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The Problems Facing the International Criminal Court: African Perspectives

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A thesis submitted in partial fulfillment of the requirements for the Doctor of Philosophy degree in Political Science

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Abstract

Since the establishment of the International Criminal Court (ICC), it has faced serious problems and has been subject to criticism, particularly from African states. More specifically, some African states have argued that the operation of the Court has produced outcomes that are vastly different from what was imagined and hoped for at the time the Court was negotiated in 1998. The dissertation answers four interrelated research questions: (1) What kind of International Criminal Court (ICC) did African states want prior to and during the Rome Diplomatic Conference in 1998? (2) Why did African states ratify the Rome Statute more than any other region even though they did not get the kind of Court that they wanted? (3) What are the origins of the criticisms levied by African states against the ICC? (4) Why, despite the compromises reached in Rome, and the significant criticism levied against the resultant ICC since, would African states commit and/or stay committed to the Court by signing, ratifying, and implementing the Rome Statute into domestic law more than any other region? The dissertation employs constructivist international relations theory and makes the overall argument that the active and meaningful engagement on the part of African governments and African individuals in the Rome Statute/ICC project from its earliest stages of development has created a deep normative commitment to the resultant Court, which, at times, overrides rationality and self-interest explanations of state behaviour.

Keywords

International Criminal Court, Rome Statute, international criminal law, international diplomacy, African Union, Africa, multilateralism.

Summary for Lay Audience

This dissertation offers insight into the problems facing the International Criminal Court (ICC or Court) from African perspectives. The analytical focus is on the ICC's interactions in Africa since the only completed cases at the Court have involved African situations and African suspects at the time of writing. The dissertation considers how the ICC was designed and constructed as a result of the multilateral negotiations at the Rome Diplomatic Conference in 1998. It then evaluates how the compromises reached in Rome have or have not affected the resultant Court's work, especially on the African continent. With this in mind, the dissertation provides answers to the following four questions: (1) What kind of ICC did African states *want* prior to and during the Rome Diplomatic Conference in 1998? (2) Why did African states ratify the Rome Statute more than any other region even though they did not get the kind of Court that they wanted? (3) What are the origins of the criticisms levied by African states against the ICC? and (4) Why, despite the compromises reached in Rome, and the significant criticism levied against the resultant ICC since, would African states commit and/or stay committed to the Court by signing, ratifying, and implementing the Rome Statute into domestic law, *more* than any other region? The overall argument is that the active role that African states and African individuals occupied with respect to the ICC project from its earliest stages of institutional development provides an answer to all four questions. The dissertation provides a thorough account of African involvement in the ICC project, including the preferences of African governments at the Rome Diplomatic Conference using a constructivist international relations theoretical approach. Such an understanding provides the necessary backdrop to evaluate the problems facing the ICC in its current institutional form, from the perspective of some African states and/or the African Union based on both rational and normative factors.

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First, to my dissertation committee: thank you for taking the time to read my work with enthusiasm and interest. I am grateful for your hard work, which I acknowledge as incredibly time-consuming. Without your guidance and support this dissertation could not and would not exist.

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I am grateful for the patience of Dr. Adam Harmes during the writing stages of the dissertation. I also thank him for affirming that indeed, this dissertation fits within the scope of serious international relations scholarship. His ability to refocus my attention to the bigger picture when I was lost in the details was so extraordinarily helpful.

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List of Abbreviations

ACJHR	African Court of Justice and Human Rights
ACN	Advisory Committee on the Nomination of Judges
ASP	Assembly of States Parties to the Rome Statute
AU	African Union
AUPD	AU High-Level Panel on Darfur
CAR	Central African Republic
CICC	Coalition for an International Criminal Court
CW	Committee of the Whole
DRC	Democratic Republic of the Congo
EAC	Extraordinary African Chambers <i>or</i> East African Community
ECOWAS	Economic Community of East African States
EU	European Union
GRULAC	Group of Latin American and Caribbean States
HOSG	Heads of State and Government
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law Commission
IL	International Law
IR	International Relations
LMG	Like-Minded Group
NGO	Non-governmental Organization
NAM	Nonaligned Movement
NMREB	Non-Medical Research Ethics Board
OAU	Organization of African Unity
ODA	Official Development Assistance
OTP	Office of the Prosecutor
P5	Permanent Five Members of the United Nations Security Council
PALU	Pan African Lawyers Union

PrepCom	Preparatory Committee
SADC	South African Development Community
SCC	Special Criminal Court
UN	United Nations
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties
WEOG	Group of Western European and Other State

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Chapter 1

1 Introduction

The formation of the International Criminal Court (ICC or ‘Court’) was agreed to with the successful conclusion of the Rome Diplomatic Conference (Rome Conference) on 17 July 1998. The Rome Conference was attended by representatives from 160 states; several non-governmental organizations (NGOs); intergovernmental organizations; and other specialized agencies. The successful adoption of the Rome Statute of the International Court (Rome Statute) signalled a collective commitment to the creation of a permanent international criminal court, which would function as a court of last resort to ensure criminal accountability for the most serious violations of international law (i.e. genocide, war crimes, crimes against humanity, and aggression) if domestic justice mechanisms prove unable or unwilling to do so. The ICC entered into force on 1 July 2002, after the Rome Statute received the required sixty ratifications to become operable. The Court has undergone growing pains in the time since. But in particular, some of the African states have voiced their displeasure in what has been framed as the Court’s bias against or targeting of them. In the popular press and in some emerging scholarship, there has been much discussion about whether the African states understood that they might be treated as unequal partners when they signed on to the Court. And whether they would, indeed, remain a part of the Rome Statute System by remaining States Parties to the ICC.

This dissertation measures the seriousness of the compromises made at the Rome Diplomatic Conference for the Establishment of an International Criminal Court from the perspective of African states and explores the explanatory value of those compromises in the context of contemporary criticism of the resultant Court. It is well understood that African states took a particularly active role in the negotiation of the Rome Statute at various junctures. This engagement offers a means to establish what kind of court African states really *wanted*, as well as the ability to measure the correlative disparities that emerged in the final negotiated text of the Rome Statute. This approach contributes to the growing discourse on the relationship between the negotiated text of the Rome Statute and the well-documented operational weaknesses of the resultant ICC, which have revealed themselves largely through the Court’s behaviour in African situations and

contexts. The reasons for the Court's hyper-focused engagement in African situations and contexts are manifold and justifiable in many respects. Nevertheless, the willingness of African states to remain committed to the ICC more than any other region, coupled with longstanding normative investment in the ICC project, fosters a sense that the criticisms raised by African governments and the African Union against the Court ought to be taken seriously and given due consideration.¹ This is important for the holism of the ICC as an institution within the international political landscape that represents the values and norms surrounding principles of human rights, human security, and justice (broadly considered), and as a last chance judicial mechanism that ensures accountability for the most serious violations of international criminal law when all else has failed in the interest of achieving long-term peace, stability, and transitional justice objectives in the aftermath of serious conflict and violence.²

This research situates itself within the context of the Africa-ICC relationship, which can be understood and conceptualized differently throughout the Court's history. Early development of the Rome Statute and the idea of an ICC was largely supported by African states. This support continued when the Rome Statute was adopted, most demonstrably evidenced by the fact that African states have signed, ratified, and implemented the Rome Statute more than any other region in the world. Notwithstanding this, African support for the ICC began to wane following the Court's indictment of African leaders, particularly Omar al-Bashir of Sudan in 2009 and others such as Uhuru Kenyatta of Kenya in 2011, and to a lesser extent, Muammar Gaddafi of Libya in 2011. These indictments created a serious conflict of interest for African governments, which were forced to choose whether to continue diplomatic relations with government leaders

¹ It is important to highlight that the use of the phrase 'more than any other region' refers to the level of support and commitment to the ICC based on the geographic regions established by the United Nations and employed by the Assembly of States Parties to the ICC. It is important to note that 34 out of 54 African States have ratified the Rome Statute (63 per cent). While it may be possible to base comparative support for the ICC on the percentage of states that have ratified the Rome Statute within each region, it is well established that African States comprise the largest regional bloc of signatories and this is what is being referred to throughout this dissertation.

² It is acknowledged and understood that the aims and objectives of the ICC are understood and conceptualized differently within the literature and is the subject of wide debate. See, for example Catherine Gegout, "The International Criminal Court: limits, potential and conditions for the promotion of justice and peace," *Third World Quarterly* 34.5 (2013): 800-818.

that were also indicted suspects at the ICC, or else to cooperate with the Court by arresting and surrendering those same indicted suspects. The unanimous decision by African governments *not* to arrest and surrender indicted heads of state was justified by them on claims of double standards, unfair targeting, and neocolonialism, since the ICC was failing to pursue perpetrators of serious international crimes from any region other than Africa.

This conflict came to a head in 2016, when several African states voiced their intent to withdraw from the Rome Statute. Often couched in rhetoric surrounding an ‘Africa-ICC crisis,’ attempts by the African Union to incite a continent-wide mass withdrawal movement, supported in large part by a handful of vocal governments, seriously threatened the trajectory of the ICC’s role in the African region. The Gambia and South Africa filed formal notices of withdrawal in 2016 but reversed those decisions. Burundi *did* formally withdraw from the ICC in 2017. Yet, some of the most vocal opponents of the Court such as Kenya and Uganda have remained States Parties to the Rome Statute despite threats of withdrawal. This peculiar inconsistency between policy and rhetoric offers a nuanced lens through which to analyze the intricacies of the ICC’s involvement on the African continent, approaches to institutional reform or alternative mechanisms of justice on the continent, and the state of the international criminal justice norm in Africa, more generally.

1.1 Research Questions and Explanation of the Research Project

The dissertation answers four interrelated research questions: (1) What kind of ICC did African states *want* prior to and during the Rome Diplomatic Conference in 1998? (2) Why did African states ratify the Rome Statute more than any other region even though they did not get the kind of Court that they wanted? (3) What are the origins of the criticisms levied by African states against the ICC? and (4) Why, despite the compromises reached in Rome, and the significant criticism levied against the resultant ICC since, would African states commit and/or stay committed to the Court by signing, ratifying, and implementing the Rome Statute into domestic law, *more* than any other region? Africa is conceptualized as a ‘region’ throughout the dissertation as opposed to a continent, to provide consistency both within the existing discourse and the ICC’s use of

the five geographic regions of the world as established by the United Nations, i.e., African States, Asia-Pacific States, Group of Latin American and Caribbean States, Eastern European States, and Western Europe and Other States. The dissertation employs constructivist theory and makes the overall argument that active and meaningful engagement on the part of African governments and African individuals in the Rome Statute project from its earliest stages has enmeshed a deep normative commitment to the ICC that at times, overrides rationality and self-interest in tangible ways.

The dissertation also places a special focus on the conceptualization of the ICC project as a vehicle to reorder the global hierarchy. Thus, the most significant compromises throughout the Rome Statute negotiations for many African governments involved the role of the United Nations Security Council to refer cases to the ICC, or defer ongoing ICC cases, and the decision to exclude nuclear weapons from the prohibited list—both of which involved, insulated, and further protected only the smallest group of most powerful states. The dissertation emphasizes that African states were averse to the enmeshment of politics within the architecture of a prospective ICC and many of the issues raised by some African states and the African Union with the resultant Court's operationalization can readily be traced back to concerns illuminated by African delegates and governments from as early as 1994 with respect to politicization and Court independence. Notwithstanding this, the longstanding historical involvement and ownership of the ICC project has created an environment where most African governments continue to support the ICC and governments that have openly criticized the Court have decided to express opposition from *within* the Rome Statute System.³ This is evidenced not only by sustained African membership to the Court comprising the largest regional bloc of States Parties, but also with active involvement within procedural processes, such as the comparatively high number of judicial nominations from the African region to fill vacancies on the ICC bench, for example.

³ The Rome Statute System refers to the obligation placed upon States Parties to include the contents of the Rome Statute into domestic law, which is referred to as implementation. It also refers to the obligation of States Parties to cooperate with the ICC in the investigation and prosecution of crimes under its jurisdiction. It also touches on the principle of complementarity, which says that the jurisdiction of the ICC is only triggered if national courts are unwilling or unable to investigate and/or prosecute international crimes.

In the context of the African Union (AU), it emphasizes pan-Africanism under the auspice of ‘African solutions to African problems,’ which includes efforts to regionalize international criminal justice through the expansion of the African Court of Justice and Human Rights to cover the same types of crimes as those enumerated in the Rome Statute in relation to the ‘Malabo Protocol.’ Interestingly, African governments have been slow to ratify the Malabo Protocol and have remained strongly committed to the Rome Statute. The dissertation argues that the expression of a pan-Africanist vision of an international criminal justice mechanism offers another layer of information about what kind of international criminal court African states *want* and the ways in which the ICC fails to satisfy those wants. While the AU efforts to regionalize international criminal law *vis-à-vis* the Malabo Protocol can be framed either positively or negatively, the substance of this effort is revealed by digging deeper into the historical trajectory on the continent with respect to what an ICC was hoped to be and how the resultant court has manifestly failed to achieve those ideals in some significant respects. In many ways, attempts to regionalize international criminal law can be framed as a response to the aversion to disproportionate paternalism and subjugation by the international community—Europe in particular—especially if (more) local responses might be possible. Yet, the dissertation highlights that the African *governments* that have sought to include regional mechanisms within the Rome Statute System under the auspice of complementarity have sought to do so under a cooperative and integrative guise. This approach yields far more productive possibilities for the development and strengthening of the international criminal justice norm altogether and ought to be considered as an avenue for the continued development of the ICC’s jurisdiction regime.

1.2 Overall Importance of the Research Project

The research project’s greatest value is its contribution to a better understanding, contextualization, and situation of African concerns and criticisms with the institutional behavior of the International Criminal Court. Since at the time of writing the ICC has only completed cases that are located on the African continent, it is fundamentally important to take stock of the institutional shortcomings and problems that have become apparent through its engagement in those situations and contexts. This can only be

possible with genuine engagement with the issues raised by those most affected by the Court, coupled with ongoing communicative strategies whether in the academy or in practice under the auspice of remedy or else reform. While the argument that the ICC is still a ‘young’ institution is losing rigor, the problems that have been observed throughout its operationalization have persisted in many respects.

Plainly, an evaluation of the ICC’s performance cannot be measured outside of the African contexts in which it has disproportionately operated. Since the ICC depends on membership from states, and African states comprise the largest regional bloc of States Parties to the Rome Statute, it makes good sense to take African concerns seriously. This is in the broad interest of institutional self-reflexivity, including potential avenues for reform, but is also necessary for the long-term sustainability and holism of the ICC altogether. This is especially the case since the choice to be bound by the Rome Statute System is entirely *voluntary* and can be revoked at any time. While the ICC has become a permanent fixture in the global political and legal landscape, its ability to operate effectively is facilitated by an expansive membership that is committed to the shared normative values that undergird the Court through a cooperative arrangement between a broad membership of states and the ICC.

This dissertation is important because it offers a more inclusive and complete historical narrative about the significant role that African states and Africans played in the negotiation of the Rome Statute from the earliest stages of its ideational development and African preferences expressed during the Rome Diplomatic Conference. In many respects, the existing literature acknowledges the engagement on the part of ‘Africa’ in the negotiation of the Rome Statute, though with limited detail and explanation. The account provided herein is in-depth and illuminates the substantive agency that African governments and African delegates exercised throughout the Rome Statute negotiation processes, which gives African concerns a considerable amount of normative weight. This level of engagement is important to document because it yields explanatory value in terms of sustained African commitment to the ICC, even among African states and the AU that have openly criticized the Court. A better understanding of the ways in which ‘Africa’ authored the ICC project allows for a more accurate situating of the fluidity between the subject-agent relationship experienced by ‘Africa’ through its complex and

intersubjective engagement with the ICC. Notwithstanding this, the dissertation also bears in mind the political hierarchy of the international political system, which is acknowledged as a structurally limiting factor in any international negotiation or institutional apparatus created by states. Thus, it is even more crucial to acknowledge the ways in which traditionally weak states such as those in Africa influenced the Rome Statute negotiations, while simultaneously acknowledging the limitations of such influence with respect to the final outcome.

In terms of the Rome Statute negotiations, the preferences expressed by African states are synthesized in this dissertation and provide a novel understanding of how African states imagined the design of the ICC in its ideal form. This is central to an understanding of how the final text of the Rome Statute either satisfied or failed to reflect the desired outcome as expressed by African states throughout the negotiations. The knowledge generated from this research provides a lens through which to evaluate the significance of the compromises reached in Rome, which has explanatory potential for making better sense of the observed problems with the resultant ICC's operationalization in African contexts as well as African responses to those problems—i.e. the regionalization of the international criminal law at the AU Court in an effort to provide an alternative or extrajudicial mechanism to the ICC. In short, the dissertation offers a more complete account of African involvement in the ICC project, which provides a framework that generates more nuanced understandings of the origins of the contemporary criticisms of the ICC. The dissertation repositions African concerns with the ICC in their appropriate historical context, which reveals far more deep-seated political problems and manifestations of those problems that are worthy of acknowledgement and inclusion in any analysis that examines how African states engage with the Rome Statute and/or the ICC.

1.3 Chapter Outline

The remainder of the dissertation is organized into eleven substantive chapters. Chapter two outlines the methodology employed by this research project. The chapter provides a formulation of the proposed research questions, relevant hypotheses, and research tools employed throughout. It offers an overview and justification for the use of process

tracing as its chosen methodology; it explores the value of elite interviewing and content analysis as invaluable tools of process tracing research, both of which are employed throughout this dissertation.

Chapter three provides a review of the literature on the Rome Statute negotiations, as well as the substantive aspects of the ‘Africa-ICC’ relationship, and generally observed problems with the ICC throughout the course of its operationalization. The literature has identified the role of African states throughout the negotiation of the Rome Statute, but has manifestly failed to provide a conceptualization of an ICC from an African perspective in substantive detail. Some research has begun to interrogate whether the compromises reached in Rome were *too material* but very few have situated this question within the Africa-ICC contention. This dissertation revisits the compromises reached in Rome and places them within the context of the more contemporary problems that some African states and the AU have cited with respect to the operation of the ICC. In this respect, the compromises reached at the Rome Diplomatic Conference are used as explanatory factors that have had long-lasting effects on the Court’s efficacy and legitimacy.

Chapter four provides background on the Rome Statute negotiation processes in the time period leading up to the Rome Diplomatic Conference. The chapter maps the historical development of the idea of a permanent international criminal court apropos the United Nations and the International Law Commission. The chapter places a special emphasis on the role of African states and African delegates within the United Nations processes to develop such a court. Chapter four provides the necessary context and background to better understand the political climate within which the idea of an ICC gained traction, its historical underpinnings and trajectory, as well as the relevant place that African states and African politicians occupied within the conceptualization and development of a permanent ICC.

Chapter five considers African preferences on the Court’s jurisdiction, with a special emphasis on the potential role of the United Nations Security Council, as well as the ability of the Prosecutor to initiate an investigation on his or her own volition, i.e. *proprio motu*. Chapter six is closely related to chapter five and considers African positions on key issues at the Rome Diplomatic Conference with respect to crimes,

including the inclusion of internal armed conflicts; the prohibition of terrorism and drug trafficking; and the inclusion of nuclear weapons on the prohibited list. In combination, the fifth and sixth chapters provide the foundation for the remainder of the dissertation, since it is the preferences expressed by African delegates in the plenary meetings at the Rome Diplomatic Conference on the most contentious issues of the Rome Statute that provide the means to construct an idealized 'African' construction of an ICC. This provides a basis to better make sense of the serious of the compromises reached in Rome from an African perspective and consider those compromises as explanatory of the subsequent operational deficiencies cited by some African states and the AU with respect to the Court.

Chapter seven provides an analysis of why African states have chosen to commit to the Rome Statute despite the substantive compromises reached at the Rome Diplomatic Conference, more than any other region. It considers African commitment to the Rome Statute using constructivist and rational choice models of international relations theory and provides an explanatory analysis of ICC commitment using Côte d'Ivoire and Kenya as its case studies using two-level game theory. The chapter places an emphasis on domestic and international political contexts as factors that explain the choice to commit to the Rome Statute and stay committed to it, even if it runs contrary to traditional notions of self-interest to do so.

Chapter eight explores the emergence of the deterioration of the relationship between Africa and the ICC, using the indictment of former Sudanese President Omar al-Bashir as the primary catalyst for this deterioration. The problems that some African states, and the AU in particular, have had with the ICC as a result of the indictment of a then sitting head of state are considered in normative (and to a lesser degree) legal terms. The important contribution of this chapter is that it links the compromise reached in Rome to give the United Nations Security Council the ability to refer situations to the ICC, including those in non-states parties (as Sudan was at the time it was referred), as explanatory of the criticisms subsequently launched from an African perspective. The chapter highlights African aversion to the politicization of the ICC from the earliest stages of its institutional development. The integration of deep politics, especially with respect to the Security Council's ability to trigger the Court's jurisdiction, was a

significant compromise for many African states. The chapter does not dispute the justifications for the ICC's intervention in the situation in Darfur, but instead places an emphasis on the interrelated political consequences of the Security Councils' decision to do so in that situation but not others of comparable gravity. *Even if* the ICC had good reason to be involved in Darfur, the uneven application of the same norms in all situations triggered sensitivities and subjected the ICC regime to serious scrutiny. Coupled with the Court's decision to indict a sitting head of state, concern that the Court could be used to incite regime change in Africa whether a state consented to its authority or not, with all of the correlative destabilizing effects associated by the creation of an internationally (politically) imposed power vacuum, were very real. This was the fear that African states clearly expressed as early as 1994, which in many ways has contributed to a pan-Africanist pushback against the ICC and attempts to establish alternative judicial mechanisms as a response to similar crimes.

Chapter nine evaluates AU efforts to regionalize international criminal law through the expansion of the African Court of Justice and Human Rights with reference to the Malabo Protocol, which includes many of the same crimes that are covered by the Rome Statute. This chapter interrogates whether regional mechanisms could or ought to fit within the Rome Statutes' conceptualization of complementarity which, as written, only enumerates a relationship between the ICC and *domestic* courts. This chapter argues that the embodiment of international criminal law enumerated in the Malabo Protocol is inherently useful for an understanding of what African states want and need out of an international criminal justice judicial mechanism that is apparently lacking at the ICC. The chapter argues that the Malabo Protocol offers an opportunity to prosecute far more crimes than the ICC can, crimes that are most relevant to the continent and may actually undergird and/or finance the perpetration of the perhaps more serious crimes covered by the Rome Statute. Thus, it argues that the integration of regional mechanisms such as the Malabo Protocol within the international criminal justice schema offers an opportunity to contribute to the evolution of a robust system of justice.

Chapter ten explores the ways in which African states remain engaged and committed to the ICC by exploring the disproportionately high number of judicial nominations to the ICC bench from African states. This chapter maps African

representation on the ICC bench, as well as the number of nominations from the region. The chapter considers the reasons for African engagement in judicial nomination processes, and also considers what types of candidates are most likely to be successfully elected. The chapter provides a means to contextualize sustained commitment to the Rome Statute System, and an ability to further recast Africans as important authors of justice at the ICC.

Chapter eleven, the final chapter, concludes the dissertation. It maps the importance and significance of the research and summarizes its primary arguments with respect to the proposed research questions. The conclusion reemphasizes the role that African states and Africans played in the negotiation of the Rome Statute and highlights the importance of the fact that many African states and politicians viewed the ICC as a vehicle to restructure the global hierarchy. The ways in which the final text of the Rome Statute reflected the interests of the most powerful states represented the most substantive compromises required of African states when deciding to voluntarily sign, ratify, and implement the Rome Statute. Though African states have raised substantive problems with the ICC throughout the course of its operationalization, almost all have continued to remain States Parties, and many have sought to insight change from *within* the Rome Statute System. As such, the ways in which African concerns can be meaningfully considered and responded to remain a vitally important imperative for the long-term success of the Court, since Africa has been the disproportionate subject of the ICC's intervention. If the ICC is to continue to evolve in terms of its institutional robustness, it ought to take African concerns seriously in order to avoid repeating mistakes in future situations and contexts. The tenth chapter resituates the dissertation within the literature on the Rome Statute negotiations and the Africa-ICC relationship. Areas for future research are considered as part of a broader research agenda.

Chapter 2

2 Methodology

This dissertation interrogates whether the compromises made by states in the 1998 Rome Statute negotiations can help explain the problems with the International Criminal Court (ICC), which have been most notably illuminated through the Court's interaction with (and in) African states from 2003 to the time of writing. Process tracing has been employed as its methodology. This is an inductive qualitative study ultimately intended to provide a deeper understanding and explanation of the underlying complexities and the dynamism of concerns that are at the heart of the at-times strained Africa-ICC relationship.¹ Process tracing allows for an interrogation of necessary and sufficient conditions, as well as the sequence of the breakdown in the Africa-ICC relationship that precedes the purview of observable contemporary phenomena.² The guiding hypothesis of the project was that the compromises made when drafting the Rome Statute in 1998 could help to explain and better understand the identifiable problems that many African states have had with the operationalization of the ICC. The fact that African states had taken such an active role in the establishment of the ICC and have committed more to the Rome Statute than any other region, makes the breakdown of the relationship even more curious and significant. The dissertation uses Africa as a 'region' instead of a continent in keeping with the ICC's use of the United Nations five geographic regions of the world (African States, Asia-Pacific States, Group of Latin American and Caribbean States, Eastern European States, and Western Europe and Other States Group). This provides consistency and continuity in the discourse. The dissertation chooses to look at the group of African States because many of the criticisms levied against the ICC from the African continent have originated from a pan-Africanist purview – i.e., the African Union. Moreover, the group of African States had signed and ratified the Rome Statute more than any other geographic region at the time of writing and had also been subjected to the behaviour of the ICC comparatively more than any other region.

¹ Derek Beach and Rasmus Brun Pedersen, *Process-Tracing Methods: Foundations and Guidelines* (Ann Arbor: University of Michigan Press, 2013): 11-12.

² David Collier, "Understanding Process Tracing," *PS: Political Science and Politics* 44.4 (2011): 823-30.

The guiding questions of the dissertation were the following: (1) What did African states want out of a permanent international criminal court? (2) Why did African states ratify the Rome Statute even though they did not get what they wanted? (3) What are the origins of African criticisms towards the ICC? and (4) Why, despite the compromises reached in Rome, would African states commit and stay committed to the ICC by signing, ratifying, and implementing the treaty into domestic law, more than any other region? I hypothesized that the answer to the fourth question was related to the ownership, activism, and agency that many African states exercised in the establishment of the ICC from the earliest stages of its development (both ideationally and operationally). This history translated into a primordial normative commitment to international criminal justice and accountability that informed the identity and interests of many African states, over and above self-interest.

2.1 Process Tracing

According to Collier, process tracing is defined as the “systematic examination of diagnostic evidence selected and analyzed in light of research questions and hypotheses posed by the researcher.”³ In order to answer the first question, i.e. What did African states want out of a permanent international criminal court?, I began by conducting a content analysis of relevant United Nations documents. Specifically, I analyzed the following documents: the statements of African delegates as well as their publications and reports that were presented at the six Preparatory Committee (PrepCom) sessions before the Rome Diplomatic Conference (1994-1998); the statements of African delegates in plenary at the Rome Diplomatic Conference (1998); and statements made by delegates post-Rome at the Preparatory Commission and at the Assembly of States Parties to the Rome Statute. The research design relied on the selection of particular variables, for example, the independence of the Court from political influence, the automatic jurisdiction mechanism, the *proprio motu* powers of the Prosecutor, and state cooperation obligations. While some depth may have been lost through the selection of

³ Collier, “Understanding Process Tracing,” 823.

these variables, doing so did not undermine the greater value of the project, but instead provided the appropriate scope to begin to answer the proposed research questions.

James Mahoney explains that “process tracing tests can be used to help establish that (1) an initial event or process took place, (2) a subsequent outcome also occurred, and (3) the former was a cause of the latter.”⁴ This is quite plainly what this research project is seeking to establish. That is, (1) there were substantive compromises made in Rome in order to ensure that the Diplomatic Conference was a success; (2) African states were once active supporters of the Rome Statute and the ICC, but that relationship was severely strained after the ICC began its operationalization; (3) and the compromises made in Rome caused, *at least in part*, the deficiencies in the ICC’s operationalization which have strained the relationship between some African states and the Court. Thus, process tracing is a logical methodological choice and is particularly well suited to the theoretical aims of this dissertation. As Mahoney explains, process tracing “is arguably the most important tool of causal inference in qualitative and case study research.”⁵ On this basis, the hypothesis is evaluated to determine if there is a causal connection between two or more events or processes. This is achieved by applying rigorous research standards relying on what Collier, Brady, and Seawright refer to as causal-process observations (diagnostic pieces of evidence), which may or may not be used in combination with generalizations relevant to the analysis.⁶ While the research suggests that a causal connection might exist between two or more events or processes, the dissertation is not meant as a causal explanation, as such. Instead, it seeks to provide a richer explanation and understanding of those processes, which is valuable independently or combined with other analytical approaches.

It is not the aim of this project to prove or argue that the ICC is ineffective or deficient. Rather, the project takes the existing literature and works backwards to better

⁴ James Mahoney, “The Logic of Process Tracing Tests in the Social Sciences,” *Sociological Methods and Research* (2012), 2.

⁵ Ibid.

⁶ Ibid. See also David Collier, Henry E. Brady, and Jason Seawright, “Sources of Leverage in Causal Inference: Toward an Alternative View of Methodology,” in *Rethinking Social Inquiry: Diverse Tools, Shared Standards*, 2nd edition, eds. Hendry E. Brady and David Collier (Lanham: Rowman and Littlefield, 2010): 161-199.

understand the troubled relationship between Africa and the ICC, based on the institutional deficiencies cited in the literature. This could only be done with an effective data collection method. To this end, I gathered as much information as possible from primary and secondary literature and combined these findings with the content analyses mentioned hereto.

2.2 Analysis

As described, the research process began with primary and secondary document sources. I began with a review of the Rome Statute negotiation plenary transcripts, demarcating the participation (and influence) of various African states throughout the diplomatic process. While the task was largely one of ‘counting’ and in a basic way coding the preferences of African states, it provided a framework to situate my research question with respect to African preferences and agency with respect to the ICC. This content analysis also provided a lens to ascertain nuance among the preferences of African States, since there is not a monolithic ‘African’ vision of the ICC. However, the position of the African Union in the post-Rome period is weighed against the preferences of African states (as expressed in Rome and afterward), to elicit a broader picture of the complexity of the regional issue(s) with the resultant ICC. Thus, I triangulated the elite interviews I conducted by combining interviews with my content analysis/document review to balance any inaccuracies or bias.⁷

2.2.1 Interviews

After this work was completed and a satisfactory cursory understanding was established, I supplemented my research with fifteen semi-structured elite interviews carried out between 2018 to 2019, in order to make up for gaps in the data and to enrich my overall understanding of the Rome Statute negotiations, African involvement in the negotiations, and/or African concerns with the ICC. Most of the interviews ranged from one to two hours in length, over one to two-day time periods.

⁷ See Rebecca S. Natow, “The use of triangulation in qualitative studies employing elite interviews,” *Qualitative Research* 20.2 (2019): 160-173.

The semi-structured elite interviews were conducted with those with the most relevant, first-hand experience. I asked each person about their recollections of the Rome Statute negotiation process and how it engaged with and involved African states in particular. I interviewed former state delegates, observers, academics, and NGO personnel who were directly involved in the Rome Statute negotiation processes. I interviewed ICC employees, including employees of the Office of the Prosecutor and ICC Judges. I conducted semi-structured interviews to elicit insight into any relationship between the outcome of the Rome Statute negotiations and the contemporary ICC-Africa problem(s). I also asked probing questions about the soundness of the African discontent with the ICC and proposed solutions thereto (i.e. a regional African court to prosecute the same crimes as those contained in the Rome Statute).

2.3 Recruitment Methods

I relied on targeted sampling to identify key actors with the most involvement in the negotiation process. I recruited key experts with relevant knowledge or insight to enrich my initial content analysis. As such, in-depth elite interviews were used to obtain information and to, as Tansey described, “probe beyond official accounts and narratives and ask theoretically-guided questions about issues that are highly specific to the research objectives.”⁸ The research project was approved and guided by the rules provided by The University of Western Ontario’s Non-Medical Research Ethics Board (NMREB) to protect the participants involved in my study.⁹ As such, I took care to avoid coercion, pressure, and obligation.

The pre-interview stage was vital to the success of my interviews. I had to know exactly who I was interviewing with respect to their individual history and background. According to Mikecz, this enhances an understanding of the researcher’s own positionality and decreases the status imbalance between the interviewer and respondent.¹⁰ I was cognizant and limited by the practical barriers that slowed down the

⁸ Oisín Tansey, “Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling,” *Political Science and Politics* (October 2007): 7.

⁹ The project was approved as Western University NMREB protocol #107906.

¹⁰ Robert Mikecz, “Interviewing Elites: Addressing Methodological Issues,” *Qualitative Inquiry* 18.6 (2012): 482.

progress of my study significantly. Specifically, I experienced difficulties with respect to accessing elites, acquiring their trust, and establishing rapport.¹¹ In this respect, anonymizing the responses of some interviewees was determined to be a useful strategic tool, and was often paramount to the success of the interview. This bears particular relevance among those who are currently employed by government or the Court. Adequate preparation for the interviews mitigated the challenges that act as a barrier to trust and rapport. I was able to determine the willingness of particular individuals to assist with my academic research, which informed who and how I asked my questions from the outset. The aim of this project was to obtain more than just ‘official’ account of the process—i.e. what can be delineated from the statements of delegates at the Rome Diplomatic Conference or the Assembly of States Parties. This required careful and strategic planning and a paramount respect for the stakes involved for the respondent. It is important to note that any interviews that were conducted under the promise of anonymity (i.e. the so-called “Chatham House” rules where ideas may be used but the identity of the speaker is not disclosed) did not compromise the overall value or weight of the answers given, but instead increased an understanding of mutual respect and trust.¹² Indeed, I attempted to adopt what Saunders et al. described as “context-sensitive strategies to preserve the richness of the interview material wherever possible while also protecting participants.”¹³ Anonymity provided a degree of protection so that elites could be more open and honest about their own opinions and points of view without disrupting their employment obligations or reputation within their professional capacities.

The risk and potential bias associated with simply parroting official or ‘public relations’ answers with respect to the research question was a known concern that was taken into consideration throughout the course of the interviews. A well-informed semi-structured interview guide allowed for the flexibility and precision to avoid this concern, as it was clear when ‘official’ accounts emerged throughout the course of the

¹¹ Ibid.

¹² See William S. Harvey, “Strategies for conducting elite interviews,” *Qualitative Research* 11.4 (2011): 431-441.

¹³ Benjamin Saunders, Jenny Kitzinger, and Celia Kitzinger, “Anonymising interview data: challenges and compromise in practice,” *Qualitative Research* 15.5 (2015): 616.

interview(s). Being aware of official government or Court positions on particular issues made me aware of such responses and provided me with an opportunity to probe the respondent beyond these often superficial, politicized accounts. This was only possible with adequate preparation and background knowledge of both the institution/government and respondent. While it was not always possible to move beyond an official explanation or account, knowledge that the response was generated to promote a particular point of view allowed for a greater contextualization of the responses given.

In-depth interviews were an appropriate choice for the study because the focus of the inquiry was relatively narrow, and the respondents were/are directly involved in the processes under investigation. Moreover, the goal of the project was to acquire a better understanding of a particular phenomenon, and even more so to generate a narrative about the process in an interactive and relational way, based largely on the perceptions and experiences of those who were/are directly involved. My evolving status between insider/outsider throughout the course of the study permitted necessary objectivity; self-reflection was frequently used to account for biases and/or expectations that emerged throughout the course of the study, which were acknowledged, evaluated, and mitigated throughout the course of the project.

Travel was required to conduct the necessary interviews for this study. I attended the 17th Assembly of States Parties (ASP) meeting as part of the Canadian Partnership for International Justice delegation from 3 December to 13 December 2018 in The Hague. My attendance at the ASP was supported by the Social Sciences and Humanities Research Council of Canada. Once in The Hague, I took the opportunity to access elites and coordinate interviews with several Court employees. I also travelled to Pretoria, South Africa from 15 February to 20 February 2019, where I was able to interview several current and past government employees, particularly those from South Africa who played an active role in the Rome Statute negotiation efforts within the South African Development Community and the government of South Africa as an entity. I was also able to access those with first-hand knowledge about the contemporary problems that African states have with the ICC, and government responses to those problems.

I exhausted all domestic resources first and foremost with respect to data collection. Since Canada was so actively involved in the negotiation for an ICC well

before the Rome Conference, I started by talking to those with relevant insight and information with respect to the intricacies of the negotiations the compromises made by various states and the reasons for making those compromises. Similarly, several African delegations were provided with diplomats and lawyers from the United States and Canada, which provided an opportunity to access those who were involved in that capacity. I used these interviews, as well as my own independent research, to ascertain whom I needed contact next, provided that the interviewee had adequate experience to instruct me on the points of interest. I contacted various elites by telephone and/or e-mail and determined whether or not in-person interviews were required. In accordance with the guidelines provided by the NMREB, I did not incentivize any participant in my study, nor did I use language that gave the impression that I was incentivizing them in any way. I obtained full informed consent and had participants contact me directly to participate in my study. The nature of my study was considered to be of low risk to the participants by the NMREB and as a result, was not reviewed by the full board when it was granted approval. This was likely because I relied heavily on documents. The interviews I did conduct were with elites, as opposed to members of vulnerable populations. Nevertheless, I took caution to ensure that ethical standards were upheld, including the confidentiality of participants, if requested, and the proper storage of interview transcripts and project materials to ensure that the identity of any and all respondents are protected at all times. I greatly appreciated the time and participation of each of the individuals that I interviewed. Their insight was invaluable and imperative to the success of my study.

2.4 Conclusion

In summary, this dissertation examines whether the compromises made by states in the 1998 Rome Statute negotiations can help explain the problems with the International Criminal Court (ICC), which have been most notably illuminated through the Court's interaction with (and in) African states from 2003 to the time of writing. Process tracing is employed as its methodology and it is an inductive qualitative study ultimately intended to provide a deeper understanding and explanation of the underlying complexities and the dynamism of concerns that are at the heart of the at-times strained

Africa-ICC relationship. The dissertation relies on primary and secondary documents, as well as elite interviews to answer the proposed research questions.

Chapter 3

3 Literature Review

This dissertation takes a collaborative and interdisciplinary approach and can generally be situated within the growing scholarship on Africa and the International Criminal Court (ICC or Court). It relies and builds upon key theoretical frameworks provided by international relations (IR) and, to some extent, international law (IL) literatures. This chapter reviews the most salient themes in the Africa-ICC discourse. Whereas most of the existing scholarship tends to focus on the operational problems that have plagued the Africa-ICC relationship from the Court's establishment in 2002 onwards, this dissertation examines that literature but also focuses on the time that precedes the establishment of the Court. In doing so, this chapter also highlights literatures of institutional design, specifically in the context of the Rome Statute negotiations, to theoretically ground the design and architecture of the resultant ICC. The existing literatures on the Rome Statute negotiations and the Africa-ICC relationship illuminate the compromises that African States made in and after Rome when signing, ratifying, and implementing the Rome Statute into domestic legislation, and also frame the most prevalent debates concerning the problems with the ICC's operationalization in African contexts *and* African responses to those problems. In short, the literatures of the Rome Statute negotiations; African commitment to the Rome Statute/ICC; African problems with the ICC; and African responses to the problems with the ICC each provide a theoretical framework through which to situate this dissertation's contribution to the literature.

3.1 Rome Statute Negotiations

Much of the literature on the Rome Statute negotiations is descriptive in nature, as opposed to theoretical or argumentative.¹ Some literatures focus on the development of

¹ See generally Fanny Benedetti, Karine Bonneau, and John L. Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Boston: Martinus Nijhoff Publishers, 2014); Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed. (C.H. Beck, Hart, and Nomos, 2008); Roy S.K. Lee, ed., *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, and Results* (The Hague: Kluwer Law International, 1999); William A Schabas, *The International Criminal Court 2nd ed.: A Commentary*

the idea of an international criminal court from the pre-Rome period and/or trace the emergence of the developing international criminal justice and accountability norm within the international political landscape, particularly at the United Nations (UN) and through the early work of the International Law Commission (ILC) in creating a draft statute for an international criminal court.² With respect to pre- and post- Rome UN developments, Christopher Keith Hall carefully documented the meetings of the Preparatory Committee (PrepCom) on the Establishment of an International Criminal Court and the Preparatory Commission for the International Criminal Court.³ While Hall

on the Rome Statute (Oxford: Oxford University Press, 2016); Antonio Cassese, Paola Gaeta, and John R. W. D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, Volume 1 and Volume II (Oxford: Oxford University Press, 2002); William Schabas, *Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001); M. Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (New York: Transnational Publishers, 1998); Mauro Politi and Giuseppe Nesi, eds., *Rome Statute of the International Criminal Court: A Challenge to Impunity* (Ashgate, 2001); Leila Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (New York: Transnational Publishers, 2002); Herman A.M. von Hebel, Johan G. Lammers, and Jolien Schukking, *Reflections on the International Criminal Court—Essays in Honour of Adriaan Bos* (The Hague: T.M.C. Asser Press, 1999). Note that some scholars do offer more a more analytical approach to the study of the Rome Statute negotiations. See for example Frédéric Mégret, “The Rome Conference: institutional design and the constraints of diplomacy,” in *The Elgar Companion to the International Criminal Court*, eds. Margaret deGuzman and Valerie Oosterveld (Edward Elgar Publishing Ltd., 2020), 20-47.

² See for example Benedetti, Bonneau, and Washburn, *Negotiating the International Criminal Court*; see also John Washburn, “The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century,” *Pace International Law Review* 11.2 (1999): 361-377. Washburn explained that many of the diplomats involved in the negotiation of the Rome Statute were involved from the earliest stages (1995) through the post-Rome period. This shared experience and commitment fostered a sense of trust among delegates. He also attributes the mutually shared experience within the United Nations system in the 1990s as a contributing factor for the successful negotiation of the Rome Statute, since many delegates felt an ideological and normative attachment to the project. See also M. Cherif Bassiouni, “Negotiating the Treaty of Rome on the Establishment of an International Criminal Court,” *Cornell International Law Journal* 32.3 (1999): 443-469. See also Antonio Cassese, “From Nuremberg to Rome: International Military Tribunals to the International Criminal Court,” in *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1, eds. Antonio Cassese, Paola Gaeta and John R.W.D. Jones (Oxford: Oxford University Press, 2002): 3-22. See also Adriaan Bos, “From the International Law Commission to the Rome Conference (1994-1998),” in *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1, eds. Antonio Cassese, Paola Gaeta and John R.W.D. Jones (Oxford: Oxford University Press, 2002): 35-66.

³ Christopher Keith Hall, “The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court,” *American Journal of International Law* 91.1 (1997): 177-187; Christopher Keith Hall, “The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court,” *American Journal of International Law* 92.1 (1998): 124-133; Christopher Keith Hall, “The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court,” *American Journal of International Law* 92.2 (1998): 331-339; Christopher Keith Hall, “The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court,” *American Journal of International Law* 92.3 (1998): 548-556; Christopher Keith Hall, “The First Five Sessions of the UN Preparatory Commission for the

primarily focused on the *issues* dealt with by the PrepCom, other scholars such as Fanny Benedetti and John Washburn described the *practices* undertaken by officers, governments, NGO representatives, and UN officials at the PrepCom meetings, which the authors argue, was a “high act of international creativity.”⁴

Indeed, the Rome Statute negotiations have been rightly situated in the literatures concerning the new wave of multilateral diplomacy and treaty making of the 1990s. The approach taken in Rome has been described as akin to the strategy undertaken with respect to the Landmines Convention (i.e. the role of NGO campaigning and the formation of strategic negotiation blocs as an effective opposition to traditionally powerful states). In the context of landmines, Axworthy and Taylor explained that “governments and civil society worked directly together as members of a team.”⁵

According to the literature on the Rome Statute negotiations, given the success of this so-called ‘Ottawa Process’ approach in 1997, William Pace of the Coalition for the International Criminal Court contacted former Canadian Minister of Foreign Affairs, Lloyd Axworthy, to reproduce this coordinated civil society-governmental approach in Rome.⁶ In a similar vein, Marlies Glasius highlighted the important role of the Like-Minded Group (LMG) and non-governmental organizations (NGOs) in the proliferation and diffusion of the idea of an ICC.⁷ NGO involvement was a keystone of the Rome

International Criminal Court,” *American Journal of International Law* 94.4 (2000): 773-789. See also Philippe Kirsch, QC and Valerie Oosterveld, “The Post-Rome Conference Preparatory Commission,” in *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1, eds. Antonio Cassese, Paola Gaeta and John R.W.D. Jones (Oxford: Oxford University Press, 2002): 93-104.

⁴ Fanny Benedetti and John L. Washburn, “Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference,” *Global Governance* 5.1 (1999): 2.

⁵ Lloyd Axworthy and Sarah Taylor, “A ban for all seasons: The landmines convention and its implications for Canadian diplomacy,” *International Journal* 53.2 (1998): 190.

⁶ Lloyd Axworthy, *Navigating a New World: Canada’s Global Future* (Toronto: Vintage Canada, 2003). See Chapter 9: A New Court for a New Century; but see Benedetti, Bonneau, and Washburn, *Negotiating the International Criminal Court*, 74-5. The authors explained that William Pace differentiated the Rome Statute negotiations from the Ottawa Process because the Rome Statute negotiations were conducted within and under the auspice of the UN. Yet, the authors still concede that the Mine Ban Treaty offers the “most relevant precedent for civil society’s leadership in international negotiations and treaty making.”

⁷ See generally Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* (Routledge, 2007). See also William R. Pace and Jennifer Schense, “The Role of Non-Governmental Organizations,” in *The Rome Statute of the International Criminal Court: A Commentary*, Vol 1, eds. Antonio Cassese, Paola Gaeta and John R.W.D. Jones (Oxford: Oxford University Press, 2002): 105-143. See also William Pace and Mark Thieroff, “Participation of Non-Governmental Organizations,” in *The*

Statute negotiations and thus the merger of civil society and governments in Rome has occupied an important place in the literature.

However, it is important to note that the influence of civil society and NGOs in multilateral treaty making is not always viewed positively. For example, Shirley V. Scott has argued that:

The very openness of the system of international law that enables both democratic and authoritarian regimes to promote norms reflective of their policy preferences has also enabled civil society to advance norms, processes, and institutional structures that go beyond the policy preferences of dominant states. In doing so, civil society—a hallmark of what we might refer to as the ‘pseudo-democratic’ international legal system—has challenged the delicate balance between power politics and the realization of a pure international rule of law. The consequences appear serious.⁸

Scott points out important difficulties with multilateral treaty making processes, notably that in trying to solve collective action problems, the text of the treaty could reflect the opposition calls from the staunchest resisters.⁹ However, she also identifies that international law is only capable of offering normative standards to create a better world if the gap between the substance of the law and what is agreeable to the most powerful states is not “too stretched.”¹⁰ She explained, “[i]f there is no gap, then law simply reflects policy preferences, but if the gap is too big, international law will be unlikely to exert any pull over the behavior of the most powerful.”¹¹ She contended that middle powers and NGOs have stretched international law beyond what is acceptable to the most powerful states. In the context of the ICC, that overstretch is evidenced in the fact that the United States, China, and Russia have not ratified the Rome Statute at the time of writing.

International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results, ed. Roy S. Lee (Boston: Kluwer Law International, 1999), 391-398.

⁸ Shirley V. Scott, “The Imperial Over-Stretch of International Law,” *AJIL Unbound* 114 (2020): 242. See also Joseph S. Nye, Jr. “Globalization’s Democratic Deficit: How to Make International Institutions More Accountable,” *Foreign Affairs* 80.2 (2001). See also Robert Keohane, “Democracy Enhancing Multilateralism,” *International Organization* 63.1 (2009): 1-31.

⁹ *Ibid.* See also Tom Ginsburg, “Authoritarian International Law?” *AJIL Unbound* 114 (2020): 221, 228.

¹⁰ Scott, “The Imperial Over-Stretch of International Law,” 245.

¹¹ *Ibid.*

Thus, Scott said that “[t]he ICC is perhaps the classic example of over-reach within the empire of international law,” and the overall claim is that it is civil society and *not* the hegemon (the United States) that has acted as “the imperial power within international law.”¹² It is thus argued by Scott that the ICC lacks an inbuilt design feature to balance legalism with *realpolitik*, which is an inherently limiting factor in terms of its institutional effectiveness.

Despite these political limitations, it is important to make sense of how the Rome Statute negotiations unfolded in 1998. To this end, Roy S. Lee explained that most of the Rome Statute negotiations were conducted in informal meetings from the preparatory stage to the Rome Diplomatic Conference and “no official records were kept at those meetings.”¹³ As such, there is no other option than to rely on individual accounts of all stages of the negotiations to ascertain the most important controversies and themes concerning the institutional design of the ICC. Yet as Cherif Bassiouni pointed out in the context of observers of the Rome Conference, “personal views stem from the perspective of how they [experts or those who were involved in the drafting of specific provisions of the Rome Statute] perceived the intended purpose of each specific provision and its contextual relationship to related provisions.”¹⁴ This is a point that bears repeating since the literatures on the Rome Statute negotiations fundamentally depend on the intersubjective perspectives of particular individuals, rather than objective facts.

Several works have documented the complex process of the Rome Statute negotiations in 1998. For example, Philippe Kirsch and John Holmes provided an account of how the negotiations unfolded in Rome.¹⁵ Philippe Kirsch was a member of the Canadian delegation and served as Chair of the Conference. Holmes was also a part of the Canadian delegation and took a leading role with respect to the provisions regarding complementarity. Kirsch and Holmes focused on the most controversial aspects of the

¹² *Ibid.*

¹³ Roy S. Lee, ed., *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (Boston: Kluwer Law International, 1999), vii.

¹⁴ M. Cherif Bassiouni, “Preface to the 2nd ed.,” in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd edition, ed. Otto Triffterer (C.H. Beck, Hart, Nomos, 2008), xxvi.

¹⁵ Philippe Kirsch and John T. Holmes, “The Rome Conference on an International Criminal Court: The Negotiating Process,” *The American Journal of International Law* 93.1 (1999), 2-12.

Statute as being most important to the success of the Rome Diplomatic Conference—that is, the political issues: the role of the Security Council in relation to the Court; the inclusion of aggression among the core crimes covered by the statute; how the jurisdiction of the Court could be triggered; the power of the Prosecutor to initiate proceedings *proprio motu*; the inclusion of terrorism and drug trafficking; and the inclusion of nuclear weapons among the list of weapons prohibited by the statute.¹⁶ Based on this list of controversial statutory elements, it is apparent that the influence of *realpolitik* heavily affected the institutional design of the ICC, since almost all of these components involved the United Nations Security Council (especially the permanent five members, or ‘P5’) directly or indirectly—a point that is highlighted by most scholars seeking to explain the outcome of the Rome Statute negotiations.¹⁷ To this point, Louise Arbour described the history of the ICC negotiations by article, with a particular emphasis on the inclusion of Security Council powers—i.e. to refer and defer cases at the ICC. She explained, “Many of the concerns surrounding the nature and parameters of the Security Council’s relationship to the ICC were raised at the negotiating stage of the Rome Statute... many delegates expressed concern that, should the two bodies be too closely linked, the ICC could become subject to political maneuvering that would undermine its independence and credibility.”¹⁸

Philippe Kirsch explained that groups of states—particularly the Like-Minded Group (i.e. the sixty plus states that wanted an independent and effective ICC) and its engagement with non-governmental organizations (NGOs), the permanent members of the Security Council, and the Non-Aligned Movement (NAM)—largely structured the controversies and ideological conflicts at the Rome Diplomatic Conference. He said that “[t]he interaction of these groups and their competing views shaped the resulting

¹⁶ Kirsch and Holmes, “The Rome Conference on an International Criminal Court,” 4. For another account of contentious issues taken up in Rome, see also Ronald J. Glossop, “Creating an International Criminal Court: Giant Step Forward for World Law,” *Peace Research* 31.1 (1999): 1-12.

¹⁷ See Lionel Yee, “The International Criminal Court and the Security Council: Articles 13(b) and 16,” in *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results*, ed. Roy S. Lee (Boston: Kluwer Law International, 1999), 143-152.

¹⁸ Louise Arbour, “The Relationship Between the ICC and the UN Security Council,” *Global Governance* 20.2 (2014): 196.

Statute.”¹⁹ Observers most often credit the role of the Like-Minded Group, largely consisting of middle power and weaker states, as an effective counter to the political power wielded by the P5.

The literature has made clear that several delegations in Rome were forced to make compromises with respect to the final version of the Statute. As Rome Statute observer Otto Triffterer explained,

the only alternative to the establishment of a permanent ICC by the Rome Statute would have been the failure of the Conference, in spite of decades of comprehensive preparations, endeavours and various proposals. A compromise therefore, was required in many cases... Closing the Conference without the adoption of a Statute for the ICC would have delayed the whole idea for decades, if not destroyed it altogether. Nobody dared to carry the responsibility for thus refusing the mandate conferred to the Conference by the General Assembly.²⁰

This observation serves as an analytical basis to question ‘how much compromise is too much compromise.’ The institutional design of the Rome Statute reflects quintessentially important design features, particularly as a consequence of balancing the interests of powerful states with smaller coalitions or blocs of states that wanted a strong, independent ICC. Other Rome Statute participants such as Kirsch have similarly explained that “[t]he Statute is not a perfect instrument; it is the product of international negotiations on a sensitive subject between diverse groups. It includes uneasy technical solutions, awkward formulations and difficult compromises. But it is a balanced instrument, strong enough to ensure the effective functioning of the Court and with sufficient safeguards to foster broad support among States.”²¹ Other participants and observers have made similar claims. For example, the Canadian Minister of Foreign Affairs at the time of the Rome Statute negotiations, Lloyd Axworthy, said that “The

¹⁹ Philippe Kirsch, “Introduction,” in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd edition, ed. Otto Triffterer (C.H. Beck, Hart, Nomos, 2008), xxxviii.

²⁰ Otto Triffterer, “Preliminary Remarks: The permanent ICC – Ideal and Reality,” in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd edition, ed. Otto Triffterer (C.H. Beck, Hart, and Nomos, 2008), 36.

²¹ Kirsch, “Introduction,” xli.

Rome Statute is by no means a perfect document and it will need a great deal of refining in the years ahead.”²² It is these imperfections that guide the research project herein.

One form of compromise in the Rome Statute was to make use of ambiguous language to satisfy opposing factions during the negotiations. This strategy has been referred to in the literature as ‘constructive’ or ‘creative’ ambiguity.²³ To be sure, early commentators on the Rome Diplomatic Conference tend to credit the diplomatic solutions and compromises made as fundamental to the successful negotiation of the Rome Statute and ultimately conceptualize the approach taken by the drafters as both effective and necessary for the success of the final package presented to governments for up and down vote in Rome.²⁴ As observers Kirsch and Robinson pointed out, if the strongest possible statute was put forward, it would have received very little political or financial support, and would have received significant opposition from states.²⁵ As such, it appears that the drafters of the Rome Statute were aware that the final document did *not* facilitate the strongest possible ICC, but this was indeed a strategic and diplomatic

²² *Ibid.*, 205.

²³ See Valerie Oosterveld, “The Definition of ‘Gender’ in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?” *Harvard Human Rights Journal* 18 (2005): 55-84; Valerie Oosterveld, “Constructive Ambiguity and the Meaning of ‘Gender’ for the International Criminal Court,” *International Feminist Journal of Politics* 16.4 (2014): 563-580; David Hunt, “The International Criminal Court: high hopes, ‘creative ambiguity’ and an unfortunate mistrust in international judges,” *Journal of International Criminal Justice* 2.1 (2004): 56-70; Leena Grover, “A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court,” *European Journal of International Law* 21.3 (2010): 543-583; Michael Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court,” *Cornell International Law Journal* 32.3 (1999): 522, Scharf stated that Philippe Kirsch described in a personal interview that ‘creative ambiguity’ was an approach to unresolved issues during the Rome Diplomatic Conference. These were issues that were left up to the prosecutor and judges of the ICC to interpret (in the context of the article, the issue of amnesty). For literature that makes use of ambiguity in treaties, see also David McDowall, “Clarity or ambiguity? The withdrawal clause of UN Security Council Resolution 242,” *International Affairs* 90.6 (2014): 1367-1381.

²⁴ See generally Benedetti and Washburn, “Drafting the International Criminal Court Treaty,” 33. The authors described the uniqueness of the Rome Conference in that it did not end in consensus but rather an up and down vote, as part of a take-it or leave-it package deal. The authors explained that “the package is clearly a unique tool to overcome indefinite obstruction by those who do not wish to achieve prompt or any results. The final broad view in Rome was that the package approach was the only way to achieve a statute in five weeks.” See also Philippe Kirsch and Darryl Robinson, “Reaching Agreement at the Rome Conference,” in *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1, eds. Antonio Cassese, Paola Gaeta and John R.W.D. Jones (Oxford: Oxford University Press, 2002): 67-92.

²⁵ Kirsch and Robinson, “Reaching Agreement at the Rome Conference,” 87.

decision.²⁶ As Adriaan Bos explained, “the Rome Statute, as negotiated between the participating States, reflects the current political forces in the international community. A statute that would run counter to what States view as their fundamental common interests is a non-starter.”²⁷ The observers of the negotiations have made clear that the Rome Statute’s fundamentally political foundation affected its construction in discernable ways. This is consistent with the literature surrounding institutionalism, global governance, and institutional design, which overwhelmingly points out that the challenge in creating international institutions is to “provide adequate assurance to nation-states that their interests will not be abused, while at the same time vesting the institutions with the independence needed for them to be effective in promoting global well-being.”²⁸ The reality that the Rome Statute succeeded *without* the support of the most powerful states, especially the United States, and how that has affected the institutional effectiveness of the Court has been a focal preoccupation for many researchers.²⁹ Others have considered

²⁶ See Otto Triffterer, “Part 1. Establishment of the Court, Preliminary Remarks: The Permanent International Criminal Court—Ideal and Reality,” in *Commentary on the Rome Statute of the International Criminal Court—Observers’ Notes, Article by Article*, 2nd edition, ed. Otto Triffterer (C.H. Beck, Hart, Nomos, 2008), 36. Triffterer explains that the failure of the Rome Diplomatic Conference was not an acceptable option for most delegates given the years of work that went into the project. He explains that “A compromise, therefore, was required in many cases.” He also explained that the timing was particularly good for the success of the Rome Conference, given the growing recognition and acceptance of the work of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

²⁷ Adriaan Bos, “The International Criminal Court: A Perspective,” in *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results*, ed. Roy S. Lee (Boston: Kluwer Law International, 1999), 464. See also Richard Dicker and Helen Duffy, “National Courts and the ICC,” *The Brown Journal of World Affairs* 6.1 (Winter/Spring 1999): 53-63. At p. 63: “Completed after four years of complex negotiations, the ICC statute embodies a delicate balance between divergent political interests and a synthesis of the world’s legal traditions.”

²⁸ Cary Coglianese, “Globalization and the Design of International Institutions,” in *Governance in a Globalizing World: Visions of Governance for the 21st Century*, eds. Joseph S. Nye Jr. and John D. Donahue (Washington: Brookings Institution Press, 2000), 298. See also John J. Mearsheimer, “The False Promise of International Institutions,” *International Security* 19.3 (Winter 1994-1995): 5-49; Robert O. Keohane and Lisa Martin, “The Promise of Institutional Theory,” *International Security* 20.1 (Summer 1995): 39-51; John J. Mearsheimer, “A Realist Reply,” *International Security* 20.1 (Summer 1995): 82-93.

²⁹ See generally David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014); Monroe Leigh, “The United States and the Statute of Rome,” *The American Journal of International Law* 95.1 (2001): 124-131; Marcella David, “Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law,” *Michigan Journal of International Law* 20.2 (1999): 337-412; Andrea Betti, “Slay This Monster: The United States and Opposition to the Rome Statute on the International Criminal Court,” *Human Rights Review* 17.4 (2016): 417-438. For an account provided the head of the U.S. Delegation in Rome about the most contentious statutory elements for the United States, See David J. Scheffer, “U.S. Policy and the International Criminal Court,” *Cornell International Law Journal* 32.3 (1999): 529-534. For

how this observed inequality between states has in turn affected the equality of individuals, especially those before the ICC.³⁰

With the benefit of hindsight, some scholars have questioned the compromises made and the architecture of the Rome Statute as explanatory of the ICC's institutional weaknesses. For example, William Schabas opined that “[t]here is as yet not much soul-searching about the role of that the Rome Conference, for all of its glory, may have played in the creation of an institution whose achievements remain a disappointment. Perhaps the architecture of the Court has some serious flaws. Possibly some of the compromises were not as brilliant as was once thought.”³¹ This is precisely the intellectual space that this dissertation occupies—linking the compromises made at the Rome Diplomatic Conference to the problems that some African states have identified with the ICC throughout the course of its operationalization. In many respects, one of the motivating questions that guides this research project can be reduced to ‘how much compromise is too much compromise?’

Some works have considered similar questions in the African context. For example, Lucrecia García Iommi posited that “the absence of meaningful engagement with issues germane to some ICC stakeholders before and during the Rome Conference

a comparative analysis, see Martijn Groenleer, “The United States, the European Union, and the International Criminal Court: Similar values, different interests?” *International Journal of Constitutional Law* 13.4 (2015): 923-944. See also Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca, NY: Cornell University Press, 2013): “The tragedy of the ICC is its incapacity to exercise political jurisdiction over great powers, thus, creating a permanent two-tier justice system in which strong states use global institutions to discipline the weak.” See also Caroline Fehl, “Explaining the International Criminal Court: A ‘Practice Test’ for Rationalist and Constructivist Approaches,” *European Journal of International Relations* 10.3 (2004): 357-394, at 357: “Regarding institutional design, rationalist theory helps identify a tradeoff between a weak court backed by the US and a strong court without US support; a complementary constructivist approach can explain why states opted for the latter.” See also Steven C. Roach, *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (Oxford: Oxford University Press, 2009); Caroline Fehl, *Living with a Reluctant Hegemon: Explaining European Responses to US Unilateralism* (Oxford: Oxford University Press, 2012), Part II: Case Studies (5), The International Criminal Court; Stephen C. Roach, *Politicizing the International Criminal Court: The Convergence of Politics, Ethics, and Law* (Toronto: Rowman and Littlefield Publishers, Inc., 2006).

³⁰ Sarah M.H. Nouwen, “Legal Equality on Trial: Sovereigns and Individuals Before the International Criminal Court,” *Netherlands Yearbook of International Law* 43 (December 2012): 151-181.

³¹ William Schabas, “The dynamics of the Rome Conference,” in *The Elgar Companion to the International Criminal Court*, eds. Margaret deGuzman and Valerie Oosterveld (Edward Elgar Publishing Ltd., 2020), 19. See also Mégret, “The Rome Conference,” 22: “the adoption of the Statute was not the victory that it is sometimes described as being, as much as a complex compromise that contained what have turned out to be many potentialities as well as some severe limitations.”

facilitated the adoption of the Rome Statute, but also plausibly created difficulties for the Court in the long run... it postponed unavoidable conflict over contentious issues and undermined the likelihood that specific stakeholders would develop a sense of ownership over the Statute.”³² From a different point of view, Line Engbo Gissel conducted a study looking at the preferences of African states towards the ICC as expressed in the statements of diplomats made to the United Nations General Assembly from 1993-2003.³³ She concluded that African states wanted a very different kind of Court than the one that was ultimately established. She focused on key areas of departure, namely: understandings of universality, participation, complementarity, court independence and sovereign equality. Max du Plessis and Christopher Gevers have similarly focused on what they refer to as Africa’s ‘four fears’—that is, the understandings upon which African states supported the establishment of the ICC in Rome, which they reduced to the following: (1) the Prosecutor should be able to initiate investigations *without interference from States or the Security Council*; (2) the Court should contribute to furthering the *equality of States*; (3) the Court should be an effective *complement to national criminal justice systems* and *respect the complementary nature of its relationship with such national systems*; and (4) the Court should *contribute to the attainment of international peace*.³⁴ Thus, some scholars have considered how the outcomes in Rome have affected African perceptions of the ICC and the general conclusions hint at the role of sovereignty and the hierarchy of states as both a statutory and operational weakness of the Court.

³² Lucrecia García Iommi, “Al-Bashir didn’t start the fire: diversity, low contestedness, and the adoption of the Rome Statute of the International Criminal Court,” *Cambridge Review of International Affairs* 34.1 (2021): 105-136.

³³ Line Engbo Gissel, “A Different Kind of Court: Africa’s Support for the International Criminal Court, 1993-2003,” *The European Journal of International Law* 29.3 (2018): 725-748.

³⁴ Max du Plessis and Christopher Gevers, “The Sum of Four Fears: African States and the International Criminal Court in Retrospect—Part I,” *OpinioJuris* (7 August 2019), blogpost available at <https://opiniojuris.org/2019/07/08/the-sum-of-four-fears-african-states-and-the-international-criminal-court-in-retrospect-part-i/>; accessed 1 April 2021; Max du Plessis and Christopher Gevers, “The Sum of Four Fears: African States and the International Criminal Court in Retrospect – Part II,” *OpinioJuris* (7 August 2019), blogpost available at <https://opiniojuris.org/2019/07/08/the-sum-of-four-fears-african-states-and-the-international-criminal-court-in-retrospect-part-ii/>; accessed 1 April 2021 [*emphasis in original*].

3.2 African Involvement in the Rome Statute Negotiations

Some literatures offer a more nuanced and/or personalized perspective of the direct involvement of particular participants and/or groups of participants in the Rome Statute negotiation processes.³⁵ Most relevant for the purposes of this research project, Sivu Maqungo and Phakiso Mochochoko have each provided an account of the important role taken by African states, African groups of states, particularly the South African Development Community, and African delegates within the Rome Statute negotiations from the earliest stages of its ideational development, based on their own personal involvement and experience in the processes.³⁶ Indeed, most detailed commentaries of the Rome Statute negotiations have acknowledged the fundamentally important role taken by African states and Africans in the negotiation processes, with a primary acknowledgement of the important role taken on by the South African Development Community (SADC), as well as the regional meeting that resulted in the passing of the Dakar Declaration for the Establishment of the International Criminal Court in 1998—though with mixed degrees of detail and explanatory depth.³⁷

In the context of NGO involvement in Africa throughout the Rome Statute negotiations, Benedetti, Bonneau, and Washburn explained that the NGO Human Rights

³⁵ See generally Triffterer, *Commentary on the Rome Statute of the International Criminal Court*. Each chapter was written by those with the most first-hand engagement and experience in the drafting of the article under discussion.

³⁶ Sivuyile (Sivu) Maqungo, “The African contribution towards the establishment of an International Criminal Court,” *African Yearbook of International Law* 8.1 (2000), 333-350; Phakiso Mochochoko, “Africa and the International Criminal Court,” in *African Perspectives on International Criminal Justice*, eds. Evelyn A. Ankumah and Edward K. Kwakwa (Accra: Africa Legal Aid, 2005).

³⁷ See for example Sanji Mmasenono Monageng, “Africa and the International Criminal Court: Then and Now,” in *Africa and the International Criminal Court*, eds. Gerhard Werle, Lovell Fernandez, and Moritz Vormbaum (T.M.C. Asser Press, 2014): 14-15. The author describes that “African States participated very actively during the whole process.” She details the developments of SADC and the regional conference in Dakar, as well as the role that Africans played during the course of the negotiations in Rome. But see Bos, “From the International Law Commission to the Rome Conference,” 52-53: discussions of controversial elements of the draft statute that emerged during the meetings of the Sixth Committee on the ICC were discussed during meetings of the Afro-Asian Legal Consultative Committee, which was another form of increased participation in the negotiation processes on the continent. Bos also highlighted the important role of SADC and associated conferences that promoted cooperation and coordination of a common position for the establishment of an ICC.

Watch played a particularly supportive role and helped SADC states organize its Regional Conference on the Establishment of an International Criminal Court in Pretoria in September 1997; the government of Senegal and the NGO No Peace Without Justice convened an ‘African Conference on the International Criminal Court’ in Dakar in February 1998.³⁸ The authors also explained that Human Rights Watch and other NGOs “provided funds for developing countries’ legal advisers to attend the intersessional meeting in Syracuse. This allowed for some African delegates to participate more effectively in the negotiations and to associate themselves with the results of the Syracuse meetings.”³⁹ For context, the Syracuse meeting was sponsored by Cherif Bassiouni and was intended to continue the advancement of the draft statute between formal negotiations and facilitate engagement between NGOs and state delegates in the interim period. It is important to note that this literature establishes that NGOs played a significant role in supporting and coordinating African engagement in the Rome Statute negotiations throughout much of the diplomatic processes in the pre-Rome period. It has also been pointed out that “Some 90 African organisations joined the NGO Coalition for an International Criminal Court (CICC). They lobbied in their respective countries for the early establishment of an independent and effective international criminal court.”⁴⁰

Some literatures acknowledge African participation in the Rome Conference but fail to provide the amount of depth necessary for any substantive analysis of that participation. To illustrate this point, former ICC Judge Geoffrey Henderson said that “A careful historical review of the negotiations at Rome must acknowledge the strong and active participation of African States in the drafting and adoption of the Rome Statute... African states actively participated in the debates and did so with high level participants as their delegations were led by Attorney Generals, Ministers of Justice and Ministers of

³⁸ Benedetti, Bonneau, and Washburn, *Negotiating the International Criminal Court*, 82.

³⁹ Ibid., 83. See also Bos, “From the International Law Commission to the Rome Conference,” 53: “In order to stimulate still more participation, a proposal was... submitted to the General Assembly, for the establishment of a special fund for the participation of the least developed countries in the work of the PrepCom. States were requested to contribute voluntarily to the Special Fund. In 1997, thanks to contributions from Canada, Denmark, Finland, and the Netherlands, the Fund had about US \$340,000 at its disposal.” Thus, these states were similarly responsible for increased participation among developing states, including those in Africa.

⁴⁰ Max du Plessis, “The International Criminal Court that Africa Wants,” *Institute for Security Studies*, Monograph 172 (August 2010): 6.

Foreign Affairs.”⁴¹ ICC Judge Kimberly Prost similarly highlighted what she identified as “the important role that African States and Africans played in the adoption of the ICC Statute.”⁴² Max du Plessis opined that “The high ideals and hard work that marked African states’ participation in bringing the ICC to life in Rome should not too easily be forgotten.”⁴³ Others have pointed out that forty-seven of the fifty-four African states attended the Rome Diplomatic Conference.⁴⁴

Notwithstanding this, other literatures have viewed African participation in the Rome Statute negotiations through a much more critical lens. For example, other literatures contend that “it cannot be overlooked that many African states and NGOs actively participated in the development of the Rome Statute. However, cloaked in the universalist language of the ICC, relations of dominance have privileged particular norms of ‘juridical justice’ over others. The reality is that during the negotiations on the Rome Statute, politically ‘weak’ states were rarely in positions to overpower ‘stronger’ ones.”⁴⁵

In order to fill in the necessary gaps and inconsistencies in the narrative, others have outlined why and how Africans were interested and involved in the creation of an ICC. In this vein, Phakiso Mochochoko, the Head of the Jurisdiction, Complementarity and Cooperation Division at the ICC at the time of writing, and a former diplomat from

⁴¹ Geoffrey Andrew Henderson, “20 Years of the Rome Statute of the International Criminal Court,” *Africa Legal Aid Quarterly* (Special Edition 2018): 5.

⁴² Kimberly Prost, “Strengthening Complementarity as a Cornerstone of the Rome Statute System,” *Africa Legal Aid Quarterly* (Special Edition 2018): 8.

⁴³ du Plessis, “The International Criminal Court that Africa Wants,” 6.

⁴⁴ Pacifique Manirakiza, “L’Afrique et le système de justice pénale internationale,” *African Journal of Legal Studies* 3.1 (2009): 21-52. See also Rowland JV Cole, “Africa’s Relationship with the International Criminal Court: More Political than Legal,” *Melbourne Journal of International Law* 13 (2013): 670-698. For the purposes of the dissertation, forty-eight African states attended the Rome Conference, including: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d’Ivoire, Djibouti, Democratic Republic of the Congo, Egypt, Eritrea, Ethiopia, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe. The African states *not* in attendance included Cabo/Cape Verde, Equatorial Guinea, Gambia, Seychelles, and Somalia. It is important to note that the UN does not recognize Saharawi Arab Democratic Republic as a sovereign state. At the time of the Rome Diplomatic Conference, South Sudan had not yet achieved independence and therefore, for the purpose of this dissertation, forty-eight out of a possible fifty-three African states attended the Rome Conference.

⁴⁵ Kamari M. Clarke, Abel S. Knottnerus, and Eefje de Volder, “Africa and the ICC: An Introduction,” in *Africa and the ICC: Perceptions of Justice*, eds. Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (Cambridge: Cambridge University Press, 2016), 11, 12-13.

Lesotho at the time of the Rome Statute negotiations, has explained that African support for an ICC was rooted in a desire to combat gross violations of human rights, which was understood to be inextricably linked to the goal of proliferating regional peace and security, including socioeconomic and political security—what he referred to as the ‘rebirth of Africa’ in the new millennium.⁴⁶ In this sense, African support for an ICC was linked to the primary objective of regional economic development, which Mochochoko argues can be eroded by political instability, violence, and civil war. Thus, he argued that “[i]nvestigating and prosecuting those responsible for serious crimes was amongst the measures that could be taken if Africans were to succeed in making Africa a safe haven for foreign investment and greater economic prosperity.”⁴⁷ This account hints that African interest in the ICC project was rooted in the self-interest of states. With this historical context in mind, Mochochoko detailed the involvement of ‘Africa’ throughout the Rome Statute negotiation processes through several lenses. First, he described the role of African NGOs. Second, he highlighted the importance of SADC, particularly its formulation of ten basic negotiating principles for the establishment of an ICC in 1997. Third, he drew attention to the significance of the African Conference on the ICC, which resulted in the Dakar Declaration in 1998. Last, he explained how the then-Organization of African Unity (OAU) Council of Ministers directed its Member States to support the creation of the ICC.⁴⁸

In the context of the Rome Conference itself, it was explained that African delegates had the SADC Principles and the Dakar Declaration at their disposal, both of which were compatible with the principles of the Like-Minded Group. As such, it was explained that “African delegates thus joined the so-called ‘like minded group’ whose diverse nature made it clear that support for and opposition to an effective Court was not a North South dispute.”⁴⁹ Like former Judge Henderson, Mochochoko pointed out that Africans took leading roles throughout the negotiations by either chairing or coordinating

⁴⁶ Phakiso Mochochoko, “Africa and the International Criminal Court,” in *African Perspectives on International Criminal Justice*, eds. Evelyn A. Ankumah and Edward K. Kwakaw (Accra: Africa Legal Aid, 2005), 242-3.

⁴⁷ *Ibid.*, 246-7.

⁴⁸ *Ibid.*, 249.

⁴⁹ *Ibid.*, 250.

various issues. For example, Egypt chaired the Drafting Committee, South Africa chaired the working group on the Composition of the Court, Malawi coordinated articles on cooperation, Tanzania coordinated discussions on the crime of aggression, and Lesotho chaired the Committee of the Whole and chaired the working group on international cooperation and judicial assistance.⁵⁰ This account provided the necessary context to grasp how and why the level of engagement on the part of African governments and African delegates was so high throughout the Rome Diplomatic Conference. This account similarly explains the significance of that engagement for ‘Africa’ and the Rome Conference more generally.

Other literatures focus on more particular African entities and efforts throughout the negotiation processes. For example, former South African delegate Sivu Maqungo provided a specific and detailed account of SADC’s engagement in the negotiation processes by explaining the role and participation of SADC in the Rome Statute negotiations before, during, and after Rome.⁵¹ Writing in 2000, Maqungo interrogated why, despite longstanding commitment to the Rome Statute during and pre-Rome, no SADC state had yet ratified the statute. Tracing SADC participation in the establishment of an ICC, Maqungo detailed that SADC states initially chose to negotiate in Rome as a bloc because “[i]t had been quite clear that, in order to make an impact on these multilateral negotiations, SADC states had to speak with one voice and thus negotiate as a bloc rather than as ‘small’ individual states.”⁵² This decision resulted in the development of SADC’s ten negotiating principles for the establishment of an ICC, which Maqungo described as an “instruction manual for SADC’s negotiations.”⁵³ In

⁵⁰ Ibid. See also Monageng, “Africa and the International Criminal Court,” 14: “At the Rome Conference, African States actively participated in the debates, and African delegations were mainly led by high calibre officials—Ministers of Justice, Ministers of Foreign Affairs, and Attorneys General. Africa was represented in all commissions. Among the 31 Vice-Presidents of the diplomatic conference, eight were from the African continent, namely Algeria, Burkina Faso, Egypt, Gabon, Kenya, Malawi, Nigeria and Sudan, when the Drafting Committee was chaired by Egypt.”

⁵¹ Sivu Maqungo, “The establishment of the International Criminal Court: SADC’s participation in the negotiations,” *African Security Review* 9.1 (2000): 42-53. Note that Maqungo also provided a general account of the ‘African’ contribution in the establishment of an ICC. See Sivuyile (Sivu) Maqungo, “The African Contribution Towards the Establishment of an International Criminal Court,” *African Yearbook of International Law* 8 (2001): 333-350.

⁵² Ibid.

⁵³ Ibid., 43.

order to implement SADC's principles to the greatest extent possible, SADC delegates sought to occupy "strategic positions within the political structures in the conference."⁵⁴ Linking this account back to the list of positions occupied by African delegates provided by Mochochoko, the fact that each of the listed delegations except Egypt belonged to SADC can be rightly contextualized and better understood. Importantly, however, Maqungo further enriched an account of African involvement throughout the negotiation process by explaining how SADC mobilized its influence over other groupings *within* Africa, specifically the African Group and the Non-Aligned Movement, and other African states generally.⁵⁵ Adding to the initial list of important positions enumerated by Mochochoko, Maqungo added that Namibia was the coordinator of African states with the Non-Aligned Movement group, and Zambia was a member of the Credentials Committee of the conference.⁵⁶ This account planted the seed to better understand how African states intended to shift the balance of the hierarchy of states throughout the negotiation process, which was clearly described as *intentional*.

Indeed, scholars such as Christopher Rudolph have emphasized that a state's acceptance of its place in the "hierarchy of international society" was a relevant factor for understanding national preferences and interests throughout the Rome Statute negotiations, since the ICC's "design had such potentially dramatic implications for international order."⁵⁷ This assertion is firmly linked to the conclusion made by Gissel that "the creation of the ICC was never solely about justice; it was also about sovereign inequality and global order."⁵⁸ Jalloh and Bantekas similarly opined that "in decolonization, the claim of post-colonial governments was not confined merely to the establishment of independent states but invoked also the ability to formulate rules of international law, whether or regional or universal value, as well as to partake in global decision-making; the same is true today in respect of African states in their power

⁵⁴ Ibid.

⁵⁵ Maqungo, "The establishment of the International Criminal Court: SADC's participation in the negotiations."

⁵⁶ Ibid., 44.

⁵⁷ Christopher Rudolph, *Power and Principle: The Politics of International Criminal Courts* (Cornell University Press, 2017), 89.

⁵⁸ Gissel, "A Different Kind of Court," 725.

struggle with Western superpowers.”⁵⁹ In this sense, the literature has situated the ICC negotiations (and the resultant Court) within the broader political context that shaped African diplomacy towards the establishment of the ICC in the 1990s and beyond.

In seeking to explain why SADC states had not yet ratified the Statute, Maungo highlighted the most contentious elements and their compatibility with the SADC principles. Based on this account, the biggest compromises for SADC states were about the ICC’s jurisdiction (SADC states preferred universal jurisdiction) and the role of the Security Council (SADC states preferred that the only role for the Security Council was to refer matters to the prosecutor—deferral capabilities were thus a compromise position). It was explained that “the draft Statute was not the best result that SADC would have hoped for,” but nevertheless, SADC states accepted it at the end of the conference as a package deal.⁶⁰ The way SADC states worked to convince other African states to accept the package deal was further explained by Maungo in a subsequent article.⁶¹ Indeed, the decision to accept the final version of the statute is compatible with the account provided by Kirsch, since he explained that no state or groups of states were wholly satisfied with the final text, yet most accepted it anyway. However, Maungo’s account of SADC’s regional mobilization to accept the final package enriches the explanation as to why states did ultimately accept the final text, especially African states.

In looking to explain why SADC states did not readily ratify the Rome Statute, Maungo opined that SADC states had not yet done so in 2000 because they took the obligation to implement and enforce the treaty seriously and needed to continue to formulate a strategy to this end. This was supported by the fact that SADC held a one-week conference in July 1999 to develop a model for how to implement the Rome Statute

⁵⁹ Charles Chernor Jalloh and Ilias Bantekas, “Introduction,” in *The International Criminal Court and Africa*, eds. Charles Chernor Jalloh and Ilias Bantekas (Oxford: Oxford University Press, 2017), 8. For an analysis of how international institutions reproduce and transform inequalities among states, see Caroline Fehl and Katja Freistein, “(Un)making global inequalities: International institutions in a stratified international society,” *Journal of International Relations and Development* (2020): 251-278; Caroline Fehl and Katja Freistein, “Organising Global Stratification: How International Organisations (Re)Produce Inequalities in International Society,” *Global Society: Journal of Interdisciplinary International Relations* 34.3 (2020): 285-303.

⁶⁰ *Ibid.*, 45.

⁶¹ See Maungo, *The African Contribution Towards the Establishment of an International Criminal Court*.

into domestic law.⁶² In a related vein, Max du Plessis described that SADC state South Africa was the first African state to implement the Rome Statute into domestic legislation and sought to provide a regional model to this end.⁶³ Taken together, this history provides a more holistic view as to why South Africa took a leading role in this regard.

3.2.1 African Commitment to the Rome Statute

There is a growing literature that seeks to answer why states choose to become States Parties to the Rome Statute/ICC, since doing so imposes tremendous sovereignty costs onto states.⁶⁴ This bears particular relevance in the African context, since African states comprise the largest regional bloc of members to the Court. As du Plessis has pointed out, the ICC is “a court which counts amongst its members such a significant coterie of African nations that Africa today is the largest regional bloc represented at the ICC. After the statute was completed, in February 1999 Senegal become [*sic*] the first state party to ratify the Rome Statute. Steadily following suit were a host of African states parties so that today the court enjoys—at least on paper—significant support in the region.”⁶⁵ Similar to the literature on the Rome Statute negotiations, many works *acknowledge* the comparatively high levels of commitment to the Rome Statute among African states, but few substantively analyze or else seek to *explain* this commitment.⁶⁶

⁶² Maqungo, “The establishment of the International Criminal Court: SADC’s participation in the negotiations,” 42.

⁶³ Max du Plessis, “South Africa’s Implementation of the ICC Statute: An African Example,” *Journal of International Criminal Justice* 5.2 (2007): 460-479. See also Max du Plessis, “South Africa’s International Criminal Court Act: Countering genocide, war crimes and crimes against humanity,” *Institute for Security Studies Paper* 172 (November 2008). See also Max du Plessis and Jolyon Ford, *Unable or unwilling? Case studies on domestic implementation of the ICC Statute in selected African countries* (Institute for Security Studies Monograph Series, No. 141, March 2008).

⁶⁴ See Beth A. Simmons and Allison Danner, “Credible Commitments and the International Criminal Court,” *International Organization* 64.2 (2010): 225-256. See also Terrence L. Chapman and Stephen Chaudoin, “Ratification Patterns and the International Criminal Court,” *International Studies Quarterly* 57.2 (2013): 400-409. For an example from the human rights literature, see Oona A. Hathaway, “Why Do Countries Commit to Human Rights Treaties?” *Journal of Conflict Resolution* 51.4 (2007): 558-621. See also Richard A. Nielsen and Beth A. Simmons, “Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime?” *International Studies Quarterly* 59.2 (2015): 197-208.

⁶⁵ du Plessis, “The International Criminal Court that Africa Wants,” 21.

⁶⁶ See for example Tim Murithi, “Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court,” in *Africa and the International Criminal Court*, eds. Gerhard Werle, Lovell Fernandez, and Moritz Vormbaum (The Hague: T.M.C. Asser Press,

Scholars such as Vilmer claim that African commitment to the Rome Statute “can be traced to the end of the Cold War, when newly independent African countries sought to demonstrate a commitment to good governance and membership of the ‘new world order’ by signing international treaties.”⁶⁷ While this offers some explanatory value, it fails to adequately interrogate why newly independent states might be willing to give up any amount of sovereignty. Referring to the explanation provided by Mochochoko, it might be for reasons of self-interest; that is, to promote socioeconomic development and regional stability.⁶⁸ Other reasons might include an aim to achieve “the goal of ridding the continent of its deserved reputation as a collage of despots, crackpots and hotspots where impunity for too long has followed serious human rights violations.”⁶⁹ Yet, it is important to consider the hypothesis presented by Maqungo that “[i]t is expected that SADC states, *due to the contribution they made in the process to establish the ICC*, will be among the first sixty states to ratify the Statute of the Court.”⁷⁰ This explanation links political and normative commitment—at least on the part of SADC states—to explain the potential reason(s) for ratification.

Relying on the human rights literature, scholars such as Goldsmith and Posner have argued that most states ratify multilateral treaties because of a ‘coincidence of interest’—in other words, ratifying human rights treaties “often requires many of the parties to do nothing different from what they have done in the past.”⁷¹ Oona Hathaway has posited that treaty ratification can best be explained by considering the domestic constraints it places on states. She argued that “states with less democratic institutions will be no less likely to commit to

2014), 174: “African countries were actively involved in the creation of the International Criminal Court and played a crucial role at the Rome conference when the Court’s Statute was drafted and adopted. To date, Africa represents the largest regional grouping of countries within the ICC’s Assembly of States Parties.”

⁶⁷ Jean-Baptiste Jeangène Vilmer, “The African Union and the International Criminal Court: counteracting the crisis,” *International Affairs* 92.6 (2016): 1329.

⁶⁸ Mochochoko, “Africa and the International Criminal Court,” 242-243.

⁶⁹ du Plessis, “The International Criminal Court that Africa Wants,” 25.

⁷⁰ Maqungo, “The Establishment of the International Criminal Court: SADC’s participation in the negotiations,” 49 [*emphasis added*].

⁷¹ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005), 89.

human rights treaties if they have poor human rights records because there is little prospect that the treaties will be enforced. Conversely, states with more democratic institutions will be less likely to commit to human rights treaties if they have poor human rights records—precisely because treaties are likely to lead to changes in behavior.”⁷²

Others point out that the ICC operates under the principle of complementarity: i.e. that it is complementary to national justice systems and can only intervene if a state is unwilling or unable to prosecute international crimes. Therefore, the intent is to bolster national criminal justice responses, ultimately reducing overall sovereignty costs. As John Holmes has explained, “ironically, the provisions of the Rome Statute itself contemplate an institution that may never be employed.”⁷³ In a similar vein, Anne-Marie Slaughter said that:

One of the most powerful arguments for the ICC is not that it will be a global instrument of justice itself—arresting and trying tyrants and torturers worldwide—but that it will be a backstop and trigger domestic forces for justice and democracy. By posing a choice—either a nation tries its own or they will be tried in The Hague—it strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle.⁷⁴

Former ICC Prosecutor Luis Moreno-Ocampo similarly explained that “as a consequence of complementarity, the number of cases that reach the Court should not measure its efficiency. On the contrary, the absence of trials before this Court,

⁷² Oona A. Hathaway, “Why Do Countries Commit to Human Rights Treaties?” *Journal of Conflict Resolution* 51.4 (2007): 588.

⁷³ John T. Holmes, “Complementarity: National Courts *versus* the ICC,” in *The Rome Statute of the International Criminal Court: A Commentary*, Volume 1, eds. Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (Oxford: Oxford University Press, 2002), 667.

⁷⁴ Anne-Marie Slaughter, “Not the Court of First Resort,” *The Washington Post* (21 December 2003), available at <https://www.washingtonpost.com/archive/opinions/2003/12/21/not-the-court-of-first-resort/8f2e6532-eb23-4311-b077-c6278115c542/>; accessed 2 February 2021; see also Rahmat Mohamad, “The role of the International Criminal Court and the Rome Statute in international criminal justice standard setting,” in *Shifting Global Powers and International Law: Challenges and Opportunities*, eds. Rowena Maguire, Bridget Lewis, and Charles Sampford (New York: Routledge, 2013), 105.

as a consequence of the regular functioning of national institutions, would be a major success.”⁷⁵ On this basis, the literature on complementarity mitigates sovereignty concerns to a sizable degree.

However, in the context of the Rome Statute and African states, there were/are reasonable concerns about the capacity of national legal institutions to adequately respond to international criminal law violations and ratification often required/requires significant change in behavior. It is perhaps even more important to note, as scholars have, that domestic institutional failure/collapse would actually increase the chances of the treaty being enforced—that is, for the ICC to intervene due to the national states’ inability to respond to violations of international criminal law therefore *increasing* the associated sovereignty costs.⁷⁶ Some have proposed that weak states ratified the Rome Statute to increase development aid and/or assistance because “[p]oorer states might have seen the Rome Statute as a key to unlock greater flows of official development assistance (ODA), even while intellectuals and government advisers in the Global South might have seen the ICC’s mandate as an extension of the West’s neocolonial projects.”⁷⁷

Such claims have been discredited in the human rights literature, which could have analogous application in the international criminal law discourse.⁷⁸

This is supported by Mochochoko who explained that:

Contrary to the view that the ICC was shoved through the throats of unwilling Africans who were dragged screaming and shouting to Rome

⁷⁵ As quoted in William W. Burke-White, “Reframing positive complementarity,” in *The International Criminal Court and Complementarity: From Theory to Practice*, eds. Carsten Stahn and Mohamed M. El Zeidy (Cambridge University Press, 2011), 341.

⁷⁶ See Nicole Dietelhoff, “The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case,” *International Organization* 63.1 (2009): 33-65. See, at 42: “Plagued by military uprisings and failing state structures, these countries could realistically expect their heads of state to be summoned before the court, so they had to expect the highest costs.”

⁷⁷ Sandeep Prasanna, “Did some African states ratify the Rome Statute to marginalize political competitors?” ICC Forum; available at iccforum.com/forum/permalink/91/1198; accessed 1 April 2021.

⁷⁸ See Richard A. Nielsen and Beth A. Simmons, “Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime?” *International Studies Quarterly* 59.2 (2015): 197-208. At 205 the authors argue that there is “practically no support for the idea that treaty ratification produces significant increases in aid.”

and who had no alternative but to follow their Western Masters under the threat of withholding of economic aid if they did not follow, the historical developments leading up to the establishment of the Court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.⁷⁹

On this basis, it becomes clear that the Africans who participated and published about their experience in the establishment of the ICC (i.e. Mochochoko and Maqungo) emphasize the authenticity of African involvement in the enterprise *and* the normative valuation of the project that undergirds and helps to explain the comparatively high levels of commitment on the part of ‘Africa.’ However, both of these accounts emanate from experience within SADC (Mochochoko represented Lesotho; Maqungo, South Africa) and this could be viewed as problematic for the formation of a regional explanatory account. Indeed, there is no monolithic ‘African’ experience or position and the lack of literature from outside of SADC can be reasonably framed as a significant gap that is at least worth pointing out.

Other scholars have provided more ‘generalizable’ theories about why states (including African states) ratify the Rome Statute. For example, Simmons and Danner have explained Rome Statute ratification in terms of “credible commitments theory.” The authors argued that states that are the most and least likely to experience ICC intervention have most readily committed to the Court. Conversely, states with credible means to conduct international criminal law trials have not. The authors argue that “ratification of the ICC is associated with tentative steps towards violence reduction and peace in those countries precisely least likely to be able to commit credibly to forswear atrocities.”⁸⁰

⁷⁹ Mochochoko, “Africa and the International Criminal Court,” 243.

⁸⁰ Simmons and Danner, “Credible Commitments and the International Criminal Court,” 225. See also Tom Ginsburg, “The Clash of Commitments at the International Criminal Court,” *Chicago Journal of International Law* 9.2 (2009): 499-514. Ginsburg acknowledges the argument proposed by Simmons and Danner that states use the ICC to make promises to deter atrocity credible. He also points out that the ICC has a legal and political obligation to make good on its promise of prosecution in order to be credible.

Chapman and Chaudoin reach a different conclusion and argue that “countries for whom compliance is likely to be easiest—democracies with little internal violence—are the most likely countries to join the ICC. On the other hand, countries with the most to fear from ICC prosecution, nondemocracies with weak legal systems and a history of domestic political violence, tend to avoid ratification.”⁸¹ This argument falls in line with the coincidence of interest argument promoted by Goldsmith and Posner, but does not do a sufficient job of explaining why African states comprise the largest regional bloc of States Parties to the Rome Statute. The authors acknowledge and accept this theoretical incompatibility and term it the “Sub-Saharan Africa Exception.”⁸² What Chapman and Chaudoin do provide, however, is a theoretical explanation for this exception through an examination of *domestic* political factors or motivations for Rome Statute ratification in African contexts. The authors raise the important point that African *leaders* may commit to the Rome Statute for their own political interests and purposes, that is that they “are trying to make a strong commitment to prosecute, without necessarily committing to *being* prosecuted.”⁸³ This has particular application in African states that have instrumentalized the ICC to prosecute rebels or warlords while simultaneously insulating the sitting government. Indeed, the political instrumentalization of the ICC by African leaders has started to occupy an important space in the literature that seeks to explain ongoing African commitment to the Rome Statute, despite widespread criticism and opposition from the African Union (AU) and some African states.⁸⁴

However, he contends that states and the international community may need to abandon an international prosecution to appear credible—that is, there may be a need to promise not to prosecute, or to grant an amnesty. This he frames as a clash of commitments and uses the indictment of Omar Al-Bashir as an example of such a clash. Thus, Ginsburg appears to challenge the appropriateness of international prosecutions as an absolute means of obtaining credibility for states and the international community.

⁸¹ Terrence L. Chapman and Stephen Chaudoin, “Ratification Patterns and the International Criminal Court,” *International Studies Quarterly* (2012): 1.

⁸² *Ibid.*, 4.

⁸³ *Ibid.*, 5.

⁸⁴ See for example Oumar Bar, *States of Justice: The Politics of the International Criminal Court* (Cambridge: Cambridge University Press, 2020), at 161: “Indeed, the ICC is entangled in the wider web of political instrumentalization and strategic calculations, even from states that are presumed to be weaker in the international system.” He also notes that “Joining the ICC and working with international tribunals can

3.3 The Decline of the Africa-ICC Relationship: head of state immunity, selectivity, bias, and double-standards

A proliferation of literature on the relationship between Africa and the ICC started to emerge following the ICC's indictment of Sudanese President Omar al-Bashir and the African Union's direct opposition to those indictments. Al-Bashir was a sitting head of state of a non-States Party (Sudan) at the time that the arrest warrant was issued by way of referral by the United Nations Security Council. The African Union strongly opposed the ICC's indictment of a sitting head of state for legal reasons, claiming that it is a violation of customary international law, and also for political reasons, claiming that the decision to indict al-Bashir disrupted sensitive peace processes that were underway in Darfur.⁸⁵ Thus, the AU adopted a policy of non-cooperation with the ICC for the arrest and surrender of al-Bashir and obliged its member states to allow indicted leaders onto their territory in order to facilitate regional peace and security goals. The literature can be largely parsed into works that consider the following issues: (a) the legality of ICC

be a mere cost-benefit analysis for states that are eager to find avenues to prosecute their enemies and at the same time shielding their agents;" see Ba, *States of Justice*, 33. See also Kenneth A. Rodman and Petie Booth, "Manipulated Commitments: The International Criminal Court in Uganda," *Human Rights Quarterly* 35.2 (2013): 271-303; Laurence R. Helfer and Anne E. Showalter, "Opposing International Justice: Kenya's Integrated Backlash Strategy against the ICC," *International Criminal Law Review* 17.1 (2017): 1-46; Gabrielle Lynch, *Performances of Injustice: The Politics of Truth, Justice and Reconciliation in Kenya* (Cambridge: Cambridge University Press, 2018); William A. Schabas, "Complementarity in Practice: Some Uncomplimentary Thoughts," 20th Anniversary Conference of the International Society for the Reform of Criminal Law (23 June 2007); Catherine Gegout, "The International Criminal Court: limits, potential and conditions for the promotion of justice and peace," *Third World Quarterly* 34.5 (2013): 800-818; Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics and International Affairs* 21.2 (2011): 179-198; Mattia Cacciatori, "When Kings Are Criminals: Lessons from ICC Prosecutions of African Presidents," *International Journal of Transitional Justice* 12.3 (2018): 386-406; Sara Kendall, "'UhuRuto' and Other Leviathans: The International Criminal Court and the Kenyan Political Order," *African Journal of Legal Studies* 7.3 (2014): 399-427; Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press, 2018).

⁸⁵ See for example Ilias Bantekas, "Sequencing Peace and Justice in Post-Conflict Africa," in *The International Criminal Court and Africa*, eds. Charles Chernor Jalloh and Ilias Bantekas (Oxford: Oxford University Press, 2017), 91-110; Abel S. Knottnerus, "The AU, the ICC, and the Prosecution of African Presidents," in *Africa and the ICC: Perceptions of Justice*, eds. Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (Cambridge: Cambridge University Press, 2016), 152-184, at 152: "the AU has argued that by prosecuting African leaders the ICC jeopardizes the promotion of peace and stability in Africa."

indictments against sitting heads of state;⁸⁶ (b) evaluations of the political appropriateness of such indictments as they relate to peace and justice objectives;⁸⁷ (c) normative evaluations about the AU's response to such indictments with respect to claims of selectivity, bias, and double-standards;⁸⁸ (d) analyses seeking to explain why some African states chose to prioritize their obligations to the AU over the ICC by refusing to arrest and surrender indicted suspects (particularly Omar al-Bashir, former President of Sudan) to the Court and the related nexus of competing obligations and duties.⁸⁹

⁸⁶ See generally Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?" *Journal of International Criminal Justice* 7.2 (2009): 315-332; Paola Gaeta and Patryk I Labuda, "Trying Sitting Heads of State: The African Union versus the ICC in the *Al Bashir* and *Kenyatta* Cases," in *The International Criminal Court and Africa*, eds. Charles Chernor Jalloh and Ilias Bantekas (Oxford: Oxford University Press, 2017), 138-162; Dapo Akande, "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities," *Journal of International Criminal Justice* 7 (2009): 333-352; Asad G. Kiyani, "Al-Bashir and the ICC: The Problem of Head of State Immunity," *Chinese Journal of International Law* 12 (2013): 467-508; Micaela Frulli, "Piercing the Veil of Head-of-State Immunity: The Taylor Trial and Beyond," in *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law*, ed. Charles Chernor Jalloh (Cambridge: Cambridge University Press, 2013), 325-339; Jens M. Iverson, "The Continuing Functions of Article 98 of the Rome Statute," *Goettingen Journal of International Law* 4 (2012): 131-151; Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill, Nijhoff, 2019); Johan D van der Vyver, "Prosecuting the President of Sudan: A dispute between the African Union and the International Criminal Court," *African Human Rights Law Journal* 11 (2011): 683-698; Sarah Williams and Lena Sherif, "The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court," *Journal of Conflict and Security Law* 14.1 (2009): 71-92; Jessica Needham, "Protection or Prosecution for Omar Al Bashir? Changing State of Immunity in International Criminal Law," *Auckland University Law Review* 17 (2011): 219-248; Sophie Papillon, "Has the United Nations Security Council Implicitly Removed Al-Bashir's Immunity?" *International Criminal Law Review* 10.2 (2010): 275-288.

⁸⁷ See generally Allard Duursma and Tanja R Müller, "The ICC indictment against Al-Bashir and its repercussions for peacekeeping and humanitarian operations in Darfur," *Third World Quarterly* 40.5 (2019): 890-907. The authors argue that the ICC indictment against Al-Bashir can not only be detrimental to peace efforts but also "negatively affect everyday practices of peacekeepers and humanitarian workers."

⁸⁸ See generally Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," *German Yearbook of International Law* 60 (2017): 43-68; Max du Plessis, Charles Chernor Jalloh, and Dapo Akande, "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court," *African Journal of Legal Studies* 4.1 (2011): 5-50; Christa-Gaye Kerr, "Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined," *Michigan Journal of International Law* 41.1 (2020): 195-225; Manisuli Ssenyonjo, "The International Criminal Court and the Warrant of Arrest for Sudan's President Al-Bashir: A Crucial Step Towards Challenging Impunity or a Political Decision?" *Nordic Journal of International Law* 78.3 (2009): 397-431; Simon M Weldehaimanot, "Arresting Al-Bashir: The African Union's Opposition and the Legalities," *African Journal of International and Comparative Law* 19.2 (2011): 208-235.

⁸⁹ See generally Franziska Boehme, "'We Chose Africa': South Africa and the Regional Politics of Cooperation with the International Criminal Court," *International Journal of Transitional Justice* 11.1 (2017): 50-70; Crystal Mokoena Untalimile and Ademola Oluborode Jegede, "Politics or Law: Reflections on the aftermath of the Omar Al-Bashir saga and South Africa's intended withdrawal from the ICC,"

Others have focused on explaining the reasons why the relationship between the AU, some African states, and the ICC began to decline.⁹⁰ In making sense of African discontent towards the ICC, scholars have identified the significance of “Africa’s tortured place in geopolitics.”⁹¹ It has been pointed out that “[e]qually important is the need for sensitivity to the history of Africa’s troubled relationship with international law and how the impact of the power structure of the international system on the ICC shapes how the ICC is perceived in Africa.”⁹² In this vein, Mutua argued that “[i]n my view, the ICC will not be able to blunt the charges of a racist agenda if it cannot produce indictments of senior officials from continents other than Africa.”⁹³ Such a view is not wholly sympathetic with the AU position, but also acknowledges the reality of the ICC’s behaviour that validates regional criticisms and tugs at historical and emotional sensitivities in many respects.

Journal of African Foreign Affairs 5.2 (2018): 91-107; Max du Plessis and Christopher Gevers, “South Africa’s Foreign Policy and the International Criminal Court: Of African Lessons, Security Council Reform, and Possibilities for an Improved ICC,” in *African Foreign Policies in International Institutions*, eds. Jason Warner and Timothy M. Shaw (Palgrave Macmillan, 2018), 199-214; Kurt Mills, “‘Bashir is Dividing Us’: Africa and the International Criminal Court,” *Human Rights Quarterly* 34.2 (2012): 404-447; Dire Tladi, “The African Union and the International Criminal Court: The Battle for the Soul of International Law,” *South African Yearbook of International Law* 34.1 (2009): 57-69; Jadranka Petrovic, Dale Stephens, and Vasko Nasteovski, “To arrest or not to arrest the incumbent head of state: The ‘Bashir’ case and the interplay between law and politics,” *Monash University Law Review* 42.3 (2016): 740-782; Ntombizozo Dyani-Mhango, “South Africa’s dilemma: immunity laws, international obligations, and the visit by Sudan’s president Omar Al Bashir,” *Washington International Law Journal* 26.3 (2017): 535-571. For an evaluation of the AU’s ability to influence international perceptions of the ICC as a consequence of al-Bashir’s indictment, see Martin Welz, “The African Union Beyond Africa: Explaining the Limited Impact of Africa’s Continental Organization on Global Governance,” *Global Governance* 19.3 (2013): 425-441.

⁹⁰ See generally Gino Naldi and Konstantinos D Magliveras, “The International Criminal Court and the African Union: A Problematic Relationship,” in *The International Criminal Court and Africa*, eds. Charles Chernor Jalloh and Ilias Bantekas (Oxford: Oxford University Press, 2017), 111-137. The authors argue that the arrest warrants issued against al-Bashir was the turning point in the relationship. They explained that the AU viewed the ICC’s application of international criminal law principles against African officials as the root of the problem. The explanation why the AU and some African states did not enforce the arrest warrant against al-Bashir, it is argued, is because “the leaders of these states fear that one day they will be indicted by the ICC and, in acting as they do now, want to ensure that they will also enjoy full immunity.”

⁹¹ Makau W. Mutua, “Africans and the ICC: Hypocrisy, Impunity, and Perversion,” in *Africa and the ICC: Perceptions of Justice*, eds. Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (Cambridge: Cambridge University Press, 2016), 47.

⁹² Solomon A. Dersso, “The ICC’s Africa Problem: A Spotlight on the Politics and Limits of International Criminal Justice,” in *Africa and the ICC: Perceptions of Justice*, eds. Kamari M. Clarke, Abel S. Knottnerus, and Eefje de Volder (Cambridge: Cambridge University Press, 2016), 61.

⁹³ Mutua, “Africans and the ICC,” 47.

Aside from these more political considerations, it is also worth noting that some scholars have *agreed* with the AU position regarding al-Bashir's immunity under customary international law,⁹⁴ while others have provided legal pathways intended to strip al-Bashir's alleged immunity. For example, some have argued that the Security Council referral made Sudan a *de facto* States Party to the ICC.⁹⁵ Others say that under customary international law, immunities do not apply to core international crimes such as those covered by the Rome Statute, regardless of jurisdiction.⁹⁶ A survey of the literature indicates that the immunities issue has been vexing, contentious, and variously understood by international legal experts and the ICC as an institution, which has exacerbated tensions with the AU and some African states. The formulation of a modality to resolve the immunities issue remains a vital priority for the legitimacy of the Court and international law (including criminal *and* customary legal standards).

3.4 The African Union (AU) and the Malabo Protocol: 'African Solutions to African Problems'

There is a growing literature that evaluates the African Union's steps to regionalize international criminal law in Africa through the expansion of the African Court of Justice and Human Rights (ACJHR) vis-à-vis the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of

⁹⁴ See Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?"; Gaeta and Labuda, "Trying Sitting Heads of State,"; Kiyani, "Al-Bashir and the ICC"; and Tladi, "Of Heroes and Villains, Angels and Demons," 67: "As long as supporters of the ICC's claim to legal neutrality are willing to turn a blind eye to the ICC's baseless interpretation of international law in order to catch one man [al-Bashir] (who may, by the way, catch a bad cold and die tomorrow), and as long as supporters of the AU's objective of independence and non-colonialism continue to turn a blind eye to the AU's apparent insistence on protecting heads of State, the AU and the ICC will continue to play hero and villain games at the expense of the African continent." Tladi argues that the AU's legal arguments with respect to al-Bashir's immunity were sound, but similar arguments launched against the ICC's indictment of Uhuro Kenyatta (leader of a States Party to the ICC) were unjustifiable.

⁹⁵ See generally Dapo Akande, "The Legal Nature of the Security Council Referrals to the ICC and its Impact on Al Bashir's Immunity," *Journal of International Criminal Justice* 7 (2009): 333. See also: Samar El-Masri, "The legality of the International Criminal Court's decision against Omar Al-Bashir of Sudan," *International Journal* 66.2 (2011): 371-390.

⁹⁶ See Guénaél Mettraux, John Dugard, and Max du Plessis, "Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa," *International Criminal Law Review* 18.4 (2018): 577-622.

Justice and Human Rights (Malabo Protocol). The proposed Malabo Protocol grants the regional court jurisdiction over international crimes, including those covered in the Rome Statute. This institutional overlap has led some to frame the Malabo Protocol in the context of regime complexes, that is, “the way in which two or more institutions intersect in terms of their scope and purpose.”⁹⁷ Scholars such as Sirleaf have explained that the ICC’s “institutional crisis created a space for regional innovation.”⁹⁸ Others including Jackson say that the likelihood of the creation of regional tribunals with overlapping subject matter jurisdiction with the ICC should be expected over time whether regional, multilateral, or bilateral.⁹⁹

Some scholars have attempted to explain why the AU would want to regionalize international criminal justice in the first place. For example, Tim Murithi opined that “the key issue is that the continental body views its relationship with the International Criminal Court as having deteriorated to such a point that it is exploring actively how to make the Court’s presence in Africa an irrelevancy in the future.”¹⁰⁰ In a similar vein, Gaeta and Labuda couched the Malabo Protocol as reactive to the Court and more particularly as “[o]ne of the surprising consequences of the AU’s conflict with the ICC.”¹⁰¹ Few scholars have considered potentiality for the coexistence of the ICC and the AU Court.¹⁰² Rather, most works have focused on the merits and acceptability of the

⁹⁷ Matiangai V.S. Sirleaf, “Regionalism, Regime Complexes, and the Crisis in International Criminal Justice,” *Columbia Journal of Transnational Law* 54 (2015-2016): 699.

⁹⁸ *Ibid.*

⁹⁹ Miles Jackson, “Regional Complementarity: The Rome Statute and Public International Law,” *Journal of International Criminal Justice* 14.5 (2016): 1061-1072. Other scholars have pointed out that the Rome Statute does not restrict States Parties from entering into other treaties that address similar subject matter. See Ademola Abass, “Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges,” *European Journal of International Law* 24.3 (2013): 933-946. Abass does not view the expansion of the ACJHR as a positive potential development. Note, at 946: “the future of international criminal justice in Africa lies not in the duplicity of international judicial institutions but in the ICC’s prosecutors discharging their duties and responsibilities with candour and impartiality.” In other words, if the ICC (especially the Prosecutor) is operating effectively, there will be no need for an institution with an overlapping mandate.

¹⁰⁰ Murithi, “Between Political Justice and Judicial Politics,” 189.

¹⁰¹ Paola Gaeta and Patryk I Labuda, “Trying Sitting Heads of State: The African Union versus the ICC in the *Al Bashir* and *Kenyatta* Cases,” in *The International Criminal Court and Africa*, eds. Charles Chernor Jalloh and Ilias Bantekas (Oxford: Oxford University Press, 2017), 160.

¹⁰² But See Abel S. Knottnerus and Eefje de Volder, “International Criminal Justice and the Early Formation of an African Criminal Court,” in *Africa and the ICC: Perceptions of Justice*, eds. Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (Cambridge: Cambridge University Press, 2016).

proposal without considering how regional courts such as the ACJHR could fit within the Rome Statute System under the auspices of the complementarity principle.

To illustrate this point, some scholars have challenged the Malabo Protocol on the grounds that it is merely a response to the ICC's prosecution of African presidents and is an attempt to insulate African leaders, since the Malabo Protocol provides immunity for sitting heads of state, which is not afforded under the Rome Statute.¹⁰³ For example, Fred Aja Agwu opined that "the African leaders' decision to imbue the African Court with a criminal jurisdiction and ensure a soft landing for those of them that committed heinous crimes against their populations raises a red flag for Africa on the standards of complementarity in the international criminal justice system, especially as anticipated by the Rome Statute that created the ICC."¹⁰⁴ Other scholars have argued that the Malabo Protocol's immunity clause is 'self-defeating' because "[i]t calls into question seemingly settled norms of customary international law... Moreover, the immunities clause contravenes the law of some African countries... which have adapted their internal legislation to the Rome Statute. Most seriously, giving immunity to African leaders undercuts the AU's criticisms of the ICC's system of 'selective justice' and suggests that the proposed African Court is little more than a thinly veiled attempt to challenge the ICC's authority over high-ranking African politicians."¹⁰⁵ Thus, there is a real concern raised in the literature about the intent of the Malabo Protocol and how it relates to political insulation for African leaders.

¹⁰³ See generally Dire Tladi, "The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff," *Journal of International Criminal Justice* 13.1 (2015): 3-17. See also Knottnerus and de Volder, "International Criminal Justice and the Early Formation of an African Criminal Court"; Gaeta and Labuda, "Trying Sitting Heads of State," 160-161: "Although the proposed African Court is beset by controversy, in particular with regard to its overambitious mandate and lack of financial independence, it is arguably the issue of immunities that has garnered most criticism from international observers." See also Max du Plessis, "Implications of the AU Decision to give the African Court Jurisdiction over International Crimes," *Institute for Security Studies Paper* 235 (June 2012), 5-11; Max du Plessis, "Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders," *Institute for Security Studies Paper* 278 (November 2014).

¹⁰⁴ Fred Aja Agwu, *Africa and International Criminal Justice: Radical Evils and the International Criminal Court* (Routledge, New York, 2020), Preface, xii. See also Fred Aja Agwu, "The African Court of Justice and Human Rights: the future of international criminal justice in Africa," *Africa Review* 6.1 (2014): 30-43.

¹⁰⁵ Gaeta and Labuda, "Trying Sitting Heads of State," 161. See also Jutta F. Bertram-Nothnagel, "A Seed for World Peace Growing in Africa: The Kampala Amendments on the Crime of Aggression and the Monsoon of Malabo," in *The International Criminal Court and Africa: One Decade On*, ed. Evelyn A. Ankumah (Intersentia, 2017), 347-400.

On the other hand, Abel S. Knottnerus and Eefje de Volder argued that, “[i]n response to opponents of the AU’s initiative to endow the African Court with criminal jurisdiction, we argue that the concerns that have been voiced about the intentions of African leaders and about possible jurisdictional battles with the ICC are exaggerated... the Protocol has express value... even if the Protocol will not enter into force... its adoption matters, because it articulates a regional vision on the future of international criminal justice.”¹⁰⁶ This is consistent with the ‘official AU position,’ which is that “the African Court’s wider jurisdictional mandate is not a challenge to the ICC’s authority but rather an ‘African solution to African problems.’”¹⁰⁷ Kamari Maxine Clarke also drew attention to the importance of the Pan-Africanism that undergirds the Malabo Protocol. Her study explained “how the drafters of the Malabo Protocol for the ACJHR sought to gain authority over the sequencing of peace and justice interventions by discursively recalling the deep inequalities in Africa’s histories and infrastructures, while innovating new ways for political actors to navigate judicial contexts.”¹⁰⁸ As such, Clarke uses the immunity provision in Malabo to spin the argument of political insulation on its head by emphasizing that such an approach allows for the prioritization of justice responses *outside* of retributive or court-based mechanisms, while simultaneously addressing the crimes that are a direct byproduct of the structural inequality that stems from colonialism. Thus, scholars have acknowledged that “the postcolonial condition is the one in which the globally disenfranchised navigate the international justice system, which still consecrates the West as incapable of committing criminal acts.”¹⁰⁹ This acknowledgement is part of the discourse that surrounds calls for African solutions to

¹⁰⁶ Abel S. Knottnerus and Eefje de Volder, “International Criminal Justice and the Early Formation of an African Criminal Court,” in *Africa and the ICC: Perceptions of Justice*, eds. Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (Cambridge: Cambridge University Press, 2016), 377-378. Other scholars agree with this position. See Matiangai Sirleaf, “The African Justice Cascade and the Malabo Protocol,” *International Journal of Transitional Justice* 11 (2017): 71-91. At 71: “the Malabo Protocol offers the Continent an important, alternative vision of regional criminal justice... the regional court could arguably tailor criminal accountability to the context, needs and aspirations of the Continent.”

¹⁰⁷ Gaeta and Labuda, “Trying Sitting Heads of State,” 161.

¹⁰⁸ Kamari Maxine Clarke, *Affective Justice: The international Criminal Court and the Pan-Africanist Pushback* (London: Duke University Press, 2019), 183.

¹⁰⁹ Oumar Ba, “International Justice and the Postcolonial Condition,” *Africa Today* 63.4 (Summer 2017): 44.

African problems and recontextualizes African discontent with the behaviour of the ICC and the desire to pursue Afro-centric alternatives.

3.5 Part II. Theoretical Approach

As determined from the summary of the literature above, much of the discourse surrounding the Rome Statute negotiations is descriptive as opposed to theoretical and/or explanatory. In the context of the Africa-ICC relationship, the theoretical literatures tend to focus on African criticisms of the Court as such, with little consideration of their origins. On this pattern, analyses that consider similar questions to those of the dissertation tend to focus on the years after the ICC's establishment, rather than the pre-Rome or Rome Conference time period. When works do consider the pre-Rome time period, they have failed to consider African positions at the Rome Conference itself, or else fail to consider how African conceptualizations of an ideal ICC can be used to explain the origins of the criticisms towards the resultant Court. As such, consideration of African engagement in the Rome Statute negotiation processes increases the explanatory depth and facilitates a better understanding of the criticisms expressed by some African states and the African Union towards the Court. It also fosters a greater appreciation of the empirical significance of the normative commitment that African states have towards the ICC, which at times has superseded rational self-interest and directly informed African state behaviour and policy preferences with respect to sustained commitment to the Rome Statute.

It is argued here that the behaviour of African states in relation to the ICC can only be sufficiently explained through the use of a constructivist theoretical approach. The remainder of this section will unpack why constructivism is the preferred lens through which to answer each of the four guiding research questions of the dissertation, over and above other less suitable theories of international relations, which have narrowed to include realism/rational choice; postcolonialism; and liberal institutionalism/institutional design. It is argued that constructivism offers a theoretical basis to both predict and explain the behaviour of African states in relation to the ICC based on its inclusion of the empirical value of rational, normative, *and* ideational factors. To frame the remainder of the chapter, each of the theoretical approaches that were considered for the purposes of the dissertation are outlined below, followed by an explanation as to why constructivism

provides a preferable theoretical framework through which to answer the research questions herein.

3.5.1 Liberal Institutionalism

Liberal institutionalists posit that the international political world is ordered by rules and is less anarchic and chaotic than realists suggest. Within international relations theory, liberal institutionalists such as Alexrod and Keohane assert that institutions can strongly influence cooperation between states.¹¹⁰ International institutions are defined as “recognized patterns of practice around which expectations converge.”¹¹¹ While other definitions may be possible, the common theme is that institutions determine expectations of behaviour. As such, institutions “facilitate significant amounts of cooperation for a period of time” and can change the incentives for countries, as well as the strategic choices available to states in their own self-interest.¹¹² Quite plainly, liberal institutionalism has deep roots in game theory—i.e. the measure of strategic opportunities and constraints in decision making. Similar to realists, liberal institutionalists are concerned with states as unitary actors. For liberal institutionalists, states make strategic choices based on self-interest in terms of material security and/or wealth as a primary goal. Thus, liberal institutionalism is closely associated with neoliberal, rational-choice models.

The relationship between liberal institutionalism and international law rests on the fact that “fully legalized institutions bind states through law: their behavior is subject to scrutiny under the general rules, procedures, and discourse of international law and, often, domestic law.”¹¹³ Thus, if a state is willing to make a legal commitment, it is because it coalesces with its national self-interest even when levied against the relative sovereignty costs associated with doing so. International institutions, it is argued, reduce transaction costs. As such, the ICC would be beneficial because creating a permanent court would eliminate the need to establish *ad hoc* tribunals in the future. On this basis,

¹¹⁰ See Robert Alexrod and Robert O. Keohane, “Achieving Cooperation under Anarchy: Strategies and Institutions,” *World Politics* 38.1 (1985): 226-254.

¹¹¹ *Ibid.*, 252.

¹¹² *Ibid.*

¹¹³ Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, “Introduction: Legalization and World Politics,” *International Organization* 54.3 (2000): 387.

scholars such as Goldsmith and Posner staunchly assert that states only obey international law when it is in the self-interest of the state to do so.¹¹⁴ They further argue that when international law is instrumentalized in this way, it does not indicate that it is an effective legal system.

In this vein, law and institutions such as the ICC are designed, created, and maintained for reasons of strategic self-interest. Liberal institutionalism provides a theoretical framework to understand why states choose to legalize arrangements, and to better understand the spectrum of soft and hard law approaches to solving collective problems. The process of legalization, as defined by Abbott et al., is a “particular form of institutionalization characterized by three components: obligation, precision, and delegation.”¹¹⁵ Institutions may or may not possess each of these characteristics; they each operate independently of the other and can exist at different levels along a continuum. The greatest utility of liberal institutionalism for the purposes of this study is its ability to provide a theoretical lens through which to explain elements of the ICC’s institutional design. However, while liberal institutionalism provides a lens to theorize about how and why the ICC was established through the course of its negotiation process, it also provides a more general theoretical framework to analyze why states choose to commit to it.¹¹⁶

3.5.2 Institutional Design

This dissertation engages with works concerning the ICC’s institutional design, that is the “specific provisions in the Rome Statute governing the ICC’s operation.”¹¹⁷ As Christopher Rudolph has explained, “[w]here a state stands regarding joining the court is a direct function of its process of institutional design, for that determines what exactly it is supporting or opposing. Thus, theorizing interests regarding the court must begin by

¹¹⁴ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

¹¹⁵ Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, “The Concept of Legalization,” *International Organization* 54.3 (2000), 401-419.

¹¹⁶ See for example Sara McLaughlin Mitchell and Emilia Justyna Powell, *Domestic Law Goes Global: Legal Traditions and International Courts* (Cambridge: Cambridge University Press, 2011).

¹¹⁷ Fehl, “Explaining the International Criminal Court,” 358.

considering them in the context of preferences in institutional design.”¹¹⁸ Rudolph also importantly points out that “beneath the surface of the Rome Statute negotiations, a battle was also waged between states seeking to maintain their relative position in the global hierarchy and those who sought to restructure that hierarchy in part by creating a specific type of international criminal court.”¹¹⁹ This point is linked back to the Court’s relationship to the United Nations Security Council as the ‘crucial political fault line’ in the institutional design of the court.¹²⁰ Rudolph identifies three ‘phases of the process of institutional design’: (1) Preparatory Committee meetings (1996-1998); (2) the Rome Conference (1998); and (3) the Kampala Review Conference (2010).¹²¹ Relying on these phases of the ICC’s institutional design offers a lens to better theorize about the kind of Court that African states ‘wanted’ *and* how that might explain state support or opposition to the Rome Statute. Similarly, theorizing in terms of the ICC’s institutional design allows for an integration of the effects of power politics within the architecture of the Rome Statute. The following section will examine how various theoretical approaches might answer the research questions and will explain why constructivism provides the greatest overall explanatory and predictive value for the purposes of the dissertation.

3.5.3 Rational Choice

Duncan Snidal defines rational choice as a “methodological approach that explains both individual and collective (social) outcomes in terms of *individual goal-seeking under constraints*.”¹²² Thus, rational choice says that explanation can be found by determining the “relevant actors, the goals they seek, and their ability to do so. The approach also requires some specification of constraints—which may be technological, institutional, or

¹¹⁸ Christopher Rudolph, *Power and Principle: The Politics of International Criminal Courts* (Cornell University Press, 2017), 62.

¹¹⁹ *Ibid.*, 58.

¹²⁰ *Ibid.*, 66.

¹²¹ This dissertation identifies four phases of the process of the ICC’s institutional design. The additional phase is the Preparatory Commission meetings, given that the drafting of the Elements of Crimes and Rules of Procedure and Evidence grappled with, and set, many of the key internal processes of the Court which have wide-ranging effects.

¹²² Duncan Snidal, “Rational Choice and International Relations,” in *Handbook of International Relations*, 2nd edition, eds. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons (Sage, 2013), 87.

arise from interdependencies among actors' choices."¹²³ It is important to note that the goals under consideration could include material interests but also "normative or ideational 'goals.'"¹²⁴

Rational choice, at least in the context of this dissertation, can be closely associated with realist principles that suggest that states are the primary actors, have sufficient information, and have the capability to make rational calculations in order to maximize power and self-interest. It is important to acknowledge that any explanation of state behaviour ought to consider that states typically engage in international politics both strategically and rationally. Under a rational choice model, goal seeking is its primary explanatory factor. In the context of the Rome Statute negotiations, rational choice provides a theoretical model to consider why states chose to design the ICC the way that they did, but it substantively fails to explain what kind of Court states *ought* to have designed. Therefore, rational choice tends to generally overlook broader normative concerns. Snidal says that "by showing that good institutional design must be consistent with interests to be effective, rational choice can help normative analysis avoid foundering on naïve idealism."¹²⁵ Yet, such an approach does not account for the inequality of interests in international politics. In other words, the interests of dominant states tend to overshadow those of traditionally weak or less powerful states, particularly in the context of multilateral negotiations pertaining to questions of institutional design. Thus, rational choice is limited in that it takes for granted who the key actors are (identity); what their interests are; and how that affects the creation of international institutions, all of which are fundamentally important for the purposes of this dissertation. Moreover, it fails to consider how interests or preferences can change. Thus, rational choice explanations are partially helpful, but need to be combined with other (constructivist) theoretical approaches to be more fully instructive.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid., 103.

3.5.4 Postcolonialism

Postcolonialism emphasizes the importance of power relations stemming from decolonization and anticolonial struggles. It looks not only at the formal end of colonialism following the Second World War, but also the imperial and colonial experiences that continue to affect contemporary politics. This suggests that there are lingering consequences to colonialism that persist, based on the relations between ‘the West’ – i.e. the dominant political powers in international relations, and the ‘other’ – i.e. the ‘Third World,’ developing world, or ‘Global South.’ For postcolonial theorists, the starting place is one which assumes that ‘Western’ power and influence before and during decolonization still exists and informs political strategies that seek to retain that power and influence, at the subjugation of developing states, including those in Africa. The utility of employing a postcolonial lens is in its ability to think critically about an often ‘taken for granted’ Eurocentric and/or North American point of view and to begin to deconstruct the ways in which the global order is both shaped and maintained by dominant and subjugated states.¹²⁶

Scholars such as Epstein argue that postcolonialism provides a different lens through which to consider the nature of norms in the context of international relations. She says that “the postcolonial perspective is thus deeply... genealogical, in its dual concerns with, first, the genesis of norms, or the processes by which particular behaviours come to be taken to be ‘normal.’ Second, it is centrally concerned with the power relations implicated in the (re)drawing of boundaries between the normal and the strange or the unacceptable.”¹²⁷ In this light, postcolonialism offers a lens through which to reframe norms as a mechanism or process of control and/or domination created by the existing power relations in international politics. It also provides a means to consider ‘alternate’ behaviours as potentially legitimate, or least of all, it provides a theoretical method to situate difference within the overarching power structures that shape and are shaped by dominant powers in the global order.

¹²⁶ See generally Sanjay Seth, “Postcolonial Theory and the Critique of International Relations,” *Millennium: Journal of International Studies* 40.1 (2011): 167-183.

¹²⁷ Charlotte Epstein, “The postcolonial perspective: an introduction,” *International Studies Perspectives* 2.13 (2012): 294.

In the context of the research questions that guide this dissertation, postcolonialism can help to theoretically reposition and *partially* explain all four. Since postcolonialism is not a grand theory of international relations, but rather a situational lens through which to view phenomena, it offers an alternative standpoint from which to examine each of the research questions employed throughout the dissertation, but it can neither fully explain nor predict. It does, however, provide a means to deconstruct the Eurocentric undercurrents of international law, human rights, and liberal cosmopolitanism rooted in the United Nations System that greatly influenced the Rome Statute negotiations and the establishment of the ICC. Postcolonialism has often been used as a theoretical approach to explain the operationalization of the ICC, especially with respect to its hyper-focus in African situations and contexts, which is highly important for the purposes of the dissertation.¹²⁸

3.5.5 Constructivism

Constructivism provides the means to examine the identities and interests of relevant actors within the international system, but also allows for rational considerations, such as the strategic pursuit of interests. As Reus-Smit explained, constructivism “is characterized by an emphasis on the importance of normative as well as material structures, on the role of identity in shaping political action and on the mutually constitute relationship between agents and structures.”¹²⁹ Early constructivists such as Wendt and Ruggie challenged the epistemological foundations of dominant realist theories of international relations (i.e. realism and liberalism) by emphasizing the importance of ideational and identity factors in generating understandings and explanations of global phenomena.¹³⁰ Constructivism is fundamentally what Wendt et al.

¹²⁸ See for example Lea Schneider, “The International Criminal Court (ICC)—A Postcolonial Tool for Western States to Control Africa?” *Journal of International Criminal Law* 1 (2020): 90-109.

¹²⁹ Christian Reus-Smit, “Constructivism” in *Theories of International Relations*, eds. Scott Burchill and Andrew Linklater (Palgrave Macmillan, 2013), 217.

¹³⁰ Alexander E. Wendt, “The Agent-Structure Problem in International Relations Theory,” *International Organization* 43.3 (1987): 335-370; John Gerard Ruggie, “Territoriality and Beyond: Problematizing Modernity in International Relations,” *International Organization* 47.1 (1993): 139-174.

described as a “social theory of international politics.”¹³¹ Indeed, the foundation of constructivism rests on the notion that the international system is ‘socially constructed’ and reflects the identity and practices of actors, as opposed to a fixed approach to identities and interests, as is the case with rational approaches stemming from realist and liberal schools. Constructivists do not deny that the international political system is largely anarchical but instead challenge the significance anarchy.

According to Wendt, “anarchy is what states make of it.”¹³² In the case of the ICC, states have elected to create an institution to preserve order, based on a collective and intersubjective understanding of appropriate behaviour, i.e. norms. As such, constructivism makes sense of international relations by understanding it as inherently social. Constructivists argue that states create—and are created by—shared norms and values. Thus, some scholars argue that the guiding theoretical objective for international relations constructivists is to establish that norms matter.¹³³ In this respect, constructivism is an inherently useful theoretical framework for this study because it allows consideration for how the international criminal justice norm as exemplified by the creation and enmeshment of the International Criminal Court is related to identity and interests. Such an approach can be used to help explain commitment, avoidance, *or* reversion to the ICC at various junctures of its lifecycle.

From an ontological perspective, constructivism allows for consideration of social facts, that is facts that “depend on human agreement that they exist and typically require human institutions for their existence.”¹³⁴ On this basis, constructivism is influenced by critical international theory in its broad ontology but differs with respect to its emphasis on *empirical analysis*. According to Adler, constructivism “occupies the middle ground between rationalist approaches (whether realist or liberal) and interpretive approaches (mainly postmodernist, poststructuralist and critical), and creates new areas for theoretic

¹³¹ Alexander E. Wendt, Michael N. Barnett, and Raymond Duvall, eds., *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).

¹³² Alexander E. Wendt, “Anarchy is what states make of it: the social construction of power politics,” *International Organization* 46.2 (1991): 391-425.

¹³³ Martha Finnemore and Kathryn Sikkink, “Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics,” *Annual Review of Political Science* 4 (2001): 396.

¹³⁴ John Gerard Ruggie, “What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge,” *International Organization* 52.4 (1993): 856.

and empirical investigation.”¹³⁵ Since the Rome Statute and the ICC only exist because a group of states collectively decided that they ought to, constructivism is a particularly well-suited lens through which to view both the Statute and the Court’s normative and institutional evolution.

Foundationally, constructivism gained traction in the 1990s as an alternative theory to explain international relations, since rationalist theories failed to predict the end of the Cold War. Allowing scholars of international relations to consider ideational factors in their analyses provided an opportunity for an increased and richer understanding of global politics. The depth afforded by a constructivist approach is preferable for the purposes of this study, since its intent is to generate deeper and richer understanding of the evolution of international criminal justice, the ICC, and its relationship to African states. While realist accounts can more readily explain the preferences of powerful states, especially members of the permanent five of the United Nations Security Council in opposing the Court, the behaviour and interest formation of the coalition of middle and weak power states (i.e. the Like-Minded Group) that pushed for the success of the Rome Statute and the Court cannot be explained by similar theoretical approaches. Thus, Nicole Deitelhoff argued that the ICC was created because of persuasion and discourse within the negotiations, in other words, “a shift in states’ interests.”¹³⁶ This, she argued, was heavily influenced by the ability of weak states and non-governmental actors to influence the normative and institutional settings of the Rome Statute negotiations altogether, which contributed to persuasion and discourse.¹³⁷

The compatibility of constructivism with the study of international law has been established in the literature. For example, Brunnée and Toope suggest that constructivism is compatible with the study of international law because of the attention it gives to the role of norms in international politics, which is ‘stock-in-trade’ for international law

¹³⁵ Emanuel Adler, “Seizing the Middle Ground: Constructivism in World Politics,” *European Journal of International Relations* 3.3 (1997): 319-363.

¹³⁶ Nicole Dietelhoff, “The Discursive Process of Legalization: Charting the Island of Persuasion in the ICC Case,” *International Organization* 63.1 (2009): 33.

¹³⁷ *Ibid.*

scholars.¹³⁸ Brunnée and Toope further explain that it is “norm creation, evolution, and destruction that has proven to be the strongest bridging point between some IL theorists and the constructivists.”¹³⁹ Slaughter et al. pointed out that international relations constructivists and international law scholars start with the same proposition that “actors, identities, interests and social structures are culturally and historically contingent products of interaction on the basis of shared norms.”¹⁴⁰ Slaughter had previously written that constructivist international relations theories expanded the prospects for interdisciplinary collaboration because of its emphasis on international legal norms in shaping state behaviour; institutions have the capacity to transform the identity of actors, and thus reshape calculations of interests.¹⁴¹ Similarly, Anthony Arend said that constructivism is useful to the study of international law because international legal rules contribute to the creation of state identity and interest.¹⁴² In a similar vein, Harold Koh posited that states obey international law because interpreting global norms and internalizing them into domestic law leads to the “reconstruction of national interests and eventually national identities.”¹⁴³ On this basis, constructivism departs from realism by broadening the spectrum of factors that might shape and inform conceptions of a states’ self-interest. Interdisciplinarity in the fields of international relations and international law has been a focal advocacy point for scholars on both sides of the disciplinary divide, with constructivism featuring strongly on the international relations side of the discussion.

¹³⁸ Jutta Brunnée and Stephen J. Toope, “Constructivism and International Law,” in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, eds. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2012), 119.

¹³⁹ *Ibid.*

¹⁴⁰ Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship,” *The American Journal of International Law* 92.3 (1998): 384.

¹⁴¹ Anne-Marie Slaughter Burley, “International Law and International Relations Theory: A Dual Agenda,” *The American Journal of International Law* 87.2 (1993): 222.

¹⁴² Anthony Arend, “Do Legal Rules Matter? International Law and International Politics,” *Virginia Journal of International Law* 38.10 (1997-1998): 107-154.

¹⁴³ Harold Hongju Koh, “Why Do Nations Obey International Law?” *The Yale Law Journal* 106 (1997): 2659.

3.5.6 Norm Theory

A key component of constructivism depends on the emergence and valuation of norms in the formation of a states' identity and interests. Norms are defined as a standard of appropriate behaviour for actors with a given identity.¹⁴⁴ The constructivist undercurrent of norm theory stresses the significance of socialization by both international institutions and norms, which inform identity and interests. However, liberal institutionalist scholars have argued that norms are not causally linked to behaviour or phenomena. As Ruggie explained:

Norms may 'guide' behavior, they may 'inspire' behavior, they may 'rationalize' or 'justify' behavior, they may express 'mutual expectations' about behavior, or they may be ignored. But they do not effect *cause* in the sense that a bullet through the heart causes death... The impact of norms within international regimes is not a passive process... because state behavior within regimes is interpreted by other states, the rationales and justifications for behavior that are proffered, together with pleas for understanding or admissions of guilt, as well as the responsiveness of such reasoning on the part of other states, all are absolutely critical component parts of any explanation involving the efficacy of norms.¹⁴⁵

On this basis, it is important to measure the efficacy of the international criminal justice norm not in terms of its causal effect on 'compliance,' 'deterrence' or similar behaviours in the narrow sense. Alternatively, the discourse among states offers a better opportunity to take stock of the norm's overall significance in international relations.

Other scholars such as Risse and Ropp have considered how international human rights norms influence domestic politics and the behaviour of states.¹⁴⁶ Karen Engle mapped the evolution of the anti-impunity norm and its synonymity with international criminal law as a response to human rights violations, including the relevant history that

¹⁴⁴ Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52.4 (1998): 891.

¹⁴⁵ John Gerard Ruggie, "Epistemology, ontology, and the study of international regimes," in *Constructing the World Polity: Essays on International Institutionalization*, ed. John Gerard Ruggie (London: Routledge, 1998): 97-98 [*emphasis in original text*].

¹⁴⁶ Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

paved the way for the establishment of the ICC.¹⁴⁷ Theorizing about how norms diffuse and the contexts in which they influence international politics encompasses a wide research agenda with particular applicability to the study of the diffusion of the international criminal justice norm.

The theory of norm diffusion was laid out most cohesively by Martha Finnemore and Kathryn Sikkink in their article, *International Norm Dynamics and Political Change*.¹⁴⁸ Employing a largely constructivist international relations theoretical framework (with consideration to rational strategic factors), Finnemore and Sikkink explained how new norms are created and diffuse, which may take the form of law over time. Indeed, in the context of the ICC, international criminal justice and accountability for grave violations of human rights serve as bedrock norms that undergird the entire institutional enterprise of the Court. It is therefore impossible to make sense of how and why the ICC came to be without tracing the evolution of the international criminal justice norm in international political and legal life. According to Finnemore and Sikkink, norms evolve in a patterned three-step 'life cycle:' (1) 'norm emergence,' which occurs as a result of persuasion by norm entrepreneurs who convince states to embrace new norms; if a critical mass of states support the norm it reaches a 'tipping point,' leading to; (2) broad norm acceptance, otherwise referred to as a 'norm cascade' where states attempt to 'socialize' other states to follow the norm; (3) internalization, where norms assume a 'taken-for-granted quality.'¹⁴⁹

In the context of the ICC, some scholars point out that the academic debate is saturated with normative discussions, which largely pivot around empirical findings about the Court's effectiveness at holding perpetrators accountable, and its corresponding deterrent capabilities.¹⁵⁰ Indeed, scholars such as Sikkink have posited that the ICC *does*

¹⁴⁷ Karen Engle, "Anti-Impunity and the Turn to Criminal Law in Human Rights," *Cornell Law Review* 100.5 (2015): 1070-1128.

¹⁴⁸ Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," 887-917.

¹⁴⁹ *Ibid.*, 895.

¹⁵⁰ Caroline Fehl, "Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches," *European Journal of International Relations* 10.3 (2004), 358; See for example Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* 95.1 (2001): 7-31; James F. Alexander, "The

have a deterrent effect, largely expanding upon her work regarding the deterrent effect of human rights trials.¹⁵¹ Jo and Simmons reach a similar conclusion based on their systematic assessment of the ICC's deterrent effects for state *and* nonstate actors.¹⁵² Catherine Gegout reaches the opposite conclusion, that ICC intervention has not prevented the emergence of new conflicts, but argues that it *could* have a deterrent effect, though this is not guaranteed.¹⁵³ Nevertheless, this approach to the study of international law falls under what Shaffer and Ginsburg have referred to as “a new empirical turn in international legal scholarship.”¹⁵⁴ The authors contend that “[t]he theoretical debate over whether international law matters is a stale one. What matters now is the study of the conditions under which international law is formed and has effects.” While speaking from an international legal theoretical perspective, the same applies for the study of international legal institutions within the study of international relations. The interdisciplinary nature of international courts and institutions is inherent and ought to be incorporated into any empirical inquiry.

On this basis, other literatures have focused on measures of normative commitment and/or compliance in the context of the ICC as a modicum for norm efficacy. However, as Howse and Teitel point out, “the concept of compliance (especially viewed as rule observance) is inadequate for understanding how international law has normative effects.”¹⁵⁵ This is especially because a strict interpretation of state compliance or noncompliance, which is common in international law scholarship, ignores the broader effects that international legal norms might have at multiple levels of political

International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact,” *Villanova Law Review* 54 (2008-09): 1-55.

¹⁵¹ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (W.W. Norton and Company, 2011), 166-167; see also Hunjoon Kim and Kathryn Sikkink, “Explaining the Deterrence Effect on Human Rights Prosecutions in Transitional Countries,” *International Studies Quarterly* 54.4 (2010): 939-963.

¹⁵² Hyeran Jo and Beth A. Simmons, “Can the International Criminal Court Deter Atrocity?” *International Organization* 70.3 (2017): 419-421.

¹⁵³ Catherine Gegout, “The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace,” *Third World Quarterly* 34.5 (2013): 800-818.

¹⁵⁴ Gregory Shaffer and Tom Ginsburg, “The Empirical Turn in International Legal Scholarship,” *American Journal of International Law* 106.1 (2012): 1-46.

¹⁵⁵ Robert Howse and Ruti Teitel, “Beyond Compliance: Rethinking Why International Law Really Matters,” *Global Policy* 1.2 (2010): 127.

engagement. This theoretical framework offers a means to evaluate norm diffusion at the domestic, regional, and/or international level(s), which is a primary objective of this dissertation.

In addition to norm evolution and diffusion, scholars have also focused on norm contestation and erosion.¹⁵⁶ Falling somewhere in the middle of those discourses, scholars have similarly considered the role of norm contestation as it relates to concepts of political backlash.¹⁵⁷ For example, Dietelhoff examined the impact of norm contestation in the context of Africa and the ICC and determined that “the spread and intensification of this contestation, or backlash movement, has weakened the court and the norm it embodies: Non-compliance with the court has increased on the African continent... Hence, contestation even was consequential.”¹⁵⁸ On the other hand, Dietelhoff also acknowledged that ICC activity in some African states sparked efforts to bolster domestic legal institutions so as to avoid Court intervention, and the African Union has made efforts to regionalize international criminal justice as a response.¹⁵⁹ This is especially important to acknowledge, since not all forms of norm contestation are *de facto* regressive. This provides a framework to consider the unintended normative consequences for African states engaged in pushback or backlash towards the ICC.

3.5.7 Hybrid Theoretical Approaches

In the context of the ICC, scholars have attempted to explain the successful negotiation of the Rome Statute in both rationalist and constructivist terms. For example, David Whippman has explained that the Rome Statute negotiations can best be understood by considering three factors: (1) the ‘reasons for action’ of the actors involved—i.e. states and

¹⁵⁶ Diana Panke and Ulrich Petersohm, “Why international norms disappear sometimes,” *European Journal of International Relations* 18.4 (2012): 719-742. See, also: Antje Wiener, “A Theory of Contestation – a concise summary of its arguments and concepts,” *Polity* 49.1 (2017): 109-125. Wiener argues that constructive engagement with norms give them legitimacy and structuring power.

¹⁵⁷ See Nicole Dietelhoff, “What’s in a name? Contestation and backlash against international norms and institutions,” *The British Journal of Politics and International Relations* 22.4 (2020): 715-727. See also Laurence R. Helfer and Anne E. Showalter, “Opposing International Justice: Kenya’s Integrated Backlash Strategy against the ICC,” *International Criminal Law Review* 17 (2017): 1-46.

¹⁵⁸ *Ibid.*, 727.

¹⁵⁹ *Ibid.*

non-governmental organizations; (2) how actors' interests and identities produced positions on particular elements of the statute; and (3) the context of the negotiations, since actors were required to situate their positions in the framework of a legal institution.¹⁶⁰ The overall conclusion made by Whippman is that "politics is driven by normative as well as material concerns, and that law is both a product of– and constituted of– this multifaceted politics. In the context of the ICC, the arguments of both supporters and critics of the proposed new court evidenced a combination of normative, material, and identity-based concerns."¹⁶¹ While this study situates the negotiation of the ICC in terms of United States opposition to the Rome Statute and the Court, questions about interest formation on the part of weak states can be interrogated through similar frameworks. Thus, the positions of African delegations can also be understood in light of material and normative factors that influenced identity and interests which were ultimately reflected in support or opposition to the ICC.

Relying on the work of Abbott and Snidal, both rationalist and constructivist international relations analyses can be combined with international law in order to explain particular phenomena and make sense of legal institutional design. It is argued that "law and legalization involve values and interests; they operate through instrumental and normative channels; they involve power as well as rational design; they are shaped by and shape the behavior of private actors as well as states."¹⁶² Finnemore and Sikkink similarly posit that "rationality cannot be separated from any politically significant episode of normative influence or normative change, just as the normative context conditions any episode of rational choice."¹⁶³ This bears particular relevance to the ICC, since as Nicole Deitelhoff has explained, "the ICC entails enormous sovereignty costs for

¹⁶⁰ David Whippman, "The International Criminal Court," in *The Politics of International Law*, ed. Christian Reus-Smit (Cambridge: Cambridge University Press, 2004), 153.

¹⁶¹ *Ibid.*, 155-156.

¹⁶² Kenneth W. Abbott and Duncan Snidal, "Law, Legalization, and Politics: An Agenda for the Next Generation of IR-IL Scholars," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff (Cambridge: Cambridge University Press, 2013), 52.

¹⁶³ Martha Finnemore and Kathryn Sikkink, "International norm dynamics and political change," 888.

states but only uncertain benefits.”¹⁶⁴ Political scientist Judith Kelley similarly concluded that “[i]t is not very clear what concrete gains any one state can anticipate from supporting the ICC.”¹⁶⁵ Thus, there is a basis to employ *both* constructivist and rationalist approaches together to better understand questions of why the ICC was created why states choose to commit to it.

3.6 Conclusions

This chapter has reviewed the most salient themes in the Africa-ICC discourse and has surveyed works that evaluate aspects of the ICC’s institutional design as reflected by the Rome Statute negotiations in particular. In doing so, this chapter provided a framework to theoretically ground the design and architecture of the resultant ICC and evaluate the compromises reached in Rome from an African perspective. This chapter provided a sketch of the literatures on the Rome Statute negotiations and the Africa-ICC relationship to illuminate the compromises that African States made in and after Rome when signing, ratifying, and implementing the Rome Statute into domestic legislation. This framing also emphasized the most prevalent debates concerning the problems with the ICC’s operationalization in African contexts *and* African responses to those problems. In short, the literatures of the Rome Statute negotiations, African commitment to the Rome Statute/ICC, African problems with the ICC, and African responses to the problems with the ICC have each provided a theoretical lens through which to situate this dissertation’s contribution to the literature. This chapter also provided an overview of the theoretical approaches with the greatest utility throughout the dissertation and has explained why constructivism/norm theory has been selected as its theoretical lens. It is important to note that the point is not that the existing literatures are inherently flawed or wrong. Rather, this dissertation seeks to complement the existing literature by providing another layer of nuance and analysis.

¹⁶⁴ Nicole Deithelhoff, “The Discursive Process of Legalization: Charting the Islands of Persuasion in the ICC Case,” *International Organization* 63.1 (2009): 33.

¹⁶⁵ Judith Kelley, “Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Non-Surrender Agreements,” *American Political Science Review* 101.3 (2007): 577.

Chapter 4

4 Historical Background

It is necessary to situate African support and activism for an International Criminal Court (ICC or ‘Court’) within its broader historical context. The ICC initiative began at the United Nations (UN), and more particularly within the UN General Assembly’s Sixth Committee after the Second World War. This chapter maps African interest and involvement in the ICC project, and considers how this interest translated into direct participation and influence throughout the pre-Rome Conference period. The process of establishing the ICC in its broad sense has been well-documented by scholars of international relations and international law.¹ Tangible developments began in 1994 when the International Law Commission (ILC) presented the first draft statute for an ICC to the United Nations General Assembly. This draft was the necessary springboard for the work that followed, which was completed within four negotiation forums set up by the UN Secretariat: the Ad Hoc Committee (1995); the Preparatory Committee or ‘PrepCom’ (1996-1998); the Rome Diplomatic Conference (1998); and the Preparatory Commission (1999-2004) under the Sixth Committee’s agenda item, ‘The Establishment of the International Criminal Court.’

This chapter focuses on the specific role of Africa and Africans in the formation and establishment of the ICC within *and* outside of UN processes from 1993 to the Rome Diplomatic Conference in 1998, i.e. at the Ad Hoc Committee, the Preparatory Committee, in regional meetings, and through engagement with civil society most particularly the Coalition for an International Criminal Court (CICC), Human Rights Watch, and No Peace Without Justice. These contributions were the culmination of (in many cases) years of negotiation and diplomacy at the local, regional, and international level(s).

¹ See generally Fanny Benedetti, Karine Boneau, and John L. Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Boston: Martinus Nijhoff Publishers, 2014); Fanny Benedetti and John L. Washburn, “Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference,” *Global Governance* 5 (1999): 1-37; William Schabas, *Oxford Commentaries on International Law: The International Criminal Court, A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010).

The aim of this chapter is to systematically map African engagement in the development of the Rome Statute from its earliest stages in order to dispel the myth that Africans were coerced into joining the ICC by Western states (and other neocolonial assertions about the Africa-ICC relationship). This historical analysis is based on research findings which effectively demonstrate high levels of (organic) participation, agency, and influence in the *creation* and *use* of the Court through diplomatic, political, and legal channels leading up to the Rome Diplomatic Conference. The primary conclusion is that (neo)colonial arguments are not only inaccurate but deny an important historical moment for Africa and the Africans who worked tirelessly to establish the ICC. Mutually constituted skepticism on the part of ‘Africa’ and ‘the West’ reinforce ideas of mistrust. This is a mistake; if couched differently, the insights generated from the ICC’s disproportionate involvement in African situations could provide a reasonable basis to consider avenues for constructive reform, used to strengthen the institution *and* international criminal law, more generally. This will require a genuine dialectical process rooted in equality and respect, which is imperative given Africa’s disproportionate and long-lasting support for the Court and the normative and tangible development of international criminal law, more broadly. Alternatively, acknowledging the longstanding African commitment to the development of the international criminal justice norm provides the space to meaningfully consider the merits of establishing regional mechanisms to address similar crimes.

4.1 Drafting the Rome Statute: Tracing UN Processes

The idea of establishing an ICC originated within the General Assembly of the United Nations and the International Law Commission, as early as 1948. See Table 4-1 for a timeline of the early stages and legwork involved in establishing an ICC. Table 4-2 details the processes from the establishment of the *ad hoc* committee to Rome. Note that relevant African contributions or roles are referenced throughout Tables 4-1 and 4-2. Several key political events reinforced the notion that a permanent court was needed to address the most heinous violations of human rights. Yet it is essential to highlight the political factors that both hindered and facilitated the establishment of an ICC from its earliest moments to the adoption of the Rome Statute in 1998.

For example, the Nuremberg and Tokyo Trials following the Second World War established the idea of holding *individuals* criminally responsible for atrocity crimes. Without dwelling on the overwhelming criticism surrounding these trials and the associated complaints of ‘victors justice’—the idea of criminalizing international crimes was born as a result of these trials.² While the General Assembly had asked the International Law Commission to examine the establishment of an ICC and a draft statute was presented, the effective prioritization of human rights was not a strong or primary focus during the Cold War. However, the conflicts in the 1990s in the former Yugoslavia and Rwanda and subsequent *ad hoc* tribunals established by the United Nations Security Council, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, reiterated the need for a permanent judicial institution to respond to mass atrocity crimes. Historical events, coupled with changing political trends in the 1990s (which focused less on the primacy of sovereignty and more so on ideas of human security and human rights), presented an opportune political environment in which to establish an ICC.

² See generally Richard H. Minear, *Victors’ Justice: Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971); Guénaél Mettraux, ed., *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008); Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008); Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge: Harvard University Press, 2009); William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012).

Table 4-1: Drafting the International Criminal Court Treaty, Key United Nations General Assembly and International Law Commission Efforts (1948-1994)

1948
<p>General Assembly Resolution 260 invited the International Law Commission (ILC), “to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred.”</p> <p>Note: This was a response to the Nuremberg and Tokyo Trials (1945-1948), which established a system of international criminal justice based upon holding <i>individuals</i> criminally responsible for the most serious international crimes: war crimes, crimes against peace, and crimes against humanity by (fair) trial.</p>
1951
<p>ILC presented a draft statute to the General Assembly to be submitted to governments for comment and observation titled, ‘Code of Offences against the Peace and Security of Mankind.’</p> <p>Discussion about the possibility and desirability of defining ‘aggression’ was undertaken.</p>
1954
<p>The ILC prepared a revised draft based on the observations received from governments.</p> <p>The General Assembly postponed considering the draft until aggression was defined. (Note: The Cold War limited the progress of the ICC project during this time period. Political will was insufficient to push the ICC initiative forward.)</p>
1989
<p>Trinidad and Tobago asked the General Assembly to create an international criminal court with jurisdiction over drug trafficking.</p> <p>The General Assembly asked the ILC to revive the ICC project and work on a new draft statute.</p>
1991
<p>9 December: ILC completes provisional draft articles on the draft Code of Crimes against the Peace and Security of Mankind.</p>
1992
<p>25 November: ILC requested to continue its work on a draft statute for an ICC as a matter of priority. The report of the Working Group, views expressed during debate in the Sixth Committee, and written comments from states were to be considered.</p>
1993
<p>9 December: ILC asked to continue its work as a matter of priority with the goal to establish a draft statute by the forty-sixth session in 1994.</p> <p>The ILC decided that the draft articles proposed by the Working Group on a draft statute for an ICC be transmitted to governments to formulate observations and submit comments to the Secretary-General.</p> <p>(Note: the conflict and <i>ad hoc</i> tribunal set up by the UN Security Council on 25 May for the former Yugoslavia put pressure on the UN to create a more permanent solution.)</p>

<p><i>South African Development Community (SADC) countries Lesotho, Malawi, Swaziland, Tanzania, and South Africa begin to meet and discuss the ICC project with the aim to meaningfully participate in its establishment.</i></p> <p><i>African membership in the ILC Working Group on the ICC: Sierra Leone (chair), Madagascar, Senegal (Special Rapporteur).</i></p>
<p>1994</p>
<p>ILC forty-sixth session: ILC completed a draft statute based on government feedback and recommended that the General Assembly convene an international conference of plenipotentiaries to adopt a treaty on the establishment of an ICC.</p> <p>9 December: General Assembly decided to establish an <i>ad hoc</i> committee to consider the substantive and administrative issues in the draft statute and consider arrangements for convening an international conference of plenipotentiaries.</p> <p>(Note: The <i>ad hoc</i> tribunal set up by the UN Security Council on 8 November for Rwanda put continued pressure on the UN to create a more permanent solution.)</p> <p>(Note also: In South Africa, Nelson Mandela was inaugurated signaling a definitive transition from apartheid. This created additional momentum in international politics to prioritize norms such as international human rights and post-conflict/violence reconciliation.)</p>
<p><i>The ILC appointed Senegalese lawyer and former Minister Doudou Thiam as Special Rapporteur on the Draft Code of 'Crimes Against the Peace and Security of Humanity' from 1982 until the ILC completed its draft statute in 1994.</i></p>

Table 4-2: The Ad Hoc Committee, Preparatory Committee, and Rome Conference

1995
The <i>ad hoc</i> committee meets twice and submits a report to the General Assembly. The General Assembly creates the Preparatory Committee (PrepCom) to prepare the draft text for submission to a diplomatic conference of plenipotentiaries.
<i>African membership in the ad hoc committee 3-13 April: Algeria, Botswana, Cameroon, Egypt (Vice-Chairman), Gabon, Ghana, Kenya, Lesotho, Madagascar, Mauritania, Morocco, Namibia, Nigeria, Senegal, South Africa, Sudan, Tunisia, Tanzania, Zimbabwe.</i> <i>African membership in the ad hoc committee 14-25 August: Algeria, Botswana, Egypt, Gabon, Ghana, Kenya, Mauritania, Morocco, Namibia, Sudan, Tunisia.</i>
1996
25 March – 12 April: First session of the PrepCom takes place. 12 August – 30 August: Second session of the PrepCom takes place. 17 December: General Assembly adopts a resolution and sets the dates for subsequent PrepCom sessions. Italy offers to host the treaty conference in 1998. (Note: Non-governmental organizations (NGOs) attended the PrepComs, particularly under the ‘Coalition for the International Criminal Court’ (CICC) umbrella.)
<i>7 August: South Africa and Lesotho submit a working paper on international cooperation and judicial [mutual] assistance.</i>
1997
10 February – 21 February: Third session of the PrepCom takes place. 4 August – 15 August: Fourth session of the PrepCom takes place. 1 December – 12 December: Fifth session of the PrepCom takes place.
<i>14 September: SADC states meet and establish ‘ten basic principles’ for negotiating an independent and effective ICC.</i>
1998
16 March – 3 April: Sixth session of the PrepCom takes place. 15 June – 17 July: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court takes place in Rome, Italy.
<i>5 February – 6 February: twenty-five African governments meet in Dakar, Senegal and adopt the ‘Dakar Declaration,’ calling for an independent and effective ICC.</i> <i>February 1998: Organization of African Unity Council of Ministers adopts the Dakar Declaration</i> <i>June 1998: Assembly of Heads of State and Government of the Organization of African Unity adopts the Dakar Declaration</i> <i>31 October 1998: Organization of African Unity adopts ‘Resolution on the Ratification of the Treaty on the International Criminal Court</i>

4.2 African Support within the General Assembly Processes

4.2.1 The Ad Hoc Committee

Africans and African governments took a particularly keen interest in the development of the throughout its trajectory through the UN system. Former South African diplomat Pieter Kruger, who participated in the discussions that led to the establishment of the Ad Hoc Committee in 1994, explained that his own personal position, in consultation with the (then) Foreign Affairs and Legal Section, “at the time was cautious support for the ICC, but no input had yet been received from other Departments such as Justice, Police, and Defence.”³ Kruger explained that he was the only representative of South Africa who attended the Ad Hoc Committee meetings in 1995 and “had a general mandate to take a positive position to the establishment of an ICC.”⁴ At least for South Africa, he explained, the aftermath of the Cold War made the idea of an ICC viable and possible, although it needed a lot of negotiation.⁵ Referring to Table 4-2, it is apparent that several African governments were involved at this stage of the Court’s development and contributed to its evolution.

Kruger explained that during the second week of the Ad Hoc Committee meetings, he was invited by the representatives of Australia and New Zealand to participate in an early meeting, which he said was the beginnings of the ‘Like-Minded Group’ (LMG). The LMG was a formidable negotiating bloc for the remainder of the process, including at the Rome Diplomatic Conference. According to Kruger, African membership in the LMG grew to include “at least Lesotho, Botswana, and Malawi.”⁶ Also highly influential, Egyptian Cherif Bassiouni assembled interim workshops to work on ICC issues at the Siracusa Institute in Sicily. This is particularly important to highlight, since Cherif Bassiouni was able to fundamentally influence the development of the ICC project and take a leading role in its success, even though his government did not fully support the idea (Egypt has neither signed nor ratified the Rome Statute at the time

³ Pieter Kruger, former South African diplomat, Foreign Affairs, interview by author, 28 September 2018, by telephone.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

of writing).⁷ Once the Ad Hoc Committee had done all it could, the Preparatory Committee for the Establishment of the ICC was established, in order to work out the more complex issues surrounding the text of the draft statute.

4.2.2 The Preparatory Committee (PrepCom) Meetings

With respect to the Preparatory Committee, Pieter Kruger described that in the context of South Africa, Foreign Affairs could not take a position on any issue without the participation of the Justice Department. As such, he campaigned to put a Justice official on the delegation. It is incredibly interesting to note that South Africa's Department of Justice was not initially eager to participate in the Rome Statute negotiation process. Kruger explained that "the main reason for the initial recalcitrance was a concern that the ICC could have retrospective jurisdiction, which could be problematic during South Africa's ongoing transition period. Once informed that the Statute would not provide for retrospective jurisdiction, Justice considered my request."⁸ This is significant because it demonstrates that South Africa was thinking about the consequences of establishing an ICC and its potential effects in domestic contexts. This is a high level of engagement, and one that is worth pointing out.

South Africa took a leading role at the PrepCom meetings. Kruger explained that after the first PrepCom that he "started to seriously engage SADC representatives to get them to participate actively in the ICC process."⁹ This is important to note, since SADC had been engaging in its own meetings and establishing its own principles in this respect for some time. He explained that Phakiso Mochochoko from Lesotho, who was then part of Lesotho's Permanent Mission to the United Nations, was the only other participant

⁷ Note: Cherif Bassiouni has been called the 'Father of International Criminal Law' for the leading role he took in the development of the International Criminal Court. See Mohamed Helal, "In Celebratus: M. Cherif Bassiouni (1937-2017)" *OpinioJuris* (26 September 2017) available at <https://opiniojuris.org/2017/09/26/in-celebratus-m-cherif-bassiouni-1937-2017/>; accessed 1 January 2021: "He is essentially the father of International Criminal Law as we know it today; he is the authority on extradition law and practice; he has made immense contributions to international human rights law; he has written widely on Islamic law and Middle East politics; and he is one of the authors of the Rome Statute of the International Criminal Court."

⁸ Pieter Kruger, former South African diplomat, Foreign Affairs, interview by author, 28 September 2018, by telephone.

⁹ *Ibid.*

who took an active interest in the ICC and was soon brought into the LMG meetings.¹⁰ This provided the foundation for Kruger and Mochochoko to work on issues together, particularly the working paper that they co-authored on International Cooperation and Judicial Assistance.¹¹ This demonstrates a degree of regional cooperation and coalescence on the most important issues for the development of the ICC project at its critical stages of development at the UN.

4.2.3 The Second PrepCom Meeting and Increased African Participation

The second PrepCom meeting saw the expansion of the South African delegation to include two Justice officials and Sivu Maqungo from Foreign Affairs; Kruger served as the Head of Delegation at this meeting. At this meeting, Kruger explained that the co-authored paper with Mochochoko served as the basis for the working group discussion on international cooperation and judicial assistance. This similarly demonstrates the high level of engagement that African governments and Africans exercised throughout the development of the ICC through the UN process. Other African participation “remained very low key due to limited resources and expertise. At least the representative of Malawi was there, and more visible as a result of his participation in earlier workshops.”¹² Kruger recalled having numerous discussions with non-governmental organizations about ways to increase African participation in the process, since “it was not apathy, but a genuine lack of resources at that stage.”¹³ Thus, while South Africa was in a position to take a leading role in the process, other avenues were required and pursued for a great deal of the region. Kruger said that “most African representatives that I spoke to during that time were pretty much in favour of the ICC. They were all aware of the Rwanda tribunal and viewed it in a positive light. At that stage there was no real talk of this being imposed on Africa by the West, and that the ICC would only exercise its jurisdiction in Africa—those

¹⁰ Ibid.

¹¹ United Nations General Assembly, *International Cooperation and Judicial (Mutual) Assistance, working paper submitted by South Africa and Lesotho* (7 August 1996), A/AC.249/L.5.

¹² Ibid.

¹³ Ibid.

arguments only came later.”¹⁴ In this respect, African engagement at the earliest stages was genuine, as was support for the ICC initiative. This is important because it makes clear that such support did not come from a place of manipulation or coercion either directly or indirectly on the part of the ‘West.’

4.2.4 The Third Preparatory Committee Meeting

Kruger explained that he had left the Civil Service at the end of September 1997. However, Chairman of the PrepCom Meetings, Adrian Bos of the Netherlands requested that South Africa’s Foreign Affairs Department include him on the South African delegation so that he could chair the Working Group on International Cooperation and Judicial Assistance again.¹⁵ The government of South Africa did not compensate him financially for his attendance, instead Cherif Bassiouni facilitated the sponsorship of his participation and he chaired the meeting. This is important because it demonstrates the lengths that individual Africans were willing to go to ensure that the ICC project ended in a successful outcome, above and beyond what the dominant historical narrative might suggest.

Following Kruger’s departure from the South African delegation, he explained that he was replaced by Professor Medard Rwelamira who “was aware of the efforts to involve SADC states and other African states.”¹⁶ Other members of the delegation included John Makhubele, Gen De Klerk, and Sivu Maqungo. With respect to the Working Group at the final PrepCom and the Rome Conference on International Cooperation and Judicial Assistance, Phakiso Mochochoko took over that role, further demonstrating regional collaboration and engagement in the process. Kruger explained that the LMG began to expand its membership, which he said made it “a little less effective because the interests were becoming a bit more diverse the close it came to the Rome Conference.”¹⁷ This is an important point, since it offers some explanation as to why governments often chose to negotiate as regional blocs instead of under the umbrella

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

of the LMG. It raises questions about how close interests need to be in order to provide an effective negotiation strategy for blocs of states. South African participation in the final PrepCom meeting remained high, with positive and active participation by Medard Rwelamira and Sivu Maqungo. This was the final meeting heading into the Rome Conference.

4.3 Outside of the United Nations: SADC's early interest in the establishment of an ICC

African support for the idea of an international criminal court began as early as 1993 through the work of the South African Development Community (SADC), which spearheaded coordinated regional activism. Sivu Maqungo, the former Principal State Law Advisor to South Africa, explained that “Delegations from Lesotho, Malawi, Swaziland, Tanzania and South Africa had participated in the effort to establish the ICC as early as 1993 when the International Law Commission (ILC) presented a draft statute to the General Assembly Sixth Committee for consideration.”¹⁸ This cursory involvement evolved into a robust consultative approach by SADC, “with the view to develop a strategy aimed at making a meaningful impact on the negotiations on the establishment of the ICC.”¹⁹ This is significant inasmuch as it illustrates that African states not only supported the idea of an ICC, but sought to impact its institutional design from the earliest stages. African interest in establishing a permanent ICC was directly related to the regional experience with widespread and systematic grave human rights abuses, particularly apartheid in South Africa and genocide in Rwanda.²⁰

To this end, according to Maqungo, delegates of fourteen African states,²¹ “had met for the first time on the topic of an International Criminal Court on the 11 to 14

¹⁸ Sivu Maqungo, “The establishment of the International Criminal Court: SADC’s participation in the negotiations,” *African Security Review* 9 (2000), 42; United Nations, “Report of the Commission to the General Assembly on the work of its forty-fifth session,” *Yearbook of the International Law Commission*, II (1993), Part Two, 21-100.

¹⁹ Maqungo, “The establishment of the International Criminal Court,” 42.

²⁰ Sivu Maqungo, former South African diplomat, interview by author, 22 February 2019, Pretoria.

²¹ Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

September 1994 and discussed a joint uniform approach to negotiating the draft Statute of the International Criminal Court.”²² The SADC-led discussions aimed to establish a unified position, which was a strategic approach to make a meaningful impact on the multilateral negotiations as the ICC initiative continued to move forward. In the intervening years, African states worked together in close consultation to shape and support the ICC project locally, regionally, and internationally, particularly within the United Nations.

In this vein, legal experts from SADC states met in Pretoria, South Africa on 14 September 1997, “and adopted principles of consensus which were transmitted for review to SADC ministers of Justice and attorneys-general.”²³ These principles of consensus provided the basis for the issuance of a Common Statement, “which became the instruction manual for SADC’s negotiations.”²⁴ This streamlined approach provided a strong basis for African activism and involvement in negotiating the ICC from the outset.

The 14 September 1997 meeting and subsequent principles of consensus are referred to as ‘SADC’s ten negotiating principles for the Establishment of an International Criminal Court.’ The ten negotiating principles were enumerated as follows:

- (1) Support for an early Establishment of an International Criminal Court;
- (2) The ICC should be effective, independent and impartial and operating within the highest standards of international criminal justice;
- (3) The ICC should decide whether it has jurisdiction in circumstances where the national judicial system is not available, fails to prosecute or investigate or is ineffective;
- (4) The ICC should be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective;
- (5) The ICC should be responsive and give consideration to plights of victims especially women and children;

²² Sivuyile (Sivu) Maqungo, “The African Contribution Towards the Establishment of an International Criminal Court”, in *African Yearbook of International Law*, ed. A.A. Yusuf (African Association of International Law, 2001), 333-350; United Nations, “Draft Statute for an International Criminal Court,” *Yearbook of the International Law Commission*, II (1994), Part Two, pg. 23-209.

²³ Maqungo, “The establishment of the International Criminal Court,” 43.

²⁴ *Ibid.*

- (6) The ICC should be unfettered by veto of the Security Council;
- (7) Independence of the Prosecutor should be guaranteed and he/she must have ex officio powers to initiate investigations;
- (8) The ICC should enjoy maximum cooperation of States;
- (9) The ICC ought to have inherent jurisdiction over the crime of genocide, crimes against humanity, serious violations of the principles applicable in armed conflicts and if consensus is reached in respect of the crime of aggression it should also fall under inherent jurisdiction of the ICC. Opt in or prior consent should be in respect of treaty-based crimes;
- 10 Human Rights must be respected in all aspects of the ICC Statute, especially rights of the accused to a fair trial.²⁵

These negotiating principles reflect an Afro-centric vision of what would be required to establish an effective ICC. Interestingly, these principles reflect a desire for a much stronger statute than the one that was ultimately negotiated in 1998, especially regarding the role of the Security Council, for example. The efforts on the part of SADC triggered other regional dialogue about the want and need for the ICC Statute to succeed and the importance of establishing an effective negotiation strategy to this end.

4.4 The Dakar Declaration

On 5-6 February 1998, the government of Senegal hosted an ‘African Conference on the International Criminal Court’ (African Conference). Twenty-five states attended this conference and the ‘Dakar Declaration on the Establishment of the International Criminal Court’ (Dakar Declaration) was adopted.²⁶ The attendees of the African Conference were aware of the upcoming diplomatic conference for the adoption of the ICC treaty, which was only four months away in Rome, Italy. African interest in the ICC project had been well-established and the Dakar Declaration may be framed as reactionary to SADC’s

²⁵ Maqungo, “The African contribution towards the establishment of an International Criminal Court,” 335.

²⁶ *Dakar Declaration for the Establishment of the International Criminal Court in 1998* (6 February 1998), available at <http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf>.

vigilance, best expressed by the ten negotiating principles for the establishment of an ICC. Of importance, the Organization of African Unity (OAU), now African Union (AU), adopted the Dakar Declaration at the 67th ordinary session of the OAU Council of Ministers in Addis Ababa (February 1998) and at the 34th Assembly of Heads of State and Government of the OAU in Ouagadougou (June 1998). Since all African nations are members of the African Union (which was then the OAU), this demonstrates strong regional support for an ICC.

The Dakar Declaration makes several similar affirmations to those in the SADC principles. For example, the Dakar Declaration affirms “that the Court shall be independent, permanent, impartial, just and effective.”²⁷ Other parallel components include the affirmation that the ICC statute be adopted at the diplomatic conference, in other words, there was a shared regional commitment to the early establishment of an ICC. An important affirmation that “the International Criminal Court shall operate without being prejudiced by actions of the Security Council”²⁸ demonstrates a uniform regional importance placed on this particular point. Both SADC and the Dakar Declaration identify the importance of complementarity between the ICC and national tribunals. Other similar points address the importance of state cooperation, respect for human rights in all phases of the procedure, the independence of the Prosecutor, and a financing scheme that does not impede the ICC’s independence and impartiality.²⁹ Additionally, both documents say that the ICC can determine its own jurisdiction when national systems fail to punish those most responsible for committing genocide, crimes against humanity, and war crimes.

The Dakar Declaration largely mirrored SADC’s ten negotiating principles, with some interesting points of departure. For example, while SADC only references national justice systems in its conception of complementarity, the Dakar Declaration says, “That a complementarity exists between the International Court and national and *regional* tribunals, when these are ineffective and where political will is manifestly absent.”³⁰ This

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid. [*emphasis added*].

approach signals a focus on (more) local forms of justice, and further entrenches the notion of complementarity by framing the ICC as a court of last resort. The second key difference is with respect to the question of providing compensation for victims. The Dakar Declaration says “that the Statute of the Court must ensure respect for Human Rights in all phases of the procedure, namely the rights of the suspects, the accused, the victims and the witnesses, and consequently that the Preparatory Committee should intensify its efforts to establish a consensus on the question of victim compensation.”³¹ These differences may be a reflection of the expansion of states involved in the process, which represent different legal systems and/or valuations of particular aspects or ideas of justice, i.e. compensation.

4.5 Conclusion

This chapter has outlined African participation in the establishment an ICC, particularly from 1993 to 1998. It is clear that African governments and individuals engaged in very high levels of engagement with the issues both inside and outside of the United Nations processes. The role of civil society to increase broader regional involvement in the development of the ICC project is especially important to note. Ultimately, however, this chapter has outlined that African delegations were invested in the successful negotiation of the Rome Statute, and many governments had established positions and preferences on what kind of Court the ICC ought to be. This engagement offers a basis to seriously consider the interventions of African governments throughout the Rome Diplomatic Conference to better understand how the region conceptualized international criminal justice at the ICC.

³¹ Ibid.

Chapter 5

5 African Participation at the Rome Diplomatic Conference

This chapter deconstructs the preferences of African states at the Rome Diplomatic Conference with respect to the role of the Security Council, the trigger mechanism for the Court's jurisdiction, and the power of the Prosecutor to initiate an investigation *proprio motu*. While there is no one monolith, there are some general regional consistencies in the construction of preferences on these three provisions. This chapter synthesizes the positions of African governments with respect to these issues, based upon the plenary meetings and meetings of the Committee of the Whole at the Rome Diplomatic Conference.

Generally, the states that preferred to construct the Court in the ways reflected in the final text displayed a strong commitment to the Statute in the form of treaty ratification. It is important to note that these trends are general, since not every African state spoke to every issue. However, the information provided by the summary records of the plenary meetings and meetings of the Committee of the Whole indicates that there is a general correlation between how much of the final text of the Statute reflected the preferences of various African delegations and that states' willingness to be bound by it.

5.1 Key Issues

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (The Rome Diplomatic Conference, Rome Conference or Conference) took place from 15 June to 17 July 1998 in Rome, Italy. From an organizational (United Nations) perspective, it was the culmination of years of work on the part of the International Law Commission (ILC), the Ad Hoc Committee (which was tasked with reviewing the draft statute provided by the ILC in 1995),¹ and the Preparatory Committee (PrepCom), which continued to iron out the contentious components of the

¹ See United Nations, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, Fifteenth Session (New York, 1995), Supplement No. 22 (A/20/22).

draft statute leading up to the Rome Diplomatic Conference in 1998.² These efforts were supplemented by the work of non-governmental organizations (NGOs), governments, intergovernmental (regional) organizations, and committed delegates and activists. The draft statute contained 13 parts and 116 articles.

Heading into the diplomatic conference in Rome, the successful negotiation of the treaty to establish an International Criminal Court (ICC) was uncertain. Conference Chairman Philippe Kirsch and his colleague, Canadian delegate John Holmes, explained, “[d]espite the work accomplished by the Preparatory Committee (PrepCom), the draft statute that ultimately emerged from the PrepCom was riddled with some fourteen hundred square brackets, i.e. points of disagreement, surrounding partial and complete provisions, with any number of alternative texts.”³ This resulted in the need to organize the Conference strategically. Coordinators were appointed to a specific area of responsibility: “the chairman requested all coordinators at the outset to take the lead in drafting provisions in their area of responsibility and to refer only unbracketed texts to the CW [Committee of the Whole] so as to avoid miring it in negotiations on the multitude of square brackets.”⁴ This division of labour was a managerial choice to maximize time and consolidate the text.

On this basis, it is important to highlight the most controversial or contentious parts of the treaty— that is, those aspects that could have resulted in the failure of the Conference. Heading into Rome, according to the UN Press Release of 8 June 1998:

Most of the draft’s unresolved issues, however, are *political* in nature. Key issues still outstanding include whether or not State consent would apply within inherent jurisdiction of the court; whether the prosecutor would be able to initiate criminal

² See United Nations, *Report of the Preparatory Committee on the Establishment of an International Criminal Court* (14 April 1998), A/CONF.183/2/Add.1.

³ Philippe Kirsch and John T. Holmes, “The Rome Conference on an International Criminal Court: The Negotiating Process,” *The American Journal of International Law*, 93.1 (January 1999), 3. Note that Philippe Kirsch was the Canadian Chairman of the Conference and John T. Holmes was the Counsellor for the Delegation of Canada, which gives their account of the negotiations special weight.

⁴ *Ibid.* See note 5: “In general, issues once debated in the CW were referred to working groups or coordinators. The latter then reported the results of their work to the CW, and texts accepted by the CW were referred to the Drafting Committee. Texts refined by the committee had again to be approved by the CW. The final report was sent from the CW to the plenary, with a complete text, on the final day of the conference.”

action independently of the Security Council or the complaint of any State; whether the Security Council could stop the course of investigation or prosecution if it considered it a matter of international peace and security; the definition of war crimes; and whether or not to include the crime of aggression under the jurisdiction of the court.⁵

Naturally, as the Conference evolved, the questions of contention became more concentrated. Benedetti, Bonneau, and Washburn broke the issues into two ‘sets of questions.’ The first concerned questions “about the exact categories of crimes the Court would try, and the second would be directed at the Court’s jurisdiction, how to determine a case’s admissibility, and the type of law the Court would apply... The meeting and Conference as a whole recognized that these questions of jurisdiction and admissibility were the intensely political issues that could no longer be postponed.”⁶ A key example of this was the crime of aggression and its fundamental ties to the United Nations Security Council (Security Council or UNSC). While a definition of aggression was not established in the context of the ICC by the PrepCom before the Rome Conference, the basic and general understanding was that aggressive acts breached the peace.⁷ Such breaches are fundamentally linked to the Security Council, the primary responsibility of which is to maintain international peace and security, under Chapter VII of the UN Charter.⁸ The nature of the relationship between the proposed Court and the Security Council was unclear leading up to and at the Rome Conference, especially when handling the same situation(s). Questions about institutional sequencing and concurrent involvement remained largely unanswered leading up to and during the negotiations.

⁵ Press Release L/2867, “UN Diplomatic Conference to Establish International Criminal Court to Convene in Rome, 15 June-17 July,” (8 June 1998), available at <https://www.un.org/press/en/1998/19980608.12867.html>; accessed 28 February 2020 [*emphasis added*].

⁶ Benedetti, Bonneau, and Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Boston: Martinus Nijhoff Publishers, 2014), 126.

⁷ Note that the General Assembly had dealt with the difficult issue of defining aggression since 1945, referring the issue to the International Law Commission in 1950. In 1967, a Special Committee on the Question of Defining Aggression was established. In 1974, the General Assembly adopted resolution 3314 (XXIX), without a vote. See United Nations Resolution (XXIX), (14 December 1974), available at [https://undocs.org/en/A/RES/3314\(XXIX\)](https://undocs.org/en/A/RES/3314(XXIX)); accessed 9 March 2020.

⁸ Charter of the United Nations, Chapter V: The Security Council, Article 24.1 (26 June 1945).

Nevertheless, Kirsch and Holmes explained that “the most controversial elements of the statute—those that could make or break the conference—were largely contained in Part 2, Jurisdiction, Admissibility and Applicable Law, which includes the list and definition of crimes. For that reason... the negotiating efforts of the chairman and the Bureau of the Committee of the Whole were mainly directed at resolving problems in part 2.”⁹ Kirsch and Holmes highlighted some key areas of contention: the role of the Security Council in respect of the Court; the inclusion of aggression among the core crimes covered by the statute; how the jurisdiction of the Court could be triggered (automatic jurisdiction upon ratification, case-by-case consent, universal jurisdiction); the power of the Prosecutor to initiate proceedings *proprio motu*; the inclusion of terrorism and regional drug trafficking; and the inclusion of nuclear weapons among the list of weapons prohibited by the statute.¹⁰ The jurisdiction question was the most problematic: “It is on this issue that the differences proved irreconcilable and consensus eventually broke down, leading to a vote at the end of the conference.”¹¹ Indeed, the Rome Statute was not borne out of consensus. Instead, the final text was a reflection of measured compromise, designed to generate broad acceptance in the form of a ‘final package’ that states would be forced to accept in its entirety, or not at all, by an unrecorded yes-or-no vote. This was an effective strategy: 120 countries voted in favour of the Statute; seven countries, China, Iraq, Israel, Libya, Qatar, the United States, and Yemen, voted against it; 21 countries abstained.

Within that framework, this chapter focuses on the positions of African delegations on the controversial elements contained in Part 2 in an effort to better understand the African ‘vision’ of the Statute and has been broken into two parts. The first considers African positions on the Court’s jurisdiction in relation to the Security Council, ‘trigger mechanisms,’ and the powers of the Prosecutor to initiate an investigation on his or her own volition (i.e. *proprio motu*). The second part considers African positions on key issues with respect to crimes. This includes the inclusion of

⁹ Kirsch and Holmes, “The Rome Conference on an International Criminal Court: The Negotiating Process,” 4.

¹⁰ *Ibid.*

¹¹ *Ibid.*

internal armed conflicts, the prohibition of terrorism and drug trafficking, and the prohibition of nuclear weapons. For clarity, the inclusion of aggression as a core crime is fundamentally interlinked with the role of the Security Council and is considered as such, in part one.

This builds on the work of others by further enriching understandings of African activism and support for the establishment of an ICC by putting a special analytical focus on the Rome Diplomatic Conference negotiations.¹² This content analysis primarily relies upon the summary records of the plenary meetings and the meetings of the Committee of the Whole, the main working body of the Conference. Unpacking Afro-specific contributions at the Rome Conference provides important insight into the ‘African vision’ of the ICC in its key ideational moment. A review of the contributions in Rome is used to better understand what kind of Court African states and coalitions of states *wanted* and whether or not such preferences ultimately affected treaty ratification in the region. Understanding these preferences provides a basis to better understand the areas of compromise which were required to ensure the success of the Conference and the establishment of the Court. It is argued that these compromises in many respects troubled the Court’s institutional design as a corollary of political posturing. This has permeated its operationalization, most focally in African situations.

5.2 Regional and Other Group Affiliations

African preferences in Rome were formed by states, and in many cases, within coalitions of states. Such coalitions took the form of intergovernmental negotiation blocs or regional organizations, namely: the South African Development Community (SADC), the

¹² See Line Engbo Gissel, “A Different Kind of Court: Africa’s Support for the International Criminal Court, 1993-2003,” *The European Journal of International Law* 29.3 (2018): 725-748; Max du Plessis and Christopher Gevers, “The Sum of Four Fears: African States and the International Criminal Court in Retrospect – Part I,” *OpinioJuris* (blog), August 7, 2019, available at <http://opiniojuris.org/2019/07/08/the-sum-of-four-fears-african-states-and-the-international-criminal-court-in-retrospect-part-i/>; accessed 5 April 2020; and Max du Plessis and Christopher Gevers, “The Sum of Four Fears: African States and the International Criminal Court in Retrospect – Part II,” *OpinioJuris* (blog), August 7, 2019, available at http://opiniojuris.org/2019/07/08/the-sum-of-four-fears-african-states-and-the-international-criminal-court-in-retrospect-part-ii/?relatedposts_hit=1&relatedposts_origin=35701&relatedposts_position=0; accessed 5 April 2020.

Group of Arab States, the Group of African States, the Like-Minded Group (LMG), and/or the Nonaligned Movement (NAM); intersectional membership was commonplace for many African delegations, as shown in Table 5-1. It is also important to acknowledge the role of nongovernmental organizations (NGOs) in supporting and driving commitment to the establishment of an ICC, most notably through the work of the umbrella NGO Coalition for the International Criminal Court (CICC).

Table 5-1: African Coalition Membership at the Rome Diplomatic Conference (1998)

Negotiating Bloc	African Member States
SADC	Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe.
Group of Arab States	Algeria, Comoros, Djibouti, Egypt, Eritrea, Libya, Mauritania, Morocco, Sudan, Tunisia.
Group of African States	Angola, Burkina Faso, Egypt, Ghana, Guinea, Guinea-Bissau, Lesotho, Mali, Tunisia.
Like-Minded Group	Algeria, Benin, Burkina Faso, Burundi, Congo, Egypt, Gabon, Ghana, Lesotho, Malawi, Namibia, Senegal, Sierra Leone, South Africa, Swaziland, Zambia.
Nonaligned Movement	Algeria, Ghana, Egypt, Mozambique, Sudan.

It is important to understand that many African delegations had multiple affiliations at the Rome Conference, which often shaped the preferences of individual states throughout the negotiations. This frames a conceptualization of African diplomacy in Rome as complex and interdependent in many respects. The decision to join a negotiation bloc or coalition is a strategic choice for less powerful states to wield greater influence over the outcome of the negotiations.¹³ For context, it is important to note that SADC took a leading role

¹³ See Sivuyile (Sivu) Maqungo, “The African Contribution Towards the Establishment of an International Criminal Court,” in *African Yearbook of International Law*, ed. A.A. Yusef (African Association of International Law: 2001), 333-350; Nicole Deitelhoff and Linda Wallbott, “Beyond soft balancing: small states and coalition-building in the ICC and climate negotiations,” *Cambridge Review of International Affairs* 25.3 (2012): 345-366.

regionally. As South African delegate Sivu Maqungo explained, “SADC also sought to maintain control of the regional groups, particularly the African group. To this end a successful concerted lobby effort was undertaken by SADC to have Lesotho co-ordinate, on a permanent basis, the Africa group’s effort within the process to establish an ICC.”¹⁴ It is also important to highlight that “The Arab States formed one of the most active informal groups; they met frequently and adopted common positions that were not necessarily supportive of the ICC, although some states (such as Egypt and Jordan) were part of the ‘like-minded states.’”¹⁵ This is indicative of the difficulty stemming from membership in multiple groups. Nevertheless, while regional or group affiliations may explain preferential patterns among some African states, the analytical starting point is at the level of the state. More specifically, 48 African states attended the Rome Statute negotiations and expressed a range of national preferences.¹⁶ On this basis, African positions on the most controversial elements and key issues relating to elements of the Court’s jurisdiction are summarized in Table 5-2, below.

¹⁴ Manqungo, “The African Contribution Towards the Establishment of an International Criminal Court,” 339.

¹⁵ M. Cherif Bassiouni, “Negotiating the Treaty of Rome on the Establishment of an International Criminal Court,” *Cornell International Law Journal* 32.3, Article 3 (1999): 449, note 25.

¹⁶ These states included Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d’Ivoire, Djibouti, Democratic Republic of the Congo, Egypt, Eritrea, Ethiopia, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, Tanzania, Zambia, Zimbabwe.

Table 5-2: African Positions on Controversial Elements and Key Issues on Jurisdiction at the Rome Diplomatic Conference, 1998

Controversial element and/or key issue		Number of African states that expressed a preference for the stated element/issue
The role of the Security Council	No role for UNSC	4
	No veto to block cases	7
	Independence from	16
	Cooperative relationship	4
	Referral powers	18
	Deferral powers	17
Inclusion of aggression as a core crime		31
	Clear definition needed	15
	No inclusion	4
'Trigger mechanism'	Automatic	30
	Case-by-case consent	7
	Universal	10
Powers of the Prosecutor	<i>Proprio motu</i>	28
	No power to initiate proceedings	7

5.3 The role of the Security Council

Many African delegations engaged in dialogue surrounding the proposed relationship between the ICC and the Security Council. The range of positions on this issue was broad. Five delegations expressly felt that the Council should have no involvement in the

operation or function of the Court.¹⁷ Others took a softer position, suggesting that the Council and the Court would need to have clearly defined roles and boundaries in order for both to work effectively— a cooperative arrangement.¹⁸ It is helpful to evaluate the positions of African delegations in further detail on this point, to better understand the imagined working relationship between the Council and the proposed Court.

5.3.1 The Security Council and the crime of aggression

Many states understood that the Security Council was bound to the crime of aggression, however defined, given its responsibility to maintain international peace and security under Chapter VII of the UN Charter. Some African states wanted to give the Council inherent power in this respect. Cameroon, for one, was particularly involved in this discussion and submitted a proposal on the crime of aggression and the relationship between the Security Council and the Court. The most relevant points of the Cameroonian proposal are contained in its proposed Article 10: Relationship between the Security Council and the Court, which stated:

1. The Security Council shall determine the existence of aggression in accordance with the pertinent provisions of the Charter of the United Nations before any proceedings take place in the Court in regard to a crime of aggression.
2. The Security Council may determine the existence of aggression in accordance with paragraph 1 of this article:
 - (a) On its own initiative;
 - (b) At the request of a State which considers itself the victim of aggression;
 - (c) At the request of the Court when a complaint relating to a crime of aggression has been submitted to it.¹⁹

¹⁷ These states included Democratic Republic of Congo, Malawi, Niger, Nigeria, Tunisia.

¹⁸ These states included Cameroon, Central African Republic, Madagascar, Mozambique.

¹⁹ Proposal Submitted by Cameroon to the Committee of the Whole, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (2 July 1998) A/CONF.183/C.1/L.39.

This approach suggests that the Security Council would have primary and sole authority to determine whether the crime of aggression had been committed.

Other African delegations strongly disagreed with this idea. For example, the Nigerian delegate stated that:

He had a reservation about the proposed role of the Security Council. While there should be a relationship between the United Nations and the Court under an agreement, he was opposed to conferring on the Council the exclusive right to determine when aggression was committed and to refer such cases to the Court. The Court should not be encumbered at the outset by avoidable political influences. The power of the Council under Chapter VII of the Charter of the United Nations should not extend to the Court.²⁰

These concerns were further highlighted when he asked, “Moreover, how could aggression on the part of one of the permanent members of the Security Council be referred to the Court if that member could veto such a referral?”²¹ These sentiments were echoed by the Kenyan delegate who said that “he shared the view concerning the potential for conflict of jurisdiction, given the pre-existing powers of the Security Council. Its competence to determine the existence of acts of aggression could seriously affect the integrity of the Court as an independent body free from political influence.”²² The delegate from Libya provided an experience-based opinion and posited that:

²⁰ Summary records of the plenary meetings of the Rome Diplomatic Conference, 7th plenary meeting (18 June 1998) A/CONF.183/2/Add.1 and Corr.1, 111, para. 87. See also 8th plenary meeting (18 June 1998) A/CONF.183/2/Add. 1 and Cor. 1, 118, para. 69: This opinion was mirrored by the Ugandan delegate who said, “The role of the Security Council under Chapter VII of the Charter of the United Nations should not be allowed to influence the acceptability and independence of the Court.” 31st meeting (9 July 1998) A/CONF.183/2/Add. 1 and Corr. 1, 314, para. 6: The Tunisian delegate took a balanced position and said, “The Court should not be prevented by the Security Council from exercising jurisdiction over situations involving the crime of aggression. Nevertheless, due weight must be accorded to the Council’s role in the maintenance of international peace and security.”

²¹ Summary records of the meetings of the Committee of the Whole, 10th meeting (22 June 1998) A/CONF./183/Add.1 and Corr.1, 209, para. 83.

²² Summary records of the meetings of the Committee of the Whole, 7th meeting (19 June 1998) A/CONF.183/C.1/SR.7, 181, para. 15. See also the statement of the delegate from Ghana: “The Court should have jurisdiction over genocide, crimes against humanity and war crimes, but not, at the current juncture, over aggression, as that would inevitably cause conflict with the Security Council.” Summary records of the meetings of the Committee of the Whole, 26th meeting (8 July 1998) A/CONF.183/C.1/L.53, 278, para.61.

She did not consider that the Security Council should refer cases. The Security Council had failed to deal with many cases of flagrant aggression—for instance, the attack on her country in 1986... The Security Council and its decisions were influenced by the interests and positions of certain permanent members, so that its resolutions were selective and followed a double standard. Her delegation would object to the Court's being paralysed if the Security Council could not decide whether or not there was aggression.²³

These examples demonstrate the range of opinion about the Security Council's power to determine acts of aggression among various African delegations. Importantly, the politicization of the Council was acknowledged by several states that were less than enthusiastic about incorporating an unchecked United Nations Security Council into the framework of the ICC to solely determine acts of aggression.

It is important to note that there was a high level of consensus among African delegations in Rome to include the crime of aggression in the Statute (65 per cent of the total number of African delegations in Rome).²⁴ Only four states posited that aggression should *not* be included in the Statute, namely Ghana, Mali, Morocco, and Rwanda. Ghana appeared to change its position as the Conference evolved.²⁵ Despite the overall

²³ Summary records of the meetings of the Committee of the Whole, 6th meeting (18 June 1998), A/CONF.183/C.1/SR.6, 174, paras. 79-80.

²⁴ These included Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Congo, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Libya, Madagascar, Mali, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Sudan, Swaziland, Tanzania, and Tunisia.

²⁵ See Summary records of the meetings of the Committee of the Whole, 25th meeting (8 July 1998), 278, para. 61. Ghana had said that "The Court should have jurisdiction over genocide, crimes against humanity and war crimes, but not, at the current juncture, over aggression, as that would inevitably cause conflict with the Security Council." Later, at the 33rd meeting (13 July 1998), 325, para. 63, the delegate from Ghana, "said that aggression was the mother of war crimes and it was absolutely essential that the Statute should reflect that fact." At the 6th plenary meeting (17 June 1998), 103, para. 106, Morocco "agreed that the Court's jurisdiction should be confined to war crimes, crimes of genocide and crimes against humanity. To include the crime of aggression would be premature." *Ibid.*, at 174, para. 53: "Given the difficulty of finding a precise definition of the crime of aggression and the role of the Security Council, he thought that aggression should be excluded from the list of crimes falling within the competence of the Court. At the 29th meeting (9 July 1998), 298, para. 53, Morocco said, "Aggression was political in nature and had not been clearly defined. It should therefore be excluded from the Court's jurisdiction, and the same applied to other crimes which were not of the same gravity." At the 26th meeting (8 July 1998), 278, para. 65, Mali said, "Aggression should not be included at that stage because it was an act for which no generally acceptable definition had yet been found." Rwanda's preference to exclude aggression is derived from its statement at the 6th plenary meeting, 103, para. 11: "His delegation believed that the crimes falling within the jurisdiction of the International Criminal Court should be confined to genocide, war crimes and crimes

consensus that aggression ought to be included in the Statute, opinion diverged on two distinct and important points: (1) its definition and (2) whether the Security Council would be necessarily and/or solely responsible for determining whether aggression had occurred as a precursor to Court intervention. This divergence is important because it hints at the willingness of African governments to accept the status quo—that is, the integration of the power of the Security Council within the Court’s institutional architecture. To this point, there was some disagreement as to whether or not the Court would be able to make its own determination about acts of aggression independent of the Security Council, or if there might be a role for the United Nations General Assembly in determining aggressive acts. Nevertheless, enumerating aggression within the Rome Statute required an acknowledged degree of coalescence between the Court and the Security Council, given the Security Council’s primary duty to maintain international peace and security; at the most basic level, acts of aggression disrupt international order. However, embedding *realpolitik* within the structure of an international judicial institution *vis-à-vis* the Security Council raised concerns for many African states in (and before) the negotiations at Rome. Since consensus broke down on this issue, aggression was included as an *undefined* core crime in the Statute in 1998. However, it did not come into force until it was: (a) defined in 2010 at a review conference in Kampala; (b) activated through the adoption of a resolution on 15 December 2017; and (c) entered into force on 17 July 2018.²⁶ It is also important to note that the ICC only has jurisdiction over aggression with respect to States Parties which have ratified the Rome Statute *and* the

against humanity, to the exclusion of other crimes already covered by national, regional or international conventions.” While aggression may be conceptualized as a war crime, it was generally compartmentalized as a separate and distinct ‘core crime’ alongside those cited by the Rwandan delegate and it is inferred that aggression was deliberately omitted from its preferred list of crimes. Note, also: the Angolan delegate took a mixed position, first supporting the inclusion of aggression at the 8th plenary meeting (18 June 1998), 118, para. 56: “He supported the inclusion of aggression within the Court’s jurisdiction.” This was reinforced at the 9th meeting (19 June 1998), 180, para. 8: “aggression was a very serious crime which caused a great deal of suffering and damage to the victim State. It must therefore be covered in the Statute.” Later at the 27th meeting (8 July 1998), 285, para. 42, the delegate stated that “he was not yet decided whether aggression should be included. A clear definition was needed so as to take account of General Assembly resolution 3314 (XXIX) and, particularly, the role of the Security Council.”

²⁶ See generally “The Crime of Aggression,” *Coalition for the International Criminal Court*, (no date), available at <http://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression>; accessed 25 February 2020.

amendments on the crime of aggression (unless referred to the ICC by the Security Council, which has no jurisdictional limits).

5.3.2 Veto Powers

Before the Rome Conference, SADC states had considered the role of the Security Council and the Court. Specifically, the SADC Principles enumerate that “The ICC should be unfettered by the veto of the Security Council.”²⁷ More general language was expressed by African states in the Dakar Declaration, which states “that the International Criminal Court shall operate without being prejudiced by actions of the Security Council.”²⁸ While SADC’s position focused squarely on the use of the UNSC veto, the Dakar Declaration reads more generally, with reference to ‘actions’ of the Security Council, which may include referral and deferral powers, for example. The consistency between the two expressions is in an overall emphasis on the Court’s independence from the Security Council, which was the primary point articulated by African delegates in the plenary meetings and the meetings of the Committee of the Whole.

It is significant that 33 per cent of African states that attended the Rome Conference expressed general statements about the importance of the Court’s independence from the Security Council. For example, the Tanzanian delegate said that “The International Criminal Court had to be truly independent, effective, impartial and permanent. It must not become a tool for the political convenience of states.”²⁹ Similar claims were made by Senegal, which noted that “referring to the role of the Security Council in respect of the International Criminal Court... no political structure should hamper the Court’s action. The Court should be independent of the Council and any other political body.”³⁰ General expressions about the Court’s independence from political bodies, and particularly the Security Council permeate the summary records and

²⁷ SADC Negotiating Principles for the Establishment of an International Criminal Court (11-14 September 1997, Pretoria, South Africa).

²⁸ Dakar Declaration for the Establishment of the International Criminal Court in 1998 (6 February 1998, Dakar, Senegal).

²⁹ Summary records of the plenary meetings of the Rome Diplomatic Conference, 3rd plenary meeting (16 June 1998), 74, para. 29.

³⁰ Summary records of the meetings of the Committee of the Whole, 11th meeting (22 June 1998), 211, para. 1.

thematically characterize an African vision of a depoliticized Court rooted in the ideals of judicial independence. These two examples are relatively unsurprising, since Tanzania belongs to SADC and the Dakar Declaration took place in Senegal and both states had advocated the need for an independent ICC well before the Conference. Nevertheless, it is constructive to evaluate how the SADC Principles and Dakar Declaration shaped state positions at the Rome Conference with respect to the role of the Security Council in greater detail.

Preference for the Court's independence from the use of the Security Council veto was clearly reflected in the positions of seven African delegations in Rome.³¹ To highlight this point, the Gabonese delegate stated that:

His delegation also considered that the Council should be given the possibility of bringing certain cases before the Court. It was, however, opposed to the principle that the Court could not prosecute persons who had committed crimes in a situation being taken up by the Council by virtue of its powers under the Chapter VII of the Charter of the United Nations, unless the Council explicitly authorized it to do so. The exercise of the Court's jurisdiction must therefore not depend on prior decisions by the Council, a highly politicized body. *Any machinery that might allow the permanent members of the Council to use their veto to protect potential accused persons when the interests of their countries were at stake would severely damage the independence and credibility of the Court.*³²

Gabon was a member of the Like-Minded Group (LMG), of which many African countries were also a part.³³ This may explain why the Gabonese delegate took a strong position on this particular issue. Most important, it illustrates that the delegate had meaningfully considered the significance of the relationship between the Security

³¹ These were Angola, Benin, Botswana, Gabon, Libya, Senegal, Sierra Leone.

³² Summary records of the plenary meetings of the Rome Diplomatic Conference, 6th plenary meeting (17 June 1998), 102-103, para. 96 [*emphasis added*].

³³ The Like-Minded Group consisted of 55 states. African countries included: Algeria, Benin, Burkina Faso, Burundi, Congo, Egypt, Gabon, Ghana, Lesotho, Malawi, Namibia, Senegal, Sierra Leone, South Africa, Swaziland, and Zambia. See Morten Bergsmo, Cheah Wui Ling, Song Tianying and Yi Ping, eds. *Historical Origins of International Criminal Law: Volume 4*, (Brussels: Torkel Opsahl Academic EPublisher, 2015), 732, note 8.

Council and the Court and chose to emphasize judicial independence to enhance institutional credibility.

This might be compared to the contributions of the Botswanan delegate (and SADC member), who said, “some questions remained, for instance, regarding the role of the Security Council. The Council was the first port of call in international crises and should be allowed to refer cases to the Court. Any State or member of the Council should also be able to refer cases before it to the Court, and the veto should not be applicable.”³⁴ Comparing the statements of these two delegations indicates diversity with respect to the overall willingness to involve the Security Council within the structure and function of the Court. Both Botswana and Gabon reach the same conclusion (i.e. that the UNSC can refer cases to the Court, but the veto should not be used), yet the language indicates a greater willingness on the part of Botswana to work within the existing political structure by incorporating and trusting the Security Council to fulfill its mandate and the mandate of the Court. These are important distinctions which demonstrate that consensus is often reached with complex and principled difference(s), even in cases of surface-level (general) agreement.

A different concern regarding the role of the Security Council and the use of the veto with respect to the Court was raised by the Libyan delegate, who said that “the Court should not be prevented from exercising its jurisdiction in the event of a Security Council veto.”³⁵ This was reinforced when she said that “her delegation could not agree to any role for the Security Council. The Court would be paralysed if the Council could impede its investigations because of the veto power of individual States.”³⁶ This position demonstrates a strong aversion to the Security Council altogether. Curiously, this indicates a desire for a strong and independent Court, but *only* if the case was not referred by the Security Council. Such a position is consistent with placing an ideological superiority on state sovereignty and ultimately reflects a desire to establish new power

³⁴ Summary records of the plenary meetings of the Rome Diplomatic Conference, 8th plenary meeting (18 June 1998), 118, para. 66.

³⁵ Summary records of the meetings of the Committee of the Whole, 28th meeting (8 July 1998), 293-294, para 102.

³⁶ Summary records of the meetings of the Committee of the Whole, 36th meeting (13 July 1998), 344, para. 6.

structures in international politics concerning the design of international criminal law and its judicial institutions.³⁷ This illustrates that there was not one monolithic ‘African’ position with respect to the ICC and its intended relationship with international political structures such as the Security Council. Nevertheless, similar fears were identified by Gabon and Libya with respect to the possibility of the Council abusing its power by using the veto and obfuscating the independence of the Court. Despite nuanced differences, expressions of Court independence remained generally consistent among African states in Rome.

In contrast, Cameroon took a unique approach to constructing the relationship between the Court and the Council based on ideas of ‘cooperation and complementarity.’ Specifically, the Cameroonian delegate said that “the relationship between the Security Council and the Court should be a matter of cooperation and complementarity. The Council needed the Court to help maintain global peace and the Court needed the Council, in particular, to help enforce its decisions.”³⁸ This suggests that Cameroon’s vision of the Court was based more so on including it within the existing political landscape, rather than seeking complete independence from it. This also indicates a belief that the Council and the Court could work together to achieve mutually shared goals. Similar themes were addressed by Mozambique when it outlined the importance of establishing a coordinated and cooperative relationship between the Security Council and the Court. In a similar vein, the Central African Republic emphasized the need for harmonization, not obstruction between the Court and the Security Council.

Perhaps the most significant underlying concern raised by Cameroon and others was the idea that the Court would need assistance with enforcement, based on complex political realities, which the Security Council could help facilitate. To elaborate, Madagascar suggested that the Security Council would be needed to compel States Parties to enforce the Court’s sentences. However, underlying these advances of

³⁷ See generally 28th meeting, 294, para. 104 when the delegate from Libya said that “she was ready to consider guarantees that would secure the integrity and sovereignty of States;” see, also: 6th plenary meeting (17 June 1998), 102, para. 81: Libya similarly said that “It was essential to respect the sovereignty, equality and independence of States and to prevent political organs from controlling international life.”

³⁸ Summary records of the meetings of the Committee of the Whole, 30th meeting (9 July 1998), 310, para. 81.

institutional cooperation is the assumption that the Council would place the moral imperatives or normative ideologies of the Court above the political interests of Council members, either individually or collectively. Although relatively unpopular with other African delegations, this position presents a degree of pragmatism with respect to enforcement challenges that could not go unacknowledged. This is important because it demonstrates the high level of engagement exercised by African delegates, who engaged with the difficult and contentious issues directly relating to power politics and the limitations of *realpolitik*.

Nevertheless, a different understanding was described by the delegate from Lesotho, who said that “the relationship between the Security Council and the Court raised difficult questions. Although, in theory, no conflict should exist, the Council’s maintenance of peace and security might either complement or frustrate the work of the Court in bringing war criminals to justice and advancing the international rule of law. He opposed any political interference by the Council or States in the affairs of the Court.”³⁹ Lesotho took a leading role within the SADC on the ICC issue and was heavily involved in the negotiations leading up to Rome. This statement suggests a fundamental concern with trusting the Security Council to strengthen, rather than weaken, the Court. This appears to be a chance that Lesotho was unwilling to take, opting instead for an independent and depoliticized ICC, much like the majority of African delegations that spoke to this issue in plenary. This is important because it demonstrates that the majority of African states viewed the ICC as an institution that ought to reflect a new world order, or at least not integrate the existing power structures within its institutional design.

5.3.3 Referral powers

Other expressions of Security Council powers outside of the veto include its capacity to refer situations to the Court and to defer proceedings in the interest of maintaining international peace and security under Chapter VII of the UN Charter. The majority of African delegations that addressed the powers of the Security Council in the plenary

³⁹ Summary records of the plenary meetings of the Rome Diplomatic Conference, 2nd plenary meeting (15 June 1998), 69, para. 72.

meetings were willing to grant referral powers with relatively little contestation. This willingness may be linked to thematic ideals of universality and the desire to establish a Court with broad jurisdictional reach.⁴⁰ Further, the Security Council has historical ties to international criminal justice, since it established the *ad hoc* tribunals in Yugoslavia and Rwanda. Granting the Security Council referral powers would supplant the need to establish *ad hoc* tribunals, should the need arise in future contexts.

Nonetheless, there was variation in opinion on how to establish Security Council referral powers in the context of an ICC during the negotiations. Specifically, 15 African states expressly agreed to give the Security Council referral powers. This represented the position of 31 per cent of the African delegations in attendance in Rome and more pointedly, 75 per cent of African delegations that addressed this particular issue in the plenary meetings and meetings of the Committee of the Whole.⁴¹ Ethiopia, Morocco, and Zimbabwe preferred that the referral powers of the Security Council be limited *only* to acts of aggression. Nigeria and Libya were expressly opposed to giving referral powers in any capacity.⁴² To demonstrate this point, the Nigerian delegate said that the Council should have “no role whatsoever with regard to referral of matters to the Court.”⁴³

Generally, this indicates broad(er) regional support for granting the Security Council referral powers, though 28 African states did not address this issue in the plenary meetings. Tacit approval and/or consent may be inferred by the states that did not speak to this issue but either signed, or more demonstrably, signed *and* ratified the final version of the Statute.⁴⁴ Of the 18 African delegations that preferred to grant the UNSC referral

⁴⁰ See generally Line Engbo Gissel, “A Different Kind of Court: Africa’s Support for the International Criminal Court, 1993-2003,” *The European Journal of International Law* 29.3 (2018), 735.

⁴¹ This included the following states: Algeria, Botswana, Burkina Faso, Burundi, Central African Republic, Congo, Côte d’Ivoire, Djibouti, Egypt, Gabon, Lesotho, Malawi, Namibia, Senegal, and Sierra Leone.

⁴² See generally Summary records of the meetings of the Committee of the Whole, 10th meeting (22 June 1998), 209, para. 77. Libya said that “To give the Security Council, which was a political body, the right to trigger action would destroy confidence in the impartiality and independence of the Court, and thus detract from its credibility.”

⁴³ Summary records of the meetings of the Committee of the Whole, 9th meeting (22 June 1998), 198, para. 76. See 28th meeting, 293-294, para. 102: Libya expressed a similar position when its delegate said that “the right of members of the Council to refer cases to the Court was an entrenchment of domination.”

⁴⁴ Note that Angola, Cameroon, Eritrea, Guinea-Bissau, Sao Tome and Principe, and Sudan did not speak to UNSC referrals and ultimately signed the Rome Statute but did *not* ratify it. States that did not speak to the issue of Security Council referral powers but signed *and* ratified the Rome Statute include: Cape Verde, Chad, Comoros, Democratic Republic of the Congo, Gambia, Ghana, Guinea, Kenya, Liberia, Madagascar,

powers (limited or general), 13 went on to ratify the Statute, constituting the majority of the group with this shared preference.⁴⁵ Algeria, Egypt, Morocco, and Zimbabwe signed the Rome Statute, but did not ratify it, which demonstrates a degree of low-level commitment. Ethiopia neither signed nor ratified the Statute.

Indeed, the final text of the Statute grants the Security Council referral powers under Article 13 (b)– Exercise of jurisdiction:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if...

b. A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.⁴⁶

Providing referral powers for the Security Council is generally in line with the predominant ‘African’ vision of the Court. Only two African states specifically expressed a preference for no referral powers: Nigeria and Libya. Nigeria eventually signed *and* ratified the Rome Statute. Libya neither signed nor ratified. The significance of the Security Council’s referral power is that it can expand the Court’s jurisdiction to situations involving non-State Parties. This is a privilege not afforded to the Prosecutor or to States Parties when triggering the Court’s jurisdiction and can be used in lieu of the establishment of *ad hoc* tribunals.

5.3.4 Deferral powers

All the African states that accepted conferring deferral powers on the UNSC opposed prolonged involvement or interference with the Court and sought to limit this power as a result. This is consistent with the regional thematic aspiration of Court independence from political bodies, especially the Security Council. Specifically, 17 African delegations accepted giving the Security Council the ability to defer proceedings at the

Mali, Mauritius, Mozambique, Niger, South Africa, Tunisia, Uganda, Tanzania, Zambia. The states that did not speak to the issue of Security Council referral powers and did *not* sign or ratify the Rome Statute include Mauritania, Rwanda, and Swaziland.

⁴⁵This included the following states: Botswana, Burkina Faso, Burundi, Central African Republic, Congo, Côte d’Ivoire, Djibouti, Gabon, Lesotho, Malawi, Namibia, Senegal, Sierra Leone.

⁴⁶ Rome Statute of the International Criminal Court (17 July 1998) A/CONF.183/9.

Court, though with varying levels of overall approval and endorsement.⁴⁷ African delegations sought to restrict UNSC deferral powers in two primary ways: (1) temporal restrictions with respect to the duration of the deferral and the duration and number of possible renewal(s); (2) the caveat that evidence and witnesses be protected during the deferment process.⁴⁸ To be sure, these restrictions were important for many African states. Consider that Congo and Senegal preferred not to give the UNSC deferral powers but were willing to compromise if limits were placed on those powers. It is instructive to evaluate the positions of various African delegations to better understand the ideological spectrum on this particular issue.

First, Libya recommended giving no deferral powers to the Security Council. The Libyan delegate said, “[t]he Security Council should not have powers over the Court or be able to suspend proceedings for 12 months. Both article 10 [Security Council deferral] and article 6(b) [Exercise of jurisdiction: Security Council referral] should be deleted.”⁴⁹ This position is consistent with Libya’s view of a depoliticized Court, particularly regarding its quintessential independence from the Security Council. Speaking from a similar perspective, the delegate from Democratic Republic of the Congo expressed that “the Court should be able to function without interference from any other organ, especially the Security Council.”⁵⁰ However, it is necessary to identify that the majority of African states that addressed this issue expressed a desire to *limit* the deferral powers of the Security Council, rather than deny this power altogether.

In this frame, the majority of African states that considered this issue took a (more) moderate position on UNSC deferral powers in Rome. Delegations such as Congo submitted that its preference was *not* to grant the Security Council deferral powers.

⁴⁷ These included Angola, Benin, Burkina Faso, Burundi, Central African Republic, Congo, Egypt, Ethiopia, Gabon, Ghana, Guinea-Bissau, Kenya, Mozambique, Senegal, Sierra Leone, South Africa, and Sudan.

⁴⁸ Note that the states that preferred placing limits on the duration of the deferral included Angola, Benin, Burkina Faso, Central African Republic, Burundi, Congo, Egypt, Ethiopia, Gabon, Ghana, Guinea-Bissau, Kenya, Mozambique, Senegal, Sierra Leone, South Africa, and Sudan. States that preferred to incorporate protections for witnesses and evidence included Benin, Burundi, Congo, Gabon, Senegal, and Sierra Leone.

⁴⁹ Summary records of the meetings of the Committee of the Whole, 30th meeting (9 July 1998), 307, para. 35.

⁵⁰ Summary records of the plenary meetings of the Rome Diplomatic Conference, 7th plenary meeting (18 June 1998), 112, para. 93.

However, “it could, as a compromise, agree to a suspension for a maximum, non-renewable period of six months.”⁵¹ The Burundian delegation also took a compromise position, expressing that “it would have liked the suspension period to be shorter, but could accept the provision... provided that the need for preservation of evidence was addressed.”⁵² This position indicates an acceptance of limited deferral powers, so long as evidence is preserved while proceedings are suspended. In other words, the deferral cannot prejudice any future investigations or proceedings.

The preservation of evidence and the protection of witnesses in the event of a deferral was a priority for Benin, Burundi, Congo, Gabon, Senegal, and Sierra Leone. Like Burundi, each of these delegations also preferred to place temporal restrictions on the duration of the deferral and/or the possibility for renewal. To illustrate this point, the Senegalese delegate presented a compromise position by placing temporal and evidentiary restrictions on UNSC deferrals when he said “the Security Council should be able to refer matters to the Court, but it would be preferable for it *not* to have the power to suspend proceedings. However, he would be prepared to accept option 2 for article 10, paragraph 2, [Security Council deferral] if the period involved did not exceed three or perhaps six months and if the suspension was not renewable. Strong provisions should be included for the protection of witnesses and the preservation of evidence.”⁵³ This position reflects a preference for the Council *not* to have deferral powers, but a willingness to compromise if powers were limited in terms of duration and if protections were afforded to the evidence and associated witnesses/victims. Other states made more general assertions. For example, the delegate from Gabon said that “the Council should not have the power to defer consideration of a case by the Court for more than six months.”⁵⁴ African delegations had competing ideas about the appropriate length of time that the

⁵¹ Summary records of the meetings of the Committee of the Whole, 31st meeting (9 July 1998), 315, para. 17.

⁵² Summary records of the meetings of the Committee of the Whole, 35th meeting (13 July 1998), 336, para. 21.

⁵³ Summary records of the meetings of the Committee of the Whole, 30th meeting (9 July 1998), 307, para. 29.

⁵⁴ Summary records of the meetings of the Committee of the Whole, 29th meeting (9 July 1998), 300, para. 103. In a similar vein, Ethiopia supported the view that deferral powers should not exceed six months and could not be renewed for more than six months, see 31st meeting (9 July 1998), 315, para. 29.

UNSC could defer a situation from the Court. This provides additional evidence with respect to how African governments viewed the UNSC, and more specifically, the relative willingness of particular African governments to provide the UNSC with more or less integrative powers within the institutional framework of the Court.

Some African states had less hesitation about incorporating Security Council deferral powers within the Statute, albeit with similar temporal limits. Egypt, for example, submitted that while the Security Council “should have the right to deal initially with some matters, it should be empowered to prevent the Court from dealing with them only for a limited, non-renewable period.”⁵⁵ Similarly, but more specifically, Kenya acknowledged the Security Council’s primary responsibility to maintain international peace and security, yet suggested that a twelve-month deferral period should be reduced to six, with the possibility of one six-month extension.⁵⁶ Mozambique dealt specifically with the question of renewal and was willing to accept UNSC deferral powers “on the understanding that the request of the Security Council could be renewed for no longer than six months, and once only.”⁵⁷ Notably, some African delegations were concerned with the possibility that the Security Council could defer a situation indefinitely. For example, the delegate from Central African Republic said that “granting the Council power to suspend proceedings reflected a commendable desire to harmonize the actions of those two bodies; however, harmonization did not mean obstruction... his delegation felt that... the Council’s right of suspension could not be renewed indefinitely.”⁵⁸ Such positions acknowledge that the Security Council may have a need to defer Court action in the interest of maintaining international peace and security, but only temporarily.

⁵⁵ Summary records of the meetings of the Committee of the Whole, 10th meeting (22 June 1998), 209, para. 89.

⁵⁶ Summary records of the meetings of the Committee of the Whole, 31st meeting (9 July 1998), 317, para. 33.

⁵⁷ Summary records of the meetings of the Committee of the Whole, 35th meeting (13 July 1998), 341, para. 71.

⁵⁸ Summary records of the meetings of the Committee of the Whole, 11th meeting (22 June 1998), 212, para. 12.

5.4 The final text

The final version of the Statute under Article 16 that deals with the deferral of investigation or prosecution says:

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.⁵⁹

Ultimately, the negotiated Statute does not reflect the ‘African vision’ of Security Council deferral powers. Indeed, all of the African states that addressed this issue in the plenary meetings preferred to grant limited deferral powers to the Council in terms of duration and/or evidence and witness protections. This required compromise on the part of Senegal and Congo, as both countries ideally preferred to grant no deferral powers to the Council.⁶⁰ However, since deferrals are enacted by Security Council Resolution, it requires a relatively unified Council decision-making process; abstention rather than the use of the veto may suggest disapproval without impacting the outcome of the resolution. However, the use of the veto on a deferral resolution could be used. Nonetheless, the Rome Statute does not reflect the ideal ‘African vision’ of Security Council deferral powers as described at the Rome Conference. It is important to note that non-States Parties of the ICC which are permanent members of the Security Council have built-in insulation from the Court (i.e. Russia, China, United States) as a consequence of its collective deferral (and referral) powers. Of the 17 African states that were willing to grant the UNSC deferral powers, 11 went on to ratify the Statute, constituting 65 per cent of this group of states.⁶¹ Angola, Egypt, Guinea-Bissau, Mozambique, and Sudan signed the Rome Statute, but did not ratify it, demonstrating a minimal level of approval and commitment. Ethiopia neither signed nor ratified.

⁵⁹ The Rome Statute of the International Criminal Court, Art. 16.

⁶⁰ It could be viewed as problematic that the final text does not enumerate the need to protect evidence or witnesses in the event of a deferral. It similarly places no restriction on renewals, meaning that the Security Council could infinitely defer situations from Court action.

⁶¹ These states included: Benin, Burkina Faso, Burundi, Central African Republic, Congo, Gabon, Ghana, Kenya, Senegal, Sierra Leone, and South Africa.

5.5 Implications of key positions on the role of the Security Council

The broad spectrum of African positions ranged from rejection, cautious acceptance, tacit approval, and overall acceptance of the UNSC as it relates to, and operates alongside, the ICC. This highlights the difficulty in constructing an institution from scratch and incorporating it within an existing global structure (and order), which has been designed to deal with similar and related issues in international political life. Nevertheless, it is fundamentally important to acknowledge that the diffusion of politics and law is in keeping with the most basic rule-of-law principles—embedding an *imbalanced* and *hierarchical* political body within the foundation and structure of a (purportedly objective) judicial institution is perplexing at the very least. This is even more so the case because the use of the Security Council veto presents the opportunity to insulate the national interest(s) of states, even with respect to the most serious crimes. In a similar vein, relying solely on the Security Council to determine acts of aggression presents another opportunity for politicized lawlessness.

Given that African states stressed the importance of the Court's independence from the ICC in Rome, the final Statute reflects a compromise outcome—one that iterates the fears expressly stated by African states that saw Security Council involvement as an opportunity for the enmeshment of power politics in international law. Many delegates in Rome had the foresight to predict that the Council would interject in the Court's proceedings in subjective and unfair (i.e. political) ways. Since then, the Security Council can and *has* used the veto to block referrals to the Court, particularly as it relates to jurisdictional matters concerning non-states parties (e.g. the resolution on the referral of the situation in Syria to the ICC, which was blocked by China and Russia) even with respect to the most serious international crimes.⁶² On the other hand, it can and *has*

⁶² United Nations, Meeting Coverage and Press Releases, “Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution,” (22 May 2014) SC/11407, available at <https://www.un.org/press/en/2014/sc11407.doc.htm>; accessed 11 March 2020. Note that even the representative of the United States supported the draft resolution and said it “was about accountability for crimes so extensive and deadly that they had few equals in modern history. It was also about accountability on the [Security] Council's part. Recalling that the International Criminal Court had been able to act when extraordinary crimes had been committed in the past, she asked why the Syrian

referred situations to the ICC, even with respect to non-states parties (e.g. the resolution referring the situation in [Darfur] Sudan—a non-states party, to the ICC and the subsequent referral of the situation in Libya to the ICC, also a non-states party).⁶³ This uneven application of the Court’s only mechanism of ‘universal’ jurisdiction damages not only the ICC’s institutional reputation, but perhaps more importantly, international criminal justice norms altogether.

The fact that the UNSC referred the African situations but not others of equal gravity is less significant than the point that African delegates were very aware of this possibility, well before the Rome Statute entered into force and the ICC came to be. In other words, this was a known risk associated with signing and ratifying the treaty. While Sudan and Libya did not become States Parties, the majority of African nations that did, did so with an awareness that this type of politicization was not only possible, but likely. With the benefit of hindsight, it is relatively uncontroversial to contend that the powers given to the Security Council constituted the biggest compromise of the Conference. This is iterated by reference to Security Council referrals as a ‘poisoned chalice.’⁶⁴ This is not just because such referrals enmesh justice and politics, but also because UNSC referrals have had no substantive political support or backing and completely debilitate the Court as a result. In this view, the ideal construction of the relationship between the UNSC and the Court by the majority of African delegations in Rome was not reflected in the final text of the Rome Statute. Problematically, the Court is not solely independent nor is it coalescent with the Security Council in many respects, which troubles the effective political and legal operationalization of both.

people did not equally deserve justice.” The French representative also said that the resolution “appealed to the human conscience and was not a political gesture... stressing that failure to adopt it was an insult to humanity.” Note also: justice was extremely slow for the Rohingya in Myanmar – mass violence began in 2017 during a military campaign and has continued since. The Prosecutor of the ICC was only authorized to open an investigation by the Pre-Trial Chamber in November 2019 based on neighbouring Bangladesh’s membership. It is argued that the UNSC could and should have referred this situation to the ICC much earlier.

⁶³ United Nations Security Council Resolution 1593 (2005), S/RES/1593; United Nations Security Council Resolution 1970 (2011), S/RES/1970.

⁶⁴ Mark Kersten, “The UN Security Council and the ICC: Between a Rock and a Hard Place,” *Justice in Conflict* (6 May 2011), blogpost available online at <https://justiceinconflict.org/2011/05/06/the-un-security-council-and-the-icc-between-a-rock-and-a-hard-place/>; accessed 7 April 2020.

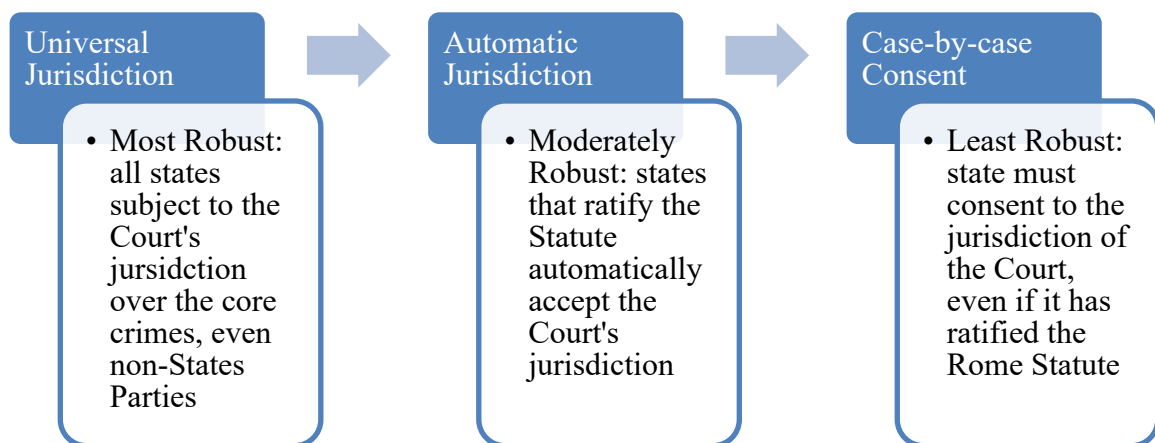
5.6 Jurisdiction: ‘Trigger mechanism’

Establishing the trigger mechanism for the Court’s jurisdiction was a particularly high priority at the Rome Diplomatic Conference and is a key institutional feature of the Court. Consensus broke down on this issue and African delegations were similarly divided. Importantly, 77 per cent of African delegates in attendance in Rome took an express position on the Court’s jurisdiction regime, providing ample insight into regional preference(s) on this issue. Specifically, modes of jurisdiction were broken down and compartmentalized within three ideological frames: automatic, universal, and case-by-case consent/opt-in. Automatic jurisdiction upon ratification of the Statute was the most widely shared preference for the Court’s jurisdiction regime by African delegations in Rome, which compromised the majority and 63 per cent of the total number of African delegations in attendance at the Conference; 81 per cent of African delegations that spoke to the jurisdiction regime issue during the negotiations.⁶⁵ Universal jurisdiction was supported by 10 African delegations, which constituted 21 per cent of total African delegations and 28 per cent of the African delegations that spoke to the jurisdiction regime issue. Importantly, *all* of the African delegations that wanted universal jurisdiction were willing to compromise and settle for automatic jurisdiction. For this reason, these states are identified and dually listed in both universal and automatic jurisdiction categories for the purpose of this analysis. Case-by-case consent was endorsed by eight African delegations, which compromised 17 per cent of the total African delegations in attendance at the Conference and 22 per cent of African delegations that spoke to the jurisdiction regime issue in the plenary meetings and

⁶⁵ These states included Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Congo, Côte d’Ivoire, Djibouti, Egypt, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Madagascar, Mali, Morocco, Namibia, Senegal, Sierra Leone, South Africa, Swaziland, Togo, Tunisia, Uganda, Tanzania, Zambia, and Zimbabwe. Note that Burundi, Cameroon, Congo, Djibouti, Guinea, Mali, Senegal, Sierra Leone, Tanzania, and Zimbabwe preferred universal jurisdiction, but accepted automatic jurisdiction as a compromise. Note also: Tunisia preferred the Court have automatic jurisdiction over some crimes, while others would require explicit consent. Consider also that delegations such as Ghana explicitly opposed a consent-based system but did not expressly take a position on automatic or universal jurisdiction. Such ambiguous positions have been omitted from this analysis. For context, the Republic of Korea proposed ‘automatic jurisdiction’ at the outset of the Conference. Under this framework, jurisdiction would be triggered when any of the states involved (territorial, national [of accused or victims], or custodial) had consented to the Court’s jurisdiction either by ratifying the Rome Statute or *ad hoc* and this position was supported by the majority of African states in the negotiations.

meetings of the Committee of the Whole.⁶⁶ These positions will be considered in greater detail in order to generate a more nuanced understanding of the ‘African vision’ of the ICC as it was negotiated in Rome. The jurisdiction issue might be understood on an ideational spectrum of desired institutional strength/robustness, illustrated by Figure 5-1. This is significant because this spectrum reflects the relative willingness of states to be subject to infringement on sovereignty, evidenced by preferences in the ICC’s institutional design, particularly with respect to its jurisdiction regime.

Figure 5-1: Institutional robustness based on jurisdiction regime or ‘trigger mechanism’



5.6.1 Case-by-case Consent/Opt-in Jurisdiction

Case-by-case or opt-in approaches to the jurisdiction of the Court would require the explicit agreement on the part of states over and above ratification of the Statute to trigger Court action. This conception of the Court’s jurisdiction is strongly rooted in

⁶⁶These states included Algeria, Ethiopia, Libya, Mozambique, Nigeria, Rwanda, Sudan, Tunisia. Note that Algeria, Rwanda, and Sudan preferred for states to be able to issue reservations. Tunisia preferred mixed jurisdiction: automatic for some crimes and opt-in for others. It is cross-listed on both automatic and consent-based preferences.

traditional understandings of state sovereignty and the primacy of states in international law.⁶⁷ The interjection of international law in domestic contexts is only permissible if the state allows it. This was an especially common understanding of international law in the mid to late 1990s, which explains why consent was advocated or presumed as an essential feature of the Court's jurisdiction regime by some African states.

Specifically, Algeria, Ethiopia, Libya, Morocco, Sudan, Tunisia, and Nigeria expressly endorsed a case-by-case consent jurisdiction in Rome. Algeria took the position that "State consent was fundamental. The consent of at least two States should be required: the State of nationality [of the suspect/accused] and the State of custody [of the suspect/accused]."⁶⁸ The Algerian delegate clarified his position in later meetings and said that his country, "was not in favour of automatic jurisdiction of the Court over all the crimes covered by the Statute. When ratifying the Statute, States should indicate the crimes for which they accepted the Court's jurisdiction. For the exercise of jurisdiction, the consent of the following States would be necessary: the State of which the victim was a national, the State where the act had been committed and the State of which the accused was a national."⁶⁹ This raises fundamental questions about the nature of consent and which States might be required to agree to Court action and whether a lack of consensus could render the Court ineffective. This particular interpretation of state consent is exhaustive and presents the greatest likelihood of restricting the Court's jurisdictional reach.

In a similar vein, the Nigerian delegate highlighted the importance of the relationship between sovereignty and state consent. In particular, the Nigerian delegate said that he "reiterated his full support for the collective African position set out in the declaration on the establishment of an international criminal court adopted by the Organization of African Unity at Ouagadougou in June 1998. That declaration stressed,

⁶⁷ See generally Ian Brownlie, *Principles of Public International Law* 6th Edition (Oxford: Oxford University Press, 2003), 4: "the general consent of states creates general rules of application;" Louis Henkin, *International Law: Politics and Values* (Brill Academic Publishers, 1994), 28: "No treaty, old or new, whatever its character or subject, is binding on a state unless it has consented to it."

⁶⁸ Summary records of the meetings of the Committee of the Whole, 9th meeting (22 June 1998), 197, para. 58.

⁶⁹ Summary records of the meetings of the Committee of the Whole, 30th meeting (9 July 1998), 307, para. 75.

inter alia, that the cardinal principle of the sovereignty of States should be preserved in the Statute of the Court and that the Court should be complementary to national criminal justice systems and be based on the *consent* of the States concerned.”⁷⁰ Similarly, the Libyan delegate opined “that the exercise of the Court’s jurisdiction should be based on State *consent*” and moreover that “[t]he jurisdiction of the Court could not be split in the sense of having an inherent jurisdiction for some crimes such as genocide and an optional jurisdiction for other crimes. Her delegation supported the principle of acceptance of jurisdiction, rather than that of inherent jurisdiction.”⁷¹ This position similarly places an emphasis on state sovereignty and consent. With respect to ‘split jurisdiction,’ Tunisia proposed a mixed approach—some crimes should have automatic jurisdiction and others should require the consent of States. In rejecting this approach, it is clear that Libya endorsed consent-based jurisdiction, emphasizing the primacy of state sovereignty and the principle of non-interference with respect to internal (domestic) matters.

In this vein, Algeria, Rwanda, Sudan, and, to some degree, Egypt posited that states should be able to issue reservations on particular aspects of the Statute, thus reflecting a degree of opt-in jurisdiction, since it would allow States to choose the laws it is subject to on an *ad hoc* or piecemeal basis. According to the Vienna Convention of the Law of Treaties, Article 2(1)(a):

“reservation” means a unilateral statement, however phrased or named, made by a State, when ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.⁷²

In the context of the Rome Conference, it was well-established that Rwanda preferred the inclusion of the death penalty. At the negotiations, the Rwandan delegate expressed that “the exclusion of the death penalty could not affect the right of sovereign States to apply

⁷⁰ Summary records of the plenary meetings of the Rome Diplomatic Conference, 7th plenary meeting (18 June 1998), 111, para. 89 [*emphasis added*].

⁷¹ Summary records of the meetings of the Committee of the Whole, 9th meeting (22 June 1998), 197, para. 74.

⁷² United Nations, Vienna Convention of the Law of Treaties (23 May 1969) see Articles 19-23 inclusive.

it in aggravated circumstances, particularly in situations involving great loss of life.”⁷³ This may explain why Rwanda took the position that states should be able to express reservations. Particularly, its delegate said, “Rwanda supported the right of a State to express reservations with respect to certain provisions of the Statute. It hoped that the establishment of an international criminal court would allow prosecution of the planners of genocide who had sought refuge in other States.”⁷⁴ This position is interesting inasmuch as on one hand, it promotes the ‘right’ of a State to express reservations while advocating for the extrajudicial prosecution for perpetrators of genocide on the other. This appears to combine a consent-based regime with universal jurisdiction.

Sudan also expressed a preference for reservations in Rome, but couched its justification in the idea of universality. Specifically, the Sudanese delegate, speaking on behalf of the Group of Arab States, said that, “[w]hile the Arab States would not stand in the way of the adoption of the Statute of the Court, he felt bound to place on record that they were not convinced by what had been agreed upon... The right to express reservations should also have been granted. The removal of that right by article 109 would be an obstacle to accession.”⁷⁵ Egypt also touched on this point when its delegate said that “he attached great importance to the universality of the Convention to be adopted. The possibility of entering reservations might encourage many countries to accede to the Convention.”⁷⁶ Indeed, the final version of the Rome Statute does *not* allow reservations of any kind.⁷⁷ As such, States Parties must accept the treaty in its entirety. It appears as though Sudan and Egypt (and the Group of Arab States, by extension) were willing to construct a weaker Statute in exchange for increased ratification (i.e.

⁷³ Summary records of the meetings of the Committee of the Whole, 41st meeting (16 July 1998), 357, para. 10. Note that other African states endorsed the use of the death penalty, including Ethiopia at the 41st meeting (16 July 1998), 356-357, para. 7: “Crimes like genocide, war crimes and crimes against humanity called for penalties commensurate with their gravity. Exclusion of the death penalty for such crimes was unacceptable.”

⁷⁴ Summary records of the plenary meetings of the Rome Diplomatic Conference, 6th plenary meeting (17 June 1998), 103, para. 114.

⁷⁵ Summary records of the plenary meetings of the Rome Diplomatic Conference, 9th plenary meeting (17 July 1998), 126-127, paras. 74-78.

⁷⁶ Summary records of the plenary meetings of the Rome Diplomatic Conference, 1st plenary meeting (15 June 1998), 69, para. 80.

⁷⁷ Rome Statute of the International Criminal Court, Art. 120: Reservations: “no reservations may be made to this Statute.”

universality). This is important because it demarcates a division in regional preferences and priorities. Indeed, a trade-off in the interest of universality was not prioritized by the majority of African delegations at the Conference, but it provides interesting insight as to how African states conceptualized or ranked features of institutional effectiveness.

A related concern was raised about the potential for conflict between domestic law and the proposed Rome Statute with respect to the surrender of nationals under the International Cooperation and Judicial Assistance heading. In three African cases, the extradition of nationals was an express contradiction with domestic law. It was explained by the Sudanese delegate that “the constitutions of a number of countries, including his own, prohibited the surrender of nationals. His delegation hoped that the International Criminal Court, once established, would take that difficulty into account.”⁷⁸ The delegate from Libya similarly identified this competing obligation. She explained that “the prohibition of the surrender of nationals was one of the most important provisions in her country’s legislation.”⁷⁹ Likewise, the delegate from Algeria said that “[h]is country’s Constitution and legislation prohibited the extradition of nationals. Algeria therefore wished to record its reservation... pending a final decision as to the issue of reservations in general.”⁸⁰ Libya and Sudan made clear the incompatibility between domestic law and the proposed Rome Statute on the issue of extradition. This may offer explanation regarding the preference for reservations in the negotiation process, emphasized by Algeria. This is particularly insightful when coupled with national preference for the use of the death penalty, as expressed by states like Rwanda and Ethiopia. Such a position suggests that a ‘weaker’ Court would be more agreeable to a greater number of states; this would result in increased membership and work towards the broadly stated goal of universality. This reflects a view that institutional and normative weakness is generally more acceptable to states and the Court’s relative effectiveness would be correlated with its number of States Parties.

⁷⁸ Summary records of the meetings of the Committee of the Whole, 38th meeting (15 July 1998), 351, para. 19.

⁷⁹ Summary records of the meetings of the Committee of the Whole, 38th meeting (15 July 1998), 352, para. 22.

⁸⁰ *Ibid.*, at para. 23.

It is worth noting that Sudan also expressed other reasons for opposing automatic jurisdiction for Court. Specifically, the Sudanese delegate said, “to give the Court inherent [automatic] jurisdiction would favour a State that was not a party to the Statute, because in their case the *consent* of the custodial State or the territorial State or both would be required before the Court could exercise its jurisdiction, whereas in the case of States parties the Court would automatically exercise jurisdiction. That would discourage accession to the Statute.”⁸¹

This demonstrates an emphasis on protective measures—that States should be insulated from the Court’s jurisdiction. This position privileges consent and principles of state sovereignty and non-intervention. In this respect, an emphasis on the principle of complementarity is relevant since the Court can only intervene as a last resort when domestic institutions manifestly fail to act. This bedrock principle is fundamentally important when conceptualizing the role and function of the Court in domestic contexts and responding to concerns like those expressed by Sudan. Ultimately, a normative commitment to international criminal justice demands that states surrender some amount of sovereignty.

This isolationist approach was countered by several African delegations, most strongly by Botswana. Specifically, the delegate from Botswana “rejected the opt-in/opt-out approach: in his delegation’s view, States ratifying the Statute must accept the Court’s automatic jurisdiction in respect of all the core crimes. That did not mean he did not want to see a universally accepted court. However, *the ideal of universality should not be achieved at the expense of effectiveness.*”⁸² This demonstrates broad ideological diversity with respect to the Court’s jurisdiction regime or trigger mechanism. It is clear that there was not one monolithic ‘African’ position, though the majority of delegates that addressed the options for triggering the Court’s jurisdiction in the plenaries and the Committee of the Whole preferred to establish an effective Court that could operate beyond the limits of state consent. The strongest articulation of this position came from

⁸¹ Summary records of the meetings of the Committee of the Whole, 9th meeting (22 June 1998), 198, para. 68 [*emphasis added*].

⁸² Summary records of the meetings of the Committee of the Whole, 31st meeting (9 July 1998), 313, para. 3 [*emphasis added*].

the states that pushed for a Court with universal jurisdiction over the core crimes—that is, a view that the Statute should apply to every relevant situation regardless of consent or accession by the national, territorial, or custodial state(s) involved.⁸³

5.6.2 Universal Jurisdiction

Ten African delegations at the Rome Conference supported a universal approach to the Court's jurisdiction: Burundi, Cameroon, Congo, Djibouti, Guinea, Mali, Senegal,⁸⁴ Sierra Leone, Tanzania and Zimbabwe. Universal jurisdiction would have expanded the Court's reach, making it more effective and a comparatively stronger institution than the other jurisdiction regimes allow. In normative terms, universal jurisdiction offers an opportunity to expand the salience of international criminal justice, regardless of a state's willingness to submit to it. The reality of international relations is such that the willingness on the part of states to realize the ideals of international criminal law is not uniform; compromise positions are not only necessary, they were (and are) required. This offers explanation as to why all of the African delegations that preferred universal jurisdiction were willing to accept automatic jurisdiction as a compromise. Yet it is useful to evaluate the statements made on behalf of the African states that were willing to grant the Court universal jurisdiction, mitigating state sovereignty and maximizing institutional power and scope.

In this respect, Tanzania's contributions were particularly instructive. Specifically, early in the Conference, the Tanzanian delegate said that “[t]he regime of human rights derived its legitimacy from the universality of those rights, and the same would apply to the Court. Some aspects of the idea of sovereignty were a potential bar to

⁸³ See generally Sharon A. Williams, “The Rome Statute on the International Criminal Court – Universal Jurisdiction or State Consent – To Make or Break the Package Deal,” *International Law Studies* 75 (2000): 544; Olympia Bekou and Robert Cryer, “The International Criminal Court and Universal Jurisdiction: A Close Encounter?” *The International and Comparative Law Quarterly* 56.1 (2007): 49-68. The German delegation proposed the strongest concept of universal jurisdiction in Rome. The United States was particularly disapproving of this approach and the proposal was ultimately dropped. As a compromise response, South Korea proposed a form of so-called automatic jurisdiction by expanding jurisdiction to the ICC if any of the following states were States Parties to the Rome Statute: territorial, nationality or passive personality, or custodial. See Summary records of the meetings of the Committee of the Whole, 9th meeting (9 July 1998), 302, para. 130: Guinea said, “As to acceptance of jurisdiction, his delegation regretted that the German proposal on universal jurisdiction seemed to have been withdrawn.”

⁸⁴ Note that Senegal preferred automatic jurisdiction for States Parties and universal jurisdiction over the core crimes for *non*-States Parties.

the common will to punish heinous crimes, but the Court must ensure that State sovereignty became a concept of responsibility and international cooperation rather than an obstacle to the enjoyment of universal human rights.”⁸⁵

Such an approach is rooted in ideas of human rights, human security, and the interrelated consequence of placing conditional limits on sovereignty if gross human rights violations are largely ignored by the state in which they occur.⁸⁶ Tanzania framed sovereignty in a very different way than the states that promoted a consent-based jurisdiction regime. This demonstrates a significant difference in ideological perspective. With specific attention to jurisdiction, the Tanzanian delegate stated that “her delegation supported universal jurisdiction for all the core crimes but as a *compromise* could accept automatic jurisdiction. It considered that an opt-in/opt-out regime would undermine the Court’s effectiveness.”⁸⁷ Similar statements were made by other states, such as Congo. For example, the Congolese delegate explained that

the Statute should provide for automatic jurisdiction of the Court over genocide, war crimes, crimes against humanity and the crime of aggression. His delegation was in favour of universal jurisdiction, and thus regretted the omission of the proposal by Germany ... It would *reluctantly* accept option 1 [automatic jurisdiction]... as a compromise. However, it was opposed to jurisdiction of the Court being subjected to a regime of acceptance by States, which should not be allowed the possibility of protecting those responsible for the most odious crimes.⁸⁸

In a similar vein, the delegate from Cameroon “said that he would have much preferred universal jurisdiction with respect to all the core crimes, but would settle for automatic jurisdiction. The opt-in regime would run counter to the fundamental concept of the

⁸⁵ Summary records of the plenary meetings of the Rome Diplomatic Conference, 3rd plenary meeting (16 June 1998), 74, para. 30.

⁸⁶See generally M.V. Naidu, “Security, sovereignty, and intervention: concepts and case studies,” *Peace Research* 34.1 (May 2002): 33-58.

⁸⁷ Summary records of the plenary meetings of the Rome Diplomatic Conference, 29th meeting (9 July 1998), 303, para. 175 [*emphasis added*].

⁸⁸ Summary records of the meetings of the Committee of the Whole, 31st meeting (9 July 1998), 315, para. 16 [*emphasis added*].

Statute.”⁸⁹ These contributions demonstrate a preference for universal jurisdiction, but a willingness to compromise in the interest of moving the Conference and international criminal justice forward. It is interesting to note that many African delegations expressly disapproved of any jurisdiction regime based solely on state consent or opt-in measures. This reflects a commitment to international norms and a desire to establish a tangible institution with effective enforcement capabilities. Yet the progressive commitments by various African delegations faced weighty opposition, which demanded a significant amount of compromise.

5.6.3 Automatic Jurisdiction

Automatic jurisdiction was the primary preference of African delegations in Rome when designing the ICC’s jurisdiction regime or ‘trigger mechanism.’ Automatic jurisdiction means that states that ratify the Rome Statute automatically accept the ICC’s jurisdiction over the core crimes covered in Article 5 (genocide, crimes against humanity, war crimes, aggression). This decision, it is argued, “represents a major advance in international law because in the past, the acceptance of jurisdiction has, in most cases, been subject to additional State consent.”⁹⁰ To provide some context, the International Law Commission’s draft statute presented a form of jurisdiction it referred to as ‘inherent jurisdiction.’ Under this framework, genocide was inherently within the Court’s jurisdiction (if a State Party issued a complaint). Benedetti, Bonneau, and Washburn explain, “[t]he Court could exercise its jurisdiction over other crimes once the state with custody of the suspect and the state on whose territory the crimes were committed

⁸⁹ Summary records of the meetings of the Committee of the Whole, 30th meeting (9 July 1998), 309, para. 79. Note also: *Ibid.*, at 298, para. 60, Sierra Leone similarly said that “It regretted that universal jurisdiction had been eliminated from the choices;” *Ibid.*, at 311, para. 110, the delegate from Djibouti said that “although he would have preferred the German concept of universal jurisdiction, he would accept option 1 in article 7, [automatic jurisdiction] for the reasons put forward by many delegations;” *Ibid.*, at 307, para. 36, the Burundian delegate said that “He would have liked the Statute to confirm the principle of universal jurisdiction for core crimes, but could accept the proposal providing for automatic jurisdiction for genocide, crimes against humanity and war crimes.”

⁹⁰ Rome Statute of the International Criminal Court: Some Questions and Answers, question 12: “When will the Court have jurisdiction over crimes?” available at <https://legal.un.org/icc/statute/iccq&a.htm>; accessed 20 March 2020.

accepted the jurisdiction through ratification and specific declaration.”⁹¹ This type of inherent jurisdiction regime is etched in a state-based, sovereign frame, relying on traditional consent-based applications of international law. A significant amount of discussion regarding the options for the Court’s jurisdiction took place in 1998, with states such as Germany and the United Kingdom taking a keen interest. It is worth noting that it was the Republic of Korea that presented a proposal for ‘automatic jurisdiction’ at the opening of the Conference, “in which the Court could exercise its jurisdiction when any four possible states involved (the territorial state, the states of nationality of the accused and the victims, or the custodial state) had consented to the ICC jurisdiction over the case by ratification or acceptance on an ad hoc basis.”⁹² Benedetti, Bonneau, and Washburn go on to explain that, “African states and like-minded states supported the automatic jurisdiction of the Korean proposal.”⁹³ Curiously, however, automatic jurisdiction was a *compromise* for the ten African states that actually preferred an even stronger Court and enmeshment of norms couched in a universal jurisdiction regime. This is important because this compromise suggested that states could choose whether or not to be subject to the Court’s jurisdiction, integrating and protecting sovereign principles within the framework of the Court. The justifications for African support of automatic jurisdiction are worth exploring in greater detail.

Based on the summary records of the Rome Diplomatic Conference, automatic jurisdiction was the primary choice for 20 African delegations, representing a general regional preference and key negotiating position. Egypt, for example, stated that it “supported automatic jurisdiction over the core crimes, which should include aggression. States not parties to the Statute should not be subject to the Court by virtue of universal jurisdiction, because that would run counter to international law.”⁹⁴ This is particularly interesting, since it has been argued that automatic jurisdiction extended traditional

⁹¹ Benedetti, Bonneau, and Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998*, 162.

⁹² *Ibid.*

⁹³ *Ibid.*, 163.

⁹⁴ Summary records of the meetings of the Committee of the Whole, 30th meeting, (9 July 1998), 310, para. 87. See also 29th meeting (9 July 1998), 300, para. 103, where Gabon made a similar point: “the Court’s jurisdiction for all crimes under article 5 should be automatic for States parties. The possibility of allowing States parties to take measures affecting non-parties might run counter to the law of treaties.”

approaches to jurisdiction in international law by moving away from additional opt-in (consent) by states. This suggests that the moderate approach embodied by automatic jurisdiction was more agreeable than a universal jurisdiction regime when moving away from strict, consent-based trigger mechanisms for the Court.

Other states such as Morocco reached the same conclusion, though for different reasons. To this point, the Moroccan delegate said “that Court action should be triggered by a State party. If the Court was to be as universal as possible, States should be allowed to decide whether or not they accepted its jurisdiction, at least during the initial phase following its establishment.”⁹⁵ This perspective has some important implications, namely, that the Court may need to be less effective in its infancy to generate broad(er) acceptance by States. This seems to suggest that universality and institutional strength are inversely related. In other words, in order to achieve universal membership, the institution ought to preserve state sovereignty over and above evolving international criminal law norms. In its rejection of universal jurisdiction, this interpretation also suggests that States Parties have consented to potential Court action by virtue of ratifying the Statute.

More general understandings of automatic jurisdiction were expressed by others. For example, the delegate from Côte d’Ivoire said that “in ratifying the Statute, States should accept the jurisdiction of the Court in respect of the four categories of core crimes, including aggression.”⁹⁶ This implies that ratification constitutes more than a symbolic act, it enacts a tangible acceptance of the Court’s jurisdiction over the core crimes. In many respects, such an approach ensures that the states that sign and ratify the treaty intend to strengthen the Court by conceding to its jurisdiction if any of the core crimes are committed and domestic courts fail to investigate or prosecute them. This safeguard mitigates concerns that States Parties will unduly block Court action, or else stagnate its institutional strength and utility. Such a pragmatic approach abandons traditional consent-based conceptions of jurisdiction in international law, while accepting that the universal

⁹⁵ Summary records of the meetings of the Committee of the Whole, 9th meeting (22 June 1998), 196, para. 38.

⁹⁶ Summary records of the meetings of the Committee of the Whole, 30th meeting (9 July 1998), 308, para. 63.

application of the Statute would most likely result in the failure of the Conference. Problematically, while automatic jurisdiction sufficiently addresses how Court action might be triggered in situations involving States Parties, it inadequately addresses how the Court might effectively respond to atrocity crimes involving non-States Parties.

While consensus broke down on the jurisdiction issue somewhat in the African context, and more so generally, the final compromise largely reflects a narrow conception of automatic jurisdiction, with mixed features for dealing with non-States Parties. Specifically, the Rome Statute provides jurisdiction to the ICC over the core crimes if the national and/or territorial state is a States Party. According to Article 12, the Preconditions to the exercise of jurisdiction:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.⁹⁷

This explains that ratification of the Rome Statute is the usual mechanism by which jurisdiction is triggered. Notwithstanding this, the final text of the Statute restricts the States Parties that trigger jurisdiction when compared to the Korean proposal, since it eliminates both the state of nationality of the victims and the custodial state from the list of states that could trigger the Court's jurisdiction. Further, while not universal, this

⁹⁷ Rome Statute of the International Criminal Court, Art. 12: Preconditions to the exercise of jurisdiction.

approach allows jurisdiction to be based on the ratification of the Statute by the national and/or territorial State of which the alleged crime(s) occurred, which is loosely consistent with what African delegations envisioned in Rome, albeit considerably more restricted. Regarding non-States Parties, the Rome Statute provides that jurisdiction may be triggered if the state expressly accepts it (i.e. consent regime). The exception to this is if a situation is referred to the Court by the Security Council under Chapter VII of the UN Charter under Article 13(b). Interestingly, the Council can refer *any* situation to the Court, regardless of ratification or consent by the state(s) involved. This particular inclusion can be framed optimistically as a form of universal jurisdiction, though it remains subject to heavy criticism. Relying on the Council to achieve institutional and normative consistency and effectiveness has been met with logical suspicion.

5.6.4 Conclusions about the Court's mixed jurisdiction regime

Indeed, this power structure raises difficult questions and exposes the Court to criticism, since it is foreseeable that some crimes will remain outside of the Court's jurisdiction, particularly situations involving non-States Parties which are also permanent members of the Security Council: China, Russia, and the United States, and their allies. Naturally, this arrangement highlights the problematic use of the veto as a means to curtail international criminal justice norms for politically motivated reasons. Former ICC Judge Hans-Peter Kaul identified another related weakness: "In civil wars, the most common form of conflict today, the present compromise provision does not allow for any jurisdiction unless the state in question is a Party to the Statute."⁹⁸ Nevertheless, the automatic jurisdiction regime embodied in the Rome Statute reflects an institutional structure that a significant majority of African delegations *wanted* in Rome, though in a limited form.

The role of the Security Council, while marred with practical difficulties, expands the jurisdictional capacity of the Court beyond a strict ratification/implied consent approach and encroaches on the idea of universal jurisdiction, albeit in a relatively weak way. It is weak in the sense that it reinforces the existing power structure and hierarchy in

⁹⁸ Hans-Peter Kaul, "Special Note: The Struggle for the International Criminal Court's Jurisdiction," *European Journal of Crime, Criminal Law and Criminal Justice* 4 (1998), 57.

international political life; the Security Council reserves ‘watchdog’ privileges that other states simply do not and will not have. Inconsistency in normative commitment and institutional trust riddle the Security Council-Court relationship in significant ways and severely undermine arguments about the Court’s potential universal jurisdiction capacity within its current construction. Referring to the findings with respect to how African states conceptualized the Court’s relationship with the Security Council, vesting *only* the Council with the power to apply the Court’s jurisdiction in non-consensual non-States Parties was likely approached with a reasonable degree of skepticism, especially from the states that pushed for consent-based jurisdiction altogether. It also effectively insulates dual Security Council members and non-States Parties from the Court’s reach altogether. While imperfect, this mixed jurisdictional regime reflects a modest version of automatic jurisdiction that most African delegations preferred, while providing an additional element of jurisdictional capacity with respect to *some* non-States Parties. Given the strong opposition to universal jurisdiction on the part of the United States, for example, the compromise reflected in the final Statute provides measured jurisdictional capacity for the Court, while insulating powerful ‘norm spoilers’ at the same time by virtue of political prowess.

The seven African delegations that supported a consent-based jurisdiction regime for the Court at the Conference did not see this vision reflected in the final version of the Rome Statute. Of these states, only Nigeria and Tunisia ultimately ratified the Statute. Algeria, Morocco, and Sudan signed but did not ratify. Ethiopia and Libya neither signed nor ratified. This means that of the African states that preferred a consent-based jurisdiction regime, only 25 per cent ultimately ratified the Rome Statute. Since 75 per cent of these states chose not to ratify, it might be argued that the compromise on trigger mechanisms was a deal breaker for these states. It is interesting to note that Algeria, Libya, Morocco, and Sudan are members of the Group of Arab States, which may explain the consistency in decision making among this group if those states were negotiating as a coalition or bloc. Least of all, the coalescence among this group of states can be understood as an expression of a shared experience within Arabic states in Africa. This can be couched in a deep ideological commitment to the principles of state sovereignty and non-interference, which frame a particular outlook and approach to international

relations and institutional design rooted in the primacy of states and the comparative weakness of institutions and norms.

Automatic jurisdiction was agreeable to 30 African states, comprising 81 per cent of delegations that spoke to this issue, which represents a clear regional preference. Of the 10 delegations that preferred universal jurisdiction but accepted automatic jurisdiction as a compromise, only Cameroon signed but did not ultimately ratify the Statute. This suggests a correlation between a state's willingness to establish the strongest possible Court with its overall commitment to be subject to it. This correlation similarly holds when the analysis is expanded to include all 30 states that accepted an automatic jurisdiction regime at the Conference, since 73 per cent of this group of states ratified the Rome Statute.⁹⁹ This demonstrates a general willingness to be subject to the Court, given its primary reliance on States Parties to trigger jurisdiction. It is of interest to note that Angola, Cameroon, Egypt, Guinea-Bissau, Morocco, and Zimbabwe went on to sign the Statute but did not ratify it. Only Swaziland and Togo neither signed nor ratified. While the jurisdiction regime issue was among the most contentious at the Rome Conference, the majority of African states preferred a version of the approach that is largely reflected in the final text of the Rome Statute, which may offer a marginal degree of explanatory power with respect to its broad regional acceptance.¹⁰⁰

5.7 Prosecutorial Powers

In an effort to ensure the independence of the Court, most African states preferred giving the Prosecutor the power to investigate (alleged) crimes *proprio motu*. Benedetti, Bonneau, and Washburn explained that “[o]pponents defending the sole legitimacy of the Security Council to act on behalf of the international community or to qualify serious

⁹⁹ These included Benin, Botswana, Burkina Faso, Burundi, Congo, Côte d’Ivoire, Djibouti, Gabon, Guinea, Kenya, Lesotho, Madagascar, Mali, Namibia, Senegal, Sierra Leone, South Africa, Tunisia, Uganda, Tanzania, and Zambia.

¹⁰⁰ This conclusion is made with the caveat that most African states wanted a Court free from political influence, in particular from the Security Council, which troubles the form of ‘politicized universal jurisdiction’ that appears in the final text of the Statute. Nevertheless, the Security Council’s ability to refer non-states parties to the Court, even without that states’ consent is an expansion of the Court’s jurisdictional reach.

crimes feared the risks of politicization.”¹⁰¹ It was argued that a strong, independent Prosecutor with the ability to initiate investigations on his/her own volition would be a safeguard against political posturing by the Security Council and by States. Many African states took an early position on this issue. For example, the SADC States enumerated in its sixth principle of consensus that, “[t]he independence of the prosecutor must be guaranteed by the Statute and should have the necessary powers to initiate investigations and prosecute ex-officials.”¹⁰² Additional regional consensus on this issue was articulated in the Dakar Declaration, particularly where it states “[t]hat the independence of the Prosecutor and his functions must be guaranteed.”¹⁰³ It is important to note that in Rome, delegations used the terms *proprio motu* and *ex officio* (i.e. prosecutorial discretion by virtue of office) interchangeably.¹⁰⁴ For the purposes of this analysis, the terms are understood as closely related and are treated synonymously.¹⁰⁵ The most significant points of contention regarding the independence of the Prosecutor pivoted on issues of oversight and information sourcing. Specifically, states were concerned about a Prosecutor’s ability to go ‘rogue’ or to act with no effective oversight mechanism. In addition, delegates expressed concern about how and where the Prosecutor would gather evidence when conducting an investigation. On this basis, it is useful to evaluate how African states understood and negotiated prosecutorial powers in Rome.

¹⁰¹ Benedetti, Bonneau, and Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998*, 164.

¹⁰² SADC Principles for Negotiating an International Criminal Court (Pretoria, South Africa: 11-14 September 1997), Principle 5.

¹⁰³ Dakar Declaration for the Establishment of the International Criminal Court in 1998 (Dakar, Senegal: 6 February 1998).

¹⁰⁴ Note that this is the usual analytical approach based on the drafting history of the Statute. See, generally: William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 2nd ed. (Oxford: Oxford University Press, 2016), 402: “The Preparatory Committee draft said: ‘The Prosecutor [may] [shall] initiate investigations [ex officio] [proprio motu] [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations].’”

¹⁰⁵ The term ‘*ex-officio*’ is Latin meaning “from the office.” Thus, in the context of the powers of the Prosecutor, *ex officio* powers would be given by virtue of the Office of the Prosecutor (OTP), as such. The term ‘*proprio motu*’ is Latin for “by one’s own impulse.” In the context of the powers of the Prosecutor, it would mean that the Prosecutor’s instincts could guide the opening of an investigation, as they do in the current construct of the ICC. Thus, one source of power comes from the office itself, while the other comes from the individual. In either instance, the OTP has the authority to open an investigation without outside authority, which was the fundamental goal of governments seeking to establish an independent ICC in Rome.

Given the strong regional consensus on the issue preceding the Conference, it is relatively unsurprising that 28 African states expressly preferred to give the Prosecutor *proprio motu* powers.¹⁰⁶ This constitutes 58 per cent of the total African delegations in attendance at the Conference and 80 per cent of the African delegates that vocalized a clear position on the issue in the plenaries, reflecting a clear ‘majority preference’ of African delegations. Of the 13 SADC states in attendance at the negotiations, nine clearly stated a preference for conferring *proprio motu* powers to the Prosecutor.¹⁰⁷ The remaining SADC states did not indicate a preference on this particular issue.¹⁰⁸ This suggests a high level of (regional) organizational consensus since there was no explicit dissent expressed by any SADC member state(s) in the summary records of the plenary meetings or the meetings of the Committee of the Whole.

This was best illustrated when the delegate from South Africa, speaking on behalf of SADC States, took a clear position on this issue early in the Conference. Specifically, the South African delegate said that “the SADC States believed that the Prosecutor should be independent and have authority to initiate investigations and prosecutions on his or her own initiative without interference from States or the Security Council, subject to appropriate judicial scrutiny. The independence of the Court must not be prejudiced by political considerations.”¹⁰⁹ Similarly, Lesotho’s delegate demonstrated SADC’s commitment to the adoption of an independent Prosecutor when he said that “[t]he Prosecutor’s power to initiate proceedings without awaiting referrals by the Security Council or States would help to assure the Court’s independence and ensure that justice was served in cases where the Council or States failed to act. There were many procedural safeguards against the unlikely eventuality that the Prosecutor would ‘run

¹⁰⁶ These states included Angola, Benin, Botswana, Burkina Faso, Cameroon, Congo, Côte d’Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Gabon, Guinea, Guinea-Bissau, Lesotho, Madagascar, Mali, Morocco, Mozambique, Namibia, Niger, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, Uganda.

¹⁰⁷ These states included Angola, Botswana, Democratic Republic of the Congo, Lesotho, Mozambique, Namibia, Swaziland, Tanzania, South Africa.

¹⁰⁸ These states included Malawi, Mauritius, Zambia, Zimbabwe. Note that Seychelles did not attend the Rome Conference and is omitted from the analysis altogether.

¹⁰⁹ Summary records of the plenary meetings of the Rome Diplomatic Conference, 2nd plenary meeting (15 June 1998), 65, para. 16.

wild.”¹¹⁰ Lesotho remained committed to its preference for an independent Prosecutor throughout the Conference. To demonstrate this commitment, Lesotho subsequently submitted that:

if an independent and effective Court was to be established, it was essential that the Prosecutor should have the authority to initiate investigations *ex officio*. If investigations and prosecutions could only be triggered by States and to some extent by the Security Council, the functioning of the Court would be dependent on the political motivations of those entities and as a result be severely hampered, because in practice States and the Security Council would be reluctant, or unable, to lodge complaints or refer situations to the Court.¹¹¹

This position raises the complex political issues associated with restricting the Court’s jurisdiction to the whims of states and the Security Council. Under this construction, the independence of the Prosecutor is a mitigating factor in a highly politicized state-based institutional model. This presumes the Prosecutor’s ability to act outside of the political sphere, or at least not to be directed solely by national or collective political interest(s).

Functional safeguards were an important feature of the Prosecutor’s independence and were frequently referred to by many African delegations that promoted this institutional feature. For example, the delegate from Lesotho explained that “[t]he Prosecutor should be able to initiate investigations *proprio motu* on the basis of information obtained from any source. Judicial review of the decision to commence an investigation would be the task of the Pre-Trial Chamber.”¹¹² This suggests that these states wanted a scenario whereby the Prosecutor would be able to act independently when opening an investigation, with the potential for judicial review by the Pre-Trial Chamber.

¹¹⁰ Summary records of the plenary meetings of the Rome Diplomatic Conference, 2nd plenary meeting (15 June 1998), 69, para. 71.

¹¹¹ Summary records of the meetings of the Committee of the Whole, 9th meeting (22 June 1998), 199, para. 84.

¹¹² Summary records of the meetings of the Committee of the Whole, 30th meeting (9 July 1998), 307, para. 40. Note that other African states shared this belief with respect to broad information sourcing. See for example *Ibid.*, 309, para. 63: the delegate from Côte d’Ivoire said that “he was in favour of the power of the Prosecutor to act *proprio motu* on the basis of information obtained from States, international organizations, non-governmental organizations or victims, or indeed from the Security Council.”

This was not a vision of unchecked Prosecutorial powers; it advanced a role with built-in assurances against rogue behaviour emanating from the institution itself, rather than states or the Security Council.

Similar positions were taken by African states outside of SADC. For example, the delegate from Burkina Faso said that “he too, favoured empowering the Prosecutor to initiate proceedings... That would enable an independent prosecutor with a purely judicial role to act in cases where States or the Security Council might block investigations because of the political interests at stake. The Prosecutor’s powers should nevertheless be subject to control by the Pre-Trial Chamber.”¹¹³ These positions demonstrate a broad commitment to adopting an independent Prosecutor, with appropriate controls to monitor decision-making processes when opening an investigation *proprio motu*. Of the 28 African delegations that preferred to confer *proprio motu* powers to an independent Prosecutor, almost all qualified their endorsement with reference to the role of judicial oversight from the Pre-Trial Chamber, or else made generalized statements about the importance of providing adequate safeguards against unchecked prosecutorial power.¹¹⁴

However, some states did not share the view that the Prosecutor should be subject to review by the Pre-Trial Chamber at the early stages of an investigation. The Congolese delegate, for example, stated that “[t]he Prosecutor should have ex officio powers to initiate proceedings and should not be subject to controls by the Pre-Trial Chamber, which should only intervene once proceedings had commenced, to check abuses.”¹¹⁵ Later in the Conference, he clarified this position when he said that “[t]he Prosecutor must be able to initiate investigations *proprio motu*... The Pre-Trial Chamber should be entitled to act only after the Prosecutor had done so, and the latter must have very broad

¹¹³ Summary records of the meetings of the Committee of the Whole, 10th meeting (22 June 1998), 206, para. 42.

¹¹⁴ Note that 23 out of the 28 African states that preferred conferring *proprio motu* on the Prosecutor qualified this preference with reference to Pre-Trial Chamber oversight or more generally, adequate safeguards. These states included Angola, Botswana, Burkina Faso, Cameroon, Congo, Côte d’Ivoire, Djibouti, Egypt, Gabon, Guinea, Lesotho, Madagascar, Morocco, Mozambique, Namibia, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, and Uganda.

¹¹⁵ Summary records of the meetings of the Committee of the Whole, 31st meeting (9 July 1998), 315, para. 17.

powers in order to carry out an effective investigation.”¹¹⁶ While framed differently, Congo seemed to share a similar view that the Prosecutor should be independent, yet it still details the necessity of Pre-Trial Chamber oversight in the overall functioning of the Court. This conceptualization of the powers of the Prosecutor is largely consistent with the examples provided from Lesotho and Burkina Faso and reflects the majority position taken by many African states in Rome.

The Moroccan, Libyan, and Egyptian¹¹⁷ delegates indicated a preference for giving the Prosecutor limited power to initiate proceedings to mitigate fears associated with unchecked power. Each of these delegations expressed the preference to limit the sources of information that the Prosecutor could use in opening his or her investigation to information obtained only from states and state-based sources. This constituted less than one per cent of the African delegations at the Conference *and* of the African delegations that took an express position on the issue during the negotiations.

To better understand this position, the Moroccan delegate expressed that “[t]he Prosecutor should have the right of initiative in cases, but there must be adequate safeguards to avoid misuse of his powers and to ensure that the rights of the accused were respected.”¹¹⁸ This position was reiterated and expanded upon when the delegate expressed “that the Prosecutor should have an independent role and be able to initiate investigations *ex officio*. However, such action should be subject to the agreement of the Pre-Trial Chamber. *Information should only be obtained from States and organizations in the United Nations system.*”¹¹⁹ This makes clear that the Moroccan position was that the

¹¹⁶ Summary records of the meetings of the Committee of the Whole, 36th meeting (13 July 1998), 345, para. 16.

¹¹⁷ Note that Egypt stated that it preferred that the Prosecutor have limited powers. See 2nd plenary meeting (15 June 1998), 69, para. 77: “The Prosecutor should have the power to commence proceedings *ex officio*, although not as an absolute and unrestricted right. There would have to be some form of recourse against the Prosecutor’s decisions.” However, this was contradicted at the 9th plenary meeting at 127, para 87: “The Prosecutor should *not* be able to initiate investigations *ex officio* for practical and legal reasons” [*emphasis added*]. Egypt also said at the 9th meeting at 201, para. 119 that safeguards would be required if the Prosecutor were to receive information from any source; the Pre-Trial Chamber would need to “check the accuracy of information.” These statements in combination suggest a preference for a limited role for the Prosecutor.

¹¹⁸ Summary records of the plenary meetings of the Rome Diplomatic Conference, 6th plenary meeting (17 June 1998), 103, para 107.

¹¹⁹ Summary records of the meetings of the Committee of the Whole, 9th meeting (22 June 1998), 200, para. 100 [*emphasis added*].

Prosecutor should be limited by Court oversight and should also be restricted by the sources of information he or she could use to initiate the opening of an investigation. This would exclude the Prosecutor from initiating Court action on the basis of information obtained from important civil society actors such as survivors/victims and key non-governmental organizations, for example. While Morocco was willing to give the Prosecutor a version of *proprio motu* powers, it also sought to curtail his or her independence by restricting sources of information available for initiating an investigation and subjecting decision making to institutional oversight from the Pre-Trial Chamber. As such, it is reasonable to argue that the Moroccan preference was for limited *proprio motu* powers for the Prosecutor—not a purely independent role.

This sentiment was echoed by the Libyan delegate who said, “the power vested in the Prosecutor should be restricted. He or she should be able to commence an investigation on the basis of information obtained from a State, *but not on the basis of information from non-governmental organizations, victims or their representatives.*”¹²⁰ This position seeks to restrict the type of information that would be available to the Prosecutor, and compromises his or her independence to conduct a thorough and objective investigation. Information obtained from a state may be censored in significant ways; least of all, this approach runs the risk of constructing a narrative based on evidence that supports the practical and political national interests of the state(s) involved. However, given the primacy of states in the international system, this preference is consistent with Libya’s largely realist approach to institutional design and norm enforcement, which permeates the summary records of the plenary meetings and meetings of the Committee of the Whole in distinct ways. Notwithstanding this, such an approach does grant the Prosecutor the power to start an investigation, but effectively limits the source of information upon which it might be based. This construction would not establish a truly independent Prosecutor and does not express a preference for conferring true *proprio motu* powers to him or her.

¹²⁰ Summary records of the meetings of the Committee of the Whole, 36th meeting (13 July 1998), 344, para. 7 [*emphasis added*].

Such an approach is consistent among the seven African delegations that preferred to give the Prosecutor *no* power to initiate an investigation.¹²¹ This constituted 10 per cent of the total African delegations present at the Conference and 16 per cent of those that articulated a preference in the plenary meetings. This was the position taken by Tunisia, which was made clear when its delegate “said that his country had some misgivings as to the powers being granted to the Prosecutor in the draft proposed. His delegation believed that action should only be initiated on the basis of a complaint submitted by a State.”¹²² Such a position restricts prosecutorial powers by limiting cases to those referred to the Court by states. This framework does not allow the Prosecutor to initiate an investigation into a situation on his or her own volition and emphasizes the priority of state sovereignty in its institutional model. This position was echoed by Kenya when its delegate said that, “his delegation saw no reason why the Prosecutor would require *ex officio* powers to trigger Court action. The twin triggers of States and the Security Council, subject to appropriate controls, were sufficient to cover all cases which would need to go before the Court.”¹²³ This demonstrates an effective trust in States and the Security Council and seeks to limit the powers of the Prosecutor as a consequence. The Kenyan and Tunisian delegates plainly endorsed the preservation of states’ primacy in the international order and sought to mitigate prosecutorial power and intervention in domestic affairs to that end.

Applying a different rationale, Sudan preferred that the Prosecutor *not* be given *proprio motu* powers because it feared that the power of the Prosecutor would be too great. To this point, the Sudanese delegate opined that “the Statute gave the Prosecutor, acting *proprio motu*, a role beyond the control of the Pre-Trial Chamber. The Prosecutor should be under reasonable and logical control, and should not act *ex officio*.”¹²⁴ This position suggests that institutional oversight by the Pre-Trial Chamber was a necessary institutional feature to screen the powers of the Prosecutor. Related concerns were raised

¹²¹ These states included Algeria, Ethiopia, Kenya, Libya, Nigeria, Sudan, and Tunisia.

¹²² Summary records of the meetings of the Committee of the Whole, 10th meeting (22 June 1998), 205, para. 29.

¹²³ *Ibid.*, at 199, para. 92.

¹²⁴ Summary records of the plenary meetings of the Rome Diplomatic Conference, 9th plenary meeting (17 July 1998), 126, para. 77.

by Egypt, particularly with respect to information received by the Prosecutor as a basis for initiating an investigation. Such positions iterate a mistrust in the Prosecutor's discretionary capabilities and suggest that institutional oversight by the Pre-Trial Chamber ought to be required to limit the Prosecutor's independence. Limitations in this respect seriously affect the independence of the Prosecutor and his or her ability to initiate an independent investigation.

Some delegations agreed that the Prosecutor should not have *proprio motu* powers because of the pressures it would place on him or her. These pressures, it is argued, would compromise his or her independence in the role and negatively impact the Court. To this point, the delegate from Algeria said that "he did not support the power of the Prosecutor to initiate investigations *proprio motu*. Such powers might expose him or her to all sorts of pressures and prevent him or her from carrying out his or her work impartially and independently."¹²⁵ It is unclear exactly what sorts of pressures the delegate was referring to, although it seems to suggest that the Prosecutor may be subject to political posturing from states or other interested parties. Similar concerns were raised by the Kenyan delegate when he said that "Kenya continued to doubt the desirability of conferring *proprio motu* powers on the Prosecutor, particularly because of the danger that pressure might be exerted on him or her to act or not to act, to the detriment of his or her independence. However, it would not stand in the way of consensus on that issue."¹²⁶ This suggests that Kenya shared concerns with Algeria about the pressures the Prosecutor might be exposed to and its impact on his or her independence. However, the fact that the delegate expressed that this issue was not significant enough to obstruct consensus suggests that it was a concern, but not a barrier to Kenya's particular support of the Statute in its entirety.

¹²⁵ Summary records of the meetings of the Committee of the Whole, 30th meeting (9 July 1998), 308, para 75.

¹²⁶ Summary records of the meetings of the Committee of the Whole, 31st meeting (9 July 1998), 317, para 33. Note that similar concerns were raised by the delegate from Nigeria in the 7th plenary meeting (18 June 1998), at 111, para. 87, when he said that "He also had a strong reservation to the ex officio powers of the Prosecutor under article 12 of the draft Statute. Giving the Prosecutor such power without any safeguards might entail the risk of political manipulation, which would not augur well for the independence of the Court." Egypt made similar comments at 35th meeting (13 July 1998), 335, para. 6: "Egypt had serious reservations about conferring *proprio motu* powers on the Prosecutor: to do so might hamper the Prosecutor's effectiveness in practice."

5.7.1 The final text and conclusions

The final text of the Rome Statute details the powers of the Prosecutor under Article 15.¹²⁷ Some key elements of the Statute include the Prosecutor's ability to initiate investigations *proprio motu* based on information concerning crimes within the Court's jurisdiction.¹²⁸ The Statute also includes the possibility for consultancy with States, organs of the UN, intergovernmental or non-governmental organizations, or other reliable sources when assessing the information received.¹²⁹ Article 15(3) enumerates that the Prosecutor must submit a request for authorization of an investigation to the Pre-Trial Chamber based on the information he or she has collected.¹³⁰ As such, the final text largely reflects the preference of the majority of African delegations in Rome—an independent Prosecutor with the ability to initiate investigations *proprio motu*, accompanied with broad sources of consultancy when gathering information and appropriate judicial oversight from the Pre-Trial Chamber.

The seven African states that did not want to give the Prosecutor *proprio motu* powers did not see this reflected in the final text of the Rome Statute. Libya and Ethiopia did not sign or ratify the Rome Statute. Algeria and Sudan both signed it; Kenya, Nigeria, and Tunisia all signed *and* ratified it. However, it would be an omission not to point out that Algeria, Libya, and Sudan are each *also* members of the Group of Arab States, and this may explain the cohesion in decision-making among these states, outside of the narrow prosecutorial powers issue, based on shared culture and experience. A notable outlier is Tunisia, since it is a member of the Group of Arab States, yet preferred not to confer *proprio motu* powers to the Prosecutor, but signed and ratified the Rome Statute anyway. Nevertheless, the ability of the Prosecutor to initiate an investigation *proprio motu* or to base an investigation on information from sources other than State(s) may

¹²⁷ Rome Statute of the International Criminal Court, Art. 15.

¹²⁸ *Ibid.*, Art. 15(1).

¹²⁹ *Ibid.*, Art. 15(2).

¹³⁰ *Ibid.*, Art. 15(4): The Pre-Trial Chamber can authorize an investigation if there is a reasonable basis to do so based on the evidence and the Court's jurisdiction. Art. 15(5): Denial at the Pre-Trial stage does not preclude resubmission at a later stage based on new evidence. Art. 15(6): Similarly, if the Prosecutor decides not to initiate an investigation, additional information may be submitted to him or her at a later stage.

have been decidedly problematic for some, especially African states that are also in the Group of Arab States.

On the other hand, most African states expressed a preference for the type of prosecutorial powers reflected in the final text of the Rome Statute. Of these 28 states, only Rwanda, Swaziland, and Togo neither signed nor ratified the Statute. Angola, Cameroon, Egypt, Guinea-Bissau, Morocco, and Mozambique signed the Statute but did not ratify it. On this basis, the ratification rate is 68 per cent among the African states that vocalized a preference for conferring *proprio motu* powers to the Prosecutor. This suggests that 32 per cent of African states felt strongly enough to enumerate a preference for an independent prosecutor in the plenary meetings and meetings of the Committee of the Whole but were not entirely committed to the Statute and chose not to ratify it. Curiously, of the six states that endorsed *proprio motu* powers and ultimately did not ratify the Rome Statute, half belong to SADC: Angola, Mozambique, and Swaziland. The final text of the Statute reflects the type of prosecutorial powers that SADC endorsed from the earliest stages, which raises questions about the other provisions which might explain this defection. It is worth noting that 89 per cent of the African states that preferred conferring *proprio motu* powers to the Prosecutor did sign the Statute, reflecting tacit approval among the majority of this group of states.

5.8 Conclusion

The final text of the Rome Statute enumerates that a situation can be investigated and prosecuted at the ICC if referred by a States Party, which reflects an automatic jurisdiction regime. Alternatively, the Prosecutor can initiate an investigation *proprio motu*, subject to appropriate judicial oversight in situations involving States Parties. Lastly, the Security Council may refer a situation to the Court, even with respect to non-states parties. The Security Council may also defer a situation at the Court, if it is in the interest of maintaining international peace and security to do so. This chapter has deconstructed the particular preferences of African states at the Rome Diplomatic Conference with respect to the role of the Security Council, the trigger mechanism for the Court's jurisdiction, and the power of the Prosecutor to initiate an investigation *proprio motu*. While there is no one monolith, this chapter has drawn attention to some general

patterns and consistencies in the construction of preferences on these provisions among African states.

Generally, the states that preferred to construct the Court in the ways reflected in the final text of the Statute displayed a strong commitment in the form of treaty ratification. It is important to note that these trends are general, since not every state spoke to every issue. However, relying on the information provided by the summary records of the plenary meetings and meetings of the Committee of the Whole indicates that there is a general correlation between how much of the final text of the Statute reflected the preferences of various African delegations and that states' commitment to be bound by it. This is particularly visible when considering the ways that situations can come under the Court's jurisdiction. The next section analyzes the preferences of African states on the provisions concerning *crimes*, including the inclusion of war crimes committed during internal armed conflict, the inclusion of so-called 'treaty crimes'—especially terrorism and drug trafficking, and the inclusion of nuclear weapons on the prohibited list of weapons used in conflict.

Chapter 6

6 African Positions at the Rome Diplomatic Conference, continued

The previous chapter provided insight into African positions on contentious aspects of the Rome Statute negotiations with respect to issues concerning the Court's jurisdiction, including the role of the United Nations Security Council and the independence of the Prosecutor. In addition to those issues, there was significant contention surrounding some of the provisions of the Statute that dealt with the nature of crimes covered by the Statute, most notably the inclusion of war crimes committed during internal armed conflict; the inclusion of so-called 'treaty crimes,' especially terrorism and drug trafficking; and the prohibition of the use of nuclear weapons. Similar to the jurisdiction provisions, African states engaged with the difficult issues with respect to the nature of crimes, demonstrating meaningful and affective diplomacy throughout the negotiations. Likewise, African delegates expressed a keen interest in designing an ICC that covered the sorts of crimes that were most relevant to the region. In many respects, African interventions with respect to the provisions dealing with crimes provided further evidence to suggest that positions were constructed from an Afro-centric point of view. On this basis, the preferences of African states on the controversial parts of the Statute with respect to crimes is summarized in Table 6-1.

Table 6-1: African Positions on Controversial Elements and Key Issues on crimes provisions at the Rome Diplomatic Conference, 1998

Controversial Element and key issues	Number of African states that supported the stated controversial elements of the Statute
Inclusion of war crimes in <i>internal</i> armed conflict	25
No inclusion of war crimes in <i>internal</i> armed conflict	7
Inclusion of ‘treaty crimes’	9
Terrorism	9
Drug trafficking	5
Unspecified	1
No inclusion of ‘treaty crimes’	12
Prohibition of nuclear weapons	17
No inclusion of nuclear weapons	1

6.1 Internal Conflict

Among the most debated issues was whether war crimes committed during internal armed conflict (non-international armed conflicts) should be included and if so, what the threshold should be to distinguish these acts from isolated internal disturbances or acts of violence.¹ 52 per cent of the African states in attendance at the Conference expressed a preference to include internal conflicts in the Statute, in many cases because of direct

¹ See Thomas Graditzky, “War Crime Issues before the Rome Diplomatic Conference on the Establishment of an International Criminal Court,” *U.C. Davis Journal of International Law and Policy* 5.2 (1999), 208: “One of the most controversial issues relating to war crimes was whether to include a provision covering non-international armed conflicts.”

experience(s).² Stephen John Stedman provides a contemporaneous analysis and explained that:

in 1995, there were five ongoing wars (in Angola, Liberia, Sierra Leone, Somalia, and Sudan), and several countries that were candidates for state collapse or civil war (Burundi, Cameroon, Kenya, Nigeria, Rwanda, Togo, and Zaire), and a host of other countries where low-level ethnic and political conflict remained contained, but unresolved (Chad, Congo, Djibouti, Ethiopia, Malawi, Mali, Mozambique, Senegal, South Africa, and Uganda).³

This suggests that this issue had a geopolitical component, which informed a want and need for the establishment of an ICC with jurisdiction over war crimes committed in internal conflicts. It is important to highlight the significance and importance of the negotiations to countries with firsthand experience (past or present) with widespread internal conflict and violence in shaping the institutional design of the proposed Court. This is one area of the negotiations that showcases how various African experiences with post-colonial violence directly influenced state preferences in the negotiations and permeated the summary records of the plenary meetings and meetings of the Committee of the Whole. It demonstrates that the African experience was a driving factor that directly affected African support for, and engagement in, the drafting of the Rome Statute. To reflect this point, the delegate from Benin “said that the adoption of the Statute of the International Criminal Court was a major step forward for humanity as a whole and for Africa in particular. Africa had suffered from the most serious violence for decades.”⁴ This regional component was demonstrated by reference to country-specific experience(s) with widespread human rights violations by Burundi, the Democratic

² These states included Angola, Botswana, Congo, Democratic Republic of the Congo, Ethiopia, Gabon, Guinea-Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Tanzania, Togo, Uganda, Senegal, Sierra Leone, South Africa, Swaziland, and Zambia, and Zimbabwe. Note that South Africa expressed its preference to include war crimes committed in internal conflict on behalf of the South African Development Community (SADC) States. As such, the SADC states are individually listed in this preferential group.

³ Stephen John Stedman, “Conflict and Conciliation in Sub-Saharan Africa,” in *The International Dimensions of Internal Conflict*, ed. Michael Edward Brown (Harvard University: Center for Science and International Affairs, 1996), 237.

⁴ Summary Records of the plenary meetings, 8th plenary meetings (18 June 1998) A/CONF.183/SR.8, 128, para. 106.

Republic of the Congo, Guinea-Bissau, Sierra Leone, South Africa, Namibia, Uganda, and frequent reference to the Rwandan genocide throughout the plenary meetings and meetings of the Committee of the Whole at the Rome Conference.⁵

The main issue at the Conference with respect to the inclusion of war crimes committed during internal armed conflict surrounded clarifying the defining nature and threshold of internal conflict itself. The initial proposal to address this issue presented in the Rome Statute negotiations employed the Protocol Additional to the Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), which covers non-derogable rights contained in Article 3 common to the four Geneva Conventions. More particularly, the initial proposal suggested the use of the threshold contained in Article 1, paragraph 2 of Protocol II, which says: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”⁶

However, difficulty arose in the negotiations because the Rome Statute deals with war crimes outside of those contained in common Article 3. As such, Graditzky explained that some delegations argued that the acts not mentioned by Common Article 3

⁵ For example, see Summary records of the plenary meetings 4th plenary meeting (16 June 1998) A/CONF.183/SR.4, 87, para. 56: The delegate from Namibia said, “In view of the atrocities the world had witnessed during the previous century *and Namibia’s own recent history*, his Government supported the establishment of an effective and independent international criminal court” [*emphasis added*]. See also Summary records of the plenary meetings, 8th plenary meeting, 118, para. 58: The delegate from Burundi, “said that his country had suffered for almost five years from genocide and attacks by bands of terrorists against innocent people; he requested that an ad hoc international criminal tribunal be set up for Burundi in order to help national reconciliation efforts.” See also Summary records of the meetings of the Committee of the Whole, 28th meeting (8 July 1998) A/CONF.183/C.1/SR.28, 292, para. 76: The delegate from Guinea-Bissau said that “He attached prime importance to the inclusion of sections C and D, *since his country continued to suffer from non-international armed conflicts*” [*emphasis added*]. See also Summary records of the plenary meetings, 7th plenary meeting (18 June 1998), A/CONF.183/SR.7, 112, para. 91: The delegate from the Democratic Republic of the Congo said that “The international community had proved powerless to prevent atrocities or even punish the perpetrators. Indeed, *his own country had suffered the influx of millions fleeing from the genocide in Rwanda*. His delegation therefore believed that the creation of an international criminal court was an imperative” [*emphasis added*]. See also Summary records of the meetings of the Committee of the Whole, 35th meeting (13 July 1998), A/CONF.183/C.1/SR.35, 337, para. 23: The delegate from Uganda said, “Whether or not the perpetrators controlled territory was immaterial: they might be operating from a neighbouring country, with or without that country’s consent, *as was currently the case in Uganda*” [*emphasis added*].

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 1, paragraph 2.

should have a higher threshold.⁷ On this basis, some delegates proposed to “resolve this issue by inserting the restrictive threshold of Article 1, paragraph 1 of Additional Protocol II before the list of additional acts at issue.”⁸

The international humanitarian law framework provided by Article 1 in Protocol II espouses a high threshold based on the actors involved and the level of territorial control necessary to reach the categorical label of non-international armed conflict.⁹ The specific problem with employing this threshold in the broadly termed ‘African context’ is, as it was at the time, its focus on organized armed groups, or else state or dissident armed forces, acting under responsible command, exercising control over and operating out of a part of the states’ territory. This implies an organizational and territorial aspect, which effectively limits its application in many internal conflicts. As Charles Jalloh highlights, “keeping in mind the types of non-State actor conflicts that we see in that region of Africa today... more conflicts are of an *intra*-state rather than *inter*-state nature and feature rebel groups and other non-State actors as key perpetrators.”¹⁰

Within the context of the Rome Statute negotiations, Graditzky explained, “[o]pposing delegations and other involved actors reacted strongly [to inserting the restrictive threshold of Article 1] since many internal conflicts would be excluded.”¹¹ This is consistent with the view taken by the International Committee of the Red Cross, which argued that “[t]he restrictive definition of the material field of application in Article 1 will have the effect that Protocol II will be applicable to a smaller range of

⁷ Graditzky, “War Crime Issues,” 209.

⁸ *Ibid.*

⁹ Protocol II Article 1(1): This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol; Article 1(2): This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

¹⁰ Charles Chernor Jalloh, “What Makes a Crime Against Humanity a Crime Against Humanity,” *American University International Law Review* 28.2 (2013): 415.

¹¹ Graditzky, “War Crime Issues,” 209.

internal conflicts than Article 3 common to the Geneva Conventions of 1949.”¹² Common Article 3 of the Geneva Conventions enumerates human rights that are non-derogable in character, amounting to peremptory norms of international law or *jus cogens*. It was therefore understood that embedding the framework contained in Article 1 of Protocol II within the structure of the Court would severely limit its utility in addressing war crimes allegedly committed during internal conflicts, particularly if the sorts of crimes fell outside of those listed in Common Article 3 of the Geneva Conventions.¹³ In this frame, the utilization of Article 1 of Protocol II would have been limited in terms of the actors and crimes in which it covers. This was especially problematic for African states that had dealt with (and continue to deal with) the complexities of war crimes committed during internal conflict by rebel groups and other non-State actors without satisfying the territorial control threshold.

To reconcile this issue, Sierra Leone made reference to its own experience with internal conflict. The delegate said that he had reservations, for example, regarding the chapeau of section D, which referred to organized armed groups that exercised ‘control over a part of [a State party’s] territory.’ That wording was very restrictive: in his own country, for example, the rebel forces did not occupy a territory. Thus, as presently drafted, section D would exclude the type of internal conflict presently taking place in Sierra Leone.¹⁴ As a result, Sierra Leone proposed using the language that internal conflict “applies to armed conflicts that take place in a territory of a State when there is protracted armed

¹² International Committee of the Red Cross, “Treaties, States Parties and Commentaries: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977,” available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475>; accessed 1 April 2020.

¹³ See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949: Conflicts Not of an International Character. Article 3 provides essential human rights and freedom from persecution in the case of non-international armed conflict. Article 3(1) specifically enumerates some acts which would constitute a crime: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

¹⁴ Summary records of the meetings of the Committee of the Whole, 35th meeting (13 July 1998), 335, para. 8.

conflict between governmental authorities and organized armed groups or between such groups.”¹⁵ This is an example of an African country using its own experience to lead negotiations in an important manner. The practicality and relevance of this proposal to the region was demonstrated by the Ugandan delegate when he said that:

Uganda shared other delegations’ concern about the watering down of the Court’s jurisdiction over situations of internal conflict. As currently worded, the second sentence of the chapeau of article 5 quarter, section D, severely limited the Court’s scope in that regard. Whether or not the perpetrators controlled territory was immaterial: they might be operating from a neighbouring country, with or without that country’s consent, as was currently the case in Uganda. His delegation thus supported the proposal by the representative of Sierra Leone with regard to the chapeau of section D.¹⁶

This not only highlights the importance of the proposal made by Sierra Leone, but it also demonstrates a need for the provision to cover the sorts of crimes being committed in several African states during the Rome Diplomatic Conference. To further illustrate this point, the delegate from Guinea-Bissau said that “[h]e attached prime importance to the inclusion of sections C and D [on internal conflict], since his country continued to suffer from non-international armed conflicts.”¹⁷ This is another example of how country-specific experience guided some African states in the negotiation of particular aspects of the ICC, especially with respect to the inclusion of war crimes committed in internal conflict. Acknowledging the relevance of particular crimes in domestic contexts reinforced the need for an effective system of international criminal justice, which influenced national preferences during the negotiations in pointed ways. This is important because it directly affected African preferences throughout the Rome Diplomatic Conference which are strongly evidenced through a content analysis of the plenary meetings and meetings of the Committee of the Whole.

¹⁵U.N. Doc. A/CONF.183/C.1/L.62 (13 July 1998). Note that the language proposed by Sierra Leone is reflected directly in the final text of the Rome Statute in Article 8 para. 2(f).

¹⁶ Summary records of the meetings of the Committee of the Whole, 35th meeting (13 July 1998), 337, para. 23.

¹⁷ Summary records of the plenary meetings of the Rome Diplomatic Conference, 28th meeting (8 July 1998), 292, para. 77.

More generally, 32 African states took a clear position on non-international armed conflict: 25 expressed a preference to *include* internal conflicts within the war crimes provisions;¹⁸ seven expressed a preference *not* to do so.¹⁹ The states that preferred to include war crimes committed during internal conflict did so for mixed reasons. Several African states emphasized the evolving contemporary reality of internal armed conflicts. For example, the delegate from South Africa, speaking on behalf of the South African Development Community (SADC) States, said that “most atrocities were now committed in the context of internal armed conflicts. The member States of SADC therefore supported the inclusion of sections C and D in the Statute [on internal armed conflict].”²⁰ Similarly, Ethiopia, stated that, “[n]on-international armed conflicts should be included, being the main cause of crimes within the jurisdiction of the International Criminal Court.”²¹ Mali also said that “[m]ost conflicts were internal in nature, so sections C and D [on internal conflict] should be included in the Statute.”²² This rationale emphasizes not only the changing nature of conflict but prioritizes the Court’s utility to address the crimes which it is designed to respond to, based on the broadly understood ‘African’ experience. While traditionally conceptualized as state-on-state aggression, the 1990s brought to the fore a new wave of warfare defined by violent internal conflict – including in many African countries, which directly influenced state preferences and conceptualization of the object and purpose of the ICC.²³

Other states relied on specific experiences with violent internal conflict even more directly when forming a domestic preference. For example, the delegate from Namibia said, “[i]n common with several African delegations, he believed that the question of internal conflicts must be addressed, since in one case the entire Government had been

¹⁸ These states included Angola, Botswana, Congo, Democratic Republic of the Congo, Ethiopia, Gabon, Guinea-Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Senegal, Sierra Leone, South Africa, Swaziland, Togo, Tanzania, Uganda, Zambia, Zimbabwe.

¹⁹ Algeria, Burundi, Egypt, Libya, Morocco, Sudan, Tunisia.

²⁰ Summary records of the meetings of the Committee of the Whole, 25th meeting (8 July 1998), A/CONF.183/C.1/SR.25, 267, para. 10.

²¹ Summary records of the meetings of the Committee of the Whole, 28th meeting (8 July 1998), 288, para. 4.

²² Summary records of the meetings of the Committee of the Whole, 26th meeting (8 July 1998), 278, para. 66.

²³ See Michael Edward Brown, *The International Dimensions of Internal Conflict* (Harvard University: Center for Science and International Affairs, 1996).

involved in genocide and the judicial system in situ had not been effective.”²⁴ This statement reflects a degree of regional consensus on this issue. Further, it makes reference to the violent internal conflict that had taken place in Rwanda to highlight the need for the ICC Statute to deal with similar situations, should they occur in the future. Curiously, one might have expected Rwanda itself to take a position on this issue based on first-hand experience, yet it did not.²⁵ The delegate from Rwanda did say “that his delegation hoped that the many references made to the genocide that had involved the people of his country in 1994 denoted a desire to bring the organizers of *that* genocide to justice... While supporting the establishment of a permanent international criminal court, Rwanda believed that its establishment would not obviate the need for ad hoc tribunals.”²⁶ It is curious that the Rwandan genocide was a major catalyst for the establishment of an ICC and bolstered regional and global commitment to the norms undergirding it, yet Rwanda itself demonstrated a degree of apathy at the Rome Conference and neither signed nor ratified the Rome Statute, which casts doubt as to whether or not Rwanda wanted to ensure that future crimes of a similar gravity could not go unpunished by committing to a permanent international criminal justice mechanism.²⁷

Nevertheless, jointly and separately, the African majority position on the inclusion of war crimes committed during non-international conflict may explain why the delegate from Togo said that “[s]ections C and D on non-international armed conflicts must be included in the Statute, as the *credibility* of the Court depended on it.”²⁸ Ultimately, the African contributions with respect to the inclusion of war crimes committed during non-international armed conflict demonstrate the relevance of

²⁴ Summary records of the meetings of the Committee of the Whole, 28th meeting (8 July 1998), 290, para. 26.

²⁵ See generally Summary records of the plenary meetings, 6th plenary meeting (17 June 1998), 103-104, paras. 110-114: Rwanda’s primary issues were with respect to the continued support of ad hoc tribunals, the scope of the crimes within the Court’s jurisdiction, the primacy of national courts, the independence of the Prosecutor, the use of the death penalty, victims’ rights, and the right of a State to express reservations with respect to certain provisions of the Statute.

²⁶ Summary records of the plenary meetings, 6th plenary meeting (17 June 1998) A/CONF.183/SR.6, 103, para. 110 [*emphasis added*].

²⁷ Note that the ICC can only prosecute crimes committed *after* July 2002, once it entered into force with the necessary sixty ratifications.

²⁸ Summary records of the meetings of the Committee of the Whole, 26th meeting (8 July 1998), 278, para. 72 [*emphasis added*].

continental and domestic experience(s) in shaping preferences and negotiating positions. This effectively demonstrates that the majority position on the part of African states to include war crimes committed in internal conflict was strongly influenced by the regional experience with such conflicts. While there is a geopolitical aspect to explaining African support for the inclusion of internal conflict in the war crimes provisions, it would be negligent to ignore that the International Committee of the Red Cross estimates that 80 per cent of victims of armed conflicts since 1945 have been victims of non-international armed conflicts,²⁹ which highlights the importance of the issue to the overall utility and effectiveness of the Court altogether.

Notwithstanding this, it is necessary to evaluate the rationale of the seven African delegations that preferred *not* to include internal conflict in the Rome Statute. The primary justification for taking this position hinged on traditional concepts of sovereignty and non-interference in domestic politics. For example, the delegate from Tunisia, when addressing crimes against humanity, said that “his delegation interpreted crimes against humanity as taking place only in international armed conflicts; otherwise intervention by the Court would amount to interference in internal affairs contrary to the principles of the United Nations.”³⁰ Related points were made by the delegate from Algeria, who said that “he was somewhat concerned about the inclusion of sections C and D [on internal conflict], since that might lead to interference in the internal affairs of countries. It would be difficult to draw a line between a genuine armed internal conflict and internal disturbances.”³¹ He reaffirmed these concerns later in the Conference when he said that Algeria “continued to oppose inclusion of internal armed conflicts under the Court’s jurisdiction, on account of the practical difficulty of distinguishing between true armed conflict and policing operations intended to restore public order.”³² Sudan felt similarly

²⁹ International Committee of the Red Cross, “Treaties, States Parties and Commentaries: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977,” available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475>; accessed 1 April 2020.

³⁰ Summary records of the meetings of the Committee of the Whole, 3rd meeting (17 June 1998), 148, para. 34.

³¹ Summary records of the meetings of the Committee of the Whole, 27th meeting (8 July 1998), 283, para. 5.

³² Summary records of the meetings of the Committee of the Whole, 35th meeting (13 July 1998), 337, para. 31.

hesitant to endorse an inclusion of internal conflicts within the Statute. When speaking on behalf of the Group of Arab States, the Sudanese delegate said that “the Arab States were afraid that the inclusion of non-international conflicts within the Statute would allow interference in the internal affairs of States on flimsy pretexts.”³³

Given that this was the position of the Group of Arab States, it may be inferred that it reflects the views of Algeria, Egypt, Libya, Morocco, Sudan, and Tunisia—six of the seven African states that expressly preferred *not* to include non-international armed conflict in the Statute and belong to the Group of Arab States. The sixth state, Burundi, did not provide a justification for taking this position. The delegate simply said that “[t]he Court should not have competence with respect to internal conflicts.”³⁴ This may be a consequence of Burundi’s own experience with internal conflict, exemplified by the military coup in 1993, which started a civil war between the Tutsi armed forces and Hutu rebel groups.³⁵ It is logical to infer that delegates negotiating the Rome Statute would have considered its impact on their own domestic realities. Those states with questionable human rights records, or that were otherwise coping with the sorts of crimes being discussed at the negotiations, would likely have had a special interest in seeking to limit the Court’s reach in those contexts.

Nevertheless, defection from the African majority position with respect to internal conflicts primarily emanated from the Group of Arab States in Rome. The heart of the justification(s) provided by these states thematically rests on realist principles, which permeated the negotiations throughout. These included the primacy of state sovereignty above all else. This was emphasized by the Libyan delegate when she said that “sections C and D [on internal conflicts] should not be included. She was ready to consider guarantees that would secure the integrity and sovereignty of States.”³⁶ This demonstrates a clear ideological difference from the majority of African states that considered the

³³ Summary records of the plenary meetings of the Rome Diplomatic Conference, 9th plenary meeting (17 July 1998), 126, para. 75.

³⁴ Summary records of the meetings of the Committee of the Whole, 27th meeting (8 July 1998), 286, para. 46.

³⁵ See, for example, Léonce Ndikumana, “Institutional Failure and Ethnic Conflicts in Burundi,” *African Studies Review* 4.1 (1998): 29-47.

³⁶ Summary records of the meetings of the Committee of the Whole, 28th meeting (8 July 1998), 394, para. 104.

Court's role in addressing war crimes committed in internal conflicts as not only important, but necessary.

The minority position articulated in the summary records of the plenary meetings and the meetings of the Committee of the Whole seems to rely on three distinct and consistent fears: first, that state sovereignty would be compromised; second, that governments would be unable to maintain effective order within borders; and third, that unsolicited intervention on the part of other states (or the Court, for that matter) will be justifiable. Separately or combined, the potential realization of these fears compromises the foundation of the nation state and the international state-based system; this forms the basis of normative and institutional rejection, least avoidance. As Sivu Maqungo explained, "it was always going to be difficult to convince governments, particularly, African governments to accept an institution that threatened to lift or even pierce the veil of their hard won sovereignty."³⁷ This challenge explains the polarization in the approaches of African states, many being willing to give up some degree of sovereignty in exchange for normative commitment, while others were unwavering in their ideological ascription to the primacy of state sovereignty and non-intervention for any purpose(s) in the post-colonial political landscape.

6.1.1 The final text and conclusions

Article 8 of the Rome Statute gives the ICC Prosecutor the ability to investigate war crimes committed in both international *and* internal armed conflict.³⁸ The provisions concerning internal armed conflict specifically enumerate violations of Common Article 3 of the Geneva Conventions at Article 8, 2 (c).³⁹ Importantly, Article 8, 2 (e) details

³⁷ Sivu Maqungo (Sivu) Maqungo, "The African Contribution Towards the Establishment of an International Criminal Court," in *African Yearbook of International Law*, ed. A.A. Yusuf (African Association of International Law: 2001), 339.

³⁸ Rome Statute of the International Criminal Court, Article 8: War Crimes.

³⁹ *Ibid.*, at Art. 8.2(c): "In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: i. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; ii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment; iii. Taking of hostages; iv. The passing of sentences and the carrying out of executions without previous

other serious violations of the laws and customs applicable in internal conflicts and enumerates specific war crimes in these contexts.⁴⁰ Of additional relevance, both Article 8, paragraph 2 (d) and Article 8, paragraph 2 (f) employ the language and threshold provided in Paragraph 2 of Protocol II of the Geneva Conventions:

Paragraph 2 (c) [or Paragraph 2 (e)] applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.⁴¹

This inclusion seeks to clarify the threshold to distinguish ‘regular’ internal violence from internal conflict, an attempt to pacify the concern raised by some states (including some African states) that the Court could intervene in domestic affairs on weak bases. A key distinction between the two paragraphs is the additional text in paragraph 2 (f) that follows, and, which says: “It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”⁴²

This text is a verbatim application of the proposal made by Sierra Leone in the course of the negotiations, referenced above. This proposal effectively mitigated the use of the restrictive threshold contained in Paragraph 1 of Protocol II of the Geneva Conventions. This is a clear example of African involvement in the institutional design of the Court based on domestic experience with the issues involved.

It is also important to note that a further attempt was made to assuage the fears of the delegations that touted the primacy of sovereignty and non-interference. Specifically, Article 8, paragraph 3 of the Rome Statute states that “Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.”⁴³

judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.”

⁴⁰ Ibid., Art. 8 paragraph 2(e).

⁴¹ Ibid., Arts. 8, para. 2 (d) and (f).

⁴² Ibid., Arts. 8, para. 2(f).

⁴³ Ibid., Art. 8, para. 3.

This inclusion reflects an acknowledgement of the concerns raised by states throughout the course of the negotiations, including the African states that preferred not to include war crimes allegedly committed in internal conflicts in the Statute because it would allow for intervention on weak grounds. This inclusion shifts responsibility back to the government to maintain the state, consistent with the object and purpose of the bedrock complementarity principle espoused by the Court. That is, the Court is meant to be a complement to national institutions and may only intervene if a state is unwilling *or* unable to do so—a last resort.⁴⁴

Notwithstanding this, of the seven African states that preferred not to include internal conflict, Algeria, Egypt, Morocco, and Sudan did sign the Rome Statute, but did not ratify it. Burundi and Tunisia signed *and* ratified the Statute. Libya neither signed nor ratified. This suggests that the compromise solution or the substance of the Statute was great enough to overcome a delegations' preference on this particular issue, since 86 per cent of this group ended up at least signing the Statute. More demonstrably, 29 per cent of this group exercised a strong commitment to the Court by ratifying the Statute. The other 71 per cent of African states that preferred not to include internal conflict acted consistently by not ratifying the Statute, since the final text included internal conflicts within the war crimes provisions in Article 8.

With respect to the 25 African states that preferred to include war crimes committed during internal conflicts, Ethiopia, Swaziland, and Togo neither signed nor ratified the Statute; together, these three comprised 12 per cent of this group of states. Angola, Guinea-Bissau, Mozambique, and Zimbabwe demonstrated a low-level of commitment to the Rome Statute and signed but did not ratify it. The other 18 States did ultimately ratify the Rome Statute; they comprised 72 per cent of the delegations that enumerated a preference to include internal conflicts. While 88 per cent of the African states that preferred to include war crimes committed in internal conflict within the Rome Statute signed it, 28 per cent of the 88 per cent per cent did *not* ultimately ratify it.

⁴⁴ See *Rome Statute of the International Criminal Court* (17 July 1998), A/CONF.183/9, Preamble: “Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions;” Art. 1; Art. 17.

It is important to note that the final text of the Rome Statute has been criticized on the grounds that some war crimes provisions apply to international conflicts yet are excluded from internal ones. The crimes that apply in international conflicts but not internal ones include: “launching indiscriminate attacks likely to cause incidental loss of life, injury to civilians or damage to civilian objects; widespread, long-term and severe damage to the environment; attacking undefended places which are not military objectives; improper use of flags and markings; use of human shields; and the use of starvation as a method of warfare.”⁴⁵ Scholars such as Willmott have problematized this, arguing that “These acts, committed in the course of non-international armed conflict, cannot be prosecuted by the ICC as war crimes.”⁴⁶ Dörmann explains this asymmetry as having two explanations: the first is that some provisions simply do not apply to internal conflicts. The second is that “several states took the view that these have not yet reached the status of customary international law and should therefore not be included.”⁴⁷

The unequal application of crimes in international and internal conflicts may explain why 20 per cent of the African states that preferred to include war crimes committed in internal conflict in Statute ultimately decided not to ratify the final text, notwithstanding their preferred inclusion. Scholars such as Graditzky argue that “however disappointing the list of the included crimes might seem, the presence of

⁴⁵ Deidre Willmott, “Removing the Distinction between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court,” *Melbourne Journal of International Law* 5.1 (2004), 196.

⁴⁶ Willmott, “Removing the Distinction between International and Non-International Armed Conflict,” 197.

⁴⁷ Knut Dörmann, “War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes,” *Max Planck Yearbook of United Nations Law* 7 (2003): 347. Note that the second reason was directly applicable to the decision not to include the use of prohibited weapons in internal armed conflicts. Scholars such as Willmott and Dörmann argue that this was a problematic outcome of the negotiations. However, the first amendment to the Rome Statute expanded the Court’s jurisdiction over the use of prohibited weapons in international armed conflicts to their use in internal conflicts, which happened at the Review Conference on the International Criminal Court in Kampala (June 2010). See generally Amal Alamuddin and Philippa Webb, “Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute,” *Journal of International Criminal Justice* 8.5(2010): 1219-1243. Similarly, Switzerland proposed to include the intentional starvation of civilians as a war crime in internal conflicts in 2019. See United Nations, Rome Statute of the International Criminal Court Rome, 17 July 1998, Switzerland: Proposal of Amendment (30 August 2019), C.N.399.2019.TREATIES-XVIII.10 (Depositary Notification). At the 18th Assembly of States Parties of the International Criminal Court, it was unanimously agreed to amend the Rome Statute to include starvation as a war crime during internal conflict. In combination, these amendments signal the evolving nature of international law covering war crimes committed during internal conflicts.

provisions relating to non-international armed conflicts is itself one of the greatest achievements of the Conference.”⁴⁸ The inclusion of internal conflicts within the war crimes provisions of the Rome Statute was indeed consistent with the majority preference of African delegates at the Conference. This is similarly reflected by the strong ratification rate among states that expressed this preference in the summary records of the plenary meetings and the meetings of the Committee of the Whole.

6.2 Treaty Crimes: Terrorism and Drug Trafficking

At the Rome Conference there was significant discussion about whether the Court should cover so-called ‘treaty crimes’ that is, crimes already defined and established by treaties—especially terrorism and drug trafficking.⁴⁹ Kirsch and Robinson explained that “whether to include the drug trafficking or terrorist crimes (referred to in the negotiations as the ‘treaty crimes’) was also hotly debated, as a minority of States pressed keenly for their inclusion.”⁵⁰ With respect to African states, nine preferred to include terrorism in the Statute and five supported the inclusion of drug trafficking.⁵¹ This reflects a general low-level of regional preference; 19 per cent of African delegations at the Conference pushed for the inclusion of terrorism; 10 per cent for drug trafficking.

⁴⁸ Graditzky, “War Crimes Issues,” 211; Dörmann, “War Crimes under the Rome Statute,” 348: “Nevertheless, it must be emphasised that the major accomplishment of the Rome Conference with regard to war crimes certainly resides in the inclusion of war crimes committed during non-international armed conflicts.”

⁴⁹ See Herman von Hebel and Darryl Robinson, “Crimes within the Jurisdiction of the Court,” in *The International Criminal Court: the making of the Rome Statute: Issues, Negotiations, Results*, ed. Roy S. Lee (The Hague: Kluwer Law International, 1999), 80: under the ILC Draft Statute, treaty crimes were understood to include grave breaches of the Geneva Conventions and Additional protocol I, apartheid, torture and certain acts of terrorism and illicit traffic in narcotic drugs. These crimes were considered separately from the ‘core crimes’ – genocide, crimes against humanity, war crimes, and aggression. It is important to note that apartheid was included as a crime against humanity in the final text of the Rome Statute.

⁵⁰ Philippe Kirsch and Darryl Robinson, “Reaching Agreement at the Rome Conference,” in *The Rome Statute of the International Criminal Court*, Vol. 1, eds. Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (Oxford: Oxford University Press: 2002), 78. The authors explain that the states that pushed for drug crimes included Barbados, Dominica, Jamaica, and Trinidad and Tobago; India, Sri Lanka, Algeria, and Turkey pushed for the inclusion of terrorist crimes (at note 41). Accordingly, Algeria is the most relevant state for the purposes of this analysis.

⁵¹ The African states that preferred to include terrorism included Algeria, Benin, Botswana, Comoros, Congo, Côte d’Ivoire, Egypt, Ethiopia, and Tunisia; regarding drug trafficking, Algeria, Botswana, Comoros, Kenya, and Madagascar preferred its inclusion.

It is also important to highlight that Namibia enumerated an unspecified preference to include “some treaty crimes... though definitions were not yet clear enough.”⁵² Through a similar lens, Cameroon and the SADC States took a loose position on the inclusion of treaty crimes, generally understood. For example, the Cameroonian delegate said that “he had an open mind concerning the other crimes—terrorism, crimes against United Nations and associated personnel and the illicit traffic in narcotic drugs and psychotropic substances.”⁵³ The delegate from South Africa said that “[t]he member States of SADC had a flexible attitude with regard to the inclusion of treaty crimes: drug crimes and crimes against United Nations personnel represented major challenges that might usefully be reflected in the Statute.”⁵⁴ Congo was similarly vague about the inclusion of treaty crimes. Its delegate said, “[h]e was not opposed to the inclusion of treaty crimes, since the role of the Court was to ensure legal protection for the international community.”⁵⁵ Since Cameroon, Congo, and South Africa (and by extension, SADC States) were ambiguous with their preferences to include treaty crimes, these positions are excluded from the analysis on terrorism and drug trafficking. It is worth noting that the delegate from Tanzania, Mr. Tuvako Manongi, coordinated consultations on treaty crimes throughout the negotiations.⁵⁶ This is important because it demonstrates a high level of engagement within the Rome Diplomatic Conference on the part of African delegations and African individuals, thus giving the resultant Statute an inherent African identity.

Algeria took a leading role in the push to include treaty crimes—particularly terrorism. To illustrate this point, the Algerian delegate said in the meetings of the Committee of the Whole that:

⁵² Summary records of the meetings of the Committee of the Whole, 28th meeting (8 July 1998), 290, para. 24.

⁵³ Summary records of the meetings of the Committee of the Whole, 7th meeting (19 June 1998), 181, para. 23.

⁵⁴ Summary records of the meetings of the Committee of the Whole, 25th meeting (8 July 1998), 268, para. 12.

⁵⁵ Summary records of the meetings of the Committee of the Whole, 27th meeting (8 July 1998), 286, para. 56.

⁵⁶ von Hebel and Robinson, “Reaching Agreement at the Rome Conference,” footnote 1.

terrorism should be within the Court's jurisdiction. He agreed with the representative from Norway that it was a matter of great concern to the international community, as reflected in the large number of international instruments that had been prepared in order to deal with the various aspects of the phenomenon and in the efforts of States to explore other ways and means of strengthening their cooperation in order to end those acts... With regard to illicit drug trafficking, the idea of creating the Court had been revived as the result of a desire to bring the authors of those crimes to justice. Illicit drug trafficking should be included in the competence of the Court.⁵⁷

With respect to drug trafficking, the delegate from Algeria referred to the push for the establishment of an ICC by Trinidad and Tobago in 1989, which reignited the stagnant project and ultimately resulted in the Diplomatic Conference nine years later.⁵⁸ Regarding terrorism, Algeria referenced its preference to include it within the Statute four times in the summary records of the plenary meetings and the meetings of the Committee of the Whole.⁵⁹ Algeria advanced the position that terrorism and drug trafficking were important and serious crimes that threaten international peace and security. It proposed that the Court's credibility would be strengthened by including treaty crimes and pushed for this outcome throughout the course of the negotiations. It is especially important to emphasize that Algeria has dealt with terrorism throughout much of its history, but was

⁵⁷ Summary records of the plenary meetings of the Rome Diplomatic Conference, 6th meeting (18 June 1998), 177, paras. 110-111.

⁵⁸ See United Nations, *Rome Statute of the International Criminal Court*, available at <https://legal.un.org/icc/general/overview.htm>; accessed 2 February 2021. Note that the idea of an ICC was brought back onto the agenda of the United Nations as a response to a request by Trinidad and Tobago to the General Assembly to work on establishing an international criminal court that was able to prosecute drug trafficking. The General Assembly requested that the International Law Commission begin to work on drafting a statute for such a court. Following the serious conflicts in the 1990s (i.e. in the former Yugoslavia in 1993 and Rwanda in 1994), even more attention was directed towards the idea of an ICC. The International Law Commission finished its draft statute in 1994, which was submitted to the General Assembly.

⁵⁹ Summary records of the meetings of the Committee of the Whole, 27th meeting (8 July 1998), 282-283, para. 3: "He favoured the inclusion of treaty crimes, especially terrorism. However, a global and unified approach to such crimes was needed." 3rd plenary meeting (16 June 1998), 73, para. 18: "The Court would be more credible and find wider acceptance if its scope was limited. It should therefore focus on the core of serious crimes that threatened international peace and security. Terrorism and drug trafficking should be included in the list of crimes within its jurisdiction." 3rd meeting (17 June 1998), 148, para 43: "As far as other crimes were concerned, his delegation was in favour of including terrorism and illicit drug trafficking."

experiencing particularly serious violence in the historical moment leading up to the Rome Conference. According to Anneli Botha,

the period between 1995 and 1998 could probably be described as a black period in Algeria’s history, categorized *inter alia* by collective massacres directed at rural and isolated communities. According to eyewitness reports, terrorist elements responsible for the massacre in Bentalha (Baraki), south of Algiers, on 22 and 23 September 1997 had a list of primary targets. This was an action that confirmed that these attacks were intended to terrorise and punish the population hostile to them, or those who formerly supported them but who had since withdrawn their support, or relatives and current supporters of rival armed groups.⁶⁰

This domestic experience likely contributed to Algeria’s desire to include treaty crimes, especially terrorism, within the Court’s mandate. This is another example of how domestic experience shaped national preference at the Rome Conference and informed a states’ idealized vision of the Court.

However, low-level regional support for the inclusion of treaty crimes was made especially clear since 12 African states expressly preferred *not* to include treaty crimes, either terrorism or drug trafficking, which suggests a split on this issue.⁶¹ Some of these states took a sympathetic position, while maintaining that treaty crimes should not be included. Senegal, for example, “[a]greed that terrorism, crimes against United Nations personnel and drug trafficking were important and serious, but thought that they should not be within the Court’s jurisdiction.”⁶² The delegate from Sierra Leone said that “while appreciating the seriousness of the treaty crimes and their adverse effect on society, his

⁶⁰ Anneli Botha, “Terrorism in Algeria,” in *Terrorism in the Maghreb: The Transnationalisation of Domestic Terrorism*, Monograph No. 144 (Institute for Security Studies, June 2008), available at <https://issafrica.org/chapter-2-terrorism-in-algeria>; accessed 20 April 2020.

⁶¹ These states included Benin, Burkina Faso, Gabon, Ghana, Lesotho, Libya, Mali, Morocco, Nigeria, Senegal, Sierra Leone, Togo. Note that Some of these states recommended that treaty crimes be considered at a later stage, specifically: Benin, Lesotho, Mali, and Sierra Leone. It is also important to disclose that Nigeria initially preferred to include treaty crimes, but later in the Conference recommended that they not be included in the Statute.

⁶² Summary records of the meetings of the Committee of the Whole, 6th meeting (18 June 1998), 176, para. 90,

delegation thought that those offences should not be included at the current stage.”⁶³ These positions were a natural consequence of the difficulty in reaching consensus on this issue within the time constraints of the Conference.

The delegate from Nigeria raised a different issue and said that “though he sympathized with the desire to include treaty crimes, the list proposed was selective. Treaty crimes should be left to national courts.”⁶⁴ This position highlights the selectivity involved with narrowing in on drug trafficking, terrorism, and less frequently, crimes against UN personnel, while omitting other serious crimes. The problem with the scope of crimes was addressed by the Libyan delegate when he said,

moreover, it was not acceptable that the Court’s jurisdiction should be confined to matters of interest to some States while ignoring different issues of concern to others. In addition to so-called aggression and so-called terrorism, the Court might deal with *drug trafficking*, insults to religion, violation of humanitarian values, forbidding of religious rites, white slavery, organized crime, involvement of children in war, violence and prostitution, economic and financial crimes, aggression against the environment and other threats.⁶⁵

This supports the inclusion of some crimes while approaching others with a degree of condescension. Moreover, it reflects a detailed list of crimes (drug trafficking, insults to religion, violation of humanitarian values, forbidding of religious rites, white slavery, organized crime, involvement of children in war, violence and prostitution, economic and financial crimes, aggression against the environment), some of which were ultimately included in the Statute.⁶⁶ Along the same mixed preference pattern, Côte d’Ivoire supported the inclusion of treaty crimes, with the exception of drug trafficking, and “urged the inclusion of crimes against United Nations and associated personnel within the

⁶³ Summary records of the meetings of the Committee of the Whole, 25th meeting (8 July 1998), 271, para. 54.

⁶⁴ Summary records of the meetings of the Committee of the Whole, 28th meeting (8 July 1998), 293, para. 99. See also 25th meeting (8 July 1998), 273, para. 74, the delegate from Botswana said that “It was in favour of including treaty crimes, but since they were all equally important, they must either all be included or all excluded.”

⁶⁵ Summary records of the plenary meetings of the Rome Diplomatic Conference, 6th plenary meeting (17 June 1998), 102, para. 82 [*emphasis added*].

⁶⁶ Note that the involvement of children in war was included in the Statute, for example.

competence of the Court.”⁶⁷ It is interesting to note that both Burundi and Libya expressly posited that economic embargoes should have been included as a crime covered by the Statute.⁶⁸ Madagascar preferred that the Court cover “trafficking in narcotic drugs and psychotropic substances, the deposit of toxic or nuclear waste within the territory of a State, and the sale of arms or munitions to Governments not recognized by the international community or to military leaders, except in cases authorized under international law.”⁶⁹ It is also worth noting that Comoros and Madagascar submitted a proposal to include the crime of “mercenarism” in the Statute.⁷⁰ This demonstrates the diversity in preferences with respect to what crimes should be included in the Statute on the part of several African states, beyond the focused consideration of terrorism and drug trafficking, in many cases based on country-specific and regional experiences.

Alternatively, Ghana considered that the inclusion of treaty crimes would complicate the relationship between the Court and national judicial institutions. Specifically, the delegate from Ghana said that “[t]he inclusion of the treaty crimes, particularly terrorism and drug trafficking, would only heighten national sensitivities, and would therefore not be conducive to the desired cooperation envisaged for their effective prosecution.”⁷¹ This position emphasizes the importance of constructing an institution with the greatest potential to work cooperatively with domestic courts. This is in keeping with the principle of complementarity, which is a cornerstone of the Court’s structure.

⁶⁷ Summary records of the meetings of the Committee of the Whole, 6th meeting (18 June 1998), 174, paras. 60-61: “It would be premature to include illicit traffic in narcotics in the Statute at the current stage, but the other provisions on treaty crimes could be forwarded to the Drafting Committee.”

⁶⁸ See for example Summary records of the meetings of the Committee of the Whole, 27th meeting (8 July 1998), 285-286, para. 46, the delegate from Burundi said that “Economic embargoes, which subjected the vulnerable population to great suffering, should also fall under the jurisdiction of the Court.” See also: Summary records of the meetings of the Committee of the Whole, 36th meeting (13 July 1998), 344, para. 6. The delegate from Libya said that “Economic embargoes should be included... as a crime against humanity.”

⁶⁹ Summary records of the plenary meetings of the Rome Diplomatic Conference, 7th plenary meeting (18 June 1998), 107-108, para. 31.

⁷⁰ Proposal by Comoros and Madagascar on Article 5 (3 July 1998) A/CONF.183/C.1/L.46 and Corr. 1 (7 July 1998). See A/CONF.183/C.1/L.12 (22 June 1998): It is also demonstrative that Bangladesh, India, Lesotho, Malawi, Mexico, Namibia, South Africa, Swaziland, Trinidad and Tobago and Tanzania submitted a proposal to include apartheid as an enumerated crime against humanity, which was ultimately successful.

⁷¹ Summary records of the meetings of the Committee of the Whole, 26th meeting (8 July 1998), 278, para. 62.

Further complicating the notion of consensus among African delegations, Cameroon and South Africa took a flexible approach to the inclusion of treaty crimes. While these States were not against including them, they did not indicate any meaningful degree of support or focus on this issue. Lesotho was also sympathetic and proposed that treaty crimes could be included in the Statute at a later stage. The delegate explained that this position was a result of “the controversy that still surrounded questions of definition and scope, as well as time constraints.”⁷² These concerns were further addressed by the delegate from Mali, who said that “it would be premature to include treaty crimes in the Statute, which should be referred to a review conference.”⁷³ Similarly, Benin said that “the consideration of the other treaty crimes should continue in the Preparatory Commission, with a view to their inclusion at a later stage.”⁷⁴ Ultimately, the majority of African states that took a position on the inclusion of treaty crimes within the Statute either preferred not to include them in the Statute, or else had no substantive preference either way.

The final text of the Rome Statute does *not* include treaty crimes. Kirsch and Robinson explained that “the majority regarded these crimes as crimes of a fundamentally different character than the ‘core crimes,’ and feared that they might overburden the Court.”⁷⁵ However, the Final Act of the Conference recommended that a future review conference reopen the idea of adding terrorism and drug trafficking to the Statute. Specifically, Annex I(E) states:

Having adopted the Statute of the International Criminal Court,
Recognizing that terrorist acts, by whomever and wherever perpetrated and
whatever their forms, methods or motives, are serious crimes of concern to the
international community,

⁷² Ibid., 281, para. 117.

⁷³ Ibid., 278, para. 66.

⁷⁴ Summary records of the meetings of the Committee of the Whole, 27th meeting (8 July 1998), 286, para. 58.

⁷⁵ Philippe Kirsch and Darryl Robinson, “Reaching Agreement at the Rome Conference,” 78.

Recognizing that the international trafficking of illicit drugs is a very serious crime, sometimes destabilizing the political and social and economic order in States,

Regretting that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court,

Affirming that the Statute of the International Criminal Court provides for a review mechanism, which allows for an expansion in future of the jurisdiction of the Court,

Recommends that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition in their inclusion in the list of crimes within the jurisdiction of the Court.⁷⁶

This suggests that the importance of treaty crimes to some states was significant enough for the Final Act to recommend reconsideration at a later date, even if the majority of states (including most in Africa) did not approach this issue with the highest priority. There is a certain irony in the fact that the ICC project was reinvigorated by a State that wanted to address drug trafficking, yet the resultant Court does not address such crimes. This speaks to the evolution of international criminal law, which was informed by the mass and widespread atrocities in the Second World War, the former Yugoslavia, and Rwanda. These modalities of crime overshadow acts such as drug trafficking, which have a traditional conceptualization as occurring during times of war and peace and fall under the jurisdiction of domestic courts.⁷⁷ The threshold of the Rome Statute requires the Court have “jurisdiction over the *most serious* crimes of concern to

⁷⁶ Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Done at Rome on 17 July 1998, U.N. Doc. A/CONF.183/10.

⁷⁷ Another reason why states viewed treaty crimes differently than the core crimes is because genocide, crimes against humanity, and war crimes are considered international crimes, while drug and human trafficking is considered a transnational crime. Therefore, some states considered treaty crimes to fall on different planes of action under international law, and it would confuse the Rome Statute to include both types of crime equitably. See Robert J Currie and Dr Joseph Rikhof, *International and Transnational Criminal Law*, Third Edition (Irwin Law Inc, 2020).

the international community as a whole.”⁷⁸ Although seemingly peculiar to compare acts of genocide to drug trafficking, for example, it is important to consider that the latter may severely complicate international and domestic relations in some situations. In addition, such acts may undergird an organized criminal network which facilitates the perpetration of the core crimes: genocide, crimes against humanity, war crimes, and aggression. The effective prosecution of such crimes may have a deterrent or preventative effect on the perpetration of the core crimes.

Nine African states wanted to include acts of terrorism in the Rome Statute: Algeria, Benin, Botswana, Comoros, Congo, Côte d’Ivoire, Egypt, Ethiopia, and Tunisia. Six African states wanted to see drug trafficking within the Court’s jurisdiction, namely: Algeria, Botswana, Comoros, Kenya, Madagascar, and Tunisia. Namibia suggested that some treaty crimes should be included in the Statute, without specificity. Thus, the preferences of these states were not reflected in the Statute on this issue. Of the African states that preferred the inclusion of treaty crimes, four did not ratify the Rome Statute: Algeria, Egypt, Ethiopia, and Libya. This suggests that 67 per cent of the African states that preferred to include treaty crimes (either terrorism, drug trafficking, or both) ultimately went on to ratify the Statute even though this was not included in the final text. This may be explained by the recommendation in the Final Act of the Conference to consider the inclusion of these crimes at a later date. The implication of this is that the inclusion of treaty crimes did not fundamentally influence accession to the Statute in the African context, since most of the states that wanted them to be included went on to ratify the Statute anyway.

Of the 14 African states that took a flexible position or expressly rejected the inclusion of treaty crimes, 10 went on to ratify the Rome Statute.⁷⁹ Cameroon, Libya, Morocco, and Togo did not accede to the Statute, although Cameroon and Morocco did sign it. Nevertheless, diplomatic negotiation efforts on the part of many African states with respect to the inclusion of treaty crimes within the Statute demonstrate how national experience shaped preferences. This is most strongly demonstrated by states that

⁷⁸ The Rome Statute of the International Criminal Court, Preamble [*emphasis added*].

⁷⁹ These states included Benin, Burkina Faso, Gabon, Ghana, Lesotho, Mali, Nigeria, Senegal, Sierra Leone, and South Africa.

preferred to include crimes which were not even “on the table” such as Comoros and Madagascar, with the joint proposal to include so-called “mercenarism.” Similarly, Algeria’s preference to include terrorism within the list of crimes covered by the Statute can be directly tied to its own experience with such crimes. These two examples demonstrate that domestic experience shaped the preferences of some African states at the Rome Conference with respect to the crimes included in the Statute.

6.3 Prohibition of Nuclear Weapons

Falling under the war crimes heading, provisions relating to the prohibition of weapons were highly contested at the Conference. According to von Hebel and Robinson, “particularly controversial was the inclusion or non-inclusion of nuclear weapons... The inclusion of nuclear weapons was strongly supported by Arab countries, India, Pakistan and countries in the Pacific region, and also had support from several African, Asian and Latin American countries.”⁸⁰ Kirsch and Robinson explain the division on this issue as related to the fact that some delegations felt it was unreasonable to omit nuclear weapons while at the same time including lesser weapons on a prohibited list. Others, however, “argued that including nuclear weapons would be creating new law, since fifty years of negotiations had produced neither a conventional nor a customary prohibition on the use of nuclear weapons. Moreover, these delegations believed that to use the Statute to attempt to achieve a ban, where fifty years of disarmament negotiations had not, would be fatal for the creation of the Court.”⁸¹ It is useful to understand African support and/or opinion on the prohibition of nuclear weapons in the Rome Statute, to better grasp the conceptualization of the Court by African delegations in Rome.

To this end, based on the summary records of the plenary meetings and meetings of the Committee of the Whole, 18 African states, comprising 38 per cent of the African delegates in attendance at the Conference spoke to the issue of including nuclear weapons on a prohibited list. Of them, 17 states preferred to expressly criminalize the use of

⁸⁰ Herman Von Hebel and Darryl Robinson, “Crimes Within the Jurisdiction of the Court,” 115.

⁸¹ Kirsch and Robinson, “Reaching Agreement at the Rome Conference,” 79-80.

nuclear weapons; seven belonged to the SADC and four were Arab States.⁸² Only one African state, Guinea, opined that nuclear weapons should *not* be included on the list of prohibited weapons.

In line with the explanation provided by Kirsch and Robinson, the delegate from Guinea said that “it would be premature to include nuclear weapons... as there was no treaty banning them.”⁸³ In light of this explanation, it can be inferred that the delegate from Guinea acknowledged that this particular issue had been and remained legally and politically challenging. This position highlights the direct impact(s) that a nuclear weapon prohibition could have not only on the success of the Conference, but the Court’s efficacy if it were to be included in the Statute and the Court came to be. Since nuclear weapons were ultimately *not* included in the final text of the Rome Statute, Guinea was the only African state that had its preferred outcome reflected in the Statute. It is worth noting that Guinea did ultimately ratify the Rome Statute.

It is worth noting that the other 17 African states that addressed the question of nuclear weapons supported their inclusion on the prohibited list of weapons; these comprised the majority African position on this issue. In keeping with the explanation provided by Kirsch and Robinson, the delegate from Libya said that “his delegation also found it contradictory to regard the use of certain types of weapons as a crime but not the use of the most destructive and dangerous weapons of all.”⁸⁴ This suggests that a list of prohibited weapons ought to include the most serious types, most of all nuclear weapons.

Other African states believed that the drafting of the Rome Statute provided an opportunity to develop law on nuclear weapons, rather than avoid the issue. For example, Namibia said the inclusion of nuclear weapons, “would allow the addition of weapons as

⁸² These states included Algeria, Angola, Benin, Botswana, Burundi, Congo, Egypt, Ethiopia, Ghana, Libya, Mozambique, Namibia, Nigeria, South Africa, Sudan, Tanzania, Zimbabwe. Note: Algeria, Egypt, Libya, and Sudan belong to the Group of Arab States. Note also that Angola, Botswana, Mozambique, Namibia, South Africa, Tanzania, and Zimbabwe belong to the SADC.

⁸³ Summary records of the meetings of the Committee of the Whole, 28th meeting (8 July 1998), 290, para. 37.

⁸⁴ Summary records of the plenary meetings of the Rome Diplomatic Conference, 42nd meeting (17 July 1998), 362, para. 33.

yet undeveloped.”⁸⁵ This sentiment was echoed by the delegate from Benin when he said that “nuclear weapons should have been outlawed once and for all. He had not gained satisfaction on these points, but nevertheless welcomed the considerable progress achieved.”⁸⁶ While Benin supported the inclusion of nuclear weapons on the prohibited list, it can be inferred that the overall contribution of the Statute outweighed this particular disappointment. In this sense, it is clear that several African states saw the Conference and the Court as an opportunity to develop the law on nuclear weapons and contribute to the resolution of a complex international political debate muddied by the interdependent relationship between hard power and global ordering principles. This was extremely important for those African governments that viewed the ICC and the Rome Diplomatic Conference as an opportunity to restructure the political hierarchy, or at least begin to level the political playing field between and among states.

SADC States Angola, Botswana, Mozambique, Namibia, South Africa, Tanzania, and Zimbabwe each expressly endorsed the inclusion of nuclear weapons on the prohibited list. The SADC Negotiating Principles did not specifically address this issue, though it can be inferred from the summary records of the meetings of the Committee of the Whole that this was a uniform position and negotiation strategy. The South African delegate addressed this point when he “drew attention to matters of concern to his delegation and to some extent to the Southern African Development Community... Nuclear weapons and other weapons causing indiscriminate injury or suffering should be included.”⁸⁷ As such, it is understood that the SADC States preferred to include nuclear weapons on the prohibited list.

The Rome Statute does not reflect this vision and failed to satisfy the majority of African states on this issue. For example, Ghana was particularly disappointed with the exclusion of nuclear weapons from the prohibited list. This was made clear when its

⁸⁵ Summary records of the plenary meetings of the Rome Diplomatic Conference, 28th meeting (8 July 1998), 289, para. 25.

⁸⁶ Summary records of the plenary meetings of the Rome Diplomatic Conference, 9th plenary meeting (17 July 1998), 128, para. 109.

⁸⁷ Summary records of the meetings of the Committee of the Whole, 5th meeting (18 June 1998), 168, paras. 94-96.

delegate said, “as for nuclear weapons, their exclusion from the list of prohibited weapons rendered that list well-nigh meaningless.”⁸⁸ Ghana was not alone in its dissatisfaction. Egypt was also especially displeased with the exclusion of nuclear weapons from the prohibited list. This was made clear when its delegate said,

with regard to section B, subparagraph (o) [on prohibited weapons], he was disappointed to note that the Bureau proposal offered only one option, which was supported by nuclear States but which was totally unacceptable to his delegation because it made no reference to nuclear weapons. If the International Criminal Court was to be an international rather than a European body, a text acceptable to all must be found.⁸⁹

These comments demonstrate the depth of disapproval felt by Egypt with respect to the absence of nuclear weapons on the prohibited list at the end stages of the Conference. This interjection suggests there was a racial, if not colonial, *realpolitik* explanation for the negotiation outcome on this issue, which was strongly opposed by Egypt and others.

To be sure, at the end of the Conference, the issue of nuclear weapons remained focal. In response to the final package presented by the Bureau of the Committee of the Whole, India interjected and proposed two amendments (one dealing with war crimes and one dealing with the role of the Security Council). With respect to the relevant amendment on war crimes, the delegate from India

drew attention to document A/CONF.183/C.1/L.94, which contained amendments proposed by his delegation to article 8 concerning war crimes... The effect of these amendments would be to include weapons of mass destruction, i.e. nuclear... among the weapons whose use would constitute a war crime. The

⁸⁸ Summary records of the meetings of the Committee of the Whole, 33rd meeting (13 July 1998), 325, para. 63.

⁸⁹ Summary records of the meetings of the Committee of the Whole, 35th meeting (13 July 1998), 335, para. 3. Egypt’s preference to include nuclear weapons on the prohibited list of weapons was made clear throughout the Conference. See also Summary records of the plenary meetings, 9th meeting (17 July 1998), 127, para. 85: “Nuclear weapons should have been included. He agreed with the statements made by the representatives of the Group of Arab States, and of Lesotho on behalf of the Group of African States... any future lists of prohibited arms annexed to the text should include weapons of mass destruction, particularly nuclear weapons.” This demonstrates Egypt’s co-membership in the Group of Arab States and the Group of African States but also effectively points to the fact that both groups endorsed the inclusion of nuclear weapons within the Statute.

absence of any mention of such weapons in the draft represented a retrograde step.⁹⁰

However, the delegate from Norway proposed a motion that no action be taken on the proposals submitted by India. This was recommended since the final text reflected a compromise formula designed to achieve broad support and reflecting as far as possible a consensus approach. A package, almost by definition, would contain elements which displeased some delegations. It was essential to maintain the integrity of the package offered in order to avoid destroying the balance achieved with such difficulty and making it impossible to achieve the ultimate goal of an independent, effective and credible international court.⁹¹

It is interesting to note that Malawi and the majority of SADC states supported the Norwegian proposal. The Malawian delegate said that, “while he appreciated the rationale behind the Indian proposals, he considered that the issues they raised had already been fully discussed, and therefore supported the Norwegian proposal. The delegations of Angola, Botswana, Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe associated themselves with his delegation’s view.”⁹² This suggests that Namibia and Tanzania were the only SADC States that expressly preferred to include nuclear weapons in the Statute, and did not clearly endorse the rejection of India’s proposal to prohibit them at the final moment of the Conference. Lesotho, Swaziland, and Zambia did not take an express position on this particular issue in the plenary meetings or meetings of the Committee of the Whole. Nevertheless, this implies a degree of acceptance of the decision to exclude nuclear weapons from the final text of the Statute on behalf of these African states. Ultimately, of the 17 African States that expressly preferred to prohibit nuclear weapons, 53 per cent went on to ratify the Rome Statute. This constitutes a slim majority, particularly when compared to the other

⁹⁰ Summary records of the plenary meetings of the Rome Diplomatic Conference, 42nd meeting (17 July 1998), 360, para. 7.

⁹¹ *Ibid.*, at para. 9.

⁹² *Ibid.*, 361, para. 12.

provisions considered in this analysis.⁹³ This suggests that this issue was important and the decision not to prohibit nuclear weapons could indeed explain accession depression among this group of states.⁹⁴ Least of all, it is important to acknowledge that the prohibition of nuclear weapons only applies to states that have nuclear weapons. This issue is and was fundamentally political and interlinked with conceptions of hard power, which subsequently reinforce(d) the existing global order.

6.4 Concluding Remarks about African Diplomacy at the Rome Conference

It is apparent that African delegations contributed meaningfully at the Rome Conference, as states and as part of coalitions and regional blocs. On balance, African states took part in the negotiations with the view to push back against traditionally powerful states. To illustrate this point, the delegate from Malawi “appealed to delegations to make an effort to achieve compromises. It was unhelpful for powerful countries to attempt to force their point of view on the rest by threatening not to sign the Statute.”⁹⁵ It is clear that many African delegations approached the Rome Conference with the attitude that compromises would be required in order to ensure success, which was a better alternative than outright failure. Balancing the interests of the Permanent Five members of the Security Council with those of low and middle power states demanded strategic compromise. The salience of the need for compromise was most apparent with respect to the Court’s relationship to the Security Council and the inclusion of nuclear weapons on the prohibited list—i.e. the elements of the Statute that directly impact traditionally powerful states. Notwithstanding this, as Otto Triffterer pointedly explained,

⁹³ These states included Benin, Botswana, Burundi, Congo, Ghana, Namibia, Nigeria, South Africa, Tanzania.

⁹⁴ See Summary records of the plenary meetings of the Rome Diplomatic Conference, 9th meeting (17 July 1998), 127, paras. 84-85: The delegate from Egypt said that “his country had been among the first to call for the establishment of the International Criminal Court. . . While he supported the text in general, there were some matters that the Statute did not deal with satisfactorily. Nuclear weapons should have been included.”

⁹⁵ Summary records of the plenary meetings of the Rome Diplomatic Conference, 30th meeting (9 July 1998), 310, para. 91. A/CONF.183/C.1/SR.30

the only alternative to the establishment of a permanent ICC by the Rome Statute would have been the failure of the Conference, in spite of decades of comprehensive preparations, endeavours and various proposals. A compromise, therefore, was required in many cases ... Closing the Conference without the adoption of a Statute for the ICC would have delayed the whole idea for decades, if not destroyed it altogether.⁹⁶

African states compromised during the Rome Conference and afterward, by committing to the Rome Statute by signing and/or ratifying it, illustrated by Figure 6-1.

⁹⁶ Otto Triffterer, Part 1. Establishment of the Court, Preliminary Remarks: The Permanent International Criminal Court – Ideal and Reality in *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2nd edition, ed. Otto Triffterer (C.H. Beck, Hart, Nomos: 2008), 36.

Figure 6-1

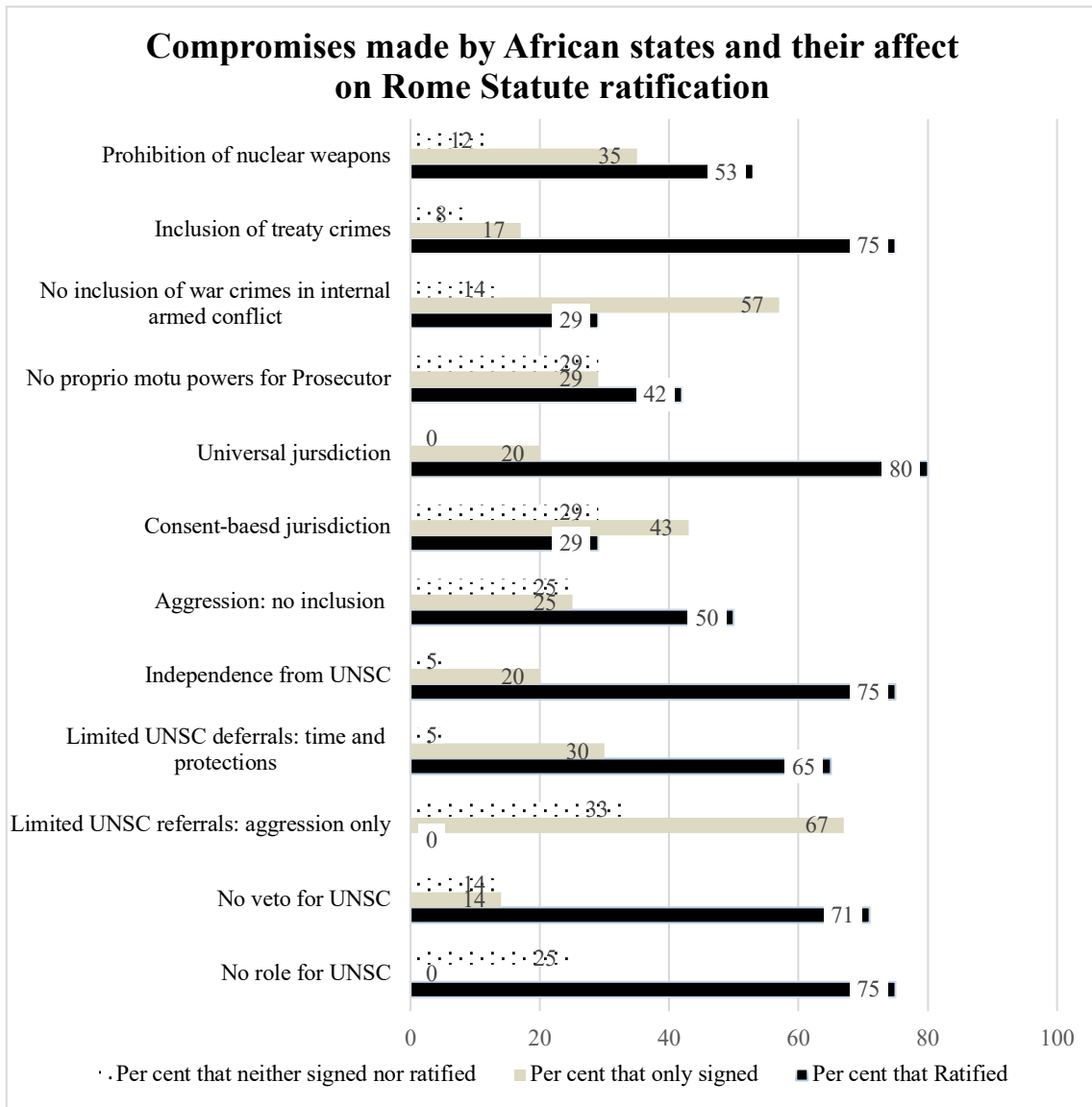


Figure 6-1 illustrates general trends about the African states that wanted a different kind of Court, feature by feature. It is apparent that for the most part, compromise was achieved, and African states were willing to commit to the Rome Statute, even to the strongest degree in the form of ratification. In three instances the majority of African states that wanted a different kind of Court did not end up ratifying the Rome Statute: those that preferred consent-based jurisdiction, those that preferred that the United Nations Security Council be able to refer only acts of aggression to the Court, and those that preferred not to include war crimes committed in internal armed conflict. In many

cases, the same states preferred a different kind of Court— on the balance, the cumulative compromise may have been too great.⁹⁷

In the end, African states compromised to ensure the success of the Rome Conference and committed to the Rome Statute by signing and ratifying it more than states from any other region. No African state was completely satisfied by the final text of the Statute. To reconcile this problem, some delegations viewed the Statute as evolutionary, which could be improved upon by future generations. To illustrate this point, the delegate from Botswana said that

although imperfect, the Statute of the International Criminal Court clearly expressed common values of justice, governing how the human race wanted to live in the future. He had supported the adoption of the Statute because it reflected the consensus of humanity as represented at the Conference. Generations to come should be able to perfect the Statute, and he urged those who felt that the document fell short of their expectations to reflect further and resolve to improve it during the review process.⁹⁸

General statements were offered at the end of the Conference by several African states: Algeria, Benin, Botswana, Egypt, Sierra Leone, and Sudan. It is important to identify that Algeria, Egypt, and Sudan are members of the Group of Arab States, and Sudan's comments were made on its behalf. General themes of disappointment emerged throughout the statements of Egypt and Sudan, namely: the inclusion of aggression without definition or substance; the absence of nuclear weapons from the list of prohibited weapons enumerated in the Statute; disappointment with the ability of the

⁹⁷ For example, Ethiopia preferred that the UNSC only be able to refer acts of aggression, and it preferred a consent-based jurisdiction regime. Ethiopia neither signed nor ratified the Rome Statute. Libya preferred a consent-based jurisdiction regime and that war crimes committed during internal armed conflict not be included. Libya neither signed nor ratified the Rome Statute. This may also explain why some African states signed but did not ratify the Rome Statute. For example, Morocco preferred that the UNSC only be able to refer acts of aggression, it preferred a consent-based jurisdiction regime, and it preferred that war crimes committed during internal armed conflict not be included in the Statute. Morocco signed, but did not ratify the Rome Statute. Similarly, Algeria and Sudan preferred a consent-based jurisdiction regime and that war crimes committed during internal armed conflict not be included. Algeria and Sudan signed but did not ratify the Rome Statute. Zimbabwe preferred that the UNSC only be able to refer acts of aggression. It signed but did not ratify the Rome Statute. Egypt preferred that war crimes committed during internal armed conflict not be included. Egypt signed but did not ratify the Rome Statute.

⁹⁸ Summary records of the plenary meetings, 9th plenary meeting (17 July 1998), 127, para. 89.

Prosecutor to initiate an investigation *proprio motu*; the inability of states to issue reservations; and a role for the General Assembly over and above the Security Council.⁹⁹ Algeria's comments were far more general and convey a degree of disappointment balanced with positivity. Specifically, it said that "Algeria [had] always longed for such a Court, and had always been committed to its achievement. Algeria had *given a great deal without achieving all that it had wanted*. It had some fears and regrets. It hoped the signing of the text would augur well for the future."¹⁰⁰ This statement made clear that Algeria compromised a great deal and was not fully satisfied by the final text. Nevertheless, it preserved optimism about the long-term success of the Court and its commitment to the same.

In the African context, the division between the Group of Arab States and the rest of Africa is quite apparent when approaching the difficult components of the Statute issue-by-issue, or when viewing the Statute in its entirety. It also apparent when considering a state's overall attitude towards the Court. For example, Sierra Leone expressed that it was pleased that the Court preserved jurisdiction over internal armed conflict— a logical satisfaction based on its country-specific involvement on that particular issue. It was also pleased that the Prosecutor was given *proprio motu* powers.¹⁰¹ Botswana reiterated the point that the Statute was an important historical

⁹⁹ UN Press Release L/2889 (20 July 1998), available at <https://www.un.org/press/en/1998/19980720.l2889.html>; accessed 1 May 2020. See, more specifically, Sudan (on behalf of the Group of Arab States): "The Arab States came to the Conference with great hope of achieving a great document, the signing of which will be a great moment for humankind. The Court must try every criminal that commits a crime against humanity. The Arab States are not happy with the document. It was regrettable that just reference to aggression was included, as aggression is 'the mother of all crimes.' Also, nuclear weapons should also have been included. Any future list of weapons of mass destruction must include those weapons. The Prosecutor should also be under reasonable and logical control and not be ex-officio only. The Statute might even increase the power of the Security Council, and for that reason the Arab States have tried to have a role for the General Assembly under the Statute, but those hopes had been destroyed. Reservations should also have been allowed." See also Egypt, "Egypt was among the first States which called for the establishment of the Court, and had participated in the preparatory work. The Arab world had need for such a Court, as acts of the perpetrator went unpunished. Egypt accepted the text in toto as a package, although some provisions had not been dealt with satisfactorily. It had stated time and again the need for inclusion of the use of weapons of mass destruction such as nuclear weapons. It had hoped for a definition of aggression which should conform to that of the General Assembly. The Prosecutor should not be able to initiate investigations ex officio. With regard to reservations, a general declaration should be adopted in the future."

¹⁰⁰ Ibid. [*emphasis added*].

¹⁰¹ Ibid.

landmark and that future generations could improve upon it.¹⁰² Benin identified some pointed concerns. More specifically, it identified the importance of the Statute to Africa in general, while highlighting that “[t]he text adopted was not a perfect one. Benin was not entirely satisfied with the provisions on war crimes. It was also concerned about the role given to the Security Council under the Statute” and questioned whether it was fair “that the Council should be able to block investigations of the Court. Benin would have preferred that nuclear weapons were formally banned by its inclusion in war crimes provisions of the Statute. Benin hoped all would work together for the effective implementation of the Statute.”¹⁰³ This statement fused the concerns raised by some of the Arab States with general concerns about balancing its interests with those of nuclear or else P5 states in a multilateral negotiation process. However, Benin erred on the side of positivity, stressing the importance of cooperation in order to effectively implement the Statute.

The outcome of the Conference from an African perspective was explained by Sivu Maqungo, delegate for South Africa and Rome Statute Drafting Committee member:

as expected, reservations from some African States on the fact that the crime of aggression was not included to their satisfaction were voiced, the absence of nuclear weapons in the list of weapons whose use in armed conflict is prohibited was also vented as a major concern. Moreover, the issue of inclusion of internal armed conflict within the Statute was a point of dissatisfaction from other African States. However, after much deliberation and due to the overwhelming vociferous support for the package deal by, notably, Francophone and Anglophone African States the retractors yielded to the wishes of the majority and thus Africa decided that, with all its deficiencies, the package by the Bureau was an acceptable deal.¹⁰⁴

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Maqungo, “The African contribution towards the establishment of an International Criminal Court,” 337.

This pitted African-Arab States against the rest of ‘Africa’ to some degree. It also suggests that the majority African position was one of support for the final package and for the establishment of the ICC. On the whole, African States accepted the final text of the Statute and were willing to commit to it— Senegal being the first State to ratify the Rome Statute on 2 February 1999. Nevertheless, general trends suggest that Arab-African States were less likely to ratify the Statute, since 67 per cent of the African members of the Group of Arab States still had *not* ratified the Rome Statute at the time of writing. Notwithstanding this, Comoros, Djibouti, and Tunisia are Arab-African States that *had* ratified the Rome Statute. The majority of this Group had signed, but not ratified the Statute, including Algeria, Egypt, Morocco, and Sudan, demonstrating a loose level of commitment to it. Libya and Mauritania had neither signed nor ratified the Statute. In many respects, the compromises reached in the final text of the Rome Statute can be understood as too great to satisfy the preferences of Arab-African States and others throughout the region, more generally.

Chapter 7

7 African Commitment to the Rome Statute¹

The aims and normative goals of the International Criminal Court (ICC or Court) can only be achieved by the adoption of the Rome Statute of the International Criminal Court.² In order to be truly effective, states must sign, ratify, and implement the Statute. As an international institution, the ICC cannot oblige states to commit to the Rome Statute. It necessarily relies on state cooperation and consent in the form of accession to be effective, which requires a mitigation of sovereignty. States must meaningfully contribute to the evolution of the international criminal justice norm by committing to its tangible application and establishing binding principles of international law. Importantly, the Rome Statute requires that States Parties implement its contents into domestic legislation, under the auspice of complementarity—i.e. the ICC is to be complementary to national jurisdictions and can only intervene when a state is unwilling *or* unable to do so.³ Commitment to the goals of the ICC and its normative underpinnings, generally framed, can be positioned on an ideational spectrum ranging from none (no signature or ratification), weak (signature only), strong (signature and ratification), and strongest (signature, ratification, and implementation in domestic legislation).

The willingness of states to establish binding principles of international criminal law with reference to the Rome Statute has been mixed. This uneven landscape troubles the predictability of the ICC and has contributed to substantive criticism in its nascency. In this frame, African states have ratified the Rome Statute *more* than any other region.

¹ An earlier version of this chapter was published as Sarah Nimigan, “Africa and the International Criminal Court: (Re)constructing the Narrative,” *International Criminal Law Review* 21.2 (2021): 203-241.

² *Rome Statute of the International Criminal Court*, (17 July 1998), A/CONF.183/9 (hereafter Rome Statute or Statute).

³ It is acknowledged that whether states are legally obligated to implement the contents of the Rome Statute into domestic law is the subject of ongoing debate. Some scholars contend that states are *not* legally required to implement the Rome Statute into domestic law, particularly because the contents of the Rome Statute are already covered by universal jurisdiction and customary law. See, for example, Xavier Philippe, “The principles of universal jurisdiction and complementarity: how do the two principles intermesh?” *International Review of the Red Cross* 88.862 (June 2006): 375-398

At the time of writing, 33 African states were States Parties to the Statute.⁴ This might be compared to other geographic regions as categorized by the Assembly of States Parties to the Rome Statute: 19 States Parties come from Asia-Pacific States; 18 from Eastern Europe; 28 from Latin America and Caribbean States; and 25 from Western European and Other States.⁵ It is also important to acknowledge that South Africa was the first African State to develop implementation legislation in the form of the Rome Statute of the International Criminal Court Act, 2002, which served as a regional example for African States domesticating the Rome Statute.⁶ An overview of African commitment to the Rome Statute is illustrated in Table 7-1.

Table 7-1: African Commitment to the Rome Statute

Country	Signed Rome Statute	Ratified Rome Statute	Domestic Legislation
Algeria	X		
Angola	X		
Benin	X	X	X
Botswana	X	X	Draft Law
Burkina Faso	X	X	X
Burundi			
Cabo/Cape Verde	X	X	
Cameroon	X		
Central African Republic	X	X	X
Chad	X	X	Draft Law
Comoros	X	X	X
Congo	X	X	X
Côte d'Ivoire	X	X	X
Djibouti	X	X	

⁴ This includes the following states (listed in order of ratification): Senegal; Ghana; Mali; Lesotho; Botswana; Sierra Leone; Gabon; South Africa; Nigeria; Central African Republic; Benin; Mauritius; Democratic Republic of the Congo; Niger; Uganda; Namibia; Gambia; Tanzania; Malawi; Djibouti; Zambia; Guinea; Burkina Faso; Congo; Liberia; Kenya; Comoros; Chad; Madagascar; Seychelles; Tunisia; Cabo Verde; Côte d'Ivoire.

⁵ Assembly of States Parties, *The States Parties to the Rome Statute*, available at asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx, accessed 5 May 2020.

⁶ The Implementation of the Rome Statute of the ICC Act 27 of 2002, 16 August 2002. See also Max du Plessis, "South Africa's Implementation of the ICC Statute: An African Example," *Journal of International Criminal Justice* 5.2 (2007): 460-479.

Democratic Republic of the Congo	X	X	X
Egypt	X		
Equatorial Guinea			
Eritrea	X		
Ethiopia			
Gabon	X	X	Draft Law
Gambia	X	X	
Ghana	X	X	Draft Law
Guinea	X	X	X
Guinea-Bissau	X		
Kenya	X	X	X
Lesotho	X	X	X
Liberia	X	X	Draft Law
Libya			
Madagascar	X	X	
Malawi	X	X	Draft Law
Mali	X	X	X
Mauritania			
Mauritius	X	X	X
Morocco	X		
Mozambique	X		
Namibia	X	X	
Niger	X	X	X
Nigeria	X	X	Draft Law
Rwanda			
Sao Tome and Principe	X		
Senegal	X	X	X
Seychelles	X	X	
Sierra Leone	X	X	Draft Law
Somalia			
South Africa	X	X	X
Sudan	X		
Swaziland			
Tanzania	X	X	Draft Law
Togo			
Tunisia	X	X	
Uganda	X	X	X
Zambia	X	X	
Zimbabwe	X		

The importance of Table 7-1 is that 47 per cent of *all* African States have signed, ratified, and taken steps to implement the Rome Statute domestically and 62 per cent

have signed and ratified it. The decision to ratify the Rome Statute by the majority of African States is especially important, since a disproportionate amount of violence and widespread human rights violations plague the continent and the likelihood of ICC intervention in African contexts was (and remains) comparatively high. The behaviour and decision-making of African states in deciding to ratify the Statute and be bound to the institutional canon of the ICC can best be explained using two international relations (IR) theories: rational choice and constructivism. This work analyzes patterns of behaviour related to Rome Statute commitment in Africa, against the backdrop of the overall regional commitment to international criminal justice norms that undergird it.

The choice of states to join the ICC is far more than symbolic; it carries obligations that affect the domestic, regional, and international political and legal landscape to varying but interrelated degrees. The overall conclusion is that using a rational choice lens provides an incomplete view as to why African states have committed to the Rome Statute. Similarly, norms shape national preferences to varying degrees, but the dynamization of interests collectively and individually must be accounted for, beyond a valuation of moral imperative. Thus, the influence of international criminal justice norms in shaping African preferences, coupled with complex and dynamic domestic political factors yields the most holistic explanatory approach. This rationalist-constructivist approach provides a strong foundation for explaining state behaviour in this context.⁷

⁷ This work employs the approach advocated by Abbott and Snidal to the multidisciplinary study of IR-IL. See Kenneth W. Abbott and Duncan Snidal, "Law, Legalization, and Politics: An Agenda for the Next Generation of IR-IL Scholars," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff (Cambridge: Cambridge University Press, 2013), 33-56, at 52: "It is likewise essential to draw on the range of theoretical perspectives within each discipline, both for explanatory analysis and for international legal design. Law and legalization involve values and interests; they operate through instrumental and normative channels; they involve power as well as rational design; they are shaped by and shape the behavior of private acts as well as states." See also Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52.4 (1998): 888. The authors say that "Rationality cannot be separated from any politically significant episode of normative influence or normative change, just as the normative context conditions any episode of rational choice."

7.1 General Remarks About Rome Statute Ratification Processes

The Rome Statute was open for signature following the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) on 17 July 1998. It entered into force four years later, in July 2002, once it was ratified by 60 States. Formally, a state must issue a deposit of its instrument of ratification of the Rome Statute to the Secretary-General of the United Nations in order to become a States Party.⁸ Fourteen African states were among the first sixty to ratify the Statute, as illustrated in Table 7-2. It is worth noting that Senegal was the first state to ratify. These African States contributed substantially to the necessary ratifications required for the Rome Statute to enter into force and the ICC to become a reality by effectively committing to the Court's overall utility and normative value by legalizing the Statute.⁹

Table 7-2: African States Among the First Sixty Rome Statute Ratifications

Date of Ratification	State
02 February 1999	Senegal
20 December 1999	Ghana
16 August 2000	Mali
06 September 2000	Lesotho
08 September 2000	Botswana
15 September 2000	Sierra Leone
20 September 2000	Gabon
27 November 2000	South Africa
27 September 2001	Nigeria
03 October 2001	Central African Republic
22 January 2002	Benin
05 March 2002	Mauritius
11 April 2002	Democratic Republic of the Congo
11 April 2002	Niger

⁸ The Rome Statute, Art. 125.

⁹ See Table 1. Note that Burundi was the 26th African State to ratify the Rome Statute on 1 December 2004. It issued a deposit of withdrawal to the United Nations Secretary General on 27 October 2016 and the withdrawal took effect one year later on 27 October 2017, in accordance with Art. 127(1) of the Rome Statute.

7.2 Explaining African commitment to the ICC using international relations theory

A robust literature seeks to explain state behaviour with respect to commitment to international institutions, including courts and tribunals, and even the ICC, largely with a specific focus on *powerful* states.¹⁰ The aim of this analysis is to build upon this work and expand the theoretical application of major international relations theories to explain the behaviour of *weak* states, particularly African states, and the pronounced regional commitment to the Rome Statute in the form of ratification and implementation.

7.3 Rational Choice

A rational choice theoretical approach presumes that a state will act rationally to maximize its interests, which is situated within the broader prism of the interests of other states and the distribution of power in the international system.¹¹ While it is true that individuals negotiated the Rome Statute, its obligations are placed upon states and thus,

¹⁰ See John J. Mearsheimer, "The False Promise of International Institutions," *International Security* 19.3 (1994): 5-49; Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2006). See also David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014). For a neoliberal account, see Kenneth W. Abbott and Duncan Snidal, "Why States Act through Formal International Organizations," *Journal of Conflict Resolution* 42.1 (1998): 3-32. The sum of these parts is the basic presumption that powerful states preserve control over international institutions, since they are merely a reflection of existing power structures and realities. For a general theoretical understanding of legalization and world politics, See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, "The Concept of Legalization," *International Organization* 54.3 (2000): 401-419. Note that the use of rational choice methodologies makes good sense when explaining the actions of powerful states. For example, the United States made clear that the costs of ratifying the Rome Statute outweighed the benefits. Since the United States disproportionately intervenes in international conflict(s), the risks of soldiers being exposed to Court prosecution was not acceptable to the Bush administration, or any administration thereafter. US hostility towards the ICC was made especially clear by the Trump administration, and more particularly by John Bolton, who openly discredited and opposed the ICC in the context of a possible investigation into grave crimes committed in Afghanistan. Bolton threatened sanctions against the ICC and its staff and said, "We will not cooperate with the ICC... for all intents and purposes, the ICC is already dead to us." See "John Bolton threatens ICC with US sanctions," *BBC News*, 11 September 2018, available at www.bbc.com/news/world-us-canada-45474864; accessed 10 May 2020.

¹¹ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, 3.

the state remains focal point of analysis under a rational choice model. In other words, the state is a unitary, rational actor, that follows a rationalist ‘logic of consequences.’ According to Goldsmith and Posner, “a state... can make coherent decisions based upon identifiable preferences, or interests, and it is natural and common to explain state action on the international plane in terms of the primary goal or goals the state seeks to achieve.”¹² In this vein, it can be presumed that African delegations at the Diplomatic Conference negotiating the establishment of an ICC constructed preferences either in advance of the Conference, or throughout, based on domestic and/or regional goals. This is particularly likely given the strong regional commitment to the ICC project— most notably by the South African Development Community (SADC) and more generally at the African Conference in Dakar leading up to the negotiations in Rome.¹³ It is also important to note that African civil society organizations were heavily involved in the creation of the ICC and several joined the Coalition for the International Criminal Court (CICC), putting exogenous pressure on states to commit to the Rome Statute.¹⁴ From an intergovernmental standpoint, the African Union (Organization of African Unity at the time) supported the establishment of the ICC and encouraged its members to join the Rome Statute.¹⁵

¹² Ibid., 6.

¹³ Note that SADC states met as early as 1994 to discuss the ICC project and to coordinate a regional negotiation strategy for its establishment. The Dakar Declaration was the result of the African Conference, which provided a general regional position heading into the negotiations in 1998.

¹⁴ Phakiso Mochochoko, “Africa and the International Criminal Court,” in *African Perspectives on International Criminal Justice*, eds. Evelyn A. Ankumah and Edward K. Kwakwa (Accra: Africa Legal Aid, 2005), 248. Note that non-governmental organizations based in Kenya, South Africa, Nigeria, Uganda, Rwanda, and Ethiopia (among others) joined the CICC and lobbied for the establishment of an ICC.

¹⁵ See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Summary of the plenary meetings, 6th plenary meeting, 17 June 1998 (A/CONF.183/SR.6), 104, para. 116. At the Rome Diplomatic Conference (1998), the observer for the Organization of African Unity said that “Africa had a particular interest in the establishment of the Court, since its peoples had been the victims of large-scale violations of human rights over the centuries: slavery, wars of colonial conquest and continued acts of war and violence, even in the post-colonial era. The recent genocide in Rwanda was a tragic reminder that such atrocities were not yet over, but had strengthened OAU’s determination to support the creation of a permanent, independent court to punish the perpetrators of such acts.” See also Hassan Jallow and Fatou Bensouda, “International criminal law in an African context,” in *African Guide to International Criminal Justice*, ed. Max du Plessis (Institute for Security Studies, 2008), 42. The authors said that “At a meeting on 27 February 1998, the council of ministers of the Organisation of African Unity (OAU, now the African Union) took note of the Dakar declaration and called

Analogously, using a rational choice model, Goldsmith and Posner posit that most states ratify multilateral *human rights* treaties due to a ‘coincidence of interest.’ Namely, the authors argue that human rights treaties “often requires many of the parties to do nothing different from what they have done in the past.”¹⁶ In the context of the ICC, this rationale has a particular relevance to democracies with robust judicial institutions, since the ICC cannot intervene if a national system has initiated genuine proceedings.¹⁷

On the other hand, this is often untrue in African contexts. It is relatively uncontroversial to contend that extensive human rights abuses amounting to the threshold of the crimes contained in the Rome Statute still occur throughout the African continent and this was similarly true during the period of African Rome Statute ratification (1999-2013). In this respect, ratification of the Rome Statute would in many cases contradict the coincidence of interest argument, especially with respect to African states experiencing ongoing conflict and/or widespread and systematic human rights abuses. From a rational choice perspective, it seems plausible and quite likely that many African delegates in attendance at the Rome Conference considered that the Court they were negotiating had potential domestic relevance, or else direct application. This is especially true in states run by dictators, despots, autocrats, or other oppressive or corrupt leadership models. To cede sovereignty by signing and ratifying the Statute would risk the possibility of bringing ICC prosecutions into the domestic fold. As Deitelhoff argues, “[p]lagued by military uprisings and failing state structures, these [developing] countries could realistically expect their heads of state to be summoned before the court, so they had to

on all OAU member states to support the creation of the ICC. This resolution was later adopted by the OAU summit of heads of state and government in Burkina Faso in June 1998.”

¹⁶ Ibid., 89. See also Oona A. Hathaway, “Why Do Countries Commit to Human Rights Treaties?” *Journal of Conflict Resolution* 51.4 (2007): 588-621. The overall argument made by Hathaway is that treaty ratification can best be explained by considering the domestic constraints it places on states. The less the obligation on states, the more likely the probability of ratification. See Hathaway, “Why Do Countries Commit to Human Rights Treaties?” 588: “states with less democratic institutions will be no less likely to commit to human rights treaties if they have poor human rights records because there is little prospect that the treaties will be enforced. Conversely, states with more democratic institutions will be less likely to commit to human rights treaties if they have poor human rights records – precisely because treaties are likely to lead to changes in behavior.”

¹⁷ The Rome Statute, Art. 17.

expect the highest costs.”¹⁸ This is relevant to African states with ostensibly weak domestic judicial systems, which trouble the complementarity principle since such states would most often be unwilling and/or unable to investigate and prosecute the most serious international crimes.

Some potential benefits of committing to the Rome Statute are considered in the literature. For example, it may be the case that “Poorer states might have seen the Rome Statute as a key to unlock greater flows of official development assistance (ODA), even while intellectuals and governmental advisers in the Global South might have seen the ICC’s mandate as an extension of the West’s neocolonial projects.”¹⁹ This assumption has been empirically challenged in the context of human rights treaty ratification. Specifically, Nielsen and Simmons concluded that there is “practically no support for the idea that treaty ratification produces significant increases in aid.”²⁰ Thus, relying on the human rights experience, it is unlikely that African states assumed Rome Statute ratification would result in increased aid, since similar actions have not yielded this result in the past. At the very least, there would be no guarantee that ratification of the Rome Statute would have a direct correlation to increases in development assistance or aid. This uncertainty would tip the scales in any rational cost-benefit analysis, since accession to the Rome Statute carries significant sovereignty costs.

Nevertheless, some behaviour might indicate a form of ‘soft coercion’ on the part of the European Union (EU) to increase ratification of the Rome Statute in African States in exchange for development aid. Specifically, the EU highlighted the importance of ratifying and implementing the Rome Statute in the Cotonou Partnership Agreement on development assistance. The agreement regulates cooperation between the EU and African, Caribbean, and Pacific states on political, commercial, cooperation and

¹⁸ Nicole Deitelhoff, “The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case,” *International Organization* 63.1 (2009): 42.

¹⁹ Sandeep Prasanna, “Did some African states ratify the Rome Statute to marginalize political competitors?” ICC Forum available at iccforum.com/forum/permalink/91/1198; accessed 10 May 2020.

²⁰ Richard A. Nielsen and Beth A. Simmons, “Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime?” *International Studies Quarterly* 59.2 (2015): 205.

development issues. The EU can impose sanctions or freeze aid to problem states, and human rights feature strongly in its framework for development and cooperation.²¹

In this vein, the Cotonou Partnership Agreement includes the Rome Statute under the umbrella of ‘promoting the strengthening of peace and international justice.’ More specifically, Article 11 (on peacebuilding policies, conflict prevention and resolution, and response to situations of fragility) states:

In promoting the strengthening of peace and international justice, the Parties reaffirm their determination to:

- share experience in the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court; and
- fight against international crime in accordance with international law, giving due regard to the Rome Statute.

The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments.²²

The Cotonou Agreement also states in the Preamble that, “the establishment and effective functioning of the International Criminal Court constitute an important development for peace and international justice.”²³ Thus, it appears that the European Union has framed the ICC as a key component to development, both domestically and internationally. Although it seems somewhat peculiar (and raises neocolonial sensitivities) to push African states to ratify the Statute, it does not seem to tie any development aid to ratification *directly*. Nevertheless, this use of soft power has the potential to shape and

²¹ Sanctions have been imposed on Zimbabwe (2002), Central African Republic (2003), Guinea-Bissau (2004, 2011), Togo (2004), Burundi (2015), and Madagascar (2020) for widespread human rights violations or other political violence. It is interesting that three of these six are States Parties to the Rome Statute, and Burundi was a States Party until 2017, meaning it was in 2015 at the time the sanctions were authorized for election violence. The link between Rome Statute ratification and behaviour change in this frame remains unestablished.

²² *Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States of the Other Part*, Ouagadougou, 22 June 2010, available at ceas.europa.eu/archives/delegations/namibia/documents/eu_namibia/cotonou-agreement_en.pdf; accessed 8 May 2020.

²³ *Ibid.*

influence developing states that might feel pressure to conform to European ideals, particularly in the interest of securing development assistance.²⁴

However, there are 45 African contracting Parties to the Cotonou Agreement.²⁵ Of them, 12 have failed to ratify the Rome Statute, comprising 27 per cent of the group of African contracting Parties to the Cotonou Agreement.²⁶ The high number of non-States Parties to the Rome Statute that are contracting members to the Cotonou Agreement weakens the argument that the European Union is using treaty ratification to spike development aid in African states. While it is important to acknowledge the possible influence that such an approach may have on weak states, including the contracting African states Parties to the Cotonou Agreement, the reality is such that ratification rates are high, but not as high as they should be if tangible development incentives are directly correlated. More importantly, many African states that are contracting Parties to the Cotonou Agreement worked tirelessly to establish the ICC. It is disingenuous in many respects to reduce African commitment to the Rome Statute to aid incentives or other forms of coercion. Phakiso Mochochoko, head of the Jurisdiction, Complementarity and Cooperation division of the ICC and delegate for Lesotho during the Rome Statute negotiations crystallized this point when he explained that

contrary to the view that the ICC was shoved through the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, the historical

²⁴ For an example of such an argument, see Stephen R. Hurt, “Co-operation and coercion? The Cotonou Agreement between the European Union and ACP states and the end of the Lomé Convention,” *Third World Quarterly* 24.1 (2003): 161-176. Hurt argues at 161 that “the new EU-ACP agreement has significantly shifted the relationship further from one of co-operation to one of coercion. The new approach taken by the EU can be understood within the context of the hegemonic dominance of neoliberalism within political elites.”

²⁵ These States include Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Côte d’Ivoire, Democratic Republic of the Congo, Djibouti, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, São Tomé and Príncipe, Tanzania, Togo, Uganda, Zambia, and Zimbabwe.

²⁶ More specifically, the following states have *not* ratified the Rome Statute: Angola, Burundi, Cameroon, Eritrea, Ethiopia, Guinea-Bissau, Mauritania, Mozambique, Rwanda, Swaziland, Togo, and Zimbabwe.

developments leading up to the establishment of the Court portray an international will of which Africa was a part.²⁷

The significance of this point cannot be understated. The involvement, activism, and *agency* that African states had over the development and establishment of the ICC was and remains extraordinarily high. This is further compounded by the fact that a strategic partnership agreement was signed at the EU-Africa summit in 2007 saying that,

crimes against humanity, war crimes and genocide should not go unpunished and their prosecution should be ensured by measures at both domestic and international levels. In this context, the partners agree that the establishment and effective functioning of the International Criminal Court constitute an important development for peace and international justice.²⁸

This suggests that the goals underpinning the Rome Statute and the ICC were mutually constructed on the part of ‘Africa’ and the EU.²⁹ Thus, the utility of employing a reductionist calculus to explain African ratification of the Rome Statute in exchange for increased development aid is questionable at best and provides minimal (or else incomplete) explanatory value.

Instead, a different explanation for high ratification rates relies on ‘credible commitments’ theory. More specifically, Simmons and Danner contend that the states that are both the least and the most vulnerable to the possibility of an ICC case affecting their citizens have committed most readily to the ICC, while potentially vulnerable states with credible alternative means to hold leaders accountable do not. Similarly, ratification of the ICC is associated with tentative steps towards violence reduction and peace in

²⁷ Mochochoko, “Africa and the International Criminal Court,” 243.

²⁸ *The Africa-EU Strategic Partnership: A Joint Africa-EU Strategy*, 12 August 2007, 8, para. 30, available at <africa-eu-partnership.org/sites/default/files/eas2007_joint_strategy_en_0.pdf>.

²⁹ Jallow and Bensouda, “International criminal law in an African context,” 43.

those countries precisely least likely to be able to commit credibly to
foreswear atrocities.³⁰

In the African context, the overall application of this argument is that states use the ICC as a springboard to peace, signalling commitments to justice—i.e. ratification is a nod to the international community, used to signal a states’ credible commitment to the aims and goals of the ICC: peace, stability, and justice in respect of accountability. This is particularly relevant in states that self-identify as having progressive human rights agendas (e.g. Botswana, Senegal, South Africa), or else having a particularly legitimate legal tradition (e.g. Ghana).

On the other hand, this theory has been subject to criticism, most notably from Chapman and Chaudoin who argue that “countries for whom compliance is likely to be easiest—democracies with little internal violence—are the most likely countries to join the ICC. On the other hand, countries with the most to fear from ICC prosecution, nondemocracies with weak legal systems and a history of domestic political violence, tend to avoid ratification.”³¹ *Prima facie*, Chapman and Chaudoin’s approach does not explain the widespread ratification rates in African contexts, which the authors acknowledge as the ‘Sub-Saharan Africa Exception.’³² In opening up the ‘black box’ of the state to consider domestic political factors or motivations, the authors address the important point that the ICC’s involvement in Central African Republic (CAR), Democratic Republic of the Congo (DRC), and Uganda focused on the prosecution of rebels and *not* heads of state or other senior government officials. The same is also true in Mali and the second situation opened in CAR (otherwise referred to as CAR II). It is also important to note that all of these situations were brought to the ICC by self-referral. Quoting legal scholar Tom Ginsburg, the authors raise the point that some countries “are ‘trying to make a strong commitment to prosecute, without necessarily committing to

³⁰ Beth A. Simmons and Allison Danner, “Credible Commitments and the International Criminal Court,” *International Organization* 64.2 (2010): 225.

³¹ Terrence L. Chapman and Stephen Chaudoin, “Ratification Patterns and the International Criminal Court,” *International Studies Quarterly* 57.2 (2013): 400.

³² *Ibid.*, 404.

being prosecuted.”³³ This point, which is of particular relevance in the African context, casts doubt about the merits of employing a generalizable credible commitments theory advanced by Simmons and Danner in *all* African States. Yet, while it might be true that leaders commit to the ICC for the purpose of self-preservation, it is also true that there is no absolute guarantee that once a state accedes to the Rome Statute that government leaders or other senior officials will not find themselves in the crosshairs of the Court, as was the case in Kenya, for example.³⁴ Any rational state engaging in a cost-benefit analysis must account for this possibility and include it in its calculus.

Thus, scholars have suggested that “some states engaged in a simpler rational choice analysis regarding ratification: whether ratification would marginalize domestic political competitors and benefit the sitting government. Internal politics, just as much as international power dynamics, provide an important framework for understanding whether and why a state ratified the Rome Statute.”³⁵ The traditional view that states have fixed foreign policy interests no matter the leadership is questionable at best, particularly with respect to accountability for serious human rights violations such as the crimes covered by the Rome Statute (that is, genocide, crimes against humanity, war crimes, aggression). Domestic political considerations matter when attempting to make sense of African commitment to the Rome Statute. Nevertheless, employing such an approach largely fails to account for the analytical value of international criminal justice norms as independent conjunct variables, which may also inform state behaviour and shape state preferences. This is especially the case because ratifying the Rome Statute is *always* a gamble for any rational decision-maker—once the Rome Statute has been ratified, the ICC, and particularly the Prosecutor, has the ability to act autonomously and perhaps even unpredictably. Contributing to the significance of this point, a state may

³³ *Ibid.*, 405. See also Kenneth A. Rodman and Petie Booth, “Manipulated Commitments: The International Criminal Court in Uganda,” *Human Rights Quarterly* 35.2 (2013): 271-303.

³⁴ ICC, *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11. Kenyatta was the Deputy Prime Minister and Minister of Finance at the time of summons and won the Presidential election in 2013 during the course of his indictment by the ICC. The charges were eventually withdrawn due to insufficient evidence and widespread non-cooperation with the ICC investigation.

³⁵ Prasanna, “Did some African states ratify the Rome Statute to marginalize political competitors?” See also Simmons and Danner, “Credible Commitments and the International Criminal Court.”

withdraw from the Rome Statute after ratification, but this only comes into effect one year after the deposit of withdrawal to the United Nations Secretary-General. Further, the ICC retains jurisdiction over that state during the time in which it was a States Party. On this basis, ratification cannot only be explained as a politicized opt-in/opt-out process used to maximize domestic leadership interests because the long-term costs are simply far too uncertain and therefore, too high.

This conclusion is further supported by the fact that Burundi is the only African state that quit the Court when it acted incompatibly with domestic political interests. While South Africa and The Gambia filed notices of withdrawal, both ultimately reversed those decisions and remained States Parties to the Rome Statute.³⁶ Some African States Parties such as Kenya, Namibia, Uganda, and Zambia *threatened* to withdraw, but never formally did so.³⁷ From a Pan-African perspective, the African Union (AU) adopted a

³⁶ The Gambia reversed its formal withdrawal almost immediately after the election of President Adama Barrow in 2017. The Gambia's previous President, Yahya Jammeh, had a troubling human rights record. It is likely that Jammeh wanted to withdraw from the ICC to avoid accountability for crimes committed by him or else under his leadership, akin to Burundi. On the other hand, Jammeh was the leader of the Gambia for 22 years and it is unclear why he would ratify the Rome Statute in the first place. With respect to South Africa, see Robbie Gramer, "South African Court Tells Government It Can't Withdraw From the ICC," *Foreign Policy*, 22 February 2017, available at <https://foreignpolicy.com/2017/02/22/south-african-court-tells-government-it-cant-withdraw-from-the-icc/>; accessed 5 February 2021. The South African High Court ruled that the decision to withdraw from the Court was unconstitutional and therefore invalid because the Executive decision was not dually authorized by Parliament, maintaining South Africa's status as States Party to the Rome Statute. This example demonstrates that in an operational democracy, unilateral decision making is likely impossible, troubling the ability of a leader to act solely in his or her own personal (political) interest. See also Anton du Plessis and Simon Allison, "ICC Withdrawal: a new low in Zuma's rule," *Institute for Security Studies*, 25 October 2016, available at <https://issafrica.org/iss-today/icc-withdrawal-a-new-low-in-zumas-rule>; accessed 5 February 2021: "There is little doubt among independent journalists and civil society activists in South Africa that the motivation for the proposed withdrawal is political rather than legal, and that it is inextricably linked to the president's own domestic issues." For an official justification for the Zuma government's decision to withdraw from the ICC, see 'SA formally withdrawing from ICC', *South African Government News*, 21 October 2016, available at www.sanews.gov.za/south-africa/sa-formally-withdrawing-icc; accessed 5 February 2021. The reasons cited included selectivity in ICC case selection; the Court's hinderance of the peaceful resolution of conflicts; and competing obligations that the Rome Statute imposed with respect to immunities for sitting heads of state that would ordinarily be afforded under customary international law, which hinder South Africa's ability to host peace talks with leaders indicted by the ICC.

³⁷ See Duncan E Omondi Gumba, "Will other African countries follow Burundi out of the ICC?" *Institute for Security Studies*, 16 November 2017, available at <https://issafrica.org/iss-today/will-other-african-countries-follow-burundi-out-of-the-icc>; accessed 5 February 2021. Note that African States Parties including Botswana, Cape Verde, Côte d'Ivoire, Malawi, Nigeria, Senegal, Sierra Leone, and Tanzania expressly opposed the idea of withdrawing from the ICC.

non-binding decision for a continent-wide mass withdrawal strategy from the ICC.³⁸ However, this never materialized and African States Parties have collectively remained committed to the Rome Statute, save for Burundi. Instead, many African States Parties have prioritized the need to amend the Rome Statute, or else engage in genuine processes to begin to mend the points of contention that have troubled the Africa-ICC relationship.³⁹ As such, there must be ‘something else’ that contributes to the explanation of African states’ disproportionate commitment to the Rome Statute beyond material self-interest.

7.4 Constructivism and African Rome Statute ratification

The ICC operates at the nexus of international relations (IR) and international law (IL). Scholars have attempted to bridge the gap between the two disciplines, in order to generate an enriched understanding and increase explanatory or predictive capabilities. International law inherently considers the evolutionary nature and significance of norms, since it is the product of shared ideas, values, and beliefs, translated by states into law. This reality makes the study of international law highly compatible with constructivist accounts of international relations. Norms are generally defined as a “standard of appropriate behavior for actors with a given identity.”⁴⁰ Early constructivists such as Wendt and Ruggie offered an alternative theoretical lens to study global politics and explained international relations as a social construct, placing a special analytical focus

³⁸African Union, *Draft 2: Withdrawal Strategy Document* (Version 12.01.2017), available at www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf, accessed 12 May 2020), 7, para. (E)26.

³⁹ See Ed Cropley, “Reform the ICC from within, pleads Botswana’s Foreign Minister Venson-Moitoi,” *Business Live*, 26 October 2016, available at www.businesslive.co.za/news/africa/2016-10-26-reform-the-icc-from-within-pleads-botswanas-foreign-minister-venson-moitoi/; accessed 5 February 2021. Botswana was a regional leader in the advocacy for this position. During the peak of AU efforts to encourage mass withdrawal from the ICC in 2016, Botswana’s then Foreign Minister Pelomoni Venson-Moitoi encouraged AU-ICC member states to continue to support the Court from within saying, “I don’t see why we should be pulling out... The good thing is that a few more members now, within the AU, agree that pulling out is not the solution. We should be working towards fixing.”

⁴⁰ Finnemore and Sikkink, “International Norm Dynamics and Political Change,” 891.

on ideations and identity factors in analyzing global phenomena.⁴¹ By emphasizing the significance of norms and identity in international relations as factors that shape state behaviour, constructivism offers a useful lens through which to study the evolution of international law, and more particularly, international criminal law. The enmeshment of international criminal justice norms in the Rome Statute and through the work of the ICC constructs the ‘logic of appropriateness’—the expected behaviour of states operating the international system. Constructivist accounts “understand legal norms as social norms, and so as constituted and powered primarily by social practices.”⁴² This provides an analytical framework to consider the Rome Statute itself as a social construct and not epiphenomenal.

It is also important to note that “Constructivism has made important contributions to understanding the operation of international law by showing how norms may constitute or even trump interests.”⁴³ This is particularly useful for explaining African ratification of the Rome Statute. By requiring states to cede sovereignty, the Rome Statute directly opposes conventional understandings of material interests. The evolution of the international criminal justice norm has been remarkable and has direct explanatory value for understanding the behaviour of African states with respect to Rome Statute ratification and overall commitment. As Risse and Ropp observe, “we witness the gradual emergence of a new model of criminal accountability used by states acting collectively through the International Criminal Court (ICC) to hold individuals responsible for human rights violations.”⁴⁴ Since African states continue to contribute immensely to this model, a constructivist account as to why is worthwhile.

⁴¹ Alexander E. Wendt, “The Agent-Structure Problem in International Relations Theory,” *International Organization* 41.3 (1987): 335-370. See also John Gerard Ruggie, “Territoriality and Beyond: Problematizing Modernity in International Relations,” *International Organization* 47.1 (1993): 139-174.

⁴² Jutta Brunnée and Stephen J. Toope, “Constructivism and International Law,” in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, eds. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2012), 129.

⁴³ *Ibid.*

⁴⁴ Thomas Risse and Stephen C. Ropp, “Introduction and overview,” in *The Persistent Power of Human Rights: From Commitment to Compliance*, eds. Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (Cambridge: Cambridge University Press, 2013), 3.

General comments about what Finnemore and Sikkink call the ‘life cycle’ of the international criminal justice norm can be made in the African context.⁴⁵ The idea of international criminal justice for atrocity crimes began with the Nuremberg Tribunal and the International Military Tribunal for the Far East following the Second World War. However, in the African context, the regional experience with genocide in Rwanda illuminated the reality that serious widespread and systematic human rights crises were a problem on the continent.⁴⁶ This experience prompted the pursuit of accountability, which was complemented by the creation of the International Criminal Tribunal for Rwanda (ICTR) by the United Nations Security Council in 1994. More generally, the use of *ad hoc* tribunals to address post-conflict violence was gaining salience in the 1990s (e.g. The International Criminal Tribunal for the former Yugoslavia and the ICTR). The idea of an ICC reappeared at the United Nations in 1994, when the need for a permanent international criminal justice institution became apparent.

The push for a permanent institution to assure accountability for atrocity crimes was undergirded by several ‘norm entrepreneurs,’ constituting a strong civil society network, operating under the Coalition for the International Criminal Court (CICC) umbrella headed by William Pace. Over ninety African nongovernmental organizations (NGOs) joined the CICC.⁴⁷ Pace recruited Lloyd Axworthy, Canadian Minister of Foreign Affairs, to do for the ICC Statute what he had done for landmines.⁴⁸ As a result, Canada mobilized a key negotiation coalition called the ‘Like-Minded Group’ during the 1995 Ad Hoc Committee Meetings for the establishment of an ICC at the United Nations,

⁴⁵ This analysis relies on the ‘life cycle’ of norms as described by Kathryn Sikkink. See Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton and Company, 2011).

⁴⁶ Sivu Maqungo, former South African diplomat, Department of Foreign Affairs, interview by author, Pretoria, South Africa, 22 February 2019. It is important to note that this is relevant not only in the regional context, but also more generally. For example, reference to the Rwandan genocide was made 66 times throughout the course of the Rome Diplomatic Conference.

⁴⁷ Mochochoko, “Africa and the International Criminal Court,” 248.

⁴⁸ Lloyd Axworthy, former Minister of Foreign Affairs (Canada), interview by author, London, Ontario, 11 March 2019. Pace was referring to Axworthy’s mobilization of like-minded states interested in banning anti-personnel landmines in 1996, which resulted in the fast-track negotiation that established the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.

of which several African states became a part.⁴⁹ Even without the support of the most powerful states, the merger of civil society and weak and middle power government coalitions created a strong push for the establishment of the Court, causing the international criminal justice norm to ‘cascade’ by the time of the Rome Diplomatic Conference in 1998.⁵⁰

From a regional perspective, the states from the South African Development Community (SADC) took a particularly keen interest in establishing an ICC. Justice Ministers and Attorneys General from SADC states began meeting as early as 1994 to discuss the issue and to take a uniform negotiation strategy.⁵¹ In 1997, SADC states established ten principles of consensus for negotiating an ICC, otherwise referred to as the ‘SADC Principles.’⁵² This meeting was jointly organized by the NGO South African Lawyers for Human Rights and the Justice Ministry of South Africa. Richard Dicker of Human Rights Watch also attended this meeting. According to Dicker, he was invited to the SADC meeting in Pretoria to ensure that the negotiating principles used the strongest human rights language possible.⁵³ Dicker emphasized that African commitment to the establishment of the ICC was an organic regional effort and was *not* directly informed or influenced by Western NGOs or actors.⁵⁴ Human Rights Watch played a supportive role

⁴⁹ Jennifer Schense, “The Role of Non-Governmental Organizations,” in *The Rome Statute of the International Criminal Court: A Commentary*, Vol 1, eds. Antonio Cassese, Paola Gaeta and John R.W.D. Jones (Oxford: Oxford University Press, 2002), 113. For example, In December 1997, African members of the Like-Minded Group included Egypt, Ghana, Lesotho, Malawi, and South Africa. It is also interesting to note that Egyptian Cherif Bassiouni established an institute after the first Ad Hoc Committee session in Siracusa, Sicily to work on ICC issues in 1994. A second workshop took place at this institute after the first Preparatory Committee meeting in 1996. This demonstrates the involvement of Africans throughout the process of establishing the ICC, even at the earliest stages and the most formalized processes. For example, South Africa and Lesotho produced a joint working paper to the Preparatory Committee on International Cooperation and Judicial (Mutual) Assistance, 12-30 August 1996 (A/AC.249/L.5). The delegate from Lesotho that co-authored this paper, Phakiso Mochochoko is now the head of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor of the ICC. This reflects a longstanding commitment and dedication to the ICC project from its origination to present.

⁵⁰ Finnemore and Sikkink, “International Norm Dynamics and Political Change,” 895.

⁵¹ Sivuyile (Sivu) Maqungo, “The African contribution towards the establishment of an International Criminal Court,” *African Yearbook of International Law* 8.1 (2000): 334.

⁵² *Ibid.*, 335.

⁵³ Richard Dicker, Director of Human Rights Watch International Justice Program, interview by author, 7 June 2018, by phone.

⁵⁴ *Ibid.*

for SADC States in formulating an ICC negotiation strategy. The initiative and leadership role taken by SADC states on the ICC issue provided a basis for norm diffusion throughout the rest of the continent. SADC States have been strong supporters of the ICC and 75 per cent of its members have ratified the Rome Statute to date.

A similar regional conference took place in Dakar, Senegal in 1998 as a response to the SADC principles.⁵⁵ The so-called ‘African Conference on the International Criminal Court’ was attended by twenty-five African states and resulted in the Dakar Declaration for the Establishment of the International Criminal Court in 1998.⁵⁶ In the Dakar Declaration, “African States affirmed their commitment to the establishment of the International Criminal Court and underlined the importance that the accomplishment of such a court implies for Africa and the world community as a whole.”⁵⁷ This regional conference was organized by the NGO No Peace Without Justice and was convened by the government of Senegal. According to Niccolò Figà-Talamanca of No Peace Without Justice, this conference solidified the Pan-African movement that brought African support to the idea of an ICC.⁵⁸

At the Rome Diplomatic Conference in 1998, African states continued to engage meaningfully in the negotiations, taking on leadership roles and actively participating in the process, including the drafting committee that produced the final draft of the statute. The only African state that voted against the Statute in Rome was Libya. According to former South African diplomat Pieter Kruger, “African states had mostly voted yes. There may have been one or two abstentions, but Africa as a whole was supportive of the ICC at that stage—and it was *without coercion*.”⁵⁹ On this basis, African commitment to the Rome Statute needs to be situated within its broad and deep-seated normative context. The instinct to view the ICC project as ‘Western’ or Eurocentric is simply inaccurate.

⁵⁵ Sivu Maungo, interview by author, 22 February 2019.

⁵⁶ Maungo, “The African contribution towards the establishment of an International Criminal Court,” 335.

⁵⁷ *Ibid.*

⁵⁸ Niccolò Figà-Talamanca, Secretary General of No Peace Without Justice, interview by author, 5 July 2018, by phone.

⁵⁹ Pieter Kruger, former South African diplomat, Department of Foreign Affairs, interview by author, 12 December 2018, by telephone [*emphasis added*].

Against this backdrop, the internalization of the international criminal justice norm in the African context is apparent and important. According to Niccolò Figà-Talamanca, the idea of an ICC gained African support because it was an anti-colonial movement.⁶⁰ The permanent members of the United Nations Security Council vehemently opposed a strong, independent ICC and sought to establish a court that would pivot around the authority of the Security Council. At the same time, small or weak states like those in Africa saw the Rome Statute negotiations as an opportunity to achieve an important result for humanity, in “which they were the drivers and not the followers of the great powers’ priorities.”⁶¹ As such, the Rome Statute itself is an expression of a new institutional approach, since coalitions or blocs of small and/or weak states mitigated the interests of powerful states in the international political system to achieve an outcome that reflected their values and beliefs. Thus, the Rome Statute not only expresses norms about international criminal justice, it also signifies a commitment to a new global order, of which ‘Africa’ is an integral part. While regional and domestic power dynamics are important, so too are the manifold normative bases for ratifying the Rome Statute and remaining committed to it for the many African states that were active drivers of the ICC project from the earliest stages of its ideation and establishment.

7.5 Anti-ICC Rhetoric, Two-level Games, and Sustained Rome Statute Commitment

Though African support for the ICC was extraordinarily high during the early stages of its development, the Africa-ICC relationship has been turbulent throughout the course of its existence. Explanations for the fallout of the Africa/AU-ICC relationship are perhaps the most salient in the literature.⁶² The point of this section is not to reproduce those

⁶⁰ Niccolò Figà-Talamanca, Secretary General of No Peace Without Justice, interview by author, 5 July 2018, by phone.

⁶¹ Ibid.

⁶² For example, see Kamari M. Clarke, Abel S. Knottnerus, and Eefje de Volder, eds., *Africa and the ICC: Perceptions of Justice* (Cambridge: Cambridge University Press, 2017); Charles Chernor Jalloh and Ilias Bantekas, eds., *The International Criminal Court and Africa* (Oxford University Press, New York, 2017); Gerhard Werle, Lovell Fernandez, and Moritz Vormbaum, eds., *Africa and the International Criminal Court*, (The Hague: T.M.C. Asser Press, 2014); Phil Clark, *Distant Justice: The Impact of the International*

explanations, but rather to consider how domestic *and* international politics via two-level game theory might explain sustained African commitment to the Rome Statute, using Kenya as its analytical lens.⁶³

7.6 Background

For the purpose of context, at the time of writing, the Security Council had referred two situations involving non-states parties to the ICC Prosecutor: Darfur, Sudan in 2005 and Libya in 2011. The ICC issued arrest warrants for the sitting heads of state in both situations, namely Omar al-Bashir in 2009 and 2010, and Muammar Gaddafi in 2011. This was perceived by the African Union and some African states as a derogation of the principle of state sovereignty and the Court was purported to be a politicized tool of powerful states used to directly influence African politics and governance.⁶⁴ These sentiments were exacerbated when the Prosecutor opened a case in Kenya *proprio motu* and indicted Kenyan President Uhuru Kenyatta in 2012 for post-election violence

Criminal Court on African Politics (Cambridge: Cambridge University Press, 2018); Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Durham: Duke University Press, 2019); Evelyn A. Ankumah, ed., *The International Criminal Court and Africa: One Decade On* (Intersentia, 2016).

⁶³ Traditionally, approaches to international relations that integrate domestic factors into a systemic theory are blanketed under liberalism. See Kenneth W. Abbott, “International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts,” *American Journal of International Law* 93.2 (1999): 361-379. Generally, liberalism holds that state preferences are informed by domestic politics as opposed to material factors (i.e. state power). However, the two-level games approach is particularly useful for this analysis. See Andrew Moravcsik, ‘Introduction: Integrating International and Domestic Theories of International Bargaining,’ in *Double Edged Diplomacy: International Bargaining and Domestic Politics*, eds. Peter Evans, Harold K. Jacobson, and Robert D. Putnam (Berkeley: University of California Press, 1993), 15-17: Two-level game theory is useful because it places the political leader as the central strategic actor, and “begins by assuming that statesmen are typically trying to do two things at once; that is, they seek to manipulate domestic and international politics simultaneously.” Two-level games seek to explain the strategic opportunities and strategic dilemmas that exist when leaders balance domestic and international demands. Similarly, two-level games allow for the consideration of Waltz’s ‘first-image’ explanations, i.e. that leaders are seeking to realize personal goals which are contingent on individual psychology and political skill. Leaders seek to ‘simultaneously exploit both levels’ – that is, domestic and international. Two-level game theory effectively combines liberalism with rational-choice models of analysis. See also Robert Putnam, “Diplomacy and Domestic Politics: The Logic of ‘Two-Level Games,’” *International Organization* 42.3 (1988): 427-460.

⁶⁴ See for example Dire Tladi, “The African Union and the International Criminal Court: The battle for the soul of international law,” *South African Yearbook of International Law* 34.1 (2019): 58. Tladi says, “yet the vision [of international law predicated on respect for human rights and concern for the plight of humanity] continues to be questioned as imperialistic, colonialist, and even racist. Thus it may be argued that... the ICC is seen as a Western imperial master exercising imperial power over African subjects.”

perpetrated in 2007.⁶⁵ Within the AU and some African states, the ICC's pursuit of African heads of state mobilized feelings of distrust towards the Court and fostered a sense of fear that the ICC could be a very real threat to African leaders.⁶⁶ The postulation that the Court was pursuing accountability as an objective and universal imperative was called into question and rhetoric of neocolonial politicization was instrumentalized in AU and (sometimes) domestic politics, largely from the governments of Ethiopia, Kenya, Rwanda, Sudan, Uganda, and Zimbabwe.⁶⁷ It is significant that four out of these six states are non-states parties to the Rome Statute and the two States Parties to the Rome Statute had both been subjects of ICC intervention (i.e. *proprio motu* in Kenya; self-referral in Uganda).

The use of anti-ICC rhetoric from leaders of non-states parties is logical, since it justifies defection from the accountability and international criminal justice norms typified by the ICC. It is instructive to highlight that the non-states parties that engaged in anti-ICC rhetoric *never* supported the idea of an international criminal court, particularly at its liberal cosmopolitan maxim. This is tangentially evidenced by statements of delegations at the Rome Diplomatic Conference and more consequentially confirmed by subsequent unwillingness to be bound by the Rome Statute System.⁶⁸ As such, anti-ICC rhetoric from this group of states is expected, since its normative and ideological

⁶⁵ *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11.

⁶⁶ Jean-Baptiste Jeangène Vilmer, "The African Union and the International Criminal Court," *International Affairs* 92.6 (2016): 1321. Vilmer explained that "when Sudan's President Omar al-Bashir was indicted for crimes against humanity and war crimes in 2009 and for genocide in 2010, the protests started to spread. *Fuelled by other leaders' fear* and Bashir's desire to embody 'a liberation movement against this new colonization,' a post-colonial, pan-African anti-ICC rhetoric emerged" [*emphasis added*].

⁶⁷ See Mark Kersten, "South Africa and Burundi Withdrawals Expose Faults and Fault-Lines in ICC Opposition," *Justice in Conflict*, 11 November 2016, available at justiceinconflict.org/2016/11/11/south-africa-and-burundi-withdrawals-expose-faults-and-fault-lines-in-icc-opposition/; accessed 6 February 2021. See also "Countering the anti-ICC agenda in Africa," *Coalition for the International Criminal Court*, 3 September 2015, available at coalitionfortheicc.org/fr/node/178; accessed 10 February 2021. Note that this work identifies other African states that also engaged in the use of anti-ICC rhetoric, including Burundi, Libya, and The Gambia. See Vilmer, "The African Union and the International Criminal Court," 1321: Former Libyan leader Muammar Gaddafi said that the ICC was an "attempt [by the West] to recolonize their former colonies... a practice of First World terrorism."

⁶⁸ See Table 1. See also, for example, *Summary records of the plenary meetings, 9th plenary meeting*, 17 July 1998, (A/CONF.183/SR.9), 126, paras. 74-78: the delegate from Sudan, speaking on behalf of the Group of Arab States said, "While the Arab States would not stand in the way of the adoption of the Statute of the Court, he felt bound to place on record that they were not convinced by what had been agreed upon."

foundation was/is fundamentally incompatible with domestic interests, even from its earliest stages of development.

7.7 Kenya: Anti-ICC Rhetoric and Domestic Political Strategy

However, the President of Kenya similarly made use of anti-ICC rhetoric to further domestic political interests. More specifically, Kenyan President Uhuru Kenyatta described the ICC as a “tool of global power politics and not the justice it was built to dispense.”⁶⁹ It is important to note that *all* African leaders who chose to speak out against the ICC framed their opposition in anticolonial rhetoric and stereotypical tropes in an attempt to diminish the Court’s institutional credibility, legitimacy, and overall normative value under the auspice of Pan-African solidarity.

Kenyatta won the 2013 Kenyan Presidential election running on anti-ICC campaign, which united formerly divided ethnic groups against a common enemy: the interventionist, neocolonial, ‘Western’ ICC.⁷⁰ It is important to note that Kenyatta’s running mate was William Ruto and both were accused of bearing responsibility for the 2007 post-election violence at the ICC. Together they formed the Jubilee Alliance, which united former rival ethnic groups the Kikuyu and Kalenjin in an unlikely strategic

⁶⁹ Franck Kuwonu, “ICC: Beyond the threats of withdrawal: African countries in dilemma over whether to leave or support the International Criminal Court,” *Africa Renewal*, May-July 2017, available at www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal; accessed 9 May 2020. This article also highlights the warnings of Rwandan President Paul Kagame who said that “the court was never about ‘justice but politics disguised as international justice.’”

⁷⁰ Laurence R. Helfer and Anne E. Showalter, “Opposing International Justice: Kenya’s Integrated Backlash Strategy against the ICC,” *International Criminal Law Review* 17.1 (2017): 8. Simultaneous two-level game play is made clear by the observation that “promises to cooperate with the ICC were a pillar of the defendants’ [Kenyatta and his Deputy President, Ruto’s] campaign... The dual strategy—pledging cooperation while raising objections to the prosecution based on Kenya’s sovereignty—allowed the defendants to avoid the appearance of shirking accountability while increasing public support for their anti-colonial narrative against the ICC.” See also Gabrielle Lynch, *Performances of Injustice: The Politics of Truth, Justice and Reconciliation in Kenya* (Cambridge: Cambridge University Press, 2018), 57. Lynch explained that Kenyatta and his Deputy President used the involvement of the ICC to win the election in 2013, “following a campaign that had placed ‘their struggle’ against the ICC centre stage; and the process had revealed how the rich and powerful could undermine the ICC and strengthened opposition to the Court around the world.” See also Kamari M. Clarke, “International Justice and Politics of Sentimentality,” in *Africa and the ICC: Perceptions of Justice*, eds. Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (Cambridge: Cambridge University Press, 2016), 81: “After discussing the ‘brutality’ that their ‘independence heroes’ endured, Kenyatta linked his judicial indictment by the ICC to his father’s indictment by the British colonial administration in Kenya, thereby connecting the brutality of the colonial past to contemporary international law.”

partnership. Since Kenyatta and Ruto were both suspects at the ICC at the time that they were elected President and Deputy President, institutional delegitimization was important to maintain and gather domestic political support. Using the ICC to achieve domestic political ends worked. When William and Ruto were elected in 2013, it was explained that “[t]he ICC was definitely a factor in this election... It got people out. People were saying, ‘They’re our boys, they’re our sons, we need to protect them.’”⁷¹ This suggests that Kenyatta was able to strategically mobilize domestic support in direct opposition to the ICC.

While initially cooperative with the Court, after Kenyatta won the election, he wielded his Presidential power to stifle the ICC’s investigation process.⁷² This forced the Prosecutor to drop the charges against him due to a lack of evidence. Since Kenyatta ran on an anti-ICC campaign, it was logical to calculate that the costs of noncompliance with the Court would be inconsequential among domestic constituents. Strangely, however, Kenya has remained a States Party to the Rome Statute after Kenyatta’s election, even though the government actively sabotaged the Court’s effective operationalization in the country. It is also significant that the government of Kenya has actively attempted to reform the Rome Statute from within the Court’s institutional channels.⁷³ This suggests a

⁷¹ See Thomas P. Wolf, “The Electoral Consequences of Kenya’s ICC Cases,” in *Africa and the ICC: Perceptions of Justice*, eds. Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (Cambridge: Cambridge University Press, 2016), 249.

⁷² See *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta*, 5 December 2014, available at www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2; accessed 12 February 2021. The Prosecutor raised issues of witness tampering, noncooperation on the part of the Kenyan government, and an overall lack of evidence as reasons for withdrawing the charges against Kenyatta. It is worth noting that in 2016, the ICC Judges referred Kenya to the Assembly of States Parties (the Court’s oversight and legislative body), for its non-cooperation with the Prosecutor’s investigation and allegations of witness tampering. Some observers have argued that Kenya strategically used the threat of withdrawal as a way to temper the outcome of the procedures. See Thomas Obel Hansen, “Will Kenya Withdraw from the ICC?” *Justiceinfo*, 12 December 2016, available at www.justiceinfo.net/en/31056-kenya.html; accessed 10 February 2021.

⁷³ See Secretariat of the Assembly of States Parties, *Informal compilation of proposals to amend the Rome Statute*, 23 January 2015, 9, para. VI., available at asp.icc-cpi.int/iccdocs/asp_docs/Publications/WGA-Inf-Comp-RS-amendments-ENG.pdf; accessed 12 February 2021. Kenya has proposed to amend various articles of the Rome Statute: Art. 63 to allow a trial in absentia by video or representation of Counsel; Art. 27 to provide immunity for sitting heads of state or government; Art. 70 to include offences against the administration of justice committed by court officials (i.e. the Prosecutor); Art. 112 to establish an independent oversight mechanism to evaluate the performance of the Prosecutor; and the proposal to include regional mechanisms under the Court’s vision of complementarity; and Art. 68 regarding the inadmissibility of pre-recorded evidence.

sustained commitment to the Statute, whether for Kenyatta's own strategic interest or otherwise.

The behaviour of the government of Kenya demonstrates that the undercurrent of support for the international criminal justice norm is usually stronger than domestic political maneuvering, but not for depoliticized reasons. Kenyatta played a two-level game in order to distract constituents from domestic political problems by blaming an international institution, i.e. the ICC, while remaining a member. Aside from using the Court to unite domestic constituents against a common enemy during his campaign, once he was elected President, Kenyatta blamed the Court for his leadership struggles. For example, he said, "we've had to contend with the ICC pursuing weak, politicized cases. This has become a huge distraction from our duty to serve our people and this continent fully. That is not what Kenya signed up for when we joined the ICC."⁷⁴ Berating the Court provided Kenyatta with a strategic opportunity to achieve his political goals by fostering an anti-ICC stance among his domestic constituents from the earliest stages of his Presidency.

7.7.1 Strategic Opportunities and Constraints at the International Level
 Kenyatta calculated that the ICC could be exploited to bolster domestic political support without damaging relations with the African Union and several other African states. Important in this calculus was the fact that the AU had already taken an 'anti-ICC' position on immunities for sitting heads of state, stemming from the indictment of al-Bashir,⁷⁵ and was actively trying to fast-track the establishment of its regional court to prosecute international and transnational crimes, including those covered by the Rome Statute.⁷⁶ This position correlatively informed the foreign policy positions of some AU

⁷⁴ Ed Cropley, "ICC's toughest trial: Africa vs. 'Infamous Caucasian Court,'" *Reuters*, 28 October 2016, available at www.reuters.com/article/us-africa-icc/iccs-toughest-trial-africa-vs-infamous-caucasian-court-idUSKCN12S1U3; accessed 10 February 2021. Note that this statement was in reference to global security concerns, essentially blaming the ICC for Kenya's inability to fight armed groups, including those who attacked Nairobi's Westgate Mall in 2013.

⁷⁵ See African Union Assembly, *Decision on the Meeting of African States to the Rome Statute of the International Criminal Court (ICC)*, AU Doc.Assembly/AU/Dec.245 (XIII), 3 July 2009, para. 10.

⁷⁶ See African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 27 June 2014 (hereafter 'Malabo Protocol'). For a more in-depth discussion of

member states with respect to the ICC, shown in Table 7-3.⁷⁷ States are placed into particular categories based on commitment to the Rome Statute and relative levels of cooperation with the ICC. It is necessary to note that these positions can be fluid, depending on the ideological approach of particular statesmen and their governments—e.g. The Gambia reversing its withdrawal immediately following the election of President Adama Barrow. Nevertheless, pre-existing regional opposition to the ICC created a strategic opportunity for Kenyatta to manipulate the Court to his benefit and rally AU support for his opposition position.

Table 7-3: African Foreign Policy Positions on the ICC

Country	Liberal	Protectionist	Swing
Algeria		X	
Angola		X	
Benin	X		
Botswana	X		
Burkina Faso	X		
Burundi		X	
Cabo/Cape Verde	X		
Cameroon		X	
Central African Republic	X		
Chad			X
Comoros	X		
Congo	X		
Côte d'Ivoire	X		
Djibouti			X
DRC			X
Egypt		X	
Equatorial Guinea		X	
Eritrea		X	

the Malabo Protocol, see Jutta F. Bertram-Nothnagel, “A Seed for World Peace Growing in Africa: The Kampala Amendments on the Crime of Aggression and the Monsoon of Malabo,” in *The International Criminal Court and Africa: One Decade On*, ed. Evelyn A. Ankumah (Intersentia, 2016), 347-400. See also Charles C. Jalloh, Kamari M. Clarke and Vincent O. Nmehielle, eds., *The African Court of Justice and Human and Peoples’ Rights in Context: Development and Challenges* (Cambridge: Cambridge University Press, 2019).

⁷⁷ Table 3 relies on the positions of delegations at African Union meetings on the issue of the ICC. It also considers state cooperation with the Court—i.e. the arrest and surrender of indicted suspects while on the territory of States Parties. It also reflects levels of commitment to the Rome Statute in terms of ratification and implementation.

Ethiopia		X	
Gabon	X		
Gambia			X
Ghana	X		
Guinea	X		
Guinea-Bissau		X	
Kenya			X
Lesotho	X		
Liberia	X		
Libya		X	
Madagascar	X		
Malawi			X
Mali	X		
Mauritania		X	
Mauritius	X		
Morocco		X	
Mozambique			X
Namibia			X
Niger	X		
Nigeria	X		
Rwanda		X	
Sahrawi Republic		X	
Sao Tome and Principe		X	
Senegal	X		
Seychelles	X		
Sierra Leone	X		
Somalia		X	
South Africa			X
South Sudan		X	
Sudan		X	
Swaziland		X	
Tanzania	X		
Togo		X	
Tunisia	X		
Uganda			X
Zambia			X
Zimbabwe		X	

Indeed, the African Union supported Kenyatta, most expressly by changing its previous legal stance on immunities for sitting heads of state to include even those in

States Parties to the Rome Statute.⁷⁸ However, the majority of African states have continued to approach the Court from a liberal foreign policy position (43 per cent). This can be compared to the 37 per cent of African states that approach the ICC from a protectionist position and 20 per cent that swing. This regional dynamic may help to explain why Kenya remains committed to the Rome Statute, since most African states continued to take a liberal foreign policy position with respect to the Court, regardless of the protectionist stance advanced by the AU. This is supported by the fact that at the time of writing, African states boasted the highest number of regional ratifications of the Rome Statute, but no state had ratified the Malabo Protocol to regionalize international criminal justice at the AU Court of Justice and Human Rights.⁷⁹ Nevertheless, the substantial amount of protectionist and swing states signalled to Kenyatta that the use of anti-ICC rhetoric and efforts to withdraw from the Statute would not be a significant problem for Kenya's relations on the continent.⁸⁰ Even so, it was important for Kenyatta to situate the potential consequences of withdrawal in its broader context—i.e. how it might affect relations with those from Western Europe and Other States that vehemently support the ICC and the international criminal justice norm that undergirds it.

⁷⁸ Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," *German Yearbook of International Law* 60 (2017): 59. Tladi explained that "the position of the AU... which emerges in light of the *Kenyatta* prosecutions, seems to be that heads of State cannot be prosecuted at all, even by international courts."

⁷⁹ At the time of writing, fifteen African states had signed the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), including: Benin, Chad, Comoros, Congo, Côte d'Ivoire, Ghana, Guinea-Bissau, Guinea, Kenya, Mozambique, Mauritania, Togo, and Uganda. No states had ratified the Malabo Protocol at the time of writing. The Malabo Protocol requires ratification by fifteen states to enter into force.

⁸⁰ This is further supported by that fact that Kenya belongs to the East African Community (EAC) with other member states Burundi, Rwanda, South Sudan, Tanzania, and Uganda. The fact that Tanzania is the only member state of the EAC that takes a liberal foreign policy position towards the ICC is a further indicator that regional costs would be inconsequential for Kenyatta taking an anti-ICC position. On the other hand, it is worth noting that in 2013 the European Union was Kenya's greatest export partner, accounting for 20.6 per cent of Kenya's total exports. See *Trade between the EU and Kenya*, Information on the EAC-EU Economic Partnership Agreement, April 2015, available at eeas.europa.eu/archives/delegations/kenya/documents/press_corner/trade_between_the_eu_and_kenya_2105.pdf; accessed 10 February 2021. This relationship might have tacitly influenced Kenya's decision to remain a States Party to the Rome Statute. See also Obel Hansen, "Will Kenya Withdraw from the ICC?" Thomas Obel Hansen explained the role of European diplomacy and soft power on Kenya's decision to remain a States Party: "Undoubtedly, European diplomats are now urging Kenya to stay with the ICC. Even if it is unlikely that 'hard sanctions' will be associated with a withdrawal, it would surely frustrate some European capitals if Kenya proceeds to withdraw."

In this vein, since the charges against Kenyatta were dropped, he had no substantive reason to push for Kenya's withdrawal from the Rome Statute. He had already 'beaten' the ICC and is at no risk of being prosecuted by the Court again, *unless* he commits other atrocity crimes or more evidence against him with respect to the 2007 post-election violence becomes available.⁸¹ Therefore, there was/is no reason for Kenya to incur the potential reputational or material costs associated with pulling out of the Rome Statute. Kenyatta strategically calculated the potential reputational costs of leaving the Court, evidenced by the fact that the Kenyan Parliament passed two resolutions to withdraw from the ICC: one in 2010 and one in 2013 but neither resolution materialized. In 2016, government spokesman Manoah Esipisu explained that the Cabinet was still deciding whether or not to proceed with withdrawal, depending on the reputational costs that South Africa incurred for doing so.⁸² Indeed, South Africa's post-apartheid reputation as a leader in human rights was severely damaged when it attempt to withdraw from the Rome Statute, which provided the Kenyan government with important information to assess the costs and benefits of remaining a States Party.⁸³ Therefore, international

⁸¹ Scholars have argued that the ICC had a deterrent effect in Kenya, since the 2013 election was comparatively peaceful. The explanation for this is twofold: (1) Kenyatta had a rational self-interest to make sure the 2013 election was peaceful to avoid future intervention by the ICC and (2) ethnic tensions had been eased as a result of the Jubilee Alliance. See Claudio Corradetti, "The Priority of Conflict Deterrence and the Role of the International Criminal Court in Kenya's Post-Electoral Violence in 2007-8 and 2013," *Human Rights Review* 16.3 (2015): 257-272.

⁸² 'ICC debate: Africa vs 'infamous Caucasian court'?' *IPP Media*, 2 November 2016, available at www.ippmedia.com/en/news/icc-debate-africa-vs-infamous-caucasian-court; accessed 10 February 2021. See also Thomas Obel Hansen, 'What's at stake as Kenya weighs withdrawal from the ICC', *The Conversation*, 9 November 2016, available at theconversation.com/whats-at-stake-as-kenya-weighs-withdrawal-from-the-icc-68353; accessed 12 February 2021: "Shortly before making the announcement that it was withdrawing, South African President Jacob Zuma met Kenyan leaders in Nairobi, suggesting some form of coordination may have taken place." See also anonymous employee of South Africa Department of International Relations and Cooperation (DIRCO), interview by author, Pretoria, 20 February 2019: it was confirmed that Kenya indeed waited to see what happened to South Africa after its withdrawal from the Rome Statute to decide if it would follow suit. The reputational costs for South Africa were severe both domestically and internationally, which informed Kenya's decision to remain a States Party to some degree.

⁸³ See Manisuli Ssenyonjo, "State Withdrawals from the Rome Statute of the International Criminal Court: South Africa, Burundi, and The Gambia," in *The International Criminal Court and Africa*, eds. Charles Chernor Jalloh and Ilias Bantekas (Oxford: Oxford University Press, 2017), 238-239: "withdrawal from the ICC is costly for poorer developing states in terms of its impact on a state's (perceived or real) commitment to international criminal justice and may lead to retaliatory measures (such as cutbacks in EU or US international assistance/development aid)." See also "South Africa: Decision to leave International Criminal Court a 'deep betrayal of millions of victims worldwide'" *Amnesty International*, 21 October

normative pressures acted as a constraint on Kenyatta that influenced his decision to remain committed to the Rome Statute.

From a regional perspective, while many African states have openly criticized the Court, all of the African States Parties that initially ratified the Rome Statute have remained committed to it, except for Burundi. Kenya would be considered an outlier if it abandoned the Statute, which was/is counterintuitive for the achievement of domestic, regional, and/or international political goals. The effective strategizing by Kenyatta allowed him to exploit the ICC for his own ends at both domestic and international levels of political engagement, which required tactful manipulation of the opportunities and constraints presented at both levels.

It is argued that domestic political dynamics matter and continue to inform commitment to the Rome Statute in Kenya. Unlike the African states that never ratified the Rome Statute, Kenya expressed a strong commitment to the normative foundation of the ICC at its earliest stages.⁸⁴ It is apparent that support for the norms that undergird the international criminal justice project informed state support throughout the negotiation of the Rome Statute, and continue to shape the willingness of Kenya to remain subject to it. This is supported by the statement of the Kenyan Ambassador at the 16th Session of the Assembly of States Parties to the Rome Statute in 2017 when he said,

In our belief in the noble objectives of the Statute and its potential capacity to end impunity, Kenya played a key role in *championing for the establishment of the Court* and firmly remains a steadfast ally in the fight against impunity. As a firm adherent to the rule of law, Kenya actively

2016, available at www.amnesty.org/en/latest/news/2016/10/south-africa-decision-to-leave-international-criminal-court-a-deep-betrayal-of-millions-of-victims-worldwide/; accessed 12 February 2021.

⁸⁴ See, for example, Rome Diplomatic Conference, *Summary records of the plenary meetings, 3rd plenary meeting*, 16 June 1998, (A/CONF.183/SR.3), 77, paras. 63-68. The Kenyan delegate “reaffirmed Kenya’s commitment to the establishment of an effective, impartial, credible and independent international criminal court... There must therefore be a strong political will on the part of the States parties that would sign and ratify the Statute... His delegation would support all efforts to that end.” See also Wolf, “The Electoral Consequences of Kenya’s ICC Cases,” 253. Wolf notes that the fact that the “morally impaired political elite... had (almost unanimously) supported Kenya’s ICC membership without imagining that any Kenyan would ever ‘visit’ The Hague.” This problematizes the notion that entering the Rome Statute System was a rational choice by the Kenyan government and suggests that other factors influenced Kenya’s decision to join the ICC in the first place.

supports the international criminal justice system. Even as we *constructively criticize* the Court, it remains our aspiration that the highest standards of justice, human rights and the rule of law, are achieved as envisioned by the Rome Statute.⁸⁵

In this respect, anti-ICC rhetoric in Kenya can be framed as a form of pushback politics, i.e. using jargon and logic to contest the rules and authority of the Court *within* the existing structure.⁸⁶ Kenyatta was displeased with how the ICC was operating, but was not compelled to abandon the Rome Statute System for a myriad of strategic reasons.

What is perhaps most surprising is that even with extreme anti-ICC rhetoric, Kenyatta did not reduce the costs of non-compliance to the point where withdrawal was a logical or strategic choice to appeal to domestic constituents or other states in Africa or elsewhere.⁸⁷ In this respect, the normative strength of the accountability and international criminal justice norm in domestic and international contexts is a constraint on Kenyatta that helps to explain sustained commitment to the Rome Statute. The ICC's involvement in Kenya demonstrates the complexity of competing interests. Ultimately, however, anti-ICC rhetoric and threats of withdrawal were used to achieve strategic political ends at the domestic and international levels but had no substantive impact on Kenya's overall commitment to the Rome Statute for rational *and* normative reasons.

⁸⁵ *Statement by H.E. Amb. Koki Muli Grignon, Charge d'Affaires, A.I., of the Republic of Kenya to the United Nations*, General Debate of the Assembly of States Parties during the 16th Session of the Assembly of States Parties to the Rome Statute, 7 December 2017, available at asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-KEN.pdf; accessed 10 February 2021 [*emphasis added*].

⁸⁶ Mikael Rask Madsen, "Two-level politics and the backlash against international courts: Evidence from the politicisation of the European court of human rights," *British Journal of Politics and International Relations* 22.4 (2020): 728-738.

⁸⁷ See Rorisang Lekalake and Stephen Buchanan-Clarke, "Support for the International Criminal Court in Africa: Evidence from Kenya," Policy Paper No. 23 *Afrobarometer* (August 2015), available at afrobarometer.org/sites/default/files/publications/Policy%20papers/ab_r6_policypaperno23_kenya_anti_corruption.pdf; accessed 10 February 2021. This large N-studies quantitative study concluded that "a majority of Kenyans believe that the ICC is an important tool in the fight against impunity, see it as an impartial institution, and reject the notion of withdrawal from the court." It is also important to acknowledge the nuance within this conclusion that "Further analysis reveals that opinions are sharply divided along ethnic lines, reflecting the deep discord between the country's notoriously factious ethnic groups." See Geoff Dancy, Yvonne Marie Dutton, Tessa Alleblas, and Eamon Aloyo, "What Determines Perceptions of Bias towards the International Criminal Court? Evidence from Kenya," *Journal of Conflict Resolution* 64.7-8 (2020): 1443-1469. Note also the role of civil society as a driver of the international criminal justice norm, acting as a constraint on Kenyatta's decision making.

7.8 The Curious Case of Côte d'Ivoire

The paradox surrounding African ratification of the Rome Statute is typified by the fact that Côte d'Ivoire consented to the Court's involvement and ratified the Statute only *after* the ICC initiated an investigation into alleged crimes committed by its nationals.⁸⁸ In order to explain this behaviour, the expected benefits of Rome Statute ratification to Côte d'Ivoire must be understood. This is an especially peculiar case, since the ICC targeted former Ivorian President, Laurent Gbagbo; his wife, Simone Gbagbo; and the leader of the pro-Gbagbo militia, Charles Blé Goudé as bearing the most responsibility for crimes against humanity perpetrated in the context of post-election violence in 2010-2011.⁸⁹ In 2003, former President Gbagbo authorized the Prosecutor to open an investigation *proprio motu* in response to widespread and violent internal conflict in Côte d'Ivoire—a non-states party at that time. As such, the government leader that initially *consented* to the Court's jurisdiction as a non-States Party in 2003 was subsequently targeted by the Prosecutor for investigation and prosecution.⁹⁰ The incoming President, Alassane Ouattara surrendered Laurent Gbagbo and Blé Goudé to the ICC and transferred them to

⁸⁸ It is important to note that Côte d'Ivoire formally consented to the Prosecutor's investigation in 2003, which was initiated *proprio motu*. It reaffirmed its consent to the Court's jurisdiction formally in 2010 and 2011. The Pre-Trial Chamber of the ICC authorized the Prosecutor's investigation on 3 October 2011 with respect to post-election violence. Côte d'Ivoire ratified the Rome Statute much later in 2013. Côte d'Ivoire also implemented domestic legislation to amend its penal code to integrate the Rome Statute in March 2015. See LOI n° 2015-133 du 9 mars 2015 modifiant et complétant la loi n° 60-366 du 14 novembre 1960 portant institution d'un Code de Procédure pénale, Art. 139, available at www.gouv.ci/doc/accords/1512502230CODE-PENAL-2015-134.pdf; accessed 10 February 2021. It is worth noting that the case against the former President of Côte d'Ivoire Laurent Gbagbo and his aide Charles Blé Goudé resulted in an acquittal for alleged crimes against humanity in January 2019. For context, Gbagbo was transferred to the Hague after he was captured by opposition forces, backed by the French military and United Nations peacekeeping forces in November 2011. Laurent Gbagbo's wife Simone Gbagbo remains at large, with a warrant out for her arrest. Côte d'Ivoire has challenged the Court's jurisdiction, arguing that domestic Ivorian courts have prosecuted her for similar crimes, including genocide and other crimes. President Ouattara granted her amnesty in 2018. The Court urges the surrender of Simone Gbagbo to The Hague. See *Situation in the Republic of Côte d'Ivoire*, ICC-02/11.

⁸⁹ Human Rights Watch, 'Côte d'Ivoire: Events of 2018,' available at www.hrw.org/world-report/2019/country-chapters/cote-divoire; accessed 10 May 2020. Note that it is estimated that at least 3,000 people were killed, and more than 150 women were raped in the 2010-11 post-election crisis. Gbagbo lost the election and refused to leave office, sparking widespread and systematic violence and human rights abuse.

⁹⁰ Gbagbo initially consented to the jurisdiction of the ICC in 2003 as a response to widespread internal conflict in Côte d'Ivoire.

the Hague in November 2011. Simone Gbagbo was never transferred to the ICC and remains at large. Notwithstanding this overall sentiment of cooperation, Ouattara did not ultimately ratify the Rome Statute until two years later in 2013.

In order to explain this behaviour, it is important to acknowledge that the 2010-2011 post-election violence emanated from both sides: from Gbagbo *and* Ouattara, and from their respective supporters. Human Rights Watch (HRW) has been particularly vocal on this point. In the 2013 World Report, HRW argued that, “Eighteen months after the end of the 2010-2011 post-election crisis, justice for the grave crimes committed remained disturbingly one-sided. Ivorian authorities and the International Criminal Court have yet to arrest and prosecute any member of President Alassane Ouattara’s camp for post-election crimes, reinforcing dangerous communal divisions.”⁹¹ This point frames two important political realities. First, Ouattara and his supporters were exposed as a potential target of the ICC. Second, the decision to cooperate with the Court was likely informed by two interdependent goals: (1) an attempt to mitigate his own personal exposure by becoming a ‘friend of the Court’ and bolstering the perceived legitimacy of the new political regime and (2) the effective removal of Gbagbo from the Ivorian political landscape. However, the cost of ratifying the Statute without sufficient guarantees that he and his supporters would not be directly targeted by the Court would be sufficient to stall ratification.⁹² The use of rational choice in this context makes their actions particularly telling, since Ouattara’s behaviour can be readily explained utilizing a political calculus shaped by individual power and interests. As William Schabas cautions, “when a State is actively engaged in initiation of the process, there is a potential for manipulation. In effect, the State quite predictably uses the international institution to

⁹¹ Human Rights Watch, “World Report 2013: Côte d’Ivoire, Events of 2012,” available at www.hrw.org/world-report/2013/country-chapters/cote-divoire#; accessed 10 May 2020.

⁹² The point that Ouattara was using the ICC as a political tool to remove Gbagbo from the Ivorian political landscape is further supported by the fact that he sent a letter to the ICC after taking office to reaffirm Côte d’Ivoire’s consent to the Court’s jurisdiction originally granted by Gbagbo. See Office of the Prosecutor, Letter Reconfirming the Acceptance of the ICC Jurisdiction (14 December 2011). Ouattara reaffirmed Côte d’Ivoire’s willingness “to fully cooperate and without delay with the ICC, especially regarding all the crimes and abuses perpetrated since 2004.” Given that Gbagbo was the President of Côte d’Ivoire from 26 October 2000 to 11 April 2011, the time period emphasized by Ouattara would directly implicate Gbagbo and his supporters.

pursue its enemies.”⁹³ Through this lens, the ICC is just as exposed to political instrumentalization as a result of self-referrals by States Parties as it is by referrals from the UNSC.⁹⁴ Yet, the AU and many African States Parties have been seemingly accepting of politicizing the ICC when it emanates from the power of African leaders, but less so when it stems from the power of the Security Council.

Notwithstanding this, it is still unclear why Côte d’Ivoire ratified the Rome Statute in 2013. This decision was a risk, since the Prosecutor could open new investigations on all sides of the conflict with little jurisdictional difficulty. It is impossible to know whether or not a deal was made by the OTP and Ouattara, or whether future Prosecutors would be obligated to uphold such a deal. However, the nongovernmental organization (NGO) Africa Legal Aid explained that “ratification of the Rome Statute was delayed because it was determined to be unconstitutional by Côte d’Ivoire’s Constitutional Court. Civil society organisations, both national and international, set up conferences, advocated and conducted trainings and with the help of some supportive members of Parliament, they made sure the Constitution was properly amended so that ratification became possible.”⁹⁵ Thus, the ‘norm entrepreneurs’ in Ivory Coast directly facilitated ratification in this case. If the aim is to appear legitimate, there are few good reasons to oppose commitment to the Rome Statute, particularly in a post-conflict society.

⁹³ William A. Schabas, “Complementarity in Practice: Some Uncomplimentary Thoughts,” 20th Anniversary Conference of the International Society for the Reform of Criminal Law (Vancouver, 23 June 2007), available at www.icc-cpi.int/RelatedRecords/CR2010_02017.PDF; accessed 10 May 2020, 12.

⁹⁴ Catherine Gegout, “The International Criminal Court: limits, potential and conditions for the promotion of justice and peace,” *Third World Quarterly* 34.5 (2013): 800-818. Gegout argues that, “State leaders who ask the ICC to act against rebels in order to reinforce their own regime and authority are effectively seeking to turn the ICC into their political instrument. They are also contributing to the creation of an unjust international legal system, as they want the Court to focus on one side of a conflict. This was the case with Joseph Kabila in the DRC in 2004, Yoweri Museveni in Uganda in 2004, François Bozizé in the Central African Republic in 2005, and with the government of Mali in 2012.” See also Phil Clark, *Distant Justice*.

⁹⁵ Africa Legal Aid, ‘Côte d’Ivoire has ratified the Statute of the International Criminal Court (ICC),’ 4 April 2013, available online at www.africalegalaid.com/cote-divoire-has-ratified-the-statute-of-the-international-criminal-court-icc/; accessed 11 May 2020. See also *Statement by the Ivorian Coalition for the International Criminal Court at the 10th Assembly of States Parties to the ICC* (New York: UN Headquarters, 12-21 December 2011), available at asp.icc-cpi.int/iccdocs/asp_docs/ASP10/Statements/ICC-ASP10-GenDeba-CICC-IvoryCoast-ENG.pdf; accessed 11 May 2020.

To further support this conclusion, President Ouattara stated in a 2011 letter to the Prosecutor of the ICC that

For reasons you are aware of, the transfer of power following the presidential election of 31 October and 28 November 2010 could not occur in the peaceful manner I wished for. A serious crisis has ensued, during which it is unfortunately reasonable to believe that crimes falling under the jurisdiction of the International Criminal Court have been committed. These crimes are of such gravity that I call for your assistance to make sure that the main perpetrators will not remain unpunished, hence contributing to restoring the rule of law in Côte d'Ivoire.⁹⁶

President Ouattara made clear that Ivorian judicial mechanisms were insufficient to deal with the types of crimes committed in the post-election conflict. According to the Coalition for the International Criminal Court, the letter also made a promise of cooperation with the Office of the Prosecutor and confirmed Côte d'Ivoire's intent to become a State Party to the Rome Statute "with the shortest possible delay."⁹⁷ The significance of this behaviour is that while the situation in Côte d'Ivoire is technically a *proprio motu* referral stemming from Gbagbo's initial consent in 2003, the reality is such that the Prosecutor's investigation into the 2010 post-election violence in Ivory Coast was *actually* a self-referral by Ouattara, reaffirming the new governments' consent to ICC involvement. This reality complicates the objectivity of prosecutorial decision making and raises questions about the malleability of case selection.

Indeed, Ouattara publicly acknowledged the need to bring *all* of those involved in the perpetration of atrocious crimes to justice— "regardless of political affiliation or military rank."⁹⁸ Notwithstanding this, in 2016, one week after Prosecutor Bensouda

⁹⁶ Président de la République de Côte d'Ivoire, Lettre du 3 Mai 2011, cited by Pre-Trial Chamber III, *Situation in the Republic of Côte d'Ivoire: Request for authorisation of an investigation pursuant to article 15* (23 June 2011), ICC-02/11; [OTP translation].

⁹⁷Coalition for the International Criminal Court, "Côte d'Ivoire: President Ouattara wants ICC Investigation; OTP to Seek Pre-Trial Authorization," available at iccnw.org/?mod=newsdetail&news=4476; accessed 11 May 2020.

⁹⁸ Human Rights Watch, "Turning Rhetoric into Reality: Accountability for Serious International Crimes in Côte d'Ivoire," 3 April 2013, available at www.hrw.org/report/2013/04/03/turning-rhetoric-reality/accountability-serious-international-crimes-cote-divoire; accessed 10 February 2021.

announced that she would be investigating alleged crimes committed by pro-Ouattara members, Ouattara publicly stated that no more Ivorians would go before the ICC. He explained that domestic justice systems were operational and capable of prosecuting atrocity crimes, eliminating the need for ICC intervention in Ivory Coast.⁹⁹ In 2018, it was made clear that President Ouattara's ethos surrounding international criminal justice and accountability shifted when he announced an amnesty for over 800 people involved in the perpetration of serious crimes committed in the context of the post-election internal conflict—including Simone Gbagbo, whose arrest warrant at the ICC is still outstanding. As Amnesty International highlights, "Ouattara listed Simone Gbagbo, who is serving a 20-year sentence for other offenses related to the post-election crisis, as one of the people who would benefit from an amnesty, casting doubt on the willingness of the Ivorian justice system to try her for her alleged role in crimes against humanity or war crimes."¹⁰⁰ Against this backdrop, an ideological shift has taken place in Ivory Coast.

What remains consistent is an undercurrent of protectionism and the instrumentalization of the Court to fulfill a myriad of political goals in Ivory Coast. Immediately following his election, Ouattara had an interest in appealing to the ICC for help as a demonstration of leadership through his commitment to justice for victims. Using the ICC to further entrench an anti-Gbagbo narrative through its selectivity in cases, which was directly influenced by Côte d'Ivoire's approach to cooperation with the OTP and its influence over evidence gathering and investigative processes, offered a direct benefit to Ouattara. Least of all, managing a conflict-ridden country is cumbersome. The promise of a better life by committing to accountability and the international criminal justice norm *vis-à-vis* the ICC signalled domestically and to other states that atrocity crimes would not be tolerated under the new leadership. Prosecutorial

⁹⁹ Statement of President Alassane Ouattara, 4 February 2016, Elysee Presidential Palace, Paris: Ouattara said that "The ICC played the role it had to. After the electoral crisis, we had no justice system, the country was in tatters... Now we have a justice system that is operational and that has begun to judge everyone without exception. These trials will begin very shortly and I hope they will move faster than the ICC." It is worth noting that Prosecutor Bensouda had announced that the OTP was looking into crimes committed by pro-Ouattara members one week before this statement was made.

¹⁰⁰ Amnesty International, "Côte d'Ivoire: No Amnesty for Serious Crimes of 2010-11 Crisis," 7 August 2018, available at www.amnesty.org/en/latest/news/2018/08/cote-ivoire-no-amnesty-for-serious-crimes-of-crisis/; accessed 11 May 2020.

discretion on the part of the OTP largely obfuscates Ouattara's responsibility for how justice is dispensed by the Court. However, the fact that justice has been so one-sided in Côte d'Ivoire raises genuine concern about the authenticity of the President's commitment to justice and his strategic involvement with the Court. This was compounded by his shift in international criminal justice related policy, which must be situated in its broader context.

In 2016, African hostility toward the ICC was mounting. At the same time, the Ivorian experience had left many victims disenchanted due to the selectivity of the Court's cases and the inefficiency of the process altogether.¹⁰¹ In combination, the necessity to remain committed to the ICC to secure legitimacy domestically and regionally was rapidly declining. Thus, the mitigation of sovereignty to the Court in the current climate likely incurs more costs than benefits for Ouattara. Côte d'Ivoire's ratification of the Rome Statute can reasonably be explained by domestic political interests, which have shifted over time. Notwithstanding this, while other African states were considering leaving the Court in 2016, Ouattara reaffirmed his commitment to it.¹⁰² It is worth noting that Gbagbo and Blé Goudé remained in ICC custody until 2019, which may explain why Ouattara remained committed to the Court, since it was actively targeting his enemies.

While Côte d'Ivoire remains committed to the Rome Statute and the ICC, it would appear that it would now prefer to dispense justice locally. The *framing* of this reality, i.e. that Ivory Coast is now capable of prosecuting international crimes domestically, acknowledges the value of the accountability norm, while keeping the ICC at a comfortable distance under the auspice of complementarity. This may be a consequence of the fear that the Prosecutor will move on to consider pro-Ouattara

¹⁰¹ See Netton Prince Tawa and Alexandra Engelsdorfer, "Acceptance of the International Criminal Court in Côte d'Ivoire: Between the Hope for Justice and the Concern of 'Victor's Justice,'" in *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice*, eds. Susanne Buckley-Zistel, Friederike Mieth and Marjana Papa (International Nuremberg Principles Academy, 2017), available at www.nurembergacademy.org/fileadmin/user_upload/Cote_d_Ivoire.pdf; accessed 10 February 2021.

¹⁰² Freddy Mulongo, "La Côte d'Ivoire n'envisage pas de quitter le CPI répond Alasane Ouattara à Réveil FM," *Mediapart*, 19 May 2020, available at blogs.mediapart.fr/freddy-mulongo/blog/011116/la-cote-divoire-nenvisage-pas-de-quitter-le-cpi-repond-alasane-ouattara-reveil-fm; accessed 10 May 2020.

suspects in the aftermath of the Gbagbo and Blé Goudé trials. Nevertheless, this example provides a useful illustration of the interplay between domestic politics and the overarching influence of the international criminal justice norm to explain commitment to the Rome Statute in an African context.

7.9 Conclusion

This analysis provided a lens through which to view the interrelationship between African commitment to the ICC and the diffusion of the international criminal justice norm on the continent more broadly. While the ICC has been criticized on neocolonial bases, it is important to reconstruct the narrative to more accurately reflect African agency and ownership over the international criminal justice project and the ICC in particular. African states committed to the ICC as a counter to impunity for the perpetration of international crimes through the establishment of the Court. The significance of the fact that 62 per cent of all African states have ratified the Rome Statute cannot be understated. This is especially pertinent due to the propensity of violence on the continent reaching the threshold of the crimes contained in the Rome Statute, which logically increases the probability of ICC intervention in domestic political and legal matters.

The mobilization of the Rome Statute and therefore, the ICC, to restructure or equalize the global order is similarly important. Since powerful states opposed the creation of a strong, independent Court in exchange for one under the strict control of the Security Council, African states approached the ICC project as fundamentally anticolonial. This perspective reflects a desire to restructure global politics. In many ways, the establishment of the ICC demonstrated the emergence of a new multilateral diplomacy model which could achieve results even without the support of powerful states. In concert, the shared idea that accountability for atrocity crimes is important, coupled with the desire to achieve an outcome that would benefit humanity with or without powerful states, typify the Africa-ICC relationship from 1994 to present-day to varying degrees.

Activism and agency in the establishment of the ICC by SADC states, the government of Senegal, and others, along with strong support from NGOs and the African Union, created a strong normative backbone for the establishment of an ICC in

Africa from the earliest stages. This important historical experience continues to influence state behaviour and commitment to the ICC throughout most of Africa. This is supported by the willingness of most African states to remain a part of the Rome Statute System, even when domestic or regional political dynamics present a logical or strategic opportunity to defect. It is important not to underestimate the ability of African governments to instrumentalize the ICC for domestic political ends, while also acknowledging that ongoing commitment to the ICC in the form of treaty ratification and implementation contributes to the value of the Rome Statute System, whether intended or not.

Using the example of Côte d'Ivoire, it is apparent that domestic politics are important considerations for understanding why a state might ratify the Rome Statute or else make use of the ICC. While it is possible and indeed likely that the ICC was used for strategic political interests in that case, the reality remains that once Ivory Coast became a States Party to the Rome Statute in 2013, ICC intervention on *any* side of the conflict became possible with little jurisdictional difficulty. On this basis, it is fundamentally important to consider both rational and normative explanations for Rome Statute ratifications in Africa and the interplay between the two as valuable tools of analysis. Similarly, Kenya's sustained commitment to the Rome Statute is best explained by considering both domestic *and* international political factors, with a particular focus on Kenyatta as the central strategic actor. While Kenyatta approached the ICC negatively for his own objectives, the fact that Kenya remains a States Party to the Rome Statute suggests that the normative value surrounding the Court is a relevant constraint on governments, which informs sustained commitment to the Statute regardless of contradictory domestic political interests.

Chapter 8

8 Head of State Immunity

The previous chapters have helped to establish an understanding of what kind of International Criminal Court (ICC or ‘Court’) African states wanted before and during the Rome Diplomatic Conference. The ICC entered into force in 2002 and began its work almost exclusively in African situations. The first case brought to the Prosecutor was a self-referral by Uganda in 2003. The first investigation opened by the Prosecutor *proprio motu* was in Kenya in 2007. And the first case involving a non-States Party that was referred to the Prosecutor by the United Nations Security Council (UNSC) was the situation in Darfur (Sudan) in 2005. The UNSC’s referral of the situation in Darfur to the ICC has been widely understood as the impetus for the breakdown of the relationship between the African Union (AU), some African states, and the Court. Some reasons for this can be linked back to the concerns of politicization raised by African governments at the Rome Diplomatic Conference, since the UNSC was yielding its power to interfere in the sovereign activities of a non-States Party, while others are linked to the Prosecutor’s targeting of a sitting head of state and the severity of the consequences for such a decision, since the ICC indicted then-President of Sudan, Omar al-Bashir in 2009.¹ What is perhaps most important for the purposes of this dissertation is to establish the link between what African states vocalized in Rome as legitimate concerns with embedding the authority of the UNSC within the Court’s structure, which provided the necessary foreshadowing for the ICC’s controversial involvement in Sudan. It is nevertheless important to recall that the AU is not a States Party to the Rome Statute, and therefore its antagonism towards the Court has mattered inasmuch as it affected or influenced the

¹ See for example Awa Adamu, “Lack of Objectivity in Security Council Referrals and its Effects on International Criminal Court’s Prosecution,” *International Journal of Creative Research Thoughts* 9.1 (2021): 2120-2134. See also Bethel Aregawi, “The Politicisation of the International Criminal Court by United Nations Security Council Referrals,” *Accord* (2017), available at <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/>; (accessed 1 February 2021). See also Christa-Gaye Kerr, “Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined,” *Michigan Journal of International Law* 41.1 (2020): 195-225. See also Manisuili Ssenyonjo, “The Rise of the African Union Opposition to the International Criminal Court’s Investigations and Prosecutions of African Leaders,” *International Criminal Law Review* 13 (2013): 385-391.

behaviour and policy choices of States Parties to the Rome Statute, which will be evaluated herein. Ultimately, the aim of this chapter is to outline the most serious point of contention in the ‘Africa-ICC’ relationship, i.e. head of state immunity, situate it within its broader historical context, and consider the compatibility of the ICC’s approach to international criminal justice within the African context with respect to the indictment of sitting heads of state.

8.1 Framing the relationship between the AU and the ICC

The relationship between the African Union (AU) and the International Criminal Court has been tumultuous. Focal in the discourse surrounding the AU-ICC relationship is the issue of head of state immunity: the AU takes the position that sitting heads of state and senior government officials enjoy immunity during their tenure of office, while the ICC’s establishing treaty, the Rome Statute, specifically waives immunity for heads of state and senior officials who are subject to the jurisdiction of the Court. The crystallization of the AU position emanated from the ICC’s indictment of former Sudanese leader, Omar al-Bashir in 2009 via United Nations Security Council (UNSC) Resolution 1593, and relatedly, the indictments of former Libyan leader Muammar Gaddafi and Kenyan President Uhuru Kenyatta in 2011.² The Court’s pursuit of al-Bashir is particularly contentious from the perspective of the AU since Sudan has never ratified the Rome Statute and therefore, has not consented to the involvement of the ICC in its domestic political and legal affairs.

However, the UNSC has a special jurisdictional role under the Rome Statute. Article 13(b) grants the Security Council the power to refer situations to the ICC

² Note that the ICC also indicted Libyan leader Muammar Gaddafi via Security Council Resolution 1970 for alleged crimes against humanity, particularly the murder and persecution of civilians who opposed his political leadership. See “ICC issues Gaddafi arrest warrant: Libya has dismissed the move by the ICC, rejecting the authority of the tribunal,” *Reuters* (28 June 2011), available at <https://www.aljazeera.com/news/2011/6/28/icc-issues-gaddafi-arrest-warrant>; (accessed 1 January 2021): Gaddafi opposed the ICC intervention on the basis that it was a “crusade against his country and an attempt by the West to recolonize Libya.” The justice minister of Libya at the time, Mohammed al-Qamoodi, stated that “Libya... does not accept the decisions of the ICC which is a tool of the Western world to prosecute leaders in the Third World.” Note that the arrest warrant was terminated following Gaddafi’s death on 22 November 2011.

Prosecutor where crimes under the jurisdiction of the Court are alleged to have taken place.³ This includes situations involving non-States Parties to the Rome Statute, providing the Court with a form of universal jurisdiction. Relatedly, Article 16 of the Rome Statute allows the UNSC to defer an investigation or prosecution for a renewable one-year period. Both powers were given to the UNSC for the purpose of maintaining international peace and security under Chapter VII of the United Nations Charter.⁴

Against this backdrop, this chapter considers the international criminal justice norm, typified by the ICC, and its compatibility with the AU on the issue of head of state immunity by using the Court's indictment of Omar al-Bashir as its analytical lens. It argues that the AU does endorse and support the international criminal justice norm, albeit from a different position than the ICC with respect to immunity for sitting heads of state, primarily for protectionist reasons. Nevertheless, the AU has attempted to use the mechanisms available within the Rome Statute System to mediate its disagreements regarding the al-Bashir case including at the UNSC, the Assembly of States Parties, and the Court itself. The AU and the ICC have identified the same goal with respect to international criminal justice: long-term peace and stability. The point of departure, however, is on how best to achieve this goal. The ICC prioritizes ending impunity, emphasizing criminal accountability and claims that justice is a 'key prerequisite' for lasting peace.⁵ On the other hand, the AU has placed an emphasis on containing peace and stability on the continent, which it argues can be eroded by arresting sitting heads of state.⁶ This is evidenced by the AU's tacit support of ICC indictments against rebels and

³ Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998, Art. 13(b): Exercise of jurisdiction. The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

⁴ Rome Statute of the International Criminal Court, Art. 16: Deferral of investigation or prosecution. 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.

⁵ International Criminal Court, available at <https://www.icc-cpi.int/about>.

⁶ African Union, *Observations of the African Union on the Scope and Application of the Principle of Universal Jurisdiction*, presented to at the United Nations General Assembly, Sixth Committee, Seventy-fifth session (15 December 2020) available at https://www.un.org/en/ga/sixth/75/universal_jurisdiction/au_e.pdf; accessed 5 January 2021, 4: "However,

warlords, and its direct opposition to the Court, i.e. when it requested its members *not* to cooperate with the ICC by arresting and/or surrendering sitting heads of state, especially al-Bashir. The AU has also asserted that reconciliation is primordial in post-conflict or transitional societies, over and above the retributive approach typified by the ICC. On this basis, the AU and the ICC have fundamentally disagreed about the primacy of arresting and surrendering al-Bashir while he was President of Sudan to the Court in order to achieve the mutually constituted objective of long-term peace and stability in Darfur. Considering that al-Bashir was never arrested, even when traveling to African States Parties of the Rome Statute, suggests that the predictive and expected behaviour of African states was *not* to arrest and surrender al-Bashir to the ICC. On this basis, the AU's interpretation and understanding of the international criminal justice norm was prioritized over and above that of the ICC in some African states.

It is important to note that the AU and relevant African states provided complex legal justifications using both the Rome Statute and customary international law to uphold the immunity of al-Bashir while he was a sitting head of state. The ICC failed to adequately respond to these arguments in a cogent manner, which has created a serious institutional legitimacy and credibility crisis for the Court. The instrumentalization of head of state immunity by both the AU and the ICC in the al-Bashir case is a clear demonstration of the deep politicization that undergirds the operationalization of the Court at the domestic, regional, and international level(s). Neither the AU nor the ICC approached the issue of al-Bashir's immunity from a depoliticized position, yet neither abandoned the international criminal justice norm in formulating justifications for the immunity (or lack thereof) of al-Bashir during his tenure as President of Sudan. This suggests a mutual respect and acknowledgement of the norm, but exposes its potential for political instrumentalization, since it has not yet reached its conceptual maxim.⁷

whilst affirming universal jurisdiction, the AU has also taken cognizance of the political use and abuse of the principle by some States against African leaders in particular. Essentially, African States have consistently echoed concerns with the selective and political manner in which universal jurisdiction is exercised by non-African foreign States against African State Officials, and which has the potential to undermine the peace efforts and stability on the Continent as well as other existing international law principles such as the principle of sovereign equality of State.”

⁷ See generally Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52.4 (1998): 887-917: It is argued here that many African states and

8.2 Resolution 1593 and beyond

The situation in Darfur, Sudan was referred to the ICC Prosecutor by UNSC Resolution 1593, which was made possible by Article 13(b) of the Rome Statute.⁸ To be sure, UNSC referrals are the only possible avenue to trigger the Court's jurisdiction in non-states parties to the Rome Statute where genocide, crimes against humanity, war crimes, and/or aggression are alleged to have taken place. The UNSC based its decision to refer the situation in Darfur to the ICC Prosecutor on a proposal by the International Commission of Inquiry, which enumerated reasons to refer the situation to the Court.⁹ At the time of writing, the UNSC has referred only two situations involving non-States Parties to the ICC: Darfur (Sudan) in 2005 and Libya in 2011. It is important to acknowledge that ICC

African individuals were in fact the 'norm entrepreneurs' that helped to establish the Rome Statute and thus, the ICC. In this vein, it would be unwise for the AU to reject the presence of the norm altogether. Similarly, the fact that so many African States have ratified the Rome Statute and integrated into domestic law further suggests an African commitment to the 'norm cascade.' Nevertheless, the operationalization of the ICC has raised practical and political difficulties with the implementation of the norm and has stagnated its 'life cycle' thus, not reaching the point of 'norm internalization.' See also Jutta Brunnée, "International Legal Accountability Through the Lens of the Law of State Responsibility," *Netherlands Yearbook of International Law* 36 (2005): 3-38. See also Jutta Brunnée and Stephen J. Toope, "Interactional international law: an introduction," *International Theory* 3.2 (2011): 307-318.

⁸ UN Doc. S/Res/1593 (2005); *Rome Statute of the International Criminal Court*, 17 July 1998, A/CONF.183/9, Art. 13(b): "Exercise of jurisdiction. The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;" Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005.

⁹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005: the reasons for the proposed UNSC referral included that the crimes being committed were a threat to peace and security; the investigation and prosecution of crimes would "be conducive, or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations" and that investigation and prosecution in Sudan of those with authority and prestige was impossible at the local level. Therefore, having trials "away from the community over which those persons still wield authority and where their followers live, *might* ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions;" the UNSC and ICC's authority "might compel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigation and *possibly* criminal proceedings;" the ICC would facilitate a "veritably fair trial;" the ICC could start its work immediately as opposed to ad hoc tribunals or other internationalized courts or alternative mechanisms of justice; and the ICC proceedings "would *not necessarily* involve a significant financial burden for the international community [*emphasis added*]."

intervention has not manifestly contributed to the proliferation of ‘justice’ in the form of criminal accountability in either instance.¹⁰

In many respects, the referral of the situation in Darfur to the ICC was an important test case used to measure the institutional effectiveness of the ICC in the context of non-States Parties and ultimately, the malleability of the concept of universal jurisdiction advanced by the Rome Statute. It is clear that this approach was an overreach both normatively and conceptually: it has done more damage to the international criminal justice regime and the institutional credibility of the ICC than it has helped to end impunity, deter atrocity crimes, or contribute to peace and security. It is for this reason that Phakiso Mochochoko, Head of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor of the ICC, has referred to UNSC referrals as a “poisoned chalice,” and has advanced the idea that the ICC would be far better off without *any* involvement from the UNSC in the future.¹¹ This stemmed largely from the fact that the UNSC does not oblige cooperation from states (other than the states involved—i.e. Libya and Sudan). Cooperation from other states is voluntary, which has revealed an ostensive lack of political will to uphold and/or strengthen the accountability norm in the international political sphere. The UNSC has, as a matter of practice, referred situations to the Court without providing any of the necessary support to ensure its institutional effectiveness.¹² The only value of a UNSC referral appears to be symbolic, which has had severe reputational consequences for the ICC, and the international criminal justice regime altogether.

¹⁰ See Security Council Meetings Coverage, “We Have Failed Darfur’s Victims, International Criminal Court Prosecutor Tells Security Council, Noting Continuing ‘Total Impunity,’” SC/11441 (17 June 2014): ICC Prosecutor Fatou Bensouda told the UNSC that “systematic and wide-spread crimes continued to be committed with total impunity in Darfur nearly ten years since the situation was referred to the International Criminal Court.”

¹¹ Sarah Nimigan, “Carrots, Sticks, and the ICC: Prospects for Cooperation? Part 1,” *IntLawGrrls*, (9 December 2018), blogpost available at <https://ilg2.org/2018/12/09/carrots-sticks-and-the-icc-prospects-for-cooperation-part-1/>; accessed 3 January 2021.

¹² “In Hindsight: The Security Council and the International Criminal Court,” *Security Council Report* (31 July 2018) available at https://www.securitycouncilreport.org/monthly-forecast/2018-08/in_hindsight_the_security_council_and_the_international_criminal_court.php; accessed 4 January 2021: “The Council has also been relatively indifferent towards states’ non-cooperation with the ICC on existing referrals, refraining from taking action on the 13 decisions of the court regarding the non-compliance of UN member states.”

In effect, allowing the UNSC to refer non-States Parties to the Court provides the ICC with a politicized and weak form of universal jurisdiction over atrocity crimes. Indeed, the involvement of the UNSC in the situations in Darfur and Libya have been explained as a manifestation of a global order whereby powerful states can act in an interventionist way and make determinations about the standards of appropriateness in weak(er) states, subject to political interests.¹³ This has readily been interpreted by the AU and African leaders as a violation of state sovereignty and an imposition of ‘Western’ values.¹⁴ From the perspective of the AU, this realization triggered colonial sensitivities and reiterated that the ICC operates squarely within the realm of power politics rather than an objective and/or neutral legal space. This point has only been strengthened by the UNSC’s willingness to get the ICC involved in African situations, but not others of equal gravity, based solely on political factors.¹⁵

This manifestation of overt politicization is precisely why the relationship between the ICC and the UNSC was so contentious during the negotiation of the Rome Statute in 1998. As Williams and Schabas have explained, “[t]hose delegations that had opposed any Security Council involvement had argued that it would politicize the ICC

¹³ See for example Mary Kimani, “Pursuit of justice or Western plot? International indictments stir angry debate in Africa,” *Africa Renewal* (October 2009) available at <https://www.un.org/africarenewal/magazine/october-2009/pursuit-justice-or-western-plot>; accessed 4 January 2021. See in particular, the comments of AU Commission President Jean Ping to a French radio network RFI that the “ICC always targets... Africans. Does it mean that you have nothing on Gaza? Does it mean you have nothing [on the] Caucasus? Does it mean that you have nothing on the militants in Colombia? There is nothing on Iraq? We are raising this type of question because we don’t want a double standard.”

¹⁴ See for example “Uganda’s Museveni calls on African nations to quit the ICC,” *Reuters* (12 December 2014), available at <https://www.reuters.com/article/us-africa-icc-idUSKBN0JQ1DO20141212>; accessed 3 January 2021: “I supported the court at first because I like discipline. I don’t want people to err without accountability... But they have turned it into a vessel for oppressing Africa again so I’m done with that court. I won’t work with them again.” Museveni advised that “I want all of us to get out of that court of the West. Let them (Westerners) stay with their court.” See also Siobhán O’Grady, “Gambia: The ICC Should be Called the International Caucasian Court,” *Foreign Policy* (26 October 2016), available at <https://foreignpolicy.com/2016/10/26/gambia-the-icc-should-be-called-the-international-caucasian-court/>; accessed 3 January 2021: Gambian Information Minister Sheriff Bojang said 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.”

¹⁵ Key examples of similar gravity which were *not* referred to the ICC by the UNSC include, but are not limited to: Iraq, North Korea, Palestine, Sri Lanka, Syria, and Ukraine. Note that the investigation in Afghanistan was initiated by the prosecutor *proprio motu* and similarly not by UNSC referral (for obvious reasons). It is interesting to note that the Pre-Trial Chamber denied Bensouda’s request to open the investigation at first, solely for political reasons. This decision was reversed unanimously on appeal.

and undermine its credibility. As before Rome the arguments of inequality based on the role of the P5 [that is, the permanent five members of the UNSC: China, France, Russia, United Kingdom, United States] was presented and that the veto would be used to stop referrals involving these States or their more indirect interests.”¹⁶ It is relevant to note that African states were particularly opposed to the use of the UNSC veto in the function of the Court. For example, the South African Development Community had established negotiating principles for the establishment of the ICC in 1997, which clearly enumerated that “[t]he ICC should be unfettered by the veto of the Security Council.”¹⁷ Further African negotiation coordination efforts were undertaken in Senegal in 1998 with the signing of the Dakar Declaration which stated more broadly, “that the International Criminal Court shall operate without being prejudiced by actions of the Security Council.”¹⁸ It is apparent that African states were generally concerned about the role of the UNSC and its potential influence on the ICC’s politicization and judicial independence. In the course of the Court’s history, it is apparent that such concerns were both appropriate and well-conceived. The complication of the United States, Russia, and China *not* ratifying the Rome Statute has further inflamed perceptions of inequality and has posed serious credibility challenges for the Court, particularly from the perspective of the AU and its member states that have been subject to UNSC intervention that triggers the Court’s jurisdiction over the alleged behaviour of non-States Parties.¹⁹ The UNSC has manifestly failed to apply the same standard in *all* situations in need of ICC intervention,

¹⁶ Sharon A. Williams and William A. Schabas, “Part 2. Jurisdiction, admissibility and applicable law: Exercise of jurisdiction,” in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd edition, ed. Otto Triffterer (Portland: C.H Beck, Hart, Nomos, 2008), 568.

¹⁷ SADC Negotiating Principles for the Establishment of an International Criminal Court (11-14 September 1997, Pretoria, South Africa).

¹⁸ Dakar Declaration for the Establishment of the International Criminal Court in 1998 (6 February 1998, Dakar, Senegal).

¹⁹ Note that there have also been concerns raised by the relationship between the UNSC and the ICC from scholars and observers. See for example Louise Arbour, “The Relationship Between the ICC and the UN Security Council,” *Global Governance* 20.2 (2014), 196: “Yet for all the good that Security Council referrals do in expanding accountability and combating impunity, there is a danger they could, and already do, undermine the wider aims of international criminal justice. Such referrals not only could erode the legal principles at the heart of this project, not least the fundamental tenets of the rule of law, but also on a more practical level could provoke a *backlash against the ICC* over the perceived use of international justice as a bargaining chip or tool to gain political powers [*emphasis added*].”

which has devalued the institution's legitimacy and credibility and contributed to backlash from the AU and some African states.

The point is not to dispute that horrific violations of international criminal law amounting to the crimes enumerated in the Rome Statute were being committed in both Darfur and Libya. Rather, the bigger concern is twofold: (1) the UNSC has demonstrated a willingness to refer situations in Africa to the ICC, but not in other situations of comparable gravity; this behaviour has knowingly compromised perceptions of institutional fairness, objectivity, and neutrality—all of which are quintessential features of a *legal* institution such as the ICC; (2) the UNSC has failed to ensure that existing referrals to the ICC are effectively enforced and knowingly degraded the effectiveness, legitimacy, and credibility of the ICC and risked its long-term institutional sustainability. It is important to couch the AU's problems with the ICC in its broader political context, which can be perspicuously linked to the significant compromise reached during the Rome Statute negotiations to provide the UNSC with referral and deferral powers under the Court's jurisdiction regime—an outcome that African states did not want. This particular compromise was an attempt to assuage the fears of powerful states by reinstating their power within the apparatus of the ICC, which has had a disproportionate impact on the AU and many African states and has insulated the permanent five members of the UNSC and their interests and/or allies all at the same time. AU opposition to this type of political posturing can be viewed as a counter to the dominant global order, which the ICC was intended to operate independently from.

8.3 Peace v. Justice and Head of State Immunity

The majority of African states (and the AU, formally the Organization of African Unity) were historically strong supporters of the ICC from the earliest stages of its development.²⁰ However, in 2008, the AU's Peace and Security Council issued a press

²⁰ See for example The African Commission on Human and Peoples' Rights, 24th Ordinary Session (22-31 October 1998), Banjul, The Gambia, 27 Resolution on the Ratification of the Treaty on the International Criminal Court, ACHPR/Res.27(XXIV) 98: "Calls on all States Parties to the African Charter on Human and Peoples' Rights to carry out all the appropriate constitutional procedures to sign and ratify the Rome treaty on the International Criminal Court."

release identifying concern over the indictment of al-Bashir, citing the problems it posed for the pursuit of peace and reconciliation, which were inherently prioritized over ‘strict’ legal justice.²¹ This is thematic; a resurrection of the ‘peace versus justice’ debate saturates the AU’s opposition calls towards ICC decision-making and operationalization processes, particularly those led by the Prosecutor at the time, Luis Moreno Ocampo. On a practical level, the AU postulates that indicting sitting heads of state has the ability to further compromise peace and security efforts. Instead, healing and reconciliation are prioritized above criminal accountability in delicate post-conflict or transitional societies, such as Darfur. Moreover, the argument that restorative or alternative transitional justice approaches have a greater suitability in African contexts is not an uncommon position, which the AU has expressly integrated in its opposition to al-Bashir’s indictment by the Court.²² It is relevant to point out that as a response to the arrest warrant, the African Union’s Peace and Security Council called for the establishment of an AU High-Level Panel on Darfur (AUPD), led by former South African President Thabo Mbeki (‘The Mbeki Panel’). The AUPD issued an in-depth report, enumerating how to achieve the

²¹ African Union Peace and Security Council, Comminiqué of 142nd meeting, 21 July 2008, PSC/MIN/2(CLI); see also African Union Peace and Security Council, Comminiqué of the 175th meeting, 5 March 2009, PSC/PR/Comm(CLXXV): “Council expresses deep concern over the decision taken by Pre-Trial Chamber I of the ICC on 4 March 2009, to issue an arrest warrant against the President of the Republic of the Sudan, Mr. Omar Hassan Al Bashir, for war crimes and crimes against humanity, and the far reaching consequences of this decision. Council notes with regret that this decision comes at a critical juncture in the process to promote lasting peace, reconciliation and democratic governance in the Sudan, and underlines that the search for justice should be pursued in a way that does not impede or jeopardize the promotion of peace.” Note that genocide was added to al-Bashir’s arrest warrant in 2010.

²² See generally Julena Jumbe Gabagambi, “A Comparative Analysis of Restorative Justice Practices in Africa,” *Globalex* (October 2018), available at https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html; accessed 4 January 2021: “The paper argues that restorative justice is a paradigm that was in use in Africa prior to the coming of colonialists and should be revived by African countries because it promotes healing and restores relationships between offenders, victims, and community much better than the western adversarial system... restorative justice can work much better in the 21st century in Africa than the court proceedings;” Fainos Mangena, “Restorative justice’s deep roots in Africa,” *South African Journal of Philosophy* 34.1 (2015): 1-12; Brian Kagoro, “The paradox of alien knowledge, narrative and praxis: transitional justice and the politics of agenda setting in Africa,” in *Where Law Meets Reality*, eds. Moses Chrispus Okello, Chris Dolan, Undine Whande, Nokukhanya Mncwabe, Levis Onegi and Stephen Oola (Cape Town: Pambazuka Press, 2012), 8: “It is fair to surmise that African victims of crimes against humanity, gross human rights violations, war crimes and genocide are trapped between inadequate local remedies and expensive, highly politicised, ineffective, remote and relatively low-impact international criminal justice options... local activists vest their hopes in an international system whose ethos has historically been imbued with self-interest and bigotry, heavy handedness and short-term objectives.”

interrelated goals of “accountability and fighting impunity, on the one hand, and reconciliation and healing, on the other” in Darfur.²³ The report proposed that an integrated justice and reconciliation process would be the best pathway to address the conflict in Darfur. It called for national criminal justice processes; a hybrid criminal tribunal to address those bearing the most responsibility for atrocity crimes in Darfur; reconciliation and truth-telling mechanisms; traditional justice mechanisms to deal with appropriate crimes; and compensation programs for victims.²⁴ It is interesting to note that AUPD determined that “Criminal justice will be a significant, though not sufficient, pillar in the justice and reconciliation framework for Darfur.”²⁵ The recommendation to employ national and hybrid court systems effectively limits the potential role of the ICC, and places an emphasis on local capacity building efforts. The establishment of the Mbeki Panel iterates AU commitment to achieving peace and stability in Darfur from an Afro-centric point of view, with a broad(er) lens than strict mechanisms of international criminal justice— but not to their exclusion.

Indeed, the UNSC was similarly aware of the need to approach justice in Darfur holistically and not rely solely on the ICC. To this point, Security Council Resolution 1593 expressly stated that:

The Security Council,

Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),
 Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect...

5. Also emphasizes the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to

²³ African Union Peace and Security Council, 207th Meeting at the Level of the Heads of State and Government, *Report of the African Union High-Level Panel on Darfur (AUPD) The Quest for Peace, Justice and Reconciliation* (20 October 2009), PSC/AHG/2(CCVII).

²⁴ *Ibid.*, 86-87.

²⁵ *Ibid.*, 87.

complement judicial processes and thereby reinforce the effects to restore long-lasting peace, with African Union and international support as necessary.²⁶

It is on this basis that the AU requested the UNSC to use its deferral powers under Article 16 of the Rome Statute to suspend ICC proceedings against then President Omar al-Bashir, due to the ongoing peace process in Sudan.²⁷ Even though the preamble of Resolution 1593 makes explicit mention of this deferral power, the UNSC ignored the AU's request, which further damaged AU-ICC relations and perceptions of institutional credibility. Demonstrating this point, Ghana's Foreign Minister at the time, Alhaji Muhammad Mumuni explained, "the AU actually addressed a resolution to the Security Council asking... to defer the warrant [against al-Bashir] for one year, and it was virtually ignored. That we thought was a slap. We thought that as Africans, and having a clear understanding and clear interest in the interest of peace in the Sudan and in Darfur, we thought that was a matter (where) the Security Council should have listened to Africa, at the very minimum."²⁸ The AU was not alone in its concern over the potentially destabilizing effects of indicting al-Bashir. It has been explained that "US diplomats in the Hague described the prosecutor's coming move against Bashir as 'a high stakes gamble— not only for the ICC but for global politics.'"²⁹ Furthermore, "Chinese and Russian diplomats warned that the prosecutor's move could threaten the fragile progress

²⁶ United Nations Security Council, Resolution 1593 (31 March 2005), UN Doc. S/RES/1593 available at <https://www.icc-cpi.int/nr/rdonlyres/85febd1a-29f8-4ec4-9566-48edf55cc587/283244/n0529273.pdf>; accessed 10 January 2021.

²⁷ Note that the UNSC reserves referral and deferral powers with respect to the ICC under Article 16 of the Rome Statute for a renewable period of twelve months. The UNSC has used its deferral powers to prevent the ICC from starting an investigation or prosecution regarding UN peacekeeping personnel in Bosnia but has never responded to the requests of the African Union to defer ICC proceedings in either Sudan or Kenya. See specifically African Union Assembly, 12th Ordinary Session, *Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan*, AU Assembly Doc. Dec.22(XII), 1-2 February 2009, 3. Note also that the United Nations and the African Union worked to help facilitate peace processes and diplomatic solutions to the conflict in Darfur. The processes involved al-Bashir and senior officials in Khartoum, and leaders of the numerous rebel groups, which took a significant amount of detailed coordination to achieve, see generally United States Institute of Peace, USIPeace Briefing "Negotiating Peace in Darfur," (January 2008), available at <https://www.usip.org/publications/2008/01/negotiating-peace-darfur>; accessed 3 January 2021.

²⁸ "AU votes against cooperating with ICC arrest warrant for Bashir," *France 24* (7 March 2009), available at <https://www.france24.com/en/20090703-au-votes-against-cooperating-with-icc-arrest-warrant-bashir->; accessed 5 January 2021.

²⁹ David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2004), 144.

in Darfur... they argued that the prosecutor was interfering recklessly with the diplomatic process.”³⁰ Thus, the far-reaching consequences of prosecuting the sitting head of state in Sudan was a concern for many in Africa and elsewhere. The United States, China, and/or Russia did not utilize UNSC powers to stop the indictment of al-Bashir through an ICC deferral. Consequentially, the prosecutorial strategy to indict al-Bashir and the related political inaction on the part of the UNSC to stop it singlehandedly led to the fallout of the relationship between the AU and the ICC.

However, since he was overthrown by military coup on 11 April 2019, the possibility of al-Bashir being prosecuted at the ICC has been revived. He is accused of committing genocide, war crimes, and crimes against humanity in Darfur from 2003 to 2008. However, the ability of the Prosecutor to build a strong enough case to secure a conviction (particularly for the genocide charge) has been called into question.³¹ This raises doubts about the appropriateness of the initial indictment, particularly if the evidence was weak and/or insufficient to substantiate the charges brought against him. This concern is substantiated by the fact that former Chief Prosecutor Ocampo had to appeal the decision of the Pre-Trial Chamber to omit the genocide charge saying that the standard applied was *too high*.³² The Appeals Chamber allowed the inclusion of the genocide charge on al-Bashir’s arrest warrant, though concerns about its viability at trial based on the evidence remain high.³³ While it is undeniable that horrific violations of international criminal law occurred in Darfur, the necessary question is whether or not al-Bashir can be held criminally responsible for those crimes and/or whether it would have

³⁰ Ibid., 145.

³¹ Alex de Waal, “Omar al-Bashir: Will genocide charge against Sudan’s ex-president stick,” *BBC News* (14 February 2020), available at <https://www.bbc.com/news/51489802>; accessed 2 January 2021. With respect to the initial charges filed by former Prosecutor Luis Moreno Ocampo, it was said that “some Sudanese wryly comment that Mr. Ocampo had charged Bashir with the only crime he had not actually committed [genocide].” It is also argued that “The current prosecutor... will need substantially to improve on her predecessor’s performance if the charges, especially on genocide, are to go forward...A few years ago it put its Darfur investigations on ice, expecting no progress. The ICC is not ready for Bashir yet.”

³² See ICC Press Release, “Pre-Trial Chamber I issues a second warrant of arrest against Omar Al Bashir for counts of genocide,” (12 July 2010), available at <https://www.icc-cpi.int/pages/item.aspx?name=pr557>; accessed 5 January 2021.

³³ “Judges allow genocide charge against Sudanese leader,” *CNN* (3 February 2010), available at <http://www.cnn.com/2010/WORLD/africa/02/03/sudan.bashir.genocide/index.html>; accessed 2 January 2021: “Even if genocide is added to the arrest warrant, Moreno-Ocampo still faces a challenge in proving the charges at trial, said Mark Ellis, the executive director of the International Bar Association.”

been appropriate to remove him from office to stand trial at the ICC when the Prosecutor had limited evidence to substantiate the charges brought against him.³⁴

In the aftermath of the acquittal of former Vice-President of the Central African Republic, Jean-Pierre Bemba by the ICC Appeals Chamber, and the acquittal of former President of Côte d'Ivoire, Laurent Gbagbo by the Trial Chamber, it is clear that the standard of proof at the ICC is high for former government leaders, as it should be for all defendants. In this vein, it would be devastating for the ICC and the victims in Sudan seeking criminal accountability to finally get al-Bashir in custody, only to see him be acquitted due to a lack of evidence. This example also illuminates that the incoming Prosecutor is at the behest of the strategy taken by Ocampo with respect to the charges against al-Bashir and will similarly be dependent on the investigation materials obtained by Ocampo and Bensouda in building the most high-stakes case in the history of the Court. These difficulties should be taken very seriously; ICC prosecution of al-Bashir should be compartmentalized as but *one* remedial approach to justice for the victims in Darfur—not the only one. This point was emphasized by the UNSC in its initial referral, and by the AU throughout the Court's involvement in the situation in Darfur, for good and important reasons.

Notwithstanding this, the al-Bashir example effectively demonstrates that in a protectionist fashion, African political leaders and the African Union as a collective are largely opposed to the indictment of sitting heads of state, and that once a leader is removed from power, justice becomes reprioritized. Indeed, since being overthrown, al-Bashir has become 'available' for justice: the Sudanese government has tacitly agreed to his transfer to the ICC, or least of all to accept assistance from the ICC to prosecute him in a national or hybrid court.³⁵ States in Africa and elsewhere no longer have to choose

³⁴ Phil Clark, *Distant Justice*, 273: "the ICC's investigations in Darfur highlight that, even when the Security Council refers a situation, the Court depends heavily on cooperation by the state in which crimes were allegedly committed. From the outset, Bashir's government barred ICC investigators from gathering on-the-ground evidence and refused any form of cooperation with the Court."

³⁵ Omar al-Bashir: Sudan agrees ex-president must face ICC, *BBC News* (11 February 2020), available at <https://www.bbc.com/news/world-africa-51462613>; accessed 1 January 2021; Mark Kersten, "The ICC Inches Closer to Bashir Prosecution as Sudan and Israel Normalize Relations," *Justice in Conflict* (28 October 2020) blogpost available at <https://justiceinconflict.org/2020/10/28/the-icc-inches-closer-to-bashir-prosecution-as-sudan-and-israel-normalize-relations/>; accessed 1 January 2021.

whether to prioritize justice above regional political obligations and interests, including the inevitably destabilizing consequences of inciting regime change (or least of all, a power vacuum) by arresting a sitting head of state.³⁶ In the case of al-Bashir, Sudanese civilian protests led to the military coup that removed him from power—not the ICC, UNSC, or any other state.

While this demonstrates the ICC’s utter dependence on the voluntary cooperation of states to operate effectively, it also raises questions about the significance of local agency when triggering justice processes altogether, and perhaps more importantly, its longer-term impact(s) on peace and stability in post-conflict and transitional societies such as Sudan.³⁷ Importantly, criminal accountability at the ICC has been emphasized as a priority by the military junta governing Sudan. More specifically, Mohammed Hassan al-Taishi, member of the ruling Sovereign Council said that “the ICC would be among the four mechanisms for transitional justice in Darfur, which will also include a special criminal court and truth and reconciliation in Sudan... everyone who had arrest warrants issued against them will appear before the ICC.”³⁸ This indicates that the form of justice championed by the ICC still matters, thereby strengthening the international criminal justice regime and the accountability norm, more broadly. Karen Allen from the Institute of Security Studies has described the potential indictment of al-Bashir as a “delicate balancing act between politics and the law” while reiterating that there is in fact a “global appetite for individual responsibility.”³⁹ The legal maxim ‘justice delayed is justice denied’ is relevant in the al-Bashir case, though it is also important to acknowledge that ‘something is better than nothing;’ it seems that the remedy, either symbolic or material, provided by a potential ICC conviction against al-Bashir is still significant over a decade

³⁶ The Libyan example serves well to demonstrate the complexities of removing a leader without demonstrative plans to rebuild society. This raises deeper, fundamental questions about the role of the ICC in the conflict/post-conflict and/or transitional contexts in which it operates.

³⁷ See generally Phil Clark, *Distant Justice*.

³⁸ “Sudan Opens Door for ICC Prosecutions: Ex-President Bashir May Finally Face Trial for Alleged Darfur Crimes,” *Human Rights Watch* (12 February 2020), available at <https://www.hrw.org/news/2020/02/12/sudan-opens-door-icc-prosecutions#>; accessed 2 January 2021.

³⁹ Karen Allen, “Will Omar al-Bashir and the ICC meet at last?” *ISS Today* (21 February 2020), available at <https://issafrica.org/iss-today/will-omar-al-bashir-and-the-icc-meet-at-last>; accessed 4 January 2021. Note that political reasons for the new transitional government’s willingness to engage with the ICC include its desire to see Sudan removed from the United States sanctions list and/or to pacify armed factions within Darfur.

after the initial arrest warrants against him were issued. The transitional military government will necessarily seek justification from the international community, the AU, and other African states for pushing al-Bashir out of power. In this sense, the ICC is exposed to instrumentalization for political purposes, which will nevertheless concurrently strengthen the international criminal justice norm as a result.

8.4 Framing the fallout of AU-ICC relations *vis-à-vis* al-Bashir

When the UNSC referred the situation in Darfur to the ICC, eleven states on the Security Council voted in favour, none voted against, and four states, Algeria, Brazil, China, and the United States, abstained.⁴⁰ It is perhaps relevant to note that aside from Algeria, African non-permanent members of the UNSC at the time included Benin and Tanzania, both of which voted in favour of the referral. Consequently, the Prosecutor began investigating the situation in Darfur. The Pre-Trial Chamber ultimately issued arrest warrants for seven suspects, including al-Bashir, beginning in 2007. Al-Bashir was indicted first in 2009 for war crimes and crimes against humanity, and second in 2010 for genocide. The genocide charge was included once Prosecutor Moreno Ocampo was able to provide the necessary evidence to charge al-Bashir with genocide, which was denied at the initial indictment by the Pre-Trial Chamber due to a lack of evidence.

On this basis, tensions between the AU and the ICC can be traced back to 2008 when it became clear that the ICC Prosecutor intended to indict al-Bashir. At that time, the AU's Peace and Security Council identified a 'double standard' with respect to international justice and emphasized the "AU's concern with the misuse of indictments against African leaders."⁴¹ The centrality of Africa in the operationalization of the ICC in every situation at that time led to assertions by some African politicians of selectivity, neo-colonialism, 'white justice,' and reference to the ICC as the 'African Criminal

⁴⁰ Security Council, 5158th Meeting, *UNSC Resolution 1593 (2005)*, SC/8531, 31 March 2005.

⁴¹ African Union, Peace and Security Council, 141st Meeting (11 July 2008), Addis Ababa, Ethiopia, PSC/PR/BR(CXLI).

Court.’⁴² This anti-ICC rhetoric has had a significant impact on African states and the AU’s identity, interests, and behaviour, which have shaped interactions with the Court to varying degrees ever since. The ICC and the UNSC’s flippant attitude towards the concerns raised by the AU and avenues for remedy further escalated feelings of mistrust throughout much of the Court’s operational history.

Further compounding criticisms of institutional selectivity, the ICC did not extend its reach into situations outside of Africa until 2016. At the time of writing, the Court’s hyper-focus on ‘Africa’ was still visible: ten out of thirteen situations under investigation at the ICC involved African states.⁴³ This reality has been matched with an institutional unwillingness to consider the AU’s position on key issues (i.e. head of state immunity and UNSC capability to refer and defer cases in sensitive and complex conflict and post-conflict contexts). Resultantly, the Court, the Assembly of States Parties (ASP), and the UNSC manifestly failed to mitigate the escalation of AU concerns, which fostered a culture and policy of non-cooperation with the ICC on the part of the AU for the arrest and surrender of al-Bashir to the Court.⁴⁴ Specifically, at the 13th AU Summit it was 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... for the arrest and surrender of President Omar El [*sic*] Bashir of The Sudan.”⁴⁵ It is interesting to note that Chad issued

⁴² Jean-Baptiste Vilmer, “The African Union and the International Criminal Court: counteracting the crisis,” *International Affairs* 92.6 (2016), 1319-1320.

⁴³ The situations under investigation in Africa included Burundi, Central African Republic, Central African Republic II, Democratic Republic of the Congo, Kenya, Libya, Mali, Sudan, and Uganda. The situations under investigation by the ICC outside of Africa included Afghanistan, Bangladesh/Myanmar, and Georgia.

⁴⁴ Note that the Assembly of States Parties is the management and legislative body of the ICC. Regarding institutional failure to mitigate AU concerns, see for example Charles Chernor Jalloh, Dapo Akande, and Max du Plessis, “Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court,” *African Journal of Legal Studies* 4 (2011), 5: “The UNSC’s failure to accede to the AU request [to defer the case against President Omar al-Bashir] led African States to formally withhold cooperation from the ICC in respect to the arrest and surrender of the Sudanese leader.” See, also: Adil Ahmad Haque, “Head of State Immunity is Too Important for the International Court of Justice,” *Just Security* (24 February 2020) blogpost available at <https://www.justsecurity.org/68801/head-of-state-immunity-is-too-important-for-the-international-court-of-justice/>; accessed 1 January 2021: the author observes that the legal inconsistencies regarding head of state immunity could have been resolved by the International Law Commission, the United Nations General Assembly, the United Nations Security Council, and/or the Assembly of States Parties, but was not.

⁴⁵ African Union Assembly, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, 1-3 July 2009, Assembly/AU/Dec.245(XIII), July 3, para. 10.

a formal reservation to this decision, demonstrating that it was adopted with some level of opposition from AU-ICC member states.

Nevertheless, all of the African States Parties to the Rome Statute are also members of the AU, which effectively created a political climate of conflicting and overlapping mandates and obligations. African States Parties to the Rome Statute had to choose whether to uphold obligations to the AU or to the ICC regarding the arrest and surrender of Omar al-Bashir. This dualism ultimately led to increased AU pushback against the Court, first as a response to the Kenyan suggestion that African states should collectively withdraw from the ICC in 2013, and again in the form of its ‘ICC withdrawal strategy’ document in 2017.⁴⁶

Ultimately, Kenya, Namibia, and Uganda, threatened to withdraw, but never did.⁴⁷ Burundi, The Gambia, and South Africa filed written notices of withdrawal from the Rome Statute, though The Gambia and South Africa withdrew their notifications and remained States Parties. Burundi did leave the Court, though this behaviour is readily explained by the fact that the prosecutor opened an investigation *proprio motu* in response to alleged crimes against humanity perpetrated in the context of political (election) violence, and withdrawal from the ICC has been understood as an attempt to skirt accountability for those crimes.⁴⁸ Indeed, collective African withdrawal from the Court did not happen, though AU frustrations with the operationalization of the ICC in its pursuit of al-Bashir (and other African sitting heads of state) remained visible.

⁴⁶ African Union, “Withdrawal Strategy Document: Draft 2,” (2017) available at https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf; accessed 3 January 2021.

⁴⁷ Philomena Apiko and Faten Aggad, “The International Criminal Court, Africa and the African Union: What way forward?” *European Centre for Development Policy Management*, Discussion Paper 201 (November 2016), 1.

⁴⁸ See generally Refik Hodzic, “Burundi’s Vote to Leave ICC is Ill-Conceived and Sets Dangerous Precedent, Says ICTJ,” *ICTJ* (13 October 2016), available at <https://www.ictj.org/news/burundi-icc-leave>; accessed 5 January 2021: “The Burundi government has done a great disservice to its citizens, especially victims, by adopting this decision which uses false accusations of the court’s ‘anti-African’ bias to avoid the possibility of justice being done.” See also Benjamin Duerr, “Burundi’s ICC Withdrawal a Major Blow for Accountability,” *Global Observatory* (12 October 2016) available at <https://theglobalobservatory.org/2016/10/burundi-icc-rome-statute-nkurunziza/>; accessed 5 January 2021: “Nkurunziza’s government has a clear intention of avoiding accountability for its actions.”

Within the AU, those initially opposed to the ICC largely came from East African states (Ethiopia, Kenya, Rwanda, Sudan, and Uganda). However, AU Assembly Chairperson Ethiopian Prime Minister Hailemariam Desalegn stated in 2013 that “it should be underscored that our goal is not and should not be a crusade against the ICC, but a solemn call for the organization to take Africa’s concerns seriously.”⁴⁹ This underscores the divisions within the AU with respect to the ICC—not all African states support the idea that they ought to abandon the ICC altogether and the real objective is to achieve genuine dialogue and constructive reform.

Desalegn also claimed that the ICC was “degenerat[ing] into some kind of race hunting.”⁵⁰ This type of rhetoric has infiltrated the backdrop upon which AU-ICC relations operate. This also reflects the competing identities and norms at play on the continent. There is a desire not to completely reject the ICC, while at the same time reiterating strategically charged political rhetoric stemming from influential states within the AU. This is compounded by the lack of meaningful dialogue between the ICC and the AU, and the inherent distrust of the AU in general. These biases are significant because their internalization had the dual impact of shaping state (and regional) identity and perpetuated constructions of an ‘us versus them’ approach to ICC-AU relations at both the organizational and institutional levels. The AU has engaged in a two-level game whereby it has openly criticized the ICC while simultaneously seeking avenues for mediation. In many respects, South Africa’s withdrawal was a useful experiment for the rest of the continent to evaluate the reputational consequences that would stem from leaving the Court. Indeed, South Africa faced significant reputational costs associated with its decision to withdraw, which offers some explanatory value as to why other African countries decided to remain States Parties.⁵¹

⁴⁹ Voice of America, “AU Requests Kenyatta ICC Trial Delay,” available online <https://www.voanews.com/africa/au-requests-kenyatta-icc-trial-delay> (accessed 10 April 2021).

⁵⁰ Manuel J. Ventura and Amelia J. Bleeker, “Universal Jurisdiction, African Perceptions of the International Criminal Court and the New AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,” in *The International Criminal Court and Africa: One Decade On*, ed. Evelyn A. Ankumah (Cambridge: Intersentia, 2016), 442.

⁵¹ See for example: Saul Musker, “Why South Africa is wrong to leave the international criminal court,” *The Guardian* (14 October 2015) available at <https://www.theguardian.com/world/2015/oct/14/why-south-africa-is-wrong-to-leave-the-international-criminal-court>; accessed 10 January 2021: “Should the country

Notwithstanding this, calls for the ICC to take African concerns seriously permeate the AU discourse. Moreover, attempts by the AU to facilitate communicative diplomacy through the UNSC with respect to ICC cases concerning sitting heads of state, particularly in the case of al-Bashir is worth noting in this respect. Morally charged judgments aside, the AU had clearly formulated objections to the ICC's conduct on the continent and the failure to engage in meaningful dialogue with respect to these points allowed the AU to take a step away from the institution and provide its membership with politically instrumental insulation and solidarity. Pitted against the idea that there needs to be 'African solutions to African problems' coupled with constructions of identity that reinforce an 'us versus the West' power structure within the AU, isolationist movements by African states may be better understood. It is also necessary to acknowledge the longstanding tradition of brotherhood and protectionism afforded to African leaders by the AU and the related reluctance to censure a sitting head of state, no matter how untoward their domestic politics may be.⁵² This reality similarly informs constructions of identity, both inside and outside of the AU.

It is clear that African states chose to uphold regional political obligations over international ones, since al-Bashir was never arrested, even when he travelled to ICC member states throughout the continent, including Chad, Djibouti, Kenya, Malawi, South Africa, and Uganda. African interests and the AU legacy of brotherhood among government leaders prevented the effective operationalization of the Rome Statute and al-Bashir's arrest at various junctures between the years 2009-2019. However, despite the

withdraw, a mass exodus of African states will likely follow and the foundations of the court will crumble. Not only will this set back the pursuit of meaningful international justice by decades, it will seriously tarnish South Africa's global reputation as a proponent of human rights and a moral authority in the world, significantly reducing its political capital. The country's prominence in a variety of international institutions relies on this reputation, as does its bid for permanent status at the UN security council."

⁵² Note that key examples of this tradition include the Organization of African Unity making Idi Amin Chair in the 1970s, despite knowledge that he was perpetrating atrocious crimes against his own citizens. Similarly, when Mugabe was under Western sanctions for election-based crimes he became the Chair of the AU. Other AU chairs include Muammar Gaddafi from February 2009-January 2010, which demonstrates that domestic human rights issues do not factor into the legacy of the AU power structure. See Elizabeth Ohene, "Letter from Africa: Has the African Union grown some teeth?" *BBC* (23 December 2015), available at <https://www.bbc.com/news/world-africa-35162455>; accessed 5 January 2021: "I gritted my teeth through sessions chaired by the Ugandan leader Idi Amin... I covered the OAU when the principle of non-interference in international affairs was sacrosanct and members would not condemn 'Brother Presidents,' no matter how badly they behaved towards their own citizens."

widespread regional culture of non-cooperation with the Court, dual AU-ICC member states chose to remain States Parties to the Rome Statute.

As a result, the AU began to soften its approach towards the Court in 2018, by seeking remedial strategies to resolve tensions and confusions, most notably through its request for an advisory opinion from the International Court of Justice on the issue of immunities for sitting heads of state, and the establishment of an expert working group on the same topic through the Assembly of States Parties to the Rome Statute (ASP). Similar efforts were initiated with respect to the UNSC's deferral powers: the AU proposed an amendment to the Rome Statute to empower the United Nations General Assembly to act if the UNSC fails to act on an ICC deferral request after six months. Thus, the AU has formalized its concerns and thought about potential avenues for remedy, rather than continuing to promote African abandonment of the ICC *en masse*. However, the political palatability and legal feasibility of African concerns and proposed solutions have failed to gain traction outside of the AU, which has resulted in a lack of genuine dialectical engagement within the institutional framework of the Court. Due to the long-term neglect of these concerns, the AU has reemphasized (more) local responses to international criminal justice—i.e. through the effective use of “national and continental judicial and legislative mechanisms to deal with impunity in order to ensure that justice is served in a fair manner.”⁵³ This includes expanding the mandate of regional justice mechanisms such as the African Court for Human and Peoples' Rights, to cover the same crimes as the Rome Statute: genocide, war crimes, crimes against humanity, and aggression—with the caveat that heads of state and senior government officials are immune from prosecution during their leadership. However, African commitment to establish an AU-backed, regional international criminal court has been weak, which suggests that capacity building at the local level and sustained commitment to the ICC remain paramount prerogatives for the longevity of international criminal justice mechanisms on the continent.

⁵³ African Union, 30th Ordinary Session of the Assembly, 28-29 January 2018, Addis Ababa, Ethiopia, *Decision on the International Criminal Court*, Assembly/AU/Dec.672, 3(ii).

8.5 Head of State Immunity and International Criminal Law: An overview

Since the indictment of al-Bashir, the judges at the ICC have manifestly failed to issue cogent decisions on the issue of head of state immunity.⁵⁴ As noted above, al-Bashir travelled to several States Parties on official business but was never arrested, which forced the Court to opine on issues of non-cooperation with respect to those states. The decisions reached by the Pre-Trial and Appeals Chambers on this issue have coalesced on the point that al-Bashir does not enjoy immunity from arrest, but the reasons for arriving at this conclusion have been inconsistent and subject to widespread criticism not only from the AU and relevant African states, but from the broad community of ICC scholars, observers, and stakeholders.⁵⁵ This suggests that the AU's points of concern were far

⁵⁴ See Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Al Ahmad Al Bashir, ICC-02/05-01/09-3 (4 March 2009); Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-140 (13 December 2011); Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195 (9 April 2014); Decision Under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ICC-02/05-01/09-302 (6 July 2017); Decision Under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ICC-02/05-01/09-309 (11 December 2017); Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02-05-01/09-397-Corr (6 May 2019).

⁵⁵ See ICC Press Release, "Al-Bashir Case: ICC Appeals Chamber confirms Jordan's non-cooperation but reverses the decision referring it to the ASP and UNSC," ICC-CPI-20190506-PR1452, 6 May 2019, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1452>; accessed 2 January 2021. For some examples of scholars and observers who have criticized the ICC's decision-making on Bashir's immunity, see Ben Batros, "A Confusing ICC Appeals Judgement on Head-of-State Immunity," *Just Security* (7 May 2019), blogpost available at <https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity/>; accessed 2 January 2021; Dapo Akande, "ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals," *EJIL:Talk!* (6 May 2019) blogpost available at <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/>; accessed 2 January 2021; Dapo Akande, "ICC Issues Detailed Decision on Bashir's Immunity (... At Long Last...) But Gets the Law Wrong," *EJIL:Talk!* (15 December 2011) blogpost available at <https://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir-s-immunity-at-long-last-but-gets-the-law-wrong/>; accessed 2 January 2021; William Schabas, "Obama, Medvedev and Hu Jintao may be Prosecuted by International Criminal Court, Pre-Trial Chamber Concludes," *PhD studies in human rights* (15 December 2011) blogpost available at <http://humanrightsdoctorate.blogspot.com/2011/12/obama-medvedev-and-hu-jintao-may-be.html>; accessed 2 January 2021; Dov Jacobs, "You have just entered Narnia: ICC Appeals Chamber adopts the worst possible solution on immunities in the Bashir case," *Spreading the Jam* (6 May 2019) blogpost available at <https://dovjacobs.com/2019/05/06/you-have-just->

from baseless with respect to the legal issues surrounding immunity, particularly as it applies to non-States Parties, as was the case with al-Bashir.

In the context of the ICC, the Rome Statute espouses an understanding of accountability whereby no-one is immune from prosecution for violations of the most serious international criminal crimes, namely: genocide, war crimes, crimes against humanity, and aggression. Specifically, article 27 of the Rome Statute deals with the irrelevance of official capacity and says,

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.⁵⁶

Prima facie, Article 27 is quite clear on the issue and thus, States Parties should understand their obligation to waive any immunities afforded to individuals in this respect. However, this inclusion is novel and contradictory to longstanding international legal doctrines that do afford immunities to sitting heads of state and high-ranking officials from criminal jurisdiction both domestically and in other states.⁵⁷ Taken further, Article 27 actually undercuts established standards of international law with respect to the absolute personal immunity afforded to heads of state, whether at home or in a foreign country on official business.⁵⁸ The jurisprudence provided by the International Court of

entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/; accessed 2 January 2021.

⁵⁶ *Rome Statute of the International Criminal Court*, A/CONF.183/9, (17 July 1998), Art. 27(1), (2).

⁵⁷ Roseanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press, 2008), 169.

⁵⁸ *Arrest Warrant of 11 April 2000, (Democratic Republic of Congo vs Belgium)*; 2002; ICJ: it was found that it is an established principle of international law that Heads of States and Governments, Foreign

Justice in the *Arrest Warrant Case* (2002) clearly established that senior government officials *do* have immunity from criminal jurisdiction under international law, if the arrest warrant is issued by a national court.⁵⁹ On this basis, Article 27 can readily be interpreted as a contradiction to longstanding standards of customary international law.

However, the idea that heads of state and government are *not* free from criminal responsibility can be framed as a developing legal concept. For example, the finding by the Special Court for Sierra Leone that Charles Taylor did not enjoy any immunity from prosecution even though he was the sitting head of state of Liberia at the time is the most relevant articulation of this idea. It has been explained that “this historic ruling by the Court is a significant contribution to the *modern* international law norm asserting that Heads of State and other high-ranking government officials are not absolved of criminal responsibility for serious international crimes.”⁶⁰ Nevertheless, there appears to be two fundamentally different understandings of the treatment of immunity at the national and international levels. The Special Court for Sierra Leone characterized these differences based on the fact that “the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.”⁶¹ This implies that international tribunals or courts have the ability to strip immunities that national courts cannot. However, all international courts and tribunals preceding the establishment of the ICC derived their mandates from the ideation and direct support of the United Nations. In contrast, the ICC is treaty-based and derives its mandate from the

Ministers and Diplomatic and Consular agents enjoy immunities from civil and criminal jurisdictions of other States.

⁵⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*. Note that this case involved the issuance of an international arrest warrant in absentia by Belgium against the incumbent Minister for Foreign Affairs of the Congo, alleging crimes against humanity. The arrest warrant was circulated through Interpol. The ICJ Judges determined that Belgium was required to cancel the arrest warrant because the suspect enjoyed immunity under international law as Minister for Foreign Affairs of the Democratic Republic of the Congo.

⁶⁰ Charles Jalloh, “Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone,” *The American Society of International Law* 8.2 (2004) [*emphasis added*]. Available at <https://www.asil.org/insights/volume/8/issue/21/immunity-prosecution-international-crimes-case-charles-taylor-special>; accessed 2 April 2021.

⁶¹ *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, 51.

consent of states, independent of the United Nations. The Rome Statute has not achieved universal ratification, which directly challenges the argument that the ICC derives its mandate from the ‘international community;’ rather, it appears to derive its mandate from the 123 states that have voluntarily agreed to be bound by it (64 per cent of all states, at the time of writing). The ICC is very much limited as a result of its dependence and preoccupation with the principle of sovereignty and the mixed political will of states to uphold the norms embedded in the Rome Statute.

On this basis, the juxtaposition of this reasoning in the context of the ICC is inherently problematic, since the ICC depends on the consent, membership, and cooperation of sovereign states in order to operate effectively. Therefore, it not only derives its mandate from the ‘international community,’ broadly understood, but more particularly from its member states (and perhaps non-member states) who feel compelled to cooperate to achieve particular judicial and/or political outcomes, which are fluid and can change over time. With the benefit of retrospect concerning the al-Bashir example, it is clear that the ‘modern’ norm is *not* upheld when it clashes with interests and objectives of states or regional organizations of states—in this case, the AU. Nevertheless, Charles Jalloh argued in 2003 that “the trend in the jurisprudence suggests that the scope of immunity is highly contested and will therefore continue to evolve.”⁶² At the time of writing, the scope of immunity is still contested and it is unclear that the evolution of the norm and/or the jurisprudence has clarified the matter in the interim, but instead complicated it further. While it is clear that providing immunity for heads of state and senior government officials who perpetrate the core crimes covered by the Rome Statute is ethically and morally obtuse, the legal reasoning required to settle the issue at the ICC has been unsatisfactory. In the absence of political will, the legal reasoning needs to fill in the gaps and compel states to uphold the Rome Statute, even if it runs counter to the political interests of its member and non-member states. The unwillingness of the UNSC to contribute to the Court’s overall effectiveness with tangible commitments is a contributing and limiting factor to this end.

⁶² Charles Jalloh, “Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone.”

Returning to the ideational foundation of the ICC, the contestation of immunity at the national and international levels was something that the drafters of the Rome Statute were very much aware of. It has been explained that “this slowly developing tendency in international law [the progressive agreement that heads of state and government were not free from criminal responsibility] has to be contrasted with domestic law where head of state immunity in international criminal proceedings still might be regarded up till today as absolute.”⁶³ Thus, Article 27 was met with the inclusion of Article 98, which was “accepted as political compromise.”⁶⁴ Article 98 deals with cooperation with respect to waiver of immunity and consent to surrender and says,

1. 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.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.⁶⁵

The interpretation and application of Article 98 as it relates to Article 27 has been highly contested by scholars, some African states, and extensively by the AU. It seems fair to suggest that there is a contradictory relationship between the two articles, especially in light of how observers of Rome Statute negotiations have described the origins of this particular statutory inclusion. On this basis, the relationship between the two articles is

⁶³ Claus Kreß and Kimberly Prost, “Article 98: Cooperation with respect to waiver of immunity and consent to surrender,” in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd edition, ed. Otto Triffterer (C.H. Beck, Hart, Nomos, 2008), 781.

⁶⁴ *Ibid.*

⁶⁵ Rome Statute of the International Criminal Court, Art. 98.

opaque and confused the obligations of states to either arrest al-Bashir or to uphold his immunity under customary international law.

It is also clear that questions regarding the interrelationship of Articles 27 and 98 have been highly contentious in the operationalization of the Court when it has pursued heads of state, particularly al-Bashir. Scholars such as Dapo Akande have argued that the Pre-Trial Chamber manifestly failed to consider Article 98 when issuing al-Bashir's Arrest Warrant. More specifically, Akande argued that "I continue to be astounded that the Pre-Trial Chamber in the Bashir Arrest Warrant failed to address [Article] 98, a provision directly applicable to the precise situation that was before them. This was nothing short of a dereliction of duty on the part of the judges. I really am hard pressed to think of a decision of an international tribunal where the tribunal simply ignores— does not even mention— what is perhaps the key provision which deals with the case at hand."⁶⁶ This omission at the earliest stages of the Court's pursuit of al-Bashir set the course for recurring judicial missteps and patterns of procedural deficiency.

States that allowed al-Bashir to visit but failed to arrest him have provided legal justifications for this behavior at the Court. For example, Malawi argued that it did not arrest al-Bashir because he was the head of a state not party to the Rome Statute, and therefore was immune from arrest under customary international law. However, the Pre-Trial Chamber decided that "customary international law creates an exception to Head of State immunity when *international courts* seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, Article 98(1) of the Statute does not apply."⁶⁷ Thus, Malawi failed to comply with its obligations to cooperate with the ICC because the nature of international courts provides an exception to the immunity of al-Bashir, which he might enjoy under national courts. This conclusion is relatively consistent with the reasoning in *Charles Taylor*. However, it

⁶⁶ Dapo Akande, "Is the Rift between Africa and the ICC Deepening? Heads of State Decide Not to Cooperate with ICC on the Bashir Case," *EJIL:Talk!* (4 July 2009) blogpost available at <https://www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/>; accessed 6 January 2021.

⁶⁷ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 (11 December 2011), p 43 [*emphasis added*].

is necessary to reiterate that the ICC is constituted by States, and not the ambiguously termed ‘international community’ since it is not sponsored or otherwise dependent on the United Nations. Even though UNSC Resolution 1593 obliged Sudan to ‘cooperate fully’ with the ICC, it never expressly imposed obligations onto any other state regarding cooperation, further blurring the line between national and international obligations with respect to non-States Parties. Compounding this confusion, the AU required its member states not to cooperate with the ICC in the arrest and surrender of al-Bashir, which effectively created the potential for trilateral conflicting obligations onto dual AU-ICC member states.⁶⁸

Nevertheless, the Pre-Trial Chamber also decided in *Malawi* that “there is an inherent tension between Articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State. The Chamber considers that Malawi, and by extension the African Union, are not entitled to rely on Article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests.”⁶⁹ The justification for the reasoning stemmed from the evolving trend that head of state immunity no longer exists in the Post Second World War era, amounting to customary international law. This reasoning was repeated in the judgment involving the non-cooperation of Chad, another States Party to the Rome Statute that failed to arrest al-Bashir when he was on its territory.⁷⁰ On this basis, it has been argued by Dire Tladi that “the Court proceeded to decide the cases as if Article 98 was not included in the Statute.”⁷¹ This was picked up by the AU Commission, which stated that the decision has the effect of “rendering Article 98 of the Rome Statute redundant, non-operational and meaningless.”⁷² This is a highly contested issue among international legal scholars

⁶⁸ African Union Assembly, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court*, Assembly/AU/Dec.245 (XIII), 3 July 2009: This decision expressly required AU member states not to cooperate with the ICC relating to immunities for the arrest and surrender of President [al- Bashir] of Sudan.

⁶⁹ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 (11 December 2011).

⁷⁰ Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, (13 December 2011).

⁷¹ Dire Tladi, “The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98,” *Journal of International Criminal Justice* 11.1 (2013): 199.

⁷² African Union Commission Press Release No. 002/201 (9 January 2012).

and commentators.⁷³ Inasmuch as the origins of Article 98 can be traced back to political compromise as a counter to the inclusion of Article 27 in Rome, the position that a conflict between the two articles does not exist is ostensibly weak. The more palpable argument is that there is a contradictory relationship between Articles 27 and 98 as a result of political compromise in Rome, which has not been dealt with sufficiently by the Court, demonstrated by inconsistent reasoning on the issue. Moral and political imperatives aside, the ICC needs to establish a sound legal position on the question, or else be exposed to ongoing scrutiny. This lack of consistency has exacerbated tensions with the AU, further contributing to AU discontent and pushback towards the Court. With reference to the previous chapters, it is clear that African states wanted to avoid the potential for these sorts of political conflicts at the ICC from the outset of its institutional design. Thus, this is a direct reflection of the concerns raised by African states at the Rome Diplomatic Conference with respect to the politicization of the ICC and the involvement of the United Nations Security Council in the function of the Court.

This point was further aggravated by the fact that the Pre-Trial Chamber abandoned its reasoning in *Malawi* and *Chad* when it advanced a new decision that the Security Council referral itself implicitly waived al-Bashir's immunity by referring the situation in Darfur to the ICC and requiring Sudan to 'cooperate fully' with the Court.⁷⁴ This approach has been colloquially referred to as the 'Security Council route.' In the *Democratic Republic of the Congo Decision*, the Pre-Trial Chamber held that because the situation was referred to the ICC via Security Council Resolution 1593, this "implicitly waived the immunities granted to Omar al-Bashir under international law and attached to his position as a Head of State."⁷⁵ Three years later in the *South Africa Decision*, the Pre-

⁷³ Jens Iverson, "Head of State Immunity is not the same as State Immunity: A Response to the African Union's Position on Article 98 of the ICC Statute" *EJIL Analysis* (13 February 2012), available at <http://www.ejiltalk.org/head-of-state-immunity-is-not-the-same-as-state-immunity-a-response-to-the-african-unions-position-on-article-98-of-the-icc-statute/>; accessed 3 January 2021; for an example of an argument that al-Bashir *did* enjoy immunity from arrest see Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest?" *Journal of International Criminal Justice* 7.2 (2009): 315-332.

⁷⁴ *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*, ICC-02/05-01/09-195 (9 April 2014).

⁷⁵ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ICC-02/05-01/09-195 (9 April 2014), 29.

Trial Chamber adopted another position and decided that the very nature of the UNSC referral made Sudan analogous to a States Party of the Rome Statute, and therefore al-Bashir's immunity was waived under Article 27.⁷⁶ While each of these approaches arrive at the same conclusion, i.e. that al-Bashir does not have immunity, the pathways taken to get there have been wholly inconsistent.

In his minority opinions in *South Africa* and *Jordan*, Judge Marc Perrin de Brichambaut offered yet another judicial avenue to lift al-Bashir's immunity. He opined that immunity is lifted when al-Bashir visits states that have ratified the Genocide Convention, since he was a person being charged with the crime of genocide. This approach has been subject to scrutiny for a host of reasons, most crippling of which is the point that the Court's ability to exercise its own jurisdiction would be dependent upon the ratification of other treaties by States Parties, compromising the institutional dependence of the Court.⁷⁷ It is perhaps instructive to recall the uncertainty surrounding the genocide charge against al-Bashir in the first place. To this point, the International Commission of Inquiry on Darfur that recommended the situation be referred to the ICC in 2005 determined that genocide had not been committed in Darfur. More specifically,

The Commission concluded that the Government of Sudan has *not* pursued a policy of genocide... The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken in any way as detracting from the gravity of the crimes perpetrated in the region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.⁷⁸

With this finding in mind, it is prudent to question if it is appropriate to strip immunity on the basis of a charge that might not stick or is reflective of an overzealous prosecutorial

⁷⁶ *Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*, ICC-02/05-01/09, 6 July 2017.

⁷⁷ Leila Sadat, "Why the ICC's Judgment in the al-Bashir Case Wasn't So Surprising," *Just Security* (12 July 2019) blogpost available at <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/>; accessed 5 January 2021.

⁷⁸ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (Geneva: 25 January 2005), 4 [*emphasis added*].

strategy. This is supported by the fact that the genocide charge against al-Bashir was initially rejected in 2009 because the prosecutor failed to adequately establish that al-Bashir acted with genocidal intent. However, the Appeals Chamber relaxed the standard of proof required at the charging stage and thus, genocide was included in a second arrest warrant in 2010. Nevertheless, it is clear that the prosecutor has a significant amount of work to do before trial to substantiate the genocide charge. On this basis, using the genocide charge as a modicum for stripping al-Bashir's immunity is a bad idea optically, politically, and legally. This is significant because it undermines the authority of the Court altogether, and rests authority on unsubstantiated allegations, which may or may not result in a guilty verdict.

However, the most important aspect of Judge Brichambaut's minority opinion in *Jordan* was the point that "the issue of Omar Al-Bashir's immunity... has given rise to different legal positions in the decisions of this Court. It is therefore of the utmost importance and urgency that the Court take a clear stance on the legal issues bearing on the obligation of States Parties to cooperate with the Court in the arrest and surrender of Omar Al-Bashir."⁷⁹ This plea demonstrates the seriousness of the issue and the unpredictability of the judiciary at the same time. As Dire Tladi has explained, "The ICC has essentially adopted an *à la carte* approach to the applicability of immunities in the Rome Statute system, in which any approach in a wide selection of options is acceptable as long as the option leads to the conclusion that *Al Bashir* must be arrested and surrendered."⁸⁰ From a political standpoint, such inconsistent decision-making obfuscates the obligations of states, and compromises the development of the norm that heads of state and other senior government officials do not enjoy immunity from prosecution for atrocity crimes.

It is certain that the most significant problem emanating from the Court's decisions with respect to al-Bashir's immunity is the lack of judicial consistency. While the overall sentiment at the Court is that the immunity of al-Bashir is uncontentious and

⁷⁹ *Minority Opinion of Judge Marc Perrin de Brichambaut*, ICC-02/05-01/09-319-Anx (21 February 2018), 4 (7).

⁸⁰ Dire Tladi, "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited," *German Yearbook of International Law*, 60 (2017): 65.

non-existent, legally and politically there has been no cogent justification for saying so beyond moral imperative, which is nonetheless important from an ethical standpoint, but not a legal one. Indeed, it has been argued that the “reversal of the Malawi and Chad decisions demonstrates the continuing uncertainty about this complex issue. As things stand, not only States and commentators but also different Chambers disagree about the correct interpretation of Article 98(1) in relation to Article 27(2), customary international law, and Resolution 1593.”⁸¹ At the Appeals Chamber in the *Jordan Decision*, the Court attempted to bridge two approaches when it decided that there is no immunity for heads of state in international criminal courts exercising proper jurisdiction, and also finding that the Security Council referral required Sudan to ‘cooperate fully’ with the ICC, meaning that UNSC Resolution 1593 made Sudan a *de facto* States Party to the Rome Statute, and implicitly removed al-Bashir’s immunities under Article 27 as a result. This decision has similarly been met with disappointment and skepticism.⁸² From a political standpoint, further engraining the powers of the UNSC within the jurisdictional apparatus of the Court to strip immunity for heads of states of non-States Parties only contributes to perceptions of unfairness and renders the Court practically dependent on the UNSC, as opposed to its own independent authority. Resolution 1593 requires Sudan to ‘cooperate fully’ with the Court but does not mention whether or not it is subject to the Rome Statute as if it were a States Party, nor does it explicitly address the issue of immunity in its

⁸¹ André de Hoogh and Abel Knottnerus, “ICC Issues New Decision on Al-Bashir’s Immunities – But Gets the Law Wrong... Again,” *EJIL: Talk!* (18 April 2014), blogpost available at <http://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities—but-gets-the-law-wrong-again/>; accessed 3 January 2021.

⁸² Dapo Akande, “ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals,” *EJIL: Talk!* (6 May 2019) blogpost available at <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/>; accessed 3 January 2021: “the Appeals Chamber, once again changes the basis on which the ICC has held that the Sudanese (now former) President was not immune from the arrest in ICC states parties that he visited... Indeed the Appeals Chamber appears to explicitly endorse the much criticized decision of the Pre-Trial Chamber I in the *Malawi Decision*,” Asad Kiyani, “Elisions and Omissions: Questioning the ICC’s Latest Bashir Immunity Ruling,” *Just Security* (8 May 2019), blogpost available at <https://www.justsecurity.org/63973/elisions-and-omissions-questioning-the-iccs-latest-bashir-immunity-ruling/>; accessed 3 January 2021: “In this confusing and at times apparently contradictory decision, the Appeals Chamber offers arguments that rest on contestable foundations, in part because of its questionable interpretations of or indifference to unfavorable evidence... In a case that demanded careful reasoning, the Chamber’s arguments unfortunately stretch its credibility by either leaving important questions unanswered, omitting relevant detail, or veering into the disingenuous.”

original resolution or another to clarify the issue.⁸³ Reading in these authoritative presumptions was both legally dubious and politically unwise, especially from the perspective of the AU and some African states.

The UNSC has made no attempt to clarify the role of immunities in Resolution 1593. From a practical standpoint, the UNSC appears to be completely disengaged from the Court and its correlative powers emanating from Resolution 1593. It has been noted by the Pre-Trial Chamber that “the past 24 meetings of the Security Council of the United Nations following the adoption of Resolution 1593 (2005), including meetings held on the occasion of the biannual reports made by the Prosecutor to the Security Council of the United Nations, have not resulted in measures against States Parties that have failed to comply with their obligations to cooperate with the Court.”⁸⁴ This suggests that the UNSC as a collective political body does not feel strongly about States Parties choosing not to arrest al-Bashir. Permanent five members China and Russia have expressly sided with the African Union and the Government of Sudan on this issue.⁸⁵ This sends a message that informs the predictability of state behavior and tacitly suggests that there was no political obligation to arrest and surrender al-Bashir to the Court. In the absence of heavy political consequences for noncooperation by the UNSC, choosing AU and/or regional interests over and above the ICC appears rational, since the reputational damage incurred by noncompliance with the Court was relatively inconsequential.

⁸³ Alexandre Skander Galand, “Why the Security Council Should Not be Involved Regarding Al-Bashir’s Immunity,” *OpinioJuris* (20 July 2017) blogpost available at <http://opiniojuris.org/2017/07/20/33215/>; accessed 5 January 2021: “The RSA [Republic of South Africa] also argued that ‘if the UNSC intended to remove immunity, it could have clarified the situation by adopting another resolution.’ This is indeed a suggestion I made in my previous post; not as sine qua non for finding that Al-Bashir’s immunity did not apply but simply as an aid for the ICC to uphold its position.”

⁸⁴ *Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*, ICC-02/05-01/09, 6 July 2017, 51 at 138.

⁸⁵ *United Nations Security Council*, 7963rd meeting, 8 June 2017, S/PV.7963, 11: The representative of China said, “China’s position on the handling of the situation in The Sudan by the International Criminal Court remains unchanged. China believes that the legitimate concerns of the African Union and the Sudanese Government on the Court’s handling of the situation in The Sudan should be given adequate attention.” At 12, the representative from Russia said, “On more than one occasion, we have called attention to the fact that the obligation to cooperate, as set forth in resolution 1593 (2005), does not mean that the norms of international law governing the immunity of the Government officials of those States not party [to] the Rome Statute can be repealed, and presuming the contrary is unacceptable.”

Importantly, because Article 98 emerged as a political compromise in response to Article 27, the idea of circumventing this strong politicization through creative legal interpretation and application in the interest of moral appeal is wholly simplistic and deeply problematic, especially when it further engrains the power of the UNSC within the practical functioning of the Court. There *is* a direct relationship between Article 27 and Article 98, and this was constructed on purpose by the drafters of the Rome Statute. As Dov Jacobs has similarly pointed out,

as a consequence of the [Appeals] Judgment, Article 98(1) is rendered mostly meaningless. Of course Article 98(1) does not actually list what immunities need to be respected by cooperating States, but it is somewhat difficult to imagine that if the drafters of the Rome Statute really thought that Article 27 removed all immunities, even in the horizontal relationship between States, as an established rule of customary international law, it would have bothered to introduce Article 98(1) in the first place.⁸⁶

Thus, in order to pacify the uneven acceptance and diffusion of the so-called ‘modern’ norm that heads of state and government no longer enjoy immunity under customary international law, compromise was required in Rome, suggesting that this was not (and is not) a universally accepted custom that can bind non-States Parties to the Rome Statute. The issue is magnified when it is framed as a ‘modern’ norm. The expectation that this evolutionary moral imperative be internalized universally at such a premature stage in the development of international criminal law is politically and practically unrealistic. While universal accountability is morally and ethically altruistic, it remains legally, and especially politically, difficult to enforce. Article 98 cracks the door for states to preserve sovereignty with respect to cooperation and compliance, particularly regarding the obligations concerning non-States Parties by deferring to a consent-based jurisdiction regime. The most significant problem is the identification of conflicting norms at the international, regional, and domestic levels that have problematized the operationalization of the Court. With respect to dual members of the AU and the Rome

⁸⁶ Dov Jacobs, “You have just entered Narnia: ICC Appeals Chamber adopts the worst possible solution on immunities in the Bashir case.”

Statute, there is a conflicting regional standard that has been implemented through AU resolutions reaffirming immunities for sitting heads of state and demands for non-cooperation with the ICC in the arrest and surrender of al-Bashir, which is directly at odds with international and domestic obligations. Perhaps what is most offensive is the underlying feeling that the UNSC was using an African case to firmly establish the ‘modern norm’ which may or may not have been viewed as ‘low hanging fruit’ since situations and leaders perpetrating crimes of comparable gravity were *not* targeted in the same way. Even if that is not the case, colonial sensitivities and concerns raised by African states in Rome indicate serious concern about integrating the politicization of the UNSC within the ICC as deeply problematic.

Equally important, while the kneejerk reaction is to view the AU position hastily, it is important to take its concerns seriously. This is not a question of morality— of course those most responsible for serious crimes ought to be held to account. The accountability norm is *good*, impunity is *bad*, and al-Bashir should be brought to justice. Inasmuch as these sentiments permeate all facets of the international criminal justice project, it turns into a normatively biased enterprise, void of sufficient analytical scrutiny. At the nexus of international relations and international criminal law, moral appeals are insufficient justifications for imposing standards or expectations that are not, as it turns out, universally held at any particular time, in any particular place. It is important to situate the ICC within its broader context. The immunity issue was identified as being problematic during the course of the Rome Statute negotiations. The ICC has operated disproportionately in Africa and it should be unsurprising that this foreseen statutory conflict has come to a head through the interpretation and application of the Rome Statute in the case of al-Bashir.

Notwithstanding this, the AU has not abandoned the international criminal justice norm. Conceptually, there is much agreement between the ICC and the AU regarding the importance of fighting impunity, least of all for the most serious violations of international criminal law. Functionally, however, the approach to immunities for sitting heads of state taken by the ICC might rightly be viewed as unreasonably progressive, since it has been routinely argued that “the case law of the ICC is contrary to customary

law in relation to immunities.”⁸⁷ The tendency to view the AU with constructed distrust ought to be levied against what is at stake. Inasmuch as the AU might be framed as an organization designed to insulate powerful Africans by maintaining a culture of impunity, AU members might view the ICC with a similar distrust based on its inconsistent decision making, hyper-focus on African situations, and attempts to incite regime change by obliging African states to prioritize the Rome Statute over the prescribed interests of ‘Africa’ without cogent reasoning. All of these stereotypes must be rightly understood as symptomatic of a colonial history that continues to inform identity, interests, and behaviors, fundamentally rooted in mutually constituted sentiments of mistrust and skepticism.

8.6 Domestic Courts and the immunity of al-Bashir

It is useful to highlight that domestic courts in South Africa, Kenya, and Uganda have opined on al-Bashir’s immunity during the course of his tenure as President and each determined that there was *no immunity* and therefore, an obligation exists to arrest and surrender the suspect to the ICC. The Supreme Court of South Africa found that head of state immunity does not apply in the context of international criminal law, and that there was an obligation to arrest al-Bashir while he was in South Africa, demonstrating an ideological polarization within political and legal branches, since the Zuma government facilitated his escape from the country despite a domestic arrest warrant being issued.⁸⁸

⁸⁷ Dov Jacobs, “Some additional thoughts on African withdrawals from the ICC,” *Spreading the Jam: International Law, International Criminal Law, Human Rights and Transitional Justice* (27 October 2016) blogpost available at: <https://dovjacobs.com/2016/10/27/some-additional-thoughts-on-african-withdrawals-from-the-icc/>; accessed 2 April 2021. Note that South Africa fundamentally relied on this argument at the Court. In its submissions before the Pre-Trial Chamber, see *Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*, ICC-02/05-01/09, 6 July 2017, 13 (32): “the position expressed by South Africa at the hearing is that Omar Al-Bashir enjoys immunity from criminal proceedings, including from arrest, under customary international law, and since that immunity had not been waived by Sudan or otherwise, the Court was precluded by article 98(1) of the Statute from requesting South Africa to arrest and surrender Omar Al-Bashir and, consequently, South Africa was not obliged to arrest Omar Al-Bashir and surrender him to the Court.”

⁸⁸ *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others* 2015 (5)SA 1 (GP). The South African High Court also determined that there was a legal obligation to arrest al-Bashir while he was in South Africa, but the Cabinet facilitated his escape from the country following the

The Kenyan Court of Appeal also found that that the government had an international obligation to arrest al-Bashir. It opined that “the Government of Kenya by inviting al Bashir to Kenya and failing to arrest him acted not only with complete impunity but also in violation of its international obligations.”⁸⁹ The Kenyan decision also stated that al-Bashir should be arrested if he ever returns to Kenya. Similarly, the High Court in Kampala questioned Uganda’s failure to arrest al-Bashir when he visited the country and issued a domestic warrant for his arrest, should he ever go back to Uganda.⁹⁰ While he is no longer a sitting head of state, the Ugandan decision is symbolic in the sense that it overtly criticizes Museveni’s decision not to arrest al-Bashir when he was visiting Uganda as President of Sudan. Thus, there was not a monolithic ‘African’ position to oppose the ICC by insulating al-Bashir. On the contrary, every domestic African court that ruled on the immunity of al-Bashir determined that he had none, since he was properly indicted by the ICC. Despite this streamlined legal reasoning, the reality in this case was that regional political dynamics and protectionist leadership interests espoused by the AU visibly trumped international (and domestic) legal obligations.⁹¹ This was tacitly facilitated by the UNSC itself, since it placed no formal duty on states other than Sudan to cooperate with the ICC. Similarly, this case demonstrates that the consent-based jurisdiction of the ICC is not only at the behest of ‘states’ but more particularly, *leaders* of states, which offers significant enforcement and cooperation challenges for the ICC when executing arrest warrants for sitting heads of state and other senior government officials that may have developed relationships, working or personal, with indicted fugitives, which may inform interests and behaviour.

AU Summit meetings, see The High Court of South Africa (Gauteng Division, Pretoria) Case Number: 27740/2015 (24 June 2015).

⁸⁹ Civil Appeal 105 of 2012 & Criminal Appeal 274 of 2011 (Consolidated), available at <http://kenyalaw.org/caselaw/cases/view/148746/>; accessed 5 January 2021.

⁹⁰ Jonathan Kamoga, “Uganda arrest warrant for Bashir,” *The East African* (21 December 2019), available at <https://www.theeastafrican.co.ke/tea/news/east-africa/uganda-arrest-warrant-for-bashir-1433336>; accessed 2 January 2021; “Ugandan court issues arrest warrant for Sudan’s Bashir,” *The Independent* (19 December 2019) available at <https://www.independent.co.ug/ugandan-court-issues-arrest-warrant-for-sudans-bashir/>; accessed 2 January 2021.

⁹¹ Note that under the auspice of complementarity, the Rome Statute requires States Parties to adopt legislation to domesticate the Statute. South Africa was the first state to adopt implementation legislation, namely the Rome Statute Implementation Act (16 August 2002); Uganda passed implementation legislation entitled the Ugandan ICC Act (10 March 2010).

8.7 Institutional weaknesses revealed by the al-Bashir indictment

It is important to highlight that the AU's concerns about the operationalization of the Court have drawn attention to some serious institutional weaknesses (e.g. inconsistent judgements on complex legal issues such as head of state immunity; non-cooperation from states—including States Parties to the Rome Statute to enforce ICC arrest warrants; and a lack of UNSC involvement with respect to its own referrals to enforce ICC arrest warrants in both States Parties and non-States Parties), all of which need to be addressed in the interest of strengthening the ICC going forward. The al-Bashir indictment brought all of these weaknesses to the fore and created serious credibility challenges for the Court as a consequence.

The effective application of the Rome Statute with respect to immunities for heads of state and other senior government officials has been practically and politically difficult for States Parties and non-States Parties alike. This contention has structured the division between the ICC, the AU, and several African states, and remains a fundamental disunity between the Court and much of the continent. Mapping the trajectory of AU criticisms towards the ICC on the issue of al-Bashir's immunities during his tenure as President demonstrates recurring trends and points of disagreement, which ought to be considered through negotiation and meaningful dialogue, in order for effective resolution to take place. This is an important prerogative, since the AU presents an opportunity to (re)acquire greater Pan-African support for the ICC: a necessary step to encourage African states that are not signatory to the Rome Statute to consider ratifying the Statute, contributing to the proliferation of international criminal justice on the continent. Moreover, given the ICC's hyper-focus on African situations, it would be prudent to consider the feedback provided by subjects of the Court's interventions as a matter of institutional self-reflexivity and constructive reform. Least of all, this feedback offers a gauge to measure the acceptance of the international criminal justice norm embedded in the Rome Statute, particularly with respect to the immunity of sitting heads of state of non-States Parties indicted by the ICC *vis-à-vis* the UNSC.

The relevant insights are the prioritization of regional and/or domestic political interests in several African states that chose not to arrest al-Bashir when given an opportunity to do so. Also interesting is the reliance and recurrent use of human rights and transitional justice vernacular in the justifications for *noncompliance* with the ICC. Catchphrases such as ‘lasting peace’ and ‘reconciliation and reconstruction’ are tightly knit with the aims of transitional justice and by extension, the diffusion of international human rights. It seems appropriate to reflect on this point. This type of discourse and rhetoric clearly reflects an internalization and diffusion of international human rights objectives and more importantly, the norms that undergird a substantial part of the international criminal justice project. Moreover, AU calls for more local responses to international crimes indicate that valuation that is placed on accountability mechanisms, while simultaneously refocusing the need for national capacity building and pan-African regional mechanisms better suited to provide ‘African solutions to African problems.’

Moreover, the desire for streamlined integration of international criminal law mechanisms at the AU suggests that it is mindful of the international standards of appropriateness in this respect. Even if AU member states substantially fail to respect these norms, they are at least integrated into the regional normative foundation at the conceptual level. Thus, even though the various developments at the AU can be framed as ‘anti-ICC,’ or ‘anti-international criminal justice,’ the AU has clearly stated that it remains committed to international criminal justice and the values closely associated with the norms that provide legitimacy, or perhaps more accurately, perceptions of legitimacy on the continent. The most basic interpretation is that the AU is identifying how non-cooperation with the ICC is actually what is required to achieve the stated goals of the Court, which can be seen as an attempt to prioritize regional interests and delegitimize the ICC simultaneously.

Even when the AU asked its member states not to comply with the ICC in the arrest and surrender of al-Bashir, it still couched its opposition within the Rome Statute itself. Moreover, the regional position was that more human rights violations would occur *with* compliance than without it, due to the destabilizing effects of arresting sitting heads of state. The persuasiveness of this strategy is certainly suspicious, though worth considering and situating in its broader (normative) context.

Alternatively, reflexivity with respect to Western interpretations of ‘international criminal justice’ might result in an admission of bias. It is unlikely that an immunity provision would derail the international criminal justice project altogether. If anything, such a provision would allow the ICC to continue operating without the recurring legitimacy crises that result from failing to capture sitting heads of state. In reality, impunity with respect to these individuals *is* the norm. The same is not true for former heads of state, including al-Bashir, who will most likely be prosecuted for his alleged crimes. Nevertheless, to date, the ICC has failed to cement universal jurisdiction and therefore, accountability for atrocity crimes. Since the current international criminal justice landscape depends on state consent and cooperation to function, pragmatic approaches to political and legal conflicts of interest are imperative to the long-term success of the project.

While it is impossible to demonstrate empirically that charging sitting heads of state and government officials is a risk to security and peace, it is also impossible to demonstrate the opposite. At a minimum, dialogue concerning this issue ought to take place in order to bridge the gap and normative divergence between the ICC and the AU on this key issue. Taken further, suppose the AU’s concerns about the arrest and surrender of al-Bashir were realized— it would be necessary to determine who or what was responsible for crimes committed as a result of the fallout of unsolicited, ICC-provoked, regime change and/or power vacuum. The capacity of the ICC to handle societal and regional instability as a result of indicting a head of state remains suspect at best, and potentially damaging at worst. Symbolic value aside, it is unclear that such an outcome is (or ought to be) compatible with the stated aims of the ICC, particularly in the absence of material UNSC support or involvement.

8.8 Conclusion

There is a fundamental distinction between the need for dialogue, negotiation, and bargaining on one hand, and non-cooperation on the other. Many of the concerns raised by the AU are understandable, and at least worthy of a conversation. It is well established that the ICC was envisioned with African perspectives in mind. Conceptually, the Rome Statute is agreeable to African states; the operationalization of the Rome Statute seems to

be the substantive objection. Notwithstanding the ongoing disagreement concerning immunity for sitting heads of state, the norm of international criminal justice continues to be embodied by both the AU and the ICC, though with varying interpretations.

Practically speaking, the failure on the part of the ICC to establish and maintain a coherent position on head of state immunities with respect to al-Bashir has tarnished perceptions of judicial cogency. The idea that norms can diffuse unevenly is important in this context. Thus, while the AU continues to embody a perspective rooted in customary law that supports head of state immunities, the trajectory of the evolution of the norm is uncertain, yet not necessarily fixed. There appears to be two potential outcomes with respect to AU-ICC relations: (1) the continued proliferation of non-cooperation and a reversion to national and/or regional court(s) to address violations of international criminal law that better suit African political interests; or (2) reasoned negotiation and bargaining between the AU and the ICC with respect to critical issues of contention, especially regarding the role of the UNSC and the meaning of article 98, which are perhaps not as ill-founded as they first seem. With respect to the status of immunity for sitting heads of state, al-Bashir demonstrated that the ICC has been unable to effectively integrate this norm into the structure of the international criminal justice regime. The function of the UNSC has acted as a fundamental impediment to its proliferation and solidification by tacitly informing the expectations and obligations of state behaviour when interacting with the Court.

Chapter 9

9 Regional Criminal Justice Mechanisms and The Malabo Protocol¹

The principle of complementarity is a cornerstone of the Rome Statute of the International Criminal Court (ICC).² Complementarity establishes the relationship between the ICC and the national legal systems of state parties. Under the Rome Statute system, states have the primary responsibility to investigate and prosecute violations of international criminal law. The ICC is to be ‘complementary’ to national jurisdictions, and act as a secondary catch-all when national justice mechanisms fail.³ ICC intervention is triggered when a state is unwilling or unable to investigate and prosecute. In short, the ICC is understood as a court of *last resort*, to be used when all else has failed.⁴ Based on this principle, states should be scrutinized for failing to investigate and prosecute atrocious crimes long before the inaction of the ICC is called into question. This is appropriate, since the ICC is inherently (and purposefully) limited in scope.

The ICC straddles the boundaries of international politics and international criminal law. It is tasked to balance the political interests of states while applying the Rome Statute and its ‘objective’ rule-of-law principles. Complementarity reiterates the political preoccupation with sovereignty by vesting national judicial mechanisms with the primary responsibility to prosecute international crimes. Interference on the part of the ICC is only permissible when a sovereign state fails in its duty to implement and enforce international criminal law. This could be explained by a lack of political will, a lack of capacity, or both. Notwithstanding the various explanations for state inaction, the

¹ An earlier version of this chapter was published as Sarah Nimigan, “The Malabo Protocol, the ICC, and the Idea of ‘Regional Complementarity,’” *Journal of International Criminal Justice* 17.5 (2019): 1005-1029.

² Rome Statute of the International Criminal Court, A/CONF.183/9 (adopted 17 July 1998, entered into force 1 July 2002); see Preamble; Arts. 1 and 17.

³ *Ibid.*

⁴ For a detailed summary of complementarity see Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes* (International Center for Transitional Justice, 2016), available at <https://www.ictj.org/publication/handbook-complementarity>; accessed 14 June 2019.

relationship between states and the ICC is sequenced and clear.⁵ However, a textual interpretation of the Rome Statute makes it less apparent how *regional* mechanisms might fit within the complementary schema. This is increasingly relevant, given recent moves on the African continent to regionalize international criminal law.

In June 2014 the African Union (AU) adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).⁶ The Malabo Protocol extends the jurisdiction of the proposed African Court of Justice and Human Rights (ACJHR) to include international and transnational crimes, including those covered in the Rome Statute.⁷ The yet-to-be established ACJHR would sit in Arusha, Tanzania. At the time of writing, eleven states have signed the treaty;⁸ fifteen ratifications are required for the treaty to come into force. While the impact of the Malabo Protocol can only be imagined for now, the potential role of the ACJHR within the broader international criminal justice project is worth thinking about. It is proposed here that ‘positive complementarity’ offers the most appropriate lens through which to analyze this role.⁹

This chapter argues that regional courts such as the ACJHR can and *should* complement national courts and the ICC. The Malabo Protocol raises particular legal

⁵ See generally Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Leiden: Martinus Nijhoff, 2008), 11-30; Steven Freeland, “It’s a Good Idea... Isn’t It? The Impact of Complementarity at the International Criminal Court on Domestic Law, Politics and Perceptions of Sovereignty,” in *International Courts and Domestic Politics: Studies on International Courts and Tribunals*, ed. Marlene Wind (Cambridge: Cambridge University Press, 2018): 93-116; Max du Plessis, “Complementarity: a working relationship between African states and the International Criminal Court,” in *African Guide to International Criminal Justice* (Institute for Security Studies, 2008) 123-142.

⁶ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014 (hereafter the ‘Malabo Protocol’).

⁷ The core crimes refer to genocide, crimes against humanity, war crimes, aggression. The Malabo Protocol also includes the following crimes: unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources. Note that the Malabo Protocol not only focuses on individual accountability but also the role of corporate liability, see Art. 46(c): Corporate Criminal Liability.

⁸ Signatory states include: Benin, Chad, Comoros, Congo, Ghana, Guinea-Bissau, Kenya, Mauritania, Sierra Leone, Sao Tome & Principe, Uganda.

⁹ See for example International Criminal Court, Office of the Prosecutor, *Prosecutorial Strategy, 2009-2012*, 1 February 2010, at 5: ‘Positive complementarity is a strong interpretation of partnership with other jurisdictions or a “proactive policy of cooperation aimed at promoting national proceedings”’; Darryl Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court,” *European Journal of International Law* 14 (2003): 482.

concerns about jurisdictional gaps and immunities for heads of state and other senior government officials, as well as practical concerns with respect to capacity and funding.¹⁰ While these concerns are worth noting, they are neither wholly nor partially destructive of the aims of the international criminal justice project in the African context or elsewhere. There is a need to reimagine the principle of complementarity by including regional courts such as the ACJHR since it presents an opportunity to prosecute crimes which the ICC cannot. The core atrocity crimes covered by the Rome Statute are not perpetrated in a vacuum. In many respects, the ACJHR offers an opportunity to prosecute crimes which undergird and finance genocide, war crimes, crimes against humanity, and aggression in Africa.¹¹ This *may* have a preventative or deterrent consequence and/or help the ICC in its own work by laying the foundation to link mid-level to senior offenders. This will allow for the clear and streamlined integration of regional justice mechanisms within the international criminal justice project, of which the Rome Statute System is an integral part. The ACJHR offers the potential to pivot expressions of international criminal justice from a concentration on international initiatives to more accurate reflections of local contexts and realities. Framed in this way, the idea of including regional institutions into the international criminal justice system could be important to its holism and long-term success.

¹⁰ See, generally Lutz Oette, “The African Union High-Level Panel on Darfur: A Precedent for Regional Solutions to the Challenges Facing International Criminal Justice?” in *Africa and the Future of International Criminal Justice*, ed. Vincent Nmehielle (Eleven International Publishing, 2012); Kristen Rau, “Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights,” *Minnesota Law Review* 97 (2012): 669-708.

¹¹ Note that thematic understandings that other crimes covered by the Malabo Protocol demonstrably fund and facilitate the perpetration of genocide, war crimes, crimes against humanity, and aggression. See, on Joseph Kony (Uganda) using the ivory trade to buy arms and finance the LRA, Peter Fabricius, “The LRA rising again?” *Institute for Security Studies*, ISS Today, 6 July 2016, available at <https://issafrica.org/iss-today/the-lra-rising-again>; accessed 14 June 2019; Oil and gold have been smuggled in exchange for arms in Sudan, see: Human Rights Watch Report, *China’s Involvement in Sudan: Arms and Oil* (2003), available at <https://www.hrw.org/reports/2003/sudan1103/26.htm>; accessed 14 June 2019; Colum Lynch, “Russia Blocks U.N. Report Linking Alleged Sudanese War Criminal to Gold Profiteering,” *Foreign Policy*, 4 April 2016, available at <https://foreignpolicy.com/2016/04/04/russia-blocks-u-n-report-linking-alleged-sudanese-war-criminal-to-gold-profiteering/>; accessed 14 June 2019. Note also that the role of corporations in facilitating these crimes, such as Canadian company SNC-Lavalin and its role in sustaining the Gaddafi regime and civil war, see Mark Kersten, “SNC’s business in Libya sustained a brutal regime. They should be held to account,” 8 April 2019, available at <https://www.theglobeandmail.com/opinion/article-sncs-business-in-libya-sustained-a-brutal-regime-they-should-be-held/>; visited 14 June 2019 as some brief and cursory illustrations of this point.

After all, the *raison d'être* of complementarity is to motivate states to dispense justice for the most serious crimes, while simultaneously ensuring such crimes will not go unpunished if states are unwilling or unable to do so. The ICC is not intended to be, nor is it capable of being, a standalone response to atrocity. Therefore, the inclusion of all forms of jurisdiction recognized by international law (including regional mechanisms such as the ACJHR) should be built-in to establish a positive interpretation of complementarity. This will contribute to the proliferation of more 'local' justice and restructure/redistribute the division of labour to meet the demands and expectations for justice at the national, regional, and international level(s). Reimagining complementarity to include regional mechanisms such as the ACJHR could reflect an important part of the constructive reform that the ICC needs to regain its legitimacy in Africa and beyond.

9.1 The Malabo Protocol

In 2009 the AU had identified a need to accelerate the integration of the contents of the Rome Statute at the regional level.¹² This was to some degree, a response to the AU's claims that the ICC unfairly targets Africans with selectivity and bias, jeopardizes peace by prioritizing justice, and reinforces a neocolonial Western power structure, especially since the United Nations Security Council reserves control over the ICC without three of its permanent members being subject to the Court's jurisdiction.¹³ Mostly though, it was in response to ICC's indictment of Sudanese President Omar al-Bashir and the concerns about its potentially destabilizing effects on the continent.¹⁴ This was addressed by the AU at the 2013 Extraordinary Session.¹⁵ The underlying impetus for fast-tracking the

¹² The AU had been working on the idea of including international crimes at the regional level as early as 2004 and therefore, it cannot be framed as a direct response to the operationalization of the ICC; ICC-AU relations led to the AU court being *fast-tracked*.

¹³ See generally Jean-Baptiste Jeangène Vilmer, "The African Union and the International Criminal Court: counteracting the crisis," *International Affairs* 92.6 (2016): 1319-1342; Tim Murithi, "Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court," in *Africa and the International Criminal Court*, eds. Gerhard Werle, Lovell Fernandez, and Moritz Vormbaum (The Hague: T.M.C. Asser Press, 2014), 179-194.

¹⁴ AU PSC/MIN/Comm(CXLII), 21 July 2008. Note that Sudan has neither signed nor ratified the Rome Statute and the case was referred to the ICC by the United Nations Security Council.

¹⁵ *Decision on Africa's Relationship with the International Criminal Court*, AU Decisions and Declarations. Ext/Assembly/AU/Dec.1, October 2013, §10, at (iv): NOW DECIDES (iv) To fast track the process of

regional court was rooted in AU concern over the indictment of sitting heads of state, but was mostly reactionary to the operationalization of the ICC altogether.¹⁶

In an effort to fast-track the process, the AU Assembly adopted the ‘Malabo Protocol’ in 2014, designed to expand the mandate of the already drafted African Court of Justice and Human Rights (ACJHR) to include jurisdiction over fourteen serious international crimes including genocide (Article 28B), war crimes (Article 28D), crimes against humanity (Article 28C), and aggression (Article 28M), among other transnational crimes.¹⁷ The scope of the Malabo Protocol is vast, far greater than any other international criminal justice mechanism. For example, it criminalizes trafficking with respect to persons (Article 28J), drugs (Article 28K), and hazardous waste (Article 28L), the illicit exploitation of natural resources (Article 28L Bis) and enumerates terrorism (Article 28G) and corruption (Article 28I) as distinct international crimes, among others. In addition, the Malabo Protocol includes corporate criminal liability (Article 46C), which is an important inclusion especially in the African context. The Malabo Protocol reflects region-specific crimes, which have profound socioeconomic and political consequences on the continent. The ACJHR is structured to have three sections: General Affairs, Human and Peoples Rights, and International Criminal Law. The focus of this paper is solely on the third.

The Malabo Protocol has been heavily criticized for its Article 46A bis, which deals with immunities and says: “No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.”¹⁸

expanding the mandate of the African Court on Human and Peoples’ Rights (AfCHPR) to try international crimes, such as genocide, crimes against humanity and war crimes.

¹⁶ Robert Eno, “The Malabo Protocol and Complementarity of International Criminal Justice: Challenges and Prospects,” in *Commemorating the 20th Anniversary of the Rome Statute of the International Criminal Court*, ed. Evelyn Ankumah (Africa Legal Aid, 2018), 30-38, at 31. Consider also that the United Nations Security Council refused to consider deferral requests in the al-Bashir case in the interest of stabilizing peace talks/negotiations in Sudan.

¹⁷ Malabo Protocol, Art. 28A.

¹⁸ Malabo Protocol, Art. 46A bis.

This inclusion frames the argument that the ACJHR is merely an attempt to perpetuate a culture of impunity for leaders who commit the most egregious crimes on the continent.¹⁹ It is worth noting that the Rome Statute lifts immunity for heads of state or government under Article 27 (irrelevance of official capacity).²⁰ However, customary law provides immunity for heads of state and other senior government officials both at home and abroad.²¹ Therefore, Article 27 may be viewed in opposition to established international legal standards with respect to absolute personal immunity afforded to heads of state, whether at home or in a foreign country on official business.²² The juxtaposition of head of state immunity within the Rome Statute and customary international law is inconsistent at best, particularly as it applies to non-States Parties *vis-à-vis* United Nations Security Council referrals.²³ It is for this reason that the AU has requested an advisory opinion from the International Court of Justice on the status of immunity for heads of state and government leaders, which is yet to be delivered.²⁴

As such, viewing Article 46A bis of the Malabo Protocol as a digression of international criminal law lacks cogent justification beyond moral appeal, which is nevertheless important. However, the ICC is the only court that mandates the irrelevance of official capacity universally and has been mostly unsuccessful at implementing it.²⁵

¹⁹ See Max du Plessis, “Shambolic, shameful and symbolic: Implications of the African Union’s immunity for African leaders,” *Institute for Security Studies*, November 2014, available at <https://issafrica.s3.amazonaws.com/site/uploads/Paper278.pdf>; accessed 10 June 2019.

²⁰ The Rome Statute, Art. 27.

²¹ Jutta Bertram-Nothnagel, “A Seed for World Peace Growing in Africa: The Kampala Amendments on the Crime of Aggression and the Monsoon of Malabo,” in *The International Criminal Court and Africa: One Decade On*, ed. Evelyn A. Ankumah (Intersentia, 2016), 347-400, at 369. See also Judgment in the Jordan Referral re Al-Bashir Appeal, *Situation in Darfur, Sudan* (ICC-02/05-01/09-397-Corr), Appeals Chamber, 6 May 2019.

²² Roseanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University Press, 2008), 169. See also Paola Gaeta, “Does President Al Bashir Enjoy Immunity from Arrest?” *Journal of International Criminal Justice* 7.2 (2009): 315-332; Asad Kiyani, “Al-Bashir and the ICC: The Problem of Head of State Immunity,” *Chinese Journal of International Law* 12 (2013): 467-508.

²³ The Rome Statute, Art 98: Cooperation with respect to waiver of immunity and consent to surrender, which may be viewed as conflicting with Article 27(1), i.e. irrelevance of official capacity.

²⁴ Coalition for the International Criminal Court, *Challenging ICC, AU seeks opinion on head of state immunities from top UN court*, 1 February 2018, available at www.coalitionfortheicc.org/news/20180201/globaljustice-weekly-au-seeks-icj-opinion-head-state-immunities-witnesses-take-stand; accessed 2 June 2019.

²⁵ The ICC has indicted al-Bashir (arrest warrant outstanding/unexecuted), Kenyatta and Ruto (charges dropped). Gaddafi (deceased), former head of state: Gbagbo (acquitted).

While there are important normative imperatives for saying that official capacity does not matter and there is universal jurisdiction for violations of international criminal law, there are also tangible political and legal difficulties with implementing this ideal. Most notably, the ICC lacks the ability to function effectively without the cooperation of states.²⁶ While there are few, if any, noble arguments to support head of state immunity for international crimes, the lack of cooperation and political will to arrest and surrender individuals indicted by the ICC is incredibly damaging to the legitimacy and reputation of the Court altogether. The unfortunate current reality is such that even *if* the Malabo Protocol comes into force with Article 46A bis, it will be of little consequence to heads of state in Africa, whether indicted by the ICC or not.²⁷

9.2 The Peculiar Nexus of Law and Politics

Setting up realistic expectations and reasonable parameters for the operationalization of international criminal law is necessary. Imposing transnational authority is only as effective as the commitment on the part of states to be subject to it. Thus, the diffusion of international norms such as the irrelevance of official capacity under international criminal law at the ICC is contingent on buy-in by states. Not all norms will diffuse evenly across time and space. Implementing strategies to facilitate meaningful dialogue may be useful to reach a shared understanding of ‘international criminal justice.’ Yet, it is unsurprising that the AU is looking inward to establish legal systems that accurately reflect afro-centric, regional perspectives otherwise referred to as ‘African Solutions for African Problems.’

²⁶ Note the ICC’s difficulty with respect to the indictment of Kenyan President Uhuru Kenyatta and his Deputy President William Ruto. The AU decided that heads of state or heads of government could not be charged before any international court or tribunal during their term of office, thus contributing to formalized noncooperation from the AU with the ICC in such cases. Such noncooperation led to difficulty with evidence gathering, which resulted in the Kenyatta case being dropped. See *Decision on Africa’s Relationship with the International Criminal Court*, AU Decisions and Declarations. Ext/Assembly/AU/Dec.1, 12 October 2013, 1-3.

²⁷ There are also important arguments to suggest that indicting heads of state could be contrary to the aims of international criminal justice. While outside the scope of this paper, it is worth mentioning the relevance of the ‘peace versus justice’ debate in this regard. See for example Payam Akhavan, “Are International Criminal Tribunals a Disincentive to Peace?” *Reconciling Judicial Romanticism with Political Realism*,” *Human Rights Quarterly* 31 (2009): 624-654.

In contrast, the Rome Statute was born out of consensus-based negotiation and compromises were struck in order to ensure its success.²⁸ The nature of political negotiation complicates coherence to varying degrees. However, it is important to consider that “the aim of the [Rome] Statute is not to negate sovereignty... which illustrates clearly that the concerns of States with respect to their sovereign interests in criminal justice was at the forefront of the negotiations from the earliest stages.”²⁹ Complex political realities complicate the international criminal law initiative in substantive and *uneven* ways. The point is not that the ICC had (has) no moral or legal basis to be involved in African situations. The hypocrisy lies in the ICC’s inability to intervene in most other places due to political bargaining and/or alliance. This is not unfair to Africans, it is unfair to victims who are denied justice on political bases. The double standards which are clearly visible in the administration of ‘international justice’ reveal substantive cleavages created by deep politicization.³⁰

The AU-ICC narrative typically pits the organization against the institution on the basis of sovereign interference, the unfair and biased focus on Africans, and opposing interpretations of customary international law.³¹ Explicably, the ACJHR may (ostensibly) contribute to the idea of universal jurisdiction by offering an African alternative to filling immunity gaps and contributing to the proliferation of justice for international crimes committed on the continent. It is also worth noting that there is no one monolithic anti-ICC position shared by ‘Africa’ or the constitutive populations of AU member states. Most often, it is the states which have been the target(s) of ICC investigation and prosecution that are particularly disapproving and scathing of the institution. Curiously,

²⁸ See generally Fanny Benedetti, Karine Bonneau and John L. Washburn, *Negotiating the International Criminal Court: New York to Rome 1994-1998*, (Martinus Nijhoff Publishers, 2013).

²⁹ Sharon A. Williams and William A. Schabas, “Article 17: Issues of admissibility,” in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd edition, ed. Otto Triffterer (C.H. Beck, Hart, Nomos, 2008), 606.

³⁰ See generally Max du Plessis and Christopher Gevers, “South Africa’s Foreign Policy and the International Criminal Court: Of African Lessons, Security Council Reform, and Possibilities for an Improved ICC,” in Jason Warner and Timothy M. Shaw, eds., *African Foreign Policies in International Institutions* (Palgrave Macmillan, 2018), 199-214.

³¹ See Matiangai V.S. Sirleaf, “Regionalism, Regime Complexes, and the Crisis in International Criminal Justice,” *Columbia Journal of Transnational Law* 54 (2016): 699-775. This paper argues that the ICC’s institutional crisis created space for regional approaches to international criminal law.

even some of the strongest critics of the ICC within the AU remain members of both.³² On this basis, it is important to consider the potential integration of the Malabo Protocol within the Rome Statute System under the auspice of positive complementarity.

The AU has made efforts to work with the ICC on the idea of regional complementarity with respect to the ACJHR. One approach might be to amend the Rome Statute to include regional courts in its conception of complementarity. For example, Kenya has submitted a proposed amendment to the Rome Statute to the Working Group on Amendments with respect to the Preamble of the Rome Statute. As previously noted, the Preamble of the Rome Statute says: “Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”³³

Kenya has proposed that it be amended to read: “Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions.”³⁴ To elaborate, the Kenyan delegation explained that regional complementarity “is not a way to oust the ICC. It is the opposite. The regional jurisdiction gets just the first bite. National jurisdiction may be difficult to exercise. Rather than spring-boarding [from national to international jurisdiction], the ICC would be what it was meant to be, the last resort.”³⁵ The Kenyan delegate also identified that the proposal to include regional courts would “allow judicial proceedings to take place closer to the location where the alleged crimes had been committed.”³⁶ Through this lens, regional complementarity is a compelling and useful concept. Framed

³² See for example, Rorisang Lekalake and Stephen Buchanan-Clarke, *PP23: Support for the International Criminal Court in Africa: Evidence from Kenya*, AfroBarometer, 2015, available at <http://afrobarometer.org/fr/publications/pp23-support-international-criminal-court-africa-evidence-kenya; accessed 30 June 2019>). In 2015, over sixty percent of Kenyans believed the ICC’s cases against Kenyatta and Ruto were important for fighting impunity in their country. Also note that Kenya remains a States Party to the ICC.

³³ The Rome Statute, Preamble.

³⁴ Draft 2: Withdrawal Strategy Document, AU Doc. Restricted Circulation, 12 January 2017, available at www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf; accessed 1 July 2019; Kenya: *Proposal of Amendments to the Rome Statute of the International Criminal Court Rome, 17 July 1998*, UN Depository Notification C.N.1026.2013TREATIES-XVIII.10, 14 March 2014.

³⁵ Bertram-Nothnagel, “A Seed for World Peace Growing in Africa,” 373.

³⁶ *Report of the Working Group on Amendments, Fourteenth Session*, ICC-ASP/14/34, 18-26 November 2015, § 18.

as an intermediary and cooperative jurisdictional mechanism, regional courts such as the ACJHR may yield greater prospects for justice than national courts and the ICC alone.³⁷

Nevertheless, it is important to emphasize that national jurisdictions should always get the first bite. It is a state's primary responsibility and obligation to investigate and prosecute these crimes. Difficulties aside, the diffusion of obligation should begin at the national level. This would be the best way to ensure that judicial proceedings take place closest to where the alleged crimes were committed and foster the greatest sense of 'local' justice. National jurisdictions should necessarily endeavour to build their capacity in order to prosecute these crimes. This will establish agency and ownership over the justice process and will (likely) contribute to greater localized deterrence. Regional jurisdictions may serve as an effective middle-ground between national and international jurisdictions to prosecute cases which require specialization and high degrees of human capital and judicial capacity to succeed. *Prima facie*, more justice is better than less and local mechanisms allow victims to see and feel that justice has been done. Situating international criminal law within its broader objective(s) indicates a need to fill impunity gaps in new and creative ways.

However, it would be remiss to not point out that the Malabo Protocol excludes the ICC and international jurisdictions from its conception of complementarity. Article 46H, Complementary Jurisdiction (1), says: "The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities."³⁸ Article 46(H) also enumerates that the ACJHR would only have jurisdiction if the state is unwilling or unable to carry out the investigation and prosecution. This keeps the caseload down at the ACJHR while simultaneously encouraging national and regional courts to build their capacity and commitment to investigate and prosecute egregious crimes.

³⁷ Antonio Cassese, *The Oxford companion to international criminal justice* (Oxford: Oxford University Press, 2009), at 208: "Accordingly, international criminal justice should not be understood as a *domain reservée* of international institutions. International and national prosecutions are not even alternatives in the proper sense, but should be conceived of as formally distinct, yet substantively intertwined mechanisms that pursue a common goal: the enforcement of ICL [international criminal law]."

³⁸ Malabo Protocol, Article 46(H).

The exclusion of international jurisdictions and the ICC in particular from the principle of complementarity in the Malabo Protocol raises some suspicions about the authenticity of a vision of mutual cooperation and/or assistance. While the Rome Statute's exclusion of regional jurisdictions can be reconciled by the fact that no such institutions existed at the time of drafting, the Malabo Protocol was drafted in 2014 (sixteen years after the Rome Statute). This omission has subjected the Malabo Protocol to strong criticism. For example, Garth Abraham has argued that, "the only reasonable interpretation of this exclusion can be that it is a conscious snub to the ICC and aims specifically to protect African HOSG [heads of state and government] and senior government officials from prosecution."³⁹

On the other hand, "Don Deya, director of PALU [Pan African Lawyers Union], the organisation that was tasked with drafting the Protocol, is adamant that throughout the process it has been clear that the ACJHR intends to cooperate with, and complement the ICC."⁴⁰ This inconsistency may be reflective of what Max du Plessis referred to as "a case of irresponsible treaty making."⁴¹ Nevertheless, in the absence of a clearly enumerated formal relationship, alternative approaches are required. According to Knotternus and de Volder, "there are also other avenues to establish a formal relationship between the courts, including the auxiliary documents of the Criminal Chamber, which will have to regulate its procedural functioning, and the possibility of a memorandum of understanding or relationship agreement between the African Court and the ICC."⁴² Yet, (outside of the immunity issue) the drafters of the Malabo Protocol seem to view the intended relationship between the ACJHR and ICC as a complementary one, which seeks

³⁹ Garth Abraham, *Africa's Evolving Continental Court Structures: At the Crossroads?* South African Institute of International Affairs (SAIIA) Occasional Papers, Democracy & Human Rights, 3 February 2015, available at <https://saiia.org.za/research/africas-evolving-continental-court-structures-at-the-crossroads/>; accessed 3 July 2019.

⁴⁰ Kenyans for Peace with Truth & Justice, *Seeking Justice or Shielding Suspects? An Analysis of the Malabo Protocol on the African Court* (2016), available at <http://kptj.africog.org/seeking-justice-or-shielding-suspects-an-analysis-of-the-malabo-protocol-on-the-african-court/>; accessed 5 June 2019, 20.

⁴¹ M. du Plessis, *Implications of the AU Decision to Expand the African Court's Jurisdiction*, Institute for Security Studies (ISS) Paper 235, June 2012; available at <https://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf>; accessed 2 June 2019, 10.

⁴² Abel S. Knotternus and Eefje de Volder, 'The Early Formation of an African Criminal Court,' in *Africa and the ICC: Perceptions of Justice*, eds. Kamari M. Clarke, Abel S. Knotternus and Eefje de Volder (Cambridge: Cambridge University Press, 2016), 376-406, at 385.

to incorporate an intermediary regional focus into the existing international criminal justice framework.⁴³ This is an avenue that may yield several benefits to victims, national jurisdictions, regional groups of states and peoples, and the ICC;⁴⁴ this ought to be given fair consideration by civil society, practitioners, and academics altogether.

9.3 Interpreting the Complementarity Principle Positively and Purposively

An understanding of complementarity based on a positive interpretation is imperative to the success of the ICC and the international criminal justice project as a whole. In support of regional complementarity, it has been argued that “a purposive interpretation of the [complementarity] principle can include regional courts. In assessing the admissibility of a case before the Court, it is important to consider whether any action, if any, has been taken not only in the national courts of the State, but also at regional courts.”⁴⁵ Some judges interpret the law by looking at the words and give them their usual and natural interpretation, otherwise understood as the ‘textual’ or ‘ordinary meaning’ approach to interpretation. This approach is said to reinforce the promise of objectivity and neutrality. On the other hand, purposive approaches provide judges with a broader scope to develop the law, since the aim is to determine the “normative message that arises from the text...

⁴³ This may also be understood as a part of the AU’s peace and security agenda, see for example African Union Constitutive Act, Article 4(h).

⁴⁴ Admittedly, the ACJHR may or may not undermine the ICC; the important point is that the ICC has failed victims in some significant ways and supplemental or alternative forms of justice should be given full consideration. For example, consider the issue of group-based selectivity, see generally Asad Kiyani, “Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity,” *Journal of International Criminal Justice* 14 (2016): 939-957; consider also the ICC’s deference to political power most pointedly demonstrated by the failed Afghan Referral, see: Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, (ICC-02/17-33 12-04-2019 1/32 EK PT), Pre-Trial Chamber II of 12 April 2019 § 32(a). This decision has subjected the court to targeted criticism. See generally Luis Moreno Ocampo, ‘Deconstructing the Int’l Criminal Court’s Decision on Afghanistan’, Just Security, 24 April 2019 available at <https://www.justsecurity.org/63746/deconstructing-the-intl-criminal-courts-decision-on-afghanistan/> accessed 1 June 2019: “The decision of the International Criminal Court’s Pre-Trial Chamber II refusing to open an investigation into crimes committed in Afghanistan establishes a new Rome Statute rule: there will be no investigations against suspects when they have enough raw political power to affect States Parties’ cooperation with the Court.”

⁴⁵ “Annex 1: Africa and the International Criminal Court–Recommendations,” in Gerhard Werle, Lovell Fernandez and Mortiz Vormbaum, eds., *Africa and the International Criminal Court*, 231.

interpretation shapes the content of the norm ‘trapped’ inside the text.”⁴⁶ Importantly, judges do remain bound by the text of the statute: “That language sets the outer limits of any possible interpretation... one cannot read into them what they do not contain.”⁴⁷ On this basis, it is useful to conceptualize what the ‘fundamental values’ of complementarity are and how its language might allow the ICC judges to incorporate regional jurisdictions under its purview.

Employing a purposive approach to an interpretation of the complementarity principle is necessary yet challenging. The nature of the Rome Statute negotiations resulted in high politicization, compromise, and intentionally built-in ‘constructed’ ambiguities.⁴⁸ At the same time, the notion that international criminal law ought to be approached with the same rigidity as domestic criminal law is deeply flawed. International criminal law requires a supportive international political environment. The legitimacy of the international criminal justice project is subject to scrutiny by individuals, states, organizations, institutions, and civil society. Therefore, although international criminal law is an enhanced form of domestic legal systems, its scope and character are markedly different.⁴⁹ This is especially true of the ICC, which is a complicated hybrid of civil and common law systems, has six official languages, and has eighteen judges with unique backgrounds and perspectives (both legally and personally). Therefore, approaching the Rome Statute with a degree of sensible flexibility paired with ongoing dialectical/deliberative processes to arrive at reasoned and *consistent* interpretations of the law will be essential to the success of the ICC.

⁴⁶Aharon Barak, translated from the Hebrew by Sari Bashi, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005), 3.

⁴⁷ *Ibid.*, 20.

⁴⁸ See Valerie Oosterveld, “Constructive Ambiguity and the Meaning of ‘Gender’ for the International Criminal Court,” *International Journal of Feminist Politics* 16 (2014): 563-580. Also consider the variance in opinion with respect to the apparent statutory conflict between Art. 27 and Art. 98, most relevant to Chad and Malawi and the non-arrest of al-Bashir. This statutory conflict has been framed as ‘political compromise’ struck by the negotiators in Rome, see Otto Triffterer, “Article 27: Irrelevance of official capacity,” in *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article – 2nd Edition*, ed. Otto Triffterer (C.H. Beck, Hart, Nomos, 2008), 781. Also consider the significant political compromise with respect to the independence of the Prosecutor and the role of the UN Security Council, as cursory examples.

⁴⁹ See generally Mark A. Drumbl, *Atrocity, Punishment, and International Law*, (Cambridge: Cambridge University Press, 2007), at xi.

Practically speaking, it seems that a purposive interpretation of complementarity under the Rome Statute requires that the ICC be used fundamentally as a court of ‘last resort’ and maintain the primacy of state sovereignty. According to former ICC Prosecutor, Luis Moreno-Ocampo: “As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”⁵⁰ Ocampo was referring to national institutions, though the point ought to stand for regional courts as well. Complementarity in its simplest form suggests that the fewer number of cases at the ICC, the better the court is doing, provided that the matters are being prosecuted elsewhere. Therefore, an intermediary between domestic and international jurisdictions seems to embody the spirit of complementarity. However, the idea that a regional body could act as a check on national mechanisms and the adjoining responsibility to prosecute extraordinary international crime implies a power-sharing arrangement with the ICC, since both will function as supranational institutions with (potentially, but not necessarily) competing mandates. It also requires that the regional court and the ICC be *cooperative* with other relevant institutions and each other in order to function as a ‘complement’ and provide mutual assistance in the truest sense. This is not impossible and could foreseeably strengthen each jurisdictional level if executed effectively.

A purposive and positive interpretation of complementarity would suggest that the ICC should not investigate or prosecute the same crimes as the ACJHR, *if it were to be effective in its work*. As Knottnerus and de Volder argue,

When the African Court has already decided to investigate or prosecute crimes that are also covered by a preliminary examination or investigation of the ICC, the Prosecutor of the ICC should not proceed with a prosecution against the same persons on the basis that this is not in the interests of justice (Article 53) or possibly because these cases are inadmissible as the concerned persons have already been tried for the same conduct by another court (*ne bis in idem*, article

⁵⁰ *The Principle of Complementarity in Practice*, Informal Expert Paper, ICC-OTP 2003 available at <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>; accessed 20 July 2019.

20). The same logic should also withhold the Prosecutor of the African Court to address cases that fall within its jurisdiction, but have already been completed by the ICC.⁵¹

The significant challenge is one of cooperation and mutual assistance at the institutional, governmental, and individual level(s).⁵² Nevertheless, the purpose of complementarity is to limit the involvement of the ICC and nudge states (or in this case, a regional grouping of states) to prosecute violations of international criminal law. A positive and purposive interpretation of complementarity demands a pragmatic approach at multiple levels of interpretation, understanding, and enforcement.

The principle of complementarity means that international criminal justice in Africa is not synonymous with the ICC. While the ICC is one vehicle for the operationalization of international criminal justice, it is not necessarily the only one, nor should it be. The ICC was never intended to monopolize international criminal justice in Africa, or anywhere for that matter. Consider the expansion of the ACJHR as a potential trade-off. In the worst case, it *might* insulate sitting heads of state and senior government officials from accountability. On the other, it *will* expand subject matter jurisdiction to include crimes that are especially relevant to the continent, but beyond the scope of the Rome Statute.⁵³ Consideration must be given to the idea that ‘international criminal justice’ could exist alongside or perhaps even outside of the Rome Statute system. One is not necessary ‘better’ or ‘worse’ than the other, it is simply different. It is important to emphasize that this remains subject to proper funding and support by states.

To be sure, the ACJHR and the ICC have been criticized on similar grounds: namely, the ICC has been said to cover too many international crimes, even narrowly defined.⁵⁴ Paradoxically, the ICC is also questioned about not covering *enough* serious

⁵¹ Abel S. Knottnerus and Eefje de Volder, “The Early Formation of an African Criminal Court,” 386.

⁵² *Ibid.*, 385: “Other promising options to prevent jurisdictional clashes lie with the Prosecutor of the ICC and the future Prosecutor of the African Court... the Prosecutor of the African Court could consult with the Prosecutor of the ICC, and *vice versa*, in order to ensure that their limited resources are not spent on the exact same cases.”

⁵³ It is important to reemphasize that this refers not only to the expansion of crimes but also conceptions of corporate liability contained in the Malabo Protocol.

⁵⁴ See generally Roy S. Lee, ed., *States’ responses to issues arising from the ICC Statute: constitutional, sovereignty, judicial cooperation and criminal law*, Vol. 26 (International and Comparative Criminal Law Series, Brill Nijhoff/Transnational Publishers, 2005).

crimes, such as terrorism and drug trafficking, for example.⁵⁵ Unlike the Rome Statute (which was limited by international negotiation constraints), the model espoused by the ACJHR expands jurisdiction in a flexible way, which is necessary to prosecute offenders responsible for a myriad of crimes that are harmful to civilians. The expansion of crimes seeks to address the underlying and/or root causes of violent conflict on the continent. Moreover, since the focus is on mid-level suspects, the likelihood of states obstructing the process allows for laying the foundation for later charges by the ICC against senior offenders if coordinated effectively as a robust system of international criminal law.

The ICC is the best victims can hope for in many cases and falls somewhere on the ideational spectrum between ‘something is better than nothing’ and setting global standards for international criminal justice. Including other modes of justice will not delegitimize, destabilize, or dismantle the international criminal justice project as a whole. Rather, it could strengthen the regime by fostering a sense of local ownership, agency, and commitment to the project. Advancing this type of thinking depends on a confidence in the broad norms that underpin the Rome Statute. After all, the ICC will still be there to dispense justice if the ACJHR substantively fails to do so, intervening where and when it should— as a last resort. Manifestations of privilege associated with the rigid advancement of universalist ‘best-practice’ could sometimes do more harm than good. At a minimum, it risks stagnating the growth and development of the international criminal justice system and local capacity-building efforts by eschewing a monolithic interpretation and application which lacks local buy-in.

Some argue that the likelihood of states establishing regional tribunals with overlapping subject-matter jurisdiction with the ICC should be expected over time. For example, Jackson says, “these may be continent wide, as with the African Court, or multilateral, or even bilateral, where two states establish a criminal tribunal to prosecute

⁵⁵ UN Department of Public Information, ‘Some Questions and Answers’, UN OLA DPI/2016 (October 1998) available at <http://legal.un.org/icc/statute/iccq&a.htm>; accessed 5 June 2019: “States could not agree on a definition of terrorism at the Rome Conference.” Note also that the very idea of the ICC was presented by Trinidad and Tobago which asked the International Law Commission to work on an international criminal court with the jurisdiction to prosecute drug trafficking in 1989, see ‘Overview’, UN OLA available at <http://legal.un.org/icc/general/overview.htm>; accessed 5 June 2019.

crimes in a specific conflict.”⁵⁶ Pragmatically, as with most courts, the ICC is limited with respect to funding and resources.⁵⁷ After all, the Rome Statute does not restrict its member states from entering other treaties such as regional groupings or organizations with a mandate to address similar things.⁵⁸ Strategic cooperation at national, regional, and international levels could offer more efficient, complete, and cost-effective approaches to justice in Africa. Setting clear expectations, engaging in mutual assistance, and building capacity at national and regional levels will keep the pressure off of the ICC, as complementarity intended.⁵⁹ Thus far, an analysis and theoretical framing for thinking about regional approaches to international criminal law and complementarity using the example of the ACJHR has been presented. The following sections consider tangible examples to enrich the analysis above and seek to address practical concerns about the integration of regional mechanisms (the ACJHR in particular), into the landscape of the international criminal law system.

9.4 Innovative Regional Approaches to International Justice

Interestingly, the Rome Statute does not specifically address the role of *ad hoc*, hybrid, or special courts/tribunals with respect to complementarity. Although typically viewed as a composite of national jurisdictions, they have a distinct character from usual domestic courts based on ties to the United Nations and the international community more broadly. This is important to consider given the recent resurgence of special tribunals and hybrid courts as a mode of dispensing justice in Africa.⁶⁰

⁵⁶ Miles Jackson, “Regional Complementarity: The Rome Statute and Public International Law,” *Journal of International Criminal Justice* 14 (2016), 1062.

⁵⁷ Some key states have adopted a ‘zero nominal growth’ policy with respect to the ICC’s budget. Although the budget has been allowed to narrowly increase, its caseload, expectations, and demands push the limits of its resources.

⁵⁸ See Ademola Abass, “Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges,” *European Journal of International Law* 24 (2013): 933-946.

⁵⁹ International Criminal Court, Office of the Prosecutor, ‘Prosecutorial Strategy, 2009-2012,’ 5: Some examples: information sharing, inviting domestic officials and lawyers to participate in OTP (or regional) investigations and prosecutions, sharing expertise through trainings and workshops and encouraging development organizations and donors to support domestic accountability efforts.

⁶⁰ Chad, South Sudan, Central African Republic. See generally Mark Kersten, “As the Pendulum Swings – The Revival of the Hybrid Tribunal,” in Mikkel Jarle Christensen and Ron Levi, eds., *International Practices of Criminal Justice: Social and legal perspectives* (London: Routledge, 2017).

The Special Criminal Court in the Central African Republic (CAR) is a good example of this. In April 2015, the Central African Transitional Parliament adopted organic law 15-003 establishing the Special Criminal Court (SCC) to prosecute the most serious crimes including war crimes, crimes against humanity, and genocide.⁶¹ The SCC employs international and national staff and applies a combination of CAR law (Central African Penal Code and Code of Criminal Procedure) alongside international legal norms to deliver justice for victims of the atrocious conflict(s) there. Most important, the SCC's hybridity stems from its combination of law and process.

The SCC was designed to operate alongside ICC involvement, since there are two ICC referrals in CAR. Situation I covers the period since 2002 (peak violence in 2002 and 2003) and Situation II covers 2012 onwards (peak violence between 2012-2015).⁶² Yet, the ICC has been limited in its indictments and prosecutions.⁶³ Conjoined efforts on the part of the United Nations and the government of CAR to stabilize the country contributed to the establishment of the SCC, albeit through domestic legislation alone. Labuda argues that, “[f]rom a purely legal perspective, the SCC is indeed a state court operating on the basis of a national law, which in turn suggests that genuine proceedings undertaken by the SCC's organs could render a case inadmissible in line with Article 17 of the ICC Statute.”⁶⁴ Nevertheless, it is important to consider how the SCC fits alongside the ICC in terms of complementarity since the enumeration of special or hybrid courts does not appear in the Rome Statute and the SCC has some distinctly international components in terms of staff and UN support that supersede strict interpretations of domestic or national court systems.

⁶¹ Loi organique portant création, organisation et fonctionnement de la Cour pénale spéciale, Loi no. 15/003, 3 June 2015.

⁶² See *Situation in Central African Republic* (ICC-01-05) May 2007; *Situation in the Central African Republic II* (ICC-01/14) September 2014.

⁶³ CAR I led to one prosecution at the ICC, Congolese politician Jean-Pierre Bemba who was initially convicted of war crimes and crimes against humanity for crimes his militants perpetrated in CAR, see Judgment pursuant to Article 74 of the Statute, *Jean-Pierre Bemba Gombo* (ICC-01/05-01/08-3343 21-03 2016 1/364 NM T), Trial Chamber III, 21 March 2016. This was overturned on appeal by majority opinion, see Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", *Jean-Pierre Bemba Gombo* (ICC-01/05-01/08-06-2018 1/80 EC A), Appeals Chamber, 8 June 2018.

⁶⁴ Patryk I. Labuda, "The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?" *Journal of International Criminal Justice* 15 (2017): 175-206, at 183.

The SCC's relationship with the ICC could be considered controversial. The SCC's Article 37 says that if the ICC Prosecutor exercises jurisdiction over a specific case, it has primacy.⁶⁵ According to Labuda, "the SCC has primacy but only if the ICC is not involved... In terms of jurisdictional priority, the ICC comes first, then the SCC, and last are the ordinary CAR courts."⁶⁶ Understood in this way, the SCC contradicts the idea of the ICC being a court of last resort. The Special Prosecutor will be unable to investigate an individual that the ICC is already pursuing, or least of all will be required to ask the Prosecutor of the ICC for permission to engage with suspects under her (potential) purview, which is "irreconcilable with even the widest interpretations of complementarity under Article 17."⁶⁷ Complementarity requires that the ICC yield to any court willing or able to prosecute egregious international crimes.

The ICC is not bound by SCC law and will continue to rely on the Rome Statute in its operation. Therefore, a purposive and positive understanding of complementarity will reaffirm the ICC as a court of last resort and encourage the Special Prosecutor to pursue individuals at the highest levels of responsibility at the SCC and CAR courts. This situation is hypothetical at present since investigations did not begin until last year, though a relationship between the ICC, SSC, and CAR courts could present a novel approach to international criminal justice in CAR and perhaps in the international community more broadly.

The *Habré* case at the Extraordinary African Chambers (EAC) in Senegal is a notable example of universal jurisdiction and international criminal justice in Africa.⁶⁸ The EAC was a court created by the AU to see justice done for victims in Chad who suffered under Habré's rule from the years 1982-1990. In effect, the EAC was mandated to prosecute international crimes in Dakar, Senegal "on behalf of Africa."⁶⁹ The former Chadian head of state was convicted of crimes against humanity. This has been considered a landmark case in many respects and has been described as an "excellent

⁶⁵ Ibid., 192.

⁶⁶ Ibid.

⁶⁷ Ibid., 192-193.

⁶⁸ Judgment, *Habré*, Chambre Africaine Extraordinaire D'Assises (30 May 2016).

⁶⁹ Ibid.

example of how regional solutions in Africa could and should work.”⁷⁰ This case was the first time that a former head of state was tried in an African court. AU Commission Chairperson Dr. Dlamini Zuma said that “the judgment comes at a time when the AU is actively fighting impunity and promoting accountability for egregious wrongs... the judgment by the EAC, being an African Union mechanism, is significant in that it reinforces the AU’s principle of African solutions to African problems.”⁷¹ The EAC was created inside in the existing Senegalese court structure.⁷² Its mandate was to prosecute Habré and all “person or persons most responsible” for international crimes including genocide, war crimes, crimes against humanity, and torture.⁷³ The statute relied largely on the definitions of crimes contained within the Rome Statute. The EAC was a mixed system, since the legal system in Senegal is French-based. This allowed for victims’ participation in the proceedings, to be represented by legal counsel, and to seek reparations. The process was well sequenced; Senegal and Chad signed a legal cooperation agreement with the AU regarding testimonies, declarations, and the transportation and security of witnesses and experts.⁷⁴ This case demonstrates that mutual assistance and cooperation can be possible, but *only* if political will, human capital, and overall capacity allow.⁷⁵

Trends in international relations and international criminal law seem to suggest that opening up the discussion with respect to complementarity is not only appropriate, but necessary. It is unclear how national jurisdictions fundamentally differ from jurisdictions established by groups of states or international organizations such as the United Nations. This is not necessarily a competitive or mutually exclusive ‘national-regional-hybrid-international’ scenario, or an inherent transfer of authority in any

⁷⁰ Anonymous ICC Judge, interview by author, 24 January 2019.

⁷¹ AU Press Release, ‘AU welcomes the judgement of an unprecedented trial of Hissène Habré’ 1 June 2016, available at <https://au.int/ar/node/30728>; accessed 20 June 2019.

⁷² Human Rights Watch, *Q & A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal* (3 May 2016), available at <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal#19>; accessed 15 July 2019.

⁷³ Reed Brody, “Victims bring a Dictator to Justice: The Case of Hissène Habré,” 2nd ed. (*Brot für die Welt*, June 2017), 13.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* Funding for the EAC came from Chad (€3 million), the European Union (€2 million), the Netherlands (€1 million), the African Union (1 million USD), the United States (1 million USD), Belgium (€500,000), Germany (€500,000), France (€300,000), Luxembourg (€100,000).

direction. On this basis, both the ACJHR and the ICC could operate in a mutually cooperative manner if timed, sequenced, and prioritized strategically from the outset. Regional mechanisms such as the ACJHR could be an essential part of a robust system of global justice.⁷⁶ The important thing is to make clear the expectations and roles of each jurisdiction *now* in order to best realize the shared commitment to increased justice and accountability in Africa for victims and perpetrators of egregious international crimes. The ACJHR has fifteen signatories and no ratifications,⁷⁷ which nevertheless demands some targeted preparation and strategizing in the interim. Practical concerns aside, at a minimum, the enumeration of an African vision of international criminal law offers a meaningful lens through which to evaluate the project's success both on the continent and more generally.

9.5 Resolving Competing Mandates

Informed by interviews with elites with specific relevant knowledge, an ideal distribution of investigatory and prosecutorial roles has been imagined. In its simplest structure, national jurisdictions would investigate and prosecute foot soldiers, regional jurisdictions would pursue rebel leaders, military commanders or intermediaries, and the ICC would deal with heads of state and senior government officials.⁷⁸ The representation below highlights the distribution of responsibility which is necessarily inverted in terms of caseload (volume), but (more) equal in terms of *maximizing jurisdictional capacity* regarding the culpability of individuals targeted at each level. For illustrative purposes, a national jurisdiction could foreseeably prosecute hundreds and thousands of foot soldiers, the ACJHR could prosecute less than fifty commanders or leaders, and the ICC one to five individuals. Jurisdictional demands vary in terms of expertise, resources, and

⁷⁶ Sirleaf, "Regionalism, Regime Complexes, and the Crisis in International Criminal Justice," 703.

⁷⁷ *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*, AU (updated 20 May 2019), available at <https://au.int/sites/default/files/treaties/36398-sl-PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf>; accessed 15 July 2019).

⁷⁸ Anonymous, Office of the Prosecutor: Jurisdiction, Complementarity and Cooperation Division, interview by author, 11 December 2018, The Hague.

capacity, depending on the seniority of individual suspects and the corresponding crimes being investigated and prosecuted. Parsing out an equitable distribution of jurisdictional fora helps to facilitate mutual cooperation and assistance and eliminates an unfair burden on any or all system(s). The interrelationship between the crimes covered by the ACJHR and the core crimes covered by the Rome Statute will establish links to root causes and a more holistic approach to criminal justice. The ACJHR may be beneficial in isolation, though its greatest strategic advantage for the development of international criminal law is that it offers the potential for progressive developments in the holistic investigation and targeted prosecution of crimes at the ICC.

This arrangement offers some key benefits. First, national jurisdictions would undertake the greatest volume of cases, hopefully from all sides of the conflict. Although almost all courts will have difficulty prosecuting government leaders, this approach is highly important for post-conflict reconstruction efforts. The crimes committed by foot soldiers would conceivably be the most intimate, direct, and localized forms of violence perpetrated against victims. Evidence gathering and investigation strategies, once capacitated, will mimic existing domestic legal approaches, including modes of accountability. The accused can be directly linked to the crime, easily identified, and evidence gathered. Victims should have the opportunity to look their perpetrator in the eye and see justice done; this yields greater prospects for transition, stability, and healing in the wake of mass atrocity.

The significant point is that the immunity critiques only scratch the surface of what is at issue. Pigeonholing the Malabo Protocol in the immunity provision undersells its potential contribution to the continued development of a robust system of international criminal justice. More importantly, it is helpful to recall that the United Nations Security Council (UNSC) retains the ability to refer cases to the ICC⁷⁹ if the ACJHR and national

⁷⁹ It is necessary to note that the current climate of international relations suggests that the United Nations Security Council is unlikely to refer cases to the ICC given open hostility on the part of P5 members China, Russia, and the United States. Political limitations and defects aside, the Security Council has the *means* to refer cases to the ICC, which remains a feature embedded in the Rome Statute System no matter how the global climate and approaches to international relations ebb and flow. See generally Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits*, vol. 5 Leiden Studies on the Frontiers of International Law, (Leiden: Brill/Nijhoff, 2018).

jurisdictions fail to prosecute those most responsible for serious violations of international criminal law. Eight of the eleven states that have signed the Malabo Protocol are also States Parties to the Rome Statute and show no signs of withdrawing from the ICC. The Malabo Protocol simply indicates who can be prosecuted regionally and who cannot.⁸⁰

The Vienna Convention on the Law of Treaties (VCLT) might be used to explain the treaty conflict and subsequent obligations of States Parties to both the Rome Statute and the Malabo Protocol.⁸¹ The relevant question is which provision takes *priority*, since at present the relationship between immunities (*ratione personae*) and a state's legal obligations are profoundly unclear.⁸² In this regard, the interpretative rule *pacta sunt servanda* (the agreement shall be honoured) found in Article 26 of the VCLT is useful.⁸³ There are two primary interpretations of the rule. The first does not favour the earlier treaty but makes each treaty enforceable, "even though they may pose potentially incompatible obligations."⁸⁴ The second interpretation favours the earlier treaty. The important part is that under either interpretation, "Treaty I shall be honored unless a State makes the policy choice of breaching and incurring responsibility."⁸⁵ This implies that States Parties to both the Rome Statute *and* the Malabo Protocol will retain an obligation to waive immunity and surrender suspects regardless of their official capacity or else incur responsibility. Borgen explains, "The disagreement concerns the effect of *pacta sunt servanda* on Treaty II: Is the second treaty abrogated or should it simply be followed

⁸⁰ It is important to note that the ACJHR is expansive (more crimes, corporate liability) and limited in terms of its inability/unwillingness to prosecute sitting heads of state and government.

⁸¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Since the parties to both treaties are not identical and the provision in the Malabo Protocol and the provision in the Rome Statute are incompatible, the relevant section is 30(5): Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

⁸² See Guénaël Mettraux, John Dugard, and Max du Plessis, "Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa," *International Criminal Law Review* 18.4 (2018): 577-622.

⁸³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁸⁴ Christopher Borgen, "Resolving Treaty Conflicts," *The George Washington International Law Review* 37 (2005): 573-648, at 587.

⁸⁵ *Ibid.*

to the fullest extent possible without frustrating the first treaty?”⁸⁶ Some scholars argue that this type of treaty conflict is resolved by the state choosing which obligation to fulfill, referred to as the principle of *political will*.⁸⁷ The underlying point is that States Parties will be forced to make a decision to fulfill obligations to either the AU or the ICC, but not both concerning this particular provision. The burden and risk of breaching either or both treaties, it is argued, will lead states to negotiate a solution.⁸⁸ However, abrogating Treaty II (in this case the Malabo Protocol) makes little sense. Instead, it should be followed to the fullest extent and prosecute everyone it can outside of heads of state and government in the interest of positive complementarity and international criminal justice more generally.

Importantly, the UNSC retains the power to refer *anyone* accused of bearing the most responsibility for atrocious crimes to the ICC. Moreover, States Parties to both treaties maintain an obligation to honour the Rome Statute according to the interpretive rule *pacta sunt servanda*, even if the Malabo Protocol is being followed to the fullest extent possible. This suggests that sitting heads of state and government officials will remain captured by the Rome Statute, *even if* they cannot be prosecuted regionally.

Skeptics typically situate the Malabo Protocol against the backdrop of the escalating crisis between the ICC and the AU. The strained relationship has had a profound impact on the discourse. For example, it has been explained that “the charged atmosphere appears to have left scant room for a detailed and comprehensive assessment of the drafting of the Malabo Protocol, and for a calm evaluation [of] how the interplay of national, regional and international jurisdiction could best advance the judicial response to crimes of international concern.”⁸⁹ This is a problem that needs to be addressed, since calls for substantive consideration on the issue of integrating regional courts into an

⁸⁶ Ibid., 589.

⁸⁷ J. B. Bus, ‘Conflicts Between Treaties in International Law’, XLV *Netherlands International Law Review*, (1998), 231.

⁸⁸ Borgen, “Resolving Treaty Conflicts,” 589. In a related area, this has already been demonstrated through the dialectical exchange on the part of South Africa, in particular when it was forced to make a decision whether to oblige the AU or the ICC with respect to non-cooperation and surrender of al-Bashir. If the Malabo Protocol comes into force, States Parties *could* be forced to make a decision regarding which treaty obligation to fulfill.

⁸⁹ Bertram-Nothnagel, “A Seed for World Peace Growing in Africa,” 360.

understanding of the concept of complementarity with the ICC can be found in AU meeting transcripts as early as 2009.⁹⁰ Opportunities for more (local) justice should be supported, not dismissed. Most important, both the AU and ICC are receptive to the idea of complementary regional courts, which indicates the significant potential of the ACJHR.⁹¹

To be clear, the Malabo Protocol may have been accelerated due to tense relations between the AU and the ICC, but the AU had been working on it since 2004.⁹² The propensity to narrowly view the ACJHR as an attempt to insulate politically powerful Africans from the ICC provides an incomplete and/or false narrative with respect to its political and legal trajectory. The strategic approach identified above supports the view that the ACJHR could effectively maximize its jurisdictional capacity by investigating and prosecuting *some* of those most responsible for egregious crimes, even if this excludes sitting heads of state and government. It is highly important to prosecute rebel leaders, junta, military commanders, and other intermediaries between government and soldiers on the ground in any idealized system of international criminal justice. It is possible that the gap between who can be prosecuted regionally and who cannot is a natural one, leading some to argue that leaders' cases cannot succeed nationally and regionally.⁹³ Many of the reasons for this appear to be obvious: the political self-interest of individuals and states insulate those with power. Ultimately, the capacity of national and regional courts, as with the ICC, cannot be separated from the political will of states, which is necessarily tied up with sovereign interests. Until universal jurisdiction is adhered to, the ICC needs to endure the growing pains it is currently experiencing.

⁹⁰ Max du Plessis, "Implications of the AU Decision," 4.

⁹¹ The ICC's receptiveness to regional courts within the international legal system and complementarity more broadly derive from the author's personal interviews conducted under the promise of anonymity, which include Judges and staff of the OTP's Jurisdiction, Complementarity and Cooperation Division.

⁹² *Strategic Plan of the African Union Commission*, Vol. 1: vision and mission of the African Union, AU Commission (May 2004) § 30: "The African Court of Justice will adjudicate in civil cases and be responsible for human rights protection and monitoring human rights violations. It will also constitute itself into a *real criminal court* in the long term [*emphasis added*]."

⁹³ Anonymous ICC Judge, interview by author, 24 January 2019, The Hague; see Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press, 2018).

A purposive approach to complementarity could alleviate some of the current credibility and legitimacy pressures on the ICC. Specifically, some have argued that “the Court is emerging as an institution where only rebels can be and will be successfully prosecuted.”⁹⁴ However, if regional courts such as the ACJHR could effectively investigate and prosecute rebels, junta, or military leaders, this would free up human and material resources for the ICC. This could allow the Office of the Prosecutor to develop a more robust and targeted strategy for the successful prosecution of heads of state and government, which is vitally important for the longevity of the institution. The primary concern should always be what is best for justice, by any and all means possible.

The distribution of jurisdictional responsibility has the potentially cumulative effect of uncovering more evidence and contributing to multi-level information sharing and capacity building. This could be mutually constitutive in strategizing complex modes of liability, which is required to hold heads of state and government to account at the ICC.⁹⁵ Establishing evidentiary ties between foot soldiers, military commanders, and heads of state will establish linkages and culpability at various levels of perpetration. Looking at complementarity in this way is more relational than vertical/hierarchical, since each jurisdictional mechanism offers an opportunity for interdependence in order to bolster, support, and strengthen the other—*only if* effective coordination and political will allow. Neither the ACJHR nor the ICC would have primacy but would work together towards constituting what Cassese refers to as “a system of international justice.”⁹⁶ Regional agency and ownership over the international criminal justice project could contribute to a renewed sense of commitment to ‘international criminal law’ as such and work to establish a cooperative and trilateral international judicial system in African contexts.

A pragmatic question considers the implications of competing obligations of States Parties to both the Rome Statute and the ACJHR. Since a key aspect of

⁹⁴ Mark Kersten, “Some Quick Reflections on the Gbagbo Acquittal at the ICC,” *Justice in Conflict*, 18 January 2019, available at: <https://justiceinconflict.org/2019/01/18/some-quick-reflections-on-the-gbagbo-acquittal-at-the-icc/>; accessed 3 June 2019.

⁹⁵ The Rome Statute, Art. 25.

⁹⁶ Cassese, *The Oxford companion to international criminal justice*, 213.

complementarity is the integration of the Rome Statute into domestic law, it remains unclear how double signatories might implement competing obligations, particularly concerning the issue of immunity.⁹⁷ For example, South Africa's initial withdrawal from the Rome Statute stemmed from its conflicting obligations to the AU and the ICC with respect to the (non)arrest of al-Bashir.⁹⁸ South Africa chose to uphold its regional and/or strategic political commitments to the AU over and above those of the ICC when it allowed al-Bashir to attend an African Union summit in Johannesburg and failed to arrest and surrender him to the Court. The traditional customary immunity that South Africa owed to the head of state and head delegate of Sudan at the AU summit clashed directly with its obligations to the ICC. This raises suspicion about the nature of competing obligations in international law, especially between AU-instruments such as the Malabo Protocol and the Rome Statute. This also brings African regional political interests and dynamics into the fold. The operation of international criminal law is more intersectional than universal inasmuch as it is dispensed alongside complex (and perhaps competing) political, moral, and legal realities. The (perceived) duality between the Malabo Protocol and the Rome Statute raise important questions about the frictions between national, regional, and international political and legal systems and possibilities for synergistic justice.

Most telling, at the peak of the 'ICC withdrawal movement' in 2016, when Burundi, The Gambia, and South Africa had initiated procedures to withdraw from the Rome Statute, the most vocal critics that 'should' have followed suit never did (e.g. Kenya, Namibia, and Uganda).⁹⁹ This is further confused by the fact that the Gambia has reversed its decision by deciding to stay in the ICC, and South Africa has also halted their

⁹⁷ Malabo Protocol Art. 28(e); Malabo Protocol Art. 28(g). See Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* (2017), available at <https://www.amnesty.org/download/Documents/AFR0161372017ENGLISH.PDF>; accessed 10 June 2019: the definition of terrorism is overly broad and the definition of unconstitutional change of government may potentially criminalize popular protests - both are drafted broadly and "raise serious concerns as to the compliance with the principle of legality established under international law."

⁹⁸ See Franziska Boehme, "We Chose Africa: South Africa and the Regional Politics of Cooperation within the International Criminal Court," *International Journal of Transitional Justice* 11.1 (2016): 50-70.

⁹⁹ Franck Kuwonu, 'ICC: Beyond the threats of withdrawal', *Africa Renewal Online* (2017), available at <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal>; accessed 13 July 2019.

withdrawal.¹⁰⁰ Thus, Burundi remains the sole dissenter for transparent reasons.¹⁰¹ It is important to emphasize that the ICC is a vehicle for much more than retribution; it is a manifestation of norms and values and a promise to victims that even if domestic systems fail, the rule of law endures. The Prosecutor of the ICC maintained her commitment to continue with the investigation in Burundi until she left the Office of the Prosecutor in 2021, reaffirming this promise.

This demonstrates that African concerns with the ICC, outside of Burundi, are not rooted in a desire to forego international legal obligations, or the rule of law, but are instead a manifestation of unresolved dispute. This is further reflected in the soft language enacted throughout the AU's Proposed Withdrawal Strategy, which reads more like a plea for reasoned deliberation and compromise than abandon.¹⁰² However, colonial histories and longstanding power imbalances lend to the calls for African Solutions for African Problems. Such structural imbalances ultimately shape a mutually constructed skepticism on the part of both 'Africa' and 'the West,' which will continue to make cooperation and trust difficult in the absence of a genuine dialectical process. The positive point is that neither the ICC nor the AU seem to propose that the two courts are in conflict or are necessarily incompatible. Nevertheless, although the ACJHR is an innovative and creative solution in the abstract sense, making it a tangible reality remains severely debilitated.

¹⁰⁰ See Max du Plessis and Guénaél Mettraux, "South Africa's Failed Withdrawal from the Rome Statute: Politics, Law, and Judicial Accountability," *Journal of International Criminal Justice* 15 (2017): 361-370.

¹⁰¹ See Coalition for the International Criminal Court, *Burundi on regressive path following ICC withdrawal vote* (12 October 2016), available at http://www.iccnw.org/documents/CICCPR_BurundiICCwithdrawal_Oct2016.pdf; accessed 20 May 2019; Human Rights Watch, *Burundi: ICC Withdrawal Major Loss to Victims: Latest Move Shows Government's Disregard for Victims* (27 October 2016), available at <https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>; accessed 25 May 2019.

¹⁰² Withdrawal Strategy Document. See also Human Rights Watch, *AU's Withdrawal Strategy' Less than Meets the Eye* (1 February 2017) available at <https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye>; accessed 3 June 2019; Mark Kersten, "Not All it's Cracked Up to Be-The African Union's 'ICC Withdrawal Strategy,'" *Justice in Conflict*, 6 February 2017, available at: <https://justiceinconflict.org/2017/02/06/not-all-its-cracked-up-to-be-the-african-unions-icc-withdrawal-strategy/>; accessed 3 June 2019. Patryk I. Labuda, "The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics?" *EJIL: Talk!* Blog of the European Journal of International Law, 15 February 2017, available at: <https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/>; accessed 3 June 2019.

9.6 An Operational, Yet Ineffective Court

More robust critiques of the Malabo Protocol stem from practical concerns rather than principled ones. The funding demanded for running a regional court and the cost for adding the additional chamber is crippling. For example, with respect to funding, “the unit cost of a single trial for an international crime in 2009 was estimated to be US \$20 million. This is nearly double the approved 2009 budgets for the African Court and the African Commission standing at US \$7 642 269 and US \$3 671 766, respectively.”¹⁰³ For the purpose of comparison, “the ICC budget [in the same year]... for investigating just three crimes, and not the raft of offences the African Court is expected to tackle—is more than 14 times that of the African Court without a criminal component; and is just about double the entire budget of the AU.”¹⁰⁴ In 2012, the Pan-African Lawyers Union estimated that it would cost \$4.42 million USD and 211 people to staff the ACJHR.¹⁰⁵ It can be deduced that investigating and prosecuting international criminal cases on the continent is flagrantly expensive. For example, the ICC’s budget continues to increase annually. In 2016 the approved budget was 17.3% over what it was in 2015.¹⁰⁶ States have been reluctant to increase the budget of the ICC, but minimal growth has occurred. In the case of the ACJHR, such a financial burden is plainly unrealistic.

Staffing a court with prosecutors, investigators, and judges requires significant resources. The Protocol lacks a funding breakdown and it remains unclear where the money might come from. This raises concerns with respect to independence from the start. Furthermore, it has been argued that historic AU donors such as the European Union may not be willing to finance the ACJHR based on the immunity provision.¹⁰⁷ The widespread disapproval on the part of the international community and global civil society with respect to immunities may challenge the ACJHR’s ability to secure donors, should the Malabo Protocol receive the necessary ratifications to enter into force.

¹⁰³ Max du Plessis, “Implications of the AU Decision to Expand the African Court’s Jurisdiction,” 9.

¹⁰⁴ *Ibid.*

¹⁰⁵ Amnesty International, *supra* note 96, at 9.

¹⁰⁶ *Proposed Programme Budget for 2016 of the International Criminal Court*, Assembly of States Parties, Fourteenth Session (ICC-ASP/14/10), 18-26 November 2015.

¹⁰⁷ Amnesty International, *Malabo Protocol: Legal and Institutional Implications*, 31.

Looking internally, “the capacity of African states to muster the resources and will to guarantee these facilities—even as many of them struggle to guarantee the independence of their own domestic judicial institutions—is open to serious question.”¹⁰⁸ Furthermore, for African States Parties to the ICC and the ACJHR, the double burden of funding in addition to domestic obligations would be encumbering. This raises questions not of willingness to prosecute, but of ability. The financial burden would be extraordinary, which has led some to argue that the ACJHR is ‘stillborn.’¹⁰⁹

Regionalizing international criminal justice may require a more pragmatic approach than the ACJHR lays out. As du Plessis suggests, “Of course, we should all applaud if the AU were in due course to unveil a comprehensively funded, strongly resourced, legally sound, and politically backed African court that fearlessly pursues justice for those afflicted by the continent’s warlords and dictators, at the same time as fulfilling effectively its parallel human rights roles.”¹¹⁰ Unfortunately, the Malabo Protocol is unlikely to have the capacity to satisfy each of these requirements at this time or in the foreseeable future.

9.7 Conclusion

The prospect of the ACJHR offers a unique opportunity to forge the idea of regional complementarity in the Rome Statute System. However, the strained relationship between the AU and the ICC and insufficient resources may act as impediments to the tangible realization of the ACJHR separately or mixed. Against this backdrop, such assumptions are aggravated by the immunity provision contained in Article 46A bis of the Malabo Protocol, which is further confused by the absence of a clearly defined relationship between the ACJHR and the ICC. Each of these concerns makes the likelihood of integrating the ACJHR within the ICC’s complementary schema extremely difficult.

¹⁰⁸ Max du Plessis, “Implications of the AU Decision to Expand the African Court’s Jurisdiction,” 10.

¹⁰⁹ Anonymous, Office of the Prosecutor, interview by author (12 December 2018), The Hague.

¹¹⁰ Max du Plessis, “A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes,” *EJIL: Talk!* Blog of the European Journal of International Law, 27 August 2012, available at <https://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>; accessed 20 June 2019.

Notwithstanding this, a purposive interpretation of complementarity to include regional jurisdictions presents interesting opportunities for (re)thinking and (re)situating the principle in its broader socio-political-legal context. Perhaps more important, the enumeration of an afro-centric approach to international criminal law offers an important perspective through which to understand the strained AU-ICC relationship and way(s) forward in the African context and more generally as part of a strategy aimed at constructive reform.

Chapter 10

10 Africa and the ICC Judiciary

Various attitudes and dynamics of the ICC judges have shaped the operation of the ICC in visible ways. It is useful to evaluate the quality and effectiveness of the judiciary, since it is an essential component of the Courts legitimacy and credibility. The aim of this chapter is to explain some of the problems with the ICC bench, which have become a focal point of concern by scholars and observers of the Court.¹ This has a direct application when viewed through the lens of Africa, since it is these judges who have opined on the criminality *solely* of Africans, at the time of writing. It is necessary to highlight that the problems identified within the judiciary are undergirded by assertions of politicization throughout the state-based nomination and election processes via the Assembly of States Parties (ASP), which directly affects the makeup of the bench in discernible ways. This is directly correlated with the institutional design of the ICC as enumerated by the Rome Statute with respect to judicial nomination and election processes, but more pointedly with the way that states manipulate the judicial nomination and election design features of the Court for political purposes.

It is impossible to divorce any credible evaluation of the ICC (including the judiciary) from its relationship with African States Parties or ‘Africa’ more broadly, since it is there where the Court has operated almost exclusively. It is equally important to acknowledge that African governments and African *individuals* have engaged with, and

¹ See generally Yassir Al-Khudayri and Christian de Vos, “Excellence, not Politics, should Choose the Judges at the ICC,” *Open Society Justice Initiative* (28 October 2019), blogpost available at <https://www.justiceinitiative.org/voices/excellence-not-politics-should-choose-the-judges-at-the-icc>; accessed 20 November 2020: “Nominations and elections of judicial candidates often overlook merit-based considerations in favor of political interests.” See also Open Society Justice Initiative, *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court* (28 October 2019), available at <https://www.justiceinitiative.org/publications/raising-the-bar-improving-the-nomination-and-election-of-judges-to-the-international-criminal-court>; accessed 20 November 2020; Andrea Trigoso, “The Politics of Electing ICC Judges: Some Unpopular Thoughts,” *Justice in Conflict* (22 October 2020) blogpost available at <https://justiceinconflict.org/2020/10/22/the-politics-of-electing-icc-judges-some-unpopular-thoughts/>; accessed 20 November 2020; Angela Mudukuti, “A look at OSJI’s ‘Raising the Bar: Improving the Nomination and Selection of Judges at the International Criminal Court,’” *OpinioJuris* (24 November 2019) blogpost available at <http://opiniojuris.org/2019/11/24/a-look-at-osjis-raising-the-bar-improving-the-nomination-and-selection-of-judges-at-the-international-criminal-court/>; accessed 20 November 2020; Andrea Carcano, “On the exercise of the judicial function at the International Criminal Court: Issues of credibility and structural design,” *Questions of International Law* 67 (2020): 3-23.

occupied important roles within, various components of the ICC's institutional structure.² The so-called 'Africa bias' at the ICC has contributed to the proliferation of rhetoric that the Court is merely a forum for Europeans to prosecute Africans.³ While it is inappropriate to deny the complexities of colonialism and its impact on the global order (of which the ICC is a part), it is likewise important to emphasize the agency exercised by many African states and African individuals in the operationalization of the ICC, and in the context of this chapter, the judiciary in particular. It is also necessary to acknowledge 'Africa' and Africans as bona fide actors within the apparatus of the Court and its structures, rather than continuing to view 'Africa' through the oppressive rhetorical canon of European subjugation and paternalism. As Judge Solomy Balungi Bossa from Uganda has argued, "hundreds of African legal practitioners have made the International Criminal Court what it is. Frankly, it is absolutely ridiculous to accuse the Court of being racist."⁴ With respect to the nomination and election of judges at the ICC, while it appears rational to criticize the ICC judges as individuals, it is also important to challenge the States Parties that nominate and (perhaps more importantly) elect particular candidates, which illuminates a deeper seated institutional and political problem.

The reality is that at the time of writing, African States Parties had nominated more candidates to the ICC judiciary than any other region and had the third highest number of judges elected to the bench in the Court's history. Nonetheless, at the time of writing, African defendants are the only ones who have been subject to ICC decisions—many of which have been openly challenged by scholars, observers, and even the judges themselves. For example, consider the acquittal (on appeal) of Jean-Pierre Bemba, former

² Note, for example that former ICC Judge Chile Eboe-Osuji (Nigeria) served as President of the ICC (2018-2020); Fatou Bensouda (The Gambia) served as the first Deputy Prosecutor under Luis Moreno-Ocampo and became the second Chief Prosecutor from 2012-2020.

³ See for example Dr. David Hoile, "Is the ICC a tool to recolonise Africa?" *New African* (31 March 2017), available at <https://newafricanmagazine.com/15261/>; accessed 10 October 2020: "A hundred and twenty-three years later, Europe appears to still be trying to steal both Africa and the Africans. They are now using their new creation, the International Criminal Court (ICC), to steal Africans from Africa to put on show-trials in Western Europe." The article goes on to argue that "Broadly, the ICC has emerged as a de facto European court, funded by Europe, directed by Europe, and focused almost exclusively on the African continent, and thereby serving Western political and economic interests in Africa."

⁴ Sanji Mmasenono Monageng, "Africa and the International Criminal Court: Then and Now," in *Africa and the International Criminal Court*, eds. Gerhard Werle, Lovell Fernandez, Moritz Vormbaum (Springer, 2014), 19.

Vice President of the Democratic Republic of the Congo, who was detained at the ICC for over *ten* years. Similarly, former President of Côte d’Ivoire and associate Charles Blé Goudé were acquitted at the trial stage when the defense successfully filed a motion that there was ‘no case to answer’ after *eight* years in ICC custody. The administration of justice at the ICC has been extraordinarily and unduly slow, which has had a disproportionate impact on African suspects, survivors/witnesses, and relevant post-conflict societies.

Notwithstanding this, Africans are strongly represented on the bench and have been just as responsible for the judgements issued against Africans as any other judge(s). To be sure, African judges have dealt with a significant number of situations and cases at the ICC at the time of writing, across all divisions.⁵ Africans have been both subjects and authors of justice at the ICC. The dynamism of this reality is important to reiterate in any fair assessment of how ICC judges have contributed to international criminal justice, most particularly in African contexts. It is worthwhile to unpack the merits of this assertion in the context of the ICC judiciary at its various procedural stages, in order to provide a meaningful analysis of how African states and Africans engage within and outside of the various judicial processes at the Court, including: nomination of judicial candidates, election of judicial candidates, and the decision-making of ICC judges. It is plainly visible that ‘Africa’ permeates each of these procedural stages, and African states and African judges have been equitably responsible for the shortcomings and deficiencies of the bench at the ICC to date, while being disproportionately impacted by the same.

10.1 Technical Specifications: an overview of judicial election processes at the ICC

Article 36 of the Rome Statute of the International Criminal Court (ICC) sets out criteria for the qualification, nomination and election of judges. Judges are to be “persons of high

⁵ More specifically, at the time of writing, Chile Eboe-Osuji sat on fifteen cases; Antoine Kesia Mbe-Mindua sat on twenty-four cases; Solomy Balungi Bossa sat on three cases; Reine Alapini-Gansou sat on fifteen cases; Sanji Monageng sat on twenty-one cases; Fatoumata Dembélé Diarra sat on thirteen cases; Akua Kuenyehia sat on twenty-three cases; and Joyce Aluoch sat on fifteen cases.

moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.”⁶ Judges are nominated by States Parties and are elected by secret ballot by the Assembly of States Parties (ASP) for a non-renewable (maximum) nine-year term. Typically, the ASP elects six judges per election cycle. The ICC bench is comprised of eighteen judges, who are the individuals that received the highest number of votes by the ASP. For the votes to count, a two-thirds majority of the States Parties must be present and voting at the election meeting.⁷ All States Parties to the Rome Statute are able to nominate one candidate for each election cycle. The candidate need not be a national of the nominating state, but must be a national of a States Party to the Rome Statute.

Each candidate’s suitability for the position is evaluated by the Advisory Committee on the Nomination of Judges (ACN), the determinations of which are disseminated to States Parties before the election. For illustrative purposes, the ACN ranked the 2020 candidates into four categories:

- (a) highly qualified: the candidate excels in terms of the experience and knowledge about the Court and its jurisprudence; it is very likely that he/she would be able to make an important contribution to the work of the Court;
- (b) qualified: the candidate has some relevant experience and knowledge about the Court; he/she could contribute to the work of the Court;
- (c) only formally qualified: the candidate meets the requirements set out in the Rome Statute for election as a judge, but it is uncertain if the candidate could make a noteworthy contribution to the work of the Court;
- (d) not qualified: the candidate does not meet the formal requirements set out in the Rome Statute.⁸

The Committee is composed of nine members from all five regions and their recommendations are based on the written and oral responses of candidates through

⁶ Rome Statute of the International Criminal Court, A/CONF.183/9 (17 July 1998), Article 36.3(a).

⁷ International Criminal Court: The Judges of the Court, available at <https://www.icc-cpi.int/Publications/JudgesENG.pdf>; accessed 4 July 2020.

⁸ *Report on the Advisory Committee on Nominations of Judges on the work of its seventh session*, ICC-ASP/19/11 (30 September 2020), 6.

interview-based assessments. Importantly, in December 2019, the ASP by consensus adopted a resolution to strengthen the advisory role of the ACN in an effort to better guide States Parties in the nomination and election of judges.⁹ Candidates provide a statement specifying how their experience amounts to the necessary experience in criminal law or international law. They also provide a curriculum vitae, which is publicly available on the ASP website. In sum, candidates are nominated by States Parties, are subject to review by the ACN, and are elected by the ASP.

The Rome Statute breaks down specific representative requirements that directly influence the makeup of the ICC bench. Candidates are required to be fluent in at least one of the working languages of the Court, namely English and/or French.¹⁰ Further, States Parties are required to *consider* nominating and electing candidates who will provide a fair representation of the various legal systems of the world; equitable geographic representation; a fair representation of female and male judges; and no two judges can be nationals of the same state.¹¹ The Rome Statute also particularizes the need to include judges with legal expertise on issues such as violence against women and children.¹² To assure that the representative requirements outlined in the Rome Statute are upheld, the ASP has provided a series of minimum voting requirements, which specify how many judges are required based on professional experience, geographic region, and gender. These representative requirements are reiterated on the ballot paper during the election. In combination, the representative requirements outlined in the Rome Statute and implemented by the ASP provide a clear framework for a presumably diverse and equitable bench. Nevertheless, it is up to States Parties to nominate and elect the best possible candidates, while remaining mindful of these key representative factors.

⁹ *Resolution on the review of the procedure for the nomination and election of judges*, Resolution ICC-ASP/18/Res.4 (6 December 2019).

¹⁰ *Ibid.*, Art. 36.3(c). Note: this requirement has been viewed as a limiting factor by scholars in the Court's nascency, since many defendants do not speak either English and/or French. *See*: Julie Fraser and Brianna McGonigle Leyh, eds., *Intersections of Law and Culture at the International Criminal Court* (United Kingdom: Edward Elgar, 2020).

¹¹ Rome Statute, Art. 36(7); Art. 8(a).

¹² *Ibid.*, Art. 36.8(b).

10.1.1 Practical Consequences of Judicial Nomination and Election Processes at the ICC

On this cursory basis, the nomination and election of ICC judges is a highly political process, since they are both nominated and elected by States Parties to the Rome Statute. This structural politicization has the potential to complicate the overall merit and quality of the bench at the ICC at both the nomination and election stage(s). Arguably, the primacy of meritocracy is further troubled by the Rome Statute's representative requirements, specifically: gender, geographical region, and legal competence.¹³ Fulfilling the prescriptive representative requirements contained in the Rome Statute, by its very design, *could* restrict candidates based on arbitrary factors such as gender and/or region and/or legal competence. Consequentially, it is quite possible that a superior candidate may be unsuccessful if they do not 'tick the necessary boxes' as set out in the Rome Statute and articulated by the ASP.¹⁴ Notwithstanding this, equitable representation on the bench was an institutional design choice made by the drafters of the Rome Statute. This appears logical in the sense that it is an international court and the panel of those making judgements ought to reflect that fact. Nevertheless, it is similarly important to acknowledge that such a design choice can be a limiting factor in terms of overall quality and merit when strictly executed in practice, depending on the credible engagement on the part of states to nominate and elect the best possible candidates among the spectrum of qualifying factors. This is because states may nominate candidates for political or arbitrary reasons, which has to the potential to trouble the pool of candidates from which States Parties are required to choose from. This is not an inherent problem linked to the institutional design of the ICC *per se*, but with the cavalier engagement by States Parties

¹³ Legal competence refers to the process whereby States Parties nominate candidates under either List A (competence in criminal law) or List B (competence in international law – i.e. human rights, humanitarian, etc.). See specifically Article 36(b) of the Rome Statute, which states, "Every candidate for election to the Court shall: (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal proceedings [List A]; or (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court [List B]."

¹⁴ See ICC Assembly of States Parties: Resolution ICC-ASP/3/Res.6, "Annex I: Illustrative tables of minimum voting requirements" available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP3-Res-06-ENG.pdf, 6-7 accessed 2 February 2021.

to adequately contribute to, and improve the quality of, the ICC judiciary through rigorous and transparent national nomination procedures and legitimate international election processes. This is important because States Parties need to demonstrate credible commitment to the institutional robustness, legitimacy, and credibility of the ICC in all facets, including the judiciary in order to withstand internal and external pressures on the Court.

10.1.2 Representative Requirements in Practice

The Rome Statute enumerates a minimum gender requirement of at least six women or men on the bench. It is worth noting that the current makeup of the bench reflects a perfect gender balance: there are nine women and nine men on the bench following the 2020 judicial election. The ICC has been lauded by scholars and observers as being a comparatively progressive international Court in terms of its gender balance, which is a fair assertion throughout most of the Court's history.¹⁵ Such claims importantly emphasize the gendered nature of international law and international politics beyond the scope of the ICC, but also suggest that the gender balance on the bench can shift progressively or regressively over time, based on the mindful and inclusive nominations and elections of candidates by states.¹⁶ It is interesting to note that leading up to the 2020 election, there were half as many women (six) as there were men (twelve) on the bench. For illustrative purposes, the 2020 election of six judges had nine female candidates and eleven male candidates who were nominated by States Parties. There were four outgoing

¹⁵ See Josephine Jarpa Dawuni, "Akua Kuenyehia: Leaving a Mark Along the Journey for Human Rights," in *International Courts and the African Woman Judge*, eds. Josephine Jarpa Dawuni and Akua Kuenyehia (New York: Routledge, 2018), at 63: "Despite the progress made by the Rome Statute in achieving gender parity on the bench, the outcome of women's access to other international benches remains uneven." However, when the analysis is expanded to consider the total number of ICC judgeships, the gender balance appears to improve (27 total men, 20 total women). Importantly, there was a time when the ICC bench was comprised by a majority of women.

¹⁶ See Nienke Grossman, "Achieving Sex-Representative International Court Benches," *The American Journal of International Law*, 110 (2016): 82. In surveying the gender balance of international court benches in 2015, Grossman argues, "For courts where states were required by statute to take sex into account when nominating and voting for judges, a higher percentage of women sat on the bench in mid 2015." She concludes that among those courts (including the ICC, European Court of Human Rights, African Court on Human Peoples' Rights, and the *ad litem* benches of the International Criminal Tribunals for Rwanda and the Former Yugoslavia, thirty-two percent of the judges were women as opposed to fifteen percent among courts that did not require a 'fair representation' of women and men judges.

male judges and two outgoing female judges, which presented an opportunity to reprioritize an equitable gender balance on the bench.¹⁷ On a positive note, the Rome Statute safeguards the inclusion of women judges at the ICC and is reflective of a progressive development in the landscape of international law and international criminal justice. Throughout the Court's history, of the fifty-four judges ever to be elected to the ICC, twenty-nine have identified as male and twenty-five as female—not a completely perfect balance, but a notable and progressive one, nonetheless. The voting requirements based on gender were illustrated by the Assembly of States Parties in Table 4 of Annex 1: *Illustrative tables of minimum voting requirements*, which suggest that if four women remained on the bench after 2020, at least two women *must* be elected by minimum voting requirement. With respect to men, if eight remained on the bench after 2020, the minimum voting requirement would be fulfilled. Thus, it was conceivable that *all* incoming judges could have been women in this election cycle. While this did not happen, the ASP went above the minimum voting requirement with respect to gender by electing four incoming female judges. This is significant for achieving the goal of gender parity in the international legal landscape.

In terms of judicial competence, candidates are elected from either 'List A'—those having competence and experience in criminal law and procedure, or 'List B'—those having competence and experience in international law, such as international humanitarian law or international human rights law.¹⁸ According to article 36.3(b) of the Rome Statute,

Every candidate for election to the Court shall:

- (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal proceedings [List A]; or

¹⁷ The outgoing Judges were elected in 2011. The outgoing male Judges include Howard Morrison (United Kingdom); Robert Fremr (Czech Republic); Chile Eboe-Osuji (Nigeria); Anthony Thomas Aquinas Carmona (Trinidad and Tobago). The outgoing female Judges include Miriam Defensor-Santiago (Philippines) and Olga Venecia Herrera Carbuccion (Dominican Republic).

¹⁸ Rome Statute, Art. 36(3)(i); Art. 36(3)(ii).

- (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court [List B].¹⁹

The Rome Statute requires that at least nine candidates be elected from List A and at least five candidates be elected by List B. At the time of writing, there were eleven judges elected from List A on the bench, and seven elected from List B. It is worth noting that at the 2020 judicial election there were four remaining judges from List B on the bench, which therefore required that *at least* one incoming judge be elected from List B to satisfy the minimum requirement of five. Similarly, five outgoing judges were elected from List A, which required that *at least* one incoming judge be elected from List A to satisfy the minimum requirement of nine. It is important to emphasize that again in the 2020 election the ASP went above the minimum voting requirements by electing three judges from List B and three judges from List A. This effectively increased the representation of List B candidates on the bench altogether from five to seven. The representation of judges elected from List A decreased from thirteen to eleven, reflecting a rebalancing of the bench based on competence and experience. As a matter of practice, the bench has emphasized List A candidates as a maxim—a natural consequence of the construct of the Rome Statute. To be sure, of the fifty-four judges elected to the ICC to date, thirty-three were elected from List A and twenty-one were elected from List B. It is instructive to recall that the first judicial election in 2003 assembled the first ICC bench with eight Judges from List B and ten Judges from List A. Thus, the current bench at the time of writing reflects a (more) similar structure to the original judiciary on the basis of competence and experience.

This was an unexpected shift because over time, the number of List B electees had been reduced so as to allow only for the minimum number required by the Rome Statute. The reasons for this were manifold; the strongest of which being that some observers have argued that List B should be eliminated altogether, since it facilitates the election of judges with no judicial training or experience (i.e. career diplomats and

¹⁹ *Ibid.*, at 36.3 (b).

academics).²⁰ However, this is not a generalizable point of view and is certainly contentious on the basis that List A Judges have made just as many problematic judgements in the Court's nascency as those elected by List B. The notion that career academics or diplomats offer a unique perspective beyond a nuanced criminal law background is not *de facto* incompatible with the intent and purpose of the ICC. It is pertinent to reiterate that it is the responsibility of States Parties to nominate candidates on the basis of merit, regardless of what list they are nominated from.

In addition, the Rome Statute calls for equitable geographic representation on the bench. The ICC uses the five regions of the world as described by the United Nations to frame geographic representation: Western European and Other States Group (WEOG); Eastern European States; Group of Latin American and Caribbean States (GRULAC); African States; and Asia-Pacific States. Each region ought to have *at least* three judges on the bench to be considered equitably represented. At the time of writing, the Western European and Other States Group had the greatest geographic representation with five judgeships; African States had four; the Group of Latin American and Caribbean States had four; Eastern European States had three; and Asia-Pacific States had two. This construct reflected a fair degree of regional parity, although Asia-Pacific States are technically 'underrepresented' by one seat according to the Rome Statute.

This underrepresentation can be situated within its broader political context. Specifically, the 2020 election of six judges had seven nominees from Latin American and Caribbean States; seven nominees from African States; three nominees from Western European and Other States; two nominees from Eastern European States; and one nominee from Asia-Pacific States. In 2020, there were two outgoing Judges from Latin American and Caribbean States, and one outgoing judge in each other region. Thus, to fulfill the proposed regional voting requirements, two incoming judges ought to have come from Latin American and Caribbean States; one from Eastern European States; and

²⁰ Open Society Justice Initiative, *Raising the Bar*, 4: "In particular, so-called 'List B candidates' (those candidates nominated for having 'established competence in relevant areas of international law... and extensive experience in a professional legal capacity') often lack that experience [in criminal law and procedure]... Similarly, the fact that so many government officials, including career diplomats, have previously been elected to the ICC judgeships is a cause for concern."

one from Asia-Pacific States. Since only two nominees came from Eastern Europe, each had a fifty-fifty chance of being successfully nominated on this basis alone.²¹ The point is not to criticize these candidates on their merits, but rather to question whether States Parties had done a sufficient job in nominating the best possible candidates for the job, from the greatest number of states, to create a more competitive election environment. Regional political dynamics should not influence a States Party's willingness to nominate qualified candidates, even if another country in the region has already submitted a nomination. Regional apathy devalues the nomination and election process altogether, which has far reaching consequences for the perceptive legitimacy of the Court.

This is particularly telling in the context of Asia-Pacific States, since the only candidate put forward from the region in the 2020 election was Khosbayar Chagdaa from Mongolia. Chagdaa had also been nominated in 2017 but was not elected. Judge Raul Cano Pangalangan (Philippines) was outgoing, leaving a vacancy for a judge from the region to maintain a balanced bench in terms of geographic representation, per the Rome Statute. *Prima facie*, the vacancy of Judge Pangalangan ought to have secured the successful election of Chagdaa in the interests of fair and equitable geographic representation on the bench. The practice of regional groups nominating only the number of candidates to fit the number of seats available for that group is referred to as a 'clean slate.' Mackenzie et al. explain that in the context of the ICC, States Parties are not formally obliged to vote for a 'clean slate,' "but they may decide to do so in order to retain regional balance."²² This institutional flexibility allows States Parties to focus on a candidates overall merits, above strict regional representation requirements. With specific reference to Chagdaa, it is worth noting that the Advisory Committee on Nominations of Judges determined that he "did not have in-depth knowledge of the Rome Statute or the jurisprudence of the International Criminal Court" and furthermore, the ACN "was not persuaded that the candidates' oral proficiency in English... met the high standard

²¹ Gocha Lordkipanidze from Georgia was elected in 2020.

²² Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands, *Selecting International Judges: Principle, Process, and Politics* (Oxford: Oxford University Press, 2010), 110.

prescribed under article 36, paragraph 3(b)(i) of the Rome Statute.”²³ On this basis, it was determined that Chagdaa was only formally qualified for appointment as judge of the International Criminal Court. Thus, the quality of the candidate was called into question leading up to the election. Mongolia withdrew Chagdaa after the fourth election round after he received eight votes of the required two-thirds majority (eighty).²⁴ The reasons for Mongolia’s decision to withdraw Chagdaa are presumptive, but nevertheless it is apparent that his election was highly unlikely following the fourth round. Thus, States Parties decided to prioritize factors over and above the retainment of regional balance on the bench. This is a positive outcome and demonstrates that States Parties are making a concerted effort to emphasize merit-based judicial appointments at the ICC. In choosing not to elect the candidate from the Asia-Pacific region, Latin American and Caribbean States claimed another seat on the bench, increasing regional representation from GRULAC to four judges from its previous three.

10.2 *Realpolitik* and ICC Judgeships: Financial Contributions to the Court

Notwithstanding this, it is important to acknowledge the reality that at present, most ICC judges come from Western European and Other States—even within a statutory context that demands regional parity. This reality subjects the Court to criticism on colonial grounds, whether logical or not.²⁵ It is most important to consider that it remains the ultimate responsibility of States Parties to nominate and elect candidates that can fulfill

²³ Assembly of States Parties, Report of the Advisory Committee on Nominations of Judges on the work of its seventh session, ICC-ASP/19/11, 30 September 2020, 12, paras. 2 and 4.

²⁴ Note that Chagdaa received 33 of the required two-thirds majority (78) in the first round; 16 of the required two-thirds majority (74) in the second round; and 14 of the required two-thirds majority (79) in the third round. See 2020–Election of six judges–Results available at https://asp.icc-cpi.int/en_menus/asp/elections/judges/2020/Pages/Results.aspx; accessed 1 January 2021.

²⁵ While it is argued that merit and attitude should be weighed more heavily than representational markers, the need for an inclusive and representative judiciary is essential. It is well understood in many legal systems that diversity among the bench is imperative for a fairer justice system. See for example Lawrence R. Baca, “Diversity Among Judges: Building a Better Bench,” *Judges’ Journal* 43 (2004): 30-35, at 30. The author describes his experience as being “one Indian in a sea of white justice.” Quite naturally, stakeholders want to see an ICC that is representative of international society. Similar arguments have been made in other legal contexts with respect to the need for more women on the bench.

the representative requirements outlined by the Rome Statute while also meeting the primordial merit and attitude-based qualifications that will best achieve the overall purpose of the ICC. However, since States Parties nominate candidates, there is reasonable concern about the politicization of the process (i.e. by states arbitrarily appointing candidates in the absence of a competitive national nomination process; the so-called ‘horse-trading’ or ‘vote-trading’ of candidates as a result of diplomatic lobbying at ICC judicial elections; and the related inquisitive suspicion that financial contributions by states are correlated with increased representation and influence on the bench, illustrated by Table 10-1, below).²⁶

²⁶ See David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014), 81-83, at 82: “Major powers with large military, development, and aid budgets have significant leverage, and there is evidence that they used it during the first round of ICC elections. ‘Votes can be traded against promises of development assistance,’ one delegate reported to researchers. While the Jordanian diplomat chairing the Assembly asked states to refrain from the bargaining and horse-trading that had become typical in elections for other international judgeships, it appears the practice endured.” Note also: the assessed contributions by States Parties are based on the scale of assessments used by the United Nations for its regular budget.

Table 10-1: Top Ten ICC Budget Contributors and Judgeships²⁷

Country	2019 Assessed Dues (amount in Euros and % of total)	Current Judgeship	Previous Judgeship	Total Nominations	Success Rate (%)
Japan	24,201,348 16%	Yes	2	3	100
Germany	16,115,590 11%	Yes	1	2	100
France	12,509,604 8%	Yes	2	3	100
United Kingdom	12,085,392 8%	Yes	2	3	100
Italy	8,751,057 6%	Yes	2	3	100
Brazil	8,217,956* 6%	No	1	3	33
Canada	7,234,872 5%	Yes	1	2	100
Republic of Korea	6,229,598 4%	Yes	1	2	100

*Brazil owed 10,475,986 Euro at the time of writing and was the only leading assessment with an outstanding balance owed to the Court. Brazil has a mixed record of making its payment (e.g., Brazil owed 11,413,371 euro in accumulated assessments in 2015).

The implication of this is that 39 per cent of the current ICC bench was nominated by the leading financial contributors of the Court (35 per cent of all-time ICC judgeships). It is also important to note the overarching reality that the top ten assessments comprise 72 per cent of the Court's total. For the purpose of comparison, the *regional* total for Africa in 2019 was 1,930,634 Euro, which comprised 1.3 per cent of the ICC's total assessments for the year. The demonstrable point is that the ICC has disproportionately operated in African situations while being largely funded by a core group of states, mostly from

²⁷ Assembly of States Parties to the Rome Statute of the International Criminal Court, Nineteenth session, New York, 17 July 2020, ICC-ASP/19/12, Financial statements of the International Criminal Court for the year ended 31 December 2019, 45-46, available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-12-ENG-FS-ICC-17Jul20-1900%20cln.pdf; accessed 30 July 2020.

Western Europe. While the United Nations assessment scale is largely responsible for this, the very construct provides circumstantial support to embolden politicized arguments which pit the ICC and Europe against Africa and Africans.²⁸ This is further strengthened by the reality that WEOG has had sixteen all-time ICC judgeships, the most of any region, and the leading financial contributors from the Western European and Other States Group have had a 100 per cent success rate for nominees. This matters inasmuch as it supports the claim that that *realpolitik* influences judgeships and provides powerful states with a reasonable assurance of influence on the bench, with little contestation. At the same time, it is important to acknowledge that African States have had eleven ICC judgeships (the third most, regionally at the time of writing).²⁹ Thus, even though other states contribute more financially to the ICC, African states continue to be represented on the bench and have comprised 20 per cent of the total ICC judgeships to date.

10.3 Regional Participation in the Nomination Process

Strong African representation on the ICC bench can most readily be explained by the disproportionately high regional engagement in nomination processes. To be sure, at the time of writing, the African region had nominated more ICC judicial candidates than any other region. There had been 149 all-time nominations for ICC judges and Africa had submitted 47 of them, comprising 32 per cent of all-time nominations. Engagement in the judicial nomination process is broken down by region in Table 10-2, below.

²⁸ The United Nations Assessment scale is based upon rule 160 of the Rules of Procedure of the UN General Assembly (A/520/Rev.18) and is summarized as the amount of money that the General Assembly determines that a state is able to pay to cover the expenses of the Organization. This scale is used to disperse funding obligations to states at the ICC.

²⁹ Note that the overall breakdown of ICC judgeships by region is as follows: WEOS (16); GRULAC (12); African States (11); Asia-Pacific (8); Eastern Europe (6). Thus, it is apparent that Western Europe has a significant leg up on the other regions when considering lifetime judicial appointments at the ICC. Yet, even more important to note, it is a handful of core States within Western Europe and Other States that have nominated the bulk of the Judges—i.e. the leading financial contributors: Italy (3), France (2), Germany (2), the United Kingdom (3), and Canada (2) have provided the nominations for twelve of these sixteen Judges (75 per cent). This is significant when one considers that there are twenty-five States Parties to the Rome Statute in the region. Similar trends are identified in the Group of Asia-Pacific States, since seven out of nine Judges were nominated by a core group of States: Japan (3), Korea (2), and the Philippines (2), prior to its withdrawal as a States Party to the Rome Statute.

Table 10-2: Regional engagement in the nomination of ICC Judges and success rates

Region	Number of States Parties (by region)	Per cent of States regionally that have nominated <i>at least one candidate</i>	Total Number of Regional Nominations	Total contribution to all-time ICC judge nominations (per cent)	Number of Judges successfully elected	Success Rate (per cent)
Group of Western European and Other States	25	56	28	19	16	64
Eastern European States	18	67	22	15	6	30
Asia-Pacific States	20*	50	19	13	11	61
Latin American and Caribbean States	28	54	33	22	10	38
African States	33	64	47	32	10	24

*This analysis includes the Philippines because it successfully nominated two candidates (one in 2011 and one in 2015), prior to its withdrawal from the Rome Statute on March 17, 2018.

This breakdown is important for any analysis of the ICC judiciary inasmuch as it demonstrates the level of active regional engagement by States Parties to contribute to the makeup of the bench. The level of apathy across regions is quite striking when one considers the contributive value of the ICC. Perhaps more practically, it is curious that any States Party would be willing to subject its nationals to the Court without seeking adequate representation on the bench. It is logical that African States and Latin American and Caribbean States have contributed the greatest percentage of nominations by region, since it is comparatively more likely for the Court to be involved in these regions. Least of all, GRULAC and African States have had the greatest first-hand experience with the types of crimes covered by the Rome Statute, which might create a greater normative valuation to the work of the Court and increased support. This is important because both Latin American and Caribbean States and African States continue to nominate the most candidates, reflecting regional engagement and a generalized ability to claim credible commitment to the work of the ICC. Such engagement also provides a strong counter to the influence of powerful states throughout the judicial nomination and election processes, which is an important objective for small and middle power states operating within international institutions such as the ICC.

Notwithstanding this, it is necessary to highlight that regional representation in the African context has not been wholly equitable. Table 10-3 illustrates African regional nominations, at the time of writing, based on geographic location and regional affiliation, namely membership to the Economic Community of West African States (ECOWAS); South African Development Community (SADC); and East African Community (EAC).

Table 10-3: African regional representation on the ICC bench

State	Geographic Location/Regional Affiliation	National Language	Gender of nominee	List Elected From
Benin	West Africa/ECOWAS	Francophone	Female	B
Botswana	South Africa/SADC	Anglophone	Female	B
Democratic Republic of the Congo	South Africa/SADC	Francophone	Male	B
Nigeria	West Africa/ECOWAS	Anglophone	Male	A
Ghana	West Africa/ECOWAS	Anglophone	Female	B
Mali	West Africa/ECOWAS	Francophone	Female	A
Sierra Leone	West Africa/ECOWAS	Anglophone	Female	A
South Africa	South Africa/SADC	Anglophone	Female	B
Kenya	East Africa/EAC	Anglophone	Female	A
Uganda (two elects)	East Africa/EAC	Anglophone	Female Male	A A

On this basis, while there has been Francophone representation from Africa on the bench, the majority of African judges have been English-speaking, and none have represented Arabic-speaking North Africa, though Tunisia is the only State Party that could nominate a potential candidate from the region, and it has done so three times, including in the 2020 election, unsuccessfully. The Horn has also not been represented on the bench, although Djibouti is the only country from the region that is also a State Party to the Rome Statute, and it has never nominated a candidate. Central Africa remains

unrepresented as well, even though Central African Republic and the Congo have each nominated a candidate, unsuccessfully. What is perhaps more curious is the fact that most African judges have come from West Africa (five) and West African states are more widely represented than the States Parties in the South African Development Community (SADC) that were so actively involved in the drafting of the Rome Statute from the earliest stages. SADC States Parties have made a combined eleven nominations: Botswana (1); Democratic Republic of the Congo (3); Lesotho (1); Madagascar (2); Mauritius (1); South Africa (2); and Tanzania (1). Therefore, SADC as a whole has had a 27 per cent success rate of successfully nominating a candidate to the ICC. This is important inasmuch as it demonstrates that historical involvement in the drafting of the Rome Statute is not a definitive marker of representation on the bench.

The same trend holds when the analysis is expanded to consider nominations from the Economic Community of West African States (ECOWAS). For example, Senegal was especially active in its commitment to the Rome Statute project and hosted the African regional conference in 1998 in Dakar to mobilize regional support for the treaty.³⁰ Since then, Senegal has nominated three candidates to the ICC bench and has had a zero per cent success rate. Sierra Leone has similarly nominated three candidates and only one was elected (in 2020). ECOWAS states have collectively nominated twenty candidates, including: Benin (2); Burkina Faso (1); Ghana (3); Mali (1); Niger (2); Nigeria (3); Senegal (3); Sierra Leone (3); and The Gambia (2). This amounts to a 25 per cent sub-regional success rate in the nomination of judicial candidates at the ICC. The significance of this is that ECOWAS states have demonstrated a particularly strong commitment to the nomination of candidates, even in the face of repeated defeat. This demonstrates a strong commitment to the ICC and a keen interest in contributing to its development. Similar conclusions can be drawn with respect to Tunisia, which has

³⁰ Note that this pattern does not hold when consideration is given to Trinidad and Tobago, the country that initiated the entire ICC project from the beginning in 1993. Trinidad and Tobago have nominated five candidates and four have been elected thus reflecting an 80 per cent success rate – the most of any States Party in the Latin American and Caribbean States region. Consider that Colombia has nominated four candidates and has a zero per cent success rate. It is important to note that Trinidad and Tobago is a regionally dominant contributor to ICC judgeships.

nominated a candidate on three occasions unsuccessfully but continues to engage in the nomination and election process on a consistent basis.

This might be contrasted with the experience of the states in the East African Community (EAC), particularly Kenya and Uganda. Kenya has nominated one candidate and Uganda has nominated two candidates to the ICC bench. All three of these candidates were ultimately elected to the ICC judiciary. The fact that Uganda is the only African States Party that has been represented on the ICC bench more than once is noteworthy (Daniel David Ntanda Nsereko in 2007 and Solomy Balungi Bossa in 2017). Perhaps also important, Judge Nsereko was first nominated unsuccessfully in 2003, but was re-nominated in 2007 and elected. As such, all three individuals that have been nominated by States Parties from the EAC were eventually elected. Kenyan candidate Joyce Aluoch was elected in 2009, the same year that the Prosecutor began to investigate the post-election violence in Kenya. Indeed, the most distinguishable marker that separates the EAC experience is the fact that the ICC has been involved in both the Kenyan and Ugandan contexts. This is relevant, since ICC involvement in a state may prompt increased political motivation to be represented on the bench. The ICC has similarly been involved in the situations in the Democratic Republic of the Congo and Mali. An extra-regional example of this is Georgia, since it is a state subject to ICC activity and has similarly successfully nominated a judicial candidate in 2020. It is perhaps explanatory to consider that such representation could also be viewed as a way to increase institutional trust in those regions where the Court is actively involved, although such conclusions are plainly speculative and circumstantial, but nevertheless appear to present a patterned consistency in rates of electoral success among a particular group of states.

It also worth highlighting that all of the African States Parties to the ICC also belong to the African Union (AU). This informs voting patterns at ICC elections since, “the African Union always votes as a bloc.”³¹ It has been explained that “gathering the support of such a major voting bloc can go a long way in securing a judicial seat, but banding together is also seen as important for the furtherance of African states’ priorities

³¹ Open Society Justice Initiative, *Raising the Bar*, 40.

at the ICC, especially in the face of the prominent influence of major donor states.”³² On this basis, while sub-regional considerations are perhaps relevant, it is similarly important to acknowledge a bigger ‘pan-African’ presence, intended to counter the influence of powerful states such as those in Western European and Other States. This reality may provide additional explanation as to why African representation on the ICC bench has continued to proliferate over time, since African states constitute the greatest number of States Parties to the Rome Statute.

10.4 Politicization and National Nomination Processes

Representative concerns only scratch the surface of the problematic politicization during the judicial nomination and election process at the ICC. For example, William Pace from the Coalition for the International Criminal Court has explained that, “unfortunately, governments don’t always nominate the best people... often for political reasons.”³³ This sentiment was echoed by Stef Blok, the Minister of Foreign Affairs of the Netherlands, who said that “many states... frequently put mediocre judges up for election.”³⁴ Since the judges that were elected through such processes have been responsible for dispensing international criminal justice *exclusively* against Africans thus far, this is a very real problem—especially when it is situated within its broader political context. The optics are bad, and the stake are high, which makes improving the quality of the bench a fundamentally important concern for any supporter of the ICC and international criminal justice, more broadly. The intersecting need for states to nominate and elect representative *and* qualified judges is a practical concern that continues to loom over the ICC and directly impact the Court’s legitimacy and institutional credibility. Notwithstanding this, it is also important to acknowledge that African States have

³² Ibid.

³³ Sophie van Leeuwen, “Election: We might not get the best ICC judges,” *Justice Hub* (15 September 2014), interview available at <https://justicehub.org/article/election-we-might-not-get-the-best-icc-judges/>; accessed 1 July 2020.

³⁴ Stef Blok, “The International Criminal Court must do better. Reforms are urgently needed,” *The Washington Post* (2 December 2019), available at <https://www.washingtonpost.com/opinions/2019/12/02/international-criminal-court-must-do-better-reforms-are-urgently-needed/>; accessed 30 July 2020.

similarly nominated subpar candidates, which is counterintuitive at a minimum.³⁵ The reality that the ICC has an established track record of involvement in African contexts should be enough motivation for African states to nominate high quality candidates, since the likelihood of them dealing with African situations and cases is extraordinarily high. This is a problem that begins and ends with States Parties and will require institutional and domestic political reform to overcome. The ICC has provided institutional guidance on judicial nomination procedures and has advised Foreign Ministers of ICC States Parties to

place a particular emphasis on those candidates who possess substantial practical experience in criminal trials; can meet the many demands associated with adjudicating complex and time-intensive cases; and demonstrate a willingness to learn, including through ongoing trainings. We believe that candidates who possess these qualities, in addition to satisfying the Rome Statute criteria, will be best equipped to meet the challenges ahead.³⁶

These institutional recommendations are general and provide minimal guidance to governments in the nomination process. General assertions about a ‘willingness to learn’ fail to adequately address the importance of assembling a bench of individuals with the right personality. According to one current ICC trial judge, the right personality would be someone with the need to understand colleagues, which requires a genuine curiosity about other systems and backgrounds and a commitment to learning about different approaches to law and to life.³⁷ Another ICC judge “highlighted the need for a general

³⁵ See for example Audu Emakpe (pseudonym), “Justice Ishaq Bello’s Nomination is a Poor Choice for ICC Job,” *International Justice Monitor* (30 September 2020), blogpost available at <https://www.ijmonitor.org/2020/09/justice-ishaq-bellos-nomination-is-a-poor-choice-for-icc-job/>; accessed 20 October 2020. This blogpost highlights that Nigeria’s nomination of Ishaq Bello in 2020 was “shrouded in secrecy... smacks of cronyism, a trait that the administration of President Muhammadu Buhari has become notorious for. Applications were not invited from suitable candidates. Civil society organizations were shut out. No interview was conducted.” Note that the ACN determined that Bello was only formally qualified for appointment as judge of the International Criminal Court, since he limited knowledge of the workings of the Court.

³⁶ *ICC: Recommendations for Nominating and Electing Candidates to Serve as Judges*, Letter to Foreign Ministers of ICC States Parties (18 May 2011), circulated by Human Rights Watch, available at <https://www.hrw.org/news/2011/05/18/icc-recommendations-nominating-and-electing-candidates-serve-judges>; accessed 10 October 2020.

³⁷ Anonymous ICC Judge, interview by author, 12 December 2018, by Skype.

awareness of different legal cultures and the ability to work in cross-cultural legal environments as useful skills in the ICC context.”³⁸ These are personality and character traits that are difficult to discern in the absence of a thorough screening and vetting process at the national level.

It is likewise problematic that there is an overarching theme of secrecy surrounding national nomination processes that has been well-documented in the literature. For example, career academic and women’s rights activist Akua Kuenyehia from Ghana described her inaugural 2003 nomination and election in detail. In the context of her experience with the government of Ghana, she described: “I did not hear about the vacancy [for ICC judge]; I had a call from the Attorney-General. I went to see him, and he told me ‘the President has asked us to nominate you for the ICC.’ I told him I was not interested and he said ‘well, that means you are turning the President down.’ That made me take the matter seriously, and I decided to accept the President’s nomination.”³⁹ Kuenyehia was nominated under List B. She did not have any judicial experience but had taught international law at the University of Ghana and had worked on international committees relating to women’s human rights issues throughout her career. In this context, it is relevant to note Article 36(8)(b) of the Rome Statute: “States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”⁴⁰

³⁸ Mackenzie et al., *Selecting International Judges*, 59.

³⁹ Josephine Jarpa Dawuni, “Akua Kuenyehia: Leaving a Mark Along the Journey for Human Rights,” 63-64.

⁴⁰ *Rome Statute of the International Criminal Court*, Article 36(8)(b). Note that Judge Joyce Aluoch (Kenya, elected in 2009 by List A) had experience at the Court of Appeals in Kenya but had also chaired the African Union Committee of Experts on the Rights of the Child (2001-2005) and was a member and vice-chair of the UN Committee on the Rights and Welfare of the Child (2003-2008). Judge Adelaide Sophie Alapini-Gansou (Benin, elected in 2017 by List B) was a founding member of WILDAF-Benin Network (Women’s Rights and Development in Africa), working as legal counsel to women victims of violence for the Women’s Rights and Development Centre. Judge Navanethem Pillay (South Africa, elected in 2003 by List B) advocated for women’s rights throughout her career, including co-founding the international women’s rights group Equality Now in 1985; Judge Fatoumata Dembélé Diarra (Mali, elected in 2003 by List A) is the founding president of the Office on Relief for Impoverished Women and Children and Observation of the Rights of Children and Women (ODEF), and also participated in several sessions of the United Nations Commission on the Status of Women. Judge Sanji Mmasenono Monageng (Botswana, elected in 2009 by List B) was a long-time women’s rights activist. Judge Solomy Balungi Bossa (Uganda, elected in 2017 by List A) had experience representing indigent women and children in Uganda. In combination, this suggests that African candidates with demonstrative experience with women’s and/or children’s rights have had a particularly good chance of being elected to the ICC bench. This applies

Thus, Kuenyehia was a particularly attractive candidate based on her career-long experience with promoting women's human rights and might have been viewed as highly electable by the Ghanaian government. However, regardless of her objective suitability as a candidate for ICC judge, the unilateral and unsolicited decision-making on the part of the government is particularly striking. In the absence of a broad dissemination of the *note verbale*, other potential candidates could never know that the position was available, which inherently limits the prospect for a competitive and rigorous nomination process among those with a genuine desire to fill the position.⁴¹ Such an approach to ICC judicial appointments reemphasizes the deeply political nature of the process as a whole and places an emphasis not necessarily on merit first but on political nepotism and/or power and influence. Mackenzie et al. explain that "ICC nomination rules are meant to insulate nominations from political influence. In practice, a recurring theme across the interviews was the strong vested interest of governments in strictly controlling the nomination process in order to influence the composition of international courts... Personal relationships and alliances frequently come into play."⁴² This reality supports the notion that states guide nomination processes for reasons of self-interest and not for the broad interest of the ICC, as such.

The lack of transparency within domestic nomination procedures has been a topic of concern for scholars of the ICC. For example, it has been argued by scholars such as Grossman that

little to no statutory guidance to states exists for selecting candidates at the national level. States are left to craft their own procedures, with no international or domestic oversight. Even on courts where some guidance is provided (such as the ICC and ICJ [International Court of Justice]), scholars have raised doubts that it is followed. A series of interviews about selection procedures on these courts

similarly to the African male judges, each of which cite a demonstrable commitment to gender and/or children throughout their scholarly works or civil service.

⁴¹ Josephine Jarpa Dawuni, "Akua Kuenyehia: Leaving a Mark Along the Journey for Human Rights," 64. Note that the government of Ghana did consider three candidates for evaluation and Kuenyehia was selected based on assessments by The Chief Justice in consultation with the Attorney-General and Minister of Justice and the Judicial Council. The Attorney-General and a bipartisan Parliamentary Committee on Legal and Constitutional Issues made the final decision on what candidate to select.

⁴² Mackenzie et al., *Selecting International Judges*, 65.

showed that ‘few well-informed insiders appear to be familiar with the details,’ and processes varied significantly across states and were ‘marked by their lack of transparency and accountability.’ One interviewee described the process of nominating judges to the ICJ and ICC as ‘not very institutional-like, [more] a friendship thing.’ Others wrote that ‘one cannot apply to become an international judge’ but rather must be ‘called’ and that perhaps the most important factor is ‘being on the radar screen of, and appreciated by, one’s own government, particularly by some key civil servants.’⁴³

In the context of ICC judicial nominations, it makes sense that governments would want to nominate a predictable and familiar candidate to the bench. It is likely for this reason that many judicial nominees have experience working in the Ministry of Foreign Affairs, or other similar posts. These candidates provide a modest degree of judicial insulation, should government actors or their allies become the subject(s) of interest at the Court. These candidates also have particular knowledge about government interests that other candidates would lack.

Some scholars have referred to such nominations as a form of ‘cronyism.’ For example, Nigeria’s nomination of Justice Ishaq Bello in 2020 was subject to scrutiny on the basis that “[t]he process that led to Bello’s nomination is shrouded in secrecy. It smacks of cronyism, a trait that the administration of President Muhammadu Buhari has become notorious for. Applications were not invited from suitable candidates. Civil society organizations were shut out. No interview was conducted. Nigeria should not be allowed to infect the world with her cronyism.”⁴⁴ These trends undergird recent efforts by the ASP to bolster national nomination processes, specifically by encouraging States Parties to take responsibility for national procedures for nominating candidates to the Court and by expanding the Advisory Committee on Nominations of Judges’ (can) mandate to provide provisional assessments on the suitability of potential candidates prior to their nomination.⁴⁵ Using Ishaq Bello as an example, tcanACN determined that “[b]ased on both his professional experience and his answers during the interview, and

⁴³ Nienke Grossman, “Achieving Sex-Representative International Court Benches,” 90.

⁴⁴ Audu Emakpe (pseudonym), “Justice Ishaq Bello’s Nomination is a Poor Choice for ICC Job.”

⁴⁵ ICC-ASP/18/Res.4, Annex II (c); 8 *bis*.

bearing in mind particularly his lack of detailed knowledge of the workings of the Court, the Committee concluded that the candidate was only formally qualified for appointment as judge of the International Criminal Court.”⁴⁶ Bello was not elected in 2020. While these trends are positive in that they acknowledge the deficit on the part of States Parties to adequately safeguard national nomination processes, it remains up to States Parties to genuinely commit to fixing the problem.⁴⁷

Even still, this is a multilayered problem inasmuch as States Parties engage in vote-trading and aggressive diplomatic lobbying leading up to and during the election. The influence of the ACN is limited in the sense that it only provides guidance to the ASP and does not directly inform how States Parties will vote for a particular candidate. Problematically, it has been explained that “[m]any individuals who participate in the ICC process believe it to be even more politicized than other international judicial elections.”⁴⁸ Practically, the politicization of judicial nomination processes takes the form of aggressive diplomatic campaigning and vote-trading practices.

Campaigning for judicial nominees at the ICC is a well-established political practice. According to Mudukuti, “[c]andidates engage in expensive and time consuming campaigns, visiting embassies, travelling to UN Headquarters in New York, meeting diplomats and anyone else... relevant for their successful election.”⁴⁹ In this light, it is well-documented that ICC election procedures are riddled with “a toxic campaigning culture... campaigning dynamics often override merit-based considerations: candidates with the strongest campaign, rather than those most qualified, are most likely to be elected.”⁵⁰ This practice is particularly problematic, in part because not every state can afford to engage in such aggressive lobbying efforts, but mostly because it erodes notions

⁴⁶ ICC-ASP/19/11, 12, para. 7.

⁴⁷ See, for example Nino Jomarjidge, “Electing the 2020 ICC Judges: challenges related to nomination of Georgian judicial candidate,” *International Justice Monitor* (15 September 2020) Commentary available at <https://www.ijmonitor.org/2020/09/electing-the-2020-icc-judges-challenges-related-to-nomination-of-georgian-judicial-candidate/>; accessed 10 October 2020. The Georgian nomination procedure, which it is argued “was indeed a step forward. However, the identified flaws raise concerns that the process as a whole may have been tailored to fit a specific person. These weaknesses further confirm that more should be done at the national and international levels to encourage credible national nomination processes and to enhance the quality of judicial nominees.”

⁴⁸ Mackenzie et al., *Selecting International Judges*, 101.

⁴⁹ Mudukuti, “A look at OSJI’s ‘Raising the Bar.’”

⁵⁰ Open Society Justice Initiative, *Raising the Bar*, 5.

of electing a candidate based on merit alone. To illustrate this reality, Judge Akua Kuenyehia from Ghana explained that she “did not actively lobby for her election. In fact, she did not go to New York as most candidates do to personally lobby to be elected.”⁵¹ Kuenyehia was elected on the first ballot in the 2003 election. However, in this case, the *government* did a significant amount of lobbying. It was explained that “[t]hough Kuenyehia was not present during the elections, it is a fact that the Head of the Ghana Mission, the Foreign Minister, and other diplomatic representatives from Ghana did an enormous amount of lobbying on her behalf.”⁵² This example effectively demonstrates the reality of a strong campaign culture surrounding ICC judicial nomination procedures, even if not engaged with by the candidates themselves.

Perhaps even more egregious is the practice of vote-trading. More specifically, vote-trading implies that “a state will vote for a candidate in exchange for a vote in the same or another election (for the same or another body), or in exchange for other benefits or inducements.”⁵³ The ‘other benefits or inducements’ could include development aid. As Mackenzie et al. explain, “[o]ne interviewee who was part of a delegation in the first ICC elections told us that the practice of vote-trading in exchange for aid was more prevalent in the ICC than the ICJ [International Court of Justice] elections.”⁵⁴ This is particularly problematic since such deals reinforce political power structures rooted in *realpolitik*. These sorts of ‘deals’ are fundamentally incompatible with the objectives of the ICC and severely bind less powerful states to the political goals of more powerful states. This reality may further explain why Western European and Other States have such a strong success rate for the election of their nominees at the ICC. Although this practice has been discouraged by the ASP Bureau, evidence suggests that it continues to take place.⁵⁵

⁵¹ Josephine Jarpa Dawuni, “Akua Kuenyehia,” 64.

⁵² *Ibid.*

⁵³ Mackenzie et al., *Selecting International Judges*, 122.

⁵⁴ *Ibid.*, 124.

⁵⁵ Open Society Justice Initiative, *Raising the Bar*, 38: “Yet vote trading has persisted. (One diplomat noted that, since an ICC judgeship is generally a highly valued position, the ‘cost’ for nominating states that seek to have their candidate elected is that they have to lower their political ambitions in other for a when entering into similar vote-trading arrangements elsewhere).”

Addressing this complex problem will require a widespread culture change within and among the ICC States Parties. It is redundant to point out that this is a problem that should never exist if States Parties were truly committed to the institutional success of the ICC. Still, this points to a much bigger issue: the indifference on the part of States Parties with respect to the ICC's posterity and credible development and the overarching and contradictory influence of power politics in the operationalization of the Court, which privileges developed states and binds the less powerful, including those in Africa.

10.5 Repeat Nominations, African modes of Engagement, and ACN Determinations

Many African States have demonstrated a particularly keen commitment to the candidates put forward for judicial election. This is most pointedly illustrated by the fact that African States have re-nominated unsuccessful candidates six times in the history of ICC judicial elections at the time of writing.⁵⁶ Four of these candidates were elected on their second attempt, namely: Daniel David Ntanda Nsereko (Uganda, initially nominated in 2003 and successfully elected in 2007); ICC President Chile Eboe-Osuji (Nigeria, initially nominated in 2009 and successfully elected in 2011); Antoine Kesiya-Mbe Mindua (Democratic Republic of the Congo, initially nominated in 2011 and successfully elected in 2014); and Reine Adelaide Sophie Alapini-Gansou (Benin, initially nominated in 2014 and successfully elected in 2017). In the 2020 election, there were two repeat nominations from African States. First, Gberdao Gustave Kam from Burkina Faso had been nominated as an ICC judge *three* times (2009, 2011, and 2020) under List B; and Raymond Sock from The Gambia was initially nominated in the first judicial election in 2003 and was nominated again seventeen years later at seventy-four years of age under List A in 2020. Neither candidate was successfully elected in 2020.

⁵⁶ To date, ten candidates have been nominated as an ICC Judge more than once. This includes: Khosbayar Chagdaa (Mongolia, List A, 2017, 2020); Gberdao Gustave Kam (Burkina Faso, List B, 2009, 2011, 2020); Ariela Peralta Distefano (Uruguay, List B, 2017, 2020); Ramond Sock (Gambia, List A, 2003, 2020); Reine Adelaide Sophie Alapini-Gansou (Benin, List B, 2014, 2017); Zlata Durdevic (Croatia, List B, 2014, 2017); Dragomir Vukoje (Bosnia and Herzegovina, List A, 2009; 2017); Antoine Kesiya-Mbe Mindua (Democratic Republic of Congo, List B, 2011; 2014); Chile Eboe-Osuji (Nigeria, List A, 2009; 2011); Daniel David Ntanda Nsereko (Uganda, List A, 2003; 2007).

In 2020, the Advisory Committee on Nominations of Judges considered Kam from Burkina Faso to be ‘qualified’ for the job and considered Sock from The Gambia to be ‘only formally qualified.’ Of the seven African candidates nominated during the 2020 election cycle, the ACN determined two to be ‘highly qualified’—Haykel Ben Mahfoudh nominated by Tunisia under List B and Miatta Maria Samba nominated by Sierra Leone under List A.⁵⁷ Both states had nominated candidates twice before, with no success. This is significant inasmuch as both states continued to nominate candidates, and more importantly, provide ‘highly qualified’ candidates in the ACN’s view. This further demonstrates that Tunisia and Sierra Leone remain committed to the integrity of the ICC through their national judicial nomination and election processes. Positively, Miatta Maria Samba was successfully elected in the third round of the 2020 judicial election. Haykel Ben Mahfoudh remained in the election until the final (eighth) round but was ultimately defeated by Althea Violet Alexis-Windsor from Trinidad and Tobago 86 to 32 (79 votes constituted the two-thirds required majority).

It is worth noting that the reasons for Kam’s classification as ‘qualified,’ as opposed to ‘highly qualified’ by the ACN have been met with criticism from some observers. For example, Owiso and Nakandha explain that “[d]espite having extensive international judicial experience spanning decades as Roster Judge at the International Residual Mechanism for Criminal Tribunals for the former Yugoslavia and Rwanda... as a Judge at the ICTR... and as President Judge of the Extraordinary African Chambers that conducted the *Hissène Habrè* trial, the Committee deemed him simply ‘qualified.’”⁵⁸ In reaching its determination, the Committee said that “[t]he candidate demonstrated some general knowledge of the Rome Statute but nonetheless he had only very limited knowledge of the Rome Statute framework... The Committee was disappointed that...

⁵⁷ The ACN determined that Ben Mahfoudh and Samba were highly qualified; Kam was qualified; and Bello, Tall, Milandou, and Sock were only formally qualified. This raises questions about the quality of the candidates that African States sometimes nominate, which may require meaningful reflection in upcoming election cycles.

⁵⁸ Owiso Owiso and Sharon Nakandha, “‘Grading’ the Nominees for the International Criminal Court Judges Election 2021-2030: The Report of the Advisory Committee on Nomination of Judges – Part 1,” *Opinio Juris* (9 October 2020) blogpost available at: <http://opiniojuris.org/2020/10/09/grading-the-nominees-for-the-international-criminal-court-judges-election-2021-2030-the-report-of-the-advisory-committee-on-nomination-of-judges-part-i/>; accessed 20 October 2020.

the candidate did not appear to be familiar with the jurisprudence of the International Criminal Court or of its procedures.”⁵⁹ However, when evaluating Kam’s professional experience, it is difficult to determine only that he is merely ‘qualified’—particularly when evaluated against the other candidates nominated under List B that achieved the designation of ‘highly qualified.’⁶⁰ This is heightened by the fact that the ACN considered Tunisian candidate Haykel Ben Mahfoudh ‘highly qualified’ under List B, while concurrently reporting that “sometimes his answers were inaccurate, for instance regarding the role of victims’ participation, or were controversial (e.g. in relation to trials in absentia).”⁶¹ It becomes increasingly unclear why it is acceptable for one candidate to misunderstand the Rome Statute but not for another.

Kam’s nomination was further questioned by the Committee on the basis that “while the candidate had significant judicial experience in international criminal tribunals, he had been nominated as a candidate for List B. The candidate did not provide any explanation for his inclusion on List B rather than on List A.”⁶² This may explain why the Committee was more likely to determine that diplomats and academics under List B were ‘highly qualified’ in the absence of judicial experience.⁶³ Yet, it remains that the majority of List A candidates have experience in domestic criminal law contexts and rarely in international criminal law contexts.

Two other African nominees with ‘extensive judicial experience in international criminal tribunals’ have been successfully nominated under List B: judge Navanethem

⁵⁹ *Report of the Advisory Committee on Nominations of Judges on the work of its seventh session*, ICC-ASP/19/11 (30 September 2020), 21, paras. 3-4.

⁶⁰ *Ibid.*

⁶¹ ICC-ASP/19/11, p. 20.

⁶² *Ibid.*, 21.

⁶³ Owiso Owiso and Sharon Nakandha, “‘Grading’ the Nominees for International Criminal Court Judges Election 2021-2030.” Note that the List B candidates that were deemed ‘highly qualified’ include: María del Socorro (Mexico) who has primarily worked for the Mexican Secretariat of Foreign Affairs on issues ranging from human rights, international cooperation, and climate change; Sergio Ugalde Godinez (Costa Rica) who has experience as an Associate Professor of International Law at the University for Peace and as the Ambassador of Costa Rica to the Netherlands (including attending ASP meetings as a country representative) alongside other diplomatic experience in relevant areas such as advocate and co-agent at the International Court of Justice, and work on the prohibition of chemical weapons; Ariela Peralta Distefano (Uruguay) whose professional experience includes being the Executive Secretary for Institute of Public Policies on Human Rights and other extensive experience in human rights work; Haykel Ben Mahfoudh (Tunisia) who is a career academic, teaching and researching on relevant subjects such as international human rights.

Pillay from South Africa was appointed to the International Criminal Tribunal for Rwanda before her election to the ICC; and judge Antoine Kesia-Mbe Mindua from the Democratic Republic of the Congo was occupied a seat on the bench at the International Criminal Tribunal for the Former Yugoslavia before his election to the ICC. Moreover, it has been established that “in cases where a candidate possesses sufficient qualifications for both lists, he/she should choose on which list to appear.”⁶⁴ As such, it is relatively uncontroversial to assert that Kam’s experience is primarily in international law and therefore makes him an appropriate candidate to consider under List B based on the historical standards of ICC nomination and election processes. The ACN appears to mischaracterize the categorization of the lists in this respect and calls into the question its priorities in making determinations about the suitability of candidates on the basis of arbitrary or else generally insignificant factors.

It is unclear whether or not such a determination is in line with the object and purpose of List B. Denying qualified candidates’ proper assessment under this category only contributes to the inflammation of arguments from those opposed to the inclusion of List B altogether. The Committee ought to have determined whether or not Kam demonstrated a willingness to learn about the Rome Statute framework, the jurisprudence of the ICC, and/ or its procedures instead of expecting a candidate with perfect knowledge from the beginning. Personality and character traits should be just as important, if not more, as knowledge-based markers when assessing candidates. Moreover, List B is not meant solely to include academics and diplomats.⁶⁵ Individuals with the necessary experience in international law can take many forms and should not be approached with such rigidity if merit is to take primacy throughout the judicial election process.

⁶⁴ Zhu Wen-qi and Sureta Chana, “Part 4. Composition and administration of the Court, Article 36: Qualifications, nomination and election of judges,” in *Commentary on the Rome Statute of the International Criminal Court -Observers’ Notes, Article by Article – 2nd edition*, ed. Otto Triffterer (C.H Beck, Hart, Nomos, 2008), 946.

⁶⁵ Note that there are some good arguments to suggest that academics can contribute meaningfully to the bench. See Mackenzie et. al., *Selecting International Judges*, 53: “academics can make an important contribution to a complementary and balanced bench, by assisting judges with backgrounds as practitioners or diplomats to understand the underlying theory of the arguments being made” and at 52: ‘Professors are very good candidates because officials of government are necessarily very much influenced by the positions of their countries, whilst the professors have, I would say, more liberty.’”

10.6 Quality Concerns and the Power of Interpretation

It is necessary to understand why the quality of the judges at the ICC has become a central concern in the Court's nascency.⁶⁶ To be sure, at various junctures, (some) ICC judges have acted inappropriately. Notable examples include French Judge Marc Perrin de Brichambaut, who made highly unprofessional comments during a presentation at Peking University Law School in 2017, i.e. describing "The Africans" as "a group of 54 countries who provide the suspects and accused" to the Court. ICC President Chile Eboe-Osuji led a lawsuit at the Geneva Tribunal of the International Labour Organization in an effort to sue his own Court for a 26 per cent increase in pay with the knowledge that the institution did not have a budget for internal litigation or salary increases.⁶⁷ Japanese diplomat-turned-judge Kuniko Ozaki requested to return to diplomatic life as the Japanese ambassador to Estonia during the *Ntaganda* case, risking a mistrial after six years of ongoing litigation.⁶⁸ And the Pre-Trial Chamber decided *not* to open an investigation into the situation in Afghanistan, asserting that to do so was 'not in the interests of justice,' despite the Prosecutor's substantive submissions to the contrary.⁶⁹

⁶⁶ See generally Open Society Justice Initiative, *Raising the Bar*; Yassir Al-Khudayri, "Raising the Bar Further: Professional Development for ICC Judges," *International Justice Monitor* (10 June 2020), blogpost available at <https://www.ijmonitor.org/2020/06/raising-the-bar-further-professional-development-for-icc-judges/>; accessed 1 July 2020; Douglas Guilfoyle, "Part II – This is not fine: The International Criminal Court in Trouble," *EJIL: Talk!* (22 March 2019), blogpost available at <https://www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/>; accessed 24 June 2020; Darryl Robinson, "The Other Poisoned Chalice: Unprecedented Evidentiary Standards in the Gbagbo Case? (Part 1)," *EJIL: Talk!* (5 November 2019), blogpost available at <https://www.ejiltalk.org/the-other-poisoned-chalice-unprecedented-evidentiary-standards-in-the-gbagbo-case-part-1/>; accessed 24 June 2020; Kevin Jon Heller, "Judge Ozaki Must Resign – Or Be Removed," *OpinioJuris* (29 March 2019), blogpost available at <http://opiniojuris.org/2019/03/29/judge-ozaki-must-resign-or-be-removed/>; accessed 24 June 2020; Joseph Powderly, *Judges and the Making of International Criminal Law* (Brill/Nijhoff: 2020).

⁶⁷ Marlise Simons, "In the Hague's Lofty Judicial Halls, Judges Wrangle Over Pay," *The New York Times* (20 January 2019), available at <https://www.nytimes.com/2019/01/20/world/europe/hague-judges-pay.html>; accessed 20 November 2020.

⁶⁸ Kevin Jon Heller, "Judge Ozaki Must Resign – Or Be Removed."

⁶⁹ See generally Tjitske Lingsma, "ICC Judges at Centre of Controversy," *Justiceinfo.net* (16 May 2019) blogpost available at <https://www.justiceinfo.net/en/tribunals/icc/41447-icc-judges-at-centre-of-controversy.html>; accessed 20 October 2020; *Situation in the Islamic Republic of Afghanistan*: Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber II: ICC-02/17 (12 April 2019); Transcription écrite de l'intervention de Monsieur le Juge Marc Perrin de Brichambaut à la Peking University Law School (Beijing), available at https://www.icc-cpi.int/RelatedRecords/CR2019_02039.PDF; accessed 20 October 2020; Kevin Jon Heller, "Problematic Statements by the French Judge at the ICC," *OpinioJuris* (5 March

Compounding these problems, the judges as a collective have manifestly failed to issue cogent decisions on several complex and important legal issues, which has troubled the effective development of international criminal law altogether and cast doubt on the credibility of the ICC in the process.⁷⁰ There is indeed reason to be critical of the social and professional quality and overt displays of self-interest demonstrated by *some* ICC judges. At their core, judges must be committed to the stated intent and purpose of the ICC above their own self-interests if the Court is to truly be effective. This is particularly the case because the ICC is financially and politically overburdened. Hostility towards the Court on the part of states (whether signatory/ratifier or not) requires a shared normative commitment to the importance and significance of international criminal justice, even when it is under pressure from both internal and external factors.⁷¹ Governments need to ensure that they nominate candidates with the right mindset and belief in the norms that undergird the ICC if it is to regain and rebuild its institutional credibility.

The importance of this issue cannot be overstated: ICC judges are responsible for dispensing international criminal justice in situations and cases where *all else* has failed. This has both direct and far-reaching implications for suspects, victims, communities (local and international), civil society, political leaders, and other relevant actors. The Rome Statute is constructed by words, but it is up to the judges to give those words meaning by providing a direct application and (perhaps more importantly) a specific interpretation of its values and ideals. It is fundamentally important that ICC judges create legal principles with tangible and practical utility. This can only be achieved if judgements create the necessary jurisprudence and establish *predictable* or at least

2019) blogpost available at <http://opiniojuris.org/2019/05/03/problematic-statements-by-the-french-judge-at-the-icc/>; accessed 20 October 2020; Marlise Simons, “In the Hague’s Lofty Judicial Halls, Judges Wrangle Over Pay.”

⁷⁰ This is meant to include the inconsistent standard of proof used by the Trial and Appeals division in Bemba (which led to a successful appeal), or the manifestly diverse opinions issued on al-Bashir’s immunity during his tenure as head of state of Sudan, as two obvious cursory examples.

⁷¹ This refers to the Africa-ICC crisis, which led to the withdrawal of Burundi in 2017 from the Court but triggered formal opposition from other African states and the African Union; the withdrawal of the Philippines from the Court in 2019 following the opening of an investigation into alleged crimes against humanity perpetrated during the war on drugs; and the United States issuing sanctions and travel bans on ICC staff in 2020 in response to opening an investigation into the situation in Afghanistan.

consistent legal standards and reasoning. Logistically, judges preserve the integrity of the Court by upholding the rights of the accused to a fair trial and are ultimately responsible for ensuring due process throughout proceedings. The spectrum of duties is both profound and complex. International criminal justice is a passion project which ICC judges must share if the Court is to maintain its place in the international global landscape. This is especially because the ICC is not yet a universal institution and states retain the ability to be subject to its jurisdiction or not. Work remains to be done to ensure that international criminal justice and the accountability provided by the ICC is wholly enmeshed in the global order and continually strengthened over time in an evolutionary trajectory.

In order to achieve this aim, it is essential that states nominate judicial candidates who are qualified and committed to doing what is required to uphold the legitimacy of the Court and the value of international criminal justice in general. Quite naturally, the ‘international’ aspect of the ICC complicates the makeup of the bench in significant ways based on individual judges’ identity, which could be informed by a myriad of factors such as the representative factors including gender, education, personal background, professional experience, and nationality. Nevertheless, it is imperative that the ICC judiciary establish a coherent professional culture, which is best achieved by adopting an overarching spirit of collegiality and mutual respect in the face of fundamental difference. As former ICC Judge Akua Kuenyehia explained, “working with the Rome Statute was a novelty for all of us— the civil and common law divide was always a big problem for all of us... now I think nothing of it, but the blending of the traditions has been a big challenge, and I had to sit down and understand that this is a new institution and we are doing something new, and so we had to give each other a chance.”⁷² Giving each other a chance remains a vitally important mindset for the optimal operation of the ICC bench across all divisions.

Thus, despite the multiplicity of individual differences, the judges must share a genuine commitment to the goals of international criminal justice mechanisms—broadly understood. This is the collective responsibility of the bench and of the Court itself. This

⁷² Josephine Jarpa Dawuni, “Akua Kuenyehia: Leaving a Mark Along the Journey for Human Rights,” 68.

does not imply that a conviction should necessarily follow a trial at the ICC as a guaranteed mode of accountability. Rather, the right to a *fair trial* is an essential component of institutional credibility and integrity. As Richard Goldstone has argued, “the fairness of any criminal justice system must be judged by acquittals and not by convictions.”⁷³ This points to the prioritization of institutional credibility, rather than a strict focus on datapoints such as conviction rates, as a better marker of the Court’s success.

At the same time, the unconventional nature of international crime requires a degree of sensible flexibility and logical consistency in order to develop appropriate judicial standards over time. This requires a particular mindedness and the ability to have reasoned discussion amongst the bench and across divisions, which is required to streamline the development of international criminal law at the ICC. Such a judicial approach has a rich history in international human rights law, in particular at the European Court of Human Rights, otherwise understood as “interpretive decision-making.” Although the Rome Statute attempts to restrain or as Powderly says, ‘corset’ interpretive powers, such an approach must be used to adjust ambiguous or flawed legislation.⁷⁴ This is compounded by the reality that the Rome Statute is the result of multilateral diplomacy. In many respects it is up to the judges to make determinations about the ‘real’ meaning of the Statute where it is otherwise and intentionally ambiguous. It is clear that the nature of the political negotiations in Rome led to the construction of a Statute where a literal and/or textual interpretation of the law would be extraordinarily difficult for judges to employ as best practice when adjudicating contentious matters, which complicates the professional environment at the ICC in distinct and complex ways.

⁷³ Richard Goldstone, “Acquittals by the International Criminal Court,” *EJIL: Talk!* (18 January 2019), blogpost available at <https://www.ejiltalk.org/acquittals-by-the-international-criminal-court/>; accessed 20 November 2020.

⁷⁴ See generally Joseph Powderly, ‘Curb Your Creativity:’ The Rome Statute and the Attempted Institution of Interpretive Restraint in *Judges and the Making of International Criminal Law*, ed. Joseph Powderly (The Hague: Brill Nijhoff, 2020), 454-541.

10.7 Rome Conference involvement and its influence on judicial suitability

Some judicial nominees have appealed to their experience in drafting the Rome Statute as a basis for their successful election as an ICC judge. For example, French candidate Marc Pierre Perrin de Brichambaut who was successfully elected from List B in the 2014 election explicitly referenced his involvement in Rome as a basis for his competence and suitability to serve as an ICC Judge. Specifically, his curriculum vitae stated:

I was responsible for coordinating the French contribution to the preparatory work for the International Criminal Court and I led the French delegation to the Rome conference. I was directly involved in shaping some key parts of the Statute regarding crimes, complementarity and victims. I was able to sign the Statute of Rome on behalf of France. I was thus able to acquire a *solid understanding of the choices and compromises that prevailed during the drafting of the Statute* which is of great value for further contributions of its future development... Many others who negotiated the Statute of Rome have performed, and continue to perform with distinction, these eminent functions.⁷⁵

Notwithstanding this perspective, other observers view direct involvement in the negotiation of the Rome Statute as a hinderance to objectivity and neutrality on the bench. Some argue that “[m]any of those interpreting the Statute, including several of the judges, ‘remember’ what the drafters meant at Rome, and this colours their understanding of the various provisions.”⁷⁶ The significance of this polarization lies in the ability of judges to arrive at reasonable conclusions, rooted in the text of the Rome Statute and not politicized interpretations or understandings above all else. Since his election to the ICC bench, Judge Marc Pierre Perrin de Brichambaut has explained that

⁷⁵ ICC Judicial Nomination Curriculum Vitae of Marc Pierre Perrin de Brichambaut, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2014/ICC-ASP-EJ2014-FRA-CV-ENG.pdf; accessed 20 October 2020.

⁷⁶ William A. Schabas, “Georghios Pikis on the Rome Statute,” *PhD studies in human rights* (9 February 2011), blogpost available at <http://humanrightsdoctorate.blogspot.com/2011/02/georghios-pikis-on-rome-statute.html>; accessed 20 October 2020.

the judges are still finding their way around the multiplicity and myriad of problems which derive from the way that the Statute was worded the way that the Rules of Procedure were worded and then the reality of the variety of cases and situations they have to deal with. Judges come from different backgrounds, they have different personalities, they do not spontaneously converge on everything. There is serious debate within Chambers, there is serious debate among Chambers, and there is serious debate among the College of Judges. Setting up broad case law is still a work in progress.⁷⁷

On this basis, in the absence of a culture of respect, appropriate judicial standards will be impossible to establish and uphold. Of additional significance, the statements made by Judge Brichambaut after his election signal that his involvement at the Rome Diplomatic Conference has not been enough to overcome widespread disagreement on complex legal issues brought forward in practice.

Interpretive decisions must reflect the ethos that undergirds the Rome Statute. However, it is important to note that this approach does not allow judges to reach decisions *carte blanche*; the Rome Statute, the facts of the case, and jurisprudence will necessarily restrict a judges' interpretive powers. While the Rome Statute affirms a commitment to *nullum crimen sine lege*, it also allows judges to rely not only on the Rome Statute and ICC documents, including the *travaux préparatoires*, but general principles of international law and decisions arising from national legal systems.⁷⁸ This casts a wide net and grants a significant amount of flexibility to judges. Interpretation and development of the law contained in the Rome Statute is unavoidable in this context, within its legislative and procedural limits. Some ICC Judges assert that the problem is not that there is not enough flexibility in the judges' interpretive powers, but rather that there is *too much* flexibility, which results in inconsistent outcomes and contributes to an

⁷⁷ Marc Pierre Perrin de Brichambaut, CILRAP Conversations, interview at Peking University, Beijing, (20 May 2017), available at <https://www.cilrap.org/cilrap-film/170520-perrin-de-brichambaut/> at 3:33.

⁷⁸ Annex, List of Authorities A. Travaux Préparatoires, ICC-01/04-01/06-2120-Anx 14-09-2009 1/3 IO T OA16, list available at https://www.icc-cpi.int/RelatedRecords/CR2009_06602.PDF; accessed 10 October 2020; Caroline Davidson, "How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court," *St. John's Law Review* 91.1 (2017): 37-38.

increased lack of cohesion among the bench.⁷⁹ It is fundamentally important that judges continue to engage in teambuilding, ongoing trainings, and genuine dialectical processes in order to progress as a unified component of the Court.

It is also important to consider that the judicial nomination and election cycle as enumerated in the Rome Statute itself can contribute to a divisive environment. As current Trial Chamber Judge Kimberly Prost has explained, “as the ICC is designed to support a diverse bench, it requires a three-year cycle term where six judges depart, and six new judges arrive. This makes it difficult to foster a judicial culture and can lead to fractured decision-making. As a result, the consistency of decision-making suffers... the onus falls upon judges to create practices that can be institutionalized in order to facilitate the decision-making process.”⁸⁰ This concern highlights the need for judges to work together to establish best practices and collegiality in order to achieve consistent outcomes, over time. This will only be possible if States Parties nominate open-minded and constructive candidates.

10.7.1 List B Judges: Evaluating the Concern(s)

The current ICC bench has eleven candidates from List A and seven candidates from List B at the time of writing.⁸¹ For clarity, the inclusion of List B allows for judges with no competence or experience in criminal law, even though the ICC is solely focused on violations of the most heinous acts of criminality. List B candidates are required to have competence and experience in relevant areas of international law (i.e. humanitarian law, human rights law). To be sure, List B candidatures have been significantly more contentious than those from List A. This is largely because the loose wording of List B has facilitated the successful nomination and election of career diplomats and academics, including two who had no formal legal training or experience prior to their posts at the

⁷⁹ Anonymous ICC Trial Judge, interview by author, 12 December 2018, by Skype.

⁸⁰ Amna Farooqi, “A Prescription for Optimism—Judge Kim Prost on the Future of the International Criminal Court,” *Global Justice Journal* 2(17 January 2020), available at <https://globaljustice.queenslaw.ca/news/a-prescription-for-optimism-judge-kim-prost-on-the-future-of-the-international-criminal-court>; accessed 20 November 2020.

⁸¹ See, ASP Resolution ICC-ASP/3/Res.6 at Table 2. Minimum voting requirements for list B (there must be *at least* five judges elected by List B on the bench at all times) and with reference to Table 1. Minimum voting requirements for list A, there must be *at least* nine judges elected by list A on the bench at all times.

ICC.⁸² This practice has been the subject of serious criticism, and observers such as the Open Society Justice Initiative have suggested that List B should be abandoned altogether because “the fact that so many government officials, including career diplomats, have previously been elected to ICC judgeships is a cause for concern.”⁸³

It is necessary to consider why it is inherently ‘bad’ to elect government officials and diplomats to the bench. According to Mackenzie et al.,

by profession, [diplomats] are successful because they make concessions, this way or the other. The mentality of a diplomat, I think, is not at all what I would consider to be compatible with the mentality of a judge. There are certain exceptions, but it remains very odd for me that a diplomat would change his mental behaviour when he sits as a judge. He will always be a diplomat trying to make concessions one way or the other, always in the middle of the road.⁸⁴

Perhaps more practically, it has also been raised that “the ex-diplomat has been a government representative, so he is not neutral.”⁸⁵ In combination, these criticisms raise

⁸² Note that Kuniko Ozaki from Japan (Asia-Pacific region) was a career diplomat, having worked in the Ministry of Justice, she had experience drafting law and worked with the United Nations. She never attended law school but self-identifies as an ‘academic lawyer’ meaning that she has experience with research, teaching, and publishing at various universities on international legal subjects. See: Kuniko Ozaki Statement of Qualifications (11 August 2009), available at <https://asp.icc-cpi.int/NR/rdonlyres/9CFC0FBB-3B82-40DD-ACF8-8ACDC4EA8D3E/0/ICCASPEJ22009JPNSTENG.pdf>; accessed 20 June 2020. Note also that French candidates often have a unique educational experience. In France, judges are formally selected through competitive examinations which allow them to attend the *Ecole Nationale de la Magistrature*, which formally trains judges and prosecutors, sometimes without any conventional lawyering experience. The emphasis is on education in the French context. Thus, at the ICC, the French judge Marc Perrin de Brichambaut is similarly referred to as a career diplomat since he worked for the French Ministry of Foreign Affairs and Ministry of Defence and served in the UN Secretariat. He also worked as a Legal Advisor to the French Foreign Ministry, helped France negotiate the Rome Statute and taught international law subjects at the university level. This experience is markedly different from that of a conventional criminal lawyer and serves as a useful example in differentiating between candidates selected from List A and List B. See Marc Perrin de Brichambaut Statement of Qualifications, ‘French candidate for election as a judge of the International Criminal Court,’ (25 July 2014) available at https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2014/ICC-ASP-EJ2014-FRA-ST-ENG.pdf; accessed 20 June 2020. See also Mackenzie et al., *Selecting International Judges*, 51: “The interviews revealed criticisms of the election of some judges appointed to the ICC to date, with particular concerns raised about individuals who did not appear to have academic legal training, and those with no knowledge of international criminal law or litigation experience. Some interviewees felt that the appointment of such judges could compromise the legitimacy of the court and even potentially raise grounds for appeal.”

⁸³ Open Society Justice Initiative, *Raising the Bar*, (2019), 4.

⁸⁴ Mackenzie et al., *Selecting International Judges*, 58.

⁸⁵ *Ibid.*

important points about neutrality and the suitability of diplomats to serve on the ICC judiciary.

The Open Society Justice Initiative opines that at the 2020 ICC judicial election, the absolute minimum number of List B candidates should be elected to sustain the minimum total number of five. As a matter of practice, it is argued that “until such a time as List B is eliminated, the number of candidates elected from List B should not exceed the minimum number required.”⁸⁶ It is important to consider the merits of such a recommendation, which provides a useful analytical basis to evaluate the unified performance and identity of the ICC bench. The twenty-one judges elected to the ICC from List B are listed in Table 10-4, below.

Table 10-4: Judges Elected by List B at the ICC (2003-2020)

Name	Region	Gender	Division	Attended Rome Conference /On behalf of
<i>Current Judges</i>				
Maria del Socorro Flores Liera	GRULAC	F	PTC	Y/Mexico
Gocha Lordkipanidze	EE	M	Appeals	Y/Georgia
Sergio Gerardo Ugalde Godinez	GRULAC	M	PTC	N*
Marc Perrin de Brichambaut	WEOG	M	PTC	Y/France
Antoine Kesia-Mbe Mindua	African States	M	PTC	N
Péter Kovács	EE	M	PTC	N*
Reine Alapini-Gansou	African States	F	PTC	N
<i>Previous Judges</i>				
Raul Cano Pangalangan	AP	M	Trial	Y/Philippines
Miriam Defensor-Santiago	AP	F	N/A	N

⁸⁶ Open Society Justice Initiative, *Raising the Bar*, 8.

Kuniko Ozaki	AP	F	Trial	N*
Mohamed Shahabuddeen	GRULAC	M	N/A	N
Sanji Monageng	African States	F	Appeals	N
Claude Jorda	WEOG	M	PTC	N
Navanethem Pillay	African States	F	N/A	N
René Blattmann	GRULAC	M	Trial	N
Hans-Peter Kaul	WEOG	M	PTC	Y/Germany
Erkki Kourula	WEOG	M	Appeals	Y/Finland
Akua Kuenyehia	African States	F	Appeals	N
Philippe Kirsch	WEOG	M	Appeals	Y/Canada
Anita Usacka	EE	F	Appeals	N
Mauro Politi	WEOG	M	PTC	Y/Italy

*other civil service and/or diplomatic experience

As a cursory observation, the Rome Statute was negotiated by diplomats and the inclusion of List B facilitates the potential nomination of those who drafted it. This anomaly could reasonably raise legitimacy concerns and create suspicion about the intended purpose of List B altogether. It is perhaps ethically ambiguous for an individual to both draft the law on behalf of government and then interpret, implement, and enforce it from a neutral unbiased perspective as a judge. The decisions made by the ICC today will bind future judges in their decision-making—an objective reading of the law in the Court’s nascency is a central point of concern. On a broader scale, the notion that an individual could contribute to drafting the law and subsequently be tasked to interpret it raises paternalistic concerns, which could stagnate the development of the law if it is not looked at with fresh eyes. This concern is heightened by the fact that List B nominees are not strictly required to have *any* criminal law experience and would be tasked with opining on and developing complex matters of (international) criminal law—a clear

departure from government-based diplomatic negotiations. It is worth noting that of the fifty-four judges elected to the ICC bench at the time of writing, twelve are also diplomats who attended the Rome Conference.⁸⁷ Four of those twelve are current ICC judges (two of which were elected in 2020): Maria del Socorro Flores Liera (Mexico, List B); Gocha Lordkipanidze (Georgia, List B); Kimberly Prost (Canada, List A); and Marc Perrin de Brichambaut (France, List B).

Altogether, eight of the twelve judges who attended the Rome Diplomatic Conference were elected from List B.⁸⁸ This matters since four of the diplomats-turned-judges had enough expertise in criminal law to be elected from List A, which disturbs the argument that diplomats at the Rome Conference simply included List B as a collective strategy to facilitate future employment opportunities for themselves or other career diplomats—though this indeed *has* happened, albeit on a limited basis. 22 per cent of all judges attended the Rome Conference; 38 per cent of all judges elected by List B attended the Rome Conference. The marginal uptick in the percentage of List B judges who also attended the Rome Conference is logical, since List B was designed to include exactly the sort of individual that would have been involved in the drafting of the Rome Statute and thus have the necessary competence and experience in international law. Whether it is appropriate to elect individuals with direct experience drafting the law that they are subsequently tasked to interpret raises a far more important question and is one which requires serious ethical and practical consideration. Similar concerns can be raised about diplomats who represent their governments at the ASP, since these individuals will have particular experience with the inner workings of the Court and potentially be guided by national approaches or policies towards them.

⁸⁷ These judges include Erkki Kourula (Finland), Hans-Peter Kaul (Germany), Silvia Fernández de Gurmendi (Argentina), Phillippe Kirsch (Canada), Tuiloma Neroni Slade (Samoa), Mauro Politi (Italy), Kimberly Prost (Canada), Raul Cano Pangalangan (Philippines), Marc Perrin de Brichambaut (France); Maria del Socorro Flores Liera (Mexico); Gocha Lordkipanidze (Georgia); Daniel David Ntanda Nsereko also attended, not as part of a state delegation but as a part of civil society and the Coalition for the International Criminal Court.

⁸⁸ This includes Judge Hans-Peter Kaul (Germany); Judge Raul Cano Pangalangan (Philippines); Judge Marc Perrin de Brichambaut (France); Judge Phillippe Kirsch (Canada); Judge Erkki Kourula (Finland); Judge Mauro Politi (Italy); Judge Maria del Socorro Flores Liera (Mexico); Judge Gocha Lordkipanidze (Georgia).

Expanding the analytical focus, of the fifty-four judges elected to the ICC, eighteen have been elected from List B.⁸⁹ Thirty-three per cent of the candidates elected from List B come from African States. This can be compared to 22 per cent from Latin American and Caribbean States; 17 per cent from Western European and Other States; 17 per cent from Asia-Pacific States; and 11 per cent from Eastern European States, respectively. *Prima facie*, it is unclear why the majority of the List B nominations have come from African States and why this has not been the subject of any substantive analysis. However, it is important to note that this pattern is beginning to change. At the time of writing, there were four African judges on the bench: two were elected from List A and two were elected from List B. However, in total, eleven judges have been elected from African States at the ICC: six were nominated from List B, and five were nominated from List A.⁹⁰ Nevertheless, in its historical regional context, it remains true that the majority of African judges at the ICC have been elected from List B.

Only three of the eleven African judges elected to the ICC are men, two of whom were elected from List B. Of the seven women elected from List B to date, four are from African States, two are from Asia-Pacific States, and one is from Latin American and Caribbean States. Of the nine women currently on the bench, seven were elected from List A, which is significant only inasmuch as gender representation would be largely unaffected by the dissolution of List B candidatures in the future, should it be implemented. Expanding the analysis, there have been twenty-four women elected as ICC judges to date and eighteen of them were elected from List A. Thus, the general trend indicates that women most often are successfully elected from List A, and the

⁸⁹ These judges include Maria del Socorro Flores Liera (GRULAC), Gocha Lordkipanidze (Eastern European States), Sergio Gerardo Ugalde Godinez (GRULAC), Marc Perrin de Brichambaut (WEOS), Antoine Kesia-Mbe Mindua (African States), Péter Kovács (Eastern European States), Raul Cano Pangalangan (Asia-Pacific States), Reine Alapini-Gansou (African States), Kuniko Ozaki (Asia-Pacific States), Sanji Monageng (African States), Claude Jorda (WEOS), Navanethem Pillay (African States), René Blattmann (GRULAC), Hans-Peter Kaul (WEOS), Akua Kuenyehia (African States), Daniel David Ntanda Nsereko (African States).

⁹⁰ The judges representing African States that were elected by List A include Joyce Aluoch, Fatoumata Dembélé Diarra, Solomy Balungi Bossa, Chile Eboe-Osuji, and Miatta Maria Samba. It is interesting to highlight that four out of the five judges elected from African States by List A are female. The overall analytical value of this point is ambiguous at this time but remains an interesting feature of African representation on the ICC judiciary.

elimination of List B would have only a minimal impact on gender representation on the bench—*perhaps* with the exception of African women based on overall election trends.

Another observed trend is that all but none of the *current* judges elected from List B, at the time of writing, have been assigned to the Pre-Trial division, which is responsible for issuing arrest warrants and/or summons to appear based on evidence submitted by the Office of the Prosecutor (OTP).⁹¹ The Pre-Trial Division is also responsible for authorizing investigations into situations under consideration by the Office of Prosecutor *proprio motu*. Thus, the current construct of the bench is such that List B elects largely serve as the institutional ‘gatekeepers’ and can therefore be seen as mostly responsible for triggering Court (in)action at the earliest procedural stages. Only two judges currently appointed to the Pre-Trial Division were elected from List A.⁹² Only one List B candidate has been assigned to another division (Appeals). Thus, 86 per cent of the List B candidates have been assigned to the Pre-Trial Division and make up the majority of the division altogether. This was not always the case—previous judges elected from List B were assigned to different divisions including two that were assigned to the Trial division and three African judges that were assigned to the Appeals division. This is significant inasmuch as it effectively demonstrates a strong institutional shift in the assignments of judges to particular divisions over time, apparently based, at least in part, on judicial competence and experience. Indeed, at the time of writing, two African judges were assigned to the Pre-Trial Division; one African judge was assigned to the Trial division; and one African judge was assigned to the Appeals Division. This division of African representation within Chambers further demonstrates African representation throughout the Court’s institutional construction. In the same vein, the composition of the Court is a reflection of broader institutional choices that are subject to evaluation.

⁹¹ Marc Perrin de Brichambaut and Gocha Lordkipanidze were the only judges elected from List B to be assigned to another division at the time of writing (both were assigned to Appeals), which were new assignments by the President in 2021. Judge Brichambaut was moved from the Pre-Trial division and Judge Lordkipanidze was beginning his first term.

⁹² At the time of writing this included Judge Rosario Salvatore Aitala (WEOS) and Judge Tomoko Akane (Asia-Pacific).

On this basis, the contemporary approach to appoint the overwhelming majority of List B Judges to the Pre-Trial division could be subject to scrutiny when situated within Article 39(1) of the Rome Statute, which says:

As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions *shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court*, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. *The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.*⁹³

Considering the reality that two out of six judges appointed to the Pre-Trial Division at the time of writing had criminal trial experience (List A)—this is a significant imbalance in need of restructuring. When levied against the problematic decisions that the Pre-Trial has made, most egregiously in unanimously deciding *not* to allow the Prosecutor to open an investigation into the situation in *Afghanistan*, it becomes presumptive that putting politically minded individuals in the Pre-Trial Division yields politically reasoned decisions. This is especially so because Pre-Trial Chamber II acknowledged that the Prosecutor had fulfilled the procedural requirements to authorize an investigation, yet unanimously denied her request because such an investigation was determined not to be in the ‘interests of justice’ based purely on political (not legal) factors.⁹⁴

10.8 The Situation in Afghanistan

In *Afghanistan*, the Pre-Trial Chamber Judges included Judge Antoine Kesia-Mbe Mindua (List B); Judge Tomoko Akane (List A); and Judge Rosario Salvatore Aitala

⁹³ *Rome Statute of the International Criminal Court*, Article 39(1) [*emphasis added*].

⁹⁴ Pre-Trial II, *Situation in the Islamic Republic of Afghanistan: Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (12 April 2019), ICC-02/17.

(List A). Thus, both List A Judges appointed to the Pre-Trial Division were responsible for this problematic and widely criticized decision.⁹⁵ This is highlighted by the fact that the Prosecutor was unanimously authorized to open an investigation in *Afghanistan* on Appeal.⁹⁶ All five judges appointed to the Appeals Division in this case were elected from List A.⁹⁷ On Appeal, it was determined that:

the Appeals Chamber found that the Pre-Trial Chamber erred in considering the ‘interests of justice factor’ when examining the Prosecutor’s request for authorization to open an investigation. In the Appeals Chamber’s view, the Pre-Trial Chamber should have addressed *only* whether there was a reasonable factual basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court’s jurisdiction. Noting that the Pre-Trial Chamber’s decision contained all the necessary factual findings and had confirmed that there is a reasonable basis to consider that crimes within the ICC jurisdiction have been committed in Afghanistan, the Appeals Chamber decided to authorize the opening of an investigation itself, rather than to send the matter back to the Pre Trial Chamber for a new decision.⁹⁸

On this basis, the Pre-Trial Chamber asked broader, *political* questions that they were not tasked to consider in deciding to authorize the Prosecutor’s investigation or not. This resulted in flawed decision-making and a problematic outcome that compromised the legitimacy and credibility of the ICC as a whole. Taken in its entirety, the Pre-Trial Chamber essentially concluded that the investigation in Afghanistan would be politically

⁹⁵ Christian de Vos, “No ICC Investigation in Afghanistan: A Bad Decision with Big Implications,” *International Justice Monitor* (15 April 2019) blogpost available at <https://www.ijmonitor.org/2019/04/no-icc-investigation-in-afghanistan-a-bad-decision-with-big-implications/>; accessed 10 October 2020); Mark Kersten, “The ICC was wrong to deny prosecution request for Afghan probe,” *Aljazeera* (12 April 2019) available at <https://www.aljazeera.com/opinions/2019/4/12/the-icc-was-wrong-to-deny-prosecution-request-for-afghan-probe/>; accessed 10 October 2020.

⁹⁶ *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan*, ICC-02/17-138 (5 March 2020), Appeals Chamber, available at <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-138>; accessed 21 October 2020.

⁹⁷ This included Judge Solomy Balungi Bossa; Luz del Carmen Ibáñez Carranza; Piotr Hofmanski; Howard Morrison; and Chile Eboe-Osuji.

⁹⁸ *Afghanistan: ICC Appeals Chamber authorises the opening of an investigation*, Press Release (5 March 2020), available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1516>; accessed 21 October 2020.

difficult because of the alleged perpetrators involved—i.e. the United States military and intelligence agencies, and should be avoided altogether. It was argued that “the investigation in Afghanistan would inevitably require a significant amount of resources... such a stillborn investigation will result in the Prosecutor having to reallocate its financial and human resources, putting in jeopardy *more realistic* investigations and prosecutions.”⁹⁹

This is particularly problematic when viewed through the lens of Africans who have been the subject of ICC intervention, even under contentious political circumstances. For example, in the situation in *Burundi*, the Pre Trial Chamber authorized the Prosecutor to open an investigation *proprio motu* even though “the Government of Burundi has interfered with, intimidated, or harmed victims and witnesses... the Government of Burundi is suspending international cooperation in connection with the alleged crimes.”¹⁰⁰ Note that in *Burundi*, the Pre-Trial Chamber was composed of two judges from List B (Judge Antoine Kesia-Mbe Mindua and Judge Raul C. Pangalangan) and one judge from List A (Judge Chang-ho Chung). The comparatively uneven application of the Rome Statute in the situations in *Afghanistan* and *Burundi* can best be understood as politics disrupting law. The implicit notion that African situations and cases are ‘more realistic’ is highly contentious and reiterates the manifestation of *realpolitik*—even in the minds and decision-making processes of judges themselves.

It is also necessary to point out that the Pre-Trial Division had, at the time of writing, authorized the Prosecutor’s request to open an investigation in *every* African situation requested, including the situations in *Côte d’Ivoire* and *Kenya*—neither of which were particularly ‘politically stable’ environments, which directly impacted the Prosecutor’s (in)ability to secure a conviction in both cases due to a lack of evidence and widespread witness tampering. The decision not to authorize an investigation in the situation in *Afghanistan* risked emphasizing the Court’s biased treatment of Africans and

⁹⁹ Concurring and Separate Opinion of Judge Antoine Kesia-Mbe Mindua, (31 May 2019), ICC-02/17, para. 32 [*emphasis added*] available at https://www.icc-cpi.int/RelatedRecords/CR2019_03049.PDF ; accessed 12 January 2021.

¹⁰⁰ Public Redacted Version of ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi,’ ICC-01/17-X-9-US-Exp (25 October 2017), para. 13-14.

African situations by denying justice elsewhere. In the same vein, victims in Afghanistan could rightly question why the crimes committed against them were not worthy of ICC intervention when crimes committed in Africa are.

The ICC's commitment to justice cannot be understood as contingent on the actors or states involved, even in the face of extreme political backlash.¹⁰¹ This uneven application of international criminal justice fuels disdain and lack of trust at the state and individual levels, generally, and specifically. It should not be up to ICC judges to weigh the political consequences of upholding the Rome Statute, it simply must be upheld.

Importantly, while the current construct of the Pre-Trial Division lends itself to synonymy with List B judges, it is important to note that in the *Afghanistan* decision, two of the three judges were elected from List A and the decision was reached unanimously. Such decisions reiterate that it is a judges' character that is at the core of his or her suitability and aptitude for the job, which is not contingent on whether or not they have criminal law or international law experience *per se*. The ultimate point demonstrated by this example is that List A judges are just as capable of making 'bad' decisions as those elected from List B. In reality, the Pre-Trial Chamber with a majority of List B judges authorized the Prosecutor's investigation in *Burundi*, regardless of the difficult political circumstances surrounding such a decision.¹⁰² It is the responsibility of

¹⁰¹ Note, generally, that The United States authorized sanctions and travel restrictions against International Criminal Court employees investigating the situation in Afghanistan, including Prosecutor Fatou Bensouda and Phakiso Mochochoko (Head of the Jurisdiction, Complementarity, and Cooperation Division), and others attempting to investigate alleged crimes committed by US citizens in Afghanistan since 2003, for example.

¹⁰² It is important to note that African Judge Antoine Kesia-Mbe Mindua (List B) was a member of Pre-Trial Chamber in both the *Burundi* and *Afghanistan* decisions. It is necessary to point out the relative inconsistency in his reasoning. In his dissenting opinion in the situation in *Afghanistan*, Judge Antoine Kesia-Mbe Mindua said at paragraph 25 "since the Prosecutor has not determined that initiating an investigation in the Burundi situation 'would not serve the interests of justice' and, importantly, taking into account the views of the victims which overwhelmingly spoke in favour of commencing an investigation, the Chamber considered that there were indeed no substantial reasons to believe that an investigation would not serve the interests of justice." The same approach was taken by the Prosecutor in Afghanistan. Judge Kesia-Mbe Mindua's dissenting opinion at para. 27 says that "...the Prosecutor has identified no substantial reasons to believe that the opening of an investigation into the situation would not serve the 'interests of justice.'" Thus, the Pre-Trial Chamber took it upon itself to render an investigation into the situation in Afghanistan to be not in the interests of justice for practical (political) reasons. It remains unclear why this was not done in Burundi (or any other African situation) but was done in Afghanistan. This sort of uneven application of the Rome Statute and hyper focus in African situations is thematic no matter whether situations are referred by the United Nations Security Council (i.e. the referral of the situation in Darfur and the denial of the referral of the situation in Syria) or when the Prosecutor seeks authorization from the Pre-

the ICC to enforce the principles enumerated in the Rome Statute, not to cower to powerful States that might interfere with its operational effectiveness. The ultimate blame should always lie with those bearing the most responsibility for the perpetration of the most serious international crimes—never with the institution designed to respond to them. The only way that the ICC will continue to gain international respect and strength is to consistently and credibly fulfill its mandate head on, rather than succumbing to political pressure by a handful of powerful states. To this end, judges must be able to reasonably divorce politics from law, even though the ICC is a practical function of both. The political consequences of their decisions should be a distant or moot consideration in their judicial reasoning, which requires a particular temperament based on principles of objectivity, neutrality, and rationality above all else.

10.9 Conclusion

The substantive and widespread criticism of the ICC judiciary by scholars and observers are well-founded and complex. These problems can be explained in structural terms—i.e. by the design of the Rome Statute itself (specifically its provisions with respect to judges)

Trial Chamber to open an investigation *proprio motu*. This is problematic optically and practically. Further, this sort of judicial inconsistency raises serious questions about the objectivity and neutrality of Judge Kesia-Mbe Mindua and the rationality of Trial Chamber III as a whole in reaching its decision in the situation in *Afghanistan*. Worth noting, Pre-Trial Chamber III noted in its *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan*, ICC-02/17 (12 April 2019) at para. 27 that “A high number of victims of the situation have come forward to present their views on whether the Chamber should authorise the commencement of the Prosecutor’s investigation into the situation. Overall, the Court has received a total of 794 representations in Dari and Pashto, as well as Arabic, English and German of which 699 were transmitted to the Pre-Trial Chamber on behalf of the following victims: 668 representations on behalf of 6,220 individuals; 17 representations on behalf of 1,690 families; 13 representations on behalf of several millions of victims, including 26 villages; and 1 representation on behalf of an institution.” It is similarly curious as to why the victims that spoke overwhelmingly in favour of opening an investigation in Burundi were heard, but those in the situation in Afghanistan were not. This sort of piecemeal or fragmented judicial reasoning is wholly problematic, particularly when viewed with the broader aim to establish coherent legal standards and jurisprudence. Judge Kesia-Mbe Mindua’s dissenting opinion at paragraph 53 says that “The Chamber, which is sensitive to the victims’ situation, has taken such a decision also in their interests, in preserving the Court’s credibility. The Judges’ decision is a legal determination, even though they have taken into account certain factors linked to the security on the ground and to the States cooperation or lack of cooperation. It should be stressed that the ICC Judges are not politicians and they are guided only by law even though the Court operates in a highly political environment. To sum up, this decision not to authorise the investigation is a legal one and it is beneficial to international criminal justice.” This opinion is flagrantly riddled with logical inconsistencies and ill-founded determinations that caused irreparable credibility and reputational harms to the Court before this decision was unanimously reversed on Appeal.

and, perhaps even more so in political terms—i.e. the way that states employ the Rome Statute *vis-à-vis* the Assembly of States Parties to maximize particular interests, particularly in the judicial nomination and election stages. Once elected, some judges have acted inappropriately, and even more egregiously, the judges as a collective have largely failed to arrive at cogent decisions in an efficient manner, best exemplified by extraordinarily long detainment periods for suspects and the myriad of acquittals and overturned decisions at various stages that have disproportionately affected Africans both directly and indirectly.

Against this backdrop, Africans have been subject to the decisions of ICC judges, yet have *always* had equitable representation on the ICC bench, at the time of writing. African governments continue to engage in ICC judicial nominations and elections at an extraordinarily high levels of engagement. This is reflected by high nomination numbers across the region and the associated increase in representation of African judges on the bench throughout the Court's history. This activism and engagement on the part of African states within the ICC functions as an effective counter to the power of developed states within the institution. Nevertheless, it is necessary to acknowledge 'African' inclusion in the ICC judiciary, including on the part of states *and* individuals. Such an acknowledgement illuminates that the shortcomings observed with the bench are *shared* and will require collective international commitment to remedy in the years ahead through more robust and exhaustive national nomination procedures. What is perhaps most important to highlight is that African states continue to engage within the framework of the ICC by seeking representation on the judiciary, which reiterates that there is indeed African ownership over the type of justice being dispensed by the Court.

Chapter 11

11 Conclusion

This dissertation has answered four interrelated questions. The first asked what kind of International Criminal Court African states wanted out of an International Criminal Court (ICC or Court) *before* and *during* the Rome Statute negotiations in 1998. The second inquiry interrogated why African states have ratified the Rome Statute more than states from any other region even though they did not get the kind of Court that they wanted. The third question asked about the origins of the criticisms levied by African states against the ICC. Finally, the dissertation answered why African states have chosen to commit and/or stay committed to the Court by signing, ratifying, and implementing the Rome Statute despite the compromises reached in Rome and significant criticism levied against the ICC since.

This dissertation has argued that African states were among the group of states that viewed the ICC and the Rome Statute as a means to restructure the global order and hierarchy of states but also those that viewed international criminal justice as an important normative prerogative for the protection of international human rights and security. This informed the idealized ‘African’ vision of the ICC pre-Rome and during the Rome Diplomatic Conference in 1998. The compromises reached at the Rome Diplomatic Conference were largely the result of concerns raised by the Permanent Five members of the United Nations Security Council, particularly elements that threatened the existing power structures and global hierarchy thereto. This was an unfortunate political dilemma, since states such as China, Russia, and the United States never ratified the Rome Statute, and have given no indication that they ever plan to, at least at the time of writing. Therefore, for the states that have chosen to be bound by the Rome Statute System, it is a system that reflects the *status quo*, especially the post-war power dynamics that have permeated the global order in critical respects. In the context of the ICC, this includes the ability of the Security Council to refer and defer cases at the ICC, as well as the omission of nuclear weapons from the list of prohibited weapons used in war. In seeking to better understand why African states would sign, ratify, and implement the Rome Statute into domestic law despite these significant compromises in the Court’s

architecture, the dissertation argued that African normative commitment, agency, and activism in the Rome Statute negotiation processes, coupled with the comparatively high regional experience with the sorts of crimes covered by the Rome Statute (especially the Rwandan genocide) were catalysts for African ICC support. When addressing the sustained commitment of African states to the ICC despite widespread criticism during the Court's operational years, the dissertation made two arguments: (1) For the most part, African states have remained strongly committed to the international criminal justice norm even when actively criticizing the ICC, or when attempting to regionalize international criminal justice within the AU. And (2), the dissertation argued that the ability of African leaders to manipulate the ICC to achieve domestic political ends is a significant factor that has affected sustained institutional commitment in several African contexts.

The overarching argument made throughout the dissertation is that African involvement in the establishment of the ICC, its engagement with the resultant Court in terms of high ratification rates, self-referral of cases, and the continent's representation within all major branches of the Court (including prominent positions within the judiciary and the Office of the Prosecutor) supports the notion that the Court is as much 'African' as it is global. While Afro-centric concerns illuminate some serious institutional weaknesses, attempts to regionalize international criminal justice offer an opportunity to bolster the international criminal justice regime, strengthen the norms that undergird it, and proliferate the intended aims of justice and accountability for atrocity crimes that are most relevant to the continent as part of a robust system of international criminal justice.

The dissertation also argued that African criticisms of the ICC need to be taken seriously because of the significant long-term regional involvement, engagement, and commitment to the success of the project. There are normative reasons for doing so—that is, to create a better and stronger ICC that reflects the policy preferences of its member states. But there is also a more practical reason for doing so. The holism of the institution depends on the support of states and the Court's sustainability will be in jeopardy if it fails to acquire the necessary political will and cooperation of its member states to be effective. Despite claims that the ICC is an objective and neutral legal institution, in reality it is not. Rather, it is deeply embedded in the complexities of the international

political arena. Failure to acknowledge and adequately respond to the issues raised by the states in which it operates (or seeks to operate), especially in historically disenfranchised parts of the Global South (and Africa in particular), unnecessarily feeds a narrative of paternalism and neocolonialism, which contributes to the manifestation of a serious legitimacy crisis at the ICC.

The basis of the dissertation emanates from a conceptualization of an Afro-centric vision of a prospective ICC. In doing so, the dissertation provided a novel analysis of African positions on highly contested issues at the Rome Diplomatic Conference based on the statements of delegates in the plenary meetings. These statements were situated within the context of regional meetings conducted by the South African Development Community in 1997, the African Regional Conference for the Establishment of an ICC in Dakar, Senegal in 1998, and the participation of African diplomats in the Preparatory Committee meetings at the United Nations leading up to the Rome Diplomatic Conference. This content analysis provided a holistic account of an 'African' vision of an ICC, which offered a theoretical basis to consider the significance of the compromises that were ultimately integrated into the final package and text of the Rome Statute.

The remainder of the dissertation relies upon this conceptualization of an 'African' vision of an ideal ICC, since it uses the negotiated deficits as explanatory factors to better understand and explain contemporary criticisms on the part of the AU and some African states with the Court's operationalization. Relying on the ICC's indictment of Omar Al Bashir, the dissertation examined how the United Nations Security Council's referral of the situation in Darfur to the ICC triggered sensitivities and reiterated the pervasive inequalities that dominate the international political order which subjugate African states and Africans to the beneficial exclusion of others. This point of view was (and has continued to be) compounded by two distinct factors: (1) the Security Council referred the situation in Darfur to the ICC but has not done so in situations of comparable gravity based solely on political factors and manifestations of *realpolitik*; and (2) the indictment of a sitting head of state of a *non-states party* to the ICC deeply infringed upon the principle of the sovereign equality of states. Both of these objective realities are directly related to the concerns of politicization and revealed the seriousness of imbedding hierarchical political inequalities into the architecture of the ICC, which

African states cited before and during the Rome Statute negotiations as a high priority issue with respect to the Court's construction. The legitimate difficulties that the AU had with ICC's indictment of Al Bashir, and the lack of genuine discourse with respect to those difficulties, contributed to the proliferation of anti-ICC rhetoric and policy, including the more problematic objection and opposition to the indictment of leaders of *states parties* (e.g. Kenya). This policy decision on the part of the AU rested on normatively shaky ground and subjected the more legitimate arguments launched by the AU to discreditation on the basis that it was attempting to protect African leaders at any cost. Notwithstanding this, the dissertation placed an emphasis on the more substantive concerns with the ICC's behaviour in African situations and contexts, utilizing the disparity between institutional expectations and reality as an explanatory and analytical tool.

Similarly, the AU's attempts to regionalize international criminal justice was examined and considered not as a competitor institution promoting an opposing court, but instead as a compatible one under the auspice of complementarity. The dissertation focused on the overall value of including an afro-centric international criminal justice mechanism within the international criminal justice system. It argued that 'Africa' values international criminal justice and the norms that undergird the project. As such, the African Court could offer an intermediary mechanism at a level that rests between the state and the international sphere to address violations of international criminal law that disproportionately affect the continent. Relying on 'Africa's' longstanding commitment to the ICC, the dissertation argued that the AU regional court is another manifestation of normative commitment to the aims and values of international criminal law, and ought to be adequately and fairly considered as an integrative response both to concerns raised about the function of the ICC, but perhaps more importantly to its inherent deficiencies and limitations, based on the scope of the Rome Statute itself. Indeed, the African Court incorporates *more* crimes than the Rome Statute, and conceptualizes a form of international criminal justice that encapsulates continentally relevant criminal activities and behaviours. It is argued that immunity for sitting heads of state, as provided by the Malabo Protocol, does not eliminate the ICC's waiver of immunity and even if it did, makes little material difference in the practical exercise of justice (at the time of writing).

Thus, the ideation of an international criminal court on the part of African states is once again re-imagined in the context of an African Court and provides important insight into a regional conceptualization of the purpose and utility of international criminal courts.

Lastly, the dissertation argues that African states remain committed to the ICC through high engagement *within* the Court's structures, and the judiciary in particular. It was argued that African states have been adequately represented on the ICC bench throughout the Court's history. The dissertation systematically demonstrated that African states have exercised high levels of engagement by nominating the highest number of judicial candidates for appointment out of any region. The overall point was to evidence that African states and African individuals have continued to be involved in the highest levels of the Court's operationalization. As such, the ICC has woven African representation into its institutional fabric at all stages of its evolution and development. The utility of this argument is that it offers a formidable challenge to the assertion that the Court is 'European' or neocolonial and instead recasts the narrative to both acknowledge and appreciate the vitally important role of African governments and African individuals in the Court's day-to-day function. Consequently, Africans are equitably responsible for the institutional shortcomings of the Court, which have become apparent throughout its operationalization primarily in African contexts. Nevertheless, the fact that African governments continue to seek representation on the ICC bench demonstrates a preference for involvement within the ICC, as opposed to outright abandon or rejection of the project altogether. This offers formidable support for the notion that African states remain committed to the ICC and the norms that undergird the international criminal justice project, whether for reasons of political self-interest or otherwise.

11.1 Understanding African Discontent

This dissertation argues that African states were deeply, authentically, and meaningfully involved in the drafting of the Rome Statute and had a vision of an ideal international criminal court heading into the Rome Diplomatic Conference in 1998. The compromises reached in Rome were substantial in key areas and can be linked to the contemporary discontent and criticism levied by some African states and the AU against the resultant ICC. Normative commitment to international criminal justice stemming from the regional

experience with widespread human rights violations and judicial responses to the same in the context of Rwanda fostered broad support from African governments and individuals for the establishment of a permanent court. This support was sustained even though the weaknesses in the Court's institutional design were well-known by African delegates.

This project argued that African states remain committed to 'international criminal justice' broadly considered, including the ICC, even while actively criticizing it. Since the ICC has operated disproportionately in African contexts, it is important to meaningfully evaluate the concerns raised by those most affected by its activities, in the interest of constructive reform. It is well acknowledged that the Rome Statute is an imperfect treaty and the compromises reached in Rome were substantial. Therefore, the dissertation argued that meaningful engagement and dialogue are required to bolster the institutional strength of the Court, and to remedy the ostensive issues in its structure or else application.

The strength of employing a content analysis combined with in-depth interviews of those involved in the drafting of the Rome Statute allows for a conceptualization of the kind of court that 'Africa' really wanted. This formulation allows not only for a measure of the seriousness of the compromises reached in the final package presented in Rome, but also offers a greater understanding of how African states imagined the ways in which an ICC could fit within, or even shift, the global hierarchy and political landscape. The disappointment that some African states and the AU have expressed towards the ICC can be explicably traced back to the disparity between the 'African' conceptualization of an ideal ICC and what was ultimately negotiated in Rome in key respects. At the same time, the dissertation demonstrated that African governments were very much aware of the limitations of the final package presented in Rome, but chose to commit to the Court anyway.

While the dissertation acknowledges and evaluates the merits of the concerns raised by some African states and the AU, it primarily focuses on explaining the root causes of this discontent, which it argued, stem in large part from the deficiencies in the Court's institutional design as a reaction to the interests of the most powerful states. Perhaps the greatest irony is that the powerful states that vehemently guided the negotiations on key issues such as the powers of the United Nations Security Council to

refer and defer cases, and the glaring omission of nuclear weapons from the prohibited list, are not States Parties to the Rome Statute (and do not appear to plan to join) and are largely insulated from its jurisdictional reach. Thus, states that choose to be members of the ICC have committed to an institution designed and heavily influenced by the constraints of *realpolitik*. In many respects, African states saw the ICC as an opportunity to reorder international politics. Instead, the negotiated Rome Statute reflected a reshuffling of the same stacked deck that privileges the most powerful states. This narrative is supported by the fact that the United Nations Security Council has been willing to refer African situations involving non-states parties to the Court, but not others, including serious situations involving members of the Security Council where it could reasonably be concluded that the types of crimes enumerated in the Rome Statute had been committed. Even so, the choice to commit to the ICC by so many African states suggests that beyond rationality or self-interest, norms also inform (and continue to inform) policy preferences and guide behaviour domestically, regionally, and internationally.

Yet, African commitment to the Rome Statute and cooperation with the ICC provide different measures of normativity. Indeed, African states have been unwilling to cooperate with the ICC when it has attempted to target leaders whether in a States Party or otherwise, suggesting that an uneven application of the Rome Statute and/or intervention into the affairs of sovereign states is generally not agreeable *unless* it coalesces with domestic political interests. The dissertation highlighted the ability of African governments to instrumentalize the ICC and emphasized the ways in which African states have worked within the Rome Statute System to leverage various political objectives, suggesting that it is not only traditionally powerful states that are able to manipulate the Court's overall ability to operate effectively. Thus, the ICC's reliance on the cooperation and political will of states to be effective is a limiting factor not only as it relates to traditionally powerful states, but also the less powerful—including those in Africa.

11.2 Avenues for Reform

This dissertation has implications in terms of policy and theory. Perhaps more importantly, it also provides a new framework through which to view prospective avenues for constructive reform at the ICC on the basis of African concerns and criticisms stemming from the Court's operationalization in its nascent years. While a substantial amount of literature has evaluated various aspects of the 'Africa-ICC crisis,' few have considered the seriousness of 'Africa's' historical involvement in the development of the ICC project, or considered this involvement as an explanatory tool to make better sense of the institutional weaknesses cited by some African states and the AU from 2005 onwards. The point is not to accept the criticisms levied against the Court by some African states and/or the AU wholesale. Rather, the dissertation simply provides a means to recast and resituate the problems with the ICC in their relevant historical context, which reveals the far more deep-seated and complex political dynamism at play.

Focusing on the genuine efforts of African governments and African individuals to promote the international criminal justice project allows for a better understanding as to why the AU has voiced opposition towards the Court and has attempted to regionalize international criminal justice. The dissertation considered the ideological disparity between what the ICC was hoped to be and what it actually is as fundamentally explanatory of the pan-African response. Thus, efforts to regionalize international criminal justice at the AU court are better understood as a secondary attempt to integrate an African vision of an ICC into the international political landscape. While aspects of this vision are open to skepticism, on the balance it offers particular insight into the most pressing institutional issues with the ICC from an African perspective.

In the context of norm theory, African involvement with the ICC can be framed both progressively and regressively. However, the dissertation focused on the ways in which African commitment to the ICC, involvement within the ICC's institutional apparatuses, and criticism of the Court's operationalization and behaviour can each be framed separately and in tandem as generally advancing the international criminal justice norm. While diffusion may happen in different ways across time and space, the overwhelming evidence suggests that African states remain heavily committed to the Court and the international criminal justice norm that undergirds it. Thus, the findings of

the dissertation suggested that African states have provided incredibly useful insight into the Court's institutional shortcomings. If the problems illuminated by some African states and the AU are responded to with meaningful and measured consideration, such insights could reasonably contribute to the increased robustness and strength of the ICC altogether. On this basis, there is a need to consider the utility of the criticisms levied against the Court based on its behaviour and operationalization, if not to integrate responses to those problems either in terms of treaty reform or within the general procedural processes at the Court through its various organs and institutional channels. Most of all, the dissertation demonstrated that many of the institutional weaknesses of the ICC stem from the behaviour of *states* both inside and outside of Africa, and not necessarily with the Court *per se*.

11.3 Future Research

The Africa-ICC relationship offers multiple pathways for a continued research agenda. As the ICC moves past its hyper-focus on African situations and has recently opened investigations into alleged crimes committed in Afghanistan, the State of Palestine, Bangladesh/Myanmar, and Georgia, it faces another onslaught of opposition, criticism, and challenges. It would appear in many respects that African concerns with the ICC have been acknowledged and taken seriously, based on the decision of the Prosecutor to pursue cases elsewhere, particularly in the incredibly difficult political contexts referenced above. It is important for the Court's holism to intervene whenever it is in the interest of justice to do so, no matter the political circumstance. Yet, in the context of an ongoing research agenda, it will be useful to consider whether or not the problems identified by African states are shared by states in other regions. Comparative analyses in this respect could offer further explanatory value and provide a means to consider areas for institutional reform. The ability of the ICC to achieve its stated goals and to contribute to the proliferation of justice in a global context can be better analyzed based on its involvement in a truly 'international' sense. Further, whether or not the ICC is actually able to do its job in contexts outside of Africa and outside of the context of self-referral, especially of rebels or warlords, by states, will be a definitive marker of the state of the

international criminal justice and accountability norm as well as the principle of the sovereign equality of states, broadly understood.

Beyond these areas of research, whether or not the ICC has actually contributed to localized deterrence, the bolstering of national justice mechanisms, or the achievement of transitional justice and/or post-conflict reconstruction efforts can only be judged retrospectively with the benefit of time. Thus, the effects of the ICC on the contexts in which it has operated—*only* in Africa at the time of writing, can be better understood as part of a holistic research agenda stemming from a place of institutional self-reflexivity and honest evaluation about the Court's success in terms of its ability to advance human security, human rights, and justice at multiple levels of engagement. It will be important to monitor whether African responses to the ICC, particularly in terms of the establishment of a regional court to prosecute international crimes, becomes prioritized by African governments in the future, and relatedly, to evaluate whether more local responses better achieve the stated goals of international criminal justice mechanisms.

In terms of whether the compromises reached in Rome were *too significant*, it will be necessary to evaluate whether or not the ICC is able to achieve its purpose without the support of the most powerful states. The Rome Statute can be rightly framed as a civil society and middle and weak power state achievement; how this can explain institutional effectiveness will be a continuous task for future research. Moreover, whether or not the negotiated Rome Statute fails to encapsulate all that it ought to either terms of the content of the Statute itself or its jurisdictional reach, will be revealed by the need to establish even *more* nested institutions, such as regional courts with a similar mandate to the ICC, or a spurt of the establishment of *ad hoc* or hybrid tribunals as a response to gross and widespread human rights violations (i.e. the United Nations' establishment of the International, Impartial and Independent Mechanism in Syria—IIIM in 2016). Thus, whether or not the ICC holds a necessary place in the international political and legal landscape for the advancement of international criminal justice ought to be a part of a continued research agenda.

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