the equal sovereignty of another country. But, one may object to his argument that he himself provides no proof as to the statement that a court like the ICC cannot be controlled by any of its members. He forgets the linkage between this Court and the world order, and particularly the Security Council. In addition, as already

¹²³⁵ See B. Tranchant, ‘Les immunités des Etats tiers devant la Cour pénale internationale’, *CXVII Revue générale de droit international public* (2013) 633-656, at 639-645 and 651-656; W.A. Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (Oxford/New York: Oxford University Press, 2010), at 449-450.

¹²³⁶ C. Kreß, ‘The International Criminal Court and Immunity under International Law for States not Party to the Court’s Statute’, in M. Bergsmo and L. Yan (eds), *State Sovereignty and International Criminal Law* (Beijing: Torkel Opsahl Academic Epublisher, 2012) 223-265, at 243-257; A. Abass, ‘The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court’, *40 Texas International Law Journal* (2005) 263-297, at 278-282.

¹²³⁷ D. Tladi, ‘The Immunity Provision of the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff’, *13 Journal of International Criminal Justice* (2015) 3-17, at 12, 15 and 17.

¹²³⁸ African Union Commission, above note 1047, at 2.

¹²³⁹ *Ibid.*

¹²⁴⁰ Tladi, above note 1237, at 13.

¹²⁴¹ *Ibid.*

¹²⁴² *Ibid.*

indicated, there is evidence that even states, which are not parties such as the United States of America, are interfering with the ICC's proceedings, undermine its independence and influence its work. Formally, Dire Tladi's thesis also falters in that it renders article 27 (2) of the Court's Statute unnecessary as there seems to be no explanation in his argument as to why it has been included in this treaty. The objection is so pertinent that the author suggests, on the other hand, that there is no customary rule denying immunity to state officials before international tribunals, while proponents of this position argue that the underlying provision is rather declarative of customary international law.¹²⁴³

It is important to note that even the exceptional waiver of personal immunity of state officials (notably heads of state) before international tribunals under customary international law is defective in the ICC's Decisions of December 2011 on five principal points. First, this theory had the effect of nullifying article 98 (1) of the ICC Statute by excluding any kind of immunity for officials of third states in relation to states parties before the Court. It rendered it non-operational and meaningless.¹²⁴⁴ Second, to establish that article 27 (2) of the ICC Statute was declarative of customary international law, the PTC I resorted to arguments about functional immunity on the issue of personal immunity. This is very clear when it relies on the fact that international crimes are acts which cannot be covered by immunity. But, this position, though tenable in the past, is already overturned by the ICJ in the sense that substantive rules, even violations of international law amounting to international crimes, do not affect the relevance of procedural norms of immunities. In line with the customary rule of functional immunity, the PTC I recalled the formula of various legal instruments providing that the official position of an individual who commits an international crime shall in no case relieve him from criminal responsibility, nor shall it constitute a ground for reduction of sentence under international law. Third, with regard to case-law, the PTC I made the ICJ say what did not correspond to the language used in the *Arrest Warrant* case concerning the potential irrelevance of immunities before international tribunals. In fact, the ICJ never said that personal immunity was inapplicable before the ICC with respect to officials who were nationals of states not parties to its Statute. Rather, the ICJ said that immunities could not

¹²⁴³ This is also the position espoused by Judge Eboe-Osuji on the defence applications for judgments of acquittal in the situation in Kenya. See *Ruto and Sang* (ICC-01/09-01/11-2027), above note 1137, paras.241 and 245.

¹²⁴⁴ African Union Commission, above note 1047, at 1.

operate “before *certain* international criminal courts, where they have jurisdiction”.¹²⁴⁵ In other words, not all international criminal tribunals can exercise jurisdiction irrespective of immunities that may enjoy officials of any state. That is why Sarah Williams and Lena Sherif rightly suggested the following position:

(...) in order to ascertain whether a tribunal falls within the *dictum* of the ICJ in the Arrest Warrant case, it is necessary to consider the nature of the Court, its method of establishment and its constituent instrument. It must be determined whether the provisions of the instrument creating jurisdiction on the tribunal, expressly or implicitly, lift immunity and whether the state concerned is bound by that instrument.¹²⁴⁶

As for the ICC, the basic condition of state consent to the conventional waiver of immunity must be met, either through the ratification of its founding treaty or the *ad hoc* acceptance of its jurisdiction.¹²⁴⁷ Fourth, concerning immunity referred to with regard to the arrest and surrender of the accused (article 98 (1) of the ICC Statute), the PTC I invoked a number of international practices about indictments of heads of state which were rather contrary to its own finding on the waiver of that immunity. In particular, it suffices to affirm that neither of these former heads of state were arrested and surrendered to an international tribunal while being still in office: Charles Taylor, Slobodan Milosevic, Laurent Gbagbo and Muammar Kadhafi. In addition, some of the examples provided by the Chamber were even outside the position on the exceptional waiver of immunity before international tribunals under customary international law. For example, proceedings against Laurent Gbagbo were initiated with the consent of the Republic of Ivory Coast to the ICC jurisdiction, including its Statute.¹²⁴⁸ Similarly, Slobodan Milosevic was indicted before an *ad hoc* tribunal created by the Security Council. It could take compulsory measures against him owing to the powers deriving from Chapter VII of the UN Charter, and which the ICC is deprived of. More important, Slobodan was arrested and surrendered to the ICTY by his own country, meaning that immunity under international law could not apply to him accordingly. Fifth, and last, to ascertain a rule of

¹²⁴⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, above note 569, para.61. Emphasis is mine.

¹²⁴⁶ S. Williams and L. Sherif, ‘The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court’, 14 (1) *Journal of Conflict and Security Law* (2009) 71-92, at 76-77. See also Akande, above note 1197, at 408-409.

¹²⁴⁷ *Ibid.*

¹²⁴⁸ This consent was given through the declaration accepting the ICC jurisdiction under Article 12 (3) of the Rome Statute, made on 18 April 2003, and confirmed by the letter of 10 December 2010.

customary international law, the mere establishment of a practice does not suffice. It must be associated with a legal conviction of states (*opinio juris*) that such practice has acquired status of a positive rule under international law. Again, on this point, the PTC I unconvincingly advanced arguments relating to the rule of functional immunity to establish a customary rule on personal immunity. It forgot that the ICC Statute was in this respect unique in its kind. It is the first legal instrument to contain provisions which make a clear distinction between functional immunity and personal immunity in international criminal law.¹²⁴⁹ Given this innovative dimension, the *opinio juris* of states could not be proved out of reasonable doubt.¹²⁵⁰ On the contrary, the objection to the Decisions of 12 and 13 December 2011 by the AU,¹²⁵¹ with its 54 member states, saying that they do not recognise such a customary rule of international law, strongly consolidated the view of a lack of “a general practice accepted as law”.¹²⁵²

Thus, given that personal immunity of officials of third states is still valid before the ICC, the problem which then arises relates to who should remove it. In *Omar Al Bashir* case, the PTC II upheld, starting by its decisions of 9 April 2014 and 13 June 2015, the theory of implicit waiver of immunity whereby it rather seems to have misunderstood the intent and the power of the Security Council under Chapter VII of the UN Charter.

2.2.3.2. The Misunderstanding of the Intent and the Power of the Security Council

There are two different assumptions at the basis of the theory of implicit waiver of immunity. First, the language used by the PTC II in its initial Decisions of on 9 April 2014 and 13 June 2015 shows that this waiver, instead of being absolutely explicit, can simply be implicit, in case of textual silence, since it can derive by means of interpretation from the intent of the Security Council. Second, and above all, it also means that the Security Council, which enjoys powers under Chapter VII of the UN Charter, is in a position to lift immunity of the accused persons who are nationals of states not parties to the ICC Statute. These assumptions generate

¹²⁴⁹ E. David, ‘La Cour pénale internationale’, 313, *Recueil des Cours de l’Académie de Droit International* (2005) 325-454, at 420.

¹²⁵⁰ J. Mouangue Kobila, ‘L’Afrique et les juridictions pénales internationales’, 17 *African Yearbook of International Law* (2011) 13-55, at 41; Tladi, above note 1237, at 13-14.

¹²⁵¹ Assembly/AU/DEC.397 (XVIII), Decision on the Progress Report of the Commission on the Implementation of Assembly Decisions on the International Criminal Court (ICC), Doc. EX.CL/710 (XX), 18th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 29-30 January 2012, para. 6.

¹²⁵² ICJ Statute, Article 38 (1) (b).

three problematic issues, namely the debate on implicit or explicit waiver of immunity (a), the lack of logic in the judicial construction of the PTC II (b) and the question of the power of the UN Security Council to lift immunities otherwise applicable before the ICC (c).

a) The Issue of Implicit Waiver of Immunity

In the scholarship, the theory of implicit waiver of immunity before the ICC was already defended by Eric David in 2005.¹²⁵³ He then underlined that a Security Council referral of a situation to the ICC would implicitly signify removal of immunity, unless it was otherwise determined by it.¹²⁵⁴ For example, the Security Council may immune nationals of some third states concerned by a situation of a state not party which it has referred to the ICC.¹²⁵⁵ Later, the theory was thoroughly developed by Dapo Akande in reaction to the Decision of 4 March 2009.¹²⁵⁶ This author believes that denying implicitly personal immunity to Omar Al Bashir was the best argument for the conclusion of the PTC I.¹²⁵⁷ To justify his position, Dapo Akande emphasised that “the very decision to refer a situation to the Court is a decision to bring whatever individuals may be covered by the referral within the jurisdiction of the Court and therefore within the operation of its Statute”.¹²⁵⁸ This is the scholarly pedigree which presumably influenced the reasoning of the PTC II.

However, for the AU, should the Security Council hold the power under Chapter VII to lift Omar Al Bashir’s personal immunity, this removal must be explicit.¹²⁵⁹ This view is also defended by Dire Tladi, who writes:

For one thing, Resolution 1593 places a duty on Sudan; it does not waive immunities of Sudan. The Security Council does have the power to deviate from the rules of international law, but whenever it does, it does so expressly and not by implications. Linked to this point,

¹²⁵³ David, above note 1249, at 424.

¹²⁵⁴ *Ibid.*

¹²⁵⁵ This is the practice of the Security Council concerning referrals of situations in Darfur (Sudan) and in Libya. See respectively SC Res.1593 (2005), above note 389, para.6; SC Res. 1970 (2011), above note 389, para.6. The practice is however criticised for being discriminatory and exceeding the power of referral of situations to the Court.

¹²⁵⁶ D. Akande, ‘The Legal Nature of Security Council Referrals to the ICC and its Impact on al-Bashir’s Immunity’, 7 *Journal of International Criminal Justice* (2009)333-352, at 340-342.

¹²⁵⁷ *Ibid.*, at 341-342.

¹²⁵⁸ *Ibid.*, at 341.

¹²⁵⁹ African Union Commission, above note 1047, at 2.

as a general rule, immunity is never waived implicitly but explicitly. The notion of an implicit waiver of immunity is, therefore, a fiction.¹²⁶⁰

Claus Kreß refutes this assertion on the ground that explicit lift of immunity is not required by the UN Charter or the ICC Statute.¹²⁶¹ According to him, “whether or not the Security Council has decided that an otherwise existing international law immunity shall not apply with respect to certain proceedings before the ICC, is a matter of construction of the relevant Security Council resolution”.¹²⁶²

In the *Namibia Advisory Opinion* of 21 June 1971, the ICJ indicated four applicable means of interpretation in order to establish the meaning of a resolution of the Security Council in case of ambiguity.¹²⁶³ It stated that everything must be determined in each case with regard to : i) the terms of the resolution to be interpreted; ii) the discussion leading to it; iii) the Charter provisions invoked; iv) and all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.¹²⁶⁴ In other words, what a resolution of the Security Council actually provides for may be implied as a result of a sound legal construction, in application of any of these non-cumulative means of interpretation, when nothing enables to solve the matter *prima facie* through the explicit language of the text itself. In the *Tadić* case of October 1995, the ICTY also resorted to the debates within the Security Council, following the adoption of the resolution establishing the tribunal,¹²⁶⁵ in order to clarify the kind of crimes falling under its substantive competence as violations of the “laws or customs of war” under article 3 of its Statute.¹²⁶⁶ Moreover, general rules of interpretation provided for by the law of treaties remain relevant.¹²⁶⁷

¹²⁶⁰ D. Tladi, ‘The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law – A Perspective from International Law’, *Journal of International Criminal Justice* (2015) 1-21, at 17.

¹²⁶¹ Kreß, above note 1236, at 241.

¹²⁶² *Ibid.*

¹²⁶³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, para.114.

¹²⁶⁴ *Ibid.*

¹²⁶⁵ SC Res. 827 (1993), above note 343.

¹²⁶⁶ *Tadić* (IT-94-1-AR72), above note 265, para. 88.

¹²⁶⁷ *Simic and Others* (IT-95-9), Decision on Motion for Judicial Assistance to Be Provided by SFOR and Others, Trial Chamber, 18 October 2000, para.47-48. See also Daillier, Forteau and Pellet, above note 15, at 287.

In light of this jurisprudence, the judicial construction of the PTC II is justified, even though the interpretation of the intent of the Security Council does not appear to be logical.

b) The Lack of Logic in the Judicial Construction of the Pre-Trial Chamber II

The theory of implicit waiver of immunity by the Security Council is not an invention of the PTC II in the Decision of 13 June 2015. It was already implicitly mentioned in the Decision of 4 February 2009¹²⁶⁸ and reiterated in the one of 4 March 2009 in which the PTC I said:

(...) by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.¹²⁶⁹

But, the theory clearly appeared for the first time in the Decision of 9 April 2014. In this respect, the PTC II settled the same matter of non-cooperation raised by South Africa with regard to the DRC.¹²⁷⁰ The Decision of 13 June 2015 is therefore a confirmation of the one of April 2014 in similar terms as follows:

[B]y issuing Resolution 1593(2005) the SC decided that the “Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”. Since immunities attached to Omar al-Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan “cooperate fully” and “provide any necessary assistance to the Court” senseless. Accordingly, the “cooperation of that third State [Sudan] for the waiver of the immunity”, as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State.¹²⁷¹

There is no controversy about the basis of this resolution in Chapter VII of the UN Charter. But, the meaning attached to the terms about the duty on Sudan to cooperate with the Court

¹²⁶⁸ *Situation in Darfur, Sudan*, above note 1145, para.31.

¹²⁶⁹ *Al Bashir* (ICC-02/05-01/09-3), above note 1186, para.45.

¹²⁷⁰ *Al Bashir* (ICC-02/05-01/09-195), above note 1189, para.29.

¹²⁷¹ *Al Bashir* (ICC-02/05-01/09-242), above note 1182, para.6.

appears unconvincing. The PTC II drew therefrom a conclusion which sheds a serious misunderstanding on the intent of the Security Council. To summarise it, the Decision may lead to the statement that the resolution of the Security Council would become senseless on the matter of the obligation for Sudan to cooperate with the Court, should it not be regarded as having implicitly removed Omar Al Bashir's personal immunity.

In the merits, such a general statement is inaccurate. It may be objected that the obligation to cooperate cannot itself eliminate the right to enjoy personal immunity. Similarly, the right to enjoy personal immunity does not preclude by itself the duty to cooperate with the Court. Both pieces of law are different and operate independently from each other. There is no contradiction in their coexistence on the part of Sudan. Rather, the problem is that the PTC II seems to have polarised its reasoning just on the case of one person. It did not take into account "all circumstances that might assist in determining the legal consequences of the resolution of the Security Council",¹²⁷² as advised by the ICJ on 21 June 1971.

In fact, contrary to that Decision, one may argue that the duty to cooperate was meant by the Security Council to ensure that Sudan was obliged to lift personal immunity to which any of its nationals could be internationally entitled, should the Court require it in order to give effects to its decision to prosecute. Moreover, this is not all about the duty to cooperate. Normally, it goes beyond the issue of removal of immunity. It includes other forms of cooperation in support of effective investigations on the ground.¹²⁷³ In this regard, Omar Al Bashir was not the only man who could be seen through the interpretation of the said resolution of the Security Council. The obligation to cooperate *equally* applies to Sudan with respect to prosecutions against any of its nationals, including those who are not entitled to the immunity regime under international law, like army military commanders. Accordingly, it is illogical to argue that Omar Al Bashir's right to enjoy personal immunity would render senseless the duty of Sudan to cooperate with the Court, whereas this duty remains totally meaningful concerning investigations and prosecutions against other Sudanese nationals. That cannot be the intent of the Security Council. It is even doubtful that this political body possesses that power to remove personal immunity that officials of third states may enjoy before the Court.

¹²⁷² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, above note 1263, para.114.

¹²⁷³ For example, the security guarantee for the ICC's staff and team of investigators.

c) The Power of the Security Council to Lift Applicable Personal Immunity in Question

The Pre-Trial Chamber II failed to consider the question whether the Security Council was allowed, in the legal framework in which the ICC operates, to remove personal immunity of an incumbent head of a state not party to the Statute. It perhaps took a positive answer for granted. Some scholars often justify this answer by the recourse to exorbitant powers of the Security Council under Chapter VII of the UN Charter.¹²⁷⁴ However, the view is based on an unjustified analogy with the authority of the Security Council upon *ad hoc* tribunals, which rather correspond to non-conventional legal regimes. It might be an error to pretend that this political body could do whatever it desires under Chapter VII through the mechanism of referral of situations to the Court, unless it is pushed above the law. Indeed, the power to refer a situation to the ICC does not imply the power to modify its Statute and create a special regime (of immunity) for a state not party. As Paula Gaeta has rightly underlined it, “a referral by the Security Council is simply a mechanism designed to trigger the jurisdiction of the ICC towards non-contracting states. It is nothing more than that”.¹²⁷⁵ “It does not and cannot turn a state non-party to the Statute into a state party, and it has not turned Sudan into a state party to the Statute”.¹²⁷⁶ William A. Schabas concludes that:

The argument of implied removal of immunity also falters on the fact that as a general rule, the Security Council cannot alter the provisions of the Rome Statute when it makes a referral. Otherwise, the Security Council referral would create a different legal regime than that resulting from state party referral or *proprio motu* triggering by the Prosecutor. The Security Council cannot add new crimes, or alter the temporal jurisdiction of the Court, for example. Accordingly, its referral should not alter the general rule on immunities set out in paragraph 2 of article 27.¹²⁷⁷

In view of this legal framework, it cannot be presumed that the Security Council intended, by means of a bad interpretation of resolution 1593 (2005), to exercise illegal power towards the state of Sudan, concerning the removal of Omar Al Bashir’s personal immunity. It is time that the ICC considers that justice and accountability cannot be defended through violation of applicable law. As would say a Congolese francophone lawyer, in this context, “*violier ou*

¹²⁷⁴ See David, above note 1249, at 424; Akande, above note 1256, at 341-342; Kreß, above note 1236, at 240-242; Du Plessis, above note 953, at 79.

¹²⁷⁵ P. Gaeta, ‘Does President al-Bashir Enjoy Immunity from Arrest?’, 7 *Journal of International Criminal Justice* (2009) 315-332, at 330.

¹²⁷⁶ *Ibid.*, at 320.

¹²⁷⁷ Schabas, above note 1235, at 452.

enfreindre le droit pour défendre le droit ne vaut” (to violate or infringe law in order to defend the law is irrelevant).¹²⁷⁸

2.2.3.3. The Court’s Reversal of Previous Findings on Personal Immunity

On 6 July 2017, the ICC delivered a new decision on Omar Al Bashir’s personal immunity.¹²⁷⁹ The main question on which the Court wished to make a determination was whether South Africa failed to comply with its obligation to cooperate under the Rome Statute by not arresting and surrendering Omar Al-Bashir to the Court while he was on South African territory to attend the AU summit between 13 and 15 June 2015. Given the fact that South Africa invoked its duty to comply with heads of state’s personal immunity to justify its conduct, the question turned to be, for the Court’s determination, whether Omar Al Bashir enjoyed such immunity from arrest and surrender by South Africa? In this regard, the Court’s answer is again in the negative (a), but its ruling according to which immunity does not apply because Sudan is in a position similar to that of a state party to the Rome Statute remains to some extent unconvincing (b).

a) *The Decision of 6 July 2017*

To answer the question as to whether Omar Al Bashir enjoyed immunity when he was in South Africa, the Pre-Trial Chamber II reasoned in different ways and reversed the Court’s previous findings on the same issue. First of all, the Chamber observed that the Host Agreement of 8 June 2015 between South Africa and the AU did not grant any immunity to the Sudanese Head of State. However, it found that there was no evidence of a waiver of personal immunity of state officials before international criminal jurisdictions under customary international law,¹²⁸⁰ thereby reversing the Court’s decisions of December 2011 concerning the failure of Chad and Malawi to comply with the cooperation request to arrest and surrender Omar Al Bashir. Secondly, the Chamber disapproved the so-called implicit waiver of Omar Al Bashir’s personal immunity by the Security Council as held in the Court’s

¹²⁷⁸ G. Ntirumenyerwa M. Kimonyo, ‘La crise dans la sous-région des grands lacs : quand les protagonistes tournent le dos au droit’, in S. Marysse and F. Reyntjens (eds), *L’Afrique des grands lacs : Annuaire 2003-2004* (Paris : L’Harmattan, 2004) 254-274, at 259. The translation is mine.

¹²⁷⁹ *Al Bashir* (ICC-02/05-01/09), Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, Pre-Trial Chamber II, 6 July 2017.

¹²⁸⁰ *Ibid*, paras.67-68.

decision of 9 April 2014. According to the Chamber, not only it does see no such waiver in the Security Council resolution 1593 (2005), but also this waiver –whether explicit or implicit –is not necessary because personal immunity does not apply in the present case.¹²⁸¹ In this vein, the Chamber held that “the necessary effect of Security Council resolution 1593 (2005) triggering the Court’s jurisdiction in the situation in Darfur and imposing on Sudan the obligation to cooperate fully with the Court is that, for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of states parties”.¹²⁸² The Security Council resolution in question arguably made the entire Rome Statute applicable to this country,¹²⁸³ including article 27 (2) concerning the irrelevance of personal immunity before the Court.¹²⁸⁴ Consequently, article 98 (1) of the Rome Statute, which requires that the Court obtains the waiver of personal immunity of nationals of third states before issuing any cooperation request for arrest and surrender of the accused, does not apply to Sudan because the Rome Statute does not confer any immunity on officials of states parties that needs to be lifted.¹²⁸⁵ According to the Chamber, this finding is in line with the intent of the Security Council, which anticipated that by referring the situation in Darfur to the Court, Omar al Bashir’s immunity as Head of State would not be applicable.¹²⁸⁶ The Chamber argued that this was an expansion of a treaty to a third state pursuant to the UN Charter, which permits the Security Council to impose obligations on states.¹²⁸⁷ However, the Chamber emphasised that this was a *sui generis* legal regime.¹²⁸⁸ It is limited to the particular situation in Darfur, while Sudan does have no obligation or right in other situation, such as voting in the ASP or paying contribution to the Court’s budget.¹²⁸⁹ Therefore, all states parties to the Rome Statute are under the obligation, upon request, to arrest and surrender Omar Al Bashir to the Court. By not having done that, South Africa violated its duty to cooperate under the Rome Statute.¹²⁹⁰

¹²⁸¹ *Ibid.*, para.96.

¹²⁸² *Ibid.*, para.88.

¹²⁸³ *Ibid.*, para.85.

¹²⁸⁴ *Ibid.*, para.91.

¹²⁸⁵ *Ibid.*, para.93.

¹²⁸⁶ *Ibid.*, para.95.

¹²⁸⁷ *Ibid.*, para.89.

¹²⁸⁸ *Ibid.*, para.83.

¹²⁸⁹ *Ibid.*, para.90.

¹²⁹⁰ *Ibid.*, para.126.

b) The Discussion of the New Finding of the Court on Personal Immunity

By rejecting Omar Al Bashir's immunity on the ground that Sudan has rights and obligations analogous to those of a state party to the Rome Statute, the ICC upheld the submission made by the prosecution. Originally, this submission is from Dapo Akande who posited:

(...) the Statute, including Article 27, must be regarded as binding on Sudan. The Security Council's decision to confer jurisdiction on the ICC, being (implicitly) a decision to confer jurisdiction in accordance with the Statute, must be taken to include every provision of the Statute that defines how the exercise of such jurisdiction is to take place. Article 27 is a provision that defines the exercise of such jurisdiction (...). The fact that Sudan is bound by Article 25 of the UN Charter and implicitly by SC Resolution 1593 to accept the decisions of the ICC puts Sudan in an analogous position to a party to the Statute. The only difference is that Sudan's obligations to accept the provisions of the Statute are derived not from the Statute directly, but from a UN Security Council resolution and the Charter.¹²⁹¹

However, South Africa objected to the Prosecutor's submission in the following words:

Sudan is not, as is suggested by the Office of the Prosecutor, comparable to a State Party. It does not have the right to decide or to vote in the ASP. It does not pay membership fees. The only thing that Article 13(b) of the Rome Statute does or, rather, a UN Security Council pursuant to Article 13(b) does, is to confer jurisdiction on the Court. [...] And yes, it is also to ensure that the whole Statute applies. But the whole Statute [...] includes also Article 98. But it does nothing more than this. [...] UN Security Council resolution operative paragraph 2 places an obligation on Sudan. This would not be necessary if Sudan was in a position comparable to that of a State Party, because then Part 9 of the Statute would already apply, and there would already be a duty on Sudan [...] to cooperate.¹²⁹²

The irreconcilable character of these submissions shows why the Court's finding is itself weak to be convincing. This justifies the dissenting opinion by Judge De Brichambaut who rightly underscores that the state of the law is ambiguous.¹²⁹³ He concludes that "given the current state of the law, it cannot be determined, exclusively on the basis of the legal effects generated by UN Security Council Resolution 1593, whether, in general, either article 27(2)

¹²⁹¹ Akande, above note 1260, at 342.

¹²⁹² Transcript of Hearing, 7 April 2017, ICC-02/05-01/09-T-2-ENG, at 86 <https://www.icc-cpi.int/Transcripts/CR2017_02211.PDF> accessed 30 August 2017.

¹²⁹³ Minority Opinion of Judge Marc Perrin De Brichambaut, *Al Bashir* (ICC-02/05-01/09), Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, Pre-Trial Chamber II, 6 July 2017, paras.48-57.

of the Statute or article 98(1) of the Statute applies between the Court, South Africa, and Sudan in relation to the request to arrest and surrender Omar Al-Bashir to the Court”.¹²⁹⁴ However, he thinks that the Court could have rejected Omar Al Bashir’s immunity in application of the Genocide Convention because “Sudan must be regarded to have relinquished the immunities of its “constitutionally responsible rulers” when acceding to the Convention”.¹²⁹⁵ It has to be noted that this position was itself rightly rejected by the Chamber on the ground that “the Genocide Convention, unlike the Statute in article 27(2), does not mention immunities based on official capacity, and the majority does not see a convincing basis for a constructive interpretation of the provisions in the Convention such that would give rise to an implicit exclusion of immunities”.¹²⁹⁶

In the end, the ICC has lost some of its support in Africa because of its own conflicting interpretations and bad application of the Rome Statute concerning Heads of State’s personal immunity. Some commentators have suggested the idea to request an advisory opinion to the ICJ on the issue.¹²⁹⁷ But, as far as the Rome Statute is concerned, there is a need to promote explicit legal reforms in order to ensure confidence in the system of justice it has put in place. States must adhere to the same rules. Otherwise, the Court could be destroyed by a lack of sufficient international legitimacy.

¹²⁹⁴ *Ibid.*, para.58.

¹²⁹⁵ *Ibid.*, para.38.

¹²⁹⁶ *Al Bashir* (ICC-02/05-01/09), above note 1279, para.109.

¹²⁹⁷ M. Du Plessis and D. Tladi, ‘The ICC’s Immunity Debate –the Need for Finality’, *EJIL: Talk* (11 August 2017) <<https://www.ejiltalk.org/the-iccs-immunity-debate-the-need-for-finality/>> accessed 30 August 2017.

3. The Claims for Legal Reforms by Member States of the African Union

Very often, the time of crisis constitutes an opportunity to advance reforms within a legal order.¹²⁹⁸ The history of international law has examples of such reforms after violence and numerous losses caused to mankind. This observation particularly applies to major changes within the international legal system during the 20th century which gave birth to the League of Nations in 1919 and the United Nations in 1945. In both cases, World Wars I and II respectively played a crucial role in the establishment of post-crisis international law. The development of international human rights law has followed the same dynamic.¹²⁹⁹ On the whole, crises and violence shape international law and deconstruct it. But, this time, reforms of the system of international criminal justice are pacifically demanded by member states of the AU. There is no need to go to another war for that. Pacifist changes have the advantage that no one among the contenders in the legal crisis would theoretically impose his views on the other sides. Rather, the entire process of reforming the system aims at finding a fresh legal consensus which balances and satisfies the interests of everybody. In such conditions, the language of war is replaced by the power of proposals, exchanges and concessions. Everything is characterised by the logic of international negotiations (3.1), even though confrontation persists via the opposition of narratives and strategies to advance or to block the requested legal reforms (3.2).

3.1. The Logic of International Negotiations

AU member states which desire to reform the system of international criminal justice resort to multilateral forums of negotiations in order to find a solution with other stakeholders around the world on several contentious legal issues. It is important to revisit these forums (3.1.1) before examining the proposals for reforms emanating from Africa (3.1.2).

3.1.1. The Mobilisation of Multilateral Forums

Two main forums of negotiations have been mobilised by African states, depending on the issue at stake. These forums are the UN General Assembly regarding the question of universal

¹²⁹⁸ W. van Genugten and M. Bulterman, 'Crises: Concern and Fuel for International Law and International Lawyers', 44 *Netherlands Yearbook of International Law* (2013) 3-18, at 10. See also O. Gross and F. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press).

¹²⁹⁹ B. Authers and H. Charlesworth, 'The Crisis and the Quotidian in International Human Rights Law', 44 *Netherlands Yearbook of International Law* (2013) 19-39, at 24-25.

jurisdiction (3.1.1.1) and the Assembly of States Parties (ASP) for the reform of the ICC justice system (3.1.1.2).

3.1.1.1. The United Nations General Assembly

In its decisions of July 2008 and 2010, the AU Assembly mandated the chairperson of the Union to follow up on the matter of the abuse of universal jurisdiction by some non-African states with a view to ensuring that it is exhaustively discussed for a durable solution at the UN level.¹³⁰⁰ This procedure was initiated in parallel with the discussion of the issue in the context of the relationship between the AU and the EU.¹³⁰¹ The discussion at the UN level can be justified by two principal reasons.

First, the discussion between the AU and the EU placed itself in a very narrow perspective. Both regional organisations convened to establish a technical *ad hoc* expert group in order “to clarify the respective understanding on the African and EU side on the principle of universal jurisdiction”,¹³⁰² given the fact that the matter was one which endangered the relationship between both parties. However, the AU-EU Expert Group had no mandate to study possible reforms of the principle. Rather, its mission of clarification led to several recommendations to the effect that the exercise of universal jurisdiction should be in line with international courtesy and relevant rules of international law. This is the case with the duty to comply with immunities of state officials before foreign criminal courts and the necessity to leave primary jurisdiction to the territorial state willing and capable to prosecute the alleged perpetrators (subsidiarity).¹³⁰³

Second, the UN General Assembly appeared to be the best multilateral forum to discuss the issue, to advance the law or to reform it. Established as one of the UN principal organs,¹³⁰⁴ the General Assembly is competent to “initiate studies and make recommendations for the

¹³⁰⁰ Assembly/AU/Dec.199 (XI), above note 221, para.6; Assembly/AU/Dec.292(XV), above note 864, para.11.

¹³⁰¹ See Executive Council of the African Union, ‘Progress Report of the Commission on the Abuse of the Principle of Universal Jurisdiction’, EX.CL/540 (XVI), Addis Ababa (Ethiopia), 25-29 January 2010, para.3.

¹³⁰² African Union and European Union, above note 671, para.2.

¹³⁰³ *Ibid.*, para.6-8.

¹³⁰⁴ UN Charter, Article 7. It reads as follows : ‘1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat. 2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter’.

purpose (...) of promoting international cooperation in the political field and encouraging the progressive development of international law and its codification".¹³⁰⁵ The progressive development of international law implies that the General Assembly may prepare drafts conventions "on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of states".¹³⁰⁶ Instead, the codification of international law refers to "the more precise formulation and systematisation of rules of international law in fields where there already has been extensive state practice, precedent and doctrine".¹³⁰⁷ Normally, codification can be achieved through the adoption of international treaties (opened to state ratification) or mere resolutions or declarations enunciating the rules, principles or guidelines that are formulated and systematised. The discussion of the principle of universal jurisdiction can lead to the same outcome. The legitimacy of such a codification and progressive development of international law is deemed to be high since the General Assembly consists of all UN member states, involved in its work and discussion.

The African concerns were raised to the level of the United Nations by the Permanent Representative of Tanzania. On 21 January 2009, he requested the UN Secretary General that an additional item on the "abuse of the principle of universal jurisdiction" be included in the agenda of the 63rd session of the General Assembly.¹³⁰⁸ Tanzania which was chairing the AU Assembly at that time acted on behalf of the group of African states. But, on 18 February 2009, several delegations disagreed with the title of the proposed item which was considered to have a pejorative connotation.¹³⁰⁹ Accordingly, Tanzania requested the suspension of the discussion to allow extensive consultations on its proposal. On 29 June 2009, it requested that the proposed item be included in the agenda of the 64th session of the General Assembly under the title "the scope and application of the principle of universal jurisdiction".¹³¹⁰ Annex

¹³⁰⁵ *Ibid.*, Article 13 (1) (a).

¹³⁰⁶ Statute of the International Law Commission (21 November 1947), Article 15.

¹³⁰⁷ *Ibid.*

¹³⁰⁸ Z. Lijiang, 'Universal Jurisdiction before the United Nations General Assembly: Seeking Common Understanding under International Law', in M. Bergsmo and L. Yan (eds), *State Sovereignty and International Criminal Law* (Beijing: Torkel Opsahl Academic Epubliser, 2012) 191-222, at 198.

¹³⁰⁹ *Ibid.*, at 199.

¹³¹⁰ UN General Assembly, 'Request for the Inclusion of an Additional Item in the Agenda of the Sixty-Third Session: the Scope and Application of the Principle of Universal Jurisdiction - Letter Dated 29 June 2009 from

to this request was an explanatory memorandum detailing the reasons of the Tanzanian submission. This memorandum indicates:

While the African Union fully subscribes to and supports the principle of universal jurisdiction within the context of fighting impunity as well as the need to punish perpetrators of genocide, crimes against humanity and war crimes, it is, however, concerned about its ad hoc and arbitrary application, particularly towards African leaders. The application of this principle has to be consistent with international law and the conduct of international relations.¹³¹¹

Furthermore, the memorandum points out that “the extent of the application of this important principle has never been discussed at the level of the United Nations”¹³¹² and that “there is no widespread state practice”.¹³¹³ Accordingly, Tanzania declared that the purpose of referring to the United Nations the issue of the principle of universal jurisdiction for discussion in the General Assembly was the need to establish “regulatory provisions for its application”.¹³¹⁴

At its 105th plenary meeting held on 14 September 2009, the General Assembly took note of the Tanzanian submission. It consequently decided to include in the draft agenda of its 64th session the proposed item and recommended that it be considered by the Sixth Committee at that session.¹³¹⁵ On 16 December 2009, this decision was reiterated for the inclusion of the same item in the agenda of the 65th session of the General Assembly.¹³¹⁶ Two organs were mandated to work on the issue. First, the Sixth Committee or the Legal Committee,¹³¹⁷ which is the main forum for discussion of legal questions within the General Assembly. Another appropriate forum is the ILC which is the appropriate technical subsidiary organ to which a

the Permanent Representative of the United Republic of Tanzania to the United Nations Addressed to the Secretary-General’ (23 July 2009) Sixty-third session (A/63/237/Rev.1).

¹³¹¹ Tanzania, ‘Explanatory Memorandum: Scope and Application of the Principle of Universal Jurisdiction’ (23 July 2009) UN General Assembly Sixty-third session (A/63/237/Rev.1) Annexe I, para.5.

¹³¹² *Ibid.*, para.4.

¹³¹³ *Ibid.*

¹³¹⁴ *Ibid.*, para.6.

¹³¹⁵ UN General Assembly, ‘Resolutions and Decisions adopted by the General Assembly during its Sixty-third Session’ (25 December 2008 – 14 September 2009) Volume III -General Assembly Official Records Sixty-third Session Supplement No. 49 (A/63/49), at 148.

¹³¹⁶ UNGA Res. 64/117, 16 December 2009.

¹³¹⁷ This is one of the six main committees established as subsidiary organs of the General Assembly. The other five committees are the Disarmament and International Security Committee, the Economic and Financial Committee, the Social, Humanitarian and Cultural Committee, the Special Political and Decolonisation Committee, as well as the Administrative and Budgetary Committee.

topic before the Sixth Committee may be referred, when it is of a high technical aspect, for a deep study. But, through resolution 64/117, the General Assembly decided that the Sixth Committee should continue “its consideration of the scope and application of the principle of universal jurisdiction, without prejudice to the consideration of related issues in other forums of the United Nations”.¹³¹⁸ Second, the UN Secretary General was requested to invite member states (and that invitation was extended to relevant observers for the General Assembly, including intergovernmental organisations like the AU and the EU) to submit information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice, and to prepare and submit to the General Assembly a report based on such information and observations.¹³¹⁹ Since then, the Sixth Committee has worked hand in hand with the Secretary General. It has established a Working Group on the issue. This Working Group is opened to all UN member states and observers to the General Assembly. Each year, it works in consideration of annual reports submitted to the General Assembly by the Secretary General. The initial report on the scope and application of the principle of universal jurisdiction was delivered in 2010¹³²⁰ and the most recent ones in June 2017.¹³²¹ Any recommendation following the discussion of the issue within the Sixth Committee must be submitted to the plenary of the General Assembly for final adoption. How about the work of the ASP?

3.1.1.2. The Assembly of States Parties

The ASP is a political body outside the ICC’s judicial structure. It is a plenary organ established under article 112 (1) of the Rome Statute and therefore consists of all Court’s member states. States not parties, intergovernmental and non-governmental organisations may be convened to its meetings. It is the avenue to discuss and adopt proposals for amendments to the ICC Statute and the main legal texts underpinning its justice system, notably the

¹³¹⁸UNGA Res. 64/117, above note 1316, para.2.

¹³¹⁹ *Ibid.*, para.1. See also UNGA Res.69/124, 10 December 2014, para.3-4.

¹³²⁰ UN General Assembly, ‘The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments’ (29 July 2010) A/65/181, para.1.

¹³²¹ UN General Assembly, ‘The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General’ (22 June 2017) A/72/112, para.1.

Elements of Crimes¹³²² and the Court's Rules of Procedure and Evidence.¹³²³ As such, it is a legislative body which meets at the seat of the Court in The Hague or at the UN headquarters in New York once a year and, if need be, may hold special sessions.¹³²⁴ In this regard, the Rome Statute provides that the ASP is competent to adopt amendments to it¹³²⁵ or to "convene a Review Conference if the issue involved so warrants".¹³²⁶ The ASP is assisted in the discharge of its functions by a Bureau consisting of a President, two Vice Presidents and 18 members elected for three-year terms.¹³²⁷ It can also create subsidiary bodies as may be necessary for accomplishing its mission.¹³²⁸

The initial submission of African proposals for amendments to the ICC Statute and its justice system to the ASP was made at its 8th session, held from 16 to 26 November 2009 in The Hague (Netherlands). The decision for this submission was adopted after two important meetings convened by the AU. First, in February 2009, the AU Commission was requested to convene, as early as possible, a meeting of the African states parties to the ICC Statute on the

¹³²²ICC Statute, Article 9. This Article stipulates: '1.Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties. 2. Amendments to the Elements of Crimes may be proposed by: (a) Any State Party; (b) The judges acting by an absolute majority; (c) The Prosecutor. Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties. 3. The Elements of Crimes and amendments thereto shall be consistent with this Statute'.

¹³²³ *Ibid.*, Article 51. This Article provides: '1.The Rules of Procedure and Evidence shall enter into force upon adoption by a two thirds majority of the members of the Assembly of States Parties. 2. Amendments to the Rules of Procedure and Evidence may be proposed by: (a) Any State Party; (b) The judges acting by an absolute majority; or (c) The Prosecutor. Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties. 3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties. 4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted. 5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail'.

¹³²⁴ ICC Statute, Article 112 (6).

¹³²⁵ *Ibid.*, Articles 121 and 122.

¹³²⁶ *Ibid.*, Article 121 (2).

¹³²⁷ *Ibid.*, Article 112 (3) (a).

¹³²⁸ *Ibid.*, Article 112 (4).

establishment of this Court in order to exchange views on its work in relation to Africa, especially in the light of the processes initiated against African personalities, and to submit recommendations thereon taking into consideration all pertinent elements.¹³²⁹ This meeting took place in Addis Ababa, from 8th to 9th June 2009, and was attended by 25 out of 30 African states who were parties to the ICC Statute at that time.¹³³⁰ Second, in July 2009, the AU Assembly mandated the same Commission to convene a preparatory meeting of African states parties at expert and ministerial levels (foreign affairs and justice) but open to other member states at the end of 2009 to prepare fully for the Review Conference of states parties scheduled for Kampala (Uganda) in May 2010.¹³³¹ This meeting which prolonged the discussion undertaken in June 2009 was held in Addis Ababa on 6 November 2009.¹³³² Among other outcomes, it recommended that African proposals for amendments be presented to the aforementioned 8th session of the ASP.¹³³³ The procedure required that such proposals are deposited with the UN Secretary General who should circulate them to all ICC member states¹³³⁴ before discussion and eventually adoption by the ASP or the Review Conference.

As a consequence, a Working Group on Amendments (WGA) was established by the 8th session of the ASP pursuant to resolution ICC-ASP/8/Res.6 of 26 November 2009. According to this resolution, such a subsidiary body of the ASP was created for the following purpose:

considering, as from its ninth session, amendments to the Rome Statute proposed in accordance with article 121, paragraph 1, of the Statute at its eighth session, as well as any other possible amendments to the Rome Statute and to the Rules of Procedure and Evidence, with a view to identifying amendments to be adopted in accordance with the Rome Statute and the Rules of Procedure of the Assembly of States Parties.¹³³⁵

Additional to the initial meetings of African states parties to the ICC Statute, the AU held an extraordinary summit to examine the relationship between the Court and Africa in October 2013. The AU Assembly decided that African states should continue to propose amendments

¹³²⁹ Assembly/AU/DEC.221 (XII), above note 222, para.5.

¹³³⁰ Kahombo, above note 11, at 77.

¹³³¹ Assembly/AU/Dec.245 (XIII) Rev.1, above note 1119, para.8.

¹³³² See Executive Council of the African Union, 'Report of the 2nd Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)', EX.CEL/568 (XVI) Annex 1, Addis Ababa (Ethiopia), 6 November 2009.

¹³³³ *Ibid.*, para.14.

¹³³⁴ ICC Statute, Article 121 (1).

¹³³⁵ ICC-ASP/8/Res.6, 26 November 2009, para.4.

to the Rome Statute for the consideration of the ASP.¹³³⁶ In particular, it requested African states parties to the ICC Statute, especially the members of the Bureau of the ASP, to inscribe on the agenda of the forthcoming sessions of the ASP the issue of indictment of African sitting heads of state and government by the ICC and its consequences on peace, stability and reconciliation in AU member states.¹³³⁷ It is therefore interesting to pinpoint which amendments they have articulated to this effect, compared with the reform they are demanding regarding the scope and application of the principle of universal jurisdiction.

3.1.2. The Proposals for Reforms Emanating from Africa

These proposals pertain to the principle of universal jurisdiction (3.1.2.1) and to the reform of the ICC justice system (3.1.2.2).

3.1.2.1. The Regulation of the Scope and Application of Universal Jurisdiction

It must be recalled that the referral by African states of the issue of universal jurisdiction to the UN General Assembly is based on the allegation of its abusive application outside the continent. To put an end to such an abuse, the proposal to reform emanating from Africa is made up of two different dynamics. The first one is the development of a number of legal options by the AU (a) and the second relates to the course of discussion within the Sixth Committee of the UN General Assembly (b).

a) The Legal Options of the African Union

It is a fact that the AU has developed a common African position on the issue of universal jurisdiction. This position is expressed through those various decisions against the abusive application of this principle by non-African states. The position is also found in the AU Model National Law on Universal Jurisdiction over International Crimes, which is a non-binding instrument, adopted in July 2012 at the 21st session of the AU Executive Council. The main objective and expectation of its adoption is that AU member states would legislate with regard to the legal standards provided for therein, in accordance with their specific constitutional arrangements and procedures.¹³³⁸ But, the AU Model National Law on Universal Jurisdiction over International Crimes is also expected to achieve another goal. In

¹³³⁶ Ext/Assembly/AU/DEC.1 (Oct.2013), above note 1039, para.10 (vi).

¹³³⁷ *Ibid.*, para.10 (vii).

¹³³⁸ EX.CL/Dec.708(XXI), above note 827, at 3.

fact, one may observe that the AU has not only drawn the attention of the Sixth Committee on its content but also sent the text to the UN as document containing African information and observations for the purpose of the discussion within the General Assembly.¹³³⁹ In essence, the legal options made by the AU for the regulation of the scope and application of the principle of universal jurisdiction are linked to two basic problems, i.e. the approach to states' criminal power to be adopted and the choice of a theory of reform of the principle of universal jurisdiction.

Concerning the approach to states' criminal jurisdiction, a distinction has already been made between the sovereign state-oriented conception and the constitutional approach. It is a fact that the AU espouses the latter conception, meaning that universal jurisdiction is allocated to states over certain offenses by international law. This approach was already contained in the Tanzanian explanatory memorandum submitted to the UN General Assembly in 2009, which indicated:

The principle of universal jurisdiction is well established in international law. Universal jurisdiction does not apply to all international crimes, but rather to a very limited category of offences. It allows a State to exercise its domestic jurisdiction to indict and prosecute perpetrators of serious offences such as piracy, slavery, torture, genocide, war crimes and crimes against humanity occurring outside its territory irrespective of the nationality of the perpetrators. The African Union respects this principle, which is enshrined in article 4(h) of the Constitutive Act.¹³⁴⁰

However, the exploration of a number of national legislation of African states has shown that these countries exercise a wider liberty by granting to their courts universal jurisdiction over certain crimes, including domestic offenses, outside any allocation of such power by a rule of international law.¹³⁴¹ This practice, which is not particular to Africa, is based on the opposite sovereign state-oriented conception of state criminal powers. This means that the constitutionalisation of universal jurisdiction over serious offenses that is sought at the UN level would continue to coexist with the sovereign state-oriented conception as legal practice

¹³³⁹ See UN General Assembly, 'The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General' (28 June 2016) A/71/111, para.23. See also UN General Assembly, 'The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General' (26 June 2013) Sixty-eighth session (A/68/113), para.33.

¹³⁴⁰ Tanzania, above note 1311, para.1.

¹³⁴¹ Ondo, above note 808, at 80.

of states. Therefore, the work of the Sixth Committee is likely to provide a partial solution to the problem of abusive application of the principle of universal jurisdiction insofar as other offenses over which states ascertain their universal criminal power would continue to be fixed on the basis of each one's sovereignty, freedom and active cooperation in the fight against impunity. Yet, it could be possible to elaborate regulatory provisions on universal jurisdiction, for instance by imposing some restrictions common to all states, regardless of these diverging and conflicting conceptions on criminal jurisdictional powers.

On the other hand, there are three theories concerning the reform of the principle of universal jurisdiction. The first one refers to the abandonment of universal jurisdiction. This theory is based on the idea that the principle of universal jurisdiction is so hard to apply, due to various obstacles, risks of fragmentation (of laws and case-law)¹³⁴² and diplomatic costs that it turns to be, in the end, ineffective or inefficient. The theory contains two separate aspects. The first one is defended by Dalida V. Hoover who thinks that universal jurisdiction should be removed from the states and conferred on the ICC so that international crimes are punished fairly and according to uniform laws.¹³⁴³

But, this position is weak in that the ICC is a treaty-based court, whose jurisdiction is not accepted worldwide. In addition, even if one may hardly conceive that the ICC can be empowered to try all and any kind of international crimes, it remains that states may still exercise universal jurisdiction on domestic or even transnational offenses, meaning that the problem to be addressed would have been solved only in part.

The second aspect of the theory of abandonment was defended by Henry A. Kissinger.¹³⁴⁴ He proposed the prosecution of genocide, war crimes and crimes against humanity under the authority of the UN Security Council. According to him, the mechanism could operate as follows:

¹³⁴² See M.A. Pasculli, 'Universal Jurisdiction between Unity and Fragmentation of International Criminal Law', v (1) *Rivista di Criminologia, Vittimologia e Sicurezza* (2011) 34-56.

¹³⁴³ D. V. Hoover, 'Universal Jurisdiction not so Universal: a Time to Delegate to the International Criminal Court', Cornell Law School Inter-University Graduate Student Conference Paper –Paper 52 (2011), at 19. See also E. Kontorovich, 'The Inefficiency of Universal Jurisdiction', 1 *University of Illinois Law Review* (2008) 389-418, at 418.

¹³⁴⁴ Kissinger, above note 662.

First, the U.N. Security Council would create a Human Rights Commission or a special subcommittee to report whenever systematic human rights violations seem to warrant judicial action. Second, when the government under which the alleged crime occurred is not authentically representative, or where the domestic judicial system is incapable of sitting in judgment on the crime, the Security Council would set up an ad hoc international tribunal on the model of those of the former Yugoslavia or Rwanda. And third, the procedures for these international tribunals as well as the scope of the prosecution should be precisely defined by the Security Council, and the accused should be entitled to the due process safeguards accorded in common jurisdiction.¹³⁴⁵

However, the problem with his proposal is triple. It subordinates prosecutions to the approval of a political body which, depending on diplomatic and political factors, may be reluctant to act. It also establishes a regime of inequality between permanent members of the Security Council, one of them being capable to veto a collective decision approving international prosecutions, and other UN member states.¹³⁴⁶ It is finally constitutive of a duplication of the ICC, whose creation was also motivated by the intention to avoid the creation of costly *ad hoc* international criminal tribunals.

The second theory is based on monitoring the exercise of universal jurisdiction by a designated state. The mechanism, suggested by Ariel Zeman, implies that universal jurisdiction recognised to *any* state over serious international crimes should be exercised in respect of the principle of equality before the law, regardless of whether suspects to prosecute and to try are nationals of powerful or weak countries.¹³⁴⁷ According to this theory, it should be up to the ICC Prosecutor to designate a state which can exercise, in a particular situation or in respect of a particular case, its criminal universal jurisdiction.¹³⁴⁸ Moreover, this exercise should be monitored by the ICC to the effect that, in case of abuse duly noted upon reports or information provided by the designated state, its jurisdiction is revoked and the matter be transferred to another country.¹³⁴⁹

¹³⁴⁵ *Ibid.* See also Coombes, above note 883, at 458.

¹³⁴⁶ K. Roth, 'The Case for Universal Jurisdiction', *Foreign Affairs* (September/October 2001), at 5 <<http://faculty.maxwell.syr.edu/hpschmitz/PSC354/PSC354Readings/RothUniversalJurisdiction.pdf>> accessed 28 October 2016.

¹³⁴⁷ A. Zeman, 'Reconciling Universal Jurisdiction with Equality before the Law', 47 (1) *Texas International Law Journal* (2011) 143-199, at 143.

¹³⁴⁸ *Ibid.*, at 189-192.

¹³⁴⁹ *Ibid.*

The limit of this theory is that it is founded on a false premise. First of all, not all states may be in a position to exercise universal jurisdiction. Even when it is imposed by virtue of international law, it is still required that that jurisdiction is concretely conferred on courts and tribunals in the domestic legal system. Second, as already indicated, the ICC jurisdiction will not necessarily be accepted by all states. The ICC Prosecutor may not therefore act in every situation and case. Moreover, the theory does not indicate who should request the ICC Prosecutor's intervention when he does not act on his own initiative. In this regard, it is obvious that any state would not be entitled to submit the issue to the ICC with its limited scope of jurisdiction. Likewise, the possibility of referral by the Security Council is not warranted due to the politicisation of its actions or the blockage of its decision by a veto.

The third and last theory relies on the necessity to adopt restrictions on the use of universal jurisdiction. There is apparently a need to "curb enthusiasm for universal jurisdiction"¹³⁵⁰ so that its exercise becomes very exceptional, with fewer risks of abuse and impairing international relations. The principle is to be deemed a measure of last resort.¹³⁵¹ This is the option espoused by the AU. Its advantage is that it does not deprive states of their jurisdiction. This is because the universality principle is useful for the fight against impunity to which each state and the international community are expected to contribute. Therefore the need to identify those restrictions that would constitute the regulatory provisions of the principle of universal jurisdiction that the AU and its member states are demanding at the UN level.

b) The Search for Restrictions on the Use of Universal Jurisdiction

The discussion of the principle of universal jurisdiction within the Sixth Committee and its Working Group is based on different sources. In addition to the AU Model National Law on Universal Jurisdiction over International Crimes which summarises the common position of African states on various contentious issues, there are information and observations provided by UN member states, which are notably founded on their domestic legislation and case-law, and so reported to the General Assembly by the UN Secretary General. Rwanda, which is one of the leading states in the contestation of the abuse of the principle of universal jurisdiction

¹³⁵⁰ D. Morrison and J. R. Weiner, 'Curbing Enthusiasm for Universal Jurisdiction', 4 *Berkeley Journal of International Law Publicist* (2010) 1-11, at 11.

¹³⁵¹ UN General Assembly, 'The Scope and Application of the Principle of Universal Jurisdiction (Agenda item 86)' (12 October- 20 November 2015) Legal - Sixth Committee - Seventieth Session (A/C.6/70/SR.12, 13, 27 and 28) <http://www.un.org/en/ga/sixth/70/universal_jurisdiction.shtml> accessed 9 October 2016.

in Africa, has also mentioned the Princeton Principles on Universal Jurisdiction and pleaded for their incorporation into the discussion.¹³⁵² In the light of these available sources, one may try to identify those contentious issues as they appear to be under discussion within the Sixth Committee (i) before focusing on the particular question of subsidiarity (ii).

i) The Identification of Issues under Discussion within the Sixth Committee

The discussion on the principle of universal jurisdiction encompasses two main parts. First, its scope, which means the question as to which crimes may justify its exercise.¹³⁵³ The second part is about the application of the principle. In this regard, states would like to define and harmonise their views on six different issues, namely the (pre) conditions for application of universal jurisdiction, the jurisdictional criteria (i.e. whether mandatory or discretionary universal jurisdiction), the procedural aspects to observe (i.e. international due process guarantees), the role of national judicial systems (i.e. the complementary role that courts exercising universal jurisdiction should play in contrast to courts exercising other forms of jurisdictional powers), the problem of international assistance and cooperation in the conduct of criminal matters (including extradition), as well as questions of state responsibility for wrongful acts in its exercise, including, if appropriate, its abuse.¹³⁵⁴

Neither of these issues is already settled. The divergence of views is still important. Regarding the scope of universal jurisdiction, the AU Model National Law on Universal Jurisdiction over International Crimes has determined a list of six crimes subject to the principle, i.e. genocide, crimes against humanity, war crimes, piracy, trafficking in drugs and terrorism.¹³⁵⁵ It is remarkable that distinct crimes such as slavery, torture and crimes against peace (aggression) which are listed by the Princeton Principles on Universal Jurisdiction¹³⁵⁶

¹³⁵² Rwanda, 'The Government of Rwanda's Report on Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction' (2010), at 5 <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Rwanda.pdf> accessed 30 October 2016.

¹³⁵³ UN General Assembly, 'The Scope and Application of the Principle of Universal Jurisdiction: Oral Report of the Chairman of the Working Group' (7 November 2014) Legal - Sixth Committee - Sixty-ninth session (Agenda item 83), para.10.

¹³⁵⁴ *Ibid.*, para.12-18. See also International Justice Resource Center, 'UNGA Sixth Committee Advances Discussion of Universal Jurisdiction' (17 November 2014) <<http://www.ijrcenter.org/2014/11/17/unga-sixth-committee-advances-discussion-of-universal-jurisdiction/>> accessed 09 June 2015.

¹³⁵⁵ African Union Model National Law on Universal Jurisdiction over International Crimes, Article 8.

¹³⁵⁶ Principle 2 (1). See Macedo, above note 633, at 29.

are not covered by that instrument. However, the Princeton Principles are not exhaustive either. Other international crimes such as apartheid and enforced disappearances are outside its scope. That is why, for the purpose of facilitating further discussion at the UN level, the chair of the Working Group of the Sixth Committee has elaborated a preliminary list of twelve crimes that may be subject to universal jurisdiction, including corruption and transnational organised crime.¹³⁵⁷ But, the major question stressed by several states is whether the establishment of such a list is even relevant. It has been argued that a general reference to customary and treaty international law would be preferable since crimes under universal jurisdiction should proceed on that basis.¹³⁵⁸ Arguably, an unwarranted expansion of the list of crimes under universal jurisdiction should be avoided.¹³⁵⁹

Concerning the application of universal jurisdiction, South Africa, speaking on behalf of the group of African states during the Sixth Committee's meeting of 20 October 2015, recalled that it must be consistent with applicable international law.¹³⁶⁰ This exigency includes the respect for the UN Charter, other norms and principles of international law, including the sovereign equality of states, the territorial jurisdiction, the good faith, the fair trial and the immunity of officials existing under customary international law.¹³⁶¹ Among other issues that are under consideration there is the principle of double jeopardy (*ne bis in idem*), the subordination of prosecutions to the discretion of the state prosecutor and the possibility for the suspect to challenge or to appeal against the decision to prosecute under universal jurisdiction.

¹³⁵⁷ UN General Assembly, above note 1353, para.10; UN General Assembly, 'Sixth Committee: Informal Working Paper Prepared by the Chairperson for Discussion in the Working Group' (2014) <<https://papersmart.unmeetings.org/media2/4655216/roadmap-en.pdf>> accessed 31 October 2016. The proposed crimes to be subject to universal jurisdiction are: apartheid, corruption, crimes against humanity, crimes against peace/crime of aggression, enforced disappearances, genocide, piracy, slavery, terrorism, torture, transnational organised crime and war crimes.

¹³⁵⁸ UN General Assembly, 'Sixth Committee: Summary Record of the 28th Meeting of 7 November 2014' (13 November 2014) General Assembly Sixty-ninth Session Official Records (A/C.6/69/SR.28), para.32.

¹³⁵⁹ UN General Assembly, above note 1351.

¹³⁶⁰ UN General Assembly, 'Sixth Committee: Summary Record of the 12th Meeting of 20 October 2015' (5 November 2015) General Assembly Seventieth Session Official Records (A/C.6/70/SR.12), para.8.

¹³⁶¹ *Ibid.*

The condition regarding the presence of the accused in the territory of the prosecuting or trying state is also still challenged.¹³⁶² In previous developments, it was demonstrated that this condition was primarily a requirement for the principle of sovereign equality of states. However, its persistent challenge seems to relate to the continuing confusion between the prohibition of universal jurisdiction *in absentia* and the ban of trials *in absentia* which is not absolute.¹³⁶³ Even Rwanda made this confusion in its observations when it contended:

(...) it remains unclear whether or not *the prosecution of the accused in absentia* is allowed. The experience of international tribunals and domestic courts would be helpful to clarify this issue. The general rule is that in criminal proceedings the presence of the accused is mandatory. However, this is not absolute. The rationale for this rule is to secure the fair trial requirement stipulated to, not only in international instruments, but also probably in the criminal statutes of almost every state. Particularly, Article 14 of International Covenant on Civil and Political Rights, Article 6 of the European Convention on Human Rights and the relevant statutory articles of the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), all encapsulate this norm. (...) States are reluctant to exercise *universal jurisdiction in absentia*. Such a strict requirement may preclude the effective exercise of universal jurisdiction. The position of Rwanda on this issue is that there should be a fair balance and "the meaning of this right to fair trial is not to be interpreted too literally." In this regard, we support the position of ICTR in Barayagwiza case, where the ICTR Chamber concluded that neither *the refusal of the accused to attend his trial nor the absence of his council* might preclude the proceedings against him provided that they were "duly informed of his on-going trial." Thus, whenever a state seeking to utilize universal jurisdiction duly informs the accused, or a state that is anticipated to provide 'secure heaven' to the perpetrator of the crime falling under the

¹³⁶² UN General Assembly, 'The Scope and Application of the Principle of Universal Jurisdiction (Agenda item 83)' (7 October-14 November 2014) Sixty-ninth Session (A/C.6/69/SR.11, 12 and 28) <http://www.un.org/en/ga/sixth/69/universal_jurisdiction.shtml> accessed 9 October 2016.

¹³⁶³ For example, the confusion is perceptible in Alina Kaczorowska-Ireland's viewpoint when, on the exercise of universal jurisdiction *in absentia*, she affirms: 'Two approaches have been adopted. The first one requires the presence of the accused within the *forum* State. The second considers that a State may exercise jurisdiction regardless of whether or not the alleged offender is in its custody. The first approach is that of the majority of common law countries which consider that 'due process' guarantees require that the accused must be present within the *forum* State. Thus, criminal trials *in absentia* are normally not permitted. Under US law the defendant must be before the court at the time the trial begins. The second approach is embraced by many civil law countries which allow a trial to take place in the absence of the accused. The main justification is that justice should not be frustrated by delays. Accordingly trials *in absentia* will either force the accused to submit to the court or allow the court to proceed'. See A. Kaczorowska-Ireland, *Public International Law* (5th edn., New York: Routledge, 2015), at 371-372.

domain of universal jurisdiction, may warrant criminal proceedings without violating the above-mentioned light to fair trial.¹³⁶⁴

Surely, if a state is forbidden to exercise universal jurisdiction *in absentia*, that amounts *a fortiori* to the proposition that it cannot organise, in this particular circumstance, a trial *in absentia*. This is how the prohibition of such trials under the Princeton Principles on Universal Jurisdiction should also be understood as the text does not explicitly envisage, contrast to the AU Model National Law,¹³⁶⁵ the ban of universal jurisdiction *in absentia*.¹³⁶⁶ But, even when the accused is present in the territory of the prosecuting state, there are further procedural steps to accomplish in order to ensure that he appears before the competent court. In this context, a trial *in absentia* (different from universal jurisdiction *in absentia* which refers to the legality of the exercise of criminal powers between states) is a procedural prohibition under human rights law, in particular because the judicial appearance is a guarantee of a fair trial. The accused person would have been given the possibility to bring his means of defence into the proceedings before the competent court decides to proceed by default. Likewise, if he anyhow escapes the proceedings after his initial appearance, it is thinkable that the trial would normally continue in his absence. These kinds of defaults may be minimised at best, should the state having closer connection with the crime at stake (by commission or nationality) be given priority for its repression. This possibility gives rise to another debate concerning the principle of subsidiarity.

ii) The Question of Subsidiarity

Subsidiarity is a concept of jurisdiction which means that the principle of universality is a default mechanism, meaning that it should be exercised only “to substitute for other countries that would be in a better position to prosecute the offender”.¹³⁶⁷ These countries are those

¹³⁶⁴ Rwanda, above note 1352, at 3-4. Emphasis is mine.

¹³⁶⁵ Article 4 (a) of the African Union Model National Law on Universal Jurisdiction over International Crimes stipulates: ‘The Court shall have jurisdiction to try any person alleged to have committed any crime under this law, regardless of whether such a crime is alleged to have been committed in the territory of the State or abroad and irrespective of the nationality of the victim, provided that such a person shall be within the territory of the State’.

¹³⁶⁶ Principle 1 (2) states : Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body’.

¹³⁶⁷ Cassese, above note 604, at 593.

which have closer connection with the crime (territorial state), the offender (active personality) or even the victim (passive personality). But, even though subsidiarity may be provided for in some domestic legal systems, it is difficult to say that it is a positive rule of international law, simply because the sovereign equality of states implies that there is no hierarchy between states that are in a position to exercise any type of criminal jurisdiction over the crime at stake.¹³⁶⁸ This lack of hierarchy, from which it can be departed through particular arrangements, may be in turn a source of conflicts between national jurisdictions. The plea for ascertaining the principle of subsidiarity as a condition for the exercise of universal jurisdiction under international law aims to solve such conflicts between states. Subsidiarity would give the country which is the best qualified to exercise jurisdiction the opportunity to prosecute the crime by means of its own legal system.¹³⁶⁹ In this regard, the state which is in a position to exercise universal jurisdiction would intervene only when neither state that may be considered as the best *forum conveniens* is willing and able to prosecute. That could bring the exercise of universal jurisdiction to the level of conditions established for the application of the ICC complementarity principle.¹³⁷⁰

The principle of subsidiarity has been incorporated in the AU Model National Law on Universal Jurisdiction over International Crimes. This text provides that “in exercising jurisdiction under this law, a court shall accord priority to the court of the state in whose territory the crime is alleged to have been committed, provided that the state is willing and able to prosecute”.¹³⁷¹ But, one may observe that the AU Model National Law on Universal Jurisdiction over International Crimes inaccurately restricts the best *forum conveniens* to prosecute to the territorial state, while the state of nationality of the offender or the victim may also claim for their primary jurisdiction. This possibility is explicitly stipulated by the IIL resolution of 26 August 2005 on universal jurisdiction with regard to genocide, crimes against humanity and war crimes, which reads as follows:

Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality,

¹³⁶⁸ Lafontaine, above note 609, at 139.

¹³⁶⁹ Morrison and Weiner, above note 1350, at 10; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, above note 294, para.59.

¹³⁷⁰ ICC Statute, Article 17.

¹³⁷¹ African Union Model National Law on Universal Jurisdiction over International Crimes, Article 4 (b).

with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender.¹³⁷²

The same resolution envisages an obligation for the state relying on universal jurisdiction to ask, before commencing any trial,¹³⁷³ the state having a proximate connection with the crime (territoriality) or the offender (nationality) whether it can prosecute or not. There is even a sort of double subsidiarity since that state is also obligated to consider the competent international criminal tribunal. The relevant operative paragraph in the said resolution reads as follows:

Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so. It shall also take into account the jurisdiction of international criminal courts.¹³⁷⁴

Despite these two gaps of the AU Model National Law on Universal Jurisdiction over International Crimes, it appears to be a better instrument than the Princeton Principles which do not normally establish a hierarchy between the state which has no ground for jurisdiction other than the principle of universality and other states. In this respect, principle 8 precisely provides for an aggregate balance of criteria on which the state of custody which is in a position to exercise universal jurisdiction shall, in deciding whether to prosecute or to extradite, base its decision.¹³⁷⁵ These criteria are: i) the existence of multilateral or bilateral treaty obligations; ii) the place of commission of the crime; iii) the nationality connection of the alleged perpetrator to the requesting state; iv) the nationality connection of the victim to the requesting state; v) any other connection between the requesting state and the alleged perpetrator, the crime or the victim; vi) the likelihood, good faith, and effectiveness of the prosecution in the requesting state; vii) the fairness and impartiality of the proceedings in the requesting state; viii) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; ix) the interests of justice.¹³⁷⁶ They can be equally used for

¹³⁷² Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes, above note 281, para.3 (d).

¹³⁷³ This means that such a demand may not be sent to the state having primary jurisdiction at the stage of mere investigation.

¹³⁷⁴ *Ibid.*, para.3 (c).

¹³⁷⁵ Macedo, above note 633, at 32.

¹³⁷⁶ *Ibid.*

the determination of the best *forum conveniens* to prosecute in the event of competing jurisdictions between the territorial state, the state of nationality of the offender or the victim.

In addition, the AU Model National Law on Universal Jurisdiction over International Crimes establishes for the state of custody relying on universal jurisdiction an obligation, rather than discretion, to give priority to the best *forum conveniens* to prosecute. But, it is hard to predict which option (obligatory or optional and discretionary subsidiarity) will be adopted at the UN level. Obligatory subsidiarity implies that the state relying on the principle of universality has a duty to decline its jurisdiction should a state with a proximate connection with the case be willing and able to prosecute. Conversely, optional and discretionary subsidiarity means that the said state would have to choose between according priority to the primary jurisdiction of the best qualified *forum conveniens* and prosecuting by itself. In this regard, one may uphold the choice of the mandatory subsidiarity as an appropriate judicial policy in order to avoid at maximum any manipulation of justice for political ends and so to safeguard stable relations between states. The decline of universal jurisdiction should be refused only for exceptional reasons, such as those which can justify the refusal of extradition for international crimes: risk of torture, denial of fair trial guarantees, application of the death penalty, risk of summary execution or enforced disappearance, etc.¹³⁷⁷

A close related problem has arisen as to whether it is appropriate to leave to the country of custody relying on the principle of universality the power to decide if the state (or which one among countries in competition) claiming for a different basis of jurisdiction is genuinely willing and able to prosecute. This question is based on the concern that leaving such power in the hand of the custodial state may result in unfair, partial and arbitrary decisions vis-à-vis the requesting countries. Basically, the custodial state would be adjudicating its own case in which it is opposed to the state claiming for its primary jurisdiction. It would also be a way to giving a foreign state the authority to scrutinise the proper functioning of the legal system of another country in a manner which is at odds with the sovereign equality of states. That is why proposals to confer that power on an international institution have been formulated. In 2006, Claus Kreß made the suggestion that “an international judicial organ rather than the state concerned, should be entrusted with the power to make the decision as to whether another state was or is unwilling or unable to conduct the criminal proceedings in a given case where such a decision is necessary to apply the *subsidiarity* or the *ne bis in idem*

¹³⁷⁷Lafontaine, above note 609, at 142.

principle”.¹³⁷⁸ It must be noted that the proposition is without prejudice to a different procedure whereby the suspect may himself have the right to challenge the admissibility of his case in the prosecuting state on the basis of universal jurisdiction. It has been suggested that such an international judicial organ to make that decision can be the ICC,¹³⁷⁹ meaning that it would decide on issues of complementarity of its own jurisdiction and subsidiarity between states with the potential to unite the jurisprudence. But, according to Jo Stigen, an alternative could be that “the state contesting the exercise of jurisdiction could always turn to the ICJ, arguing that the forum state has violated the (subsidiarity) principle”.¹³⁸⁰ That is also the view of European states within the Sixth Committee¹³⁸¹ and the suggestion of the Princeton Principles.¹³⁸² But, again, the two proposals encompass some weaknesses. First, the ICC as well as the ICJ jurisdictions may not be necessarily accepted by all the litigating states. Second, the ICC jurisdiction is limited to a number of international crimes which may not constitute the entire list of crimes over which states can exercise universal jurisdiction. As a result, the Court’s Statute requires a deep reform for the discharge of that expanded mandate.

Alternatively, the AU has suggested that “there is need for establishment of an international regulatory body with competence to review and/or handle complaints or appeals arising out of abuse of the principle of universal jurisdiction by individual States”.¹³⁸³ This is a broad proposal as it goes beyond the sole issue of subsidiarity and recalls what was already

¹³⁷⁸ C. Kreß, ‘Universal Jurisdiction over International Crimes and the Institut de Droit international’, 4 *Journal of International Criminal Justice* (2006) 561-585, at 584-585.

¹³⁷⁹ J. Stigen, ‘The Relationship between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 133-160, at 157.

¹³⁸⁰ *Ibid.*

¹³⁸¹ Lijiang, above note 1308, at 219.

¹³⁸² Principle 14 (1) indicates : ‘Consistent with international law and the Charter of the United Nations states should settle their disputes arising out of the exercise of universal jurisdiction by all available means of peaceful settlement of disputes and in particular by submitting the dispute to the International Court of Justice’. In the meanwhile, principle 14 (2) solves the problem of the position of the accused person during the procedure of peaceful settlement of disputes as follows: ‘Pending the determination of the issue in dispute, a state seeking to exercise universal jurisdiction shall not detain the accused person nor seek to have that person detained by another state unless there is a reasonable risk of flight and no other reasonable means can be found to ensure that person’s eventual appearance before the judicial organs of the state seeking to exercise its jurisdiction’.

¹³⁸³ Assembly/AU/Dec.199 (XI), above note 221, para.5 (v) ; Assembly/AU/Dec.243(XIII) Rev.1, above note 603, para.5; Assembly/AU/Dec.292(XV), above note 864, para.4

suggested by Susane Walter in 2005, i.e. the establishment of an international system of accreditation allowing to monitor the correct application of universal jurisdiction.¹³⁸⁴ But, the project is also challenged on the ground that it would jeopardise the independence of the national judiciaries.¹³⁸⁵ It also seems to be a bureaucratic proposition adding itself to the existing mechanisms of the system of international justice which all states have not yet accepted.¹³⁸⁶ In this respect, Paula Gaeta finally notes that the project “would create a useless burden, which would discourage –instead of encouraging –domestic prosecutions of international crimes”,¹³⁸⁷ while they are “a central component for the international community to become that which it ostensibly claims to be –a true community”.¹³⁸⁸ The debates are thus very opened at the UN level as they seem to be regarding the reform of the ICC justice system.

3.1.2.2. The Proposed Reform of the ICC Justice System

Apart from searching for regulatory provisions for the application of the principle of universal jurisdiction, African states also express a strong need to reform the ICC justice system. It is not just about amending one or several provisions of this treaty, but to change fundamentally its configuration compared with the provisions on which states agreed at the United Nations Diplomatic Conference of Plenipotentiaries in Rome. Earlier initiatives were triggered by the AU (a), but proposals for amendments were submitted to the ASP by South Africa and Kenya (b).

a) *The Earlier Initiatives of the African Union*

The impetus to the reform of the ICC justice system was given by the AU which convened several meetings of African states in order to discuss the work of this Court in the continent. It was in July 2009 that the AU Assembly decided, on the basis of issues highlighted by the

¹³⁸⁴ Kreß, above note 1378, at 584. This author refers to S. Walther, ‘Terra Incognita: Wird staatliche internationale Strafgewalt den Menschen gerecht?’, in A. Eser, U. Sieber and J. Arnold (eds.), *Menschengerechtes Strafrecht. Festschrift für Albin Eser zum 70. Geburtstag* (München: Verlag C.H. Beck, 2005), at 953.

¹³⁸⁵ Lijiang, above note 1308, at 219.

¹³⁸⁶ Lafontaine, above note 609, at 142.

¹³⁸⁷ Gaeta, above note 274, at 606.

¹³⁸⁸ *Ibid.*

earlier meeting of June 2009,¹³⁸⁹ to fix a list of items that deserved to be addressed by the meeting of African states parties or not to the ICC Statute that took place in November 2009. African proposals for amendments to this treaty were expected to be formulated after the discussion of the following six legal issues: i) article 13 of the ICC Statute granting power to the UN Security Council to refer cases to the ICC; ii) article 16 of the same Statute granting power to the UN Security Council to defer investigations or prosecutions for one (1) year; iii) procedures of the ICC; iv) clarification on the immunities of officials whose states are not party to the Statute; v) comparative analysis of the implications of the practical application of articles 27 and 98 of the Rome Statute; vi) the possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution, particularly against senior state officials.¹³⁹⁰ But, the list was not exhaustive. It was opened to evolution because the AU Assembly decided to reserve “any other areas of concern to African States Parties”.¹³⁹¹ The AU Commission, which prepared the concept note for this meeting reduced these items to five issues, namely the development of guidelines for the exercise of prosecutorial discretion, the power of the Security Council to refer cases to the ICC, the power of the Security Council to defer cases for one year, the immunities of officials whose states are not parties to the Rome Statute, and proposals relating to the crime of aggression.¹³⁹²

The meeting of 6 November 2009 reached several recommendations after deliberations under the chair of South Africa. First of all, African states called for a review of the regulations and the policy paper regarding “the guidelines and code of conduct of the exercise of (discretionary) prosecutorial powers to include factors of promoting peace (...)”.¹³⁹³ Second, they gave up the possibility to amend the power of the Security Council to refer situations to the ICC in view of the fact that it was the organ responsible for the maintenance of international peace and security and it had the power to set up *ad hoc* criminal tribunals.¹³⁹⁴ Third, instead, a consensus was found that article 16 of the Court’s Statute conferring the

¹³⁸⁹ Executive Council of the African Union, above note 1332, para.4

¹³⁹⁰ Assembly/AU/Dec.245 (XIII) Rev.1, above note 1119, para.8.

¹³⁹¹ *Ibid.*, para.8 (vii).

¹³⁹² Executive Council of the African Union, ‘Introduction to the Report of the Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)’, EX.CEL/568 (XVI), Addis Ababa (Ethiopia), 6 November 2009, para.3.

¹³⁹³ Executive Council of the African Union, above note 1332, para.13 (R.1).

¹³⁹⁴ *Ibid.*, para.13 (R.2).

power on the Security Council to defer investigations or prosecutions for one year should be amended. That power should be shared with the General Assembly.¹³⁹⁵ Fourth, concerning the problem of immunities, the meeting recommended that articles 27 and 98 of the ICC Statute should be discussed by the ASP in order to obtain clarification on their application particularly with regard to states not parties.¹³⁹⁶ In fact, “there is a need to clarify whether immunities enjoyed by officials of non states parties under international law have been removed by the Rome Statute or not”.¹³⁹⁷ This means that an amendment to the immunity regime was not yet at issue. The misunderstanding of its scope and application should have been settled before envisaging any proposal to amend it in view of the proper interpretation of the AU. Fifth, regarding the crime of aggression whose discussion was scheduled during the Review Conference which took place in Kampala (Uganda) in 2010, it was recommended that “the Security Council should not be granted exclusive powers to make a determination on whether aggression has been committed or not before the ICC can exercise jurisdiction with respect to crime of aggression”.¹³⁹⁸ According to the AU and its member states, considerations could have been paid to granting the same power to other UN organs, namely the ICJ and the General Assembly.¹³⁹⁹

It follows that apart from the option for amending article 16 of the ICC Statute, the AU and its member states were, at this stage, very far from a profound reform of the ICC justice system. Proposals were still very modest. Thus, the above mentioned recommendation one was expected to be dealt with through a mere resolution of the ASP calling the OTP to review the prosecutorial guidelines.¹⁴⁰⁰ In contrast, the remaining recommendations could be handled and discussed thoroughly by the ASP.¹⁴⁰¹ All these options were endorsed by the AU Assembly in its decision of January 2010.¹⁴⁰² It is likely that because of the judicial escalation

¹³⁹⁵ *Ibid.*, para.13 (R.3).

¹³⁹⁶ *Ibid.*, para.13 (R.4).

¹³⁹⁷ *Ibid.*

¹³⁹⁸ *Ibid.*, para.13 (R.6).

¹³⁹⁹ *Ibid.*

¹⁴⁰⁰ *Ibid.*, para.14 (ii).

¹⁴⁰¹ *Ibid.*, para.14 (iii).

¹⁴⁰² Assembly/AU/DEC.270 (XIV), Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC) (DOC. Assembly/AU/8(XIV)), 14th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 31 January-2 February 2010, para.2.

of African situations before the ICC, notably the Kenyan situation, the AU and its member states expanded the proposals for amendments to the Court's justice system.

b) The African Proposals for Amendments to the ICC Statute

It is the right of each state party, not an intergovernmental organisation or a non-contracting state, to submit proposals for amendments to the ICC Statute. In this respect, the Rome Statute provides that “after the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto”.¹⁴⁰³ Accordingly, the amendments promoted by the AU had to be backed up by willing African states parties. Thus, South Africa took on its part the proposal to amend article 16 concerning the power of the Security Council to defer investigation or prosecution and submitted it, on behalf of the African states parties, to the 8th session of the ASP, held from 16 to 26 November 2009. Kenya, on its side, formulated further proposals for amendments which were not discussed during the meetings of African states parties. It notified its proposals to the UN Secretary General on 22 November 2013 and submitted them for the first time to the 14th session of the ASP, held from 8 to 17 December 2014. All these proposals can be highlighted (i) before analysing a number of legal obstacles which they could face for their adoption or to get in force (ii).

i) The Submissions of South Africa and Kenya

Overall, South Africa submitted its amendment proposal to the ASP in the context of an institutional tension between the AU, the Security Council and the Court owing to the manner in which the latter was dealing with several African situations.¹⁴⁰⁴ The main contention turns around the power of the Security Council to refer situations to or defer cases from the Court.¹⁴⁰⁵ In the past, there was profound problems of politicised justice with a selective application of articles 13 (b) and 16 of the Rome Statute. With respect to article 13 (b), the Security Council referred the situations in Sudan and Libya to the ICC, but failed to do so in respect of other countries (Palestine and Syria).¹⁴⁰⁶ Likewise, the Security Council several

¹⁴⁰³ ICC Statute, Article 121 (1).

¹⁴⁰⁴ See B. C. Olugbuo, ‘The African Union, the United Nations Security Council and the Politicization of International Justice in Africa’, *7 African Journal of Legal Studies* (2014) 351-379, at 354.

¹⁴⁰⁵ *Ibid.*, at 351.

¹⁴⁰⁶ About Palestine, the main opposition has come from the United States of America, while Russia has resorted to its veto power concerning the situation in Syria.

times resorted to article 16 of the ICC Statute,¹⁴⁰⁷ on the request of the United States of America,¹⁴⁰⁸ but failed to do so for the situations in Kenya and in Sudan, on the AU request. Concerning the Kenyan situation, the deferral request of investigations and prosecutions against President Uhuru Kenyatta and Deputy President William Ruto for a period of 12 months did not get a majority vote in support. True, none of the Security Council members voted against the draft deferral resolution. Azerbaijan, China, Morocco, Pakistan, Russian Federation, Rwanda and Togo voted in favour. But, other members, particularly all the Western powers, abstained.¹⁴⁰⁹ Instead, the Security Council simply failed to consider the deferral request regarding the situation in Sudan. The AU Assembly expressed its deep disappointment that the request to the Security Council to defer the proceedings initiated against the President of Sudan was acted upon.¹⁴¹⁰ It has qualified the Security Council's failure as being tantamount to a "lack of consideration of a whole continent".¹⁴¹¹

It is under these circumstances that the need to frame differently the relationship between the ICC and the Security Council has appeared in order to avoid a sort of double standard in the application of the Court's Statute. While the AU has renounced to the amendment of article 13 (b) concerning the power of the Security Council to refer situations to the ICC Prosecutor, it has endorsed the proposal to amend article 16 of the Rome Statute, thereby adding to it paragraphs 2 and 3. In essence, South Africa has submitted the proposal in the following terms:

Deferral of Investigation or Prosecution

1) No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under the Chapter VII of the Charter of the United Nations, has requested the Court to that effect, that request may be renewed by the Council under the same conditions. 2) A State with jurisdiction over a situation before the Court may request the UN Security Council to defer the matter before the Court as

¹⁴⁰⁷ SC Res. 4222 (2002), 12 July 2002, para.1; SC Res.1487 (2013), 12 June 2013, para.1.

¹⁴⁰⁸ See Abass, above note 1236, at 263-264.

¹⁴⁰⁹ SC 7060th meeting, S.PV/7060, above note 1040, at 2. Abstention was made by Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom of Great Britain and Northern Ireland, United States of America.

¹⁴¹⁰ Assembly/AU/DEC.296 (XV), above note 1029, para.4.

¹⁴¹¹ Assembly/AU/Dec.493(XXII), Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court (Doc. Assembly/AU/13(XXII)), 22nd Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 30-31 January 2014, para.8.

provided for in (1) above. 3) Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under paragraph 1 consistent with Resolution 377 (v) of the UN General Assembly.¹⁴¹²

On its side, Kenya has submitted five proposals for amendments. Three of them pertain to the institution of trial in the absence of the accused for exceptional circumstances under article 63,¹⁴¹³ the inclusion of offenses against the administration of justice committed by the Court's officials under article 70¹⁴¹⁴ and the establishment of an independent oversight mechanism enjoying the power to carry out inspection, evaluation and investigations of all the organs of the Court.¹⁴¹⁵ But, the most important proposals which deserve some specific comments relate to the principle of complementarity and the immunity regime applicable before the Court.

¹⁴¹² Secretariat of the Assembly of the States Parties, 'Informal Compilation of Proposals to Amend the Rome Statute' (23 January 2015), at 8-9 <http://www.icc-cpi.int/iccdocs/asp_docs/Publications/WGA-Inf-Comp-RS-amendments-ENG.pdf> accessed 29 September 2015.

¹⁴¹³ *Ibid.*, at 9. The proposal is articulated as follows: 'Article 63 - Trial in the Presence of the accused. Under the Rome Statute, article 63(2) envisages a trial in absence of the Accused in exceptional circumstances. The Rome Statute does not define the term exceptional circumstances and neither are there case laws to guide the Court on the same. Article 63(2) further provides other caveats in granting such trials in circumstances where other reasonable alternatives have provided to be inadequate and for a strictly required duration. From the above, it is our humble opinion that an amendment to article 63(2) may be considered along the following lines: "Notwithstanding article 63(1), an accused may be excused from continuous presence in the Court after the Chamber satisfies itself that exceptional circumstances exists, alternative measures have been put in place and considered, including but not limited to changes to the trial schedule or temporary adjournment or attendance through the use of communications technology or through representation of Counsel. (2) Any such absence shall be considered on a case-by-case basis and be limited to that which is strictly necessary. (3) The Trial Chamber shall only grant the request if it determines that such exceptional circumstances exist and if the rights of the accused are fully ensured in his or her absence, in particular through representation by counsel and that the accused has explicitly waived his right to be present at the trial".

¹⁴¹⁴ *Ibid.*, at 10. The proposal is articulated as follows: 'This particular article presumes that such offences save for 70(1) (f) can be committed only against the Court. Noting the current situation in the Kenyan cases especially Trial Chamber V (b). This article should be amended to include offences by the Court Officials so that it's clear that either party to the proceedings can approach the Court when 2 such offences are committed. It is proposed that paragraph 1 be amended as follows: "The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally by any person:"

¹⁴¹⁵ *Ibid.* The proposal is articulated as follows: 'Article 112 -Implementation of IOM. Article 112 (4) Assembly of States Parties shall establish such subsidiary bodies as may be necessary including Independent Oversight mechanism for inspection, evaluation and investigation of the Court ,in order to enhance its efficiency and

Regarding the principle of complementarity, the idea is that regions (starting with Africa) may continue to claim more control over the prosecution of international crimes to the detriment of the universal level. There is need to create “new geographies of justice”¹⁴¹⁶ at the regional level that the ICC Statute should explicitly take into account.¹⁴¹⁷ This perspective could promote the ownership of international criminal justice and reduce the perception of politicisation of ICC’s prosecutions at the convenience of big powers. In this regard, Kenya has proposed to amend the preamble of the Rome Statute which states that the ICC “shall be complementary to national criminal jurisdictions”.¹⁴¹⁸ The Kenyan proposal intends to ensure that the Court is also “complementary to national and regional criminal jurisdictions”.¹⁴¹⁹ But, one may wonder how this proposal could be operationalised if it is not followed by a proposal of amendment to article 17 on issues of admissibility before the Court. Vertical relationships between the ICC and any emerging regional criminal court should be anticipated and harmonised in advance. This would not be a loss for the ICC. On the contrary, the diversification of enforcement mechanisms of law may strengthen the quest for justice and the fight against impunity. The international community in a whole should accept and support the idea of the regionalisation of international criminal justice,¹⁴²⁰ because, as Heike Krieger has rightly put it, “there is a strong presumption that effective enforcement requires a multilevel

economy. This includes the conduct of officers/procedure/code of ethics in the office of the prosecutor. The Office of the Prosecutor has historically opposed the scope of authority of the IOM. Under Article 42 (1) and (2) the Prosecutor has power to act independently as a separate organ of the Court with full authority *over* the management and administration of the office. There is a conflict of powers between the OTP and the IOM that is continuously present in the ASP. It is proposed that IOM be operationalized and empowered to carry out inspection, evaluation and investigations of all the organs of the Court’.

¹⁴¹⁶ T. McNamee, ‘The ICC and Africa. Between Aspiration and Reality: Making International Justice Work Better for Africa. Reflections on a High-Level Roundtable, Co-hosted by the Brenthurst Foundation and the Africa Centre for Strategic Studies’, Discussion Paper 2/2014 (18-19 March 2014), Addis Ababa (Ethiopia), at 14.

¹⁴¹⁷ See J. de Hemptinne, ‘The Future of International Criminal Justice: a Blueprint for Action’, in A. Cassese (ed.), *Realizing Utopia: the Future of International Law* (Oxford: Oxford University Press, 2012) 585-595, at 587-592.

¹⁴¹⁸ ICC Statute, Preamble, para.10.

¹⁴¹⁹ Secretariat of the Assembly of the States Parties, above note 1412, at 11.

¹⁴²⁰ See A. Soma, ‘L’afrikanisation du droit international pénal’, in Société africaine pour le Droit international (SADI), *L’Afrique et le droit international pénal* (Paris : Pedone, 2015) 7-36, at 12.

system”.¹⁴²¹ Therefore, the regionalisation process should not be perceived as a negation of the existing system of (global) international criminal law.¹⁴²²

Concerning the immunity regime for sitting senior states officials, particularly heads of states, the state of the ICC-Africa relationship shows that the rules borne by articles 27 and 98 of the Rome Statute is prone to a lot of misunderstandings. The controversial decisions of the ICC Pre-Trial Chamber affirming an exceptional waiver of immunity for sitting heads of state has not put an end to the debate. Rather, in October 2013, the AU adopted the decision precluding any charges to be commenced or continued before any international court or tribunal against any serving AU head of state or government or anybody acting or entitled to act in such capacity during their tenure of office.¹⁴²³ Later, the AU Amendments Protocol on the Statute of the African Court of Justice and Human Rights (AfCJHR) even added to the list of beneficiaries of personal immunities “other senior states officials”¹⁴²⁴ in case of charges brought before the criminal section of the African Court. These officials could be determined by the African Court on a case-by-case basis.¹⁴²⁵

The Kenyan proposal of amendment is a bit weaker than the AU position on personal immunities before international criminal courts. It intends to provide for a possibility for the ICC to exempt some state officials from prosecutions on a case-by-case basis. This would be provided for in an additional paragraph 3 to article 27 of the ICC Statute which reads as follows: “Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies

¹⁴²¹ H. Krieger, ‘A Turn to Non-State Actors: Inducing Compliance with International Humanitarian Law in War-Torn Areas of Limited Statehood’, 62 *SFB-Governance Working Paper Series* (June 2013) 1-46, at 27; H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law -Lessons from the African Great Lakes Region* (Cambridge: Cambridge University Press, 2015), at 539.

¹⁴²² Soma, above note 1420, at 12.

¹⁴²³ Ext/Assembly/AU/DEC.1 (Oct.2013), above note 1039, para.10 (i).

¹⁴²⁴ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Article 46A *bis*. This Article stipulates: ‘No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office’.

¹⁴²⁵ African Union, ‘Report of the First Ministerial Meeting of the Specialized Technical Committee on Justice and Legal Affairs’, STC/Legal/Min/Rpt., Addis Ababa (Ethiopia), 15 and 16 May 2014, para.26. See also Executive Council of the African Union, ‘The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs’, EX.CL/846(XXV), Malabo (Equatorial Guinea), 20-24 June 2014.

and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions". It follows that the category of "other senior states officials" included in the AU amendments Protocol would not be formally covered before the ICC. In addition, it is clear that the Kenyan proposal of amendment could not solve the initial problem raised by the AU suggesting that officials of states not parties to the ICC Statute are immune from its jurisdiction. Given all these contradictory languages on the immunity regime (personal, but not functional) before international tribunals, a better course could be to put the issue on the table of negotiation and to elaborate a comprehensive clarification and reform.

This recommendation also finds support in the fact that the problem of immunity is not particular to the AU and African states. To some extent, it has also been raised at the global level in the resolutions of the Security Council excusing nationals of some third states from the ICC jurisdiction. The United States of America went even farther and used the strategy of the so-called "Bilateral Immunities Agreements (BIA)" concluded with other states (parties and not parties) in order to defeat the potential ICC jurisdiction over American citizens.¹⁴²⁶ There has to be found a balance between the struggle against impunity and the interests of weak countries to which any exception to the rules on personal immunity would be applicable in *de facto* exclusion of leaders of big powers. It is now a presumption that the extreme treaty rule making official capacities irrelevant as provided for by the ICC Statute clashes with state sovereignty and the complexity of international relations. Even if a reform is much needed, there are several obstacles to amend the ICC justice system as expected.

ii) The Potential Obstacles against the Proposed African Amendments

Apart from the proposal to establish an independent oversight mechanism of the organs of the Court, which does not require the modification of its Statute but the exercise of the power of control conferred on the ASP, the proposed African amendments are likely to face a number of legal obstacles. This is beforehand due to the nature of these proposals. The Rome Statute distinguishes between amendments to provisions of an institutional nature and others. The interest of such a distinction lies in the applicable procedure which is to lead to their adoption and entry into force.

¹⁴²⁶ JEU, above note 962, at 431-441.

Amendments to provisions of an institutional nature are those which are provided for under article 122 (1) of the ICC Statute which stipulates:

Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party.

The conditions for the adoption and entry into force of these amendments are less stringent than those provided for the others of procedural or substantive nature. The ICC Statute specifies that the amendments of an institutional nature “on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two thirds majority of States Parties”.¹⁴²⁷ Furthermore, “such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference”.¹⁴²⁸

Instead, even though the category of amendments of procedural or substantive nature shall be adopted by a two thirds majority if consensus is not found, their entry into force for all states parties is made dependent on two conditions. First, any of such amendments must be ratified by seven-eighths of states parties.¹⁴²⁹ Second, the entry into force becomes effective only one year after “instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations”.¹⁴³⁰ The sole exception to this provision relates to amendments to the substantive jurisdiction (the list of crimes at stake and their constituent elements) of the Court and reads:

Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.¹⁴³¹

¹⁴²⁷ ICC Statute, Article 122 (2).

¹⁴²⁸ *Ibid.*

¹⁴²⁹ *Ibid.*, Article 121 (4).

¹⁴³⁰ *Ibid.*

¹⁴³¹ *Ibid.*, Article 121 (5).

It follows that the African proposals of amendments which are not of an institutional nature or do not relate to the crimes within the ICC jurisdiction require almost a unanimous ratification or acceptance by states parties. It is likely very difficult to reach this threshold and the amendments, if adopted, would take many years to come into force.

Several other obstacles are specific to the amendment submitted by South Africa. The first one is the potential objection to the legality of the proposal to confer on the General Assembly the power that it does not directly have under the UN Charter.¹⁴³² In fact, this political body is deprived of coercive powers such as those provided for in Chapter VII and on the basis of which the Security Council can adopt a resolution to defer investigations or prosecutions for the purpose of maintaining international peace and security. The allocation of powers between these two UN principal organs cannot be changed or modified by an amendment to the ICC Statute,¹⁴³³ which is a distinct treaty from the UN Charter. Maybe, this is why the South African proposal has made reference to the resolution 377 (V) of 3 November 1950, the so-called “Uniting for Peace Resolution”, which says:

(...) if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security (...).¹⁴³⁴

Despite the fact that the consistency of this resolution with the UN Charter may be controversial, it is argued that it does not explicitly confer on the General Assembly the power to take binding decisions, whereas a deferral resolution must bind the ICC organs, such as the OTP and the chambers.¹⁴³⁵ According to Dapo Akande, Max Du Plessis and Charles C. Jalloh, it is however possible to confer on the General Assembly the power to request deferrals.¹⁴³⁶ In their view, “this is because the power to make a request for deferrals is

¹⁴³² D. Akande, M. Du Plessis and C. C. Jalloh, ‘An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC’, Institute for Security Studies Position Paper (2010), at 13.

¹⁴³³ *Ibid.*

¹⁴³⁴ UNGA Res. 377 (V) A, above note 360, para.1

¹⁴³⁵ Akande, Du Plessis and Jalloh, above note 1432, at 13.

¹⁴³⁶ *Ibid.*

nothing more than that: a request – as far as the requesting body is concerned. However, that request is made binding on the ICC by the Rome Statute under article 16”.¹⁴³⁷

Of course this would not be the first time that a separate treaty contains an obligation to the effect that its addressees must have regard to a non-binding act of an organ of an intergovernmental organisation.¹⁴³⁸ However, this suggestion is unnecessary simply because, as demonstrated earlier, even if the General Assembly is deprived of coercive powers, some of its recommendations may qualify as binding decisions. The only limitation is that it shall not decide on a question which is at the same time actively examined by the Security Council. As a consequence, the true problem with the reference to the Uniting for Peace Resolution in the South African amendment proposal is to reduce the possibility for the General Assembly to be requested to act. In fact, this reference may suggest that the General Assembly is unable to decide “if the reason for which an unsuccessful request for deferral is anything other than the use of the veto by a permanent member of the UNSC”.¹⁴³⁹ Obviously, other possible options are not covered such as the lack of a majority vote for a deferral resolution of the Security Council or the failure even to consider the issue as illustrated by the freezing of the AU request to defer investigations and prosecutions in regard to the situation in Sudan. Therefore, it would be better to remove that reference from the South African proposal.¹⁴⁴⁰ Such a removal would not be at odds with the UN Charter.

The second specific obstacle will remain at the diplomatic level. It has to be reminded that many states (including Africans) had attempted to oppose the granting of deferral power to the Security Council during the Diplomatic Conference of Plenipotentiaries in Rome. Even if this power could be politically well justified if it had been conferred on the General Assembly, due to its wider representativeness and its legitimacy, it is improbable that many

¹⁴³⁷ *Ibid.*

¹⁴³⁸ Kahombo, above note 1193, at 439-440. The example provided by this author is the Convention on the Privileges and the Immunities of the United Nations (13 February 1946) with respect to the advisory opinion of the ICJ. Under section 30 of its Article VIII, it is stipulated: ‘All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties’.

¹⁴³⁹ Akande, Du Plessis and Jalloh, above note 1432, at 16.

¹⁴⁴⁰ *Ibid.*

states would now accept that another political body, next to the Security Council, is allowed to interfere with ICC's proceedings.¹⁴⁴¹ This is because the proposal is likely to increase the politicisation of the Court and undermine its independence. The same reason seems to have captured the attention of states parties at the Review Conference of Kampala (Uganda) in 2010. Whereas the AU and its member states suggested that the exercise of the Court's jurisdiction over the crime of aggression should depend on the prior determination of an act of aggression not only by the Security Council, but also by other UN organs, notably the General Assembly, the suggestion did not find support from other states. The Kampala compromise on this issue only provides for the power of the Security Council to make such a determination.¹⁴⁴² But, there is one exception in the following terms:

Where no such determination is made within six months after the date of notification (of a situation before the Court by the Prosecutor to the Secretary General of the United Nations), the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.¹⁴⁴³

This diplomatic obstacle may provoke another kind of crisis within the ICC justice system. The logic of negotiations which is based on discussing the proposed amendments to the Court's Statute could be replaced by the logic of confrontation between states in favour of the African proposals and those opposing their adoption. The reform of the scope and application of the principle of universal jurisdiction runs the same risk.

3.2. The Logic of International Confrontation

The claims for legal reforms of the system of international criminal justice seem to generate oppositions between states and other actors of international relations (ICC, EU, NGOs, etc.).

¹⁴⁴¹ *Ibid.*

¹⁴⁴² ICC Statute, Article 15 *bis* (6 and 7). These provisions are read as follows: "6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents. 7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression".

¹⁴⁴³ *Ibid.*, Article 15 *bis* (8).

None of the proposed reforms has been so far adopted. Strategies developed to block or to push for adoption of these reforms by each side are contradictory. The language of protective measures from the AU (3.2.1) constitutes a response to the apparent international resistance to the unheeded proposals to reform the system of international criminal justice (3.2.2).

3.2.1. The Protective Measures of the African Union

The AU has adopted two principal protective measures to defend its member states against the perceived bias of the system of international criminal justice. The first one consists of the creation of the obligation for member states not to cooperate in the execution of arrest warrants issued against African leaders (3.2.1.1). The second measure is the threat of a collective withdrawal of African states parties from the ICC (3.2.1.2).

3.2.1.1. The Obligation not to Cooperate

Two situations are under consideration here. In the first place, the UA has considered arrest warrants delivered by European states in application (or so presupposed) of the principle of universal jurisdiction. In this respect, earlier in July 2008, it decided that “those warrants shall not be executed in African Union Member States”.¹⁴⁴⁴ A request was also made to all UN member states, particularly EU states, to impose a moratorium on the execution of those warrants.¹⁴⁴⁵ These measures are expected to remain valid “until all the legal and political issues have been exhaustively discussed between the African Union, the European Union and the United Nations”.¹⁴⁴⁶ In the second place, regarding ICC’s proceedings, the AU has decided that African states shall not cooperate in the arrest and surrender of President Omar Al-Bashir.¹⁴⁴⁷ A similar decision has rejected the arrest warrant against the Libyan leader, Muammar Kadhafi.¹⁴⁴⁸ But, because of his death, the latter decision is of little practical usefulness.

It follows that these measures have the effect to impair the operation of prominent mechanisms (arrest warrants) for effective prosecutions of international crimes, whether at the domestic or international levels. Legal debates have been particularly hot in relation to the

¹⁴⁴⁴ Assembly/AU/Dec.199 (XI), above note 221, para.5 (iv).

¹⁴⁴⁵ *Ibid.*, para.8.

¹⁴⁴⁶ *Ibid.*

¹⁴⁴⁷ Assembly/AU/Dec.245 (XIII) Rev.1, above note 1119, para.10.

¹⁴⁴⁸ Assembly/AU/Dec.366 (XVII), above note 1030, para.6.

ICC's proceedings. Instead, any incident of refusal to comply with arrest warrants against any African state official has not occurred in the continent in relation to the exercise of universal jurisdiction. Likewise, none of the European states has raised a dispute relating to the compliance with such arrest warrants in Africa. This situation may be justified by the fact that cases of prosecutions on the basis of universal jurisdiction have sensibly diminished since the the AU protest in 2008.

That is why the following developments exclusively focus on the refusal to cooperate in the arrest and surrender of President Omar Al Bashir. The goal is not to find a sound legal solution to the problem of competing obligations which has been the reason for that refusal of African states that are also ICC members. Rather, it is about explaining the predominant logic of confrontation between interested stakeholders as another manifestation of the Court's crisis. The argumentation distinguishes the political context of the obligation for AU member states not to cooperate with the ICC (a) from its legal context (b).

a) The Political Context

The duty imposed by the AU on its member states not to cooperate and comply with ICC's arrest warrants against the Sudanese President is above all in political defiance of the Court in Africa. This defiance can be linked to three other close examples.

First of all, it is not the first time that the African region defies and disobeys decisions of a universal organisation. In 1998, the OAU adopted a similar position in relation to the historic *Lockerbie* case.¹⁴⁴⁹ It decided that its members should no longer comply with the regime of sanctions,¹⁴⁵⁰ including the denial of transport and communications links, imposed by the Security Council on Libya pursuant to Chapter VII of the UN Charter.¹⁴⁵¹ The OAU decision was based on the fact that these sanctions had become bias and unfair against the Libyan people. They simply lacked a sound justification because Libya had consented to justice by accepting that its nationals suspected of having committed the Lockerbie terrorist attack be

¹⁴⁴⁹ See T. Kalala, 'La décision de l'O.U.A. de ne plus respecter les sanctions décrétées par l'O.N.U. contre la Libye : désobéissance civile des Etats africains à l'égard de l'O.N.U.', 2 *Revue belge de droit international* (1999) 545-576, at 553-559.

¹⁴⁵⁰ SC Res.748 (1992), above note 542, para.3-6; SC Res. 883 (1993), above note 550, para.2-7.

¹⁴⁵¹ AHG/Dec.127 (XXXIV), The Crisis between the Great Socialist People's Libyan Arab Jamahiriya and the United States of America and the United Kingdom, 34th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Ouagadougou (Burkina Faso), 8-10 June, 1998, para.2-3.

tried in a third neutral state, therefore not in the USA or the United Kingdom as imposed by the same Security Council and wanted by the two latter states.¹⁴⁵² Obviously, the language of politics prevailed over the concern about the legality of the OAU decision under the UN Charter.¹⁴⁵³

Secondly, it also appears that the African defiance against the ICC is not the only example in this regard. The USA was the first country to challenge the Court through the conclusion of bilateral immunity agreements with other states, parties or not to the Rome Statute, stipulating non-surrender of American citizens to the ICC even where a request for such surrender is made by the Court.¹⁴⁵⁴ In reciprocity, the USA has committed to refuse the surrender of the other states' persons to the Court. The only difference with the African defiance is that the latter occurs in a concrete pending case while the USA strategy envisages potential situations in which one of its nationals may be sought by the ICC. For both sides, the goal is identical. They deliberately create legal conflicts in order to impair the ICC's work. This is something which Surabhi Ranganathan has correctly described as "strategically created treaty conflicts"¹⁴⁵⁵ that precisely consist of the use of a legal form to limit the operation of another.¹⁴⁵⁶ In the present situation, a treaty or treaty-based decisions are used to defeat the application of the Rome Statute. Beyond its legal perspective, this kind of defiance against the ICC is beforehand a political problem. It brings the legal dissatisfaction of states, either after the negotiation of the ICC Statute (USA) or as a consequence of the conflicting interpretation of its provisions by the Court itself (Africa), in the field of international politics.

Thirdly and last, the AU decision not to cooperate with the ICC is a political rejection of its related judicial decisions in contravention of the requirement of the rule of law. This rejection is not the only example in history of non-execution of judicial decisions of international

¹⁴⁵² *Ibid.*, para.2.

¹⁴⁵³ This is because obligations owed pursuant to resolutions adopted by the Security Council under Chapter VII of the UN Charter have a prevalence effect over any other obligations to the contrary. See UN Charter, Article 103.

¹⁴⁵⁴ See L. Burgorgue-Larsen, 'Les Etats-Unis d'Amérique et la justice internationale : entre l'utilisation et l'instrumentalisation du droit international', in R. Ben Achour and S. Laghmani (ed.), *Le droit international à la croisée des chemins : force du droit et droit de la force* (Paris : Pedone, 2004) 233-269 ; Fernandez, above note 960.

¹⁴⁵⁵ S. Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge: Cambridge University Press, 2014).

¹⁴⁵⁶ *Ibid.*, at 6.

courts, even though such a disobedience is still a minority phenomenon.¹⁴⁵⁷ The reasons underpinning such a defiance have been previously indicated, in particular the duty to respect personal immunity to which President Omar Al Bashir is entitled under international law, the misuse of indictments against African leaders and the need to safeguard peace and security in Sudan. Politically, there seems to be a lack of confidence in the impartiality of the Court. African states have just created a legal conflict in order to find a technical justification or alibi to disobey the Court's decisions willingly. Of course the Court may report cases of non-cooperation to the ASP or/and to the Security Council (which has referred the Sudanese situation to the Court) for consideration.¹⁴⁵⁸ Accordingly, this procedure has the potential to displace the issue from the judicial arena to the table of political organs external to the Court. It is up to the latter organs to find a suitable solution to the matter, the Court having no other mean to impose its decisions on states that are determined to challenge its authority. In such conditions, the legal context of the refusal to cooperate is of a secondary importance in this crisis.

b) The Legal Context

The creation of a duty not to cooperate with the ICC has given rise to competing obligations vis-à-vis African states parties to the Court's Statute. The basis of this intricate issue is presented (i) before looking at the battle of legal solutions to a problem which deserves a political treatment through dialogue (ii).

i) The Rise of Competing Obligations

The ICC Statute imposes the duty to cooperate with the Court on all state parties. This is the object of part 9 on "international cooperation and judicial assistance". The general obligation in this respect specifies that "states Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court".¹⁴⁵⁹ But, there are different aspects of cooperation under the Rome Statute. These include cooperation in the arrest and surrender of the accused person to

¹⁴⁵⁷ See M. M. Al-Qahtani, 'Enforcement of International Judicial Decisions of the International Court of Justice in Public International Law' (PhD Thesis, University of Glasgow 2003), at 181; E. L. Abdelgawad, 'L'exécution des décisions des juridictions internationales des droits de l'homme: vers une harmonisation des systèmes régionaux', 3 *Anuario Colombiano de Derecho Internacional* (2010) 9-55, at 36-42.

¹⁴⁵⁸ ICC Statute, Article 87.

¹⁴⁵⁹ *Ibid.*, Article 86.

the Court,¹⁴⁶⁰ his provisional arrest,¹⁴⁶¹ the removal of his otherwise applicable immunity¹⁴⁶² and other forms of judicial cooperation.¹⁴⁶³ In the present context, the type of cooperation requested to African states parties to the Rome Statute is only their compliance with the request for the arrest and surrender of President Omar Al Bashir to the Court. Another possible obligation for states parties to cooperate with the Court can be envisaged on the basis of the genocide Convention because the ICC is also prosecuting the accused for genocidal acts allegedly committed in Darfur.¹⁴⁶⁴

The problem of competing obligations arises from the time when the AU, relying on its Constitutive Act of 2000, imposes on its member states the obligation not to cooperate with the ICC to that effect. The AU Assembly has reminded that its decision is binding pursuant to article 23 (2) of the Constitutive Act.¹⁴⁶⁵ Reacting against the decisions on the alleged failure by Chad and Malawi to comply with the cooperation requests issued by the Court in 2011, the AU Commission expressed its total disagreement with the decisions of the PTC I “which did not take cognisance whatsoever of the obligations of AU Member states arising from Article 23 (2) of the Constitutive Act of the African Union, to which Chad and Malawi are State Parties, and which obligate all AU Member States *“to comply with the decisions and policies of the Union”*”.¹⁴⁶⁶

Of Course, the AU decisions not to cooperate with the ICC have been adopted by the Assembly which is the supreme organ of the Union.¹⁴⁶⁷ It is competent to take such decisions on issues of interest to the continent and its people.¹⁴⁶⁸ The insistence on the applicability of the aforementioned article 23 (2) should also confirm, in addition to the language used in those decisions, their binding character. In this respect, the position of a commentator

¹⁴⁶⁰ *Ibid.*, Article 89.

¹⁴⁶¹ *Ibid.*, Article 92.

¹⁴⁶² *Ibid.*, Article 98.

¹⁴⁶³ *Ibid.*, Article 93.

¹⁴⁶⁴ See M. Du Plessis and C. Gevers, ‘Balancing Competing Obligations: the Rome Statute and AU Decisions’, Institute for Security Studies Paper No. 225 (2010), at 10-11.

¹⁴⁶⁵ Assembly/AU/DEC.547 (XXIV), above note 1032, para.19.

¹⁴⁶⁶ African Union Commission, above note 1047, at 2.

¹⁴⁶⁷ AU Constitutive Act, Article 6(2).

¹⁴⁶⁸ *Ibid.*, Articles 3 (d), 7 (1) and 9 (a).

suggesting that the AU decisions are non-binding directives is mistaken.¹⁴⁶⁹ In case of non-compliance with such “decisions and policies of the Union”, sanctions can be imposed on the state, “such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly”.¹⁴⁷⁰ The dilemma therefore appears. Either African states parties to the Rome Statute disobey the AU in order to comply with the ICC request or they violate the Court’s Statute in order to obey the AU decisions. This justifies the difficulties of legal interpretation for the purpose of finding an acceptable solution to the competing obligations at stake.

ii) The Battle of Legal Solutions

The problem of competing obligations in the context of ICC’s proceedings with respect to the Sudanese President interrogates the relationship between universalism and regional international law. The problem is intricate because it is not a dispute opposing a state against another, but a conflict between two intergovernmental organisations with transversal effects on the relationship with each other’s member states. Several approaches have been suggested to put an end to the issue.

In the first place, there is the ICC own finding. The position has already been explained in regard to the contention over the irrelevance of state officials’ personal immunity before the Court. The ICC’s central idea is that the situation in Sudan has been referred to the Prosecutor by a resolution of the Security Council acting under Chapter VII of the UN Charter. This resolution, which implies the removal of President Omar Al Bashir’s personal immunity under international law, trumps the AU decisions pursuant to article 103 of the UN Charter. But, the flaw of this finding is that it creates a conflict which does not truly exist between the UN resolution and the AU decisions. The reason is that the Security Council did not create for UN members any obligation to cooperate with the ICC under Chapter VII in a manner that it could override the contrary obligation arising from the AU decisions.

Secondly, Max Du Plessis and Christopher Gevers suggest the theory of effective construction,¹⁴⁷¹ which requires to “avoid interpretations which would leave any part of the

¹⁴⁶⁹ See N.J. Udombana, “Can These Dry Bones Live?”: In Search of a Lasting Therapy for AU and ICC Toxic Relationship’, 1 (1) *African Journal of International Criminal Justice* (2014) 57-76, at 67.

¹⁴⁷⁰ AU Constitutive Act, Article 23 (2).

¹⁴⁷¹ Du Plessis and Gevers, above note 1464, at 18-19.

provision to be interpreted without effect”,¹⁴⁷² while “an interpretation which would make the text ineffective to achieve the object in view is *prima facie suspect*”.¹⁴⁷³ Therefore, according to these authors, the AU decisions do not displace the obligation to cooperate owed by its member states that are parties to the ICC Statute.¹⁴⁷⁴ They also conclude that African states’ duty under their domestic laws might be of great help for balancing the competing obligations. In this regard, they argue that everything would depend on each legal system. It means that where one of the competing obligations is domesticated (automatically for monist countries and by transformation for dualist ones), then that obligation will prevail. As a result, the state concerned will cooperate or refuse to cooperate depending on what is provided for by its domestic law.

But, the critique is that the first part of this solution equally renders meaningless the obligation not to cooperate arising from AU decisions under the Constitutive Act. Truly, it does not say anything more than giving the impression to support a sort of institutional prevalence of the ICC over the AU. Concerning the second part of the solution, it is obvious that it contradicts the customary rule, codified by the VCLT, prescribing that national law cannot be invoked as justification for failing to perform a treaty.¹⁴⁷⁵ It is very doubtful that that was the kind of demand to member states when the AU Assembly requested them “to balance, where applicable, their obligations to the AU with their obligations to the ICC”.¹⁴⁷⁶ Therefore the need for a more cautious balancing approach to competing obligations which indicates:

(...) while there still exists a conflict of obligation in this matter, African states should not ignore their obligations under the Rome Statute but should balance the two. This is to be taken to mean that, at the very least, these states should take measures to ensure that persons accused of such heinous crimes under the Rome Statute do not enter their territory.¹⁴⁷⁷

¹⁴⁷² *Ibid.*, at 19. The authors refer to C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd. Rev., Cambridge: Cambridge University Press, 2005), at 46.

¹⁴⁷³ *Ibid.*

¹⁴⁷⁴ *Ibid.*, at 19.

¹⁴⁷⁵ Vienna Convention on the Law of Treaties, Article 27.

¹⁴⁷⁶ Assembly/AU/DEC.296 (XV), above note 1029, para.6.

¹⁴⁷⁷ E. Wakesho Ngolo, ‘Analysing the Future of International Criminal Justice in Africa: A Focus on the ICC’, *Strathmore Law Review* (2016) 99-122, at 121.

Another approach relying on norms of conflict has been proposed by James Mouangue Kobila.¹⁴⁷⁸ In his view, the Rome Statute and the AU Constitutive Act are constitutive of *lex specialis* compared with the UN Charter,¹⁴⁷⁹ notwithstanding its article 103. However, between the ICC Statute and the AU Constitutive Act, the speciality is in favour of the African regional organisation.¹⁴⁸⁰ But, the problem remains unsolved because he does not suggest the way to decide on this position. It is thinkable that the ICC may not adopt this approach which undermines the application of its basic treaty. In the meantime, the AU would unlikely be ready to accept further pronouncements of the Court on this issue if the latter does not support a position which it finds to be favourable. This is because the Court which is competent to settle any dispute concerning the exercise of its judicial functions¹⁴⁸¹ is considered to be part of the problem, and the AU is not anyway a party to its Statute.

The last approach was proposed by Mba Chidi NMaju, who thinks that the problem of competing obligations in the present context should be solved with reference to the legal regime applicable to intergovernmental organisations.¹⁴⁸² The premises of his position read:

Disputes between the organisation and its members or between members would be resolved using the provisions of the constituent instrument. However, disputes between two international organisations may not be settled using the constituent of one of them; rather it must be resolved by applying the general principles common to international organisations.¹⁴⁸³

For this purpose, he proposes a central argument based on the competences of each organisation. He then observes that the AU may have the powers to adopt decisions that are

¹⁴⁷⁸ J. M. Kobila, 'L'Afrique et les juridictions internationales pénales', Cahier Thygydide n°10, Etude (2012), at 49-51.

¹⁴⁷⁹ *Ibid.*, at 49.

¹⁴⁸⁰ *Ibid.*

¹⁴⁸¹ ICC Statute, Article 119 (1): 'Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court'. In paragraph 2, the same Article provides: 'Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court'.

¹⁴⁸² M. C. Nmaju, 'Relevance of the Law of International Organisations in Resolving International Disputes: a Review of the AU/ICC Impasse', 14 (14) *African Journal on Conflict Resolution* (2014) 155-185, at 183.

¹⁴⁸³ *Ibid.*, at 166.

binding on its member states.¹⁴⁸⁴ But, he recommends that this organisation should refrain from encouraging its members to violate other treaties.¹⁴⁸⁵ Turning back to the ICC, he suggests that the Court has violated the rules on immunity.¹⁴⁸⁶ So, with respect to President Omar Al Bashir, the Court has gone beyond its powers to actively require its members to violate the law in arresting and surrendering the suspect.¹⁴⁸⁷ Consequently, he concludes that the ICC should change its approach to the issue of Omar Al Bashir's immunity.¹⁴⁸⁸ The reason is that "few states will be willing to take the gamble of arresting a foreign official due to the high political and legal risks that it poses",¹⁴⁸⁹ notably cause of war, state responsibility and other diplomatic and economic risks.

The critique against this approach is that it appears inapplicable to a true problem of competing obligations. The latter presupposes that one valid obligation is concurrent for application with another valid obligation. But, as far as the author relies on the rules governing the powers of the two organisations, it is implicit that when an obligation is established outside the legal framework of such powers, it is invalid in law and cannot be regarded as being in competition with another. In short, this kind of legal competition can only exist between two or more valid obligations.

All these approaches show the limits of legal solutions to a problem which may be efficiently settled through dialogue. The same applies to the threat of collective withdrawal of African states from the ICC Statute.

3.2.1.2. The Threat of Collective Withdrawal of African States from the ICC

At outset, it is important to note that withdrawing from a treaty like the ICC Statute is a sovereign decision of a state. In this respect, the VCLT provides that the state concerned which wishes to pull out should comply with the provisions set out in the treaty in question.¹⁴⁹⁰ Article 127 of the ICC Statute provides:

¹⁴⁸⁴ *Ibid.*, at 176.

¹⁴⁸⁵ *Ibid.*, at 183.

¹⁴⁸⁶ *Ibid.*, at 179-180.

¹⁴⁸⁷ *Ibid.*, at 183.

¹⁴⁸⁸ *Ibid.*

¹⁴⁸⁹ *Ibid.*

¹⁴⁹⁰ Vienna Convention on the Law of Treaties, Article 54.

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date. 2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Pursuant to this article, withdrawing from the ICC Statute is a prerogative of any state party. The notification of a withdrawal decision should be signed by the national authority enjoying full power to bind that state party internationally. But, by analogy to the process of joining a treaty, the observation of national constitutional arrangements of political power is not of great legal importance to the effectiveness of the withdrawal at the international level, except if the violation of these arrangements was manifest and constituted a breach of a fundamental domestic norm.¹⁴⁹¹ A violation is manifest if it “would be objectively evident to any State conducting itself in a matter in accordance with normal practice and in good faith”.¹⁴⁹²

The issue of withdrawal of African states from the ICC Statute was initially invoked by the AU during the first meeting of African states parties that took place in Addis Ababa, in June 2009.¹⁴⁹³ But, it was only at the AU summit which was held in January 2016 that the recommendation to develop a comprehensive strategy of collective withdrawal from the ICC was decided.¹⁴⁹⁴ But, such a strategy should be submitted to an extraordinary session of the AU Executive Council for adoption.¹⁴⁹⁵ The reasons of promoting this strategy of collective withdrawal move have not changed. They turn around all the concerns (including reforms) of African states about the judicial work of the ICC that have been raised over the years and are not yet taken into account. In January 2017, the AU adopted the ICC Withdrawal Strategy

¹⁴⁹¹ Vienna Convention on the Law of Treaties, Article 46(1).

¹⁴⁹² *Ibid.*, Article 46(2).

¹⁴⁹³ Kahombo, above note 11, at 77.

¹⁴⁹⁴ Assembly/AU/Dec.590(XXVI), Decision on the International Criminal Court (Doc. EX.CL/952(XXVIII)), 26th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 30-31 January 2016, para.10 (iv).

¹⁴⁹⁵ *Ibid.*

Document, which acknowledges the sovereign right of AU member states parties to the Rome Statute to pull out of the Court.¹⁴⁹⁶ Rather than constituting a real withdrawal strategy with a collective plan of retreat, the Document simply provides those member states with “a holistic approach, analysis and implications of initiating the withdrawal provisions under the Rome Statute in accordance with the constitutional provisions of individual African states parties”.¹⁴⁹⁷ Hence, one must speak of the threat of massive withdrawal from the ICC Statute as the concept of collective retreat is unknown in international law.

In practice, the continent has already known the first countries that have declared their intention to pull out of the ICC Statute, namely Burundi, South Africa and The Gambia. Burundi and South Africa have even notified their will to withdraw to the UN Secretary General. A *domino* effect on other African states parties is feared.¹⁴⁹⁸ However, in March 2017, South Africa revoked its decision to withdraw from the ICC in order to comply with a domestic judicial decision which found that its withdrawal without the approval of the South African Parliament was unconstitutional and invalid.¹⁴⁹⁹ On its part, The Gambia does no longer consider to retreat from the ICC after the election of a new President in December 2016.

The potential impact of a massive retreat of African states from the ICC is differently perceived. For example, a commentator who tries to minimise the phenomenon states:

The ICC is a court. It will continue to carry out its legally assigned mandate: to deal with cases *within its jurisdiction*. Even if more African states withdraw, the Court will still have more work than it can handle. The Court will move on to other situations, of less extreme gravity but

¹⁴⁹⁶ African Union, ‘Draft 2: Withdrawal Strategy Document’ (12 January 2017), para.8 <https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf> accessed 22 April 2017.

¹⁴⁹⁷ *Ibid.*, para.9.

¹⁴⁹⁸ D. Akande, ‘South African Withdrawal from the International Criminal Court – Does the ICC Statute Lead to Violations of Other International Obligations?’ (22 October 2016) <<http://www.ejiltalk.org/south-african-withdrawal-from-the-international-criminal-court/>> accessed 27 October 2016; O. Ba, ‘Why is South Africa Withdrawing from the International Criminal Court? And Why Now?’ (23 October 2016) <<http://africasacountry.com/2016/10/why-is-south-africa-withdrawing-from-the-international-criminal-court-and-why-now/>> accessed 27 October 2016.

¹⁴⁹⁹ *Democratic Alliance v Minister of International Relations and Cooperation and Others* (Council for the Advancement of the South African Constitution Intervening) (83145/2016) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP) (22 February 2017), para.84.

still quite grave enough to warrant action. Situations of more moderate scale and gravity may prove much more manageable for investigation and prosecution. Greater regional diversity of selected situation will result. The Court will continue to serve states, the United Nations, and ultimately to human beings within its jurisdiction. And if withdrawing states decide someday to rejoin the Statute, then their people will once again have the ICC backstopping national courts in responding to atrocities.¹⁵⁰⁰

True, international criminal justice is a project to envisage in a *longue durée*. It could not collapse at once because of just the African withdrawals. However, it seems evident that these retreats may seriously undermine the legitimacy of the ICC, which already misses sufficient membership from a large part of Asia, beginning by the Arabic world, and three permanent members of the UN Security Council. The most devastating impact would be African withdrawals without bringing into operation an alternative mechanism of international criminal justice at the regional level. According to the AU Withdrawal Strategy Document, African states should ratify the Malabo Protocol on the AU Criminal Court “in order to enhance principle of complementarity in order to reduce the deference to the ICC, which futhers the mantra of African solution to African problems”.¹⁵⁰¹ Otherwise, victims of international crimes on the continent could be left to the mercy of their oppressors, so powerful to avoid justice at the domestic level. Even the establishment of such a regional judicial institution might not be sufficient to deal with all potential offenders in Africa. The fight against impunity for international crimes will be more efficient with the contribution of the ICC in a multi-level system of criminal accountability. Cautiousness is thus necessary in order not to succumb to the massive withdrawals that could be avoided through dialogue on every aspect of the ICC Statute on which states parties appear to be in disagreement. This dialogue was underlined by the 15th session of the ASP, held in November 2016. In fact, “there was ample satisfaction that an open process of dialogue had been started in order to address the concerns of African States. It was agreed that this dialogue should continue and develop further, focusing also on possible practical measures for the future of the Rome Statute system and the International Criminal Court”.¹⁵⁰² For its efficacy, dialogue requires

¹⁵⁰⁰ D. Robinson, ‘Take the Long View of International Justice’ (24 October 2016) <<http://www.ejiltalk.org/take-the-long-view-of-international-justice/>> accessed 2 November 2016.

¹⁵⁰¹ African Union, above note 1496, para.35.

¹⁵⁰² Assembly of States Parties, ‘Informal summary by the President on the “Relationship between Africa and the International Criminal Court”’, ICC-ASP/15/36, Fifteenth Session, The Hague, 16-24 November 2016, para.9.

some political will, openness to reforms and no resistance to change of the current state of international criminal law.

3.2.2. The International Resistance against the Claims for Legal Reforms

There is a standoff with the proposed reforms of the system of international criminal justice. At the UN level, the question of the scope and application of the principle of universal jurisdiction is still on the table of discussion within the Sixth Committee of the General Assembly. The issue might even be displaced from the Sixth Committee to the ILC as a number of state delegates are demanding that the latter subsidiary body of the General Assembly undertake a study on such a technical legal issue.¹⁵⁰³ Predictably, that could take some years again.

Concerning the ICC justice system, the situation is worse. Since the adoption of the Common African Position on the ICC, almost nothing has moved in the direction of reforms demanded by Africa. The reason lies in the attitude of African states parties themselves. Despite several AU calls that they should speak with one voice and demonstrate a unity of action to ensure that African proposals for amendments to the Rome Statute are considered by the ASP,¹⁵⁰⁴ a common strategy to this effect has missed at several occasions.¹⁵⁰⁵ On their sides, the ICC's defenders (ICC's employees, western great powers, EU, international NGOs, pro universalism international lawyers, etc.) have opposed a fierce resistance to these proposals. The AU itself acknowledged the limited influence that the African group of states parties to the Court's Statute had in the decision process of the ASP during the 2009 and 2010 sessions.¹⁵⁰⁶ In general, only few states supported the African proposals.¹⁵⁰⁷ Hence, with respect to amendment of article 16 submitted to the ASP during the 2009 session, the AU observed: "only two African states namely Namibia and Senegal took the floor to support the proposal while thirteen (13) non-African states took the floor against the proposal".¹⁵⁰⁸ Likewise, the

¹⁵⁰³ UN General Assembly, above note 1353, para.19.

¹⁵⁰⁴ Assembly/AU/DEC.547 (XXIV), above note 1032, para.10.

¹⁵⁰⁵ See Executive Council of the African Union, 'Report of the Commission on the Outcome and Deliberations of the 8th Session of the Assembly of States Parties to the Rome Statute of the ICC held at The Hague, Netherlands from 16 to 26 November 2009', EX.CEL/568 (XVI), Addis Ababa (Ethiopia), 29 January 2010, para.5.

¹⁵⁰⁶ Executive Council of the African Union, above note 1067, at 12.

¹⁵⁰⁷ *Ibid.*

¹⁵⁰⁸ Executive Council of the African Union, above note 1505, para.10.

AU has expressed its concern over “the failure by the ASP to consider the concerns and proposals for amendments by African Union of the Rome Statute of the ICC during the 13th Session of the ASP held in New York from 8 to 17 December, 2014”.¹⁵⁰⁹

How to justify such a strong opposition to amend the Rome Statute and therefore to reform the ICC justice system? Three hypotheses can be envisaged,¹⁵¹⁰ namely the protection of professionalism (ICC’s employees and NGOs), the refusal of any power sharing between universal and regional levels to preserve an instrument for a (geo-) political agenda (great powers), the alignment with an ideology (pro universalism lawyers and NGOs). It is in the name of this ideology that the ICC justice system is generally said to be equivalent to the efficient struggle against impunity, while regional contestations of the misuse of universal mechanisms are viewed as an attempt to protect leaders from criminal accountability, notably in regard to the issue of immunity.¹⁵¹¹

Therefore, instead of dealing with all the African proposals for amendments, the ASP has forwarded two principal responses to criticisms against the Court. First, the allocation of more personnel originating from Africa to the ICC. It is obvious that this kind of response is unconvincing since it does not match with the merits of criticisms raised against the ICC’s work. However, it aligns with certain professionalism, as stated above, with the expectation to smoothen the attitude of those who have presented the ICC as the “Europe’s Court for Africa”.¹⁵¹² Second, some amendments to the Court’s Rules of Procedure and Evidence have been adopted by the ASP on 27 November 2013. Among other innovations, “an accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused (*from presence at trial*) and to be represented by counsel only (...)”.¹⁵¹³ However, the most important African proposals to amend the Court’s Statute remained unsolved. They continue to be under discussion within the Working Group on Amendments, which was established by

¹⁵⁰⁹Assembly/AU/DEC.547 (XXIV), above note 1032, para.11.

¹⁵¹⁰ See also S. Moyn, ‘Towards Instrumentalism at the International Criminal Court’, 39 *The Yale Journal of International Law Online* (2014) 55-65, at 56-63.

¹⁵¹¹ Tladi, above note 1237, at 7-10; G. Abraham, ‘Africa’s Evolving Continental Court Structures: at the Crossroad?’, SAIIA Occasional Paper 209 (January 2015), at 14-15 <http://www.saiia.org.za/doc_view/669-africa-s-evolving-continental-court-structures-at-the-crossroads> accessed 6 July 2015.

¹⁵¹² McNamee, above note 1416, at 6; Hoile, above note 920, at 35.

¹⁵¹³ ASP Res. ICC-ASP/12/Res.7, 27 November 2013, Rule 134 *quarter*, para.1. Emphasis is mine.

the ASP in 2009.¹⁵¹⁴ Resistance to legal reforms seems to be to date the most important threat to the maintenance of a well-balanced system of international criminal justice. Yet, such a system is needed to ensure that justice is equally delivered for states and individuals from all the regions. It is a requirement for a more efficient fight against impunity around the world.

¹⁵¹⁴ See Assembly of the States Parties, 'Report of the Working Group on Amendments', Thirteenth Session (New-York, 8-17 December 2014), ICC-ASP/13/31, 7 December 2014; 'Report of the Working Group on Amendments', ICC –Fourteenth Session (The Hague, 18-26 November 2015).

4. Conclusion of Part I

This part has placed the question of jurisdictional criminal power within the international legal system in the heart of the crisis of global international criminal law as it manifests itself in relation to Africa. On the one hand, it appears that, outside the realm of domestic jurisdictions, that power is concentrated at the universal level at the expense of states and their respective regions. It is a fact that the ICC which constitutes the greatest symbol of such universalism in criminal matters is a politicised Court in which powerful states that are permanent members of the Security Council play an important role. This is the case because of the power conferred on the Security Council to trigger ICC jurisdiction or to suspend its proceedings for the purpose of maintaining international peace and security. The functioning of the ICC demonstrates that the influence of powerful countries has even increased beyond what the Rome Statute allows them to do. The ICC proves to be deferential to the Security Council and the latter's permanent members have succeeded in getting control of its operations in part, either by preventing its action (situation in Syria) or by interfering with its proceedings (situation in Libya). Yet, some permanent Security Council members are not parties to the Rome Statute (China, Russia and USA) whilst they participate in the decision-making in situations concerning states parties that are among the powerless ones in the world. Moreover, it is symptomatic to note that, as at August 2017, all the cases brought before the ICC have come from African states.

On the other hand, this part has shown that in practical terms, weak states are not better placed to apply the principle of universal jurisdiction due to the costs of its enforcement: diplomatic frictions, deficient capabilities of the judiciary and financial constraints. This contrasts with the massive use of the same principle by strong states, such as EU member states. In a number of cases relating to officials of some African countries (DRC, Congo-Brazzaville, Rwanda, etc.), universal jurisdiction was exercised inconsistently with international law. Either the accused person was not present in the territory of the prosecuting state or arrest warrants were issued in such circumstances and circulated through media, and sometimes in violation of immunities of foreign state officials.

Both uses of international criminal law at the universal and domestic levels have increased the number of judicial interventions in foreign states, especially in powerless countries, in the name of the fight against impunity. However, powerful countries, while intervening or supporting such interventions in other states, are not *de facto* subordinated to the same

institutions and rules of international criminal law. The weight of international criminal law is much felt by weak states at the expense of their sovereignty, not because they are the only places where international crimes are perpetrated or whose nationals may be suspected of having committed such crimes, but owing to the fact that the system of international criminal law is indeed unbalanced and in favour of those states which most influence the functioning of the international legal system.

International criminal law is furthermore less flexible for states. The latter have to exercise their jurisdiction if they want to avoid external judicial interventions. The margin of choice between prosecutions and alternatives of non-prosecution, such as inaction, statutes of limitation, amnesties and sequencing of justice for reasons of peace promotion, which may well be dictated by the state national policy, has become extremely reduced. International criminal law is for them a sort of anti-state law. That is why a permanent tension does exist between the objective to ensure criminal accountability and the preservation of states' national interests, including self-determination and democratic aspirations of peoples.

It is the combination of all these factors concerning the distribution of jurisdictional criminal power within the international legal system which stands behind the current crisis of global international criminal law. Confidence in law and justice which reach the concerns of all states and regions is eroding. There are perceptions of manipulations of law and justice for political ends, selectivity of crimes, situations and cases to bring to justice, as well as double standards and neo-colonialism. This perception is found in the African objection to the abusive application of the principle of universal jurisdiction, the criticisms against the ICC's work in Africa and the contestation of the rules on state officials' personal immunity. Thus, a number of reforms are requested by the AU member states in order to stop the current crisis: the need to adopt some regulatory provisions for the application of universal jurisdiction and to amend some provisions of the ICC Statute, including the rules on personal immunity and the deferral power conferred on the Security Council. However, the most important reform to carry out could be the regionalisation of international criminal law: regionalisation of the ICC which may be connected to regional criminal tribunals, if they exist, and extension of the list of crimes to be brought before international courts to other offences, including those crimes of particular concern to Africa, such as the illicit exploitation of natural resources and unconstitutional change of government. The trend towards the regionalisation of international criminal law is the next premise of the current development of African international criminal law, which will be analysed in the second part of this study.

Part II. The Pillars of African International Criminal Law

African international criminal law does exist. It emerges out of the process of regionalisation of international law in Africa. Two principal drivers stand behind its development. On the one hand, there is the crisis of general international criminal law, which is criticised for its alleged injustices or biases,¹⁵¹⁵ particularly towards weak states. The process of regionalisation has to some extent a legal and political response to it, with the will to ensure a balanced future for the international legal system.¹⁵¹⁶ This is because, on the other hand, there are other problematic issues specific to the continent that demand appropriate African answers in terms of law making and enforcement. Arguably, such development in law can promote or undermine the prosecution of international crimes in Africa.¹⁵¹⁷ There is an impression that African international criminal law might be a replacement of universal international criminal law on the continent, undermine its progress or establish enforcement mechanisms competing with global institutions of criminal accountability.¹⁵¹⁸ However, the development of African international criminal law can be also cherished. While universalism accords with a cosmopolitan aspiration of states, regionalism is for them a natural and even a practical orientation,¹⁵¹⁹ given the proximity of ties between states and their common problems in their region, the challenge of regional ownership of the fight against impunity and the potential of the process of regionalisation to reduce the risk of politicisation of justice or the cost of sovereignty for states against judicial globalisation. In this regard, the process of regionalisation implies an African conception of international criminal law. Since regionalisation promotes the development of international law,¹⁵²⁰ it should not be seen as a

¹⁵¹⁵ See S. Kaba, *Justice universelle en question : justice de blancs contre les autres ?* (Paris : L'Harmattan, 2010) ; D. Lagot, *Justice ou injustice internationale ?* (Paris : L'harmattan, 2009) ; M. Gallois and J. Verges, *L'apartheid judiciaire : le Tribunal pénal international, une arme de guerre* (Paris : L'Âge d'Homme, 2002).

¹⁵¹⁶ V. O. Nmehielle, 'Conclusion: Ensuring a Balanced Future for International Criminal Justice', in V.O. Nmehielle (ed.), *Africa and the Future of International Criminal Justice* (The Hague: Eleven International Publishing, 2012) 405-414.

¹⁵¹⁷ S.H. Adem and M. Yankson, 'The African Criminal Court: Promoting or Undermining the Prosecution of International Crimes in Africa? Symposium on 29th and 30th June 2015 at Humboldt-Universität zu Berlin', *Zeitschrift für Internationale Strafrechtsdogmatik* (2015) 567-571.

¹⁵¹⁸ Udombana, above note 1469, at 69.

¹⁵¹⁹ R. Burchill, 'International Criminal Tribunal at the Regional Level: Lessons from International Human Rights Law', *New Zealand Yearbook of International Law* (2007) 25-44, at 26.

¹⁵²⁰ S. Freeland, 'Internationalization of Justice –A Case for the Universal Application of International Criminal Norms', *4 New Zealand Yearbook of International Law* (2007) 45-65, at 45.

competing process with universalism. Interactions, mutual enrichment and some types of cooperation between the regions and the global level will be inevitable in the future. A multilevel system of international criminal law is likely to emerge and needs to be interconnected and integrated.

This part of the study aims to examine the specific pillars of African international criminal law, that is to say, the regional bases for its development. Both *lex lata* and *lex ferenda* are taken into account because African international criminal law is still in its prime infancy towards maturation.¹⁵²¹ The AU Criminal Court itself has not yet become operational.

Therefore, the issue at stake is not about providing full details on every aspect of the content of African international criminal law, with respect to its sources, the punishable crimes, the forms of criminal responsibility, jurisdiction and procedures, and the sentencing system. Rather, while illustrating this content, the study will focus on three main regional pillars of African international criminal law, namely, the emerging notion of African regional public order to the protection of which this law will contribute (1), the development of a system of African regional criminal justice (2) and the principles governing its relationship with the global system of international criminal justice (3).

1. The Emergence of African Regional Public Order

The concept of public order, *ordre public* in French or *öffentliche Ordnung* in German, is not easy to define and to develop.¹⁵²² It is adaptable to every kind of law, whether national or international, and changes its scope according to the specificities of each legal branch (public law, private law, economic law or international law). Just in domestic law and private international law, where its existence is quite widespread, the concept has many understandings. For example, Didier Boden has found that it refers at least to 104 legal notions.¹⁵²³ In public international law, the matter is more complicated because the notion does not have a prescriptive positive content.¹⁵²⁴ While the existence of public order is not

¹⁵²¹ Soma, above note 206, at 520.

¹⁵²² Bouchet-Saulnier, above note 537, at 535.

¹⁵²³ D. Boden, 'L'ordre public : limite et condition de la tolérance –Recherches sur le pluralisme juridique' (PhD Thesis, Université Panthéon-Sorbonne Paris 2002).

¹⁵²⁴ J. Kokott and F. Hoffmeister, 'International Public Order', in *Max Planck Encyclopedia of Public International Law* (Max Planck Institute for Comparative Public Law and International: Heidelberg and Oxford

disputed as such, the concept appears to be mainly doctrinal.¹⁵²⁵ It is referred to as international public order or the public order of the international community.¹⁵²⁶ The doctrine of public order is necessary for the identification of certain rules –as well as their consequences –that are deemed essential for the security and the stability of a given society or for the protection of its fundamental interests or the dignity of human beings who are under its jurisdiction.¹⁵²⁷ The concept is central to criminal law.¹⁵²⁸ This is because criminal law usually intervenes as a means of last (or even *severe*) resort (*ultima ratio*) in order to safeguard the community against serious violations of its fundamental values that derive from different branches of law, whose legal force is thereby reinforced.¹⁵²⁹ In this regard, criminal law deals with behaviours which are contrary to such essential rules by imposing criminal punishment on their perpetrators.

In the context of African international law, it is preferable to talk about African regional public order or simply Pan-African public order if one refers to the ideology of African unity which underpins its conception. Analogously, the notion is affected by the same lack of a prescriptive content as at the global level. The problem seems to be even worse because the very existence of a regional (international) community, on behalf of which the concept of Pan-African public order evolves, may not be accepted. However, as in global international law, there are signs of the existence of such an order in African international law. This may be seen in the definition of the concept (1.1) and the extent to which it is particularly enriching in criminal matters with the codification of crimes against peace and security in Africa (1.2).

1.1. The Definition of the Concept

The debate about public order in international law is linked to the question whether there are legal norms of a higher status than ordinary rules, which states cannot dispose of at their

University Press, 2010) 1-11, at 7 <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1430?prd=EPIL>> accessed 20 December 2016.

¹⁵²⁵ *Ibid.*

¹⁵²⁶ H. Mosler, *The International Society as a Legal Community* (Sijthoff & Noordhoff: Alphen aan den Rijn, 1980), at 17.

¹⁵²⁷ S. Santos, 'The International Criminal Court and the Construction of International Public Order', 5 (2) *JANUS.NET e-Journal of International Relations* (2014-2015) 16-44, at 17.

¹⁵²⁸ *Ibid.* See also R. C. Keith and Z. Lin, *New Crime in China: Public Order and Human Rights* (London/New-York, Routledge, 2006), at 1.

¹⁵²⁹ R. Nyabirungu mwene Songo, *Traité de droit pénal congolais* (2th end., Kinshasa : Editions Universitaires Africaines, 2007), at 18, 20 and 21.

will.¹⁵³⁰ The transformation of the international legal system with the advent of the UN Charter and the increasing emphasis on the protection of human rights have crystallised new rules binding on states without their consent in the interest of mankind.¹⁵³¹ Nowadays, international law promotes and protects community interests,¹⁵³² i.e. those interests which are not “to be left to the free disposition of states individually or *inter se*”,¹⁵³³ but are “recognised and sanctioned by international law”¹⁵³⁴ as matter of concern to all the community. In this regard, to uphold the existence of African regional public order, there must be a community which is given appropriate means, procedures and institutions, to defend itself or its members against violations of regional norms of such a high legal status in order to maintain security and stability as well as the dignity of peoples. Thus, it is important to interrogate the existence of these norms which form an order of protection of Africa (1.1.1) before discussing their enforcement in the framework of an order of defence against security threats, such as international crimes, occurring in Africa (1.1.2).

1.1.1. The Order of Protection by Regional Rules of Fundamental Importance for Africa

There are different kinds of protective rules in African international law. Even if these rules do not constitute a sort of regional *jus cogens* (1.1.1.1), the African Charter on Human and Peoples’ Rights possesses some specific features regarding the issue of their normative hierarchy (1.1.1.2).

1.1.1.1. The Question of Regional *Jus Cogens*

The question which arises is to know whether the African regional public order does exist without an African regional *jus cogens*. The answer is in the affirmative. Norms of different legal nature relate to the notion of international public order. Some are part of *jus cogens* and

¹⁵³⁰ H. Rolin, ‘Vers un ordre public réellement international’, in *Hommage d’une génération de juristes au professeur Basdevant* (Paris : Pedone, 1960) 441-462, at 451.

¹⁵³¹ See Tomuschat, above note 45; J. A. Frowein, ‘Reactions by Not Directly Affected States to Breaches of Public International Law’, 248 *Recueil des Cours de l’Académie de Droit International* (1994) 345-438.

¹⁵³² H. Krieger, ‘Rights and Obligations of Third Parties in Armed Conflicts’, KFG Working Paper Series, No.5, Berlin Potsdam Research Group ‘The International Rule of Law – Rise or Decline?’ (Berlin: December 2016), at 5.

¹⁵³³ Simma, above note 50, at 233. The author has relied on P.C. Jessup, *A Modern Law of Nations* (New York: Macmillan, 1949), at 2.

¹⁵³⁴ *Ibid.*

others not (*jus dispositivum*). Literally, *jus cogens* simply means *compelling law*,¹⁵³⁵ i.e. the law consisting of peremptory norms from which no derogation is possible. This coexistence of rules of different legal nature is also found in African international law. In fact, norms of *jus cogens* from general international law coexist with a number of specific African regional rules. Even if the latter do not constitute regional peremptory norms protecting the African regional public order (a), they possess a high legal status in the hierarchy of norms in African international law (b).

a) The Relationship with the Notion of Public Order

At the outset, the concept of public order in general international law referred to the notion of *jus cogens*.¹⁵³⁶ The link is evident in Jean Salmon's *Dictionnaire de droit international public*.¹⁵³⁷ Article 53 of the VCLT defines the notion of *jus cogens* as follows:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

It appears that the VCLT envisages peremptory norms only in relation to treaty law-making as well as the invalidity which sanctions their violation. The VCLT adds that "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".¹⁵³⁸ One of the most important examples of a norm of *jus cogens* is the prohibition of the use of armed force between independent states. But, norms of *jus cogens* also exist outside the field of international treaty law-making. A typical example is provided by international human rights law. In this regard, the International

¹⁵³⁵ K. Hossain, 'The Concept of Jus Cogens and the obligation under the UN Charter', 3 (1) *Santa Clara Journal of International Law* (2005) 72-98, at 74.

¹⁵³⁶ A. Verdross, 'Jus Dispositivum and Jus Cogens in International Law', 60 *American Journal of International Law* (1960) 55-63, at 58.

¹⁵³⁷ Salmon, above note 149, at 788-789. International public is here defined as consisting of 'rules of fundamental importance for the international community as whole from which states shall not derogate, under penalty of invalidity, by contrary conventions'. The original French version defines international public order as the 'règles d'importance fondamentale pour la communauté internationale dans son ensemble auxquelles les Etats ne pourraient, à peine de nullité, déroger par des conventions contraires'. The translation is mine.

¹⁵³⁸ Vienna Convention on the Law of Treaties, Article 64.

Covenant on Civil and Political Rights precludes state unilateral acts or conducts responding to a situation of public emergency which derogate from some fundamental rights, such as the right to life, the prohibition of torture, slavery and the retroactive application of penal laws.¹⁵³⁹ Violations of norms having this character may constitute an international crime in the sense of the ILC Draft Articles on State Responsibility of 1996. In the latter instrument, the ILC also specifies that any other internationally wrongful act, that is to say any conduct constituting a breach of an international obligation of the state, which does not constitute an international crime, amounts to an international delict.¹⁵⁴⁰ The difference between a crime and a delict was based on the notion of gravity. In particular, an international crime was characterised as the violation of an international obligation of an essential importance for the protection of fundamental interests of the international community as a whole.¹⁵⁴¹ Although this categorisation –crime and delict –was relinquished in the Draft Articles on State Responsibility in 2001,¹⁵⁴² owing probably to its lack of legal pertinence,¹⁵⁴³ the notion of gravity survived in relation to particular consequences of “serious breaches of obligations under peremptory norms of general international law”.¹⁵⁴⁴

The relationship between the notion of international public order and *jus cogens* might raise some doubts concerning the existence of the African regional public order for two main

¹⁵³⁹ International Covenant on Civil and Political Rights (16 December 1966), Article 4. It reads as follows: ‘1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision. 3. Any State party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation’.

¹⁵⁴⁰ ILC Draft Articles on State Responsibility with Commentaries (1996), Article 19 (4).

¹⁵⁴¹ *Ibid.*, Article 19 (2).

¹⁵⁴² See M. Arcari, ‘Responsabilité de l’Etat pour violations graves du droit international et système collective des Nations unies’, 21 *Anuario de Derecho Internacional* (2005) 415–447.

¹⁵⁴³ State responsibility is implied, be it for a breach of its international obligation constituting a crime or a delict. The categorisation –crime and delict- does not change its nature. Still, states are not criminally responsible.

¹⁵⁴⁴ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Articles 40–41.

reasons. First, the VCLT deals with *jus cogens* only in relation to general international law. By nature, norms of *jus cogens* are not constitutive of a different source of law but they are embodied in customary international law or codified in universal multilateral conventions.¹⁵⁴⁵ This means that if there is no regional *jus cogens*, the African regional public order would not exist either. Secondly, there would not be any international crime at the regional level, constituting an attempt to this order, if it does not originate from general international law.

However, international public order is not today limited to *jus cogens*.¹⁵⁴⁶ There are “other principles and rules of general international law which –irrespective of whether or not they qualify as *jus cogens* – are regarded as fundamental because they serve common interests of the international community of States”.¹⁵⁴⁷ These rules and principles include the principles on friendly relations between states,¹⁵⁴⁸ such as sovereign equality, non-intervention, good faith in the performance of international obligations, self-determination and peaceful settlement of disputes.¹⁵⁴⁹ Other areas of general international law are also concerned. But, it is quite impossible to identify therefrom all kinds of rules that relate to the notion of international public order. One may just mention the law of the sea with respect to the principle of freedom of navigation in the high seas, the prohibition of piracy or the right of foreign vessels to innocent passage in the territorial sea of the coastal states.¹⁵⁵⁰

Regarding the high legal status of such rules and principles in international law, Pierre-Marie Dupuy writes that an importance may be in fact attached to certain norms, which may even have a higher rank to other rules, without necessarily having a peremptory character, that is to say non-derogable.¹⁵⁵¹ In particular, article 103 of the UN Charter provides such a rank for obligations of member states under the Charter because, in the event of conflict, they shall

¹⁵⁴⁵ M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden/Boston: Martinus Nijhoff Publisher, 2009), at 670.

¹⁵⁴⁶ Mosler, above note 1526, at 19.

¹⁵⁴⁷ G. Jaenicke, ‘International Public Order’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam/ New York/ Oxford: Elsevier Science Publishers B.V., 1984) 314-318, at 315.

¹⁵⁴⁸ See UN Charter, Article 2; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970).

¹⁵⁴⁹ *Ibid.* See also Jaenicke, above note 1547, at 316-317.

¹⁵⁵⁰ M. A. Becker, ‘The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea’, 46 (1) *Harvard International Law Journal* (2005) 131-230.

¹⁵⁵¹ Dupuy, above note 48, at 72.

prevail over their obligations deriving from any other international agreement.¹⁵⁵² This is why the obligation to respect Security Council resolutions, adopted under Chapter VII and pursuant to article 25 of the UN Charter,¹⁵⁵³ is reflective of the international public order, although it is not a rule pertaining to *jus cogens*. Other norms of international public order derive from *erga omnes* obligations, as recognised several times by the ICJ,¹⁵⁵⁴ insofar as they are not obligations owed by a state to another, but by every state to all the others and the international community as a whole. Therefore, each of the states concerned possesses an interest to have these obligations observed or even enforced in case of violation.

On the whole, the notion of public order of the international community can be defined with respect to principles and rules which are deemed fundamental for the stability of the international community as a whole or the protection of human rights, and whose enforcement is of such a vital importance for all its members that any unilateral act or any agreement which breaches the said principles and rules is either void or simply deprived of legal effect. Some specific consequences that are attached to violations of the international public order differ from one field of law to another. For example, in collective security, the illegal use of force by a state normally engenders a situation of international public emergency which justifies the Security Council to resort to its exorbitant powers under Chapter VII of the UN Charter.¹⁵⁵⁵ In international criminal law, perpetrators of international crimes may face prosecutions and trials, and eventually national or international penal sanctions.

In the light of these developments, there is no need to have norms of regional *jus cogens* as a condition for the existence of the African regional public order. The latter coincides with general international law wherever universal norms have been regionalised. But, there are also a number of rules and principles that are peculiar to Africa and possess a high legal status in African international law. These regional rules and principles constitute a sort of *erga omnes partes* obligations, established in the interest of the community of states and peoples belonging to the African continent. Such obligations are the heart of the African regional

¹⁵⁵² Rolin, above note 1530, at 456.

¹⁵⁵³ This Article provides: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

¹⁵⁵⁴ *Barcelona Traction*, above note 46, para.33; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, above note 54, para.31.

¹⁵⁵⁵ T. Tzimas, 'International Public Emergency and Collective Security', 20(3) *Journal of Conflict and Security Law* (2015) 335-358, at 354.

public order because they determine its specificity. This order may be defined as a set of rules and principles having a high legal status in Africa –even a peremptory character as regards those universal norms which are regionalised –and a fundamental importance for the protection of peace, stability and human rights on the continent or any other interest essential for the African community of states and peoples as a whole. To be concrete, it is now necessary to examine the content of this order through the discussion of the issue of the existence of a legal and institutional hierarchy in African international law.

b) The Existence of a Regional Legal and Institutional Hierarchy

African regional public order is based on different legal instruments. For their identification, one may rely on the report of the President of the AU Commission on ending conflicts and sustaining peace in Africa, submitted to the AU Assembly in 2009.¹⁵⁵⁶ The report indicates that these instruments “represent a consolidated framework of commonly accepted norms and principles, whose observance would reduce considerably the risk of conflict and violence on the continent and consolidate peace where it has been achieved”.¹⁵⁵⁷ The instruments referred to cover various domains relating to “human rights; governance and the fight against corruption; on-going democratisation processes on the continent; disarmament; terrorism; and the prevention and reduction of interstate conflicts”.¹⁵⁵⁸ In this regard, numerous continental treaties are taken into account: the AU Constitutive Act, the African Nuclear Weapon-Free Zone Treaty (Pelindaba Treaty),¹⁵⁵⁹ the OAU Convention on the prevention and combating of terrorism,¹⁵⁶⁰ the Protocol to the OAU Convention on the prevention and combating of terrorism,¹⁵⁶¹ the OAU Convention for the elimination of mercenarism in Africa,¹⁵⁶² the OAU Convention governing the specific aspects of refugee problems in Africa,¹⁵⁶³ the Protocol relating to the establishment of the AU Peace and Security Council,¹⁵⁶⁴ the AU Convention on

¹⁵⁵⁶ Assembly of the African Union, ‘Report of the Chairperson of the Commission: Enhancing Africa’s Resolve and Effectiveness in Ending Conflict and Sustaining Peace’, SP/ASSEMBLY/PS/RPT(I), Tripoli (Libya), 30-31 August 2009.

¹⁵⁵⁷ *Ibid.*, para.26.

¹⁵⁵⁸ *Ibid.*, para.27.

¹⁵⁵⁹ Adopted on 11 April 1996 and entered into force on 15 July 2009.

¹⁵⁶⁰ Adopted on 1 July 1999 and entered into force on 6 December 2002.

¹⁵⁶¹ Adopted on 1 July 2004 (not yet into force as of 31 December 2016).

¹⁵⁶² Adopted on 3 July 1977 and entered into force on 22 April 1985.

¹⁵⁶³ Adopted on 10 September 1969 and entered into force on 20 January 1974.

¹⁵⁶⁴ Adopted on 9 July 2002 and entered into force on 26 December 2003.

the prevention and combating of corruption,¹⁵⁶⁵ the AU non-aggression and common defence Pact,¹⁵⁶⁶ the African Charter on democracy, elections and governance,¹⁵⁶⁷ the AU Convention for the protection and assistance of internally displaced persons in Africa (Kampala Convention),¹⁵⁶⁸ etc. There are also many OAU/UA unilateral acts such as the Declaration on unconstitutional changes of government,¹⁵⁶⁹ the Solemn Declaration on the CSSDCA (2000)¹⁵⁷⁰ and the Solemn Declaration on a Common African Defence and Security Policy.¹⁵⁷¹

This order of protection of Africa possesses a hierarchical character. Institutionally, it is linked to the articulation of the African system of integration. The AU places itself at the summit, while the centre is occupied by the RECs and S/RECs. As a consequence, the system is based on the coexistence of legal mechanisms at the continental and (sub-) regional levels. Likewise, there is an overlapping of institutions. For instance, the AU Peace and Security Council (PSC) coexists with the Council for Peace and Security in Central Africa (COPAX)¹⁵⁷² or the ECOWAS Mediation and Security Council.¹⁵⁷³ On its side, the AfCJHR coexists with (sub-) regional courts and tribunals. Cooperation between these different levels of the system is inevitable. But, in order to avoid disorder, and even anarchy, the AU has the power to coordinate the system. For example, the Constitutive Act provides that the AU “coordinate and harmonise the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union”.¹⁵⁷⁴ The power of coordination can be understood as the authority to put together several distinct institutions in order to establish a coherent whole for the achievement of a given objective. In other words,

¹⁵⁶⁵ Adopted on 1 July 2003 and entered into force on 5 August 2006.

¹⁵⁶⁶ Adopted on 1 January 2005 and entered into force on 18 December 2009.

¹⁵⁶⁷ Adopted on 30 January 2007 and entered into force on 15 February 2012.

¹⁵⁶⁸ Adopted on 22 October 2009 and entered into force on 6 December 2012.

¹⁵⁶⁹ AHG/Decl.5 (XXXVI), Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, 36th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Lomé (Togo), 10-12 July 2000.

¹⁵⁷⁰ AHG/Decl.4 (XXXVI), above note 982.

¹⁵⁷¹ Ext/Assembly/AU/1-2/(II), above note 208.

¹⁵⁷² Protocol Relating to the Council for Peace and Security in Central Africa (24 February 2000), Articles 2 and 5-6.

¹⁵⁷³ Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (10 December 1999), Articles 7-10.

¹⁵⁷⁴ Constitutive Act of the African Union, Article 3(1).

this power consists of organising different parts of the African system of integration in order to make a whole which is coherent and in harmony with the Union. In this respect, harmonisation seems to be a high degree of coordination, but both tend to the accomplishment of the same objectives of the Union. Accordingly, the AU has the power to determine principles for the creation of regional and sub-regional groupings. These principles are contained in the OAU resolution of 1963¹⁵⁷⁵ and complemented by the Abuja Treaty instituting the AEC,¹⁵⁷⁶ which is part of the AU.¹⁵⁷⁷ Furthermore, “Regional Mechanisms”, that is to say mechanisms established by the REC in the field of conflict prevention, management and resolution, are integrated into the African Peace and Security Architecture (APSA),¹⁵⁷⁸ on the top of which stands the AU PSC.¹⁵⁷⁹ The activities of these Regional Mechanisms must be “consistent with the objectives and principles of the Union”.¹⁵⁸⁰ Therefore, the AU has the power to recognise or not regional or sub-regional groupings. Its relationships with these groupings are governed by several principles and legal instruments.¹⁵⁸¹ For instance, Regional Mechanisms must keep the PSC “fully and

¹⁵⁷⁵ CM/Res. 5 (I), Regional Groupings, 1st Ordinary Session of the Council of Ministers of the Organisation of the African Unity, Dakar (Senegal), 2-11 August 1963, paras.2-5. In particular, in paragraph 2, the Council of Ministers recommends that ‘any regional grouping or sub-regional groupings be in keeping with the Charter of the OAU and meet the following criteria: (a) geographical realities and economic, social and cultural factors common to the States; (b) co-ordinating of economic, social and cultural activities peculiar to the States concerned’.

¹⁵⁷⁶ Treaty of Abuja Establishing the African Economic Community, Article 2 (d) and (e). This Treaty specifies hereby the status of regions and sub-regions in which such regional and sub-regional groupings should be created.

¹⁵⁷⁷ However, Article 33 (2) of the Constitutive Act of the African Union stipulates that ‘this Act shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community’.

¹⁵⁷⁸ See L. M. Fisher, A.S. Bah, A. Mniema, H.N. Okome, M. Tamba, J. Frederiksen, A. Abdelaziz and R. Reeve, ‘African Peace and Security Architecture (APSA): 2010 Assessment Study’, Commission of the African Union (2010).

¹⁵⁷⁹ D. Lecoutre, ‘Le Conseil de paix et de sécurité de l’Union africaine, clé d’une nouvelle architecture de stabilité en Afrique ?’, *Afrique contemporaine* (2004) 131-162.

¹⁵⁸⁰ Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Article 16 (1) (a). See also M. Gueyou, ‘Articulation normative des systèmes africains de maintien de la paix et de la sécurité’, in D. Bangoura (ed.), *L’Union africaine face aux enjeux de paix, de sécurité et de défense* (Paris : L’Harmattan, 2003) 133-144.

¹⁵⁸¹ See Constitutive Act of the African Union; Protocol Relating to the Establishment of the Peace and Security Council of the African Union; Memorandum of Understanding on Cooperation in the Area of Peace and Security

continuously informed of their activities and ensure that these activities are closely harmonised and coordinated with the activities of Peace and Security Council".¹⁵⁸² Likewise, the PSC must "keep the Regional Mechanisms fully and continuously informed of its activities".¹⁵⁸³ This legal framework would be reinforced by the Protocol on Amendments on the AU Constitutive Act of 2003 once it comes into force. The Protocol provides that AU member states must "restraint (...) from entering into any treaty or alliance that is incompatible with the principles and objectives of the Union".¹⁵⁸⁴ The violation of this provision could entail the application of AU's sanctions for non-observation of its policy.

What are the common values and interests whose protection is sought through this order? To answer this question, it is important to recall the AU's objectives. The Constitutive Act provides that the Union aims, among others, to promote peace, security and stability on the continent, to defend the sovereignty, territorial integrity and independence of its members, to promote and protect human and peoples' rights, democratic principles and institutions, to accelerate the political and socio-economical integration of the continent, and to achieve greater unity and solidarity between African countries and the peoples of Africa.¹⁵⁸⁵ Even though some of these objectives have to be understood in a long-term perspective, they constitute the basis for a number of principles which stand, in addition to those which are provided for under the UN Charter,¹⁵⁸⁶ in the heart of the African regional public order. This is the case with the duty to respect borders existing on achievement of independence; the prohibition of destabilisation; the respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; the condemnation and rejection of unconstitutional changes of governments; the ban of

Between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa (2008); Protocol on Relations Between the African Union (AU) and the Regional Economic Communities (2007), Protocol on Relations Between the Regional Economic Communities and the African Economic Community (25 February 1998); EX.CL/Dec.331 (X), Decision on the Relationship Between the African Union Commission and the Regional Economic Communities (RECS) (DOC. EX.CL/308 (X)), 10th Ordinary Session of the Executive Council of the African Union, Addis Ababa (Ethiopia), 25-26 January 2007.

¹⁵⁸² Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Article 16 (3).

¹⁵⁸³ *Ibid.*

¹⁵⁸⁴ Protocol on Amendments on the Constitutive Act of the African Union (11 July 2003), Article 4(q).

¹⁵⁸⁵ Constitutive Act of the African Union, Article 3.

¹⁵⁸⁶ UN Charter, Article 2.

nuclear weapons in all its forms (production, detention or use); and the right of the Union to intervene in a member state in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.¹⁵⁸⁷ It would not be an exaggeration to assume that these principles have acquired the status of African regional customary law given their wide recognition and acceptance by African states. As a reminder, these principles coexist with norms of *jus cogens* in the region. Other specific rules relating to this order of protection of Africa are stipulated by the African Charter on Human and Peoples Rights (ACHPR).

1.1.1.2. The Specificity of the African Charter on Human and Peoples' Rights

The ACHPR constitute an expression of public order. This order is based on several legal specificities as acknowledged in the jurisprudence of the African Commission on Human and Peoples' Rights (ACmHPR). These specificities include the non-derogation character of the Charter (a) and the consequences that it implies for the application and the enforcement of human rights in Africa (b).

a) The Absence of Derogation from the Minimum Standards of the Charter

Human rights are inherent to every human being and protected by the law. Each society has its own experience regarding their assertion, promotion and adjudicative protection.¹⁵⁸⁸ However, the contemporary expansion of human rights in international law came with the creation of the United Nations. The objective of the United Nations is, among others, “to achieve international cooperation in (...) promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.¹⁵⁸⁹ At the regional level, Europe and Americas were the first continents to establish their systems of human rights protection. Whilst the European system is mainly based on the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in the framework of the Council of Europe on 4 November 1950, the American

¹⁵⁸⁷ Constitutive Act of the African Union, Article 4.

¹⁵⁸⁸ K. Vasak, ‘Avant-propos du rédacteur général’, in K. Vasak (ed.), *Les dimensions internationales des droits de l'homme – Manuel destiné à l'enseignement des droits de l'homme dans les universités* (Paris : Unesco, 1978) vii-xii, at vii-viii.

¹⁵⁸⁹ UN Charter, Article 1(3).

system chiefly relies on the American Convention on Human Rights of 22 November 1969.¹⁵⁹⁰

In Africa, the regionalisation of human rights dates back to the beginning of Pan-Africanism (since the 19th century). The latter was a movement which started to claim for the recognition of the dignity of black peoples, in the diaspora and in Africa, after centuries of slave trade and colonisation. This explains in part why African regional human rights are founded on the recognition of both the rights of individuals and those of the peoples. In 1961, a Pan-African Conference on the Rule of Law in Africa was held in Lagos (Nigeria).¹⁵⁹¹ The Conference issued a declaration, known as the “Law of Lagos”, which recommended the adoption of an African charter on human rights and the creation of an appropriate court to protect them.¹⁵⁹² However, the Conference of Independent States of Africa, which adopted the OAU Charter in May 1963, did not uphold this recommendation for two main reasons. First of all, African countries were divided during the Cold War to the extent that an agreement on regional standards of human rights was impossible to find. Rather, the OAU Charter simply endorsed “a policy of non-alignment with regard to all blocs”.¹⁵⁹³ This policy was in line with the outcome of the Bandung Conference (18-24 April 1955) where twenty-nine Asian and African countries (China, Ethiopia, India, Jordan, Liberia, Libya, Egypt, Philippines, Syria, Sudan, etc.) had decided to launch the movement of non-alignment. Secondly, many states seem to have preferred to safeguard and consolidate their sovereignty,¹⁵⁹⁴ before agreeing on a deep regionalisation of human rights. In this context, only a short reference was made to the UN Charter and the Universal Declaration of Human Rights.¹⁵⁹⁵ The OAU Charter also provided that all forms of colonialism should be eradicated from Africa.¹⁵⁹⁶ This insufficient

¹⁵⁹⁰ The American Convention was preceded by the American Declaration of the Rights and the Duties of Man, adopted by the Ninth International Conference of American States, on 2 May 1948, in Bogota (Colombia).

¹⁵⁹¹ F. Viljoen, ‘The African Charter on Human and Peoples’ Rights/The *Travaux Préparatoires* in the Light of Subsequent Practice’, 25 (9-12) *Human Rights Law Journal* (2004) 313-326, at 316.

¹⁵⁹² *Ibid.*

¹⁵⁹³ *Ibid.*, Article III (7).

¹⁵⁹⁴ See J. Mfoulou, *L’OUA : triomphe de l’unité ou des nationalités ? Essai d’une sociologie politique de l’Organisation de l’Unité Africaine* (Paris : L’Harmattan, 1986).

¹⁵⁹⁵ OAU Charter, Preamble, para.9. The OAU Heads of States hereby said that they were ‘persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the Principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among States’. See also Sepúlveda, Banning, Gudmundsdottir, Chamoun and Genugten, above note 572, at 159.

¹⁵⁹⁶ OAU Charter, Article II (1) (d).

regulation on human rights significantly changed when the ACHPR was adopted in 1981, followed by the establishment of the ACmHPR in 1987. The conception of human rights borne by this new legal framework takes into account the historical and traditional virtues of OAU member states as well as “the values of African civilisation”.¹⁵⁹⁷ The ACHPR codifies not only individual human rights, but also peoples’ rights and the duties of every man/woman towards “his family and society, the State and other legally recognised communities and the international community”.¹⁵⁹⁸ It follows that the content of the ACHPR goes beyond the liberal conception of human rights –which is individual-oriented –because the Charter contains a communitarian dimension based on African social solidarity.¹⁵⁹⁹

Another specificity of the ACHPR is the lack of a derogation provision, unlike the European and American conventions on human rights. Pursuant to the latter conventions, a state can derogate from human rights in the event of public emergency such as war or other circumstances which threaten the life of the nation, with the exception of those rules which are clearly specified as insusceptible to derogation or suspension.¹⁶⁰⁰ This lack of a derogation

¹⁵⁹⁷ African Charter on Human and Peoples’ Rights, Preamble, para.5.

¹⁵⁹⁸ *Ibid.*, Articles 27 (1).

¹⁵⁹⁹ O. Ndeshyo, ‘La problématique des droits de l’homme et des peuples en Afrique’, in *Philosophie et droits de l’homme* : actes de la 5^{ème} semaine philosophique de Kinshasa du 26 avril au 1^{er} mai 1981 (Kinshasa : Faculté de Théologie catholique, 1982) 139-157, at 143-146.

¹⁶⁰⁰ Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) provides: ‘1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed’. On its side, Article 27 of the American Convention on Human Rights (22 November 1969) stipulates: ‘1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, religion, or social origin. 2. The foregoing provision does not authorise any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom

provision from the ACHPR could be interpreted as a permission for states parties to adopt derogatory measures in exceptional circumstances under their domestic laws, regardless of the rights at stake.¹⁶⁰¹ However, the ACmHPR has taken a different position. In the communication No.74/92 against Chad, it states that “the African Charter, unlike other human rights instruments, does not allow for stated parties to derogate from their treaty obligations during emergency situations”.¹⁶⁰² Accordingly, “even a civil war (...) cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter”.¹⁶⁰³ In another communication No.101/93 against Nigeria, the ACmHPR held that competent authorities should not enact provisions which limit the exercise of rights under the ACHPR.¹⁶⁰⁴ This position is of course without prejudice to internal restrictions that the ACHPR provides for regarding a number of rights, such as those stipulated by articles 6 and 8.¹⁶⁰⁵ But, for a state party to avail the plea for any limitation of human rights on the basis of its national law, “it must show that it is consistent with its obligations under the (African) Charter”.¹⁶⁰⁶ According to the ACmHPR, the Charter “represents the *minimum* on which the

from *Ex Post Facto* laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. 3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension’.

¹⁶⁰¹ R. Murray, *The African Commission on Human and Peoples’ Rights and International Law* (Oxford: Hart Publishing, 2000), at 123.

¹⁶⁰² *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, ACmHPR, Comm.74/92, 9 Activity Report (1995-1996), para.21.

¹⁶⁰³ *Ibid.*

¹⁶⁰⁴ *Civil Liberties Organisation (in respect of Bar Association) v. Nigeria*, ACmHPR, Comm.101/93, 8th Activity Report (1994-1995), para.15.

¹⁶⁰⁵ Article 6 provides: ‘Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom *except for reasons and conditions previously laid down by law*. In particular, no one may be arbitrarily arrested or detained’. Article 14 stipulates: ‘The right to property shall be guaranteed. *It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws*’. Emphasis is mine.

¹⁶⁰⁶ *Sir Dawda K. Jawara v. The Gambia*, ACmHPR, Comm. 147/95 and 149/96, 13th Activity Report (1999-2000), paras.43, 59 and 68. The brackets are mine.

States Parties agreed to guarantee fundamental human freedoms”.¹⁶⁰⁷ Thus, “the only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27.2, that is that the rights of the Charter ‘shall be exercised with due regard to the rights of others, collective security, morality and common interest’”.¹⁶⁰⁸

The prohibition of derogation from the ACHPR and the obligation for states parties not to adopt national measures which limit the minimum rights which it guarantees may imply that the ACmHPR sees in this treaty the reflection of African regional public order. In this respect, its position is comparable to the jurisprudence of both the European Commission on Human Rights (EComHR) in *Austria v. Italy*¹⁶⁰⁹ and the European Court of Human Rights (ECHR) in *Loizidou v. Turkey*.¹⁶¹⁰ In both cases, the European Convention for the Protection of Human

¹⁶⁰⁷ *Malawi African Association and others v. Mauritania*, ACmHPR, Comm.54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, 13th Activity Report (1999-2000), para.84.

¹⁶⁰⁸ *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria*, ACmHPR, Comm.105/93, 128/94, 130/94 and 152/96, 12th Activity Report (998-1999), para.68.

¹⁶⁰⁹ *Austria v. Italy*, EComHR, Decision of 11 January 1961, Application No. 788/60, 4 *Yearbook of the European Convention on Human Rights* (1961), at 138 and 140. In this case, the European Commission has declared ‘that the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realize the aims and ideals of the Council of Europe...and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideas, freedom and the rule of law’ (at 138). In addition, ‘the obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves’ (at 140). Emphasis is mine.

¹⁶¹⁰ *Loizidou c. Turkey*, ECHR, Preliminary Exceptions, Judgment of du 23 mars 1995, série A, n° 310, para.75. Under the latter paragraph, the European Court of Human Rights has stated: ‘If, as contended by the respondent Government, substantive or territorial restrictions were permissible under these provisions, Contracting Parties would be free to subscribe to separate regimes of enforcement of Convention obligations depending on the scope of their acceptances. Such a system, which would enable States to qualify their consent under the optional clauses, would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a *constitutional instrument of European public order (ordre public)*. Moreover, where the Convention permits States to limit their acceptance under Article 25 (art. 25), there is an express stipulation to this effect (see, in this regard, Article 6 para. 2 of Protocol No. 4 and Article 7 para. 2 of Protocol No. 7) (P4-6-2, P7-7-2). In the Court's view, having regard to the object and purpose of the Convention system as set out above, the consequences for the enforcement of the Convention and the achievement of its aims would be so far-reaching that a power to this effect should have

Rights and Fundamental Freedoms was recognised as an instrument of “European public order”.¹⁶¹¹ Relying on this European jurisprudence, the Inter-American Court of Human Rights espoused the same position in its Advisory Opinion on the *Effect of Reservations on the Entry into Force of the American Convention on Human Rights*.¹⁶¹² However, it is submitted that African regional public order offers, at least in theory, more protection of human rights than its European and American counterparts. This is because of the lack of a derogation provision from the ACHPR. In terms of norm differentiation, one may therefore say that any provision insusceptible to derogation is certainly part of public order. In contrast, the prohibition of derogation does not affect all norms of public order. Furthermore, if the notion of *jus cogens* refers to peremptory norms from which no derogation is permitted, there are other rules insusceptible to derogation, which are not part of it.¹⁶¹³ Likewise, peremptory norms are narrower in extension than the notion of rules of public order. Some consequences necessarily stem from this particular scope of the ACHPR.

been expressly provided for. However no such provision exists in either Article 25 or Article 46 (art. 25, art. 46)’. Emphasis is mine.

¹⁶¹¹ See G. Lebreton, ‘Ordre public’, in J. Andriantsimba Zovina, H. Gaudin, J.-P. Marguénaud, S. Rials and F. Sudre (eds), *Dictionnaire des droits de l’homme* (Paris: Presses universitaires de France, 2008) 717-719, at 718-719 ; E. De Wet, ‘The Emergence of International Regional Values Systems as a Manifestation of the Emerging International Constitutional Order’, 19 *Leiden Journal of International Law* (2006) 611-632 ; B. Moutel, ‘L’"effet horizontal" de la Convention européenne des droits de l’homme en droit privé français. Essai sur la diffusion de la CEDH dans les rapports entre personnes privées’ (PhD Thesis, Université de Limoges 2006), at 305-306 ; G. Cohen-Jonathan, ‘L’affaire Loizidou devant la Cour européenne des droits de l’Homme : quelques observations’, CII (1) *Revue générale de droit international public* (1998) 123-144 ; F. Sudre, ‘Existe-t-il un ordre public européen ?’, in T. Tavernier (ed.), *Quelle Europe pour les droits de l’Homme ? La Cour de Strasbourg et la réalisation d’une « Union plus étroite », 35 années de jurisprudence (1959-1994)* (Bruxelles : Bruylant, 1996) 39-80.

¹⁶¹² *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, September 24, 1982, Inter-Am. Ct. H.R. (Ser.A) No. 2 (1982), para.29. In particular, the Court emphasises that ‘modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the *common good*, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction’. Emphasis is mine.

¹⁶¹³ Villiger, above note 1545, at 669.

b) The Possible Consequences for the Safeguard of Regional Public Order

Admitting the existence of a regional public order in the field of human rights in Africa implies some specific legal consequences. Five of these consequences can be listed with respect to the application of the ACHPR.

First, the ACHPR does not contain any provision prohibiting reservations to it. This fact must be understood in the sense that reservations are permitted pursuant to article 19 of the VCLT. However, given the interpretation of the ACHPR by the AComHPR acknowledging African regional public order, it is submitted that a reservation that amounts to a derogation from the minimum standards of human rights protected by the Charter is prohibited. In fact, only Egypt and Zambia entered some reservations to this treaty. The Egyptian reservations are about the application of articles 8 and 18 (3) as well as the interpretation of article 9(1).¹⁶¹⁴ On its part, Zambia entered reservations on the formulation of articles 13 (3) and 37.¹⁶¹⁵ However, these reservations do not constitute a rejection of the relevant provisions of the Charter. They simply seek to interpret them in a certain way without derogating from the substance.

¹⁶¹⁴Executive Council of the African Union, 'Report on the Status of OAU/AU Treaties (As at 11 July 2012)', EX.CL/728(XXI) Rev.1, Addis Ababa (Ethiopia), 9-13 July 2012, para.54. Article 8 of the Charter provides: 'Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms'. Article 9(1) stipulates: 'Every individual shall have the right to receive information'. Article 18(3) states: 'The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions'. The Egyptian reservations then read as follows: 'Article 8 and Article 18(3) - Application of Article 8 and Article 18 (3) of the Charter should be in the light of Islamic Sharia Law and not to its demerit; Article 9(1)- Egypt shall interpret this paragraph as being applicable only to information, the obtaining of which is authorized by Egyptian laws and regulations'.

¹⁶¹⁵ *Ibid.* Article 13 (3) provides: 'Every individual shall have the right of access to public property and services in strict equality of all persons before the law'. Article 37 stipulates: 'Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organisation of African Unity shall draw lots to decide the names of those members referred to in Article 36'. The Zambian reservations then read as follows: 'Article 13(3) -should be amended such that every individual has the right of access to any place, services or public property intended for use by the general public; Article 37- the Secretary-General of the Organisation, rather than the Chairman of the Assembly, should draw lots to determine the terms of office of members of the Commission; and non-State Parties to the Charter should also submit reports to the Commission'.

Second, there is no reciprocity in the application of the ACHPR by states parties. This is also the option of the VCLT, which apparently excludes reciprocity between states concerning the protection of human rights.¹⁶¹⁶

Third, inter-state communications may be referred to the ACmHPR owing not only to violations of human rights which have occurred on the defendant or the applicant state's territory, but also in the territory of any other state party by any contracting country. The general terms used in the ACHPR does not seem to preclude this possibility as the Charter stipulates: "(...) if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission",¹⁶¹⁷ by addressing a communication to the Chairman, the OAU Secretary General (today the President of the AU Commission) and the state concerned.¹⁶¹⁸ Up to now, all AU member states have ratified the ACHPR.¹⁶¹⁹ The right of a state to address a communication to the ACmHPR implies the right to lodge a complaint with the African Court of Human and Peoples' Rights (AfCHPR),¹⁶²⁰ provided that the defendant state before the ACmHPR is a party –like the applicant state –to the Court's founding Protocol. This entitlement is important since the ACmHPR issues recommendations while the Court delivers binding judgments. Moreover, in the communication No.227/ 1999 against Burundi, Rwanda and Uganda, the ACmHPR held that the requirement to exhaust local remedies does not apply when a state party refers a matter to it in relation to violation of human rights perpetrated on its territory.¹⁶²¹ The same jurisprudence should logically apply to communications relating to situations in states parties other than the defendant country. This position is consistent with the rationale of the requirement to exhaust local remedies since the principle aims to leave the primary right to the defendant state, whose national public order was broken, to deal in good faith with violations of human rights perpetrated on its territory through the laws and procedures available within its domestic order. In case of violations committed outside its

¹⁶¹⁶ Vienna Convention on the Law of Treaties, Article 60 (5).

¹⁶¹⁷ African Charter on Human and Peoples' Rights, Article 49.

¹⁶¹⁸ *Ibid.*

¹⁶¹⁹ See List of ratifications (3 June 2016) <https://au.int/en/sites/default/files/treaties/7770-sl-african_charter_on_human_and_peoples_rights_0.pdf> accessed 9 January 2017.

¹⁶²⁰ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (10 June 1998), Article 5(1) (b).

¹⁶²¹ *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*, ACmHPR, Comm. 227/ 1999, 20 Activity Report (2006), para.63.

territory and for which it might bear responsibility, it becomes incompatible with the protection of the regional public order to wait for the very same state to make use of its law as a judge and a party.

Fourth, violations of the rights of a people, for example oppression, colonisation or the denial of participation in government, may justify the right to secession from the mother state. This is not forbidden by international law as it does not protect a state from internal separatism but only external violations of its territorial integrity, mainly by another state.¹⁶²² In the context of Africa, the concept “people” means either the people of the continent as a whole, the entire population of a state, an ethnic group or minority or any other homogenous population with a common identity.¹⁶²³ In this respect, the ACmHPR regarded the Katangese (from the Katanga province in the South-East of the DRC) as a people but refused to accede to their claim for secession and independence from the defendant country since none of their rights had been violated.¹⁶²⁴ They should rather exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of the DRC, that is to say “self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people”.¹⁶²⁵

Fifth, and last, certain violations of the values protected by the ACHPR, while being threats against Pan-African public order *per se*, can also constitute regional crimes. This is the case with the crime of illicit exploitation of natural resources,¹⁶²⁶ which derives from the criminalisation of violations of the right of all peoples to dispose of their wealth and natural resources.¹⁶²⁷ The list of crimes falling within the jurisdiction of the AU Criminal Court will further illustrate the issue. Thus, the order of protection of Africa has developed in parallel with a regional order of defence against such security threats that undermine the rules and principles laid down.

¹⁶²² A. Vahlas, ‘Les séparations d’Etats : l’Organisation des Nations Unies, la sécession des peuples et l’unité des Etats’ (PhD Thesis, Université Pathéon-Assas (II) 2000), at 508-509.

¹⁶²³ See also Murray, above note 1601, at 105.

¹⁶²⁴ *Katangese Peoples’ Congress v. Zaire*, ACmHPR, Comm.75/92, 8 Activity Report (1994-1995), paras.2 and 6. Zaire is the former name of the Democratic Republic of Congo.

¹⁶²⁵ *Ibid.*, paras.4 and 6.

¹⁶²⁶ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28L Bis.

¹⁶²⁷ African Charter on Human and Peoples’ Rights, Article 21.

1.1.2. The Order of Defence Against Regional Security Threats

There is no African regional public order without establishing institutions of security and defence, whose function is to enforce the rules and principles laid down in the interest of the African community. The issue raises a conceptual problem. From the OAU to the AU, the African conception of security and defence has radically evolved. It now covers a wide range of threats against African regional public order, including threats against the continent, the states, the individuals and African peoples as a whole. This evolution (1.1.2.1) entails a re-organisation of African institutions of security and defence, and criminal jurisdictions in particular (1.1.2.2.).

1.1.2.1. The Evolution from the OAU to the African Union

This evolution is the result of the will to correct the weaknesses of the OAU security system (a) and to replace it by the Common African Defence and Security Policy (b).

a) The Weaknesses of the OAU System

The OAU, the AU's predecessor, was almost unable to protect the African regional public order or to find solutions for African human rights crises by its own means. Statistically, the AU Commission declared that 186 coups d'état had occurred on the continent between 1956 and 2001, half of which having been committed between 1980 and 1990.¹⁶²⁸ It also indicated that 26 armed conflicts happened between 1963 and 2000, causing seven million dead people, three million refugees and 20 million internally displaced persons (IDP).¹⁶²⁹ Many of these conflicts were non-international conflicts and together they affected 61% of the population of Africa.¹⁶³⁰ The matter is so serious that the AU Commission emphasised:

(...) wars did not spare any geographic region of the Continent: the Horn of Africa (Ethiopia, The Sudan, Eritrea and Somalia), Southern Africa (12 conflicts) and West Africa, (some 10 wars) have been the theatre of conflicts. Only North Africa with the exception of Algeria remained relatively conflict-free. Some of these wars lasted for quite long periods. For instance, the war in Chad

¹⁶²⁸ African Union Commission, *Strategic Plan of the African Union Commission -Volume 1: Vision and Mission of the African Union* (Addis Ababa, May 2004), at 14.

¹⁶²⁹ *Ibid.*, at 14 and 15.

¹⁶³⁰ *Ibid.*, at 15. See also See J. Cilliers, 'Future (im) Perfect? Mapping Conflict, Violence and Extremism in Africa', Institute of Security Studies Paper No.287 (October 2015), at 3-4 and 9-10.

persisted for 40 years; in South Sudan, the war lasted 37 years; in Eritrea, 30 years; and in Angola, 27 years, etc.¹⁶³¹

The most critical situations happened in the 1990s. They include a number of fratricidal wars in Liberia (1990), Somalia (1992) and Sierra Leona (1995), Burundi (1993), the genocide in Rwanda (1994), the massacres of Rwandan refugees (1996) and the persistent armed conflicts (since 1993) in the DRC. The latter reached their peak in 1998 with the direct involvement of eight African countries.¹⁶³² Some commentators even argued that the Congo war of 1998 constituted the true first “African world war”.¹⁶³³

The OAU was crippled by a number of deficiencies to raise all these challenges. The Commission on Mediation, Conciliation and Arbitration (CMCA) which was the OAU principal organ in charge of peaceful settlement of interstate disputes,¹⁶³⁴ had never become operational. States preferred to stick on their sovereignty rather than subjecting themselves to a continental quasi-jurisdictional institution.¹⁶³⁵ Even if the Protocol organising the CMCA was adopted on 21 July 1964, the mechanism failed and the OAU Assembly proceeded to its abolition in 1977.¹⁶³⁶ State disputes could be submitted to *ad hoc* political committees, which had little to do with human right protection. Concerning military (humanitarian) intervention, the Cairo Declaration of 30 June 1993 on the OAU Mechanism for Conflict Prevention, Management and Resolution limited any African troop deployment to an observer mission, devoid of a mandate to use force for the protection of civilians, except in case of self-defence.¹⁶³⁷ The consent of interested belligerent parties was also required, in accordance with

¹⁶³¹ *Ibid.*

¹⁶³² Angola, Burundi, Chad, Democratic Republic of Congo, Namibia, Rwanda, Uganda and Zimbabwe.

¹⁶³³ C. Braeckman, *L'enjeu congolais. L'Afrique centrale après Mobutu* (Paris : Fayard, 1999), at 11 ; B. Kabamba et O. Lanotte, ‘Guerres au Congo-zaïre (1996-1999). Acteurs et scénarios’, in P. Mathieu and J.-C. Willame (eds), *Conflits et guerres au Kivu et dans la région des Grands Lacs. Entre tentions locales et escalade régionale* (Paris : L'Harmattan, 1999) 99-159, at 99 ; L. Sindjoun, *Les relations internationales africaines : entre Etats en crise et flux transnationaux* (Dakar : CODESRIA, 2002), at 58.

¹⁶³⁴ OAU Charter, Article XIX.

¹⁶³⁵ L. D. Kassabo, ‘Le système africain de sécurité collective régionale à l'ère de l'Union africaine’ (Unpublished PhD Thesis, Università degli studi di Padova 2010), at 140.

¹⁶³⁶ *Ibid.*

¹⁶³⁷ AHG/Decl.3 (XXIX), Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, 29th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Cairo (Egypt), 28-30 June 1993, paras.14-15. In paragraph 14, it is stated: ‘The Mechanism will be guided by the objectives and

the OAU's obligation not to interfere with the internal affairs of member states.¹⁶³⁸ From a political angle, the continental organisation suffered from a lack of state cooperation. Its observer missions on the ground neither received sufficient personnel, nor appropriate financial and logistical means to implement their powerless mandates.¹⁶³⁹ For the same reason, the OAU was not able to take judicial criminal measures. It had no legal power, like the one with which the Security Council is vested under Chapter VII of the UN Charter, to create an *ad hoc* tribunal. The ACmHPR, which was created by the ACHPR,¹⁶⁴⁰ engendered a new expectation in human rights protection.¹⁶⁴¹ However, this body is not a court of justice. The AfCHPR was established by the Ouagadougou Protocol in June 1998 to fill this gap. But, it has no criminal jurisdiction, while the Ouagadougou Protocol has entered into force only on 10 January 2004.

Criticised for its inability to deal efficiently with African crises, the OAU had to be replaced by the AU. The process towards this replacement started in Sirte (Libya) in 1999. The Sirte Declaration announced the decision of African Heads of state and government to create the AU pursuant to fundamental objectives of the OAU Charter and the Abuja Treaty instituting

principles of the OAU Charter; in particular, the sovereign equality of Member States, noninterference in the internal affairs of States, the respect of the sovereignty and territorial integrity of Member States, their inalienable right to independent existence, the peaceful settlement of disputes as well as the inviolability of borders inherited from colonialism. *It will also function on the basis of the consent and the co-operation of the parties to a conflict*. In paragraph 15, the Declaration provides: 'The Mechanism will have as a primary objective, the anticipation and prevention of conflicts. In circumstances where conflicts have occurred, it will be its *responsibility to undertake peace-making and peace-building functions in order to facilitate the resolution of these conflicts*. In this respect, *civilian and military missions of observation and monitoring of limited scope and duration may be mounted and deployed*. In setting these objectives, we are fully convinced that prompt and decisive action in these spheres will, in the first instance, prevent the emergence of conflicts, and where they do inevitably occur, stop them from degenerating into intense or generalised conflicts. Emphasis on anticipatory and preventive measures, and concerted action in peace-making and peace-building will obviate the need to resort to the complex and resource-demanding peacekeeping operations, which our countries will find difficult to finance'. Emphasis is mine.

¹⁶³⁸ See M.C. Djiena Wembou, 'A propos du nouveau mécanisme de l'OUA sur les conflits', *XCVIII Revue générale de droit international public* (1994) 377-386.

¹⁶³⁹ J. D. Biyogue-Bi-Ntougou, *Les politiques africaines de paix et de sécurité* (Paris : L'Harmattan, 2010), at 21.

¹⁶⁴⁰ African Charter on Human and Peoples' Rights, Article 30.

¹⁶⁴¹ G. J. Naldi, 'Future Trends in Human Rights in Africa: the Increased Role of the OAU', in M. D. Evans and R. Murray (eds), *The African Charter on Human and Peoples' Rights: the System in Practice, 1986-2000* (Cambridge: Cambridge University Press, 2002)1-35, at 10.

the AEC.¹⁶⁴² The AU Constitutive Act, which was adopted in July 2000, entered into force on 26 May 2001. The new organisation was officially launched in Durban (South Africa) in July 2002. It contains an important institutional reform and a new security paradigm for the continent.

b) The Advent of the Common African Defence and Security Policy

Compared to the OAU's security paradigm, the Common African Defence and Security Policy (CADSP) expands the conception of threats to the African regional public order and relies on new institutions of security and defence. Historically, the establishment of a common defence policy for the African continent was on the agenda of the Union of African States (Ghana, Mali and Guinea) in 1961.¹⁶⁴³ The Union's vision derived from the African Charter of Casablanca (Morocco)¹⁶⁴⁴ and the doctrine of President Kwame N'krumah on African unity.¹⁶⁴⁵ But, the system of common defence policy which it established through the Constitutive Charter of 29 April 1961 was very embryonic insofar as it only dealt with external threats to African peace and security, in particular the crime of aggression against member states.¹⁶⁴⁶ In the end, this system failed given the fact that the Union did not survive after the creation of the OAU in 1963.

The AU continued to promote the same agenda. The Constitutive Act provides that the Union shall establish "a common defence policy for the African continent".¹⁶⁴⁷ This policy is to be adopted by the AU Assembly which is the competent organ to "determine the common policies of the Union".¹⁶⁴⁸ However, the PSC is also permitted to "develop a common defence policy

¹⁶⁴² EAHG/Decl. (IV) Rev.1, Sirte Declaration, 4th Extraordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Sirte (Libya), 8-9 September 2009, para.8(i).

¹⁶⁴³ Charter of the Union of African States (29 April 1961), Article 4 and Title IV.

¹⁶⁴⁴ This Charter was adopted by the Casablanca Conference held in Casablanca (Morocco) from 3 to 7 January 1961, gathering African states belonging to the so-called group of progressist countries (Ghana, Guinea Conakry, Mali, Libya, Egypt et Morocco) as opposed to the so-called group of moderate states, which were in favour of a close cooperation with the former colonial powers and the West in general and gathered in Monrovia (Liberia) in May 1961. It must be noted that this division between the group of Casablanca and the group of Monrovia was aggravated by the climate of the Cold War in Africa.

¹⁶⁴⁵ N'krumah, above note 97.

¹⁶⁴⁶ Charter of the Union of African States, Article 7.

¹⁶⁴⁷ Constitutive Act of the African Union, Article 4(d).

¹⁶⁴⁸ *Ibid.*, Article 9 (a).

for the Union, in accordance with article 4(d) of the Constitutive Act”.¹⁶⁴⁹ Despite an apparent conflict between these provisions, the contradiction should disappear because the PSC acts in the name of the AU Assembly of which it is a subsidiary organ. In addition, the PSC has the power to “implement the common defence policy of the Union”.¹⁶⁵⁰ According to the AU Non-aggression and Common Defence Pact, the PSC shall be assisted in the implementation of its mandate by “any organ of the Union, pending the setting up of mechanisms and institutions for *common defence and security*”.¹⁶⁵¹ The expression “Common African Defence and Security Policy” is explicitly used as such in other important decisions of the AU Assembly in 2002 and 2003. The Durban Decision was a call on the AU Chairperson and South African President, Thabo Mbeki, to establish a group of experts to examine all aspects related to the establishment of such policy and to submit recommendations to the AU Assembly.¹⁶⁵² The Maputo Decision commended the efforts of the AU Chairperson for the implementation of his mission after presenting the “Draft Framework for a Common African Defence and Security Policy”.¹⁶⁵³ This document constitutes the basis on which the Solemn Declaration on a Common African Defence and Security Policy was adopted in February 2004.

The CADSP contributes to the process of African integration and is therefore limitative of state sovereignty as the AU itself.¹⁶⁵⁴ But, the notion of “common policies of the Union” and the CADSP must be distinguished from the concept of AU’s “common positions”.¹⁶⁵⁵ These positions are adopted in order to ensure that African states present collectively African claims and concerns on issues of “interest to the continent and its peoples”¹⁶⁵⁶ at the global level. The most striking example is the common African position on the ICC. In terms of definition, one

¹⁶⁴⁹ Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Article 3(e).

¹⁶⁵⁰ *Ibid.*, Article 7 (h).

¹⁶⁵¹ African Union Non-aggression and Common Defence Pact, Article 9. Emphasis is mine.

¹⁶⁵² ASS/AU/Dec. 8 (I), Decision on a Common African Defence and Security, 1st Ordinary Session of the Assembly of the African Union, Durban (South Africa), 9-10 July 2002, para.2.

¹⁶⁵³ Assembly/AU/Dec.13 (II), Decision on the African Defence and Security Policy (Doc. Assembly/AU/6 (II)), 2nd Ordinary Session of the Assembly of the African Union, Maputo (Mozambique), 10-12 July 2003, paras.1 and 4.

¹⁶⁵⁴ L.J. Farmer, ‘Sovereignty and the African Union’, 4 (10) *Journal of Pan-African Studies* (2012)93-105, at 98-99.

¹⁶⁵⁵ Constitutive Act of the African Union, Article 3 (d).

¹⁶⁵⁶ *Ibid.*

may say that a common policy implies a clear determination of objectives to achieve in any domain in which the AU is competent to exercise its functions and appropriate means to be used for their realisation. The CADSP focuses on security issues. It pursues three objectives, which are interconnected and mutually dependent.

First, the CADSP aims to preserve national security, i.e. the security of the state. Second, it aims to protect human security, which turns around the individual. According the AU Non-aggression and Common Defence Pact, human security must be understood in terms of satisfaction of basic needs of the individual.¹⁶⁵⁷ However, human security also includes “the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his/her full development”.¹⁶⁵⁸ As far as African regional criminal law is concerned, this is an important distinctive feature from the project for the global system of international criminal justice. The latter pays little attention to economic crimes as threats to human security. A conflict may arise between these two objectives. In fact, human security can be protected against the state or the state against the individual. For example, the crime of unconstitutional change of government is a threat to the state security and political organisation, whereas the commission of war crimes by state officials violates the rights of individuals or peoples. The CADSP does not seem to prioritise human security over the security of the state. This conception of security is likely one of the justifications for the relevance of personal immunity for state officials before the AU Criminal Court. Third, the CADSP aims to establish peace and security in the African continent. In this regard, the AU Constitutive Act provides that the scourge of conflicts in Africa constitutes “a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of (the) development and integration agenda”.¹⁶⁵⁹ Likewise, the AU Non-aggression and Common Defence Pact aims “to deal with threats to peace, security and stability in the continent and to ensure the well being of the African peoples”.¹⁶⁶⁰ This third goal is transversal because it can be attained only if human security

¹⁶⁵⁷ African Union Non-aggression and Common Defence Pact, Article 1 (k).

¹⁶⁵⁸ *Ibid.*

¹⁶⁵⁹ Constitutive Act of the African Union, Preamble, para.9. The brackets are mine.

¹⁶⁶⁰ African Union Non-aggression and Common Defence Pact, Preamble, para.9.

and state security are guaranteed. Put it differently, there will not be peace, security and stability in Africa if individuals, peoples and states are not secured.

Against this backdrop, the notion of threats to the African regional public order has shifted from a narrow to a broad conception. It consists of both military and non-military threats.¹⁶⁶¹ Their origin may be political, economic, social, cultural, environmental and humanitarian. But, in Africa, some scholars suggest that security threats are beforehand due to economic and social problems,¹⁶⁶² while others argue in favour of the primacy of political violence over other factors.¹⁶⁶³ The CADSP embraces both approaches and deals with any threat regardless of its origin: aggression, genocide, war crimes, crimes against humanity, subversion, political assassinations, unconstitutional change of government, corruption, trafficking in human beings or drugs, etc. This expansion of the notion of threats to African regional public order justifies the reinforcement of the AU's operational abilities. The AU may now use force even without the consent of the state concerned.¹⁶⁶⁴ It is submitted that the CADSP deals only with security threats that take place in Africa. Thus, as a matter of principle, the AU's institutions of security and defence would be territorially incompetent to exercise their functions in situations or in cases of crimes that endanger African regional public order occurring outside the continent.

1.1.2.2. The Reorganisation of Institutions of Security and Defence

Which institutions of security and defence can protect African regional public order? The answer to this question depends on the resolution of two correlative issues: whether the AU

¹⁶⁶¹ L.K.H Goma, 'Some reflections on African security', in *The Fourth Conference of Pan-African Pugwash on African Security and Namibia (Cairo, November 1984)* (Cairo: Egyptian State Information Service, 1986) 8-16.

¹⁶⁶² J. Y. Ewusie, 'African Security : Implication of Socio-Economic Constraints and Political Instability', *The Fourth Conference of Pan-African Pugwash on African Security and Namibia (Cairo, November 1984)* (Cairo: Egyptian State Information Service, 1986) 133-140; L. Buur, S. Jensen and F. Stepputat, 'The Security-Development Nexus', in L. Buur, S. Jensen and F. Stepputat (eds), *The Security-Development Nexus: Expressions of Sovereignty and Securization in Southern Africa* (Cap Town: HSRC Press, 2007) 9-33.

¹⁶⁶³ M. Tshiyembe, 'Nature et dynamique de la conflictualité africaine', in D. Bangoura and E. Fidiéck A. Bidias (eds), *L'Union africaine et les acteurs sociaux dans la gestion des crises et des conflits armés* (Paris : L'Harmattan, 2006) 33-42 ; P.F. Ngayap, 'Le monopole et le partage du pouvoir à l'origine des conflits en Afrique', in P. Ango Ela (ed.), *La prévention des conflits en Afrique centrale. Prospective pour une culture de la paix* (Paris: Karthala, 2001)59-66.

¹⁶⁶⁴ Y.A. Chouala, 'Puissance, résolution des conflits et sécurité collective à l'ère de l'Union africaine. Théorie et pratique', *VI Annuaire français de relations internationales* (2005) 287-306.

was institutionalised as a community in the name of which this order is to be protected (a) and how, for this purpose, it can exercise its right to intervene in a member state (b).

a) The African Union as a Community of States and Peoples

Created in 2000 and officially launched in 2002, the AU can be regarded as a community. Pursuant to the AU Non-aggression and Common Defence Pact, it is “a community of member states”.¹⁶⁶⁵ The Sirte Declaration of 1999 on the establishment of the Union also specifies that the AU is “a larger community of peoples”,¹⁶⁶⁶ the aspirations of which it aims to rekindle for “stronger unity, solidarity and cohesion”.¹⁶⁶⁷ The states and peoples can organise themselves in different ways within their community. States can adhere to the AU and any other intergovernmental organisation, such as RECs, while peoples and individuals may create civil society organisations, such as non-governmental organisations.

This approach to a community was initially upheld by the African Conference of African Peoples, held in Accra (Ghana) from 3 to 5 December 1958, in its final resolution on borders, territorial limits and federations.¹⁶⁶⁸ But, the process towards the establishment of the African community has been in an impasse since the OAU creation until the adoption of the Abuja Treaty instituting the AEC in 1991. The Abuja Treaty transformed the OAU into the OAU/AEC to which the AU succeeded.¹⁶⁶⁹ It also provides the creation of the entire African community in a period of 34 years from the date of its entry into force on 12 May 1994.¹⁶⁷⁰ In any case, this term should not be longer than 40 years.¹⁶⁷¹ Likewise, the UA Non-aggression and Common Defence Pact stipulates that “as part of the vision of building a strong and united Africa, State Parties undertake to establish an African Army at the final stage of the political and economic integration of the Continent (...)”.¹⁶⁷² In this context, the UA was created in abbreviation of the implementation periods of the Abuja Treaty.¹⁶⁷³ A number of

¹⁶⁶⁵ African Union Non-aggression and Common Defence Pact, Preamble, para.9.

¹⁶⁶⁶ EAHG/Decl. (IV) Rev.1, above note 1642, para.5.

¹⁶⁶⁷ *Ibid.*

¹⁶⁶⁸ Organisation Internationale de la Francophonie, above note 684, at 283.

¹⁶⁶⁹ Constitutive Act of the African Union, Article 33.

¹⁶⁷⁰ Treaty Establishing the African Economic Community, Article 6 (1).

¹⁶⁷¹ *Ibid.*, Article 6 (5).

¹⁶⁷² African Union Non-aggression and Common Defence Pact, Article 4 (d).

¹⁶⁷³ EAHG/Decl. (IV) Rev.1, above note 1642, para.8 (ii). In the paragraph, the OAU Assembly stated following the Libyan proposals: ‘Having discussed frankly and extensively on how to proceed with the strengthening of

community institutions, such as the Pan-African Parliament and the AU Court of Justice, were put in place earlier than expected.

The new African institutions of defence and security implies different stakes. The first one relates to the aspiration to solidarity within the African community. At the global level, solidarity serves to distinguish the notion of international society of sovereign states, based on self-interests, from the international community as a whole.¹⁶⁷⁴ Christian Tomuschat has defined the international community as “a kind of authority that closely follows world events and bears responsibility for maintaining an orderly and peaceful international environment and for ensuring decent conditions of existence to every human being”.¹⁶⁷⁵ However, it is formally more a fiction than a concrete authority. States may even divert its actions in the pursuit of their ego-centric interests by other means. Theoretically, the international community protects its own interests (such as world peace, security and environment) or mankind (humanity) against fundamental and existential threats (such as pandemic diseases and egregious crimes). In this regard, “mankind is for the international community what is a people for a state”.¹⁶⁷⁶ The solidarity which arguably exists within a community is stronger where a process of integration of states, and therefore the establishment of a community, is undertaken. The Malabo Protocol clearly refers to this link between integration and

the unity of our continent and its peoples, in the light of those proposals, and hearing in mind the current situation on the Continent, we DECIDE TO: (i) Establish an African Union, in conformity with the ultimate objectives of the Charter of our Continental Organisation and the provisions of the Treaty establishing the African Economic Community. (ii) Accelerate the process of implementing the Treaty establishing the African Economic Community, in particular: (a) Shorten the implementation periods of the Abuja Treaty, (b) Ensure the speedy establishment of all the institutions provided for in the Abuja Treaty; such as the African Central Bank, the African Monetary Union, the African Court of Justice and in particular, the Pan-African Parliament. We aim to establish that Parliament by the year 2000, to provide a common platform for our peoples and their grass-root organizations to be more involved in discussions and decision-making on the problems and challenges facing our continent. (c) Strengthening and consolidating the Regional Economic Communities as the pillars for achieving the objectives of the African Economic Community and realising the envisaged Union’.

¹⁶⁷⁴ R. Kolb, ‘Société internationale ! Communauté internationale ?’, in J.F. Akandji-Kombé, *L’homme dans la société internationale –Mélanges P. Tavernier* (Bruylant : Bruxelles, 2013) 57-89, at 59-60 ; E. Jouanet, ‘La communauté internationale vue par les juristes’, *VI Annuaire français de relations internationales* (2005) 3-26, at 5.

¹⁶⁷⁵ Tomuschat, above note 45, at 222.

¹⁶⁷⁶ I. Ivanovich Lukashuk, ‘The Law of the International Community’, in United Nations, *International law on the eve of the twenty-first century. Views from the International Law Commission* (New York: United Nations, 1997) 51-68, at 56.

community. Its preamble states that the AU Criminal Court is among the efforts “to promote the objectives of the political and socio-economic integration and development of the continent with a view to realising the ultimate objective of a United States of Africa”.¹⁶⁷⁷ The AU Criminal Court will exercise its jurisdiction and deliver justice on behalf of the African community of states and peoples.

The second stake derives from a close different question: apart from the AU Criminal Court and the Pan-African Parliament, which institutions of security and defence can precisely act on behalf of this community? The PSC is certainly one of these institutions. It has replaced the OAU Central Organ, based on the Cairo Declaration of 1993.¹⁶⁷⁸ The process of its establishment began in 2001 when the decision was taken to incorporate the OAU Central Organ into the AU with a review of its structures, procedures and working methods, including the change of its name.¹⁶⁷⁹ In July 2002, the AU Assembly finally adopted the Protocol establishing the PSC. The latter is therefore its subsidiary organ pursuant to article 5(2) of the Constitutive Act. Compared to the OAU Central Organ, the PSC is relatively a robust institution which is likely the most important innovation of the AU system.¹⁶⁸⁰ Like the UN Security Council, it consists of 15 member states, but none of them has a veto power. The PSC meets at the level of ambassadors, ministers of foreign affairs or heads of state and government. For the better performance of its functions, the PSC has an administrative secretariat and is supported by the AU Commission, the Panel of the Wise, the Continental Early Warning System, the African Standby Force and the Special Fund.¹⁶⁸¹ Its extensive

¹⁶⁷⁷ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Preamble, para.13.

¹⁶⁷⁸ AHG/Decl.3 (XXIX), above note 1637, para.13.

¹⁶⁷⁹ AHG/Dec.1 (XXXVII), Decision on the Implementation of the Sirte Summit Decision on the African Union, 37th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Lusaka (Zambia), 9-11 July 2002, para.8 (a) and (b).

¹⁶⁸⁰ S. A. Dersso, *Annual Review of the Peace and Security Council 2012/2013* (Pretoria: Institute for Security Studies, 2013), at 1.

¹⁶⁸¹ Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Article 1 (2). The AU Commission plays a similar role to the UN Secretariat in relation with the Security Council, including drawing the attention of the PSC on situations which deserves its actions and reporting on the activities of AU peace support operations across the continent. The Panel of the Wise is an organ composed of five highly respected personalities, appointed by the AU Assembly for a period of three years, and is mandated to advise the PSC or the Chairperson of the AU Commission on all issues pertaining to the promotion, and maintenance of peace, security and stability in Africa. The Continental Early Warning System is like the security intelligence

powers include the authorisation of the mounting and deployment of AU peace support operations, the examination and adoption of appropriate actions within its mandate in situations where a member state is threatened by acts of aggression, the imposition of sanction in cases of unconstitutional changes of government, and the power to decide on any other issue relating to the maintenance of peace in Africa.¹⁶⁸² Thus, the PSC appears to be “the main authority on matters of peace and security on the continent”¹⁶⁸³ and the principal institution of the APSA.

As a subsidiary organ, the PSC is accountable to the AU Assembly, which is “the supreme organ of the Union”.¹⁶⁸⁴ The AU Assembly can approve, modify or even disapprove any decision taken by it. Moreover, there are decisions that the PSC cannot take without an express delegation of power by the AU Assembly. This is the case of the imposition of sanctions against states, for example, in response to an unconstitutional change of government. The PSC can only sanction individuals or non-state actors.¹⁶⁸⁵ In addition, it cannot take any decision to intervene in a member state in the event of war crimes, genocide and crimes against humanity. But, it can recommend such an intervention to the AU Assembly which has the exclusive power to decide on the matter.¹⁶⁸⁶ This distribution of powers between the PSC and the AU Assembly may negatively affect the efficacy of the Union’s right to intervene. Yet, it is one of the most important mechanisms for the protection of African regional public order.

service of the African Union. It collects information about situations which deserve the action of the PSC in order to facilitate the anticipation and prevention of conflict in Africa. The African Standby Force is the military branch of the AU, pending the establishment of the African Army at the final stage of the continental integration. Whereas it is not yet operational, the African Standby Force is notably designed for the deployment of peace support operations or other AU military interventions. The Special Fund has been created in order to secure the necessary financial resources for the activities related to peace and security on the continent.

¹⁶⁸² *Ibid.*, Article 7 (1) (c), (g), (o) and (r).

¹⁶⁸³ Dersso, above note 1680, at 5.

¹⁶⁸⁴ Constitutive Act of the African Union, Article 6 (2).

¹⁶⁸⁵ African Charter on Democracy, Elections and Governance, Article 25 (6). In this paragraph, the Charter provides: ‘The Assembly shall impose sanctions on any Member State that is proved to have instigated or supported unconstitutional change of government in another state in conformity with Article 23 of the Constitutive Act’.

¹⁶⁸⁶ Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Article 7 (1) (e).

b) The Right of the African Union to Intervene in a Member State

The will to curb the OAU inertia when faced with African crises is the reason for the broad ambitions of the AU. But, the modification of the law is not of itself sufficient for the effective realisation of these ambitions if no action is undertaken on the ground to ensure order, peace and security.¹⁶⁸⁷ The will to deal with African crises is reflected in the right to intervene in a member state pursuant to a decision of the AU Assembly.

The mechanism contains two different coexisting conceptions in the AU Constitutive Act. The first one is an intervention “in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity”.¹⁶⁸⁸ This is the first time that such a right is provided for in an international treaty in favour of an intergovernmental organisation in international law. The UN Charter prohibits the interference with the domestic affairs of member states, except for measures that decided pursuant to Chapter VII for the maintenance of international peace and security.¹⁶⁸⁹ Instead, the right to intervene in a member state is one of the principles governing the AU functioning. The mechanism aims to protect human security. It is also provided for in other AU’s legal instruments, such as the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).¹⁶⁹⁰

The second conception is brought in by the Protocol on Amendments on the AU Constitutive Act of 2003. This Protocol adds to the list of grave circumstances a new situation as follows: “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity *as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council*”.¹⁶⁹¹ If the amendment comes into force, it will put on a balance the protection of human security with the right to intervene for the protection of the legitimate order established and contested in a

¹⁶⁸⁷ N.J. Udombana, ‘Can the Leopard Change its Spots? The African Union Treaty and Human Rights’, 17 *American University International Law Review* (2002) 1177-1261, at 1256-1257.

¹⁶⁸⁸ Constitutive Act of the African Union, Article 4 (h).

¹⁶⁸⁹ UN Charter, Article 2 (7).

¹⁶⁹⁰ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (22 October 2009), Article 8 (1).

¹⁶⁹¹ Protocol on Amendments on the Constitutive Act of the African Union, Article 4(d). Emphasis is mine.

state.¹⁶⁹² The AU's choice might be difficult between these two conflicting conceptions: protecting human and peoples' rights or saving a bloody or a dictatorial government? The ambiguity is such that there is not even a definition of what could be "a serious threat to legitimate order", contrary to serious crimes which have well established definitions under international law. The risk of misusing one conception against another cannot be excluded. Perhaps, given the rejection of unconstitutional changes of government, the AU could intervene only where it has to protect, without prejudice to individual criminal responsibility, a democratically elected government, which may not be legally perceived as illegitimate before the termination of its constitutional term or of which inauguration is thwarted by an outgoing regime.

But, there is no definition of the forms in which the AU could exercise its right to intervene in a member state. In practice, the AU may decide a military intervention to stop gross violations of human rights or humanitarian international law. The possibility was invoked as such by the PSC as a measure of last resort in Burundi, following the constitutional and electoral crisis which began in 2015, should this country not accept the deployment of a peace support operation, called the African Prevention and Protection Mission in Burundi (MAPROBU).¹⁶⁹³ The AU's right to intervene also implies a criminal dimension. On this basis, the AU took the decision to try the former Chadian President,¹⁶⁹⁴ Hissène Habré, for acts of torture, war crimes and crimes against humanity. This practice shows that the AU can establish even a special regional criminal tribunal with the mandate to prosecute crimes that would normally fall within the primary jurisdiction of one or more member state(s).

The AU's right to intervene in a member state must be distinguished from "the right of Member States to request intervention from the Union in order to restore peace and security",¹⁶⁹⁵ for example in the event of aggression or non-international armed conflict. This

¹⁶⁹² E. Baimu and K. Sturman, 'Amendments to the African Union's Right to Intervene: a Shift from Human Security to Regime Security', 12 (2) *African Security Review* (2003) 37-45.

¹⁶⁹³ PSC/PR/COMM (DLXV), 17 December 2015, para.13 (c) (iv).

¹⁶⁹⁴ Assembly/AU/Dec.127 (VII), Decision on the Hissène Habré Case and the African Union (Doc.Assembly/AU/3 (VII)), 7th Ordinary Session of the Assembly of the African Union, Banjul (The Gambia), 1-2 July 2006, para.3. In this paragraph, 'the Assembly observes that, according to the terms of Articles 3 (h), 4 (h) and 4 (o) of the Constitutive Act of the African Union, the crimes of which Hissène Habré is accused fall within the competence of the African Union'.

¹⁶⁹⁵ Constitutive Act of the African Union, Article 4 (j).

request would imply that the intervention is accepted by the territorial state. However, it is not clear whether any other country may demand the AU's intervention in the territory of a non-requesting state. There is not yet a sufficient practice to support a trend in this direction.

On the other hand, the AU has just a right to be exercised. This does imply that there is a political will to intervene, if the necessary resources (financial, military or others) are made available to carry out an intervention.¹⁶⁹⁶ Nothing indicates that the AU has a duty to intervene. However, the Kampala Convention seems to give rise to a duty insofar as it reaffirms the Union's right to intervene in a member state as part of its obligations to protect and assist internally displaced persons (IDPs). Given the fact that the AU cannot access this treaty, the enforcement of its obligation becomes problematic. In the *Femi Falana* case, the AfCHPR declined its jurisdiction to examine a judicial claim against the AU concerning violations of a treaty to which it was not a party.¹⁶⁹⁷

Another problem with the AU's right to intervene in a member state is the lack of an anticipatory or preventive authority.¹⁶⁹⁸ The intervention can be decided only if one of the grave circumstances has occurred or is ongoing. The mechanism is also very difficult to activate. As a matter of procedure, the AU Constitutive Act is "incomplete on how to decide when to intervene".¹⁶⁹⁹ In fact, "it is unclear whether the AU Assembly may first conduct an investigation before determining if an intervention is necessary, or whether it needs to first decide to intervene before finding out if indeed international crimes were committed in a member state".¹⁷⁰⁰ But, looking at the MAPROBU case, it is clear that the PSC invoked the AU's right to intervene after taking note of the preliminary findings of the fact-finding mission dispatched in Burundi by the ACmHPR pursuant to the Communiqué of 13

¹⁶⁹⁶ N. Dyani-Mhango, 'Reflections on the African Union's Right to Intervene', 38(1) *Brooklyn Journal of International Law* (2012) 1-48, at 13.

¹⁶⁹⁷ *Femi Falana v. The African Union*, Judgment of 26 June 2012, AfCHPR, Application No.001/2011, paras.71-72. See A. Kilangi, 'Legal Personality, Responsibility and Immunity of the African Union: Reflection on the Decision of the African Court on Human and Peoples' Rights in the Femi Falana Case', 1 *AUCIL Journal of International Law* (2013) 95-139.

¹⁶⁹⁸ S. Dujardin, 'L'Union africaine : objectifs et moyens de gestion des crises politiques et des conflits armés', in D. Bangoura and E. Fidiack A. Bidias (eds), *L'Union africaine et les acteurs sociaux dans la gestion des crises et des conflits armés* (Paris : L'Harmattan, 2006)51-82, at 61.

¹⁶⁹⁹ D. Kuwali, 'The Conundrum of Conditions for Intervention under Article 4(h) of the African Union Act', 17 *African Security Review* (2008) 90-111, at 93.

¹⁷⁰⁰ Dyani-Mhango, above note 1696, at 14-15.

November 2015.¹⁷⁰¹ Moreover, the decision to intervene must be taken by the AU Assembly which is not a permanent body, whereas the issue likely requires celerity. Yet, an extraordinary session of the AU Assembly is made dependent on drastic conditions. For instance, any request by a member state for an extraordinary session of the AU Assembly must be approved by a two-thirds majority of all the members in order to be convened.¹⁷⁰² Meanwhile, the matter on the ground could be exacerbating. Therefore, as a matter of good policy, it might be wise to confer the competence to take the decision to intervene on the PSC, which is a permanent body working under the authority of the AU Assembly.

Finally, the decision to intervene in a member state is a regional enforcement action in the meaning of Chapter VIII of the UN Charter on regional arrangements of collective security. The authorisation of the Security Council is therefore necessary pursuant to article 53(1) of the UN Charter.¹⁷⁰³ However, the AU Constitutive Act does not make any express reference to this procedure. In practice, the Security Council's authorisation can be given *a priori* or after adopting the decision to intervene, or even after its implementation, in terms of an approval resolution. This a requirement for practical flexibility because of the urgent character of the right to intervene. It must be kept in mind that the authorisation or approval in question guarantees that the AU's right to intervene is not to be perceived, contrary to what some commentators have argued,¹⁷⁰⁴ as a challenge to the authority of the UN Security Council. Rather, the AU's right to intervene is a power aiming to ensure that Africa takes its political responsibility in dealing with African situations and problems, even when there is not any timely action decided at the global level. This understanding is consistent with the view of the AU itself, as expressed in "the Common African Position on the Proposed Reform of the United Nations", famously known as "*The Ezulwini Consensus*". This Position was adopted

¹⁷⁰¹ PSC/PR/COMM.(DLVII), 13 November 2015, paras.9 (iii) and 10 ; PSC/PR/COMM (DLXV), above note 1693, para.5.

¹⁷⁰² Rules of Procedure of the Assembly of the African Union (9 July 2002), Rule 11 (1).

¹⁷⁰³ Article 53 (1) of the UN Charter provides: 'The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council (...)'.

¹⁷⁰⁴ Y. Gapasi Muhire, 'The African Union's Right of Intervention and the UN System of Collective Security' (PhD Thesis, Utrecht University 2013), at 231-236; A. Abass and M.A. Baderin, 'Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union', 49 (1) *Netherlands International Law Review* (2002) 1-38, at 23.

by the AU Executive Council in March 2005 in reaction to the report of the UN Secretary-General's High-Level Panel on Threats, Challenges and Change, issued in the context of the emerging doctrine of the responsibility to protect in 2004.¹⁷⁰⁵ *The Ezulwini Consensus* indicates:

Since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organisations, in areas of proximity to conflicts, are empowered to take actions in this regard. The African Union agrees with the Panel that the intervention of Regional Organisations should be with the approval of the Security Council; although in certain situations, such approval could be granted "after the fact" in circumstances requiring urgent action (...).¹⁷⁰⁶

This order of protection and defence of the African continent is enriched in criminal matters with the codification of crimes against peace and security in Africa.

1.2. The Codification of Crimes against Peace and Security in Africa

The notion of "crimes against peace and security in Africa" is reminiscent of the ILC's list of "crimes against the peace and the security of mankind"¹⁷⁰⁷ at the universal level. The expression is found in the OAU Convention of 1977 for the elimination of mercenarism, which provides that "any person, natural or juridical who commits the crime of mercenarism as defined in paragraph 1 of this Article commits *an offence considered as a crime against peace and security in Africa* and shall be punished as such".¹⁷⁰⁸ However, the list of crimes against peace and security in Africa is much broader. As preliminary remarks, the notion has to be clarified. The analysis of the codification of these regional crimes will facilitate the understanding of the extent to which their definitions have been influenced by universal legal standards or depart from them. The peak of this codification was reached with the adoption of the Malabo Protocol on the AU Criminal Court, the drafting process of which is examined at a

¹⁷⁰⁵ United Nations, above note 346, paras.185 and 203.

¹⁷⁰⁶ Ext/EX.CL/2 (VII), The Common African Position on the Proposed Reform of the United Nations: "*The Ezulwini Consensus*", 7th Extraordinary Session of the Executive Council of the African Union, Addis Ababa (Ethiopia), 7-8 March 2005, at 6.

¹⁷⁰⁷ ILC Draft Code of Offences against the Peace and Security of the Mankind (1954); ILC Draft Code of Crimes against the Peace and Security of Mankind (1996).

¹⁷⁰⁸ OAU Convention for the Elimination of Mercenarism in Africa (3 July 1977), Article 1 (3). Emphasis is mine.

later stage, in the chapter relating to the development of a system of African regional criminal justice. Keeping in mind that the notion of crimes against peace and security in Africa covers crimes of both international and transnational character by nature (1.2.1), it is necessary to distinguish between the regionalisation of ICC crimes (1.2.2) and the codification of other offences of specific concern to the continent (1.2.3).

1.2.1. The Combination of International and Transnational Crimes

International criminal law, be it regional or universal, is not normally designed to deal with transnational crimes. But, the difference between transnational and international crimes is not a truism. Authors do not conceive the notion of international crimes in the same way. The distinction is important due to its legal implications. In principle, international crimes are not subject to statutes of limitation, blanket amnesty or pardon. They may attract states to exercise universal jurisdiction, justify the launch of prosecutions before an international court or the rejection of state officials' immunities.

In the ILC's Draft Articles on State Responsibility of 1996, the notion of international crimes was linked to that of the crimes of states.¹⁷⁰⁹ The commission of such crimes is in principle a manifestation of political violence to maintain power and may entail individual criminal responsibility of officials who act on behalf of the state under international law.¹⁷¹⁰ Even individuals who may have acted outside the state umbrella can also be held criminally responsible. This is the case of members of armed groups. In this regard, some commentators define the notion of international crimes as "those offences over which international courts and tribunals have been given jurisdiction under *general international law*".¹⁷¹¹ However, this definition seems to conceive the notion of international crimes only in relation to global international criminal law. This was also the position of the American Tribunal at Nuremberg in 1948 which held that an international crime was "such act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over

¹⁷⁰⁹ ILC Draft Articles on State Responsibility (1996), Article 19 (2) and (3). See also A. Cassese, 'Remarks on the Present Legal Regulation of Crimes of States', in P. Gaeta and S. Zappala (eds), *The Human Dimension of International Law :Selected Papers* (Oxford: Oxford University Press, 2008) 403-415, at 403-404;

¹⁷¹⁰ A. Smeulers and F. Grünfeld, *International Crimes and other Gross Human Rights Violations: A Multi- and Interdisciplinary Textbook* (Leiden/Boston: Martinus Nijhoff Publishers, 2011), at 20-21.

¹⁷¹¹ Cryer, Friman, Robinson and Wilmshurst, above note 207, at 2.

it under ordinary circumstances (...)"¹⁷¹² This universal recognition to qualify a behaviour as an international crime seems to be justified by the fact that such crime amounts to a gross or serious violation of universal values protected by international law. This is the case of the prohibition of the use of armed force between states, the violation of which can constitute an act of aggression. Accordingly, international crimes have been identified in respect of gross violations of (universal) international law which entail international criminal responsibility¹⁷¹³ and constitute a matter of concern to the entire world community.¹⁷¹⁴ It is arguably this universal concern which justifies the intervention of international courts, expressing the will of the whole international community.¹⁷¹⁵

However, the above definitions do not provide any indication as to why jurisdiction may not be conferred on international crimes on regional criminal courts. Likewise, these definitions do not tell anything about the possible existence of regional crimes, that is to say international crimes under regional international criminal law. Furthermore, it is known that even mixed criminal courts and tribunals, i.e. those jurisdictions combining both domestic and international characters, have been given jurisdiction not only over international crimes but also ordinary offences, without the latter being transformed into international crimes. Additionally, the ICC Statute implies a gradation between international crimes. It applies to the most serious crimes of concern to the international community as a whole. This may suggest that there are other crimes which do not constitute the most serious international crimes and a matter of concern to the international community as a whole. Therefore, outside ICC crimes, other crimes against peace and security in Africa may be considered as international crimes constituting a matter of concern to the entire community of African states and peoples.

This suggestion is without prejudice to the notion of transnational crimes. The AU Non-aggression and Common Defence Pact refers to transnational crimes in the definition of "Trans-national Organised Criminal Group" in the following terms:

¹⁷¹² Kittichaisaree, above note 207, at 3.

¹⁷¹³ Cassese, above note 210, at 23.

¹⁷¹⁴ A. Cassese, 'Rationale for International Criminal Justice', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford/New York: Oxford University Press, 2009) 123-130, at 127.

¹⁷¹⁵ *Ibid.*, at 127 and 130.

Trans-national Organised Criminal Group means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more *serious crimes* which are transnational in scope, or offences established in accordance with international law, including the United Nations Convention Against Trans-national Organised Crime and its Protocols thereto, the purpose being which to obtain, directly or indirectly financial and other material benefits.¹⁷¹⁶

Beside the UN Convention against Transnational Organised Crime (Palermo Convention) of 15 November 2000,¹⁷¹⁷ two other treaties can be referred to: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children,¹⁷¹⁸ and the Protocol against the Smuggling of Migrants by Land, Sea and Air.¹⁷¹⁹ The Palermo Convention clearly defines the notion of transnational organised crimes.¹⁷²⁰

First of all, there must be a group of three or more persons who act in concert with the aim of committing a crime.¹⁷²¹ This group shall be structured, meaning that “it is not randomly formed for the immediate commission of an offence”,¹⁷²² irrespective of whether there are “formally defined roles for its members, continuity of its membership or a developed structure” .¹⁷²³ Secondly, the Palermo Convention requires an international dimension to qualify a crime as transnational by nature in four different situations, namely if: (a) it is committed in more than one state; (b) it is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; (c) it is committed in one state but involves an organised criminal group that engages in criminal activities in more than one state; or (d) it is committed in one state but has substantial effects in another state.¹⁷²⁴ Thirdly, a transnational organised crime must fulfill the condition of gravity and be among those offences which are referred to by the Palermo Convention or its additional protocols. A serious crime means a “conduct constituting an offence punishable by a

¹⁷¹⁶ African Union Non-aggression and Common Defence Pact, Article 1 (x). Emphasis is mine.

¹⁷¹⁷ It has entered into force on 29 September 2003.

¹⁷¹⁸ Adopted on 15 November 2000 and entered into force on 25 December 2003.

¹⁷¹⁹ Adopted on 15 November 2000 and entered into force on 28 January 2004.

¹⁷²⁰ See N. Boister, *An Introduction to Transnational Criminal Law* (Oxford: Oxford University Press, 2012), at 3-4.

¹⁷²¹ United Nations Convention against Transnational Organised Crime (15 November 2000), Article 2 (a).

¹⁷²² *Ibid.* Article 2 (c).

¹⁷²³ *Ibid.*

¹⁷²⁴ *Ibid.*, Article 3 (2).

maximum deprivation of liberty of at least four years or a more serious penalty”.¹⁷²⁵ This is the case of participation in an organised criminal group,¹⁷²⁶ corruption,¹⁷²⁷ trafficking in persons, especially women and children,¹⁷²⁸ the laundering of proceeds of crime,¹⁷²⁹ including money laundering,¹⁷³⁰ and related obstructions to justice.¹⁷³¹

Unlike international crimes, transnational crimes are not in principle state crimes in the sense of political violence to maintain power or mass atrocities. Rather, they are mostly criminal conducts of individuals (private or official) and constitute offences against a certain decency or morality that should reign within a community.¹⁷³² Some of these offenses are on the list of crimes against peace and security in Africa, such as corruption, money laundering and trafficking in persons. They must be distinguished from “trans-border crimes” of which they may form a category. The definition of trans-border crimes can be borrowed from the ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security:

“Trans-border crime” refers to all crimes organised or perpetrated by individuals, organisations or networks of local and/or foreign criminals operating beyond the national boundaries of a Member State, or acting in complicity with associates based on one or several States adjoining the country where the crimes are actually committed or having any connection with any Member State.¹⁷³³

These crimes are in principle subject to prosecutions in domestic legal orders. But, if some crimes against peace and security in Africa are transnational by nature, it is submitted that they have been *conventionally* raised by the Malabo Protocol to an independent status of regional international crimes, entailing individual and corporate criminal responsibility. Their

¹⁷²⁵ *Ibid.*, Article 2 (b).

¹⁷²⁶ *Ibid.*, Article 5.

¹⁷²⁷ *Ibid.*, Article 8.

¹⁷²⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (15 November 2000), Articles 3 and 5.

¹⁷²⁹ United Nations Convention against Transnational Organised Crime, Article 6.

¹⁷³⁰ *Ibid.*, Article 7.

¹⁷³¹ *Ibid.*, Article 23.

¹⁷³² S. Szurek, ‘La formation du droit international pénal’, in H. Ascensio, E. Decaux and A. Pellet (eds), *Droit international pénal* (Paris : Pedone, 2000) 7-22, at 19.

¹⁷³³ Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, *Definitions*.

commission does not therefore necessarily require anymore the “structured group” element or the condition of perpetration in more than one state as provided for by the UN Convention against Transnational Organised Crime. In order to establish these regional crimes, it would be sufficient to prove the only constituent elements which are contained in their independent definitions enshrined in the Malabo Protocol instituting the AU Criminal Court. This is obviously the case of corruption committed within one state by public agents. This change of nature from transnational to regional international crimes reflects the necessity for solidarity with which the impunity of these crimes particularly dangerous for the states or the entire African community should be combated.¹⁷³⁴ The need of solidarity in the prosecution of these crimes justifies the whole process of their regional codification.

1.2.2. The Regionalisation of ICC Crimes

The regionalisation of ICC crimes means their incorporation into African regional legal instruments. This can happen in two ways. First, it can simply be referred to the crimes in question in terms of prohibition, obligation for states to prevent or to punish their perpetrators, or in relation to the expression of a need for a regional action to protect human and peoples’ rights. The second way relates to the definition of these crimes in the context of the region. While a mere reference to these crimes does not raise any particular problem as far as regional codification is concerned, their distinct definition in an African regional instrument may have a drawback and an advantage. As drawback, regionalisation may lead to contradictions with universal legal standards or bring ambiguities in law. As advantage, it can result in the expansion of the scope of the definition of ICC crimes in Africa, thereby contributing to the progressive development of international criminal law. If some states not parties to universal treaties ratify the regional instrument, the range of addressees of the definition in question would be widened.

This part does not aim to analyse in detail the definitions of these crimes, which can be found in appropriate monographies and commentary books, but to underline and describe their potential regional specificity. It is therefore important to focus on genocide, crimes against humanity and war crimes (1.2.2.1) before examining the specificity of the codification of the crime of aggression (1.2.2.2).

¹⁷³⁴ *Ibid.*

1.2.2.1 The Crime of Genocide, Crimes against Humanity and War Crimes

Before adopting the Malabo Protocol, these ICC crimes were defined by two other African regional instruments in 2012: the AU Model National Law on Universal Jurisdiction over International Crimes and the Agreement between the AU and Senegal establishing the Extraordinary African Chambers for the purpose of the trial of Hissène Habré. At the sub-regional level, some efforts were made by the International Conference on the Great Lakes Region (ICGLR) with two protocols additional to the Pact on Security, Stability and Development of the Great Lakes of 30 November 2006, namely the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, and the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination.¹⁷³⁵ The drafters of the Malabo Protocol seem to have mainly based their work on the ICC Statute and the AU Model National Law on Universal Jurisdiction over International Crimes. They have not paid sufficient attention to other African treaties and to national legislation of AU member states in their efforts to domesticate ICC crimes. Accordingly, the Malabo Protocol would inherit the merits and the limits of the Rome Statute and the AU Model National Law on Universal Jurisdiction over International Crimes regarding the definitions genocide (a), crimes against humanity (b) and war crimes (c).

a) The Failure to Expand the Ambit of the Crime of Genocide

Genocide is defined by the Malabo Protocol in article 28B of its Annex on the Statute of the AU Criminal Court. This article is a copy of the definition provided for by the ICC Statute, with the exception of subparagraph (f) which extends genocide to “acts of rape or any other form of sexual violence”. The Malabo Protocol (Annex) differs from the Agreement between the AU and Senegal establishing the Extraordinary African Chambers which defines genocide in similar words to those of the ICC Statute¹⁷³⁶ and the ICGLR’s Protocol of 30 November 2006.¹⁷³⁷ The substance of article 28B (f) of the Malabo Protocol (Annex) is even problematic. Of course, the ICTR held that acts of sexual abuse could “constitute genocide in

¹⁷³⁵ These two protocols entered into force on the same date as the Pact on Security, Stability and Development for the Great Lakes Region, of which they form a part, on 21 June 2008.

¹⁷³⁶ Agreement on the Establishment of the Extraordinary African Chambers (Annexe), Article 5.

¹⁷³⁷ Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination (30 November 2006), Article 1 (a).

the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such”.¹⁷³⁸ However, these acts were covered by the existing definition under article 28B (b) of the Malabo Protocol (Annex) when it specifies the crime of “causing serious bodily or mental harm to members of the group” which must be interpreted to include sexual violence, notably rape.¹⁷³⁹ According to the ICTR, “rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even (...) one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm”.¹⁷⁴⁰ In addition, article 28B (d) of the Malabo Protocol (Annex) concerning the imposition of measures intended to prevent births within the group was construed to include “sexual mutilation, the practice of sterilisation, forced birth control, separation of the sexes and prohibition of marriages”.¹⁷⁴¹ The Malabo Protocol (Annex) could innovate if it had reproduced the provision of the AU Model National Law on Universal Jurisdiction over International Crimes concerning “acts of rape that are intended to change the identity of a particular group”.¹⁷⁴² Even if this might have been perceived as a separate positive expansion of acts of genocide, it does not seem to be entirely the case. The ICTR has held that in patriarchal societies, where membership of a group is determined by the identity of the father, “an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group”.¹⁷⁴³ In matriarchal societies, the problem of qualification disappears. This is because children born out of the underlying acts of rape will remain the babies of their mothers and do not therefore change in cultural identity. This view is in line with the position of the ICJ,¹⁷⁴⁴ in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.¹⁷⁴⁵ Therefore, it is

¹⁷³⁸ *Akayesu* (ICTR-96-4-T), Judgment, Trial Chamber I, 2 September 1998, para.731. See also *Kayishema and Ruzindana* (ICTR-95-1-T), Judgment, Trial Chamber II, 21 May 1999, para.95.

¹⁷³⁹ *Akayesu* (ICTR-96-4-T), para.734.

¹⁷⁴⁰ *Ibid.*, para.731.

¹⁷⁴¹ *Ibid.*, para.507.

¹⁷⁴² African Union Model National Law on Universal Jurisdiction over International Crimes, Article 9 (f).

¹⁷⁴³ *Akayesu* (ICTR-96-4-T), above note 1738, para.507.

¹⁷⁴⁴ W.A. Schabas, *Genocide in International Law: the Crime of the Crimes* (2 edn., Cambridge: Cambridge University Press, 2009), at 206.

¹⁷⁴⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, I.C.J. Reports 2007, paras.366-367.

understandable that “acts of rape that are intended to change the identity of a particular group”, which were incorporated into the draft Malabo Protocol (Annex) in 2012, were removed from the final version.¹⁷⁴⁶

A further observation relates to the list of protected groups against genocide. The Malabo Protocol (Annex) missed the opportunity to develop the law with respect to political groups. It reproduces the provision of the ICC Statute, which is based on the Genocide Convention.¹⁷⁴⁷ Yet, there are examples of African domestic laws including political groups in the definition of genocide. This is the case of the Ethiopian Penal Code of 2004.¹⁷⁴⁸ The reason why the Malabo Protocol failed to take into account the development of African national legislation was not specified. Regarding the Genocide Convention, the exclusion of political groups was motivated by political reasons relating to the Cold War and its ideological division between states. States from the communist bloc would not have voted for this Convention without such exclusion,¹⁷⁴⁹ even though political and other groups were already included in the resolution of 11 December 1946 of the UN General Assembly,¹⁷⁵⁰ calling upon member states to adopt necessary legislation to prevent and punish genocide and to adopt an appropriate international treaty. If the ICC Statute relies on the Genocide Convention, the exclusion of political groups, or others (social, sexual, linguistic or geographical groups), is now arbitrary. This is because such an exclusion does not find support in state practice, even outside Africa.¹⁷⁵¹ In this regard, John Quigley notes that “to date, no controversy has arisen as a result of such

¹⁷⁴⁶ Executive Council of the African Union, ‘The Report, the Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General - Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights: Revisions up to Tuesday 15th May 2012 (Exp/Min/IV/Rev.7)’, EX.CL/731(XXI), Addis Ababa (Ethiopia), 9-13 July 2012, at 16.

¹⁷⁴⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Article 2.

¹⁷⁴⁸ Article 269 of the Ethiopian Penal Code of 2004 reads as follows: ‘Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or *political group*, organizes, orders or engaged in, be it in time of war or in time of peace: (a) Killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or (b) measures to prevent the propagation or continued survival of its members or their progeny; or (c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.’ (emphasis is mine)

¹⁷⁴⁹ J. Verhoeven, ‘Le crime de génocide: originalité et ambiguïté’, 1 *Revue belge de droit international* (1991) 5-26, at 21.

¹⁷⁵⁰ UNGA Res.96 (I), 11 December 1946, Preamble, para.2.

¹⁷⁵¹ Quigley, above note 784, at 16-17.

variances. The most common variances have been the addition of additional acts committed against members of a group, and the addition of more types of protected groups".¹⁷⁵² Moreover, the ideological reason, which led to the restrictive wording of the Genocide Convention in 1948, disappeared with the end of the Cold War in 1990.

It is submitted that the list of groups protected against genocide could be expanded for policy reasons. There are other suggestions in this direction.¹⁷⁵³ Rather than being exhaustive, the list could even be left open so as to potentially include protection for other groups.¹⁷⁵⁴ In the view of Joe Verhoeven, there is no technical obstacle in law for such an expansion.¹⁷⁵⁵ In contrast, it has the advantage of widening the protection of human beings.¹⁷⁵⁶ Accordingly, in many African states where political oppression is often a mode of governance, the retention of genocide against political groups could be an expansion in human rights protection and serve as a deterrent for potential offenders.

b) The Ambiguity of Crimes against Humanity

Crimes against humanity are provided for by the Malabo Protocol under article 28C of its Annex on the Statute of the AU Criminal Court. This article is a copy of article 10 of the AU Model National Law on Universal Jurisdiction over International Crimes. It differs from the definitions provided for by ICGLR's instruments which either refer to the ICC Statute¹⁷⁵⁷ or reproduce its provisions with the exception of article 7 (2) and (3) of the latter Statute.¹⁷⁵⁸ The Malabo Protocol (Annex) is different from the ICC Statute in three respects.

¹⁷⁵² *Ibid.*, at 16.

¹⁷⁵³ W.A. Schabas, *Genocide in International Law: the Crime of the Crimes* (Cambridge: Cambridge University Press, 2000), at 102-103.

¹⁷⁵⁴ T.W. Simon, *The Laws of Genocide: Prescription for a Just World* (London: Praeger Security International, 2007), at 96.

¹⁷⁵⁵ Verhoeven, above note 1749, at 23.

¹⁷⁵⁶ *Ibid.*

¹⁷⁵⁷ Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination (30 November 2006), Article 1 (h).

¹⁷⁵⁸ Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, Article 1 (2). It must be noted that these flaw and difference in the wording of the ICGLR's treaties show the lightness with which they were drafted. Worse, there are no available *travaux préparatoires* which may help explain the reasons behind such wording problems.

First of all, article 28C (1) of the Malabo Protocol (Annex) defines crimes against humanity as “any of the following acts when committed as part of a widespread or systematic attack or enterprise directed against any civilian population, with knowledge of the attack or enterprise”. It adds to the *chapeau* of these crimes the concept of “enterprise”, but without defining it in subsequent paragraph 2 on the definitions of concepts. It has to be noted that the ICTR expanded the concept “attack” to non-violent acts, such as imposing a system of apartheid or exerting pressure on the population to act in a particular manner.¹⁷⁵⁹ According to Kai Ambos, the term has “the potential to capture almost any kind of criminal undertaking”.¹⁷⁶⁰ Thus, the concept “enterprise” does not technically add anything new to the *chapeau* of the definition of crimes against humanity. Furthermore, the drafters of the Malabo Protocol did not specify the reason for its inclusion in the definition of crimes against humanity. While an “enterprise” may imply the conduct of legal persons of which criminal liability is admitted by the Malabo Protocol (Annex),¹⁷⁶¹ Kai Ambos rightly underscores: “In any rate, Article 28C in its current form does not make legal persons possible agents of the crime but puts the term “enterprise directly after attack, thereby making clear that it complements the context element of crimes against humanity captured by the systematic widespread and systematic “attack””.¹⁷⁶² The AU Criminal Court should determine, in practical cases, the extent to which the scope of an “enterprise” is different from that of an “attack” which is widespread or systematic.

Secondly, article 28C (1) (f) of the Malabo Protocol (Annex) adds to the crime of torture “cruel, inhuman and degrading treatment or punishment”, but without giving any definition whatsoever in paragraph 2. According to the ECHR, the difference between these two categories of acts lies in the intensity of the suffering inflicted, because “torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment”.¹⁷⁶³ But, “cruel, inhuman and degrading treatment or punishment” could be also covered by article 28C (1) (k) of the Malabo Protocol (Annex) which bears on “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical

¹⁷⁵⁹ *Akayesu* (ICTR-96-4-T), above note 1738, para.581.

¹⁷⁶⁰ K. Ambos, ‘Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)’, in G. Werle and M. Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (Berlin: Springer, 2017) 31-55, at 41.

¹⁷⁶¹ *Ibid.*

¹⁷⁶² *Ibid.*

¹⁷⁶³ *Irland v. United Kingdom*, ECHR, Judgment of 18 January 1978, Application No.5310/71, para.167.

health". These acts should be determined on a case-by-case basis, with regard to their nature and gravity, and must include none of the acts which already qualify as crime against humanity.¹⁷⁶⁴ This is the case of food deprivation to detainees¹⁷⁶⁵ or acts of sexual violence whereby, for instance, it is imposed on victims to undress in public or to circulate as such for the purpose of humiliating them and attempting to their dignity. However, not every "cruel, inhuman and degrading treatment or punishment" may constitute a crime against humanity. To be qualified as such, these acts must reflect some gravity as provided for in article 28C (1) (k) of the Malabo Protocol (Annex). This gravity threshold is missing in article 28 (1) (f).

Thirdly, article 28C (1) (h) of the Malabo Protocol (Annex) omits the definition of gender provided for by the ICC Statute in relation to the crime of persecution.¹⁷⁶⁶ It also omits the connection which exists under the Rome Statute between the crime of persecution and "any act referred to in this paragraph or any crime within the jurisdiction of the Court". These omissions leave unclear the crime of persecution which is rather "a kind of umbrella crime that needs to be fleshed out by the underlying acts".¹⁷⁶⁷

c) The Scope of War Crimes between Progress and Omissions

War Crimes are defined by the Malabo Protocol in article 28D of its Annex on the Statute of the AU Criminal Court. This is the most expansive article among all the definitions of ICC crimes incorporated into the Malabo Protocol (Annex). It is a restatement of article 11 of the AU Model National Law on Universal Jurisdiction over International Crimes. This article largely differs from the provision of the ICGLR's Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, which wrongly restricts the definition of war crimes to graves breaches of the Geneva Conventions of 1949.¹⁷⁶⁸ Compared to the ICC Statute, the Malabo Protocol (Annex) is a progressive development of international law (i) but at the same time contains some omissions (ii).

¹⁷⁶⁴ C. K. Hall and C. Stahn, 'Article 7: Crimes against Humanity', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) 235-242, at 237-238.

¹⁷⁶⁵ *Ibid.*, at 238.

¹⁷⁶⁶ See ICC Statute, Article 7(3). It is hereby stipulated: 'For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above'.

¹⁷⁶⁷ Ambos, above note 1760, at 42.

¹⁷⁶⁸ Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, Article 1(7).

i) The Progressive Definition of the Malabo Protocol

The Malabo Protocol (Annex) develops international criminal law on various aspects. The starting point is the improvement of the age of children victims of conscription or enlistment into armed forces or groups or their use to participate actively in hostilities. The ICC Statute which relies on both Additional Protocols of 1977 to the Geneva Conventions (1949)¹⁷⁶⁹ takes into account the yardstick of 15 years old.¹⁷⁷⁰ Instead, the Malabo Protocol (Annex) incriminates such acts for children under 18 years old.¹⁷⁷¹ This age limit comes from the African Charter on the Rights and Welfare of the Child, which defines such person as “every human being below the age of 18 years”.¹⁷⁷² The Charter does not permit any derogation from this definition.¹⁷⁷³ All children within this age limit and not just a category of them must be protected. The ICC Statute contradicts itself on this issue. It does not prohibit the practice of child soldiers over the age of 15 years, while excluding them from the Court’s jurisdiction if they commit crimes when they are less than 18 years old.¹⁷⁷⁴ The Malabo Protocol (Annex) has corrected this incoherence. It also incorporates a total number of 15 new crimes. One may first have a look at the criminalisation of the use of nuclear weapons or other weapons of mass destruction before discussing the relevance of other additional crimes.

¹⁷⁶⁹ GP I, Article 77(2); GPII, Article 4(3)(c).

¹⁷⁷⁰ ICC Statute, Article 8 (2) (b) (xxvi) and (e) (vii).

¹⁷⁷¹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28D (b) (xxvii) and (e) (vii). The bracket and emphasis are mine.

¹⁷⁷² African Charter on the Rights and Welfare of the Child (1 July 1990), Article 2.

¹⁷⁷³ See *Institute for Human Right and Development in Africa v. The Government of Malawi*, ACERWC Comm. No. 004/Com/001/2014, Report on Consideration of an Amicable Settlement under the Auspices of the Committee (27 October 2016), paras.6-7 <<http://www.acerwc.org/download/decision-on-the-amicable-settlement-between-irhda-and-the-government-of-malawi/?wpdmdl=9845>> accessed 24 November 2016. In this case, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) has decided to adopt the Amicable Settlement on Communication No.004/Com/001/2014 opposing the Institute for Human Right and Development in Africa (IHRDA) to the Republic of Malawi, in which the latter state commits itself to conform its Constitution (as amended in 2010), Article 23(5) of which defines children as persons under 16 years old, to the African Charter on the Rights and Welfare of the Child by 31 December 2018.

¹⁷⁷⁴ Article 26 of the ICC Statute provides: ‘The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime’.

1°) The Criminalisation of the Use of Nuclear Weapons or Other Weapons of Mass Destruction

The use or threat of use of nuclear weapons is not prohibited or authorised under general international law. In its Advisory Opinion of 8 July 1996, the ICJ even stated that it could not “conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake”.¹⁷⁷⁵ International efforts rather focused on nuclear weapons disarmament. In Africa, the denuclearisation policy dates back to the UN General Assembly resolution of 24 November 1961 on “consideration of Africa as a denuclearised zone”.¹⁷⁷⁶ This policy was endorsed by African states during the first ordinary session of the OAU Assembly in July 1964.¹⁷⁷⁷ It resulted in the adoption of the African Nuclear Weapon-Free Zone Treaty (Pelindaba Treaty) in 1996,¹⁷⁷⁸ which includes “the territory of the continent of Africa, islands states members of OAU and all islands considered by the Organisation of African Unity in its resolutions to be part of Africa”.¹⁷⁷⁹ States parties are forbidden to possess, to develop, to manufacture, to test, to allow transit or stationing of any nuclear weapons or explosive devises within this zone. Only peaceful nuclear activities for non-military purposes are permitted.

However, the Pelindaba Treaty does not prohibit as such the use of nuclear weapons in African conflicts, irrespective of whether they are international or of non-international character. It is the Malabo Protocol (Annex) which makes a step in this direction through the war crime of “using nuclear weapons or other weapons of mass destruction”,¹⁷⁸⁰ regardless of the type of armed conflict. Despite the lack of a clear definition of the expression “other weapons of mass destruction”, it appears that the African continent is taking the lead on a controversial issue on which states have not yet found a compromise at the global level. The

¹⁷⁷⁵ *Legality of the Threat or Use of Nuclear Weapons*, above note 291, para.105.

¹⁷⁷⁶ UNGA Res.1652 (XVI), 24 November 1961, para.6. In this paragraph, the General Assembly ‘calls upon member states: a) to refrain from carrying out or continuing to carry out in Africa nuclear tests in any form; b) to refrain from using the territory, the territorial waters or air space of Africa for testing, storing or transporting nuclear weapons; c) to consider and to respect the continent of Africa as a denuclearized zone’.

¹⁷⁷⁷ AHG/Res.11(I), Denuclearization of Africa, 1st Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Cairo (Egypt), 17-21 July 1964, paras.1-4.

¹⁷⁷⁸ It was adopted on 11 April 1996 and entered into force on 15 July 2001), Preamble, para.14.

¹⁷⁷⁹ African Nuclear Weapon-Free Zone Treaty (Pelindaba Treaty), Article 1 (a).

¹⁷⁸⁰ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28D (g).

use of nuclear weapons is not criminalised under the ICC Statute despite the will of several states from the south world, including India.¹⁷⁸¹ In this regard, a proposal of amendment to the ICC Statute was introduced by Mexico,¹⁷⁸² even though it seems to have little chance to be accepted by other military nuclear powers. The fact that these powers and the states which benefit from the American nuclear umbrella or protection within NATO –such as Germany and The Netherlands – were opposed to the adoption of the UN Treaty on the prohibition of nuclear weapons on 7 July 2017 is a clear indication in this regard. If they reject complete nuclear weapons disarmament, it is likely that they will not *a fortiori* adhere to the criminalisation of their use in the context of armed conflicts.

2°) *The Incorporation of Other Crimes*

Seven crimes among the remaining 14 new crimes that are incorporated into the Malabo Protocol (Annex) relate to international armed conflicts as stipulated in article 28D (b) (v), (xxviii), (xxix), (xxx), (xxxi), (xxxii) and (xxxiii): intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated; unjustifiably delaying the repatriation of prisoners of war or civilians; willfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination; making non-defended localities and demilitarised zones the object of attack; slavery and deportation to slave labour; collective punishments; despoliation of the wounded, sick, shipwrecked or dead. Article 28D of the Malabo Protocol (Annex) incorporates seven other crimes in the context of armed conflicts of non-international character under paragraph (e) (xvi), (xvii), (xviii), (xix), (xx), (xxi) and (xxii): Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies; utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage; making non-defended localities and demilitarised zones the object of attack; slavery; collective punishments; despoliation of the wounded, sick,

¹⁷⁸¹ Tiwari, above note 965.

¹⁷⁸² Secretariat of the Assembly of the States Parties, above note 1412, at 4.

shipwrecked or dead. All of these new crimes find their original source in international humanitarian law in terms of prohibitions.¹⁷⁸³ But, there are two principal criticisms.

First, the relevance of the crime of “intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated” is contested. In fact, the crime derives from the prohibition under article 56 of the Additional Protocol I to the Geneva Conventions of 1949. It is argued that this prohibition is not absolute because the works or installations in question could be attacked if they were used for military purposes by the adverse party.¹⁷⁸⁴ Of course, this is true. However, the argument is inaccurate. On the one hand, to criminalise the prohibition of individual conducts, there is no legal need for an “absolute prohibition” under international humanitarian law, which means a prohibition insusceptible to derogation. On the other hand, there is a possible and contrary argument in favour of this criminalisation. Indeed, the attack against those works or installations would imply criminal responsibility if it was not justified by military necessity.

¹⁷⁸³ Ambos, above note 1760, at 43 and 46-47. In the context of international armed conflicts, the crime of ‘intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated’ is based on Article 56 of the Additional Protocol I to the Geneva Conventions of 1949. For other new crimes, Kai Ambos reports: ‘If one examines the sources of international humanitarian law (The Hague and Geneva law) to identify the legal bases of these crimes, one finds that the six further crimes of *international* armed conflict introduced in para (b) are based on the Geneva Conventions I–IV, The Hague Conventions and the Additional Protocol I. More precisely, subpara (b)(xxviii) is based on Article 118 of the Geneva Convention III and Article 85(4)(b) of the Additional Protocol I; subparas (b) (xxix) and (xxx) likewise find a basis in international humanitarian law. With regard to subpara (b)(xxxi), the general maxim of the humane treatment of prisoners and the rule of fair remuneration of their work apply. Collective punishment in the sense of subpara (b)(xxxii) is prohibited by Article 87 of the Geneva Convention III. Finally, subpara (b)(xxxiii) is covered by the property provision of Article 51 of the Geneva Convention II. The seven crimes of *non-international* armed conflict also rely on several primary provisions of international humanitarian law. Subparagraph (e) (xvi) is based on Article 14 of the Additional Protocol II. Subparagraphs (e)(xvii) and (xviii) find a legal basis in the Geneva Conventions I, IV and the Additional Protocol II. The legal basis of subparas (e) (xix), (xx), (xxi) and (xxii) is identical to that of the prohibitions mentioned above with reference to international armed conflict’ (*ibid.*).

¹⁷⁸⁴ *Ibid.*, at 43.

Secondly, it is suggested that the passage from prohibition to criminalisation is not automatic.¹⁷⁸⁵ It must be based on a special justification: the wrongfulness and the gravity of the prohibition.¹⁷⁸⁶ It is curious to observe that this argument does not specify to which extent the aforementioned war crimes do not fulfill this requirement. In any case, there is no legal obstacle for a group of states to expand the protection of humanitarian standards through international criminal law. States are sovereign and free to adopt the laws that fit better with the preservation of their collective interests or those of their peoples. The only difference is that the new war crimes will not be universal because of their treaty-based character between states parties to the Malabo Protocol. A similar expansion can even be made by one state in its domestic order as in the case of extensive definitions of genocide. However, the principle of legality would be breached in respect of the exercise of adjudicative powers if the war crime to be prosecuted against aliens (in case of universal jurisdiction, passive personality and protective principle) were not committed on the territory of a state party to the Malabo Protocol or another state which has adopted the same definition under its domestic legislation. The Malabo Protocol (Annex) should be applied in light of the same principle.

ii) The Omissions of the Malabo Protocol

The definition of war crimes contains four main omissions. The first omission is the list of prohibited weapons, which are referred to in an annex to the ICC Statute, in article 28D (b) (xxi) of the Malabo Protocol (Annex): employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict. This omission undermines legal certainty.¹⁷⁸⁷ Secondly, the Malabo Protocol (Annex) failed to improve the criminalisation of the conscription or enlistment of children in the context of international armed conflicts. The ICC Statute criminalises the conscription or enlistment of children “into the *national* armed forces”,¹⁷⁸⁸ and in the context of armed conflicts of non-international character, the conscription or enlistment of children “into armed groups”.¹⁷⁸⁹ What should appear if the conscription or enlistment of children “into armed groups” is committed in the context of an international armed conflict? The Malabo Protocol (Annex)

¹⁷⁸⁵ *Ibid.*, at 43 and 47.

¹⁷⁸⁶ *Ibid.*, at 48.

¹⁷⁸⁷ *Ibid.*, at 44.

¹⁷⁸⁸ ICC Statute, Article 7 (2) (b) (xxvi). Emphasis is mine.

¹⁷⁸⁹ *Ibid.*, Article 7 (2) (e) (vii).

missed the opportunity to expressly correct this legal gap. Such a correction would have avoided the risk of an extensive interpretation of the words “national armed forces” in order to include “armed groups” in contradiction with the principle of strict interpretation of penal laws.¹⁷⁹⁰ Thirdly, the Malabo Protocol (Annex) omits paragraph 3 of article 7 of the ICC Statute: “Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means”. Fourthly, the Malabo Protocol could incorporate the crime of arbitrary displacement of persons in time any armed conflict.

The “arbitrary displacement of persons” is prohibited by the Kampala Convention of 2009 on the protection of IDPs.¹⁷⁹¹ The notion includes any of the following acts: i) the displacement based on policies of racial discrimination or other similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the population; ii) the individual or mass displacement of civilians in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand, in accordance with international humanitarian law; iii) the displacement intentionally used as a method of warfare or due to other violations of international humanitarian law in situations of armed conflict; iv) the displacement caused by generalised violence or violations of human rights; v) the displacement as a result of harmful practices; vi) forced evacuations in cases of natural or human made disasters or other causes if the evacuations are not required by the safety and health of those affected; vii) the displacement used as a collective punishment; viii) the displacement caused by any act, event, factor, or phenomenon of comparable gravity to all of the above and which is not justified under international law, including human rights and international humanitarian law.¹⁷⁹² States parties have agreed to enforce individual responsibility of perpetrators of these acts in accordance with applicable domestic and

¹⁷⁹⁰ Ambos, above note 1760, at 45. See also *Lubanga* (ICC-01/04-01/06-803-tEN), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, para.277. In this paragraph, the Chamber noted: ‘First, the ordinary meaning of the adjective “national” does not necessarily lead to an interpretation of the term as meaning governmental armed forces. In this regard, the Chamber notes that the Appeals Chamber of the ICTY defined the term “national” within the meaning of Article 4(1) of the Fourth Geneva Convention for the purpose of determining who can be considered a “protected person” under the Convention’.

¹⁷⁹¹ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Articles 1 (d) and 4 (4) (a) to (h).

¹⁷⁹² *Ibid.*

international criminal law.¹⁷⁹³ The incorporation of these acts into the Malabo Protocol (Annex) was necessary. True, some of them can be reached through existing provisions. Regarding war crimes, punishable behaviours related to arbitrary displacement of persons include the crime of “ordering the displacement of civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand”¹⁷⁹⁴ during a non-international armed conflict, or “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory”¹⁷⁹⁵ in the context of an international armed conflict. Concerning crimes against humanity, another act of arbitrary displacement of persons can be prosecuted as a “deportation or forcible transfer of population”.¹⁷⁹⁶ However, the state of international criminal law remains lower than what is actually required by the Kampala Convention during all types of armed conflicts. Thus, the Malabo Protocol (Annex) failed, in this respect, to develop international criminal law.

1.2.2.2. The Specificity of the Crime of Aggression

The crime of aggression is defined by the Malabo Protocol in article 28M of its Annex on the Statute of the AU Criminal Court. Previously, various initiatives were undertaken to codify rules on aggression in Africa. The most important treaties were concluded in western¹⁷⁹⁷ and central Africa.¹⁷⁹⁸ The reason why aggression captured so earlier the attention of states, contrary to the other ICC crimes, is the discourse on decolonisation and the consolidation of state sovereignty. Human rights protection was not a priority. The AU adopted its own Non-aggression and Common Defence Pact in 2005 and inspired other initiatives at the sub-

¹⁷⁹³ *Ibid.*, Article 3 (1) (g).

¹⁷⁹⁴ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28D (e) (viii).

¹⁷⁹⁵ *Ibid.*, Article 28D (b) (ix).

¹⁷⁹⁶ *Ibid.*, Article 28C (1) (d).

¹⁷⁹⁷ See Agreement on Non-Aggression and Defence Assistance (ANAD) between Member States of the Western African Economic Community (CEAO) and Togo (9 June 1977); Amended Protocol on Non-Aggression between Member States of the Economic Community of West African States (22 April 1978).

¹⁷⁹⁸ Non-Aggression Pact between Member States of the United Nations Standing Advisory Committee on Security Questions in Central Africa (08 July 1996); Mutual Assistance Pact between Member States of the Economic Community of Central African States (2000). See M. Mubiala, *Coopérer pour la paix en Afrique centrale* (Geneva : UNIDIR, 2003), at 35-37 and 65-69.

regional level such as the ICGLR in 2006.¹⁷⁹⁹ The AU Non-aggression and Common Defence Pact also inspired the Malabo Protocol (Annex), regarding at least the list of constitutive acts of aggression¹⁸⁰⁰ and the status of potential perpetrators. The UN General Assembly resolution 3314 of 14 December 1974 on aggression, which has influenced the definition of this crime under the ICC Statute, was not referred to. This is because the said resolution limits the crime of aggression to state acts, while the AU Non-aggression and Common Defence Pact extends its definition to acts of “a State, a group of States, an organisation of States or non-State actor(s) or (...) any foreign or external entity”.¹⁸⁰¹ This is a substantial departure from general international law and may have implications with respect to the exercise of the right of a state to self-defence (against non-state actors). As a consequence, the definition of aggression in the Malabo Protocol (Annex) differs from the one which is provided for in the ICC Statute, with the exception of the nature of acts of individuals who may be held criminally responsible. Both treaties criminalise “the planning, preparation, initiation or execution” of acts of aggression. It has to be noted the criminalisation of preparatory acts which should in principle fall out of the ambit of criminal law. Such criminalisation of preparatory acts seems to be the acknowledgment of the gravity of aggression as the “supreme international crime”¹⁸⁰² from which other crimes can be committed.

Furthermore, the definition of aggression in the Malabo Protocol (Annex) includes acts that constitute violations of the UN Charter or the AU Constitutive Act “and with regard to the territorial integrity and human security of the population of a State Party”.¹⁸⁰³ The phrase

¹⁷⁹⁹ Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region (30 November 2006). In Article 1 (2) and (3), it copies the definition of aggression provided for by the African Union Non-aggression and Common Defence Pact under Article 1 (c) (i) to (xi).

¹⁸⁰⁰ With the exception of Article (1) (ix), (x) and (xi) of African Union Non-aggression and Common Defence Pact: ix) the acts of espionage which could be used for military aggression against a Member State; x) technological assistance of any kind, intelligence and training to another State for use in committing acts of aggression against another Member State; xi) the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent trans-national organised crimes against a Member State. These acts do not constitute any use of force and do not reach the threshold of gravity which is required for the commission of aggression implying criminal responsibility.

¹⁸⁰¹ African Union Non-aggression and Common Defence Pact, Article 1 (c).

¹⁸⁰² C. Kress, “The Crime of Aggression before the First Review of the ICC Statute”, *20 Leiden Journal of International Law* (2007) 851–865, at 852.

¹⁸⁰³ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28M (A).

“with regard to the territorial integrity and human security of the population of a State Party” looks at first sight ambiguous. The *travaux préparatoires* of the Malabo Protocol provide no indication in order to clarify its meaning. However, given that the UN Charter prohibits the use of armed force between states, one may suggest that the phrase is connected to acts of aggression by non-state actors, the prosecution of which might be relevant if only they have infringed the territorial integrity of the state party or human security of its population. As a consequence, simple threats of aggressive acts against a state would not be sufficient for the commission of this crime. Likewise, fears of a state to be a victim of such acts could not justify the use of armed force against a non-state actor on the territory of another state without the latter’s consent. Such a use of armed force without the consent of the territorial state would be constitutive of the crime of aggression. In addition, the definition of the Malabo Protocol (Annex) contains a number of acts that cannot be committed by non-state actors. Only states are able to perpetrate acts that are listed in article 28M (B) (c), (d), (e), (f) and (g): the bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; the blockade of the ports, coasts or airspace of a State by the armed forces of another State; the attack by the armed forces of a State on the land, sea or air forces, or marine and fleets of another State; the use of the armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the AU Non-Aggression and Common Defence Pact or any extension of their presence in such territory beyond the termination of the agreement; the action of a State in allowing its territory, which it has placed at the disposal of another State to be used by another State for perpetrating an act of aggression against a third State.

The deficiency of the Malabo Protocol (Annex) relates to the inclusion of the general definition of aggression under article 28M (B) (a), that is, “the use of armed forces against the sovereignty, territorial integrity and political independence of any state, or any other act inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations”, in the list of constitutive acts of this crime. It is a non-sense insofar as every act of aggression proceeds from the use of armed force, meaning that such use cannot *per se* constitute a crime. The general definition also extends to violations of the AU Constitutive Act *and* the UN Charter, whereas article 28M (A) already defines aggression with respect to “a manifest violation of the Charter of the United Nations *or* the Constitutive Act of the African Union (...)”.

Finally, the nature of some perpetrators of aggression is subject to misinterpretation. For the state or non-state actor, everything is clear. It does not seem the case for “an organisation of states or any foreign entity”. Maybe, such an organisation of state could include not only interstate organisations having legal personality and *de facto* military alliances. But, the hypothesis may turn out to be an aggression by a state because such organisations are constituted by individual countries. Concerning “any foreign entity”, the AU Non-aggression and Common Defence Pact refers to “any external entity”. The adjective “external” apparently alludes to “out of the African continent”. But, the term “entity” remains very ambiguous. Even the *travaux préparatoires* are silent on the issue. Arguably, “given the criminal responsibility of corporations, the phrase may refer to legal entities in the sense of legal persons, but such “entities” would certainly need military assistance to perform acts of aggression”.¹⁸⁰⁴ It will belong to the AU Criminal Court to clarify the text in case-law.

1.2.3. The Codification of Other Crimes

There are 11 other crimes which are codified in African international law. They can be examined in two groups: the crimes against the security of the state (1.2.3.1) and the crimes against human security (1.2.3.2).

1.2.3.1. The Crimes against the Security of the State

In this category, a distinction may be drawn between political assassination and subversion (a), mercenarism (b) and unconstitutional change of government (c).

a) The Crime of Political Assassination and Subversion

Political assassination and subversion do not constitute autonomous crimes. Rather, they must be seen as constitutive acts of a different crime such as the unconstitutional change of government.¹⁸⁰⁵ As a reminder, one of the principles enshrined in the AU Constitutive Act is the condemnation and rejection of political assassination and subversive activities. It is a heritage of the OAU Charter which stipulated an “unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States

¹⁸⁰⁴ Ambos, above note 1760, at 50.

¹⁸⁰⁵ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Articles 28E (1) (a) and (c).

or any other States".¹⁸⁰⁶ However, neither the AU Constitutive Act nor the OAU Charter defined political assassination and subversion.

Regarding political assassination, its condemnation under the OAU Charter was influenced by two prominent events: the regime changes in the DRC and Togo, respectively after the killing of the Congolese Prime Minister, Patrice-Emery Lumumba, on 17 January 1961,¹⁸⁰⁷ and the assassination of the Togolese President, Sylvanus Olympio, on 13 January 1963.¹⁸⁰⁸ It follows that the assassination envisaged by the OAU Charter as well as the AU Constitutive Act is one which is committed for political purposes of regime change and not just the killing of a political leader for other reasons or the assassination of any citizen whom a government may have wanted to get rid of. Both treaties do not envisage an assassination of any kind. According to Joseph-Marie Bipoun-Woum, the assassination in question must have diplomatic implications either by its origin or through the victim, or even the political functions exercised by the latter.¹⁸⁰⁹ This is because the perpetrator of a political assassination actually aims to target the organisation and the functioning of the state and its political organisation.¹⁸¹⁰

This conception of political assassination is connected to the condemnation of subversive activities. The initial declaration in this respect was issued in Brazzaville (Congo) on 29 December 1960. It stated that each African independent country should prohibit in its territory the undertaking of subversive activities against any other African country.¹⁸¹¹ Another formal condemnation of subversive activities was made in Monrovia (Liberia) in 1961.¹⁸¹² In 1965, the OAU Assembly met in Accra (Ghana) and adopted the Declaration on the Problem of Subversion in Africa.¹⁸¹³ This process of codification continued with the adoption of the AU

¹⁸⁰⁶ OAU Charter, Article III (5).

¹⁸⁰⁷ See G. Zongola-Ntalaja, 'Patrice Lumumba: the Most Important Assassination of the 20th Century', *The Guardian* (17 January 2011) <https://www.theguardian.com/global-development/poverty-matters/2011/jan/17/patrice-lumumba-50th-anniversary-assassination?CMP=share_btn_fb> accessed 20 December 2016.

¹⁸⁰⁸ See J. Morel, 'Calendrier des crimes de la France outre-mer', at 11-12 <<http://jacques.morel67.pagesperso-orange.fr/ccfo/crimcol.pdf>> accessed 27 January 2017.

¹⁸⁰⁹ Bipoun-Woum, above note 197, at 215.

¹⁸¹⁰ *Ibid.*

¹⁸¹¹ E. Jouve, *L'Organisation de l'unité africaine* (Paris : Presses Universitaires de France, 1984), at 163.

¹⁸¹² *Ibid.*

¹⁸¹³ AHG/Res. 27 (II), above note 196.

Non-aggression and Common Defence Pact in 2005. There is no contradiction between these two African instruments. The AU succeeded to the Accra Declaration which codified eight principles on the rejection of subversive activities on the continent.¹⁸¹⁴ In particular, two of these principles commit African states not to tolerate the use of their territories for any subversive activity directed from outside Africa against any OAU member state and to oppose collectively and firmly by every means at their disposal any form of subversion conceived, organised or financed by foreign powers against Africa, OAU or its member states individually.¹⁸¹⁵ The originality of the AU Non-aggression and Common Defence Pact is to be a treaty and to provide a conventional definition of subversion, binding on states parties, in the following terms:

“Acts of Subversion” means any act that incites, aggravates or creates dissension within or among Member States with the intention or purpose to destabilise or overthrow the existing regime or political order by, among other means, fomenting racial, religious, linguistic, ethnic and other differences, in a manner inconsistent with the Constitutive Act, the Charter of the United Nations and the Lome Declaration (on unconstitutional changes of government).¹⁸¹⁶

This definition should be read in the light of the Accra Declaration. The rationale of the rejection of subversive activities is the weaknesses of African political regimes and a sort of paranoia and permanent suspicion of foreign interferences against incumbent governments. In this regard, the OAU Declaration on a Code of Conduct for Inter-African Relations of 1994 clearly recalled: “We are determined to cooperate in the defence of the institution of our respective States against hegemony and all other activities carried out in violation of the independence, unity, sovereign equality or territorial integrity of Member States”.¹⁸¹⁷ In another Resolution on the Right of States to Decide on their Political Options without Foreign Interference, the OAU Council of Ministers called on “extra-African Powers to refrain from interfering in the internal affairs of African countries”.¹⁸¹⁸

¹⁸¹⁴ *Ibid.*

¹⁸¹⁵ *Ibid.*, paras.2-3.

¹⁸¹⁶ African Union Non-aggression and Common Defence Pact, Article 1(a). The brackets are mine.

¹⁸¹⁷ AHG/Decl.2 (XXX), Declaration on a Code of Conduct for Inter-African Relations, 30th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Tunis (Tunisia), 13-15 June 1994, para.9.

¹⁸¹⁸ CM/Res.1389 (LVI) Rev.1, Resolution on the Right of States to Decide on their Political Options without Foreign Interference, 56th Ordinary Session of the Council of Ministers of the Organisation of African Unity, Dakar (Senegal), 22- 28 June 1992, paras.1-2.

Subversion can be committed by foreign states, including African countries between themselves, or by individuals residing in their territories. The ACHPR further provides that acts of subversion are contrary to the right of “all peoples (...) to national and international peace and security”.¹⁸¹⁹ Therefore, for the purpose of strengthening peace, solidarity and friendly relations, states parties must ensure that “any individual enjoying the right of asylum (...) shall not engage in subversive activities against his country of origin or any other state party (...)”.¹⁸²⁰ The host state must respect the principles of international law,¹⁸²¹ especially the principle that political refugees must remain apolitical.

b) The Crime of Mercenarism

Mercenarism is defined by the Malabo Protocol in article 28H of its Annex on the Statute of the AU Criminal Court. Unlike political assassination and subversion, it is not only an autonomous crime but also a constituent element of the crime of unconstitutional change of government and aggression.¹⁸²² Historically, mercenarism, or the state of being a mercenary, has been a severe long time sore for African international relations. While the use of mercenaries during armed conflicts was still quite a normal phenomenon around the time African states were being decolonised,¹⁸²³ the legality of their recruitment, use, financing and training became problematic this time. Former colonial powers were suspected of resorting to the use of mercenaries since it had become politically difficult to use their regular armed forces in order to hinder the process of decolonisation or, at least, of self-determination after independence.¹⁸²⁴ Mercenaries were used during the Katanga secession in the DRC (1960-

¹⁸¹⁹ African Charter on Human and Peoples’ Rights, Article 23 (1).

¹⁸²⁰ *Ibid.*, Article 23 (2) (a).

¹⁸²¹ AHG/Res. 27 (II), above note 196, para.6.

¹⁸²² Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Articles 28E (1) (b) and 28M (B) (h); UNGA Res. 3314 (XXIX), 29 November 1974, Article 3 (g).

¹⁸²³ S.J.G. Clarke, *The Congo Mercenary: a History and Analysis*, (Johannesburg: South African Institute of International Affairs, 1968), at 9-10; J. Tercinet, ‘Les mercenaires et le droit international’, 23 *Annuaire français de droit international* (1977) 269-293, at 270. See also C. C. Bayley, *Mercenaries for the Crimea: The German, Swiss and Italian Legions in British Service, 1854–1856*, (Montreal: McGill-Queens University Press, 1977).

¹⁸²⁴ L.S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (1st edn., Martinus Nijhoff Publishers: Kluwer Law International, 1997), at 184; J. Riley and M. Gambone, ‘Men with Guns’, 28 (1) *Wisconsin International Law Journal* (2010)39-73, at 56; J. C. Zarate, ‘The Emergence of a New Dog of War: Private International Security Companies, International Law and the New World Disorder’, 34 (1) *Stanford Journal of International Law* (1998) 75-162, at 86-90.

1962), the Biafra secession in Nigeria (1968-1969), the civil wars in Soudan (1970) and Angola (1975-1976) and the liberation war in Zimbabwe (1970).¹⁸²⁵ Mercenaries were also used in almost all contemporary African armed conflicts, including in Liberia, Sierra Leone, Ivory Coast, Central African Republic and the DRC.¹⁸²⁶ Outside the realm of armed conflicts, mercenaries have been involved in many military *coups d'état* across the continent, notably in Benin and Comoros.

Several United Nations resolutions, adopted by the Security Council or the General Assembly, have condemned mercenarism or held that mercenaries are criminals to be prosecuted and tried as such under domestic law.¹⁸²⁷ However, these United Nations resolutions are problematic for several reasons. First, some are contextualised to specific cases (e.g. Katanga or Biafra sessions) and can not be relied upon to imply a general prohibition against mercenarism during any armed conflict. Second, these resolutions have been drafted as non-binding recommendations to member states. Thirdly, and more important, they have not provided any definition of the term 'mercenary'.

This justifies why African states, Nigeria taking the lead,¹⁸²⁸ raised the matter at the diplomatic conferences dedicated to the adoption of the Additional Protocols (to the Geneva Conventions of 1949) of 7 June 1977. However, due to a lack of consensus among negotiating states, no general prohibition against mercenarism was reached.¹⁸²⁹ Only a minor compromise was found within the framework of article 47 of Additional Protocol I in four ways. First, this treaty does not prohibit as such the recourse by states to use of mercenaries as a wrongful act under international law. Second, article 47 stipulates that a mercenary shall not enjoy the right to be a combatant or a prisoner of war. This means that he could be prosecuted, if caught by the adverse party, solely on the ground of being a mercenary, without having committed any

¹⁸²⁵ See E. David, 'Les mercenaires en droit international (développements récents)', 13 *Revue belge de droit international* (1977)197-237, at 200-201 ; Clarke, above note 1823.

¹⁸²⁶ J.-P. Segihobe, *Le Congo en droit international: essai d'histoire agonistique d'un Etat multinational* (Bruxelles : Presses universitaires Ryckmans, 2011), at 208 ; K. Pech, 'The Hand of War : Mercenaries in the Former Zaïre 1996-97', in A.-F. Musah and J. K. Fayeni (eds), *Mercenaries : an African Dilemma* (London :Sterling/Virginia : Pluto Press, 2000) 117-154.

¹⁸²⁷ See UNSC Res.169 (1961), 24 November 1961, para.4.

¹⁸²⁸ David, above note 1825, at 204.

¹⁸²⁹ S. Nourou Tall, 'Théories et réalités du droit international humanitaire: contribution à l'étude de l'application du droit des conflits armés en Afrique noire contemporaine' (PhD Thesis, University Cheik Anta Diop 2001), at 89-90.

other crime, provided that the incrimination does exist under domestic law as required by the principle of legality. This denial of the status of combatant to mercenaries was strategic in order to advance the cause of peace. In fact, putting a mercenary in a position whereby he could be “less tempted to shoot his way out of a situation in order to avoid capture”,¹⁸³⁰ must be avoided, because “he is more likely to abide by his obligations as a combatant if he can also expect to benefit from the rights attaching to the status”.¹⁸³¹ Third, article 47 defines a mercenary as being “any person who: a) is specially recruited locally or abroad in order to fight in an armed conflict; b) does, in fact, take a direct part in the hostilities; c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party; d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; e) is not a member of the armed forces of a party to the conflict; and (f) has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces”. Fourth, article 47 applies only to international armed conflicts.

This deficiency of Additional Protocol I strengthened the necessity for the adoption of the OAU Convention for the Elimination of Mercenarism in Africa on 3 July 1977. The drafting process was boosted by three African precedents, namely: i) the OAU Convention governing the specific aspects of refugee problems in Africa which had excluded any mercenary from enjoying refugee status in African states since 1969 inasmuch as he was guilty of acts contrary to the purposes and principles of the OAU, now the AU;¹⁸³² ii) the OAU Committee of Experts which had proposed the first draft convention on mercenarism in Rabat (Morocco) in June 1972; and iii) the Luanda (Angola) trial,¹⁸³³ conducted from 11 to 19 June 1976, whereby 13 individuals (nine British, three Americans and one Irish) who were caught by the Angola government’s forces during the civil war were prosecuted “for the crime of being

¹⁸³⁰ F.J. Hampson, ‘Mercenaries: Diagnosis before Prescription’, 22 *Netherlands Yearbook of International Law* (1991) 3-38, at 15-16.

¹⁸³¹ *Ibid.*

¹⁸³² OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Article 1 (5) (c). See also M. Mubiala, ‘La protection des réfugiés et des personnes déplacés en Afrique’, in O. Ndeshyo (ed.), *Mélanges Célestin Nguya-Ndila –La République démocratique du Congo : les défis récurrents de décolonisation, de l’Etat de droit et de développement économique et social* (Kinshasa : CEDESURK, 2012)699-730, at 705.

¹⁸³³ David, above note 1825, at 203-204; Nourou Tall, above note 1829, at 272.

mercenaries and for crimes against peace (...) in a mercenary war of aggression".¹⁸³⁴ They were all convicted of mercenarism: four were sentenced to death penalty and nine to prison.¹⁸³⁵ Following this event, the International Commission of Enquiry on Mercenaries (ICEM), which was convened by Angola to observe the trial and to make recommendations for an international action to deal with such problem in the future, produced a new draft convention on mercenarism.¹⁸³⁶ This second draft treaty together with the one which was proposed by the OAU Committee of Experts in 1972, constituted the principal materials upon which the OAU Convention for the elimination of mercenarism in Africa was elaborated.

The OAU Convention differs from Additional Protocol I on three major points. First, it applies to armed conflicts of any kind. Second, the OAU Convention criminalises mercenarism and considers that it is a crime against peace and security in Africa. Third, the crime of mercenarism may be committed by any person, natural (individual) or legal/juridical (corporation or association, or representative of a state or the state itself).¹⁸³⁷ This is likely the first time that corporate criminal liability was ascertained under African international law, far before the adoption of the UN Convention against Transnational Organised Crime (Palermo Convention) of 15 November 2000 and the ICGLR's Protocol against Illegal Exploitation of Natural Resources of 30 November 2006. Fourth, the OAU Convention indicates that the crime of mercenarism is committed by any of the following acts when the offender : a) shelters, organises, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries; b) enlists, enrolls or tries to enroll in the said bands; c) allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above mentioned forces.¹⁸³⁸

In terms of legal impact, most of the provisions of the OAU Convention were introduced into the United Nations Convention against the Recruitment, Use, Financing and Training of Mercenaries whose adoption followed on 4 December 1989. Further, this universal convention extended the definition of mercenarism to mercenaries used to perpetrate military

¹⁸³⁴ M. J. Hoover, 'The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War', 9 *Case Western Reserve Journal of International Law* (1977)323-406, at 327 and 353.

¹⁸³⁵ *Ibid.*, at 323.

¹⁸³⁶ David, above note 1825, at 204; Segihobe, above note 1826, at 206.

¹⁸³⁷ OAU Convention for the Elimination of Mercenarism in Africa, Article 1 (2).

¹⁸³⁸ *Ibid.*

coups in other independent states.¹⁸³⁹ Both treaties have led to the consolidation of the definition of the crime of mercenarism as enshrined in the Malabo Protocol (Annex).¹⁸⁴⁰ On the one hand, article 28H (1) (b) of the Malabo Protocol (Annex) is taken from the UN Convention. On the other hand, article 28H (1) (a) derives from article 1 (1) of the OAU Convention, with the exception of subparagraph (b) regarding the definition of mercenary as a person who “does in fact take a direct part in hostilities”. This omission might be justified since it could be redundant with article 28H (3) which provides that “a mercenary (...) who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence”. Hence, the mere status of mercenary is not apparently sufficient for the accused to be held criminally responsible under the Malabo Protocol (Annex). There must be direct participation in hostilities or in a concerted act of violence. It will belong to the AU Criminal Court to precise the meaning of each expression in concrete cases. In any event, “any person who recruits, uses, finances or trains mercenaries”¹⁸⁴¹ is criminally responsible.

c) The Crime of Unconstitutional Change of Government

The crime of unconstitutional change of government is defined by the Malabo Protocol in article 28E of its Annex on the Statute of the AU Criminal Court. The origin of the prohibition of unconstitutional changes of government may be dated back to the theory of non-recognition of governments coming to power through *coups d'état* in Latino-America.¹⁸⁴² The rejection of unconstitutional governments is now widespread in practice.¹⁸⁴³ International law is no longer insensible to the political organisation of states and the democratic legitimacy

¹⁸³⁹ International Convention against the Recruitment, Use, Financing and Training of Mercenaries (4 December 1989), Article 1 (1).

¹⁸⁴⁰ It must be noted that the UN Commission on International Law drafted a Code of crimes against peace and security of the humanity containing the crime of mercenarism in 1991. However, disagreements appeared upon the universal relevance of the inclusion of mercenarism to the extent that the crime was removed in the Draft Code of 1996.

¹⁸⁴¹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28H (2).

¹⁸⁴² S. Bula-Bula, ‘Mise hors-la-loi ou mise en quarantaine des gouvernements anticonstitutionnels par l’Union africaine ?’, 11 *African Yearbook of International Law* (2003) 23-78, at 30-31.

¹⁸⁴³ See R. Ben Achour, ‘Changements anticonstitutionnels de gouvernement’, 379 *Recueil des Cours de l’Académie de Droit International* (2016) 397-548.

of their rulers.¹⁸⁴⁴ But, it is the first time that unconstitutional changes of government are criminalised under international law.¹⁸⁴⁵ Thus, it is important to examine how Africa evolved from the mere prohibition of such changes of government to regional criminalisation (i) and the status of potential perpetrators of the crime in question (ii).

i) The Passage from Prohibition to Criminalisation

The formal prohibition of unconstitutional changes of government began with the OAU,¹⁸⁴⁶ following the revival of democratisation in Africa in the 1990s. The term unconstitutional change of government was used as such in the Declaration of Grand Bay (Mauritius) in April 1999 as one of the causes of human rights violations on the continent.¹⁸⁴⁷ It was again referred to in two decisions of the OAU Assembly, adopted in Alger (Algeria) in July 1999.¹⁸⁴⁸ The term also gained a lot of support from RECs. This is the case of ECOWAS which decided to use force, with the OAU support through the Declaration of Harare (Zimbabwe) of 4 June 1997, in order to re-establish in power elected President Ahmad Tejan Kabbah (Sierra Leone) after the *coup d'état* of 25 May 1997, perpetrated by Johnny Paul Koroma.¹⁸⁴⁹ In December 1999, it was formally agreed that ECOWAS would intervene in a member state, without its consent, in situations of serious and massive violations of human rights and the rule of law or “in the event of an overthrow or attempted overthrow of a democratically elected

¹⁸⁴⁴ D. Kokoroko, ‘Souveraineté étatique et principe de légitimité démocratique’, 16 (1) *Revue québécoise de droit international* (2003) 37-59, at 38.

¹⁸⁴⁵ B. Tchikaya, ‘Le crime international de changement anticonstitutionnel de gouvernement : quelques questions’, in R. Ben Achour (ed.), *Les changements anticonstitutionnels de gouvernement : approches de droit constitutionnel et de droit international* (Marseille : Presses Universitaires d’Aix-Marseille, 2014) 141-147.

¹⁸⁴⁶ K. Oteng Kufuor, ‘The OAU and the Recognition of Governments in Africa: Analyzing Its Practice and Proposals for the Future’, 17 (2) *American University International Law Review* (2002) 369-401, at 390-393.

¹⁸⁴⁷ CONF/HRA/DECL (I), Declaration and Plan of Action, 1st OAU Ministerial Conference on Human Rights, Grand Bay (Mauritius), 12-16 April 1999, para.8 (p).

¹⁸⁴⁸ AHG/Dec.141 (XXXV), Decision, 35th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Alger (Algeria), 12-14 July 1999, para.4; AHG/Dec. 142 (XXXV), Decision, 35th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Alger (Algeria), 12-14 July 1999, para.1.

¹⁸⁴⁹ J. Kazadi Mpiana, ‘L’Union africaine face à la gestion des changements anticonstitutionnels de gouvernement’, 25 (2) *Revue québécoise de droit international* (212)101-141, at 103-104 ; D. Bangoura, ‘Les modalités d’intervention : deux cas de maintien de la paix (Liberia et Centrafrique)’, in P. Ango Ela (ed.), *La prévention des conflits en Afrique centrale. Prospective pour une culture de la paix* (Paris : Karthala, 2001) 99-112, at 102-104.

government”.¹⁸⁵⁰ This legal development was previous to the ECOWAS policy of “zero tolerance for power obtained or maintained by unconstitutional means”.¹⁸⁵¹ What is at stake is the protection of African democracies as political regimes in which “authority to exercise power derives from the will of the people”.¹⁸⁵²

The codification of unconstitutional changes of government has been improved at the continental level. The Lomé Declaration of July 2000 is the first legal instrument to have defined the content of the prohibition and set out procedures and sanctions of the OAU in reaction to its violation.¹⁸⁵³ The AU inherited this OAU’s legal framework. The notion of unconstitutional change of government was conventionalised in the AU Constitutive Act of 2000, the Protocol on the AU PSC of 2002 and the ACDEG of 2007.¹⁸⁵⁴ In terms of comparison, subparagraphs (a) to (d) of article 28 E (1) of the Malabo Protocol (Annex) are almost a copy of the Lomé Declaration. Under this article, the crime of unconstitutional change of government means committing or ordering to be committed any of the following acts with the aim of illegally accessing or maintaining power: a) a putsch or coup d’état against a democratically elected government; b) an intervention by mercenaries to replace a democratically elected government; c) any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination; d) any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections. In addition, article 28E (1) (e) of the Malabo Protocol (Annex), which criminalises “any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution”, derives from the ACDEG.¹⁸⁵⁵ But, the Malabo

¹⁸⁵⁰ Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, Article 25.

¹⁸⁵¹ Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security (21 December 2001), Article 1 (c).

¹⁸⁵² B. Costantinos, ‘Unconstitutional Regime Change: Trend Perspective and Political Requisite for Stricter Law Enforcement’, 1 *Pan-African Yearbook of Law* (2012) 1-18, at 16.

¹⁸⁵³ AHG/Decl.5 (XXXVI), above note 1569, at 4.

¹⁸⁵⁴ B. Tchikaya, ‘La Charte africaine de la démocratie, des élections et de la gouvernance’, LIV *Annuaire français de droit international* (2008) 515-528, at 525 ; E.Y. Omorogbe, ‘A Club of Incumbents? The African Union and Coups d’État’, 44 *Vanderbilt Journal of Transnational Law* (2011) 123-154, at 134-135.

¹⁸⁵⁵ African Charter on Democracy, Elections and Governance, Article 23 (5).

Protocol (Annex) also innovates. On the one hand, as may be observed from the *chapeau* of article 28 E (1), it adds to the mental element of the crime of unconstitutional change of government the special intent of accessing or maintaining power, beside the illegal aim to perpetrate such acts. On the other hand, it includes two further material elements into the definition. This is the case of unconstitutional change of government through “political assassination” under article 28E (1) (c), which was not included in the Lome Declaration, and the entire subparagraph (f) of the same article which incriminates “any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors”.

However, the process of criminalisation is prior to the Malabo Protocol (Annex). The crime of unconstitutional change of government is part of *lex lata* at least after the entry into force of the ACDEG in 2012, obligating states parties to “(...) bring to justice the perpetrators of unconstitutional change of government or take necessary steps to effect their extradition”.¹⁸⁵⁶ The states parties have agreed to do so in accordance with article 23 of the ACDEG, which defines unconstitutional change of government in reference to a non-exhaustive list of constituent material acts. Apart from a number of substantive innovations, the Malabo Protocol (Annex) rather creates, in accordance with the ACDEG,¹⁸⁵⁷ a system of criminal justice overlapping domestic judicial apparatus.

This passage from prohibition to criminalisation of unconstitutional change of government is a further step in the protection democracy as part of a public international policy.¹⁸⁵⁸ The crime is exactly directed against “a democratically elected government”, whose meaning is to be established pursuant to AU instruments.¹⁸⁵⁹ In other words, AU member states shall no longer enjoy the right to choose freely a political regime other than democracy. The policy is apparently part of a wide process towards the regionalisation of constitutional law, the

¹⁸⁵⁶ *Ibid.*, Article 25 (9).

¹⁸⁵⁷ *Ibid.*, Article 25 (5).

¹⁸⁵⁸ M. Gounelle, ‘La démocratisation, politique publique internationale’, in *Mélanges Hubert Thierry* (Paris : Pedone, 1998) 201-213.

¹⁸⁵⁹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28E (2).

creation of a Pan-African Constitutional Court¹⁸⁶⁰ and the United States of Africa. This is an important limitation of state sovereignty. But, which democratic values and principles are protected? The Lomé Declaration particularly mentions the adoption of a constitution of which preparation, content and method of revision should be in conformity with generally acceptable principles of democracy; the respect for the Constitution and adherence to the provisions of the law adopted by Parliament; the principle of democratic change and recognition of a role for the opposition; and the organisation of free and regular elections.¹⁸⁶¹ The application of all these principles is also likely to protect security and political stability within African states without which no integration of the entire continent is possible. The insistence on the commission of the crime of unconstitutional change of government through the intervention of mercenaries, rebellions or political assassinations is a rejection of any subversive activity that may be fomented from abroad in violation of state sovereignty and the self-determination of African peoples. Many unconstitutional changes of government have occurred in the way since 1960 (Togo, Republic of Congo, Nigeria, Ghana, DRC, Comoros, CAR, Burkina Faso and Benin).

Still, the shift towards criminalisation is justified since violations of the prohibition of unconstitutional change of government have dramatically increased since 2000. The AU itself deplored “the resurgence of the scourge of coups d’état in Africa”.¹⁸⁶² Between 2002 and 2016, there have been at least 13 cases of successful unconstitutional changes of government: Madagascar (2002), CAR (2003), Togo (2005), Mauritania (2005 and 2008), Guinea Conakry (2008), Madagascar (2009), Niger (2010), Ivory Coast (2010), Mali (2012), Guinea Bissau (2012), CAR (2013), Egypt (2013). The means of reaction to these situations (mainly

¹⁸⁶⁰ Assembly/AU/Dec.458 (XX), Decision on the Establishment of an “International Constitutional Court” (Doc Assembly/AU/12(XX) Add.1)’, 20th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 27-28 January 2013, paras.2-3.

¹⁸⁶¹ AHG/Decl.5 (XXXVI), above note 1569, at 3-4. See also AHG/Decl. 1 (XXXVIII), OAU/AU Declaration on the Principles Governing Democratic Elections in Africa, 38th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Durban (South Africa), 8 July 2002, para.2 (4). Among these principles, this Declaration indicates: ‘Democratic elections should be conducted: a) freely and fairly; b) under democratic constitutions and in compliance with supportive legal instruments; c) under a system of separation of powers that ensures in particular, the independence of the judiciary; d) at regular intervals, as provided for in National Constitutions; e) by impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics’.

¹⁸⁶² Assembly/AU/Dec.220 (XII), Decision on the Resurgence of the Scourge of Coups d’état in Africa, 12th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 1-3 February 2009, paras.1-2.

sanctions against member states for non-compliance with AU decisions and policies, suspension of participation of unconstitutional government in the AU's activities and targeted individual sanctions such as the ban of visas)¹⁸⁶³ have yielded little success. The perpetrators of the crime often remain unpunished; they regain legitimacy after organising (fraudulent) elections and their governments ultimately reintegrate the AU. Accordingly, there was a need to reinforce the AU's means of reaction to such situations. Hence, the adoption of the historic Decision of 2010,¹⁸⁶⁴ in which the AU Assembly imposed the principle of non-participation of perpetrators of unconstitutional change of government in the elections held in order to restore constitutional order.¹⁸⁶⁵ The process of criminalisation intervenes as a measure of last resort. African states now have not only the duty to prosecute the perpetrators of the crime in question, but also not to recognise their governments or conduct foreign relations with their states until the constitutional order is re-established.¹⁸⁶⁶

ii) The Potential Perpetrators of the Crime

Unconstitutional change of government constitutes a pluralistic crime. As it may be implied from its constituent elements, this crime can be committed only by more than one person. It can also be committed by omission. Everything depends on the form of participation in the perpetration of the crime: direct offender, accomplice or superior acting in shadow. One of the perpetrators can be a statesman who, knowing that a *coup d'état* is being executed, omits to discharge his duty to defend the state institutions under his protection in order to facilitate the success of the operation of an armed group in which he takes part. The perpetrators of unconstitutional change of government are *de jure* or *de facto* rulers because this is essentially a leadership crime.¹⁸⁶⁷ But, this characterisation is not entirely tenable. In fact, outside those

¹⁸⁶³ Constitutive Act of the African Union, Article 30; Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Article 7 (1) (g). See also F. Tabala Kitene, 'Le statut des sanctions contre les changements anticonstitutionnels de gouvernement dans les textes et la pratique de l'Union africaine : contribution a l'étude de la production des normes par les organisations internationales' (PhD Thesis, Universiteit Gent, 2013), at 123-135.

¹⁸⁶⁴ Assembly/AU/Dec.269(XIV), Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacities of the African Union to Manage such Situations (Doc.Assembly/AU/4(XIV)), 14th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 31 January-2 February 2010.

¹⁸⁶⁵ *Ibid.*, para.6 (i) (b) (a).

¹⁸⁶⁶ *Ibid.*, para.6 (i) (c).

¹⁸⁶⁷ A. Soma, 'Le crime international de changement anticonstitutionnel de gouvernement', 26 (3) *Swiss Review of International and European Law* (2016) 417-442.

persons who have “the aim of illegally accessing or maintaining power”, there are also accomplices, devoid of such a special intent, who may have with knowledge supported the coup. Accomplices might not necessarily be rulers. This is the case of mercenaries. Nothing explains why they should not be subjected to this incrimination, in addition to the crime of mercenarism, even though they do not themselves accede to power. Accomplices may also be members of a band constituted or used to capture the power or even a scientist who may have been recruited to support and facilitate the manipulation of a Constitution to prevent a democratic change of government. Even if these perpetrators are not rulers, the struggle against impunity would not be served if they were not subjected to the crime. The same applies to corporations which organise or finance unconstitutional changes of government as the Malabo Protocol (Annex) admits criminal liability of legal persons, with the exception of states.¹⁸⁶⁸

Finally, unlike the ACDEG, the Malabo Protocol (Annex) provides an exhaustive enumeration of constitutive acts of unconstitutional change of government. A situation whereby an incumbent government *deliberately* refuses, at the end of the constitutional term, to organise elections, as in the DRC (2016), and sticks on power, by *maliciously* alleging technical or financial problems, is not covered. A problem arises here in conjunction with the concurrent power which is confers on the PSC to qualify situations of unconstitutional change of government under the ACDEG. The PSC would qualify and condemn other situations of unconstitutional change of government of which perpetrators could not be tried before the AU Criminal Court. This is an unjust legal treatment. Maybe, the Malabo Protocol (Annex) should include “any other act of comparable gravity which is a breach of democratic change of government, resulting from the non-observation of laws in order to maintain power, inconsistently with the Constitution”. The formulation is in line with the principle of legality. It would enable to prosecute rulers who rely on their own bad governance, like in the DRC’s case in 2016, in order to illegally cling to power. Reversely, it would deter other citizens to resort to violence as an ultimate mean to come to power. True, bad governance does not justify an unconstitutional change of government. The proposed formulation would help to equally outlaw the case on the part of both the citizens and the rulers. Otherwise, the Malabo Protocol (Annex) should incorporate the initial proposition that “any acts of a sovereign people peacefully exercising their inherent right which results in a change of government shall

¹⁸⁶⁸ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 46 C (1).

not constitute an offence under this Article".¹⁸⁶⁹ If waiting for these changes in law a government is all the same overthrown by the citizens, bad governance could perhaps influence the *quantum* of the penalty to apply under article 43A (2) of the Malabo Protocol (Annex). In any case, the AU is of the view that popular uprising against *oppressive political systems* does not amount to unconstitutional change of government.¹⁸⁷⁰

1.2.3.2. The Crimes against Human Security

These crimes protect the security of individuals (and even peoples), either in their physical integrity, their property or socio-economic welfare. If an attachment to the state sometimes appears in criminal definitions, it may only be in the course of better ensuring the ultimate end of human security. This end can be successively seen through prosecuting piracy and terrorism (a), illicit exploitation of natural resources (b), corruption and money laundering (c), and trafficking in persons, drugs or hazardous wastes in Africa (d).

a) The Crimes of Piracy and Terrorism

At first sight, the difference between pirate and terrorist acts is not obvious. But, the legal demarcation is clear in the definitions of piracy (i) and terrorism (ii) in the Malabo Protocol (Annex).

i) The Definition of Piracy

Piracy is defined by the Malabo Protocol in article 28F of its Annex on the Statute of the AU Criminal Court. Historically, piracy is a crime which is as old as humanity on the seas. A pirate is perceived as the enemy of mankind. The revival of pirate activities is however very recent. The most important criminal activities have been committed in the Gulf of Aden, off the coast of Somalia, in the Horn of Africa, since 2008. Pirate attacks escalated to hostage-taking for ransom, thereby jeopardising international trade trafficking and fishing activities in the Indian Ocean.¹⁸⁷¹ One observer noted:

Piracy off the coast of Somalia had more than doubled by 2008; pirates had attacked over sixty ships and regularly demanded and received million-dollar ransom payments. The international

¹⁸⁶⁹ Executive Council of the African Union, above note 1746, at 24.

¹⁸⁷⁰ Assembly/AU/Decl.3/(XXI), Solemn Declaration on the 50th Anniversary of the OAU/AU, 21st Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 26-27 May 2013, para. F (ii); PSC/PR/BR.(CDXXXII), 29 April 2014, at 2.

¹⁸⁷¹ D. Guilfoyle, 'The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?', *11 Melbourne Journal of International Law* (2010)1-13, at 2.

community expressed fears that money from ransoms was helping to pay for the war in Somalia, including funding to the U.S. terror-listed Al-Shabaab. Aid deliveries to the then drought-stricken Somalia became more difficult and costly. By November 2009, 104 pirate attacks had been reported in the Gulf of Aden for that year alone, with fifty-four attacks in the Indian Ocean during the same period.¹⁸⁷²

The increasing concern over pirate attacks in this region justified the launch of several anti-piracy operations,¹⁸⁷³ pursuant to various resolutions of the Security Council authorising cooperating states to use all necessary means for the fight against acts of piracy and armed robbery at sea or to enter the territorial waters of Somalia for this purpose.¹⁸⁷⁴ Meanwhile, criminal measures had to be taken. But, on the part of Africa, many states were not yet equipped with adequate legislation to prosecute pirates, notably owing to the non-incorporation of the relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS) of 1982 into domestic orders.¹⁸⁷⁵ It is in view of this legal gap that the AU included piracy in its Model National Law on Universal Jurisdiction over International Crimes in order to suggest a harmonised definition to its member states.¹⁸⁷⁶ The definition contained in the Malabo Protocol (Annex) is its copy. In these two African instruments, the definition provided for is a copy of article 101 of the UNCLOS.

Piracy is different from terrorism since it is limited to illegal acts that occur in the high seas or in other places outside the jurisdiction of any state. Article 28F (a) of the Malabo Protocol (Annex) provides that these acts must be committed for private ends, meaning that those committed for political, religious, racial or other reasons or acts of states are outside the scope of the definition of piracy. Shall be punished not only those who directly perpetrate these acts, but also those who may be guilty of “any act of *voluntary* participation in the operation of a boat, ship or of an aircraft *with knowledge of facts* making it a pirate boat, ship or aircraft”.¹⁸⁷⁷ Both the knowledge of facts and the free will of a participant must be established. Moreover,

¹⁸⁷² S. Beekarry, ‘Assessing Current Trends and Efforts to Combat Piracy’, 46 (1-2) *Case Western Reserve Journal of International Law* (2013) 161-175, at 163.

¹⁸⁷³ See R. Geiß and A. Petrig, *Piracy and Armed Robbery at Sea: the Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (New York: Oxford University Press, 2011), at 17-36.

¹⁸⁷⁴ SC Res.1816 (2008), 2 June 2008, para.7; SC Res.1838 (2008), 7 October 2008, para. 4; SC Res.1846 (2008), 2 December 2008, para. 10; SC Res.1851 (2008), 16 December 2008, para.6.

¹⁸⁷⁵ Beekarry, above note 1872, at 162.

¹⁸⁷⁶ African Union Model National Law on Universal Jurisdiction over International Crimes, Article 8 and 12.

¹⁸⁷⁷ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28F (b). Emphasis is mine.

criminalisation extends to incitement and facilitation of the commission of direct or participation acts. This criminalisation of piracy is intended to protect the interests of individuals who are affected by pirate acts (life, physical integrity and property), the safety of sea and air trafficking on the high seas to allow international trade and mobility.¹⁸⁷⁸

ii) The Definition of Terrorism

Terrorism is set out by the Malabo Protocol under article 28G of its Annex on the Statute of the AU Criminal Court. African regional efforts to prevent and fight terrorism in Africa started in 1992 when the OAU Assembly adopted a resolution in which it declared its objective to enhance cooperation and coordination of efforts of member states in order to suppress the phenomenon of extremism and terrorism on the continent.¹⁸⁷⁹ In 1994, the OAU Code of Conduct for Inter-African Relations unequivocally rejected as criminal all terrorist acts, methods and practices, fanaticism and extremism or the use of religion to commit acts of violence.¹⁸⁸⁰ Four years later, the African continent was shaken by the terrorist attacks against the American embassies in Nairobi (Kenya) and Dar-es-Salam (Tanzania) on 7 August 1998. These events boosted the process of adoption of the OAU Convention on the Prevention and Combating of Terrorism in 1999 or the Alger Convention.¹⁸⁸¹ In 2000, the AU Constitutive Act reiterated the condemnation and rejection of terrorist acts. On 14 September 2002, a continental plan of action against terrorism was adopted and envisaged the creation of the African Centre for the Study and Research on Terrorism (ACSRT) with seat in Alger (Algeria). This legal and institutional framework was reinforced in 2004 by the adoption of the Protocol to the OAU Convention on the Prevention and Combating of Terrorism. The main purpose of this Protocol is to enhance the effective implementation of the Convention and to give effect to article 3(d) of the Protocol concerning the mandate of the PSC¹⁸⁸² to

¹⁸⁷⁸ F. Jeßberger, 'Piracy (Article 28F), Terrorism (Article 28G) and Mercenarism (Article 28H), in G. Werle and M. Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (Berlin: Springer, 2017) 71-88, at 78.

¹⁸⁷⁹ AHG/Res.213 (XXVIII), Resolution on the Strengthening of Cooperation and Coordination among African States, 28th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Dakar (Senegal), 29 June-1 July 1992, para.2.

¹⁸⁸⁰ AHG/Decl.2 (XXX), above note 1817, paras.5, 9 and 15.

¹⁸⁸¹ M. Joannidis, 'La menace terroriste', 19-20 *Géopolitique africaine* (October 2005) 241-252, at 245.

¹⁸⁸² Peace and Security Council of the African Union, 'Report of the Chairperson of the Commission on Measures to Strengthen Cooperation in the Prevention and Combating of Terrorism', PSC/PR/2(CCXLIX), Addis Ababa (Ethiopia), 22 November 2010, paras.11 and 17.

coordinate and harmonise continental strategies against international terrorism in all its aspects.¹⁸⁸³ Further efforts were criminal initiatives owing to the intensification of terrorism and the increase of terrorist groups across the continent, particularly after the dismantlement of Muammar Kadhafi's government in Libya in 2011. The AU included terrorism in its Model National Law on Universal Jurisdiction over International Crimes.¹⁸⁸⁴ It also adopted the African Model Anti-Terrorism Law in July 2011, which aims to harmonise domestic legislation as regards some specific terrorist acts, such as offence of financing of terrorism, hijacking of aircraft, acts of violence at airports serving international civil aviation, offences against internationally protected persons and hostage taking.¹⁸⁸⁵

While there is not yet any comprehensive definition of terrorism reached at the global level, the Malabo Protocol (Annex) provides for one which is a copy of article 14 of the AU Model National Law on Universal Jurisdiction over International Crimes. Originally, the definition is taken from articles 1 (3) and 3 (2) of the OAU Convention on the Prevention and Combating of Terrorism, with two exceptions.

On the one hand, if the unlawfulness of terrorist acts envisaged in article 28G (A) of the Malabo Protocol (Annex) must be a violation of the criminal laws of a state party, it could also be a violation of either "the laws of the African Union or a regional economic community recognised by the African Union, or (...) international law".¹⁸⁸⁶ In contrast to the OAU Convention on the Prevention and Combating of Terrorism, this definition places terrorism in

¹⁸⁸³ In this respect, Article 4 of the Protocol to the OAU Convention on the Prevention and Combating of Terrorism stipulates: 'the Peace and Security Council (PSC) shall be responsible for harmonizing and coordinating continental efforts in the prevention and combating of terrorism. In pursuing this endeavor, the PSC shall: a) establish operating procedures for information gathering, processing and dissemination; b) establish mechanisms to facilitate the exchange of information among States Parties on patterns and trends in terrorist acts and the activities of terrorist groups and on successful practices on combating terrorism; c) present an annual report to the Assembly of the Union on the situation of terrorism on the Continent; d) monitor, evaluate and make recommendations on the implementation of the Plan of Action and programmes adopted by the African Union; e) examine all reports submitted by States Parties on the implementation of the provisions of this Protocol; and f) establish an information network with national, regional and international focal points on terrorism'.

¹⁸⁸⁴ African Union Model National Law on Universal Jurisdiction over International Crimes, Articles 8 and 14.

¹⁸⁸⁵ African Model Anti-Terrorism Law (1 July 2011), Articles 6, 10, 13, 15 and 16 <<http://caert.org.dz/official-documents/african-model-law-en.pdf>> accessed 1 February 2017.

¹⁸⁸⁶ The brackets are mine.

a broad approach owing to the diversity of its legal framework.¹⁸⁸⁷ However, this approach seems to be inconsistent with the principle of legality. In this regard, Amnesty International has rightly noted:

(...) many governments across the world invoke broad definitions of terrorism in order to repress political opposition, target human rights defenders, and harass and intimidate “suspect” religious and/or ethnic groups, and clamp down on legitimate exercise freedom of expression, association, assembly and other human rights. The definition in the Malabo Protocol may be used for similar purposes as it is overly broad. This challenge is compounded by the fact that Article 28G (A) partly defines the crime in question by referring to an open-ended list of offences contained in a series of international, regional and domestic legal frameworks, including where such offences are themselves ill or vaguely defined, thus adding to the confusion and likely overbroad nature of the crime and its arbitrary application. This raises serious concerns as to compliance with the principle of legality, a core general principle of law, enshrined, *inter alia*, in Article 15 of the International Covenant on Civil and Political Rights (ICCPR), which requires laws to be clear and accessible and for their application in practice to be sufficiently foreseeable.¹⁸⁸⁸

On the other hand, the Malabo Protocol (Annex) provides that “acts covered by international humanitarian law, committed in the course of an international or non-international armed conflict by government forces or members of organised armed groups, shall not be considered as terrorist acts”.¹⁸⁸⁹ This provision may have two different implications. First of all, it could mean that acts covered by international humanitarian law are not acts of terrorism. The clarification is worthy of concern given the danger of confusion at the domestic level. For example, in its judgment of 29 October 2014, a local court in the DRC unconvincingly held that the killing of the commander of the national army in operation in the region of Beni (North Kivu Province) by rebels amounted to the crime of terrorism.¹⁸⁹⁰ Second, this provision could mean that acts of terrorism that are covered by other qualifications under international humanitarian law, that is to say war crimes, are not to be dealt with as terrorism

¹⁸⁸⁷ For example, at the universal level, treaty law on terrorism has been developed sector by sector. There is no treaty on the issue, but various treaties addressing specific types of violence as terrorism.

¹⁸⁸⁸ Amnesty International, ‘Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court’ (London: Amnesty International Ltd, 2016), at 17.

¹⁸⁸⁹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28G (D).

¹⁸⁹⁰ *Public Prosecutor and Civil Parties v. Atanaserose Nabini Bijou and Others*, Judgment of 29 October 2014, Mobile Military Court of the North Kivu Province, Colonel Mamadou Ndala case, RP n°015, 017 and 018/014 (not published). The judgment was delivered in application of articles 6, 157 and 158 of the DRC’s Military Penal Code (2002).

under the Malabo Protocol (Annex). This understanding is relevant because the OAU Convention on the Prevention and Combating of Terrorism provides that nothing therein should be interpreted as “derogating from the general principles of international law, in particular the principles of international humanitarian law (...)”.¹⁸⁹¹

In the end, terrorism requires the establishment of a special intent under article 28G (A) of the Malabo Protocol (Annex). In fact, a terrorist act must be one which “is calculated or intended to” one of the objectives listed in article 28G (A) (1), (2) and (3). Article 28G (B) specifies that shall be punished “any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organising, or procurement of any person” to commit terrorism. There is no excuse at all based on political, philosophical, ideological, racial, ethnic, religious or other motives.¹⁸⁹² Finally, there is no terrorism when peoples struggle in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces.¹⁸⁹³

b) The Crime of Illicit Exploitation of Natural Resources

The Malabo Protocol criminalises the illicit exploitation of natural resources under article 28Lbis of its Annex on the Statute of the AU Criminal Court in regard to the following acts: a) concluding an agreement to exploit resources, in violation of the principle of peoples’ sovereignty over their natural resources; b) concluding with state authorities an agreement to exploit natural resources, in violation of the legal and regulatory procedures of the State concerned; c) concluding an agreement to exploit natural resources through corrupt practices; d) concluding an agreement to exploit natural resources that is clearly one-sided; e) exploiting natural resources without any agreement with the State concerned; f) exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff; and g) violating the norms and standards established by the relevant natural resource certification mechanism.

This definition is founded on the paradox between the existence of numerous natural resources in Africa and the continuing extreme poverty of African peoples. The soil of the

¹⁸⁹¹ OAU Convention on the Prevention and Combating of Terrorism, article 22 (1).

¹⁸⁹² Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28G (E).

¹⁸⁹³ *Ibid.*, Article 28G (C).

African continent contains precious metals and stones like gold, diamonds, and minerals such as copper, cobalt, uranium and coltan, which are used in high technology for the production of electricity, laptops, cell phones, vehicles, aircrafts and weaponry. However, since most of the least developed countries are in Africa, it is obvious that these resources do not benefit to African peoples. One of the reasons for this situation is the illicit exploitation of natural resources. The resources of African states further constitute a source of misfortune for African peoples because they have often nourished armed conflicts in many countries, such as Sierra Leone, Liberia, the DRC and Angola.¹⁸⁹⁴ The illicit exploitation of natural resources is a breach of the sovereign right of all peoples to “freely dispose of their wealth and natural resources”¹⁸⁹⁵ and undermines their “right to socio-economic development”.¹⁸⁹⁶ It also violates the “permanent sovereignty of African countries over their natural resources”.¹⁸⁹⁷ The illicit exploitation of natural resources is a threat to peace and security in Africa as a means of financing of wars, thereby affecting the stability of states and the wellbeing of African peoples.

The strategy to put an end to this kind of exploitation has been developed over the time. Concerns were initially addressed with respect to international trade of natural resources by armed groups in countries affected by conflicts. This effort led to the establishment of mechanisms of certification to prevent foreign consumers to buy resources which they know are illegally exploited or nourish armed conflicts in the countries of origin. The most known of these mechanisms of certification is the Kimberley Process Certificate Scheme which applies to diamonds.¹⁸⁹⁸ It was created in November 2002 on the basis of a non-binding document, of which negotiations began in May 2000 in Kimberly (South Africa). The Kimberley Process Certificate Scheme came into operation in 2003.¹⁸⁹⁹ However, beyond non-state actor’s trade activities, it has appeared that even foreign states may directly be

¹⁸⁹⁴ T. B. Van Solinge, ‘The Illegal Exploitation of Natural Resources’, in L. Paoli (ed.), *The Oxford Handbook of Organized Crime* (New York: Oxford University Press, 2014) 500-526, at 507.

¹⁸⁹⁵ African Charter on Human and Peoples’ Rights, Article 21(1).

¹⁸⁹⁶ *Ibid.*, Article 22 (1).

¹⁸⁹⁷ CM/Res. 245 (XVII), Resolution on the Permanent Sovereignty of African Countries over their Natural Resources, 17th Ordinary Session of the Council of Ministers of the Organisation of African Unity, Addis Ababa (Ethiopia), 15-19 June 1971, paras.1-2.

¹⁸⁹⁸ J.-P. Segihobe, ‘Traçabilité des minerais en droit positif congolais’, *Annales de la Faculté de Droit de l’Université de Kinshasa* (2013)38-60, at 51-52.

¹⁸⁹⁹ See Kimberley Process Certificate Scheme (5 November 2002) <<https://www.kimberleyprocess.com/en/kpcs-core-document-version-2016-0>> accessed 3 February 2017.

involved in the illicit exploitation of natural resources of another country. For instance, the ICJ held that Uganda was responsible for “acts of looting, plundering and exploitation of Congolese natural resources”¹⁹⁰⁰ in the territory of the DRC during the war of aggression between 1998 and 2002. The UN Security Council took an *ad hoc* initiative in this regard. It created the Expert Panel on the Illegal Exploitation of Natural Resources and other Forms of Wealth in the DRC in 2001.¹⁹⁰¹ This Panel particularly reports on the link between the continuation of armed conflicts in this country and the exploitation of its natural resources.¹⁹⁰² However, the Security Council remains free to give effect to recommendations issued by it.

In general international criminal law, there is not a specific rule that explicitly targets the illicit exploitation of natural resources as such. Arguably, the criminal behaviour could be prosecuted as war crime under the ICC Statute,¹⁹⁰³ only in the context of an international armed conflict.¹⁹⁰⁴ The Malabo Protocol (Annex) solves this deficient legal framework in Africa, regardless of the type of armed conflict and even in time of peace. Article 28Lbis of the Malabo Protocol (Annex) criminalises the same constituent acts as those provided for in article 12 of the ICGLR’s Protocol against illegal exploitation of natural resources of 30 November 2006.

One can observe that article 28Lbis of the Malabo Protocol (Annex) incorporates not only unlawful direct acts of exploitation of nature resources, but also the mere conclusion of an agreement for this purpose if such an agreement does not meet some specific legal standards, such as non-corrupt practices, legal and regulatory procedures of the state of exploitation. The criminalisation of the mere conclusion of an agreement for the illicit exploitation of natural resources amounts to the penalisation of preparatory acts of exploitation; which implies the great concern with which the crime is considered by African states. In any event, article 28Lbis of the Malabo Protocol (Annex) imposes that such acts of illicit exploitation of natural resources meet the jurisdictional criterion according to which they must be of “a serious

¹⁹⁰⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, above note 739, para.345(4).

¹⁹⁰¹ Kahombo, above note 796, at 173.

¹⁹⁰² UNSC Res.1457 (2003), 24 January 2003, para.8.

¹⁹⁰³ ICC Statute, Article 8 (2) (a) (iv). This provision incriminates the ‘extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’.

¹⁹⁰⁴ P. Kambale Mahuka, ‘L’exploitation illicite des ressources naturelles d’un Etat étranger en cas de conflit armé : étude sur la responsabilité des Etats et de leurs dirigeants’ (Unpublished PhD Thesis, Université Catholique de Louvain 2014), at 392.

nature affecting the stability of a state, region or the Union". This jurisdictional restriction makes the Malabo Protocol (Annex) distinct from the aforementioned ICGLR's Protocol against illegal exploitation of natural resources. The conclusion of a convention which is not yet implemented on the ground would not therefore reach this gravity threshold, unless it is part of a serie of acts of exploitation of natural resources which has commenced in accordance with previous arrangements or not. The same jurisdictional restriction is valid for attempts to commit such acts of exploitation.

c) The Crimes of Corruption and Money Laundering

Corruption and money laundering are two other economic crimes having devastating consequences on the development of African states. In fact, public officials and leaders in the private sector illicitly enrich themselves or those who are close to them at the expense of public goods and the populations. These crimes affect the human security, the life and the dignity of African peoples due to the volatilisation of funds that are necessary to cover the expenditure relating to economic, social or public services, namely health, education, agriculture, payment of appropriate salaries to servants and transport. The two crimes are interconnected. The Malabo Protocol (Annex) targets grand corruption (i) which problematically proves to be the exclusive offence on which the commission of money laundering is predicated (ii).

i) The Malabo Protocol against Grand Corruption

Corruption is defined by the Malabo Protocol in article 28I of its Annex on the Statute of the AU Criminal Court. African efforts to fight corruption started at the level of RECs, especially within SADC¹⁹⁰⁵ and ECOWAS,¹⁹⁰⁶ in 2001. The AU embarked on the issue in 2003 with the adoption of the Convention on Preventing and Combating Corruption.¹⁹⁰⁷ The definition contained in article 28I (1) of the Malabo Protocol (Annex) is a copy of acts of corruption set out in the AU Convention of 2003.¹⁹⁰⁸ However, article 28I (1) of the Malabo Protocol

¹⁹⁰⁵ Southern African Development Community Protocol against Corruption (14 August 2001).

¹⁹⁰⁶ Economic Community of West African States Protocol on the Fight against Corruption (21 December 2001). See also S. M. Atuobi, 'Corruption and State Instability in West Africa: An Examination of Policy Options', Kofi Annan International Peacekeeping Training Centre (KA IPTC) Occasional Paper No. 21 (December 2007), at <<http://reliefweb.int/sites/reliefweb.int/files/resources/9BD8A1F729CEB5B8C125746C0049D740-kaiptc-dec2007.pdf>> accessed 2 February 2017.

¹⁹⁰⁷ African Union Convention on Preventing and Combating Corruption (11 July 2003).

¹⁹⁰⁸ *Ibid.*, Article 4 (1) (a)-(h).

(Annex) restricts the jurisdiction of the AU Criminal Court as regards acts of corruption to acts that are of “a serious nature affecting the stability of a state, region or the Union”.¹⁹⁰⁹

This gravity threshold is to be clarified by the AU Criminal Court. It shows that the Malabo Protocol (Annex) aims to tackle grand corruption which undermines the socio-economic conditions of peoples and causes instability within states.¹⁹¹⁰ This is the case of scandals of corruption or corruption accompanied by popular protests and demonstrations. By definition, the grand corruption is the opposite of the petty corruption. While the former implies acts of corruption committed by “individuals at a high level of government or in executive in the private sector and having a significant impact on society by distorting policies or the functioning of the state (...)”,¹⁹¹¹ the latter is used in the context of small bribes.¹⁹¹² In other words, petty corruption refers “only to the size of each transaction and not to its total impact on government income or policy”.¹⁹¹³ This is why it implies in principle everyday’s acts of corruption by “low- and mid-level public officials in their interaction with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police department and other agencies”.¹⁹¹⁴ But, nothing excludes that high ranking officials perpetrate petty corruption.

It is important to note that the act of corruption listed under article 28I (1) (h) of the Malabo Protocol (Annex) is “the use or concealment of proceeds derived from any of the acts referred to in this Article”. But, something seems to be missing that could have improved the wording of this provision, that is, the moral element consisting of the knowledge of the fact. This is because the mere use or concealment of the aforementioned proceeds would not suffice to

¹⁹⁰⁹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28I (1).

¹⁹¹⁰ L. D. Fernandez, ‘Corruption (Article 28I) and Money Laundering (Article 28I bis)’, in G. Werle and M. Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (Berlin: Springer, 2017) 89-107, at 92.

¹⁹¹¹ Transparency International, ‘Fighting Grand Corruption: Challenges and Successes’ (2015), at 2 <http://www.transparency.org/files/content/corruptionqas/Fighting_grand_corruption_challenges_and_successes_2015.pdf> accessed 3 February 2017.

¹⁹¹² A. Lambert-Mogiliansky, M. Majumdar and R. Radner, ‘Strategic Analysis of Petty Corruption: Entrepreneurs and Bureaucrats’, 83 *Journal of Development Economics* (2007) 351–367, at 352.

¹⁹¹³ *Ibid.*

¹⁹¹⁴ Fernandez, above note 1910, at 92.

establish the crime if the alleged offender did not know that they derived from an act of corruption. The inclusion of this moral element is an exigency of the principle of legality.

ii) The Dependency of Money Laundering on Corruption

The definition of money laundering is set out by the Malabo Protocol in article 28I *bis* of its Annex on the Statute of the AU Criminal Court. In general, money laundering means the disguising of proceeds deriving from a crime in view of making everything look like being in conformity with the law. Its definition is taken from the AU Convention on Preventing and Combating Corruption of 2003,¹⁹¹⁵ with the exception of article 28I*bis* (1) (iv) which incriminates acts of participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of money laundering. Furthermore, the definition of money laundering raises three main observations.

First, money laundering is predicated on the disguising of proceeds of corruption or “related offences”. It is submitted that the said “related offences” derive from the nature of acts punishable as acts of participation in the commission of acts of corruption, pursuant to applicable modes of criminal responsibility. This limitation of money laundering to the disguising of proceeds of corruption is inherited from the AU Convention on Preventing and Combating Corruption. But, there is no reason why the offences on which money laundering is predicated should not be extended to other crimes.¹⁹¹⁶ This extension could be consistent with the recommendation 3 of the Financial Action Task Force (FATF),¹⁹¹⁷ according to which “countries should apply the crime of money laundering to all serious offences with a view to include the widest range of predicate offences”.¹⁹¹⁸

Second, the drafters of the Malabo Protocol (Annex) seem to have left, under article 28I *bis* (2), a margin of appreciation to the AU Criminal Court to decide on the seriousness of any act of money laundering to be brought before it for trial. Unlike the crimes of corruption and

¹⁹¹⁵ African Union Convention on Preventing and Combating Corruption, Article 6.

¹⁹¹⁶ Fernandez, above note 1910, at 102.

¹⁹¹⁷ The Financial Action Task Force (FATF) is an intergovernmental agency founded in 1989 on the initiative of the Group of 7 major powers (G7) in order to develop policies for the fight against money laundering around the world. Its function now extends to terrorism financing. The FATF Secretariat is located at the headquarters of the Organisation for Economic Cooperation and Development (OECD) in Paris (France).

¹⁹¹⁸ Financial Action Task Force, ‘The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation’ (2012) <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf> accessed 3 February 2017.

illicit exploitation of natural resources, this gravity threshold is not a mandatory criterion to establish the Court's jurisdiction. It just implies that a case which lacks some seriousness can be dismissed by the Court. Everything will be decided on a case-by-case basis.

Third, and last, there is a mental element which misses in article 28I *bis* (1) (ii) of the Malabo Protocol (Annex): concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences. The Malabo Protocol (Annex) must improve the copy of the AU Convention on Preventing and Combating Corruption by imposing that the alleged perpetrator acts with knowledge of the fact that the property in question is the proceeds of corruption. This improvement is in line with the the principle of legality. Similar provisions are contained in other treaties, such as the ECOWAS Protocol on the Fight against Corruption which criminalises “the concealment of the true nature, source, location, disposition, movement or ownership of or rights with respect to assets, knowing that such assets are the proceeds of crime”.¹⁹¹⁹ .

d) The Crimes of Trafficking in Persons, Drugs or Hazardous Wastes in Africa

Despite their apparent similar denominations, these three types of criminal trafficking have not followed the same process of codification and have different meanings. The *immediate* interests protected by the Malabo Protocol (Annex) are also different. The crime of trafficking in persons aims to ensure respect for the dignity of human beings (i), the crime of trafficking in drugs the protection of public health and security (ii), whereas the crime of trafficking in hazardous wastes in Africa protects the environment against pollution which may affect the welfare of peoples (iii).

i) The Trafficking in Persons

The crime of trafficking in persons or human trafficking is defined by the Malabo Protocol in article 28J of its Annex on the Statute of the AU Criminal Court. The AU does not have any specific treaty on human trafficking. This crime has been however referred to implicitly in the ACHPR¹⁹²⁰ and directly in two other instruments: the African Charter on the Rights and

¹⁹¹⁹ Economic Community of West African States Protocol on the Fight against Corruption, Article 7 (1) (a) (ii). See also United Nations Convention against Transnational Organised Crime, Article 6 (1) (a) (ii).

¹⁹²⁰ African Charter on Human and Peoples' Rights, Article 5. This Article provides: ‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All

Welfare of the Child of 1990¹⁹²¹ and the Protocol on the Rights of Women in Africa of 2003.¹⁹²² The only African treaty which is entirely dedicated to the issue is the Multilateral Cooperation Agreement to Combat Trafficking in Persons, Especially Women and Children in West and Central Africa, adopted on 6 June 2006. On its part, the AU issued some policy documents for its member states, the most important of which being the Migration Policy Framework for Africa which includes human trafficking among cases of irregular immigration¹⁹²³ and the Ouagadougou Action Plan of 2006 calling for the ratification and the implementation of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of 2000.¹⁹²⁴

The definition set out by the Malabo Protocol (Annex) is copied from the said UN Protocol.¹⁹²⁵ The crime of trafficking in persons consists of three different elements. First, the action of perpetrating human trafficking, that is to say the recruitment, transportation, transfer, harbouring or receipt of persons. The second element refers to the means with which such an action can be fulfilled: threat or use of force or other forms of coercion, of abduction, of fraud, of deception; abuse of power or of a position of vulnerability; or giving or receiving of payments or benefits to achieve the consent of a person having control over another person. Third, the purpose element is the specific moral requirement to establish responsibility for the crime, meaning that this crime must be committed in order to achieve any of the following goals of human exploitation: prostitution of others or other forms of sexual exploitation,

forms of exploitation and degradation of man particularly *slavery*, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'. Emphasis is mine.

¹⁹²¹ African Charter on the Rights and Welfare of the Child, Article 29 (a). This Article provides: 'States Parties to the present Charter shall take appropriate measures to prevent the abduction, the sale of, or traffic of children for any purpose or in any form, by any person including parents or legal guardians of the child'.

¹⁹²² Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003), Article 4 (2) (g). This provision stipulates: 'States Parties shall take appropriate and effective measures to prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk'.

¹⁹²³ Executive Council of the African Union, 'The Migration Policy Framework for Africa', EX.CL/276 (IX), Banjul (The Gambia), 25-29 June 2006, at 16.

¹⁹²⁴ African Union and European Union, 'Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children', Ministerial Conference on Migration and Development, Tripoli (Libya), 22-23 November 2006, at 4 <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/ouagadougou_action_plan_to_combat_trafficking_en_1.pdf> accessed 3 February 2017.

¹⁹²⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 3.

forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. The consent of the victim is irrelevant and must not exclude criminal responsibility, whilst the recruitment, transportation, transfer, harbouring or receipt of a *child* for the purpose of exploitation is presumed to be a crime of trafficking in persons and so the means element need not to be anymore proven.

ii) The Trafficking in Drugs

This crime is set out by the Malabo Protocol under article 28K of its Annex on the Statute of the AU Criminal Court. The AU described the danger and challenge of drug trafficking on the continent in the following terms:

(...) production, trafficking and use of illicit drugs continue to be a growing challenge in Africa. There has been an increase in the use of almost all types of drugs over the past few years. Whereas illicit drug production in Africa is mainly focused on cannabis, there is an emerging threat of locally manufactured Amphetamine Type Stimulants (ATS), trafficking in and consumption of diverted or counterfeited prescription drugs, and precursor chemicals containing controlled substances. Moreover, cannabis is widely trafficked across African countries, significant amounts of cocaine trafficked from South America to Europe via West Africa and indications that some West African Countries are being used to stock-pile cocaine which is later trans-shipped in small quantities to Europe. In addition, African Countries are increasingly being used to ship Afghan heroin to final destinations in Europe and other regions, with the East African region being the main target.¹⁹²⁶

However, the AU has not so far adopted any specific treaty on the issue. There are only some policy documents, the first one being the OAU Declaration and Plan of Action on Drug Abuse Control and Illicit Drug Trafficking in Africa of 1996, which calls African states to accede to existing international drug treaties as part of their commitment to effective international drug control efforts.¹⁹²⁷ These treaties were adopted at the UN level, especially the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs of 1961, the 1971 Vienna Convention on Psychotropic

¹⁹²⁶ African Union, 'AU Plan of Action on Drug Control (2013-2017) Submitted for consideration by the 5th Session of the Africa Union Conference of Ministers of Drug Control (CAMDC5)' (CAMDC/EXP/2(V)), para.12 <http://www.sadrugpolicyweek.com/uploads/6/6/2/3/66238155/aupa_on_dc__2013-2017_-_english.pdf> accessed 3 February 2017.

¹⁹²⁷ AHG/Decl.2 (XXXII), Declaration and Plan of Action on Drug Abuse Control and Illicit Drug Trafficking in Africa, 32nd Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Yaoundé (Cameroun), 10 July 1996.

Substances and the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

These are also the treaties to which the Malabo Protocol (Annex) refers regarding the meaning of the terms “drugs” and “precursors” for the identification of substances which fall in the definition of the crime.¹⁹²⁸ The two terms are the cornerstones of the distinction between different criminal activities that are prohibited under article 28K (1) of the Malabo Protocol (Annex). In fact, the mere cultivation of opium poppy, coca bush or cannabis plant is criminalised. However, the possession or purchase of drugs is a crime only if the alleged perpetrator meets the special goal which consists of conducting one of the criminal activities listed in 28K (1)(a): production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs. Concerning the manufacture, transport or distribution of precursors, the knowledge of the fact that these substances are to be used in or for the illicit production or manufacture of drugs is required as mental element. In any case, article 28K (2) of the Malabo Protocol (Annex) provides that drug trafficking for personal consumption is not a crime. This is quite logical because trafficking in drugs has been criminalised to ensure the protection of public health and security, but not the personal security and health of an individual.

iii) The Trafficking in Hazardous Wastes in Africa

This crime is set out by the Malabo Protocol under article 28L of its Annex on the Statute of the AU Criminal Court. Contrary to the two other crimes of trafficking above, there is a continental treaty on the issue: the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa of 30 January 1991. African states wanted to improve the legal framework of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and

¹⁹²⁸ For example, Article 1 (1) (j) of the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs of 1961 stipulates: “‘Drug’ means any of the substances in Schedules I and II, whether natural or synthetic’. Article 12 (1) of the 1971 Vienna Convention on Psychotropic Substances and the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 also provides: ‘The Parties shall take the measures they deem appropriate to prevent diversion of substances in Table I and Table II used for the purpose of illicit manufacture of narcotic drugs or psychotropic substances, and shall co-operate with one another to this end’.

their Disposal of 22 March 1989.¹⁹²⁹ The fact is that the continent became the place where industrialised nations used to get rid of their nuclear and industrial wastes, thereby using Africa as their dustbin.

The Basel Convention did not entirely meet the expectations of African states because it did not prohibit as such trafficking in hazardous wastes.¹⁹³⁰ This was contrary to the OAU's policy contained in various instruments, especially the Resolution on Dumping of Nuclear and Industrial Wastes in Africa of 1988 which declared such activity "a crime against Africa and the African people".¹⁹³¹ This position was recalled in another resolution of 1989, stating the concern of African states that "the draft Global Convention for the Control of Transboundary Movement of Hazardous Wastes is merely aimed at the regulation or control, rather than the prohibition, of transboundary movement of hazardous wastes, contrary to the spirit of Council Resolution CM/Res.1153 (XLVIII) (...)".¹⁹³² The Bamako Convention rather imposed a total import ban of hazardous wastes in Africa.¹⁹³³ Export of the same wastes from Africa is not covered.¹⁹³⁴ The Bamako Convention also regulates the management and control of wastes generated in Africa.¹⁹³⁵

The definition of the crime of trafficking in hazardous wastes in Africa in the Malabo Protocol (Annex) is taken from the Bamako Convention. First of all, hazardous wastes that are covered by this crime refer to those wastes which are prohibited and listed in annexes I

¹⁹²⁹ C. N. Eze, 'The Bamako Convention on the Ban of the Import into Africa and the Control of the Transboundary Movement and Management of Hazardous Wastes within Africa: A Milestone in Environmental Protection?', 15 *African Journal of International and Comparative Law* (2007) 208-229, at 214-218.

¹⁹³⁰ According to Article 4 (1) of this Convention, such prohibition is the right of each state party and it is up to the latter to exercise it under the obligation of informing other parties of the decision taken in this respect pursuant to Article 13. Furthermore, Article 4 (3) provides: 'The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal'.

¹⁹³¹ CM/Res.1153 (XLVIII), Dumping of Nuclear and Industrial Wastes in Africa, 48th Ordinary Session of the Council of Ministers of the Organisation of African Unity, Addis Ababa (Ethiopia), 19-23 May 1988, para.1.

¹⁹³² CM/Res.1199 (XLIX), Resolution on Global Convention for the Control of Transboundary Movement of Hazardous Wastes, 49th Ordinary Session of the Council of Ministers of the Organisation of African Unity, Addis Ababa (Ethiopia), 20-25 February 1989, Preamble, para.8.

¹⁹³³ Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (30 January 1991), Article 4 (1).

¹⁹³⁴ Eze, above note 1929, at 217.

¹⁹³⁵ Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Article 4(3).

and II of the Bamako Convention. However, other types of hazardous wastes may be determined by domestic law in accordance with article 28L (2) (b) and (d) of the Malabo Protocol (Annex). Secondly, the Bamako Convention is referred to in respect of criminal activities that are punishable under 28L (1) of the Malabo Protocol (Annex), that is to say “any import or failure to re-import, transboundary movement, or export of hazardous wastes proscribed by the Bamako Convention”. There are also cases in which criminalisation does not apply. This is the case of “the export of hazardous wastes into an AU member state for the *purpose* of rendering it safe”.¹⁹³⁶ The special goal to render the wastes safe must be proven. It is also the case of “wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument”.¹⁹³⁷

It is clear that trafficking in hazardous wastes in Africa is one of the crimes against peace and security in Africa whose codification has undergone less global influence. The same goes for the illicit exploitation of natural resources, the crimes of political assassination and subversion as well as unconstitutional change of government. The manner in which this codification was realised in the Malabo Protocol (Annex) through the mere copying of provisions of previous treaties, which were not primarily dedicated to international criminalisation, would likely have a negative impact on the exercise of the jurisdiction of the AU Criminal Court as will be demonstrated in the next chapter. The gap in the definition of crimes is one of the challenges to the existence of a viable system of African regional criminal justice.

¹⁹³⁶ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28L (6). Emphasis is mine.

¹⁹³⁷ *Ibid.*, Article 28L (4).

2. The Promotion of the System of African Regional Criminal Justice

At this stage, international criminal justice is conceived as a tool, but not the only one, designed for the protection and the defence of Africa against violations of regional public order. The emerging system of regional criminal justice complements the two traditional levels of international criminal justice, that is, universal and municipal administration of justice. It implies the existence of what may be termed “regional criminal power”,¹⁹³⁸ which means the power conferred on the AU to prescribe penal rules, to investigate, to prosecute and to eventually try crimes against peace and security in Africa. There is a will on the part of African states to overcome judicial inertia against the scourge of impunity on the continent. Ensuring international criminal justice is therefore part of what Roland Adjovi calls “African international criminal policy”,¹⁹³⁹ the objective of which being to place the AU in the centre of the fight against impunity of crimes that are of collective concern to the community of African states and peoples.

This chapter intends to explain how the AU can play that central role, solely and/or in cooperation with its member states. Various questions can be raised with regard to the authority of the continental organisation to exercise criminal jurisdiction in Africa. In particular, what are the legal bases which entitle the AU to act or which judicial options are available in order to undertake an action? The pivotal question seeks to know whether the emerging system of African regional criminal justice is or at least may be viable to deal with crimes against peace and security in Africa.

It will be shown that the AU has at its disposal various judicial options to exercise regional criminal jurisdiction, either directly by itself, jointly with an African state or through delegating jurisdiction to a member state. Each option has its own specific legal context. These options are also subject to different theoretical and practical challenges. The AU Criminal Court may become the principal mechanism to deliver regional criminal justice in

¹⁹³⁸ M. Mubiala, ‘Chronique de droit pénal de l’Union africaine : vers une justice pénale régionale en Afrique’, 83 *Revue internationale de droit pénal* (2012) 547-557, at 548.

¹⁹³⁹ R. Adjovi, ‘Introduction : l’Afrique dans le développement de la justice pénale internationale’, 14 *African Yearbook of International Law* (2006) 3-28, at 28.

Africa.¹⁹⁴⁰ However, the viability of the AU Criminal Court seems to be problematic. In particular, the Court still has to become effective. Its efficacy could also be hampered by operational difficulties, such as financial constraints, deficient support from African states, including concern over the immunity of state officials, tension with alternative options to criminal prosecutions (such as amnesty and promotion of peace) and default of effective judicial cooperation. In the end, the success of the Court will depend very much on the will of AU member states to promote and support the rise of a system of independent regional criminal justice for Africa. In this regard, the judicial options available to the AU are examined (2.1) as well as the viability of the system of regional criminal justice which is put and mainly embodied in the new Court (2.2).

2.1. The Available Judicial Options to the African Union

Like the UN, the AU is not an institution of criminal nature. However, it has three judicial options at its disposal. None of these options is about *ad hoc* tribunals such as those which were put in place by the UN Security Council in the former Yugoslavia and Rwanda. In various occasions, the establishment of an *ad hoc* regional criminal tribunal was rejected because of financial constraints. Instead, the AU has preferred to resort to the technique of delegating jurisdiction to a member state (2.1.1) or to attempt to ensure justice through hybrid criminal tribunals (2.1.2). These two approaches to the exercise of regional criminal jurisdiction have contributed to the process towards the establishment of the AU Criminal Court (2.1.3).

2.1.1. The Delegation of Jurisdiction to a Member State

A delegation of jurisdiction is a conferral of power by a competent entity on another one which becomes entitled to exercise the delegated power in the interest of both parties. In international law, such a delegation of jurisdiction is possible between states or in their relationship with intergovernmental organisations.¹⁹⁴¹ The delegation of jurisdiction is a legal operation which is realised through the conclusion of an international treaty or in application of it. The operation aims to vest the delegated entity with the power of the delegating

¹⁹⁴⁰ See B. Kahombo and J.-P. Segihobe, 'L'Union africaine et le traitement des affaires Hissène Habré, Rose Kabuye et Omar Al Bashir : à la recherche des implications sur le droit international', *Annales de la Faculté de Droit de l'Université de Kinshasa* (2014) 100-119.

¹⁹⁴¹ D. Sarooshi, 'Some Preliminary Remarks on the Conferral by States of Powers on International Organizations' Jean Monnet Working Paper 4/03, New York University School of Law (2003), at 2.

authority without which it would have been incompetent to act or to proceed. Practices of delegation of jurisdiction are particularly widespread in international law as far as powers conferred on international tribunals are concerned.¹⁹⁴² The obvious example is the ICC jurisdiction over nationals of a state which is not a party to the Rome Statute.¹⁹⁴³ This power derives from the jurisdiction that could be exercised over such nationals by a state party in the territory of which the crime has been committed. In other words, the ICC will be just doing the job in the place of the state concerned. Despite criticisms,¹⁹⁴⁴ consent of the state not party is not necessary.¹⁹⁴⁵

The AU has delegated jurisdiction to one of its member states (Senegal) in order to try the former Chadian Head of State, Hissène Habré. But, this is a distinct regional practice from the conferral of jurisdiction on a court by treaty as in the case of the ICC or the creation an *ad hoc* international criminal tribunal by the UN Security Council. While the Senegalese precedent may be seen as a progressive development of regional criminal justice (2.1.1.1), it also raises several problems concerning its legality and implementation (2.1.1.2).

2.1.1.1. The Novelty of the Senegalese Precedent

The background to this precedent is the failure of Senegal to prosecute and try Hissène Habré for acts of torture, barbarity and crimes against humanity or to extradite him to Belgium. As a

¹⁹⁴² See K.J. Alter, 'Delegating to International Courts: Self-Binding vs. Other-binding Delegation' Working Paper No.07-004, Buffett Center for International and Comparative Studies (July 2007) <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1452&context=lcp>> accessed 1 March 2017.

¹⁹⁴³ D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', 1 *Journal of International Criminal Justice* (2003) 618-650, at 634-636.

¹⁹⁴⁴ M. Morris, 'High Crimes and Misconceptions: the ICC and Non-party States', 64 (1) *Law and Contemporary Problems* (2001) 13-66, at 15 and 21; R. Wedgwood, 'The Irresolution of Rome', 64 (1) *Law and Contemporary Problems* (2001) 193-214, at 199. For these authors, the consent of the state not party is necessary for the exercise of this jurisdiction if the accused persons have acted pursuant to its policy.

¹⁹⁴⁵ *Ibid.*, at 635; F. Mégret, 'Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law', 12 (2) *European Journal of International Law* (2001) 247-268, at 251-254. These authors rightly suggest that the opposite position of Madeline Morris and Ruth Wedgwood is flawed. Besides the fact that the Court's jurisdiction derives from the power of the state party to prosecute and to try, prosecuting individuals before an international criminal court is also different from implying state international responsibility. It can be added that there are also other persons who may have committed crimes outside the state apparatus to the extent that the latter would not be seen as official acts of the state not party.

reminder, Senegalese courts held that they lacked jurisdiction over the matter. Furthermore, on 27 November 2005, the Senegalese Minister of Foreign Affairs, Cheikh Tidiane Gadio, indicated that the matter was referred to the AU.¹⁹⁴⁶ He declared: “the State of Senegal, sensitive to the complaints of victims who are seeking justice, will abstain from any act which could permit Hissène Habré not to face justice. It therefore considers that it is up to the African Union summit to indicate the jurisdiction which is competent to try this matter”.¹⁹⁴⁷ As a consequence, the AU Assembly considered the issue during its 6th ordinary session, held in Khartoum (Sudan), in January 2006. It was briefed on the case by Presidents Abdoulaye Wade of Senegal and Olusegun Obasanjo of Nigeria, the outgoing Chairperson of the AU. Support was given to the collective commitment to fight impunity “in line with the relevant provisions of the Constitutive Act”.¹⁹⁴⁸ After deliberations, the AU Assembly decided to establish a Committee of Eminent African Jurists,¹⁹⁴⁹ with the following mandate:

(...) to consider all aspects and implications of the Hissène Habré case as well as the options available for his trial, taking into account the following benchmarks: a) Adherence to the principles of total rejection of impunity; b) Adherence to international fair trial standards including the independence of the judiciary and impartiality of proceedings; c) Jurisdiction over the alleged crimes for which Mr. Habré should be tried; d) Efficiency in terms of cost and time of trial; e) Accessibility to the trial by alleged victims as well as witnesses; f) Priority for an African mechanism.¹⁹⁵⁰

In its reports of July 2006, the Committee recommended three options for the trial of Hissène Habré.¹⁹⁵¹ The first option was national jurisdiction in Senegal or Chad. Senegal was chosen as the country of residence of the suspect, while Chad was the state where the alleged crimes

¹⁹⁴⁶ Human Rights Watch, above note 557, at 7.

¹⁹⁴⁷ *Ibid.*

¹⁹⁴⁸ Assembly/AU/Dec.103 (VI), Decision on the Hissène Habré Case and the African Union (Doc.Assembly/AU/8 (VI)) Add.9, 6th Ordinary Session of the Assembly of the African Union, Khartoum (Sudan), 23-24 January 2006, para.1.

¹⁹⁴⁹ Seven (7) persons appointed by the Chairperson of the AU in their personal capacities to constitute the composition of the Committee of Eminent African Jurists: Juge Guibril Camara (Senegal), Professor Delphine Emmanuel born Adouki (Congo – Brazzaville), Professor Michael Ayodele Ajomo (Nigeria), Robert Dossou (Benin), Judge Joseph S. Warioba (Tanzania), Anil Kumarsingh Gayan (Mauritius), Professor Henrietta J.A.N. Mensa-Bonsu (Ghana). The Committee was chaired by Robert Dossou.

¹⁹⁵⁰ Assembly/AU/Dec.103 (VI), above note 1948, para.3.

¹⁹⁵¹ African Union, ‘Report of the Committee of Eminent African Jurists on the Case of Hissène Habré’ (2006), paras. 27-33 <http://www.hrw.org/legacy/justice/habre/CEJA_Repor0506.pdf> accessed 28 March 2015.

were committed against Chadian victims. But, the Committee argued that Senegal was the country best suited to conduct the trial because it was bound by international law to perform its obligations under the UN Convention against torture.¹⁹⁵² Another possible reason is the fact that the trial in Chad could not necessarily be consistent with one of the aforementioned benchmarks required by the AU Assembly, that is, the independence of the judiciary and impartiality of proceedings, insofar as President Idriss Déby, who had overthrown Hissène Habré in 1990, is still the incumbent Head of State and new dictator in the country.

The second option was the creation of an *ad hoc* regional criminal tribunal, composed of 5 judges.¹⁹⁵³ In the Committee's view, "the power of the Assembly to set up such an *ad hoc* regional criminal tribunal is based upon Article 3 (h) 4(h) and (o) 9(1) (d) and Article 5(2) of the Constitutive Act of the African Union".¹⁹⁵⁴ Article 3 (h) provides that the AU aims to promote and protect human and peoples' rights in accordance with the ACHPR and other relevant human rights instruments. Article 4 (h) confers on the AU the right to intervene in a member state in the event of genocide, war crimes and crimes against humanity. Article 4 (o) provides for the principle of respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities. Article 5 (2) states that the AU shall have organs that the Assembly may decide to establish in addition to those which are expressly determined by the Constitutive Act. Article 9 (1) (d) reiterates such power of the AU Assembly to establish any other organ of the Union. While these articles do not explicitly grant the power to the AU Assembly to create an *ad hoc* regional criminal tribunal, one may agree that objectives and principles which they provide for play a functional role, from which complementary rules can be adopted or implied.¹⁹⁵⁵ In this regard, creating an *ad hoc* regional criminal tribunal as a subsidiary organ of the AU Assembly was not problematic. But, the Committee warned that "an ad hoc tribunal, in whatever form, would cost a lot of money and create further delay in the trial of Habré",¹⁹⁵⁶ even though "where there is a will, there is a way and the process could be expedited".¹⁹⁵⁷

¹⁹⁵² *Ibid.*, paras.17 and 29.

¹⁹⁵³ *Ibid.*, paras.24 and 31.

¹⁹⁵⁴ *Ibid.*, para.23.

¹⁹⁵⁵ J.F. Wandji K, 'L'Afrique dans la lutte contre l'impunité des crimes internationaux', 11 *Cahiers de la recherche sur les droits fondamentaux* (2013) 89-103, at 97.

¹⁹⁵⁶ African Union, above note 1951, para.25.

¹⁹⁵⁷ *Ibid.*

The third option took into account the possibility for any African state to prosecute and exercise jurisdiction.¹⁹⁵⁸ The criterion of availability of any African state to do so was simply the ratification by it of the UN Convention against torture. However, this option was more problematic than the previous ones for two main reasons. First, there was no evidence as to the existence of domestic legislation implementing the UN Convention against torture in any other African state. New delays before starting with the proceedings were therefore very high until such legislation was to be adopted. Second, the preparedness of the judiciary of any African third state to begin with the trial could be undertaken by zero, including the transfer of the existing judicial file from Senegal and the study of its various documents. Moreover, it was not sure that the request for extradition of Hissène Habré by Senegal to a designated country other than Chad would have received a different response from the rejection of the repetitive demands made by Belgium.

Consequently, the AU Assembly rightly decided to confer jurisdiction on Senegal.¹⁹⁵⁹ The motivation of this decision contains three considerations. First of all, the AU Assembly observed that “according to the terms of Articles 3 (h), 4 (h) and 4 (o) of the Constitutive Act of the African Union, the crimes of which Hissène Habré is accused fall within the competence of the African Union”.¹⁹⁶⁰ Secondly, the AU Assembly acknowledged that “in its present state, the African Union has no legal organ competent to try Hissène Habré”.¹⁹⁶¹ Thirdly, given that the *Hissène Habré* case was within the competence of the Union, the AU Assembly decided to mandate Senegal to prosecute and ensure that the suspect was tried, “on behalf of Africa, by a competent Senegalese court with guarantees for fair trial”.¹⁹⁶² All AU member states were requested to cooperate with Senegal on this matter,¹⁹⁶³ while the Chairperson of the Union, in consultation with the Chairperson of the AU Commission, was mandated “to provide Senegal with the necessary assistance for the effective conduct of the trial”.¹⁹⁶⁴

¹⁹⁵⁸ *Ibid.*, paras.21 and 33.

¹⁹⁵⁹ Assembly/AU/ Dec.127 (VII), Decision on the Hissène Habré Case and the African Union (DOC. ASSEMBLY/AU/3 (VII)), 7th Ordinary Session of the Assembly of the African Union, Banjul (The Gambia), 1-2 July 2006.

¹⁹⁶⁰ *Ibid.*, para.3.

¹⁹⁶¹ *Ibid.*, para.4.

¹⁹⁶² *Ibid.*, para.5 (ii).

¹⁹⁶³ *Ibid.*, para.5 (iv).

¹⁹⁶⁴ *Ibid.*, para.5 (iii).

It is submitted that this jurisdictional mandate conferred on Senegal implied that the latter was not going to exercise not its own jurisdiction but that of the AU. It is the first precedent in international criminal law whereby an intergovernmental organisation has decided to delegate criminal jurisdiction to one of its member states. The practice may inspire the Security Council which has meaningful experience in authorising member states to act in the name of the international community by using force for the purpose of enforcing collective security decisions, but has never delegated criminal jurisdiction to any UN member state. Rather, the Security Council has had the occasion to confer jurisdiction only on *ad hoc* international criminal tribunals, constituting its subsidiary organs.

The benefits of this model of jurisdiction are not negligible. It appears that it fits better for trying a small number of specific individuals, such as high ranking state officials, in a particular situation and outside the territory of the state of commission of the crime or the state of nationality. The collective delegation of jurisdiction increases the legitimacy of proceedings on the part of the designated/delegated third state. The latter acts as a true agent of the international community, exercising its power. This is a significant departure from the exercise of universal jurisdiction by a state. Compared with prosecutions before *ad hoc* international criminal tribunals, state procedures are likely to take not too much time. These procedures may also cost less money due to a reduced internationalisation as regards staff composition and institutional building. However, there are also drawbacks. One of these could be the perception of an imperial jurisdiction when the state of nationality of the presumed offenders has not consented to such a delegation of power or when jurisdiction is not conferred on the country of its wish. Difficulties in the process of implementation can also arise if the content of the legal mandate is not clearly specified for the delegated state in advance. Interpretations on how this mandate has to be executed can create a number of complex legal problems to solve, thereby undermining the start of the trial in a reasonable time or even thwarting the effectiveness of prosecutions.

2.1.1.2. The Problems of Legality and Implementation

The AU's delegation of jurisdiction to Senegal in the case of the trial of Hissène Habré raises two main legal problems. The first problem relates to the legality of this delegation of power and the second to legal issues of interpretation of the mandate in regard to how Senegal should have implemented it.

Concerning the legality of the delegation of jurisdiction, it has to be observed that power was given to Senegal to try Hissène Habré with respect to criminal events which had occurred in Chad prior to the creation of the AU, that is to say between 7 June 1982 and 1 December 1990. Yet, the VCLT which codifies customary international law prohibits retroactive application of treaties¹⁹⁶⁵ as follows:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.¹⁹⁶⁶

The party which falls within the meaning of this provision is either Chad (territorial state and state of nationality) or Senegal (state of residence). These two countries did not object to the AU's delegation of jurisdiction. Rather, they consented to it. But, still, regarding the time of occurrence of the criminal events in question, given the fact that the OAU itself did not have the power to act in the same manner as its successor (the AU) did in July 2006, the AU Constitutive Act could not be applied retroactively.¹⁹⁶⁷ The delegation of criminal jurisdiction to Senegal was therefore illegal in this particular context. State consent is irrelevant where there is no power for the AU to act retroactively.

Furthermore, it has to be noted that when the AU is competent to act and state consent is provided to its action, the delegation of criminal jurisdiction based on the AU's right to intervene in a member state does not need to be authorised by the UN Security Council. Such authorisation is only required when the AU decides to impose jurisdiction on a member state willing to prosecute without the consent of the state of residence and /or the state of nationality of the suspect. Given that Chad and Senegal were in favour of the AU's decision of July 2006, the absence of the Security Council's authorisation was not an issue in the case of the trial of Hissène Habré. The AU was in a position to act as it did in accordance with the Constitutive Act.

¹⁹⁶⁵ T. Hillier, *Sourcebook on Public International Law* (London/Sydney: Cavendish Publishing Limited, 1998), at 138; A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000), at 142.

¹⁹⁶⁶ Vienna Convention on the Law of Treaties, Article 28.

¹⁹⁶⁷ In contrast, Article 33 (3) of the AU Constitutive Act lets think that retroactive application of this treaty was not even foreseen. It provides: '*Upon the entry into force of this Act, all necessary measures shall be undertaken to implement its provisions and to ensure the establishment of the organs provided for under the Act in accordance with any directives or decisions which may be adopted in this regard by the Parties thereto within the transitional period stipulated above*'. Emphasis is mine.

Concerning the implementation of the jurisdictional mandate conferred on the delegated state, problems of interpretation have arisen in relation to its content. Normally, when an intergovernmental organisation delegates criminal jurisdiction to an international court, it in the same time defines the applicable law in the court's statute. But, the AU conferred jurisdiction on Senegal without determining exactly the law which had to be applied by the Senegalese competent court in the name of the African community of states and peoples. This legal deficiency pushed the delegated state to interpret the AU's mandate in a way that it had to determine unilaterally the law applicable to the trial of Hissène Habré. As a result, it undertook initiatives to amend its domestic law and to adapt it to international law in order to allow the proceedings to commence.¹⁹⁶⁸ The AU Committee of Eminent African Jurists understood in the same manner the mandate to be implemented by Senegal when it reported:

The Committee was apprised of the decision of United Nations Committee on Convention Against Torture taken on 17th May, 2006 concerning Hissène Habré that Senegal's conduct was in violation of Articles 5 (2) and 7 of the Convention Against Torture. It is therefore incumbent on Senegal in accordance with its international obligations, to take steps, *not only to adapt its legislation*, but also to bring Habré to trial. The Committee considered that in the event that Senegal proceeds with the trial of Habré, *Senegal should confer special powers upon the court* to proceed to Chad or to any other country to take evidence of witnesses and do whatever is necessary to achieve its mandate.¹⁹⁶⁹

However, one may argue that the said adaptation of national legislation to Senegal's international obligations or the conferral of special powers on its court was not meaningful in this context because the delegated state was not mandated to exercise its own jurisdiction but the power conferred on it by the AU. The misinterpretation of this mandate resulted in contestations of the laws adopted by Senegal, arguably for they violated the principle of legality and particularly the prohibition of retroactive application of criminal laws.¹⁹⁷⁰ What

¹⁹⁶⁸ The Law No.2007-02 of 12 February 2007 Amending the Penal Code has domesticated international crimes, i.e. genocide, crimes against humanity and war crimes, in Senegal; the Law No.2007-05 of 12 February 2007 Modifying the Code of Criminal Procedure Concerning the Implementation of the Rome Statute of the International Criminal Court has provided universal jurisdiction over them, the crimes of terrorism and torture; the Constitutional Law No. 2008-33 of 7 August 2008 Amending Articles 9 and 95 and Complementing Articles 62 and 92 of the Constitution has provided that criminal prosecutions do not violate the principle of non-retroactive application of criminal laws if the conduct is criminal, at the time it takes place, pursuant to rules of international law with respect to genocide, crimes against humanity and war crimes (Article 9 amended).

¹⁹⁶⁹ African Union, above note 1951, paras.18-19. Emphasis is mine.

¹⁹⁷⁰ *Hissène Habré v. Republic of Senegal*, above note 586, para.19.

was forgotten was that the AU intervened because of the Senegalese incapacity to use its proper adjudicative power (lack of universal jurisdiction) and substantive law (default of relevant offences in the domestic legal system) in order to try the accused person. The AU's mandate was not meant to obliterate this incapacity but to serve just as an alternative option for the fight against impunity.

A different interpretation was possible. As already seen, the Hissène Habré case had to be brought before a competent Senegalese court with guarantees for a fair trial. The initial question in this regard was for such a court to have been legally created. It was implicit that the court could apply the Senegalese criminal procedure. However, the question as to the court which was specifically competent over the case could be answered in accordance with Senegalese domestic law. The assessment could be made on the basis of a number of factors, such as the place of commission of the crime and residence of the suspect (*ratione loci* competence), the official status of the accused person (*ratione personae* competence), the offence at stake (*ratione materiae* competence) and the time of its commission (*ratione temporis* competence). The territorially competent court could be one which was established in Dakar where Hissène Habré resided. The personal competence of the court was unnecessary in view of the fact that the accused person was found in a foreign country as a former head of state. His status had no particular relevance as regards the rank of Senegalese tribunals. There was no problem with the *ratione temporis* jurisdiction because Senegal was given special power by the AU to try crimes committed in Chad during the relevant period of time. These crimes already existed under international law. There was in principle no breach of the prohibition of retroactive application of criminal laws. Problems would have arisen only about the *ratione materiae* competence insofar as the aforementioned crimes were not yet incorporated in the Senegalese domestic legal order. The *ratione materiae* competence was crucial to be determined for two main reasons. On the one hand, it was necessary for the precise identification of one of the courts sitting in Dakar as the competent jurisdiction to try the accused person. On the other hand, it was necessary for the determination of the substantive law applicable by that competent court. Given the fact Senegal could not rely on its contested municipal law, it is submitted that there was an alternative solution in accordance with international law: either to adopt a special statute in the name of Africa or to request for a binding decision of the AU Assembly specifying the rules and principles applicable to the trial of Hissène Habré. Accordingly, the AU would have decided in line with international practice according to which delegation of criminal jurisdiction is accompanied by the

determination of applicable law by the delegating authority. The designated competent court could have exercised its jurisdiction as a special mechanism within the Senegalese domestic legal order. If contestations were so avoided, this first experience of the AU's delegation of criminal jurisdiction to a member state could have been successful and rendered the creation of a mixed tribunal between Senegal and the AU unnecessary.

2.1.2. The Creation of Hybrid Criminal Tribunals

A mixed, hybrid or internationalised criminal tribunal is a jurisdiction which combines national and international staff, and often involves both domestic and internationally recognised criminal justice procedures.¹⁹⁷¹ There are however different variants: either a national jurisdiction which is internationalised (e.g. the ECCC) or an international court which is nationalised (e.g. the SCSL).¹⁹⁷² Such a criminal tribunal may take the form of a mixed court which is autonomous from the domestic legal system or special mixed chambers that are integrated into the judicial system of the state concerned. A hybrid tribunal is designed to deliver justice in a particular context or special circumstances. Its jurisdiction is therefore limited in time, whereas its exercise is often expected to contribute to the promotion of stability in a post-conflict state. In practice, the AU in cooperation with Senegal resorted to a hybrid jurisdiction with the creation of the Extraordinary African Chambers (EAC) in the Senegalese Courts in 2012 (2.1.2.1), while an analogous experience was recommended in relation to Sudan in 2009 (2.1.2.2).

2.1.2.1. The Extraordinary African Chambers in the Senegalese Courts

The EAC was created after the failure to implement the AU's delegation of criminal jurisdiction to Senegal for the purpose of the trial of Hissène Habré. Contestations of this delegated jurisdiction were brought before several African courts. The most important case was dealt with by the ECOWAS Court of Justice, whose judgement of 18 November 2010 constituted the main trigger event of the process of establishment of the EAC (a). These Chambers have some specific features and mix characteristics of both internationalised national and nationalised international courts (b).

¹⁹⁷¹ Mbeki, Abubakar, Buyoya, El Sayed, Mumba, Mohamed, Omaar, above note 1109, para.247.

¹⁹⁷² Pazartzis, above note 367, at 643-644 and 646. See also C. P.R. Romano and T. Boutruche, 'Tribunaux pénaux internationalisés : état des lieux d'une justice 'hybride'', *CVII Revue générale de droit international public* (2003) 109-124.

a) The Process of Establishment of the Chambers

The creation of the EAC proceeds from a combination of factors which have led to the failure of the AU's delegation of criminal jurisdiction to Senegal. From 2006 to 2012, the judicial impasse of the Hissène Habré case was total. Among other obstacles towards exercising this jurisdiction, there was the lack of funding of the trial. The Senegalese Government declined to fund it alone while none of the AU member states provided financial assistance. In July 2010, the AU Assembly explicitly made an appeal for all its members to contribute to the budget for the trial.¹⁹⁷³ It convened a round table of donors (including the EU) in Dakar on 24 November 2010.¹⁹⁷⁴ At the end of that day, the budget for the trial was about a total amount of 8.570.000 Euros.¹⁹⁷⁵ However, donors agreed to mobilise some 8.600.000 Euros.¹⁹⁷⁶ The AU itself pledged to contribute with 1 million USD.¹⁹⁷⁷ The success of this meeting geared hopes to begin with the trial in reasonable time. But, judicial contestations of the AU's jurisdictional mandate to Senegal had already taken another twist. It appeared that Senegal could no longer try the accused person in the way it wished to do in accordance with its domestic legislation.

The initial contestation was made by a Chadian national, Michelot Yogogombaye, in his application of 11 August 2008 against Senegal before the AfCHPR.¹⁹⁷⁸ The applicant contended that the amendments to the Senegalese laws and Constitution authorising retroactive application of criminal laws for the purpose of trying Hissène Habré violated article 7(2) of the ACHPR.¹⁹⁷⁹ He also submitted that Senegal had violated the principle of

¹⁹⁷³ Assembly/AU/Dec.297(XV), Decision on the Hissene Habre Case (Doc.Assembly/AU/11(XV)), 15th Ordinary Session of the Assembly of the African Union, Kampala (Uganda), 25-27 July 2010, para.3.

¹⁹⁷⁴ *Ibid.*, paras.4-5.

¹⁹⁷⁵ African Union, 'Plus de huit millions d'euros recueillis pour l'organisation du procès d'Hissène Habré', Press Release No.162/2010 (24 novembre 2010). See Kahombo, above note 11, at 81.

¹⁹⁷⁶ *Ibid.*

¹⁹⁷⁷ Assembly/AU/ Dec.340(XVI), Decision on the Hissene Habre Case (Doc. Assembly/AU/9(XVI)), 16th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 30-31 January 2011, para.5.

¹⁹⁷⁸ See G.-F. Ntwari, 'Note sur le premier arrêt de la Cour africaine des droits de l'homme et des peuples', 18 (2) *African Journal of International and Comparative Law* (2010) 233-237.

¹⁹⁷⁹ *Michelot Yogogombaye v. The Republic of Senegal*, Judgment of 15 December 2009, AfCHPR, Application No.001/2008, paras.20-21. Article 7 (2) of the African Charter on Human and Peoples' Rights provides: 'No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender'.

universal jurisdiction and committed an abuse of it for political and lucrative ends.¹⁹⁸⁰ The applicant therefore requested the suspension of the Senegalese proceedings, pending an African solution through the establishment of a Truth, Justice, Reparations and Reconciliation Commission for all crimes committed in Chad between 1962 and 2008.¹⁹⁸¹ However, the AfCHPR held that it lacked jurisdiction to decide on the matter. The reason was that Senegal had not made the declaration accepting the competence of the Court to receive cases instituted by individuals or NGOs.¹⁹⁸²

In another procedure Hissène Habré lodged an application with the ECOWAS Court of Justice on 1 October 2008, alleging the same violation by Senegal of the principle of non-retroactivity of criminal laws and the authority of *res judicata* owed to its own courts' decisions.¹⁹⁸³ It must be recalled that these courts established that they had no jurisdiction to prosecute and try foreigners present in Senegal for alleged crimes committed against alien outside the Senegalese territory.

Concerning the first allegation, the ECOWAS Court of Justice concluded that by amending its domestic legislation for the purpose of trying Hissène Habré, Senegal violated the principle non-retroactivity of penal laws.¹⁹⁸⁴ Furthermore, the Court held that the AU's delegation of jurisdiction conferred on Senegal the mandate to conceive and to suggest specific modalities for trying the accused person in the framework of an *ad hoc* special procedure of an international character as is practiced in international law by all civilised nations.¹⁹⁸⁵ For the Court, this was the only procedure which would not breach the principle of non-retroactivity of criminal laws because it was consistent with article 15 (2) of the International Covenant on Civil and Political Rights,¹⁹⁸⁶ which permits "the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations". Regarding the second

¹⁹⁸⁰ *Ibid.*, para.23 (5) and (6).

¹⁹⁸¹ *Ibid.*, paras.1, 23 (2), (9) and (10).

¹⁹⁸² *Ibid.*, para.40 (1). See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (10 June 1998), Article 34 (6).

¹⁹⁸³ *Hissène Habré v. Republic of Senegal*, above note 586, paras.19 and 28.

¹⁹⁸⁴ *Ibid.*, paras.54 and 61.

¹⁹⁸⁵ *Ibid.*, paras.58 and 61.

¹⁹⁸⁶ *Ibid.*, para.58.

allegation, the Court decided that Senegal should respect decisions delivered by its own courts on this case.

This judgment raised several criticisms.¹⁹⁸⁷ Concerning the *res judicata* principle, Raphaël Tiwang Watio rightly argued that the Court ignored the principle of international law prohibiting any state to invoke its domestic law as justification not to perform its international obligations.¹⁹⁸⁸ The Senegalese courts relied on the Code of Criminal Procedure to declare that they were incompetent to prosecute and try Hissène Habré. The ECOWAS Court of Justice should have decided that any allegation of violation of the authority of *res judicata* pursuant to Senegalese laws was irrelevant owing to the duty on Senegal to prosecute the Hissène Habré under the Convention against torture.

Concerning the prohibition of retroactive penal laws, Valentina Spiga argued that the principle was not violated since changes within Senegalese domestic legislation did not create new crimes but simply incorporated those which already existed under international law: genocide, crimes against humanity and war crimes.¹⁹⁸⁹ This line of argument was also followed by Senegal before the ECOWAS Court of Justice.¹⁹⁹⁰ However, it is flawed for two principal reasons. First, Senegal incorporated these crimes from the ICC Statute. Apart from genocide and crimes against humanity, the incorporation of war crimes had something to do with the respect for the principle of legality. In fact, it was doubtful until the establishment of the ICTR and ICTY in the 1990s that serious violations of common article 3 of the Geneva Conventions of 1949 and of Additional Protocol II of 1977 could entail criminal responsibility under customary international law.¹⁹⁹¹ In addition, it is doubtful that Senegal had a duty to prosecute these serious violations during the relevant period between 1982 and 1990. A problem of legality might arise when such violations are connected to the amendment to the

¹⁹⁸⁷ *Ibid.*, para.61.

¹⁹⁸⁸ R.T. Watio, 'Affaire Hissène Habré: où en est la justice?', 17 *African Yearbook of International Law* (2011) 379-409, at 404.

¹⁹⁸⁹ V. Spiga, 'Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga', 9 *Journal of International Criminal Justice* (2011) 5-23, at 16-19.

¹⁹⁹⁰ *Hissène Habré v. Republic of Senegal*, above note 586, para.44.

¹⁹⁹¹ S. Williams, 'The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?', 11 *Journal of International Criminal Justice* (2013) 1139-1160, at 1158.

Senegalese Code of Criminal Procedure instituting universal jurisdiction.¹⁹⁹² It is submitted that where a state has no obligation to prosecute, it cannot confer on itself the power to exercise retroactive universal jurisdiction. Second, one must not overlook torture, the other crime among charges against Hissène Habré, which was incorporated in the Senegalese Penal Code only through the Law No.96-15 of 28 August 1996.¹⁹⁹³ In the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, the ICJ held that torture for purposes of the Convention against torture could not apply to acts that had been committed before the entry into force of the Convention towards Senegal, that is, on 26 June 1987.¹⁹⁹⁴ As a consequence, the principle of legality was breached by the fact that Senegal conferred on itself retroactive universal jurisdiction over acts of torture allegedly committed between 1982 and 26 June 1987 which it had no obligation to prosecute under the Convention against torture. The contrary statement of the ICJ according to which the Convention against torture did not prevent Senegal from instituting criminal proceedings against these acts was not motivated and had no legal basis.¹⁹⁹⁵

Under these circumstances, the ECOWAS Court of Justice was right to find that Senegal violated the principle of non-retroactivity of penal laws even though without nuancing its decision. However, it was mistaken to hold that the same principle would not be violated if prosecutions against Hissène Habré were initiated before an *ad hoc* mechanism of an international character.¹⁹⁹⁶ Every criminal tribunal, regardless of its form or nature, must ensure respect for this cardinal principle. The judgment of the ECOWAS Court of Justice even ran against the will of the AU which had delegated jurisdiction to Senegal in order to try the accused by a *Senegalese competent court* instead of an international criminal tribunal.¹⁹⁹⁷ Finally, by interpreting the AU's mandate given to Senegal, the Court also acted out of its competence.¹⁹⁹⁸

¹⁹⁹² Law No.2007-05 of 12 February 2007 Modifying the Code of Criminal Procedure Concerning the Implementation of the Rome Statute of the International Criminal Court, Article 2.

¹⁹⁹³ Senegalese Penal Code (21 July 1965), Article 295-1.

¹⁹⁹⁴ *Questions relating to the Obligation to Prosecute or Extradite*, above note 425, paras.101-102.

¹⁹⁹⁵ *Ibid.*, para.102.

¹⁹⁹⁶ Spiga, above note 1989, at 23.

¹⁹⁹⁷ Watio, above note 1988, at 406.

¹⁹⁹⁸ *Ibid.*, at 405-406. See Protocol A/P.1/7/91 on the Community Court of Justice (6 July 1991), Article 9; Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol

Finally, the AU Assembly took note of the judgment of the ECOWAS Court of Justice on Hissène Habré's trial in spite of various legal flaws. In January 2011, it requested the AU Commission to "to undertake consultations with the Government of Senegal in order to finalise the modalities for the expeditious trial of Hissene Habre through a special tribunal with an international character consistent with the Economic Community of West African States (ECOWAS) Court of Justice Decision".¹⁹⁹⁹ The creation of a special tribunal was another way for Senegal to discharge the mandate given to it. This time, the delegated state would not anymore use its domestic courts solely as it had to exercise jurisdiction jointly, in direct cooperation with the AU. But, negotiations between Senegal and the AU made no further progress until the announcement by the Government of President Abdoulaye Wade to give up the case and to send Hissène Habré back to Chad.²⁰⁰⁰ It was clear that there was little political will to prosecute the accused in Senegal. On the request of the UN High Commission on Human Rights, the Senegalese Government revoked its previous decision on 10 July 2011. In January 2012, the AU suggested that prosecutions in Rwanda could be an alternative option to proceedings in Senegal in order to ensure the expeditious trial of Hissène Habré.²⁰⁰¹ With the advent of the new Senegalese Government of President Macky Sall in April 2012, negotiations with the AU were resumed. They resulted in the conclusion of the Agreement on the Establishment of the EAC on 22 August 2012. This Agreement was ratified by Senegal after parliamentary authorisation by virtue of the Law No.2012/25 of 28 December 2012.

b) The Main Features of the Chambers: an Innovation?

The Agreement of 22 August 2012 between Senegal and the AU created the EAC "to prosecute the person or persons responsible for the crimes and serious violations of international law, international humanitarian law and custom, and international conventions

A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol (19 January 2005), Article 3. Article 9 of the Protocol on the ECOWAS Court of Justice so amended provides that the Court has jurisdiction to adjudicate on any dispute relating to the following: 'a) The interpretation and application of the Treaty, Conventions and Protocols of the Community; b) The interpretation and application of the regulations, directives, decisions and other legal instruments adopted by ECOWAS; (...)'. The ECOWAS Court of Justice had no power to interpret decisions adopted by the AU.

¹⁹⁹⁹ Assembly/AU/ Dec.340(XVI), above note 1977, para.9.

²⁰⁰⁰ African Union, 'Affaire Hissène Habré : le Tchad soutien les victimes et réclame un procès' Press Release No.75/2011 (21 July 2011). See Kahombo, above note 11, at 82-83.

²⁰⁰¹ Assembly/AU/Dec.401(XVIII), Decision on the Hissene Habre Case (Doc. Assembly/AU/12(XVIII)), 18th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 29-30 January 2012, para.5

ratified by Chad and Senegal that were committed in Chad between 7 June 1982 and 1 December 1990".²⁰⁰² It was very clear herein that anybody, and not solely Hissène Habré, who was suspected of being responsible for such crimes during that period, would be prosecuted. The Agreement contained as an annex the Statute of the Chambers (hereafter the EAC Statute).²⁰⁰³ The EAC had jurisdiction over genocide, crimes against humanity and war crimes²⁰⁰⁴, the definitions of which were borrowed from the Statutes of *ad hoc* international criminal tribunals.²⁰⁰⁵ Torture was another separate crime,²⁰⁰⁶ in addition to being provided for as crime against humanity or war crime under the EAC Statute.²⁰⁰⁷ Immunities for the accused persons, statute of limitation and amnesty before the Chambers were irrelevant.²⁰⁰⁸ Victims could participate in proceedings pursuant to the Senegalese criminal procedure and be awarded reparations for damages they had suffered, individually or collectively, as a consequence of the crimes and individual criminal responsibility.²⁰⁰⁹ The Chambers were not authorised to apply the death penalty. Rather, they could sentence any convicted person to imprisonment up to 30 years or life imprisonment. Additionally, a convicted person could be sentenced to a fine or forfeiture of proceeds, property and assets derived directly or indirectly from the crime.²⁰¹⁰

The structure of the Chambers was based on the idea that these Chambers were integrated into the Senegalese judicial system.²⁰¹¹ A total number of four chambers were created.²⁰¹² For the

²⁰⁰²Agreement on the Establishment of the Extraordinary African Chambers within the Courts of Senegal between the Government of the Republic of Senegal and the African Union, Article 1 (1).

²⁰⁰³ It is officially entitled 'Statute of the Extraordinary African Chambers within the Courts of Senegal for the Prosecution of International Crimes Committed in Chad in the Period between 7 June 1982 and 1 December 1990'.

²⁰⁰⁴ EAC Statute, Articles 4-7.

²⁰⁰⁵ R. Adjovi, 'Introductory Note to the Agreement on the Establishment of the Extraordinary African Chambers Within the Senegalese Judicial System Between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers', 52 (4) *International Legal Materials* (2013) 1020-1036, at 1021.

²⁰⁰⁶EAC Statute, Articles 4 (d) and 8.

²⁰⁰⁷ *Ibid.*, Articles 6(g) and 7 (1) (b) and (2) (a).

²⁰⁰⁸ *Ibid.*, Articles 9, 10 (3) and 20.

²⁰⁰⁹ *Ibid.*, Articles 27-28.

²⁰¹⁰ *Ibid.*, Article 24.

²⁰¹¹ Agreement on the Establishment of the Extraordinary African Chambers within the Courts of Senegal between the Government of the Republic of Senegal and the African Union, Article 1 (2); Law No.2012-29 of 28

pre-trial phase, a distinction was made between the Investigative Chamber (first instance) within the Regional Tribunal of Dakar and the Indicting Chamber within the Dakar Court of Appeals. For the trial level, the Dakar Court of Appeals included a Trial Chamber and an Appeals Chamber. There were also the Office of the Prosecutor (OTP) and the Registry. The Office of the Defence Counsel was added in 2014.²⁰¹³ The Chambers were designed to be automatically dismantled at the end of their mission.²⁰¹⁴

A controversy arose as to the nature of the EAC. For example, Emanuele Cimiotta wrote: “due to its establishment, location, jurisdiction and the function it carries out within the international legal system, the EAC is different than a mixed criminal tribunal. It could be considered as the first of its kind of a new criminal tribunal, reflecting a process of regionalisation of international criminal justice”.²⁰¹⁵ To support his position, he advanced three arguments.²⁰¹⁶ First of all, he argued that the EAC was created within a fully regional framework without the UN involvement. Second, the Chambers were not located in Chad, on the territory of which the crimes were committed. Third, the Chambers found its remote roots at the national level because their establishment was related to the obligation for Senegal to comply with the Convention against torture. Fourth, the EAC did not aim to contribute to a transitional process for peace building or national reconciliation in Chad or to reinforce the Chadian judicial system. Instead, the creation of the Chambers was a response to a particular circumstance of the struggle against impunity on the basis of universal jurisdiction. Consequently, Emanuele Cimiotta concluded that the EAC constituted a new type of judicial body in the field of international criminal law.²⁰¹⁷

December 2012 Modifying the First Article of the Law No.84-19 of 2 February 1984 Determining the Judicial Organisation, Article 1.

²⁰¹² EAC Statute, Article 11.

²⁰¹³ Amendment to the Agreement between the Government of the Republic of Senegal and the African Union on the Statute of Statute of the Extraordinary African Chambers within the Courts of Senegal for the Prosecution of International Crimes Committed in Chad in the Period between 7 June 1982 and 1 December 1990 (24 July 2014), Article 2.

²⁰¹⁴ EAC Statute, Article 37 (1).

²⁰¹⁵ E. Cimiotta, ‘The First Steps of the Extraordinary African Chambers: A New Mixed Criminal Tribunal?’, 13 *Journal of International Criminal Justice* (2015) 177-197, at 179.

²⁰¹⁶ *Ibid.*, at 178-179 and 193-197.

²⁰¹⁷ *Ibid.*, at 178 and 196.

On her side, Sarah Williams thought that the EAC qualified as a mixed or hybrid tribunal,²⁰¹⁸ as they fulfilled the six criteria of this type of jurisdiction.²⁰¹⁹ First, the EAC performed criminal functions. Second, concerning the duration of their existence, they were temporary institutions. Third, there was a minimum international participation in the functioning of the Chambers: the President of the Trial Chamber and the President of the Appeals Chamber were non-Senegalese judges, selected from another AU member state. Nevertheless, all other Senegalese judges were nominated by the Senegalese Minister of Justice but appointed by the Chairperson of the AU. Fourth, international assistance in the financing of the EAC was provided. Fifth, the applicable law combined both international law and Senegalese domestic legislation. Sixth, a party other than Chad was involved in the EAC, that is, the AU. According to Sarah Williams, the EAC constituted a new type of mixed tribunal because it was the first jurisdiction of the kind to apply universal jurisdiction (with the consent of Chad), so operating outside the state of commission and having a minimalist approach to judicial internationalisation, in order to address a particular situation of impunity in Africa.²⁰²⁰

Sarah Williams' position is particularly relevant because she considers that the involvement of the international community in the functioning of a hybrid tribunal may not come only from the UN.²⁰²¹ The restriction of such an involvement to universal actors and particularly the UN had no justification. In fact, international law not only exists but may also be enforced at the regional level. Hence, Sarah Williams's suggestion according to which the involvement of the international community could also come from a regional organisation or even other states.²⁰²²

The EAC embryonic model of regional criminal justice²⁰²³ would perhaps be replicated and more developed in the future.²⁰²⁴ Its comparative advantages were summarised as follows:

²⁰¹⁸ Williams, above note 1991, at 1140, 1147 and 159.

²⁰¹⁹ *Ibid.*, at 1145-1146.

²⁰²⁰ *Ibid.*, at 1160.

²⁰²¹ *Ibid.*, at 1145.

²⁰²² *Ibid.*

²⁰²³ A. Nguefeu, 'Les chambres africaines extraordinaires pour la répression des crimes internationaux : embryon d'une instance juridictionnelle pénale africaine ?', in Société africaine pour le Droit international (SADI), *L'Afrique et le droit international pénal* (Paris : Pedone, 2015) 129-144, at 131.

²⁰²⁴ S.A.E. Hogestol, 'The Habré Judgment at the Extraordinary African Chambers: A Singular Victory in the Fight against Impunity', 34 (3) *Nordic Journal of Human rights* (2016) 147-156, at 155.

(...) an EAC-style internationalised court could be set up by a regional body, within the domestic courts of another country in the region. This would bring the trial closer to victims; give regional bodies more ownership over their international justice mechanisms, while also ensuring that the prosecutions are conducted before well-functioning courts. Early analysis of the Habré trial have underscored that it seems to have been executed in a low cost, speedy manner, while still adhering to international fair trial rights. This is notable when compared to the very costly and time consuming trials that have become the norm at international criminal courts.²⁰²⁵

In the end, the EAC were successful. Hissène Habré, the principal accused in the Chadian situation, was arrested and then indicted for crimes against humanity, war crimes and torture on 2 July 2013.²⁰²⁶ His trial started in July 2015. Even if the EAC did not try any other person, Hissène Habré was convicted at the first instance on 30 May 2016 and in appeal on 27 April 2017, and sentenced to life imprisonment.²⁰²⁷ In addition, the Appeals Chamber ordered Hissène Habré to pay reparations to his 7,396 victims: a total sum of 82,290,000,000 CFA (more than 140 million USD).²⁰²⁸ An attempt to organise similar regionalised criminal proceedings in Sudan failed.

2.1.2.2. The Call for the Creation of a Hybrid Court for Darfur

The proposal to create a hybrid court for Darfur was made by the AU High-Level Panel on Darfur (AUPD) in its report of 2009. The proposed court could be located in Sudan and composed of Sudanese and international judges, prosecutors, investigators and defence lawyers.²⁰²⁹ It was expected to be given jurisdiction over international crimes that were

²⁰²⁵ *Ibid.*, at 156.

²⁰²⁶ See R. Brody, 'Bringing a Dictator to Justice: The Case of Hissène Habré', 13 *Journal of International Criminal Justice* (2015) 209-217, at 213.

²⁰²⁷ *Public Prosecutor v. Hissène Habré*, Judgment, Extraordinary African Chambers, Trial Chamber, 30 May 2016, at 536; *Public Prosecutor v. Hissène Habré*, Judgment, Extraordinary African Chambers, Appeals Chamber, 17 April 2017, para.568.

²⁰²⁸ *Public Prosecutor v. Hissène Habré*, Judgment, Extraordinary African Chambers, Appeals Chamber, 17 April 2017, para.939. The Appeals Chamber revised the Trial Chamber's judgment which previously ordered Hissène Habré to pay to each of his victims reparations as follows: 20 million CFA to each victim of sexual slavery and rape, 15 million CFA to each victim of arbitrary detention, torture or mistreatment as prisoner of war and survivor of massacre. *Public Prosecutor v. Hissène Habré*, Judgment on Reparations, Extraordinary African Chambers, Trial Chamber, 29 July 2016, para.82.

²⁰²⁹ Mbeki, Abubakar, Buyoya, El Sayed, Mumba, Mohamed, Omaar, above note 1109, para.252.

reportedly perpetrated during the armed conflict which began in Darfur region in 2003.²⁰³⁰ The hybrid court could be an alternative option for the ICC's intervention in Sudan,²⁰³¹ in addition to local prosecutions undertaken by the Sudanese justice system.

There are three reasons why the AUPD called for the establishment of the proposed hybrid court. First, as already indicated, justice through the ICC was contested, mainly by the Government of Sudan. The judicial impasse had to be overcome. Second, while Sudan undertook several initiatives to address the impunity gap domestically through the SCCED, its efforts failed to bring to trial those who appeared to bear the greatest responsibility for crimes committed in Darfur. The justification of this failure lay in the lack of political will to ensure justice, the lack of international support for domestic trials and the enjoyment of immunities by President Omar Al Bashir, his Deputy, and members of security forces, even though these immunities were subject to removal.²⁰³² Instead, no immunity would have applied before the proposed hybrid court. Third, the AUPD reported that there was little trust in the Sudanese judicial system, including on the part of victims. For example, it noted that "Sudan's unilateral actions, using existing mechanisms, have not commanded the broad confidence required to secure the cooperation of the people of Darfur, whose faith in Government institutions has been eroded".²⁰³³ Moreover, the report indicated:

Whilst it is not questioning the technical competence or integrity of the Sudanese judiciary or legal personnel, the Panel must nevertheless recognise that the victims of the conflict simply have no faith that the justice system of Sudan will be deployed fairly to address the crimes they have

²⁰³⁰ As early as in 2004, the African Commission on Human and Peoples' Rights sent a fact-finding mission to Darfur, which recommended the setting up of an international commission of inquiry to investigate thoroughly into crimes committed. See African Commission on Human and Peoples' Rights, 'Report of the African Commission on Human and Peoples' Rights' Fact-Finding Mission to the Republic of Sudan in the Darfur Region' (08 to 18 July 2004) EX.CL/364 (XI), Annex III, paras.120-123 and 137.

²⁰³¹ Mbeki, Abubakar, Buyoya, El Sayed, Mumba, Mohamed, Omaar, above note 1109, para.255. In this paragraph, the the AU High-Level Panel on Darfur concludes: '(...) should Sudan make genuine efforts to address the crimes in Darfur, the judges of the ICC would be required to evaluate those steps to consider whether they meet the requirements of Article 17. The final determination of this issue, however, is for the judges of the ICC alone. For the Panel, however, what matters, above all else, is that justice must be dispensed for Darfur in a credible, comprehensive, coherent and timely manner. The needs in this regard are immense, and it is equally clear that the entire burden of justice cannot be placed on any single institution or model, be it the ICC, special courts, traditional courts, other tribunals or a hybrid court'.

²⁰³² *Ibid.*, paras.236-237.

²⁰³³ *Ibid.*, para.248.

suffered. Their grave concerns, which often manifested in the call for the establishment of a Hybrid Court for Darfur, cannot be ignored.²⁰³⁴

It therefore appeared that the proposed hybrid court for Darfur was justified by the will to alleviate the weakness of Sudan's justice system to deal with crimes committed in Darfur and to solve, through the promotion of positive complementarity, the judicial crisis related to the contestation of ICC's proceedings in Sudan. This was the first time for the AU to envisage a hybrid court working in the state of commission of the alleged crimes. Initiatives of this kind were rather supported or suggested by the UN as evidenced by the establishment of the Special Criminal Court for CAR²⁰³⁵ and the proposed creation of hybrid judicial mechanisms for the DRC.²⁰³⁶

The choice of a hybrid court rather than an *ad hoc* regional criminal tribunal was based on the following reason:

Hybrids began to be the preferred model after the initial experience with the UN *Ad Hoc* Tribunals for Yugoslavia and Rwanda, international courts that became associated with an expensive and slow pace of justice. It was more cost effective, more efficient and in some cases more acceptable in the domestic or regional context, to have courts operating *in situ*, but strengthened by external actors.²⁰³⁷

However, this does not mean that a hybrid court does not have specific drawbacks.²⁰³⁸ First of all, this type of court requires an important diplomatic mobilisation and institutional building. So, the necessary preparation in order to start with prosecutions can be delayed in a matter which deserves swift action. Secondly, financial means must be available because this kind of court is expensive due to the internationalisation of personnel (judges, prosecutors or other staff members). Thirdly, like any special mechanism of criminal justice, a hybrid court cannot

²⁰³⁴ *Ibid.*, para.246.

²⁰³⁵ Organic Law No.15-003 Relating to the Creation, Organisation and Functioning of the Special Criminal Court (3 June 2015). According to Article 3 of this Law, the Special Criminal Court for the Central African Republic has jurisdiction over genocide, crimes against humanity and war crimes committed in the country since 1 January 2003. It has jurisdictional primacy over other central African courts. However, the International Criminal Court has primacy over it (Article 37). No immunity for the accused person is applicable before the Special Court (Article 56). The duration of the Court is of five years, starting from the date of its effective establishment (Article 70).

²⁰³⁶ Office of the United Nations High Commissioner for Human Rights, above note 742, para.86.

²⁰³⁷ Mbeki, Abubakar, Buyoya, El Sayed, Mumba, Mohamed, Omaar, above note 1109, para.247.

²⁰³⁸ *Ibid.*, paras. 250-251.

try every presumed offender. It can only focus on those who allegedly bear the greatest responsibility. If there is not any other mechanism to prosecute and try the remaining presumed offenders, the result of a hybrid court would be a disparity of justice in the country concerned. This is why the AUPD recommended a division of work between the Sudanese justice system and the proposed hybrid court.²⁰³⁹

While the AU was urged to support the urgent implementation of the Panel's recommendation, it failed to do so.²⁰⁴⁰ However, the AU Commission welcomed the proposal as an aspect of the roadmap on how peace, justice and reconciliation could be addressed in Darfur.²⁰⁴¹ One of the reasons for the failure to create the proposed hybrid court for Darfur is specific to the dynamic of Sudanese national politics. In fact, at the time of issuance of the AUPD's report in 2009, Sudan was involved in a process of allowing the region of South Sudan to access independence after a long civil war which started in 1983 between governmental forces and rebels of the Sudan Peoples' Liberation Movement (SPLM).²⁰⁴² Thus, the issue of criminal accountability in Darfur was overshadowed by the political process which led South Sudan to independence on 9 June 2011. The government of President Al Bashir was put in contribution as a partner to this process. Another and more convincing reason could be the lack of international support for the regional initiative. The AU found itself insulated, whereas exclusive deference was paid by the international community to the ICC's prosecutions in Sudan. Not only the ICC should not be undermined through parallel regional initiatives, but also it was perceived as the best way to ensure criminal accountability for those persons who were supposed to bear the greatest responsibility for crimes committed in Darfur, beginning by President Omar Al Bashir.

In spite of this failure in Sudan, another AU Commission of Inquiry recommended the creation of an *ad hoc* mechanism of criminal accountability for South Sudan in 2014. This recommendation was made following a report which found that war crimes and crimes against humanity had been committed in South Sudan since 15 December 2013, in the context of an armed conflict of non-international character opposing governmental forces to rebels,

²⁰³⁹ *Ibid.*, para.254.

²⁰⁴⁰ S.M. Weldehaimanot, 'Arresting Al-Bashir: The African Union's Opposition and the Legalities', 19 (2) *African Journal of International and Comparative Law* (2011) 208-235, at 220.

²⁰⁴¹ *Ibid.*

²⁰⁴² See C. Riziki Majinge, 'The United Nations, the African Union and the Rule of Law in Southern Sudan' (PhD Thesis, London School of Economics and Political Science 2013), at 105.

respectively under the command of President Salva Kiir and his former Deputy, Riek Machar.²⁰⁴³ This recommendation could lead to the establishment of “an Africa-led, Africa-owned, Africa-resourced legal mechanism under the aegis of the African Union supported by the international community, particularly the United Nations (...)”.²⁰⁴⁴ While it remains to be seen if the proposal would be followed, the logical conclusion from both situations in Sudan and South Sudan is the existence of a regional will to address crimes committed in Africa through African mechanisms of criminal accountability established in the continent. It is of course this will which also justifies the creation of a permanent AU Criminal Court.

2.1.3. The Establishment of the Criminal Court of the African Union

Two questions arise concerning the creation of the AU Criminal Court. The first one relates to the historical evolution (2.1.3.1) and the second question to the Court’s status within the AU institutional system (2.1.3.2).

2.1.3.1. The Historical Evolution

The project for the creation of the AU Criminal Court dates back to the time of the OAU. Its historical evolution can be divided into two main phases: the phase from emergence to maturation (a) and the drafting process of the Court’s Statute (b).

a) From Emergence to Maturation of the Project

The establishment of an African court of justice was recommended by the Pan-African Conference on the Rule of Law in Africa in 1961.²⁰⁴⁵ However, the creation of a criminal jurisdiction was invoked for the first time during the drafting process of the ACHPR in the late 1970s and the early 1980s.²⁰⁴⁶ In the end, the OAU Commission of Experts omitted to

²⁰⁴³ African Union, ‘Final Report of the African Union Commission of Inquiry on South Soudan’ (15 October 2014), paras.1125-1129 and 1133 <<http://www.peaceau.org/uploads/auciss.final.report.pdf>> accessed 22 October 2016.

²⁰⁴⁴ *Ibid.*, para.1148.

²⁰⁴⁵ F. A. Agwu, ‘The African Court of Justice and Human Rights: the Future of International Criminal Justice in Africa’, 6 (1) *African Review* (2014) 30-43.

²⁰⁴⁶ M. Du Plessis, T. Maluwa and A. O’Reilly, ‘Africa and the International Criminal Court’ International Law Programme Paper, International Law 2013/01 ‘Africa Programme, Africa and the Changing Balance of International Power’ (2013), at 9

include a court in the proposed draft Charter.²⁰⁴⁷ Professor Keba Mbaye, the chair of this Commission, specified that it was still premature to establish a court with criminal jurisdiction.²⁰⁴⁸ Rather, if need be, such a jurisdiction could be created by way of a protocol to the Charter.²⁰⁴⁹ This proposal did not satisfy every state such as Guinea (Conakry), which was in favour of the establishment of a court vested with jurisdiction to try violations of human rights and international crimes in Africa, in particular the crime of apartheid.²⁰⁵⁰

However, the Guinean proposal was rejected as inopportune. In fact, the majority of states chose to establish only a human right commission rather than a court.²⁰⁵¹ One of the reasons for this choice was the sovereign-oriented approach of the OAU whose member states were not ready to accept a judicial institution taking binding decisions upon them.²⁰⁵² The national political context of reigning dictatorship in most African countries was not in favour of the creation of such an institution.²⁰⁵³ It was also explained that creating an African criminal court was not a pressing concern because the UN Convention on the suppression and punishment of the crime of apartheid had already contemplated the establishment of an international penal court.²⁰⁵⁴ Moreover, there was an ongoing UN project to set up a criminal jurisdiction for the purpose of prosecuting and trying crimes against the peace and security of mankind.²⁰⁵⁵

After more than a decade of oblivion, the project re-emerged in the late 1990s after the end of the cold war and the beginning of new processes of state democratisation after the failure of

<https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf> accessed 10 May 2016.

²⁰⁴⁷ F. Viljoen, 'A Human Rights Court for Africa, and Africans', 30 (1) *Brooklyn Journal of International Law* (2004) 1-66, at 5.

²⁰⁴⁸ *Ibid.*

²⁰⁴⁹ *Ibid.*, at 6.

²⁰⁵⁰ K. M'Baye, *Les droits de l'homme en Afrique* (Paris : Editions A Pedone, 1992), at 164 ; F. Ougergouz, *La Charte africaine de droit de l'homme et des peuples: une approche juridique de droits de l'homme entre tradition et modernité* (Paris : Presses Universitaires de France, 1993), at 72.

²⁰⁵¹ Viljoen, above note 2047, at 6.

²⁰⁵² G. Bekker, 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States', 51 (1) *Journal of African Law* (2007) 151-172, at 154-155.

²⁰⁵³ J. Mouangue Kabila, 'Article 1. Création de la Cour', in M. Kamto (ed.), *La Charte africaine des droits de l'homme et des peuples et le protocole y relatif portant création de la Cour africaine des droits de l'homme* (Brussels : Bruylant, 2011)1215-1241, at 1224.

²⁰⁵⁴ Viljoen, above note 2047, at 6.

²⁰⁵⁵ *Ibid.*

initial experiences in the 1960s. Commentators continued to underline the necessity to create a regional criminal tribunal given the scourge of impunity for international crimes committed during various armed conflicts affecting the continent.²⁰⁵⁶ In June 1991, the Abuja Treaty instituting the AEC provided that a Court of Justice having jurisdiction to apply the African community law was created.²⁰⁵⁷ But, the Court was not operationalised because of several obstacles, including political will, although the Abuja Treaty came into force in 1994.

In July 2000, the project to create an African court of justice came to maturation. The AU Constitutive Act instituted a Court of Justice as one of its principal judicial organs.²⁰⁵⁸ The Union then had two courts: the AU Court of Justice having jurisdiction over general interstate matters and the AfCHPR, created in 1998, vested with the mandate to protect human and peoples' rights.²⁰⁵⁹ In 2004, while it was still to be seen if the new Protocol on the AU Court of Justice, adopted in 2003, would come into force, the AU Assembly decided that it should be merged with the AfCHPR²⁰⁶⁰ for reasons of rationalisation of the AU's institutions and staff (organs, personnel and premises) and financial constraints.²⁰⁶¹ Then, Olusegun Obasanjo, the Chairperson of the AU and Nigerian President, suggested to vest the new AU Court with criminal jurisdiction in the following terms: "Why shouldn't the Court of Justice take along with it the Court on Human and Peoples' Rights so that we have a Court of Justice which will have a division, if you like, for border issues, a division for human rights issues, *a division for cross-border criminal issues* or whatever".²⁰⁶² The same call for a court having criminal jurisdiction was made by the AU Committee of Eminent African Jurists which was mandated

²⁰⁵⁶ F. Olonisakin, 'An International War Crimes Tribunal for Africa: Problems and Prospects', 9 *African Journal of International and Comparative Law* (1997) 822-835, at 824 and 835.

²⁰⁵⁷ Treaty Establishing the African Economic Community, Article 18.

²⁰⁵⁸ Constitutive Act of the African Union, Articles 5 (d) and 18; Protocol of the Court of Justice of the African Union (11 July 2003), Article 2(2).

²⁰⁵⁹ See B. Tchikaya, 'La juridictionnalisation du règlement des conflits internationaux en Afrique', 2 *Revue du droit public et de la science politique en France et à l'étranger* (2006) 459-486.

²⁰⁶⁰ Assembly/AU/Dec.45 (III) Rev.1, Decision on the Seats of the African Union, 3rd Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 6-8 July 2004, para.4.

²⁰⁶¹ K. Kindiki, 'The Proposed Integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal Difficulties and Merits', 15 *African Journal of International and Comparative Law* (2007) 138-146, at 138.

²⁰⁶² Executive Council of the African Union, 'Report on the Decision of the Assembly of the Union to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union', EX.CL/162, Abuja (Nigeria), 24-28 January 2005, at 1-2. See also Amnesty International, above note 1888, at 8.

to consider the options available for the trial of Hissène Habré and “to make concrete recommendations on the ways and means of dealing with issues of a similar nature in the future”.²⁰⁶³ In its reports, the Committee recommended that “the on-going process that should lead to the establishment of a single Court at the African Union level should confer criminal jurisdiction on that Court”.²⁰⁶⁴ It added:

The Court must be allowed to operate as an independent institution free from all forms of pressure, so that it can be impartial, and be seen to be impartial. There should be a rapid response mechanism within the Court to ensure that Africa can act with dispatch in situations of gross violations and so give teeth to the notion of “total rejection of impunity”. There should be an ad hoc monitoring mechanism to ensure that the independence and impartiality of the institutions would exist both in theory and in fact. Such monitoring would affirm the credibility of the regional institutions and so offer credible regional options.²⁰⁶⁵

In July 2008, the process of integration of the two previous Courts (the AfCHPR and the AU Court of Justice) into one single institution gave birth to the AfCJHR.²⁰⁶⁶ However, the drafters did not provide the Court with criminal jurisdiction, although this was still necessary for states affected by conflicts.²⁰⁶⁷ The Statute annexed to the Protocol of 2008 provides that the Court “shall have two (2) sections: a General Affairs Section composed of eight (8) Judges and a Human Rights Section composed of eight (8) Judges”.²⁰⁶⁸ Whilst the General Affairs Section “shall be competent to hear all cases submitted under (...) this Statute *save those concerning human and/or peoples’ rights issues*”,²⁰⁶⁹ the Human Rights Section “shall be competent to hear all cases relating to human and/or peoples’ rights”.²⁰⁷⁰ The reasons why criminal jurisdiction was not conferred on the Court in spite of all the previous calls to do so were not specified. But, one may argue in favour of the belief in the potential efficacy of the ICC jurisdiction on the continent. There were apparently some hesitations to duplicate its mandate to try international crimes. As a reminder, African states had already declined to

²⁰⁶³ Assembly/AU/Dec.103 (VI), above note 1948, para.4.

²⁰⁶⁴ African Union, above note 1951, para.39.

²⁰⁶⁵ *Ibid.*, paras.40-42.

²⁰⁶⁶ Protocol on the Statute of the African Court of Justice and Human Rights (1 July 2008), Articles 1 and 2.

²⁰⁶⁷ J. M. Isanga, ‘The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?’, 11 (2) *Santa Clara Journal of International Law* (2013) 267-302, at 296.

²⁰⁶⁸ Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 16.

²⁰⁶⁹ *Ibid.*, Article 17 (1).

²⁰⁷⁰ *Ibid.*, Article 17 (2).

create a regional criminal court in the 1980s to deal with international crimes in Africa given the fact that an international criminal tribunal was going to be established at the global level.

Until July 2008, there was not any open crisis between Africa and the ICC. However, the process for the establishment of the AU Criminal Jurisdiction was re-launched as a consequence of African contestations against the so-called abusive application of the principle of universal jurisdiction and indictments of some African leaders in Europe. Everything started in February 2009 after Germany had executed a French arrest warrant against Rose Kabuye, the then Chief of Protocol to the President of the Republic of Rwanda, Paul Kagame.²⁰⁷¹ The AU Assembly requested “the Commission, in consultation with the African Commission on Human and Peoples’ Rights, and the African Court on Human and Peoples’ Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes (...)”.²⁰⁷² This request was later strengthened, but not triggered, by the deterioration of the relationships between Africa and the ICC. In fact, the ICC Prosecutor decided to indict President Omar Al Bashir on 14 July 2008 and obtained an arrest warrant against him on 4 March 2009. These ICC’s proceedings were connected for the first time to the project for the creation of the AU Criminal Court only in July 2009.²⁰⁷³ Therefore, it does not appear to be accurate to assert that the project for an African regional criminal court intended to be simply “a conscious snub to the ICC by the AU”.²⁰⁷⁴ The project was rather previous to the ICC crisis both in context (contestation of abusive application of universal jurisdiction) and remote origin (the late 1960s, 1970s and early 1980s).

There were also changes in the law on which the establishment of the AU Criminal Court could be based. The aforementioned sovereign-oriented approach of the OAU has been mitigated by new principles and objectives enshrined in the AU Constitutive Act relating to human rights protection and the fight against impunity. It suffices to recall the Union’s right to intervene in a member state in the event of genocide, crimes against humanity and war crimes. Moreover, the ACDEG has provided that “perpetrators of unconstitutional change of

²⁰⁷¹ Assembly/AU/Dec.213(XII), above note 862, para.4

²⁰⁷² *Ibid.*, para.9.

²⁰⁷³ Assembly/AU/Dec.245 (XIII) Rev.1, above note 1119, para.5.

²⁰⁷⁴ G. Abraham, ‘Africa’s Evolving Continental Court Structures: at the Crossroad?’ Occasional Paper 209, South African Institute of International Affairs - Governance and African Peer Review Mechanism Programme (January 2015), at 12.

government may also be tried before the competent Court of the Union”.²⁰⁷⁵ The creation of this court could also be founded on article 5 of the Constitutive Act which permits the AU Assembly to establish other organs of the Union in addition to those which are explicitly provided by the Constitutive Act.²⁰⁷⁶ The establishment of the AU Criminal Court is consistent with the UN Charter which promotes regionalism under Chapter VIII concerning “regional arrangements”. Finally, it is a truism that states are sovereign and free to establish any court they want for the purpose of prosecuting and trying collectively crimes that they consider of concern to all of them within their specific community,²⁰⁷⁷ regardless of whether these crimes are cross-border, transnational or international by nature.

b) The Drafting Process of the Court’s Statute

It was in July 2009 that the AU Assembly renewed its request of February 2009 to the AU Commission to examine the implications of the AfCHPR being empowered to try international crimes. The drafting process of the Court’s Statute started in January 2010 when the AU Commission contacted the Pan-African Lawyers Union (PALU) “to produce a detailed study with comprehensive recommendations and a draft legal instrument amending the Protocol on the Statute of the African Court of Justice and Human Rights”.²⁰⁷⁸

The mandate given to PALU implies three observations. First of all, it was no longer the AfCHPR which was going to be given criminal jurisdiction but rather the AfCJHR whose founding treaty was not yet in force. This choice between the two courts was quite logical because the AfCHPR was transitionally working until the AfCJHR would become operational. Secondly, the proposed AU Criminal Court was indeed a proposition to include a third section within the AfCJHR by means of amendments to its founding treaty of July 2008 and Statute annexed to it. The General Affairs Section and the Human Rights Section should therefore coexist with the International Criminal Law Section. Thirdly, the AU Commission chose to mandate PALU to draft the Court’s legal instrument instead of resorting to the

²⁰⁷⁵ African Charter on Democracy, Elections and Governance, Article 25 (5).

²⁰⁷⁶ The organs of the AU are the Assembly of the Union; the Executive Council; the Pan-African Parliament; the Court of Justice; the Commission; the Permanent Representatives Committee; the Specialised Technical Committees; the Economic, Social and Cultural Council; the Financial Institutions (African Central Bank, African Monetary Fund, African Investment Bank).

²⁰⁷⁷ Soma, above note 206, at 529.

²⁰⁷⁸ D. Deya, ‘Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes’, *Openspace on International Criminal Justice* (2012) 22-26, at 24.

AUCIL. Yet, the AUCIL was already created²⁰⁷⁹ and its Statute adopted in February 2009. Its eleven members were appointed in July 2009,²⁰⁸⁰ while its first session took place from 3 to 6 May 2010 in Addis Ababa.²⁰⁸¹ In terms of technical expertise, the AUCIL was the best institution to draft the amendments to the Protocol of the Statute of the AfCJHR due to the highest qualification of its members who should have “recognised competence in international law”.²⁰⁸² Instead, PALU is simply a civil society organisation founded in 2002 and gathering African lawyers and bar associations in view of advancing law and the legal profession, rule of law and socio-economic development in Africa. The choice by the AU Commission to consult such a private organisation rather than the AUCIL was made in the implementation of the Memorandum of Understanding Establishing the Framework for Cooperation and Collaboration between the AU and PALU, adopted in May 2006.²⁰⁸³ But, there were also some drawbacks. On the one hand, the choice of PALU implied additional financial costs for the AU Commission that could not have been paid should the work have been done by the AUCIL as an organ of the Union. On the other hand, and more important, the draft legal instrument to propose was inclined to a deficit of technical quality.

Unsurprisingly, the drafting process of the Court’s legal instrument was very short. PALU submitted its first draft report and draft legal instrument to the AU Commission in June 2010,²⁰⁸⁴ only 5 months after being contacted. The second submission was made in August 2010 after the incorporation of directives and suggestions of the Office of the Legal Counsel of the AU Commission. PALU’s work was validated during workshops hosted by the Pan-African Parliament in August and November 2010 with the participation of representatives of the AU (including the AU Commission and the Economic, Social and Cultural Council

²⁰⁷⁹ African Union Non-aggression and Common Defence Pact, Articles 11 (b) (iii) and 14.

²⁰⁸⁰ Assembly/AU/Dec.249(XIII), Decision on the Report On The Election Of Members Of The African Union Commission On International Law (Doc.Ex.CL/534(XV)), 13th Ordinary Session of the Assembly of the African Union, Sirte (Libya), 1-3 July 2009, para.2.

²⁰⁸¹ B. Tchikaya, ‘La Commission de l’Union africaine sur le droit international: bilan des trios premières années’, *LVIII Annuaire français du droit international* (2012) 307-317, at 309; A. Kilangi, ‘The African Union Commission on International Law (AUCIL): An Elaboration of its Mandate and Functions of Codification and Progressive Development of International Law’, 1 *AUCIL Journal of International Law* (2013) 1-27, at 4.

²⁰⁸² Statute of the African Union Commission on International Law, Article 3 (1).

²⁰⁸³ Memorandum of Understanding Establishing the Framework for Cooperation and Collaboration between the African Union and the Pan African Lawyers Union (5 May 2006), Articles 1 and 2.

²⁰⁸⁴ Deya, above note 2078, at 24.

(ECOSOCC)),²⁰⁸⁵ the RECs and private institutions such as the Centre for Human Rights of Pretoria University.²⁰⁸⁶ States were involved in the drafting process during the meeting of governmental experts, held in March, May and November 2011 in Addis Ababa, to discuss PALU's draft report and draft legal instrument.²⁰⁸⁷ Another meeting of these experts was held in Addis Ababa from 7 to 11 May 2012. It was followed by the meeting of Ministers of Justice/Attorneys General on Legal Matters, attended by some 39 AU member states from 14 to 15 May 2012, in order to finalise the draft Protocol on Amendments to the Protocol on the Statute of the AfCJHR.²⁰⁸⁸

However, the AU Assembly was not in a position to adopt the draft legal instrument during the session of July 2012. The reason was that states did not yet agree on the definition of the crime of unconstitutional change of government, whether to include or not peoples' uprisings within its constituent elements.²⁰⁸⁹ The issue emerged after the events that occurred in North Africa, in Tunisia, Libya and Egypt, in the context of the so-called Arab Spring in 2011 and 2012.²⁰⁹⁰ This time, the AU Commission was requested to obtain inputs from the AUCIL and the ACmHPR.²⁰⁹¹

Thus, a workshop was convened in Arusha (Tanzania) from 19 to 20 December 2012, gathering these three AU organs, to consider the controversial definition in question. As a result, it was proposed that where the PSC determined that "the change of government through popular uprising is not an unconstitutional change of government the Court shall not

²⁰⁸⁵ Constitutive Act of the African Union, Article 22. It provides: '1. The Economic, Social and Cultural Council shall be an advisory organ composed of different social and professional groups of the Member States of the Union. 2. The functions, powers, composition and organization of the Economic, Social and Cultural Council shall be determined by the Assembly'.

²⁰⁸⁶ Deya, above note 2078, at 24.

²⁰⁸⁷ Amnesty International, above note 1888, at 10.

²⁰⁸⁸ Executive Council of the African Union, 'The Report, the Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General, Min/Legal/Rpt., Addis Ababa (Ethiopia), 9-13 July 2012, paras.3-4.

²⁰⁸⁹ Executive Council of the African Union, above note 1746, at 24.

²⁰⁹⁰ African Union, 'Report of the Fifth Ordinary Session of the African Union Commission on International Law', AUCIL/Legal/ Rpt (V), Addis Ababa (Ethiopia), 26 November -5 December 2012, para.28 (iii).

²⁰⁹¹ Assembly/AU/Dec.427(XIX), Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court on Human and Peoples' Rights (Doc. Assembly/AU/13(XIX)a), 19th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 15-16 July 2012, para.3.

be seized of the matter”.²⁰⁹² In the end, the proposal was not approved by states during the meetings of the Specialised Technical Committee (STC) on Justice and Legal Affairs, held in Addis Ababa from 6 to 14 May 2014 (experts), and from 15 to 16 May 2014 (ministerial level).²⁰⁹³ Due to the lack of consensus, the popular uprising was simply deleted in the final draft Protocol that was submitted to the AU Assembly and adopted by it in Malabo (Equatorial Guinea) on 27 June 2014.²⁰⁹⁴ It is this so-called Malabo Protocol which establishes what is generically referred to as the AU Criminal Court. The Malabo Protocol is not just a “protest treaty”²⁰⁹⁵ against the global system of international criminal justice. As a mechanism of judicial self-reliance, it could extend the reach of international criminal justice in Africa in view of the broader list of crimes included and in regard to contracting states that may not be parties to the ICC Statute; what is potentially a good thing.

2.1.3.2. The Status of the Court

In creating a judicial institution of an international character, there are preliminary issues relating to its status which must be carefully considered. Such issues include two main questions about the AU Criminal Court. First, what did inform the decision to establish a permanent rather than a non-permanent jurisdiction? Second, did the AU follow a maximalist approach in establishing a single court or a minimalist approach, implying that this jurisdiction would coexist with several other tribunals established and having primacy over it in the framework of the RECs? These two questions were not scrutinised during the drafting

²⁰⁹² Executive Council of the African Union, ‘Report on the Workshop on the Definition of Crimes of Unconstitutional Change of Government and Financial and Structural Implication, 19–20 December 2012 (AfCHPR/LEGAL/Doc.3)’, EX.CL/773(XXII) Annex 1, 21–25 January 2013, para.12.

²⁰⁹³ Executive Council of the African Union, ‘The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs – Report (STC/Legal/Min/Rpt.)’, EX.CL/846(XXV), Malabo (Equatorial Guinea), 20-24 June 2014, paras.1 and 22-23. Accordingly, the African Union Commission on International Law also deleted popular uprising in the final version of its proper definition of unconstitutional changes of government. See African Union Commission on International Law, ‘Records of Activities of AUCIL and Extraordinary Sessions, Legal Opinions, Forum of Experts of International Law and African Union Strategic Plan for the Period 2010-2012’, *Yearbook of African Union Commission on International Law* (2013), at 82.

²⁰⁹⁴ Assembly/AU/Dec.529(XXIII), Decision on the Draft Legal Instruments (Doc. Assembly/AU/8(XXIII), 23th Ordinary Session of the Assembly of the African Union, Malabo (Equatorial Guinea), 26-27 June 2014, para.2 (e).

²⁰⁹⁵ A. Abass, ‘The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects’, *LX Netherlands International Law Review* (2013) 27-50, at 42.

process of the Malabo Protocol. The mere creation of the International Criminal Law Section of the AfCJHR has given birth to a giant and complex court's system. This complexity relates to the default to opt for one single court for the African continent (a) and to the establishment of a permanent rather than a non-permanent criminal jurisdiction (b).

a) The Case for a Single Regional Criminal Jurisdiction for Africa

The starting point of the debate is the AU decision of July 2009 which indicated that the proposed AU Criminal Court “would be complementary to national jurisdiction and processes for fighting impunity”.²⁰⁹⁶ No reference was made to tribunals other than domestic courts. Surprisingly, the Malabo Protocol (Annex) provides: “The jurisdiction of the Court shall be complementary to that of the National Courts and to the Courts of the Regional Economic Communities where specifically provided for by the Communities”.²⁰⁹⁷ The reasons why the drafters have departed from the original will of the AU Assembly to include jurisdictions of RECs in the system of the AU Criminal Court are not specified in the *travaux préparatoires*. But, one may suppose that the Malabo Protocol (Annex) espouses the minimalist approach to Pan-Africanism and African regionalism.

The meaning of the minimalist approach is closely related to controversies over the way in which African unity and so Pan-Africanism should be achieved. The Conference of African Independent States, held in Accra (Ghana) on 15 April 1958, had particularly insisted on uniting all African states in one continental organisation. In this organisation, African unity could have been based on three objectives according to President Kwame N'krumah: economic integration, common foreign policy, common defence and a united government of Africa.²⁰⁹⁸ This maximalist approach to Pan-Africanism suggested that multiplication of regional groupings was a factor of division of African states depending on geography, colonial history and so linguistic and economic ties. Instead, the Conference of African peoples, which took place in Accra from 5 to 13 December 1959, was reluctant to a policy of continentalisation. While agreeing with the necessity for African unity, the Conference concluded that states should first and foremost create specific groupings on the bases of their

²⁰⁹⁶ Assembly/AU/Dec.245 (XIII) Rev.1, above note 1119, para.5.

²⁰⁹⁷ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 46H.

²⁰⁹⁸ O. Ndeshyo, A. Ntumba Luaba and D. Dheba, *L'antidérive de l'Afrique en désarroi : le Plan d'action de Lagos* (Kinshasa : Presses Universitaires du Zaïre, 1985), at 148.

location, economic, linguistic and cultural connections as initial steps towards the realisation of continental unity, the ultimate objective.²⁰⁹⁹ In other words, and for the first time, it was agreed that continentalisation should be progressively realised, step by step, through the division of Africa into different regions and state groupings.²¹⁰⁰ These two visions were confronted during the Conference of Addis Ababa for the creation of the OAU in 1963. The proponents of immediate continentalisation constituted the so-called progressist group, led by Presidents Kwame N’krumah (Ghana) and Sekou Touré (Guinea/Conakry). The other group consisted of the so-called realist states, led by Presidents Félix Houphouët Boigny and Léopold Sédar Senghor (Senegal). At the end of negotiations, a compromise was found. The OAU Charter provided for a minimum cooperation between states at the continental level. States would have to consolidate their independence before embarking progressively on the path of Africa’s integration. They were also free to create their specific regional groupings in conformity with relevant criteria defined by the OAU Council of Ministers in August 1963.²¹⁰¹ This minimalist approach therefore leaves minor powers to the continental level but tends to include regions as primary spaces from which African unity has to be built and realised. The coexistence between continental and regional institutions is its main characteristic. This logic persists with the advent of the AU. President Kwame N’krumah’s maximalist approach was revived by Muḥammad Kadhafi, who was defending the establishment of the United States of Africa.²¹⁰² But, views from the majority of states such as Nigeria and South Africa were in favour of the minimalist position.²¹⁰³ In any case, if the continental level is vested with more power in the framework of the AU than it was under the OAU, it is still a fact that RECs remain the pillars of Africa’s integration.

The drafters of the Malabo Protocol seem to have followed the minimalist approach: the AU Criminal Court should coexist with courts of justice of RECs, the latter having even jurisdictional primacy over it. This position can be politically justified. However, the implication of such courts in criminal matters is likely to render justice difficult to administrate. First of all, the financial burden to operationalise the AU Criminal Court

²⁰⁹⁹ *Ibid.*, at 149.

²¹⁰⁰ Organisation Internationale de la Francophonie, above note 684, at 283-284.

²¹⁰¹ CM/Res. 5 (I), above note 1575, para.2.

²¹⁰² G. Ngoie Tshibambe, ‘Etats-Unis d’Afrique : analyse généalogique d’une vision’, 426 *Congo-Afrique* (June-July-August 2008) 507-524, at 510-516.

²¹⁰³ *Ibid.*

become aggravated owing to the costs that states must pay to make other potential eight criminal jurisdictions attached to those recognised RECs effective. Secondly, states normally belong to more than a REC. For example, the DRC is a member of three RECs: SADC, COMESA and ECCAS. It is not excluded that it consents to their respective criminal jurisdictions. In such a situation, the multiple memberships to RECs reduce the state capacity to contribute substantially to the funding of common and duplicated criminal institutions. Thirdly, and more important, there are technical drawbacks. On the one hand, the AU Criminal Court may prove to be in fact useless due to the lack of cases to handle. This is because of the double complementarity principle established by the Malabo Protocol (Annex), requiring that the Court intervenes only when states fail to carry out investigations and prosecutions against the alleged perpetrators, and when the case is not or has not been prosecuted or tried before a regional court of justice. On the other hand, the Malabo Protocol (Annex) creates unnecessary competing criminal jurisdictions. In this regard, “the question is which of the RECs’ courts should be considered for the purposes of the complementarity principle where the national state of an accused person holds multiple memberships”.²¹⁰⁴ The Malabo Protocol (Annex) is dramatically silent on the possible coordination of these courts and their mutual cooperation.

After all, there are two additional reasons why the Malabo Protocol (Annex) should have opted for the maximalist approach. First, the proper dynamic of African regionalism towards continental unification shows that RECs are themselves in a process of rationalisation. They have been grouped into two main regional blocs of integration in order to avoid duplication of objectives, programs and institutions in view of reaching in time “the final stage of the political and economic integration of the continent”.²¹⁰⁵ One of these blocs is constituted by SADC-COMESA-EAC-IGAD and the other by ECOWAS-ECCAS-AMU-CEN-SADC.²¹⁰⁶

²¹⁰⁴ A. Abass, ‘Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges’, 24 (3) *European Journal of International Law* (2013) 933–946, at 945.

²¹⁰⁵ African Union Non-aggression and Common Defence Pact, Article 4 (d).

²¹⁰⁶ Assembly/AU/Dec.392(XVIII), Decision on African Integration (Doc: EX.CL/693(XX)), 18th Ordinary Session of the Assembly of the African Union, Malabo (Equatorial Guinea), 29-30 January 2012, para.7; Assembly/AU/Dec.394(XVIII), Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area (Doc: EX.CL/700(XX)), 18th Ordinary Session of the Assembly of the African Union, Malabo (Equatorial Guinea), 29-30 January 2012, para.4 (i) and (ii); Assembly/AU/Decl.1(XVIII), Declaration on Boosting Intra-African Trade and the Establishment of a Continental Free Trade Area (CFTA), 18th Ordinary Session of the Assembly of the African Union, Malabo (Equatorial Guinea), 29-30 January 2012, para.6.

Therefore, whereas there is a will to speed up the process of integration towards continental unification, the trend which consists of creating and increasing the number of regional institutions runs against this backdrop. Second, in 2012, it was envisaged to create an arbitral section within the AfCJHR as part of the institutional mechanism of the proposed Continental Free Trade Area (CFTA).²¹⁰⁷ For the first time, one jurisdiction was foreseen to be relevant for the settlement of disputes on the continent without any role being left to courts of justice of RECs.²¹⁰⁸ Due to all the drawbacks mentioned above, the Malabo Protocol (Annex) could follow the same dynamic of unification. The AU had the power to make such an institutional rationalisation and harmonisation.

b) The Case for a Permanent or Non-Permanent Court

As a reminder, the AU Assembly chose to confer criminal jurisdiction on the AfCJHR rather than creating a separate criminal tribunal comparable to an ICC made in Africa. This choice was quite logical because, as stated above, it was already decided in 2004 to merge the AU's existing courts as a matter of institutional rationalisation and for reducing financial costs. Creating a separate criminal jurisdiction could have been in contradiction with this policy.²¹⁰⁹ Nevertheless, the form of the criminal jurisdiction to create was not thoroughly considered during the drafting process of the Malabo Protocol.

Like the Court itself, its International Criminal Law Section shall be permanent. This means that the criminal jurisdiction will be also exercised permanently. In other words, the Court is not designed to deal with particular situations with a limited mandate in time. But, its permanence is to some extent mitigated by the fact that the Court shall sit in ordinary or extraordinary sessions,²¹¹⁰ and so judges will perform their functions on a part-time basis.²¹¹¹ Only

²¹⁰⁷ B. Kahombo, 'L'intensification du commerce intra-africain et l'accélération de la création de la Zone continentale de libre-échange : aperçu global sur le nouveau Plan d'action de l'Union africaine', in O. Ndeshyo (ed.), *Le nouvel élan du panafricanisme, l'émergence de l'Afrique et la nécessité de l'intégration continentale – Les actes des journées scientifiques consacrées à la commémoration de la journée de l'Afrique : 2011-2012-2013-2014* (Kinshasa : Cededurk, 2015)123-151, at 142.

²¹⁰⁸ *Ibid.*

²¹⁰⁹ Manirakiza, above note 595, at 49.

²¹¹⁰ Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 20. This Article provides: '1. The Court shall hold ordinary and extraordinary sessions. 2. The Court shall decide each year on the periods of its ordinary sessions. 3. Extraordinary sessions shall be convened by the President or at the request of the majority of the Judges'.

“the President and Vice President reside at the seat of the Court”.²¹¹² However, for a permanent criminal jurisdiction, it is hard to imagine that sessions would permit criminal judges to be out of the seat of the Court during a large period of the year like their counterparts sitting in the General Affairs and Human Rights Sections. The reason is that criminal justice is a matter of daily administration, particularly if the accused persons are in detention. The procedure is characterised by a high degree of oral submission and publicity before the Court. Hence, procedural motions to be dealt with and the length of hearings must make these judges almost permanent at the seat of the Court like the President and Vice-President. The OTP which shall not only support the accusation before the Court but also monitor situations occurring on the continent will also be necessarily permanent. The same observation applies to the Registry which shall be responsible for the administration of the Court,²¹¹³ in addition to its traditional judicial mission to record the Court’s hearings. This permanent character of the Court will imply enormous financial costs for African states. Yet, the AU has wanted to avoid these costs through the rationalisation of its institutions.

Another judicial option was possible: the creation of a non-permanent criminal jurisdiction. The Malabo Protocol (Annex) could include article 19(2) of the Protocol of the Court of Justice of the AU of July 2003, which was deleted without justification in the Protocol on the Statute of the AfCJHR of July 2008. This article provided that the AU Assembly could confer on the Court jurisdiction over *any dispute* other than those referred to in its first paragraph.²¹¹⁴ The term *any dispute* could be given a broad meaning in order to cover criminal matters. For example, such conferral of jurisdiction could be decided on matters in which competent states remain inactive or that engender an international dispute as it has been observed in the

²¹¹¹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 5(4).

²¹¹² *Ibid.*, Article 22 (5).

²¹¹³ *Ibid.*, Article 22B (5).

²¹¹⁴ Article 19(2) of this Protocol reads as follows: ‘1. The Court shall have jurisdiction over all disputes and applications referred to it in accordance with the Act and this Protocol which relate to: (a) the interpretation and application of the Act; (b) the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union; (c) any question of international law; (d) all acts, decisions, regulations and directives of the organs of the Union; (e) all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court; (f) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; (g) the nature or extent of the reparation to be made for the breach of an obligation’.

Hissène Habré case. In this scenario, the AU Criminal Court could have received the function analogues to that of an *ad hoc* international criminal tribunal, intervening only in exceptional circumstances when a particular situation was referred to it. If the Malabo Protocol (Annex) could still have to provide for the applicable law in such circumstances, it was not necessary to institutionalise a permanent criminal jurisdiction as described above. Rather, the AU needed to appoint a Special Prosecutor attached to the Court, vested with the mandate to monitor and investigate permanently situations all over Africa. It could have been up to this Special Prosecutor to identify situations or cases which could deserve regional judicial action and to recommend to the AU Assembly or the PSC either to refer the matter to the Court or to choose any other option of regional criminal justice mentioned above, that is, to delegate jurisdiction to a third member state or to create a hybrid criminal tribunal. The involvement of the AU Assembly or the PSC as political bodies in this system of justice could not hamper justice. Firstly, this involvement could be a test of good faith on the part of the AU to fight impunity. Secondly, at least for crimes falling under its competence, the ICC's eyes would be also permanent in a manner that when a situation or a case is not dealt with by the competent state or the AU, there would be no reason to complain about its intervention to deliver justice. In this regard, the AU Special Prosecutor could work hand in hand with the ICC Prosecutor and exchange judicial information, documents and evidence. Likewise, if the AU decided to resort to any of the three models of regional criminal jurisdiction, the ICC could support the proceedings in the same manner or even more and up to providing financial assistance.

This kind of non-permanent criminal jurisdiction had several advantages as a matter of judicial policy. First, it gives a margin of appreciation to the AU Assembly to decide, on a case-by-case basis, whether to trigger the regional criminal jurisdiction or not. In this process of decision-making, various factors could be put into consideration, including the political sensibility of a situation or a case to be taken out of Africa and the availability of financial means. Second, it would avoid unnecessary conflicts with the ICC. This is important because there has been a perception that calls for the establishment of the AU Criminal Court “are manifestly meant to detract from the progressive development of international criminal justice”.²¹¹⁵ Third, the exercise of regional criminal jurisdiction would remain very exceptional. Positive cooperation would be strengthened between the ICC and the AU through its Special Prosecutor. The operations of this kind of regional criminal jurisdiction would be

²¹¹⁵ Murungu, above note 596, at 1086.

less heavy to sustain than the institution established by the Malabo Protocol which poses questions about its viability.

2.2. The Viability of the Criminal Court of the African Union

The Malabo Protocol was badly drafted. This lack of technical quality has increased skepticisms about the viability of the AU Criminal Court in addition to initial concerns over the alleged will of African states to undermine the ICC justice system. Max Du Plessis has qualified this kind of law-making as “a case of irresponsible treaty making”.²¹¹⁶ There are several reasons to believe that the Court’s viability could be undermined if there is not sufficient political will to support its mandate or if the legal framework is not improved. These reasons relate to conditions of the Court’s operationalisation (2.2.1), the ambition of its jurisdiction (2.2.2), the existence of a number of factors that can hamper its work (2.2.3) and the need for effective cooperation with African states (2.2.4).

2.2.1. The Conditions of Operationalisation

There are three conditions to fulfill so that the AU Criminal Court becomes operational: the ratification of the Malabo Protocol (2.2.1.1), the operationalisation of the Court’s structure (2.2.1.2) and the completion of the definition of its applicable law (2.2.1.3).

2.2.1.1. The Ratification of the Malabo Protocol

A short reminder of the succession of AU courts is important to understand the issue of ratification of the Malabo Protocol. The AfCHPR was created by the Ouagadougou Protocol in June 1998. In 2000, the Constitutive Act established the AU Court of Justice, organised by the Protocol of July 2003. The merge of the two courts gave birth to the AfCJHR, created by the Protocol in July 2008. The Malabo Protocol of June 2014, by granting criminal jurisdiction to the latter Court, changed its name. It became the African Court of Justice and Human and Peoples’ Rights (AfCJHR).²¹¹⁷ In view of this complexity of the succession of courts, Don Deya, the former Chief Executive of PALU, wrote:

There are two points to make with regard to the succession of Courts. The first is that the second and third Courts might never be practically established. There could very easily be a ‘transition’

²¹¹⁶ M. Du Plessis, ‘Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes’, Institute for Security Studies Paper No.235 (June 2012), at 10.

²¹¹⁷ Protocol on the Statute of the African Court of Justice and Human Rights, Article 1(6).

from the existing Court to the fourth Court. The second point is that future phases of the Court do not hinder operationalisation of the current phases of the Court. Thus, the existing African Court on Human and Peoples' Rights – based in Arusha, Tanzania – will continue to function according to its founding Protocol until the envisaged 'Merged' Court comes into being. But if the 'Merger' Protocol never comes into force, then the Human and Peoples' Rights Court will continue to operate as it does now. Similarly, the 'Merged' Court would – once established – continue to function according to its founding Protocol until the eventual tri-mandate, African Court of Justice and Human and Peoples' Rights comes into being. But if this fourth Court is never created, then the third Court would continue as is. This is a pragmatic compromise.²¹¹⁸

The Malabo Protocol “shall enter into force thirty (30) days after the deposit of instruments of ratification by fifteen (15) Member States”.²¹¹⁹ However, it has to be noted that it amended the Protocol of July 2008 which was not yet in force, whereas the better course could have been to re-write the instrument and avoid a useless overlapping of protocols. To be clear, one must observe that the Malabo Protocol is not an independent treaty because its sole ratification would not suffice to allow the Court to start working without the entry into force of the founding Protocol of July 2008. Therefore, it is not sure if a state which ratifies the Protocol of July 2008 will consent to the Malabo Protocol as well. Similarly, those states which only ratify the Malabo Protocol may remain outside the Court's jurisdiction if they do not also consent to the founding Protocol of July 2008.

Still, there are some serious doubts whether African states will be ready to ratify the Malabo Protocol and to leave free hands to the AfCJHPR to exercise independently its criminal jurisdiction. This is because many of these states do not accept individual access to judicial mechanisms for human rights protection. There are various attempts to prevent a number of African regional courts from reviewing human rights complaints.²¹²⁰ The most important example is the suspension of the SADC Tribunal in 2010 due to the increasing and successful individual petitions against member states, notably Zimbabwe, following disputes over arbitrary land seizure.²¹²¹ In August 2012, Heads of States gathered in Maputo (Mozambique)

²¹¹⁸ Deya, above note 2078, at 23.

²¹¹⁹ Protocol on the Statute of the African Court of Justice and Human Rights, Article 11 (1).

²¹²⁰ See K. J. Alter, J. T. Gathii and L. R. Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', 27 (2) *European Journal of International Law* (2016) 293–328.

²¹²¹ B. Kahombo, 'Le chantier de la justice communautaire africaine : entre fragmentation et tentative d'unification', in O. Ndeshyo (ed.), *Le nouvel élan du panafricanisme, l'émergence de l'Afrique et la nécessité de l'intégration continentale – Les actes des journées scientifiques consacrées à la commémoration de la journée de l'Afrique : 2011-2012-2013-2014* (Kinshasa : Editions CEDESURK, 2015)337-348, at 346.

extended this suspension and decided to expunge disputes between member states and individuals from the competences of the Tribunal.²¹²² In February 2013, the decision was transformed into a draft agreement which was consolidated in the new Protocol of the Tribunal laying down its composition, powers, functions, procedures and other related matters,²¹²³ adopted in Victoria Falls (Zimbabwe) on 18 August 2014.²¹²⁴ Likewise, as at August 2017, only 8 states out of thirty that have ratified the Ouagadougou Protocol (Benin, Burkina Faso, Ghana, Ivory Coast, Mali, Malawi, Tanzania and Tunisia) have accepted the jurisdiction of the AfCHPR with respect to individual petitions.²¹²⁵ Worse, Rwanda, the champion of contestations against the application of universal jurisdiction and the ICC, decided to withdraw its declaration accepting the competence of the Court to receive such petitions on 29 February 2016.²¹²⁶ The decision was taken following a claim against Rwanda by a leading opposition politician, Victoire Ingabire, alleging that she had been imprisoned for genocide denial in violation of the ACHPR and for political reasons.²¹²⁷ While this withdrawal decision had no consequence on the Ingabire's complaint insofar as it could not affect the pending case retroactively, Rwanda decided to boycott the Court's hearings which were scheduled to start on 27 March 2017.²¹²⁸ Thus, if most African states cannot even

²¹²² F. Cowell, 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction', 13 (1) *Human Rights Law Review* (2013) 153-165, at 154. See also A. Van der Vleuten and M. Hulse, 'Governance Transfer by the Southern African Development Community (SADC)', SFB-Governance Working Paper Series No.48 (December 2013) 1-98, at 61.

²¹²³ Kahombo, above note 2121, at 346.

²¹²⁴ Protocol on the Tribunal in the Southern African Development Community (2014), Articles 33 and 34 <<http://www.tralac.org/images/Resources/SADC/SADC%20Protocol%20on%20the%20Tribunal%202014.pdf>> accessed 21 March 2017.

²¹²⁵ See 'Statistics of Ratification –Declaration –Cases', <<http://en.african-court.org/index.php/basic-documents>> accessed 30 August 2017.

²¹²⁶ Republic of Rwanda, 'Ministry of Justice of the Republic of Rwanda: Clarification', <http://www.minijust.gov.rw/fileadmin/Documents/Photo_News_2016/Clarification2.pdf> accessed 21 March 2017.

²¹²⁷ W. Engler, 'Rwanda Withdraws Access to African Court for Individuals and NGOs', *International Justice Resource Center* (14 March 2016) <<http://www.ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/>> accessed 21 March 2017.

²¹²⁸ I. Biruka, 'The Rwandan State Has Boycotted the African Court on Human and Peoples' Rights in Case No.003/2014, which Opposes it to Ms. Victoire Ingabire Umuhoza, President of the FDU-Inkingi', *The Rwandan* (20 March 2017) <<http://www.therwandan.com/blog/the-rwandan-state-has-boycotted-the-african-court-on->

consent to individual human rights litigation before the AfCHPR, it is likely that they will not *a fortiori* ratify the Malabo Protocol. The AU Criminal Court may become a still-born criminal jurisdiction or could take many years before it becomes operational.

2.2.1.2. The Operationalisation of the Court's Structure

One of the biggest challenges to overcome is to make operational the whole complex structure of the AfCJHPR. As already stated, the Court has three sections: General Affairs Section, Human, and Peoples' Rights Section and International Criminal Law Section. This tripartite mixture of competences is unprecedented in the world. Unlike the ICC which is an intergovernmental organisation, the AfCJHPR is an organ of the Union. Its International Criminal Law Section which shall be competent to hear all cases relating to the crimes falling within the Court's jurisdiction is structured on the basis of the ICC's model. It consists of three chambers: Pre-Trial Chamber, Trial Chamber and Appellate Chamber.²¹²⁹ The bureau of the Court is constituted by a President and a Vice President elected by the judges between themselves for a term of two years, renewable once.²¹³⁰ But, each judge is in principle elected by the AU Assembly for nine years.²¹³¹ The Pre-Trial Chamber has various powers.²¹³² It shall decide whether to authorise investigations into alleged crimes or not. It shall also decide on issues of the Court's jurisdiction and admissibility of cases, issue arrest warrants against the accused persons or other judicial orders (e.g. for the protection of witnesses, victims and

human-and-peoples-rights-in-case-no-0032014-which-opposes-it-to-ms-victoire-ingabire-umuhoza-president-of-the-fdu-inkingi/> accessed 21 March 2017.

²¹²⁹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Articles 16 (2) and 17 (3).

²¹³⁰ *Ibid.*, Article 22 (1) and (2).

²¹³¹ *Ibid.*, Article 5 (1) to (3). This Article provides: '1. (...) the terms of office of five (5) of the judges elected at the first election shall end after three (3) years, and the terms of another five (5) of the judges shall end after six (6) years. 2. The Judges whose term of office shall end after the initial periods of three (3) and six (6) years shall be determined by lot drawn by the Chairperson of the Assembly or the Executive Council, immediately after the first election. 3. A Judge elected to replace another whose term of office has not expired shall complete the term of office of his or her predecessor'.

²¹³² *Ibid.*, Articles 19 (2) to (3), 46G (3) to (5). It must be noted a bad formulation of Article 19 (1) which reads: 'The Pre-Trial Chamber shall exercise the functions provided for in Article 46F of this Statute'. But, the latter Article 46F does not specify such functions; it rather indicates the triggering mechanisms of the Court's jurisdiction. Thus, the unclear provision should have been written: The Pre-Trial Chamber shall exercise its functions in accordance with Article 46F of this Statute'. This is justified by the fact that the functions of the Pre-Trial Chamber are provided for in other different Articles above.

arrested persons, as well as the presentation of evidence) on the request of the Prosecutor or the defence council. However, the Malabo Protocol (Annex) is silent on the modalities of challenging either the Court's jurisdiction or the admissibility of cases, particularly on the crucial issue of who should have standing to submit an application in this respect: states parties, the accused, the REcs, etc. Maybe, these flaws could be covered by the Court's Rules of Procedure and Evidence.

In contrast, the Malabo Protocol (Annex) has made some progress by omitting the stage of confirmation of charges, which is one of the principal causes of very lengthy trials and resources consumption before the ICC.²¹³³ This stage of procedure did not exist at the ICTY and ICTR. Cases will have to be brought before the Trial Chamber of the AU Criminal Court immediately after investigations. The Trial Chamber shall try the accused persons or receive and examine appeals against decisions of the Pre-Trial Chamber. The Trial Chamber's judgments shall be challenged before the Appeals Chamber. During the trial, a person accused shall have the right to represent himself or herself in person or through an agent.²¹³⁴ This is a significant departure from the ICC's legal framework, as amended in 2013, which allows representation of the accused person only if, owing to his extraordinary public duties at the highest national level, he gets an excuse from presence at trial.²¹³⁵

There is also the OTP, led by a Prosecutor and assisted by two Deputy Prosecutors,²¹³⁶ elected by the AU Assembly. While the Prosecutor enjoys a non-renewable term of seven years, his Deputies are elected for four years terms, renewable once. The OTP shall be responsible for the investigation and prosecution of crimes and act independently as a separate organ of the Court.²¹³⁷ Unlike the ICC Statute, the Malabo Protocol (Annex) also provides for a Defence Office, led by the Principal Defender, who is vested with equal status to that of the Prosecutor. He shall be appointed by the AU Assembly, but the Malabo Protocol (Annex) does not specify any term for his function. This implies that he could be removed *ad nutum* by

²¹³³ W. A. Schabas, 'The International Criminal Court: Struggling to Find its Way', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012) 250-260, at 253-254.

²¹³⁴ *Ibid.*, Article 18.

²¹³⁵ ASP Res. ICC-ASP/12/Res.7, above note 1513.

²¹³⁶ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 22A (1).

²¹³⁷ *Ibid.* Article 22A (6).

the AU Assembly. Such a potential instability of the Principal Defender's position is likely to undermine his independence. The main function of the Defence Office consists of "protecting the rights of the defence, providing support and assistance to defence counsel and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of evidence and advice, and appearing before the Chamber in respect of specific issues".²¹³⁸

The Registry comprises a Registrar and two Assistant Registrars, who shall be appointed by the Court itself, respectively for a non-renewable term of seven years and four years, renewable once. The Registry includes two main units. The first one is the Victims and Witnesses Unit, the function of which consists of ensuring "protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses".²¹³⁹ This Unit is one of the pillars of the protection of victim's rights,²¹⁴⁰ beside the Trust Fund which is established in order cover the costs of "legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families".²¹⁴¹ The second one is the Detention and Management Unit, which shall manage the conditions of detention of accused and convicted persons.²¹⁴²

As one may observe, the whole structure of the AU Criminal Court implies some challenges to overcome for the Court to become fully operational. Of course the appointment on different positions within the Court is not difficult. But, there is a problem with the number of judges, who are only 16 for the three Court's Sections, compared to 18 judges acting for the ICC alone with a limited substantive jurisdiction. It has been posited that the International Criminal Law Section could face some difficulties to sit because of a lack of judges. The opinion was first developed by Max Du Plessis and then followed by Amnesty

²¹³⁸ *Ibid.*, Article 22C (2).

²¹³⁹ *Ibid.*, Article 22B (9) (a).

²¹⁴⁰ See Y. Hamuli Kabumba, 'Le statut juridique de la victime devant la Section du droit international pénal de la future Cour africaine de justice, des droits de l'Homme et des peuples', 93 (3) *Revue de droit international et comparé* (2016) 367-406.

²¹⁴¹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 46M (1).

²¹⁴² *Ibid.*, Article 22B (9) (b).

International.²¹⁴³ These commentators based their position on the premise that six of those judges were the only available human resources for the International Criminal Section. Thus, at the beginning of the drafting process of the Malabo Protocol, Max Du Plessis warned:

(...) the draft protocol already stipulates the quorum for the various chambers of the ICL section: the pre-trial chamber shall be duly constituted by one judge; the trial chamber shall be constituted by three judges and the appellate chamber by five judges. It is clear that the six ICL judges will find themselves spread so thinly over these three chambers as to jeopardise any thought of speedy justice. More problematic is a question of mathematics (...) One judge would preside in the pre-trial chamber, and she could not then preside in the other two chambers in respect of the same case; another three would then preside in the trial-chamber; and a further (and different) five would have to be available to sit in any appeal. A full criminal trial and appeal, involving each of the designated chambers, would accordingly require nine judges, three more than the total allotment of ICL judges appointed to the court's ICL section. In short, there are not enough judges necessary to do anything close to the justice (...).²¹⁴⁴

However, this position found no audience on the part of the drafters of the Malabo Protocol, probably because it was unconvincing. In fact, the premise of the position makes confusion between the conditions for electing judges and their allocation to the Court's sections and chambers. The Malabo Protocol (Annex) does provide that six of the 16 judges of the Court will belong to the International Criminal Law Section, but that they are elected on the list of candidates C, having expertise in international criminal law.²¹⁴⁵ And five judges each shall be elected from amongst the candidates on lists A and B, having expertise in international law (in general) and international human rights as well as humanitarian law respectively.²¹⁴⁶ The quorum of judges for the sections and the chambers is a different issue. The Malabo Protocol (Annex) clearly specifies:

The General Affairs Section of the Court shall be duly constituted by three (3) judges. The Human and Peoples' Rights Section of the Court shall be duly constituted by three (3) judges. The Pre-Trial Chamber of the International Criminal Law Section of the Court shall be duly constituted by

²¹⁴³ M. Du Plessis, 'A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes', *EJIL: Talk* (27 August 2012), <<http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>> accessed 18 April 2016; Amnesty International, above note 1888, at 25.

²¹⁴⁴ Du Plessis, above note 2116, at 7.

²¹⁴⁵ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 4 (1) (iii) and (3).

²¹⁴⁶ *Ibid.*, Article 4 (1) (i)-(ii) and (3).

one (1) judge. The Trial Chamber of the International Criminal Law Section of the Court shall be duly constituted by three (3) judges. The Appellate Chamber of the International Criminal Law Section of the Court shall be duly constituted by five (5) judges.²¹⁴⁷

Mathematically, six judges will be available for the General Affairs and Human and Peoples' Rights Sections, and nine out of 16 judges for the International Criminal Law Section. One judge will remain at the disposal of the Court. Nevertheless, these numbers presuppose that judges may have to deal with a lot of cases because chambers could not be multiplied due to staff insufficiency. It is also supposed that there would not be sick judges or otherwise prevented from sitting with the Court.

Finally, the Court must have facilities for its new structure. This includes a detention house. All this is a matter of financial issues that are examined below. Maybe, upon agreement, the Court could utilise the detention houses of the hosting state before being granted its own facilities.

2.2.1.3. The Completion of the Definition of the Court's Applicable Law

The Malabo Protocol (Annex) does not contain any provision on applicable law by the AU Criminal Court. This silence is similar to that of the ICTY and ICTR Statutes. But, for these *ad hoc* international criminal tribunals, the silence was understandable since they were set up as temporal judicial mechanisms to enforce, in particular circumstances, existing customary international law and general principles of law pursuant to their Statutes. In this regard, judges had a broad margin of discretion to the judges to identify the content of such applicable law to concrete cases brought before the tribunals. This was a challenging task to accomplish beyond any doubt, in particular because the existence of international customary law remained "difficult to demonstrate given the widespread impunity of grave human rights violations"²¹⁴⁸ over the years. In contrast, in order to ensure more compliance with the principle of legality, the discretion of judges in the determination of applicable law is limited before the ICC as provided for in article 21 of the Rome Statute.²¹⁴⁹ Hybrid tribunals also followed a different

²¹⁴⁷ *Ibid.*, Article 10.

²¹⁴⁸ K. Ambos, *Treatise on International Criminal Law – Volume I: Foundations and General Part* (Oxford: Oxford University Press, 2013), at 76.

²¹⁴⁹ This Article provides: '1. The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed

practice. Their specific nature implies that at least the domestic legislation to apply is clearly specified.²¹⁵⁰

In order to cover the silence of the Malabo Protocol (Annex), it may be useful to resort to the Protocol on the Statute of the AfCJHR that it amended. Article 31 of the latter Protocol provides:

1. In carrying out its functions, the Court shall have regard to:
 - a) The Constitutive Act;
 - b) International treaties, whether general or particular, ratified by the contesting States;
 - c) International custom, as evidence of a general practice accepted as law;
 - d) The general principles of law recognized universally or by African States;
 - e) Subject to the provisions of paragraph 1, of Article 46 of the present Statute, judicial decisions and writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the Union, as subsidiary means for the determination of the rules of law;
 - f) Any other law relevant to the determination of the case.
2. This Article shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

This article is however modeled on article 38 of the ICJ Statute providing for sources of law in general international law. While these sources are also applicable in international criminal law,²¹⁵¹ the specificity of the latter discipline must be taken into consideration: the need for clarity, certainty and hierarchy of sources of law as a requirement of the principle of

conflict;(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards. 2. The Court may apply principles and rules of law as interpreted in its previous decisions. 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status’.

²¹⁵⁰ See SCSL Statute, Article 5; EAC Statute, Articles 16 and 22; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004, Articles 2 and 3; Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences within the District Court in Dili in East Timor, Section 3.

²¹⁵¹ Cassese, above note 210, at 26.

legality.²¹⁵² This is the reason why article 21 of the ICC Statute establishes “a three-tiered hierarchy”²¹⁵³ of sources of applicable law. In the first place, the ICC applies its Statute, Elements of Crimes and the Rules of Procedure and Evidence. If there are lacunae, it applies in the second place “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict”. It is admitted that this second source of applicable law before the ICC includes all the primary sources of law mentioned in article 38 of the ICJ Statute, that is, treaties, customs and general principles of law,²¹⁵⁴ apart from principles that can be derived from national law.²¹⁵⁵ If there is still some lacuna, then the ICC is authorised to apply “general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime”. The difference between these two kinds of general principles of law may lead to some confusion.²¹⁵⁶ General principles that are derived from national systems “require analysis and comparison of national law. Reversely, those which underlie the international system do not consider national law but are instead based on the fundamental features and the basic requirement of international criminal justice”.²¹⁵⁷

It is obvious that article 31 of the Protocol on the Statute of the AfCJHR does not specify any hierarchy of sources of applicable law. Its wording is also more general to meet the clarity requirement of international criminal law. The AU Constitutive Act is even quoted before other sources, and eventually before the Malabo Protocol (Annex) which must be included in the category of “international treaties, whether general or particular”. Yet, it is well known that each international criminal court should first pay regard to its Statute as applicable

²¹⁵² *Ibid.* See also M. M. deGuzman, ‘Article 21: Applicable Law’, in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn., München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016) 932-948, at 933

²¹⁵³ W. A. Schabas, *An Introduction to the International Criminal Court* (3rd edn., Cambridge: Cambridge University Press, 2007), at 195.

²¹⁵⁴ *Ibid.*, at 196.

²¹⁵⁵ DeGuzman, above note 2152, at 940.

²¹⁵⁶ D. Akande, ‘Sources of International Criminal Law’, A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford/New York: Oxford University Press, 2009) 41-53, at 51.

²¹⁵⁷ *Ibid.*, at 52. See also F. O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden/Boston: Martinus Nijhoff Publishers, 2008), at 1.

law.²¹⁵⁸ The Statute is crucial for an international tribunal because it sets out its structure and defines its temporal, personal and substantive jurisdiction.²¹⁵⁹ It also provides for some procedures, such as the interplay between the tribunal, states (parties) and their domestic courts. Furthermore, article 31 (f) of the Protocol on the Statute of the AfCJHR refers to a more ambiguous applicable law: “any other law relevant to the determination of the case”.

On the whole, these legal deficiencies imply that the Malabo Protocol (Annex) should include a specific provision on applicable law. Moreover, there is a necessity to draft and adopt not only the Elements of Crimes falling under its substantive jurisdiction but also its Rules of Procedure and Evidence. The Elements of Crimes must clarify the content and understanding of the constituent elements of each crime. The Rules of Procedure and Evidence must regulate the conduct of the pre-trial phase proceedings, trials and appeals, the admission of evidence, the procedures relating to the protection of witnesses and victims as well as any other appropriate matters which may not be determined by the Court’s Statute. These legal instruments (Statute annexed to the Malabo Protocol, Elements of Crimes and Rules of Procedure and Evidence) shall constitute the law that the AU Criminal Court will have to apply in the first place. Their complete availability is the primary condition for the Court’s technical operationalisation.

It is not known who can adopt the Elements of Crimes for the AU Criminal Court, whereas the adoption of the Rules of Procedure and Evidence apparently belongs to the Court itself.²¹⁶⁰ This role granted to the Court to adopt its Rules is similar to the power conferred on the judges of *ad hoc* international criminal tribunals.²¹⁶¹ For the ICC, these legal instruments were adopted by the ASP. However, there is not any similar organ within the structure of the AU Criminal Court. To be logical, the Elements of Crimes should also be adopted by the Court. A problem would arise only with respect to issues of legitimacy of a Court to legislate on behalf of states parties. It has to be reminded that this is the reason why the power to adopt the two legal instruments was given to the ASP within the ICC justice system.

²¹⁵⁸ Akande, above note 2156, at 44.

²¹⁵⁹ *Ibid.*

²¹⁶⁰ Protocol on the Statute of the African Court of Justice and Human Rights, Article 27. This Article reads: ‘1. The Court shall adopt rules for carrying out its functions and the implementation of the present Statute. In particular, it shall lay down its own Rules. 2. In elaborating its Rules, the Court shall bear in mind the complementarity it maintains with the African Commission and the African Committee of Experts’.

²¹⁶¹ ICTY Statute, Article 15; ICTR Statute, Article 14.

2.2.2. The Ambitious Jurisdiction of the Court

The jurisdiction of the AU Criminal Court is very ambitious compared to that of the ICC. This ambition can be seen in regard to the broad list of crimes within the Court's substantive competence (2.2.2.1), the admission of corporate criminal liability (2.2.2.2) and the trigger mechanisms of the Court's jurisdiction (2.2.2.3).

2.2.2.1. The Broad List of Crimes Covered

The AU Criminal Court will have jurisdiction over 14 different crimes: four ICC crimes (aggression, genocide, crimes against humanity and war crimes) and ten more crimes (unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources). The legal criteria which were taken into account to include such an extensive list of crimes within the Court's jurisdiction were not specified. However, Dona Deya has explained:

(...) these crimes incorporate all the elements contained in the Rome Statute, as it represents the consensus of the international community. This (Amendment) Protocol gives effect to the requirement of the ACDEG for the speedy formulation of a new crime of 'unconstitutional change of government' in Africa. This (Amendment) Protocol provides for other serious crimes of concern to African States and the international community, especially those already addressed in Treaties and Protocols of the African Union and of the RECs (...).²¹⁶²

The statement shows that there were apparently two criteria for incorporating these crimes. The first criterion was the necessity to include ICC crimes in the Malabo Protocol (Annex). But, as already demonstrated, the Malabo Protocol has expanded the definitions of these crimes and so contributes to the progressive development of international criminal law. The second criterion consisted of taking into account crimes that were already incorporated in specific African treaties. The drafters of the Malabo Protocol largely copied the provisions of these treaties with more or less some progressive development in the case of unconstitutional change of government, terrorism, mercenarism, corruption, money laundering, trafficking in hazardous wastes and illicit exploitation of natural resources. However, the definitions of piracy, trafficking in persons and trafficking in drugs were drawn from other universal treaties. This method of copying provisions from other treaties implies two main drawbacks.

²¹⁶² Deya, above note 2078, at 25.

First, concerning specific African treaties, crimes were incorporated into the Malabo Protocol (Annex) whereas not all AU member states were parties to each of them or domesticated the definitions provided for therein.²¹⁶³ This raises a problem of legitimacy of the crimes concerned at the continental level. It may hamper accession to the Malabo Protocol for those states which are not yet ready to accept such definitions. Furthermore, if the AU Criminal Court becomes operational, there is a potential that its substantive jurisdiction will be interpreted with due regard to treaties that a state party may not have yet ratified. This is a serious lack of logic in the process of regional law-making.

Second, the copying approach has resulted in the duplication of modes of criminal responsibility. For example, article 28G (b) of the Malabo Protocol (Annex) punishes any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organising, or procurement of any person, with the intent to commit any act of terrorism. Likewise, article 28F (c) incriminates any act of inciting or of intentionally facilitating an act of piracy. Yet, the Malabo Protocol (Annex) provides for similar modes of criminal responsibility in article 28N as follows:

An offence is committed by any person who, in relation to any of the crimes or offences provided for in this Statute:

- i. Incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute;
- ii. Aids or abets the commission of any of the offences set forth in the present Statute;
- iii. Is an accessory before or after the fact or in any other manner participates in a collaboration or conspiracy to commit any of the offences set forth in the present Statute;
- iv. Attempts to commit any of the offences set forth in the present Statute.

Therefore, it can be considered that article 28N contains general provisions on criminal responsibility while the specific articles on crimes in question constitute special rules. In terms of interpretation, the special rules will prevail over the general provisions in case of conflict.

Nevertheless, the expanded substantive jurisdiction remains controversial. Some commentators have argued that the list of crimes is too broad for a Court that is already heavy due to its mandate and runs the risk of facing tremendous financial and human resources

²¹⁶³ Jeßberger, above note 1878, at 77.

constraints.²¹⁶⁴ But, the position is unconvincing. It can be argued that the jurisdictional overreach does not necessarily mean that there are too many cases to try. Since the Court is a continental one, with complementary jurisdiction to national tribunals, the number of cases brought before it would be sensibly reduced. If complementarity with the courts of justice of RECs becomes effective, the AU Criminal Court may even miss cases to try which have not been dealt with by these RECs, when domestic tribunals fail to exercise their primary jurisdiction. Furthermore, the Malabo Protocol (Annex) contains a general clause restricting the Court's intervention to cases of "sufficient gravity".²¹⁶⁵ This gravity threshold must be clearly determined by the Court in order to avoid prosecutions or trials of complaisance and to overwhelm the judges uselessly. Concerning the crimes of corruption and illicit exploitation of natural resources, there is an additional restriction, requiring that the Court proceeds if only the punishable acts in question are "of a serious nature affecting the stability of a state, region or the Union".²¹⁶⁶ It is submitted that this criterion must be understood in the sense of the AU Non-Aggression and Common Defence Pact which defines destabilisation as "any act that disrupts the peace and tranquility of any member state or which may lead to mass social and political disorder".²¹⁶⁷

Other commentators argue that the expanded substantive jurisdiction reflects the quotidian problems affecting the African continent.²¹⁶⁸ In this regard, the Kenyan NGO, Kenyans for Peace with Truth and Justice, has posited:

An important rationale for placing these crimes on the same level as the so-called 'core' international crimes is that many of them are capable of destabilising a state, which in turn leads to the proliferation of core international crimes. For example, several of the civil wars in Africa were

²¹⁶⁴ G. Kemp, 'Taking Stock of International Criminal Justice in Africa: Three Inventories Considered', in B. Van der Merwe (ed.), *International Criminal Justice in Africa: Challenges and Opportunities* (Nairobi: Konrad Adenauer Stiftung, 2014)7-32, at 18-19; Bensouda, above note 968, at 34.

²¹⁶⁵ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 46H (2) (d).

²¹⁶⁶ *Ibid.*, Articles 28I (1) and 28L (bis).

²¹⁶⁷ African Union Non-aggression and Common Defence Pact, Article 1 (i).

²¹⁶⁸ M. Sirleaf, 'The African Justice Cascade and the Malabo Protocol' Working Paper No.2017-01, Legal Studies Research Paper Series (January 2016), at 29; P. Naidoo and T. Murithi, 'The African Court of Justice and Human Rights and the International Criminal Court: Unpacking the Political Dimensions of Concurrent Jurisdiction' Policy Brief No.20, The Institute for Justice and Reconciliation, (October 2016), at 6 <<http://ijr.org.za/home/wp-content/uploads/2016/11/IJR-Brief-No-20-web-ready.pdf>> accessed 27 March 2017.

preceded by an unconstitutional change of government that threw the state into chaos in which core crimes were committed. Thus, it is arguably more sensible and forward-looking to address the crimes that may *lead* to serious conflict or civil war, rather than waiting for violence to happen. In addition, there is often a mutually causative and reinforcing relationship between these crimes and core international crimes.²¹⁶⁹

Another rationale is that where state borders are porous, the mobility of criminals is likely to increase across different countries.²¹⁷⁰ The risk could be aggravated if these borders were to be opened to the free movement of people in accordance with the integration agenda of the African continent. Therefore, the issue of cross-borders criminality should involve the exercise of regional jurisdiction to deal with it collectively. This jurisdiction fills the gap of general international criminal law which does not cover the additional crimes incorporated into the Malabo Protocol (Annex).²¹⁷¹ Socio-economic crimes such as illicit exploitation of natural resources, corruption and money laundering are taken into account in contrast to the ICC substantive jurisdiction. It is a positive evolution in international criminal law, which may contribute to the fight against the impunity of businessmen, of which criminal activities can impair development in Africa. Finally, it must be reminded that it was because of the gap in the system of international criminal justice that the UN Secretary General proposed to the Security Council in 2012, the establishment of specialised courts in Somalia in order to prosecute acts of piracy committed in the Horn of Africa.²¹⁷² Another gap is filled by the Malabo Protocol (Annex) with respect to corporate criminal liability.

2.2.2.2. The Admission of Corporate Criminal Liability

Another innovation of the Malabo Protocol (Annex) is the admission of corporate criminal liability in addition to individual criminal responsibility.²¹⁷³ This is a historic and milestone event, significantly contributing to the development of international criminal law, because it is

²¹⁶⁹ Kenyans for Peace with Truth and Justice, 'Seeking Justice or Shielding Suspects? An Analysis of the Malabo Protocol on the African Court' (November 2016), at 13 <<http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf>> accessed 27 March 2017.

²¹⁷⁰ M. Sirleaf, 'The African Justice Cascade and the Malabo Protocol', *International Journal of Transitional Justice* (2017) 1–21, at 5.

²¹⁷¹ *Ibid.*, at 17.

²¹⁷² UN Security Council, 'Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and other States in the Region' (20 January 2012) S/2012/50, para.126.

²¹⁷³ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Articles 46B and 46C.

the first time that a treaty expressly provides for corporate liability under the criminal jurisdiction of an international court. Article 46C of the Malabo Protocol, entitled “corporate criminal liability”, provides:

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

It has to be reminded that the ICC does not have jurisdiction over corporations. But, the draft Rome Statute included corporate criminal liability.²¹⁷⁴ African states upheld the same proposal. But, there was no time to focus on the issue and reach a consensus.²¹⁷⁵ This situation was due to the fact that “for some delegations, the notion of corporate criminal responsibility did not exist in their legal systems, which would raise problems of complementarity. Others were concerned that it could be applied to self-determination movements or against state-owned entities”.²¹⁷⁶ Another concern about corporate criminal liability was the danger of “tarnishing reputable companies that provide the legitimate investment essential to rehabilitating economies ravaged by war”.²¹⁷⁷

²¹⁷⁴ A. Clapham, ‘The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court’, in M.T. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (The Hague: Kluwer Law International, 2000) 139-195, at 143-144.

²¹⁷⁵ Schabas, above note 941.

²¹⁷⁶ N.S. Pak and J.P. Nussbaumer, ‘Beyond Impunity: Strengthening the Accountability of Transnational Corporations for Human Rights Abuses’, Hertie School of Governance –Working Paper No.45 (November 2009), at 41.

²¹⁷⁷ J.G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (New York: Open Society Institute, 2011), at 10.

By incorporating corporate criminal liability, the Malabo Protocol seems to have paid attention to the OAU Convention for the Elimination of Mercenarism in Africa of 1977 and the ICGLR's Protocol against Illegal Exploitation of Natural Resources of 2006.²¹⁷⁸ This is also in line with other instruments, adopted at the global level, two of which deserving to be mentioned. First, the UN Convention against Transnational Organised Crime, which obliges states parties to establish the liability of legal persons for participation in serious crimes involving an organised criminal group or for the laundering of proceeds of crime, corruption and obstruction to justice.²¹⁷⁹ Second, the United Nations' Guiding Principles on Business and Human Rights, which invite states to ensure that corporations respect human rights within their territory.²¹⁸⁰ States should particularly ensure that those victims affected by business-related human rights abuses have access to an effective national judicial remedy by eliminating all "legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed".²¹⁸¹ The case-law landscape has also evolved towards the acknowledgement of corporate criminal liability.²¹⁸² For example, the Special Tribunal for Lebanon delivered, in January 2015, the first international judicial decisions supporting criminal jurisdiction over media corporations, even if its Statute does not explicitly confer on it such jurisdiction.²¹⁸³ The Tribunal considered that its jurisdiction over

²¹⁷⁸ Article 1 (2) of the OAU Convention for the Elimination of Mercenarism in Africa provides that the crime of mercenarism may be committed by any person, natural (individual) or legal/juridical (group or association, or representative of a state or the state itself). Article 17 (1) and (2) of the ICGLR's Protocol states: '1. Each Member State shall adopt measures to establish the liability of legal entities for participating in the illegal exploitation of natural resources. 2. Subject to the legal principles of the Member State, the liability of legal entities may be criminal, civil or administrative'.

²¹⁷⁹ United Nations Convention against Transnational Organised Crime, Article 10. See also H. Van der Wilt, 'Expanding Criminal Responsibility in Transnational and International Organized Crimes', 4 (1) *Groningen Journal of International Law* (2016) 1-9, at 6 and 8.

²¹⁸⁰ Office of the United Nations High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011), at 13 <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> on 23 November 2016.

²¹⁸¹ *Ibid.*, at 28-29.

²¹⁸² See C. Kaeb, 'The Shifting Sands of Corporate Liability under International Criminal Law', 49 *George Washington International Law Review* (2016) 351-403.

²¹⁸³ N. Bernaz, 'Corporate Criminal Liability under International Law: The *New TVS.A.L.* and *Akhbar Beirut S.A.L.* cases at the Special Tribunal for Lebanon' 13 *Journal of International Criminal Justice* (2015) 315-316, at 321-322. See also *New TV S.A.L. and Al Khayat*, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings (STL-14-05/PT/AP/AR126.1), Appeals Panel, 23 January 2015, para.91;

corporations was implicit to its power to deal with the offence against the administration of justice.²¹⁸⁴

The Malabo Protocol (Annex) is further consistent with the position of the African Coalition for Corporate Accountability, gathering over 20 NGOs, which promotes civil and criminal mechanisms to address the impunity with which corporations continue to operate on the African continent.²¹⁸⁵ In the same vein, it is in line with the work undertaken by the Human Rights Council, which adopted resolution 26/9 of 26 June 2014 deciding to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. The mandate of this working group is “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”.²¹⁸⁶ This work may include the issue of corporate criminal liability, whose reconsideration within the ICC justice system also continues to be recommended.²¹⁸⁷

In essence, the scope of article 46C of the Malabo Protocol (Annex) could raise three challenges to the AU Criminal Court. First of all, the Malabo Protocol (Annex) provides for criminal liability of corporations, whether private, state-controlled or entirely public, with the exception of the states as internationally recognised separate entities. This raises the problem as to whether the AU Criminal Court will exercise jurisdiction over state corporations and particularly foreign state companies in the country of commission of the crime without violating international law.²¹⁸⁸ In this regard, a defence can be drawn from the theory of acts of state, which implies that acts of such corporations cannot be adjudicated by a foreign criminal tribunal because they are considered as sovereign acts. But, this defence is not

Akhbar Beirut S.A.L. and Ibrahim Mohamed Al-Amin, Decision on Interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings (STL-14-06/PT/AP/AR126.1), Appeals Panel, 23 January 2015, para.71.

²¹⁸⁴ *Ibid.*, at 322.

²¹⁸⁵ See African Coalition for Corporate Accountability, ‘Declaration of the African Coalition for Corporate Accountability (ACCA)’ (27 November 2013) <http://www.accahumanrights.org/images/ACCA_declaration/declaration_en.pdf> accessed 27 March 2017.

²¹⁸⁶ HRC Res. 26/9, ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights’ (A/HRC/RES/26/9), 14 July 2014, para.1.

²¹⁸⁷ Pak and Nussbaumer, above note 2176, at 38.

²¹⁸⁸ J. Kyriakakis, ‘Corporate Criminal Liability at the African Criminal Court’, Briefing Paper –African Court Research Initiative (ACRI) Meeting (Arusha 2016), at 3 <http://www.africancourtresearch.com/wp-content/uploads/2016/07/Kyriakakis_Briefing-Paper_-ACRI-2016-Meeting.pdf> accessed 27 march 2017.

convincing insofar as it cannot be opposed to an international court. In the same vein, no immunity would apply to such corporations since the Malabo Protocol (Annex) grants personal immunity only to individuals, who are incumbent heads of state or government, and other senior state officials.²¹⁸⁹

Secondly, it will be difficult to address corporate criminal liability in light of the Court's complementary jurisdiction when the state having primary competence to prosecute does not recognise such kind of liability. A tentative solution could be that the municipal non-recognition of corporate criminal liability would amount to a legal inability to prosecute. In other words, the lack of legislation on the part of a state party would justify the Court's intervention based on national inability to prosecute.²¹⁹⁰ The pressure from the Court to intervene in such circumstances will push states parties to adapt their legislation to the standards of the Malabo Protocol (Annex). However, the reluctance of states parties to do so may overwhelm the Court with cases which could be efficiently dealt with at the domestic level. This is why there is a need for an alternative approach, which is based on the proportionality of sanctions applied to a corporation domestically in respect of the crime committed, regardless of the nature of the liability, whether civil or administrative. This approach is consistent with the range of sanctions applicable by the AU Criminal Court itself. It is obvious that corporations cannot be sentenced to imprisonment unlike natural persons. The AU Criminal Court will apply pecuniary fines,²¹⁹¹ and order, if necessary, "forfeiture of

²¹⁸⁹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 46A bis.

²¹⁹⁰ See *Public Prosecutor and Civil Parties v. Adémar Ilunga and others*, Judgment of 28 June 2007, Military Court of Katanga, RP 010/2006 (unpublished); J. Kyriakakis, 'Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code', 5 *Journal of International Criminal Justice* (2007)809-826, at 811-814. In this case, which dated back in 2004, the Australian company, *Anvil Mining Company*, was suspected of having participated, through providing logistical assistance to a unit of the Congolese armed forces, in the commission of war crimes in the village of Kilwa (south-east of the DRC). A hundred of civilians were reportedly executed by the army during the military operations aiming to re-capture the village of Kilwa, which had been occupied by a militia group from 13 to 15 October 2004. But, in the so-called *Kilwa* case, the Military Court of Katanga did not examine the criminal liability of *Anvil Mining Company* due to the lack of appropriate law. It restricted itself to (civil) responsibility for acts committed by its agents. It must be noted that the Military Court of Katanga failed to establish this kind of responsibility because the three agents of *Anvil Mining Company*, who were prosecuted for their own acts of complicity of war crimes in the *Kilwa* case, were finally acquitted due to a lack of evidence.

²¹⁹¹ *Ibid.*, Article 43A (2).

any property, proceeds or any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member State".²¹⁹² Consequently, if a corporation is sentenced to a pecuniary fine which is proportional to the seriousness of its criminal conduct, the Court may not exercise jurisdiction. In contrast, concerning situations in those states parties which have legislation on corporate criminal liability, civil or administrative proceedings against corporations could not hamper criminal prosecutions before the AU Criminal Court.²¹⁹³

Thirdly, many corporations operating in Africa do not belong to Africans (states or individuals) or have their seats outside the continent. Yet, the mental element with regard to corporate criminal liability under the Malabo Protocol (Annex) consists of the policy of the corporation to commit a crime or the knowledge of such a commission. In order to establish this mental element threshold, the AU Criminal Court must receive information available in the structure of the corporation in question. This exigency will render very problematic prosecutions of any foreign corporation for crimes committed in Africa if cooperation is not provided by the state of social siege or nationality. Thus, much of what the AU Criminal Court will do to enforce corporate criminal liability will depend on the will of non-African states to cooperate in good faith.

2.2.2.3. The Court's Trigger Mechanisms

The trigger mechanisms refer to the way in which the jurisdiction of the AU Criminal Court may be activated. These mechanisms are provided for in article 46F of the Malabo Protocol (Annex) on the exercise of jurisdiction as follows:

The Court may exercise its jurisdiction with respect to a crime referred to in article 28A in accordance with the provisions of this Statute if: -

1. A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party;
2. A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Assembly of Heads of State and Government of the African Union or the Peace and Security Council of the African Union.
3. The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 46G.

²¹⁹² *Ibid.*, Article 43A (5).

²¹⁹³ Kyriakakis, above note 2188, at 5.

The mechanisms must be distinguished from the institution of proceedings that are brought before the Court by or in the name of the Prosecutor.²¹⁹⁴ Any referral by a state party, the AU Assembly or the PSC must be made to the independent Prosecutor who shall be free to decide on the action to be undertaken next, that is, whether to open a preliminary examination or not, to request the opening of an investigation to the Pre-Trial Chamber or not. But, the Malabo Protocol (Annex) does not contain any procedure to challenge the Prosecutor's decision not to proceed before the Pre-Trial Chamber. The reason is not specified in the *travaux préparatoires*. However, if it is not a deliberate omission to exclude judicial control over the Prosecutor's discretionary decisions, the gap must be covered by the Court's Rules of Procedure and Evidence so as to avoid the risk of arbitrariness. Furthermore, the trigger mechanisms must be distinguished from the pre-conditions for the exercise of the Court's jurisdiction as provided for in article 46Ebis of the Malabo Protocol (Annex):

1. A State which becomes a Party to this Protocol and Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 28A.
2. The Court may exercise its jurisdiction if one or more of the following, conditions apply:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.
 - (b) The State of which the person accused of the crime is a national.
 - (c) When the victim of the crime is a national of that State.
 - (d) Extraterritorial acts by non-nationals which threaten a vital interest of that State.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise.

These pre-conditions are the modalities under which the activation of the Court's jurisdiction is allowed.²¹⁹⁵ It has to be noted that the wording of article 46Ebis of the Malabo Protocol (Annex) is poor. For example, the *chapeau* of its paragraph 2 appears to be incomplete if not read in connection with paragraph 1 above because it omits to mention that the jurisdictional criteria listed therein involved only the state which is a party to the Malabo Protocol. Likewise, paragraph 3 is incomplete and not understandable if the final words "accept the exercise" is not linked to "the exercise of jurisdiction" referred to in the title of article 46Ebis

²¹⁹⁴ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 34A (1).

²¹⁹⁵ See V. Nerlich, 'Preconditions to the Exercise of Jurisdiction (Article 46Ebis), Exercise of Jurisdiction (Article 46F) and the Prosecutor (Article 46G)', in G. Werle and M. Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (Berlin: Springer, 2017) 157-186, at 165-174.

and “with respect to crimes referred to in article 28A” as stipulated in paragraph 1. The comparison between the Malabo Protocol (Annex) and the ICC Statute on this point leads to three main observations.

First, the jurisdictional criteria of the AU Criminal Court are broader than those applicable to the ICC, which can exercise its jurisdiction only on the basis of territoriality and active personality of states parties.²¹⁹⁶ However, the Malabo Protocol (Annex) extends the jurisdictional criteria to passive personality and the principle of protection of states parties. Passive personality implies that the AU Criminal Court could be activated against nationals of states not parties, even though the crimes at issue have not been committed on the territory of a state party or a country which has accepted its competence. For those states not parties which do not recognise the principle of passive personality, the Court’s intervention could be subject to contestations. The critique may be even more serious if these states are not African countries. The position of the Court to try crimes committed outside Africa also runs against the object of the CADSP, which deals with threats to the African regional public order which only occur on the continent. The AU Criminal Court cannot be a world jurisdiction. The passive personality should be therefore interpreted restrictively in order to include only crimes committed on the territory of African states not parties against nationals of states parties. The same restriction should apply to the principle of protection of a state party to include only the specific crimes affecting its security or vital interest (as opposed to crimes against human security) towards which territoriality, active and passive personality may not be upheld: aggression, unconstitutional change of government and mercenarism. A practical example could be the recruitment of mercenaries in a third African country to be sent to the territory of a state party.

Second, paragraph 3 of article 46Ebis is unclear on the identity of the state not party which may accept the exercise of the Court’s jurisdiction with respect to crimes referred to in article 28A. For the same reason related to the object of the CADSP, non-African states cannot accede to the Court’s jurisdiction. This understanding is confirmed by article 29(2) of the Protocol on the Statute of the AfCJHR, as amended by the Malabo Protocol (Annex),²¹⁹⁷

²¹⁹⁶ ICC Statute, Article 12 (a) and (b).

²¹⁹⁷ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 15.

stipulating that “the Court shall not be open to States, which are not members of the Union”. To date, all African countries are AU member states.

Third, the trigger mechanisms of the jurisdiction of the AU Criminal Court under the aforementioned list of pre-conditions have some similarities with those provided for under article 13 of the ICC Statute.²¹⁹⁸ In fact, the Malabo Protocol (Annex) admits state referrals and the power of the Prosecutor to initiate investigation *proprio motu*, including when a state not party has accepted the Court’s jurisdiction pursuant to paragraph 3 of article 46Ebis. Considering that the AU has been particularly critical against the ICC Prosecutor’s *proprio motu* powers, it is questionable why African states accept similar powers for the Prosecutor of the AU Criminal Court. Likewise, as the ICC jurisdiction can be activated by a political body, namely the Security Council, a situation can be referred to the AU Criminal Court by the AU Assembly or the PSC. These similarities have led a commentator to doubt whether Africa does understand what it actually wants or where the problem with international criminal justice really lies.²¹⁹⁹ However, one may argue that the problem does not appear to be the attribution of these powers to political organs as such but the way in which they can be used or misused. Regarding the ICC, the African objection is rather about the selectivity, the partiality and the misuse of justice for (geo)-political agenda.

There are two further differences between the ICC and the AU Criminal Court concerning the activation of their jurisdiction by political organs. On the one hand, the AU Assembly and the PSC do not have the power to defer investigations or prosecutions from the AU Criminal Court. This is consistent with the position of African states opposing a similar power in the hands of the Security Council towards the ICC during the negotiations of the Rome Statute. On the other hand, the Security Council can refer a situation to the ICC in respect of a state which is not a party to its Statute. But, the AU Assembly and the PSC do not have the same

²¹⁹⁸ This article provides: ‘The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15’.

²¹⁹⁹ E. Owiye Asaala, ‘The African Court of Justice and Human and Peoples’ Rights: An Opportunity for International Criminal Justice’, in B. Van der Merwe (ed.), *International Criminal Justice in Africa: Challenges and Opportunities* (Nairobi: Konrad Adenauer Stiftung, 2014) 33-56, at 49.

authority towards African states not parties to the Malabo Protocol. The refusal to confer deferral authority on the PSC is easy to understand since this political organ does not have coercive powers vis-à-vis AU member states in order to impose criminal jurisdiction upon them. Such authority however exists for the AU Assembly on the basis of the Union's right to intervene in a member state, only in the event of genocide, war crimes or crimes against humanity. The reason why the AU Assembly has not been given the power to refer situations of third African states to the AU Criminal Court has not been specified. One may suppose that the drafters of the Malabo Protocol (Annex) did not want to include a provision which could lead to controversies such as those affecting the ICC in its relationship with Sudan. In any case, if the AU Assembly wishes to impose criminal jurisdiction on a non-contracting state on the basis of the Union's right to intervene in a member state, it could resort to any of the following judicial options at its disposal: delegation of jurisdiction to a member state and creation of a hybrid court or an *ad hoc* regional criminal tribunal. Each of these options will imply for the AU some specific human, institutional and financial costs, the lack of which could hamper justice to be done and the fight against impunity.

2.2.3. The Factors Susceptible to Hamper the Court's Jurisdiction

There are four main factors which can hinder the exercise by the Court of its jurisdiction: the expanded immunity provisions of the Malabo Protocol (2.2.3.1), the low standards of the Court's complementary jurisdiction (2.2.3.2), the potential non-cooperation by African states (2.2.3.3) and the lack of sufficient financial means (2.2.3.4).

2.2.3.1. The Expanded Immunity Provisions

The history of the provisions on immunity before the AU Criminal Court can be traced back in 2012. Article 46B (2) of the Court's draft Protocol adopted by the AU Ministers of Justice/Attorneys General on Legal Matters in May 2012 provided: "Without prejudice to the immunities provided for under international law, the official position of any accused person, whether as Head of State or Government, Minister or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment".²²⁰⁰ It clearly appears that the exception specified in the first part of this article referred to personal immunity, whereas the second part excluded functional immunity as an exemption from criminal responsibility for acts committed in an official capacity. While functional immunity

²²⁰⁰ Executive Council of the African Union, above note 1746, at 36.

does not raise any particular problem at this stage, personal immunity as a procedural bar to the Court's jurisdiction could have created controversy given its laconic wording and the lack of precision. It could have been up to the Court to determine in concrete cases who actually enjoyed such immunity. This margin of appreciation had the potential to revive before the AU Criminal Court the conflicting positions on personal immunity before international criminal tribunals. In particular, given the fact that there was no other specific provision precluding this kind immunity in respect of officials of contracting states, the Court could have had to decide whether the exception applied to them or only to officials of states not parties, and to find a tenable justification for its decision: conventional waiver of personal immunity, waiver of such immunity under customary international law, or the neutral doctrine of non-requirement or non-recognition of personal immunity for state officials before international criminal tribunals. In short, the exception in article 46B (2) of the draft Protocol of May 2012 was very ambiguous. This is probably the provision had to be improved in accordance with the will of AU member states to grant immunity to incumbent senior state officials before any international criminal jurisdiction.

The improvement was incorporated in 2014. Two separate rules were drafted. On the one hand, article 46B (2) on functional immunity was amended as follows: "Subject to the provisions of Article 46A*bis* of this Statute, the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment".²²⁰¹ On the other hand, the new article 46A*bis* on personal immunity now provides: "No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office".²²⁰² The context of incorporation of the latter article recalls the AU extraordinary summit held in October 2013, where the decision was made to exclude prosecutions of any serving AU Head of State or Government or anybody acting or entitled to act in such capacity before any international criminal tribunal.²²⁰³ Everything was done under the influence of the Kenyan relationship

²²⁰¹Executive Council of the African Union, 'The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs -Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights: As at Thursday 15 May 2014 (STC/Legal/Min/7(I) Rev. 1), EX.CL/846(XXV) Annex 5, Malabo (Equatorial Guinea), 20-24 June 2014, at 35.

²²⁰² *Ibid.*, at 34.

²²⁰³ Ext/Assembly/AU/DEC.1 (Oct.2013), above note 1039.

with the ICC, which was prosecuting President Uhuru Kenyatta and his Deputy, William Ruto. During this extraordinary summit, the extension of personal immunity to “other senior state officials” referred to in article 46ABis was not at issue. These officials were included in the list of beneficiaries only in May 2014.

There were concerns about extending personal immunity to other senior state officials during the drafting process of the Malabo Protocol (Annex). The discussion and the consensus found in May 2014 have been summarised as follows:

During the consideration of Article 46ABis of the Draft Protocol, delegations raised concerns regarding extension of immunities to senior state officials and its conformity with international law, domestic laws of Member States and jurisprudence, underlining the challenges inherent in widening immunities, and especially considering the lack of a precise definition of “*senior state official*”, as well as the difficulty in providing an exhaustive list of persons who should be included in the category of senior state officials. After exhaustive deliberations, taking into consideration the relevant Decisions of the Assembly of the Union, and appreciating that some senior state officials are entitled to functional immunities by virtue of their functions, the meeting resolved that Article 46ABis should include the provision “senior state officials based on their functions.” The meeting further resolved that interpretation of “senior state official” would be determined by the Court, on a case-by-case basis taking their functions into account in accordance with international law.²²⁰⁴

Article 46ABis of the Malabo Protocol (Annex) provides for absolute personal immunity insofar as it permits no exception to the level of protection it confers on the beneficiaries. But, it is a temporary immunity, meaning that it remains relevant as long as the beneficiaries are still in office. Article 46B (2) does not uphold any functional immunity covering any crime within the Court’s jurisdiction. This is easy to understand for ICC crimes because immunity does not operate anymore in favour of offenders as a matter of customary international law. However, for the other crimes, such as corruption, illicit exploitation of natural resources and money laundering, there is only a conventional removal of functional immunity, which could have been otherwise relevantly pleaded by the accused persons. On the whole, the immunity provisions of the Malabo Protocol (Annex) constitute a draw game. While personal immunity is conferred on senior state officials during their tenure of office, functional immunity is excluded beyond what is actually required under customary international law.

²²⁰⁴ Executive Council of the African Union, above note 2093, paras.26-26. It has to be noted that the expression “functional immunities” referred to in the quotation should be read “personal immunities”, for they are the ones which are granted to incumbent state officials, due to the positions they hold.

However, there are still many criticisms against article 46Abis. This is probably due to the fact that the provision is perceived as a setback compared to personal immunity under article 27(2) of the ICC Statute. Article 46B (2) of the Malabo Protocol (Annex) is almost forgotten. Still, some commentators agree with the inclusion of article 46Abis in the Malabo Protocol (Annex) arguing that it is “a compromise which should help ensure better sequencing of justice and peace”.²²⁰⁵ The reason is that prosecuting the state officials listed above, particularly heads of state, while they are still in office, may endanger peace and security. The risk is even higher when the state concerned is affected by a conflict or political crisis. It is rather preferable to suspend any prosecution, pending the establishment of stability and peace, as a matter of good policy. But, other commentators disapprove this line of argument and suggest that the immunity provision will further impunity for African political leaders.²²⁰⁶ In this regard, the immunity provision is said to be in conflict with the ICC Statute and to undermine the integrity of the AU Criminal Court.²²⁰⁷ Another “retort of critics of the provision is that the temporary nature of the protection might well encourage leaders in danger of prosecution to illegally extend their stay in office, thus endangering democratic progress in Africa”.²²⁰⁸ Max Du Plessis gave the following example:

Take the crime of unconstitutional change of government and consider situations in which the incumbent may commit such a crime. This could be by his refusal to ‘relinquish power to the winning party or candidate after free, fair and regular elections’ (Article 28E (1)(d)), or revising ‘the Constitution or legal instruments’ (Article 28E (1)(e)) or modifying ‘the electoral laws ... without the consent of the majority of the political actors’ (Article 28E (1)(f)). The incumbent, however, cannot be prosecuted because of the provisions of Article 46Abis, which secures his or her immunity before the court. The immunity provision has therefore rendered this crime entirely redundant.²²⁰⁹

²²⁰⁵ C.C. Jalloh, ‘International Justice, Reconciliation and Peace in Africa’, CODESRIA Policy Briefs No.1 (March 2015), at 6 <https://www.codesria.org/IMG/.../icj_policybriefn1-02042015.pdf> accessed 26 March 2017.

²²⁰⁶ *Ibid.* See also Udombana, above note 1469, at 71.

²²⁰⁷ M. Swart and K. Krisch, ‘Irreconcilable Differences? An Analysis of the Standoff between the African Union and the International Criminal Court’, 1 (1) *African Journal of International Criminal Justice* (2014) 38-56, at 48.

²²⁰⁸ Jalloh, above note 2205, at 6.

²²⁰⁹ M. Du Plessis, ‘Shambolic, Shameful and Symbolic: Implications of the African Union’s Immunity for African Leaders’, Institute for Security Studies Paper No.278 (November 2014), at 8.

All these criticisms can be mitigated. First of all, the immunity provision must not be overestimated because, as indicated above, it only provides temporary protection, which can be lifted by the states concerned, or is simply irrelevant when the beneficiaries are no longer in office.²²¹⁰ Secondly, the immunity provision is not indeed in conflict with the ICC Statute. As Dire Tladi has noted, “under Article 46Abis the African Court will not have the competence to try the persons having immunity but this will not prevent the ICC from exercising jurisdiction against such persons, if it has jurisdiction”.²²¹¹ Finally, rulers holding their power from an unconstitutional change of government should not be recognised and so no immunity would apply to them. The reason is that they are or become illegitimate and illegal rulers *ab initio*, that is to say from the time when the commission of the crime in question is completed. It is submitted that this consequence is a specificity of unconstitutional changes of government and does not apply to other crimes within the jurisdiction of the AU Criminal Court. But, while such non-recognition would open the doors of regional prosecutions against the suspects, it is without prejudice to diplomatic contacts and initiatives aiming to restore democratic order in the state concerned.²²¹² This means that beyond criminal justice, there are other means to favour democratic governance. International criminal tribunals should not be transformed into new regulators of political affairs within states or a mean which can be used to provoke regime-change. International criminal justice is not designed for that.

2.2.3.2. The Low Standards of the Court’s Complementary Jurisdiction

The primary responsibility to investigate, prosecute and try the crimes provided for by the Malabo Protocol (Annex) lies with states parties. The AU Criminal Court is complementary to domestic criminal tribunals. It will play a subsidiary role. The standards of this complementarity are stated in article 46H of the Malabo Protocol (Annex) as follows:

1. The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.
2. The Court shall determine that a case is inadmissible where:
 - a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution;

²²¹⁰ Jalloh, above note 2205.

²²¹¹ Tladi, above note 1237, at 15-16.

²²¹² African Charter on Democracy, Elections and Governance, Article 25(3).

- b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to prosecute;
 - c) The person concerned has already been tried for conduct which is the subject of the complaint;
 - d) The case is not of sufficient gravity to justify further action by the Court.
3. In order to determine that a State is unwilling to investigate or prosecute in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
- a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
 - b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
4. In order to determine that a State is unable to investigate or prosecute in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

As the ICC is the first international criminal jurisdiction to have experienced the principle of complementarity, it is clear that its Statute has inspired the drafters of the Malabo Protocol (Annex). The wording of article 46H generally includes the terms of article 17 of the Rome Statute. But, three main differences between both articles can be pointed out.

First of all, while article 17 of the Rome Statute is based on the relationship between the states parties and the Court in terms of complementarity, article 46H (1) of the Malabo Protocol (Annex) establishes the so-called double complementary to national criminal jurisdictions and to courts of justice of RECs. The complementarity with the jurisdictions of RECs relates to the issue of one single criminal tribunal for the whole African continent as discussed above. The remaining article 46H of the Malabo Protocol (Annex) is solely dedicated to the binary relationship between the AU Criminal Court and domestic tribunals. Complementarity between courts of justice of RECs and the AU Criminal Court could be on the contrary covered by specific agreements on cooperation.

Secondly, the word “genuinely” in article 17 (a) and (b) of the Rome Statute is lacking in article 46H (2) (a) and (b) of the Malabo Protocol (Annex). For the ICC, this word helps to

assess the state unwillingness or inability to carry out investigations or prosecutions in order to determine whether a case is admissible or not.²²¹³ It implies an aggravated burden of proof on the part of the Prosecutor because the sole establishment of the state unwillingness or inability to investigate or to prosecute does not suffice to make a case admissible.²²¹⁴ The Prosecutor must additionally prove that the state proceedings are not genuine,²²¹⁵ meaning that these proceedings do not meet the objective criteria of quality that are specified under article 17 (2) and (3) of the Rome Statute.²²¹⁶ In other words, the case would be inadmissible if the state proceedings in question have the quality of what is objectively expected in terms of judicial standards. In this respect, it has been argued that the omission of the word “genuinely” in the Malabo Protocol (Annex) might lead to the trivialisation of international criminal justice in Africa.²²¹⁷ In particular, Ademola Abass suggests that “African states will easily avoid prosecuting their nationals and offload such cases on to the African Court of Justice and Human and Peoples’ Rights, thereby unduly burdening the Court and making it a Court of first rather than last resort”.²²¹⁸ However, this opinion can be mitigated because article 46H (3) and (4) of the Malabo Protocol (Annex) provides for objective criteria for the assessment of state inability or unwillingness to investigate or to prosecute. These criteria are similar to those stipulated in article 17 (2) and (3) of the ICC Statute. Furthermore, it has to be remembered that even some delegations during the drafting process of the Rome Statute were

²²¹³ See M. M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden/Boston: Martinus Nijhoff Publishers, 2008), at 165-170.

²²¹⁴ H. Van der Wilt, ‘Complementarity Jurisdiction (Article 46H)’, in G. Werle and M. Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol* (Berlin: Springer, 2017) 187-202, at 193.

²²¹⁵ El Zeidy, above note 2213, at 165-170.

²²¹⁶ Article 17 (2) and (3) of the ICC Statute provides: “2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”.

²²¹⁷ Abass, above note 2104, at 945.

²²¹⁸ *Ibid.* See also Wilt, above note 2214, at 195.

opposed to the term “genuinely” for it was a vague concept.²²¹⁹ Its inclusion in the ICC Statute is simply an emphasis on the quality of state proceedings to be evaluated. Hence, its omission in the Malabo Protocol (Annex) does not imply any risk of trivialisation of proceedings before the AU Criminal Court.

Thirdly, unlike the ICC Statute,²²²⁰ nothing is specified in the Malabo Protocol (Annex) about challenges to the jurisdiction of the AU Criminal Court or the admissibility of cases. The regulation of the principle of complementarity is therefore incomplete. Not only is the procedure missing, but also the specification of who shall have the standing to make an application for that purpose. Probably, the vacuum could be covered by the Court’s Rules of Procedure and Evidence. In principle, it will suffice to adopt for the AU Criminal Court the standards of the ICC Statute. However, the issue is a contentious one since such law-making relates to state sovereignty. It raises the problem of legitimacy of the judges to adopt the Rules of the Court and so to legislate on the account of states, whereas for the ICC, this matter is governed by the Rome Statute itself and its Rules of Procedure and Evidence, which were adopted by states parties. Since the Rules of the AU Criminal Court will not be treaty rules, the question as to whether they could be binding on sovereign states parties is open. A cautious option for solving this issue could consist of including a provision in the Malabo Protocol (Annex) which provides that the Court’s Rules of Procedure and Evidence shall be consistent with this Protocol and binding on the contracting parties.

Furthermore, in order to give a positive effect to the principle of complementarity, states parties to the Malabo Protocol will need to take two different actions. On the one hand, each state should adopt national implementation legislation, incorporating the relevant crimes in the domestic legal order and providing for the rules on cooperation with the AU Criminal Court. Of course the Malabo Protocol (Annex) does not explicitly oblige them to do so. However, it is a matter of practical requirement in order to give effect to the principle of complementarity. Even those states that are parties to the ICC Statute and which have domesticated the core crimes should amend their laws and adapt the corresponding definitions to those embodied in the Malabo Protocol (Annex). In the same vein, states should extend the non-application of statutes of limitations to the entire list of 14 crimes within the competence

²²¹⁹ El Zeidy, above note 2213, at 164.

²²²⁰ ICC Statute, Articles 18-19.

of the AU Criminal Court.²²²¹ On the other hand, whilst states parties have the primary responsibility to prosecute, the Malabo Protocol (Annex) does not place any duty on them to do so or to rely on a specific head of jurisdiction, such as territoriality or universal jurisdiction, in the exercise of their jurisdiction. States parties to the Malabo Protocol should however exercise any kind of jurisdiction which any of the different African penal treaties that they have also ratified impose on them.²²²² In any case, territoriality and active personality will remain the best jurisdictional bases for states parties in the discharge of their primary responsibility.

2.2.3.3. The Potential Non-Cooperation of African States

The question of cooperation of African states with the AU Criminal Court or between themselves is a central issue for effective regional criminal justice in Africa. By definition, cooperation in criminal matters implies “many measures including everything from law enforcement exchanges and co-operation, agencies and facilities such as Interpol, as well as

²²²¹ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), Article 28A (3): ‘The crimes within the Jurisdiction of the Court shall not be subject to any statute of limitations’.

²²²² For example, Article 6 (1) and (2) of the OAU Convention on the Prevention and Combating of Terrorism provides: ‘1. Each State Party has jurisdiction over terrorist acts as defined in Article 1 when: (a) the act is committed in the territory of that State and the perpetrator of the act is arrested in its territory or outside it if this punishable by its national law; (b) the act is committed on board a vessel or a ship flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or (c) the act is committed by a national or a group or nationals of that State. 2. A State Party may also establish its jurisdiction over any such offence when: (a) the act is committed against a national of that State; or (b) the act is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises, and any other property, of that State; (c) the act is committed by a stateless person who has his or her habitual residence in the territory of that State; or (d) the act is committed on board an aircraft which is operated by any carrier of that State; and (e) the act is committed against the security of the State Party’. On its part, Article 13 of the AU Convention on Preventing and Combating Corruption stipulates: ‘1. Each State Party has jurisdiction over acts of corruption and related offences when: (a) the breach is committed wholly or partially inside its territory; (b) the offence is committed by one of its nationals outside its territory or by a person who resides in its territory; and (c) the alleged criminal is present in its territory and it does not extradite such person to another country. (d) when the offence, although committed outside its jurisdiction, affects, in the view of the State concerned, its vital interests or the deleterious or harmful consequences or effects of such offences impact on the State Party. 2. This Convention does not exclude any criminal jurisdiction exercised by a State Party in accordance with its domestic law. 3. Notwithstanding the provision of paragraph I of this Article, a person shall not be tried twice for the same offence’.

legal measures such as extradition, mutual assistance, transfer of sentenced prisoners, transfer of proceedings, and cooperation in the restraint and confiscation of proceeds of crime”.²²²³ The risk of non-cooperation can be high if the enablers for such cooperation are missing, notably political will as a prerequisite for any judicial action, national culture in favour of justice and adequate resources capacity to cooperate (number and training of the personnel or financial costs).²²²⁴ However, the most important challenge that the AU Criminal Court could face is the deficiency of the applicable legal framework. Beyond the scope of existing provisions on judicial cooperation in the Malabo Protocol (Annex) (a), it is important to develop a comprehensive legal framework on the matter, binding on African states, between them, the RECs and the AU (b).

a) The Facets of Judicial Cooperation under the Malabo Protocol

The AU Criminal Court does not have a territory within which it could sovereignly exercise its jurisdiction. It has no police or other security services to protect its investigators or other staff members deployed on the ground, or to enforce its legal acts such as arrest warrants or orders concerning fines and forfeiture measures. In principle, cooperation with states is required by the power of fact.²²²⁵ The AU Criminal Court will rely on the states’ police, judicial authorities and other security services in order to discharge its mandate with efficacy. Cooperation is also important to avoid conflicts which may result from competing requests for cooperation between the Court and the states.

The regulation of this cooperation is based on various articles of the Malabo Protocol (Annex). Thus, article 46L stipulates:

1. States Parties shall co-operate with the Court in the investigation and prosecution of persons accused of committing the crimes defined by this Statute.
2. States Parties shall comply without undue delay with any request for assistance or an order issued by the Court, including but not limited to:
 - a) The identification and location of persons;

²²²³ K. Prost, ‘No Hiding Place: How Justice Need not Be Blinded by Borders’, in S. D. Brown (ed.), *Combating International Crime: The Longer Arm of the Law* (London/New York: Routledge-Cavendish, 2008) 123-162, at 125.

²²²⁴ S. D. Brown, ‘Ready, Willing and Enable: A theory of Enablers for International Co-operation’, in S. D. Brown (ed.), *Combating International Crime: The Longer Arm of the Law* (London/New York: Routledge-Cavendish, 2008) 29-39, at 29 and 39.

²²²⁵ Mampuya, above note 165, at 906.

- b) The taking of testimony and the production of evidence;
 - c) The service of documents;
 - d) The arrest, detention or extradition of persons;
 - e) The surrender or the transfer of the accused to the Court.
 - f) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.
 - g) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the court.
3. The Court shall be entitled to seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and may conclude Agreements for that purpose.

Furthermore, article 46Jbis of the Malabo Protocol (Annex) establishes the duty on states parties to enforce fines and forfeiture measures ordered by the Court.²²²⁶ Article 46J is about the cooperation of the same states in the enforcement of the Court's sentence of imprisonment. Such sentence shall be served in a willing state party, pursuant to an agreement concluded with the Court to that effect and the criteria set out by the Rules of Procedure and Evidence.²²²⁷

In general, article 46L is modeled on the laconic provisions of the ICTY and ICTR Statutes.²²²⁸ However, this was a bad approach to be followed by the drafters of the Malabo Protocol for several reasons. First of all, the content of article 46L is also laconic and non-exhaustive. This is implied by the expression "including but not limited to" which is contained in article 46L (2). For the ICTY and ICTR, such laconism could be justified on the ground that these tribunals were created under Chapter VII of the UN Charter. Every UN

²²²⁶ Article 46J reads: '1. A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. 2. Such imprisonment shall be served as provided for in a prior agreement between the Court and a receiving State and in accordance with the criteria as set out in the Rules of Court'.

²²²⁷ Article 46Jbis reads as follows: '1. States Parties shall give effect to fines or forfeitures ordered by the Court without prejudice to the rights of bona fide third parties, and in accordance with the procedure provided for in their national law. 2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties. 3. The Court shall determine in its Rules how real or movable property obtained by a State as a result of its enforcement of a judgment or order may be dealt with'.

²²²⁸ ICTY Statute, Article 29; ICTR Statute, Article 28.

member state had the obligation to cooperate with them. Other relevant aspects of this cooperation were derived from the tribunals Statutes or included in their Rules of Procedure and Evidence, binding on all the states.²²²⁹ This might not be the case for a treaty-based court. Consent to all the relevant rules on cooperation must be provided in advance as a matter of state sovereignty. This is why the ICC Statute contains a detailed Part 9 on “international cooperation and judicial assistance”.

The deficiency of article 46L of the Malabo Protocol (Annex) is therefore obvious. In fact, the scope of its two first paragraphs is limited to states parties. With respect to states not parties, no distinction is made between those which accept the Court’s jurisdiction and other non-contracting countries. Yet, regarding the ICC Statute, the states not parties accepting its jurisdiction are consequently obliged to “cooperate with the Court without any delay or exception in accordance with Part 9”.²²³⁰ Other states not parties can conclude agreements on cooperation with the Court and some others may even be obliged to cooperate upon the decision of the Security Council acting under Chapter VII of the UN Charter.²²³¹ To avoid a legal vacuum, paragraph 3 of article 46L of the Malabo Protocol (Annex) must be applicable only to a state not party which conclude a specific agreement on cooperation with the AU Criminal Court. However, regarding a state not party that accepts the Court’s jurisdiction, it cannot be placed under a narrower legal regime than what is provided for in respect of states parties.

Concerning the forms of cooperation, article 46L (2) of the Malabo Protocol (Annex) is less detailed than Part 9 of the ICC Statute. The regulation on many important issues is missing for the AU Criminal Court. This includes the obligation for states parties to enact domestic legislations on cooperation, the procedure for surrendering the accused persons and possible judicial challenges, the competing requests for cooperation, the transportation arrangements and the costs of cooperation. The drafters of the Malabo Protocol (Annex) might have thought that these issues could be covered by the Court’s Rules of Procedure and Evidence. But, for the same reasons related to state sovereignty, such issues deserved to be dealt with by the Malabo Protocol (Annex) itself.

²²²⁹ D. Stroh, ‘State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and for Rwanda’, *Max Planck Yearbook of United Nations Law* (2001) 249-283, at 253.

²²³⁰ ICC Statute, Article 12 (3).

²²³¹ See P.D. Massi Lombat, ‘Les sources et fondements de l’obligation de coopérer avec la Cour pénale internationale’, 27 (1) *Revue québécoise de droit international* (2014) 113-141, at 121.

In addition, the regulation on cooperation of states parties with the potential courts of justice of RECs having jurisdiction over the same crimes is not provided. Probably, the issue could be resolved by the RECs themselves when they establish their own criminal jurisdictions. The same could be said about cooperation between the RECs' jurisdictions and the AU Criminal Court. It will belong to each REC to conclude an agreement of cooperation with the latter Court in accordance with article 46L (3) of the Malabo Protocol (Annex).

It is worth recalling that the AU Criminal Court which is not a legal subject *per se*, but one of the AU organs. It has been nonetheless authorised to make international treaties. The question then arises as to who should negotiate, sign and ratify these treaties on behalf of the Court. The Malabo Protocol (Annex) is silent on the issue. Concerning foreign relations, the AU is rather represented by the Chairperson of the Commission who can negotiate and signed treaties on behalf of the AU, with the mandate of the AU Assembly and the Executive Council.²²³² In this regard, the best example is the Agreement of 22 August 2012 between Senegal and the AU establishing the EAC. To simplify the matter, the Malabo Protocol (Annex) should confer the treaty-making power on the President of the Court. The reason is that he is the first authority in the administrative hierarchy who shall represent the Court before third parties. After all, in order to avoid any risk of legal vacuum, the disparity of African legal instruments and the potential contradictions between them, it is advisable to adopt a comprehensive legal framework on judicial cooperation in Africa.

b) The Need for a Comprehensive Legal Framework on Judicial Cooperation

The previous developments have shown that the justice system of the Malabo Protocol is based on a deficient legal framework on judicial cooperation. Furthermore, the Malabo Protocol could generate different legal instruments on cooperation involving the key actors of the system: states parties, states not parties, the RECs and the AU. This may give rise to a complex legal framework which, due to the disconnection of one state to another or of one REC to another and the lack of regulations on interregional cooperation between courts of justice of RECs, could impair the objective of cooperation for the fight against impunity. As it is known, "if the law is too prescriptive and the field is over-regulated, the opportunities for international co-operation will become paralysed in trying to comply with conflicting legal approaches. (...) if the legal basis is inadequate, the necessary co-operation and support for

²²³² Statute of the Commission of the African Union (9 July 2002), Article 3 (2) (a) and (y); Rules of Procedure of the Executive Council of the African Union (9 July 2002), Article 5 (1) (r).

partners may be illegal”.²²³³ That is why there is a need to adopt a comprehensive legal framework for judicial cooperation in Africa.

This approach is founded on two other reasons. On the one hand, given that the issue is about establishing a system of African regional criminal justice, it is better to strengthen the ties between different stakeholders rather than favoring their mutual legal de-connection or increasing the potential of legal fragmentation and conflicts.²²³⁴ For example, if the DRC is a member state of three RECs having criminal jurisdictions and fails to discharge its primary responsibility, it has to be known in advance which principle will apply for the exercise of complementary jurisdiction by one of these RECs, rather than risking a positive conflict of jurisdiction whereby all the courts of justice of RECs would declare themselves competent. Another issue is what could be the role of the AU Criminal Court if such a conflict in spite of everything appears? One may imagine a case of referral of the matter to the latter Court that could decide which RECs should exercise jurisdiction. This kind of organisation of cooperation and relationships between different actors within the system will not be new. It presupposes that RECs can access and ratify the proposed legal instrument on judicial cooperation. In the fields of economic integration as well as peace and security, precedents whereby RECs have entered into treaties of cooperation with the AU exist.²²³⁵ The experience will just be replicated in criminal matters.

On the other hand, there is not any duty on states parties to cooperate between themselves for the purpose of investigating and prosecuting crimes against peace and security in Africa under the Malabo Protocol (Annex). This lack of horizontal conventional obligation on cooperation between states parties is also a gap in the ICC Statute.²²³⁶ The more states parties are in a good legal position to cooperate in criminal matters, the more they can be capable to exercise their primary jurisdiction with efficacy. This is particularly the case regarding the commission of crimes which are cross-border or transnational by nature. Countries have to build bridges in

²²³³ Brown, above note 2224, at 39.

²²³⁴ Kahombo, above note 2121, at 345.

²²³⁵ This is the case of the Protocol on the Relations between the Regional Economic Communities and the African Economic Community (1998), the Protocol on the Relations between the African Union and the Regional Economic Communities (2007) and Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa (2008).

²²³⁶ D. Tladi, ‘Complementarity and Cooperation in International Criminal Justice: Assessing Initiatives to Fill the Impunity Gap’ Institute for Security Studies Paper No.277 (November 2014), at 5.

order to overcome barriers of sovereignty and to enforce justice, including when the suspects try to escape outside the national territory of the competent country.²²³⁷ In this regard, the drafters of the Malabo Protocol (Annex) failed to make a progressive development in law on the African continent. The comprehensive legal framework should fill this gap.

The conclusion of an African comprehensive legal framework on judicial cooperation has several advantages. In fact, the comprehensive legal framework may reduce the disparity of existing African treaties on judicial cooperation between AU member states. For instance, the OAU Convention for the elimination of mercenarism in Africa and the OAU Convention on the prevention and combating of terrorism impose on states parties the obligation to extradite or prosecute.²²³⁸ The AU Convention on the prevention and combating of corruption sets out a similar duty with respect to persons charged with or convicted of corruption or related offences.²²³⁹ The ACDEG not only establishes the same obligation²²⁴⁰ but also encourages states parties to conclude bilateral extradition agreements as well as to adopt legal instruments on extradition and mutual legal assistance in order to bring to justice perpetrators of unconstitutional change of government.²²⁴¹ There are also non-continental treaties. The ICGLR's Protocol against illegal exploitation of natural resources imposes on states parties a duty to extradite or prosecute.²²⁴² However, the Conference adopted a comprehensive

²²³⁷ Prost, above note 2223, at 124.

²²³⁸ Article 9 (2) of this OAU Convention for the elimination of mercenarism in Africa stipulates: 'A request for extradition shall not be refused unless the requested State undertakes to exercise jurisdiction over the offender in accordance with the provisions of Article 8'. Article 8 (4) of the OAU Convention on the prevention and combating of terrorism stipulates: 'A State Party in whose territory an alleged offender is present shall be obliged, whether or not the offence was committed in its territory, to submit the case without undue delay to its component authorities for the purpose of prosecution if it does not extradite that person'.

²²³⁹ Article 15 (6) of this Convention provides: 'Where a State Party in whose territory any person charged with or convicted of offences is present and has refused to extradite that person on the basis that it has jurisdiction over offences, the Requested State Party shall be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution, unless otherwise agreed with the Requesting State Party, and shall report the final outcome to the Requesting State Party'.

²²⁴⁰ Article 25 (9) of this Charter provides: "State Parties shall bring to justice the perpetrators of unconstitutional changes of government or take necessary steps to effect their extradition".

²²⁴¹ Article 25 (10) of this Charter provides: "State Parties shall encourage conclusion of bilateral extradition agreements as well as the adoption of legal instruments on extradition and mutual legal assistance".

²²⁴² Article 18 (5) of this Protocol provides: 'If an alleged offender is not extradited on the ground of his or her nationality, or because the requested State deems itself competent in the particular case, such State shall submit the case without undue delay to its competent authorities for the purpose of prosecution, unless there are

Protocol on judicial cooperation. Among other issues covered by this instrument, any offence under the laws of each states party which is punishable by an imprisonment of not less than six months is made extraditable.²²⁴³ This Protocol reminds various other treaties such as the ECOWAS Convention on Judicial Assistance in Criminal Matters (1992), the SADC Protocol on Mutual Legal Assistance in Criminal Matters (2002) and the Agreement on Judicial Cooperation between Member States of the Economic and Monetary Community of Central Africa (2004).²²⁴⁴

Furthermore, the conclusion of an African comprehensive legal framework on judicial cooperation can solve the problem of ratification that may attach to the disparity of African treaties. Concerning the AU treaties, it has been demonstrated that:

treaties that have both been signed and ratified by the greatest number of member states and secured high positive ratification–signature correlation are the constituent instruments establishing the foundational institutions and general human rights issues. Treaties on more focused and narrow policy areas generally seem to attract fewer signatures, and correspondingly fewer ratifications, arguably because these are the types of treaties that require changes to domestic legislation for their post-ratification implementation.²²⁴⁵

This problem is recognised by the AU itself in its Report of 2012 on the Status of OAU/AU Treaties.²²⁴⁶ It is probable that the same problem affects other African treaties concluded at the regional or sub-regional levels. The lack of ratification simply increases legal de-connection between states, some of which bearing the risk to become safe havens for fugitive offenders.²²⁴⁷ The problem is even worse if the relevant treaties cover some regions or sub-regions of Africa only.²²⁴⁸ The comprehensive legal framework on cooperation could solve this problem insofar as states would have to decide to access one continental legal instrument.

provisions agreed upon with the requesting party. The requesting State shall be kept duly informed of the final outcome’.

²²⁴³ ICGLR’s Protocol on Judicial Cooperation (1 December 2006), Article 3.

²²⁴⁴ See also Office des Nations Unies contre la Drogue et le Crime, *Recueil d’accords bilatéraux, régionaux et internationaux en matière d’entraide judiciaire et d’extradition –Tome 1* (Vienna : 2008), at vii-viii.

²²⁴⁵ T. Maluwa, ‘Ratification of African Union Treaties by Member States: Law, Policy and Practice’, 13 *Melbourne Journal of International Law* (2012)1-49, at 26.

²²⁴⁶ Executive Council of the African Union, above note 1614, para.6.

²²⁴⁷ B. Kahombo, ‘La coopération judiciaire pénale fondée sur les traités de la CEEAC, du COMESA et de la SADC’, 5 *African Law Study Library* (2010) 1-23, at 21.

²²⁴⁸ *Ibid.*

It could also harmonise the forms of cooperation between states towards the 14 crimes within the jurisdiction of the AU Criminal Court. For example, the comprehensive legal framework on cooperation could include a duty to extradite or prosecute perpetrators of any of these crimes, instead of maintaining the current disparity of treaty provisions. This may be an outstanding improvement of the law for crimes such as the illicit exploitation of natural resources, which is not covered by any other treaty, with the exception of the ICGLR's Protocol of 2006, or additional criminal acts that have been incorporated into the regionalised definitions of ICC crimes such as war crimes.

In addition, the comprehensive legal framework on cooperation could determine the role of national alternative options for criminal prosecutions such as amnesties, which may impair cooperation with the AU Criminal Court or any other African states willing to exercise jurisdiction. If amnesties can be admitted regarding ICC crimes on a case-by-case basis, there does not seem to be any legal impediment to acknowledge their full relevance for other crimes within the jurisdiction of the AU Criminal Court. However, the comprehensive legal framework on cooperation may determine principles that states should follow in order to avoid the increasing of cases of blanket amnesties and so impunity. The last matter to deal with should be the question about the tension between the preservation of peace and the necessity of criminal prosecutions. The comprehensive legal framework on cooperation may provide for realistic options for sequencing the two values of justice and peace.

Finally, concerning the form of this legal instrument, states may choose between amending the Malabo Protocol and adopting a separate treaty. The former option is more preferable as the latter one may create a useless duplication of existing treaties on cooperation, thereby perpetuating the problem of legal disparity to which a solution must be rather found.

2.2.3.4. The Funding of the Court in Question

Where the money to fund the AU Criminal Court will come from? This is a legitimate question to ask given the modest budget of the AU and its dependence on international donors.²²⁴⁹ The numbers in the years 2015, 2016 and 2017 are telling evidence. In 2015, the total budget of the AU was 522,121,602 USD, of which 122,793,882 USD only, representing

²²⁴⁹ Du Plessis, above note 2116, at 9-10.

23,51%, were assessed on its member states.²²⁵⁰ In 2016, the budget decreased to 416,867,326 USD, of which 247,033,986 USD, representing 59,25%, were provided by partners.²²⁵¹ In contrast, the budget for 2017 increased up to 782,108,049 USD, of which 576,959,511 USD, representing 73,76%, were secured from partners.²²⁵² During these years, the amount of money allocated to the AfCHPR was 9,857,665 USD in 2015, 10,286,401 USD in 2016 and 10,315,284 USD in 2017. This is comparable to the total budget for the trial of Hissène Habré, that is to say 8.570.000 Euros. Yet, unlike the EAC, the AU Criminal Court has a broad substantive jurisdiction, a heavy permanent structure (combined with the human rights and general affairs sections, increase in personnel and need of new premises), and is designed to perform its functions all over the continent. If, when it becomes operational, it does have a lot of cases to hear, then the financial needs would be equal to the budget of the current AfCHPR but multiplied by ten or twenty, if not more. This problem will be hard to solve because it is unlikely that international donors agree to increase their assistance to the AU, given the fact that they already contribute significantly, in order to meet the financial needs implied by the new AU Criminal Court.

The financing of AU's institutions is an old problem. The Declaration of the AU Ministerial Conference on Human Rights, held in Kigali (Rwanda) in 2003, recognised that the AfComHPR was underfunded and that there was a need to establish "a fund to be financed through voluntary contributions from member states, international and regional institutions".²²⁵³ In July 2011, the AU Assembly recalled its concerns about "the dire financial situation of the AU caused by delays in Member States honouring their assessed contributions and complexities of accessing partner funds".²²⁵⁴ In order to find a sustainable solution, it

²²⁵⁰ Assembly/AU/Dec.544 (XXIII), Decision on the Budget of the African Union for the 2015 Financial Year (Doc. Assembly/AU/3(XXIII)), Malabo (Equatorial Guinea), 26-27 June 2014, paras.1-2.

²²⁵¹ Assembly/AU/Dec.577(XXV), Decision on the Budget of the African Union for the 2016 Financial Year (Doc. Assembly/AU/3(XXV)), 25th Ordinary Session of the Assembly of the African Union, Johannesburg (South Africa), 14-15 June 2015, paras.1-2.

²²⁵² EX.CL/Dec.919 (XXIX), Decision on the Budget of the African Union for the 2017 Financial Year (Doc. EX.CL/956(XXIX)), 29th Ordinary Session of the Executive Council of the African Union, Kigali (Rwanda), 13-15 July 2016, paras.2-3.

²²⁵³ MIN/CONF/HRA/Decl.1(I), Kigali Declaration, The First AU Ministerial Conference on Human Rights in Africa, Kigali (Rwanda), 8 May 2003, para.23.

²²⁵⁴ Assembly/AU/Dec.364(XVII), Decision on Alternative Sources of Financing the African Union – Doc. EX./CL/656(XIX), 17th Ordinary Session of the Assembly of the African Union, Malabo (Equatorial Guinea), 30 June – 1 July 2011, para.3.

requested the Commission to put in place a High Level Panel on Alternative Sources of Financing the AU to undertake consultations with member states and to submit a report to the Assembly.²²⁵⁵ In July 2012, the High Level Panel, chaired by Olusegun Obasanjo, former President of Nigeria, submitted the said report in which it noted:

Presently, the Union continues to depend heavily on partners to finance its programmes. For instance, Member States contributed just about 7% of the Programme Budget in 2011 and 2012. Added to this is the problem of arrears in back payment of statutory contributions by Member States. By year 2009 and 2010, Member States arrears amounted to US\$ 40 million and US 43 million, respectively. Another problem is the continued dependence of the Union on five countries (Algeria, Egypt, Libya, Nigeria, and South Africa) for financing the bulk of its activities. The five countries each account for 13.272% of the Union Budget. That is, around 66.36% of the total Union budget comes from only five countries. The implication of the heavy dependence on a few countries is that failure to honour their commitments by any one of the countries could mean a serious financial trouble for the Union. The 2011 events in North Africa brought this reality to the fore and it provided a strong incentive and justification for spreading the financing web much wider.²²⁵⁶

In deciding to include criminal jurisdiction within the AfCJHR, the AU Assembly was also aware of the financial difficulties the Court could face. The merge of the AU Court of Justice with the AfCHPR which gave give birth to a single court, the AfCJHR, was partly motivated by the necessity to reduce the financial costs of the Union. In July 2012, the AU Assembly requested the Commission to prepare a study on the financial and structural implications resulting from the expansion of the Court's jurisdiction to try international crimes and submit its report for consideration by the AU policy organs.²²⁵⁷ This report confirmed that the cost for the trial of Hissène Habré was the comparative reference to assess the financial needs of the AU Criminal Court.²²⁵⁸ Moreover, it explained that some of the regional trials that would not

²²⁵⁵ *Ibid.*, paras.8 and 10.

²²⁵⁶ Assembly of the African Union, 'Progress Report of the High Level Panel on Alternative Sources of Financing the African Union Chaired by H.E. Olusegun Obasanjo, Former President of Nigeria Consultations with Member States', Assembly/AU/18(XIX), Addis Ababa (Ethiopia), 15-16 July 2012, para.6.

²²⁵⁷ Assembly/AU/Dec.427(XIX), above note 2091, para.2.

²²⁵⁸ Executive Council of the African Union, 'Report on the Financial and Structural Implications of Extending the Jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes', EX.CL/773(XXII) Annex 2 Rev., Addis Ababa (Ethiopia), 21-25 January 2013, para.12.

involve former Heads of State or Government could be cheaper to sustain.²²⁵⁹ In any case, the financial needs will be significant.

How to overcome this challenge? One of the solutions lies in the political will of member states to increase their voluntary contributions to the AU budget. This recommendation should apply foremost to states that will be parties to the Malabo Protocol. The opposite argument to this recommendation could be that the states are poor and may not have additional resources to support the AU Criminal Court. It can be objected that many African countries have a lot of resources to do what they wish, but money is not generally available for various structural problems, including corruption, embezzlement and monopolisation of resources and public revenue by the state officials for private and familial ends.²²⁶⁰ Another solution is to “invent ways of funding additional structure and not rely on donor funding”.²²⁶¹ This suggestion relates to the issue of alternative sources of financing the AU. It is a solution in line with the African self-reliance policy, which does not mean “self-isolation”,²²⁶² but a commitment to base the development of the continent primarily on own resources.²²⁶³ International partners

²²⁵⁹ *Ibid.*, para.13.

²²⁶⁰ See M. Kavanagh, T. Wilson and F. Wild, ‘With His Family’s Fortune at Stake, President Kabila Digs In: Joseph Kabila and his relatives have built a network of businesses that reaches into every corner of Congo’s economy. Is that why he won’t step down?’ (16 December 2016) <<https://www.bloomberg.com/news/features/2016-12-15/with-his-family-fortune-at-stake-congo-president-kabila-digs-in>> accessed 26 March 2017. In this outstanding example concerning the DRC, the authors write: ‘Together the Kabilas have built a network of businesses that reaches into every corner of Congo’s economy and has brought hundreds of millions of dollars to the family, a Bloomberg News investigation has found (...). While Congolese law doesn’t prohibit politicians or their families from having business interests, the scope of that empire has only recently become visible, in publicly available corporate and government records that Congolese regulators have computerized and made searchable in just the past few years. Bloomberg News, with support from the Pulitzer Centre on Crisis Reporting, traced the Kabilas’ interests by amassing an archive of hundreds of thousands of pages of corporate documents that shows his wife, two children and eight of his siblings control more than 120 permits to dig gold, diamonds, copper, cobalt and other minerals. Two of the family’s businesses alone own diamond permits that stretch more than 450 miles across Congo’s southwestern border with Angola. Family members also have stakes in banks, farms, fuel distributors, airline operators, a road builder, hotels, a pharmaceutical supplier, travel agencies, boutiques and nightclubs. Another venture even tried to launch a rat into space on a rocket’.

²²⁶¹ Owiye Asaala, above note 2199, at 55.

²²⁶² Assembly/AU/Decl.5(XXV), Declaration on Self-reliance, 25th Ordinary Session of the Assembly of the African Union, Johannesburg (South Africa), 14-15 June 2015, para.2.

²²⁶³ *Ibid.*

might still have something to provide, even though subsidiarily, if they wish to support the AU Criminal Court.

Thus, in January 2015, the AU Assembly underlined “the need to ensure predictable and sustainable funding”²²⁶⁴ and decided “to establish a Special Fund and convene a resource mobilisation conference to raise funds to initiate and sustain the activities of the African Court on Human and Peoples Rights’ proposed Chambers of the International Criminal Law Section (...)”.²²⁶⁵ In July 2016, it further decided “to institute and implement a 0.2 percent Levy on all eligible imported goods into the Continent to finance the African Union Operational, Program and Peace Support Operations Budgets (...)”.²²⁶⁶ It is worth noting that this import levy was discarded by the High Level Panel on Alternative Sources of Financing the AU in 2012,²²⁶⁷ probably because it could entail the increase of prices of such goods which might be necessary for feeding the African peoples. Moreover, in the absence of an indicative list of the goods concerned, the reservation made by Mauritius to the decision of July 2016 could be understood. In the end, the AU aims to support 100% of its operational budget, 75% of its program budget and 25% of its peace support operations budget.²²⁶⁸ It only remains to be seen if these decisions showing good intention to ensure financial self-reliance will be implemented.

²²⁶⁴ Assembly/AU/DEC.547 (XXIV), above note 1032, para.15.

²²⁶⁵ *Ibid.*, para.17(b). See also Statute on the Establishment of Legal Aid Fund for the African Union Human Rights Organs (30 January 2016).

²²⁶⁶ Assembly/AU/Dec.605(XXVII), Decision on the Outcome of the Retreat of the Heads of States and Government, Ministers of Foreign Affairs and Ministers of Finance on the Financing of the African Union, 27th Ordinary Session of the Assembly of the African Union, Kigali (Rwanda), 17– 18 July 2016, para.5(a) (i).

²²⁶⁷ Assembly of the African Union, above note 2256, para.22 (4).

²²⁶⁸ Assembly/AU/Dec.578 (XXV), Decision on the Scale of Assessment and Alternative Sources of Financing the African Union (Doc. Assembly/AU/5(XXV)), 25th Ordinary Session of the Assembly of the African Union, Johannesburg (South Africa), 14-15 June 2015, para.2 (ii).

3. The Relationship with the Global System of International Criminal Justice

The creation of the AU Criminal Court presupposes that Africa as a region claims to be an enforcer of international law and participates in the international struggle against impunity. It also implies that the ICC, although currently the most current dominant global system of international criminal justice, is not the end of the story of the development of international criminal law.²²⁶⁹ Further developments remain possible. The creation of the AU Criminal Court is a step in this direction. It entails both fragmentation and complexity in international criminal law.²²⁷⁰

However, the establishment of an AU Criminal Court could cause fragmentation and complexity in international criminal law. There would be normative fragmentation (on substantive and procedural levels) of two kinds. On the one hand, norms and features of African international criminal law differ from those of global international criminal law. The following, for example, are unique to the Malabo Protocol (Annex): corporate criminal liability, an extensive list of crimes against peace and security in Africa, deletion of the confirmation of charges from the procedure applicable before the AU Criminal Court, and the possible application by the latter of extensive jurisdictional principles, including passive personality. Another prominent example of African regional norms that diverge from rules of universal international criminal law is the rules on functional and personal immunity of state officials from international criminal prosecutions. Furthermore, there is institutional fragmentation.²²⁷¹ This implies a plurality of courts that could get into competition with one another because they will have jurisdiction to try the same international crimes. In particular, the AU Criminal Court stands alongside with the ICC at the regional level. It duplicates the mandate of the ICC with respect to the latter's substantive jurisdiction, personal jurisdiction (trying alleged African offenders), and territorial jurisdiction (trying crimes committed in Africa).²²⁷²

²²⁶⁹ Kemp, above note 2164, at 9.

²²⁷⁰ M. Sirleaf, 'Regionalism, Regime Complex and the Crisis in International Criminal Justice', 54 *Columbia Journal of Transnational Law* (2016) 699-778, at 743-747.

²²⁷¹ See C. Giorgetti, 'Horizontal and Vertical Relationships of International Courts and Tribunals - How Do We Address Their Competing Jurisdiction?', 30 (1) *ICSID Review - Foreign Investment Law Journal* (2015) 98-117.

²²⁷² A. Soma, 'Vers une juridiction pénale régionale pour l'Afrique', in F. Niang and F. Bernard (eds), *Colloque sur les droits humains. Mécanismes régionaux et mise en œuvre universelle/Colloquium on Human Rights*.

The normative fragmentation does not pose difficult legal problems. It is well known that each criminal court shall apply first the norms provided for in its Statute. In the event of conflict with global international criminal law, regional criminal law could benefit from the status of prevailing special applicable law, without prejudice to the respect for the rules of *jus cogens* or peremptory norms of general international law from which no derogation is possible. However, the institutional fragmentation and the plurality of courts resulting from jurisdiction over the same international crimes may engender very complex legal problems. Competition between courts should be avoided because it can lead to an inefficiency of justice for perpetrators of international crimes.²²⁷³ That is why a careful coordination of jurisdictions and activities must be attained. What then is the appropriate approach to coordination between the AU Criminal Court and the ICC? Which principles should apply to solve their potential jurisdictional conflicts? What role may the UN Security Council play in the functioning of the AU Criminal Court when it comes to dealing with crimes affecting international peace and security for the maintenance of which this UN organ assume the primary responsibility pursuant to the UN Charter?

This chapter discusses two different possible approaches to coordination of international criminal justice, namely, the hierarchical model whereby the AU Criminal Court is subordinated and connected to the institutions of global system of international criminal justice (the ICC and the UN Security Council), and the cooperative approach which privileges mutual accommodation and principles on the resolution of potential conflicts between equally coexisting international criminal courts. The chapter also proposes a third alternative approach to coordination, which seems to be the best prospect for international criminal law. This third approach is based on the regionalisation of the ICC in connection with the establishment and application of the principle of regional territoriality. The latter principle implies that crimes committed in one region should be tried by domestic courts of states belonging to that region or the competent regional jurisdictions before any involvement from another region or global mechanisms of criminal accountability. The final objective of this third approach is the establishment an appropriate model of integrated system of international criminal justice, consisting of both regional and universal fragments of international criminal law, standing in harmony one with another.

Regional Mechanisms and Global Implementation (Geneva: University of Geneva, Global Studies Institute, 2014) 121-140, at 136.

²²⁷³Sirleaf, above note 2270, at 759.

Therefore, the arguments in favour of the regionalisation of international criminal justice that are developed below are divided into two main parts: first, the coordination of global system of international criminal justice with the AU Criminal Court (3.1), and, second, the prospect for the future of international criminal justice (3.2).

3.1. The Coordination with the Criminal Court of the African Union

The ICC and the Security Council dominate the global system of international criminal justice. Yet, the Malabo Protocol (Annex) is silent on the relationship between the AU Criminal Court and the Security Council. It does not refer to the Rome Statute in the same way as the latter is silent on regional criminal courts. A possible reason is that no regional criminal courts with jurisdiction over core crimes existed when the ICC as established. However, the lack of reference of the Malabo Protocol (Annex) to the ICC Statute should not be seen as a legal gap. It seems to be a deliberate omission by African states and the AU²²⁷⁴ for two main reasons. First, the AU and some of its member states are not parties to the ICC Statute. Second, the omission is likely a manifestation of the African contestation of the ICC's work in Africa and implies a tension of distribution of power between universalism and regionalism. A compromise between states and the international community in terms of coordination of enforcement mechanisms of international criminal law must be found in order to avoid conflicts that may impair the efficacy of justice. Such coordination can be envisaged in respect of the AU Criminal Court's relationship with the ICC (3.1.1) and the role that the Security Council may play in its the functioning (3.1.2).

3.1.1. The Relationship with the ICC

The relationship between the AU Criminal Court and the ICC may be based on two possible approaches: the hierarchical model (3.1.1.1) and the cooperative approach between the two courts (3.1.1.2).

3.1.1.1. The Hierarchical Model

This model takes into account the experience of the relationship between the ICC and domestic courts based on the principle of complementarity. The hierarchical model implies that the ICC “would remain at the apex of international criminal law enforcement”.²²⁷⁵

²²⁷⁴ Rau, above note 945, at 690.

²²⁷⁵ Wilt, above note 2214, at 191.

According to Haren Van der Wilt, this model envisages a situation in which a judgment by the AU Criminal Court “might be superseded by one of the ICC if the former’s judgment be found not to measure up to the standards of the ICC Statute and therefore to exemplify the inability (or unwillingness) of the African Court to exercise jurisdiction in a particular case”.²²⁷⁶ This situation would lead to making the ICC complementary not only to domestic courts but also to regional criminal jurisdictions.

In 2013, Kenya submitted to the ASP a proposal of amendment in this respect.²²⁷⁷ Several commentators also support this proposal. For example, Abdoulaye Soma suggests that the principle of complementarity should result in a judicial dialogue whereby the jurisdiction of the ICC or the AU Criminal Court will prevail, depending on existing comparative advantages of either court for the prosecution of relevant international crimes.²²⁷⁸ However, this is a confusing suggestion given that complementarity is not meant to promote judicial dialogue but rather to test whether domestic tribunals or potential regional courts exercise or have exercised jurisdiction over the alleged crimes pursuant to what is expected in terms of quality of criminal prosecutions in view of preventing the ICC from stepping in. In contrast, judicial dialogue is a form of communication between courts and tribunals.²²⁷⁹ This is pursued through various channels such as cross-referencing in case-law, which promotes normative coherence within the legal system, consultations and meetings between judicial actors from different courts and tribunals in order to harmonise policies and activities.²²⁸⁰ Furthermore, Abdoulaye Soma failed to indicate how his suggested principle of complementarity with regional courts should be operationalised in terms of admissibility of cases. There might be a need to amend article 17 of the Rome Statute on issues of admissibility before the ICC to include proceedings before regional criminal courts. However, for Chacha Bhoke Murungu, even though the Rome Statute does not contemplate regional criminal jurisdiction such as the AU Criminal Court, “a progressive interpretation of positive complementarity might, for the purposes of closing all impunity gaps, infer that even regional criminal courts could have

²²⁷⁶ *Ibid.*

²²⁷⁷ United Nations, ‘Rome Statute of the International Criminal Court: Rome, 17 July 1998. Kenya: Proposal of Amendments’ (March 2014) <<https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf>> accessed 20 April 2015.

²²⁷⁸ Soma, above note 2272, at 139.

²²⁷⁹ L. Boisson de Chazournes, ‘Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach’, 28 (1) *European Journal of International Law* (2017) 13-72, at 30.

²²⁸⁰ *Ibid.*, at 36.

jurisdiction over international crimes within the ICC jurisdiction".²²⁸¹ Miles Jackson espouses a similar view. He posits that, while article 17 of the ICC Statute refers to states' jurisdictions, prosecutions by a regional criminal court should be seen as prosecutions by a state.²²⁸² This is because such regional prosecutions should be regarded as a lawful way of collective exercise by states of their primary responsibility to investigate and prosecute crimes within their jurisdiction.²²⁸³ These states have simply delegated their powers to the said regional criminal court.²²⁸⁴ In any case, when prosecutions are barred by the rules on immunities before the AU Criminal Court, the ICC should intervene on the basis of inability to prosecute.²²⁸⁵

Even if the AU has encouraged its member states –including Kenya –that are parties to the Rome Statute to submit amendments to this treaty, a problem of acceptance of the hierarchical model based on complementarity between the ICC and the AU Criminal Court may arise after adoption of the Malabo Protocol in 2014. It must be recalled that such a hierarchy between international courts does not in principle exist under international law. In the *Tadić* case, the ICTY indicated:

International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).²²⁸⁶

The drafters of the Malabo Protocol also seem to have rejected the hierarchical model towards the ICC. This is how the silence on the relationship of the AU Criminal Court and the ICC could be understood. However, it has been foreseen that an agreement on cooperation between the two equally coexisting courts might be possible. In this regard, Don Deya has written:

The drafters and negotiators are acutely aware of the fact that the proposed Court will be complementary to national courts and will co-exist with other international courts, which will

²²⁸¹ Murungu, above note 596, at 1081.

²²⁸² M. Jackson, 'Regional Complementarity: the Rome Statute and Public International Law', 14 *Journal of International Criminal Justice* (2016) 1061-1072, at 1062.

²²⁸³ *Ibid.*, at 1067-1068.

²²⁸⁴ *Ibid.*

²²⁸⁵ Wilt, above note 2214, at 196.

²²⁸⁶ *Tadić* (IT-94-1-AR72), above note 265, para.11.

have similar mandates and jurisdictions to it. For instance, part of its general affairs mandate will be shared with the International Court of Justice (ICJ), and also the Courts of the African RECs. Similarly, its human and peoples' rights mandates will be shared with some (if not all) of the Courts of the RECs. Furthermore, its international criminal law mandate (at least in respect of the crimes of genocide, crimes against humanity and war crimes at the moment, and the crime of aggression in the future) will be shared with the ICC. This international criminal law mandate may eventually be shared with the Courts of the RECs as well, if some of the current discussions on the continent come to fruition. (...) The drafters and negotiators clearly envisage that, since multiple courts will share jurisdiction, these courts may opt to negotiate among themselves on how best to handle this shared jurisdiction so that the ends of justice are met in an effective, efficient, credible and fair manner. In this regard, it is left to the Courts themselves, once fully constituted, to negotiate how they will work together. The aim is to reduce the possibility of 'politics' or 'political considerations' playing a part in what should essentially be a judicial task. This, in my view, is another positive and pragmatic position.²²⁸⁷

This rejection of the hierarchical model diverges from the acceptance of the latter model concerning the relationship between the AU Criminal Court and the courts of justice of RECs, when they have criminal jurisdiction, on the basis of the principle of complementarity. This differentiation is understandable. The reason is that within the AU institutional system, hierarchy already exists between the continental, regional and national levels of exercise of public authority for the integration of the African continent. Against this backdrop, the cooperative approach to the relationship between the ICC and the AU Criminal Court may be preferable.

3.1.1.2. The Cooperative Approach

This approach can be based on two main ideas. First, the ICC will have to equally coexist with the AU Criminal Court. This plurality of jurisdictions implies that states parties will have an option to refer their situations to either court when it comes to prosecuting ICC crimes. Second, for the purpose of solving possible conflicts resulting from the situation of overlapping jurisdictions, an agreement on cooperation should be concluded between the ICC and the AU Criminal Court. This is because neither court may gain from lasting conflict at the expenses of the struggle against impunity.²²⁸⁸ In this regard, article 46L (3) of the Malabo Protocol (Annex) stipulates: "The Court shall be entitled to seek the co-operation or assistance

²²⁸⁷ Deya, above note 2078, at 25.

²²⁸⁸ Sirleaf, above note 2270, at 759. See also T. Gehring and B. Fraude, 'The Dynamics of Regime Complexes: Microfoundations and Systemic Effects', 19 (1) *Global Governance* (2013) 119-130, at 124-125.

of regional or international courts, non-states parties or co-operating partners of the African Union and may conclude agreements for that purpose". The question is what could be the content of such an agreement on cooperation between the ICC and the AU Criminal Court.

Foremost, the simplest content could be providing for a division of work between the ICC and the AU Criminal Court. Haren Van der Wilt has suggested that this division of work could be made on the basis of one of the following options. On the one hand, "one could envisage a selection and division of cases on the basis of gravity".²²⁸⁹ This means that "the ICC could opt for prosecuting the gravest crimes, while leaving others to the African Court".²²⁹⁰ In the view of this author, this criterion would also help to distinguish between the specific incidents that could be addressed by the ICC and those which may be dealt with by the AU Criminal Court.²²⁹¹ A criminal incident has to be understood here as "a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators".²²⁹²

However, the problem with this option is that the criterion of gravity may not be clear enough to avoid conflict of jurisdiction. Each Court may even have its own interpretation as to whether the criterion is met, even if indicators of the gravest crimes are specified in the agreement on cooperation between the two courts. Furthermore, this kind of division of work may lead to different courses of international criminal justice in the same situation and even with respect to the same incident within the same country. Potential contradictions of court's decisions on the qualification of crimes, the circumstances of their commission, the qualification of perpetrators (direct or indirect), the punishment applied or the designation of victims are not totally inevitable.

On the other hand, the division of work may be made on the basis of the nature of the crimes.²²⁹³ According to Haren Van der Wilt, this is a stronger argument to uphold. It means that the ICC would continue to try exclusively ICC crimes, while the AU Criminal Court

²²⁸⁹ Wilt, above note 2214, at 199.

²²⁹⁰ *Ibid.*

²²⁹¹ *Ibid.*

²²⁹² *Situation in Libya in the Case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11-01/11 OA 4), Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi", Appeals Chamber, 21 May 2014, para.62.

²²⁹³ Wilt, above note 2214, at 199-200.

could focus on the rest of crimes of transnational nature.²²⁹⁴ One may add to this argument another distinction whereby the AU Criminal Court could even try part of ICC crimes when the acts committed are not covered by the Rome Statute but by the extensive definitions of crimes contained in the Malabo Protocol (Annex).

This option keeps the ICC jurisdiction untouched. All possible conflicts of jurisdiction with the AU Criminal Court would be thus avoided. But, the problem with this option is that it appears to be inconsistent with the very motives that have informed the creation of the AU Criminal Court. It must be recalled that this Court has been created for the purpose of realising African self-reliance and participation in dealing with crimes committed in Africa, before any involvement of non-African mechanisms of criminal accountability. It is also the result of the African contestations against part of the ICC's judicial work in Africa and the perception of a certain bias in the treatment of important cases such as those involving (incumbent and former) African heads of states. Given the importance of these cases, instead of being heard exclusively by the ICC, they are the cases to which the AU Criminal Court should be dedicated.²²⁹⁵ Michelo Hansungule even recommended that such cases should fall within the jurisdiction of the AU Criminal Court rather than being left to African domestic courts when he stated:

(...) the African Union should adopt a resolution to establish an international tribunal capable of prosecuting former heads of state of Africa instead of leaving prosecution in the hands of their national courts after the incumbents leave office. This will remove the influence and threat directed towards the judiciary by heads of state by eliminating the option of surrendering their power for fear of facing criminal responsibility under international law. This process will also create confidence and in time will establish the independence of the judicial authority from executive power in the implementation of the rule of law in Africa and respect for international human rights for Africans.²²⁹⁶

Thus, the division of work based on the nature of crimes between the ICC and the AU Criminal Court is undesirable. It would render meaningless the establishment of the latter Court.

That is why the proposed agreement on cooperation between the ICC and the AU Criminal Court would rather focus on other issues. First of all, given that each court may exercise its

²²⁹⁴ *Ibid.*

²²⁹⁵ Hansungule, above note 844, at 56.

²²⁹⁶ *Ibid.*

entire jurisdiction without limitations related to the division of work, the agreement on cooperation should prescribe applicable procedures designed to eliminate potential conflicts due to parallel proceedings and the risk of contradictory judgments. The most prominent example of these procedures is the principle of *litis alibi pendens*. This principle, which derives from domestic laws, is widely recognised by international courts and tribunals.²²⁹⁷ It is relevant to solving conflicts of jurisdiction resulting from pending disputes between the same parties for the same object and cause of action brought before two or more competent tribunals.²²⁹⁸ In such circumstances, the principle implies a set of procedural rules which favour the jurisdiction of one court and the decline of jurisdiction by the other. For example, it may be that the jurisdiction that has been activated first will be the competent court, or the court of the first-filed application.²²⁹⁹ The European Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 prescribes the same rule for domestic courts.²³⁰⁰ Preference may also be given to the court which has made much progress in instance and proceedings compared to the other. This is particularly important because the alleged offenders should be tried and their cases terminated in a reasonable delay. The principle of *litis alibi pendens* should apply to investigations and prosecutions of concrete cases. In case of a motion challenging the jurisdiction of one Court on this basis, the proceedings should be suspended until the jurisdiction of the other Court has been established.

Secondly, the proposed agreement on cooperation between the ICC and the AU Criminal Court could also provide for principles on mutual recognition of jurisdiction and judicial decisions. These principles may include the principle of double jeopardy (*ne bis in idem*), which prevents perpetrators from being prosecuted more than once the same crimes. They

²²⁹⁷ Boisson de Chazournes, above note 2279, at 46.

²²⁹⁸ J.P. George, 'International Parallel Litigation -A Survey of Current Conventions and Model Laws', 37 *Texas International Law Journal* (2002) 499-540, at 522-523.

²²⁹⁹ *Ibid.*

²³⁰⁰ This is the solution provided for by article 27 of the European Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (30 October 2007). This Article stipulates: '1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different States bound by this Convention, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court'.

also include the principle of the authority of *res judicata*, which imposes the respect by a court of the decision made by it or another court when it is exercising its jurisdiction in order to avoid contradictory judgments and jurisprudence.

In any event, whichever procedural mechanism may be established by the said agreement on cooperation, there will still be a need for judicial dialogue between the two Courts. This dialogue may be promoted through regular meetings between their Presidents and consultations and exchange of information as well as evidentiary elements between their OTP. A conference of international prosecutors may even be established to this effect. This conference could be a forum whereby these offices would have to harmonise their criminal and prosecutorial policies or strategies and thus end mutual misunderstandings, which may potentially derive from their parallel activities.

3.1.2. The Potential Role of the Security Council

The Security Council is primarily responsible for the maintenance of international peace and security. In the past, the Security Council has resorted to the establishment of *ad hoc* international criminal tribunals when it views prosecutions as essential to achieving international peace and security. This is also why it has been provided a role in the functioning of the ICC through referral of situations to the ICC's Prosecutor or deferral of investigations or prosecutions. This raises the question: can or should the Security Council utilise the AU Criminal Court through referral of situations or deferral of investigations or prosecutions for the purpose of maintaining international peace and security? Furthermore, the Security Council enjoys the principal authority to qualify acts of aggression. Given that aggression also falls within the jurisdiction of the AU Criminal Court, one may ask which kind of interplay may exist between this Court and the Security Council for the purpose of prosecuting such crime.

The first question can be answered in application of the principle of subordination of regional mechanisms of collective security to the United Nations.²³⁰¹ African regional criminal justice can be considered as an important tool with potential to contribute to the maintenance of international peace and security in Africa. In this regard, the Malabo Protocol has explicitly indicated the pivotal role that the AU Criminal Court can play "in strengthening the commitment of the African Union to promote sustained peace, security and stability on the

²³⁰¹ UN Charter, Article 52 (1).

continent and to promote justice and human and peoples' rights (...).²³⁰² Now, it is well known from the UN Charter that the Security Council is authorised to “investigate any dispute or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security”.²³⁰³ Moreover, the Security Council may “where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority”.²³⁰⁴ In this context, there are not theoretically legal impediments to have a regime of connection of the Security Council to the AU Criminal Court which is similar to the one established by the Rome Statute in relation to the ICC. In terms of concrete proposal, the Security Council could have the power to refer situations to the Court's Prosecutor or to defer investigations or prosecutions in the interests of maintaining international peace and security in Africa.

Concerning the second question on the interplay between the AU Criminal Court and the Security Council with respect to the prosecution of the crime of aggression, there is no reason why the relationship should not be modelled on the Rome Statute. This is because the problem arises in the same terms.²³⁰⁵ In fact, how can the exercise of the Court's jurisdiction be reconciled with the power of the Security Council to proceed to the qualification of acts of aggression pursuant to Chapter VII of the UN Charter? Should the Court wait for the decision of the Security Council on whether a state has committed aggression before any determination on individual criminal responsibility? Or could the Court remain free to exercise its criminal jurisdiction rather than potentially being blocked by political considerations on acts of aggression within the Security Council? The whole debate is therefore about the independence of the Court vis-à-vis the Security Council, the balance between judicial process and political control.²³⁰⁶

The consensus found in the framework of ICC's proceedings is formulated in article 15*bis* of the Rome Statute. The ICC Prosecutor shall proceed with an investigation upon the Security Council's determination whether the state concerned has committed an act of aggression.

²³⁰² Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Preamble, paras.5 and 13.

²³⁰³ UN Charter, Article 34.

²³⁰⁴ *Ibid.*, Article 53 (1).

²³⁰⁵ See L. May, *Aggression and Crimes against Peace* (Cambridge: Cambridge University Press, 2008), at 227.

²³⁰⁶ N. Weisbord, 'Prosecuting Aggression', 49 (1) *Harvard International Law Journal* (2008) 161-220, at 196.

When no such prior determination is made within six months, the ICC Prosecutor may proceed with an investigation, “provided that the Pre-Trial Division has authorised the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16”.²³⁰⁷ In any case, “a determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute”.²³⁰⁸ If the AU Criminal Court does not adopt the same solution, it would practically enjoy more independence in the prosecution of acts of aggression than the ICC. Its judicial process would be completely independent from political control. The risk of contradiction between judicial determination and political considerations could be very high. This may impair judicial cooperation on the part of states parties and undermine the struggle against impunity.

However, there are several concerns with all these proposals. First, there is a risk that –like the ICC –the AU Criminal Court will become politicised if it allows political organs to interfere in its operation. The second concern is the potential contestation of the Court by non-contracting states that could be coerced to its jurisdiction through a referral of a situation by the Security Council. Thirdly, even African states, by adopting the Malabo Protocol, omitted to confer on the proper organ of the AU, namely the AU Assembly, the power to trigger the Court’s jurisdiction in respect of states not parties or to suspend proceedings before the Court. The fourth concern is about the issue of legitimacy of the Security Council to enjoy increasing powers in the administration of regional criminal justice without being reformed in a manner that all the regions of the world are provided with equitable powers and representation in its composition. Currently, the Security Council consists of 15 member states, of which five are permanent and dominate its operation with their veto right. That is to say, the veto provides these states the power to block any resolution in conflict with their individual interests.

Generally speaking, the Security Council is a product of realism after the trauma of World War II and this situation is reflected by the veto power given to its permanent members,²³⁰⁹

²³⁰⁷ ICC Statute, Article 15bis (8). Article 15 of the ICC Statute refers to the initiation of investigations by the Prosecutor *proprio motu*. Its Article 16 is about the power of the Security Council to refer situation to the Prosecutor or to defer investigations or prosecutions.

²³⁰⁸ *Ibid.*, Article 15bis (9).

²³⁰⁹ K. Oteng Kufuor, ‘Recent Developments: The African Union and the Reform of the Security Council: Some Matters Arising’, 14 *African Journal of International and Comparative Law* (2006)288-292, at 291.

who won the war: USA, Russia, United Kingdom, China and France. After decolonisation, Africa remains without permanent seat in the Security Council. True, membership in the Council as a whole should not be linked only to geographical balance, but also to effective “contributions to maintaining peace and security”.²³¹⁰ But, more than seven decades after the creation of the UN, the underrepresentation of Africa is unjustified and arbitrary, particularly because the meaning of contribution to the maintenance of peace and security has become very flexible.²³¹¹ In this regard, the proposed reform of the Security Council is expected to “increase the involvement in decision-making of those who contribute most to the United Nations financially, militarily and diplomatically”,²³¹² including “contributions to United Nations assessed budgets, participation in mandated peace operations, contributions to voluntary activities of the United Nations in the areas of security and development, and diplomatic activities in support of United Nations objectives and mandates”.²³¹³ On its part, the Common African Position on the Proposed Reform of the Security Council of the United Nations indicates that “full representation of Africa in the Security Council means: i. not less than two permanent seats with all the prerogatives and privileges of permanent membership including the right of veto; ii. five non-permanent seats”.²³¹⁴ Given the disagreements between UN member states on that proposed reform,²³¹⁵ the concern about the legitimacy of the Security Council is likely to continue for a long time.

²³¹⁰ United Nations, above note 346, para.244.

²³¹¹ Normally, developed and powerful states have particular responsibilities towards the maintenance of international peace and security since such countries contribute most to the United Nations in terms of decision-making, military capacity and financial support. These criteria are not in favour of developing countries in order to get permanent seats within the UN Security Council. However, due to the expansion of the UN Security Council’s activities after the end of the Cold War, other criteria for gauging the contribution to the maintenance of international peace and security have come into consideration. For example, the bulk of the UN Security Council’s activity relates to peacekeeping operations in states affected by civil wars. As powerful countries do not have troops and policemen to deploy everywhere, the United Nations increasingly rely on the contributions of developing states. As such, developing states can no longer be regarded as less able to contribute to the United Nations so that permanent seats within the Security Council should still be considered reserved for developed and powerful states.

²³¹² United Nations, above note 346, para.249 (a).

²³¹³ *Ibid.*

²³¹⁴ Ext/EX.CL/2 (VII), above note 1706, at 9.

²³¹⁵ Institute for Security Studies, ‘Peace and Security Council Report’ Issue 77 (February 2016), at 5.

Ultimately, the proposals to reserve a role to the Security Council in the functioning of the AU Criminal Court require some amendments to the Malabo Protocol (Annex). In the absence of such amendments concerning the power to refer a situation to the Court or to suspend its proceedings, the Security Council could only *recommend* to the AU that a situation in a state party be referred to the Court. Regarding a state not party, the situation could be referred to the ICC. The suspension of proceedings will not yet be possible since the same power is not even given by the Malabo Protocol (Annex) to the AU Assembly. Perhaps, a better model for relationship between the AU Criminal Court and the ICC may be based on the regionalisation of the ICC in conjunction with the establishment and application of the principle of regional territoriality. As discussed below, this might constitute the most realistic future for international criminal justice.

3.2. The Future of International Criminal Justice

The future of international criminal justice lies in the regionalisation of international criminal law. Beside domestic courts, power to prosecute and try international crimes should be distributed between regions and universal mechanisms of criminal accountability. This requires some changes within the system, which currently gives a predominant role to the ICC, when crimes have not been dealt with domestically. These changes can occur in two principal and complementary directions, that is to say the regionalisation of the ICC (3.2.1) and the establishment and application of the principle of regional territoriality (3.2.2).

3.2.1. The Regionalisation of the ICC

This is one of the most controversial issues in international criminal law. It is generally acknowledged that “the task of reversing the culture of impunity for international crimes and thereby strengthening the rule of law cannot simply be devolved to the ICC”.²³¹⁶ But, the idea to regionalise international criminal justice is not entirely accepted in respect of Africa. The AU Criminal Court is said to imply negative or cynical complementarity, that to say “an attempt to undermine the existing work of the ICC through a commitment to an alternative mechanism for dispensing international criminal justice but which stands no realistic chance of providing such justice, at least not without significant changes in the funding available to

²³¹⁶ M. Du Plessis, ‘Complementarity and Africa: The Promises and Problems of International Criminal Justice’, 17 (4) *African Security Review* (2008) 154-170, at 167; Manirakiza, above note 595, at 49.

the AU”.²³¹⁷ States should rather strengthen their domestic justice as a key to achieve effective struggle against impunity in line with the principle of complementarity. But, this position does not resist critique. As William Schabas has noted, the debate on the usefulness of regional criminal justice has been “short-circuited”.²³¹⁸ This is because regional courts are often presented as an alternative to the ICC rather than a mechanism necessary to complement its operations and work. On his part, William Burke-White opposes his vision of strong regionalisation based on the establishment of regional criminal courts to soft forms of regional enforcement of international criminal law in the framework of existing arrangements, notably through the creation of hybrid court with regional judges or the ICC sitting regionally, in place where the crime in question was committed.²³¹⁹ According to him, soft forms of regional enforcement of international criminal law should be favoured given that the ICC has already gained significant support and it would be unnecessary duplication of effort to create regional criminal courts.²³²⁰ However, this statement might be tenable only if regional criminal courts enjoy the same substantive jurisdiction as the ICC or if the latter Court does not itself face contestations against a part of its judicial work. The regionalisation of the ICC is simply a way to decentralise the system of international criminal justice, to bring confidence in such a system, to promote ownership of justice and proximate access to judicial forums. Against this backdrop, the debate on the regionalisation of the ICC turns to the potential creation of regional chambers of the ICC (3.2.1.1) or the transformation of existing regional criminal courts into jurisdictions of first instance within the ICC justice system (3.2.1.2).

3.2.1.1. The Creation of Regional Trial Chambers of the ICC

The first way in which the ICC may be regionalised is through the creation of regional trial chambers, which may sit in the regions of the world where crimes have been committed. William Burke-White has indicated that “from a legal perspective then, the possibility of the

²³¹⁷ M. Du Plessis, A. Louw and O. Maunganidze ‘African efforts to Close the Impunity Gap: Lessons for Complementarity from National and Regional Actions’, Institute for Security Studies Paper No.241 (November 2012), at 2.

²³¹⁸ W.A. Schabas, ‘Regions, Regionalism and International Criminal Law’, 4 *New Zealand Yearbook of International Law* (2007) 3-23, at 23.

²³¹⁹ W. Burke-White, ‘Regionalization of International Criminal Law Enforcement: A Preliminary Exploration’, *Texas International Law Journal* (2003) 729-761, at 731.

²³²⁰ *Ibid.*

ICC sitting in a regional context is both possible and easy to achieve without structural changes”.²³²¹ Jérôme De Hemptinne supports this notion and argues that it could strengthen the legitimacy of the Court’s judicial work.²³²² But, it is Stuart K. Ford who has thoroughly studied the creation of regional trial chambers without making amendments to the Rome Statute.²³²³ The basis of his analysis is found in articles 3, 4 and 62 of the Rome Statute. Article 3 (1) provides that the seat of the ICC is established at The Hague. However, article 3 (3) indicates that “the Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute”. Article 62 of the same Statute provides that “unless otherwise decided, the place of the trial shall be the seat of the Court”. This article makes The Hague the default seat of the Court. Article 4 gives to the Court legal capacity as an intergovernmental organisation, including treaty-making power in relation to the state on whose territory it may decide to sit. Article 4 specifies:

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

Article 62 above indicates that it is rather the place of the trial which may be moved from the seat of the Court. This literally implies that pre-trial proceedings are out of the scope of this provision and should take place in The Hague. This is the case of procedures on confirmation of charges or challenges to the Court’s jurisdiction.²³²⁴ Furthermore, the Court may sit elsewhere to hold a trial in whole or in part. The possibility has been invoked before the Court on several occasions.²³²⁵ For example, in the *Ntaganda* case, the Trial Chamber IV envisaged to hold the opening statements of the trial in Bunia (DRC) in order to bring the judicial work of the Court closer to the most affected communities by the crimes allegedly committed by

²³²¹ *Ibid.*, at 751.

²³²² J. De Hemptinne, ‘Trois propositions de réforme du système de la justice pénale internationale’, 19 *African Yearbook of International Law* (2014) 395-402, at 402.

²³²³ S. F. Ford, ‘The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute Permit All of the ICC’s Trials to Take Place at Local or Regional Chambers?’, 43 *John Marshall Law Review* (2010) 715-752, at 735 and 739.

²³²⁴ *Ibid.*, at 739.

²³²⁵ *Ibid.*, at 732-734.

the accused person.²³²⁶ But, creating a regional chamber goes far beyond displacing the Court's hearing in a particular case. It would require "entering into a formal agreement with the receiving country, posting staff to the receiving country, and signing a multi-year contract to acquire the use of suitable facilities".²³²⁷ According to Stuart K. Ford, if article 62 of the Rome Statute permits the ICC to displace the trial from The Hague, "there is nothing within the other provisions of the Rome Statute or its negotiating history that would prohibit the Court from deciding to hold all or most of the trials arising out of a particular situation away from the seat of the Court if that would be in the interests of justice".²³²⁸ Article 4 (1) above reinforces this possibility as it implies the relevant authority of the Court to enter into agreements that could be necessary to establish a regional trial chamber for the exercise of the Court's functions and the fulfillment of its purposes.²³²⁹

However, the ICC Statute is silent on who could make the decision to establish such a regional trial chamber. It is also silent on the applicable procedure. But, one may rely on Rule 100 of the Court's Rules of Procedure and Evidence which seems to grant that power to the Presidency of the Court,²³³⁰ that is to say the organ consisting of the Court's President, First and Second Vice-Presidents.²³³¹ Pursuant to this Rule, the Presidency can not only decide to displace the Court's hearing in a particular case from The Hague, but also, by extension, create a regional trial chamber. In this regard, Rule 100 specifies:

1. In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State, for such period or periods as may be required, to hear the case in whole or in part.
2. The Chamber, at any time after the initiation of an investigation, may *proprio motu* or at the request of the Prosecutor or the defence, decide to make a recommendation changing the place where the Chamber sits. The judges of the Chamber shall attempt to achieve unanimity in their recommendation, failing which the recommendation shall be made by a majority of the judges. Such a recommendation shall take account of the views of the parties, of the victims and an assessment prepared by the Registry and shall be addressed to the Presidency. It shall be made in

²³²⁶ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06), Recommendation to the Presidency on Holding part of the Trial in the State Concerned, Trial Chamber IV, 19 March 2015, para.21.

²³²⁷ Ford, above note 2323, at 732.

²³²⁸ *Ibid.*, at 739.

²³²⁹ *Ibid.*

²³³⁰ *Ibid.*, at 742.

²³³¹ ICC Statute, Article 38 (3).

writing and specify in which State the Chamber would sit. The assessment prepared by the Registry shall be annexed to the recommendation.

3. The Presidency shall consult the State where the Chamber intends to sit. If that State agrees that the Chamber can sit in that State, then the decision to sit in a State other than the host State shall be taken by the Presidency in consultation with the Chamber. Thereafter, the Chamber or any designated Judge shall sit at the location decided upon.

In deciding on whether the Court may sit in a state other than the host country, the Presidency must take into account various factors, including those which make the displacement of the trial desirable. Rule 100 (1) above refers to the interests of justice. In the *Ntaganda* case, for example, the appraisal of these interests of justice proved to be negative and the recommendation of the Trial Chamber IV to the Presidency for the purpose of sitting in Bunia was therefore rejected. The ICC specifically explained:

In deciding whether it was desirable and in the interests of justice to sit in Bunia, the Presidency considered a number of factors. Most importantly, it considered concerns over the consequences of the *in situ* hearings on the witnesses and victims' safety and well-being, as well as the security of the local communities involved. Furthermore, the Presidency considered the concerns expressed by the victims that the accused's return would remind them of the suffering and trauma. The Presidency also considered the impact of the logistics required for the hearings, which may have resulted in the affected communities having limited access to them, given their length and nature. Finally, the Presidency noted the financial impact of the costs of hosting the opening statements in Bunia, which were estimated to be more than €600,000. The ICC Presidency concluded that the potential benefits of holding proceedings in Bunia are, in view of the Presidency, outweighed by these risks.²³³²

In the end, there are two specific problems with this possibility of creating regional trial chambers. First of all, regional trial chambers may be established at odd times, depending on circumstances peculiar to each situation and each region. Secondly, creating regional trial chambers leaves the issue of coordination of the ICC with potential regional criminal courts unsolved. It would be preferable to restructure the Court by expressly establishing permanent regional trial chambers to act at first instance in all cases in the regions concerned. This will require more resource mobilisation, including increasing the Court's staff with the majority involvement of judges from the region concerned, as well as amendment of the Rome Statute. The ICC at The Hague would retain appeal jurisdiction. These regional chambers have been

²³³² ICC, 'Ntaganda case: Trial opening statements will be held at the seat of the ICC, in the Netherlands' Press Release ICC-CPI-20150615-PR1118 (15 June 2015) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1118>> accessed 20 April 2017.

envisaged in the absence of the establishment of regional criminal courts. Thus, if the African experience with the creation of the AU Criminal Court becomes effective and is copied in other regions of the world, it could make sense to prefer an alternative to the creation of regional trial chambers, namely, the transformation of the existing regional criminal courts into jurisdictions of first instance within the ICC justice system.

3.2.1.2. The Regional Criminal Courts as Jurisdictions of First Instance

Regional criminal courts may be defined as judicial organs established within the framework of regional or sub-regional intergovernmental organisations such as the AU. Transforming these courts into jurisdictions of first instance within the system of international criminal justice may be the most preferable option for the regionalisation of the ICC. Given the protracted conflict between Africa and the ICC as well as Africa's objections to the use of universal jurisdiction in Africa, regionalisation promises to deliver the benefits of greater regional participation and ownership in the prosecution of international crimes. The ICC at The Hague would become a jurisdiction of appeal.

Even if this proposal appears to be a move back to a form of institutional hierarchy, as the ICC would be given the power to say the last word within the system, it is quite different from the hierarchical model that has been developed above, which is based on the ICC's complementarity jurisdiction to the AU Criminal Court. First, the principle of complementarity pre-supposes the fragmentation of the system of international criminal justice, whilst the current proposal aims to integrate the latter. Second, it is well known that a court of appeal will not re-start the proceedings but base its examination on the work done by the regional criminal court which has heard the case at the first instance. The reasons for appealing against decisions of acquittal or conviction could be similar to those provided for under article 81 (1) of the Rome Statute, namely procedural error, error of fact or error of law. In case of conviction in particular, the same article provides that appeal may be based on 'any other ground that affects the fairness or the reliability of the proceedings or decision'. This clearly means that the competence of a court of appeal could be more limited than the ICC's complementary jurisdiction to the AU Criminal Court. Such a limited competence is likely to be beneficial to the timely termination of the case by the ICC. Therefore, the current proposal could reduce the risk of perception that lengthy proceedings before the ICC deliberately aim to sustainably remove the accused person from his homeland or the region of his origin for

political reasons, in favour of his opponents. This is likely to increase the legitimacy of the ICC's operation.

Two main arguments can be advanced in support of this option. First, the creation of regional criminal courts appears to be the next step in development in international criminal law, even outside the African continent. Prior to the African experience, the first regional court to enjoy explicit criminal jurisdiction is the Caribbean Court of Justice (CCJ) established within the Caribbean Community (CARICOM), which was created by a treaty adopted in 1973 and revised in 2001 in order to include the CARICOM single market and economy.²³³³ Being a community court, the CCJ also aims to consolidate the sovereignty of member states towards Great Britain, the former colonial power.²³³⁴ In fact, after independence, these states allow the Judicial Committee of the Privy Council, the British court of highest instance, to hear appeals against decisions of their domestic tribunals and to render final binding judgments.²³³⁵ The Agreement establishing the CCJ provides that "an appeal shall lie to the Court with the special leave of the Court from any decision of the Court of Appeal of a Contracting Party in any civil or criminal matter".²³³⁶ In this respect, the CCJ shall operate as a court of last instance for member states. If the Agreement above does not exclude the exercise of jurisdiction over international crimes, it remains to be seen whether it could be utilised by CARICOM for that purpose.

The replication of the African experience in some other parts of the world can also be envisaged outside the EU zone where the ICC currently finds the most enthusiastic state supporters. In Latin America, for example, there is a long history of initiatives to establish regional tribunals. The Central American Court of Justice could be regarded as the first modern regional court that was established out of the Central American Peace Conference in

²³³³ Treaty of Chaguaramas Establishing the Caribbean Community (4 July 1973); Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (5 July 2001).

²³³⁴ A.N. Maharajh, 'The Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean's First Independent and Interdependent Court', 47 *Cornell International Law Journal* (2014) 375-766, at 736-737.

²³³⁵ *Ibid.*, at 736. See also J. Kocken and G. van Roozendaal, 'Constructing the Caribbean Court of Justice: How Ideas Inform Institutional Choices', 93 *European Review of Latin American and Caribbean Studies* (2012) 95-112, at 96-97.

²³³⁶ Agreement Establishing the CARICOM Court of Justice (14 February 2001), Article XXV (4).

1907.²³³⁷ This Court performed its functions for ten years in Costa Rica. It ceased to exist in March 1918 because member states failed to extend its life duration.²³³⁸ However, American countries remained receptive to the possibility of creating a regional criminal court in the 1990s within the Organisation of American States (OAS) as part of their efforts to prosecute collectively the crimes of terrorism and drug trafficking.²³³⁹ But, the initiative has so far failed, probably because of the disinterest of some member states, including the USA, to promote such a court.²³⁴⁰ It has to be noted that the need for international prosecutions of the crime of drug trafficking in the Americas seems to be persistent. This is probably why Trinidad and Tobago and Belize submitted to the ASP an amendment to the Rome Statute in order to give jurisdiction to the ICC to try the said crime.²³⁴¹ It was also Mexico that proposed the inclusion of “employing nuclear weapons” as war crime.²³⁴² Perhaps, if these issues are not addressed with satisfaction within the ICC, the idea to create a regional criminal court for Americas could be revived.

In Asia, the situation is quite different. International criminal justice was experienced at an earlier stage in different Asian countries. This is true in respect of prosecutions of war criminals in Tokyo (Japan) out of World War II. Other experiences include the establishment of hybrid special panels of judges within the District Court in Dili in East Timor in 2000 and the ECCC in 2004. However, it is clear that these experiences have been more promoted from abroad rather than from regional initiatives in Asia.²³⁴³ Up to now, there is not in this continent any regional organisation comparable to the AU or the OAS,²³⁴⁴ which may promote the idea of regional criminal court. From this perspective, this lack of regional initiatives in favour of international criminal law comes as no surprise. It follows from the

²³³⁷ F. K. Tiba, ‘Regional International Criminal Courts: an Idea Whose Time Has Come?’, 17 *Cardozo Journal of Conflict Resolution* (2016) 521-549, at 525.

²³³⁸ *Ibid.* See also M. O. Hudson, ‘The Central American Court of Justice’, 26 (4) *American Journal of International Law* (1932) 759-786, at 781.

²³³⁹ M.C. Bassiouni, ‘The Time Has Come for an International Criminal Court’, 1 *Indiana International & Comparative Law Review* (1991)1- 43, at 17-18.

²³⁴⁰ *Ibid.*, at 18 ; Tiba, above note 2337, at 547.

²³⁴¹ Secretariat of the Assembly of the States Parties, above note 1412, at 7.

²³⁴² *Ibid.*, at 4-7.

²³⁴³ Tiba, above note 2337, at 548.

²³⁴⁴ S. Chresterman, ‘Asia’s Ambivalence about International Law and Institutions: Past, Present and Future’, 27 (4) *European Journal of International Law* (2016) 945-978, at 957.

absence of a system of regional human rights protection for the entire Asian continent.²³⁴⁵ According to Alvin Tan Poh Heng, “it is recognised from the international human rights debate that Asia is too diverse to claim that any homogeneous culture and uniformity of norms exists”.²³⁴⁶ Therefore, for a regional approach to international criminal law to be pursued, it might be “more prudent to focus attention at the sub-regional level, rather than argue for a pan-Asian system”.²³⁴⁷ In this regard, the Association of South East Asian Nations (ASEAN) created by the Bangkok Declaration of 1967²³⁴⁸ is the most developed Asian intergovernmental organisation.²³⁴⁹ The pivotal role of ASEAN in Asian regionalism has been described as follows:

ASEAN serves as the core of other important regional organizations such as ASEAN+3, the Asian Regional Forum, and the East Asian Summit, among others. In a region with some of the most dynamic economies in the world and also some of the most intractable conflicts, some see regionalism as an answer to the region’s development and security challenges. ASEAN, made up of mostly small powers and developing nations, has taken the opportunity to shape the incipient regionalism. In other words, due to the lack of other viable centers for regionalism ASEAN has taken the helm and at the same time it has institutionalized some of its norms.²³⁵⁰

In the field of human rights protection, the ASEAN Charter of 20 November 2007, which institutionalises and confers legal personality on this organisation, provides that the Association aims “to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the member states of ASEAN”.²³⁵¹ It also aims “to respond effectively, in accordance with the principle of comprehensive security, to all forms of threats,

²³⁴⁵ S. Freeland, ‘International Criminal Justice in the Asia-Pacific Region: the Role of the International Criminal Court Treaty Regime’, 11 (5) *Journal of International Criminal Justice* (2013) 1029-1057, at 1035.

²³⁴⁶ A. Tan Poh Heng, ‘Advancing International Criminal Justice in Southeast Asia through the Regionalisation of International Criminal Law’ (PhD Thesis, University of Nottingham 2014), at 3.

²³⁴⁷ *Ibid.*, at 4.

²³⁴⁸ The ASEAN Declaration (Bangkok Declaration, 1967), Article 1 <http://shodhganga.inflibnet.ac.in/bitstream/10603/16214/12/12_appendix.pdf> accessed 7 May 2017.

²³⁴⁹ Chresterman, above note 2344, at 958.

²³⁵⁰ O. von Feigenblatt, ‘ASEAN and Human Security: Challenges and Opportunities’, Ritsumeikan Centre for Asia Pacific Studies (RCAPS) RCAPS Working Paper No. 09-5 (July 2009), at 3 <http://www.apu.ac.jp/rcaps/uploads/fckeditor/publications/workingPapers/RCAPS_WP09-5.pdf> accessed 7 May 2017.

²³⁵¹ Charter of the Association of Southeast Asian Nations (20 November 2007), Article 1 (7).

transnational crimes and transboundary challenges”.²³⁵² To this effect, ASEAN member states adhere to several principles, such as “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice”.²³⁵³ In 2012, the ASEAN Human Rights Declaration was adopted.²³⁵⁴ In terms of enforcement of ASEAN human rights law, it was foreseen to establish the ASEAN human rights body, which should operate “in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting”.²³⁵⁵ Member states preferred to establish a commission on human rights rather than a court. This modest choice might be due to some hesitations to create a robust institution that could take decisions binding on member states, because of a conservative approach to state sovereignty. The ASEAN Inter-governmental Commission on Human Rights (AICHR) was launched in 2009.²³⁵⁶ It is a consultative body to develop strategies for the promotion and protection of human rights and has no judicial competence to hear cases on matters of individual rights.²³⁵⁷

It is hard to predict if these relatively new developments in human rights law may lead to the creation of a regional court vested with criminal jurisdiction under the auspices of ASEAN. Alvin Tan Poh Heng has demonstrated that such evolution towards a regional criminal court is desirable in order to deal with international and regional crimes of collective concern to ASEAN member states, including maritime piracy.²³⁵⁸ However, non-penal options and alternative processes could remain legitimate and valid in this region, notably recourse to amnesties and truth commissions.²³⁵⁹ For example, “after winning independence, even East Timorese government acknowledged the benefits of post-conflict reconciliation with Indonesia over legal proceedings under a criminal tribunal”.²³⁶⁰ While criminal prosecutions

²³⁵² *Ibid.*, Article 1 (8).

²³⁵³ *Ibid.*, Article 2 (2) (i).

²³⁵⁴ L. Schuldt, ‘Southeast Asian Hesitation: ASEAN Countries and the International Criminal Court’, 16 (1) *German Law Journal* (2015) 75-104, at 101.

²³⁵⁵ Charter of the Association of Southeast Asian Nations, Article 14.

²³⁵⁶ R. Ramcharan, ‘Asean’s Human Rights Commission: Policy Considerations for Enhancing its Capacity to Protect Human Rights’, 3 *UCL Human Rights Review* (2010) 199-235, at 204.

²³⁵⁷ Terms of Reference of the ASEAN Inter-governmental Commission on Human Rights (2009), Article 4 <<http://hrlibrary.umn.edu/research/Philippines/Terms%20of%20Reference%20for%20the%20ASEAN%20Inter-Governmental%20CHR.pdf>> accessed 10 May 2017.

²³⁵⁸ Tan Poh Heng, above note 2346, at 25, 161-170 and 196.

²³⁵⁹ *Ibid.*, at 161.

²³⁶⁰ *Ibid.*

might be a better approach to uphold the responsibility of high-level perpetrators of international and regional crimes, restorative justice and non-penal forms of regional accountability will constitute a viable alternative to criminal trials for masses of lower-level offenders in the ASEAN context.²³⁶¹

The second argument in support of transforming potential regional criminal courts into jurisdictions of first instance rather than creating ICC's regional trial chambers is that regional criminal courts' substantive competences are likely to be broader than the ICC jurisdiction. Regional criminal courts may therefore have more potential to contribute to the struggle against impunity than regional trial chambers since these courts could also focus on crimes that are specific to the regions concerned. In the end, regional criminal courts are better placed to give effect to the principle of regional territoriality.

3.2.2. The Establishment and Application of the Principle of Regional Territoriality

It is suggested that the principle of regional territoriality implies that international crimes should be prosecuted or tried in each region where they have been committed to the exclusion of external judicial interventions of foreign states to that region and the international community. This principle aims to create for the states of the region or the regional criminal courts the primary responsibility for fighting impunity of international crimes around the world. In the African context, the AU explicitly claims this responsibility. The Protocol on the PSC indicates that Africa, through the AU, should play "a central role in bringing about peace, security and stability on the continent".²³⁶² In the field of international criminal justice, the principle of regional territoriality implies that Africans should prosecute international crimes committed in Africa through mechanisms of criminal accountability existing on the continent. It also reflects the ideas of regional self-reliance in dealing with African matters on Africa. This approach has informed all the developments of African international criminal law, notably the creation of the AU Criminal Court. The principle of regional territoriality could be extended to other regions of the world in the collective effort to regionalise the system of international criminal justice or to take part of international jurisdictional powers away from the universal level to the regions and their different judicial actors. Two main rules should characterise the principle of regional territoriality and its application. First, a court of a

²³⁶¹ *Ibid.*

²³⁶² Protocol relating to the Establishment of the Peace and Security Council of the African Union, Preamble, para.16. See also AHG/Decl.3 (XXIX), above note 1637, para.11.

state in a region should not hear cases concerning crimes committed in a foreign state from another region of the world, except in cases involving the application of the active personality principle. It will be up to the courts of states belonging to the region of commission of the crimes in question to exercise jurisdiction if they are competent under any traditional basis of criminal jurisdiction, namely, territoriality, personality, protection principle, or universal jurisdiction. Second, global mechanisms of criminal accountability, notably the ICC, should not intervene in the repression of international crimes in a given region at the first instance. The task must be executed by the competent regional criminal court, that is to say the court established in the region where the alleged crimes have been committed. These main rules raise the question as to how the principle of regional territoriality could be reconciled with the principle of universal jurisdiction.

The principle of universal jurisdiction has to be understood here as adjudicative criminal power which potentially stands at the disposal of any state. But, it could be limited by way of an international arrangement of universal character, such as a multilateral treaty, to states of the region of commission of the crimes in question. In effect, when a crime has to be prosecuted on the basis of such principle, it will be up to the state in the region concerned which is willing and capable to prosecute, and which is competent in law to act, to exercise jurisdiction. In case of conflict of jurisdictions, when several states claim to be competent, or if a state claiming jurisdiction is accused of not complying with the rules on jurisdictional powers –such as the principle of subsidiarity of universal jurisdiction or the rules on immunities of state officials –the matter should be referred to the independent Prosecutor of the competent regional criminal court. In this case, the said Prosecutor could request the latter court to issue an order whereby it designates the state of the region which may exercise jurisdiction. Alternatively, the Prosecutor may take the situation or the case away from a state in favour of a regional trial. In the context of the African continent, regional international criminal jurisdiction should be exercised through one of the aforementioned judicial options available to the AU, that is to say delegation of jurisdiction to a member state, hybrid tribunal or regional criminal court.

There are technical and policy advantages to establish such a system of international criminal justice. First, it clearly eliminates the duplication of international mechanisms of criminal accountability, either at the state, regional or universal levels. Second, the system is based on the ownership of justice by states and in each region. Third, this system could promote equitable participation of regions in the struggle against impunity. In time, it would reveal

those regions which are actively defending the cause of justice and safeguarding the peace and security of mankind. Fourth, this system is likely to reduce the perception of instrumentalisation of international criminal justice by states from one region against the sovereignty, the nationals, or political leadership of other regions.

However, there are also some weaknesses. In fact, for the ICC to become a court of appeal against decisions of regional criminal courts, it should enjoy a wide international recognition in order to avoid the risk of judicial vacuum when this recognition is lacking. For example, that may be the case when a state is a party to the treaty establishing the competent regional court and not to the Rome Statute. There should also be a legal basis allowing the ICC to sit on appeal in cases involving crimes that are specific to a region, unless such an appeal is lodged with a special chamber of the regional criminal court which has heard those cases at the first instance. This is a matter of particular arrangements within the system. Similarly, regional criminal courts should be established in every region and be widely accepted by the states concerned for the purpose of exercising jurisdiction at first instance. Given these weaknesses, the principle of regional territoriality may be difficult to apply. One may reasonably doubt that a system of international criminal justice based on this principle will be established in the near future. The establishment of such a system is highly dependent on political will of states and the international community as a whole. For its efficiency, it would be necessary to promote interregional judicial cooperation in criminal matters in order to avoid that a given region becomes the sanctuary of impunity.

Finally, in the context of Africa, the intervention of the regional criminal court should be exceptional. This is because recognition of its jurisdiction by African states might remain limited. Furthermore, recourse to universal jurisdiction in the framework of the principle of regional territoriality should be prioritised. In the event of regional prosecutions or trials, priority should be accorded to delegation of jurisdiction to an AU member state or the creation of a hybrid court with participation of regional judges. When the AU Criminal Court exceptionally upholds its jurisdiction, it will act as a jurisdiction of first instance in the repression of ICC crimes. In this regard, the AU Criminal Court should benefit from the support of the international community as a whole. Globally, the ICC Prosecutor should work hand in hand with the regional prosecutors and offices, share expertise and judicial information. The ICC could equitably allocate part of its financial resources to regional criminal courts to support their proceedings. In short, all this may constitute the better system of international criminal justice, which is multilevel, integrated and unified. This evolutionary

shift towards more regionalisation of international criminal law will therefore require profound legal reforms. The amendments to the Rome Statute, as described in the first part of this study, would not be anymore sufficient. It is the entire system of international criminal law which should be revisited.

Conclusion of Part II

This part has highlighted a number of indicators of the development of African international criminal law. Two aspects have been distinguished. The first one relates to the necessity to protect and defend African regional public order. This notion of African regional public order is made up of legal rules of different nature and institutions which aim to protect peace, security, stability and human rights in Africa. Regarding legal rules, it has been demonstrated that African international criminal law contains two categories of norms. First of all, some rules emanate from global international criminal law. These norms are however regionalised and incorporated into African legal instruments with a relative expansion of their legal scope. This is the case of the definitions of ICC crimes, such as war crimes and aggression, by the Malabo Protocol of June 2014. Second, the notion of African regional public order is enriched by the codification of various norms that are specific to Africa in criminal matters. These norms include the definitions of another ten crimes, including economic and political offenses that are not dealt with as such by the ICC, notably illicit exploitation of natural resources, political assassination and unconstitutional changes of government. All these norms can be enforced on behalf of the AU as a community of African states and peoples. One of the best bases for this community's action for the fight against impunity is the Union's right to intervene in a member state in the event of genocide, war crimes and crimes against humanity.

Furthermore, the AU can now resort to different regional mechanisms of criminal accountability to protect and defend African regional public order. This has been demonstrated in the second aspect of the development of African international criminal law: the promotion of the system of African regional criminal justice. Practical information has shown that the AU suggests or has resorted to various types of regional exercise of jurisdiction over international crimes in Africa: delegation of jurisdiction to a member state (case of the trial of Hissène Habré) and hybrid jurisdictions, such as the Extraordinary African Chambers in the Senegalese Courts, the proposed hybrid court for the Darfur region (Sudan) in 2009 and the *ad hoc* legal mechanism of criminal accountability for South Sudan that was recommended in 2014. However, the most important innovation in this respect is the creation of the AU Criminal Court. This jurisdiction is actually the International Criminal Law Section established within the AfCJHPR. It is modeled on the ICC and the *ad hoc* UN criminal tribunals (ICTY and ICTR).

The features of the ICC are found in the structure of the AU Criminal Court, the mechanisms to trigger its jurisdiction which include political bodies (the AU assembly and PSC), and the procedures applicable by the Court, notably the principle of complementarity to African domestic criminal tribunals. However, the AU Criminal Court is also different from the ICC in several respects. For example, its jurisdictional clauses extend to passive personality and the principle of protection. The AU Criminal Court is also complementary to courts of justice of RECs which may have criminal jurisdiction. Procedurally speaking, it does not include the stage of confirmation of charges, which is one of the principal causes of very lengthy trials before the ICC and resources consumption. In addition, corporate criminal liability and personal immunities of officials of states parties are admitted before it. The regime of cooperation between the AU Criminal Court and its member states is (wrongly) modeled on the laconic provisions of the ICTY and ICTR Statutes rather than on detailed Part 9 of the ICC Statute concerning “international cooperation and judicial assistance”. Furthermore, apart from several technical shortcomings relating to the drafting of the Malabo Protocol (Annex), the AU Criminal Court contains numerous deficiencies. One may recall the omission of applicable procedures concerning challenges to the Court’s jurisdiction and the admissibility of cases as required by the principle of complementarity. Another missing is the procedure on the challenge to the Prosecutor’s decision not to proceed, before the Pre-Trial Chamber. More important, the Malabo Protocol (Annex) does not contain any specific provision on the law applicable by the Court that could be comparable to article 21 of the ICC Statute. It even omits to refer to the necessity to adopt the Court’s Rules of Procedures and Evidence, as well as the Elements of Crimes, which should be part of that applicable law.

These deficiencies are among the challenges to overcome for the viability of the system of justice embodied in the AU Criminal Court. In this regard, the Malabo Protocol (Annex) needs a profound technical refinement. This concerns, among others, the inclusion of a specific provision on applicable law and the missing procedures before the Court. The Rules of Procedures and Evidence as well as the Elements of Crimes should also be adopted. As there is no such organ within the structure of the AU Criminal Court comparable to the ASP to the ICC Statute, it has been suggested that these two important instruments may be adopted by the Court itself. Finally, there is a need, in the form of a separate treaty or amendments to the Malabo Protocol (Annex), for a comprehensive legal framework on judicial cooperation in criminal matters in Africa, which could be binding on the AU, the RECs and their member states. This will help avoid a number of risks which can impair the fight against impunity in

the continent: diversification of legal instruments on judicial cooperation and potential legal fragmentation; legal de-connection of one state to another or of one REC to another; lack of regulations on interregional cooperation between courts of justice of RECs. If these improvements are made and the AU guarantees financial resources to support the Court's operation and other mechanisms of criminal accountability, the emerging system of regional criminal justice may become viable and eventually efficient in the fight against impunity in Africa. This system can be connected to the global system of international criminal justice, notably through the regionalisation of the ICC. The latter may be transformed into a court of appeal against decisions of regional criminal tribunals, where they exist, as jurisdictions of first instance over ICC crimes and in accordance with the principle of regional territoriality.

General Conclusion

This thesis is situated in the context of the regionalisation of international criminal law. It deals with the development of African international criminal law under the aegis of the AU. The central question has asked which factors inform this development, the concept and the content of regional law so laid down for the African continent. The primary objective was to explore theoretical and practical bases for the establishment of a viable system of African regional criminal justice in order to deal with crimes against peace and security in Africa, which put in danger African regional public order. The thesis also aimed to examine the relationship between African regional criminal law and the global system of international criminal justice, currently dominated by the ICC and the UN Security Council. The systemic analysis of these different issues have reached three main conclusions.

1. The Combination of Universal and Regional Factors behind the Development of African International Criminal Law

The first conclusion of this study is that the development of African international criminal law is not simply a conjectural consequence of the crisis observed within general international criminal law. It is also and chiefly the result of the policy of self-reliance of the AU and its member states aiming to protect and defend African regional public order through the recourse to regional institutions of criminal accountability.

With respect to the crisis of general international criminal law, this thesis has demonstrated that it manifests itself in four different ways in relation to the African continent. First of all, there are tensions arising from perceptions of unequal decline of sovereignty deriving from the distribution of criminal powers between states and the international community. Second, the AU and its member states disapproved the abusive exercise of universal jurisdiction by some European states in African situations. Third, there are a divergence of views on the ICC jurisdiction and contestations of its judicial work in Africa. Fourth, the crisis relates to the unsatisfied claim for legal reforms by AU member states.

In fact, states no longer possess judicial discretion or monopoly to prosecute international crimes committed in their territory, by their nationals or by aliens who are found therein. Competing criminal jurisdiction acknowledged to foreign countries or the international community may result in external judicial interventions. Contestations then arise when such interventions to ensure criminal prosecutions and fight against impunity contradict the policy

of the competent state not to prosecute, notably through amnesties or judicial inaction, in order to achieve a peace process or realise national reconciliation. Contestations are also possible if these interventions involve prosecutions of former or incumbent senior state officials in violation of the rules on immunity or are viewed as potentially provocative of regime-change, irrespective of the democratic aspirations and self-determination of the people of the state concerned. Contestations are finally possible when external judicial interventions appear as a measure of constraint against the competent state, given the fact that its nationals or situations occurring within its territory are submitted to a foreign judicial authority without its express consent. These contestations are more perceptible in the relationship between weak and powerful countries. The reason is that, in practice, powerful states are more likely to exercise jurisdiction over criminal acts committed abroad than weak countries, owing to the costs of such an action, notably diplomatic frictions and financial resources. Powerful countries also influence the work done in the name of the international community. Of particular interest was the *Lockerbie* case in respect of the relationship between Libya, the United Kingdom and the USA, when the Security Council imposed the extradition of two Libyans to the latter countries for the purpose of prosecutions for acts of terrorism. The influence of powerful countries is even explicit through referrals of situations in non-contracting states to the ICC Prosecutor or the suspension of the Court's proceedings in accordance with Chapter VII of the UN Charter. Examples were those relating to the referral of the situation in Libya to the ICC Prosecutor and the refusal by the Security Council to defer the Court's proceedings regarding the situation in Kenya. All in all, external judicial interventions are perceived as a manifestation of a policy of force or a means to achieve a (geo-) political agenda, rather than just the pursuit of the cause of justice, against nationals or the leadership of weak states or other countries where great powers do not have specific interests to protect. As a result, the decline of state sovereignty has become in practical terms the decline of sovereignty on the part of weak countries and the parallel increasing of exorbitant powers in favour of powerful states within the international legal system. This is paradoxical given the under-participation of great powers in the ICC. Countries such as India, Israel and three permanent members of the Security Council (China, Russia and USA) have not ratified the Rome Statute. This under-participation gives the impression that some states are jealously guarding their sovereignty, while others are subjected, by will, constraint or enticement, to the global system of international criminal justice.

This inequality between states reinforces perceptions of “hegemonic” use of international mechanisms of criminal accountability. This explains all the negative legal and political statements on the ICC and the principle of universal jurisdiction: tool for imperialism; contestations of both the application of the rules on the principle of ICC’s complementary jurisdiction or the state officials’ immunity; disapproval of indictments against the AU sitting heads of state or government before any international criminal tribunal; need to frame differently the exercise of powers granted by the Rome Statute to the ICC Prosecutor and the Security Council; diplomatic efforts within the UN General Assembly aiming to define a number of rules restricting or preventing the abuse of the application of universal jurisdiction. There is no legal or technical solution to such a crisis. The pursuit of dialogue between states should continue in order to advance on the path of legal reforms which would satisfy the interests of all the states and the regions.

The crisis of general international criminal law has boosted the development of African international criminal law. However, this development is previous to it and dates back at least to the creation of the OAU in 1963. The policy of self-reliance of the AU and its member states might limit external judicial interventions in African countries. It is also designed to fill the gap of general international criminal law by addressing a number of crimes of specific concern to the African continent which are not dealt with at the universal level. It is in this context that the notion of African regional public order finds its application. This notion is made up of two different legal conceptions. On the one hand, it refers to an order of protection of Africa, which implies a set of rules and principles having a high legal status in Africa – even a peremptory character as regards those universal norms that have been regionalised – which are of fundamental importance for the protection of peace, stability and human rights in Africa or any other essential interests of the African community of states and peoples as a whole. On the other hand, the notion refers to an order of defence against regional security threats violating the norms so laid down. In African international criminal law, these violations have been identified as crimes against peace and security in Africa. The thesis has discussed the African codification of these crimes and classified them into two categories, namely the crimes against human security, i.e. that of individuals, and the crimes against the states and Africa. They include the four ICC crimes, with a relative regional expansion of their definitions, and at least some other ten crimes of specific concern to Africa.

The substantive added value of African international criminal law lies in the definitions of these crimes. Suffice it to recall some innovations in respect of some ICC crimes incorporated

into the Malabo Protocol (Annex). For example, the crime of aggression can be committed on behalf of a state or a non-state actor. War crimes include 15 new offences as compared to the definition provided for by the Rome Statute. This is notably the case of the criminalisation of the use of nuclear weapons or other weapons of mass destruction in the context of any armed conflict. Furthermore, the other ten crimes of specific concern to Africa and over which the ICC does not have jurisdiction include unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes and illicit exploitation of natural resources.

African regional public order therefore offers a promising legal framework to respond collectively to the said crimes in the framework of the AU. The protection and the defence of this order is the *raison d'être* of the promotion of the system of African regional criminal justice.

2. The Promotion of Three Optional Approaches to African Regional Criminal Justice

The second conclusion of this study is that the AU is promoting a system of African regional criminal justice based on three optional models of justice, namely the delegation of jurisdiction to a member state, the creation of hybrid courts with participation of regional judges and the establishment of a regional criminal court, mandated to try the aforementioned crimes against peace and security in Africa. Together with these crimes, these models of justice form the core of the content of African international criminal law. Delegation of jurisdiction to a member state was experienced in the case of the trial of the former Chadian president, Hissène Habré, in Senegal. Hybrid courts were suggested in Senegal and Darfur (Sudan). The first experience succeeded with the establishment of the EAC, whilst the second failed due to insufficient international support for the regional initiative and the lack of political will on the part of Sudan. The regional criminal court was created by the Malabo Protocol in June 2014. It indeed creates an International Criminal Law Section within the AfCJHPR which this thesis generically referred to as the AU Criminal Court. It has been demonstrated that for any initiation of regional prosecutions or trials of crimes committed in Africa, the AU may attempt to rely on any of these three models of justice, depending on the specificity of every situation or case and the availability of financial resources. However, the recourse to the AU Criminal Court, which is to be the main judicial institution in the emerging system of African regional criminal justice, should remain exceptional, as prosecutions and trials may be conducted by states themselves or in collaboration with the AU. Still, the

viability of the AU Criminal Court is problematic. There are numerous challenges to overcome, including ratifying the Malabo Protocol, complementing the definition of the Court's applicable law, raising the technical legal standards of the Court's complementary jurisdiction to domestic tribunals and courts of justice of RECs, promoting judicial cooperation of African states by adopting a comprehensive regional framework on judicial cooperation in Africa and finding financial resources to support the Court's operation. Another challenge is the coordination of African international criminal law with the global system of international criminal justice.

3. The Prospect for Three Alternative Approaches to Consistent Relationship with the Global System of International Criminal Justice

The third conclusion of this study is that African international criminal law is not a replacement of general international criminal law on the continent. There is rather a coexistence of norms and institutions which commands a certain degree of coordinated relationships to avoid unnecessary conflicts and so inefficiency of justice. This thesis has discussed perspectives on three alternative approaches to consistent relationships between African regional criminal law and the global system of international criminal justice, namely the hierarchical model, the cooperative approach and the regionalisation of the ICC in conjunction with the principle of regional territoriality.

The hierarchical model privileges complementarity of the ICC to the AU Criminal Court. In this model, the latter Court is subordinated like domestic jurisdictions to the decision of the ICC on the admissibility of cases. The ICC should intervene when the AU Criminal Court fails to exercise its jurisdiction. A strong example to recall is the incapacity to proceed due to immunity bars to bring cases against AU sitting heads of state or government before the regional criminal court. However, the thesis found that this approach was rejected by the drafters of the Malabo Protocol. This was evidenced by their silence on such a principle as regards the ICC, in contrast to the express provision on complementarity of the AU Criminal Court to courts of justice of RECs. Rather, the drafters of the Malabo Protocol put forward a cooperative approach between equally coexisting international courts. Furthermore, the Malabo Protocol (Annex) is silent on the relationship between the AU Criminal Court and the UN Security Council which has the principal responsibility for the maintenance of international peace and security. It has been concluded that this UN political body could only have the possibility to recommend to the competent AU organs (the AU Assembly or the

PSC) referral of a situation in a state party to the Malabo Protocol to the AU Criminal Court. There is no such kind of relationship between the Security Council and the AU Criminal Court which is comparable to that of the Security Council and the ICC. In terms of legitimacy, more involvement of the Security Council in the functioning of the AU Criminal Court would require amendments to the Malabo Protocol, the reform of the composition of the Council and an equitable allocation of the veto power to its member states.

The cooperative approach privileges mutual accommodation between equally coexisting courts. This thesis has shown that cooperation on the basis of division of work is undesirable. The most important reason is that this division of work could run against the objective which has informed the creation of the AU Criminal Court or broadly the system of African regional criminal justice, which is to try any international crime committed in Africa, prior to any judicial intervention of external actors to the continent. At best, the relationship between the two courts should be based on an agreement on cooperation which provides for applicable procedures designed to eliminate potential conflicts due to parallel proceedings and the risk of contradictory judgments. This is the case of the principles of *litis alibi pendens* and *ne bis in idem*. These procedures should be complemented by judicial dialogue between officials of the two courts in order to harmonise policies, strategies and activities on the ground. The thesis has notably suggested the establishment of a conference of international prosecutors to this effect.

Finally, regionalisation of the ICC appears to be the most realistic option for the future of the system of international criminal justice. Regional criminal courts, which are also envisaged as potentially delivering justice outside Africa, such as in the Caribbean, in Latin-America or in Southeast Asia, could be transformed into jurisdictions of first instance for the ICC. Doing so will allow these courts to efficiently apply the principle of regional territoriality, according to which crimes committed in one region should be tried by states of that region or the competent regional criminal court at first instance, before any possible external judicial intervention. This is a way to increase the ownership of international criminal justice in order to avoid perceptions of hegemonic exercise of jurisdiction by states from one region against nationals of other states from other regions, and so to increase confidence in the system of international criminal justice as a whole.

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Zusammenfassung

Die vorliegende Arbeit steht im Kontext der Regionalisierung im Internationalen Strafrecht. Sie untersucht die Faktoren, die der entsprechenden Entwicklung des afrikanischen internationalen Strafrechts unter der Ägide der Afrikanischen Union (AU) zugrunde liegen und beleuchtet die Inhalte dieser sich entwickelnden Disziplin. Primäres Ziel der Arbeit ist es, die theoretischen und praktischen Grundlagen für die Entwicklung eines tragfähigen Systems afrikanischer Strafjustiz zu untersuchen, das in der Lage sein soll, mit Verbrechen gegen den Frieden und die Sicherheit in Afrika umzugehen, die die öffentliche Ordnung des Kontinents bedrohen. Im Weiteren entwickelt die Arbeit das Verhältnis des regionalen, afrikanischen Strafrechts zu dem globalen System des internationalen Strafrechts, in dessen Mittelpunkt der Internationale Strafgerichtshof (IStGH) und der Sicherheitsrat der Vereinten Nationen stehen. Die Kombination der Analysen dieser verschiedenen Bereiche führt die Arbeit zu drei zentralen Schlussfolgerungen: Erstens ist die Entwicklung eines afrikanischen internationalen Strafrechts nicht nur eine Konsequenz der aktuellen Krise des internationalen Strafrechts. Sie ist ebenso und zuvorderst das Ergebnis einer Politik der Eigenständigkeit der AU und ihrer Mitgliedsstaaten. Diese zielt darauf ab, die regionale öffentliche Ordnung durch regionale Institutionen und strafrechtliche Verantwortlichkeit zu schützen. Die zweite Schlussfolgerung lautet, dass die AU ein System regional- afrikanischer Strafjustiz vorantreibt, das auf drei optionalen Modellen aufbaut: Der Delegation von Rechtsprechungsbefugnissen an Mitgliedsstaaten, der Errichtung hybrider Gerichte mit regionalen RichterInnen sowie dem Aufbau eines regionalen Strafgerichtshofs. Zusammen mit solchen Straftatbeständen der Verbrechen gegen den Frieden und die Sicherheit, die den Kontinent spezifisch betreffen, bilden diese Modelle den Kern des afrikanischen internationalen Strafrechts. Allerdings bleiben Tragfähigkeit und Effizienz des Systems problematisch. Es steht vor einer Vielzahl an Herausforderungen, etwa der Ratifikation des Malabo-Protokolls von 2014, das einen „Strafgerichtshof der AU“ errichten soll, der Förderung justizieller Kooperation der Staaten oder der Sicherung einer stabilen Finanzierung des Gerichts. Die dritte Schlussfolgerung lautet, dass ein afrikanisches internationales Strafrecht kein Ersatz für das allgemeine internationale Strafrecht ist. Es geht um die Koexistenz von Normen und Institutionen und eine koordinierte Beziehung, um Kollisionen und Ineffizienzen zu vermeiden. Die Arbeit diskutiert drei verschiedener Ansätze für stabile Beziehungen zwischen dem afrikanisch-regionalen und dem internationalen Strafrecht: Das hierarchische Modell, den kooperativen Ansatz und die Regionalisierung des IStGH in Verbindung mit dem Prinzip der regionalen Territorialität.