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# The International Criminal Court (ICC) – A Postcolonial Tool for Western States to Control Africa?

Lea Ina Schneider, BLaw<sup>1</sup>

## Abstract

This paper examines the question to what extent the criticism is justified that the ICC functions as a postcolonial tool for Western countries to control African countries. To analyse this question, this paper focuses on two main arguments of the postcolonial critique: first, the accusation that the ICC focuses unfairly on Africa and second, that the ICC is as a hegemonic tool of the West which stresses the importance of global politics in the practice of the ICC. Evaluating the two key aspects of the postcolonial critique, I conclude that the ICC is unfairly accused of practising selective prosecution and also the critique that the ICC is a hegemonic tool of Western countries is not true as African countries played an essential role in its formation. However, the critique of the role of the UNSC is justified.

**Key Words:** International Criminal Court (ICC), Postcolonial Critique of the ICC, Western States, Anti-African Bias, ICC as a Hegemonic Tool of the West

## I. Introduction

The International Criminal Court (ICC), the only universal and permanent judicial body with jurisdiction over international crimes,<sup>2</sup> was only founded in 2002. An initial euphoria on what the ICC could achieve was quickly replaced by a lot of criticism.<sup>3</sup> Especially, the ICC experiences increased resistance from African states who criticize that their nationals are the ones mostly convicted by the ICC. Additionally, they argue that politics plays the main role in the decision to investigate and prosecute specific individuals within the jurisdiction of the ICC.<sup>4</sup> As a result of these criticisms, the African Union (AU) has even contemplated a mass withdrawal from the ICC by African states parties to the Rome Statute (RS), thereby threatening the existence of the ICC.<sup>5</sup>

The criticism that the ICC reflects postcolonial structures will be referred to as the ‘postcolonial critique’ throughout this paper. This critique argues that postcolonial power structures are maintained by the ICC, mostly in two ways: first, by practising selective prosecution and second, by being a hegemonic tool of the West which focuses on the relationship between the ICC and the United Nations Security Council (UNSC) and claims that Western politics influences the ICC strongly. This paper will focus on these two aspects of the postcolonial critique.

There is much literature about the postcolonial critique in general, however, this paper takes a different angle by focusing on the relationship between the AU, the UNSC and the

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<sup>2</sup> Mandiaye Niang, *Africa and the Legitimacy of the ICC in Question*, in Nicholson Joanna (ed.), *Strengthening the Validity of International Criminal Tribunals* (2018), 303–312, 303.

<sup>3</sup> See for example Max du Plessis, *The International Court that Africa wants*, Institute for Security Studies (August 2010), <<https://media.africaportal.org/documents/Mono172.pdf>> (accessed 11 May 2020); Charles Chernor Jalloh, *Africa and the International Criminal Court: Collision Course or Cooperation*, 34(2) *North Carolina Central Law Review* 203 (2012); André Mbata Mangu, *The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa: An Overview*, 40(2) *Africa Development* 7 (2015); Tim Murithi, *Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court*, in Werle Gerhard/Fernandez Lovell/Vormbaum Moritz (eds.), *Africa and the International Criminal Court* (2014), 179–193; Dire Tladi, *The African Union and the International Criminal Court: The battle for the soul of international law*, 34(1) *South African Yearbook of International Law* 57 (2009).

<sup>4</sup> Benson Chinedu Olugbuo, *The African Union, the United Nations Security Council and the Politicisation of International Justice in Africa*, 7(3) *African Journal of Legal Studies* 351 (2014), 351.

<sup>5</sup> Jacey Fortin, *The Continent versus the Court: African Union Deliberates Withdrawal from the ICC*, *International Business Times* (11 October 2013), <[www.ibtimes.com/continent-versus-court-african-union-deliberates-withdrawal-icc-1422434](http://www.ibtimes.com/continent-versus-court-african-union-deliberates-withdrawal-icc-1422434)> (accessed 11 April 2020).

ICC. Focusing on the interaction between these institutions, makes it possible to examine the role of politics regarding the ICC which is criticized by the postcolonial critique.

Western states and the ICC often respond with annoyance to this postcolonial critique and try to refute it while stressing the importance of the ICC as a court for justice. This is partly understandable as the criticism by African states cannot always be separated from the self-interest of their leaders. However, it is an oversimplification if the critique of African states is portrayed as a mere misunderstanding or propaganda for criminal leaders.<sup>6</sup>

This paper is placed against this highly controversial background and aims to delve deeper into the roots of this postcolonial critique. It poses the following research question:

*To what extent is the criticism justified that the ICC functions as a postcolonial tool for Western states to control Africa?*

Africa as a continent is highly diversified. It cannot be assumed that there is a unanimous ‘African voice’ when it comes to the critique of the ICC.<sup>7</sup> While some African leaders criticise the work of the ICC, others support it by for example changing their domestic legislation to comply with the RS.<sup>8</sup> Additionally, many African citizens and Civil Society Organisations do not support their governments in their refusal to cooperate with the ICC and withdrawal from the RS.<sup>9</sup> To do justice to this highly diverse continent, I will refer as often as possible to the specific country. Yet my aim remains to provide a synopsis over the two aspects of the postcolonial critique outlined before.

This paper argues that the postcolonial critique needs to be taken seriously, independently of whether one agrees with it or not, it poses a serious legitimacy threat to the ICC. Legitimacy is a complex, multidimensional concept.<sup>10</sup> I use the term herein to refer to the perception among relevant audiences that the ICC's actions are worthy of respect.<sup>11</sup> Such legitimacy depends to a significant degree on whether such audiences perceive the Court – primarily the Office of the Prosecutor (OTP) – as selecting appropriate crimes and defendants for prosecution.<sup>12</sup>

I claim that the postcolonial critique is a chance to identify some of the main weaknesses of the ICC and improve them. Indeed, while the first aspect of the critique, namely that the ICC is practising selective prosecution is not justified, the second aspect which claims that the ICC is a hegemonic tool of the West, is justified regarding the problematic role of the UNSC. Overall, this paper concludes that the question of whether the postcolonial critique is true is less vital than the question of how to react to these criticisms.

First, this paper will outline and contextualize the postcolonial critique, focusing on the two aspects mentioned before in order to evaluate them critically afterwards. The aim is to examine where the postcolonial critique usefully draws attention to and where it is not justified.

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<sup>6</sup> Marieke de Hoon, *The Future of the International Criminal Court, On Critique, Legalism and Strengthening the ICC's Legitimacy*, 17(4) *International Criminal Law Review* 591 (2017), 594.

<sup>7</sup> Mangu, *supra* note 3, at 10; Sarah Nimigan, *The Malabo Protocol, the ICC, and the Idea of ‘Regional Complementarity’*, 17(5) *Journal of International Criminal Justice* 1005 (2019), 1012; Hermanus Jacobus Van der Merwe, *The International Criminal Court, Universal Jurisdiction and Africa: Intrusion or Intercession?*, in Hermanus Jacobus/Kemp Gerhard (eds.), *International Criminal Justice in Africa*, 2017 (2018), 53–71, 66–67.

<sup>8</sup> Mangu, *supra* note 3, at 28.

<sup>9</sup> *Id.*, 25; Elise Keppler, *Managing Setback for the International Criminal Court in Africa*, 56(1) *Journal of African Law* 1 (2012), 8.

<sup>10</sup> Hilary Charlesworth, *Conclusion: The Legitimacies of International Law*, in Charlesworth Hilary/Coicaud Jean-Marc (eds.), *Fault Lines of International Legitimacy* (2010), 389–398, 396.

<sup>11</sup> Margaret M. De Guzman, *choosing to prosecute: Expressive selection at the international criminal court*, 33(2) *Michigan Journal of International Law* 265 (2012), 268.

<sup>12</sup> *Id.*

Subsequently, I will examine the Sudan-Situation in order to demonstrate the complex interaction between the ICC, the AU and the UNSC with the help of a concrete example. In the last section, I will outline possible ways of improving the legitimacy of the ICC through drawing insights from the postcolonial critique.

## II. Postcolonial Critique

### 1. The Initial Euphoria of the ICC Establishment

When the ICC came to life in 2002, it was universally acclaimed as a historic milestone, including by African states and civil society. African states were enthusiastic about welcoming the new court as it raised hope for justice.<sup>13</sup> Not only individual states but also regional organisations including the Organisation of African Unity, the predecessor of the AU supported the establishment of the ICC.<sup>14</sup>

As a continent marred with mass atrocities, Africa could now contemplate an alternative to the prevailing impunity enjoyed thus far by many warlords.<sup>15</sup> The founding of the ICC was thought to strengthen the rule of law and place moral limits on the tempestuous logic of *realpolitik*.<sup>16</sup> The fresh memories of the Rwandan genocide in 1994 strengthened Africa's decision to support the idea of an independent and effective international court that would punish and even deter perpetrators of such crimes in the future.<sup>17</sup> Hence, some AU member states such as Senegal, Niger and the Democratic Republic of the Congo (DRC) were instrumental in the creation of the RS and the establishment of the ICC.<sup>18</sup> In its first strategic plan, the AU called on its member states to ratify the RS<sup>19</sup> and Africa today constitutes the largest geographical group in the Assembly of States Parties (ASP) of the ICC.<sup>20</sup>

As outlined, initially, the regional bloc supported the work of the ICC in Africa – why has this changed? Discontent with the ICC had been brewing in Africa as early as 2005.<sup>21</sup> Especially, African states disagreed with the ICC on the cases involving Sudanese President Omar al-Bashir and Kenyan President Uhuru Kenyatta.<sup>22</sup>

When the efforts of the African leaders to suspend these cases failed,<sup>23</sup> they began discrediting the ICC's actions and undermining its legitimacy. They claimed that Africans

<sup>13</sup> Jalloh, *supra* note 3, at 209.

<sup>14</sup> Solomon A. Dersso, The ICC's Africa Problem, A Spotlight on the Politics and Limits of International Criminal Justice, in Clarke Kamari M./Knottnerus Abel S./De Volder Eefje (eds.), *Africa and the ICC, Perceptions of Justice* (2016), 61–77, 62.

<sup>15</sup> Niang, *supra* note 2, at 303.

<sup>16</sup> Tor Krever, International Criminal Law: An Ideology Critique, 26(3) *Leiden Journal of International Law* 701 (2013), 702.

<sup>17</sup> Jalloh, *supra* note 3, at 205.

<sup>18</sup> Philomena Apiko/Faten Aggad, The International Criminal Court, Africa and the African Union: What way forward? 201 European Centre for Development Policy Management (2016), <<https://ecdpm.org/wp-content/uploads/DP201-ICC-Africa-AU-Apiko-Aggad-November-2016.pdf>> (accessed 6 April 2020), 1; Hassan Jallow/Fatou Bensouda, International criminal law in an African context, in Du Plessis Max (ed.), *African Guide to International Criminal Justice* (2008), 15–53, 41–43.

<sup>19</sup> Mehari Taddele Maru, The International Criminal Court and African leaders: Deterrence and general shift of attitude, 247 *ISPI Analysis* (2014), <[https://www.ispionline.it/sites/default/files/publicazioni/analysis\\_247\\_2014.pdf](https://www.ispionline.it/sites/default/files/publicazioni/analysis_247_2014.pdf)> (accessed 6 April 2020), 5.

<sup>20</sup> Among the 123 states members of the ICC, 33 are from Africa, <[https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx)> (accessed 13 April 2020).

<sup>21</sup> Kurt Mills, “Bashir is Dividing Us”: Africa and the International Criminal Court, 34(2) *Human Rights Quarterly* 404 (2012), 406; Jean-Baptiste Jeangène Vilmer, The African Union and the International Criminal Court; Counteracting the Crisis, 92(6) *International Affairs* 1319 (2016), 1321.

<sup>22</sup> Ronald Chipaike/Nduduzo Tshuma/Sharon Hofisi, African Move to Withdraw from the ICC: Assessment of Issues and Implications, 75(3) *India Quarterly* 334 (2019), 338.

<sup>23</sup> The UNSC Res. 11176 (15 November 2013), United Nations Meeting Coverage and Press Releases, Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in

were the main targets of the ICC even though mass atrocities were committed elsewhere too, but no credible effort were made by the OTP to take action against those perpetrators.<sup>24</sup>

However, the opinions of civil society and the government do not always coincide. Many Africans record their dissent against the current trend of disparaging the ICC. They argue that as long as those who perpetrate heinous crimes in Africa are brought to justice, this helps Africa. Also, in many African states, not only were the legal requirements for the ICC to claim jurisdiction met, but the ICC was also called upon to intervene by African states.<sup>25</sup> Hence, some are inclined to see the current complaints against the ICC as a drive by a syndicate of African leaders only interested in covering their own backs.<sup>26</sup>

## 2. Analysis of the Postcolonial Critique

Year after year, tensions between African and Western states intensify during the annual ASP diplomatic conventions; especially around the ICC's alleged anti-African bias which reflects in the ICC's current exclusive trial of African nationals<sup>27</sup> and the role of global politics in the practice of the ICC which is perceived as a system of Western politics. In the following, I will examine these two aspects of the postcolonial critique in more detail.

### a) ICC as the 'African Criminal Court'

From its inception in 2002 until now, ten out of thirteen situations under investigation of the ICC concerned African states.<sup>28</sup> All of the concluded cases of the ICC are African.<sup>29</sup> This situation explains why Professor Mamdani accuses the ICC of «[...] rapidly turning into a Western court to try African crimes against humanity.»<sup>30</sup> This postcolonial view on the ICC portrays the court as a Western master exercising imperial power over African subjects. The ICC represents a tool for Western powers to further demean the already demeaned victims of past colonialism, with the help of law which is a mere tool of Western domination.<sup>31</sup>

There is thus a general perception in Africa that the OTP practises selective prosecution using geopolitical considerations, targeting Africa and casting a blind eye on atrocities committed by the United States and its allies in Syria, Iraq and Afghanistan.<sup>32</sup> The fact that

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Favour, 8 Abstaining, <<https://www.un.org/press/en/2013/sc11176.doc.htm>> (accessed 10 May 2020) seeking the deferral of the trial of the Kenyan leaders did not marshal enough votes to pass.

<sup>24</sup> Niang, *supra* note 2, at 305.

<sup>25</sup> *Id.*, 306.

<sup>26</sup> Luke Moffet, Al Bashir's escape: why the African Union defies the ICC, *The Conversation* (15 June 2015), <<https://theconversation.com/al-bashirs-escape-why-the-african-union-defies-the-icc-43226>> (accessed 13 April 2020)

<sup>27</sup> De Hoon, *supra* note 6, at 593.

<sup>28</sup> ICC, Trying individuals for genocide, war crimes, crimes against humanity, and aggression, Situations under investigation, <<https://www.icc-cpi.int/pages/situation.aspx>> (accessed 28 June 2020).

<sup>29</sup> Coalition for the International Criminal Court, <[http://www.coalitionfortheicc.org/cases?field\\_case\\_status\\_tid=366](http://www.coalitionfortheicc.org/cases?field_case_status_tid=366)> (accessed 1 May 2020).

<sup>30</sup> Mahmood Mamdani, How the ICC's "Responsibility to Protect" is being turned into an assertion of neocolonial domination, *Pambazuka News* (17 September 2008), <<https://www.pambazuka.org/governance/darfur-icc-and-new-humanitarian-order>> (accessed 17 April 2020).

<sup>31</sup> Kamari Maxine Clarke, Affective Justice, *The International Criminal Court and the Pan-Africanist Pushback* (2019), 31; Tladi, *supra* note 3, at 58.

<sup>32</sup> Chipaike/Tshuma/Hofisi, *supra* note 22, at 340; Ntombizozuko Dyani, Is the International Criminal Court Targeting Africa? Reflections on the Enforcement of International Criminal Law in Africa, in Nmehielle Vincent O. (ed.), *Africa and the Future of International Criminal Justice* (2012), 185–220, 185; Henry J. Richardson, African Grievances and the International Criminal Court: Issues of African Equity under International Criminal Law, in Nmehielle Vincent O. (ed.), *Africa and the Future of International Criminal Justice* (2012), 81–124, 83; Manisuli Ssenyonjo, The Implementation of the Proprio Motu Authority of the Prosecutor in Africa, in Jalloh Charles Cherner/Bantekas Ilias (eds.), *The International Criminal Court and Africa* (2017), 38–63, 62–63; Adedokun Ogunfolu/Usang Maria Assim, Africa and the International Criminal Court, 18(1) *East African Journal of Peace & Human Rights* 101 (2012); Scott Stearns, African Union Says

cases drawn from African situations involve only Africans, while non-African actors arguably also participate in conflicts and atrocities in the continent further contributes to this perception.<sup>33</sup> Murithi argues that Africa is being singled out since the ICC cannot risk alienating its biggest financial supporters, and Africa lacks the diplomatic and economic power of other states.<sup>34</sup> This results in only weak individuals from generally poor African states being indicted.<sup>35</sup> Due to its colonial history, the ICC's investigations in Africa have evoked concerns over states' sovereignty. Since criminal law is the branch of law most associated with sovereignty<sup>36</sup> it is even more vulnerable to the postcolonial critique. African states feel that, apart from only focusing on Africa, the ICC undermines Africa's efforts to solve its problems and its conflict resolution processes.<sup>37</sup> It is, therefore, unsurprising that the AU is sceptical of exposing its political leaders to what is perceived as a mainly European judicial system.<sup>38</sup>

### b) ICC as Hegemonic Tool of the Western Powers: The UNSC, AU and the ICC – A Delicate Collaboration

The postcolonial critique argues that the OTP bends to the wishes of Western foreign policy,<sup>39</sup> which is seen as a perpetuation of power imbalances stemming from colonial times. Central to the accusation of pursuing Western politics and thereby being a hegemonic tool of the West, is the role of the UNSC and the interest of its P5 members.<sup>40</sup> The central role of the UNSC in the tension between the AU and the ICC is evident particularly concerning the ICC situations in Darfur and Libya.<sup>41</sup>

As per Articles 1216 of the RS, the ICC may initiate an investigation by the referral of a state party, on the OTP's own initiative (*proprio motu*), or by referral from the UNSC. Mainly, it is the referral and deferral powers of the UNSC which evoke criticism.<sup>42</sup> The UNSC referral power enables the ICC to exercise jurisdiction when a state is not a party to the RS or defer cases for subsequent years, even though the majority of the P5 of the UNSC, namely the United States, China and Russia are not member states of the ICC.<sup>43</sup> Despite the ICC's universal jurisdiction, it requires a referral from the UNSC to investigate in a non-party

ICC Prosecutions Are Discriminatory, Voice of America (4 July 2011), <[www.voanews.com/africa/african-union-says-icc-prosecutions-are-discriminatory](http://www.voanews.com/africa/african-union-says-icc-prosecutions-are-discriminatory)> (accessed 11 April 2020).

<sup>33</sup> Ifeonu Eberечи, *Armed Conflicts in Africa and Western Complicity: A Disincentive African Union's Cooperation with the ICC*, 3(1) *African Journal of Legal Studies* 53 (2009) 56–71, 75–76.

<sup>34</sup> Tim Murithi, *Africa's relations with the ICC: A need for reorientation?*, in Heinrich Böll Stiftung, *A Fractious relationship: Africa and the International Criminal Court* (2012), <[https://www.boell.de/sites/default/files/2012-08-Perspectives\\_Africa\\_1\\_12.pdf](https://www.boell.de/sites/default/files/2012-08-Perspectives_Africa_1_12.pdf)> (accessed 18 April 2020), 4–9, 5.

<sup>35</sup> David Kezio-Musoke, *Kagame Tells Why He is Against ICC Charging Bashir*, *Daily Nation* (5 August 2008), <<https://www.nation.co.ke/news/africa/1066-446426-7ulr1ez/index.html>> (accessed 16 April 2020).

<sup>36</sup> Elies Van Sliedregt, *International Criminal Law: Over-studied and Underachieving?*, 29(1) *Leiden Journal of International Law* 1 (2016), 6; see Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?*, 16(5) *European Journal of International Law* 979 (2006) for an analysis of criminal law and state sovereignty.

<sup>37</sup> Du Plessis, *supra* note 3, at 13 ff; see Kamari Maxine Clarke, *Fictions of Justice, The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009) for a critical stance on the ICC's role in Africa.

<sup>38</sup> Tladi, *supra* note 3, at 66.

<sup>39</sup> Alexis Arieff/Rhoda Margesson/Marjorie Ann Browne/Matthew C. Weed, *International Criminal Court Cases in Africa: Status and Policy Issues*, 7-5700 *Congressional Research Service* (2011), <<https://fas.org/sgp/crs/row/RL34665.pdf>> (accessed 6 April 2020), 27.

<sup>40</sup> Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20(2) *European Journal of International Law* 331 (2009), 334.

<sup>41</sup> Dire Tladi, *When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic*, 7(3) *African Journal of Legal Studies* 381 (2014), 382.

<sup>42</sup> Clarke, *supra* note 31, at 2.

<sup>43</sup> Mangu, *supra* note 3, at 11; Maru, *supra* note 19, at 3.

state.<sup>44</sup> Examples for situations where a UNSC referral would be needed are Myanmar, Syria, Iraq or North Korea.<sup>45</sup>

A referral regulated in Article 13(b) of the RS and a deferral of ICC jurisdiction which is regulated in Article 16 of the RS require the approval of nine of the fifteen UNSC members and no veto by the P5 members.<sup>46</sup> The *travaux préparatoires* of Article 16 indicate that the relationship between the ICC and the UNSC has been very contentious.<sup>47</sup> The content of the current Article 16 of the RS was introduced as a means of ensuring that politically motivated referrals by states or by the OTP that might contradict UNSC aims could be suspended or terminated indefinitely by the UNSC acting under its Chapter VII authority.<sup>48</sup>

The underlying logic of the institutional role of the UNSC is that while the OTP focuses on investigating and prosecuting international crimes, it is the responsibility of the UNSC as a political body to determine when an investigation and prosecution will not serve the interests of justice under Article 16.<sup>49</sup> This means that if a decision on deferral is to be made, the proper channel is through the UNSC which is a political body. However, its political nature and composition has resulted in its actions and decisions coming under scrutiny and criticisms.<sup>50</sup> Clarke/Koulen underline the problematic role of the executive in judicial decision-making, when it comes to the referral by the UNSC.<sup>51</sup>

Through the referral and deferral powers of the UNSC, the general problem of its undemocratic nature regarding the veto powers of the UNSC permanent members is extended to the ICC. This is especially problematic as the ICC is placed under the influence of the dominant global powers through this key role of the UNSC.<sup>52</sup> This leads to the accusation that the ICC is manipulated by the political interest of powerful nations and the P5 in the UNSC which use their powers and influences to target other nations or characters that endanger their respective interests.<sup>53</sup> This danger could be reduced by limiting the deferral of proceedings to UNSC referrals, ensuring that the ICC does not become involved with politically charged situations occasioned by the democracy deficit of the UNSC.<sup>54</sup>

Surely, the referral and deferral powers of the UNSC lead to a politization of the ICC as the undemocratic nature of veto power dictates justice at the ICC by selecting who and when

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<sup>44</sup> See Art. 13(b) of the Rome Statute of the International Criminal Court, 17 July 1998, (last amended 2010, entered into force on 1 July 2002), 2187 UNTS 3, <<https://www.refworld.org/docid/3ae6b3a84.html>> (accessed 1 May 2020).

<sup>45</sup> Africa and the International Criminal Court, 22(10) Strategic Comments vi (2016), vi.

<sup>46</sup> Dapo Akande/Max du Plessis/Charles Chernor Jalloh, Position Paper, An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC, Institute for Security Studies, (2010), <[https://www.files.ethz.ch/isn/136703/PositionPaper\\_ICC\\_2010.pdf](https://www.files.ethz.ch/isn/136703/PositionPaper_ICC_2010.pdf)> (accessed 11 May 2020), 21.

<sup>47</sup> Morten Bergsmo/Jelena Pejic/Dan Zhu, Article 16, Deferral or investigation or prosecution, in Triffterer Otto/Ambos Kai (eds.), Rome Statute of the International Criminal Court: A Commentary, 3rd edn (2016), 770-780, 770-780.

<sup>48</sup> David Scheffer, Three Realities About the African Situation at the International Criminal Court, ICC Forum (November 2016), <<https://iccforum.com/withdrawal>> (accessed 8 May 2020).

<sup>49</sup> Kenneth A. Rodman, Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court, 22(1) Leiden Journal of International Law 99 (2009), 120.

<sup>50</sup> Thomas G. Weiss, The Illusion of UN Security Council Reform, 26(4) Washington Quarterly 147 (2003).

<sup>51</sup> Kamari Maxine Clarke/Sarah-Jane Koulen, The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise, 7(3) African Journal of Legal Studies 297 (2014), 310.

<sup>52</sup> Maru, *supra* note 19, at 4.

<sup>53</sup> Chipaika/Tshuma/Hofisi, *supra* note 22, at 339; Hans-Peter Kaul, The International Criminal Court – Current Challenges and Perspectives, Salzburg Law School on International Criminal Law (2011), <[https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911\\_salzburglawschool.pdf](https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911_salzburglawschool.pdf)> (accessed 6 April 2020), 9-10.

<sup>54</sup> Olugbuo, *supra* note 4, at 378; Benson Olugbuo, Positive Complementarity and the Fight Against Impunity in Africa, in Murungu Chacha/Biegon Japhet (eds.), Prosecuting International Crimes in Africa (2011), 249-275, 275.

investigation and prosecution take place.<sup>55</sup> This power of the UNSC to refer matters to the ICC and defer matters currently before the ICC questions the credibility of the ICC as an independent court of law.<sup>56</sup> The AU began voicing concerns about the abuse of this referral principle in 2008<sup>57</sup> and urged its members in 2012 to defend themselves against the abuse of universal jurisdiction.<sup>58</sup> Syria is an example of UNSC inaction. Various resolutions have been presented to the UNSC to refer this situation to the ICC but have all been vetoed.<sup>59</sup> The situation in Libya, on the other hand, was referred to the ICC by the UNSC in February 2011 and the OTP opened an examination days later.<sup>60</sup>

Furthermore, repeated AU requests for a deferral in the Bashir case, and in the Kenyan and Libyan cases, have essentially been ignored by the UNSC.<sup>61</sup> On the other hand, twice before the UNSC had used its deferral powers to immunize peacekeepers from non-states parties to the RS from ICC investigation or prosecution as a result of United States' pressure.<sup>62</sup> Considering the systematic disadvantage that African nations face in UNSC decisions, being legally bound by a UNSC decision to the RS that an African country has not even ratified is not seen as acceptable.<sup>63</sup> For example, the United States was instrumental in the establishment of the ICC and still finds ways to involve itself in the ICC's operations through the UNSC, even though it is not a signatory of the RS.<sup>64</sup> Other prominent dissenters of the ICC are Syria, Iran, China and Iraq.<sup>65</sup> Again, these examples are taken to show a decidedly anti-African bias in the UNSC referral and deferral procedures and showing the problematic role of the UNSC.

### 3. Contextualizing the Postcolonial Critique

#### a) Third World Approaches to International Law (TWAIL)

The postcolonial critique can be embedded into the more general critique of so-called transformative projects (that would, for example, include the Responsibility to Protect) which

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<sup>55</sup> Maru, *supra* note 19, at 4.

<sup>56</sup> Nabil Elaraby, The Role of the Security Council and the Independence of the International Criminal Court: Some Reflections, in Politi Mauro/Nesi Giuseppe (eds.), *The Rome Statute of the International Criminal Court, A Challenge to Impunity* (2001), 43–48, 43.

<sup>57</sup> Christopher Gevers, International Criminal Law and Individualism: An African Perspective, in Schwöbel Christine (ed.), *Critical Approaches to International Criminal Law, An Introduction* (2014), 221–245, 221, 229.

<sup>58</sup> AU Assembly, Decision on the Abuse of the Principle of Universal Jurisdiction, adopted 15–16 July 2012, AU Assembly, 19th Ordinary Session, No. 5, Doc. EX.CL/731(XXI), <[https://au.int/sites/default/files/decisions/9651-assembly\\_au\\_dec\\_416-449\\_xix\\_e\\_final.pdf](https://au.int/sites/default/files/decisions/9651-assembly_au_dec_416-449_xix_e_final.pdf)> (accessed 28 April 2020).

<sup>59</sup> Clarke/Koulen, *supra* note 51, at 298; David P. Forsythe, 'Political Trials'? The UN Security Council and the Development of International Criminal Law, in Schabas William A./McDermott Yvonne/Hayes Niamh (eds.), *The Ashgate Research Companion to International Criminal Law, Critical Perspectives* (2013), 475–497, 488.

<sup>60</sup> UNSC Res. 1970 (26 February 2011), UN Doc S/Res/1970.

<sup>61</sup> Tendayi Achiume, The African Union, The International Criminal Court, And the United Nations Security Council, Background Paper, University of California, Irvine School of Law ICC-UNSC Workshop (November 2012), <<http://sites.uci.edu/internationaljustice/files/2013/04/ICC-AU-UNSC-Position-Paper-FINAL.pdf>> (accessed 29 April 2020), 6.

<sup>62</sup> UNSC Res. 1422 (12 July 2002), UN Doc S/Res/1422; UNSC Res. 1487 (12 June 2003), UN Doc S/Res/1487.

<sup>63</sup> AU, Draft 2, Withdrawal Strategy Document (12 January 2017), <[https://www.hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan.\\_2017.pdf](https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf)> (accessed 19 May 2020), para 4.

<sup>64</sup> Chipaike/Tshuma/Hofisi, *supra* note 22, at 338.

<sup>65</sup> Gerry J. Simpson, Great Powers and Outlaw States, *Unequal Sovereigns in the International Legal Order* (2004), 8



are criticised for being drawn narrowly from Western models.<sup>66</sup> TWAIL and the wider postcolonial critique on public international law are essential background trends to understand the postcolonial critique of the ICC.<sup>67</sup>

TWAIL scholars focus on the notion of international law as embedded in the social, historical and political context and argue that law is a crucial site for the creation of ideological ideas and the manifestation of social power.<sup>68</sup> These scholars have stressed the importance of the founding origins of violence that have been part of the colonial and imperial tenets of international law.<sup>69</sup> They underline that the ICC can reproduce existing inequalities in international law – especially, due to its universal jurisdiction which is, in fact, in its application focused on non-Western actors.<sup>70</sup> Furthermore, TWAIL argues that the UNSC's referral power of situations happening in states which are not parties to the RS, as it was the case with Sudan,<sup>71</sup> violates Article 35 of the 1969 Vienna Convention on the Law of Treaties which precludes the application of treaties to third parties absent their consent, and is arguably a norm of customary international law as well.<sup>72</sup>

### **b) Postcolonial Perspectives on Public International Law**

Postcolonial scholars criticize the universality claim of today's international law which moves away from a state-centric model of traditional international law based on the preservation of sovereignty to one more concerned with humanity.<sup>73</sup> Reference is made to Simma's «third level universality» – an approach that establishes a «[...] public order on a global scale, a common legal order for mankind as a whole».<sup>74</sup>

The birth of the ICC to try serious international crimes is a direct consequence of this appeal to universality.<sup>75</sup> The appeal to universality has led to a debate about neo-imperialism and the imposition of cultural values. The main argument being that this new vision of international law and the values it contains is not universal but rather reflects Western ideology and these values are now being pushed on non-Western cultures in the name of

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<sup>66</sup> Christopher R. Rossi, *Hauntings, Hegemony and the Threatened African Exodus from the International Criminal Court*, 40(2) *Human Rights Quarterly* 369 (2018), 374–375.

<sup>67</sup> See Oumar Ba, *International Justice and the Postcolonial Condition*, 63(4) *Africa Today* 44 (2017).

<sup>68</sup> James Thuo Gathii, *Rejoinder: Twailing International Law*, 98(6) *Michigan Law Review* 2066 (2000), 2066.

<sup>69</sup> See Antony Anghie/Bhupinder S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2(1) *Chinese Journal of International Law* 77 (2003); Gathii, *supra* note 68; Siba N. Grovogui, *Regimes of Sovereignty: Rethinking International Morality and the African Condition*, 8(3) *The European Journal of International Relations* 315 (2002); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16(2) *Wisconsin International Law Journal* 353 (1998); Makau Mutua, *What is TWAIL?*, 94 *Proceedings of the Annual Meeting (American Society for International Law)* 31 (2000); Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform In Our Time: A TWAIL Perspective*, 43(1/2) *Osgoode Hall Law Journal* 171 (2005).

<sup>70</sup> Asad Kiyani, *A TWAIL Critique of the International Criminal Court: Contestations from the Global South*, Asad Kiyani CPSA Paper “Contestations”, (2011), <<https://www.cpsa-acsp.ca/papers-2011/Kiyani.pdf>> (accessed 4 May 2020), 13–14.

<sup>71</sup> Discussed in Chapter IV.

<sup>72</sup> Kiyani, *supra* note 70, at 17–18.

<sup>73</sup> Tladi, *supra* note 3, at 62; see John Dugard, *The future of international law: A human rights perspective – With some comments on the Leiden School of International Law*, 20(4) *Leiden Journal of International Law* 729 (2007); Philippe Sands, *Lawless world: The cultures of international law*, 41(3) *Texas International Law Journal* 387 (2006); Dire Tladi, *South African lawyers, values and new vision of international law: The road to perdition is paved with the pursuit of laudable goals*, 33(1) *South African Yearbook of International Law* 167 (2008) for a more detailed discussion of the characteristics.

<sup>74</sup> Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20(2) *European Journal of International Law* 265 (2009), 267.

<sup>75</sup> Erkki Kourula, *Questions and Observations Relating to the International Criminal Court*, in Petman Jarna/Klabbers Jan (eds.), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (2003), 327–340, 328.

universality.<sup>76</sup> Postcolonial scholars argue that the idea of universality is based on «Western rationalism».<sup>77</sup> They question that the West as a particular tradition can claim to speak in the name of humanity.<sup>78</sup>

### III. Facing the Postcolonial Critique

This section intends to evaluate the two aspects of the postcolonial critique identified and outlined in Chapter II.

#### 1. ICC as the ‘African Criminal Court’

The criticism that so far only African nationals have been tried can be countered as follows:

States in Africa are likely to be the frequent users of the ICC because of two main factors; namely a relatively higher prevalence of conflicts and serious human rights violations, and a general lack of credible legal systems to address them.<sup>79</sup> Even where states have shown their apparent willingness to prosecute perpetrators by signing the RS, it does not necessarily follow that the domestic courts are equipped to prosecute perpetrators of violent atrocities. Very few African states have in fact adopted the RS into their domestic law.<sup>80</sup> Without such domestication, in case of dualist states, perpetrators cannot be prosecuted on a national level, leaving the ICC with no option but to institute prosecution, according to the complementarity principle.<sup>81</sup>

Furthermore, there are procedures and rules that govern case selection as protection against potential bias in selecting cases.<sup>82</sup> Among these is Article 17(1)(d), which is seen as tempering the *proprio motu* powers of the OTP by introducing a gravity threshold to the admissibility requirements.<sup>83</sup> More importantly, Articles 15, 53 and 58 of the RS impose Pre-Trial Chamber judicial oversight of the *proprio motu* and other prosecutorial powers and duties of the OTP. These Articles aim to create objective criteria as to when the OTP can start investigations. They help to prevent the accusation of selective prosecution as the OTP’s decision to investigate each of its situations has been taken within the constraints laid down by the RS.<sup>84</sup>

Moreover, the ICC is starting to redeem itself from its notable absence involvement in the affairs of Western states with the opening of investigations in Afghanistan and Georgia and of preliminary examinations in Iraq, over the past few years. Importantly, the preliminary examinations in Iraq allow the OTP to focus on the role of nationals from the UK.<sup>85</sup> In the investigation in Afghanistan, US citizens will also be investigated with the US being a non-member state.<sup>86</sup> However, this has been made considerably more difficult by the sanctions

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<sup>76</sup> Henry J. Steiner/Philip Alston/Ryan Goodman, *International Human Rights in Context, Law, Politics, Morals*, 3rd edn (2008), 517–521; Tladi, *supra* note 3, at 64.

<sup>77</sup> Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law*, 18(3) *European Journal of International Law* 379 (2007), 387.

<sup>78</sup> Martti Koskeniemi, *International Law in Europe: Between Tradition and Renewal*, 16(1) *European Journal of International Law* 113 (2005), 115.

<sup>79</sup> Jalloh, *supra* note 3, at 206.

<sup>80</sup> Michelle Nel/Vukile Ezrom Sibiyi, *Withdrawal from the International Criminal Court: Does Africa have an alternative?*, 17(1) *African Journal on Conflict Resolution* 79 (2017), 91; *Cooperation and Judicial Assistance Database, National Implementing Legislation*, <<https://cjad.nottingham.ac.uk/en/legislation/>> (accessed 28 June 2020).

<sup>81</sup> Nel/Sibiyi, *supra* note 80, at 91.

<sup>82</sup> Du Plessis, *supra* note 3, at 28.

<sup>83</sup> Du Plessis, *supra* note 3, at 34.

<sup>84</sup> *Id.*, 36.

<sup>85</sup> Hermanus Jacobus Van der Merwe, Introduction, in Van der Merwe Hermanus Jacobus/Kemp Gerhard (eds.), *International Criminal Justice in Africa*, 2017 (2018), xxvii–xxxii, xxix.

<sup>86</sup> *Id.*

imposed by the United States on Fatou Bensouda and other ICC workers.<sup>87</sup> Nevertheless, this potential indictment of nationals from permanent member states of the UNSC offers a good stance against the critique of an African-bias.

Furthermore, the question of selective prosecution must be analysed regarding the expressive role of the ICC.<sup>88</sup> Expressive theories posit that law, like other forms of expression, manifests states of mind, including beliefs, attitudes, and intentions.<sup>89</sup> An expressivist's normative agenda therefore includes both crafting law to express valued social messages and employing law as a mechanism for altering social norms.<sup>90</sup> What does the ICC's selective prosecution of Africans mean regarding the expressive role of the ICC? Two lines of argumentation can be followed: First, in line with the postcolonial critique, the exclusive focus on Africa is interpreted as portraying Africa as the continent where crimes happen, while at the same time tolerate wrongdoing's in the rest of the world. Second, failure to prosecute particular situations or cases at the ICC is not viewed as expressing approval of crimes committed outside of Africa as the ICC is, due to its limited resources, not expected to respond to all serious violations of international criminal law.<sup>91</sup> De Guzman argues that by adopting an expressive approach to case selection at the ICC, the court could also strengthen its legitimacy as this would foster an open dialogue about the value choices animating the ICC's selection decisions rather than speculating about the improper motivations of decision makers.<sup>92</sup> Against the background of the expressive role of the ICC, I argue that focusing on African states plays an important role in the global perception where in the world atrocities are committed. This is underlined by the fact that gravity is at the centre of the admissibility assessment conducted by the OTP.<sup>93</sup> This fosters the image that all grave crimes are committed in Africa. De Guzman's considerations are conclusive in themselves, but they have no effect on global perception, where the most serious crimes are committed. I argue that precisely because of the ICC's need for selectivity, there is a symbolic dimension to its choices which make focussing on Africa even more problematic.

## 2. ICC as Hegemonic Tool of the Western Powers

### a) Africa as Part of the ICC

The characterisation of the ICC as a tool of Western imperialism can be rejected insofar as that there was a strong involvement of African governments and civil society organisations in the drafting of the RS and the establishment of the ICC. Hence, Africa is (at least primarily) not a target but a part of the ICC.<sup>94</sup> Furthermore, African states voluntarily signed up to be subjected to the jurisdiction of the ICC by signing the RS.<sup>95</sup> However, Sur contests the idea of

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<sup>87</sup> Jack Parrock, 'Profound regret': ICC prosecutor on being hit with US sanctions over Afghanistan war crimes probe, euronews (25 June 2020), <<https://www.euronews.com/2020/06/25/profound-regret-icc-prosecutor-on-being-hit-with-us-sanctions-over-afghanistan-war-crimes>> (accessed 28 June 2020).

<sup>88</sup> De Guzman, *supra* note 11, at 270.

<sup>89</sup> Elizabeth S. Anderson/Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148(5) *University of Pennsylvania Law Review* 1503 (2000), 1504–1505.

<sup>90</sup> Cass R. Sunstein, On the Expressive Function of Law, 144(5) *University of Pennsylvania Law Review* 2021 (1996), 2022–2024.

<sup>91</sup> De Guzman, *supra* note 11, at 315.

<sup>92</sup> *Id.*, 319; Rod Rastan, Comment on Victor's Justice & the Viability of Ex Ante Standards, 43(3) *The John Marshall Law Review* 569 (2010), 592–593.

<sup>93</sup> Alette Smeulders/Maartje Weerdesteijn/Barbora Hola, The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance, 15(5) *International Criminal Law Review* 1 (2015), 6.

<sup>94</sup> Kai Ambos, Expanding the Focus of the 'African Criminal Court', in Schabas William A./McDermott Yvonne/Hayes Niamh (eds.), *The Ashgate Research Companion to International Criminal Law, Critical Perspectives* (2013), 499–529, 507.

<sup>95</sup> Murithi, *supra* note 3, at 181; contested in Balingene Kahombo Africa within the Justice System of the International Criminal Court: the Need for a Reform, Berlin Potsdam Research Group „The International

free consent by African states to the RS, by referring to the pressure and excessive influence of NGOs.<sup>96</sup>

The impressive number of African states parties to the RS and the dominance of self-referrals by African states among the situations before the ICC must be mentioned.<sup>97</sup> Uganda, DRC and the Central African Republic are examples of such self-referrals.<sup>98</sup> By choosing to self-refer under the RS, each of the state parties demonstrated their commitment to utilise the statute and the principles in the RS by African and other states.<sup>99</sup> Especially in the cases where the cases are before the ICC due to self-referrals, one cannot argue that Africa is targeted unfairly as they themselves triggered the ICC's jurisdiction.<sup>100</sup>

The referrals demonstrate how African states have attempted to use the ICC for political ends. The Ugandan and Congolese governments had selfish interests for inviting the ICC to do business in their respective states. These appear to have been to employ the ICC to prosecute rebel bands within their own territories.<sup>101</sup> Hence, in these cases it is ironic to suggest that these African situations are proof of the ICC's meddling in Africa.<sup>102</sup> Clark argues that the ICC has further empowered the Congolese and Ugandan governments in the sense that the ICC has failed to mitigate the states' ability to pull the strings of international justice. This highlights the ICC's complacency and lack of expertise in Africa.<sup>103</sup>

While I do not agree with the criticism that the ICC is a hegemonic tool of the West, I do see the critical role the UNSC plays in it. The central institutional role of the UNSC remains an open portal through which the politics of the UNSC threatens the actual and perceived independence of the ICC.<sup>104</sup> The referral and deferral powers of the UNSC must be exercised with extreme caution, especially regarding situations in parts of the world that are under-represented in the UNSC. Even though negative votes (especially by non-state parties) in the UNSC are, of course, wholly outside the ICC's influence or control, failure to trigger the ICC's universal jurisdiction in non-African states (for example Syria, a resolution to this effect was blocked by Russia and China<sup>105</sup>) still provide powerful ammunition for the court's detractors.<sup>106</sup> However, since the ICC does not participate in the UNSC's decision-making, it is not directly responsible for its practice.<sup>107</sup> The role of the UNSC is an institutional problem that should be improved, but because of that, questioning the ICC as a whole is a short circuit.

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Rule of Law – Rise or Decline?“, KFG Working Paper Series, No. 2, (2016), <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3129009](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3129009)> (accessed 6 May 2020), 15–16.

<sup>96</sup> Serge Sur, *Vers une Cour pénale internationale: la Convention de Rome entre les ONG et le Conseil de sécurité*, 103 *Revue Générale de Droit International Public* 29 (1999), 35, 39.

<sup>97</sup> Du Plessis, *supra* note 3, at 72.

<sup>98</sup> Thomas O. Hansen, *Africa and the International Criminal Court*, in Murithi Tim (ed.), *Handbook of Africa's International Relations* (2013), 165–179.

<sup>99</sup> Max du Plessis, *The International Criminal Court and its work in Africa, Confronting the myths*, Institute for Security Studies, Paper No. 173, (November 2008), <[file:///C:/Users/Lea%20Schneider/AppData/Local/Packages/Microsoft.MicrosoftEdge\\_8wekyb3d8bbwe/TempState/Downloads/PAPER173%20\(3\).pdf](file:///C:/Users/Lea%20Schneider/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/PAPER173%20(3).pdf)> (accessed 29 April 2020), 12.

<sup>100</sup> Ambos, *supra* note 94, at 516; Ambos, *supra* note 94, at 517–521 on the ICC's *proprio motu* action in Kenya; Keppeler, *supra* note 9, at 6–7.

<sup>101</sup> William A. Schabas, *An Introduction to the International Criminal Court*, 5th edn (2017), 33.

<sup>102</sup> Du Plessis, *supra* note 99, at 8.

<sup>103</sup> Phil Clark, *Distant Justice, The Impact of the International Criminal Court on African Politics* (2018), 52–65.

<sup>104</sup> Du Plessis, *supra* note 3, at 74.

<sup>105</sup> UN News, *Russia, China block Security Council referral of Syria to International Criminal Court*, UN News (22 May 2014), <<https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court>> (accessed 4 May 2020).

<sup>106</sup> Van der Merwe, *supra* note 7, at 68.

<sup>107</sup> Manisuli Ssenyonjo, *State Withdrawals from the Rome Statute of the International Criminal Court South Africa, Burundi, and The Gambia*, in Jalloh Charles Chernor/Bantekas Ilias (eds.), *The International Criminal Court and Africa* (2017), 214–246, 220.

Thirty-three out of the fifty-five member states of the AU are parties to the RS. This statistic puts a lot of strain on the argument that the values represented by the ICC of intolerance against impunity are being imposed on African states by Western states.<sup>108</sup> The value of intolerance against impunity for serious international crimes represented by the ICC is an expression of general characteristics of human beings and thus allows for universality.<sup>109</sup> Furthermore, the values under consideration have been (re)appropriated by African culture which is reflected in the number of AU member states having ratified the RS and in the (re)appropriation of these values in the AU Constitutive Act.<sup>110</sup> The provisions of the AU's Constitutive Act suggest that human rights are to play an important role in the work of the Union.<sup>111</sup>

### **b) The ICC – Between Law and Politics**

Finally, the postcolonial critique helps to understand the role of politics regarding the ICC by claiming that the ICC is a hegemonic tool of the West due to it being ruled by a Western political agenda. This aspect of the postcolonial critique can be traced back to the more fundamental problem of a denial of the inherent politics of international justice.

Throughout the recent era of institutionalisation of international criminal law since the early 1990s, international criminal courts and tribunals present their mandate as apolitical, one where purely legal considerations matter and where politics is subordinated to law.<sup>112</sup> The ICC is depicted as apolitical as the RS binds decision-makers at the ICC, and largely prohibits those decision-makers from considering political concerns.<sup>113</sup> To portray the ICC as decidedly apolitical is meant to affirm the credibility and legitimacy of the ICC.<sup>114</sup> The denial of the inherent politics of ICL comes with its predominantly legalist conceptualisation. According to the legalist understanding, the law is something external to politics. Law is understood as a neutral set of rules that bounds on acceptable state behaviour, whereas politics lies in the realm of the unrestrained free will of states.<sup>115</sup> While the ICC embodies what is often seen as law,<sup>116</sup> the UNSC is characterized as decidedly political, undemocratic and non-transparent in nature.<sup>117</sup> The AU is a political body as well.<sup>118</sup>

The idea that law is disconnected from politics fails to take into account that law is based on and is an outcome of political choice. The legal language is a form of politics as the structure of law represents what a given community accepts as law.<sup>119</sup> Law reflects the

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<sup>108</sup> Tladi, *supra* note 3, at 65.

<sup>109</sup> *Id.*, 66.

<sup>110</sup> See Art 4(h) and 4(o) of the Constitutive Act of the African Union adopted by the thirty-sixth Ordinary Session of the Assembly of Heads of State and Government, 11 July 2000, (entered into force on 26 May 2001), 2158 UNTS 3, <[https://au.int/sites/default/files/pages/34873-file-constitutiveact\\_en.pdf](https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf)> (accessed 19 April 2020).

<sup>111</sup> Amanda Lloyd/Rachel Murray, Institutions with Responsibility for Human Rights Protection under the African Union, 48(2) *Journal of African Law* 165 (2004), 171.

<sup>112</sup> Sarah Nouwen/Wouter Werner, Doing Justice to the Political: The International Criminal Court in Uganda and Sudan, 21(4) *European Journal of International Law* 941 (2010), 942.

<sup>113</sup> Van der Merwe, *supra* note 7, at 68.

<sup>114</sup> Clark, *supra* note 103, at 37–41; Clarke/Koulen, *supra* note 51, at 302.

<sup>115</sup> De Hoon, *supra* note 6, at 597; see Judith N. Shklar, *Legalism, Law, Morals, and Political Trials*, 3rd edn (1986) for a detailed critique on legalism.

<sup>116</sup> Sosteness Francis Materu, A Strained Relationship: Reflections on the African Union's Stand Towards the International Criminal Court from the Kenyan Experience, in Werle Gerhard/Fernandez Lovell/Vormbaum Moritz (eds.), *Africa and the International Criminal Court* (2014), 211–228, 226.

<sup>117</sup> Clarke/Koulen, *supra* note 51, at 301.

<sup>118</sup> Murithi, *supra* note 3, at 7.

<sup>119</sup> De Hoon, *supra* note 6, at 610; Wouter Werner, The Use of Law in International Political Sociology, 4(3) *International Political Sociology* 304 (2010), 305; David Kennedy, *International Legal Structures* (1987); Martti Koskeniemi, *From Apology to Utopia, The Structure of International Legal Argument* (2005); Philip

outcome of a political structure and thus is the product of power which means it can reinforce power relations and interests.<sup>120</sup> There is no doubt that international justice takes place within a political, socio-economic and cultural context.<sup>121</sup> Hence, the law always operates closely with politics.<sup>122</sup>

To a certain extent, any court and any trial are political in the sense that they involve questions of social power, legislative choice, prosecutorial discretion, and judicial interpretation.<sup>123</sup> However, international criminal trials are particularly political as the facts, causal relations and contexts are usually highly contentious in the cases that land before these judges.<sup>124</sup> As the court needs to consider the facts and how they should be interpreted, the court will inevitably take some political stance.<sup>125</sup> Nevertheless, this happens in accordance with the rules of judicial interpretation and other legal procedural guarantees.<sup>126</sup> As seen, the ICC makes choices about who it prosecutes and for what and these choices are unavoidably political which is not the problem in and of itself.<sup>127</sup> The subject for concern is the ICC's lack of transparency about its politics.<sup>128</sup> Efforts to demarcate law and politics render an analysis of the politics of law impossible.<sup>129</sup>

#### IV. Case Study: The Challenges of the Sudan-Situation

The Sudan-Situation has formed what De Waal described as Africa's «push-back against the ICC»<sup>130</sup> because the problematic role of the UNSC became apparent. The second aspect of the postcolonial critique, namely that the ICC is hegemonic tool of the West, being dominated by Western politics, was mostly articulated in response to the Sudan-Situation. The aim is to show why this criticism was formulated, laying the focus in the interaction between the ICC, the AU and the UNSC. Furthermore, this case study illustrates this paper's claim that irrespectively of whether the postcolonial critique is true or not it questions the ICC's legitimacy.

Since the UNSC, acting under Chapter VII of the UN Charter and pursuant to Article 13(b) of the RS, referred the situation in Darfur (Sudan) to the ICC in March 2005,<sup>131</sup> the OTP has successfully issued various arrest warrants arising from his investigations.<sup>132</sup> The most

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Liste, *Articulating the Nexus of Politics and Law: War in Iraq and the Practice within Two Legal Systems*, 2(1) *International Political Sociology* 38 (2008).

<sup>120</sup> De Hoon, *supra* note 6, at 610.

<sup>121</sup> Swikani Ncube, *In search of international criminal justice in Africa: What role for the United Nations?* 24(4) *South African Journal of International Affairs* 423 (2017), 432.

<sup>122</sup> Westen K. Shilah, *The International Criminal Court and the African Union: Is the ICC a bulwark against impunity or an imperial Trojan horse?* 18(1) *African Journal on Conflict Resolution* 119 (2018), 130.

<sup>123</sup> See Gerry J. Simpson, *Law, War and Crime, War Crimes Trials and the Reinvention of International Law* (2007), 11–25 for discussion on the political nature of trials.

<sup>124</sup> De Hoon, *supra* note 6, at 606.

<sup>125</sup> Martti Koskeniemi, *Between Impunity and Show Trials*, 6(1) *Max Planck Yearbook for United Nations Law* 1 (2002), 29–30.

<sup>126</sup> De Hoon, *supra* note 6, at 606.

<sup>127</sup> Forsythe, *supra* note 59, at 497.

<sup>128</sup> De Hoon, *supra* note 6, at 608.

<sup>129</sup> Nouwen/Werner, *supra* note 112, at 944.

<sup>130</sup> Mills, *supra* note 21, at 410; Lee J. M. Seymour, *The ICC and Africa Rhetoric, Hypocrisy Management, and Legitimacy*, in Clarke Kamari M./Knottnerus Abel S./De Volder Eefje (eds.), *Africa and the ICC, Perceptions of Justice* (2016), 107–126, 113–114; Alex De Waal, *ICC making sense of Darfur, Africa's position on the ICC*, Coalition for the International Criminal Court (23 September 2008), <<http://iccnw.org/?mod=newsdetail&news=3113>> (accessed 27 April 2020); Kahombo, *supra* note 95, at 19ff. contests the idea that the arrest warrant against Bashir was the origin of the African hostility towards the ICC.

<sup>131</sup> UNSC Res. 1593 (31 March 2005), UN Doc S/Res/1593.

<sup>132</sup> See for example ICC, *Warrant of Arrest for Ahmad Harun (ICC-02/05-01/07-2)*, Pre-trial Chamber I (27 April 2007).

significant and most controversial<sup>133</sup> warrant is that for incumbent Sudanese President Omar Hassan al-Bashir.<sup>134</sup> The UNSC's referral is historic as it is the first time that the UNSC referred a case to the ICC.<sup>135</sup>

Specifically, criticism extends to the imperialistic nature of the warrant and the failed action of the UNSC on the AU's deferral request.

In response to the ICC arrest warrant, the critique that the ICC functions as a hegemonic tool for the West formed. Voices arose which claimed that the ICC is a Western and imperialistic initiative; being some form of colonial throwback or the imposition of a developed world's form of justice on an unsuspecting and servile African people.<sup>136</sup> This critique was supported by the fact that Sudan was not a signatory to the RS and therefore has not formally recognized the legitimacy of the ICC.<sup>137</sup> Bashir argued that the ICC's case was a Western ploy to target Sudan's oil and gas resources.<sup>138</sup> The Government of Sudan has been very direct about the claim of imperialism. In a statement delivered at an AU Ministers of Justice Meeting in 2008, the Sudanese Minister of Justice noted that the indictment against Bashir was a clear breach of Sudan's sovereignty establishing «[...] new tyrant legal supremacy under the guise of lofty objectives».<sup>139</sup>

The AU observes that while it endorses criminal accountability for gross human rights violations, the search for justice should be pursued in a way that complements, rather than impedes, efforts to secure a lasting peace in the country.<sup>140</sup> It emphasizes that ICC jurisdiction is based on complementarity and that a prosecution could lead to greater destabilization in Sudan and the region.<sup>141</sup>

Another point of criticism was the propriety of a UNSC deferral – as requested by AU leaders.<sup>142</sup> Following the OTP's application for an arrest warrant for Bashir in July 2008, the AU immediately adopted a decision calling on the UNSC to deploy Article 16 of the RS to «[...] defer the process initiated by the ICC.»<sup>143</sup> However, the UNSC failed to act on the AU's deferral request.<sup>144</sup> Reacting to this, African states suggested amendments to the RS.<sup>145</sup>

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<sup>133</sup> See for example BBC News, Arab Leaders Back "Wanted" Bashir, BBC News (30 March 2009), <<http://news.bbc.co.uk/2/hi/7971624.stm>> (accessed 17 April 2020).

<sup>134</sup> ICC, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09-1), Pre-trial Chamber I (4 March 2009).

<sup>135</sup> Christopher D. Totten/Nicholas Tyler, Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court, 98(3) *Journal of Criminal Law and Criminology* 1069 (2008), 1072.

<sup>136</sup> Du Plessis, *supra* note 99, at 2.

<sup>137</sup> Clark, *supra* note 103, at 51.

<sup>138</sup> Mike Pflanz, Bashir calls ICC arrest warrant a 'conspiracy', *Telegraph* (5 March 2009), <<https://www.telegraph.co.uk/news/worldnews/africaandindianocean/sudan/4942470/Sudan-President-Omar-al-Bashir-calls-ICC-arrest-warrant-a-conspiracy.html>> (accessed 27 April 2020).

<sup>139</sup> Statement of Mr. Abdul Sabdrat, Minister of Justice of the Republic of Sudan, at the Meeting of Ministers of Justice and Attorneys-General of the African Union on Legal Matters 3-4 (November 2008) cited as in Tladi, *supra* note 3, at 64.

<sup>140</sup> Will be analysed further in Chapter V.1.

<sup>141</sup> The AU has been seeking a peaceful resolution to the Darfur crisis and deployed the first hybrid peacekeeping force between the UN and a regional organisation to Sudan in July 2007 pursuant to UNSC Res. 1769 (31 July 2007), UN Doc S/Res/1769.

<sup>142</sup> Annalisa Ciampi, The Proceedings Against President Al Bashir and the Prospects of their Suspension Under Article 16 ICC Statute, 6(5) *Journal of International Criminal Justice* 885 (2008); Christopher Gosnell, The Request for an Arrest Warrant in Al Bashir, Idealistic Posturing or Calculated Plan?, 6(5) *Journal of International Criminal Justice* 841 (2008).

<sup>143</sup> AU Peace and Security Council, Communiqué of the 142nd Meeting of the Peace and Security Council, PSC/MIN/Comm(CXLII), (21 July 2008), <[http://www.iccnw.org/documents/AU\\_142-communication-eng.pdf](http://www.iccnw.org/documents/AU_142-communication-eng.pdf)> (accessed 17 April 2020), paras 3, 5, 9, 11(i).

<sup>144</sup> Akande/Du Plessis/Jalloh, *supra* note 46, at 6; Payam Akhavan, Are International Criminal Tribunals a Disincentive to Peace?, *Reconciling Judicial Romanticism with Political Realism*, 31(3) *Human Rights Quarterly* 624 (2009), 648; see Charles Chernor Jalloh, *The African Union, the Security Council, and the*

In 2009, as a reaction to the above-mentioned criticisms on the Bashir warrant, the AU made the controversial decision suspending cooperation with the ICC in respect of the arrest and surrender of Bashir. All AU member states were instructed not to enforce the warrant. This means African states might be put in a position where they might have conflicting obligations between two different organisations: on the one part, the ICC, which seeks that they enforce the Bashir warrant, and on the other, the AU which urges them not to enforce it.<sup>146</sup>

The AU request not to cooperate with the ICC was not followed unanimously by its member states.<sup>147</sup> Officially, the AU explained its objection to the execution of the arrest warrant against Bashir with their fear that such action would threaten the peace process underway in Sudan. However, an underlying reason is the notion that the ICC, as a Western institution, should not exercise jurisdiction over African leaders with the arrest warrant smacking of imperialist arrogance.<sup>148</sup> In the AU Summit Decision, there are hints of the attitude that African leaders ought not to be tried under non-African systems.<sup>149</sup>

Analysing the Sudan-Situation shows that the ICC was understood primarily as a Western instrument from the moment the UNSC made use of its powers – underlining this paper’s argument that the UNSC is key in understanding the postcolonial critique. Looking at the AU’s decision not to cooperate with the ICC, shows that irrespectively of whether the postcolonial critique is true it has severe negative consequences for the ICC.

## V. Ways forward: Improving the Legitimacy and Acceptance of the ICC

Regardless of whether the postcolonial critique is justified or not, it poses a serious legitimacy threat to the ICC. As this paper argues that through identifying the weaknesses of the ICC’s system, the postcolonial critique should be seen as a chance to improve these difficulties, the next paragraph explores ways of how the ICC’s legitimacy could be improved through drawing insights from the postcolonial critique.

### 1. Strengthening African Regional Entities and the Complementarity Principle

Essential to the legitimacy of the ICC is that it succeeds in dispelling the feeling that it is a foreign body to Africans.<sup>150</sup> In the end, it does not matter whether this feeling is justified or not, but as long as the ICC is depicted as a foreign body, its legitimacy is questioned. Also, the critique on the ICC is vulnerable for acting as a pretext for political purposes. This means that the question of whether the postcolonial critique is true is less essential than how to react to it.

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International Criminal Court, in Jalloh Charles Chernor/Bantekas Ilias (eds.), *The International Criminal Court and Africa* (2017), 181–213, 202–207 for details why the UNSC did not act on the deferral request.

<sup>145</sup> Clarke, *supra* note 31 at 238–243. For example, South Africa decided to propose an amendment to the RS with respect to Article 16 to address situations where the UNSC did not decide on deferral requests.

<sup>146</sup> Jalloh, *supra* note 3, at 214.

<sup>147</sup> Mangu, *supra* note 3, at 24. Uganda, Botswana, Malawi and South Africa announced that they would not comply with the AU request.

<sup>148</sup> Kofi Annan, *Africa and the International Court*, *New York Times* (29 June 2009), <<https://www.nytimes.com/2009/06/30/opinion/30iht-edannan.html>> (accessed 18 April 2020).

<sup>149</sup> AU Assembly, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/Dec 245(XIII), (July 2009), <[https://au.int/sites/default/files/decisions/9560-assembly\\_en\\_1\\_3\\_july\\_2009\\_auc\\_thirteenth\\_ordinary\\_session\\_decisions\\_declarations\\_message\\_congratulations\\_motion\\_0.pdf](https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf)> (accessed 18 April 2020), para 5. This decision calls on the AU Commission to investigate the possibility of empowering the African Court of Justice on Human and People’s Rights (ACJHR) to try serious crimes of international concern, presumably as an alternative to non-African courts and tribunals.

<sup>150</sup> Niang, *supra* note 2, at 311.



A strong symbolic gesture would be to conduct trials on African soil and as close as possible to the crime scenes and the location of the victims.<sup>151</sup> Vital for the acceptance of the ICC is the inclusion of African Regional entities like the Economic Community of West African States and the Southern African Development Community. A way should be found to allow these institutions to play a role in linking the political and judicial agenda in Africa.<sup>152</sup>

For the acceptance of the ICC it is essential that the complementarity principle entrenched in Article 17 of the RS is taken seriously. The underlying logic of that principle is that the ICC must supplement the work of national jurisdictions. It can only exercise jurisdiction when states prove to be inactive and/or unwilling or unable to prosecute.<sup>153</sup> From a concerned African government perspective, an enhanced capacity to claim their first right to prosecute the international crimes within the jurisdiction of the ICC might be a tool to make sure their claim to sovereignty is respected.<sup>154</sup> Thus, instead of weakening states and undermining sovereignty, properly understood the ICC regime does the opposite: it «[...] strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle».<sup>155</sup>

As the complementarity principle effectively creates a presumption in favour of action at the level of states,<sup>156</sup> it might also create an incentive for them to develop their national prosecution mechanisms.<sup>157</sup> This developmental concept according to which the ICC should aim to catalyse and support domestic investigations and prosecutions is referred to as ‘positive complementarity’.<sup>158</sup>

As the ICC will only exercise jurisdiction where states having jurisdiction are unwilling or unable genuinely to carry out the prosecution, the fact that Bashir has been indicted by the ICC is, therefore, an indication that, in the view of the OTP, African states having jurisdiction over the crimes are unable or unwilling genuinely to try Bashir.<sup>159</sup> The effect of the argument that trials for the atrocities committed should be tried by Africans, therefore, would be to defeat the object of the RS, namely to end impunity for grave international crimes.<sup>160</sup>

## 2. Regional African Criminal Court

As the ICC is a court of last resort, a regional African Criminal Court would make sense, especially as this could foster the legitimacy of the ICC.<sup>161</sup>

The African Court of Justice (ACJ) was envisioned in the constitutive act to be the principal judicial organ of the AU. The Protocol establishing the ACJ was adopted in 2003,

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<sup>151</sup> *Id*; Balingene Kahombo, Towards Coordination of the Global System of International Criminal Justice with the Criminal Court of the African Union, in Van der Merwe Hermanus Jacobus/Kemp Gerhard (eds.), *International Criminal Justice in Africa*, 2017 (2018), 1–32, 18–22; see Article 62 of the RS.

<sup>152</sup> Niang, *supra* note 2, at 308; Jeremy Sarkin, The Role of the International Criminal Court (ICC) in Reducing Massive Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies, 11(1) *Studies in Ethnicity and Nationalism* 130 (2011), 135–136.

<sup>153</sup> Jalloh, *supra* note 3, at 218; Clark, *supra* note 103, at 302–312 criticises that the ICC has not taken the complementarity principle seriously as the ICC intervened in situations where domestic judiciaries were already investigating and prosecuting cases,

<sup>154</sup> Jalloh, *supra* note 3, at 220.

<sup>155</sup> Anne-Marie Slaughter, Not the Court of First Resort, *Washington Post* (21 December 2003), <<https://www.washingtonpost.com/archive/opinions/2003/12/21/not-the-court-of-first-resort/8f2e6532-eb23-4311-b077-c6278115c542/>> (accessed 27 April 2020).

<sup>156</sup> Du Plessis, *supra* note 99, at 15.

<sup>157</sup> Olympia Bekou, National Implementation of the ICC Statute to Prosecute International Crimes in Africa, in Jalloh Charles Chernor/Bantekas Ilias (eds.), *The International Criminal Court and Africa* (2017), 272–288, 287–288; Jalloh, *supra* note 3, at 219.

<sup>158</sup> Clark, *supra* note 103, at 31.

<sup>159</sup> Tenth Report of the Prosecutor of the International Criminal Court to the Security Council (4 December 2009), paras 36–43 cited as in Tladi, *supra* note 3, at 59.

<sup>160</sup> Tladi, *supra* note 3, at 67.

<sup>161</sup> Niang, *supra* note 2, at 309.

and eighteen African states subsequently ratified it, with the effect of bringing the Protocol into force.<sup>162</sup>

The African Court on Human and Peoples' Rights (ACHPR) was established in 2004 and became operational in 2008.<sup>163</sup> As the ACHPR's effectiveness was being questioned, the proposal was made to merge the ACJ and the ACHPR.<sup>164</sup> This would create the new African Court of Justice on Human and Peoples' Rights (ACJHR) which will take responsibility for crimes committed on the African continent.<sup>165</sup>

While the Protocol establishing the ACJHR was adopted in July 2008 at the 11<sup>th</sup> AU Summit, it has never come into force. It requires fifteen ratifications to enter into force<sup>166</sup> but has only been ratified by six states so far.<sup>167</sup>

Although the focus of the ACJHR originally was on human rights,<sup>168</sup> the ASP requested a study into the implications of extending the court's jurisdiction to criminal matters in 2009.<sup>169</sup> In June 2014, the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ('Malabo Protocol'),<sup>170</sup> even though the protocol establishing the ACJHR had not come into force yet.

The Malabo Protocol extends the jurisdiction of the proposed ACJHR to include international and transnational crimes, including those covered in the RS.<sup>171</sup> The logic and organisation of the ACJHR is to be complementary to national African courts, only having jurisdiction if African states are unwilling or unable to act.<sup>172</sup> The relationship between the ACJHR and the ICC is unclear; ranging from the ICC having complementarity jurisdiction to the ICC acting as a court of appeal.<sup>173</sup> Also, the role of the UNSC remains unclear.<sup>174</sup>

The need identified by the AU to accelerate the integration of the contents of the RS at the regional level was a response to the postcolonial critique and the indictment of Sudanese President al-Bashir and the concerns about its potentially destabilizing effects on the continent.<sup>175</sup>

<sup>162</sup> AU, Protocol of the African Court of Justice of the African Union, 10 June 1998, (entered into force on 25 January 2004), <[https://au.int/sites/default/files/treaties/36393-treaty-0019\\_-\\_protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoplesrights\\_on\\_the\\_establishment\\_of\\_an\\_african\\_court\\_on\\_human\\_and\\_peoples\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf)> (accessed 1 May 2020), Article 60 (requiring fifteen ratifications to enter into force).

<sup>163</sup> Clarke, *supra* note 31, at 203.

<sup>164</sup> *Id.*, 204.

<sup>165</sup> Clarke/Koulen, *supra* note 51, at 303.

<sup>166</sup> Article 9(1) of the AU, Protocol on the Statute of the African Court of Justice and Human Rights (1 July 2008), <[https://au.int/sites/default/files/treaties/36396-treaty-0035\\_-\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36396-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf)> (accessed 24 May 2020).

<sup>167</sup> AU, List of states which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights, Malabo Protocol (6 February 2019), <[https://au.int/sites/default/files/treaties/36396-sl-protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights.pdf](https://au.int/sites/default/files/treaties/36396-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf)> (accessed 24 May 2020)

<sup>168</sup> Nel/Sibiya, *supra* note 80, at 96.

<sup>169</sup> *Id.*

<sup>170</sup> AU, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (27 June 2014), <[https://au.int/sites/default/files/treaties/36398-treaty-0045\\_-\\_protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf)> (accessed 19 April 2020), hereafter the 'Malabo Protocol'.

<sup>171</sup> Nimigan, *supra* note 7, at 1006.

<sup>172</sup> Clarke, *supra* note 31, at 209.

<sup>173</sup> Kahombo, *supra* note 151, at 6–9, 22.

<sup>174</sup> *Id.*, 13–17.

<sup>175</sup> Nimigan, *supra* note 7, at 1008; Charles Chernor Jalloh, The Place of the African Criminal Court in the Prosecution of Serious Crimes in Africa, in Jalloh Charles Chernor/Bantekas Ilias (eds.), *The International Criminal Court and Africa* (2017), 289–319, 303–304 contests the idea that the tension between the AU and the ICC is the reason for the desire of a regional African criminal court.

The ACJHR also presents difficulties: First, complaints are only possible against states and not against individuals. Second, the ACJHR only allows direct access to member states and a limited number of African NGOs.<sup>176</sup> Third, the Malabo Protocol has been heavily criticised for its Art. 46Abis which deals with immunities and states that no charges shall be commenced or continued before the court against any serving AU head of state or government, during their tenure of office. This inclusion frames the argument that the ACJHR is merely an attempt to perpetuate a culture of impunity for criminal leaders<sup>177</sup> and is vulnerable to domestic political pressures.<sup>178</sup> Fourth, the funding of the court remains uncertain.<sup>179</sup>

In respect to the ACJHR, a concept of regional complementarity would be compelling as this would support the acceptance of the ICC<sup>180</sup> as international criminal justice would not be synonymous with the ICC.<sup>181</sup> In assessing the admissibility of a case before the ICC, it should also be considered whether any action has been taken not only in the national courts of the state but also at regional courts.<sup>182</sup> The RS should be amended to include regional courts in its conception of complementarity, even though the Malabo Protocol excludes the ICC and international jurisdictions from its conception of complementarity.<sup>183</sup> This would be the best way to foster the greatest sense of ‘local’ justice<sup>184</sup> and enforce the primacy of state sovereignty.<sup>185</sup>

## VI. Conclusion

The ICC is surely not a creation of Western powers. This is underlined by the history of the ICC’s creation and the serious engagement of African states in that history.<sup>186</sup> The first aspect of the postcolonial critique, namely the accusation that the ICC is biased against Africa and Africans is insofar true as that the work of the ICC has focused on Africa and Africans so far.<sup>187</sup>

However, where this is due to self-referrals by African states, this argument is not valid. In terms of the expressive role of the ICC, the fact that only Africans have been tried, whether justified or not, has an impact on the global perception where most crimes are committed.

The second aspect, namely that the ICC is a hegemonic tool of the West, highlights the role of politics regarding the ICC. The ICC is not a purely legal institution and has to navigate international jurisprudence, *realpolitik*, and cultural nuances.<sup>188</sup> Rather than denying its politics, the ICC should recognize and explain its politics and choices. Thereby, it

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<sup>176</sup> Sonya Sceats, Africa’s new Human Rights Court: Whistling in the wind? Briefing Paper, Chatham House (March 2009), <<https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp0309sceats.pdf>> (accessed 20 April 2020), 2.

<sup>177</sup> Max du Plessis, Shambolic, shameful and symbolic, Implications of the African Union’s immunity for African leaders, Institute for Security Studies, Paper No. 278, (November 2014), <<https://www.files.ethz.ch/isn/185934/Paper278.pdf>> (accessed 20 April 2020).

<sup>178</sup> Ncube, *supra* note 121, at 433; Niang, *supra* note 2, at 310.

<sup>179</sup> Max du Plessis, Reflections on a storm: the International Criminal Court and its work in Africa, 18(2) Australian Journal of Human Rights 161 (2012), 170–171.

<sup>180</sup> Nimigan, *supra* note 7, at 1012.

<sup>181</sup> *Id.*, 1017.

<sup>182</sup> Annex 1: Africa and the International Criminal Court – Recommendations, in Werle Gerhard/Fernandez Lovell/Vormbaum Moritz (eds.), Africa and the International Criminal Court (2014), 229–232, 231.

<sup>183</sup> Nimigan, *supra* note 7, at 1013.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*, 1016.

<sup>186</sup> Du Plessis, *supra* note 99, at 3–4. The active and important role played by the Southern African Development Community in its support for the ICC must be mentioned.

<sup>187</sup> Mangu, *supra* note 3, at 24.

<sup>188</sup> Shilaho, *supra* note 121, at 130.

acknowledges that, with its financial and jurisdictional limitations, the ICC can only be a symbolic court that only has the resources to prosecute a fraction of what occurs in a world, and engage in an open dialogue with victims and stakeholders on the choices it thus needs to make.<sup>189</sup> Law must be understood as a special form of politics, through which prosecutorial priorities and selectivity are translated into judicial processes against those that are believed to be most needed to be held to account.<sup>190</sup> Generally, it is too simple to portray the ICC as a hegemonic tool of the West, as African states played an important role in its creation. However, this critique has a point regarding the role of the UNSC and its Western political agendas pushed by the P5. How can it be that the UNSC can refer or defer cases to the ICC, while the majority of the P5 are not even a party to the RS? Hence, the only aspect where the postcolonial critique is clearly justified is the role of the UNSC. As for the rest of the postcolonial critique, I argue that the question of its correctness is less crucial than the question of how to respond to it. First of all, it is essential that the postcolonial critique is taken seriously<sup>191</sup> as the rhetoric of condemnation practiced by many African states – portraying the ICC as an agent of neo-imperialism – in the worst case can damage the institution so much that it is simply abandoned altogether.<sup>192</sup> The politicization of the ICC by the world's most powerful nations in the UNSC poses a continuous threat to the legitimacy of the court. This politicization remains of particular concern given that in many ways the ICC must rely upon its legitimacy to garner the cooperation and compliance necessary to execute its mandate. Even if states do not formally withdraw, without the political will of cooperation in all state parties, the ICC cannot function effectively. The obligation to cooperate with the ICC is central to its success as the ICC does not have its own police force to arrest persons with an outstanding arrest warrant.<sup>193</sup> The ICC also relies on the cooperation of the member states in evidence gathering against the suspect.<sup>194</sup> Without effective state cooperation, it is almost impossible for the ICC to achieve its goal to provide justice for victims of crimes.<sup>195</sup> The challenge of the ICC consists in it being dependent on the cooperation of a government to fulfil its mandate, yet it is that same government that stands to be investigated.<sup>196</sup> This need for cooperation means that regardless of whether the postcolonial critique is true or not, it should be fully engaged with in order to anticipate the critics and, if possible, to prevent the instrumentalization of this criticism.

One also must reflect on the consequences if one were to agree fully with the postcolonial critique. What would be an alternative to the ICC? Africa's judiciaries often have no capacity or political will to bring to justice violators of international humanitarian law, who in most cases are prominent state actors, including heads of state and government or their surrogates in the security forces. Warlords are equally powerful and the fact that they have the capacity to challenge the state through violence means it is difficult to put them to trial locally as well.<sup>197</sup> Hence, as long as African state parties fail to fight impunity and to ensure that the

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<sup>189</sup> De Hoon, *supra* note 6, at 611; William A. Schabas, *The Short Arm of International Criminal Law*, in Schabas William A./McDermott Yvonne/Hayes Niamh (eds.), *The Ashgate Research Companion to International Criminal Law, Critical Perspectives* (2013), 387–405, 399, 404–405.

<sup>190</sup> De Hoon, *supra* note 6, at 614.

<sup>191</sup> See Max du Plessis/Tiyanjana Maluwa/Annie O'Reilly, *Africa and the International Criminal Court*, International Law, Chatham House (2013), <[https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713pp\\_iccafrica.pdf](https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713pp_iccafrica.pdf)> (accessed 6 May 2020), 2, 11.

<sup>192</sup> Nicole Fritz, *Black-white debate does no justice to a nuanced case*, *Business Day* (13 August 2008), <<https://allafrica.com/stories/200808130193.html>> (accessed 27 April 2020).

<sup>193</sup> Bert Swart, *General Problems*, in Cassese Antonio/Gaeta Paola/Jones John R.W.D. (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, vol II, (2002), 1589–1605, 1589.

<sup>194</sup> Shilaho, *supra* note 121, at 131.

<sup>195</sup> Jalloh, *supra* note 3, at 215.

<sup>196</sup> Nel/Sibiya, *supra* note 80, at 88.

<sup>197</sup> Shilaho, *supra* note 121, at 137.

rights of the victims of atrocious crimes are protected, the ICC, despite its shortcomings, remains the most appropriate institution.<sup>198</sup>

Addressing impunity requires the ICC and the AU to see each other as partners and not antagonists. This is in support of the argument advanced by Du Plessis that «[...]the fulfilment of the aims and objectives of the ICC on the African continent [...] are dependent on the support of African states [...], the AU and [...] civil society. Meeting these needs requires commitment to a collaborative relationship between these stakeholders and the ICC». <sup>199</sup>

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<sup>198</sup> Gino Naldi/Konstantinos D. Magliveras, *The International Criminal Court and the African Union, A Problematic Relationship*, in Jalloh Charles Chernor/Bantekas Ilias (eds.), *The International Criminal Court and Africa* (2017), 111–137, 137.

<sup>199</sup> Max du Plessis, *Complementarity and Africa: The Promises and Problems of International Criminal Justice*, 17(4) *African Security Review* 154 (2008), 168.