AN ANALYSIS OF THE AFRICAN UNION'S CRITICISM OF THE INTERNATIONAL CRIMINAL COURT

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ABSTRACT

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This study examines the African Union's (AU) criticisms of the International Criminal Court (ICC). The purpose of this study is to reveal the deteriorating relationship between the ICC and the African Union by analysing the four criticisms African states have used to criticise the work of the ICC in Africa. The four criticisms are expressed as follows; (i) The claim that the ICC is targeting African countries. This claim was evaluated, the study found that arguments in support of this criticism were weak and minimal. (ii) The ICC's investigations as an obstruction to African peace processes. Under this section, an assessment of the tensions that exist between the promotion of peace and the implementation of justice was made. It was concluded that the pursuit of justice in ongoing conflicts can undermine peace processes. The promotion of peace should not reduce the importance of justice and accountability. (iii) Diplomatic immunities for Heads of States accused of committing international crimes are evaluated under a separate heading. Diplomatic immunities under the Rome Statute within the framework of the relationship between articles 27 and 98 are examined. It was argued that states that are party to the Rome Statute waive their rights to diplomatic immunities as a result of article 27. States not a party to the Rome Statute continue to be entitled to their diplomatic immunities even in cases where they are accused of committing international crimes. (iv) Lastly, the relationship between the

United Nations Security Council (UNSC) and the ICC was evaluated. Under this section, an examination of how the UNSC affects the legitimacy of the ICC was made. The study revealed that the manner in which the UNSC has conducted its relations with the ICC has greatly undermined the integrity of the ICC. The ICC-Africa relationship would be best served if both parties engaged in constructive dialog aimed at defusing the current tensions that exist between the two bodies. There is also a need for the UNSC to change the manner in which it has conducted its relations with the ICC. This study was carried out through the use of documentary search as an instrument of data collection and data was analysed through qualitative techniques.

Keywords: International Criminal Law, International Criminal Court, African Union, United Nations Security Council, Diplomatic Immunity, Justice and Peace

ÖZET

AFRİKA BİRLİĞİ'NİN ULUSLARARASI CEZA MAHKEMESİ'NE YÖNELİK ELEŞTİRİLERİNİN İNCELENMESİ

SISHEKANU, Martin

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Bu çalışma Afrika Birliği'nin Uluslararası Ceza Mahkemesi'ne yönelik eleştirilerini incelemektedir. Bu çalışmanın amacı UCM ile Afrika Birliği arasındaki ilişkinin olumsuz ilerlemesini Afrika devletlerinin UCM'nin Afrika'daki uygulamalarına yönelik eleştirilerini çözümleyerek dört başlık altında ortaya koymaktır. Bu dört eleştiri noktası şu şekilde ifade edilmektedir; (i) UCM'nin Afrika ülkelerini haksız yere hedeflediği iddiasıyla gerçekleşen ilk eleştiri değerlendirilmiştir. Çalışmada bu eleştirinin temellerinin zayıf olduğu bulgulanmıştır. (ii) UCM'nin Afrika barış süreçlerine engel teşkil eden soruşturmaları ele alınmıştır. Bu bölümde, barışın teşviki ile adaletin uygulanması arasındaki gerilimin değerlendirilmesi yapılmıştır. Devam eden çatışmalarda adalet arayışının barış süreçlerini sekteye uğratabileceği sonucuna varılmıştır. Barışın teşviki, adalet ve hesap verebilirliğin önemini azaltmamalıdır. (iii) Uluslararası suç işledikleri ileri sürülen devlet başkanları için diplomatik dokunulmazlıklar ayrı bir başlık altında irdelenmiştir. Roma Statüsü kapsamındaki diplomatik dokunulmazlıklar, Roma Statüsü'nün 27. ve 98. maddeleri arasındaki ilişki çerçevesinde çözümlenmiştir. Roma Statüsüne taraf devletlerin 27. madde nedeniyle diplomatik dokunulmazlık haklarından feragat ettikleri ileri sürülmüştür. Roma Statüsüne taraf olmayan devletler, uluslararası suç işledikleri ileri sürülen durumlarda bile diplomatik dokunulmazlıkları almaya devam etmektedir. (iv)

Son olarak Birleşmiş Milletler Güvenlik Konseyi (BMGK) ile UCM arasındaki ilişki değerlendirilmiştir. Bu bölümde, BM Güvenlik Konseyi'nin UCM'nin meşruluğuna etkisi incelenmiştir. Çalışma, BMGK'nin UCM ile ilişkilerini yürütme biçiminin UCM'nin bütünlüğünü büyük ölçüde azalttığını ortaya koymaktadır. Her iki tarafın iki organ arasındaki mevcut gerilimleri etkisiz hale getirmeyi amaçlayan yapıcı bir diyalogda bulunması UCM ve Afrika Birliği ilişkisini olumlu anlamda geliştirebilecektir. BMGK'nin UCM ile ilişkilerini yürütme biçimini değiştirmesine de ihtiyaç olduğu değerlendirilmektedir. Bu çalışma, veri toplama aracı olarak belgesel taramanın kullanılmasıyla yapılmış ve nitel tekniklerle veriler çözümlenmiştir.

Anahtar Kelimeler: Uluslararası Ceza Hukuku, Uluslararası Ceza Mahkemesi, Afrika Birliği, Birleşmiş Milletler Güvenlik Konseyi, Diplomatik Dokunulmazlık, Adalet ve Barış

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LIST OF ABBREVIATIONS

AU : Africa Union

ACJHR : African Court of Justice and Human Rights

CAR : The Central African Republic

CIPEV : Commission of Inquiry into Post Election Violence

DRC : Democratic Republic of Congo

ECOWAS : Economic Community for West African States

HRW : Human Rights Watch

ICC : International Criminal Court

IEC : Independent Electoral Commission

ICJ : International Court of Justice

ICL : International Criminal Law

ICR : Individual Criminal Responsibility

ICTR : International Criminal Tribunal for Rwanda

ICTY : International Criminal Tribunal for the Former Yugoslavia

ILC : International Law Commission

LRA : Lord's Resistance Army

NGO : Non-Governmental Organisation

NMLA : National Movement for the Liberation of Azawad

P5 : Permanent Members

RUF : Revolutionary United Front

SADC : Southern African Development Community

UN : United Nations

UNC : United Nations Charter

UNGA : United Nations General Assembly

UNSC : United Nations Security Council

US : United States of America

WWI : World War One

WWII : World War Two

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INTRODUCTION

The world has witnessed numerous conflicts of different natures and magnitudes, in as much as every conflict is different from the other, the various conflicts the world has witnessed have at least shared one mutual thing, 'impunity'. A situation where the victimized people were deprived of justice. The international community has on different occasions held the belief that the perpetrators of crimes of atrocities ought to be held responsible for their actions because such actions are a danger to the whole international community. In an endeavour to rectify this and bring an end to impunity, the international community felt obliged to put up measures that prohibit the likelihood of such crimes from happening and also to punish the perpetrators of those crimes. They did so by establishing various tribunals such as Nuremberg and Tokyo Tribunals, the Tribunals for Rwanda and the former Yugoslavia. The tribunals above were mandated to try individuals charged with committing international crimes.

The above tribunals proved to be effective in pursuing their various mandates, however, they were Ad Hoc Tribunals and only existed for a limited period of time. As such there was a need for the creation of a permanent global court with the jurisdiction to prosecute crimes of atrocities. By 2002, the world witnessed the birth of the International Criminal Court (ICC), a permanent institution tasked to try individuals who perpetrate crimes of aggression, war crimes, crimes against humanity and genocide. The establishment of the ICC was seen as a very important step in the fight against impunity, Fatou Bensouda, the current ICC Chief Prosecutor was gladdened by the creation of the ICC. From her perspective, the formation of such a court and most importantly, the investigations and prosecutions of such a court will indirectly send a strong message to the entire world that they will be held accountable for any atrocities they might commit. It was believed that such developments would massively help in bringing an end to impunity.

African people are among the individuals who have been victims of human rights abuses. Numerous human rights abuses such as colonialism, slavery, apartheid, genocide and civil wars have taken place in Africa. To prevent the reoccurrence of

such acts, various African countries and international organisations were eager to create an international criminal court. They did so by taking leading roles in various meetings that were related to the establishment of the Rome Statute. They also frequently urged all African countries to become Rome Statute states parties.

Of late, the relationship certain African countries have with the ICC seems to be deteriorating, some African countries have started to criticise and negatively perceive the ICC's work in Africa. This leads to the problem statement of this research. The Africa-ICC relationship has increasingly become strained with allegations shared by certain African states who accuse the ICC of pursuing a selective form of justice that targets African people and poor countries while ignoring the crimes of atrocities perpetrated by powerful states and their allies. Such views have led certain African politicians and organisations to view the ICC as an instrument of neo-colonialism and as an organisation that practices double standards. A majority of the states that were in support of the ICC are now being frustrated with the ICC's strategies, prosecutorial policies, and the direction it has taken. Such opposition towards the ICC continues to be on the rise, as various African countries have refused to offer their cooperation to the ICC with regard to the arrest warrant of certain individuals as such Al-Bashir. Furthermore, African countries through the African Union (AU) passed a resolution that seeks to establish a strategy on how African states can collectively withdraw from the Rome Statute. The resolution established by the AU is partly based on the conviction that the ICC is a biased organisation that targets African countries.

The criticisms and negative perceptions towards the ICC certain African states have, can greatly undermine the effectiveness, integrity and legitimacy of the ICC in Africa and various regions of the world. This research seeks to examine the AU's criticisms of the ICC, by analysing the main criticisms the AU has levelled towards the ICC. This study identifies four major concerns shared by the AU; (i) the ICC targeting Africa and practising double standards, under this theme, this research seeks to examine the rationales African countries have used as evidence to support their claims that the ICC is targeting Africa. In doing so, an assessment aiming to determine whether or not African criticisms towards the ICC are accurate or factual will be made. (ii) The ICC as an obstruction to peace negotiations in Africa, under this theme, this research examines the tension that exists between the implementation of justice and the promotion of peace. The promotion of justice, especially in ongoing or recent

ended conflicts can at times undermine peace-promoting efforts such as the implementation of peace deals or processes. In such situations, it has often been argued that investigations carried out by the ICC can undermine or destabilise ongoing peace negotiations thereby prolonging conflicts. As such, an investigation of whether the need for peace should take priority over the promotion of justice is made. (iii) Diplomatic immunity for Heads of States, under this theme, this research evaluates diplomatic immunities under the Rome Statute by examining the relationship between Rome Statute article 27 and 98, and assessing whether diplomatic immunities can shield Heads of States accused of committing international crimes from the ICC's jurisdiction. (iv) The relationship between the United Nations Security Council (UNSC) and the ICC. The Rome Statute grants the UNSC the ability to refer situations to the Court and to defer on-going ICC investigations. The link between the two bodies will be examined and an assessment of how the UNSC has conducted its relations with the ICC will be made, with particular focus being on whether the UNSC undermines the integrity of the ICC.

The ICC's reputation and legitimacy are perceived to be under attack in a way that may endanger and undermine the ICC's pursuit of justice and peace not only in Africa but also in other parts of the globe. There is therefore a need to critically examine the AU's criticisms towards the ICC in a manner that seeks to fill the void of knowledge that exists between the two bodies, especially with regard to how the relationship between the two can be improved. The findings of this research may be of use to African foreign policymakers, ICC policymakers, and to those who would want to study international criminal law in Africa. Lastly, some of the findings of this research might also be applicable to other regions aside from Africa.

The research questions of this study are as follows;

(i) Is the ICC targeting Africa?

(ii) Are Heads of States accused of committing international crimes entitled to diplomatic immunities?

(iii) Is the UNSC undermining the legitimacy and efficiency of the ICC?

(iv) Should justice be pursued at the expense of peace?

(v) In what ways can the AU-ICC relationship be improved?

The study is grounded on the assumption that despite the ICC not being a perfect institution, it is not targeting African countries. A majority of the criticism towards the ICC is due to the misunderstood role African states have of the ICC and the Rome Statute. Aside from that, this study assumed that the UNSC greatly undermines the legitimacy of the ICC because certain members of the UNSC such as China, the United States of America (US) and Russia are not members of the Court and yet they have the authority to refer states to the ICC. As long as African countries continue to perceive the ICC as a biased organisation, they will continue to be reluctant to cooperate with the ICC.

The focus of this study is limited to the AU's criticisms towards the ICC from 2002 to 2018. In examining this, only four concerns shared by the AU will be addressed; Heads of State immunity, peace and justice in Africa, the UNSC-ICC relationship, and the allegation of the ICC targeting Africa. Anything outside these objectives will not be examined.

This research utilised descriptive research methods, data was collected and analysed through qualitative research techniques. The researcher utilised documentary research techniques for the purpose of collecting data from relevant documents and archives. This included but was not limited to; international law treaties and agreements, interviews done by other researchers, essays, videos, meeting transcripts, working papers, online articles, research papers, reports and journal publications, books, newspapers and government publications.

The study is made up of four chapters, in the first chapter, a historical perspective of modern-day international criminal law is made. It starts by making an analysis of previous international criminal tribunals and how they each contributed to the creation of international criminal law and the ICC. An examination of the Rome Statute is also made with the main focus of examining the crimes that fall under the jurisdiction of the Statute and how the ICC's jurisdiction over a situation can be triggered. Lastly, an examination of the role African states had in the establishment of the ICC is made.

Chapter two continues with the examination of the Rome Statute provisions, however, its scope is narrowed down to state immunities under the ICC and the relationship between the UNSC and the ICC. Under this section, the manner in which

the UNSC has cooperated with the ICC with specific reference to UNSC referrals and deferrals is examined. An analysis is made on whether or not the UNSC undermines the legitimacy and integrity of the ICC. State immunities have become part of international customary law, when states become Rome Statute states parties, they waive their rights to diplomatic immunities. This is not the case for Rome Statute non-states parties. This chapter further examines the relationship between Rome Statute article 27 and article 98 with the focus being on Sudan and Libya; countries not party to the Rome Statute yet currently under the jurisdiction of the ICC virtue of UNSC referral resolutions. It examines whether diplomatic immunities would shield officials, especially those from Sudan and Libya from the jurisdiction of the Court.

Chapter three highlights the tensions that exist between some African states and the ICC, as such, it examines the validity and rationales African countries have used in criticizing the work of the ICC in Africa. Lastly, the last part concludes the research and provides various ways in which the ICC-Africa relationship can be improved.

CHAPTER ONE

HISTORICAL BACKGROUND

1.1. THE HISTORY OF INTERNATIONAL CRIMINAL PROSECUTIONS

International criminal law (ICL) is a field of international law that criminalises and seeks to prosecute individuals who perpetrate the most serious human rights violations.[1] Despite ICL being relatively considered as a new field of law, it is believed to have existed in ancient times. Evidence suggests that criminal tribunals mandated to hold individuals accountable for war crimes existed in 405 BC in Greece, aside from Greece, such tribunals were believed to have existed in countries such as Japan, India and China. As such, it can be concluded that the international community has always had an interest in creating judicial institutions with the jurisdiction to try people who commit crimes of atrocities.[2] A modern-day account of ICL dates back to the nineteenth century; with international law acts that sought to prohibit slavery, piracy, and the introduction of international humanitarian laws. [3] Such acts helped the international community develop treaties, rules, and norms that massively helped in the development of modern-day ICL.

1.1.1. Versailles, Nuremberg and Tokyo

The end of World War I (WWI) marked an important step for ICL. Towards the end of WWI, the Allied countries established a commission tasked to examine and establish the people who were responsible for the war, and also the people who

[1] Diakonia, *International Criminal Law,* (online) https://www.diakonia.se/en/IHL/The- Law/International-Criminal-Law1/, 15 April 2020.
[2] Cenap Çakmak, *A Brief History of International Criminal Law and International Criminal Court,* Palgrave Macmillan, New York, 2017, p.9
[3] Beth Van Schaack and Slye Ronald, *A Concise History of International Criminal Law: Chapter 1 of Understanding International Criminal Law,* (Online) https://digitalcommons.law.scu.edu/facpubs/626 15 April 2020

violated the laws of war.[4] These proceedings led to the establishment of the Treaty of Versailles, which advocated for the public prosecution and trial of officials for the offence of crimes against international morality.[5] The successful implementation of the Treaty of Versailles proved to be a challenge for various reasons, for instance, Kaiser was never tried for his crimes because he fled to Holland.[6]

In between the WWI and WWII, various attempts with the goal of creating a permanent international court were made, however, calls for such a court were rejected by the League of Nations Assembly as they deemed the establishment of such a court to be premature.[7] A step forward in the establishment of modern-day ICL was taken after the end of WWII. During this phase, the Allied countries took on the task of establishing the Tokyo and Nuremberg tribunals with the purpose of trying Japanese and German leaders who were liable for the violation of humanitarian laws.[8] Crimes under the jurisdiction of the Nuremberg tribunals were articulated and defined under article 6, the Nuremberg tribunal had the jurisdiction over; crimes against peace, war crimes and crimes against humanity.[9]

These tribunals massively contributed to the development of certain ICL principles. Principles such as individual criminal responsibility (ICR), the denial of state immunities for state officials who commit international crimes, and many other principles that continue to be part of current international customary law have origins from the Tokyo and Nuremberg tribunals.[10]

1.1.2. The Period between WWII and the End of the Cold War

[4] Ibid, 92
[5] Allied Powers, *Treaty of Versailles*, 1919, (Online) https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf 15 April 2020
[6] Ilias Banteksas and Susan Nash, *International Criminal Law*, Cavendish Publishing, London, 2003, pp 325-326
[7] Yusuf Aksar, *Implementing International Humanitarian Law; From the Ad Hoc Tribunals to a Permanent International Criminal Court*, Routledge, London, 2004, pp.44-48
[8] American Bar Association, *Evolution of International Criminal Justice*, 2020, (Online) https://www.aba-icc.org/about-the-icc/evolution-of-international-criminal-justice/ 15 April 2020
[9] United Nations, *Principles of International Law recognized in the Charter of the Nurnberg Tribunal and in the Judgement of the Tribunal*, United Nations, New York, 2005, pp.376-378
[10] Anthony Aust, *Handbook of International Law*, Cambridge University Press, New York, 2005, p. 274.

A majority of the principles and judgments established from those tribunals were later on endorsed by the United Nations General Assembly (UNGA) in 1946.[11] Treaties and conventions that sought to define certain international crimes began to be established, for instance, a genocide convention was established by the UNGA in 1948, a convention that sort to prohibit and punish the perpetrators of genocide.[12] Having witnessed the massive role played by Military Tribunals in the fight against impunity, the UN recognised the importance of the creation of a permanent international criminal court with the mandate to try people who might perpetrate crimes of atrocities. As such, the UNGA mandated the International Law Commission (ILC) with the task of preparing a draft statute that would bring about the establishment of an everlasting criminal court that would try individuals who commit international crimes.[13] The ILC was in support of the establishment of such a court as it deemed such an organ to be both desirable and possible. As such, in 1951 and 1954, the ILC made various drafts calling for the creation of an international criminal court, however, the UNGA frequently kept on postponing the adoption and implementation of the established drafts due to various political considerations.[14]

The implementation of the draft statutes was greatly challenged due to the lack of unity on vital aspects of certain international law terminologies. For instance, there was a lack of unity with regard to what constitutes the definition of crimes of aggression. These challenges made the realisation of an international court difficult thus the work of drafting the statute of such a court was put on hold.[15] In 1989, seventeen Latin American and Caribbean states under the leadership of Trinidad and Tobago proposed for the creation of a permanent international criminal court. These countries, later on, requested the UNGA to reconsider the possibility of establishing an international court with the jurisdiction over drug trafficking-related crimes. As a response to these requests, the UNGA mandated the ILC to resume its works of examining the possibility of creating an international criminal court.[16]

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[11] Antonio Cassese, *Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal General Assembly 95 (I) 1946*, (Online) https://legal.un.org/avl/ha/ga_95-I/ga_95-I.html 16 April 2020

[12] American Bar Association, *Evolution of International Criminal Justice*

[13] Ibid

[14] Ibid

[15] Aksar, *Implementing International Humanitarian Law; From the Ad Hoc Tribunals to a Permanent International Criminal Court*, pp. 44-48

[16] Çakmak, A Brief History of International Criminal Law and International Criminal Court, p.104

1.1.3. The Ad Hoc International Criminal Tribunals for Rwanda and the Former Yugoslavia

Aside from the proposal from Trinidad and Tobago, various ongoing activities in the early 1990s gave the international community further impetus to create an international court. For instance, there was a desire to establish a court that would investigate Iraqi leaders for war crimes and crimes of aggression that might have been committed when Iraq invaded Kuwait.[17] Perhaps one of the biggest events that highlighted the importance of an international criminal court was the war in the former Yugoslavia and Rwanda. In the case of the former Yugoslavia, the conflict was characterised with a wide scale of violations of ICL which were mostly committed against civilian populations.[18] In 1994, various international crimes were reported to be taking place in Rwanda. It was reported that a widespread human rights violations in the form of crimes against humanity and genocide carried out by the Hutus ethnic group against the Tutsi minority ethnic group were taking place in Rwanda. [19]

In response to the highlighted events, the UNSC established resolutions that led to the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993[20] and the International Criminal Tribunal for Rwanda (ICTR) in 1994.[21] The two tribunals contributed to bringing an end to impunity in the former Yugoslavia and Rwanda. In as much as Ad Hoc tribunals prosecuted perpetrators of crimes of atrocities, they only had limited jurisdiction, focusing on crimes committed within a specific time period and during a specific conflict, and the costs of continually establishing tribunal courts proved to be expensive.[22]

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[17] Aksar, *Implementing International Humanitarian Law; From the Ad Hoc Tribunals to a Permanent International Criminal Court,* pp.44-48

[18] Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure,* Cambridge University Press, New York, 2007, p.120

[19] Aksar, *Implementing International Humanitarian Law; From the Ad Hoc Tribunals to a Permanent International Criminal Court,* pp.14-15

[20] Banteksas and Nash, *International Criminal Law,* pp.339-340

[21] Banteksas and Nash, *International Criminal Law,* pp.339-340

[22] Skilbeck Rupert, *Funding Justice: The Price of War Crimes Trials,* Human Rights Brief, Vol 15, No. 3, 2008, p.1

1.2. THE ROME STATUTE

The formation of an international criminal court that would be permanent became more logical and practical, a majority of countries continued to agree for the necessity of a permanent court.[23] The ILC finalised the draft statute of an international criminal court in 1994 and later submitted it to the UNGA. During this period, various aspects of the draft continued to be debated, critiqued and edited by states. Despite all these challenges, in 1998, 120 countries voted in favour of adopting the statute which was later on known as the Rome Statute, by the 1st of July 2002, the Rome Statute was ratified by at least 60 countries thereby providing for its activation, to date, the Rome Statute has been ratified by 123 countries.[24]

1.2.1. Crimes under the jurisdiction of the Rome Statute

The crimes currently under the jurisdiction of the Rome Statute are stipulated under article 5.[25] Currently, the jurisdiction of the ICC covers the following crimes; crimes against humanity, war crimes, genocide and crimes of aggression.

1.2.1.1. Genocide

The crime of genocide was identified as an international crime in 1944, this was seen as a response to the Holocaust that led to the systematic murder of certain racial and ethnic groups, particularly groups of people belonging to the Jewish and Polish community.[26] After the tragic events of the Holocaust, treaties that sort to prohibit the crime of genocide begun to be established. The first treaty developed to prohibit genocide is the Convention on the Prevention and Punishment of the Crime

[23] David Malone, *The UN Security Council; from the Cold War to the 21st Century*, Lynne Rienner Publishers, Inc, Colorado, 2004, p.287
[24] Avocats Sans Frontieres, *International Criminal Law Training Manual*, Avocats Sans Frontieres, Kampala, 2016, p.7
[25] International Criminal Court, *Rome Statute of the International Criminal Court*, The Hague, International Criminal Court, 2011, p.3
[26] Cryer, Friman and Robinson, *An Introduction to International Criminal Law and Procedure*, p.166.

of Genocide of 1948, it was established by the UNGA.[27] The implementation of this treaty marked a very important step in the establishment of ICL and humanitarian rights. Definitions used in this treaty have helped inspire ICL, such that a majority of nations and international criminal courts have adopted the definitions set out in the Convention.

The Convention on the Prevention and Punishment of the Crime of Genocide (1948) under article 2 defines it as an act that involves the following acts; *"Killing or causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group".* Furthermore, the Convention states that *"these acts have to be committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".*[28]

1.2.1.2. War Crimes

There is evidence that suggests that certain acts of behaviour during conflict were prohibited many centuries ago, however, the principle of war crimes begun to develop towards the late nineteenth century, as a result of the establishment of international humanitarian laws.[29]The Hague Conventions implemented in 1899 and 1907 focused on establishing the customs and laws of war, they sort to prohibit the parties in conflict from using certain methods and means of warfare.[30] Aside from these conventions, numerous treaties have been developed. Treaties that also seek to prohibit certain behaviour during a conflict. For instance, in 1949, four Geneva Conventions were adopted, in these treaties, rules that aim to limit the brutality of war were established, and rules aimed at protecting individuals who are not taking part in

[27] United Nations, *Legal Framework; Genocide Prevention and the Responsibility to Protect*, (Online) https://www.un.org/en/genocideprevention/genocide-convention.shtml 15 April 2020
[28] United Nations, *Convention on the Prevention and Punishment of the Crime of Genocide*. United Nations, New York, 1948, p.280
[29] United Nations, *Legal Frame; Genocide Prevention and the Responsibility to Protect*,
[30] Medecins San Frontieres, *The Practical Guide to Humanitarian Law*, (Online) https://guide-humanitarian-law.org/content/article/3/the-hague-conventions-of-1899-and-1907/ 16 April 2020

the conflict (aid workers, medical doctors, civilians, prisoners of war, wounded soldiers) were established.[31]

War Crimes are defined as *"serious violations of the laws and customs applicable in international armed conflict" and "serious violations of the laws and customs applicable in an armed conflict not of an international character*".[32]Article 8 of the Rome Statute categorises war crimes in the following aspects; "*grave breaches of the 1949 Geneva Conventions and serious violations of the laws and customs applicable in armed conflict".*[33]

1.2.1.3. Crimes against Humanity

It is currently not certain when the "crimes against humanity" were first established. Scholars such as Schabas, proclaim that the term "crimes against humanity" was developed towards the end of the eighteenth century as a term used to condemn and define acts such as slave trade, slavery, and the various atrocities that occurred during the European colonialism of Africa.[34] Various atrocities such as war crimes and genocide have been prohibited under international law and such prohibitions have often been supported by treaties such as the Geneva and Genocide Conventions. As for crimes against humanity, no codified international law treaty dedicated to crimes against humanity exists, in spite of this, crimes against humanity are prohibited and still regarded as international law peremptory norms from which no derogation is allowed.[35]

Crimes against humanity have been defined as a *"category of crimes against international law which includes the most egregious violations of human dignity,*

[31] International Committee of the Red Cross (ICRC), *The Geneva Conventions of 1949 and their Additional Protocols*, (Online) https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm 16 April 2020

[32] ICRC, *Customary International Humanitarian law Database*, (Online) https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156#Fn_64761199_00001 16 April 2020

[33] International Criminal Court, *Rome Statute of the International Criminal Court*, p.5

[34] William Schabas, *Unimaginable Atrocities, Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press, United Kingdom, 2012, p. 51-53

[35] United Nations, *Definations, Crimes Against Humanity*, (Online) https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml#footnote-1 16 April 2020

especially those directed towards civilian populations".[36] The prohibition of crimes against humanity has been adopted in various criminal tribunals including the ICC. Rome Statute article 7 considers these acts as crimes against humanity; apartheid, ethnic persecution, sexual slavery, rape, torture, false imprisonment, deportation or forcible transfer, extermination, murder and enforced sterilisation. However, the Statute establishes that the above acts are only regarded as crimes against humanity if they are *"perpetrated as part of a systematic or widespread attack against a civilian population*".[37]

1.2.1.4. Crimes of Aggression

In ancient history, international law did not prohibit the waging of war and use of force, as such, countries could legitimately use war as a political instrument to advance their national interest. Towards the start of the twentieth century, international law began to condemn the unnecessary waging of war.[38] For instance, article 10 of the Covenant of the League of Nations (1919) brought about a significant change with regard to waging war. It states that "*the members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League*".[39]

The establishment of the UN further strengthened the prohibition of crimes of aggression. Article 2 (4) of the United Nations Charter (UNC) discourages countries from threatening or using their force against the political independence of other countries, especially in a way that is not consistent with the UNC.[40] Currently, the UNC offers various exceptions in which force can legally be used. These exceptions are found in articles 42 and 51 (self-defence).[41] By definition, the crime of aggression means "*the planning, preparation, initiation or execution, by a person in a*

[36] Cornell Law School, *Crime Against Humanity*, (Online) https://www.law.cornell.edu/wex/crime_against_humanity 16 April 2020
[37] International Criminal Court, 2011, p.5
[38] Asser Institute, *Crime of Aggression*, 2013 (Online) http://www.internationalcrimesdatabase.org/Crimes/CrimeOfAggression#_ftn1 16 April 2020
[39] Yale Law School, *The Covenant of the League of Nations*, 1924, (Online) https://avalon.law.yale.edu/20th_century/leagcov.asp 16 April 2020
[40] United Nations, *Charter of the United Nations and Statute of the International Court of Justice.* United Nations, New York, 1945, p.3
[41] Ibid

position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations".[42] The crime of aggression is also among the crimes that are under the jurisdiction of the ICC. However, this jurisdiction was only activated on the 17th of July 2018, before that period, the ICC could not legally prosecute individuals who commit crimes of aggression.[43]

1.2.2. Trigger Mechanisms under the Rome Statute

Rome Statute article 13 highlights various mechanisms that trigger the ICC's jurisdiction over situations. Currently, the ICC's jurisdiction can be triggered in the following ways; (i) Proprio Motu; under this provision, the ICC prosecutor has the power to open investigations. However, to do so, article 15 states that the Prosecutor needs to seek authorisation from the Pre-Trial Chamber. (ii) State Referral; Rome Statute state parties have the right to refer a situation to the ICC, requesting the court to investigate the situations in the state in question and to determine whether or not certain people should be charged with the crimes in question. (iii) UNSC; the UNSC possesses the powers of referral, as such, it can refer situations to the court. For it to exercise such powers, there is a need for it to act under UNC Chapter VII powers. [44]

For the jurisdiction of the ICC to be established over a situation, certain conditions have to be present, these conditions are highlighted in article 12 (2) of the Rome Statute. The ICC has automatic jurisdiction over situations committed by states that are party to the Rome Statute. In such circumstances, the ICC can have jurisdiction if the conduct in question occurs in the region of a state party or if the conduct has been carried out by a Rome Statute state party national. The ICC can have jurisdiction on a situation that occurs in the region of a Rome Statute non-state party, however for

[42]Coalition for the ICC, Historic activation of the Crime of Aggression, (Online) http://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression 17 April 2020
[43] International Criminal Court, *Crime of Aggression, Amendments Ratification*, 2019, (Online) https://asp.icc-cpi.int/en_menus/asp/crime%20of%20aggression/Pages/default.aspx 17 April 2020
[44] International Criminal Court, *Rome Statute of the International Criminal Court*, p.11

that to happen the third state has to accept the jurisdiction of the ICC or the UNSC can refer the situation to the ICC prosecutor.[45]

1.2.3. Complementarity

One important aspect of the ICC is the aspect of complementarity highlighted in the preamble and article 1 of the Rome Statute.[46] The ICC was not established to supersede national courts, it was created to supplement them. National or domestic courts have the main obligation of investigating and prosecuting atrocities in their own countries.[47] National courts can be better suited to investigate crimes because of various reasons such as national courts having more means available to collect needed evidence or to arrest the accused people, under the principle of complementarity, the ICC would only come in and get involved in the event where states fail to conduct investigations and prosecutions for various reasons such as the desire to protect or shield individuals from prosecution.[48] It is, therefore, the responsibility of countries to assert that they will conduct genuine investigations on any allegations against their citizens. If states do so, the situation in question will be inadmissible thereby hindering the ICC from exercising its jurisdiction over such a situation.[49]

1.3. AFRICAN INTERNATIONAL LEGAL HISTORY

Throughout the history of mankind, law has played a vital role in creating order. Every society regardless of its status or size has created for itself a set of laws used to govern its conduct. Law has been an important factor in binding the members of a society together in their adherence to their established standards and values. Modern international law is believed to have originated from Europe, a majority of the

[45] Ibid p.10
[46] Ibid, p.2
[47] ICTJ, *What is Complementarity? National Courts, the ICC, and the Struggle against Impunity*, (Online) https://www.ictj.org/sites/default/files/subsites/complementarity-icc/ 11 November 2019
[48] FICHL, *The Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, 2009, (Online) https://www.fichl.org/activities/the-principle-of-complementarity-and-the-exercise-of-universal-jurisdiction-for-core-international-crimes/ 11 November 2019
[49] International Criminal Court, *Rome Statute of the International Criminal Court*, p.13

principles and doctrines of international law were heavily influenced by European political experiences, organisations, culture, history, norms and values.[50] Various organisations which helped to establish the principles of international law originated from Europe. For instance, The Red Cross International Committee founded in Switzerland, The Hague Conferences of 1899 and various congresses, conventions and conferences all helped to expand the rules of international relations and international law. The European values of international law were then exported to other parts of the world through European conquest as such the colonisation.[51]

Before the arrival of colonialism in Africa, African people and societies were governed by their own beliefs, customs and traditions. After the arrival of colonialism, the colonisers arrived with their laws which were later on imposed on the societies they colonised. The administrations of the colonisers persistently tried to downgrade traditional customs and practices to the background. For instance, before the arrival of colonialism, Chiefs were the traditional rulers who exercised and implemented judicial and political laws, however, after the implementation of colonialism, Chiefs were subjected to the authority of the colonisers and most of the authority they had was stripped away.[52]

Narrowing down this discussion to ICL, it can also be argued that a majority of the principles of ICL were also introduced to African states. The establishment of modern-day ICL dates back to the International Military Tribunals established after the WWI and WWII, during this period treaties that defined, prohibited and punished international crimes were established. However, during their establishment, almost the whole African continent was still under colonial rule, as such, African societies did not have any part in the establishment of ICL during that particular period.[53]

Towards the middle of the twentieth century, African countries began to gain independence from their colonisers. The newly formed African states entered an international community that had an already established system of governance and

[50] Malcolm Shaw, *International Law*, 5th ed, Cambridge University Press, Cambridge, p.1

[51] Ibid, p.28

[52] Kofi Quashigah, *Justice in the Traditional African Society within the Modern Constitutional Set-up, Jurisprudence*, Vol.7, No.1. 2016, p. 98-99

[53] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States; An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, Asser Press, The Hague, 2017, p. 62-63

laws which were accepted by numerous states. As such, the newly formed states incorporated the already existing international law norms and values such as equality of states, sovereignty, and other international law principles into their laws and constitutions.[54] It should however be noted that, before the acceptance of European norms of international law, African societies had their norms and customs which helped to govern human conduct. African societies had their traditional justice systems. These justice systems refer to various mechanisms societies in Africa applied intending to resolve disputes or conflicts.[55]

These mechanisms vary from country to country, however, three main features can be identified; (i) Reconciliation; this was the main goal of African traditional justice mechanisms. Under this aspect, Community leaders and elders would perform various rituals on the people guilty of committing crimes, after these rituals were completed, the offenders would be welcomed back into the community. (ii) Accountability; offenders were encouraged to take full responsibility for the crimes they have committed. Restoration and forgiveness were possible on the condition that the wrongdoers take full responsibility and acceptance of their actions. (iii) Truth-telling and Reparations; in order to prevent the denial of the crimes or different narratives of the crime, it was important to establish an account of the real facts that happened during a conflict or dispute. Lastly, the wrongdoers were ordered to offer reparations to the victims of the crimes.[56]

A majority of these mechanisms were practiced in Africa before colonialism began, however, some have continued to be practiced in the post-colonialism period.[57] For example, in South Africa, the government established the Promotion of National Unity and Reconciliation Act in 1995 which led to the establishment of the Commission for Truth and Reconciliation. This Commission helped to bring about restorative justice in South Africa and offered amnesties to the wrongdoers in exchange for their cooperation and acceptance of the wrong they had done during the

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[54] David Harris, Cases and Materials on International Law, 6th ed, Sweet & Maxwell, London, 2005, p. 14

[55] Francis Kariuki, *African Traditional Justice Systems*, [online] https://www.studocu.com/row/document/moi-university/legal-drafting/essays/african-traditional-justice-systems/4292741/view 25 August 2020

[56] Luc Huyse and Mark Salter, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, International Institute for Democracy and Electoral Assistance, Stockholm, 2008, p. 11

[57] Report of the AU Panel of the Wise, *Peace, Justice, and Reconciliation in Africa, Opportunities and Challenges in the Fight against Impunity*, International Peace Institute, New York, 2013, p. 29-35

period of Apartheid. As a response to the genocide that happened in Rwanda, the Rwandan government established local courts known as the Gacaca courts. Respected members of the community were appointed as judges and they were given the task of promoting reconciliation and restitution.[58] Similar mechanisms have been practiced in countries such as Uganda, Sierra Leone, Mozambique and Burundi.[59]

The practice of African traditional justice mechanisms has become less common, this is so because a majority of the concepts under traditional justice mechanisms conflict and have failed to conform with the established international norms. For instance under traditional mechanisms, forgiveness and reconciliation were highly important. To promote that, amnesties were often granted to the offenders.[60] However, current international law forbids the granting of amnesties to individuals accused of committing international crimes.[61] African countries and their constitutions have begun to be influenced by ongoing events and development in the international arena. Under such situations, African countries have found it difficult to preserve their cultural identities, there are cases where African constitutions have recognised the traditional values and practices; however, most of those values have been subjected to the international norms and international human rights standards.[62]

1.3.1. AFRICA'S ROLE IN THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT

A majority of countries were in support of establishing an international criminal court, it, therefore, became vital for such countries to agree on key definitions of certain words used under ICL. Words and terminologies such as war crimes, crimes against humanity and genocide. This task proved to be very challenging, however, the

[58] Ibid
[59] Huma Haider, *Transitional Justice*, 2016, [online] https://gsdrc.org/topic-guides/transitional-justice/concepts-and-mechanisms/mechanisms/traditional-justice-systems/ 25 August 2020
[60] Report of the AU Panel of the Wise, *Peace, Justice, and Reconciliation in Africa, Opportunities and Challenges in the Fight against Impunity*, p. 29-35
[61] Maria Mingo Jaramillo, *Law Versus Politics: The ICC as an Obstacle to Successful Peace Negotiations?* 2014, (Online) http://hdl.handle.net/1887/31946 7 May 2020 7 May 2020
[62] Quashigah, *Justice in the Traditional African Society within the Modern Constitutional Set-up*, p. 99-100

experience the international community gained from the Tokyo and Nuremberg trials which dealt with crimes of atrocities committed during WWII made this task to be less challenging. Furthermore, the international community got some experience from the creation of the ICTR and ICTY. In 1998 July, the international community adopted the Rome Statute, this was after 60 countries ratified the Statute.[63] The adoption of the Rome Statute was viewed as a great accomplishment by a majority of countries due to their determination of creating a universe where peace and justice for all would be promoted. African people, as well as people from various parts of the world, have greatly suffered from various human rights abuses, people from the African continent have been victims of civil wars, apartheid, genocide and various human rights abuses.[64] In spite of the abuses (or maybe as a result of the abuses), African people have continued to pursue justice, peace and reconciliation. All the catastrophic situations that transpired in Africa helped bring about a universal consensus. This consensus can be summarised in the Rome Statute preamble which affirms the importance of ending impunity thereby not allowing crimes of atrocities to go unpunished.[65]

Countries from Africa proved to be key actors in the establishment of such a consensus and the creation of the ICC. Africa's commitment and involvement in the creation of the ICC demonstrates that the ICC was partly created by Africans and for their benefit.[66] Before the Rome conference was held, a lot of meetings and activities in connection to the Rome conference were held in a majority of African states, this was done with the ultimate aim of enhancing universal support for the ICC and also with the aim of educating countries on the importance and aim of the ICC.[67] Various regional organisations from Africa such as the Southern African Development Community (SADC) played a massive role in the creation of the ICC. For instance, 14 member states from SADC held a meeting in 1997, during this meeting, they proposed 10 principles they desired to be incorporated in the Rome Statute. One SADC proposal

[63] United Nations Treaty Collection, *Rome Statute of the International Criminal Court*, (Online) https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en 22 March 2019

[64] Jackson Ashley, *War, Violence and Peace in Africa*, *Journal of Southern African Studies* 34, no. 4 2008, pp.969-79. www.jstor.org/stable/40283204.

[65] International Criminal Court, *Rome Statute of the International Criminal Court*, p.1

[66] Sophia Plessis, *The International Criminal Court and its Work in Africa: Confronting the Myths*. Institute for Security Studies, Pretoria, 2008, p.4

[67] Ibid

worth noting during this meeting was the need for the ICC to have jurisdiction over crimes against humanity, war crimes, genocide and crimes of aggression.[68]

Countries such as Lesotho, Senegal, South Africa, and many others played a key part in drafting the Rome Statute, for instance, these countries took part in the discussions to do with the ICC establishment in 1993, during ILC presentation of the draft statute to the UNGA. Aside from that, various African international organisations including the African Commission on Human and Peoples' Rights played a key part in supporting the establishment of the ICC, they did so by frequently urging all African countries to become a party to the Rome Statute.[69] Various African NGO's also had a key part in the establishment of the ICC. Around 90 African organisations based in various countries such as Rwanda, Nigeria, South Africa, Kenya and Uganda joined the NGO called the 'Coalition for an International Criminal Court'.[70] Under this organisation, they urged their states to push for the formation of an effective and independent ICC, a court with the authority to try people who commit international crimes. They also urged all states to collaborate with such an international court.[71]

47 African states also attended the Rome Conference, a highly important international conference that helped to establish the Rome Statute in 1998. During the Rome Conference, various ministers and government officials from different African countries actively took part in debates and shared their views in various commissions.[72] African states believed that national legal systems are not able to hold perpetrators accountable for their offences, as a result of that, the 25 African states asserted their allegiance to the creation of the ICC. Aside from that, they also acknowledged the significance of the ICC not only for African states but also for the whole world at large. History highlights the important role African countries played in the formation of the Rome Statute. At the end of those negotiations, African countries

[68] Schuerch, *The International Criminal Court at the Mercy of Powerful States; An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, p.92
[69] Rowland Cole, *Africa's Relationship with the International Criminal Court: More Political than Legal.* Melbourne Journal of International Law, Vol, 14, 2014
[70] Plessis, *The International Criminal Court and its Work in Africa: Confronting the Myths*, p.4
[71] Ibid
[72]Gerhard Werle, Lovell Fernandez and Moritz Vormbaum, *Africa and the International Criminal Court*, T.M.C. Asser Press, The Hague, 2014, p.13

were among the first states to ratify the Rome Statute.[73] As of 2020, 33 African countries are party to the Rome Statute.[74]

[73] Ibid
[74] International Criminal Court, *The States Party to the Rome Statute* [online] asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx 10 June 2020

CHAPTER TWO

HEAD OF STATE IMMUNITY AND UNITED NATIONS SECURITY COUNCIL REFERRALS AND DEFERRALS.

2.1. UNITED NATIONS SECURITY COUNCIL

The UNSC and the ICC are organs both responsible for the preservation of world peace and the prosecution of crimes of atrocities. The two organisations share a very complex and delicate relationship. The UN was established for various reasons, among those reasons was the need for maintaining world peace. Throughout history, it has taken various measures that sort to promote and increase world security and peace. The Rome Statute grants the UNSC specific powers and influence over the ICC. However, such powers are only applicable in circumstances where the UNSC acts under UN Charter Chapter VII.[1]

2.1.1. The Effects of the UNSC-ICC Relationship on the Legitimacy of the ICC

Scholars such as Dan Zhu note that the UNSC-ICC relationship has always been controversial, especially during the negotiating stages which led to the establishment of the Rome Statute. It is noted that, during the Rome Statute negotiations, a lot of people were concerned with the idea of providing the UNSC with powers of referral and deferral. It was believed that giving the UNSC such powers would subordinate the ICC to the UNSC.[2] The current article 13 and 16 of the Statute are as a result of negotiations between groups of people and countries who wished to

[1] International Criminal Court, *Rome Statute of the International Criminal Court,* p.11
[2] Dan Zhu, *Who Politicizes the International Criminal Court?* Journal, Brief Series No.28. Torkel Opsahl Academic E Publisher, 2014, p.1

establish a criminal court independent from the politics of the UNSC and groups of people who sought to establish a criminal court subject to the control of the UNSC.[3]

The legitimacy of the ICC depends on various factors, one important factor that influences the legitimacy of the ICC is its perceived independence from outside political interference. Today, there are widespread perceptions that the ICC is politicised. It is claimed that the political interests which are often external to the ICC have biased its judicial activities. For instance, it is argued that 3 permanent members (P5) of the UNSC are not members of the ICC, they, however, have the authority to refer a situation happening in the territories of countries not a party to the Rome Statute to the ICC. This is a major source of concern, various states wonder how some states in the UNSC (the US, China and Russia, (P3) Rome Statute non-state parties) subject other states to the ICC's jurisdiction while they (P3) refuse to accept the ICC's jurisdiction. It is partly because of all these reasons that scholars such as Mistry and Verduzco begin to question and wonder whether UNSC referrals make the ICC become an instrument UNSC members can use to promote their political interests. The powers (deferral and referral) granted to the UNSC by the Rome Statute have the ability to affect the credibility and legitimacy of the ICC in both a positive and negative manner.[4]

2.1.1.1. Deferrals by the UNSC to the ICC

To date, the UNSC has used its powers given to it by the Rome Statute on different occasions. The manner in which the UNSC has exercised these powers has raised a lot of controversies. The first time the UNSC exercised its deferral powers was in Resolution 1422/1487.[5] Under this resolution, the UNSC granted UN peacekeepers who belonged to Rome Statute non-states parties' immunity from prosecutions that might be carried out by the ICC. Before examining the two resolutions, it is important to analyse article 16 of the Rome Statute.

[3] Ibid

[4] Hemi Mistry and Deborah Verduzco, *The UN Security Council and the International Criminal Court*, Chatham House, London, 2012, p.3

[5] Coalition for the International Criminal Court, *Compilation of Documents on UN Security Council Resolutions 1422/1487*. New York; Coalition for the International Criminal Court, New York, 2004

Article 16 of the Rome Statute grants the UNSC the powers of deferral, using these powers, the UNSC can suspend any investigations or prosecutions being conducted by the ICC. Article 16 states that "*No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions".*[6] From the wording used in the above article, two points are worth noting; when the UNSC makes the deferral, it needs to act under UNC Chapter VII. In other words, if the UNSC makes a deferral, a situation activating the language contained in the UNC Chapter VII has to be present. In this case, a threat to peace has to be present. If such a case exists, the UNSC has the authority to defer ICC investigations or prosecutions, however, this deferral lasts for a period of 12 months, although it can be renewable. Article 16 does not grant immunity nor amnesty to the people under investigation, it rather gives them time to find a solution in order to resolve any present threats to world peace and security.

To date, the UNSC has only used its deferral powers on one occasion, in Resolution 1422 which was later reintroduced as Resolution 1487. Under this resolution, it was noted that, if a situation comprising personnel or an official from a contributing state which is not a Rome Statute states party arises, the ICC shall not proceed with investigations or prosecutions involving such officials. This resolution was made with particular reference to UN peacekeeping operations.[7]

Analysing the above statement from a legal perspective, various questions begin to arise. To begin with, one might question whether a legitimate threat to world peace and security was present, a threat that legitimatised the establishment of this resolution. Without such a case, it is questionable whether Resolution 1422 would be a proper use of UNC Chapter VII powers. Prior to the approval of Resolution 1422, in July 2002, the US government (which has been known to oppose the ICC) warned that it would veto any extension of peacekeeping missions in Bosnia under the UN unless peacekeepers belonging to the UN were granted a permanent immunity from the ICC's

[6] International Criminal Court, *Rome Statute of the International Criminal Court*, p.13
[7] Coalition for the International Criminal Court, *Compilation of Documents on UN Security Council Resolutions 1422/1487*, p.19

jurisdiction. If such a request was not approved, the US would veto any UN peacekeeping missions in Bosnia.[8]

As a way of compromise and with the major aim of preventing the US from vetoing UN peacekeeping missions in Bosnia, Resolution 1422 was adopted under the UNSC's deferral powers contained in the Rome Statute. Thus immunity was given to all UN peacekeepers who belonged to states not a party to the Rome Statute, this immunity would be active for 12 months, however, the UNSC had the right to renew the resolution. In 2003, the UNSC decided to renew the resolution to Resolution 1487.[9]

Since the UNSC was using its authority the UNC Chapter VII grants it, this situation would be interpreted in the following manner, the UNSC alleges that ICC prosecutions of UN personnel would be a danger to world peace. However, the UNSC does not provide reasons as to why it believes that the prosecution of UN personnel poses a danger to the security and peace of the world. An important question of whether or not a real threat to world peace and security was present arises. A threat that legitimised the use of article 16. Scholars such as Trahan suggest that no real threat to world security and peace was present. They wonder what the threat to peace and security was in Resolution 1422.[10] Could the lack of UN peacekeeping missions be a real threat to peace? Such assumptions imply that a threat or danger to world peace will exist due to the non-involvement of troops to UN future peacekeeping missions. Alleging that a matter might have future negative consequences on world peace and security is not sufficient to warrant a deferral from the UNSC.

Another important question that comes to mind is the question of who provides a threat to peace? It seems illogical for the country or individual that would profit from the deferral to be the same country that threatens to bring about the lack of peace. For instance, in situations where a state under ICC investigations successfully convinces the UNSC to use its deferral powers because it believes that any investigations would present a danger to world security and peace, it is possible for such a state to use this as a means of blackmailing the UNSC. Such a state could blackmail the UNSC to renew the deferral every twelve months. It would do so by threatening the UNSC with restarting the conflict in the event that UNSC decides not to renew the deferral request,

[8] Mistry and Verduzco, *The UN Security Council and the International Criminal Court*, p.4
[9] Trahan, *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, p.437
[10] Ibid

such a move would make it possible for a regime to repeatedly delay the administration of justice.[11]

Another important question that arises is whether deferrals may be activated before any investigations or prosecution are opened or present. At the time this resolution was adopted, there were no ICC on-going prosecutions or investigations related to peacekeepers from non-state parties, Resolution 1422 rather acted pre-emptively in that it shielded a certain category of people from potential future ICC investigations or prosecutions.[12] In that regard, a certain category of people was already exempted from ICC jurisdiction for crimes not yet committed.

It is also important to address the legitimacy of Resolutions 1487 and 1422 by examining if they are in accord with Rome Statute article 27. Article 27 demands that ICC laws and standards equally apply to all regardless of the status they hold. In other words, this article establishes that no official capacity will hinder the court from carrying out investigations and prosecutions.[13] Despite Article 27 establishing that no immunity shall prevent the ICC from exercising its jurisdiction, Resolution 1422 does grant immunity to certain categories of people based on their official capacity. Thereby making it inconsistent with Rome Statute article 27. Resolution 1422 and 1487 allow a certain category of people to escape ICC judgment thus opening the door to impunity in the event where the domestic courts of the Rome Statute non-states parties fail to conduct investigations and prosecutions on such people in good faith.

The ICC does not have the competence to review the deferral requests from the UNSC, due to this situation, the Court would not be in a position to decline deferral resolutions even if they might be flawed. In other words, so long as the UNSC issues a deferral, the ICC ought to be bound by such a request.[14] The manner in which Resolution 1422 and 1487 was implemented has often been used as evidence to highlight how powerful states can influence the jurisdiction of the Court to their advantage. As was earlier highlighted, the adoption of resolution 1422 came about after the US government made a threat to veto peacekeeping operations in Bosnia and

[11] Mistry and Verduzco, *The UN Security Council and the International Criminal Court,* p.14
[12] Coalition for the International Criminal Court, *Compilation of Documents on UN Security Council Resolutions 1422/1487.*
[13] International Criminal Court, *Rome Statute of the International Criminal Court*, p.19
[14] Res Schuerch, *The International Criminal Court at the Mercy of Powerful States; An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, p.255

to boycott future peacekeeping missions in general. In light of the various threats issued by the government of the US, other UNSC member states decided to approve the adoption of Resolution 1422. They did so despite a majority of them having doubts and concerns over the legality and legitimacy of granting immunity to certain categories of people. This was so, due to their desire to have the support of the US with regard to the extension of peacekeeping missions in Bosnia.[15] The adoption of this resolution created unevenness in the manner in which the Rome Statute is applied. It did so by treating people who would commit international crimes differently. Furthermore, the deferral resolutions were very dubious as there were no ongoing investigations or prosecutions to be deferred.[16]

2.1.1.2. Referrals by the UNSC to the ICC

Article 13 of the Rome Statute stipulates various means by which the ICC's jurisdiction can be triggered.[17] To date, the UNSC has twice referred cases to the Court; the Sudan referral known as UNSC Resolution 1593(2005)[18] , and the Libya referral known as UNSC Resolution 1970 (2011).[19] Currently, Sudan is a Rome Statute non-states party, despite Sudan not being a state party to the Rome Statute, the situation in Darfur, fell under the jurisdiction of the ICC in 2005 as a result of the UNSC resolution 1593, that referred Darfur to the ICC Prosecutor.[20] The referral tasked the ICC Prosecutor with the mandate of investigating genocide, war crimes and crimes against humanity that might have allegedly been committed since 2002 by rebel forces, Janjaweed militia and Sudanese officials.[21]

According to the report by the Commission mandated to investigate the crimes in Sudan, it was assessed that over 1.65 million individuals were displaced from Darfur. The report by the Commission further noted that there were large-scale

[15] Ibid, p.255
[16] Mistry and Verduzco, *The UN Security Council and the International Criminal Court*, p.4
[17] International Criminal Court, *Rome Statute of the International Criminal Court*, p.13
[18] United Nations Security Council, *Resolution 1593*, United Nations, New York, 2005
[19] United Nations Security Council, *Resolution 1970*, United Nations, New York, 2011
[20] International Criminal Court, *Situation in Darfu, Sudan*, 2019 (Online) https://www.icc-cpi.int/darfur 20 November 2019
[21] Coalition for the International Criminal Court, Sudan, [online] http://www.coalitionfortheicc.org/country/sudan 12 August 2020

destructions in the villages in Darfur. The investigations in Sudan identified several suspects allegedly liable to the crimes. The suspects included Militia leaders, Sudan Government officials and the Resistance Front leaders.[22] In 2009, the Pre-Trial Chamber I issued an arrest warrant for Al-Bashir, the Sudanese Head of State and charged him with the crime of committing genocide, crimes against humanity and war crimes.[23]

As a response to the ICC proceedings in Sudan, the government of Sudan has on numerous occasions rejected the jurisdiction of the ICC. Mohamed Mardi, the former Sudanese Minister of Justice was quoted saying that "*the ICC has no jurisdiction to try any Sudanese".* He further argued that "*the Sudanese government will not allow any Sudanese to be tried and punished outside the national justice framework".* The AU has on different occasions been against the ICC proceedings in Sudan. In 2008, during the AU's Peace and Security Council meeting, the AU argued that ICC's investigations in Sudan have the potential to undermine on-going peace negotiations in Sudan and cause further conflict. It argued that the promotion of justice should not be done in a manner that jeopardises the promotion of peace. As such, the AU requested the UNSC to invoke article 16 of the Rome Statute and defer the investigations initiated by the ICC in Sudan.[24]

The AU's request for the deferral of the situation in Sudan was not approved, during the 13th Assembly of the AU session, the AU expressed its disappointment at the UNSC and ICC's decision not to defer the investigations in Sudan. It decided that "*in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan".*[25]

The AU mandated African countries not to offer their cooperation to the ICC with respect to the warrant of arrest of Bashir. Due to this policy of non-cooperation, Bashir has travelled to other states including Rome Statute states parties without being

[22] International Criminal Court, *Situation in Darfu, Sudan*,
[23] International Criminal Court, *Situation in Dafur, Sudan, Warrant of Arrest Omar Hassan Ahmad Al Bashir*, International Criminal Court, Hague, 2009,
[24]African Union, Peace and Security Council, 142nd Meeting, African Union, Addis Ababa, 2008, p.1-2
[25] African Union, *Assembly of the African Union, Thirteenth Ordinary Session*, African Union, Addis Ababa, 2009,p.2

detained.[26] His travels included but was not limited to; a visit to Chad in 2010, 2011, 2013 and 2014, Kenya in 2010, Malawi in 2011, Djibouti in 2011, 2016 and 2018, DRC in 2014, South Africa in 2015, Nigeria in 2013 and Uganda in 2016.[27]

In 2011, protests against the Gaddafi administration broke out in Libya, the Libyan government tried to forcefully end the protests, in doing so, numerous civilians died. The on-going conflicts in Libya prompted the UNSC to perceive them as a threat to international peace and security thereby referring Libya to the ICC through Resolution 1970.[28] After investigations were done by the ICC in Libya, three cases were opened against five suspects which charged them with being responsible for war crimes and crimes against humanity.[29] In June 2011, the ICC Pre-Trial Chamber I issued an arrest warrant for certain Libyan officials including Gaddafi, however, his arrest warrant was withdrawn due to his demise.[30] The AU responded to the Gaddafi case, in the same manner, it did with the Bashir case. During the 17th Ordinary Session of the Assembly of the Union, the AU argued that the arrest warrants issued for Libyan officials including Gaddafi complicated the task of peace negotiations in Libya and the task of negotiating a political solution to the conflict that was happening in Libya. As a result of that, the AU decided that all members of the AU shall not offer their cooperation with regard to the enforcement of the arrest warrant for Gaddafi.[31]

In the event that the UNSC uses its referral powers to refer cases to the ICC, certain conditions need to be met, the most important condition is the presence of an event that poses a threat to world peace and security, thereby enabling the UNSC to act under UNC Chapter VII. In the Sudan and Libya situations, all the above requirements were met. Indeed, innocent people were killed, thousands were displaced and one or more international crimes were present. The situations in Libya and Sudan

[26] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*. Brill Nijhoff, Boston, 2015, p.225
[27] Eki Omorogbe, *The Crisis of International Criminal Law in Africa: A Regional Regime in Response*? Neth Int Law Rev 66, p.287-311, 2019, https://doi.org/10.1007/s40802-019-00143-5
[28] Coalition for the International Criminal Court, *Libya*, [online] http://www.coalitionfortheicc.org/country/libya 12 August 2020
[29] International Criminal Court, Libya; *Situation in Libya*, (Online) https://www.icc-cpi.int/libya 20 November 2019
[30] International Criminal Court, *Situation in the Libyan Arab Jamahiriya, Warrant of Arrest for Muammar Mohammed Abbu Minyar Gaddafi*, International Criminal Court, Hague, 2011, p.7
[31] African Union, *Assembly of the Union, 17th Ordinary Session*, African Union, Addis Ababa, 2011, p.1

posed a danger to the security and peace of the world, as a result of that, UNC Chapter VII was rightly invoked.

In as much as the two referral resolutions (Resolutions 1593 and 1970) to the ICC satisfied the requirements needed for the UNSC to exercise its referral powers under the Rome Statute, certain aspects contained in the Resolutions are worth noting and analysing. In the first place, part 6 of both Resolution 1593 and Resolution 1970 exclude the ICC's jurisdiction on certain nationals. UNSC Resolution 1593 part 6 states that "*nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State".* [32] The same language was used in Resolution 1970.[33]

In both UNSC Resolutions, reference to Rome Statute article 16 was made. It is, therefore, possible to interpret the above Resolutions as the UNSC using both its powers of deferral and referral at the same time. It is possible to read the Resolutions as the UNSC referring situations in both Libya and Sudan to the ICC, while also limiting the scope of the jurisdiction in both geographical and personnel terms. This type of action would resemble the exclusion of certain people practiced in previous resolutions 1422 and 1487. It should, however, be noted that the exclusion of certain personnel practiced in resolution 1593 and 1970 does not meet the terms stipulated in Rome Statute article 16. One condition stipulated under article 16 is that a deferral can be limited to a period of 12 months,[34] however, both resolution 1593 and 1970 contain no time clause thereby making the exclusion of certain personnel permanent and there also seems to be no evidence to show that the exclusion and immunity were granted in the interest preserving world peace as article 16 stipulates. Resolutions 1422 and 1487 were clearly issued under Rome Statute article 16 and comprised of a temporal limitation of 12 months which was renewed into resolution 1487. It is for this reason

[32] United Nations Security Council, *Resolution 1593*.
[33] United Nations Security Council, *Resolution 1970*.
[34] International Criminal Court, *Rome Statute of the International Criminal Court*, p.13

that the immunity granted to certain personnel in the Libyan and Sudan referrals has no connection with Rome Statute article 16.[35]

Having that understanding in mind, questions begin to emerge as to whether Rome Statute article 13 grants the UNSC with the power to refer less than a full situation to the ICC. When article 13 proclaims that the UNSC *"shall refer a situation",* does it imply that only certain groups of people can be referred, for instance only rebels or only government actors in a situation can be referred? That seems not to be the case, article 13 intentionally used the word 'situations' in order to avoid any political interference that would lead to states and institutions such as the UNSC referring only certain people to the ICC.[36] For instance, the Ugandan government referred the situations happening in Uganda to the Court, the Ugandan government, however, attempted to only refer the situations related to the crimes perpetrated by the Lord's Resistance Army (LRA). However, the Office of the Prosecutor overruled this referral because they viewed it as a one-sided referral. Therefore, they interpreted the referral as one that refers to the ICC all the crimes committed by all parties in Uganda.[37] This result was arrived upon because Rome Statute article 14 (1) grants states the prospect of referring a situation and not only one aspect or side of the conflict to the ICC. Given these points, a legal question arises as to whether a group of personnel may be excluded from a referral in the manner that Resolutions 1593 and 1970 did.

The ICC's Pre-Trial Chamber proclaimed that the wording 'situation' means that a referral should not limit the ICC to only investigate violations allegedly perpetrated by one side of the group in the conflict. In addition to that, in the case of Libya, the ICC Prosecutor highlighted how the ICC has the duty to investigate all the alleged crimes by all actors, however, no reference was made to part 6 of resolution 1970.[38] Regarding the above analysis, the exemption of certain individuals and nationals from the ICC's jurisdiction evident in part 6 of resolutions 1593 and 1970

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[35] Schuerch, *The International Criminal Court at the Mercy of Powerful States; An Assessment of the Neo-Colonialism Claim Made by African Stakeholders,* p.196

[36] Gabriel Lentner, *The Role of the UN Security Council Visa-Vis the International Criminal Court Resolution 1970 and Its Challenges to International Criminal Justice.* Journal, International and Comparative Law Review, 2014, Vol. 14. No. 2, pp.7-23,

[37] Trahan, *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices,* p.459

[38] Lentner, *The Role of the UN Security Council Visa-Vis the International Criminal Court Resolution 1970 (2011) and Its Challenges to International Criminal Justice*, p.9

appears to be in conflict with Rome Statute article 13 (b). UNSC referrals are only supposed to activate the whole Rome Statute and not only certain parts. Not only does the practice of excluding certain categories of people from ICC's jurisdiction undermine Rome Statute article 13, it also conflicts with Rome Statute article 27. The provisions of the Statute ought to equally apply to all people regardless of their nationality or official capacity, as a result of that, all like situations ought to be treated in the same manner.[39] For justice to be administered in a fair manner, there is a need for it to be administered equally. The equal administration of justice was one of the motives behind the creation of the ICC. In particular, the firm belief that no individual should escape the rule of law. Treating people differently, especially based on their nationality is not consistent with the notion of equality before the law, a notion widely recognised to be vital for the administration of justice.[40]

The different treatment of people under ICL is then interpreted by some as the practice of double standards, double standards that undermine the legitimacy and credibility of the Court. This view can be evidenced by the statement made in 2005 by a representative from Sudan who commented on Resolution 1593. He was quoted saying "*to the claim made by some that this resolution sends a message to all the parties that no one will now enjoy impunity, I would add in order to avoid hypocrisy, except if he belongs to a certain category of States*".[41] The International Peace Institute observed that the limitations in terms of jurisdiction of the ICC in both Libya and the Sudan situation were a result of negotiations in the UNSC thus they were seen as a necessary thing in order to make sure that no UNSC permanent state vetoes any referral resolution.[42]

Resolution 1593 was approved after the abstentions of China and the US. Two countries that might have vetoed the referral. The desire to avoid a veto from the China and US incited some members of the UNSC to adopt a compromised referral in order to appease the US and China. The US sought for certain assurances to be made in order

[39] Ibid, p.9
[40] Ibid, p.20
[41] Schuerch, *The International Criminal Court at the Mercy of Powerful States; An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, p.171
[42] International Peace Institute, *The Relationship Between the ICC and the Security Council: Challenges and Opportunities*, International Peace Institute, New York, 2013, p.3

to shield US citizens from prosecution and prevent the UN from any costs that may arise from the ICC investigations.[43]

As a summary of this discussion, it can be concluded that in legal terms, the Rome Statute can only be activated as a whole, and not only certain parts of it can be activated. Rome Statute article 13 (b) grants the UNSC the powers of referral, however, this power does not legally give the UNSC the right to put any sort of restrictions on the jurisdiction of the ICC. The manner in which the UNSC has used its referral powers, especially the exemption of certain individuals from the ICC's jurisdiction is not consistent with Rome Statute article 13 (b).[44] Reason being that any UNSC referrals issued to the ICC ought not to lead to everlasting exemptions for certain groups of people from the ICC's jurisdiction. The exemption of certain groups of people from the jurisdiction of the ICC by the UNSC exceeded the powers given to the UNSC under Rome Statute article 13.[45]

2.1.1.3. Responsibilities of the UNSC

2.1.1.3.1. Cooperation

Under national law, judicial bodies are often accompanied by other bodies such as the executive body which helps to enforce the decisions made by the judicial organs. When it comes to ICL however, the ICC being a judicial body has no enforcement powers of its own. As a result of that, cooperation between countries and the Court is very vital. The Rome Statute, under part 9 lists various methods in which Rome Statute state parties can offer their cooperation to the ICC. States parties have an obligation to fully cooperate with the ICC in various ways, especially in any ICC related investigations and prosecution. This is the case regardless of how the ICC takes hold of the jurisdiction.[46] As for Rome Statute non-states parties, they are not legally obliged to cooperate with the ICC. Cooperation between such countries and the ICC can, however, be enforced through Ad Hoc agreements or in certain circumstances

[43] Rosa Aloisi, *A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court*, Martinus Nijhoff Publisher, Texas, 2013, p.160
[44] International Peace Institute, *The Relationship Between the ICC and the Security Council: Challenges and Opportunities,* p.3
[45] Ibid
[46] International Criminal Court, *Rome Statute of the International Criminal Court*, p.55

through UNSC resolutions. UNSC resolutions are a more efficient way of obliging enforcement, the reason being that the UNSC has the ability to enforce obligations that are binding on all UN members, irrespective of their standing to the Rome Statute.[47]

The role and support the UNSC provided in the ICTY and ICTR can be used as evidence to highlight the massive role played by the UNSC binding resolutions. Under those tribunals, an obligation of cooperation was imposed by the UNSC. The obligation was enforced on all members of the UN. Such obligations made by the UNSC helped to facilitate the execution of arrests for the people who were indicted for crimes.[48] In contrast to that, the two UNSC referrals (Resolution 1593 and 1970) oblige Libya and Sudan to fully cooperate with the court whilst merely urging states not party to the ICC to cooperate.

The language the UNSC used in Resolution 1593 part 2 states that the UNSC "*decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully".*[49] The same language was used in part 5 of Resolution 1970 which obliged the Libyan government to fully cooperate with the ICC whilst noting that other Rome Statute non-states parties have no obligation to cooperate with the Court. In doing so, this resolution merely urged other countries to cooperate with the ICC.[50]

The ICC still faces a lot of challenges in arresting the people indicted for crimes of atrocities in both Libya and Sudan. The Sudanese government refused to arrest and surrender various Sudanese people such as Al-Bashir, Ahmed Haroun and Ali Kosheib, people accused of being the perpetrators of crimes of atrocities. Despite the ICC issuing arrest warrants for such people, those people have been extensively travelling to various parts of the world, including states party to the Rome Statute.[51]

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[47] Mistry and Verduzco, *The UN Security Council and the International Criminal Court,* p.8
[48] Aloisi, *A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court,* p.153
[49]United Nations Security Council, *Resolution 1593,* p.1
[50]United Nations Security Council, *Resolution 1970,* p.2
[51]Lawrence Moss, *The UN Security Council and the International Criminal Court*; Towards a More Principled Relationship, Berlin, Friedrich Ebert Stiftung, 2012, p.7

When the UNSC makes a referral to the ICC, it becomes very important for the UNSC to follow up on those situations, without effort and support from the UNSC, the amount of progress the ICC can achieve is very limited. The lack of progress in the Sudan and Libya situations is to some extent attributed to the lack of support from the UNSC to the ICC, particularly in the area of enforcing arrest warrants.[52] The current ICC Prosecutor Bensouda in a report presented to the UNSC expressed her disappointment at the lack of support from the UNSC. Bensouda was quoted saying "*my office and the Court as a whole have done their part in executing the mandate given by this Council in accordance with the Rome Statute, the question that remains to be answered is how many more civilians must be killed, injured and displaced for this Council to be spurred into doing its part?"* [53] The same thing can be said about the situation in Libya, it was observed that there has been a reluctance on the part of the UNSC in terms of providing the ICC with assistance. It is well-known that ICC has been having trouble in having access to locations where the crimes took place, talking to the people who have been indicted and in the collection of evidence.[54] All these challenges undermine the ICC's effectiveness in achieving its major task.

2.1.1.3.2. Financing

During the time the ICTR and ICTY were established by the UNSC, the fees deriving from the investigations and other cost-related activities were paid for by the UN.[55] In the ICC era, Rome Statute article 115 stipulates the various means through which the Court's expenses shall be raised. One of the ways in which the ICC can receive funds is through the UN, however, such a move first has to be approved by the UNGA. Article 115 further concludes that such an event would particularly happen in situations where the ICC's costs arise due to UNSC referrals.[56] However, under part 7 of resolution 1970 and part 8 of resolution 1593, the UNSC proclaimed that any expenses that might arise from the two referrals shall not be covered by the UN. The

[52] International Peace Institute, *The Relationship Between the ICC and the Security Council: Challenges and Opportunities*, p.4
[53] Ibid, p.4
[54] Aloisi, *A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court*, p.155
[55] Mistry and Verduzco, *The UN Security Council and the International Criminal Court*, p.7
[56] International Criminal Court, *Rome Statute of the International Criminal Court*, p.71

UN will not provide funds for any expenses that might arise from ICC investigations or prosecutions, as such, all cost-related activities in the Libya and Sudan cases shall be covered by Rome Statute states parties and states that wish to voluntarily contribute.[57] In other words, while fulfilling the obligations under UNC Chapter VII; maintaining world security and peace, the UNSC referred the situations in Libya and Sudan to the ICC. At the same time, the UNSC explicitly placed all the financial responsibilities that might arise upon Rome Statute member states.

In December 2011, the Rome Statute state parties reduced the ICC's budget by € 9 million below the ICC's request. In 2009, the ICC budget approved for the Sudan investigations was € 4.6 million, €4.1 million in 2010 and € 2.3 million in 2011.[58] The number of current investigations, cases, and investigation requests at the ICC continues to be on the rise. As a result of that, finances are a real concern for the ICC. If the ICC is to effectively fulfill its various tasks, it is vital for it to have adequate financial support from various organisations. It is not a must or compulsory for the UNSC to provide funds to the ICC, but logically speaking, if the UNSC makes a number of referrals without providing the funds, there are high chances of the ICC, unfortunately, being in a situation where it has insufficient funds to investigate and prosecute the referred situations. It is questionable whether the UNSC has the authority to prevent the UN from allocating funds to the ICC. Scholars note that the UNC gives the UNSC the powers to act under Chapter VII, however in areas of finance, the UN organ responsible for handling the finance-related issues is the UNGA.[59] Article 17 of the UNC states that the UNGA shall be the organ that considers and approves the budget of the UN. [60]

2.1.1.3.3. Non-Referral Situations

[57] United Nations Security Council, *Resolution 1970 and Resolution 1593*
[58] Moss, *The UN Security Council and the International Criminal Court*; Towards a More Principled Relationship, p.12
[59] Trahan, *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, p.450
[60] United Nations, *Charter of the United Nations and Statute of the International Court of Justice*, p.5-6

The selectivity with which the UNSC has made referrals to the ICC is also one of the things that significantly affect the legitimacy of the ICC. There are a number of situations that the UNSC ought to have referred to the Court that has not been referred to the Court, mostly because of the veto powers that certain countries in the UNSC have. Situations in places like Gaza or Syria among other places have never been referred to the ICC. Situations happening in Syria might be no different or might even be worse than what transpired in Sudan and Libya, various reports from different organisations under the UN, encouraged the UNSC to refer such situations to the Court.[61] However, China and Russia have often vetoed the resolution. Such moves have happened on different occasions.[62]

An analysis of the motives behind why countries use their veto powers to oppose UNSC referral proposals will not be made in this analysis, however, what is important to note is that there has been an increasing trend of situations were UNSC permanent members veto resolutions that target them or their allies.[63] The current voting behaviour among the UNSC permanent members is often not primarily based on the existence of an event that poses as a danger to world peace and security or the presence of any UNC Chapter VII situations, but rather, the voting behaviour is a mere reflection of how UNSC permanent members use their veto powers to safeguard their national interests and those of their allies.[64]The use of vetoing powers and behaviour among the UNSC permanent members especially in situations related to the ICC massively affects the work of the ICC. It leaves the ICC vulnerable to accusations of practicing double standards thereby suggesting that the same type of law does not apply to all.

As a conclusion to the above discussion, a link between a political body concerned with international security and a judicial body, in theory, would contribute massively towards international peace and security, however, practically speaking a link between such bodies is bound to bring about complications. There is a need for

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[61] Moss, *The UN Security Council and the International Criminal Court*; Towards a More Principled Relationship, p.11

[62]Michelle Nichols, Russia casts 13th Veto of UN Security Council action during Syrian War, 2019, (Online) https://www.reuters.com/article/us-syria-security-un/russia-casts-13th-veto-of-un-security-council-action-during-syrian-war-idUSKBN1W42CJ 10 January 2020

[63] Schuerch, , *The International Criminal Court at the Mercy of Powerful States; An Assessment of the Neo-Colonialism Claim Made by African Stakeholders*, p.210

[64] Ibid, p.210

the UNSC to apply constant principles whenever it refers a situation to the Court. It is no secret that the UNSC is a political organ, as a result of that, political agendas and interests might continue to influence a majority of the decisions the UNSC will make. However, in as much as that is the case, it is important for the UNSC to apply consistent standards in its decisions especially when it refers situations to the ICC. Without uniform standards, the ICC's integrity and legitimacy will continue to be damaged.

The habit of excluding certain groups of people from the ICC's jurisdiction is very problematic and a dangerous trend. The two UNSC resolutions that referred situations in Libya and Sudan to the Court contained language that sort to shield certain categories of people from the jurisdiction of the ICC. It is doubtful whether such exemptions could withstand judicial scrutiny because the Rome Statute ought to be only activated as a whole and not only certain parts of it. Such practices by the UNSC have negative consequences on the legitimacy and independence of the ICC. The costs of ICC investigations as a result of referrals from the UNSC greatly strain the budget of the ICC. Whenever the UNSC makes a referral to the Court, it does so on behalf of the UN membership. In that regard, as stipulated by the Rome Statute and the UNC, the UNGA should be the organ responsible for the allocation of funds to cover costs that might arise due to UNSC referrals to the ICC. The lack of funds from the UN has the potential to make ICC investigations less effective. The UNSC has also not adequately supported the ICC with regard to the cases it referred to the Court. For the ICC to properly carry out its mandate, the UNSC needs to follow up and enforce cooperation on all member states of the UN.

Perhaps the biggest criticism of the ICC-UNSC relationship is as a result of the UNSC not referring certain situations to the ICC. In the absence of such referrals from the UNSC, various crimes committed go unpunished. In an interview with Al Arabiya News Luis Moreno Ocampo, the former ICC Prosecutor was asked about the violence in Yemen and Syria and the lack of ICC investigations in those places. In response to that, Ocampo was quoted saying "*talk to the UNSC, they can do it, they can decide to refer the case to the ICC; it is their decision, it is their responsibility, not mine". "Without a referral, I have no jurisdiction, I can do nothing".*[65] Without UNSC

[65] Aloisi, *A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court*, p.159

referrals to the ICC, the ICC cannot get involved in places where its jurisdiction might be needed.

All the legal challenges highlighted above could become less problematic if the Rome Statute was ratified by all the countries in the world. Universal ratification would put to rest allegations of the ICC and UNSC practicing double standards in their case selections. Until such a time is reached, it is important for the UNSC to use the power granted to it by the Rome Statute to serve the communal interests of the whole world. In doing so, the UNSC would positively be contributing to fighting impunity in the world. This is of significant importance because currently, instead of helping promote principles of ICL, the UNSC undermines them.[66] This trend greatly damages the credibility, integrity and legitimacy of the ICC.

2.2. IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

There has been increasing tension between the desire to uphold the principles of state sovereignty and the desire to protect human rights. This tension can be evidenced in the ongoing debate on whether or not certain government officials ought to be held accountable for the crimes of atrocities they might commit while in office. In this particular situation, two different fields of international law are at play. Under the laws of diplomatic immunities, certain individuals are accorded with diplomatic and state immunities. The main rationale behind this is that all countries of the world are deemed to be equal. As such, countries ought not to interfere in the domestic activities of other countries. However, an increased desire to protect the human rights of individuals has developed. Such desires have led to the establishment of humanitarian law. Laws that seek to prohibit crimes that are deemed as international crimes.

For such laws to be effective, it is vital for the international community to put up measures that prosecute people who are found guilty of committing international crimes. Such measures are important because most of the time states are reluctant to

[66] Lentner, *The Role of the UN Security Council Visa-Vis the International Criminal Court Resolution 1970 (2011) and Its Challenges to International Criminal Justice* , p.23

domestically prosecute their state officials and individuals accused of committing international crimes. To overcome such challenges, foreign courts or international courts need to have jurisdiction to prosecute individuals who commit international crimes. For such a move to happen, it is important for the foreign courts or the international courts to have jurisdiction over state officials that commit international crimes. Providing such jurisdiction to international courts and foreign states has proved to be a challenge due to diplomatic immunities certain officials have. The following part of the research examines diplomatic immunities under international law, it seeks to examine whether state immunities can shield state officials accused of committing international crimes. A general outlook on diplomatic immunities will be given and it will, later on, be narrowed down to the case of Sudan and Libya. Two states currently under the jurisdiction of the ICC yet not party to the Rome Statute.

2.2.1. Types of Immunities under International Law

State immunity prohibits states from prosecuting each other in their domestic courts, apart from that, it further prohibits certain state officials of one state from being prosecuted in international criminal courts.[67] The principle of granting certain state officials with state immunity has been long practiced under international law, as such, it is now regarded to be part of international customary law. For any principle to attain such a level, two situations have to be met. Firstly, that principle needs to be backed by widespread state practice. Secondly, the states that undertake that practice ought to do so believing that they are obliged by law to do so. For scholars such as Schabas, international customary law recognises that certain individuals especially government officials have immunity from criminal prosecutions. As such, state immunity laws originate from international customary law.[68]

The previous concept has been acknowledged by various judicial organs. For instance in Lampen-Wolfe v Holland the House of Lords pointed out that "*It is an established rule of customary international law that one state cannot be sued in the*

[67] Peter Allard, *Accountability in Foreign Courts for State Officials' Serious illegal Acts: When do Immunities Apply?* International Justice and Human Rights Clinic, British Columbia, 2016, p. 2

[68] Asian-African Legal Consultative Organisation, *Immunity of State Officials from Foreign Criminal Jurisdiction,* New Delhi, 2012, p.3

courts of another for acts performed iure imperi (public acts of the state), the immunity does not derive from the authority or dignity of sovereign states or the need to protect the integrity of their governmental functions, it derives from the sovereign nature of the exercise of the state's adjudicative powers and the basic principle of international law that all states are equal." [69]

2.2.1.1. Immunity Ratione Personae (Personal Immunity)

Ratione Personae (personal immunity) is a type of immunity that prohibits the jurisdiction of courts over certain state officials. It seeks to cover the official and private acts of certain government officials. Furthermore, it is granted to certain individuals based on the governmental position they hold. As such, it is attached to the governmental position an individual holds rather than to the individual.[70] As a result of that, Ratione Personae immunity is only applicable to individuals during their tenure in office. This type of immunity is important for various reasons; the office of the President symbolises the country, its beliefs, its citizens and a sovereign state.[71] In international law, the concept of a 'sovereign state' symbolises the notion that all countries are equal, as such, countries ought not to impede in the affairs of other countries.[72]

The prosecution and arrest of a Head of State by another state would be an indirect manner of changing the government of a country. Such an event would symbolize the highest level of state interference thereby greatly undermining the independence and autonomy of a country. Furthermore, the prosecution of a Head of State would hinder his/her ability to conduct international relations and his duties, thereby endangering world security and peace. Wirth suggested that "*the ability of states to discharge their functions is even more important than the deterrence of core*

[69] www.parliament.uk.,*Judgments –Holland v. Lampen Wolfe*, 2000 (Online) https://publications.parliament.uk/pa/ld199900/ldjudgmt/jd000720/hollan-2.htm 10 March 2020

[70] Allard, *Accountability in Foreign Courts for State Officials' Serious illegal Acts: When do Immunities Apply?* p.4

[71] UShistor.org, The Presidency:*The Leadership Branch*? (Online) https://www.ushistory.org/gov/7d.asp 12 April 2020

[72] Janne Nijman, *Human inequality puts sovereign equality to the test*, (Online) https://www.thebrokeronline.eu/human-inequality-puts-sovereign-equality-to-the-test-d161/ 12 April 2020

crimes by criminal prosecutions". [73] An argument in support of this was established by the International Court of Justice (ICJ) when they held the view that *"there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies"*. In other words, diplomatic and state immunity is very important for the peaceful cooperation and preservation of relations among states.[74]

Currently, such immunities have frequently been accorded to Foreign Affairs Ministers, Presidents and Heads of State. It is, however, unclear whether certain state officials would also benefit from personal immunity.[75] Of late, various state officials other than the ones mentioned above are tasked with the duty of conducting international relations on behalf of their countries. For instance ministers other than Foreign Affairs ministers are at times required to travel to other countries for them to conduct their functions. It, however, remains unclear whether or not such officials would benefit from personal immunities.

2.2.1.2. Immunity Ratione Materiae (functional immunity)

Ratione Materiae immunities are granted to a majority of government officials. Rather than being attached to a particular position, functional immunity is attached to acts viewed as 'official acts' that have been conducted on behalf of the state.[76] As such, it covers the acts state officials conduct while exercising their official mandates and duties. As a result of functional immunities being attached to the acts rather than the individual, they continue to cover the official acts even if the person who conducted those acts is no longer in office.[77]

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[73] Hugh King, *Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute,* New Zealand Journal of Public and International Law, 2006, Vol. 4, No. 4. p.273

[74] International Court of Justice, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran),* 1979, (Online) https://www.icj-cij.org/en/case/64 02 January 2020

[75] Allard, *Accountability in Foreign Courts for State Officials' Serious illegal Acts: When do Immunities Apply?* p.4

[76] Jimena Alvarez,. *The Balance of Immunity and Impunity in the Prosecution of International Crimes,* Fibgar, Madrid, 2016, p.5-6

[77] Ibid, p.5

A lot of rationales justify the importance of functional immunity. For instance, in Blaskic v Prosecutor 1997 it was argued that *"officials are mere instruments of a State and their official actions can only be attributed to the State, they cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State"*.[78] Due to the broad scope of functional immunity, various individuals can be accorded functional immunities as long as they act on behalf of their government. However, state practice under international law highlights that such immunities have only been given to a select few government officials.[79] Officials such as Foreign Affairs ministers, former diplomatic agents and Presidents or Heads of State. As a result of that, despite conducting duties for the government, low ranking government officials are not usually granted functional immunity. [80]

2.3. THE ROME STATUTE AND STATE IMMUNITY

2.3.1. The Relationship between Article 27 and Article 98 of the Rome Statute

The ICC is a treaty-based establishment, Rome Statute state parties collectively established the ICC and granted it the power to prosecute individuals who commit crimes the ICC has under its jurisdiction.[81] Having ratified the Statute, states agreed to be governed and led by all its provisions. Among those provisions is Rome Statute article 27 which broadly states that individuals regardless of their official capacity would be held responsible and made to account for the crimes they commit. Furthermore, immunities that national or international law provides to such people cannot hinder the court from applying its jurisdiction with regard to such people. [82]

In the earlier part of this study, it was concluded that customary international law accords immunities to certain state officials. Through the ratification of the Rome Statute, states agree to waive any sort of immunities their state officials might be

[78]United Nations. 1997. *Prosecutor v. Tihomir Blaskic*, 1997, (Online) https://cld.irmct.org/notions/show/376/functional-immunity-of-state-officials# 13 March 2020
[79]Allard, *Accountability in Foreign Courts for State Officials' Serious illegal Acts: When do Immunities Apply?* p.4
[80] Ibid, p.12
[81] International Criminal Court, *Rome Statute of the International Criminal Court* p.1
[82] Ibid, p.19

entitled to. As such immunities international or national law attaches to the official capacities of certain individuals cannot hinder the ICC from establishing its jurisdiction on a situation.[83] Rome Statute article 98 also addresses the topic of diplomatic immunities. It establishes that "*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".*[84] This article has created tension with article 27. Various rationales have been used to explain the relationship between article 98 and article 27 of the Rome Statute.

The first rationale provided is that article 98 applies to interstate relations. For instance, assuming that State 'a' and State 'b' are all Rome Statute state parties. In the event that the Head of State 'a' happens to be in the territory of State 'b', would he/she claim to be immune from the arrest and from the jurisdiction of State 'b'? Even in cases where the ICC issues a warrant of arrest for the Head of State 'a'. It is argued that, in such situations, the ICC would first have to convince State 'a' to waive its immunity thereby enabling the ICC to issue its arrest warrant and to request State 'b' to arrest the head of State of 'a'. [85] According to this argument, if the ICC fails to request for the waiver of immunity from State 'a', it cannot request State 'b' and other states to surrender or arrest the Head of State 'a'. This is so because the request for surrender would bring about conflicting obligations for State 'b' and make State 'b' to act in a way that might not be consistent with its international law obligation to respect the immunities of other countries.

This research does not advocate for such an interpretation of Rome Statute article 98. The ICC does not possess a police force of its own, in terms of enforcing its arrest warrants and requests for surrender, the court is dependent on its states parties.[86] It is important to note that the ICC works with the principle of complementarity. In this case, it seeks to prosecute individuals only in situations where their states fail or are unwilling to genuinely prosecute them.[87] If the Rome Statute states parties are

[83] Ibid, p.19
[84] Ibid, p.63
[85] King, *Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of The Rome Statute,* p.284
[86] International Criminal Court, *Rome Statute of the International Criminal Court,* p.55
[87] Ibid, 2011. p.2

unwilling to prosecute their officials, it is extremely doubtful that they would waive the immunity of their state officials or surrender them to the ICC. As such, one of the ways the ICC can gain custody of individuals is through the cooperation the court has with other Rome Statute states parties. Especially in cases where the indicted individuals happen to be on the territory of other Rome Statute state parties.

Furthermore, arguing that article 98 preserves interstate immunities between Rome Statute members would greatly undermine Rome Statute article 27. Such an interpretation undermines the whole main reason that led to the creation of the ICC, which is to "*put an end to impunity*".[88] That aim would be weakened if Rome Statute states parties can claim to have immunity in situations where the ICC seeks to indict their state officials. It would also be illogical for states on one side to consent to the creation of the ICC, a court where immunities cannot be invoked and on the other side for those same states to claim to have immunities preserved courtesy of article 98. A more logical interpretation of Rome Statute article 98 would be to view it as applying to Rome Statute non-states parties.[89]

The ICC is a treaty-based organisation, by virtue of ratification, countries agree and assent to waive any procedural immunities international law accords to them (article 27).[90] In cases where states create a treaty, states parties to the treaty will be bound to adhere to the obligations the treaty creates. Such obligations cannot be enforced on individuals or states not a party to the treaty in question, especially if the consent of those states is absent. This view is supported by article 34 of the Vienna Convention on the Law of Treaties (1968), it establishes that "*a treaty does not create either obligations or rights for a third State without its consent".*[91] As such, legally speaking, the ICC's jurisdiction only ought to apply to states party to the Rome Statute, therefore the ICC can only enforce its obligations on state parties to the Rome Statute. The waiver of immunity established in article 27 cannot be applicable to Rome Statute non-states parties, they continue to preserve their immunity because they have not

[88] King, *Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of The Rome Statute*, p.286

[89] Kai Ambos and Ottilia Maunganidze. *Power and Prosecution; Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa*. Konrad Adenauer Stiftung, Berlin, 2012, p.95

[90] Fred Nkusi, *Immunity of State Officials before the International Criminal Court: The Indictment of President Al-Bashir*, Arizona Journal of International and Comparative Law, 2013, Vol. 1, No. 1

[91] United Nations, *Vienna Convention on the Law of Treaties* 1969, (Online) https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf 13 March 2020

waivered their rights to immunity. Under such circumstances, if the ICC seeks to arrest an individual from a Rome Statute non-state party, it is vital for the ICC to first acquire a waiver of immunities of such a person from his/her nation of origin. Doing so would be in line with article 98.

2.3.2. The Case of Sudan and Libya

In 2005, the UNSC referred Sudan to the ICC. The ICC Pre-Trial Chamber issued warrants of arrests for Bashir, the Sudanese president. He was accused of committing war crimes, crimes against humanity and genocide.[92] In 2011, the UNSC also referred Libya to the ICC. Arrest warrants for various Libyan state officials including Gaddafi were issued.[93] Both Libya and Sudan are not Rome Statute states parties, as a result of that, they are entitled to Ratione Personae immunity. The Pre-Trial Chamber I of the ICC, however, argued that *"consistent with its findings in the Al Bashir Case, the official position of an individual, whether he or she is a national of a State party or of a State which is not a party to the Statute, has no effect on the Court's jurisdiction".*[94]

Aside from the Pre-Trial Chamber, various scholars in Knuchel (2011) held the view that immunity is not applicable to officials who commit international crimes or actions that breach the norms of jus cogens. They argued that immunity covers the official acts of a state, as such, acts that infringe or breach humanitarian laws can never be considered as sovereign or official acts.[95] Such views have been shared and applied in certain judicial decisions such as Siderman Blake vs Argentina[96] and in the Pinochet case[97] where it was debated that immunity under international law is conferred only to actions conducted in pursuance of state functions, it was however noted that 'state functions' are restricted to actions internationally recognised to be part of the functions

[92] International Criminal Court, *Darfur, Sudan; Situation in Darfu, Sudan,*
[93] International Criminal Court, Libya; *Situation in Libya,*
[94] Laurence Chazournes, Jorge Vinauales, J. and Marcelo Kohen *Diplomatic and Judicial Means of Dispute Settlement,* Martinus Nijhoff publishers, Boston, 2013, p.31
[95] Sevrine Knuchel, *State Immunity and the Promise of Jus Cogens*. Northwestern Journal of International Human Rights, Vol 9, No. 2, 2011, p.153
[96] United States Court of Appeals, *Susana Siderman v. Argentina,* 1992 (Online) https://ihl-databases.icrc.org/ihl-nat/0/752434334A8A7D0EC1256D180031C242 12 March 2020
[97] Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*. European Journal of International Law. 1999, Vol. 10. No 2, 237-277

of governments. As such, crimes internationally condemned by law such as torture, genocide, crimes against humanity and genocide can never be considered as functions of a state.

To examine the validity of such judgments, it is vital to understand what the term 'official acts' means. Article 4 of the ILC's State Responsibility document states that, *"the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the Central Government or a territorial unit of the State"*.[98]

In an endeavour to explain the meaning of article 4, the Commission suggested that the personal motives state officials might have are of no relevance, the main important aspect is *"whether or not the official acted in an official capacity or under the colour of authority".* For acts to be qualified as 'official acts', certain conditions have to be met. Firstly, the act must be performed in pursuance of state policies. Secondly, the act must be conducted with the use of the state apparatus. As such, when officials conduct acts in pursuance of state policies and as agents of the state, the acts they conduct qualify to be considered as official acts. As a result of that, such officials are entitled to state immunities.[99]

It has frequently been argued that, when state officials conduct acts that violate jus cogens, they would not be entitled to state immunity. The reason behind this is that, in terms of hierarchy, jus cogens norms rank higher than state immunity norms. As such, they prevail over state immunity laws under international law.[100] For jus cogens norms to nullify Ratione Personae immunity, it has to be established that a conflict exists between the laws of state immunities (Ratione Personae) and the laws of jus cogens. State immunity laws can be nullified only when they come into conflict with jus cogens laws.

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[98] United Nations, *Responsibility of States for Internationally Wrongful Acts*, United Nations, New York, 2005, p.2

[99] Philippa Webb, *International Judicial Integration and Fragmentation*, Oxford University Press, United Kingdom, 2013, p.84

[100] Dapo Akande, and Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts.* The European Journal of International Law, 2011, Vol. 21. No. 4, p.832

Jus cogens rules that prohibit the conduct of serious crimes and the rules that provide states with immunities belong to different branches of international law. Ratione Personae immunity is under procedural law while jus cogens norms fall under substantive law (concerned with the prohibition of serious crimes). Due to this difference, the norms of jus cogens cannot nullify the laws of state immunity, in this particular case, Ratione Personae immunities.[101] For the jus cogens norms (the prohibition of the conduct of certain international crimes) to come into conflict with state immunities, certain conditions have to be in place (a) third states need to be obliged to prosecute individuals who perpetrate crimes of atrocities or international crimes. (b) if the obligation highlighted in part (a) exists, such an obligation needs to be a jus cogens rule.[102] Put differently, the violation of jus cogens (substantive law) norms ought to have a procedural element (the obligation and likelihood of punishing and prosecuting individuals who violate jus cogens norms). Furthermore, there is a need for the procedural element to amount to the status of being a jus cogens norm. Only when that is the case, can the norms of jus cogens be capable of nullifying Ratione Personae immunity.

Certain rules that give third states an obligation to prosecute individuals who violate humanitarian rights exist. However such rules can only be seen as consequences of violating jus cogens norms, as a result of that, they have not attained a level of jus cogens thus those obligations cannot override ratione personae immunity.[103] The views highlighted above have been shared in a majority of judicial decisions. For instance, in Ferrini v. Federal Republic of Germany, the ICJ argued that a conflict between the norms of jus cogens and state immunities does not exist. They established that "*the two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question of whether or not the conduct in respect of which the proceeding are brought are lawful or unlawful".* [104]

[101] Webb, *International Judicial Integration and Fragmentation* ,p.396-397
[102] Akande, and Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts* p.834
[103] Ibid, p.835
[104] Webb, *International Judicial Integration and Fragmentation,* p.97

The European Court of Human Rights in the case of the United Kingdom v. Al-Adsani acknowledged that under international law, torture is prohibited, as such, laws that prohibit torture attain the level of being considered as a peremptory norm, however, it established that "*the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged".*[105]

Lastly, the ICJ broadly proclaimed that "*It has been unable to deduce that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity".*[106] While the ICJ specifically referred to foreign ministers, the above statement is applicable to all those serving diplomats and state officials who possess this type of immunity. As such, claiming that Heads of State seize to benefit from state immunities (Ratione Personae) when they commit international crimes is not accurate.

In the case of Sudan and Libya, a majority of African countries and organisations including the AU share such views. They firmly believed that international customary law still accorded immunities to Heads of State regardless of the crimes they commit. Furthermore, the AU argued that the Rome Statute article 98 acknowledges this aspect of immunities. During the 18th AU Assembly of the Union Sessions, the AU stated that "*Article 98(1) was included in the Rome Statute establishing the ICC 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, and by referring the situation in Darfur to the ICC, the UN Security Council intended that the Rome Statute would be applicable, including Article 98".*

As such, the ICC's request for arrests for Bashir and Gaddafi would require requested states to act in a manner not consistent with their international law

[105] European Court of Human Rights, *Case of Al-Adsani v. The United Kingdom,* 2001, (Online) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59885%22]} 14 March 2020

[106] International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000, Congo v. Belgium.* I.C.J. Reports, 2002

obligations with regard to respecting the diplomatic immunities of other states.[107] It is partly because of this decision that Bashir travelled to numerous countries in Africa without being arrested. In response to this, the ICC found that by not arresting Bashir, Rome Statute state parties did not comply with the ICC's requests for arrest.[108] As such, they hindered the ICC from establishing its jurisdiction in relation to Sudan. A move contrary to Rome Statute article 87 (a).[109] The ICC argued that Heads of State, regardless of their standing with the Rome Statute are not entitled to state immunities virtue of Rome Statute article 27, this applies when they are being indicted for committing crimes of atrocities. The court further argued that Heads of State cannot rely on state immunities in cases where an international court seeks to prosecute them.[110]

This research argues that the justifications provided by the ICC are not accurate and not supported by a majority of international law principles. The Rome Statute treaty cannot establish treaty obligations for countries not a party to it.[111] As such, article 27 cannot waive the immunities (Ratione Personae) Bashir is entitled to under international law. As it has been examined earlier, Heads of states still benefit from Ratione Personae immunity even in situations where they are being charged with committing crimes of atrocities.[112]

Lastly, the argument that Heads of State cannot rely on immunity when an international court seeks to prosecute them is not entirely accurate. Not all international courts are capable of prosecuting officials who are entitled to state immunity. The ability to prosecute certain officials is dependent on the type of court. International courts created by the UNSC especially in situations where it is acting under UNC Chapter VII legally bind all members of the UN. Such international courts can have the jurisdiction to prosecute Heads of States.[113] As for the ICC, it is not a

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[107] Ramona Pedretti, *Immunity of Heads of State and State Officials for International Crimes*. Brill Nijhoff, Boston, 2015, p.225

[108] Beitel Merwe, *Non-Compliance with a twist; Some thoughts on the ICC's decision on South Africa's failure to arrest and surrender President Al-Bashir, 2017,* (Online) https://www.icjafrica.com/single-post/2017/07/14/Non-compliance-with-a-twist-Some-thoughts-on-the-ICCs-decision-on-South-Africas-failure-to-arrest-and-surrender-President-Al-Bashir11 December 2019

[109] International Criminal Court *Rome Statute of the International Criminal Court*, p.55

[110]Omorogbe, *The Crisis of International Criminal Law in Africa: A Regional Regime in Response*? p.289

[111] Nkusi, *Immunity of State Officials before the International Criminal Court: The Indictment of President Al-Bashir*, p.5

[112]Knuchel, *State Immunity and the Promise of Jus Cogens*, p.156

[113] Dapo Akande, *International Law Immunities and the International Criminal Court*. The American

creation of the UNSC, as such, its jurisdiction is mostly limited to Rome Statute state parties.

This research argues that the only possible explanation that could justify Bashir's and Gaddafi's lack of immunity in proceedings initiated by the ICC is the UNSC resolution 1970 and 1593. It is important to remember that when the UNSC referred Libya and Sudan to the ICC, it was acting under UNC Chapter VII, as such, it was acting in a manner that is capable of imposing obligations that legally bind all UN members. Article 25 of the UNC (1945) states that *"the members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".*[114] Furthermore, under article 103 it is stated that "*in the event of a conflict between the obligations of the members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".*[115]

UNSC resolution 1593 establishes that "*the government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution".*[116] Similar language was used in UNSC resolution 1970.[117] Both countries were obliged to fully collaborate and offer any required support to the ICC. Due to the UNSC referrals to the Court and the language contained in the resolutions, the UNSC accepted that any investigations that might arise ought to be done in a way that is in accord with all the Rome Statute provisions.[118] Not only did the UNSC referrals trigger the jurisdiction of the ICC over Sudan and Libya, but it also meant that any ICC proceedings that might arise would be conducted using all the Rome Statute provisions.[119] This is in line with Rome Statute article 1 which states that "*the jurisdiction and functioning of the Court shall be governed by the provisions of this Statute".*[120] For this reason, Libya

Journal of Intenational Law, 2004, Vol. 98. No. 3. p.417

[114] United Nations. *Charter of the United Nations and Statute of the International Court of Justice,* p.7

[115] Ibid., p.19

[116] United Nations Security Council, *Resolution 1593,* p.1

[117] United Nations Security Council, *Resolution 1970,* p.2

[118] International Criminal Court, *The Appeals Chamber, Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgement in the Jordan Referral,* International Criminal Court, The Hague, 2019, p.6

[119] Ibid., p.6

[120] International Criminal Court, International Criminal Court, *Rome Statute of the International Criminal Court,* p.2

and Sudan are obligated to fully cooperate with the Court as if they are Rome Statute states parties.

Therefore the pivotal basis for declining the state immunities entitled to Bashir and Gaddafi is the UNSC resolution. The UNSC resolutions enable the ICC to have jurisdiction on the situations in Libya and Sudan. Furthermore, it enables the Court to apply all the provisions contained in the Rome Statute, this also includes article 27; the removal of state immunity which Sudan and Libyan state officials might be entitled to.[121] As a result of this, state immunities cannot hinder or stop the ICC from establishing its jurisdiction on state officials from Sudan and Libya. Lastly, the Rome Statute article 98 becomes inapplicable in the situation of Sudan and Libya. Reason being that no waiver of immunities is required since there are no immunities to be waived. As a result of this, all Rome Statute state parties are obliged to arrest Bashir. Doing so will not make Rome Statute state parties violate their international law obligations.[122]

[121]Pedretti, *Immunity of Heads of State and State Officials for International Crimes*, p.259

[122] International Criminal Court. *The Appeals Chamber, Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgement in the Jordan Referral* ,p.28

CHAPTER THREE

AFRICA AND THE INTERNATIONAL CRIMINAL COURT.

3.1. THE AFRICAN UNION'S RATIONALE FOR CRITICIZING THE INTERNATIONAL CRIMINAL COURT

African countries had a vital part in the creation of the ICC. Regrettably, the Africa-ICC relationship appears to be at crossroads. The relationship that was once promising now seems to be deteriorating. African countries through the AU have started to question why a majority of situations currently under ICC investigations focus on Africa. Such concerns are not only shared by AU representatives, but they are also shared among a majority of African politicians and citizens. Such politicians are of the view that the ICC is focusing on Africa and ignoring international crimes committed outside the African continent. They view the ICC as a biased organisation and accuse the Court of being a neo-colonial organisation.[1]

For instance, influential African people such as Mahmood Mamdani, Desmond Tutu and Tedros Adhanom have often openly criticised the ICC. Mamdani alleged that the ICC exists for the sole purpose of prosecuting African people, Desmond Tutu allegedly refused to be on the same stage with Tony Blair (former British Prime Minister). This was a way Tutu used to protest against the alleged bias the ICC has towards Africa. Lastly, Adhanom claimed that the court had transformed from being an independent court to a court that is a political instrument with the main aim of targeting African people.[2]

Since the ICC came to being in 2002, 12 situations are currently being investigated, out of 12 cases being investigated, 10 are in connection with people from African countries such as Democratic Republic of Congo (DRC), Kenya, Central

[1]Ambos and Maunganidze. *Power and Prosecution; Challenges and Opportunities for International Criminal Justice in Sub-Saharan Africa*, p.181

[2] Brendon Cannon, Dominic Pkalya, and Bosire Maragia, *The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative.* African Journal of International Criminal Justice, 2016, No. 2. pp. 6-28,

African Republic (CAR), Burundi, Mali, Sudan, Uganda, Ivory Coast and Libya.[3] A majority of situations under the investigation of the Court happen to originate from Africa. The focus on Africa has made people wonder whether the crimes under the ICC's jurisdiction only occur in Africa. Jean Ping points out how human rights abuses have been going on in places such as Myanmar, Sri Lanka, Gaza and Iraq. Situations that are worthy of triggering ICC investigations. Yet, the ICC seems not to take any action in those places. It is for this reason that, he accused the ICC of practising double standards in its implementation of justice. [4]

Mugabe the former President of Zimbabwe arrived at the same conclusion. During a speech at the UNGA in 2011, he accused the ICC of ignoring the violations of human rights perpetrated by powerful states. Mugabe further went on and argued that the crimes committed by officials such as George Bush and Tony Blair, leaders who happen to be from powerful states are ignored, despite such officials allegedly being guilty of committing those crimes. For him, such examples highlight the double standards practiced by the Court. Most importantly, he argued that those double standards negatively affect the legitimacy of the ICC in Africa. [5]

The opposition towards the court can be evidenced in situations where the AU, Africa's biggest regional body, advised its member states not to cooperate with the ICC on certain issues. During the 13th Session of the AU, the AU passed a resolution urging all its member states not to cooperate with the ICC's arrest warrants for Bashir.[6] A similar resolution was passed when the ICC initiated investigations in Libya during the 17th Session of the AU. The AU urged all its member states not to offer their cooperation with regard to the enforcement of the warrant of arrest for Gaddafi.[7] Aside from that, in both the resolutions, the AU criticised the initiation of the ICC's investigations in Libya and Sudan, citing that the ICC's proceedings and the quest for justice would undermine the promotion of peace deals thereby escalating the conflict in the two countries.

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[3] International Criminal Court, *Situations under Investigation*, 2020, (Online) https://www.icc-cpi.int/pages/situation.aspx 10 January 2020

[4] Richard Lough, *African Union Accuses ICC prosecutor of bias*, 2011, (Online) https://www.reuters.com/article/ozatp-africa-icc-idAFJOE70T01R20110130 05 September 2019

[5] Timeslive, *Mugabe UNGA speech*, 2011, (Online) https://www.timeslive.co.za/news/africa/2011-09-24-western-crimes-ignores---mugabe/ 25 June 2019

[6] African Union, *Assembly of the African Union, Thirteenth Ordinary Session*, p.2

[7] African Union, *Assembly of the African Union, Seventeenth Ordinary Session*, p.2

At times, the AU has passed resolutions that go against the provisions of the Rome Statute, especially article 27 of the Rome Statute. For instance, when the ICC opened investigations in Kenya, and the Kenyan President was among the people accused of committing human rights violations, the AU issued a statement claiming that no investigations against a sitting Head of State from the AU will be commenced by any International Court.[8] This statement was to apply to all AU states regardless of their status with the Rome Statute.

In 2014 during an AU Session in Equatorial Guinea, the AU adopted the Malabo Protocol. A protocol that seeks to expand the jurisdiction of the current African Court of Justice and Human Rights (ACJHR) and enable it to have the jurisdiction to try international crimes in Africa.[9] The proposed African international criminal court would have overlapping jurisdiction with the ICC, in such cases, states party to the ICC and the African Criminal Court would be faced with competing obligations, especially in cases where the two courts want to investigate a situation in the same country. Furthermore, the Malabo Protocol makes no mention of the Rome Statute nor how the relationship between it and the ICC would be.[10]

In 2017 during the 28th Session of the AU, the AU expressed its support and welcomed the decision made by the certain governments such as the Burundian government to withdraw from the ICC and it also expressed its support to countries such as the Gambia and South Africa who stated that they would withdraw from the ICC. Furthermore, the AU decided to adopt a non-binding resolution that calls for African countries to collectively withdraw from the ICC.[11] African countries such as Rwanda, Sudan and Kenya have begun to urge other African countries to withdraw from the ICC, and a majority of Rome State parties have opted not to cooperate with the ICC, with regard to Al Bashir's warrant of arrest.[12]

The AU-ICC relationship has been under the radar of numerous academicians and diplomats. Of late, various academic materials have been published and various

[8] African Union, *Extraordinary Session of the Assembly of the African Union*, African Union, Addis Ababa, 2013, p.1-2
[9] African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, African Union, Addis Ababa, 2014.
[10] Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, Amnesty International, London, 2017, p.3-10
[11] African Union, *Assembly of the Union, Twenty-Eighth Ordinary Session*, African Union, Addis Ababa, 2017, p.1-2
[12] Ibid

conferences and diplomatic meetings have taken place intending to address major areas of concern present in the Africa-ICC relationship. Despite all the amount of time and effort spent in trying to address the areas of concern in the Africa-ICC relationship, the relationship between the two continues to be problematic and there are little signs that show any signs of improvement being achieved between the two.[13]

Against this background, various questions arise. Questions that seek to understand why a majority of ICC cases are in Africa and to examine whether such an outcome ought to be seen as evidence of the ICC targeting Africa. These are some of the questions the following part of the research seeks to answer. The objective of this section is to critically examine the Africa-ICC relationship with particular focus on perceptions of the ICC as being "*biased*" or "*targeting*" African states, this section seeks to understand why the ICC has mostly intervened in African states and lastly it seeks to address the rationales African politicians have used to criticise the work of the ICC in Africa. In order to have a good understanding of the ICC-Africa relationship, it is important to have an understanding of the ICC cases in Africa and an examination of how those cases came before the ICC.

3.1.1. African cases under the investigation of the ICC

As earlier established, since the ICC came into being in 2002, 12 situations are currently being investigated, 10 out of the 12 situations currently under investigation are in connection with African countries. From the 10 situations under investigation, five have been as a result of African self-referrals to the ICC, three have been opened by the ICC Prosecutor and two have been as a result of UNSC referrals to the ICC.[14]

3.1.1.1. Democratic Republic of Congo (DRC)

[13] Mark Kersten, *Constructive Engagement in The Africa-ICC Relationship*. Berlin: Wayamo Foundation, 2018, p.8

[14] International Criminal Court, *Situations under Investigation*, 2020, (Online) https://www.icc-cpi.int/pages/situation.aspx 10 January 2020

Since 1998, conflicts between local militias and government forces have been taking place in the DRC, it has been reported that over 5.4 million people have died in the DRC due to war-related reasons. Numerous international crimes have been reported to have been committed in the DRC, crimes such as; the use of child soldiers, war crimes and crimes against humanity.[15]

In 2002, the DRC ratified the Rome Statute, and in 2004, the Congolese government referred the situation happening in its territory to the ICC. The focus of the investigations is on crimes against humanity and war crimes.[16] Having done the investigations, the ICC found evidence that numerous atrocities were committed in the DRC, according to their records and investigations, the crimes committed in the DRC include war crimes such as; the use and recruitment of child soldiers in conflicts and crimes of humanity such as; rape, sexual slavery, destruction of property, attacks on civilians, murder, torture and wilful killings. The ICC investigations led to the convictions of Germain Katanga and Thomas Lubanga and Ntaganda Bosco who were the main perpetrators of the crimes listed above.[17]

Thomas Lubanga was charged with war crimes and was sentenced to 14 years imprisonment. Bosco and Katanga were both charged with crimes against humanity and war crimes, however, Bosco was sentenced to 12 years imprisonment, while Katanga's prison sentence was 30 years.[18] The ICC's proceedings in the DRC have helped to promote justice and accountability, however, the ICC has been heavily criticised for only initiating investigations against rebel groups, while ignoring the crimes committed by the government officials and the national army.[19] In order to ensure and promote justice for everyone, it will be important for the ICC to remain impartial in its proceedings and to prosecute all individuals who committed crimes, regardless of their official position.

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[15] Coalition for the International Criminal Court, *Democratic Republic of Congo*, [online] http://www.coalitionfortheicc.org/country/democratic-republic-congo 12 August 2020

[16] International Criminal Court, *Democratic Republic of the Congo; Situation in the Democratic Republic of the Congo.* 2019 (Online) https://www.icc-cpi.int/drc 20 November 2019

[17] Ibid

[18] International Criminal Court, *Cases*, [online] https://www.icc-cpi.int/Pages/cases.aspx 12 August 2020

[19] Maria Elena Vignoli, *The ICC's Work in Congo Isn't Done*, 2020, [online] https://www.hrw.org/news/2020/08/11/iccs-work-congo-isnt-done 12 August 2020

3.1.1.2. Uganda

The LRA was formed by Joseph Kony in 1987, its main mission was to create a Ugandan government that would govern Uganda using the principles of Christianity and the ten commandments of the Bible. From the time the LRA came into existence, it has been accused of kidnapping over 20,000 children and forcing them to be child soldiers and sex slaves. Aside from that, it has also been accused of murdering over 20,000 civilians.[20]

The Rome Statute was ratified by Uganda in June 2002, in the year 2004, it referred the situation that happened in the territory of Uganda to the Court.[21] The ICC conducted investigations over situations in the territory of Uganda. According to the ICC, evidence was found that international crimes were committed in Uganda. It was alleged that crimes committed in Uganda included; war crimes such as murder, rape, forced recruitment of children, deliberate attacks against civilians. Evidence also suggested that various crimes against humanity were also committed.[22]

In 2005, the Pre-Trial Chamber II issued arrest warrants for the LRA's top leaders. Kony was charged with 33 counts of war crimes and crimes against humanity.[23] During a review conference of the ICC held in Uganda, numerous victims of human rights abuses accused both the LRA and the military of Uganda of committing crimes of atrocities, however, the ICC's investigations only focused on the crimes committed by the LRA. As a response to the above statement, Ocampo acknowledged that the Ugandan military might have committed some human rights abuses, however, he claimed that the crimes allegedly committed by the military did not meet the gravity of the threshold stipulated under the Rome Statute.[24]

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[20] Global Policy Forum, *International Criminal Court Investigations Uganda*, [online] https://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/uganda.html 13 August 2020

[21] International Criminal Court, *Uganda; Situation in Uganda*. 2019d (Online) https://www.icc-cpi.int/uganda 20 November 2019

[22] Ibid

[23] International Criminal Court, *Situation in Uganda, Warrant of Arrest for Joseph Kony*, International Criminal Court, Hague, 2005, p.20-23

[24] Global Policy Forum, *International Criminal Court Investigations Uganda*,

The work of the ICC in Uganda has encountered numerous setbacks. At times, it has been argued that the ICC's investigations and arrest warrants for the LRA members have negatively affected the implementation of peace agreements between the Ugandan government and the LRA. In 2000 the Ugandan government had issued amnesties to people who were involved in the conflict since its start.[25] However, it was not certain as to whether these amnesties would shield individuals from the jurisdiction of the ICC. As such, the LRA has on different occasions threatened to use violence if the ICC does not revoke the arrest warrants it issued for the leaders of the LRA.[26]

Of late, Museveni, the current President of Uganda has started to negatively perceive the ICC's work in Africa. During a speech made by Museveni at the inauguration ceremony of Kenyatta in 2013, he accused the ICC of being a Court used by western powers who seek to promote their national interests in Africa. The highlighted setbacks have slowed down the pace at which the ICC has carried out its investigations in Uganda.[27]

3.1.1.3. Ivory Coast

In 2010, presidential elections between Ouattara and the incumbent president Gbagbo were held. The Independent Electoral Commission (IEC) of the Ivory Coast announced that Ouattara won the elections. However, Gbagbo rejected the decision made by the IEC and appealed to the Constitutional Council of the Ivory Coast, a body with members that supported Gbagbo. Basing its decision on electoral violence and voting irregularities, the Constitutional Council annulled the poll results from seven regions thus declaring Gbagbo as the winner of the elections. This led to a situation where both Ouattara and Gbagbo declared themselves as winners of the 2010

[25] Çakmak, *A Brief History of International Criminal Law and International Criminal Court*, p.229
[26] Patrick Corrigan, *Why the ICC Must Stop Impeding Juba Process*, 2007, [online], https://www.globalpolicy.org/component/content/article/164/28641.html 13 August 2020
[27] Kenya CitizenTV, *Ugandan President Museveni Stirs Fresh ICC Debate*, 2013, [online] https://www.youtube.com/watch?v=3QrL-_X1vGo 13 August 2020

elections.[28] As a result of this outcome, post-electoral violence commenced between the supporters of Gbagbo and Ouattara.[29]

Various African regional organisations condemned Gbagbo. The Economic Community for West African States (ECOWAS) during a session held in December 2010 endorsed the election results declared by the IEC, urged Gbagbo to accept the decision of the IEC, and recognised Ouattara as the President of the Ivory Coast.[30] During the Peace and Security Council session of the AU in December 2010, the AU endorsed the decision made by ECOWAS and also recognised Ouattara as the President of the Ivory Coast. In addition to that, the AU decided to suspend Ivory Coast from all AU related activities up to a time where a president democratically elected assumes power.[31]

As a response to the 2010 post-electoral violence, The ICC Prosecutor initiated the investigations over the situations in the territory of Ivory Coast. At the time the investigations were opened, Ivory Coast was not a party to the Rome Statute, however, the government of Ivory Coast granted the Prosecutor permission to have jurisdiction over the situations in Ivory Coast. [32] Years later, notably in 2011, the government of the Ivory Coast reaffirmed its acceptance of the ICC's jurisdiction. In 2013, the Ivory Coast ratified the Rome Statute.[33] The focus of the investigations carried out in the Ivory Coast was on the crimes against humanity allegedly believed to have been committed in 2010/2011 in the form of post-electoral violence. Evidence suggested that the civilian populations were victims of numerous attacks that were carried out in a widespread and systematic way.[34]

In 2011, the Pre-Trial Chamber III issued an arrest warrant for Laurent Gbagbo and charged him with committing crimes against humanity, aside from Gbagbo, an arrest warrant was also issued for Ble Goude.[35] In 2019, the Trial Chamber

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[28] Nicolas Cook, *Cote d'Ivoire's Post-Election Crisis*, CRS Report for Congress, Washington DC, 2011, p.2
[29] Ibid, p.7
[30] Ecowas Commission, *Extraordinary Session of the Authority of Heads of State and Government on Cote D'Ivoire,* Abuja, 2010, p.3
[31] African Union, *Peace and Security Council, 252nd Meeting*, African Union, Addis Ababa, 2010, p.1
[32] International Criminal Court, *Cote d'Ivoire; Situation in the Republic of Cote D'Ivoire.* 2019 (online) https://www.icc-cpi.int/cdi 20 November 2019
[33] Ibid
[34] Ibid
[35] International Criminal Court, *Situation in Ivory Coast, Warrant of Arrest for Laurent Koudou Gbagbo*, International Criminal Court, Hague, 2011, p.7

I cleared Ble Goude and Gbagbo from all the allegations they were charged with. It was argued that the Prosecutor failed to provide adequate evidence required to prove their guilt, in relation to the crimes they were accused of committing.[36]

3.1.1.4. The Central African Republic (CAR)

CAR gained its independence in 1960, since then, it has gone through various political transitions such as a military rule, rebel uprisings, and coups. These political transitions have led to conflict and insecurity in CAR. CAR became a Rome Statute state party in October 2001 following its ratification.[37] The judicial organs of the CAR stated that they were incapable of addressing the widespread violence that were being committed in CAR, as a result of that, the government of CAR decided to refer itself to the ICC.[38] In 2007, the ICC initiated its first investigations in CAR, the focus was on alleged crimes against humanity and war crimes that took place between 2002 and 2003. The crimes under investigation occurred during an armed conflict between rebel forces and the government forces. In a report by the ICC, it was noted that numerous war crimes and crimes against humanity were committed in CAR. The ICC's investigations identified Jean-Pierre Bemba as the main suspect in the crimes committed in CAR and charged him with crimes against humanity and war crimes.[39]

The Trial Chamber III sentenced Bemba to 18 years imprisonment in 2016 for his involvement in the crimes committed in CAR. His prison sentence was later on reversed by the ICC Appeals Chamber in 2018. The Appeals Chamber argued that Bemba was incorrectly sentenced for criminal activities that fell outside the scope of the charges the Trial Chamber accused him of committing. As a result of that, Bemba was acquitted from the charges of crimes against humanity and war crimes.[40]

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[36] International Criminal Court, *ICC Trial Chamber I acquits Laurent Gbagbo and Charles Ble Goude from all charges*, International Criminal Court, Hague, 2019

[37] Coalition for the International Criminal Court, *The Central African Republic*, [online] http://www.coalitionfortheicc.org/country/central-african-republic-i-and-ii 12 August 2020

[38] Çakmak, *A Brief History of International Criminal Law and International Criminal Court*, p.230

[39] International Criminal Court, *Central African Republic; Situation in the Central African Republic*. 2019 (Online) https://www.icc-cpi.int/car 20 November 2019

[40] Coalition for the International Criminal Court, *The Central African Republic*,

In May 2014, the ICC further noted that CAR referred the situation in its territory that had occurred since the 1st August 2012 to the ICC. This was the second time CAR referred itself to the ICC, however, the focus of investigations was on war crimes and crimes against humanity that transpired from the 1st of August 2012. The 2012 conflict supposedly involved alleged crimes committed by Christian anti-balaka and Muslim Seleka groups. The violence during the conflict allegedly led to the displacement and deaths of numerous people.[41] The ICC's investigations identified Ngaissona and Yekatom as the people who bore the greatest criminal responsibility. In 2018 warrants of arrests were issued for Yekatom and Ngaissona, they have both been transferred to the ICC and are awaiting their trials.[42]

3.1.1.5. Mali

Mali has had a long history of uprisings mostly caused by people belonging to the Tuareg ethnic group located in the northern part of Mali. The people from the Tuareg ethnic group have on different occasions tried to break away from Mali and establish their independent state known as Azawad. In 2012, various people from the Tuareg ethnic group established the National Movement for the Liberation of Azawad (NMLA), through this movement, they managed to stage a military uprising in the northern part of Mali and gained control of a majority of the cities such as Gao, Timbuktu, Kial, Tessalit, Tinzaouatene, Lere and Aguelhoc.[43]

While an uprising was happening in the above cities, the Malian military and various citizens in the southern part of Mali were unhappy and frustrated with how the then-Malian President Toure had dealt with the uprising. As a result of that, a faction from the Malian army organised a military coup in 2012, in doing so, they suspended the constitution and ousted Mr. Toure.[44] After the coup, various international bodies including the AU and ECOWAS condemned the events that were occurring in Mali,

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[41] Ibid
[42] International Criminal Court, *Cases*,
[43] Gregory Chauzal and Thibault van Damme, *The roots of Mali's conflict, moving beyond the 2012 crisis*, Clingendael Institute, Hague, 2015, p.6-14
[44] International Coalition for the Responsibility to Protect, *Crisis in Mali*, [online] http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-mali 13 August 2020

they suspended Mali from any AU and ECOWAS related activities and imposed sanctions on the rebel leaders. While this was ongoing, mediation attempts were being implemented by the ECOWAS, as a result of these negotiations, Mr. Toure stepped down as the President of Mali and the military group responsible for the coup handed over its power to a transitional government.[45]

Mali being a state party to the Rome Statute, referred the situation that was happening in its territory from January 2012 to the ICC. The focus of the investigations was mostly on the war crimes allegedly believed to have taken place in Gao, Kidal Timbuktu, Bamako and severe regions of Mali. It was noted that war crimes such as; torture, murder, mutilation, harsh treatment, deliberate attacks towards protected objects, pillaging and rape were committed in Mali.[46] The ICC's investigations led to the issuance of two arrest warrants for Al Mahdi and Al Hassan who are currently in ICC custody.[47]

3.1.1.6.Kenya

As of 2005, Kenya became and is still a Rome Statute state party. Post-election violence erupted in Kenya after the 2007 elections. The Kenyan government established a Commission of Inquiry into Post-Election Violence (CIPEV) and tasked it with the mandate of investigating the nature of the crimes committed during the post-election period. The CIPEV reported that at least 350,000 individuals were displaced from their residences, property amounting to 117,216 was damaged, 1,133 people were murdered and over 3,561 people were severely injured.[48]

After conducting the investigations, the CIPEV advocated for the establishment of a domestic special tribunal with the jurisdiction to try the people who were responsible for the crimes of atrocities that occurred during the post-election period.[49] The bill that would have led to the establishment of the tribunal did not

[45] Ibid
[46] International Criminal Court, *Situation in the Republic of Mali*. 2019 (Online) https://www.icc-cpi.int/mali 20 November 2019
[47] Ibid
[48] Truth, Justice, and Reconciliation Commission, *Commissions of Inquiry-CIPEV Report*, 2008, [online] https://digitalcommons.law.seattleu.edu/tjrc-gov/5 10 August 2020
[49] International Crisis Group, *Kenya: Impact of the ICC Proceedings*, Africa Briefing, 2012, No.84, p.5-6

materialise, as a result of the lack of agreement and unity among the Kenyan members of parliament. One group of parliamentarians supported the establishment of the tribunal, however, the second group of voted against the bill, arguing that it had no trust in the Kenyan judicial institutions. It further argued that the domestic judicial institutions could easily be manipulated by persons of interest, as a result of that, it was of the view that the only possible way in which justice can be promoted is through the ICC.[50]

Ruto William and Kenyatta Uhuru (at this time were not yet elected as the Vice President and President of Kenya) were among the people who advocated for Kenya to refer its case to the ICC, for instance, Ruto was quoted saying "*instead of wasting time on a special tribunal, the names of suspects should be handed over to the ICC so that proper investigations can start.*"[51] At this time, Ruto and Kenyatta were not aware that they would be part of the people under the ICC's investigations. Following the failed attempts of establishing a special tribunal for Kenya, the Prosecutor of the ICC (Mr. Ocampo) exercised his proprio motu powers and opened investigations in Kenya against Kenyatta Uhuru, Ruto William, Mohammed Hussein Ali, Muthaura Francis, Joshua Sang and Henry Kosgey.[52]The Kenyan situation was the first situation where the Prosecutor initiated the investigations.

When ICC investigations were opened in Kenya, Kenyatta, Ruto along with other Kenyan politicians began to negatively criticise the ICC and labelled it as "*a western colonial institution that is bent on re-colonizing Africa.*"[53] In 2013 Kenyatta became the President of Kenya and Ruto became the Vice President, using their positions, they had on different occasions requested the UNSC and ICC to defer the ICC investigations in Kenya. However, none of the Kenyan requests for deferral were implemented or adopted. [54]

The AU through several of its sessions and decisions has supported Kenya's request for deferral. During the Extraordinary Session of the Assembly of the AU in

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[50] Ibid
[51] Daily Nation, *Ruto: Why I prefer The Hague route*, 2009, [online] https://www.nation.co.ke/kenya/news/ruto-why-i-prefer-the-hague-route--581684 12 August 2020
[52] Wierda, Large and Ambos, *Building a Future on Peace and Justice*, p.134
[53] Ibid
[54] United Nations, *Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining*, 2013, [online] un.org/press/en/2013/sc11176.doc.htm 12 August 2020

2013, The AU highlighted that it was against the prosecution of Kenyatta and Ruto, the reason being that any ICC investigations would greatly undermine the stability, peace and sovereignty of Kenya.[55] The AU argued that the Kenyan government is an important actor in the fight against terrorism in its region, as such, the ICC's proceedings against the Heads of State of Kenya could create a threat to peace because they would prevent and distract Kenyatta and Ruto from performing their presidential duties, including the Kenyan fight against terrorism.[56]

Regarding the previous statements, the AU decided that no proceedings or investigations by any Tribunal or International Court will be commenced against any sitting AU Head of State. It further decided that the ICC's proceedings initiated against Kenyatta and Ruto should be deferred until a time when Kenyatta and Ruto complete their terms in office. Lastly, it also urged the Kenyan President not to appear before the ICC.[57]

The arguments made by the AU are however unsustainable, because Kenya is a state party to the Rome Statute, as such, it waivered any rights to diplomatic immunities its officials might have. This waiver of immunities is also highlighted in the constitution of Kenya under article 143, which grants immunity to the President from criminal proceedings during his/her term in office, however, this article also states that "*Head of State immunities 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*."[58] Lastly, the Rome Statute does not have a provision which enables it to defer a situation until a time when the accused individuals seize to hold their official positions.

Despite the AU urging the Kenyan government not to cooperate with the ICC and, despite the Kenyan officials negatively criticizing the ICC, Kenyan officials cooperated with the ICC and adhered to the ICC's summons.[59] The ICC charges against Kenyatta have now been withdrawn, the ICC cites lack of sufficient evidence

[55] African Union, *Extraordinary Session of the Assembly of the African Union*, 2013, p.1-2
[56] Ibid
[57] Ibid, p.2
[58] Kenya Law, Constitution of Kenya, 2010, [online], kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010 12 August 2020
[59] Çakmak, *A Brief History of International Criminal Law and International Criminal Court*, p.232

as the reason for withdrawing its proceedings against Kenyatta. In 2016, the ICC terminated the proceedings it initiated against Ruto William and Joshua Sang.[60]

3.1.1.7. Burundi

The Burundian government signed the Rome Statute in 1999, however, the Statute was ratified in 2004. In April 2015, the President of Burundi, Pierre Nkurunziza proclaimed his intentions of running for a third term in office. His intentions were approved by the Constitutional Court of Burundi, due to his announcement, certain groups that opposed his decision begun to protest.[61] In an attempt to suppress the protests, the government allegedly used unlawful means and force which led to grave human rights violations being committed. Despite the ongoing unrest in the country, the government managed to conduct the elections in 2015, July and Nkurunziza was re-elected. This led to further protests and human rights violations.[62]

Based on UN statistics, it was estimated that, between 2015 and 2017, over 400,000 people were forced to leave Burundi and over 200,000 people were displaced in Burundi as a result of the conflict.[63] In 2015, the ICC Chamber authorised investigations in Burundi because it believed that Burundian state agents and groups launched attacks against the Burundian civilian population. Crimes against humanity such as; rape, torture, murder, persecution, enforced disappearance and imprisonment were reported to have allegedly transpired on the territory of Burundi between 26 April 2015 and 26 October 2017.[64]

The government of Burundi negatively reacted to the ICC's investigations. The Burundian Minister of Justice Kanyana was quoted saying that "*the government rejects that decision (to investigate) and reiterates its firm determination that it will not cooperate.*"[65] 6 months after the ICC initiated its investigations in Burundi, the

[60] International Criminal Court, *Kenya; Situation in the Republic of Kenya*, 2019 (Online)https://www.icc-cpi.int/kenya 20 November 2019
[61] International Criminal Court, *Burundi; Situation in the Republic of Burundi*, 2019i (Online)https://www.icc-cpi.int/burundi 20 November 2019
[62] Coalition for the International Criminal Court, *Burundi and the ICC,* [online] coalitionfortheicc.org/latest/resources/burundi-and-icc 12 August 2020
[63] United Nations, *Burundi Situation*, United Nations, New York, 2017
[64] Ibid
[65] Toby Sterling and Katharine Houreld, *Burundi rejects International Criminal Court war crimes*

parliament of Burundi passed a bill in favour of withdrawing from the Rome Statute. In 2017, Burundi successfully withdrew from the Rome Statute, however, the ICC still has the jurisdiction to investigate the crimes that occurred in Burundi from 2004 to 2017.[66]

3.1.2. The Perception of 'African Bias'

When examining the ICC-Africa relationship, it is important to analyse how the African cases came before the court. As can be seen above, five situations at the ICC have been as a result of self-referrals, situations where the ICC has been requested by the African States to investigate certain crimes in their territories. ICC supporters use this fact in their defence, they argue that the ICC was invited to Africa as a result of self-referrals. The role played by African countries in these cases challenges the accusations that Africa is being targeted. The Prosecutor of the ICC Fatou Bensouda points out how African countries invited the ICC to investigate situations happening in their territories.[67]

African regional bodies such as ECOWAS have also supported ICC investigations in Africa. ECOWAS was in support of the ICC carrying out investigations over alleged war crimes committed in Mali, ECOWAS urged the Court to make enquires with the purpose of identifying and prosecuting the people liable to the war crimes that occurred in Mali.[68] Luis Ocampo the ICC former Prosecutor of the ICC claims to have been the recipient of a letter from the DRC President, in that letter, the DRC President referred to Luis Moreno Ocampo the crimes that occurred on the territory of the DRC. The President of the DRC requested the ICC Prosecutor to examine and establish whether or not crimes listed under the ICC's jurisdiction occurred, if so, the letter also asked the Prosecutor to determine which people should

investigation, 2017, [online] reuters.com/article/us-warcrimes-burundi/burundi-rejects-international-criminal-court-war-crimes-investigation-idUSKBN1DA1IH 13 August 2020

[66] Coalition for the International Criminal Court, *Burundi and the ICC*

[67] ICC Forum, *Is the International Criminal Court targeting Africa inappropriately*? 2014, (Online) https://iccforum.com/africa, 6 July 2019

[68] Ibid

be held responsible for such crimes. Such evidence challenges statements African politicians make against the ICC.[69]

The eagerness of African states to refer their cases to the ICC can be interpreted as follows, it is either a sign that African countries are unwilling to handle such cases or a sign that African states are unable to handle such cases. Certain African countries have been accused of failing to put up effective measures to prosecute crimes of atrocity within their national courts. They have been accused of failing to establish credible and reliable judicial systems that could be used to prosecute international crimes thus diminish the need for an external court such as the ICC.[70] It is vital to highlight the concept of complementarity under the Rome Statute.[71] Under this principle, it is the responsibility of states to see to it that people accused of committing crimes against international law are genuinely investigated and prosecuted. The ICC is therefore a court of last resort that only steps in when states fail to make genuine prosecutions**.**[72]

Scholars such as Cannon, Pkalya, and Maragia note that certain countries in Africa have corruptible or weak judiciaries and institutions that lack the ability to deal with complex legal proceedings and to bring individuals who violate human rights to justice.[73] Universal principles that outline the independence of the judiciary are often undermined in certain African states, they are compromised in a variety of ways, for instance, the politicisation of the judicial appointees, the executive branches exercise too much power on the work of the judicial organs, and at times, it is due to the inability of the constitutions to plainly define the independence of the judicial bodies.[74] These are among some of the structural handicaps that highlight the importance and need of the ICC in Africa and also in various regions of the world with similar judicial challenges.

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[69] United Nations, *Prosecutor receives Referral of situation in Democratic Republic of Congo*, 2004, (online) https://www.un.org/press/en/2004/afr903.doc.htm 6 July 2019

[70] Cannon, Pkalya, and Maragia, *The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative* , p.15

[71] International Criminal Court, *Rome Statute of the International Criminal Court* , p.2

[72] FICHL, *The Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes.*

[73] Cannon, Pkalya, and Maragia, *The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative.*, p.15

[74] Ibid

The lack of competence or capacity to prosecute individuals responsible for international crimes can be evidenced by the decisions made by CAR and Mali to refer themselves to the ICC.[75] In the case of countries such as Kenya, the Kenyan led investigation and prosecutions over the people allegedly liable to international crimes committed in Kenya proved to be unsuccessful. This was so because the Kenyan parliament failed to pass the laws needed for the creation of a Tribunal.[76] The failure to create the tribunal indirectly meant granting the ICC jurisdiction over the situations in Kenya.

It is therefore imbalanced for the AU and other African politicians to blame the ICC for prosecuting African people charged with violations of international human rights especially when African states have at times been unwilling or unable to prosecute such people in their countries. To claim that African countries are being targeted by the ICC would be equivalent to claiming that all the African situations under the ICC are false and baseless. Self-referrals by African countries show that countries in Africa are in the ICC's sights because African countries that are party to the ICC decided so, they invited the ICC to Africa. It should, however, be noted that self-referrals should not be seen as an extensive validation of the ICC. This is so, because, at times, African countries refer situations to the Court due to their desire to influence the international criminal justice system to their advantages or interests.[77]

Referrals to the ICC made by the UNSC such as the case of Sudan and Libya have been cited as evidence of the ICC targeting Africa.[78] This can be evidenced by the Sudanese government's reaction to the Al-Bashir warrant of arrest, when the ICC decided to open investigations in Sudan, the Sudanese government rejected the ICC jurisdiction over Sudan. The Sudanese government viewed this as a violation of its sovereignty and accused the ICC of being an instrument of the western countries that seek to interfere with the sovereignty of an African state and to bring about regime

[75] Kersten *Constructive Engagement in The Africa-ICC Relationship*, p.11
[76] Everisto Benyera,. *Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States.* Politeia, *2018,* Vol, 37 No. 1, p.10
[77] Sophia Plessis, *The International Criminal Court and its Work in Africa: Confronting the Myths*, p.10
[78] CRS Report for Congress, *International Criminal Court Cases in Africa: Status and Policy Issues*, p.26

change in Sudan, the Sudanese government did not view the ICC as an independent institution.[79]

Aside from the Sudanese government, various influential Africans such as Mamdani held the same views, for instance, Mamdani has often accused the ICC of turning into a western court meant to prosecute Africans.[80] Libya is another country the UNSC referred to the Court. The question that now arises is why the UNSC has not referred any other cases outside Africa to the ICC. Critics of the ICC wonder why the ICC is not investigating crimes being committed in places such as Iraq, Afghanistan and Syria.[81]

On a sad note, the Prosecutor of the ICC is not the Prosecutor of the whole world, under treaty law, she is only the prosecutor to countries party to the Rome Statute. Numerous situations in need of accountability and investigations are present. For instance places such as Syria. However, most of these countries are Rome Statute non-states parties, as a result of this, the Court lacks jurisdiction to conduct any investigations in those places, aside from that, the UNSC has been unwilling or unable to refer situations in certain countries to the ICC.[82] Such unwillingness shows how power politics can potentially affect ICL, however, selectivity practiced by the UNSC is often blamed on the ICC. The blame of the negative effects of power politics and the selectivity of the UNSC should not be put on the ICC. African states should put the blame on the institution that at least to a significant extent makes ICL to be selective and influenced by power politics, that institution being the UNSC.[83]

The ICC is prone to being used by western powers, however, to claim that it is a creation of western countries meant to target poor countries would be false. To accept such claims would be to ignore all the hard work and ideas made by African countries that helped in the creation of the ICC. No evidence suggests that African countries were forced to sign up to the Rome Statute. Prior to the Rome Statute establishment, international will to impose accountability and justice was present in Africa. This can be evidenced by examining the roles various African countries and regional bodies

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[79] Ibid
[80] Mahmood Mamdani, *The New Humanitarian Order*, 2008, (Online) https://www.thenation.com/article/archive/new-humanitarian-order/ 12 November 2019
[81] Moss, *The UN Security Council and the International Criminal Court*; Towards a More Principled Relationship, p.11
[82] Kersten, *Constructive Engagement in The Africa-ICC Relationship.*, p.6
[83] Ibid

played, they took leading roles in ICC related negotiations that set up the principles the Rome Statute ought to contain.[84]

Having an understanding of the role played by African countries in establishing the Rome Statute, the ICC appears not to be a creation of western countries meant to try poor countries. It is, however, true, that at times, western countries can use the ICC to advance their political interests. African countries can also be accused of using the ICC to advance their political interests, for instance, the governments of Uganda and Congo have been accused of having personal political motives for calling upon the ICC conduct investigations in their territories, they seemed to have done so because of the desire for them to see the ICC prosecute rebel groups or opposition leaders in their territories.[85]

At times, African people have been accused of supporting the ICC in a selective manner, they offer support to the Court in times when it is being used to prosecute their opposition groups, they, however, seize to support the ICC when it seeks to arrest one of their leaders.[86] The former Chief Prosecutor of ICTR and ICTY Richard Goldstone highlighted at how some leaders from Africa become silent when the ICC is prosecuting their political adversaries or leaders of rebel groups, and how most African leaders accuse the ICC of being biased and protest against ICC prosecutions when they target a fellow president. He argued that support to the ICC should not only be in times when it is convenient for them. The ICC seeks to impose justice on all individuals that violate human rights. [87]

To date, a majority of situations under ICC's investigations originate from Africa, certain African leaders have magnified such statements and used them as evidence to show that the ICC is impropriety targeting Africa. Such critics rarely address or mention the over 40, 000 people who have been victims of human rights violations such as murder, rape, or the thousands of kids who have been turned into killers. They also rarely mention the four million-plus people who have been displaced.

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[84] Plessis, *The International Criminal Court and its Work in Africa: Confronting the Myths*., p.2
[85] Ibid, 10
[86] Benyera, *Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States*, p.9-11
[87] Mary Kimani, *Pursuit of Justice or Western Plot*? 2009, (Online) https://www.un.org/africarenewal/magazine/october-2009/pursuit-justice-or-western-plot 02 February 2020

[88]All those people are Africans too, Africans who need justice. Lastly, the critics of the Court rarely take in mind the unwillingness and inability on the part of the states concerned to efficiently try the individuals who are suspected of committing international crimes.[89]

African people ought to see the ICC's intervention in a positive manner, a manner that celebrates the fact that African victims will get justice and accountability. Places that are not being targeted such as Iraq or Syria, are missing out on the chance of getting justice and accountability. Kofi Anan questioned why leaders in Africa do not celebrate the attention being given to African people, he noted that African victims have often been failed due to the fact that people who perpetrate crimes are often not held accountable or prosecuted. In such cases, who will speak on behalf of the victims? He argued that the ICC was created with the main goal of rectifying this problem, a majority of Africans seek justice, if their national courts do not grant them the justice they seek, the ICC will do so since it is the court of last resort. Furthermore, he was curious as to whether the absence of prosecutions or investigations in different regions of the world would justify terminating prosecutions and investigations in Africa. He argued that it is not Africa that is being targeted, it is the culture of impunity that is being targeted. [90]

All the proceedings currently at the ICC being carried out in accord with the Rome Statute provisions, the ICC is not a political institution, the main mandate it has is to interpret and apply Rome Statute provisions.[91] As such it should not be condemned for merely applying the Rome Statute provisions. Such criticism is uncalled for because the Court is simply doing the mandate it was tasked to do by the Rome Statute state parties during its establishment. If the Rome Statute has got some problems and limitations, it is not the Court that must remedy them, this task belongs to the Assembly of States Parties to the Rome Statute, because they are the political organ.[92]

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[88] Werle, Fernandez and Vormbaum, *Africa and the International Criminal Court*, p.49
[89] ICC Forum, 2014
[90] Kofi Annan, *Speech by Kofi Annan 3rd Annual Desmond Tutu International Peace Lecture*, 2013, (Online) http://iccnow.org/documents/Tutu_Lecture_delivered_by_Kofi_Annan.pdf 21 April 2020
[91] Werle, Fernandez and Vormbaum, *Africa and the International Criminal Court*, p.3
[92] Ibid

A majority of the criticism made by African states against the ICC are partly as a result of the misunderstood role of the ICC. After the creation of the Court in July 2002, the Prosecutor received over 499 complaints from different countries who sort to report the crimes happening in their countries. He noted that over 50 of the complaints contained allegations of crimes committed before the 1st of July 2002. Any crimes committed before that date automatically fall out of the jurisdiction of the ICC. A majority of complaints the Prosecutor also received contained alleged acts that are not under the jurisdiction of the ICC. Certain countries reported to the ICC, cases involving corruption, drug trafficking, tax evasion, environmental damage and other less human rights violations. 38 of the complaints alleged that acts of aggression took place in Iraq in 2003, the main challenge with this is that, at that point, the crimes of aggression were not well-defined, due to that, the ICC was incapable of exercising its jurisdiction in relation to such crimes.[93]

By the year 2006, The Prosecutor's office claims to have been a recipient of 1732 communications from close to 100 states, and from the 1732 communications, 80% of them were outside the ICC's jurisdiction.[94] In certain parts of Africa, Africans have a misunderstood role of the ICC. For example, in the Northern District of Uganda, the LRA committed a lot of human rights violations, a majority of the people who were victims of abuses were expecting the ICC to take them back to their previous houses and to give them money as a form of compensation. When none of this happened, the people became hostile towards the Court.[95] This case is not only applicable in Uganda but in other parts of the world. The ICC receives a lot of complaints that are outside its jurisdiction and in the event that the ICC does not act of those complaints, people became very hostile towards it.

The AU's criticism towards the ICC is not as a result of African countries being the target of ICC investigations, but rather, it is mostly as a result of the ICC's proceedings that involve AU Heads of States. The AU has only raised concern, issued statements and resolutions concerning the ICC, only when the ICC initiated investigations involving African sitting Heads of States and their allies. When the ICC

[93] International Criminal Court, *Communications received by the Office of the Prosecutor of the ICC*, International Criminal Court, The Hague, 2003, p.1-4

[94] International Criminal Court, *Communications received by the Office of the Prosecutor of the ICC*, International Criminal Court, The Hague, 2006, p.1-3

[95] Benyera, *Is the International Criminal Court Unfairly Targeting Africa? Lessons for Latin America and the Caribbean States*, p.11

opened proceedings against rebels or political opponents such as Bemba, Kony, Katanga, Lubanga and many other rebel leaders, little or no resolutions criticising such investigations were made by the AU.[96] It was only after the ICC initiated investigations against sitting Heads of States (Bashir, Kenyatta and Ruto) that the relationship between the AU and ICC began to be detrimental.[97]

The AU does not seem to support or favour the indictment of sitting Heads of State. This position was made known in 2013 when the AU was quoted saying that, "*to safeguard the constitutional order, stability and, integrity of Member States, no charges shall 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 term of office*."[98]

At times, it can be argued that the desire of African leaders to protect themselves from the ICC has driven some of the ICC backlashes.[99] This self-protection desire can be seen in the introduction of an immunity clause for sitting presidents or certain state officials in the proposed African Court of Justice and Human and Peoples' Rights.[100] Article 46A of the Malabo Protocol states that "*no charges shall be commenced or continued before the Court against any serving African Union 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."*[101]

Granting immunities to Heads of States who are guilty of committing international crimes can undermine the promotion of justice and human rights in Africa in numerous ways. For instance, assuming that Heads of States are granted immunity and only prosecuted after their term in office has expired, how will the collected perishable evidence capable of being used against the Heads of States be preserved? Furthermore, when the implementation of justice is put on hold, important witnesses might die or forget the valuable information they might have.[102] Lastly, granting immunities to Heads of States can provide them with incentives to cling on to power

[96] Werle, Fernandez and Vormbaum, *Africa and the International Criminal Court*, p.205
[97] Ibid
[98] African Union, *Extraordinary Session of the Assembly of the African Union*, 2013, p.1-2
[99] Valerie Arnould, *A Court in Crisis? The ICC in Africa, and Beyond,* Egmont Institute, Brussels, 2017, p.6
[100] Ibid
[101] African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 2014.
[102] Werle, Fernandez and Vormbaum, *Africa and the International Criminal Court*, p.218

and their official positions for fear that if they are no longer in power, they might be prosecuted.[103]

The desire for some African leaders to shield themselves from the jurisdiction of the ICC can also be seen by analysing the individual relationships African countries have with the ICC. In the case of Burundi, when the ICC initiated investigations in Burundi, a majority of senior government officials were among the perpetrators of human rights violations, as such, the ICC would have initiated investigations against them. As a response to this, the Burundian government rejected the jurisdiction of the ICC, accused the ICC of being an instrument of colonialism, and withdrew from the ICC.[104]

In 2016, the Gambia under the leadership of President Yahya Jammeh proclaimed that it would withdraw from the ICC, it occasionally accused the Court of targeting African people. The Gambian Minister of Information was quoted saying that "*the withdrawal is warranted by the fact that the ICC, despite being called International Criminal Court, is in fact an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans*".[105] The Jammeh administration has often been accused of committing human rights violations such as illegal killings, torture and forced disappearances, thus, criticising and withdrawing from the ICC would have been a way his administration could have used to escape scrutiny from the ICC.[106]

In 2017, Gambia held presidential elections and Barrow was elected as the President of Gambia. Immediately after this victory, he announced that his government would reverse its request to withdraw from the ICC. He was further quoted saying that "*as a new government that has committed itself to the promotion of human rights, we*

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[103] Charles Manga Fombad and Enyinna Nwauche, *Africa's Imperial Presidents: Immunity, Impunity and Accountability,* African Journal of Legal Studies, Martinus Nijhoff Publishers, 2012, p.109

[104] Paul Nantulya, *What's Next for Africa and the International Criminal Court*? 2017, [online] https://africacenter.org/spotlight/whats-next-africa-international-criminal-court-icc/ 15 August 2020

[105] Aljazeera, *Gambia withdraws from International Criminal Court*, 2016, [online] https://www.aljazeera.com/news/2016/10/gambia-withdraws-international-criminal-court-161026041436188.html 15 August 2020

[106] Nantulya, *What's Next for Africa and the International Criminal Court?*

reaffirm The Gambia's commitment to the principles enshrined in the Rome Statute of the International Criminal Court."[107]

Kenyatta and Ruto were in favour of Kenya referring the situation that happened in Kenya in 2008-2009 to the ICC.[108] However, their support for the ICC changed when it initiated investigations against them. After the ICC initiated investigations against them, they started to accuse and denounce the ICC, labelling it as a threat to the sovereignty of Kenya. In 2013, the Kenyan parliament passed a resolution that would lead the Kenyan government to withdraw from the ICC.[109] However, the Kenyan government has not yet acted on this resolution, it has however started to request for the amendment of the Rome Statute. During the 13th Session of the ICC Assembly of States Parties in 2014, the Kenyan government proposed that article 27 of the Rome Statute should be amended. In their view, the ICC's proceedings should not be initiated against sitting Heads of States, they advocated for the ICC's prosecutions against Heads of States to be only initiated after the accused Head of State is no longer in power.[110]

In the situations highlighted above, the main cause of hostility states had with the ICC was as a result of article 27 of the Rome Statute. Under such cases, African criticism against the ICC appears to be politically motivated, branding the ICC as a neo-colonial organisation that targets Africans has proved to be useful to some political leaders who seek to protect themselves from ICC investigations.

The initiation of the ICC investigations in Sudan in 2005 is often seen as the start of the conflictual relationship between the AU and the ICC. Despite that being the case, it is worth noting that a majority of African countries have continued to support the work of the ICC in Africa. Since 2005, six African states have ratified the Rome Statute; Ivory Coast in 2013, Cape Verde and Tunisia in 2011, Seychelles in 2010, Chad in 2006 and Kenya in 2005.[111]African countries such as South Africa,

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[107] Merrit Kennedy, *Under New Leader, Gambia Cancels Withdrawal from International Criminal Court*, 2017, [online] https://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court
15 August 2020

[108] Daily Nation, Ruto: Why I prefer The Hague route,

[109] Mills and Bloomfield, *African resistance to the International Criminal Court: Halting the advance of the anti-impunity norm,*

[110]International Criminal Court, *Assembly of States Parties, 13th Session, Report of the Working Group on Amendments*, International Criminal Court, Hague, 2014, p.2

[111] Omorogbe, *The Crisis of International Criminal Law in Africa: A Regional Regime in*

Nigeria, Gabon, Tanzania and Benin voted in favour of the UNSC referring Libya and Sudan to the ICC.[112]

The support and commitment African countries still have towards the ICC can also be evidenced by the lack of implementation of the AU's resolution which called for African countries to collectively withdraw from the ICC in 2017. After the adoption of this resolution, sixteen countries; Zambia, Tunisia, Tanzania, Senegal, Nigeria, Mozambique, Malawi, Madagascar, Liberia, Lesotho, Ivory Coast, Gambia, Cape Verde, Burkina Faso, Botswana and Benin entered formal reservations.[113] During the establishment of the withdraw strategy, the Minister of Foreign Affairs from Nigeria was quoted saying that "*the ICC has an important role to play in holding leaders accountable, and that Nigeria is not the only voice agitating against [withdrawal], in fact, Senegal is very strongly speaking against it, Cape Verde and other countries are also against it."*[114]

The Minister's spokesman further argued that the AU is not a Rome Statute states party, as such, it should not be establishing strategies for a collective withdrawal from an institution it is not part of and an institution that each distinct state decided to be part of. He was quoted saying that "*each country freely and willingly acceded to the Treaty and not all of the members of the AU acceded; each country acceded individually, exercising its own sovereign right, so, if each country wants to withdraw, it has the right to do that individually."*[115]

Outside the AU structures, countries such as Botswana, Sierra Leone, Lesotho, DRC, Ghana, Tanzania, Zambia, Malawi, Mali, Ivory Coast, Burkina Faso, Senegal and Nigeria have continued to express their support and commitment to the ICC. The leaders from all these countries issued various statements pledging their allegiance to the ICC.[116] Countries such as South Africa, Gambia, Kenya and Burundi announced

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Response? .p.296
[112] Werle, Fernandez and Vormbaum, *Africa and the International Criminal Court*, p.50
[113] Omorogbe, *The Crisis of International Criminal Law in Africa: A Regional Regime in Response*? .p.296
[114] Elise Keppler, *AU's ICC Withdrawal Strategy Less than Meets the Eye, Opposition to Withdrawal by States,* 2016, [online] https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye 15 August 2020
[115] Chijioke Jannah, *Nigeria will not withdraw from ICC, 2017*, [online] https://dailypost.ng/2017/02/02/nigeria-will-not-withdraw-icc-fg-insists/ 15 August 2020
[116] Keppler, *AU's ICC Withdrawal Strategy Less than Meets the Eye, Opposition to Withdrawal by States,*

that they would withdraw from the ICC, however, apart from Burundi, none of them have done so. In the case of South Africa, then-President Mr. Zuma announced that South Africa would withdraw from the Rome Statute in 2016. A majority of the South African citizens opposed this decision, and in 2017, the South African High Court revoked the government's decision and announcement to withdraw from the Rome Statute.[117]

The unwillingness of African states to withdraw from the ICC can also be seen by examining the number of countries that have ratified the Malabo Protocol. During the AU Session in 2017, the AU urged states to sign the Malabo Protocol[118], despite the AU urging African states to sign and ratify the Malabo Protocol on different occasions, African countries have been reluctant to do so. For the Statute to enter into force, it has to be ratified by at least 15 AU states.[119] As of 2020, only 15 out of 55 AU states have signed the Protocol, countries such as Uganda, Togo, Sao Tome and Principe, Equatorial Guinea, Sierra Leone, Mozambique, Mauritania, Kenya, Guinea-Bissau, Guinea, Ghana, Congo, Comoros, Chad, and Benin. However, these countries are yet to ratify the Protocol.[120]

There are a variety of reasons as to why countries have been reluctant to sign and ratify the Protocol. Perhaps the biggest reason is the motivation behind the establishment of the African Criminal Court. At times, the establishment of the Court has been seen as an attempt by African Heads of States to shield themselves from prosecution in times when they are being accused of committing international crimes. It has also been argued that the Court was established to frustrate the work of the ICC in Africa.[121] Reasons certain states have not ratified the Protocol vary from country to country, as such, it remains unclear as to why certain states have decided to sign and not sign the Protocol.

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[117] Mills and Bloomfield, *African resistance to the International Criminal Court: Halting the advance of the anti-impunity norm,*
[118] African Union, *Assembly of the Union 28th Ordinary Session,* p.1
[119] African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,* p.8
[120] African Union, *List of Countries which have signed, ratified/acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, African Union, Addis Ababa, 2020, p.1-2
[121] Amnesty International, *Malabo Protocol, Legal and Institutional Implications of the Merged and Expanded African Court,* Amnesty International, London, 2016, p. 6

As a conclusion to the above topic, a majority of the situations under the investigation of the Court involve African people, it is, however, inaccurate to allege that the ICC is targeting Africa. As indicated above, several African countries are under investigation of the ICC as a result of self-referrals, on top of that, the decision by the Prosecutor to carry out investigations in all the situations in Africa was done in accordance with the provisions of the Rome Statute. Lastly, the ICC has now opened preliminary investigations in regions outside Africa, these preliminary investigations are being conducted in countries such as; Venezuela, Ukraine, Philippines, Palestine, Iraq and Colombia.[122]

Against this background, it is in need worrying to hear how some African leaders criticise the ICC of targeting Africa when in reality, the ICC seeks to help in pursuing justice for African people and at times it does so at the explicit request from African countries. All the work that the ICC has carried out and will carry out in the future is/will be in accordance with the Rome Statute provisions, this also includes prosecuting Heads of State.[123] Therefore it is wrong for countries to criticise the ICC for performing the task Rome Statute states parties established it to do. This does not mean that the Rome Statute is flawless, it indeed has certain areas worth improving. If that happens to be the case however, especially in circumstances where Rome Statute states parties identify such faults, they have the power to recommend modifications to those deficiencies. However, as it currently stands, the Rome Statute ought to be respected and the ICC should not be blamed for doing its mandate which is applying all that is written in the Rome Statute.

3.2. PEACE AND JUSTICE IN AFRICA

Certain African leaders have accused the ICC of ignoring African perspectives and recommendations on how to best bring about peace and justice in Africa. Debates have arisen between the need for peace and the need for accountability and justice. Various academicians disagree on the issue of peace and justice, key among these disagreements is whether or not peace should be prioritised over justice. For those who

[122] International Criminal Court, Preliminary investigations, 2020, [online] https://www.icc-cpi.int/pages/pe.aspx 18 August 2020
[123] Werle, Fernandez and Vormbaum, *Africa and the International Criminal Court*, p.5

hold the view that peace should take priority believe that, during a conflict, reconciliation can be the most feasible means of ending the conflict thus bringing about peace. In such a situation, there would be little or no need for any prosecutions to happen, because the pursuit of justice has the potential to further destabilise conflicts. Those who advocate for justice believe that it is morally and legally right to prosecute individuals who commit crimes of atrocities. It is believed that long-lasting peace is not conceivable without justice. This debate has at times been named as the "peace versus justice" debate.

The history of granting amnesties to individuals in pursuit of peace dates back to the 1980s in South America, during this period, amnesties were given to certain perpetrators of human rights, this was so because it was conceived that the desire for stability outweighed the desire for justice and accountability.[124] Advocates for amnesties suggest that, during a conflict, the pursuit of justice and prosecutions against perpetrators of human rights has the potential to make such people or groups continue fighting for their survival, thereby leading to the continuation of the conflict. As such, the pursuit of justice and prosecutions has the potential of negatively affecting the desire to negotiate peace agreements.[125] This would be so because the violators of human rights would have little or no incentives in taking part in any negotiations that might not be beneficial for them.

These concerns were also shared by the AU. As a response to the ICC's proceedings in Africa, in 2009, 2010, 2011, 2012, 2013, and on several occasions, the AU stated that "*the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace."*[126] The AU pointed out how arrests done in the interest of justice could not only undermine peace and mediation efforts but also revive conflicts in countries such as Kenya, Sudan and Libya. The AU has frequently been against the pursuit of individuals in on-going or recently ended conflicts as it can prolong the conflict and in some cases revive the conflict. [127] For example, it has been argued that the warrant of arrests for people such as Bashir in Sudan undermines any peace negotiations because, in as much as Bashir is part of the

[124] Laura Riches and Katerina Mansour, *Peace versus Justice: A False Dichotomy*, Sciencespo Paris School of International Affairs, Paris, 2017, p.7
[125] Ibid
[126] African Union, *Extraordinary Session of the Assembly of the African Union*, 2013, p.1
[127] Arnould, *A Court in Crisis? The ICC in Africa, and Beyond*, p.4

problem, it is important to remember that he can also have a vital part in the solution of peace.[128]

Thabo Mbeki the former President of South Africa was quoted saying that "*African countries do not dismiss the need to deal with impunity" he further argued that "African countries are aware that temporary immunity should be given for key actors in order to secure their engagement in peace negotiations*".[129] Jean Ping, the former AU Chairperson also shared similar views, he was quoted saying that "*the AU wants to support the fight against impunity and that it does not want to let crime go unpunished"*, however, Jean Ping said that "*peace and justice should not collide because the need for justice should not override the need for peace".*[130] As a result of the above reasons, the AU and various African countries have called upon the UNSC to invoke Rome Statute article 16 and temporally stop the prosecutions in Kenya and Sudan for peace negotiations to be addressed.[131]

It was however noted that the AU and most countries that advocate for peace at the expense of justice fail to state when the right time to conduct prosecutions should be. Currently, the ICC has collected evidence (at times sensitive and perishable evidence) from situations under the investigations of the Court. In the event that investigations are put on hold due to the interest of peace, what would happen to the collected evidence? There are individuals who are currently in ICC's custody, what ought to be done with regard to such people? Most importantly, what would be the status of people under witness protection programs? These are among the key issues the AU and advocates for peace over justice have failed to address.[132] Aside from these areas of concern, the difficulty of examining the influence amnesties have on bringing about peace also exists. For instance, during peace negotiations, amnesties might be provided to individuals, at the same time other mechanisms meant to promote peace

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[128] Cole, *Africa's Relationship with the International Criminal Court: More Political than Legal*, p.682

[129] Philomena Apiko and Faten Aggad, *The International Criminal Court, Africa and the African Union: What way forward?* ECDPM, Maastricht, 2016, p.2

[130] Avocats Sans Frontieres, *Africa and The International Criminal Court: Mending Fences,* Avocats Sans Frontieres, Kampala, 2012, p.10

[131] Charles Jalloh, Dapo Akande, and Max du Plessis, *Assessing the African Union Concerns about Article 16 of the Rome State of the International Criminal Court* , 2011, (Online) https://ecollections.law.fiu.edu/faculty_publications/242 17 April 2020

[132] Louise *Mallinder, Amnesty, Human Rights and Political Transitions, Bridging the Peace and Justice Divide*, Hart Publishing, Worcester, 2008, p.46

might also be put in place. If peace is established, it would be difficult to ascertain the level to which amnesties contributed to bringing about peace.[133]

Amnesties played a vital role in the past, however, of late the international community has witnessed the emergence of various bodies that advocate for human rights. Bodies such as but not limited to; Human Rights Watch (HRW), Amnesty International and the ICC. Such organisations believe that immunity or amnesties ought not to be provided to individuals who commit crimes of atrocities. These organisations believe it is their responsibility to see to it that the violators of human rights are prosecuted and held accountable for their crimes.[134] The ICC's sole purpose of being established was to see to it that impunity comes to an end, halting ICC investigations in the interest of peace would mean acting in contradiction to the courts main mandate of putting an end to impunity, as such certain scholars such as Kenneth Rodman broadly reject the view that justice undermines peace.[135]

Certain scholars such as Mistry and Verduzco proclaim that the danger the pursuit of justice allegedly puts on peace is "greatly exaggerated". On the contrary, they believe that justice leads to long-lasting peace, without justice reconciliation cannot last. They however did not explain how justice would lead to peace.[136] Various scholars have tried to come up with explanations of how justice would promote lasting peace. For instance, Scharf argued that the prosecution of individuals would indirectly be a proclamation of the importance of democratic principles and norms, this would encourage the citizens to believe in them. The lack of such prosecutions would lead to citizens losing confidence in the rule of law thereby losing trust in the political system.[137]

Other scholars such as Riches and Mansour understand peace in two ways, the first being peace as in the absence of conflict and violence (negative peace), the second type of peace known as positive peace is not merely the absence of conflict, it is also the peace that is brought about using reconciliation thus it is long-lasting. They note

[133] Ibid
[134] Ibid, p.7
[135] Kenneth Rodman, *The "Peace versus Justice" Debate at the International Court*, Jagiellionian University, Poland, 2007, p.1
[136] Mistry and Verduzco, *The UN Security Council and the International Criminal Court*, p.14
[137] Mallinder, *Amnesty, Human Rights and Political Transitions, Bridging the Peace and Justice Divide*, p.17

that achieving this type of peace requires the justice mechanisms to be implemented because this type of peace entails the use of the rule of law to resolve conflict.[138]

A majority of the people who advocate for justice have at times not acknowledged the practical realities the pursuit of justice entails. Using Sudan as an example, as a response to the ICC's issuance of Bashir's warrant of arrest, the government of Sudan expelled 13 humanitarian aid agencies thereby leaving at least a million individuals with no access to their basic needs.[139] Furthermore, the threat of arrest provided incentives for Bashir to cling on to power as it was one of the means he could be immune from prosecution.[140] This is the reality of what happens in certain countries. However, if these concerns were to be addressed by criminal courts, it is possible that it could lead to a situation where perpetrators of human rights start to request for amnesty as a precondition for peace.

3.2.1. The International Criminal Court as an Obstruction to African Peace Processes.

The ICC has a vital role to play in the implantation of ICL and the fight against impunity in Africa. As such, the ICC would usually be active during ongoing conflicts. Of late, the ICC has been massively accused of obstructing peace, critics of the court argue that the blind pursuit of justice without putting the political implications into consideration has the ability to negatively undermine peace negotiations. It has been argued that the ICC's actions can be counterproductive and potentially contribute to the failure of peace talks. [141]

At the time the Rome Statute was drafted, little attention was given to the role of amnesties or the tensions that might exist between peace and justice. John Dugard stated that "*there are signs in the Rome Statute that the failure to deal with amnesty was deliberate*". In his perspective, the creation of the ICC demonstrates that the

[138] Riches and Mansour, *Peace versus Justice: A False Dichotomy*, p.2
[139] Ibid, p.8
[140] Ibid
[141] Maria Mingo Jaramillo, *Law Versus Politics: The ICC as an Obstacle to Successful Peace Negotiations?* 2014, (Online) http://hdl.handle.net/1887/31946 7 May 2020 7 May 2020

international community decided that justice (investigating and prosecuting individuals) takes precedence over national reconciliation and peace. [142]

Evidence in support of this is found in the Rome Statute preamble which establishes that "*the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation*."[143] Prosecution alluded to in the Rome Statute preamble is understood to be in a retributive manner whereby wrongdoers are prosecuted and punished for their wrongdoing. The Rome Statute preamble further obliges all its states parties to put an end to any sort of impunity, in this manner, it urges that wrongdoers should be held accountable for their actions.[144]

Using this stance, the ICC has not been in favour of amnesties or peace deals that do not hold the wrongdoers accountable for their actions. At times, this stance taken by the ICC has been accused of greatly undermining peace talks. For instance in Uganda, the LRA has declined to sign any peace deals with the Ugandan government unless the ICC drops the arrest warrants it has issued for LRA leaders.[145] This then sets up the argument of whether justice should take precedence over peace talks or whether peace talks should take precedence over justice with respect to the ICC's work in Africa. While acknowledging the negative effects the pursuit of justice might have on peace talks, this research argues that the promotion of human rights is best achieved through the implementation of justice and not by compromising justice at the expense of peace, especially peace brought about through granting amnesties. Long-lasting peace is best achieved through the promotion of justice and accountability.

Peace deals or negotiations that grant amnesties to individuals who commit international crimes are no longer allowed under international law, the prohibition of crimes of atrocities such as crimes against humanity, war crimes and genocide has attained a status of jus cogens, and as such international law obliges states to prosecute

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[142] Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms.* Connecticut Journal of International Law, Vol. 23, No. 2, p. 209, 2008 https://ssrn.com/abstract=1018539 p. 237

[143] International Criminal Court, *Rome Statute of the International Criminal Court,* The Hague, International Criminal Court, 2011, p.1

[144] Ibid, 2011, p.1

[145] Nicholas Waddell and Phil Clark, *Peace, Justice and the ICC in Africa*. London School of Economics, London. 2007, p.9

individuals who violate such norms.[146] Aside from such obligations arising from jus cogens norms, various international treaties oblige states to prosecute individuals who commit such crimes. For instance, the Convention against Torture, Genocide Convention, the Geneva Conventions and the Rome Statute oblige states parties to prosecute individuals who commit crimes that fall under the jurisdiction of the above conventions.[147] The duty to prosecute such crimes highlights the illegality of amnesties that seek to shield people who commit such atrocities.

The illegality of amnesties and the duty to prosecute international crimes was highlighted in the Prosecutor v. Kamara and Morris Kallon in the Special Court for Sierra Leone.[148] Prior to this decision, the Tejan Kabbah the Head of State of Sierra Leone signed a peace deal with the leader of the Revolutionary United Front (RUF) known as Lome Accord. The peace deal sort to bring an end to the civil war that was ongoing in Sierra Leone, it granted amnesties to all the RUF combatants.[149]

However in the Prosecutor v. Karama and Kallon, it was stated that "*where jurisdiction is universal, a state cannot deprive another state of its jurisdiction to prosecute the offender by the grant of amnesty, it is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction, a state cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember*."[150] It was for this reason that blanket amnesties granted in the Lome Accord were rejected. International tribunals are therefore not bound to respect blanket amnesties for international crimes.

The promotion and implementation of justice play a vital part in the establishment of long-lasting peace due to its deterrent effect. Under this concept, holding people accountable for their crimes by prosecuting and punishing the wrongdoers sends a message to other people that such acts or crimes will not be

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[146] Jaramillo, *Law Versus Politics: The ICC as an Obstacle to Successful Peace Negotiations?* p.2

[147] Marieke Wierda, Judith Large and Kai Ambos, *Building a Future on Peace and Justice*, Springer Verlag Berlin Heidelberg, Germany, 2009, p.107

[148] Special Court for Sierra Leone, *Prosecutor v. Morris and Ors- Decision on Challenge to Jurisdiction: Lome Accord Amnesty.* (Online) https://sierralii.org/sl/judgment/special-court/2004/3 10 May 2020

[149] Rashid, I. (2000). *The Lome Peace Negotiations*, (Online) https://www.c-r.org/accord/sierra-leone/lom%C3%A9-peace-negotiations 10 May 2020

[150] Special Court for Sierra Leone, *Prosecutor v. Morris and Ors- Decision on Challenge to Jurisdiction: Lome Accord Amnesty*.

tolerated, as a consequence of that, it has the effect of preventing the occurrence of such crimes in the future.[151]

Aside from that, the pursuit of justice helps to raise international awareness and education that certain acts are not allowed. For instance, when the government of the DRC transferred Thomas Lubanga to the ICC, he was charged and accused of committing various international crimes including the use of child soldiers. The HRW had various meetings with different rebel army leaders in Congo, during one of the meetings, one army commander stood up and said *"I do not want to be like Lubanga! I do not want to be transferred to The Hague!"* During other meetings, various Militia commanders asked the HRW for further information on what acts are considered to be war crimes, this desire in seeking more information on war crimes was due to the indictment of Lubanga by the ICC. When acts considered as war crimes were clarified to them, they asked, *"So could I also be transferred to The ICC if I did those things?"* When they were told of the possibility of them being transferred to the ICC, if they commit such acts, one of the commanders repeatedly said, "*I had no idea! I had no idea*!" [152] The arrest of Lubanga made it clear to people who were not previously aware that the recruitment and use of child soldiers are not allowed under international law.[153]

Arrest warrants and the pursuit of justice delegitimises groups or individuals guilty of committing international crimes. When arrest warrants are issued, they generate international pressure on the perpetrators of human rights, they delegitimise them and their actions. The pressure arrest warrants generate on such individuals have the potential to isolate and weaken the support indicted groups might have.[154] For instance, the warrant of arrests for the LRA's leaders in Uganda helped put international pressure on the group, the government of Sudan has been known to be an ally of the LRA, and it provided funds, training, weapons, and transportation to the LRA.[155] However, the issuance of ICC arrest warrants for the leaders of the LRA

[151] Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms* p.261
[152] Human Rights Watch, *Selling Justice Short, Why Accountability Matters for Peace*, Human Rights Watch, New York, 2009, p. 125
[153] Ibid
[154] Jaramillo, *Law Versus Politics: The ICC as an Obstacle to Successful Peace Negotiations?* 2014, p.21
[155] Nicholas Waddell and Phil Clark, *Courting Conflict? Justice, Peace and the ICC in Africa.* Royal African Society, London. 2008, p. 16

prompted Sudan to sign a memorandum with the ICC stating that it would cooperate with the arrest warrants issued for the leaders of the LRA.[156]

Evidence shows that after the ICC issued warrants of arrest for certain individuals belonging to the LRA, major allies for the LRA found it difficult to continue supporting the LRA.[157] As such, the government of Sudan granted the government of Uganda permission to attack the LRA's military bases in Sudan thereby weakening the power of the LRA. The arrest warrants issued for the leaders of the LRA have greatly threatened their existence such that they are no longer based in Uganda and only operate in the isolated areas of DRC, CAR and South Sudan.[158]

Granting amnesties for international crimes and the failure to prosecute individuals who perpetrate international crimes can have a lot of negative effects, they have the potential to send a wrong message to the violators of human rights.[159] For instance, it might set a precedent whereby people can commit human rights violations without fear of being punished. In such cases, groups with political agendas can likely resort to using violence to accomplish their goals.[160]

Furthermore, if the precedent of granting amnesties for international crimes is set, indicted groups can use this as a means to blackmail judicial bodies. For instance, the LRA has stated that it is willing to stop attacks on civilians and to end the conduct of crimes of atrocities, however, for that to happen, the ICC's arrest warrants have to be dropped and a peace deal that grants amnesties to the LRA leaders has to be implemented.[161] Such requests amount to extortion and blackmail. If such demands are granted, it is possible for groups to use the threat of violence in order to achieve their aims.

Justice and accountability help to promote the rule of law, the implementation of the rule of law is an important means of promoting long-lasting peace in societies that have been in conflict. This is so because it signifies a halt to the cycle of impunity, it helps to build the trust and legitimacy of the government. The lack of justice and

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[156] Ibid
[157] Riches and Mansour, *Peace versus Justice: A False Dichotomy*, p.7
[158] Ibid
[159] Langer, Johannes. *Peace vs. Justice: The Perceived and Real Contradictions of Conflict Resolution and Human Rights.* Criterios, 2015, Vol. 8. No. 1 p. 165-189
[160] Ibid
[161] Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms* p.210

accountability leads to impunity. In such cases, this has the potential to undermine the belief people have in the rule of law or in the possibility of building a culture that respects the rule of law.[162] It is hard to establish durable peace without the implementation of justice, and in most cases, peacebuilding efforts that ignore justice have often failed and not been sustainable, they mostly set a pattern of impunity and encourage the occurrence abuses in the future.[163]

For instance, the HRW notes that in Sierra Leone, blanket amnesties have been granted on different occasions, they, however, failed to bring about the peace they hoped to achieve, in Angola, amnesties were granted on six occasions and they did not bring about peace. In both countries, war and human rights abuses recommenced within a short period after the signing and implementation of peace agreements. Peace was not achieved, at most, the granting of amnesties set a pattern of impunity thereby making individuals less fearful of committing unlawful acts.[164]

In certain circumstances, rather than prosecuting indicted groups or people, certain governments opt to include such people into the government by granting them various key positions in the government. The HRW notes that, in a majority of such situations, such actions never brought about the end of violence they had hoped for. Rather than doing that, the incorporation of individuals who have got records of human rights abuses resulted in more human rights abuses and led to the return of lawlessness. Aside from that, such actions have greatly undermined the legitimacy of governments and the rule of law.[165]

For instance, in the DRC, the government sort to create a transitional government, in doing so, it integrated various people including people accused of committing grave human rights violations into the new government and the national army.[166] Rather than bringing about peace and unity, this approach has brought about mistrust and more divisions in the army which further increase the likelihood of more conflict, rebel groups that have been integrated into the national army of the DRC have been accused of continuing to abuse and torture civilians.[167] The culture of impunity

[162] Riches and Mansour, *Peace versus Justice: A False Dichotomy*, 2017, p.6
[163] Jaramillo, *Law Versus Politics: The ICC as an Obstacle to Successful Peace Negotiations?* p.5
[164] Human Rights Watch, *Selling Justice Short, Why Accountability Matters for Peace*, p. 4
[165] Ibid, p.5
[166] Human Rights Watch, *Democratic Republic of Congo, Events of 2004.* 2005, (Online) https://www.hrw.org/world-report/2005/country-chapters/democratic-republic-congo 10 May 2020
[167] Ibid

is seen as a key obstacle to the creation of lasting peace. Various people accused of committing international crimes continue to occupy key positions in the transitional government and national army, such acts may encourage and offer incentives for people to comply with the transitional government in the short term period, however it has great potential of preparing the way for instability in the future.[168]

In a quantitative research carried out by Jeffery Renne an examination of amnesties was made from 1974 to 2007, of 43 countries that offered amnesties to rebel groups in order to entice the rebel groups to sign peace deals, 28 of them offered amnesty deals to the same rebel groups on more than one occasion, out of 28 countries, 19 of them offered the same type of amnesties to rebel groups 3 or more times. The granting of amnesties did not achieve its desired aim, it only led to the institutionalisation of granting amnesties in a repeated manner.[169]

If amnesties achieved their desired aim, they would have been no need of repeatedly offering them to the same rebel groups. Using the above countries as a reference, the success rate of amnesties is 35%.[170] The UN stated that approximately half of all peace deals breakdown within 5 years.[171] It should however be noted that impunity might not be the only reason that can lead to the breakdown of amnesty deals. When amnesties are granted, they are usually put in place with other mechanisms that seek to promote peaceful transitions. The success rate of amnesties could also be negatively affected by the failure to improve the standards of living of the previously oppressed individuals.[172] However, in a majority of cases, the difficulty of implementing rule of law is often seen as the major reason for their breakdown as it is often difficult to establish an environment or society based on rule of law when such a society is founded on impunity.[173]

In conclusion, it is understandable as to why certain countries and individuals might be tempted to implement peace deals at the expense of justice. However, such moves are often short-sighted as they do not usually achieve their desired aim of bringing about long-lasting peace. Various factors can contribute to the reoccurrence

[168] Ibid
[169] Jeffery Renne, *Amnesties, Accountability, and Human Rights*. University of Philadelphia Press, Philadelphia, 2014, p.109
[170] Ibid
[171] Wierda, Large and Ambos, *Building a Future on Peace and Justice* , p.120
[172] Ibid, 162
[173] Ibid, 120

of a conflict, however, ignoring atrocities greatly undermines long-lasting peace. This research takes a justice-oriented approach, taking such an approach does not mean that it is against peace agreements. This is so because the promotion of justice does not entail the end of peace agreements. Peace agreements can be organised without granting amnesties for international crimes. If peace agreements are established, there is a need for mechanisms that bring about accountability and justice to be implemented in such peace deals. Achieving peace without addressing the needs of the victims is very challenging.

Peace ought not to be understood as only the absence of conflict. There is a need to understand peace as the refurbishment of justice and accountability, the use of rule of law to arbitrate and resolve conflict.[174] For such a kind of peace to be established, it is important for accountability and other activities such as punishing the perpetrators of human rights and addressing the needs of the victims to be present.

Under the Rome Statute, there is no mention of amnesties, however, in certain circumstances, certain articles of the statute could be used to balance the tensions that might exist between peace and justice. Under Rome Statute article 16 the UNSC can halt ICC investigations and prosecutions if they are deemed to be a threat to international peace and security.[175] Article 53 of the Rome Statute could also be invoked, in this manner, the ICC Prosecutor can use his/her discretion and decline to open proceedings if such proceedings are deemed not to be in the interests of justice and the victims. In doing so, the Prosecutor would be forced to make prosecutorial verdicts based on political reasoning.[176] Such a move might at times be necessary however it would greatly undermine the reality and perception of the ICC as a judicial organisation that is not prone to political influence.[177] It is important for the ICC to strive to achieve the mandate it was created to achieve, which is bringing about an end to impunity and only being a judicial organisation. As such, it should not defer to non-prosecutorial mechanisms that might dent its major mandate.

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[174] Cherif Bassiouni, Justice and Peace, Case Western Reserve Journal of International Law, Vol. 35, No. 2. https://scholarlycommons.law.case.edu/jil 2003, p. 192
[175] International Criminal Court, *Rome Statute of the International Criminal Court*, p.6
[176] Ibid, 33
[177] Wierda, Large and Ambos, *Building a Future on Peace and Justice* , 2009, p.120

CONCLUSION

The ICC and its work in Africa have been at the centre of a debate between groups of people who view the Court as a vital organisation in the fight against ending impunity in Africa, and people who accuse and criticise the Court of being biased and a neo-colonial organisation. Based on numerous reports certain African leaders have made through various channels including the AU, their views suggest that they firmly view the Court as an institution that practices selective justice, double standards and ignores African views on how to best achieve and promote justice in Africa. Basing their judgments mostly on these rationales, the AU has adopted numerous resolutions condemning the work of the ICC in Africa.

After making a critical evaluation of the AU's criticisms of the ICC (the ICC targeting Africa), the study concluded that the AU's rationale for criticising the ICC is weak. As such, accusations of the ICC targeting African countries did not correspond with reality. The trend practised by certain African leaders of accusing the ICC of being biased is not only inaccurate, but it greatly undermines the commitment and support a majority of African countries played in the establishment and ratification of the Rome Statute. Despite a majority of situations under the ICC originating from Africa, it is important to highlight that the majority of those situations are a result of self-referrals. Situations where African governments invited the ICC to conduct investigations in their territories. Proceedings in Kenya and Ivory Coast were initiated by the ICC Prosecutor, in the case of the Ivory Coast, its government supported and accepted the jurisdiction of the ICC over situations in its territory. The Kenyan governed also supported the work of the ICC in Kenya, however, its support later on diminished.

Furthermore, it is also important to highlight that all the work and proceedings currently being carried out by the ICC are in line with the Rome Statute provisions. As such, criticising the ICC for merely implementing the mandate it was established to implement seems to be uncalled-for. Not all criticisms towards the ICC ought to be ignored because some of the concerns African states share have some validity.

The study also examined the ICC's relationship with the UNSC. Possibly the biggest source of criticism of the ICC has been as a result of the relationship it has with the UNSC. During the Rome conference, the role of the UNSC in the ICC was greatly debated. Certain countries, especially the US were against the establishment of a fully independent court. They were in favour of the court partially being under the control of a political organ such as the UNSC. Other countries were against subjecting the court under the authority of a political organ, as such a move would greatly undermine the legitimacy of the court. A compromise between the two groups was reached, that compromise resulted in the UNSC having the power to refer and defer ICC investigations.

The relationship between the two organisations was analysed with the focus being on how the UNSC has conducted its relations with the ICC. It was concluded that the manner in which the UNSC has used the power it has been granted by the Rome Statute has greatly undermined the legitimacy of the ICC. The UNSC has made resolutions that seek to exclude and shield certain nationals from the jurisdiction of the ICC, aside from that it has offered little support to the ICC by not following up on the referrals it has made to the ICC. The biggest criticism of the UNSC is as a result of the UNSC not referring certain situations to the ICC. There are a majority of situations that are in need of the ICC's intervention, however, most of them have not been referred to the ICC due to what can at times be seen as the unwillingness of the UNSC. In a majority of cases, the UNSC's decisions on whether or not to refer a state to the ICC have been based on the political and national interests of the UNSC permanent members rather than in the interests of justice. Such views have led certain African states to express their concerns and displeasure with the politicised and selective approach the UNSC has taken. Unfortunately, rather than blaming the UNSC, a majority of countries put their frustrations of the UNSC on the ICC. Therefore, there is a need to take measures that seek to safeguard the ICC from the damaging political effects that might be brought about by the UNSC.

The topic of Head of State immunities was also examined. It was concluded that Rome Statute states parties, waive their rights to any immunities their officials might be entitled to, virtue of Rome Statute article 27. The difficulty comes in when the ICC seeks to exercise its jurisdiction on states not a party to the Rome Statute. This difficulty was evident in the Sudan and Libya situations. Countries not party to the

Rome Statute yet under the ICC's jurisdiction as a result of UNSC referrals. It was concluded that states not a party to the Rome Statute continue to be entitled to immunities international customary law accords to them, the reason being that treaties cannot impose treaty obligations on a state that has not ratified the treaty in question. Therefore, Heads of States not a party to the Rome Statute continue to enjoy Ratione Personae immunity even in cases where they are being accused of committing international crimes or crimes that violate jus cogens. Under normal circumstances, the Heads of State of Libya and Sudan are entitled to Ratione Personae immunities. In the event that the ICC seeks to prosecute such people, it is important for the court to first request the governments of those countries to waive the immunity the Heads of States are entitled to.

Bearing in mind the manner in which Libya and Sudan were referred to the ICC, through a UNSC resolution, it should be noted that the UNSC has the power to make resolutions that legally bind all member states of the UN. The Resolutions that referred the two countries to the ICC oblige them to fully cooperate with the ICC. The study argued that, by referring the two countries to the ICC, the UNSC not only triggered the ICC's jurisdiction over Sudan and Libya, it also enabled the ICC to conduct all its proceedings in accordance with the Rome Statute. As such, Libya and Sudan are obligated to cooperate with the ICC as if they are Rome Statute states parties. Under such circumstances, the Head of State immunities of Sudan and Libya cannot shield their officials from the jurisdiction of the ICC.

The tensions that exist between the promotion of peace and the implementation of justice were also analysed in this research. Historically international criminal justice has often been pursued at the end of a conflict. Of late, pursuing justice and accountability while a conflict is on-going has become common. The pursuit of justice especially in times when a conflict is on-going or has recently ended has brought about a lot of concern. It has been argued that the blind pursuit of justice has the potential to undermine peace negotiations and at times the potential to restart the conflict. In such situations, the ICC has been accused of being an obstacle to peace processes. At times, such accusations have some validity. The pursuit of justice and the threat of indictment has made it difficult for peace negotiations to be concluded in a lot of countries especially in Uganda. Despite this being the case, this research argued that justice and peace should be mutually inclusive. In such a manner, long term peace can be

established through the use of justice. Peace is not simply the absence of conflict, it is the restoration of accountability and rule of law. It was argued that peace deals that ignore atrocities or rule of law are often short-lived. The promotion of peace should not lead to situations where efforts to bring about accountability and justice are ignored.

The Rome Statute makes no mention of amnesties, however, in cases where the ICC's pursuit of justice might be deemed to be a threat to peace, article 16 empowers the UNSC to halt any ICC on-going investigations. Such a move can at times be desirable, however, its implementation might have massively negative consequences on the ICC and on ICL. Reason being that such a move would make a judicial organ (ICC) to start making its prosecutorial verdicts based on political reasoning. Furthermore, halting investigations in the interests of peace might lead to a situation where countries blackmail judicial organs with the recommencing of violence unless those organs halt their investigations. This would set the wrong precedence in ICL.

Recommendations

Strategies for Repairing the ICC-AU Relationship

From the assessments made in the previous chapters, it was concluded that part of the reasons that cause the ICC-AU relationship to be conflictual is as a result of the misunderstood role of the work of the ICC. To overcome such challenges, it is of vital importance for the ICC to implement a proactive stance and strategy aimed at educating the public of the work and mandate of the court.[178] The ICC could take advantage of various media platforms and frequently explain the work the Court does. For example, it could publish articles that explain the work of the Court in leading newspaper columns. Therefore, the ICC would benefit if it improved its outreach and engagement with African civil societies. This could be done by conducting various meetings and workshops in Africa.[179]

Aside from improving its outreach program in Africa, there is also a need for the ICC to interact and communicate with the African leaders. In this regard, it might

[178] Kersten *Constructive Engagement in The Africa-ICC Relationship*, pp.10-11
[179] Ibid

be beneficial for the ICC to create an office at the headquarters of the AU in Addis Ababa, an office that would act as a liaison office between the ICC and the AU.[180] Such an office is of high importance because it would increase the number of bilateral talks between African countries and the ICC. Furthermore, with the establishment of such an office, states that are party to both the AU and the ICC would easily benefit from frequent updates on various topics relating to their membership with the ICC, such updates might be used to defend the ICC's position in AU summits. The creation of such an office would also make it easy for the ICC's representatives and AU staff to create dialog aimed at defusing the concerns and tensions African countries might have with regard to the ICC and its work in Africa.[181]

The ICC should also give high importance to some of the criticisms made by African countries, the reason being that some of the criticisms made by African countries have some validity. Especially with regard to how ICC investigations can potentially undermine peace negotiations in Africa as was evidenced in the previous chapter. As a result of that, it is important for the ICC to examine some of its prosecutorial policies and to be aware of the political realities that exist between the promotion of justice and peace. If the pursuit of justice brings about a genuine threat to peace, the Prosecutor of the ICC can invoke Rome Statute article 53 and not proceed with prosecutions as they might not be in the interests of justice and of the victims.[182]

It should however be noted that the deferring or halting of prosecutions, has a high chance of undermining the legitimacy of the ICC, as such, it should only be invoked in rare circumstances. To lessen the negative implications a deferral might have on the legitimacy of the ICC, the timing of when the deferral is made will be of high importance. For instance, it would be more beneficial for the ICC if the deferral is made at the time of investigations and not made after warrants of arrests for certain individuals have been made.[183] As such, the timing of the deferral will play a vital role.

On the part of African countries and leaders, it is important for them not to view the ICC as an enemy or competitor in the administration of justice, they should rather see it as an organisation that they can work hand in hand with to promote justice

[180] Avocats Sans Frontieres, *Africa and The International Criminal Court: Mending Fences,* p.15
[181] Benson Olugbuo, *The African Union, the United Nations Security Council and the Politicisation of International Justice in Africa,* African Journal of Legal Studies, 2014, Vol.7, No, 3. p.376
[182] Ibid, 378
[183] Mistry and Verduzco, *The UN Security Council and the International Criminal Court*, p.14

and to bring about an end to impunity in Africa.[184] The AU can also engage in a dialog with the ICC and take advantage of the high number of African countries that are party to the Rome Statute and the ICC Assembly of States Parties. It can use the African states party to the Rome Statute as a means of communicating its views to the ICC during various ICC related meetings.[185]

The AU should also be open to the establishment of an ICC liaison office at the headquarters of the AU, such an office would help to improve dialog between the two organisations.[186] African countries should also note that the Rome Statute works with the principle of complementarity. Under such a principle, the ICC is a court of last resort. It only gets involved in cases where states fail to conduct investigations and prosecutions for various reasons such as the desire to protect, shield individuals from prosecution, or when they are incapable of conducting investigations.[187] It is, therefore, the responsibility of countries to conduct genuine investigations of crimes that happen in their territories, if they do that, the ICC would not be capable of exercising its jurisdiction.[188] It is therefore important for African countries to improve their judicial systems and various aspects that are important in the implementation of justice. If African judicial systems are improved, there would be less need for African countries to refer situations to the ICC.

As it was highlighted in the previous chapters, the UNSC's relationship with the ICC has greatly undermined the legitimacy of the ICC. It is important for the UNSC to change the manner in which it has conducted its relations with the Court. There are a lot of countries and situations that might be in need of ICC intervention, however, the lack of UNSC referrals to the ICC has meant that the ICC cannot exercise its jurisdiction in such places.[189] The lack of referrals of certain situations to the ICC is mostly as a result of the political interests UNSC member states have.[190]

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[184] Avocats Sans Frontieres, *Africa and The International Criminal Court: Mending Fences,* p.16
[185] Werle, Fernandez and Vormbaum, *Africa and the International Criminal Court,* pp.191-192
[186] Avocats Sans Frontieres, *Africa and The International Criminal Court: Mending Fences,* p.16
[187] FICHL, *The Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes.*
[188] International Criminal Court, *Rome Statute of the International Criminal Court,* p.13
[189] Aloisi, *A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court,* p.159
[190] Lentner, *The Role of the UN Security Council Visa-Vis the International Criminal Court Resolution 1970 (2011) and Its Challenges to International Criminal Justice ,* p.23

Rather than basing the decision to refer situations to the ICC on political considerations, the UNSC should consider referring situations to the court on the basis of the thresholds of the crimes. For instance, when crimes are being committed, the UNSC could utilise various UN human rights commissions and bodies and task them with the aim of investigating whether or not crimes have been perpetrated and whether the crimes in question fall under the ICC's jurisdiction. If the crimes that are deemed to be a threat to international peace and security are present, the UNSC ought to refer the situation to the ICC.[191]

Furthermore, whenever the UNSC refers a situation to the court, it should stop the habit of excluding certain groups and citizens from the jurisdiction of the ICC, such a move greatly undermines the notion of "equality before the law" which is an important principle in the field of ICL.[192] In the past resolutions the UNSC has made, it has only imposed obligations to cooperate with the ICC only on the states it has referred to the ICC.[193] If the UNSC decides to draft a referral resolution to the court, it needs to impose provisions that not only oblige the states in question to fully cooperate with the ICC but also provisions that oblige all UN members to fully cooperate with the ICC and provide it with any essential support it might need.[194]

Aside from obliging a state to fully cooperate, it would be more beneficial if the UNSC provided the specific steps the state in question should take while cooperating with the ICC. Such a level of obligation to cooperate with the ICC may greatly help in the execution of warrants of arrest.[195]Furthermore, the UNSC ought not to block or hinder the possibility of the UN providing financial support to the ICC, such provisions should not be included in the resolutions.[196]

When the UNSC makes a referral to the ICC, it needs to follow up and support the court in any way possible. In most of the situations referred to the ICC by the UNSC, the ICC has had difficulties in a lot of ways, especially in the area of enforcing

[191] Mistry and Verduzco, *The UN Security Council and the International Criminal Court*, p.18
[192] Moss, *The UN Security Council and the International Criminal Court; Towards a More Principled Relationship*, p.13
[193] United Nations Security Council, *Resolution 1970 and Resolution 1593.*
[194] Trahan, *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, pp.462-464
[195] Ibid
[196] Mistry and Verduzco, *The UN Security Council and the International Criminal Court*, p.18

its arrest warrants.[197] This can be partly attributed to the lack of support from the UNSC, once a referral is made, the UNSC should ensure that the referral becomes effective and achieves its purpose. There are certain measures the UNSC can impose on states to guarantee that states fully cooperate with the ICC. For instance, they could impose travel restrictions or travel bans on the people who are being indicted by the court, threaten such individuals or countries with the use of international sanctions or the freezing of their assets and the use various alternatives that can pressure indicted individuals or countries to cooperate and support the work of the ICC.[198] The implementation and enforcement by the UNSC of some of the highlighted measures above, might not only assist and simplify the ICC's work in Africa and various parts of the world, but it would also enable the UNSC to positively contribute to the perceptions, integrity and legitimacy of the ICC.

Areas of future research

In the event that the tensions between the ICC and the AU fail to be resolved, and a majority of African states decide to withdraw from the ICC, it would be important to examine the consequences such a move might have on the ICC. It would also be important to examine whether or not the creation of an African Criminal Court would be considered as a viable alternative to the ICC.

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